CUSTOMARY PROPERTY INHERITANCE AMONG THE YORUBA

IBO AND EDO

BY

DR ALFRED ABHULIMHEN-IYOHA

CHIEF MAGISTRATE, EDO STATE JUDICIARY, BENIN CITY, NIGERIA.

PhD LAW, PhD INTERNATIONAL RELATIONS, MPA, LLM, DIPLOMA CHRISTIAN THEOLOGY, +2348055968440.

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INTRODUCTION

The law of succession involves the transmission of the rights and obligations of the deceased person in respect of his estate to his heirs and successors. It equally deals with the rules governing the administration of the estate by the personal representatives of the deceased person including state participation in respect of the real estate situate within its territory and personal estate of the deceased person subject to its jurisdiction.[1] Succession may be testate or intestate. Where a deceased person made a Will, he is said to have died testate. Where a deceased person did not make a Will, he is said to have died intestate. In customary law, this distinction is of marginal importance because under customary law, intestacy is the rule. The only consideration

[1] Babatunde Oni: "The Rights of Women to Inheritance under Nigerian Law: An Evaluation" Nigerian Journal of African Law (2008) 2 NJAL P. 40

of a testate succession under customary law is a nun-cupative Will, also known as death bed declaration.[2]

Inheritance issues are varied across the length and breadth of Nigeria. The law of succession and inheritance is a reflection of the legal pluralism inherent in Nigeria. In general, in cases of inheritance of property of a person who dies intestate in Nigeria, the personal customary law of the deceased, that is, customary law to which the deceased was subject, governs the distribution of his estate. The system of customary inheritance varies from one ethnic group to the other. The class of people who should benefit from intestate succession and the share of such beneficiary are not free from problems. The aim of this paper is to critically analyze the problems generated as a result of discrimination of property inheritance rights under the various customary law with particular reference to the customary laws of the Yoruba, Igbo and Edo in Nigeria.

Beneficiaries Under Customary Law

Unlike the situation under Wills where a man can bequeath all his assets to total strangers, children are the exclusive beneficiaries to the estate of a deceased person under the Customary Law. While some tribes do not discriminate between the sexes of their children, some other tribes do. For instance, while the Yoruba of south western Nigeria do not distinguish between male and female in the distribution of their father's property, some other tribes like the Binis and the Ibos do.

Primogeniture Rule

The general rule of Customary Law where a land owner dies intestate is that his self-acquired property devolves on his children as family property[3]. The head of the family is the eldest male child of the deceased who occupies the family house and holds same as a trustee of the other children, male or female. However, the rule is different in certain localities. In Bini and Onitsha communities for instance, the deceased's property devolves to the eldest son exclusively, in accordance with the rule of primogeniture, under which the eldest son is expected to look after

[2] Ibid
[3] Suberu V Sumonu (1957) 2 FSC, P.33

the younger children and may sell the house over the wishes of other children or treat it as his own property.

The rule of primogeniture though viewed in some quarters to be unfair to the younger children of the family, it has been argued that the system accords with native ideas, particularly the role of the eldest son as the "father of the family" who has a legally binding obligation towards the children. The right of the eldest surviving son to succeed his father in the headship of the family is automatic and arises from the fact of seniority. Only the father, as the owner and creator of the family property, can deprive the eldest son of this right, by a valid direction made with the aim of ensuring that the affairs of the family are properly managed by a person qualified on the grounds of intelligence and education to do so. In the absence of any such direction by the father, the right of the eldest son cannot be taken away without his consent.

An Analysis of The Rules of Intestacy Under The Various Customary Laws

Nigeria has over two hundred and fifty (250) ethnic groups and even greater number of customary laws. The distribution of a deceased's estate under customary law is based on the customary doctrines of inheritance and succession of property. These doctrines are governed by the canons of lineal descent along paternal or maternal lines.[4] Paternal lines are lines of descent traced through the father while maternal lines are lines traced through the mother. For instance, the line of descent governing inheritance of the people in Yoruba is paternal while that governing the people of Afikpo, Abriba and Ohafia in the Eastern part of Nigeria is maternal.[5]When a deceased dies intestate, his personal customary law governs the distribution of his estate, irrespective of where the property is situated or where the death occurred.[6]

Tapa V. Kuku.[7] The deceased was a Nupe of Bida who died intestate leaving landed property in Lagos. It was held by Brooke J, that the law to be applied in determining who was entitled to

[4] T.G.O Animashaun and A.B Oyeneyin: Law of Succession, Wills and Probate in Nigeria: M.J Publisher Ltd (2003) P.3

[5] See Prof. U.U in the Article "The Matrilineal System of Inheritance. The Nigeria Model" in Towards a Restatement of Nigeria Customary Laws (1991) Federal Ministry of Justice P. 174 @177

[6] See Section 25(2) of the Customary Court Edict, 1997 of Delta State Section 20(2) Customary Court Law Cap 31 of Western Nigeria 1959, Section 15, Customary Court Edict 1966 of Eastern Nigeria

[7] (1945) 18 NLR 5

administer the estate was the deceased's personal law of Nupe and not that of Lagos. However, where the deceased during his life time adopted the law of the area of jurisdiction as his personal law, then that law would govern the administration of his estate.

In Olowu V. Olowu[8] the deceased was a Yoruba of Ijesha by birth, who lived all his life in Benin City. He married a Bini woman and acquired property there. He naturalized as a Bini man, died intestate and his estate was distributed under Bini native law and custom.

The provisions of Section 24(a) of the Land Use Act provides that the applicable law is the customary law of the place where the land is situate (Lex situs), where the occupier is a native of the place or by contract, statue or special custom. But if it is established that the occupier is governed by any other customary law which is his personal law, it will apply. This provision may have reversed the general principle that was stated in Aishatu V. Coker. [9] With the above exposition to the background of customary laws and practices governing intestate inheritance, some customary law rules on succession among the Yoruba, Igbo and Edo will now be examined.

The Yoruba Customary Law of Inheritance

The native law and customs among the Yoruba, especially in respect to inheritance and succession have grown out of the age-long practices and dealings of the people. The Yoruba customary law of inheritance and succession appears to be general among the constituent Yoruba States. This, however, is not to say that there are no few differences among the sub-ethno cultural groups. For example, findings have shown that among the Ijesha people, the mode of inheritance is belineal. Among the Ijebus, it is patrilineal (although women can inherit). And for the Ilaje and Idanre, brothers and sisters (of full blood) of the deceased were entitled to inherit property.[10] However, the tendency now is to excuse the brothers and sisters and limit the right to inherit property to the children of the deceased.

[8] (1985)3 NWLR (Pt 13) 372 (1985) 12 SC 84
[9] (1945) 18 NLR 5
[10] A.B Kasumu and J.W Salacuse Family Law (Revised ed) Butterworth London P.291

The rights of the brothers and sisters are in some areas only curtailed but not abrogated. For example in Abeokuta, they are still entitled to one third (1/3) of the deceased property.[11] However a testator by Will may enlarge his family to include brothers and sisters. In Sogbesan V. Adebiyi[12], the deceased founder of the family devised his property to his heirs as family house. In his Will, he appointed one of his brothers as the head of family. The court held that the Will as a whole made it clear that the testator intended the word "family" to include his brothers and sisters and their descendants as well as his own children. According to Yoruba Native law and custom, if an individual dies intestate, his children, both male and female succeed to the estate as a single entity as was held in Amadi V. Obayomi.[13] As joint owners of the property, they have the right to agree and attend meetings therein. The eldest son known as Dawodu inherits the responsibility for the management of the estate. In dealing with this point, Osborne CJ in Lewis V. Bankole[14] said that this was a well-established rule both at that variations would begin. However, it has been a laid down general rule of inheritance among the Yoruba that the eldest son succeeds to the land in the place of his father for his own benefit and that of the family.[15]The other children and wives though have the right to live in the house. The widow who takes another husband loses her right. The son had no right sell the land or the house for he holds it in trust for the family. Accepting that the rationale for keeping the headship in the male line is that the women on marriage, go to live with their husbands.

The children succeed to the deceased's property as family property. The concept of family property really belongs to the field of land law but a short description of the concept is necessary for a proper understanding of the law of succession. Under customary law, particularly in the southern parts, the main unit of land holding is through the family. A person has to be identified with a family before he can claim land. When part of the communal land, that is, land belonging to the community is given to the founder of the family for his use, such land on the death of the founder will devolve on his family. The title is vested in the family of the founder as a corporate

[11] A.B Kasumu and J.W Salacuse Family Law Ibid P. 29137 (1941) 19 No 26 (1992) 5 NWLR (Pt 242) P. 503
[12] (1992) 5NWLR (Pt 242)P. 503
[13] Lewis v Bankole (1909) 1 NLR 82
[14] Ibid
[15] Ibid

group. It is joint and indivisible and no part of it is capable of being alienated absolutely by an individual member without the consent of the other family members.[16]

It should of course be mentioned that family property is not limited to a residence nor is it necessary that he deceased should expressly provide that it must be used as family property. The creation of family property is automatic on a death intestate. Family in this context often means the immediate family, that is, the children of the deceased.

Under the traditional customary law, factors like age and sex often affect the scale of distribution. A female child regardless of her age, might be made to take last and her share might also be smaller when compared to the entitlements of her brothers. However, since the decision in Lopez V. Lopez[17] where Combe CJ confirmed that, originally, the rules of the daughters in Yoruba land were not the same as sons with regards to their father's property, he went on to hold that both sons and daughters can inherit equally. This decision has been followed in a number of cases. In Salami V. Salami[18] it was held that the plaintiff's right to inherit her father's estate along with her two brothers was not diminished by the fact that she was a girl.

In Richardo V. Abal[19] not only did the court accept the proposition that a female child has inheritance rights, but it went further to hold that when a man dies leaving two houses and two children, male and female, the female if older has the first choice as to which house she wants if the property is eventually partitioned.[20]

It is also relevant in this connection to note Section 20(4) of the Western Nigeria Customary Law, which provides thus:

"Where the customary law applying to land prohibits, restricts, or regulates the devolution on death to any particular class of persons of the right to occupy such land, it shall not operate to deprive any person of any beneficial interest in such land (other than the right to occupy the same or proceeds of sale therefore to which he may be entitled under the rules of inheritance or any other customary law)"

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[16] Omoiregun v Sadutu (1888) Colonial Nigeria A
[17] A.B Kasumu and J.W Salacuse Ibid Pt 292
[18] (1924) 5NLR 43
[19] (1926) 7 NLR 58
[20] See also Barreto v Onitiga (1961) WLR 58

The effect of this provision is that even when a female child is not entitled to occupy land under the succession laws of any area in Western Nigeria, such a child will still be entitled to the proceeds derived from the land.[21]

Where the deceased intestate married only one wife and had all his children by her, the distribution of the estate among them is equal proportion, hence little or no dispute occurs, but if the deceased intestate had children by different wives or women, the distribution of estate may raise questions as to what mode of distribution should be adopted. This is because the women may have unequal number of children for the deceased intestate. It is a rule of Yoruba customary law that an intestate estate may be distributed among the children by the Idi Igi mode, that is per stripe or the Ori Ojori mode, that is per capital.[22] In an examination of the two modes of distribution, Obilade[23], described the Idi Igi mode of distribution as: A custom whereby the property of the deceased is divided among his children per stripes (the property being first divided equally into the number of wives, the share attributable to each wife being then sub-divide equally among her own children).

The rationale for the Idi-Igi mode of distribution was considered by the Learned Judge, Jibowu J in Danmole V. Dawodu[24]as being that each wife who had a child was given no cause for jealousy against the others. Therefore the number of wives and not the children is the determinant factor. In Taiwo V. Lawani,[25] it was held that according to the Native Law and Custom of the Yoruba people of Lagos State, there is a custom known as Igi kan kan or idi-Igi, where the property of the deceased intestate is distributed among his children according to the number of mothers (wives of the deceased).

Each mother is regarded as constituting a branch of the family for the purpose of succession. An only child of a wife will get the same share as with the many children of another wife. It was further held that the rule of succession known as Igi kan kan or Idi-Igi which regulates the distribution of customary estate of the deceased intestate is a well recognized and established

[21] A.B Kasumu and J.W Salacue Ibid P.293
[22] A.B Kasumu and J.W Salacuse Ibid P.292, E.I Nwogugu Family Law in Nigeria (revised ed), Heinemann Educational Books. P.311-312
[23] A.O Obilade, The Nigerian Legal System, (Revised ed)Sweet and Maxwell: London (1979)P. 86-87
[24] (1958) 3 FSC 46
[25] (1961) ANLR 733

native law and custom and it was also held that Igi kan kan or Idi-Igi is not repugnant to natural justice, equity and good conscience.

In the Ori Ojori mode of distribution, each child enjoys an equal share. It has been argued that this mode is likely to produce fairness and thereby prevent dispute and dissention in the family. Conversely, that an adoption of the Idi-Igi is more likely to bring about disharmony within the family as it would be unfair to the children of a particular wife with more siblings.[26]

Whereas the right of daughters to inherit their father's property has been recognized under Yoruba Native Law and Custom, wives have no right of inheritance in their deceased husbands' estate. As Jibowu FJ, observed in Suberu V. Sunmonu.[27] It is a well settled rule of native law and custom of the Yoruba people that a wife could not inherit her husband's property since she herself is like a chattel to be inherited by a relative of her husband.

Earlier, in Sogunro-Davies V. Sogunro-Davies.[28] Beckley J had opined that Yoruba native Law and Custom deprived the wife of inheritance right in her deceased husband's estate because devolution of property follows the blood.

Consequently, unless a property given to a wife is proved to be an outright gift, it will pass on the husband's death as family property to be inherited by the husband's children or the husband's family where there are no children. The wife has no right of inheritance whatsoever.

Igbo Customary Law of Property Inheritance

The rules of customary law on succession in Igboland are not uniform. However, certain similarities can still be identified. The Igbos of Nigeria are found predominantly in Anambra, Imo, Enugu, Ebonyi and some parts of Rivers and Delta States. The cardinal principle of customary law of succession among the Ibos is **Primogeniture,** that is, succession by the first son of the line.[29] This principle, which is also prevalent in the customary laws of other ethnic groups in Nigeria, determines the right to inherit property in Igbo land and therefore the interest of all persons related in one way or the other to the deceased. The exception to this rule exists in

[26] MC Okany, Commercial Law in Nigeria (Revised ed)P.692
[27] (1957) 12 FSC 33
[28] (1928) 8 NLR 79
[29] E. I Nwogugu

Afikpo and Bende areas of Ebonyi and Abia States which are bilineal,[30] where women have full legal capacity to own land and to transmit their rights and interests to others either inter vivos or death.

Under the principle of primogeniture, succession is through the eldest male in the family who is known as "Okpala, Diokpala or Diokpa". In the case of a nuclear family, succession is through the eldest male child of the deceased. With regard to the extended family, succession is through the eldest son of the ancestor and so on in that line irrespective of the fact that the Okpala may in fact be junior in age to other members of the extended family. On the death of the founder of a family, his eldest son succeeds him as the head of the family.

The eldest son is entitled to special property by virtue of his status in the family. He enjoys this property during his life time to the exclusion of his brothers. He is entitled to reside in his father's dwelling house. Subject to accommodation required by his own family, he may allow his younger brothers and sisters to live in this house with him. He is also entitled to the use of the piece of land within or surrounding the father's compound and to harvest the economic trees in it. Among the Ibos in Okigwe, he is given another piece of fertile land called Ala Iasi Obi. In Orunba, Mbaise, Udoka and Agudo all in Awka, he is shown a piece of farm land by the administrators of the estate. In Ogoni, he is entitled to a piece of farm land and in Annang, he is shown a fertile piece of land and a palm bush. He is also entitled to the dresses which his father wore in special occasions together with his walking stick.[31] He also inherits his father's personal ofo and other objects of worship. Where a title survives the holder, the eldest son inherits the father's title. He is also entitled to the insignia of a hereditary office which he has no right to sell, being family property.[32]

In Ejiamike V Ejiamike,[33] the court found an evidence that in accordance with Onitsha customary law, the eldest son has the right to manage and administer the real estate of his deceased father for the benefit of himself and his brothers. According to Mr. G.T Basden,

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[30] Babatunde Oni, Ibid

[31] Nwakanma Okoro. The Customary Laws of Succession in Eastern Nigeria and the Judicial Rules Governing their Application London: (revised ed) Sweet and Maxwell (1966) P.118-119

[32] E.I Nwogugu Ibid

[33] (1972)2 ESLR-11. See also Ngwo v Onyejana (1968) 1 All NLR 352

personal property descended to the eldest son as heir and in the absence of a son, to the eldest brother or male relative.[34]

Under Igbo customary law, females do not possess the rights to inherit land, that is, neither the daughters nor the widows of the deceased have the right in the intestate estate of the deceased, unlike what is obtainable under the Yoruba customary law of inheritance where female children are also entitled to a share of their deceased father's property.

In Ugboma V. Ibeneme[35] where it was held in accordance with the general Ibo custom which is also the custom of the deceased home in Anambra Local Government Area, women are not entitled to inherit land from their father. Consequently, the female plaintiffs have no locus standi in such action. In Nezianya V. Okagbue,[36]it was held that possession by a widow of her husband's land cannot be adverse to the right of her husband's family to enable her acquire an absolute right to possession of it against the family.

Although a widow cannot alienate any part of the deceased's estate, she is entitled to live in the deceased husband's house as a member of the family until she remarries or dies. The Diokpa has no right under native law and custom to dispose of the property occupied by her without an alternative accommodation so long as she behaves well.[37]

Daughters, like wives, do not inherit under Igbo customary law.[38] A daughter can only inherit where she accepts to remain unmarried in her father's house with a view of raising sons in her father's name. This is known as "Nrachi"[39]or "Idigbe" institution. It usually happens when the deceased left behind a substantial estate but no surviving son or other male issue of the lineage to inherit it. The idea behind this practice is to save the lineage from extinction. The daughter as an "Idigbe" or "Nrachi" is entitled to inherit both movable and immovable property of her deceased father's estate. The legal interest vests in her until she gives birth to her own children. However, if she bears sons and daughters, the sons and not the daughters will succeed her in accordance with the rule of primogeniture.

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[34] Niger Ibos Chapter XIX Land Tenure and Inheritance, P. 268
[35] (1967) FNLR 251
[36] (1963) 1 All, NLR 352
[37] Ogboina, R.A Edo Land Law Services No. 4 Oshimili and Amocha – Their People and Land Tenure
[38] Mojekwu v Mojekwu (1999) 7 NWLR (Pt 215)P.203
[39] Nwogugu, Family Law in Nigeria (1974) Heinemann Studies in Nigeria Law. P.402

Daughters have no right of inheritance over their mother's landed property. Where a wife predecease her husband, the sons will inherit and in the absence of a son, male relatives inherit. In some parts of Igbo land where the intestate died without sons, brothers or father, his estate is inherited by his eldest nearest paternal male relation. Such relation is known as "Ori ekpe" while the custom is known as "Iri ekpe" Custom.

In Mojekwu V. Mojekwu,[40]the deceased owner had two females surviving him, his male nephews claimed to be entitled to his estate. The Court of Appeal (per Tobi J.C.A.) rejected the view that the case was governed by Nnewi Customary Law but added that even if this were so, such a customary law which discriminated against women, would not be enforced as it would be repugnant to natural justice, equity and good conscience. However, the Supreme Court rejected the decision of the Court of Appeal and upheld the "Iri ekpe" custom.

While a daughter is not entitled to inherit her father's estate, she has the right to be maintained by the person who inherits her father's estate until she marries or becomes financially independent or dies.

In the estate of Agboruja,[41] the court held that the custom whereby the eldest brother of the deceased or male relative inherits his deceased brother's property is widespread throughout Nigeria. Yet it is not equitable because such male relative would thus become a new father to the children and be responsible for their upbringing as if they were his own. It was also held to be perfectly permissible that such a male relative of the deceased should be able to inherit the latter's wife if she agrees.

The inheritance of the wife and children of a deceased man by his younger brother, a system known as levirate marriage, is a scheme of social insurance against neglect and hunger of the decease dependent.[42]

Edo Customary Law of Property Inheritance

The system of primogeniture in which the eldest son ascends to the throne of his deceased father, and also inherits his properties absolutely governs inheritance in Bini kingdom. Under the Benin

[40] (1997) 7NWLR (Pt 512) 283
[41] (1949) 19 NLR 38
[42] See T.O Elias. Impact of English Law upon Nigerian Customary Law

native laws and customs, the system of primogeniture is rigidly adhered to.[43] Two variants of this system are recognized. The first is hereditary title and second is the non- hereditary title.

Hereditary Traditional Title Holders (Chiefs)

On the death of a holder of a hereditary title, the principal actor in the burial ceremony is the eldest surviving son, though the other children may make contribution to help their eldest brother. It is the eldest son who performs all the ceremony. After the eldest son has performed the final burial ceremony, which of course will end with Ukomwen,[44] he succeeds to all his father's title and he inherits the entire estate exclusively. According to Benin traditional council,[45] "Benin Customary Law is not "an ass" like the English law is said to be" hence custom expects the eldest son, morally, to make gifts out of the estate to some of his brothers and sisters next to him in seniority. Again, custom expects him to accommodate his other brothers and sisters (subject, of course, to their good behavior to him).

Where there is no male child to succeed to the hereditary title, a brother or any other male paternal relation of the deceased succeed to the title after due confirmation by the Oba, but the deceased properties are shared among his female children, unlike under the Ibo Customary Law of Inheritance where the female children are not in any way entitled to their father's properties.

If a person, be it a title holder or not, made a grant of a gift to any of his children or other person while alive, such property ceases to be part of the estate of the person upon his death, and is excluded from those to be shared.[46] There are traditional offices and institutions that are hereditary in Benin, at the top is the Oba of Benin. Apart from the Obaship there are other hereditary titles in Benin, these titles are categorized into two, the kingmakers and non-kingmakers.

The kingmakers are: Oliha, Ezomo, Ero, Edohen, Oloton, Eholonire and Edaiken- called the Uzamas. The non- kingmakers are Arala, Aihioba and recently the Obasaki. As regards inheritance outside the Obaship, after the eldest son has performed the final burial ceremony,

[43] Osemwowa, Usi (2000:36) the customary law of Binis, Mike Commercial Press, Benin City
[44] Ukomwen means establishing an altar for a deceased father. In Bini Kingdom, the final burial ceremony ends with the establishment of altar for the deceased, this altar is called the ancestral altar or shrine.
[45] Benin traditional council (1994:15)a handbook on some Benin customs and usages, issued on the authority of the Omo N Oba Erediauwa, Oba of Benin
[46] Ibid

which of course, will end with the establishment of an altar for his deceased father, he succeeds to his father's title and inherits the entire estate exclusively.

Non- hereditary Traditional Title Holders and Ordinary Persons

As noted earlier, inheritance in Benin Kingdom is based on primogeniture system. Soon after the death of a Benin man, the inventory of the deceased properties is taken by the Okaegbe[47] or his representative in the presence of the deceased eldest son and any of the other children who may be present. The inventory is kept by the Okaegbe who has responsibility to ensure their safe keeping pending the completion of the burial ceremonies by the children. In the olden days, all the movable properties were kept physically in the Okaegbe's possession while all immovable properties were identified.[48]

On completion of the final burial ceremony by the eldest son, this means in Benin custom "Orere- Okoe",[49] the Okaegbe who preside over the burial ceremonies, with other senior members of the extended family, if considered necessary, meet with the children of the deceased and share the deceased person's properties among the children.

In sharing the deceased's properties, the house in which the deceased lived and died which is otherwise referred to as his Igiogbe automatically devolves on the eldest surviving son. However, custom enjoins the eldest son to accommodate his brothers and sisters (subject to their good behavior) until they are able to build their own houses and move out (if women) until they get married.[50] Benin custom stipulates where the deceased has other landed properties apart from his Igiogbe, these properties are distributed to the other children according to "Urho"[51] and all other movable properties are similarly distributed among all the children starting with the eldest son.

Urho System- (per stripes)

[47] Okaegbe is the family elder
[48] Benin traditional council (1994:12) a handbook on some Benin customs and usuages, issued on the Authority of the Omo N Oba Erediauwa, Oba of Benin
[49] In Benin custom "orere-okoe" means completion of the final burial ceremonies. In other words, it means the eldest son has established an altar for worshipping the departed father.
[50] Ibid
[51] Urho under Benin customary laws means the sharing of deceased properties according to the number of wives

As in other parts of Africa and Nigeria, Benin men indulge in polygamy. This practice somehow has been posing problems especially after the demise of the head of the family, as regards the distribution of his estate, more especially if the deceased had more than his dwelling house which is the Igiogbe. In other to remedy the problem caused by polygamous practice, urho system of property distribution among the deceased children was invoked.

Urho system under the Benin customary law of inheritance is recognizing another child by a different woman for the deceased Benin man. Urho simply means the sharing of the deceased properties according to the numbers of wives.

What constitute Igiogbe?

The "Igiogbe" is of utmost importance in Benin customary law. This is due to the incidents attached to it under the customary law of inheritance[52], the most important being that the Igiogbe is always inherited by the first son of a deceased person absolutely, notwithstanding any instruction, disposition in a Will or family arrangement to the contrary[53].

Igiogbe is defined as the house where the deceased lived until his death and was buried and where the ancestral shrine is erected, which serves as a medium of worship between the ancestors and their living descendants[54]

It is pertinent to state however that **In Benin Kingdom** , the doctrine of primogeniture applies; that is the right to succession of the entire estate belongs exclusively to the eldest son of a deceased person who acts as a sort of Trustee for the other children and where there is a Will, the maker of the Will cannot devise the House where he lived and died to any person other than his eldest son.

The same rules of succession that apply to the Binis also apply to most parts of **Igbo land** including Onitsha, which by history, originated from the Benin Kingdom . There is also the

[52] Aigbovo, O, "The principal house in Benin Customary Law" in University of Benin Law Journal (2005:16) 8 (1) UBLJ

[53] Agioigbi v Agidigbi (1996) 6 NWLR (Pt. 454) 300

[54] Ancestral worship in Benin Kingdom is usually led by the Okaegbe or the eldest son who step into the shoes of his deceased father, that is the son who inherits the Igiogbe

interesting custom, which requires that the property of a deceased woman, which she acquired before her marriage, go back to her family on her demise.

Victims of Discriminatory Property Rights Under Customary Law

i. The Right Of Spouses

On the death intestate of a husband, dispute often arises as to whether his widow can inherit his property. Whether a widow can inherit the intestate estate of her husband will depend on the customary law of his locality, the husband may during his life-time allocate a house or land for the use of his wife. Unless an outright gift is proved, the property allocated to the wife will on the death of the husband still pass as a family property. Thus in *Oloko V. Giwa*[55] there was an allocation of family land to each of the wives of the deceased. It was held that the effect of the allocation was not to confer title or give any right on such properties to the wives.

[55] (1939) 15 NLR

Similarly, in *Caulcrick V. Harding*[56] it was held that a husband was not entitled to succeed to the property of the wife under customary law. The property involved in the two cases above was unpartitioned family property. It is submitted that the same decision could be reached in respect of the self acquired property of the spouses. The rule that the spouses have no succession rights in the property of each other seems to be universally acknowledged principle under most of the customary law system in Nigeria.[57]

Thus, in *Nezianya V. Okagbue,*[58] the land in dispute was situated at Onitsha and all the parties were natives of Onitsha also. On the death of the husband, his widow began letting his houses to tenants. Later on she sold a portion of the land and with the proceeds, she built two mud huts on another portion of the land. When she wanted to sell more parcels of land, her later husband's family objected. The only child she had for her husband was a girl who predeceased her.

The widow devised the property to the late daughter's child who now sued the husband's family claiming right to exclusive possession of the grounds that the widow, their grandmother had long adverse possession on the land. In the trial court, it was held that possession by a widow of her husband's land cannot be adverse to the rights of her husband's family to enable her acquire an absolute right to possession of it against the family. On appeal to the Supreme Court by the plaintiff, the court observed that:

It will appear that the essence of passion of the wife in such a case is that she occupies the property or deals with it as a recognized member of her husband's family and not as a stranger, nor does she need the express consent or permission of the family to occupy the property so long as the family make no objection to her occupation.

From the evidence, it is abundantly clear that a married woman after the death of her husband can never under native law and custom be a stranger to her deceased husband's property, she would not at any time acquire a distinct possession of her own to oust the family's right of ownership over the property. The Onitsha native law and custom postulate that a married woman on the death of her husband without a male issue, without the concurrence of her husband's family, may deal with his (deceased) property. Her dealings, of course must receive the consent of the family. The consent, it would appear, may be actual or implied from the

[56] (1926) 7 NLR 48
[57] A. B Kasumu and J. W Salacuse
[58] (1963) 1 All NLR 352

circumstances of the case, but she cannot assume ownership of the property or alienate it. She cannot by effluxion of time claim the property as her own. If the family does not give their consent, she cannot, it would appear, deal with the property. She has however right to occupy the building or part of it, but this is subject to good behaviour.

According to the authorities, under the Yoruba customary marriage law, separate houses or rooms allotted to the wives by their polygamist husband does not vest in the wives, as such allotments are not outright gifts. Upon his death, such houses or rooms become part of the real property of the deceased which devolve on his family.[59] Moreover, where a husband in his Will ;purports to vest the unpartitioned family property in his wife, it is not capable of devolving upon the widow as such property consists of rights which are purely communal and inalienable, and where such property is being distributed by the family members, the widow cannot successfully claim that she is entitled to the share which would have been hers if the husband had been alive. This is because devolution of family property under customary law "follows the blood"[60]

The rationale behind this rule is that family land must be kept intact. There is also the fact that the deceased intestate's customary law wife is not a member of the family for this purpose. This is evidence in the statement by Coker[61] that among the Yorubas of Nigeria the wives of a man also constitute part of his property. In *Suberu V. Sunmonu*[62] the question for decision was which of the two parties, the maternal or paternal relations- should inherit the real estate. The court held that as the deceased son died intestate without an issue, his share of the family house developed upon his uterine brother's children. The court also declared. "It is a well settled rule of native law and custom of the Yoruba people that a wife could not inherit her husband's property."

[59] Per Graham Paul in Oloko v Giwa Ibid
[60] Sogunro Davies v Sogunro Davies and Ors (1929) 9 NLR 76
[61] Coker; G.B.O
[62] (1957) 12 FSC 33

In *Oshilaja V. Oshilaja*[63] the court held that in accordance with the decision of the Supreme Court in the *Suberu's case***,** the widow in the instant case could not inherit her deceased husband's estate, and as the deceased intestate died without a child, the court held that the sons of the uterine sisters were entitled to share in the estate to the exclusion of his widow.

The disintegration of the family property could not therefore be avoided if some of the parts of the family land were inherited by a widow as she could not possibly leave the land in her deceased husband's family in the event of her marriage.

The absence of the right to inheritance by widows extends to the administration of intestate estate. In the Ibo case of *Ejiamaike V. Ejiamaik,e*[64] Oputa J held that a widow of a deceased person had no right under Onitsha customary law to administer the estate of her later husband "especially where there is an **"***Okpala***"** (first male issue) of the deceased who was not a mirror. This was implied in the Yoruba case of *Aileru & Ors V. Anibi*[65] where *Jibowu J* held under native law and custom, widows cannot administer the estate of their husbands".

According to these decisions, as far as the property in question is the real property of the deceased husband, customary law does not allow his widow to inherit or administer it. However, in recent years, Yoruba customary marriage tends to be more liberal on this issue. This liberal approach was adopted in respect of the administration by widows, of their deceased husband estate. In *Re* Joseph *Asaboro* Deceased[66] the court appointed a widow to be one of the two administrators of the estate of her deceased husband.

Under the Ibo customary law, property acquired by a married woman after marriage; goes to her husband on her death.

In *Nwugege V Adigwe & Ors***,**[67]where the court had to call chiefs to answer the question which the court was faced with. The chiefs asserted that on the death of a married woman, any property which she had acquired before her marriage goes to her own family and not to her husband or his family, but movable properties acquired by the wife before marriage if taken by the wife to her husband's house, goes to the husband or his family on her death, and that property acquired by a

[63] C.C. H C.J 30/10/73. Pg 11
[64] (1972) 2 E.C SN L.R P.11
[65] (1952) 20 NLR 46
[66] Suit No AK/4/70 (unreported) Akure High Court
[67] (1934) All NLR 134

married woman after her marriage goes to her husband on her death. The court accordingly held that it was the defendant that was the proper person to administer the decreased woman's estate.

Among the Yorubas and some other communities, a husband cannot inherit from his wife just as the wife cannot inherit from the husband. If she dies without an issue, her property passes to her siblings. It is also true that a wife cannot inherit property acquired by the husband during separation.

ii. Inheritance Right of Illegitimate Children

By the received English Law, a child born out of lawful wedlock, that is, under the Marriage Act or some foreign law which prescribes monogamy, is regarded as illegitimate. This status deprives the child of the right to maintenance and succession in respect of its natural father.

Under customary law, the question of the existence of a status of illegitimacy has been contested by writers. Coker described the position under Yoruba customary law thus:

"It is generally supposed that there is no status of illegitimacy in native law and custom: this is not correct, for there is a status of illegitimacy as opposed to that of legitimacy. The latter entitles the subject ipso facto to succeed to property; the former disentitles the subject from so succeeding, unless his rights are legalized by an acknowledgment of paternity" by the father. Generally speaking, a child born in wedlock is legitimate from birth, whereas an illegitimate child can only be legitimated if he was duly acknowledged by his father. It is important to observe that the bastard is so regarded among the Yoruba

as, and is commonly called the Omo Ale, which literally means „the child of an adulteress or an unmarried woman"…[68]

Dr. Obi after examining the position in Southern Nigeria came to the conclusion that: a child born of an unmarried mother is illegitimate at birth, unmarried being used to include women whose marriages have been legally dissolved.[69]

If an unmarried mother gives birth to a child, some social stigma is usually attached to such a pregnancy; which in Ibo custom is referred to as 'Ime Nkpuke', which literally means 'pregnancy out of the matrimonial home'. The status of that child is regarded as illegitimate. Sometimes where the natural father of such a child has accepted paternity, he may be allowed to claim the child even though he does not marry its mother. This situation is seen to be akin to the principle of legitimation by acknowledgement in Yoruba customary law.

Legitimation is a process by which a child who was born illegitimate acquires legitimate status. The process of legitimation may be achieved by the subsequent marriage of the parents or by the acknowledgment by his natural father. Acknowledgement simply means the recognition of the paternity of a child by his natural father. Consequently, an illegitimate child may be legitimated by acknowledgment despite the fact that the parents are not married or have never been married.

To constitute acknowledgment, the acts or conduct of the illegitimate child's father must be such as to indicate or establish his acceptance of the child's paternity. It has been held that the maintenance of a child by his natural father including the payment of school fees constitute acknowledgment.[70]

The necessity to examine the rights of an illegitimate child arises from the fact that the right of an illegitimate child is very controversial. According to Kasumu[71] "most of the cases on illegitimacy deal with the right of illegitimate child to succeed property… it is in that area that the consequences of illegitimacy are being greatly felt". It is a well established rule of law that a child born during the subsistence of a customary or statutory marriage between his/her parents is legitimate. However, where a child is born to a legally married man through extra-marital affairs, the question of illegitimacy arises. More often than not, the mothers of this class of children in

[68] Coker G.B.A Family Property Among the Yorubas, 2nd Edition (Sweet & Maxwell) London (1966) 266

[69] Obi, S.N.C Modern Family Law in Southern Nigeria (Sweet & Maxwell)London African Universities Press. Lagos (1966) 294

[70] Young v Young (1953) WACA, 19

[71] A.B Kasumu 'Adultery Acknowledgement and the Illegitimate Child in Nigeria (1973) U. G.L.I Vol 15

Nigeria believe that their children, though born outside marriage, have the same inheritance rights to the estate of their father as do the legitimate children of the marriage. This inevitably leads to litigation, during which time the courts, in applying the law attempts to reconcile it with social realities. This recalls the statement that illegitimacy as a social problem is as old as unsolved as human existence itself. In attempting to find a legal solution, the courts have allowed the strict legal rule to override policy and social considerations.[72]

However, in consideration of the dual marriage system, the Supreme Court in *Adeyemi V. Bamidele* [73]said that… legitimacy in England is a different concept on legitimacy in Nigeria. The court also held that the status of legitimacy may have different implications according to the system of law referred to and it is appropriate in the context purely and solely of Yoruba customary law to describe a person as an illegitimate child of the father since even if he was born out of wedlock he would be legitimate if his paternity is acknowledged by the putative father.

In *Olulode V. Oviosu,* the learned judge confirmed the principle enunciated in a long line of decisions like *Lawal V. Youran,* and *Bamgbose V. Daniel* that there is no issue of illegitimacy in Nigeria once the father has accepted the paternity of the child.

[72] N Rubin & E. Cokran (Ed) Annual Survey of African Law (1968) Vol 1, P. 45
[73] (1968) 1 All NLR 31, P. 37

Under the Yoruba and some other customary law, illegitimate children are accorded the same rights as children who are born in lawful wedlock while in others they are deprived of succession rights. The courts appear to be supporting this reprehensible practice as demonstrated in the case of *Onwudinjo V. Onwudinjo*[74] where the court rejected the claim of an illegitimate child to share in the estate of his father on the ground that no evidence had been laid down in support of such claim, but clearly supported a claim made by a child where paternity has been acknowledged.

Criticism of the Mode of Inheritance

Section 42(1) of the 1999 Constitution provides that:

*"A citizen of Nigeria of a particular community, ethnic group, place or origin, sex, religion, political opinion shall not, by reason only that he is such a person: (a) be subjected either expressly by or in the practical application of any law in forces in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places or origin, sex, religion or political opinion are not made subject***".**

Section 42(2) 1999 Constitution equally provides that no citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth. A similar right is guaranteed under *Article 2* of the *African Charter on Human and Peoples" rights in the* following terms:

"Every individual shall be entitled to the enjoyment of the rights and freedom recognized and guaranteed in the present charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion national or social origin, fortune, birth or other status".

Article 1 of the *UN Convention on the Elimination of ALL forms of Discrimination Against Women (CEDAW)* defines discrimination as "any distinction, exclusion or restriction made on the basis of sex in the political, economic, social, cultural civic or any other field".

[74] (1963) All NLR 235

Article 1 further defines discrimination against women as anything that can bring about unequal treatment between men and women in the course of their livelihood. This article groups married and unmarried women together. *Article 13* stipulates in part that women have the right to obtain family benefits, while *Article 15* states inter alia that women have equal rights with men in matters of law that relate to business contracts. Under *Article 16,* women are empowered to own and give away their property.

Nigeria having ratified CEDAW treaty, is bound by its provisions hence anything to the contrary must be declared null and void. Unfortunately, Nigerian courts have for long sustained some of the customary practices which subjugate women as demonstrated in the case of *Nwanya V. Nwanya***.**[75] The case of *Mojekwu V. Mojekwu*[76] has however marked a turning point. The Court of Appeal Per Niki Tobi (as he then was) held as peril repugnant to natural justice, equity and good conscience the Oli-ekpe custom in Ibo land which debases and debars women from inheriting landed property.

According to his lordship:-

"Day after day, month after month and year after year, we hear of and read about customs which discriminate against the womenfolk in the country. They are regarded as inferior to the men folk. Why should this be so? All human beings male and female are born into a free world and are expected to participate freely without any inhibition on grounds of sex. Apart from being unconstitutional, it is an antithesis to the society built on the tenets of democracy which we have freely chosen as a people. We need not travel all the way to Beijing to know that some of our customs including the Nnewi "Oli-ekpe" custom relied upon by the appellant are not consistent with our civilized world in which we live today… on my part, I have no difficulty in holding that the oli-ekpe custom of Nnewi is repugnant to natural justice, equity and good conscience. The

[75] (1987) 3 NWLR (Pt 62) 697
[76] (1997) 7 NWLR (Pt 512) 283

oli-ekpe custom is one of such customs as it permits the son of a brother of the deceased person to inherit the property of the deceased to the exclusion of the deceased's female children".

The above decision has hindered the realization of equality of rights of both men and women to inheritance under Igbo customary law

Heirs to a man's estate under the Customary Law are his children. Unfortunately however, as we have seen from practices in some climes, the customs seeks to discriminate amongst the male and female children. Under the Yoruba Customary Laws, the Courts have held that both the male and female children of a deceased have equal rights to inherit their father's estate. See Amusan V. Olawunmi[77] where the Court even upheld the rights of a woman to be family head in Yoruba Customs. In Ibo culture, the strict application of the primogeniture rule operates to exclude women from inheriting their father's estate.

Further, in Mojekwu v Mojekwu,[78] the court held that a Customary Law that allows only males to exercise a right of inheritance and denied female children of a deceased the right of inheritance while conferring the right on a distant male relative is not only discriminatory, it is equally repugnant and unconstitutional as it conflicts the provision of the Constitution of the Federal Republic of Nigeria 1999 (as amended). In the case of Lois Chituru Ukeje & Anor. Vs. Gladys Ada Ukeje.[79] The judgment was on the appeal filed by Mrs. Lois Chituru Ukeje (wife of late Lazarus Ogbonna Ukeje and their son, Enyinnaya Lazarus Ukeje against Mrs. Gladys Ada Ukeje (the deceased's daughter). Gladys had sued the deceased's wife and son at the Lagos High Court, claiming to be one of the deceased's children and sought to be included among those to administer their deceased father's estate. The trial court found that she was a daughter to the deceased and that she was qualified to benefit from the estate of their father who died intestate in 1981. The Court of Appeal, Lagos to which the Defendants at the trial court appealed, upheld the decision of the trial court, prompting them to further appeal to the Supreme Court.

The Supreme Court per Bode Rhodes-Vivour, JSC, held:

"*No matter the circumstances of the birth of a female child, such a child is entitled to an inheritance from her late father's estate. Consequently, the Ibo Customary Law, which*

[77](2002)12 NWLR (Pt 780) 30
[78] (1997) 7 NWLR (Pt. 512) 283
[79] SC. 224/ 2004, (2014) LPELR-22724 (SC)

disentitles a female child from partaking in the sharing of her deceased father's estate is in breach of section 42(1) and (2) of the Constitution, a fundamental rights provision guaranteed to every Nigerian".

CONCLUSION AND RECOMMENDATIONS

In as much as the recent laws and judicial authorities now frown at the discriminatory property inheritance, most people are ignorant of the rights afforded them under the statutes and if such laws are to have their desired impact, then it will be expedient to launch extensive educational as well as legal aid programmes. Legal literacy is an invaluable tool for the empowerment of women because it provides essential information that allows women to exercise their right through channels of legal assistance and action. The Beijing Declaration and platform for action of the fourth United Nations World Conference on women stated that:

"While women are increasingly using the legal system to exercise their rights, in many countries, rights is an obstacle that prevents women from fully enjoying their human rights and attaining equality"

Governmental organizations as well as civil society have always acted as indispensable agents in the protection and promotion of the rights of the vulnerable in the society and continue to do so. Their continued and intensified efforts to promote women's inheritance rights through legal literacy programmes would help to reduce the discriminations which women experience.

Also, codification of the customary law will bring about certainty and sanctity of the law. This is because a society where an individual knows the applicable law, his rights and obligations and punishment for the breach of the law, will certainly command obedience and respect of the law.

Further, the unification of customary laws in the country will bring about a possible solution to the problem of lack of unity among the various customary laws and practices in Nigeria. It means the assimilation of the customary laws of all major tribes in Nigeria so as to have one unified law.

Finally,, it is imperative for people to make wills so as to avoid situations whereby their estates will be governed by customary rules of inheritance. A person can dispose of his property in the

way and manner he deems fit and proper to any person of his choice and in any proportion as long as it is stipulated in his Will.