EQUITY AND EQUALITY IN CUSTOMARY MODES OF INHERITANCE AMONG THE YORUBA OF SOUTHWESTERN NIGERIA

BY

ADEGBEMI ATANDA ADEWALE (LL.B., BL, LL.M (Ife)

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CERTIFICATION

I certify that this thesis which has been read and approved meets the requirements for the award of the Doctor of Philosophy in African Law, Institute of African Studies, University of Ibadan. This thesis was carried out by Adegbemi Atanda ADEWALE under my supervision at the Institute of African Studies, University of Ibadan, Nigeria.

_____ _____

Date

T. Kehinde ADEKUNLE

LL.B., BL., M.A., Ph.D (Ib.)

Research Fellow
Institute of African Studies
University of Ibadan

DEDICATION

This work is dedicated to the Almighty God, to my lovely wife Olubunmi Ajoke Ade-Adewale, to the Episcopate of Methodist Church Nigeria, and to all who have shown concern for my academic growth.

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ABSTRACT

Inheritance issues in Yoruba customary law have always been beset by problems of who gets what and how. Previous studies have examined different aspects of Yoruba customary law, but little attention has been paid to equity and equality in customary modes of *8d7 igi* (per stirpes) and *or7 0 jor7* (per capita). This study, therefore, investigated equity and equality, appraised and compared customary devolution practices, and assessed the impact of Yoruba modes of inheritance with a view to comparing how equity and equality are promoted in the study areas.

The study adopted the descriptive research design using William Graham Sumner's theory of Social Conflict, which states that competition over resources can trigger inequity and inequality, thus exacerbating violence. This was supported with the analytical application of *2t-* in *Ifá* divination. Data were collected through six non-participant observations, in-depth interviews of 61 informants, comprising 32 widows, 10 family heads, nine royal fathers and 10 community leaders purposively selected from five States of Ekiti (Omuo), Ogun (Ago Iwoye), Ondo (Okitipupa), Osun (Imesi Ile), and Oyo (Ogbomoso). Five focus group discussions were conducted, and interactions made with 108 children of deceased families. Secondary data were sourced from Nigerian law reports, journals and books. Data were qualitatively analysed using descriptive and explanatory methods.

The two concepts that promote equity and equality in Yoruba customary mode of inheritance are *8d7 igi* and or7 0 jor7 but they are against the practice of English testamentary disposition. These customary practices are not generally applicable among the various Yoruba sub-groups. In *Ikale*land, *8d7 igi* is modified in such a way that the first male child represents his *8d7 igi* and can suggest variation in the sharing mode. Among other Yoruba groups, wives are invited yet they have no say on inheritance devolution issues. Among the Ijebu, in *or7 0 jor7* mode, the first female child has the same status and rights as the first son and can inherit estate or any part thereof or make decisions as to who gets what and how in testamentary disposition. In Ekiti, Ijesa, Ikale, and Oyo, the rule of male primogeniture is dominant. However, there exist manifestations of inequity and inequality in some families due to male primogeniture. Assertive posture of first wives and first male children often lead to physical struggle and lengthy court cases may disrupt the *8d7 igi* and *or7 0 jor7* modes of inheritance. In cases of conflict, rancour and acrimony, folklores, divination, oath taking, myths, proverbs and historical experiences are employed in their resolutions.

**8d7 igi* and *or7 0 jor7* are antithesis of discrimination in inheritance devolution. Inheritance devolution should appropriate a combination of *8d7 igi* and *or7 0 jor7* on the one hand and the values of English testamentary system on the other. Studies in African law should use positive aspects of customary inheritance practices and adopt same in the formulation of an alternative model for contemporary testamentary disposition.

Key words: Yoruba inheritance devolution, Equity and equality in customary inheritance, *8d7 igi* and *or7 0 jor7,* Inheritance modes.

Word count: 462

CHAPTER ONE

INTRODUCTION

1.1 Background to the Study

Death is an inevitable end of earthly life[1]. In almost all societies, when a person dies he leaves something behind which must pass to someone else, and there are rules for this transmission. The rule of transmission in legal parlance is known as inheritance devolution law.

Issues bothering on inheritance are always beset by problems of who gets what and how among the people in general and among Yoruba in particular. Acrimonious destructions of family units and dis-affectionate relationships at the end of some testators' life on account of conflicts and disagreements over inheritance have taken a new dimension, but where there is nothing to share, the likelihood of misgiving among siblings will be at the barest minimal level. That is why the Yoruba succinctly puts it thus: *Zgb2 l9 dq jz s7l2, [m[od9 k0 n7 0un 9 lu 8yq 0un pa* (Pestle has no misgiving with mortal, save the farmer who insisted on eating pounded yam). Since people continue to acquire properties for their comfort and well being, struggle for equitable share in the property of the deceased by those entitled to it is inevitable, while greed and cupidity make those who are not entitled to the estate find dubious ways and means of becoming part of the struggle[2], thereby claiming family relationship that does not exist which makes the Yoruba to summarise such behaviour by saying *cni bq f1 jc og5n k9g5n, ir5 w[n n7 pa 8tzn ki tzn.* (Those who want to inherit from the estate they are not entitled to, fabricate stories to justify their claims). Conflicts and acrimonies do arise among survivors, wherein homes could be broken and scattered, and children and relations become mortal enemies in their struggle to share the properties of a deceased. Oyetunde (2010) observed that a happy family is the one which manages inherently inevitable crisis well and to the delight of all its constituent members.

The Yoruba society has laws, rules and regulations and a system of enforcement and sanctions already put in place to guide individuals and bodies in the overall interest of

[1] Hebrew 9:27; Eccl. 9:5; Surah 3:9

[2] *S. J. Adeseye and Ors v. S. F. Taíwo and Anor* (1956) 1 F.S.C. 84

everyone and the society in general. Therefore, while an individual desires absolute freedom to do or not to do whatever he likes, the society had to put in place checks and balances to absolute freedom in the interest of the general populace. As a result of which every activity is guided by a prescribed basic structure which when it guarantees a right, it creates a corresponding duty and when it imposes a duty it also guarantees a corresponding right[3]. It assures correction of wrongs and aims at equity and equality, it also provides a peaceful and orderly forum for resolution of disputes in devolution matters, so as not to pull down the cherished family system. The Yoruba has a system already developed around folklores, divination, oath taking, myths, proverbs and historical experiences which are employed in the resolution of conflicts arising from inheritance issues.

While this is fully recognised among the experts of Yoruba customary law, the application of Common law which provides for Western mode of inheritance tends to challenge the equality and equitability which customary mode entrenches. This is so because the orientation of the people have been distorted to condemning the customary modes as naïve, archaic, gruesome and unethical, while the Western one which came to distort it, is acclaimed upright and just. Whereas the Yoruba saying is *2f- k78 l3 2f- l'qwo*, (many different types of vegetables can be eaten in the same plate with none disturbing the other) should be the style. Each of the legal systems developed from different backgrounds, so using the same yardstick set up by one in measuring the application of the other is rather unacceptable as *0fin eg5ng5n k0 m5 cl1hzq, tor7 lqqdq ju lqqdq l[* (the same set of rules should not be made applicable to masquerades and women in harem as they have different spiritual rewards).

Succession affects everyone as all property must pass to someone else on death. English law as received in Nigeria[4], recognises two kinds of disposition of property on death – testate and intestate inheritance. *$kuru 0 p3 m1ta, b7k0 j1 funfun, q*

[3] Malemi, E.O., 2012.*The Nigerian Legal System, Text and Cases*, Lagos: Princeton Publishing Co.
[4] The Wills Amendment Act, 1837 and the Wills Amendment Act, 1852, regarded as statutes of general application, which were in force in England on January 1, 1900, Wills (Soldiers and Sailors) Act, 1918 which deals with the formal validity of Wills. In some states the Wills Law, CAP 133, Laws of Western Nigeria applies. This 1958 law is essentially a re-enactment of the above mentioned laws on Wills. However, section 3(1) of the Wills Law, 1958 contains a provision not contained in the other Laws mentioned above to the effect that: "The real or personal estate which cannot be disposed by the applicable customary law, cannot be disposed by Will".

j1 d5d5, 4y7 t9 bq s4s8 l'3po n7y= y90 di =l2l2 (4kuru a special bean meal) has only two colours, either white or black and if it ever has palm oil and salt added to it, it has turned to *=l2l2* (another bean meal delicacy).

Testate succession occurs when a person dies and leaves a Will, his estate will be distributed as a bequest in the Will, however legal rights will still have to be satisfied, while intestate succession occurs when someone dies without a Will and the estate is distributed by the dictates of survivors to manipulate as they so wish, either through the use of an existing enactment or through whims and caprices of human ingenuity of the survivors. Testate succession is of little concern to this study as Yoruba legal system did not adopt it, therefore, this work will only discuss the topic in chapter two where it will be relevant in the review of existing literatures on the study.

According to Sagay[5], intestate succession involves the applications of three systems of laws:

(a) the Common Law
(b) the Administration of Estate Laws of the various States and
(c) Customary Law. (These systems of law shall be discussed in details in Chapter two of the work).

Among the Yoruba of Southwestern Nigeria, there is no uniformity of rules under customary law of succession because there are many sub-ethnic groups[6], each with its own peculiar characteristics[7]. The determinants of the appropriate mode that will be best suitable in the devolution of an intestate Yoruba are: the type of marriage contracted by the intestate[8], the religion he practised,[9] his personal law,[10] or the kind of property involved. However, with respect to land, the general rule is *lex situs* represented in the Yoruba saying *ibi ajq bq k5 s7 ni 44pa r2 k5 s7* (the dog and its body rashes die on the same spot) that is, the customary law of the place where the land is situate will be applicable, while the law in respect of his other

[5] Sagay, I. E., 2006. *Nigerian Law of Succession, Principles, Cases, Statutes and Commentaries,* Malthouse Press Limited
[6] Oluyede P.A.O., 1992.*Constitutional Law in Nigeria*.
[7] Young, C., 1976. *The Politics of Cultural Pluralism* 276-281
[8] Cap. 1, 1959 Laws of Western Nigeria
[9] *Op cit*. Sagay
[10] *Zaidan v. Zaidan* (1974) 4 UILR 283

properties will be his personal law,[11] even if he died outside his ethnic group or leaves properties outside his hometown.

Before the early Europeans made their first appearance in Yorubaland, African law, in general, and Yoruba native law and customs in particular had been in existence, deriving their authenticity from African lore and mores, evidenced in the saying *cdun d6n l90t-, x6gb-n k0 n7 0k7k7 ob8* (*cdun* (a particular kind of nut) is sweet indeed, but it does not have the popularity of Kolanut). The facts of its pragmatism and acceptance materialise in the experiences of the people (Allott 1960:86-87). The assent of the native community gives Yoruba custom its validity. In the words of Bairamian FJ in *Owoniyi v. Omotosho*[12], it is "a mirror of accepted usage" and in trying to explain the need for a custom to enjoy the assent of a community, as a valid custom before a court can apply it, Lord Atkin submitted in the case of *Eshugbayi Eleko v. Officer Administering the Government of Nigeria*[13] thus:

> Their Lordships entertain no doubt that the more barbarous customs of earlier days may under the influences of civilization become milder without losing their essential character as custom. It would however appear to be necessary to show that in their milder form they are still recognised in the native community as custom, so as in the form to regulate the relation of the native community inter se… It is the assent of the native community that gives a custom its validity, barbarous or mild. It must be shown to be recognised by the native community whose conduct it is supposed to regulate.[14]

He further stressed that, whether considered barbarous or mild by the outside world, it must be shown to be recognised by the native community whose conduct it regulates, "even the court cannot itself transform a barbarous custom into a milder one (for instance, to kill, and not to banish, a deposed King). If it stands in its barbarous character, it must be rejected as repugnant to natural justice, equity and good conscience".

The colonialists actually abrogated some norms of customary law that they thought were barbaric and unacceptable to them, and they enforced the remaining norms subject to three tests, generally described as the validity tests,[15] yet the customary law

[11] *Tapa v. Kuka* (1945) 18 NLR 5.
[12] (1961) 1 All NLR 304
[13] (1931) A. C. 662, p.673
[14] *Eshugbayi Eleko* Ibid
[15] Asein, J. O., 1998. *Introduction to Nigerian Legal System.* Ibadan: Sam Bookman.

of the Yoruba still remain acceptable to them. The first validity test of the colonialists is that a customary law norm must not be repugnant to natural justice, equity, and good conscience.[16] The second test is that a customary law norm must not be incompatible, either directly or by implication, with any law presently in force.[17] The last of the validity tests is that a customary law norm must not be contrary to public policy.[18] A further validity test in the post-independence era holds that the constitution is the supreme law of the land,[19] and any other law that is inconsistent with the provisions of the constitution shall to the extent of the inconsistency be void[20].

Deathbed dispositions and other forms of formal and informal giving by a progenitor or on his earlier pronouncements were known in customary law before Europeans came to Yorubaland. There was no question of making Wills or other testamentary instruments as majority of family property had arisen on the intestacy of the founder of the family (Coker, 1966: 247-248). Nigerian courts have held that conformity to the standard of the acceptable English community should not be the test of repugnancy[21], nor should a rule be declared void because it is inconsistent with the English law principles.[22] The Supreme Court made an attempt to define the phrase 'repugnant to natural justice, equity and good conscience' without much success in the case of *Okonkwo v. Okagbue*[23]. Hence, the meaning and application of the test remain subjective and inconsistent.

Given their long history of application, African customary laws and, in particular, Yoruba customs and practices are deemed to possess the intrinsic variability and adaptive possibilities, provided that relevant judicial mechanisms are devised to support their application. As noted, the fact that the contemporary world is fast-changing makes this proposition rather timely. As earlier, and aptly, hinted by Ahmed

[16] High Court Law of Kwara State (1994), Cap. (67), § 34(1).
[17] High Court Law of Kwara State Ibid.
[18] Evidence Act (1990) Cap. 112, s. 14(3).
[19] Constitution of Nigeria (1999), S. 1(1).
[20] *Ibid* S.1(3).
[21] *Mojekwu v. Ejikeme* (2001) 1 C.H.R 179 at 209
[22] *Rufai v. Igbirra N. A.* (1957) N.R.L.R. 178
[23] (1994) 12 SCNJ 89, 102.

and Shore[24] that, as the twentieth century drew to an end, it became increasingly apparent that the world was truly changing, not just incrementally but also qualitatively. Human societies were moving into a new phase of history: this includes African societies and their customary practices. Many people had thought the values of family system will decline as it has in the Western world, but the opposite is the case among Yoruba because, it is the family institution that still holds together Africans in general and Yoruba in particular and it is the properties belonging to a family whether nuclear or extended that is shared in inheritance.

In view of the above, this study examined Yoruba customary belief in property devolution. It also investigated the notion of equity and equality in Yoruba inheritance practices. Appraisal of customary practices of devolution of inheritance in selected Yoruba sub-ethnic groups was undertaken; comparative studies of similarities and differences found in the practices among the sub-groups of Ekiti, Ijebu, Ijesa, Ikale, and Oyo were noted and an assessment of the impact of the customary modes of inheritance on private access to property was made with a view to comparing how equity and equality are promoted through the use of the customary devolution models in the study areas. This study therefore looked at the customary ways through which such conflicts have been avoided or amicably resolved. The study observed that although African customary laws differ slightly from locale to locale (Coker, 1966), yet different forms of dispositive succession, (the nuncupative Will, the designation of a successor, the earmarking of property, and death bed disposition) were known to all, but the institution of Wills as known in Europe was alien.

The concept of inheritance is embedded in the word *og5n* which means twenty or inheritance in Yoruba lexicon. The notion of equity is subsumed in the representation of inheritance with this divisible figure. The figure 20 can be equally divided between 20, 10, 5, 4 and 2 survivors to the estate of an intestate Yoruba without any rancor or acrimony. When the notion is transmitted to inheritance, the modes are believed to foreclose inequity and inequality.

[24] Ahmed, A., and Shore C., (Eds.), 1995a. The future of Anthropology: Its relevance in the contemporary

1.2 Statement of the Problem

Since many societies across Africa practise both customary and statutory laws of inheritance, it is imperative to examine critically the manner in which each type of law impacts on the right of the individual inheritor. This demands that the age-long system be examined to see whether or not it fosters equity and equality among survivors to the estate of an intestate Yoruba. This very fact underscores the need for emergent researchers to identify significant lacuna with respect to inheritance and succession, particularly as they affect not only the progeny of the deceased but also their widows. This work, therefore, is poised towards bringing further perspectives into the Yoruba idea of devolution of inheritance and other related areas. So that in the end, an independent legal framework will modify and integrate the cultural traditions into the Europeanised African legal system,[25] if it is impossible to allow customary courts (Customary Court of Appeal inclusive) to have exclusive jurisdiction over all customary matters.

The Yoruba of Southwestern Nigeria in particular are experiencing culture change which has resulted in attitudinal changes and the people's orientations on certain customary issues have been negatively affected to the extent that the core values of customary practices have been relegated almost to the points of irrelevance (Lloyd, 1974). Inheritance and succession under Yoruba customary law are two of the mostly affected practices, as adequate attention has not been given to research on them. To condense the innate problems associated with customary modes of inheritance, it has been subjected to the translation and transmutation of the English lexicon of barbarism, injustice, unfairness, and unethical. All these ethnocentric perceptions have presented customary devolution practices as discriminatory and repugnant to the principles of equity, fairness and good conscience. Whereas, the English system of testamentary disposition through Wills is not immune to inequality as there are acrimonies and ill-feelings and contestations which have led to physical struggle among siblings that often result to, family feuds, property abandonment, protracted litigation, and disunity in families and thus breed inequality among beneficiaries.

[25] Ademola Popoola's oral submission at the 50th Anniversary Roundtable Discussion of University of Ibadan, organised by the Institute of African Studies, African Law Dept. on *Lessons of the Administration of Customary Law in the Nigerian Legal System*, on Tuesday, 30th October, 2012

Apart from the pressures within, the international human rights regime keeps indicting customary laws generally on gender equality rights in inheritance.[26] However, the human rights, gender equality perspectives, did not realise that customary norms are not simplistic neither do they bring to the fore the underpinning customary reasons upon which these cultural issues are established nor do they have in mind that the philosophy and significance will be lost when customary issues are considered without recourse to its ideals.

Acceptable customs continue to exist on a philosophy and its significance in the lives of people. An example is why *igiogbe* (the principal place of residence) of a deceased *Bini* man should be exclusively inherited by the oldest surviving son. The answer, which is unknown to many, is that, in *Bini* customary tradition the oldest surviving son should continually discharge the family religious obligations at the family shrine which is located in the *igiogbe* where the ancestral staff (*ukhuru*) is kept. So, if the *igiogbe* was given to a female member of the family who would under normal circumstances be, under her husband's authority, she could not effectively discharge those obligations from her husband's home. It then means the customary family religious obligations in *Bini* will suffer neglect, and later on, go into extinction. To the outside world the rule of male primogeniture as practised in *Bini* custom is discriminatory and repugnant to justice and equity in the perception of western tradition without any attempt at allowing equity and justice of *Bini* customary tradition to hold its sway.

The emergence of industrialisation, the imposition of colonial rule and the introduction of Western education, actually altered the agrarian and communal structure of economic and political power in the Yoruba communities visited for this study. These changes created new opportunities for a small group of educated Africans in commerce, the colonial service and other professions (Tuden and Plotnicov 1970). This group evolved a distinctive culture, accumulated wealth and other resources, and quickly established itself as new elite group (Aronson 1980, 176-182). Indeed, it set a future template for new developments in the emerging modern and industrial urban centers of the country. It is observed that while the elite class emerged, it more or less provided a model for the non-elite group to emulate. As such,

[26] Heiner. B., 1995. *Muslim Voices in the Human Rights Debate*, 17 HUM.RTS. Q. 587, 595–597.

the elitist culture spread across and then became a 'general culture' whittling down the effect of the customary practices for the imbibed culture. The aforesaid acculturation affected among others things, devolution of estate among the Yoruba, and the pattern of approach to things began to change without respect for institutionalised customary practices. These challenges faced by customary law has almost replaced with the colonialists' common law. Even in the Nigerian legal system, it is placed in inferior position when in compared with the common law, and its jurisdictions of the former gradually been eroded in favour of the later.

It is the opinion of Balonwu (1974) that, since the time when Sir Fredrick Lugard promulgated the Supreme Court Proclamation No.6 of 1900 and pursued the British Colonial Policy of Indirect Rule, the British established courts have continued to administer the customary laws of the people of Nigeria in utmost clarity and permanence. Sometimes they have unavoidably administered strict and undiluted customary law, and at other times, they have been pragmatic, by refusing to allow themselves to be used as instruments 'for observing or enforcing the observance of a customary law, which is repugnant or incompatible with the local enactment or the ones which conflicts with rules of equity, or where substantial injustice would result, if the customary law, in question, were to be applied.'

Unlike the position where legislative provision excludes the application of customary laws, which are deemed 'incompatible, either directly or by necessary implication, with any valid local enactment', a declaration by the courts, that a customary law is repugnant to natural justice, equity and good conscience, does not necessarily imply that such customary law is illegal, for, sometimes, the practice still goes on publicly, long after the judge's decision[27]. In such a case, all that the courts can legitimately do, and have done, is to refuse to enforce the customary law in question.

Among the Yoruba, customs, deep-rooted cultural mores and religious beliefs tend to compete with the received English law with regard to some issues such as inheritance devolution, kinship and family relationships. Today the western world romances gay marriages and even legislates on it, even luring others to follow suit. Gay marriage is

[27] *Ojemem & Ors. v. Momodu* II (1983) 3 S.C. 173

now an acceptable western ideal, but it is an abominable thing in African customary practices[28].

This development constitute the gap to which this thesis is responding, since much has hitherto been said and ciphered in relation to the need for relevant change both in the constitution and the practice of customary law in Nigeria as they affect Yoruba customary practices in general and the devolution of estate in particular, because in inheritance issues conflict is inevitable (Farrington & Keith, 1983:374), competition over resources do trigger inequity and inequality thus exacerbating violence as many people may desire the same thing and the thing may not be enough.

1.3 Research Questions:

Emerging from the study problem are the following research questions, to which this study responded:

- What is the customary belief of the Yoruba on property and inheritance issues?
- How are equity and equality ascertained among the Yoruba of Southwestern Nigeria?
- Are these customary modes of devolution generic across Yorubaland?
- What are the similarities and differences in inheritance devolution practices among sub-ethnic groups?
- How has Yoruba customary modes of inheritance impacted on private access to property?

1.4 Objectives of the Study

The general objective of the study is to examine how customary law of inheritance among the Yoruba of Southwestern Nigeria upholds the principles of equity and equality in property devolution.

This study specifically sets out to:

- Examine Yoruba customary belief in property and its devolution
- Investigate the notion of equity and equality in Yoruba inheritance practices

[28] Azinge, E., 2013. "Lessons of the Administration of Customary Law in the Nigerian Legal System" In African Notes, vol. 37 no.3 2013 @ pp.5-6.

- Appraise customary practices of devolution of inheritance in selected Yoruba sub-ethnic groups of Southwestern Nigeria.
- Compare similarities and differences found in the selected sub-groups.
- Assess the impact of the customary modes of inheritance on private access to property.

1.5 Scope of the Study

The larger frame of this work is located within African law. Yet, considering the legal and cultural basis of this research, the scope is restricted to the field of African customary law in general and Yoruba customary rule of inheritance in particular. Thus, the study is inter-disciplinary as it draws on African studies, Law and Anthropology**.** According to Ajala (2013:12), the Yoruba make up about 77.8% of Yorubaland in Southwestern Nigeria where they are thickly concentrated, their culture, with regard to inheritance law described in this study, is still thriving, but as this study has shown, it is being affected by acculturation, incursion and loss of some historical values in various aspects.

The 22 Yoruba sub-ethnic groups (Ajala 2013:30) share some common and broad cultural identities, yet customary practices vary (Ewelukwa May 2002, 434). This makes a general rule or assumption, with regard to cultural practices, difficult. Underlying this, a comparative study of the customary practices of devolution of inheritance in the sub-groups is imperative. The study covered, 5 (five) States from Southwestern Nigeria, namely; Ekiti, Ogun, Ondo, Osun, and Oyo, with particular focus on selected sub-ethnic groups of Ekiti, Ekiti State; Ijebu in Ago Iwoye, Ogun State; Ikale in Okitipupa, Ondo State; Ijesa in Imesi Ile, Osun State; and Oyo in Ogbomoso, Oyo State. Although there may be a range of options available in devolving a deceased's estate, conceptually, the scope of this study is define around, and restricted to the two main modes of devolution of inheritance among the Yoruba of Southwestern Nigeria, namely, *8d7 igi* and *or7 0 jor7*. With consideration for possible temporal changes, there may also be the need to make comparison between what the practice of estate sharing was among the Yoruba, in both pre-colonial and post-colonial times, as well as review some legislative and judicial incursions that have impacted customary devolution practices of the people.

1.6 Justification of the Study

This study is significant because, as legal-anthropological research documentation which explored the generational changes of Yoruba customary law. It can be considered a legal-historical record to be referred to for the purpose of retaining or modifying customary practices to suit modern day realities and requirements as well as a veritable material in legal-anthropological discourse. The study is a response to specific contribution to testamentary substantiation within the context of African customary law. It also holds the assumption that the dearth or lack of adequate discourse, and indeed, judicial precedents, which sufficiently accommodate traditional African thought on devolution of estate should be of concern to modern day researches in view of emergent changes and development in Africans' adjustment to cultural realities around the world as these implicate testamentary disposition.

The intensive, holistic and comparative analysis of culture, together with its dynamics, and the influence of cultures upon each other is basically the discipline of anthropology. Therefore, it can only be expected that anthropologists should continue exploring, examining, evaluating and documenting the gradual changes, both obvious and not so obvious, that appear over time (Belshaw, 1972)[29]. As a result, it can be better understood now why studies, such as this, can enrich knowledge on inheritance matters in such a way as to further aid the development and integration of Yoruba customary law into modern day inheritance devolution practices.

Customary law regulates the lives of about 80% Nigerians[30]. The lives of majority of Nigerians are governed by customary laws, hence disposition of property are settled under customary law and many states do not have appropriate laws to deal with intestate succession. This has made the application of customary laws in the distribution of real and personal property inevitable. It is also the opinion of researchers, that the spate of changes across the globe, due to the great extent of cultural interactions, has necessitated the imperative of looking inwards towards the (re)formulation of a possible alternative method of helping prospective arbiters and/or

[29] Belshaw, C. S., Development: The contribution of Anthropology, International Social Science Journal, 1972 :83-94.

[30] Olubor, J. O., "Customary Laws, Practice and Procedure in the Area/Customary Court, and the Customary Court of Appeal" in National Judicial Institute, 2002 *Induction Course for newly appointed Judges* and *Kadis in Nigeria*, Ibadan, Pectrum, 2004, pp. 1-20 " p.1

adjudicators attain equity in matters of intestacy involving individuals of consanguine and affinal connections.

Other significant aspects of this study include:

i. The elaborate insight it offers into the history and development of Yoruba customary law and how it can be used to help in the formulation of socio-cultural developmental policies and programmes, as well as law reforms.
ii. How the Yoruba, as a people, can re-identify with their cultural heritage.
iii. How it offers itself in the form of an up-to-date literature on the pragmatic historical practices of the Yoruba inheritance modes as well as the development of the legal practice in Nigeria.

1.7 Limitation of the study

This study does not cover all aspects of Yoruba Customary law. It is limited to customary modes of inheritance among the Yoruba of Southwestern Nigeria, a customary practice that is very significant to them since majority of them are governed by customary laws in most of their dealings; hence the disposition of their real and personal properties are inevitably settled under customary law.

Other limitations are:

i) refusal of courts to allow audio or/and visual recording of proceedings, judicial officers' refusal to be tape-recorded or quoted
ii) cultural biases inhibiting women from openly condemning perceived injustice in their matrimonial homes
iii) selective memory (remembering or choosing not to remember) in respect of events or experiences that occurred at some point in the past
iv) attribution – attributing positive events and outcome to ones side and the negative to others or external agents.

All the above were alternatively tackled through the use of long-hand in recording court proceedings and interviews, subtle plea on the women who later voiced their minds but requested for anonymity, use of probes to elucidate the veracity of attributions and selective memory.

1.8 Definition of Terms

These are terms used, and the operational definition of their meanings within the context of the study. They are: equity, equality, family, agnate/agnatic, cognate/cognatic, *[m[8yq, [bzkan, 8d7 igi, or7 0 jor7,* Yoruba, *cb7, og5n,* testacy, intestacy and *ifq.*

1.8.1 Equity

The word "equity" may appear in three different contexts in African legal system. First is general equity which can mean fairness, which permits a judge to waive technicalities of English law (especially on the procedural side), to disregard substantive rules of law which would produce manifestly and substantially unfair result. Second is technical equity, or the body of rules formerly administered in the Court of Chancery. It has technical meaning denoting the law created by judges of the juridical English Court of Chancery which was administered in separate court, which as a result of the dichotomy grew up as an appendage of the common law and was made to fill the gaps where the remedies available at common law were inadequate to meet the need of justice on any particular matter. (Allott, 1970:160-161). Lastly, is the contextual equity which this study shall adopt, as it appears in the phrase "repugnant to natural justice, equity and good conscience" where it provides a controlling factor in the application of customary law. In the third case, equity functions negatively, by disallowing objectionable features of customary law[31].

The other contextual meaning of equity is fair and just. Equity in its broad sense is equivalent to the meaning of natural justice as it embraces all, if not all concepts of 'good conscience', but in its popular sense, equity is practically equivalent to natural justice or morality[32]. Most of these rules are not applied to cases involving customary law, though in some procedural matters (e.g. constructive notice, laches, etc.) recourse may be had to equity in common law for rules which are then applied to African cases.

[31] Allott, A., (1960) *Essays in African Law,* London: Butterworth's
[32] Ahmed and Shore Op. Cit.

In a rather general sense, the term equity suggests equal treatment of parties involved in a legal matter by an adjudicator, whether a judge in a modern court or an arbiter in a customary dispute, based on consideration by the arbiter of such factors as the social, ethnic, racial, or economic disparity of the parties. The contrast between general equity and technical equity is the fact that the latter is peculiarly English, whereas the former is universal. Equity is a universal concept, among the Yoruba for instance, the kind of legal rules that will satisfy their sense of justice must be one that is practical and capable of being construed as coinciding with social reality that will produce results that find favour within the community, and it is this that the study adopts.

There is a sense of 'equity' (in the sense of what is fair and just in the circumstances) in the traditional African administration of law and justice, in the settlement of disputes wherein, justice does not take the form of juridical battle between two or more skillful legal experts seeking the use of legal technicalities to undo one another, thereby beclouding the real cause of dispute. Adigun, O. (1987:3). For example, Yoruba chiefs will hold as immoral and unjust a man, who watched in silence another person planting cocoa or even erecting a building on his land, and then suddenly woke up and sue for the recovery of both the land and the improvements thereon[33].

The traditional 'equity' did not owe its origin to any ancient European theory of justice; evidence of such influence is non-existent. Equity had been known to the customary system of administration of justice, before the colonial era (Lloyd, 1962). For example, it has long been an established rule of customary law that 'the fact that someone has been using other people's land for some time does not make the land become his absolutely. Even the English doctrines of laches and acquiescence is not new to the customary legal regime, there is no possibility that a man can lose his land because he does not claim it in time. This is the customary law rule but where strict adherence to this rule will result in failure of justice, it may not be applied; in that case, equitable consideration will prevail[34].

[33] *Tobias Epelle v. Ojo (*1926) 7 NLR 96
[34]Lloyd, P. C., 1962.*Yoruba Land Law.* London: Oxford University Press @ p. 339

Few maxims of equity are provided below for more insight into equity as a term:

i. **He who seeks equity must do equity**[35]

The biblical injunction "do unto others as you would have them do unto you" has a place in equity by virtue of this maxim, it simply means the same measure you want others to use for measuring for you should be used in measuring for them since equity is fairness.

ii. He who comes to equity must come with clean hands[36] **or He who comes to equity must do equity**

A person seeking equity must not only do equity, but his hands must be clean as regards past activities, the conscience must be clear of bad faith. Equity is not only said but must be done. Anyone seeking equity must have displayed some equity[37].

iii. Delay defeats equity[38] **or Equity aids the vigilant**[39]

Timeous act of rejection will support any claim made in future and any form of delay will deny one of any right in future on the same matter. Equity is sought timeously, an indolent will have his rights trampled on despite the fact that he has a right in the issue, but once he exercises the right he possesses equity will aid him.[40]

1.8.2 Equality

'Equality is equity', this maxim means, whenever anything is to be distributed among persons and no specific mode of distribution is provided, the maxim is used to equalise the share of the parties. The application of this maxim means that the term "equality" is dependent on the social relationship of each society and personalities. Equality is the state of being equal, especially in status or rank, degree, value, rights and opportunities. A system that ensures that policies, procedures and processes are the same, there is no discrimination against certain individuals or groups, thus, making individuals or groups of individuals to be treated fairly and equally and no

[35] *Taylor v. Williams* (1936) 12 NLR 67
[36] *Brown v. Adebanjo* (1986) 1 NWLR 383
[37] *Ibid* @ p.394-395
[38] *Agaran v. Olushi* (1907) 1 NLR 66
[39] *Agbeyegbe v. Ikomi* (1953) 12 WACA 383
[40] *Op. cit. Agaran v. Olushi* @ p.67

less favourably, specific to their needs, including areas of race, gender, disability, religion or belief, sexual orientation and age.

1.8.3 Family

Using the *Shorter Oxford English Dictionary* and the case of *Okulate v. Awosanya*[41] as basis, family is conceived as the body of persons who live in one house or under one head, including parents, children, servant, and so on; and as the group consisting of parents and their children whether living together or not; and in a wider sense, all those who are nearly connected by blood affinity, and as those descended or claiming descent from a common ancestor; a house, kindred, lineage.

The term "family" has more than a meaning ascribed to it, depending on which clime the person comes from. In the English sense, it is sometimes restricted to a smaller group consisting of the man, his wife and the issues, meanwhile, among the Yoruba it may be extended to the dependents who live with him. This is known as nuclear family unit. Sometimes, family includes not necessarily the wife and issues of a man, but extends to others whose closeness are not too distant but have ancestral blood relationship, this is known as the extended family unit. This family concept is commonly known as *cb7*, it may be *cb7 8yq l-k6nrin* (maternal male members) *cb7 8yq l9b8nrin* (maternal female members), *cb7 bzbq l-k6nrin* (paternal male members) *or cb7 bzbq l9b8nrin* (paternal female members), as it extends to mother in-laws and father in-laws, brothers and sisters, uncles, aunts, cousins, nephew and all relations by blood or marriage. Thus the extended family unit is usually a large family unit among the Yoruba.

At a much legal scale, family is understood as the legal standing or position of a person as determined by his membership of some class of persons legally enjoying certain rights or subject to certain limitations. This, as stated in *Okulate v. Awosanya*[42] earlier cited, has implication on the meaning of 'family status.' This means that from a combination of the definitions above, 'family status' must be the standing or position of a person within a class of persons constituting a family. Family status means social and legal position of an individual to the rest of the members of the

[41] (2001) 1 SCNQR, 149
[42] *Ibid*

family. Thus one has to be a member of a family before acquiring a status within the family.

1.8.4 Agnate/agnatic

An agnate is a relative who is descended from a man who is also the ancestor of other relatives, especially through the male line. 'Agnatic' is an adjectival derivative.

1.8.5 Cognate/cognatic

A cognatic descent group consists of all persons tracing descent in male, female and mixed lines from the same parentage.

1.8.6 *{m[8yq*

{m[8yq is understood in the context of Yoruba culture as the smallest unit of kin, made up of children of one mother in a polygamous marriage. Although *[m[8yq* could also imply children of one woman by different fathers, the former meaning is more likely to be recurrent in usage in this work.

1.8.7 *{bzkan*

{bzkan refers to children of one father from different mothers. In a polygamous family, children of one *[m[8yq* bear relationship of *[bzkan* to one another.

1.8.8 **d7 igi*

A literal realisation of this term will yield the meaning 'base of a tree'. However, the *8d7 igi* system is in this project deployed as found, recognised and practised among the Yoruba, or within Yoruba customary law, as a system in which the estate is divided *per stirpes*, that is equally among the mothers who are wives of the deceased, with the children taking their portions through their respective mothers.

1.8.9 *Or7 0 jor7*

By the same token, a literal meaning of this term will translate as 'no head is bigger than the other.' Thus, the *or7 0 jor7* system is also used in this work as found, recognised and practised among the Yoruba, or within Yoruba customary law, as a system of estate devolution in which property is distributed *per capita* among the children of the deceased.

1.8.10 Yoruba

One of the factors of identifying a group of people from other groups is the language (usually called the mother tongue). With some common features one can distinguish the language and its speakers. Among the Yoruba, homonyms are very common and determined only by the accent given to them. Examples of few homonyms will be used here:

Word	**Meaning**
)j0	rain
Ojo	coward
)j9	name of a person (not used among Ijebu)
[lq	honour
[lz	wealth
=la	tomorrow
[lq	name of a person or town
Od9	mortar
Od0	river
)do	zero
Il3	house
**l3*	layer or additional
Ow9	money
)wo	horn
)w0	trade

Another feature is seen in Yoruba greetings and expressions for most if not all occasions, start with c k5 (plural), o k5 (singular). Yoruba constantly greet one another and they have greetings for almost all conditions of life:

c k5 0w5r=	in the morning
c k5 =sqn	in the afternoon
c k5 al1	in the evening
c k5 ix1	while working
c k5 er3 'xe	while playing/leisure
c k5 oh6n	while singing or delivering a speech
c k5 8r8n	while walking or travelling
c k5 8d5r9	while standing

c k5 8j9k9	while sitting
c k5 ok=	while in the vehicle or in the boat
c k5 or7re	for goodluck or the blessing of any kind
c k5 =f=	for sympathy in grief[43].

In spite of these common features in the language, dialectical differences still exist, though the dialectical differences may not disrupt mutual intelligibility, it only breed identification. Thus in the course of historical development, people became known particularly to outsiders by their sub-group identities such as Ife, Oyo, Ekiti, Owo, Ondo, Egba, Ijebu, Ilaje, Akoko, Yagba, Ijumu, etc[44].

Within the scope of this work, Yoruba is conceived as the people, the language and the culture. However, because this consideration also implicates the Yoruba in diaspora, it is thought wise to limit the signification of the term to the Yoruba of Southwestern Nigeria. This is deemed fit due to the reality of a higher dimension of acculturation of members of this ethnicity as settled in other parts across the globe.

1.8.11 *Cb7*

Although *cb7* might logically be considered as a linguistic equivalent of 'family' in English, it stands to reason that 'family' is an unstable category as it tends to be perceived discretely by the law (statutory law) and by culture; hence the need to retain the cultural essence of the term. *Cb7*, therefore, is commonly used by the Yoruba, not only to denote both the patrilineage and the cognate descent groups but also by an individual to denote all his relatives. Though to Lloyd, the term is as imprecise as the English word 'family', in context and meaning, but *cb7* in the cultural sense holds a rather semantic precision in contexts of usage, making its meaning clearer.

1.8.12 *Og5n*

Og5n in Yoruba means either *twenty* or *inheritance*. *Og5n* in terms of number in Yoruba belief system is believed to be a dividable figure which represents equity in its divisibility. Twenty could be divided for 20, 10, 5, 4 or 2 persons equally without acrimony.

1.8.13 Testacy

[43] Koelle, S.W., 1963. *Polygotta Africans* . London: Church Missionary House
[44] Falola, T., and Genova, A., 2006. (Eds), *Yoruba in Transition.* Durham: North Carolina, USA

This refers to a situation where a deceased person dies having written a Will, which must conform to strict rules of Wills writing. In writing the Will, wishes regarding the disposal of the deceased property and other rights or obligations are expressed. The person making the Will (testator) is expected to name an executor and the beneficiaries of the estate. The main strength of the rules of testate succession is that they allow a person to dispose of his/her property as he so wishes.

1.8.14 Intestacy

This, as opposed to testacy, refers to a situation where a deceased person dies having nothing written to express his/her wish regarding the disposal of his/her property and other rights or obligations.

1.8.15 *Ifq*

Ifq refers to the system of divination, and the verses of the literary corpus are known as *odẹ ifq*. Yoruba religion identifies *ifq* or Òrunmila as the Grand Priest, who revealed oracle divinity to the world. *Ifq* originated in the form of a religious system, and is celebrated in traditional African society. Yoruba consult *ifq* to receive instructions through divination on inheritance issues.

CHAPTER TWO

LITERATURE REVIEW AND THEORETICAL FRAMEWORK

2.0 Introduction

This chapter reviews existing relevant literature and examines what scholars have written on the subject matter of this study. The importance of this is that, the research will not be in isolation of what previous studies have done on the subject matter. With the knowledge of previous contributions in the field of African Law, the researcher is able to analyse the documents containing significant information on the subject of discuss.

This review includes a cursory look on the received English law, administration of estate laws, customary law, proof of customary law, repugnancy tests, conflict of laws, Yoruba legal system, marriage, Yoruba land tenure system, notion of family property, its creation and alienation, testate and intestate succession, personhood and inheritance, Yoruba kinship and inheritance devolution, inheritance and religion, customary modes of inheritance and English testament, modernity in cultural inheritance practices, Wills under customary law, customary modes of inheritance, *8d7 igi and or7 0 jor7.*

2.1 Received English Law

Reception of English law in Nigeria dates back to 1863 when ordinance No.3 of 1863 introduced English law into the Colony of Lagos[45]. Uwais CJN (as he then was) in *Attorney General of the Federation v. Attorney General of Abia State*[46]said:

> Historically, the British ruled their colonies by introducing English laws to the colonies. Most of the colonies in Africa including Nigeria, were either conquered or ceded colonies or protectorates and trust territories. English law was introduced in those colonies by express enactment, the legislation provided for the introduction and observance of English law. Such legislation were made by the crown by order-in-council, acting by virtue of prerogative, or powers conferred by the British Settlements Act, 1887 (for settlements) and by the Foreign Jurisdiction Act, 1890 for protectorates, protected states and trust territories, that is the former mandated territories. In the alternative, English law was introduced by the colonial legislature by means of local legislation-through ordinances, proclamations, acts etc. by virtue of the powers granted to such legislature by the crown. English law

[45] Adebayo, M.A., 2014.*Cases & Materials on Nigeria Legal System,* Lagos: Princeton Publishing Co.
[46] (2002) FWLR (pt.102) 1

> was introduced into West African territories (Ghana and Nigeria) by this means. In this case the authority for the application of English law is to be found in such enactment as the Supreme Court Ordinance of Nigeria…the amount of law received was the Common law, doctrines of equity and statutes of general application.[47]

On the same issue, Ogundare JSC submitted:

> …With profound respect to learned counsel. I cannot accept this submission. Common law has been received law in this country since 1863 when it was applied to Lagos and 1914 when by the Supreme Court Ordinance of that year; it was applied to the colony and protectorate of Nigeria.[48]

In the case of *Folarin v. Durojaiye*[49]Oputa JSC (as he then was) stated:

> "…Our colonial contact with England exposed us to the English common law and statutes of general application. There is nothing wrong, nothing to be ashamed of; or apologetic about, our assimilation of the positive aspect of the received English law into our corpus juris. After all English law itself was highly coloured and radically influenced by Roman law concept as England was once a Roman colony and the American Restatement bears visible scar and easily discernable marks of its English common law origin".

Common law is the part of the law of England formulated, developed and administered by the old common law courts, based originally on the common customs of the country, and unwritten. It is different from equity administered by the court of Chancery; it is also different from statute law, laid down by the Parliament; it is not the same as such laws as ecclesiastical law or the merchant law.[50] The received English law in Nigeria is a combination of both Common law of England and the doctrine of Equity received by virtue of local statutes that permitted the application.

According to Malemi,[51] the local statutes which received English law for application in Nigeria included:

1. Ordinance No.3 of 1863 which introduced English law into Lagos Colony;
2. Supreme Court Ordinance No. 4 of 1876 which applied to Lagos Colony; Supreme Court Proclamation Ordinance No.6 of 1900; and later the Supreme Court Ordinance No. 6 of 1914, now the Supreme Court Act 2004.

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[47] *Op. cit.* Malemi
[48] *Ibid*
[49] (1988) 1 NSCC 255
[50]Osborn's Concise Law Dictionary (Eight Edition)
[51] *Op. cit.* Malemi @ p.46

3. Court of Appeal Act and Federal High Court Act
4. The High Court Laws of the Regions, now States
5. Interpretation Act[52]

2.2 Administration of Estate Laws

Marriage Act governs intestate succession to the estates of persons who are married under the Act. Section 36 of the law says, such persons must be subject to customary law and must have been survived by a spouse or child of that marriage. Three of the States of this study were created in 1976 from the defunct Western region: Ogun, Oyo and Ondo States, the 1959 Administration of Estates Law[53], in use in the then Western Region became part of the laws of the newly created States. Upon the additional creation of Osun from the old Oyo and Ekiti from the old Ondo States in 1991, and 1996 respectively, the Administration of Estates law in use in the States from where they were created became applicable in the two States also. Consequent upon the aforesaid creation, these states legislative powers in respect of succession became vested in their states assemblies. In effect, the same statute, the Administration of Estates Law, 1959 which was applicable to the five states of Lagos, Ogun, Oyo, Ondo and Bendel in 1976 now applies to the five states under study- Ekiti, Ogun, Ondo, Osun and Oyo States. The Administration of Estates law, 1959 in question does not apply to any death which occurred before 23rd April, 1959, when the law actually commenced,[54] it will also be inapplicable where the distribution, inheritance or succession of any estate is governed by customary law. It is immaterial whether the estate is administered under the 1959 Law or under the authority of a customary court.[55]

On the authority of the decision in *Cole v. Cole*[56], the law may apply, where a monogamous marriage was celebrated abroad, and on the authority of *Administrator General v. Egbuka*[57]if the marriage was contracted in accordance with the Act, section 36 of the Marriage Act may apply. Otherwise, the rule of customary law will apply. Meanwhile, in *Aidan v Mohssen*,[58] the court held that the Moslem law binding

[52] Cap I. 23, 2004 s.32
[53] *Op cit.* Sagay.
[54] Section 1(2)
[55] *Olowu v. Olowu* (1985) 3 NWLR 372.
[56] (1989) 1 NLR 15.
[57] (1945) 18 NLRI
[58] (1973) 1 All NLR 86.

the parties applied to the administration of the leasehold of a Lebanese Moslem who died intestate leaving leasehold property in Warri, Bendel State. The *lex situs* was agreed in the matter to govern the leasehold classified as immovable for the purposes of conflict of laws. The trial judge found that the applicable law was the Moslem law of Lebanon and not the Administration of Estates Law of the Midwestern State, because the distribution of intestate estate under Section 49 of the Law applies only where the parties are married in accordance with the Marriage act. Whereas, the parties to this dispute were Lebanese Moslems who were married in accordance with Moslem law.

On appeal, the Supreme Court approved the judgment below, and observed thus:

> It follows, therefore, having regard to our own built-in rules in section 20 of the Customary Court Law governing the choice of law in the application of the *lex situs* to the succession to the intestate estate of a deceased person in Warri, the applicable law is not the Administrator of Estates law (Cap I); but the (Moslem) Customary Law of Lebanon which is the one binding between the parties (section 20 (3) (a) (I) of the Customary Law). We are of the view that, in this context, customary law is any system of law not being the common law and not being a law enacted by any competent legislature in Nigeria but which is enforceable and binding within Nigeria as between the parties subject to its sway. We are of the view that anyone subject to any such law is excluded from the operation of section 49 of the Administration of Estates Law (cap.1) of Western Nigeria 1959 applicable in the Mid-Western State of Nigeria.

Section 49 (1) of the Administration of Estates Law lays down the rules of succession to real and personal property on intestacy thus:

> (i) If the intestate leaves a husband or wife but no issue, parent, brother or sister of the whole blood, the residuary estate will be held in trust for the surviving husband or wife absolutely.
>
> (ii) If the intestate leaves a husband or wife and issue (with or without parent, brother or sister) the surviving spouse will take the personal chattels absolutely. In addition, the residuary estate of the intestate will be charged with the payment of a net sum of money equivalent to the value of one-third of the residuary estate, free of death duties and costs, to the surviving spouse, with interest at the rate of two and half per cent from the date of the death until the sum is paid or appropriated. Besides the provision of the said sum and interest thereon, the residuary estate (less the personal chattels) will be held as to one-third on

trust for the surviving spouse during his or her life and then on statutory trusts for the children of the intestate. The remaining two-thirds will be held on statutory trusts for the issue of the intestate.

(iii) If the intestate leaves a husband or wife and parent, brother or sister of the whole blood but no issue, the distribution is as in (ii) above. But after the payment of the stipulated net sum and interest thereon, the residuary estate (less the personal chattels) is to be held as to one half in trusts for the surviving spouse absolutely. The other half is to be held in trust for the surviving parent or parents, or where no parent survives, on statutory trust for the brothers and sisters of the intestate.

(iv) If the intestate leaves issue but no husband or wife, the residuary estate of the intestate will be held on statutory trusts for the issue of the intestate.
In the absence of any person taking an absolute interest under the rules discussed above, the residuary estate of the intestate will devolve on the State as bona vacantia. But the State may out of the property devolving on it provide for the dependants of the intestate.

(v) Where property is distributed on intestacy among the children of the deceased equity presumes that the father intends to preserve the family harmony by giving to his children almost equal portions. This principle is laid down in Section 50(1)(iii) of the Administration of Estates Law 1959.

The law expressly stated matters to which it does not apply; the law does not apply to the estate of a deceased person which is either under the authority of a Customary Court or the distribution of which is governed by customary law.[59] The law applies where a person who is subject to customary law contracts a marriage under the Act. Such a person must have died intestate, even where the deceased intestate is not survived by a widow, widower or a child of the marriage. His or her residuary estate is subject to distribution under this law to his or her extended family in the order specified under the law[60].

[59] S.1 (3)
[60] Onokah, M.C., 2012 *Family Law,* Ibadan: Spectrum Books

2.3 Customary law

Law, according to the *Osborn's Concise Law Dictionary* (English Edition) is:

> … an obligatory rule of conduct. The commands of him or them that have coercive power (Hobbes). A law is made of conduct imposed and enforced by the sovereign (Austin). But the law is the body of principles recognised and applied by the state in the administration of justice (Salmond). Blackstone, however, maintained that a rule of law made on a pre-existing custom exists as positive law apart from the legislator or judge p. 94.

Roscoe Pound[61] defines *law* as a social institution to satisfy social wants, - the claims as demands involved in the existence of civilised society – by giving effect to as much as we may least sacrifice. However, because law, in a more encompassing view, is not applicable only to what Pound calls 'civilised society', one is prompt to note that, prior to the existence of 'civilised' societies, law had been understood to be integral to the rubrics of traditional societies, whether in Africa or elsewhere.

Customary law is unwritten, it has the recognition and acceptance of the community as one that should govern its transactions and code of behaviour in any particular matter as it owes its authority to the fact that the custom has been established prior to the existence of 'civilised societies'. Customary law is the body of customs which from long usage have acquired the force of law among a people, to regulate their affairs, while perceived inimical behaviour among the people are properly sanctioned.

The Evidence Act[62] defines custom as:

> A rule which in a particular district has from long usage obtained the force of law

Obaseki, J.S.C (as he then was) defined customary law in the case of *Oyewumi v. Oyewumi*[63]as:

> The organic or living law of the indigenous people of Nigeria regulating their lives and transactions. It is organic in that it is not static. It is regulatory in that it controls the lives and transaction of the community subject to it. It is said that custom is a mirror of the culture of the people. I would say that customary law goes further and imports justice to the lives of all those subject to it.

[61] Pound, R., 1933 *Modern Theories of Law* : London
[62] Evidence Act 2004, s.2
[63] (1990) 3 NWLR (pt.137) 182 @ 202

According to Malemi[64], Customary law is the people's law springing directly from their consciousness and molded to their own desires and practices. Whereas, English law is an imposed and alien code, imperfectly corresponding to African structures and aspirations. The differences in origin, principles and methods of the indigenous legal institutions and the received English law in Nigeria created the divide; but the source of the laws, whether African or European, is the same. Though the issue of origin, principles and methods are no longer relevant because received laws were enacted as part of our own laws, some have been modified and others rejected. By the singular act of rejection or choosing any part of the received law, it has become our own law.

The unwritten nature of customary law makes it flexible and adaptable and it is one of its enduring qualities, as it has its existence and essence in the rule of conduct, obligatory on those subject to its sway, and established by long usage. Further, it is rooted in a valid (African) custom that is typically and often of immemorial antiquity, certain and reasonable, obligatory yet not repugnant to the average mind within the cultural context of its application. It is a law not frozen in time but a dynamic living law that responds to actual needs and sentiments of the time and place, since the purpose of law is to fulfill human wants, and this is found in customary law.

In the words of Osborne, C.J in *Lewis v. Bankole*-[65]

> ... one of the most striking features of West Africa native custom, to my mind, is its flexibility; it appears to have been always subject to motives of expediency, and it shows unquestionable adaptability to altered circumstances without entirely losing its individualistic characteristics.[66]

In Nigeria, customary law may be conveniently divided into two classes: ethnic and Islamic. Islamic law is a religious law based on the Moslem faith and applicable to members of the faith who choose to be so guided by it. It is in written form and rigid because of the belief that it is a divine instruction, though scholars are of diverse opinion on the proper classification of Islamic law. The position today that has not changed is the fact that Islamic law is part of customary law in Nigeria. Ethnic customary law, on the other hand, is unwritten and varies from one ethnic group to another. Since customary law is flexible and accommodating in its application and

[64] *Op. cit.* Malemi @ page 27
[65] (1909) 1 N.L.R 81@ p. 103
[66] *Ibid* @ p. 100-101.

responds gradually to modern day challenges, one cannot but, agree with those agitating for a re-classification of Islamic law which is not flexible in any sense.

Among the Yoruba it is believed that *cni bq yq [k- ol9k6nr6n r'oko, k87 f1 k7 ol9k6nr6n 9 y4* (One who borrows the hoe of a sick farmer may not pray he recovers), hence the legal system was regarded as not meeting the standard set by the colonialists for a legal system, so, they agreed to observe and enforce customary law which to them "is applicable and not repugnant to natural justice, equity and good conscience nor incompatible either directly or by implication with any law for the time being in force", however, its application depends on sufficient proof since it is unwritten and it varies from one place to another.

Furthermore, customary law is the dynamic rule rather than the static, providing the guiding principles of interrelationship between one generation and the next. It is the mirror of accepted usage which exists in the hearts and minds of its adherents as communicated by ancestors and carried on through oral tradition. As aptly observed, "there is no written memory of the edicts and judgment. They exist only in the minds of those who administer and those who are subject to the customary law. It is flexible and adaptable to changing circumstances and society There is no pondering over legal principles, no juristic analysis, no critics or refurbishing of old precedents, all of which depend on written texts which the justice may scrutinise at leisure.[67] The customary laws of an area sum up the beliefs, social institution and religion that makes a community or a people unique because it differ from place to place and no one practice can be said to be inferior or superior to the other. This is why it is virtually impossible to replace one culture with another. One unique value of the Yoruba customary law is that it is humane and allows for true bonding in the family, with emphasis on unity which is the social fabric of the Yoruba family.

Just as the Constitution of the Federal Republic of Nigeria (1999) has also changed several times to accommodate modern changes, the social, political and economic life of the Yoruba have also changed with time and they have in some ways modified customary practices greatly. While some old practices and customs have disappeared, new ones have appeared to deal with new situations. In his own engagement and

[67] Allot, A.N., 1970. *Essays in Africa Law*. London: Butterworth's @ pp. 61-62

explication of law in traditional Africa, Adaramola (1991) makes some relevant allusion to Alan Watson who had earlier pontificated that:

> … the nature of custom is quite unlike that of any source of law. Other kinds of law making are at least in form, imposed on the populace from above; custom represents… what the people do [and accept] as having the effect of law.

Hence, in line with the above stated, Oyewo (2003) accords as to the fact that, binding African customs are the unwritten usages and practices of the people in an African society. What is then known as 'African customary law' is the recognised operative normative system in traditional African societies. Adaramola (1991:69) says, customary laws are binding on all indigenes and non-indigenes living in the native area in certain circumstances, and in some cases, on indigenes in diaspora. In the particular example of Nigeria, according to Adaramola, there are three discernible streams of customary law. There is the type which binds both indigenes and non-indigenes in their area of operation, such as customary rule relating to land; that is, *ratione loci* (by reason of its being attached to the geographical area concerned). A second type is said to bind indigenes only whether they live in their home areas or outside it, such as customary law relating to succession, marriage and widowhood. This type operates extra-territorially upon the affected people, *ratione personae* (that is, by reason of what it attaches to their persons). Finally, a third type is said to bind indigenes only when they live in their native area but not otherwise; for instance, such regulates the monarchical institution or the traditional role of women in society, and so on; that is, *ratione loci et personae* (that is, by reason that it attached to the area and concerned native inhabitants).

When situate within the context of this disquisition, one may have reasons to contest the submission of Adaramola who is of the view that the fact that a rule of ethnic customary law may be voidable in certain circumstances weakens the customary law system and may, in the course of time, completely stifle it, especially because generally education spreads with the irresistible and increasing tempo of urbanisation. Although this point of view (with regard to widespread of education and urbanisation) has been evidenced by Kristin Mann in *Marrying Well*, a differing perspective would be to see the possibility of customary laws of Africa being further augmented through

the cultural consciousness of educated Africans whose levels of awareness can be said to straddle two worlds – Africa and, especially, the West.

This is particularly true even in the twenty-first century when Africans, whether well read (as in the case of African elites) or moderately educated, have relatively stable awareness or understanding of the 'global culture', and therefore might be able to locate areas in their own customary laws where the principle of hybridisation (of their customs and compatible foreign values) may be adjudged applicable. In this case, therefore, rather than having the Ibo customary law 'ousted', as in the case of *Okolie v. Ibo*[68], a middle ground could be found to accommodate the two possible sides (or kinds) of law to attain balanced adjudication.

Customary Courts in some cases are also known as Native Courts. All Customary Courts are courts of record. They exist in all the states of Southwestern Nigeria, and the extant Customary Court Law of the different states of Southwestern Nigeria are deemed to be existing laws by virtue of the clear provisions of the Constitution[69]. The Constitution protects such laws and are deemed to be properly enacted by their respective State Houses of Assembly[70]. Customary courts are to dispense justice in matters relating to customs in the area[71].

The existence of Customary Courts in Southwestern Nigeria is to do justice in matters within the ambit of customs and tradition of the people. This position was articulated in the case of *Ehigie v. Ehigie*[72], when the Court x-ray the powers of customary courts in simple terms that:

> Customary Courts have their practice and procedure as embodied in the Customary Courts Law and Rules of the State in the country where they are applicable. By virtue of the nature or form of customary laws they relate to the traditional unwritten law of the people handed down from generation to generation. Where members of the Courts are familiar with the custom of a community they can apply it without first requiring evidence.

[68] (1958) NRNLR. 89.
[69] *Op. cit* 1999 Constitution @ S.315.
[70] *Ibid* @ (1)(a)(b).
[71] CAP E14, 2004
[72] (1961) 1 NMLR

However, legally admissible custom must not be repugnant to natural justice, equity and good conscience. This was endorsed in the case of *Arum v. Nwobodo*[73], where the court espoused the principles governing proceedings of Customary Court as follows:

> ... The cardinal principle governing the Court's proceedings is the attainment of substantial justice based on the reasonable practice, tradition and custom of the local people.

2. 4 Proof of Customary Law

The unwritten nature of customary law and its flexibility have implications for its acceptability. Unlike the received English law that is within the knowledge of the judge and the contemplation of the courts; customary law is regarded as a matter of evidence to be proved in individual cases before it can be accepted and applied by courts. And, of course, as stated in the Evidence Act[74], 'A custom may be adopted as part of the law governing a particular set of circumstances if it can be judicially noticed or can be proved to exist by evidence,' and in addition, the same Act goes further to state that even 'Where a custom cannot be established as one judicially noticed, it shall be proved as a fact.' Its unwritten nature and its acceptance has to be tested against actual application by those whose lives and affairs it governs.

Customary law is a law because the people accepted the rules and codes of behaviour laid down by their customs. It was the genuine acceptance of customs that gave it the toga of law as opposed to English law, statutes and so forth. For a custom to now be accepted as law, the colonialists laid down what is now known as validity tests which a custom must pass, and the validity tests say that a custom must not be repugnant to:

i. Natural Justice
ii. Equity
iii. Good conscience
iv. Public policy; nor
v. Incompatible with any law for the time being in force

Where customary law has satisfied the above conditions, does the Act apply to proof of its Evidence in Customary Courts? In answering this question, an attempt at

[73] (2004) 9 NWLR (pt 878) 411
[74] *Op. cit.* CAP E14

knowing the meaning of Evidence in law will be attempted, while the historical analysis of the Evidence Act will be dealt with also.

Meanwhile, the Oxford Advanced Learner's Dictionary[75], sees Evidence as information that gives a strong reason for believing something or proves something. Evidence therefore, is the existence of facts required for the proof of an issue. The reason for evidence is to show the existence of facts and the proof of same, Evidence has been conceptualised as:

> The means by which any alleged matter of fact, the truth of which is submitted to investigation is established or disproved[76].

Judgments are based on available facts and the reasoning for requiring evidence is to adduce facts. Facts are the fountain of law. All substantive principles of law are useless without the existence of facts,[77] and legal actions cannot be successfully predicated on such principles in Court. The proof of fact is predicated on the proof of Evidence in any matter before the Court of law. A fact being anything capable of being perceived by the sense cannot be allowed to be treated anyhow, so the provision of the Evidence Act[78] as laid down for the proof of a fact or otherwise should guide us:

> A fact is said to be:
>
> (a) 'proved' when, after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, in the circumstances of the peculiar case to act upon the supposition that it does exist;
> (b) 'disproved' when after considering the matters before it, the Court either believes that it does not exist or considers its non existence so probable that a prudent man ought, in the circumstances of the particular case, to act upon the supposition that it does not exist,
> (c) 'not proved' when it is neither proved nor disproved.

[75] 5th Edition (Edited by Jonathan Crowther).
[76] Will's Circumstantial Evidence (7th Edition, 1937), page 2, quoted in P.B. Carter's "Cases And Statutes Of Evidence (2nd Edition, 1990), page 3.
[77] Osadolor, F. O., & Bazuaye, in Evidence Act and its Applicability to Customary Courts in Nigeria: Quo Vadis? www.nigerianlawguru.comRetrieved September 16th, 2014
[78] *Op. cit.* CAP E14 @ S. 2(2)(a),(b),(c).

Authorities abound on the meaning of Evidence in law, and few of such shall be consider here:

Cross[79] sees Evidence as:

> The testimony, hearsay, documents, things and facts which a Court will accept as Evidence of the facts in issue in a given case.

Phipson[80], in his work on Evidence submits that Evidence is:

> The testimony whether oral, documentary or real, which may be legally received in order to prove or disprove some facts in dispute.

Nokes[81], explains judicial Evidence to consist of:

> Facts which are legally admissible and the legal means of attempting to prove such facts.

Oputa J.S.C. (as he then was) in the case of *Emmanuel M. O. Chukwuogor v. Richard Obigiabo Obuora*[82]explains thus:

> In its broadest sense, Evidence encompasses and includes the means employed for the purpose of proving a disputed fact.

From all the above, Evidence is the means by which any alleged matter of fact is proved or disproved. Whereas, the law of Evidence encompasses the legal rules regulating Evidence. It is submitted therefore that no course or matter succeeds in any trial without proof of Evidence. A Judge whose main responsibility is to adjudicate on the rights and duties of parties, listens to the testimonies or evidence of the witnesses, sees their demeanor and general comportment in the witness box. The Judge whether in an English court or in customary matter therefore determines the liabilities or otherwise of parties on the basis of the Evidence placed before it.

Evidence is the fountain of the law, the in-road to the success or otherwise of any form of litigation. Murtala Aremu Okunola (J.C.A.) (as he then was) has this to say in *Oluwole v. Abubakare*[83]:

> Although a Court of law is not an investigative body, it is empowered to evaluate evidence of facts tendered before it.

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[79] Cross on Evidence, 4th Edition.
[80] Phipson's Evidence, 11th Edition.
[81] An Introduction to Evidence, 4th Edition.
[82] (1987) 3 N.W.L.R., Pt. 61, 454, 477 – 478.
[83] (2004) 10 N.W.L.R., Pt. 882, 549.

In the wisdom of the draftsmen of the Evidence Act[84], the Act[85] says:

> Court includes all Judges and Magistrates and except Arbitrators, all persons legally authorized to take evidence.

From the quoted passage of the act, it appears that anyone or body of persons performing judicial or quasi judicial functions and empowered to take evidence would automatically fall within the ambit of the definition of a "court". This was interpreted differently by the Supreme Court in *Denloye v. Medical & Dental Practitioners Disciplinary Committee*[86]where it says:

> ... we are of the opinion that it would be wrong for any court to take this view. Any enquiry cannot be looked upon as proceedings in court and unless there is relaxation of the ordinary rules with which the courts are bound, it will be difficult in many cases to conduct an enquiry.

However, the proper definition of court is found in the provision of Section 6 (1) and (5) of the Constitution[87], which has on its side note "judicial powers", where courts in Nigeria were clearly identified as follows:

> Section 6(1):
> The Judicial Powers of the Federation shall be vested in the courts in which this section relates, being Courts established for the Federation;
>
> Section 6(5):
> This Section relates to: -
> (a) the Supreme Court of Nigeria;
> (b) the Court of Appeal;
> (c) the Federal High Court;
> (d) the High Court of the Federal Capital Territory, Abuja,
> (e) a High Court of a State;
> (f) the Sharia Court of Appeal of the Federal Capital Territory, Abuja;
> (g) a Sharia Court of Appeal of a State;
> (h) the Customary Court of Appeal of the Federal Capital Territory, Abuja;
> (i) a Customary Court of Appeal of a State;
> (j) such other Courts as may be authorized by law to exercise jurisdiction on matters with respect to which the National Assembly make laws; and

[84] *Op. cit.* CAP E14
[85] Section 2(1) Evidence Act.
[86] (1968) 1 All N.L.R., 306.
[87] *Op cit*. Constitution of Nigeria

(k) such other Court as may be authorized by law to exercise jurisdiction at first instance or on appeal on matter with respect of which a House of Assembly may make laws.

A historical analysis of Section 1(2) of the Evidence Act[88] which was amended by Evidence (Amendment) Decree No. 61 of 1991[89] laid to rest arguments as to its applicability. It is therefore pertinent to examine the Evidence Act[90] in a historical perspective with reference to its Section 1 (2) (a) (b)[91] which is so fundamental to this argument. The old order was as stated in the 1990 Laws of the Federation,

Section 1(2)

This Act shall apply to all judicial proceedings in or before any court established in the Federal Republic of Nigeria, but it shall not apply: -
(a) to proceedings before an Arbitrator or
(b) to a field general court martial

There came an amendment to the Evidence Act[92] by Decree No. 61 of 1991[93] which commencement date as per the amendment was 1st of January, 1990. The relevant provisions as amended are set below:

Section 1(2)

This Act shall apply to all judicial proceedings in or before any court established in the Federal Republic of Nigeria, but it shall not apply: -

(a) to proceeding before an Arbitrator, or
(b) to a Field General Court Martial, or
(c) to judicial proceedings in any civil cause or matter, in or before any Sharia Court of Appeal, Customary Court of Appeal, Area Court or Customary Court unless the President, Commander-in-Chief of the Armed Forces or the Military Governor or Military Administrator of a State, by order published in the Gazette, confers upon any or all Sharia Courts of Appeal, Customary Courts of Appeal , Area Courts or Customary Courts in the Federal Capital Territory, Abuja, or a State as the case may be, power to enforce any or all the provisions of this Act;

[88] Cap. 112 LFN., 1990
[89] Decree No. 61 of 1991 is now an Act deemed to have been duly enacted by the National Assembly by virtue of the provisions of Section 316 of the Constitution of the Federal Republic of Nigeria, 1999.
[90] *Ibid*
[91] *Ibid.*
[92] *Ibid.*
[93] *Op. cit.* Constitution of Nigeria

> (3) In judicial proceedings in any criminal cause or matter in or before an Area Court, the Court shall be guided by the provisions of this Act and in accordance with the provisions of the Criminal Procedure Code Law;
>
> (4) Notwithstanding anything in this section, an Area Court shall, in judicial proceeding in any criminal cause or matter be bound by the provisions of Sections 138, 139, 140, 141, 142 and 143 of this Act.;

The position of the law after the amendment Act is now clear and different from the position before the amendment that became operative on the 1st of January, 1990, and the provisions[94] are unambiguous as to where Evidence Act shall apply. The law says, it will be applicable:

> to all judicial proceedings in or before any court established in the Federal Republic of Nigeria.

The Act unequivocally states its areas of coverage as, all judicial proceedings in or before any Court established in the Federal Republic of Nigeria, but, it does not apply to proceedings before an arbitrator, or to a field general court martial, and it provided the exceptions also. The amendment incorporated an additional paragraph to Section 1(2) of the Act, which is now Section 1(2), paragraph (c), which now make the Customary Court of Appeal, Sharia Courts of Appeal or Area Courts, to enforce any or all the provisions of the Evidence Act when the Governor or President as the case may be, confers power on the courts so to do only.

In the case of *Adeyemi Ogunnaike v. Taiwo Ojayemi*[95]the Supreme Court took this view, when it held, per Kawu J.S.C. (as he then was):

> now in my view, the clear wordings or provisions of Section 1(4)(c) of the Evidence Act leaves no room for any doubt that the provisions of the Act do not apply to judicial proceedings before Native Courts ... as there is no evidence to show that the Act was made applicable to the trial Customary Court when it gave its judgment. I am of the view that the Court of Appeal was right in their decision that the appellate High Court was in error to have applied the provisions of Sections 45 and 54 of the case.

[94] *Op. cit.* Evidence Act. @ S. 1(2) (a) & (b)
[95] (1987) 1 NWLR., Pt. 53, 760.

Obaseki J.S.C.[96](as he then was), concurred with the lead judgment of Kawu J.S.C. (as he then was) thus:

> it is erroneous to argue that the provisions of the Evidence Act applies to Customary Court when the Evidence Act has expressly exempted the application of the Act from judicial proceedings before a Native Court.

The Supreme Court of Nigeria restated the position of the law in the case of *Chief Awara Osu v. Ibor Igiri & 3 Ors*.[97] When Belgore J.S.C. (as he then was) delivering the leading judgment held:

> the Governor of South-Eastern State of former Cross River State was not known and never conferred this power on district Court or Customary Court (which nomenclature Native Courts later came to be known). Had the Court of Appeal adverted to this section, its decision might have been difficult. For Customary Courts are not bound by Evidence Act unless subsequently so conferred with the power to apply it...

In the case of *Alhaji Ahmadu Alao v. Alhaji Oba Alabi*[98], Ogebe J.C.A., delivered the judgment thus:

> with the greatest respect to both Counsel in this case, it would appear that they are behind in the development of the law. Section 1 of the Evidence Act. Cap. 112 of the Laws of the Federation, 1990, sets out the relevant portion of the Evidence Act. It reads:-

This Act shall apply to all judicial proceedings in or before any court established in the Federal Republic of Nigeria, but it shall not apply: -

> (a) to proceedings before an Arbitrator or
>
> (b) to a field general court martial'[99]

In his judgment, he further stated:

> This Section now makes the Evidence Act to apply to all judicial proceedings in or before a Court established in the Federal Republic of Nigeria. The only exceptions are proceedings before an arbitrator or a field general court martial. The Upper Area Court, Omu-Aran is certainly a Court established in Nigeria and the retrial before it started on the 28th of October, 1992, when the Evidence Act, 1990, had already come into operation. The law as it is now is that the Evidence Act applies to all Courts established in Nigeria.

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[96] *Ibid*.
[97] (1988) 1 NWLR pt. 69, 221.
[98] (1997) 6 NWLR,pt. 508, 351, 356.
[99] S. 1 (2)

The judgment of Ogebe J.C.A. was a literal interpretation of the old provision without reference to *stare decisis* by which precedents are authoritative and binding, and the non-recognition of which led the court to following the old law. Whereas, the new position of the law would have guided the judgment if the principle was followed, as at the date of delivery of the judgment, the Evidence Act had become unambiguous as per its applicability.[100] The judgment had been severally criticised not to be a 'good law' by legal minds in many fora and one of them states thus:

> Against this background therefore, … with due respect, that the position of the law stated by Ogebe J.C.A. in the case of *Alhaji Ahmadu Alao v. Alhaji Oba Alabi*[101] was held *per incuriam* and is no good law with due respect to the express provisions and the combined effect of Section 1(2) (a),(b) & (c), (3) & (4) of the Evidence Act as amended.

The truth of the matter is that, the Evidence Acts has been made inapplicable in the courts mentioned in civil causes or matters but applicable in criminal causes or matters with a caveat, subject to the conferment of its applicability by the Governor or President as the case may be, by an order published in the Gazette.[102] Section 1(3) of the Act clearly invokes the entire provisions of the act to guide judicial proceedings in criminal cause or matter before Area or Customary Courts. This does not make the provisions of the Act to apply in such matters; rather, it assists the court to take a good path to criminal justice. The provisions of the Act that the Area or Customary Courts is bound to apply in criminal cause or matter are Sections 138, 139, 140, 141, 142 and 143 which deals with burden of proof[103].

2.5 Repugnancy Tests and Customary Law

The main origin of the doctrine appears obscure, however, it is difficult to resist the fact that the origin of the repugnancy doctrine has much to do with Aristotle[104]; a contrary view may result drawing artificial distinction between ideas and the terms or terminology adopted in describing these same ideas. The idea that what is fair and just in the circumstance should be a controlling factor in the administration of law permeated Aristotle's writings. His idea of equity is to pardon human failings where

[100] *Op. cit. Evidence Act @ S. 1(2) (a),(b) & (c), (3) & (4)*
[101] *Op. cit*. Ogebe J.C.A
[102] *Op. cit*. Evidence Act @ S. 1(2) (c)
[103] *Ibid*
[104] Derrett, J..N.D.,1963 Ed. *Justice, Equity and Good Conscience* in Changing Law in Developing Countries, Studies on Modern Asia and Africa 2. London: George Allen & Urwin, p. 114

strict application of law would lead to failure of justice. In essence, it is implicit in Aristotle's writings, that the law should be administered with particular reference to what is fair and just in the circumstance,[105]but the origin of the doctrine on the development of our customary law in Nigeria is not far-fetched. The British colonised Nigeria from 1863 – 1960, and introduced the doctrine to their territories where common law and doctrines of equity had to be administered side by side with the local laws, of which Nigeria was one. Until the enactment of the Criminal Ordinance No. 3 of 1904, the British administered the colony of Lagos from 1863 with the common law of England. Therefore, the "repugnancy doctrine" became part of our system through various local enactments[106], it was of much importance in the ascertainment and application of our customary law, as the colonial administration permitted the application and enforcement of customary law rules by our courts provided they pass a general test of validity: not repugnant to natural justice, equity and good conscience or incompatible either directly or by implication with any law for the time being in force.[107]

An attempt at ascertaining the meanings of "the attributes of the repugnancy doctrine" have been a bit difficult. W. C. E. Daniels on "Influence of Equity in West African Law"[108]writes:

> …when we look for the meaning of equity in the broad sense, we are told that it is equivalent to natural justice. When we try to ascertain the meaning of natural justice we are told that it is practically equivalent to equity in the popular sense. Then both are said to mean natural law. At this juncture we re-enter the realm of uncertainties, but one thing being made clear: is that the theory of assigning specific meanings to each of the phrases in the context of their usage is unattainable.

Speed, Ag CJ says "… I am not sure that I know what the terms 'natural justice and good conscience' mean. They are high-sounding phrases and it would of course not be difficult to hold that many of the ancient customs of the barbaric times are repugnant thereto, but it would not be easy to offer strict and accurate definitions of the terms". "But with regard to equity the case is quite different. The rules of equity are, or ought

[105] *Op cit*. Belgore, J.S.C.,
[106] Supreme Court Ordinances No. 4 1876, s. 19; No 6, 1900, s.13; No 6, 1914, s.20; No 23, 1943, s.17, now Supreme Court Act; Native Courts Ordinance No. 9, 1900, and the Native Courts Ordinance No. 3 of 1914 and 1948; Court of Appeal Act; High Court Laws of the States; Customary Courts Laws of the States; Evidence Act and Evidence Laws of the States; Interpretation Act and Laws, and so forth.
[107] High Court Law, No.8 of 1955 (N.R.) s.34 (4).
[108] (1962) 11, *ICLQ*, 31 at 37

to be, perfectly known to this court, and if a native law or custom is found to be repugnant to the fundamental rules of equity it is absolutely the duty of the court to ignore it"[109]

An interesting question arose at the hearing, as to the modification of an original custom to kill [the Oba] into a milder custom to banish. Lord Atkin in *Eshugbayi Eleko v. Government of Southern Nigeria*[110] says:

> …the more barbarous customs of earlier days e.g., to kill, and not to banish, a deposed chief may under the influence of civilisation become milder without losing their essential character of custom. It would, however, appear to be necessary to show that in their milder form they are still recognised in the native community as custom, so as in that form to regulate the relations of the native community inter se. In other words, the court cannot itself transform a barbarous custom into a milder one. If it still stands in its barbarous character it must be rejected as repugnant to 'natural justice, equity and good conscience.' It is the assent of the native community that gives a custom its validity, and, therefore, barbarous or mild, it must be shown to be recognised by the native community whose conduct it is supposed to regulate.

Though, the test has been applied to various issues of customary law in Nigeria, such as customary tenancy,[111] customary pledge among others,[112] yet its application does not seem to have offered any satisfactory solution to most of the cases and have not in any way showed that customary law of the people is inimical to the promotion of equity and equality on one hand or that it inhibited natural justice on the other hand, especially if one looks at the ratio of the *Eshugbayi Eleko* case[113] which stands as the *locus clasicus* on the doctrine, the case[114] has positioned itself as an authoritative pronouncements that "the court cannot itself reform a barbarous custom into a milder one." if it still stands in its barbarous character it must be rejected as repugnant to "natural justice, equity and good conscience". That is all it has offered, and the fact that the 'repugnancy doctrine' is introduced by statutory enactments does not necessarily mean that its application should be governed by rigid canons of statutory interpretation because, no court of justice would apply any rule of customary law which is repugnant to natural justice, equity and good conscience even if the statutes

[109] *Op. cit.* Speed, Ag CJ.
[110] *Op. cit.* Lord Atkin
[111] *Odusoga v. Ricketts* (1997) 7 NWLR pt 511, p.1SC.
[112] *Abioye v. Yakubu* (1991) 5 NWLR pt 190, p.130 SC.
[113] *Op. cit. Esugbayi Eleko*
[114] *Ibid.*

introducing the doctrine had not been enacted.

According to Elias:

> In the sphere of African law, fiction, equity and legislation seem to be concurrent influences making for legal change. The King, the Chief, and the Village Headman are each in his turn regarded as the father of his people and the fountain of justice ... In chiefless communities, the inevitable interplay of counter balancing segments which are so far a regular feature of all their social and cultural activities renders the free application of equitable consideration of fairness and impartiality absolutely necessary among these highly egalitarian peoples.[115]

2.6 Conflict of Laws

Conflict of laws or Private International Law is concerned with the application of the law in space and time[116]. It arises where a 'foreign law' is at variance with its native counterpart as to which court an action or suit should be brought, and by what law that cause of action is to be decided when the court before which the action is brought assumes jurisdiction (Emiola, 1997). It is that part of Private Law of a country which deals with cases having foreign elements[117]. It concerns relations across different legal jurisdictions between persons and sometimes companies, corporations and other legal entities.

According to Black's Law Dictionary[118], conflict of laws is that:

> branch of jurisprudence, arising from the diversity of the laws of different nations, states, or jurisdictions in their application to rights and remedies, which reconciles the inconsistency, or decides which law or system is to govern in the particular case, or settles the degree of force to be accorded to the law of another jurisdiction (the acts or rights in question having arisen under it) either where it varies from the domestic law, or where the domestic law is silent or not exclusively applicable in the case in point.

Conflict of laws concern those areas of law primarily with specific duties and rights of individuals with which the state is not immediately and directly concerned.[119] It is the body of rules for determining questions of jurisdiction and questions as to the

[115] Elias, T. O., 1956.*The Nature of African Customary Law*, Manchester: University Press @ p.188
[116] Osborn's Concise Dictionary 1993.
[117] Agbede, I. O., 1998. in National Open University of Nigeria, School of Law, Course Code
[118] 6th Edition, p. 299 – 300
[119] *Wardsworth IBC v. Winder* (1985) AC 461

selection of the appropriate law, in civil cases which came to Court that have foreign element. That is, if the cause of action arose and a party to the contract resides abroad. Its objects are to prescribe the conditions under which the court is competent to hear the case, to determine for each class of case the internal system of law by reference to which the rights of the parties must be ascertained, to specify the circumstances in which a foreign judgment can be recognised as finally deciding a case and enforcement of foreign judgments through the English Courts. It is a difference between the laws of different states or countries in a case in which a transaction or occurrence central to the case has a connection to one or more jurisdictions.

Conflict of laws is the part of private law of a particular country which deals with some system of law other than that of the country where courts are seized of the case. If a claim is made for damages for breach of a contract made in Nigeria between two Nigerians companies and to be executed in Lagos, there is no foreign element in such a contract. Therefore, the case is not covered by the principles of conflict of laws. Such a case will be treated by the courts applying the domestic law of contract. But if the contract had been contracted in, shall we say Togo, between a Nigerian company and a Togolese company to be executed in Togo or in Ghana, the case is within the scope of conflict of law. Determination of who has jurisdiction on the matter will now be left for any of the three countries court to determine. The court will have to use its 'choice of Law' rules to decide whether to apply Ghanaian, Nigeria or Togolese law in deciding which of the law is most appropriate in the matter pending before the domestic court[120], whereby issues of jurisdiction will be first determined

Where a cause of action is known to one system of law but not to the other, that system which provides a remedy will apply. For example, a statement which is *prima facie* slanderous will not be treated as such among the Yoruba, where words are not given the same meaning the Common law gives to them. Vulgar abuse[121] that Common law uses in seeking redress for damages done to reputation and dignity are mere rhetoric which does not give remedy for abuse among the Yoruba. In *Bakare v. Ishola*[122] where an action for damages for defamation was in contention for referring to him as *'ol4 ni -, cl1ω=n, 8ω[t7 9 x2 x2*

[120] Agbede, I. O., 2001.*Conflict of Laws in Nigeria*, Akoka: Lagos
[121] *Cassidy v. Daily Mirror Newspaper* (1929) 2KB @ 331
[122] (1959) WNLR 106 p.107

t'2ɯ=n d3' (You are a thief, an ex-convict, who has just returned from prison), the court held as per Jibowu that among the Yoruba it is common in rural communities for peers to use the words which abuses no-one seriously, as they are words uttered in the cause of heat of a quarrel and anger, and are nothing but vulgar abuse. Somolu J also submitted in *Awolowo v. West African Pilot*[123] "…the very words 'vulgar abuse' imply verbal exchanges of words face to face uttered in the heat of a quarrel….", and held that vulgar abuse was common among the people. In actual fact, slander was not actionable among the Yoruba as many of the sub-groups have ways of using even stronger words to curtail misuse of power, indiscipline, and evil acts. Among the Ijebu it is known as *2f2* (jesting), wherein every evil done in the society will be turned to jesting and the culprit will know he is the one whose misdeed is the subject of ridicule.

The basic idea behind conflict of laws is the existence in the world of a number of separate independent countries with separate municipal systems of laws that differ greatly from one other in respect of the rules by which daily human interactions are regulated. There are frequent occasions when the courts in one country must take account of the law that obtains in another. Nations and nationals are today inter-dependent and none, no matter how economically or politically viable, can dispense with cross cultural or extra-national contracts among men of other nations. When such rules relate to issues outside those areas where states acted in their sovereign capacities they are conveniently referred to as private international law rules or conflict of law rules. Such rules necessarily involve situations where a local court will abandon the law of the locality and apply foreign rule of law.

In spite of the avowed claims of readiness to enforce foreign laws and judgments, every developed legal system usually reserve to itself an ultimate residual power and discretion which it exercises for various reasons. As Holder opined,[124]

> In the resolution of legal disputes containing supra-national elements national court utilizes the rules for private international law to identify the appropriate governing legal prescriptions. In some occasions, however, when foreign law is thus found to be prima facie applicable

[123] Nigeria 1962, p.29
[124] Holder, W.,1963. *Public Policy and National Preferences: The Exclusion of Foreign Law in English Private International Law* 17 ICLQ 925.

> to the situation it is not applied, instead for certain reasons it is rejected by the forum.[125]

The first group of situations when foreign law may be excluded for various reasons usually relate to consideration of public policy, where the law of another country appears confiscatory or tends to penalise it. Indeed a foreign law may not be enforced where such enforcement would mean giving effect to the law of that other country and when failure to plead or prove a foreign law would disallow its applicability.

The second group of cases deals with such situations when the courts do not normally refer to foreign laws as a result of the nature of the issue to be considered. In this category are issues relating to divorce, nullity, separation and maintenance proceedings, custody and adoption cases; admiralty damage actions and questions of procedure. In this area, rules of foreign law are not considered at all.

One of the most difficult problems of law is to devise ways of resolving the conflicts of laws that inevitably arise in situations where an individual whose personal law is Islamic law finds himself in a transaction that must be guided by English law rules in an area where customary law is prevalent. The question of which system of law to apply will be an issue when discussing issues on a matter just stated above. In order to give effect to the intention of parties to a transaction, the nature of contract concluded by them must be ascertained to know the law that will guide the parties and not the environment. It is after this that the specifics can now be attended to, what transaction is known or unknown to customary law cannot be determined by mere speculation since there exists a conflict of law.

Contracts such as trade by barter, and loan have been practised from time immemorial. This includes the well-known custom of *8pzzr=, ==yz, zqr9*. Loans of animals, cash and kind or other equivalents were known and frequently practised in pre-colonial days. It was the custom for one man to advance a sum of money to another in *==yz* customary practice.

[125] *Ibid* @ p. 926

The received English law as received in Nigeria operated side by side with the rules of customary law. It led to a conflict which arose from the application of both rules. If customary law is in conflict with the common law:

i. Common law is primarily to be applied and customary law is to be applied only when the nature of the transaction is peculiar to customary law.
ii. Where the cause of action is known only to one system of law and not the other, that system which provides a remedy should be applied.
iii. Where the action is brought in a form known to one system of law or indicating by summons or otherwise that it falls under one system rather than another, the system indicated is normally applied. The effect of this practice is to confer on the plaintiff a part, if not the whole of the discretion.
iv. Where the plaintiff gives no such indication, the nature of the transaction is the test; provided that when in doubt the court will apply Common law.

2.7 Yoruba Legal System

The effect of colonialism especially in Nigeria was the transplantation of the British legal system. It led to recognition of both English and Yoruba legal systems and the gradual relegation of the later. This made the use and effect of the later become so dependent on the permissive extent of the former. In its regulated state, its operation became dependent on the compliance to a laid down rule (repugnancy rule). Other rules as to the amenability of Yoruba customary law and proof became established. Notwithstanding the relegation of the rules of the law vis-a-vis the common law, these rules have endured to date because they evolved with the custom and culture of the people. The legal system has deep roots in tradition which had been diluted, by years of colonial influence. It is significant that the dilution and bastardisation was so gradual that an average Yoruba may not feel any sense of loss in the legal system. Scholars such as Lloyd, Atanda, Elias, Ajisafe, Fadipe, Mann, Syllon, Lucas and others too numerous to mention have in various texts agreed that Yoruba had a legal system that was indigenous, sovereign and synonymous with their juristic thought; a vigorous and efficient instrument for the adjudication of disputes, particularly in spheres such as land-holding, family, inheritance devolution, and marriage which are most closely bound up with the community social order.

The structure of governance across Yorubaland was the same. At the zenith of the organisational/legal structure of each town is the Oba, known as:

Alaafin in *Oyo*

Olowu in *Owu Abeokuta*

Ooni in *Ife*

Ebumawe in *Ago Iwoye*

Osemawe in *Ondo*

Olu in *Ilaro*

Alake in *Egba Alake*

Akarigbo in *Remo*

Jegun in *Idepe, Okitipupa*

Alaye in *Ode Remo* and *Odogbolu*

Alaperu in *Iperu Remo*

Odemo in *Isara*

Limeri in *Awa Ijebu*

Olubadan in *Ibadan*

Owa Obokun in *Ilesa*

Owa Ooye in *Imesi Ile*

Ajalorun in *Ijebu Ife*

Soun in *Ogbomoso*

Olomuo in *Omuo Ekiti* etc.

Oba are the fountain of traditional, political, legal, and religious authority. He was the executive head of the community, and all decisions were made by him or in his name, *Eerin l9 ni'gb9, cf=n l9 l=dzn, [ba l9 n8'l5,* (Lion and Elephant own the forest, the king owns the town).The institution of Oba is generally regarded as sacred among the Yoruba, but no holder of the office is above the law of the land. He has no right to suspend the law of the people, as there are recognised limitations to the exercise of his authority. An Oba does not interfere with traditionally established norms and conduct. Prerogatives are often attached to the office of an Oba, since the proper and effective exercise of authority would be impossible without them in any human society with a system of monarchical rule. But the council of elders and nobles, acting like a (kind of) cabinet, ensures that the king's doings do not run contrary to accepted standard already set. Any Oba who exceeds his legitimate

powers, may be deposed, or sometimes asked to commit suicide, or is put to death by the unanimous verdict of public opinion. In these cases, the council of elders or some powerful secret society made up of the chief's often act as a court of trial before execution of the judgment. The *)xugb9* cult was another group that keeps a check and balance on the activities of the Oba.

)xugb9 was a special class of the nobly revered cult, who had a duty to give effect to the decision on enthronement and dethronement of an Oba, as well as execution of judgment on sacrilegious offences.

Oba does not want to be seen as acting alone, so, the source of all governmental powers- legislative, executive, or judicial was not made to reside only on the Oba *per se*, he shared power with certain individuals, groups and institutions for the smooth administration of the kingdom *nit9r7 cn8kan k87 j1 zwq d3* (One man cannot be referred to as 'they'). He is also surrounded by a retinue of palace officials, priests and eunuchs, some of whom might have one form of influence or the other on him; and there are others, vested with powers to take decisions on behalf of the Oba (who cannot be in all places at the same time). The bodies included a council of chiefs, which normally comprised respectable and noble chiefs who in some instances had supervisory authority over lesser communities or divisions of the town.

These chiefs have influence on both the ruled and the ruler because in some cases they were king makers vested with the authority of appointing the most qualified candidate for the position of king. They represent the Oba at functions that he sends them aside from oversight of the affairs of the clan or district they headed. They act as ears, eyes and mouths of the king in matters of public importance and use his name to do and undo, *or5k[[ba ni a f7 nb1 'r9k0* says the elders (meaning: the name of the Oba can see you through any hurdle in the town). *Baql2*, as leaders of local administrations, performed similar functions in this regard.

The legal history of the Yoruba could be divided into three major periods, the pre-colonial era, the colonial era, and the post-colonial era. During the pre-colonial era indigenous legal institutions were evolving on ethnic considerations. The Oba and his chiefs exercised judicial as well as general administrative authority over the people under their jurisdiction. The *Baql2* at the lower levels, sub-village heads courts, the *Zw0r0* (Priests), the *)xugb9* (the native court), and the family heads were recognised

in the judicial administration of the land by the Oba in council, upon whose authority they functioned. There were civil and criminal matters before the Yoruba courts as there exist different levels of adjudication in different courts. There were differences in the kind of cases each court could hear and settle. The Oba in council constitutes a kind of "Supreme Court", though there are ancillary courts of the Oba in council which try sacrilegious and grave offences referred to them.

The pre-colonial laws were unwritten, simple and flexible, yet widely known, accepted and respected among the people. Just as Section 4 of the Criminal Code[126] says, "no person shall be liable to be tried or punished in any court in Nigeria for an offence, except under the express provisions of the code or of some Act or Law which is in force in, or forming part of the law of Nigeria…."It is also a requirement of Yoruba native laws that for an act to be a punishable offence, there must have been a law stating it to be an offence, and this is expressed thus: *8l5 t7 k0 bq s7 0fin, 2s2 k0 s7, (*where there is no law there could not be guilt). Hence, various means of communicating laws, edicts and their sanction are provided in village square meetings, through town criers or through family heads, and *Baql2* who will inform people as appropriate.

The colonial era brought about a revolution in legal arrangements of the Yoruba sub-groups. The revolution began with the annulment of some of the fundamental customary rules by the colonial powers and the super-imposition of its own legal system on the territories. Though the customary legal institutions were permitted where they were able to regulate its operations which did not run contrary to their idea of justice. This period saw the emergence of Western judicial systems and the abandonment of the customary law. But for this period, customary law would have come of age and be competing with its English counterpart; instead, it was left more or less as it was except, where considerations of public order or policy became an issue. Legislative enactments were not made to strengthen customary law at this period. Customary marriage, divorce and African family structures were intact. Western model of transacting in land was introduced to provide an alternative means of transferring or holding property, though the customary land tenure continued simultaneously. In summary, colonial era produced dual legal and judicial systems,

[126] Cap 77 L.F.N. 1990

with the introduction of the indigenous laws existing side by side with the common law, and they were applied by different courts to different classes of persons.

The last era was a continuum of the colonial era, as there were little differences in the legal arrangements of the colonial and post colonial era. The legal system after Nigeria's independence was practically the same as that prior to it; the colonial system was carried on with little alterations. Less has been done in the development of customary law in the country since then, but statutory or English Patent law, Company law, Law of Contracts, Labour law, Law of Trusts and Equity, Law of Tort, and, Land law have been reasonably attended to.

While the colonial system confirmed even after post-colonial era that, there were in existence numerous courts and arbitration models aimed at ascertaining peaceful co-existence of the Yoruba indigenous society because the community is built on family. There were formal and informal courts saddled with responsibility of maintenance of peace and order within the various jurisdiction, which include:

i. *)gb9ni* in Council among the Egba and Ijebu
ii. Public tribunals meeting under the trees
iii. Market councils
iv. Commodity associations and guilds

The formal courts in Yorubaland are:

i. Oba court
ii. *Baql2* court (in villages)
iii. *Ol9r7t5n* court (common among the Ijebu)
iv. Ward chief and
v. *Baql3* court (in family houses), tribunal
vi. *)x6gb9* court

The adjudicative system was easy to comprehend, the hierarchy of courts and judicial officers were known, family or clan head, chiefs specially designated as judges, *Baql2,)x6gb9* cult and the Oba were known to handle serious matters depending on the nature of the dispute or severity of the offence[127]. Minor issues are left to be

[127] Olaoba, O. B., 2008. *Yoruba Legal Culture* (Revised and Enlarged) Lagos: New Age Publishers Ltd.@ p. .33

settled at the lower level while high profile disputes are tried by the Oba in council. Judicial proceedings were devoid of "rigid rules of procedure and evidence," but there were enough rules of evidence designed to ensure fair hearing and transparency in the administration of justice[128].

Judicial proceedings were held in the open court of the palace, and parties to disputes were expected to present their cases one after the other beginning with the plaintiff, who ought to open his case after which the respondent is allowed to respond. There is room for cross and re-examination, as well as witnesses allowed in the various courts to prove Evidence of their cases. According to Olaoba (2008:38) judicial proceedings among Yoruba is geared towards restoration and reconciliation of the disputants and maintenance of the peace, order and tranquility in the society and there is no victor or vanquished in a dispute settlement as disputants are encouraged to adopt a "give and take attitude. The system mainly aimed at settlement of disputes and not judgment of wrong and right on one hand and punishment of evil in the society on the other.

The Hearing and summoning fees are paid by the litigants, this fee is used in facilitating court seating, it finances part of the expenses of the court for celebration in joyous moods and appeasing the gods through sacrifices to the ancestors in serious matters. Once the issue involved in the dispute had been resolved and the disputants have been joyfully reconciled, hugging and embracing of one another before the court connotes amicable settlement of issues brought before the court. This does not preclude rights of litigants to appeal, a right which is assured, though rarely could one find anyone appealing judgments made because the legal system had checks and balances. For example the two cardinal principles of fair hearing as expressed in the latin maxims *audi altrem partem,* (you must hear both sides of a case), and *nemo judex in causa sua* (no man shall be a judge in his own case) are cautiously exemplify in Yoruba legal system. The practice of not allowing an interested party to a dispute to sit in judgment in the same case agrees with the *nemo judex* maxim, while the Yoruba saying *agb'1j- cn8kan dq, zgbz 0s8kz* (He who hears one side of the case and give judgment on it, is a wicked elder) agrees with *audi altrem partem* which makes it incumbent on judges to hear both sides. Where there is a need for appeal, an appeal can go from any of the formal courts to the Oba court or from *Baql3's* court (in family houses) to Ward chief to the *Ol9r7t5n's* court (if in Ijebu township) or to

[128] Ibid @ p. 128

Baale's court (if in villages, either in Ijebu or other Yoruba villages) before it goes to the Oba.

The customary courts apply only native law and custom, and they have been extremely known to be in-partial in the exercise of their duties because both the petitioner and the respondents are from the community. Even the principle of 'fair hearing' which the legal maxim *audi altrem partem* represents is believed to have been coined from the Yoruba saying *agb'1j- cn8kan dq, zgbz 0s8kz*. The issue of relevance and admissibility of evidence is always overlook as parties are allowed to pour out their grievances which in some cases may end the matter once the petitioner is allowed to state all that made him angry. Judgment is given after the parties have presented their cases. The family head and the elders, or the ward chief and his chiefs, or the Oba and the council of chiefs consider the issues and give their judgment. Depending on the severity of the offence, punishment could be as little as an hour work at the Oba farm or fetching of water from the stream into a basket, and it may range from flogging, compensation, reprimanding, expulsion from the community, fine, confiscation of property, to imprisonment, banishment and death penalty in severe cases.[129]

Olaoba (2000) engaged the significance of cross-examination in Yoruba customary or traditional jurisdiction where he considered it a vital aspect of Yoruba judicial thought. In his submission, he posited that as heterogeneous as Yoruba society might seem to be, the people had long evolved the culture of cross-examination of facts which according to him were sacred. Thus, cross-examination, within Yoruba customary practices, demands a sense of vast wisdom, boldness and ancestral support, hence he regarded it "a rather difficult process".

In this Yoruba scenario, it is said that two principal characters are usually involved in the herculean tasks of promoting the ethical modus of the society via the restoration of peace and harmony, defense of the course of justice and reverence for the ancestors who unequivocally are a part of the adjudicatory process. Expectedly, the principal characters involved in this process are the cross-examiners and examinees. While the cross-examination includes the adjudicators, respectable elders and the ancestors, the

[129] Ibid

cross-examinees include the litigants (plaintiff and defendant) and eye-witnesses of the dispute. While, as a matter of fact, the elders have been considered as ancestors who are the wisdom lore of Yoruba society, the eye-witnesses are equally very important as they are said to have what it takes to make or mar the process of cross-examination owing to the magnitude of evidence adduced (or adducible) by them.

As customary attributors and mediators applying established customary law to civil inter-personal and inter-communal problems in their own localities, and as mobilisers and counselors of public opinion in their domains, the traditional rulers play significant roles generally as agents of good governance and shapers of local beliefs and opinions which always have the tendency of social stabilisation. This is the cultural base of the African people, and, since the culture of a people is its soul, care must be taken not to destroy or damage the civil role which the African civilisation has, from time immemorial, allotted to the chiefs in African society. And although governments come and go, sometimes with startling rapidity, by its antiquity, perpetuity and reliability, the chieftaincy institution constitutes a certain source of continuity and stability within the body polity (Adaramola,1992:72-73)

In summary, law as an instrument of social control, among the Yoruba is similar in many respects but essentially different from the modern conception of law and the legal process. The Yoruba had for a very long time evolved a legal system which is incomparable with the western styled courts. The indigenous legal system has history that is as old as the history of the Yoruba itself. Among the Yoruba there are various channels (formal and informal) for dispute settlement. Thus the Yoruba do have courts 'properly so called' because they do have an enduring political culture. The goal of law and the legal, including the judicial, process was to make for orderly development of the society. The Yoruba had their own indigenous and distinct system of administering justice.[130] Justice was administered by the king, his chiefs, elders, spiritual leaders, secret societies, clan family heads, age grades, etc., depending on the nature of the offences as earlier mentioned.

[130] Ume, F.E., 1989.*The Courts and the Administration of Law in Nigeria*..Enugu: Fourth Dimension Publishing @ p. 40

The administration of justice was hierarchically structured, and ultimate appeal lay at the king's court which gives the final verdict after consultation with his chiefs.[131] The language of the court is the language of the people. The litigants are able to express themselves well and follow the proceedings of the court with no need for any legal aid, with simple and easy to assimilate procedure, tension free proceedings is simple and easy to follow. The court proceeding is tension free, the constitution of the court is accepted by the people, machinery of justice is inexpensive, effluxion of time cannot defeat genuine claims in the court.

The intervention of the colonial masters in the political affairs of the Yoruba led to the ceding of territorial powers of the Oba to the British overlords and the establishment of various native courts which curtailed arbitrating powers of chiefs who adjudicate in traditional disputes, and the removal of judicial powers of the Oba affected Yoruba legal system negatively. Until the British brought their legal system which almost made the 'kings danced naked' in their domain as it relates to legal matters. The king was the supreme head of the Yoruba community before colonial incursion. He had legislative, executive and judicial clout, he was regarded as *Alqsc 4kej8 0r8sz* (meaning: As powerful as the Supreme being). His words were sacrosanct and divine, he must not be made angry to curse any of his subjects. He was the custodian of the tradition and referred to as *Kqb7y4s7* an immutable being who could not be questioned for anything. He was the high priest, and an embodiment and symbol of authority. The Oba court was the Supreme Court and can also try a case as a court of first instance to deal with disputes involving high ranking members of the community, chiefs, cases of parties from different wards or villages, and cases of appeal from other lower courts.

2.8 Marriage

'Marriage' (as we thought, until recently) by universal definition is the legal relationship between a man and a woman. Among the Yoruba, it is a union between male and female, hence the sayings *cni z ngb3 8yzw9 b= wq bq, k87 ga'r6n wo 8yzw9* (The groom does not need to peep to see the bride), *alqsej5 aya n7 p[k[n7 baba,* (It is the overzealous wife who calls her husband father). The Yoruba has this saying also, *cni bq f1 gb3 [m[r3r3 j9, q k-k- f1 aya rere s7 =d2d2*

[131] Alabi, M.O.A., 2002. *The Supreme Court in the Nigerian Political System,1963-1997.* Ibadan: Demyaxs Press. @ p.76.

(Anyone who wishes to have good children must first have a good wife). The words *8yzw9* and *aya* represent a person of different sex other than the man, and it is the belief that *aya n7i l9y5n n77 b7m[, n77 f-m[l9m5 mu* (A woman gets pregnant, puts to bed, and breast feeds the baby). The issue of same sex marriage is a misnomer among the Yoruba, as nothing in the widest imagination of the Yoruba family system suggests same sex relationship, and this dictates their idea of family, marriage and inheritance devolution.

Marriage is defined as "…an interpersonal relationship with governmental, social, or religious recognition, usually intimate and sexual and often created as a contract. The most frequently occurring form of marriage unites a man and a woman as husband and wife. Other forms of marriage also exist, for example polygamy in which a person takes more than one spouse, is common among the Yoruba. Beginning from 2001, the legal concept of marriage has been expanded to include same- sex marriage in some jurisdiction"[132]

Marriage has a prestigious and foremost place among the Yoruba like in other African cultures. So important is the institution of marriage that an unmarried man or woman is considered incomplete and a few satirical songs have been composed and sung for such group of people. In the Hausa culture, there is an adage that says, "a man without a wife is like a big tree without fruit" (Ibrahim, 1998). Marriage can be contracted under any of the Statutory, Customary or Islamic legal systems. Under Statutory law, it is governed by the Marriage Act (1990) and the Matrimonial Causes Act (1970). The customs of the parties govern marriage under customary law and Islamic injunctions as contained in the holy writ govern Islamic marriages.

The history of marriage itself forms a vital part of the history of the family (Mann, 1986: 8). There is thus a crucial sense in which it can be contested that the essence of African customary law might not be well appreciated without its foundation in marriage. In this sense, the structure of African marriage is also significant to understanding the manner in which the individuals who constitute them relate to one another and how they understand or perceive these relations, as these relations are

[132] Wikipedia-the free encyclopaedia

deemed to have their own place in matters connected with inheritance or devolution of a deceased's estate.

Hence, in Africa, as enunciated by Khapoya (1998:31), due perhaps to agrarian economics and the collective ethic of the communities, marriage acquires probably a far greater societal significance than in Western societies. An African is therefore likely to link the essence of getting married to tradition. Marriage, from this point of view, is intimately linked to reproduction, to having children, and indeed to the very survival of the community. To this end it is succinctly put in Yoruba, that *[m[cni n77 jog5n cni, b'qlqdi 0 s7 n7l3, [m[w[n n7 jog5n cbu* (roughly translating as 'it is one's offspring that inherit one's estate'). This love for children is exhibited in some of the names given to children. Names like "*{m[d5nb7*"—it is good to have a child or "*{m[d5nk1*"—it is good to have a child to care for. These suggest the importance attached to children among the Yoruba culture. A barren woman is referred to as an "empty gourd" signifying emptiness, or uselessness. Barrenness in marriage is blamed, and wrongly too, on the woman and never the man. She is blamed, abused and ridiculed while the man is pitied and in most cases pacified and given counsel, to look for an alternative way of having children. Where the woman gives birth to only female children as against the expectation of male sons who are expected to ensure continuity of the generations to come of the family, she is blamed for not bringing forth male issues in the family, even though medical evidence abound to prove that the man determines the sex of a child and not a woman.

Marriage, to Africans, and of course, to the Yoruba, is a union between two different families and not only the couple. This is displayed during the traditional marriage ceremony even when the parties to the marriage are mature adults, thus, the dictum **yzw9 bub5r5 d5n n7, zna bub5r5 ni 0 se 3 n7 (a bad wife is better than bad in-laws).* The reason is that; the Yoruba see the institution as a purely family matter to which family consent is needed prior to the marriage. This has resulted in the existence of a plural law of succession to property. In all, having children is an important contribution that each marriage is expected to make to his or her society. Society, therefore, tends to recognise that contribution by rating the status of a married person above that of an unmarried one. As with the Yoruba, the place or stake of the extended family, many times as embodied in the *Ol9r7 cb7,* may not be fully

emphasised until something goes wrong, or a sensitive matter is implicated, such as the need to devolve the estate of a deceased upon death.

Moreover, as Khapoya re-echoes, marriages traditionally used to be arranged by elders, but this is changing as it is now becoming fashionable for individuals to woo their partners and afterwards return to seek the consent of their parents. Where this consent is not forthcoming, the elitist young Yoruba for instance, may proceed to marry his fiancée (or in the case of the woman, her fiancé) whether through 'elopement' or private marriage with the notion of *"4y7 w6m7 k0 w6 -, ni k87 j1 q pa 'w-p= f1 'b8nrin* in mind,(that is, 'my likeness in a lady may not interest you, is the basis for not jointly marrying a woman'). Whether for emotional or other reasons, young men and women in late-nineteenth-century Lagos (as with other emerging urban centers' in Yorubaland at the time) sometimes expressed strong feeling about whom they wanted to wed. Occasionally, they forced kin to heed their wishes. Mann, for example, records the case of one *Barikisu Laniwan* who resolved to marry a young trader named *Sani Giwa*. When the relatives objected, she obstinately refused to marry anyone else and finally had her way through their consenting to the marriage, even if grudgingly.

To this effect, Yoruba marriage was said to have been changing in the second half of the nineteenth century as individual behaviour often deviated widely from socially accepted norms. Mann further provides testimonies in this regard, such as the example, in 1911, of a Lagos Chief called to give evidence on marriage, and who had testified that in "olden times, no man could act independently of his family… some are acting independent now, others not." And in the same trial, another Chief had complained that Girls go to live with husbands of their own choice. We are not finding a remedy (Mann, 1986:41). These statements are made to show how in the late nineteenth century, some Lagos men and women asserted independence of kin in domestic affairs. Relatives could not always control the selection of spouses, the terms and timing of marriages, or the character of conjugal relationships and roles. In fact, it is reported that some men and women treated the web of rituals and obligations surrounding marriage as a matter desirable and avoided when not. Hence, in many instances, couples formed union without the consent of kin. However, in the view of

Khapoya, relatively few marriages are still being arranged, and only in remote areas, away from the seductive influence of the cities or towns.

In some cases, however, even in contemporary times, the community still gets involved during the preliminary phases when arrangements have been made regarding the actual marriage ceremony and the transfer of property, called bride wealth. The bride wealth, in the form of cattle, goats, sheep, and/or money is transferred from family of the groom to that of the bride. This reality does have some significance in the sharing of the property of a woman upon her death, and in many cases, explains why much is done to prevent divorce between the couples so that the need will not arise for the bride's family to return the property (always constituted by the bride wealth) to the groom's family (Khapoya, 1998:32)

Certainly, Yoruba and Christian marriage differ fundamentally. They rest on different assumptions about polygamy, domestic relationship and roles, and legal rights and duties. Each of these types of marriage had emerged from a particular cultural context and has been shaped by specific processes of historical change. Each stands at the heart of a distinct socio-cultural order and has distinct economic, social and political implications. As viewed by Mann, Yoruba and Christian marriage represent 'ideological construct' − terms he employed to make his point. Neither Yoruba nor Christian marriage remained static and unchanging. Changes in the wider economy and society affected these two types of marriage, just as they were affected by them. However, the possibility of polygamy within the African customary system serves to constitute some complexity to not only the structure of the African family, but also to how matters of inheritance are resolved according to the rules of these shades of polygamy. There are many reasons why polygamy (that is, marriage between one man and two or more women) is prevalent in African societies. One reason emanates from the fact of social security and stability provided by people having families. Because marriage is considered as being socially desirable, everyone is expected to get married, particularly since it is important for the community as a whole. Unfortunately, it was not always possible for every woman to have a spouse as there were not enough men to go round. The surplus, therefore, of marriageable women over men meant that the only way every woman would be assured of a husband was if the men were permitted to have more than one wife which the Christian doctrine frowns at.

From an economic point of view, agrarian societies of Africa require a large number of field hands to contribute to the economic well-being of the community, to work on the farms, look after cattle, and perform other chores. Thus, it was necessary for men to want large families and the surest way for men to achieve this was for them to have more than one wife. According to Khapoya (1992:35), observation among the Yoruba people of Nigeria showed that polygamy increased considerably during the colonial period when the British introduced cocoa as a cash crop. More wives and children were needed to assist the men in ensuring a plentiful, or at least an adequate, economic production.

Both Khapoya and Mann appear to agree as regards the economic conditions that necessitated the practice of polygamy. To a reasonable extent, the author of *Marrying Well* has traced the origin of polygamy and the elite class to the economic development and commercial boom of 19th century Lagos, besides the rise of the colonial state, and the spread of Christianity and Western education. In the nineteen century, Lagos was said to have emerged into West Africa's leading centre of international trade and colonial capital. Christian educated elite emerged there, as in other West African coastal towns, poised at the center of the far-reaching economic, political and social changes then occurring. The men and women who made up such groups knew two kinds of marriage; African marriage, practised by their ancestors and the majority of the population; and Christian marriage, held up by the Europeans as the only legitimate form of union between man and woman. Very different expectations about polygamy, domestic relationships and roles, and legal rights and duties characterised these two types of marriages. Each stood at the heart of a radically different social-cultural order. Marriage presented the educated elite with a problem. Question about how to marry and what marriage should be, deeply preoccupied members of the group, who reflected over them privately, debated them publicly, and struggled to resolve them in their domestic lives (Mann, 1986: 1)

2.9 Notion of Property among the Yoruba

Smith's (1995:1) attempt at conceptualising the term 'property' tends towards a rather literate, contemporary understanding of the term, thereby excluding the possibilities of native 'rights' and autochthony, for instance. While he agrees that the term

'property' has different layers of meaning, depending on the context of its use, his attempt fails to accommodate the meanings or understanding of the term in relation to native ownership of a thing such as land, farmstead, etc among non-metropolitan or urban Yoruba populations. Smith further notes that, sometimes, the term may refer to ownership or title such as when it is said that property in the goods passes to the buyer immediately the contract of sale is concluded whether or not the goods have been physically transferred to him.

While it is possible for Smith to agree to the fact that 'property' may mean "the *'res'* (thing) over which ownership may be exercised," the example cited by Smith in this sense − that of car or a Black acre − has more leaning towards 'modern' materiality as against what is much culturally traditional in the African sense. Smith further argues that 'in whichever sense the word property is used, property law is designed to regulate the relation of person to things thereby providing a secure foundation for the acquisition, of enjoyment and disposal of things or wealth.' Although this conception is conveyed in the passive sense, making the question 'designed by who?' pertinent. Still the expression thus implicates the fact that rules − traditional or sophisticated − abound in every culture and society which define the nature and extent of property acquisition and mode of transfer of inheritance.

Historians disagree about the impact on Yorubaland of the shift from the illegal slave trade in palm produce. Hopkins, had argued that the transition created opportunities for ordinary farmers employing mainly family labour to participate in the overseas exchange economy for the first time. This was because there were few barriers to entry and economies of scale in palm-oil and palm-kernel production and trade. Competition from below, Hopkins asserts, threatened the economic and political power of Yoruba rulers, thereby generating conflicts between the rulers within the states, and between rulers and ruled. However, other historians maintain that economic considerations were subordinate to political ones in nineteenth-century Yoruba warfare, and that control of trade was not essential to achieving political power in most Yoruba states (Mann, 1986: 16), and through this power, the acquisition of property.

In the early years, individual land rights became widely accepted, land values appreciated. The colonial state encouraged and protected the establishment of private

claims, and records of Wills in the Lagos Probate registry reveal that by the 1880s, land was a major form of investment and repository of wealth in the colony. The pattern of land ownership also changed fundamentally during these years. Many of the most valuable commercial and residential sites on the island passed from the original lineages to recent African and European arrivals. As Hopkins noted, by the 1880s land ownership had become an important basis of inequality in Lagos, and a local rentier had emerged.

Furthermore, it was observed that the far-reaching economic, political and social changes in early colonial Lagos favoured educated Christians and fostered development of educated elite. Repatriated slaves returned to Lagos, well placed to take rapid advantage of new opportunities created by the growth of legitimate commerce, the rise of the colonial state and the emergence of new property rights, in part because they had already witnessed similar developments in their former homes. Some consolidated their economic position in the colony by acquiring titles to choice pieces of real estate before the local inhabitants realised their value. To cite an instance, I. H. Willoughby's mother for example was said to have squatted with her children on one of the best sites in Lagos and successfully defended it against all challengers. Later, Willoughby built a profitable trading establishment on the property. Her example is a demonstration of how repatriates were able to use the colonial courts and bureaucracy to protect and extend their interests.

One observable or deducible tendency of colonial intervention on the African continent (as with other colonies outside Africa) is its ability to spring up 'emergent modernities' in the post-colonial period. In Nigeria's particular example, the country has received the English common law's classification of property into reality and personality (Smith, 1995:1). However, the distinction has a historical origin in the old forms of action. In this respect, Allott (1970: 68) also expresses the view that one may use what he calls 'the tree metaphor' for the evolution of legal system, and say that from the reception date a new branch sprang from the trunk of English common law. Thus the Nigerian and English legal systems began to diverge from the year 1900, both sharing a common trunk − the pre-1900 English law − but each functions in parallel, and one system was not subordinate to the other.

From here, therefore, the question arises about the continuous relevance of this parallel as depicted by Allot, especially in the light of observable suppression of the customary law by the English law. This standpoint, and perception, is further problematised by Comaroff and Comaroff (2001), in the argument that colonialism spawned relations that transected the lines of race, class, and culture creating, among other things, hybrid identifies and unexpected pattern of consociation.

To challenge Smith further, his view that in early law, property will be classified as real if the court would restore to a dispossessed owner the thing itself and not merely give compensation for the loss, is fraught with lack of cultural precision as we do not know if 'early law' refers to early English laws or those of the other cultures. One might argue that, in defining what property is, it is adducible that what is so owned, possessed − real or personal − equally defines the ownership status of its owner or possessor, thereby implying the right of the owner to transfer or bequeath the same if they so wished.

By implication, will, whether statutory, nuncupative, or written customary will, provides the occasion for transferring an individual's estate or property − especially after the owner is deceased. In this vein, for instance, Abayomi (2004: 1) notes that both the statutory law and the customary law prescribe the various ways through which a person's property can be disposed, managed and administered after his death. While the ultimate may be to ensure the passing of property at death, the devices are available to pass the property *inter-vivos* either as prelude to what happens to the property at death or to by-pass certain obligation at death: for example, taxes and other death dues or levies. Although Abayomi's explication tilts more towards a literate culture (e.g. the English testamentary tradition of Will making), even Africans (and in fact the Yoruba) can relate to this from their own customary practices of devolution of inheritance.

To devolve an individual's property in contemporary times, one option may be through the statutory Will, which is, one made in accordance with the provisions of the relevant statute in force. This type of Will, to be valid, must conform to the requirements prescribed in the relevant statutes, the departure from which will render the instrument void and of no effect. As earlier hinted, there is also the option of the nuncupative Will, which, differing from the statutory Will, is oral and takes effect

under customary law. In essence, this originates in the oral directives of someone, which is made in anticipation of death before credible witnesses. Such directives are usually enforced with the consent of the testator's family (Abayomi 2004: 1).

In his discussion of a written customary Will, Abayomi recourses to the suggestion of one Dr. M. Odje who offers that such document must fall or rise with the provisions of the general statute relating to Wills. There, however, seems to be some relative contestation in this regard. According to Odje's view, if a Will complies with the law, it should be treated as statutory Will and, if not, it fails and becomes null and avoid. Conversely, Okoro champions the view that, once customary Will is recognised by native law and custom, it does not matter which form it takes, whether oral or written. The validity of a customary written Will is typically rooted in the collective psyche of the people within a cultural context from which the guiding law (customary) is derived. For example, as noted by Abayomi, within the circles of village heads, elders and kinsmen, it is generally believed that the declarations of the dead are not easily departed from. Instead, they are executed out of respect for him in fear of his anger and spiritual vengeance from the grave. Hence, as long as the declarations, whether written or oral, are accepted by all and no quarrels or disagreements manifest, effect will be given to them. These options are besides other possibilities or devices of property disposition such as settlement *inter-vivos;* nomination; *donatio mortis causa*, and deed of gift.

2.10 Yoruba Land Tenure System

Yoruba land tenure is the system of land holding practised by the people and made applicable by the various High Court Laws meant to "observe and enforce the observance of customary law which is applicable and not repugnant to natural justice, equity and good conscience nor incompatible either directly or by implication with any law for the time being in force"[133]. This system is flexible and it responds to changes of the time, since it is unwritten, its application depends on sufficient proof. Among the Yoruba, land belongs to families, villages, or communities with the chief or head of the community or family holding the land for the use of the whole family, village, or community as a 'trustee' while title to the land is vested in the corporate

[133] S. 26 of the High Court Law of Lagos State cap 60 Laws of Lagos State 1994. The same provision is in the High Court Laws of the other States of Nigeria

unit thereby disallowing individuals from laying any claim to it. As the owner, not even the family head. There is clan, lineage or household control over the occupation and enjoyment of land by individual members of the clan. On the death of an individual holder of land, his property may vest in his family and become family property. Though individuals have rights to its use and enjoyment, but these rights are restricted when it comes to alienation.[134]Individual's self-acquired property may be used during his lifetime, or bequeath at his death as he pleases. No legal action can be taken to prevent him from alienating his interests and he needs no consent of any other party. If what he is giving out is gift *inter vivos* it should be shown that the donee is receiving the donor's total interests in the property and is not merely becoming a customary tenant or pawnee (pledge). The transaction should be witnessed by the donor's *Ol9r7 cb7* to certify that the donor possess the right to make such a gift, and also by his children in order to forestall later claims by them that the grant was not outright. In addition to the above, land belongs to the family, clan, lineage village or town and it remains so.

2.11 Creation of Family Property

Family property is created when these conditions apply; Firstly, by purchase of the property with family fund. Secondly, by declaration of an intention to create family property in a Will for the benefit and enjoyment of members of the family. Thirdly, by way of conveyance, where the settler confers property on the family under a valid deed for that purpose and declares that the use and enjoyment of the property shall be for named members of a particular family. Fourthly, by way of intestacy, the rule in *Abeje v. Ogundairo*[135] is that where a landowner whose estate is governed by customary law dies intestate such land devolves on his heirs in perpetuity as family property.

The rule in *Abeje v. Ogundairo*[136] says "it is immaterial that the deceased is survived by only one child. The conditions mainly are that the landowner must have died intestate, and that the estate during his lifetime must have been governed by customary law.

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[134] *Dr Abiola Akerele v. A. J. Atunrase & Ors* (1969) 1 All N.L.R 201 @ 208; *Okelola v. Boyle* (1998) 1 SCJN 63

[135] (1967) L.L.R 9

[136] *Ibid.*

This study begs to differ from this position and agrees with Lloyd's view that family property cannot be created when there is a sole heir, as in systems of primogeniture or ultimogeniture,[137] because among the Yoruba, the word 'family' is neither given a narrow meaning nor does it depend on the Western definition to understand the meaning of family which is the binding cord among the Yoruba. Family as interpreted in the case of *Abeje v. Ogundairo*[138] means, the direct offshoot, of the founder i.e. his children. But among the Yoruba of Southwestern Nigeria, family includes and it is not limited to children, grandchildren and great-grandchildren, which is inclusive of both sexes. Although at the point of devolution, who is entitled to share in the property is brought to fore and as already decided in the case of *Lewis v. Bankole*[139] that a grandchild could not demand as of right a portion of family land for building [unless he is demanding for his parent's share], means a grandchild has seen himself as part of the family, the fact that his right in the family does not extend to his demands does not demean his status in the family. Family bond extends more than was been stretched in the case. Even in the English world, there is nuclear and extended family. This study does not agree with Smith and other researchers who are in the same position with the *Abeje v. Ogundairo*[140] case as this may not be absolutely correct, because among the Yoruba the word "family" is inclusive and not exclusive, it is of common knowledge that people who bear the same surname and are from the same ancestral home are referred to as belonging to the same family, they attend family meetings and are of consanguine and affinine links which makes marriage exogamous among them.

To say the least, family relationship among the Yoruba goes beyond inheritance, and even on inheritance, instances of grandchildren inheriting properties from their grand-parents either as gift *inter vivos, donatis causa*, deathbed disposition or as representatives of their dead parents abound. If grandchildren are excluded from the definition of family, and the estate devolves on the only child, as the case of *Abeje v. Ogundairo*[141]pontificates, this study says it is not possible to refer to one person as family especially if he is unmarried, and in consonance with Yoruba dictum and

[137] Lloyd, P.C., 1959. Family Property among the Yoruba quoted in *Journal of African Law* Vol. II. No. 8. Summer
[138] *Op. cit Abeje v. Ogundairo*
[139] *Op. cit. Lewis v. Bankole*
[140] *Op. cit. Abeje v. Ogundairo*
[141] *Ibid.*

words of elders, *cn8kan k87 j1 zwq d3,* (one person cannot be 'we'). Family among the Yoruba is more than an individual, and if a family head is more or less a trustee and he is in a fiduciary position in relation to the property and to other members of the family who require him to act in good faith in carrying out his duties, then, the reference is not to an individual. It is my considered opinion that the rule in *Abeje v. Ogundairo*[142] will be given a different judicial interpretation if a similar case comes before any of our courts today as it cannot stand the test of modern day argument if it remains as decided thus:

> where a landowner whose estate is governed by customary law dies intestate such land devolves on his heirs in perpetuity as family property. It is immaterial that the deceased is survived by only one child. The conditions mainly are that the landowner must have died intestate, and that the estate during his lifetime must have been governed by customary law. Once the foregoing conditions are met, the rule simply states that the property automatically devolve on his children as family property.

The rule therefore takes no account of the number of children nor, indeed, the existence of children. The criticism against the decision in *Abeje v. Ogundairo*[143] on the ground that a sole heir could not have constituted the family is unfounded and should be ignored.

2.12 Alienation of Family Property

Alienation of family property in customary law means any form of transfer of family property and includes not only sale but also lease, mortgage, pledge or any other form in which an interest in land may pass from one party to another, and the position has been established beyond doubt by the Supreme Court in *Lewis v. Bankole*[144]and applied in a plethora of cases that alienation of family property without the consent of the family head is void *ab initio,* and where the family head alienates family land without the concurrence of the principal members, the sale is voidable. It is even true to say that customary law did not provide for alienation, as there was no need or demand for such, even a temporary grant of land for building purpose was unknown to Yoruba land tenure system as exemplified in *Adeyemo v. Ladipo,*[145]though borrowing of land for a specified period of time was common. Tenancy tended to be

[142] *Ibid*
[143] *Ibid*
[144] *Op. cit* Osborne C.J.
[145] (1958) W.R.N.L.R 138

for a nominal rental, or else on a crop-sharing basis and not for planting of economic trees.

However, in response to the demands of education, commercial agriculture, increased population, stimulation of acquisitiveness (Allott: 1960) and judicial decisions,[146] with a general trend of such decisions tilting in the direction of English law, have challenged the inalienability position as practised by the Yoruba. Interests in land are now been transferred for cash in many areas. Sales, lease for a money and various forms of equitable mortgages are replacing the traditional pledge while the indigenous sanctions are losing their hold. There is great influence by culture-contact and the clear cut dichotomy between land governed by English law and land governed by customary law is fast disappearing as most rural areas are now receiving influx of people and they are gaining positively from it.

2.13 Testate Succession

Testate succession occurs when a person dies leaving property and he has a valid and enforceable Will which ensures that upon his death, his property shall pass according to his wishes. In testate succession the deceased indicates that he is desirous of retaining absolute or limited control over his property after death, and it is therefore absolutely necessary to ensure that he prepares a Will that must conform to the provisions of the law. A Will is mainly concerned with the disposal of property, but it can be used for other incidental purposes. Anyone who has "capacity" to make a Will can do so. However, a Will cannot be effectual until it is activated by the death of the testator. Which means the benefit conferred on an individual by a Will cannot be enjoyed until the death of the testator as it is a mere intention on the path of the testator, and any beneficiary who predeceased the testator has no benefit, though Section 33 of the Wills Act 1837, section 18 of the old Western Region Wills Law and similar sections in the Wills Laws of some states of Nigeria state that contrary to any intention, if property is given to a child or other issue of the testator who predeceased him, but leaves any issue surviving the testator, the devise shall not lapse but shall take effect as if the death of such a person had happened immediately after the death of the testator (Abayomi,2004: 36).

[146] *Oshodi v. Balogun* (1931) 10 NLR @ 36; (1936) W.A.C.A 1 @ 2

A Will is an expression of intention which the law says takes effect upon death.[147]It is ambulatory because it is capable of dealing with property which is acquired after the date of the Will. Will takes effect, when it has been proved to be a valid testamentary disposition. The testator must have testamentary capacity[148], i.e. the capacity to make a Will – The testator must not have been under the age of 18 at the date of the execution of the Will (unless it is "Privileged Will[149]" as a soldier on actual military service or a seaman at seas). He must have *animus testandi* or sound disposing mind.[150]Therefore, an infant and a lunatic[151] cannot make a Will. Apart from sound disposing mind that enables a testator to understand the nature of the act of making a Will and its effects, it is also necessary for the testator to have a sound memory[152] which will enable him to recollect the kind of properties he is disposing and further he must have a sound understanding of what he is undertaking. This includes appreciating the moral claims upon him, that is, he should be able to remember the persons he is morally bound to provide for having regard to their relationship with him. Otherwise, the omission to adequately cater for any dependant may make the court order a reasonable provision as the court thinks fit be made for that dependant out of his net estate.

A Will is revocable before the testator's death. A codicil can be made to alter the last testament. A testator may revoke his Will as many times as he wishes to alter, amend or even cancel it by destruction. Unless there is a binding contract which may be affected if the Will is revoked, as the law keeps the sanctity of agreement. However, the law does not prevent a testator from revoking his Will, all that the other contractual party can do is to sue for damages if the Will is revoked.[153]Where the revocation arises due to operation of law and not the willful act of the testator, the remedy may not be available to the party asking for damages to the breach.

Section 15 Wills Act 1837 and similar sections of the states Wills laws enshrined a vitiating effect clause on the laws, where a beneficiary, or his or her spouse, witnesses the Will, the gift to the beneficiary fails but the Will remains valid. Under this section

[147] Abayomi, K.., 2004. *Wills: Law and Practice.* Lagos, Nigeria: Mbeyi Associates (Nig.) Ltd. pg 36
[148] *Federal Administrator-General v. Johnson* (1960) L.L.R. 291
[149] Soldiers and Sailors Act, 1918.
[150] *Marques v, Winchester* (1958) 6 Co. Rep 23.
[151] *Parker v. Felgate* (1883) 8 P.D.171
[152] *Banks v. Goodfellow* (1870) L. R. 5 QB 549 at p.565
[153] *Synge v. Synge* (1894) 1 Q.B. 466

a gift to a beneficiary fails if the beneficiary or his/her spouse witnesses the Will, though the attestation of the Will remains valid; it is the gift which fails. The critical issue in this is the date of the execution of the Will, so that if a witness marries one of the beneficiaries after that date, the gift is not affected. The gift is saved if there are at least two other non-beneficiary witnesses thereby rendering the attestation by the witness or his or her spouse useless. Note that there are other factors which may vitiate legacies – e.g. gifts contrary to public policy – e.g. a gift to a Terrorist Organisation, a gift in promotion of immorality, disclaimer, suspicious circumstances, mistake, want of due execution, etc. The Will must also contain an attestation clause. The attestation clause recites that the Will was executed in accordance with the requirements of section 9 Wills Act 1837 and raises a presumption of due execution;

It is important to point out here that the marriage of the testator automatically revokes his Will. The exception to this is where it appears from the Will that at the time it was made the testator was expecting to be married to a particular person and that he intended that the Will should not be revoked by that marriage. The Will is not revoked by a marriage to that person but marriage to any other person will ordinarily revoke the Will. And when a marriage is dissolved, annulled or declared void after the date of the testator's Will, any appointment of the former spouse as executor and/or trustee and any gift to the former spouse is effectively revoked – though - the Will remains otherwise intact. The revocation only affects gifts to the former spouse. Where the gift to the former spouse fails, it will fall into residue, or, if it is a gift or residue, will pass on intestacy.

The Wills Amendment Act 1837 and the Will Amendment Act, 1852 are statutes of general application which were in force in England on January 1, 1900.[154]They are therefore part of Nigerian Law on testate succession. The Wills (Soldiers and Sailors) Act, 1918 is also applicable to Nigeria as it regulates "probate clauses and proceedings"[155]and the High Court Laws of the various states under study are applicable in the states.[156]

[154] *Yinusa v. Adesubokan* (1971) 1 All NLR 225
[155] *Op. cit.* Nwogugu @ p.372
[156] S. 6 (1) Wills law of Oyo State 1990.

There are certain statutory formalities, which must be followed when a Will is drawn in accordance with the received English law in Nigeria. The formalities are:

(a) it must comply with a form

(b) it must be signed at the foot or end by the testator or by some other person in his presence and by his direction or the signature acknowledged by him in the presence of at least two witnesses present[157] at the same time, who shall attest and subscribe the Will in the presence of the testator[158] but no form of attestation or publication is necessary.

The harshness of (b) above must be noted, that, if all legal requirements for a valid Will are met but the signature was in any other place other than "at the foot or end" the Will became invalid, and for this reason the British Parliament had to enact the Wills Amendment Act of 1852 to correct the rigidity of the law in this respect. The amendment allowed the signature to be placed at, or after, or following, or under, or beside, or opposite to, the end of the Will so that it is apparent on the face of the Will that the testator intended to give effect to the writing as his Will by his signature. It does not validate wrong placing of signature, neither does it authorise Will signed by a testator after the witnesses had signed[159], nor approve any disposition inserted after the signature (Abayomi, 2004:45-46).

2.14 Intestate Succession

Intestate succession in Nigeria is governed by different rules due to pluralism of the family law[160]. Until 1954, s.36 of the Marriage Act governs the intestate succession to the estates of persons who married under the Act. The applicable law in the states under study is the Administration of Estates Law, 1959 applicable to Oyo, Ondo, Ogun, Osun and Ekiti[161] and it provides for a wife, a husband, issue, parents, brothers and sisters of full blood, grand-parents, uncles and aunts (being brothers of full blood or half blood or sisters of full blood or half blood or a parent of the intestate) brothers or sisters of half blood, as persons entitled to share in the property of an intestate

[157] *Smith v. Smith* (1866) L. R. 1 P&D 143
[158] *Groofman v. Groofman* (1969) 2 All E.R. 108
[159] *Apatira v. Akanke* (1944) 17 N.L.R. 149
[160] *Op. cit.* Onokah *@ p.63*
[161] S.49(1) Administration of Estates Law Oyo State; CAP 1 Laws of Oyo State of Nigeria 1978; S.49(1) Administration of Estates Law Ondo State CAP 1 Laws of Ondo State of Nigeria 1978; S.49(1) Administration of Estates Law Ogun State CAP 1 Laws of Ogun State of Nigeria 1978

depending on who survives the intestate. However, inheritance of the estates of an intestate may be governed by:

(a) the received English law as received in Nigeria

(b) the Administration of Estate Law of his state, or

(c) Customary Law.

S.36 of the Marriage Ordinance[162] specifically states:

> (1) where any person who is subject to native law or custom contracts a marriage in accordance with the provision of this Ordinance, and such person dies intestate, subsequently to the commencement of this Ordinance, leaving a widow or husband, or any issue of such marriage; and also where any person who is the issue of any such marriage as aforesaid dies intestate subsequently to the commencement of this Ordinance. The personal property of such intestate and also any real property of which the said intestate might have disposed by Will, shall be distributed in accordance with the provisions of the law of England relating to the distribution of the personal estates of intestate, any native law and custom to the contrary notwithstanding: provided that:
> (a) Where by the law of England any portion of the estate of such intestate would become a portion of the casual hereditary revenues of the crown, such portion shall be distributed in accordance with the provision of native law and custom, and shall not become a portion of the said casual hereditary revenues, and
> (b) real property, the succession to which cannot by native law and custom be affected by testamentary disposition shall descend in accordance, with the provisions of such native law or custom, anything herein to the contrary notwithstanding.

The section is said to apply to the colony only. The law provides two exceptions when customary law as against English law should apply to the distribution of the estate of an intestate:

> (i) customary law will apply to the distribution of the estate of such an intestate where by the English law any portion of the estate would have become bona vacantia to the Crown (in default of any person taking an absolute interest in the property of an intestate it belongs to the Crown) it should not devolve on the state.
> (ii) customary law will apply to real property of the intestate which, according to customary law, he had no power to dispose of by will.

[162] The Marriage Act, 1914 Cap 218 LFN, 1990.

The purpose of the exceptions is to exclude from the operation of the section, family property to which the deceased has no right to alienate. In the same vein, the Administration of Estates Law of the former Western Region 1958, which has been re-enacted by states created out of the Region (for the purpose of this study) namely: Oyo, Ogun, and Ondo, and later Osun, Ekiti, provide that where any person who is subject to customary law contracts a marriage in accordance with the provisions of the Marriage Act or marries in accordance with law which makes polygamy unlawful and such person dies intestate leaving a widow or husband or any issue of such marriage, any property of which the person might have disposed of by Will shall be distributed in accordance with the provisions of the Administration of Estates Law notwithstanding any customary law to the contrary.[163] The effect of this provision of the law is that customary law is not applicable to the estates of the intestate deceased who married under the Marriage Act or contracted a monogamous marriage.

Intestate succession occurs when a person dies without making a Will, or when in an attempt to make a Will, the Will fails to comply with provisions of the law, or when someone who had made a Will revokes the Will and was not able to revive it or make another before death. Where a testator specifically bequeaths part of his estate in a Will, but omits to deal with the rest of his assets, this is referred to as dying partly testate and partly intestate which is a possibility in inheritance devolution practises. In that case, the un-disposed residue of the estate will devolve according to the rule of intestate succession. An intestate estate may be govern by the *lex situs* principle which means the law prevalent in a place where the property is located. It applies to only immovable properties (i.e. land) no matter where the immovable property is located. The principle governs the immovable property of an intestate irrespective of his personal law. Therefore, where a German, for instance, acquires immovable properties in Ogbomoso, Nigeria, and dies intestate, the Yoruba customary law of intestate distribution will govern the distribution of his immovable property located in Ogbomoso. Similarly, where a Yoruba man acquires immovable properties in Akwa Ibom State of Nigeria and dies intestate, the *Efik*, *Anang* or *Ibibio* rules of intestate

[163] S. 49 (5) Administration of Estates Law of Western Region of Nigeria 1959 Cap 1 Laws of Western Region of Nigeria 1959; Administration of Estates Law of Ogun State CAP 1 Laws of Ogun State Nigeria 1978; S. 49 (5) Administration of Estates Law of Oyo State CAP 1 Laws of Oyo State of Nigeria 1978; S. 71 (2) (c).

succession will govern the distribution of his immovable property located there, depending on the location of the property in Akwa Ibom State.

Personal law of an intestate may also determine the way his intestate estate will be shared. Personal law of a person is the law which prevails in the area of his birth. The personal law of a Nigerian is the native law and customs prevalent in his place of birth. However, a person has a right to change his or her personal law, either locally of internationally. Where a change of personal law is made, it will affect the distribution of his estate. For instance, a person may change his personal law by choice through naturalisation or culturalisation. If a person renounces his citizenship of America and acquires Nigeria citizenship, he has by the act of renunciation and naturalisation changed his personal law. Similarly, where a person acquires the status of another ethnic group by a process of culturalisation, he has also changed his personal law. In each of these cases, his new citizenship status will displace his personal law and will govern the distribution of his estate[164]. Where a man whose personal law is Yoruba native law and customs decides to contract a Marriage under the Act, if such a person dies, English law shall govern the distribution of his estate[165] regardless of his being a Yoruba man whose personal law is the native law and customs of his area because by his celebration of a Christian marriage, there is a presumption that he has excluded himself from whatever benefit the native law has to offer and shielded himself with the English law.

2.15 Judicial Position on Intestate Succession

Coker JSC delivering the lead judgment in *Olowu v. Olowu*[166] declared that:

> There is yet another point. There have been several decisions of the courts on the customary law of succession and distribution amongst the Yoruba. The issues of a deceased person on intestacy succeed to his properties. Not his relations.
> *Lewis v. Bankole*[167], and *S.J. Adeseye & Ors v. S.F. Taiwo*[168] are authorities in support of the views that on the death intestate of the founder of the family, his eldest son, who is the " *Dqw9d6*", becomes the head of the estate of the deceased for himself and other members of his issues. It is ... the *Dqw9d6*, who decides which system of

[164] *Op. cit. Olowu v. Olowu*
[165] *Op. cit. Cole v. Cole*
[166] *Op. cit. Olowu v. Olowu*
[167] *Op. cit.* Osborne C.J.
[168] *Op. cit. Adeseye v. Taiwo*

> distribution should be adopted, be it the "*8d7 igi* " or " *or7 0 jor7*" system. See *Taiwo v. Lawani*[169] and *Dawodu v. Danmole*[170] and the Privy Council decision reported in (1962) 1 NLR 702... In the case it was held that the eldest son was the head of the deceased's family, and not his eldest child (a daughter) or the brother of the deceased.

While calling the attention of the court to the position of a *Dqw9d6* which is automatic among the Yoruba, and as earlier defined in this work, he is the eldest male child, while the eldest female child is known as *B11r2*. Today, in the absence of a *Dqw9d6*, a *B11r2* will take the position as family head especially among the Ijebu and Abeokuta[171]. It must be noted that the family he or she heads consist only of his father's children, so the larger family which he or she is also responsible to, still has an *Ol9r7 cb7* who is "mightier" than him or her. The true position among the Yoruba is not "…it is the *Dqw9d6*, who decides which system of distribution should be adopted, be it the *"8d7 igi"* or *"or7 0 jor7"* system." It would have been better if the expression is that, it is the *Ol9r7 eb7* and not the *Dqw9d6* who decides which system of distribution should be adopted. Even as good as that would be, evidence of this research has shown that it is the family (now in a wider sense) who employs, oath taking, words of elders, divination and other techniques aimed at fostering equity and equality that determines which mode to use in distributing the inheritance of an intestate Yoruba and not the *Dqw9d6*. It is the duty of the *cb7* headed by the *Ol9r7 cb7* to decide how devolution should go and not the *Dqw9d6*. The successor to the family-headship was usually the next younger brother of the deceased *ol9r7 cb7*, so chosen because he was the eldest male of the senior branch of the family. It was only when there was no such younger brother of the deceased that the deceased's eldest surviving son succeeded to the family headship. A younger brother might supersede his senior eldest brother as the family head on the ground of ability, intelligence or influence. The choice being confined to those descended from a common father through males. If there were no males, the eldest female member would succeed, though not a generalised practice as earlier mentioned in the work.

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[169] (1961) 1 ALL NLR 707
[170] (1958) 3 FSC 46; (1962) 1 All NLR 702 (PC)
[171] Abeokuta is specifically used here to generalise the practice among the Egba, Owu, and Gbagura who inhabit the town as opposed to the notion that everyone in Abeokuta is an Egba.

The issue before the court on intestate succession in *Johnson v. United African Company Limited*[172] was whether the widow of a Nigeria man who married under the Marriage Ordinance and died intestate had an attached interest in the property of her deceased husband. The court held that the Marriage Ordinance expressly declared that the real property of an intestate which he could have disposed by Will should be distributed according to the law of England relating to the distribution of personal estates and not customary law. The court further held that the English law applicable under S. 36 of the Marriage Ordinance was the English law as at the date of the enactment of the Ordinance, that is to say 1914 and that the law in force in England as at that date was the Statutes of Distribution which gave one third of the property to the widow and two thirds to the children. Therefore, the widow concerned in that case had one third attachable interest in the property of her late husband.

The English Statutes of Distribution referred to in that case are the Statutes of Distribution of 1670 and 1685, which states the mode of distribution of the estates of an intestate after the payment of debts and funeral expenses, the statute allowed a widow who survived the intestate to take one third of the estates and the remaining two thirds are to be distributed in equal proportion among the children. Where there is no widow, the estate is distributed equally among the children. The grandchild of any of the children who predeceased his father will take the share his father would have taken, where there is no children, the wife is entitled to half of the net estate and the other half is given to the deceased's father or if his father was dead it will go to his mother, brothers and sisters with children representing a deceased parent. Where there are no children and wife, the intestate father is entitled absolutely; and if the father also predeceased the intestate, the mother, brothers and sisters and the next of kin of the same degree share equally on a *per capita* basis. If a married woman dies intestate, the whole of her personal property will go to her husband to the exclusion of any children. If there is no husband, the estate will go to her children. However, Marriage Ordinance[173] also provides that there is no reversion of property to the State for want of heir; instead, the portion which would have gone to the State for want of heir would be distributed according to customary law.

[172] 13 NLR 13
[173] Marriage Ordinance S. 36

The decision in *Coker v. Coker*[174]and *In-Re Estate Emodie*[175], are that the provision of S.36 (3) of the Marriage Act, without prejudice to the specific mentioning of colony, as its area of coverage applies throughout Nigeria. The court held *In-Re Estate Emodie* that the property of an Ibo man who married under the Act in the Registry at Port-Harcourt and later died intestate in the Protectorate must be distributed in accordance with English law. Although the judge agreed that the Marriage Act did not apply, but nonetheless stated that customary law did not apply to the distribution of the property. Therefore, he would have to apply the rule in *Cole v. Cole*[176] which says that the distribution of the estate of an intestate who was subject to customary law and had contracted a Christian or monogamous marriage was to be governed English law.

In its literal translation there would have been no argument as to where the provision of S.36 (3) of the Marriage Act would apply, but the Judge interpreted the section as he wanted its meaning to be, *8l2k2 mq jzq s7l3, mq jzq s7 8ta, ib8 kan ni 90 jq s7.* (If one is struggling with beads not to lose both in the room and outside the room, it will definitely loose somewhere). The section actually specified the Colony of Lagos which was the only part of Nigeria known during the colonial administration as a colony in its strict Constitutional sense and if section 36 was intended to apply to the whole country, there would have been no need for the inclusion of subsection 3 which specifically mentioned the colony which was a part of Nigeria then, so instead of not applying it to the matter the judge decided it should be applicable.

The decisions of the above stated cases are that intestate estates of persons who contracted marriages under the Marriage Act anywhere in Nigeria, no matter where the property is located will be govern by English law. Since the provision of the Marriage Act applies in respect of Marriage contracted in accordance with provision of the Marriage Act, the rule in *Cole v. Cole*[177] is that distribution of the estates of an intestate who was subject to customary law and had contracted a monogamous marriage outside Nigeria but died, left real property in Lagos, is that his marriage according to Christian rites had altered his position and clothed the deceased, his wife and their children with duties and obligations which are foreign to customary law,

[174] (1943) 17 N.L.R 55
[175] 18 N.L.R. 1
[176] *Op. cit. Cole v. Cole*
[177] *Ibid*

therefore, English law should govern the estate. This had been followed by some cases,[178] while its validity had been doubted and the ratio of the decision set aside in many others such as in *Ajayi v. White*,[179] *Cole v. Cole*[180] to mention just a few.

The facts of *Cole v. Cole*[181] were similar to *Smith v. Smith*[182] because the intestate also contracted a Christian marriage in Sierra Leone in 1876 and died domiciled, in Lagos where he left a house. At the time of death, he was living with his wife and children in the house and used it as family property. The plaintiff was the only male child of the Christian marriage while the other children were female. After the death of their mother, the plaintiff claimed that succession to the house was governed by English law and that as the heir; he was exclusively entitled to inherit the house. The issue which the court had to determine was whether English Law was applicable which would then entitle the plaintiff to inherit the house. But if customary law is applicable, the house would be inherited by all the three children as family property. The judge in the case disagreed and said that a Christian marriage or a monogamous marriage only raised a rebuttable presumption that English law was to apply and that other considerations such as personal law of intestate, their position in life and their conduct with reference to the property in dispute could make English law inapplicable. The judge concluded on the premise that the intestate bought the house in order that it might be their family home, and if he had wished to change that position, he would have given an indication of such an intention by making a Will or in another manner before his death. The judge therefore held that customary law should apply to the inheritance of the deceased property.

It is clear from the decisions of the mentioned cases that the courts had not been consistent in the decision as to which law should apply to the estates of an intestate who was subject to customary law and had married under the Marriage Act or had contracted a monogamous marriage.

The problem of interpreting who is an issue or a child entitled to inherit the estates of an intestate under the Statutes of Distribution has also come before the courts several

[178] *Haastrup v. Coker* (1927) 18 N.L.R. 68
[179] 18 N.L.R 41
[180] *Op. cit. Cole v. Cole*
[181] *Ibid*
[182] (1924) 5 N.L.R 105

times, and the courts have interpreted an issue as stated in the Statute of Distribution to mean a child legitimated under English Law. The courts have held that the children of customary law marriage and children whose paternity were acknowledged under customary law are not legitimate children entitled to inherit under the Statutes of Distribution, though such children are legitimate by the law of domicile to their origin.[183] Such decisions have been overruled by the decision in the *Re Adadevoh*[184] *and Bamigbose v. Daniel*[185] where the court held that a child who was legitimate by the law of his domicile of origin can inherit under the Statutes of Distribution, and the issue of whether a wife or a widow stated in the Statutes of Distribution who was entitled to inherit the estates of an intestate refers to a widow of customary law marriage or not was also resolved in that case. The court ordered that one third of the value of estates which the widow was entitled to by the English Statute of Distribution, should be reserved pending the time when the widow or widows might make claims for a share of the estates of the husband who died intestate. Some of the verdicts of the courts are repugnant to equity and fairness in the eye of customary law. The estate of an intestate ought to benefit his survivors including outsiders to the family if the estate is large enough to accommodate that.

2.16 Personhood and Inheritance

African cultures and customs share a reasonable degree of similarities in their outlook. However, in spite of those similarities, every cultural locale maintains its peculiar and distinct ways of life and of resolving certain problems, especially culture-specific ones. As African families settled and expanded in different locales during the past millennia and throughout the African continent, they developed somewhat different customs and vocabularies to order and explain their lives and existence (Khapoya, 1998: 13). Khapoya's view is further buttressed by the fact that African ethnicity has many variants and undergoes much redefinition through time, yet one's home 'people' (that is, those whom one grows up with, knows, or is related to through extended networks of kinship groups) remains a significant point of reference for most African families today.

[183] *Op. cit. Coker v. Coker*; *Adegbola v. Folaranmi* (1921) 3 N.L.R. 89; *Gooding v. Martins* (1942) 8 WACA 108.
[184] 13 WACA 304
[185] 14 WACA 111

Further, while pictures, as described by Khapoya, of African 'network' of kinship or family relations may somewhat suggest the fact that Africans are overtly communal or gregarious people, the truth however remains that the personality of an individual − more importantly as it relates to the material 'appropriation' of inheritance – often comes to matter, coming under 'proper' definition in relation to a deceased who has died intestate (whether through oral proclamation). Comaroff and Comaroff (2001), for instance conducted a relevant inquisition in this respect, into the culture of the Tswana of Southern African. According to them:

> Among those peoples who, during the colonial encounter, came to be known as 'the Tswana', personhood was everywhere seen to be an intrinsically social construction. This [is] in two senses: first, nobody existed or could be known except in relation and with reference to, even as part of, a wide array of significant others; and second, the identity of each and every one was forged, cumulatively, by an indefinite, ongoing series of practical activities (p. 268).

The implication of this on inheritance among the Yoruba is that, an outsider to the family, may assume, the existence of certain *filial* relations, which in actual fact does not exist within such a family. Further implication of this is that, at the point of devolution of a deceased's estate, the identity of the individual is brought to the fore, and as such, 'properly defined' in relation to the deceased, by the latter's immediate relations − both nuclear and extended families − in such manner that may, in the interim, disregard any form of assumption about the mere physical, communal presence of an individual in the family, to establishing through blood ties to the deceased with the view of ascertaining entitlement of every claimant to the deceased's estate.

For instance, in the case of *Adeseye and Ors v. Taiwo and Anor*[186], the plaintiffs unsuccessfully tried to base their claim to succession to the estate of a deceased relative on the facts that they were blood relations of the deceased and that they were so regarded by him during his lifetime. The court held that they could not by those facts become entitled to succeed the estate. This example appropriately evidences the fact that personhood becomes really integral and a sensitive reality in deciding who is entitled to the estate of a deceased, and who is not, at his death. Indeed, in other to succeed to their deceased father's estate, Coker says, it is necessary for even the

[186] *Op. cit. Adeseye v. Taiwo*

children to establish that they were so regarded as children by their deceased father. This does not mean others cannot benefit from the estate of their father but the rightful owners must first be satisfied in accordance with the laws.

Locating what he calls 'twin words', 'inheritance' and 'succession', in conceptual perspective, Emiola (2005) argues that the distinction between the two is profoundly significant in customary law. Inheritance, according to him, is an estate or property that a man acquired by descent and can be transmitted to his heir in the same way on his death on intestacy. On the other hand, succession includes the devolution of title to land by Will as well as accession to office and dignity. Hence, the latter term encompasses what in English law is governed by three different rules of law; the law of Will, the law of Intestacy, and the law relating to Accession to title and dignities, all of which have parallels in Customary law (p.131).

Although Emiola's submission tends to tilt in favour of the view that 'Inheritance' and 'Succession' are twin terminologies, it may be safely posited that succession is subsumed under inheritance, this latter view being *in tandem* with that of Lewin (1947:136). However, this position is not to be favoured by Emiola who believes that the traditional view of some sociologists and social anthropologists, that 'Inheritance' was the more appropriate terminology, misses the point, especially in relation to customary law because the idea of 'wife-inheritance' associated with customary law is, according to him, out of place. In buttressing this, the concept of levirate marriage or 'widow-inheritance' belongs not to the realm of the law of succession but to the law of marriage.

However, this argument of Emiola and his school of thought are technically faulty and problematic standing on the pedestal that the basis of their submission is founded in the English law. Thus to apply a basically foreign principle of law to a culturally distinct issue is a misapplication of the principle of law. The study also disagree with Ajisafe[187]who asserts the patrilineal principle of succession, but believes that goods and land of a deceased person are shared and distributed according to rank, title or age, the eldest taking the largest share and the other children's shares follow in a descending order of magnitude. One may not know if Ajisafe was referring to *id7 igi*

[187] Ajisafe, A. K.., 1924. *The Law and Customs of the Yoruba people.* London: George Rutledge and Sons Ltd.,

or or7 0 jor7, even at that, there is no mode of sharing among the Yoruba whereby estate is shared in a descending order. Although inheritance is done *seniori priori* seniority takes priority, that does not mean the first child will take the father's estate located in Ajah, Lagos and leave the intestate's wheel chair for the last child. If consideration is given to the time Ajisafe wrote, what he said may be a possibility then, as history has it that around that time or thereabout, you do not need to be present to sell a product by the road side, one does not need to be present by the wares once the price is known, prospective buyers go there, pick what they want to buy and place the amount on the tray or beside it, so people tend to be contented with little things then, than now.

2.17 Yoruba Kinship and Inheritance Devolution

All cultures distinguish various categories of kin and affine, and these categories, with their associated patterns of rights and obligations, make up what social anthropologists call kinship systems. In Yoruba societies individual are related by kinship or affinity and these relationships are culturally recognised.

Kinship plays little or no part in interpersonal relationships which make up the Western world and this defines the interpretation given to some issues they are confronted with, but in African societies especially among Yoruba, kinship is of social importance. Where a person lives, his group and community membership, whom he should obey in certain regards, whom he may and may not marry, from whom he may hope to inherit and to whom his own status and property may go to at death, all these and many more are determined by his status in a kinship system. Among the Yoruba, everybody is or thinks of himself as being related to nearly everybody in the village, almost all social relationships are of kinship or affinal ones.

The Western way of thinking and classification of kinship are consistent and reasonable in their own cultural and social contexts, but alien to Yoruba customs and tradition. Kinship among the Yoruba helps in distinguishing between the people one is born among, in ordering one's relationship with them. When a Western anthropologist speaks of a parent-child relationship, or of the relationship between cross-cousins (the children of a brother and a sister), he is not primarily concerned

with the biological connections between these kinds of kin, though he may recognise the existence of such relations. What he is concerned with, are the social relationships between them; the facts that in the culture being studied they involve distinct types of social behaviour, and particular patterns of expectations, beliefs and values. Although he is interested in them as social relationships, he calls them kinship relations because that is how they are culturally defined. Among the Yoruba, the term 'brother' may denote many relatives besides the son of one's parents; sometimes it may refer to people who are not ones biological kin at all. What it denotes can only be determined in the light of a thorough knowledge of the culture.

Attempts at translating the kinship terms of Yoruba culture into English have led to serious misinterpretation and misrepresentation. Here is a simple example. In many cultures relatives on the father's side and on the mother's side are terminologically distinguished, and are thought of as being quite different kinds of people. Where this is the case there are distinct terms for the mother's brother (*Zb5r0/@gb-n 8yq l-k6nrin*) and for the father's brother (*Zb5r0/@gb-n bzbq l-k6nrin*)), and father's sister (*Zb5r0/@gb-n bzbq l9b8nrin*) and for the mother's sister (*Zb5r0/@gb-n 8yq l9b8nrin*) these set of relatives are differently regarded. So to translate the term for the first set as 'uncle' and the second as ‘aunts’ is to conceal a vital important social distinction that has kept the unity among Yoruba people ongoing for generations. But Western social anthropologists have critically applied the predetermined framework of their own kinship system to the social life of the Yoruba without understanding the people's kinship systems from within; instead they have imposed their own. Therefore, the classificatory terminology: first cousin, second cousin, third cousin, paternal grandfather, paternal grand-uncle, maternal uncle, parents siblings and siblings children, uncles and aunts, nephews and nieces in Western terms are not so important to the Yoruba who refers to his father's sister as 8yq (Mother), and a mother's brother is regarded as *bzbq (*father).

The Yoruba are typically patrilineal, even though cognate ties may exist in certain parts of Yorubaland. However, one might agree with Lloyd (1959) that the smallest unit of kinship among the Yoruba is not the biological family of father-mother-children, but the *[m[8yq,* the children of one mother in a polygamous household. Although modern day Yoruba frequently use the term ‘full brother (or sister)’ for this

term, confusion often arises when the term 'full brother' is used, since *[m[8yq* in its translation also implies the children of one woman by several men. According to Lloyd, the Yoruba always state (*ok6n [m[8yq le*), i.e. that their emotional ties with the maternal siblings are of much stronger bond than those with the father; hence the children of one mother should not only never quarrel openly, but also cooperate closely and not divide property rigidly.

In addition, the children of one's father with more than one wife are referred to as *[bzkan* – that is, half brothers or/and half sisters. However, between the *[m[8yq* (here, precluding members born to other fathers) within the *[bzkan*, there are situations of hostility, competition and conflict. Therefore, whatever the father has, he is expected to share equally between each *[m[8yq*. One weakness in the exposition of Lloyd is his assumption that conflict between *[bzkan* is inevitable when it may only, in actual fact, be a possibility, and this is in the light of realism: the view that exceptional polygamous family do cohabit in peace and amity.

Lloyd, writing from an *etic* point of view, has taken for granted the possibility of a modern-day elite African (Yoruba) choosing on his own accord not to accentuate the right to titles to himself, even when he has, by law of inheritance and succession, a right to it. Instead, Lloyd presumed that a person must hold many statuses during his lifetime, so that at death, many of these would be assumed by others (those others who are associated with the kin group). As such, a man is first a member of a kin group, whether patrilineage or cognate. So, he holds a general right to as much land as he needs for his house and his farms, and a specific right to the use during his lifetime, of that land which he has, before his death, in fact used. In neither case, as Lloyd found, can he alienate these rights outside the kin group, as only the group, acting as a corporate body, has such a power. It should however be noted that this general right, as held by members of the group, is not heritable since each member assumes the right at birth and it terminates at the death of the holder.

One might not totally disregard Lloyd's view, in the sense that in Yoruba customary practice, a member of the kin group participates in the meetings of the group during which control, allocation and alienation of the group's property − mostly real estate − are discussed. At such meetings, his rank depends on his age, and, upon his death, the

next in age takes his place. By the same token, the oldest male member (*Ol9r7 1b7*) is the extended family head who presides over family meetings, wields considerable administrative and executive power on behalf of the group. However, specific rights to property are usually held within the *[m[8yq* even when it is within a polygamous arrangement. Here, a man (who is a member of the *[m[8yq*) has duties in respect of his deceased parents, such as yearly ceremonies to the dead; and also has certain rights to property used by these parents during their lifetime. As a member of the *[m[8yq,* a deceased man's status passes to his immediate younger brother or, failing a junior sibling in that order.

It is also agreeable that kinship can be extended logically back to the founder of the kin group, as, in fact, they are frequently deployed for matters of common grandparents, but rarely beyond this level. It may be true that the kin group tracing descent from a common great-grandparent rarely holds rights to land or titles corporately and so does not function effectively as a corporate group; but the sheer existence of a family house (property) will make these groups more important in future as these buildings for instance pass to the builder's great-grandchildren. In Yoruba patrilineal society, a man is linked through his father to a whole group of people, the lineage of which his mother is not a member. In his mother's side, although he is not a member of that group, he is bound to it by strong ties of attachment, and its members will reciprocate the attachment, and think and speak of him collectively as 'their' child.

The kin group itself is often segmented into between two and six segments, known as *8d7, or7gun* (Oyo, Ekiti, Egba) or *oj5mu* (Lloyd,1959). With regard to inheritance or/and succession, genealogies are usually foreshortened to four or five above living elders. The founder-ancestor is usually said to have had X children (all males in the patrilineage), each of whom heads a segment in the genealogy (each is presumed to have been born to a different mother). In this scenario, the land of the kin group is frequently divided among the segments, each being 'allocated sole usufructuary rights over its own portion.' In the case of Ekiti and Oyo, the lineage chieftaincy title must usually be held in turn by each segment.

This reality recalls the fact that each man within the *[m[8yq* may have his own children and as such become the head of a little family so to say. He acquires interest in property by his own efforts and, at his death, his status as family head of his own nuclear group passes to his eldest son, and thereon to other children (males *defacto).* Women are expected to be in their husband's houses and thus are deemed unable to assume the responsibilities of office as family head.[188] It should also be noted that family property inherited from *8yq* (his mother) reverts to the mother's family.

2.18 Inheritance and Religion

Religion is an integral part of culture; Walter Burkett opined that there has never been a society without religion[189]. African inheritance practices today are made up of the customs and traditions of the people, the adopted Judao-Christian and Islamic cultures that have been prevalent even before the colonial arrival. Much of African customary law is inter-twined with religious beliefs, practices, and institutions. Some customary practices such as marriage, burial, inheritance and succession[190] are connected to religion in obvious ways, they appear secular but they have sacred meanings and implications. Arrangements at death, rites held after a period of mourning, and devolution of inheritance provide the occasion both for laying the deceased's spirit to rest peacefully with his ancestors and for distributing the estate in a way that will not call for his anger.[191]

The Holy Bible[192] says, 'A good man leaves an inheritance to his children's children', this presupposes no discrimination about sex, but the Old Testament, reflecting ancient Jewish culture gives the male members of the household, all rights of succession to the family estate,[193] save Job[194], whom the bible says gave inheritance to his daughters, on the caveat that there were no women as fair as his daughters in the land. By the Mosaic enactment, daughters were admitted to succession in the event

[188] *Karimu Akande & Anor v. Joseph Oyewole* (2003) ANLR 358
[189] Walter, B., 1996. *Creation of the sacred : Tracks of Biology in Early Religion.* United States: Harvard University Press,
[190] Tebbe, N., 2007. Witchcraft and Statecraft : Liberal Democracy in Africa, *Georgetown Law Journal* 96 183–236
[191] Bennett, T. W., 1991. *A Sourcebook of African Customary Law for Southern Africa*. Cape Town: Juta, 379-84
[192] Proverbs 13:22
[193] Deuteronomy 21:15-17, Gen. 25:5
[194] Job 42:15

that no male issue remained,[195] but the wife was not recognised as heir even in such conditions. Women are owned before marriage, by the father and after marriage, by the husband. The Bible allows a wise servant to have part of a deceased inheritance over a son that causes shame to the father, and not the widow[196].

The provisions of the Holy Quran and the Hadith differ from that of the Bible and the customary rule of inheritance of the Yoruba, as succession rights under Islamic law are mathematically laid down[197]. Under the Islamic law, wives and daughters are entitled to participate in the sharing of the estate of their deceased husband or father. When there are children or other descendants, the widow's portion is one-eighth of the deceased estate. If there is more than one widow, the one-eighth is shared equally amongst them. A woman without any child inherits one-quarter of the deceased husband's estate as decided in *Ahmadusidi v. AbdulahiShaaban*[198].

> From what is left by parents and those nearest related there is a share for men and a share for women, whether the property be small or large --a determinate share,[199]says the holy book..

Under the Islamic law, women's right of inheritance is non-negotiable and the share of every survivor in the property is predetermined. It is difficult for women to be disinherited of their determined portion, even though, the share is merely a fraction of what men are entitled to, under the law of succession (mirath). Christianity and Islam somehow militate against equity and equality as both hardly concede equality of share in inheritance, whereas equity subsists in Yoruba devolution modes.

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[195] Numbers 27:1-11

[196] Proverbs 17:2

[197] a.) Father, one – sixth (1/6).
b.) Grandfather, one –sixth (1/6).
c.) Mother, one – sixth (1/6) with a child and one – third (1/3) without a child.
d.) Grandmother, one – sixth (1/6) with a child and one – third (1/3) without a child.
e.) Husband, one – fourth (1/4) with a child and one – half (1/2) without a child.
f.) Wife or wives, one – eighth (1/8) with a child and one – fourth (1/4) without a child.
g.) Daughter, half (1/2) when alone, and two – third (2/3) if more than one son.
h.) Sons daughter, howsoever like above.
i.) Uterine brother or sister, one – sixth (1/6) if one, one – third (1/3) if more.
j.) Full sister, one – sixth (1/6) when alone, and two – third (2/3) if more.
k.) Consanguine sister, half (1/2) if one and two – third (2/3) if more.

[198] (1992) 4 NWLRP 113

[199] Sura 4:7

The need to discuss Islamic law of inheritance is not only because it is regarded as a customary law in Nigeria, but the fact that devolution in Islam is unalterable. The holy Quran has stipulated the modes to be followed. According to the verses of the Quran, the first right on the property of the deceased is that of his creditors. A cursory look at the sharing prescribed by the holy writ is to the effect that the first category of inheritors which include parents shall be given their stipulated portion of share before the children and the balance shall now be distributed among the children and others.

The two kinds of inheritors are:

i. Inheritors who have fixed proportion of the total inheritance and
ii. Inheritors who are to share, in a specific proportion, the balance of the inheritance after the share of the first category of inheritors has been given.

By implication, if there are instances where a portion of the wealth of the deceased Muslim is left over after all the heirs have been given their portion, the Quran has directed that close relatives and the poor should be part of the devolution[200].

The fact that Islamic law is regarded as part of the customary law in Nigeria calls for the attention of customary law and Islamic law experts for intellectual discuss[201]. From all intent and purposes, Islamic law does not fall within the same category of customary law, because, Islamic law is based upon written sources, while customary law is not. Islamic law is fixed and immutable; it is the revealed will of God. In contrast, customary law is meant to reflect the living traditions of those who follow it, and is therefore amenable to change as often as the culture which is not static changes.[202]Some other factors that distinguish Islamic from its customary law counterpart are: the intimate link between law and religion; its objective basis on standards of good and evil; its ethical standards that cannot be rationally known, rather, they are dependent on divine revelation; as God's law. Islamic law has precedence over the state; it has four roots- the Qur'an, the Sunna (traditions or

[200] *Op. cit.* @ 2:180, 4:8
[201] The dicta of Justice Wali of the Supreme Court in *Alhaji Ila Alkumawa v. Alhaji Hassan Bello* and *Alhaji Malami Yaro*, (1998) 6 SCNJ 127, 136.
[202] Jamil Abun-Nasr, 1990. *The Recognition of Islamic Law in Nigeria as Customary Law: Its Justification and Consequences* in Abun-Nasr et al. (ed.) Law Society and National Identity in Africa.

practices) of the Prophet, consensus of scholars and analogical reasoning; and was developed through private jurists, not state legislators.[203]

Islamic law itself distinguishes between sharia law and customary law, and like the common law, it has mechanisms to accommodate the latter when necessary.[204] Classifying Islamic law as customary fails to account for the fact that some states in Northern Nigeria, (with particular reference to Zamfara state)[205] have adopted the precepts of Islamic law as their penal system of law, though the constitution frowns at any state adopting any religion[206].

However, for the purpose of this study, it is helpful to recognise that Islamic law remains customary law unless formally codified, and is therefore amenable to continued interpretation in keeping with life experiences. Such an interpretation is supported by the Nigerian legal system which continues to include Islamic law in its definition of customary law.[207]

2.19 Customary Modes of Inheritance and English Testament

The fundamental reason necessitating the need to make this important comparison or ascertain the relationship between the Yoruba and English modes of devolution of estate is no other than the sheer influence on the former by the latter, consequent upon colonial incursion into the autochthonous African systems.

Unknown to African customary law is the institution of Wills (see Wills Act 1837; Wills Amendment Act 1852; Wills Law, 1959 of the Old Western Region of Nigeria; Wills Edict 1990 of Lagos State; Wills Law Cap 133 Laws of the Western Region of Nigeria; Wills Law Cap W2 Laws of Lagos State 2003) or testament as known in Europe, although different forms of dispositive succession, notably the nuncupative Will, the designation of a successor, the earmarking of property, and so on were known.

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[203] *Elegido, J. M,. 1994: Jurisprudence: A textbook for Nigerian Students. Ibadan: Spectrum publishing, Nigeria,).*

[204] *Ibid*

[205] The Shariah Penal Code Law (No. 10, 2000, Zamafra State). Other states have also recognised a distinction between Islamic personal (although not statutory) and customary law by statute. For example, see s. 2 of the Statute of the Plateau State Customary Court of Appeal Law 1979: "'Customary law' means the rule of conduct which governs legal relationships as established by custom and usage and not forming part of the common law of England nor formally enacted by the Plateau State

[206] *Op. cit*. Constitution of Nigeria @ S.10

[207] *Yakuba v. Paiko*, Suit No.CA/K/80S/85 (Nigeria)

Among the characteristics or attributes frequently alleged as typifying traditional African judicial procedure are simplicity and lack of formality, reliance on 'irrational' or subjective modes of proof and decision. In addition is the fact that the parties (and often the judges or adjudicators (for example, the *Ol9r7 cb7*) are normally involved in complex or what has been termed 'multiplex relations', serving single interests, or, better still, relations which existed before and continue after the actual appearance in court (whether traditional or adopted Western court system), and which largely determine the form that a judicial hearing takes. Other characteristics include, a common sense as opposed to a legalistic approach to problem-solving; the underlying desire to promote reconciliation of the contesting parties, rather than merely to rule on the overt dispute which they have brought to court; and the role of religious and ritual beliefs and practices in determining legal responsibility.

There is an obvious espousal by *Allot et al on the ideas of N. A. Ollennu,* who in this regard, had earlier stressed that the very informality of proceedings in traditional courts achieved similar evidential ends to those achieved for developed courts by counsel and counsel's preparations of pleadings. This informality of procedure is said to obtain in the mode in which litigants present their cases, in the manner of obtaining evidence from litigants before requiring witnesses for the plaintiff to substantiate his case. Further comparison subsists in the fact that both parties in a litigation (whether in the context of customary law or English law) are heard before witnesses are called in order to clarify and settle the issues and to determine on whom the onus lies, and therefore who should first call witnesses in evidence of his claim. This procedure, in essence, serves the same purposes which pleadings, prepared by professional counsel, serve in superior courts.

In addition, a relationship also exists – between African indigenous and European laws – in the fact that, since the plaintiff, lacking trained counsel's advise, may not be seized of the law, but perhaps merely feel that he has been badly treated, justice cannot be achieved unless he is allowed to speak about many things, which may at first be irrelevant, but which may later on turn out to be crucial. Here, if the same observation is made in court by counsel, litigants may not be able to present their grievances in coherent, logical, and relevant form. In this scenario, traditional judges are said to play the role of counsel as an English judge may not do on behalf of a

litigant who appears without benefit of counsel. Then, again, similar to an English court, when native adjudicators enter into judgment, they eliminate the irrelevances, and their arguments are couched in an accumulating logic, leading to a verdict on the balance of probabilities in the light of the native law of the land, because of their experience in the native lore. Of native adjudicators, it is said, that they also play the role of counsel in cross-examining parties and witnesses. This fact, it is argued, has given rise to the mistaken idea among those used to Anglo-Saxon law trials, where the judges preside over an adversary contest between counsels, that in African courts there is a presumption of guilt. This presumption, it is said, seems to arise wherever the judge's duty is to find out the truth, it is only possible to check evidence under cross–examination by formulating questions as if the cross-examiner assumed the person to be lying.

According to Coker (1966:248), one main point of distinction that can be thumb nailed, is the fact that whereas in the case of English law of trusts the donor engrafts upon an existing larger estate or interest a limitation in favour of another person or object, in the case of deathbed dispositions of properties under customary laws, there is no limitation to the nature of the interests transferred. Also, it is doubtful whether the interests usually created by way of secret trust are capable of being created under customary tenures (that is, in so far as those interests relate to land) and no authority exists to establish the contrary.

Besides, in order to create a valid secret trust, it is necessary that such declarations should have been communicated in the lifetime of the donor to the owner of the larger interest or estate and his consent thereto secured. In the case of deathbed dispositions under customary law, it is necessary that the gift should be made in the presence of capable witnesses, and no necessity exists for the presence of the beneficiary. In the view of Coker, attention is also drawn to the fact that dispositions of this nature under customary laws are not limited to property, and are not infrequently employed to ensure the execution of the wishes of a dying man with regards to other aspects of his affairs.

2.20 Modernity in Cultural Inheritance Practices

Nwogugu (1974), like others, has also put Yoruba system of succession in a modern perspective in his *Family Law in Nigeria*. When he explains that under modern Yoruba customary law of intestacy, the children of the deceased are entitled to his real property to the exclusion of other blood relations.[208] He also justifies further the 'gender-blind' practice in Abeokuta where the traditional succession rights of brothers and sisters have survived to a certain extent.

Upon the death of a deceased person, his landed property devolves on his children as family property. This includes property acquired by the deceased-whether under English law or by customary law, and family property under his control, but where the deceased makes a gift of his self-acquired land to a child or any other person during his lifetime, the property will not devolve as family property. While the children of the deceased have rights to the family property, its management is under the control of the *dqw9d6*, that is, the eldest surviving son of the deceased. All the legitimate children of the deceased are entitled to succeed to his disposable landed property. These include children born of customary-law marriage and those legitimated in accordance with the prevalent customary law, for instance by acknowledgement. The children share equally, irrespective sex or age.

Nwogugu further exemplifies the foregoing possibilities using the case of *Salami v Salami*[209], where the plaintiff and the defendants were the only surviving children of one Salami Goodluck, a native of Abeokuta, who died intestate, leaving a house and farmland in Abeokuta. Soon after the death of their father in 1927, the plaintiff, then about seven years old, was taken to the French Cameroons by her mother and did not return to Abeokuta until 1953. Apart from some clothes and two chairs allocated to her at the time of her father's death, she had received no benefit from the estate. In an action for an account and partition brought by the plaintiff against her two brothers, Irvin, J, held that the plaintiff's right to inherit under Yoruba customary law could not be affected by her absence, minority or sex, and that the *dqw9d6* (that is, the eldest son) was not entitled to a greater share more than the other children. (see *Barretto v. Oniga*[210]; Lopez v Lopez[211]; *Sule v. Ajisegiri*[212], and *Ricardo v. Abal.*[213]. Modernity

[208] *Op. cit. Adeseye v Taiwo.*
[209] (1957) WRNLR 10
[210] (1961) WNLR 112
[211] (1924) 5 NLR 43

has affected cultural inheritance modes in diverse ways. It is difficult to say whether positively or negatively as this depends on which side of the divide one finds himself, but this study affirms the later.

2.21 Written Wills under Customary Law

Formal way of writing as known today is not an essential feature of customary law, in the same way reduction of customary law transaction into writing does not alter its nature. Disposition of property by Will in the English form with all it is laid down format may be alien to Customary law, but the principle is recognised by customary law. A customary law Will is in form of an oral declaration made voluntarily by a testator while still alive which he intends to take effect after his death, in the presence of credible witnesses. The credible witnesses in this case may not be beneficiaries of the Will. Meanwhile, beneficiary are not precluded from listening to an *oral* Will as it may also give directions at to the mode of burial and funeral ceremony to be performed for the testator. If more than one witnesses witnessed the Will and one of them is a beneficiary, the presence of that one beneficiary may not invalidate the Will. A Will may be made in anticipation of death or while in good state of health. The testator in customary law as in English law must possess the full mental capacity at the time of making the Will,[214] the beneficiaries must be certain while the subject matter of disposition must not only be certain, it must be disposable, as no one can dispose of an un-partitioned family property.[215]

There had been issues raised as to the validity of customary law Will, whether it should comply with the provisions of the Will Act 1837 or the Wills Law 1958? And where it does not comply with the provision of either of them, what is the implication? The court decision[216] notwithstanding, once a nuncupative Will fails the requirement of a valid Will by commission, omission or by deliberate attempt, it should leave the realm of English Will and return to customary law disposition. If a man makes a written declaration of his intention in a manner which shows clearly that he was not making a Will in the English form, the customary courts are likely to

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[212] (1937) 13 NLR 146
[213] (1926) 7NLR 58
[214] *Op. cit.* Nwogugu @ pg 396
[215] *Johnson v. Macaulay* (1961) 1 All NLR 743
[216] *Op. cit. Apatira v. Akanke*

uphold it.[217] Customary law is more concerned with the intent rather than the form, therefore, once the technicalities of the English law fail any document intended to be considered a Will, customary law will be available to cure the defect of English law Will[218]

2.22 Customary Modes of Inheritance:

i. *d7 igi

There are two systems of distribution recognised by Yoruba customary law, *8d7 igi* is one of them. Under the *8d7 igi* system, the estate is divided *per stirpes*, that is, according to the number of wives of the deceased – the children taking their portions through their respective mothers. In the *Danmole case*,[219] the deceased, *Suberu Dawodu*, was survived by nine children born of five wives. The question before the court was whether the deceased's estate should be divided *per stirpes* or *per capita*. Jibowu, J. first held that distribution on the basis of *8d7 igi* was contrary to natural justice, equity and good conscience. The Supreme Court's rejected the judgment of Jibowu J. that distribution on the basis of *8d7 igi* was contrary to natural justice, equity and good conscience and decided that the estate should be divided using the *8d7 igi* mode and this was accepted by the Privy Council. In the opinion of the board, *8d7 igi* was a prevalent custom among the Yoruba; *or7 0 jor7* was regarded as a modern method of distribution for the avoidance of litigation. In the end, the board also concluded that the distribution in accordance with the *ìdí-igi* system was not contrary to natural justice, equity and good conscience.

The foregoing explications are intended to serve as a prelude to the understanding of the cultural modes of inheritance. It should be quickly noted, however, that as distinct from what exists within a lager (extended family) kin group, the *8d7 igi* and *or7 0 jor7* are often applied in relation to the direct offspring and wives of a deceased who has died (intestate). These realities are subsequently appraised in consideration of both the people's collective wisdom and relevant interventions from the Yoruba customary law.

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[217] Oluyede, P.A., 1978. *Nigerian Law of Conveyancing*. Ibadan: University Press
[218] *George & Anor. v. Fajore* (1939) 15 N.L.R 1
[219] *Op. cit. Dawodu v. Danmole*

Smith (1995; 66) notes that Yoruba customary law generally favours equality in the distribution of estate particularly in a polygamous settings where squabbles and rancour "feature prominently." Much as Smith's observation appears to be good and arguable, it is however flawed by its tendency towards ambiguity. To offer that situations of squabble and rancour "feature prominently" among the Yoruba might imply that the Yoruba perhaps have greater 'greedy' disposition towards the distribution of estate above people of other cultures, when relatively compared to other ethnicities within Nigeria or Africa.

However, Smith goes further to inform that, where the deceased is survived by a wife and children, property is shared among the children, male or female, on the advice of the family council. But the rule in *Dawodu v Damole*[220] cited by Smith in relation to what obtains in the case of children of polygamous marriage, suggests division of the estate *per stripes*, that is using the *ẹ̀dẹ̀ igi* mode of sharing which the Yoruba (here typified by the individual's in this case) are culturally familiar with. The thrust of the argument therefore, is the fact that the principle of *[m[ẹ̀yọ* is closely tied to that of *ẹ̀dẹ̀ igi*, so that *[m[ẹ̀yọ* constitutes the core component of *ẹ̀dẹ̀ igi*.

The position of the court in *Caulcrick v. Harding*[221] and later in *Suberu v. Sumonu*[222] the Courts have held that by Yoruba custom, a wife cannot inherit her husband's property, in the absence of surviving children, property which the deceased inherited will devolve on the members of the family from which it came. Thus, if the property came from maternal ancestor it goes to his maternal relations, and *vice versa*.[223]
Lambo, J, held that under Yoruba customary law the property of a woman devolves, on intestacy, upon her children in common[224]. Consequently, the distribution will be *per capita*. But the descendants of predeceased children of the dead share in the division of her real property *per stirpes*. And, lastly, that upon the death intestate of a child, his brothers and sisters will be exclusively entitled to succeed to his estate. Half-brothers and sisters, being the children of a different mother, would not take any share. If there are no brothers and sisters, the property will devolve on the parents of the deceased. (Nwogugu, 1974: 400-401). There is no arguing the facts as explained

[220] *Ibid*
[221] (1926) 7 NLR 48
[222] ([1957] Vol. II FSC 33
[223] *Op. cit.* Nwogugu @ pg 400
[224] *Op. cit. Johnson v. Macaulay*

by Nwogugu, but the truth of the matter is that parents among the Yoruba do not go near the property of their deceased children. It is more of an abominable thing to hear that parents inherit their son or daughter. The position expressed by Nwogugu must be a modern trend as the Yoruba have a saying; *cgb-n k87 jog5n zb5r0, n7bo lcti gb- t7 baba t7 ń jog5n [m[* (meaning: elders do not inherit their younger ones, it is unheard that a father will inherit his child). Upon this submission, the customary mode of *8d7 igi* allows wives to inherit estate for and on behalf of their children who are final beneficiaries of the fortunes of the estate.

ii. *Or7 0 jor7*

Conversely, and in comparison with the *8d7 igi* mode of estate sharing, *or7 0 jor7* entails the devolution of a deceased's estate among his children, *per capita*. This may also be understood in the light of the fact that the *or7 0 jor7* mode is complimentary to the *8d7 igi* mode. For example, in the case of *Danmole*,[225] once the property has been shared through *8d7 igi*, the eldest child in each *[m[8yq* unit is entrusted with the further distribution in *or7 0 jor7*. However, as Smith observes, if the family council is of the view that division through *8d7 igi* may result in injustice or where there is a disagreement among members of the family, *or7 0 jor7* may be adopted in lieu.

Although it is clear from Smith's explication that in a polygamous setting, property is shared through the wives as 'channels', using *8d7 igi*. The author, in his explanation of *8d7 igi* is silent on the position of the wives in the *or7 0 jor7* mode, even when it is understood that the children all partake in the property devolution. The observed *lacuna* is however spotted in the fact that in the *or7 0 jor7* mode, mother's interests lie in the portions of their respective offspring. According to Smith – and, of course, a general knowledge among the Yoruba – both male and female children share out of the estate without any discrimination. This reality, as pointed out, is different from what obtains in some other cultural locales outside Yorubaland. For instance, in many localities in Northern Nigeria, only male children can share out of the deceased's property as female children are not entitled to inherit property, not even by a deathbed gift of land. Among many Igbo communities, real property is always reserved for the

[225] *Op. cit. Dawodu v. Damole*

sons, the eldest being entitled, by custom, to the largest share while the others divide what is left in diminishing proportion.

Similarly, by the customary tradition of *Bini*, upon the death of a father, the eldest son takes over the deceased estate as a trustee for all the children pending the performance of the final burial rites after which he automatically inherits the house where his father lived, died and was buried. This house is known as the *igiogbe*, and this inheritance does not vest unless the final burial rites, known as *Ukpomwan* are performed by the eldest child; otherwise, the eldest son will hold in trust all the estate including the *igiogbe* for himself and his other siblings (see *Idehen v. Idehen*[226]; *Lawal-Osula v. Lawal Osula*[227]; *Arase v. Arase*[228]; *Ogiamen v. Ogiamen*[229]*and Olowu v. Olowu*[230].

However, the application of either the *8d7 igi* or *or7 0 jor7* or both modes, as Smith suggests, may be a product or result of family verdict. Thus, family verdict is of great importance in circumstances in which the application of a particular rule of customary law is causing disagreement or 'great hardship' among the family. In such instances, rules are applied in accordance with wisdom. The court emphasis that although the *8d7 igi* system of sharing property *per stirpes* was the applicable custom, while the 'alternative' system of *or7 0 jor7*, is applied in case of any disagreement among beneficiaries (Smith, 1995: 69). This, again, underscores the complementary role the *8d7 igi* and *or7 9 jor7* methods hold for each other within Yoruba customary practice. *or7 9 jor7* in its own is not an appendage mode to *8d7 igi* or any other mode. Among some Yoruba families and settlements, it is a mode preferred to *8d7 igi*.

2.23 Knowledge Gap

There are scholarly writings on African law in general, but the gap in knowledge was located in five areas: Firstly, most of the early writings and researches were undertaken by foreigners, whose focuses were on African law in general[231] than

[226] (1991) 6 NWLR (Pt. 198) 382, 386, 388
[227] (1995) 10 SCJN 84
[228] (1981) 5 SC 33
[229] (1967) NMLR 245; (1967) NSCC 189, 192, 193
[230] *Op. cit. Olowu v. Olowu* @ pt. 13
[231] Lloyd, P. C., 1959a. "Some Notes on the Yoruba Rules of Succession and on 'Family Property'" In *Journal of African Law* Vol. 111, No 1 Spring, and, Lloyd, P. C., 1959b. "Family Property Among the Yoruba" In *Journal of African Law* Vol. 111, No 2 Summer.

specific references to African customary practices. Secondly, the few writings available on African customary law did not deeply research rules of inheritance practices among Yoruba. Thirdly, attention is yet to be given to the evolving and application of well-timed solutions and methods of property devolution, such that would be capable of showing, among African cultures and, indeed, the Yoruba, the awareness of cultural trends across the world, and the capability of African legal scholars to blend the inter-cultural possibilities with current developments to meet emergent modern day challenges. Fourthly, the need to advance a jurisprudence for customary law in Nigeria,[232] because customary norms are not simplistic; rather, they have philosophical significance behind them, and this is lost when customary issues are not considered in relation to the ideas, and finally, Nigerian judiciary is in dire need of exploratory rather than explanatory scholarly research work on customary law in general and inheritance practices in particular to be able to dispense justice as it ought[233].

2.24 Theoretical Framework

The study adopted the descriptive research design using William Graham Sumner's Social Conflict Theory, which states that competition over resources can trigger inequity and inequality, thus exacerbating violence. This was supported with the hermeneutic analysis of *2t-* (right) in *Ogbè a t2*, an *Ifá* corpus which states thus:

Ogbè a t2, k'ára ó r' 2dú
Àk6k[tó k[lánàá, ìk[rere ló k[
A d7'á f5n Erin, Erin ńsun ck5n [lá
Àk6k[tó k[lánàá, ìk[rere ló k[
A d7'á f5n Cf=n, Cf=n ńsun ck5n iyì
Àk6k[tó k[lánàá, ìk[rere ló k[
A d'7 á f5n Elégédé,
Elégédé ńsun ckún à7rí [m[bí (1:14)

Erin (Elephant), *Cf=n* (Bufalo), and *Elégédé* (Pumpkin) were children of *Ogbè*, a rich and famous father, who also had slaves. When he became old and was about to die, he called the three children one after the other to ask them what they wanted from his estate, so that amity would reign among his children. *Erin* requested for his father's *ow9* (money), he said, once he has money, he will use it to buy other things.

[232] *Op. Cit* Azinge, E.
[233] Views of participants at the 50th Anniversary Roundtable Discussion of The University of Ibadan, organised by The Institute of African Studies, African Law Unit, on *Lessons of the Administration of Customary Law in the Nigerian Legal System*, on Tuesday, 30th October, 2012

Cf=n demanded for his *d5k8q* (properties), he said, if he has properties he can sell any of it to get what he wants. *Elégédé* requested for children. *Ogbè* then went to *+r5nm8lz* and consulted *Ifá*, (who was a servant of *+r5nm8lz)*. The response of *Ifá* was "*Ogbè k1r6 wqq t2 k7 ara 9 r2d5 wq"*, (That, if *Ogbè* can give his properties to his children as they requested, there would be peace and harmony in his home after his demise.

Ogbè was told to sacrifice *$x6 +dzrz* and make his children come together and repeat the requests they had made in secret in the presence of one another. After the three of them had met and said what they requested for in the presence of one another, *Ogbè k1r6 wqq t2, ara wq r2d5 (*gave them what they requested for and there was peace). *Ifa* also led *Elégédé* to a servant who made her pregnant to satisfy her request. After the bequest, there was no acrimony as each of them had their *2t-* in the devolution.

@t- is right, a right to partake in anything inclusive of inheritance devolution. *Ògbè a t2* is regarded as *[m[af8'fz gbu ru gbu, k7 9 le r7 2t- 2 gbz. 2t-* is different from *8fz* (which is define as profit or advantage got by luck, not by effort[234]). Your *2t-* is synonymous with your being. Once you are alive you can lay claim to your *2t-* in customary devolution as efluxion of time will not foreclose one's right to partake in the devolution of one's father's estate. Even at death the survivors to the estate can sue for their progenitor's *2t-* as oppose to *8fz* which cannot be claimed as of right. That is why *Ògbè a t2* was referred to as *[m[af8'fz gbu ru gbu, k7 9 le r7 2t- 2 gbz.* There could be *8fz* in *2t- but* one cannot find *2t-* in *8fz.*

The submissions of William Graham Sumner (1883), Herbert Spencer (1898), Sprey (1969), LaRossa (1977), Adaramola (1992), Farrington and Keith (1993) and, Marshall (1998) agree with this *ifq* corpus that, conflict is a basic element of human social life, and devolution of any kind, often structure people, who ought to be in harmony, to be at loggerheads in the pursuit of their *2t-* but if there is understanding equity and equality will prevail. William Graham Sumner's theory of Social Conflict and the model have been applied to various conflict and struggle studies and as they are being refined by on-going research, now offer a primary theoretical orientation to

[234] Abraham, R.C., 1946. Dictionary of Modern Yoruba

the problem of the adaptation of African modes of devolution of inheritance to the modern processes of devolution of inheritance.

According to Herbert Spencer (1898), conflict is a natural process which contributes to social evolution. Competition for survival causes positive social advancement, (William Graham Sumner (1883). Individuals are motivated to act in accordance with their own interests, thereby making people pursue needs, values, goals, and resources that they consider important or desirable, (Adaramola 1992: 213). Since individuals in a deceased family may want different things on one hand while on the other hand different individuals still want the same thing, and there is a limited supply of the commodity, then conflict is inevitable especially in relation to devolution. Although conflict is inevitable, social order could be maintained within the family. Where conflict is limited in amount, intensity, and manner of expression: it becomes an effective method for dealing with potential family problems such as inheritance. (Farrington & Keith, 1983:374).

2.25 *Ifq*

Believers of *ifq* deem it to be the "truth" and the way of their ancestors; functioning to the devoted as not only a system of guidance, but one that fuses a way of living with the psychological, providing them with a legitimate course of action that is genuine and unequivocal.

Ifq originated in the form of a religious system, and is celebrated in traditional African medicine till date. It is a system of divination among the Yoruba and the verses of the literary corpus are known as *od6 ifq*. *Ifq* combines a large body of wisdom literature with a system for selecting the appropriate passages from it. However, *ifq* poetry was not written down but passed down orally from one *Babalqwo* to another. Today, there are many texts that are designed to help *Babalqwo* to learn and retain the body of knowledge. *Ifá* divination system has taken a different dimension and its tentacles spreading outside its original domain: among the Yoruba of Southwestern Nigeria, to other parts of the world to the extent that UNESCO added it to its list of “Masterpieces of Oral and Intangible Heritage of Humanity in 2005.

Oral and Intangible Heritage of Humanity was defined by a group of experts in Turin in March 2001[235] thus:

> People's learned processes along with the knowledge, skills and creativity that inform and are developed by them, the products they create and the resources, spaces and other aspects of social and natural context necessary to their sustainability: these processes provide living communities with a sense of continuity with previous generations and are important to cultural identity, as well as to the safeguarding of cultural diversity and creativity of humanity.

The oral and intangible heritage has become internationally recognised as a vital factor for cultural identity, promotion of creativity and the preservation of cultural diversity. Intangible cultural heritage is in fact manifested either as a regularly occurring form of cultural expression, such as musical or theatrical performances, rituals or diverse festivities, or as a cultural space defined as a place which brings together a concentration of popular and traditional cultural activities and also as a time for a normal regular occurring event. This temporal and physical space should owe its existence to the cultural manifestations which traditionally takes place there.

With present day globalisation, numerous forms of cultural heritage are in danger of disappearing, threatened by cultural standardisation, armed conflicts, tourism, industrialisation, the rural exodus, migrations and the degradation of the environment, UNESCO has made it to play crucial role in national and international development for tolerance and harmonious interaction between cultures.

Ifq d7dq is like consultation in Orthodox medical practice, *ifq d7dq*, is the divination ritual itself where specific verses in the *od6 ifq* (the Yoruba sacred texts) given to the diviner through arrangements of the sacred palm nuts cast in divination are accessed. *Ifq d7dq/8dqfq* is performed by a *Babalqwo* or **yqn7fq* (an initiate of *ifq* oracle). (B*abalqwo* can be translated as "father of the secrets" while *"*yqn7fq* " means "mother that has *ifq's* blessing"). The *Babalqwo* or **yqn7fq* casts for the *odu* or "pattern" and provides insights to the circumstances that brought the person consulting *ifq* and provides necessary information to aid the individual according to what *od6 ifq* says. More than the above stated, a *Babalqwo* or **yqn7fq* performs more than a Medical Doctor of today's world. Divination sessions

[235] The Executive Board of UNESCO at its 161" session and by the General Conference at its 31" session (October-November 2001, 31 C/43) accepted the definition.

can be performed for reasons such as "regular check up" to life-changing occasions such as marriage, child birth, sickness, devolution of inheritance, rancour and acrimony in inheritance devolution etc., divination can also be performed for a group (small / large) or community.

Initiation into ifq requires rigorous study. The *Babalqwo* or *8yqn7fq* must learn and understand each of the 256 chapters (*Od6*) of *ifq*. The minimum of four verses will of necessity include *cb[* (sacrifice) and *00g6n* (medicine) that are embedded and relevant to each of the verses, plus other issues that complement divination. An accomplished initiate must be verse in oral rendition of *od6 ifq* in form of recitation. *Ifq* service is an office bestowed once you have received training from an initiate. Those who aspire to serve through *ifq* must have this qualification.

Traits of all true *ifq* initiates are: patience, righteous character, honesty, and humility and that is why divination is employed in Yoruba devolution modes to instill the virtues.

Ifq k87 pur-
Ifq k87 tzn jc
Ifq k87 pur- o
Ifq k87 tzn jc
Oun t9 bq xcl2
Ni ifq nw7 o[236]

{p-n ifq and *ik7n* (Tray and palm nuts with four "eyes")[237]

[236] Curled from an interview held with *Baba Awo, Dada Abinupagun* at his residence in Oru, Ijebu, Ogun State, in 2013
[237] Retrieved September 3,2014, from en.m.wikipedia.org/wiki/ifa

This *(ẹ̀p-n ifq)* or tray and *(ọ̀r9k2 ifq)* or tapper are used in *ifq* divination, a central ritual in *ifq* tradition. The tray is adorned with carved images and dusted with powder, it serves as the template on which sacred signs (*od6*) relating to the personal issues of the patient are traced as the point of departure for analysis. To begin the ritual, the *Babalqwo/Iyqn7fq* places the tray in front of him and taps rhythmically on it with the pointed end of the tapper, invoking the presence of *+r5nm8lz*, past diviners, and other *)r8sz*. Divination is a common feature among Yoruba, even in inheritance devolution divination as to the mode to be used in inheritance is often made, and *ifq* may be allowed to choose either *8d7 igi* or *or7 0 jor7* mode for the particular devolution.

CHAPTER THREE
RESEARCH METHODOLOGY AND DESIGN

3.0 Introduction

This chapter clearly defines the Anthropological and legal methods of the research, the study area, the sampling methods, the study population, methods of data collection, methods of data analysis and the limitation of the study.

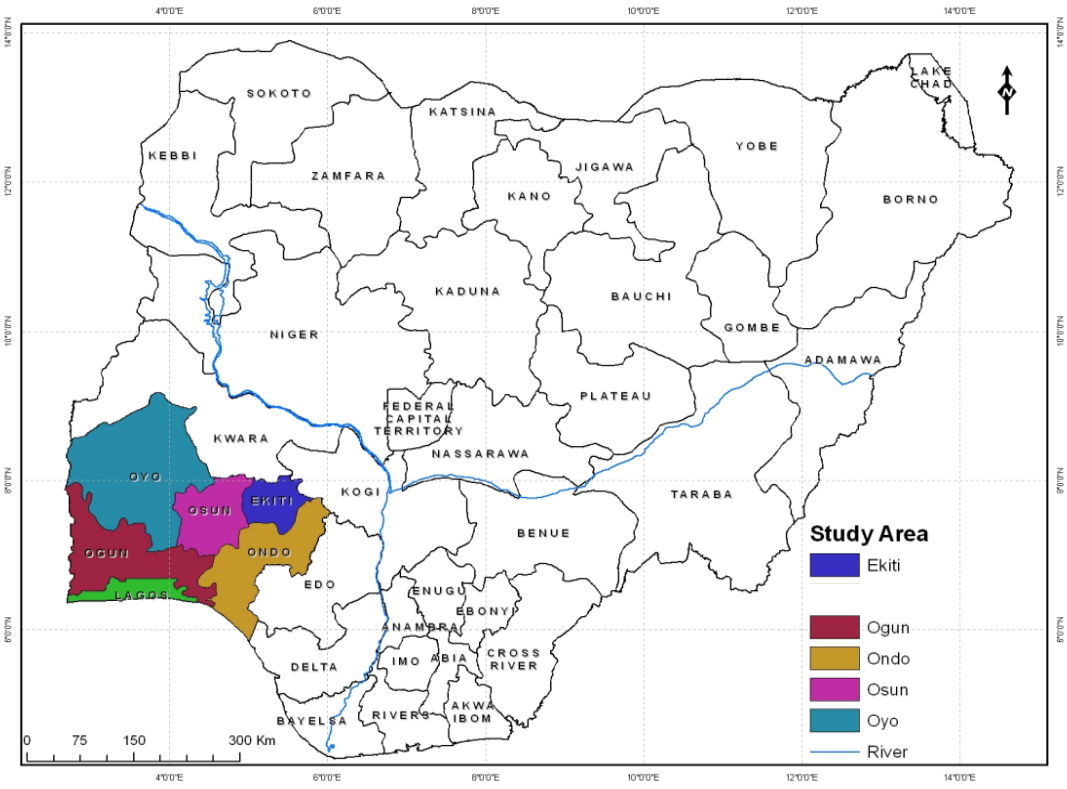
3.1 Study Methodology

Given the socio-legal outlook of this work, and its anthropological foundations, the research appropriated anthropological and legal methods of research. The research is qualitative and descriptive. In this regard, primary data were collected from fieldwork relying on non-participant observations, semi-structured interviews, in-depth interviews of 61 informants, comprising 32 widows, ten family heads, nine royal fathers and ten community leaders who were purposively selected for key informant interviews. Five focus group discussions were conducted, life histories of four widows were taken, and interactions made with 108 children of deceased families. The detailed and specific cases studied among the sub-ethnic groups provided the opportunity for a comparative analysis of the study as well as generalisation of findings. Secondary data, comprising a range of qualitative information were sourced from law reports, journals, internet, library, customary and magistrate courts registry records, and other relevant published works. These were subsequently organised, and interpreted to build up the arguments and discussion of this thesis using descriptive and explanatory methods.

3.2 Fieldwork Location

Field work for the study was conducted in Ekiti, Ogun, Ondo, Osun, and Oyo, States. The five states are located in Southwestern Nigeria where the Yoruba are largely found. The Yoruba people are a near-homogenous and semi-independent people loosely linked by geography, language, history, culture and religion. The five States randomly selected for this study have been shown to constitute the core areas of Yoruba culture where one is likely to find evidence of customary inheritance practices closest to their original formations, since they are predominantly located there (Ajala, 2013). Bearing in mind the conflicting positions of historians about the mode of

inheritance among the Yoruba, it becomes necessary for the researcher to make direct trips to these selected states and towns in order to appropriately ascertain, from the people's own oral accounts and understanding, the modes of inheritance and how it has engendered equity and equality among the beneficiaries as well as how they have come to understand and practiced them.



Map of Nigeria showing Southwestern Nigeria.
Source: http://www.onlinenigeria.com/southwesternstates

Five sub-ethnic groups of Ekiti, Ijebu, Ijesa, Ikale, and Oyo were also randomly selected manually from the five States. The random selection of the States was done by the researcher listing all the States in Southwestern Nigeria on small pieces of papers and a young boy of about 6 years of age was asked to pick the first five and the ones selected were chosen for the research. The process used in the selection of States was also used for selecting the sub-ethnic groups, as names of all major towns in the States where the sub-ethnic groups could be found were listed, and the same boy was asked to pick one name from each of the States and the ones randomly picked that were used for the study are: Omuo in Ekiti, Ago Iwoye in Ogun, Okitipupa in Ondo, Imesi Ile in Osun and Ogbomoso in Oyo and these were where the research took place.

This study was based on fieldwork that was carried out in selected cities in Southwestern Nigeria between November 2011 and April 2013, and it pays attention to social and legal issues underpinning inheritance practices among the Yoruba as shaped and defined by the political economy of equity and equality in perception. In the study, five sub-ethnic groups of Ekiti, Ijebu, Ikale, Ijesa, and Ogbomoso, from a total of five states of Ekiti, Ogun, Ondo, Osun and Oyo. Omuo in Ekiti State, Ago-Iwoye in Ogun State, Okitipupa in Ondo State, Imesi Ile in Osun State, Ogbomoso in Oyo State were purposively sampled respectively.

According to Bascom (1969), the mythological origin of the Yoruba people is generally traced to a single ancestor, Oduduwa. Who was said to have resided in Ile-Ife, a place considered the cradle of mankind and the place from which all people migrated to their present locations. Yoruba people are highly urbanised and have resided in cities for hundreds of years. Yoruba cities formed the political centres of city-states governed by a king and supreme council within an aristocratic system. Prior to foreign interventions (European and Islamic), each Yoruba city-state was autonomous and had its own distinct dialect, religious societies and army. These sub-groups numbered up to 22 with distinct dialects and government, although with some commonness. This commonness draws the sub-groups into a form of unified culture which was propagated to forming a seemingly homogenous group now known as the Yoruba. The Yoruba people are predominantly farmers and highly skilled artists with a polytheistic religion, centered on a pantheon of divinities serving as intermediaries between man and the Supreme God (Olupona, 1993).

In Southwestern Nigeria where they are thickly concentrated, the Yoruba culture, with regard to inheritance law described in this study, is still thriving, but as this study has shown, it is being affected by acculturation, incursion and loss of historical values in various respects. There is no way any discuss can be made of Yoruba legal system without a mention of *ifq* which occupied a unique position in respect of the customs and traditions which were unwritten but known orally. *Ifq* according to Abimbola, (1977:14) is the means whereby non-literate Yoruba society attempts to keep and disseminate its philosophy and values not minding the imperfection of human memory upon which the system is founded. The Yoruba had developed a legal system that contained adequate checks and balances for all and sundry in the society. Law in

traditional Yoruba society is the agency of social engineering and the lubricant of social justice, Olaoba, 2008:42. The law to the Yoruba is not for disunity, but that people should remain together. Kin and families should not disintegrate, so litigants before traditional arbitrations are reminded of their relationships with one another and not the narrow legal issue raised by any of the parties. The use of proverbs in settlement of thorny issues among Yoruba cannot be swept over. Proverbs explicate the law, the custom and the culture that are self evident truths that are inspired by the values in the society, such that it neither praise stealing nor pontificate that evil is better than good.

Their sense of justice is one that coincides with social reality and is acceptable with the communal values, thereby adopting simple and effective procedures, conducted in a language understood by the common man as against the English legal system mainly conducted in English language. Even where the parties are unschooled in the formal education system, the court still goes on in English and the judgment delivered in English language. An interpreter may be allowed, yet, judgment is delivered in no other language but English even if it means the man to be sentenced not understanding the language of the court.

3.3.1 Methods of Data Collection

(a) Key informant interview.

Key informants for this study were purposively selected from each of the selected communities and their selection was determined by the findings made at the pre-field visits of the researcher. Thus, the study was partly based on interviews with the various categories of informants with whom the researcher maintained regular contact during the period of fieldwork. The researcher established some contacts through community heads/Oba and key informants within the community (some of whom the researcher had no previous relationship with), and later through a network of other community members by whom he was introduced to their friends and relations. Subsequently, the researcher visited their homes and held several interviews with widows, family members, friends and community leaders and Oba. There he craved their time to have them explain how issues of equity and equality were negotiated and represented in cases of inheritance.

The researcher also spent considerable time in customary and magistrate courts within the communities, observing how disputes on inheritance issues were arbitrated, negotiated or judged in four different cases. The interviews were both structured and unstructured, it took the form of informal conversations, but others were in-depth, and the interviewees were selected through purposive sampling technique. Respondents for in-depth interviews included widows, male and female children of the deceased, Community leaders and Oba with demonstrable knowledge and information about devolution practices. In this regard, the researcher employed purposive sampling method in engaging key informants based on their knowledge of customary practices pertaining to inheritance, Yoruba history, equity and justice and other relevant issues teased from the research objectives. Other selection criteria include occupation, age, marital status and gender.

In all, the researcher spent time with 61 key informants, comprising of 10 aged and experienced members of the communities, 4 customary court presidents, 1 Magistrate, 10 family heads, and 19 community heads /royal fathers. 32 widows, 108 children who have been part of the devolution of their deceased fathers' estate, and 17 other persons in the selected communities and townships were also interviewed. The interviews comprised several taped in-depth interviews (ranging from 45 to 180 minutes), as well as several weekly non-taped, informal interviews on the field (from 4 to 10 interviews per week) with respondents that were carried out in English and Yoruba languages. Most of the questions were developed based on the direction of the discuss and were used to clarify and explain emergent issues.

In this connection, each interview was treated as a point for departure, which gave interviewees some freedom in shaping the conversation and emphasising what was relevant to them. The general framework of the theme discussed in the interviews were:

i. Inheritance
ii. Succession
iii. Gender discrimination
iv. Equity and Equality

There were also a number of unstructured interviews and informal conversations with several people, including widows and aged people from the selected communities. In

all, 192 persons were interviewed with 150 randomly selected for unstructured interviews. Four widows were also sampled for life history documentation. All informants were interviewed basically about the same issues raised in the objectives of the study.

(b) Focus Group Discussions

Focus group discussion is opinion sampling in a tightly controlled group discussion that involved eight or more participants purposively selected from the communities being studied. It is a useful method for sampling the aggregate opinion of people regarding an issue. The researcher conducted five focus group discussions with a minimum of 8-12 respondents in all the states, widows and children of deceased members of the communities who had been parties to customary modes of devolution formed each group except in Ijebu where the researcher had a focus group discussion with a group of elders in the town. This was moderated using pre-determined, structured and on-field questions.

(c) In-depth interviews

In-depth interviews were conducted with children and widows who have been involved in customary devolution in the selected states and their responses made the core of the discussion, as this shed more light to the findings of the research.

Key informants were selected based on their experiences on inheritance devolution issues. The interview questions were semi-structured and it allowed for an engaging experience with the respondents. Interviews with Oba and community leaders in this regard gave insights to the various contributions and interventions made by this group of leaders in fostering equity and equality while interviews with a Magistrate and Customary Court Presidents gave insights to judicial standpoint on the topic in issue at the lower court level.

(d) Life Histories

Because this is partly a narration of the life experiences of widows with regard to inheritance law, “life histories” was also used as a technique of data collection. This came about from prolonged semi-structured interviews with the widows. For our purpose, a total of 4 widows, purposively selected along the line of age and length of

widowhood, were interviewed to record their life histories verbatim. Two of the widows were young women recently bereaved (less than ten years) and below the age of 60 years, while the other two were older people who had spent many years in widowhood and had been on prolonged issues over inheritance devolution. One of them was a woman whose story was culled from one of the customary courts records. The other respondents, who were neither widows, nor children of the deceased but were blood relations, were also interviewed in their various homes. The life histories were recorded with the use of tape recorder and transcription took place after disengagement from the field.

(e) Observations

This is a purposeful, systematic and selective way of watching and listening to an interaction or phenomenon as it takes place. There are two types of observation; Participant and Non- participant. Non-participant observatory system was employed in the research.

3.3.2 Other Sources of Data

The secondary sources consulted for the work in line with the objectives of the study which have been acknowledged by way of footnotes and other approved referencing styles are: statutes, text books, published articles, journals, papers presented at law seminars, law reports, relevant library and archival documentations, in addition to records from the registries of Customary Courts that have bearing with devolution of inheritance practices in general.

3.4 Research Instruments

All data relevant to the study were collected through the use of both primary and secondary sources of data collection. The research instruments included- In-depth-interviews, Focus group discussions (FGDs), Non-participant observation, life histories and the use of key informant interviews. The instruments were needed because the study is multi-disciplinary, covering the fields of African studies, Law and Anthropology, and all the needed information on the topic cannot be taken from-statutes, text books, cases, published articles, journals, papers presented at law seminars, law reports, relevant library, archival documentations and registry records

of magistrates and customary courts alone, i.e., the secondary sources, but with a visit to the study area of Omuo in Ekiti State, Ago-Iwoye in Ogun State, Okitipupa in Ondo State, Imesi-Ile in Osun State, and Ogbomoso in Oyo State more insight were given to the study.

3.5 Methods of Data Analysis

Analysis of field data for the work was qualitative, taking the form of interpretative and deconstructive appraisal of collected data which were transcribed before being analysed. The analysis allowed for the voices and opinions of informants to be privileged while the other secondary sources of information were used as prop for the analysis. The analysis appropriated the authority of Yoruba proverbial, as evidence of the power of Yoruba thought on Yoruba socio-cultural life, including issues of legal import. Other analyses used were tailored to be consistent with principles residing in the theory already selected for application.

Finally, with regards to the qualitative approach, interpretation and presentation were employed using hermeneutic approach in which interviews and text materials were interpreted from the perspective of the interviewees and the authors respectively. This is because Denzin and Lincoln (2000:8) noted that, "qualitative researchers stress the socially constructed nature of reality, the intimate relationship between the researcher and what is studied, and the situational constraints that shape inquiry. Such researchers emphasise the value-laden nature of inquiry". Thus, in keeping with the tradition of data interpretation and presentation mode in qualitative research, the use of ethnographic prose, historical narratives, first person accounts, life histories and other value-laden approaches were emphasised. Oral interviews on research devices such as midgets and video tape recorders that were not in English language were first transcribed into English, while other written and devices recorded interviews were also transcribed in descriptive and interpretative forms using deductive and inductive reasoning.

CHAPTER FOUR

DATA PRESENTATION AND ANALYSIS

4.0 Introduction

This chapter is a presentation and analysis of the data gathered from the field work. It responds to the objectives of the study through the research questions, that is:

- What is the customary belief of the Yoruba on property and inheritance issues?
- How are equity and equality ascertained among the Yoruba of Southwestern Nigeria?
- Are these customary modes of devolution generic across Yorubaland?
- What are the similarities and differences in inheritance devolution practices among sub-ethnic groups?
- How has Yoruba customary modes of inheritance impacted on private access to property?

The findings contained in this chapter are based on the understanding of equity and equality in customary modes of inheritance among the Yoruba in the five States of Southwestern Nigeria, namely; Ekiti, Ogun, Ondo, Osun, and Oyo, with particular focus on selected sub-ethnic groups in Omuo Ekiti, (Ekiti State); Ago Iwoye, (Ogun State); Okitipupa, (Ondo State); Imesi Ile, (Osun State); and Ogbomoso, (Oyo State) which to an extent can be regarded as the general practice among the entire Yorubaland.

4.1 Yoruba Customary Belief in Property and its Devolution

The concept of 'inheritance' is embedded in the Yoruba customary belief. The word *og5n* means twenty or inheritance in Yoruba vocabulary. The notion of equity is subsumed in the representation of inheritance with this divisible figure. The figure twenty or *og5n* is divisible and can be equally divided between survivors to the estate of an intestate Yoruba, even when they are 2, 4, 5, 10, or 20 in number, without any rancor or acrimony. When transmitted into property devolution which is *8pín og5n* or *og5n p7np7n* among the Yoruba, it is believed to foreclose inequity and

inequality as harmony and tranquility are germane in property devolution among the Yoruba.

The concept of property ownership varies in its concrete application among the Yoruba, but the concept is embedded in the saying *[m[zgb2 ní j'og5n zdq, [m[[dc ní í j'og5n ap9* (A farmer's son inherits his cutlass while a hunter's son inherits [his father's] gun). Property at devolution should benefit the survivors to an estate, especially the children since their father had suffered to acquire that much for the family. Property in land is either inherited or self-acquired. In earlier times, a man had no legal power to effect succession to communal land as the basic rule is that land belongs to communities or families[238]. This is rooted in the rule of '*nemo dat quod non habet*[239]' (he who has not cannot give), since individuals derive their rights of ownership or claim to any part thereof from their membership of the community[240], they cannot by any stretch of imagination be regarded as the owner rather, they are care-takers in representative capacities because family property is meant for the use and enjoyment of the family as a whole.[241] Inherited landed property is under the control of the clan, lineage, or household, and cannot be alienated[242] by an individual or cannot be bequeathed at all since the right of disposition resides corporately with the remainder of the group, *{m[8yq* or *{bzkan.*[243] On the death of an individual holder or acquirer, his property in land vests in his family and become 'family property'[244] as family members have limited rights to use family property, they cannot alienate it (Cotran and Rubin, 1970:237). In English law, a stranger cannot apply to set aside a deed which he was not a party as enunciated in *Ordor v. Nwosu*[245], this is far from what obtains in customary law of inheritance as evidence of this study corroborates the Supreme Court judgment of *Adejumo v. Ayantegbe*[246] where the Court ruled that family land belongs to all members of the family and a co-owner who is a family member is *ipso facto* not a stranger to any transactions purported to have been made in relation thereto.

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[238] *Amodu Tijani v. Secretary Southern Provinces* (1921) 2 A.C. @ p.399.
[239] *Re Stone & Savile's Contract* (1963) 1 ALL ER p.353
[240] *A. Shelle v. Chief Asajon etc*. (1957) 2 FSC 65.
[241] *Thomas v. Thomas* (1932) 16 N.L.R. 5 at p.6
[242] *Op. cit. Oshodi v. Balogun*
[243] Views of *Owa Ooye* of Imesi Ile, *Ijesaland*, 2013
[244] *Op. cit. Amodu Tijani*
[245] (1974) 1 ALL NLR (pt. II) p.478
[246] (1989) 3 NWLR (pt. 110) p.417 @ 444

Yoruba societies did not have complex transactions that were later brought forth by changes in socio-economic structures of the modern day. The economic and social factors of past centuries did not call for alienation of land on commercial basis as strangers can even acquire landed property by only becoming accepted through good behavior as full members of the community, and through integration into the membership of the community they become beneficiaries of the rights and privileges available[247]to indigenes of the community. Pursuit of social and economic developments as a result of acculturation with the Western world led to natural adaptations of indigenous notions to different transactions producing granting, leasing, pledging, loaning and even Will. Many of the known commercial transactions of today, such as lease, pledge, pawn or mortgage in land were rare, though not illegal as there was no need for anyone to buy or lease land in the ancient Yoruba communities[248].

While the social and economic setting of the past decades did not allow communal land to be alienated[249] because it was for the interest of the community, clan or lineage, the same piece of land has become one of the best known sources of wealth in the world today. Butter-Llyod, J., saw credence in the enduring family institution that 30years after Speed, Ag. C.J. had spoken his mind in the case of *Lewis v. Bankole*[250] in 1908. on his hope that the customary family institution will one day fizzle out, when the law would have been so developed to meet the challenge of the economic development and posited the hope that either the legislature or the courts will one day kill the family system of the land tenure completely. Butter-Llyod, J., in *Bajulaiye v. Akapo*[251]made the following remark in favour of the enduring family institution.

> Now with all due respect to the opinion expressed by Speed, Ag C.J, in the case *Lewis v. Bankole*[252] (supra) to the effect that family ownership is a dying institution, I am bound to place on record my view that notwithstanding the lapse of nearly a generation since that judgment was delivered, the institution of family ownership is still a very living force in native tenure in Lagos.

[247] Interview with Jegun of Idepe, Okitipupa 2012
[248] Curled from an interview with HRM Oba Jimoh Oyewumi, Soun of Ogbomoso in his palace in 2012
[249] *Op. cit. Amodu Tijani*
[250] *Op. cit. Lewis v. Bankole*
[251] (1938) 14 N.L.R. 10.
[252] *Op. cit. Lewis v. Bankole*

The 'prophesy' of Speed, Ag C.J. has not come to pass, but the rigour of alienation of family property has been relaxed and alienation made easier. The courts have worked out certain rules to meet economic and social challenges of today by developing rules that allow easy transfer of family property without destroying the basic concept of the customary land holding system. Some of the rules are to the effect that:

(i) Family land can now be partitioned by consent of all interested parties, or by an order of the court, and after such a partition each individual becomes the absolute owner of his/her own portion, and can dispose of it freely *inter vivos*, or by his Will, and this can be taken in execution.

(ii) *Ol9r7 cb7* acting with consent of principal members of the family can now alienate part or all of the family property.

(iii) If *Ol9r7 cb7* alone, or along with a few other members of the family alienates family land without the consent of the principal members of the family, such a transaction is voidable.

(iv) If the consent of the *Ol9r7 cb7* is not obtained the alienation is a nullity and the transaction is void.[253]

An individuals could by *inter vivos* gift or by *mortis causa* bequest, give away his interest in self acquired land or other properties temporarily or permanently; but for such a gift not to be voidable, it must have been given with the knowledge and or in the presence of at least a credible member of the family, preferably the *Ol9r7 cb7*[254]. Though no action can be taken to prevent him from alienating his interest in his self acquired land or other properties and no consent was required to do this, yet the validity or otherwise of the gift is dependent on who takes what of the gift and under what circumstances. If the gifts were given to those who have definite connection or claim on the deceased estate (e.g. his wife or child or a relation who had lived with him or served him in one way or the other), and provided that the bulk of the estate is left to be devolved in accordance with the customary rule of succession prevalent in the area, the wishes of the deceased may be honoured by his *cb7*, especially if the bequest is made by him to a person, who would otherwise be completely excluded from the inheritance, so a gift of one or more of his farms, a piece of land, or other

[253] *Ekpendu & Ors. v. Erika* (1959) 4 F.S.C. 79, at pg. 81.
[254] *Op. cit.* Soun of Ogbomoso

belongings which he had acquired for himself by purchase or otherwise to a relation who had served him diligently would not be voided when his intestate estate is to be shared. Whereas, if the gift is made to an outsider and his immediate family interest will be affected, the *Ol9r7 cb7* and other members of the family will resist such a gift despite the fact that it was his self acquired property[255].

Preservation of family unity is another objective of the Yoruba customary belief in property. Benefits and burdens aside, the *Dqw9d6* assumes a social role that carries with it grave responsibilities. The customary devolution idea seems to endorse this view that if one accepts the duty to provide sustenance, maintenance and shelter as a necessary corollary of the system of primogeniture, then no one should equate the differentiation between men and women with 'unfair discrimination'. The belief is that a person's property should be to the benefit of his heirs in disposition and that all of the deceased person's rights and duties should transit to the heirs—who is often said to "step into the shoes" of the deceased. Therefore, both men and women have dispositive power on their self acquired properties during their lifetime, although, woman's *inter vivos* disposition, among the sub-groups studied, will require the consent of her husband before such disposition could be made, yet this study corroborates the facts of *Suberu & ors. v. Sunmonu & ors*[256] that among the Ekiti, Ijebu, Ijesa, Ikale, and Oyo inheritance practices, the children of the deceased regardless of their sexes are entitled to inherit from their father's estate, except where the deceased had made any form of oral death-bed disposition before he died, so discrimination in the line of sex in property issues are discouraged as decided in *Sule v. Ajisegiri*[257], where the court held that the partition must be equally made between the children, regardless of their sex.

A husband cannot inherit his deceased wife's share of her family property if she pre-deceased him,[258] so also is a widow not entitled s*tricto senso* to share in the property of the deceased husband at customary law, '…she is allowed to stay and enjoy all privileges and rights of a wife as long as she continues to be well behaved, obedient

[255] View expressed by Chief Solomon Epoyun of Ago-Iwoye, Ijebu, aged 82yrs in 2013
[256] (1957) 1 NSCC 4
[257] *Op. cit. Sule v. Ajisegiri*
[258] *Op. cit. Caulcrick v. Harding*

and does not query the authorities of her late husband's family'[259]. Under native law and customs, the devolution of property follows the blood. Consequently, a wife or widow, not being of the blood, has no claim to any share. More so, among the Yoruba, husbands and wives traditionally do not pool their finances. So, on the death of spouses, their individual property does not pass to each other, (Fadipe 1970, 140, 146) unless they are married under the Act.[260] The main thrust of "devolution follows the blood" is that properties of a woman cannot be said to devolve on the husband who will now go to the lineage of his wife to claim part of their own family property. It then means, he has crossed his own lineage to another where he ought to be a stranger by blood relation.

4.2 Equity and Equality in Yoruba Customary Modes of Inheritance

The word 'Equity', whether used alone or with the preceding words 'doctrine of' refers to the body of principles developed by the English Court of Chancery from medieval times as a gloss upon common law (Allott 1970:36). Equity means that which is fair and just, the objective of all laws, and in the specific sense an element of law which introduces distinctive ethical values into legal norms, Adigun (1987:4). There is general and technical equity, the contrast between general and technical equity is, perhaps, expressed by the fact that the latter is peculiarly English, whereas the former is universal (Allott 1970:160-161).

According to Uwais C.J. (as he then was) in *Osinjugbebi v. Saibu & Ors*,[261] 'Equity is a rule of English law, and it is not part of Yoruba native law and customs, as there is nothing in customary law known as equity'. However, elements of this rule of English law, 'equity', which are: fairness, good faith, equal treatment, are consistent with the general tenor and spirit of customary law as rooted in Yoruba native law and customs, and are found playing dominant roles in inheritance devolution practices among the Yoruba, though they are not known and called 'equity'. Equity has affected the application of customary law in these ways:

[259] Aguda, A., 1971. *Law lectures and Papers*, Ibadan: Associated Publishers (Nigeria) Limited, pg 74
[260] *Shogunro Davies v. Edward Shogunro* (1929) 9 NLR at 79/80
[261] (1982) 9 SC 904

(1) Equitable remedies have been available on occasions to protect customary rights and enforce specific performance to customary obligations.
(2) Equitable maxims in proverbs have been invoked to control the exercise of customary claims, thus equitable doctrines of estoppels, laches and acquiescence[262] are available to resist claims to land held under customary law.

Reasoning along the line of *ogún,* customary devolution has positively affected the application of *8d7 igi* and *or7 0 jor7.* Variability, adaptability and relativity found in the modes when applied to different shades of inheritance issues found among the sub-groups made them bedrock of equity and equality. (i). Where there tends to be ill feeling, the *Ol9r7 cb7* in conjunction with other members of the *cb7* with or without the concurrent consent of the children, often vary the generic mode of the locality to achieve equality, which keeps the Yoruba on as a united indivisible entity. The modes were adapted to relative needs for achieving equity and equality among the people, as evidence of this study has shown in Ikale.[263] The acceptance of the variation made avoidance of rancour and acrimony possible while equity and equality were promoted.

The argument in favour of *or7 0 jor7* mode, among those who prefer the mode is that, while the deceased was alive, he would have been relating and dealing with all his children on individual basis: in payment of school fees, training, allotment of farmland, clothing etc, and if this assertion was true and there had been peace and harmony in the household, there was no basis for changing what had fostered equity and equality for any other mode in the household.

According to others, in *or7 0 jor7* mode, the children were the direct beneficiaries of this system and they had the right to do whatever they wanted with their share of the estate as against *8d7 igi*, where the estate is divided equally among the mothers who are wives of the deceased, with the children taking their portions through their respective mothers who could make it impossible for any of the children she does not like to enjoy any part of the estate. This view, to the researcher is a modern approach to customary devolution, as 80% of those who subscribed to it were the younger ones under 50years of age.

[262] *Oshodi v. Imoru* (1936) 3 W.A.C.A. 93.
[263] A beneficiary in the case study in Ikale suggested variation and the application of the suggestion brought about peace.

The study further revealed a hidden fact in *ọ̀dọ̀ igi* mode of property devolution whereby the estate is shared between the widows. The fact that the estate is shared between the widows does not mean the devolution is for the widows as inheritance follows the blood in customary law. It is also for the benefit of their issues, especially if they are minor. Though it is shared on the basis of equity between widows who in turn transmit equality of benefit and opportunity to their offspring and their portion will again be equitably shared among their own children through *ọ̀rọ̀ ọ jọ̀rọ̀*[264].

From the aforesaid, acceptability of the Yoruba customary devolution modes by a section of the survivors without any discriminative ill-feeling makes the *ìdí-igi* mode a test case for other devolution practices in other climes to emulate. Though, some of the women accepted the mode because custom dictates, some said they had no say because they were in the family because of their children, so whatever came to them, whether good or bad, for as long as it was because of their children, they would accept. Yet, the widows are of the opinion that *ọ̀dọ̀ igi* mode engender equity. Contentment such as found in the statement above, is a virtue in Yoruba customary devolution practice and should be encouraged. Although each of the modes has its own dissent, the *ọ̀dọ̀ igi* system, as alluded to by most of the respondents-save a few persons who have some reservations on it- agree that it engendered more equity and equality than *ọ̀rọ̀ ọ jọ̀rọ̀* among heirs to deceased estates among the Yoruba.

4.3 Customary Property Devolution Practices in Selected Sub-Ethnic Groups of Southwestern Nigeria

Yoruba sub-ethnic groups share some common and broad cultural identities, an attempt to establish a general rule or assumption, on the Yoruba idea of devolution of inheritance will be wrong, because of the variations in practices found in the selected sub-ethnic groups of this study. It is appropriate to reiterate this: African ethnicity has many variants that had undergone much redefinition through time. Even with the variants they still share some degree of similarities in outlook, every cultural locale maintains its peculiar and distinct way of resolving culture-specific problems. Such similarities may differ on points of details or the degree of observance or the procedure for its application. For example, among the Ekiti, Ijebu, Ijesa, Ikale, and

[264] *Yusuf v. Dada* (1990) 4 NWLR (pt.146) 657,669

Oyo, studied for this work, *8d7 igi* and *or7 0 jor7* are the dominant customary devolution modes, although there may be a range of options in devolving a deceased's estate, since *8d7 igi* and *or7 0 jor7* modes were dominant, they became the focus of this discuss with prospect for possible changes.

The study revealed that these customary inheritance practices derive their authenticity and acceptability from the customs and traditions of the people. These customs and traditions are so respected that any deviation from their agreed terms are abhorred and repelled[265] and the deviant is made to face the music alone. Therefore the age long mode of distribution of estate known as *8d7 igi* is regarded as *nulli secundus,* though there are absolute grounds for improving upon the modalities, even now that modernity is really affecting its application.

Among the Yoruba of Southwestern Nigeria, *8d7 igi* mode is seen to be more acceptable, than *or7 0 jor7,* yet no one should say with all emphasis that one customary mode is generic across Yorubaland. *or7 0 jor7* is more of a palliative dispute resolution and mediation mode as espoused by Abott F.J.[266] Suffice it to say that, there is no single set of customary law of inheritance among the Yoruba because it is tribal in origin and operates within sub-ethnic groups which differ from one another; hence from one sub-group to another, similarities and differences were found. The elderly among the interviewees, the key informants and traditional institutions agreed that the use of *8d7 igi* mode of customary devolution engender equity and it had been in use for a considerable length of time, but most of the younger ones in Ekiti, Ijesa, Ikale, and Ogbomoso were at ease with the use of *or7 0 jor7* mode which their counterparts in Ijebu did not agree with.

Ìd7 igi mode found among the Ekiti, Ijebu, Ijesa, Ikale, and Ogbomoso fosters equity and equality among the survivors as evidence of harmonious relationships was found even among *[bzkan* not only among *[m[8yq* In some of the interactions made with children of deceased families, there were strong ties that one wonders if there had been any inheritance devolution issue among the siblings. Though instances of children of the same *[m[8yq* quarrelling over inheritance of their late father when they have no *[bzkan* were seen in the study area, yet cases of *Dqw9d6* taking

[265] *Owoyin v. Omotosho* 1961 1 ALL N.L.R 304 @ 309
[266] *Op. cit. Dawodu v. Danmole*

financial responsibilities over his *[bzkan* on one hand or and his *[m[8yq* on the other, thus stepping into their late father's shoes.[267]

In all the communities, *or7 0 jor7* is subsumed in *8d7 igi* though beneficiaries do not see it in that light, but it is, in the sense that the children do come to their *8d7 igi* to get their *or7 0 jor7* share, whereas there is no traces of *8d7 igi* found in *or7 0 jor7* devolution mode but beneficiaries of *or7 0 jor7* modes were expected to take care of their *8d7 igi.*

In one of the life histories taken in this study, one of the demerits of *or7 0 jor7* was pointed out in a customary devolution in Ikale, wherein the children took their share of the estate through *or7 0 jor7* and they never returned to care for their mother on the excuses that their mother was a witch. Meanwhile, all the four children are well to do and they have attained enviable status in their chosen carriers.

Among the Ijebu, in *or7 0 jor7* mode, the first female child has the same status and rights as the first son and can inherit estate or any part thereof or make decisions as to who gets what and how in testamentary disposition. In Ekiti, Ijesa, Ikale, and Oyo, the rule of male primogeniture is dominant and the first female child does not have the same status and rights as the first son, she can inherit the estate or any part thereof but cannot be made the family head, even where she was referred to as such, she was not given the right and privileges of office[268]. Though cases of female reagents abound in succession to titles in Ekiti, this was found uncommon in other areas.

In customary devolution practices of *8d7 igi* and *or7 0 jor7,* divination is not taken for granted as *ifq* is all knowing and directs the affairs of men. *Ifq* is consulted on inheritance issues, and it is only through its approval that devolution can be undertaken, in some cases the time and venue of the devolution will be sought and approval taken through divination, once the approval is sought and obtained from *ifq,* they believe that from the commencement to the end of devolution, all will be well.[269]

Oath taking has also engendered fairness and equilibrium which are elements of equity. Members of the extended family including the *Ol9r7 cb7* who stand in as

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[267] The cases are not as in *Bini* Customary tradition where the *dqw9d6* exclusively takes the father's last abode

[268] *Olohunkan v. Teniola* (1991) 5 NWLR (pt.192) p.501@ 513

[269] *Op. cit. Baba Awo, Dada Abinupagun*

executors are in fiduciary position and are made to swear to an oath of truthfulness in dealing, impartiality in devolution and sincerity in all things pertaining to the exercise. The beneficiaries in both *8d7 igi* and *or7 0 jor7* modes are also made to swear to an oath of obedience, and once these pre-cautionary measures are taken, customary devolution issues become easy, simple and rancour free as everyone would have acted in good faith having the resultant effect of betrayal in mind, then justice would not only have been done but would have also been seen to have been done.

This study has further revealed that African inheritance law has a disconnect from customary practices, and that is why African law is subjected to the 'English Repugnancy Test' principle because elitist behavior has made some old time practices archaic in the estimation of modern day Yoruba. Even the changing social circumstances in which women now take on equal roles, both within the family and in the wider society is mounting pressure on indigenous devolution system whereby gender equality is now on the front burner, but it would be a mistake to apply the Common law with all 'intent and purposes' to African inheritance system in search of equity and equality in a discriminatory free sharing modes. That would mean "a destructive confrontation between the English legal system on the one hand, and the indigenous law, on the other, a conflict that may well lead to the obliteration of indigenous law, despite the statutory shield for customary law since all operators of the law today were trained in the English legal system. The Customary rule of male primogeniture to outsiders discriminates against women but the Yoruba idea of devolution is that the right of inheritance brings with it heavy responsibilities to male heirs. Male heirs, according to customary traditions, not only inherit assets of the deceased but also become liable for his debts and—more critically—assumes the duty of care for any dependents, including minor sons and certain women relatives, even if providing for them exceeds the resources inherited, a specific example was found in Ago Iwoye where the *B11r2* who "stepped into the shoe of his late father" as the head of the family was responsible for payment of school fees of minors among her siblings and care of the widows.

*D& IGI

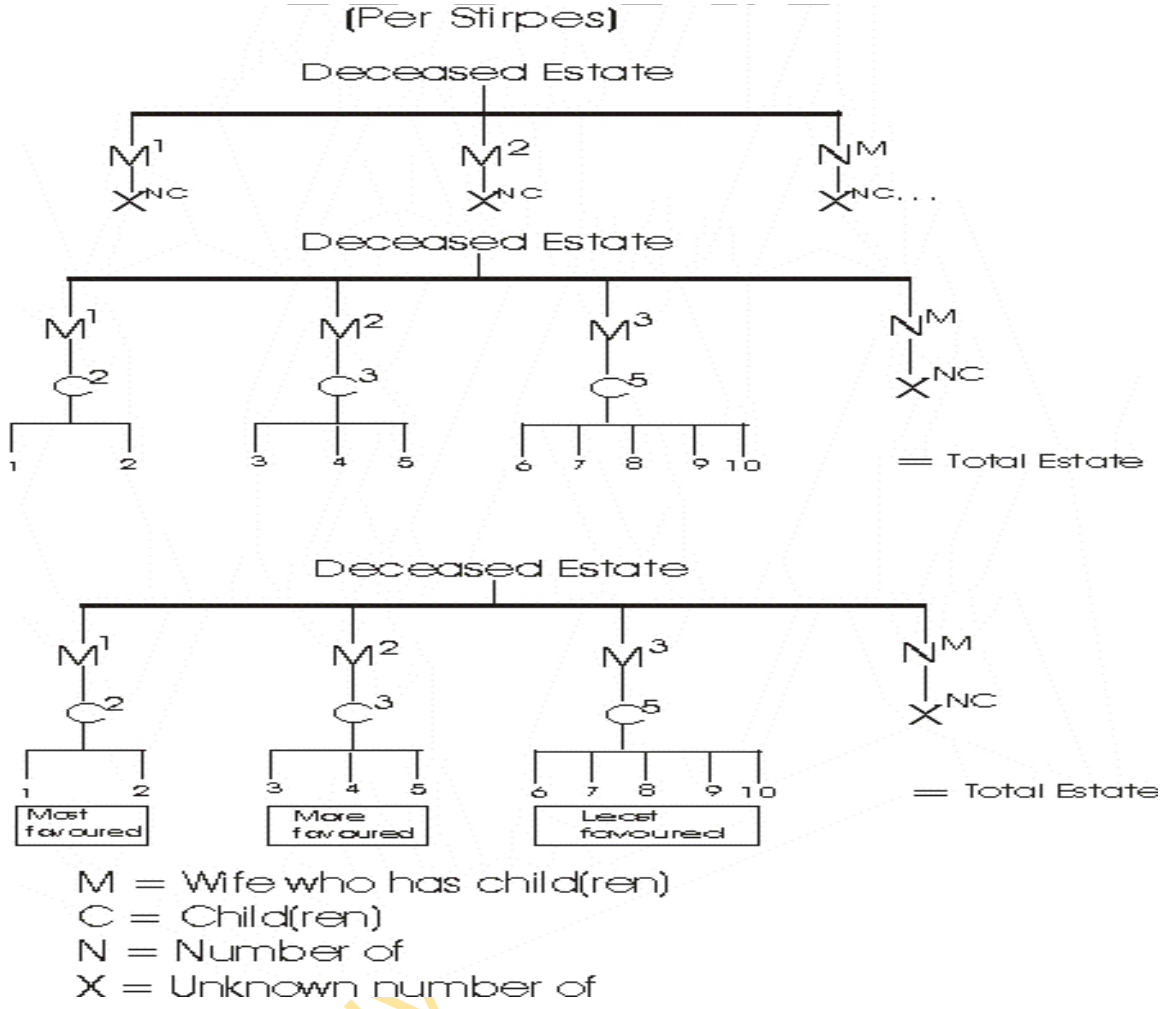

Fig 1: Showing *8d7 igi* devolution pattern

OR&) JOR&

(Per Capita)

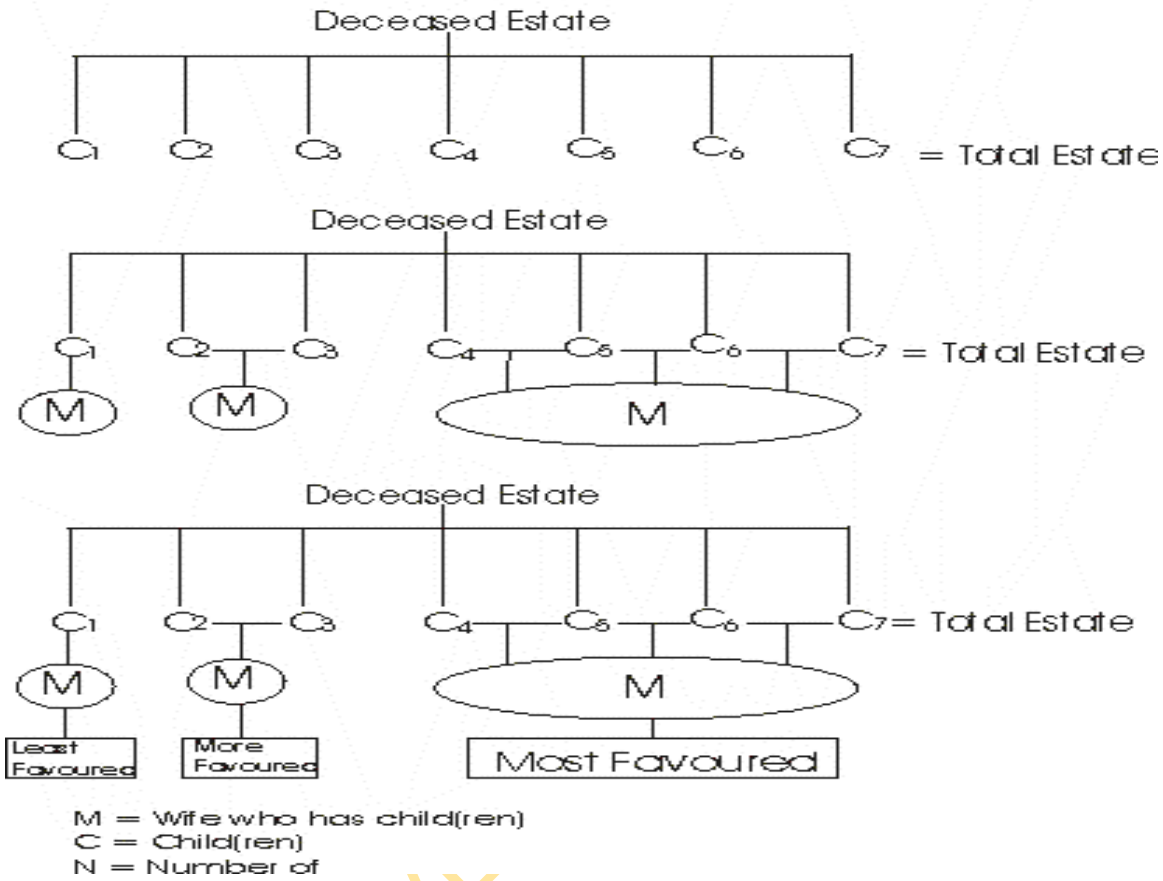

Fig 2: Showing *or7 0 jor7* devolution pattern

4.4 Similarities and Differences in Inheritance Practices among Yoruba Sub-Groups

Yoruba sub-ethnic groups have cultural identities that are similar in nature, but there are variations in practice and since many sub-groups were studied, the tendency for the existence of similarities and differences in the way things are done cannot be taken for granted for example inheritance rights in Ekiti, Oyo, Ijesa and Ilaje favour male children more than what was found among the Ijebu, it stems from gender expectations that the family wealth ought to remain in the family. In addition, traditionally the husband is seen to have the role of providing for the well-being of his family, and so it is argued that male are more suitable guardians of the family's inheritance than female.

Some of the similarities and differences discovered in inheritance devolution practices among the sub-ethnic groups are discussed below:

i. Devolution Pattern and Beneficiaries

The devolution modes of *ẹ̀dẹ̀ igi* and *orẹ̀ ọ̀ jorẹ̀* do not take the same pattern in the sub-groups. In *ẹ̀dẹ̀ igi* mode of estate devolution, the estate is divided among the wives of the deceased, though they are deemed beneficiaries, but in the real sense of it, a husband cannot inherit his deceased wife's share of her family property[270], so also is a widow not entitled s*tricto senso* to share in the property of the deceased husband at customary law, for under native law and custom, the devolution of property follows the blood. Consequently, a wife or widow, not being of the blood, has no claim to any share. This study saw wives as mere custodians of the devolution or a conduit pipe through which their children's share should pass. In all the study areas, separation of the father and mother, or divorce does not in any way make the children lose their share of the estate. For example, where the man and the woman no longer live as husband and wife, this does not in any way affect the children in inheritance devolution.

In Ikale, the eldest male child of every *ẹ̀dẹ̀ igi* represents his *ẹ̀dẹ̀ igi* for the purpose of devolution, whereas in Ekiti, Ijebu, Ijesa, and Oyo the wives are allowed to be present or be represented by an offspring (either male or female). In the study areas the *modus operandi* of the devolution pattern remains the exclusive preserve of the *ebí* whose duty it is to see to equitable distribution. It may be done through seniority (status) of the wives in *ẹ̀dẹ̀ igi* or that of the children in *orẹ̀ ọ̀ jorẹ̀* or as they might have decided at a previous gathering, as devolution of inheritance does not end at one sitting. Sometimes it takes up to four or five times of gathering before amity is obtained.

Personhood is an integral and sensitive reality upon which Yoruba devolution practices stand in deciding who is entitled to the estate of a deceased and who is not. The case of *Adeseye and Ors v. Taiwo and Anr*[271], which Coker (1966:263) also alluded to, agree with this fact. Plaintiffs in the case unsuccessfully tried to base their

[270] (1929) 7 NLR p. 48
[271] *Op. cit. Adeseye v. Taiwo*

claim to succession to the estate of a deceased relative on the facts that they were blood relations of the deceased and that they were so regarded by him during his lifetime. The court held that they could not, by those facts, become entitled to succeed to the estate. In *Savage v. McFoy*[272], the court held that the benefit of customary law cannot extend to the plaintiff in such circumstances as above. These examples re-echo the Yoruba idea of devolution of inheritance, that in order to succeed to their deceased father's estate, it may be necessary for even the children to establish that they were so regarded as children by their deceased father. The implication of the above is that, an outsider to the family, often assume, the existence of certain *filial* relations, which, in actual fact, does not exist within such a family. Some family relations might have stayed with the deceased long enough that outsiders regard them as offspring. While some of them may not know the true position, some who know may want to pretend they do not know since it will be an *8fz*, if they eventually get something from the estate as survivors.

All the deceased children in Yoruba customary inheritance are entitled to inherit. It makes no difference whether they were born from a statutory marriage, customary marriage, were adopted (though very rare in yester years) or born out of wedlock. As decided in the *Lewis v. Bankole*,[273] the daughter takes second position, after the eldest surviving son, so, regardless of their sexes, children of the deceased are entitled to inherit their father,[274] except where the deceased had made such form of disposition before he died, or the *cb7* at their meeting decided to give something to anyone a right the *cb7* can exercise without questioning. The wife has no right either to inherit or administer the property, but she can protect the property rights of her minor children if she finds out that they are not equally treated[275] by taking 'legal' actions, such as appropriately reporting the perceived injustice to the *cb7, the Ol9r7t5n* and*)x6gb9* (Ijebu), *Baql2 or* Oba and her interest will be taken care of. However, in the absence of a male child, the court has held in *Abibatu v. Flora Cole*[276] that the eldest daughter should become the *Dqw9d6,* though the actual nomenclature in Yoruba is *B11r2*. This practice as found among the Ijebu was expressed in *Ashipa v.*

[272] (1909) REN 505
[273] *Op. cit. Lewis v. Bankole*
[274] *Op* cit. *Suberu & Ors. v. Sunmonu & Ors.*
[275] *Aileru v. Anibi* (1952) 20 N.L.R. 46; *Bolaji v. Akapo* 2 F.N.R 24, 245 (Nigeria).
[276] (1986)] 2 NWLR 369

Ashipa,[277] whereas, among the Ekiti, Ikale, Oyo and Ijesa, to regard a female *B11r2* as *Ol9r7 cb7* is a mere academic exercise as she would bear the title without the authority of office. Barren women are given appropriate care in the devolution even where *or7 0 jor7* is the mode used, while the *8d7 igi* of a woman with no male child or one who pre-deceased the devolution is represented by a female child. Meanwhile a widow without an issue was regarded as part of the property in *Awero v. Raimi*[278] liable to be inherited with the other properties of the husband. This is a common practice in all the sub-group visited. The woman is regarded as part of the inheritance and she could be inherited. The last wife of a deceased in Ikale was part of the inheritance a first son got. The widow was two years younger than the first son to whom she was later given as inheritance.

There is a similar rule in all the sub-groups that the eldest son cannot succeed his father as head of the family so long as an uncle, who may be much older than him is alive. He remains the *Dq*w*9*d6 of his immediate family, but the larger kin has an *Ol9r7 cb7* which is rotational, it does not remain on a particular line in the family, it moves from the eldest in one line to the eldest in the other. For as long as the kinship remains, it cannot suffer lack of *Ol9r7 cb7*.

ii. Devolution Panel

Cb7 occupies an eminent place in the life of the Yoruba. Every Yoruba child is born into a home, which is a part of a compound or a clan. Family members always trace their descent to a common ancestor, and inheritance is patrilineal, yet the estate of a deceased Yoruba is first for the benefit of his children who survived him and by extension for the enjoyment of his widows. It is the exclusive preserve of the *cb7* to see that devolution issues do not lead to rancour and acrimony, the *Ol9r7 cb7* leads the team and devolution is undertaken, that does not mean that membership of the panel is constituted the same way in all the sub-groups studied as only male children could attain the status of *Dáwódù* and be regarded so to say as *Ol9r7 cb7* in Ekiti, Ijesa, Ikale and Oyo[279] whereas the eldest child 'whether male or female' could attain

[277] (2002) LHCR 60-84
[278] (1983) 11 O.Y.S. H.C. 790 (Nigeria)
[279] *Op. cit*. Onokah, M.C.

the position among the Ijebu[280]. Membership of the devolution panel is open to *cb7* of the deceased among the Ekiti, Ijesa, Ikale and Oyo, whereas among the Ijebu, in addition to what is obtainable in the other sub-groups under study, devolution could be made by the *cb7*, the *Ol9r7t5n* in council,*)x6gb9* in council, *Baql2* in council and Oba in council, depending on whose 'court' the devolution issue was reported. The *cb7* with *ol9r7 cb7* as Chairman has the primary responsibility on inheritance devolution among the Yoruba. This does not in any way demean the powers of the other groups in Ijebu. These other groups are supposed to have 'appellate jurisdiction' on inheritance issues but if cases are taken to them *de novo*, they do attend to them. The use of *Baql2* in council or Oba for testamentary disposition is not limited to Ijebu sub-group alone; the type of monarchical administrative structure on ground in the other area determines which way to go about resolving inheritance issues.

Among the Ekiti, Ikale, Oyo, and Ijesa, the eldest male member is usually the *Ol9r7 cb7* or *Baql3* of the immediate family. There exists another *Ol9r7 cb7* for the extended family who conveys the meeting of the extended family and directs the way inheritance devolution should go except where *ifq* has given an earlier directive. The *Ol9r7 cb7* takes office automatically and without ceremony upon the death of his predecessor. Among the Ijebu, a woman may act as head, if she is the eldest living member, of the family. It does not matter if she lives in the family house or not, even when she is married out of the family house, she could still hold the position, for as long as she is the eldest living member of the family. As *Ol9r7 cb7* he/she presides over the meetings of the descent group, usually held in the family house in the compound. He/she has jurisdiction over all matters pertaining to the group, including land; he/she has the last say on allocation of family land and apartments in the family house. *Ol9r7 cb7* may make orders, and family members have to obey if the members still regard him/her so, but he/she is subject to the will of the group expressed at its meetings; he/she cannot make a counter order against an agreement reached by other members of the family. He/she can be ignored but cannot be deposed, though if unpopular, authority can be wrestled out from him/her through a sort of abandonment and recognition as leader given to his/her immediate junior and that is why the

[280] *Op. cit. Lewis v. Bankole*

Yoruba says *a k87 fi 2gb-n jc zr9l3, k7 q wq l[pe cj- l9j5de zb6r0.* (You cannot make the elder the head and you now go ahead to try cases at the younger brother's house). The *Ol9r7 cb7* sits over family disputes to give final verdicts and he/she is respected for whatever he/she says.

iii. Adjudication Options in Cases of Acrimony

Oba and *Baql2* have so much power among the Yoruba that they give various punishments and penalties not limited to banishment to the grooves, and ordering of death sentences to their subjects who were found guilty of one offence or another. Though a bulk of decisions on family issues rests on *Ol9r7 cb7,* and whatever case he could not handle with other members may be referred to the *Baql2* or Oba in council, and that must be serious cases beyond his limit.

Among the Ijebu, *Ol9r7t5n* and *)x6gb9* have roles to play if acrimony and rancour arose and this was reported to them. The petitioner will report his grievances to either the *Ol9r7t5n* who will call the council of elders and ask the Secretary to invite the respondent, the invitation is not done until the petitioner has paid a fixed charge known as *8kòs6n.* It is only after the payment of *8kòs6n* that the council can hear him. Both petitioner and respondent shall pay the same *8kòs6n* before they can be heard, and the principle of 'he who alleges must prove' is brought to fore at the sitting.[281] The payment of *8kòs6n* is not limited to the *Ol9r7t5n* 'court' in *Ijebu*, it is also practiced by both Oba and *Baql2* in council. It is trite to note that devolution cases can be moved by disputants from *cb7* to *Ol9r7t5n* or *)x6gb9*, if parties are unsatisfied, from *Ol9r7t5n* or *)x6gb9 to Baql2*, if still unsatisfied, from *Baql2* it can then go to the Oba, at which point the final decision on the matter is heard. In Ijebu customary setting, *Ol9r7t5n* is a community head or leader who uses elders in the community to settle disputes, he is an appointee of the Oba and acts within the ambit of powers delegated to him, whereas, *)x6gb9* is a voluntary but powerful organisation in the town or village that has its rules, its dispute resolution arena is open to only members of the group or their family[282]. The *Baql2* is higher than *)x6gb9*, as the *)x6gb9* of every village must respect the authority of the *Baql2* who is often refer to as *Baql2 [k[8l5,* (the husband or head of a town), consequently,

[281] They are community leaders in their own right and are highly regarded by the people.
[282] This is a cult and only initiates cases are heard here

Oba is higher in status than both *Baql2 (*his appointee), and *)x6gb9* which is below the *Baql2*. Therefore, no case already handled by Oba can be taken before *Ol9r7t5n,)x6gb9* or *Baql2* in Yoruba legal system.

4.5 Impact of Yoruba Customary Modes on Access to Property

Findings of this study have revealed that devolution of estate among the Yoruba does not have to do with marriage because 'devolution follows the blood'. A man may be married to one wife, or a number of wives yet have relationship with other women who bore him children, so, in Yoruba customary inheritance practices, the interest of the children outweighs other interests, as they should have share in their father's estate.

In a case study in Ijebu, the deceased did not bring in two children he had with another woman, and no member of either the nuclear or the extended family had met them during his life time. After his death, on the day of his burial, the children were brought and presented to the family by their mother. The extended family after serious considerations accepted the children on the ground that they resemble their deceased father; they were described as "his carbon copies" in these words *k0 s7 7 iyzn j7jz n7b2, b7 i cni p3 9 p= w-n s7l2 ni* (meaning, the resemblance is uncontestable). The point been stressed here, is that children will receive acceptance by the extended family among the Yoruba. Without any DNA test, paternity issue was laid to its final rest, and the children were recognised as part of the family by the simple acceptance of the extended family, they were regarded as children, and allowed to inherit from the estate of the deceased.[283]Whereas, similar situations that have come before courts in Nigeria have been given different judicial interpretations. In the case of *Alake &Ors* v. *Pratt*[284], the trial judge of the matter at the West African Court of Appeal, Foster Sutton, P., concluded on the premise that once the paternity of the two children had been acknowledged by the deceased during his life time under customary law of the Yoruba, the children were to be regarded as legitimate under the law, regardless of whether their mothers were validly married to the deceased or not.

[283] Response of an interviewee, Chief Kemi Aluko, an *Oloritun* in Ijebu, 2011
[284] (1955) 15 W.A.C.A. 20.

Based on this the court held that the two children could share in the estate of their deceased father and that there was nothing contrary to public policy in holding thus:

> …the evidence in this case is that under Yoruba Law and Custom all legitimate children are entitled to share in their father's estate, and the appellants having been held to be legitimate, I do not think the question of their parents' marriage is then a relevant subject for investigation. Nor do I think that the public policy demands that the courts of this country should hold otherwise.

The above judgment was over-ruled 5years later by another panel of non-Nigerians in the case of *Olubunmi Cole & Anor. v. P. A. Akinyele*[285]at the Federal Supreme Court where Brett F. J, said:

> I am not prepared to treat *Alake v. Pratt*[286] as authority for the proposition that while a man is married under the Marriage Ordinance he can make a child born to him during the continuance of that marriage by a woman other than his wife, legitimate by the mere acknowledgement of paternity, and I should regard such a rule as contrary to public policy.

The judgment of the Federal Supreme Court delivered by Brett F. J cited above to me was on legitimacy and not on capacity of the children to inherit from their father's estate, whereas the judgment of *Alake v. Pratt*[287] was on whether the children could share in the property of their father or not. For children whose paternity had been acknowledged by their father for several years before his demise to be denied equitable share of the same father's estate, to me is discriminatory against them.

The issue of public policy raised by the two courts calls for a deep thought on whose interest the court judgments should serve. Public policy, who is the public? Except the public will exclude the children and their mothers in the matters above, but if not, the children's interest should be built into the yardstick for measuring what public policy in this type of case should be. Considering firstly, the facts that the judges in both cases were non-Nigerians whose background and cultures were different from the culture of the *dramatis personae* involved in the cases and lastly that they have little or no idea of the social realities of the society they are sitting in judgment over. Monogamy is the acceptable form of marriage in the clime they come from, and polygamy is so common among the Yoruba, that it is even found among those who

[285] (1960) 5 F.S.C. 84
[286] *Op. cit. Alake v. Pratt*
[287] *Ibid*

have embraced formal education and the Christian religion.

It should be added that the combined effect of the interpretation of S.49(5) of the administration of estate law and S. 35 of the Marriage Act 1914 denied a widow and her four children inheritance benefits in *Awobodu v. Awobodu*[288] because a marriage under the Act was still subsisting. Something that customary law will not justify.

In a case, in *Omuo Ekiti*, a man disowned his son for embracing a different religion, and sent him out of the house, during devolution; the *cb7* did not regard him disowned, the *ol9r7 cb7* said the *cb7* could not have disowned him for embracing a different religious persuasion since adherents of other religions are in the *cb7*, thus making a defense for his inclusion in the devolution and establishing the fact that *cb7* does not only have a say in customary inheritance,[289] but gives directives as to how equity and equality would be achieved.

A woman who had left her matrimonial home in anger because the deceased husband brought in a fourth wife in a case in Ogbomoso, was allowed to share in the estate during devolution, her absence as a wife in the home during the latter part of the deceased lifetime was not counted against her, the family gave her recognition and subsequently allowed her on grounds that:

i. She did not leave her matrimonial home for another marriage.
ii. She had no child for any other person other than the deceased.
iii. She was always coming to the family house during festivals and special events, and
iv. She continued till the day of devolution to answer the deceased family name as her surname.

On the basis of the above conclusion, she was allowed to be part of the *ìdí igi* mode of estate devolution.[290].

A *Dqw9d6* who pre-deceased his father in *Imesi Ile*, but left children was allotted share in the estate through his children by the *cb7*. His share of the estate was devolved to his children as joint-owners, so in the instant case, the children of the late

[288] (1979) 2 L. R. N. 339
[289] An interview with Olomuo of Omuo Ekiti, 2012
[290] A case withdrawn from the customary court in Ogbomoso witnessed by the researcher and was followed to its conclusion at their family meeting.

Dqw9d6 who were grandchildren of the deceased were given share in a representative capacity. Grandchildren ought to inherit through their father among the Yoruba, but in other legal systems, once you pre-decease your father, you are not entitled to any share in the estate unless it is so stated in the testamentary document, but the uniqueness of customary inheritance practice is exploited in the instant case to cater for survivors of a son who if he had been alive would have been there, not only to take his own share of the estate but would have been the *Dqw9d6* of the family. This is worth emulating in a legal system by other legal systems.

The above cases and their impact on access to property and modern day gender equality struggle as well as court verdicts in favour of customary devolution modes have positively influenced not only Yoruba devolution practices but other customary devolution practices which had in the past relegated the rights of certain individuals on private access to property to the background. For example, in most cultural jurisdictions in Nigeria save Yoruba, particularly the Ibo, Edo and Urhobo, the widow of a deceased does not have rights and privileges as the children do. She is regarded as a non legal person and so could neither hold any right to property, nor inherit from her husband, (and in some cases even her father). Even where a woman is allotted a portion of land from her deceased father's estate, that portion remains her father's family land, she can neither make an absolute gift of the land nor could her husband dispose of the land as the principle of *nemo dat quod non habet* is invoked.

As against Igbo customary practices, where daughters like wives, do not inherit, a daughter among the Yoruba inherits, even among the Ijebu, instances of female *ol9r7 cb7* abound among the Ijebu. The only situation in which a daughter can inherit among the Igbo is where she chooses to remain unmarried in her father's home with a view to raising children there. This cultural practice is known as *"nrachi"* or "*Idegbe*" custom among various Igbo communities, and in Edo culture it is known as "Arewa." This situation usually arises when a deceased man leaves an estate, but no surviving male child to inherit it. The idea said to be underlying this practice is to save the lineage 'from extinction'. The daughter, now considered an *"nrachi"* or "*Idegbe*"is entitled to inherit both movable and immovable property from her deceased father's estate. The legal interest vests in her until she gives birth to her own children. However, it is only her sons and not her daughters who can succeed her in accordance

with the rule of male primogeniture[291]. On the whole, daughters have no rights to inherit their father's compound or residual land and houses among the Igbo. Some local variations may provide for inheritance by daughters; however, control of the inherited property remains with the oldest son.

Whereas, the Yoruba customs and traditions have guaranteed inheritance rights to daughters in their fathers properties and also to widows in their fathers properties. The use of folklores, divination, oath taking, myths, proverbs and historical experiences employed in the devolution process protect the interest of women among the Yoruba, so, the widow is not just ejected from her home by any of these acts: intimidation, threats, physical violence or a combination of some of them because the custom and tradition frowns at such treatment. Care for the widow and the vulnerable children are of importance in Yoruba customs and tradition. Death bed disposition is stronger than Will among the Yoruba because most time the disposition goes with a curse and everyone will honour an agreement or directive that is enveloped with curses.

The Administration of Estate Law, 1958, applicable to the whole Yorubaland, which gives spouses right to succeed to each other's property, does not apply to persons subject to customary law. If the deceased was married under customary law then the distribution of his estate will be under that law. The courts over the years have worked out rights of the individual in so far as family property is concerned, that every member of the family male or female has a right to live and continue to live in the family home as he or she wishes,[292] even a female member of the family who moved to her husband's house has a right to return to live in the family home "on deserting or being deserted by her husband" and such member must be consulted with regard to transactions relating to the family property[293]

In 1897, Samuel Johnson in his *History of the Yoruba* made this statement:

> …when a man dies, his farm is inherited by his children, and so from father to son in perpetuity; and like the house, it is not subject to sale. If his children are females, they will pass on to the male relatives.[294]

There has been a very significant change in the social and economic life of the

[291] The practice is found in some parts of Anambra State
[292] *Op. cit. Bajulaiye v. Akapo*
[293] *Op.cit. Aganran v. Olushi*
[294] Johnson, S., History of the Yorubas (1897), p.96.

Yoruba since Jonson wrote his book in 1897, and I think if Johnson were to be alive today his perception of these changes would have affected his standpoint. The position has since change that both male and female Yoruba now have share in their father's house or estate.

In so far as the Yoruba people are concerned; the Courts held that two possible methods of distribution exist. In the Federal Supreme Court judgment of 1958[295], Abbott, F.J. said *8d7 igi* is an integral part of the Yoruba native law and custom relating to the distribution of intestate's estates and that where there is a dispute, the head of the family is empowered to and should, decide whether *or7 0 jor7* ought, in that particular case, to be adopted instead of *8d7 igi*, and that *or7 0 jor7* is a relatively modern method of distribution adopted as an expedient to avoid litigation.

The law depriving women of inheritance rights in their deceased husbands' estates already laid down by Buckley J. in *Shogunro Davies v. Edward Shogunro*[296], where he said that the reason for depriving a wife of inheritance rights was because devolution of property under native law and customs, follows the blood and unless a property given to a wife is proved to be an outright gift it will pass on the husband's death to the husband's family. She has no right of inheritance whatsoever (Okunola 1991:151,173)[297]. A view re-echoed in 1963 cases of *Nezianya v. Okagbue & Ors.*,[298]and *Uka v. Ukama*[299], that, a widow may only deal with her late husband's property with the concurrence of her husband's family but cannot assume ownership or alienate the property. She cannot by effluxion of time, claim the property as her own but she can occupy the building subject to good behaviour. She can also let part of the house to tenants and use the rent obtained to maintain herself if her husband's family failed to maintain her and that in accordance with general Ibo custom, women are not entitled to inherit land from their father, a female has no *locus standi* to question the sale of her father's property, no matter her seniority in the family respectively[300].

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[295] *Op. cit. Dawodu v. Danmole*
[296] *Op. cit. Shogunro Davies*
[297] Okunola, M., 1991. "Relationship between Islamic law and customary law of succession in southern Nigeria", in *Towards a Restatement of Nigeria Customary Law* Lagos, Nigeria: Published by the Federal Ministry of Justice, pp 151,173
[298] (1963) 3 NSCC 277
[299] (1963) FSC 184
[300] *Ugboma v. Ibineme* (1967) FNLR 251

About 45years later, there has not been any substantial improvement on the rights of women to inheritance, in the Eastern and Northern parts of Nigeria as the case of *Oke & Anor v. Oke & Anor*[301] buttressed this submission, that, a woman cannot devise her un-partitioned portion of family land to her son and neither could she dispose of it in any other way to her son even though the son might inherit the property on her death. Ownership of the land still remains in her family.

In *Chinweze v. Masi*[302]which came up about 60years after *Shogunro Davies v. Edward Shogunro*[303] the Supreme Court position was still the same, following the same pattern that a woman has only a life interest in the property of her deceased husband as long as she remains the wife and if she dies, her interest ceases, the interest was said to still be possessory, therefore, she could not dispose of it.

The absence of the right to inheritance by the widow which Jibowu J. says extends to administration of the intestate estate in *Aileru & Others .v. Anibi*[304], where he held that "under native law and custom, widows cannot administer the estate of their husbands," was the standpoint of the Supreme Court in the case of *Akinnubi .v. Akinnubi,*[305]where, the apex court declared that it is trite in Yoruba customary law that a widow can be inherited by her deceased husband's family, but she could not apply for a grant of letter of administration nor be appointed as co-administratrix of her deceased husband's estate.

The table was turned in 1957 by Irvin J, who held in the case of *Salami v Salami,*[306] that the plaintiff in the case had a right to inherit under the Yoruba customary law, and 'neither absence nor minority and sex could preclude her from inheriting from the estate of the deceased father'. In *Kafi v. Kafi*[307], the Court of Appeal held that a wife was entitled to occupy one of her husband's houses for her life time, the Court took into consideration what others have neglected in the past, i.e. the supervisory and contributory roles played by the wife during the building of the house and other

[301] (1974) 9 NSCC 148
[302] (1989) 1 NWLR (pt. 97) 254, 270
[303] *Op. cit. Shogunro Davies*
[304] *Op. cit. Aileru v. Anibi*
[305] (1997) 2 WLR 144.
[306] *Op. cit. Salami v. Salami*
[307] (1986) 3 NWLR (Pt.27) P. 175

houses built by the husband, including feeding the builders and fetching materials to the building sites. In a 1996 case of *Jadesimi v. Okotie-Eboh*[308]a statutorily married widow, with her children applied to the high court for a grant of letters of administration to enable them administer the estate of their deceased progenitor, and it was granted by the Court.

In a year 2014 Supreme Court judgment in *Lois Ukeje & Anors v. Cladys Ada Ukeje*[309] Justice Bode Rhodes-Vivour who read the lead judgment of the Supreme Court in the case upholds female child's right to inheritance in *Igbo*land thereby laying to rest the earlier discriminatory rules of customary inheritance which is in breach of Section 42 (1) and (2) of the Constitution, a fundamental rights provision guaranteed to every Nigerian and Article 18(3) of the African Charter on Human and Peoples Rights which imposes responsibility on the state to ensure the elimination of every form of discrimination against women and their children[310].

The development of structures in myths, folklores, divination, proverbs historical experiences and oath-taking techniques impact on harmonious family relationship positively in customary devolution among the Yoruba. Invariably, existence of structures in myths, folklores, divination, proverbs historical experiences and oath-taking insulate the customary devolution practices of *ẹ̀d7 igi* and *or7 0 jor7* from needless acrimony and rancor which often set families against one another. Once oath is administered in Yorubaland, it must be so respected that no true Yoruba will take 'real' oath with impunity or under false pretences as the repercussion is always unpalatable to defaulters, but it strengthens the customary inheritance practices.

[308] (1996)2 NWLR 128.
[309] See Guardian Newspaper of Wed., April 16, 2014. pg 4
[310] Emory International Law Review Vol. 25

CHAPTER FIVE
SUMMARYAND CONCLUSION

5.1 Summary

It is difficult to controvert the fact that many African societies combine both customary and statutory laws of inheritance, and these laws have impact on the rights of inheritors as well as on both laws. A comparative study of similarities and differences found in the practises among the sub-groups of Ekiti, Ijebu, Ijesa, Ikale, and Oyo attest to the fact that cultural dynamics has resulted in attitudinal changes which has negatively affected the core values of customary inheritance practices. Conflicts have been avoided or amicably resolved in many devolution issues of *8d7 igi* and *or7 0 jor7* through the application of folklores, oath-taking, swearing and divination to attain equity and equality which is the primary objective of Yoruba inheritance practices.

Devolution of inheritance among the Yoruba is mostly intestate, universal and patriarchal. The indigenous law of succession is universal because, rights and duties transit to the heir who "step into the shoes" of the deceased, and property devolves mainly according to the rule of male primogeniture which brings with it heavy responsibilities to the male heirs who are expected to preserve the family unity. The gamut of inheritance pattern in Yoruba devolution practice is that, a husband cannot inherit his deceased wife's share of her family property, so also is a widow not entitled s*tricto senso* to share in the property of the deceased husband for under native law and customs, the devolution of property is said to follow the blood.

Yoruba customary practices of *8d7 igi* and *or7 0 jor7* are alive among the people. It fosters equity and equality in customary testamentary substantiation among the Yoruba as the socio-cultural life of the Yoruba is built on the family system which had in the past arbitrate in inheritance issues, without which the situation would have been more chaotic. The aim and objectives of this study were achieved and the data found show the possibility of peaceful inheritance devolution in the future as it was in the years gone by. The study agrees with previous studies that *8d7 igi* and not *or7 0 jor7* is a preference mode among the people, but distinguishes itself on the premise

that modern day inheritors are no longer at ease with the mode as it was practised. Evidence of the study reveals that a rebranding of the modes will go a long way in fostering the required equity and equality among the survivors in Yorubaland.

*d7 igi and or7 0 jor7 are the two concepts that promote equity and equality in Yoruba customary mode of inheritance, but they are against the practice of English testamentary disposition. These customary practices are not generally applicable among the various Yoruba sub-groups. In Ikale land, 8d7 igi is modified in such a way that the first male child represents his 8d7 igi and can suggest variation in the sharing mode. Among other Yoruba groups, wives may be invited yet they have no say on inheritance devolution issues. Among the Ijebu, in or7 0 jor7 mode, the first female child has the same status and rights as the first son and can inherit estate or any part thereof or make decisions as to who gets what and how in testamentary disposition. In Ekiti, Ijesa, Ikale, and Oyo, the rule of male primogeniture is dominant. However, there exist manifestations of inequity and inequality in some families due to the rule of male primogeniture. Assertive postures of first wives and first male children often lead to physical struggle and lengthy court cases which may disrupt the 8d7 igi and or7 0 jor7 modes of inheritance. In cases of conflict, rancour and acrimony; folklores, divination, oath taking, myths, proverbs and historical experiences are employed in the resolution.

The study has responded as a contribution to testamentary substantiation within the context of African customary law. It also holds the assumption that the dearth of adequate discourse, and indeed, judicial precedence, which sufficiently accommodate traditional African thought, especially among the Yoruba of Southwestern Nigeria on devolution of estate, should be of concern to African law experts today considering emergent changes and development in Africans' adjustment to cultural realities around the world as these implicate testamentary disposition. The study has offered insight into the history and development of Yoruba customary law and how it can be used to help in the formulation of socio-cultural developmental policies and programmes, as well as law reforms, aimed at re-identification of the values of Yoruba cultural heritage. In addition, it offers an up-to-date literature on the pragmatic historical practices of the Yoruba inheritance modes as well as the development of the legal practice in Nigeria.

The Constitution of Nigeria is the supreme law of the land while other laws are subordinate.[311] Customary law is protected by this Constitution which under various sections prohibits any form of discriminatory practices. Of note is the provisions of S. 34 (1) (b) which deals with 'Right to dignity of human person' and S. 42 which prohibits discrimination against any citizen of a particular community, ethnic group, and on the ground of place of origin, sex, religion, circumstances of birth or political opinion by any law, executive or administrative action. Yoruba customary inheritance practices are in concord with the provisions of the Constitution.

This research found elements of equity, consistent with the general tenor and spirit of customary law, rooted in Yoruba native law and customs, playing dominant roles in inheritance devolution among the Yoruba, though they are not known or described as 'equity'. The word *og5n* in Yoruba means either twenty or inheritance depending on the usage and the intended meaning. *Og5n* twenty as a figure in Yoruba belief system is a dividable figure. Since it is divisible for 20, 10, 5, 4 or 2 persons equally, it is a notion of equality and equilibrium. When the notion is transmitted to inheritance which is known as *8p7n og5n* (inheritance devolution), the modes are believed to foreclose inequity and inequality.

**d7 igi* and *or7 0 jor7* modes found applicable in the study areas are responsive and relative to the needs of the communities. In *8d7 igi*, the estate is divided equally among the wives of the deceased, with the children taking their portions through their respective mothers, while in *or7 0 jor7*, the children are direct beneficiaries of the system. Despite the fact that this study found *8d7 igi* mode more acceptable than *or7 0 jor7,* no one can say with certainty that there is a single set of customary law of inheritance among the Yoruba because it is tribal in origin and operates within tribes. The *8d7 igi* mode represents a widely accepted system, though with variants. The study further reveals that the widow is also a consideration in inheritance devolution issues because the care for widow is of importance, hence, the in *8d7 igi* mode the widow is at the centre of devolution.

Some first wives complained of inequality (outside the formal interviews), on the strength of their long stay and endurance with their husbands, 'when he was nothing',

[311] *Op.cit.* Constitution of Nigeria (1999) @ 1(1)

yet the argument against such submissions is that these first wives, because of their long stay had enjoyed some level of comfort and pleasure with their deceased husband. They had him while he was vibrant and energetic; he had trained their (i.e first wives) children in most cases to a level of independence, and such trainings put the children in vantage positions in life better than the children of the younger wives. In some cases children of the first wives are like fathers to the children of the younger wives and they are expected to take up associated responsibilities which this study observed was adequately taken care of in some instances, an advantage of the male primogeniture rule found among the Yoruba by the study.

Some of the younger or latter wives averred that complaints of inequality on the part of the first wives were unfair statements and this may not be tenable, as they (other wives) took up the 'bread winner status' of their own children, a status the deceased had taken up for the children of the first wives, aside from the junior wife roles they had played. According to customary marriage conventions, a new wife was junior not only to her husband but to all of his lineage members born before the date of her marriage. She was also a subordinate in the domestic domain (Fadipe 1970, 114).

The *or7 0 jor7*, mode, was found in some cases to be a continuation of how the deceased lived his life while dealing with his household, and if it has engendered peace, and tranquility in the household, the submission of some interviewees was that, there was no basis for changing what had fostered equity and equality while the deceased was alive.

A disconnect was found in the law and practice. Due to the changing social circumstances in which women now take on equal roles, both within the family and in the wider society at large, people now assume that Yoruba customary devolution modes discriminate between survivors. Care should be taken not to continue the use of the rules of Common law to judge African customary law on inheritance practices as this may lead to the obliteration of the indigenous laws. Contentment is a virtue in Yoruba customary devolution practice and should be encouraged. In many communities daughters have a share out of the estate, and this has become an accepted rule among some sub-ethnic groups in Nigeria. In a case study in Ikale, it was the first son of the second wife who suggested dialogue and not a strict adherence to the rules of customary practices, whereas the same suggestion, in a case study in

Imesi Ile was met with stiff resistance. While dialogue brought about adaptability and variability to the customary practice in Ikale, it also re-united the children of the deceased, a unity so much cherished by the Yoruba.

Case laws and judicial attitudes are indicative of the fact that in Nigeria and in other climes, the laws and practices are beginning to positively influence private access to properties. Nonetheless, without new policy-making and other declarations, new laws and activism without positive change in judicial attitude, which this study reflects, it may not be easy to get equity and equality required for a just and egalitarian society.

The general tenure of Yoruba customary modes of inheritance on private access to property as found out by this study, is that under Yoruba customary law, the children of the deceased, regardless of their sexes, are entitled to succeed their father (to the exclusion of other relations, except where the deceased had made such form of disposition before he died, so private access to property is unhindered and widely enhanced. The study further revealed the hidden facts in the preference for *ìdí-igi* mode of property devolution, whereby the estate is shared between the widows, for the benefit of their children, in agreement with the Yoruba saying, *a nu [m[k87 fi [w- nu il2* which literally translates, someone who is responsible for feeding/nurturing a baby with his/her bare hand will definitely lick his/her fingers afterwards. This research agrees with the wise saying, in the sense that, care for the widow is of importance also and the children's share will definitely benefit their mother in one way or the other, since 'blood is thicker than water', apart from her right to inherit from her own father's estate.

Dynamism of judicial pronouncements,[312] and decisions of some cases cited below attest to the fact that courts decisions have started influencing customary devolution patterns among the Yoruba. In *Mojekwu v. Mojekwu*[313], the Supreme Court held that, Nigeria is an egalitarian society, where civilised sociology expects male and female to participate freely without any inhibition on grounds of sex. Any form of societal discrimination on grounds of sex, apart from being unconstitutional, is antithetical to a society built on the tenets of democracy. The "Oli-ekpe" custom, which permits the son of the brother of a deceased person to inherit his property to the exclusion of the

[312] Guardian Newspaper of Wednesday, !6th April, 2014, pg. 4
[313] (1997) 7 NWLR (pt.512) 283

deceased's female child, was declared discriminatory and inconsistent with the doctrine of equity. In *Ukeje v. Ukeje*[314], the Court of Appeal held that the Igbo Native Law and Custom which disentitles a female child to partake in her deceased father's estate is void as it conflicts with Section 42 (1) & (2) of the Constitution of Nigeria. In *Uke v. Iro*[315], the same Court of Appeal held that, any assertion that a woman cannot give evidence in relation to title to land under Nnewi Customary Law, is numb of the constitutional provisions and it is not only repugnant to natural justice but also offends all decent norms applicable in a civilised culture where the rights of all sexes are protected under the Constitution. In *Obusez v. Obusez*[316], the Agbor Native Law and Custom which denies a widow who was married under the Marriage Act, a right to the management and distribution of the Estate of her deceased husband who died intestate leaving 5 children was upturned by the Court of Appeal which held that the surviving spouse who is a lawful widow and children of an intestate deceased get first priority to a grant of Letters of Administration of the estate. Whereas, under the Agbor Native Law and Custom she is regarded as a "chattel".

Global agitation for the advancement of women started a long time ago, and the achievement of equal rights and development for women have moved steadily into the national sphere. The UN Commission for Status of Women (CSW) under the Economic, Cultural and Social Council (ECOSOC) of 1946 envisaged that men and women should be treated equally in all spheres of life where the same conditions prevail. The establishment of CSW led to the subsequent adoption of the Universal Declaration of Human Rights (UDHR) in 1948; Convention on the Political Rights of Women (1952), the Convention on the status of Nationality of Married Women (1957), Convention on the Elimination of all Forms of Discrimination Against women (CEDAW) 1979, and the Convention on the Elimination of Violence Against Women in 1993 were also adopted.

African Union, through the New Partnership for Africa's Development (NEPAD); The UN, through CEDAW and its optional Protocols, Regional Charter such as the African Charter of Human and Peoples' Rights (ACHPR) have come to a conclusion that giant strides have been made in establishing a framework for supplanting

[314] (2001) 27 WRN 14
[315] (2001) 11 NWLR (pt.723) 196
[316] (2001) 15 NWLR (pt.736) 377

discriminatory practices. In 1985, the General Assembly of the United Nations adopted the Nairobi Forward Looking Strategies (FLS). The strategies aimed at measures to improve the rights of women in all spheres and to address the root causes of discrimination against women in order to provide measures for combating them. Not satisfied with the result, the UN General Assembly in 1994 resolved to use both formal and non-formal educational materials to publicise women's rights issues[317] thereby creating the Division for the Advancement of Women (DAW) which works under the auspices of the Economic and Social Council (ECOSOC). Unfortunately, the strategies do not have any legal binding effect, but only the moral consensus of participating member countries. Nigeria domesticated the UN Charter and also became a signatory to CEDAW in 1984, ratified the agreement in 1985, signed the Optional Protocol in 2000 and it became effective in the country in 2004. These and other giant steps have been taken by government to erode the perceived discrimination on women. This study did not see the discrimination, and because the discrimination is imaginary, people feel that nothing is done to address the discrimination against women.

5.2 Conclusion

Most of the early writings and researches on African Law and Yoruba inheritance practices were undertaken by foreigners, whose focuses were on African law in general[318]rather than specific references to African customary practices. The few writings available on African customary law did not deeply research into rules of inheritance practices among Yoruba.

The family was central and strategic to the relevance and status of the individual within African culture in general and Yoruba in particular. Today, modernity is weakening the links within the family system,[319]to the extent that emphasis is now on individuality as against the corporate existence of the family. For instance, the family or lineage system which is sustained by the law of intestate succession is almost withering and may die if the law is changed so that the self-acquired property of deceased members no longer go to enrich the corporate family. The way things are,

[317]Brautigam. C. A., in Benedek *et al* (2002) 16

[318] Lloyd, P. C., 1959a. "Some Notes on the Yoruba Rules of Succession and on 'Family Property'" In *Journal of African Law* Vol. 111, No 1 Spring, and, Lloyd, P. C., 1959b. "Family Property Among the Yoruba" In *Journal of African Law* Vol. 111, No 2 Summer.

[319] *Op. cit.* Nwogugu @ pg 429

the family system may still exist but only in principle, as it may not be open to individuals to still recognise its existence and find solace within the kin groups. It may be impossible for a family to gather for the purpose of inheritance devolution, rather, a price value of the net estate may be found, and the property will be sold off and the proceed shared. Children of the same parents may not need to see each other, for the purpose of family meeting not to talk of inheritance devolution, instead an Estate valuer or a Lawyer may be commissioned to sell off the property and share the proceed in an agreed ratio, after which everyone goes their individual ways. This is almost becoming the order, considering the number of unresolved cases on inheritance in various courts. And the migrant nature of individuals owning to the international scope of their professional status and engagements, or even where people now hold multiple citizenships.

In Nigeria, as in many other African countries, women are said to be suffering inequalities in the socio-cultural and legal fields (Abdullahi: 2002). This should not be so, as there exist provisions in several laws that portend to guarantee equality of all, irrespective of sex. Many constitutions of the world envisage equality of all citizens and it is enshrined in their statutes. Several African countries, including Nigeria, are parties to international conventions and instruments that provide for equal enjoyment of human rights by men and women. This ought to be maintained. Yoruba customs and traditions promote equity and equality in its customary inheritance practices in Southwestern Nigeria through insulation of the devolution modes by structures in myths, folklores, oath-taking, historical experiences and divination. It would have all been tales of despair and disenchantment if these were not available.

The creation of a Ministry of Women's Affairs at both the Federal and States levels of governance in Nigeria (after serious agitation), without a corresponding Ministry of Men's Affairs, which by every calculation, must have bridged the perceived gender inequality in the socio-economic life of Nigerian women is a welcome development. Women are now prominent in the Legal, Medical, Engineering, Clergy and Journalism professions as well as in governance: a woman had once been the Speaker of the House of Representative in Nigeria[320], while other women were in other

[320] Mrs Patricia Olubunmi Etteh was a former Deputy Chief Whip before she became the Speaker of the House of Representatives in Nigeria.

strategic positions in Banking, Government parastatals, Ministers of the Federal Republic of Nigeria, Ambassadors, members of States and Federal Houses of Parliament, and so on.

Conversely, the study observed the weakness of the practice of Yoruba customary practice in dealing with the devolution of the estate of a deceased, in that, where there are more than one wife, with each having varying numbers of children, the customary devolution does not take cognisance of this. Neither is the number of children borne by each of the wives, nor the number of years each wife had spent in the marriage considered in devolution. It is also of general knowledge that, there is likely to be a 'black sheep' in every home, which the customary devolution modes do not take care of. The purpose of devolution of inheritance is not to squander the estate, but to provide for the comfort and enjoyment of the survivors, yet Yoruba customary devolution practices neither provide for the 'black sheep' nor provide for long years of marriage. Unfortunately, the above appears to be one of the weaknesses of this system of estate devolution, which is an indication that, there is the need to further develop customary law through vigorous research that would reflect the challenges of today's world.

There is no gain-saying in the facts, as found out by this study, that, Yoruba customary inheritance practice is both alive and well in Southwestern Nigeria; its existence and essence are firmly rooted in the rule of conduct, obligatory on those subject to this custom of immemorial antiquity, certain and reasonable, obligatory yet not repugnant to the average mind within the cultural context[321]. It has been so accepted, by the people, that many families have no reservations in accepting the application of Yoruba customary mode of inheritance in the sharing of their estate when they eventually die. The reason for this has been found to lie in: a) recognition of the fairness by which customary devolution of inheritance is implemented, b) the willingness of the people to identify with the customs and traditions of their ancestry, and c) its recognition as a *bona fide* way of avoiding or, at least, minimising acrimony among the survivors to the estate of the deceased which English testamentary mode does not promise as there are contestations and many ligations in courts on testamentary devolution made through will.

[321] Adewale, A. A., 2013. "Future of Customary Inheritance Practices Among the Yoruba" In African Notes, vol. 37 no. 3 2013 @ p. 71

Even the declarations of the dead among the Yoruba, are not easily departed from. Instead, they are executed out of respect for him in fear of his anger and spiritual vengeance from the grave. For this reason, as long as the declarations had been made by him, whether written or oral, they would be accepted by all and no quarrel or disagreement will manifest, except where the *cb7* thought otherwise, and after divination, if *ifq* re-directs, effect will then be given to the direction of *ifq.* These options are beside other possibilities or devices of property disposition such as settlement *inter-vivos;* nomination; *donatio mortis causa*, and deed of gift by the owner.

Our customary law requires for its growth and adaptability not a rigid approach but a 'liberal and humane interpretation' in as much as such interpretation is not inconsistent with existing community values and expectations. It would be sad and regrettable if the ascertainment and application of our customary law should fall under the canopy of analytical positivism. Ajayi (1955) had stressed the need for a flexible and sociological approach to the ascertainment and application of customary law; and today that proposition is valid[322]. Times are changing, legal practitioners, judges, law officers, and parliaments are now seeing the need for cooperation in the bid to develop indigenous legal institutions, coupled with the drive of the Institute of Advanced Legal Studies to expand the frontiers of customary law for the various level of courts to have enough materials in the dispensation of justice at their disposal, because we cannot now blame the present low level of the development of our customary law on our colonial masters. Nigeria became independent of the colonialist fifty-four years ago. The blame should go to the practitioners at the Bar and on the Bench who still regard customary laws as less prestigious and primitive.

5.3 Recommendations

Existing disconnect between the realities in African customary law and practice makes appropriate intervention of Africans scholars, legal practitioners (in the field of African law) and traditional institutions more imperative today for a work aimed at

[322] Ajayi, F. A., *The Future of Customary Law in Africa* - Symposium (1955), p.42 at p. 68.

raising the state and standard of customary law to judicial relevance, applicability and acceptability that will influence equitable access to inheritance irrespective of gender. There is also the need for an overview of domestic and international regime of family law which has led to the conclusion that giant strides have been taken in establishing legal and regulatory platforms for supplanting discrimination in inheritance issues with a view to conducting intensive and well-documented research into realities of equity and equality of rights in inheritance practices.

Codification and unification of customary laws with some values of the received English law, in its various particulars, especially in the area of family law in general and the law of inheritance in particular, for the sole aim of eliminating the perceived discrimination against women, particularly in respect of their civil, cultural and legal rights to engender equality of legal and social status[323] is imperative. This recommendation is supported by Emeritus Professor D. A. Ijalaye's view, that both customary devolution systems of *8d7 igi* and *or7 0 jor7*, may be considered unjust as argued by him at pages 37-38 of his work titled "Justice As Administered By The Nigerian Courts" being Justice Idigbe Memorial Lecture, Series Five, delivered by him on 6th February, 1992 at the University of Benin, Nigeria.

In an effort to stimulate national pride and self-consciousness, it is necessary for Nigeria's government to lay more emphasis on things that were considered valuable in the past, such as the traditional African institution and values expressed in our customary legal system. The need to break away from the overpowering influence of introduced European institutionalised system is necessary. The need for development of a legal framework which will be all inclusive cannot be over emphasised.

One essential step required for the development of customary law today is the development of judicial personnel, trained in the existing practice of the courts, but with special training in customary law, this will produce a more professionalised bench that would make customary law explicit enough, so that its underlying principles may be applied systematically to new circumstances as they show up. The need to specially train manpower to develop rules of customary law now is apt and the importance of encouraging both the practice and the development of Yoruba

[323] Ezeilo, J., 2002 *Law and Practices Relating to Women's Rights in Nigeria* Enugu: Haven publishers p.21.

customary law, especially as regards inheritance, so as to make it prominent for those who do not know of it to know, and those who may wish to be guided by it, to be so guided is now.

Dualism is a part of our legal system, but integration of the courts with creation of a chain of appeal and allowing a common practice and procedure will bring about unification, though it may not be total. If total unification is eventually attained, the exemption enjoyed by non-Africans from obligations imposed by customary law will no more be there. A proof of non-African for an act committed will no longer avail non-Africans to escape justice.

There is a need for constitutional guarantee for survival of customary laws, the sublime pledge of the constitution -"promoting the welfare of all persons in our country on the principle of freedom, equality and justice"- should be translated into reality for the legitimacy of the grund norm in equitable distribution of the estate of a deceased through proper implementation because a k87 fi 2r= gba [m[l-w-4k6r9 (a palm nut seed is not easy to crack).

Both Statutory and customary marriages should be given equal treatments since both marriages are regarded valid under the law, more so, when the Constitution of the Federal Republic of Nigeria (1999), frowns at discrimination on all grounds. Consequently, government is expected to adopt appropriate legislation and actions aimed at modifying discriminatory laws in the land,[324] especially discrimination in favour of the English legal system against customary laws.

Customary law ought to be assessed in its proper context in today's globalised but plural world. Within the Nigerian legal system, the colonially imposed validity tests applicable to customary law should be repealed, especially now that the constitution includes a comprehensive bill of rights. The current court system should also be reorganised so that the courts vested with the jurisdiction to administer English law are different from the ones which will administer customary law. These exclusive jurisdictions will solve some of the conflicts and procedural incongruities in the administration of law in Nigeria. Consequent upon Nigeria being a signatory to many international treaties, she should keep to her obligations as a state party and

[324] Articles 29(f) and 16 of CEDAW

deliberately formulate policies such as those that are aimed at giving recognition to property jointly owned by couples during marriage, (Adamolekun: 1995), so that the widow is not made to suffer unduly even over a property she jointly laboured for with her deceased husband.

There is need to work towards raising the standard of those customs that are just and equitable but do not have the force of law, so that they can become binding and enforceable, African scholars and legal practitioners should aim at bringing such customs to judicial relevance and applicability in the twenty-first century. In fact, the realities of today will make such timely interventions more imperative. If the modernisation, unification, codification and customisation of the African legal system are allowed, then customary law would mature through judicial pronouncements and law reporting. The likelihood that in the long run, there might be consensus on the applicability of some customary laws in many parts of the country may not be farfetched. And as soon as the acceptable customary laws are found and harnessed by the superior courts, the judicial parlance of the country would then begin to experience the dawn of the development of its own 'common law.'

One major setback that may be envisaged is the absence of Customary Court of Appeal in some states[325]. If appeal from customary court goes to High Courts, the customary law in those states would again be subject to the Evidence Act which had hindered their growth in the past. It is hoped that states that do not have Customary Courts of Appeal would begin to think of doing so now. The country's legal system recognises the principle of *stare decisis* by which precedents are authoritative and binding, the best for the customary law is to have precedents of customary law judgments given by judicial experts in customary law and not the other way round.

In the light of contemporary developments, which tend towards hybridising customary laws and compatible foreign values, to stimulate equality of rights of all survivors to an estate, irrespective of sex or age, codification, unification, customisation and harmonisation of customary laws will produce an ***alter native*** certainty in formulating, applying, and implementing the law that will allow the deceased to have the eternal rest, so that in the end, an independent legal framework

[325] *Op. cit.* Olubor, J. O.

will modify and integrate the cultural traditions into the Europeanised African legal system,[326] if it is impossible to allow customary courts (Customary Court of Appeal inclusive) to have exclusive jurisdiction over all customary matters.

Moreover, the trend of enlightenment is moving towards a more participatory system which a combination of both the *ọ̀dọ̀ọ́ igi* and *ọ̀rọ̀ọ́ ọ̀ jọ̀rọ̀ọ́* modes will promote: a combination which this study refers to as *alter native* (meaning, to improve the native way of inheritance devolution) model to *ọ̀dọ̀ọ́ igi* and *ọ̀rọ̀ọ́ ọ̀ jọ̀rọ̀ọ́* which could be achieved through hybridisation of both modes with some good elements of the received English law. Anything different from this may continue to move our inheritance practices two feet forward, two feet backward and we would remain on the same spot at the end of the day.

The need to advance jurisprudence for customary law in Nigeria,[327] is now, as customary norms are not simplistic; rather, they have philosophical significance behind them, and this is lost when customary issues are considered in isolation of the thrust of the custom and tradition upon which their reliance had been. For example, to strike down a rule of African customary law in a judicial decision for not aligning with the English law principles is like dismissing an African institution without examining its essential purpose and content.

If the ***alter native*** model is hereby adopted, it will provide a leeway for equity and equality. Though human appetite is insatiable, it is my submission and hope that this will reduce tension and litigation associated with customary inheritance issues.

[326] *Op. cit.* Ademola Popoola
[327] *Op. cit.* Azinge E.

Proposed *Alter native* Devolution Mode

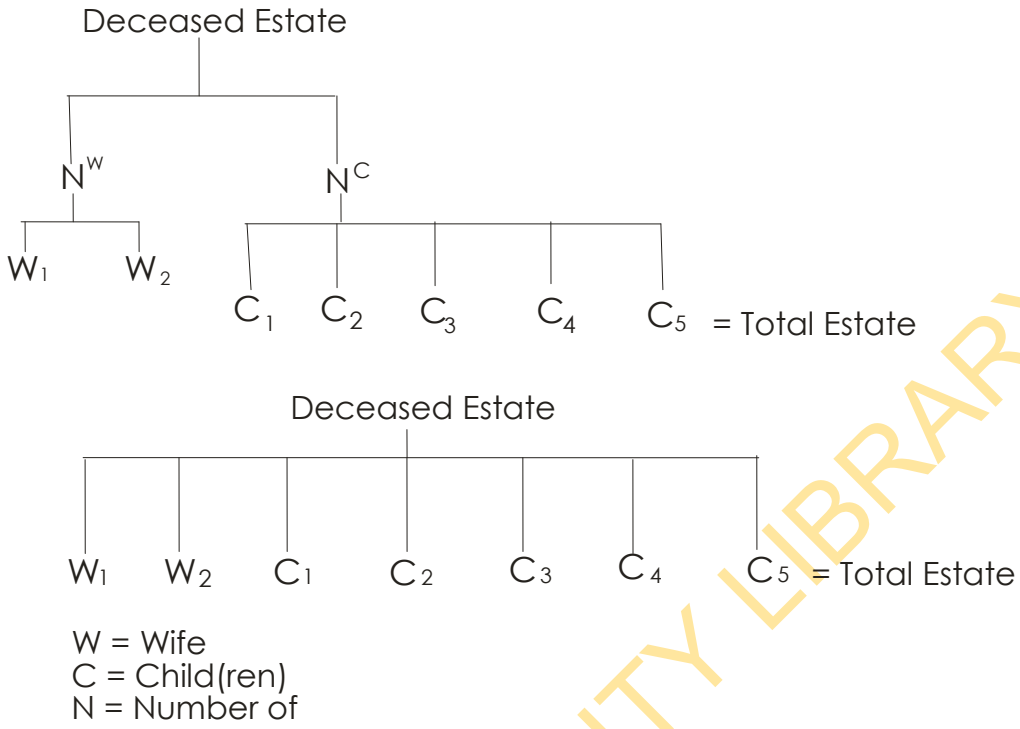

Fig. 3: The recommended devolution mode

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APPENDIX I

Field Interview Tables

Table 1: Summary of field interviews

State	Traditional Rulers & Key Informants	Family heads	Courts and others/dependents	No. of Widows	No. of Children	Total no. of people interviewed
Ekiti	4	2	4	7	19	36
Ogun	4	2	4	6	17	33
Ondo	4	2	5	6	21	38
Osun	4	2	4	8	29	47
Oyo	4	2	5	5	22	38
	20	**10**	**22**	**32**	**108**	**192**

(Source: Author's compilation from fieldwork)

Table 2

Title	*8d7 igi* %	*or7 0 jor7* %	Indifference %
Traditional Rulers	100	-	-
Key Informants	90	10	-
Widows	71	18.75	9.38
Children	49.03	50	.97
Others	30	40	30

(Source: Author's compilation from fieldwork)

Table 3

State	No. of Traditional Rulers	Family Heads	Community Leaders	No. of Widows	No. of Children	Total no. of people interviewed
Ekiti	2	2	2	7	19	32
Ogun	2	2	2	6	17	29
Ondo	2	2	2	6	.	33
Osun	2	2	2	8	29	43
Oyo	1	2	2	5	22	32
	9	10	10	32	108	169

(Source: Author's compilation from fieldwork)

Table 4: Royal Fathers/Traditional Heads.

Town	Years on the throne	Level of education	Involvement in devolution practices	Mode of devolution	Willingness to allow survivors use the acceptable mode	Does the mode engender equity and equality?	Executor of devolution
Omuo-Ekiti	22	Tertiary	Yes	*8d7 igi*	Yes	Yes	Head of the family/ traditional head (where there is dispute)
Ago – Iwoye Ijebu, Ogun state	5	Tertiary	Yes	*8d7 igi*	Yes	Yes	Head of the family
Idepe, Okiti – Pupa, Ondo State	10	Tertiary	Yes	*8d7 igi* with variation similar to Benin mode	Yes	Yes	The family
Imesi Ile Ijesa, Osun State	7	Tertiary	No	*8d7 igi*	Yes	Yes	The family
Ogbomoso, Oyo State	39	Tertiary	Yes	*8d7 igi*	Yes	Yes	The family

(Source: Author's compilation from fieldwork)

Table 5: Key Informants

Town	Age	Level of education	Involvement in devolution practices	Mode of devolution participate	Prefer mode	Does the mode engender equity and equality?	Executor of devolution
Omuo-Ekiti 1	Adult	Tertiary	Yes	8d7 igi, or7 0 jor7 & Will	8d7 igi	Yes	Head of the family/ traditional head (where there is dispute)
2	Adult	Informal	Yes	8d7 igi & or7 0 jor7	8d7 igi	Neutral	Head of the family/ traditional head (where there is dispute)
Ago-Iwoye, Ogun State 1	Adult	Tertiary	Yes	8d7 igi & or7 0 jor7	8d7 igi	Yes	Head of the family (irrespective of sex)
2	Adult	SSCE	Yes	8d7 igi & or7 0 jor7	or7 0 jor7	Yes	Head of the family (irrespective of sex)
Idepe Okiti – Pupa, Ondo State 1	Adult	Tertiary	Yes	8d7 igi & or7 0 jor7	8d7 igi	Yes	Family
2	Adult	Tertiary	Yes	8d7 igi & or7 0 jor7	8d7 igi	Yes	Family head
Imesi – Ile Ijesa, Osun State 1	Adult	Tertiary	Yes	8d7 igi & or7 0 jor7	8d7 igi	Yes	Family
2	Adult	Tertiary	Yes	8d7 igi & or7 0 jor7	8d7 igi	Yes	Family head
Ogbomoso, Oyo State 1	Adult	Tertiary	Yes	8d7 igi & or7 0 jor7	8d7 igi	Yes	Family head
2	Adult	Tertiary	Yes	8d7 igi & or7 0	8d7 igi	Yes	Family head

					jor7				

(Source: Author's compilation from fieldwork)

Table 6: Widows

State	Town	Families inter viewed	No of widows	Position among wives	No. of children		*8d7 igi* equitable?	*or7 0 jor7* equitable?		Regrets	Any suggestion/ Comment	
					M	F	Yes	No	Yes	No		
Ekiti	Omuo-Ekiti	Family 1	3	1st wife	3	1	✓	-	-	✓	No	Widows to be cared for
				2nd wife	1	1	✓	-	-	✓	Yes	Yes
				3rd wife	2	-	✓	-	-	✓	No	No
		Family 2	2	1st wife	-	4	✓	-	-	✓	No	Though the sharing mode was accepted, the properties were not shared
				2nd wife	1	1	✓	-	-	✓	Yes	✓
		Family 3	3	1st wife	-	4	✓	-	-	✓	No	The deceased had given instruction on how the properties should be shared
				2nd wife	1	-	✓	-		✓	No	✓
				3rd wife	-	-	-	-	-	-	-	Dead before devolution
Ogun	Ago-Iwoye	Family 1	3	1st wife	-	3	-	✓		-	Yes	*8d7 igi* was enforced
				2nd wife	-	3	-	✓		-	Yes	✓
				3rd wife	1	2	✓	-	-	✓	No	-
	Ago-Iwoye	Family 2	3	1st wife	3	1	✓	-	-	✓	No	The deceased already wrote customary Will and also had dead bed disposition

				2nd wife	2	-	✓	-	-	✓	No	✓
				3rd wife	2	-	✓	-	-	✓	No	✓
Ondo	Okiti Pupa	Family 1	2	1st wife	2	3	✓	-	-	✓	No	She complained about the position took on the devolution. Mothers were not allowed to attend.
				2nd wife	1	2	-	✓	-	✓	Yes	She regretted marrying in that home
		Family 2	4	1st wife	2	3	-	-	-	-	-	Deceased at time of interview
				2nd wife	2	1	✓	-	-	✓	No	No involvement in the devolution
				3rd wife	-	2	✓	-	-	✓	No	✓
				4th wife	-	3	✓	-	-	✓	No	Good and equitable
Osun	Imesi-Ile	Family 1	4	1st wife	2	1	-	✓		-	Yes	The devolution mode was unfair
				2nd wife	1	2	-	✓		-	Yes	✓
				3rd wife	4	2	✓	-	-	✓	No	-
				4th wife	-	1	✓	-	-	✓	Yes	The devolution mode was unfair
		Family 2	3	1st wife	1	3	-	-	-	-	No	In the quest for harmony, the family properties were not shared but the 1st wife was given preference.
				2nd wife	2	1	-	-	-	-	No	✓

				3rd wife	1	2	-	-	-	-	No	She prefers *8d7 igi* if the devolution were to be shared.
		Family 3	2	1st wife	3	1	-	✓		-	Yes	She expressed having suffered with the deceased without adequate compensation.
				2nd wife	1	1	✓	-	-	✓	No	Prefer monogamy
Oyo	Ogbomoso	Family 1	2	1st wife	2	-	✓	-	-	✓	No	The first wife arranged the marriage of the second wife
				2nd wife	2	2	✓	-	-	✓	No	We are at peace
		Family 2	3	1st wife	4	3	✓	-	-	✓	No	*or7 0 jor7* was unacceptable
				2nd wife	2	2	✓	-	-	✓	No	'we brought nothing into the world'
				3rd wife	2	3	✓	-	-	✓	-	Dead

(Source: Author's compilation from fieldwork)

Table 7: Analysis of children interviewed

Table 7.1: Ekiti family 1

Sex	Age	Education	No. among mother's children	No among father's children	Accept *8d7 igi*	Accept *or7 0 jor7*	Comments
M	Adult	Formal	1	1	No	Yes	
M	Adult	Informal	2	3	Yes	No	
M	Adult	Informal	3	6	No	Yes	
F	Adult	Informal	4	7	No	Yes	
M	Adult	Informal	1	2	No	Yes	
F	Adult	Informal	2	5	No	Yes	
M	Adult	Informal	1	4	No	Yes	
M	Adult	Formal	2	8	No	Yes	

(Source: Author's compilation from fieldwork)

***No of wives 3**

***No of children 8**

*** Column 5 represents a seniority arrangement of both children and their mothers with every no 1 representing the 1st child of his/her mother.**

Table 7.2: Ekiti family 2

Sex	Age	Education	No. among mother's children	No among father's children	Accept *8d7 igi*	Accept *or7 0 jor7*	Comments
F	Adult	Formal	1	1	No	Yes	
F	Adult	Formal	2	2	No	Yes	
F	Adult	Formal	3	3	No	Yes	
F	Adult	Formal	4	5	No	Yes	
F	Adult	Formal	1	4	No	Yes	
M	Adult	Formal	2	6	Yes	No	

(Source: Author's compilation from fieldwork)

***No of wives 2**

***No of children 6**

*** Column 5 represents a seniority arrangement of both children and their mothers with every no 1 representing the 1st child of his/her mother.**

Table 7.3: Ekiti family 3

Sex	Age	Education	No. among mother's children	No among father's children	Accept *8d7 igi*	Accept *or7 0 jor7*	Comments
F	Adult	Informal	1	1	Yes	No	
F	Adult	Formal	2	2	No	Yes	
F	Adult	Formal	3	3	No	Yes	
M	Adult	Formal	1	4	No	Yes	
F	Adult	Formal	2	5	No	Yes	

(Source: Author's compilation from fieldwork)

***No of wives 3**

***No of children 5**

*** Column 5 represents a seniority arrangement of both children and their mothers with every no 1 representing the 1st child of his/her mother.**

Table 7.4: Ogun family 1

Sex	Age	Education	No. among mother's children	No among father's children	Accept *8d7 igi*	Accept *or7 0 jor7*	Comments
F	Adult	Formal	1	1	No	Yes	All see *8d7 igi*
F	Adult	Formal	2	2	No	Yes	as unfair
F	Adult	Formal	3	6	No	Yes	and want a mode
F	Adult	Formal	1	3	No	Yes	that will provide
F	Adult	Informal	2	4	No	Yes	for both children
F	Adult	Formal	3	5	No	Yes	and the widows
M	Adult	Formal	1	7	No	Yes	
F	Adult	Formal	2	8	No	Yes	
F	Adult	Formal	3	9	No	Yes	

(Source: Author's compilation from fieldwork)

***No of wives 3**

***No of children 9**

*** Column 5 represents a seniority arrangement of both children and their mothers with every no 1 representing the 1st child of his/her mother.**

Table 7.5: Ogun family 2

Sex	Age	Education	No. among mother's children	No among father's children	Accept *8d7 igi*	Accept *or7 0 jor7*	Comments
M	Adult	Formal	1	2	No	Yes	
M	Adult	Formal	2	3	No	Yes	
M	Adult	Formal	3	4	No	Yes	
F	Adult	Formal	4	6	No	Yes	
M	Adult	Formal	1	1	No	Yes	
M	Adult	Formal	2	5	No	Yes	
M	Adult	Formal	1	7	No	Yes	
M	Adult	Formal	2	8	No	Yes	

(Source: Author's compilation from fieldwork)

***No of wives 3**

***No of children 8**

*** Column 5 represents a seniority arrangement of both children and their mothers with every no 1 representing the 1st child of his/her mother.**

Table 7.6: Ondo family 1

Sex	Age	Education	No. among mother's children	No among father's children	Accept *8d7 igi*	Accept *or7 0 jor7*	Comments
M	Adult	Formal	1	2	No	Yes	Not minding the position
F	Adult	Formal	2	3	No	Yes	of the 7th child of the
F	Adult	Formal	3	4	No	Yes	deceased who was the
M	Adult	Formal	4	6	No	Yes	1st male child of his mother
F	Adult	Formal	5	1	No	Yes	He represented his mother's
F	Adult	Formal	1	5	No	Yes	children at the sharing, as the
M	Adult	Formal	2	7	No	Yes	tradition here is akin to *Bini*
F	Minor	Formal	3	8	No	Yes	customary tradition

(Source: Author's compilation from fieldwork)

***No of wives 2**

***No of children 8**

*** Column 5 represents a seniority arrangement of both children and their mothers with every no 1 representing the 1st child of his/her mother.**

Table 7.7: Ondo family 2

Sex	Age	Education	No. among mother's children	No among father's children	Accept *8d7 igi*	Accept *or7 0 jor7*	Comments
F	Adult	Formal	1	4	Yes	No	
F	Adult	Formal	2	6	Yes	No	
F	Adult	Formal	3	7	Yes	No	
M	Adult	Formal	4	8	Yes	No	
M	Adult	Formal	5	10	Yes	No	
M	Adult	Formal	1	1	Yes	No	
F	Adult	Formal	2	2	Yes	No	
M	Adult	Formal	3	9	Yes	No	
F	Adult	Formal	1	3	Yes	No	
F	Adult	Formal	2	5	Yes	No	
F	Adult	Formal	1	11	Yes	No	
F	Adult	Formal	2	12	Yes	No	
F	Adult	Formal	3	13	Yes	No	

(Source: Author's compilation from fieldwork)

***No of wives 4**

***No of children 13**

*** Column 5 represents a seniority arrangement of both children and their mothers with every no 1 representing the 1st child of his/her mother.**

Table 7.8: Osun family 1

Sex	Age	Education	No. among mother's children	No among father's children	Accept *8d7 igi*	Accept *or7 0 jor7*	Comments
F	Adult	Formal	1	2	No	Yes	The children were
M	Adult	Formal	2	3	No	Yes	indifferent to devolution
F	Adult	Formal	3	4	No	Yes	they did not want sharing to take place
F	Adult	Formal	1	1	No	Yes	but for the 3rd wife's insistence on
F	Adult	Formal	2	6	No	Yes	having something for the training
M	Adult	Formal	3	8	No	Yes	of her children.
F	Adult	Formal	1	5	No	Yes	
M	Adult	Formal	2	9	No	Yes	The family began with *or7 0 jor7* but
M	Adult	Formal	3	10	No	Yes	later settled for *8d7 igi*.
M	Adult	Formal	4	11	No	Yes	
F	Adult	Formal	5	12	No	Yes	
M	Adult	Formal	6	13	No	Yes	
F	Adult	Formal	1	7	No	Yes	

(Source: Author's compilation from fieldwork)

***No of wives 4**

***No of children 13**

*** Column 5 represents a seniority arrangement of both children and their mothers with every no 1 representing the 1st child of his/her mother.**

Table 7.9: Osun family 2

Sex	Age	Education	No. among mother's children	No among father's children	Accept *8d7 igi*	Accept *or7 0 jor7*	Comments
M	Adult	Formal	1	1	Yes	No	The family lived as one united family
F	Adult	Formal	2	4	Yes	No	with the children not biased over who is the
F	Adult	Formal	3	6	Yes	No	mother of who. They resolved to share the estate
F	Adult	Formal	4	7	Yes	No	for their mothers as they have made it in life
M	Adult	Formal	1	2	Yes	No	and felt, if it was not shared the properties will
F	Adult	Formal	2	3	Yes	No	be destroyed and the extended family may
M	Adult	Formal	3	8	Yes	No	take advantage of their absence and deny their
F	Adult	Formal	1	5	Yes	No	mothers access to the estate.
F	Adult	Formal	2	9	Yes	No	
M	Adult	Formal	3	10	Yes	No	

(Source: Author's compilation from fieldwork)

***No of wives 3**

***No of children 10**

*** Column 5 represents a seniority arrangement of both children and their mothers with every no 1 representing the 1st child of his/her mother.**

Table 7.10: Osun family 3

Sex	Age	Education	No. among mother's children	No among father's children	Accept *8d7 igi*	Accept *or7 0 jor7*	Comments
M	Adult	Informal	1	5	Yes	No	Though, they are
F	Adult	Informal	2	6	Yes	No	indifferent to any
F	Adult	Informal	1	1	Yes	No	mode adopted, yet
F	Adult	Formal	2	2	Yes	No	they prefer ìdí-igi
F	Adult	Formal	3	3	Yes	No	
M	Adult	Formal	4	4	Yes	No	

(Source: Author's compilation from fieldwork)

***No of wives 2**

***No of children 6**

*** Column 5 represents a seniority arrangement of both children and their mothers with every no 1 representing the 1st child of his/her mother.**

Table 7.11: Oyo family 1

Sex	Age	Education	No. among mother's children	No among father's children	Accept *8d7 igi*	Accept *or7 0 jor7*	Comments
M	Adult	Informal	1	4	Yes	No	
M	Adult	Formal	2	5	Yes	No	
M	Adult	Formal	1	1	Yes	No	
F	Adult	Formal	2	2	Yes	No	
F	Adult	Formal	3	3	Yes	No	
M	Adult	Formal	4	6	No	Yes	

(Source: Author's compilation from fieldwork)

***No of wives 2**

***No of children 6**

*** Column 5 represents a seniority arrangement of both children and their mothers with every no 1 representing the 1st child of his/her mother.**

Table 7.12: Oyo family 2

Sex	Age	Education	No. among mother's children	No among father's children	Accept *8d7 igi*	Accept *or7 0 jor7*	Comments
M	Adult	Formal	1	1	Yes	No	
M	Adult	Formal	2	2	Yes	No	
F	Adult	Formal	3	3	Yes	No	
M	Adult	Formal	4	8	Yes	No	
M	Adult	Formal	5	9	Yes	No	
M	Adult	Formal	6	10	Yes	No	
F	Adult	Formal	7	11	Yes	No	
F	Adult	Formal	1	4	Yes	No	
F	Adult	Formal	2	5	Yes	No	
F	Adult	Formal	3	7	Yes	No	
F	Adult	Formal	4	12	Yes	No	
F	Adult	Formal	1	6	Yes	No	
F	Adult	Formal	2	13	Yes	No	
M	Adult	Formal	3	14	Yes	No	
M	Adult	Formal	4	15	Yes	No	
M	Adult	Formal	5	16	Yes	No	

(Source: Author's compilation from fieldwork)

***No of wives 3**

***No of children 16**

*** Column 5 represents a seniority arrangement of both children and their mothers with every no 1 representing the 1st child of his/her mother.**

One hundred percent (100%) of the traditional rulers, 90% of key informants, 71% of the widows 49.3% of the children and 30% of the others interviewed supported *8d7 igi* mode of devolution. Meanwhile, 50% of children, 40% of the other survivors, 18.75% of widows, and 10% of key informants supported the use of *or7 0 jor7* mode of devolution.

APPENDIX II

A. Field Interview Questions (Community Head/Oba)

1. Briefly introduce yourself? (name; place of birth; growing up, etc)
2. What is your status in this community?
3. Were you elected into the office and which year?
4. How vast is your domain?
5. How does this community share the inheritance of a deceased member?
6. Have you been involved in any inheritance sharing since you assumed office?
7. What is your assessment of the mode of sharing?
8. Would you say it was fair/unfair?
9. Why did you see it as fair/unfair? (Yardstick for measuring equity/inequality)
10. Would you prefer any other mode of sharing apart from the one used?
11. What is your ethnic background? (e.g. non-Yoruba; and if Yoruba, what subgroup?)
12. Will you want your survivors to use any other sharing mode for your estate and why?
13. What is your occupation?
14. Are you currently working (e.g. pay job, trading, etc)

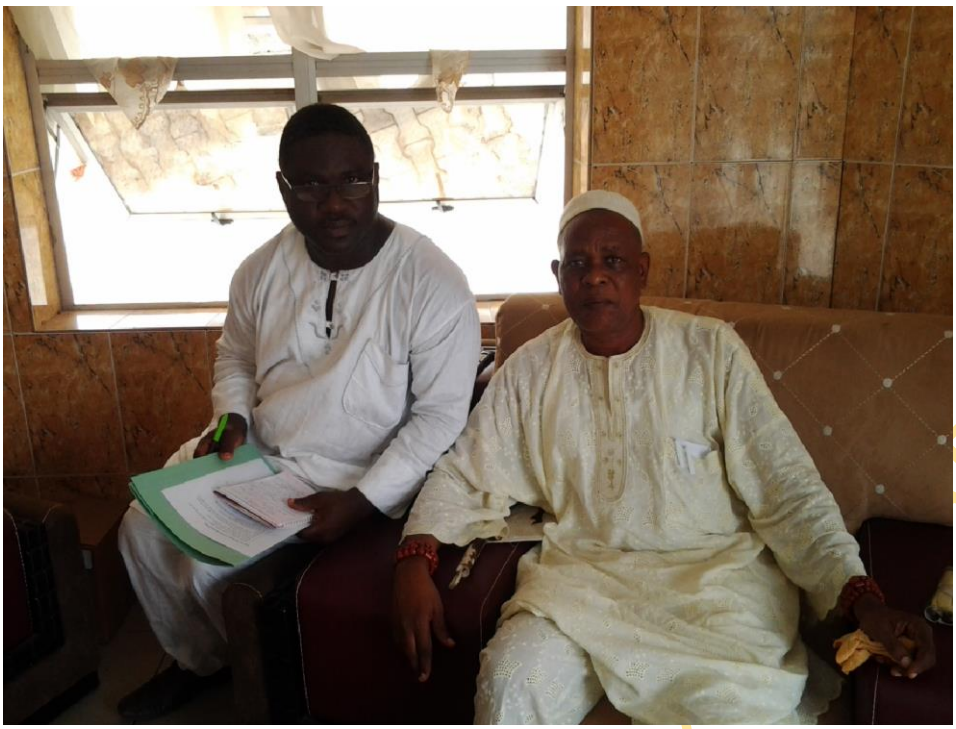
B. Field Interview Questions (Others)

1. Briefly introduce yourself? (name; place of birth; growing up, etc)
2. What is your status in this family?
3. (If a wife/offspring) what is your number amongst the wives/children of the deceased?
4. How many children have you?
5. Are all your children for the deceased?
6. (If yes) in what mode was the property of the deceased shared?
7. What is your assessment of the mode of sharing?
8. Would you say it was fair/unfair to you?
9. Why did you see it as fair/unfair? (Yardstick for measuring equity/inequality)
10. Would you prefer any other mode of sharing apart from the one used?
11. What is your ethnic background? (e.g. non-Yoruba; and if Yoruba, what subgroup?)
12. Did you grow up and married in this town; or you grew up elsewhere and was brought to this town due to marriage?
13. What is your occupation?
14. Are you currently working (e.g. pay job, trading, etc)

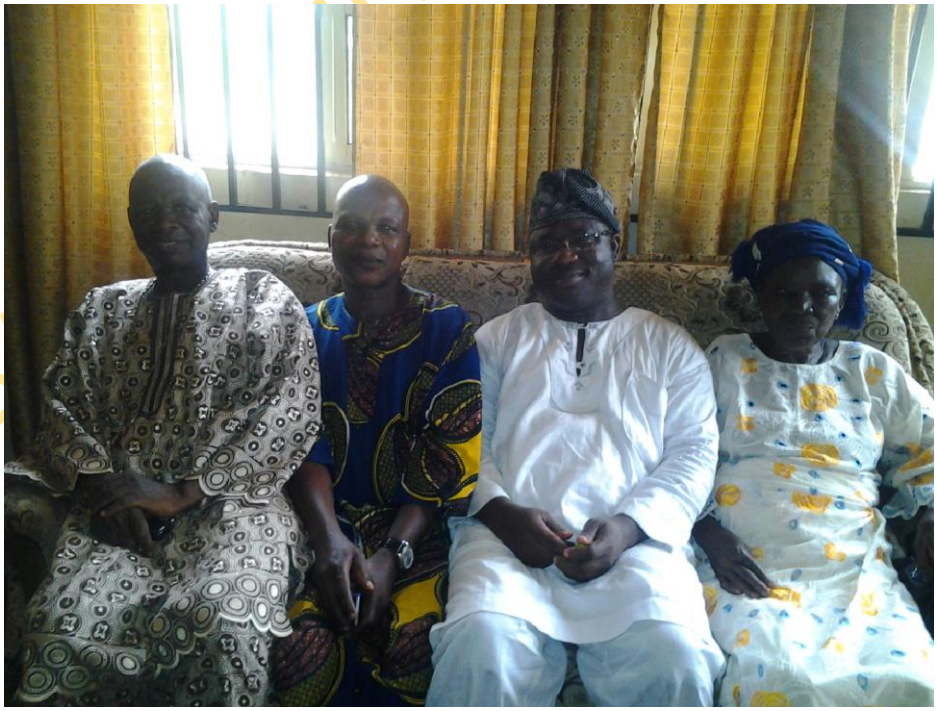
APPENDIX III
PICTURES

Picture 1: New Palace in Omuo, Ekiti State
Source: Pix. taken by the interviewer in 2012

Picture 2: Researcher interviewing the Olomuo of Omuo, Ekiti State
Source: Pix. taken by the interviewer in 2012



Picture 3: Researcher with the Olomuo of Omuo, Ekiti State
Source: Pix. taken by the interviewer in 2012



Picture 4: Researcher with a family in Omuo, Ekiti State
Source: Taken by the interviewer in 2012

Picture 5: Researcher with 2 widows in Omuo, Ekiti State
Source: Pix. taken by the interviewer in 2012

Picture 6: Researcher after conducting an interview in Omuo, Ekiti State
Source: Pix. taken by the interviewer in 2012

Picture 7: Researcher after interviews and FGD with a family in Omuo, Ekiti State
Source: Pix. taken by the interviewer in 2012

Picture 8: Researcher with Ayandelu of Odosinusi, Ago-Iwoye, Ogun State
Source: Pix. taken by the interviewer in 2013

Picture 9: Researcher interviewing a widow (1st wife) and her son (an Oloritun) in Ago-Iwoye
Source: Pix. taken by the interviewer in 2013

Picture 10: Researcher interviewing another widow (2nd wife of pix 9) in Ago-Iwoye
Source: Pix. taken by the interviewer in 2013

Picture 11: Researcher interviewing another widow (3rd wife of pix 9 & 10) in Ago-Iwoye
Source: Pix. taken by the interviewer in 2013

Picture 12: Researcher conducting an interview in Ago-Iwoye, Ogun State
Source: Pix. taken by the interviewer in 2013

Picture 13: Researcher with the Jegun of Idepe, Okitipupa, Ondo State
Source: Pix. taken by the interviewer in 2013

Picture 14: Researcher interviewing a widow (1st wife) in Okitipupa, Ondo State
Source: Pix. taken by the interviewer in 2013

Picture 15: Researcher with a widow (2nd wife in pix 14) in Okitipupa, Ondo Stat
Source: Pix. taken by the interviewer in 2013

Picture 16: Researcher with (1st son of 2nd wife in pix 15) in Okitipupa, Ondo State
Source: Pix. taken by the interviewer in 2013

Picture 17: Researcher after interviews and FGD with widows who agreed to be photographed in Okitipupa, Ondo State

Source: Pix. taken by the interviewer in 2013

Picture 18: Researcher after an interview with The Owa Ooye of Imesi-Ile, Osun State

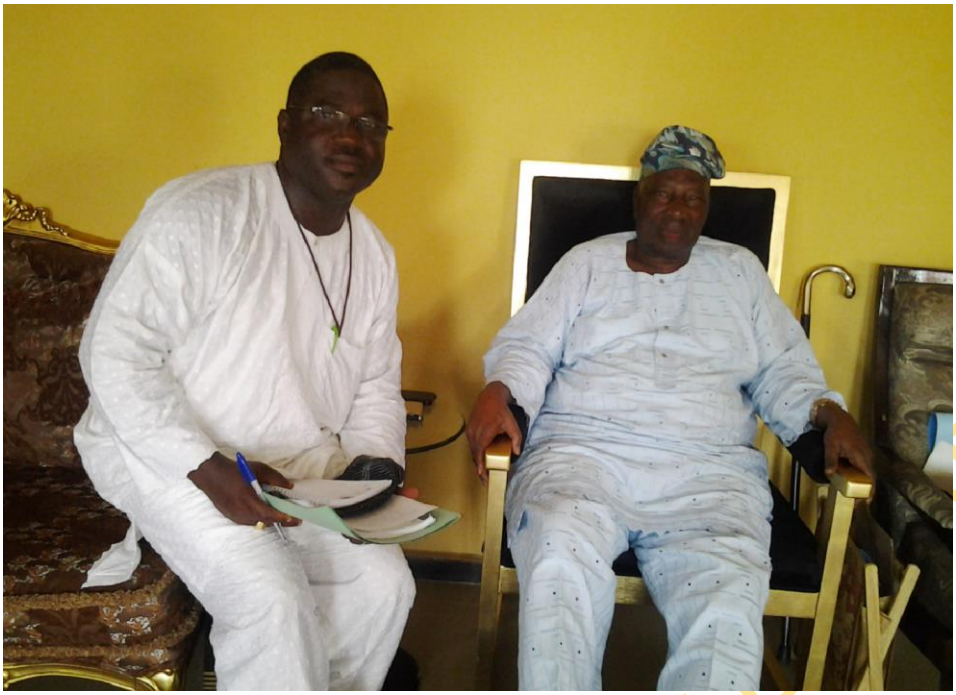
Source: Pix. taken by the interviewer in 2013

Picture 19: Researcher with a family after an interview in Owa Ooye's Palace, Imesi-Ile, Osun State
Source: Pix. taken by the interviewer in 2013

Picture 20: Researcher after interviews with male survivors to an estate in Imesi-Ile, Osun State
Source: Pix. taken by the interviewer in 2013

Picture 21: Researcher after interviews in Imesi Ile, Osun State
Source: Pix. taken by the interviewer in 2013

Picture 22: Researcher with 2 widows in Imesi Ile, Osun State
Source: Pix. taken by the interviewer in 2013



Picture 23: Researcher with Soun of Ogbomoso, Oyo State
Source: Pix. taken by the interviewer in 2013

Picture 24: Researcher with survivors to an estate in Ogbomoso, Oyo State
Source: Pix. taken by the interviewer in 2013

Picture 25: Researcher with a family in Ogbomoso, Oyo State.
Source: Pix. taken by the interviewer in 2013

Picture 26: Researcher in an interview session with a widow in Ogbomoso, Oyo State
Source: Pix. taken by the interviewer in 2013