

**Analysis of the Nigerian Supreme Court's Constitutional Duty Regarding Women's Inheritance Right under Customary Law**

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## ABSTRACT

Customary law existed before the enactment of formal laws to govern the affairs of Nigerians. It started as behavioural norms that grew to be widely accepted by the community and became law. Inheritance rights are recognised under Nigerian customary law. Most customs provided for a way in which a person's properties could be distributed upon his death. However, most of these customs did not make provision for women in the distribution of a deceased estate. This disparity between the inheritance right of a man and woman was very prominent in the distribution of landed properties. Upon the demise of a man, his estate becomes family property and his eldest male child inherits it on behalf of other male members of the family. Where the deceased dies without a son, his brother inherits the estate. Notably, the Constitution did not abolish laws that existed prior to its enactment. It provides that these laws shall continue to exist subject to its provisions, the Constitution provides for its supremacy over every other law, and that the court has a duty to invalidate any law that is inconsistent with its provisions.

The Court found the opportunity to alter the unfair discriminatory position against Nigerian women and develop customary law in line with Constitution in the case of *Anekwe v Nwekwe*. Here, the defendant (brother of the deceased) sought to evict the plaintiff (widow of the deceased and her female children) from the property of the deceased because she had no male child. He claimed that based on their customary law female children are excluded from inheriting property. The Supreme Court then invalidated this customary law of male primogeniture for being repugnant to natural justice, equity and good conscience. Although the decision of the court solved the problem of discrimination, it failed to develop customary law by invalidating only the discriminatory aspect of the customary law. Lessons can therefore be drawn from the minority decision of the South African Constitutional Court in the case of *Bhe v Magistrate of Khaylistha*, where recourse to developing the customary law was posited.

This study will examine to what extent the court has applied customary law to bring it to conformity with the Constitution, drawing from other African countries especially South Africa. It utilises literature review and case law analysis, arguing that the court needs to review the *Anekwe v Nwekwe* case and make a more declarative position that brings customary law up to date with modern realities. It will recommend that the courts should in consultation with the people develop the customary law of inheritance.

## LIST OF ABBREVIATIONS

UDHR – Universal Declaration of Human

Rights FSC- Federal Supreme Court

ICCPR- International Covenant on Civil and Political Rights

CEDAW- Convention on the Elimination of all forms of Discrimination against

Women

CFRN-Constitution of the Federal Republic of Nigeria

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## CHAPTER 1

### INTRODUCTION

#### 1.1 Background to the Study

The Constitution of the Federal Republic of Nigeria provides for the right of everyone to own property irrespective of age, sex or colour.<sup>1</sup> Prior to this constitutional provision, there was an established means of inheritance guided by the customary law of male primogeniture.<sup>2</sup> The customary law of male primogeniture prescribed that only male children can inherit property on the demise of the deceased.<sup>3</sup>

Upon the enactment of the Constitution, the customary law of male primogeniture like every other customary law had to comply with the repugnancy, incompatibility and public policy tests.<sup>4</sup> These tests were to ensure that only customs which are not repugnant to natural justice remain valid and binding. Although, the customary law of male primogeniture precluded women from inheriting property, this was not considered repugnant to natural justice, equity and good conscience. Instead, the Supreme Court held that the custom was not repugnant to natural justice, equity and good conscience thus, it is valid and binding on those subject to it.<sup>5</sup>

Upon the enactment of the 1999 Constitution the basis for validity of customary law was replaced from the repugnancy, incompatibility and public policy tests to the anti discrimination provision of the Constitution. This provided that no one should be discriminated against on the basis of sex. Furthermore, the Constitution specifically the 1999 Constitution (as amended) provided that everyone has a right to own property. Thus, the Constitution expressly provides that everyone shall be allowed to own and by extension inherit property irrespective of their sex. It further stipulates that where an existing law (all laws which existed before the enactment of the Constitution) conflicts with the Constitution, such aspects of such existing law should be invalidated. In lieu

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<sup>1</sup> Section 43, Constitution of the Federal Republic of Nigeria 1999, Cap C3 Laws of the Federation 2004 (will hereinafter be referred to as Constitution).

<sup>2</sup> Oluwakemi Adekile Succession at Customary law – Addressing the Crossroads of Constitutional Conflicts, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1589648](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1589648), accessed on 7 March 2017.

<sup>3</sup> *Ibid* at 5.

<sup>4</sup> Section 26, High Court Law of Lagos State Cap 113 Laws of Lagos State 2003. This is contained also in Section 34 High Court Law Kano, CAP 57 Laws of Kano State of Nigeria 1991; Section 34 High Court Law of Kwara State. CAP 67 Laws of Kwara State of Nigeria 1991. See also Dr Babatunde Isaac Olutoyin ‘People Perish for Lack of Knowledge: Revisiting of the Role of Custom in the Development of Nigerian Legal System’ , available at [moj.ekitistate.gov.ng/online-journal/people-perish-for-lack-of-knowledge—revisiting-of—the-role-of-custom-in-the-development-f-nigerian-legal-system/](http://moj.ekitistate.gov.ng/online-journal/people-perish-for-lack-of-knowledge—revisiting-of—the-role-of-custom-in-the-development-f-nigerian-legal-system/) accessed on 7 March 2017.

<sup>5</sup> *Arase v Arase* [1981] N.S.C.C 101,114.

of these sections, the Supreme Court of Nigeria invalidated the customary law of male primogeniture in the cases of *Anekwe v Nweke* (2014) NWLR pt 1412 and *Ukeje v Ukeje* (2014) SC LPELR-22724.

The judgement of the Supreme Court appears to have solved the problem of discrimination. However, the court did not consider developing customary law in its decision by invalidating only the discriminatory aspects of the law rather than the system of customary law of male primogeniture. The Constitution empowers the courts to invalidate only the discriminatory aspect of the law and not the system of customary law generally. Unfortunately, although the Supreme Court did justice to expunging the discrimination it failed to balance the need for preservation of non-discriminatory customary law.

This thesis will examine the role of the courts in protecting women's inheritance right, while balancing this right with the need to preserve the system of customary law of inheritance in its non-discriminatory form. In order to sufficiently understand the concept and the application of the customary law of male primogeniture, an examination of women's inheritance rights under the three major customs in Nigeria and its application under these customs prior to the 1999 Constitution is relevant. These customs are the Yoruba (South West), Ibo (East) and Hausa (North). The rationale for examining the three major customary laws is based on the heterogeneous nature of Nigeria, where there are about 300 customs.<sup>6</sup>

This line of inquiry is important for the following reasons: first the continued existence of the principle of male primogeniture compromises the rights of women as guaranteed by the Constitution. Secondly, the inquiry is important to determine the effect of invalidating the customary rule of inheritance and how the system of customary law can be preserved without discrimination.

This research is significant because it seeks to advance the argument that the court can protect women's right through the provisions of the Constitution whilst preserving the institution of customary law in Nigeria. This will be done by relying on the equality section, which strictly requires equality of all sexes against the existing laws recognized by the Constitution.

## **1.2. Problem Statement**

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<sup>6</sup> Anthony C. Diala 'Reform of the customary law of inheritance in Nigeria: Lessons from South Africa' (2014) 2 *AHRLJ* at 639

Customary law is a reflection of the way of life of people.<sup>7</sup> Where people observe laws that discriminate against women and female children, it reflects their way of life. Prior to 2014, the courts had held such customary laws as valid, even though they discriminate against women and female children.<sup>8</sup>

Customary law of male primogeniture, which excludes women and female children from inheriting property, has been judicially noticed.<sup>9</sup> Under Nigerian legal system, when a superior court has decided severally on a particular matter, judicial notice is taken over such area of the law. Thus, where a superior court has taken judicial notice of the customary law, it binds inferior courts<sup>10</sup> and remains in force until overturned by the legislature or a decision of a superior court.<sup>11</sup> This leaves women and female children in untold hardship, despite the compulsory tests mentioned above and the equality provision in the various Constitutions which will be discussed in chapter three.

An opportunity to update the law to reflect the constitutional rights to equality and access to property arose in the cases of *Anekwe v Nweke*<sup>12</sup> and *Ukeje v Ukeje*.<sup>13</sup> In those cases, the courts had the opportunity to enforce the provision of the Constitution based on the equality section when dealing with the rules of customary law on inheritance, specifically the rule of male primogeniture. However, those decisions did not resolve the tension between customary and constitutional law in that, the Supreme Court invalidated the system of customary law of inheritance for being repugnant;<sup>14</sup> rather than merely invalidating the infringing aspects of the customary law as stipulated by the Constitution.

This thesis thus seeks to investigate the tension between customary law and the constitutional right of women to inherit property. In this regard, it will advance ways of resolving these conflicting issues.

### 1.3. Research Question

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<sup>7</sup> *Eshugbaya Eleko v Government of Nigeria* (1931) A.C 662 at 673.

<sup>8</sup> *Nezianya v Okagbue* (1926) N.L.R. 48, See also ; *Agidigbi v. Agidigbi* [1996] 6 N.W.L.R. (Pt.454) 300, *Aileru & others v Anibi* 20 NLR 46. The Supreme Court of Nigeria is the highest Court in Nigeria. Where this Court recognises the customs that infringes on the rights of women, other lower Courts are bound to apply these decisions. This is based on the principle of judicial precedents, which provides that lower Courts are bound by the decisions of superior Courts.

<sup>9</sup> *Nezianya v Okagbue* supra, *Aileru & others v Anibi* supra.

<sup>10</sup> John O. Asein 'Introduction to Nigerian Legal System' 2ed at 73.

<sup>11</sup> *Ibid* at 78.

<sup>12</sup> *Anekwe v Nweke* (2014) NWLR pt 1412.

<sup>13</sup> *Ukeje v Ukeje* (2014) SC LPELR-22724.

<sup>14</sup> *Anekwe v Nweke* supra note 12.

***This thesis seeks to answer one question:***

To what extent are the decisions of the Supreme Court on the customary law of inheritance in *Anekwe v Nweke and Ukeje v Ukeje* consistent with the courts' duty to ensure compliance with the Constitution?

*1.3. Aims and objectives of the study*

This thesis aims to evaluate women's right of inheritance under customary law in Nigeria; the infringement of such rights; and how the courts have decided on this matter.

It generally aims to analyse the decisions of the court before and after the 1999 Constitution. The purpose of this exercise is to examine whether there has been improvements to the rights of women or if the status quo has been maintained.

Lastly, the aim of the research is to understand if the courts have a duty to develop the customary law of inheritance and if same was done in the recent cases mentioned above.

*1.4. Research Methodology*

The research questions to be addressed by this study are impacted by the decisions of the courts prior to the 1999 Constitution in the area of women's inheritance rights under customary law. The method applied in this research therefore, consists of:

- i. a description of the previous position under customary law,
- ii. a critic and analysis of the previous positions, and
- iii. a presentation of new positions from primary and secondary sources.

As a result, this research will be desk-based. It will rely on available literature and numerous cases on the topic. The thesis will also rely on secondary sources, considering that most of the materials in this area of law are secondary sources.

*1.5. Structure of Research*

The research is structured into five chapters including the introductory chapter. Chapter two focuses on the background to the rights of women in the context of customary law, various writings by authors on the subject matter, their views on customary laws generally, definition of concepts, customary law on inheritance, and the arguments for and against women's inheritance.

Chapter three focuses on the customary law of inheritance and its application in the pre-millennium era, the customary law of inheritance in the three major tribes in Nigeria, and courts' decisions on women's inheritance rights under customary law. The chapter will also analyze the effect of depriving women of their right of inheritance by looking at case law.

Chapter four focuses on the customary law of inheritance in the constitutional era, the shift in position from the pre-constitutional era, conflict of customary laws with the Constitution. The chapter will also examine the duty of the Court to develop existing customary laws. It will also examine the recent decision on women's inheritance rights and compare this with the South African Bhe case.

Chapter five focuses on recommendations on women's inheritance rights, as well as the role of the courts in developing customary law.

## CHAPTER 2

### Background to the Rights of Women in the Context of Customary Law

#### 2.0 INTRODUCTION

This chapter examines the concept of customary law, with particular reference to customary law of inheritance in Nigeria. An explanation will be given on the customary law of inheritance of male primogeniture. This will be done through the use of opinions of scholars on the applicable customary law in the three major tribes in Nigeria. The work of these scholars will help with an understanding of the essence and arguments for and against male primogeniture.

The view adopted by a Nigerian scholar prior to the decision in *Anekwe v Nweke and Ukeje v Ukeje* is that women generally have no rights to inherit property under the varying customs.<sup>15</sup> The male primogeniture rule says that property should be transferred to any male relative of a deceased where there is no male child in a family. According to Diala, the decisions in the cases of *Anekwe v Nweke and Ukeje v Ukeje* invalidated the male primogeniture rule. Diala however, criticized those decisions for not giving a far reaching explanation for invalidating the customary law. Diala's argument is supported based on the court's act of invalidating both the customary aspect of law and the customary law itself, the latter being a valid system of law in Nigeria.<sup>16</sup> In essence, a total invalidation of this law will contradict the provision of the 1999 Constitution (as amended), which is to the effect that only discriminatory aspects of law should be invalidated.<sup>17</sup>

Prior to the recent cases founded on the 1999 Constitution, women only had a right to occupy property while alive. This right was however, subject to good behavior.<sup>18</sup> The position in the Yoruba tribe is slightly different in the sense that women (wives) can only inherit property through their children.<sup>19</sup> In other words, where a woman has no child or children, it will be impossible for such woman to inherit any property. Furthermore, the Yoruba tribe did not discriminate against female

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<sup>15</sup> Reginald Akujobi Onuoha Discriminatory Property Inheritance under Customary Law in Nigeria: NGOs to the Rescue *International Journal of Not-for-Profit Law* / vol. 10, no. 2, April 2008 at 81.

<sup>16</sup> Asien opcit note 10 at 114.

<sup>17</sup> Section 315 (3) Constitution of the Federal Republic of Nigeria 1999, Cap C3, Laws of the Federation 2004.

<sup>18</sup> *Nezianya v Okagbue* (1963) 1 ALL, NLR 352.

<sup>19</sup> *Dawodu v Danmole* (1958) 3 F S C 46.

children in terms of inheritance. Therefore, both male and female children are entitled to inherit the property of their deceased father.

Another major tribe in Nigeria where the male primogeniture rule is applied (apart from the three mentioned tribes) is Edo/ Delta State in the South-South region Nigeria. According to Odje,<sup>20</sup> the customary laws governing succession in the Edo/Delta area are divided into three main types in the essentially dominant patrilineal society. There is a fourth type which is a fusion of a matrilineal and patrilineal society. These four categories are:

- i. the Ishan, Benin Chieftaincy families, where the first son takes all exclusively
- ii. the Ibo, ivbiosakan-(owan), where only sons inherit;
- iii. the Bini non-chieftaincy families (Akoko –Edo, Isoko, Itsekiri and Urhobo), where all the children inherit irrespective of the sex, and
- iv. the Etsako and Ijaw class, where inheritance rights are determined by customary marriage.<sup>21</sup>

The approach adopted by Ezeilo<sup>22</sup> is to analyse inheritance laws generally in Nigeria. She makes a case for the harmonization of all laws regulating the inheritance of property in Nigeria. This includes English law and statutes, and customary law. Ezeilo proposes adequate education of illiterate women and judicial officers so as to see the ills of discriminatory disinheritance on the basis of the sex of the individual.<sup>23</sup>

The works of these scholars reflect the discrimination inherent in these customary laws applicable in the different tribes. They also propose some solutions which include harmonization of the laws, a far reaching effect on invalidation of discriminatory customary laws.

In a bid to understand the background to the rights of women in the context of customary law, it is important to consider some concepts relating to the inheritance of property. These concepts will be considered below.

## 2.1. Law of Succession

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<sup>20</sup> Mudiaga Odje 'Integration in the field of the Law of Succession in the Midwestern Region of Nigeria' in *Integration of Customary and Modern Legal Systems in Africa*, P 60 at 265-266.

<sup>21</sup> Ibid.

<sup>22</sup> JN Ezeilo 'Law and practices relating to women's inheritance rights in Nigeria: An overview' (1998-9) 7 *Nigerian Juridical Review* 131-139.

<sup>23</sup> Ibid.

The law of succession governs the administration of property of the deceased.<sup>24</sup> It guarantees and protects the interest of beneficiaries of the deceased.<sup>25</sup> It also determines who executes the property of the deceased.<sup>26</sup> This law regulates the competing interests of the beneficiaries, and where there is a dispute, it provides the appropriate steps to remedy such dispute. Furthermore, there are two categories of succession namely, testate and intestate succession.<sup>27</sup> Testate succession occurs where a person makes a will which administers the estate prior to the death of the deceased.<sup>28</sup> Intestate succession, on the other hand connotes the applicable laws which govern the distribution of estate of the deceased where there is no valid will, or where the will does not cover all the estate.<sup>29</sup> In addition, where the deceased is subject to customary law, the customary law of the deceased will apply where there was no valid will.<sup>30</sup>

The central theme of customary law of succession, particularly intestate succession, focuses on continuity in the family name and property. Therefore, the successor of the deceased inherits the status of the deceased along with the property.<sup>31</sup>

## 2.2. The Concept of Customary Law

Customs are the acceptable way of life of a given indigenous group of people.<sup>32</sup> It refers to the indigenous set of laws which the group of people choose to regulate the affairs of their lives.<sup>33</sup> The laws emanate from the way of their way of life and over time, have been recognized as binding over the indigenous group.<sup>34</sup> The laws derive its binding force from the people, through a collective belief that it is binding on everyone subject to it.<sup>35</sup>

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<sup>24</sup> Babatunde Oni 'Discriminatory Property Inheritance Rights Under the Yoruba and Igbo Customary Law in Nigeria: The Need for Reforms', (Feb. 2014) *IOSR Journal of Humanities and Social Science (IOSR-JHSS) Volume 19, Issue 2, Ver. IV* at 30

<sup>25</sup> Jamneck, Rautenbach, Paleker et al 'Introduction' in *The Law of Succession in South Africa* Oxford University Press Southern Africa 2009 at 17.

<sup>26</sup> Diala op cit note 6 at 640.

<sup>27</sup> Ibid.

<sup>28</sup> Himonga, Nhlapo, Maithufi et al 'The Customary Law of Succession' in *African Customary Law in South Africa Post – Apartheid and Living Law Perspectives* (2014) at 159.

<sup>29</sup> Ibid.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

<sup>32</sup> Black's Law Dictionary (6th Edition, pp. 299 – 300)

<sup>33</sup> Derek Asiedu-Akrofi 'Judicial Recognition and Adoption of Customary Law in Nigeria' (Summer, 1989) Vol. 37, No. 3 *The American Journal of Comparative Law* at 572.

<sup>34</sup> *Owonyin v Omotosho* (1961) 1 All N.L.R 304.

<sup>35</sup> Niki Tobi 'Sources of Nigerian Law' *Lagos MIJ Professional Publishers* (1996).



Customary law are primarily unwritten and undocumented, as was held in the case of *Alfa v Arepo*.<sup>36</sup> In this case, the court held that the characteristics of customary law are largely unwritten and applied by a community who regards it as binding on them.<sup>37</sup> Thus, the court decided cases based on oral evidence and testimonies of chiefs and witnesses.<sup>38</sup> Although, customary law may be written, the mere fact that it is written does not change the nature of the customary law. For instance, the Customary Courts Law of Anambra State describes customary law as a body of rules that regulates the rights and duties of human being, a body of laws which is sustained by constant use by the people subject to it. This law is applicable in all matters and disputes which this law governs.<sup>39</sup> Customary laws are usually not static; they develop as the members of the community develop.<sup>40</sup> The fact that customary laws are not static means that they need to be developed to be consistent with changing society; one of which includes colonialism and then the Constitution.

The emergence of colonialism brought changes to the legal system in Nigeria. However, colonial masters sought to preserve native laws (customary law) even though most of them were archaic.<sup>41</sup> In order for customary laws to be recognized, some conditions were put in place to invalidate defective customary laws.<sup>42</sup> These conditions were structured as tests which include the Repugnancy test, the incompatibility test, and the public policy test which has been incorporated into the High Court Rules of various states.<sup>43</sup>

The High Court Rules of Lagos State incorporated these tests in applying customary law. The Rules state that the court shall apply native laws, provided they are not repugnant to natural justice, equity and good conscience.<sup>44</sup> Also, native law and custom must not be incompatible with a law which exists; and everyone who wants to be bound by customary law will not be prevented from benefiting from such.<sup>45</sup> Although these laws guarantee the right to benefit from customary law, this customary

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<sup>36</sup> (1963) WNLR 95 at 97.

<sup>37</sup> *Ibid.*

<sup>38</sup> Asiedu- Akrofi op cit note 33 at 572.

<sup>39</sup> Customary Courts Law CAP 49. Revised Laws of Anambra State of Nigeria 1979

<sup>40</sup> *Oyewumi v Ogunesan* [1990] 3 N.W.L.R (pt 37) 182 at 207

<sup>41</sup> J.Olabosipo Anifalaje 'Judicial Development of Customary Law in Nigeria', Available at 9 *J. Legal Hist.* 40 1988 at 41. Accessed on 11<sup>th</sup> November 2016.

<sup>42</sup> *Ibid.*

<sup>43</sup> Section 26, High Court Law of Lagos State Cap 113 Laws of Lagos State 2003. This is contained also in Section 34 High Court Law Kano, CAP 57Laws of Kano State of Nigeria 1991; Section 34 High Court Law of Kwara State. CAP 67 Laws of Kwara State of Nigeria 1991.

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*

law must not affect public morals.<sup>46</sup> This is now contained in the provision of section 14(3) of the Evidence Act 2011.<sup>47</sup> Clearly, the intention of the drafters of the laws and the Colonials was to ensure the existence of customary law.

The requirement of the fulfillment of the above mentioned tests is to prevent the enforcement of arbitrary customary laws, as well as protect the people. However, where the law put in place to protect people fails to carry out its mandate, a serious issue arises. It can therefore, be argued that these tests are aimed at protecting the non-indigenous people. An explanation of the tests will be given below.

### 2.2.1. Repugnancy Test

The concept of repugnancy can be described to be fair, just and equitable. The test seeks to uphold natural justice, equity and good conscience.<sup>48</sup> For a customary law to be held as valid, it must not be contrary to natural justice, reasoning, and equity.<sup>49</sup> Equity in its technical meaning refers to the principles developed by the English Court of Chancery to remedy the hardship caused by common law on litigants without a writ.<sup>50</sup> These three legal concepts have their different technical meanings. However, for the purpose of this thesis each technical meaning to three concepts will not be applied. Instead, the three concepts will be interpreted as one.<sup>51</sup>

A custom can be declared invalid where it fails to align with an acceptable standard of reasoning or natural laws (repugnancy clause).<sup>52</sup> The unanswered question then is on whose standard is a custom repugnant? Is it to the natives who the customary law emanates from? Clearly, the repugnancy test unfortunately is not to protect or for the interest of the native, but a group of people outside the scope of the natives; arguably this is based on the English system.<sup>53</sup>

The colonials sought to preserve customary law of succession because of their misunderstanding of the law. This is because under common law, succession and inheritance relate to acquiring the property of a deceased person. It involves the laws

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<sup>46</sup> Asiedu-Akrofi op cit note 33 at 572.

<sup>47</sup> Evidence Act, 2011 [Nigeria], 3 June 2011, available at: <http://www.refworld.org/docid/54f86b844.html>, accessed on 15 November 2016.

<sup>48</sup> Remigius N. Nwabueze, *The Dynamics and Genius of Nigeria's Indigenous Legal Order* Available at [https://www.researchgate.net/publication/265143018\\_The\\_Dynamics\\_and\\_Genius\\_of\\_Nigeria's\\_Indigenous\\_Legal\\_Order](https://www.researchgate.net/publication/265143018_The_Dynamics_and_Genius_of_Nigeria's_Indigenous_Legal_Order), accessed on August 30 2016.

<sup>49</sup> S O Tonwe and O.K Edu *Customary law in Nigeria* (2007) at 27.

<sup>50</sup> Anifalaje opcit note 41 at 41.

<sup>51</sup> Ibid. See also a germane argument made in Asiedu- Akrofi op cit note 44 at 580.

<sup>52</sup> G.F.A. Sawyerr, 'Internal Conflict of Laws in East Africa' in G.F.A. Sawyerr, ed *East African Law and Social Change* (Kenya: East African Publishing House, 1967) 134.

<sup>53</sup> Asiedu- Akrofi op cit note 33 at 580.

relevant to the transfer of property from the deceased to the beneficiary.<sup>54</sup> However, under customary law, there is a difference between succession and inheritance. Succession refers to the “acquisition of the status of the deceased”.<sup>55</sup> Here, the successor assumes all responsibilities and duties of the deceased, which may include inheriting the property of the deceased.<sup>56</sup> Therefore, the inheritance is premised on the status of the successor to the deceased and as such the inheritance is only incidental to succession.<sup>57</sup> Under customary law, the status of family head transfers to the successor upon his demise, since succession is premised on status and assumption of responsibility where the deceased was the family head.<sup>58</sup>

Under customary law, succession primarily is based on male primogeniture.<sup>59</sup> Therefore, since inheritance is incidental to succession, on assumption of the status of the family head by the eldest male, inheritance also takes place. Although, the inheritance may flow from the succession, it is not a prerequisite for inheritance as this only occurs when the successor is the family head.<sup>60</sup> Thus inheritance being only incidental to succession to the position of the role of family head does not stand alone, but flows from the succession to status of family head. This customary law like other customary law is subject to the repugnancy test.<sup>61</sup> If there is anything to be inherited typically, it is the succession to the position of family head and the responsibility in which case, inheriting property follows. Consequently, the difference between inheritance under common law and customary law is the status attached to customary law.

The Federal Supreme Court of Nigeria applied the repugnancy test in the case of *Dawodu v Danmole*.<sup>62</sup> Here the court was required to consider the distribution of the estate of a deceased; a Yoruba man who had four wives and nine children. The Yoruba customary law dealing with the distribution of the estate is based on the *per stripes* rule, which provides that an estate be distributed according to the number of wives (*idi igi*). The court held that this is the recognized means of distribution of the estate in

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<sup>54</sup> Himonga, Nhlapo, Maithufi et al op cit note 28 at 162.

<sup>55</sup> Ibid

<sup>56</sup> Ibid.

<sup>57</sup> Ibid

<sup>58</sup> Ibid

<sup>59</sup> Ibid.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid.

<sup>62</sup> (1958) 3 F S C 46.

<sup>63</sup> Ibid.

terms of Yoruba customary law and is not repugnant to natural justice.<sup>64</sup> The court further stressed that the other means of distribution (which is division amongst all children (*ori ojori*), also known as *per capital*) can only be applied where there is a dispute.<sup>65</sup> On appeal, the Privy Council stated that the means of distribution of property per stripes is not repugnant in the Yoruba tribe. This was also adopted in the case of *Rufai v Igbira NA*<sup>66</sup> where the court stated that it would be wrong to declare a custom as repugnant merely because it is not in alignment with English law. These latter decisions are clearly an improvement on the concept of repugnancy which was skewed against indigenes.

### 2.2.2. Incompatibility Test

The validity of customary law is subject to the Constitution of Nigeria.<sup>67</sup> The Constitution is the supreme law in Nigeria.<sup>68</sup> It is on this basis that every other law gains validity, especially customary law.<sup>69</sup> The Constitution recognizes customary law only to the extent that it is not incompatible with the provision of the Constitution.<sup>70</sup> An example of this is seen in the area of the customary right of inheritance. A review of the case of *Ukeje v Ukeje*<sup>71</sup> reflects a situation where a female child was prevented from inheriting the property of her late father, which her mother used when she was alive. This custom, called the male primogeniture rule conflicts with the provision of the Constitution, which guarantees the right not to be discriminated.<sup>72</sup> The court declared such customary law incompatible with the Constitution.<sup>73</sup>

### 2.2.3 Public Policy

The requirement of public policy in the validity of customary law, as was described in the case of *Amachree v Kallio*<sup>74</sup> reflects the need of public opinion and public interest. Thus, where the customary law is not beneficial to the public, it will not be

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<sup>64</sup> Ibid.

<sup>65</sup> Ibid.

<sup>66</sup> 1944 A C 170. See also *Adeniji and Others v Adeniji and Others* (1969) 2 All N L R 123, *Administrator- General v Olubamiwo* (1965) L.L.R 136. See A.J Oosthuizen 'The Law of Succession'

*JUTA and Company Limited* (1982) at pg 15-16. For further explanation of the per stripes and per capital rule

<sup>67</sup> Section 1(3) Constitution of the Federal Republic of Nigeria 1999 Cap C3 Laws of the Federation 2004.

<sup>68</sup> Section 1(1), Ibid.

<sup>69</sup> Section 315, Ibid.

<sup>70</sup> Ibid.

<sup>71</sup> *Ukeje v Ukeje* supra 13

<sup>72</sup> Section 42, Constitution .

<sup>73</sup> *Ukeje v Ukeje* supra 13 per Rhodes-Vivor J.S.C at 32-33, paragraph E-G.

<sup>74</sup> (1913) 2 N.L.R. 108.

valid. This has the ability to change overtime, which is influenced by the development in that system. A shift in public policy occurred in the context of inheritance of property by illegitimate children, in a case prior to the current Constitution.<sup>75</sup> However, the position under the current Nigerian Constitution is that illegitimate children are allowed to inherit family property.<sup>76</sup> Prior to this provision of the Constitution, illegitimate children could not inherit as it was considered contrary to public policy to allow an illegitimate child to inherit property from the father who never got married to the mother, especially where he subsequently got married to another woman and has children from the marriage.<sup>77</sup>

The approach of the higher Court was to change the pre-Constitution approach; from precluding illegitimate children from inheriting property to allowing them inherit property. The court did so on the basis that Yoruba custom recognizes legitimization of children by acknowledgment, therefore it does not matter that the child was born out of wedlock.<sup>78</sup> It also would not be contrary to public policy to prevent such child from inheriting property.<sup>79</sup>

The repugnancy, incompatibility and public policy tests are measures taken to protect the sanctity and sanity of customary law of inheritance (Primogeniture Rule) in Nigeria.

#### **2.2.4. The Male Primogeniture Rule**

The occurrence of intestate succession is prominent in Nigeria, primarily under customary law. Here, the customary law of the deceased applies to regulate the distribution of the deceased's properties.<sup>80</sup> The customary laws in most parts of Nigeria required the rule of male primogeniture to be applied when there is distribution of an estate. This rule provides that the male child particularly the first-born son inherits the property of the deceased.<sup>81</sup> He however, owns and holds the properties as a trustee for himself and his younger male siblings.<sup>82</sup> A female child is automatically excluded from inheriting even if she is the first-born child.<sup>83</sup> This rule creates a system where a deceased can only

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<sup>75</sup> *Cole v Akinyele* (1960) FSC 84.

<sup>76</sup> Section 42, Constitution.

<sup>77</sup> *Alake v Pratt* (1955) 15 WACA 20.

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*

<sup>80</sup> Onuoha *op cit* note 15.

<sup>81</sup> Tia Venter, Jeanne Nel 'African customary law of intestate succession and gender (in) equality' 2005 J. S. Afr. L. 87 2005 at 89.

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*

transfer property to the male descendants of the family.<sup>84</sup> This rule, however, is clearly in conflict with the current Constitution as it discriminates against the female gender where a female is the first born.<sup>85</sup> Although, previous Constitutions provided for the protection of women against discrimination, courts never protected this right.

The male primogeniture rule is present in Nigeria, for instance in the Benin (*Bini*) Custom the first-born son inherits the house of the deceased father exclusively, following the second burial called the '*igi obe*'.<sup>86</sup> In the case of *Arase v Arase*<sup>87</sup> the Supreme Court held that under the *Bini* custom, a deceased cannot by a Will or any other means exclude his first son from inheriting his house.<sup>88</sup> This therefore, strengthens the effect of the rule of male primogeniture in excluding the female children from the property of the deceased.<sup>89</sup>

The Supreme Court has however departed from its earlier position of enforcing discriminatory customary law of male primogeniture, to invalidating this rule in the case of *Anekwe v Nweke*.<sup>90</sup> Here, the Supreme Court stated that the customary law of male primogeniture of the Awka people relied on by the claimant is condemned in strong terms. Also, the court stated that any culture that excludes a daughter from her father's estate or a wife from her husband's property is punitive.<sup>91</sup> The Supreme Court further criticized the primogeniture rule for discriminating against the female gender on the issue of inheritance for being repugnant to natural justice, equity and good conscience.<sup>92</sup>

It is thus arguable from the above decisions that the court ought to have developed the customary law of male primogeniture by invalidating only the discriminatory aspect (express mention of male in primogeniture) rather than invalidating the system of customary law of male primogeniture.

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<sup>84</sup> Tia Venter, Jeanne Nel opcit 81 at 89.

<sup>85</sup> Ibid.

<sup>86</sup> Teslim.O. Elias *Nigerian Land Law* (1971) chapter 8 at 120.

<sup>87</sup> *Arase v Arase* supra 5 Per Idigbe J.S.C pg 40-41, Paragraph G-B. The second burial is a traditional custom where the son steps into the position of his father and perform the traditional processes. Then he inherits the property of the deceased.

<sup>88</sup> *Arase vs Arase* supra note 101, per Idigbe J.S.C at 40-41, Paragraph G-B.

<sup>89</sup> Onuoha op cit note 15 at 11.

<sup>90</sup> *Anekwe v Nweke* supra 12

<sup>91</sup> *Anekwe v Nweke* supra 12, Per Ogunbiyi at 36 Paragraph D

<sup>92</sup> *Anekwe v Nweke* supra 12, Per Ogunbiyi, at 37 Paragraph C

### **2.3. Conclusion**

A major feature of customary law is its flexibility.<sup>93</sup> Therefore, it evolves with the times and needs of people. The customary laws also have to comply with three tests namely the repugnancy, incompatibility and public policy tests; failure to comply will make such customary law invalid.

This chapter has been able to explain the concept of customary law of male primogeniture. It states that this customary law only allows the eldest male child to inherit the properties of the deceased while female children are excluded.

The next chapter will discuss the application of the concept of male primogeniture in the three major tribes in Nigeria and how courts have applied this concept.

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<sup>93</sup> *Agbai v. Okogbue* (1991) 7NWLR (Pt 204) 391 Per Nwokedi JSC at 417.

## CHAPTER 3

### Customary Law and the Application of Customary Law in the Three Major Tribes in Nigeria

#### 3.0. INTRODUCTION

Women as human beings have fundamental human rights, which are recognized globally.<sup>94</sup> Therefore, any domestic law which relates to the rights of women must be careful not to discriminate or infringe on the rights of women. Consequently, the 1999 Constitution of Nigeria recognizes the rights of all citizens of Nigeria; and it creates an equality section to eliminate all forms of discrimination.<sup>95</sup> This section provides that, no one shall be discriminated against on the basis of sex, religion or tribe.<sup>96</sup> Therefore, to discriminate against a woman in the right to own property will be contrary to these provisions of the Constitution. In the event that a law contravenes these rights as contained in the Constitution, such law shall be declared invalid as stipulated by the Constitution;<sup>97</sup> a position based on the supremacy provision of the Constitution.<sup>98</sup>

The protection of women's rights is not limited to the Nigerian Constitution. International laws and instruments also protect the rights of women against discrimination and guarantee the right to own property.<sup>99</sup> The provision of Article 7 of the Universal Declaration of Human Rights,<sup>100</sup> state that all persons are entitled to the protection of the law and that no one should be discriminated against. In addition, Article 2 of the same Instrument provides that no one is to be discriminated against on the basis of sex, race and color.<sup>101</sup> Also, at the Beijing Platform for Action which was held at the Fourth World Conference on Women in 1995, the rights of women and gender equality were discussed. As part of the discussion, the platform identified gender discrimination as a major challenge to women's economic development. It was proposed that the solution is gender equality and empowerment of women.<sup>102</sup>

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<sup>94</sup>Kemi M. Adekile 'Property Rights of Women in Nigeria as Impediment to Full Realisation of Economic and Social Rights' (May 26, 2010) available at <http://ssrn.com/abstract=1616270>, accessed on July 20 2016.

<sup>95</sup>Section 43, Constitution of the Federal Republic of Nigeria 1999.

<sup>96</sup>Ibid.

<sup>97</sup>Section 1(3) Constitution.

<sup>98</sup>Section 1(1) Constitution.

<sup>99</sup>Adekile op cit note 94 at 2

<sup>100</sup>Universal Declaration of Human Rights 1948.

<sup>101</sup>Ibid.

<sup>102</sup>Among the UNDP objectives of gender equality is giving economic and social value to women's Capacities and work to enhance their participation in social, political and economic development.



Although, the provisions of local and international instruments protect the rights of the Nigerian woman, this protection is hardly felt in practice.<sup>103</sup> In practice, there are gender stereotyped roles and rights; rights largely determined by the family and the society.

The 1999 Constitution expressly recognizes customary law, through the acknowledgement of laws which were in existence prior to its enactment.<sup>104</sup> The Constitution stipulates that these existing laws shall continue to exist, provided they are not in conflict with the provision of the Constitution.<sup>105</sup> It is under this classification of existing laws that customary laws comes, considering that it regulated the affairs of Nigerians before the enactment of the Constitution.<sup>106</sup>

The unwritten nature of customary law, having become the accepted practice of the people over centuries of usage, creates a binding force on the people, however discriminatory this may be.<sup>107</sup> The discrimination is particularly evident in issues of inheritance, and the rights of women.<sup>108</sup> As far as inheritance of property is concerned, women are not allowed to inherit property, based on the patriarchal nature of Nigeria and arguably most African Countries.<sup>109</sup> This is a clear case of discrimination against women and the female gender. Instead of the courts declaring these discriminatory customs invalid, the courts have only taken judicial notice of them.<sup>110</sup> Thus, by validating discriminatory customary law, the courts create a struggle for practical supremacy between the unwritten nature of customary law and the written provision of the Constitution; the latter in which the judges swore to uphold.<sup>111</sup>

Despite the supremacy of the Constitution, courts have always interpreted customary laws without considering the human rights provisions in the Constitution of the land and other International instruments which eliminate discrimination against

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<sup>103</sup> Emeka E. Obioha *Inheritance Rights, Access to Property and Deepening Poverty Situation among Women in Igbo land, South East Nigeria*, Paper Presented at a Sub-Regional Conference on Gender and Poverty Organized by Centre for Gender and Social Policy, Obafemi Awolowo University Ile-Ife, Nigeria 2003.

<sup>104</sup> Section 315(1) Constitution.

<sup>105</sup> Ibid.

<sup>106</sup> Ibid.

<sup>107</sup> Obioha op cit note 103 at 5, see also Adekile op cit note 94 at 2.

<sup>108</sup> Muna Ndulo 'African Customary Law, Customs, and Women's Rights' 2011. *Cornell Law Faculty Publications*. Paper 187 at 89, available at <http://scholarship.law.cornell.edu/facpub/187>, accessed on 1<sup>st</sup> August 2016.

<sup>109</sup> Ibid, see further T W Bennet 'The Equality Clause and Customary Law' (1994) *10 S. Afr. J. on Hum. Rts.* 122 at 123.

<sup>110</sup> Obioha op cit note 103 at 4.

<sup>111</sup> Section 6, Constitution of the Federal Republic of Nigeria 1979.

women based on customary law.<sup>112</sup> Arguably, the court's interpretation of upholding discriminatory customary laws is premised on the Constitution of Nigeria; in the sense that customary law is incorporated without clearly resolving the conflict with human rights provisions.<sup>113</sup> Although, the Constitution includes a condition for the validity of customary law, it provides that it must not conflict with the provision of the Constitution.<sup>114</sup> Hence the real conflict is not in whether the customary law is recognized, since the Constitution recognizes it; neither is the enforceability of the rights in the Constitution in doubt. The real conflict then is, since both provisions are recognized and are clearly conflicting, the court is faced with the challenge of which law should apply. Prior to the 1999 Constitution, judges usually interpret the laws to mean that, all customary laws are permissible irrespective of their discriminatory nature.<sup>115</sup> Furthermore, the courts apply such customary law provided it does not violate the repugnancy, incompatibility and public policy test.

An analysis of how courts have applied the rights entrenched under the 1999 Constitution against the various discriminatory customs is imperative. Courts have therefore, been saddled with the responsibility of determining which customary law aligns with the Constitution. A review of what rights are available to women as regards inheritance will be discussed.

### *3.1. Fundamental Human Rights as Regards Women's Inheritance Right*

Nigeria is a country where fundamental human rights are taken seriously on paper but not as effective in practice.<sup>116</sup> Fundamental human rights refer to the inalienable rights inherent in a particular individual, which is guaranteed by the Constitution.<sup>117</sup> According to Yakubu, these are the minimal rights that could be ascribed to any person in a civilized area.<sup>118</sup> These rights are minimal in nature, in prescription and valuable in outreach.<sup>119</sup> A similitude of these rights can be seen in the Universal Declaration of Human Rights (UDHR)<sup>120</sup> and other international instruments. The Constitution of Nigeria (CFRN) provides for some rights which will

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<sup>112</sup> Ndulo op cit note 108 at 102. See also, John W. Van Doren, *Death African Style: The Case of S.M. Otieno*, (1988) 36 *AM. J.COMP. L.* 329.

<sup>113</sup> *Ibid.*

<sup>114</sup> Section 315(1) (a) Constitution.

<sup>115</sup> *Ibid.*

<sup>116</sup> Obioha op cit note 103 at 5.

<sup>117</sup> Chapter IV, Constitution.

<sup>118</sup> Professor J.A Yakubu *Constitutional Law in Nigeria* (2003) at 362

<sup>119</sup> *Ibid.*

<sup>120</sup> Article 19 Universal Declaration of Human Rights 1948.

be examined as regards women's right to inherit property. These include the right to own properties, right against discrimination and the right to dignity. These rights are described in details below, under the various Nigerian Constitutions, which are the 1960 (Independence) Constitution, 1963 Constitution, 1979 Constitution, and 1999 Constitution.

### **3.1.1. Right of Inheritance and Owning Properties**

The right of inheritance and owning of properties is an offshoot of the right to acquire and own immovable properties anywhere in Nigeria. This right is recognized under Section 30 of the 1963 Constitution, Section 40 of the 1979 constitution, and Section 43 of the 1999 Constitution. These provisions stipulate that no immovable property of anyone shall be compulsorily acquired without compensation. The effect of the above provisions is that every citizen, irrespective of their sex can own immovable property within Nigeria; provided he or she is a Nigerian. This therefore, guarantees equality of sexes.

The Nigerian widow and female children come under the category of people entitled to own property according to the 1999 Constitution.<sup>121</sup> The method of owning property includes inheritance. In essence, a widow and female child should be allowed to inherit any immovable property of the deceased husband and father, respectively. The right to own property has been recognized not only in the Nigerian Constitution, but also in the Constitution of other countries and in other international instruments. An example of such is the Constitution of South Africa which provides for the right of anyone to own property, irrespective of their sex.<sup>122</sup>

However, the right to own property like other rights has limitations, but customary law does not form one of the limitations to this right as stated by the Constitution. The Constitution expressly stipulates that customary law like every other law is subject to the Constitution and where they conflict, such law is declared invalid.<sup>123</sup> Thus, customary laws that prevent women from inheriting property are invalid. The decisions of courts do not protect the right of women from being excluded from inheriting property under customary law as guaranteed by the Constitution of Nigeria. In the case of *Nezianya v Okagbue & ors*<sup>124</sup> the court held that under the

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<sup>121</sup> Section 43, Constitution

<sup>122</sup> Section 25 of The Constitution of the Republic of South Africa Act 108 of 1996

<sup>123</sup> Section 1(3) Constitution

<sup>124</sup> NSCC 277 1963

Onitsha customary law, a widow does not have a right to inherit the properties of her husband. However, she can exercise and enjoy the property while she remained alive. This is merely a possessory right; thus she cannot alienate the property but she can rent it out, and use the proceeds to maintain herself and her children.<sup>125</sup> Although, she is in physical possession of the property, the family of the deceased retains ownership of the property. Therefore, her long possession of the property cannot prevent the family from exercising acts of ownership on the property. This decision clearly is a violation of the provision of the Constitution against discrimination on the basis of sex. It is also a disregard against the Constitution on the right to own property.

The court adopted a similar position in the case of *Uka v Ukama*<sup>126</sup> by upholding the patrilineal Ibo custom of precluding a widow from inheriting her husband's property. It was further held that the property should devolve on the family, particularly where the widow has no male child who can sufficiently inherit the property, while precluding female children from inheriting their father's property. This position was restated in the case of *Ugboma v Ibineme*,<sup>127</sup> where the court held that women are not allowed to inherit property in accordance with the general Ibo custom, particularly women from Akwuzu of Anambra State. Thus, a woman cannot inherit her father's property. The laws protect the rights of widows but the courts have failed to enforce this right of ownership as it concerns the right of inheritance and other connected rights.

The cases above have reflected the right to ownership of property, but this right is disregarded by the courts based on customary law. Not only do these cases infringe on the right to own property, they also discriminate against women and female children. It is therefore, important to understand what the Constitution provides about the right against discrimination.

### **3.1.2 Right against Discrimination**

The Nigerian Constitution guarantees equality of sexes. It provides that no one shall be subject to any form of discrimination on the basis of sex, religion and political thought.<sup>128</sup> This law protects women and female children from being discriminated against and therefore allows women to inherit property. In addition, the provision of

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<sup>125</sup> *Nezianya v Okagbue* supra

18. <sup>126</sup>(1963) FSC 184.

<sup>127</sup> (1967) FNLR 251.

<sup>128</sup> Section 42, Constitution.

Article 2 of the United Nations Declaration of Human Right stipulates that, everyone shall have a right to enjoy all the rights contained in its instrument.<sup>129</sup> The Rights guaranteed by this instrument includes the right to own property irrespective of sex.<sup>130</sup> Also, a joint reading of the provision of Article 24 and 26 of the International Covenant on Civil and Political Rights (ICCPR) provides that no one shall be discriminated against on the basis of sex.<sup>131</sup> The provision of this instrument is not binding unless ratified by the legislature in Nigeria.<sup>132</sup> However, these instruments have been ratified and in effect, are binding on Nigeria.

A review of these provisions and the effect on the Nigerian woman and female children will be examined through the decisions of courts. The act of discriminating against women and female children significantly touches on their dignity as human beings. The effect of this discrimination implies that women are less capable of owning and inheriting property. Considering that the right against discrimination is closely associated with the protection of the right to dignity, it is important to examine the provision of the relevant laws which protect the dignity of women and female children.

### **3.1.3 Right to Dignity**

The right to dignity is a fundamental right that encompasses every other right apart from the right to life. The provision of Section 34 of the Constitution stipulates that, everyone shall be entitled to the dignity of his person.<sup>133</sup> In recognition of this right, it can be argued that precluding a woman from inheriting property means she is not recognized as a capable human being. This means she is one who lacks capacity to own property. The Constitution of South Africa also recognizes this right in Section 9 of the Bill of Rights provision of the South African Constitution. The constitutional court stated that there is a duty to respect the dignity of other people; one way of doing so is to respect their right to own property.<sup>134</sup> Further, the preamble of the Universal Declaration on Human Rights declares that recognition of the right to dignity and the right to the equal and inalienable rights of all individuals is the foundation of freedom,

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<sup>129</sup> United Declaration on Human Rights 1948.

<sup>130</sup> Article 17, United Declaration on Human Rights 1948.

<sup>131</sup> International Covenant on Civil and Political Rights 1966. Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49. The provision of Article 26, provide that the protection of the right against discrimination forms the basis for equality of sexes.

<sup>132</sup> Section 12, Constitution .

<sup>133</sup> Section 34, Constitution.

<sup>134</sup> *Dawood and Another v Minister of Home Affairs* (CCT35/99) [2000] ZACC 8.

justice, and peace in the world.<sup>135</sup> Therefore, the discussion on women's right to inheritance is not limited to Nigeria but is recognized by the international community.

In conclusion, dignity is at the epicenter of the society and to erode it on the altar customary law is to contradict the spirit of the Law.<sup>136</sup> In this regard, a perusal of the rights, using cases emanating from the three major tribes in Nigeria will best explain how the right is being applied.

### **3.2. The Means of Distribution of Properties under the Various Tribes Before and During the Enactment of Constitutionalism in Nigeria**

In Nigeria, the customary law of inheritance varies from tribe to tribe. Despite the variance, it was subject to the repugnancy, incompatibility and public policy test. However, these tests achieved very little as discriminatory customary law was still in force. This lacuna was addressed upon the enactment of Constitutionalism. A discussion of how the courts have applied customary laws of various tribes before and during the enactment of Constitutionalism is relevant to determine if the rights of women are better protected.

#### **3.2.1. Yoruba Tribe**

The distribution of estate of a deceased subject to customary law is guided by customary doctrines of inheritance under intestate succession.<sup>137</sup> Under the Yoruba customary law, widows are not allowed to inherit property.<sup>138</sup> In the case of *Aileru & others v Anibi*, the defendant (a brother to the deceased) sought to obtain letters of administration of estates over the estate of the deceased. The plaintiffs, who are children of the deceased objected to the defendant being the administrator of the estate, through their mothers. However, the defendant argued that based on the customary law in Yoruba land, women cannot inherit property because they are chattels capable of being inherited. Jibowu J, a Justice of the Supreme Court, held that widows are chattels and personal properties of the deceased, capable of being inherited by the successor to the deceased.<sup>139</sup> The court in dismissing the claim of the defendant stated that women

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<sup>135</sup> Universal Declaration on Human Rights (UDHR) adopted on 10 December 1948. GA res 217A (III) U.N Doc A.

<sup>136</sup> Opeyemi Aladetola *Widow's right to inheritance under customary law in Nigeria* (unpublished L.L.B thesis submitted to the Faculty of Law University of Lagos 2014).

<sup>137</sup> Oni, *op cit* note 24 at 30.

<sup>138</sup> Prof .Epiphany 'Restatement of Customary Law in Nigeria' (2011) *National Institute of Advanced Legal Studies* at 359.

<sup>139</sup> *Aileru & others v Anibi* 20 NLR 46, See Also *Iwelo Awero v Raimi Sadipe* (1983) 11 O.Y.S. H.C. (pt. 11) 790

are not qualified to administer the estate of the deceased; instead it conferred the administration on the Administrator General.

The case of *Giwa v Oloko*<sup>140</sup> further reiterates this principle that, although a widow can be allocated a property by her deceased husband's family for her accommodation, she is not entitled to own or sell the house. She just enjoys the right to the use of the house during her lifetime, but even then, she lacks the capacity to inherit the property. Also, considering her status as a chattel to be inherited like every other property of the deceased, she lacks the corpus mentis to inherit.<sup>141</sup>

The argument in support of precluding widows from inheriting property is that inheritance of property resides in the family. Secondly the only means of inheritance is by blood relationship, as was established in the case of *Sogunro Davies v Sogunro Davies*.<sup>142</sup> The above cases clearly reflect the failure of the court to invalidate this custom for being repugnant to natural justice, equity and good conscience. The effect of precluding the female gender from inheriting property based on customary law constitutes a failure in the application of the tests and an infringement of the right to own property as guaranteed by the Constitution.

The Yoruba customary law expressly allows both male and female children to inherit the property of their deceased father.<sup>143</sup> However, the eldest son wields the power to manage the estate of the deceased person.<sup>144</sup> He is called *Dawodu*, and only upon his death can there be other variations.<sup>145</sup> He holds the property in trust for the other members of the family.<sup>146</sup> The institution of the title of a *Dawodu*, which is exclusive to the eldest male child, is a form of inheritance, which creates a form of discrimination especially where the first child is a female. It automatically strips her of the position of the family head, simply because she is female.<sup>147</sup>

The Chief Justice however, explained the rationale for maintaining male trusteeship or primogeniture in the case of *Lewis v. Bankole*.<sup>148</sup> The learned judge stated that female children get married and move to their husband's family, thus will not be able

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<sup>140</sup> (1939) 15 NLR 82

<sup>141</sup> Ephiaphany op cit note 138 at 359.

<sup>142</sup> (1928) 8 NLR 79

<sup>143</sup> *Lewis v. Bankole* (1909) 1 NLR 82.

<sup>144</sup> Ibid. See also Brian W Harvey The law and Practice of Nigerian Wills, Probate, and Succession, London: Sweet & Maxwell Lagos: African Universities Press 1968 at 178.

<sup>145</sup> Ibid.

<sup>146</sup> Oni op cit note 24 at 32

<sup>147</sup> Section 42 Constitution.

<sup>148</sup> *Lewis v Bankole* supra 143.

to handle the affairs of the estate effectively. This decision of the learned judge is debatable and subject to criticism, in that being married does not affect the right of women to manage the property of the family. In addition, in the case of *Lopez v Lopez* Combe J held that originally women were not equal to men on the issue of inheritance, He however, further held that now women have equal rights to inherit like male children.<sup>149</sup> This position was upheld in the case of *Salami v Salami*<sup>150</sup> where the court held that a female child's right of inheritance is not affected simply because she is a female.

The cases above clearly show the high level of discrimination against the widow. This discrimination begins from the fact that she cannot inherit property on the basis that she is not a member of the family.

### 3.2.2. Igbo Tribe

The right of succession under customary law in the Igbo tribe is based on the principle of male primogeniture.<sup>151</sup> Here, property devolves customarily on the male children only. The question is what happens to the widows considering that customary law is skewed towards patrimony? A widow is left with nothing, but a remedy would be available for her if she has a son that can inherit the property instead, as she can enjoy the property through her son.

As mentioned earlier, the principle greatly applied in the distribution of property under the Igbo customary law is the principle of male primogeniture.<sup>152</sup> This principle stipulates that the first male son shall inherit the property of the deceased. He is known as the *Okpala or Diokpala*.<sup>153</sup> In this regard, even where there is a female child before the first son, he still inherits all property as the head of the family.<sup>154</sup> This principle largely discriminates against the female children on the basis of their sex.<sup>155</sup>

In the case of *Nezianya v Okagbue*, the court stated *inter alia* that the right of a widow over her deceased husband's property is merely a possessory right. She cannot act in such a way as to preclude her deceased husband's family from exercising an

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<sup>149</sup> Oni op cit note 24 at 32

<sup>150</sup> (1924)5 NLR 43.

<sup>151</sup> Oni op cit note 24 at 34.

<sup>152</sup> Ibid. See also Diala op cit note 7 at 642, Onuoha op cit note 15 at 2.

<sup>153</sup> Ibid.

<sup>154</sup> Ibid.

<sup>155</sup> Section 39, Constitution of the Federal Republic of Nigeria 1979, available at <http://www.constitutionnet.org/vl/item/constitution-federal-republic-nigeria-1979>, accessed on 2016.08.25.



absolute right over the property.<sup>156</sup> In this case, the parties were natives of Onitsha and the land in issue was in Onitsha. On the death of her husband, she assumed the property and let it to tenants. She sold a part of the land and from the proceeds, built two mud houses. She subsequently made attempts to alienate other parts of the land but was restrained by her deceased husband's family. The Supreme Court held that the right of the wife of the deceased is merely that of an occupier of land and her occupation is subject to the family's approval.

The court came to a similar conclusion in the case of *Ugboma v Ibeneme*,<sup>157</sup> where it held that in line with the customary law of the deceased (the customary laws of Anambra Local Government), women are not permitted to inherit land from their father. The court arrived at the same position in the case of *Ejiamaike v Ejiamaike*.<sup>158</sup> Here, Oputa J held that a widow of a deceased person has no right under Onitsha customary law to administer the estate of her late husband "especially where there is an "Okpala" (first male child) of the deceased who was not a minor". In deciding, the judge referred to the Yoruba case of *Aileru & ors v Anibi* where Jibowu J stated that under native law and customs, widows cannot administer the estate of their husbands.<sup>159</sup> The decisions of the court therefore simply show that customs that excludes women from inheriting property is neither repugnant, incompatible with an existing law, nor against public policy. This therefore, means that women and female children have no locus standing under customary laws to inherit property.

The court clearly gave supremacy of customary law over the provisions of both 1963<sup>160</sup> and 1979<sup>161</sup> Constitutions respectively, by stating that a widow does not have a right to administer property. The court of Appeal, however, took a different approach in the case of *Mojekwu v Mojekwu*.<sup>162</sup> In this case, the appellant (Mr. Augustine) relied on the *Oli Ekpe* custom, a custom in the South Eastern part of Nigeria, in instituting an action against the respondent who is the wife of the deceased. He claimed that he was

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<sup>156</sup> (1963) 1 All NLR 352.

<sup>157</sup> (1967) FNLR 251.

<sup>158</sup> (1972) 2 E.C.S.N.L.R at 11.

<sup>159</sup> Oni op cit 24 at 8.

<sup>160</sup> Section 28, Constitution of the Federal Republic of Nigeria 1963, available at <http://www.lawnigeria.com/CONSTITUTIONHUB/Constitution/1963ConstitutionofNigeria.html>, accessed on 25 August 2016. This provision expressly makes provision for the right against being discriminated against.

<sup>161</sup> Section 39, Constitution of the Federal Republic of Nigeria 1979, available at <http://www.constitutionnet.org/vl/item/constitution-federal-republic-nigeria-1979>, accessed on 26 August 2016.

<sup>162</sup> [1997] 7 NWLR 283.

entitled to inherit the property of the deceased. The basis for his claim was that the deceased had no male child before he died and based on this custom, a female child could not inherit property. He argued that, being the closest male to the deceased, he was entitled to inherit the deceased property. He stated that his father who is the closest male relative would have inherited the property but was also deceased, and as the heir to his father, he was therefore, entitled to inherit the property. The appellant claimed ownership of the deceased's house in the town of Onitsha, which the deceased had built on the land he had acquired from the Mgbelekeke family of Onitsha. The respondent claimed that her son, Patrick, who had predeceased his father, had fathered an infant son who should inherit the house. The appellant, however, denied the existence of any such son. The claim which the respondent sought was to declare that based on this custom a woman can inherit property. The court found for the respondent that it is immaterial that there was no son to inherit, since the Kola system governed the devolution of the property, and it allowed women to inherit property.

The court held that the *Oli Ekpe* custom was repugnant to natural justice, equity and good conscience, and consequently refused to enforce such custom. Furthermore, the court declared the custom invalid for infringing on a fundamental human right against discrimination guaranteed by the Constitution.<sup>163</sup> It emphasized that this custom conflicts with the provisions of the right to own property as guaranteed by the Constitution.<sup>164</sup> It therefore, declared the customary law invalid for infringing on the provision of the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) and the provision of the Constitution.<sup>165</sup> Although this decision restored the right of women to inherit property, it attracted a lot of criticism at the Supreme Court. This will be examined in chapter four.

It can therefore, be argued that the case gave meaning to the rights of women to inherit property and applied the provisions of the Constitution.

### **3.2.3. Hausa Tribe**

The Hausa culture on inheritance emanates from the Quran. There have been arguments as to whether Islamic law qualifies as a customary law since it is presumed

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<sup>163</sup> Section 39, Constitution of the Federal Republic of Nigeria 1979.

<sup>164</sup> Section 40, Constitution of the Federal Republic of Nigeria 1979.

<sup>165</sup> Article 2, of Convention on the Elimination of all forms of Discrimination against Women

(CEDAW) 1979, available at [www.ohchr.org/Documents/Professional Interest/cedaw.pdf](http://www.ohchr.org/Documents/Professional%20Interest/cedaw.pdf), accessed on 26 August 2016.

to be Divine.<sup>166</sup> There have been statutory definitions which describe customary law to include Islamic law.<sup>167</sup> The Plateau State customary Court of Appeal, a state in the Northern part of Nigeria defines, customary law as all native laws excluding Islamic law.<sup>168</sup> In 1999, Kano (a Northern) State separated Islamic law from customary law.<sup>169</sup> The other Northern States still recognizes Islamic law as the applicable law on succession. Islamic law has different schools, with the applicable one in the North being the Maliki School of Islam. This school regulates the affairs of Muslims even on inheritance.<sup>170</sup>

The Quran stipulates how property is to be distributed. It allows women and female children to inherit property, but not in equal proportions. The Quran recognizes the rights of each sex. It however, accords the male more rights to inherit property than the female gender, leading to discrimination against women and female children.

The mere fact that the Quran makes mention of the fact that women can inherit does not in itself mean that the rights of women and female children have been fully protected, considering that there are limitations on the extent to which they can inherit. This call for an application of the Islamic law in a way that allows both Nigerian Muslim women and men have equal rights to inheritance under Islamic law, considering that, it is the applicable law of the Hausa tribe.<sup>171</sup>

### 3.3. Conclusion

A major connecting factor among the three tribes is the heavy presence of infringement of rights of widows. These discriminatory customs have been judicially noticed by the courts as part of the customary laws of the people. The effect thereof is that widows and female children are left without a remedy. This shows the unfavorable challenges facing widows, including being called chattels that can be inherited, as well as being deprived of inheritance rights. Rather than the court protecting the

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<sup>166</sup> Abdulmumini A. Oba *Islamic Law as Customary Law: The Changing Perspective in Nigeria* (2002) 51 *Int'l & Comp. L.Q.* 817. Oba views that it is inappropriate to classify Islamic law as customary law.

<sup>167</sup> Section 34, Laws of Northern Nigeria, High Court Law (1963) Cap (49) see also Section 2, Laws of Kwara State, High Court Law (2007) Cap. (H2).

<sup>168</sup> Plateau State Customary Court of Appeal Law 1979. See also Abdulmumini A. Oba *Religious and Customary Laws in Nigeria* available on <http://law.emory.edu/eilr/content/volume-25/issue-2/religious-nigeria/religious-customary-laws-nigeria.html>, accessed on August 24, 2016.

<sup>169</sup> Section 29(2)(4) Kano State Sharia Courts Law, 2000.

<sup>170</sup> Asein op cit 10 at 118.

<sup>171</sup> Ibid .

fundamental Human Rights of women and female children, the court enforces discriminatory customary laws.

The decisions of the courts reflect continuous infringement and an unwillingness to guarantee women's right. Courts have failed to apply customary law in line with the provisions of the Constitution. Instead, they have determined the validity of such customary laws based on the repugnancy test.

Chapter four will consider the effect of a replacement of the validity of customary law from the repugnancy test to discrimination clause contained in the 1999 Constitution. There is therefore a need for an examination of post 1999 Constitution cases to determine how the courts have adopted the new change.

## Chapter 4

### A Review of the Recent Decisions by the Superior Courts in Nigeria on Women's Inheritance Rights under customary law Based on the 1999 Constitution with Lessons from South Africa

#### 4.0. INTRODUCTION

The judicial power of the state is vested in the court in Nigeria.<sup>172</sup> This power confers on the court a duty on the court to interpret the laws in line with the Constitution. In addition, Holmes views that, a law only becomes law when the court has interpreted and given a position on what the law really is.<sup>173</sup>

The courts have interpreted and given a position on the subject of distribution of property under customary law, the male primogeniture rule. This rule has been recognized as binding by the courts through a plethora of cases<sup>174</sup> particularly in the Eastern parts of Nigeria.<sup>175</sup> Although the male primogeniture rule was valid prior to the enactment of the current Constitution, it is doubtful that it will be seen as valid under this Constitution. This is because, it will be considered as impeding the right to own property by females. Also, this will be considered as discrimination on the basis of sex.

The Constitution recognizes customary laws under the broad heading of existing laws.<sup>176</sup> In this regard; the Constitution describes existing law as any law which was in force before the enactment of the Constitution.<sup>177</sup> This description encapsulates customary law which has been recognized by the court as a valid law. Customary law in this regard operates on two levels; first as living or official customary law, second as unofficial customary law.<sup>178</sup>

The official customary law in this regard refers to the customary law which has been recognized by the law and courts as binding.<sup>179</sup> The second level of customary law is the unofficial customary law, which is the customary law as practiced by the members of the community.<sup>180</sup> Although this has no official recognition, it remains valid to the people who recognize them as valid.<sup>181</sup> This is especially true as a major

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<sup>172</sup> Section 6, Constitution.

<sup>173</sup> Oliver W Holmes Jr 'The Path of the Law' (1897) *10 Harvard Law Review* 460-61.

<sup>174</sup> *Arase v Arase* supra 5.

<sup>175</sup> *Ibid.*

<sup>176</sup> Section 315(1) Constitution.

<sup>177</sup> Section 315(4) (b) *Ibid.*

<sup>178</sup> *Ibid.*

<sup>179</sup> A. N. Allott 'The People as Law-Makers: Custom, Practice, and Public Opinion as Sources of Law in Africa and England' (Spring 1977), *Journal of African Law*, Vol. 21, No. 1, Honour of Isaac Schapera at

<sup>180</sup> *Ibid.*

<sup>181</sup> *Ibid.*

feature of customary law is that it gains validity from the assent of the people. In this regard, the courts are bound to apply both levels of customary law.<sup>182</sup>

The Constitution stipulates that all existing laws, which include customary law prior to the enactment of the Constitution, shall continue to apply subject to modifications, necessary to bring it in form with the spirit of the Constitution.<sup>183</sup> However, for the court to apply customary law without conflicting with the Constitution there is a need for modification of customary law. The argument for a modification is premised on the flexible nature of customary law as it changes from time to time, thus there will be a need for modification and reform.<sup>184</sup> In this regard, the Constitution stipulates that modification can only be done by the appropriate authorities; these authorities include any person empowered by the law to revise, rewrite the laws.<sup>185</sup>

The definition of the appropriate authority reflects the legislature, or someone functioning in that capacity. Although, this description on the power of the legislature, the Nigerian legislature has attached low priority to the issues of women's right; this is evident as they recently voted against the equality bill, which has a huge impact on women's right.<sup>186</sup> The duty to develop the law customary law, therefore, lies on the court.<sup>187</sup> It can be argued that the description of 'any person' in Section 315(4) (iii) of the Constitution, also gives power to court while interpreting the laws to develop customary laws.

Also, in support of the court's duty to develop customary law is the provision of Section 315(3) of the Constitution, which empowers the court with the power to invalidate any provision of an existing law which infringes on the Constitution. Therefore, where a customary law means of distribution of property for instance expressly discriminates against women; the court has a duty to invalidate the discriminatory aspects of such customary law.

The effect of the provisions of Section 315 (3) and (4) of the Constitution is to balances the two systems by providing that the discriminatory aspect of the customary

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<sup>182</sup> Section 315(4) (b), Constitution.

<sup>183</sup> Ibid.

<sup>184</sup> T.W Bennett 'Customary Law in South Africa' (2004) at 17.

<sup>185</sup> Section 315(4)(a) Constitution.

<sup>186</sup> Matt Payton 'Nigerian Senate votes down gender equality bill due to religious beliefs' available at <http://www.independent.co.uk/news/world/africa/nigerian-senate-votes-down-gender-equality-bill-due-to-religious-beliefs-a6936021.html>, accessed on 24 October 2016.

<sup>187</sup> Wieland Lehnert 'The role of the courts in the Conflict between African Customary Law and Human rights'(2005) *21 South Africa Journal on Human Rights* ,241 at 253.

law of male primogeniture should be invalidated. Also, by doing so, Section 315 (4) of the Constitution which provides for modification will have been done, considering that by the invalidation; the courts have made a change to the customary law, which has the effect of bringing the customary law in line with the Constitution.<sup>188</sup> Consequently, the courts cannot perform their duty of invalidating the law, without a corresponding duty of developing and preserving the customary law.<sup>189</sup> Developing customary law in this regard involves modifying the customary law to expunge the discriminatory nature of the custom. Developing the customary law by way of modification will encapsulate invalidating the discriminatory parts of customary law of succession. Once the discriminatory aspects of the customary law are invalidated, there will be a better version of the customary law which will be preserved.

The need for development is to preserve existing laws and the customary system of law which is the essence of section 315 of the Constitution. Although, the drafters of the Constitution drafted this section in order to invalidate discriminatory customary laws and to enforce human rights particularly women's rights, it, however, recognized that not all customary laws are discriminatory. Thus, the courts have the power to invalidate only the aspects of the law that discriminates, the effect of this is that the courts modify and only the non discriminatory customary law is enforceable. Thus, the effect of invalidating customary law is a modification and development of the law.

The argument in support of reformation of customary law through the courts has also been advanced by Ndulo.<sup>190</sup> Although his argument is based on Southern African jurisprudence, lessons can be drawn and applied in Nigeria.<sup>191</sup> He stated that, there is a duty imposed on the court to develop and preserve customary law.<sup>192</sup> Lastly, he views that although legislative intervention is necessary but ultimately it is the court that has the duty to interpret and declare a law as valid.<sup>193</sup>

The argument of the thesis as regards developing the customary law particularly the rule of male primogeniture through the courts is to invalidate the discriminatory aspect of the rule but to retain the non discriminatory customary law. The effect is that in place of male primogeniture, property will be distributed equally

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<sup>188</sup> Section 315, Constitution.

<sup>189</sup> Ibid.

<sup>190</sup> Ndulo opcit 112 at 92.

<sup>191</sup> Ibid

<sup>192</sup> Ibid.

<sup>193</sup> Ibid.

amongst all the children irrespective of their sex but based on customary law, while the residue is held in trust for the younger members of the family, which is the essence of primogeniture.<sup>194</sup> The argument in support of the development of customary law is made for the following reasons; first is the preservation of the institution of the customary law system; where all customary laws are invalidated, the system of customary law will become extinct. Secondly, it is submitted that, by developing customary law, the members of the community will be more apt to apply the developed customary law, particularly where they are involved in the development.

Although the Constitution is supreme and binding, there are some areas of uncertainties which will require interpretation by the courts to reflect the spirit and intention of the law. Although, the legislature can make laws to further interpret the law, where there lays an ambiguity, the court will use different mechanisms to resolve this ambiguity. This primarily is through their interpretative powers, thus by interpreting the laws courts can modify the laws, where the literal meaning will result in manifest absurdity. Therefore, since resolving conflicts and ambiguities in the Constitution is primarily a duty of the court, then the court has a duty to modify the customary laws to resolve this ambiguity. This, therefore, gives the court the power to invalidate only the aspects of customary law that infringes on the Constitution and not the system of customary law. The implication of invalidating the discriminatory aspects of the customary law is a modification of the law, this then makes the law conform to the Constitution.<sup>195</sup>

The power to invalidate the law as conferred on the courts by the Constitution is not equal to law making powers, considering that law making powers is exclusive to the legislature under the Nigerian Constitution.<sup>196</sup> The power to invalidate, interpret laws and give binding decisions is to ensure certainty and predictability of the law also called judicial precedence.<sup>197</sup>

The relevance of this concept (judicial precedence) has created reluctance in the court to invalidate customary laws which violate the repugnancy, incompatibility and public policy test, set for validity of customary laws as stated in the cases cited in chapter three. Following the enactment of the 1999 Constitution, which has an equality

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<sup>194</sup> Jelili A. Omotola 'Primogeniture and Illegitimacy in African Customary Law: The Battle for Survival of Culture' *Ind.Int'l & Comp. L. Rev. Vol. 15:1* at 123.

<sup>195</sup> Section 315 Constitution.

<sup>196</sup> Section 4, Constitution .

<sup>197</sup> Asein opcit note 10 at 73.



provision, the disinheritance of women have been put to an end. In this regard, an examination of the decisions of the courts after the enactment of this Constitution is relevant in reflecting this.

#### ***4.1. The Shift in the Decisions of the court under the Post 1999 Constitution***

The Nigerian courts, prior to the 1999 Constitution, have over the years created through judicial system an idea that sustenance customary law was of more importance than the rights guaranteed by the Constitution. These decisions have clogged the wheel of development and have made lower courts bound, and compelled not to improve on the law but to apply the law as decided by the superior courts. Irrespective of how discriminatory the decisions are, the lower courts must apply the decisions until they are overruled by the superior courts. The Supreme Court in the light of development have done what seemed as equitable in a few cases, it will, however, be considered if it acted in conformity with the Constitution.

The Supreme Court had the opportunity to interpret customary law in line with the 1999 Constitution in the case of *Mojekwu v Iwuchukwu*<sup>198</sup> and to review the decision of the Court of Appeal. This case came on appeal from the Court of Appeal;<sup>199</sup> here the Court of Appeal declared the Ibo's *Oli-Ekpe* custom repugnant to natural justice. The court further invalidated this custom for conflicting with the human rights provision against discrimination guaranteed by the Constitution and Article 2 of the Convention on the Elimination of all forms of Discrimination against women.<sup>200</sup>

On appeal of the decision to the court of Appeal, the Supreme Court criticized the decision of the lower court for invalidating this custom, especially where that was not the issue raised by the parties.<sup>201</sup> The rationale for criticizing the decision is that neither of the parties raised the issue of the repugnancy of the *Oli-Ekpe* custom as an issue for legal determination.<sup>202</sup> The majority judgment given by Uwaifo J.S.C held that even though the Court of Appeal was concerned about the discriminatory nature of the *Oli-Ekpe* customary law, it however erred in law by condemning the custom solely because of its discriminatory nature.<sup>203</sup> He stressed that the Court of Appeal did not consider other customs which do not prescribe roles and rights for women, especially

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<sup>198</sup> (2004) NWLR (Pt. 883) 196.

<sup>199</sup> *Mojekwu v Iwuchukwu* supra 198.

<sup>200</sup> Ibid.

<sup>201</sup> *Mojekwu v Iwuchukwu* supra 198, Uwaifo J.S.C paragraph 5

<sup>202</sup> *Mojekwu v Iwuchukwu* supra 198, Uwaifo J.S.C paragraph 33

<sup>203</sup> Ibid.

with becoming family or community heads. He stated that the effect would mean that, a decision had been reached against all customs that has discriminatory tendencies, without giving the community that upholds this custom a right to be heard.<sup>204</sup> The rationale for this was laid down in the case of *Taiwo v. Dosunmu and Another*,<sup>205</sup> where Brett J.S.C held that there is no evidence that the customary law in one area is the same as that of another area.<sup>206</sup> Therefore by the Court of Appeal making a blanket statement especially for an evolving area like customary law attracted the disapproval of the Supreme Court. The Supreme Court however, agreed with the Court of Appeal that the Kola system was the applicable customary law, and this allowed women to inherit property, contrary to the claim of the claimant.

The Supreme Court in the case of *Anekwe & anor v. Mrs. Maria Nweke*,<sup>207</sup> had to revisit the issue of customary law of male primogeniture, here the defendant sought to disinherit the widow of the deceased from the property of her husband. He bases his claim on the fact that the widow has six female children with no male child and consequent to their customary law women and female children do not inherit property; thus he has the next male relation is the qualified successor of the property. The Supreme Court while condemning the custom stated that such customary law was repugnant to natural justice, equity, and good conscience. The lead judge, Justice Ogunbiyi berated the custom for being contrary to the developments on human rights, uncivilized, while condemning the custom she stated that the custom is barbaric.<sup>208</sup> She stressed that in this dispensation of enlightenment, such obvious discrimination should not be present. In addition, she stressed that the lawyer was unethical in advancing an argument for a barbaric customary law. Justice Muhammed in reaching a decision considered natural laws; stating that only God decides on the sex of a child thus to disinherit a woman and female child is contrary to natural laws.<sup>209</sup> Further Justice Ariwola adopted the natural law judgment of Justice Muhammed; he stated that the *Awka* customary law pleaded by the defendant is repugnant to natural justice and barbaric.<sup>210</sup> It can be argued that the decision and conclusions reached by the judges was reached on the basis of the repugnancy, incompatibility, and public policy tests.

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<sup>204</sup> Ibid.

<sup>205</sup> [1966] N.M.L.R. 94.

<sup>206</sup> *Taiwo v Dosunmu* Supra note 98, Paragraph 2, lines 48-51.

<sup>207</sup> (2014) LPELR-22697(SC).

<sup>208</sup> *Anekwe v Nweke* supra 12, per Ogunbiyi J. S.C at 36 paragraph F-G.

<sup>209</sup> *Anekwe v Nweke* supra 12, per Muhammed J. S.C at 38 paragraph D

<sup>210</sup> *Anekwe v Nweke* supra 12 per Ariwoola J.S.C at 43 paragraph D-E

Thus, there is little or no recognition of the equality provision of the Constitution which is the basis of all laws.

The Supreme Court also had to determine a matter of a similar customary law which excluded women from inheriting property in the case of *Mrs. Lois Chituru Ukeje & Anor v. Gladys Ada Ukeje*<sup>211</sup> here the deceased (Lazarus Ukeje) died intestate. The brother of the deceased sought to disinherit the female child of the deceased from the property of the deceased. Here, the focus of the claim is that the child was a product of an extramarital affair, hence an illegitimate child. Therefore, the plaintiff (illegitimate child) cannot inherit or apply for a letter of administration for the property of the deceased.

The High Court dismissed the application of the defendant for being discriminatory, which conflicts with the provision of Section 42(1) of the Constitution of the Nigeria,<sup>212</sup> which expressly provides that no one should be discriminated on the basis of sex, religion, tribe. The Court of Appeal upheld the decision of the High Court, unsatisfied by the judgment the defendant appealed to the Supreme Court. Here, the Supreme Court affirmed the decisions of the lower courts; it affirmed the decision restating that the Igbo customary law which excludes women from inheriting property is discriminatory. Justice Rhodes-Vivor, while giving the lead judgment stated that although the subject matter of the case is on the issue of the illegitimacy of the plaintiff; the customary law violates the provision of Section 42 of the Constitution.<sup>213</sup> Thus the customary law of male primogeniture in so far as it violates the equality section of the Constitution, it is declared invalid, it can however be inferred that primogeniture (without the express mention of male in that it is discriminatory against females) can be applied. Justice Ogunbiyi in alluding to this submission stated that the customary law violates the express provision also the court cannot enforce a discriminatory customary law.<sup>214</sup> This restates her position in the *Onyibor anekwe & Anor v. Mrs. Maria Nweke* of invalidating discriminating customary laws. Although in the former case where she decided based on the repugnancy doctrine like the other judges; in the latter case, she agreed with the lead judge and decided based on the equality provision of the Constitution.

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<sup>211</sup>(2014) LPELR-22724(SC) pp32-33).

<sup>212</sup> Section 42, Constitution of the Federal Republic of Nigeria 1999, Cap C3, Laws of the Federation 2004.

<sup>213</sup> *Ukeje v Ukeje* supra 13, per Rhodes-Vivor J.S.C 32-33, paragraph E-G.

<sup>214</sup> *Ukeje v Ukeje* supra 13, per Ogunbiyi, J.S.C at 37, paragraph A-E.

This thesis, however suggest that the Supreme Court could have modified the law by invalidating the discriminatory part. Following the fact that the learned Supreme Court Justice Ogunbiyi admitted that the customary law of male primogeniture is discriminated, the discriminatory aspect of the male primogeniture can be invalidated. Thus, the court could have invalidated the use of male from the concept of primogeniture. This sufficiently will have been an improvement of the custom of inheritance and will have no discriminatory nature. The argument in support of retaining the primogeniture rule is first, based on the trust concept heavily present in Nigeria, especially in relation to property and inheritance.<sup>215</sup> Property is believed to be owned by a large number of family members, some of whom are dead, others alive and some yet unborn, with the family head as the trustee of this properties, thus establishing the concept of primogeniture. This simply refers to the eldest as the trustee of the properties of the family property for the other members of the family, especially younger members of the family. Secondly, customary law is a source of Nigerian law,<sup>216</sup> thus to invalidate a customary law is expressly not recognising customary law.

The argument in favour of modification is to prevent a case of the proverbial throwing away the baby with the bath water; this is recognising that some aspect of customary law requires modification. An example is the discriminatory aspect of the male primogeniture, but where modified and the male prefix is removed from primogeniture, there will be a customary law devoid of discrimination.

An example of where the court modified a customary law was in the case of *Dawodu v Danmole*. Here, the court modified the method of distribution of property; prior to the modification, the method of distribution of property was through the wives (per stripes) otherwise called “*idi igi*”. This caused a lot of unfairness because, especially for polygamous families, in that one wife may have more children than the others, thus creating inequality for the children. The improvement of this method of distribution by the court recognized the *idi igi* method of distribution but created a remedy for children from polygamous families can benefit individually. The method of distribution used to be which is the distribution of property amongst the wives, this principle has however worked hardship in that, one wife can bear more children than another; thereby putting the children at a disadvantaged position. The court has

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<sup>215</sup> *Amodu Tijani v Secretary of Southern Nigeria* [1921] A.C 399.

<sup>216</sup> Asein opcit 10 at 23.

adopted a new position which is the “ori ojori” where the properties are distributed to all the children irrespective of the sex of the children.

#### **4.2. The Distinction and Implication of the Two Cases on the Protection of the Rights of women.**

The cases of *Onyibor anekwe & Anor v. Mrs. Maria Nweke* and *Mrs. Lois Chituru Ukeje & Anor v. Gladys Ada Ukeje* clearly reached the same conclusion which is protecting and guaranteeing the right of women to inherit property. However, they reached these decisions based on two different bases. In the former, the court gave judgment based on the repugnancy doctrine, premised on Section 14 of the Evidence Act.<sup>217</sup> This stipulates that where a customary law has not been judicially noticed, then the condition for its applicability is that it must not be repugnant, incompatible to existing laws and not contrary to public policy. In the above instance, it is obvious that discriminatory customary laws were otherwise judicially noticed in previous cases; however, change in time and development has made the court to jettison the judicially noticed discriminatory customary law. As noted by Justice Ogunbiyi in her judgment that in this dispensation, there should be nothing like an obvious discrimination in customary laws.<sup>218</sup> It therefore, resonates that the court is majorly responsible for the development of customary laws, which must be in line with the laws. In this regard, the flexibility characteristic of customary law is brought to the fore. Consequently, it can be inferred that this judgment was based on the developmental and flexible nature of customary law.

The decision of the Supreme Court in the subsequent case relying on the equality section of the Constitution fundamentally guarantees the right of the female children against discrimination. In this regard, it ensures that equality transcends beyond the equality of sexes but also the circumstances of birth. Thus, it stretched the boundary of the right against discrimination to illegitimate children, therefore any customary law which discriminates against any form of gender or circumstances of birth on any issue will be invalidated.

The decisions of the Supreme Court are highly commendable as it expunges all forms of discrimination; however, it can be argued that the court only performed its duty in part. Here, by invalidating the customary law for being discriminatory, the

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<sup>217</sup> Section 14(3) Evidence Act, Chapter 112, Laws of the Federation 2004.

<sup>218</sup> *Anekwe v Nweke* supra 12, per Ogunbiyi J. S.C at 36, paragraph D.

court has solved the problem of discrimination; however it has created a problem of extinction of customary law. This is a case of the proverbial throwing away the baby with the bath water. The Constitution provides for the preservation of existing laws and in the circumstance customary laws.<sup>219</sup> This provision as stated above requires that customary law shall continue to exist subject to modification necessary to bring it in line with the Constitution. Furthermore, it provides the appropriate authority that can make such modification; this includes anyone appointed by law to perform such function.<sup>220</sup> In addition, it can be further argued that the essence of section 315(3) of the Constitution is preservation and reformation of existing laws through invalidating discriminatory aspects of customary law. Consequently, the duty to reform customary law residing on the court is better advocated in Nigeria considering the lack the lack of interest in protecting the rights of women displayed by the legislature in voting against the equality of sexes Bill.<sup>221</sup> Therefore, this thesis argues that the courts can invalidate the discriminatory prefix “male” from male primogeniture and retain the concept of primogeniture.

In this regard, it is advocated that the properties of the deceased be distributed evenly, however the eldest child should be in charge of managing the estate of the deceased, especially for infant children. This is because of the trust concept richly available under customary law in Nigeria, as it is noted that property is owned collectively by the family and the family head as trustee.<sup>222</sup> This position of trustee should be available to the eldest child irrespective of the sex of the eldest child. It is also relevant to state that the original idea behind primogeniture is to ensure that property remains in the family and the eldest child sufficiently caters for the younger members of the family. However, due to modernization people have misapplied the custom for their selfish intents, thereby taking the custom to

The two cases further illustrate the power of the courts not to only invalidate customary law, but to modify the laws as stipulated by the Constitution; in other to conform to the Constitution.<sup>223</sup> The effect will bring customary law to the meet the

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<sup>219</sup> Section 315(1) Constitution.

<sup>220</sup> Section 315 (4) (c) Constitution.

<sup>221</sup> Hanibal Goitom ‘Nigeria Gender Equality Bill Fails in the Senate’ published on 28<sup>th</sup> March, 2016, available at <http://www.loc.gov/law/foreign-news/article/nigeria-gender-equality-bill-fails-in-the-senate/>, accessed on 8th November 2016.

<sup>222</sup> *Amodu Tijani v Secretary of Southern Nigeria* supra 215.

<sup>223</sup> Section 315 (1) Constitution.

needs of the changing society.<sup>224</sup> In addition, a clear understanding of the provision of the repugnancy tests and the provision of the existing law section of the Constitution imposes a duty on the courts to prune the repugnant aspect of customary law and make it align with needs of the current society.<sup>225</sup> Consequently, the need for the modification and invalidating of discriminatory aspects of customary laws flows from one of the characteristics of customary law which is that; it is flexible and changes from time to time.<sup>226</sup> Thus the courts have not fully performed their duty as intended by the repugnancy tests and the Constitution, considering that they could have simply invalidated the discriminatory provision of the law for being inconsistent with the Constitution and not the law itself.<sup>227</sup>

The Nigerian cases above are similar to the *South African case of Bhe v Magistrate of Khayelitsha*.<sup>228</sup> This case is brought to the Constitutional Court in order to confirm the order granted by the lower court recognizing the right of two female children to inherit the property of their father. One of the issues raised in this case is whether the children; a product of an extramarital affair, can claim the property of the deceased. The appellant, in this case, seeks to overturn the order given by the magistrate court, which gave the father of the deceased the right to manage the deceased's estate. The respondent claimed inter alia that the two children lack the right to inherit the property since they are illegitimate children, he made his claim while relying on Section 23 of Black Administration Act 38 of 1927 (the Act) which excludes female children from inheriting property. This includes both legitimate and illegitimate children based on the principle of male primogeniture. In lieu of the order granted, the grandfather of the female children tried to sell the dwelling place of the deceased but was opposed by the appellant who got an interdict to restrain him from doing so. The decision of the trial court was affirmed by the Supreme Court of Appeal and at the Constitutional court, the court declared the male primogeniture rule invalid. The court stated that principles, laws, and regulations must be consistent with the Bill of rights entrenched in the Constitution. In the circumstances, the customary law of

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<sup>224</sup> Dr F. A Ajayi 'The Interaction of English Law with Customary Law in Western Nigeria'. (1960) *Vol. 4 J.A.L.* 40 at pp. 103-105.

<sup>225</sup> Ibid. See Also O.W. Igwe 'Repugnancy Test and Customary Criminal law in Nigeria: A Time for Re-assessing Content and Relevance' available at <https://www.researchgate.net/publication/275271417>, accessed on 11<sup>th</sup> November 2016.

<sup>226</sup> *Owonyin v Omotosho* supra 34.

<sup>227</sup> Section 315 (3) Constitution.

<sup>228</sup> (CCT 49/03) [2004] ZACC 17.

male primogeniture violates the equality, dignity, and right to own property provision of the Constitution.

The Constitutional Court raised the provision of the Constitution which South Africa is a party to, which clearly provide against discrimination. Consequently, the majority judges declared the male primogeniture principle raised by the deceased's father invalid. First, the customary law infringes on the right to dignity of the children as provided by section 10 of the South African Constitution. This section provides that dignity of every person shall be protected by the Constitution; this is based on the colonial history of South Africa. Thus anything that touches on the dignity of any person will be invalidated. In this regard by disinheriting the female children based on their illegitimate status touches on their human dignity. Secondly, the court held that the male primogeniture rule violates the provision of section 9 of the Constitution which guarantees equality of sexes. Here, the Constitution ensures the protection of the right of women and female children against discrimination, this right is also contained in international instruments. Thus any customary law which discriminates against the right of women will be abolished. In holding that this customary law is in breach of this right, the Constitutional Court relied on the case of *Fraser v Children's Court, Pretoria North, and Others*. Here Mahomed DP viewed that what is required in the changing society, is equality of the rights of all both male and female. Also, no one should be discriminated against on the basis of sex. In addition, the discrimination of children on the basis of their circumstance of birth clearly violates the provision of Section 9(3) of the Constitution. This provides that no one shall be discriminated against on the basis of the circumstances of their birth. It also violates the provision of Article 2 of the United Nations Convention on the Right of a child.<sup>229</sup> Therefore, since Section 23 of the Black Administration Act conflicts with the right to equality and dignity, the court must invalidate it. Also, while invalidating as stipulated by Section 17(2) of the Constitution; an equitable order must be granted. In the circumstance, the majority of the Constitutional Court decided to apply the common law rule on succession to customary law. The effect is neglecting the option to develop customary law. However, Ngcobo J in his minority judgment, decided against applying common law to customary law, rather; he decided that customary law should be developed.<sup>230</sup>

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<sup>229</sup> South Africa became a party to the United Nations Convention on the Rights of the Child on 16 July 1995.

<sup>230</sup> *Bhe v Magistrate of Khayelitsha* supra 228 per Ngcobo at 86, paragraph 139.



Here, the law should be developed by recognizing the essence of the primogeniture rule but expunging the discrimination. This is done by involving the community members; thereby ensuring the preservation of living customary law of the people.<sup>231</sup>

Lehnert argues that the development of customary law will further guarantee the recognition of customary law by the Constitution.<sup>232</sup> Considering that, the application will be in line with the express provision of the Constitution. Further in recognition of the flexible nature of customary law; there is a need for a flexible form of reform which is only possible by the courts. Thus, a case by case approach is relevant in ensuring that customary law reform grows with development.<sup>233</sup>

### **4.3. Conclusion**

The decisions of the Nigerian Supreme Court have clearly laid the foundations for the extinction of discrimination of sexes on the subject matter of succession. However, the court failed to lay foundations for the protection of customary law which the minority judge in *Bhe v Magistrate of Khayelitsha* explored. It is noted that by invalidating the customary law, the Supreme Court terminated the customary law of inheritance (Male Primogeniture) which definitely is not the intention of Section 315(3) of the Constitution. In that, the court could merely have invalidated the discriminatory aspect of the customary law and not the customary law itself as stipulated by the Constitution.<sup>234</sup> Furthermore, the decision may reflect victory but this may not be absolute in that customary law is a recognised source of law in Nigeria, and to invalidate a customary law absolutely may be unconstitutional. Thus, there is a need to balance the laws where possible; this will do two things below.

The first benefit of balancing the laws is preservation of the rights of the female gender by recognising that they can inherit property as a stakeholder; more specifically, instead of being a mere possessor of the property they should become owners, thus they have equal stake in the ownership of the property as the male members of the family. The second benefit is smooth running and application of the decisions of the court in practice. Here, merely invalidating the customary laws may not automatically terminate the existence of the customary law, rather where the members of the community are involved in the reformation of the customary law,

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<sup>231</sup> Lehnert op cit note 36 at 270.

<sup>232</sup> Ibid.

<sup>233</sup> Ibid at 274.

<sup>234</sup> Section 315 (3) Constitution.

where the law is reformed it will be accepted and applied. This follows the nature of customary law, that it gains validity from the assent of the people, not by any force of law or decision of a court.<sup>235</sup> In addition, where the members of the community are involved in the reformatory process as initiated by the court, it further guarantees the validity of the customary law and acceptance by the people.

The institution of customary law, largely being a people determined system of law is one which no arm of government can reform without their consent. Thus, since the courts are in a better position to take develop the customary law on a case by case analysis, but doing so with contribution from the members of the community.

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<sup>235</sup> *Owonyin v Omotosho* Supra, see also *Lewis v. Bankole* supra note 157.

## CHAPTER 5

### CONCLUSION AND RECOMMENDATIONS

#### 5.0. CONCLUSION

The aim of this thesis was to examine customary laws prior to the 1999 Constitution era and how the courts have developed customary law in this period. In this regard, the purpose of researching on this is to state that the court plays a major role in the development of customary law. It does so using the tests available to either invalidate or uphold customary law. These tests include the repugnancy, incompatibility, and public policy test, this held sway until the enactment of constitutional governance in Nigeria. Furthermore, the courts continually, apply these tests to ensure that only satisfactory customary laws are enforced.

The intent of these tests is to make customary law on the same rank with common law provided it complied with the tests. Admittedly, the interest of preserving the customary law was not for the natives but to ensure that laws had the same level of civility as common law. Therefore, the courts had a duty to constantly expunge any law which failed any of the tests. By so doing, it advanced and developed the scope of customary law.

Despite these tests, the superior courts through a long line of cases have failed to declare discriminatory customary laws invalid, male primogeniture for instance. This can be because of the discretion given to the courts to determine when a customary law is repugnant, incompatible to an existing law and contrary to public policy. Clearly, the courts did not invalidate the discriminatory customary laws since they never saw them as repugnant.

The effect of upholding the discriminatory customary laws is that the courts have helped in promoting discriminatory customary laws. This contributes negatively to the development of customary law. Furthermore, by upholding these customary laws, the superior courts laid binding precedents which lower courts are bound to follow until such decision has been overturned by the superior courts.

The far-reaching effect on women and female children is a deprivation of the right to own property; although not an express right prior to Constitutional governance in Nigeria. The courts generally took judicial notice of these discriminatory customary laws, although they failed to comply with the tests for the validity of a customary law. Following the failure of the application of these tests and the introduction of

Constitutional governance in Nigeria, customary law became subject to the equality provision of the various Constitutions.

The equality section provided that no one must be discriminated against on the basis of sex. Thus, in the right to own land, no one should also be precluded from owning land on the basis of sex. Therefore, where a customary law (male primogeniture) precludes women from inheriting property, it violates the express provision of the Constitution. The courts in line with these provisions invalidated customary laws which precluded women from inheriting property. However, invalidating the customary law without developing the law to conform to the stipulation of the Constitution is in itself a violation. Considering that, the shift in the standard of validity of customary law from the repugnancy, incompatibility and public policy to the equality section is a form of development.

Furthermore, in order to sufficiently carry out this task, the courts are to invalidate only the discriminatory aspect of the law and to interpret the law in conformity with the Constitution. Thus, by invalidating the customary law, in the two cases referenced amounts to wrong interpretation of the Constitution. The Constitution contemplates development of the law not a total invalidation of the law, thus the total invalidation of the customary law amounts to an error of interpretation of the Constitution.

The intent of the Constitution, by recognizing customary law but subjecting its existence to the equality section of the Constitution is to balance the need to preserve customary law on the one hand with the need to guarantee human rights. Therefore, the courts have a duty to interpret customary law within the context of the Constitution and to do so by guarantying the rights of all Nigerians and in this regard, women right. This thesis, suggests that courts in invalidating customary law, should not invalidate the system totally, but should invalidate the discriminatory aspect. In this case, the discriminatory aspect of the custom is emphasis on the male gender which ultimately discriminates against the female gender. Thus, development of the customary law involves the courts invalidating the concentration on the male gender in the customary law of primogeniture.

The very essence of expunging the discriminatory aspect is to keep existing laws and by extension, customary law in line with the Constitution. It is therefore advised that subsequent courts should invalidate the discriminatory aspect which is the

express mention of a specific gender and retain the institution of customary law of primogeniture because of its rich value to Nigerians.

### 5.1. Recommendations

The way forward in preserving customary law is to first understand that the courts do not make laws or repeal laws. However, the courts have a responsibility to interpret laws which must conform to the stipulations of the Constitution. Consequently, the Supreme Court should while interpreting customary law consider expunging only the discriminatory aspect of customary law but should preserve customary law.

Also, the court should not limit the decision or judgment to a particular area of Nigeria but should be holistic in approach, such that it encompasses and reforms all customary laws with discriminatory tendencies. In addition, in interpreting the customary law; the court should involve the members of the community in the development of the customary law. In this regard, wider consultation and enlightenment will help develop the customary law as reformed by the court. Further, since customary law is a mirror of acceptable usage, where the courts haven explained the rationale for the reform, the application of the reformed law will be generally accepted thus leading to a development of the law.

Lastly, the duty of reformation is not to abrogate the law-making power which is the exclusive preserve of the legislature; rather it is to ensure that the application of customary law does not lead to manifest absurdity. To serve this purpose, there should be constant training of judges on development of customary law.

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