

## The Nerve Jangling Interaction between Customary Law Right to Succession and Constitutional Right to Freedom from Discrimination in Nigeria

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### Abstract

*The issue of inheritance under customary law is an intricate and excruciating issue under the various customs of the people. This is aggravated by the fact that there is no uniform customary law applicable in this circumstance from one community to the other. Strictly, this issue rears its head when a person dies intestate. In such cases, the rivalry among possible beneficiaries becomes a matter of life and death. It is also believed that the Constitutional right to freedom from discrimination is a clog on the wheel of succession rights under customary law. Most scholars are of the view that customary law is skewed heavily against women. The objective of this work is to juxtapose the succession right of inheritance under customary law and ascertain the friction between these customary law rights and the right to freedom from discrimination. The methodology adopted in this work is the doctrinal methodology and comparative methodology. It is deciphered that there is indeed a nerve jangling interaction between these rights.*

### 1. Introduction

Many people are not given to the making of wills as it is usually believed that will is a reminder of death.<sup>1</sup> This belief remains extant and forceful among many people, though fallacious, but it still holds sway. Relatives got deeply scared once such an idea is muted and are quick to express their rejection or utter condemnation of such an idea.

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<sup>1</sup> FJ Oniekoro, *Wills Probate Practice and Administration of Estates in Nigeria* (Enugu: Chenglo Ltd 2007) 3

It must be emphasised that irrespective of this repulsive attitude towards writing wills, it is still a veritable and efficient tool for addressing posthumous matters. The law respects the owner of estate's decision on who should have or get what in his estate. Obuka<sup>2</sup> insists that 'one justification for this deference is that owners typically internalize the benefits and costs of their actions.'

It is this reluctance towards writing wills that ignited the probe into an alternative means of sharing estate where a person dies intestate. At this juncture, the customary law right of inheritance becomes the available route for the determination of right to succession in Nigeria. Although, customary law right of inheritance is still pervading the terrain, issues concerning the discrimination against women within this customary law right of succession are rearing up their heads.

There is reverberating and indeed deafening uproar over discriminatory customary law stipulations against female children. The Constitution provides against discrimination, customary law insists that certain aspects in inheritance ought or better still must be reserved for the male children exclusively. This is where the frictional tango, which resulted in the nerve jangling interaction between customary law inheritance and constitutional right to freedom from discrimination, started. Therefore, this work is aimed at studying this interaction deeply with the intent of arriving at feasible and sustainable recommendations.

## **2. Definition of Salient Terms**

There are terms the elucidation of which will aid the easy comprehension of this study. This section will be devoted to adumbrating those terms.

### **2.1 Fundamental Rights**

Manifestly, fundamental right is a microcosm of human right. Fundamental right is not exactly the same thing with human right. Human right is the right to be enjoyed by all human beings of the global

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<sup>2</sup> Uju Obuka, 'Limitations of Testamentary Freedom in Nigeria' (2015) (8) *Law and Policy Review* 35 – 58, 35

village and not gifts to be withdrawn, withheld or granted at someone's whims or will.<sup>3</sup> In *Uzoukwu v Ezeonu II & Ors*<sup>4</sup> the Court of Appeal held that:

Due to the development of constitutional law in this field, distinct difference has emerged between fundamental rights and human rights. It may be recalled that human rights were derived from and out of the wider concept of natural rights. They are rights which every civilised society must accept as belonging to each person as a human being. These were termed human rights. When the United Nations made its declaration it was in respect of human rights as it envisaged that certain rights belong to all human being irrespective of citizenship, race, religion and so on. This has now formed part of international law. Fundamental rights remain in the realm of domestic law. They are fundamental because they have been guaranteed by the fundamental law of the country; that is by the Constitution.

It must be stressed that irrespective of the fundamental nature of fundamental rights, the rights are still alienable and can be derogated from under certain constitutionally prescribed circumstances.<sup>5</sup> In Nigeria, Chapter IV of the Constitution of the Federal Republic of Nigeria 1999 (as amended) outlines the constitutionally recognised fundamental rights. Any right that is not listed in the said Chapter IV of the 1999 Constitution cannot be tagged fundamental rights but such right can still be enforced as human right.

The categories of people that are regarded as applicants in fundamental rights case have been clearly identified in *Agupugo & Anor v The Police Service Commission & Ors*<sup>6</sup> in line with Paragraph 3(e) of the Preamble to the Fundamental Rights (Enforcement Procedure) Rules 2009 which provides *inter alia* that: 'Human rights activists, advocates or groups as well as any non-governmental

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<sup>3</sup> Richard Emeka Ogbodo, 'The Procedural Challenges to the Enforcement of Labour Related Fundamental Rights at the National Industrial Court,' (2014) (8) (2) *Labour Law Review* 27 – 38, 31

<sup>4</sup> [1991] 6 NWLR (Pt 200) 708, 761

<sup>5</sup> Ogbodo, (n3), 32

<sup>6</sup> [2021] 3 WRN 168, 185 – 186

organisation may institute human rights application on behalf of any potential applicant'. It would thus be deduced that the proper applicants in fundamental rights application should be:

- i. Anyone acting on his own interest.
- ii. Anyone acting on behalf of another person.
- iii. Anyone acting as a member of, or in the interest of a group or class of persons.
- iv. Anyone acting in the public interest.
- v. Association acting in the interest of its members or other individual or group.

It must be stressed that the Preamble to the Fundamental Rights (Enforcement Procedure) Rules 2009 enjoins the courts to expansively and purposely interpret and apply the provisions of the 1999 Constitution and other international instruments and protocols with a view to advancing and realising the rights and freedom therein.

## **2.2 Customary Law**

Customary law is law consisting of customs that are accepted as legal requirements of obligatory rules of conduct; practices and beliefs that are so vital and intrinsic part of a social and economic system that they are treated as if they were laws.<sup>7</sup> Customs are norms or rules about the ways in which people are to behave if social institutions are to perform their tasks and society is to endure. The central principle of customary law is the reciprocity of benefit conferred; the sanctions which ensures compliance with the rules of customary law lies in a tacit threat that if a man does not make his contribution, others may withhold theirs.<sup>8</sup> A valid custom must be of immemorial antiquity, certain and reasonable, obligatory, not repugnant to any legislation though it may derogate from

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<sup>7</sup> BA Garner, *Black's Law Dictionary*, (8th edn., USA: Thomson West Publishing Co. 2004) 413

<sup>8</sup> MDA Freeman, *Lloyd's Introduction to Jurisprudence* (7th edn., London: Sweet & Maxwell 2001) 945

common law.<sup>9</sup> According to Akaniro:<sup>10</sup>

The customary law of any community is a body of customs or traditions which regulate the various kinds of relationships between members of that particular community in their traditional settlements. Thus customary law in Nigeria is a body of law derived from the custom of the people as practiced from time immemorial till the present time.

Customary law is also defined as the customs accepted by members of a community as binding among them.<sup>11</sup> In *Owoniye v Omotosho*<sup>12</sup> Baramian FJ, described customary law as ‘a mirror of accepted usage among a given people.’ Obaseki JSC in *Oyewunmi v. Oguesan*<sup>13</sup> explained customary law as: ‘The organic or living law of the indigenous people of Nigeria regulating their lives and transactions.’

Section 258(1) of the Evidence Act 2011 adumbrates custom as: ‘A rule which in a particular district has from long usage obtained the force of law.’ An enforceable customary law is one that is not repugnant to natural justice, equity and good conscience; it is not against public policy and is not incompatible, either directly or by necessary implication with any written law for the time being in force.<sup>14</sup>

Customary law generally emerges from the traditional usage and practice of a people in a given community, which, by common adoption, consent, long and unvarying habit, has acquired to some extent, element of compulsion, and force of law, with reference to the community. It is because of element of compulsion, which it has acquired over time by constant and consistent community usage that it

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<sup>9</sup> Sheila Bone, *Osborn's Concise Law Dictionary* (9th edn., London: Sweet & Maxwell 2001) 121

<sup>10</sup> Ebere Gregory Akaniro, *A Study Guide to the General Principles of Nigerian Law* (Ikeja: Elcoon Press Ltd 1997) 27

<sup>11</sup> A Sanni, *Introduction to Nigerian Legal Method* (Ibadan: Spectrum Books Ltd 2006) 8

<sup>12</sup> (1961) All NLR 304

<sup>13</sup> [1990] 3 NWLR (Pt 137) 365

<sup>14</sup> The Customary Court Law, Cap. 32 *Laws of Enugu State* 2004, s 15(1) (a); also Akaniro, (n10), 28 and AEW Park, *The Sources of Nigerian Law* (London: Sweet & Maxwell 1963), 69 – 68

attracts sanction of different kinds and is enforceable. Succinctly and simplistically, the custom, rules, traditions, ethics, and culture which govern the relationships of members of a community are generally agreed as customary law of the people.

Customary law is any system of law not being the common law and not being a law enacted by any competent legislature in Nigeria but which is enforceable and binding within Nigeria between parties subject to its sway. Thus custom means a rule which, in a particular district, has, from long usage, obtained the force of law.<sup>15</sup> There are numerous usages in every community but not all these usages are eligible to be tagged customary law. Illustratively:

Customs such as ‘yam eating’<sup>16</sup> festivals, annual or seasonal masquerade festivals and others, vividly portray the non-law quality of these customs; thus, with regards to masquerade festivals, if a man invites the public to the celebration of a masquerade and fails to fulfil his obligation on the appointed day, no one can coerce him to do so and there is no sanction for his failure; also whereas it is customary among Igbo to offer kolanut to visitors and to present kolanut at occasions and ceremonies, failure or omission to do so, does not attract punitive actions.<sup>17</sup>

It is only those usages which by virtue of long usage have acquired the potency of law that are accepted as customary law. Thus customary law is not an enactment.

Customary law is unwritten and it depends on what the appropriate authority believes or is persuaded to believe by evidence as customary law. The Supreme Court in *Pius Umeadi & Ors v Chibunze & Anor*<sup>18</sup> relying on its decision in *Omaye v Omagu*<sup>19</sup> held that: ‘Customary law is unwritten and it depends on what the appropriate

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<sup>15</sup> Evidence Act 2011, s 258 (1)

<sup>16</sup> Also known as new yam festival

<sup>17</sup> Chris Chijioke Ohuruogu and Chukwudumebi Okoye, Chijioke Chris Ohuruogu and Okechukwu Timothy Umahi (Eds.) ‘Nature of Customary Law in Nigeria,’ *Selected Themes on Nigerian Legal System* (Lagos: Continental Resource Concepts 2015) A65 – A91, A67

<sup>18</sup> [2020] 22 WRN 1, 35 – 36.

<sup>19</sup> [2008] 7 NWLR (Pt 1087) 447

authority believes or is persuaded to believe by evidence as the customary law. In other words, customary law is a question of fact to be proved by evidence'. It must be accentuated that customary law being unwritten must be established through evidence in order to sway the court to enforce it.

The veracity is that customary law is not homogenous. This is where human right and customary law have a meeting point. Both are not homogeneous. Ortuanya<sup>20</sup> states that:

The relationship between culture and human rights revolves around two general ideas. Firstly, both globally and nationally, cultural diversity is an omnipresent aspect of society and must inform our approach to human rights. Very few countries can claim to be culturally homogeneous. Secondly, throughout the world, culture is often used to justify human rights.

Manifestly, human right is modified and subjected to culture. Culture, which is contextually used interchangeably here with customary law, influences and streamlines human rights. Therefore, where the dictates of human right is antagonistic or antithetical to the dictates of customary law, then there will be frictional tango between them.

### 2.3 Succession

Succession connotes the right to inherit, the order in which inheritance is bequeathed and the condition precedent under which one can succeed another. It is the devolution of property on the death of the person concerned.<sup>21</sup> The law of succession therefore is all about the transfer or devolution of property on the death of an owner to another, his heir. Simply put, the law is the rule by which such devolution occurs.<sup>22</sup> When

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<sup>20</sup> Simon Uche Ortuanya, 'Human Rights and Globalization: A Curse or a Blessing?' (2012) (1) *Journal of International & Comparative Law* 8 – 14, 10

<sup>21</sup> Obuka, (n2) 36

<sup>22</sup> Hon. Justice Moses A Bello, 'Principles and Practice of Succession under Customary Law' < [https://niji.gov.ng/images/Workshop\\_Papers/2017/Refresher\\_Judges\\_and\\_Kadis/s4.pdf](https://niji.gov.ng/images/Workshop_Papers/2017/Refresher_Judges_and_Kadis/s4.pdf) > accessed 2 September 2021.

a man dies, devolution of his self acquired property depends upon whether or not he has made a will. According to Nwabueze:<sup>23</sup>

If he has made a will, the property will devolve according to the directions contained in the will, or has made one which at his death has become totally inoperative, he is said to die intestate, and devolution of his property will be governed entirely by the rules of law prescribing the order of succession upon an intestacy.

In customary law, the distinction between the two types of succession to wit: testate and intestate succession is of minor importance. However, intestate succession is more prevalent in Igbo communities given the odium in which people hold wills. Intestate succession in Igbo communities is governed by primogeniture. Nwogugu<sup>24</sup> writes that:

By the concept of primogeniture, succession is through the male line by the eldest member of the family. On the death of the head of the family, the eldest son – Okpala or Diokpala – succeeds not only to the status of headship but also to the obi and the immediate surrounding land to the obi sometimes referred to as Ani Obi.

Also, Nnamani elucidates that:

The eldest or first son of a man (Okpala or Okpara) is entitled to the dwelling house (obi or Obu) of his father by virtue of his position to the exclusion of his other siblings....In Akpuoga Nike custom in Enugu State, the estate of a deceased person who has no surviving male child and whose surviving daughters are all married goes to his relations upon the performance of the deceased's funeral ceremony by the said relations.<sup>25</sup>

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<sup>23</sup> BO Nwabueze, *Nigerian Land Law* (Enugu: Nwamaife Publishers Ltd 1974) 380

<sup>24</sup> Edwin Nwogugu, 'Primogeniture in Igbo Customary Law of Intestate Succession: A Revisit' (2016) (1) (1) *Enbar Law Journal* 1 – 18, 1

<sup>25</sup> George Nnamani, *Customary Law in Nigeria* (Enugu: Chenglo Limited 2020) 54



Under the English law, the statutory rules governing the distribution of an intestate's estate are based upon the principle that those who die intestate would, had they made a will, have made provision for certain classes of near relations and would have preferred some relations to others.<sup>26</sup> Thus the law of inheritance and succession under the received English law is certain and reasonably settled. However, the aspect dealing with customary law is diverse and largely unsettled. What is more, there is a notorious diversity of customs and practices amongst the different tribes and at times amongst the different lineage groups.<sup>27</sup> Section 24 of Land Use Act simply makes provisions on devolution of the rights of an occupier upon death. It provides that:

The devolution of the rights of an occupier upon death shall

- a. In the case of customary right of occupancy, unless non-customary law or any other customary law applies, be regulated by the customary law existing in the locality in which the land is situated; and
- b. In the case of statutory right of occupancy (unless any non-customary law or other customary law applies) be regulated by the customary law of the deceased occupier at the time of his death relating to the distribution of property of like nature to a right of occupancy.

The above principle of law is deployed in *Obum Eze & Anor v Hon. Vincent Eze & Ors*<sup>28</sup> to resolve the raging controversy therein.

There are basically two systems of succession under customary law. They are the patrilineal and matrilineal.<sup>29</sup> In Igbo land, family grouping is patrilineal. As a result of this, inheritance is based on principle of primogeniture. This means that succession is based on eldest son known as *okpala* or *diokpa*. Nnamani<sup>30</sup> accentuates that:

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<sup>26</sup> Bone, (n9) 214

<sup>27</sup> Niki Tobi, *Cases and Materials on Nigerian Land Law*, (Lagos: Mabrochi Books 1997) 75

<sup>28</sup> Unreported judgment delivered on the 11th day of June 2014 by the Customary Court of Appeal Enugu in Appeal No. CCAE/6/2011.

<sup>29</sup> *Ibid.*, 76.

<sup>30</sup> EN Nnamani, *The Practical Dimensions of Nigerian Land Law* (Enugu: CIDJAP Press 2008)

If the deceased was a polygamist and is survived by many sons from several wives, the estate is partitioned between the eldest sons of each of the wives. Each of the said eldest sons will subsequently return to his mother's group of sons to what has been inherited by their eldest from the general estate.<sup>31</sup>

However, the Court of Appeal in *Motoh v Motoh*<sup>32</sup> recognized the right of a man's wife to inherit his property where the man dies intestate. In *Motoh's* case it was held that the position of the law is that, where a man who marries under the statute dies intestate, his estate is only inheritable by his wife.<sup>33</sup>

The practice of *Igi-ogbe* found in Bini culture/customary law<sup>34</sup> is also obtainable in some part of Igbo land. *Igi-ogbe* is the principle in customary law of succession wherein the eldest male child inherits the family's principal house. The said principal house is the *Igi-ogbe*. The practice was vividly adumbrated in the case of *Osemwenkha v. Osemwenkha*<sup>35</sup> when the Court of Appeal held that:

It has been settled long ago that the evidence of customary law in Bini is that the eldest son of the testator is entitled without question to the house or houses known as *Igi-ogbe* in which his father lived and died. It has been stated emphatically that this is the normal rule. No exceptional situation has been shown where an eldest son is denied this right.<sup>36</sup>

In *Abudu v Eguakun*<sup>37</sup> the Supreme Court stated thus:

By the customary law of Bini, upon the death of a father, the eldest son takes over his estate as a trustee for all the deceased children pending the performance of the second burial rites. After the performance of final rites the eldest son automatically inherit

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<sup>31</sup> *Ibid.*, 145

<sup>32</sup> [2011] 42 WRN 124

<sup>33</sup> *Ibid.*, 179, lines 40 – 45

<sup>34</sup> A shade of inheritance by primogeniture

<sup>35</sup> [2012] 44 WRN 150

<sup>36</sup> *Ibid.*, 163 lines 20 – 25. See also *Idehen v Idehen* [1991] 6 NWLR (Pt 198) 382

<sup>37</sup> [2003] 14 NWLR (Pt 840)

the main seat of his deceased father that is to say the house where the deceased lived, died and was buried. This house is called *Igi-ogbe* and does not vest until the 2nd burial rites are performed by the eldest son.<sup>38</sup>

A similar custom to *Igi-Ogbe* is practiced in Awka, Anambra State in the South-Eastern Nigeria. It is not clear where the culture originated from for the first time but it is certain that both are similar in operation and effect. However, the nomenclature is not the same. In Awka the house which the deceased lived in and died which the eldest son is traditionally entitled to inherit is called *uno obu*. No matter how big the compound is, it is the eldest son that will inherit it. This custom has occasioned a lot of hardship particularly where the other children have no alternative accommodation. A wicked eldest son may drive them out of the compound and make them homeless.

It is pertinent to point out that the issue of inheritance has clear rules for legitimate children as has already been elucidated. Another aspect worthy of note is the status of 'illegitimate' children which is not so clearly defined in customary law as it is in English law. Nwabueze rationalizes this position of law thus:

This is because of the possibility of legitimation by acknowledgement. A child born out of wedlock but whose paternity has been acknowledged by its natural father is as much legitimate as one born in lawful wedlock. Owing to the very high premium placed on the paternity of children, a child born out of wedlock is usually acknowledged by its natural father, unless where by custom someone else has a prior claim to its paternity.<sup>39</sup>

Consequently, an illegitimate child is not entitled to inherit under the customary law of Igbo land. It is only legitimate children that can inherit. This is because under most systems of customary law, inheritance is by blood.<sup>40</sup> However, even where the illegitimacy of a

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<sup>38</sup> *Ibid.*, 319. See also *Agidigbi v Agidigbi* [1996] 6 SCNJ 105 and *Ogiamen v Ogiamen* (1967) NSCC 189

<sup>39</sup> Nwabueze, (n23) 384

<sup>40</sup> Obuka, (n2) 51

child is conspicuous, mere acknowledgement during the deceased lifetime confers on the child legitimacy status.

Thus the child will be placed on the same scale in the distribution of the estate of the deceased under the customary law. This brings to mind the decision in *Alake v Pratt*<sup>41</sup> relied on by the Court of Appeal in *Motoh v Motoh*<sup>42</sup> which approves the custom of legitimation by acknowledgement of paternity and placed illegitimate children in the same position for inheritance as children conceived in lawful wedlock. However, that statement of the law has been qualified by the decision in the case of *Cole v Akinyele*<sup>43</sup> which held that the custom of legitimation by acknowledgement can be allowed by the court only in so far as it affects illegitimate children not born during the continuance of a statutory marriage. This decision with utmost respect and deference is not acceptable.

This is because if the man for whom the child is born decides to overlook the circumstances of the child's birth, why will the court refuse to accord his decision recognition? Thus the decision is a bit baffling. Though justified on ground of the law against bigamy, public policy and protection of morals, the decision also depicts an interface between statutory law of bigamy and customary law of paternity by acknowledgment. Nevertheless, the *lex naturale* encourages act of forgiveness in event of penitence and repentance.

Nwabueze<sup>44</sup> maintains that it is true that a child who predeceases his father has no right in the estate, his own children are indisputably members of their grandfather's family and they inherit as members of the family not by virtue of any estate left behind by their father. There is therefore no question of their being entitled by right of representation. It is repugnant to the whole notion of customary land tenure that a grandchild should be denied the right of membership of his grandfather's family and of the right to share in the enjoyment of his land, merely because his father predeceased the intestate.

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<sup>41</sup> [1955] 15 WACA 20

<sup>42</sup> *Op.cit*

<sup>43</sup> [1960] 5 FSC 84

<sup>44</sup> Nwabueze, (n23) 381 – 382.

## 2.4 Freedom from Discrimination

Section 42(1 – 2) of the 1999 Constitution as amended stipulates that:

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 other communities, ethnic groups, places of origin, sex, religions or political opinions are not made subject; or
  - (b) be accorded either expressly by, or in the practical application of any law in force in Nigeria or such executive or administrative action, any privilege or advantage that is not accorded to citizen of Nigeria of other communities, ethnic groups, places of origin, sex, religion or political opinions.
2. No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth.

A liberal approach must be adopted when interpreting the 1999 Constitution as amended and especially the fundamental rights provisions. Section 42 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) guarantees every citizen of Nigeria freedom from discrimination on the basis of belonging to a particular community, ethnic group, place of origin, sex, religion or political opinion.

Therefore, strictly speaking, the constitutional right to freedom from discrimination is only enforceable if the discrimination is on ground of (i) community, (ii) ethnicity (iii) place of origin (iv) religion (v) sex and (vi) political opinion. Discrimination on any other ground other than these is permissible within the provisions of section 42 of the Constitution of the Federal Republic of Nigeria 1999 (as amended). It must be noted that fundamental rights enshrined in section 42 of the 1999 Constitution as amended is not enjoyed by aliens<sup>45</sup> that is none

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<sup>45</sup> MC Anozie, *Notes on Nigerian Constitutional Law*, (Enugu: Pymonak Printing and Publishing Co. 2000) 255

Nigerian citizens. Hence in *Lafia Local Government v The Executive Governor of Nasarawa State & Ors.*<sup>46</sup>, the Supreme Court held that the discrimination complained about must emanate from a law in force in Nigeria, or any executive or administrative action of the government. This includes laws made by the Legislative Houses and legislation made by Local Government and this includes policy statements.<sup>47</sup> The rights are enforceable against the state and not against individuals.<sup>48</sup>

### 3. Customary Law on Succession

Succession under customary law is either patrilineal or matrilineal. Succession is patrilineal when it takes father's lineage into consideration and matrilineal when the mother's lineage is taken into consideration. Niki Tobi<sup>49</sup> adumbrates that:

Where there exist pockets of matrilineal systems in Nigeria the predominant system is patrilineal and patrilocal. The principles of primogeniture in which the eldest son inherits the property of his deceased father exclusively and that of ultimogeniture in which the youngest son inherits the property of his deceased father to the exclusion of all others are an offshoot of the patrilineal system.

Generally, the customary law applicable to succession is the usage prevailing in the concerned community *vis-a-vis* devolution of property of a person who died intestate. However, the Land Use Act has introduced a somewhat plurality on the position of law with respect to customary law applicable to succession. Specifically, section 24 of the Land Use Act<sup>50</sup> introduced this plurality. This is clearly pinpointed by Umezulike. According to Umezulike:<sup>51</sup>

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<sup>46</sup> [2015] 13 WRN 1

<sup>47</sup> Ibid, 30

<sup>48</sup> Reliance is placed here on *Uzoukwu v Ezeonu II* [1991] 6 NWLR (Pt 200) 708

<sup>49</sup> Tobi, (n27) 76

<sup>50</sup> Which has already been reproduced in this study

<sup>51</sup> IA Umezulike, *ABC of Contemporary Land Law in Nigeria* (Enugu: Snaap Press Nigeria Limited 2013) 172 – 173

The section seems to have divided the application of customary law in question of devolution of right of occupancy into two, namely, customary law applicable where the land is in non-urban area and subject to customary right of occupancy and where the land is in the urban area and subject to the statutory right of occupancy. In the former, the applicable customary law should be the customary law existing in the locality in which the land is situated, and, in the latter, the applicable customary law is the one which at the death of the holder or occupier regulates the distribution of his property.

In any case, the patrilineal or matrilineal considerations play significant role before the deployment or better still application of these two considerations introduced by section 24 of the Land Use Act.

It is pertinent to state that a person who died before his father is not entitled to the estate of his father. This is because intestate succession is activated by the death of the holder. The snag is where the person dies leaving an offspring that is the grandchild to his father. What will be the fate of such a grandchild since his deceased father has not inherited any estate? Nwabueze<sup>52</sup> ebulliently and excellently answers this poser thus:

While it is true that a child who predeceases his father has no right in the estate, his own children are indisputably members of their grandfather's family, and they inherit as members of the family not by virtue of any estate left behind by their father. There is, therefore, no question of their being entitled by right of representation. It is repugnant to the whole notion of customary land tenure that a grandchild should be denied the right of membership of his grandfather's family and of the right to share in the enjoyment of his land, merely because his father predeceased the intestate.

The above view is appealing and will eliminate any envisaged hardship to a grandchild who is bearing the pain of his father's demise. It will be heart rending to deprive such a child of the benefit of inheriting from the estate of his grandfather.

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<sup>52</sup> Nwabueze, (n23) 381 – 382

#### 4. The Frictional Tango

The quantum of customary law on succession generally caters for the needs of the men-folk but discriminates against the needs of the womenfolk. Customary law has come under a lot of criticism for being discriminatory against women.<sup>53</sup> The process of succession in Igbo land is strictly skewed against women. Married women are rarely considered whereas unmarried girls are hopefully believed to be soon married. However, where they remain unmarried the frictional tango gets inflamed. Onovo<sup>54</sup> explains that:

The right of an unmarried girl to inheritance under Igbo customary law appears to be one of the most hostile to a girl-child in Nigeria. The entire system is absolutely skewed in favour of the male children and against the female children. With a few exceptions and local variations, a female child in Igbo land generally is absolutely not entitled to the inheritance of her father's property or the family property. Everything goes to the male children.

In *Uboma v Ibeneme*<sup>55</sup> the daughters of a man who died intestate in Awkuzu of the then Onitsha Province attempted to enforce their right of customary succession by claiming that they are jointly entitled with their brothers to inherit their father's land. The court held that: 'women have no such right...it seems to me that land can be allotted to women for farming purposes but they cannot call the land their own'. The foregoing position operates and remains extant irrespective of the constitutional

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<sup>53</sup> Eze Obiageli Chinelo, 'Decades after *Edet v Essien*: The Place of Biological Paternity under Customary Law' *The Customary Court: Imperatives of Renaissance in Mode of Administration of Justice* (Enugu: Research & Information Unit, Customary Court of Appeal Enugu, 2020) 1 – 42, 14

<sup>54</sup> AO Onovo, 'Gender and Inheritance/Succession to Family Property' *Enshrining Judicial Integrity in Nigeria* (Enugu: DeRafelo Ltd 2015) 183 – 223, 200

<sup>55</sup> Judgment delivered in Suit No. O/150/61 at the High Court Onitsha on 12th April 1967



provisions of right against freedom from discrimination based on sex or gender. Ogbu<sup>56</sup> berates this thus:

Unfortunately, Nigerian courts have for long sustained some of the laws and practices which subjugate women. There are several decisions where the facts of the case disclose discrimination against women yet neither the repugnancy doctrine nor the constitutional prohibition against discrimination on ground of sex was invoked.

The good news is that the Supreme Court has halted this practice in *Ukeje v Ukeje*<sup>57</sup> and *Anekwe v Anekwe*<sup>58</sup>. Without delving into the facts of *Ukeje's case* in this study, the Supreme Court held that the Igbo customary law which disentitles a female from inheriting the property of the deceased father is void as it conflicts with the fundamental right to freedom from discrimination set out in section 42 of the Constitution of the Federal Republic of Nigeria 1999 as amended.

## 5. Conclusion

Manifestly, the nerve jangling interaction between the customary law stipulations on mode of inheritance and that of freedom from discrimination seem lubricated and smoothened. But the veracity is that the tough and rough tango between the dictations of both customary law on succession and constitutional right to freedom from discrimination is still on. In most communities first sons are still entitled to inherit their father's obi. There are also other societies where only male children are allowed to assume the mantle of their father's membership on his death. Discussing *Ukeje's case* and *Anekwe's case* Nwogugu<sup>59</sup> explains that the principles enunciated in those cases:

...laid to rest the extant Igbo customary law which recognises only the right of male children in respect of succession or

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<sup>56</sup> Osita Nnamani Ogbu, *Human Rights Law and Practice in Nigeria* (Enugu: Snaap Press Nigeria Ltd 2013) 388 – 389

<sup>57</sup> [2014] 11 NWLR (Pt 1418) 384

<sup>58</sup> [2014] 9 NWLR (Pt 1412) 393

<sup>59</sup> Nwogugu, (n24) 13 – 14

ownership of land. To what extent, if any, does the new rule affect the customary right of the Okpala to succeed to his father's Obi? If females can now inherit land along with their male counterparts based on the non-discrimination provision of section 42(2) of the Constitution, it may not be farfetched to argue that depriving the eldest female child of the family the headship offends the same provision.

Lucidly, the extent and scope of the decision in *Ukeje's* case and *Anekwe's case* may be said to be limited to succession of land and nothing more. There are still many customary practices which are indeed discriminatory against female children. Efforts to suppress or better still asphyxiate these discriminatory practices are at best on paper. Hopefully, the traditional rulers and other community leaders should be mobilised with the aim of ensuring compliance with the constitutional provision against discrimination. They should be enlightened to the effect that both male and female children are at par in land inheritance in Nigeria. This work has demonstrated that there exists nerve jangling tango between the customary law of succession and the constitutional right of freedom from discrimination. Consequently, more needs to be done to ensure that in reality the said discrimination is actually extirpated.