MANAGEMENT AND CONTROL OF THE DECEASED ESTATE PRIOR TO SHARING IN NIGERIA: CRITIQUE OF THE LEGAL DIALECTICS OF SUCCESSION

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Abstract

The article examines the management and control of the deceased estate prior to sharing in Nigeria and further critique the legal dialectics of succession rules in Nigeria. The position of the female child under the Yoruba, customary law of succession modes of distribution of property under Yoruba, customary law of succession the rights of spouses, illegitimate children and other blood relations of deceased intestate vis-à-vis their discriminatory property inheritance rights under the Yoruba customary law. The rules of succession under customary law are as varied as the ethnic groups that are found in Nigeria. Over the years, various customary rules of succession have been used in Nigeria, when an issue of intestate succession is in question. The objective of the article is to critically examine how the personal law of the individual governs his domestic affairs having subjected himself to such laws. The article concludes and recommends that the Wills Act should enact a provision recognizing the inheritance rights of any child in the womb at the date of the testator's death who is born alive after the testator's death as it is in the intestate and dependents reliefs legislation.

Keywords: Beneficiaries, intestate, testate, testator and Will

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Introduction

From the beginning of time, transition from one generation to another has been one of the characteristics of human existence. Under the Nigerian legal system, succession means the devolution of a man's estate to other persons called the beneficiaries. Succession means taking the rights of another as his or her successor. It usually denotes the transmission of rights and obligations of the deceased to his legal heirs. Succession not only includes the rights and obligations of the deceased, as they exist at the time of his death, but all that has accrued thereto since the opening of the succession, as also of the new charges to which it becomes subject. Finally, succession signifies also that right by which the heir can take possession of the estate of the deceased, such as it may be.[1]

The word succession is also used to refer to the rights, estate and charges left by a person after his or her death, irrespective of whether the value of the property is more or less than the charges. It may also signify the right of the heir to take possession of the estate of the deceased. Succession not only includes the rights and obligations left by the deceased at the time of his or her death, but it also includes new charges, rights and obligations that accrue to the existing ones after opening of the succession. Succession is the order in which or the conditions under one person after another succeeds to property, dignity, title or throne. It is also the right of a person or line to succeed. It could also be referred to as the act or process of person's becoming beneficially entitled to a property or property interest of a deceased person.[2]

Succession is also the devolution of title to the property under the law of descent and distribution, the act of official investment with a predecessor's office, dignity, possession or function; also the legal or actual order of succeeding from that which is to be vested or taken[3]. Succession may either be testate or intestate; however, the purport of this article is to critique and

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1 "Law of Succession Definition: Everything You Need to Know" https://www.counsel.com/lawofsuccession (accessed on 29-01-2020).

2 Definition of Succession by Merriam-Webster https://www.merriam-webster.com/dictionary/succession (accessed on 29-01-2020).

3 David Folorunsho Tom, *Succession to the Estate of a deceased who marriage under the Marriage Act in the States that formed the former Western Region of Nigeria*, in Delsu Reading in Law, (ed) M.O.U. Gasioku (Enugu: Chenglo Limited, 2004), 256.

critically examined the import of intestate succession under the Yoruba nation.

Prior to the sharing or partitioning of the landed property, the eldest surviving son of the deceased called the Dawodu is charged with the management and control of such property. The Dawodu is the family head. This customary law practice among the Yoruba people recognizes the Dawodu as the family head which has long been settled in *Lewis v. Bankole*[4] was re-echoed in *Otun v. Otun*[5] by the Supreme Court, per Kalgo J.S.C. adopted the judgment of Osborn C. J. in *Lewis v. Bankole* as follows:

> There is practically a consensus of opinion that on the death of a founder of a family, the proper person to be head of family is the 'Dawodu' or the eldest surviving son. This seems to be well established rule both in Lagos and other parts of Yoruba land.

A comprehensive statement of the headship of the family, the person qualified to be the head of the family and the incidence of headship of the family as found by the Privy Council in *Lewis v. Bankole* was quoted with approval by the Court of Appeal in *Folomo v. Onakanmi*[6] as follows:

i. When the founder of a family dies, the eldest surviving son called the 'Dawodu' succeeds to the headship of the family with all that implies including residence and giving of orders in his father's house or compound;

ii. On the death of the eldest surviving son, the next eldest surviving child of the founder, whether male or female, is the proper person to succeed as head of the family;

iii. If there is going to be any important dealing with family property, all branches of the family must be consulted, and representation on the family council is also per stripes accordingly as there are wives with children;

iv. The division is into equal shares between the respective branches, regard being had to any property already

4 (1901) 1 NLR 82; NLR (Vol. I-V), 81Nwogugu *Family Law in Nigeria,* P 399.
5 (2004) 14 NWLR (Pt. 893) 381 para. F at 395.
6 (2005) 11 WRN 141, lines 20-30, at 152-153.

received by any of the founder's children during his life-time;

v. The founder's grandchildren only succeed to such right as their immediate parents had in the family property;

vi. The founder's compound or house is usually regarded as the 'family property' which must be preserved for posterity.

From settled authorities, a Dawodu emerges as of right through direct consequences of natural process and not by appointment or selection. In managing the estate of the deceased, however, the Dawodu must bear in mind always that the property is for the benefit of all the children of the deceased. The Dawodu, in essence, hold the property in trust for the benefit of all the children of the deceased.

It has been noted that a female, if she is the oldest or first child happens to be a strong and influential character or if there are no other male members of the family, can be a family head[7]. However, it is true; a female family head may be nominated or elected. As seen in *Ajoke v. Olateju*[8] where even in the availability of a male preferred erroneously by the testator thinking he had no more close relation living, the court held that a close female relation had the right to succeed as the head of the family.

The Position of the Female Child under the Yoruba Customary Law of Succession

Under the Yoruba customary law in the South Western Nigeria, there is no discrimination between male and female children in the distribution of their intestate father's estate. Under the age long traditional customary law, factors like age often affect the scale of distribution. A female child regardless of her age might be made to take last and her share might also be smaller when compared to the entitlements of her brothers. However, since the decision in *Lopez v. Lopez*[9], Combe C. J. confirmed that, originally, the rules of the daughters in Yoruba land were not the same as sons with

7 *Richardo v. Abal* supra note 24; *Taiwo v. Sanumi* (1913) 2 NLR 106.
8 (1962) L.L.R. 32.
9 (1924) 5 N.L.R. 43

regards to their father's property. He went on to hold that both sons and daughters can inherit equally[10].

This position has been reaffirmed in a plethora of cases which include the following:

In *Salami v. Salami*[11], the court held that the plaintiff's right to inherit under Yoruba customary law could not be affected by her absence, minority or sex, and neither was it diminished by the fact that she was a girl. It noted that the Dawodu was not entitled to a greater share than the other children. In *Sule v. Ajisegiri*[12], it was held that the portioned family property must be equally shared between those entitled to it regardless of sex. Thus, the defendant's claim that being a male, he was entitled to a larger share was rejected.

In *Amusan v. Olawunmi*[13], the court held that the right of inheritance of female children in Yoruba custom emerges from the fact that in some situation, women can be head of family. In *Richardo v. Abal*[14] not only did the Court accept the proposition that a female child has inheritance rights, but it went further to hold that when a man dies leaving two houses and two children, male and female, the female if older, has the first choice as to which house she wants.

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

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

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10 *Barreto v. Oniga* (1961) WNLR 112 cited in P.O. Itua, Legitimacy, Legitimation and Succession in Nigeria: An Appraisal of section 42(2) of the Constitution of Federal Republic of Nigeria 1999 as amended on the right of inheritance. Available at http://www.academicjournals.org/JLCR accessed on January 27, 2021.

11 (1957) WRNLR 10, *Lopez v. Lopez*, supra; *Barretto v. Oniga*, supra.

12 (1937) 13 NLR 146.

13 (2002) 12 NWLR (Pt. 780) 30.

14 (1924) 5 NLR 43

The import of this provision is that even when a female child is not entitled to occupy land under the succession laws of any area in Western Nigeria, such a child will still be entitled to the proceeds derived from the land[15].

Modes of Distribution of Property under Yoruba Customary Law of Succession

Basically, there are two (2) modes of distribution of the estate of a deceased intestate under the Yoruba customary law. It must be borne in mind always that under the general customary law which is the focus of this thesis, the children of the deceased inherit his estate to the exclusion of other family members[16]. The two modes are:

(a) *Idi-Igi* interpreted as per stripes and

(b) *Ori-Ojori* interpreted as per capita[17]

(a) ***Idi-Igi* Mode of Distribution (per stripes)**: The distribution of the intestate estate under this mode is by sharing the estate of the deceased. The number of wives is commonly referred to as 'branch' or 'gates'.[18] This is done irrespective of the number of children from each wife. The children take the portion of their respective mothers and divide their portion as they like between themselves. This usually occurs where the deceased intestate had more than one wife.

In an examination of the two modes of distribution, Obilade[19] described the Idi-Igi mode of distribution as:

> A custom whereby the property of the deceased is divided among his children per stripes (the property being first divided equally into the number of wives) the share attributable to each wife being then sub-divided equally among her own children.

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15 Kasumu, *Family Law*, Op.cit, 293.

16 *Okelola v. Adeleke* (2004) 13 NWLR (Pt. 890) 307; Orojo, Customary Court Manual, Ondo State, 1980, 119

17 Kasumu, *Family Law*, 292.

18 The use of the term 'gate' in describing the children from a particular wife is common among the Binis in Edo State and Urhobo in Delta State.

19 A. O. Obilade, *The Nigerian Legal System*, (Sweet and Maxwell: London, 1999). Revised ed, 86-87.

In the same vein, the question as to whether *Idi-Igi* system of distribution is still an integral part of Yoruba customary law is best answered by the expository and seminal judgment of the Privy Council in *Dawodu v. Danmole*[20]. In its judgment, the Privy Council adopted fully the finding of the Supreme Court as follows:

Having very carefully considered all the evidence new before us, I would hold:

(i) that *Idi-Igi* is an integral part of the Yoruba native law and custom relating to the distribution of intestate's estate;

(ii) that *Idi-Igi* is in full force and observance at the present time, and has not been abrogated;

(iii) that *Idi-Igi* is the universal method of distribution except where there is a dispute among the descendants of the intestate as to the proportions into which the estate should be divided;

(iv) that where there is such a dispute, the head of the family is empowered to and should decide whether *Ori-Ojori* ought, in that particular case, to be adopted instead of *Idi-Igi*;

(v) that any such decision prevails

(vi) that *Ori-Ojori* is a relatively modern method of distribution adopted as an expedient to avoid litigation[21].

Resort to *Idi-igi* as the general mode of distribution of a deceased Yoruba person was settled and reaffirmed in *Vincent v. Vincent.*[22]

(b) ***Ori-Ojori*** **Mode of Distribution (per capita)*:*** This system of distribution of the estate of an intestate Yoruba person is based on the number of children. In other words, the estate is shared equally among the children. As observed by the Privy Council in *Dawodu v.*

[20] (2003) 49 WRN 127.
[21] Ibid at 137, lines 5-15.
[22] (2008) 18 NRN 189.

> *Danmole*[23]*, Ori-Ojori* is a relatively modern concept of distribution adopted as an expedient to avoid litigation.[24] *Ori-Ojori* gives credence to the fact that Yoruba customary law is progressive in nature and that it adopts to changes as well as malleable with modern notion of fairness in appropriate cases.

It has been argued that this mode of distribution is likely to produce fairness and thereby prevent dispute and dissention in the family. The difference between the two modes is that all children get equal share under *Ori-Ojori* (per capita) while under the *Idi-Igi* method, though, the branches get equal shares, the share of each children depends on the number of the children in each branch.

The Controversy between *Idi-Igi* and *Ori-Ojori*

There had been diverse opinions by jurists on the mode of distribution that should be best applied in sharing the estate of the Yoruba intestate. In *Taiwo v. Lawani*[25], it was held that according to the native law and custom of the Yoruba people of Lagos State, the custom known as *Igikan* or *Idi-Igi*, where the property of the deceased intestate is distributed among the children according to the number of mothers (wives of the deceased), is a well-recognized and established native law and custom and held that *Igikan* or *Idi-Igi* is not repugnant to natural justice, equity and good conscience.

Conversely, it has been argued that an adoption of the *Idi-igi* is more likely to bring about disharmony within the family as it would be unfair to the children of a particular wife with more siblings.[26]

Also, in *Salako v. Salako*[27] the Idi-Igi system came under serious attack as Adefarasin J., upheld the *Idi-Igi* as the prevailing custom in the distribution of the intestate's estate in Yoruba land and noted that the system is unfair and leads to great hardship. The Idi-igi customary rule has been the subject of litigation and decision in general cases. Thus, the discussion under this sub-topic focuses on the manner with which a decision is arrived as to which of the two methods of distribution is to be adopted in a particular

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23 Supra, n 50
24 Ibid.
25 (1961) 1 All LR 703.
26 Mc Okany, *Commercial Law in Nigeria* (Revised edition), p. 692
27 Unreported High Court of Lagos, Suit No. M/160/62, decided on May 13th 1963.

case. It is important to point out that where the beneficiaries unanimously agree as to a particular method to be adopted, the question of choice would not arise. The sticking point, however, is when there is conflict as to which method to adopt. From settled authorities on the Yoruba customary law, in the event of controversy as to which method to adopt, the decision falls on the family head i.e. the 'Dawodu'. The decision of the Dawodu is final ad cannot be questioned or upturned through litigation.

In *Damole v. Dawodu*[28], the Yoruba custom of Idi-Igi was challenged on the ground that it was contrary to natural justice, equity and good conscience. The deceased, Suberu Dawodu was survived by nine children born of four wives. The question before the court was whether the intestate's estate should be divided into four parts (per stripes) or into nine parts (per capita). Jibowu J. in the court of first instance held that distribution on the basis of *Idi-igi* was contrary to natural justice, equity and good conscience. The Privy Council upheld the Supreme Court's rejection of Jibowu's judgment and decided that the estate should be divided into four parts. In the opinion of the Board, *Idi-Igi* was the prevalent custom of the Yoruba. *Ori-Ojori* is a modern method of distribution for the avoidance of litigation. The Supreme Court further held that the *Idi-Igi* custom is still in force and has not been abrogated and that it is the universal method of distribution, except where there is a dispute among the descendants of the intestate as to the proportions to them. The head of the family is empowered by custom to decide whether *Ori-Ojiri* ought to be adopted instead of the *Idi-Igi* and that such decision prevails.

Another interesting point is that the *Dawodu* may change a particular mode he earlier adopted or that of his predecessor. This is done given the peculiar circumstances and the need to do justice. Thus, if the *Dawodu* exercise his power to reverse the earlier position, the decision is final. This rule was strengthened in *Akinyede and Ors. v. Yaya Mustapha Opere and Ors*[29]. The fact of the case is that Iman Abasi Opere died leaving three properties in Lagos. One of his five children, Mustapha, predeceased him; he died intestate leaving some issues. On the death of Iman Opere, his property devolved on his children and rents from the properties were by agreement of all divided into five parts representing each child or branch of the family.

[28] Supra n 50.
[29] (1968) 5 NSCC 48.

Later, one of the children died and subsequently the only daughter who survived that child died. The rest were from that time divided into four parts. The dispute in the case arose from compensation paid in respect of the family property acquired by the Lagos State Government in 1957. The compensation was divided into four parts and each branch received its share. The head of the family devised in favour of *Idi-Igi* since very few of the family members preferred *Ori-Ojori.* It is this decision that led to the suit. It was found during trial that the family head previously agreed to share the family's estate according to '*Ori-Ojori*' method because some of the members were very young and that method enabled them to have money for their education and upkeep. The Supreme Court held as follows:

a. where dispute arises as to the distribution, the head of the family has a right to decide which system of distribution is to be adopted.

b. That the 'Dawodu' i.e. the head of the family was entitled to revert an earlier decision on the mode of distribution.

Thus, the family head was entitled to revert to the *Idi-igi* system after the younger members of the family had completed their education twenty-seven years later.

Similarly, in *Vincent v. Vincent*[30], the deceased who had two wives and seven children died intestate leaving a house consisting of five rooms in Lagos. It would appear from the fact of the case that the original family head (who died in the course of the suit) unilaterally adopted the '*Ori-Ojori*' method in sharing the property. The defendant, who preferred the '*Idi-Igi*' method rejected the one room due her under the '*Ori-Ojori*' method and unilaterally gave herself two rooms in defiance of the decision of the family head. Having recognized the two settled methods of distribution under the Yoruba customary law, Dongban-Mensenm J.C.A. held as follows: The head of the family is not a figure head, he is there for a purpose and his decision once made, must be respected, until overturned by popular vote at another meeting, or by court of competent jurisdiction.[31]

30 (2003) 49 WRN 127.
31 Ibid at 196 Lines 5-10.

The Court of Appeal took serious exception to unilateral action of the defendant and stated as follows: Court must not be seen to give a nod to lawlessness and defiance to lawful authority, however minute the situation. The rule of law is the only cure for acts of lawlessness[32].

The writer posits that this system of *Idi-Igi* seems to discourage wives from having many children since the *Idi-Igi* system seems to favour a wife with fewer children than the ones with a lot of them. Again, the idea of leaving the decision on the method to adopt in the distribution of the estate and opportunity to alter or change it at will to a single person in the name of *Dawodu* seem to be unfair and inequitable.

The Rights of Spouses, Illegitimate Children and other Blood Relations of Deceased Intestate vis-à-vis their Discriminatory Property Inheritance Rights under the Yoruba Customary Law

a. The Right of the Widow/Spouse

Basically, under the Yoruba customary law of succession, wives/spouses have no right of inheritance in their deceased husband's estate whatsoever. The widows form part of the estate of their husband. As Jibowu, F. J. observed in *Suberu v. Sunmonu.*[33] 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.

In the *Suberu's* case, there was also the question on which of the two parties i.e. the maternal or paternal relations should inherit the deceased's real estate. The court held that, as the deceased son died intestate without an issue, his share of the family's house would devolve on his uterine brother's children. Thus, since the deceased inherited the property from his father's side, it should devolve on his paternal relations.[34]

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32 Ibid at 196, Lines 15-19.

33 (1957) 12 F.S.C. 33.

34 See also *Oshilaja v. Oshilaja,* (1973) CCHCL, 11, where the court held that in accordance with the decision in Suberu's case, the widow in the instant case could not inherit the deceased's husband's estate, and as the deceased intestate died without a child, the court held that the sons of his sister were entitled to share in the estate to the exclusion of his widow. Thus, unless the property is proved to be an outright gift by the husband to the wife before his death, the property passes to the members of the deceased's family on his death.

In *Sogunro-Davies v. Sogunro,*[35] Beckley J. noted that the reason for depriving a wife of inheritance rights in the deceased husband's estate was because devolution of property under native law and custom "follows the blood". The rationale behind this rule is on the fact that the deceased's customary law wife is not a member of the family for this purpose.[36]

According to the authorities, under the Yoruba Customary Marriage Law, separate houses or rooms allotted to the wives by their polygamist husband does not vest in the wives, as such allotments are not outright gifts. Upon his death, such houses or rooms become part of the real property of the deceased which devolve on his family.[37] Moreover, where a husband in his Will purports to vest the un-partitioned family property in his wife, it is not capable of devolving upon the widow as such property is being distributed by the family members, the widow cannot successfully claim that she is entitled to the share which would have been her husband's had he been alive.[38]

The reason being that devolution of family property is connected to 'blood-ties'. Consequently, where there is no issue of the marriage unless a property given to a wife is proven to be an outright gift, it will pass, on the husband's death, to the husband's family.[39] Thus in *Oloko v. Giwa*[40], there was an allocation to each of the wives of the deceased. It was held that the effect of the allocation was not to confer title or give any right on such properties to the wives. However, under the Ado-Ekiti Customary

35 (1929) 2 NLR 79

36 This is evidenced in the statement by Coker GBA in his book, *Family Property among the Yorubas.* 2nd ed. (Sweet & Maxwell, London) 1966, 266.

37 Per Graham Paul in *Oloko v. Giwa* (1939) 15 NLR 31.

38 Ibid.

39 See generally, Justice Muri Okunola, *Relationship between Islamic Law and Customary Law of Succession in Southern Nigeria in Towards A Restatement of Nigeria Customary Law*, op. cit, pp.151-173. Also, Obilade A. O., Women in Law (ed) (Southern University Law Centre, University of Lagos, 1993) Chapters 7 and 13.

40 Supra, n 67; *Dosunmu v. Dosunmu* (1954) 14 WACA 527 with similar facts like *Oloko v. Giwa*, the West African Court of Appeal rejected a claim of inheritance through a woman who had been allocated the rooms, subject matter of this dispute, by her husband's family. According to the court, to uphold such a claim would mean that, on the death of a childless woman, not of the same family as her husband, property vested in her could pass away from the husband's family from whom the wife becomes entitled to it, to the wife's family.

Inheritance Law, a wife can be entitled to her deceased's husband's estate but not applicable to a widower.

In the same vein, under the Yoruba custom, a husband cannot inherit his wife's estate if she died without an issue, in which the property devolves on her family unlike under the Igbo mode of succession, where a husband can inherit from the wife, if she had no sons, except for the property she acquired before marriage which could devolve on her family.

Inheritance of a deceased wife's estate by her surviving husband was viewed by Dr. T. O. Elias and Okunola as an anathema to Yoruba custom and such a husband could be ridiculed in the society[41]. Dr. Elias stated thus: Rules of inheritance apart, local sentiments would frown upon the idea of a scapegrace husband aspiring to share in his deceased wife's family property[42].

In *Caulcrick v. Harding*[43], it was held that a husband was not entitled to succeed to the un-partitioned family property of the wife under customary law. It is submitted that the same decision could be reached in respect of the self-acquired property of the spouses particularly, property acquired by the widow before the marriage.

The Right of a Spouse to the Administration of Intestate under the Yoruba Customary Law

The relevant law in regard to death intestate of a person married under the Marriage Act is the Administration of Estate Law, 1959. It is important to note that, under the 1959 Law, provisions of that law do not apply where the distribution, inheritance and succession of any estate is governed by customary law. In essence, the Administration of Estate Law applicable to the whole Yoruba land which gives spouse's right to succeed to each other's property does not apply to persons subject to customary law.[44] This position is evident in the Yoruba case of *Aileru & Ors v. Anibi*[45], where Jibowu, J. held that, under the Yoruba native law and custom, widows cannot administer the estate of their deceased husbands.

41 Sagay, *Nigerian Law of Succession*, 272.
42 Ibid, See also T. O. S Elias, *Nigerian Land Law and Custom* (1962) 234.
43 (1926) 7 N.L.R. 48
44 In *Zaidan v. Mohsen* (1973) All NLR 86 illustrates these points.
45 (1952) 20 NLR 46

Also in *Akinnubi v. Akinnubi,*[46] the Supreme Court declared that it is trite under Yoruba customary law, that a widow can be inherited by her deceased husband's family, but she could not apply for a grant of letters of administration nor be appointed as a Co-administrix of her deceased husband's estate.

However, under the general law, there could be no question of denying the statutory married widow her share in the deceased husband's estate or to apply for a grant of letters of administration. In *Jadesinmi v. Okotie-Eboh*[47], a statutory married widow, with children successfully applied to the High Court for the grant of letters of administration to enable them administer the deceased husband's estate.[48]

In recent years, it has also been shown that the Yoruba customary marriage tends to be more liberal on this issue. This liberal approach was adopted in respect of widow's administration of their deceased husband's estate. In *Re Joseph Asaboro*[49], the court appointed a widow to be one of the two administrators of the estate of her deceased husband.

a. Rights of Illegitimate Children

By the received English law, a child born out of lawful wedlock, that is, under the Marriage Act, which prescribes monogamy, is regarded as illegitimate. This status deprives the child of the right to maintenance and succession in respect of its natural father[50]. Prior to the enactment of section 42(2) of the 1999 Constitution of Nigeria as amended,[51] right of inheritance was predicated on the status of the child. Thus, children born outside wedlock during the subsistence of a statutory marriage were deprived of their share in the distribution of their father's estate. In the cases of *Cole v. Akinyele*[52] and *Alake v. Pratt*[53], the above principle had been affirmed to the

46 (1995) 2 WLR 144

47 (1996) 2 NWLR 128

48 See also Tolu Adesanya: *Term paper of Law of Succession*, 37, https://segunakinpel...n_by_tolu.html?m=1, accessed on 23/1/2023

49 Suit No. AK/4/70 (unreported) Akure High Court cited in Dr. Oni, *Discriminatory Property Inheritance Rights under the Yoruba and Igbo Customary Law in Nigeria*, 37.

50 Ibid.

51 Cap 123, Laws of the Federation of Nigeria, 2004. The provision frowns at any discrimination of a person by reason of the circumstances of his birth.

52 (1960) 3 C.N.L.R. 192.

effect that, for the children born outside wedlock during the subsistence of the statutory marriage, it was contrary to public policy to allow the father to legitimize that child by any other method other than the procedure provided by the legitimacy ordinance.[54]

In contrast, customary law adopts a liberal approach in relation to a child born to a man outside his customary law marriage. In such a situation, all that is needed to legitimate the child is by acknowledgement by his father, which in itself consist of the informal voluntary declaration of paternity or acts/conducts of such as could indicate or establish his acceptance of the child's paternity by the punitive father e.g. payment of school fees.[55]

Furthermore, the presumed rights of the illegitimate child may not possibly conflict with the succession rights of the legitimate child of the marriage, whether upon, by the Act or by customary law[56]. Under the Yoruba customary law, illegitimate children are accorded the same inheritance rights as children who are born in lawful wedlock provided the child is acknowledged by the punitive father.[57]

The court states in that case that there appears no difference between children born in native wedlock and the offspring of fortuitous connection provided that paternity has been acknowledged. Legitimation is a process by which a child who was born illegitimate acquires legitimate status which may be achieved by the subsequent marriage of the parents or by the acknowledgement by his natural father.

As earlier mentioned, acknowledgement simply means the recognition of the paternity of a child by his natural father. These range from the performance of certain rites, like given token money or money's worth such as kola nuts, palm wine, yams, etc. to paying the hospital bills on the birth of the child. Once paternity has been acknowledged, it becomes permanent, and any subsequent withdrawal or revocation of acknowledgement seems unknown to Yoruba native law and custom.

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53 (1955) 15 WACA 20

54 See also in *Re Adadevoh* (1959) 13 WACA 304.

55 See *Savage v. Macfoy* (1970) Ren. 505, 39.

56 Kasunmu A. B., *Adultery, Acknowledgement and Illegitimate Child in Nigeria* (1973) U.G.L.I Vol.15, available at https://www.iosrjournals.org. accessed on 23/1/2021.

57 *Savage v. Macfoy*, supra note 85.

The court frowns on any discrimination between the legitimate children of the customary marriage and those legitimated by acknowledgement in the distribution of the intestate estate of the deceased father perhaps in reliance on section 42(2) of the 1999 Constitution[58]. In *Philip v. Philip*[59] the court held that a child legitimized by acknowledgement was entitled to a share equal to that of each of the other sons of his father[60]. One way the court has granted an illegitimate child right to share in their deceased father's estate, is by applying the Doctrine of estoppel.

b. Rights of Inheritance of an Illegitimate Child by the Doctrine of Estoppel

Notwithstanding the decisions discussed above, the Supreme Court seemed to have introduced the principle of estoppel in this area of intestacy. Where an illegitimate child has been allowed to share and manage the intestate estate with the 'legitimate children', it seems that there might come a time when those legitimate children and those claiming under them will be stopped from asserting that the illegitimate child has no share in the estate.

In *Ogunmodede v. Thomas & Ors.*[61] There was only one child of the statutory marriage and sixteen children by extra-marital relationship during the subsistence of the Act marriage and whose paternity P's father, had acknowledged. P married under the Act, and although there was no issue of the marriage, she had two children outside the marriage. On the death of P's parents and P's demise, her widower claimed he was exclusively entitled to the intestate estate. The Supreme Court stated that because P's widowed mother had regarded her deceased husband's property as belonging to her daughter, P, and the sixteen illegitimate children and as P subsequently dealt with the property as joint property with the other children of the deceased. Consequently, her surviving husband was stopped from claiming

58 Cap. 123, LFN 2004.

59 *Philip v. Philip* Unreported High Court of Lagos State Ikeja Judicial Division, Suit No. M/24/74.

60 See also *Olulode v. Oviosu* (Unreported High Court of Lagos State, Ikeja Judicial Division, and 27th November, 1981. Suit No. M/133/81. Cited in Paul O. Itua, *Legitimacy, Legitimating and Succession in Nigeria: An Appraisal of s.42 (2) of the Constitution of the Federal Republic of Nigeria 1999 as amended on the Rights of Inheritance*. Available at http://www.academicjournals.org/JLCR. accessed on 27/1/2023.

61 Supreme Court F.S.C. Suit No.337/1962 of 10/3/66 (Unreported).

the property as his. The Supreme Court in effect, held that the 'doctrine of estoppel' may operate to enable an illegitimate child to share in the intestate estate of his/her statutory married father.

c. The Rights of an Adopted Child

Adoption of children is very rare in our customary law, it has been established that the right of an adopted child is inferior to that of the legitimate child[62]. This view however, is not shared by some legal authors.[63] For the Yoruba people, it has been stated that an adopted child cannot inherit from his/her adoptive parents.

However, in *Administrator-General v. Tuwase*[64], the estate of a Yoruba woman from Ijebu who had died without a child was claimed on one hand by her husband from whom she had been separated for 44 years before her death and on the other hand her adopted child who predeceased her. The claim of the husband was rejected and it was ordered that the deceased natural grandfather should take one share each, while her direct descendants i.e. the surviving adopted child should share per stripes.

From the above decisions, it is perceived still that the right of an adopted child is inferior to that of legitimate or legitimated child. It is not really clear if the adopted child can inherit from his natural patents even if he knows them. But a logical inference will be that, since inheritance 'follows the blood' and since he never had a clear cut right of inheritance from the adoptive parents, he should be able to inherit from the natural parents when they are revealed to him[65].

d. Right of Grand Children

Incidental to the inheritance rights of relations other than children of the deceased is the right of grandchildren. Where the father of the grandchild predeceased the grandfather, the Supreme Court held in *Rabiu v. Abasi*[66], that under the Yoruba customary law, such a grandchild cannot share in his

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62 Onuoha, Reginald Akujobi, *Law and Real Property in Nigeria: Essays in Memory of Prof. J. A. Omotola* (Revised ed. 2008), 240. Retrieved from Oni, *Discriminatory Property Inheritance Rights Under the Yoruba and Igbo Customary Law in Nigeria*, 30.

63 See Nwagugu, E. I., *Family Law in Nigeria*, 145.

64 (1946) 18 NLR 83.

65 Oni, *Discriminatory Property Inheritance Rights*, 39.

66 (1996) 7 NWLR (Pt. 462) 505.

deceased grandfather's estate. In this case, the Supreme Court went further to emphasize that under the Yoruba customary law, the real property of a deceased person who dies leaving children surviving him, goes to the children to the exclusion of all other blood relations. The real property does not go to the deceased's uncles, aunts and cousins. The grandchild in this case was not entitled to share in the distribution of property. the Learned Justice who read the lead judgment did not reflect on the point under the Yoruba custom whether a 'grandchild' can be regarded as a 'child' to the effect that, in listing the classes of relations excluded from participating the distribution of an intestate's estate under customary law, Learned Justice mentioned uncles, aunts and cousins, but was silent with regard to grandchildren.[67] In another case, female grandchildren who preserved the right of succession of their intestate's grandfather estate can inherit.[68]

e. The Rights of Other Relations to the Intestate Estate

This group consists of persons other than the deceased's children and spouse(s). They include parents, uncles, aunts, nieces, nephews, brothers and sisters of full and half-blood, whether paternal or maternal, etc.

According to Sagay, the right of these groups arises as a general rule only if the deceased is not survived by children. There are two views on this issue. The first establishes a clear order of priority amongst these relations, in the manner of English law, and only if relations of the prior order do not exist, would those of the next order succeed? The second view is that the original source of the property must be traced. If it came from the deceased's paternal family, then succession must pass to that family, but if it came from maternal line, then only maternal relations can inherit.[69]

The first view is represented in *Adedoyin v. Simeon and Ors.*[70] In that case, the mother of a deceased intestate women without issue claimed that she is the rightful person to inherit her daughter's share from a property the daughter inherited from her father in conjunction with her other three sisters of the same father but different mothers. The plaintiff resisted the claim on the ground that by Yoruba customary law, she was entitled to succeed to her daughter's share to the exclusion of the defendants.

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67 Sagay, E.I The *Law of Succession*, op.cit. 273.
68 *Johnson v. Macaulay* (1961) All N.L.R. 743.
69 Ibid.
70 (1928) 9 NLR 76.

The court held that where a child inherits person property, on his or her death intestate without an issue, the surviving parents succeed to the property to the exclusion of half-blood brothers and sisters. The court outlined the order of priority as follows:

i. Brothers and sisters of the same mother;

ii. Parents;

iii. Brothers and sisters of the same father.

Since in this case, there was no uterine brothers and sisters, the mother being the only surviving parent was entitled to inherit. This view has been rejected such that it altered the tradition that although the property in question was originally derived from the deceased's father, it now ended up in her maternal family.[71]

The second view which is the accepted rule that property should be traced to its original source to the effect that if the property comes from the deceased's father's family, then succession must come from there while if it is from the maternal side, then similarly, only members of that family can inherit.

Instructive of this is *Idowu & Ors. v. Hausa & Ors.,*[72] where Idowu died leaving three daughters. The piece of land in dispute was allotted to two of the daughters and Bello, the son of the third daughter Aina who had since died. When Bello died, his father was allowed to collect the rent in his share of the property until he died. After the death of his father, another son of the father, but not of the same mother with Bello now claimed to have inherited the property from his father. The plaintiff in this case contested this view, arguing that under Yoruba customary law, on the death of a man intestate without issue, the family property inherited from his mother reverts to his mother's family. The court held that since there was no concrete evidence that the property had been partitioned, Bello never acquired a separate property in the estate, and the property should therefore revert to Bello's maternal family[73].

71 Ibid.
72 (1939) 13 NLR 96
73 Ibid

Thus, it is clear that this rule of succession according to the origins of the property is applicable to both un-partitioned family property and individually owned property, what is important is the root source of the property[74].

The Yoruba Customary Law and the Legislative Interventions: Criticism of the Mode of Distribution

The first subjection of Yoruba customary law to authority of the second arm of government i.e. the legislature is traceable to what is popularly known as the repugnancy test.[75] The proviso to section 14(3) of the Evidence Act[76] states that, Provided that in case of any custom relied upon in any judicial proceeding it shall not be enforced as a law if it is contrary to public policy and is not in accordance with natural justice, equity and good conscience.

The question whether a particular mode of distribution of an intestate Yoruba man's estate scaled the repugnancy test was resolved by the Supreme Court decisions in *Danmole v. Dawodu*[77] thus:

> In their lordship's opinion, the principles of natural justice, equity and good conscience applicable in a country where polygamy is generally accepted should not in a matter of this kind be readily equated with those applicable in a community governed by the rule of monogamy. Their lordships are not therefore satisfied that Idi-igi, proved and found to still be in full force and effect in Lagos, ought not be fairly and equitably to applied be the estate of one who left children by his four wives.[78]

Under the primogeniture rule, it is the general rule of the Yorubas that, where a landowner dies intestate, his self-acquired property devolves on his children as family property. The head of the family i.e. 'Dawodu' is the

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74 Other cases on this view are – *Administrator-General v. Akintan & Ors.* (1972) U.I.L.R.; *Suberu v. Sunmonu* 2, F.S.C. 33.

75 Now codified in the proviso of s.14 (3) of the Evidence Act, Cap E14, Laws of the Federation of Nigeria, 2004.

76 Ibid.

77 Supra n 50

78 Ibid, lines 15 – 21, p. 138.

eldest male child of the family who occupies the family house and holds same as trustee for the other children, male or female[79].

This rule on the face of it is unfair to the youngest children of the family who are barred, hence it is repugnant to natural justice, equity and good conscience[80]. It is equally unconstitutional, unfair and unjust. Although, the eldest son is enjoined by custom to provide for the maintenance of his younger brothers, sisters and other relations, he is not strictly accountable to them for his use and enjoyments of the family property[81]. Though, as the head of the family, he holds no legal estate in the property, chances are that he might use the estate in such a way as to make it empty before he is succeeded by his next brother on his death.

Section 42(1) of the 1999 Constitution[82] provides that:

> A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion, political opinion shall not by reason only that he is such a person (a) be subjected either expressly by or in the practical application of any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places or origin, sex, religion or political opinion are not made subject. Section 42(2) equally provides that no citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of birth.[83]

Under International Treaty Obligations such as the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), women's rights are being protected against any form of discrimination. Article 1 of CEDAW, defines discrimination against women as anything that can bring about unequal treatment between men and women in the course of their livelihood. The Article recognizes equality between men and

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79 *Suberu v. Sunmonu*, supra

80 That was the view of the court of first instance in *Ogiamien v. Ogiamien* (1967) NMLR 245 at 247.

81 *Taiwo v. Dosunmu* (1966) NMLR, 94.

82 Cap 123, LFN 2004.

83 Similar right is guaranteed under Article 2 of the African Charter on Human and People's Rights.

women; married and unmarried as one while Article 13, stipulates in part, that women have the right to obtain family benefits.

Nigeria, having ratified CEDAW treaty, is bound by its provisions; hence anything contrary must be declared null and void. Nigerian courts, unfortunately, have for long, sustained some of the customary practices including the Yoruba custom on inheritance which subjugate women as demonstrated in some cases earlier mentioned.[84] The seemingly unfair customary practices such as the deprivation of spouses' from right of inheritance of their deceased husband's property, where there is no issue of the marriage is clearly a violation of the above constitutional provisions as well as the International treaties. Reason being that the wife is not a blood relative of the deceased spouse.[85]

An exception to this repugnant custom is in a situation in which a widow chooses to remain in her husband's house and retain his name, she is to that extent, entitled notwithstanding that she has no children. She cannot, however transfer or alienate any of her deceased husband's property outright. Thus, her interest is merely possessory and not proprietary.[86]

It is submitted that this practice offends the principle of natural justice, equity and good conscience, based on the probable fact that, during the existence of the marriage, the wife might have laboured and toiled to bring about the acquisition of such property together with the deceased husband. It is also morally repulsive to deprive her from ownership of the property which is in violation of the *section 43 of the 1999 Constitution of Nigeria as amended.*[87]Even the Holy Bible has written thus: "a man shall leave his father and mother and shall cleave unto his wife and they shall become one flesh".[88]

Conclusion

Finally, the African traditional institutions have had their own way of devolving property since the beginning of time of time. This article has highlighted some of the practices of the Nigerian traditional communities

84 *Suberu v. Sunmonu*, supra n 63.
85 *Sogunro-Davies v. Sogunro*, supra n 65.
86 Oni, *Discriminatory Property Inheritance Right*, 42.
87 Cap 123, LFN 2004.
88 Genesis 2 verse 24; see also Mark 10:6-9 (What God has joined together, let no man put asunder).

with respect to succession. While it is imperative to note that customary succession is an important tool for resolution of disputes which inevitably arise from issue of inheritance.

This article reveal that Nigeria has neither harmonized customary law inheritance rules in order to reconcile them with socio-economic changes, nor adopted legislation with human rights benchmarks to regulate the customary law of succession. This situation of law reform is not likely to change soon because of the devolution of power between federal government and the states.

Customary rules of succession in Western Nigeria already observe a best interest of dependant's principle, leaving Southern Nigeria behind, where states are, unfortunately not active in the reform of customary law of succession.

The second and difficult option is to properly give customary law a place in the Constitution and to subject it to human rights benchmarks[89]. It has been noted that 'the co-existence of modern, statutory laws with traditional customary laws and practices' in Nigeria has created a complex and confusing legal regime under which women generally are denied adequate legal protection.[90] Side by side with constitutional reform should be the abolition of laws that enable the operation of the male primogeniture rule. These are primarily, laws based on *section 3(1) of the Wills Law of Old Bendel State* and *section 49(5) of the Administration of Estate Law.* As long as the court fails to take into consideration the role of socio-economic changes in the customary law of succession, the best interests of dependents principles would suffer along with females and younger male children.

Recommendations

Since the word inheritance touches every individual in the society and indeed the community at large, it merits close attention. The law must be reformed to redress the loopholes, the inadequacies and the harsh consequences of some customary law applications. A society can be socially engineered in an effective way only if the law is fair, just and

89 An Even more difficult sub-option is to adopt federal legislation with a human rights bench mark to regulate inheritance.

90 U. Ewelukwa 'Post-Colonization, Gender, Customary Injustice: Widows in African Societies. (2002) 24 *Human Rights Quarterly 446.*

human. Indeed, operation of the rule of law respects the aspirations of all and consequently maximizes the happiness of all. In the spirit of utilitarianism, the greatest happiness for the greatest number, any law that pursues this end is an instrument of social engineering.

In Nigeria, customary law lacks the above-mentioned ingredients of a virile legal system. Moreover, many uncertainties exist in succession and inheritance law, which create conflict and acrimony among contending interests. The following recommendations are submitted:

(a) **Codification of Customary Law**: Codification is very important for a reliable and stable legal system, especially in a developing country like Nigeria, where less regards are paid to the rule of law and even where the laws are adequately enshrined in the Constitution. Consider the human rights abuses by both the State and group(s), particularly during the military dictatorial regimes. Codification of customary law enhances certainty. A society's law commands respect and obedience where the individual knows the governing laws, his right, obligations and the punishment for violating it. Our customary law, especially in the area of inheritance, is uncertain as demonstrated in *Dawodu v. Danmole*[91] where the unsuccessful application of one method of distribution, per stripes (Idi-Igi), will lead to another method (Ori-Ojori). This law leaves room for abuse, oppression, and exploitation of the weak because in most cases, the head of the family as a last resort will be asked to choose a more convenient system of distribution. He will often decide the option that will be more beneficial to his own interest. In this process, he would have breached one of the demands of natural justice: "a man must not be a judge in his own case" (*nemo judex in causa sua*)[92], in such a situation, fair judgment cannot be obtained. Codification will weed out all irrelevant areas and uncertainties in the law, leaving certainty behind.

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91 (1958) 3 FSC 46 (962) 1 All NLR 702.

92 See *State Council Service Commission and Another v. Burugbe* (1984) 7 SC 19; *Metropolitan Properties Ltd v. Lannon* (1969) 1 QB 577, 599. *Okoduwa v. State* (1988) 2 NWLR pt. 76, 333. Attesting to the Universality of Natural Justice, Karibi Whyte JSC in *Adeniyi v. Governing Council of Yaba College of Technology (1993) 6 NWLR (pt.300) 526, 449* stated that the rule is an ancient origin and common to mankind, recognized by the ancient Greeks and Romans enshrined in the Holy Bible and recognized as part of Africa culture and philosophy of justice.

Codification respects moral and legal considerations, unlike most aspects of our country's law.[93] Codification will clarify the multiple systems of customary law, but that is not enough. The National Assembly should ensure that these customary laws are codify in our constitution whenever there is a room for constitutional amendment.

(b) **Law Reform and the Constitution:** The 1999 Constitution does not dignify law reform or review with a mention. It gives the federal government exclusive legislative powers in most matters, and gives states concurrent and residual powers in the rest.[94] It is ambiguous on who possesses legislative competence over customary law, thereby making it difficult to assess customary law reform. For example, section 4(7)(a) empowers states to make laws with respect to "any matter" outside the exclusive Legislative List. Item 61 of the List gives Federal Government powers to legislate on "the formation, annulment and dissolution, of marriages other than marriages under Islamic law and customary law, including matrimonial causes relating thereto. From these provisions, it is possible to argue that customary law, implied, its reform, are outside the legislative jurisdiction to the federal government[95]. However, customary laws codified by states are subject to interpretation by federal courts. For example, the Supreme Court has severally debated the legal implications. *Section 3(1) of the Wills Law of Bendel State* which, as shown above, limits the testamentary disposition of properties governed by customary law.[96] Because of Nigeria's pattern of governance, the enquiry into customary law reform is undertaken at federal and state levels.

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93 E. g. the Osu Caste, Disinheritance of female child of property right. *Mojekwu v. Mojekwu* and the disinheritance of illegitimate child, to mention but a few.

94 Section 7(5) of the 1999 Constitution (as amended) gives very restricted powers to local government councils.

95 I. E. Sagay, Intestate Succession in the States of Former Western Region of Nigeria (1998) 42 *Journal of Africa 112.*

96 *Idehen v. Idehen* (1991) 6 NWLR (pt 198) 382, *Lawal-Osula v. Lawal-Osula* (1995) 9 NWLR (Pt. 419) 259.