A COMPARATIVE STUDY OF WOMEN'S RIGHTS OF INHERITANCE IN NIGERIA UNDER ISLAMIC LAW AND SOME CUSTOMARY LAWS

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ABRAKA, NIGERIA.

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OLEH CAMPUS.

A DISSERTATION SUBMITTED TO THE POSTGRADUATE SCHOOL IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE AWARD OF MASTER OF LAWS (LL.M) DEGREE OF THE DELTA STATE UNIVERSITY, NIGERIA

NOVEMBER, 2016.

CERTIFICATION

This is to certify that this project work titled A COMPARATIVE STUDY OF WOMEN'S RIGHT OF INHERITANCE IN NIGERIA UNDER ISLAMIC LAW AND SOME CUSTOMARY LAWS was carried out by me Megbele, Ogechi Jessica of Faculty of law, and that apart from references to other people's works which have been duly acknowledged, this work has neither in whole or in part been presented for the award of another Degree, Certificate or Diploma else.

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APPROVAL

This work was submitted by MEGBELE Ogechi Jessica in partial fulfillment of the requirements for the Degree of Master of Laws (LL.M) of the Delta State University, Nigeria.

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DEDICATION

This project work is dedicated to God Almighty for seeing me through the programme furthermore, to my husband Megbele Andrew and wonderful children Oritsetimeyin Alvin, Onetoritsebawo Gerald, Utseoritselaju Melvin, Oritsejolomisan Alexander Megbele. Who have in all stages provided needed moral and financial support to ensure the completion of my programme.

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All the work done here belongs to God Almighty who in His infinite mercy and blessing stood by me all through the period of my education. To him I give all the praises and glory.

The success of this research project is attributed to the immense contributions and assistance of several individuals too numerous to mention.

My very special thanks and gratitude of heart goes to my erudite project supervisor, Dr. A.O. Giwa who conscientiously guided and corrected my work. God should strengthen and bless you according to his riches in glory.

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LIST OF ABBREVIATION

AC	-	Appeal Cases
ALL E.R.	-	All England Reports
ALL NLR	-	All Nigeria Law Reports
CAP	-	Chapter in an Act
F.S.C	-	Federal Supreme Court Cases
FWLR	-	Federation Weekly Law Reports
NLR	-	Nigeria Law Reports
NCLR	-	Nigerian Constitutional Law Reports
NMLR	-	Northern Nigeria Law Reports
NRNLR	-	Northern Region of Nigeria Law Reports
NWLR	-	Nigerian Weekly Law Reports
P	-	Probate Division
S.C	-	Judgments of the Supreme Court.

SCNJ	-	Supreme Court of Nigeria Judgments
SCNLR	-	Supreme Court of Nigeria Law Reports
WACA	-	West African Court of Appeal
WNLR	-	Western Nigerian Law Reports.

ABSTRACT

Generally, most Nigerians both literates and illiterates are ignorant of the laws that regulate their private lives until they fall foul of such laws or there is a problem which affects their relatives as a result of the application of such laws. One area of law which Nigerians are ignorant of or for which they have shown apathy is the law of inheritance. Many Nigerians contract their marriages under customary law and so the customary laws of inheritance will be applied to the distribution of their estates after their death if they leave no valid will. Many of the customary laws of inheritance deprive women of their right to inherit the estate of their deceased husbands and fathers. The aim of this research is therefore to awaken the men folk to the unfairness of the customary laws of inheritance which do not entitle widows and their daughters to inherit the estates of their husbands and fathers and the consequential hardships such women suffer. The research considers the following questions: Are women entitled to inherit the property of deceased male relations and relatives and what are the rules of inheritance? Do the customary laws of inheritance treat men and women equally? Are there differences or similarities between customary laws and the Islamic law as they relate to women's right of inheritance? How can the customary laws of inheritance be reformed to improve women's rights of inheritance? What laws are in existence to combat this trend and how effective are they? This study's objective is to examine the status of women vis-à-vis the rights of inheritance under customary and Islamic laws, it will also asses the adequacy or otherwise of the laws relating to women's rights of inheritance under the customary laws. It is also aimed at sensitizing the legislatures, policy makers and other stakeholders on the need to reform or abolish the discriminatory customary laws of inheritance to give the women right of inheritance. The research will adopt the doctrinal and comparative study of customary laws and Islamic law as they relate to women's right of

inheritance. This study is aimed at the enlightenment of the reader, who will become aware of the discriminatory practices of inheritance against women and its damaging effect on the overall socio-economic development of the country. Under Islamic law, women's rights are protected because Islamic laws allow women in their capacities as wives, daughters and sisters to inherit the estates of their deceased relatives these rights are clearly stated in the Islamic law sources. The customary laws of inheritance of the Igbo, Benin, and Yoruba people which deprive women the right of inheritance are unjust and discriminatory. They contravene the provisions of the 1999 Constitution of Nigeria and other International Conventions on elimination of discrimination against women of which Nigeria is a signatory. This work contributes to knowledge by exposing these discriminatory laws for what they are, that is contrary to the Constitution of the Federal Republic of Nigeria 1999 and the extant conventions against discrimination of the Nigeria grund norm. It advocates the consideration of the Islamic customary law of inheritance not ordinarily commended by non adherents of that faith as a better option to other customary laws without prejudice to religion or faith or belief.

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CHAPTER ONE

GENERAL INTRODUCTION

1.0 INTRODUCTION

Gender issues are topical throughout the world as there seems to be an increasing demand for more equitable treatment of women in all human actions. Many women throughout the world are campaigning, organizing and working together to improve their lives. Their aims, methods and interests are various. Some are working in women's refuges, some are campaigning against pornography, some are demanding total legal equality with men, some want improved maternity leave, some are campaigning for abortion on request etc. Hence there is no united women's movement.

However, they are all concerned with improving the status and promoting the rights and interests of women. These women's movements are usually described as "feminist". Alison Jaggar[1] identifies feminism with various social movements which are dedicated to ending the subordination of women.

The feminist's claim is that women should have the rights and freedom as men. In view of their various aims, methods and interests, feminist theory is not uniform. Many

[1] Cited by Bryson Valerie in Feminist Debates Issues of Theory and Political Practice (Palgrave New York 1999) page 5.

writers have identified three main theories of feminism namely liberal, socialist and radical feminism.

The liberal approach is that women have as much right as men. The aim of the liberal approach is formal and sexual equality for women and men. Although the liberalism's claim for formal sexual equality for women and men has been successful and resulted in the acquisition of rights for women to be educated, to vote and to stand for political office etc, some feminists disagree with the liberal approach because they feel that the approach recognizes certain values that are mainly male.

Bryson[2] says the socialist theory of feminism like liberalism, promotes equal rights and opportunities to all individuals. However, unlike liberalism, it emphasizes economic and social rights and freedom of exploitation. Socialism allows women to recognize the ways in which men are also oppressed and to work with them to achieve a more equitable society in the interest of all.

The radical feminist approach sees patriarch as the oldest and most significant form of oppression for women. The radical view is that women are an oppressed group who has to struggle for their liberation against their male oppressors. Women must recongnise that it is men who oppress them and that politics has to be redefined to include family and personal relationships.[3]

This study supports the socialist approach that women should work with men to achieve an equitable society in the interest of all. It is necessary that women should collaborate with men so as to enlighten the men about the injustice which inequality of the rights of men and women creates. The enlightenment of men in this regards could eventually eliminate the unpopular misconception of men that women are inferior. However, the collaboration of women with men should not preclude activities that are solely women. Despite the differences in their approaches, the feminists' claim that women should have the same rights and freedom as men which has been largely conceded in western society has led

[2] Bryson Valerie op cit. page 16
[3] Ibid. page 27

to concerted efforts by international communities to hold conferences on the elimination of gender inequality. Consequently, many international instruments have been promulgated by General Assembly of the United Nations to address gender inequality. One important international instrument as regards women's rights is the Convention on Elimination of All Forms of Discrimination against Women adopted in 1979 by the UN General Assembly which provides guidelines for legal policy and programme development to promote equality as a means of justice.[4]

Article 5 of the convention[5] obligates state parties to the convention to take action to modify custom and eliminate prejudices which are based on inferiority or superiority of either sexes or stereotyped roles for men and women. According to Freeman[6] the examination of custom, the elimination of prejudices and the development of measure to promote equality in practice as well as in law are the tools for justice.

Article 5 of the convention[7] is relevant to the title of this research because the customary laws which this research examines are generally biased against women as they do not accord women equal rights with men as regards inheritance. Generally, under customary laws of the various tribes in Nigeria, women are not allowed to inherit the estates of their late husbands and fathers. However, under some customary laws, women are given limited right to inherit the estates of their husbands and fathers. The customary laws which deny women of the right to inherit the estates of their husbands and fathers pose some challenges to women because on the death of men, widows and children are left destitute by surviving relations of men who inherit the estates of the deceased. Islamic law, on the other hand, allows women to inherit certain portions of the estates of their husbands and fathers. Many Muslim women are however denied this right by surviving relatives of their husbands who prefer to apply customary law of inheritance to the distribution of the property of the deceased Muslims.

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[4] Kerr Joanna (ed.) "Ours by Rights: Women's Right as Human Rights" (Zed Books London 1993) page 93.
[5] Convention on the Elimination of All Forms of Discrimination against Women, Adopted and opened for signature, ratification and accession by General Assembly resolution 34/ 180 of December 1979.
[6] Freeman Marsha A. "Women Development and Justice. Using the International Convention on Women's Rights" in Kerr (ed.) Ours by Right: Women's Rights as Human Rights. Op cit. page 93.
[7] Ibid

Customary laws are the indigenous laws of the people. They are founded on the social norms or cultures of the people. They are a reflection of the habits and social attitudes of the people they govern, and they drive their validity from the consent of the people they govern[8]. There is no single set of customary laws of inheritance in Nigeria because customary laws are tribal in origin. They operate within the tribes. Therefore, customary laws vary from one tribe to another and also from one community to another. Generally, customary laws are unwritten in the sense that they cannot be found in statute books. It should be noted however, that in the recent times, some customary laws of inheritance have been put in writing. Examples are the customary laws of inheritance of former Anambra and Imo states which have been written in a customary law manual[9] and the customary law of inheritance of Benin which has also been written in a hand book[10]. Islamic law, which is also regarded as customary law[11], unlike the indigenous customary laws has religious basis. According to Islamic scholars, Islamic law includes two basic elements. The divine which is unequivocally commanded by God or His messenger and is designated as Sharia in the strict sense of the word; and the human which based upon and aimed at the interpretation/ or application of the Sharia and is designated as Fiqh or applied Sharia.[12]

The divine sources of Islamic law are the Quran and the Sunna of Prophet Muhammad while the human components are Ijma, Qiyas, Urf, Istihsan and Maslaha under the broad heading of Ijtihad. The Holy Quran is the first and primary source from which all the teachings and laws of Islam are derived. It is the pivot upon which all the other sources

[8] Eshugbayi Eleko v Government of Nigeria (1931) A.C 662 at 673 where the Privy Council said "it is the assent of the native community that gives a custom its validity…'

[9] Manual of Customary Law obtaining in Anambra and Imo States of Nigeria (Government Press, Enugu, 1977).

[10] A Handbook of Benin Customs and Usages (Eweka Court; The Palace Benin City Nigeria, 1996).

[11] S.2 of the Native Courts Law 1956. CAP 56 Laws of Northern Nigeria 1963 states: 'Native law and custom includes Muslim law.' However in the case of Alkamawa v Bello, (1998) 6 SCNJ 127 the Supreme Court held that the Islamic Law is not and has never been customary law. Court stated thus, "Islamic law is not the same as customary law as it does not belong to any particular tribe. It is a complete system of universal law, more certain and permanent and more universal than the English Common Law" at p. 128.

[12] Fayzee, Asaf A.A, (1964) Outlines of Muhammed Law (Oxford University Press 3rd Edition , London) Faruki Kemal A. (1962) Islamic Jurisprudence (Karachi Publishing House Pakistan)p.18, Couslon, N.J 1964. A History of Islamic Law. (The University Press, Edinburg) p.85; Schacht J. 1964, Introduction to Islamic Law (Clarendon Press Oxford) and Shorter Encyclopedia of Islam, pp. 102-107; 524-529) cited by Sada I.N in his article 'The nature of Islamic Law, A Rigid or Dynamic System? A Critique' (2000-2002) vol 11, No 11 (Ahmed Bello University Journal of Islamic Law).

revolved. Briefly, it is the ground norm of Islamic law (the sharia).[13] The Quran is the exact words of Allah as revealed to mankind through the Prophet Muhammad. The secondary source is the Sunna of the Prophet Muhammad, that is to say, his deeds, utterances and his indirect authorization.

The human components of Islamic law under the broad heading of Ijtihad include Ijma (consensus) Qiyas (analogical deduction), Istihsan (preference) Istislah and Maslahah (public interest and welfare). These other components of Islamic law are aimed at interpreting, expounding, understanding and applying the injunctions of Sharia to practical day to day affairs of the Muslim community. This is because according to Ramadan Said[14], the Quran and Sunna established the general rules without going into details.

The source of Islamic law rule of inheritance as it affects women's rights of inheritance in their capacity as wives and daughters is the Holy Quran which is the first and primary source of Islamic law.

This study discusses the rules of inheritance as they affect women's rights as wives and daughters under the customary laws of some major tribes in Nigeria and Islamic law of inheritance as regards this category of women.

1.1 BACKGROUND TO THE STUDY

Generally, most Nigerians both literates and illiterates are ignorant of the laws that regulate their private lives until they fall foul of such laws or there is a problem which affects their lives or the lives of their relatives as a result of the application of such laws. One area of the law which many Nigerians are ignorant of or for which they have shown apathy is the law of inheritance.

[13] Sada I. N, "The Nature of Islamic law; A Rigid or Dynamic System? A Critique" (2000- 2001) vol. 11 No 11 Ahmed Bello University Journal of Islamic Law.
[14] (1970) Islamic Law its Scope and Equity p.64. Cited by Sada I.N. op. cit. page 17.

Many Nigerians contract their marriages under customary law and so the customary law and so the customary laws of inheritance will be applied to the distribution of their estates after their death if they leave no valid will. The inheritance practices of intestate estate under the customary laws in Nigeria have almost as many variations as there are ethnic groups in the country and they are predominantly patrilineal that is relating to, based on, or tracing descent through the paternal line. Inheritance and succession under native law and custom is determined primarily by the customary rules of the place of origin of the deceased person and not by where he resides or w\here the property is situated. These practices conform to the primogeniture rule which is a system of inheritance or succession by the firstborn child, specifically the eldest child[15] who consequently becomes the head of the family. He occupies the family house, holding same as trustee of the other children, male or female.

As earlier stated, many of the customary laws of inheritance deprive women of the rights to inherit the estates of their deceased husbands and fathers. Some Nigerians are aware of the fact that if they die, their wives will not have the right to inherit their estates because of their customary laws of inheritance. This category of Nigerians does not bother to question such laws probably due to their carefree attitude. Some believe that after their death, their relatives will take care of their wives, children and property. Unfortunately, this apathy or carefree attitude to customary laws of inheritance which deprive widows of the right to inherit the estates of their husbands has been creating problems for widows. This is because in many instances, the relatives whom their deceased husbands trusted while alive to take care of their children and property sometimes convert the estates of the deceased of the deceased to their own thereby leaving the widows and the children in destitute.[16]

It is therefore necessary to awaken the men folk to the unfairness of the customary laws of inheritance which do not entitle widows and their daughters to inherit the estates of their husbands and fathers and the consequential hardships such women suffer.

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[15] Chambers 20th Century Dictionary 4th Ed., 1981.

[16] Socio-Economical and Legal Rights of Women: The Challenge (Women's Aid Collective [WACOL] Nigeria 2006) pg. 5. WACOL is a non- governmental, non-profit making organization in Nigeria which is gender conscious working towards gender equality and human rights for all.

1.2 RESEARCH PROBLEM

One can easily perceive generally that the Nigerian woman (the widow) and the girl child typically get little or nothing in comparison with their male counterparts when it comes to intestate devolution of property. This is because these customary laws exhibit an overwhelming sympathy for the male gender and has as a consequence, sustained an unjust and disproportional treatment of female in Nigeria. The continued practices of these laws constitute a major obstacle to gender equality, economic empowerment of female gender and actualization of social justice in terms of development, peace and security[17].

These discriminatory aspects of property inheritance under the customary law in Nigeria manifests in different forms and scope ranging from primogeniture rules to the right of spouses and they run contrary to various international conventions and more importantly, to the constitution[18] of the Federal Republic of Nigeria.

As regards Islamic law of inheritance, the study discusses the quantum of share to women in their capacities as wives and daughters in the estates of their deceased husbands and fathers as contained in the Holy Quran which is the divine source of Islamic law.

In this connection, the research considers the following questions: Are women entitled to inherit the property of deceased male persons and what are the rules of inheritance? Do the customary laws of inheritance treat men and women equally? Are there differences or similarities between the customary laws and the Islamic laws as they relate to women's right of inheritance? How can the customary laws of inheritance be reformed to improve women's rights of inheritance?

1.3 OBJECTIVES OF THE STUDY

One of the objectives of this study is to examine the status of women vis-à-vis the rights of inheritance under the customary and Islamic laws. Generally, under customary

[17] Ikpeze O. V., Gender Dynamics of Inheritance Rights in Nigeria: Need for the Women Empowerment (Onitsha: Folmech Printing & Pub. Co. Ltd; 2009), p.54

[18] The highest law of the people of Nigeria, against which, any law (or practice) in contradiction is invalid.

laws, a wife is not entitled to inherit the estates of her late husband. Similarly, the right of inheritance of a girl child is also curtailed. However, Islamic law allows women in their capacity as daughters, wives, mothers and sisters to inherit the estates of their relatives. It is therefore clear that the customary laws of inheritance are discriminatory against women.

The second purpose of this study is to assess the adequacy or otherwise of the laws relating to women's rights of inheritance under the customary laws of inheritance of the Igbo, Benin and Yoruba peoples of Nigeria.

Furthermore, the aim of this study is to examine which of the customary laws of inheritance of the three ethnic groups considered in this study has any similarity with Islamic law.

Finally, the purpose of this study is to sensitize the legislatures, policy makers and other concerned stakeholders on the need to reform or abolish the discriminatory customary laws of inheritance to give women right of inheritance.

1.4 SCOPE OF THE STUDY

A discussion of the full range of the customary laws of inheritance of the various customary laws of the over two hundred and fifty ethnic groups in Nigeria is not the focus of this study. This study is concerned with the customary laws of inheritance of three of the major ethnic groups, that is to say, Igbo, Benin and Yoruba people as they affect women in their capacity as wives and daughters.

Generally, the customary laws of inheritance of these ethnic groups deny wives of the right to inherit the estates of their deceased husbands. In the same vein, the Igbo customary law denies women and daughters the right to inherit the estates of their late fathers, while the Benin customary law gives preference to sons over daughters. This study has criticized these customary laws to be unjust, inequitable, and unconstitutional.[19] They

[19] They violate S. 42(1) of the 1999 Constitution of the Federal Republic of Nigeria CAP C23 Laws of the Federation of Nigeria 2004 which prohibits discrimination against any citizen of Nigeria on the basis of sex.

also violate the CEDAW[20] to which Nigeria is a signatory and the African Charter on Human and Peoples Rights which Nigeria has also domesticated.[21]

On the other hand, Islamic law of inheritance which gives women as wives and daughters certain portions of the estates of their deceased husbands and fathers is just and equitable.

1.5 METHODOLOGY

The research is both doctrinal and comparative. The research adopted a comparative study of customary laws and Islamic law as they relate to women's rights of inheritance. The doctrinal research method and context analysis were used for the comparative study.

Secondary sources of materials were mainly utilized. Law text books learned authors on customary laws and Islamic law of inheritance, manual and handbook on customary laws, articles in law Journals and materials downloaded from the internet were consulted for the study. The other sources utilized were statutory laws and decided cases from different jurisdictions cutting across all the ethnic groups covered by the study.

Moreover, information about the existing customary laws of the tribes covered by the study was considered vis-à-vis the provisions of the Islamic law of inheritance as enshrined in the Holy Quran.

1.6 LITERATURE REVIEW

Many scholars have written on customary laws of inheritance of the Igbo, Benin and Yoruba peoples of Nigeria. These writings form one or two chapters in their books on customary laws generally, family law and land law. Some of these scholars whose books are

[20] By Article 2 of the Convention, State signatories to the Convention are required to take appropriate measures to abolish existing laws, customs, regulations and practices which are discriminatory against women

[21] African Charter on Human and People Rights (Ratification and Enforcement Act, CAP A9 Laws of Federation of Nigeria 2004. Article 18(3) of the Charter provides " The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in International declarations and conventions"

sources for this thesis are: *Okoro Nwakamma*[22], *Obi S. N.C*[23], *Okany Martin Chukwuka*[24], *Oye and Ola Oba*[25], *Nwabueze B. O.*[26] *Nwogugu E. I.*[27] , *Animashaun T. O. G and Oyeneyin A. B.*[28], *Yakubu Musa G.*[29] , *Harvey Brian W*[30] , *Osanwowa Usu*[31]. The consensus of these scholars is that under the Igbo, Benin and Yoruba customary laws of inheritance, wives are not entitled to inherit real and personal property of their deceased husbands. However, they are entitled to live in their husbands' houses until they remarry or die.

Moreover, the consensus of the scholars is that generally, under the customary laws of these people, female children of a deceased male person are not entitled to inherit his personal and real property. Under the Yoruba customary law, however, both male and female children are entitled to inherit the personal property of their deceased fathers. Some of these scholars do not criticize in their books the discriminatory laws which deny daughters and wives the right to inherit the property of their deceased fathers and husbands. Only *Nwogugu, Animashaun* and *Oyeneyin*[32] have criticized these customary laws as being inconsistent with the 1999 Constitution.

Therefore, the approach of these scholars differs from this study because these authors wrote on the general laws. They do not suggest any reform. On the other hand, this study has not criticized the customary laws that are discriminatory against women but has also made concrete recommendations on how to reform the laws.

The manual of customary laws obtained in the former Anambra and Imo states is another source for this study. Obi, wrote the preface to the manual. The preface to the manual states, that the manual covers thirty-nine Administrative Divisions of former Eastern

[22] The Customary Laws of Succession in Eastern Nigeria and the Statutory and Judicial Rules Governing their Application (Sweet & Maxwell London, 1966)
[23] The Ibo Law of Property (Butterworth and Co. London 1963)
[24] Nigeria Law of Property (Fourth Dimension Publishers Nigeria 2000)
[25] A Survey of African Law and Custom (Jator Publishing Nigeria 1999)
[26] Nigerian Land Law (Nwamife Publishers, Nigeria 1972)
[27] Family Law in Nigeria(Heinemann Educational Books Nigeria 1990)
[28] Law of Succession, Wills and Probate in Nigeria(MIJ Professional Publishers Ltd Nigeria 2002)
[29] Property Inheritance and Distribution of Estates under Customary Law in the Book Towards Reinstatement of Nigeria Customary Laws. (Federal Ministry of Justice Nigeria).
[30] The Law and Practice of Nigeria Wills Probate and Succession(Sweet and Maxwell London Nigeria 2000)
[31] The Customary Law of the Bini (Fine Fare International Company London Nigeria 2000)
[32] Nwogugu, Animashaun & Oyeneyin op.cit

Region of Nigeria[33]. This means that the manual covers customary laws of all Igbo people of the present Abia, Anambra, Ebonyi, Enugu and Imo States.

Part 11 of the manual entitled customary laws of succession based on extensive research gives details of the types of estates that can be inherited, the methods of distribution of estates, the rules of general application and local variations. Therefore, the manual appears to be the most recent authority on the customary law of inheritance of the Igbo people. However, the manual only states the laws for the purpose of certainty of the laws. It dies not criticize them.

A handbook of some Benin Customs and usage[34] issued by the Benin Traditional Council on the authority of the Omo n'Oba Erediauwa the Oba of Benin is one of the main sources for the Benin customary laws of inheritance discussed in this study. The preamble to the handbook states that the handbook was prepared on the authority of Omo n'Oba Erediauwa, the Oba of Benin as a result of lots of acrimony generated among the children of a deceased Benin person as a result of the distribution of his estates by the elders of the family. The handbook states the customary rules of inheritance for non-hereditary traditional title holders. The handbook, like the customary law manual of Anambra and Imo States, only states details those who are entitled to the estates and the categories of the estates i.e. landed properties and immovable properties.

According to the handbook, the only method of distribution of estates recognized under the Benin customary law of inheritance is *urho* i.e. per stripe. The handbook does not criticize the customary law of inheritance of the Benin which gives precedence to male children over the female children.

Ezeillo Joy[35] critically outlines the laws of inheritance in Nigeria. She makes some suggestions on how to improve women's rights to inheritance. Some of the suggestions include harmonization of the received English law, local statutes and customary laws on

[33] Customary Law Manual Op.cit page 5. The learned author was the Commissioner for Law Revision of Anambra State of Nigeria in 1977.
[34] Hand Book on Benin Customs & Usages Op.cit
[35] Law and Practices Relating to Women's Inheritance Rights in Nigeria (Women's Aid Collective(WACOL) Nigeria 2000

inheritance; legal education for women, gender sensitivity training for judicial and other law enforcement officers for effective elimination of discrimination against women and funds to support women to fight discriminatory inheritance laws. These suggestions are good and we support them.

Clarke Peter B.[36], Hogben S. J.[37] , Ajayi J. F. A.[38] , Holt P. M.[39], discusses the history of Islam and introduction of Islamic law (Sharia) in Kanen-Bornu and many parts of Hausa land. They also discuss the Jihad of Usman Dan Fodio in Hausa land which resulted in the establishment of an Islamic State covering many areas of the former Northern Region of Nigeria.

Justice Mahmud Abdul Malik Bappa[40] discusses the history of the operation of Islamic law in the former Northern Region of Nigeria from the time of the British colonial rule till after independence. Abdul-Wahab Tajudeen[41] discusses the concept of shariah, scope, sources and schools of Shariah, Southern States and Shariah, and impediments to the implementation of the constitutional provisions on the establishment of Shariah Courts in Southern Nigeria. The learned author suggests two methods that could facilitate the establishment of Shariah Courts of Appeal in Southern States as provided for in the Constitution. First, the Houses of Assembly of Southern States should enact a law to establish courts of co-ordinate jurisdiction with the existing customary courts in the States with the jurisdiction over Islamic personal law.

Chaudry Muhammed Sharif[42] and Gurin Aminu Muhammed[43] Ati Abdal Hammudah[44] discuss the rights of women to inheritance as stipulated in the Holy Quran. Chaudhry and Ati[45] give explanation for the greater share of the estate to men as against

[36] West Africa and Islam (Edward Arnold 1988)
[37] An Introduction to the History of Islamic States of Northern Nigeria (Oxford University Press Nigeria 1967)
[38] History of West Africa Vol 1. 2nd Edition (Longman Group Ltd London 1976)
[39] The Cambridge History of Islam Vol. 2A (Cambridge University Press. Great Britain 1992.
[40] A brief of History of Sharia in the defunct Northern Nigeria (Jos. University Press Ltd Nigeria 1988)
[41] Application of Shariah in Southern Nigeria; The Hoax, The Truth(Al Furuq'aan Publishers Nigeria 2006)
[42] Women's Rights in Islam (Adam Publishers and Distribution India 2002).
[43] An Introduction to Islamic Law of Succession (Testate and Intestate) (Jodda Press Ltd. Nigeria 1998)
[44] The Family Structure in Islam (Islamic Publications Bureau. Nigeria 1982).
[45] Women's Rights in Islam Op.cit; page 75, The Structure in Islam op.cit page 267.

women. According to them, Islam places greater economic obligations on men than women because men have responsibility for earning livelihood for the family. Hence, in Islam, an unmarried woman is maintained by her father and a married woman is maintained by her husband. We agree with the explanations given by the authors. What is noteworthy of the Islamic law of inheritance is that the law which gives women right to inherit certain portions of the estate of their husbands and fathers is just and equitable than customary laws which totally deprive women right of inheritance.

The following articles in the journals are also reviewed:

> *Onuoha[46], in Discriminatory Property Inheritance under the customary law in Nigeria, discusses the patterns of inheritance and succession on intestacy under customary law in Nigeria. She discusses the discriminatory aspect of property inheritance under customary law as they affect the rights of spouses, adopted children and illegitimate children. She criticizes the general rule of customary law that a wife cannot inherit the property of her deceased husband. According to her, this customary law offends the principle of natural justice, equity and good conscience. It is morally unfair and repulsive to deprive a wife of the right to inherit her husband's property.*

She recommends a reform of the customary law. The reform should be the codification, unification and harmonization to make for certainty in formulating, applying and the implementing of the law leavened as necessary by the natural justice principle. She also recommends that government should encourage and promote the role of non-governmental organizations which have been educating and enlightening women and society on the need to recognize and eliminate these discriminatory customary laws.

While this study agrees that non-governmental organizations have a role to play in educating women and the society to appreciate the unfairness of discriminatory customary laws and the need for the laws to be reformed, we do not think codification and

[46] Onuoha, Reginald Akujobi, 'Discriminatory Property Inheritance under the Customary Law in Nigeria NGOs to the Rescue (2008) vol.10. The International Journal of Not for Profit Law

harmonization of the laws will reform the law. This is because codification and harmonization of the laws will only make for certainty of the laws but will not change the laws to improve the status and rights of women.

Opeloye Muhib. O.[47] discusses the definition of Sharia application in Yoruba land, impediments against realization of Sharia in South-Western Nigeria and prospects for the implementation of Sharia in South-Western Nigeria. As regards the implementation of Sharia in South-West, the learned author recommends inter-alia that conferences and seminars should be organized by appropriate Islamic organizations to promote dialogue among Muslims and Christians for better understanding of Sharia by Muslims themselves. Moreover prominent Islamic organizations should establish independent Sharia panels to adjudicate in civil matters involving Muslims. These recommendations are good but we think there should be preliminaries to the official establishment of Sharia Courts. Therefore, Muslims in South-West should continue to put pressure on their governments and legislatures for the establishment of Sharia legal system.

Sada I. N.[48] discusses the meaning and sources of Sharia, which in the wide sense is usually translated as Islamic law. He classifies the sources of law into two components, that is to say, the divine and human sources. The divine source comprises the Quran and the Sunna of Prophet Muhammad while the human source comprises Ijma, Qiyas, Urf, Istihsan and Maslaha broadly termed Ijtihad. According to him, the divine source which is unequivocally commanded by Allah on the messenger is designated as Sharia in its strict sense of the word.

In the view of the fact that the Quran with Sunna i.e. Sharia proper is very concise and supply only the general rules, it means that Allah the law giver wants Muslims to work out the details of the law through interpretation and the application of the injunctions of the Sharia to every contingency of life. As human opinions and reasoning vary, the

[47] 'The Realization of Shariah in South-Western Nigeria: A Mirage or Reality' (2003) A digest on Islamic Law and Jurisprudence in Nigeria Essays in Honour of Justice Umar Fruk Abdullah. President Court of Appeal Abuja.

[48] 'The Nature of Islamic law; A Rigid or Dynamic System? A Critique'(2000-2001) vol. 11 No 11 Ahmed Bello University Journal of Islamic law

interpretation and application of the injunctions of Sharia vary from one person to another and from one community to another.

As regards the controversy whether Islamic law is rigid or dynamic, the writer concludes that Islamic law if considered from the aspect of its divine component is rigid and immutable, but dynamic, flexible and adaptable if viewed from the aspect of its human component. The human component is flexible and dynamic because human effort to solve human problems as they rise is bound to keep changing as human nature, conditions and circumstances continue changing from time to time and generation to generation. We think the article has undoubtedly clarified the confusion as regards the sources of Sharia in its strict sense and Islamic law in its wide sense.

Edu O.K.[49] discusses the customary laws of inheritance of the Igbo, Benin and Yoruba people. He highlights the shortcomings of these customary laws which he criticizes as being not only biased against female children and widows but also unconstitutional and repugnant to natural justice, equity and good conscience. He recommends the enactment of a legislation which will give a widow who married under customary law a right to inherit a portion of her deceased husband's estate. Moreover, the courts should declare repugnant the Ibo customary law of inheritance which deprives female children of the right the estates of their late fathers.

These recommendations are good and are supported. However, the abolition of customary law of inheritance which deprives female children right of inheritance should not be limited to Igbo customary law but all customary laws of inheritance which discriminate against women should be abolished.

1.7 DEFINITIONS OF TERMS

This study contains some technical words and terminologies. For a proper understanding of this thesis, it is necessary to define these terminologies in the context they are used in the study. These terminologies are defined below:

[49] A Review of Laws of Inheritance in the Southern States of Nigeria' (2004) Vol.24 The Journal of Private and Property Law JPPL. Faculty of Law University of Nigeria, Nsukka

"Customary law" or "native law and customs" means the unwritten rules, customs and traditions which regulate various kinds of relationship among members of a particular indigenous community and accepted as binding on them.

"Sharia" or "Islamic law" is written religious law laid down and prescribed by Allah to govern and guide humankind in all aspects of life which Muslims accept as binding on them. Sharia is classified statutorily as customary law, but the Supreme Court has pronounced recently that Sharia or Islamic law is not customary law.

Idi-Igi (per stripe) means distribution of property according to the number of wives of the deceased.

Ori-Ojori (per capita) means distribution of property of a deceased equally among all his children.

Igiogbe – means the house in which a deceased Benin man lived and died and usually, though not always where he was buried.

Urho means method of distribution of property according to the number of wives of a deceased.

Usekwu – where a man has children by two or more women, the children born by each of those women together make up one Usekwu for the purpose of distributing his property on intestate.

Nrachi – the practice whereby a daughter whose father has no male children is retained unmarried in the father's compound with a view to her having a male child in the father's name. The children she has are children of her father whether the father is dead or alive.

Ukomwen – the second and final burial rites for a deceased Benin man.

"Quranic Heirs" – means the relations whose names and respective shares are specifically mentioned in the Quran. They are entitled to receive fixed shares allotted to them in certain order of preference.

1.8 CONCLUSION

It is an indisputable fact that one of the common characteristics of customary law is that it is dynamic.[50] It changes with time to meet the social and economic changes of the society. It is regrettable that the customary laws of inheritance which deny women the right to inherit the property of their deceased husbands and fathers have remained static. Consequently, these discriminatory and obsolete laws are still operating despite the provisions of the 1999 constitution of the Federal Republic of Nigeria which guarantees freedom from discrimination based on sex[51] and the International Conventions which prohibits discrimination against women which Nigeria has signed[52]

In this connection, it is high time these customary laws were reformed to give women the right of inheritance so as to improve the economic and social status of women. Such reforms should in fact aim at the abolition of the discriminatory laws so that women can enjoy the right of freedom from discrimination as guaranteed by the Constitution.

Though Islamic law gives women the right to inherit certain portions of the estates of their late husbands and fathers, many women are still denied the right by surviving relatives of many deceased Muslims who prefer to distribute the property of surviving relatives according to customary laws. It would appear that this has been possible because many Muslims women do not know their rights under the Islamic law. Therefore, there is need for Islamic scholars and Imams to enlighten Muslim women of their rights of inheritance under the Islamic law.

[50] Agbai v. Okogbue (1991) 7NWLR (Pt 204) 391 Per Nwokedi JSC at 417
[51] S. 42(1)(a) Constitution of the Federal Republic of Nigeria 1999
[52] Op.cit

CHAPTER TWO

AN OVERVIEW OF THE NIGERIAN LEGAL SYSTEM

2.0 INTRODUCTION

According to a learned author,[53] the Nigerian legal system consists of the 'totality of laws, or legal rules and the legal machinery, which obtain within Nigeria as a sovereign and independent African country'.

The colonization of Nigeria by the British Authorities and the consequent imposition of English law have made the Nigeria legal system to have a dual structure comprising English law and customary law. Under the hybrid legal system, Islamic law has, over the years, been treated as customary law because the English who colonized Nigeria classified the Islamic law as customary law by legislation. However, as stated earlier in the preceding chapter, the Supreme Court has pronounced recently that Islamic Law is different from customary law[54]. Consequently, Islamic law is no longer customary law but a separate law in Nigeria.

Taking a cue from the definition of Nigerian legal system as stated by Okonkwo[55], in discussing the Nigerian legal system, the researcher focuses on the principal legal sources of Nigerian laws and various courts which apply or administer the laws in order to ensure justice.

The principal legal sources are the Constitution, Nigerian Legislation or local Statues, Case laws, English law comprising Acts or Orders in Council applying directly to Nigeria, Statutes of General Application, the Common law, Doctrines of Equity, (generally called the Received English law), Customary and Islamic laws. These principal sources, the controversy about the interpretation of the reception clauses of the Received English law, tests of validity of customary law prescribed by the Statutes are examined in detail.

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[53] Okonkwo C.O Introduction to Nigeria Law. (Sweet & Maxwell London 1980) at p.40
[54] *Alkamawa v Bello (1998)6 SCNJ 127 at p.128*
[55] Op.cit

In view of the fact that the research is on inheritance, the statutory laws on inheritance, the Wills Act 1837, Wills Laws and Administration of Estates Laws as they affect women are also discussed in detail.

2.1 NIGERIAN LAW

(a) Received English Law

Historically, Nigeria as a country was created by the British who colonized the territories now called Nigeria. The colonization of Nigeria was followed by the imposition of English laws by the colonial masters. Asein J.O.[56] has classified English law as a source of Nigeria law into two namely:

> *(a) Those English laws that apply by their own force, or by imperial own force or by imperial extension consisting mainly of statues and subsidiary legislations and*
> (b) *Those that have been received into Nigeria by local enactments and comprising the common law, the doctrines of equity and statutes of general application.*

English law extending to Nigeria is the law introduced to Nigeria directly by English legislation. English law extending to Nigeria consists of statutes and subsidiary legislation made on or before October 1, 1960 but not yet repealed by an appropriate authority in Nigeria. English law extending to Nigeria is subject to Nigeria legislation, limits of local jurisdiction, local circumstances and formal verbal alterations.

Since no English law enacted in England after October 1, 1960 applies by its own force in Nigeria, any English law extending to Nigeria prior to October 1st 1960 continues to apply in Nigeria regardless of its repeal in England after that date until it is repealed by an appropriate authority in Nigeria. Thus, the Supreme Court in *Ibidapo v Lufthansa Airline*[57] said:

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[56] Asein John Ohiereini, Introduction to Nigerian Legal System (Sam Bookman Publishers, Nigeria 1998).
[57] (1997) 4 NWLR (Pt 498) 124 at p. 149. Per Wali J.S.C. *1. Per Osborne C.J. at p.9*

> *all the received English laws, multilateral and bilateral agreements conclude and extended to Nigeria unless repealed or declared invalid by a court of law or tribunal established by law, remain in force subject to the provision of Section 274(1) of the 1979 Constitution dealing with existing laws.*

In that case, the Carriage of Goods by Air (Colonies Protectorates and Trusts Territories) Order 1953 was declared to subsist as part of Nigerian law despite its omission from the laws of the Federation of Nigeria 1990 since it had neither been repealed nor declared invalid.

Apart from the English law extending to Nigeria, English law was also introduced into Nigeria legislation. English law introduced into Nigeria by local legislation is generally referred to as "Received English Law". The history of the received English law dates back to 1863 when Ordinance No. 3 of 1863 introduced English law into the colony of Lagos. Ordinance No.3 of 1863 provides:

> *all laws and statutes which were enforced within the realm of England on the 1st day of January, 1863, not being inconsistent with any Ordinance in force in the colony or with any rule made in pursuance of any such ordinance, should be deemed and taken to be in force in the colony and should be applied in the administration of justice, so far as local circumstances would permit.*[58]

Later, upon the enactment of the Supreme Court Ordinance of 1876, the reference date was changed to July 24, 1874. The reference date was further extended to 1900, following the establishment of the Protectorate of Northern Nigeria and the amalgamation of the Colony of Lagos and the Protectorate of Southern Nigeria and the colony and Protectorate of Southern Nigeria. The 1900 date was maintained after the 1914 amalgamation of the colony and Protectorate of the Southern Nigeria and the Protectorate of the Northern Nigeria. Thus the reference date 1900 has remained the operative date ever since.

[58] *Attorney General v John Holt & Co (1910) 2 NLR*

The current Federal enactment that has received English law is the Interpretation Act[59] in force as a Federal law throughout Nigeria. S.32 of the Interpretation Act provides thus;

> *32(1) subject to the provision of this section and except in so far as other provision is made by any Federal law, the common law of England and the doctrine of equity, together with the statutes of general application that were in force in England on the 1st day of January, 1900, shall, in so far as they relate to any matter within the legislative competence of the Federal legislature, been in force in Nigeria.*
>
> *(2) Such imperial laws shall be in force so far as the limits of local jurisdiction and local jurisdiction and local circumstances shall permit and subject to any Federal law.*
>
> *(3) For the purpose of facilitating the application of the said imperial laws they shall be read with such formal verbal alterations not affecting the substance as to names, localities, courts, officers, persons, moneys, penalties and otherwise as may be necessary to render the same applicable to the circumstances.*

There are provisions similar to S.32 of the Interpretation Act in the High Court Laws of Northern States, High Court Laws of Eastern Nigeria, Law (Miscellaneous Provisions) of Lagos State, and the Law of England (Application law) of Western Region of Nigeria in force in Oyo, Ogun, Ondo, Osun, Delta and Ekiti, states.[60] However, it should be noted that the Law of England (Application Law) of Western Region 1959[61] does not receive English statutes. Moreover, the reception date of 1st January 1900 does not apply in the former Western Region, and those states that emerged from that Region before the enactment of the

[59] CAP 123 Laws of the Federation of Nigeria 2004.
[60] CAP 49 Laws of Northern Nigeria 1963. Section 28 & 29; CAP 61 Laws of Eastern Nigeria 1963. Section 15 & 25; CAP 65 Laws of Lagos State of Nigeria 1974. Section 2; CAP 60 Laws of Western Region of Nigeria 1959.
[61] Op.cit.

law of England (Application Law) of 1909.[62] This is because S.3 of that law which receives only the common law of England and the doctrines of equity does not contain a reception date. Thus, Tobi Niki[63] and Nwogugu[64] have suggested that since the opening words of S.3 say 'from and after the commencement of this law', it is intended that the common law and doctrine of equity should come into force on the date of enactment i.e. 1st July 1959. We share the views expressed by these learned writers.

The interpretation of the reception clauses of the various local enactments that received English law has generated a lot of arguments among learned authors. Hence, some of the issues that gave rise to the arguments are discussed with a view to showing how far the issues have been resolved. One issue that has risen from the interpretation of the reception clause is whether the reference date of January 1, 1900 should apply to the common law and doctrines of equity as well as statutes of general application. This is because of the ambiguity in the reception enactment which was received in general terms, the common law, the doctrine of equity and the statues of general application that were in force in England on January 1, 1900.

For example S.32 of the Interpretation Act[65] and S.2 Law (Miscellaneous Provisions) of Lagos State Law[66] provides thus: 'The common law of England and the doctrines of equity together with the statutes of general application that were in force in England on 1st day of January, 1900'.

S.15 of the Cross River State High Court Law[67] states: 'The common law of England, the doctrine of equity and the statutes of general application'. S.28 of the High

[62] Ibid.
[63] Tobi Niki, Sources of Nigerian Law. (MIJ Professional Publishers Ltd. Lagos 1996
[64] Nwogugu E.I 'Reception of the Common Law in Common Wealth Scope and Extent in New Commonwealth Countries' in proceedings and papers of the Six Commonwealth Law Conference 1980 p.164 cited by Tobi Niki, op.cit at pages 20,33-34
[65] Op.cit page 13
[66] Op.cit
[67] CAP 51 Laws of Cross River State of Nigeria 1981

Court Law of the Northern Region[68] lists all three as follows:- (a) The common law, (b) The doctrine of equity and (c) The statute of general application.

It is pertinent to state that the reception enactment of the former Western Region is clear as far as the reference date is concerned. This is because S.3 of the Law of England (Application Law) of Western Nigeria[69] which received only the common law and doctrines of equity contains limiting date. According to Tobi Niki[70] the date 1st January 1900 is omitted in the enactment because it applies to the statutes only.

The consensus of Obilade[71] and Park[72] on the reference date is that the limitation of the date does not apply to the rules of common law and doctrines of equity. We agree with this view because it is common knowledge that the common law and the doctrines of equity are judge made laws and are therefore prone to changes. Consequently, a limitation of the rules of common laws and doctrines of equity to pre-1900 position could fetter the courts to modify or make alterations in the rules of common law and equity that may be necessary as local circumstances demand.

The Supreme Court, in the case of *Nigerian Tobacco Co Ltd v Agunanne*[73] opined that the reference to the 1st January, 1900 date in the reception clause of S.28 of High Court Law of Northern Nigeria should be read as referring to only statutes of general application. The court further held that the common law and doctrines of equity could mean only the current common law and the current doctrines of equity. This decision affirmed the consensus of the learned authors and judicial practice though the Supreme Court decision concerns the interpretation of the reception enactments of Statue that were formerly part of Northern Nigeria, we think this interpretation should apply to the reception enactment of the Federal and other states of the Federation. This is because if the reference date of 1st January,

[68] Op. cit page 927
[69] Op. cit pages 181-182
[70] Tobi Niki, Sources of Nigeria law. (MIJ Professional Publishers Ltd Nigeria 1996) Obilade A.O. The Nigerian Legal System (Spectrum Law Publishing Nigeria 1990); Park A.E.W., Sources of Nigerian Law (African Universities Ltd. Nigeria 1963).
[71] Ibid
[72] Ibid
[73] (1995) 5 NWLR(Pt 397) at 547

1900 was made to apply to common and doctrines of equity, it would mean that archaic principles that had probably been abolished in English would remain part of our law. This could lead to perpetuation of bad law.

The second issue as regards the English laws that are received by local enactments is the geographical limitation for statutes of general application. This was one of the issues that the court had to decide in *Young v Abina*[74]. In that case, the court said the test of general application in terms of territory is England. The acceptance of England as the test of geographical generality was re-affirmed by the Federal Supreme Court in *Lawal v Youana.*[75]

Another issue is that for a statute of general application to be applicable in Nigeria, it must have been in force in England as at 1st January, 1900. So, an English statute that had been repealed in England after that date is still applicable if a Nigerian statue has not repealed it. Thus, in *Young v Abina*,[76] the West African Court of Appeal held that the Land Transfer Act of 1887 which was repealed in England in 1925 was still applicable in Nigeria in 1940. Also in *Sanusi v Daniel,*[77] the Wills Acts 1837 was held to be statutes of general application and as such is in force in Nigeria.

The decision of the Court of Appeal in *Lawal v Ejidike*[78] has overruled the decision of *Young v Abina*[79]. In the former case, the Court of Appeal held that a statute is not necessarily one of general application because it was in force in England on the 1st day of January, 1900. In order to be applicable as a statute of general application, it must also be one that was of general application in England on 1st January, 1900. The court also stated that it would be ridiculous for Nigerian courts to apply statutes of general application which had been abolished in England because with the death of the statute in England, there is no legal basis for it to continue to apply in Nigeria. We think this decision of the court is progressive and should be affirmed by the Supreme Court anytime it has an opportunity to make a pronouncement on it.

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[74] (1990) 6 WACA 180 AT 184
[75] (1961) 1 ALL.N.L.R 257
[76] Op.cit page 184
[77] (1956) 1 F.S.C 93
[78] (1997) 2 NWLR (Pt 487) 319 at 323 & 332
[79] Op. cit page 183

Moreover, the issue of determining the full ambit of the general application has not been easy for the courts. The courts have tried to devise different tests in determining when a statute can be a general application. The attempt made by Osborne in *Attorney General V John Holt & Co*[80] to formulate a comprehensive test has been criticized as being too restrictive.[81]

The test was couched in the following words:

Two preliminary questions can however be put by way of a rough, but not infallible test viz.

> *(1) by what courts is the statute applied in England and*
> (2) *to what classes of the community in England does it apply? If on the 1st January 1900, an Act of Parliament was applied by civil and criminal court to all classes of the community, there is a strong likelihood that it is in force within the jurisdiction. If on the other hand, it were applied only by certain courts (example, a statute regulating procedure) or only to certain classes of the community (example, an Act regulating a particular trade), the probability is that it would not be held to be locally applicable.*

The test as indicated by its sentence is only a rough guide and it is no means infallible. Contrary to the requirement of the rough test, many statutes which are statutes regulating procedure have been received and held by the courts to be statutes of general application. For instance, the English Summary Jurisdiction Act 1849[82] and the Common Law Procedure Act 1852 have been held to be statutes of general application by the West African Court of Appeal.

The second criterion of the test formulated is that the statute must apply to all classes of the community. On the other hand, a statute that is applicable to only certain classes of the

[80] Op. cit page 21
[81] Park A.E.W., The Sources of Nigerian Law. African University Press Nigeria 1963; Obilade A.O, The Nigerian Legal System (Spectrum Law Publishing Nigeria 1990).
[82] *Inspector General of Police v Kamara (1934) WACA 183.*

community would not be a statute of general application. The consensus of learned authors who have criticized this criterion is that English statute which applied to all classes or all members of any particular class as at 1st January 1900 should qualify as a statute of general application. Thus in *Labinjoh v Abake*,[83] the court held that the Infants Relief Act1874 was a statute of general application despite its application to infants only, since it would apply to all infants without discrimination.

The second ambit of the reception enactment is that the received law should apply only so far as local jurisdiction and circumstances permit. This provision is to the effect that the Received English laws can only be in force subject to the dictates of local situations or circumstances. There is no doubt that differences in circumstances prevailing in England and Nigeria are likely to make the application of some English laws or statutes unsustainable in Nigeria. Thus, where a particular factor essential to the application of an English statute is not present in Nigeria, the courts have held that local circumstances have not permitted its application. For example, *Halliday v Alapatira*[84] the Bankruptcy Act of 1869 was not in force in Nigeria because the machinery for its application was not available in the country.[85]

However, there have been arguments as to whether the provision limiting the application of the Received English Law to local jurisdiction and local circumstances also apply to common law and equity. The consensus of learned authors[86] is that S.32 (1) of Interpretation Act,[87] a Federal Law and SS. 28-29 of the High Court Law of the Northern Region[88] which mention "imperial laws" as laws which apply subject to the limits of local jurisdiction and to local circumstances are that the word " imperial laws" mean statutes of general application. Therefore, the provision does not apply to the common laws or to equity.[89]

[83] (1924) 1 NLR 1
[84] (1881)1 NLR 1
[85] Obilade A.O, Op cit pages 19 & 78; Park A.E.W. op.cit; Asein John Ohireime, op.cit page 107.
[86] Park, Obilade, Op. cit page 37-38; 79-80 respectively
[87] Op.cit page 13
[88] Op.cit page 927
[89] Ibid

The seeming ambiguity as to whether the limitation of local jurisdiction and local circumstances apply to common law, equity or only to statutes was removed in the reception clause of the law of former Eastern Region of Nigeria[90] (adopted by all States that have merged from that Region) which made clear reference to statutes. Similarly, the Law of England (Application Law) of former Western Region of Nigeria[91] (Adopted by all States that have emerged from that region) went further to forbid the application of statutes of general application in the region. This is because by virtue of that law, no statute of United Kingdom Parliament within the limits of the region's legislative competence was to be in force in the region.

Another limitation to the application to the statutes is that the courts should read them with such formal verbal alterations as to names, localities, courts, officers, persons, money, etc as may be necessary to facilitate the application of the statutes. The purpose of this provision is to enable judges to effect such substitution of wordings as *"England' or United Kingdom"* for *"Nigeria"*. Similarly, *"London"* could read "Lagos" or in regional cases, the names of the capital of the regions. "House of Commons" for "House of Representative". "Pound Sterling" for "Naira" etc.

(b) Islamic Law or Sharia

(i) Sources of Islamic Law

According to *Shaltut M,*[92] Muslim scholars usually define Sharia as the body of 'those institutions which Allah has ordained in full or in essence to guide the individual in his relationship with God, his fellow Muslims and the rest of the universe'. Ismail Mustafa Hussain also says 'Shariah is a body of rules and regulations, a body of laws, in form of commands and prohibitions, laid down and prescribed by Allah, to govern and guide Human

[90] Ibid
[91] Op.cit pages 181 -182
[92] Shaltut M. al Islam (Cairo al-Azhar Press) p.5; also Qadri A.A, Islamic jurisprudence in the Modern World Ashraf Press Lahore. 1973 pp 15-16 cited by Sada I.N. in his article 'The Nature of Islamic Law; A Rigid or Dynamic System? A Critique' (2000-2001) vol. 11 No. 11 Ahmadu Bello University Journal of Islamic Law

kinds, His servants, in all spheres of life, in religion , politics, commerce and economy, culture and society'[93].

Some learned scholars of Islamic Law opined that Islamic law is held by Muslims to include two basic elements. The divine, which is unequivocally commanded by God or His Messenger and which is designated as Sharia in the strict sense of the word, and the human which is based upon and aimed at the interpretation and/ or application of Sharia. This is designated as fiqh or applied Sharia.[94] Abd al Ati said fiqh is a human product, the intellectual systematic endeavor to interpret and apply the principles of Sharia[95]

Sada I.N,[96] said the sources of Sharia can simply be classified into two, namely divine and human. The divine sources of Sharia are the Quran and the Sunna of Prophet Muhammad. The human components are *Ijma, Qiyas, Urf, Istihsan and Maslaha* under the broad heading of *Ijtihad.* The Holy Quran is the first and primary source from which all the teachings and laws of Islam are derived. It is the pivot upon which all other components revolve. Briefly, it is the ground norm of Islamic Law. (The Sharia).

The second primary source of Islamic Law is the Sunna. The Sunna means the deeds, utterances and indirect authorization of the Prophet Muhammad. It explains, elucidates the Quran. The Sunna derives its authority from three unequivocal roles assigned to the Prophet in the Quran. The first is as an expounder of the message of the Quran. The second role is as a model for the Muslim community. The third role given specifically to the Prophet is that of legislator for the Muslim community. The human components of Islamic Law are *Ijma (*consensus) *Qiya* (analogical deductions) *Istihsan* (preference) and *Maslahah* (public interest and welfare). All these are generally called *Ijtihad* by Islamic jurists.

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[93] 'Shariah Sources and the Defence of Women's Rights' in the Book Sharia Penal and Family Laws in Nigeria and in the Muslim World: Rights Based Approach (Ahmed Bello University Press Zaria Nigeria 2004) at p.140

[94] Asaf Fayzee A.A, Outlines of Muhamadam Law (London: Oxford University Press 3rd ed. P.22); Kemal Faruki A, Islamic Jurisprudence (Karachi Pakistan, Publishing House p 18); Kahhab Khallaf abd al in Usul al fiqh (Cairo, Matbaat' al Nasr, 7th ed) P.282; Coulson, N.J.A, A History of Islamic Law (Edinburg, The University Press 1964 p.85); Schacht J, Introduction to Islamic Law (Oxford, Clarendon Press and Shorter Encyclopedia of Islam pp 102-107; 524-529)

[95] Ati Abdal Hammudah, The Family Structure in Islam (Islamic Publications Bureau Nigeria 1982) p.14

[96] 'The Nature of Islamic Law; A Rigid or Dynamic System? A Critique' (Ahmadu Bello University Journal of Islamic Law Vol 11 No 11 2000-2001)

These components of Islamic Law are aimed at interpreting, expounding, understanding and applying the injunctions of Sharia to practical day affairs of the Muslim community. This is because according to Said Ramadan,[97] Quran and Sunna provide the general rules without going into details. The Muslim community is left with ample opportunity to work out the details through human effort/ reasoning to solve their contemporary problems. *Ijtihad* operates in the absence of any applicable text in the Quran and Sunna on a matter but must not contravene any injunction of the Quran and the Sunna.

Customs and usages of various Muslim societies are recognized as minor components of Islamic Law. Islam, being a universal religion and way of life, also places great value on the custom of the people. The fact that people are different and possess different customs is recognized by the Quran. However, before a custom can have force of law, it must satisfy certain conditions. It must be acceptable to the people of sound nature. In other words, it must be reasonable and compatible with good sense and public sentiment. It must be of frequent and common occurrence and must be prevalent at the time.[98] In addition the custom must not be inconsistent with the text of the Quran or the Sunna. Where a custom is so inconsistent that if followed, it will amount to abandoning the Quran or Sunna, then it must be set aside. A custom which is of general application may be followed to the extent that it agrees with the Quran and Sunna.[99]

(ii) Advent of Islamic Law in Nigeria

The consensus of many scholars on the history of Islam in West Africa is that the Northern part of Nigeria where Islam is predominant is that Islam was first introduced to through Kanen-Bornu situated in the North- Eastern part of the present day Nigeria in the

[97] Said Ramandan, (1970) 'Islamic Law its Scope and Equity' p.64. Cited by Sada op.cit page 171
[98] Mahmassan L.S, (1961) The Philosophy of Islamic Jurisprudence translated by Zaideh F.J., Leida F.J. Brill. Netherlands. P.133 cited by Sada op.cit. p.181
[99] Qadri, A.A. (1973) 'Islamic Jurisprudence in the Modern World' (Ashraf Press Lahore) P.228 cited by Sada op.cit p.181

second half of the eleventh century when mai (king) Hume of Kanen-Bornu accepted Islam.[100]

Some successive mais of Karen-Bornu were converted to Islam. Islamic Law of the Maliki School and Qadi courts was established in Karen-Bornu during the reign of the mais though traditional religious practices continued. Islam was also introduced to some Hausa towns of Kano and Katsina in the Fourteenth Century during the reign of Sarkin (king) of Kano by the names Yaji and Mohammed Korau of Katsina.[101] Yaji of Kano and Mohammed Korau of Katsina respectively were the first kings of the two respective towns to accept Islam. Successive kings of Kano and Katsina after Yaji and Korau were also converted and dedicated to Islam. By the sixteenth century, Islam had become the State religion in these Hausa towns. Islam also spread to Zaria, Zamfara, Yauri and Nupe in the sixteenth century.

From the sixteenth century, Kastina and Kano became great centers of Islamic learning which attracted Muslim scholars from Magrib, Middle East and Western Sudan. Muslim scholars settled in these towns to teach Islamic doctrines established numerous settlements over the entire Hausa land. Quranic schools flourished in many towns in Hausa land.

The growth of Islamic education led to the emergence of indigenous Islamic scholars who worked together with the immigrant Islamic teacher and preachers to propagate Islam. However, the main impact of Islam was among the urban centers. Islam made little or no impact on the common people in the rural areas. Thus, the traditional religious practices were still widespread among the common people in the rural areas and even among those who professed to be Muslims. The Hausa rulers were nominal Muslims practicing Islam with all forms of traditional religious.

[100] Hogben S.J, An introduction of the History of Islamic States of Northern Nigeria. (Oxford University Press) History of West Africa Vol 1, Edited by Ade Ajayi J. F and Crowder Michael (Longman Publishers New York USA 1984; Doi Abdulrahman I., - Islam in Nigeria Gaskiya Corporation Nigeria 1984). Clarke Peter B, West Africa and Islam (Edward Arnold Oxford 1981) op.cit page 67

[101] Hiskett Mervyn, The Course of Islam in Africa (Edinburgh University Press. Edinburgh Great Britain 1994); Clarke Peter B. Ibid page 61

The continued expansion of Islamic education in Hausa land increased the number of Muslim scholars and intellectual elites in Hausa land. Some of these Muslim intellectual elites were radically minded and very critical of Hausa kings' failure to govern according to Islamic law and principles. One of such Muslim intellectual elites in Hausa land was Shehu Usman Dan Fodio who established himself as a great scholar.

Shehu Usman Dan Fodio was a Fulani. He was a preacher who dedicated himself to the teaching and spreading of Islam, the eradication of un-Islamic practices which were common in Hausa land and the establishment of Sharia. His itinerant Islamic missionary activities influenced a large number of people who converted to Islam and became his followers. Shehu Usman Dan Fodio's teaching against unIslamic practices of the kings of Hausa land and ordinary Muslims who were nominal Muslims but engaged in pagan practices infuriated the king in Gobir where Shehu resided. Consequently, the king of Gobir sent a punitive force against Shehu Usman Dan Fodio and his followers who he considered as rebels.

The armed clash between Shehu's followers (Jamaa), the loyalists and followers of king Gobir sparked of what became the Fulani Jihad in Hausa land. What started as a skirmish later grew into an open was of conquest against Hausa States of Kano, Zaria, Katsina, Bauchi, Adamawa, and Nupe. The wars against the Hausa States though inspired by Shehu were conducted by Fulani clan leaders. The Fulani clan leaders after successfully waging war against the Hausa States were made emirs (Muslims) rulers of the States that had conquered but owed allegiance to Shehu.

The Fulani Jihad resulted in the collapse of the old Hausa dynasties. The Hausa dynasties were replaced by Fulani emirates. By 1812 a Fulani Islamic Empire (Sokoto Caliphate) was established over many of the Hausa States in many parts of the present Northern States of Nigeria. In 1817 a Jihad was launched in Ilorin which led to the establishment of a Fulani emirate in Ilorin which hitherto was a dependency of the old Yoruba Kingdom of Oyo.

Islamic law was applied vigorously as the law of the land the basis of political administration in the Sokoto Caliphate. By 1906 when the British took over the administration of Northern Nigeria, Islamic Law had taken root in many towns and villages of the Sokoto Caliphate. Islamic law was applied in criminal and civil matters to all Muslims by the Emirs' courts and alkali courts within the Caliphate. However, local customs of non-Muslims within the caliphate were allowed to operate.

Therefore, when the British conquered the Sokoto Caliphate they met a well established administration and judicial system based on Islamic Law. Mahmud referred to well- established Islamic law operating in the defunct Northern Nigeria, when the British colonized it thus:

> *When they came they found the Emirs' Courts filled with learned and pious jurists whose decision were always based on the authorities from the Quran, Hadith or other Islamic books….existing side by side with this were the Alkali's courts which were also engaged in the dispensation of the justice based on Sharia.*[102]

The fact that the prevalence of Islamic law in the Sokoto Caliphate was second only to Islamic law operating in Arabia was acknowledge by Professor Anderson when he said: 'Islamic Law is more widely and in some respects more rigidly applied in Northern Nigeria than anywhere else outside Arabia'.[103]

The British realizing that any attempt by them to interfere with the well-established administration based on Shariah in the Sokoto Caliphate could lead to stiff resistance from the people initially retained the system. Thus, they adopted indirect rule of administration, that is, ruling through the Emir and Native Chiefs. They also allowed the existing Courts of Shariah to continue.

[102] Justice Muhmud Abdul Malik Bappa, A brief History of Shariah in the Defunct Northern Nigeria (Nigeria Jos University Press 1988) at pp. 1-2
[103] Anderson J.N.D, Islamic Law in Africa (Fran Cass London 1978) p.219

However, over the years, the British Colonial administration made various legislations to restrict scope of Islamic law and undermine it. The first legislation that was enacted to restrict the scope of Islamic law was Native Courts Ordinance 1933.[104] By this Ordinance, appeals from certain native courts were to lie to the Magistrate Court, the Supreme Court and West Africa Court of Appeal was subjected to the principles of English law. Therefore, such appeals were allowed on the ground of either repugnancy or incompatibility. In *M. Mba v Mary Banke*[105] it was decided in the Court below that Mary, being a Christian, could not inherit the property of her Muslim father under Islamic law of inheritance. On appeal to the Supreme Court, the decision of the Alkali Court was set aside on the ground that Islamic law, in this regard, repugnant to natural justice equity and good conscience.

Similarly in *Guri v Hadeja N.A,*[106] the Emir of Hadeja's Court found Guri of robbery and homicide while attempting to rob and therefore sentenced him to death. On appeal, the Federal Supreme Court annulled the judgment on the ground that the accused was not allowed to defend him. This is because according to Islamic law of evidence an accused is not allowed to give evidence on his behalf while under the English law, he can do so but in a witness box. The Court held that this rule of evidence of Islamic law was repugnant to natural justice, equity and good conscience.

The Native Court (Amendment) Ordinance 1951[107] further undermined Islamic law on criminal matters. Section 10(a) of the Ordinance[108] provided that where an act of commission or omission constituted an offence under native law and custom and also under the statute, native courts could not impose a penalty greater than that provided by the criminal code for the same offence. Muslims were unhappy with the Native Court (Amendment) Ordinance 1951[109] and the Moslem Court of Appeal[110] which provisions are to the effect that cases decided on the principles of Islamic law would go on appeal to

[104] No 44 of 1933 CAP 142 Laws of Nigeria 1948
[105] Unreported case of Appeal from Kano in Suit No. K/20A/1943
[106] (1959) 4 F.S.C 44
[107] (1959) 4 F.S.C 44
[108] No.2 of 1951
[109] Ibid
[110] Moslem Court of Appeal NR. 10,1956

Magistrate Court where the courts would apply English law to review such cases because there was no expert on Islamic law sitting in such courts. The implication of this was that these appellate courts would amend or modify Islamic law on an ad hoc basis. Consequently, there was a protest from Muslims.

As a result of the protest from Muslims, the government of the Northern Region enacted the Penal Code Law,[111] Criminal Procedure Code Law[112] and the Native Courts Law of 1960[113] based on the recommendation of a panel of jurists set up to examine the reform of the legal system on the application of Islamic Law and non-Muslim law. Section 3(2) of the Penal Code[114] provides: 'After the commencement of this law no person shall be liable to punishment under native law and custom'.

While Section 23 of the Native Courts Law of 1960[115] provides that: 'in criminal causes a Native Court shall administer the provisions of (a) the Penal Code and the Criminal Procedure Code Law and any subsidiary, legislation made there under'. The combined effect of these laws is that Native Court Judges were to decide criminal cases in accordance with the Penal Code Law[116] and the Criminal Procedure Code Law[117] and not in accordance with native law and custom.

The implication of this as regards Islamic law is that the application of Islamic law on crime was abolished in Northern Nigeria since the Native Court Law[118] has defined native law and custom to include Muslim law (Islamic Law). Consequently, the Native Courts were vested with power to deal with civil matters only. Furthermore, appeals on civil matters decided on the principles of Islamic Law by Native Courts were to lie to High Court and from the High Court to Federal Supreme Court.

[111] NR.18 of 1959, N.R 19 of 1960 CAP 89 Laws of Northern Nigeria1963
[112] NR.11 of 1960, NR.20 0f 1960
[113] No. 21 of 1960 CAP 78 Laws of Northern Nigeria 1963
[114] Ibid
[115] Ibid
[116] Ibid
[117] Ibid
[118] Ibid

As a result of the dissatisfaction of Northern with the anomalous practice whereby appeals on civil matters decided on the principles of Islamic Law by native court where to lie to High Court and Federal Supreme Court whose judge had no knowledge of Islamic Law, Sharia Court of Appeal Law[119] was enacted to hear appeals for native court on Islamic Law matters. The preamble to law the clearly states thus; 'A law to establish a Sharia Court for the hearing of Appeals from Native Courts in cases covered by Moslems personal law and for matters ancillary thereto'.

The jurisdiction of Sharia Court of Appeal[120] includes any dispute on Moslem law regarding marriage concluded in accordance with that law, its dissolution and guardianship of an infant. It is also includes any matter of Moslem law regarding a wakf (endowment) gift, Will or Succession where the endower, donor, testator is a Moslem. The Sharia Court of Appeal law of 1960[121] applicable in former Northern Region of Nigeria was adopted by all States created out of that region and each of those States now has Sharia Court of Appeal.

Demands by Muslims to have a Federal Sharia Court of Appeal as a final Court of Appeal with respect to Islamic cases properly established under various constitutions of Nigeria to usher in democratic system of Government, over the years have not been successful. The reason for the demand for the establishment of a Federal Sharia Court of Appeal as a superior Court of record is to give Muslims the opportunity to appeal against the decision of Sharia Courts of Appeal of States.

The provisions of the three constitutions of the Federal Republic of Nigeria i.e. 1979, 1989 and 1999 enacted to usher in democratic governments empowering states to establish Sharia Court of Appeal at State level to hear appeals on matters of Islamic personal law were just a compromise. Despite the provisions of these constitutions, only States in northern Nigeria and the Federal Capital Territory Abuja have Sharia Courts of Appeal.

Historical accounts by Islamic scholars and historians of the introduction of Islam in Southern Nigeria show that Islamic was introduced to major towns in Yoruba land in the

[119] N.R 16 1960. CAP 122 Laws of Northern Nigeria 1963
[120] Ibid. Section 11(a-c)
[121] Ibid

latter half of eighteenth century.[122] According to Doi and Clarke,[123] Islam had been in Yoruba land before the Jihad of Usman Dan Fodio between 1804 and 1814 in Northern Nigeria. Unlike in Northern Nigeria where Islamic law had been well-established and enforced in all aspects of life among Muslims before the advent of the British Colonial Administration, Islamic Law was not well established in Yoruba land. The British Administration abolished the operation of Islamic law in some Muslim communities in Yoruba land.

Nevertheless, during and after the British Colonial Administration, Muslims in Yoruba land have been demanding from successive governments for the application of Islamic law to regulate their lives and for the establishment of Sharia Courts to adjudicate in matters involving Muslims. In 1894, the Muslim Community in Lagos sent a petition to the British Governor demanding for the establishment of the Sharia Court in Lagos Colony so that matters involving one Awawu Thomas, a Muslim woman who was separated from her husband without her observing the mandatory 'Iddah' in accordance with Islamic law. The Muslims in Lagos were angry and dissatisfied with the decision of the Court which was not in accordance with Islamic law.

In 1938, Ibadan Muslim Community also petitioned demanding for the establishment of Islamic Legal system. Their petition was also disregarded. In 1940, the Muslim Congress of Nigeria with headquarters in Ijebu Ode wrote a letter to the Chief Secretary to the Colonial government demanding for the establishment of an Islamic legal system for Southern Nigeria.[124] The Congress also wrote to the Brooke Commission demanding for the establishment of Shariah Courts that would initially deal with matrimonial cases and questions of inheritance involving Muslims who formed the greater part of the cases handled

[122] Gbadamosi T.G.O, The Growth of Islam among the Yoruba 1841-1905 (London. Longman 1978) Extract from PhD Thesis of Adeniyi Musa Osuolale "Islamic Movements in Yoruba land. A study of Muslim Response to Religion Interaction".(University of Ilorin 1992) at PP 111-113

[123] Doi Abudulrahman I., Islam in Nigeria (Gaskiya Corporations Ltd, Zaria Nigeria 1984); Clarke Peter B., West Africa and Islam (Edward Arnold Oxford 1981).

[124] Anderson J.N.D, op.cit pp 222-223

by Native Courts.[125] Also in 1948, a group of Muslims in Ibadan sent a memorandum to the Brooke Commission on the application of Sharia in Yoruba land. Nothing came out of the memorandum.

Notwithstanding the indifference of the British Colonial administration to the demands of Muslims for the application of Sharia in Yoruba land, Muslims continued with their demands for Islamic legal systems in States of Yoruba land any time an opportunity arose. Thus, Muslims submitted memorandum to the Constitution Drafting Committees setup by the then Military Government to prepare the 1979, 1989 and 1999 Constitutions for democratically elected governments demanding for the establishment of Islamic legal system with Sharia Courts in Yoruba land. Their ceaseless demands in this regard achieved some success when the 1979 and 1999 constitutions recognized the application of Islamic law throughout Nigeria.[126]

The Constitutions provided for the establishment of Sharia Court of Appeal by any State that requires such a Court.[127] The Constitutions have also empowered a state to establish Courts to exercise jurisdiction on matters with respect to which Houses of Assembly may make laws.[128] The legal implication of this is that a State may establish a Sharia Court of first instance where appeal could lie to Sharia Court of Appeal established by the State. Regrettably, successive governments of Southern Nigeria particularly those of Yoruba land have not established Islamic legal system even though Muslims are many in Yoruba land.

(c). Customary Law

Before the advent of the British, the natives of the different ethnic groups that formed the present ethnic groups in Nigeria had their own rules, norms, habits and cultures that regulated their conducts and activities. The people had their own indigenous system of

[125] Ibid pg. 222-223. Brook Commission was set up by the British Colonial Administration to investigate the whole position with regard to native courts in Nigeria and make recommendations for their future. Ibid pp. 219-220.
[126] 1979 Constitution and the 1999 Constitution of the Federal Republic of Nigeria.
[127] Ibid. Section 240 (1) 1979 Constitution and Section 275(1) 1999 Constitution.
[128] Ibid. Section 6(5)(H) of 1979 Constitution and Section 6(5)(K) of 1999 Constitution.

administration of justice aimed at promoting communal welfare by reconciling the divergent interests of the different people.

The British, after colonizing Nigeria, recognized the customs, rules, norms and the traditional system of administration of justice which were in operation among the various people. The respect which the British had for the native laws and customs of the people was reflected in the Royal Company Charter of 1886 which provided in Article 8 as follows:

> *In the administration of justice by the Company to the peoples of its territories or any of its inhabitants thereof, careful regard shall always be had to the customs and laws of the class or tribe or nation to which the parties respectively, belong.*[129]

The Royal Niger Company surrendered the Charter to British crown in 1889.[130] The British policy in this regard was also stated by the Privy Council in the case of *Laoye v. Oyetunde*[131] where the Privy Council in examining the basis of the establishment of Native Courts said:

> *The policy of the British in this and other respects is to use for purposes of administration of the country the native laws and customs in so far as possible and in so far as they have not been varied or suspended by Statutes or Ordinance affecting Nigeria.*

The British called the laws and customs they found operating among the various people native law and customs in the Northern protectorate and customary law in the then Southern Protectorate. At this juncture, it is necessary to examine what is customary law. There is no universal definition of customary law. Different terms such as "native law" and Local law" have been used by jurists, learned authors and judges to refer to customary law.

[129] Op.cit. page 6.
[130] Ibid.
[131] (1944) A,C 17

Okonkwo C.O. described customary law as "a body of customs and traditions" which regulates the various kinds of relationship among members of the community in their traditional setting".[132]

The Customary Courts Law of Anambra State defines customary law as

> *a rule or body of rules regulating rights and imposing correlative duties, being a rule or body of rules obtained and is fortified by established usage and which is appropriate and applicable to any particular cause, matter, dispute, issue or question.*[133]

In Oyewumi v Ogunsesan,[134] the Supreme Court defined customary law as;

> *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. It is regulatory in that it controls the lives and transactions of the community subject to it. It is said that custom is a mirror of the culture of the people. I would say that customary law goes further and imports justice to the lives of all those subject to it.*

As earlier stated, at the advent of the British Authority, the indigenous laws of the people of the territory now called Nigeria were in operation. Therefore, customary law as a source of Nigerian law is the oldest because for Centuries customary law had regulated all kinds of relationship of the people.

Customary law as a source of Nigerian law includes Islamic law. Therefore, in Nigeria, Customary law is divided into ethnic or indigenous customary law and Islamic law. Islamic law is applicable in the greater part of Northern Nigeria. Ethnic customary law is not uniform. There are several customary laws in the country as each ethnic group has its own separate law and the law differs from tribe to tribe. Nevertheless, the general law obtained within a particular predominant tribe may be similar. Such common rules may differ on points of details or as to the degree of observance or the method of application is concerned

[132] Okonkwo cited by Asein at p.109
[133] Customary Courts Law CAP 49.Revised Laws of Anambra State of Nigeria 1979
[134] (1990) 3 NWLR (Pt 137) 182 followed in *White v. Jack* (1996) 2 NWLR (Pt 431) 407 at 412; *Nwagbogu v. Abadom* (1994) 7 NWLR (Pt 356) 357 at 363

among the dialectic of the tribe. Apart from being entrenched in the customs and traditions of the people, ethnic customary law possesses certain unique characteristics which distinguish it from other forms of law.

Firstly, it derives its validity from acceptability by the community as an obligation that is binding upon them. Its acceptability by the community also determines its enforceability and effectiveness. Lord Atkins said in *Eshugbayi Eleko v. Government of Nigeria.*[135] "It is the assent of the native community that gives a custom its validity".

In the same vein, in *Owoyin v. Omotosho*[136] Customary law was described as 'A mirror of accepted usage'.

Another characteristic of customary law is that it must be in existence at the material or relevant time. A rule of customary law, though having its root in the past, must still be amenable to the present condition and life style of the people and would not qualify as a law if it is only a relic of olden days. Thus, in *Lewis v. Bankole*[137] Speed Ag C.J said the native law and custom enforceable must be 'existing native law and custom and not that of by gone days'.

This characteristic of customary law was reemphasized by the Supreme Court in *Kimdey & ors v. Military Governor of Gongola State*[138] where the court said.

> *It is one of the characteristics of customary law that it must be in existence at the relevant time – Native law and custom which the court which the courts enforce must be existing Native law and custom and not that of by-gone days.*

Customary law is largely unwritten. Generally, customary law is not written in a statute book as it is the case with Nigerian legislation. It arises from the traditional rules of

[135] (1931) A.C 662 at 673
[136] (1961) 1 All NLR 304 at 309
[137] (1908) 1 NLR 81 at 83
[138] (1988) 1 N.S.C 827 or (1988) 2 NWLR (Pt 79) 445, followed in *Agbai v. Okogbue* (1991) 7 NWLR (Pt 204) 391

conduct governing the people. In *Alfa & Or v. Arepo*[139] Duffus J recognized the unwritten nature of customary law when he said:-

> *Customary law may be defined as the unwritten law or rules which are recognized and applied by the community as governing its transactions and code of behavior in any particular matter. The law is unwritten and I agree with the above passage from Lloyd's book that it owes its authority to the fact that custom has established, from ancient days.*

Closely related to the unwritten nature of customary law is its flexibility. The unwritten nature of customary law makes it flexible and easy to apply to particular situations at particular times. In other words, it is easily adaptable to changing social circumstances and conditions.[140]

The controversy now is whether customary law should be codified. The proponents of codification contend that such a step will make the law certain, precise and uniform. Those who are against codification are of the view that such a step will result in the ossification of customary law thereby losing its flexibility.

We share the views of those who feel the codification of customary law could lead to ossification of the law. Therefore, we support the proponent of restatement of customary law. The restatement should be in form of record of digest of customary laws prepared in consultation with the elders of each community so as to ensure they reflect their common opinions. The record should not be given statutory form but should be receivable in the courts as public document admissible without formal proof. However, the digest should be revised as frequently as necessary so as to ensure that it keeps pace with changing social circumstances of the time.

The discussion of customary law in this study is focused mainly on the tests of validity prescribed by statues for the applicability of customary law. Therefore, the rules prescribed by statutes for establishing customary law are not discussed. Rules of customary

[139] (1963) WNRL 95
[140] *Lewis v. Bankole.* Op. cit page 101; *Kimdey v. Military Governor of Gongola State.* Op. cit page 461

law even after it has been established and accepted in the community concerned must not be enforced by the courts unless the rule meets statutory requirements stated for a applicability of custom law.

S.20 (1) of Cross River State High Court Law[141] provides:

> *The High Court shall observe and enforce the observance of every native and custom which is applicable and is not repugnant to natural justice, equity and good conscience, not incompatible either directly or by implications with any law for the time being in force, and nothing in this Act shall deprive any person of the benefit of any such native law or custom.*

The foregoing provision is contained in the High Court Law of all States of the Federation.[142] The same provision is in S.19 customary Courts Law of Western Region of Nigeria 1959.[143] In addition, the provision to S. (3) Evidence Act[144] states that any custom relied upon in any judicial proceeding shall be enforced as law if it is not contrary to public policy and is in accordance with natural justice, equity and good conscience.

The combined effect of the foregoing provisions in the High Court Laws of various States and the Evidence Act is that the following tests must be satisfied by every rule of customary law for it to be valid:

> *(a) The rule must not be repugnant to natural justice, equity and good conscience;*
> *(b) The rule must not be incompatible either directly or by implication with any law for the time being in force;*
> *(c) The rule must not be contrary to public policy.*

[141] CAP 51 Laws of Cross River of Nigeria 1981
[142] S. 34 High Court Law Kano, CAP 57 Laws of Kano State of Nigeria 1991; S.26 High Court Law of Lagos State. CAP 60 Laws of Lagos State of Nigeria 1994; S.34 High Court Law of Kwara State. CAP 67 Laws of Kwara State of Nigeria 1991
[143] CAP 31 Laws of Western Region of Nigeria
[144] CAP E 14 Laws of the Federation of Nigeria

The phrase "repugnant to natural justice, equity and good conscience" which is commonly referred to as the repugnancy doctrine does not seem to have a precise meaning. The courts have also not attempted to explain in detail the meaning of the phrase. Both natural justice and equity technical meanings in English law and, initially, judges had imported the technical meaning into interpretation of the phrase when applying it to customary law.

Hence the principle of English law was the standard applied in determining whether a particular customary law rule is repugnant to natural justice, equity and good conscience. In *Laoye v. Oyetunde*[145] Lord Wright expressed the view that the phrase was intended to invalidate "barbarous customs". Similarly, in *Eshughayi Eleko v Officer Administering the Government of Nigeria*[146] Lord Atkins said that "a barbarous custom must be rejected on the ground of repugnancy to natural justice, equity and good conscience". In the opinion of the above named judges, a custom was repugnant to natural justice, equity and good conscience if it was uncivilized. Furthermore, some of the English judges, while applying the repugnancy criterion had stated that the courts had no power to modify an uncivilized custom and apply the modified version of the custom. For example, Lord Atkin said in Eleko's case[147] thus: - 'The court cannot itself transform a barbarous custom into a milder one. If it still stands in its barbarous character, it must be rejected as repugnant to natural justice, equity and good conscience'.

It is clear from the decisions of those cases that the repugnancy doctrine is regarded as absolute which leaves no room for the exercise of any discretionary power of the court.

On the other hand, the views of some judges in applying the repugnancy doctrine were the standard of test should not be the English law. This means that a customary law does not fail the repugnancy test if it those not conform to the standard of behavior acceptable in social development, that is to say, the English. For example, the Supreme

[145] Op. cit page 173
[146] Op.cit page 673
[147] Ibid

Court in *Lewis v. Bankole*[148] rejected the view of the trial judge that because a custom did not form part of the English doctrine of equity, it was invalid by virtue of the repugnancy test. Similarly, both the Federal Supreme Court and the Judicial Committee of the Privy Council in *Dawodu v. Danmole*[149] rejected the view expressed by Jibowu J. that the *idi igi* custom on succession was repugnant to natural justice, equity and good conscience. The trial judge in that case was of the opinion that the custom which stated that the property of the deceased should be distributed among his children per stripes rather than per capital was inconsistent with the modern idea of equality among the children.

The Privy Council in its opinion on the matter said 'the principle of natural justice, equity and good conscience' applicable in a country where polygamy is generally accepted should not be readily equated with those applicable to a community governed by the rule of monogamy. The court also held that the *Idi Igi* custom is in force and is the universal method of distribution of intestate property in Yoruba customary law.

Similarly, in *Adeniji & Ors v. Adeniji & Ors*[150] the Supreme Court held that Idi-Igi custom of distributing the property of a deceased person was not repugnant to natural justice, equity and good conscience. In *Agibigbi v. Agibigbi*[151] the Court of Appeal re-affirmed that the Bini custom of inheritance whereby the eldest surviving son of a deceased person inherits the *Igiogbe* is not repugnant to natural justice, equity and good conscience.

In all these cases, the customary law in question has been considered in the abstract and declared valid or invalid in general terms so that the decision seems to confirm or nullify the rule for all purposes and merely for the purpose of the particular case.

There are, however, a few decisions in which the courts have applied the provision relatively. In such cases, the courts have considered the possible results of the application of the repugnancy test in the particular case before them. Thus in *Edet v. Essen*[152] the appellant was married to his wife under native law and custom. His wife left him and went to live with

[148] op. cit pages 83-84
[149] (1958) 5 F.S.C 46
[150] (1972) 4 S.C; *Reis v. Messaya (1964) L.L.R 19; Taiwo v. Lawani (1961) 1 ALL NLR.733*
[151] (1992) 2 NWLR (Pt 221) 98.
[152] (1932) 11 NLR 47

the respondent. Two children were born of the union between the respondent and the wife. The respondent did not the appellant the money which the appellant had paid as dowry on the wife. The appellant therefore claimed that the children were his. The court held that the customary law which allowed the appellant to claim the children of another man merely because the other man had deprived the appellant of his wife without paying dowry on her repugnant to natural justice, equity and good conscience. The rationale for this decision was probably that it was fair that a natural father should not be deprived of his children in favour of another merely on grounds of a 'debt' owed.

Similarly, customs based on the concept of slavery have been declared to be repugnant to natural justice, equity and good conscience. In *Re Effiong Okon*[153] the court stated that a custom whereby a former owner of a slave was entitled to administer the personal property of the slave after the death of the slave was repugnant to natural justice, equity and good conscience.

In *Okonkwo v. Okagbue*[154] the Supreme Court attempted to interpret the phase "repugnant" to natural justice, equity and good conscience" as regards its applicability to customary law. The court held thus:

> *The phrase "repugnant to natural justice, equity and good conscience" has not been interpreted disjunctively by the courts. "Equity in its broad senses, as used in the repugnancy doctrine is equivalent to the meaning of "natural justice" and embraces almost all, if not all, the concept of "good conscience". The equity is not used in the modern technical sense but synonymous with natural law.*

The interpretation of the phrase repugnant to natural justice, equity and good conscience given by the Supreme Court is not explicit enough as one would have expected the court to go further to state the meaning of "natural justice" and "good conscience" in the

[153] (1930) 10 NLR 47
[154] (1994) 9 NWLR (Pt. 368) 301

context of their use in the repugnancy doctrine. The meaning to be given to the phrase by the Supreme Court should be such that will assist the courts in developing our customary law.

Although there are no express provisions in the statutes which contain repugnancy doctrine that a court may look further into the results produced in specific cases, the essence of judicial discretion suggests such an approach. A custom that does not accommodate any variation in factual situation is likely to work injustice. Since it is accepted that customary law rules are flexible and easily adjust to changing economic and social conditions of the society, a customary law should be varied to avoid injustice. Therefore, where the application of a custom in a particular case would result in the adoption of an uncivilized standard or work injustice in the particular case, the court must hold that the custom is repugnant to natural justice, equity and good conscience.

Thus the Supreme Court in *Nzekwu v. Nzekwu*[155] approved the Onitsha customary law postulation that a married woman without a male issue may, on the death of her husband and with the concurrence of her husband's family deal with the deceased's property. Her dealing must however receive the consent of the family and she cannot by affluxion of time claim the property as her own. The court went further to emphasize that any Onitsha custom postulating that an Okpala i.e. the family head has the right to alienate the property of a deceased person in the life time of his widow is a barbarous and uncivilized custom which should be regarded as repugnant to equity and good conscience and therefore unacceptable.

In the same vein, the Court of Appeal in *Mojekwu v. Mojekwu*[156] held that the Olikpe custom of Nnewi which discriminated against women by permitting the son of the brother of a deceased person to inherit his property to the exclusion of his female child, apart from being unconstitutional is repugnant to natural justice, equity and good conscience. "In *Akpalakpa v. Igbaibo*[157] the Court of Appeal held that the court will not entertain a rule of customary law which will sentence a community to perpetual penury, servitude and makes its members social pariah. The court said a custom that does not permit the economic, social

[155] (1989)2 NWLR(Pt. 104) 378
[156] (1997)7 NWLR(pt. 512) 283 at pp. 288—289
[157] (1996)8 NWLR(pt. 468) p. 533 at p.536

and political growth of people is contrary to the rule of natural justice, equity and good conscience.

The decision of both the Supreme Court and the Court of Appeal in the three cases mentioned above, are progressive and the Supreme Court should affirm the decisions of the Court of Appeal in both *Mojekwu v Mojekwu*[158] and *Akpalaka v. Igbaibo*.[159] Such an affirmation by the Supreme Court, being the highest in the country with its decisions binding on all other courts, will make our customary laws to develop like the British common law.

The second important requirement for the validity and enforceability of customary law is that the customary law must not be incompatible either directly or by implication with any law for the time being in force. This is generally referred to as the incompatibility test. The ambiguity in some of the enactments has created problems of interpretation of this phrase. For example, while S. 13 (1) of Oyo State High Court Law[160] uses the phrase "any written law for the time being in force". The enactment in Cross River State High Court Law[161] states 'with any law for the time in force'. The Courts have been consistent in their interpretation of the provision. In some cases, it has been held that 'any law for the time being in force' includes English law in force in Nigeria. Thus, in *Re Adedavoh*[162], the West African Court of Appeal expressed the view, obiter that "any law included the rules of common law pertaining to the enforceability of claims contrary to public policy". In *Rotibi v. Savage*[163] it was held that the phrase "any law for the time being in force" in S. 16 of the Protectorate Courts Ordinance 1933 had reference only to local enactments. It is pertinent to state that the provisions of the various High Court Laws replicated the provision in the Ordinance of 1933.

[158] Ibid
[159] Ibid
[160] CAP 46 Laws of Oyo State of Nigeria 1978 Law.
[161] Op.cit page 363
[162] (1951) 13 WACA 304 at 307.
[163] (1944) 17NLR77.

The consensus of Tobi Niki and Asein J.O[164] is that in all the enactments containing the incompatibility test, the test should be prescribed by reference to local enactments and not in relation to English law. They are of the opinion that customary law is so inconsistent with English law that prescribing an incompatibility test by reference to English law would result in the total abolition of customary laws. Their argument is that the legislature would not have intended the abolition of customary law when the provision was enacted. We share the views of these learned authors.

The third requirement of validity is the test of public policy. This is stated in S. 14 (3) Evidence Act.[165] The Act provides that a custom shall not be enforced if it is contrary to public policy. But the Act does not define the phrase 'Public Policy'. Generally, the courts have found it difficult to determine what 'Public Policy" in any factual situation is. This was the reason why the phrase 'public policy' was described as 'a very unruly horse and when you astride it you never know where it will carry you.[166]

There are only a few reported cases in which reference has been made to public policy in relation to customary law. In *Re Adedevoh*,[167] the court, when considering the Yoruba custom of legitimating by acknowledgment of paternity stated that it would be contrary to public policy to enforce a rule that encouraged sexual promiscuity. The Evidence Ordinance was not referred to in the case. Similarly, in *Alake v. Pratt*,[168] the court held that it was contrary to public policy when considering the distribution of man's estate to place his children born outside wedlock on the same position as those born within.

Since the courts in these cases did not expressly apply or consider the statutory provision of the Evidence Ordinance (now Evidence Act) as regards public policy test in reference to customary law, it is submitted that the compatibility with public policy should be eliminated as a test validity of customary law.

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[164] Tobi Niki op. cit page 121; Asein John Ohireime op. cit page 132.
[165] Op. cit page 13
[166] Per Burrough J in *Richardson v. Mellish* (1824) 2 Bing 252
[167] op. cit page 310
[168] (1955) 15 WACA 20

(d) Legislation

Legislation is the product of deliberate and formal expression of rules of conduct made by the relevant law making authority. Legislation simply means law enacted by law making body. Nigerian legislation consists of statutes. Local statutes are called Acts, Laws, Decrees, Edicts or Bye laws depending on the status and political nature of the enacting authority. An Act as a Nigerian Legislation is an enactment by the Federal Legislature. In general, a law is an enactment by the Legislature of a State. A Decree is an enactment made by the Federal Military Government while an Edict is an enactment made by Military Government of a State. Bye law or regulation is an enactment made by a Local Government Council.

Nigerian legislation may be primary or subsidiary. Primary legislations or statutes are laws enacted by major legislative arms of Government. This may either be the National Assembly comprising the Senate and House of Representatives or State House of Assembly. A subsidiary Legislation is a law enacted in the exercise of powers conferred by a statute. According to Idigbe JSC in *Barclays Bank of Nigeria v. Shiru*,[169]

> *a subsidiary Legislation is a Legislation made by a person or body other than the sovereign parliament (or the government of a State or Federation) by virtue of powers conferred either by statute or by legislation which is itself made under statutory power.*

Subsidiary legislation may take the form of regulations, rules or bye laws. Subsidiary legislation always derives authority from a provision contained in the primary statute which is known as the enabling statute.

Examples of subsidiary legislation are:

(a) Regulations issued by administrative agents (e.g. Minister or Commissioner) of the executive arm of

[169] (1978) 6-7 S.C. 99

government as a necessary instrument for running the machinery of State.

(b) Rules of procedure made by judicial authorities in respect of matters going to the courts.

(c) Municipal bye-laws enacted by local government councils to regulate matters within their spheres of control.

Legislation is also a useful tool for the social and economic development of a country because it is suitable for the abrogation and reform of existing laws, the provision of anticipatory remedies to cope with the future developments. Legislation is an important instrument of legal development. It has a tremendous effect on all other sources of law. As earlier stated, statutes are subordinate to the provisions of the Constitution. But the legislature has the power to amend a part or change the whole of the Constitution in accordance with the special procedure laid down by the Constitution itself. For example, the National Assembly has powers to alter any of the provisions of the Constitution through a special procedure.[170] All statutes derive their authority from, and must comply with the provisions of the Constitution. A statute, that is to say, an Act of the National Assembly is also the only authority, subject to special procedure, by which the supreme law, that is to say the Constitution, may be amended.

It is pertinent to state that section 315 (1) & (4) of the Constitution[171] preserves all existing laws in force immediately before the date of the commencement of the Constitution or, which having been passed or made before that date come into force after that date. In effect, all existing laws including Decrees and Edicts which were promulgated by defunct Military Governments at both Federal and State levels are to be regarded as laws enacted by the National Assembly or State Assemblies as the case may be.

(i) Statutes on Inheritance of Testate Estates

[170] Section 9(1) and (2) of the 1999 Constitution of the Federal Republic of Nigeria, an Act of the National Assembly to alter any of the provisions of the Constitution shall only be passed by either House of the National Assembly when the proposal is supported by the votes of two thirds majority of all the members of that House and approved by Assembly of two thirds of all States of the Federation.

[171] Ibid.

One characteristic of the Nigerian legal system is the co-existence of customary laws, English law and Local statutes. Therefore, customary law, English law and local statutes govern inheritance. In view of the fact that some customary laws and Islamic law of inheritance are discussed in the subsequent chapters, it is appropriate at this stage to discuss the statutory law of inheritance comprising English law and local statutes. The details of statutory laws governing inheritance of both a deceased testate and intestate estates are beyond the scope of the study. Hence, an outline of the laws is made.

When a man dies, the devolution of his estate or property depends on whether or not he has made a Will. If he has made a Will, the estates will devolve according to the directions contained in the Will and such inheritance is described as testate. If he did not make a Will or had made one which at his death has become totally inoperative due to a defect, he is said to die intestate and the devolution of his estates will be governed by the rules of law prescribing the order of inheritance on intestacy.

The law governing inheritance of a deceased's testate estates is the English law, that is to say, the Wills Act 1837 and Wills Act 1852 which were in force in England on the 1st day of January, 1900. Therefore, they are regarded as statutes of general application received in Nigeria and presently applicable in many States of the Federation where there are no local statutes on Wills. It is noteworthy to state that both the Wills Act 1837 and 1852 are no longer applicable in states that were created out of the former Western Region of Nigeria because the Wills law 1959 of the former Western Region[172] is applicable in those States. The states concerned are Oyo, Ogun, Ondo, Osun, Ekiti, Delta and Edo, which have adopted the Wills law of 1959. States like Lagos, Kwara, Kaduna and Anambra have enacted statutes on Wills.[173]

The discussion on Wills is limited to persons who have capacity to make a Will and the formal requirement of a valid Will. A Will is a document in writing executed by the

[172] *CAP 133 Laws of Western Region of Nigeria 1959.*

[173] Wills Law of Lagos State. *CAP W2 Laws of Lagos State of Nigeria 2003*; Kwara State Wills Edict. *CAP* 168 *Laws of Kwara State of Nigeria 1991*; Kaduna State Wills Edict; CAP *163 Laws of Kaduna State of Nigeria 1991*; Administration and Succession (Estate of Deceased Persons) Laws of Anambra State, *CAP 4 Laws of Anambra State of Nigeria 1986*.

testator in accordance with the Wills Act. A Will is ambulatory and revocable. A Will is ambulatory, since it takes effect from the death of the testator. Consequently, any property dealt with within a Will but disposed of by the testator before his death cannot be affected by the Will. On the other hand, property acquired after the making of the Will may be disposed of under its terms.

A Will is always revocable in the sense that it may be completely revoked, altered or added to by the testator during his lifetime so long as he complies with the appropriate formalities. The law governing the validity of a Will depends on whether the property to be disposed of is movable or immovable. If the property to be disposed of is movable, the capacity of the testator to make a Will in respect of such property is governed by the law of his domicile at the time of his death. Where the property to be disposed of is immovable, the capacity of the testator, the form of the Will and its validity are governed by lex situs (i.e. law of the place where the property is situated).

Under the Wills Act of 1837, the Wills Edicts or Laws of States[174] that have such laws, every person has capacity to make a Will irrespective of whether or not such a person is subject to customary law. This provision has been re-affirmed by the Supreme Court in *Adesunbokan v. Yunusa*.[175] In that case, the Supreme Court held that if a Nigerian Muslim who had two options for the devolution of his property according to Islamic Law or under Wills Act 1837, he had absolute discretion to dispose of his property as he pleased without any restrictions imposed by customary or religious injunctions.

However, there are some exceptions to this rule. S. 7 of Wills Act 1837 and 5. 5 of Wills Law of former Western Region of Nigeria 1959 provide that persons under twenty one years of age shall not make a valid Will. The Wills Law of Lagos State 1990, Wills Edict of Kaduna State 1987, Administration and Succession (Estate of Deceased Persons) Law of

[174] S.3 Wills Act 1837; S. 1 (1) Wills Law Lagos State 1990; S.4 Kwara State Wills Edict 1991; S. 3 Wills Law of former Western Region 1959; S.4 Kaduna State Wills Edict 1987; S. 137 (1) Administration and Succession (Estate of Deceased Persons) Law of Anambra State 1986.
[175] (1971) All N.L.R. 227

Anambra State 1986 and Wills Edict of Kwara State 1991, all provide a minimum of Eighteen years of age for a person to make a valid Will.

Other factors like insanity, blindness or illiteracy might affect the capacity of the testator to make a valid Will. These factors will not be relevant if it could be proved that at the time of making the Will, the testator understood the nature of transaction he was performing. Thus, in *Christian v. Instsiful*,[176] the Privy Council said that neither partial nor total blindness would affect the capacity of the testator to make a valid Will if it could be shown that such a testator understood the document which was put before him.

Under S. 8 of the Wills Act 1837, married women lacked capacity to make a Will. This had been altered by S. 1 of Married Women Property Act 1882 and S. 3 of the Married Women Properly Act 1893. Both statutes are statues of general application in Nigeria. The Wills Law of former Western Region and the Wills Laws or Edicts of some States of the Federation of Nigeria earlier mentioned do not disallow women from making valid Wills.

Section 11 of the Wills Act 1837 and the Wills (Soldiers and Sailors) Act 1918 provided that any soldier in actual military service or seaman, being at sea and member of the Royal Air Force may dispose of his personal estate without complying with the requirements and formalities of the Act.

Similar provisions are in S. 9 (1) Wills Law of Western Region 1959; S. 6 (1) Wills Law of Lagos State 1990, S. 9 (1) Kaduna State Wills Edict 1987; S. 91 Kwara State Wills Edict 1991; and 143 Administration and Succession (Estate of Deceased Persons) Law of Anambra State 1986.[177]

The Wills (Soldiers and Sailors) Act 1918 by virtue of the "probate causes" provision of the High Court Laws of Lagos State may be applicable in many Northern and Eastern States which have not enacted their own Wills Laws. It is pertinent to state that the Armed

[176] (1933) 13 WACA 347.
[177] Ibid.

Forces Act[178] now governs the making of Wills by officers and men of the Armed Forces of Nigeria. S. 275 (1) of the Act[179] provides that:

> *a will made by a person subject to service under this Act shall be made for disposing of any money or personal property which is due or belongs to him at his demise, if it is in writing and signed or acknowledged by him in the presence of, and in his presence attested by one witness being an officer of the Forces or any Government Medical Officer.*

By virtue of Section 1 of the Act which provides that Armed Forces in the Act comprises the Nigerian Army, the Nigerian Navy and the Nigerian Air Force, the provision of S. 276 (1) thus applies to officers and men of these organizations. The Armed Forces Act being a Federal legislation is superior to the provisions of Wills of Military men and Seamen in the various Wills Laws and Edicts of States which have enacted their own laws on Wills.

The law governing Wills requires that a Will must be in writing[180] and it must be properly executed, that is to say, that it must be signed at the foot or end by the testator or by someone in his presence and by his direction.[181] The signature required for this purpose may be the initials of the testator or his thumb mark if he cannot write. The requirement that the Will be signed at the foot or end was formerly rigidly interpreted to mean that it must immediately follow the dispositive part of the Will.

The Wills Amendment Act 1852 has altered this rigid interpretation by providing that the testator' s signature shall still be valid even when it does not follow or be immediately at the foot or end of the Will. Section 1 of Wills Amendment Act 1852 enables a testator to affix his signature at or after or following, or under, or beside or opposite to the end of the Will, or in the attestation clause, or beside the signature of witness if there is room at the

[178] CAP A 20 Laws of the Federation of Nigeria 2004
[179] Ibid
[180] S.9 Wills Act 1837; S. 6 Wills Law of Western Region 1959; D. 7 Kaduna State Wills Edict 1987; S. 7 Kwara State Wills Edict 1991; S 137 (1) Administration and Succession (Estate of Deceased Persons) Laws of Anambra State 1986.
[181] Section 9 Wills Act 1837

bottom of the previous completed page. The Wills Laws and Wills Edicts of States[182] that have enacted their own laws on Wills provide that every Will shall be valid with respect to position of the testator's signature if the signature is so placed in such a place that it shall be apparent on the face of the Will that the testator intended to give effect by such his signature to the writing signed as his Will.

The Laws on Wills also provide that the testator's signature shall be made or acknowledged in the presence of at least two witnesses present at the same time who subsequently attest the Will. These witnesses must attest and subscribe to the Will in the presence of the testator. However, it appears from the decision in *Re Estate Gibson*[183] that the witnesses need not attest in the presence of each other. The witnesses must sign their signatures after that of the testator. It is not permissible for them to sign before the testator and thereafter merely acknowledge their signatures.[184]

A Will made in accordance with the provisions of the Wills Act, Wills Laws and Wills Edicts of States which have enacted such laws can be revoked by tearing, burning or otherwise destroyed by the testator or by some persons in his presence and by his direction with the intention of revoking the same.[185]

S. 18 Wills Act 1837 provides that every Will made by a man or woman shall be revoked by his or her marriage. However, the provisions of the Wills Laws and Wills Edicts of various States are that a Will shall not be revoked by a subsequent marriage under customary law or Islamic law.[186] It should be noted that S 149(1) of Administration and Succession (Estate of Deceased Persons) Law of Anambra State does not expressly state that a Will shall not be revoked by a subsequent marriage under customary law.

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[182] S. 7 Wills Law of Western Region; 1959; S. 14 (1) Administration and Succession (Estate of Deceased Persons) Law of Anambra State 1986; S. 7 (1), (b) Kwara State Wills Edict 1991; S. 7(1) (b) Kaduna State Wills Edict 1987; S. 4 1(b) Lagos State Wills Law 1990.

[183] (1949)P.434

[184] *In the Estate of Randle (Deceased)* (1962) 1 ALL N.L.R. 13

[185] S. 16 Kaduna State Wills Edict 1987; S.17 Wills Law of Western Region 1958; S. 13 Lagos State Wills Law 1990; S. 151 Administration and Succession (Estate of Deceased Persons) Law of Anambra State 1986; S. 16 Kwara State Wills Edict 1991

[186] S. 14 Kwara State Wills Edict 1991; S. 15 Wills Law of Western Region 1958; S., 11 Wills Law of Lagos State 1990; S. 14 Wills Edict Kaduna State 1989.

An exception to the rule that a Will is revoked by the subsequent marriage of the testator is to the effect that an appointment by Will under a power of appointment is not revoked by the marriage of the testator and the property thereby appointed would pass in default of an appointment to the testator's heir, executor, administrator or statutory next of kin.[187]

A Will which has been revoked animos revocandi (intention to revoke) other than by destruction may be revived by re-exercising the same or executing a codicil which shows an intention to revive the same.[188]

In recent years, some Nigerians have been expressing concern about the social consequences of the decision of the Supreme Court in *Adesunbokan v. Yunusa*[189] to the effect that a Nigerian has right to exercise his testamentary power as he pleases even to the detriment of his family. Until the decision in *Yunusa's* case, the only limitation on testamentary powers of Nigerians is that prescribed by Islamic law. Under Islamic Law, a Muslim can only dispose of one-third of his property by Will to persons other than his Islamic heirs, and the remaining two thirds devolve compulsorily on his heirs whose interests are indefeasible.

Many legal systems of the developed world since the last century had recognized the need to provide maintenance from the estate of a decedent, for persons who were dependent on him during his life. This trend has influenced some Nigerians who have shown concern about the need to restrain the testamentary powers of Nigerians to ensure that the laws on Wills make provision for maintenance of dependants of the testator who he might have not taken care of in his Will.

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[187] 149 (2) Administration and Succession (Estate of Deceased Persons) Law Anambra State 1986; 14(a) Kaduna State Wills Edict 1987; S. 11(a) Lagos State Wills Law 1990; S. 15 Wills Law of Western Region 1958; S. 14(a) Kwara State Wills Edict 1991.

[188] S. 22 Wills Act 1837; S. 18 Kwara State Wills Edict 1991 S.18 Kaduna State Wills Edict 1986; S.15 Lagos State Wills Law 1990; S.153(1) Administration and Succession (Estate of Deceased Persons) Law Anambra State 1986; S.19 Wills Law of Western Region 1958.

[189] op cit page 227

Developed countries like Russia,[190] England,[191] New Zealand[192] and even some African countries like Ghana[193] and Malawi[194] have enacted laws to curb the testamentary freedoms of their citizens. The laws of the above mentioned countries are to the effect that where a testator has failed to make adequate provisions in his Will for his surviving spouse, children and other dependants, such a spouse, child or dependant can apply personally or through a close relative to a court for an order of court for making such reasonable provision as the court deems fit out of the deceased net estate for the maintenance of the applicant.

It is gratifying to state that the Wills Laws and Edicts of Lagos[195], Oyo[196], Kaduna[197], Kwara[198] and Administration and Succession (Estate of Deceased Persons) Law of Anambra[199] States have followed the modern trend by making provisions for family and dependants who the testator has failed to take care of in his Will.

The Laws of Wills in these States have made provisions that certain categories of persons like spouse, children, parent, brother, sisters and other dependants of the deceased who immediately before his death were being maintained either wholly or partly by him and who have not been adequately provided for by the testator's Will might apply to a court of competent jurisdiction that financial provision should be made for them for maintenance. An application under these laws must be made within six months after the grant of probate.

(ii) Statutes on Inheritance of Intestate Estates

The inheritance of the estates of an intestate is governed by the received English Law and Local Statutes i.e., the Administration of Estate Laws of some States of the Federation.

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[190] Russia Civil Code of 1964 which provides that a testator may freely dispose of his property but subject to the obligatory shares for his dependants

[191] Inheritance (Family Provisions) Act 1938 as amended by the Intestates Estate Act 1952.

[192] The Family Protection Act 1900 N.Z. Stat 64 Vict No. 20 as amended in 1934 N.Z. Stat II Geo 6 No. 39

[193] S. 13 Ghana Wills Act 1971. See (1972) Journal of African Law Vol. 16 No. 1

[194] Wills and Inheritance (Kamuzu's Mbunba Protectorate) Ordinance of 1964; S. 10 of the Ordinance. See (1966) J.A.L. Vol. 10 No. 1.

[195] S. 2 Wills Law of Lagos State *CAP W2 Laws of Lagos State of Nigeria 2003*.

[196] S. 4 Wills Edicts of 0yo State *CAP W63 Laws of Oyo State of Nigeria 1990.*

[197] S. 5 Kaduna Wills Law of Lagos State *CAP W2 Laws of Lagos State of Nigeria 2003*

[198] S. 5 Kwara State Wills Edict *CAP 168 Laws of Kwara State of Nigeria 1994*

[199] S. 127 Anambra State Administration and Succession (Estate of Deceased Person) Law *CAP 4 Laws of Anambra State of Nigeria 1987*

The English Law rule of intestate applicable in Nigeria was introduced by a local enactment. The local enactment is the Marriage Ordinance.[200]

As a general rule, the form of marriage determines which system of law should govern the inheritance of estates of an intestate S. 36 Marriage Ordinance[201] specifically states that if a deceased person who was subject to customary law and married according to the Ordinance died intestate, the law to be applied to the distribution of his estates, personal and real property is the received English law relating to distribution of personal estates intestate.

S. 36 of the Marriage Ordinance provides:

> *(1) 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; and also where any person who is the issue of any such marriage as aforesaid dies intestate subsequently to the commencement of this Ordinance.*
>
> *The personal property of such intestate and also any real property of which the said intestate might have disposed by Will, shall be distributed in accordance with the provisions of the law of England relating to the distribution of the personal estates of intestate, any native law and custom to the contrary notwithstanding: provided that:*
>
> *(a) whereby the law of England any portion of the estate of such intestate would become a portion of the causal hereditary revenues of the crown, such portion shall be distributed in accordance with the provision of native law and*

[200] *CAP 115 Revised Laws of Federation and Lagos 1958*
[201] Ibid

custom, and shall not become a portion of the said casual hereditary revenues, and

(b) real property, the succession to which cannot by native law and custom be affected by testamentary disposition shall descend in accordance with the provisions of such native law or custom, anything herein to the contrary notwithstanding.

3. This section applies to the colony only.

The Ordinance provides two exceptions when customary law as against English law should apply to the distribution of the estate of an intestate. First, customary law will apply to the distribution of the estate of such an intestate where by the English law any portion of the estate would have become bona vacantia to the Crown (in default of any person taking an absolute interest in the property of an intestate it belongs to the Crown) it should not devolve on the state.

Secondly, customary law will apply to real property of the intestate which, according to customary law, he had no power to dispose of by will. The purpose of these exceptions is to exclude from the operation of the section family property to which the deceased did not have a separate title. Thus, in *Sogunro Davies v Edward Sogunro,*[202] the court held that S. 36 could not apply to an un-partitioned family property. However, the section applies to self-acquired property and family property which had been partitioned since these could be disposed of by Will and become family property only when the owner died intestate.

In the same vein, the Administration of Estates Law of the former Western Region 1958, which has been reenacted by States created out by that Region namely: Oyo, Ogun, Ondo, Osun, Ekiti and Delta, the Administration of Estates Law of Lagos State and the Administration and Succession (Estate of Deceased Persons) Law of Anambra State provide that where any person who is subject to customary law contracts a marriage in accordance with the provisions of the Marriage Act or marries in accordance with law which makes polygamy unlawful and such person dies intestate leaving a widow or husband or any issue

[202] (1936) 13 NLR 15

of such marriage, any property of which the person might have disposed of by Will shall be distributed in accordance with the provisions of the Administration of Estates Law notwithstanding any customary law to customary law to the contrary.[203] The effect of this provision of the laws is that customary law is not applicable to the estates of the intestate deceased who married under the Marriage Act or contracted a monogamous marriage.

It is pertinent to state that Administration of Estate Edict of Kwara State[204] does not mention that the provision of the Edict applies to person who is subject to customary law. Section 2 of the Edict provides:-

> *The provisions of this Edict relating to the administration of the estate of a person who died intestate or the indisposed part of the estate of a testator shall apply only to persons who contract a valid monogamous marriage and we survived by a spouse or issue of such marriage.*

The proviso to this Edict is also to the effect that any property which, according to customary law, the intestate could not dispose of by Will shall be according to the customary law.[205]

A rider to the general rule that the form of marriage determines which law should govern the inheritance of the estates of an intestate is inheritance to the estates of intestate who is subject to customary law and who married under customary law or died unmarried is governed by customary law.[206]

S. 71 (2) Administration and Succession (Estate of Deceased Persons) Laws of Anambra State 1986 is more explicit on the laws applicable to the estates of an intestate. The

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[203] 49 (5) Administration of Estates Law of Western Region of Nigeria *1959 Cap 1 Law of Western Region of Nigeria 1959;* S. 49 (5) Administration of Estates Law of Lagos State 1972 *CAP 3 Laws of Lagos State of Nigeria 1994;* S.49 (5) Administration Estates Law of Ogun State *CAP 1 Laws of Ogun State Nigeria 1978;* S. 49 (5) Administration of Estates Law of Oyo State *CAP 1 Laws of Oyo State of Nigeria 1978;* S. 71 (2) © Administration and Succession (Estate of Deceased Persons) Law of Anambra State 1986 *CAP 4 Laws of Anambra State of Nigeria 1986*

[204] Administration of Estates Edict Kwara State *CAP 1 Laws of Kwara State of Nigeria 1991*

[205] Ibid Section 2.

[206] *Obusez v Obusez* (2001) 5 NWLR (pt 736) 372 at 384

section provides that if the property is land or interest in land is situated within the State and also where the property is personal no matter where it is situated then:

> *(a) If the deceased in his lifetime was subject to customary law and married in accordance with customary law only, the law applicable shall be customary law applying to the deceased.*
>
> *(b) if the deceased in his lifetime was subject to customary law and died without marrying, the law applicable shall be the customary law applying to the deceased;*
>
> *(c) If the deceased married only in accordance with law which makes polygamy unlawful, then notwithstanding that he was in his lifetime subject to customary law applicable shall be this law;*
>
> *(d) If the deceased in his lifetime was not subject to customary law the law applicable shall be this law….*

We think this provision which categories the law applicable to the estates of an intestate depending on the form of marriage the deceased contracted or the marital status of the deceased during the lifetime is undoubtedly more explicit than the general provisions of the laws of other States of the Federation on Administration of Estates of Intestates.

As earlier stated, the Marriage Act provides that on the death intestate of a person who was subject to customary law and who was married under the Act, the distribution of his real and personal estates should be governed by the English law on the distribution of the personal estates of intestates.

In view of the fact that the English Law on intestacy has undergone a lot of changes, it is necessary to determine which English law on intestacy is applicable under the Act. Is it the English law existing as at 1884 or the English law existing as at 1914 which is the

effective date of the Marriage Act contained both in the Laws of Federation and Lagos 1958[207] and the present Laws of Federation of Nigeria 2004?[208]

In *Oluremi Johnson v. The United African Company Limited*[209] where the issue before the court was whether the widow of a Nigerian man who married under the Marriage Ordinance and died intestate had an attached interest in the property of her deceased husband. The court held that S. 36 of the Marriage Ordinance expressly declared that the real property of an intestate which he could have disposed by Will should be distributed according to the law of England relating to the distribution of personal estates and not customary law. The court further held that the English law applicable under S. 36 Marriage Ordinance was the English law as at the date of the enactment of the Ordinance, that is to say 1914 and that the law in force in England as at that date was the Statutes of Distribution which gave one third of the property to the widow and two thirds to the children. Therefore, the widow concerned in that case had one third attachable interest in the property of her late husband.

The English Statutes of Distribution stated in that case are the Statutes of Distribution of 1670 and 1685. According to Gareth Miller and Hughes Parry,[210] under the Statutes of Distribution, the mode of distribution of the estates of an intestate after the payment of debts and funeral expenses is that if the intestate is survived by a widow the widow is entitled to one third of the estates and the remaining two thirds are distributed in equal proportion among his issues. Where there is no wife, the estate is distributed equally among his issues. The issue of any child who has died will take the share that child would have taken.

Furthermore, where there is no issue, the wife is entitled to one half and the other half is given to the deceased's father or if he was dead to his mother, brothers and sisters with children (but not remoter issue) representing a deceased parent. Where there are no issues and wife, the intestate father is entitled absolutely; and if the father also predeceased

[207] *CAP 115 Laws of Federation of Nigeria and Lagos 1958*
[208] *CAP M6 Laws of Federation of Nigeria 2004*
[209] *13 NLR 13*
[210] Miller Gareth, The Machinery of Succession. (2nd Edition) Dartmouth Company Limited (England 1966); Sir Parry David Hughes, - The Law of Succession (4th Edition) Sweet & Maxwell London 1961.

the intestate the mother, brothers and sisters and the next of kin of the same degree share equally on a per capital basis.

In respect of a married woman who died intestate, the whole of her personal property goes to her husband to the exclusion of any children. If there is no husband, the personality goes to her children.

However, S. 36 Marriage Ordinance also provides that there is no escheat to the State (that is to say, reversion of property to the State for want of heir) when the Statutes of Distribution are applied by virtue of that section. Instead, the portion which would have gone to the State for want of heir is to be distributed according to customary law.

Although, Kasumu and Salacuse[211] are of the opinion that the Intestacy Act 1890 should also be applicable in Nigeria since the Act applies to the estate of intestate who died wholly after 1st September 1890, it would appear that the decision in Oluremi Johnson v. UAC Ltd[212] that the Statutes of Distribution should apply, which has not been overruled by any higher court in the country is the applicable law for now. However, we think the confusion about which English law should apply to the inheritance of property of persons who were subject to customary law and contracted marriage under the Marriage Act when such persons died intestate can be brought to an end by appropriate laws on Administration of Estates of intestate by the legislatures of States which have no such laws at present.

At this juncture, it is pertinent to state that the provision of S.36 Marriage Act has generated controversy among learned authors and judges[213] One issue involved in the controversy is whether the provision of the Act is applicable in the Colony of Lagos, that is to say, the then Lagos Federal Capital Territory of Nigeria which is now part of the present Lagos State or whether it is applicable throughout the Federation. The consensus of learned

[211] Kasumu Alfred B. & Salacuse J.W, - Nigerian Family Law (Butterworth Company London 1966).
[212] Op. cit pages 13-14
[213] Nwogugu .E.I. — Family Law in Nigeria (Revised Edition Heinemann Educational Books Ltd Nigeria 1990); Salacuse J.W. —'Intestate Succession in Nigeria' (1964) Vol. 1; Nigerian law Journal Yakubu M.W, — Land Law in Nigeria (Macmillan Publishers 1985).

authors and writers[214] is that the section applied in the Colony of Lagos which was the only part of Nigeria known during the colonial administration as a Colony in the strict Constitutional sense. In addition, the learned authors and writers have argued that if section 36 was intended to apply to the whole country, there would have been no need for the inclusion of subsection 3 which specifically mentioned the Colony which was a part of Nigeria. However, judicial decisions show that the section applies throughout Nigeria. Thus, in *In-Re Estate Emodie*[215] a case decided in 1945, the court held that the property of an Ibo man who married under the Act in the Registry at Port-Harcourt and later died intestate in the Protectorate must be distributed in accordance with English law. Although the judge agreed that S.36 of the Marriage Act did not apply but nonetheless stated that customary law did not apply to the distribution of the property. Therefore, he would have to apply the rule in *Cole v Cole*[216] which was to the effect that the distribution of the estate of an intestate who was subject to customary law and had contracted a Christian or monogamous marriage was not governed by customary law but English law. Similarly, in *Coker v Coker*[217] a case decided in 1943, the court held that English law governed the distribution of the estate of a Yoruba man who married under the Act and died intestate. The decisions of the above stated cases are to the effect that English law governs the distribution of the property of persons who contracted marriages under the marriage Act anywhere in Nigeria no matter where the property is located if the persons died intestate.

Since the provision of S.36 of the Marriage Act applies in respect of Marriage contracted in accordance with provision of the Marriage Act, another issue that has arisen from that provision is which law should govern the distribution of the estates of an intestate who was subject to customary law and had contracted a monogamous marriage outside Nigeria but died domiciled in Lagos or had left real property in Lagos?

[214] Ibid.
[215] 18 N.L.R. 1
[216] 1NLR15
[217] 17 N.L.R 55

This issue was first considered in the case of *Cole v. Cole.*[218] In that case, the deceased, a native of Lagos contracted a Christian marriage in Sierra Leone with his wife. The deceased later returned to Lagos and was domiciled in Lagos where he died intestate leaving his widow and a son. The lower court was of the view that the Marriage Ordinance of 1864 dealt with marriage celebrated within the Colony of Lagos. It was therefore held that the Ordinance did not apply to the case in which the marriage was celebrated in Sierra Leone. The court also held that the distribution of the estate must be governed by customary law. On appeal, the decision of the trial court was reversed and it was held that the marriage, according to Christian rites, had altered the position of the deceased and that the Christian marriage had clothed the deceased and his wife and their issues with duties and obligations not recognized by customary law. Therefore, the court held that English law should govern the estate of the deceased.

The decision in the case of *Cole v* Cole[219] was followed by some cases[220] On the other hand; some cases have doubted the validity and the rationale of the decision of *Cole v Cole.*[221]

In *Smith v Smith,*[222] the facts of which were similar to *Cole v Cole,* the intestate also contracted a Christian marriage in Sierra Leone in 1876 and died domiciled in Lagos and left a house in Lagos. At the time of the death of the intestate he was living with his wife and children in the house and used it as family property. The plaintiff was the only male child of the Christian marriage while the other children were females. After the death of their mother, the plaintiff claimed that succession to the house was governed by English Law and that as the heir in law, he was exclusively entitled to inherit the house.

The issue which the court had to determine was whether English Law applied to the succession which would entitle the plaintiff to inherit the house. But if customary law applied, the house would be inherited by all the three children as family property.

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[218] Op. cit page 22.
[219] Ibid.
[220] *Emily Fowler v Frederick Martins* 5 N.L.R 45; *Haastrup v Coker* 18 N.L.R 68
[221] Ibid
[222] (1924) 5 N.L.R 105

The judge disagreed with the opinion that *Cole v Cole*[223] laid down a general principle that English law of intestacy must apply in all cases of intestacy where the deceased had contracted a Christian or monogamous marriage. He was of the view that a Christian marriage or a monogamous marriage only raised a rebuttable presumption that English law was to apply and that other considerations such as the position in life occupied by the parties and their conduct with reference to the property in dispute could make English law inapplicable. The judge concluded that the intestate bought the house in order that it might be their family home.

Furthermore, had the intestate wished to change that position, he would have given an indication of such an intention by making a Will or in another manner. The judge therefore held that customary law should apply to the inheritance of the deceased property. Also in *Ajayi v White*[224] the court rejected the decision in *Cole v Cole*.[225]

It is clear from the decisions of the aforementioned cases that the courts had not been consistent in their decisions as to which law should apply to the estates of an intestate who was subject to customary law and had married under the Marriage Act or had contracted a monogamous marriage. In view of the fact that the decision of the then Supreme Court in 1945 in the case of *Re-Estate of Emodie*[226] that English Law on intestacy would apply in such cases throughout the Federation no matter where the property was situated has not been overruled, it would appear that is the law for now.

We agree with this position of the law and also with the view of the judge in *Cole v Cole*[227] that a marriage under the Marriage Act or a monogamous marriage imposes rights and obligations which are inconsistent with customary law, on persons who contract such marriage. Therefore, the law regulating the rights and obligations of persons who contract such marriage should govern their intestate estates. It is common knowledge that the received English Law regulates rights, obligations and other incidents of Marriage under the

[223] *Cole v Cole.* Op.cit page 22
[224] 18N.L.R41
[225] *Cole v* Cole, Op.cit page 22
[226] Re- Estate v Emodie, op. cit pages 2-3
[227] *Cole v* Cole, op. cit page 22

Marriage Act or monogamous marriage where there is no local statute on such issues. Therefore, to allow persons who voluntarily contract marriage under the Marriage Act to benefit from customary law regulating the rights, obligations and other incidents of customary law marriage will amount to allowing such persons to approbate and reprobate which is against the principle of justice and fairness.

The courts have also had the problem of interpreting who is an issue or a child entitled to inherit the estates of an intestate under the Statutes of Distribution. For some years, the court had interpreted an issue as stated in the Statute of Distribution to mean a child legitimate under English Law. Therefore, they held that the children of the customary Law marriage and children whose paternity was acknowledged under customary law were not legitimate children entitled to inherit under the Statutes of Distribution, though such children were legitimate by the law of domicile to their origin.[228]

Such decisions have been overruled by the decision in the *Re Adadevoh* and others[229] where the court held that a child who was legitimate by the law of his domicile of origin should inherit under the Statutes of Distribution. Similarly, the issue of whether a wife or a widow stated in the Statutes of Distribution who was entitled to inherit the estates of an intestate refers to a widow of customary law marriage was also resolved in that case. The court in that case ordered that one third of the value of estates which the widow was entitled to by the English Statute of Distribution, should be reserved pending the time when the widow or widows might make claims for a share of the estates of the husband who died intestate.

At this juncture, it is appropriate to examine the mode of distribution of the estates of an intestate under the local statutes on intestate, that is to say, the Administration of Estate Laws of those states that have such laws. In view of the fact that the detailed rules distribution of estate on intestacy in the local statutes on Administration of Estates Law are

[228] *Haastrurp v Coker* (1927) 18 N.L.R 68; *Coker v Coker* (1943) 17 N.L.R. 55; *Adegbola v Folaranmi* (1921) 3 N.L.R. 89; *Gooding v Martins* (1942) 8 WACA 108.
[229] 13 WACA 304; *Bamigbose v Daniel* 14 WACA 111

lengthy, a summary of persons entitled to share in the distribution of the estates as provided in the statutes is discussed.

The Administration of Estates laws of Oyo, Ondo, Ogun and Lagos States[230] provide for a wife, a husband, issue, parents, brothers and sisters of full blood, grandparents, uncles and aunts (being brothers of full blood or half blood or sisters of lull blood or half blood or a parent of the intestate) brothers or sisters of half blood, as persons entitled to share in the property of an intestate depending on who survives the intestate.

Similar provisions are contained in the second schedule of the Administration of Estate Edict of Kwara State.[231] But Kwara State Edict does not provide for grandparents, uncles and aunts of the intestate among persons who are entitled to share in the estates of an intestate depending on who survives him.

The Administration and Succession (Estate of Deceased Persons) Law of Anambra State[232] provides for a spouse, issue, parents, brothers or sisters of whole blood, grandparents, grand children, uncles and aunts (being full brothers or half brothers of full sisters or half sisters of a parent of the intestate), half brothers and half sisters of the intestate, as persons who are entitled to share in the estates of an intestate, depending on who survives the intestate.

The aforementioned Administration of Estates Laws also provides that the children of the intestate have equal shares to the estates irrespective of their sex[233] i.e. male and female children share equally.

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[230] S.49 (1) Administration of Estates Law Oyo State; *CAP 1 Laws of 0yo State of Nigeria 1978;*
S.49 (1) Administration of Estates Law Ondo State *CAP 1 Laws of Ondo State of Nigeria 1978;*
S.49 (1) Administration of Estates Law Ogun State *CAP 1 Laws of Ogun State of Nigeria 1978;*
S.49 (1) Administration of Estates Law Lagos State *CAP 3 Laws of Lagos State of Nigeria 1994.*

[231] *Cap 1 Laws of Kwara State of Nigeria 1991.*

[232] S.120 Administration and Succession (Estate of the Deceased Persons) *Law CAP 4 Laws of Anambra State of Nigeria 1987.* S.50 (1) (a) Administration of Estates Law Oyo State. *CAP I Laws of Oyo State of Nigeria 1978;*

[233] S. 50(1) (a) Administration of Estates Law Ondo State. *CAP 1 Laws of Ondo State of Nigeria 1978;* S.50 (1)(a) Administration of Estates Law Ogun State. *CAP 1 Laws of Ogun State of Nigeria 1978;* S.50(1)(a)

(iii) Constitution

The Black's law dictionary[234] defines Constitution thus:

> *The organic and fundamental law of a nation or state which may be written or unwritten, establishing the character and conception of its government, laying the basic principles to which its internal life is to be confirmed, organizing the government, and regulating, distributing and limiting the functions of its different departments and prescribing the extent and manner of the exercise of sovereign powers.*

All the Constitutions of Nigeria since the country attained independence had been written. The Constitution of Nigeria[235] is not only written but also supreme, having a binding force on all authorities and persons in Nigeria. The Constitution also provides that the Federal Republic of Nigeria shall not be governed except in accordance with the provisions of the Constitution. If any other law is inconsistent with the provision of the Constitution, the Constitution shall prevail and that other law shall be void to the extent of the inconsistency.[236]

In *Momoh v. Senate of the National Assembly*[237] the court considered the validity of S. 31 of the (Legislative Power and Privileges) Act purporting to prohibit the execution of court processes within the precinct of a Legislative House while the house was in session. The court held that the section in question was inconsistent with the provision of S. 42 of the 1979 Constitution which was unrestrictive as to the mode or place of service of any process required for the due enforcement of the rights conferred. Therefore, in line with S.I of the Constitution which proclaims the supremacy of the Constitution, the offensive section of the (Legislative Powers and Privileges) Act was declared void as it was inconsistent with the

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Administration of Estates Edict Kwara State *Cap 1 Laws of Kwara State of Nigeria 1991;* S. 121 (1) (a) Administration and Succession Estates of Deceased Persons Law of Anambra State *CAP 4 Laws of Anambra State of Nigeria 1987.*

[234] 191 Black Henry Campbell, - *Black's Law Dictionary* (West Publishing Co. 1990, 6th Edition).

[235] 1999 Constitution of the Federal Republic of Nigeria. op cit

[236] Ibid. Sections 1 – 3.

[237] [1981] 1N.C.L.R21

Constitution. The decision of the court shows that the Nigerian Constitution is a law of supreme force containing certain rights and at the same time providing for the limits of other statutes.

The Constitution is also a literary or material source of law, being the fundamental law of the land. As a legal source, the Constitution also contains a bundle of rights and duties that may be enforced under the law. For instance, Chapter IV of the Constitution contains a number of fundamental rights[238] that individuals may claim and enforce in law court. One of the rights provided by the Constitution to all citizens of Nigeria is the right to freedom from discrimination. It is the violation of this right by some customary law rules with regard to women's right of inheritance that explains the reason for the topic of this study.

(e) Case Laws

Case law means a body of principles and rules of law which over the years, have been formulated or pronounced upon by the courts as governing specific legal situations. Case law therefore consists of law found in judicial decisions. Case law is generally said to be judge made law.

Before Nigeria became a Republic, Nigeria case law was not an important source of Nigerian law. This was because most of the judges who were trained in England applied the English doctrines of equity as expounded by English cases even in the interpretation of local statutes. This approach did not help the growth of Nigerian case law. With time, the position changed and the Nigerian courts developed a case law articulating the provisions of local legislatures. Thus, there is a steady growth of Nigerian case law which can be regarded as a source of Nigerian law.

Case law is generally a judge made law. Traditionally, the legislature has the primary duty of enacting laws. Judges are not expected to enact laws. The traditional function of a

[238] These rights are right to life, right to dignity of human person, right to personal liberty, right to fair hearing, right to private and family life; right to freedom of thought, conscience and religion; right to freedom of expression and the press, right to peaceful assembly and association, right to freedom of movement, right to freedom from discrimination and right to acquire and own immovable property anywhere in Nigeria.

judge is to interpret the law and apply it to the facts before him. However, there are instances when a judge in the interpretation of law, somehow makes a law.

Firstly, the judge, in the course of interpretation, either widens or restricts the scope of a law or statute. This could happen when the wordings of the statute are ambiguous and therefore capable of more than one legitimate interpretation. In the course of giving correct interpretation of the words of the statute, the judge may unintentionally or unwittingly make a law.

Secondly, there are certain instances when there is neither a statute nor a case law on a matter before a judge. He cannot adjourn the case and ask the legislature to pass a statute on the matter before him. He cannot fold his arms and tell the litigants that he is helpless on the ground that there is no relevant statute or case law governing the issue before him. He must decide it one way or the other. He therefore propounds a principle suitable to the case before him. The principle is new and since it is an innovation, the judge in such a situation, is said to have made a law. By so doing, judges add to the corpus of existing law. This law making function of the courts is sustained by doctrine of precedent. Under the doctrine of precedent, decisions of superior courts in the judicial hierarchy are generally binding on inferior courts. Precedent is of two types namely, binding precedent and persuasive precedent.[239]

A precedent is binding on an inferior court because it must, as a matter of law, follow that precedent of the superior court.

What is binding in a judicial decision is the ratio decidendi literally meaning the reason for the decision. The ratio decidendi is the major principle of law on which the judicial decision is based. In *Agbai v. Okogbue*,[240] the Supreme Court said: - 'a decision is only an authority binding inferior courts for what it decided. Thus, the only aspect binding inferior courts is the reason for its decision or the ratio decidendi'.

[239] A precedent is persuasive if a court has an option in the hierarchy of the court's structure, either to follow or reject it. Decisions of lower court, court of co-ordinate jurisdiction and foreign courts are treated as merely persuasive.

[240] (1991) 7 NWLR (Pt 204) 319 at 402

In *National Electric Power Authority v. Onah,*[241] the court also said: 'the doctrine of precedent ensures that court principles which the court has decided that bind courts of concurrent or lower jurisdiction and requires them to follow and adopt such principles when they are relevant'.

It is not everything said by a judge in the course of his judgment that constitutes a precedent. Any other pronouncement of law made in the course of a judgment is an obiter dictum (a statement by the way) and it does not form part of the ratio decidendi. Obiter dictum is a statement which the court makes in the course of its decision or judgment.[242]

As a general rule, obiter dictum is not binding.[243] However, there are occasions when it may have a binding effect. For instance, when it has been repeated a number of times by a court which is highly recognized in the judicial hierarchy of the legal system, then it becomes binding. For example, an obiter dictum of the Supreme Court could, with time, assume the status of a ratio decidendi thus influencing the decision of inferior courts.

In Ifeodirah v. Ume[244] *Nnemeka Agu IS. C stated that:*

> *although what is ordinarily binding in a case is the ratio decidendi and not the obiter dictum yet an obiter dictum by the ultimate court on an important point of law is one which is binding on and followed by all the lower courts.*

2.1.1 CONCLUSION

From the foregoing, it is clear that Nigerian Legal System comprises different laws namely received English Law, Islamic Law, Customary Law and the Constitution etc. The Constitution is supreme to all these laws and if any of these laws is inconsistent with the

[241] (1997) 1 NWLR (Pt 484) 680 at 688
[242] It is a mere casual and passing expression of the judge. It is a statement of an illustrative nature or based on hypothetical facts. Obiter dictum does not form part of the ratio decidendi.
[243] *Aihaji Yusuf v. Egbe* (1987)2 NWLR (Pt 56) 341
[244] (1988) 2 NWLR (Pt 74) 5 at 13.

Constitution, such a law is null and void.[245] All these laws except the Constitution govern inheritance in Nigeria.

This chapter has examined the advent of Islam and Islamic law in Nigeria. Also discussed is the application of Islamic Law before the British colonized Nigeria, during the colonial period and after independence. The laws enacted by the British colonial administration to undermine and displace Islamic law by the English common law have been highlighted.

In the same vein, the persistent protests by Muslims over the years that resulted in the recognition of Islamic personal law under the Constitution have been examined.

It is also clear that Nigeria courts have not found it easy to give a precise meaning to the phrase 'repugnant to natural justice, equity and good conscience' (which is commonly referred to as the repugnancy doctrine or test) in determining the validity of customary laws. Hence, the courts have, in some cases applied the repugnancy doctrine in general terms to confirm or nullify some customary laws for all purposes. On the other hand, the courts, in a few decisions, have applied the repugnancy doctrine relatively by considering the possible result of the application of the repugnancy doctrine in the particular case before them.

However, we feel that since it is accepted that customary laws are flexible and can easily adjust to changing economic and social conditions of the society, the courts should hold a customary law that does not meet modern economic and social changes of the society and which is likely to be unjust repugnant to natural justice, equity and good conscience.

Our discussion on statutory laws on inheritance has shown that both the received English Law of inheritance on intestacy and the Administration of Estates Laws of States which have such laws that women as wives daughters and even sisters have the right of inheritance to the property of their husbands, fathers or brothers who died intestate.

[245] Sections 1-3 of 1999 Constitution of the Federal Republic of Nigeria. op cit

The question is, are the women who are to benefit from these laws aware of their rights under the laws? The right of women to inherit the estates of their husbands and fathers is however different under Islamic law and some customary laws which are discussed in the next chapters.

The failure of successive indifferent governments of States in Yoruba land to establish Sharia Courts to adjudicate on Islamic personal law matters of matrimonial and succession matters has not enable Muslims in the States where Muslims are predominant to benefit from Islamic personal law which the Constitution allows. In this regard, many Muslim women in Yoruba land do not enjoy the rights of inheritance which Islamic Law accords them.

Furthermore, the non-implementation of the Constitutional provision as regards Islamic personal law on matters affecting Muslims is a violating of the constitutional right of Muslims to freedom of religion guaranteed by the Constitution.[246]

CHAPTER THREE

ISLAMIC LAW OF INHERITANCE

3.0 INTRODUCTION

This chapter examines the rules of inheritance relating to women before the advent of Islam in Arabia (known in Islamic literature as Jahiliyyah period), the rules of inheritance under Islamic law in the Holy Quran and explained by the Sunna.

It is pertinent to state that the details of the rules of inheritance under the Islamic law are not discussed. This is because there are large volumes of work written by Muslim jurists to expound the broad rules contained in the Quran and as explained by Sunna of Prophet

[246] Section 38 (1) of the 1999 Constitution of the Federal Republic of Nigeria. Op cit

Muhammed. A discussion of the work on the details of Islamic law of inheritance will make this study disproportionally voluminous.

Therefore, it is the broad rules as interpreted by jurists gathered from textbooks and the quantum of shares of women in their capacities as wives, daughters, mothers, grandmothers and sisters as contained in the Quran and the Sunna that are outlined in this study.

Moreover, the arguments of Muslims writers/scholars who are the proponents and opponents of the double share of inheritance for men as against women under Islamic law of inheritance are discussed.

3.1 INHERITANCE DURING PRE-ISLAMIC PERIOD

The religion of Islam was revealed by Allah to Prophet Muhammed, an Arab, in Mecca in the Arab Peninsula. It was from Arab that Islam spread to other parts of the world. So, Arabia is the cradle of Islam. In this connection, inheritance among the Arabs before the advent of Islam or during the pre-Islamic period in Arab is discussed below.

According to Hussain[247], the exact details of the rules of inheritance before the advent of Islam are not known. What is known is that the rule of inheritance was confined to male agnate's relatives of the deceased. The pre-Islamic period is known in Arabic and Islamic Literature as *"Jihailiyyah"* period, literally meaning the "era of ignorance".[248]

Inheritance among the Arabs during the pre-Islamic period was confined only to able-bodied male relations who were capable of fighting battles to defend the honor of their family or tribe. Consequently, daughters, widows; mothers, minors, infirm and old persons had no right of inheritance to the property of their deceased fathers, husbands and other relations.

[247] Hussain, A., Islamic Law of Succession (D'arussalam Riyadh. 2005) at page 24.
[248] Ismail Mustapha Hussain Sharia Sources and the Defence of Women's Right in Sharia Penal and Family Laws in Nigeria and in the Muslim World Rights Based Approach (Ahmadu Bello Press, Nigeria 2004) at page 147.

According to Mahmud,[249] during the *"Jahiliyyah"* period, if a person died and left property, his eldest son was the only person who would inherit the property. Other children of the deceased would inherit nothing. If the deceased had no surviving son but brothers, the eldest surviving brother would inherit the property. If no brother, his uncle would be the heir. Female children and wives had no right of inheritance at all because they could not go to battles if there was an attack against their community of tribe to defend the community\tribe. Rather they need help to defend themselves.

During that period, women as wives were regarded as chattels which formed part of the estate of their husbands to be inherited. Therefore, on the death of a married man, his sons and, in their absence, his brothers inherited his widows like any other property. The sons would inherit the widows except their own mothers. The widows would become the wives of the sons or brothers of the deceased.

The other reasons why daughters were excluded from inheriting their father's property were because after their marriage, they ceased to be members of their natural (paternal) family. According to the Arab custom then, the children of a man's son were the issues of the man and thus they were part and parcel of his family. On the other hand, the children of his daughter were not his children but the children of the husband of the daughter. Consequently, if a daughter inherited and later her children succeeded her that would cause a situation where the wealth of one family would pass on to a different family.[250] Since the purpose of inheritance under the customary rules of the Arabs was the maintenance of the property in the family, the transfer of the family property to another family would defeat that purpose. In the light of the foregoing, no female person could inherit either from her father or from her husband.

3.1.1 Islamic Rules of Inheritance

[249] Mahmud Alkali Abubakar Guide to Succession under Islajujmic Law (Al-Abumidi, Yola) at page 1.
[250] Mutahhari Murtada, The Rights of Women in Islam (World Organization for Islamic Services, Tehran-Iran 1981).

With the advent of Islam in Arabia, these unjust practices of inheritance of women as wives by the heirs of their deceased husbands and the deprivation of women from inheriting the property of their husbands and fathers were abolished by Allah. Allah in the Holy Quran provides women in the right to inherit property of their husbands, parents, brothers and other relations. In fact the Holy Quran established rights of inheritance to women in different capacities like daughter, wife, mother, sister and grandmother. As earlier stated, a detailed discussion of the rules of Islamic law of inheritance is beyond the scope of this study because many Muslim jurists have written a lot of work to expound the broad rules contained in the Holy Quran and as explained by the Sunna of Prophet Muhammed. Therefore, it is the broad rules as interpreted by jurists gathered from texts that are outlined in this study. As regards the practice of inheritance of women as wives by the heirs of their deceased husbands, Islam enhances the status of women by abolishing the custom of inheriting wife/wives of a deceased man by his surviving male relations. The Holy Quran enjoins Muslims to treat women justly and generously. They should be allowed to go their own ways once they conclude the waiting period of four months and ten days after the death of their husbands.

Islam accorded women, as wives and daughters right to inherit the property of their deceased husbands and fathers. Their right to inherit is recognized and fixed by the Holy /Quran; the holy book specifies the share that is due to women as daughters when it says:

> *Allah (thus) directs you as regards your children's (inheritance); to the male, a portion equal to that of two females; if only daughters, two or more, their share is two-thirds of the inheritance; if only one, her share is a half…The distribution in all cases is) after the payment of legacies and debts…*[251]

Verse 12 of the same Chapter Four of the Holy Quran provides wives the right to inherit the property of their deceased husbands and specifies the share that is due to them. The verse says:

[251] Quran 4:11.

> *In what your wives leave, your share is half, if they leave no child. But if they leave a child ye get a fourth; after payment of legacies and debts. In what ye leave; their share is a fourth; if ye have no child; but if ye leave a child, they get an eighth; after payment of legacies and debts. Thus is it ordained by Allah and Allah is All-knowing Most For bearing.*[252]

The shares allotted to women as daughter and wives by Allah in the Holy Quran the details of which were worked out by Prophet Muhammed are summarized below:

Daughter's share

A daughter is a primary heir as stipulated in the Holy Quran and she is always entitled to inherit. She takes her fixed share in the absence of a son and becomes a residuary in the presence of a son. A daughter of a deceased has three ways of inheritance under different situations:

I. *In the absence of a son, she is entitled to half (1/2) of net estate of her deceased parents when she is the only child of the parents.*
II. *Two or more daughters (in the absence of a son are entitled to two-thirds (2/3) of the net estate. They will share the two-thirds (2/3) equally.*
III. *In the presence of a son or sons, the daughter (one or more) become residuary. Each daughter gets half (1/2) of the share of the son.*

Wife's share

The wife of a deceased man has two ways of inheritance under different situations. A wife is entitled to inherit one eighth (1/8) of the net estate of her husband when the deceased left children or the children of his son.

[252] Quran 4:12.

If a man died leaving behind more than one wife, the wives share the one-eighth (1/8). Where the man died without any issues or agnate descendants, the wife or wives as the case may be are entitled to inherit one fourth (1/4) of his net estate. They will share one fourth (1/4) or one eighth (1/8) equally.

Mother's share

The right of a woman to inheritance in her capacity as a mother is stated in the Holy Quran thus:

> *...For parents a sixth shares of inheritance to each if the deceased left children; if no children and the parents are the(only) heirs, the mother has a third; if the deceased left brothers (or sisters) the mother has a sixth…Ye know not whether your parents or your children are nearest to you in benefit. These are settled portion ordained by Allah and Allah is All-Knowing. All-Wise.*[253]

The mother of the deceased is a primary heir. She is always entitled to inheritance. In the Holy Quran, the mother is entitled to 1/3 (maximum) and 1/6 minimum as her share. There are three conditions that may affect her share. These are as follows:

1. *She gets one sixth (1/6) with a child or with the son's child howsoever low or with two or more brothers and sisters whether full or half blood (consanguine and uterine).*[254]
2. *She gets one-third (1/3) of the total property when there is no child or son's child and not more than one brother and sister;*
3. *She gets one third (1/3) of the balance not of the total, in the presence of the father and spouse of the deceased. This means that a mother gets one third (1/3) of the balance after giving shares to the husband or wife in two cases (a) when there co-exists a husband with both*

[253] Ibid. 4:11.

[254] Full blood relationship means the relationship through both parents e.g. real brother or sister, half blood relationship means relationship through only one of the parents e.g. brothers and/ sisters where only father or mother is common, consanguine sisters/or brothers mean the children of the same father by different mothers; uterine sisters and or brothers mean the children of the same mother but by different father.

parents (b) or the wife with both parents. However, if there exists a grandfather instead of father the mother takes one third (1/3) of the whole property.

Grandmother's share

The grandmother is not specifically mentioned in the Holy Quran as a legal heir. Rather, she was added to the list through a hadith.[255] This means that the grandmother is not a primary heir. She is a substitute for the mother and is therefore entitled to inherit only in her absence. The mother excludes all grandmothers paternal or maternal. Her share is one-sixth (1/6) in all circumstances. A grandmother never gets one third (1/3) of the mother's maximum share. This means that in conditions where a mother gets one third (1/3) a grandmother will get only one sixth (1/6).

More than one grandmother will divide one sixth (1/6) among themselves equally. The paternal grandmother is excluded by the father. However, she is not excluded by the grandfather. Therefore she co-inherits with the grandfather.

Sister's share

With regard to the right of inheritance of a woman as a sister, the Holy Quran says:

They ask thee for a legal decision. Say; Allah directs (thus) about those who leave no descendants or ascendants as heirs. If it is a man that dies leaving a sister but no child she have half the inheritance… if there are two sisters, they shall have two thirds of the inheritance (between them)… Thus doth Allah make clear to you (His law) lest ye err. And Allah hath knowledge of all things.[256]

The sister of a deceased who can inherit could be sister of full blood, consanguine sister or uterine sister. Different conditions govern the sister's inheritance based on whether they are full, consanguine or uterine sisters.

[255] As in the narrated hadith, which says 'From Ibn Muraydah from his father that the Prophet allotted one-sixth to the Grandmother in the absence of the mother of the deceased.' Transmitted by Abu Daud and al-Nasa'i. See Ibn, Hajar al-Asqatani, Bulugh al-Maran min adillati al-ahkan (Dan Masr Press Cairo) p.200.

[256] Quran 4:176

Full sisters (sisters of the same mother and fathers)

The following conditions govern the sisters' rights of inheritance:

I. *If the deceased has one sister and no father, children or grandchildren, the sister will inherit half (1/2) of the estate.*
II. *If there are two or more sisters and no fathers, children or grandchildren, the sisters will receive two thirds (2/3) which they will share equally among themselves.*
III. *If the deceased has full brothers, one or more, the full sister will also receive the balance of the estate. A sister will take half (1/2) of the amount a brother receives.*
IV. *Sisters will not inherit if the deceased has any of the following relatives: father, paternal grandfather, great-grandfather, son, grandson or great grandson.*

Consanguine sisters (same father different mothers)

The conditions governing their rights of inheritance are as follows:

I. *If the deceased has only one consanguine sister, she will inherit half (1/2) of the estate.*
II. *If there are two or more consanguine sisters, they will jointly inherit two thirds (2/3) if there is no full sister. The two third (2/3) will be shared equally among them.*
III. *If the deceased has one full sister, she takes half (1/2), the consanguine sisters will receive one sixth (1/6) to complete two third (2/3).*
IV. *If the deceased has two or more full sisters, the consanguine sisters will not inherit.*
V. *If the deceased has any following, a son, grandson, great grandson, father, grandfather, or great grandfather or full brother, the consanguine sisters will not inherit.*
VI. *She takes the residue in the presence of the daughter or granddaughter*
VII. *If the deceased has a consanguine brother, she will inherit the residuary. The residuary will be divided between her and the consanguine brother. A consanguine brother will receive twice the share of a consanguine sister.*

Uterine Sisters (Sisters of the same mother but different fathers)

The uterine sister has three conditions regarding her right of inheritance;

I. She will inherit one sixth (1/6) if she is the only uterine sister of the deceased.
II. Where the uterine sister is more than one, they will jointly receive one third (1/3). They will share this equally among themselves.
III. The uterine sister will not inherit if the deceased is survived by children, son's children, father or paternal grandfather.

3.1.2 Inequality of Shares of Women and Men

It is evident from our discussion of the rights of women to inheritance under Islamic law that in certain cases, a man takes double the share of a woman. For example, a son inherits double the share of a daughter, a brother inherits double the share of a sister and a husband inherits double the share of wife. This inequality of shares of inheritance has been misconstrued and criticized as a discrimination against women by non-Muslims and some Muslim scholars/writers on Islamic law.[257]

These Muslim scholars/writers who have been advocating for equal rights and shares for women and men under Islamic law to conform to the United Nations Convention on Elimination of All Forms of Discrimination Against Women (CEDAW)[258] which is an individual human rights document aimed at establishing equality among women and men. Some scholar suggests that the reason why men take double the share of women is not because Islam considers women as inferior to men. It is therefore not a discrimination based on sex. Rather, the rationale for the double share of inheritance given to men under Islamic law is based on the financial/economic responsibilities which Islam imposes on men.

[257] Ali Shaheen Sardar, 'Women's Human Rights in Islam Towards a Theoretical Framework' (2008) International Law and Islamic Law p.130. Zechan Hassan, 'Islam from Patriarchy to Feminism' (April 14, 1998 Issue of Star Weekend Bangladesh) p.3. An-Naim Abdullahi Ahmed, Towards an Islamic Reformation (Syracuse University Press New York 1990) p.176. Shah Naiz A. 'Women's Human Rights in the Koran: An Interpretative Approach' (2006) 28 Human Rights Quarterly 868-903.

[258] Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979.

Islam places the responsibility of maintaining the family on men while women are exempted from such responsibility. When a woman is unmarried, she lives with her parents. Her father has the responsibility to provide for all her financial needs. On the death of her father, her brothers are charged with the responsibility of maintaining her until she gets married. After her marriage, she is entitled to maintenance by her husband. All her needs are to be met by her husband even if she is wealthy. When a woman is old and her husband is dead, she is to be maintained by her male children. Such economic responsibilities are not imposed on a woman.

When Islam gives a woman the right to inherit the estates of her deceased relatives, she does not have obligation to spend for her maintenance. Hence, in the Holy Book, Allah says; 'Men are the protectors and maintainers of women because Allah has given one more (strength) than the other and because they support them from their means'.[259]

In the light of the foregoing, a man needs more wealth than a woman to discharge the great economic responsibility placed on him to provide for his family and other dependents. This is the justification for giving a man twice a share of inheritance of a woman under Islamic law.

Some Muslim scholars/writers who are proponents of the non-discriminatory nature of Islamic law of inheritance have contended that it is not in all circumstance that men are automatically entitled to double share of inheritance. Chaudhry[260] argues that there are many instances where men and women receive equal or proportional shares. An example is where a woman dies leaving no children or grandchildren. Her only survivors are her husband and her full sister. Her estate is distributed so that her husband gets one half (1/2) and her sister gets the other half (1/2). Another example is where a woman dies leaving her husband, one daughter and one full brother. The husband receives one fourth (1/4) of her estate, the daughter receives one half (1/2) and the remaining one fourth (1/4) goes to the full brother. In this case, a woman has taken twice the share of her father's and uncles individual shares.

[259] Quran 4:34.
[260] Chaudhry Zainab, 'The Myth or Misogyny A Reanalysis of Women's Inheritance in Islamic Law' (1997) 61 Albany L. Rev. 529-30 cited by Shah Zaiz op cit p.897.

Also, the share of the mother and father of a deceased who has surviving child or children is one sixth (1/6) each.[261] If a deceased is survived by uterine brother and sister and if there are no children or father and grandfather, the uterine brother and sister where he or she is alone receives one sixth (1/6) of the property. Where there are two or more uterine brothers or sisters or both or one uterine brother and uterine sister together collectively receives one third (1/3) of the property which they divide, among themselves equally irrespectively of sex.[262] Therefore, the rule that a male receives double share of a female is not applicable to this class of inheritors.

However, some contemporary Muslim writers who opine that Islamic law of inheritance is discriminatory against women have argued that the men's greater economic responsibility in the family in Islam used by conservative Muslim scholars to justify men's double share of inheritance is no longer tenable in contemporary world. Their argument is that in the socio-economic circumstances of the present day, many women are no longer financially/economically dependent on their husbands and male relations because women in many families around the world today are responsible for the entire household expenses of their families. Therefore, the economic responsibility of men to maintain women as stated in the Holy book as justification for double share of inheritance for men is no longer tenable.

In this connection, in situations where men do not discharge their economical responsibility and women contribute equally to family income, women should get an equal share of inheritance as men.[263] They have therefore advocated that Islamic law should be reformed so that Muslim women and men will have equal rights in inheritance and other matters to conform to the standard of the international human rights document (CEDAW)[264].

In spite of the criticisms of these liberal Muslim writers/scholars against inequality of shares for men and women under Islamic law of inheritance and their arguments for as reform of the law for equal shares for men and women, the predominant view of pious Muslims even women is that God has ordained as shares of inheritance cannot be questioned

[261] Quran 4:11
[262] Quran 4:12
[263] Shah Ziaz op.cit page 896.
[264] Ibid

or changed. These pious Muslims reject the international human rights document based on equality of sex in all matters as a new form of western imperialism to impose their own laws on non-western countries particularly countries where Islamic law is operating so as to undermine Islamic law.

The report of the study on the Compatibility and Divergence of CEDAW and Protocol to African Protocol on Human and People's Right on the right of women in Sharia in Nigeria shows that the consensus of Muslim women and men stakeholders i.e. Muslim scholars and women's rights advocates in Northern states of Nigeria with predominantly Muslim populations is that equal rights of inheritance as specified in the Quran by Allah cannot be tempered with in the name of domesticating a man-made convention such as CEDAW[265] . This view should be applicable to the provision of Section 42 (1) (a) of the 1999 Constitution of Nigeria[266] which prohibits discrimination on the basis of sex as regards Islamic law if inheritance.

This study supports the consensus of Muslim men and women in Nigeria that Islamic law of inheritance as ordained by Allah in the Quran cannot be changed to comply with man-made law. However, men should live up to their responsibility of maintaining women which Allah imposes on them so as to ensure equitable rights which is the intent of Islamic Law.

3.2 CONCLUSION

It is evident from our discussion of the verses of the Quran on inheritance that Islamic law regards women in their capacities as wives and daughters who were denied

[265] Report of the Study on the Compatibility and Divergence of CEDAW and Protocol to African, Protocol on Human and Peoples Rights on the Rights of Women with Shari in Nigeria April 2008 page 26. The Muslim women and men stakeholders i.e. Muslim scholars and women's rights advocates (whose views could influence the debate on domestication of (CEDAW) were consulted though focus group discussions and workshops.

[266] CAP C.23 Laws of Federation of Nigeria 2004.

inheritance during the pre-Islamic period as Quranic or primary heirs[267] who always have the right of inheritance. As Quranic or primary heirs, wives and daughters of a deceased man in the context of Islamic law are amongst the proper relatives upon whom the estates of the deceased should first devolve by operation of law. In addition specific shares of a deceased's estates are allotted to them in the Quran.

Consequently, the fact that the Quran makes wives and daughters primary heirs and clearly specifies their shares mean that Islamic law has safeguarded their absolute rights of inheritance as their rights as Quranic or primary heirs are indefeasible. Moreover, despite the criticisms of the unequal shares of inheritance to men and women under Islamic Law by some liberal Muslim writers/scholars, many Muslims even women believe that the law is the command of Allah and man can obey it.

CHAPTER FOUR

CUSTOMARY LAWS OF INHERITANCE OF IGBO, BENIN AND YORUBA PEOPLE OF NIGERIA

4.0 INTRODUCTION

This chapter examines the customary laws of inheritance of the Igbo and Benin people. The rights of women to inherit the property of their deceased relations vis-à-vis the rights of men under the Igbo and Benin customary laws is discussed. The details of the types of property that can be inherited under the Igbo customary laws as stated in the customary law manual[268] are examined. However, our discussion of the types of property to be

[267] Gurin Aminu Muhammed, An Introduction to Islamic Law Testate/Intestate (Jodda Press Ltd 1998) says Quranic heirs consist of certain close relations of the deceased to whom a specific share is allowed in the Quran. These include four male and eight female sub-classes. The male shares are: The husband, the father, true grandfather how high so ever and the uterine brother. The female sharers are: the wife, the mother, the true grandmother, the daughter, and the son's daughter, how low so ever, the germane sister i.e. (full sister), and the uterine sister (of the same mother but not father).

[268] Manual of Customary Laws obtaining in Anambra and Imo States of Nigeria (Government Printer, Enugu 1977).

The types of property in the Manual includes houses, lands, economic trees and plants, farm produce, farm

inherited is limited to land, houses, economic trees, plants, farm produce and money which are of immense benefits to women. This is because these types of property could empower women economically after the death of their fathers and husbands. This no doubt will reduce their hardships.

The methods of their distribution of property, the order of priority in the distribution of property among the male and female relations are examined. Judicial decisions on the rights of wives and daughters to inherit property under some Igbo customary laws and the laws enacted by two Igbo States, namely Anambra and Imo[269] on the right of women to inheritance are also appraised.

As regards the Benin customary law of inheritance, the right of the eldest surviving son to inherit the principal house of his deceased father called *Igiogbe* in Benin language vis-à-vis that of a female child who is the first child of the deceased and the right of a widow to inherit the property of her deceased husband are examined. Furthermore, judicial decisions on the controversy whether two houses or a vacant land can constitute an *Igiogbe* under Benin customary laws are appraised as well.

Under the Yoruba Customary Law of inheritance, the persons who are entitled to inherit property, the concept of family property in relation to inheritance, and the interest or right of persons who inherit family property are discussed. The two methods of distributing property under Yoruba customary law of inheritance that is the *idi-igi* (per stripe) and *ori-ojori* (per capital) on which there have been judicial pronouncements are also appraised.

4.1 IGBO CUSTOMARY LAW OF INHERITANCE

The Igbo people are concentrated in five Eastern States of Nigeria. These States are Abia, Anambra, Ebonyi, Enugu and Imo.[270] Generally, the Igbo people of these states speak

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implements, furniture, wearing apparels, Ofo, titles, Isiaga office and Family Headship.

[269] Ibid

[270] 1999 Constitution of the Federal Republic of Nigeria, CAP C23 Laws of the Federation of Nigeria 2004. First Schedule Section 3.

a common language through with local dialectical variations but to a large extent they (Igbo's) have similar social systems.[271]

Seasoned authors/ scholars[272] have written extensively on the customary law of inheritance and some variations of the general rules. This study, in examining the Igbo customary law of inheritance, places reliance mainly on the Customary Law Manual[273] of the laws of Anambra and Imo States. The manual not only incorporates the general rules of Igbo Customary law of inheritance as discussed by these authors/scholars but also provides detailed information on the numerous variations of the Igbo customary law rules beyond the purview of the earlier publication on the study written over ten years before the manual was published.

It is noteworthy to state that the Manual has not yet obtained the status of a primary source of Igbo customary law of inheritance because as required by Evidence Act,[274] many of the customary rules of inheritance stated in the manual are yet to be proved and established before our High Courts and other superior courts.[275]

In view of the fact that the customary law manual was prepared after wide consultations with traditional rulers, community elders, presidents and members of customary courts and other persons who are knowledgeable about local customary laws of various Igbo communities, it is submitted that the manual should be regarded as a legal authority of Igbo customary law of inheritance to be accepted by the courts in line with Section 59 of Evidence Act[276] without formal proof.

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[271] Green M.M., Igbo Village Affairs (Frank Cass 1964); Nsugbe Phillip. O, Ohaffia- A Matrilineal Ibo People (Oxford University Press, London, 1974).

[272] Okoro Nwakamma. The Customary Laws of Succession in Eastern Nigeria and the Statutory and Judicial Rules Governing their Application (Sweet and Maxwell, London. 1966); Obi S.N.C., The Ibo Law of Property (Butter Worth & Co. London. (1963); Meek C. K, Law and Authority in Nigerian Tribe A study in Indirect Rule (Oxford University Press oxford 1950); Basden G.T, Nigeria Ibos (Frank Cass & Co. London. 1966).

[273] Manual of Customary Law, Op.cit.

[274] CAP. E14 Laws of Federation of Nigeria 2004.

[275] Section 14(1) of Evidence Act provides

[276] S.59 Evidence Act provides 'In deciding questions of native law and custom… any book or manuscript

4.2 TYPES OF PROPERTY TO BE INHERITED AND PERSONS WHO CAN INHERIT

(A) Lands and Houses

Under the Igbo customary law practice, the eldest son inherits his father's compound exclusively in some Igbo communities.[277] In practice, however, he gives part of the land to other sons at their request for building purposes. A man's compound is inherited by all his sons as a corporate body with the eldest son acting as a caretaker.[278] In *Ohafia Division,*[279] a man's compound is inherited by sons and daughters in joint tenancy. Where a man is not survived by any son, his compound is inherited by his eldest surviving brother of full blood. In the absence of a full brother, the compound is inherited by the deceased father. There is a local variation with regard to the above practice. In *Anambra, Ezzikwo and Mbaitoli/Ikeduru Divisions.*[280] Where a man is not survived by any son his compound is inherited by his father and in the absence of father, the deceased compound will be inherited by his eldest surviving brother of full blood.

A man's land and houses other than his compound are inherited by his sons or sons as a corporate body. In the absence of any surviving son, the land and house are inherited by the eldest full brother and, in the absence of full brothers, the land and houses are inherited by the deceased father.[281] There are local variations with regard to this customary practice in some communities[282] where lands and houses although inherited by the eldest son exclusively, the heir has an obligation to give part of lands and houses to other sons for their residential and farming needs. However, the customary law manual does not specify a fixed

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recognized by natives as a legal authority, are relevant'.

277 Customary Law Manual op.cit page 100. The communities are in Aguata, Idemili, Ihiala, Ogbaru which are Local Government Areas in Anambra State; Mbaitoli, Ikeduru, Orlu, Mbano, Oguta, Okigwe are in Imo State;
Igbo-Eze, Nsukka, Ezeogu are in Enugu State.

278 Ibid. page 100. The communities are in Aba, Northern Ngwa, Ukwa and Umuahia, Ishielu of Abia State; Abakaliki; Afikpo in Ebonyi State, Onitsha in Anambra State.

279 Ibid. page 100. Ohafia is in Abia State.

280 Ibid. page 100. Anambra is in Anambra state; Mbaitoli and Ikeduru are in Imo State.

281 Ibid. Customary Law Manual page 100.

282 Ibid. page 101. Enugu and Igbo-Eze are in Enugu State; Nnewi is in Anambra State and Owerri is in Imo State.

portion which the eldest son has to give to his younger brothers. Therefore, it appears that what the other sons of a deceased get is at the discretion of the eldest son.

It is evident from the foregoing that a deceased man's lands and houses are inherited mainly by his paternal relations. Where a man is not survived by sons, but by daughters only, the daughters generally do not have the right to inherit his compound or any of his lands or houses.[283] are however local variations in Ohafia Division where daughters in such a case inherit the deceased's compound, other lands and houses with the eldest brother of the deceased in control.[284] In Oraukwu town in Idemili Division, a daughter in respect of whom the *nrachi* ceremony has been performed inherits her father's compound, other lands and houses.[285]

According to Customary Law Manual, *nrachi* is the practice whereby a daughter whose father has no male children is retained unmarried in the father's compound with a view to her having male child in her father's name. If unmarried, she has the right to conceive a child for any man of her choice. The children she has are the children of her father whether the father is dead or alive.

(B) Economic Plants and Tress

Customary Law of the Igbo permits separate ownership of land on the one hand and economic plants and trees growing on such land on the other hand. Thus, while the land itself is the property of one person, economic plants and trees growing on it are the property of another person or the community at large or vice versa.[286] This is whether or not the relationship of landlord and tenant exists between the owner of the land and economic plants and trees growing on it. In this situation, inheritance of the land is different from inheritance

[283] Ibid. page 103.
[284] Ibid. page 103 Ohafia is in Abia State.
[285] Ibid. page 103. Idemili is in Anambra State.
[286] Ibid. Customary Law Manual page 110.

of economic trees. The land and economic trees are inherited by the heirs of their respective owners.[287]

However, in some communities, palm trees growing wild on any piece of land other than a man's compound, are the properties of the community, not of the land owner. Such palm trees are not subject to inheritance. In Uturu clan of Okigwe Division, economic plants and trees are not inherited by individuals but are retained as communal property.[288] Economic plants and trees are inherited by sons as a corporate body. There are local variations in Afikpo and Edda clans of Afikpo Division where a man's economic plants and trees are inherited jointly by the full brothers, maternal uncles, maternal half sisters, maternal sisters, maternal half brothers, maternal aunts and the mother of the deceased.[289]

In Enugu-Ezeike, Itchi and Etteh clans of Igbo Eze Division, the eldest son inherits all economic plants and trees exclusively but he cannot sell them to outsiders without the consent of the family. In Nnewi, Northern Ngwa and Ogbaru Divisions, a man's economic plants and trees are inherited by his eldest son exclusively.[290]

In Ohafia Division, economic plants and trees are inherited by sons and daughters of a deceased man tighter with the man's full brothers, maternal half brothers, maternal uncles, the mother, full sisters, maternal aunts and widow (if married outside the division) and fathers as a body. In case of economic plants and trees growing within the man's compound, the man's children take precedence over the other joint co-heirs. In the case of economic plants and trees growing outside the compound, the man's maternal relations take precedence over his children.[291] In Owerri Division, economic plants and trees growing on

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[287] Ibid.

[288] Ibid.

[289] Ibid. Customary Law Manual does not define what the term half sister or half brother mean. We can therefore assume that half sister and half brother as used in the manual have the same meaning as defined in the Black's Law Dictionary as persons who have the same father but different mother or persons who have the same mother but different fathers. (West Publishers USA 1990).

[290] Ibid. Customary Law Manual pages 110-111.

[291] Ibid.

Uhu or *Okpulo* land[292] are inherited by the head of the deceased person's family exclusively. The land itself is inherited by sons and other heirs of the deceased person as a corporate body. Economic plants and trees growing on his other lands are inherited by the eldest son exclusively.[293]

Generally, a widow whether childless or not, does not inherit her husband's economic plants or trees and does not have the right to any share of these. Where a widow has sons, it is the sons who inherit not herself though she may act as a caretaker for them if they are too young to take care of such property themselves. There are however local variations. In Arochukwu and Eme clans of Arochukwu Division, a widow inherits her husband's economic plants and trees if, but only if the deceased husband is not survived by any son.[294]

In Mbano Division, a widow whose husband is not survived by a son inherits the husband's economic trees and plants but subject to over all control of her and the property by the eldest nearest paternal male relation of her husband. In Ohafia Division, a widow who is married from a community outside the division is deemed to be a member of the deceased husband's maternal family and accordingly she inherits the deceased man's economic plants and trees along with the other maternal relations of the husband.[295]

With respect to a daughter's right to inherit, a daughter generally does not have the right to inherit her father's economic plants or trees whether or not the deceased is survived by sons.[296] There are local variations. In Mbamisi, Enugu-Uno and Ndeni clans of Aguata, Agwu Division, Agulu in Njikoka Division and Nkwerre Division, the ceremony of *nrachi* may be performed where a man is survived by daughters and no son. After that ceremony, the daughter in respect of whom *nrachi* is performed, is treated as a son and will inherit her father's estate including economic plants and trees. In Arochukwu and Eme communities in

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[292] Ibid.
[293] Ibid. page 111.
[294] Ibid. Customary Law Manual page 111.
[295] Ibid.
[296] Ibid. page 114.

Arochukwu Division, a daughter inherits her father's economic plants and trees if the deceased is not survived by a son.

In Ohafia Division, if a man is survived by only a daughter, economic plants and trees growing within his compound are inherited by the daughter exclusively. Economic plants and trees growing outside the compound are inherited by the daughter in common with the maternal relations of the deceased, (including the widow if married from outside) the daughter taking after them during distribution.[297] If the deceased leaves a daughter as well as a son, economic plants and trees growing within his compound are inherited in common by the daughter and the son. Economic plants and trees growing outside the compound are inherited by the daughter, the son and the maternal relations of the deceased (including the widow if married from outside) the maternal relations taking precedence over the deceased's children during the distribution. A married daughter ranks below other children of the deceased while the unmarried daughter takes on equal basis with other children according to seniority of age.[298]

C. Farm Produce

According to Customary Law Manual, the sons of a deceased man inherit his farm but the eldest son has the right to administer such property for his benefit and that of the other sons pending distribution.[299]

There are local variations to this customary practice. In Aba Division, the eldest daughter of a deceased man as well as all the male relations who made financial contributions to the man's funeral ceremonies have the right to a share in his yams. In Bende, Ishielu, Northern Ngwa and Ogbaru Divisions, the eldest surviving son of a deceased man inherits his farm produce exclusively.[300] Similarly, in Enugu, Ezeike and Etteh clans of Igbo-Ezeh Division, the eldest son of the deceased takes the entire farm produce exclusively

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297 Ibid. pages 114-115.

298 Ibid

299 Ibid. page 116.

300 Ibid. Aba and Bende are in Abia State. Ogbaru is in Anambra State, Mbano and Oru are in Imo State.

whether the family is monogamous or polygamous. In Umuahia Division, the sons of a deceased man inherit his yams as a corporate body. A widow inherits her husband's cassava subject to overall control by the husband's principal heir.

A widow generally does not inherit her husband's farm produce or any part of it whether the husband has surviving children or not. There are however local variations.[301] In Etiti Division, Umunumu and Akanu Ezeala communities in Mbano Division, a widow whose husband has no surviving sons inherits the husband's farm produce. In Oru Division, a widow inherits her husband's cassava and vegetables. In Ohafia Division, where a widow is married from outside the division, she is entitled to inherit the deceased husband's farm produce along with deceased's children and maternal relations.

Generally, a daughter does not inherit her father's farm produce or any part of it.[302] Exceptions exist in Aba and Mbaitoli/ Ikeduru Divisions. The eldest daughter has a right to a reasonable number of her father's yams. In Neke clan of Isi-Uzo Division, the eldest daughter is entitled to twenty seed yams or its value in money out of her father's estate. In Mbamisi, Enugu-Uno and Ndeni clans of Aguata Division, Agwu Division, Agulu in Njikoka Division and Nkewerre Division, a daughter in respect of whom the '*nrachi*' ceremony has been performed has a right to inherit her father's produce. In Ohafia Division, a deceased man's daughter whether married or not, is entitled to inherit and have a share in her deceased father's produce. In Owerri Division, a daughter is invariably given a reasonable portion of her father's farm produce.[303]

D. Money

All sons as a body inherit the father's money. But in Afikpo and Edda clans in Afikpo Division, a man's money is inherited by his eldest uterine brother. In Mbaloye clan of Aguata Division, Enugu, Ezeike and Etteh clans of Igbo-Eze Division Anaedo clan of

[301] Ibid. page 119.
[302] Ibid. Aba is in Abia State, Ikeduru is in Imo State.

[303] Ibid. Customary Law Manual, pages 118-119. Aguata is in Anambra State, Nkewerre is in Imo State.

Nnewi Division, Northern Ngwa Division, Ogbaru Division and Oguta town in Oguta Division, the eldest son inherits the father's money exclusively.

Generally, daughters do not inherit the father's money.[304] There are variations of this general rule. In Arochukwu Division and Mbanesi clan of Nnewi Division, daughters inherit their father's money along with sons and maternal relations (including the widow if married from outside). In the absence of maternal relations, daughters share such money with sons (according to seniority of age) and the mother (if married from outside the Division).[305]

A widow does not inherit the husband's money. However, in Agudo and Ndeni clans of Aguata Division and in Etiti and Mbano Divisions, a widow whose husband has no surviving son inherits her husband's money.[306] In Ohafia Division, a widow who is married from outside the Division inherits her husband's money jointly with the husband's maternal relations and children. A widow married from within the Division does not have such right.[307]

4.2.1 METHODS OF DISTRIBUTION OF PROPERTY AND ORDER OF PRIORITY OF INHERITANCE AMONG RELATIONS

Two methods of distribution of the property of a deceased person are recognized under Igbo Customary Law. The two methods are *per stripe*[308] and *per capital.*[309] *Per stripe* is used where a man is survived by children of two or more wives. In this case, the property is divided among the number of wives who have sons for the deceased. The property is then sub-divided *per capita* among the sons of each wife. Each mother with a child/children

[304] Ibid. pages 124-125.
[305] Ibid page 126.
[306] Ibid.
[307] Ibid. page 126.
[308] *Per stripe* is the distribution of property according to the number of wives of the deceased who have sons for him. *Usekwu* means children born of each wife of a man who has two or more wives. See page 99 Customary Law Manual.
[309] *Per Capital* is the distribution of property equally among those who are entitled to inherit it.

forms one *usekwu.* On the other hand, *per capita* is used where a man is survived by children of only one wife. The property is divided among the number of the children.

In many Igbo communities of Aba, Abakaliki, Afikpo, Aguta, Anambra, Arochukwu, Agwu, Bende, Enugu, Etiti and Ezeagu Divisions, Abacha, Abatete, Nkpor, Oba, Obosi, Ogidi, Ojoto, Oraukwu, Uke, Umudioka and Umuoji towns in Idemili Division, Itchi clan of Igbo-Eze Division, Mgbo, Igbo Ano, Igbo Ato and Orri clans of Ishielu Division, Isi-Uzo, Mbaitoli/Ikeduru and Mbano Division, Nri clan and Abagana town of Njikoka Division, Nkanu, Nkwerre, Nnewi (excluding Anaedo), Oguta, Ohafia, Okigwe and Onitsha Division, Ezumba, Alamiri and Mbano clans of Oru Division, Owerri, Udi (excluding Umuneke and ojebe-ogene clans) Northern Ngwa, Nsukka (excluding Nsukka and Ogurugu towns/and Umuahia Divisions, the distribution of the property is done by *per stripe* when there are more than one wife (i.e. the property is divided into the number of *usekwu* that have sons). The property is then divided *per capita* among the individuals' sons in each *usekwu.* Distribution *per capita* does not necessarily mean that the property is equally distributed. However, where a deceased has children by only one wife, the distribution of his property is done *per capita* among the children.

There are local variations in some communities. In Ezzikwo Division, Akwa-Ukwu Alor, Aloka Etiti, Eziowele, Nnobi, Nnokwa and Umunachi towns in Idemili Division, Ekete-Ekelu, clan of Igbo-Eze Division, Ihiala Division, Effium, Ezzagu and Agba clans of Ishielu Division, (excluding Nri and Abagana), Nsukka town in Nsukka Division, the distribution of the property is done *per capita* among the heirs irrespective of whether the heirs were born by the same or different mother.[310] However, this does not necessarily mean that the property is equally distributed.

In addition, there are variations in other communities. In Onitsha Division, the distribution of landed property is done *per stripe* while distribution of moveable property is done *per capita.* In Anaedo clan of Nnewi Division, the eldest son inherits the whole property.

[310] Op.cit Customary Law Manual. Page 139.

In a polygamous family, however, the eldest son distributes the property *per stripe* at his discretion. In Enugu, Ezeike and Etteh clans of Igbo-Eze Division, the eldest son is the sole heir. In Ogbaru Division, the eldest son inherits the property exclusively though in practice, he sometimes shares the property out with his other brothers.

Where the distribution of the property is done *per capita,* the sons take their shares in order of seniority. The eldest son takes first before the younger ones. As regards the distribution *per stripe*, each *usekwu* takes its shares in order in which the eldest son in them were born. This means that the *usekwu* with the eldest son will take first. The eldest son in each *usekwu* receives the share for his *usekwu* on behalf of himself and his brothers.

A variation of distribution *per stripe* is found in Nnewi and Ogbaru where the various *usekwu* with sons take in order in which their mothers were married in the family. This means that the son of the first wife takes first whatever his age.[311] Where the relations of a deceased man inherit a property jointly, the distribution is done in order of priority. Priority, according to Customary Law Manual means the order in which different persons or classes inherit a deceased person's estate to the exclusion of others according to the degrees of their respective relationship with the deceased.

The order of inheritance of economic plants and trees is as follows. A man's economic plants and trees are inherited by his sons, failing sons, brothers of the full blood, failing them, the father, failing him, brothers of the half blood, failing them, the eldest nearest paternal male relation. There are however local variations. In Enugu, Ezeagu, Ezzikwo, Nkewerre, Okigwe and Udi Divisions and in Ndeni and Agudo clans of Aguata Division, in the absence of sons, the father inherits, failing father, full brothers, half brothers and nearest paternal male relations take in that order. In Aguata Division (excluding Ndeni and Agudo clans) and Owerri Division, in the absence of sons and full brothers, half brothers take, failing them, the father takes, failing father, the nearest paternal male relation takes. In Anedo clan of Nnewi Division, the eldest son of a deceased male inherits all his economic

[311] Op.cit Customary Law Manual. Pages 139-140.

plants and trees[312] In Mbanesi clan of the same division, a deceased man's economic plants and trees are inherited by all his sons but the eldest son takes two shares on distribution.[313]

The order of inheritance of farm produce among relations is as follows. In Bende, Idemili, Igbo-Eze, Ihiala, Ishielu, Nkanu, Onitsha, Oru, Ukwa and Umuahia Divisions, sons inherit, failing sons, brothers of the full blood inherit, failing them, the father inherits, failing father, paternal half brothers inherit, failing them the eldest nearest male paternal relations inherits. In Agudo, Enugu-Uno and Ndeni clans of Aguata Division, Anambra, Agwu, Enugu, Ezeagu, Ezzikwo, Isi-Uzo, Mbano, Nkwerre, Nnewi, Ogbaru, Oguta Okigwe, and Udi Divisions, sons inherit, failing sons, the father inherits, failing father, brother of the full blood inherit, failing them, paternal half brother inherit, failing them, the eldest nearest male paternal relation inherits.[314]

In Aba, Abakaliki, Arochukwu, Mbaise, Mbaitoli/Ikeduru, Njikoka, Northern Ngwa, Nsukka and Owerri Divisions, sons inherit, failing sons, brothers of the full blood inherit, failing them, the father inherits, failing father, the eldest nearest male paternal relations inherits. In Afikpo and Edda clan of Afikpo Division, the male children in a polygamous family or the eldest child in a monogamous family will share the yams with the maternal brothers of the deceased. Other farm produce are inherited by the nearest maternal sisters e.g. sisters of the same mothers daughters of the sisters etc. in Ohafia Division, farm produce is shared by all maternal relations (including widow if married from outside) and the children of the deceased, the children taking precedence during the distribution.

It is evident from our discussion the Igbo customary law of inheritance that many Igbo communities favour male children and male relations liked fathers and brothers more than daughters and other female relation like wives, mothers and sisters. Besides, the eldest male child is given precedence over other male children. The variation in some communities where women as widows, wives, sisters and daughters are allowed to inherit and where male

[312] Op.cit. page 112.
[313] Op.cit. pages 112.
[314] Op.cit. pages 117-118.

children are allowed to inherit property jointly irrespective of their seniority in their families are few.

In this connection, this customary law of inheritance is not only discriminatory against women but also against other sons of a man who, due to circumstances beyond their control were not born first in their families. This discrimination is not only unfair but also unconstitutional as it violates the provision of the 1999 Constitution of the Federal Republic of Nigeria.[315] There is no fixed ratio for the sharing of the property among the heirs. The share of the eldest son which is usually larger than that of any of his junior brothers is determined on the basis of what the administrators think reasonable considering the size of the estate and the number of the heirs.[316]

The reason for giving the eldest son special right of inheritance and other male relations of a deceased man the right of inheritance as against his wife/wives and female children is that by the custom, the male heirs are under obligation to cater for the needs of the wife/wives and children of the deceased. While this reason could be plausible in the past when there were well established extended families, it is no longer so in the modern times when the male heirs in many cases cater for members of their own nuclear families thereby neglecting their duties to the family of the deceased.

4.3 THE BENIN CUSTOMARY LAW OF INHERITANCE

The Benin people are one of the ethnic tribes in Nigeria. They are concentrated in five local government areas of Edo State of Nigeria. These local governments are Oredo,

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[315] Section 41(1) & (2) of the Constitution provides that no citizen of Nigeria shall be subjected to any disability or restriction and depravity based on sex, ethnicity and circumstance of his birth.

[316] Okoro Nwakamma. The Customary Laws of Succession in Eastern Nigeria (Sweet and Maxwell. London 1966) page 124.

Orhionmwon, Ovia South West, Ovia North East and Uhunmwonde. The Benin people form the core of the Benin Kingdom which at the height of its power comprised other Edo speaking groups from Esan, Esako, Owan and Akoko Edo to the North East. They are called Edo-speaking people because their language sprang from the same source.

They are believed to have spoken the same language. The variations came through migration, war and linguistic interference.[317]

To some extent the Benin customary law of inheritance has been collated and stated in a handbook[318] by the Benin Traditional Council on the authority of the Oba of Benin who is the custodian of the Benin customary law. Our discussion of the Benin customary law of inheritance is based mainly on the handbook and decided cases. The primogeniture rule is one of the main rules of the Benin customary law of inheritance whereby the eldest son of a deceased person inherits all his property to the exclusion of other children. This rule is stated in the handbook has been affirmed by the Supreme Court.[319] Our courts have taken judicial notice on the rule in accordance with Section 14 of the Evidence Act.[320]

Other rule of inheritance of Benin customary law stated in the handbook are yet to be proved and established before our superior courts as required by the Evidence Act[321] because people have not contested such rules in courts. However since the handbook was prepared by the Benin Traditional Council on the authority of the Oba of Benin whom the Benin people owe great allegiance. It is conceivable to suggest that the handbook, like the customary law manual of the Igbo, should be accepted by our courts in line with Section 59 of the Evidence Act.[322] Section 59 of the Evidence Act allows the court to rely on any book or manuscript recognized by a community in deciding issues relating to customary law of such a community.

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317 Igbinokpogie John, Lawal M.B and Ekhator John. The Benin Kingdom Historical and Environmental Perspectives, (Institute for Benin Studies Nigeria 1998).

318 A Handbook on some Benin Customs and Usages (Eweka Court the Palace Benin-City. Nigeria 1996.)

319 *Ogiamien v. Ogiamien (1967) N. M. L, R 245 at page 247.* Where the Court said 'it is common ground that according to Benin custom the eldest son succeeds to all the property of the father to the exclusion of other children… We can only say that it is not unknown in some other highly civilized countries of the world'.

320 Op.cit.

321 Op.cit.

322 Op.cit.

Historical accounts of the Benin people show that the rule of primogeniture of the Benin customary law of inheritance was introduced by the first Oba (King) of Benin, Oba Eweka 1 who ruled about 1200 A.D.[323] Oba Eweka 1 established that the eldest male child of the Oba would succeed him on the throne and also inherit his estate to the exclusion of other children provided he had solely performed the funeral rites of his father. However, the eldest son had the obligation to take care of the wives and other children of his father.

The Benin people adopted this rule as a mark of respect and honour for their Oba. Hence, when a Benin man died intestate, his surviving male child inherited his entire property to the exclusion of other children after he had performed the customary funeral rites of his father. The eldest son who inherited the property to the exclusion of other children was under the obligation to take care of his deceased father's other children. The failure of the eldest son over the years, to take care of other children after inheriting the property of their deceased fathers to the exclusion of other children led to acrimony and serious conflicts among the eldest son and other male children of other wives of the deceased. Consequently, there was a general discontent amongst the people with the primogeniture rule. The people modified the rule to permit the children of the other wives of a deceased person to inherit his estates. This led to the evolution of the *urho* system of inheritance,[324] *urho* literally means *per stripe*. *Per stripe* means the property of a deceased Benin man will be distributed according to the number of his wives who have children for him. The properties distributed are for the children and not for the wives. Under the *urho* system the eldest son is entitled to a lion's share of the deceased property which is usually his main or principal dwelling house called *Igiogbe.* Although the eldest son is still given precedence over other children, the modification of the primogeniture rule by the *urho* system which entitles all children of the deceased to inherit his property is more equitable than the primogeniture rule which entitles only the eldest son to inherit the property. The *urho* system is also stated in the handbook on

[323] Osamuede Efe Sophia, The Igiogbe Controversies in the Bini Customary Law of Succession: Judicial Review
(Praise Communications Press Nigeria 2003) Eghareaba Jacob, A short History of Benin (Ibadan University Press Nigeria, 1968) Bradbury R.T, Benin Studies (Oxford University Press 1973).

[324] Osamuede Efe Sophia, ibid page 3.

some Benin Custom and Usages.[325] With the evolution of the *urho* system of inheritance, the burden of the full burial ceremony of his deceased father solely born by the eldest surviving son is no longer the practice. The full burial is now jointly done by all his children.[326]

4.3.1 Rules of Inheritance under the Benin Customary Law

There are two broad rules of inheritance under the Benin customary law depending on whether the deceased was a hereditary traditional title holder, a non-hereditary traditional title holder and an ordinary person. According o the handbook, the customary law of inheritance as regards the estate of non-hereditary traditional title holder and an ordinary person is that the *Igiogbe* i.e. the house in which the deceased lived and died (and sometimes where he was buried) is inherited by the eldest son. However, custom enjoins the eldest son to accommodate his brothers and sisters provided they are of good behavior until they are able to build their own houses and move out or, if women until they get married.

Other landed properties of the deceased are distributed among the other children according to *urho* in order of seniority i.e. according to the number of the wives of the deceased. Each wife with children forms an *urho*. Where the property is distributed according to *urho*, the male children take precedence over the female children. The eldest son who has inherited the *Igiogbe* is still entitled to a share in the other landed properties. Similarly, all other moveable properties are distributed among all the children starting with the eldest son. If the eldest child of the deceased is a female, customs allows her with the consent of the family elders and other children to be given a reasonable share of the property on the ground that she is the most senior of the children. Where the deceased has one house with many rooms, custom allows the rooms to be shared among the children proportionately in order of seniority with the consent of the eldest son and family elders. This is allowed so as to unite the children.[327]

As regards inheritance of the property of a hereditary traditional title holder, the eldest surviving son is solely responsible for his burial ceremony though the other children

[325] Handbook on Some Benin Customs and Usages. Op.cit at page 13.
[326] Ibid. page 9, Osamuede Efe Sophia. Op.cit page 4.
[327] Handbook on Some Benin Customs and Usages. Op. cit. pages 11-13.

may contribute to assist him. It is the eldest son who performs all the ceremonies. After the eldest son has performed the final burial ceremony, he succeeds to his father's traditional title and inherits all his property to the exclusion of other children. Morally, custom expects him to give part of the property to his brothers and sisters. In addition, customs expects him to accommodate his other brothers and sisters provided they behave well towards him. Where there is no male child to succeed to the hereditary title, a brother or any male paternal relation of the deceased succeeds to the title after due confirmation by the Oba. The deceased's properties will be shared among his female children.[328]

4.3.2 Judicial Approach to Women's Rights and the Concept of Igiogbe

There have been judicial decisions on women's right of inheritance as a wife or as a daughter under Igbo Customary law of some communities. In *Nzianya v. Okagbue*[329] and *Nzekwe v. Nzekwe*,[330] the Supreme Court held that under Igbo customary law of Onitsha which does not give a wife the right to inherit property of her deceased husband, a widow has the right only to occupy her deceased husband's property with the consent of her husband's family or subject to her good behavior. She cannot lay claim to be the owner of the property or alienate it.

In view of the fact that the Supreme Court is the highest court in the country and its decisions are binding on all other courts, this decision of the court that a widow does not have the right of inheritance under the Igbo customary law of Onitsha could impliedly mean that a widow does not have the right of inheritance under the customary law which does not give such a right to a widow.

In *Mojekwu v. Mojekwu*[331] and *Uke v. Iro*,[332] the Court of Appeal considered the legality of the customary law of Nnewi, which deprives a daughter of the right to inherit her

[328] Ibid. page 15.
[329] (1963) 1 All N.L.R 352.
[330] (1988) 1 NSCC 581.
[331] (1997) 7 NWLR (Pt 512) 283.
[332] (2001) 11 NWLR (Pt 723) 196.

deceased father's property against her rights guaranteed by the 1999 Constitution.[333] The court held that the Olikpe custom of Nnewi which deprives a daughter of right to inherit her deceased father's property or any customary law which discriminates against a woman is unconstitutional and is also repugnant to natural justice, equity and good conscience and therefore unenforceable. Similarly, in *Muojekwu v. Ejikeme,*[334] the Court of Appeal held that the *nrachi* custom of Nnewi is repugnant to natural justice, equity and good conscience and unenforceable. Therefore, a female child does not need the performance of *nrachi* ceremony on her to be entitled to inherit her deceased father's estate.

This progressive decision of the Court of Appeal that the Igbo Customary law of Nnewi which deprives a female child the right to inherit her deceased father's estate was however reversed by the Supreme Court when the case of *Mojekwu v. Mojekwu* got to that court as *Mojekwu v. Iwuchukwu*[335] (by the substitution of Caroline Mgbafor. O. Mojekwu deceased with Mrs. Theresa Iwuchukwu). The Supreme Court's reason for reversing the Court of Appeal's decision that Nnewi customary law of *Oli-Ekpe* which precludes a female child from inheriting the property of her father is repugnant to natural justice, equity and good conscience was because the issue was raised by the Court of Appeal *suo motu* and without hearing from the parties to the case.[336] The court went further to state that the pronouncement of the Court of Appeal that the *Oli-Ekpe* custom is repugnant went far as it is capable of stirring the hornet's nest. This is because it is capable of causing strong feelings against all customs which do not recognize a role for women.[337]

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[333] Section 41(1) 1999 Constitution of the Federal Republic of Nigeria. CAP C 23 Laws of the Federation of Nigeria 2004.

[334] (2000) 5 NWLR (Pt 657) 402. The Court also stated that the *nrachi* custom which allows a woman to stay unmarried for the rest of her life conceiving for any man of her choice tends to encourage promiscuity and prostitution contrary to Article 6 of the Convention on Elimination of all Forms of Discrimination Against Women (CEDAW). Article 6 of the CEDAW obliges countries who are signatories to the convention to take measures to suppress trafficking in women and exploitation through prostitution. Nigeria is a signatory to the Convention and so has an obligation to comply with the provision of the convention.

[335] (2004) 11 NWLR (Pt. 883) 196.

[336] Op.cit page 202 per Mohammed J.S.C.

[337] *Mojekwu v. Mojekwu.* Op.cit. page 204 per Uwaifo J.S.C.

Aigbovo[338] has opined that the Supreme Court's failure to consider the alternative ground of inconsistency with the constitution on which the Court of Appeal based its decision has clearly shown that the Supreme Court is reluctant to depart from its conservative policy of protecting fundamental native customs. According to him, this conservative policy of the Supreme Court to favour the preservation of customary laws even if they are unfair by modern day standard has left open the question whether or not a customary law which discriminates against women is valid.

This researcher shares the view expressed by the learned writer and submitted that the Supreme Court's condemnation of the decision of the Court of Appeal which declared a customary law that is inconsistent with the provisions of the constitution on guaranteed fundamental human rights as not only unconstitutional but repugnant to natural justice, equity and good conscience is unfortunate. This is because the Supreme Court, by that statement, has dampened the expectations of many progressive people of this country who have thought that the affirmation by the Supreme Court of the Court of Appeal's decision on the unconstitutionality of some of our customary laws that are outrageous, obnoxious and barbaric would help to effect some modifications to our customary laws and thereby help the law to develop to meet the social changes in modern society.

Twenty-six years and ten year after its landmark decisions in *Nzekwu*[339] and *Mojekwu,*[340] respectively, the Supreme Court was presented with another opportunity to pronounce on the two limbs of the *Oli-ekpe* custom, namely the disinheritance of the widow without a male child and the female child. In *Ukeje v. Ukeje*[341] the court had the choice to follow its decision in *Mojekwu*[342] and refuse to endorse one of the grounds of the Court of Appeal judgment in that case by virtue of which the Igbo native law custom which precludes

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338 Aigbovo, O, 'Supreme Court Policy in relation to Customary Law Cases,' in Guobadia, D.A. and Adekunle,
A.O. eds. The Uwais Court: The Supreme Court and the Challenges of Legal Development (1995-2006), revised
ed. (Lagos: NIALS Press, 2007), 297.

339 Op. cit.

340 Op. cit.

341 (2014) 3-4 MJSC 149, (2014) 234 LRCN 1.(2014) 11 NWLR (Pt 1341) 185SC

342 Op. cit.

a female child from inheriting her father's property was struck down (This ground is that the Igbo native law and custom is incompatible with the non-discrimination clause of the Constitution)[343] or endorse the decision of the Court of Appeal and thereby lend its considerable authority to the judicial liquidation of customary law rules which disinherit females in Nigeria. In the case of *Anekwe & Anor v. Nweke,*[344] the Supreme Court endorsed the decision of the Court of Appeal refusing to apply an Akwa Igbo custom which disinherits a widow without a male of the property of her deceased husband. The custom of Akwa people of Anambra State pleaded and relied on by the appellant is barbaric and takes the Akwa community to the era of cave man. It is repugnant to natural justice, equity and good conscience and ought to be abolished.[345] The effect of the road taken by the court in *Anekwe*[346] would be no less profound. If it endorsed the Court of Appeal decision in that case, it would give the widow of a deceased man the right to inherit and not merely *usufructuary* rights over his property. It is fortuitous that both cases were decided by the Supreme Court on the same day.[347]

In those decisions the Supreme Court at last, relied on *Section 42*, the non-discriminating provision of the Constitution of the Federal Republic of Nigeria 1999,and the repugnancy clause, to strike down in no certain terms gender-based discriminatory customary law rules. It is argued that an important reason for the change in the policy of the court is its gender composition, although the promotion to the Supreme Court of some Court of Appeal justices who have favoured the striking down of the gender-based discriminatory customary rules of inheritance cannot be discounted. It is also argued that it will be difficult to convince the Supreme Court to reverse itself in any subsequent challenge to its new policy. It is further argued that in the light of Nigeria's obligation under several International Human Rights Conventions and developments in other Commonwealth jurisdictions in Africa with similar discriminatory native laws and customs, it would be difficult, if not

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343 The second ground of the Court of Appeal judgment is the incompatibility of the Igbo custom with that of Lagos,
the *lexsitus.* Under the custom of the Yoruba of Lagos, a female child can inherit from her father.

344 (2014) LPELR-22697(SC), (2014) 9 NWLR (Pt.1412) 393.

345 Ibid. page 41. Per Nwali J.S.C.

346 Ibid.

347 11th April, 2014

impossible for the Supreme Court to reverse its decision in the two cases. The Supreme Court decision has come to stay because its decision is final and an appeal can only rely to God.

Similarly, there have been litigations concerning the inheritance of *Igiogbe*. Thus, there have been many judicial pronouncements on the concept of *Igiogbe.* As stated in the preceding paragraph, *Igiogbe* is the principal house where the deceased Benin man lived and died. To the Benin people, the *Igiogbe* is not just a house. Traditionally, the *Igiogbe* houses the ancestral shrine and the staff of the particular family ancestors. Osamuede and Okeaya-Inneh[348] said the Benin people regard the *Igiogbe* as the seat of the ancestors of the family where members of the family worship their ancestral god or deity. It is also the place where members of the family observe some customary activities like traditional marriage ceremonies, naming ceremonies etc. This is why the *Igiogbe* in Benin custom is important.

The litigations on the concept of *Igiogbe* centered on the following issues; can more than one house constitute the *Igiogbe*? Does bare land constitute *Igiogbe?* Can *Igiogbe* be alienated or can a testator devise his *Igiogbe* under a Will to another child while the eldest son is still alive? The issue whether two houses constituted *Igiogbe* arose in *Idehen v. Idehen*.[349] In that case, a father gave his first son his two *Igiogbe* by Will. The son predeceased him. The father did not rectify the Will before his death. Thus, the children of his predeceased son claimed ownership of the *Igiogbes* relying on the Will. The eldest surviving son at the death of the father instituted a legal action to refrain the children of the predeceased son from claiming the *Igiogbe.* The court held that under the Benin customary law of inheritance, the *Igiogbe* which is the house where the deceased Benin man lived in his lifetime is inherited by the eldest surviving son after the son has completed the funeral rites of his late father. The court awarded the two *Igiogbe* which were six kilometers apart to the eldest surviving son of the testator at the time of his death.

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[348] The Igiogbe Controversies in the Bini Customary Law of Succession: Judicial Review Op.cit at page XI; Benin
Native Law and Custom at a Glance (Gift- Print Associates Nigeria 2007) at p.30.

[349] (1991) 6 NWLR (Pt. 198) 382.

The decision of the court was criticized by Osamuede.[350] According to her, a man can only have one principal or main dwelling house where he lived and died and the family ancestral shrine can only be in one place. She said that the idea of double *Igiogbe* as pronounced by the court in *Idehen v. Idehen*[351] was against Benin Customary law. It is submitted that the view expressed by Osamuede in respect of the decision of the court is most commendable. Notwithstanding that the facts of the case showed that there was evidence that the deceased lived in the two houses in his lifetime, the inheritance of the two houses as *Igiogbe* by the eldest son to the exclusion of other children will further compound the conflicts and acrimony among the children.

It is therefore gratifying that the Supreme Court in *Agidigbi v. Agidigbi*[352] expressed the view that only one house should be regarded as *Igiogbe.* This view is contrary to its decision in *Idehen v. Idehen*[353] where the court held that two houses constituted *Igiogbe*. This view of the Supreme Court in *Agidigbi's* case is better and it is hoped it will serve as a warning to eldest sons who may want to make more than one house *Igiogbe* for selfish ends.

As regards the issue whether a parcel of land can be regarded as an *Igiogbe*, the Supreme Court in *Imade v. Otabor*[354] held that *Igiogbe* is a principal house and not a piece of land. Moreover, the *Igiogbe* cannot be given to any person other than the eldest surviving son by a Will.[355] The *Igbiogbe* cannot also be bequeathed to the eldest son during the lifetime of a Benin man. By the nature of *Igiogbe* under the Benin customary law, the prerequisite for its inheritance is that the owner must have died before the question of who inherits it will arise.

In *Osula v. Osula,*[356] the testator, a Benin traditional chief, lived and died in his house. Before his death, he made a Will which made provision for his wife and children (of a marriage under the Act). No provision was made for the second set of respondents in the

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350 Op.cit.
351 Ibid
352 (1996) 6 NWLR (Pt. 454) 300 at page 311-312.
353 Op.cit.
354 (1998) 4 NWLR (Pt.544) 20 at 23.
355 *Igbinoba v. Igbinoba (1995) NWLR (Pt. 371) 375 at 376.*
356 (1995) 9 NWLR (Pt. 419) 259.

Will. The second sets of respondents who claimed to be the children of the testator and his eldest surviving male child who was denied paternity instituted the action against the validity of the Will. The Supreme Court unanimously held that the *Igiogbe* could not be taken away from the eldest son who succeeded his father. Therefore the testator was wrong to have given the *Igiogbe* by Will to a person other than his eldest son.

The issue of whether *Igiogbe* can be alienated arose in the case of *Ugbo v. Asemota.*[357] In that case, the deceased was survived by among others, two sons. The second plaintiff was the eldest son while the defendant was the second son. Their deceased father left behind a house and rubber plantation. The second son lived in the house. The eldest son sold it to the first plaintiff. The second son and other members of the family argued that before their father died he had told the family head that the house should be shared between his sons. It was held that under the Benin Customary law, the father could not deprive his eldest son form inheriting his house absolutely. In addition, the eldest son was free to sell the house to the first plaintiff.

The custodian of Benin custom, the Oba of Benin, Oba Akenzua II, was said to have testified in the case. The Oba testified that once the eldest male child has inherited the *Igiogbe*, the house belongs to him absolutely and he can do whatever he likes with it.

It is pertinent to state that the decision in *Ugbo v. Asemota*[358] is that of a High Court. Since the issue of whether *Igiogbe* can be alienated has not gone to higher courts, it seems that the decision in that case remains the law on the issue for now. Moreover, it is evident from the handbook on Benin Customs and Usages those women as wives are not entitled to inherit the property of their husbands.

It is clear from the discussion of Benin customary law of inheritance based on primogeniture and *urho* rules that the custom places a premium on male children vis-à-vis female children. The primogeniture rule of the past which prescribed that the eldest male surviving child of a deceased Benin man should inherit all his property to the exclusion of

[357] Unreported Suit No. B/49/70, High Court of Justice Benin.
[358] Ibid.

other children was very unfair. Hence, the *urho* rule was introduced to modify the primogeniture rule with its inherent injustice. By the *urho* rule, the children (both male and female) of the deceased Benin man who had more than one wife are entitled to share in the estate of their father as the property is shared among the children of the wives of the man.

Nevertheless, both the primogeniture and *urho* rules of inheritance are discriminatory against women. This is because although the *urho* rule allows female children to share in the property of their deceased father with the male children, precedence is given to male children of the stripes. This sort of discrimination by reason of sex is against the provision of *Section 42(1) of the 1999 Constitution.*[359]

The import this provision is to protect all citizens of Nigeria, male or female against any form of discrimination by reason of sex, religion, ethnicity etc. which may be imposed by any law in force in Nigeria or any executive or administrative action of the government. Therefore, the Benin customary law of inheritance which discriminates against women by reasons of being born female persons is unconstitutional.

In the light of the foregoing, the Benin people who introduced *urho* rule of inheritance to modify the unjust primogeniture rule, should, in like manner, modify the whole of Benin customary law of inheritance to give female children of a deceased man equal right of inheritance with his male children. Similarly, wives should be allowed inherit part of their husband's estate. This will be in line with the provision of 1999 Constitution of Nigeria which is the Supreme law of the country.

In addition, the primogeniture rule which deprives other male children of the right to inherit the *Igiogbe* simply because they happened to have been born after the first male child is unfair and unconstitutional. It is unconstitutional because it violates the provision of Section 42(2) of the 1999 Constitution[360] which stipulates that no citizen of Nigeria should be subjected to any disability or deprivation merely by reason of the circumstances of his birth.

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[359] Op.cit. page 16
[360] Op.cit.

4.4 YORUBA CUSTOMARY LAW OF INHERITANCE

There is no conclusive tradition on the origin of the Yoruba people of Nigeria because there are different versions of the mythological traditions on the historical origin of the people. However, according to Biobaku[361]

> *The name Yoruba is applied to a linguistic group numbering several millions, which occupies a large area extending through Kwara, Lagos, and Western States of the Federation of Nigeria and the Republics of Dahomey and Togo. Besides their common language, the Yoruba are united, to a large extent, by a common culture, by traditions of a common origin in the town of Ile-Ife in the Western State of Nigeria.*

This research focuses on the Yoruba people who inhabit mainly the South- Western part of Nigeria. They are found in States of Lagos, Ogun, Oyo, Osun, Ondo, Ekiti and part of Kwara State. Although the Yoruba people speak a common language and are united to a large extent by a common culture, there are local dialectical variations in the language. There are also slight local variations in their custom. However, the Yoruba customary law of inheritance as regards women's rights of inheritance is uniform.

It is pertinent to state that there are more Muslims in Yoruba land than in any of the other Southern Nigeria. Although Sharia Courts and Islamic legal system are yet to be established in Yoruba land in order to facilitate the application of Islamic personal law on the matrimonial and succession matters as provided for by the Constitution,[362] some pious Muslims who are aware of Islamic law of inheritance request Muslim clerics/scholars who are knowledgeable about Islamic law of inheritance to distribute the property of their deceased Muslim relations according to Islamic law.

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[361] Source of Yoruba History (Clarendon Press Oxford 1973) page 1.

[362] 1999 Constitution of the Federal Republic of Nigeria. Section 25(1) of the Constitution allows any State to establish a Sharia Court of Appeal for the State. By Section 275(1) such Sharia Court of Appeal has jurisdiction to deal with matters involving Islamic Personal Law on Marriage, Succession etc.

However, many Yoruba Muslims probably out of ignorance of Islamic law of inheritance or their belief in their custom still apply customary law of inheritance in the distribution of the property of their deceased Muslim relatives. Therefore, unlike the Igbo and Benin people, many Yoruba Muslims are torn between their customary laws of inheritance and Islamic. In this connection, having discussed Islamic law of inheritance in Chapter 3, it is appropriate to discuss the Yoruba customary law of inheritance.

Unlike the customary laws of inheritance of the Igbo and Benin people which have been complied into a handbook or a manual, there is no single handbook or manual on customary law of inheritance of the Yoruba. Therefore, our discussion of the customary law of inheritance of the Yoruba is based on the various textbooks written by erudite author and judicial decisions on the customary law of inheritance of the Yoruba.[363]

The consensus of authors of books on customary law of inheritance of the Yoruba people is that in the past the property of a deceased person was inherited by his full blood brothers and sisters. His children had no right to inherit his property. The brothers and sisters of the deceased were under a duty to provide for his widows and children. The children and half brothers and sisters of a deceased person were considered after the claims of the full blood brothers and sisters had been satisfied.[364]

In view of the fact that culture and custom are dynamic and change with the socio-economic development of the society, over the centuries, the right of the siblings to inherit the property of a deceased person to the exclusion of the children of a deceased became out of place. Thus, the rule that the children of a deceased person should inherit his property was

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[363] Fadipe N.A, - The Sociology of the Yoruba (University Press Nigeria 1970): Lloyd P.C. - 'Some Notes of the Yoruba Rules of Succession on Family Property' (1959) Vol.3 Journal of African Law p.7: Elias T.O, Nigerian Land Law and Custom (Routlegde and Kegan Paul London 1951): Animashaun, T.O.G, Law of Succession, Will and Probate in Nigeria (MIJ Publishers Nigeria 2000). Kasumu and Salacuse, Nigeria Family Law (Butterworth London 1966).

[364] Ibid.

introduced. This rule which was initiated by the Yoruba people of Ibadan was later and gradually adopted throughout Yoruba land.

According to Lloyd P.C.,[365]

> *Johnson[366] records that in 1858 the Ibadan chiefs made a rule later adopted by the Alafin of Oyo for the whole kingdom that a man's self – acquired interest in property (at this period slaves, guns, horse etc.) should not pass to his junior brothers but to his sons.*

According to Kasumu and Salacuse[367] 'The rights of the brothers and sisters (to succeed to property) are in some areas only curtailed but not abrogated. For example, in Abeokuta they are still entitled to one third of the deceased property'.

4.4.1 Persons Entitled to Inherit Property

The rule of the customary law of inheritance of the Yoruba that the property of a person who died intestate is inherited by his surviving children has been confirmed by many judicial decisions. In *Adeseye v. Taiwo*[368] the appellants as plaintiffs in the High Court sought an order of Court to join them in the scheme of distribution for equal shares with the defendants (respondents) in the proceeds of sale of a property. The appellants claimed to be blood relations of Chief Taiwo, deceased and owner of the property in question through one Ajayi the deceased's mother's sister. The respondents were the daughters and grandchildren of the deceased. The appellant's claim was dismissed on the ground that only children of the deceased could succeed to his estate. The appellants appealed to the Federal Supreme Court. Therefore the issue for determination was whether blood relations of a deceased Yoruba person, who was survived by children, could have a share of his real property under the native law and custom of the Yoruba. The Federal Supreme Court held that the children of a

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365 Llyod op.cit page 157.

366 Johnson S, 1921.The History of the Yoruba from the Earliest Times to the Beginning of the British Protectorate
(Lowe and Brydone Norfold Printers. Thetford 1976).

367 Nigeria Family Law (Butterworth London 1966) at page 192.

368 (1956) SCNLR 265; *Gbadamosi Rabiu v. Silifatu Abasi (1996) 7SC NJ 53; at page 55. Amodu v. Obayomi (1992) 5 NWLR (Pt. 242) 503 at page 506.*

deceased person could inherit his real property to the exclusion of other blood relations. The court stated thus: 'Under the Native Law and Custom of the Yoruba's the real properties of a deceased person who had children surviving go to his children and not his uncles, aunts and cousins'.

The landed property of a deceased person is inherited jointly by his children as family property with the eldest son surviving him as the head of the family called *Dawodu. Landed* property inherited by children of a deceased as family property could be a house where the deceased lived during his life-time. It is pertinent to state that it is not necessary that the deceased should expressly provide that his landed property should be used as family property. This is because it is an established rule in Yoruba customary law of inheritance that on the death of a person intestate, his landed property automatically devolves to his immediate family (i.e. the children) as family property.

Although family property is in the realm of land law, a brief discussion of the concept is necessary because of the concept of family property is a cardinal principle of the Yoruba customary law of inheritance. In *Usiobaifo v. Usiobafo*[369] the Court of Appeal described the concept of family property as original to our indigenous society and the bedrock of our law.

A landed property which is inherited by all children as family property remains so until it is partitioned by the consent of all members of the family. The title of a family property is vested in the family of the founder as a corporate entity. The title is joint and indivisible. The individual member of the family has no separate claim of ownership to any part or whole of it. A family property is under the control of the head of the family. In essence, the head of the family acts as a trustee or custodian for all the beneficiaries of the family property.

Individual members of the family do not have any separate rights to the property because all members have equal rights. Therefore, no member of the family can alienate or dispose of the family property without the consent of the other members of the family.

[369] (2001) FWLR (Pt. 61) 1784.

Carey J. in *Coker v. Coker*[370] formulated the definition of family house/property thus:

> *A family house in this connection is a residence which the father of a family sets apart for his wives and children to occupy jointly after his decease. All his children are to reside there with their mothers and his married sons with their wives and children… No one has any chargeable or alienable interest in the family house. It is only with the consent of all those entitled to reside in the family house that it can be mortgaged or sold.*

In *Kadiri Adagun v. Fagbola*[371] the court held that a member of a family cannot alienate part of the family property without the prior consent of the family head and other members of the family. It is only when the family property is partitioned with the consent of all members of the family that a right of ownership can arise. Thereafter, a member of the family can alienate his own portion of the property. In that case, the first defendant was a member of the Olorogun family. A portion of the family property was allotted to him to occupy under customary law. He entered into occupation. Later, he mortgaged the portion allotted to him for occupation to the second defendant without the knowledge of the family. The mortgaged eventually proceeded to advertise the property for sale. The family first got information about the mortgaged through the notice of sale. The plaintiff suing for and on behalf of Olorogun family sought first an order setting aside the mortgage and secondly to recover possession of the portion allotted to the first defendant. The court held that the first defendant had no right to grant the mortgage and the mortgage was set aside.

Similarly, in *Alao v. Ajani,*[372] the plaintiff and the 1st and 2nd defendants were members of the same family. The 1st and 2nd defendants constructed a building on a portion of family land. The building was financed by the 3rd and 4th defendants and the 1st and 2nd defendants agreed to grant leasehold to the land to the 3rd and 4th defendants for 40years in consideration of the money they expended on the building.

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370 14 N.L.R 83 (the judgment was delivered in 1938).
371 (1932) 11 NLR 110.
372 (1989) 4 NWLR (Pt.113) 1 at page 3.

Whereupon, the plaintiff sued the defendants claiming: (1) a declaration that the alienation of the family land by the 1st and 2nd defendants to the 3rs and 4th defendants was void and (2) an account of the money realized by the 1st and 2nd defendants to the other members of the family from the alienation. The contention of the plaintiffs was that the land in dispute was family property and that notwithstanding the development of the land by the 1st and 2nd defendants, they could not alienate the property to the 3rd and 4th defendants without the consent of the family. The defendants contended that they was no alienation of the family land and that in any case, any member of the family who builds on the family land is entitled to let out his building and collect rent without consultation with any other member of the family.

The learned trail judge upheld the contention of the plaintiff and gave judgment in their favour. On appeal, the Court of Appeal reversed the decision of the learned trail judge and dismissed the plaintiff's claims. Dissatisfied with the Court of Appeal's decision, the plaintiff's appealed to the Supreme Court. The Supreme Court allowed the appeal.

The court held that family property under Yoruba customary law belongs to the family as a whole and that all individual members of the family are entitled to enjoy the property. Moreover, a member of a family who built on a portion of family land could not alienate the building thereon without the consent of the family.

In the past, when family property was to be partitioned, factors like age and sex of the children were considered in determining the order of inheritance and the quantum of share. Thus, a female child regardless of her age used to take last and her share used to be less than the shares of her brothers.[373]

Hence in *Lopez v. Lopez*[374] the court held that under Yoruba customary law, both male and female children acquired interest in family property but the female did not have the same rights as the males.

[373] Kasumu and Salacuse, Nigeria Family Law (Butterworth London 1966) at page 292.
[374] 5 NLR 50.

However in *Sule v. Ajisegiri*[375] the plaintiff claimed partition and sale of six properties alleged to form the undistributed portion of their grandfather's estate. The p[plaintiff were children of the same mother who they claimed was entitled to an equal share of the property with the defendant, their mother's brother. The defendant's claim was that as a male child he was entitled to a larger share than the plaintiff's mother. The court held that under Yoruba customary law, the division of family property or its proceeds must be shared equally among the children of a deceased regardless of sex. This decision of the court has firmly established the modern Yoruba customary law of inheritance that both male and female children are entitled to equal share in the real and personal property of their deceased father.

4.4.2 Method of Distribution of Property.

Three are two methods of distributing a deceased self-acquired property (other than that reserved as family property) under Yoruba customary law of inheritance. The two methods are called *Idi-Igi (per stripe)* and *Ori Ojori (per capita)*. The *Idi-Igi (per stripe)* method is generally used where a deceased man had more than one wife. The property is divided into equal shares in accordance with the number of wives of the deceased with children. Each mother with children or child forms a branch of the family or a stripe for the purpose of inheritance. The children of each wife take a share regardless of how many they are. The children of each wife then divide their shares they like among themselves. However, where the deceased had only one wife, his property is distributed equally among his children.

The second method is *Ori Ojori* i.e. distribution per capita. By this method, the distribution of the property among the children is equal. The difference between the two methods is that all the children get equal share under the *Ori Ojori (per capita)* while under *Idi-Igi* method, though the stripes get equal shares, the share of each child depends on the number of the children in each stripe. *Idi-Igi (per stripe)* method generally appears unfair because the number of children born of each wife is not considered. Hence, under that

[375] (1937) 13 NLR 146.

method, an only child of one mother has an equal share with many children of another mother. This method is inequitable. On the other hand, the equal treatment of all children under *Ori Ojori (per capita)* method is fair and equitable. This may also prevent dispute and envy in the family and preserve unity among the children.

An attempt made in the case of *Dawodu v. Danmole*[376] to get the court to declare *Idi-Igi (per stripe)* method as repugnant to the principle of natural justice, equity and good conscience did not succeed. In that case, the plaintiff/respondent claimed that the rents from the property of their deceased father who had four wives should be divided according to *Idi-Igi (per stripe)* method. Therefore the property should be divided into four parts according to the number of wives of the deceased with children. The defendants/appellants claimed that *Ori Ojori (per capita)* method should be used to distribute the rents so that the rents should be divided into nine parts according to the number of children of the deceased. The defendants/appellants also claimed that the *Idi-Igi (per stripe)* method of distribution had been abrogated and that the new method was the *Ori Ojori (per capita)* method.

The trail court held that the *Idi-Igi (per stripe)* method of distribution of property had not been abrogated but held that the custom was repugnant to natural justice, equity and good conscience because it was contrary to the modern idea of the basis for distribution which the number of the children of an intestate. He therefore ordered the division of the rents into nine parts. On appeal, the Federal Supreme Court held that the relevant customary law was *Idi-Igi (per strip)* and that the customary law was not contrary to natural justice, equity and good conscience.

On further appeal to the Privy Council by the defendants/appellants, the Privy Council held thus:

> *(1) Idi-Igi is the Yoruba Native Law and Custom whereby the estate of an intestate is distributed according to the number of mothers (wives of the intestate) of the children of such intestate;*

[376] (1962) 1 ALL NLR 702; *Adeniji v. Adeniji (1972) 1 ALL NLR 301; Taiwo v. Lawani (1961) ANLR 33: Administrator General v. Olubamiwo (1971) 1 ALL NLR 429.*

(2) *Idi-Igi is an integral part of Yoruba Native Law and Custom relating to the distribution of intestate's estates; and is in force and observance, and has not been abrogated.*

(3) *Ori-Ojori, a Yoruba Native Law and Custom whereby the estate of such intestate is distributed according to the number of his children, is a relatively modern method of distribution and may be adopted only at the discretion of the head of the family for the avoidance of litigation.*

(4) *Idi-Igi in its application to the distribution of the estate of an intestate is not contrary to the principle of natural justice, equity, and good conscience.*

There is no doubt that both the *Idi-Igi (per stripe)* method of distribution of the estate of an intestate, that is , according to the number of wives (with children) and *Ori Ojori (per capita),* that is, distribution equally among all children of an intestate are well recognized and used under the Yoruba customary law of inheritance. The method adopted by one community/family or the other is a matter of preference. However, we think the *Ori Ojori* method which is relatively modern method is a more equitable form of distribution.

Surviving wives of deceased persons who died intestate are not entitled to inherit the property of their deceased husbands. There have been judicial pronouncements on this customary rule. In *Osilaja v. Osilaja,*[377] the Supreme Court held that the rule that a widow cannot inherit her deceased husband property has become so notorious by frequent proof in court and has become judicially noticed.

The Supreme held in *Akinnubi v. Akinnubi,*[378]

> *It is well settled rule of native law and custom of the Yoruba that a wife could not inherit her husband's property. Indeed, under Yoruba Customary Law, a widow under intestacy is regarded as part of the estate of her deceased husband to be administered or inherited by the deceased's family…*

[377] (1972) 10 SC 126.
[378] (1997) 2 NWLR (Pt. 486) 149.

The general rule under the Igbo, Benin and Yoruba customary laws of inheritance which deprives women as wives, the right to inherit property of deceased husbands is not only otiose but is also unjust especially where the wives have made some contributions to the acquisition of the property by their husbands. In addition, the denial of right of inheritance to wives of the property of their husbands is antiquated in the light of changing social and economic conditions of modern times. In the same vein, the general rule of the Igbo Customary law of inheritance which deprives daughters of the right to inherit the property of their fathers is unjust and inequitable.

The general rule under the Yoruba customary law is that the real property of a deceased person is inherited as family property for all the children for the benefit of all of them. The eldest son as the head of the family manages the property. No child has absolute right of ownership of the property until the property is partitioned among the children. All the male and female children have equal rights and are entitled to equal shares of the property.

In the light of the foregoing, while there is no discrimination against women in their capacity as daughters regarding their rights of inheritance of the property of their deceased fathers under the Yoruba customary law, the customary laws of the Igbo and Benin are discriminatory against women in their capacity as daughters.

The customary laws of the three ethnic groups *viz* the Igbo, Benin and Yoruba which deprive wives the right to inherit the property of their deceased husbands are discriminatory against women. These discriminatory customary laws are unjust, inequitable and unconstitutional. They are unconstitutional because they are inconsistent with the provision of the Section 42(1) of the 1999 Constitution of the Federal Republic of Nigeria which prohibits discrimination on the basis of sex.

In the course of the last two and half decades the fortunes of gender-based discriminatory customary law rules in Nigerian courts have been mixed. The tide against the rules has witnessed its ebb and flood. For example, in 2014, the Supreme Court of Nigeria firmly disagreed with the activist zeal of the lower courts in the application of the

constitutional provisions against gender-based discriminatory customary law rules in the case of *Mojekwu v. Iwuchukwu.*[379] In that case, the Supreme Court had the opportunity to lend its authority to the judicial onslaught against gender-based discriminatory customary law rules, especially customary law rules of inheritance championed vigorously by the Court of Appeal in that and a number of cases.[380] However, that hope was dashed, spectacularly by the apex court when in its decision it chose to maintain its usual conservative policy in favour of the discriminatory customary law rules of inheritance.

Nearly a decade after its decision in *Mojekwu,* the Supreme Court was presented with the opportunity to re-examine its policy on the gender-based discriminatory customary law rules of inheritance in two cases in which the Court of Appeal, as usual, had struck down the offending rules. After decades of hopes and expectation, the April 2014 decisions of the Supreme Court in *Ukeje & Anor v. Ukeje*[381] and *Anekwe & Anor v. Nweke*[382] came as a pleasant relief to the female-folk, and a milestone in the annals of judicial development in Nigeria. The decision finally terminated the prevarication and conservative policy of the apex court and firmly turned the tide against discriminatory customary rules of succession in favour of female children and widows, respectively. As a result of the principle of *stare decisis* upon which the Nigerian legal system is built, the decisions will no doubt command tremendous influence on the future development of intestate succession rules in Nigeria. By virtue of these decisions, the succession rights of female children and Nigerian widows on intestacy have finally become a reality in line with prevailing global trends and constitutional standards against gender-based discrimination.

4.5 DIFFERENCES AND SIMILARITIES, BETWEEN ISLAMIC LAW OF INHERITANCE AND THE CUSTOMARY LAWS OF INHERITANCE OF THE IGBO, BENIN AND YORUBA PEOPLE.

379 (2004) 11 NWLR (Pt 882) 196.

380 See for example *Mojekwu v. Mojekwu (1997) 7 NWLR (Pt.512) 283, Ukeje v. Ukeje (2001) 27 NWLR (Pt. 723)*

196 and *Anekwe & Anor v. Nweke (Unreported decision of Enugu Division of the Court of Appeal in the Appeal*

No: CA/E/311/2009; delivered on Thursday 14th February, 2013.

381 (2014) 3-4 MJSC 149, (2014) 234 LRCN 1.

382 (2014) 3-4 MJSC 183, (2014) 234 LRCN 34, (2014) 9 NWLR (Pt.1412) 393

Under the Igbo and Benin Customary Laws of Inheritance, the rule of primogeniture (inheritance by the eldest surviving son of a deceased to the exclusion of other heirs) applies to inheritance of the main dwelling house of a deceased man. The eldest surviving son of a deceased Igbo or Benin is entitled to inherit his father's main dwelling house (called Obi among the Igbos and Igiogbe among the Benins) to the exclusion of all other children of the deceased.[383] There are local variations among some Igbo communities where the obi is inherited jointly by all the sons of a deceased person as a corporate body.[384] Moreover, in the distribution of other properties the eldest son is given precedence over the other sons.

Islamic Law of inheritance does not recognize the rule of primogeniture.[385] Islamic law does not regard any property as special to be inherited only by the eldest son. Under Islamic Law, all sons of a deceased person have equal rights to all property of the deceased. The eldest son of a deceased is not given preference in the distribution of the property simply because he was opportune to have been the first son of the family.

As discussed earlier, an established rule of Yoruba Customary Law of Inheritance is that on the death of a person intestate, his landed property automatically devolves on his children as family property until it is partitioned with the consent of all members of the family (children). The eldest son as the head of the family manages the family's property for the benefit of all members. No member of the family or heir can alienate or dispose of family property which has not been partitioned without the consent of all other members of the family.

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[383] Customary Law Manual op.cit at pp 133-136; Handbook on Some Benin Customs and Usages op.cit page 13,The Benin Customary Law on inheritance of Igiogbe by the eldest surviving son has been affirmed by many decided cases viz. *Ehigie v. Ehigie (1961) 1ALL NLR 871;Olowu v. Olowu (1985) 3NWLR (Pt138) 372; Idehen v. Idehen (1991) 6NWLR (Pt 198) 382.*

[384] Customary Law Manual op.cit at p 136. The communities are in Abakaliki and Ishiehu in Ebonyi State; Enugu in Enugu State and Onitsha in Anambra State.

[385] Alikhan Mohammed Mustapha Islamic Law of Inheritance: A New Approach (Kitab Bhavan New Delhi India 2000) at p.10; Gurin Anunu Muhammadu An Introduction to Islamic Law of Succession (Testate/Intestate), (Jodda Press Nigeria 1998) at p.6

The concept of family property as it is under Yoruba Customary Law is not recognized under Islamic Law. In contrast, under Islamic Law, landed property of a deceased is shared among his children and other heirs in the proportion specified by the law. Each heir has a right to deal with his own share of the property as he wishes.

Generally, under Igbo Customary Law, a daughter does not have the right to inherit the landed property of her deceased's father. There are however local variations in Ohafia Division of Abia State where a daughter can inherit her deceased father's landed property if the father has no son. In some other communities a daughter in respect of whom the *nrachi* ceremony has been performed inherits her father's landed property. These exceptions are however few and insignificant.

Under the Benin Customary Law, daughters have the rights to inherit their father's landed property apart from the *igiogbe* when the property is distributed. However sons are given precedence over daughters in the distribution of the property. Although a daughter who is the eldest child of a deceased person under the Benin customary law of inheritance does not have the right to inherit the *igiogbe*, the custom allows her to be given a reasonable share of the other property of her father by the mutual agreement of the family elders and the other children. The fact that it is the elders and other children who determine whether or not she should be given a reasonable share and what amounts to be a reasonable share means that what she gets as the eldest child is not of right. It depends entirely on the whims and caprices of the elders of the family and the other children. Thus, the custom is unjust and discriminatory.

On the other hand, under Islamic Law, a daughter has a right like a son to inherit her father's property both landed and personal. This is because there is no distinction between landed and personal property. Under Islamic Law, all persons who are entitled to inheritance inherit all types of the property of a deceased person.[386]

The shares of daughters under the customary laws of inheritance of the Yoruba, Benin and the Igbo communities where daughters have the right to inherit their father's

[386] Alikhan Mohammed Mustapha op.cit p.29; Gurin Aminu Mohammed op.cit page 6

property are not fixed. In contrast, under Islamic Law, the shares of daughters in the property of their parents are fixed in the Holy Quran. In fact, the shares of sons and daughters in the property of their parents are fixed by Allah in the Holy Quran.[387] While Yoruba customary law gives a daughter equal share with a son in the property of their deceased parents, Islamic law gives a daughter half of share of a son where a deceased is survived by daughters and sons. As discussed in chapter three, the double share of inheritance of a son as against a daughter has been criticized by contemporary Muslim scholars/writers on Islamic law as discriminatory against women.[388]

Many Muslim scholars have explained that the justification for the double share of inheritance for a son as against a daughter is based on the financial/economic responsibilities which Islam imposes on men to take care of their wives, children and other relatives (sisters, widows etc).[389] Notwithstanding the criticism of the double share of inheritance for men, many pious Muslims believe that the shares having been ordained by Allah the All-wise in the Holy Quran cannot be changed by man. This study agrees with the justification for the double share and the views of pious Muslim that the law cannot be changed.

Under the Igbo, Benin and Yoruba customary laws of inheritance, wives do not have the right to inherit the property of their deceased husbands.[390] The exemptions to this rule among some Igbo communities of Arochukwu, Etiti and Mbano[391] where widows have the right to inherit certain property of their husbands are few and insignificant. Islamic law on

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387 Quran Chapter 4 verse 11

388 Shaheen Sardar Ali op.cit p.130; An Naim Abdullahi Ahmed op.cit p.176

389 Chaudhry Muhammed Sharif, op.cit. page 75, Mutahhari Murdala op.cit page245; Ati Abdal Hammudah op.cit page 269.

390 Okoro Nwakamma The Customary Laws of Succession in Eastern Nigeria and the Statutory and Judicial Rules Governing their Application (Sweet and Masxwell London 1966) pp.3-4; Onakah Margaret Chinyere Family Law (Spectrum Books Ltd Nigeria) p.356; *Sogunro Davies v. Sogunro (1929) 9 NLR 79* where Berkeley J said 'In intestate under native law and custom, the devolution of property follows the blood. Therefore, a wife or widow not being blood has no chain to any share.

391 Customary Law manual op.cit pages 112-113. Arochukwu is in Abia State; Etiti is in Enugu State and Mbano is in Imo State.

the other hand gives wives the right to inherit the property of their deceased husbands. The share of a wife in the property of her late husband is also fixed by Allah in the Holy book.[392]

There is no similarity between Islamic law of inheritance, the Igbo and Benin customary laws of inheritance. However, there is a striking similarity between Islamic Law of inheritance and Yoruba customary law of inheritance. Both laws give daughters and sons the rights to inherit both landed and personal property of their parents. Therefore, both laws do not distinguish between landed and personal properties to be inherited by persons who are entitled to inherit the properties.

4.5.1 Reasons for the Differences and Similarities between the Islamic Law of Inheritance and the Customary Laws of Inheritance of the Igbo, Benin and Yoruba People.

The rationale for allowing the eldest son to inherit the main dwelling house of his deceased father under the Igbo and Benin customary laws of inheritance instead of a daughter, who is the eldest surviving child, is that the eldest surviving son of a man succeeds to his father's status as the head of his immediate family. As the head of his father's immediate family, he has a duty to provide for the wives and children of his late father until the children are of age to fend for themselves.[393] While this reason could be plausible in the past when the extended family system was operating well, with the disintegration of the extended family system nowadays, many male heirs are now concerned with the care of their own nuclear families. Thus, they neglect their duties to cater for the wives and the children of their deceased father.

Moreover, under the Benin customary law, the rationale for inheritance of the *igiogbe* by the eldest son is because the *igiogbe* is regarded by the Benin people as a special house where the ancestral god and ancestral staff of the family are kept. The *igiogbe* is also the place where the ancestral god is worshipped. It is the eldest son who has the duty to take

[392] Quran Chapter 4 verse 12.

[393] Onakan Margaret Chinyere, op.cit page 342. Osamude Efe Sophia op.cit pp 22-23. Nwabueze B.O. Nigerian Land Law (Nwamife Nigeria 1972) p.393

charge of both the ancestral shrine and staff. Osamuede[394] say under the Benin customary law, a woman cannot be in charge of the ancestral shrine and staff. It is deducible that this is the reason for preventing a daughter who is the eldest child of a deceased Benin man from inheriting his *igiogbe*. Granted that a daughter who is the eldest child is disallowed from inheriting the *igiogbe* because she is considered incapable of taking charge of the ancestral shrine, it is only fair that she should be compensated by giving her precedence over the other children in the distribution of the other properties of her father. The present custom where the eldest son and other sons are given precedence over a daughter who is the eldest child and other daughters in the distribution of other properties[395] is unjust and discriminatory.

The rationale behind the general rule that a daughter does not have the right to inherit the landed property of her deceased father under the Igbo customary law is because the people believe that landed property should remain in the family of the founder or owner. In view of the fact that a daughter is expected to get married and eventually leave her parents' home to the family of her husband, she is denied the right to inherit her father's landed property because after her marriage, the landed property will still become that of her husband.[396] This is further explained by Okoro when he says on the Igbo customary law of inheritance:

> *The exogamous system of marriage removes daughters from their parents' to their husband's family. The result is that daughters are not regarded as permanent members of their father's family and for that reason are denied rights of succession to a man's property. In the case of an unmarried daughter, the possibility of a future marriage subjects her to the same consequence as if she were married…*[397]

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394 Osamuede Efe Sophia op.cit pp 27-28

395 Handbook on some Benin Customs and Usages op.cit. pg 13.

396 Okoro Nwakamma, op.cit pp.3-4, Okany Martin C. Nigeria Law of Property (Fourth Dimension Nigeria 2000)
p.774; Onokan Margret Chinyere op.cit. pp 355-356.

397 Okoro Nwakamma op.cit. pp 3-4.

This study feels that this reason is not cogent enough. Notwithstanding that a daughter is married to another family, the fact is that she is still her father's blood descendant whom the father recognizes. Therefore, it is reasonable and fair that a daughter should be given the right to inherit her father's property on the grounds of filial ties.

On the other hand, in Islam, a woman does not lose her identity and family lineal background as a result of her marriage. While a woman after her marriage takes on a new marital identity and may be called the wife of somebody, she still retains her old lineal one.[398] Ati says 'certain kinship rights and obligations of both husband and wife are not fundamentally affected by marriage. Marriage does not preclude their responsibility for, and rights over, their blood relatives'. Moreover in view of the fact that right of inheritance under Islamic law is also base on relationship of blood, a daughter is granted the right to inherit her deceased father's property on the grounds of blood relationship and preserve filial ties.

The reason why the general rule of Igbo, Yoruba and Benin customary laws deprives a wife the right to inherit her husband's property is that inheritance under these laws is limited to blood descendants. In view of the fact that a wife is not a blood descendant of her husband, she is not entitled to inherit any portion of his property notwithstanding her contribution towards the acquisition of the property. This fact was given judicial pronouncement in *Sogunro Davies v. Sogunro*[399] where Berkley J stated thus: 'In intestacy under native law and custom the devolution of property follows the blood. Therefore, a wife or widow not being of the blood has no claim to any share'.

The exception to this general rule in some Igbo communities where a widow has the right to inherit certain properties of her husband[400] is commendable. The right should not be subject to the condition when a husband is not survived by any son. The communities should be more progressive and modify their laws to grant a widow the full right to inherit the property of her husband whether or not he is survived by a son.

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398 Ati Abdal Hammudah op.cit page 27

399 (1920) 9 NLR 79 at page 80.

400 Customary Law Manual op.cit pages 113,119 and 126.

Granted that a wife is not a blood descendant of her husband, disinheritance of a wife is unfair where the wife has contributed to the acquisition of the property. Though not all wives will fit into this category, it is only fair that a wife should be entitled to inherit some portion of her husband's property on the grounds of marital relationship or as a reward for marital devotion and domestic services. Besides, a wife is one of the persons who ordinarily will suffer as a result of the death of her husband.

In contrast with the customary laws, the rationale behind the Islamic law rule of inheritance which gives a wife the right to inherit the property of her husband is that one of the principal bases for inheritance under Islamic law is marital relationship. The law considers the wife to be among the primary dependents that the deceased maintained during his life-time. A wife should therefore be provided for from the property of her deceased husband[401] so as to reduce her financial suffering as a result of her husband's death.

It is evident from the foregoing discussion that there are many differences between the Islamic law of inheritance and the customary laws of inheritance of the Igbo, Yoruba and Benin people as regards the persons who are entitled to inherit and the reasons why they have the right to inherit or are disinherited.

One of the major difference between the Islamic law of inheritance and the customary laws of inheritance of the aforementioned ethnic groups is that a wife is accorded the right to inherit the property of her husband under Islamic law because the rights of inheritance under the Islamic law are based on two principal grounds of marriage and blood relationship with the deceased whereas under the customary laws of inheritance, a wife does not have the right to inherit her husband's property because the right of inheritance is limited to blood relations.

A daughter who is the eldest surviving child of a deceased is not accorded a special status or treatment under the customary laws of inheritance. But a son who is the eldest surviving child is generally accorded a special status and treatment as the head of the

[401] Ali-Khan Mohammed Mustapha op.cit pp.1-3, Animashaun & Oyeneyin Law of Succession, Wills and Probate
in Nigeria (MIJ Professional Nigeria 2002) page 19

immediate family of the deceased man. On the other hand, under Islamic law, the eldest surviving son of the deceased Muslim man is not accorded any special status or treatment. All sons and daughters are equal in status.

Moreover, generally a daughter does not have the right to inherit the landed property of her father under Igbo customary law because such property which by custom should remain in her father's family will be taken to her husband's family after her marriage. Whereas, under Islamic law, a daughter has the right to inherit the landed and personal property of her deceased parents like her brother. This is because notwithstanding her marriage to another family, a daughter does not lose lineal ties with her original family. Therefore, she has the right to inherit her father's property as a blood descendant of her father.

One striking similarity between customary law of inheritance of the Yoruba and Islamic law of inheritance is that under both laws, a daughter has the right like a son to inherit both landed and personal properties of their parents. However, while under the Yoruba customary law, a daughter has equal share of inheritance to all properties, Islamic law gives a daughter half the share of a son. The belief of majority of pious Muslims is that the shares as decreed by Allah cannot be changed.

4.6 CONCLUSION

On the whole it is evident that women fare better under Islamic law of inheritance which gives wives the right to inherit the property of their husbands when compared with Igbo, Yoruba and Benin customary laws which deprive the generality of women in their capacities as wives the right of inheritance. Moreover, women in their capacities as daughters are treated justly under the Islamic Law of inheritance than the Igbo customary law which deprives daughters the right to inherit the property of their fathers.

Undoubtedly, the Islamic law of inheritance is more equitable as regards women's right of inheritance than the customary laws of inheritance of Igbo and Benin people. The customary laws of the three ethnic groups viz the Igbo, Benin and Yoruba which deprive

wives the right to inherit the property of their deceased husbands are discriminatory against women and as such regarded as been unjust, inequitable and unconstitutional. The Supreme Court decision in *Ukeje & Anor v. Ukeje*[402] and *Anekwe & Anor v Nweke*[403] have today turned the tide against discriminatory customary rules of succession in favour of female children and widows, respectively.

In *Ukeje*, Rhodes – Viviour, JSC who delivered the lead judgment said:

> *"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 disentitled 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 right provision guaranteed to every Nigerian. The said discriminatory customary law is void as it conflicts with Section 42(1) and (2) of the constitution"*[404]

Ogunbiyi, JSC; had this to say in the same *Ukeje's case:*

> *"It follows therefore that the Igbo native law and custom which deprives children born out of wedlock from sharing the benefits of their father's estate is conflicting with Section 42(2) of the [1999] Constitution of the Federal Republic of Nigeria [as amended].*[405]

In the view of the above, it is now beyond question that the customs or customary laws, the subject matter of the above cases cease to be law in Nigeria. This is quite commendable as it fall in line or tune with global best practices and the notion of a equality of the human race.

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402 (2014) 3-4 MJSC 149, (2014) 234 LRCN 1
403 (2014) 3-4 MJSC 183, (2014) 234 LRCN 34, (2014) 9 NWLR (Pt 1412) 393
404 [2014] 3 – 4 MJSC 149 at 175
405 Ibid, at 175

CHAPTER FIVE

5.0 GENERAL CONCLUSION

5.1 SUMMARY

Under the hydra-headed legal system which operates in Nigeria, the received English law, local statutes, customary laws of various tribes and Islamic law govern inheritance. The received English laws on inheritance on testate and intestate succession and the Administration of Estates Laws of the States which have such laws do not deprive women of the rights of inheritance to the estate of their husbands or their fathers. Regrettably, many women who contracted marriage under the Marriage Act and who should benefit from these laws are not aware of the laws.

The position as regards the rights of women to inherit property under the customary laws of inheritance of the Igbo, Benin and Yoruba people of Nigeria is different. Under the Igbo customary law of inheritance, the eldest surviving son of an Igbo man who died intestate inherits his compound exclusively in many Igbo communities. However, in practice, the eldest son gives part of the vacant land in the compound to other sons at their request for building their own houses.[406] Similarly, under the Benin customary law, the eldest surviving son of a Benin man who died intestate inherits the principal house where the deceased lived and died (called *igiogbe*) to the exclusion of other children.[407]

The eldest son has absolute control over the *igiogbe* and can do whatever he likes with it.[408] Custom however enjoins the eldest surviving son to accommodate all his other brothers and sisters (subject to their good behavior) until they are able to build their own houses and move out or (if women) until they are married.

However, there are some local variations among some Igbo communities where a man's compound, lands and houses are inherited by all sons as a body corporate with the

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[406] Manual of Customary Laws obtaining in Anambra and Imo States of Nigeria (Government Printer, Enugu 1977) at page 100.

[407] Handbook on Benin Customs and Usage (Eweka Court the Palace Benin-City. Nigeria 1996) at page 13

[408] *Ugbo v. Asemota (Unreported Suit No B/49/70 High Court of Justice Benin.*

eldest son acting as a caretaker.[409] Similarly, under the Benin customary law of inheritance the other real properties of a deceased Benin man are distributed among his other children by the *urho* system i.e. according to the number of wives the deceased had. The male children take precedence.[410]

Moreover, a common principle of the customary laws of inheritance of Igbo, Benin and Yoruba is that women as wives do not have the right to inherit the estate of their deceased husbands.[411] While there are some local variations to this general law in some Igbo communities where wives are given limited right to inherit certain property of their deceased husbands, wives under Yoruba and Benin customary laws of inheritance are absolutely deprived of the right to inherit their husband's property.

Women, as daughters under both Igbo and Benin customary laws of inheritance generally do not have the right to inherit the estates of their deceased fathers. There are however local variations of the law in some Igbo communities and under the Benin customary law where daughters are entitled to inherit the estates of their fathers on certain conditions.

However, the right of women as daughters to inherit the real and personal property of their deceased fathers under the Yoruba customary law of inheritance is quite different. Under the Yoruba customary law of inheritance, all children of a deceased person both male and female inherit his real and personal property on his intestacy. The real property of the deceased is inherited by all his children both male and female as family property for the benefit of all children. The eldest surviving son as head of the family manages the property. No child has absolute right of ownership to the property. All children both male and female have equal rights and are entitled to equal shares of the property.

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409 Customary Law Manual op.cit at page 100.
410 Handbook on Some Benin Customs and Usages op.cit at 13
411 *Nezianya v. Okagbue (1963) 1 ALL NLR at page 358, Akinubi v. Akinubi (1997) 2 NWLR (Pt 486) 147.*

On the other hand, unlike what operates under customary law of the Igbo, Benin and Yoruba people, women as wives and daughters have the rights to inherit the property of their deceased husbands and fathers under Islamic law.[412]

5.2 FINDINGS

5.2.1 Our findings on the received English law on inheritance on testacy, that is, the Wills Act of 1837 does not ordinarily deprive women of the right of inheritance. However, a man in exercising his unlimited freedom to dispose of his estate as he wishes in a Will could deprive his wife or daughter the right to inherit his property if he fails to make provisions for either of them in his Will. There is nothing the wife or daughter can do if the Will complies with the formalities prescribed by the Wills Act of 1837 for making a valid Will.

The English Wills Act of 1837 has been abrogated in England. New laws have since been enacted to restrain the testamentary freedom of a testator such that wife, children and other dependents of a testator who have been deprived of the right to inherit his estate in a Will could be given a reasonable financial provision from the net estate by a court of competent jurisdiction on application by such persons.[413] The provisions of the new law can be said to have somehow conferred on a wife or a daughter who has been deprived of the right to inherit the estates of her husband or her father in a Will, a limited right of inheritance of such estate.

It is regrettable that despite the fact that the Wills Act of 1837 is no longer operative in England, the Act is still applicable in many States of Nigeria except in few States which have enacted their own Wills Laws.[414] It is gratifying however that the States that have enacted Wills laws have followed the modern trend in England and some other developed countries to restrain the testamentary freedom of a testator under their Wills Laws. Hence,

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[412] Quran Chapter Four, Verses 7, 11 & 12.

[413] Inheritance (Family Provision) Act 1938 as amended by the Intestate Estates Act 1952 and Inheritance (Provision for Family and Dependants Act 1975).

[414] Wills Laws of Lagos State CAPW2 Laws of Lagos State of Nigeria 2003; Wills Edict of Oyo State CAP 63 Laws of Oyo State of Nigeria 1990. Kaduna State Wills Edict CAP 168 Laws of Kwara State of Nigeria 1994, Anambra State Administration and Succession (Estate of Deceased Persons) Law, CAP 4 Laws of Anambra State of Nigeria 1987.

there is need for other States in Nigeria that have not enacted statues on Wills to take a cue from those States.

5.2.2 Our findings in respect of Igbo, Benin and Yoruba customary laws of inheritance reveals that there are local variations to the general rule of inheritance of the customary laws of these ethnic groups that women as wives and daughters are not entitled to inherit the property of their deceased husbands and fathers. In some Igbo communities of Arochukwu, a wife inherits her husband's economic plants and trees. In Etiti Division, a wife inherits such property if the husband is not survived by any son. In Mbano, a wife inherits such property subject to overall control of herself and the property by the eldest nearest paternal relation of her husband.[415]

The local variations as regards the customary law that daughters do not have the right to inherit the property of their fathers are found in Ohafia Division where a man's compound is inherited by his sons and daughter as a body. In the same Division, where a man is survived by only daughters, the daughters inherits his compound or any of his other lands and houses with the eldest full brother of the deceased in control. In Oraukwu town in Idemile Division, a daughter on whom the *nrachi* ceremony has been performed inherits her father's compound, other lands and houses.[416]

The variations under the Benin customary law of inheritance is that where the eldest surviving child of a deceased Benin man is a female, she could be given a reasonable share of the deceased property with mutual agreement of the family eldest and other children.[417]

Notwithstanding the variations of the customary laws of inheritance of Igbo and Benin where wives and daughters are given limited rights to inherit the estates of their husbands and fathers, these are just few exceptions to the general rule which disinherits many women. Moreover, the reasonable share of the estate which Benin custom allows a daughter is not right but it is dependent on the whims and caprices of the other children and elders of the family.

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[415] Customary Law Manual op.cit at page 113.
[416] Customary Law Manual op.cit page 103.
[417] Handbook on Benin Custom and Usages op.cit at page 13.

In this connection, the Benin and Igbo customary laws of inheritance which deprive women as wives and daughters, of the right to inherit the property of their husbands and fathers because they are females are discriminatory against women. In the same vein, the Yoruba customary law which deprives wives the right to inherit the estates of their husbands is also discriminatory.

These customary laws are not only unjust but also unconstitutional as they violate the provisions of *S.42 of the 1999 Constitution of the Federal Republic of Nigeria*[418] which forbids discrimination by reason of sex. *S.42 (1) of the Constitution* provides:

> *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 made subject.*

The import of this provision is to protect the rights of all citizens of Nigeria, male or female against any form of discrimination by reason of sex, religion, ethnicity etc. which may be imposed by any law operating in Nigeria. Therefore, there is need to reform these customary laws so that women can have the rights to inherit the property of their deceased husbands and fathers.

5.2.3 On the other hand, Islamic law which regulates the lives of Muslims accord women, as wives and daughters the rights of inheritance of the property of their deceased husbands and fathers. Specific shares of the deceased estates are allocated to them in the Holy Quran. The Holy book being a divine book revealed by Allah is scared and immutable. Therefore, the rights of women as wives and daughters to inheritance under Islamic law are indefeasible. In this connection, Islamic law of inheritance, unlike the customary laws of

[418] CAP C 23 Laws of Federation of Nigeria 2004.

inheritance of Igbo, Benin and Yoruba people not only accord women as wives and daughters the rights of inheritance but better rights of inheritance.

However, in States of Southern Nigeria where Islamic law has not been officially established, it seems probable that many matters of inheritance and succession affecting Muslims which should have been dealt with under Islamic law are still being dealt with under customary law by customary law courts legally established in the States.

It is noteworthy to say that the fervent desire of Muslims in Lagos State to have Islamic personal law matters affecting Muslims determined according to Islamic law has led to the establishment of an Independent Sharia Panel under the auspices of Lagos State Chapter of the Supreme Council for Sharia in Nigeria to adjudicate on Islamic personal law matters in accordance with Islamic law as they affect Muslims who have voluntarily submitted themselves to the judgment of the panel.[419]

Although, the panel was not established by legal or constitutional instrument, the panel has satisfactorily adjudicated on Islamic personal law matter as regards marriage, divorce, custody etc. The efforts of the panel are therefore commendable because the panel has lived up to the yearnings of pious Muslims in the State for matters affecting them to be determined in accordance with Islamic law.

Professor Auwalu. H. Yadudu who wrote the preface to the selected judgments of the panel stated thus:

> *The analysis of laws, consideration of social and political matters and the review of fact contained in these decisions and the personnel who have rendered them have, without doubt, portrayed a breadth and depth of knowledge of Sharia principles, Nigerian Court System: both the Sharia, and common law types.*[420]

[419] The Selected Judgment of the Lagos State Independent Sharia Panel Vol. 1 (Published by graphix solutions suite Nigeria 2005).
[420] Ibid

5.2.4 Our findings also reveal that Imo and Enugu States which are predominately Igbo people have recently enacted laws which have given women the right to inherit the estates of their deceased husbands and fathers. These laws seem to have abolished the Igbo customary law of inheritance that deprives women, as daughter and wives of the rights of inheritance. In fact, *Section 4(c) of Imo State law on Elimination of all Forms of Gender Based Discrimination and Inequalities*[421] specifically states thus: 'any existing laws, regulations, customs and practices, which constitute discrimination against any person, shall be null and void and of no effect whatsoever and shall not be enforceable against any person'.

While these laws are progressive, many people are not aware of them. It would appear that women are yet to benefit from these laws. Therefore, there is need for the governments of those States to publicize the laws.

5.3 RECOMMENDATIONS

Based on our findings, the following recommendations are made:

5.3.1 Reform of Customary Law

The customary laws of inheritance that are discriminatory against women on the basis of sex contravene the provisions of the 1999 Constitution and International Convention on Elimination of Discrimination Against women, of which Nigeria is a signatory. They need to be reformed, so that wives and daughters can be given the right to inherit the property of their deceased husbands and fathers. Prior to the reforms, there is need to educate and enlighten the public particularly men to change their attitudes such that notion of women being subordinate and inferior to men and therefore should not have the rights as men will be eliminated. The enlightenment campaign should be a collective duty of traditional rulers, religious leaders/bodies, community leaders and heads of family who are regarded as the custodians of the culture of their people considering the fact that customary laws are deeply rooted in the culture of their people. It is necessary to involve these categories of people

[421] Law No. 7 Imo State of Nigeria 2007.

because it is under their auspices that these customary laws which cause a lot of hardships to women operate. Their support is therefore necessary for the reform to be effective.

In this connection, the Federal Government, through the Federal Ministry of Women Affairs, should organize conferences and workshops for prominent traditional rulers of various ethnic groups and religious leaders in the country. The aims of these conferences and workshops would be twofold. The first is to enlighten these people so that they can appreciate the hardships and injustices which the customary laws impose on women. Besides, these laws are archaic in the context of modern changes in global attitudes to women's rights. The second is to persuade these people to reform the customary laws of their people to give women the rights of inheritance. Similar conferences and workshops should be organized at state and local government levels for community leaders and family heads.

5.3.2 Mass Enlightenment Campaign

Mass campaign should be mounted by Ministry of Women Affairs at both the Federal and State levels to enlighten people first about the hardship and injustice which the discriminatory customary laws impose on women. Secondly, to make people appreciate that the basis for which custom denied women the right to inherit property in the past is no longer sustainable in contemporary times. Therefore, there is need to reform the laws. The campaign should be through jingles on electronic media, discussions over the radio, advertisements on bill boards, in newspapers in both English and local languages so as to reach the literate and illiterate members of the public. These enlightenment programmes are necessary to change the social attitudes of the people particularly men.

A change of social attitudes of men will, after sometime, make men to respect the personality of women, change the popular misconception that women are inferior to men and eventually facilitate a reform of the customary laws.

5.3.3 States' Laws on Inheritance

The reform of these customary laws on inheritance starting from the grassroots should be followed by legislation. Such legislation should abolish the indigenous customary laws of inheritance and thus give women the rights to inherit the property of their deceased husbands and fathers. The law should specify the shares which wives and daughters are entitled to inherit. Such laws should be applicable and enforceable in the respective States. If this is done, other States of the Federation will emulate Imo, Enugu and Cross River States that have enacted such laws.[422] However, the proposed new States' laws on inheritance should operate without prejudice to Islamic law of inheritance which gives women better rights of inheritance.

It is pertinent to state that *S.4 (2) of the Enugu State Law* on inheritance which provides that a Widow/Widower shall not be dispossessed on the death of the husband/wife of property acquired in the deceased husband's/wife's lifetime without his/her consent is ambiguous. To that extent it is defective. Therefore, there is need for the State legislature to take urgent action to amends the law to specifically provide for the rights of inheritance for daughters and wives in the property of their deceased fathers and husbands.

5.3.4 Enlightenment Programmes for Women

Be that as it may, it is pertinent to emphasis that legislation to eliminate discrimination against women's rights of inheritance is not enough. Educational and enlightenment programmes are necessary to inform women themselves about the inheritance law. This is because many women, owning to illiteracy or ignorance are not aware of the existing laws on inheritance which provide the rights of inheritance for them. Even the educated ones who have some knowledge of the laws do not bother to know the contents of such laws and how they can access the laws to protect their rights of inheritance.

[422] Gender and Equal Opportunities Law No 7. Of Imo State 2007; The Prohibition of Infringement of a Widow's and Widower's Fundamental Rights Law of Enugu State 2001. Cross River Female Person's Inheritance of Property Law 2007.

In this connection, women social groups/organizations, religious leaders in rural communities, non-governmental organizations, mass media, Ministries of Women Affairs and Justice at both Federal and State levels should embark on educational and enlightenment programmes to educate women of their rights of inheritance under the existing laws. It is hoped that such concerted efforts will help to promote women's rights of inheritance.

5.3.5 Role of Judiciary

Our courts should be bold and imaginative in their determination of issues on customary laws affecting inheritance rights of women. Any customary law that precludes women from inheriting the property of their husbands and parents should be declared invalid on the grounds that it is unconstitutional and repugnant to natural justice, equity and good conscience. In this way, the judiciary will help to develop our customary laws to meet changes in global trends to women's rights and uphold the fundamental human rights of women as guaranteed under our constitution.

5.3.6 Enactment of New Wills Laws.

States that have not enacted Wills Laws should enact such laws to replace the English Wills Acts of 1837 and 1852 that are still applicable in those states. The new Wills Laws of the States should emulate the Wills Laws of Lagos, Oyo, Kaduna and Kwara States.[423] These laws have curbed the testamentary freedom of testator by making provisions for courts to make financial provisions for spouses, children and other dependents of a testator who has failed to provide for such persons in his Will.

5.3.7 Free Legal Aid for Matters Relating to the Rights of Inheritance

Free legal aid services should be provided by Legal Aid Council for poor women to seek redress in courts in cases of violation of their rights of inheritance. It is pertinent to state that the Legal Aid Council Act[424] presently empowers the Legal Aid Council to render free

[423] *S.2 Wills Law of Lagos State. CAP 2 Laws of Lagos State 2003; S.4 Wills Edict Oyo State CAP 63 Laws of Oyo State of Nigeria 1990; S.5 Kaduna State Wills Edicts CAO 163 Laws of Kaduna State of Nigeria 1991; Kwara State Wills Edict CAP 168 Laws of Kwara State of Nigeria 1994;*

[424] CAP L.9 Laws of the Federation of Nigeria 2004.

legal assistance in respect of civil claims to cover breach of fundamental human rights as guaranteed under Chapter IV of the Constitution. However, we suggest that Federal Ministry of Women Affairs should initiate a bill to the National Assembly to amend the Legal Aid Council Act to specifically provide for civil matters relating to violation of women's right of inheritance. In alternative, Nigeria should emulate some African Countries like Uganda and South Africa. These countries have enlarged the fundamental rights provisions in their Constitution to give any person, organization or association the right to apply to courts for the enforcement of the rights of the under privileged, the poor or literates whose fundamental human rights are being violated or have been violated.

The proposed amendment to the Constitution should give individuals and non-governmental organizations the rights to institute legal actions against any person, group of persons or organizations that violate inheritance rights of women. This will make women to have better access to legal representation when their rights of inheritance are violated or about to be violated.

It is important to mention that *Section 15(2) of Uganda Constitution* specifically prohibits laws, cultures, customs and traditions which are against the dignity or interests of women. Our National Assembly should amend our Constitution to include such a provision. This will ensure the abolition of all customary laws that are discriminatory against women as regards the right of inheritance.

5.3.8 States' Laws on Administration of Estates

States that have not enacted Administration of Estates laws should enact such laws to replace the received English laws applicable to the estate of an intestate in Nigeria. The new laws should be made to cover the estates of intestates who contract monogamous and polygamous marriages. This will be in line with the provision of Intestate Succession Act of Zambia.[425] *Section 3 of the Zambia law on Interpretation* defines marriage to include polygamous marriage. In this regard, the Zambian law is progressive and needs to be

[425] Intestate Succession Act No.5 of Zambia 1989.

emulated by Nigeria and other African Countries which are interested in promoting the rights of women.

5.3.9 Establishment of Sharia Courts in the States of Southern Nigeria

The government of the States in Southern Nigeria where Muslims are predominate should enact laws to establish Sharia courts of co-ordinate jurisdiction with the customary courts existing presently in those States with jurisdiction over Islamic personal law on matrimonial and succession matters as provided by the Constitution. Alternatively, the governments of the States where Muslims are not many could create a department of Sharia within the existing customary courts system to deal with Islamic personal law matters.

Persons with basic qualification for appointment as Qadis (Islamic Judges) should be appointed for Sharia Courts of subordinate jurisdiction with customary courts. As regards the department of Sharia, persons knowledgeable about Islamic law should be appointed as judicial personnel to manage the department. The jurisdiction of Sharia courts of subordinate jurisdiction with customary courts or the responsibility of the Sharia department should include services as regards the distribution of the estates of Muslims according to Islamic law of inheritance will no doubt enable Muslim women in those States to enjoy the right of inheritance accorded them under Islamic law.

5.3.10 Economic Empowerment of Women

Besides legal approach this study recommends that women should be empowered economically so that they can have resources that will make them less dependent on men. In view of the fact that majority of women in both urban and rural areas engage in small businesses, petty trading and processing of agriculture produce, they should be educated and encouraged by women's associations and non-government agencies working for women to organize themselves into small cooperative groups.

Such cooperatives groups should be assisted with soft loans by local and State governments as part of their poverty alleviation programmes. The soft loans can help the businesses of the women to grow gradually and thereby increase their resources over the

years. The poverty alleviation programmes of government should also include skill acquisition training for women in urban and rural areas that will make women self-reliant economically.

In addition, while alive, men should endeavor to set up small businesses for their wives to enable them have resources of their own. Women should be allowed and encouraged by their husbands to control their resources for effective economic empowerment. The control of their financial resources by women over the years will enable them not only to fight for their rights of inheritance under the laws but also make them less dependent on inheritance from their deceased husbands and fathers. They will then be able to take care of themselves and their children on the demise of their relations.

5.4 CONTRIBUTION TO KNOWLEDGE

i. The work reveals that the legal and regulatory environment for women's rights to inheritance is not sufficient and few legislation that exist show lack of commitment to gender equality in inheritance rights. Also, the laws and practices governing inheritance and succession under customary law are very discriminatory and, therefore, constitute a major obstacle to the achievement of equality between men and women. Even the Islamic system that appears to be the most just under customary law does not give equal rights to inheritance to daughters and wives. Social justice demands that both forms of marriage are recognized under the law as valid. The customary laws of inheritance of the Igbo, Benin, and Yoruba people which deprive women the right of inheritance are unjust and discriminatory. They contravene the provisions of the 1999 Constitution of Nigeria and other International Conventions on elimination of discrimination against women of which Nigeria is a signatory.

ii. This work provides the basis and template for the harmonization of the various customary laws to bring them into consistency with the Nigeria grund norm.

iii. It advocates the consideration of the Islamic customary law of inheritance not ordinarily commended by non adherents of that faith as a better option to other customary laws without prejudice to religion or faith or belief.

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