

**COMPARATIVE ANALYSIS OF SUCCESSION RIGHTS UNDER CUSTOMARY
MARRIAGE WITH SUCCESSION RIGHTS UNDER STATUTORY MARRIAGE IN
SOUTH-EASTERN NIGERIA.**

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GOU/U21/LAW/334

**BEING A LONG ESSAY SUBMITTED TO THE FACULTY OF LAW GODFREY
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DECLARATION

I, **VIVIAN OLUCHI ONWUKA**, with the registration number **GOU/U21/LAW/334**, hereby declare that the work in this project research “**A COMPARATIVE ANALYSIS OF SUCCESSION RIGHTS UNDER CUSTOMARY MARRIAGE WITH SUCCESSION RIGHTS UNDER STATUTORY MARRIAGE IN SOUTH-EASTERN NIGERIA**” was carried out by me in the faculty of law Godfrey Okoye University Enugu under the supervision of **Dr Anthony Ifeanyi Onuigbo**. I pledge originality to the work as no part of it has been presented for another degree at any institution. All the works consulted have been duly acknowledged and referenced.

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CERTIFICATION

This is to certify that the research work and subsequent preparation for this long essay titled “**A COMPARATIVE ANALYSIS OF SUCCESSION RIGHTS UNDER CUSTOMARY MARRIAGE WITH SUCCESSION RIGHTS UNDER STATUTORY MARRIAGE IN SOUTH-EASTERN NIGERIA**” by **VIVIAN OLUCHI ONWUKA** with the registration number **GOU/U21/LAW/334** was carried out under my supervision.

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DEDICATION

This project is dedicated to the Almighty God who in his infinite mercy, love and kindness sustained me throughout my stay at the Law Faculty of Godfrey Okoye University, to my religious and biological family especially my daddy Ugochukwu Osunkwo and most importantly to all widows, female children and children born out of wedlock out there who are products of discrimination in matters of their succession rights as we join them to reinforce their rights in the society.

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LIST OF ABBREVIATION

AC	Appeal Court
ALL NLR	All Nigeria Law Report
ANLR	All Nigerian Law Report
CCHCJ	Certified Copies of High Court Judgments
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
ECSLR	East Central State Law Reports
ENLR	Eastern Nigeria Law Report
ERNLN	Eastern Region of Nigeria Law Report
FNLR	Federal Nigeria Law Report
FSC	Federal Supreme Court
NHRC	National Human Rights Commission
NLR	Nigerian Law Report
NMLR	Northern Monthly Law Report
NNLR	Northern Nigeria Law Report
NWLR	Nigerian Weekly Law Report
QB	Queen Bench
SC	Supreme Court
TLR	Times Law Reports
UILR	University of Ife Law Report
VOL.	Volume
WACA	West African Court of Appeal
WACOL	Women Aid Collectives
WARDC	Women Advocates Research and Documentation Centre
WELA	Women Empowerment and Legal Aid
WLR	Weekly Law Report
WRAPA	Women's Rights Advancement and Protection Alternative
WRNLR	Western Region of Nigeria Law Report

ABSTRACT

The nature of man makes him to value family ties and continuity. In a bid for him to maintain the status quo, he enters into marriage which could either be customary or statutory marriage to fulfil the Divine mandate of increasing and multiplying the earth to ensure continuity. The inevitability of death which makes it a reality that one day we all will exit this world but when and how remains a mystery beyond human reasoning. When a man eventually dies, his properties which he acquired during his lifetime devolve to his family members bestowing on them rights and duties over the said properties. These rights are nothing other than succession rights. A man may preempt his exit and prepare the devolution of his properties stating the beneficiaries and the extent of the interests therein through testamentary disposition. This is known as testate succession, but where he does not make such provisions before his death, such is known as intestate succession. Where the man dies intestate but contracted a customary marriage, the customs and law of his place shall regulate the devolution of his properties but if he dies intestate and contracted a valid marriage under the Act, the Administration of the Estate Laws shall regulate such devolution of property of the deceased. The implication of these is that succession and inheritance to the estate of the deceased depend largely on the type of marriage contracted during his lifetime. Marriage is a condition precedent for succession to take place for it cannot exist in isolation. This paper seeks to appraise by way of comparison succession rights under customary law marriage with succession rights under statutory marriage in South-eastern Nigeria. We were able to bring to bear through our analysis the discrimination that still exist in most customs having regards to female children, children born out of wedlock and widows even after so many laws and judicial decisions have tried to put a stop to the discriminatory practices. We equally identified the disparities that exist between the two rights of succession. We concluded by reinstating our findings and making viable recommendations that will help to strike a balance to ensure certainty and predictability in our legal system.

CHAPTER ONE

INTRODUCTION

1.1 Background to the Study

As philosopher king, it is trite to note the stages in the existence of a man: there is time for him to be born; time for him to fulfil the divine mandate of increasing and multiplying through the institution of marriage; there is also a time for him to exit the world through the inevitable reality of death. After the demise of a man comes the imminent act of passing of his property to those living or those who succeed him.

The above proposition is a confirmation that devolution or sharing of property of a man cannot happen during his lifetime. Succession is said to be in abeyance until the death of a man. The death of a man makes succession alive. It is immaterial if the man had a will during his lifetime. Succession rights are incidental to the sharing or transfer of the properties of the deceased. Succession rights are either regulated by statutes or customs.

Every human person has the Divine mandate to increase and multiply and to subdue the earth.¹ This biblical injunction has undoubtedly become the origin of the principle of continuity because every human person wants to observe the mandate to remain relevant on earth. Had the need for continuity not being in existence, marriage would have been nothing but a mere illusion. This is to assert that marriage and succession are two variables that co-exist: existence of one makes the existence of the other possible for one cannot exist in isolation or independent of the other. To solidify the Divine mandate further, the sanctity of marriage was further established thus, “and this is why a man departs his family and fuses to the wife as one entity for life until death.”²

¹ Genesis 1:28.

² Genesis 2:24.

One of the main reasons for marriage is to procreate to maintain the mandate of continuity for continuity is possible through the union of a man and a woman.

In Nigeria, the rights and duties of human persons as they relate to succession largely depend on the type of marriage contracted.³ These rights include rights accruing to the spouse and or children at the death of the other spouse: these include how property are shared and owned etc. These rights and duties take effect after the death of a spouse. Spouses, children and family members of legally recognised marriages in Nigeria enjoy these rights. This is to say that the rights and duties are evoked following a valid union. This is to say that a man and a woman who merely co-existed do not enjoy any of these rights because they are not validly married under the law. Exception to this is that the constitution recognises the rights of all children to inheritance.⁴

A man before his death may deem it necessary to write a will as to how his properties would be shared following his demise. This is known as testate succession and it is governed entirely by the Statutory Wills Act⁵ or Wills Laws of States.⁶ If the man dies without leaving a will to regulate the devolution of his property, it is taken that he died intestate and the devolution of properties following this is called intestate succession. In intestate succession, devolution of properties of the deceased is governed by the customary practices and Statutory laws on intestacy, Administration of Estate Laws of States.

In Eastern part of Nigeria, these two systems exist side by side and are fully applied in the context required. A man may by just writing a will determine what will happen to his estate upon his demise and where he fails to do so, his estate automatically will be regulated by customs or

³ I E Sagay, *Nigerian Law of Succession: Principles, Cases, Statutes and Commentaries* (1st edn, Malthouse Press Limited, 2006) 73.

⁴ Constitution of the Federal Republic of Nigeria 1999 (as amended), s 42.

⁵ See Wills Act 1837.

⁶ This includes Wills Law of Lagos State amongst others.

statutory laws on intestacy. The advantages of making a will in recent times seem to outweigh that of devolution of property subject to intestacy law. To this end, a comparative analysis becomes necessary for more elucidation.

1.2. Statement of the Problem

With the emergence of dual legal system in Nigeria and the interplay of customary and statutory marriages in Nigeria especially in the South-Eastern Nigeria, there arose some inevitable problems as to rights of succession. It is no longer news that a typical Igbo man (the focus of our study) is a traditionalist to the core with many opting for customary marriage so when such a man dies, his estate is automatically subjected to customs which determine how the man's property is shared. The deceased estate is the reason for the foregoing thrust into the complexities that bedevil the applicable customary practices and sadly so because among the Igbo customary law of inheritance the rule of primogeniture⁷ applies where male children especially the first born son is considered to be higher and superior to his other siblings⁸ and are recognised over the female children.⁹ This rule of primogeniture allows the eldest son to assume the position of the deceased father by overseeing the properties of the deceased and holding it in trust for the rest of the family members.¹⁰ The "Obi" which was the dwelling place of the deceased is inherited by the first son to the exclusion of all other children of the deceased.¹¹ This custom although may have divergent views across the states of the South-Eastern Nigeria, there exist similarities among the different customs on succession among the Igbos because they are mostly patrilineal in nature. They recognise and allow male descent and try everything possible to pass and keep properties,

⁷ E A Taiwo, 'The Customary Law Rule of Primogeniture and its Discriminatory Effects on Women's Inheritance Rights in Nigeria: A Call for Reform.' (2008) 22(2) *Speculum Juris* 104-122.

⁸ *Ogiefo v Isesele & Ors* (2014) LPELR 22333 (CA).

⁹ *Okwueze v Okwueze* (1989).

¹⁰ *Ejiamike v Ejiamike* (1972) ECSLR 11.

¹¹ *Nwafia v Ububa* (1966) 1 AII NLR; *Ezeokafor v Uba* (1975) 1 UILR 162.

especially landed properties, within the male line.¹² It is bad and problematic that even to the point that where the only male child predeceased his father, the surviving female child is not allowed to inherit the property at the death of the father¹³ but the property will rather devolve to the male descendant next in line: this may be the grandson of the deceased or even his brothers. No consideration is often made to the female child.¹⁴ In rarest circumstances where the female children are allowed to be beneficiaries of the deceased properties, they are subjected to approval by the male counterparts.¹⁵

This discrimination in matters of devolution of properties is not just limited to female children, but it is also extended to widows. Most of the Igbo customs see the widows as a chattel capable of being inherited by the brother or even son of the deceased thus excluding them from pertaining in the inheritance of their husband's property.¹⁶ This is why often times when a man dies, the widow is not entitled to inherit property of the deceased but can only make use of it during her lifetime. This situation is worsened where the widow had no child for the marriage: she may even not be given the opportunity to enjoy the husband's properties because she bore no child.¹⁷ The Igbo customary law undoubtedly creates a legal disability for the widow that prevents them from taking part in the inheritance of the properties of their husband.¹⁸ The only crime they committed is that they are female. The widow of the deceased is only accorded with the right to possess and use the

¹² *Eke v Okwaranyia* (2001) 12 NWLR (Pt. 726) 181.

¹³ *Ugboma v Ibeneme & anor.* (1967) ENLR 252.

¹⁴ *Ibid.*

¹⁵ C Okechukwu, 'The Impact of Customary Law on Women's Access to Property in Nigeria' (2018) (72) *Journal of Law, Policy and Globalisation* 40-46.

¹⁶ *Nezianya v Okagbue* (1963) 1 AII NLR 352.

¹⁷ Oluwakemi Adekile, 'Property Rights of Women in Nigeria as Impediments to full Realisation of Economic and Social Rights' (2010) *SSRN*.

¹⁸ M O Izzi, 'Discriminatory Practice against the Women Folk under Customary Law of Succession' (2019) (8) *BU Socio-Legal Journal* 112-132.

property of her deceased husband, and no provision is made for her to own and dispose of the property.¹⁹

Another problem to consider is the problem of discrimination against children born out of wedlock. The Constitution of Nigeria protects the right of every person to the point that it made a provision that no one is to be discriminated against following circumstances of birth.²⁰ The big question now is whether that provision of the constitution is obeyed. This provision of the law tries to protect the rights of children, especially those born out of wedlock during the subsistence of a valid marriage by stating that there is nothing like an illegitimate child under the law. Thus, there is presumption of legitimacy under the law until proven to the contrary.²¹ In furtherance to this, customary law equally presumes legitimacy not minding the situation surrounding the birth of the child provided such child has been duly acknowledged by the man of the family.²² This is to say that both the statutes and customary law try to protect even children born out of wedlock. The general rule is that where a man by way of acknowledgement has legitimated a child, the child becomes a legitimate child and shall remain so forever and shall have equal share of the father's estate.²³ The implication of this being that a child born out of wedlock who had been acknowledged by the father can apply for permission to administer the estate of the deceased.²⁴ Be that as it may, the whole of the provision of the law seem to be theoretical because often times we hear that children born out of wedlock who have even been acknowledged by their father still fall prey to this discrimination as they are still recognised under most customs as illegitimate and thus are not allowed to take part in the share of the estate of their father. Even in statutory marriage, two views

¹⁹ *Nzekwu v Nzekwu* (1981) 2 NWLR (pt. 104).

²⁰ CFRN 1999 (as amended), s 42(2).

²¹ Evidence Act 2011, s 165; *Mariyam v SadikuEjo* (1961) NRNLR 81.

²² *Okonkwo v Okagbue* (1994) 9 NWLR (Pt. 368) 301.

²³ *Salubi v Nwariaku* (2003) 7 NWLR (Pt. 819) 426; *Mgbodu v Mgbodu* (2015) 12 NWLR (Pt. 1474) 415.

²⁴ Administration of Estate Law of Lagos State 2015, s 26(1).

have continued to exist: one which is that once the putative father has recognised the child, they can take part while the other view is of the opinion that no child born prior to a valid marriage or born to the man by another woman during the subsistence of a valid marriage shall be legitimated through acknowledgment by the putative father. These controversies have posed lot of challenges as families are often left to engage in what seemed like mortal combat to determine who has right to the estate of the deceased and how such estate can be shared. The courts have had to dabble in and resolve most of the issues which are in conflict with the constitution along the line. The case of *Ukeje v Ukeje*²⁵ is a case that has remained relevant in the discussion that discrimination especially against a female child is unfair.

On the other hand, when an Igbo man married under the Act dies without a valid will, the intestacy law like Administration of Estate Laws of Enugu, Anambra, Imo, Ebonyi or Abia governs the administration of his estate. These Laws have a hierarchy for succession. The implication is that where there is no will, the estate is disbursed by mere predestined determining factors that he has no say in. The comparative analysis is therefore important because it will bring to the fore the ills these systems have against the interest of the deceased and from the obvious ills, recommendations will be argued for ensuring that the deceased who died abruptly without a plan is not a victim of circumstance that will have adverse effect on his dependants.

1.3. Research Questions

The main point of this study is centered around the following research questions:

1. To what extent are female children, children born out of wedlock and widows discriminated against under customary rights of succession in South-eastern Nigeria?

²⁵ (2014) 11 NWLR (pt 1418) 384.

2. How does the discrimination of the female children, children born out of wedlock or widows of the deceased in matters of succession under Igbo customary marriage affect their constitutional rights?
3. How do the succession rights under Customary law marriage differ from the succession rights under statutory marriage in south-eastern Nigeria?

1.4. Aim and Objectives of the Study

The aim of the study was to compare the succession rights of customary and statutory marriages in South-Eastern Nigeria. The specific objectives of the study were:

- i. To discover the extent of the discrimination of female children, children born out of wedlock and widows in rights of succession under Igbo customary marriage.
- ii. To discover how the discrimination of the female children, children born out of wedlock and widows in matters of succession under the Igbo customary marriage affect their constitutional rights.
- iii. To find out how succession rights under customary marriage differ from the succession rights under statutory marriage in south-eastern Nigeria

1.5. Scope and Limitations of the Study

The study concerned itself with the disparities that exist between succession rights under the customary and statutory marriage among the Igbo tribes in Nigeria with particular emphasis on the discrimination suffered by not only the female children but also children born out of wedlock, and widows. This research is limited to succession rights among the South-Eastern Nigeria popularly known as the Igbo tribe.

The challenge encountered during the subsistence of the research was problem of logistics: we were not able to undertake a physical visit to all the areas that make up the Igbo tribes, and this

was a great limitation because we missed what would have been a firsthand information. We had to fall back to books and articles.

1.6. Significance of the Study

This study is timely and apt. It exposes the ills in the society especially in matters of succession rights in customary marriage among the Igbo tribe. It unveils the discrimination meted on the female folks in Igbo land in matters of inheritance. The study exposes and lays bare the realities of children born out of wedlock who are also products of discrimination. It equally evaluates the areas and extent of this discrimination. It tries to unravel the lacunae that still exist in areas of non-enforcement of the law to mitigate discrimination. It proffers solutions to the existing challenges in areas of discrimination to offer an equal playing ground for the widows and children of the deceased of a customary marriage in matters of succession. This study as a matter of fact will help in legal reforms.

There exists varied literature in the areas of succession rights in customary and statutory marriages among the Igbo tribe, but the researcher still opines that there exists little study on the problem of discrimination among the children and widows of the deceased in matters of inheritance in customary marriage. The research acknowledged the fact that there are variegated laws out there to address this problem of discrimination and even judicial activism manifested in form of case laws to help combat them, but the challenges lie in their enforceability and even awareness. The research has as a matter of fact indulged in substantial study on how to address the problem of discrimination in succession rights among the Igbo tribes thus paving way for other researchers to embark on further research to ensure that this problem of discrimination is not only exposed but a lasting solution provided to ensure equity and equality among the children and widows of the deceased.

1.7. Research Methodology

The study made use of doctrinal research design. It relied on both primary and secondary sourced data. The primary sources of data that were relied on in the course of the work that formed the foundation include statutes, case laws, conventions and treaties. The secondary sources of data relied on in the course of the study include relevant textbooks, journal articles and materials sourced over the internet. The data collected were later analysed critically within the content and context of the study.

1.8. Literature Review

Many authorities in the forms of statutes, judicial decisions, scholars have lent their voices with regards to succession rights under both customary and statutory marriages in Nigeria. We are going to review some works to see the extent they have gone in proffering solutions to the problems identified therein and to also see what still needs to be done.

Let us start with the constitution which is the grundnorm that give relevance and credibility to all other laws and works. A critical analysis of Chapter IV of the constitution which is similar to the Bills of Rights of various countries in the world suffices to say that there is a provision for the fundamental human rights of the people. The said chapter of the constitution provides those rights as fundamental because they are inalienable and accrue to every citizen by the virtue of their being human. It is to this effect that those rights are said to be justiciable and enforceable under the law unlike what we have in Chapter II. In a bid to ensure compliance and enforcement of those rights, the government was proactive to set up the National Human Rights Commission (NHRC) saddled with the responsibilities of ensuring compliance to those rights, creating awareness and making sure that those rights are enforced. The Constitution of the Federal Republic of Nigeria clearly tells us that the constitution openly and clearly prohibits discrimination of anybody in Nigeria by virtue

of circumstances of birth.²⁶ It vehemently speaks against any form of restriction or deprivation that would be meted on any citizen residing in any part of the country owing to the circumstances of their birth.²⁷ This is to say that the provision of the constitution herein referred to above tries to ensure and promote equality amongst its citizen thus stating that every citizen ought to be treated equally not minding the circumstances surrounding the existence of the citizen. This provision of the constitution could also be said to be related to the one that preserves the dignity of human person²⁸ because the two seem not to exist in isolation because when a citizen is accorded equality devoid of discrimination, it goes a long way to say that the dignity of the said citizen is preserved for violation of one is undoubtedly the violation of the other. There is no doubt that discrimination is a form of inhumane and degrading treatment prohibited by the law.²⁹ A further look at the provision of the corresponding section of the constitution, we saw where the law recognises and gives every citizen the right to be an owner of immovable property in Nigeria, not minding the location.³⁰ What this provision of the constitution meant is that it wants to resolve all conflicts that exist with respect to devolution of property. It already saw the need for the provision of this law because most times women are subject of discrimination under customary law in matters of acquisition of immovable properties. Most of our customs deprive them of this inalienable right accrued to them simply because they are regarded as chattels and properties which are subject to being owned and acquired by others.³¹

When we look at another section of the constitution³² that guarantees and provides that every citizen of Nigeria will have the inherent right to be owners of immovable properties in any part of

²⁶ CFRN 1999 (as amended), s 42(2).

²⁷ Ibid.

²⁸ Ibid, s 34.

²⁹ Ibid.

³⁰ Ibid, s 43.

³¹ *Anekwe v Nweke* (2014)9 NWLR (pt 1412) 393.

³² CFRN 1999 (as amended), s 43.

Nigeria, we can see that this adds validity to section 42 of the Constitution for it strikes a balance among all the citizens by giving them rights to own properties of their choice anywhere in Nigeria. This ownership of property by citizens contemplated under the provision of the law extends to ownership by inheritance and succession. The only restriction of this section of the law is as it regards the Land Use Act given that ownership will be subject to the provisions of the Land use Act.³³ It is immaterial if ownership is subject to customary law or the statutes. This provision of the constitution has been found to be on all fours with the provision of the international charter that guarantees rights of citizens to own property.³⁴ As we have seen that the constitution, by the virtue of its provisions frown against all forms of discrimination, the big question we need to ask ourselves is to what extent has this law been enforced and those who go against it brought to book? Why are people subject to customary law still discriminated against even when the provisions of the constitution and the Land Use Act have not said anything to the contrary and it appears so normal in the face of many? The system has not yet taken time to call to book those who are behind the non-enforceability of the laws. The Human Rights Commission has gone into a deep slumber and forgotten their duties. This is so because they are walking freely on the street and no one is holding them accountable and liable for non-performance of their duties. It suffices to say, from all indication that often our legislation is nothing other than a worthless document that is very effective on paper but still lacks enforceability.

On the same vein perusing through the Charter of the United Nations, it is evident that in its preamble that it contemplated the need for fundamental human rights by reinstating the importance of upholding these fundamental rights that are inherent in human beings by the virtue of their being

³³ Land Use Act 1978, s 1.

³⁴ African Charter on Human and People's Rights 1948, art 14- "The right to property is guaranteed. It may only be encroached upon in the interest of the community and in accordance with the provisions of appropriate laws."

humans. The intent of the Charter of the United Nations is to improve the standard of the living of the people which will in turn bring out development and progress. The big question then is why do we still have issues bothering on human rights in Nigeria especially when we know that Nigeria is part of the United Nations and as such is bound by the Charter by the virtue of her membership? If United Nations should believe in prioritising fundamental human rights that encompass dignity and equality of persons, why do Nigerian laws still not care about the fact that a lot still needs to be done in implementing these laws. It is so much a great concern because Nigeria has not only provided for these rights but has equally made them justiciable rights. If they don't care about the enforcement, how do they now want to gain the trust and confidence of the citizens whom the law seeks to protect? It appears like a double-edged sword.

It is pertinent to point out the Universal Declaration of Human Right in its article³⁵upholds the need for equality among people of the world in all they do for they are to be allowed to enjoy all fundamental rights accruing to them by virtue of their being human without restricting anybody. The meaning of this article is that it tries to underscore the universality of rights and that as such people should not be discriminated against based on their race, nationality, religion or circumstances of birth. Judging and going by this article, it is of utmost importance to take note that these human rights are not particular to some people or some countries of the world but all human beings. This no doubt falls under the ambit of the rules of the international world known as Jus Cogens or the Peremptory Norms which have binding effects on all members not minding that some may be persistent objectors and some subsequent objectors. Jus cogens are those norms that the international world accepts to be binding on all states ³⁶of the international community because they are basic and go to the root of humanity. They bind everybody equally. There is no

³⁵ Universal Declaration of Human Rights 1948, art 16(1).

³⁶ Vienna Convention on the Law of Treaties 1969, art 53.

derogation of any person or state from such norms or rules.³⁷ Any rule, custom or even treaty that is inconsistent with the jus cogens will be invalid³⁸ because such rules or customs would be taken to go against humanity. Could it be said that some customary laws in Nigeria are inconsistent with these jus cogens, and could Nigeria be said to be in violation of these fundamental norms by the virtue of discriminating practices evidenced in its customary laws?

Prof Nwogugu³⁹ observed that although the rule of primogeniture is part and parcel of Igbo custom especially in intestate succession where the deceased left no will to guide and regulate the devolution of his estate, it has caused great harm by creating a class where the female folks and some others like those born out of wedlock are excluded from taking part in the sharing of the property of the deceased. He further adduced that the judiciary may not do more in balancing this inequality because of its unequal judgments but that the legislature has bulk of the work to bring about positive and necessary changes in the areas of customary law of intestate succession because that is where the inequality appears obvious and disturbing. He acknowledged further that things are the way they are because the legislature has not yet undertaken the work of drafting of laws to limit the discredited rules of customary law so as to set standards that society will follow. Prof Nwogugu further observed that under the Igbo customary succession, some persons lack capacity or their capacity may be limited as it pertains inheritance.⁴⁰ Such persons are the female children, wife of the deceased, members of the osu caste system, children born out of wedlock. It has been observed that female members of a family in some places in Igbo land have no legal backing to lay claims to their rights. This was the case when the court held that the Awkuzu custom which is

³⁷Verdross, 'Forbidden Treaties in International Law', (1937) (31) *American Journal on International Law* 571-572.

³⁸ Vienna Convention on the Law of Treaty 1969, art 64.

³⁹ Prof E I Nwogugu, 'Primogeniture in Igbo Customary Law of Intestate Succession: A Revisit', (1) (1) *ENBAR Law Journal*.

⁴⁰ E I Nwogugu, *Family Law in Nigeria*, (3rd edn, HEBN Publishers Plc 2014).

the general Igbo custom does not allow females to inherit real property of the deceased.⁴¹ This was the case in *Nezianya v Okagbue*⁴² where the Supreme Court held that a woman under the Igbo customary law cannot under any circumstance claim ownership of her deceased husband's property nor dispose of it without the consent of the members of the family. The import of this custom is that a woman can only possess a property of the deceased but cannot own it and since she does not own it, she cannot dispose of it.⁴³ Prof Nwogugu commented by stating that it is so disheartening that our laws exist in two opposing world as a result of the nature of our system. This he said has been laid to rest by the constitution which seeks to create equal playing grounds for the two. The constitution undoubtedly frowns at such practices that seek to discriminate against or deprive others of their rights especially as it relates to the issue at hand. This has been settled by the Court of Appeal where it held customs that discriminate against people to be repugnant to natural justice.⁴⁴

Ifeoma Enemo pointed out in her book⁴⁵ the slight variations that exist among the different customs in Nigeria with regards to customary law of intestate succession because that is where these uncertainties and problems of discrimination are evident. She tried to juxtapose the Igbo intestate succession with that of the Yoruba, and she remarked that the Igbo custom excludes the female children from being part of the beneficiaries to the estate of the deceased unlike what is obtainable among the Yorubas where the children of the deceased not minding the sex or age have equal rights to inheritance.⁴⁶

⁴¹*Ugboma v Ibeneme*(1967) FNLR 251.

⁴² (1963) AII NLR358 SC.

⁴³*Nzekwu v Nzekwu* (1981) 2 NWLR (Pt. 104).

⁴⁴*Mojekwu & Ors v Ejikeme & Ors* (2000)5 NWLR 402.

⁴⁵Ifeoma P Enemo, *Basic Principles of Family Law*, (1st edn, Spectrum Books Limited 2008).

⁴⁶ *Lopez v Lopez* (1924) 5 NLR 43.

Odiike and Agu acknowledged the fact that customary law excludes a child born out of wedlock from being a party to the inheritance of the deceased except where he has been duly legitimised. They asserted further that this customary practice has been modified by the statutes like the constitution and even international treaties and conventions that bind Nigeria equally and as a matter of fact and law, no child should be addressed as illegitimate since the law frowns against that by asserting that all human persons are equal not minding the circumstances of their birth.⁴⁷ Chisaa et al in their journal article⁴⁸ remarked by pointing out that it is no longer news that female folks among the Igbo ethnic groups have been subjected to untold hardship occasioned by discrimination in matters of inheritance. They went on to affirm that this discrimination has persisted even after Nigeria as a member of many International Organisations has equally ratified most of the treaties and conventions. This is because of the age long patriarchal system that has existed in Nigeria. This system values men more than women and as such relegate them to the background. They decried this practice of discrimination and suggested that such customs be subjected to validity tests to test them against their repugnancy to natural justice, equity and good conscience, incompatibility with public policy and inconsistency with statutes in existence at the time being. They hold the view that such customs shall not become laws if they do not pass the validity tests. They equally attributed the reason for this discrimination among women in Igbo land to the very fact that people especially women still lack awareness as to their rights under the law and are not abreast with the provisions of the law and the landmark judicial decisions that guarantee their rights. It was on this premise that they recommend more. This paper likened the female folks among the Igbo to the proletariat while the men are the bourgeoisie under Marxist capitalist theory.

⁴⁷ E A Odiike and A G Agu, *Modern Family Law with Marriage Act and Matrimonial Causes* (1st edn, Renaissance Publishers 2003).

⁴⁸ Chisaa et al, 'Awareness and Compliance with Court Judgment/Constitutional Provisions Legalising Female Inheritance Rights among the Igbo, Nigeria' (2022) *Journal of Human Rights and Social Work..*

The men have suppressed the female in order that they may continue to stay on top of the ladder of the economy, and this has made the inequality so obvious because they are in constant battle for their selfish gain. They further claimed that the problem not only lies on lack of awareness of rights but the greatest problem seem to be problem of non-compliance and non-enforceability of punishment for defaulters because often times people know their rights but the male folks have vehemently refused to comply with the provision of the law and when they do, they are not held accountable for their wrongs. Judiciary is guilty of this non-enforcement because of their nonchalant attitude when a matter bothering on human rights comes to them.

Hilary Nwaechefu et al⁴⁹ lent their voices in condemning this practice among the Igbo people. They posited that the cultural practice of discriminating against female children and widows is inhumane and should not be allowed to still see the light of 21st century. Such practice has left a lasting stigma on women where they are often seen as people with legal disabilities that hinder them from taking part in family inheritance.⁵⁰ In their vexation, they argued why such a custom would allow brothers, half-brothers or even patrilineal uncles to inherit the properties of the deceased simply because there was no male child that succeeded him thereby disregarding female children as children. They suggested not only recognising the rights of female folks so as to enable them to take part in the devolution of properties of the deceased but also in being head and taking after the deceased where she is the firstborn and that the widow should not be deprived to possess and own property of the deceased.

⁴⁹ Hilary Nwaechefu et al, 'Discrimination against Female and Widow in Inheritance of Real Estate and Succession in the Southeastern Nigeria: A Breach of International Instrument and the Nigeria Constitution', (2019) (81) *Journal of Law, Policy and Globalisation*,.

⁵⁰ M O Izzi, 'Discriminatory Practice against Women Folk under the Customary Law of Succession' (2019) *BU Socio-Legal Journal*, 1-16.

In the same vein, the Bangul Charter⁵¹ made provision to eliminate all forms of discriminations against women and children. These categories of persons contemplated by the African Charter are often regarded and seen as vulnerable and extra care ought to be deployed in ensuring that their rights are protected. This charter does not bestow this responsibility of elimination of discrimination of the vulnerable on few individuals but on the state. This goes a long way to say that this is nothing short of collective responsibility of the people of the state. It mandates that all hands must be on deck in whatever capacity that they operate to ensure that these rights are protected and safeguarded. This⁵² could be said to have drawn its strength and validity from the preceding articles especially the one that provided for every individual person to enjoy the rights and freedoms under the charter without any form of distinction or discrimination by virtue of sex, race, age, religion etc.⁵³ The African Charter further enunciated that this equality before the law cuts across the rights of all persons to enjoy same respect as no person shall be allowed to exert domination over another.⁵⁴

It is very obvious that Nigeria is not alone in this struggle because the issue of discrimination in matters of inheritance seems to share peculiarity among the African countries and this made Judge Langa found in his judgment that although the principle of primogeniture is unreasonable and unfounded in a democratic society as it robs female folks of their dignity and equality.⁵⁵ It was because of this that in proffering solution to this, he remarked that a more stringent approach that is direct is required to guarantee constitutional protection of these rights other than leaving everything at the mercy of the judiciary which may be insufficient a solution. To him, the

⁵¹ African Charter on Human and People's Rights, art 18(3)

⁵² Ibid.

⁵³ Ibid, art 2.

⁵⁴ African Charter on Human and People's Rights, art 19.

⁵⁵ *Bhe v Magistrate Khayelitsha & Anor; Shibi v Sithole* (2005) BCLR 1.

legislature is in the best position to safeguard the rights and make necessary amendments should there be needs.⁵⁶

Fr Dr Chinedu Anieke observed in his book⁵⁷ that it is trite law that a man and a woman should enjoy equal rights in marriages but he further adduced that the Igbo Customary Marriage is a mirage and illusion of this supposed reality because it seems to be more of a theory than practical because in practice some Igbo Customary marriages do not reflect mutual rights and obligations between the parties to the contract of marriage. This, he went on to assert that in Igbo Customary marriage that is patrilineal in nature, the man is taken to be the head, and the woman and every other person are subservient to him. In his position which seem not to be far from the truth, the woman is often treated as the chattel of the man, and it is on this standpoint that she is not allowed to partake in the inheritance of her husband property even such properties that are jointly owned. The big question that Fr Anieke and others who are saddened by the impartiality of the Igbo custom ask is why are the laws regulating equality and discrimination not yet enforceable in our legal system?

Pope John Paul II in his Apostolic Exhortation⁵⁸ remarked on the equality that should exist between husband and wife for he believed so strongly that the rights and duties of spouse do not exist in isolation rather they complement each other and are equal in dignity. This underscores the fact that a man and a woman should try to take away all forms of discrimination and class struggles that exist among them. This is problematic and highly impossible to attain because the Igbo custom always sees man as the head and finds it difficult to strike a balance between the rights and duties of a man and a woman. This has equally led to the establishment of gender roles where some roles

⁵⁶Langa, DCL South African Constitutional Court at paragraphs 113 and 115.

⁵⁷C O Anieke, *Legal Consequences of Igbo Customary and Canonical Laws on Marriage and Family* (Pontifical Urbanian University Rome, Italy, 2013).

⁵⁸John Paul II, *Apostolic Exhortation, on the Dignity of Women (Mulieris Dignitatem)*.

are reserved exclusively for men who are often regarded as head of the family giving rise to the discrimination of women in family matters. These customary practices are nothing but a stark contradiction of the Married Women's Property Act which has been domesticated by many states. The Act treats all married women as "*femme sole*." ⁵⁹

Euna⁶⁰ observed that one of the reasons why women are not part of customary law inheritance is because devolution is according to blood relationship and since a wife is not part of the blood, she does not qualify for such inheritance.⁶¹ This practice has become so notorious to the point that most courts have taken judicial notice of it.⁶² The big question then is if that is the case for widows, why then are daughters who are part of the blood excluded from inheritance? Many scholars have even contended that widows inherit properties indirectly through their children but we cannot be illusive of the individualistic tendencies erupting in our modern society.⁶³

It is imperative to note that customary law is unarguably one of the sources of Nigerian law and plays pivotal roles in the development of laws in Nigeria. Notwithstanding this, customs have in so many ways and at various times created an unequal playing ground in the Nigerian system because of its inability to meet up with the validity rules. It has also created tension and class because each custom tries to uphold in its entirety what they feel to be their beliefs and practices. These have in turn led to miscarriage of justice and if nothing is done, our legal system will be left to suffer. From the scholarly review done, it is evident that although speaking from different

⁵⁹ Married Women's Property Act, 1882, s 2 " All married women shall at the commencement of the Act be entitled to have and hold as her separate property and to dispose of in manner aforementioned all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money or property gained or acquired by her in any employment, trade, or occupation in which she is engaged or which she carried on separately from her husband or by exercise of any literary , artistic or scientific skills."

⁶⁰ Euna E A Amechi, *The Legal Status of Foreign Women Married to Nigerians*.

⁶¹ *Sogunro-Davies v Sogunro & Ors* (1929) 9 NLR 79 at p. 80.

⁶² *Oshilaja v Oshilaja* (1972) 10 CCHCJ 11 at p.16.

⁶³ Euna E A Amechi (ibid).

perspectives, they all still boil down to the same thing that customary rights of succession are discriminatory, and proactive measures need to be taken to nip the discrimination in the bud.

The fact remains that the various works discussed here all made their own contributions to the approaches they felt would tackle the problem of customary rights of succession. Despite these contributions and solutions put forward, discrimination witnessed in customary rights of succession appears to be garnering strength and this is basically what this work seeks to address to put a stop to this problem of discrimination. We seek to provide viable solutions that are not foreign to people so that they can relate to them, and we must ensure strict compliance with these.

CHAPTER TWO

CONCEPTUAL AND THEORETICAL FRAMEWORKS

2.1. Conceptual Framework

2.1.1. Succession

Often times people tend to use succession and inheritance interchangeably, but the truth remains that although the two may be related, they are not exactly the same and should not be used in place of the other. Succession unlike inheritance refers to the act, method, process, medium by which properties of the deceased are devolved or transferred to his survivors.⁶⁴ When a man dies, his properties are shared among his survivors who may be his children, wives, parents, siblings or uncles, as the case may be. The properties envisaged here may be movable or immovable properties. Moveable properties include his clothes, shoes, cars etc. while immovable properties may include land, plants, machinery among others. Land is the most common object of succession that breeds the most problem. The various means by which these properties move from the deceased and are vested on the successors are called succession. The devolution or transmission of the interests, rights, duties in the property of a deceased to the living is what is known as succession.⁶⁵ Succession can also be said to mean the various ways through which rights or interests in property are acquired.⁶⁶ Succession rights are largely hinged on the type of marriage contracted for this will determine those who will become beneficiaries of the estate of the deceased and the extent of sharing the deceased property.⁶⁷ This is to say that succession rights under

⁶⁴ Titus Adekunle, 'Succession and Inheritance Law in Nigeria: Resolving the Discriminatory Proprietary Rights of Widows and Children' (2016) *Property Law Review* 1.

⁶⁵ A Emiola, *Emiola's African Customary Law* (Emiola Publishers Limited, Ogbomoso, Nigeria, 2011)117.

⁶⁶ Black's Law Dictionary, 9th Ed. Pg. 1569.

⁶⁷ E A Odike and A G Agu, *Modern Nigerian Family Law with Marriage Act and Matrimonial Causes Act* (Richfield and Frank-Law and Science Publishers Nigeria, 2003)248.

customary marriage are not the same as those under statutory marriage.⁶⁸ Succession is of two types: testate and intestate succession.

A man who wants to avoid the inherent problems that exist among the living with regards to sharing of property of the deceased may during his lifetime decide to write a will on how his property would be shared among the living upon his death. This is known as “testate succession.”

On the other hand, if a man fails to state how all or part of his estate would be shared during his lifetime and he eventually dies, such a man would be said to have died intestate which means that he died living no valid will.⁶⁹ The consequence of his action is that the succession is said to be an intestate succession. Intestate succession may either be partial or total.⁷⁰ Intestate succession is said to be partial if the man before his death disposed some of his assets in his will, but the intestate succession would be total where none of his properties were disposed of under a valid will.

It is worth noting that determination of the applicable law for intestate succession depends largely on the time of marriage contracted. This means that if the marriage is customary marriage, the applicable law would be the customary rules of intestacy unlike when it is a statutory marriage, Administration of Estate Act and Laws of the various state will apply. If the man died leaving a valid will, it is not much a problem to determine the law to have recourse to as everything would be regulated by the Wills Act or the Wills Laws of various states.

2.1.2. Rights

Rights are entitlements that guarantee the action of a person. They regulate human action by giving them the freedom to act or not to act in certain ways and engage or not engage in certain

⁶⁸ Ibid.

⁶⁹ Black Law’s Dictionary, Bryan A Garner (ed) Ninth Edition (USA: West Thomas Reuter Business, 2004) p.899.

⁷⁰ A G Agu and E A Odiye, *The Jurisprudence of Trusteeship, Bankruptcy, Will and Intestacy in Nigeria* (Chenglo Limited 2023.)

activities.⁷¹Rights in ordinary parlance like moral, social, natural rights are often confused and used interchangeably with legal rights but they are not the same. Here, we will be concerned about legal rights. Legal rights refer to those rights recognized and enforced by the law creating them. Rights may either be positive or negative. Positive rights grant individuals or groups the entitlement to request that some acts be performed to them by others. Negative rights on the other hand, bestows on a person or person's entitlement to demand that they do not act in certain ways towards them.⁷²Rights refer to the advantages or benefits confer on people to behave in certain way or to cause others to act and behave in certain ways.⁷³Legal rights are enforceable because they have protection of the law and anybody who violates or acts contrary to them is penalised. A true legal right has corresponding duties outlined by the law. This means that there can be no valid legal rights without corresponding duties or obligations.

Some rights are inherent in men. They are inalienable to men while some may be created by the law. Such rights are part of human nature and cannot be violated under any conditions. Inalienable rights are universal and thus produce duties and obligations.⁷⁴The truth remains that often times legal rights are reflections of natural or moral rights. Cultural relativism has posed a great challenge to the universality of rights by positing that rights ought not to be viewed as universal since they are observed and conceived differently based on cultural beliefs and practices. This is where the issue of discrimination under rights of succession comes in since succession rights are viewed according to cultural beliefs and practices and not as it relates to universal moral right of equality.

⁷¹Wenar et al, *Rights*, Stanford Encyclopedia of Philosophy (Summer 2025 Edition).

⁷²Michelle Maiese, *Rights* (2003).

⁷³David Little, *The Nature and Basis of Human Rights in Prospects for Common Morality* (Princeton University Press 1992).

⁷⁴David Little, *The Universality of Human Rights in David Little (ed), Religion and Peacemaking*, (United States Institute of Peace Press 2001).

Rights are distinct from privileges and should not be confused. Privileges unlike rights are earned and are conferred on by the law or another body that has the right to do so. Rights cannot easily be revoked or taken away, especially natural rights because they are fundamental and basic to human existence. Rights can only be extinguished when violation of the corresponding duties occur, but privileges can be withdrawn at any time even when no violation was committed. The concept of rights has corresponding duties for rights cannot exist in the absence of duties conferred by the law.⁷⁵ This is to say that a person can only make claims to rights established by the law only if the law obliges some duties on another person to the effect of that right.⁷⁶

Privileges are not to be confused with rights although some scholars opined that rights and privileges are synonymous⁷⁷ but the truth remains the two are not the same, but they are similar. This can be illustrated in the case of *Cole v PC 443A*.⁷⁸

Liberty does not attach any right or duty to both parties. They have the freedom to enforce or prevent the exercise of the rights.⁷⁹

2.1.3. Meaning of Custom

Whenever we hear about customs, what comes to our minds is nothing other than an agreed way particular people do their things. The fact remains that we are not far from the truth.

Customs can be said to be a rule, a standard, a guideline or a principle which, because of its repeated use among people in a particular district, has metamorphosed into law and has binding effect on them.⁸⁰ Any human rules of action which by their consistent usages have legal binding

⁷⁵ For extensive and comprehensive study of the nature of rights, see Llyods et al.

⁷⁶ See Salmond op cit.

⁷⁷ Writers like Austin have held this view about rights and privileges.

⁷⁸ (1936) 3 All ER 107. The plaintiff who was a non-parishioner of Westminster after complaining of being excluded from the church service was told that the plaintiff had only privilege or liberty to visit the church but has no right to do so which means that the authorities do not owe him any duty of admittance as he claimed.

⁷⁹ *David v Abdul-Cader* (1963) 1 WLR 834.

⁸⁰ Evidence Act 2011, s 258.

effect on the people of a particular district is said to be customary law. Customs refer to a generally accepted way of doing things which, because of their uniformity and consistency, has binding effect on the people.⁸¹ Customs can be said to be the evolution of people's beliefs and practices, and this is why a custom cannot exist independent of the society who observes and practices it. Customs refer to consistence of beliefs and practices which over time have been accepted by the people.⁸² Once customs have been subjected to the validity tests, they become binding and are regarded as customary law because of their binding effect.

For people's beliefs and practices to metamorphose into customs, two elements are indispensable. They are the element of generality and opinion juris. The former is the physical element while the latter is the mental element needed to turn usage into customs. The two elements need to exist together. By the element of generality, we mean that the people have had such belief that is peculiar among a good number of them and they have conformed to such practice and belief.⁸³ Once a good number of the community have given their consent as to the practice, it suffices to say that majority has consented to such.⁸⁴ Generality of will here does not mean that all the people must give their consent because this is nearly impossible. Generality of will simply conveys the idea that a good number of people have agreed to the existence of the custom. A custom devoid of generality of will does not have binding effect on the people.⁸⁵ This element adopts the principle of majority because where the consent be it express or implied is by the minority, it cannot hold water. It is on this note that many people still practice customs that have not met the validity test because of the rule of majority.

⁸¹ Alan Watson, *Sources of Law, Legal Changes and Ambiguity*, (University of Pennsylvania Press 1984).

⁸² *Owoniyi v Omotosho* (1961) 1 ALL NLR 804,309.

⁸³ Dominic Carreau, *Droit International*, (4th edn, Paris: Editions A Pedone, 1994).

⁸⁴ Hersch Lauterpacht, *International Law: Being the Collected Papers of Hersch Lauterpacht*, vol.1, thr General Works edited by Elihu Lauterpacht (Cambridge: Cambridge University Press 1970) 66.

⁸⁵ *Eshugbayi Eleko v Officers Administering the Government of Nigeria* (1931) AC 662 at pg.673.

On the element of *Opinio juris*, this is basically concerned with customs being judicially noticed where given the generality of will, the court will envisage the need to accept the practice and give it binding effect. This is simply the feeling or conviction that there is need to give general practices a binding effect.

Customs can be said to be the law that orders the activities of indigenes in a particular area.⁸⁶ Some writers considered custom as a rigid set of rules guided and regulated by religion⁸⁷ and it was on this note that it was considered that no distinction exists between custom and other concepts like religion and morality since they are taken to be interwoven.⁸⁸ As a matter of fact, customary laws have been discovered to be generally unwritten because of its peculiarity which is as a result of the flexibility to adapt easily to the changing needs of the society.⁸⁹ The flexibility of customary laws due to its unwritten nature encourages changes and reforms although it has its own dark side because it is uncertain and unpredictable which undoubtedly creates conflicts and confusions in its application.⁹⁰ This unwritten nature of customary laws excludes Islamic customary law which is mostly a “*lex scriptum*.”⁹¹ It was on this note that many scholars argued that Islamic law cannot be classified as a customary law given that it is largely written⁹² and it is not indigenous to Nigeria given that it is a fallout of the Northern Nigeria jihad. It operates a legal system that is based on the Islamic religion. Notwithstanding these positions of Islamic laws, it has continued to be influenced greatly in some areas by the customary laws already in existence.

⁸⁶*Nwagboji v Abadom* (1994) 7 NWLR (Pt.356) 357 CA.

⁸⁷ See such writers as Durkheim and Hobhouse.

⁸⁸ Maine, *Ancient Law*, chapter 1 cf *Early Law and Custom* p5.

⁸⁹ *Lewis v Bankole* (1908) 1 NLR 81, 100-101.

⁹⁰ *Dawodu v Danmole* (1962) 1 WLR 1053; *Adeniji v Adeniji* (1972) 1 AII NLR 298, 305-306.

⁹¹ Islamic laws which are aspects of customary law although not indigenous to its people is called a *lex scriptum* because it is largely written while having its sources from the Holy Quoran, practices of Mohammed and writings of Islamic scholars.

⁹² *Usman v Umaru* (1992) 7 NWLR (pt 254) 277.

It is worthy to note that in recent times several states legislature have reduced some customary practices that regulate customary marriage in writing for certainty and predictability purposes. Some of those practices include quantum of bride price, child betrothal and the rights and duties of customary law spouses.⁹³

The existence of a customary law needs to be proved unless it has been judicially noticed.⁹⁴ A custom is said to have been judicially noticed if it has been adjudicated upon by a court of superior record.⁹⁵ The only exception that avails a custom to be treated as a question of law rather than that of fact is in a situation where a judge learned in customary law is the presiding judge.⁹⁶ The onus of proving the existence of a custom lies on he who asserts that such custom exists.⁹⁷ Some customary law because of its unwritten nature appear to be inconsistent with the provisions of the constitution and as a result, the law has established that customs can only be judicially noticed and qualified to become laws if they have been subjected to the validity tests of repugnancy to natural justice, equity and good conscience, contrary to public policy and incompatible with the law in existence.⁹⁸ This means that a custom that is not subjected to the validity tests is said not to be enforceable and is no law at all.⁹⁹

Only a living customary law that is relevant to the fact in issue can be applied even when it satisfied the validity tests required of it. Once it is evident that the customary law is obsolete and no longer exists, it will not be applicable. Suffice to assert is that the customs that excludes widows and female children from taking part in the inheritance of the deceased should not be applicable for such practice is obsolete.

⁹³ Customary Marriages (Miscellaneous Provisions Law, cap 33 Laws of Enugu State 2004).

⁹⁴ Evidence Act 2011, s 16(1); *Giwa v Erin-milokijn* (1961) 1 All NLR at 296.

⁹⁵ *Ibid*, s 17.

⁹⁶ *Ababio v Nsemfo* (1947) 12 WACA 127; *Ehioghae v Ehioghae* (1964) MNLR 30.

⁹⁷ Evidence Act 2011, s 16(2).

⁹⁸ *Ibid*, s 18(3).

⁹⁹ High Court Law of Lagos State 1973, s 26(1).

Just like every society evolves, its customary practices evolve and have played very significant and creative roles in societal development. Customary laws contain fruitful insights that have formed the foundation on which society stands.¹⁰⁰ There is no doubt that the development of basic social institutions like family law, inheritance law, and property ownership amongst others owe allegiance to customary law.

2.1.4. Statutes

When the legislative arm of a country makes law, such laws are regarded as statutes or legislation. One will be right to refer to statutes as laws made by the legislative arm of a state. A formal written enactment by legislature which serves the purpose of establishing principles to be obeyed in form of command or to prohibit an act in form of a punishment is called a statute.¹⁰¹ Statutes are often known as the principal or primary legislation. Statutes are distinguished from other laws because they are generally codified and they observe all the legislative processes before they are passed into law by the presidential or governor's assent.

Nigeria because of its federal character operates a bicameral legislature which means that she has two legislative houses: one at the federal level and one at the state level. The law-making body at the federal level is known as the National Assembly which comprises the Senate and the House of Representative.¹⁰² At the state level, the law-making body is known as the State House of Assembly.¹⁰³

Laws made at the federal level by the National Assembly are often referred to as Acts of the National Assembly while those made at the state level are simply referred to as laws. Both federal

¹⁰⁰ E Ehrlich, *Fundamental Principles of the Sociology of Law* (Walter L Moll tr, Harvard University Press, Cambridge, Massachusetts, 1936)

¹⁰¹ Black, Henry Campbell, *Black Law's Dictionary: Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern* (West Publishing 6thed.)

¹⁰² CFRN 1999 (as amended), s 4(1).

¹⁰³ Ibid, s 90.

and state laws follow the law-making processes that require lengthy and rigorous deliberations and considerations of many interests. This law-making process subjects the bill into different stages and readings before they can be passed into a workable law.¹⁰⁴ Laws made by subsidiary bodies are known as subsidiary legislation. Subsidiary legislations are laws made by bodies other than the law-making bodies of a state. They do not follow the formal legislative processes of laws made by the legislature. Example of subsidiary legislation includes Executive order, Judges made laws.

2.1.5. Marriage

Marriage is the fusion of a man and a woman. This means there is generally no union between a man and a man or a woman and a woman that is called marriage. Some countries have legalised same sex marriage. In Nigeria, marriage is strictly a union between a man and a woman. Nigerian law does not recognise same sex marriage¹⁰⁵, and it is illegal to contract same sex marriage in Nigeria.¹⁰⁶ Many scholars have tried to define marriage; thus, marriage is the state of being married. It may also mean the agreement to marry. Marriage could also be said to be the ceremony through which a man and a woman become husband and wife.¹⁰⁷ Marriage may either be monogamous or polygamous. Marriage is said to be monogamous if it is between one man and one woman but if it is a union between one man and more than one woman such a marriage is said to be a polygamous marriage. A monogamous marriage is usually a marriage under the Act but that does not mean that there can never be a monogamous marriage under customary law. A monogamous marriage is the voluntary union of one man and one woman to the exclusion of every other person during the subsistence of the marriage.¹⁰⁸ Polygamy is evident in customary marriage where the various

¹⁰⁴ Mbaya et al, 'The Processes of law making in a presidential system of Government: The Nigerian Experience.', (2013) *Asian Social Science* 106-114.

¹⁰⁵ See Same-Sex Marriage (Prohibition) Act 2013.

¹⁰⁶ Criminal Code, s 214.

¹⁰⁷ Black's Law Dictionary, 8th Ed. West Publishing Co. 2004 p.992; The New International Webster's Comprehensive Dictionary, 2010 p.781.

¹⁰⁸ Interpretation Act 2003; *Hyde v Hyde* (1886) L R I P & D 130, 133.

customs allow their men to marry as many wives as possible but Islamic customary marriage limits the number of wives to four which means that a man under Islamic custom cannot marry more than four wives. There is no such marriage between one man and more than one woman in Nigeria. This is to say that Nigeria does not recognise polyandry as a valid form of marriage.¹⁰⁹ Some tribes have criminalised a marriage between a woman and more than one man.¹¹⁰

Marriage, whether customary or statutory, confers on the parties to the marriage some rights and duties. One of such rights is right of succession. This means that succession rights are closely knitted with marriage. Succession rights cannot validly exist where there is no marriage. Marriage will help us to navigate and understand succession rights as they relate to south-eastern Nigeria.

2.1.6. Customary Marriage

Customary marriage is a marriage contracted under the native law and customs. It varies from one tribe to another.¹¹¹ Customary marriage is generally polygamous in nature. This is why customary law marriage has been said to be the union that exists between a man and one or many wives.

In Islamic customary marriage, a man cannot have more than four wives. There seem to be some bars as to the number of wives a man under the Islamic custom is allowed to marry unlike the other customary law that has no restrictions on the number of wives.

There are three requirements to be fulfilled for a valid customary law marriage to take place. They are as follows:

- Parties to the marriage must possess the requisite capacity. This required capacity includes age but the customary laws of various states are mute on the agreed marriageable age for a

¹⁰⁹ *Kpelanya v Tsoka and Anor* (1971) NNLR 66.

¹¹⁰ See Idoma Customary Law that prohibits a woman to marry more than one man.

¹¹¹ J O Asein, 'The Nigerian Legal System and the Challenges of Legal Pluralism', (2001) (45) *Journal of African Law*, 1-20.

girl under customary marriage and this has been a contributory factor for child marriages in Nigeria today.

- The other capacity required is consent. Consent under customary marriage is twofold and they are consent of the parties and consent of the parents. Parental consent is necessary and mandatory for the marriage to take place. This can be attributed to the fact that customary law marriage is often seen as a transaction between the two families.¹¹² Parental consent is always needed for the case of a girl child not minding the fact that she has attained the age of majority. The required consent here is that of the father or anyone playing the role of the father. It does not apply to adult male.
- Another requirement is the payment of bride price. Bride price is the customary gift made by a husband to or in respect of a woman at or before marriage.¹¹³ Dowry is the property that a woman brings to her husband home. Bride price may be money or any gift depending on what the family or custom of the place requires.¹¹⁴
- Formal handover of the bride by her parents or guardian. This means that a customary marriage cannot be validly contracted without the official handover.¹¹⁵ It has been held that non-Nigerians even domiciled in Nigeria cannot contract customary marriage.¹¹⁶

2.1.7. Statutory Marriage

By statutory marriage, we mean marriage under the Act which is regulated by the Marriage Act.¹¹⁷ This type of marriage is monogamous in nature which means that it is a union between one

¹¹² A C Diala, 'The Concept of Customary Marriage in Nigeria: A Critical Appraisal', (2014) (22) *African Journal of International and Comparative Law*, 245-263.

¹¹³ Marriage, Divorce and Custody of Children Adoptive By-Laws Order, 1958, s 2.

¹¹⁴ Limitation of Dowry Law. Cap. Laws of Anambra State, s 2.

¹¹⁵ T O Elias, *Groundwork of Nigerian Law* (London 1954) 283- the dowry is the deciding factor but does not clothe the contract with legality. It is the formal handing over of the bride to her husband that really completes the marriage.

¹¹⁶ *Fonesca v Passman* (1958) WRNLR 41.

¹¹⁷ Marriage Act, s 34.

man and one woman to the exclusion of all other persons until death or divorce separates both parties.

Statutory marriage is traceable to England because it is part of Nigeria inheritance from Britain their colonial master. A party married under the Act is prohibited from contracting another marriage with a third party during the subsistence of the marriage.¹¹⁸Nigeria adopted some principles of monogamy from the English Marriage Act and this undoubtedly made the celebration of marriage a civil function.¹¹⁹ A statutory marriage may be preceded by a customary marriage but it must still be between the same parties and no third party.¹²⁰There are essential and formal requirements for a valid statutory marriage. Essential elements include possessing the required capacity for being of marriageable age. The law was not explicit as to what constitutes a marriageable age¹²¹ but a more recent Act stipulates 18 years as the marriageable age.¹²²There exists disparity among the various states as to what constitutes marriageable age under customary marriage. Another essential element is that there must be real consent of both parties. Parental consent is no longer needed as far as the parties to the marriage have attained the age of majority which is eighteen years.

2.2. Theoretical Framework

2.2.1. Historical Background of Succession Rights

From time immemorial, wealth is not seen as being owned by the living. The living are mere custodians of the ancestral wealth they possess. Hence, they are not deemed transferred but

¹¹⁸ Marriage Act, s 35.

¹¹⁹Zabel, 'The Legislative History of the Gold Coast and Nigerian Marriage Ordinance' (1969) *JAL* Vol.3.

¹²⁰ Marriage Act, s 33(1).

¹²¹ Matrimonial Causes Act, 2004, s 3(1)(e).

¹²² Child Rights Act 2003, s 21.

controlled as legacy or on trust.¹²³ This largely explains the reason why the people in this region are circumspect in who takes over the wealth they possess.

Even the bible has a lot to say about rights of inheritance. The central idea of succession and inheritance is to preserve family lines and to ensure continuity. First born sons were entitled to double the inheritance.¹²⁴ This was exemplified in the lives of Abraham and Isaac where it was recorded that Abraham left all his possessions to Isaac. He equally gifted the sons of his concubines, but he separated the gifts from that of Isaac who was the main heir.¹²⁵

In the early Roman law, which happened to be the foundation of modern succession, succession was predominantly patriarchal which means that the rights of inheritance were vested on the male heirs.

Under the English Common Law, succession rights were centered on feudalism where land were the significant source of wealth. These lands were owned by the feudal lords. The landowners had the freedom to dispose of the land at will.¹²⁶ Here the rules of primogeniture were predominant, giving the eldest son the right to inherit the entire estate.

Over time, the rights were expanded to include the daughters in the absence of male children.¹²⁷ And to ensure that the inheritance does not leave the family, such a daughter was often required to marry within their community.¹²⁸ It becomes a thing of concern on whom should rest the inheritance of the man that bore no children. It was held that the brothers of the deceased should inherit the properties where the deceased left neither a son nor a daughter and if he had no brothers, it would go to the kinsmen nearest in line.¹²⁹

¹²³ S N Nwogwugwu, *Traditional Land Tenure Systems in Igboland* (Fourth Dimension Publishers 1984) 45.

¹²⁴ Deuteronomy 21: 15-17.

¹²⁵ Genesis 25:5-6.

¹²⁶ The Statute of Wills 1540.

¹²⁷ Numbers 27:6-11.

¹²⁸ Numbers 36:6-9.

¹²⁹ Numbers 27:9-11.

Islamic Law derives their rights of inheritance from the holy Quran. Here both male and female children are entitled to inherit property of the deceased. The difference lies in the fact that women are entitled to half the share of the male counterpart. The Islamic law allows moslems to dispose by way of will only one-third of their inheritance. What this means is that the remaining two-thirds can only be disposed of through rules of compulsory distribution.¹³⁰

Traditionally, under the Igbo customary law, succession rights follow the patrilineal system which allows only the male children to inherit properties of the deceased. The patrilineal system also ensures accountability, predictability and credibility of the source of wealth. People can easily trace wealth systems to family lineage and background. Women were not allowed to inherit especially landed properties except in rarest situation. Widows were excluded on the grounds that they were not related to the family by blood.

Recently, given the disparity that exists between customary rights of succession and succession under the Act, measures have been put in place to harmonise the two systems. Modern laws of succession have granted equal rights to the children of the deceased irrespective of gender. This has undoubtedly reduced the strict adherence to rule of primogeniture. Widows of the deceased can now inherit the husband's property. Courts are now allowed to step in and rule against unfair practices as it relates to succession. Children born out of wedlock can now have rights as long as they have been acknowledged by the putative father for it will be unfair to exclude them because they are products of extra-marital affairs that took place without their consent.

¹³⁰ Ruxton, *Maliki Law*, (London, Luzoc & Co.,1916)373.

2.2.2. Schools of Thoughts

Different views and schools of thought have emerged with regards to rights of succession. None of these schools of thoughts is holistic. This is because scholars give their own points of view based on experiences, ideologies, historical backgrounds etc.

Some writers strongly believe and hold the view that succession rights are inherent in men and as a result of the natural inclination of man to ensure continuity of the family line, only the male children are to be accorded this right. This is because to them, the female children are like visitors in the family and once they marry, they leave the family and any such property inherited becomes that of her husband's family thus defeating the aim of succession which is to encourage and ensure continuity of family lineage and also when they marry and acquire property from their husband side, it will now be a case of double share of the property as against the male counterparts who are entitled to just one. This school of thought excludes both the widows and daughters of the deceased from taking part in the inheritance. In the absence of male children, they recommend the brothers of the deceased for inheritance instead of the daughters or wives.¹³¹

Some other Schools of Thoughts hold the view that only the children of the deceased, excluding the widow, are entitled to inherit the property of the deceased. For them, the gender of the children is immaterial. Once it has been established that they are children of the deceased who share the same blood, they can inherit the property of the deceased. The widow is excluded from the inheritance because she does not share the same family blood with the deceased. She is often seen as a stranger in the family.

Another school of thought holds the view that children of marriage can inherit property to the exclusion of those born out of wedlock who have not been legitimised through acknowledgement.

¹³¹*Mojekwu v Mojekwu* (1997) NWLR (pt 512) 283.

This view is largely held among common law states. Here children born out of wedlock are referred to as ‘fillius nullius’¹³² for they are seen as strangers.¹³³

2.2.3. Jurisprudential Theories

2.2.3.1. Natural Law Theory of Succession

This theory asserts that right to succession naturally flows from a father to a child due to the biological relationship that exists between both.¹³⁴ Some of the proponents of these theories include Hugo Grotius, Thomas Hobbes, and John Locke etc. The selfish nature of man as opined by Thomas Hobbes makes man to be conscious of his lineage and does everything to ensure the continuity of his lineage. The succession practice in the South-eastern part of Nigeria challenges the credibility of this theory because it excludes certain children from inheriting possessions like female children. Most female offspring cannot lay legitimate claims to their father’s property. This is a culture that often goes unchallenged. This theory holds the view that only those who share natural relationships by blood are entitled to inherit the property of the deceased. It is under this theory that it holds the view that children and close relatives have natural and moral rights to inherit property. This theory is also supported by all the judicial decisions that recognise the rights of female children to inherit the property of the deceased.¹³⁵

2.2.3.2. Historical Theory of Succession

Propounded by the leading German jurist Von Savigny, it argues that law is the *Volksgeist*; that is, the spirit of the people. This is the reason the Igbo people in Nigeria hold their succession customs deeply and remains unshaken despite statutory interventions. Von Savigny explains law cannot be divorced from the people it was made for. This is because law is a product of internal,

¹³² *Galloway v Galloway* (1965) AAC. 299, 311 per Viscount Simmonds (dissenting)

¹³³ S M Cretney, *Principles of Family Law*, (4th edn, London: Sweet & Maxwell 1984) 594.

¹³⁴ J M Finnis, *Natural Law and Natural Rights* (2nd ed, Oxford University Press 2011) 23.

¹³⁵ *Ukeje v Ukeje* (2014) 11 NWLR (Pt 1418) pg 384.

silent operating forces.¹³⁶ But most importantly, it must take into consideration the history of the people, hence strengthening the saying that a people's present and future is largely dependent on their past. He argues that the existence of Law is dependent on the collective history of a community, not independent feelings. Therefore, an individual's dissatisfaction over a particular law in society does not make the law less beneficial. Largely, the whole idea is that a people's history is embedded in their law. The reason why this analysis is important is that it is going to help understand succession rights in Igbo land and how it is historically entrenched in the people's custom, hence making it difficult to adapt to the statutory provisions and judicial decisions of same law. It is under this theory that the Igbo customary law of inheritance holds as their spirit the rule of patrilineal system and primogeniture because their spirit recognises male to have rights to inherit the property of the deceased to the exclusion of the female children and even widows. This is why up until today regardless of the statutory provisions to ensure equitable rights of inheritance for all family members, the Igbo customs still hold tightly to their patrilineal spirit of inheritance. This has continued to generate tension in our legal system.

2.2.3.3. Sociological Theory of Succession

This theory propounded by many theorists like Rudolf Von Jhering, Roscoe Pound and Eugene Ehrlich thrusts the "Social Engineering" idea.¹³⁷ The main ideology pushed here is that succession is a social issue that affects the citizens and the state, hence controls a vital aspect of a part of society's behavior towards property, inheritance and possession. Therefore, this school of thought pushes the state to be justified in intervening statutorily in succession matters to ensure social cohesion. This school of thought believes that the law exists to cater for the social needs of the

¹³⁶ Friedrich Carl Von Savigny, *Of the Vocation of our Age for Legislation and Jurisprudence* (Trans Abraham Hayward, Littlewood & Co 1831).

¹³⁷R Pound, *An Introduction to the Philosophy of Law* (Yale University Press 1954) 47.

state and is a failure to the extent where it does not intervene to ensure balance. To further understand this within the context of the topic under discourse, succession rights affect people's interaction with one another, especially at the family level. Statutory laws guiding succession rights go a long way in curtailing the level of conflict of interests associated with succession matters. The statutory provisions are believed to be inadequate in douching the fire of competing claims and this is why Roscoe Pound has consistently beckoned the court to intervene through their judicial decisions by first identifying the areas of competing claims taking into consideration the changing needs of the society and establishing a balance between the competing claims so as to ensure utmost good of the society because Pound acknowledged this when he said that the law is stable yet cannot stand still.¹³⁸ This is why this theory believes that the society has changed from the era of discriminating women and children to the era of equal rights and our customs and laws should be a reflection of such societal changes.

2.2.3.4. Positive Theory of Succession

Positive theory of law thinkers like John Austin believe that law is the command of the sovereign.¹³⁹ This theory suggests that the Constitution and the Marriage Act precede any customary law. The state holds sovereign power and trumps any other existing law. Hence, if the state says that a woman can inherit properties, then that will supersede any customary law that states otherwise. The state holds the ultimate power to decide what is right or wrong. Note that one of the validity tests for customary laws is that it should not go against any already existing law of the state. While customary laws are important, they usually bow at the feet of any positive law. The idea is that law is supreme and should be regarded above all else. What the state declares to be law is the law and should not be disregarded. Any form of disregard is usually accompanied by

¹³⁸ Roscoe Pound, 'The Ideal Element in Law' (1958) *The Catholic Lawyer*.

¹³⁹ J Austin, *The Province of Jurisprudence Determined* (John Murray 1832).

sanctions or punishment. This in effect means that the laws should be enforced against all those go contrary to them through the exclusion of female children, children born out of wedlock and widows from enjoying the property of the deceased. This theory could be said to be the genesis of laws regarding succession rights.¹⁴⁰

2.2.3.5. Utilitarian Approach to Succession

Jeremy Bentham's utilitarian theory suggest that law should aim for the "greatest happiness for the greatest number."¹⁴¹ This idea allows for the equitable distribution of property among all involved without concentrating wealth in the hands of a few select individuals like male children and first-born sons.¹⁴² If succession creates marginal happiness for the greatest number of persons, then a succession law is deemed functional and just.¹⁴³ However, a customary succession law marginally excludes certain groups of persons from equal and equitable access to wealth which is in breach of the theory of utilitarian happiness. Statutory laws have stepped in where the customary law deprives people of their happiness especially female children, children born out of wedlock and widows to ensure utilitarian justice and equitable distribution. This was exactly what Bentham envisaged when he said that the law of a state should be such that it promotes pleasure and security of the people.¹⁴⁴ This theory believes that equal opportunity should be made available to people to eradicate societal evils.¹⁴⁵

¹⁴⁰ This may include the Matrimonial Causes Act, the Child Rights' Act, Wills Act, Administration of Estates Laws of various states, and the Land Use Act of 1978 amongst others.

¹⁴¹ J Bentham, *An Introduction to the Principles of Morals and Legislation* (Clarendon Press 1789).

¹⁴² J Bentham, *Fragment on Government: Being an Examination of what is Delivered of the Subject of Government in General in Introduction to Sir William Blackstone's Commentaries*, (London: T Payne 1776)

¹⁴³ J Bentham, *Introduction to Morals and Legislation* (London: T Payne 1786).

¹⁴⁴ Cf Curzon.

¹⁴⁵ G W Keeton, *Jeremy and the Law: A Study of the Legal Ideas of Jeremy Bentham and their Influence on Modern Law* (London: Stevens & Sons 1948).

2.2.3.6. Legal Pluralism Theory

It recognises that in Nigeria, more than one legal system (Customary and Statutory) operates simultaneously.¹⁴⁶ The impact of this theory is usually seen when a person marries under the Act but lives a traditional life. In this particular instance, the person chooses which of the laws to determine their cause. Legal plurality gives variety to the legal system in Nigeria. It proves that the state recognises and respects traditional authorities and framework. However, that is to the extent where the traditional framework is not unjust. In Nigeria, customary cases are taken to customary courts, with the agreement of both parties to be tried within the customary law. Statutory laws also exist to administer justice for people who do not subscribe to customary laws. The beauty of the existence of both systems is to accommodate equitable diversity hinged on justice and fairness of trials.

2.2.3.7 Feminist Theory

Feminist jurisprudence argues against the patriarchal nature of succession in Igbo land.¹⁴⁷ When women are excluded from inheritance, it shows a high level of oppression and subjugation within the system. The idea is that men and women are born equal and should be granted equal rights and opportunities without disenfranchising one on the basis of gender and sex.¹⁴⁸ Historically, women are marginalised in Africa; they are not allowed to take part in leadership or self-actualise in the ways that they want to. This further entrenches within the Igbo system, by alienating women from inheritance. The crux of the feminist theory is that women emancipation from structures that systemically oppress and subdue them should be a focal point of the law. This school of thought holds the view that law ought to strike a balance between male and female to ensure a fair and

¹⁴⁶A O Obilade, *The Nigerian Legal System* (London: Sweet & Maxwell 1979) 83.

¹⁴⁷C A MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1989).

¹⁴⁸A Pelemo, D Adetutu and J T Adeboye, 'Women's rights and Feminism under the Law in Nigeria', (2021) (1) *OAU Journal of Public Law*, 147-164.

equal playing ground for both genders.¹⁴⁹ It decries the glaring disparities that exist where women are often excluded from matters of inheritance and succession.¹⁵⁰ This school of thought is the basis for the Court's decision on the exclusion of daughters from inheritance in Igboland.¹⁵¹ It seeks to restore and promote reforms aimed at protecting and enforcing the rights of women in the society.¹⁵²

¹⁴⁹ L Obiora and R Perry, *Feminist Legal Theory in International Encyclopedia of the Social & Behavioural Sciences* (Elsevier 2001) 5464-5469.

¹⁵⁰ Ibid.

¹⁵¹ *Ukeje v Ukeje* (2014) 11 NWLR (Pt. 1418) 384.

¹⁵² E Chegwe, 'Gender Critique of Liberal Feminism and its Impact on Nigerian Law', (2014) (4) *International Journal of Discrimination and the Law*, 66-78.

CHAPTER THREE

OVERVIEW OF SUCCESSION RIGHTS IN SOUTH-EASTERN NIGERIA

3.1. Succession Rights under Customary Marriage in South-eastern Nigeria

The issue of succession rights in Nigerian legal system especially among the south-eastern Nigeria is sacrosanct given the fact that it cuts across all families. Succession rights which refer to the rights of inheritance accruing to a family member of a deceased person. These rights come into play only at the death of a person because one cannot succeed the living in terms of ownership of property.

In Igboland just like most ethnic groups in Nigeria, when a man dies, his beneficiaries are entitled to share his properties. These entitlements are what is known as succession rights. When a person dies, he not only passes his property but equally passes the rights and obligations attached to the properties to his survivors or beneficiaries to enable them to use and dispose the properties accordingly because were those rights not there it would have been difficult to use or dispose of properties of the deceased. The law whether natural or positive is what confers the rights and obligations of succession on the beneficiaries not the deceased person. This is to say that without the law, no rights will be transferred to the beneficiaries because they can only be allowed to acquire the property without any rights or obligations whatsoever and this would be the genesis of problems associated with succession because there would be clashes of interests. These rights prescribe the extent to which the beneficiaries are allowed to enjoy the estate of the deceased. These rights are regulated by the law of succession.

The pluralistic nature of the Nigerian legal system has greatly influenced the outlining of the rights of succession to the beneficiaries of the deceased estate.¹⁵³ This is largely because Nigeria

¹⁵³ D H Parry, *The Law of Succession, Testate and Intestate: Including the Administration of Assets and the Liability of Personal Representatives for death Duties* (3rd edn, London: Sweet & Maxwell 1953)1-2.

succession rights are governed by both custom and statutes. This has continued to create tension because often there is always confusion as to the right system to apply.¹⁵⁴

Succession may be testate or intestate. Where a person dies without making a will, he is said to have died intestate but where he made a will before his death outlining how his properties are to be shared, such a person died testate.

Customary rights of succession in Nigeria vary from one ethnic group to another given the multiethnic groups that exist in Nigeria and even among one ethnic group, it still varies from one locality to another¹⁵⁵ and this made customary rights of succession lack uniformity.¹⁵⁶ As a result of this, we will try to limit our discussion to broad classification as is applies among the South-eastern Nigeria since we cannot possibly address the over 250 ethnic groups in Nigeria. Predominantly, South-eastern Nigeria operates a patrilineal system of succession which means that succession flows from the father's lineage although there have been instances of matrilineal succession, but this is insignificant.

Generally speaking, succession under customary law marriage among the Igbos is largely intestate but given the complexity of the modern society, there has been situations of testate succession where a man who contracted a customary marriage died leaving a valid will specifying how his properties are to be shared.¹⁵⁷ The only rule in customary succession in intestacy that is general to almost all the ethnic groups is the fact that widows are excluded from inheriting the property of the deceased husband.

¹⁵⁴ J O Asein, 'The Nigerian Legal System and the Challenges of Legal Pluralism', (2001) (45), *Journal of African Law*, 1-20.

¹⁵⁵ S Omiyi, *A Critical Appraisal of the Legal Status of Widows under the Nigerian Law*; A. Biola, *Women and Children under the Nigerian Law* (Lagos Federal Ministry of Justice, 1990)73.

¹⁵⁶ T O Elias, *Nigerian Land Law* (4th edn, London: Sweet and Maxwell 1971)120.

¹⁵⁷ B O Nwabueze, *Nigerian Land Law* (Nwamife Publishers Limited Enugu Nigeria, 1974).

In situations where the deceased died intestate leaving no valid will, the customary law that would apply in the distribution of the estates of the deceased movable property is the customary law of the deceased not minding whether he died while living outside his homeland.¹⁵⁸ Where the property in question relates to land, the customary law that shall regulate the estate is that of the place where the land is situated.¹⁵⁹ The ideology behind the customary law of the deceased regulating his estate is the belief that a Nigerian could not legally change his ethnicity not minding the number of years he has lived in that place of domicile. It is often believed that a man carries his customary law with him wherever he goes and there is often the assumption that a man never wishes to be bound by any law other than his.¹⁶⁰ This practice has attendant consequences and has caused untold hardship and created confusion because most times the generations of the deceased after him were still subjected to the personal law of the deceased which are foreign to them and they are made to comply with such laws as against their will.

In recent times, where many people have resorted to moving out of their own home areas in search of greener pastures, the view has greatly been modified to suit the reality of society. The law sees it as unfair to still subject people who have accepted a new ethnic group or who have lived in a place for a long time and has assimilated the law of the place of domicile to their former customary law against their wish. This was why the court dismissed the case of the plaintiffs who sought to have their father's property shared according to Ijesha customary law which was his former law rather than Benin customary law which later became his own law following his marriage and naturalisation.¹⁶¹ This means that once a man denies his previous customary law and adopts a new

¹⁵⁸ *Zaidan v Zaidan* (1974) 4 UILR 2831; *Osuagwu v Soldiers* (1959) NRNLR 39; *Tapa v Kuka* (1945) 18 NLR 5.

¹⁵⁹ Land Use Act 1978, s 24(a).

¹⁶⁰ I O Agbede, *Essays in Conflict of Laws*, (1985) unpublished.

¹⁶¹ *Adeniyi Olowu & Ors v Olabowale Olowu & Anor* (1985) 3 NWLR 372.

one before his death, the law for the distribution of his estate shall be that which is his personal law before his death. What matters is that he acquired the law voluntarily before his death.

Among the Igbos, male children of the deceased are the main beneficiaries in matters of customary rights of succession where the man dies intestate. Unlike the Yoruba, the Igbos consider only male children as objects of succession rights. This means that the male, and not the female children, take part in the distribution of the estate of the father. The female child here is not entitled to inherit as much as the male child. This practice excludes not only the female children and the children born out of wedlock that have not been acknowledged by the putative father but also the wife of the deceased from being a beneficiary and it was on this ground that the court held that the action of the children who locked their deceased father's house thus preventing the wife from gaining access was legal.¹⁶² An allotment of rooms or house to a wife by the husband does not vest the said property on the woman at her husband's death but the property will revert back as part of the real property left by the deceased.¹⁶³ Wives under Igbo customary law marriage are seen as chattels and are thus excluded from inheriting their deceased husband's property.¹⁶⁴ The reason behind this is not far-fetched from the fact that women are often seen as visitors and guests in their matrimonial homes and the husband is their host which means that at the death of the husband who is the host, she is no longer entitled to any benefit.¹⁶⁵ This is because inheritance and devolution of property is by blood.¹⁶⁶ When a man dies intestate among the Igbos just like Yorubas, the eldest son takes charge of the management of the estate.¹⁶⁷

¹⁶² *Omo-Ogunkoya v Omo-Ogunkoya* (Suit No LD/444/84 of 16/1/87, unreported, Lagos High Court).

¹⁶³ *Oloko v Giwa* (1915) NLR 31; *Dosumu v Dosumu* (1954) 14 WACA 527.

¹⁶⁴ *Suberu v Sunmonu* (1957) 12 FSC 33.

¹⁶⁵ *Ibid.*

¹⁶⁶ *Sogunro-Davies v Sogunro-Davies* (1928) 8 NLR 79.

¹⁶⁷ *Lewis v Bankole* (1909) 1 NLR 81

Instances where a man under customary law marriage dies testate, it solves most of the problems of intestate succession because the testator is at liberty to dispose his properties although he takes into consideration the limitations imposed by the customary law of the place.

3.1.1. The Igbo Customary Rights of Intestate Succession

The Igbos operate largely primogeniture rule of succession which permits only male children to inherit the property of the deceased who died leaving no will.¹⁶⁸ The Okpala who is usually the first male child of the deceased is the person who succeeds the deceased upon his death. There is a preference of male children to be beneficiaries of the estate of the deceased.¹⁶⁹ If the eldest son on whom the estate is devolved dies; the property subsequently devolves on his eldest male descendant¹⁷⁰ but where the eldest son of the deceased died leaving no male issue, the property devolves to his next eldest brother and where the brother is dead, to his brother's eldest son and this will continue through to the sons respectively.¹⁷¹ Notwithstanding the patrilineal nature of the Igbo rights of succession, some communities like Afikpo, Ohafia, and Edda still practice matrilineal system that allows the estate of the deceased to be inherited by his matrilineal relatives, their sons and daughters.¹⁷² Here the maternal relations are allowed to inherit the property of the deceased to the exclusion of the deceased children and patrilineage.¹⁷³ Bilineal system of inheritance and distribution operates in some areas in Igbo land. Igbo Customs in places like Idemili in Anambra State exclude a widow to become a trustee of landed property on behalf of her

¹⁶⁸ A J Kerr, *Customary Law of Immovable Property and of Succession* (3rd edn, Grocott & Sherry 1990)

¹⁶⁹ E Obioha, 'Inheritance Rights, Access to Property and Deepening Poverty Situation among Women in Igboland, Southeast Nigeria' (2003) (12) *Nigerian Institute of Social and Economic Research (NISER)*.

¹⁷⁰ Mbatha, 'Reforming the Customary Law of Succession', (2002) *South African Journal on Human Rights*, 259-260.

¹⁷¹ *Sonti v Sonti* (1929) NAC.

¹⁷² The Customary Law Manual, p.103.

¹⁷³ *Kalu Awa & Ors v Chief Oji Ojembe* (CCS/UM/A/8/894, judgment delivered on 29/3/2000, unreported).

young son except a ceremony is done where the son will repeat all the marriage rites for his mother.¹⁷⁴

It is pertinent to point out that the Igbo customary law of intestate succession recognises two modes of distribution of the estate of the deceased. They are per stirpes and per capita. Per stirpes mode of distribution is usually applicable in polygamous families where the property is shared according to the number of the wives of the deceased that have sons irrespective of the number of sons in question. The wife and her children make up the '*usoekwu*' and such per stirpes distribution is according to the *Usoekwu*. The share in each of the '*Usoekwu*' is received by the eldest son on behalf of his brothers. This is in order of seniority starting with the *Usoekwu* that has the eldest son not minding whether such *Usoekwu* is the eldest wife. On the other hand, per capita mode of distribution shares the property according to the number of the sons of the deceased. This means that the wife that bore no son will be excluded from the sharing of the inheritance. In some areas however, whether distribution of the estate of the deceased would be per capita or per stirpes depend largely on the nature of the property in question. In places like Onitsha in Anambra state for instance, per stirpes mode of distribution is used for real or immovable property while per capita is used for movable property.¹⁷⁵

3.1.2. Igbo Customary Rights of Testate Succession

Often, people tend to associate testate succession with marriage under the Act but that is a mistaken point of view as people who contract marriage under the custom are eligible to make a valid will. Customary law of a person does not preclude such person from making a valid will. The idea in this regard is that a family property which has not been partitioned or alienated cannot be validly

¹⁷⁴ N T Nwachukwu, Interview with B Joseph on the Position of Women Inheritance in Idemili Anambra State on 15 September 2019.

¹⁷⁵ S N C Obi, *The Customary Law Manual*, (Government Printer Enugu) pp 139-141.

disposed of by one person through a will.¹⁷⁶ It is on this note that it is often said that a disposition of property through nuncupative will is only with the consent of family members who jointly own the property in question. Certain properties in family land holding cannot be disposed of by will.¹⁷⁷ These are known as ‘non-bequeathable properties and they may include the Ofo, the Obi or such other items to which the eldest son or daughter is entitled to as special rights.’¹⁷⁸ A situation where a testator disposes family property by will, such transaction is held to be invalid.¹⁷⁹ A testator needs no consent in the disposition of his personal estate and self-acquired property by will for he has unfettered freedom to dispose of his self-acquired property according to his intent.¹⁸⁰ This unfettered freedom is not absolute given that some properties are regulated by the customs and the testator must take care to ensure that he observes the customary limitations to that effect lest the will be declared null and void.¹⁸¹ One of such customary limitations is that a testator has no right to disinherit the potential future family head except in situations where he has apprehension that the potential family head may not be able to handle the family property to be entrusted in his care then he can disinherit him but such must be done with the consent of the family members.¹⁸² Absence of such consent from the family members may empower the disinherited person to challenge and vary the will after the testator’s death.¹⁸³

Under customary law, a will may be made either nuncupative or by testament. A nuncupative will is a will that is made voluntarily by word of mouth.¹⁸⁴ Customary law wills are usually nuncupative

¹⁷⁶ *Thompson Oke and Anor v Robinson Oke and Anor* (21/3/74, SC 307/71, unreported).

¹⁷⁷ The Customary Law Manual (1977) pg 145.

¹⁷⁸ See also The Customary Law Manual.

¹⁷⁹ *Estate of Taylor* (1932) 12 NLR 67.

¹⁸⁰ N Okoro (1966) pg 79-80.

¹⁸¹ Wills Law of the Western Nigeria 1958, s 3(1).

¹⁸² *Balonwu v Nezianya* (1957) 3 ERLR 40.

¹⁸³ N A Ollennu, *The Law of Testate and Intestate Succession in Ghana* (Sweet & Maxwell, London, 1966)273.

¹⁸⁴ C K Meek, ‘Land Tenure and Land Administration in Nigeria’, (H.M.S.O) (22) (1957) *Colonial Research Studies*, 182.

given its unwritten nature. A nuncupative will is a declaration by word of mouth made by the owner of a property who possesses sound disposing mind in anticipation of death. Such declaration must be in the presence of responsible persons who may serve as witnesses, and they must have no interest in the property which is subject of the will. The implication of this is that a nuncupative will must be made in the presence of witnesses. Absence of this renders the will null and void.¹⁸⁵

A nuncupative will, notwithstanding its unwritten nature, must state the property, which is the subject matter of the will, it must identify the beneficiaries on whom the property should devolve and the absolute ownership of the property.¹⁸⁶ The property which is the subject matter of the will must be such that is disposable.¹⁸⁷ The testator must clearly state the beneficiaries and they should not be subject of conjectures.¹⁸⁸

On the other hand, a customary law Will can also be in writing. This is known as testamentary disposition. This is a novel development under customary law.¹⁸⁹ It is pertinent to point out that testamentary dispositions under customary law do not follow all the technicalities enumerated under the Wills Act of 1837 or Wills Law of 1959 which are usually required in statutory testamentary dispositions. This is why although a testamentary disposition is required to be in writing but absence of that does not render it invalid.¹⁹⁰ What is required are the formalities which include the sound disposing mind of the testator, the testator must be an adult, certainty of the subject matters, the beneficiaries must be spelt out; he must have made the declaration out of his own freewill in the presence of one or more adult witnesses.¹⁹¹

¹⁸⁵ *Ayinke v Ibidunmi* (1959) 4 FSC 280 at pp. 281-282.

¹⁸⁶ B W Harvey, *The Law and Practice of Nigerian Wills, Probate and Succession* (Lagos: African Universities Press 1968) 65.

¹⁸⁷ *Johnson v Macaulay* (1961) 1 All NLR 743.

¹⁸⁸ S N C Obi, (Butterworth, London 1963) 206-208.

¹⁸⁹ P C Llyod, *Yoruba land Law*, p 291.

¹⁹⁰ N Okoro, *Customary Laws of Succession in Eastern Nigeria and the Statutory and Judicial Rules Governing their application*, (Sweet & Maxwell, London, 1966) 77.

¹⁹¹ B W Harvey, *The Law and Practice of Nigerian Wills, Probate and Succession* (Lagos: African Universities Press 1968) 45.

3.1.3. Position of Widows and Children of the Marriage

Where the deceased died intestate, the most debated issues in the distribution of the estate after the choice of law has been determined is often the beneficiaries of the rights of succession where the deceased is subject to a customary law. This is as opposed to what is obtainable where he died testate leaving a valid will which gives him the authority to choose those to whom his estate would devolve to. By beneficiaries, we mean those who are objects of rights succession; those who will inherit the properties of the deceased.

a. Children of Marriage

The eldest son of the deceased is entitled to inherit the deceased personal property and acts as a trustee holding the rest of the properties in trust for the family members particularly the male children.¹⁹² He is just a caretaker who is to make sure that the property in his care is for the male children of the deceased. As such, the eldest son cannot dispose of or alienate the family properties without the consent of all his brothers.¹⁹³ If for any reason, he lets the family property to a third party, the brothers are entitled to share in the proceeds realised.¹⁹⁴ The Okpala is duty bound to render account to his younger brothers on how he administers the estate of the deceased. He also inherits the obligations and liabilities of the late father towards dependants by virtue of exclusive inheritance of the deceased father's status.¹⁹⁵ The eldest son is allowed to inherit the personal properties of the father like his 'Ofo', his title, his apparels and even the obi to the exclusion of every other children of the deceased.¹⁹⁶ Economic trees and plants are mostly owed collectively by the male children of the deceased. Where the man died without any male child, his estate is

¹⁹² *Ejiamike v Ejiamike* (1972) 2 ENLR pg 11.

¹⁹³ *Uboma & ors v Ibeneme & anor* (1967) FNLR 251.

¹⁹⁴ *Onwusike v Onwusike* (1962) 6 ENLR 10.

¹⁹⁵ F M Mifsud, *Customary Land Law in Africa: With Reference to Legislation Aimed at Adjusting Customary Tenures to the Needs of Development* (Food and Agriculture Organisation of the United Nations, Rome, 1967) 77.

¹⁹⁶ *Nwafia v Ububa* (1966) 1 ANLR 8; *Ezeokafor v Uba* (1975) 1 UILR 162.

inherited by his brother of full blood but where he had no surviving brother of full blood, the estate goes to his father.¹⁹⁷ Often times, the rights of the full brothers of the deceased to inherit his property are prioritised above that of their father but there continues to be some variations among the communities where sometimes the father's rights are prioritised over that of the sons. Some societies even exclude the father of the deceased from being entitled to the inheritance of the son.¹⁹⁸ This is predominantly found among some Igbo communities like Ezikwo, Mbaitolu and Ikeduru. A daughter just like the widow is excluded from partaking in the property of the deceased.¹⁹⁹ This practice is common among the Onitsha people who believe that a daughter should not be allowed to succeed in the father's property to avoid the family property passing to the daughter husband's family if she eventually marries.²⁰⁰ This is why some communities allow daughters who will remain in their father's house to inherit some of the properties until they are married or have become financially stable. Some communities in Igbo land allow the daughter to inherit some economic trees depending on the locality.²⁰¹ Where a man died leaving only female child to succeed him, the daughter may be asked to remain in the father's house unmarried so that she may bear children for the family and any of such children born is for her deceased father's family. This is known as *"nrachi"* and it is mostly practiced by the Nnewi community to ensure continuity of family line. All the children born under this arrangement are regarded as legitimate children who can validly take part in the inheritance of the property of their deceased maternal grandfather.²⁰² The daughter acquires legal interests of the property until she gives birth to her own children. Where she eventually gives birth, the property will pass to the children. A male son is usually

¹⁹⁷ See The Customary Law Manual.

¹⁹⁸ M M Green, *Land Tenure in an Igbo Village in South-Eastern Nigeria* (Published for the London School of Economics and Political Science by Percy Lund, Humphries & Co Ltd 1941) 13.

¹⁹⁹ *Nezianya v Okagbue* (1963) 1 ANLR 352.

²⁰⁰ *Ugboma v Ibeneme* (1967) FNLR 251.

²⁰¹ The Customary Law Manual, pg 114-115.

²⁰² *Amode v Nmeko* (2008) 10 NWLR 9pt. 1094) 1CA.

prioritised over the female child in this situation. There is usually a ceremony that is performed preceding the 'Nrachi' to enable the daughter who is going to remain unmarried to be entitled to both the moveable and immovable properties of the deceased father. Where such ceremony is not performed on the daughter, she loses her rights of inheritance to the brother or the father in the absence of a brother. If there is no surviving father or brother, the half-brother will inherit the properties to the exclusion of a sister or half-sister.²⁰³

b. Children Born out of Wedlock

Children born out of wedlock are generally not regarded as children of a marriage and are often excluded from inheriting the property of the deceased who died intestate except where such children have been acknowledged by the putative father before his death.²⁰⁴ Once the putative father has acknowledged the child, it authorises him to be a beneficiary of the father's estate upon his death. It is immaterial that the putative father did not eventually contract a valid marriage with the mother.²⁰⁵ The acknowledgement by the putative father undoubtedly cements the relationship that exists between the child and the putative father. Thus in the absence of a valid marriage, a child born out of wedlock has his rights of succession to the father's property legalised by the mere acknowledgement of his paternity done by the putative father.²⁰⁶ He can enforce his rights to claim property on the death of his putative father²⁰⁷ and he will be entitled to equal share of the property with that of the legitimate sons of the deceased.²⁰⁸

²⁰³ *Mojekwu & Anor. V Ejikeme & Ors.* (2005) NWLR, 402.

²⁰⁴ E I Nwogugu, 'Legitimation in Nigerian Law', (1964) (8) (2) *JAL* 97.

²⁰⁵ *Lawal v Younan* (1961) 1 ANLR 145.

²⁰⁶ *Re Sapara* (1911) Renner's Reports (Ghana) 605.

²⁰⁷ A B Kasunmu, 'The Principles of Acknowledgement or Recognition of Paternity under Customary Law in Nigeria', (1964) (13) LCLQ 1091-1104.

²⁰⁸ *Philip v Philip* (1946) 18 NLR 102.

However, there are instances where a putative father may be denied the right of acknowledgement of the child born out of wedlock.²⁰⁹ One of such instances is where the mother of the child is a reserved female who is left to remain unmarried in her father's house in order to bear children for the family according to the nrachi custom which is prevalent in Nnewi community in Anambra state.

c. The surviving widows

Igbo customary law on intestate succession is similar to that of the Yoruba in that the widow is excluded as beneficiary irrespective of whether she has a son or not²¹⁰ but can only have the possessory right to remain in the husband house until she is remarried by the son of the deceased who is not her own son or any relative of the deceased.²¹¹ Her long possession of the house or property does not constitute a bar to the family's right to inheritance. This is because women are often seen as chattels capable of being inherited. The whole essence of the exclusion of a widow from inheriting her husband's property upon the husband's death is to avoid the disintegration of the family property in the event of remarriage by the widow.²¹²

The High Court in *Nwugege v Adigwe*²¹³ holds the view that if a woman dies leaving behind children, her children are beneficiaries of her property but where she left no issues before her death, any property she acquired before marriage will be inherited by her own family since she will be treated as '*femme sole*'²¹⁴ but if she acquired any property after marriage, upon her death, if she does not have children, the property will be inherited by her husband or his family members.

²⁰⁹ The Customary Law Manual (1977) p. 314.

²¹⁰ The Manual of Customary Law (1977) p.313.

²¹¹ *Nzekwu v Nzekwu* (1981) 2 NWLR pt 104.

²¹² *Oshilaja v Oshilaja* (1973) CCHCJ

²¹³ (1936) 11 NLR 134

²¹⁴ A femme sole refers to an unmarried woman.

d. Single Mothers

In recent times, the concept of single mothers has become so rampant in our society. They are seen as those women who raise their child or children independently without a husband. Many factors have been attributed to single motherhood, and such factors will help to determine the extent of their rights as it relates to succession. Such factors include judicial separation, divorce, widowhood or even a choice to raise a child without a husband from the beginning.

If single motherhood is attributed to widowhood, she has the same rights as those of the widows already discussed. If it is as a result of judicial separation or divorce which are only obtainable in marriage under the Act, her rights are to the extent of the provisions of the Matrimonial Causes Act, but it becomes a growing concern for her where she freely chose to be a single mother as in the instance of baby mama or side chick. Here in this instance, she has no rights of succession accruing to her. This is given the fact that marriage is a condition precedent for succession rights. Under customary marriage, whether testate or intestate, the single mother does not have right to inherit the properties of the deceased. This is solely because the family members do not know about the single mother and in this instance, inheritance is strictly by blood. As a result of these customary and common law restrictions, the law came through equity to ameliorate this harshness and introduced secret trust through which the testator can order that an inheritance be kept for the single mother who is the *cestui que* of the trust. This arrangement is between the testator and the trustee, and the trustee is obliged to bequeath such property as agreed under the secret trust. The problem with such arrangement is that it is often difficult to enforce given that the arrangement is secret and the family of the deceased may challenge the trust on the ground that it lacks legal protection.

e. Other Relations

Often where a man dies intestate leaving no children or wives, there is the question as to whom should be the object of the inheritance of the estate of the deceased. These properties are often left in the hands of relations of the deceased other than the children and wives. Such other relations may include parents, brothers and sisters of the whole blood, brothers and sisters of the half-blood be it maternal or paternal and then uncles, nieces and nephews. It is not as easy as it appears here because it is always the issue of priority: who and who would be prioritised against others.

3.2. Succession Rights under Statutory Marriage in South-eastern Nigeria

Succession under statutory marriage can be both intestate and testate succession. A man who contracted a valid marriage under the Act has the privilege of writing a will on how his estate should be shared upon his death and where he left a valid will, such inheritance guided by a valid will is testate succession. The provision for testate succession under the Act guarantees and preserves some rights which were never considered under customary rights of succession. This is because the testator has the freedom and liberty to dispose his properties at will and will not be subjected to unnecessary customary restrictions that exclude female children and the wife from being part of the beneficiaries of the estate of the deceased. The inheritance rights of the wife and female daughter are protected thus making it possible and easy for them to inherit both movable and immovable properties which were impossible under the customary law.²¹⁵ but where he died leaving no valid will, he is said to have died intestate and devolution of his property to those he left behind is said to be on intestate succession.

²¹⁵ A I Fenemigbo and D O Oriakhogba, 'Statutory Limitation to Testamentary Freedom in Nigeria: A Comparative Appraisal' (2013) *NAUJIL Journal*, 72.

3.2.1. Intestate Succession and Administration of Estate Laws of the various states in South-eastern Nigeria

Before now, there have been some controversies as to the law to apply in the distribution of the estate of the deceased who though subject to customary law was married under the Act but died intestate.

Unlike the colony of Lagos where section 36 (1) of the Marriage Act regulates intestate succession of the estate of a man who married under the Act, the Southeastern Nigeria has no such provision for intestate succession of estate of the man who during his lifetime contracted a marriage under the Act and this posed a great difficulty. As a result of this lacuna, they were subjected to be regulated by section 36 of the Marriage Act as was the case in *Cole v Cole*²¹⁶ where the court held that English Law which is the Marriage Act should also regulate intestate successions in the colony of Lagos. This was also upheld in the case of *Attorney-General v Egbuna*.²¹⁷

A controversy arose in a more recent case of *Salubi v Nwariaku*²¹⁸ wherein the plaintiff claimed that it was the Administration of the Estates Laws of Bendel State and section 36 of the Marriage Act that governed the distribution of the estate of the deceased. On the contrary, the defendant contended it was the Urhobo customary law or the Administration of Estates Law not the Marriage Act that governed the estate. The Supreme Court held that although the Marriage Act provided that the estate of the deceased who left no Will should be regulated by section 36(1) of the Marriage Act but that by the virtue of subsection 3 of the Act, it limited the application of the Act to only the colony of Lagos. The implication being that the estate of the deceased intestate outside Lagos cannot validly be regulated by section 36 of the Marriage Act. This is because marriage under the

²¹⁶ (1898) 1 NLR 15.

²¹⁷ (1945) 18 NLR 15.

²¹⁸ (2003) AII NLR 548.

Marriage Act was under the exclusive legislative list, but succession matters are not under the exclusive legislative list.

In order to bring this controversy to an end, the then western Region took a bold step by enacting the Administration of Estates Laws in 1959 and made it to be applicable in the Western Region including Bendel State. It was on this reasoning and development that the judge held that where there exists conflict between the received English Law and the local legislations, the local legislation shall prevail thus in the instant case of *Salubi v Nwariaku*,²¹⁹ the court held that section 49(1) of the Bendel State Administration of Estates Law shall apply not section 36(1) of the Marriage Act. The same was held and applied in the case of *Obusez v Obusez*.²²⁰

It suffices to say that what can be gotten from the decision of the Supreme Court in the above case is that where a person who was married under the Act died intestate, it is the Administration of the Estates Laws that will apply in the distribution of his estate and not the Marriage Act. to this effect, many states have enacted their own laws to administer the estate of the deceased who died without a will. Despite the disparity in their names, they are all still patterned on the Administration of the Estate Law of 1959 and they all seek to fulfil the same purpose. In 1965, the Eastern Region passed the Administration of Estate Bill, but it was withdrawn because of public objection. The military takeover in 1966 made it not see the light of the day until 1987 when the Anambra State Government enacted the Administration and Succession (Estate of Deceased Persons) Law which was later adopted by other south-eastern states.²²¹

²¹⁹ Ibid

²²⁰ (2001) 15 NWLR 377 CA.

²²¹ They include Anambra, Imo, Ebonyi, Abia and Enugu.

Under the Anambra State Administration and Succession (Estates of Deceased Persons) Law²²², the Administration of the Estate Law is said to be applicable where the deceased during his lifetime was not subject to any customary law and married under the Act. It is immaterial that the deceased was subject to customary law during his lifetime. The determining factor is the fact that he contracted a valid marriage under the Act.²²³ Here, it can be correct to say that three conditions must be fulfilled where a man died intestate for the Administration of Estate Laws to apply. The conditions are: the man must have died intestate or there are some residuary properties left which are undisposed by will; he must have contracted a valid marriage under the Act and must have been survived by a wife or children of such marriage. It is pertinent to note that the law applies only to where the properties are such that can be disposed of by will.²²⁴

The estate of a man who died intestate and contracted a valid marriage under the Act will continue to rest on the Chief Judge of the state where he was domiciled before his death until letters of administration are granted. This is to say that such property will continue to be ownerless '*bona vacantia*'²²⁵ until the letters of administration are granted to the personal representatives. Although any member of the family is qualified to apply for the letters of administration to be issued to them, letters of administration cannot be granted to more than four persons and the court shall in granting the letters of Administration have recourse to the rights and interests of persons interested in the estate.²²⁶ This is why the law as it relates to administration of estate of the deceased has provided

²²² See also Enugu State Administration and Succession (Estates of Deceased Persons) Law Cap .5 Laws of Enugu State 2004.

²²³ Anambra State Administration and Succession (Estates of Deceased Persons) Law, s 71(2)(c) and (d).

²²⁴ Administration of (Real Estate) Law of Eastern Nigeria 1963, s 2.

²²⁵ A property is said to be bona vacantia when it does not have owner. This is usually true of properties of the deceased who contracted a valid marriage under the Act but died without a valid will. Such property is declared ownerless because no beneficiary has been identified. It will continue to be ownerless until letters of administration are issued.

²²⁶ Administration of (Real Estate) Law Cap 3 Laws of the Eastern Nigeria 1963, s 3.

the order of priority to followed in the making of the grant of letters of administration. The following are the order of priority outlined by the law²²⁷:

- A surviving husband or wife of the deceased.²²⁸
- Children or grandchildren of the deceased.²²⁹
- Father or mother of the deceased.²³⁰
- Brothers or sisters of the whole blood.²³¹
- Brothers or sisters of the half blood.²³²
- Grandfather or grandmother of the deceased.²³³
- Uncles and aunts of the whole blood.²³⁴
- Uncles and aunts of the half blood.²³⁵
- Creditors of the deceased.²³⁶
- The administrator-General.²³⁷

3.2.1.1. Modes of Distribution

a. Where there are spouse and children

The spouse shall be entitled to all personal chattels and in addition to one-third of the residuary real estate of the deceased. This shall be absolute in the case of a husband but shall be for the lifetime of the wife or until she remarries. The children shall share two-thirds of the residual estate of the deceased in equal proportion not minding whether male or female. Where the children

²²⁷ Administration of Estate Law, Revised Law of Enugu State of Nigeria 2004, s 96(2).

²²⁸ Ibid, s 96(2)(a).

²²⁹ Ibid, s 96(2)(b).

²³⁰ Ibid, s 96(2)(c).

²³¹ Ibid, s 96(2)(d).

²³² Ibid, s 96(2)(e).

²³³ Ibid, s 96(2) (f).

²³⁴ Ibid, s 96(2)(g).

²³⁵ Ibid, s 96(2) (h).

²³⁶ Ibid, s 96(2) (i).

²³⁷ Ibid, s 96(2)(j).

predeceased the intestate, the portion of their residual interest shall be held in trust for their children.²³⁸

b. Where there is spouse but no children

The residuary estate shall be held on trust for the spouse absolutely provided it is the husband, but where the surviving spouse is the wife, she shall enjoy the estate for her life or until she marries after which the interests shall revert absolutely to the intestate's brothers and sisters in equal proportion. Where the brothers or sisters of the deceased predeceased the surviving spouse, it shall revert to the children of the brothers and sisters.²³⁹

c. Where there is a spouse and other family members like parents and brothers and sisters but no children

The law provides that the surviving spouse shall enjoy two-thirds of the residuary estate ²⁴⁰

d. Where there are children of the intestate or their children but no husband or wife

The children of the intestate shall be entitled to two-thirds of the residuary estate while one-sixth shall go to the parent of the intestate and if they are no more, to their own children.²⁴¹

e. Where there are no spouses and children but parents

Two-thirds of the residuary estate shall be held in trust for the parents and one-third shall go to the brothers and sisters and if there are no brothers and sisters, it shall equally go to the parents. It is immaterial if it is only one parent that is left.²⁴²

²³⁸ Administration of Estate of Revised Laws of Enugu state of Nigeria 2004, s 120(1)(b).

²³⁹ Ibid, s 120(1)(a).

²⁴⁰ Ibid, s 120(1) (c).

²⁴¹ Ibid, s 120(1)(a).

²⁴² Ibid, s 120(1)(b).

f. Where there is neither spouse nor children nor parents

The residuary interest shall be held in trust for the following persons living at the death of the intestate²⁴³:

- The full brothers and sisters of the intestate.
- The half brothers and sisters of the intestate.
- The grandparents of the intestate.
- Uncles and aunts of whole blood of the intestate.
- Uncles and aunts of the half blood of the intestate.

3.2.2. Wills and Testate Succession under Statutory Marriage in Southeastern Nigeria

A will is nothing other than a document through which the testator gives direction on how his estate should be distributed upon his death.²⁴⁴ It has also been defined to mean any document by which the testator makes a disposition of both his real and personal property which only takes effect upon his death.²⁴⁵ It may also mean the sum of what the testator wishes to happen upon his death or the document containing the intention of the testator as it relates to his movable and immovable property.²⁴⁶ A will is a testamentary and revocable document made voluntarily by the testator with the requisite capacity wherein he declares how his property is to be disposed at his death.²⁴⁷ Thus a will because of its revocability is said to be ambulatory since it can be revoked, altered or modified during the lifetime of the testator. This is why it is said that a will comes into effect at the death of the testator not before his death.

²⁴³ Ibid, s 120(1)(d).

²⁴⁴ B A Garner, *Black's Law Dictionary* (West Group, St Paul Minn, 1999) 1592.

²⁴⁵ S Bones, *Osborne's Concise Law Dictionary* (9th edn, London: Sweet and Maxwell 2001) 410

²⁴⁶ A R Mellow, *The Law of Succession* (3rd edn, London: Butterworths 1977).

²⁴⁷ K Abayomi, *Laws of Wills in Nigeria* (Ibadan: C I Limited, 2001) pp 8 and 9.

It is worthy to note that a man who dies testate has the freedom to dispose his personal property according to his own directives by naming the beneficiaries, the property which is the subject matter and even the percentage that he wishes each beneficiary to get upon his death. He may even go as far as outlining his wishes on what should happen at his burial, who should be testamentary guardian of his children where the wife has predeceased him or is old to do that and every other activity he wishes to take place after his death.

Wills under the Act came to ameliorate the hardships that exist under customary testate and intestate succession. This is so because here a woman has capacity to make a valid will unlike what was obtainable under customary law. It even allows a widow and female children to take part in the sharing of the properties of the deceased. A will allows a testator to freely choose those he wishes to inherit his property unlike intestate succession where people who may not be in good terms with the deceased during his lifetime are even made beneficiaries.²⁴⁸

The laws that guide testate succession for a statutory marriage were the Wills Act of 1837 and the Wills Amendment Act of 1852, which were all statutes of general application. These laws guided testate succession in Nigeria up until 1958 when the former Western Region in a bid to bring to an end the application of statutes of general application enacted the Wills Law of 1958 which is applicable in the states that make up the Western Region except Lagos and Oyo state. Some other states of the federation have followed suit in enacting their own state laws which are more or less a reflection of the Wills Act of 1837.

In 1991, the Nigerian Law Report Commission following report²⁴⁹ of its review of the pre-1900 English statutes in force in Nigeria in 1900 proposed a draft law on wills for states wishing to

²⁴⁸Ibid.

²⁴⁹ Report on the Review of pre-1900 English Statutes in Force in Nigeria, 1991 vol. II paras 28-42 pages 233-235.

adopt such the Commission's model.²⁵⁰ The Wills Act of 1837 and Wills Amendment Act of 1852 still applies in some states in the Southeast. Anambra state enacted the Succession Law Edict in 1987 which regulates all its testate succession matters.

3.2.2.1. Capacity to Make a Will

Often times when making a will, there has been the question of who can validly make a will. The law provides that every person has the capacity to make a valid will under the Act unlike what is obtainable under customary law. It does not matter if the person is subject to customary law or not.²⁵¹ What this means is that the law does not discriminate against or restrict anybody from making a will unlike in customary law where only male counterparts are allowed to make wills. Notwithstanding the provision of the law, there are, however, some exceptions to the general rule regarding capacity to make a valid will.

i. Infants

Section 7 of the Wills Act²⁵² provides that a person who is below the age of majority cannot validly make a will. the age of majority prescribed here under this Act is twenty-one (21) years, but this is no longer tenable given the advent of the Child Rights Act²⁵³ which provides that the new age of majority shall be 18 years.²⁵⁴ This is to say that currently children who are not up to eighteen (18) years lack the capacity to make a valid will.²⁵⁵ Only exception to this is in a situation where the person in question is a seaman, a mariner or crew of commercial aircraft, then even if they are not up to eighteen years, they would be allowed to make a privileged will.²⁵⁶

²⁵⁰ These include the Wills Law of Lagos state 2003, Wills law of Oyo State 1998, Wills Law of Rivers State 1999, Wills Law of Cross-River State.

²⁵¹ Wills Act 1837, s 3.

²⁵² 1837.

²⁵³ 2003.

²⁵⁴ Child Rights Act 2003, s 277.

²⁵⁵ Succession Law 1987, s 139(1).

²⁵⁶ Privileged will refers to those which the law does not require full compliance with the legal requirements of a valid will.

ii. Persons of Unsound Mind

It is trite law that a testator or testatrix, as the case may be, must possess a sound disposing mind at the time of making the will. This was aptly captured by the court in *Balonwu v Nezianya*²⁵⁷ where it was held that a testator ought to understand the nature of the act he is performing and the corresponding effects of such act. He shall not be under a distorted mind such that is capable of poisoning his affection, obstructing his sense of right and thus hindering him from putting into use his natural faculties. The test for determining the mental capacity of the testator who possesses sound disposing mind was such that he must not only understand the nature and effect of the will that he is making but must also have a comprehension of the extent of the nature of the property the subject matter of the will and also the extent and nature of the claims upon him.²⁵⁸

This sound disposing mind of the testator is at best determined at the time the will was made.²⁵⁹ This is to say that once it has been established that a will was made during the lucid moments of the testator, it remains valid even when the testator later becomes of unsound mind.²⁶⁰ The law presumes every testator to possess a sound disposing mind until the contrary is proven.²⁶¹ A sound disposing mind is that which is not suffering any impairment as a result of old age or illness.²⁶² This presumption can be rebutted and the onus lies on the person alleging contrary. The person may rely on the evidence of the testators conduct before and after the making of the will.²⁶³

²⁵⁷ (1959) 3 ERLR 40.

²⁵⁸ *Banks v Goodfellow* (1870) LR 5 QB 549.

²⁵⁹ *Kwentoh v Kwentoh* (2009) 16 NWLR (pt 1188) 543 CA.

²⁶⁰ *Beamish v Beamish* (1894) 1 Ir R.7.

²⁶¹ *Sutton v Saddler* (1857) 140 ER 671; *Wellesley v Vere* (1841).

²⁶² *Smith v Tebbitt* (1867) LR 1 P & D 398.

²⁶³ *Johnson v Maja* (1951) 13 WACA 290; *Adebajo v Adebajo* (1973) 4 SC 22.

iii. Blind or Illiterate Persons

Generally, blind and illiterate persons have the testamentary capacity to make a valid will just like every other adult. All that the law requires of them is their knowledge and approval²⁶⁴ prior to the granting of the probate of their wills. Such blind and illiterate persons can sign their will by way of mark or thumbprint after the contents of the will have been read to them in the language that they understand. This reading of the content of the will in the language they understand satisfies the requisite knowledge of the testator while the mark or thumbprint signifies their approval. In the case of an illiterate, a special attestation clause must always accompany the document to indicate the circumstances under which the document was signed. This is known as the illiterate jurat.²⁶⁵

iv. Married Women

Previously under the Wills Act²⁶⁶, married women were not allowed to make a valid will. This has been modified by the Married Women Property Act.²⁶⁷ Convention on Elimination of all Forms of Discrimination against Women guarantees equal rights of women with men in matters of ownership, acquisition and management of property.²⁶⁸ With the ratification of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 1983,²⁶⁹ women can now own property and dispose of it at will.

3.2.2.1.1. Validity of a Will

Before a will can be executed as a valid document, it must comply with certain legal formalities apart from the testamentary capacity of age and sound disposing mind already discussed above.

²⁶⁴ *Instifil v Christian* (1953) DLWALR 1080.

²⁶⁵ Evidence Act of 2011, s 119; Schedule 1 Oaths Law Cap 137 LLS of 1994.

²⁶⁶ Wills Act 1837, s 8.

²⁶⁷ Married Women Property Act 1893, s 3.

²⁶⁸ (CEDAW) 1979, art 16.

²⁶⁹ Art 14.

The law places the onus of proof of the validity of a will on the person alleging it thus.²⁷⁰ Such formal requirements include the following:

- a. **Writing:** a will under the Act unlike a customary law Will must be in writing. It must be noted that no form of writing is required which means a will can be handwritten or typed. This is to ensure a clear and authentic expression of the testator's wishes. It also helps to ensure the accurate recording of the intention of the testator. In events of misunderstanding or objection, such wishes expressed or reduced in writing as a will can be presented to court and other parties as proof of a valid expression of wishes. The only exception to the expression of a will under a written document is in the case of a privileged will.
- b. **Signature:** the law is that an unsigned document is nothing other than a worthless document which is incurably defective and raises doubt as to the authenticity of the document and this is why signature is a requisite formality for a valid will. A will must be signed by the testator or by someone in his presence and by his direction. The signature may be in the form of an initial, rubber stamp of a name, signature or thumbprint.²⁷¹
- c. **Position of the Testator's Signature:** The position of the signature of the testator is of great importance. The law²⁷² requires the signature to be at the foot of the document but this was considered rigid and the Wills Amendment Act²⁷³ came in to ameliorate the rigidity by providing thus: the testator's signature need not be at the foot of the document but must be placed in a manner that clearly indicates the intention of the testator to validate the will. The signature should always come after the disposition in a will such that if a

²⁷⁰ *Okelola v Boyle* (1998) 2 NWLR pt 539.

²⁷¹ *Estate of Randale* (1962) 1 A11 NLR 130.

²⁷² Wills Act 1837, s 9.

²⁷³ Wills Amendment Act 1852, s 1.

disposition comes after the signature, the will shall be null and void.²⁷⁴ This is to say that the signature must be the last thing in a will for it to be valid.²⁷⁵

- d. **Witnesses:** the law provides that the testator's signature or an acknowledgment where he authorises a third party to sign for him must be in the presence of at least two witnesses. The implication is that the two witnesses must be present at the same time.²⁷⁶ The testator cannot sign in the presence of one witness simultaneously.²⁷⁷ The witnesses are also required to be physically and visually present.²⁷⁸ This is to say that where a testator signs or acknowledges his signature, the witnesses ought to actually see the signature for it to be valid.²⁷⁹ The witness or the spouse of the witness to a will must be a neutral person who should have no interest in the will. He can neither take benefit nor gift under the will.
- e. **Attestation by the Witnesses:** it is the requirement of the law that the witnesses who attest to the signature of the testator must do so in his presence. Failure to attest in the presence of the testator is a valid ground to raise objection as to the validity of the will and the court may withhold the grant of probate to the executor.²⁸⁰ Only adults who do not suffer from any form of visual impairment are allowed to attest to the will. A visually impaired person cannot validly witness the execution of a deed. This is because of the inability to fulfil the requirement of actual visual presence.²⁸¹

The general rule under the Wills Act is that a testator has unfettered or unrestricted rights as to the disposition of his will. This means that he has the liberty to include or exclude beneficiaries to his

²⁷⁴ *Nelson v Akofiranmi* (1962) ANLR 130.

²⁷⁵ *Estate of Little* (1960) CH 559.

²⁷⁶ *Ibid.*

²⁷⁷ *Groffman v Groffman* (1969) 2 All ER 108.

²⁷⁸ *Brown v Skirrow* (1902) 18 TLR 59.

²⁷⁹ *Hudson v Parker* (1844) 1 Rob Eccl. 14.

²⁸⁰ *George v George* (1964) FSC 88

²⁸¹ *Estate of Gibson* (1949) P 434.

will.²⁸² This is no longer obtainable in Nigeria given the domestication of the Wills Act in various states which reflected some local elements in the provision of the law. These states have made provisions by placing religious and customary fetters which means that the disposing rights of the testator are subject to these customary and religious limitations.²⁸³ The Wills Law provides that a testator who may have rights to exclude his wife or children as beneficiaries²⁸⁴ will have no such right because a testator cannot validly exclude his dependents from the will except where such family members were not his dependants prior to his death as was the case in *Wigwe v Wigwe*.²⁸⁵ The dependents contemplated here are the spouse, children, parent brother or sister of the deceased wholly or partly maintained by the deceased given the monogamous nature of the marriage under the Act. Another such limitation is the fact that if the land is a family property, it cannot be disposed of under a will.²⁸⁶

3.2.2.2. Revocation of a Will

The following are the various ways of revoking a will.

a. Subsequent Will or Codicil

A codicil which is a mini and supplementary Will may be used by a testator to amend, increase, modify or alter the contents of the previous. It is the easiest form of amendment and such form of amendment whether express or implied is seen as a legal revocation of the existing will. A testator who may want to change the content of the existing will and since such is not allowed using codicil may resort to the making of a new will. The new will as a matter of law automatically revokes the

²⁸² Wills Act 1837, s 3(1).

²⁸³ B O Nwabueze, 'Power of Testamentary Disposition in Bendel and the Western States of Nigeria', (1992) (1) *Journal of Nigerian Law Journal*, 121-136.

²⁸⁴ Wills Act of 1837.

²⁸⁵ (Suit No ID/7735FPM/2024 (High Court of Lagos State, Family and Probate Division, ruling delivered on 6 February 2025).

²⁸⁶ R W James and A B Kasunmu, *Alienation of Family Property in Southern Nigeria* (Ibadan University Press, 1966); *Johnson v Macaulay* (1961) AII NLR 773.

existing will provided the testator still possesses all the testamentary capacity at the time of making the subsequent will.

b. By Destruction

Where a testator intentionally destroys by tearing or burning the document containing the Will or directs someone else to act on his behalf in his presence, the act of destruction by the testator himself or the authorised agent will revoke the will. All that is required is that the testator had the intention to destroy and that the act was done or authorised by him.²⁸⁷ Absence of the two elements does not revoke the will.

c. Subsequent Marriage

The Law provides that a valid marriage contracted under the Act revokes an existing Will.²⁸⁸ The implication of this provision of the law is that a subsequent customary law marriage does not revoke a will. A voidable marriage can also revoke a will.²⁸⁹

²⁸⁷ *In the Goods of Mitcheson* (1926)118; section 19, Wills Act 1937.

²⁸⁸ Wills Act 1837, s 18.

²⁸⁹ *Re Roberts* (1978) 3 All ER 225.

CHAPTER FOUR

COMPARATIVE ANALYSIS OF SUCCESSION RIGHTS UNDER CUSTOMARY AND STATUTORY MARRIAGES

4.1. Nature of Marriage

With regards to customary rights of succession, the marriage contemplated is customary marriage which is polygamous in nature²⁹⁰ meaning that a man is allowed to marry more than one wife and this is why children of the marriage are numerous. The polygamous nature of customary rights of succession allows relatives to even take part in the property of the deceased.

In contrast, statutory rights of succession contemplate marriage under the Act which is monogamous in nature allowing one man to marry only one wife. A man cannot marry more than one wife during the subsistence of his marriage. This is the reason why rights of inheritance are limited to the immediate family of the deceased who were dependants of the deceased prior to his death. The relatives only get to share in the instances where there are no dependants succeeding the deceased.

4.2. Rights of Widows

Under the customary rights of succession, it is a bigger issue where the man dies intestate because it is not such a big problem where he had left a valid will evidencing how his estates are to be shared. The widow of the deceased as we have already noted has only possessory rights to the property of the deceased and does not enjoy any proprietary right over such property.²⁹¹ This is because the widow is often seen as a chattel incapable of inheriting the property of the deceased.²⁹² This is to avoid the instances of the disintegration of family property where the widow eventually

²⁹⁰ S N C Obi, *Modern Family Law in Southern Nigeria* (Lagos: African Universities Press 1966).

²⁹¹ *Nezianya v Okagbue* (1963) 1 All NLR 352.

²⁹² M C Cookey & M O Izzi, 'A Legal Appraisal of the Inheritance Rights of Women in Nigeria, (2023) (2) *International Journal of Law, Social Sciences and Society*, 28.

remarries following the death of her husband because inheritance is usually by blood. She can only be allowed to hold the properties in trust for the children where the children are still minors but not to claim ownership of the property. Her acquisition of property is subject to the consent of the husband.²⁹³ The widower is not expected to lay claims to the property of the spouse at the instance of her death. This is simply to preserve his dignity. He can only inherit the property of the wife where there are no issues of the marriage and the property in question is acquired after the marriage not prior to the marriage.²⁹⁴ In the instance of customary testate succession, only the man has the right to make a valid will. there is no provision for a woman to make will stating how her property should be disposed upon her death.

This is not the case under statutory rights of succession because the wife and husband of the marriage share equal rights as it relates to succession. This is in sharp contrast with what is obtainable under customary intestate succession where the widow of the deceased is excluded from taking part in the property of the deceased.²⁹⁵ Here under the statutes, the provision of the law with regards to the Administration of Estates Law in intestate succession is that the surviving spouse is the primary beneficiary.²⁹⁶ This could either be the widow or the widower. The Law grants them equal rights as beneficiaries.²⁹⁷

Also, where the succession is testate, following the advent of the Convention on the Elimination of all Forms of Discrimination against Women²⁹⁸ and the 1999 Constitution of the Federal

²⁹³ The Customary Law Manual para 321(3)(b) p.266.

²⁹⁴ *Nwugege v Adigwe* (1934) 11 NLR 134.

²⁹⁵ A C Diala and V Adeleke, 'The Rights of Women to the Inheritance of their Husband's Estate in Nigeria' (2024) (4) *Journal of Law, Society and Development*, 78.

²⁹⁶ Matrimonial causes Act, s 42(2).

²⁹⁷ Preamble to the Universal Declaration of Human Rights.

²⁹⁸ CEDAW 1979, art 16.

Republic of Nigeria (as amended),²⁹⁹ both husband and wife can validly make a will. A woman under the Act can validly own and dispose real property.³⁰⁰

4.3. Rights of Children of Marriage

Under the customary rights of succession whether in testate and intestate succession, the rule of primogeniture and patrilineal inheritance are predominantly evident where succession is mostly by the male line which means that male children are the only ones recognised to have rights to take part in the estate of their deceased father while excluding the female children on the ground that the female children will one day get married and move into their husbands' house and they would not want the family property to leave the family line by the virtue of the female children getting married. The only instance a female child is allowed to inherit the property of the deceased father is in the case of the nrachi practice where she is allowed to stay back in the family house in the instance that the father did not have any male child to sustain the family line. She can only be allowed to enjoy the property rights only where and when the nrachi property has been performed on her. In the absence of the nrachi property, she is denied the right to enjoy the family property. Also, the female child may be allowed to use a portion of the family land subject to her getting married where the property will revert back to the family head. Here she enjoys possessory not proprietary rights over the property allotted to her. She may also be allowed to inherit her deceased mother's movable property. Even among the male children that enjoy inheritance as of right, there still exist some form of discrimination as seen in the unequal inheritance. This is given the fact that the inheritance is by order of seniority. That means that what the eldest son 'okpala' would receive will be different from that of the other children. A good example is manifested in the fact that the Okpala is the only one who is allowed to inherit the father's obi or ofo where the father

²⁹⁹ CFRN 1999(as amended) s 42.

³⁰⁰ *Okonkwo Timothy v Sunday Oforka* (2008)9 NWLR (pt 1091).

was an ofo holder. This implies that the male children do not even take part equally in the estate of the decease.

On the other hand, where there is subsistence of statutory marriage, the children of the marriage share equally in the inheritance of the deceased. The female children get as may share as the male children thus closing the gap of discrimination that existed under customary marriage.³⁰¹ The statutory provisions are trying to close up the gaps created by the customary patriarchal and patrilineal system of inheritance.³⁰²

4.4. Rights of Children Born out of Wedlock

It appears from our study so far that children born out of wedlock enjoy more liberal rights as it relates to succession under customary marriage since they are allowed to enjoy equal rights with the children of the marriage.³⁰³ This is so because customary law recognises such children born out of wedlock who have been acknowledged by their putative father to take part in the property of their putative father.³⁰⁴ All that is needed is proof that the putative father acknowledged such child during his lifetime.³⁰⁵

This is a totally different position under statutory marriage for children born out of wedlock are considered illegitimate and have been discriminated against as far as they have not been acknowledged by subsequent marriage between the man and woman.³⁰⁶ The legitimization by the subsequent marriage is the condition precedent to entitle the child to take party in the inheritance of the father's estate.³⁰⁷ The law does not recognise the rights of such children irrespective of the

³⁰¹ *Uke v Iro* (2001) 11 NWLR (pt 723) at pg 203

³⁰² E I Nwogugu, 'Emancipation of Female Rights to Intestate Succession under Igbo Customary Law' (2014) (12) The Nigerian Juridical Review.

³⁰³ *Philip v Philip* (1964) 18 NLR 102.

³⁰⁴ *Re Sapara* (1911) Renner's Reports (Ghana) 605.

³⁰⁵ A B Kasunmu, 'The Principle of Acknowledgement or Recognition of Paternity under Customary Law in Nigeria' (1964) (13) *I.C.Q.L.*, 1091-1104.

³⁰⁶ Wills Act, Cap 103, Laws of the Federation of Nigeria and Lagos 1958, s 3.

³⁰⁷ *Ibid*, s 5 (1) and (2).

fact that they have been acknowledged by their putative father through the performance of some acts. It was as a result of this provision of the law that the court held in *Cole v Cole*³⁰⁸ that a child will be deemed to be born the day he was legitimated by subsequent marriage of the parents. A child born by another woman during the subsistence of a valid marriage under the Act will not be considered a legitimate child and thus will be excluded from taking part in the inheritance of the father.³⁰⁹ It was even contended that a child born prior to the marriage under the Act with a third party cannot validly inherit the estate of the deceased even when he or she was acknowledged by the father *inter vivos*.³¹⁰ This view is basically to discourage extra-marital affairs. A contrary decision was held by the court in *Taylor v Taylor*³¹¹ where such children born to the deceased prior to his statutory marriage who were acknowledged *inter vivos* were allowed to inherit the estate of the deceased. This aligns with the provision of the constitution which provides that no person shall be discriminated against on the circumstances of their birth³¹² so as not to punish a child for an act they never gave their consent to. This uncertainty has continued to create difficulties in ascertaining the rights of children born outside valid statutory marriage.

4.5. Ownership and Distribution of Property

Under customary succession, the property, especially realty, is predominantly owned by the family because customary law recognises family or communal land holding given its polygamous nature. Such family properties are often held in trust by the eldest male child who acts as a caretaker and administers the property for the benefit of all the family members. Giving that family properties are collectively owned, the eldest male who acts as a trustee cannot validly alienate the family

³⁰⁸ (1898) 1 NLR 15.

³⁰⁹ *Cole v Akinyele* (1960) 5 FSC 84.

³¹⁰ *Adegbola v Folaranmi* (1921) 2 NLR 89.

³¹¹ (1960) LLR 286.

³¹² CFRN 1999 (as amended) s 42.

property that has not been partitioned without the consent of the principal members of the family.³¹³ The said family property may be distributed among the family members by way of allotment, and each family member enjoys equal rights and interests with regards to the family property.

A man may be allowed under customary land to own personal property or portion of the family land that has accrued to him by virtue of a valid alienation. This is because men are seen as heads of the family and are the only ones legally recognised to own property and dispose them. It was on this note that women are excluded from succeeding their husband by owning the property that the deceased husband left behind for they are regarded as visitors and since they are visitors, they cannot validly own properties of their husband by way of inheritance.³¹⁴ They can only lay claim to the ownership of their personal properties.

There is also unequal distribution of property under customary law since distribution is by order of seniority. The eldest male child often gets a bigger share of the property of the deceased leaving the youngest with the smallest share of the property. In places where distribution is per stirpes, wives that have more children than others often feel cheated when this mode of distribution is used. The implication of this is that relatives are even beneficiaries and potential owners of the properties that are subject of inheritance given that devolution of properties follow the male line except were some places like Ohafia, Afikpo etc follow the matrilineal method of inheritance. Even in instances where a woman who acquired property prior to her marriage dies without children, the property will still be distributed to the members of her paternal home.

On the other hand, where the marriage was contracted under the Act, both spouses have equal rights to the ownership of the property since they jointly own the property given the presumption

³¹³ *Esan v Faro* (1947) 12 WACA 135.

³¹⁴ *Nezianya v Okagbue* (1963) 1 AII NLR 352.

of the law that the man and woman married under the Act are but one person. Children of statutory marriage and even those born outside wedlock who have been acknowledged enjoy equal distribution of the estate of the deceased. Whether the man died intestate or testate, the law provides that the property of the deceased shall be distributed among the immediate family members who were his dependants.³¹⁵ The persons contemplated here are the surviving spouse, children of marriage and the parents. There is no provision for property to be distributed among the relatives of the deceased given that the marriage under the Act is monogamous in nature.³¹⁶ Relatives may be allowed to take part in the distribution of the estate of the deceased only in circumstances where there are neither spouse nor children nor parents to survive the deceased.

4.6. Regulations and Enforcement of Rights

Customary rights of succession are regulated by native laws and customs since the practice varies from one locality to another. This somehow applies to testate customary succession where even the testamentary disposition does not strictly comply with the Wills Act to ensure its validity. This is largely because the will is usually by words of mouth. Even when the will is reduced into writing, it does not strictly observe the provisions of the Will Act.

Where parties who are subjects of customary law want to enforce their rights, the court that has jurisdiction is the customary court. Further appeal from the customary court lies to the Customary Court of Appeal. The only exception to this is where the person subject to customary law died living a valid will, the matter will then go to High Court of the State instead of Customary Court. Statutory rights of succession are regulated by the various statutes³¹⁷ Parties subject to statutory marriage who want to enforce their rights of inheritance and succession should approach the High

³¹⁵ Anambra State Administration and Succession of the Estate of Deceased Persons Law, s 127.

³¹⁶ Marriage Act, s 35.

³¹⁷ which include but not limited to the Marriage Act, Matrimonial Causes Act, Wills Act, Wills Laws, Administration of Estates Laws among others.

Court of the State since it is the court with competent jurisdiction to entertain the matters.³¹⁸ Further appeal goes from the High Court of the State to Court of Appeal. Where the matter is on land, the High Court of the state where the land is situated has jurisdiction.

4.7. Limitations Associated with Succession

Succession under customary law experiences certain restrictions since it is largely regulated by the customs and traditions of the people. A practical example of such limitations placed by customs is the practice of primogeniture and patrilineal succession which allows only male children to inherit the estate of the deceased to the exclusion of the female children.³¹⁹ Another such limitation is the practice of family land holding which vests real property in the hand of family members where the eldest holds the property in trust for the members of the family.³²⁰ The implication is that for the family property to be alienated, the family head must first have and obtain the consent of all the principal members, and such family property cannot be validly disposed by will.³²¹ Widows are also excluded from having control of property since such control is only by family line and widows are not regarded as family.

It has been argued that there are unlimited rights under statutory rights of succession, but this is not totally true. Where the succession is intestate, the Administration of Estates Laws regulate the activities of the administrator on the residuary estate of the deceased taking into consideration the dependants of the deceased. One may even think that in testate succession which involves devolution of property through a valid will that the testator or testatrix has unrestricted power to make disposition of his property through a valid will but that to an extent was only applicable

³¹⁸ Matrimonial causes Act, s 2(1).

³¹⁹ *Ugboma v Ibeneme* (1967) FNLR 251.

³²⁰ *Ejiamike v Ejiamike* (1972) 2 ECSLR 11.

³²¹ *Coker v Coker* (1938) 14 NLR 83.

under the Wills Act.³²² The Wills Act has been domesticated by various states of the federation and some of its provisions replicated. Nevertheless, the Wills Law now differ from the Wills Act in that it subjects the disposition of property by will to religious and customary limitations thus placing restrictions on the freedom of the testator or testatrix to make a will.³²³ The Wills Law forbids the disposition of family property by will.³²⁴ A testator will be fettered from making a testamentary disposition that is contrary to customary practices such as disposing a property that is exclusively reserved to another or family property that has not been alienated or partitioned.³²⁵ It also places restriction to make sure that dependants are not excluded but they are adequately provided for under the will.³²⁶ This can be a ground to challenge the validity of a will that unjustly excludes or does not adequately provide for the dependants. With the advent of the Land Use Act, succession rights, especially real property, are now subject to the terms and conditions of the Land Use Act.³²⁷

4.8. Gender Equality/Bias

Customary rights of succession do not encourage gender equality but are full of gender biases. It prioritises a husband over the wife: it excludes the woman from making a valid will. The rule of primogeniture does not in any way encourage gender equality since it excludes female children from inheriting the estate of the deceased.

Statutory rights of inheritance, on the other hand try to balance the gap that exists in succession rights by delineating equal rights to the parties. Now spouses have equal rights with regards to

³²² Wills Act 1837, s 3(1) which guaranteed unrestricted freedom when making a will under the Act.

³²³ Wills Law of Lagos State 2003, s 3(1).

³²⁴ *Johnson v Macaulay* (1961) ALNR 743.

³²⁵ *Lawal-Osula v Lawal-Osula* (1995) 9 NWLR (pt 419) pg 259.

³²⁶ Anambra State Administration and Succession of Estate of Deceased Persons Law, s 127.

³²⁷ Land Use Act 1978, s 26.

ownership and distribution of property. A wife as well as a husband can now make a valid will unlike under the customary law where only husbands can validly make a will.

A female child now enjoys equal rights of inheritance just like a male child who was the only recognised child under customary law to inherit the estate of the deceased.

CHAPTER FIVE

SUMMARY OF FINDINGS, RECOMMENDATIONS AND CONCLUSION

5.1. Summary of Findings

The duality of Nigerian legal system has continued to create tensions and conflicts between the two rights of succession where customary law is constantly competing with the statutes for relevance and this has continued to hinder the application of the statutory provisions. A clear illustration of this is seen where in some places like Nnewi, Onicha despite the statutory provisions and judicial decisions that guarantee equality among the genders, female children and widows are still excluded from inheritance of the deceased. This duality has consistently created confusion because often times people are confused whether to apply customs or the provisions of the statutes in matters of succession. As a matter of fact, our laws have created certainty and uniformity, but lack of awareness and enforcement have continued to make it seem like the two systems are in constant opposition.

Variations in customs among the different states in South-eastern Nigeria have continued to be one of the reasons for the disparities that exist. This is because of lack of uniformity in our customs. This is evident in some instances where we have discovered that some customs have incorporated the statutory provisions and legal decisions into their own customs which now allow female children and widows to inherit properties of the deceased but this is not the case in some other customs that have vehemently refused to adopt the statutory provisions and judicial decisions and have continued to co-exist with those customs that have adopted the statutes and decisions of the court.

Moreso, there have continued to be inconsistencies in the decisions of the court. A good example is seen under the rights of children born out of wedlock under statutory rights of succession. There

are two judicial decisions. One holds the view that once the putative father has acknowledged the child in question, he is entitled to share equally with the children of the marriage. The other decision is that children born out of wedlock during the subsistence of a valid marriage do not have any right to the properties not minding that they have been acknowledged. This is in a bid to discourage adultery. This has created uncertainty in the legal system.

Furthermore, female children and widows are still discriminated upon till date despite legislative provisions and judicial decisions that have addressed the issues of discrimination. This is because people do not know their rights and even if they do, they are either frustrated by the fact that they do not have money to approach the court for proper enforcement of their rights or by protracted litigation which often make them abandon the matter halfway.

We also found out that there is largely problem of enforcement. This is so because the customs of the various states that make up the South-east always try to overpower the legislative provisions and decisions of the courts on matters of succession as it relates to discrimination. Customary courts have refused to enforce these legislative provisions and judicial decisions because of their over-reliance on customs, even those that have not passed the validity tests.

The various agencies or commissions that are charged with the responsibility of enforcement are not doing their work and nobody holds them accountable for non-performance of duties. This is largely because there is little or no protection from the government and there is no incentive to encourage them to do their duties.

There is also the problem of low level of awareness and sensitisation. Here, the citizens are not aware of their fundamental rights and the rights protected by the various statutes that regulate equality. This is because of illiteracy or lack of sensitisation since people are not willing and ready to create awareness and educate them on their rights and how to enforce them. We observed that

some states like Abia State, Rivers State have all taken proactive measures in creating awareness of the rights of the female children and widows in matters of inheritance through the enactment of these statutes into their own state laws thus bringing it closer to the people but greater number of the states are not in any way interested in creating awareness and enforcing the rights of their citizens.

Another observation that cannot be neglected is that fact that customs which do not pass the validity tests are allowed to become laws and enforceable. When such customs are thus allowed, they defeat the whole essence of the law by recognising and enforcing what should not be enforced and courts are reluctant to find them as void and unenforceable.

5.2. Recommendations

The research work which compared the customary rights of succession with the statutory rights of success examined the extent of the disparities that existed between the two succession rights with matters of discrimination and the extent of the effects of the discrimination as it relates to constitutional rights of the female children, children born out of wedlock and widows of the deceased.

From our findings, it is pertinent to make the following resolutions by way of recommendations:

- i. Empowerment of commissions and agencies like the National Human Rights Commission (NHCR), Women Empowerment and Legal Aid (WELA), Women Aid Collective (WACOL), Women's Rights Advancement and Protection Alternative (WRAPA), Women Advocates Research and Documentation Centre (WARDC) amongst others for the creation of awareness and enforcement of these laws and rights that they create. Customary law practitioners and even community leaders should be trained adequately to also be part of creating awareness at the community level and to

- also ensure that the laws are enforced adequately so as to earn the confidence and trust of the citizens, especially those whose rights are trampled upon. There is also need for campaign against inequality in matters of succession rights. Seminars and workshops should be organised as means of creating awareness.
- ii. Codification and harmonisation of the various customs of the states that make up the South-east to reduce vagueness, ensure uniformity and certainty.
 - iii. There is need for judicial activism not passivity to encourage legal development and reformation. Courts are called to take bold and proactive steps to strike out and declare unenforceable customs that do not adhere to the validity tests. This calls for adequate funding of the judiciary to improve court infrastructures and efficiency.
 - iv. States should be encouraged to pass state laws and adopt statutes and instruments that protect and encourage equality. These laws are to be made enforceable lest they become pieces of worthless legislation
 - v. Government should provide incentives and protection to the commissions and agencies employed in the creation of awareness and enforcement of those rights.
 - vi. People who breached people's rights should be made to face the consequences of the law to act as deterrence for subsequent offenders.
 - vii. Customs are to be subjected to compulsory observance of the validity tests before they could be adopted into laws and make enforceable.
 - viii. Courts should maintain a single standpoint in their judgements and not have more than one view over a matter to ensure certainty and predictability. Courts should also reduce unnecessary adjournments to address the problem of protracted litigation.

- ix. State laws should be made in compliance with the international instruments that guarantee equality of human persons.
- x. Protection of rights of widows and female children. The law should guarantee their rights by protecting them against unfair treatment or exclusion from the inheritance of the deceased. There should be constant campaign against the notion that women are chattels capable of being inherited. Such unfair treatment should be criminalised.
- xi. There should be provisions for legal representation of the indigent citizens by Legal Aid.

5.3. Conclusion

Law has undoubtedly continue to manifest itself as an instrument used to attain and administer justice in a pluralistic legal system and here we have observed that there is an interplay between the two legal systems recognised in Nigeria and because these systems are still deficient in the areas of mutual co-existence because of problem of enforcement, we implore our legislature to deploy their legislative tools by ensuring a harmonisation between the two systems so as to eradicate the unequal playing grounds in matters of succession.

We have been able to compare by way of analysis and established the similarities and differences that exist in the two legal systems which we have no doubt will pave way and give a clearer guidance to scholars and reformers who may want to advance further in researches on the gender inequalities in customary and statutory marriages in South-eastern Nigeria.

Variety which is the spice of life has made the dual systems to continue to beautify and strengthen our legal system since two good heads are seen to be better than one but we implore our government to adopt policies and reforms that we go a long way to ensure that the two systems are made two good heads so as to function coherently and effectively because a house divided against

itself can never function effectively and efficiently. This will no doubt help in the development of our legal system.

The revelation of the large gap between the two systems as it relates to non-enforcement of rights of widows, female children and children born out of wedlock seeks that all hands need to be on deck to see that the recommendations are implemented to strike a balance and restore trust and confidence in our legal system and ensure proper functioning of our economy. The court should be made available and accessible to all citizens of Nigeria to enforce their rights.

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