

**A CRITICAL APPRAISAL OF INTESTATE SUCCESSION AND
WIDOWHOOD RIGHTS IN NIGERIA WITH PARTICULAR
REFERENCE TO CUSTOMARY LAW**

BY

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CERTIFICATION

I, **ESOMBI- Enaohwo Hilda** hereby certify that apart from extracts and references to other people's work which I have duly acknowledged, the entire work is a product of my personal research and that it has neither in whole nor part been presented for another degree elsewhere.

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APPROVAL

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DEDICATION

To the glory of the Almighty God, I dedicate this dissertation. It is also dedicated to loving memory of my Late Mother Mrs. Elizabeth Esombi.

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LIST OF ABBREVIATIONS

ACFODE	-	Action for Development
African Charter	-	African Charter on Human and Peoples' Rights
African Commission	-	African Commission on Human and Peoples' Rights
African Court Rights	-	African Court on Human and Peoples' Rights
AU	-	African Union
CEDAW Committee	-	Committee on the Convention on the Elimination of all forms of Discrimination against women
CSW	-	United Nations Commission on the Status of Women
DAW	-	Division for the Advancement of Women
DEVAW	-	Declaration on the Elimination of violence against Women
ECOSOC	-	Economic and Social Council
EWD	-	Empowering Widows in Development
FLS	-	Forward Looking Strategies for the Advancement of Women
HRW	-	Human Rights Watch
ICESCR	-	International Covenant of Economic Social and Cultural Rights
IHRLG	-	International Human Rights Law Group
INSTRAW	-	International Research and Training Institute for The Advancement of Women
FIDA	-	International Federation of Women Lawyers
LAP	-	Legal Aid Project
Ministry of Gender	-	Ministry of Gender, Labour and Social Development
OAU	-	Organization of African Unity
PFA	-	Platform for Action
The Plan	-	National Action Plan on Women (1999)
The Uganda Constitution	-	1995 Constitution of Uganda
UN	-	United Nations
UNDW	-	UN decade for Women
UNIFEM	-	United Nations Development Fund for Women
UDHR	-	Universal Declaration of Human Rights

- WILDAF - Women in Law and Development
- WLEA - Women and Law in East Africa Women's protocol to
- The African Charter - Protocol to the Africa Charter on Human and Peoples' Rights on the right of women

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ABSTRACT

This research work is a critical appraisal of Intestate Succession and widowhood rights in Nigeria with particular reference to customary laws. The aim of this work is to identify problems associated with widows rights to inherit their husbands' properties under African customary laws and laws of intestate succession and their impact on the right of women. The research offers suggestions and to make recommendations with a view to ameliorating these problems. The dissertation will aim to explore the existing laws protecting the rights of women and widows in particular. The research work will also look at the prevailing customs and norms obtainable in our society today and how far these laws have gone in changing the status quo of things. Chapter one outlines the background of the study, how the mere constitutionally guaranteeing of Human rights have not been able to protect the widows as their rights are actually being violated with impunity. Notwithstanding such clear constitutional guarantees. In the concluding Chapter Five, recommendations have been made at different levels to address these issues which if accepted will add to knowledge and a way forward on this prevailing social ill. Culture, like law is dynamic and therefore must reflect the current need of the people for meaningful and sustainable development. At the end of this research work, the researcher hope to bring the prevailing status of widows in our society to the fore and point out the advancement made so far but still highlighting the need for more advancement. The researcher posits that Court cases involving widows and their deceased husband's families can be referred to Multi Door courthouses for expedited resolution. This method will provide the most equitable way of solving the issue while protecting the rights of the widow with the results achieved at a faster pace, and without any ill feeling associated with the "Victor" and "Vanquished" set up of ordinary court cases fought from beginning to end.

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CHAPTER ONE

INTRODUCTION

1.1 Background to the Study

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 where 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 son¹ who consequently becomes the head of the family. He occupies the family house, holding same as trustee of the other children, male or female.

For example in **Yoruba land**, the distribution of an estate of a deceased person who dies without a valid Will is per stripe; i.e. by the number of wives that the deceased had and not by the number of children². In **Calabar**, the eldest surviving male member of the deceased person succeeds as the head of the family and inherits the deceased estate. Also among the Fulani, the eldest son inherits his deceased father's cattle, the main asset in those days, out of which he makes presents of some of them to his younger brothers according to their needs. Finally under the Bini custom, the right to succession of the entire estate belongs exclusively to the eldest son of a deceased person who acts as a sort of trustee for the other children³.

¹ *Chambers 20th Century Dictionary* 4th Ed., 1981

² Onuoha R.A., "Discriminatory Property Inheritance Under Customary Law in Nigeria: NGOs to the Rescue" *The International Journal of Not-for-Profit Law*, (2008), Vol.10, Issue 2

³ Okeaya-Inneh K.S., *Benin Native law and Custom at a Glance*, (Benin City: Gift-prints Associate; 2007)

1.2 Aim of the Study

One can easily perceive from the foregoing statements 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 over-whelming sympathy for the male gender and has as a consequence, sustained an unjust and disproportional treatment of females in Nigeria. The continued practices of these laws constitute a major obstacle to gender equality, economic empowerment of the female gender and actualization of social justice in terms of development, peace and security⁴. These discriminatory aspects of property inheritance under 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 Constitution⁵ of the Federal Republic of Nigeria. This study is therefore aimed at critically examining these practices including their antecedents, source and prospects with a view to their elimination.

1.3 Objectives of the Study

This research work aims at an appraisal of the inheritance rights of women in Nigeria under the Act and the various customs in Nigeria. Customary practices bordering on inheritance evidently demonstrate varying degrees of gender discrimination as widows and their female children receive very little compared to the males. This discriminatory trend fuelled by ignorance, tradition and religion serves as a bar to the economic and financial empowerment

⁴ Ikpeze O.V., *Gender Dynamics of Inheritance Rights in Nigeria: Need for Women Empowerment* (Onitsha: Folmech Printing & Pub. Co. Ltd; 2009), p. 54

⁵ The highest law of the people of Nigeria, against which, any law (or practice) in contradiction, is invalid.

of women and their right to self-actualization. Without question, the poverty in this country is related to deprivations due to unequal distribution of wealth (land) and if everyone is allowed to benefit equally from an inheritance, it would catalyze economic growth, development and ultimately poverty would be eradicated.

The paper will analyse some customary law practices on inheritance with a view to unearthing such norms that perpetuate gender discrimination and impede the empowerment of women in Nigeria. It will also look at the provisions of existing local and international laws that deal with inheritance and the progress each law has made in combating this ugly trend. Finally, this paper shall proffer possible recommendations for reform to help the government and other stakeholders who are or are likely to be so affected. In the end, the undesirability of such obnoxious and anti-human practices will be made clear as a prelude to their elimination and discard in place of more humane practices. After all, custom is dynamic and not static.

1.4 Significance of the Study

The significance of 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 on the country. Also, the reader would be exposed to the laws, both domestic and international, presently in force to curb this trend and how effective they have been.

By using Nigeria as a case study, this dissertation work is also relevant in pointing out the plight of widows in many African countries which more leaves much to be desired. Recommendations are made at the domestic level with a view to enhancing the protection of widow's right in Nigeria.

1.5 Research Methodology

This essay will adopt the doctrinal and comparative research methods; reference will be made to both primary and secondary sources such as relevant books, journals, statutes, legislatives and internet sources. References will also be made to international conventions and the position of the law from foreign jurisdictions.

1.6 Literature Review

The essence of literature review is to appreciate other worked already existing in the area of studying and show why not withstanding their existence, it is still for me to undertake this work.

For example, Prof. Edwin I. Nwogugu⁶ has a standard text book on family law which substantially covers the general nature and scope of family law in Nigeria. As good as that work is it is none the less without the details regarding intestate succession and widowhood right.

Ezeilo Joy⁷ 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 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.

⁶ Nwogugu, E.I. Family Law in Nigeria third Edition. Published in 2014 by (Heinemann Educational Books Nigeria 1990)

⁷ Ezeilo Joy Law and Practices Relating to Women's Inheritance Rights in Nigeria (Women's Aid Collective (WACOL) Nigeria 2000

Onuoha⁸ 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.

Prof. O.K. Edu⁹ discusses the customary laws of inheritance of 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 to the estates of their late father.

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.

⁸ Onuoha, Reginald Akujobi, 'Discriminatory Property Inheritance under the Customary Law in Nigeria NGOs to the Rescus (2008) vol. 10 The International Journal of Not for Profit Law

⁹ Edu O.K. 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

1.7 Scope and Limitations of the Study

This study will deal primarily with inheritance and widowhood rites; its history, the customary laws practices of the major ethnic groups of Nigeria which are: Igbo, Yoruba, Bini, Esan, Urhobo, Islamic law and Hausa inheritance rights of women under the *Wills Act of 1832* & the relevant *Wills Law* of selected states. It will also examine the reasons why these discriminatory practices are still in existence despite the various laws already in place. Also, the human rights implications of discrimination against women as regards inheritance rights will be considered and it will point to the effect this worrisome trend is having on the nation's economy and her reputation in the global world view.

In terms of difficulties encountered during the course of this research work, the most prominent limitation is the adequate availability of material on the subject. The issues of succession and inheritance, as they affect different categories of women such as widows, have attracted a lot of attention. Whereas there is an abundance of publications on succession and inheritance, there is a dearth of documentation on widowhood practices.

In terms of timeframe, this study is based generally on the present, however there are references to the past and the future. The past has been compared with the present in ascertaining where the plight of widows in Nigeria has either worsened or improved with time. A comparison between the past and the present has shed some light whether the situation of widows in Nigeria has remain static over a period of time. The recommendations made at the end of the study have been targeted at the future.

CHAPTER TWO

RIGHTS OF THE WIDOW IN THE CONTEXT OF INTERNATIONAL AND REGIONAL HUMAN RIGHTS LAW

2.0 Introduction

Apparently, there is yet no separate national legal framework for the protection of widows in Nigeria except the one enacted by the Anambra State House of Assembly in 2005. Anambra is one of the States in the Eastern part of Nigeria where widowhood practice is most prevalent. Therefore, we fall back to the international human rights instruments such as CEDAW and other related regional and the Nigeria Constitutional provisions.

The United Nations has described human rights in the following terms- human rights could be generally defined as those rights, which are inherent in our nature and without which, we cannot function as human beings This is because human rights and fundamental freedoms enable a person to fully develop and use all human qualities, intelligence, talents and conscience to satisfy both spiritual and physical needs. They are basic for mankind's increasing demand for a life in which the inherent dignity and worth of each human being will receive respect and protection. Human rights are universal and apply to all persons without discrimination; respect for individual rights needs to be upheld at all times irrespective of circumstances or socio- political systems.

The fundamental rights as enshrined in Chapter IV of the Constitution include the right to; life, dignity of human person, personal liberty, fair hearing, private and family life, freedom of thought, conscience and religion, freedom of expression and the press, peaceful assembly and association, freedom of expression, freedom from discrimination, acquire and

own immovable property anywhere in Nigeria, and such property cannot be compulsorily taken over except under certain conditions. Section 34 of the Nigerian Constitution provides that every individual is entitled to respect for the dignity of his person. It states further in paragraph (a) of subsection (1) that no person shall be subjected to torture or to inhuman or degrading treatment. Section 42 also provides as follows:

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 be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administration action of government to disability or restriction to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex.

The fundamental rights of the widow are grossly infringed upon, her right to life, dignity of human person, equality and freedom from discrimination as enshrined in the Constitution of the Federal Republic of Nigeria 1999 (as amended). Samuel (2011) posits that widowhood rituals are inherently gender based because a widower has no strict customary laid-down laws governing mourning rites. (Afolaya 2011). The widowhood practices in their diverse ways are discriminatory, perpetrate inequality and dehumanize womanhood. It is also obnoxious, and entails violence against women, that needs immediate attention and affirmative actions.

Citizens are given rights to enforce the above stated rights (sections 33-46). It is only high court that has jurisdiction to entertain matters relating to violation of fundamental human right, yet women do not enjoy this right on equal footing with men, this is because many of the widows are not educated and knowledgeable about their rights.

In addition, there are other laws enacted by States Houses of Assembly that guarantee human rights and prohibits the obnoxious, anachronistic, archaic and harmful widowhood

practices/rites. They include; The Prohibition of Infringement of a Widow or Widower's fundamental rights of Enugu State 2001 and Malpractices Against Widows and Widowers (Prohibition) Law of Anambra State 2005. Section 3 of the Anambra State law 2005 mentioned herein above provides that the Fundamental human rights as enshrined in the constitution are inalienable and accrue to every widow or widower. S. 4 (1) says, 'No persons shall compel a widow or widower:

- a) To vacate his or her matrimonial home on the ground that he or she has no male child or no child at all
- b) To drink the water used in washing the corpse of the late spouse or to perform any type of ritual in order to establish innocence of causing the death of the late spouse;
- c) To sleep either alone or on the same bed or to be locked in the room with the corpse of the late spouse;
- d) To remain in compulsory confinement after the death of the spouse for any given period;
- e) To compulsorily wear mourning cloths of any make or otherwise adopt any life style indicative of being in mourning for any given period from the date of the death of the late spouse;
- f) To compulsorily sit on the bare floor or be naked during any period of the spouse's burial rites;
- g) To be remarried to a relative of the late spouse;
- h) To shave the hairs on the head or any other part of the body;

- i) To desist from receiving condolence visits from sympathizers during the period of mourning;
- j) To weep and wail loudly at intervals at anytime after the death of the late spouse;
- k) To put ashes on the head;
- l) Not to see the corpse of the late spouse;
- m) To perform any act which contravenes the fundamental human rights provisions as enshrined in the constitution;
- n) To visit any shrine and or perform any other rituals
- o) To forsake his or her personal hygiene.

Similarly, S. 4(3) states that a widow or widower should not be forcefully dispossessed of any property acquired or used by the couple during the life time of the deceased spouse. But this is subject to the provisions of the Marriage Act, Succession and Administration of Estate Act or any customary law not repugnant to natural justice, equity and good conscience. Consequent upon the above provision, section 5 of this law also provides thus;

- (1) Any person who discriminates, contravenes or conspires with, aids, counsel, procures or assists another person to contravene the provisions of section 4 of this law commits an offence and shall be liable on summary conviction to a fine not exceeding N20,000.00 (twenty thousand Naira) or to a jail term not exceeding six months imprisonment or to both such fine and imprisonment.
- (2) Any institution, group or organization which is found to have contravened, or which aids, counsels, procures or assists any person to contravene any of the provisions of

section 4 of this law commits an offence and shall on summary conviction be liable to a fine not exceeding ₦50,000.00 (fifty thousand naira) or be proscribed until the fine is paid.

Section 6 provides for enforcement, thus, vested the Magistrate Court with the jurisdiction to summarily try any offence under this law. And appeals shall lie as of right against any decision of the Magistrate Court to the High Court, up to the Supreme Court. An appraisal of the various Laws against widowhood practices bring to fore the fact that the legal framework in place although is not national but can be said to be appropriate in addressing the issue where widowhood rites are mostly practiced. These laws intend to reduce and/or eradicate completely the degrading and inhuman treatment, and maltreatment of widows in many parts of Nigeria especially the South East. But the problem is that of, recognition, awareness by the general populace, and enforcement. Especially the women in the rural setting where the widowhood practices are prevalence.

2.1 International Human Rights Law Context

The issue of protection of women's rights has been of great concern to the international world. Hence several international instruments have adequately guaranteed their protection. The Universal Declaration of Human Rights (UDHR) which was adopted by the United Nations General Assembly in 1948 states in its Art. 1 that "all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in spirit of brotherhood." This provision enjoins all to respect ones rights, treating everybody equally and fairly. Article 5 provides that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Its Art. 27 maintains that every person has the right to freely participate in a community's cultural life. No coercion is permitted.

There are other international instruments that protect women's human rights and they include. International Convention on Civil and Political Rights (ICCPR) 1966; International Convention on Economic, Social and Cultural Rights (ICESCR) 1966; Convention against Torture and other cruel, inhuman or Degrading Treatment or Punishment (CAT) 1984. At the regional level, there is the African Charter on Human and People's Rights 1981 to address human rights in Africa in general the rights of women inclusive. For example under the African charter, Art. 5 recognize individual's rights to dignity. It provides that every individual shall have the right to the respect of the dignity inherent in a human to the recognition of his legal status with no distinction or discrimination.

Similarly, the African women's protocol which is germane to our subject of discourse, defines discrimination to include; (any) distinction, exclusion or restriction or differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women regardless of their mental status, of human rights and fundamental freedoms in all spheres of life (Art.2). Art. 3 provides that "every woman shall have the right to a respect as a person and to the free development of her personality, while Articles 20(1) (a) specifically enjoins African governments to take appropriate measures in order to ensure that women are not subjected to inhuman, humiliating, and degrading treatment.

Under the ICCPR, Art. 7 provide that no one shall be subjected to torture or cruel and inhuman or degrading treatment or punishment. Art. 2 of the (ICCPR) also provide that all the rights guaranteed in the covenant must be enjoyed by all without distinction or discrimination whatsoever. This mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition enjoyment or exercise by women, irrespective of their marital status, on a basis of equality

of men and women of human rights and fundamental freedoms in the political economic, social, cultural, civil or any other field tantamount to a nullity.

2.1.1 Convention on the Elimination of all forms of Discrimination Against Women

The Convention on the Elimination of all Forms of Discrimination against Women CEDAW is an international human rights document that establishes international standards for the protection and promotion of women globally. This convention ratified by Nigeria in 1986 brings to fore the commitment of the Nigerian government to eradicate all forms of discrimination against women in civil, social, cultural fundamental and political rights. (Nwogu 2008). CEDAW in its preamble recognizes that discrimination against women abound and violates the principles of equality of rights and respect for human dignity. Its Article 1 thus defines discrimination against women to mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on the basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field.

Art. 2 further urge states parties to take necessary steps and measures with a view to eliminating discriminatory practices against women. Furthermore, Art.16 enjoins states parties to take all necessary measures to eliminate discrimination against women in all matters relating to marriage and family relations. Interestingly, Art. 16 which provides for elimination against all discrimination on matter relating to marriage and family relation aptly address the issues of widowhood practices since family and family relation provide the basis or blanket under which all the heinous widowhood rites are perpetrated

Article 2(2) provides

State parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public information, education and communication strategies with a view to achieving the elimination of harmful cultural and all other practices which are based on the idea of the inferiority of the superiority of either of the sexes, or on stereotyped roles for women and men.

Afolayan (Afolayan 2011) says CEDAW recognizes the importance of legislation as an element to ensure the realization of individual woman's human rights and freedom on the ground of equality with men in its Articles 3 and 18. This convention insists on the education, economic empowerment of women and participation of women in policy making on equal footing with the men (Articles 10, 14 and 7 respectively). This Convention also recognizes the influence of culture and other practices that apportion stereotyped roles to girls and women in contradistinction to that of boys and men. It recognizes it as discriminatory and should be eliminated from the polity as it maintains in its Article 5(a) thus:

State parties shall take, appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

2.1.2 The Optional Protocol to the Convention on All Forms of Discrimination

Against Woman - Optional Protocol to CEDAW (1996) 9NWLR Pt 475 at 710

Suffice it to state that CEDAW addresses specifically the plight of women. The question is how much have been done on the part of the Government for the implementation or enforcement where there is violation. The Optional Protocol to CEDAW is a new complaint

mechanism that permits women from the countries who are signatories to CEDAW and the Protocol to make complaints to the United Nations Commission on the Elimination of the Discrimination Against Women (the CEDAW) when domestic remedies have been exhausted. See Article 17 CEDAW and Article 4 of the Optional Protocol to CERAW.

The Optional Protocol to CEDAW also provides for an inquiry procedure whereby the Committee is empowered to investigate into serious and systematic abuses of women's human rights in countries that are state parties to it and this even entails onsite investigation by the Committee as can be found in Article 8.

Closely related to this is how much is the awareness on the part of the rights holders such as the widows or the potential widows who are likely to be affected by these obnoxious widowhood rites? These we opine the HRE might be able to address in a society such as Nigeria as a nation

The fact that Nigeria ratified these international and regional instruments she is expected to recognize, fulfill implement and enforce them. However, having identified the copious legislations, conventions, protocols and treaties entered into or adopted by Nigeria, a critical analysis suggest that there are evidences that there are sufficient provisions especially at the international level to address the plights of women globally the Nigerian women inclusive

However, Nigeria is yet to properly key in to alleviate the challenges facing women in Nigeria from actualizing the protection and promotion of their rights. It is evidence in the current discourse as regards widowhood rites and women and their rights in Nigeria. The inhuman treatment like seclusion, drinking of concussions from corpse's bathing water, sleeping with corpse, denial of widow's access to her personal effects and outright forceful ejection from matrimonial home and forceful marriage to the family member at the demise

of the husband. All constitute violations of the widows' rights to their dignity of human person, personal liberty, right to family and peaceful coexistence. Therefore their rights are infringed upon with impunity in the rural settings especially on the illiterate women. Traditional observances have made it difficult, if not impossible for the National Laws, Regional and International norms to be observed and implemented. Hence these call for a panacea using HRE; otherwise the growing society and the polity will be harmed and development stunted

2.1.3 International Human Rights Conferences Aimed At Promoting Women's Rights.

Women issues have also received attention at a series of conferences and subsequent UN actions which have resulted in several activities to wit: The adoption of the International Women's Year (Mexico City, 1975), the naming of 1979-85 as the UN Decade for Women (UNDW) (adopted by the General Assembly in Resolution 3520, 1975) The development of the Programme of Action for the Second Half of the UNDW (Copenhagen, 1980), the setting forth of the Forward looking strategies for the advancement of Women (FLS) for the period 1985-2000 (Nairobi, 1985) and the establishment of the Platform for Action (PFA) (Beijing 1995)

2.1.4 International Bodies Advancing the Course of Women's rights

The UN has also created a number of bodies that have been active in the promotion of women's issues throughout the UN system. These bodies include the Commission on the Status of Women (CSW), the United Nations Development Fund for Women (UNIFEM), the International Research and Training Institute for the Advancement of Women (INSTRAW). The Mexico city conference (Declaration and World Plan of Action for the Implementation of the Objectives of International Women's Year) led to the establishment

of INSTRAW and UNIFEM. These institutions are to provide the institutional framework for research, training and operational activities in the area of women and development. The committee on CEDAW is another body that was established by the 1979 Convention.

In April 2000, the Commission on Human Rights adopted a Resolution on “Women’s Equal Ownership of, Access to and Control over Land and the Equal Rights to Own Property and to Adequate Housing (Resolution 2000/13). More recently, on 23 April 2001, the Commission on Human Rights adopted yet another Resolution (Resolution 2001/34) on the same subject.

2.2 African Human Rights Law Context

The African human rights system has since the 1980s gradually developed its own jurisprudence in the protection of Africans. A discussion of the various instruments and activities that have place within this time will determine how adequately women, particularly widows, have been protected and their rights promoted in Africa.

2.2.1 The African Charter on Human and Peoples’ Rights

In the late 1970s and early 1980s, the OAU began to broaden its focus on human rights. It enacted the African Charter on Human and Peoples’ Rights (the African Charter) in 1981, establishing the African Commission on Human and Peoples’ Rights (the African Commission) to oversee the African Charter’s interpretation and application.

In 2002, the OAU and African Economic Community merged to create the AU, which aims to promote economic and political stability across the continent. In working towards this goal, the AU has focused on the development of a common market, democratic governance and the promotion of human rights. Notably, the Constitutive Act that gave rise to the AU included language that promotes respect for human rights, including women’s rights. Since

its inception, one goal of the AU has been the promotion of the role of women within the organization and in Member States.

The African Charter (*see* Appendix B), ratified by all 53 Member States of the African Union, is the parent treaty of the Protocol on the Rights of Women in Africa (the Women's Rights Protocol *see* Appendix A). It covers various human rights issues, from general fundamental rights, to those of specific groups, such as women.

Article 2 of the African Charter enshrines the principle of non-discrimination including on the grounds of sex and Article 18(3) "calls on all States Parties to eliminate every discrimination against women and to ensure the protection of the rights of women as stipulated in international declarations and conventions." Articles 60 and 61 of the African Charter recognize regional and international human rights instruments and African practices consistent with international norms on human and peoples' rights as being important reference points for the application and interpretation of the African Charter. All rights in the African Charter apply to women and some are of particular relevance, including those on equality and non-discrimination and those dealing with personal liberty, integrity, and dignity.

2.2.2 The Protocol to the African Charter on Human and Peoples Right on the Rights of Women in Africa

For many years, non-governmental organizations (NGOs) in Africa advocated for the adoption of the Women's Rights Protocol to strengthen the African Charter's provisions on gender equality. Shortcomings of the African Charter included the failure to explicitly define discrimination against women; lack of guarantees of the right to consent to, and equality in, marriage; and emphasis on traditional values and practices that in many cases impede the advancement of women's rights in Africa.

Before the adoption of the Women’s Rights Protocol, an NGO consensus text aimed at strengthening the draft Protocol was agreed upon at a meeting in January 2003 in Addis Ababa. The meeting was convened by the Nairobi office of Equality Now and attended by African women’s rights groups, including African Centre For Democracy and Human Rights Studies, Akina Mama Wa Afrika, Equality Now, Ethiopian Women Lawyers Association, Femmes Africa Solidarite, African Women’s Development and Communication Network (FEMNET), Malian Women Lawyers Association, Senegalese Women Lawyers Association, Women in Law And Development in Africa (WiLDAF), and Women’s Rights Advancement and Protection Alternative (WRAPA). This consensus text was based on existing international instruments, such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), but specifically adapted to the African context. The NGO group then advocated for a strong Women’s Rights Protocol with governments.

As a result of these efforts, the Women’s Rights Protocol was adopted on 11 July 2003 by Member States of the African Union and came into force on 25 November 2005. As of May 2011, 30 countries have ratified it.

The principles enshrined in the Women’s Rights Protocol are in some instances based on existing international human rights standards, but in many others significantly advance international human rights standards and specifically enhance the protection and promotion of women’s rights in Africa. In particular, the Women’s Rights Protocol makes explicit the protection of women’s rights in areas which are not expressly covered by existing treaties by:

providing specific legal protection against violence against women, both in the public and private sphere (Articles 1(j), 3(4), and 4);

requiring States to prohibit, through legislative measures backed by sanctions, all forms of female genital mutilation

(Article 5);

providing protections to adolescent girls, including the right to be free from abuse and sexual harassment in schools

(Article 12(1) (c));

specifically articulating widows' rights to equality (Article 20);

prohibiting forced marriages and specifying 18 years as the minimum age of marriage (Article 6(a) and (b));

articulating a women's right to retain her maiden name and to participate equally in decisions regarding the parties matrimonial regime and residence (Article 6(e) and (f));

expressly articulating a women's right to abortion in specified circumstances (Article 14(c)); and

specifically addressing women's rights and states obligations in relation to HIV/AIDS (Article 14(d) and (f)).

2.2.3 The African Commission on Human Rights and Peoples' Rights

The African Commission, which began functioning in 1986, was established under the African Charter to protect and promote human and peoples' rights and to monitor State compliance with the African Charter (and its Protocols). The African Commission comprises 11 independent Commissioners who are elected by the Executive Council of the AU to serve for six-year terms on a part-time basis, with the possibility of a single re-election. The AU appoints the secretary of the African Commission and approves its budget. The secretariat of the African Commission is located in Banjul, the Gambia.

The African Commission meets biannually in April/May and October/November for two-week sessions. During these sessions, the African Commission considers:

complaints (also referred to as communications) submitted to it by individuals, NGOs, institutions, lawyers and States Parties;

periodic States Party reports under Article 62 of the African Charter on compliance; and

reports of human rights violations and promotional activities of the Commissioners.

In accordance with Article 59 of the African Charter, the chairperson of the African Commission delivers its activity report to the AU at AU summits in January and June of every year. The content of the report is then made public. All decisions on complaints (communications), resolutions taken at its sessions and fact-finding mission reports form a substantial part of the activity report. The report also contains information about the promotional activities of the Commissioners such as country missions and participation at seminars.

2.2.4 Regional Agreements and Conventions That Affect Women in Africa

Other agreements which enhance the protection and promotion of the rights of women in Africa include the Declaration on the HIV/AIDS Epidemic at the XI International Conference on AIDS and STDs in Africa, 1999 Women's Declaration and Agenda for a culture of Peace in Africa adopted at the close of a Pan African Conference in Zanzibar, 1999. Gender and Development- A declaration by Heads of State or Government of the Southern African Development Community, 1997. Draft Additional Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights.

2.3 Adequacy of the Protection of Widows under Present International and Regional Human Rights law

The issue of protection of women's rights has been of great concern to the international world. Hence several international instruments have adequately guaranteed their protection.

The Universal Declaration of Human Rights (UDHR) which was adopted by the United Nations General Assembly in 1948 states in its Art. 1 that “all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in spirit of brotherhood.” This provision enjoins all to respect ones rights, treating everybody equally and fairly. Article 5 provides that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Its Art. 27 maintains that every person has the right to freely participate in a community’s cultural life. No coercion is permitted.

There are other international instruments that protect women’s human rights and they include. International Convention on Civil and Political Rights (ICCPR) 1966; International Convention on Economic, Social and Cultural Rights (ICESCR) 1966; Convention against Torture and other cruel, inhuman or Degrading Treatment or Punishment (CAT) 1984. At the regional level, there is the African Charter on Human and People’s Rights 1981 to address human rights in Africa in general the rights of women inclusive. For example under the African charter, Art. 5 recognize individual’s rights to dignity. It provides that every individual shall have the right to the respect of the dignity inherent in a human to the recognition of his legal status with no distinction or discrimination

Similarly, the African women’s protocol which is germane to our subject of discourse, defines discrimination to include; (any) distinction, exclusion or restriction or differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women regardless of their mental status, of human rights and fundamental freedoms in all spheres of life (Art.2). Art. 3 provides that “every woman shall have the right to a respect as a person and to the free development of her personality, while Articles 20(1) (a) specifically enjoins African governments to take

appropriate measures in order to ensure that women are not subjected to inhuman, humiliating, and degrading treatment.

Under the ICCPR, Art. 7 provide that no one shall be subjected to torture or cruel and inhuman or degrading treatment or punishment. Art. 2 of the (ICCPR) also provide that all the rights guaranteed in the covenant must be enjoyed by all without distinction or discrimination whatsoever. This mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women of human rights and fundamental freedoms in the political economic, social, cultural, civil or any other field tantamount to a nullity.

Happily, as already stated ,the Protocol to the African Charter and the establishment of the African Court on Human and Peoples' Rights will address all these lacunae when it comes into force. The adequacy or otherwise of the Women's Protocol and the Court will not be discussed at this point as they are not yet operative and therefore easily evaluated.

2.4 Observation

The plethora of human rights instruments and activity at the international and regional levels seem to favour women greatly in current times.

Nevertheless millions of widows in the third world, who are disinherited, evicted, victims of violence, poverty, property grabbing and marginalization continue to remain outside the remit of all these laws. They struggle to survive without legal protection, legal rights or legal aid. Of all women, they are the least empowered to use human rights laws to their benefit.

A complex mix if factors underlies women's property rights violations in African countries. Chief among them are the discriminatory laws and customary practices, ineffective

enforcement of laws, biased attitudes, unresponsive authorities, inept courts, women's low level of awareness of their rights and the social stigma of being considered greedy or traitors to culture if they assert their rights, and some are even called their husband's killer.

It is for these reasons that although most government throughout Africa, have ratified treaties promoting the welfare of women, they are the very ones which still hide behind customs as a defense against protecting women's rights.

CHAPTER THREE

THE RIGHTS OF WIDOWS TO INHERIT THEIR LATE HUSBANDS PROPERTIES UNDER CUSTOMARY LAW AND STATUES

The law of succession involves the transmission of the rights and obligations of the deceased person in respect of his estate to his heirs and successors. It deals primarily with the distribution of a deceased estate to his heirs and successors including the rules governing the administration of the estate.

Women suffer from various traditional and cultural practices rooted in customary law. This chapter sets out by attempting a description of customary law , the conflict between women's rights and customary laws vis-à-vis the position of the Marriage Act. This chapter goes further to explain widow's inheritance and succession under the customary laws and the statute.

Denial of widowhood rights to succeed their deceased husband's property has posed a major problem under customary law which is seen at all times to be inhuman and degrading as it infringes on the rights of the widows¹⁰

1 The 1999 Constitution of the Federal Republic of Nigeria

3.1 Definition of Terms

3.1.1 Customary Law

Customary law has been defined as “a mirror of accepted usage, a reflection of the social attitudes and habits of various ethnic groups and it derives its validity from the consent of the community which it governs applicable only to people indigenous to the locality where such customary law holds sway

Customary law is flexible and changes with times, thus the applicable customary law at any particular time must be an existing customary law and not merely custom of ancient times

3.1.2 Widowhood

Widowhood is generally accepted as the loss of a spouse through death; it presupposes that marriage in one form or another must have taken place between the deceased and the surviving partner.

3.1.3 The Nature of Customary Law

Basically succession under customary law is intestate succession. Succession under customary law is applicable to the estate of a person who is subject to customary law, who dies without being survived by a spouse or a child of that marriage, that is, Statutory or Christian marriage. In Nigeria, there is no uniformity of rules of succession under customary law. The reasons for this state of affairs are not far fetched. They are so many ethnic groups in Nigeria, each with their own peculiar characteristics, even within a larger ethnic classification. In some part of Nigeria, for example among the Yoruba speaking ethnic groups in the southwest, succession is based on the concept of family property. While on the other

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- 2 Salacuse Jeswald W in “A selection survey of Nigeria family law” 1965 (Ahmadu Bello University Bookshop Zaira)p2& 8
 - 3 See Bairaimain CJ in Oweyin V Omatosho (1961) All WLR 304 at 309

hand, among the Edo people in the present day Edo State in Mid-Western Nigeria, the concept of male succession prevails with little modifications. What then is the correct law to be applied in cases of intestate succession under customary law?

Essentially, the deceased customary law is the appropriate law to be applied. The principles of customary law will still be applicable irrespective of whether the deceased died outside his ethnic group or he leaves properties outside his hometown. It is also important to observe that while it is true that with respect to land matters generally, the customary law of the place where the land is situated is the applicable law. However, with respect to inheritance, the appropriate customary law is the customary law of the deceased. See *Tapa v. Kuka* (1945) 18 NLR 5, *Zaidan v. Zaidan* (1974) 4 UILR 283.

Before the Supreme Court decision in *Adeniyi Oluwu and Ors v. Olabowale Oluwu and Ors* (1985) 3 NWLR (Pt.13) 372 it was a generally accepted principle of law in Nigeria that a person carries his customary law with him. Therefore, it was not legally possible for a Nigerian to change his ethnic group and acquire another ethnic identity, irrespective of the number of years he must have spent in that “foreign” ethnic group. Thus, in *Osuagwu v. Soldier* (1959) NRNLR 39 the court was faced with a situation, that is, whether to apply Islamic law, which was the *lex situs* and *lex loci*, or Ibo customary law, which was the personal law of the parties to the resolution of a dispute between two Ibo men who were living in Kano, in the present day Kano State.

The court, in the interest of justice opted to apply the Ibo customary law. Consequently, the court held as follows: “We suggest that where the law of the court is the law prevailing in the area but a different law binds the parties, as where two Ibos appear as parties in the Moslem court in an area where Moslem law prevails, the native court will...in the interest of justice...be reluctant to administer the law prevailing in the area, and if it tries the case at all

its will... in the interest of justice...choose to administer the law which is binding between the parties”. *ibid* at page 41.

In *Yinusa v. Adebusokun (1968) NCLR 97*. Bello J (as he then was) held that duration is immaterial when considering whether a settler and his descendants have merged with the natives of the place of settlement. The test is whether it can be established that as a result of the settlement, the settler has merged with the native, and has subsequently adopted their ways of life and custom. The learned Judge continued as follows: Subject to any statutory provision to the contrary, it appears...that mere settlement in a place, unless it has been for such a long time that the settler and his descendants have merged with the natives of the place of settlement and have adopted their ways of life and custom, would not render the settler or his descendants subject to the native law and custom of the place of settlement. *ibid* at page 99.

The view expressed by Bello J (as he then was) above was given judicial recognition / consideration by the Nigerian Supreme Court in the case of *Adeniyi Oluwu & Ors v. Olabowale Oluwu and Ors*. Here the court was urged to consider whether it was possible for a person to change his personal customary law of origin in favour of that of his adopted place of settlement. The facts of the case are as follows. The deceased, Adeyinka Ayinde Oluwu, was a Yoruba man by birth from Ijesha. He had lived most of his life in Benin City. He married Benin women who bore him all his children who were the plaintiffs and defendants in this case. In 1942 the deceased applied to the Omo N’oba of Benin (the traditional Ruler of Benin) to be “naturalized” as a Benin citizen. His application was granted. As a result of his status as a Benin man he was able to acquire a lot of landed property both in Benin City and elsewhere in Bendel State. The deceased died in 1960 without making a will. The defendants, two of his children were granted Letter of Administration to administer the deceased’s estate. First defendant distributed the estate in accordance with the Benin Customary Law, but the

other children, the plaintiffs and the second defendants were dissatisfied and claimed that the estate ought to have been distributed in accordance to Ijesha Customary Law rather than by Benin Customary Law. The plaintiffs applied to the High Court for an order setting aside the distribution according to Benin customary Law, and for a Declaration that Ijesha Customary Law was the applicable law. They failed in the High Court. The High Court held that Benin Customary Law was the applicable law. They appealed to the Court of Appeal. The Court of Appeal affirmed the decision of the High Court and dismissed the appeal, wherein they further appealed to the Supreme Court. In a well considered Judgement, five Justices of the Supreme Court unanimously dismissed the appeal and confirmed the decision of the High Court on the ground that although the deceased was a man of Yoruba extraction, he had spent most of his life in Benin City, “naturalized” as a Benin and acquired considerable properties in Benin City. On the strength of this evidence, the Supreme Court held that his personal law should be the law governing the distribution of his estate at his death, which in this case was Benin Customary Law and not his personal law of origin, which was Ijesha (Yoruba) Customary Law. Coker JSC in his lead judgement observed that in the light of the facts of the case, the deceased in effect relinquished his Yoruba cultural heritage and acquired Bini status.

Accordingly, his Lordship held as follows: It follows therefore that by virtue of his change, his personal law changed to Benin Customary Law; distribution of his estate on intestacy must necessarily be governed by Benin Customary Law. He married Benin women who had children for him, he carried on various business activities in and around Benin City. He found also that the change of his status endowed him with the rights and privileges of a Bini indigene and his change in status accords with Benin customary law. Unless this finding of fact is reversed, I hold the view that the trial Judge was right in saying that the applicable customary law for the distribution of the estate is Benin Native Law and Custom.

3.2 The Rights of Widows' Under Customary Law

Stricto sensu, a widow is not entitled to share in the property of the deceased husband at customary law. In **Oloko v. Giwa**,¹¹ the court held that generally, widows do not inherit their deceased husband's property. They are only allowed to remain in the house and a portion of farm land. Widows have only possessory rights and not proprietary rights over their deceased husband's property. It was the opinion of the court that inheritance follows blood¹² and since a widow is not a blood relation of her husband, therefore she has no claim to any share in the property. Also in **Aileru V. Anibi**¹³, Jibowu J noted as follows:

“Marriage according to native law and custom is recognised by our law and the issue of such marriage is legitimate. There is no question (but) that the plaintiffs are legitimate children of their deceased fathers, but their mothers have not the same status under native law and custom as wives of marriage under the marriage ordinance.”

In **Ogunbowale v. Layiwola**¹⁴, the deceased was survived by three wives and three children one from each wife. He also left two houses, at the time of his death. The 2nd defendant who was the mother of one of the children sold and conveyed in fee simple one of the two houses left by the deceased claiming that she sold the property under the authority of a paper signed by the two daughters of the deceased and another relation of the latter. The question for determination here among others was: What is the position in law of the wife or children in relation to his real property after his death in testate? The court held, setting aside the sale of

¹¹ (1939) 15 NLR 31

¹² That is, devolution of a deceased man's property flows within a man lineage; it extends neither to his wife nor her lineage.

¹³ (1939) 15 NLR 31

¹⁴ (1975) 3 CCHCJ/HC 327 of 19th March, 1975

the property, that nothing by way of property devolves on the wife/wives of a man under customary law. The wives who had children for the deceased could continue to live in the home of the deceased with their children. A wife without any issue for the deceased if she desires to stay on with the family of the deceased, would appear to have a right of occupation only. The 2nd defendant had sold the property involved in this case as her own property and conveyed the same to the 1st defendant in fee simple, she inherited no estate in the real property of her husband except the right to live there as a widow. Therefore she had no interest in the property, which she could convey. Moreso, she herself was an object of inheritance. Furthermore, in **Bolaji v. Akapo** , Sowemimo J. (as he then was) held as follows:

The only person entitled to a grant of a letter of administration under Yoruba native law and custom which would be applicable by virtue of S.27 of High Court of Lagos Act, were the plaintiffs, four of the Children of the deceased, but not the wives who are regarded as part of his estate.

R. A. Onuoha affirms this position in his article "Discriminatory Property Inheritance Under Customary Law in Nigeria: NGOs to the Rescue"¹⁵. He posits that women do not inherit because the widow is in fact regarded as part of the estate (acquired by the deceased husband upon payment of her dowry at the time of marriage) to be inherited by the son or relative. As a result of this diminutive legal status that has been accorded the female members of the family under customary law, women are now regarded as mere articles with no right or duties of her own.¹⁶ For instance, the Court of Appeal in Lagos, in the case of **Ogunkoya V. Ogunkoya**¹⁷ held that:

¹⁵ Onuoha, R.A "Discriminatory Property Inheritance Under Customary Law in Nigeria: NGOs to the Rescue", *The International Journal of Not-for-Profit Law* (2008), Vol. 10, Issue 2

¹⁶ Coker, G.B.A., **Family Property Among the Yorubas**, London, Sweet & Maxwell, 1996, pg. 226.

¹⁷ Suit CA/L/46/48 Pg. 56, Unreported.

‘wives are also regarded as chattels who are themselves inheritable by other members of the family of the deceased under certain conditions.’

An exception to this practice does exist: that is when a widow chooses to remain in her husband’s house and in his name, she can do so even if she has no children. This is to ensure her maintenance by the husband's family but if they fail to maintain her, then she has a qualified right to let part of the house out to tenants and use the rent to maintain herself. Her interest in the house or farmland is merely possessory and not proprietary, so she cannot dispose of it.

This writer submits that this customary practice offends the principles of equity and good conscience because it does not guarantee that the widow, who during her marriage and during the deceased husband’s life, might have toiled to bring about the acquisition of such property. It is therefore morally repulsive to deprive her of ownership of such property. If a husband and wife are truly seen as one in law and before the eyes of God¹⁸ and man, it is reasoned that they should share what belongs to them equally, and should be free to exercise their rights to devolve same.

A husband, on the other hand, cannot inherit his deceased wife’s share of her family property because the husband is regarded as a stranger and as such, is not entitled to share in property of the family. This deprivation of inheritance in his deceased wife’s share of her family property is justified based on the principle of *nemo dat quod non habet*¹⁹ which literally means “No one gives what he doesn't have”. The wife’s property acquired before marriage which was not taken to her husband’s house cannot be inherited by the husband or the husband’s family. The exception is pre-nuptial property taken to the husband’s house and it

¹⁸ Genesis 2:24 - “a man shall leave his parents and cleave unto a woman and shall become one flesh.”

¹⁹ As it was held in the case of *Nwugege v. Adigwe*. [1934] 11 NLR 134. f

applies only to movable property²⁰ because land cannot be taken from one place to another. Nonetheless, his right of inheritance in his deceased wife's real property depends first, on whether the wife left any surviving issues; and second, whether the property was acquired before or during the subsistence of the marriage.

Other Factors Influencing The Discriminatory Female Inheritance Practices in Nigeria

This section points to the mindset or central philosophies that exist in the minds of any traditional customary society which ultimately is manifested, in one way, as the practice of disinheriting women. The social perception of women is very low mainly due to illiteracy, poverty and cultural practices, which treat women as sub-persons, objects of inheritance rather than subjects of inheritance. This proposition forms the basis for the widespread perpetuation of acts some which are very harmful to the overall well-being of women²¹.

Also, the frequent importation of native law and custom of inheritance to the execution of wills of a testator duly made under the Wills Act which usually results in hardship to even wives of statutory law marriage is a direct off-shoot of this ideology. For example, if a testator bequeaths his matrimonial home to his wife in perpetuity, objections are raised to the execution of that bequest on the ground that by native law and custom of Igbos, for example, a man's dwelling house (matrimonial home) belongs to his eldest son or to his male next-of-kin where he is not survived by any male issue.

Patriarchy

Patriarchy is a social system in which males are the primary authority figures central to social organization, occupying roles of political leadership, moral authority, control of property, and

²⁰ Onuoha, R.A. "Discriminatory Property Inheritance Under Customary Law in Nigeria: NGOs to the Rescue" (2008) *The International Journal of Not-for-Profit Law*; Vol.10 Issue 2

²¹ Such unsavory practices include: the discrimination in education of the girl-child, early marriages of female children, female genital mutilation, domestic violence against women, widowhood practices and even up to workplace-related discrimination against women

where fathers hold authority over women and children. That control is maintained by excluding women from access to necessary economically productive resources and by restricting women's sexuality. Attached to this philosophy is absolute control over all spheres of life by men including but not limited to direction on political, social, cultural and economic rights. It is a catalyst for the subjugation of women that ensures that no woman has access to economic resources such as land²². Patriarchy sustains gender discrimination in any society and it includes the disinheritance of the females.

Bride-Price Payment

Bride-Price is the payment made by a groom or his kin to the kin of a prospective bride in order to ratify a marriage. Traditionally, the payment of bride price is a matter of social and symbolic as well as economic reciprocity, being part of a long series of exchanges between the two inter-marrying families. It consolidates friendly relations between them, provides a material pledge that the woman and her children will be well treated, symbolizes her worth to the community, and provides a level of compensation to her natal family for the loss of her labour and company²³. So serious is this practice in Nigeria that in most cultures, a woman is considered legally and fully married to her husband if her bride price has been paid and also a marriage is not reckoned to have ended until the return of bride-price paid has been acknowledged.

Nowadays, bride-price payment is negotiated in a manner akin to haggling for foodstuffs in any open market and this is done by the elderly men of both families without the input and participation of the bride and her mother. It is this writer's humble submission that this singular practice marks the conception of the social "permissibility" of the discrimination of the woman in the minds of the husband and his kinfolk and this is exhibited in various ways

²² Land is the basis for obtaining credit facilities which could enhance the economic emancipation of women.

²³ Encyclopedia Britannica online

throughout the span of the marriage²⁴ especially at the demise of her husband. According to Oluyemisi Bamgbose²⁵, the following were stated as the negative effects of bride price on women:

1. **Transfer of right:** The nature of the practice is an indication and confirmation that a woman is viewed as a chattel with a price tag that is purchase by a person who pays the price. The “purchaser” like a purchaser of goods in law has a right to deal with the “purchased chattel” in any manner. This is the attitude of men under customary law as regards their wives.
2. **Loss of right:** After the payment of the bride price, the woman remains married to the man who paid it. If the marriage breaks down , the woman must return the bride price back to the man for her to regain her freedom. Non-repayment of the bride price makes the woman remained married to the man to the extent that any child given birth to by the woman outside the marriage is deemed to be the child of her estranged husband. The issue is more severe when the woman is unable to refund the bride for economic reasons.

From the foregoing, if wives are regarded as property of their husbands, they are therefore objects of inheritance themselves.²⁶ In some cultures, it has been argued that it is the man who pays the bride price (dowry) for a wife. The belief is that a man got his wife for a price and as such, she is a piece of property. Arising from that belief, in our customary reasoning, such a woman cannot inherit her late husband’s property; instead, she is to be inherited by one of her deceased husband’s brothers. After all, how can property inherit another property?

²⁴ Under the guise of patriarchy in customary practices

²⁵ Customary Law Practices and Violence Against Women: The Position Under the Nigerian Legal System (July 2002) Paper presented at the 8th International Interdisciplinary Congress on Women hosted by the Department of Women and Gender Studies, University of Makerere, Uganda.

²⁶ **Davis V. Davis & Ors.** (1929) 6 NLR 75.

One may rightly conclude that it is the issue of payment of bride price by a man in order to secure his wife's hand in marriage that places her in a position of inheritable property: after all she was paid for and bought. It was based on this belief that the Court of Appeal in Lagos had held in the case of *Ogunkoya V. Ogunkoya*,²⁷ that 'wives are also regarded as chattel that are inheritable by other members of the family of the deceased husband under certain conditions.'

Religion

Religion refers to an organized collection of beliefs, cultural systems, and world views that relate humanity to the supernatural, and to spirituality²⁸. From the beliefs peculiar to a particular religion, believers acquire their moral, ethics & lifestyle choices. Religion plays a very fundamental role in the lives of human beings and its directives on issues of .okklife are believed very strongly. In Nigeria, the popular religions are Islam, Christianity and Ancestral Worship and they all have similar opinions about the inheritance rights of women as compared with men. The biblical rules of inheritance were outlined in *Numbers 27:1-11*. In summary, a wife is given no share in her husband's estate, but the husband is the first to inherit from the deceased wife's estate even before her sons. A daughter can only inherit if no male heirs exist. A mother is not a heir to her deceased son's estate at all whereas a father is. Widows and daughters, if male children exist, were at the mercy of the male heirs for provision²⁹.

Among the pagan Arabs before Islam, inheritance rights were confined exclusively to the male relatives. Women were objects of inheritance and they were considered part of the possessions of a man. But the advent of Islam as a religion brought about a revolution in the

²⁷ Suit CA/L/46/48 Pg. 56, Unreported.

²⁸ Wikipedia - Religion

²⁹ This is the reason why widows and orphans girls are among the most destitute members of the Jewish society

outlook towards women and established the right of women to inherit from the deceased's estate. The Quran provides thus:

"From what is left by parents and those nearest related, there is a share for women, whether the property be large or small - a determinate³⁰ share"³¹.

By clearly stating in the Quran that women have the right to inherit for themselves, it changes the status of women in an peculiar manner; women have inheritance rights which are recognized and upheld by the religion. The general rule governing the devolution of property in inheritance is that the female share is half the male's except in cases where the mother receives equal share to that of the father³². The Quran is replete with unequivocal proof to show that women are not completely subjugated with men in the sight of God in terms of her rights and responsibilities. An example is:

"And women shall have rights similar to the rights against them, according to what is equitable; but men shall have a degree over them"³³.

From these points raised above, the writer has observed that both religions practiced in Nigeria – Christianity and Islam - militate, wholly or in part, against women's rights to inheritance. A woman is not viewed as man's equal, consequently both religions will hardly concede equality of share in inheritance. The varying systems of religion relegate woman to the background thereby covertly or overtly reinforcing the inferiority of women.

3.3 Succession under the Marriage Act

³⁰ Emphasis is the writer's

³¹ Quran 4:7

³² Quran 4:7,11,12,176

³³ Quran 2:228

The major means through which individuals are differentiated and placed into a system of inheritance is through the form of marriage that they choose to adopt.

The choices available to individuals are either a statutory, monogamous civil marriage, or a marriage under a customary or Sharia system which is permissive of polygamy.

In order to have one's property shared under extant statutory provisions, one must contract a valid civil marriage under the Marriage Act, which is the primary statute governing marriage in Nigeria. Therefore it is necessary to both complete a formal registration process and to get married within a licensed facility such as a church or court registry. It is worthy of note that while many Christian marriages will also be civil marriages, given that Churches can be licensed to perform these services, a Christian marriage alone does not mean that an individual will have rights under the civil system. A civil marriage establishes the presumption that the couple intend to subscribe to the British inheritance system. This presumption is founded on two primary bases. First, the courts have established in the case of *Cole v. Cole*³⁴ that individuals being married in the Christian form had the presumed right to succession on Christian principles. Second, this principle was codified in The Marriage Act of 1915(Marriage Ordinance), and continues to be cited as good authority. The proposition is aptly laid out in *Salubi v Nwariaku*³⁵:

Where a person, subject to native law or custom marries under the Marriage Act and dies intestate, the applicable law for the distribution of his estate would be the Marriage Act and not the Administration of Estates Law or Customary Law. This is because his intestacy is governed and regulated by English Law".

³⁴ (1898), 1 N.L.R. 15

³⁵ (1997) NWLR (Pt. 505) 442.

In summary, inheritance is possible under the British system if the marriage is itself a civil marriage, the couple does not live in a customary marriage³⁶, and the land is not subject to customary prohibitions. In the alternative, a couple that does not have a civil marriage can also opt into this system through using a will.

Inheritance will occur under a customary law if the couple marries either under a customary system, or marries under a Sharia system but is not aware of their rights under the Sharia system of inheritance, or had a Christian marriage which was not registered in compliance with the Marriage Act and, potentially, in the case the couple lives a “traditional lifestyle³⁷” but had a civil marriage. Alternatively, inheritance will be governed by the Sharia system in the case of a Sharia marriage.

3.4 Disposition by Will

Nigerian law on testate inheritance/succession includes:

The Wills Amendment Act, 1937 and the Wills Amendment Act, 1852, regarded as statutes of general application, which were in force in England on January 1, 1900. Also, the Wills (Soldiers and Sailors) Act, 1918 which deals with the formal validity of Wills. In some states of the federation of Nigeria, the Wills Law, CAP 133, Laws of Western Nigeria applies. This 1958 law is essentially a re-enactment of the above mentioned laws on Wills.

Further, testate inheritance in some states in Eastern Nigeria is governed by the Succession Law Edict, 1987. The provisions of part 4 of the 1987 Edict are similar to those in the Wills Act, 1832 and Wills Law, 1958. It is important to note that these laws apply in respect of the spouses of a statutory marriage and their children. No disability is placed on widows with regard to inheritance under a testamentary disposition. They are not treated differently from

³⁶ For example, the practice of polygamy which nullifies the validity of the civil marriage.

³⁷ Such as idolatry and polygamy

other beneficiaries with regard to their general right of inheritance as their counterparts in England. The provisions of these laws, however, do not extend to widows who contracted customary law marriages.

3.5 The Wills Acts

Testate succession is ruled by the Wills Act consisting of the Wills Act of (1832) (Nigeria), Will Law of (1958) (Nigeria), and the Wills Amendment Acts of (1937) (Nigeria), and of (1852) (Nigeria). It varies slightly depending on the state or geo-political region concerned. These laws place no restrictions on women with regard to inheritance under a testamentary disposition. They are treated equally with all other beneficiaries. However, these Acts apply only to women married under civil law, not under customary law. By law of custom, certain real property cannot be affected by testamentary disposition³⁸. Instead, it must descend by way of such customary law, and thus cannot be affected by any of the Wills Act(s)³⁹. This is enshrined in section 3(1) of the Wills Law, 1958 contains a provision not contained in the other Laws mentioned above to the effect that: *“The real or personal estate which cannot be disposed by the applicable customary law, cannot be disposed by will”*. This deference to customary law can be very harmful to women: it usually means that they are denied use of any fair portion of the estate. Vanessa Emery submits that the Wills Act(s) are almost irrelevant, as wills are rarely if ever made in Nigeria, and especially not in favor of a female spouse. Even when a will is made in favor of the spouse, in-laws will generally contest such gifts. Normally, the widow does not know how to access the courts to enforce the will, or is prevented from doing so by threats and even physical force or violence⁴⁰.

³⁸ Such as the Igiogbe which belongs exclusively to the first son of a Bini man

³⁹ Citation needed!

⁴⁰ Women’s Inheritance Rights in Nigeria: Transformative Practices

3.6 The Difference Between The Customary Law of Inheritance And Marriage Act As Regards The Widows Right Of Succession

It is generally settled that a widow cannot inherit her deceased husband's land and property under the Customary rule of intestate succession⁴¹, Widows are generally denied direct or any access to the estate of their deceased husbands. The degree and impact of such denial as mentioned earlier differs according to the age, socio-economic and educational status of the widow.

However under the Marriage Act⁴² the right of the widow is very clear. In the absence of a Will, the widow is entitled to one-half of the estate after cost⁴³.

Under the Yoruba Customary Law, a married woman is entitled to her own property. Such which could be real or personal, can be freely used by her as long as she acquired them through her own sole effort either before marriage or during marriage. However a widow from Yoruba are cannot inherit her deceased husband's property. In *Soberu v Sunmonu*⁴⁴ it is settled that a widow herself is part of the property to be inherited.

Under the customary law, a widow has the legal right to retain the use and possession of her matrimonial home subject to good behavior and if she does not remarry. She is also entitled to farm in her deceased husband's farmland even if she has no surviving children⁴⁵. However in *Quartey v Nartey*⁴⁶, the court dismissed the widows claim although it was found that she helped in the acquisition of the property. But under the customary law, a widow does not

⁴¹ See Bennet (1995)130

⁴² Cap 218 LFN 1990

⁴³ See eg. Section 49(1) Administration of Estate Law, Laws of Ogun State Nigeria

⁴⁴ (1957) 2FSC 33 Adeseye V Taiwo (1956) 1FSC 84

⁴⁵ Eze v. Okwo unreported (1959) suit No 29/59 District Court Nsukka

⁴⁶ Supra

become a co-owner of property she helped her husband to acquire. The Court further submitted that she is only entitled to support and maintenance from her deceased husband's family if she does not remarry⁴⁷. Under the Married Women's Property Law, a woman is entitled to own property and sue for possession of it and on tort; but under Customary Law a widow does not acquire inheritance rights on a landed property even though given to her deceased husband⁴⁸

3.7 Conclusion and Recommendation

Studies such as this suggest that primary reform must occur at the local level, and will include not only changing the courts, but also ensuring that systems like the local police have adequate training to know when to divert a case through the customary indigenous system, and when to recognize that factors such as violence are present that may indicate greater police, or legal, support for the widow is indicated. Working within local leaders and systems of justice brings out the tensions in women's' ability to be active in the process of cultural transformation. First, it is assumed that knowledge of customs rests within knowledgeable leaders who are the gatekeepers to such knowledge.

These traditional authority figures may be important to ensuring the stability in the society in times of rapid modernization and HIV, however, they may also serve as a barrier to women who are unable to get them to hear their cases in local courts.

For example, she points to a number of towns in which traditional leaders have been instrumental in moderating widow rites, through practices such as minimizing periods of confinement and getting rid of the more degrading practices such as shaving of the head.

⁴⁷ Ibid: 385

⁴⁸ *Dosunmu v Dosunmu* (1952)14 WACA 527

Second, legal space itself may be hostile to women. Beverly Stoetlje recognizes how the same law that has been so important within multiple legal systems in Africa in negotiating relationship between Europeans and Africans, has also had a role in constructing and perpetuating constructions of gender. When women seek to engage in legal spaces, they therefore experience constraints on both their ability to speak and to be heard. In particular:

gender ideologies, activities related to gender roles, contexts for the performance of gender, and the genres of women's speech" are contingencies which structure how women must "perform, negotiate, and contest their positions in regard to legal matters.

However ,much work more work is needed to build up the capacity of widows groups and to educate the United Nations, Civil Society, governments and institutions, including the Judiciary and the legal profession, on the importance of protecting the rights of widows and their children in all countries, whether they are at peace one in conflict.

CHAPTER FOUR

DOMESTIC LEGAL RESPONSES TO WIDOWHOOD RITES IN NIGERIA AND THE LESSONS THEREFROM

4.0 The Plight of widows, and The National Legal Framework In Nigeria For The Protection of Widows.

The plight of widows in Nigeria is an arduous one; most times irrespective of the types of marriages contracted, a widow is subjected to a lot of hardship and torture. It is well known fact that under the customary Laws operating in Nigeria, there is little or no protection offered the women and much less offered to the widows, under this system of law, women are treated as chattels and disposable commodities and properties. However with the advent of statutory law type marriage, the status of women has remarkably improved because under statutory marriage, a wife was offered some protection under the law for example where an intestate contracts a marriage under English Law, there's fewer problems in devolution of property and near absence of dehumanizing rites. However in practice, the realities on ground appear different because husbands have been known to use Wills in circumventing the rights of widows of a statutory marriage by disinheriting them through such Wills and recognizing heir⁴⁹

As discussed in the previous chapter, the human rights of widows in Nigeria are constantly being abused because of the rites they are expected and made to perform by virtue of their being widows.

Most of these rites are as old as the communities that practice them and have stood the test of time. Nigeria has been a member of the UN and has ratified an impressive number of human

⁴⁹ Kristin Mann "Marrying will", Cambridge University Press 1985 at page 84

rights instruments, including these that are specifically for the protection of women's human rights.⁵⁰

4.1 The Constitution and the Right of Widows

Rights have been defined as indivisible, inalienable and interdependent moral claims which are inherent in all human individuals by virtue of their humanity alone. They are fundamental and necessary for individuals to survive and to realize their potentials to the fullest. Therefore, to deprive any human being of these rights will mean to distort his or her humanity and to destroy his humanity. Human rights are based on the principle of respect for the individual and they exist based on the assumption that each person is a moral and rational being who deserves to be treated with dignity. Professor Osita Eze postulates that human rights in its widest connotations embraces those civil, political, economic, social, cultural, development rights which are considered indispensable to a meaningful existence⁵¹. Furthermore, rights represent demands and claims which individuals and groups make on society; some of which are protected by law and have become part of the nations municipal laws (*lex lata*) while others remain aspirations to be attained in the future. In the case of *Ransome-Kuti v AG Federation*⁵², Oputa JSC as he then was stated the fundamental rights are:

"...also derived from the premises of man's inalienable right to life, liberty and pursuit of happiness and are enshrined and clearly spelt out in the Constitution"

Human rights are universal; where nations or specialized groups enjoy specific rights that apply only to them, human rights are the rights to which everyone is entitled - no matter who

⁵⁰ It ratified CEDAW see Chapter 2

⁵¹ Human Rights in Africa; Some Selected Problems, Nigerian Institute on International Affairs (NIIA) MacMilan, Nigeria Publishers, 1984, page 5

⁵² [1985] 2 NWLR part 6 page 211

they are or where they live - simply because they are alive⁵³. At the national level, States are obliged and duty-bound under International Law to respect, protect and to fulfil human rights. Firstly, the obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights; the obligation to protect requires States to protect individuals and groups against human rights abuses and finally, the obligation to fulfil means that States must take positive action to facilitate the enjoyment of basic human rights. As individuals, while being entitled to human rights, it is expected that the human rights of other individuals would be respected also. This principle of universality of human rights was first emphasized in the Universal Declaration on Human Rights in 1948 and has been reiterated in numerous international conventions, declarations and resolutions. All States have ratified at least one, and 80% of States have ratified four or more of the core human rights treaties. This consent of the States gives concrete expression to the concept of universality of human rights⁵⁴.

Womens' Rights can be defined as gender-peculiar freedoms and entitlements that accrue unto all members of the female gender by reason of them being human. It involves the incorporation of women's perspectives into already established human rights standards and practice. A woman's human rights framework equips women with a way to define, analyze, and articulate their experiences of discrimination, violence, degradation, and marginality.

The concept of women's human rights is unique in that it is simultaneously mundane and revolutionary. On the one hand, the idea of women's human rights makes common sense; it simply states that as human beings women have human rights. So in many ways, the claim that women have human rights seems quite ordinary. On the other hand, women's human rights are a revolutionary notion because women have had and up to this moment still

⁵³ <http://www.humanrights.com/what-are-human-rights.html>

⁵⁴ <http://www.humanrights.com/what-are-human-rights.html>

continue to struggle to claim equal rights with men. This radical reclamation of humanity and the resultant insistence that women's rights are human rights have profound transformative potential to accord women the human dignity and respect that they deserve—simply as human beings. In summary, the concept of women's rights entails examining the human rights framework through a gender lens, and describing women's lives through a human rights framework. In looking at the human rights framework from women's perspectives, it can give one an idea about how current human rights definitions and practices fail to account for the ways in which already recognized human rights abuses often affect women differently because of their gender.

When the Universal Declaration of Human Rights was adopted by the United Nations General Assembly in 1948, it outlined what was considered in this century to be the fundamental consensus on the human rights of all people in relation to such matters as security of person, slavery, torture, protection of the law, freedom of movement & speech, religion, and assembly, and rights to social security, work, health, education, culture, & citizenship. It clearly stipulated that these human rights apply to all equally "*without distinction of any kind such as race, color, sex, language... or other status*"⁵⁵.

Flowing from this, it ought naturally to be discerned by a reasonable man that these human rights delineated by the Universal Declaration also applied to women. However, tradition, prejudice, social, economic and political interests have combined to exclude women from the prevailing definitions and application of "general" human rights and to relegate women to secondary and/or "special interest" status within human rights considerations. This marginalisation⁵⁶ of women is a reflection of the gender inequality that subsists in the world today and this has had an alarming impact on women's lives. It has contributed to the

⁵⁵ Article 2

⁵⁶ or discrimination

perpetuation, and indeed the condoning, of women's subordinate status in the society. It also has limited the scope of what was seen as governmental responsibility to respect, protect and to fulfill the human rights of all citizens, and thus has made the process of seeking redress for human rights violations disproportionately difficult for women and in many cases outright impossible.

A possible reason for this disparity is that human interactions have been divided into two spheres; the public and private spheres. This ideological divide originates from classical liberal political philosophy in which the world, the public/political sphere is the realm of the government, while the private, non-political sphere is that of family, home, and sexuality. The State can use laws to regulate the public sphere, but the private sphere is theoretically immune from legal regulation. According to the liberal tradition, the two spheres also correspond with the two sexes: the public is the realm of men, the traditional breadwinner assumed to be the rational and political sex, and the private is the realm of women, the irrational and natural sex⁵⁷. This gendered nature of the public/private divide in legal tradition has profound consequences for the rights of women. Feminists argue that the dichotomy has both excluded women from the public arena and reinforced their status as a second-class group. As Hilary Charlesworth contends, the law has failed to regulate much of what takes place in the private sphere explaining that a state's failure to criminalise marital rape⁵⁸ or other crimes against womanhood "supports and legitimates the power of husbands over wives". A major effect of the gender biased nature of the public/private sphere dichotomy is that human rights violations of women that occur between "private" individuals have been made invisible and deemed to be beyond the purview of the state.

⁵⁷ Hilary Charlesworth, *The Public/Private Distinction and the Right to Development in International Law*, 12 Australian Y.B. of Int'l L. 190, 190 (1988)

⁵⁸ or female disinheritance

Consequently, for those citizens - primarily men - who predominate in public and governmental realms and who enjoy gender, racial and economic privileges, the issues of primary concern have tended to be those abuses to which they are most vulnerable; abuses of the civil and political aspects of human rights such as the violation of the right to speech, arbitrary detention, torture during imprisonment, and summary execution. Whereas women have found themselves in such situations where some of their gender-specific experiences of human rights abuse - for example, disinheritance - have not been visible within the prevailing concern and protection of the law. This is because women have traditionally been relegated to the "private" sphere of the home and family; the typical citizen has been portrayed as male, and thus the dominant notions of human rights abuse have implicitly had a man as their archetype. However, governments overlook much of what happens to women at the hands of men and male family members, for example domestic violence or confinement, even when there are laws against such abuse. Thus, abuses done to women in the name of family, religion, and culture have been hidden by the sanctity of the so-called private sphere, and perpetrators of such human rights violations have enjoyed immunity from accountability for their actions

4.2 Customary Law and Widowhood Rites

The word 'customary' means pertaining to a custom, a way of life, a tradition, a generally accepted behaviour or way of doing things⁵⁹. The Evidence Act⁶⁰ defines custom as a rule which in a particular district, has, from long usage obtained the force of law. Customary law therefore, is the law which evolves from the established practices, customs and way of life of a people. A custom is a "rule of conduct, obligatory on those within its scope, established by long usage. Customary law is recognized, not because it is backed by the power of some

⁵⁹ Black's Law Dictionary (6th Edition, pp. 299 – 300)

⁶⁰ Section 2 (1) Evidence Act 2011

strong individual or institution, but because each individual recognizes the benefits of behaving in accordance with other individuals' expectations, given that others also behave as he expects.

Customary law as a legal system has been in existence from time immemorial and finds expression in the day-to-day cultural practices, rituals and traditions of a people. In the colonial era, customary law existed side by side with the received systems of law in the context of legal pluralism⁶¹. Customary law is an important source of Nigerian law primarily because it governs many issues concerning the people's lives; for instance marriage according to native law and custom, divorce, succession or inheritance, land tenure and chieftaincy matters. It was the only legal system that existed among indigenous peoples and communities before the advent of colonial rule. And because of the element of compulsion which it has acquired over the years by constant, consistent and community usage, it attracts sanctions of different kinds and is enforceable⁶². Customary law is intrinsic to the life and custom of indigenous peoples and local communities. What gives a practice the status of "custom" and what amounts to "customary law" as such will depend very much on how indigenous peoples and local communities themselves perceive these questions, and on how they function as indigenous peoples and local communities.

Customary Law has been defined differently by scholars and given different interpretation by judges; Prof Taslim Olawale Elias, CJN defined customary law as "*A body of customs accepted by members of a community as binding upon them*"⁶³. In the words of Niki Tobi

⁶¹ GJ Van Niekerk "Legal Pluralism" in JC Bekker, JMT Labuschagne and LP Vorster (eds) *Introduction to Legal Pluralism Part 1 Customary Law* (2002) 3-18.

⁶² Tobi, Niki (1996:103-104) sources of Nigerian law, MIJ professional publishers Ltd, Lagos **check faculty library

⁶³ Malemi - Legal System - Page 54?

JSC, customary law is: *"the customs, rules and traditions which govern the relationship of members of a community"*⁶⁴. Prof A.D. Badaiki in defining it said:

Customary law is law which is generated by custom. The customary law of a community is a body of customs and traditions that regulate various kinds of relationships between members of a community⁶⁵"

In the case of *Owoniyi v Omotosho*⁶⁶, Bairamian FJ defined customary law as: *"A mirror of accepted usage, among a given people"*. In *Oyewunmi v Ogunesan*⁶⁷, Obaseki JSC said:

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

The Supreme Court in *Zaidan v. Mohssen*⁶⁸ defined customary law from the Nigerian perspective as:

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

From the foregoing definitions given these eminent jurists and scholars; it is explicitly clear that customary law is the accepted customs and culture of a given people or community which after a long usage acquire a legal backing. This position arises from the fact that a judgment under customary law was typically enforceable because of an effective threat of

⁶⁴ Malemi - Legal System - Page 54?

⁶⁵ Malemi - Legal System - Page 54?

⁶⁶ [1961] 1 All NLR 304

⁶⁷ [1990] 3 NWLR part 137 page 182 at 207

⁶⁸ (1973) 11 S.C. 1

total ostracism by the community. The members of such communities, recognizing the high cost of refusal to conform, now tend to align themselves with the accepted code of behaviour⁶⁹. It suffices to state that the customary laws of a people forms the substratum upon which their socio – cultural superstructure rests. The matters with which customary law is principally concerned are simple cases of contract (mainly debt), torts, land, family law and succession.

The Constitutional Validity of Customary Law

Customary law is a law recognized by the Nigerian Constitution⁷⁰. It provides thus:

"Subject to the provisions of this Constitution, an existing law shall have effect with such modifications as may be necessary to bring it into conformity with the provisions of this Constitution..."

This means that customary law just like any other source of law, is subject to such necessary modification that will bring it into conformity with the Nigerian Constitution⁷¹.

That is, that for a custom to be valid in Nigeria and therefore be enforced by the courts as customary law, that custom must not be contrary to fairness, natural justice, right judgment and good conscience. Such law must also not be incompatible with any law for the time being in force; this is to ensure the peace, order and good governance of Nigeria⁷². It also must not incite a negative retort from the public; it should not be offensive to their sensibility; for example, the old customary tradition of killing twins in Calabar before it was outlawed by Mary Slessor.

⁶⁹ *The Enterprise of Law: Justice Without the State* by Bruce Benson. pp 12-15

⁷⁰ Section 315 1999 Constitution of the Federal Republic of Nigeria

⁷¹ Malemi - Legal System - Page 54?

⁷² Malemi - Legal System - Page 64

Proof of Customary Law

In Nigeria, the received English law i.e rules of common law, doctrine of equity and provisions of statutes need no proof before being accepted by court. This is so because judges are deemed to know the law and judicial notice is taken of them. Regrettably, rules of customary laws do not enjoy the same treatment as the received English laws. The courts in Nigeria treat customary law as a question of fact which must be pleaded and evidence of same must be proved in the first instance by calling witnesses acquainted with the native custom until the particular custom, by frequent proof in the courts, has become so notorious that the courts will take judicial notice of it. Two reasons can be adduced for this position; the first is that judges were originally not trained in customary laws; secondly, customary laws are largely unwritten and vary from culture to culture. Again, the Evidence Act 2011⁷³ has laid down the conditions that must be fulfilled before judicial notice is taken of a custom. It provides thus:

A custom may be judicially noticed by the court if it has been acted upon by a court of superior or co-ordinate jurisdiction in the same area to an extent which justifies the court asked to apply it in assuming that the persons or the class of persons concerned in that area look upon the same as binding in relation to circumstances similar to those under consideration.

Remigius Nwabueze in his article on Customary Law⁷⁴ posits that a major disadvantage of ascertaining customary law by means of judicial notice is its tendency to rigidify customary law and impair its characteristics of flexibility and adaptability. This writer aligns himself with this point of view because the fundamental characteristic of customary law is that it is dynamic i.e it changes with the times; with developments in technology, healthcare, security

⁷³ Section 16(1)

⁷⁴ The Dynamics and Genius of Nigeria's Indigenous Legal Order - Indigenous Law Journal/Volume 1/Spring 2002 - page 173

and civilization. In the case of *Lewis & Ors v Bankole*⁷⁵ Osborne, C.J as he then was, opined that:

One of the most striking features of West African native custom is its flexibility; it appears to have always been subject to motives of expediency and it shows unquestioned adaptability to altered circumstance.

This decision buttresses the fact that customs up till now were neither rigid nor inadaptable. The writer agrees with the learned scholar because the doctrine of judicial notice constructively deprives customary law of its primary and fundamental characteristic: which is its ability to adapt to changes in order to solve perceived problems or to tackle novel difficulties facing the people whom under which are bound. This peculiar situation poses the singular challenge of depriving the Nigerian courts the opportunity of appraising itself with changes to the an errant customary practice if need be.

The Repugnancy Doctrine and Customary Law in Nigeria

The doctrine of repugnancy owes its origin to the evolution of English equity. It was introduced into the Nigerian legal system by the end of the 19th century via the received English laws to test our customary law for acceptability. Before the British came, Nigeria as it is known today, was made up of about 350 ethnic nationalities described variously as empires, caliphates, kingdoms, chiefdoms, city-states and village republics, each ethnic group is governed by multiplicity of customs which were their grundnorm - the ultimate norm from which every legal norm deduces its validity⁷⁶. The establishment of a foreign legal structure by the colonial power led to the imposition of the English system of law on the local customary law made up of native law and Islamic law. The English law that were applicable in Nigeria – sometimes referred to as the ‘general law’ – consisted of the common law of

⁷⁵ [1908] 1 NLR p.82

⁷⁶ - <http://legal-dictionary.thefreedictionary.com>

England, doctrines of equity, some statutes and orders in council which were applicable in England on the date of reception, and the received law as modified by local legislatures after the attainment of independence on October 1, 1960. This English general law operated side by side with the rules of our customary law and this led to a conflict – which arose from the application of the rules of equity. The diversity of customs was a major obstacle to uniformity of customary law systems in Nigeria. This multiplicity was complicated by superstitions, which made proof and judicial notice very difficult during settlements of disputes. It was against this background that the British subjected our customary law to test to remove superstitious and harsh elements – and to conform it to the universal standard of morality. This explains why Elias has argued that the doctrine of repugnancy has positive effect on the development of our customary law by the elimination of gross injustice inherent in its application⁷⁷

Against this background, the position of the law is that every customary law shall be enforced only in so far as it is not repugnant to natural justice, equity and good conscience, or incompatible with any statutory law⁷⁸. Against this background, the position of the law is that every High Court in Nigeria is empowered to observe and enforce the observance of every customary law of the people⁷⁹ in the area of its jurisdiction provided:

- (i) That the customary law is not repugnant to natural justice, equity and good conscience, and
- (ii) That such customary law must not be incompatible either directly or by implication with any law for the time being in force.

⁷⁷ (Elias, T. O. (1956).

⁷⁸ Section 19 of the Supreme Court Ordinance 1876

⁷⁹ Section 26(1) of the Lagos State High Court Law; Similar provisions will be found in other High Court laws of various states

The courts have never attempted to explain in detail the meaning of the course but the views expressed by them through the cases have given this principle a general meaning; taken together, the phrase "*... repugnant to natural justice, equity and good conscience, or incompatible with any statutory law*" means 'unfair', 'unjust', 'unconscionable', 'barbarous' or 'uncivilised'⁸⁰. The repugnancy doctrine in Nigeria emerged from the decision in the landmark case of *Eshugbaye Eleko v. Government of Nigeria*⁸¹. In that case, Lord Atkin said:

"The court cannot itself transform a barbarous custom into a milder one. If it stands in its barbarous character it must be rejected as repugnant to natural justice, equity and good conscience".

In the case of *Solomon v Gbogbo*⁸², Holden C.J held that a custom whereby a husband can divorce his wife at will, but the wife cannot obtain divorce unless the husband consents is clearly inequitable and therefore repugnant to natural justice, equity and good conscience. Also, in *Re Whyte*⁸³, a Fanti law under which a man's maternal relations inherit all his property at his death to the exclusion of his wife and children was held to be contrary to equity and good conscience because it would cause hardship for the wife and children if applied without modification. In the case of *Edet v Essien*⁸⁴, it was held that a custom whereby the husband of a woman is entitled to claim any child of the woman by another man, when the other man's paternity was not in doubt, was repugnant to natural justice and good conscience. In *Mariama v Sadiku Ejo*⁸⁵, it was held that a customary law under which a child could be taken away from her natural parents and given to a total stranger would result in serious injustice and such a custom was therefore contrary to natural justice. Finally, the Evidence Act provides that

⁸⁰ Sagay Family Law

⁸¹ Citation needed

⁸² [1974] 4UILR

⁸³ [18 NLR 70]

⁸⁴ [NLR 47]

⁸⁵ [1961] NRNLR 81

"in case of any custom relied upon in any judicial proceedings, it shall not be enforced as law if it is contrary to public policy"

In conclusion, even though arguments abound that the doctrine of repugnancy works to dilute indigenous customary laws and practices to project the ways of life of our colonial masters, the operation of the repugnancy doctrine in determining the applicability of a customary law should be seen, only as an instrument used by the British to bring our customary law – as indeed any other law – within the acceptable objective standard of moral law currently recognized by all nations. There is no known repugnancy case that has been decided on the basis of conflict with any other law. Rather, all repugnancy cases were decided by reference to the universal standard of morality which in human transactions is founded on what is ‘good, just and fair’. They were, in fact, decided mostly on moral law. The application of the repugnancy doctrine in Nigeria is the standard practice and therefore, has no ‘English colouring’. It could be said that subjecting our customary law to test to bring them within the acceptable objective standard of moral law is a positive aspect of British colonialism

4.3 Widowhood rites in Nigeria

The process of widowhood is believed to represent a life phase, which depicts one of the fundamental problems or losses which the aged and by extension, the young people experience. A widow from the perspective of her plight is viewed as a person who, by certain circumstances, is in distress. One who finds herself in the middle of the ocean of life, struggling to survive. Technically, a widow is a woman who survives her husband and has not remarried.

In the opinion of Goldman and Lord, mourning and widowhood are opposite sides of the same coin with wide range of implications for those affected. It has been observed that widowhood is an issue that affects more women than men. Evidence indicates that over the

long-term, women are affected more severely than men financially, psychologically, sexually and socially. For instance issue of mourning and widowhood process in Nigeria is surrounded by a number of cultural expectations. It has been observed that widowhood in Nigeria is a sordid situation which merely allocates to the widow a position of societal scorn, disdain and permanent membership of the wretched of the earth.

In certain parts of Nigeria, the maltreatment of widows is common. In-laws and the community subject them to physical and emotional abuses such as being made to sit on the floor; being confined for a month to one year; having their hair literally scraped off with razors or broken bottles; not being allowed to bath; being made to routinely weep in public; being forced to drink the water used to wash their husband's corpse; crowned by the loss of inheritance rights and eviction.

SOUTH-SOUTH – RIVERS/EDO STATES

In Rivers State South-South Nigeria, practically every community subjects the widow to various rites at the demise of her husband. The general practice though is to swath the widow in black from head to toe, irrespective of the fact that society knows that “black” is a bad conductor of heat. The widow is expected to be in black for at least one year, and in some communities she is kept indoors from the date of her husband's death till his burial, irrespective of the fact that she may have very young children to take care of or that she may be claustrophobic. Common in Rivers state is the practice of a widow having to prove that she is innocent of her husband's death. To do this, various rites have to be conducted. These include bathing the anus of the corpse and giving the water to the widow to drink, as practiced by the Emohua people; submerging the widow in a river as done in Opobo area; and making the widow swim across the bottom of a boat as done by the Kalabari people. In Ndoni

area of the state, throwing the widow across the deceased's coffin several times, without her leg striking the coffin, proves her innocence.

In Bini land, widowhood rights are in two stages. First, the widow is confined to a room outside the family house for seven days immediately after the interment of the deceased husband. She is dressed in black with her hair left unkempt and, she is not allowed to take her bath. She must look mournful and sober and must cry, morning and evening. On the seventh day, a wake-keep ceremony is held and the widow is forbidden (by custom) to sleep because, the spirit of the dead man will come around and kill her if she is found sleeping. On the same day, she performs the semi-purification rites by taking her bath at a road junction all alone. Her safe return proves her innocence.

The Second stage of mourning begins at the end of the seventh day. The widow smears herself and her clothing with black charcoal and remains so for three months. At the end of the third month, the final purification, which admits her into the society, is performed. On inheritance, both the widow and property are inheritable objects.

Among the Esan, the practice is almost the same but for some little differences. During the seven days of mourning, the widow carries an Ikhmin - a many sided plant which is used to wade off evil spirit. She is also forbidden to sleep on the night preceding the seventh day because, it is believed that, the husband will visit and carry her away if she sleeps. A widow in Esan however, takes her bath in the night at a burial ground or at some obscure or isolated spot, and she shoots an arrow into the bush afterwards, to deter the late husband from coming near her again. Throughout the three months mourning period, a pot containing some leaves believed to wade off evil, is left burning on the stove. The widow performs the purification rites after three months, which includes her hair being shaved. On inheritance, a wife cannot inherit, rather she is part of the "objects" to be inherited. In Agenebode, a woman is either

Amoya, a title that is highly respected and cherished because in marriage, she is given out totally or, she is Adegbe, a title that allows the woman to stay in her father's house even after marriage. Nothing is done in her father's house without consulting her. As a result of these differences, varying degree of rights and privileges are given to them. When an Amoya is widowed, one of her sisters-in-law who is an Adegbe will assist her to wear a white hand woven pant. This she wears for one whole year without washing or changing. She stays indoors and cannot even go to the market or church. Her hair is scraped and, she is in total seclusion wearing only black. By virtue of her birth, she remains in her husband's house for life. If she accepts to be inherited, she performs the purification rite to legitimize the transfer. If she does not want to be inherited, she performs another rite to appease the family's ancestors. Her son inherits the property of the deceased if she happens to have the first son, this does not however transfer ownership of the property to her. The situation is different, when an Adegbe is widowed. She does not go through all the rites an Amoya goes through. Her hair and that of her children are scraped on the fifth day after the death. Wearing of black is her choice and her movement is not restricted for one day, she goes about her normal business. The issue of inheritance does not arise for her because, she goes back to her father's house as soon as the man dies, though she is free to stay (if she so desires), without any obligation to the family of the late husband. If she is the mother of the first son, he inherits all his father's property.

In old Bendel State, the wives of the deceased are subjected to swearing that they did nothing that could possibly lead to the death of the man such as poisoning him or committing adultery in his lifetime. In the process of this oath administration, a wife is compelled, to drink from the water already used in washing the corpse. In some societies, women are compelled to sleep on bare floor for several weeks and they are expected to wake up their neighbours early

in the morning with mournful and moaning cries to show how much they miss their husbands. Needless to say that men are not subjected to such indignities when their wives die.

SOUTH EAST - ANAMBRA/IMO STATES

In Ogidi town, in Idemili L.G.A., the mourning period is one year during which time, the widow is restricted to the house where she sits on the bare floor for four weeks and her hair is scraped. She is not allowed to talk, laugh, shake hands or greet people, bake or cook. Her attire is called "Ogodo-upa, that is, "mud cloth". After seven weeks, she removes the "mud cloth" and wears "the ikpim, that is, a pitch black mourning dress" for the rest of the year. Peculiar to this people is the "etum-afa, that is "praise naming" which the widow performs (mandatory) three times a day. In Nanka town, Orumba Local Government Area the only peculiarity of this people is that the widow is forbidden to see the corpse of her husband. Christianity or not, any widow who contravenes this customs literally ceases to exist, She neither buys from nor sell to any other member of the community. All men run away from her, she is avoided like death. In Ogbunka town, still in Orumba South L.G.A., a widow is secluded behind the house immediately the husband dies. The Umuada force her to observe the routine wailing from morning till night for many days. This widow is in turn expected to provide the oku-awa i.e. yam meal with a chicken, for the Umuada (on daily basis). In Ezira and Nawfija in Njikoka Local Government Area, the widow is put in a "cage" She is allowed to sit on a mat or mattress inside her "cage" though she does not sleep there. According to these people, the widow is ", most vulnerable to physical pains inflicted on her by vicious mourners, who are in the habit of throwing their whole weight on the victim, in the guise of deep sympathy." The widow wears either black or white for seven months at the end of which, she wears another dress for the remaining five months that is neither black nor white. In Akili-Ogidi town, in Ogbaru L.G.A., widowhood practice is the same as in Ogidi town

except that, the widow does her evening crying shift through the *onu nta*, that is, a chink in the wall. She must also be facing the west, throughout the first twenty eight days after the burial. Because of civilization however, the working class widow is allowed to return to work after the short bereavement leave granted her. However, no widow is allowed to step out of her husband's compound on her own feet. She must be carried by a man out of the compound to the road, to take transport to her destination.

SOUTH WEST - ONDO STATE

When a husband dies, the widow goes into confinement for seven days. During this period she is not allowed to go out, even to the toilet or, take her bath. On the seventh day, her head is shaved to sever the bond between her and the dead husband. She also keeps a vigil and appears very sorrowful by wailing and crying profusely. If she fails to mourn, it is believed that "she may become mentally deranged, or forfeit the right to any benefit." After this, she goes into mourning proper, which is for a period of three months. During mourning, she is to be of impeccable behaviour so that her late husband's spirit may gain quick entry into the community of his ancestral spirits. The widow is not expected to leave the family, go away with the children, or look in the mirror for fear of seeing the deceased. Until recently, she was not allowed to sit on the bed. This period is also used to ascertain whether the widow is pregnant or not. At the end of three months, she performs the outing ceremony. She is then free to remarry into the family. A widow may however, refuse to be inherited even if her late husband's family want it so. Likewise a man may equally refuse to inherit his late brother's wife. In Ondo, as in other Yoruba land, property belongs to the wife/wives and the children of the deceased. It is shared as *Ori o ju ori* i.e. equally among the children (including girls), or as *Idi'ig* i.e. equally among the wives (where the man has more than one wife), though, the

eventual beneficiaries are the children. Where the widow has no child, she may not get anything from her husband's property. It reverts to his family.

NORTH CENTRAL NIGERIA – BENUE STATE

The burial practice here is that, the man is buried almost immediately he dies. The widow is restricted to one place; however, if she is still within child bearing age, she is restricted to one room. She cannot go to the toilet unaccompanied; neither can she go to the farm to get food, even for her children. Among the Etulo people, a widow is confined in mourning for three months during which it would be confirmed if she is pregnant or not. Her only attire is a piece of cloth called bento, which has a ritual object ascribed to it. This cloth is tied round the waist of the deceased man, and the widow now wears it as a symbol of her sexual relationship with the late husband. It is also believed that, this bento deters the widow from any act of flirtation or promiscuity before she is culturally freed from widowhood." After the three months of mourning, she prepares for the outing ceremony. Her hair is shaved during this period and, she exchanges the bento for a white dress, which, she also stops wearing after outing ceremony. On the issue of inheritance, the Etulo are a matrilineal society. A barren widow has no rights to any of her late husband's property. Even where the widows have children, the property still goes to the maternal relationships who may out of good will and pity give part of it to his children³⁰. Among the Idomas, the widow mourns for at least one year wearing sackcloth. She performs the cleansing/outing ceremony with the help of her age grade (peers) at the end of the mourning period. This done, she is free to remarry either within or outside of the family. In Idoma land, the late man's property belongs to his relations.

NORTH WEST NIGERIA – KANO STATE

In this part of the country, inheritance issues are according to Islamic injunctions. The widow observes the Takaba i.e. a four-month, ten-day mourning period in seclusion talking to no one and sitting in a place. However, there are accounts of widows who are barred from: leaving the room where the corpse was laid; sleeping on a comfortable bed; taking a normal route to the toilet; observing personal hygiene; wearing long hair; moving about; taking normal bath; seeing the inside of the grave eating pounded yam; and fowl, goat meat. After the mourning, a widow is free to remarry within or outside the family. On the issue of inheritance, the manner in which the property of the deceased is shared is explicitly stated in the Qur'an. However, human factors, especially the relationship of the widow to her in-laws, education of the apportioning parties and cultural leanings have brought about injustices in property sharing.

NORTH EAST

In the Northern Region of Nigeria, attribution of death is to God and the widow traditionally is expected to mourn her late husband (tabaka) for a specified period of time. The mourning period is four lunar months plus ten days and till the day of delivery or weaning of her new baby for a widow not pregnant before the death of her husband and the pregnant widow respectively.

The widow after the mandatory mourning period could stay and remarry in the same family or go elsewhere for the same purpose. However, except that most widows are often neglected during and after mourning together with their children there is no any other practice of mourning that is physically injurious or degrading to the widow. In order to survive the harsh financial situation faced thereafter most widows are known to take to petty trading, begging for alms or other survival strategies to keep body and soul together. All these practices are

against religious tenets and instructions as widows were particularly mentioned in the bible as a category of people to be cared for.

4.5 Widowedness in the Context of Aids

AIDS has resulted in the increase of widows, especially in the sub-saharan Africa. For sociological and biological reasons women are twice as likely to contract HIV through vaginal intercourse as men. In Southern Africa, The rate of infection for young women between 10 -24 years old are up five times higher than for men. This is detrimental to widows for a number of reasons. Widows whose husbands have died of AIDS are frequently blamed for the deaths because of promiscuity, whereas, in the majority of cases, it is the men who contact the AIDS themselves. These widows may or may not be aware of their sero-positive (infected with the HIV/AIDS Virus) status and may rejected being tested, fearing the consequences of a positive result, which, with no access to modern drugs can amount to a death sentence. Besides, the dying husband's healthcare bill will have used up all the available financial resources so that the widow is unable to even buy the basic medicines or nutritious food needed to relieve her condition. AIDS widows, accused of murder and witchcraft may be driven from their homes and subject to the most extreme forms of violence.

4.6 National Policies and Widowedness Rites

There have been a number of national policies aimed at promoting and enhancing the human rights of women,⁸⁶ There are several actions and steps taken by governmental agencies, religious organizations, and non-governmental organizations, among others to protect the rights of widows. State governments in some of the south east states have passed laws to protect the rights of widows. Taking initiative from the government, non-governmental

⁸⁶ Some of these initiatives are targeted at women only

organizations have also taken steps aimed at ensuring the implementation of the widowhood laws. Some of the activities include community outreach programmes, advocacy visits to traditional rulers, simplification of the law for easy reading, campaigns on the implementation among others.

Religious organizations like the Churches have also cut down on the duration of mourning, in time past; a widow is expected to mourn for one year without getting involved in activities. Recently, Churches have initiated the shortening of the mourning period. In most communities, the mourning period is now for six months and the widow not restricted by certain laws and rules. Despite the passage of these laws, there are still instances of denial and disinheritance of widows.⁸⁷

Legal pluralism operates in Nigeria causing confusion and generating controversy. It has left a gap that permits choice of laws. The interests of the woman are particularly affected by the operation of multiple legal systems governing family law in Nigeria. Depending on the place of residence, type of marriage, ethnic group, or religion, a woman's right and responsibility to marriage, inheritance, ownership and widowhood practices may be governed by one of the systems under discussion. Boundaries of the three family law systems are complex and the customary laws are not unified. The multiplicity of the applicable legal system has been a problem for the courts that are faced with determining not only the problem of law that is applicable, but which of the several customary laws is applicable. There are further complications because the federal system of government that operates in Nigeria places customary law with the legislative competence of the states but retain federal jurisdiction over statutory marriage.

⁸⁷ 'Widows and the violations of their rights in South East Nigeria': <http://www.brighthub.com/society/cultures-customs/articles/73317.aspx>. accessed 20 December, 2010.:

The 1999 Constitution of the Federal Republic of Nigeria is the supreme law of the land with various provisions that protect the rights of all citizens from discrimination and provides citizens with rights to freedom from discrimination based on community, place or origin, ethnic group, sex, religion or political opinion.⁸⁸ However, these rights in the Constitution are more declarative than actual mostly due to the underdevelopment and inefficiency of the implementation measures. The existing legal system and the criminal justice system have not been too helpful or lived up to expectation in solving this problem. It should however be noted that in recent times, efforts are geared towards protecting women against the violence inflicted as a result of customary law practices but more effective action has to be taken. Some states in Nigeria have instituted legislation regulating customary law practices in some of the areas discussed. In Eastern Nigeria for example, there is a legislation creating a merger between customary law of marriage and statutory law⁸⁹

The court system where justice is dispensed and the advocates of equity and justice, and equality before the law have not in all cases portrayed themselves to mean this. There are occasions when the courts shifted to the side of customs in its decisions in issues of marriage, inheritance or widowhood disregarding the provisions of the statutes and its decision resulted in inflicting violence on the woman. The roles played by the regular courts have not been consistent. However many judges are now on the progressive path and have taken the bull by the horn in upholding justice⁹⁰

Nigeria is a signatory to many International Treaties that guarantee women's freedoms from discriminatory practices and equal fundamental rights as men. These include:

i. International Covenant on Economic, Social and Cultural Rights;

⁸⁸ S. 41 of the 1999 Constitution of the Federal Republic of Nigeria

⁸⁹ Laws of Eastern State (1956)

⁹⁰ *Okonkwo v. Okagbue* (1994) 12 SCNJ 89

- ii. International Convention on the Elimination of All Forms of Racial Discrimination;
- iii. Convention on the Elimination of All Forms of Discrimination Against Women;
- iv. Convention of Political Rights of Women;
- v. Slavery Convention of 1926 as amended; and
- vi. Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery.

Many of the practices under customary law are against these Covenants, they are discriminatory and are similar to slavery practices which the government has guaranteed freedom for all. The enabling environment and cultural values for implementing such Treaties are absent.

4.7 The Sociology of Widowhood Practices

In many developing countries, the exact numbers of widows, their ages and other social and economic aspects of their lives are unknown. Almost worldwide, widows comprise a significant proportion of all women, ranging from 7% to 16% of all adult women (UN Division for the Advancement of Women, 2000). However, in some countries and regions, their proportion is far higher. In developed countries, widowhood is experienced primarily by elderly women, while in developing countries it also affects younger women, many of them still rearing children (Ibid). In some regions, girls become widows even before reaching adulthood.

Women are more likely than men to be widowed for two reasons. First, women live longer than men (a fact highlighted by worldwide data regarding differences in life expectancies of men and women). In addition, women tend to marry older men, although this gap has been

narrowing. Because women live longer and marry older men, their odds of being widowed are much greater than men's (Lee, 2002). Loss of spouse is one of the most negative life events, next only to the loss of a child (Bennett *et al.*, 2005). Ironically, the disorganization and trauma that follow the death of a spouse seem to be greater in women than in men whenever either loses their spouse (Fasoranti *et al.*, 2007). Widowhood presents a myriad of economic, social and psychological problems, particularly in the first year or so after the death of the spouse. A major problem for both sexes is economic hardship. When the husband was the principal breadwinner, his widow is now deprived of his income and the nucleus of the family is destroyed (Fasoranti *et al.*, 2007).

Many studies (e.g., Amoran *et al.*, 2005; Abdallah and Ogbeide, 2002) have concluded that a higher rate of mental illness exists among the widowed than their married counterparts. Even a study conducted by Chen *et al.*, (1999) concluded that widows had higher mean levels of traumatic grief, depressive and anxiety symptoms (compared to widowers). Another problem associated with widowhood is loneliness. Many widows live by themselves. They suffer the fear of being alone and loss of self-esteem as women, in addition to the many practical problems related to living alone. They feel the loss of personal contact and human association; therefore, they tend to withdraw and become unresponsive (Fasoranti *et al.*, 2007). The greatest problem in widowhood is still emotional. Even if it had been a bad marriage, the survivor feels the loss. The role of spouse is lost, social life changes from couple-oriented to association with other single people; and the widowed no longer have the day-in, day-out companionship of the other spouse that had become an intrinsic part of their lives.

People respond differently to loss and overcome grief in their own time. Frequently, the most difficult time for new widows is after the funeral (Scannell, 2003). Young widows often have

no peer group. Compared to older widows, they are generally less prepared emotionally and practically to cope with the loss. Widowhood often causes financial stress because a major income source is lost with the death of a husband. There has been considerable controversy as to whether widowhood is a more difficult experience psychologically for men or for women. Widowhood is generally a greater problem financially for women than men, and economic difficulties can lead to lower psychological well-being. Several studies (e.g., Schuster and Butler, 1989; Thompson *et al.*, 1989; Davar, 1999; Reddy, 2004) have indeed found that widowhood has a greater adverse impact on the psychological well-being of women. Other studies, however (e.g., Lee *et al.*, 2001; Umberson *et al.*, 1992; Jason *et al.*, 2002), have reported stronger effects on men. Still others have found no gender differences at all (Li *et al.*, 2005).

A large number of studies have been done focusing on the psychiatric aspects after death of the spouse. Zisook and Shuchter (1991) and Niaz and Hassan (2006) concluded that depressive episodes were common after the death of a spouse. A high index of suspicion should be maintained by clinicians for the possibility of depression, particularly in cases of the young widows and widowers with such a history. Those who experience full depressive syndrome soon after the loss may better be considered to be suffering from depression than bereavement. Zisook *et al.* (1994) noted the existence of subsyndromal symptomatic depression contributing significantly to morbidity in widows and widowers during the first two years of bereavement. It is hence very important that existence of such entities be kept in mind; and rather than viewing altered behaviour among the bereaved as socially or culturally acceptable, psychological aspects too should be considered. The predisposition to develop anxiety as well as substance abuse disorders also increases (Collins, 1999; Barrett, 2000).

4.8 Conclusion

In providing a full survey of the most pertinent cultural factors that contribute to the conditions of widow inheritance, it is important to acknowledge the role of Nigerian women as agents in their own lives. Feminism has a strong history in Nigeria, and women's groups continue to remain active, particularly in projects such as passing widow's legislation. At the same time, women do not have a unity of interests, and may be complicit in practices that are harmful to other women. Most notably, the literature points to a vital role for the *umuokpu* or *umaada*, daughters of the lineage, in enforcing widowhood rites. These women gain power through their ability to enforce morality in their communities. However, as women, they will themselves in turn be subjected to such rituals. Therefore, there may be potential to work to transform how the *umaada* conceptualize their powers as the keepers of the community morality, and to use this power to find less harmful widowhood practices that nonetheless maintain their symbolic function.

Finally, it is of note that widows are not necessarily in a worse economic position than their married counterparts. In fact, those women who practice *purdah* may have greater economic independence because as widows they are able to work outside of the home. While women in customary systems may lack the land base to make a living, they are resourceful, and will supplement their farming income with trade, as well as minimal support from kin. These women are able to find options to finance this trade, such as taking loans from rural banks and friendly societies. The successful economic survival strategies of these women shows the importance of grassroots organizing between women to provide economic support and loans, as well as the need to increase the number of micro-loans available to widows. Owen also points to successful mutual aid organizing models in Uganda, including the Aids Support Organisation of Uganda which encourages mutual support amongst widows and speaking out about their experiences of AIDS, and Irish Concern, a group of 12 AIDS widows who have a self-help system and have started a cottage industry selling traditional herbal therapies. While

such organizing does not stop the problems with inheritance legislation, it is an immediate means for widows to gain more control over their financial resources, and can assist them in building institutional capacity to challenge their rights.

CHAPTER FIVE

CONCLUSION

5.1 Summary

As has been stated in the first chapter of this dissertation, women's rights in general have gained considerable attention from the UN and the International Community. As a result, women's rights all over the world have been given increased recognition and respect. Most human rights instruments, however, do not take cognisance of specific categories of women, with special needs such as widows. One of the reasons for this situation is because more often than not, women are treated as a homogenous group. The plight of widows in Nigeria shows that a lot remains to be done to address the needs of several categories of women in Africa.

5.2 Recommendation at the National Levels

This paper recommends among other things that:

1. Nigeria lawmakers should legislate against all oppressive, injurious and degrading widowhood practices.
2. Government at the three tiers should endeavour to provide functional basic education to the citizens to adequately prepare them for meeting the challenges of bereavement.
3. Government should establish a national commission for widow affairs as a way of fostering widows' integration into the society.
4. Younger widows i.e. those bereaved before the age of 35 years should be encouraged to remarry as a way of integrating them properly into the main stream of affairs in a socially-inclined society like Nigeria.

5. Counselors in training should be made to take bereavement and widowhood counseling in their training programme as a way of adequately fortifying them to provide the necessary integrative counselling to the marginalized groups in the society like the widows.

APPLICATION OF THE REPUGNANCY TEST CLAUSE

The British colonial masters saw the oppressive ways of the Customary and Traditional Practices, and instituted the Repugnancy Test Clause, as part of the Nigerian Legal System in 1900. It provides for the overriding of any Customary and Traditional Law and Practice in the Courts if it is in conflict with natural justice and equity. Also Customary and Traditional Law should be overridden if they are in conflict with the written and official law, and the rights of women and children. Unfortunately, the Test Clause was left by the Law Courts and Law Enforcement Agencies to lie dormant in respect of widowhood rights for one whole century until Justice Niki Tobi's landmark Decision in 1997 in *Mojekwu v Mojekwu* (1997) 7 NWLR (pt 512) 283 , and just before it was re-introduced in the 1999 Constitution. The Repugnancy Test Clause, of course, applies only to cases appealed from the lower Courts to the higher Courts.

Women should learn to take the matters that concern them to the Courts, and refuse any kind of pressure to withdraw the matter from the Court for arbitration at home. This is because any kind of adjudication out of Court would be according to tradition. Women should seek for bloodless and discrimination-free revolution in decisions in matters concerning them. The spirit of the new bloodless revolutionary initiatives for women emancipation always should be for women to take matters concerning them to the Courts of Justice everywhere in Nigeria. Many more of such favourable decisions such as by Justice Niki Tobi have followed and, in all of the cases, the judges denounced such obnoxious practices as repugnant to natural

justice, equity and good conscience. The rich provisions of the protocol recognizing and guaranteeing women's human rights in Nigeria promise a beautiful future for women - if the government fulfils its obligations.

In light of the current realities, government should redeem its image and show its commitment by:

- (1) Application of the domesticated protocol;
- (2) Passing the bill on violence against women;
- (3) Reviewing laws on women's property rights and all other laws discriminating against women;
- (4) Adequate budgetary allocations to issues that promote women's rights and bridge gender gaps;
- (5) Integrating women's right issues and gender education into the school curriculum.

There is need to enforce the provisions of the Constitution as it relates to Chapter IV by making it justiciable.

Special efforts must be made to train judges and lawyers to apply international human rights jurisprudence with special reference to CEDAW jurisprudence in court cases in Nigeria. Capacity building for all branches of government in Nigeria as well as for women's groups must focus on the creation of clarity on the meaning of substantive equality and indirect discrimination as embedded in the CEDAW.

The capacity of women must be built to form constituencies for advocacy and to claim their rights and to draw accountability from governments.

Data collection must be consistent, sustained and refined to include indicators that will surface de facto situation of widows and to identify obstacles to de facto equality.

The Federal and State governments, public and private agencies, NGOs, and religious organisations in the country should campaign against all obnoxious traditional widowhood practices.

Educated women such as Women Right Advancement protection Alternative (WRAPA) and others should be actively involved in the campaign and enlightenment of most of these harmful practices in churches, mosques and other social organisation.

Women should be more empowered, encouraged in education and self development to know their rights especially as it relates to marital practices.

5.3 Recommendation at the International Levels

In many countries, while there is ad-hoc reform of laws and creation of interventions for the advancement of women and obnoxious widowhood practices, there does not seem to be a conscious application of CEDAW at the domestic level. CEDAW is not the basis of law or policy reform. There is also a lack of clarity on CEDAW as a human rights instrument. Nigeria has domesticated CEDAW principles but they are not directly applicable in the courts. There is a lack of a comprehensive and holistic plan to implement CEDAW and whatever reform is put in place suffers from weak implementation due to lack of monitoring, inadequacy of resource allocation, lack of capability and weaknesses of the institutions concerned. Hence obnoxious widowhood practices persist. Obligations must be fulfilled evenly for all including minorities, overseas territories and even where there is devolution of powers. Hence there is a need for a unified strategy and policy for implementation of all

provisions of CEDAW. Finally State obligation also includes ensuring a gender dimension in the development assistance that a State Party may render.

The latent consequence of the forgoing is that society places limit on the extent to which the women can aspire. Concomitantly, the women do not think they are being 'oppressed' by social structure. It seems to them that whatever roles they perform in the society have been naturally ordained. Indeed it is ironical to note that those who are perpetuating the practice of these traditional harmful practices to widows are the victims themselves. The small volume of their economic activities further makes them (women) totally dependent on their husbands for all their needs. This also has an effect on the family especially when the husband dies and the widow does not have sufficient money with which to take care of the family.

5.4 Conclusion

Nations are passing laws to protect the rights of women. Imo and Enugu States have signed into law the abrogation of all obnoxious and repugnant widowhood practices in the States. But laws alone cannot change hearts, unless cultural and social values change, legislation against widowhood practices will not work where the roots of injustice and prejudice are in existence

It can be surmised that discriminatory widowhood practices exist in many African countries and other parts of the developing world, and continue because they have never been seriously addressed and challenged. Yet these issues must be addressed on a global level as part of the overall development effort, since sustainable development cannot take place within a discriminatory setting. To achieve such changes, the strong and organized support of world bodies committed to opposing oppression is necessary.

A particular feature in the Nigerian legal system is the attitude of the people. Most disputes involving family law are regarded as private. When contested in public, such disputes are usually taken outside the formal court system, and decided at the village or local administrative level. At such level, precedence is given to the customary law of the people. However, recent decisions have shown the progressive changes in the higher courts in evoking the principles of natural justice. There are many reasons why family issues are taken before the village administration in preference to the formal courts. These include:

- i. High cost of filing papers;
- ii. Bureaucracy in the formal courts;
- iii. High legal fees for counsel; and
- iv. Long and complex procedure of formal courts

The above factors point to the sad fact that, though progress has been made in protecting widows and women, the journey ahead remains a long and tedious one.

5.5 Contributions to Knowledge

A lot has been said about the rights of women but it should be noted that enough cannot be said on the issue as it is pertinent to our very social fabric. In the course of the work, the researcher point out three ideas that can aid the boost of the rights of women and widows in our present day African society.

- (1) Creation of awareness: some women suffer today due to the low illiteracy level. In order words they don't even know their rights so how can they fight for it. This work points out the need for the inclusion of women rights' issue and gender education in our school curriculum. Also, grassroot awareness should be encouraged. At Town hall

meetings and even in the market places. This work points the need for this re-education as an aggressive one and should be carried out by all stakeholders.

- (2) This work posits the need for cases involving the rights of women/widows to be sent to less congested courts such as the Multi Door courthouse system where they can be adjudicated upon with more speed and less acrimony. The research outlines the need for seasonal reform on our judicial laws governing women rights and such amendments signed into laws by The National Assembly with as little delay as possible to ensure no one suffer untold hardship coupled with the loss of a loved one.
- (3) The inclusion of traditional rulers and custodians of customs in the thought process should not be overlooked. The re-education of such esteemed men who in turn can help weed out the harmful norms and customs in their various localities .Such approach may seem far-fetched but these are men in position of authority who their kinsmen look up to for guidance.

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