

INTRODUCTION AND GENERAL OVERVIEW OF STATUTORY LAW

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**LAWS AND PRACTICES RELATING TO WOMEN'S
INHERITANCE RIGHTS IN NIGERIA
*AN OVERVIEW***

FINAL REPORT

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COURT AND JURISDICTION

The 1999 Constitution of the Federal Republic of Nigeria provides for the establishment of Courts at different levels with different powers and jurisdictions to be exercised before them.

INTRODUCTION AND GENERAL OVERVIEW OF STATUTORY LAW

Nigeria is a country in the Western Africa that lies East of the Republic of Benin, South of the Republic of Niger and Chad, West of the Republic of Cameroon and North of the Gulf of Guinea. The capital city, Abuja, is centrally located.

The Nigerian legal system is made up of the common law, the statutory law, customary law and Islamic law. The common law is essentially an accumulated body of English case law. The statutory law comprises both restatements of English statutes that over the years have been amended or reenacted and written laws passed by the enabling body. The Customary laws, where applicable, are the bodies of rules governing a particular group of people. Islamic laws are religious tenets applicable to those subject to it.

Nigeria is a signatory to many international treaties that prohibit violence and discrimination against women. There are many Regional instruments and National laws that are applicable in Nigeria. It is apparent that the international human rights law and human rights are constantly transforming Domestic laws. Human rights as it is understood today are those rights contained in international laws and instruments such as the United Nations Charter, the International Bill of Rights particularly the Universal Declaration of Human Rights adopted in December, 1948 and many others.

There are presently Regional human rights systems. The African human rights system under which Nigeria falls has the African Charter on Human and People's Rights entered into force in 1986 and the African Commission to protect the rights of persons within the region. The Organization of African Unity (OAU) Assembly of heads of State has approved the establishment of an African Court of Human and Peoples Rights.

The OAU agreed to the provisions of the African Charter and stated that it should be included as part of the National laws of the countries that agreed to the charter.

When a country adopts or signs a treaty, it becomes a member state to the Charter. A Charter is a Treaty. A Treaty is a written agreement or understanding between nations who have the intention that the agreement reached shall be carried out and enforced in their individual countries. Each country that signs and adopts a treaty is said to ratify the treaty that then becomes legally binding on the Member State. By ratifying a charter, the Member State accepts the contents of the charter and is responsible for its adoption as part of the domestic laws. Governments and countries that have signed the charter must obey the rules. The citizens of the member states must ensure that the government observes the rules. Where a country adopts a treaty, it is legally binding on the country even if not yet incorporated into the domestic law.

Nigeria is a signatory to the African Charter on Human and People's Rights, which is similar to the Universal Declaration of Human Rights. The African Charter has been incorporated into the National laws in Nigeria. It is now known as African Charter on Human and Peoples Act in the 1990 Laws of the Federation of Nigeria.

COURT, TYPES AND HIERARCHY

The 1999 Constitution of the Federal Republic of Nigeria provides for the establishment of Courts of different categories with different powers to hear and determine cases coming before the Courts.

The Court system in Nigeria is pyramid-shaped.

THE SUPREME COURT

Located in Abuja, the Supreme Court is the highest Court in Nigeria and is the Court of last resort. It is constituted by at least five justices, except when the case is on a point involving the interpretation of the Constitution, when it is constituted of seven justices. The Chief Justice of the Federation heads the Court. Each of the justices of the Supreme Court must not be less than fifteen years standing in the legal profession.

The Supreme Court has original and appellate jurisdiction depending on the type of action. It has original jurisdiction in any dispute between the Federal Government and a State in as much as the dispute involves a question of law. The Supreme Court has the sole appellate jurisdiction to hear and determine appeals from the Court of Appeal.

The Supreme Court has no original jurisdiction in any criminal matter.

THE COURT OF APPEAL

Based in a few State Capitals, the Court of Appeal ranks next to the Supreme Court. It is headed by a President assisted by other justices of the Court of Appeal who must not be less than twelve years standing in the legal profession. Not less than three justices sitting constitute the Court. However, when the Court is hearing a case on a point involving the interpretation of the Constitution, five justices sitting properly constitute it. The Court of Appeal has jurisdiction to hear and determine appeals from the Federal High Court, High Court of a State, Sharia Court of Appeal of a State, and Customary Court of Appeal of a State. It has no original jurisdiction in both civil or criminal causes and matters. The Court of Appeal sits in the following locations: Lagos, Abuja, Ibadan, Benin, Calabar, Port Harcourt, Kano, Kaduna, Ilorin and Jos.

THE FEDERAL HIGH COURT

The Federal High Court is a special Court because of its jurisdiction. It ranks next to the Court of Appeal. A single judge, of at least ten years standing in the profession, constitutes the Federal High Court. The Court has jurisdiction in matters connected with the revenue of the Government of the Federation. It also has jurisdiction in taxation matters, custom and excise duties, banking, foreign exchange or fiscal measures arising from the operation of the companies Act. The Federal High Courts are located in a few States of the Federation.

THE STATE HIGH COURT

The State High Court ranks next to the Federal High Court. It is the highest Court in each state and it is located in the thirty-six States of the Federation including Abuja.

The Court occupies an important position in the country's judicial system because they are responsible for controlling and supervising the work of other inferior Courts within the states. A single judge constitutes High Courts. In the High Courts in Northern Nigeria, however, two judges preside when hearing an appeal from a magistrate Court or an upper area Court. Chief Judge of a State heads the State High Court and other judges sit over cases in the different judicial divisions of the State. Each State is divided in judicial divisions and the numbers of judges in each division varies depending on the size of the division. High Courts are therefore distributed all over in States of the Federation.

THE SHARIA COURT OF APPEAL

The Sharia Court of Appeal ranks next to the state High Court. It is based only in the Northern part of Nigeria and headed by a *Grand Khadi* and a number of *Khadis* of the Sharia Court of Appeal. The *Khadi* of the Sharia Court of Appeal must have held the qualification for a period of not less than ten years and must possess a recognized qualification in Islamic personal law. The Court is duly constituted if it consists of at least two *Khadis* sitting. It has appellate jurisdiction and supervisory jurisdiction in civil proceeding involving questions of Islamic personal law.

MAGISTRATE COURTS

The Magistrate Courts ranks next to the Sharia Court of Appeal. They are located in all the states of Nigeria. The magistrates are located with the number varying from each magisterial district. The overall head of all magistrates in a state is the Chief Magistrate. Each magistrate Court is duly constituted when a magistrate is sitting. There are different grades of magistrates ranging from Chief magistrate, Magistrates, Senior Magistrates and Magistrates. The differences are in the jurisdiction to try certain offences and imposing punishment. In Southern Nigeria, the magistrate Courts have civil and criminal jurisdiction. In Northern Nigeria, the magistrate Courts have only criminal jurisdiction.

CUSTOMARY AND AREA COURTS

The Customary and Area Courts rank next to the Magistrate Courts. The Customary Courts are based in the Southern States while the Area Courts are in Northern Nigeria. The Attorney General in certain States, the Governor in some others or the Chief judge establishes the Customary Courts. The president of the Customary Court heads them and the Courts are widely distributed throughout the State so that an administrative division or local government area may have at least one of such Court.

There are different grades of Customary Courts. There are certain grades of Customary Courts with legally qualified judges while others are with lay judges who are not legal practitioners. Appeal from the grades of Customary Courts with legal practitioner as judges go to the High Court while appeals from those with lay judges go to the magistrate Courts. Apart from Customary Courts presided by legal Practitioners, legal practitioners in practice do not appear before lay Customary Court judges. They may however sit and observe the proceedings. The Customary Courts have jurisdiction to try persons alleged to have contravened rules and by-laws of local government and in civil proceedings involving Customary Law. The High grades of the Court may try certain criminal offences with restriction in the fines or punishments. Area Courts on the other hand are distributed in various districts or local government of the northern state.

The Chief Judge establishes the Court. There are different grades of area Courts. An area Court is duly constituted if an area Court judge sits alone when dealing with an issue on Moslem law or with one or more members experienced on the local customs or tradition when dealing with Moslem and Customary Law.

SPECIALIZED COURTS

It is worth mentioning that there are other specialized Courts.

JUVENILE COURTS

Juvenile Courts are specially constituted for hearing and determining cases involving children and young persons. A magistrate, sitting with other persons to hear and determine cases preferred against children or young persons, duly constitutes the Court. The magistrate Courts are turned into juvenile Courts when the need arises.

Unlike other Courts, the juvenile Court is not opened to the public and the Courts do not sit on the days the magistrate Courts normally sit. The jurisdiction of the Court extends beyond offenders to children in need of care and protection. The terminologies used in such Courts are different from the regular Courts.

MILITARY COURTS/COURT MARTIAL

These are Courts established to enforce discipline in the armed forces. A president and not less than two officers constitute it.

GENERAL SETUP OF THE COURT SYSTEM

Every Court sits with at least a clerk. The clerk announces the arrival of the judge(s), magistrate(s) or president(s) and keeps the records of cases to be heard by the judge. A clerk calls the cases as they come up and has custody of document or materials for the cases. The judge(s), magistrate(s), or president(s) sits on a platform higher than every other person in the Court. Depending on the type of Court, the judge(s), magistrate(s), or president(s) may either be robed or in plain decent clothing. In the superior Courts - that is, the Supreme Court to the High Courts - the legal practitioners and judges are robed in black gowns with white trimmings and wigs (the judges' style is distinct from the practitioners).

Legal practitioners are permitted to appear in the Supreme Court, Court of Appeal, Federal High Court and State High Court. The restriction put on legal practitioners who may appear before the Supreme Court and the Court of Appeal has been removed. As mentioned earlier, legal practitioners are not restricted from appearing in a Customary Court with a lay president or non-legal practitioner sitting as president but in practice they do not appear. In Nigeria, the Court fees normally referred to as "filing fees" are contained in standard Court rules. Criminal and Civil proceedings stretch over a long period of time. This has been attributed to many factors, including inadequate number of judges and Courtrooms, and the lack of computerized systems (judgements are still written by hand).

COURT FEES

The fees charged in different Courts are well laid out in the rules of the different Courts and are contained in the schedule. For example, the Court fees in the high Court are contained in the High Court (Civil Procedure) Rules. The Court of Appeal, the Supreme Court, the Magistrate Courts, and Customary Courts have similar rules.

ATTORNEY FEES

The fees to be charged or factors to be considered by a legal practitioner in charging fees for particular cases are stated in the Legal Practitioners Act Cap 207, 1990 Laws of the Federation of Nigeria. However, issues relating to remuneration of legal practitioners are contained in a subsidiary legislation in the Act. This is the Legal Practitioners (Remuneration for Conveyancing Matters) Order.

Under the schedule in scale III there are certain factors that a legal practitioner should consider in charging fees in a legal matter. These factors include:

- a. The complexity of the matter or the difficulty or novelty of all questions raised.
- b. The skill, labor, specialized knowledge and responsibility involved on the part of the legal practitioner.
- c. The number and importance of the documents prepared or perused without regard to length.
- d. The place where and circumstances in which the business or any part thereof is transacted.
- e. The time expended by the legal practitioner.
- f. Where money or property is involved, its amount or value and
- g. The importance of the matter to the client.

Attendance of legal practitioners in certain Courts

Previously, rules restricted the attendance of legal practitioners in certain Courts. This restriction was applicable in the Court of Appeal and the Supreme Court where only legal practitioners who had qualified for a particular number of years were only allowed to appear. By virtue of the 1999 Constitution, this restriction has been removed and all legal practitioners are allowed to appear before any Court in Nigeria. Another unwritten restriction is the attendance of legal practitioners in Customary Courts where the presiding judge is not a legal practitioner but a lay judge. The rationale is that issues of law put across by a legal practitioner may not be understood or appreciated in such a Court. However, nothing stops a legal practitioner from appearing in any court.

HOW ARE LAWS MADE IN NIGERIA?

Statutory Laws

Laws passed by the National Assembly, States Assemblies and local councils affect everyone in manifold ways, and for this reason it is well worth knowing how these laws are made. To start with, what is a Bill? A bill is an item of proposed legislation. Bills are formulated and submitted to the legislative in response to some needs or demands. Basically, bills may be initiated or deliberated upon and enacted into law only by the legislative houses. The three types of bills – Ordinary bills, Appropriation bills and Government bills – each require different procedures.

AN ORDINARY bill affecting any legislative matter enumerated in the Exclusive or Concurrent Legislative List may be introduced by any member of either the Senate or House of Representatives as well as House of Assembly at the state level or local council level. Bills presented locally will have been well researched, prepared and found to be somewhat in the national interest.

AN APPROPRIATION or **MONEY** bill relates to the public funds and may be presented to both Houses simultaneously by the executive.

A GOVERNMENT bill is one that the executive submits to the House at the national, state, and local levels for passage into law. Once a bill comes before the Legislature, it

enters into a trajectory that will either carry it on to become law - perhaps in a form much modified from that of the original bill - or to rejection. Each House is constitutionally guaranteed the right to regulate its own internal procedures. With a view to the operations of legislature elsewhere in the world and to the constitution drafting committees' recommendations, the stages of a bill's progress appears in this format.

1. **First Reading.** Introduction of the bill into a House and a general debate takes place regarding the subject matter; a decision may be taken as to how and what special information to obtain.
2. **Information gathering stage.**
 - a) A specialized committee considers the bill in detail; it may call in expert testimony, commission studies to hear public officials or concerned members of the public;
 - b) Joint committees, appointed from both Houses (as in the national Assembly) may convene on any matter, but must meet to work out appropriations bills;
 - c) The president may address either or both Houses on matters of national importance (as in the national Assembly), while any minister of the government shall attend either House, if invited, to explain the policies of his department.
3. **Second Reading.** Clause-by-clause debate and discussion by the entire chamber, frequently necessitating modifications and compromises.
4. **Third Reading.** Formal motion and vote on passage of bill, no debate.
5. **Conveyance of bill to the second Chamber.** Repetition of stages 1-4 above. Convening of joint committees or joint sessions of both Houses as required (National Assembly).
6. **Presidential Approval.** The President must approve or reject the bill within 30 days. If he does not, the bill automatically becomes law. If he rejects (or vetoes) the bill, it is returned to the Houses where either a jointly acceptable compromise is worked out or a two-third majority of both houses may override the presidential veto. The same goes for the State House of Assembly.
7. **Publication of the new law in the OFFICIAL GAZETTE.** Corresponding enactments in regulations of affected ministries and organs of the public service.

General Overview of Women's Legal Rights/Place in Society

The legal status of women has undergone changes over the years. By common law a married woman lacked contractual capacity and marriage made void any contract made between husband and wife when they were single. This common law position was altered by The Married Women's Property Act 1882 as amended in 1893.

These Pre 1900 Statutes are statutes of general application in Nigeria. However in Lagos, Ogun, Ondo, Ekiti, Osun, Oyo and Bendel States the Married Women's Property law 1958 is in force and has been reenacted in the various states

This Married Women's Property Act emancipated the married women from contractual disabilities under common law. It enables a married woman to enter into binding contract and to maintain action in contract against anyone in respect of her separate

property. This law also removed the procedural principle against action between husband and wife. It is no longer necessary for a husband to be joined with his wife in an action by or against her. A married woman now has a separate procedural capacity.

In the area of Tort, the position of married women under common law is different from the position under the Act. Under common law, no act committed by one spouse against the other during marriage can amount to a tort. In other parts of the country apart from Lagos, Oyo, Osun, Ondo, Ekiti, Ogun and Edo States, the position under statute – Married Women's Property Act 1882 is that no husband or wife shall be entitled to sue each other for a tort except where such action is taken by the wife for the purpose of protecting her private property.

However, in the States mentioned above, the Married Women's Property Law 1958 as reenacted is applicable. A woman is liable for torts and a husband or wife cannot sue each other except where it is for the protection and security of her own property. According to Nwogugu (1990) the bar on spouses suing each other in tort is an anachronism, which was based on the need to preserve the unity of husband and wife. In England this rule of law has been changed by the Law Reform (Husband and Wife) Act 1962.

Married Women in Criminal Law

Special provisions are made in criminal law regarding criminal liability of husband and wife. A wife of a statutory marriage or Christian marriage is not criminally responsible for an act which she is actually compelled by her husband to do in his presence provided that such an act is not an offence punishable by death or one in which grievous bodily harm is an element. (Section 33 Criminal Code Act).

A wife of a statutory marriage does not become an accessory by helping or assisting her husband to escape punishment (Section 10 Criminal Code Act 1990). A wife of a Christian or statutory marriage is not criminally responsible for conspiring with the husband alone. (Section 34 Criminal Code Act 1990)

Case: Keshinro V Inspector General of Police 1955-56 Western Region of Nigeria Law Report p. 84).

A husband under Criminal Law in Nigeria cannot rape his wife. This rule applies to both parties under statutory or Customary law marriages (Sections 10, 33, 34, 36 and 360 Criminal Code Act, 1990;

Case: Alawusa V Oduote 1941 7 West Africa Court of Appeal 140).

MARRIED WOMEN IN THE LAW OF EVIDENCE

In all Civil and Criminal proceedings the wife or husband is competent to testify for the other. (Section 158 Evidence Act 1990) Where a person is charged with any of the offences in Section 160(1) of the Evidence Act, the wife or husband is a compellable witness of the prosecution or defense without the consent of the other party. However in all other cases, the spouse is only compellable only on the application of the spouse charged.

Citizenship and legal status

Under the 1999 Constitution of the Federal Republic of Nigeria, a woman who is a foreigner does not automatically acquire Nigerian citizenship by marriage to a Nigerian husband. Such a woman can only acquire citizenship by registration or naturalization. When a female Nigerian citizen marries a foreigner, ordinarily she does not lose her Nigerian citizenship. An exception is when a woman acquires foreign citizenship via marriage; then she automatically loses her Nigerian citizenship (Sections 24 and 25, 1999 Constitution of Nigeria).

Age of Majority

In Nigeria, under the 1999 Constitution of the Federal Republic of Nigeria, the age of majority is 21. As regards the legal status of women under this heading there is no distinction between males and females who are below the age of majority. Under common law, the father had absolute right to custody for children under the age of majority if the children are legitimate children of a monogamous marriage. However, the statutes applicable in different states in Nigeria show that either parent can have custody having regard to the welfare of the child. However Customary Law recognizes that this absolute right of the father will not be enforced where the child is of tender age and would require the care of the mother.

Case: Abiakam & Ors V Anuanwu 1975 5 East Central State Law Report page 305 at 310-311.

In addition, this rule of Customary Law has been modified by statutory law, which makes the infant's interest and welfare the paramount consideration.

Women's legal rights and interest in land

The legal rights and interest of female members of the family in land differ in various parts of Nigeria. Under modern Yoruba Customary law, a female member of the family can own land and has equal rights in the family property.

Case: Lopez V Lopez 1924 5 Nigeria Law Report pg. 50

The effect is that if the family land is partitioned or sold the female member is entitled to a share equal with the males. In some other parts of Southern Nigeria, especially in the patrilineal society in Igboland, female members have only limited rights in land. Unmarried women and widows have only limited rights to reside in family property. Female members may, on request, be allotted farmland yearly. In such societies, they are neither entitled to build, share in the partition, nor sell land. Generally, a female member of the family has a right to be allotted a part of the family land either for domestic or commercial purpose, a right to annual farming plots, right of ingress and Egress and right to be consulted.

ADMINISTRATION OF ESTATE BY WOMEN

A married woman can administer an estate. She is legally entitled to be an executrix or administratrix alone or jointly with other person. She may sue or be sued

without her husband. (Married Women's Property Law 1959)

Case: Section 15 of the Married Women's Property Law of Oyo state Cap 71 1978.

OWNERSHIP OF LAND

A married woman is able to acquire as well as hold interest in real or personal property either solely or jointly. A married woman can dispose of property without her husband.

Section 16 of Married Women's Property Law.

Legal competence

A married woman is capable of rendering herself and being rendered liable in respect of tort, contract, debt and obligation. A married woman is liable of suing and being sued. (Married Women's Property Law 1978)

EXISTENCE OF WOMEN CAUCUSES

Internationally, many conferences have been held in various countries of the world that Nigeria actively participated.

These include:

- i. Second World Conference on Women in Copenhagen, 1980
- ii. Third World Conference, Nairobi, 1985
- iii. World Conference on Human Rights, Vienna, 1993
- iv. Cairo Conference on Population and Development, 1994
- v. Women's Conference on Women, Beijing, 1995
- vi. Beijing Women Conference, New York, 2000

The establishment in 1989 of the National Commission for Women by Decree No 30 promoted the full integration of women in development and for eliminating discrimination on ground of gender. 1993 and 1995 witnessed the establishment of the Ministry of Women Affairs and National Commission on Human Rights respectively. The Ministries of Women Affairs, community development and social welfare are found in all States of the Federation.

In 1995, by virtue of Decree no 22, the Nation Human Right Commission was established to deal with all matters relating to the protection of Human Rights as guaranteed by the constitution of the Federal Republic of Nigeria 1999. At the international level, the commission on status of women was established. The Economic and Social Council established the commission on the status of women contemporaneously with the commission on Human Rights in 1946 in exercise of the power conferred on it by Article 68 of the United Nations Charter.

This is a major step taken by the United Nations to concretize its recognition and promotion of women's Human rights. The commission helped to put women on a global agenda. The commission played a major role in the adoption in 1967 of the Declaration on the Elimination of discrimination against women and the Convention on the Elimination of all forms of Discrimination Against Women in 1979 (CEDAW). CEDAW was adopted on 18th December 1979 but came in force on 3rd December 1981. Nigeria ratified the Convention in 1985.

Furthermore, the wives of the various Nigerian presidents and Heads of States in an attempt to put women issues on a national agenda, embarked on different programs geared toward promotion and protection of Women's rights, including:

- Better Life for Rural Women initiated by Maryam Babangida
- Family Support Program by Maryam Abacha
- Family Economic Advancement Program

PERCENTAGE OF WOMEN IN GOVERNMENT

Politically, women are under-represented. When General Sani Abacha mandated the drafting of a new Constitution in 1989, only 8 of the 369 members of the constitutional conference were women. This represented a slight improvement from the constitution drafting committee set up by the Obasanjo military administration in 1978 that did not appoint women among the 40 people charged with the responsibility of the then 1979 constitution.

As observed in the Daily Times Editorial:

It is rather odd that no one woman was found qualified to represent the female population on the panel. In a country where about 50% of the population is female and part of this made of lawyers, educationists, sociologists, administrators and scientists.

The situation described above is contrary to Article 7 of the African Charter on Human and Peoples Right and the corresponding Act in the 1990 Laws of the Federation of Nigeria. The provision clearly prohibits discrimination in the public and political life of a country, especially in the formulation of government policy and implementation thereof. In the fourth republic, out of the total of 11,881 positions opened for election, only 631 women contested and only 181 won, of a mere 1.62%. Women in Nigeria constitute nearly half of the electorate yet won less than 2% of the elected positions.

The National Assembly consists now of 12 women out of 360 in the House of Representatives and 2 women out of 109 in the Senate. About 31 women were elected into the States House of Assembly in the 36 States of the Federation. Out of all the speakers of the legislative houses in the Federation only 1 is female. Women have not fared better in political appointments. A cursory look at the list of ministers show that less than 10% of ministers in the fourth Republic are women while less than 5% were assistants. Overall less than 10% of women occupy decision-making positions. (Ezeilo, 2000)

LITERACY RATE IN NIGERIA

According to the 1991 population Census Report, the literacy rate of men in Nigeria was 66% while that of women was 48%. By 1997 the literacy rate of men was 54.50927% and that of women 45.49072%. In the rural areas, the literacy rate is 48% while it is 72% in the urban area. (Mass Literacy, 1997)

PERCENTAGE OF MARRIAGES IN NIGERIA

Marriages may be under statutory and Customary Law. According to the report from two marriage registries visited in two local governments' headquarters over 400 applications for registry marriages are received yearly but only a little above 300 are actually solemnized. According to local government sources more marriages are

conducted under the Customary Law than under the statutory law.

General Customary law Overview

Customary law is a body of customs accepted by the community as binding. It is divided into *Ethnic Customary law* that is applicable to members of an ethnic group. This term ethnic group is narrowly defined. For example, Owerri, Onitsha and Ijesha people form different ethnic groups; therefore they all have their Customary Laws. The second category of Customary Law is the *Islamic or Moslem law*. This is a body of laws based on religion of Islam. Under the present Constitution Islamic law is distinguished from Customary Law. The principal source of the Islamic law is the *Holy Koran*. Unlike ethnic Customary Law that is unwritten, Islamic Customary law (also known as Sharia Law) is written. Therefore, Customary laws are more flexible whereas Islamic law is rigid. There are two methods of proving Customary Law. The first is by proving the existence as a fact by giving evidence that it is a custom and the second method is by judicial notice without the need for a proof.

Evolution of Customary Law

There are significant differences in opinion as to the way custom as law is generated. The earlier view is that Customary Law is law, which is generated by custom. It is believed that people started by following a uniform practice by virtue of uniformity and then it became what is called custom. It then gains hold on the mind and it is accepted as law.

Operation of Customary Law

Customary Law is unwritten. They are basically those folkways and mores which the indigenous people regarded and accepted as binding on them. They are the concretization of the group of community and conception of the group welfare, and standard of right and wrong. Customary Law can be said to be people's law made by them, having roots among them and governing their relationship. It is an expression or a product of behaviorist pattern among a people. Customary law comes into operation by the recognition of the rules as being obligatory by its members. It is therefore defined as a mirror of accepted usage. Another major feature, which explains the process Customary Law comes into operation is that, the people to whom it relates must adhere to it. Its source is to be looked for in actual tradition as interpreted by its subjects. Before a practice of the people can be referred to as Customary law, habitual practice or observance in the community is not sufficient; the observance must be a matter of obligation, which will if necessary, be enforced. Before a rule of Customary Law can be enforced, it is subject to three tests of validity:

1. The Customary law must not be repugnant to natural justice, equity, and good conscience;
2. It must not be incompatible either directly, indirectly, or by implication with any law for the time being in force;
3. It is not contrary to public policy.

Proof of Customary law

In establishing Customary Law or in proof of Customary Law, the following facts should be noted:

1. Witnesses who are acquainted with the native customs may be called to prove the custom;
2. Frequent proof of a custom in the Court may make it so notorious that the Courts will take judicial notice of it.

There are ways in which Customary Law can change. It is suggested that Customary Law should be codified. It is claimed that this will introduce certainty into an otherwise vague system of law. (Azinge, 1991) On the other hand, it is claimed that codification will result in inflexibility of Customary Law, and Customary Law will be forced into a straitjacket of code. (Nwabueze, 1963)

Handling of Disputes under Customary Law

Dispute resolutions under Customary Law vary from one community to another. In various communities in southern Nigeria, the traditional rulers with the council members –the chiefs, exhibit strong support for the tradition and were responsible for both the executive government and administration of justice. Among the Egbas and Ijebus in Yorubaland, the Ogbonis acted as advisory or consultative body with the monarch. In Eastern Nigeria, the council of family head and other respected elders is the consultative body. In some other communities, in Calabar and Ibibioland, titled societies such as the Ekpe society administer the government in the area.

Settling disputes under Customary Law

One basic feature of Customary Law is the quest for communal peace. The normal mode of dispute settlement is through the process of arbitration, which is devoid of the technicalities found in the present day Courtroom. The decisions given pursuant to a customary arbitration is binding on the parties. This fact was recognized in a High Court decision in *Okpuruwa & Others v Okpokam & Another* 1988 4 NW L R part 90 554 where the Court held that Customary arbitration exists in Nigeria. For the peace and good neighborliness in the community, when there is a dispute in a community on an issue of Customary law, the parties usually decide to refer the issue to a disinterested third party or the elders in the community for settlement. The elders who usually form what can be referred to as the chief-in-council are often known to be people of integrity, who are impartial, competent and knowledgeable.

The advantage of this form of dispute resolution over the formalized Court system is that there is communal consensus, between the litigants on whom the arbitrators are. The effect is that litigants in most cases abide with the decision of the arbitrators, unlike in decisions of the formalized Courts which often lead to other future litigation. Another advantage is that the parties are given the opportunity to talk without the objection from legal practitioner on issues of law, giving the parties the satisfaction that their cases are well stated. The language of communication in Customary Law resolution of dispute is another great advantage. The medium of communication is the local language, which the litigants are familiar with. Generally, the informal atmosphere and familiar environment in which Customary law disputes are resolved provides a relaxed environment for the litigants and removes the technicality associated with the formal Courts.

Establishment of Customary Courts

Customary Courts are established by legislation in order to deal with Native Laws and Customs of any particular region in Nigeria. The Courts are enjoined to apply native law and customs in so far as they have not contravened by status. The Customary Courts, like the Traditional Courts, are the Courts of the people that are usually shaped by them and responsive to their needs.

Further, they are easily accessible and enable litigants to hear their grievances more freely and at a low cost. Similar to the Traditional Courts, there is a general lack of technicality of procedure in these Courts. Speedy decision making usually goes a long way to engender confidence in the Courts. The existences of Customary Courts, like Traditional Courts, do not usually depend on legally trained people; therefore, quick justice is presumed to be prevalent in these Courts. The Customary Courts are highly favored by the people because of the comparative cheapness to the formalized Courts. The languages used are the local languages of the people.

In the different areas in Nigeria, the Courts have assumed different names. In Northern Nigeria, they are Area Courts of different grades; in Eastern Nigeria, they are District Courts and in Western Nigeria, the Courts are known as Customary Courts.

However, there are some differences recognized between the Traditional Courts and the Customary Courts as obtained under statute. In the Customary Courts, the rules contained in the statutes apply. For example, the composition of membership must be the same throughout the whole proceedings and members adjudicating on a case are not allowed to give evidence. A point worthy of note in the proceedings of the Customary Court and which is different from the formalized Court system is the fact that the responsibility of taking down evidence and writing judgement is carried out by the clerk instead of the president. This is not a secure system and may be subjected to abuse.

Traditional Legal Institutions in Yoruba Society

Certain important institutions enshrined in the cultural heritage of Yoruba society made Customary Law functional. Among these institutions are family, age-grade, palace and market as well as religious institutions. These "legal" but traditional institutions have been instrumental to enhancing peace, harmony and order in the traditional society. Traditional legal institutions have a long history and undergo tremendous changes from time to time. They have shaped the political culture of the Yorubas and therefore inseparable from the governance of the society.

History of the Courts and the Adjudication of Disputes in Nigeria and the Arrival of the British Colonist

Traditionally, the Yorubas, Igbos and Hausas operate vibrant family systems. Authority, which is a matrix of governance originated from the family systems. In these different cultures, the family is hierarchically modeled and authority lies on the compound heads that were the overseers of the well being of all the members under them and one significant duty has to do with the settlement of disputes. The head settled all disputes except those of a criminal nature. Therefore this was the beginning of the legal set up within the framework of the family in these three cultures.

Operation

As a legal institution, the family operated a Court of arbitration: the family Court model. The authority of the family head and other adjudicatory elders within the family was never in doubt as most cases were heard and settled in the family Court. The family Court usually settled many civil cases and family disputes involving inheritance in order to restore peace and harmony.

Age-Grade Association

They existed as a watchdog against crimes and culprits. The age-group is often well organized and exercised considerable moral authority over their members and performed a number of obligations communally for one another.

According to Fajana (1968) and Akintoye (1971), the age-group was the guardian of public morality because they were empowered to chastise and impose fines on offenders as well as to enforce the rule of law. This age-group was hierarchically structured. This includes the president in Yoruba called "*Olori-egbe*" and other officers.

Traditional Palace Court or Traditional Courts

Customary law under the Traditional Yoruba, Igbo and Hausa cultures was a relevant aspect of culture. The Palace Court was the most outstanding legal institution in traditional societies in the three cultures. The Palace Courts perform judicial functions. Olaoba (1992) and Ojo (1966); well-known scholars of Yoruba palaces, attest to the legal heritage enshrined in Yoruba palace. These Palace Courts serve as the last Court of appeal in difficult civil cases and the Oba, Obi or Emir and his council of chiefs handled criminal cases.

There was a popular saying among the Egbas in Ogun State with regards to the Position of Palace Court: "*Ejo ku si Ake* or Ake Court has the final judgment. Among the Ekitis in Ekiti State of Nigeria, the king's Court was referred to as "*Adimula*." This literally means custodian of justice and fair play. Under the three cultures, the king's Court or palace Court was not only a cultural edifice but also a Court of justice.

Procedure

Presently, the major characteristics of the Traditional Courts are the flexibility and the proceedings are studied with informality (Bohannon, 1957).

The king and his chiefs usually met in the palace at specific period and for unique purposes. Such purposes include formulation of policies, enactment of laws and adjudication of cases. The king presides over the palace Court but he was not above the law (Shyllon, 1989). The king handled the adjudication of cases in the palace Court with the assistance of the council of chiefs who have various titles under the different cultures. The chiefs acted as checks and balances for the king. Thus, it behoves the Oba to repose confidence in his council of chief in the areas of legislation and judiciary as well as being tactical in wielding executive power. The reasons for such proceedings was to resolve disputes between parties, negotiate with parties, restoration of harmony by eliminating grievance and lastly to punish an offender for wrongdoing.

Apart from the composition of members of the Traditional Courts, the Courts were flexible and less formal. Unlike the notion of justice under the more formalized

British Courts which compels that only those who listened to cases throughout should adjudicate on them, this is not the same under Traditional Courts. The wisdom, experience and wealth of knowledge and expertise of the king and chief in council in resolving local disputes are reckoned with. Unlike the English system of Court proceedings, there is no fixed time or session to adjudicate upon disputes under the Traditional Customary Courts. The king summons the chiefs and meets when the occasion arises under the doctrine of necessity.

Customary Law/Statutory Law

There are Statutory Laws dealing with Customary Law. The Evidence Act cap - 1990 laws of the federation in S 14 provides that a custom may be adopted as law if it can be noticed judicially or proved to exist by evidence.

See the case of Davodu V Danmole 1958 3 Federal Supreme Court pg. 46.

It should however be noted that some Statutory Laws are not applicable to Customary Courts. For example, under the Evidence Act, the laws are not applicable to Customary Court and Sharia Courts by virtue of section 1(4)(c). However there are other statutes, which govern rules relating to Customary Law and the applicability in various Courts to test for validity. For example, under the High Court Laws of Lagos State and other states under the old western state including Edo, it is provided that the High Court shall observe and enforce the observance of every Customary Law which is applicable and is not repugnant to natural justice, equity and good conscience or incompatible either directly or indirectly or by implication with any law for the time being in force. The interpretation is that where a Customary Law is repugnant meaning barbaric or uncivilized it is to be eliminated.

Cases: of LAOYE V OYETUNDE 1944 Appeal cases 1970.

ESUGBAYI ELEPO V GOVERNMENT of Nigeria. 1931 Appeal cases 662 at 673

The fact that a Customary Law is contrary or unknown to English Law does not mean it is repugnant.

Case: of LEWIS V BANKOLE 1908 1 N.L.R 82

Where a Customary Law is incompatible to a Statutory Law it is not to be enforced. A Customary Law may not be contrary to a statute, but if it is against public policy it will not be enforced.

Coexistence of the Statutory Law and Customary Law

Many of the provisions in the Wills Laws and Succession Law Edict are from the Wills Statutes in England. However there are important sections that are not derived from the statutes but from Customary Law. Section 31 of the Western Region 1958 Wills Law now re-enacted in the applicable states provides that "the real or personal estates of a person that cannot be disposed by the applicable Customary law cannot be disposed by Will." This shows that the statute gives recognition to the Customary Law.

Religious law

Islamic or Sharia Law has an existence independent of society. It is imposed on society from above. It became integrated into the way of life of the people in whose society it was introduced. In Nigeria, Sharia Law was introduced into the Northern part of the country - a predominantly Moslem region. In the last five years of Sharia, the

issue has raised much dust and caused religious disturbance in certain parts of Nigeria. Sharia law is applicable basically in the Northern States of Nigeria where the people are predominantly Moslems. Sharia Law is based on the religion of Islam and it is written. The Sharia Law applicable in Nigeria where they have been adopted covers all areas of the law from contract, Criminal Law and Civil Law. Unlike the secular Civil Law, Sharia Law is a legal system that is divinely ordained. The original Sharia is not contained in one or even a few books. It is God's will as recognized first in Quaranic revelations and secondly in "Summa" – the pronouncement and precedents attributed to Mohammed. The Quaran and the *Summa* are scattered regulations. The regulations do not cover every matter of life so human reason comes to play. In Nigeria, some states have codified the Sharia Law as a Statutory Law which is applicable in those States.

Applicability

The Sharia Law where it is adopted is only applicable to people of the Islamic faith. In these states, the Islamic injunctions as contained in the Quaran, the Sunna, the agreement of scholars and analogical deductions from the Holy Quaran and the prophet Mohammed are now embodied into a statute.

Islamic Law/Customary Law

According to *Schacht, (1965)* Customary Law has co-existed with the ideal theory of Islamic Law. It has remained outside the system. As a point of historical fact, custom contributed a great deal to the formulation of Islamic Law but Islamic Law ignores customs as an official source of law (pg 62). Islamic Law is distinguished from Customary Law by the present constitution. Customary Law in the Constitution means Ethnic Customary Law and Islamic Law is a Religious Law. There are other distinguishable factors between Customary and Islamic Law:

1. Customary Law is oral and unwritten while Islamic Law is written.
2. Islamic Law is received law because its origin is not based here in Nigeria while Customary Law has its roots amongst the indigenous people.
3. Islamic Law is rigid whereas Customary Law is flexible because it changes from time to time.

Enforcement of Religious Laws

The penalties envisaged by Islamic Law consist of two groups which correspond to the two sources from which all penal law is commonly derived. One group are crimes against religion – acts which have been forbidden or sanctioned by punishment in the Quaran therefore becoming crimes against religion. The enforcement of religious decisions is done through the agency of the Court by way of execution or "*Tanfiz*." It is done by different means such as imprisonment, appointment of receivers as an intern relief, or the execution of any punishment in cases of penal laws such as stoning or cutting off the hand.

In Nigeria, the administration of Islamic law has been in existence before the colonial era. Local Courts in Northern States of Nigeria have been allowed even during the colonial era to apply and administer the Islamic Law of the *Maliki* School (first in all matters but now restricted to only personal matters).

The Islamic Law is applicable where the parties are Muslims.

Position of Women Under Religious Laws

Women generally are recognized under the Islamic Law. However, there are traces of discrimination. Under the Islamic Law, there are certain qualities that a witness in the case must possess. A woman alone is not allowed to be a witness in a case. Usually, the testimony required is that of two male witnesses or one male and two female witnesses. This shows that the testimony of two females is equated as one of a male witness. Under the structure of the Islamic Law Courts, the judge should be a free, sane, adult, who must be a Muslim, who has never been convicted of a crime and of good character. A woman is eligible for the judges' office. The legal position of women under Islamic law is not favorable. The woman is considered inferior to the man and she has less rights and duties from the religious point of view.

As regards evidence of blood money and cases of inheritance she is counted as half a man. She does not belong to the "*akila*" -- members of the Muslim army whose names are in the "*diwan*" and to whom a culprit belongs. With regard to marriage and divorce a woman's position is less advantageous than that of the man. On certain grounds, the husband has the right of correction. As regards the law of property and obligation; the woman is equal to the man. The matrimonial regime is even more favorable to her in much respect. She may act as a "*Kadi*" (judge) in certain matters (*Schacht, J 1965*). Under Islamic Law, an unmarried female slave is at the disposal of her male owner as a concubine but no similar provision applies between a male slave and his female owner.

The Islamic Inheritance Laws

The inheritance rights under the Islamic Law are set out in the Quaran:

- The sharing and the inheritance is among all the heirs of the deceased both females and males.
- All the males must have equal shares.
- Females inherit half the share of males and the females all have equal shares.

Case: Yimusa V Adebusokan 1970 Vol. 14 journal of Africa law p.56.

Spouses

The wife of the deceased is taken into consideration. She inherits one-quarter ($\frac{1}{4}$) of the estate. In the case of a polygamous family, the share of ($\frac{1}{4}$) of the estate is shared equally among the wives. If the deceased is survived by children, the wife takes only one-eighth ($\frac{1}{8}$) of the estate. The husband of the deceased wife is also entitled to half ($\frac{1}{2}$) the estate of the wife and if there are surviving children to one-quarter ($\frac{1}{4}$).

Only One Male Issue

Where there is only a male issue he inherits the whole estate or the remainder after payment of shares to others entitled to inherit.

One Male Issue and a Father

In such a case, the father/husband inherits one-sixth ($\frac{1}{6}$) of the estate of the wife and the remainder goes to the son.

Only One Female Issue

Where there is only a female issue surviving the deceased, she inherits only half ($\frac{1}{2}$) of the estate.

Two or More Female Issues

Where there are two or more female issues, they inherit only two-thirds ($\frac{2}{3}$) of the estate and share it equally.

The Islamic mode of inheritance is per capita and not per stripes. (Okany, 1986; Nwogugu, 1990)

INHERITANCE LAW AND PRACTICES

The issue of inheritance arises where the owner of property dies testate or intestate. A person is said to have died testate where a will is made and intestate where a will is not made. Where a person whose estate is governed by law dies intestate, the property devolves to the laws as farm property. On the other hand, where a person dies testate, property will be devolved with the expression in the will. As a general rule, the form of marriage determines what laws govern intestate marriage in Nigeria. In a Christian marriage, a marriage under Statutory Law, or where the testator made a will, the applicable law of inheritance is received law (Okany 1986 P 21). There are different state laws applicable in different parts of the country. In Oyo, Ekiti, Osun, Ondo, Ogun and Edo States, the received law has been modified which modification as local enactment. The law is the Administration of Estate Law Cap 1 1959 Laws of Western Nigeria as reenacted in the different state laws. For example, the Oyo State Administration of Estate Law 1978 Cap 2; Lagos State Administration of Estate law 1973 cap 2. In Lagos State Section 36 of the Marriage Act has been repealed and the decision in *Cole V Cole* 1889 1 N. L. R... 15 which states that personal real estate of deceased will be distributed in accordance with the provisions of the law of England relating to the distribution of the personal estate of intestates now Administration of Estate Law of Lagos.

At the international level there is an implied provision regarding the inheritance law. At the regional level, the African Charter on Human and Peoples Rights (A.C.H.P.R) is applicable to the inheritance law; it was drawn up in 1981 by African countries through the Organization of African Unity (O.A.U). Nigeria is among the signatories to the charter. Article 2 of the A.C.H.P.R states that every woman and child has all the rights listed in the Charter. Discrimination on basis of sex, color, religion, national and social origin, is not allowed. Article 3 also states that the laws of any country must protect all persons in that country equally without considering whether the person is a man or woman. Article 14 states that every citizen is entitled to the right to have property unless it is against the law of the land as a result of public need. Article 19 states that every person in a country is equal to everyone else and no group of people can dominate another. At the National level, the Constitution of the Federal Republic of Nigeria 1999 in various sections prohibits discrimination on basis of sex and agrees with the provisions in the A.C.H.P.R

See Sections 42 of the 1999 Constitution

At the state level, there are different statutory laws applicable in different parts of the country and depending on whether succession is testate or intestate.

TESTATE INHERITANCE

It is important to determine the laws that govern testate inheritance in various parts of Nigeria.

1. The Wills Amendment Act 1837.
2. The Wills Amendment act 1852. Both are statutes of general application which were in force in England on January 1 1900. They are therefore part of the Nigerian law of testate inheritance.
3. The English Wills Act 1861.
4. The Wills Law 1958 applicable in Lagos, Oyo, Osun, Ondo, Ekiti and Edo states and incorporated into various state laws. This legislation re-enacted the substantive provisions of the Wills act 1837 and Wills Amendment Act 1852.
5. The Testate succession in Anambra State is governed by the Succession Law Edict 1987. Part 7 of the Edict contain rules which are identical to those in the Wills Act 1837 and the Wills law 1958.

Property of a deceased can be inherited under a will.

A will has three major characteristics.

- a. It takes effect only after the death of the owner of property
- b. It is revocable and it can be completely revoked, altered or added to by the testator during his life-time.
- c. A testator must have executed his will with the intention that it is his last will and wish

Capacity to benefit in a Will

Both males and females can be beneficiaries under a will.

Capacity to make a will

Under the wills Act every person has the capacity to make a Will. Therefore, women are not excluded in making Wills. However, this has not always been the position. Under the Will Acts 1837, a married woman lacked the capacity to make a Will. This has now been changed by legislation. One of such is the married Women's Property Law of the various states and the Married Women's Property Act 1882 and 1893 applicable (both the 1882 and 1893) are statutes of general application.

Wills and Statutory Powers of the Court

The statutes also give the Courts certain powers over a will. In the Succession Law Edict applicable in Anambra State, there is a provision that protects the dependants of the deceased. The law gives a dependant the right to apply to a Court for relief where in the dependent's opinion; the will does not make reasonable provision for the dependants. The Court may then make an order for such a relief for the maintenance of the dependants. The dependants entitled under this provision are the following:

- i. The wife
- ii. The husband

- iii. The male child not yet eighteen years and not married
- iv. Child in Vocation training
- v. A child who by reason of physical or mental disability is incapable of maintaining himself or herself.

The Court is expected to take into consideration certain factors in taking decision. These include:

- i. The conduct of the dependant in relation to the deceased
- ii. Reasons for the decision of the deceased.

The order made above terminates on

- i. Remarriage of spouse
- ii. Marriage of daughter
- iii. Attachment of age of eighteen for son
- iv. Cesser or removal of disability

This family provision is a means of enabling the Court to do justice where a member of the family is not adequately provided for. This will ensure family peace. This idea of family provision is known under the Traditional system in Igbo custom. It is said that after the dead has disposed his property in the way he desires, the living may review the disposition in order to do justice to all concerned. (Nwogugu, 1990)

Case: Thomas V De Souza 1929 9 NLR 81

STATUTORY LAW

INTESTATE INHERITANCE AND PRACTICE

There are provisions made for persons who do into make wills. The statutory laws applicable depend on different factors discussed below.

1. Person married under the Act. Where a person is married under the Marriage Act and dies intestate, Section 36 of the marriage Act will be made applicable in issues relating to inheritance.
2. In Lagos State: The Lagos State (Applicable laws) Amendment, law 1972 No 11 repealed Section 36 of Marriage Act. Now the Administration of Estate Law is applicable.
3. In Edo, Oyo, Osun, Ondo, Ekiti and Ogun States, the Administration of Estate laws are applicable.
4. There are no statutory provisions in Eastern Nigeria. In 1965, an attempt was made by the then eastern state government to lay down a statutory basis for the distribution of intestate estate. It attracted a lot of criticism and the Bill was withdrawn. Anambra State now adopted the Succession Law Edict 1987. Part 4 deals with inheritance of personal or real estate on intestacy. Section 51 provides for the rules of distribution. Generally, if the surviving spouse is a woman, she takes all the estate for life until remarriage. Then it passes to the brothers or sisters of the deceased equally. If the brother or sister is dead, then the children of such take the parent's share.

Effects of the Administration of Estate Laws

1. The Law is not applicable if death occurred before the 23rd day of April 1959.
2. Section 36 of the Marriage Act may apply if marriage was contracted under the Act. Where a monogamous marriage was celebrated abroad, the decision in *Cole V Cole* 1889 1 N.L.R 15 will apply.
3. The rule of Customary Law that governs the person may apply.
4. The Administration of estate law is applicable where the person is subject to Customary Law.

Inheritance Statutory Law

Specific Provisions for Spouses and Offspring

- Note: The position of women is better under Statutory Law
- Note: There is no gender distribution under the statutory law of inheritance. All children are to take equally.

INHERITANCE STATUTORY LAW

Marriage under Customary Law/Statutory Law

There have been conflicts in this regard. However there are rules governing the resolution of conflicts arising from marriages contracted under Customary Law and statutory laws on the issue of inheritance. These rules are contained in the High Court Laws of the various states. The Courts are directed to apply Customary Law and no person shall be deprived of the benefit of Customary Law. The term "no person" means someone who would apart from the introduction of English Law have been entitled to the benefit of Customary Law. The Courts in taking a decision must take into consideration the personal status of the parties whether they are natives to whom Customary Law would apply or non-natives to whom English Law would apply.

In *Labinjo V Abake* the Courts held that in cases between natives, Customary Law would apply.

Inheritance Statutory Law and Polygamous Marriages

There is no provision made for polygamous marriages. Where the deceased is married under the marriage act which permits marriage to only one wife, on his death the inheritance of his estate will be governed by the received law that forms part of the Nigerian Law. Only his wife and children from his wife under the monogamous marriage are entitled to inherit his property. However, children from other women outside the matrimonial home can exercise right of inheritance in the property of the father even though there was no formal marriage between their parents. Section 39(2) of the 1999 Constitution, provides that no citizen shall be subject to any disability or deprivation merely by reason of circumstances of birth. Once there is evidence of acknowledgement of paternity such children are entitled to the same right with other children.

INHERITANCE CUSTOMARY LAW AND PRACTICES

The law of inheritance under Customary Law differs from culture to culture.

Yoruba Inheritance Customary Law

Position of the Children: Under Yoruba Customary Law of inheritance, land is inherited by the children of the intestate to the exclusion of all other relatives. (Coker, 1966)

Case: *Adeseye V Taiwo* 1956 1 Federal Supreme Court 84

Yoruba Customary law of inheritance excludes brothers or sisters succeeding to a deceased brother's estate when the latter leaves children surviving him.

Case: *Adisa V Ladokun* 1974 Nigeria Monthly Law Report (N.M.L.R) p. 166.

Once there is no will, on the death of a man, only his child or children are entitled to inherit his property.

Case: *Bolaji V Akapo* 1968 N.M.L.R 203

In a monogamous marriage there is no difficulty as to the mode of inheritance amongst the children. It is shared equally. However in a polygamous marriage the rule of inheritance under the native law and custom of the owner will apply.

There are two forms: It may be per stripes or through the number of wives called "Idi-Igi" or through the children that make up the family that is per capita known as "Ori-Ojori." The two systems have generated a lot of controversy. The equal treatment of all children under the Ori-Ojori..... has merit of fairness and avoids disputes and jealousy. The "Idi-Igi" per stripes could be unfair to children of a particular mother after taking into account the number of children. The Supreme Court has however stated that unfairness alone or unequal distribution in the system known as per stripes Idi-Igi is not sufficient ground to hold that the custom is repugnant to natural, justice equity and good conscience. The "Ori-Ojori" or per capita according to the number of children is a relatively modern method of distribution adopted to avoid litigation.

Distribution between Male and Female Children

Under Yoruba Customary Law, factors like age and sex often affect distribution of property. A female child regardless of age might be made to take last or given a smaller share compared to her brother. However since the case of **Lopez V Lopez** 1924 5 Nigeria law Report 43. It is obvious that so far as modern Yoruba Customary Law is concerned, the age and sex of children will be irrelevant in determining the quantum of interest or the order in which the children are to inherit.

Case: *Salami V Salami* 1957 W.N.L.R 10.

The general rule under Yoruba custom is that females share equally with males.

Special note

However in some areas in Yoruba land the right of female children are curtailed but not abrogated. In Abeokuta, the female child is entitled to One-third of the deceased

property. (*Kasumu and Salacuse 1966*) Under the *Ijebu Ode* customs of Yoruba land, it is on record that out of the fifth-eight kings known as "*Awujales*" that have ruled the town, three (3) were females. The positions of these female kings among the 58 *Awujales* are the 23rd, 31st and 37th. (*Oju-Oba News 2002*)

Yoruba Customary Law of Inheritance where there is no issue

Under Yoruba culture in the absence of surviving children, property inherited by intestate will devolve on the members of the family from which it came. If it comes from maternal ancestor it goes back to them under Customary Law. The property of a deceased who has no issue will go to the brothers and sisters by the same mother. Where there is no brother or sister by the same mother, then the parents will inherit.

Cases: Adedoyin V Simeon 1928 9. Nigeria law Report 76 and the modification in Suberu V Sunmonu 1931 10 N.L.R 78 at 80

Yoruba Customary law of inheritance and illegitimacy

An illegitimate child cannot succeed the estate of the father until acknowledged by the father in accordance with Yoruba Customary Law.

Case Young V Young 1953 W.A.C.A

A child born out of wedlock and long after the period of gestation after the demise of the deceased has no right of inheritance.

Case Chinwezi V Mazi 1989 INWLR pt 97 p. 254

Age of Majority and Inheritance Under the Yoruba Custom

Under Customary Law, a person not recognized as of full age may inherit property as a beneficiary but the land is vested in a trustee who may be the guardian.

Customary Law of Inheritance and The Property of a Child

The position is that the brother and sisters of same mother inherits the property exclusively. The half brothers and sisters cannot inherit. Where there are no brothers or sisters of full blood, the parents inherit.

SPOUSES

Yoruba Customary Law of Inheritance and the Position of Wives

Under Yoruba Customary Law, a wife has no right of inheritance in the estate of her dead husband.

Case: Suberu V Sunmonu 1957 2 FSC 33; LEDB v Tukuru 1963 LLR 155

However under Customary Law, a wife has only a life interest in the property of her deceased husband. A wife has a right of residency subject to good behavior.

Case: Re Edward Forster 1938 14 NLR 83

Yoruba and Idoma Customary Law and the Position of a Widower

The same principle applies to the husband of a dead woman. He cannot inherit the property of the wife. The property of a woman who dies intestate in Yoruba Customary Law, the property of the woman goes to the children equally. The children of a predeceased child share in the property according to the share that should have devolved on the dead parent.

Yoruba Customary Law and the Property of Deceased Wife with no Issue

The property is inherited by her siblings equally and their children.

IGBO SYSTEM

INHERITANCE UNDER CUSTOMARY LAW

Generally there are two types of Customary Law systems in Igbo customs. These are the patrilineal system (inheritance through the father's lineage) and matrilineal system (through the mother's lineage).

Majorities of Ibo communities are patrilineal. The principle of primogeniture governs inheritance in predominantly Igbo culture.

IGBO SYSTEM UNDER THE PATRILINEAL SYSTEM

The position of Children

Inheritance is through the eldest male child who is known as *Okpala*, *Diokpala* and *Diokpa*. The eldest son inherits the property in trust for himself and other sons. He holds as trustees/beneficiary and has only a right of control and cannot dispose at will.

Case: Onwusike V Onwusike 1962 unreported suit no O/81/59 Onitsha High Court

Betual J held that an eldest son was not entitled to obtain a renewal of a lease of his father's property in his own name but had to hold the lease as the property of all his father's sons.

Case: Uboma V Ibeneme 1967 F.N.L.R 251 Egbuna J emphatically rejected this submission that the eldest son inherit all his fathers' property to the exclusion of his brother and held rightly that all the sons inherit land among the Ibos as family land and that the eldest son is only a "caretaker".

The eldest son inherits for his life-time the guns, dresses and farm implements of the deceased. (Okoro, 1963) The eldest also inherits for occupation his father's house and farm but ownership is for all male issues jointly.

Distribution of estate among children in Igbo Customary Law

In Igbo customs, only sons inherit to the exclusion of females.

1. Where the 1st son is dead

In Igbo custom, where the 1st son is dead, the next eldest son inherits the property for the other male issues.

Where there is no other male child, the oldest son of the dead 1st son will inherit.

2. Where there is no male child

Under Igbo Customary law, where the deceased does not have a male issue, the eldest full brothers having priority over half brothers will inherit the property.

3. Where there is no male issue or brother

The father will inherit property of the deceased in Igbo Customary law.

4. Where there is no male issue, brother or father

In such a case, the property will be inherited by the eldest nearest paternal male relation known as Igbo land as "*Oriekpe*"

Case Udensi V Mogbo 1976 7 S. C. 1

5. Unmarried male issues property

Under Igbo Customary Law

The property of an unmarried male issue is inherited by eldest male full brother or in his absence the next male in the absence of a male sibling, the father inherits.

Special note

In some non-Igbo Eastern Nigeria culture especially of Cross River State both males and females can inherit.

Distribution

Similar to the Yoruba culture, under the *Igbo* culture there are two forms of distribution. It is either per capita – that is divided equally among the male children or per stripes according to the number of wives with male children.

Position of females under *Igbo* Customary law

The female issues of a deceased under *Igbo* Customary Law have no right to inherit. The justification given for this is that it is wrong for the real property of a man who died without male issue to go to his female issue who on marriage would carry the property to the husband's house. However a female issue of a deceased has a right to be maintained by the male person who inherits the father's property until she marries or becomes financially dependant or dies.

Only Female Children

Where a man dies with no male issues, the eldest daughter may defeat her uncle's claim to the property of her father by choosing to be an "*Idegbe*" or "*Nrachi*".

A "*Nrachi*" or "*Idegbe*" is a daughter who remains unmarried and stays in the father's house for the purpose of raising sons in her father's name thus putting herself in the position of a son. An "*Idegbe*" or "*Nrachi*" inherits the father's land and if she has no son, her oldest daughter can choose to be an "*Idegbe*" and succeed to the land on her mother's death. (Olawoye, 1974 pg. 89) The institution of "*Nrachi*" or "*Idegbe*" can only come up where the deceased has no male issue.

Inheritance of a Female Child's Property

Where a female issue dies, the movable property is inherited by the full brothers and father. Other articles of dresses and ornaments are inherited by the sisters.

Case: Nwugege V Adigwe 1934 11 N.L.R 134

Married Women's Estate under Igbo Customary Law

- i. Under the *Igbo* Customary Law, the estate of a married woman is administered only by the male issues and in the absence of male issues her husband.
- ii. Where there are no issues or husband, the property is inherited by her late husband's successor and not her own father.
Case: Nwugege V Adigwe 1934 11 NLR 134
- iii. Land acquired by a married woman before marriage will be inherited by her maiden family.
- iv. The personal items of a married woman will be inherited by her daughters.

Unmarried Women's Estate under Igbo Customary Law

The inheritance laws under *Igbo* Customary law differ from culture to culture. In some parts of *Igbo* culture, the property of an unmarried woman is inherited by the brothers of full blood. The personal properties of an unmarried woman are inherited by the sisters of full blood.

IGBO SYSTEM UNDER THE MATRILINEAL SYSTEM

In a few *Igbo* societies, inheritance is matrilineal. Under this system, a child belongs to the mother rather than fathers' family, Descent is traced through the mother. A matrilineage is thus a method of social organization diametrically opposed to a patrilineage. A man's immediate matrilineage consists of himself, his mother, his full uterine brothers and sisters, his mother's brother and sisters, his maternal grandmother etc. It is from this group he can inherit and they can inherit from him. When a man from such a matrilineal society dies, his property is not inherited by his children but by his maternal relation. The order of succession is as follows:

1. His mother
2. Full uterine brothers sisters
3. The issues of his full uterine brother and sisters
4. His mothers full uterine brother and sisters
5. The issues of his mothers full and uterine sisters
6. His maternal grandmother

(Nwabueze, 1972)

Features of a Matrilineal Succession

1. A child cannot inherit from his father. The succession rights are from the mother's family.
2. Men and women are treated alike
3. Illegitimacy does not affect rights of succession. (*Okany, 1986 pg. 703*)

Treatment of Spouses under Igbo Customary Law

Under the *Igbo* Customary Law of inheritance, a wife has no inheritance right over her husband's property.

Case: Nezianya V Okagbue 1963 1 ANCR 352

A widow is entitled to a portion of land to cultivate in her late husband's estate until she remarries or dies. Her right is subject to good behaviour. Her right is protected and the heir who inherited cannot sell the house she lives in. The male who inherits the estate must maintain her.

Widow without Male Issue

A widow without male issue has a right to deal with the land of her dead husband with the concurrence of her husband's family but cannot assume ownership of it or alienate it or cannot make a will of it. She has only a right to occupy.

Case: Nezianya V Okagbue 1963 A.N.L.R 352

In practice, the duty of the male heir to maintain the widow is always neglected with the result that the male heir takes the benefit without the burden. This may be hard on the widow where she has contributed significantly to the acquisition of property in question.

CUSTOMARY LAW PRACTICES UNDER OTHER CULTURES

Bini Customary Law of Inheritance

The Binis are located in the southwest of Nigeria. The *Bini* Customary Law of inheritance is governed by the principles of primogeniture. In *Bini* Customary Law, the eldest son succeeds to all the disposable property of the deceased father to the exclusion of all the brothers and sisters PROVIDED he has performed all customary burial ceremonies of the father. However in practice, for purpose of maintaining family peace and harmony, the eldest son at his discretion gives some part of his estate to his younger brothers.

(Bradbury, and Lloyd 1957) (Thomas, 1910)

Case: Eghigie V Eghigie 1961 ANLR 842 at 845

Under the Bini custom, the eldest son's inheritance goes with the responsibility of the care of the father's household and guardianship of minor children until they become of age. If the first son dies without performing the funeral ceremony of his father, his right of inheritance passes on to the next surviving son. Where all sons fail to perform the final burial, they lose the right of inheritance. It is in such a situation that the right of inheritance passes on to the female issue provided she performs the burial ceremony of the father. (Nwabueze, 1972 pp. 392-393; Olawoye, 1974 pp. 90-91)

A female can only inherit the father's property if she remains in her father's house unmarried in order to produce a son who will take over from her as heir. Where the deceased leaves no issue, the junior brother or the next paternal male will inherit the property. Where the deceased is a female, the landed property will go to her male issues while the personal property will go to her female issues.

Case: Osazuwa V Osazuwa Suit No B/39/67 of 31/10/689 (unreported) High Court Benin City.

Ishan Customary Law of Inheritance

The Ishan custom of inheritance is similar to the Bini custom. (Okojie, 1960)

Onitsha and Asaba Customary Law of Inheritance

The people of Onitsha and Asaba have the Bini hesitance. The inheritance laws are similar to the Igbo custom where all male issues inherit.

Case: Ngwo V Onjejema 1964 1 A.N.I.R 352.

Ijaw Customary Law of Inheritance

The *Ijaw* communities especially the *Nembe* and *Kalabaris* have their inheritance laws based on the type of marriage contracted by the parents. There are two forms of marriage notably the "*Igwa*" and the "*Iya*". The children of the "*Iya*" known as "*big dowry marriage*" and their mother belong to the father's family and have succession right in that family.

The children of the "*Igwa*" or "*small dowry marriage*" belong to their mother and both children and their mother belong to the mother's family and can only inherit from their maternal relations. On the death of the husband of an "*Igwa*" marriage, the wife and the children will return to the family of the wife after the burial.

Persons entitled to inherit under the Ijaw Customary Law

Where the man contracted an "*Iya*" marriage, his property is inherited by the sons and where there are no sons by the brothers of full blood. The distribution of the estate is per capita with the eldest son receiving the largest share while the youngest receives the smallest share. Where the woman contracted an "*Iya*" marriage, the property is inherited by the sons but where she contracted an "*Igwa*" marriage, the property devolves on both sons and daughters. Where a woman who contracted an "*Igwa*" marriage dies without issues, her property is inherited by her full husband and his family has no inheritance right. (Okoro, 1966; Nwogugu, 1990 p. 315)

INHERITANCE LAWS IN NORTHERN NIGERIA

Different practices are found among the people in Northern Nigeria. Generally the people in Northern Nigeria are predominantly Moslems and the Islamic Law of inheritance as discussed applies. However the Customary law practices of other groups are discussed.

Settled Fulani Customary Law of inheritance

Under the Customary Law of the settled Fulani, the eldest son inherits the cattle of the deceased father. Out of his inheritance he makes presents to the younger brothers according to their needs. A female issue does not normally inherit cattle. However she receives cattle as gift from the brothers when she gives birth to a baby.

Nomadic Fulani Customary Law of Inheritance

Under the Customary Law of inheritance of the Nomadic Fulanis, the younger brother of the deceased inherits the cattle and in the absence, the eldest son takes all the property. However, female issues and wives that are left by the deceased are given a

share of the cattle. The female issues are allowed to take the cattle with them when getting married.

Landed Property and Inheritance

There is no question of inheritance of land or permanent buildings amongst the camp and other equipments of the cattle trade normally follow the same line of inheritance. (Croix)

Case: Aragba V Akanji 1960 WNLR 92

REFORMS AND RECENT CHANGES IN CUSTOMARY INHERITANCE LAWS

Reform and Changes in the Ijaw custom

Under the *Ijaw* custom, the distinction between the two types of marriage and inheritance rights is breaking down. (Williamon, 1962 pg. 53 at 59)

Changes and Reform in Northern Nigeria

In the northern part of Nigeria, the custom is being modified to suit the demands of the present day.

Case: Maituwo V Mallam Abubakar NNk/N/31 Appeal No SCA/CU.68/1963 pg 62 at 65.

The Provincial Court awarded the house in question to the husband but on appeal the Sharia Court of Appeal said, "The Provincial Court based its judgment on the principle that under general custom a husband is the owner of a house and not the wife. But in this matter, custom does not prevail. It is put aside where something is discovered which contradict the principles.

The wife was awarded the house.

Judicial attitudes until recently on issues of inheritance

Cases: Nezianya V Okagbue 1963 NLR 352

Nzekuru V Nzekuru 1989 2 NWLR 37

Omwuchekwe V Omwuchekwe 1991 5 NWRL part 197 page 739.

Recent changes in the attitude of the Courts.

Recent cases have shown a change in the attitude of the Courts on issues of inheritance. In *Mojekwu V Mojekwu 1997 7 NWLR pt. 512 at page 283* the Court of Appeal held that the *Oliekpe* custom in Anambra State which makes males and not females inherit fathers property is unconstitutional. In that case **Niki Tobi J.C.A** said

"All human beings male and female are born into a free world and are expected to participate freely without any inhibition on ground of sex. Any form of social discrimination on ground of sex apart from being unconstitutional is antithesis to a society built on the tenets of democracy. We do not need to travel

all the way to Beijing to know that some of our custom relied upon including Nnewi Oli-Ekpe custom relied upon by the appellant is not consistent with our civilized world in which we all live today.

Mojekwu V Mojekwu is a landmark decision in the advancement of women's inheritance rights in Nigeria.

See also *Moujekwu V Ejikeme* 2000 5 NWLR 657 at 402 where it was held that females can inherit from fathers estate in Igboland without performing "Nwach" ceremony.

This case again is another major landmark in the advancement of the inheritance rights of women. It is the first time that the international convention on women's human rights was judicially recognized.

JURISDICTION

JURISDICTION IN RESPECT OF CUSTOMARY INHERITANCE LAW

In Nigeria except in Anambra State, exclusive original jurisdiction is conferred on Customary Courts in respect of all matters relating to inheritance or disposition of property under Customary Law. All disputes pertaining to these matters are referable in the first instance to the Customary Courts. The High Courts and Magistrate Courts only have appellate jurisdiction.

PROCEDURE OF LITIGATION OF CUSTOMARY INHERITANCE CASES

Exclusive jurisdiction of all customary inheritance cases is conferred on the Customary Courts. The Customary Court has jurisdiction over all Nigerians. In as much as a Customary Law of inheritance is not repugnant to natural justice, equity and good conscience, a Customary Court can administer the law.

In causes arising from inheritance the Customary Law to be applied is the Customary Law applying to the deceased.

ENFORCEMENT OF CUSTOMARY INHERITANCE LAW

To ensure the preservation or management of any property in dispute in a case relating to inheritance, the Customary Court may appoint any person as a receiver or manager to receive or take charge of the property.

In enforcement of judgments, the Customary Court may make orders of seizure of property or other methods of enforcing judgments

APPEALS IN CUSTOMARY INHERITANCE CASES

A party that is not satisfied with the decision of a Customary Court may within 30 days of the date of decision appeal to the High Court.

SUMMARY AND CONCLUSION

The Nigerian legal system is made up of the Common Law, Statutory Law, Customary Law and Islamic Law. Nigeria is a multi-ethnic Nation with over two hundred and fifty different ethnic groups. Three dominant groups account for nearly sixty percent of the country's total population of about one hundred and twenty million people. These are the Yoruba's who are predominantly in South West, the Igbo in the South-East and the Hausas in the North. There are other smaller but important groups scattered all over the country.

This brief comment is necessary for a clearer understanding of the fact that there are many Customary Law practices existing within Nigeria. In Nigeria, traditional customs and deep-rooted cultural mores and religious beliefs tend to compete with and in many cases over shadow the common laws and statutory laws with regard to some issues. Issues relating to women are mostly affected especially in the area of inheritance. The cultural practice of inheritance is not under a uniform law in Nigeria. Three systems of inheritance laws operate hand in hand and a person's ethnic or religious affinity determines which law will apply.

There are differences in the inheritance practice where a woman is within her lineage and when she intends to claim property by virtue of marriage. There are also differences in inheritance practices within a patrilineal and matrilineal group. Within the Yoruba and Hausa Customary law, a woman can inherit land within her own patrilineage. However, her claim to land can be contested by the male siblings once she moves away from the lineage and gets married.

Under the Igbo, Edo and Ishan customs, a woman cannot inherit landed property. The above is the position in the patrilineal society. In issues of inheritance through marriage, a woman married in accordance with the marriage Act can inherit part of her late husband's property. The multiplicity of the laws leaves a gap in the inheritance law. Under the Yoruba Customary Law, a married woman does not have any inheritance right in her late husband's property. Under the Hausa Customary Law, a woman has a right to inherit from her husband's estate even where she is childless. Generally, women married, single or widowed are being tossed up and down. Legal pluralism operating in Nigeria is causing confusion and generating confusion. It has left a gap permitting choice of laws. The boundaries of the laws are complex and Customary Laws are not unified.

The multiplicity of the applicable laws has been a problem for the Courts that are faced with the problem of determining the applicable laws out of the several Customary Laws. There is a further complication because the federal system of government that operates in Nigeria places Customary Law with the legislative competence of the states but retain federal jurisdiction over statutory marriage. Some States of Nigeria have instituted legislation regulating Customary Law practices. For example, in Eastern Nigeria, there is a legislation creating a merger between Customary Law of marriage and statutory law.

The Court system has not in all cases portrayed itself as advocating equity and justices. However, many judges are now on the progressive path by denouncing repugnant and discrimination practices.

Conclusion

Cultural diversity in a multiethnic society makes each group unique in its cultural practices. Destruction of a culture is to destroy the root from which human society spring from. Retaining a culture that is oppressive is destroying the oppressed. Cultures are constantly being modified and it is not expected to change overnight. All efforts must be made to preserve the positive aspect in all cultures but at the same time global changes must not be ignored. It is conceded that not all-global changes are ideal; however, notable changes that do not destroy the fabric of the Nigeria culture should be embraced.

There is the need for changes in some inheritance practices in Nigeria. The process may be slow but the change must start. It is not an individual task but a collective one involving the three tiers of government in Nigeria, Non-Governmental Organizations that have been actively involved in the debate and struggle aimed at eliminating discriminating practices and the society as a whole.

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