
SOME RELIGIO-CULTURAL PRACTICES AGAINST THE PROPERTY RIGHTS OF WOMEN AND CHILDREN IN NIGERIA AND SPECIFIED AFRICAN COUNTRIES*

Abstract

Most African ethnic groups treat women as property to their husbands and could be inherited¹ but without inheritance rights at all or with unequal rights tilted in favour of males² especially in rural areas³. This inquiry sought the impediments to the realisation of the customary inheritance rights of African women and children and how to overcome them. Review of articles in journals, internet based materials consisting of reports of interviews of victims of inhuman customary practices, books, statutes and case law from some African countries was the analytical approach employed in this inquiry. Latest legislative and judicial attitudes were found to be intolerant of these practices but ignorance, poverty, etc. of victims is the setback. Sanctions on erring states members could secure compliance with charters/protocols that guarantee these rights; states and Human right groups' interventions could provide the enlightenment and financial support needed by rural dwellers to assert their rights.

Keywords: *Property Rights, Women and Children, Religio-cultural Practices, Nigeria, Some other African Countries*

1. Introduction

The over a thousand African tribes and ethnic groups have their different customary practices. These ethnic customary systems find unity in broad principles sometimes. One of the points of meeting is the rule of inheritance that has come to be accepted by all cultural groups in Africa with each having its independent details that find unity with other groups' details sometimes. The accepted customs of these groups⁴ become part of the legal system of African countries after purification through judicial and legislative activities⁵. The refining process is contained in the conditions laid down for the validity of customs. Customs must not be repugnant to natural justice, equity and good conscience⁶; and must not be incompatible with the laws made by any legislature or contrary to public policy before they can be applied by courts. Muslim law is sought to be isolated from other customary laws⁷ despite its acceptance by Muslims as part of their way of life and its historical⁸ and statutory⁹ acceptance as part of customary law. The difference between the two is suggested to be in the way the 1999 Constitution established a Sharia Court of Appeal to hear appeals on Muslim cases and the Customary Court of Appeal to hear Customary law appeals; and that those principles of Islamic law are not subject to repugnancy test¹⁰. Customary law has been defined in a manner that includes

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¹ Holy Bible, Genesis 38:6-24.

²Chapter 4: 11, Holy Quran. Cf. Holy Bible where females inherit when there is no male child in Numbers 27:8,8. An illegitimate child cannot inherit, see Genesis '1:10-14

³Save the Children, 'Denied our Rights: Children, Women and Inheritance in Mozambique'. <https://resourcecentre.savethechildren.net> visited 19/11/2018.

⁴ *Eshugbayi Eleko v. Officer Administering the Government of Nigeria* [1931] AC 662 at 673; *Maryama v. Sadiku Ejo* [1961] NNLR 81.

⁵It has been preserved by statutes such as the various High Court Laws of States of Nigeria (High Court Act, FCT, Abuja, s.34), Evidence Act, 2011, Nigeria, s.18(3).

⁶ *Eshugbayi Eleko v. Officer Administering the Government of Nigeria* (n. 4).

⁷Ruud Peters, *Islamic Criminal Law in Nigeria* (Ibadan: Spectrum Books Ltd., 2003) p.5-6. In *Adesubokun v. Yunusa* [1971] NNLR 77 at 80, Ademola CJN held that Islamic law is customary law.

⁸ The address of Lord Luggard in Sokoto, 1902 quoted by Ruud Peters (n.8) p.6.

⁹ High Court Law of Defunct Northern Region of Nigeria, s.34, same as High Court Law Cap. 67, Laws of Kaduna State, 1991, s.34.

¹⁰ *Osagie v. Osagie* [2009] LPELR 4533.

Islamic law as: ‘...any system of law not being common law and not being a law enacted by any competent legislature in Nigeria, but which is enforceable and binding within Nigeria...’¹¹ The non-Islamic customary laws of African ethnic groups are not divorceable from the traditional religious practices of the people. Christians never adopted any Biblical standard of the rules or practice of inheritance in the way Muslims adopted the rules of the Quran as shall be seen. While Christianity is practised by African natives, their rules of customs that find their roots in their hoary traditions are still accepted to guide their conducts especially where such customs are not renounced by the Holy Bible. Obnoxious customary practices such as window inheritance, widow ‘purifications’ in Mozambique and Ethiopia¹², the Islamic half human treatment given to Muslim women in Nigeria, Niger Republic, Egypt and other Muslim Countries of Africa; discrimination against women/widows, orphans that are minors, ‘illegitimate’ children under customs flourishes especially in African rural communities and especially among the poor and ignorant. The challenge that remains for the consolidation of the gains of the right groups and legislative and judicial bombardments of these repugnant customary practices among ethnic groups in Africa are the enforcement regimes whose wheels have been stuck in the sticky mud of ignorance, poverty, fear, religious sentiment amongst other impediments.

2. Right of Inheritance

The right to inherit is a property right that is a part of every customary law; from the codified sharia law that applies amongst Northern Nigeria Muslims, Republic of Niger and other African countries to the unwritten rules of the customary law of other ethnic groups of Africa. Thus the property interest of an Ibo woman from Eastern Nigeria who was married under native law and custom could be guided by Ibo customs and not by the Married Woman Property Act, 1881 of the United Kingdom applicable in Nigeria¹³.

Woman’s Right to Inherit

On the inheritance rights of women, the Yoruba and Islamic¹⁴ customs are commendable. The rights of the females under Islamic law are institutionalised with the acceptance of Islam as their religion¹⁵. Non-Muslim ethnic groups in the middle belt of Nigeria had no provision for females to inherit as children and as wives/widows¹⁶. This was the position among the Ham people of Kaduna State even after the advent of the Sudan Interior Mission (SIM) in Kwoi in the year 1910¹⁷. Women were treated as properties to their husbands who they could not inherit when they died¹⁸. This was the position too among the Igbo customary group of Eastern Nigeria¹⁹. Once a daughter was married out she became the property of her husband²⁰. She could

¹¹ *Iroegbu v. Mpama* [2010] All FWLR (pt 49) 1116 at 1146.

¹² Save the Children, ‘Denied our Rights: Children, Women and Inheritance in Mozambique’ <https://resourcecentre.savethechildren.net> visited 19/11/2018. This is practised in Ethiopia. See Nina Berg et al, *Women’s Inheritance and Property Rights: A vehicle to Accelerate Progress Towards Achievement of the Millennium Development Goals* (Rome: International Development Law Organisation, 2010) p. 12 available also at www.gatesfoundation.org visited 17/11/2018.

¹³ *Amadi v. Nwosu* [1992] 23 NSCC (pt 2) 94 at 101 paragraph 25-30.

¹⁴ Chapter 4:11 of the Holy Quran.

¹⁵ This right is provided for in Chapter 4 of the Holy Quran.

¹⁶ Ngozi O. Odiaka, ‘The Concept of Gender Justice and Women’s Rights in Nigeria: Addressing the Missing Link’, *Afe Babalola University Journal of Sustainable Development Law and Policy* Vol. 1 Iss. 1 p. 190 at p 201. In fact the women were placed on the same footing with children. See Save the Children, ‘Denied our Rights: Children, Women and Inheritance in Mozambique’ <https://resourcecentre.savethechildren.net> visited 19/11/2018

¹⁷ Rev. Zemo N. Audu, *The Advent of Christianity in Ham Land* (Kaduna: Pyala-mak Services Ltd., 2010) p. 44-46.

¹⁸ Cf *Rukunga v. Rukunga* <http://www.kenyalaw.org> a Kenyan custom pursuant to which a son sought the exclusion of his married sister from inheriting their deceased father’s estate was held invalid.

¹⁹ In *Ugbomia v. Ibeneme* [1967] FNLR] 257, the court held Igbo daughters incapable of inheriting their fathers’ estate by the general Igbo custom.

²⁰ In accord with the custom of Oromiya people of Ethiopia that doesn’t allow women to inherit their husbands. See Fiona Flintan et al *Study on Women’s Property Rights in Afar and Oromiya Regions Ethiopia* pp. 47 and 55 www.fao.org >fileadmin>drought>d...

not inherit but was an object of inheritance (widow inheritance) upon the death of her husband. In *Nzekwu v. Nzekwu*²¹, an Igbo widow was held under the Igbo custom to be capable of only possessory rights over her husband's landed property subject to good behaviour²². This chain of servitude around the limbs of Igbo females was broken in *Majekwu v. Majekwu*²³ where the custom of Igbo people of Nnewi that disinherited females was declared repugnant to natural justice, equity and good conscience. The widow's inheritance right amongst the Yoruba people of Lagos was long established in *Lopez v. Lopez*²⁴. In the words of Combe CJ:

In early times the rights of the daughters were not the same as those of the sons, and I should be very much surprised to find that the native custom of Lagos has so far changed that it is now recognised by natives that daughters have the same rights as sons in the land of their father. However that may be, females undoubtedly have rights and the court must have jurisdiction to make such order as may be necessary to protect a female in the enjoyment of the rights.²⁵ (Emphasis supplied).

Change is an undeniable feature of customary law. In the words of Osborne CJ²⁶:

...one of the most striking feature of West African native custom, to my mind, 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.²⁷

This humane position was taken by the Kenyan court in *Rono v. Rono*²⁸ where Keiyo custom that gave more to sons than daughters and the widow of a deceased was held to be discriminatory and short of fundamental rights standards. In a later Kenyan case of *Re Estate of Lerionka Ntutu*²⁹, the Massai customary law against inheritance rights to female children in Kenya was relegated for being 'repugnant to justice and morality', and CEDAW that guarantee women's property rights. Several factors account for these changes in the customs affecting women's customary/religious inheritance rights in Africa; these include:

- i. Dissatisfaction with a particular rule of custom within a cultural group could occasion a revolt against its application. In *Danmole and ors. v. Dawodu*³⁰, on the distribution of the estate of a

Article 34 of the Ethiopian Constitution, 1994 provides for equal rights for men and women at the time of entering into marriage, during marriage and divorce. Article 35(7) of this Constitution provides for the rights of women to acquire, control, use and transfer land as well as enjoy equal treatment in the inheritance of property.

²¹ [1989] 3 NSCNJ 167.cf with the paradox in the custom of the Akan people of Ghana where women don't inherit but their sons inherit from their (the women's) brothers. See Gwendolyn Mikell, 'Culture, Law, and Social Policy: Changing the Economic Status of Ghanaian Women', (1992) 17 *YJIL* 225 at 226.

²² Cf the Afaris of Ethiopia who apply the 'abukratie or Afar Ada- an unwritten set of customary laws which has no provision for women inheritance. See Fiona Flintan et al (n19) at pp. 20 and 21. The Provisional National Defence Council (PNDC) Law 111, 1985, Ghana aimed at ameliorating the sufferings of widows has often been ignored in Ghana. See Victor Gedzi, 'Women and Property Inheritance after Intestate Succession Law 111 in Ghana, a paper presented in a conference in Boston on the 25-27 June, 2009 p. 6-12 <https://www.iiste.org>artcle>view>

²³ [1997] 7 NWLR (pt 512) 283. In *Motoh v. Motoh* [2011] All FWLR (pt 584) 73 at 119, Aboki JCA held that the custom of the Awka people of Anambra State in Nigeria denies females to inherit as repugnant to natural justice, equity and good conscience.

²⁴ [1881-1911] 5 NLR 50.

²⁵ Ibid at pp. 54 and 55. In *Oloko v. Giwa* 15 NLR 31, it was held that there is no rule of Yoruba custom that prevented a woman from holding a house or room allocated to her by her deceased husband as her property. In *Igwemadu v. Igwemadu* [2011] All FWLR (pt 573) 1980 a grandson who was eldest member of the family lost his claim to the position of Obi when he could not prove that the custom that the eldest son and not grandson has that right under Nnewi customary law.

²⁶ *Lewis v. Bankole* [1881-1911] 1 NLR 81.

²⁷ Ibid at p. 101.

²⁸ [2008] KLR G&F 803.

²⁹ <https://kituochasheria.wordpress.co/2017/05/15/the-kenyan-womans-place-in-succession/> visited 18/11/2018.

³⁰ [1958] 1 NSCC4.

deceased person under Yoruba custom amongst his children and his three surviving wives. It was the view of the Supreme Court of Nigeria that: *idi-igi* (per wife/mother) is the universal method of distribution except there be discord among the descendants on the sharing formula. Where such dispute existed, the head of the family is empowered to, and should, decide whether *ori-ojori* (per heir) in that particular case ought to be adopted instead of *idi-igi*; and that any such decision prevails.³¹

- ii. Cultural diffusions. This occurs when the rules of one culture are infused in another culture as a result of contacts³². It could also be referred to as cultural ‘hybridization’³³. The influence of western culture on African ethnic groups prompted Lord Atkins in *Eshugbayi Eleko v. The Officer Administering the Government of Nigeria*³⁴ to remark that the barbaric custom of West Africa is becoming milder due to civilisation³⁵.
- iii. Culture revolution. This is a turbulent alteration of the culture of an ethnic group consequent to subjugation. This is typical of the Islamic religious law. The Prophet of Islam, Mohammed Bn Abdullah conquered Mecca in the *Uhud* War and replaced their idolatrous customs with Islamic customs. The Caliphs that succeeded him continued this crusade to other Arabian nations and to places such as Spain³⁶ thereby replacing the culture of their converts with the Islamic culture. Islamic religion combined elements of paganism before 1804³⁷ in Northern Nigeria. Danfodian jihadists conquered Hausa Kingdoms³⁸ together with parts of the Middle Belt to as far as Auchi in Edo State of Nigeria and the replacement of the existing culture with Islamic culture³⁹ that permitted women and children’s inheritance rights⁴⁰. The bold assertion that ‘Women married under customary law have little or no rights over their spouse’s property...’⁴¹ at least has a limit in this Quranic provision contained in Suratul Al-Nisa verse 12:

In that which a wife leave, your share is a half if they have no child; but if they leave a child, you get a fourth of that which they leave after payment of legacies that they may have bequeathed or debts. In that which you leave, they are (your wives) share is a fourth if you leave no child; but if you leave a child, they get an eighth of that which you leave after payment of legacies but that you may have bequeathed or debts. If the man or woman whose inheritance is in question has left neither ascendants nor descendants, but has left a brother or a sister, each one of the two gets a sixths; but if more than two, they share in a third; after payment of legacies he (or she) may have bequeath or debt, so that no loss is caused (to anyone). This is a commandment from Allah; and Allah is Ever All Knowing, Most Forbearing.⁴² (Emphasis supplied).

³¹ Ibid at p. 7.

³² Donald O. Bolander *et al.*, (ed) *The New Webster Dictionary of English Language International Edition* [New York: Lexical International Publishers, Guild Group, 1992] p. 266.

³³ John Storey, ‘Global Culture and Popular Culture’ in Michael Haralambos and Martin Holborn (ed), *Sociology: Themes and Perspectives* (7th edn.) p. 677.

³⁴ [Supra].

³⁵ [Supra] at p.673.

³⁶ Francis Fukuyama, *The Origins of Political Order* (London: Profile Books Ltd., 2011) pp.192 and 193.

³⁷ Crowder Michael, *West Africa: An Introduction to its History* (London: Longman Group Ltd., 1977) p. 78

³⁸ Crowder Michael (n37 p.79-82).

³⁹ Ibid.

⁴⁰ Suratul Al-Nisa (Chapter 4) of the Holy Quran.

⁴¹ J. O. Olubor, PCCA, ‘The Legal Rights of the Vulnerable Groups Visa-a-vis Customary Practices’ quoted by Eghosa Osa Ekhatior, Women and the Law in Nigeria: A Reappraisal, [2015] 16 *Journal of International Women’s Studies* Issue 2 <http://vc.bridgew.edu/jiws> accessed 12/11/2018,

⁴² *Osagie v. Osagie* [supra] mistakenly exempts Islamic law from the repugnancy test customary laws are subject to, rules of Islamic law must be consistent with statutory laws.

SULEIMAN & AMUDA-KANNIKE: *Some Religio-Cultural Practices against the Property Rights of Women and Children in Nigeria and Specified African Countries*

The limitations of women and children under customs guiding inheritance *inter alia* is flourishing on the fecund grounds of their ignorance, lack of access to rights institutions⁴³, nonchalant attitude, poverty, fear, religious sentiments etc.⁴⁴ Apart from other factors that influence customs above considered, legislations and international conventions have supplied the needed force to halt the rigours of the rules of customs that are unfair to women and children. The Nigerian Evidence Act provides that courts should not apply customs that repugnant to natural justice, equity and good conscience or is incompatible with public policy⁴⁵. Article 21 of the Protocol on the Rights of Women in Africa⁴⁶ grants the right of inheritance to widows and widowers from their deceased spouses, to live in the matrimonial home irrespective of the marriage legal regime, male and female children shall share equally from their deceased parent(s) estates. The African Charter on Human and Peoples' Rights (ACHPR) Article 3(1) and (2) provides for the equality of all persons before the law and also to equal protection by the law⁴⁷.

By the combined effect of section 42 subsections (1) and (2) of the 1999 Constitution of Nigeria, women shall not be treated different from their men counter parts. The above legislations⁴⁸ are part of the customs purification furnaces that guarantee the inheritance rights of women

Critique of Customs on Female's Right to Inherit

Customs that deny females' rights to inherit have been held by courts to be repugnant to natural justice, equity and good conscience. In *Mojekwu v. Ejikeme*⁴⁹ the court held the Nnewi rule of custom (*nrachi*) that disinherited female children as ultra vires section 39(2) of the 1979 Constitution of the Federal Republic of Nigeria that forbids discrimination on the basis of circumstances surrounding the birth of a citizen⁵⁰. The court held that the custom violated Articles 2 and 5 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)⁵¹. The easiest way of denying a widow her husband's property is to ask for her for a wife to any family member according custom. Her refusal is synonymous with rejecting her right to remain in the family especially where and when the children of her marriage are too young to resist such treatment. In Massavasse Village, Chokwe District of Mozambique, a woman who refused to go through the rite of 'purification' that involved sex with the deceased's elder brother who was 'much older than my husband' so that he would take full responsibility for her and her two children of 12 and 7 years were ostracised by the family and lost all!⁵² The contemporary practice especially in Nigeria, is that the wife of a deceased would be held hostage soon after the husband is certified dead, subjected to interrogations

⁴³ An NGO, Save the Children, in Mozambique found that Women and Children that are denied their rights to inherit have no access to institutions that could be of help to them. www.unicef.org.mz

⁴⁴ Michelle, a widow in Zimbabwe, despite assistance from a rights group against her in-laws still cried out in a report in 2016 thus: 'I am fearful and my heart is unsettled'. See Human Rights Watch, 'You will get Nothing' Violations of Property and Inheritance Rights of Widows in Zimbabwe, p.1 [https://www.hrw.org > files > report...](https://www.hrw.org/files/report...) Glynnis, a 50 year old widow was not as lucky as Michelle. She was poor, could not afford even food with her children and was driven away by her in-laws after her husband's death and was 'left with nothing'.

⁴⁵Evidence Act 2011, s. 18(3). Note that all High Court Laws of States in Nigeria have similar provisions with an additional clause that such a custom must not be incompatible with any law for the time being in force.

⁴⁶ See League for Human Rights (League for Human Rights, Human Rights: A Compendium of International Instruments and Internet Resource Guide (Jos: Dales Press Ltd., 2004) p.110-115 for a full text of the Protocol on the Rights of Women in Africa particularly Article 6 on harmful cultural practices against women.

⁴⁷ This Charter has been domesticated by the Federal Republic of Nigeria. See African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap. A9, Laws of the Federation of Nigeria, 2010.

⁴⁸ (n5, n20, n45, n47).

⁴⁹[2001] 1 CHR 179. Note that this position was assailed by the Supreme Court in *Mojekwu v. Iwuchukwu* [2004] All FWLR (pt211) 1406 at 1422 because it was not a proper issue before the court.

⁵⁰ Same as 1999 Constitution of Nigeria, s.42 (2).

⁵¹ Ibid at p.218. See League for Human Rights (n47).

⁵² (n12).

on the wealth of her husband by in-laws who would seize valuables that belongs to the deceased⁵³. These crusaders would come under the pretext that they are protecting the interest of the children who may still be minors. Honesty in this crusade may just be the necessary check on the excesses of some of the widows that would mismanage the resources of their late husbands, abandon the children to their fate and go and remarry or take to high life.

To help themselves from the estate of deceased persons at the expense of widows and orphans, in-laws invoke inhuman cultural practices to villain the wife as the husband's killer thereby unfit or lack the moral standing to be in charge of the deceased estate⁵⁴. Amongst the Ibos, such practices include asking the widow to drink from the water that was used in washing the dead body of her husband to assert her innocence of his death. Recently, a lawyer, N.O. Ezike-Okoli took up a matter in the Abuja office of the National Agency for the Prohibition of Trafficking in Persons (NAPTIP). A widow had been thrown out by her Ogoja⁵⁵ in-laws and the young children of the marriage seized from her on the ground that she refused to accede to the in-laws' demand that she should have sexual intercourse with the dead body of another man to prove that she did not kill her husband. Summarising the atrocities of in-laws against widows and orphans, a Nigerian Court remarked: 'It is however a matter of grave or serious concern whether it is not time that courts of law consider the predicament and deprivations of widows in the hands of in-laws in the guise of customary law...'⁵⁶ The female Muslim's inheritance from the estate of any deceased person that relates to her is well defined⁵⁷. The anxiety surrounding this apparent Quranic commendable step should not be taken too far. The provisions of the Quran that define the shares of children of any deceased person place a female heir at half the inheritance of her brother⁵⁸. A widower is entitled to half of the estate of his deceased wife if they had no children, but where there are children left by the deceased woman then the widower is entitled to a quarter of the deceased's estate⁵⁹. When a man dies and is survived by a wife, the widow inherits a quarter of his estate if there are no surviving children as against half that a widower is entitled to in a similar situation⁶⁰. Where the man dies and leaves behind children the widow inherits an eighth of his estate as against a fourth that he inherits if the wife were to be the one that is deceased in the circumstances.

The Quranic rights of the female Muslim to inherit above presented is assailable on the ground that it is a custom that discriminates and subjects women to unequal treatment with their male counterparts as children because of the circumstances surrounding their birth⁶¹. Apparently commenting on the rights of the helpless Kenyan Muslim female to inherit under chapter 4 of the Quran vis-a-vis those of her brother and the provisions of the Kenyan Succession Act that is made inapplicable to inheritance under Islamic law, Kayere

⁵³ This was the testimony and experience of Dulcinea, a widow in Mchele, Mozambique, a widow and her children who were robbed of all by in-laws as found by Randi Kaarhus of the Centre for Practical Knowledge, University of Nordland, Norway and Stefaan Boneeyne of the University of Leuven, Belgium, *Formalizing Land Rights Based on Customary Tenure: Community Delimitation and Women's Access to Land in Central Mozambique*, (2015) *Journal of Modern Africa Studies* p. 19, available at <http://dx.doi.org/10.1017/S0022278X15000166> visited 17/11/2018. The dictatorship of in-laws against widows and orphans reported by Human Rights Watch as 'injustice' involving the seizure of their 'homes or property' in their helplessness. (n44 at p.4.).

⁵⁴ S.T. Silas, 'An Evaluation of the Cultural Practices and Women's inheritance Rights in Ibo Land, Eastern Nigeria: A Theological-Ethical Study (being a Master's Degree Dissertation Submitted to the Post Graduate School, North-West University, Potchefstroom, 2017)p. 21.

⁵⁵ Ogoja is a tribal group in Cross River State of Nigeria.

⁵⁶ *Mojekwu v. Ejikeme* [2001] 1 CHR 179 at 219.

⁵⁷ (n40).

⁵⁸ Chapter 4 verse 11 of the Quran.

⁵⁹ Chapter 4 verse 12 of the Holy Quran.

⁶⁰ *Ibid*.

⁶¹ Constitution of Nigeria, 1999, s.42(2), Constitution of the Republic of South Africa, 1996, s. 9, ACHPR Articles 3(1) and (2), CEDAW, Articles 2 and 15(1), Article 27(3) and Constitution of Kenya, 2010, Article 27(3).

Ephraim remarked: 'This is a clear disproportionate share amongst sons and daughters. But what can the law do about it? Well, nothing. Muslims are not subject to the provisions of the Succession Act, period.'⁶²

The lamentation of Kayere is understood. We are dealing with a law that is believed to have been divinely given and the highest law of the Muslim that cannot be amended. It is a sensitive area of the law that could spark off killings if issues related to it are not handled with care. The fear of Kayere in the Kenyan legal framework would appear baseless when the Muslim law is viewed alongside the 2010 Kenyan Constitutional provisions for equal treatment of all persons⁶³ and freedom from gender discrimination⁶⁴. Unfortunately, Article 34(5) of the Ethiopian Constitution has reprehensible provisions that seek to negate other provisions that recognise the equality of men and women, their equal rights and even principles of international laws against discrimination⁶⁵. Article 34(5) provides that: 'This Constitution shall not preclude the adjudication of disputes relating to personal and family laws in accordance with religious or customary laws, with the consent of the parties to the dispute'.

Although consent of the parties is a requirement for the application of this provision, the men could secure women's consent to an inequitable distribution in accordance with the custom through coercion⁶⁶ or even blackmail that an insisting woman is an infidel thus her disrespect for Quranic provisions.

Where the wahaya practice amongst Muslims is in vogue as it is reported to be in Niger Republic⁶⁷, a slave girl that is taken as a fifth wife or a concubine by a rich Muslim has no inheritance at all. Her children with the 'husband' are legitimate and can inherit their father but their mother cannot inherit her husband. She is simply a sex object and a baby factory to the man. This practice is an inhuman cultural and religious practice that is a severe limit to the enhancement of the constitutional rights of the dignity of the human person and the property rights of the woman⁶⁸.

Right of Children to Inherit

The right of a child to inherit under custom and religion is determined by the sex of the child. A male child, even if he is delivered after his father's death has the right to inherit. The female child is subject to the rules governing the rights of women under the various customs that has been briefly considered above and shall be appraised presently. The Ham people of Kaduna State would, against the hoary practice, now entrust the properties of a deceased who left children under age to their mother who would superintend same for them until they reach the age of majority. Problems do arise when relations would confiscate everything from the widow and leave her with the under aged children or even seize the children from her until when they have squandered all that was left by their deceased father and when they are still minors and leave them to their fate. Normally, the mother whose flesh and blood the children are would take them back and attend to their needs no matter her financial disadvantageous position. This is the 'custom' today that has found its way into ethno-religious groups but has no legal basis in the main stream of the legal customs of these groups. In Islamic religious law, the right of a child to inherit is codified in Suratul Al-Nisa verse 11 in the

⁶² A provision like this cannot be vires the 1999 Constitution of Niger, section 42(2) or that of South Africa, 1996, s. 9.

⁶³ Kenya Constitution, 2010, Article 27(3).

⁶⁴ Article 27(4).

⁶⁵ For instance, ACHPR Article 3, CEDAW Articles 2 and 15(1).

⁶⁶ Nina Berg et al, *Women's Inheritance and Property Rights: A vehicle to Accelerate Progress Towards Achievement of the Millennium Development Goals* (Rome: International Development Law Organisation, 2010) p. 11 available also at www.gatesfoundation.org visited 17/11/2018.

⁶⁷ Norah Hashim Msuya, 'Tradition and Culture in Africa: Practices that Facilitate Trafficking of Women and Children' <https://ww.researchgate.net>>3 see also <https://face2faceafrica.com>>article>article>wa

⁶⁸ Nigerian Constitution, 1999, s. 34(1), CEDAW Article 2, 16(h), Protocol on the Rights of Women in Africa, Article 20.

following terms: ‘Allah commands you as regards your children’s (inheritance) to the male a portion equal to that of two females; if (there are) only daughters two or more, their share is two thirds of the inheritance; if only one, her share is half...’⁶⁹ A child in the above Quranic verse includes any descendant of a deceased no matter his age. Children have also been held under Ijebu customary law to include adopted children of a person that dies intestate⁷⁰. In all these cases under customary laws, the rights of a child to inherit are protected irrespective of the child’s age. The right to inherit by a child has a solid base in constitutional provisions such as guarantee ownership of property, freedom from discrimination and also Articles 3, 4(1) and 21 of the African Charter on the Rights and Welfare of the Child (ACHPR)⁷¹.

Right of Children Born Out of Wedlock to Inherit

In general terms, a child born out of wedlock has no right of inheritance under customary law; but as a matter of strict law, there is no gainsaying the fact that such a child can, at the very least, inherit his mother’s property if she dies intestate⁷² or if she lists him as an heir in her will. This assertion is made irrespective of whether the mother subsequent to or before the birth of the illegitimate child got married and had other children, provided maternity is not in dispute. This assertion may have its limit in Islamic law. In its strict application, the right to inherit a mother would be confined to a child that is a Muslim. Similarly, an illegitimate child can inherit his father under customary law if he provides for it in his will⁷³. He ‘inherits’ not because he is recognised as an heir by birth but as heir by testament. One practice that has been used for over half a century under customs of African people is the practice of the acknowledgment of the paternity of a child born out of wedlock by a biological father. This practice converts an illegitimate child into a legitimate one for the purpose of inheritance. In *Re Adadevoh and ors.*⁷⁴, it was the decision of the court that children born out of wedlock could inherit their father under native law and custom if he acknowledged them. This decision followed the earlier decision in *Savage v. Macfoy*⁷⁵. This feat could also be achieved through a subsequent marriage of the parents of illegitimate children⁷⁶. This practice can hold true in all customary laws but is doubtful in Islamic law; these all would be subject to constitutional and International laws provisions on freedom from discrimination⁷⁷.

Critique of the Rights of Illegitimate Children to Inherit

The right of illegitimate children to inherit appears to be founded on legitimisation by acknowledgement. The defunct West African Court of Appeal approved legitimisation as a custom that places illegitimate children on the same footing with legitimate ones⁷⁸. The Nigerian Supreme Court added a proviso to the rule when it held that legitimisation is allowed only in respect of children not born during the subsistence of a statutory marriage⁷⁹. Commendable as the custom of acknowledgment may be, it is an assailable evidential rule that brings a child within the community of the heirs of a parent. There is no valid reason to hold a child not acknowledged out of the community of heirs if he can prove that he is the son of a deceased who neither

⁶⁹ Chapter 4:11

⁷⁰ *Re Aminatu Alayo* [1945-1947] 18 NLR 88 at 95.

⁷¹ For this Charter, see League for Human Rights (n47 p. 100-109).

⁷² *Obidairo v. Bakare* [2005] All FWLR (pt 256) 1382 at 1391.

⁷³ In *Adesubokun v. Yunusa* [1971] NNLR 77, the Supreme Court held a will made by a muslim under the Wills Act superior to the rules of Islamic law which was a customary law covered by High Law of the defunct Northern Region, s.34(1). See also *Asika v. Atunya* [2008] All FWLR (pt 433) 1293 at 1316.

⁷⁴ [1950/1951] 13 WACA 304.

⁷⁵ [1909] Ren. 504. This hoary principle was followed in *Phillip v. Phillip* [1945-1947] 17 NLR 102, it was maintained that acknowledgment of paternity confers legitimacy on a child born out of wedlock.

⁷⁶ E. I. Nwogugu, *Family Law in Nigeria* (Ibadan: Heinemann Educational Books (Nig.) Plc., 1974) pp. 291 and 292.

⁷⁷ (n58).

⁷⁸ *Alake v. Pratt* [1955] 15 WACA 20.

⁷⁹ *Cole v. Akinyede* [1960] 5 FSC 84.

acknowledge nor disinherit him. This is one of the limits to the custom of acknowledgement⁸⁰. Nothing stops an heir or heirs from adducing evidence to assail the status of a child acknowledged by a parent. Once this is successfully done, he ceases to be an heir. This is in essence, establishing the fact that acknowledgement is not a conclusive prove that a child is that of the parent that acknowledged him. It is a constitutional imperative that a citizen be not subjected to any disability because of the circumstances surrounding his birth⁸¹. The illegitimate position of a child results from the amorous relationship that led to his birth and is perfectly within the purview of this constitutional imperative. If a child can prove father/son relationship between him and a deceased, a custom of acknowledgment cannot unsettle his right to inherit in the face of section 42(2) of the Nigerian Constitution⁸². Section 9 of the Republic of South African Constitution, 1996, is more elaborate in its provisions for equality before the law than the ACHPR. This may not be unconnected with its apartheid past. This provision of the South African Constitution came under consideration in the case of *Hoffmann v. South African Airways*⁸³; where the equality of all citizens before the law⁸⁴, discrimination on grounds of sex, age, birth etc.⁸⁵ under the constitution was boldly judicially renounced and rejected. The court held in this case that it is against the dignity of the citizen to discriminate against him⁸⁶.

A child who had no fault in the way he was brought into the world should not be punished or subjected to any disability for the fault of his parents including the one that has failed to acknowledge him. A custom that insists on acknowledgment of the paternity of an illegitimate child by a father (when such is no longer in dispute) as a condition precedent for inheritance is repugnant to natural justice, equity and the dictates of good conscience. There arises a problem when succession legislation defines heirs of a marriage to the disadvantage of a group. This position is illustrated in the Kenyan case of *Re Ruenji's Estate*⁸⁷. The deceased went through a statutory marriage and later through customary marriages with other women who had children for him. These later wives and their children were held not to be qualified to inherit him⁸⁸. The provisions of such an Act cannot be vires the 2010 Kenyan Constitutional provisions, Article 60 (f) that are against gender discrimination in law, customs and practices related to land and property in land while Article 27(3) that provides for the equal treatment of male and female; and section 27(4) that forbids sex, racial, marital status, pregnancy etc. based discrimination.

3.0 Conclusion and Recommendations

Certainly, customary practices that are inimical to women/widows and children/orphan are still prevalent amongst African ethnic groups especially among the poor, ignorant, timid and nonchalant rural dwellers. These vulnerable groups in the rural areas always resign to fate when in-laws would take the very last thing left by a deceased husband/father from them. They either don't know that the legal frame work in most African countries today has made it possible for them to go far and near to fight successful legal battles to deliver themselves from the hegemony of crusaders of inhuman customary practices or they do not have what it takes to fight against perpetrators of such inhuman practices. Faith in her religion drives the Muslim

⁸⁰ A custom that denies a child his biological parent was held to be repugnant to natural justice, equity and good conscience in *Mojekwu v. Ejikeme* [supra].

⁸¹ See Nigerian 1999 Constitution, s. 42(2), 1996 Constitution of South Africa, s.9, ACHPR, Article 2, CEDAW, Articles 2, 3 and 6.

⁸² In accord with ACHPR, Articles 3(1) and (2), ACRWC 3 of the, 2, 13(a), and CEDAW 15(1); for these Charters, see League for Human Rights (n47 p. 64-73, 100 and 226 respectively).

⁸³ [2001] 1 CHR 328.

⁸⁴ Section 9(1)

⁸⁵ S. 9(2).

⁸⁶ [n83 at p. 351].

⁸⁷ [1977]KLR 21

⁸⁸ In *Re Ogola's Estate* [1978] KLR 18, marriages contracted by the deceased under customary law after his first marriage under the Act were held to be void and consequently the children of the subsequent marriages and the mothers were unfairly held incapable of inheriting the deceased's estate. This decision could be queried on the ground that it wasn't the children's fault that they were illegitimate.

female to accept her fractional human status and sees nothing wrong in it or is threatened to be contented with it. The legislative and judicial aggressive advancements against such practices in African countries are commendable; the enlightenment and enforcement regimes have left much to be desired.

The following are germane. The necessary domestic and international statutes should make provisions for the actualisation of the enforcement of the property rights of women/widows and children/orphans in African countries, a strong enforcement regime to be sponsored by the states and right groups is hereby recommended. Rights groups should shift attention from the streets of Abuja, Cairo, Nairobi, Niamey, Maputo, Harare and Addis Ababa to the rural areas where the violations of women/widows and children rights go unchecked. This would enlighten these rural dwellers of the current trend of the assertion of the rights of vulnerable groups and also help bring to spot light such violations that have been going on as in the pre-legislation and judicial precedents period. A strong socialisation crusade is suggested amongst Muslim females who are prone to give into suggestions that they be contented with their subhuman status provided under the sharia law that contravenes their rights to equality, and freedom from discrimination under the constitutions of African countries and the various international instruments that provide for such rights. The era of lip and ceremonial services to the Charters and protocols on women and children rights should be over among African nations. Sanctions should be introduced against erring member states. There is no law that is above the constitution of a country, the various judicial officers control bodies of countries of Africa should take disciplinary actions against judges that would compromise women and children's constitutional property rights standards on religious/customary law grounds⁸⁹.

⁸⁹ *Asika v. Atunya* [supra].