

**PROTECTION OF WOMEN UNDER CUSTOMARY LAW IN NIGERIA:
TAKING A CUE FROM SOUTH AFRICA***

Abstract

The rights of women have been appraised at the national, regional and international levels. Globally, countries have tried to assuage the rights of women by signing conventions, treaties, which protect the fundamental human rights of such individuals. Nigeria is one of those countries that have signed several conventions that aim to protect women but challenges exist especially in the area of customary law in relation to property rights. On the dissolution of marriage in Nigeria, it appears that the law discriminates against women under customary law and hence, such women do not have rights to the property that may have been acquired during the subsistence of the marriage. The native law and custom regulate the celebration of customary law marriage and there is no substantive law that protects the interest of women. This article will therefore discuss customary law and it will be comparatively compared with South Africa to determine whether it is of great necessity to develop a legal framework for the protection of the rights of women under customary law.

Keywords: Customary law, Marriage, Property rights

1. Introduction

In African countries, where there are laws providing for co-ownership of marital property such as the family home or assets, these laws have proven very difficult to enforce because they go against the cultural practice of a community.¹ Nigeria operates a tripartite system of marriage under its legal system and it includes Statutory, Customary and Islamic laws. In other words, there are three types of marriage recognised under the Nigerian law.² Such marriages are categorized into either monogamous or polygamous marriages.³ The monogamous marriage is obtained under statutory marriage whilst polygamous marriage includes customary and Islamic marriages.⁴ Statutory marriage is marriage under the Act and it is referred to as the union of one man and one woman to the exclusion of all others.⁵ Customary law is referred to as the living law of a particular region which is generally accepted from community to community and is subsumed under native law and custom. A major characteristic is the capacity of the man to marry more than one wife at a given time and there is no limitation on the number of wives that a man may marry under native law and custom. This form of marriage falls under polygamous marriages.⁶ Another type of polygamous marriage is Islamic law. It is a system based on the Islamic religion and its sources are the Holy Quran, the practices of the Prophet, otherwise known as the *Sunna*, the consensus of scholars on obscure points together with analogical sayings from the Holy Quran.⁷ It should be noted that there are distinct characteristics between customary and Islamic marriages and they should be regarded as separate types of marriage. The types of marriage and their features is not part of the discussion in this paper. The aim of this article is to discuss indigenous customary law marriage as it relates to native law and custom of any given community. Customary law has been described as a mirror of accepted usage, and⁸ it emerged from the traditional usage or practice of particular people in a given community, which by common adoption and acquiescence on their part, and by long and unvarying habit, has acquired to some extent, the element of compulsion, and force of law with reference to the community.⁹ It is believed as being the law that was handed down from generation to generation and this usually represents a collection of precedent and decisions that was

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¹ J. Fenrich and T.E. Higgins. *Promise Unfulfilled: Law, Culture and Women's Inheritance Rights in Ghana* [2001] *Fordham International Law Journal* 25, 259-336

² E.I. Nwogugu. *Family Law in Nigeria*. [2014] (Third Edition) HEBN Publishers Plc, p.4

³ *Ibid.*, at p. 5

⁴ E.I. Nwogugu, *Family Law in Nigeria*. [2014] (Third Edition) HEBN Publishers Plc

⁵ E.I. Nwogugu, at p.41

⁶ *Ibid.*, at p.9

⁷ *Ibid.*, at p. 10

⁸ *Owonyin v. Omotosho* (1961) 1 All N.L.R. 304

⁹ N. Tobi, *Sources of Nigerian Law*. MIJ Professional Publishers Ltd. at p.104

recorded by ancestors.¹⁰ In other words, the customs, rules and traditions which govern the relationship of the members of a community are regarded as the customary rights of the people.¹¹ Customary law is recognised by the courts and exists as a second body of law and it has the greatest control over people in rural areas or in so far as it regulates issues such as marriage and inheritance.¹²

Under customary law marriages, the wife is often regarded as the property of the man and is unable to avail herself the benefits that is accrued under statutory law marriage.¹³ A distinction between testate and intestate succession to ascertain whether it plays a role under property rights of women will also be examined. The antecedents of customary law will also be discussed in line with property rights and there will be an examination of whether the woman has any right to claim under the law or whether it could be termed as a form of discrimination and gender-related issues. In Nigeria, the right of women to own property can be defined as a crucial feature which is determinative to their fundamental human rights. The indispensable truth is that women are sometimes neglected and treated with preconception in respect of the right to succession and of equal opportunity under customary law.¹⁴ This is evident when women are undergoing divorce and they find it difficult to inherit from the estate of the husband.¹⁵ This paper will discuss customary law, the right of women to inherit under customary law, the challenges that exist in accessing such rights. It will also discuss gender and culture and how it affects customary law. The incidence of culture will also be examined in order to find out whether it plays a vital role in determining the inheritance rights of women.

2. History of Customary Law

Before the advent of the colonial masters, there was in existence a system of law which is known as native law and custom to settle disputes so long as they are not repugnant to natural justice, equity and good conscience.¹⁶ It can also be referred to as the law of various indigenous peoples of Nigeria before other systems of law evolved and came into the country to displace or modify it from England.¹⁷ Native law and custom, that is, customary law was the only legal system which existed among the indigenous peoples and communities long before colonialists, religious or any other systems of law came into the settlement known as Nigeria today.¹⁸ During 1841 and 1904, a British journalist who came to Nigeria took cognizance of the existence of a system where decisions and disputes were settled through arbitrations by family heads, community head or tribal head and it was satisfactorily recognised and accepted as a medium for dispensing justice.¹⁹ Customary law can therefore be referred to as the law that has been in existence for centuries. The way it is now, indicates that it has been neglected for too long and there should have been the enactment of a law that recognises the rights and interests of women after the dissolution of the marriage.

3. Indigenous Customary Law

The sources of law in most African countries are customary law, common law and legislation that are both colonial and post-independence.²⁰ The main sources of Nigerian law are the Constitution of the Federal Republic of Nigeria 1999 (As amended), Legislation which consist of Ordinances, Acts, Laws,

¹⁰ E.A. Taiwo. The Repugnancy Clause and its impact on customary law: Comparing the South Africa. [2009] *Journal for Judicial Science*, 34(1)

¹¹ Ibid. at p. 104

¹² S.F. Joireman. The Mystery of Capital Formation in Sub-Saharan Africa: Women, Property Rights and Customary Law.[2008] *World Development*, Volume 36, No. 7, 1233-1246

¹³ Food and Agriculture Organisation of the United Nations. Gender and Land Rights Database. Customary norms, religious beliefs and social practices that influence gender differentiated

¹⁴ Y. Olomjobi. *Human Rights on Gender, Sex and the Law in Nigeria*. Revised Edition. [2015]Princeton Publishing Co. Ltd. at p. 161

¹⁵ Ibid. at p. 161

¹⁶ C. Nwagbara. *The Nature, Types and Jurisdiction of Customary Courts in the Nigeria Legal System*. [2014] *Journal of Law, Policy and Globalization*. Vol.25. Retrieved October 11, 2020 from <https://heinonline.org>

¹⁷ E. Malemi. *The Nigerian Legal Method* [2010] Published by Princeton Publishing Co., at p.215

¹⁸ E. Malemi, *ibid*, at p, 215

¹⁹ *Ibid.*, at p. 216

²⁰ M. Ndulo. African Customary Law, custom and Women's Rights.[2011] *Indiana Journal of Global Legal Studies* 18(1), 87-120

decrees, edicts and bye-laws; Received English law;²¹ Customary law; Islamic Law; Judicial precedents.²² Customary law embodies customs as practiced by the people which they regard as binding on them. Customs are the habits, attitude of a particular community and it is said to be binding and dictates their way of life.²³ It has an immense impact on the lives of the majority of Africans, in particular Nigeria in relation to custody, marriage, inheritance. Customary law can also be described as a usage or practice of the people which by common adoption and acquiescence and by lone and unvarying habit has become compulsory and has acquired the force of a law with respect to the place or the subject-matter to which it relates.²⁴

Customary or traditional law is the indigenous law of Africa and so, it is a body of customs and traditions that regulates the different kinds of relationship between members of the community.²⁵ In *Oyewunmi v. Ogunesan*,²⁶ it was stated by Obaseki that customary law is the organic or living law of the indigenous people of Nigeria regulating their lives and transactions,²⁷ and is said to be a language of human interaction.²⁸ Onokah also describes customary law as the customs that are practised by the people and it is binding on them.²⁹ It is a system of law which is enacted by legislation but it is enforceable and binding within Nigeria as between the parties subject to it.³⁰ The legal rights of women are rooted upon certain customs, traditions and religious connotations which are believed to have been passed from one generation to the next. Such customs and traditions include the notion that women are mainly for child bearing which is construed as being wrong.³¹

4. Characteristics of Customary law

Customary law is presumed to be the general law of the people in Nigeria and is to be treated as law per se for all purposes.³² For customary law to be recognised, there are several characteristics of customary law which must be discussed. One of such is that it must be in existence at the material time. It was held in the classical case of *Lewis v. Bankole*³³ that the native law and custom that is enforceable must be the existing natural law and custom, and not that of bygone days. That is, it must be a custom that is recognised by that community. Also, in *Dawodu v. Danmole*,³⁴ a man was survived by four wives and nine children but the contention in question was to determine how the property of the deceased who died intestate should be distributed. The court had to determine whether it could be through *Idi-Igi*, which is according to the number of wives or *Ori-ojori*, which is according to the number of children. Even though there were two conflicting customs, the Supreme Court held that the *Idi-igi* should be applied since it was the prevailing custom.

A second characteristic is its being accepted within the community in which it operates and can only be effective when the members of the community accede to it. On the other hand, when a custom is too harsh, it cannot stand the test of time because the community will not accept it as her own.³⁵ A major feature of customary law is that it is largely unwritten and for this reason, it is said to be vague, and unclear both in its content and in application. The reason why it is unwritten is because it is not written

²¹ This consists of common law, equitable doctrines and statutes of general application that were in force in England on 1 January 1900

²² Legal systems in Nigeria: Overview/Practical Law. Received 3 October 2020 from uk.practicallaw.thomsonreuters.com

²³ T.E. Ekpang. *An Introduction to Customary Land Law in Nigeria*. [2013] Wusen Publishers, Calabar, Nigeria. Retrieved from <https://edupediapublications.org/journals/index.php/IJR>

²⁴ A. A. Kolajo. *Customary Law in Nigeria through the Cases*. [2001] Ibadan: Spectrum Books Ltd. [Paper reference 6]

²⁵ A.O. Obilade. *The Nigerian Legal System*, at p.83

²⁶ (1990) 3 NWLR (pt.137) p. 182, 207

²⁷ A. Ibidapo-Obe. *A Synthesis of African Law*. [2005] Concept Publications Limited, at p. 34

²⁸ A.O. Obilade. *The Place of Customary Law in our Legal System*, op.cit. at p. 1

²⁹ M.C. Onokah. *Family Law*. [2003] Spectrum Books Ltd., at p. 35

³⁰ *Kharie Zaiden v. Fatima K. Mohassen* (1974) UILR 283 at 284

³¹ R. Muftau. An Appraisal of the Legal Rights of Women in Africa.[2016] *Journal of Law, Policy and Globalization*, Vol.52

³² Proof of Customary Law in Nigerian Courts. 4 *Nigerian L.J.* 20 (1970). Retrieved from <https://heinonline.org>

³³ (1908) 1 N.L.R. 81

³⁴ (1958) 3 FSC 46

³⁵ *Eshugbayi Eleko v. The Officer Administering the Government of Nigeria* (1931) A.C. 662 at 673. See also Niki Tobi. *The Sources of Nigerian Law*. MIJ Professional Publishers Ltd., at 107

down in a statute book as it is for the statutory marriage and other laws.³⁶ In *Alfa v. Arepo*,³⁷ it was affirmed that, “customary law may be defined as the unwritten law or rules that are recognised and applied by the community as governing its transactions and code of behaviour in any particular matter.”³⁸ Lastly, a paramount feature of customary law is the fact that it is flexible, elastic, dynamic and it changes with the time, that is, customary law changes with the society that observes it and this has been noted by different scholars as being the way of life of particular people.³⁹

Customary law is not codified but it arises from the traditional rules of conduct governing the people in a communal setting.⁴⁰ It is therefore any system of law not being the common law and not being a law enacted by any competent legislature in Nigeria but it is enforceable and binding within Nigeria as between the parties subject to its application.⁴¹ It is largely unwritten, but it is easily applied to particular situations at particular times. That is, it is easily adapted to changing circumstances and it is universally applied within the area of acceptability. In addition, customary law is applied universally within an area which is acceptable to the whole community. Notwithstanding however, customary law varies from one community to another and also from one ethnic group to another.⁴²

5. Laws protecting women under Statutory Marriage versus Customary Marriage

Under Customary law, there are no laws protecting women in ascertaining their rights over properties that may have been acquired during the marriage. On the other hand, the statutes make provision for the protection of women under the statutes. Firstly, there is the Married Women’s Property Act 1882 which makes provision for women the right to acquire, hold or dispose of property, before or after, marriage. Hence, the right of a woman may be enforced through the court process.⁴³

There is in addition the Marriage Act⁴⁴ whereby a woman validly married under the Act, would also enjoy equal rights to the assets of the family. If the marriage has been dissolved, the wife stands to gain during and after the marriage or upon the death of her husband. Under the Matrimonial Causes Act,⁴⁵ women also have a share of the property of the family in the event of divorce on grounds of equity. It is pertinent to note that customary laws are not protected by statutory law, despite the fact that it is widely celebrated and it is the most common form of marriage.

6. Protection of women under Customary Law upon Dissolution of Marriage

Under Customary law, there is no judicial machinery for the enforcement of the husband’s duty to maintain his wife. Since it is a marriage between families, the wife may resort to extra means to ensure that her husband, (though not living with her), provides the basic necessities.⁴⁶ Upon the dissolution of the marriage, it is assumed that the man would be duty-bound to maintain his wife and provide basic needs such as food, clothing and shelter for the wife but this is not always so, under customary law marriage. Even though under the law, a wife has a right to maintenance by the husband on the provision of the necessities of good living but there is no obligation on the part of the husband to do so as the duty to maintain a wife is usually determined by the mode of dissolution.⁴⁷ Customary law marriage may be dissolved through different methods. It could be judicial, non-judicial or upon dissolution by death.⁴⁸ In customary marriages, the wife is often regarded as the man’s property and is generally not expected

³⁶ N. Tobi, op.cit. at p. 108

³⁷ (1963) WNLR 95 at 97

³⁸ Ibid.

³⁹ E. Malemi, op.cit., at p. 223. See also *Kimdey v. Military Governor of Gongola State* (1988) 2 NWLR Pt. 77, p. 445 at 461. See also Ikenga K.E. Oraegbunam, ‘Principles and Practice of Justice in Igbo Customary Jurisprudence’, *Ogirisi Journal*, Vol. 6, 2009, pp.53-85. Available at <http://www.ajol/index.php/og/article/viewFILE/52335/40960>.

⁴⁰ T. O. Elias, op. cit.

⁴¹ N. Tobi, at p. 108-109

⁴² Ibid, at p. 110-111

⁴³ Women’s Property and use rights in personal laws/Gender and Land Rights Database. Food and Agriculture Organization of the United Nations. Accessed from www.fao.org/countries-list/women.../

⁴⁴ Laws of the Federation 2004

⁴⁵ Matrimonial Causes Act, Laws of the Federation 2004

⁴⁶ E.I. Nwogugu, op.cit. at p. 293

⁴⁷ Ibid, p.292

⁴⁸ Ibid, p.292

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to entertain any measure of equality in whatever form in the marriage. The wife cannot avail herself of the benefits enjoyed by a woman married under the Marriage Act. When her husband dies, she is more or less dispossessed but, in the advent, that the husband dies, all her properties are inherited by the husband.⁴⁹ Women under customary law rarely inherit and mostly obtain its use through the permission of their husbands. In most communities, a woman that is separated or divorced from her husband is usually stigmatized no matter the circumstances of the divorce or separation,⁵⁰ and as such, women do not have equal rights in matters of marriage, dissolution, inheritance and right of property. They can own land if they buy, inherit or are given as gifts by their husbands but they lose the right to farm lands or any kind of property upon divorce.⁵¹

7. Property Rights under Customary Law

Nigeria has over two hundred and fifty different ethnic groups and the distribution of a deceased's estate under customary law is based on the customary doctrines of inheritance and succession of property.⁵² The law of inheritance and succession under the received English law is certain and settled but the aspect dealing with customary law is at variance and not largely settled. Hence, there is diversity of customs and practices among different ethnic groups.⁵³ Under customary law, there are basically two systems and they are patrilineal and matrilineal. Under the patrilineal society, succession is through the father's lineage, while the mother's lineage is under the matrilineal society. The predominant system however is the patrilineal society and this has ruled the affairs of women for a long period of time.⁵⁴ Succession rights under customary law depend on the applicable custom of an area but generally, the property of deceased persons are shared on the basis of equality. The first son is known as the *Dawodu* amongst the Yorubas, and is regarded as the putative head of the family, except where he is incapable in which a female member could be head if she is able to gain the support of other members of the family.⁵⁵

When a man dies, his children inherit his estate. A woman cannot however inherit the estate of her husband. It was held in *Suberu v. Sumonu*,⁵⁶ that a woman cannot inherit her husband's property and where there are no children alive at the time of their father's death, the property will devolve on the members of the husband's family or as the case may be. Inheritance could either be testate and intestate succession. However, the way in which a wife can inherit from her husband is if the property is given to her as a gift before the death of her spouse.⁵⁷ Where a deceased person makes a will, he is said to have died testate whilst a person who died but did not make a will, is said to have died intestate.⁵⁸ There is what is known as the primogeniture rule which states that the eldest son succeeds to the property of the deceased in certain communities. For instance, under the custom of the Bini, the property of a deceased person vests in the eldest surviving male heir who must have performed all the ceremonial burial rights, subject to any gift the father may have made during his life time to other children or any other persons.⁵⁹ Male children are permitted to inherit properties of a person who dies intestate under the primogeniture rule.⁶⁰ Where however, the eldest male heir died and leaving no male child, the next son or the eldest male descendant would inherit, and this can go on through generations.⁶¹ Under the Igbo customary law, the rules of inheritance is not uniform but nevertheless, there are similarities under

⁴⁹ Gender and Land Rights Database. Retrieved October 15, 2020 from <https://www.fao.org>

⁵⁰ Ibid.

⁵¹ Gender and Land Rights Database, Ibid.

⁵² T.O.G. Animashaun, and A.B. Oyenyin. *Laws of Succession, Wills and Probate in Nigeria* [2006]

⁵³ A. Taiwo, A. *The Nigerian Land Law*. [2016] Princeton Publishing Co. Ltd., at p. 194

⁵⁴ A. Taiwo, A. *ibid.*, at p. 195

⁵⁵ Akin Ibidapo-Obe, *ibid.* at p. 53

⁵⁶ (1957) 2 F.S.C. 33

⁵⁷ Inheritance and Customary Laws in Nigeria. 2018.

⁵⁸ T.O.G. Animashaun and A.B. Oyenyin, A.B. 2002. *Law of Succession, Wills and Probate in Nigeria*. MIJ Publishers, at p. 3

⁵⁹ A. Taiwo, *ibid.* at p. 196

⁶⁰ Kerr. *The Customary Law of Immovable Property* 99-100.

⁶¹ *Sonti v. Sonti* (1929) NAC (C&O) 23, 24. See further, Taiwo, A., *ibid.* at p. 196

such rules. It is the eldest son of the deceased that has a right to the properties and he is the one that has the right to the management of the family.⁶²

8. Gender and Culture

The stigma of discrimination on women is usually evident in institutions such as marriage, inheritance, politics, etc, and gender discrimination is believed to be the root of custom and male dominance as it is presumed that men are the custodians of the tradition of people. This is noted from the fact that the status and control over customs are held by traditional rulers and religious leaders and the patriarchal system is common.⁶³ In order to overcome age-old customs, it has been suggested that customary laws should be entrenched in a new legal system that will imbibe equality between the sexes.⁶⁴ However, despite the misgivings about the property rights of women, culture is a critical part of the lives of people which gives meaning and it is fundamental to the identities of people.⁶⁵ To a large extent, the instruments which tend to delimit women's right to property in Nigeria are customs and tradition. As a result of the tripartite system and also the patriarchy structures in the Nigerian societies, this has put the interests and values of men over and above women's interests.⁶⁶ A woman will not be able to enjoy or have any property rights as a result of customs and tradition that dictates the way of life for particular persons. Regardless of the fact that Nigeria is a member of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), this has not allayed the fears of women in the enjoyment of their property right. The provision states that all appropriate and necessary measures should be employed in order to eliminate discrimination against women, economically or socially.⁶⁷ States are also to take into account the particular problems faced by rural women and the significant roles they play in the economic survival of their families, including their work in the non-monetized sectors of the economy should also be analysed.⁶⁸ In spite of the CEDAW provisions, there is the absence of proactive legislation in Nigeria that removes the burden of customary practices especially when a man dies intestate.⁶⁹ Nigeria on his part, has only ratified this provision but it has not been domesticated the CEDAW convention. The problem which may arise in the international conventions which Nigeria has signed, stems from the provision as laid down in the 1999 Constitution. The Constitution of the Federal Republic of Nigeria states that such conventions cannot be adopted unless it has been approved by the National Assembly and until this clause is removed, the rights of women will continue to be discriminated.⁷⁰

Nigeria practices an intensely patriarchal system that generates gender differences and this system permits customs and traditions to exclude women's property rights.⁷¹ The wife is regarded as not having the right to own property but she is considered property to be owned. There is judicial notice of the courts of law in relation to the patriarchy system in Nigeria and the courts have held that such customs are not repugnant to natural justice, equity and good conscience. In the Supreme Court of *Ojiogu v. Ojiogu*,⁷² it stated that,

A custom is a way of life of the people. This particular one must have been borne out of the peoples' belief that a woman, particularly one that is married, is a chattel to be owned. Be that as it may, it remains the custom of the people unless in an appropriate case, it is properly and legally declared repugnant to natural justice, equity and good conscience. Hence, both parties

⁶² Inheritance and Customary Laws in Nigeria. 2018. Accessed through www.leadwaycapital.com/inheritance.../

⁶³ Y. Olomjobi, op. cit., at p. 42

⁶⁴ M. Ndulo, African Customary Law, Customs and Women's Rights. [2011] *Indiana Journal of Global Legal Studies*. Volume 18: (1): 87-120

⁶⁵ V. Bronstein. Reconceptualizing the Customary law debate in South Africa. [1998] *South African Journal of Human Rights* 14(3): 388-400

⁶⁶ Y. Olomjobi, op. cit. at p. 163

⁶⁷ Article 13, CEDAW 1979

⁶⁸ Article 14, CEDAW 1979

⁶⁹ Y. Olomjobi, op. cit. at p. 165

⁷⁰ Section 12, Constitution of the Federal republic of Nigeria, 1999

⁷¹ J.O.D. Akande. *Laws and Customs Affecting Women's Status in Nigeria*. [1979] International Federation of Women Lawyers, Nigeria.

⁷² (2009) 9 NWLR (pt. 1198) 1, S.C.

recognize this particular custom and relied on it in an attempt to establish their respective contentions, there was no question of the custom being repugnant therefore.

In *Suberu v. Sunmonu*,⁷³ the learned judge held that, “it is a well settled rule of native law and custom of the Yoruba people that a wife could not inherit her husband’s property since she herself is, like a chattel, to be inherited by a relative of her husband.” The case of *Shaibu v. Bakare*,⁷⁴ also reaffirmed the Supreme Court’s decision, that under the Yoruba customary law, when a man dies intestate, his property is transferred to the children, and not to the wife. In essence, the widow in itself becomes property that can be possessed by other members of the family of the deceased man. Thus, a woman may go through undue hardship as a result of such custom.

The restriction of a woman’s right to inheritance is not peculiar to Nigeria alone but also in other various African States and such women are treated as second class citizens.⁷⁵ Women are not entitled to inherit under customary law in some customs. In *Ogunbowale v. Layiwola*⁷⁶, the deceased was survived by three wives and three children, one from each wife. The second defendant had two houses. It was held that the court, setting aside the sale of the property held that nothing by way of property devolves on the wife/wives of a Yoruba man under customary law. It was further held that under the customary law, a wife who had children for the deceased could continue to live in the home of the deceased with her children. A wife without any children for the deceased if she desires to stay on with the family of the deceased would appear to have a right of occupation only. That is, the woman will not have the right to any property of her husband but she will have the right to stay in the house if she desires.⁷⁷ Hence, the rule that a widow cannot inherit her deceased husband’s property has become so notorious by frequent proof in courts that it has become judicially noticed.⁷⁸ In *Oloko v. Giwa*,⁷⁹ it was held that a room allotted to a wife on the death of her husband becomes part of the deceased’s real estate and not vested in the wife. The wife is privileged to use the property not as a member of the family but with acknowledgement of her husband’s membership of the family if and only if she does not remarry outside her deceased husband’s family after the death of her husband. Under customary law therefore, a wife is deprived of inheritance rights in her deceased husband’s estate because in intestacy under native law and custom, the devolution of property follows blood. A wife or widow not being of the same blood with her husband does not have any claim to such cause.⁸⁰

It seems however that women married under customary law do not have any identity because she is no longer seen as a biological member of the family as she becomes a visitor and is therefore excluded from family property inheritance. The role of a woman is therefore seen as that which is subsumed under her husband. Customary law connotes that a woman can only do certain duties with the permission of her husband.⁸¹

9. Customary Law Marriage in South Africa

In South Africa, there was a time when women did not have any right to possess any type of property or perform any legal actions without the assistance of a male guardian. Women were regarded as little children, no matter their age and the hardship was made worse by marriage

⁷³ (1957) 2 F.S.C. 31 at 33

⁷⁴ (1983) Sup. Ct.

⁷⁵ U. Ewulokwa. Post-Colonialism, Gender, Customary Injustice: Widows in African Societies. [2002] *Human Rights Quarterly*, 24(2): 424-486

⁷⁶ (1975) 3 CCHCJ/HC 323

⁷⁷ A. Taiwo, op. cit., at p. 198-199

⁷⁸ *Osilaja v. Osilaja* (1972) 10 SC 126

⁷⁹ (1939) 15 NLR 31

⁸⁰ *Davies v. Davies* (1929) 2 NLR 79, 80

⁸¹ Y. Olomjobi, op. cit., at p. 168

laws that put women under the power of their husbands. In this instance, this made the husbands the sole owners and controllers of the property in the marriage.⁸² In a bid however, to ensure that women are given equal rights under customary marriage, a new law was enacted known as the Recognition of Customary marriage Act 120 of 1988 and it came into force on 15 November 2000. With the enactment of the law, it ensured that no discrimination against African women was perpetrated and it does this, by officially recognizing all African customary marriages in South Africa.⁸³ Hence, under the South African law, discriminatory laws are declared unconstitutional and against the legal fabric of the law. In addition, it gives women in customary law marriage the same status and protection as women in civil law marriages. It also introduces equality between the husband and wife and does not raise the issue of gender inequality.⁸⁴ An interesting point under customary law marriage in South Africa is that such a marriage must be registered and once it is registered, a marriage certificate will be issued and the rationale is to be able to prove that the marriage did indeed take place. The establishment of the new law, therefore removes the cultural barriers against women and ensures that their rights are protected.⁸⁵ The purpose of the law passed in 1988 was to improve the position of women by using measures that brought customary law in line with the Constitution including South Africa's international human rights commitments.⁸⁶ A customary marriage similar with civil marriage, may only be dissolved by a decree of divorce issued by a court on the ground that the marriage had broken done irretrievably and there was no window of reconciliation.⁸⁷ This paper is not to critique the law but it is to ensure that Nigeria takes a cue in ensuring that women are protected under customary laws of the land and to find ways in which the gap can be filled so that women would have a legal right under the law.

The system of law in Nigeria does not prescribe the registration or recording of customary law marriages. There have been local governments making bye-laws but some of such laws do not make registration compulsory nor are penalties prescribed for failure to comply.⁸⁸ In a bid to ensure the registration of customary law, the Registration of Marriage Adoptive Bye-law Orders of 1956 which applies to some states in Nigeria was established.⁸⁹ Notwithstanding however, efforts to register customary law have not been satisfactory enough as there is no systematic and compulsory system of registration in some parts of the country.⁹⁰ Hence, some states have not made any bye-laws to this effect and as a result of this, a national system of registration for customary law marriages was instituted. It requires that any marriage contracted under customary law in Nigeria should be registered within sixty days in the area or customary court, where the marriage was contracted.⁹¹

10. Customary Law and Human Rights

The rule that women cannot inherit after their husband dies, can be deemed as discriminatory. Customary law has great impact on personal law as it dictates the affairs of marriage, inheritance and traditional authority.⁹² The customs, tradition that particular people practice but which dictates their ways of life is said to openly discriminate against such women. A woman who marries under customary law does not enjoy adequate legal protection when the

⁸² The Recognition of Customary Marriage in South African Law, Policy and Practice. Retrieved 15 October 2020 from <https://www.larc.uct.ac.za>

⁸³ The Recognition of Customary Marriage in South African Law, Policy and Practice. Retrieved 15 October 2020 from <https://www.larc.uct.ac.za>

⁸⁴ Ibid. Section 6 of the Recognition of Customary law expressly states that women in a customary marriage are on the same status, capacity and equal footing with their husband

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Customary Marriages in South Africa. Retrieved from <https://www.adams.africa>

⁸⁸ E.I. Nwogugu, op.cit at p. 75

⁸⁹ States such as Lagos, Ogun, Oyo, Ondo, etc

⁹⁰ E.I. Nwogugu, op.cit. at p. 76

⁹¹ Section 30, Births, Deaths, etc (Compulsory Registration) Act, CAP. B9, Laws of the Federation 2004

⁹² M. Ndulo. African Customary Law, Custom and Women's Rights.[2011] *Indiana Journal of Global legal Studies* 18(1), 87-120

distribution of asset arises.⁹³ Since Nigeria follows a patriarchal system, the women are not allowed to inherit real property. The woman would however lose because by culture, she is never allowed to come from her husband's house to inherit her father's property and neither is she allowed to inherit her husband's property either. It was stated by Duncan that women traditionally, and throughout their lives, can be equated to minor children. They are regarded as children of their father before they are married and after their marriage, they are children of their husbands; and during widowhood, they are said to be children of their heirs.⁹⁴

Though the Constitution of the Federal Republic of Nigeria prohibits discrimination on account of sex and provides that a citizen of Nigeria, or, of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person be subjected either expressly by, or in the practical application of, any law in force shall not be discriminated against for any reason.⁹⁵ Every citizen is entitled to acquire and own immovable property anywhere in Nigeria.⁹⁶ From the provisions of the constitution therefore, it infers that nobody should be discriminated against and in addition, there should be equality before the law. Equality can be said to be guaranteed in all facets of life by international and domestic law but in reality, there is still a wide gap between men and women in terms of inequality.⁹⁷ Despite this provision however, which is not specific-oriented, it has not allayed the plight of women in Nigeria.

Nigeria, being a member of the Convention on the Elimination of All forms of Discrimination against Women (CEDAW)⁹⁸ emphasizes the universality of the principle of equality of rights between men and women but it goes further to make provisions for measures to ensure equality of rights for women throughout the world. The Convention also condemns discrimination against women in all form, and any country abiding by it must agree in all appropriate means and without delay, a policy of eliminating discrimination against women and commence all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.⁹⁹ The convention also provides that state parties are obliged to take appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary practices and all other practices which are based on an idea of the inferiority or the superiority of either of the sexes or on stereotype roles for men and women.¹⁰⁰

The African Charter on Human and Peoples' Rights provides that every individual shall be equal before the law and shall be entitled to protection under it.¹⁰¹ The provision further adduces that the state shall ensure the elimination of every discrimination against women and shall also protect the rights of women and the child as stipulated in international declarations and conventions.¹⁰² Hence, most of these conventions guarantee the equality of all persons and freedom from any form of discrimination.¹⁰³ All persons are therefore considered equal before the law and are entitled without any discrimination to the equal protection of the law. The law also prohibits any discrimination and guarantees all persons' equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.¹⁰⁴ Hence, when a woman has not been given the right to property, it contributes to retarded economic growth and does not allow for sustainable development.

⁹³ A. Taiwo, *ibid.* at p. 202

⁹⁴ See Duncan Sotho *Laws and Customs* (1960) 4. See further, A. Taiwo, *op. cit.*, at p. 204

⁹⁵ Section 42(1) Constitution of the Federal Republic of Nigeria, 1999 (As amended)

⁹⁶ Section 43, Constitution of the Federal Republic of Nigeria 1999 (As amended)

⁹⁷ Y. Olomojobi, *op. cit.*, at p. 33,34

⁹⁸ The Convention was adopted in 1979 by the United Nations General Assembly and it is often described as an international bill of rights for women. Convention on the Elimination of all Forms of...the United Nations. Retrieved 15 February 2021 from www.un.org/daw/cedaw

⁹⁹ Article 2 (f) CEDAW 1979

¹⁰⁰ Article 5(a) CEDAW 1979

¹⁰¹ Article 3, African Charter on Human and Peoples' Right 1981

¹⁰² Article 18(3), African Charter on Human and Peoples' Rights 1981

¹⁰³ Article 7, Universal Declaration of Human Rights (UDHR) 1948

¹⁰⁴ Article 26, International Covenant on Civil and Political Rights 1966

11. Conclusion

This paper has been able to discuss customary law and how it affects women and property rights in a given society. The paper has also been able to state that culture and custom play a vital role in the property rights of women. Can Nigeria adopt and take a cue from South Africa by registering its African Customary law and recognising all the antecedents of customary law marriage? Perhaps, Nigeria should take the baby steps first by ensuring that all customary marriages are duly registered by the appropriate bodies and there should be the issuance of a certificate which would serve as an evidence of proof that the parties did indeed conduct a customary law marriage. If the interests of women are properly taken care of, customary law can be adequately recognised under the Constitution of the Federal Republic of Nigeria, it is of the opinion of the writer that it will go quite a long way in alleviating the plight of women by recognising that they have fundamental human rights. Nigeria should at least have a legal framework for the protection of women under customary law just like women under statutory law.