

CUSTOMARY LAW ON WOMEN'S INHERITANCE AND SUCCESSION RIGHTS: A COMPARATIVE STUDY OF NIGERIA AND SOUTH AFRICA

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CONTENTS

CONTENTS.....	i
CANDIDATE'S DECLARATION.....	vi
DECLARATION BY SUPERVISORS.....	vii
DEDICATION.....	viii
ACKNOWLEDGEMENTS	ix
LIST OF ABBREVIATIONS.....	x
TABLE OF CASES	xii
TABLE OF STATUTES.....	xiv
ABSTRACT.....	xvi
CHAPTER ONE: Introduction.....	1
1.1 Background of the study.....	1
1.2 Problem statement.....	2
1.3 Aims and objectives of the study	3
1.4 Significance of the study	3
1.5 Literature review	4
1.6 Research questions.....	8
1.7 Research methodology	9
1.8 Scope of the study	9
CHAPTER TWO: The concept, characteristics and validity of customary law....	10
2.1 Introduction.....	10
2.2 Concept of customary law.....	10

2.3	The characteristics of customary law	16
2.4	The validity of customary law.....	22
2.5	Conclusion.....	27
CHAPTER THREE: Comparative overview of women's rights of inheritance in Nigeria and South Africa.....		
		28
3.1	Introduction.....	28
3.2	The position of women under customary laws of Nigeria and South Africa with regard to inheritance and succession	28
3.3	Constitutional and other legislative provisions for the protection of women's inheritance rights in Nigeria.....	35
3.3.1	Constitution of the Federal Republic of Nigeria (CFRN) 1999.....	35
3.3.2	Other legislative provisions that protect women inheritance rights in Nigeria.....	38
3.3.2.1	Land Use Act 1978.....	38
3.3.2.2	Marriage Act 1914 Cap 115, Laws of Federation of Nigeria 1958.....	39
3.3.2.3	Repugnancy doctrine.....	40
3.4	Constitutional and other legislative provisions that protect women inheritance rights in South Africa.....	41
3.4.1	The Constitution of the Republic of South Africa, 1996.....	41
3.4.2	Other legislative provisions that protect women inheritance rights in South Africa.....	43
3.4.2.1	Recognition of Customary Marriages Act (the Act) 120 of 1998.....	43
3.4.2.2	Promotion of Equality and Prevention of unfair Discrimination Act (PEPUDA) 4 of 2000.....	45
3.4.2.3	Intestate Succession Act (The succession Act) 81 of 1987.....	46

3.5	The interface between legislative guarantees and customary rules involving women's inheritance rights, and the challenges encountered in practice.....	49
3.6	Conclusion	53
CHAPTER FOUR: Legal framework for the protection of the rights of women:		
	International and regional perspective.....	54
4.1	Introduction.....	54
4.2	The Commission on the Status of Women (CSW)	56
4.3	United Nations Development Fund for Women (UNIFEM).....	60
4.4	UN Special Rapporteurs.....	61
4.5	The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).....	64
4.5.1	Background of CEDAW.....	70
4.5.2	CEDAW Committee jurisprudence	71
4.5.3	The status of African State Parties to International Human Rights Treaties.....	73
4.5.4	The impact of the international human rights treaties	74
4.6	Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (the African Women's Protocol).....	75
4.6.1	Provisions of the African Women's Protocol.....	80
4.7	Case law, which ensued from the legal frameworks at the international, regional and domestic levels	82
4.7.1	The case law at the international level	82
4.7.2	Case law of the African Commission	83
4.7.3	Case law at the domestic level	84

4.8	Conclusion.....	86
CHAPTER FIVE: Reflections on Women's Inheritance Rights through Legislation, Treaties and Policy Interventions in Nigeria and South Africa.....88		
5.1	Introduction	88
5.2	Women's Inheritance Rights through Legislation.....	88
5.3	Women's Inheritance Rights through Human Rights Treaties.....	99
5.4	Women's Inheritance Rights through Policy Intervention.....	107
5.5	Conclusion.....	110
CHAPTER SIX: CONCLUSION AND RECOMMENDATIONS.....112		
6.1	Introduction.....	112
6.2	Conclusion.....	112
6.3	Recommendations.....	116
6.3.1	Short Term Recommendations.....	116
6.3.2	Medium Term Recommendations.....	118
6.3.3	Long Term Recommendations.....	119
BIBLIOGRAPHY.....121		
Books.....		121
Journal Articles.....		124
Chapters in books.....		138
Conference contributions.....		139
Dissertations.....		139
Government Publication.....		140
International Instruments.....		140

Internet Sources.....	140
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CANDIDATE'S DECLARATION

I, Chukunedum Ovie Obianenue, hereby declare that this dissertation is original and has never been presented in any other institution. I further declare that any secondary information has been duly acknowledged in this dissertation.

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Student Number: 25522744

Signature:

Date:

DECLARATION BY SUPERVISORS

I, Prof OJ Olowu and Dr KO Lefenya hereby declare that this dissertation by Mr Chukunedum Ovie Obianenue for the degree of Master of Laws (LLM) entitled “Customary Laws on Women’s’ Inheritance and Succession Rights: A Comparative Study of Nigeria and South Africa,” be accepted for examination.

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Prof. OJ OLowu

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Dr KO Lefenya

June 2015

DEDICATION

This dissertation is dedicated to the three people who mean the world to me: My late parents: Mr & Mrs John Obianenue for raising in me the consciousness of education and my wife, Grace whose native name, Eronchi, means more than a name to me.

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LIST OF ABBREVIATIONS

AC	Appeal Cases Law Reports
ACHPR	African Charter on Human and Peoples' Rights
ALL NLR	All Nigeria Law Reports
ANON	Anonymous
ASC	African Studies Centre
AU	African Union
BAA	Black Administration Act
BCLR	Butterworths Constitutional Law Reports
CAP	Chapter in an Act
CC	Constitutional Court
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
CFRN	Constitution of the Federal Republic of Nigeria
CSW	Commission on the Status of Women
C&O	Cape and Orange Free State
DRC	Democratic Republic of Congo
ECOSOC	Economic and Social Council
ECSL	East Central State Law Reports
ICCPR	International Covenant on Civil and Political Rights
ICRW	International Centre for Research on Women

IDLO	International Development Law Organisation
IOSR-JHSS	IOSR Journal of Humanities and Social Science
KLR	Kenyan Law Reports
LRC	Legal Resources Centre
LPELR	LawPavilion Electronic Law Report
NAC	Native Appeal Court
NGOs	Non-Governmental Organisations
NLR	Nigeria Law Reports
NWLR	Nigerian Weekly Law Reports
OAU	Organisation of African Unity
OHCHR	Office of the High Commissioner for Human Rights
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
RDI	Rural Development Institute
UDHR	Universal Declaration of Human Rights
UJAH	Unizik Journal of Arts and Humanities
UN	United Nations
UNICEF	United Nations Children's Fund
UNGA	United Nations General Assembly
UNIFEM	United Nations Development Fund for Women
UNTC	United Nations Treaties Collection
WILDAF	Women in Law and Development in Africa
ZACC	South African Constitutional Court

TABLE OF CASES

Akinnubi v Akinnubi 1997 2 NWLR

Aku v Aneku 1991 8 NWLR

Alexkor Ltd v The Richtersveld Community 2004 5 SA 460 (CC)

Augustine N Mojekwu v Caroline MO Mojekwu 1997 7 NWLR pt 512

Bhe v Magistrate, Khayelisha 2005 1 SA 563 (CC)

Cristina Muñoz-Vargas v Spain Communication No.7/2005

DRC v Burundi, Rwanda and Uganda Communication No 22 of 1999

Ejiamike v Ejiamike 1972 2 ECSLR

Ephraim v Pastory 1990 LRC 757

Eshugbayi Eleko v Officer Administering the Government of Nigeria 1931 AC 662

Laoye v Oyetunde 1944 AC 170

Lewis v Bankole 1908 1 NLR

Mabuza v Mbatha 2003 4 SA 218

Mayelane v Ngwenyama and Others 2013 ZACC 14

Mohamed v Makamo 2001 High Court of Tanzania

Mthembu v Letsela 1998 2 SA 675

Muojekwu v Ejikeme 2000 5 NWLR pt 657

Muojekwu v Muojekwu 1994 7 NWLR pt 572

Nezianya v. Okagbue 1963 1 All NLR

Nwanya v Nwanya 1987 3 NWLR pt 62 697

Nzekwu v Nzekwu 1989 2 NWLR pt 104

Obusez v Obusez 2001 15 NWLR

Oshilaja v Oshilaja 1972 10 SC 126

Oyewunmi v Ogunesan 1990 3 NWLR pt 137

Prior v Battle and Others 1999 2 SA 850

Ransome Kuti v Attorney General of the Federation 1995 2 NWLR pt 16

Rono v Rono 2008 1 KLR 803

Shilubana v Nwamitwa 2008 9 BCLR 914 (CC)

Sogunro-Davies v Sogunro-Davies 1929 NLR 79

Sonti v Sonti 1929 NAC (C & O)

Timothy v Oforka 2008 9 NWLR pt 1091

Uwaifo v Uwaifo 2013 LPELR-20389 SC

TABLE OF STATUTES

Administration of Estates Law 1959

Black Administration Act 38 of 1927

Constitution of the Federal Republic of Nigeria, 1999

Constitution of the Republic of South Africa, 1996

English Wills Act 1837

Evidence Act Cap 112 Laws of the Federation 1990

Intestate Succession Act 81 of 1987

Land Use Act 1978

Law of Evidence Amendment Act 45 of 1988

Marriage Act Cap 218, Laws of the Federation of Nigeria 1990

Marriage Act 1914 Cap 115, Laws of Federation of Nigeria 1958

Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000

Recognition of Customary Marriages Act 120 of 1998

*Reform of Customary Law of Succession and Regulation of Related Matters Act
11 of 2009*

Statute of Distribution 1670

Succession Law Edict 1987

Supreme Court Ordinance 1914

Wills (Soldiers and Sailors) Act 1918

Wills Amendment Act 1852

Wills Law 1959

Wills Law of Bayelsa State 2006

Wills Law of old Bendel State Cap 133 Laws of Western Nigeria

ABSTRACT

In a typical African country, the great majority of the people conduct their personal activities in accordance with and subject to customary law. However, the recurring conflict of African cultures and traditions with human rights continue to militate against the protection of women's inheritance and succession rights in accordance with global, regional and constitutional human rights standards. In Nigeria and South Africa, it is apparent that most women are ignorant of their indispensable human rights, especially with regard to inheritance and succession, as well as the protection of such rights. As a result, most Nigerian and South African women continually face problems resulting from limitations under customary laws with regard to inheritance and succession. This study focused on discrimination of women under customary law in Nigeria and South Africa with reference to inheritance and succession. The study validated the findings of other researchers on the impact of customary law practices on women's rights to inheritance and succession. In addition, the findings revealed that efforts to eliminate customary law practices should come first from men and communities that hold such discriminatory attitudes towards women. The dissertation emphasised on Nigeria and South Africa as excellent models of the wider challenges for women as well as governments; despite firm constitutional and ratification of human rights treaties put in place by the latter, the battle continues unabated for the balance of customary laws with women's rights issues. Although South Africa is more progressive with regard to intestate succession than Nigeria in terms of constitutional guarantees and human rights praxis, a lot still needs to be done in both countries particularly in the area of harmonising the divergent systems of laws with regard to inheritance and succession rights. The study concludes that with regard to women's inheritance and succession rights, African customary law is generally known to be discriminatory against women. However, this study offers suggestions that aim at building a culture of respect for women's rights across the African continent.

Chapter One

Introduction

1.1 Background to the Study

This is a study of customary law on women's inheritance and succession rights. It is a comparative study of women's inheritance and succession rights in Nigeria and South Africa. The study examines women's inheritance rights under customary law from the African perspective, and in addition, reflects on the relevant Human Rights treaties. For example, the Convention on the Elimination of all forms of Discrimination against Women (CEDAW)¹ and the Protocol to the African Charter on Human and People's Rights on the Rights of Women.²

In Nigeria, customary laws established rules of inheritance for intestacy through the traditional norm of lineage, as adjusted over time.³ However, women's inheritance rights must be examined in the light of diversity of the legal system.⁴ Inheritance consists of inheritance under the General Law – Received English Law and local statutes (testate and intestate inheritance) and inheritance under customary law (Will and Intestate). The law recognises two kinds of disposition of property on death; testate and intestate inheritance.⁵ Under customary law, women are largely deprived the right to inherit property of their husbands or fathers in Nigeria.⁶

In South Africa during the latter period of colonial governance, a system of 'customary administration' was established. In addition, the indigenous populations could rule themselves according to indigenous law in certain matters such as succession.⁷ In terms of customary law of succession, women were discriminated against simply on the basis of their gender through the ubiquitous principle of male primogeniture.⁸ Women do not participate in the intestate succession of the deceased estate.⁹ This exclusion of women from inheritance has its genesis in the

¹ Adopted in December 1979.

² Adopted in July 2003.

³ Onuoha 2008 *The International Journal of Not for Profit Law* 1.

⁴ Ezeilo 2000 *Women's Aid Collective Nigeria* 2.

⁵ Ezeilo, as above 2.

⁶ Oni 2014 *IOSR-JHSS* 34.

⁷ Schoeman-Malan 2007 *Potchefstroom Electronic Law Journal* 108.

⁸ Ramatsekisa 2008 *US-China Law Review* 41.

⁹ Ramatsekisa, as above 41.

deeply entrenched system of patriarchy that has characterised traditional African society over the years; it found its legal basis in the *Black Administration Act* 38 of 1927 (hereafter referred to as BAA),¹⁰ section 23 of the above-mentioned Act endorsed the practice of male primogeniture. Today, South Africa retains a pluralistic legal system, with customary law remaining a legal system for those who wish to be subjected to it.¹¹ The recognition of customary law by the Constitution,¹² and in particular the entrenchment of the right to culture, has created a new dimension to the whole question of the application of customary law.¹³ The application of customary law is now in accordance with section 211 of the *Constitution of the Republic of South Africa* 1996, which is in line with South Africa's obligations under several international and regional treaties.

1.2 Problem Statement

The law of inheritance in English law stands fairly established, but the features that deal with indigenous law do not.¹⁴ Under African customary law, women are subjected to patriarchal rule, which results in discrimination against their inheritance rights.¹⁵ They are discriminated against in most African societies and often unaware of their rights and encounter obstacles to accessing the justice system.¹⁶ Most African constitutions contain provisions guaranteeing equality and prohibiting discrimination based on gender.¹⁷ However, despite the entrenchment of the norms of equality and non-discrimination in the constitutions of most African countries, as well as in international and regional human rights treaties, women experience deprivation in the areas of inheritance and succession in most African countries, particularly in Nigeria and South Africa. Under customary law, it is almost universal in Nigerian that widows have no capacity to inheritance.¹⁸ While in South Africa, the customary practice effectively excludes women from inheritance.¹⁹

¹⁰ Mubangizi 2012 *Journal of International Women's Studies* 43.

¹¹ Schoeman-Malan, as above note 7, 108.

¹² S 211(2) *Constitution of the Republic of South Africa*, 1996.

¹³ Himonga and Bosh 2000 *South African Law Journal* 306.

¹⁴ Onuoha, as above note 3, 1.

¹⁵ Ezejirofor 2011 *UJAH* 155.

¹⁶ Own emphasis.

¹⁷ Ndulo 2011 *Indiana Journal of Global Legal Studies* 89.

¹⁸ Iruonagbe 2010 *Gender and Behaviour* 2604.

¹⁹ Mubangizi, as above note 10, 43.

1.3 Aims and Objectives of the Study

This study examined the status of women in relation to rights of inheritance under African customary law, particularly in Nigeria and South Africa. In Nigeria and South Africa, women and female children including minor children are discriminated against with regard to inheritance of the estates of their husbands and fathers under customary law.²⁰ It is therefore obvious that the customary laws are discriminatory with reference to inheritance with regard to women.²¹ The aims of this study are to:

- Highlight the inequalities that exist in the legal systems of Nigeria and South Africa with regard to women's inheritance rights
- Assess whether the customary law with regard to inheritance practices are inconsistent with the Constitutions and other legal provisions in Nigeria and South Africa.
- Examine human rights instruments that have implications for women's inheritance rights.
- Make reflections on Women's Inheritance Rights through legislation, treaties, and policy intervention in Nigeria and South Africa
- Make recommendations on closing the gap caused by customary law rules, which discriminate women with regard to inheritance in Nigeria and South Africa.

1.4 Significance of the Study

Matters concerning women's rights have attracted attention in recent times. In some African states, domestic legislation and applicable human rights treaties provide for such rights. Despite all these, the issue of customary inheritance remains important because a very large part of the population of Africa live in situations where traditional devolution of property prevails. Under the customary law of inheritance, most women are excluded from inheritance, manifesting a perception that customary laws of inheritance are discriminatory against women in much of Africa.²² The significance of the study is to gain an understanding of discrimination against women with regard to inheritance and succession. This study highlights the impact of

²⁰ Ramatsekisa, as above note 8, 41.

²¹ *Nwanya v Nwanya* 1987 3 NWRL pt 62 697.

²² Mubangizi, as above note 10, 43.

customary law on women with regard to inheritance and succession rights in Nigeria and South Africa. This study creates awareness among women of their rights to equality and non-discrimination and it will give a platform to women to fight against discrimination in Nigeria and South Africa. It will enable policy makers and practitioners to enforce effectively policies and strategies that will assist in ending discrimination against women with regard to inheritance and succession in Nigeria and South Africa.²³

1.5 Literature Review

Several academic scholars such as: Bennett TW,²⁴ Badaiki AD,²⁵ Emiola A,²⁶ Kerr AJ,²⁷ Kolajo AA,²⁸ Okany MC²⁹ and Olivier NJJ *et al*³⁰ have written on customary law which form one or two chapters in their books. This concept of women's inheritance rights has generated serious debate among scholars and each of them has viewed the concept differently.

Adeyanju, Ogungbamila and Adekunle argued that in Ijaw land in Nigeria, the leader of the family would lead a delegation to the house and farm of their deceased relatives to divide his inheritance among the children, according to the number of children. Rooms/houses were not generally given to female children. The houses would be divided among the wives that bore a male child. They only utilise the wives' positions within the household to divide the properties for the children but wives do not have any portion.³¹ This is the customary law paradigm in Ijaw land in Nigeria.

However, while the above scholars argue that the Nigerian policy makers should include widows' welfare in their policy plan and should address the persistent gender inequalities in the development of the widows, they contend that the government should increase the empowerment of women and widows through policy, education and work for the protection of the rights of widows. They also stress that the existing biased and violated widowhood rights that are part of the customary law of many

²³ Mashalaba *Discrimination against Women* 7.

²⁴ *Customary Law in South Africa*.

²⁵ *Development of Customary Law*.

²⁶ *The principles of African Customary Law*.

²⁷ *The Customary Law of Immovable property and succession* 2nd edition.

²⁸ *Customary Law in Nigeria through the Case*.

²⁹ *The Nigerian Law of Property*.

³⁰ *Indigenous Law*.

³¹ Adeyanju, Ogungbamila and Adekunle 2013 *Indian Journal of Gerontology* 646.

communities in Nigeria, especially those aspects of the law that infringe upon the human rights of widows, should be properly addressed. Government can bring about this change through legislation that made provision for equality and non-discrimination.³²

Alewo and Olong argued that there are as many varieties of customary law in relation to succession rights of widows as there are ethnic groups in Nigeria.³³ They also contended that when a man subject to customary law dies intestate without contracting a monogamous marriage under the *Marriage Act*,³⁴ his estate is regulated by the customary rules of intestate succession. That one rule of customary law, which almost all the traditional Nigerian societies are unanimous about is that, a widow has to be under the customary law of intestate succession, in the sense that she can never inherit from her husband if he dies intestate.³⁵ The scholars further argued that time without number, most widows have been driven out of their matrimonial homes, with their late husband's properties including furniture and bedding seized by overzealous brothers-in-law and this process completely disinherits the widows.³⁶

On the same note, Ogebe J in his book cited a situation that arose in a small village near Zaria in Northern Nigeria.³⁷ The husband of a young woman, a Hausa non-muslim married under customary law, died in a motor accident. Her grief was great, but her sorrow increased when her husband's father and two uncles came a week later and took all her husband's clothes and the furniture in the husband's house. She and her two children under three years old were left with nothing. A month later, the relatives returned, and took her oldest child leaving her with only the baby who was too young to leave her. She had no means of support and had no protection from the customary law because she had been married under customary law ³⁸

Oni has also argued that the distribution of a deceased's estate under customary law follows the customary doctrine of inheritance and succession of property in Nigeria.

³² Adeyanju, Ogungbamila and Adekunle, as above note 31, 662.

³³ Alewo and Olong 2012 *International Law Research* 136.

³⁴ Laws of the Federation of Nigeria 1990.

³⁵ Alewo and Olong, as above note 33, 136.

³⁶ Alewo and Olong, as above note 33, 136.

³⁷ Ogebe *Marriage in Nigeria* 12.

³⁸ Ogebe, as above note 37, 12.

This doctrine follows the canons of lineal descent along paternal line. When a deceased dies intestate, his personal customary law governs the distribution of his estate.³⁹ With particular reference to South-West Nigeria, the scholar argued that the customary law, especially with respect to inheritance and succession, have grown out of the age-long practices and dealings of the people.⁴⁰ Under South-Western Nigeria customary law, the rights of daughters to inherit their father's property are recognised while wives have no right of inheritance in their deceased husband's estate.⁴¹ Oni further argued that in Eastern Nigeria, the cardinal principle of customary law of succession is primogeniture, that is, succession by the first-born of the line, and that this principle is almost prevalent in the customary laws of most ethnic groups in Nigeria.⁴² Daughters and widows of the deceased have no right to inherit intestate estate of the deceased in Eastern Nigeria.⁴³ However, the case of *Mojekwu v Mojekwu*⁴⁴ has marked a turning point. Oni further contended that customary law and principles of natural justices can be harmonised into a single legal system and be applied side by side where necessary, the objective being to supplement the customary law and not to supplant it.⁴⁵

Erhun argued that in Nigerian customary law emanates from the ideology of patriarchy, encouraging the subservience of women. Erhun argues that women who marry under customary law face a lot of hardship, they are deprived of right to inheritance of deceased husband's estate and women are granted no property right. Erhun further argued that the prevailing customary laws in operation in most part of Nigeria make women to have very limited or no property rights and that the customary rule of inheritance, which denied women the rights of inheritance or benefit over the property of the deceased husbands, is repugnant to social justice, equity, fair play and good conscience. In addition, that this should be made applicable in Nigeria.⁴⁶

³⁹ Oni, as above note 6, 30.

⁴⁰ Oni, as above note 6, 31.

⁴¹ Oni, as above note 6, 33.

⁴² Oni, as above note 6, 34.

⁴³ Oni, as above note 6, 34.

⁴⁴ 1997 7NWLR pt 512 283.

⁴⁵ Oni, as above note 6, 43.

⁴⁶ Erhun *An Appraisal of the Protection of Women's Rights under Nigerian Laws* 68-69

Mubangizi argued that intestate inheritance was in terms of the rule of primogeniture in South Africa.⁴⁷ According to him, this cultural practice effectively excludes women from inheritance, and sometimes places them under the guardianship of the male heir. This exclusion of women from inheritance has its origin in the deeply entrenched system of patriarchy that characterises traditional African society. Over the years, it found its legal basis in the *Black Administration Act*⁴⁸, section 23 of *Black Administration Act* that endorsed the practice of male primogeniture, because it excluded or hindered women and extramarital children from inheriting property.⁴⁹ Mubangizi argues that it is therefore not surprising that the practice has been widely challenged in the South African Constitutional court.⁵⁰ He further argued that the *Reform of Customary Law of Succession and Regulation of Related Matters Act*⁵¹ was promulgated and the main import of the *Act* is the legislative abolition of the male primogeniture rule and the recognition of equal inheritance rights for all surviving spouses and children. In addition, that the fundamental shift was intended to bring succession, inheritance matters in line with the Constitution, and the notions of equality and human dignity enshrined therein.⁵² However, the scholar argued that despite the aforementioned legal developments, male primogeniture is still practised in several parts of South Africa particularly in rural areas because of unawareness of the legal development. As with all the cultural practices, male primogeniture will continue to clash with the constitutionally accepted norms of human rights in the near future, particularly in the context of South African society, in which both culture and human rights enjoy significant competing interests.⁵³ Mubangizi further argues that education is pivotal in minimising the clash between culture and human rights. Human rights education can and does play an important role in building a culture of human rights in culturally diverse societies such as South Africa.⁵⁴

Ndulo argued that customary law has a great impact on the lives of the majority of Africans in the area of personal law with regard to matters such as marriage, inheritance and in its application; customary law is often discriminatory in such area

⁴⁷ Mubangizi, as above note 10, 43.

⁴⁸ 38 of 1927.

⁴⁹ Mubangizi, as above note 10, 43.

⁵⁰ Mubangizi, as above note 10, 43.

⁵¹ 11 of 2009.

⁵² Mubangizi, as above note 10, 43.

⁵³ Mubangizi, as above note 10, 43.

⁵⁴ Mubangizi, as above note 10, 45.

as inheritance. He argues that customary law tends to see women as adjuncts to the group to which they belong, such as a clan or tribe, rather than equals.⁵⁵ Ndulo further argued that most African constitutions contain provisions guaranteeing equality and prohibiting discrimination based on gender. However, the same constitutions recognise the application of customary law and without resolving the conflict between customary law norms and human rights provisions.⁵⁶ He argues that while recognising the important role legislation can play in customary law reform, the fight for gender equality needs to move to the courts and mass movements. Ndulo further argued that the challenge is how to ensure that courts interpret the law in such a way that gender equality is advanced and this will require social movements to put pressure on the courts and society to act in the interests of gender equality. He contends that there is need to improve access to courts so that women can bring claims based on discrimination, thereby giving opportunities to the courts to reform customary law. In addition, one way of encouraging the courts to interpret customary law in accordance with human rights norms is to show that the traditional social relations on which the customary norms that discriminate against women are founded, and on which traditionalists rely upon to oppose reform, have in reality been radically transformed. This will show that the values used by traditionalists to support customary legal norms that discriminate against women are no longer practiced in their existing form by communities.⁵⁷

From the above survey of literature, the researcher concurs with the view of the above scholars because that there is gap in the discussions with regard to women's inheritance rights in Nigeria and South Africa. However, this study makes suggestions on how the gap with regard to inheritance can be filled.

1.6 Research Questions

The central questions that are pivotal in this study are as follows:

1. Do African customary laws inherently deprive women of their rights to inheritance?
2. What normative and institutional frameworks exist in both Nigeria and South Africa for protecting women's rights to inheritance?

⁵⁵ Ndulo, as above note 17, 88-89.

⁵⁶ Ndulo, as above note 17, 89.

⁵⁷ Ndulo, as above note, 17, 92-93.

3. How can the inheritance customary laws be reformed to protect the rights of women against discrimination?

1.7 Research Methodology

To carry out this study, a qualitative research method was used. Qualitative method deals with reviewing journal articles, books, statutory laws and case law. It entails reviewing of data documented. Since it is a comparative study, qualitative method is an ideal method, hence, this study utilised the following resources, which are primary, secondary and internet sources. Under primary sources, this study consider *inter alia*, pieces of legislation and the constitution of the two countries as well as case law covering women's rights' issues with reference to inheritance and succession. Secondary sources, which include literature on customary law such as books and articles published in various law journals. Thirdly, this study used the World Wide Web, which is a huge repository of information especially on trends obtainable globally.

1.8 Scope of the Study

This study focused on customary laws relating to women's inheritance and succession rights in Nigeria and South Africa. It examined the rights of women with regard to inheritance and succession, within the framework of constitutional and other applicable statutory laws. It also reflected on the relevant human rights treaties (the Convention on the Elimination of All Forms of Discrimination Against Women, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women) binding both countries in their respective capacities that give rights of inheritance to women. However, the concept of women's inheritance rights is very broad. Therefore, due to time and budgetary constraints the researcher was not able to carry out exhaustive investigations into customary law with regard to inheritance and succession.

Chapter Two

The concept, characteristics and validity of customary law

2.1 Introduction

This chapter deals with the concept of customary law as well as its characteristics and validity in the African perspective, particularly in Nigeria and South Africa. The pivotal fact of this chapter is to outline information on customary laws and its application as regards inheritance in the legal system of Nigeria and South Africa. It highlights the meaning of the concept of customary law; it examines features of customary law and its validity in both countries.

2.2 Concept of customary law

According to Asiedu-Akrofi, before the arrival of colonial rule in Africa, the regulation of social relations was through indigenous legal systems. These institutions were for the most part customary in origin and type. With the advent of colonialism, a fundamental and far-reaching impact was on the indigenous social and legal arrangements.⁵⁸ Asiedu-Akrofi relied on the opinion of Allot to state that, the nature of the revolution varied with different colonial powers, but in general, each power first introduced its own legal system or a variant of it as the fundamental and general law of its territories. Secondly, colonial powers 'allowed the continuance of traditional African law and judicial institutions, except where they ran counter to the demands of colonial administration or were thought repugnant to 'civilised' ideas of justice and humanity.⁵⁹

However, these two facets of colonial legal administrations are important in that they established the legal framework, which was later to govern the application of customary law in the various English colonies, and the application of English law was heralded by the introduction of ordinances legitimising the application of English law. For example, section 20 of the *Supreme Court Ordinance* of 1914 of Nigeria, provides *inter alia* that, the common law, the doctrines of equity, and the statutes of general application, which were in force in England as at 1 January 1900 shall be in

⁵⁸ Asiedu-Akrofi 1989 *The American Journal of Comparative Law* 571.

⁵⁹ Asiedu-Akrofi, as above 571.

force within the jurisdiction of the Nigerian courts.⁶⁰ At the end of the same section, after providing for the application of English law and customary law respectively to various classes of cases, the residual clause of section 20 of the *Supreme Court Ordinance of 1914 of Nigeria*, instructed that in cases where no express rule is applicable to any matter in controversy, the court should be governed by the principles of natural justice, equity and good conscience.⁶¹ In *Lewis v Bankole*,⁶² Speed, Ag CJ stated that the rules of equity are or ought to be perfectly well known to this court and if a native law or custom is found to be repugnant to the fundamental rules of equity, it is absolutely the duty of the court to ignore it, however harmless or admirable that native law may be.⁶³

Nevertheless, customary law refers to a body of customs, practices and mores, which are largely unwritten and handed down from generation to generation by oral tradition.⁶⁴ Due to this fact, proof of these customs is sometimes very difficult and consequently, great reliance is placed on the testimonies of chiefs, elders and other people deemed to be conversant with the custom.⁶⁵ Additionally, customary law has proved very flexible and adaptable to changing circumstances.⁶⁶ This fact was given judicial recognition in the case of *Lewis v Bankole* in West Africa;⁶⁷ the court stated that, one of the most striking features of native custom is its flexibility; it appears to have been always subject to motives of expediency, and it shows unquestionable adaptability to altered circumstances without entirely losing its character.⁶⁸

However, Makeri J⁶⁹ put it simply; customary law is the law relating to the custom and traditions of the people. With reference to Nigeria, it has been defined as, any rule or body of rules of human conduct regulating the rights and duties of a particular indigenous Nigerian society whether by immemorial custom or usage or not but which are sanctioned by external forces particular to such indigenous group.⁷⁰

⁶⁰ Asiedu-Akrofi, as above not 58, 571.

⁶¹ Akuffo 2006 *Journal of African Law* 138.

⁶² 1908 1 NLR 83-84.

⁶³ *Lewis v Bankole* 1908 1 NLR 83-84.

⁶⁴ Asiedu-Akrofi, as above note 58, 572.

⁶⁵ Asiedu-Akrofi, as above note 58, 572.

⁶⁶ Asiedu-Akrofi, as above note 58, 572.

⁶⁷ As above note 63, 100-101.

⁶⁸ As above note 63, 100-101.

⁶⁹ Makeri "Jurisdictional Issues in the Application of Customary Law in Nigeria" 5-6.

⁷⁰ Makeri, as above 5-6.

Makeri also relied on the opinion of Okany to describe customary law, as a body of customs and traditions, which regulate the various kinds of relationship between members of the community. Nwauche,⁷¹ while defining customary law relied on the view of Elias to state that customary law is the body of rules, which are recognised as obligatory. This recognition must be in accordance with the principles of their social imperative.⁷² In Nigeria, this definition has been influential in the judicial articulation of the meaning of customary law. In *Oyewunmi v Ogunesan*,⁷³ the Nigerian Supreme Court defined customary law as follows:

The organic or living law of the indigenous people of Nigeria regulating their lives and transactions. It is organic in that it is not static. It is regulatory in that it controls the lives and transactions of the community subject to it. It is said that custom is a mirror of the culture of the people. I would say that the customary law goes further and imports justice to the lives of those entirely subject to it.⁷⁴

To Kolajo, customary law may be defined as those rules of conduct, which the persons living in a particular locality have come to recognise as governing them in their relationships between one another and between themselves and things.⁷⁵

According to Olivier,⁷⁶ in South Africa, no generally accepted definition of customary law exists and various South African authors discuss its contents and distinguish it from custom as such without formulating a definition. To Olivier, customary law “denotes those legal systems originating from African societies as part of the culture of particular tribes or groups that have continued to exist, supplemented, amended and or superseded in part by: (a) changing community views and the demands of a changing world; (b) contact with societies that function within other legal background; (c) contact with and influenced by other legal systems; and (d) direct and indirect influence of foreign (non-indigenous) government structures”.⁷⁷ Customary law is the indigenous law of the various ethnic groups of Africa.⁷⁸

⁷¹ Nwauche 2010 *Tulane European and Civil Law Forum* 40.

⁷² Nwauche, as above, 40.

⁷³ 1990 3 NWLR pt 137 182.

⁷⁴ Nwauche, as above note 71, 40.

⁷⁵ Kolajo *Customary law* 1.

⁷⁶ Olivier *et al Indigenous law* 186.

⁷⁷ Olivier *et al* as above 186.

⁷⁸ Ndulo, as above note 17, 88.

To Joireman,⁷⁹ customary law is a body of rules governing personal status, communal resources, and local organisation in many parts of Africa. The scholar argued that various ethnic groups defined it for their internal organisation and administration. That customary law is recognised by the courts and exists as a second body of law (in addition to statutory law) governing citizens in the countries of Sub-Saharan Africa. He further said that, it has the greatest control over people in rural areas, but also affects urbanites as far as it regulates issues such as marriage and inheritance. In Bennett's view,⁸⁰ customary law derives from social practices that the community concerned accepts as obligatory. In *Shilubana v Nwamitwa*,⁸¹ the court said customary law is a body of rules and norms that has developed over the centuries. According to *The Reform of Customary Law of Succession and Regulation of Related Matters Act* 11 of 2009 of South Africa, customary law is defined as the customs and practices traditionally observed among the indigenous African people of South Africa. Bekker contended that it is only lately that customary law came to be defined in some laws in South Africa.⁸²

Custom, on the one hand, is defined in the Black's Law Dictionary as:

A usage or practice of the people, which by common adoption and acquiescence and by long and unvarying habit has become compulsory and has acquired the force of a law with respect to the place or subject matter to which it relates.

This definition has been amplified in the case of *Aku v Aneku*,⁸³ where the Court said *inter alia*, a custom or usage is the unrecorded tradition and history of the people, which has grown with growth of the people to stability and eventually becomes an intrinsic part of the culture. It is a usage or practice of the people, which by common adoption and acquiescence, by long and unvarying habit has become compulsory, and has acquired the force of a law with respect to the place or the subject matter to which it relates.

According to Postema, customs, social rules, and conventions are pervasive in our lives.⁸⁴ Postema further relied on the opinion of Chrysostomt to state that custom is a

⁷⁹ Joireman 2008 *World Development* 1235.

⁸⁰ Bennett *Customary Law in South Africa* 1.

⁸¹ 2008 9 BCLR 914 CC.

⁸² Bekker 2012 *De Jure* 574.

⁸³ 1991 8 NWLR 280-294.

⁸⁴ Postema 2012 *Duke Law Journal* 708.

judgement common to those who use it, an unwritten law of a tribe or city, a voluntary principle of justice, acceptable to all alike with reference to the same matters, an invention made, not by any human being, but rather by life and time. Therefore, while the laws in general each obtains its power through having been approved once and for all, custom is constantly being subjected to scrutiny. Moreover, while everybody will readily choose no custom, it remains the opinions of the majority for ratification, yet a custom could not come into being if not accepted by all.⁸⁵

It could be gleaned from the above analysis that custom is the unrecorded tradition and history of the people. Once established, custom constitutes an important source of law, which governs the relationship existing among the citizens of a particular community. It should be appreciated that the use of the term 'African customary law' does not indicate that there is a single uniform set of customs prevailing in any given country. Rather, the term is used as a blanket description covering many different legal systems. However, to establish the existence of a custom, and a custom being a question of fact, has to be proved by evidence. The court in Nigeria may take judicial notice of a custom if it has been acted upon by the higher courts several times. Custom is a question of fact, which has to be pleaded and proved in the first instance by calling witnesses acquainted with the native law and custom until the particular custom, by frequent proof in courts, has become so notorious that the courts will take judicial notice of it. Once a particular custom has been so frequently proved before the courts as to be well established and notorious, it is no longer necessary to bring evidence to prove that particular custom. In proving a custom, which has not been well established and notorious, it is desirable that a person other than the person asserting it should also testify in support thereof. Since native law and custom must be strictly proved, it will be unsafe to accept the statement of the only person asserting the existence of a custom as conclusive.⁸⁶

Moreover, viewing the concept of customary law, it is obvious that a society cannot exist without rules and principles that govern relationships between persons and other persons, the community and the environment as well as handle problems that

⁸⁵ Postema, as above note 84, 709.

⁸⁶ Kolajo, as above note 75, 25.

arise within this relationship.⁸⁷ Customary laws are not legislated rules.⁸⁸ Rather, they are conventions and enforceable rules that have evolved and gained respect over the course of time, without formal agreement among the people as they go about their daily business and try to solve the problems that occasionally arise in it without upsetting the patterns of cooperation on which they so heavily depend.⁸⁹ Customary laws existed from time immemorial and apply to all members as well as the new-comers and others involved in business and other transaction with members of the group.⁹⁰ One of the major rule of customary law cover area such as land disposition.⁹¹ The distinction between immovable and movable property is recognised. Immovable is subdivided into land and dwelling. The concept of ownership, possession, custody and control as well as improvement to land and other property are well known in traditional notions of property.⁹² This concept of ownership involved in respect of land in Africa may have brought about patriarchy in most African countries, which resulted in discrimination against women with regard to inheritance.⁹³

Most African states have constitutions, which contain provisions guaranteeing equality, human dignity, and prohibiting discrimination based on gender.⁹⁴ Nigeria and South Africa have ratified CEDAW, adopted by the United Nations General Assembly, in 1979. Article 1 defines discrimination as:

any distinction, exclusion or restriction made on the basis of sex which the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on the basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.⁹⁵

In addition, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women, adopted in 2003, in Maputo, Mozambique, also made provision for non-discrimination. Article 21 of the Protocol provides for right to inheritance. It states that a widow shall have the right to an equitable share in the inheritance of the

⁸⁷ Ayithey *Indigenous African Institutions* 67.

⁸⁸ Ayithey, as above 68.

⁸⁹ Ayithey, as above note 87, 68-69.

⁹⁰ Ayithey, as above note 87, 69.

⁹¹ Ayithey, as above note 87, 69.

⁹² Ayithey, as above note 87, 69.

⁹³ As above note 16.

⁹⁴ Ndulo, as above note 17, 89.

⁹⁵ Hallward-Driemeire *African Development Forum* 20.

property of her husband. It further states that women and men shall have the right to inherit, in equitable shares, their parents' properties. It means that nobody can therefore deny a woman or a girl the right to an equal part of the property of her deceased parents.⁹⁶ The above-mentioned Article addressed the issue of non-discrimination against women with regard to inheritance. Yet, traditionally, most part of Nigeria has always been a patriarchal society in which men subjugate women in the area of inheritance.⁹⁷ In Nigeria, women seldom inherit property from their deceased husbands or parents.⁹⁸ The Nigerian Constitution guarantees women and men equal rights with regard to inheritance but most customary practices discriminate against women, particularly with regard to inheritance.⁹⁹ Traditional cultures of South Africa have always considered women inferior to men and have confined women to household activities.¹⁰⁰ However, South Africa's recent political and economic developments have offered women opportunities in their societal status.¹⁰¹ Nevertheless, even though positive changes have been recorded, the base for customary succession is still male primogeniture.¹⁰²

2.3 The characteristics of customary law

African political systems and languages may be diverse and multitudinous.¹⁰³ However, African countries have common customary law characteristics, which are intrinsic to their social structure.

One of the characteristics of customary law is the strong sense of belief of family values, which is pervasive.¹⁰⁴ Kinship is the article of social organisation and the community's interest has anteceded those of individuals for the purpose of survival.¹⁰⁵ Thus, in customary law, group rights generally override the rights of an individual.¹⁰⁶ In general, customary law seems more willing than the statute-based law to subjugate the rights of an individual to those of the group or larger society,

⁹⁶ Hallward-Driemeire, as above note 82.

⁹⁷ World Trade Press Nigeria Society and Culture Complete Report 23.

⁹⁸ World Trade Press, as above 23.

⁹⁹ World Trade Press, as above note 97, 23.

¹⁰⁰ World Trade Press *South Africa Women in Culture, Business and Travel* 1.

¹⁰¹ World Trade Press, as above 1.

¹⁰² Rudman *Equality before custom? A study of property rights* 114.

¹⁰³ Ayithey as above note 87, 292.

¹⁰⁴ Ayithey as above note 87, 292.

¹⁰⁵ Ayithey as above note 87, 292.

¹⁰⁶ Okafo *Interdisciplinary Research Series* 13.

where a community's common purpose necessitates such suppression.¹⁰⁷ In *Oshilaja v Oshilaja*,¹⁰⁸ the Nigerian Supreme Court held that the rule that a widow cannot inherit her deceased husband's property has become so notorious by frequent proof in courts that it has become judicially noticed. In this case, it is obvious as regards inheritance that the interest of the society, which is the belief of the society, overrides that of an individual. Africans have the concept of land ownership. In most indigenous African societies, all means of productions are owned privately, and land is lineage-owned.¹⁰⁹ Nevertheless, once an African applied his labour to something, the resulting product became personal property.¹¹⁰ In addition to treating private property as belonging to the entire extended family, many people in Africa today also view the fruits of an individual's hard work and education as belonging to the extended family. For example, during the 1970s and 1980s in Zambia, when miners received retirement packages after years of working for the Zambia Consolidated Copper Mines Ltd, it was customary for them to return to their respective villages and share the money with their extended families. This practice was the result of an unspoken obligation of extended family members to care for one another.¹¹¹

However, when a person dies intestate, wives and daughters will be discriminated against with regard to inheritance. In as much as land is the most valuable property in the African traditional setting, women could not own immovable property in classical customary law in her personal capacity.¹¹² Generally, customary societies and tenure systems are structured to ensure that members of the community have the means to take care of themselves. Women are secondary members of the community and family, with restricted rights to acquire and transfer land.¹¹³ According to Kerr, under the customary law rule of primogeniture, women do not inherit in customary law.¹¹⁴ In the olden case of *Sonti v Sonti*,¹¹⁵ on the death of a native, his estate devolves on his eldest son or his eldest son's eldest male

¹⁰⁷ Okafo, as above note 106, 13.

¹⁰⁸ 1972 10 SC 126.

¹⁰⁹ Ayittey, as above note 87, 92.

¹¹⁰ Ayittey, as above note 87, 92.

¹¹¹ Mwenda, Mumba and Mwenda 2005 *The George Washington International Law Review* 953-954.

¹¹² Emiola *The Principles* 28.

¹¹³ Lastarria-Cornhiel 1997 *World Development* 1324.

¹¹⁴ Kerr *The customary law* 124.

¹¹⁵ 1929 NAC (C & O) 23 at 24.

descendant. If the eldest son has died leaving no male issue, the next or his eldest male descendant inherits, and so on through the sons respectively. This position has changed in South Africa through the case of *Bhe v Magistrate, Khayelisha*,¹¹⁶ where the South African Constitutional Court did not only declare section 23 of the *Black Administration Act* to be unconstitutional, but it also found the rule of primogeniture to be unconstitutional and invalid.

However, another characteristic of the African indigenous law is that it is a popular law and commands common allegiance from the majority of the people subject to it.¹¹⁷ When a particular custom is repeatedly recognised in a traditional court, it may become law; this law has evolved over time and apply to all members of the group.¹¹⁸ To Bekker, it is generally accepted that the rule of male primogeniture, which is applicable to succession in customary law, applies equally to property inheritance. This principle applies that the eldest surviving male child of the deceased or surviving male relative of the deceased succeeds to the status of the deceased and inherits all his property.¹¹⁹

In addition, African customary law is flexible.¹²⁰ Thus, Osborne CJ in *Lewis v Bankole*,¹²¹ opined that one of the most striking features of West African native custom is its flexibility; it appears to have been always subject to motives of expediency, and it shows unquestionable adaptability to altered circumstances without entirely losing its individual characteristics. Customary law is therefore resilient and adjusts positively to changing social conditions. Any custom that fails to respond to social changes loses its character of law. By its flexible nature, customary law becomes truly 'a mirror of accepted usage'. With such flexibility, customary legal system readily adapts itself when necessary to maintain some social unity, and unity was a condition for survival in a small closely-knit community.¹²²

¹¹⁶ 2005 1 SA 563 CC par 7.

¹¹⁷ Emiola, as above note 112, 7.

¹¹⁸ Ayittey, as above note 87, 69.

¹¹⁹ Bekker, Labuschagne and Vorster *Introduction* 61.

¹²⁰ Emiola, as above note 112, 7.

¹²¹ As above note 62, 100-101.

¹²² Ayittey, as above note 87, 98.

In *Mayelane v Ngwenyama and Others*,¹²³ the South African Constitutional Court stated that the inherent flexibility of customary law provides room for consensus seeking, the prevention and resolution, in family and clan meetings, of disputes and disagreements. In addition, these aspects provide a setting, which contributes to the unity of family structures and the fostering of co-operation, a sense of responsibility and belonging in its members, as well as the nurturing of healthy communitarian traditions.¹²⁴

The indigenous court system emphasises reconciliation, promotion of social harmony to resolve dispute and conflicts in the course of pursuing a fair degree of justice.¹²⁵ Court hearings are open and the administration of justice is flexible. Indigenous courts are not conducted according to a rigid and abstract code of law. This flexibility is necessary to permit the court to achieve its twin objectives of justice and social harmony.¹²⁶ On the other hand, such flexibility means that a customary system can lack coherency and predictability; where rules are applied differently to different groups in the same situation, resolutions reached may be viewed as arbitrary or discriminatory.¹²⁷ In *Oshilaja v Oshilaja*,¹²⁸ the Supreme Court Nigeria held that the customary rule, stating that a widow cannot inherit the estate of deceased husband is so notorious.¹²⁹ Discrimination against women with regard to inheritance never sees the light of flexible customary law, for social harmony. However, constitutions of most African countries, including Nigeria and South Africa provide for equality rights and non-discrimination of the citizens.

Gender insensitivity is a characteristic of African customary law.¹³⁰ Gender-based domestic violence is deeply rooted in many African countries, including Nigeria and the social context of such violence in Nigeria is linked to a traditional African patriarchal society that determines the gender power structure.¹³¹ The powerful cultural and traditional forces have hitherto hindered the eradication of gender-based domestic violence such as dehumanising widowhood practices, deprivation of

¹²³ 2013 ZACC 14.

¹²⁴ *Mayelane v Ngwenyama and Others* 2013 ZACC 14 par 24 (f) and (g).

¹²⁵ Ayittey, as above note 87, 102.

¹²⁶ Ayittey, as above note 87, 102.

¹²⁷ Harper 2011 *IDLO* 19.

¹²⁸ As above note 108.

¹²⁹ *Oshilaja v Oshilaja* 1972 10 SC 126.

¹³⁰ Abdo and Abegaz 'Customary law Teaching Material' 64.

¹³¹ Chika 2012 *Indian Journal of Gender Studies* 138.

property rights of women and girl children, the wife as an inheritance, the preference for sons.¹³² Under Nigerian customary law, widows are subjected to severe social, cultural and economic sanctions.¹³³ Nigerian society is essentially patrilineal with a preference for male children over female. Chika relied on the opinion of Edu to state that the cardinal principle of inheritance in southeast Nigeria is primogeniture with succession or inheritance by the first male child; this customary law of inheritance has long been given judicial backing or blessing, as in *Ejiamike v Ejiamike*¹³⁴ and *Nezianya v Okagbue*.¹³⁵ It is gratifying that a resurgent international interest in feminism is having a gradual but positive impact on the Nigerian legal system. Recently, in *Muojekwu v Muojekwu*¹³⁶ and *Muojekwu v Ejikeme*,¹³⁷ the country's Court of Appeal invalidated Nnewi 'oli-ekpe' custom of inheritance in the Igbo-speaking area of Anambra state (which permits the brother of the deceased to inherit his property, to the exclusion of his female child of full blood) as discriminatory, and therefore inconsistent with the doctrine of equity. Niki Tobi, JCA, who delivered the lead judgement in the case of *Muojekwu v Ejikeme*,¹³⁸ relied heavily on CEDAW, an international instrument for the invalidation of the custom in question, despite Nigeria's non-acceptance of CEDAW. It must be stressed, however, that while this denial of the female right to inheritance is prevalent in the aforementioned parts of Nigeria because of the oppressive and highly gender-discriminatory Igbo customary law, the customs of the Yoruba in the south-west and the Hausa in the north are more gender equitable. Daughters and wives are afforded some measure of rights, though these are still not at par with their male counterparts.¹³⁹

According to Bennett,¹⁴⁰ the most striking feature of nearly all customary laws is the facts that, in their original form at least, they are unwritten and that laws of this nature have a distinctive character. In *Alexkor Ltd v The Richtersveld Community*,¹⁴¹ the court said that 'unlike common law, indigenous law is not written. It is a system of law known to the community practised and passed on from generation to

¹³² Chika, as above 138.

¹³³ Chika, as above note 131, 139.

¹³⁴ 1972 2 ECSLR 11.

¹³⁵ 1963 1 All NLR 352.

¹³⁶ 1997 7 NWLR pt 572: 283.note 44

¹³⁷ 2000 5 NWLR pt 657 402.

¹³⁸ As above.

¹³⁹ Chika, as above note 131, 139-140.

¹⁴⁰ Bennett, as above note 80, 2.

¹⁴¹ 2004 5 SA 460 CC.

generation. This system of law has its own values and norms'. However, since customary law is still largely unwritten, its source is essentially the recollection of elders and others whose traditional roles enable them to have special knowledge of the customs and traditions of their people.¹⁴²

Customary laws are not codified.¹⁴³ Kumar relied on the view of Lekgowe to state that customary law exists in our mind only. It is what an old man or Chief in the village tells you it is. Each tribe has its own customary law. Children are subject to laws of their father. Property under customary law is communally owned and belongs to the father and his descendants who are males. Women are expected to marry and eat from their husband's maintenance. If the husband dies without leaving a male heir, his brothers take over his estate even if the widow is alive. Non-trained lay individuals without a codified guide administer the customary justice system and it is more likely to reflect discriminatory perceptions such as the second-rate, subordinate position for women in society.¹⁴⁴

Another feature of customary law is the limit of its application.¹⁴⁵ It is a local law, which applies to a particular locality and people. Although the same general principles are common to all forms of customary law, their textual contents are as varied as there are tribal groups or ethnic nationalities. Customary law usually applies to a defined community brought together within a common boundary by common language and culture. Nevertheless, the fact that customary law has no extra-territorial application does not mean that it would not apply to peoples of other ethnic groups living within the community. The applicable customary law varies across ethnic groups, and each tribal tradition is an intricate body of rules, obligation and norms and under customary rules, all property of a person who dies intestate passes to family.¹⁴⁶

¹⁴² Badaiki *Development of Customary Law* 15.

¹⁴³ Kumar 2010 *City University of Hong Kong Law Review* 297.

¹⁴⁴ Kumar, as above 296.

¹⁴⁵ Emiola, as above note 112, 9.

¹⁴⁶ Kutsoati and Morck 2012 *NBER Working Paper Series* 5.

2.4 The validity of customary law

With the introduction of the English law in Africa, the indigenous law rules were relegated to the background, coming after the received foreign law.¹⁴⁷ The validity of customary law rules were assessed based on the English principles and ideas of justice. Repugnancy doctrine was one of the English principles introduced to evaluate the validity of customary law. Most African countries repealed the repugnancy provisos when they obtained independence but Nigeria retained it. In the South African context, repugnancy provisions had outlived their usefulness by virtue of section 1(1) of the *Law of Evidence Amendment Act*, 45 of 1988 and courts now apply customary law subject to the Constitution and any legislation that specifically deals with customary law, as provided for in section 211 of the Constitution of the Republic of South Africa 1996.¹⁴⁸

In Nigeria, for customary law to be enforceable, it must be recognised and adhered to by the community. In fact, it is the assent of the native community that gives a custom its validity. For a customary law to be valid and consequently binding and enforceable, it must pass the repugnancy test.¹⁴⁹ In addition, for a custom to be applied by any court, it must conform to the standards set out in the various High Court Laws, which provide that the custom should not be repugnant to natural justice, equity and good conscience.¹⁵⁰ This is provided for in section 14(3) of the *Nigerian Evidence Act* Laws of the Federation 1990 Cap 112. What is the meaning of the phrase repugnancy clause? According to Taiwo,¹⁵¹ the term 'repugnancy clause' has not been defined in any Nigerian statute, and Nigerian courts have not explained its meaning in detail. He stated that Lord Wright, in *Laoye v Oyetunde*,¹⁵² expressed the view that the clause was intended to invalidate 'barbaric' custom. In addition, in *Eshugbayi Eleko v Officer Administering the Government of Nigeria*,¹⁵³ Lord Atkins explained that a barbarous custom must be rejected on the ground of being repugnant to natural justice, equity and good conscience. In the same vein, the phrase 'natural justice, equity and good conscience' has no precise definition.

¹⁴⁷ Taiwo 2009 *Journal for Juridical Science* 90.

¹⁴⁸ Taiwo, as above note 147, 90-91.

¹⁴⁹ Kolajo, as above note 75, 13.

¹⁵⁰ Asiedu-Akrofi, as above note 58, 578.

¹⁵¹ Taiwo, as above note 147, 92.

¹⁵² 1944 AC 170.

¹⁵³ 1931 AC 662.

Controversies and uncertainties surround its exact meaning. Speed, Ag CJ expressed the difficulty in *Lewis v Bankole*:¹⁵⁴

I am not sure that I know what the term 'natural justice and good conscience' means. They are high-sounding phrases and it would of course not be difficult to hold that many of the ancient customs of the barbaric times are repugnant thereto, but it would not be easy to offer a strict and accurate definition of the term.¹⁵⁵

It is observed that the phrase has three elements and Taiwo relied on the view of Allot to state that the three elements in the phrase are overlapping and indistinguishable and that the expression simply means 'fairness.' He further relied on the opinion of Derrett to submit that the phrase should be interpreted to simply mean 'natural justice' while the words; 'equity and good conscience' are to be treated as superfluous. Again, he relied on the opinion of Fabunmi to state that an attempt to split the expression into its three component parts may lead to importing the technical meanings of the term 'equity' into the validity of customary law. And that, if the technical rules of English equity were the means by which the validity of the rules of customary law were to be tested, every rule of customary law that differs from the English rules of equity would automatically be rejected. He submits further that this approach signifies the risk of eliminating the rules of customary law rather than preserving them as intended by the statute. Under the Nigerian law, the phrase 'natural justice, equity and good conscience' has two aspects, namely, the negative and the positive aspects.¹⁵⁶

On one hand, there is opinion that the repugnancy doctrine has been of relative benefit in striking down barbarous customs and other opinion points to the disastrous effect of the repugnancy doctrine because the test uses a foreign standard in evaluating the customs of a different people.¹⁵⁷ Repugnancy doctrine constitutes the tool through which Nigerian courts abrogate any rule of customary law that outrages a natural sense of justice, it has greatly influenced the development of Nigerian customary law and has left indelible marks on both the procedural and the substantive areas of Nigerian law.¹⁵⁸

¹⁵⁴ As above note 63, 84.

¹⁵⁵ Taiwo, as above note 147, 92-93.

¹⁵⁶ Taiwo, as above note 147, 93.

¹⁵⁷ Nwauche, as above note 71, 47.

¹⁵⁸ Taiwo, as above note 147, 96.

As regards inheritance, the relative benefit was illustrated, in the judgment of the Court of Appeal, in *Augustine N Mojekwu v Caroline MO Mojekwu*,¹⁵⁹ per Niki Tobi, JCA, who expressed the following view on the *Oli-ekpe* custom:

The appellant claims to be that '*Oli-ekpe*' 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 of about customs, which discriminate against the womenfolk in this country. They are regarded as inferior to 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-ekpe* custom relied upon by the appellant are not consistent with our civilised world in which we all live today, including the appellant. 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 is repugnant to natural justice, equity and good conscience.

Nevertheless, the provision of section 42 of the 1999 Constitution of Nigeria guarantees women and men alike, the same treatment, privileges, or restrictions where these are legally or socially desired. It prohibits discrimination on the grounds of sex. Section 42(1) provides that:

A citizen of Nigeria of a particular community, ethnic group, and 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 citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions are not made subject.

On the other hand, in South Africa, according to Bennett,¹⁶⁰ since the colonial conquest of Africa, the indigenous normative orders have been treated as inferior. At best, they were tolerated in terms of such monitoring devices as the so-called 'repugnancy clauses', at worst, they were dismissed as mere custom, not law.¹⁶¹ According to Himonga,¹⁶² during the colonial era and after union in 1910, there was much confusion and inconsistency regarding the position of customary law in the

¹⁵⁹ As above note 44, 304-305.

¹⁶⁰ Bennett 2011 *Loyola Law Review* 709.

¹⁶¹ Bennett, as above 709.

¹⁶² Himonga and Bosh, as above note 13, 307.

legal system and this was resolved to a large extent by the introduction of the *Native Administration Act* 38 of 1927 (later renamed the Black Administration Act). In terms of the Act, the application of customary law was limited to disputes where both the litigants were black. The scholar further stated that those disputes were also reserved for resolution by special tribunals, namely, the Chiefs' and Headmen's Courts and Native Commissioners' Courts, which were vested with a discretion to apply customary law. And, in keeping with a long tradition, that discretion was limited in that the relevant courts were not allowed to apply customary law that could be considered 'opposed to the principles of public policy or natural justice'. The Native Commissioners' Courts and their Appeal Courts were abolished in 1986 and magistrates' courts assumed their role in applying customary law in the manner stated above. To the scholar, the so-called repugnancy clause was entrenched in section 11(1) of the BAA, which was repealed with the introduction of *Law of Evidence Amendment Act* 45 of 1988. Section 1(1) of the *Law of Evidence Amendment Act*, provides:

Any court may take judicial notice of indigenous law as far as such law can be ascertained readily and with sufficient certainty; provided that indigenous law shall not be opposed to the principles of public policy and natural justice.

The so-called 'repugnancy proviso' ensured that customary law could not be applied if it was considered contrary to public policy or natural justice.¹⁶³

Nevertheless the customary law rule of primogeniture stayed. According to Kerr, the two basic principles of succession in customary law are primogeniture of males through males and universal succession. The rule of primogeniture permits only male issue to inherit the property of a person who dies intestate. Under the rule, on the death of a native, his estate devolves on his eldest son, or his eldest son's eldest male descendant. If the eldest son has died leaving no male issue, the next son or his eldest male descendant inherits, and so on through the sons respectively. Women do not inherit under customary law rule.¹⁶⁴ This type of inheritance is to maintain the paternal lineage and name of the family.

¹⁶³ Himonga and Bosh, as above note 13, 308.

¹⁶⁴ Kerr, as above note 114, 124.

In *Mthembu v Letsele*,¹⁶⁵ Mpati AJA said of the South African customary law of succession thus:

The customary law of succession in South Africa is founded on the principle of male primogeniture. In monogamous families, the eldest son of the family is heir, failing him the eldest son's eldest male descendant. Where the eldest son has predeceased the family head without leaving male issue, the second son became heir; if he is dead leaving no male issue, the third son succeeds and so on through the sons of the family head. Where the family head dies leaving no male issue his father succeeds. Women generally do not inherit in customary law.

However, in line with the Constitutional Principles, the constitutional recognition of customary law was continued and, to a certain extent, expanded on in the final Constitution.¹⁶⁶ In post-democratisation constitutions, the status of customary law in most African jurisdictions is constitutionally protected and it is part of the general law of the country.¹⁶⁷ For example, Section 211(3) of the Final Constitution places a duty on the courts to apply customary law. It provides that 'the courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law'.¹⁶⁸ Langa DCJ, writing for the majority of the Court, in *Bhe v Magistrate, Khayelitsha*¹⁶⁹ holds that, construed in the light of its history and context, section 23 of the *Black Administration Act* is an anachronistic piece of legislation, which ossified "official" customary law and caused egregious violations of the rights of black African persons. The section created a parallel system of succession for black Africans, without sensitivity to their wishes and circumstances. Section 23 and its regulations are manifestly discriminatory and in breach of the rights to equality in section 9(3) and dignity in section 10 of our Constitution, and therefore must be struck down. In *Bhe's* case, where the Constitutional Court declared unconstitutional and invalid the customary rule of male primogeniture which allows the oldest male descendant or relative to succeed to the estate of a black person. It declared unconstitutional and invalid section 23(7) of the BAA, which unfairly discriminates against women with regard to the administration and distribution of black deceased estates. In the same vein, Mireku¹⁷⁰ posited that until the South African Constitutional Court's landmark decision in *Shilubana's*

¹⁶⁵ 1998 2 SA 675.

¹⁶⁶ Himonga and Bosh, as above note 13, 312-313.

¹⁶⁷ Ndulo, as above note 17, 98.

¹⁶⁸ *Constitution of the Republic of South Africa*.

¹⁶⁹ As above note 116.

¹⁷⁰ Mireku 2010 *African Human Rights Law Journal* 515-516.

case,¹⁷¹ the concept of male primogeniture had been utilised by courts as the overarching defining rule in resolving customary law disputes of intestate succession in South Africa. With the entrenchment of the Bill of Rights in the 1996 Constitution, however, the constitutional validity of male primogeniture persistently has been called into question in a number of cases that have come before the courts. Male primogeniture has often been challenged because, arguably, it discriminates unfairly on the grounds of age, birth and, most conspicuously, gender.

In fact, from all indications, the South African Constitution has influences on the application of customary law while Nigeria is still relying on the English law principles for the application of customary law.¹⁷²

2.5 Conclusion

This chapter dealt with the concept, which is the customary law of the various ethnic groups of Africa. Characteristics, which indicate that African countries have common customary law characteristics, that is intrinsic to their social structure. In addition, the validity of customary law in respect of Nigerian and South African perspectives is in terms of repugnancy test but Nigeria stick to application of repugnancy doctrine, South Africa is not rather she apply customary law in terms of the constitution. The following chapter is a comparative overview of women's rights of inheritance in Nigeria and South Africa. It examines the constitutional and other legislative provisions that protect the rights of women in Nigeria and South Africa as well as the interface between legislative guarantees and customary rules involving women's inheritance rights, and the challenges encountered in practice.

¹⁷¹ *Shilubana & Others v Nwamitwa* 2008 ZACC 9.

¹⁷² As above note 16.

Chapter Three

Comparative overview of women's rights of inheritance in Nigeria and South Africa

3.1 Introduction

The position of women subject to customary law has become an extremely sensitive topic in recent times.¹⁷³ Women's rights are an integral part of human rights, men and women are equal before the law, and women, without any form of discrimination must equally enjoy those rights, which are enjoyed by men.¹⁷⁴ Discourse on the rights of women in Africa has been a major focus of contemporary scholarship in Africa and many scholars of feminist studies have been largely unanimous that aspects of African culture are hostile to women; hence, the need for a paradigm shift so that the supposed hitherto marginalised women will be emancipated.¹⁷⁵ The preceding chapter dealt with the concept, characteristics and validity of customary law. This chapter examines the right of African women in the Nigerian and South African context with emphasis placed on inheritance and succession. It examines the position of women under customary laws of Nigeria and South Africa with regard to inheritance and succession. It assesses the constitutional and other legislative provisions that protect the rights of women in Nigeria and South Africa as well as the interface between legislative guarantees and customary rules involving women's inheritance rights, and the challenges encountered in practice.

3.2 The position of women under customary laws of Nigeria and South Africa with regard to inheritance and succession

In Nigeria, according to Ezejiolor, ¹⁷⁶ contrary to article 21(1) of the Protocol on the Rights of Women in Africa, this provides that women shall have the right to an equitable share in the inheritance of the property of their husband. However, most women are denied their right to inheritance. Since women are perceived as inheritable property under the customary laws, it is customarily that women have no entitlement to property ownership at the occasion of the death of their husbands and

¹⁷³ Venter 1995 *Journal of Legislation* 7.

¹⁷⁴ Abdulraheem *Protection of Women's Rights* 77.

¹⁷⁵ Familusi 2012 *The Journal of Pan African Studies* 299.

¹⁷⁶ Ezejiolor, as above note 15, 152.

this is especially the case if the widow has no grown up male child.¹⁷⁷ That women and girl children, traditionally, have no property inheritance rights in many parts of Nigeria is not news.¹⁷⁸ Suffice it to mention that the types of property widows are denied; include land, houses (including matrimonial homes), cash and other assets. In rural areas where most women depend on sale of agricultural products for a living, such an act of disinheritance obviously robs them and their young children of their livelihood and this is even a greater form of human rights violation.¹⁷⁹ Ezejiofor relied on the opinion of Korieh's field research on the subject in the south-eastern part of Nigeria to recount the experiences of some widows. He said one was forced to hand over the passbook (bank savings book) of her husband by her in-laws after they had ordered her home from Lagos to explain the cause of his death. In addition, it was even worse for another since their entire property was confiscated. Her husband's relatives sent a lorry from home to pack all his electronics and merchandise in his supermarket.¹⁸⁰ As regard to such acquisitive tendencies, these in-laws are emboldened by the knowledge that in matters of inheritance, 'the rights of widows to property remain circumscribed in many Nigerian cultures'.¹⁸¹

The Nigerian cultural milieu is not only repressive towards women in general but also overtly antagonistic to widows.¹⁸² The traditional institutions that, to a greater or lesser degree, regulate the affairs of most Nigerians are archetypal bastions of male power and are suffused with patriarchal instincts and inclinations.¹⁸³ According to Chika,¹⁸⁴ Nigerian society is essentially patrilineal with a preference for male children over female. She relied on the opinion of Edu to state that the cardinal principle of inheritance in south-east Nigeria is primogeniture with succession or inheritance by the first male child and that female children of the area do not enjoy the right to inherit and the same holds for widows of the deceased. To Nnadi,¹⁸⁵ the male child inherits his father's estate whereas the female child does not inherit her father's property as she is expected to get married and become a member of another

¹⁷⁷ Ezejiofor, as above note 15, 152.

¹⁷⁸ Ezejiofor, as above note 15, 152.

¹⁷⁹ Ezejiofor, as above note 15, 152.

¹⁸⁰ Ezejiofor, as above note 15, 152-153.

¹⁸¹ Iwobi 2008 *Canadian Journal of Women and the Law* 57.

¹⁸² Iwobi, as above 39.

¹⁸³ Iwobi, as above note 181, 40.

¹⁸⁴ Chika, as above note 131, 139.

¹⁸⁵ Nnadi 2013 *Journal of Politics and Law* 135.

household. What is more, the first-born male child at birth is immediately seen as the head of the family who is to succeed his father and continue the family lineage, as well as providing support for the rest of the family and parents in old age.¹⁸⁶ Nnadi relied on the opinion of Izugbara to state that Nigerian culture tends to treat male and female children separately as persons with different capabilities, potentials and constitutions. For instance, the importance of the male child as compared to his female counterpart is obvious in the inheritance rights of males and females in certain African cultures.¹⁸⁷ In Nigeria, particularly amongst the Igbos, as a matter of culture, the lack of a male issue in a marriage sometimes leads to divorce, separation or the husband taking several wives, until one of the wives is able to produce a male child who is considered to carry on the lineage and name of the family.¹⁸⁸

It is almost universal in Nigerian customary law that widows have no capacity to inheritance and one reason for this is that there is no concept of co-ownership of property by couples in traditional Nigerian culture, the presumption being that all substantial property, including land belongs to the husband.¹⁸⁹ In Nigeria, as a patriarchal society, inheritance is patrilineal, hence a daughter does not receive land when her father dies and even a widow does not inherit land and if she is lucky to have a male child, she generally acts as a caretaker until her son comes of age.¹⁹⁰ This practice in the Eastern part of the country, has even been codified in paragraph 156 of the *Manual of Customary Law* 1977 of Eastern Region,¹⁹¹ which provides that, 'where a man is survived by daughters but is not survived by sons, the daughters have no right to inherit his compound or any of his other lands or houses'.¹⁹²

This practice manifests itself in different dimensions across the different states that make up the present Eastern part of Nigeria.¹⁹³ Women hardly benefit from their

¹⁸⁶ Nnadi, as above note 185, 135.

¹⁸⁷ Nnadi, as above note 185, 135.

¹⁸⁸ Nnadi, as above note 185, 137.

¹⁸⁹ Iruonagbe, as above note 18, 2604.

¹⁹⁰ Iruonagbe, as above note 18, 2606.

¹⁹¹ *Manual of Customary Law* 1977.

¹⁹² Durojaye, Okeke and Adebajo 2014 *Gender & Behaviour* 6171.

¹⁹³ Durojaye, Okeke and Adebajo, as above 6171.

father's land and property after his death.¹⁹⁴ For instance, among the Nnewi people of Imo State, the *oli-ekpe* custom does not recognise a female child as being legally capable of inheriting from her deceased father.¹⁹⁵ It should be noted that the application of ethnic customary law in Nigeria is subject to the repugnancy test as stated earlier in chapter two. This test requires that for any ethnic customary law to apply, such a customary law must not be repugnant to natural justice, equity and good conscience.¹⁹⁶ The lawfulness of the primogeniture system, which often denies a female child right of inheritance was the cause of disagreement in *Mojekwu v Mojekwu*.¹⁹⁷ In this case, the nephew of a deceased property owner disputed the inheritance right of the deceased's wife and daughters. The deceased was a native of Nnewi and subject to *oli-ekpe* or Nnewi customary law, but the property was situated in Onitsha and subject to that customary law. The Court of Appeal held that since the property in dispute was immovable, it was governed by the *lex situs*, that is Onitsha customary law, under which female children are also entitled to succeed to the deceased's property. However, the Court of Appeal seized the opportunity to make a vital point on the discriminatory nature of this customary practice:

It is clear from the Record that 'Oli-ekpe' is a Nnewi custom under which males and not females inherit the father's property. 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 the 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. 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.¹⁹⁸



However, to Nwabueze,¹⁹⁹ a widow's position is even more precarious where customary law regards her as a chattel to be distributed along with her husband's

¹⁹⁴ Iruonagbe, as above note 18, 2615.

¹⁹⁵ Durojaye, Okeke and Adebajo, as above note 192, 6171.

¹⁹⁶ Durojaye, Okeke and Adebajo, as above note 192, 6171.

¹⁹⁷ As above note 44.

¹⁹⁸ Durojaye, Okeke and Adebajo, as above note 192, 6171-6172.

¹⁹⁹ Nwabueze 2010 *Harvard Human Rights Journal* 145.

estate. The Nigerian case, *Obusez v Obusez*,²⁰⁰ illustrates this point. In *Obusez's* case, the brothers of the deceased argued that they were entitled to administer the deceased's estate against his widow and infant children. They based their argument on Agbor customary law, which deemed the widow to be a chattel to be inherited and therefore, they claimed, unqualified for letters of administration. The widow had been married under the *Marriage Act* Cap 218, Laws of the Federation of Nigeria 1990, rather than customary law. The trial court held that a widow who had been married under statute is not a chattel and is entitled to letters of administration and inherited. In affirming this decision, the Court of Appeal suggested that the opposite would be true of a widow in the same position who had been married under customary law, in which case Agbor customary law would apply.²⁰¹

In *Akinnubi v Akinnubi*,²⁰² the Nigerian widow-claimant and her deceased husband were married under Yoruba customary law. She sought relief from the court to entitle her, together with her children, to the estate of her deceased husband and to appoint her as the administratrix of his estate, a position that the deceased's brothers opposed.²⁰³ She made her claim not in her capacity as a widow but rather as her children's guardian *ad litem*.²⁰⁴ In response, her brothers-in-law relied on a rule of *Ikale* customary law under which, upon the death of their brother, the widow-claimant became part of the deceased's estate and was allotted or bequeathed according to *Ikale* customary law to one of the deceased's brother.²⁰⁵ Both the Nigerian Supreme Court and Court of Appeal agreed that a widow of a Yoruba customary law marriage could not maintain an action to be one of the administrators of her deceased husband's estate. The court found the current action to be proper only because of the capacity in which the widow had sued as next friend of her children.²⁰⁶ Onu J made this point clear when he observed, under Yoruba customary law, a widow under 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

²⁰⁰ 2001 15 NWLR 377.

²⁰¹ Nwabueze, as above note 199, 145.

²⁰² 1997 2 NWLR 145.

²⁰³ Nwabueze, as above note 199, 145.

²⁰⁴ Nwabueze, as above note 199, 145.

²⁰⁵ Nwabueze, as above note 199, 145.

²⁰⁶ Nwabueze, as above note 199, 145.

apply for a grant of letters of administration nor to be appointed as co-administratrix.²⁰⁷

However, it is not impossible for female children to inherit property especially when they are single, but this is not always the case for married women because of the belief that they in their entirety belong to their husbands and of course, it is not dignified for a married woman to claim any right regarding inheriting her father's property.²⁰⁸

In South Africa, according to Venter,²⁰⁹ the position of women in African customary law could be generally characterised as being that of a perpetual minor subject to the guardianship and authority of her husband, if married, or her father. A woman subject to African customary law may also find herself in the position of not being her husband's only wife, as polygamy is practiced among many tribes in South Africa.²¹⁰ In *Mayelane v Ngwenyama and Others*,²¹¹ the late Mr Moyana was married to two wives under customary law. At his demise, his senior wife (Ms Mayelane) alleged that *Xitsonga* customary law required her husband to have received her consent in order for his subsequent marriage to Ms Ngwenyama to be valid and that her husband never sought for her consent, therefore, she never consented to his marriage to Ms Ngwenyama. Ms Ngwenyama failed to rebut Ms Mayelane averment regarding *Xitsonga* customary law. From the finding, the Constitutional Court stated that the consent of the first wife is a necessary dignity and equality component of a further customary marriage in terms of section 3(1)(b) of the *Recognition of Customary Marriages Act* and further stated that a subsequent marriage will be invalid if consent from the first wife is not obtained. The Constitutional Court held that the marriage between the late Mr Moyana and Ms Ngwenyama is invalid for want of compliance with the requirements of *Xitsonga* customary law, as they existed at the time of the purported marriage.²¹²

However, junior wives do not have the same status as senior wives and primogeniture is given effect, in that the first-born son of the senior wife will usually

²⁰⁷ Nwabueze, as above note 199, 145-146.

²⁰⁸ Familusi, as above note 175, 301.

²⁰⁹ Venter, as above note 173, 8.

²¹⁰ Venter, as above note 173, 10.

²¹¹ As above note 123.

²¹² As above note 124.

become head of the family group upon his father's death.²¹³ To Mubangizi,²¹⁴ the rule of primogeniture refers to the right of the eldest surviving male to inherit the estate of the parents and that this cultural practice effectively excludes women from inheritance and sometimes places them under the guardianship of the male heir. This exclusion of women from inheritance has its genesis in the deeply entrenched system of patriarchy that characterises traditional African society.²¹⁵ Over the years, it found its legal basis in the BAA, section 23 of which endorsed the practice of male primogeniture.²¹⁶ Male primogeniture unfairly discriminates against women, places them in a position of subservience and subordination.²¹⁷ Traditionally the role of the family head is to hold family property in trust for the family and take care of the entire family.

South Africa was, and remains, a deeply patriarchal society in which women have been subordinated to men in public and private life.²¹⁸ The majority of black women had little choice but to be subject to an official customary law that codified flexible customary rules as a gendered set of fixed rules that privileged men over women.²¹⁹ Customary law has a great impact on the lives of the majority of Africans in the area of personal law as with regard to inheritance, in its application, customary law is often discriminatory and it tends to see women as adjuncts to the group to which they belong, such as a clan or tribe, rather than equals.²²⁰ It is therefore not surprising that the practice has been widely challenged in the South African courts and consequently the South African Constitutional Court has had an opportunity to pronounce on the matter.²²¹

In the case of *Bhe v Magistrate Khayelitsha*,²²² the Constitutional Court did not only declare section 23 of the BAA to be unconstitutional, but it also found the rule of primogeniture to be unconstitutional and invalid to the extent that it excluded or hindered women and extramarital children from inheriting property. The

²¹³ Venter, as above note 173, 10.

²¹⁴ Mubangizi, as above note 10, 43.

²¹⁵ Mubangizi, as above note 10, 43.

²¹⁶ Mubangizi, as above note 10, 43.

²¹⁷ Mubangizi, as above note 10, 43.

²¹⁸ Albertyn 2011 *Oxford Development Studies* 140.

²¹⁹ Albertyn, as above 141.

²²⁰ Ndulo, as above note 17, 88-89.

²²¹ Mubangizi, as above note 10, 43.

²²² 2005 1 BCLR 1 CC.

Constitutional Court's decision was hailed as a significant step in the fight for women's rights, and the right to equality.²²³ It is because of the Constitutional Court's stance in *Bhe's case* and similar cases, that the *Reform of Customary Law of Succession and Regulation of Related Matters Act*,²²⁴ was promulgated. The main import of the Act is the legislative abolition of the male primogeniture rule and the recognition of equal inheritance rights for all surviving children and spouses.²²⁵ This fundamental shift was intended to bring succession and inheritance matters in line with the Constitution and the notions of equality and human dignity enshrined therein.²²⁶ Despite the aforementioned legal developments, however, male primogeniture is still practised in several parts of South Africa, particularly in rural areas.²²⁷ This is largely ascribed to culture and the age-old slogan that customs die-hard and male primogeniture will continue to clash with the constitutionally accepted norms of human rights in the near future, particularly in the context of South African society, in which both culture and human rights enjoy significant competing interests.²²⁸ Venter relied on the comment of Sanders to state that 'command law cannot change the nature of African law'.²²⁹

3.3 Constitutional and other legislative provisions for the protection of women's inheritance rights in Nigeria

3.3.1 Constitution of the Federal Republic of Nigeria (CFRN) 1999

The CFRN is the 'supreme law' and all other laws are subordinate to it.²³⁰ It attempts to protect the equal rights of all citizens before the law as well as the rights, which guard against discriminatory practices either expressly or through practical application of any law.²³¹ The solemn pledge of equality of women reflected in the preamble of CFRN as follows:

We the people of the Federal Republic of Nigeria having firmly and solemnly resolved to live in unity and harmony as one indivisible and indissoluble

²²³ Mubangizi, as above note 10, 43.

²²⁴ As above note 51.

²²⁵ Mubangizi, as above note 10, 43.

²²⁶ Mubangizi, as above note 10, 43.

²²⁷ Mubangizi, as above note 10, 43.

²²⁸ Mubangizi, as above note 10, 43.

²²⁹ Venter, as above note 173, 7.

²³⁰ S 1 (1) of the *Constitution of the Federal Republic of Nigeria*, 1999.

²³¹ Afolayan *Widowhood Practices and the Right of Women* 36.

sovereign nation and provide for a constitution for promoting the good government and welfare of all persons in our country on the principles of freedom, equality and justice.

In the light of the foregoing, the benefit of freedom, equality and justice must not be the privileges of a selected few. It must be the heritage of all Nigerians, women and men, adult and children, the rich and the poor. CFRN guarantees all individuals equal rights, freedoms and proscribes discrimination on grounds of sex. Yet some cultural practices such as wife inheritance or primogeniture practiced in the Eastern part of the country, which denies women right of inheritance seem to be inconsistent with the principles of non-discrimination and equality.²³² According to Durojaye, Okeke and Adebanjo²³³ the most important provision on gender equality under the Constitution is found in section 42 and the importance of this provision is that discriminatory practices against individuals are forbidden. Although the CFRN, unlike section 9 of the South African Constitution, does not use the word gender, it can be maintained that the use of the word sex should protect women from discriminatory practices. This would seem to suggest that the observance of harmful cultural practices would be inconsistent with the provision of section 42 of the CFRN. It is important to note that section 42 must be read together with section 1 of the CFRN.

Section 1(3) declares that the CFRN is supreme and that any law that is inconsistent with it will be invalid. The implication of this is that the continued adoption of cultural practices, which may discriminate against women, will be in violation of the provision of section 42. Nigerian courts are yet to develop a jurisprudence clarifying the content and meaning of the equality provision in section 42. However, an opportunity for the Supreme Court to clarify the meaning of this section, particularly in relation to widowhood practices, was missed in the *Mojekwu* case discussed above. Durojaye relied on the view of Ewelukwa and Iwobi to state the conservative and insensitive nature of the court, which is more or less a betrayal of the spirit of the CFRN and more particularly of section 42.²³⁴ In a more recent case, the Court of Appeal, addressing a similar case, has held that:

It seems that these provisions especially the provision as contained in section 42 (2) of the constitution indeed is so specific and categorical that 'No

²³² Durojaye, Okeke and Adebanjo, as above note 192, 6171.

²³³ Durojaye, Okeke and Adebanjo, as above note 192, 6174.

²³⁴ Durojaye, Okeke and Adebanjo, as above note 192, 6174.

citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth'.²³⁵

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 women subjected to this disability or deprivation by reason only of their feminine attribute?²³⁶ The constitutional provisions are quite clear and unambiguous. Despite the lack of ambiguity in the CFRN, Nigerian women in certain parts of Nigeria are not entitled to inherit any immovable property.²³⁷ As can be deduced, section 42(1) of the CFRN confers on every Nigerian citizen the fundamental right to freedom from discrimination. Thus in *Ransome Kuti v Attorney General of the Federation*,²³⁸ Kayode Eso JSC said:

A fundamental right is a right, which stands above the ordinary laws of the land, which is antecedent to the politics of the society. It is a pre-condition to civilised existence.

Thus, the fundamental right to freedom from discrimination guaranteed by the constitution is applicable to men and women. They are to be treated the same way, with the same privileges and same restrictions legally and socially. Therefore, any law executed or administered against only women/men constitutes a breach of the right to freedom from discrimination. In *Timothy v Oforka*,²³⁹ the Court held that by virtue of section 43 of the CFRN, every citizen of Nigeria should have the right to acquire and own immovable property anywhere in Nigeria. In this case, the *Oraifite* native law and custom, which did not allow women to deal in land, was not only unconstitutional but also repugnant to natural justice, equity and good conscience. Then it can be adjudged that although the CFRN recognises the rights of women as human rights, the application of these rights leaves much to be desired.

²³⁵ Durojaye, Okeke and Adebajo, as above note 192, 6174-6175.

²³⁶ Durojaye, Okeke and Adebajo, as above note 192, 6175.

²³⁷ Durojaye, Okeke and Adebajo, as above note 192, 6175.

²³⁸ 1995 2 NWLR pt 16 211.

²³⁹ 2008 9 NWLR pt 1091 204.

3.3.2 Other legislative provisions that protect women's inheritance rights in Nigeria

3.3.2.1 Land Use Act 1978

According to Nwauche,²⁴⁰ in Nigeria, the *Land Use Act* can be considered as the best example of legislation developing customary law.²⁴¹ The importance of this legislation is widely acknowledged. Nwauche relied on the opinion of Allot to describe it as revolutionary because it imposed for the first time in Nigeria a common and uniform system of land title and land control. Section 24 of the *Land Use Act* which deals with the rights of the occupier upon death, provides in respect of customary right of the occupancy, that the rights of an occupier upon death shall be regulated by their *lex situs*, provided that:

In the case of a statutory right of law (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 prohibiting, restricting or regulating the devolution on the death to any particular class of persons or the right to occupy any land shall operate to deprive any person of any beneficial interest in such a land (other than, the right to occupy the same) or in the proceeds of sale thereof to which he may be entitled to under the rule of inheritance of any other customary law.

The foregoing section of the *Land Use Act* emphasised the prohibition of discrimination against any particular class or persons under the customary law to the extent that such persons should not be barred or deprived of rights to occupy land or proceeds from the sale of land. This provision, which is similar to the constitutional provision, seems not to have been taken into account by the courts in their various decisions. It may be argued that most of the courts' decisions pre-dated the *Land Use Act*. Such argument will not be tenable because the courts do not obviously seem to have taken cognisance of the repugnancy doctrine, which have long been in existence in their decisions either. If they had, that might have assuaged the plight of women in customary intestate succession considerably.

However, in the case of *Nzekwu v Nzekwu*,²⁴² which came up some years after the *Land Use Act*, it would appear that the injunction, which prohibited discrimination against any class of persons in this legal provision, was completely overlooked by the Supreme Court in arriving at its decision. The Court held that the widow could

²⁴⁰ Nwauche, as above note 71, 50.

²⁴¹ Nwauche, as above note 71, 50.

²⁴² 1989 2 NWLR pt 104 373.

occupy the deceased husband's house subject to her good behaviour and sublet part thereof for her up keep, *albeit* she could not inherit it, the reason no doubt being that under customary law a widow cannot inherit her husband's estate.

It is glaringly obvious that the Court failed to take into account the constitutional and statutory provisions existing in Nigeria, which prohibited *inter alia* discrimination by reason of sex, such ruling was *per incuriam* and therefore should not be allowed to stand this day and age.²⁴³

3.3.2.2 Marriage Act 1914 Cap 115, Laws of Federation of Nigeria 1958

In recent times, most people now contract marriage under the *Marriage Act*. Despite which, they are obliged by tradition to also perform a customary law marriage either before or after the marriage under the Act.

The issue here is not whether such customary marriage before or after a statutory marriage is legal or of any legal effect, rather the issue is the effect of the statutory marriage on the devolution of the intestate estate of such persons who are subject to customary law but have contracted marriage under the *Marriage Act*. The devolution of such person's estate in Nigeria is regulated by the provision of section 36 of the *Marriage Act*, which provides, that when any person who is subject to customary law, marries under the Act, and dies intestate leaving a widow or husband or any issue of such marriage, and where the issue of such marriage dies intestate the personal and real property of such intestate shall be distributed in accordance with this provision of the law of England relating to distribution of personal estate of the intestates.²⁴⁴ It follows, therefore, that the portion of English law rendered applicable by section 36 of the *Marriage Act* is the one dealing with the distribution of the estate of intestates.²⁴⁵ The law regulating the distribution of personal estate by 1917 was the *Statute of Distribution* 1670 and 1685 and under these applicable English laws, if a man died intestate leaving a widow and issue, the widow was entitled to inherit one-third of the estate while the residue was distributed equally among the children irrespective of whether they were males or females. If however there was no issue, the widow was entitled to half of the estate while the residue was distributed equally

²⁴³ As above note 16.

²⁴⁴ Okany *The Nigerian Law of Property* 788-789.

²⁴⁵ Okany, as above 789.

among the intestate's next of kin. If the deceased left no spouse then his estate was shared equally among all his children.²⁴⁶

However, the relevance of the *Marriage Act* to the study is that, under the provisions of section 36 of the *Marriage Act* the real and personal property of some Nigerians who, though subject to customary law but have married under the Act, now devolve on intestacy in accordance with English law. Under the relevant English law, the widow and all the children of the marriage have the right of inheritance; the daughters are not being made to suffer any disability or being discriminated against because of their sex.

3.3.2.3 Repugnancy doctrine

According to Iwobi,²⁴⁷ repugnancy doctrine is a basis for challenging the customary stance on inheritance by widows. Iwobi relied on the observation of Ibhawoh to state that the increasing opposition to customs that deny widows a share in the estate has led to a spate of court cases instituted by aggrieved widows seeking to assert their inheritance rights. A common ground upon which the validity of various aspects of customary law is often contested within the state legal system is to seek to contend that a given custom is repugnant to natural justice, equity, and good conscience. Iwobi further relied on the view of Nwabueze to state that the repugnancy doctrine was originally conceived of as a cleansing and modernising provision, originally entrenched by the colonial government to divest customary law of its ostensibly barbaric relics. A distinctly more progressive approach was taken by the Court of Appeal in the more recent case of *Mojekwu v Mojekwu*,²⁴⁸ which centred on the operation of the male primogeniture rule in Igbo land.²⁴⁹ The position under the relevant customary law (of the Nnewi people) was that upon a man's death his male child or if he had none, his brothers, would be his heirs and not his widow or daughters.²⁵⁰ If any male child or brothers did not survive the deceased, his nephews

²⁴⁶ Okany, as above note 244, 790.

²⁴⁷ Iwobi, as above note 181, 70.

²⁴⁸ As above note 144.

²⁴⁹ Iwobi, as above note 181, 71.

²⁵⁰ Iwobi, as above note 181, 71.

would inherit his land and his widow and would acquire the right to give his daughters away in marriage.²⁵¹

In a widely acclaimed judgment, Tobi J of the Court of Appeal very much doubted whether such a custom is consistent with equity and fair play in an egalitarian society such as ours where the civilised society does not discriminate against women. The Court of Appeal was also called upon to pronounce the validity of the *oli-ekpe* custom in the subsequent case of *Muojekwu v Ejikeme*.²⁵² In this latter case, Fabiyi J of the Court of Appeal boldly predicted that the pronouncement of Tobi J in *Mojekwu's* case would continue to stand the test of time.²⁵³ The Repugnancy doctrine in the *Evidence Act* of the laws of Nigeria states that a court should not enforce as law a custom, which is repugnant to natural justice, equity and good conscience and therefore no customary law should obstruct the rules of natural justice.²⁵⁴

3.4 Constitutional and other legislative provisions which protect women's inheritance rights in South Africa

3.4.1 The Constitution of the Republic of South Africa, 1996

The Constitution is committed to the protection and promotion of the right to gender equality as well as the right to culture and to participate in cultural life.²⁵⁵ The Constitution recognises the injustices of South African past, seeks to heal the divisions of the past and states²⁵⁶ in the preamble that:

We, the people of South Africa,
Recognise the injustices of our past,
Honour those who suffered for justice and freedom in our land,
Respect those who have worked to build and develop our country; and
Believe that South Africa belongs to all who live in it, united in our diversity.

The Constitution, in terms of section 2 thereof, is the supreme law of the Republic, and any law or conduct inconsistent with the Constitution is invalid.²⁵⁷ In addition, it is based on the values of human dignity, the achievement of equality, advancement of

²⁵¹ Iwobi, as above note 181, 71.

²⁵² As above note 147.

²⁵³ Iwobi, as above note 181, 71-72.

²⁵⁴ Mukoro 2011 *Journal of Social Science* 141.

²⁵⁵ Ntlama 2009 *Stellenbosch Law Review* 333.

²⁵⁶ McGregor 2014 *South African Mercantile Law Journal* 65.

²⁵⁷ Du Toit 2011 *Journal of Gender, Social Policy & the Law* 277.

human rights and freedoms, and non-sexism.²⁵⁸ The Right to equality in section 9 of the Constitution provides for the full and equal enjoyment of all rights and freedoms and prohibits direct or indirect unfair discrimination against anyone on a number of grounds.²⁵⁹ The Constitution incorporated the Bill of Rights in Chapter 2. The Bill of Rights must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; must consider international law.²⁶⁰ The Bill of Rights enshrines the various rights of all people, *inter alia*, by affirming the rights to equality.²⁶¹ The Bill of Rights is expansive, incorporating generous provisions relating to legal standing and, arguably, laying the basis for class action litigation.²⁶²

The language in South Africa's Bill of Rights is particularly notable when compared to the constitutional protection of gender equality in the United States.²⁶³ With respect to substantive rights, the South African Constitution is one of the most inclusive in the world and it incorporates individual rights along with a wide array of social and cultural rights.²⁶⁴ The Constitution is one of the most progressive in seeking to recognise women's difference, promote gender equality, and redress past discrimination. The Constitution's strong commitment to gender equality is visible both as a foundational value in South Africa's new democracy and as a set of substantive rights specifically related to gender equality.²⁶⁵ Egalitarian constitutional provisions in South Africa have provided women's movements with a legal tool to fight gender discrimination and proactively push for women's equality.²⁶⁶ Therefore, it is clear that the framers of the Constitution anticipated that customary law, which discriminates against women, should be subject to the provisions of the Constitution, which prohibit gender discrimination.²⁶⁷ Moreover, an important provision in the Constitution, and one that potentially has the ability to solidify the constitutional commitment to gender equality, is the establishment of a Commission for Gender Equality,²⁶⁸ a body empowered to promote, educate, monitor, and lobby for gender

²⁵⁸ S 1 (a) and (b) of the *Constitution of the Republic of South Africa*, 1996.

²⁵⁹ McGregor, as above note 256, 71.

²⁶⁰ S 39(1) (a) and (b) of the *Constitution of the Republic of South Africa*, 1996.

²⁶¹ McGregor, as above note 256, 65.

²⁶² S 38 of the *Constitution of the Republic of South Africa*, 1996.

²⁶³ Andrews, 2007 *Washington and Lee Law Review* 1490.

²⁶⁴ Scribner and Lambert 2010 *Politics and Gender* 46.

²⁶⁵ Scribner and Lambert, as above 46.

²⁶⁶ Scribner and Lambert, as above note 264, 58.

²⁶⁷ Venter, as above note 173, 16.

²⁶⁸ S 181(d) of the *Constitution of the Republic of South Africa*, 1996.

equality.²⁶⁹ The Constitution also provides for a Human Rights Commission to promote and protect human rights.²⁷⁰ The South African Constitution has been hailed as one of the most impressive documents for the wide range of human rights protection, it affords and for its deep commitment, formally at least, to gender equality as evidenced by the expansive provisions.²⁷¹ It protects the civil and political rights of women in all areas of life, including the public and private sphere.²⁷²

3.4.2 *Other legislative provisions that protect women's inheritance rights in South Africa*

3.4.2.1 Recognition of Customary Marriages Act (the Act) 120 of 1998

According to Andrew,²⁷³ the Act is an important milestone on the road to gender equality in South Africa, according parity to all marital regimes and providing broad protection to women in customary unions. The passage of the Act signifies another nail in the coffin of the legal dualism that characterised colonial and apartheid South Africa, and it gives effect to the constitutional vision of equality for all the legal systems, including indigenous law.²⁷⁴ In *Mayelane v Ngwenyama and Others*,²⁷⁵ the Constitutional Court stated that the Act is premised on a customary marriage that is in accordance with the dignity and equality demands of the Constitution. The Act repealed several laws that applied only to Africans in South Africa, laws that typified the pernicious legacies of colonialism and apartheid.²⁷⁶ The primary aim of the Act is to extend full legal recognition to marriages entered into in accordance with indigenous or traditional rites and this recognition, in turn, serves the goal of improving the position of women and children within customary marriages by introducing measures that bring customary law in line with the Constitution.²⁷⁷ If a person is a spouse in more than one customary marriage, the Act recognises all of those customary marriages, including those conducted prior to passage of the Act.²⁷⁸ The major legislative measure for the harmonisation of customary law with the Bill of

²⁶⁹ Andrews, as above note 263, 1488.

²⁷⁰ Andrews, as above note 263, 1488-1489.

²⁷¹ Andrews, as above note 263, 1489.

²⁷² Andrews, as above note 263, 1489.

²⁷³ Andrews, as above note 263, 1493.

²⁷⁴ Andrews, as above note 263, 1493.

²⁷⁵ As above note 123.

²⁷⁶ Andrews, as above note 263, 1493.

²⁷⁷ Kult 2001 *Indiana International & Comparative Law Review* 718.

²⁷⁸ Andrews, as above note 263, 1493.

Rights is the adoption of the Act, which defines customary law and gives equal status to the man and woman in a marital relationship.²⁷⁹ In section 6 of the Act, it is provided that:

A wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law.²⁸⁰

This is in line with sections 9(2) and (4) of the Constitution, which require the adoption of national legislation to ensure the full and equal enjoyment of fundamental freedoms, thus seeking to ensure that women's status under customary law ceases to reflect the unfair discrimination of the past, when women married under customary law had no legal capacity.²⁸¹ Mindful of the need to protect women against unlawful property deprivation, the Act also provides for an automatic community property regime, but allows the spouses to enter into an ante nuptial contract that serves to regulate the matrimonial property.²⁸² The Act also stipulates that a husband in a customary marriage who wishes to enter into a further customary marriage with another woman must apply for court approval of a written contract to regulate the future matrimonial property systems of his marriages.²⁸³ All of these provisions reflect the formal commitment on the part of the legislature to ensure equity for all wives in customary marriages.²⁸⁴ Effectively, the Act gives effect to the *Promotion of Equality and the Prevention of Unfair Discrimination Act* 4 of 2000, which seeks to eradicate all forms of social and economic inequalities, especially those that are systemic in nature and which were generated by South Africa's history.²⁸⁵

The South African High Court has generally interpreted customary law in light of the Bill of Rights. In *Mabuza v Mbatha*,²⁸⁶ the Court found that customary law could regulate marriage so long as the law did not contravene the Constitution (in particular, the equality clause). An earlier case, *Prior v Battle and Others*²⁸⁷ found

²⁷⁹ Ntlama, as above note 255, 339.

²⁸⁰ Ntlama, as above note 255, 339.

²⁸¹ Ntlama, as above note 255, 340.

²⁸² Andrews, as above note 263, 1494.

²⁸³ Andrews, as above note 263, 1494.

²⁸⁴ Andrews, as above note 263, 1494.

²⁸⁵ Ntlama, as above note 255, 340.

²⁸⁶ 2003 4 SA 218.

²⁸⁷ 1999 2 SA 850.

that customary law contravened the Constitution because it granted the husband guardianship over his wife, which the court found outmoded and anachronistic.²⁸⁸ Similarly, with respect to inheritance and customary law, the South African Constitutional Court found a rule of male primogeniture in African customary law to entrench patriarchy and violate women's constitutional guarantees to human dignity and equality.²⁸⁹

3.4.2.2 Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) 4 of 2000

The intention behind PEPUDA is an admirable one to eradicate systemic inequality and to ensure that all persons in society are treated with the dignity that is their due.²⁹⁰ According to Pityana,²⁹¹ in the first place PEPUDA seeks to fulfil the constitutional mandate to prevent or prohibit unfair discrimination and in the second place, this piece of legislation is aimed at fulfilling South Africa's international obligations.²⁹² Thirdly, since the interim Constitution in 1993, the Constitutional Court had developed the jurisprudence on equality considerably; for the vast majority of South Africans, discrimination remained, notwithstanding the fact that the courts could declare certain offensive acts to be unconstitutional; most still had no legal remedies against discrimination except civil litigation, which would be very difficult and expensive. It was also true that litigation before the Constitutional Court came from the privileged classes. A new PEPUDA now provides specific remedies and makes the law and the process of redress accessible to ordinary people.²⁹³ Fourthly, the Act seeks to underscore the primacy of equality and the historic struggle against discrimination as a foundational element of the ethic in South Africa, it has been said that whereas liberty is the cornerstone of America's Constitution, equality is South Africa's.²⁹⁴ Fifthly, the development of PEPUDA was no doubt influenced by the urgency felt for the need to develop a legal environment capable of eradicating the racism prevalent in the society, the pathology of violence against women and gender discrimination; discrimination and inequality are probably two of the greatest social

²⁸⁸ Scribner and Lambert, as above note 264, 52.

²⁸⁹ Scribner and Lambert, as above note 264, 52.

²⁹⁰ Cooper and Lagrange 2001 *Industrial Law Journal* 1544.

²⁹¹ Pityana 2003 *Codicillus* 3.

²⁹² Pityana, as above 3.

²⁹³ Pityana, as above note 291, 3-4.

²⁹⁴ Pityana, as above note 291, 4.

ills South Africa ever suffered.²⁹⁵ The definition of discrimination in PEPUDA was taken as it is from CEDAW and chapter 2 of PEPUDA deals with prevention, prohibition and elimination of unfair discrimination on the ground of sex.²⁹⁶ Section 8 of PEPUDA, which is very specific on the elimination of gender inequalities as it prohibits any discrimination on the grounds of gender including:

- (c) the system of preventing women from inheriting family property;
- (d) any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child.²⁹⁷

3.4.2.3 Intestate Succession Act (The succession Act) 81 of 1987

According to Kult,²⁹⁸ customary laws were shaped by a pre-colonial society in which patriarchy and an extended family structure was distinctive features and patriarchy implied that senior males exercised all significant rights and powers. Traditional customary law systems of succession in South Africa were 'intestate, universal and patrilineal' and with regard to the patrilineal nature of inheritance, the principle of male primogeniture guided customary succession.²⁹⁹ The deceased's family privately regulated the system of customary succession, without any interference from outside authorities in most cases and the traditional custom law of succession revolved around the marital status of the deceased; where the deceased was monogamous, the various systems of customary law in South Africa were uniform in applying the law.³⁰⁰ The deceased's oldest son was the first choice as heir, if that son had already died, then the oldest son's oldest son succeeded and failing, any male issue in the oldest son's line, succession passed to the deceased's second son and his male descendants.³⁰¹

Polygamous marriages necessitated a modification of the succession process, because by their nature, these marriages resulted in the male's household being divided into separate houses and each of a man's marriages established an independent house, the property of which was kept separate from his other houses

²⁹⁵ Pityana, as above note 291, 4.

²⁹⁶ Maluleke 2012 *Potchefstroom Electronic Law Journal* 7-8.

²⁹⁷ Ntlamai, as above note 255, 340.

²⁹⁸ Kult, as above note 277, 706.

²⁹⁹ Kult, as above note 277, 707.

³⁰⁰ Kult, as above note 277, 707.

³⁰¹ Kult, as above note 277, 707.

because the heir to that house inherited the estate.³⁰² The nature of the system of polygamy thereafter determined the order in which the house heirs succeeded and if there were no male descendants within a polygamous household, the order of succession followed the basic principles of a monogamous marriage.³⁰³ Customary law prohibited a woman from succeeding to the status of a man because she did not have the legal power to perform typically male roles and therefore, a woman neither succeeded to a role as head of a family nor did she inherit property from her deceased husband.³⁰⁴

For South Africans who follow Roman-Dutch common law, dying intestate leads to application of the *Intestate Succession Act* 81 of 1987 and it is similar to those found in many jurisdictions in the United States because distribution of intestate property follows a mechanical approach based on a hierarchy of blood relations.³⁰⁵ For instance, if a spouse, but no descendants survive the deceased, then the spouse inherits the entire estate and if both a spouse and descendants survive the deceased, they divide the property among them.³⁰⁶ Provisions are then made for situations in which the deceased is survived only by parents or by siblings and if no one from any of the aforementioned groups survives the deceased, in that case, the other blood relation or blood relations of the deceased who are related to him nearest in degree shall inherit the intestate estate in equal shares.³⁰⁷

The *Intestate Succession Act* 81 of 1987 therefore provides a straightforward approach to property distribution upon death of the intestate; unlike customary law procedures, the *Intestate Succession Act* does not foster discrimination against women or children and in fact, the deceased's widow and children are the primary beneficiaries under the *Intestate Succession Act* 81 of 1987, thereby meeting the needs and expectations of modern society.³⁰⁸ The *Intestate Succession Act* 81 of 1987 provides a convenient solution for most of the problems in customary law; it complies with the Bill of Rights and secures the material welfare of surviving spouses

³⁰² Kult, as above note 277, 708.

³⁰³ Kult, as above note 277, 708.

³⁰⁴ Kult, as above note 277, 708.

³⁰⁵ Kult, as above note 277, 711.

³⁰⁶ Kult, as above note 277, 711.

³⁰⁷ Kult, as above note 277, 711.

³⁰⁸ Kult, as above note 277, 711-712.

and children.³⁰⁹ It provides for the surviving spouses and children of a person who dies intestate to inherit the intestate portion of the estate.³¹⁰ Originally, the Succession Act only catered to spouses who had concluded a valid civil marriage that had been solemnised and registered in accordance with the *Marriage Act*.³¹¹

However, the advent of a human rights culture necessitated a more inclusive and pluralist approach towards intestate succession in South Africa and in this regard, development has recently occurred in customary marriage. In *Bhe and Others, v Magistrate Khayelitsha and Others*,³¹² the Constitutional Court found the principle of male primogeniture to be unconstitutional. It was held that the *Intestate Succession Act* would henceforth apply to both monogamous and polygamous customary marriage.³¹³ The upshot of the development elucidated above is that *Intestate Succession Act* 81 of 1987 currently applies to most marriages and marriage-like relationships encountered in South Africa.³¹⁴ That is say that the *Intestate Succession Act* should be applied subject to the requirements of fairness, justice and equity.

The constitutional protection of women's rights, as well as the constitutional recognition of the institutions and structures of traditional law, involves a series of balancing tests that raise perennial questions about the role of law in pursuing equality, as well as respect for the many ways that citizens enjoy and practice their cultural norms and values.³¹⁵ In South Africa, constitutional provisions recognise women as a category of individuals who require protection and promotion to achieve equality.³¹⁶ Gender equality is a stated constitutional value in South Africa, and subsequent legislation has drawn on these constitutional ideals and concrete provisions to actively promote gender equality. Legislation is also more specific with respect to objectives, scope, and enforcement than in the Nigerian case.³¹⁷

³⁰⁹ Kult, as above note 277, 724.

³¹⁰ Smith and Robinson 2008 *BYU Journal of Public Law* 435.

³¹¹ Smith and Robinson, as above 435.

³¹² As above note 116, 580.

³¹³ Smith and Robinson, as above note 310, 435-436.

³¹⁴ Smith and Robinson, as above note 310, 436.

³¹⁵ Andrew, as above note 263, 1497.

³¹⁶ Scribner and Lambert, as above note 264, 57.

³¹⁷ Scribner and Lambert, as above note 264, 57.

3.5 The interface between legislative guarantees and customary rules involving women's inheritance rights, and the challenges encountered in practice

Nigeria is a pluralist state; hence, statutory provisions exist side-by-side with customary laws and this creates tension between statutory provisions and cultural practices.³¹⁸ The law that governs family relations such as marriage and inheritance, among others, is an area of law that has an immense impact on the status and welfare of women in Africa and it is an area that is rendered particularly complex by the interaction of plural legal systems.³¹⁹ For reasons ranging from history to culture, the average African is today subject to at least two distinct, and sometimes conflicting, legal systems, and customary law usually regulates family and allied relations, while statutory law regulates other aspects of life.³²⁰

Even when statutory laws do exist to govern these rights, customary law is often the most common recourse in inheritance cases because they are governed locally and hence more readily accessible and socially legitimate.³²¹ Although the provisions of statutory law are supposed to prevail when the provisions of customary law and statutory law are contradictory, the reality is that statutory law will be poorly implemented and possibly completely ignored.³²² In Nigeria, ethnic groups are deep-rooted in customary practices.³²³ This tends to make cultural practices compete with, and in many situations overtake, the laws of the land with regard to issues such as harmful traditional practices. There is no denying the fact that some aspects of customary law and practices are discriminatory and the competing values of these plural legal systems more often than not result in denial of rights, and, ultimately, access to justice is adversely affected.³²⁴

Issues relating to widows are mostly affected, resulting in discrimination against women. The highest occurrence of these discriminatory practices happens in the

³¹⁸ Durojaye, Okeke and Adebajio, as above note 192, 6174.

³¹⁹ Kuenyehia 2006 *University of California, Davis Law Review* 387.

³²⁰ Kuenyehia, as above 387.

³²¹ Cooper 2010 *working Paper* 19.

³²² Cooper, as above 19.

³²³ Afolayan, as above note 231, 36.

³²⁴ Kuenyehia, as above note 319, 387.

private sphere and even in the presence of closely knit families.³²⁵ Admittedly, the CFRN, in section 42, explicitly prohibits discrimination on grounds of sex. However, there are a few items in the Exclusive Legislative list, which precludes the federal government from legislating issues relating to women under customary law. Hence, it is intriguing to know that the culture as well as the pluralistic legal system, compound the discriminatory widowhood rights. By extension, it leaves important issues that have enormous implications for the legal status of women in Nigeria to the various states that make up the federation to decide individually.³²⁶

Besides statutory provisions, most African countries including Nigeria have constitutional provisions that seemingly guarantee the rights of women in the issue of inheritance. Such provisions usually spell out the relationship between customary laws and the Constitution as the supreme law of the land.³²⁷ However, in spite of the provisions of section 42(2) of the CFRN, there still exists evidence of discrimination based on gender in area of succession in Nigeria. Prior to the enactment of section 42(2) of the CFRN, one area where gender discrimination was palpable was the disinheritance of female children of intestates under customary law.³²⁸ Customary law may be defined as a body of rules and norms whose legitimacy is rooted in tradition and is claimed to have existed since time immemorial.³²⁹

As a body of laws rooted in tradition and historical experiences, customary law is fraught with certain inherent problems that render its application disadvantageous to women, especially in the area of marriage and succession. It operates in such a manner as to give men precedence over women and such gender inequality relegates women to a subordinate position, which in turn affects their access to resources.³³⁰ For this reason, traditional customary conceptions of marital rights do not always acknowledge the contributions that wives make to the acquisition of family wealth, regardless of what statutory law has to say on the subject. Tensions are brought to the fore when a husband dies intestate and customary law is to apply

³²⁵ Afolayan, as above note 231, 36.

³²⁶ Afolayan, as above note 231, 36.

³²⁷ Kuenyehia, as above note 319, 399.

³²⁸ Itua 2012 *Journal of Law and Conflict Resolution* 42.

³²⁹ Kuenyehia, as above note 319, 390.

³³⁰ Kuenyehia, as above note 319, 390.



to distribution of property.³³¹ The issue of inheritance is an important one because it is one way by which women can have access, especially to economic resources such as land. Most African communities are agrarian based. Accordingly, a lack of access to the main resource, land, makes women economically dependent and thwarts their efforts at achieving economic independence for themselves and their families. Because of legal plurality, the law of inheritance is fraught with uncertainty and inequality.³³²

On the other hand, in South Africa, according to Bekker,³³³ South Africa has a multicultural society in which a multiplicity of legal systems exist and are observed, and legal effect is given to certain institutions such as indigenous law. He further stated that legal pluralism exists as a corollary of the prevailing cultural pluralism.³³⁴ Legal pluralism is a system of different legal orders, conceived of as separate entities, coexisting in the same political space.³³⁵ Legal pluralism is generally defined as a situation in which two or more legal systems coexist in the same social field.³³⁶ Legal pluralism not only posits the existence of multiple legal spheres, but also develops hypotheses concerning the relationships between them and the existence of legal pluralism itself is of less interest than the dynamics of change and transformation.³³⁷

Today, customary law continues to coexist with national law.³³⁸ In *Mayelane's case*,³³⁹ the Constitutional Court stated that the Constitution 'acknowledges the originality and distinctiveness of indigenous law as an independent source of norms within the legal system' such that customary law 'feeds into, nourishes, fuses with and becomes part of the amalgam of South African law'. While the Constitution is considered the supreme law of the Republic of South Africa, it continues to require the courts to apply customary law.³⁴⁰ In addition, customary law is afforded equal recognition with national law and indeed, customary law is specifically addressed in

³³¹ Kuenyehia, as above note 319, 390.

³³² Kuenyehia, as above note 319, 387.

³³³ Bekker, Labuschagne and Vorster, as above note 119, 3.

³³⁴ Bekker, Labuschagne and Vorster, as above note 119, 3.

³³⁵ Oppermann 2006 *Hastings Women's Law Journal* 66.

³³⁶ Merry 1988 *Law and Society Review* 870.

³³⁷ Merry, as above 879.

³³⁸ Oppermann as above note 335, 74.

³³⁹ Ndulo, as above note 17, 81.

³⁴⁰ Oppermann, as above note 335, 77.

the 12th Chapter of the South Africa's Constitution.³⁴¹ Section 211(3) provides that the courts be obliged to apply it when it is applicable, subject to the Constitution and any legislation that specifically deals with customary law.³⁴² Like all other laws, customary law is subject to the Constitution and any legislation that specifically deals with customary law.³⁴³ It is essential to see state law as fundamentally different in that it exercises the coercive power of the state and monopolises the symbolic power associated with state authority and in many ways, it ideologically shapes other normative orders as well as provides an inescapable framework for their practice.³⁴⁴ Custom, when penetrated by state law, changes its nature fundamentally and becomes part of state law and custom supports law but law transforms the elements of custom that it appropriates into its own image and likeness.³⁴⁵ Law is the unsettled resultant of relations with a plurality of social forms and in this; law's identity is constantly and inherently subject to challenge and change.³⁴⁶

According to Himonga,³⁴⁷ in some countries this pluralism is accentuated by the legislative intervention that has resulted in the reform of customary succession laws.³⁴⁸ Himonga relied on the opinion of Okoth-Ogendo to state that despite the importation of a complex system of property law in many African countries, land and associated resources continue to be held, used, controlled and managed in accordance with indigenous values and norms. These values and norms remain resilient and robust, notwithstanding the extensive reach of state law.³⁴⁹ To Ossome,³⁵⁰ customary laws have the potential to narrow down a number of the gaps identified in formal laws, such as limiting women's access to and participation in land deals. Ossome relied on the opinion of Kwanele Jirira and Charles Halimana to state that, at the micro level, customary law is still more prevalent than statutory laws in

³⁴¹ Oppermann, as above note 335, 77.

³⁴² Bennett 2011 *Emory International Law Review* 1035.

³⁴³ Oppermann, as above note 335, 77.

³⁴⁴ Merry, as above note 336, 879.

³⁴⁵ Merry, as above note 336, 883.

³⁴⁶ Merry, as above note 336, 884.

³⁴⁷ Himonga 2011 *Acta Juridica* 114.

³⁴⁸ Himonga, as above 114.

³⁴⁹ Himonga, as above note 347, 115.

³⁵⁰ Ossome 2014 *Feminist Economics* 171.

many African countries and tends to discriminate against women when it comes to access, ownership, and control of land, as often women only have usufruct rights.³⁵¹

Even if women are guaranteed control over land under statutory law and the constitution, their land rights may not be guaranteed under customary law and cultural practices.³⁵² Patriarchal norms currently dominate the interpretation of customary laws and practices so that in the name of 'usage and custom', gender concerns may not be considered or may not be based on the notion of gender equality.³⁵³

3.6 Conclusion

This chapter dealt with women's rights of inheritance in Nigeria and South Africa. In South Africa, customary law is applied in accordance with the constitution, which differs from Nigeria in terms of the customary application. In fact Nigeria should learn from South Africa. It compared the position of women under customary laws of Nigeria and South Africa with regard to inheritance and succession. It examined the constitutional and legislative provisions that protect the rights of women in Nigeria and South Africa as well as the interface between legislative guarantee and customary rules involving women's inheritance rights and the challenges encountered in practice. The following chapter deals with the legal framework for the protection of the rights of women: international and regional perspective.

³⁵¹ Osome, as above note 350, 167.

³⁵² Osome, as above note 350, 167-168.

³⁵³ Osome, as above note 350, 168.

Chapter Four

Legal framework for the protection of the rights of women: International and regional perspective

4.1 Introduction

The preceding chapter dealt with women's rights of inheritance in Nigeria and South Africa. It examined the position of women under customary laws in Nigeria and South Africa with regard to inheritance and succession. It assessed the constitutional and other legislative provisions that protect the rights of women in Nigeria and South Africa as well as the interface between legislative guarantees and customary rules involving women's inheritance rights, and the challenges encountered in practice. This chapter deals with legal framework for the protection of the rights of women at the international and regional levels. The essence of this chapter is to discuss the international and regional normative and institutional frameworks for the prohibition of discrimination against women within the context of this study.

From humble beginnings, women's rights have come to occupy a central position in the global human rights discourse.³⁵⁴ The protection of basic human rights is one of the most pressing, yet most elusive goals of the international community and before World War II; international law protecting human rights was sparse.³⁵⁵ States limited their international legal obligations to declarations of intent and to a small number of treaties and conventions.³⁵⁶ The adoption of the United Nations Charter in 1945 and the Universal Declaration of Human Rights (UDHR) three years later, however, provided a window of opportunity for states, international organisations, and civil society actors and organisations to place human rights on the international legal agenda.³⁵⁷

Today, these efforts have culminated in the creation and expansion of a worldwide system of international law designed to identify and protect a growing number of basic human rights.³⁵⁸ For many scholars and activists, states' increasingly global legal commitments to protect human rights signal a fundamental shift in the structure

³⁵⁴ Olowu 2006 *Human Rights Review* 78.

³⁵⁵ Harfner-Burton and Tsutsui 2005 *American Journal of Sociology* 1373.

³⁵⁶ Harfner-Burton and Tsutsui, as above 1373-1374.

³⁵⁷ Hafner-Burton and Tsutsui, as above note 355, 1374.

³⁵⁸ Hafner-Burton and Tsutsui, as above note 355, 1374.

of international society and the vast majority of states today bind themselves to an international regime designed to protect the fundamental rights of virtually every child, woman, and man through law.³⁵⁹ In effect, debates on the rights of women in the UN take place largely outside of the frame of reference of existing human rights organs, and specialised machinery to deal with what were perceived to be 'women's rights' was set up in 1946 in the form of a UN Commission on the Status of Women.³⁶⁰

At its first session in 1946, the Sub-Commission on the Status of Women of the Commission on Human Rights adopted a programme of work based on the principle that freedom and equality are essential to human development and woman is as much a human being as man and therefore entitled to share them with him.³⁶¹ In order to enable women to participate fully as free and responsible members in the building of the new society, it was necessary to raise the status of women to equality with men in all fields of human enterprise.³⁶² As set forth by the Sub-Commission and subsequently endorsed by the Economic and Social Council, the programme included:

- (a) political equality, based on equal participation in government and possibility to exercise all rights and duties of a citizen;
- (b) civil equality, based on equality in marriage, monogamy, equal right to guardianship of children, equal right to a nationality and to property;
- (c) social and economic equality, based on the full possibility to take part in social life, the prevention of discrimination against women in social and economic status and customs.³⁶³

However, the women's rights movement was largely an upshot of the movement for women's suffrage that blossomed in the latter part of the 19th century, and women from different countries had already formed alliances to advance their common cause.³⁶⁴ During the late twentieth century, the issue of gender equality once again became a major item on the global agenda and the UN Decade for Women, which ended in 1985, initiated the integration of women into development, triggering the formation of thousands of women's organisations and networking them across the

³⁵⁹ Hafner-Burton and Tsutsui, as above note 355, 1374.

³⁶⁰ Reanda and Janus 1981 *Human Rights Quarterly* 12.

³⁶¹ Reanda and Janus, as above 18.

³⁶² Reanda and Janus, as above note 360, 18.

³⁶³ Reanda and Janus, as above note 360, 18.

³⁶⁴ Antrobus *The Global Women's Movement* 33.

world.³⁶⁵ The trend accelerated during the following decade. In 1993, the Vienna World Conference proclaimed that women's rights were human rights; in 1994, the Cairo International Conference on Population and Development placed women's empowerment and health at the centre of sustainable development programmes. Two years later, the Beijing Fourth World Conference on Women adopted a platform seeking to promote and protect the full enjoyment of women's rights and fundamental freedoms for all women.³⁶⁶

The term 'rights' consists of a moral power to claim something as one's own and rights are therefore something that are applicable to every person and should not be discriminatory nor restricted or even denied to persons.³⁶⁷ Human rights therefore have universal application; there have been efforts made internationally, regionally and nationally over the years to stall and reduce issues of discrimination against women and give equal opportunity for them to thrive.³⁶⁸ Some of such initiatives were the establishment of the Commission on the Status of Women, the UN Development Fund for Women, UN Special Rapporteurs and the adoption of CEDAW. However, the rights of women in international law took long to take root and this is partly because states were reluctant to embrace what the former US Secretary of State and former first lady, Hilary Clinton, eloquently stated, 'women's rights are human's rights'.³⁶⁹

At the regional level is the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa.

4.2 The Commission on the Status of Women (CSW)

The CSW is the principal global intergovernmental body exclusively dedicated to the promotion of gender equality and the empowerment of women and functional commission of the Economic and Social Council (ECOSOC); it was established by Council Resolution 11(II) of 21 June 1946.³⁷⁰ The CSW successfully brought out various conventions specifically dealing with the rights of women.³⁷¹ It played

³⁶⁵ Inglehart *Rising Tide* 3.

³⁶⁶ Inglehart, as above 3.

³⁶⁷ Alan-Ajonye and Awopetu 2012 *International Journal of Innovative Research & Development* 352.

³⁶⁸ Alan-Ajonye and Awopetu, as above 352.

³⁶⁹ Mooki, Ozoemana and Hansungule *Women's Rights in International law* 73-97.

³⁷⁰ CSW 2013 <http://www.unwomen.org/en/csw>.

³⁷¹ Bardalai and Gogoi 2014 *Indian Streams Research Journal* 3.

perhaps the most fundamental role in paving the way for the adoption of CEDAW.³⁷² The CSW is instrumental in promoting women's rights, documenting the reality of women's lives throughout the world, and shaping global standards on gender equality and the empowerment of women.³⁷³ Its primary function is to prepare recommendations and reports to ECOSOC on promoting women's rights in political, economic, civil, social and educational fields and it may put forward recommendations on areas requiring immediate attention.³⁷⁴ Following the Beijing Conference and Platform for Action, the General Assembly mandated the CSW with preparing for the 2000 follow up to the Beijing Conference, undertaking regular reviews of the specified critical areas of concern.³⁷⁵ Women and education, training, the environment, decision-making and health are all areas currently being reviewed with gender mainstreaming and aging women more recent additions.³⁷⁶ The CSW's membership has grown considerably since its inception with fifteen members. Its forty-five members meet for approximately eight working days every year. The Division for the Advancement of Women (now integrated into UN Women) carries out some of the servicing of the CSW.³⁷⁷

From all indications, it is obvious that CSW has done a lot on issues relating to women's rights with regard to gender equality. What is the impact of CSW on Nigeria and South Africa? In Nigeria, CSW activities created no positive impact in the sense that there is still discrimination against women as regards inheritance rights in most part of the country. To date, the Nigerian government has not taken any necessary steps to come up with national legislation on equality to arrest discrimination against women with regard to inheritance in Nigeria. On the other hand, the activities of CSW have a positive impact in South Africa. For example, the Constitution of South Africa 1996 incorporated an equality clause that outlaws discrimination,³⁷⁸ which is a focal point of CSW and therefore ensures women's rights of inheritance in South Africa.

³⁷² Bond 2014 *Michigan State Law Review* 243.

³⁷³ CSW, as above as above note 370.

³⁷⁴ Smith *Textbook on International Human Rights* 60.

³⁷⁵ Smith, as above 60.

³⁷⁶ Smith, as above note 374, 60.

³⁷⁷ Smith, as above note 374, 60.

³⁷⁸ S 9 (3) of the *Constitution of the Republic of South Africa* 1996.

Mlambo-Ngcuka, the UN Under-Secretary-General and Executive Director of UN Women, contends that individuals, governments and the UN system should recognise the rights of rural women, including their rights to land and other resources. There is thus the need to build momentum together to support and ensure the empowerment of rural women so that they can claim the rights they deserve and fully enjoy the benefits of development.³⁷⁹

She argues that throughout the world, gender inequality in land and other productive resources is intrinsically related to women's poverty and exclusion. Women's rights to access, use, control, and own land and other productive resources are essential to reverse this. The UN Women Executive Director further argues that sustainable solutions are not imposed from the outside and that it is of utmost importance that rural women's voices be heard in discussion, debates and policy making about their lives.³⁸⁰

Furthermore, Mlambo-Ngcuka avers that every day rural women face complex obstacles blocking their rights to land, which include discriminatory laws and practices that govern inheritance and marital property; gender-biased land reform that favour men over women; unequal access to land markets; and discriminatory attitudes and beliefs. Such discrimination greatly decreases the potential of rural women as agricultural producers, limiting their contributions to food security, frustrating their sustainable land management efforts, and undermining their well-being and that of their families.³⁸¹

She observes that this situation persists, despite international and regional instruments and policies that recognise women's rights to land and important developments in many countries to ensure and protect these rights. According to her, a UN Women's publication 'Realising Women's Rights to Land and Other Productive Resources,' published by the Office of the High Commissioner for Human Rights, gives a comprehensive picture of the critical issues affecting women's rights to land and presents recommendations, good practices and success stories.³⁸²

³⁷⁹ Mlambo-Ngcuka 2014 <http://www.unwomen.org/en/news/stories/2014/10/international-day-of-rural-women-ed-statement>.

³⁸⁰ Mlambo-Ngcuka, as above.

³⁸¹ Mlambo-Ngcuka, as above note 379.

³⁸² Mlambo-Ngcuka, as above note 379.

However, she stresses that change is possible through determined action, and that governments and civil society must accelerate their efforts to revise obsolete national laws, promote security of tenure, and must ensure the prohibition of forced eviction for women whose civil status has changed. To her, marriage and family laws need to be made to guarantee women's rights to property. Communal lands are powerful property; they represent the capital that secures the rights of a collective. However, those that work on communal land also need to be supported to ensure that their rights translate into returns. She argues finally that governments and civil society must generate awareness, offer training programmes to enable women to know about and claim their rights.³⁸³

Mlambo-Ngcuka further stresses that women's rights to land and other productive resources should be addressed in the post-2015 road map and that they be embraced by the future Sustainable Development Goals. This is because evidence has proven that there is a strong and positive correlation between ensuring women's rights over land and improved household welfare, women's increased power and autonomy in their families and communities, as well as in their economic and political relationships.³⁸⁴

In addition, she also argues that in order to implement appropriate policies in the post-2015 era, there is a need for adequate data that is gender-disaggregated to shape the evidence base for policy change. There is also the need to strengthen ongoing efforts to collect this data through initiatives such as the UN Women-supported Land Portal, the Gender and Land Rights Database, the Global Land Tool Network, and the Women, Business and the Law databases.³⁸⁵

Mlambo-Ngcuka finally argues that the International Day of Rural Women is an opportunity to focus global attention on the contributions and concerns of rural women, whose situations and voices are so often unheard.³⁸⁶

The articulations of the Executive Director of UN Women show that gender inequality is as a result of discrimination laws and practices and to curb this situation, she urges individuals, government and the UN system to recognise the rights of women.

³⁸³ Mlambo-Ngcuka, as above note 379.

³⁸⁴ Mlambo-Ngcuka, as above note 379.

³⁸⁵ Mlambo-Ngcuka, as above note 379.

³⁸⁶ Mlambo-Ngcuka, as above note 379.

In fact, her articulations portray advancement, promotion and protection of women's inheritance rights. Observing her views will go a long way to improve women rights of inheritance, particularly in Africa.

In Nigeria, the government should take steps to acknowledge international and regional instruments that recognise women's rights, to make Mlambo-Ngcuka's view a reality. South Africa has done great things in the advancement of marriage and family laws guaranteeing women's inheritance rights, which is in line with the view of the Executive Director of UN Women. However, more effort is still needed towards informing rural women about their rights.

4.3 United Nations Development Fund for Women (UNIFEM)

On 3 November 1999, the UN General Assembly (UNGA) passed a Resolution that officially designates 25 November as the International Day for the Elimination of Violence against Women and the Resolution was an initiative of the UNIFEM, created at the behest of the UNGA in 1976, to support the UN Decade for Women.³⁸⁷ Since then, the organisation has worked tirelessly to advance women's human rights and foster their empowerment.³⁸⁸ According to its mission statement, UNIFEM promotes the principle that the protection of women's human rights is fundamental to ensuring women's self-realisation and full participation in society.³⁸⁹

Its activities include systems-wide coordination on women's rights issues within the UN; promoting the full implementation of the measures set out in the Beijing Platform for Action; and developing a holistic and multidisciplinary approach to the task of combating violence against women.³⁹⁰ UNIFEM has worked on several fronts to end the cycle of violence against women.³⁹¹ Its strategies have included establishing legal frameworks to combat violence against women; supporting research and collection of data on gender violence; supporting violence prevention initiatives from the local to the international level, including in conflict and post-conflict situations; and supporting anti-violence initiatives of women's organisations.³⁹² Besides,

³⁸⁷ Sandis 2006 *Annals of the New York Academy of Science* 374.

³⁸⁸ Sandis, as above 374.

³⁸⁹ Sandis, as above note 387, 374.

³⁹⁰ Sandis, as above note 387, 374.

³⁹¹ Sandis, as above note 387, 374.

³⁹² Sandis, as above note 387, 374-375.

UNIFEM administers the Trust Fund to End Violence against Women, which offers grants to innovative projects to prevent violence, that are run by community, national, and regional organisations.³⁹³

UNIFEM defines women's economic empowerment as 'having access to and control over the means to make a living on a sustainable and long term basis, and receiving the material benefits of this access and control'.³⁹⁴ Such a definition goes beyond short-term goals of increasing women's access to income and looks for longer term sustainable benefits, not only in terms of changes to laws and policies that constrain women's participation in and benefits from development, but also in terms of power relationships at the household, community and market levels.³⁹⁵ UNIFEM has been an active participant in the annual commemoration of the International Day for the Elimination of Violence against Women since its inception, upon adoption of Resolution 54/134 by the UNGA in December 1999. Linked to the commemoration has been the annual international campaign of 16 Days of Activism against Gender Violence, which ends on the commemoration of International Human Rights Day, symbolically linking the two issues.³⁹⁶

4.4 UN Special Rapporteurs

Rapporteurs are drawn from practitioners and academics with considerable expertise in human rights.³⁹⁷ The institution of special rapporteurs for human rights known as the special procedures is one of the main mechanisms employed by the UN to protect and promote human rights worldwide.³⁹⁸ How do UN Special Rapporteurs protect and promote human rights worldwide? UN Special Rapporteurs provide an international spotlight in the world. Human rights violators plus emerging crises are brought to the knowledge of the international community, and voices of human rights victims are intensified on a worldwide scale. However, the Office of the High Commissioner for Human Rights (OHCHR) describes this as 'the most directly accessible mechanism of the international human rights machinery'.³⁹⁹

³⁹³ Sandis, as above note 387, 375.

³⁹⁴ Mosedale 2005 *Journal of International Development* 247.

³⁹⁵ Mosedale, as above 247.

³⁹⁶ Sandis, as above note 387, 375.

³⁹⁷ Smith, as above note 374, 65.

³⁹⁸ Subedi 2011 *Human Rights Quarterly* 201.

³⁹⁹ Subedi, as above 201.

Every year, the Special Rapporteurs of the Commission on Human Rights report to the General Assembly their concerns and activities in the course of carrying out their mandates.⁴⁰⁰ They also present their findings regularly to the Commission on Human Rights in Geneva, and to the Third Committee of the General Assembly at UN Headquarters in New York.⁴⁰¹ Their activities are also incorporated in the Secretary General's Reports to the General Assembly.⁴⁰² The Special Rapporteurs, especially in such areas as torture, extrajudicial executions, enforced disappearances, arbitrary detentions, and violence against women are particularly well placed to assess the facts on the ground and, if necessary, alert the Council to on-going gross violations of human rights, or suggest means of prevention once they note the first symptoms.⁴⁰³

Being independent, they can make public statements on the issues, request fact-finding on the ground, denounce violators, collect data, engage in dialogue with governments, or demand an emergency session of the Council.⁴⁰⁴ Their reports provide first-hand information, which is often utilised more by NGOs than by the UN system. Special Rapporteurs play an important role in preventing, addressing and responding to gross violations of human rights.⁴⁰⁵ They have long played an important role in promoting and protecting human rights in some of the most at-risk countries, such as those ruled by oppressive regimes, and in facing some of the most challenging human rights issues of our times.⁴⁰⁶

Thus, the appointment of Special Rapporteurs was an attempt by the UN 'to pierce the veil of the national sovereignty' of states to handle serious cases of human rights violations.⁴⁰⁷ In practice, Special Rapporteurs perform a supervisory, consultative, advisory or monitoring function rather than one of enforcement.⁴⁰⁸ The rapporteurs are a special UN mechanism of a quasi-judicial nature and hence, the name itself is special procedures, and they are described in common parlance as the UN human

⁴⁰⁰ Sandis, as above note 387, 379.

⁴⁰¹ Sandis, as above note 387, 379.

⁴⁰² Sandis, as above note 387, 379.

⁴⁰³ Gierycz 2010 *Global Responsibility to Protect* 264.

⁴⁰⁴ Gierycz, as above 264.

⁴⁰⁵ Gierycz, as above note 3403, 264.

⁴⁰⁶ Subedi, as above note 398, 201-202.

⁴⁰⁷ Subedi, as above note 398, 202.

⁴⁰⁸ Subedi, as above note 398, 203.

rights envoys in many countries around the globe.⁴⁰⁹ Indeed, it is an extraordinary mechanism based on the UN Charter and not on any particular human rights treaty.⁴¹⁰

Special Rapporteurs have been crucial in promoting and protecting human rights through not only monitoring and fact-finding, but also standard setting and they have significantly influenced the elaboration, interpretation, and implementation of international human rights law and have brought the human rights work of the UN to ordinary men and women around the globe.⁴¹¹ How do the UN Special Rapporteurs bring the human rights work of the UN to ordinary men and women around the globe? The UN Special Rapporteur undertakes official visits to honour an invitation from any country, to collect first-hand information on the situation on ground at the same time assess the initiatives taken by the government to improve the situation. The institution of Special Rapporteurs is indeed a vibrant, autonomous, and flexible mechanism whose work can produce speedy and tangible benefits for the victims of human rights violations and can attract attention to such violations in both the national and international media.⁴¹² However, the institution of Special Rapporteurs itself seems to have come under more pressure in the recent past and it survived the reform of the UN human rights system in 2006.⁴¹³ The new Universal Periodic Review system has given new visibility to the Special Rapporteurs and nevertheless, those states with poor human rights records seem to be gathering force within the Human Rights Council, as well as in the General Assembly.⁴¹⁴

The UN Special Rapporteurs actually played a significant role towards the promotion and protection of women's rights in Africa, for example, its concerted and relentless efforts towards monitoring the drafting, adoption and ratification of the African Women's Protocol and spearheading the drafting of guidelines for state parties reporting under the African Women's Protocol. Despite UN Special Rapporteurs efforts, state parties such as Nigeria never took any steps to harmonise domestic laws with the treaty's provisions, particularly regarding women's inheritance rights.

⁴⁰⁹ Subedi, as above note 398, 203.

⁴¹⁰ Subedi, as above note 398, 203.

⁴¹¹ Subedi, as above note 398, 204.

⁴¹² Subedi, as above note 398, 204.

⁴¹³ Subedi, as above note 398, 204.

⁴¹⁴ Subedi, as above note 398, 204.

However, South Africa harmonised domestic laws with the treaty's provisions resulting in no legislative gaps in the area of inheritance.

4.5 The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

Equality for women has been a fundamental tenet of the UN since its inception in 1945 and acting on this tenet, the UN adopted CEDAW in 1979; it entered into force in 1981.⁴¹⁵ The CEDAW, which has rightly been hailed as constituting a landmark in the history of women's rights, sought not only to critically address age-long gender biases but also to lay a universalistic framework for correcting past discriminatory distinctions and practices.⁴¹⁶

CEDAW protects a series of basic civil, political, economic and social rights for women.⁴¹⁷ It condemns discrimination against women and sets out an agenda that State parties should take to end such discrimination.⁴¹⁸ Therefore, the chief obligations are placed on individual States. Article 1 defines discrimination as:

Any distinction, exclusion or restriction made based on sex, which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.⁴¹⁹

The phrase 'effect or purpose' is perhaps, the most significant phrase in this definition as it conveys the treaty's exceptionally broad purview and this scope of state obligation is what makes CEDAW distinctive in relation to other human rights treaties and other declarations of support for women's rights. CEDAW obligates states to take positive action to eliminate *de facto* as well as *de jure* discrimination against women, intended and unintended, in the public and private spheres.⁴²⁰

A major feature of CEDAW is its 'recognition of discrimination outside the public sphere, in particular within families' and the obligation of the ratifying States to

⁴¹⁵ Vanegas and Pruitt 2012 *Baltimore Law Review* 271.

⁴¹⁶ Olowu, as above note 354, 81.

⁴¹⁷ Cole 2013 *International Studies Quarterly* 233.

⁴¹⁸ CEDAW, article 2.

⁴¹⁹ CEDAW, article 1.

⁴²⁰ Baldez 2012 http://paperroom.ipsa.org/app/webroot/papers/paper_16755.pdf.

ensure its elimination.⁴²¹ In particular, General Recommendation No. 12, issued by the CEDAW Committee in 1989, acknowledged states parties' obligation to protect women against violence of any kind occurring within the family or in any other area of social life.⁴²² It also recommended states parties include in their periodic reports any legislation in force to protect women from all kinds of violence and any other measures adopted to eradicate gender based violence as well as relevant statistical data.⁴²³ However, from the foregoing definition, it is clear that even though a law or policy may not intend to deny women the enjoyment of rights, but if it has the effect of doing so then it constitutes discrimination.⁴²⁴ Nonetheless, it may be argued that CEDAW is an improvement with respect to women's rights in that it focuses on discrimination against women specifically.⁴²⁵

However, reporting procedure is to examine state party compliance in terms of CEDAW and to indicate factors and difficulties affecting the degree of fulfilment of obligations under CEDAW. Nevertheless, in common with other UN human rights treaties, CEDAW's interstate complaints mechanism has never been used.⁴²⁶ The Optional Protocol is a supplement to CEDAW, designed to remedy some of the treaty's shortcomings.⁴²⁷ It is a separate treaty, which can only be ratified by states who are already parties to the CEDAW.⁴²⁸ As of today, 106 are states parties to the Optional Protocol to CEDAW.⁴²⁹ However, it offers two mechanisms to hold governments accountable for their obligations under CEDAW:

1. A communications procedure, which provides individuals and groups the right to lodge complaints with the Committee on the Elimination of Discrimination Against women.
2. An inquiry procedure, which enables the CEDAW Committee to conduct inquiries into serious and systematic abuses of women's rights. These procedures apply to those nations that have ratified the Optional Protocol.⁴³⁰

⁴²¹ Udoh *The Beijing Declaration, Women and Property Rights* 58.

⁴²² Duramy 2012 *Journal of Gender, Policy & the Law* 417-418.

⁴²³ Duramy, as above 418.

⁴²⁴ Mooki, Ozoemana and Hansungule as above note 369, 78.

⁴²⁵ Wallace *International Human Rights Text & Material* 19.

⁴²⁶ Hodson 2014 *European Journal of International Law* 563.

⁴²⁷ Rosenblum 2011 *Columbia Journal of Gender and Law* 100.

⁴²⁸ Anon Date Unknown <http://www.escr-net.org/sites/default/files/ESCR-NET-Manual-Booklet-3.pdf>.

⁴²⁹ UNTC 2015 https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8-b&chapter=4&lang=en.

⁴³⁰ Udoh, as above note 421, 60.

In relation to Individual Communications, the states parties to the Optional Protocol to the CEDAW accepted the competence of the CEDAW's Committee to consider requests of persons who claim to be victims of violations of their rights as laid down in the CEDAW.⁴³¹ On the one hand, the procedure provides that persons or groups of persons can introduce the requests and once the Committee registers a request, it will consider simultaneously the admissibility and merits.⁴³² A time limit will then be fixed for submitting observations before the matter can be subject to a decision of the Committee and it can give a recommendation to the State party.⁴³³ The latter is then asked to submit in written form, within six month following the receipt of the decision and possible recommendations of the Committee, detailed information on the measures it has taken as a response to these observations and recommendations.⁴³⁴

Article 5 of the Optional Protocol provides that the Committee can submit a demand to a state party to take protective measures necessary to avoid potential irreparable damage.⁴³⁵ The request will be judged inadmissible if it has already been subject to another procedure of investigation or international regulation. The Committee is also authorised to reject communications at the beginning of the procedure, which are obviously unfounded or unjustified. Moreover, all domestic possibilities of recourse must have been exhausted.⁴³⁶ However, as of January 2012, the Committee on CEDAW has decided upon 17 individual communications concerning alleged violations of the CEDAW, but so far, there have not yet been any individual complaints regarding African states.⁴³⁷

On the other hand, inquiry procedure is incorporated in articles 8, 9, and 10 of the Protocol. Article 8 defines circumstances for the Committee to initiate investigation and the requirement of state cooperation.⁴³⁸ If the Committee receives reliable information indicating grave or systematic violations by a state party of rights set forth in the CEDAW, the Committee shall invite that state party to cooperate in the

⁴³¹ UN Date Unknown http://www.claiminghumanrights.org/cedaw_individual_communications.html.

⁴³² UN, as above.

⁴³³ UN, as above note 431.

⁴³⁴ UN, as above note 431.

⁴³⁵ UN, as above note 431.

⁴³⁶ UN, as above note 431.

⁴³⁷ UN Date Unknown http://www.claiminghumanrights.org/cedaw_definition0.html.

⁴³⁸ Optional Protocol to CEDAW, article 8.

examination of the information and to this end to submit observations with regard to the information concerned.⁴³⁹ When the State submits what it observes in respect of the alleged violations the Committee shall examine them. At that point, the Committee may designate one or more of its members to conduct an inquiry and to report urgently to the Committee. Where warranted and with the consent of the state party, the inquiry may include a visit to its territory.⁴⁴⁰

After examining the findings of such an inquiry, the Committee shall transmit these findings to the state party concerned together with any comments and recommendations.⁴⁴¹ The state party concerned shall within six months of receiving the findings, comments and recommendations transmitted by the Committee, submit its observations to the Committee.⁴⁴² Besides, the Committee may invite the state party concerned to include in its report under article 18 of the CEDAW, details of any measures taken in response to an inquiry conducted under article 8 of the present Protocol.⁴⁴³ An opt-out clause allows that each state party may, at the time of signature or ratification of the present Protocol or accession thereto, declare that it does not recognise the competence of the Committee provided for in articles 8 and 9.⁴⁴⁴ Nevertheless, through the inquiry procedure the CEDAW Committee can investigate substantial abuses when individual communications and complaints have failed, address a broad range of issues in a particular country, and issue specific recommendations on the structural causes of violence.⁴⁴⁵ In short, the CEDAW and its Optional Protocol are seen to provide women with a bridge to the longed-for human rights centre, the alternative to which is for women to be consigned to a peripheral existence marked by exclusion and persistent inequality.⁴⁴⁶

It is remarkable that since its advent, CEDAW has continued to garner increasing formal recognition and support across the globe, including Africa.⁴⁴⁷ Why is CEDAW remarkable? CEDAW as a treaty has the objective of equality of men and women in terms of practice. As regards women's human rights, it is the most comprehensive

⁴³⁹ Optional Protocol to CEDAW, article 8 (1).

⁴⁴⁰ Optional Protocol to CEDAW, article 8 (2).

⁴⁴¹ Optional Protocol to CEDAW, article 8 (3).

⁴⁴² Optional Protocol to CEDAW, article 8 (4).

⁴⁴³ Optional Protocol to CEDAW, article 9 (1).

⁴⁴⁴ Optional Protocol to CEDAW, article 10 (1).

⁴⁴⁵ Duramy, as above note 422, 425.

⁴⁴⁶ Hodson, as above note 426, 565.

⁴⁴⁷ Olowu, as above note 354, 81.

treaty that establishes legally binding obligations to eradicate discrimination and make comprehensive provisions for guidelines in which all state parties should adopt to stop discriminatory policies.

As of today, CEDAW has 189 State Parties.⁴⁴⁸ Nigeria signed and ratified the CEDAW in 1985.⁴⁴⁹ The Republic of South Africa acceded to CEDAW by ratifying it without any reservation whatsoever in 1995.⁴⁵⁰ In fact, both countries ratified CEDAW without reservation, which indicates that Nigeria and South Africa do not have any intention to exclude or modify the legal impact of certain provisions of CEDAW in its application. The question is whether Nigeria and South Africa are complying with CEDAW's principles? On the one hand, in Nigeria, the state of women's human rights shows that Nigeria is not fulfilling the obligations provided in CEDAW. There is a legislative gap in the area of inheritance resulting to non-domestication of CEDAW's provisions and discrimination against women with regard to inheritance in most parts of Nigeria. Section 12(1) of the *Constitution of the Federal Republic of Nigeria* 1999 provides that:

No treaty between the Federation and any other country shall have the force of law to the extent to which any such treaty has been enacted into law by the National Assembly.

In view of the foregoing provision of the Constitution, it signifies that Nigeria is not complying with CEDAW. Nevertheless, if Nigeria can review section 12 of the Constitution to domesticate CEDAW in the national law, it will go a long way to improve the poor state of women's inheritance rights in Nigeria.

On the other hand, South Africa is carrying out her obligations towards the advancement of CEDAW's principles. The *Constitution of the Republic of South Africa* 1996 provides for international law in Chapter 14. Section 233 categorically provides for the application of international law; it states that:

When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law to any alternative interpretation that is inconsistent with international law.⁴⁵¹

⁴⁴⁸ UNTC 2015 https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en.

⁴⁴⁹ Ekhatior 2015 *Journal of International Women's Studies* 292.

⁴⁵⁰ Bamidele *Gender Equality and the United Nations* 65.

⁴⁵¹ As above note 156.

As the above-mentioned provision of the South African Constitution shows, that South Africa is complying with CEDAW. However, discrimination against women as regards inheritance still exists in the rural areas of South Africa. The position of South Africa with CEDAW is quite encouraging; however, educating the rural women about their inheritance rights must remain a high priority.

However, the widespread use of Reservations, Understandings and Declarations allows signatories of CEDAW to opt out of parts of CEDAW they do not support, as long as they are not incompatible with the object and purpose of CEDAW, as stipulated by article 28,⁴⁵² although the CEDAW committee urged states parties to withdraw their reservations in several of its General Recommendations, particularly General Recommendation No. 21 that pertains to marriage and family law.⁴⁵³

Nevertheless, the preamble to CEDAW states that discrimination against women violates the principle of equality of rights and respect for human dignity and CEDAW seeks to be an international bill of rights for women.⁴⁵⁴ Its preamble reinforces that discrimination against women and the promotion of equality between women and men are core principles in the UN Charter and constitute binding obligations under the Charter of the UN and other instruments.⁴⁵⁵ Certainly, the range of rights included in its ambit is reflective of this goal and it requires states to eliminate discrimination against women in the enjoyment of all civil and political, economic, social and cultural rights.⁴⁵⁶ CEDAW is an international standard-setting document that establishes the universally accepted principle of equality of rights between men and women and makes provisions for measures to ensure equality of rights for women throughout the world in all fields.⁴⁵⁷

To what extent is CEDAW universally accepted, when some state parties ratified without reservations, and yet not complying with its principles, some with reservations and some have not ratified? For example, Nigeria ratified without reservation, yet failed to domesticate CEDAW into her national law, which results in non-compliance with article 2 of CEDAW. Some states parties such as Egypt ratified

⁴⁵² Baldez, as above note 420.

⁴⁵³ Baldez, as above note 420.

⁴⁵⁴ Smith, as above note 374, 199.

⁴⁵⁵ CEDAW, article 1 and 2(a)

⁴⁵⁶ Smith, as above note 374, 199-200.

⁴⁵⁷ Alan-Ajonye and Awopetu, as above note 367, 352.

with reservations, which is an effort to avoid accountability of some principles stated in CEDAW. Some states, such as USA, Iran and Sudan have not ratified, which indicates not acceptance. From the above I suggest that CEDAW is not universally accepted. However, to be universally accepted, CEDAW's principles must be accepted and complied with in totality.

In addition, the CEDAW Committee suggests in its General Recommendations that the elimination of the stereotypes is one important goal and most significantly, in its General Recommendation No. 19 specifically, it seeks the elimination of traditional attitudes by which women are regarded as subordinate to men.⁴⁵⁸

For African women, CEDAW and its Protocol are essential documents for the recognition of rights whose daily violations cause much suffering and CEDAW provides a reference for a legal framework enabling various stakeholders and populations to work daily towards the respect of women's rights.⁴⁵⁹ Nevertheless, CEDAW has a statistically significant and positive impact on women's rights.⁴⁶⁰

4.5.1 Background of CEDAW

Several women's rights instruments adopted by the UN preceded CEDAW, including the Convention on the Political Rights of Women in 1952; the Convention on the Consent to Marriage in 1957; and the Declaration on the Elimination of Discrimination against Women in 1967, which provided the foundation for CEDAW.⁴⁶¹ These instruments demonstrated the growing awareness of the need for protection and promotion of women's human rights in the UN system, but remained fragmented and lacked force.⁴⁶² In 1972, the CSW began discussions on the possibility of creating a binding treaty that would give strength to the provisions of the Declaration.⁴⁶³

The CSW approached the Secretary-General, who then called upon the UN member states to share their views on this possibility. With the approval of the member states, the CSW and the working groups of the Third Committee of the General

⁴⁵⁸ Fenton 2011 *Human Rights Quarterly* 246.(Cedaw, article 5(a))

⁴⁵⁹ Oji 2010 *New England Journal of International and Comparative Law* 109.

⁴⁶⁰ Englehart 2014 *Journal of Human Rights* 22.

⁴⁶¹ Vogel 2012 http://www.tc.umn.edu/~bthomson/publications/CEDAW_Paper_final.pdf.

⁴⁶² Vogel, as above.

⁴⁶³ Vogel, as above note 461.

Assembly began drafting a single, comprehensive international document, which would call for the elimination of all forms of discrimination against women. Finally, in 1979, the UN General Assembly adopted CEDAW with 130 votes in favour and 10 abstentions.⁴⁶⁴

The most important international development in the promotion of gender and women's rights was the adoption of CEDAW, which came into effect faster than any previous human rights convention, and it is clear that the women's Declaration set the stage for the elaboration and adoption of CEDAW.⁴⁶⁵ This treaty marked the turning point in the history of international protection of women's human rights and it gives expression to the non-discrimination value in the international bill of rights instruments.⁴⁶⁶ Moreover, various international mechanisms have been established with the aim of eradicating policies, actions and norms that perpetuate discrimination against women and violate women's human rights.⁴⁶⁷

One such is the UN Committee on the Elimination of Discrimination Against Women, a body of 23 independent experts on women's issues from around the world, established in 1982, to monitor the implementation of CEDAW.⁴⁶⁸ The Committee watches over the progress for women made in those countries that are the State Parties to the CEDAW.⁴⁶⁹ However, by ratifying CEDAW, a country takes on a legal obligation to comply and it makes a public commitment to the standards articulated in CEDAW.⁴⁷⁰

4.5.2 CEDAW Committee jurisprudence

The CEDAW's Committee has adopted decisions on several individual communications of which some were declared admissible. There are presently no communications to the CEDAW Committee from African women.⁴⁷¹ However, communication as regards discrimination against women is *Cristina Munoz Vargas v*

⁴⁶⁴ Vogel, as above note 461.

⁴⁶⁵ Mooki, Ozoemana and Hansungule, as above note 369, 76.

⁴⁶⁶ Mooki, Ozoemana and Hansungule, as above note 369, 76-77.

⁴⁶⁷ Olatundun 2010 *International Journal of Psychology and Counselling* 34.

⁴⁶⁸ Olatundun, as above 34.

⁴⁶⁹ Olatundun, as above note 467, 34.

⁴⁷⁰ Baldez, as above note 420.

⁴⁷¹ Ibadin *A critical evaluation of CEDAW Committee jurisprudence* 2.

Spain,⁴⁷² where the author claimed that the State party discriminated against her based on sex by denying her right, as the first-born child, to succeed her late father to the title of Count of Bulnes. She alleged that male primacy in the order of succession to titles of nobility constitutes a violation of the Convention in general and specifically of its article 2 (f). She asserted that Spain has an obligation under the Convention to amend or revise the laws of 4 May 1948 and 11 October 1820, which establish male primacy in the order of succession to titles of nobility.⁴⁷³ The Committee declared the communication inadmissible noting that the facts that are the subject of the communication occurred prior to the entry into force of the Optional Protocol for the state party and were not of a continuous nature in accordance with article 4 paragraph 2(e) of the Optional Protocol to CEDAW. Some Committee members concurring, the majority decision of the Committee declared the communication inadmissible under article 4, paragraph 2 (b) of the Optional Protocol. In a dissenting opinion by Committee member Mary Shanthi Dairia argued that the communication is admissible under article 5 (a) of CEDAW and that the violation is of a continuing nature.⁴⁷⁴ The dissenting opinion is supportable because the objective of CEDAW is to eliminate discrimination against women in all forms. States parties, according to the Committee, are supposed to ensure that women are protected against direct or indirect discrimination committed by public authorities, the judiciary, organisation, enterprises or private individuals, and address the persistence of gender-based stereotypes that affects women by law, legal and societal structures and institutions. States parties are under an obligation to ensure that men and women are entitled to 'equal rank in the order of succession' in terms of inheritance.⁴⁷⁵

CEDAW is one of the international instruments with the aim to protect the rights of women in the world and it has international recognition. CEDAW has real, independent effects on women's rights, although these effects are not always sizeable and are not manifest across the board. Specifically, CEDAW has its largest effects on women's political rights, smaller effects on women's social rights, and

⁴⁷² Communication No 7/2005.

⁴⁷³ As above.

⁴⁷⁴ Ibidin, as above note 471, 48.

⁴⁷⁵ Ibidin, as above note 471, 48.

virtually no effects on women's economic rights.⁴⁷⁶ In terms of the CEDAW, the problem of reservations by states parties have greatly affected the effectiveness of CEDAW.⁴⁷⁷ However, General Recommendation No. 19 recognised that domestic violence is one of the most insidious forms of gender-based violence, and that it is prevalent in all societies.⁴⁷⁸ Even today, its enforcement mechanisms are no stronger than those found in other UN human rights treaties.⁴⁷⁹

4.5.3 The status of African State Parties to International Human Rights Treaties

Increased UN involvement in human rights matters has been mirrored by growing adoption of regional human rights instruments. The rapid growth of UN membership in the early 1960s included a significant number of African states.⁴⁸⁰

The individual communications, allow an individual to issue a complaint regarding a state party's violation of his/her rights under a specific treaty, provided that the state in question has accepted that treaty body's competence in this regard. Of the committees charged with this function, the individual communication procedure of the Human Rights Committee receives most participation from African states.⁴⁸¹

Special procedures conduct country visits with the consent of visited states. Such consent may be based on the standing invitations issued by states and, as of June 2012, of the 91 invitations extended, 9 are from African states.⁴⁸²

However, as of 2012, in the composition of the human rights treaty bodies, the least represented region is Africa, considering the rate of ratifications of human rights instruments by states in this region. From this point of view, African states are under-represented in every Committee. They are most under-represented in the Committee on the Rights of Persons with Disabilities, followed closely by the Human Rights

⁴⁷⁶ Englehart, as above note 460, 23.

⁴⁷⁷ Ibadin, as above note 471, 2.

⁴⁷⁸ Duramy, as above note 422, 418.

⁴⁷⁹ Englehart, as above note 460, 23.

⁴⁸⁰ Bilder 2010 <http://ssrn.com/abstract=1641167>.

⁴⁸¹ O'Flaherty and Tsai 2012 <http://thinkafricapress.com/international-law-africa/un-enforcement>.

⁴⁸² O'Flaherty and Tsai, as above.

Committee, the Committee on Economic, Social and Cultural Rights, and the Committee on the Elimination of Discrimination against Women.⁴⁸³

From the foregoing, it indicates that African states are actively involved in terms of the international human rights treaty. However, when it comes to issues of representation in the treaty committee, Africa is under-represented, which is not fair. African states ratify these treaties and play their part in any other activities as regards these treaties, yet Africa is under-represented. I suggest that Africa should be fairly represented in the composition of the human rights treaty committee.

4.5.4 The impact of the international human rights treaties

For almost 70 years, states have come together to draft international human rights treaties to improve human rights. The number of international human rights treaties has increased significantly over the years, as have the number of ratifications of these treaties by states. Known as the 'core international human rights instruments', these treaties cover; civil, economic, political, social cultural rights, as well as the rights of the child, women, disabled and migrant workers. There are also specialist treaties focused on torture, disappearances, disability and racial discrimination. In international law, treaty ratification renders the provisions of the relevant human rights instrument legally binding, hence playing a significant role in promoting the universality of human rights.⁴⁸⁴

The international community has put a lot of emphasis on urging all states to ratify all of these core international human rights treaties. Once states have ratified treaties, their provisions bind them and they become accountable to explain their compliance with its standards in front of experts and other states, with their compliance record open to scrutiny. Considering the obligations, scrutiny and on-going attention, ratification shows how a state treats those within its own jurisdiction. Treaty ratification can also lead to the creation of new civil society organisations. On the discursive level, existing organisations may employ ratified treaties to frame

⁴⁸³ Geneva Academy 2012 [http://www.geneva-academy.ch/docs/expert-meetings/ga_inbrief_web\(1\).pdf](http://www.geneva-academy.ch/docs/expert-meetings/ga_inbrief_web(1).pdf).

⁴⁸⁴ Ghana Date Unknown http://www.sbs.ox.ac.uk/sites/default/files/Skoll_Centre/Docs/essay-ghanea.pdf.

domestic issues in a different way and create a new space for dialogue, contestation and co-operation with state authorities.⁴⁸⁵

The key impact of all international human rights efforts is what is realised in the domestic jurisdiction. The international community can set up standards, can promote those norms, can offer continued expert advice and technical assistance, can encourage states to legally commit to human rights obligations, and can set up cycles of detailed review in all those human rights areas, as well as offering expert observations and legal-political pressure when these treaties are violated. However, all of these mechanisms, in the final analysis, are about supporting the advancement of full respect for human rights within the domestic jurisdiction.⁴⁸⁶

Since all states have legally bound themselves to international human rights standards through the process of ratifying a number of international human rights treaties. Tracing the domestic changes that occur after these obligations have been adopted offers interesting empirical and theoretical insights into why states ratify and how domestic changes come about. International human rights treaty ratification still offers opportunities to advance those rights domestically. This is because ratification of international human rights treaties sets in process a range of oversight and scrutiny mechanisms, and such interrogation itself creates state interest in demonstrating at least some domestic realisation and effect.⁴⁸⁷

From the above, it is obvious that the impact of core international human rights treaties is all about innovations in domestic human rights practices. The domestic effect of the treaties is very relevant in the sense that its norms form the basis of most of the constitutional human rights provision, legislative reform, and courts interpretative sources to elucidate legislative provisions in the domestic legal system and in most countries, academic publications refer to it.

4.6 Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (the African Women's Protocol)

The desire to formulate a viable treaty framework for women's rights that will meet the challenges of the socio-cultural peculiarities in Africa led to the emergence of the

⁴⁸⁵ Ghana, as above note 484.

⁴⁸⁶ Ghana, as above note 484.

⁴⁸⁷ Ghana, as above note 484.

original draft of the African Women's Protocol in the twilight years of the Organisation of African Unity (OAU).⁴⁸⁸ The genesis of the African Women's Protocol can be traced back to a joint NGO /African Commission initiative in 1995 and at the instigation of a regional women's NGO, Women in Law and Development in Africa (WILDAF), the African Commission on Human and People's Rights had organised a meeting to discuss the situation of women in Africa.⁴⁸⁹ At the meeting, it was noted that the wide spread ratification by African states of the International Bill of Rights and the Convention, all of which protected women from gender-based discrimination, had not greatly improved the lives of women on the continent. It was further noted that although African states had ratified the African Charter, which proscribed discrimination based on sex, and enjoined states, among other things, to ensure equality before the law and to eliminate every kind of discrimination against women, yet women's rights on the continent were not being enforced. The result of this non-enforcement was that women were continuing to experience violations of their rights.⁴⁹⁰

The civil society movement noted a lack of political will on the part of states to guarantee the rights of women within their jurisdictions and interestingly, the African Commission had not in its nine years of existence (1986–1995) dealt with any complaints alleging violations of women's rights.⁴⁹¹ To its credit, the African Commission agreed to the setting up of a working group to look into the matter of African women's legal disenfranchisement and to lead the working group, it appointed the Special Rapporteur on the Rights of African Women whose mandate provides in part:

(d) The Special Rapporteur will assist African governments in the development and implementation of their policies of promotion and protection of women's right in Africa.

(e) He or she will encourage and work with NGOs in the field of promotion and protection of women's rights.

(f) He or she will serve as a link between the Commission and inter-governmental and non-governmental organisations at regional and international levels in order to harmonise the initiatives on the rights of women.⁴⁹²

⁴⁸⁸ Olowu, as above note 354, 78.

⁴⁸⁹ Banda 2006 *Journal of African Law* 72.

⁴⁹⁰ Banda, as above 72.

⁴⁹¹ Banda, as above note 489, 73.

⁴⁹² Banda, as above note 489, 73.

The initiative found support within the defunct OAU, which mandated the African Commission to prepare a Protocol on the Rights of Women in Africa and the Special Rapporteur duly constituted a small working group, which produced the first draft.⁴⁹³ It had a definition of discrimination; highlighted the importance of eliminating *de jure* and *de facto* discrimination against women; and identified different kinds of violence against women, including trafficking, and traditional and cultural practices harmful to women.⁴⁹⁴ The draft also contained family law provisions including the provision that marriage should be entered into willingly, and guaranteeing women and men equal rights within marriage and at its dissolution. There were provisions protecting widows from degrading and inhuman treatment, and socio-economic rights including the right to food, housing, employment and education, all of which were to be enjoyed without discrimination based on sex.⁴⁹⁵ Provision was also made for women to participate in decision-making and interestingly it was noted that women had a right to live in peace with states being enjoined to:

Commit them to reduce military expenditure significantly in favour of spending on social development, while guaranteeing the effective participation of women in the distribution of these resources.⁴⁹⁶

This was the first of many drafts and as the drafting process went along, input came from NGOs throughout the continent, government legal experts and the Women's Unit of OAU.⁴⁹⁷ Although using the CEDAW as the template, the document that was eventually accepted by the African Union was arguably more radical than its progenitor.⁴⁹⁸

The African Women's Protocol is a legally binding multilateral supplement to the African Charter on Human and People's Rights (African Charter), adopted in July 2003 by the African Union Assembly of Heads of State and Government.⁴⁹⁹ Its adoption testifies to the greater visibility and mobilising strength of women's organisations in Africa and is the culmination of a dual drafting process; one initiated by the women's movement and one steered by the Inter-African Committee on

⁴⁹³ Banda, as above note 489, 73.

⁴⁹⁴ Banda, as above note 489, 73.

⁴⁹⁵ Banda, as above note 489, 73.

⁴⁹⁶ Banda, as above note 489, 73.

⁴⁹⁷ Banda, as above note 489, 73.

⁴⁹⁸ Banda, as above note 489, 73.

⁴⁹⁹ Viljoen 2009 *Washington & Lee Journal of Civil Rights & Social Justice* 11-12.

Harmful Traditional Practices Affecting Women's and Children's Health.⁵⁰⁰ It came into force on 25 November 2005.⁵⁰¹

According to its Preamble, the African Women's Protocol was adopted to address the concern that despite the ratification of the African Charter and other international human rights instruments by the majority of States Parties, women in Africa continue to be victims of discrimination and harmful practices. Therefore, the African Women's Protocol should not be viewed primarily as correcting normative deficiencies in international human rights law dealing with women's rights, but rather as a response to the lack of implementation of these norms.⁵⁰² It is a response to many of the substantive gaps of the CEDAW and the African Charter, seeking to correct the CEDAW's neglect of culture and the African Charter's prioritisation of culture to the neglect of gender equality.⁵⁰³ Neither the CEDAW nor the Charter offers a way to effectively address the intersectional reality of women's lives, a reality in which gender equality, custom and culture have an important role to play.⁵⁰⁴ It seeks to respond to the Beijing principles (UN) and plan of action on combating discrimination against women and strengthening women's rights.⁵⁰⁵

Its primary objects can be summarised as consolidating, as well as advancing women's rights at the African regional level and with a focus on equality and non-discrimination.⁵⁰⁶ As of today, African Women's Protocol has been ratified by 36 African countries.⁵⁰⁷ Nigeria ratified the African Women's Protocol on the 16 December 2004; South Africa also ratified on the 17 December 2004.⁵⁰⁸ The question is whether the ratification by Nigeria and South Africa has a positive impact on women's inheritance rights of both countries. The fact that no treaty between Nigeria and any other country can have the force of law until the National Assembly enacts such treaty into law is a very big issue in Nigeria. However, Nigeria has not taken any legislative steps towards domesticating the African Women's Protocol. Hence, the ratification by Nigeria has no good impact on women's inheritance rights.

⁵⁰⁰ Viljoen, as above note 499, 12.

⁵⁰¹ Ngwena 2010 *International Journal of Gynaecology and Obstetrics* 163.

⁵⁰² Viljoen, as above note 499, 16-17.

⁵⁰³ Bond 2010 *Southern California Law Review* 459.

⁵⁰⁴ Bond, as above 459.

⁵⁰⁵ Smith, as above note 374, 142.

⁵⁰⁶ Ngwena, as above note 501, 163.

⁵⁰⁷ ACHPR Date Unknown <http://www.achpr.org/instruments/women-protocol/ratification/>.

⁵⁰⁸ ACHPR, as above note 493.

Does it mean that Nigeria cannot domesticate the African Women's Protocol to actualise article 2(1) (a)? Article 2(1) (a) of the African Women's Protocol can be actualised, through the legislative review. It is obvious that domestication is a *sine qua non* for the enforcement of the treaty in Nigeria.

On the other hand, in South Africa, the status of a treaty is quite clear. The South African Constitution provides in section 39(1) (b) that, 'when interpreting the Bill of Rights, a court, tribunal or forum must consider international law'. In addition, section 233 also provides that 'when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law to any alternative interpretation that is inconsistent with international law'. The above provision of the constitution shows that the ratification of African Women's Protocol by South Africa has a positive impact on women's inheritance rights.

Like the CEDAW, its point of departure is that women have been, and continue to be, disadvantaged and marginalised by gender discriminatory laws, policies, and practices.⁵⁰⁹ As a supplement to the African Charter, the African Women's Protocol commits African states to protecting and promoting gender equality in the public as well as the private spheres.⁵¹⁰ It might thus aptly be regarded as a progressive step in enhancing the quality of the lives of African women specifically, and the region's human rights regime in general.⁵¹¹ The range of rights enshrined therein is remarkable and given the interrelationship of economic, social, civil, political and cultural rights that characterised the African Charter, it is perhaps not surprising that the African Women's Protocol is one of the most comprehensive instruments in the area.⁵¹²

Although not without shortcomings, the African Women's Protocol is a significant step forward in terms of meaningfully grappling with the potential conflict between culture and equality.⁵¹³ It contains a number of innovative provisions that move the culture/equality conversation forward in important ways.⁵¹⁴ It is part of the existing human rights machinery, and the rights enshrined in it considerably advance

⁵⁰⁹ Ngwena, as above note 501, 163.

⁵¹⁰ Ngwena, as above note 501, 163.

⁵¹¹ Olowu, as above note 354, 85.

⁵¹² Smith *Texts and Materials on International Human Rights* 562.

⁵¹³ Bond, as above note 503, 459.

⁵¹⁴ Bond, as above note 503, 459.

women's rights, addressing issues related to vulnerable groups such as the widowed.⁵¹⁵

4.6.1 Provisions of the African Women's Protocol

In line with both the CEDAW, 1979, and the African Charter, 1981, the African Women's Protocol, 2003, contains civil, political, socio-economic and cultural rights. Like the CEDAW, the preamble notes the failure of states to promote and protect women's rights, notwithstanding the existence of many human rights instruments enjoining them so to do.⁵¹⁶ Its definition of discrimination is closely modelled on that found in article 1 of the CEDAW and provides:

Discrimination against women' means any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life.⁵¹⁷

Some states parties resisted provisions of the draft seeking to ensure equal rights for men and women, arguing that men and women could not be considered as being the same (equal); they are different and therefore their roles and responsibilities required differential treatment.⁵¹⁸ These objections call to mind the tensions that arose during the drafting of the CEDAW and are manifest in the many reservations made to the CEDAW by contracting parties.⁵¹⁹ The state is enjoined in article 2 to combat discrimination by a variety of means, including amending constitutions to guarantee equality, mainstreaming and taking corrective and positive action in those areas where discrimination against women in law and in fact continues to exist.⁵²⁰

Article 2 also specifically requires state parties to challenge gender stereotypes and modify the social and cultural patterns of conduct of women and men with a view to achieving the elimination of harmful cultural and traditional practices.⁵²¹ Similarly, article 20 provides special protection for widows,⁵²² particularly article 20 (b) which provides that a widow shall automatically become the guardian and custodian of her

⁵¹⁵ Smith, as above note 374, 142.

⁵¹⁶ The African Women's Protocol, article 2.

⁵¹⁷ The African Women's Protocol, article 1 (f).

⁵¹⁸ Banda, as above note 489, 74.

⁵¹⁹ Banda, as above note 489, 74.

⁵²⁰ Banda, as above note 489, 74.

⁵²¹ Bond, as above note 503, 460.

⁵²² The African Women's Protocol, article 20.

children and property.⁵²³ Article 21 of the African Women's Protocol also sets out equitable inheritance rights for women, which is another area that customary law has traditionally controlled.⁵²⁴ Article 21 states clearly that a widow shall have the right to an equitable share in the inheritance of the property of her husband. A widow shall have the right to continue to live in the matrimonial house. In case of remarriage, she shall retain this right if the house belongs to her or she has inherited it. Women and men shall have the right to inherit, in equitable shares, their parents' properties.⁵²⁵

These provisions of the African Women's Protocol offer strong protection for women's equality rights.⁵²⁶ When there is a perceived conflict between customary law and practice and gender equality, the African Women's Protocol overwhelmingly resolves the conflict in favour of equality.⁵²⁷ Yet it does so within a framework that explicitly values the positive aspects of custom and culture, likely reducing the backlash that often results from external threats to community values and norms.⁵²⁸ In addition to recognising the positive value of culture, it also provides procedural protections that offer women a voice in the determination of cultural policies and practices.⁵²⁹

The African Women's Protocol is an important instrument, which has attempted to address the concerns of women both in the public and private realms. It provides concrete measures aimed at advancing the human rights of women on all fronts.⁵³⁰ It holds great promise to create lasting change for women in countries that have ratified it.⁵³¹ At the regional level, the adoption and coming into force of the African Women's Protocol is also a strong indicator of the normative acceptance of the idea that human rights are women's rights and the African Women's Protocol is a cause for celebration, but not complacency.⁵³²

From all indications, the African Women's Protocol is one of the most comprehensive instruments protecting and promoting the rights of women with regard to inheritance

⁵²³ The African Women's Protocol, article 20 (b).

⁵²⁴ The African Women's Protocol, article 21.

⁵²⁵ As above.

⁵²⁶ Bond, as above note 503, 462.

⁵²⁷ Bond, as above note 501, 462.

⁵²⁸ Bond, as above note 503, 462.

⁵²⁹ Bond, as above note 503, 462.

⁵³⁰ Mengesha 2006 *African Human Rights Law Journal* 224.

⁵³¹ Bond, as above note 503, 489.

⁵³² Banda, as above note 489, 84.

in Africa, the range of rights enshrined therein is remarkable. The fundamental question is, whether the African women are enjoying these rights provided for in this instrument. Women are not enjoying the rights because of the custom and traditional practices in the African countries. Discrimination against women with regard to inheritance continues to exist in most African countries, Nigeria and South Africa included.

4.7 Case law, which ensued from the legal frameworks at the international, regional and domestic levels

4.7.1 The case law at the international level

According to CEDAW Committee most recent statistics, the Committee has now adopted decisions on 31 individual communications, 16 of which it declared admissible.⁵³³ These numbers are remarkably low, especially as 106 states have now ratified the Optional Protocol to CEDAW. However, this study will focus on the case law in relation to inheritance and succession.

One such case is *Cristina Muñoz-Vargas v Spain*,⁵³⁴ which involved a claim of discrimination in relation to sex discriminatory rules relating to succession to titles of nobility. A majority of the Committee ruled the case inadmissible on procedural grounds, finding that the events in question had occurred prior to the entry into force of the Optional Protocol for Spain and that the claimed violation had not continued after that date. However, eight members of the Committee went further, ruling that the claim was incompatible with the provisions of the Optional Protocol on substantive grounds. They noted that it was undisputed in the case, that 'the title of nobility in question is of a purely symbolic and honorific nature devoid of any legal or material effect' and concluded that the CEDAW's guarantees of equality did not extend to succession to titles of nobility, apparently because such hereditary entitlements were seen as inappropriate subjects for a claim of sexual equality.⁵³⁵

The upshot of this view seems to be that CEDAW does not embody a freestanding right to equality but that it has to be linked to a specific human right or fundamental freedom, of which a right to inherit a title of nobility was not one. One member of the

⁵³³ Hodson, as above note 426, 567.

⁵³⁴ As above note 472.

⁵³⁵ Byrnes 2010 <http://ssrn.com/abstract=1595490>.

Committee directly contested this view, arguing that while a title of nobility might have no legal or material consequences, the rules governing succession to such titles reflected historical and cultural attitudes of inequality of the sort at which the CEDAW was directed and that if this right is not recognised in principle regardless of its material consequences, it serves to maintain an ideology and a norm entrenching the inferiority of women that could lead to the denial of other rights that are much more substantive and material.⁵³⁶

However, the foregoing case law encountered the problem of CEDAW's provisions interpretation. Article 1 of CEDAW, which condemns discrimination of any kind in all spheres was not given a holistic and critical view to effectively address structural gender inequalities. The communication is all about gender discrimination with regard to inheritance and succession, which was declared inadmissible by the Committee, thereby allowing the violation of the author's rights to continue. This has given room for the cultural norms governing inheritance and succession, which entrenched the inferiority of women in a society to stand.

The lesson from the above case law implies that women cannot inherit titles of nobility in Africa; title of nobility will be in accordance with the traditional norms.

4.7.2 Case law of the African Commission

The African Commission has yet to examine a single petition alleging a violation of women's rights.⁵³⁷ The Charter has, however, been invoked in conjunction with CEDAW in domestic women's rights litigation, such as *Ephraim v Pastory*.⁵³⁸ Although women's rights activists have relied on the Charter in a handful of cases, the treaty's lack of specificity on women's rights and its emphasis on African cultural values and traditions suggest that its usefulness is limited.⁵³⁹ The absence of cases pertaining to women's human rights before the African Commission have, for a long time, been a cause for concern and it had been speculated that the unclear and

⁵³⁶ Byrnes, as above note 535.

⁵³⁷ Bond, as above note 503, 451-452.

⁵³⁸ 1990 LRC 757.

⁵³⁹ Bond, as above note 503, 552.

potentially ambiguous provisions of the charter relating to women's rights were a deterrent.⁵⁴⁰

4.7.3 Case law at the domestic level

The 1990s were a period of explosive constitutional reform throughout Africa.⁵⁴¹ Although some were ineffective, many of the new constitutions included important human rights guarantees, new constitutions with strong rights protections led to test case litigation to enforce such guarantees and many of the plaintiffs in the gender equality cases arising under the new African constitutions bolstered their gender equality claims with references to international treaties such as CEDAW.⁵⁴² Domestic courts within Africa have, at times, cited CEDAW in important women's rights test cases and in several of the early, high-profile women's rights cases in Africa, female plaintiffs challenged discriminatory laws or policies.⁵⁴³

*Ephraim v Pastory*⁵⁴⁴ involved a challenge to a Tanzanian statute that incorporated customary law and the interpretation of the Constitution, which did not explicitly prohibit discrimination based upon sex. Plaintiff Holaria Pastory had inherited a plot of clan land from her father and, due to financial necessity, had sold this property. Her nephew subsequently applied to the primary court to have the sale declared null and void as illegal under *Haya* customary law, which prohibits women from selling clan land. The primary court granted the nephew's application and ordered Pastory to refund the profits that she had received from the sale. Pastory appealed to the district court arguing that the Laws of Inheritance of the Declaration of Customary Law of 1963, which include the limitation on women's property rights under *Haya* law, are unconstitutionally discriminatory and violate the Bill of Rights, which had been adopted into the Tanzanian Constitution in 1984. The district court agreed with Pastory, overturning the decision of the primary court and finding that Pastory had equal rights as clan men to sell the land that she had inherited. Pastory's nephew, Ephraim, appealed to a High Court of Tanzania at Mwanza.⁵⁴⁵

⁵⁴⁰ Bond, as above note 503, 451.

⁵⁴¹ Bond, as above note 503, 444.

⁵⁴² Bond, as above note 503, 444-445.

⁵⁴³ Bond, as above note 372, 247.

⁵⁴⁴ As above note 538.

⁵⁴⁵ Bond, as above note 373, 250-251.

In holding the Declaration of Customary Laws of 1963 unconstitutional, the High Court relied upon Tanzania's international obligations as persuasive evidence that the prohibition of discrimination based on sex should be implicitly read into the Constitution *via* the Bill of Rights. The Court found that the Constitution had explicitly incorporated article 7 of the Universal Declaration of Human Rights, which prohibits discrimination against women, and noted that Tanzania had ratified CEDAW and the African Charter on Human and People's Rights, both of which prohibit discrimination based on sex.⁵⁴⁶ The Court stated:

The principles enunciated in the above named documents, including CEDAW, the UDHR, and the African Charter are a standard below which any civilised nation will be ashamed to fall. It is clear from what I have discussed that the customary law under discussion flies in the face of our Bill of Rights as well as the international conventions to which we are signatories.⁵⁴⁷

The High Court thus held that, in accordance with the Tanzanian Bill of Rights and Tanzania's international obligations prohibiting discrimination based on sex, section 20 of the 1963 Rules of Inheritance barring women from selling clan land would be modified such that males and females would have equal rights to inherit and sell clan land.⁵⁴⁸

In the case of *Rono v Rono*,⁵⁴⁹ the Kenyan Court of Appeal relied on the Kenyan Constitution, the African Charter, and CEDAW to redistribute the deceased's property according to principles of gender equality.⁵⁵⁰ In *Rono*, three sons claimed that they should inherit a larger portion of their father's estate than their sisters should, since according to *Keiyo* traditions, girls have no right to inheritance of their father's estate. In rejecting the sons' claims to a greater share of property, the judge noted, 'I have gone at some length into international law provisions to underscore the view I take in this matter that the central issue relate to discrimination which this appeal raises, cannot be fully addressed by reference to domestic legislation alone'.⁵⁵¹

⁵⁴⁶ Bond, as above note 372, 251.

⁵⁴⁷ Bond, as above note 372, 251.

⁵⁴⁸ Bond, as above note 372, 252.

⁵⁴⁹ 2008 1 KLR 803.

⁵⁵⁰ Bond, as above note 372, 254.

⁵⁵¹ Bond, as above note 372, 254-255.

The court's decision in *Rono* was influential in the case of *In re Estate of Ntutu* in which the Kenyan High Court at Nairobi applied the Law of Succession Act rather than *Masai* customary law. The customary law would have denied distribution of the estate to the daughters of the deceased. Relying on gender-equality principles in constitutional and international law, the court recognised the statutory law as the applicable law. The Court further held that even if *Masai* customary law were applicable, the Court would consider it repugnant to justice and morality and would invalidate it on that basis.⁵⁵²

Both *Rono* and *Ntutu* were highly significant decisions for the development of women's rights within Kenya. These cases also reflect the role that international law can play in litigation involving sex discrimination under customary law. Both courts carefully considered international human rights law, including CEDAW, in their decisions to strike discriminatory customary law in matters of inheritance.⁵⁵³

From the foregoing domestic jurisprudence, there was a problem of traditional norms of inheritance, which place women in an inferior position in the society. Moreover, this particular norm tends to deprive women of their inheritance rights. However, this body of jurisprudence has advanced the place of women as regard inheritance in the society.

The lesson from the above case law implies equality for men and women. In addition, those women in Africa have the same inheritance rights as the men.

4.8 Conclusion

This chapter dealt with the legal framework for the protection of the rights of women from the international and regional perspective. It outlined the salient initiatives and interventions introduced through international and regional normative frameworks and institutional mechanisms that have been established to prohibit and monitor every form of discrimination against women. However, the international and regional systems established have the same purpose and objective towards promoting gender parity and have made wonderful exertions to place the matters of women on an agenda for the State parties, NGOs and civil society.

⁵⁵² Bond, as above note 372, 255.

⁵⁵³ Bond, as above note 372, 255.

Therefore, it is important that these stakeholders work together to make a change in the issues of women rights, internationally and regionally. From all indications, it is obvious that the effectiveness of these systems established depend on the state parties particularly because they are directly involved. Hence, there is a high expectation of diligent compliance with the reporting procedures. Nonetheless, the systems established have not been applied successfully to redress discrimination against women. In spite of the swift growth of the systems established, violation of human rights against women continues to occur in most countries particularly Africa and progress in achieving higher respect for these rights are slow and sporadic in Nigeria and South Africa.

However, the following chapter deals with the reflections on women's inheritance rights through legislation, treaties and policy interventions in Nigeria and South Africa.

Chapter Five

Reflections on Women's Inheritance Rights through Legislation, Treaties and Policy Interventions in Nigeria and South Africa

5.1 Introduction

The preceding chapter dealt with the legal framework for the protection of the rights of women at the international and regional perspective. This chapter deals with reflections on women's inheritance rights through legislation, treaties and policy interventions in Nigeria and South Africa. In numerous Sub-Saharan African countries, issues related to inheritance are explicitly meant to be governed by customary law.⁵⁵⁴ Usually, a country's constitution will exclude inheritance as well as marriage and other 'family law' matters, from any non-discrimination clauses which are meant to govern the equal status of citizens under the law.⁵⁵⁵ While the status of women has advanced generally throughout Africa, yet in the rural areas, gender inequality and other obstacles remain. This study explored one such obstacle to women's full emancipation, equality and dignity, namely, gender discrimination with regard to land property rights in the rural areas.⁵⁵⁶ These days, there is no doubt that while the law protects women's rights, it is often ignored where it matters most; at the grassroots level.⁵⁵⁷ However, Nigeria and South Africa have constitutions that explicitly prohibit discrimination in the application of laws, including customary law, based on sex and do not make exemptions to this stipulation.⁵⁵⁸ In addition, statutes also provide for non-discrimination as regard inheritance. However, women's rights to property and inheritance are safeguarded through various human rights instruments at international and regional level.⁵⁵⁹

5.2 Women's Inheritance Rights through Legislation

Legislation should prohibit discrimination against women and girls in inheritance and explicitly allow females to inherit property and land on an equal basis with males. Laws governing lines of succession should ensure equality of rank between mothers

⁵⁵⁴ Cooper, as above note 321, 11.

⁵⁵⁵ Cooper, as above note 321, 11.

⁵⁵⁶ Madu 2013 *Law, Democracy & Development* 254.

⁵⁵⁷ Madu, as above 254.

⁵⁵⁸ Cooper, as above note 321, 11.

⁵⁵⁹ Kimani and Maina 2010 *Journal of Ethnic and Cultural Diversity in Social Work* 256.

and fathers, among brothers and sisters, among daughters and sons, and between spouses, and it should state that civil laws should have supremacy over customary laws and practices that discriminate against women and girls.⁵⁶⁰

In Nigeria, women are subjected to various layers of family laws, such as customary law and statutory law, which are in simultaneous operation in the country and the issue of women's rights is much affected by the competing values of this multiple system of laws, which govern the family circle in Nigeria.⁵⁶¹ Rights accruing upon dissolution of marriage are governed by these different normative systems and the system of marriage laws in Nigeria has resulted in a plurality of legal provisions and precedents regarding property rights and inheritance.⁵⁶² Inheritance rights are governed by these systems of law with much complication upon the death of a husband and contrary to the increase in demand for the recognition of the rights of the women to a fixed portion of the husband's property, a wife under Nigerian customary law cannot inherit the husband's estate.⁵⁶³ In *Sogunro-Davies v Sogunro-Davies*,⁵⁶⁴ Beckley J was of the view that a wife was deprived of inheritance rights in her deceased husband's estate because in intestacy under the native law and custom, the devolution of property follows the blood. Therefore, a wife or widow, not being of the blood, has no claim to any cause.⁵⁶⁵ In Nigeria, women have suffered various forms of discrimination and oppression during property sharing, especially in terms of land for economic purposes and other physical assets.⁵⁶⁶

However, at the national level, the Nigerian Constitution makes provisions for the protection of women's rights.⁵⁶⁷ Under the Nigerian constitution, discrimination against any citizen of the country is prohibited, as stated in section 42(2) of the *Constitution of the Federal Republic of Nigeria 1999* (CFRN) which provides that 'No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his or her birth'.⁵⁶⁸

⁵⁶⁰ UN Date unknown <http://www.endvawnow.org/en/articles/767-inheritance-laws.html>.

⁵⁶¹ Ako-Nai (ed) *Gender and Power Relation* 63.

⁵⁶² Ako-Nai, as above 63.

⁵⁶³ Ako-Nai, as above note 561, 63-64.

⁵⁶⁴ 1929 2 NLR 79.

⁵⁶⁵ Alewo and Olong, as above note 33, 137.

⁵⁶⁶ Folarin 2014 *European Scientific Journal* 239.

⁵⁶⁷ Folarin, as above, 240.

⁵⁶⁸ *Constitution of the Federal Republic of Nigeria 1999*.

The provisions of section 42(2) of CFRN revolutionised the law with regard to the consequences of the right to inheritance and took cognisance of the discriminating practices that violate human rights and prohibit them.⁵⁶⁹ In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on the ground of sex or birth or other status.⁵⁷⁰

The above-mentioned section of the Constitution shows no restriction on women as regards inheritance. The constitution being the supreme law of Nigeria, there is no difference between men and women; equality exists and it therefore guarantees equal rights as regards inheritance in Nigeria. The position of the constitution is thus clear and unambiguous. Yet, in terms of enforcement, it is not firmly received, especially at the local or rural levels in Nigeria because of the existence of gender-biased customs that are gender insensitive. Women's inheritance rights have been under grave contention and it is essential to point out that the issue of discrimination of women is not a new matter in Nigeria.

Nonetheless, there are some factors militating against the elimination of discriminatory practices and rules of succession in Nigeria. This is the reason why the unambiguous provision of the draft of section 42(2) of CFRN was put in place.⁵⁷¹ Then how effective is the provision of section 42(2) of CFRN? Despite the provision of section 42(2) of CFRN, discrimination continue to exists as regard women's inheritance rights in Nigeria, even disregarding ratified international and regional human rights instruments by Nigeria.

In addition, the laws governing succession in Nigeria can be divided into two broad categories namely testate and intestate succession and this classification can be further divided into intestate succession (non-customary) and succession under customary law.⁵⁷²

There is no uniformity in inheritance laws in Nigeria and when a person subject to statutory law dies intestate, local enactments relating to the administration of estates

⁵⁶⁹ Itua, as above note 328, 41.

⁵⁷⁰ Itua, as above note 328, 41.

⁵⁷¹ Itua, as above note 328, 42.

⁵⁷² Itua, as above note 328, 34.

apply; where no local enactments exist, English law applies.⁵⁷³ The key laws governing testate inheritance include the *Marriage Act*, the *Administration of Estates Law* 1959, the *Succession Law Edict* 1987 (as amended by South East states), the English *Wills Act* 1837, and the *Wills Amendment Act* 1852 (generally applicable except in the South West). Others are the *Wills Law* 1959 (South West), the *Wills (Soldiers and Sailors) Act* 1918, and the *Wills Law* of old Bendel State Cap 133 Laws of Western Nigeria.⁵⁷⁴

A critical analysis of the provisions of the *Wills Law* shows that the legislation re-enacted the provisions of the *Wills Act* 1837 and the *Wills Amendment Act* 1852 together with the provisions of the *Wills (Soldiers and Sailors) Act* 1918.⁵⁷⁵

The foregoing laws are applicable to spouses of statutory marriage and place no deprivation, restriction or disability on women with regard to inheritance. Women are treated equal with other beneficiaries in relation to inheritance rights. In terms of enforcement, a testator ought to make a will in accordance to his wish; however, his Will is subject to the limitation imposing by customary law. For example, in *Uwaifo v Uwaifo*,⁵⁷⁶ it was held that the *Igiogbe* custom of the Benin, which gives the eldest son the right to inherit the family home, overrides a father's testamentary wishes. This indicates that the *Wills Act* is not received in totality in terms of enforcement in Nigeria, because where a testator makes a will and it conforms to *the Wills Act*, then the impact of customary law should be eliminated and jettisoned but here, the contrary is the case.

On the other hand, intestate succession involves the applications of three systems of laws. These are (a) the common law (b) the *Administration of Estate Laws* of the various States and (c) customary law.⁵⁷⁷ For the purpose of this chapter, emphasis will be on the *Administration of Estates Law* 1959. The *Administration of Estates Law* regulates the administration of the estate of a person who married under the Nigerian *Marriage Act*, but nevertheless dies intestate domiciled in Nigeria. States created out of the former Western Regions have re-acted the provisions of the *Administration of Estate Law* of Western Nigeria. For example, Lagos state has

⁵⁷³ Diala 2014 *African Human Rights Law Journal* 640.

⁵⁷⁴ Diala, as above, 639-640.

⁵⁷⁵ Itua, as above note 328, 35.

⁵⁷⁶ 2005 3 NWLR pt 913 479.

⁵⁷⁷ Itua, as above note 328, 35.

adopted the *Administration of Estates Law* of Western Nigeria. Prior to the adoption of the *Administration of Estates Law* of Western Nigeria,⁵⁷⁸ section 36 of the *Marriage Act*⁵⁷⁹ was applicable to Lagos. By that section, any person who is subject to customary law, and contracts a marriage under the Act, and such a person dies intestate, leaving a spouse or issue of such marriage, all his properties, both real and personal would be distributed in accordance with the English law relating to the distribution of the personal property of an intestate. Commenting on the implication of section 36 of the *Marriage Act* in *Obusez v Obusez*,⁵⁸⁰ Tobi JSC stated as follows 'By contracting the marriage under the *Marriage Act*, the deceased intended the succession to his estate under the English law and not customary law'. Therefore, real property was to be distributed in the same manner as personal property under the statute of distribution.⁵⁸¹

In the same vein, section 49(5) of the *Administration of Estates Law* of Western Nigeria contained similar provisions to that of section 36 of the *Marriage Act*. Section 49(5) of the *Administration of Estate Law* provides as follows:

Where any person who is subject to customary law contracts a marriage in accordance with the provisions of the *Marriage Ordinance*, and such a person dies intestate after the commencement of this law leaving a widow, or husband or any issue of such marriage, any property of which the said intestate might have disposed of by will shall be distributed in accordance with the provision of this law, any customary law to the contrary notwithstanding.⁵⁸²

It is imperative to state that the *Administration of Estates Law* applies to all persons not subject to customary law, irrespective of the type of marriage contracted by them and it is only in respect of a Nigerian (a person subject to customary law) that the condition of marriage under the Act is applicable.⁵⁸³

Under the *Administration of Estates Law*, women are not discriminated against as regard to inheritance. Women are given equal treatment on general inheritance rights.

⁵⁷⁸ Cap. 133 Laws of Western Nigeria 1959.

⁵⁷⁹ Cap. 115 Laws of the Federation 1958.

⁵⁸⁰ 2007 All FWLR Pt374 245.

⁵⁸¹ Itua, as above note 328, 36.

⁵⁸² As above note 566.

⁵⁸³ Itua, as above note 328, 36.

Unfortunately, many succession laws do not apply where customary law governs the distribution of an estate and this is most common in laws that restrict testators' rights to dispose of their property, which the courts have upheld in a long line of cases. In April 2013, the Nigerian Supreme Court revisited section 3(1) of the *Wills Law* of old Bendel State in the case of *Uwaifo v Uwaifo*.⁵⁸⁴ It held that the *Igiogbe* custom of the Benin, which gives the eldest son the right to inherit the family home, overrides a father's testamentary wishes.⁵⁸⁵

Notably, certain succession laws do not apply where customary law governs the distribution, inheritance and succession to an estate. Section 49(5) (b) of the *Administration of Estates Law* of 1959 states:

Any real property, the succession to which cannot by 'customary law' be effected by testamentary disposition, shall descend in accordance with customary law, anything herein to the contrary notwithstanding.

Section 3(1) of the *Wills Law* of old Bendel State provides:

'Subject to any customary law' relating thereto, it shall be lawful for every person to devise, bequeath or dispose of by his will executed in a manner hereinafter required, all real and all personal estate which he shall be entitled to, either in law or in equity, at the time of his death and which if not so devised, bequeathed and disposed of would devolve upon the heir at law.

The above law is similar to several state laws. For example, section 1 of the *Wills Law* of Bayelsa State 2006, states as follows:

It shall be lawful for everyone to bequeath or dispose by will executed in accordance with the provisions of this Law, all property to which he is entitled in law or in equity, at the time of his death: Provided that the provisions of this Law shall not apply (a) to any property which the testator had no power to dispose of by will or otherwise under 'customary law' to which he was subject.

The above laws, which have received approval from the Supreme Court, are inimical to the 'best interests' principle. Their inimicality lies in their limitation of the testamentary capacity of Nigerians subject to customary law, a limitation that enables the operation of the male primogeniture rule. It is worth noting that the majority of land in Nigeria is in rural areas and customary law regulates the lives of

⁵⁸⁴ 2013 LPELR-20389 SC.

⁵⁸⁵ Diala, as above note 573, 642.

most Nigerians. In addition, Nigerians are not enthusiastic about making wills because of cultural phobias of death. In fact, 'it is normal to die intestate'.⁵⁸⁶

From the foregoing provisions, the reality is that everyone is allowed to make a will. However, on a careful perusal, it is clear that there is a restriction on making a will, considering the words 'subject to any customary law relating thereto'. This implies that one cannot transfer away intestate and cannot transfer by will. It shows that women cannot inherit under a will, also cannot inherit under most customary law. It is high time to amend such laws to be gender sensitive.

On the other hand, South Africa's ascension to democracy in 1994 came with the cognisance of the critical need to enhance the political, social and economic rights of women and the deliberate efforts are heralded in the Constitution as the country's supreme law.⁵⁸⁷ The adoption of the Constitution, and the acknowledgment of the principle of equality as one of its founding values, paved the way for unprecedented change concerning women's rights.⁵⁸⁸ Probably the most significant achievement in relation to the right to equality is the recognition of the right as being substantive and requiring more than mere identical treatment and non-discrimination.⁵⁸⁹ This means that the right is to be enforced in its social context, including the recognition of past and existing social, political and economic disparities, and incorporates the value of human dignity.⁵⁹⁰ In addition, specific measures namely, legislation and gender machinery are the critical components that facilitate the promotion of gender equality in the South African society.⁵⁹¹

South Africa has a Constitution that explicitly prohibits discrimination in the application of law, including customary law, based on sex and does not make exemptions to this stipulation.⁵⁹² The constitution declares, that 'the Republic of South Africa is one, sovereign, democratic state founded on principles that feature non-sexism'.⁵⁹³ Section 9(3) of the Constitution provides that:

⁵⁸⁶ Diala, as above note 573, 643.

⁵⁸⁷ Kithatu-Kiwেকে 2011 *Working Paper* 6.

⁵⁸⁸ Pieterse-Spies 2013 *TSAR* 677.

⁵⁸⁹ Pieterse-Spies, as above 677.

⁵⁹⁰ Pieterse-Spies, as above note 588, 677.

⁵⁹¹ Kithatu-Kiwেকে, as above note 587, 6.

⁵⁹² Cooper, as above note 321, 11.

⁵⁹³ Tebbe 2008 *Journal of Religion* 466.

The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.⁵⁹⁴

Furthermore, the Constitution also incorporates the Bill of Rights in Chapter 2. Section 7(1) provides that the Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.⁵⁹⁵

The abovementioned provisions of the Constitution depict equality of men and women in all spheres of life. It portrays no restriction, deprivation or denial in relation to women's inheritance rights. The Constitution expressly guarantees non-discrimination based on gender, sex or marital status. In fact, South Africa has one of the most constitutionally embedded outlines for protecting the rights of the citizens in Africa. Without doubt, it is well received in terms of enforcement; however, there is discrimination against women in the rural areas of South Africa because of ignorance of the law. Therefore, I am saying that inheritance rights enlightenment is essential in the rural areas of South Africa, in order to attain full realisation of the Constitution. In addition, I suggest that the Parliament of Nigeria should embrace the Parliament of South Africa in terms of constitutional reforms that will enable parity clauses in all sphere of life in Nigeria.

However, the post-apartheid Parliament of South Africa enacted ground-breaking legislation and the bulk of these pieces of legislation took their cue from the provisions of the 1996 Constitution.⁵⁹⁶ The promulgated legislation has positively influenced the lives of women.⁵⁹⁷

With respect to substantive rights, the South African Constitution is one of the most inclusive in the world and it incorporates individual rights along with a wide array of social and cultural rights, and establishes a clear commitment to overcoming past injustices.⁵⁹⁸

⁵⁹⁴ S 9 (3) of the *Constitution of the Republic of South Africa* 1996.

⁵⁹⁵ S 7 (1) of the *Constitution of the Republic of South Africa* 1996.

⁵⁹⁶ Khunou 2011 *International Journal of Humanities and Social Science* 278.

⁵⁹⁷ Kithatu-Kiwেকে, as above note 587, 6.

⁵⁹⁸ Scribner and Lambert, as above note 264, 46.

In 2004, the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA),⁵⁹⁹ was passed to meet the constitutional requirement for national legislation prohibiting unfair discrimination, and to provide for a more accessible legal mechanism for claims of discrimination.⁶⁰⁰ It was arguably put into place to effect large-scale social transformation in South Africa. PEPUDA prohibits unfair discrimination in the public and private spheres and across all sectors of society, with the exception of those fields subject to the *Employment Equity Act* and it is enforced by equality courts, which are special courts within the magistrates' and high courts, and which are subject to their own informal procedures.⁶⁰¹ Although the definition of discrimination in PEPUDA is closely modelled on the Constitutional Court's equality jurisprudence, it goes further and prohibits discrimination not only on the listed grounds in the constitution but also on any other ground that causes or perpetuates systemic disadvantage.⁶⁰²

PEPUDA has a special focus on addressing past patterns of oppression, which is especially important for women and particularly for women who suffer from various intersecting forms of discrimination.⁶⁰³ Generally, the act has been heralded as a progressive piece of legislation with the potential to transform South African society. However, the question is whether PEPUDA has lived up to its expectations. Sadly, the answer is no as few cases have been heard and the operation of the equality courts is fraught with difficulties.⁶⁰⁴ Although all magistrates' courts have now been designated equality courts, matters heard by these courts have only marginally increased from 447 in 2008/09 to 508 in 2009/10 (an increase of 61 matters).⁶⁰⁵ Considering that the equality courts were specifically implemented to provide access to all South Africans to have matters relating to unfair discrimination, harassment and hate speech adjudicated, it is disconcerting that only 508 matters were heard countrywide during the relevant year.⁶⁰⁶ The small number of cases heard by these courts limits their ability to act as a meaningful catalyst for social change. It is also not clear from the latest statistics how many of these matters relate to gender

⁵⁹⁹ 4 of 2000.

⁶⁰⁰ Pieterse-Spies, as above note 588, 685.

⁶⁰¹ Pieterse-Spies, as above note 588, 685.

⁶⁰² Pieterse-Spies, as above note 588, 685.

⁶⁰³ Pieterse-Spies, as above note 588, 685.

⁶⁰⁴ Pieterse-Spies, as above note 588, 685.

⁶⁰⁵ Pieterse-Spies, as above note 588, 685-686.

⁶⁰⁶ Pieterse-Spies, as above note 588, 686.

equality, however, the 2007/08 statistics indicate that only two matters were related to gender equality, while unfair discrimination related to race made up the majority of claims.⁶⁰⁷ Some of the challenges faced by these courts include the fact that, despite the PEPUDA being drafted to facilitate unrepresented complainants, a lack of representation is an obstacle to complainants because respondents are often better resourced and represented; training provided to magistrates on the act is insufficient; and there is a general lack of awareness about the equality courts and their procedures.⁶⁰⁸

The possible impact that PEPUDA will have on gender discrimination is still largely untested, and so it is too early to make a finding on its transformative potential. The PEPUDA (and courts) can play a useful role in addressing systemic discrimination, and future matters might give a clearer indication as to the legislation's impact in relation to achieving actual change.⁶⁰⁹

From the foregoing, it is obvious that PEPUDA is a legislation that prohibits discrimination and promotes gender equality. However, the small number of cases before the appropriate courts shows failure by those who have been discriminated against to enforce PEPUDA because of the challenges, such as unawareness of the equality court and issue of representation. As a result, PEPUDA is not strongly received in terms of enforcement. Therefore, in order for the women to access their inheritance through PEPUDA, I suggest that awareness enlightenment and legal representative aid/assistance should be put in place.

In addition, the *Recognition of Customary Marriages Act* (The Act)⁶¹⁰ represents 'a belated but welcome and ambitious legislative effort to remedy the historical humiliation and exclusion meted out to spouses in marriages which were entered into in accordance with the law and culture of the indigenous African people of South Africa.'⁶¹¹ The Act gives expression to a number of constitutional objectives. It endeavours to recognise and value traditional African culture; it is concerned with regulating customary marriages within the context of a state bureaucratic system;

⁶⁰⁷ Pieterse-Spies, as above note 588, 686.

⁶⁰⁸ Pieterse-Spies, as above note 588, 686.

⁶⁰⁹ Pieterse-Spies, as above note 588, 686.

⁶¹⁰ 120 of 1998.

⁶¹¹ As above note 124.

and it attempts to address women's rights under customary law.⁶¹² Specifically, the Act brought an end to the uncertainties, doubtful nature of customary marriages and recognises monogamous and polygamous customary marriages concluded before and after the Act, subject to compliance with certain requirements.⁶¹³ The Act was passed with the aim, *inter alia*, of providing for the equal status and capacity of spouses, specifically women.⁶¹⁴ In promoting gender equality, the Act includes provisions that bring the customary law marriage in line with the constitutional provisions on equality and non-discrimination.⁶¹⁵ The Act granted full recognition of customary marriage for the first time but transformed the institution into a non-patriarchal and democratised form.⁶¹⁶ However, it provides with striking clarity and lack of ambiguity, a major departure from patriarchy and the principles of customary law that applied under apartheid.⁶¹⁷

Although the Act is commendable for providing legal certainty, its practical implementation seems to be out of step with the social realities of the women to whom it applies and the women to whom customary law applies are most often Africans living in rural areas.⁶¹⁸ African rural women are one of the most disadvantaged groups in South Africa, and it is therefore important to evaluate the effects of customary rules in the context of great female poverty.⁶¹⁹ In practice, registration certificates are required by the master's office in order for the office to be able to act as executor of a deceased's estate, if the deceased dies without a will.⁶²⁰ If the relevant spouse is not appointed as executor, a family member will be appointed (usually an uncle or brother), and often the customary law wife and children are not taken into consideration and most women are not aware of this process, and fail to register their marriages.⁶²¹ As a result, when their husband dies, they are left in the precarious position of not being able to access their inheritance.⁶²²

⁶¹² Pieterse-Spies, as above note 588, 683.

⁶¹³ Pieterse-Spies, as above note 588, 683.

⁶¹⁴ Mwambene 2013 *Acta Juridica* 292.

⁶¹⁵ Pieterse-Spies, as above note 588, 683.

⁶¹⁶ Jolly and Jeeves 2010 *Canadian Journal of African Studies* 533.

⁶¹⁷ Jolly and Jeeves, as above 534.

⁶¹⁸ Pieterse-Spies, as above note 588, 684.

⁶¹⁹ Pieterse-Spies, as above note 588, 684.

⁶²⁰ Pieterse-Spies, as above note 588, 684.

⁶²¹ Pieterse-Spies, as above note 588, 684.

⁶²² Pieterse-Spies, as above note 588, 684.



In addition, the Act's regulation of the proprietary consequences of customary marriages could be described as being practically untenable.⁶²³

The above legislation portrays non-discrimination for providing equal status of spouses in a customary marriage. There is no problem with the content; indeed it is the interpretation and implementation. The obstacles to implementation are complex, however, the main issues are the unawareness and understanding of how to access and enforce this legislation, hence acceptance in terms of enforcement is failing.

5.3 Women's Inheritance Rights through Human Rights Treaties

Many women, particularly in sub-Saharan Africa but also in other parts of the world, suffer immensely from property grabbing and the practice of disinheritance.⁶²⁴ In addition, many legal systems around the world fail to protect property rights equally for men and women, leaving women dependent upon their husbands or male relatives to provide housing and land on which to subsist.⁶²⁵

Therefore, the problem is a lack of women's equal rights to marital property, which must be addressed in order to secure women's right to equality. Women must be able to inherit on an equal basis with men. Even more fundamentally, women must be able to own and exercise control over resources on an equal basis with men. Hence, it is important for women to be able to claim ownership of property during marriage, as well as upon the death of a spouse (husband).⁶²⁶

However, the human rights of women and of the girl child are an inalienable, integral and indivisible part of universal human rights.⁶²⁷ The full and equal participation of women in political, civil, economic, social and cultural life at the national, regional and international levels and the eradication of all forms of discrimination on grounds of sex are priority objectives of the international community.⁶²⁸ Non-discrimination and equality are core elements of the international human rights normative

⁶²³ Pieterse-Spies, as above note 588, 684.

⁶²⁴ Gomez and Scholz Date Unknown <http://www.opensocietyfoundations.org/sites/default/files/tools-for-change-20120416.pdf>.

⁶²⁵ Mohan 2011 *Yale Journal of International Law* 461.

⁶²⁶ Gomez and Scholz as above note 624.

⁶²⁷ UN Women 2014

http://www.unwomen.org/~media/headquarters/attachments/sections/csw/pfa_e_final_web.pdf.

⁶²⁸ UNICEF 2005 <https://www.wcwonline.org/pdf/asia2007conf/Women's%20and%20Children's%20Rights%20in%20a%20Human%20Rights%20Based%20Approach.pdf>.

framework.⁶²⁹ These rights have direct implications for women's access to housing, land, and property.⁶³⁰ Part of the right to equality entails a right to equality especially within the institution of marriage. Human rights protect men and women as equals, both within and outside of marriage. Women have the same rights as men to marry, to found a family, to share in property and to make decisions about marriage.⁶³¹

Nonetheless, the Universal Declaration of Human Rights (UDHR) and the two Covenants (International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights) have inspired more than 80 subsequent international human rights instruments, which together constitute a comprehensive system of legally binding treaties for the promotion and protection of human rights.⁶³²

One of these is CEDAW, which has been described as the international bill of rights for women.⁶³³ Unlike other human rights instruments, which govern the interactions between a state and its citizens, it also requires an accepting state to eliminate discrimination against women by any person or organisation.⁶³⁴ It addresses the various aspects of discrimination faced by women and provides measures aimed at ensuring the *de facto* and *de jure* equality of women and men and the overall protection of women against discrimination.⁶³⁵

Significantly, CEDAW addresses the part of discriminatory customary law and requires that:

States parties shall take all appropriate measures to modify the social and cultural patterns of the conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.⁶³⁶

The reach of CEDAW into what has traditionally been regarded as the private realm has both been criticised for impeding on cultural rights within the home and recognised as an improvement for reaching the sphere where most women's rights

⁶²⁹ Sepulveda 2012 <http://ssrn.com/abstract=2114384>.

⁶³⁰ Gomez and Scholze as above note 624.

⁶³¹ Gomez and Scholze, as above note 624.

⁶³² Gomez and Scholze, as above note 624.

⁶³³ Gomez and Scholze, as above note 624.

⁶³⁴ Mohan, as above note 625, 471.

⁶³⁵ Gomez and Scholze, as above note 624.

⁶³⁶ CEDAW, article 5 (a).

violations take place.⁶³⁷ *Ephraim v Pastory*⁶³⁸ involved a woman who was given only usufruct rights to land she inherited from her father and was prevented from selling it by a codification of customary law. Because the Tanzanian Constitution did not make specific, explicit guarantees for women, the High Court relied on Tanzania's ratification of CEDAW and the International Covenant on Civil and Political Rights (ICCPR) to strike down the discriminatory customary law that constrained the plaintiff's full use of her land. Another Tanzanian example demonstrates that a married woman, in order to protect her property interests when a country's law favours her husband can use CEDAW. In *Mohamed v Makamo*,⁶³⁹ the High Court of Tanzania reversed the results of a divorce that awarded only five per cent of the marital property to the female spouse. Citing the constitution's incorporation of the principles of CEDAW and the UDHR, the High Court determined that the lower court's decision was discriminatory and a reflection of stereotyped concepts of a man and woman.⁶⁴⁰

This notion of equality as a fundamental value is embodied in CEDAW, which notes in its preamble that discrimination against women violates the principles of equality of rights and respect for human dignity.⁶⁴¹ It obliges States Parties to embody the principle of equality of women and men in their national constitution and take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices, which constitute discrimination against women.⁶⁴²

CEDAW is a fundamental tool in the advancement of women's rights to housing, land and property. In the context of marriage and family relations, the CEDAW entails States Parties to maintain equal rights and responsibilities for women and men during marriage and at its dissolution.⁶⁴³ Additionally, to ensure 'the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a

⁶³⁷ Mohan, as above note 625, 471-472.

⁶³⁸ As above note 538.

⁶³⁹ 2001 High Court of Tanzania.

⁶⁴⁰ Mohan, as above note 625, 472.

⁶⁴¹ Mohan, as above note 625, 467.

⁶⁴² CEDAW, article 2 (a) and (f).

⁶⁴³ Gomez and Scholze as above note 624.

valuable consideration'.⁶⁴⁴ Does it mean that unmarried women are not in the group of women with rights? It is unfair that the issue of single woman's rights to own property is not addressed in article 16 of CEDAW. It is my suggestion that unmarried women should have the same rights to own property as well.

In addition to the main text of treaties setting out general rights, it is important to look at how these general rights have been interpreted and applied to specific situations. These authoritative interpretations come from a variety of sources, including treaty-monitoring bodies, special procedures, outcomes of international conferences, and case law at the national and international levels. Reports and recommendations published by international human rights bodies provide the basis for the interpretation of and guidance on the application of international human rights norms such as non-discrimination, substantive equality and State obligations.⁶⁴⁵

A number of authoritative interpretations speak to equal inheritance and marital property rights. These include those by international treaty monitoring bodies. For example, the Committee on CEDAW has adopted General Recommendation No 21 on Equality in Marriage and Family Relations, which explicitly calls for women's equal rights to inheritance and equal ownership in property acquired during marriage.⁶⁴⁶

UN resolutions, whether from the General Assembly or the Human Rights Council, are also an important source of international human rights law, though they are not binding on States. Like Declarations, resolutions do not carry the weight of treaties, as they are not formally ratified. Rather, they are voted on and adopted by UN bodies such as the Human Rights Council and the Commission on the Status of Women. Resolutions are persuasive statements by bodies charged with monitoring human rights compliance and can provide important interpretive tools when used in conjunction with binding provisions.⁶⁴⁷

A number of resolutions have been passed on women's rights to housing for example the CSW adopted Resolution 42/1, urging States to design and revise laws

⁶⁴⁴ CEDAW, article 16 (h).

⁶⁴⁵ Gomez and Scholze, as above note 624.

⁶⁴⁶ Gomez and Scholze, as above note 624.

⁶⁴⁷ Gomez and Scholze, as above note 624.

to ensure that women are accorded full and equal rights to own land and other property, including through the rights to inheritance.⁶⁴⁸

From the analysis above, it is clear that international human rights treaties are crucial as regards women's inheritance rights, especially CEDAW. The position of CEDAW is quite encouraging and worth celebrating by women in the world, save that, the issue of unmarried women to own property are not expressly addressed in the body article 16 of CEDAW. It further obliges States Parties to ensure that there is no direct or indirect discrimination against women in their legal framework, that women are protected against discrimination and to advance the *de facto* situation of women through effective and concrete programmes and policies. How CEDAW is received in terms of enforcement, depend mostly on the acceptance position of the States Parties. In the case of Nigeria, CEDAW was signed and ratified, yet not domesticated into national law, therefore CEDAW has not really been received in terms of enforcement in Nigeria. However, courts do refer to it in their ruling on matters relating to women's inheritance rights. On the other hand, South Africa acceded, ratified and domesticated CEDAW. South African courts apply CEDAW in cases relating to women's inheritance rights. Enforcement of CEDAW in South Africa is encouraging and worth emulating by other States such as Nigeria.

On the other hand, in Africa, a considerable hurdle to the realisation of women's human rights is the pervasive denial of a woman's right to inherit land and other property.⁶⁴⁹ In most traditional societies in sub-Saharan Africa, land use, housing, and the transfer of land and housing between generations is regulated by customary law, which largely excludes women from property ownership and inheritance, and without secure land and property rights, widows are often left homeless and destitute after the death of their husband. Schemes of inheritance and property allocation at death are deeply embedded in notions of culture and tradition in most sub-Saharan African societies.⁶⁵⁰

Nevertheless, the universality of human rights is indisputable. Simultaneously, however, cultural specificity is also recognised and taken into account. While the UN has adopted many instruments setting out human rights norms to be applied by all

⁶⁴⁸ Gomez and Scholze, as above note 624.

⁶⁴⁹ Richardson 2004 *Human Rights Brief* 1.

⁶⁵⁰ Richardson, as above 1.

UN member states, regional bodies have adopted human rights agreements relative to their cultural context,⁶⁵¹ such as the African Charter on Human and Peoples' Rights (African Charter), ratified by all 53 Member States of AU, which is the parent treaty of the African Women's Protocol in Africa.⁶⁵² The African Charter as an African human rights instrument is necessary in cementing Africa's self-determination and independence from imperialism.⁶⁵³ It covers various human rights issues, from general fundamental rights, to those of specific groups, such as women.⁶⁵⁴ Article 2 of the Charter reinforces that the rights in the Charter (including the rights to dignity, security, and education, to name but a few of them that may resonate in women's lives), are to be enjoyed without any discrimination on the basis of sex, among other grounds. In article 18(3), the Charter specifically mentions the duty of States Parties to ensure the elimination of all discrimination against women.⁶⁵⁵ Articles 60 and 61 of the African Charter recognise regional and international human rights instruments and African practices consistent with international norms on human and peoples' rights as being important reference points for the application and interpretation of the African Charter. All rights in the African Charter apply to women and some are of particular relevance, including those on equality and non-discrimination and those dealing with personal liberty, integrity, and dignity.⁶⁵⁶ However, with the passage of time and the range of newly emerging issues, it was observed that the African Charter does not adequately address issue of human rights concerns pertaining to women.⁶⁵⁷

However, non-governmental organisations (NGOs) in Africa advocated for the adoption of the African Women's Protocol to strengthen the African Charter's provisions on gender equality.⁶⁵⁸ The justification for the adoption of this African Women's Protocol was based largely upon concerns regarding the limited enforcement of women's human rights in the African legal framework and it emerged as a need to complement the African Charter, which lacked elaborate provisions for

⁶⁵¹ Forere 2009 *African Human Rights Law Journal* 435.

⁶⁵² Equality Now 2011 http://www.equalitynow.org/sites/default/files/Manual%20on%20Protocol%20on%20Women%20Rights%20in%20Africa_EN.pdf.

⁶⁵³ Bawa 2012 *Canadian Journal of Development Studies* 95.

⁶⁵⁴ Equality Now, as above note 652.

⁶⁵⁵ Viljoen, as above note 499, 18.

⁶⁵⁶ Equality Now, as above note 652.

⁶⁵⁷ Teriba 2007 http://www.nda.agric.za/docs/WCRW/AU_Teriba.pdf.

⁶⁵⁸ Equality Now, as above note 652.

the substantive protection of women's rights.⁶⁵⁹ Such shortcomings of the African Charter included the failure to explicitly define discrimination against women; lack of guarantees of the rights to consent to, and equality in marriage; and emphasis on traditional values and practices that in many cases impede the advancement of women's rights in Africa.⁶⁶⁰ While the African Charter provides an important human rights framework, including reinforcing the rights to life, liberty, security and freedom from discrimination, it is silent on women's rights in general.⁶⁶¹

The African Women's Protocol advances rights of women beyond existing international instruments and the principles enshrined in it are in some instances based on existing international human rights standards, but in many others significantly advance international human rights standards and specifically enhance the protection and promotion of women's rights in Africa. In particular, the African Women's Protocol makes explicit the protection of women's rights in areas, which are not expressly covered by existing treaties by 'providing specific legal protection against violence against women, both in the public and private sphere and specifically articulating widows' rights to equality'.⁶⁶²

In the same way, the African Women's Protocol signifies the need for a voice and self-determination of marginalised groups in global rights discourses. In addition to global women's human rights instruments such as the CEDAW and specific national laws such as constitutions that contain provisions for women's rights, women's rights groups in Africa found it necessary to rally behind an instrument tailored specifically to the needs of women.⁶⁶³ For example, a potential powerful provision contain in the African Women's Protocol, the issue of inheritance, is dealt with under article 21(2) of the African Women's Protocol. Most notably, it provides that women and men have the right to inherit, in equitable shares, their parents' properties.⁶⁶⁴ Article 21 expressly provides that:

1. A widow shall have the right to an equitable share in the inheritance of the property of her husband. A widow shall have the right to continue to live in the

⁶⁵⁹ Geldenhuys and Kaufulu-Kumwenda 2014 *African Human Rights Law Journal* 682.

⁶⁶⁰ Equality Now, as above note 652.

⁶⁶¹ Geldenhuys and Kaufulu-Kumwenda, as above note 659, 682-683.

⁶⁶² Equality Now, as above note 652.

⁶⁶³ Bawa, as above note 653, 95.

⁶⁶⁴ Forere, as above note 651, 442.

matrimonial house. In case of remarriage, she shall retain this right if the house belongs to her or she has inherited it.

2. Women and men shall have the right to inherit, in equitable shares, their parents' properties.⁶⁶⁵

Nevertheless, African Women's Protocol further entails States parties to take definite steps to condemn all forms of discrimination against women. In this regard, article 2, provides that:

1. States Parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures;

a) include in their national constitutions and other legislative instruments, if not already done, the principle of equality between women and men and ensure its effective application;

b) enact and effectively implement appropriate legislative or regulatory measures, including those prohibiting and curbing all forms of discrimination particularly those harmful practices, which endanger the health and general well-being of women;

c) integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life;

d) take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist;

e) support the local, national, regional and continental initiatives directed at eradicating all forms of discrimination against women.

2. States Parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.⁶⁶⁶

Flowing from the above analysis, there are indications that the African Women's Protocol is non-discriminatory instrument as regard to women's inheritance rights. It is a legal tool, which women can use in accessing their inheritance rights. It expresses the concerns of women in Africa with greater clarity and precision and less ambiguity. However, the potential impact depends on the awareness of the African Women's Protocol and its use in legal reform, litigation and advocacy. Its effect is also contingent on the political will of State Parties to implement its contents within their jurisdictions.

In relation to Nigeria, the African Women's Protocol was ratified but has not been domesticated into the national law. Hence, the effect of the treaty is limited in practical terms. Thus, the African Women's Protocol warrants full incorporation as a

⁶⁶⁵ African Women Protocol, article 21 (1) and (2).

⁶⁶⁶ African Women Protocol, article 2 (1) and (2).

national legislation for all women to have enforceable rights to inheritance in Nigeria as envisaged by the treaty.

On the other hand, South Africa ratified and domesticated the African Women's Protocol. The position of South Africa is quite encouraging and I suggest that Nigeria should embrace such.

5.4 Women's Inheritance Rights through Policy Intervention

In spite of the existence of constitutional provisions and commitments to regional and international human right treaties, the rights of women are grossly violated and devalued in most African countries.⁶⁶⁷ Issues of property and inheritance rights pose a major threat to the dignity and survival of women irrespective of their marital status. Women's rights to property depend upon the system of law under which they are married; women married under customary law do not own property and their husbands and sons own the family property, which descends through male lineage.⁶⁶⁸ Marriage under statutory law does not guarantee women an advantage; in most cases, the laws are interpreted and biased by the prevailing cultural practices and customary law. The result is that even where women have sought court interventions, they most often lose. The pursuance of property and inheritance rights, especially rights sought after the death of the male spouse or termination of marriage, have continued to confuse numerous women.⁶⁶⁹

Gender equality is a core development objective in its own right (a core human right) as is evidenced by the adoption and ratification of CEDAW.⁶⁷⁰ Women, in particular, have been identified as particularly vulnerable across numerous different societies because of localised systems that do not recognise women's inheritance or property rights.⁶⁷¹ Most African countries remain persistent towards violation of human rights in the areas of marriage and inheritance, because of the coexistence of statutory and traditional systems.⁶⁷² However, the popular perceptions of widowhood in Africa especially sub-Saharan Africa are of discrimination, deprivation and suffering

⁶⁶⁷ Kura 2013 *International Journal of Scientific and Engineering Research* 8.

⁶⁶⁸ Kimani and Maina, as above note 559, 260.

⁶⁶⁹ Kimani and Maina, as above note 559, 260.

⁶⁷⁰ Dekker 2013 *ASC Working Paper* 1.

⁶⁷¹ Cooper and Bird 2012 *Development Policy Review* 528.

⁶⁷² Kura, as above note 667, 8.

endured by women who are often stripped of property and assets following the death of the male spouse.⁶⁷³ In securing women's property and inheritance, rights can reduce their vulnerability to crises. National and international policies are essential for a legal environment that enables women to realise these rights, also essential is the social and cultural environment; the norms and practices, which often influence people's decisions related to women's property and inheritance rights.⁶⁷⁴

Situated within the interface between international human rights provisions and national systems of law, property rights are determined by a complex web of law, custom, attitudes, and perceptions that varies between African nations, and occasionally within national borders as well. The interplay of such factors will determine how women's property and inheritance rights as stipulated by law (their *de jure* rights) are actually realised and experienced in the course of daily life and community practice (their *de facto* rights). Sometimes the gap between the two is obvious, as when a statutory law defining inheritance procedures is ignored or overridden by customary law. In other cases, the gap may be more subtle, as when a lack of knowledge about rights leads to misperceptions of what is possible or of how to employ the legal system in defence of those rights. The nature of the gap will help define the interventions and advocacy initiatives required to ensure fulfilment of women's *de jure* property and inheritance rights.⁶⁷⁵

Statutory law governing land, property, and inheritance often does not apply to customary land, a major caveat for various women who rely on access to and use of such land for their livelihoods. It is at such junctures that *de jure* rights come up against *de facto* rights, where women lack the policy traction on property matters that they might otherwise enjoy if statutory law prevailed and their *de jure* rights were upheld. This disjuncture poses critical questions for those seeking to administer justice in the case of property and inheritance concerns.⁶⁷⁶ Yet, despite widespread acknowledgment of inheritance as important to women's social and economic power the knowledge base concerning how inheritance and disinheritance affect women's

⁶⁷³ Peterman 2012 *Development Policy Review* 543.

⁶⁷⁴ ICRW 2007 <http://www.icrw.org/files/publications/Womens-Property-Rights-as-an-AIDS-Response-Lessons-from-Community-Interventions-in-Africa.pdf>.

⁶⁷⁵ Strickland 2004 *Working Paper* 25.

⁶⁷⁶ Strickland, as above 27-28.

livelihoods remains thin, scattered, and ultimately inconclusive.⁶⁷⁷ In addition, the gains made through international human rights instruments and national legislation to address challenges to women's property and inheritance rights, several interrelated social, cultural, and legal factors continue to impede the full realisation of such measures.⁶⁷⁸ Even if national legislation will fully recognise women's equal rights to own, co-own, access, control and inherit land, housing and other property, existing practices will not automatically be changed; wider changes in social and cultural attitudes are necessary for this legislation to reach all women. Only then would women be able to enjoy substantive equal and independent rights, which entails the enjoyment of access to rights in and control over land and housing. Obstacles to equal substantive rights like continued application of customs, difficulties in paying court fees, violence against women and lack of sufficient economic resources still exist.⁶⁷⁹

However, before any action is taken to amend discriminatory laws or design a land-related intervention, it is imperative that it be driven by what is feasible, possible and desired by the women that the intervention seeks to assist and since customary rules often govern women's lives, attempting to change custom can be very threatening to women and men alike. Any planned intervention must include significant efforts to solicit information from women about the rights that they want for themselves, their future with regard to safety, protection and survival. Ask women what might be feasible and desired with regard to property rights.⁶⁸⁰

Gaining inheritance rights for women requires social and cultural change and in patriarchal cultures, men are the powerbrokers; gender equity in property rights cannot be achieved unless some critical mass of men are convinced that it is worthy of their support. Thus, projects intended to promote gender equity must explicitly target men as well as women. Engaging men, especially opinion leaders and those

⁶⁷⁷ Cooper and Bird, as above note 671, 528.

⁶⁷⁸ Strickland, as above note 675, 28.

⁶⁷⁹ Strickland, as above note 675, 28.

⁶⁸⁰ RDI 2009

http://www.landesa.org/wpcontent/uploads/2011/01/RDI_Report_WJF_Womens_Inheritance_Six_South_Asian_Countries_December_2009.pdf.

who wield local influence, is a critical and often-overlooked strategy in assisting that change.⁶⁸¹

While it is true that legal change alone is insufficient to ensure women's inheritance rights in face of customary laws, a strong legal foundation can be an important and necessary first step. However, some legal reforms may be more readily acceptable to women and men than others, and part of the process of legal change must involve listening to the women to understand what legal rights are most important to them.⁶⁸²

Inheritance has gained profile as a public policy issue in sub-Saharan African countries for several reasons and most prominently, inheritance has been tackled as part of the larger problem of property-rights regimes that are discriminatory against women. International and domestic campaigns to redress women's unequal property rights in sub-Saharan Africa have advocated changes to inheritance systems within a broader reform agenda.⁶⁸³

In Nigeria, statutory law and customary law regulate land property. In most traditional Nigerian societies, women are mostly deprived of rights to property. Discrimination against women tends to seek justification in cultural beliefs and practices in Nigeria. At the same time in principle, statutory law preserves the principle of equality in property matters, in practice statutory law has failed in most rural areas to address the problem of women and their vulnerability as regard land title and accessibility.

On the other hand, in South Africa, statutes grant women in customary marriages the ability to control property; however, many marriages remain governed by customary rules whereby men make most decisions on the management of family property.

5.5 Conclusion

This chapter dealt with the reflections on women's inheritance rights through legislation, treaties and policy interventions in Nigeria and South Africa. It outlined the inheritance rights of women as enshrined in the human rights instruments, national law and policy interventions. It further states how these rights have been received in terms of enforcement in Nigeria and South Africa. Flowing from the

⁶⁸¹ RDI, as above note 680.

⁶⁸² RDI, as above note 680.

⁶⁸³ Cooper 2012 *Development Policy Review* 642.

analysis in this chapter, it is very glaringly obvious in my view that discrimination against women as regards inheritance rights in Nigeria and South Africa still exists. However, I suggest that Nigeria and South Africa should not relent in their efforts at liberating women from this unwholesome situation of discrimination and violation of their human rights. The following chapter concludes this study and proffers some recommendations.

Chapter Six

Conclusions and Recommendations

6.1 Conclusions

In relation to women's inheritance and succession rights, African customary law is generally known to be discriminatory against women. Also, women are the objects of exploitation and marginalisation by the community and families in all spheres of life. In an attempt to deal with this quandary, Nigeria and South Africa enacted national legislation and ratified various human rights instruments as a means to ameliorate the difficulties faced by women in this regard. Regrettably, it is glaringly obvious from the findings that African women, particularly those at the grassroots, are largely ignorant of these firm legislative measures put in place for the advancement of their inheritance rights, which address the issue of non-discrimination.

The study has attempted to assess whether African customary laws inherently deprive women of their rights to inheritance, resulting in inequality and discrimination against women, and demonstrated that Nigeria and South Africa are reluctant to face matter where there is a dispute between culture and equality.

Chapter one, which is the introductory chapter, examined the background of the study. The problem statement, aims and objectives of the study, significance of the study, literature review, research question, research methodology and scope of the research were articulated. An unavoidable deduction drawn from the section is that under African customary law, women are generally being discriminated against with regard to inheritance rights.

In the study, chapter two dealt with the concept of customary law as well as its characteristics and validity in the African perspective, particularly in Nigeria and South Africa. It outlined information on customary laws and their application in the socio-legal institution of inheritance in Nigeria and South Africa. It highlighted the meaning of customary law by different scholars as a body of customs, practices and mores, which are largely unwritten and passed down from generation to generation mainly through oral tradition. It examined features of customary law and concluded that African countries have common customary law characteristics, which are intrinsic to their social structure. It considered the frameworks for the validity of

customary law and concluded that while the South African Constitution is in relatively effective control of the application of customary law, Nigeria is still relying on the English law principles for the application of customary law. The chapter concluded that customary law is discriminatory in nature because women seldom inherit property from their deceased husbands.

In chapter three, the study was concerned with comparative overview of women's rights of inheritance in Nigeria and South Africa. It examined the position of women under customary laws of Nigeria and South Africa with regard to inheritance and succession. It assessed the constitutional and other legislative provisions that protect the rights of women in Nigeria and South Africa as well as the interface between legislative guarantees and customary rules involving women's inheritance rights, and the challenges encountered in practice and concluded as follows: (1) that in Nigeria, women are been discriminated against as regards inheritance rights. It is almost universal in Nigerian customary law that widows have no capacity to inherit and one reason for this is that there is no concept of co-ownership of property by couples in traditional Nigerian culture, the presumption being that all substantial property, including land, belongs to the husband.

In South Africa, male primogeniture is still practised in several communities, particularly in rural areas, resulting in discrimination against women in the area of inheritance; (2) that the constitutional and other legislative provisions in Nigeria and South Africa are non-discriminatory and guarantee equality with regard to women's inheritance rights; (3) that regardless of what statutory law has to say on inheritance, tensions are brought to the fore when a husband dies intestate and customary law is to apply to distribution of property in Nigeria, while in South Africa, even if women are guaranteed control over land under statutory law and the Constitution, their land rights may not be guaranteed under customary law and by cultural practices. Patriarchal norms currently dominate the interpretation of customary laws and practices so that on the pretext of 'usage and custom', gender concerns may not be considered or may not be based on the notion of gender equality.

In chapter four, the study considered the international and regional normative and institutional frameworks for the prohibition of discrimination against women. However, efforts that are made internationally and regionally over the years to stall,

reduce issues of discrimination against women and give equal opportunity to them to thrive are the establishment of the CSW, UNIFEM, UN Special Rapporteurs and the adoption of CEDAW. At the regional level are the African Commission on Human and Peoples' Rights, the African Court on Human and Peoples' Rights, the Special Rapporteurs of the African Commission on Human and Peoples' Rights and the African Women's Protocol.

The study concluded as follows: (1) that the CSW has done great things in the advancement of women inheritance rights at the global level irrespective of its forty-five members and meeting for about eight working days in a year, however the effect of CSW's activities in Nigeria is not positive because discrimination against women as regards inheritance is still prevalent. On the other hand, the activities of CSW have a positive impact in South Africa because of the incorporation of the equality clause, which outlaws discrimination, which is a focal point of CSW and therefore ensures women's rights of inheritance in South Africa; (2) that UNIFEM is a prominent actor for the elimination of violence against women; (3) that UN Special Rapporteurs really played an important role towards the promotion and protection of women's rights in Africa, through their efforts towards monitoring the drafting, adoption and ratification of the African Women's Protocol and spearheading the drafting of guidelines for State Parties reporting under the African Women's Protocol. Notwithstanding UN Special Rapporteurs' efforts, State Parties such as Nigeria never took any steps to harmonise domestic laws with the African Women's Protocol.

However, South Africa harmonised her domestic laws with the African Women's Protocol, resulting in relatively stronger legislative guarantees in the area of inheritance; (4) that CEDAW is one of the international instruments which aims to protect the rights of women in the world and that the problem of reservations by states parties has greatly affected the effectiveness of CEDAW; (5) that the protection mechanism under CEDAW for the rights of women is weak; (6) that presently, there have been no communications to the CEDAW Committee from Africa despite observation inequalities and discrimination against women; (7) that African states are actively involved in terms of international human rights treaties, yet under-represented in the treaty committee; (8) that the domestic effect of the treaties is very relevant, that its norms form the basis of most of the constitutional human

rights provisions, legislative reforms, and interpretative sources for judiciaries; (9) that States have been reluctant to file complaints under inter-state communication to the African Commission, particularly in matters pertaining to women's rights; (10) that the African Women's Protocol is one of the most all-inclusive instruments protecting and promoting the rights of women with regard to inheritance in Africa, as the range of rights enshrined therein considerably advance women's rights; (11) that the case of *Cristina Muñoz-Vargas v Spain* encountered a problem of interpretation of CEDAW's provisions; (12) that at the regional level, the African Commission has not yet examined any petition alleging a violation of women's rights; and (13) that domestic jurisprudence demonstrates the readiness of African judiciaries to uphold gender equality as the courts refer to CEDAW in the course of interpreting rights to inheritance.

In chapter five, the study considered reflections on women's inheritance rights through legislation, treaties and policy interventions in Nigeria and South Africa. The study indicated that the status of women has been advanced through legislation, treaties and policy interventions but with the existence of customary law, which is predominant in the rural areas of Nigeria and South Africa, gender inequalities continue to exist as regards inheritance rights of women. However, the receiving of the legislation, treaties and policy interventions in terms of enforcement left much to be desired.

The study concluded as follows: (1) that legislative intervention has not had the expected effect on women's inheritance rights; this means women's position in the studied societies has experienced little change in terms of property inheritance because of the flawed cultural conception that women need little or no property persists, and seems to fuel the socio-cultural practices on inheritance.⁶⁸⁴ However, the problems with women, especially in the rural areas are unawareness and understanding on how to access and enforce legislation; (2) that international human rights treaties are very important as regards women inheritance rights, in particular, CEDAW; (3) that article 16 of CEDAW, did not articulate the inheritance rights of unmarried women; (4) that the enforcement of CEDAW strongly depends on domestication by States Parties; (5) that African Women's Protocol is non-

discriminatory in terms of inheritance and it is a legal tool, which women can use in accessing their inheritance rights; (6) that the enforcement of African Women's Protocol largely depends on the acceptance and implementation by the State Parties; (7) that customary law which remains pertinent even within the statutory system has affected women out of all proportion in terms of inheritance rights by virtue of gender; therefore, strengthening women's inheritance rights can be achieved by formulating property policies, reviewing policies that are not consistent with human rights instruments. In addition, customary inheritance has gained profile as a public policy in sub-Saharan African countries, therefore, women's inheritance rights requires social and cultural change.

This study used Nigeria and South Africa as case studies to illustrate that women's inheritance rights in most African countries are continually being discriminated against, through traditional customs, practices and beliefs. It has also been shown that women's rights have largely been relegated to the background at the national levels, despite the existence of the international and regional human rights instruments ratified by most African states.

To summarise the study in a sentence: the national laws and human rights instruments are not expected to achieve their specified objectives of realising change as regards women's inheritance rights and promoting gender parity in African societies when their existence is not known by African women. With this in mind, the study turns to proffer recommendations.

6.3 Recommendations

6.3.1 Short term

The study recommends that in Nigeria, customary law rules of inheritance, which are discriminatory against women, and thus violate the constitution and human rights instruments, need to be reformed, to enable women to enjoy their inheritance rights over the estate of their deceased husbands. In addition, apart from the legal reforms, there is the need for public enlightenment especially among the men, for change in their attitudes toward women as being subordinate in the society, to promote the elimination of inequality in society. The enlightenment campaign should involve traditional rulers, leaders of the community and family heads being the primary

custodians of culture and traditions of their respective communities. The involvement of these groups of people is necessary because it is within their domains that customary laws discriminate against women. Hence, their support will be required for effective social mobilisation and change.

On a related note, in South Africa, there is the need for more public enlightenment among women, especially at the grassroots, on the impeccable position of the Constitution and legislative provisions relating to inheritance rights and the effect of customary law and practices in relation to inheritance rights. In addition, men should have more education in order to accord respect to women's inheritance rights, as enshrined in the Constitution.

The Constitutions of both Nigeria and South Africa attempt to protect the rights of all citizens, guarantee all individuals equal rights and guard against discriminatory practices on grounds of sex; therefore, it is recommended that the Constitutions of both countries should be implemented to the letter. The Constitutions being the supreme laws of the respective countries supersede any other law and if any law or rule is inconsistent with the Constitution, such law or rule should be declared null and void. Based on the above, women's inheritance rights should be promoted and given recognition in their respective societies. In addition, awareness of the provisions of the Constitution that guarantee equal rights must be made widely known to societies especially rural women.

Similarly, other legislative provisions in both countries that promote non-discrimination based on gender should be given effectiveness by the courts. In Nigeria, the *Land Use Act*, the *Marriage Act* and the repugnancy doctrine should be taken into account by the courts when considering women's inheritance rights because these normative provisions prohibit discrimination against any particular class or persons. Therefore, the courts should uphold and apply such in totality. On the other hand, South African courts should uphold the *Recognition of Customary Marriages Act*, the *Promotion of Equality and Prevention of Unfair Discrimination Act* and *Intestate Succession Act* when the issue of women inheritance rights is before the courts because legislation is in line with the Constitution in terms of prohibiting discrimination on grounds of sex.

In relation to interface between legislative guarantee and customary rules involving women's inheritance rights, it is recommended that the statutory laws for example: *Constitution, Land Use Act, Marriage Act, Recognition of Customary Marriage Act and Intestate Succession Act* should prevail over customary law to enable women to enjoy their inheritance rights, irrespective of the fact that customary law is more prevalent than statutory laws in most African countries.

However, it is recommended that UN member states must commend and appreciate the CSW activities in order to create a positive impact on the lives of women worldwide, because it goes a long way to curb discrimination against women in general.

It is also suggested that UNIFEM activities should be encouraged by UN member states; because it promotes the principle that, the protection of women's human rights is fundamental to ensuring women's self-realisation and full participation in society. It empowers projects that prevent violence against women run by community, national, and regional organisations.

6.3.2 Medium term

It is suggested that in as much as customary law is discriminatory against women's inheritance rights, attempts at eliminating discrimination should be considered by engaging men and women, especially men who are in the forefront of decision making, about the negative effects of discriminatory traditional practices on women's inheritance rights. The community should take bold steps in challenging customary law practices that discriminate against women's inheritance rights. In this regard, therefore, awareness and information propagation on the undesirable part of the customary law practices on women is essential.

It is also recommended:

- that CSW members be increased to enable it to cover all the countries in the world;
- that CSW meeting should be more than eight working days in a year to enable enough time for discussion of women issues around the globe;
- that UN Special Rapporteurs being prominent actors in the world should continue their activities, visit Nigeria and South Africa to ensure that human

rights violations and other emerging crises are brought to the knowledge of the international community for concerted action. This will enable states parties such as Nigeria to comply with human rights instruments and realisation of women's inheritance rights;

- that African women NGOs should be encouraged to file communications to the CEDAW Committee and there should be institutional support when filing communication against states parties. In addition, existing legal courts in states parties to CEDAW and African Women's Protocol should interpret women's inheritance rights within the provisions of the stated instruments in order to demonstrate gender parity;
- that African states parties to CEDAW should be encouraged to make use of the inter-state communication by filing complaints against other states that violate their rights;
- that CEDAW's Committee should take cognisance of the purpose, purport and objective of article 1 of CEDAW in matters relating to inheritance and succession;
- that African women should be encouraged to file petitions alleging violations of their rights before the African commission and the women be enlightened to clear the ambiguity provisions of the charter relating to women's rights.

6.3.3 Long term

The study further suggests:

- that article 28 of CEDAW should be amended because the widespread use of reservations allows signatories of CEDAW to opt out of essential provisions of CEDAW. Most reservations to CEDAW are incompatible with the purpose and objective of CEDAW; there is no definite procedure for the determination of incompatibility. It is suggested that the consideration of reservations incompatibility should be at least two-third majority of States Parties.
- that the protection mechanism under CEDAW for the rights of women needs to be strengthened through the ratification of the Optional Protocol to CEDAW, as this will place CEDAW alongside with other significant human rights treaties adopted by the UN.

- that Africa's representation in the international treaty committee should be fairly increased, in comparison to other continents.
- that the two African countries that have not ratified CEDAW and the twenty-five African countries, which have not signed the Protocol, should do so as a matter of urgency. In addition, those that have acceded and ratified CEDAW and its Protocol, and failing to domesticate it in their national laws such as Nigeria should do so as a matter of urgency. In the same vein, the African Women's Protocol should be ratified and domesticated by African states that are yet to do so.

The change envisaged here should also involve structures that create exclusion, deprivation and any forms of injustice against women in both countries. Nigeria and South Africa should intensify efforts on awareness creation programmes to ensure women's inheritance rights. Nigeria and South Africa should embark on building capacity of rural women's organisations at local level, setting up forums and networks on women's inheritance rights at national level, which should assist to move forward the women's inheritance rights agenda. Nigeria and South Africa should conduct research in respective countries, on women's inheritance issues and roll out workable policies to improve the position of women in relation to women's inheritance rights.

It is hoped that the recommendations made in this chapter would bring the plight of women to the forefront of human rights activities and discourses with the ultimate aim of building a culture of respect for women's' rights across the African continent.

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