

Discriminatory Customary Inheritance Law in Nigeria: Judicial Activism or Legislative Intervention?

Jacob Osamagiagemwen Garuba*

ABSTRACT

Intestate inheritance in Nigeria is faced with legal issues. This is due to the pluralistic nature of the Nigerian society, where there exist different native laws or customs on inheritance. Some of the native laws or customs discriminate against the rights of women to inherit. This has generated endless legal battles. There abound a number of legal frameworks that provide for women's rights, such as the African Charter on Human and Peoples' Rights, CEDAW, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. These legal frameworks are targeted at abolishing any customs or cultural practices that discriminate against the rights of women. Further is the constitutional provision on non-discrimination found in section 42 of the Constitution of the Federal Republic of Nigeria 1999 (as amended). In spite of the foregoing legal frameworks the rights of women to inherit continue to be discriminated against. This article examines the customary laws of inheritance in two ethnic groups in Nigeria which tend to discriminate against the inheritance rights of women in intestacy. Further, the paper examines these discriminatory customary law practices against the backdrop of international human rights instruments. Finally the paper advocates for a penal legal regime to address such discriminatory customary law practices rather than judicial endeavor.

1. INTRODUCTION

Under the Nigerian legal system succession matters are classified into testate and intestacy and they are governed by two separate legal regimes. While testate succession is governed by the Wills Law of the various federating States, intestate succession is governed by the personal law¹ of the deceased. Succession is contained in any of the legislative lists of the Constitution

* Department of Private and Property Law, Faculty of Law, University of Benin, Benin City, Nigeria, Email: osamagiagemwen.garuba@uniben.edu

¹ *Mojekwu v. Mojekwu* (1997) 7 N.W.L.R. (Pt. 512) 283 at 300. 'Personal law', in the context of succession cases, means the law the deceased was normally subject to when he was alive. It is peculiar to him and his family unit. It is distinct from the law prevailing or predominant in the area or locality of the deceased." See

of the Federal Republic of Nigeria 1999 (as amended).² By such exclusion, succession matters falls within the residual list of the federating States. Consequently, the National Assembly lacks the competence to exercise any legislative powers in succession matters. Whereas, in some other jurisdictions, succession matters are a national matter which gives the federal or central government jurisdiction to exercise legislative competence on them.³

The legal issues associated with intestacy due to its peculiarities do not arise in testate succession. A testator or testatrix has the opportunity to determine those to benefit from his or her estate in the testamentary instrument. In *Asika v. Atuanya*,⁴ the Court of Appeal, per Thomas, J.C.A., stated that:

A testator's Will which is not biased should be given its due respect. In the instant appeal, it is a fact that the testator clearly said in his Will as follows: 'I give and bequeath in equal shares unto my children ...all my possessions i.e. 25, New American Road.' The testator's declaration and directives is unambiguous...That sharing is to be equal irrespective of sex because a testator's Will is a sacrosanct document.⁵

Under intestacy, the status and rights of beneficiaries to the deceased intestate estate are usually determined by the relevant native law or custom the deceased was subject to in his lifetime. Most of the applicable native laws or customs are discriminatory in nature, thus, disempowering daughters⁶ and widows⁷ from inheriting from the estate of deceased in intestacy. The Supreme Court per Ademola, CJN, in *Nezianya v. Okagbue* stated that:

also O. K. Edu, 'A Review of Laws of Inheritance in the Southern States of Nigeria,' *JPPL*, Vol. 24, (2004): 100.

² *Salubi v. Nwariaku* (2003) 7 N.W.L.R. (Pt. 819) 426 at 449 to 450, '[S]uccession was neither in the Exclusive nor in the Concurrent Legislative List in the schedule but was a residual matter in the exclusive legislative competence of the States to be dealt with in State laws.'

³ Intestate Succession Law, 1985 (PNDCL) 111 (as amended) of Ghana and Intestate Succession Act 81 of 1987 as amended by Law of Succession Amendment Act 43 of 1992 also amended by Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009

⁴ (2008) 17 N.W.L.R. (Pt.1117) 484

⁵ *Asika v. Atuanya* at 523

⁶ *Ukeje & Ukeje* (2014) 11 N.W.L.R. (Pt. 1418) 384; see also *Asika v. Atuanya* (2008) 17 N.W.L.R. (Pt. 1117) 484

⁷ *Nezianya v. Okagbue* (1963) 3 All N.L.R. 352, (1963) N.S.C.C Vol. 277; *Mojekwu v. Iwachukwu* (2004) 11 (Pt.83) 196 (S.C.) and *Nzekwu v. Nzekwu* (1989) 2 N.W.L.R. (Pt. 104) 373

The Onitsha Native Law and Custom postulates that a married women, on the death of her husband without a male issue, with the concurrence of her husband's family may deal with his (deceased's) property; her dealings, of course, must receive the consent of the family. The consent it would appear may be actual or implied from the circumstances of the case, but she cannot assume ownership of the property or alienate it. She cannot, by effluxion of time, claim the property as her own. If the family does not give their consent, she cannot, it would appear, deal with the property. She has, however, a right to occupy the building or part of it, but this is subject to good behavior.⁸

This paper examines the constitutionality of such customary law practices within the legal regime of the 1999 Constitution (as amended). It will further examine the legality or otherwise of such discriminatory customary law practices as it relates to the inheritance rights of Nigeria women (daughters and widows) against the background of Convention on the Elimination of all Forms of Discrimination Against Women and The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. The paper concludes by recommending a penal legal framework to protect and guarantee women's inheritance rights rather than relying entirely on judicial endeavours.

2. ANALYSIS OF CUSTOMARY SUCCESSION LAW IN NIGERIA

Intestacy rules apply when an individual dies without a Will or left an invalid Will, resulting to partial intestacy. In practice, it is usually the native law or custom of the deceased intestate that applies to distribution of the estate. The Nigerian society is pluralistic with several ethnic groups with diverse customary law practices. This article will essentially discuss the Igbo native law and custom and part of the Yoruba native law and custom. This is so because as most of the notorious discriminatory customary law practices cases emanate from these parts of the country particularly the Igbo speaking.

⁸ (1963) at 356-357

Among the Igbo speaking tribes in the eastern part of Nigeria, the customary law practiced under intestacy ordinarily favours a male child. Oni asserts that ‘under the Igbo Customary Law, females do not possess the rights to inherit and, that is, neither the daughters nor the widows of the deceased have the right in the intestate estate of the deceased.’⁹ The philosophy behind it is women do not stay in the family forever. They get married at a time in their life, and so would not be proper for such persons to inherit property or properties of their deceased fathers and carry such property or properties into another family by virtue of marriage. In *Nezianya v. Okagbue*,¹⁰ the court stated that:

In the view of the custom of Onitsha, that the real property of a man who died without a male issue should not go to his female issue who, on her marriage, would carry the property to her husband’s family; it is right, the custom postulates, that the property should remain in the man’s family to the exclusion of the female issue.¹¹

Such customary law practices usually discriminate against widows’ rights to inherit property of their deceased spouses under intestacy.¹² In some customs, the right a widow can assert is a life interest to occupy the building or part of it as long as she is of good behaviour.¹³

According to Adekile,

The female child cannot be the family head in Ibo culture. As a widow she cannot administer her dead husband’s estate. Her only right is a right of residency subject to good behavior. She is completely deprived of inheritance rights and her situation becomes more pitiable if she has no issue at all or has only female children.¹⁴

These customary law practices gained judicial approval in the 20th century Nigeria. In *Nezianya v. Okagbue*¹⁵ the appellant challenged the Native Law and Custom of the Onitsha

⁹ AO Babatunde ‘Discriminatory Property Inheritance Rights under the Yoruba and Igbo Customary Law in Nigeria: The Need for Reforms’ (2014) 19 Journal of Humanities and Social Sciences 30, 34

¹⁰ (1963) N.S.C.C 277 at 278, (1963)1 All N.L.R. 352

¹¹ *Nezianya v. Okagbue* (1963) at 278-279

¹² *Ibid* and *Nzekwu v. Nzekwu* (1989) 373

¹³ *Nezianya v. Okagbue* (1963) 357

¹⁴ Ol Adekile ‘Property Rights of Women in Nigeria as Impediments to full Realisation of Economic and Social Rights’ (2010) Social Science Research Network 1, 18-19

¹⁵ *Nezianya v. Okagbue* (1963) 357

people which postulates that the property of a man who dies without a male child remain in the deceased man's family to the exclusion of the female children. The court held that:

A married woman, after the death of her husband, can never under Native Law and Custom be a stranger to her deceased husband's property; and she could not, at any time acquire a distinct possession of her own to oust the family's rights of ownership over the property... That a married woman, on the death of her husband without a male issue, with the concurrence of her husband's family, may deal with his (deceased's) property; her dealing, of course, must receive the consent of the family. The consent, it would appear, may be actual or implied from the circumstances of the case, but she cannot assume ownership of the property or alienate it.¹⁶

The Supreme Court in considering the inheritance rights of daughters over the estate of their deceased fathers held that 'the property should remain in the man's family to the exclusion of the female issue... the daughter in such a case has a right to live in the house with the consent of the father's family.'¹⁷ Further in the case of *Nzekwu v. Nzekwu*,¹⁸ the court stated that 'the rights of a widow in her husband's property in customary law have been settled.'¹⁹

The court per Nnamani, J.S.C. stated that:

A widow who chooses to remain in the husband's house and in his name is entitled, in her own right and notwithstanding that she has no children to go on occupying the matrimonial home and to be given some share of his farmland for her cultivation and generally to maintenance by her husband's family... Her interest in the house and farmland is merely possessory and not proprietary so that she cannot dispose of it out-and-out.²⁰

¹⁶ *Nezianya v. Okagbue* (1963) at 280

¹⁷ *Ibid* at 279

¹⁸ (1989) 2 N.W.L.R. (Pt. 104) 373

¹⁹ *Ibid*, at 395

²⁰ *Ibid*

In the western part of Nigeria particularly the Yoruba speaking tribe, the customary rules under intestacy is equitable in nature as it accords inheritance rights to both sons and daughters. In *Salami v. Salami*²¹ a case where the plaintiff, a female child and the defendants were the only surviving children of one Salami Goodluck of Abeokuta extraction who died intestate leaving a house and farmland in Abeokuta. The plaintiff who was about seven years old at the time of her father's death in 1927 was taken by her mother to Cameroon and did not return to Abeokuta till 1953. Apart from few clothes and chairs allocated to her at the time of the father's death, she received nothing more from her late father's estate as her benefit. In an action against her two brothers for account and partitioning, the court held that the plaintiff's right to inherit was unaffected by her absence, minority or sex and that the eldest son was not entitled to a greater share than the other children.

The rights of widows to inherit under intestacy are alien to the Yoruba customary law practices. This was stated in the case of *Sogunro-Davies v. Sogunro*²² that in Yoruba native law and custom that on the intestacy devolution of property follows the blood, and a wife or widow not being of the blood has no claim to any share of the inheritance. In *Fakoya v. Ilori*,²³ where the widow of a deceased Yoruba man transferred a landed property of the deceased husband to a third party, the court held that under Yoruba customary law, on intestacy devolution of property follows the blood, and a wife or widow not being of the blood has no claim to any share of the inheritance. In *Akinnubi v Akinnubi*,²⁴ the Supreme Court held that:

Now, under Yoruba customary law, a widow under an intestacy is regarded as part of the estate of her deceased husband to be administered or inherited by the deceased's family, she could neither be entitled to apply for a grant of letters of administration nor appointed as co-administratrix of her deceased husband's estate.²⁵

²¹ (1957) W.N.L.R. 10

²² (1929) 9 N.L.R 79

²³ (1983) 2 Federation of Nigeria Law Reports 402

²⁴ (1997) 2 N.W.L.R. (Pt. 486) 144

²⁵ *Ibid* at 159

3. THE CONSTITUTIONALITY OF THE DISCRIMINATORY INHERITANCE LAWS IN NIGERIA

These discriminatory customary law practices against the inheritance rights of women no doubt infringes on women's fundamental rights which are recognised and guaranteed in the 1999 Constitution (as amended). These are rights derivable from the Universal Declaration of Human Rights.

The 1999 Constitution (as amended) is the basic law of Nigeria and as such is superior to every other law in force in any part of the country whether written or unwritten. Section 1 (1) provides 'this Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria.' Subsection (3) provides 'if any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall to the extent of the inconsistency be void.' So, 'any law' may include native laws or customs which are essentially unwritten and a number of such have been declared to be in breach of the express provision of the constitution of Nigeria.²⁶

Therefore, any native law or custom that discriminates against the rights of any Nigerian on grounds of sex shall be deemed to be inconsistent with the provisions of the constitution. Although, the constitution did not provide for inheritance or succession rights, however, section 42 prohibits any form of discrimination against any person amongst others on grounds of sex. The said section has been construed by courts to protect the inheritance rights of Nigerians from any form of discrimination.²⁷ According to section 42:

- (1) A citizen of Nigeria 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 –
 - (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 citizen of Nigeria of

²⁶ *Ukeje v. Ukeje* (2014) 11 N.W.L.R. (Pt. 1418) 384 at 408. Per Rhodes-Viviour J.S.C., 'Consequently, the Igbo customary law which disentitles a female child from partaking in the sharing of her deceased father's estate is in breach of section 42(1) and (2) of the constitution.'

²⁷ *Ukeje v. Ukeje* (2014) 11 N.W.L.R. (Pt. 1418) 384

- other communities, ethnic groups places of origin, sex, religion or political opinions are not made subject; or
- (b) ...
- (2) No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth.

The Supreme Court in the case of *Ukeje v. Ukeje*²⁸ per Rhodes-Vivour, J.S.C., held that:

No matter the circumstances of the birth of a female child, such a child is entitled to an inheritance from her father's estate. Consequently the Igbo customary law which disentitles a female child from partaking in the sharing of her deceased father's estate is in breach of section 42 (1) and (2) of the Constitution, a fundamental rights provision guaranteed to every Nigerian. The said discriminatory customary law is void as it conflicts with section 42 (1) and (2) of the Constitution.²⁹

In the case of *Asika v. Atuanya*³⁰ the Onitsha customary law was condemned as being discriminatory against the rights of daughters to inherit from their deceased father. The court per Denton-West, J.C.A., stated that:

Again one may ask why in some parts of Nigeria women are by subordinate laws and customs deprived of ownership and right of inheritance to acquire and own immovable property. Why are the women subjected to this disability or deprivation by reason only of their feminine attribute? The constitutional provisions are quite clear and unambiguous. Despite the lack of ambiguity in the Constitution, Nigerian women in certain parts of Nigeria are not entitled to inherit any landed property as was envisaged in this appeal...In my humble view, it is the duty of the court to stand firm and assert the rights of ownership of land by women in any part of the country as enshrine in the constitution.

²⁸ (2014) 11 N.W.L.R. (Pt. 1418) 384. See also *Asika v. Atuanya*, (2008)

²⁹ *Ibid* at 408

³⁰ (2008) 17 N.W.L.R. (Pt. 1117) 484

Whatever, the constitution stipulated must be adhered to. The constitution may be stiff or hard, but it takes supremacy over and above any form of social engineering, equitable engineering, negative law and custom and indeed other enactments.³¹

The question of the constitutionality of any discriminatory customary law is a matter for the court to determine.³² The attitude of the Nigerian courts in the 20th Century appears to have favoured the application of such discriminatory customary law practices against the inheritance rights of Nigerian women under intestacy.³³ However, towards the close of the 20th century, the Court of Appeal in *Mojekwu v. Mojekwu*³⁴ condemned such customary law practices that discriminate against the inheritance rights of women. In that case, the plaintiff/appellant, a nephew to the defendant/respondent's deceased husband who relied on the Nnewi Native Law and Custom (Oli-ekpe) to claim/assert title over the property of the deceased to the exclusion of the defendant/respondent, had his case dismissed by the Court. In dismissing the appeal, Tobi, J. C. A., stated:

Is such a custom consistent with equity and fair play in an egalitarian society such as ours where the civilised sociology does not discriminate against women? Day after day, month after month and year after year, we hear of and read about customs which discriminate against womenfolk in this country. They are regarded as inferior to the menfolk. Why should it be so? All human beings – male and female are born into a free world and are expected to participate freely, without any inhibition on grounds of sex, and that is constitutional. Any form of societal discrimination on grounds of sex, apart from being unconstitutional, is antithesis to a society built on the tenets of democracy which we have freely chosen as a people. We need not travel all the way to Beijing to know that some of our customs, including the Nnewi “Oli-

³¹ *Asika v. Atuanya*, (2008), 513 and 514

³² Section 6 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) vests the Courts with judicial and jurisdictional powers to determine cases. This includes the powers to declare whether a native law or custom is constitutional or not

³³ *Nzekwu v. Nzekwu* (1989) 2 N.W.L.R. (Pt. 104) 373 and *Nezianya v. Okagbue*, (1963) 279,280

³⁴ (1997) 7 N.W.L.R. (Pt. 512) 283

ekpe” custom relied upon by the appellant are not consistent with our civilised world in which we all live today...Accordingly, for a custom or customary law to discriminate against a particular sex is to say the least an affront on the Almighty God Himself. Let nobody do such a thing. On my part, I have no difficulty in holding that the “Oli-ekpe” custom of Nnewi, is repugnant to natural justice, equity and good conscience.³⁵

The Supreme Court on a final appeal³⁶ found in favour of the female children; but was silent on the constitutionality of the Nnewi native law and custom of ‘oli-ekpe.’³⁷ Painfully, Uwaifo J.S.C. who delivered the lead judgment demurred the repugnancy test introduced by the lower Court and stated that:

In the present case, because of the circumstances in which it was done, I cannot see any justification for the court below to pronounce that the Nnewi native custom of “oli-ekpe” was repugnant to natural justice, equity and good conscience...I find myself unable to allow that pronouncement to stand in the circumstances, and accordingly, I disapprove of it as unwarranted.³⁸

It is pertinent to note that the Supreme Court in 2014 came down heavily on discriminatory customary law practices in two cases it decided that year. The Court did question the constitutionality of such gender discriminatory customary laws. In *Anekwe v. Nweke*³⁹ the respondent a widow who had six daughters with her late husband was ordered by the 1st appellant (her late husband nephew) to vacate the matrimonial home she shared with her late husband because she did not have any male child to survive her deceased husband. The appellant’s claim was based on the Awka custom that discriminates against daughters and widow to inherit under intestacy. According to Ogunbiyi, J.S.C. who read the lead judgment:

The impropriety of such a custom which militates against women particularly widows, who are denied their inheritance, deserves to be condemned as being

³⁵ *Ibid* at 304,305

³⁶ *Mojekwu v. Iwachukwu* (2004) 11 (Pt.883) 196 (S.C.)

³⁷ *Ibid* at 220, per Mohammed, J.S.C

³⁸ *Mojekwu v. Iwachukwu* at 216,217

³⁹ (2014) 9 N.W.L.R. (Pt.1412) 393

repugnant to natural justice, equity and good conscience. The repulsive nature of the challenged custom is heightened further in the case at hand where the widow of the deceased is sought to be deprived of the very building where her late husband was buried. The condemnation of the appellants' act is in the circumstance without any hesitation or apology.⁴⁰

In further condemnation of the native law and custom, the Court stated that:

I hasten to add at this point that the custom and practices of Awka people upon which the appellants have relied for their counter-claim is hereby out-rightly condemned in very strong terms. In other words, a custom of this nature in the 21st century societal setting will only tend to depict the absence of the realities of human civilisation. It is punitive, uncivilised and only intended to protect the selfish perpetration of male dominance which is aimed at suppressing the right of the womenfolk in the given society. One would expect that the days of such obvious differential discrimination are over. Any culture that disinherits a daughter from her father's estate or wife from her husband's property by reason of God instituted gender differential should be punitively and decisively dealt with. The punishment should serve as a deterrent measure and ought to be meted out against the perpetrators of the culture and custom. For a widow of a man to be thrown out of her matrimonial home, where she had lived all her life with her late husband and children, by her late husband's brothers on the ground that she had no male child, is indeed very barbaric, worrying, and flesh skinning.⁴¹

The court per Ngwuta, J.S.C. stated that 'the custom of Awka people of Anambra State pleaded and relied on by the appellant is barbaric and takes the Awka community to the era of cave man. It is repugnant to natural justice, equity and good conscience and ought to be abolished.'⁴²

⁴⁰ *Anekwe v. Nweke*, (2014) 422

⁴¹ *Anekwe v. Nweke*, (2014) 421,422

⁴² *Ibid* at 425

In *Ukeje v. Ukeje*,⁴³ the appellant relied on the Igbo native law and custom that discriminate against a female child from inheriting from her deceased father. In dismissing the appeal the court per Rhodes-Vivour J.S.C. stated that:

No matter the circumstances of the birth of a female child, such a child is entitled to an inheritance from her late father's estate. Consequently, the Igbo customary law which disentitles a female child from partaking in the sharing of her deceased father's estate is in breach of section 42(1) and (2) of the Constitution, a fundamental rights provision guaranteed to every Nigerian. The said discriminatory customary law is void as it conflicts with section 42(1) and (2) of the Constitution.⁴⁴

Also in *Okonkwo v. Okonkwo*⁴⁵ the Court of Appeal dismissed a claim based on a customary law practice⁴⁶ that discriminates against the rights of a childless widow to inherit from her deceased spouse. In this case it was established that the widow the legal wife of the deceased contributed her life savings to acquire the estate now in issue.

In allowing the appeal, the Court of Appeal per Agube, J.C.A. held that:

Section 120(1) (b) of the Administration and Succession (Estate of Deceased Persons') Law of Anambra State, 1991 no doubt, to the extent that it discriminates or dichotomises between male and female intestate spouses is inconsistent with section 42(1) (a) of the Constitution of the Federal Republic of Nigeria, 1999 and to the extent of such inconsistency ought to be void. This is because by providing that only one third of the estate shall go to "the surviving spouse whose interest shall be absolute in the case of a husband or for her life or until her remarriage (which ever first occurs) in the case of a wife," the widow is put under great disadvantage particularly in the case of this appellant who had toiled all these years with her husband and invested her life

⁴³ (2014) 11 N.W.L.R. (Pt. 1418) 384

⁴⁴ *Ukeje v. Ukeje* at 408

⁴⁵ (2014) 17 N.W.L.R. (Pt. 1435) 18

⁴⁶ This custom was merely reproduced in section 120(1) (b) of the Administration and Succession (Estate of Deceased Persons') Law, Cap 4 Laws of Anambra State, 1991. An Igbo native law and custom which only accord a life interest over a property to a widow which she forfeits as soon as she remarries whereas a widower is granted an absolute interest over the property

savings in building the estate now in dispute only for her to be entitled only to a life interest of one third of the estate and the bulk of the residue of two thirds of the estate shall devolve on the children of an adulteress who will now enjoy same absolutely...⁴⁷

4. DISCRIMINATORY INHERITANCE LAWS AND INTERNATIONAL HUMAN RIGHTS LAW

The native laws or customs applicable to intestacy as a system of law has been accepted by the locals where such laws or customs operate. The Nigerian courts had hitherto given judicial approval to such customary law practices till the most recent judicial pronouncements where such customs or native laws were condemned in the strongest terms ever.

This paper examines a number of international human rights instruments aimed to guarantee and protect the rights of women from all forms of discrimination; such as, the International Covenant on Economic, Social and Cultural Rights (ICESCR),⁴⁸ the Convention on the Elimination of all Forms of Discrimination against Women of 1979 (CEDAW),⁴⁹ African Charter on Human and Peoples' Rights (the African Charter) of 1981 domesticated into the nation's legal system pursuant to section 12 of the 1999 Constitution (as amended)⁵⁰ and The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.⁵¹ It is instructive to note that Nigeria as state party to the foregoing instruments has ratified all of them. It is expected that having ratified these instruments Nigeria is under obligation to observe and enforce the provisions of these instruments. And this can only be made possible by domesticating the said instruments into the nation's national

⁴⁷ *Okonkwo v. Okonkwo*, (2014), 54

⁴⁸ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force January 3, 1966. Available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>. Accessed November 21, 2017

⁴⁹ Convention on the Elimination of all Forms of Discrimination against Women adopted by the United Nations General Assembly resolution 34/140 of 18 December 1979 and came into force in 1981. Available <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>

⁵⁰ African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap A9, Laws of the Federation of Nigeria, 2004

⁵¹ Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, CAB/LEG/66.6 (Sept. 13, 2000) which entered into force on November 25, 2005. This Protocol was signed by Nigeria in 16th day of December 2003, ratified on the 16th day of December 2004 and deposited at the Secretariat on the 18th day of February 2005

law.⁵² Another important international instrument is the Universal Declaration of Human Rights (UDHR) of 1948.⁵³

Several Articles of the foregoing legal instruments provided for equality of both men and women with respects to the exercise of their rights. State parties are enjoined to make laws to modify or abolish such discriminatory laws or customs that disentitle women from exercising their rights to family benefits. And to sanction such discriminatory practices or acts against women in their respective society, and repeal all laws that discriminate against the rights of women.⁵⁴

It is pertinent to note that the African Charter has been domesticated into Nigeria's legal system as African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act⁵⁵ aimed at eliminating or abolishing all forms of discriminatory cultural law practices in any part of the country. Article 18 (3) of the Act provides that 'the State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.'

Apart from the African Charter, The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa specifically provided for equality of rights for male and female children to inherit as well as the rights of widows to inherit. The Protocol guarantees amongst others the widow's rights to equitable share of her deceased husband property, to marry any person of her choice and to live in the matrimonial house in the event of remarriage. It has been asserted that the introduction of the Maputo Protocol is in response to the lack of implementation of the international human rights norms which seek to protect the rights of women.⁵⁶

⁵² Apart from the African Charter on Human and Peoples' Rights that has been domesticated as Cap A9 Laws of the Federation of Nigeria, 2004 none other instruments have been domesticated into the nation's national law

⁵³ The Universal Declaration on Human Rights proclaimed by the United Nations General Assembly in Paris on 10 December 1948 by General Assembly Resolution 217(111).

⁵⁴ See Article 16 of UDHR, Article 3 of ICESCR and Articles 2, 5 and 13 of CEDAW

⁵⁵ African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap A9, Laws of the Federation of Nigeria, 2004

⁵⁶ F Viloen, 'An Introduction to the Protocol to African Charter on Human and Peoples' Rights on Women's Rights in Africa' (2009) 16 Wash. & Lee J.C.R. & Soc. Justice 17 available at

The Protocol enjoined state parties to fight all forms of discrimination against women through constitutional provisions or other legislative enactments where such does not already exist. To make and implement laws intended to combat all forms of discrimination against the general well-being of women and to take corrective and positive actions to arrest discrimination against women. To take steps to protect the human rights of widows by ensuring that they are not subjected to inhuman treatment or humiliated; to marry any persons of their choice in the event of remarriage; to equitably inherit from husband's property and to continually live in the matrimonial home and to retain the house in the event of remarriage. Finally, male and female children inherit equally from their parents' properties.⁵⁷

The foregoing international human rights legal framework more particularly the African Charter, CEDAW and the Maputo Protocol seek to protect the rights of women from any form of discrimination. And the legal regime of these instruments is aimed at protecting the inheritance rights of widows and daughters under intestacy and to abolish such discriminatory law custom or cultural practices in force in any state party, Nigeria inclusive.

Despite the foregoing provisions of the Maputo Protocol, cultural practices that discriminate against the rights of women still abound in Nigeria. This can be attributed to a number of factors principally among them is the non-domestication of this Protocol into Nigerian legal system and absence of national policy by the government on this score. It is the view of this paper that lack of exploring the available system by women is also a factor. According to Packer "...It was argued that the real problem lay in the lack of utilisation of the available system by women or on their behalf..."⁵⁸

The pertinent issue here is the application of the Maputo Protocol. This can only be resolved based on the acceptability of the Protocol by members of the African Union that adopted it. Regrettably out of the 54 member states of the African Union, only 37 have ratified

<http://law2.wlu.edu/deptimages/Journal%20of%20Civil%20Rights%20and%20Social%20Justice/Frans%20Viljoen.pdf>. Accessed on September 8, 2017

⁵⁷ Articles 2, 20 and 21 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

⁵⁸ Corinne A. Packer, *Using Human Rights to Change Traditions: Traditional Practices Harmful to Women's Reproductive Health in Sub-Sahara Africa*, 127-29 (2000) cited by F Viloen, 'An Introduction to the Protocol to African Charter on Human and Peoples' Rights on Women's Rights in Africa' (2009) 16 Wash. & Lee J.C.R & Soc. Justice 18

the Protocol and with some reservations. A few of the states' parties has implemented or domesticated the Protocol into their various national laws.

The said law prohibits harmful practices which includes social, cultural or religious practices on account of sex, gender or marital status amongst others. Sierra Leone passed the Registration of Customary Marriages and Divorce Act which protects persons entering into customary marriages from force forced marriage in line with traditional customs and practices, this is in accord with Article 20 (c) of the Protocol. Cases of forced marriage are common in most African countries including Nigeria where widows are usually compelled to marry from members of the family of their deceased spouse. The Republic of Benin in 2004 passed the Family Code which focuses on equality amongst others.⁵⁹

Nigeria, having ratified the Maputo Protocol and CEDAW should take bold steps to domesticate these legal instruments and make a far reaching law that will not only abolish all form of discriminatory customary law practices but also criminalise such barbaric practices in accord with modern civilization.

It is worthy of note that the elite among the Nigerian women have not done enough to protect the female folks who are victims of these cultural practices. Women who are victims of these discriminatory practices continue to accept and promote such cultural practices as binding in their localities and enforce same on the female folks.

5. RECOMMENDATIONS

The absence of a general legislation on intestacy with a wide spread jurisdiction has encouraged the operation of discriminatory native laws or customs against women's inheritance rights in Nigeria.

Notwithstanding the various international human rights instruments that Nigeria has ratified, little has been done by the country to bring the nation's legal system in conformity with modern practices. Few States in Nigeria have enacted laws to protect the inheritance rights of daughters and widows under intestacy. These include Enugu State Law of 2001,⁶⁰

⁵⁹ *Ibid*

⁶⁰ The Prohibition of Infringement of a Widow's and Widower's Fundamental Rights Law, Enugu State Law 2001. Section 4 (1) (i) of the Law provides that 'no person for whatever purpose or reason shall compel a widow/widower to vacate the matrimonial home.'

Cross River State Law of 2007,⁶¹ Anambra State Law of 2005⁶² and Anambra State's Widowhood Law.⁶³ It is the view of this writer that the unwillingness on the part of the government of Nigeria may be attributed to the peculiar nature of the nation's Constitution framework.

It is opined here that Nigeria should in conformity with Article 18 (3) of the African Charter on Human and Peoples' Rights (Enforcement) Act and section 12 of the 1999 Constitution enact laws by either domesticating the provisions of CEDAW and Maputo Protocol in its national law or incorporate certain provisions of these instruments into its body of laws to protect the rights of women under intestacy. This view was expressed by Denton-West, J.C.A., in the case of *Asika v. Auanya*,⁶⁴ thus:

[A]ny custom or culture that does not enhance the human dignity of man or woman is inconsistent with the fundamental objectives of the constitution and should therefore not be allowed. I therefore, with respect, call on the Nigerian state to protect, preserve or promote only the Nigeria culture, which enhance human dignity and discard all cultures that are discriminatory and intolerable as repugnant to nature justice, equity and good conscience.⁶⁵

5.1 Constitutional Amendment

Sovereign states are under obligations to ensure that the provisions of internationally agreed instruments are implemented within their jurisdictions. Though Nigeria ratified the foregoing legal frameworks, but effort has not been made to enact laws or formulate policies in conformity to the instruments for the abolition of those native laws or customs that discriminate against the inheritance rights of women. Should the federal government take the

⁶¹ A Law to Provide for the Right of Female Person to own and to Inherit Property, Cross River State Law 2007. Section 1 (1) thus 'notwithstanding any native law or custom to the contrary a female person has the right to acquire and own property.' Subsection (2) "subject to any other written law and notwithstanding any native law or custom to the contrary a female person shall share in the intestate Estate of her deceased father, mother or husband in accordance with the provisions of this law." subsection (3) "a female person may be administrator or one of the administrators of her fathers, mothers or husband's estate." Section 3 (1) "the widow or husband of the deceased where the marriage produced no issue shall inherit the intestate property." Section 7 of the Law provides that "notwithstanding any native law or custom to the contrary, a female person whose husband has dies shall be free to reside wherever she may please and to remain unmarried or marry again any male of her choice.'

⁶² The Widowhood Law of Anambra State of 2005.

⁶³ Section 4(3) provides that "a widow or widower shall not be forcefully dispossessed of any property acquired or used by the couple during the lifetime of the deceased spouse."

⁶⁴ (2008) 17 N.W.L.R. (Pt. 1117) 484

⁶⁵ *Ibid* at 518

initiative to make laws to that effect, this could lead to constitutional issues. The extant 1999 Constitution (as amended) does not provide for succession in any of the legislative lists, so legislating on intestate succession will be *ultra vires* the legislative competence of the federal legislature.

In order to protect and guarantee the inheritance rights of women under intestacy against all forms of discriminatory customary laws, it is recommended that constitutional reform be pursued to introduce succession matters into the nation's basic law.

5.2 The Need for a Legislative Intervention

Constitutional amendment introducing succession into the legislative list will afford the federal government to enact law(s) in conformity with the various international human rights legal frameworks it has ratified. Such law(s) will amongst others protect and guarantee the rights of women to enjoy an equitable share of family properties. It is opined here that federal law on intestacy will be in the best interest of women. To this end, therefore, it is hereby suggested that the National Assembly should begin the legal process for constitutional reforms that will incorporate succession matters into the legislative lists. Consequently, enact Intestate Succession Act to accommodate the provisions of such legal frameworks that seek to protect the inheritance rights of women pursuant to Article 18 (3) of the African Charter and section 12 of the 1999 Constitution (as amended).

6. CONCLUSION

The native law or custom that encourages discrimination against the inheritance rights of women under intestacy is an infringement to their fundamental rights. It erodes the fundamental rights guaranteed by the 1999 Constitution (as amended) and the provisions of the various international legal frameworks ratified by Nigeria as state party. Such native law or custom offends common reason and it is an attack on the rights of mankind as well as against the law of God. It is gratifying that the Nigerian Courts have risen to the occasion by declaring such obnoxious native laws or customs as repugnant to natural justice, equity and good conscience and in breach of the constitution.

However, such judicial endeavours cannot stop the operation or practice of any of such customary law practices in those communities where the native laws or customs hold sway.

Judicial decisions will only apply to the particular case in point. A legal framework abolishing or criminalising such discriminatory native laws or cultural practices may go a long way to repress such practices in the 21st century society. This will create gender balance and equality or equity in inheritance rights between sons and daughters, as well as widows and widowers under intestacy.