

## CHAPTER NINE

### INTESTATE SUCCESSION AND WIDOWHOOD RITES UNDER AFRICAN CUSTOMARY LAW IN NIGERIA AND SOUTH AFRICA

*A woman belongs to her father when she is  
born, to her husband when she is married and  
to her son after she is widowed.*

*The Laws of Manu, 300 A.D.*

9.1 *Introduction*

9.2 *African customary law*

9.3 *Intestate succession and widowhood rites in Nigeria*

9.4 *Intestate succession and widowhood rites in South Africa*

9.5 *A comparison of intestate succession and widowhood rites in Nigeria and South Africa*

---

#### 9.1 INTRODUCTION

African customs and traditions remain the greatest obstacle to the full achievement of gender equality. It is against this background that this chapter examines the African customary rules of intestate succession and its impact on the rights of women. Women in Nigeria and South Africa suffer from various traditional and cultural practices rooted in African customary law. Only black women are subject to African customary law in South Africa. However, this chapter departs from the usual pattern of discussing the international legal norm, because these practices are more common in Africa. Therefore, only the positions in Nigeria and South Africa are discussed.<sup>1</sup>

---

<sup>1</sup> Reference is however made to some other African Countries such as Ghana, Zambia and Lesotho.

This chapter sets out by attempting a description of African customary law, and highlights the differences between official and living customary law. The characteristics of customary law are also explained. This chapter goes further to explain the conflict between women's rights and customary law. African traditional and cultural practices that adversely affect the rights of women are highlighted.

Practices such as polygamy, widow inheritance, widowhood and succession, the rule of primogeniture and male child preferences are some of the customs that undermine the rights of women. Polygamy is dealt with elsewhere<sup>2</sup> as one of the incidences of customary marriage. Female genital mutilation, a practice that greatly undermines female autonomy, has also been considered earlier.<sup>3</sup> This chapter focuses on widowhood and adverse cultural practices affecting widows including customary law of intestate succession. Widowhood rites infringe on the women's right to equality as the practice affects only women. Humiliating widowhood rites also infringe on the right not to be subjected to inhuman and degrading punishment.<sup>4</sup> The practice also infringes on the right of privacy.

## 9.2 AFRICAN CUSTOMARY LAW

Customary law consists of customs accepted by members of a community as binding among them.<sup>5</sup> In Nigeria as well as in South Africa there are several customary law systems. For instance, the customary law system of a town in Ogun State in Nigeria may be different from the customary law system of a neighbouring town in the same state, even though the indigenous people of both towns are Yorubas. The diversity of customary law system is a major obstacle to uniformity of customary law systems in both

---

<sup>2</sup> See Chapter 8 above.

<sup>3</sup> See Chapter 7 above.

<sup>4</sup> The Constitutions of Nigeria and South Africa prohibit inhuman and degrading punishment.

<sup>5</sup> Obilade *op. cit.* 83.

states.<sup>6</sup> The same situation exists in South Africa. There are customary laws of the Zulus, Sothos, Venda etc. and even within groups there are differences.

Customary rules are created by the actual, visible critical behaviour of the group,<sup>7</sup> and, most importantly, by the internal aspect by which people consider the conduct or particular behaviour to be dictated by an existing rule – by notions of “right” and “wrong”, “ought”, “must” and “should”.<sup>8</sup>

Despite this multiplicity, all the various forms of indigenous law can be classified as African customary law. It is African customary law in its general sense that is the focus of this chapter, although in the discussion, examples are given of cultural practices from different areas. All forms of customary law find the basis of their validity in accepted social practice.<sup>9</sup> Customary law is the law of small-scale communities. The people living in these communities take it for granted because it is part of their everyday experience. The unit of consideration of African customary law is the community. Traditional jurisprudence has treated customary law as somehow a lesser type of law. Colonial attitudes towards indigenous custom have been one of superiority and contempt. In *Re: Southern Rhodesia*<sup>10</sup> the Privy Council has this to say of African customary law:

Some tribes are so low in scale of social organisation that their usage and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilised society.

Traditional jurisprudence has always understood law to be the command of a sovereign backed by threat of a sanction.<sup>11</sup> Austin coined this definition of law based on command, authority and threat of punishment. Western lawyers have therefore never been able to

---

<sup>6</sup> *Ibid.*

<sup>7</sup> Hund (1998) 84 (3) *ARSP* 420.

<sup>8</sup> *Ibid* 423.

<sup>9</sup> Bennett (1995) 60.

<sup>10</sup> *Re Southern Rhodesia* 1919 AC 211.

<sup>11</sup> See Dias (1990) 230.

understand the way in which customary law operates in African culture, and so, in typical colonial style, regarded indigenous law as a lesser normative order.<sup>12</sup>

Customary law has been defined as a set of norms which the actors in a social situation abstract from practice and which they invest with binding authority.<sup>13</sup> Customary law has also been described as that which is recognised as law by members of a particular ethnic group.<sup>14</sup> Customary law has also been defined as “a mirror of accepted usage”.<sup>15</sup> The most important feature of customary law is that it is unwritten<sup>16</sup> and is therefore flexible. Osborne CJ in *Lewis v Bankole*<sup>17</sup> said:

One of the most striking features of ... 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 character.

An illustration of this feature of flexibility is found in customary land law. Under the customary land law of the Yorubas, (one of the three major ethnic groups in Nigeria) absolute alienability of land was not permitted.<sup>18</sup> Land belonged to the family and no individual family member could own any piece of land absolutely.<sup>19</sup> But this custom has been changed in response to the social needs of the community. Consequently, customary law now recognises absolute transfer of title to land to individuals.<sup>20</sup> Initially, any transaction involving the use of writing was considered to be outside the province of ethnic customary law. This position has now been changed; thus customary law may now govern a written agreement.<sup>21</sup>

---

<sup>12</sup> Bennett (1995) *op. cit.* 65.

<sup>13</sup> Hamnett (1975) 10 – 13.

<sup>14</sup> *Eshugbayi Eleko v Government of Nigeria* (1931) AC 662 at 673.

<sup>15</sup> *Owonyin v Omotosho* (1961) 1 All NLR 304 at 309.

<sup>16</sup> African customary law is codified in Kwa-Zulu Natal.

<sup>17</sup> *Lewis v Bankole* (1908) INLR 81 at 100-101.

<sup>18</sup> *Lewis v Bankole* (1908) 1 NLR 81.

<sup>19</sup> *Amodu Tijani v Secretary Southern Nigeria* (1921) 2 AC 399.

<sup>20</sup> See e.g. *Alade v Aborishade* (1960) 5 FSC 167, *Oshodi v Balogun* (1936) 2 ALL ER 1632.

<sup>21</sup> See *Alfa v Arepo* (1963) WNLR 95, *Rotibi v Savage* (1944) 17 NLR 77.

### 9.2.1 Nature of African customary law

The greatest value of custom in Africa is its dynamism reflected in the spirit of tolerance, dialogue, and consultation, which bear out custom as a process whereby claims and disputes are negotiated.<sup>22</sup> Customary law varies from community to community;<sup>23</sup> it is flexible and liable to constant and imperceptible change. Customary law is diverse and volatile.

Flexibility and adaptability are some of the greatest features of the African customary law. These features could be used to change customary law and therefore make customary law to be more amenable to the rights of women.

### 9.2.2 African customary law and the right to equality

One common feature of African customary law is the subjection of women. Under African customary law, women are generally regarded as being inferior to men. Women are seen as objects of production and reproduction.<sup>24</sup> It has been argued that prior to colonisation, African women have occupied important positions in their societies.<sup>25</sup>

African societies are generally patriarchal. Patriarchy is the organisation of society on the basis of gender, institutionalising the inferiority of women to men. In patriarchal societies, men create laws and control women (and other men) according to hierarchy. This control extends to all spheres including economic, legal, political, educational, and sexual and the personal.

---

<sup>22</sup> *Women and Law in Southern Africa* (1999) 8.

<sup>23</sup> *Ibid.* 22.

<sup>24</sup> Nhlapo (1994) 95.

<sup>25</sup> See Callaway (1992) 6.

Many aspects of customary law, which generally endorses the patriarchal traditions of Africa, are in conflict with these provisions. Nigeria and South Africa have ratified a number of international instruments and Conventions that prohibit inequality. Both countries have international obligations to adjust their domestic laws in accordance with these Conventions.

### 9.2.3 Harmful cultural practices against women

Many cultural practices and tradition exist in Africa that affects women adversely. For instance in Nigeria, women are not allowed outside their homes during some traditional festivals. Women in the city of Ibadan are forbidden to go out during the 'oololu' festival upon the pain of death as she could be cursed by the masquerade. In the whole of Yoruba land in Western Nigeria, women are not allowed to see or come out during the 'oro' festival. At times this festival can go on for two days (as in the case of Remo areas), again on the pain of death. In 1999 in Sagamu (a town in the Remo area) a woman from the Northern part of Nigeria was killed for daring to come out during the 'oro' festival.<sup>26</sup> The death of the woman led to ethnic skirmishes in which more than 500 people lost their lives in both Sagamu and Kano (a state in Northern Nigeria).<sup>27</sup>

The cultural practice of preventing women from coming out during certain festivals infringes on a number of rights, first, the right to equality is breached, as such practices do not apply to men, the right to freedom of movement is also infringed, as women are not allowed to come out whenever they want. The right to life is also infringed as women are prevented from coming out on the pain of death.<sup>28</sup>

In some areas in Nigeria, there are food taboos targeted against pregnant women. In these areas women are not allowed for example, to eat snails (which are very nutritional in protein), because it is believed that the baby will salivate excessively, or that if a

---

<sup>26</sup> Available on the internet ([www.odili.net](http://www.odili.net)) accessed on 19 May 1999.

<sup>27</sup> *Ibid.*

<sup>28</sup> See Chapter IV 1999 Constitution of the Federal Republic of Nigeria.

pregnant women eats fruits her baby will have jaundice. These taboos may render pregnant women undernourished and anaemic and causes low birth weight.<sup>29</sup> Also in some areas, women who have just given birth are required to eat lizards, which are not normally eaten in Nigeria, as part of the tradition in their husbands' place.

In Africa, socio-cultural practices are reinforced through the family, which despite the great diversity in culture and tradition maintains a common thread as the most important agent of socialisation in the society. Right from childhood through adolescence to adulthood, the family remains a source of imparting social mores and values. The definition of family in Africa is neither distinct nor specific. This is because different people define the family in different ways. While some may refer to the nuclear family of a man, wife/wives (as polygamy is accepted and widely practiced in Africa), and children. Others refer to the much more extended family, which includes not only the brothers and sisters of either spouse, but also other blood relatives.

The general attitude is that everyone is first considered a member of a family before being recognised as a member of any ethnic group or the society in general. In this respect, the family can be considered to be the society's "contractor" whose contract is that of preparing the younger and newer members of society to assume adult roles and responsibilities – boys to grow up to be men "like their fathers" and girls to be women "like their mothers".<sup>30</sup>

The family is also often where all the notions of discrimination, exploitation and violence against the girl-child and women are nurtured. In many cases once the marriage is contracted, the woman is more or less a chattel or possession, of her husband.<sup>31</sup> Often voiceless, she is in most cases without rights in the husband's family except, in some cases, through what accrues to her through her children. The discrimination against

---

<sup>29</sup> *Unequal Rights* (1995) 30.

<sup>30</sup> *Unequal Rights op. cit.* 33.

<sup>31</sup> *Adeseye v Taiwo supra.*

women in marriage is only the climax as throughout a woman's life, right from birth, she is confronted with discrimination in one form or the other on account of her sex.

African customs, traditions and rules should be tested against the rule of human rights. People should be educated to give up customs, traditions and rules that are contrary to human rights norms.

#### 9.2.4 Male child preference

It is pertinent to look at the issue of male child preference and the plight of the girl child. In some communities especially in Asia, discrimination against the girl child starts even before she is born. There is the selective abortion of female foetus. All over Africa, there is frantic quest for a male child, as a male child is better regarded than the girl-child is. This is detrimental to the advancement of the girl child. Almost everybody interviewed prefers to have a male child. Most would rather have an "all boys" family than having only girls. Right from birth, the girl child is discriminated against and disadvantaged. Africa is a patriarchal society. The happiness at the birth of a child is often tinged with dismay that a girl instead of a boy, has been born (particularly if no boy has yet been born to the family in question). This in turn has given rise to jokes that are sexist in nature, imputing greater virility to men who father male children than men who have female children.<sup>32</sup>

There are also discriminations in reasons proffered for certain traditional practices conducted on the girl child as against the male child. An example of a traditional practice with discriminatory undertone towards the girl is circumcision. Traditionally, while the girl child is circumcised in order to curb her sexual instincts and desires, thereby making her less prone to promiscuity (which is in reality a fallacy),<sup>33</sup> the boy child is circumcised to give him added sexual drive and superiority (thereby making him more prone to

<sup>32</sup> Omorogbe (1993) 88-89.

<sup>33</sup> See the Chapter on Reproductive Rights above for a discussion of Female Genital Mutilation.



promiscuity). The dangers health-wise (medically and psychologically) of female genital mutilation and infibulation<sup>34</sup> are never taken into consideration.

The family is the key institution whereby societies' youngest members – the boy and the girl child are socialised into accepting future roles. It is during this process of socialisation that a lot of discrimination against the girl child occurs and is internalised. By age six, female children in Northern Nigeria get dressed in imitation of adult women and begin to be viewed as future wives. One of the major responsibilities they are entrusted with is childcare. This is because first birth among these girls often occurred before the age of 15<sup>35</sup> and as such early maternal training is deemed necessary. They go outside only for specific reasons such as delivering messages, selling food and handicrafts for their mothers who are in seclusion. They are not allowed to play with boys. In fact by age ten, boys are allowed into the female quarters less frequently. They seldom eat or sit with their sisters and mothers. As she grows up, a girl is made to realise her second class status and that her sex is a potential source of shame and dishonour.

Thus, early in life, her inferiority and socially defined sexuality<sup>36</sup> vis-à-vis that of her brothers father or male kin are constantly emphasised.<sup>37</sup> A girl child in Northern Nigeria is often told *ki dinga yin abu kamar mace* meaning “she should behave like a woman”. A girl should sit quietly, talk softly, cover her head and never disagree with a man. *Ba ki ganin ke mace ce, she namiji ne* meaning “can't you see he is a man and you're a woman” is a general refrain repeated to her from her early years. When a girl shows signs of independence of character, she is snubbed by her peers and told *tunda ke mace*

---

<sup>34</sup> Infibulation is the removal of the clitoris, labia minora and part of the medical aspect of the labia majora.

<sup>35</sup> See Chapter 6 above.

<sup>36</sup> Sexuality is “the characteristics that bestows upon an individual, an understanding of him/her as a sexual being and enables him/her to develop a successful sexual relationship with other individuals. It may be more specifically explained as the character of maleness or femaleness” See Koso-Thomas (1987) 37.

<sup>37</sup> See generally Callaway (1992).

ce, a *karkishin wani kike* meaning “you are a woman and as such under someone’s (male) authority”. Thus for an overwhelming majority of the girls, it is almost inconceivable to aspire to any other thing than being wives and mothers.<sup>38</sup>

This form of socialisation is not only particular to Northern Nigeria but is prevalent all over Africa. All over Africa, boys and girls are socialised differently. While boys are given toy guns and cars to play with (an indication that they are expected to grow up to be hard and ruthless), girls are given dolls and toy cooking pots (an indication of their motherly and wifely roles in future).<sup>39</sup>

### 9.2.5 Widowhood rites in Africa

Widowhood is generally accepted as the loss of a spouse through death. Widowhood as defined by society, customs and general law presupposes that marriage in one form or another must have taken place between the deceased and the surviving partner. In this chapter, however, only widowhood as it affects women shall be considered. This is due to the fact that only widows (as opposed to widowers) suffer harmful and adverse cultural practices.

Widowhood affects women differently depending on their age, strength of character, economic status, childlessness and especially ‘sonlessness’. Depending on these factors, widowhood might entail a variety of hardships and frustrations. For instance for those women who lack economic resources, loss of a spouse who was also the breadwinner might mean economic loss. This might mean the widow ends up at the complete mercy of others especially the family of her husband. If she is poor and childless, she would have less bargaining power and little choice if any, to decide whether she stays as a widow or enters into some levirate union or marries someone from outside the family. On the other hand, the position of a widow who is older in age, has a strong character,

---

<sup>38</sup> Callaway *op. cit.* 6.

<sup>39</sup> *Unequal Rights op cit.* 38.

economic muscle, and has sons, would be different. Her position would be enhanced and stronger than that of the former widow.

The concept of widowhood in so far as women are concerned, is further made complex by the levirate system, which is still being practiced in South Africa. By this practice, a male relative of a deceased man is identified to take over the conjugal and other functions that are performed by the deceased with respect to his wife. The practice of levirate is both undesirable and oppressive. The practice also denies the widow the right to choose a man of her own choice should she desire to do so.

Widows experience different pressures to succumb to oppressive and restrictive mourning rituals, which are in some situations both degrading and harmful to their mental and physical well being. In some tribes in Africa,<sup>40</sup> widows are expected to undergo sexual intercourse with a male relative of the deceased husband as a cleansing ritual. This exposes the widow to HIV and other sexually transmitted diseases. Widows sometimes succumb to these pressures in order to ensure their continued membership in their husbands' families for fear of ostracism and for the sake of maintaining good cordial relations with their deceased husbands' families.

Widowhood affects men and women differently in that when a woman dies, the status of widowhood for the surviving man is rarely permanent. A widower will be encouraged and assisted by the family, community and society at large to quickly pass through the state of widowhood and remarry. The temporary state of widowhood for men is explained by the fact that culturally it is expected that women should look after men. As a result everyone pities a man who has lost a wife as he is seen to be in a helpless state and therefore needing a woman to help him cope. The fact that a man is encouraged to remarry seems to put emphasis on the important role a woman plays in a man's life. A woman is acknowledged as providing emotional support for the husband and their children as well as managing the domestic chores. A man is not expected to cope alone

---

<sup>40</sup> E.g. Zambia.

hence is regarded as helpless. This is why it is felt that another woman should take over almost immediately after the death of his wife. This is contradictory because it is normally men's role as providers that is acknowledged and emphasised.

Communities and families condone the non-observance by widowers of the few restrictions and customs they have to observe following their wives' death. For instance widowers do not wear distinctive mourning clothing like widows and that means they do not stand out among other men as widowers. All possible excuses and arguments are often advanced as to why men should not 'mourn' their wives according to custom, and why their mourning should be different. The reverse obtains when a man dies, because the same society will want to enforce all the restrictive customs on the widow even those, which seem out of place in the changed circumstances and living conditions of today.

Despite the inhuman and degrading nature of these widowhood rites, women opt to go through them for the sole reason that refusal to comply would make their male children lose out of their father's estate. Moreover, non-compliance is regarded as conclusive evidence of widow's hand (complicity) in her husband's death.

### 9.3 INTESTATE SUCCESSION AND WIDOWHOOD RITES IN NIGERIA

#### 9.3.1 African customary law of intestate succession in Nigeria

The customary law of intestate succession applies only where there is no testamentary disposition. Where a will is made the customary rule of intestate succession does not apply.<sup>41</sup> Nigerian society like all other African societies is generally patriarchal. Male

---

<sup>41</sup> It should be noted that in Nigeria, you could not make a Will that will negative the rule of customary law in some states of the Federation irrespective of the marital regime in operation. In *Idehen v Idehen* (1991) 6 NWLR Pt 198 382 and *Ogiamen v Ogiamen* (1967) NMLR 245 it was held that "when devising property in Bendel State, you must take note of any "customary law relating thereto". In Edo state, you can therefore not exclude the rule of primogeniture, where property is devised to the first child male. It has been held in *Ogiamen v Ogiamen (supra)* that the property

primogeniture is a system whereby family property is inherited by the first-born male. Where the first born male is dead, the property goes to the first son of the first born male, failing any male issue, the property goes to the brother of the first son male, but never to female children.<sup>42</sup> It applies under the common law and under the customary rule of intestate succession. In Nigeria as well as in South Africa, the type of marriage the deceased entered into determines how his property is to be divided. In Nigeria, if a person who married under the Marriage Act<sup>43</sup> dies, the surviving spouse takes one-third of the estate if there are issues of the marriage, if there are no issues the surviving spouse takes one-half of the estate. However, where a person who is married under customary law dies, the customary rule of intestate succession shall apply in the absence of a will.

In Nigeria, different customary rules apply in different parts of the country. Among the Yorubas of Southwestern Nigeria, the rule of primogeniture does not apply.<sup>44</sup> Under the Yoruba customary law, daughters have the same inalienable rights as sons over their father's property. They are entitled on their father's death to remain in the family house. Their rights to the house do not terminate on their marriage for they are entitled on their husbands' death or termination of their marriage to return and reside in the family house with their children.<sup>45</sup>

The property is shared equally among the children, irrespective of sex. All the children (married or single) share in the property equally.<sup>46</sup> Only children of the deceased shared in the property. It has been judicially noticed that under the customary law of intestate succession of the Yorubas, the brothers and sisters of the deceased cannot share in the

---

Under the Wills Act the property goes to the first son male and if he predecease the father, it then goes to deceased son. See also *Lawal Osula v Lawal Osula* (1993) 2 NWLR (Pt 274) 157; *Adebajo v Adebajo* (1973) 4 Sc 22; *Yinusa v Adesubokan* (1968) NNLR 97.

<sup>42</sup> See *Ogiamen v Ogiamen* (1967) NMLR 245 for a contrary view.

<sup>43</sup> Cap 218 LFN 1990.

<sup>44</sup> *Obilade op. cit.* 90. *Lewis v Bankola supra* at 100 – 101.

<sup>45</sup> *Coker v Coker* (1957) WRNLR 10.

<sup>46</sup> *Olowu v Olowu* (1985) 3 NWLR 372 SC.

property, of the deceased if the deceased is survived by children.<sup>47</sup> The eldest son, the Dawodu, becomes the head of the family taking charge and management of the deceased's estate for himself and other children.<sup>48</sup> It has been held that not only can a woman inherit property but she can also become the family head.<sup>49</sup> Consequently, where the eldest child is a female she succeeds as head of the family. According to Osborne C.J in *Lewis v Bankole* there is "nothing inequitable in this recognition of women's right".<sup>50</sup>

While the rights of daughters to succeed to their father's property has been achieved in Yoruba land, the wife is still treated like a stranger in her husband's family. The custom is that a wife can neither inherit her husband's property nor take a share in his estate.<sup>51</sup> As Coker<sup>52</sup> puts it, "the distinction between the capacity of a female as a child and her capacity as a wife should always be borne in mind as this affects her proprietary interests in family property".

Under the Ibo customary law of succession, females cannot administer a dead man's estate. The rule originates from the custom, which forbids property inheritance by women. The practice is entrenched in patrilineal societies, which accord the right and privilege to inherit to sons alone and exclude daughters and wives from inheritance.<sup>53</sup> Among the Ibos only sons inherit. If the son of a dead Ibo man is a minor, the inheritance is held in trust for him until he grows up.<sup>54</sup>

---

<sup>47</sup> *Adeseye v Taiwo supra*.

<sup>48</sup> *Olowu v Olowu* (1985) 3 NWLR 372 SC.

<sup>49</sup> *Lewis v Bankole* (1908) 1 NLR 81. See also *Folami v Cole* (1986) 2 NWLR Part 22 372.

<sup>50</sup> *Lewis v Bankole* (1908) 1 NLR 81.

<sup>51</sup> *Awobodu v Awobodu & Ors* (1979) 2 LRN 339; *Suberu v Sunmonu* (1957) 2 FSC 33; *Oshilaja v Oshilaja* (1972) 10 CCHCJ 11.

<sup>52</sup> For customary land tenure among the Yorubas see generally Coker (1965).

<sup>53</sup> See generally, Nwogugu (1990), *Nezianya v Okagbue* (1963) 1 All NLR 352; *Nzekwu v Nsekwu* 1 (1989) 2 NWLR Pt 104 373.

<sup>54</sup> *Nezianya v Okagbue supra*.

Among the Binis of Mid Western Nigeria, the first son inherits all the disposable property to the exclusion of his brothers and sisters even though he is allowed the discretion to distribute to his younger ones.<sup>55</sup> The inheritance rights of daughters among the Binis is insignificant as Bini custom dictates that the eldest surviving son of the deceased inherits his father's property absolutely after the final burial ceremony. This rule cannot be varied by making a will.<sup>56</sup> The house in which the deceased lived, and other houses go to the first son, who may allow his junior ones to live there until they acquire theirs or marry. Movable property in the house may however be shared among the other children especially the male ones.<sup>57</sup>

Among the Efiks of Cross Rivers State in Nigeria, the rule of inheritance is similar to the Yorubas. Sons and daughters (married or single) have equal share in the inheritance. Inheritance is not done on sexual line but on seniority lines.<sup>58</sup>

Islamic law is a variant of customary law in Nigeria. Under the Islamic law of inheritance, women are allowed to inherit property either as daughters or wives. However, the share of the property depends on the sex.<sup>59</sup> A wife is entitled to only eight per cent of her late husband's property. Daughters take half of what the male children take (the age notwithstanding). Islamic law allows women to inherit land and houses. Under Islamic law a widower is entitled to one half of his deceased wife's property.<sup>60</sup>

African widows married under the African customary law find themselves in a desperate situation. During marriage a wife's acquisitions become her husband's property. In consequence, when the husband dies a widow stands to lose everything she contributed to the family estate. Although, customary law did not leave the widow destitute, for the

---

<sup>55</sup> See *Ogiamen v Ogiamen supra* and *Idehen v Idehen supra*.

<sup>56</sup> *Idehen v Idehen supra*. See also Nwabueze (1990) 136.

<sup>57</sup> *Unequal Rights op. cit.* 30.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Unequal Rights op. cit.* 32.

<sup>60</sup> *Ibid.* See also Obilade *op. cit.* 87.

marriage was not immediately terminated by the husband's death.<sup>61</sup> The widow's relationship with her husband's family could be kept going via a levirate union and, if that was not a viable option. The widow still had a right to insist that the heir maintain her out of the deceased estate.<sup>62</sup> There are restrictions to the right of the widow to be maintained. The widow had to reside at the deceased's homestead<sup>63</sup> and continue to perform her wifely duties.<sup>64</sup> In practice this meant that she had to remain on good terms with the heir and his family.<sup>65</sup>

In Nigeria, it is generally settled that a widow cannot inherit her deceased husband's landed property under the customary rule of intestate succession.<sup>66</sup> Widows are generally denied direct or any access to the estates of their deceased husbands. The degree and impact of such denial differs according to the age, socio-economic and educational status of the widow.

In Nigeria, the right of a widow to her husband property depends on the type of marriage she has contracted. If the marriage is celebrated under the Marriage Act,<sup>67</sup> the right of the widow is very clear. In the absence of a will, the widow is entitled to one-third of the property if there are issues. If there are no issue, the widow is entitled to one-half of the estate after costs.<sup>68</sup> Where the marriage is celebrated under customary law, then the customary law of intestate succession applies.

---

<sup>61</sup> Bennett (1995) 126.

<sup>62</sup> *Ibid.* Mnani 1977 BAC 270 (S), See Bennett (1995) 126.

<sup>63</sup> *Sonamzi v Nosamana* 2 NAC 297 (1914); *Mavuma v Mbebe* 1948 NAC (C&O) 16; *Tulumane v Ntsodo* 1953 NAC 185 (S).

<sup>64</sup> *Sibanda v Dlokweni* 1936 NAC (C&O) 61; *Myuyu v Nobanjwa* 1947 NAC (C&O) 66; *Kgumare* 1948 NAC (N&T) 21.

<sup>65</sup> See Armstrong *et al* (1993) 7 *International Journal of Law & Family* 348.

<sup>66</sup> See Bennett (1995) 130.

<sup>67</sup> Cap 218 LFN 1990.

<sup>68</sup> See *e.g.* S. 49(1) Administration of Estate Law, Laws of Ogun State of Nigeria.



Under the customary law among the Yorubas of Southwestern Nigeria, a married woman is entitled to her own property. Such property, which could be real or personal, can be freely used by her as long as she acquired them through her own sole effort either before marriage or during marriage. A widow from the Yoruba area cannot inherit her deceased husband's property. It is settled that a widow cannot inherit, as she herself is part of the property to be inherited.<sup>69</sup>

It has been held that where a husband in his lifetime allots a farm, a house or some other form of landed property to his wife for her use and enjoyment, the widow does not thereby acquire inheritance rights in it.<sup>70</sup> A contention that she did acquire such rights under Yoruba customary law was rejected in no uncertain terms by the West African Court of Appeal in *Dosunmu v Dosunmu*.<sup>71</sup> The Court stated that:<sup>72</sup>

The native law and customs alleged here is, briefly, that property can be allotted and descent not through a wife. If such native law and custom existed, I would mean that on the death of the childless wife, not of the same family as her husband, property vested in her would pass away from the husband's family, from whom the wife became entitled to it, to the wife's family.

Another case that illustrated the hardship and injustice to which wives are exposed is *Quartey v Nartey*.<sup>73</sup> In this case a customary law widow sued her deceased husband's family claiming *inter alia* one-third of her husband's intestate estate basing her claim on two grounds. Firstly, she asserted that she helped the husband to acquire the property in question. Secondly she claimed that she was a lawful customary law widow and therefore was entitled under customary law to a share of her husband's intestate estate. The Court was unequivocal in dismissing her claim although it was found that she actually helped in the acquisition of the property. Firstly, it was held that under

<sup>69</sup> *Suberu v Sunmonu* (1957) 2 FSC 33; *Adeseye v Taiwo* (1956) 1 FSC 84.

<sup>70</sup> *Dosunmu v Dosunmu* (1952) 14 WACA 527.

<sup>71</sup> *Dosunmu v Dosunmu* (1952) 14 WACA 527.

<sup>72</sup> *Ibid* 540.

<sup>73</sup> *Quartey v Nartey* (1959) GLR 377.

customary law, a widow does not become a co-owner of property she helped her husband to acquire. It was held that she is only entitled to support and maintenance from her deceased husband's family if she does not remarries.<sup>74</sup> By way of an *obiter dictum* the Court observed that the widow might maintain an action for maintenance and support against the head of the family, the successor to the estate or her husband's relative who had inherited her.

In *Oshilaja v Oshilaja*<sup>75</sup> the judge noted that:

The customary law that a widow cannot inherit her deceased husband's property has become so notorious by frequent proof in the Courts that it has become judicially noticeable.

In *Sogunro-Davies v Sogunro-Davies and Ors*<sup>76</sup> Bekeley J held that a wife was deprived of inheritance rights in deceased husband's estate because:

In intestacy under 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.

In *Suberu v Sunmonu Jibowu*, FJ stated that:<sup>77</sup> it is a well settled rule of native law and custom of the Yoruba that a wife could not inherit her husband's property since she herself is, like a chattel, to be inherited by a relative of her husband.

Thus, a marriage under customary law extends beyond the life of the husband. The death of her husband does not dissolve the marriage.

---

<sup>74</sup> *Ibid.* 385.

<sup>75</sup> *Supra.*

<sup>76</sup> *Sogunro-Davies v Sogunro-Davies* (1929) 2 NLR 79 at 80.

<sup>77</sup> *Supra.*

The Courts in Nigeria are still upholding the unjust rule that a wife is like a chattel to be inherited. In 1988 the Court of Appeal held in *Omo Ogunkoya v Omo Ogunkoya*,<sup>78</sup> that: “The wives left are also regarded as chattel who are inheritable by other members of the family of the deceased under certain conditions”.

Under the Yoruba customary law, a widow is not entirely without rights in her late husband’s estate. She has a legal right to retain the use and possession of the matrimonial home subject to good behaviour and if she does not remarry. A widow is also entitled to farm in her deceased husband’s farmland even if she has no surviving children.<sup>79</sup> A widow who refuses to marry one of the relatives of the deceased husband may divorce and then repay the dowry.<sup>80</sup>

Widows in Ibo land also have no right of inheritance to the deceased husband’s property. In the case of *Nezianya v Okagbue*:<sup>81</sup> a man is survived by a wife, and a daughter. The wife took possession of the deceased property consisting of a piece of land and a house. She collected rents and erected new buildings on the land. She paid all rates and received all the rents without accounting to anyone. Her efforts greatly enhanced the value of the property. On her death, she bequeathed this property to certain beneficiaries whose rights are challenged by a relation of her late husband. In an action brought by the deceased’s beneficiaries to confirm their rights; Reynolds J. was “of the opinion that this action must fail on the grounds that by native law and custom, possession by a widow of land can never be adverse to the rights of her husband’s family so as to enable her to acquire an absolute right to possession of it against the family. This being so it follows that the plaintiffs could acquire no right over the land through the wife”.

The rule of intestate succession as it exists in Nigeria, violates women’s right to equality as men are allowed to inherit their wives properties. Women (as wives) all over Nigeria

---

<sup>78</sup> *Omo Ogunkoya v Omo Ogunkoya* (1988) Suit No CA/L4688 at 6.

<sup>79</sup> *Eze v Okwo* Unreported (1959) Suit No 29/59 Obollo District Court Nsukka.

<sup>80</sup> See Omiyi (1989) 68.

<sup>81</sup> Unreported (1961) Onitsha High Court Suit No 0/17/165.

are not allowed to inherit. The customary rule of intestate succession greatly affects the socio-economic rights of women due to lack of proprietary interest.

### 9.3.2 Widowhood rites in Nigeria

Widowhood can be described as the loss of a spouse. Under Nigerian customary law, widowhood for women is a protracted period during which they must conform to lengthy and confining mourning procedures. Widows go through these rituals because of strong beliefs, which are held about the evils that would befall a widow if she does not conform. Widows also experience a lot of pressure from their own families and societies as a whole and this ensures their conformity. Widowhood tends to be a more permanent state for women than it is for men in similar circumstances. There are lengthy rituals which widows have to go through for instance the Ibo of Eastern Nigeria expects widows to shave their heads, wear black dresses for one year, at times they are expected to drink the water used in bathing the corpse of their husband to absolve them from any complicity in the husband's death.<sup>82</sup> In the Benin areas of mid western Nigeria, a widow is expected to sleep on the bare floor for 7 days and eat from the same plate for seven days (this plate is not to be washed, for the entire period of seven days).<sup>83</sup>

In most parts of Nigeria, widows are expected to wake up neighbours with their cries for the first seven days after the death of their husbands. Some communities like the Auchi community in mid western Nigeria, expects the widow to sleep overnight with the husband's corpse in a closed room without any light, to prove that she did not kill her husband. In a rite witnessed by this writer, two wives of a deceased man are made to sleep one on each side of the deceased, in a dark room for a whole night. This is to prove that they did not kill their deceased husband.

---

<sup>82</sup> Omiyi *op. cit.* 68.

<sup>83</sup> The writer witnessed these rites when her father-in-law died in 1991.

In Eastern Nigeria, a widow is not allowed to take her bath for seven days, as this will mean that she is beautifying herself, when she ought to be crying everyday having lost everything (the deceased husband representing everything). She is kept in a room alone, she sleeps on the floor covered with leaves, she is to hold a stick and a knife in her two hands and she is not to touch any part of her body with her hands, an elderly widow feeds her. The belief is that, if she is responsible for her husband's death, her deceased husband would use the knife and stick to kill her, if she is innocent, the knife and stick would defend her from any evil force.<sup>84</sup>

The account of a widow Cecilia Akuego-Onwu from Eastern Nigeria summarises the plight of widows in this area:<sup>85</sup>

I was forced to sit near the corpse of my husband till daybreak. They (his relations) put kola nut on his chest and forced me to eat it. They made it compulsory that I must eat without washing my hands or cleaning my teeth for seven market weeks, equivalent to one calendar month.

On every market day, about three O'clock in the morning, they sent an old widow to escort me with a lamp to a nearby river to take a bath. This according to them meant that if I killed my husband, he would come out of the river and avenge his death.

There is a general belief in Nigeria that when mourning her deceased husband, the widow is surrounded by ill luck for the duration of the mourning. This belief is so strongly held that the widow's interaction (for the duration of mourning) with other people is restricted, as it is believed that her ill luck will affect other people. It is believed that the ill luck will only cease after performance of rituals, which are supposed to cleanse her. The family of the deceased man decides upon termination of the mourning period for the widow and the widow has no control over this matter.

---

<sup>84</sup> *Unequal Rights op. cit.* 39.

<sup>85</sup> Available on the internet ([www.oneworld.org/ips2/jan99/13\\_40\\_041.htm](http://www.oneworld.org/ips2/jan99/13_40_041.htm)) accessed on 7 March 2000.

There is hardly any ethnic group in Nigeria, where a widow does not go through one dehumanising condition or the other. The difference lies in the gravity of the procedure, which varies from one culture to the other.

In Rivers State (South-eastern Nigeria), practically every community subjects the widow to certain sub-human conditions at the demise of the husband.<sup>86</sup> The general practice in Rivers State, as indeed other parts of Nigeria, is to swath the widow in black from head to toe.<sup>87</sup> irrespective of the fact that the society knows that 'black' is a bad conductor of heat. The widow is expected to be in black for at least one year. This is however not applicable to a husband upon the demise of his wife. Also in most communities in Rivers State, a widow is kept indoors from the date of her husband's death till his burial, irrespective of the fact that she may have young children to cater for or that she may be claustrophobic. Common in Rivers State is the practice of a widow having to prove herself innocent of her husband's death. Thus various rites are conducted such as that among the Emohua people of Rivers state whereby the anus of the corpse is washed and the water is given to the wife to drink to ascertain her innocence in her husband's death.<sup>88</sup> In the Opobo area, the widow is submerged in the river to prove her innocence while among the Kalabari the widow is made to swim across the bottom of the boat. In Ndoni area of the state, throwing of the widow across the deceased's coffin, several times, without her leg striking the coffin proves her innocence. In Bonny (also in Rivers state), the widow is made to sleep on the bare floor on two pieces of plank or on a native mat.<sup>89</sup>

According to a widow in Owerri, widowhood is a time for settling scores especially in the case of a widow who was never favoured by her late husband's family.<sup>90</sup> She goes further to describe widowhood among the Ibos of the old Owerri province as a period of

---

<sup>86</sup> *Unequal Rights op. cit.* 44.

<sup>87</sup> *Ibid.*

<sup>88</sup> See *Unequal Rights op. cit.* 44.

<sup>89</sup> *Unequal Rights op. cit.* 45.

<sup>90</sup> See *New Nigerian Newspaper* 23 April 1993.

great anxiety and pain. Pain at the loss of a dear husband and anxiety at the unpredictable moves the deceased husband's family could direct at a widow.<sup>91</sup>

In Owerri province, on the death of a husband, the woman is taken to the backyard and her hair is completely shaved. She is dressed in tattered clothes and made to sit on a mat on the floor. She remains seated there without having a bath until the burial takes place, no matter how long that is. During the period her food is prepared separately from that of others and is made to eat from an old aluminum plate, which is thrown away at the end of the mourning period.<sup>92</sup> In the Orlu area of Imo state (Nigeria), a month after the burial, a remembrance service takes place, after which the widow can start going out to buy things (she is still clad in black clothes) but does not sell. She does not sell because nobody would buy from her because of her mourning clothes. She does this for one year before she can get involved in active buying and selling. At the expiration off the one-year period of mourning, a daughter of the land, who had been earlier widowed herself, unties the widow's mourning clothes and burns them at midnight.<sup>93</sup> Thereafter, there is a thanksgiving. No reason is given for this practice other that it is "*Ome n'ala*" that is, it is a traditional duty that must be done. A duty irrespective of how loving, dedicated, responsible or otherwise the deceased was during the marriage.<sup>94</sup>

In September 1993 about 2,000 women from Enugu-Agidi in Njikoka Local government area of Anambra State protested against the customs and tradition that humiliate women in the area.<sup>95</sup> Some of the placards of the women read: "Do not debase womanhood in the name of custom; let us have freedom of worship".<sup>96</sup> The women complained

---

<sup>91</sup> *Ibid* 11.

<sup>92</sup> Korieh (1996). Available on the internet ([www.uib.no/hi/korieh/chima](http://www.uib.no/hi/korieh/chima)) accessed on 8 February 2000.

<sup>93</sup> *Ibid*.

<sup>94</sup> Korieh *op. cit.* Available on the internet ([www.uib.no/hi/korieh/chima](http://www.uib.no/hi/korieh/chima)) accessed on 8 February 2000.

<sup>95</sup> *Champion Newspaper* 9 September 1993.

<sup>96</sup> *Champion Newspaper* 9 September 1993.

particularly of the inhuman treatment meted to widows in the area. The women condemned the practice of taking widows naked to a shrine for purification before they are allowed to associate with the public. The practice, the women said, subjected them to pagan worship. Women, who refused to take part in the ‘wicked culture’ according to the women, are harassed, discriminated against and had their family property confiscated.

Among the Quas of Big Qua Town and Akim Qua Town of Cross River State, (also in Nigeria), a traditional practice known as “*Mbukpoisi*” is still carried out on widows of traditional titleholders and rulers (Etuboms). When an “Etubom” (a traditional ruler) dies, his widow is confined to a corner of the house. Throughout the burial period, she is not allowed to go out, she does not take her bath, does not brush her mouth, does not look at a mirror, eats from a broken plate, and sleeps on a dirty mat. Ironically she is guarded by elderly women to make sure she complies with all the rites. If the burial rites take six months or even one year, she is expected to go through this during the period. At the end of the mourning period, she is taken to the stream to bath, her hair is cut and finally she is free. As usual, this does not apply to an “etubom” when his wife dies. Instead, a means of immediately replacing the late wife is sort, to bring comfort to the “etubom” in this time of “great sorrow”.<sup>97</sup>

Among the Binis in Edo State, a widow’s traditional mourning period begins on the night of the burial. She is taken to a back room where for the next seven days she would sit on a few leaves spread on the floor as mat, next to a fire that must burn non-stop for the whole period. She is clad in a small cloth, with a bundle of broomsticks in her right hand, while eating with her left.<sup>98</sup> The only water she has access to it for drinking purposes, thus her left hand, which she uses to eat, remains unwashed for the seven days. At dusk and dawn, she goes to the back of the house to wail at the loss of her husband, an indication of how much she misses him. On the seventh and last day, she keeps an all night vigil along with her relations. When it is about 4.00 a.m. on the seventh day, she

<sup>97</sup> *Unequal Rights op. cit.* 47.

<sup>98</sup> Omorogbe (1993) 91.



gathers her leaves, the wood and ashes from the fire, goes to a designated place which is quite some distance away from the house, and throws away all the items she used for mourning, including the small cloth she has been typing. Chanting songs, she returns home naked. At home, she takes a bath, ties another wrapper before entering the house. Thereafter, she wears black for at least a year and does not step outside for three months.<sup>99</sup>

Also as part of the funeral rites, the widow is compelled to drink part of the water used in washing the corpse thereby swearing that she had in no way contributed to her husband's death. Men are never subjected to such indignities when their wives die.

It is worth noting that it is women themselves who uphold these customs, which may disadvantage and even oppress them. Women are thus the gatekeepers of a culture that oppresses them. In Igbo speaking areas of Nigeria, it is the *Umuada*<sup>100</sup> that enforces widowhood rites.

Widows in Northern Nigeria, unlike their predominately Christian and animist counterparts in Southern Nigeria are not subjected to inhuman and degrading funeral rites. What obtains in Muslim societies of Northern Nigeria is seclusion for the widow for four months.<sup>101</sup> When compared to what obtains in the South, four months seclusion is far much better, although it is still discriminatory, as it does not apply to men. During the four months seclusion, the widow is required to participate in readings of the Koran and ablution. She is seated on a mat in a tent, or in a corner of the house, while receiving condolence messages from relatives, friends and visitors. This takes place on the third, eight-day and 40<sup>th</sup> day. After four months she is free to remarry if she wishes.

---

<sup>99</sup> Omorogbe *op. cit.* 92.

<sup>100</sup> Patrilineal daughters.

<sup>101</sup> *Unequal Rights op. cit.* 40.

## 9.4 INTESTATE SUCCESSION AND WIDOWHOOD RITES IN SOUTH AFRICA

### 9.4.1 Basic characteristics of customary law in South Africa

African customary law, as enumerated in the first part of this chapter, also applies in South Africa. However, African customary law is more developed in South Africa than it is in Nigeria. The South African Constitution<sup>102</sup> recognises African customary law and enjoins the Courts to develop customary law.<sup>103</sup> The Constitution reiterates the individual's right to participate in the culture of his or her choice,<sup>104</sup> and introduces a group right to participate in cultural activities. Neither of these rights may be exercised "in a manner inconsistent with any provision of the Bill of Rights".<sup>105</sup>

Customary law enjoys equal mention with the common law.<sup>106</sup> Section 181(1)(c) provides for the establishment of a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities,<sup>107</sup> while section 211(1) recognises the "institution, status and role of traditional leadership, according to customary law". Section 211(2) provides that traditional authorities, observing a system of customary law, may function subject to any applicable legislation and custom. Section 212(1) and (2) foresee national legislation providing for a role for traditional leaders at local level, the establishment of provincial houses of traditional leaders and a national council of traditional leaders to deal with matters affecting traditional leadership, the role

---

<sup>102</sup> Act 108 of 1996

<sup>103</sup> Act 108 of 1996.

<sup>104</sup> S. 30 Act 108 of 1996.

<sup>105</sup> S. 31 Act 108 of 1996.

<sup>106</sup> S. 39(2) and (3) Act 108 of 1996.

<sup>107</sup> The function of the Commission is set out in S. 185 of the Constitution.

of traditional leaders, customary law and the customs of communities observing a system of customary law.<sup>108</sup>

Section 211(3) of the 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”.

In South Africa there are at least two versions of African customary law – official customary law and living customary law. The version usually relied upon by Courts and other state organs is the official customary law, while the living customary law, is customary law as practiced by the people.<sup>109</sup> Official customary law has been called into question by modern scholarship on the grounds that it is tainted by apartheid, out of date and a distortion of genuine community practices.<sup>110</sup> A distinction is now generally drawn between ‘official’ and ‘living’ law, the latter denoting law actually observed by African communities.<sup>111</sup>

The official version of customary law has its origins in attempts by colonial administrations to reduce the uncertainty inherent in an oral tradition to a system of written rules. The Natal Code of Zulu Law<sup>112</sup> was an early example of this initiative. By the end of the nineteenth century, when it was decided to report judgments handed down by the Native High Court in Natal<sup>113</sup> and the Native Appeal Court in Tanskei,<sup>114</sup> judicial

<sup>108</sup> See the Council of Traditional Leaders Act 10 of 1997, which replaced the Council of Traditional Leaders Act 31 of 1994.

<sup>109</sup> Sanders (1987) 20 *CILSA* 405.

<sup>110</sup> *Ibid* 406.

<sup>111</sup> *Ibid*.

<sup>112</sup> The first version promulgated in 1878 was a compilation of various administrative measures and the more important instrument of customary law, suitably modified to meet colonial policies. It has been revised several times (1891, 1932, 1967 and 1987). Any customary law in conflict with the Code is superseded. See *e.g. Molife* 1934 (NAC) (N&T) 33. and *Ndhlovu v Molife* 1936 NAC (N&T)33

<sup>113</sup> Established in 1898.

precedents are yielding new sources of law. The works of anthropologists are continually supplementing these formal sources.

Although the state's demand for known and certain rules has been amply supplied, critical jurisprudence has revealed that much of the work done during the colonial and apartheid eras was directed by, or at least disposed towards, the interests of the state.<sup>115</sup> The legitimacy of former systems of justice depended on customary law being cast as a tradition, a regime with origins in an autonomous, pre-colonial African society. Thus, the official version of customary law described less what people previously did (or are actually doing) and more of what the government and its chiefly rulers thought they ought to be doing.<sup>116</sup> As several historians of customary law have said, it is an 'invented tradition'.<sup>117</sup>

A particular failing of early empirical studies was a tendency to represent only the interests of senior males. The administrators, missionaries and anthropologists who are responsible for collecting data are unwittingly influenced by their own culture, which, like African culture, was also patriarchal. Hence, issues explored by fieldworkers ere determined largely by men,<sup>118</sup> and in nearly all cases informants are elders, for it was assumed that only men controlled significant information<sup>119</sup>. Authors of the official version of customary law cast it in western terms. Women, for instance, are described as 'minors' under the 'guardianship' of their husbands and fathers or they are said to be subject to 'marital power'. Less obvious than these subtle distortions, but equally

---

<sup>114</sup> Established in 1894. The successor to these colonial Courts was the Native Appeal Court established by the Black Administration Act 38 of 1927. Decision of the NAC continued to be reported until shortly before it was abolished by Act 34 of 1886.

<sup>115</sup> Kuper (1983) 91; Gluckman (1961) 21.

<sup>116</sup> Chanock (1987) 3.

<sup>117</sup> A concept introduced to the study of Law in Africa by Chanock *Law, Custom and Social Order*. "The term 'invented' is to warn people that writers are creating a past that did not in fact exist. See further Gordon: (1989) 2 *Journal of Historical Sociology* 41.

<sup>118</sup> Quinn (1977) 6 *Annual Review Anthropology* 186.

<sup>119</sup> Baerends (1990-91) 30/31 *Journal of Legal Pluralism* 38.

deceiving, was the certainty and precision given to customary law through devices of *stare decisis*, codification and restatement.<sup>120</sup> The basis of any custom is an accepted social practice, which is continually (though often imperceptibly) changing, the fixity of precedent and legislation is alien.<sup>121</sup>

The critical question in any inquiry into customary law will therefore be whether the customs and rules are derived from the 'invented African tradition', whether they are deformed in the process of fitting them into a western legal mould and, most importantly, whether they are now obsolete. In principle, only customary rules grounded on contemporary social practice should be deemed valid.

According to Bennett<sup>122</sup> most customary law of today is of dubious origin that the term is regularly accompanied by a qualifying adjective. "Living" customary law can be relied upon since it refers to the law actually observed by the African communities. "Official" customary law, the *corpus* of rules used by the legal profession, must be treated with circumspection, for it may have no genuine social basis.<sup>123</sup>

A living form of customary law is distilled from current social praxis, it is subject to continual and imperceptible change and probably exists only in an oral tradition. An authentic customary law will lack the precision and conceptual order made possible by writing<sup>124</sup> unlike western law, which is generated by legislation or precedent, customary law tends to be both volatile and uncertain. Instead of being fixed until publicly or officially changed by the law-maker.<sup>125</sup> Age, the legitimating force of customary law, however, guaranteed its stability.<sup>126</sup>

---

<sup>120</sup> Bennett (1991) 23.

<sup>121</sup> Hamnett *op.cit.* 10-13.

<sup>122</sup> Bennett (1995) 60.

<sup>123</sup> Sanders (1987) 20 *CILSA* 405.

<sup>124</sup> Hamnett *op. cit.* 3-10.

<sup>125</sup> Goody (1973) 13.

<sup>126</sup> Bennett (1995) *op. cit.* 126.

Customary law should emerge from what people do, or – more accurately – from what people believe they ought to do, rather than from what a class of legal specialists consider they should do or believe, and the ultimate test is not “what does this judge say”? But rather “what do the participants in the law regard as the rights and duties that apply to them”.<sup>127</sup>

The living customary law is dynamic and constantly adapting to changing social and economic conditions.

Despite all the shortcomings enumerated above, the official version cannot be dismissed out of hand. In the first place, it must be appreciated that a genuine system of custom can never be immediately accessible to those who are not living in the communities concerned. An outsider will always have to rely on second-hand sources.<sup>128</sup> Precedents of the former Black Appeal Courts give valuable guides on how to accommodate two legal traditions. These decisions are instructive, as it will assist those who now have to decide whether customary law conforms to fundamental human rights.<sup>129</sup>

Finally, much of the official version will persist for the simple reason that there are no other reliable accounts of customary law. Litigants are not bound by rules of official customary law. They are free to allege a better version by calling proof of a new or more authentic custom.<sup>130</sup> Where however, the standard of proof is not met,<sup>131</sup> then the official version will prevail for want of better evidence.<sup>132</sup>

---

<sup>127</sup> Hamnett *op.cit.* 10.

<sup>128</sup> Traditional rulers are different. Because they are not socially removed from the cases they adjudicate, they are more likely to be aware of changes occurring in the law.

<sup>129</sup> Bennett (1995) 23-5.

<sup>130</sup> See S1(1) and (2) Law of Evidence Amendment Act.

<sup>131</sup> *Mazibuko* 1930 NAC (N&T) 143; *Ex parte Minister of Native Affairs in re Yako v Beyi* 1948 (1) SA 388 (A) at 394-5, *Masanya v Seleka Tribal Authority & Anor* 1981 (1) SA 522

<sup>132</sup> *Ryzane v Paradzai* 1991 (1) ZLR 273 (SC) 278.

In South Africa, matters of law also fall within the scope of the doctrine of judicial notice.<sup>133</sup> The Courts are assumed to know the law that they administer it need not be proved to them. Customary law is poised as it are, between being law and fact.<sup>134</sup>

In South Africa, the problem of how to prove and ascertain customary law has generally been left to the Courts to solve.<sup>135</sup> The Courts' methods and sources have been diverse. Natal was the first colony to recognise and enforce customary law. Information about the subject was sought by means of a Commission of Inquiry, the Natal Native Commission of 1852. The Cape administration emulated this approach by appointing a Commission on Basuto laws and customs in 1873 and in 1883 the Transkeian Territories formed its own Commission.<sup>136</sup>

Customary law in both its official and living version is important to women especially black women in South Africa as the vast majority of them are governed by the rule of customary law especially in rural areas.

#### **9.4.2 African customary law of intestate succession in South Africa**

One of the main objects of the traditional customary marriage is the continuation of the family lineage of the husband as family head. The customary law of succession contains detailed provisions relating to the status and property of a deceased person. These provisions apply automatically on the death of the deceased, testamentary succession according to will is unknown in customary law.<sup>137</sup> A family head may during his lifetime dispose of property and give instructions on the distribution of his assets, but this power

---

<sup>133</sup> Bennett (1991) 20.

<sup>134</sup> *Ibid.*

<sup>135</sup> See Radcliffe-Brown & Forde, (1975) 43-54.

<sup>136</sup> See generally Lewin (1947) Chapter 1.

<sup>137</sup> Olivier *et al* (1995) 142.

is rather limited.<sup>138</sup> The general principle is that males succeed other males in the family lineage, females normally cannot inherit.

Customary law of succession is based upon the principle of primogeniture according to which the eldest son (or his eldest male descendant) is the person who succeeds the deceased. In a polygamous household this principle is qualified by the fact that the senior or general heir is the eldest son of the “great wife”, even if he is not the first maiden-born son of the family head.<sup>139</sup>

Under the customary rule of inheritance in South Africa, only sons can inherit. In fact only the eldest son can inherit.<sup>140</sup> If the deceased had more than one wife, it is the eldest son of the “great wife”, and not necessarily his first born that would inherit the estate.<sup>141</sup> Each house of a polygamous marriage<sup>142</sup> constitutes a separate estate, which passes to the eldest son in the house. The only exception to this rule occurs among a section of the *Tsonga*. Here the eldest son of the great wife is the ‘universal heir’ to the property in all the houses set up by the father. It should be noted that the heir succeeds to the *status* of the deceased.<sup>143</sup> The term *status* implies that an heir inherits not only the deceased’s property but also his responsibilities, in particular his duty to support surviving family dependants.<sup>144</sup>

---

<sup>138</sup> *Madolo v Nomawe* (1896) 1 NAC 12; *Sekeleni v Sekeleni* 21 SC 118; *Myazi v Nofenti* (1904) 1 NAC 74 *Ntuli v Ntuli* 1929 NHC 5; *Sibiya v Sibiya* 1932 NAC (C&O) 15; *Mrhluli v Mbata* 1940 NAC (N&T) 19; *Matole v Xakekili* 1940 NAC (C&O) 57 *Faro v Faro* 1950 NAC (S) 224; *Nxaba v Nxaba* 1951 NAC (N-E) 795; *Macleans Compendium op. cit.* 120, *Schapera op. cit.* 120; *Hunter* (1961) 121.

<sup>139</sup> *Seymour op. cit.* 49.

<sup>140</sup> *Ibid.* 49.

<sup>141</sup> *Simon op. cit.* 238.

<sup>142</sup> For customary marriage in South Africa See Chapter 8 above.

<sup>143</sup> See Bennett (1991) 399; Bennett (1995) 126.

<sup>144</sup> *Santviso v Misinda* 1935 NAC (C&O) 14.



The general principle in customary law is that children of an unmarried woman belong to her guardian (or his successor)<sup>145</sup> except where the woman and the man concerned thereafter conclude a customary or civil marriage, in which case the children are legalised as if born in wedlock.<sup>146</sup> If the natural father of a child born of an unmarried woman fails to pay the prescribed fine and *isondlo* to her guardian, the child belongs to the latter and has only ultimate rights of succession, that is, he will inherit only upon failure of all male relatives in the family group of the maternal grandfather.<sup>147</sup> When the natural father pays the fine or *isondlo* he obtains custody and guardianship of the child. If the child is a girl he obtains the *lobolo* rights in her. If the father fails to pay the *isondlo*, although he has paid the fine, the child remains with the family of his mother.<sup>148</sup>

The High Court in South Africa recently had the opportunity to test the constitutionality of the customary law of intestate succession.<sup>149</sup> In *Mthembu v Letsela and Another*<sup>150</sup> the applicant contended that the customary rule of intestate succession is discriminatory as it violates Section 8 of the Interim Constitution.<sup>151</sup> Section 8 of the Interim Constitution prohibits discrimination on the basis of sex, among other listed grounds. Unfortunately, the Court found that the rule of primogeniture, which excludes women from intestate succession, is not an unfair discrimination and therefore not unconstitutional since the male person who inherits the property has a duty to maintain the widow and the children left behind by the deceased. The facts of *Mthembu v Letsela*<sup>152</sup> are as follows:

<sup>145</sup> *Paponi v Mpakati* (1912) 3 NAC 241; *Sikivi v Nonjila* (1915) 3 NAC 124; *Nhlapo v Magodhla* 1941 NAC (N&T) 59.

<sup>146</sup> *Ovolo v Tshemese* (1912) 3 NAC 121; *Ntshongolo v Danti* (1914) 3 NAC 126. See also S. 16(1) of the KwaZulu Law on the Code of Zulu law 16 of 1985 and the Natal Code of Zulu Law Proc R151 of 1987.

<sup>147</sup> *Mangqalaza v Mangqalaza* (1904) 1 NAC 82; *Letlotla v Bolofu* 1947 NAC (C&O) 16.

<sup>148</sup> Bennett (1991) 401.

<sup>149</sup> *Mthembu v Letsela and Anor* (No 1) 1997 (2) SA 936 (T).

<sup>150</sup> *Supra*.

<sup>151</sup> Now S. 9 of the Constitution of the Republic of South Africa Act 108 of 1996.

<sup>152</sup> *Supra*.

The applicant entered into a customary union with the deceased L. An amount of *lobolo* was agreed upon. After the first instalment had been paid, but before the balance was paid, L died. A daughter was born of the union between the applicant and L, who had died intestate. According to the customary law rules of succession the first respondent, L's father, was L's sole heir. The applicant, *inter alia*, applied in a Provincial Division to have the rule which excludes African women from intestate succession (the customary law rule) declared to be inconsistent with the provisions of fundamental human rights of the Constitution of Republic of South Africa.<sup>153</sup>

The Court held that the system of primogeniture is recognised in section 23(1) and (2) of the Black Administration Act and that the President had made regulations in terms of section 23(10)(a) of the Black Administration Act and that the system of primogeniture is prescribed for the administration of deceased blacks who die intestate.<sup>154</sup>

The Court held further that the disqualification of the applicant's daughter to inherit from her deceased father flowed from her status as an illegitimate child and not the fact that she was a girl and that the system of primogeniture was applied in customary law.<sup>155</sup>

The issue of whether the deceased was married to the applicant was not settled, because oral evidence are not led as ordered by the Court of first instance.<sup>156</sup> Nonetheless the judge held that the daughter was illegitimate.<sup>157</sup> The Court ought to have treated the applicant as a "putative spouse" within the meaning of regulation 2(d)(iii).<sup>158</sup> That would

---

<sup>153</sup> Interim Constitution, Act 200 of 1993, now Chapter Two of the Final Constitution, Act 108 of 1996. See also S. 23 Black Administration Act 38 of 1927 and Reg 2 promulgated on 6 February 1987 by Government Notice R200 in Government Gazette 10601.

<sup>154</sup> *Mthembu v Letsela and Anor* (No 1) 1997 (2) SA 936 (T) at 954.

<sup>155</sup> *Ibid.*

<sup>156</sup> *Mthembu v Letsela and Anor* (No 1) 1997 (2) SA 936 (T).

<sup>157</sup> At 956.

<sup>158</sup> GN 200 Government Gazette 10601 6 February, 1987.

have placed the applicant in the same position as a widow. The Court however preferred to treat the daughter as illegitimate, thereby avoiding to consider whether the rule of primogeniture amounts to unfair discrimination on the basis of gender equality. The Court held that all illegitimate children do not inherit from their natural father if he dies intestate.<sup>159</sup>

The Court applied the rule of primogeniture and held that the deceased's father is the sole heir in the absence of a male child. The judge stated that the hardship in the rule of primogeniture is mitigated by the heir's concomitant duty of support and protection of the wife or wives was of the deceased and of the children of the deceased.

It is respectfully submitted that the judge missed a unique opportunity to alleviate the problems of widows and thereby ensure the right to equality, which is enshrined in the Constitution. The Court also missed its duty to develop customary law in accordance with the values of the Constitution<sup>160</sup> and also the duty to consider international laws and documents. The judge should have considered international law (for example CEDAW)<sup>161</sup> to arrive at a decision that the system of primogeniture constitutes an unfair discrimination against women as daughters as well as wives.

The Court erred in concluding that the daughter is illegitimate and that as an illegitimate child she is not entitled to inherit from her father. Section 8 of the Interim Constitution prohibits discrimination on the ground of birth. Birth is a prohibited ground and denial of the right of inheritance should have been treated as an unfair discrimination.<sup>162</sup>

---

<sup>159</sup> *Mthembu v Letsela and Anor* (No 2) 1998 (2) SA 675 (T). The decision of the judge is in sharp contrast with the decision in *Sati v Kitsile* 1998 (3) SA 602 (ECD) where it was held that treating black children differently from white children with regard to illegitimacy, constitutes discrimination.

<sup>160</sup> See S. 39 Final Constitution, Act 108 of 1996.

<sup>161</sup> Especially articles 3 and 5.

<sup>162</sup> See Chapter 3 above.

The South African Court of Appeal had a unique opportunity to develop African customary law in the case of *Mthembu v Letsela*<sup>163</sup> when the case came on appeal. Unfortunately, the Court adopted a simplistic approach and held that the daughter of the deceased was illegitimate and that the cause of action in the case arose before the Interim Constitution.

The Supreme Court of Appeal could have relied on the judgment in *Du Plessis v De Klerk*<sup>164</sup> where it was stated that:

We leave open the possibility that there may be cases where the enforcement of previously acquired rights would, in the light of our present constitutional values, be so grossly unjust and abhorrent that it could not be countenanced, whether as being contrary to public policy or on some other basis.

It could have considered the constitutional issues involved in the case notwithstanding the fact that the cause of action arose after the interim Constitution. It is also submitted that the illegitimacy of the daughter should not have been in issue. Section 9 of the Constitution<sup>165</sup> listed “birth” as one of the prohibited grounds. It is suggested that the case should be further appealed to the Constitutional Court and emphasis should be placed on discrimination on the basis of birth.

### 9.4.3 Widowed rites in South Africa

Widowed rites in South Africa are not as severe as in Nigeria. The humiliating rites and practices that Nigerian widows are required to observe under customary law are absent in South Africa.

---

<sup>163</sup> *Mthembu v Letsela* 2000 (3) SA 867 (SCA).

<sup>164</sup> *Du Plessis v De Klerk* 1996 (3) SA 850 (CC).

<sup>165</sup> Constitution of the Republic of South Africa Act 108 of 1996.

In some parts of South Africa, the status of widowhood is almost permanent. A widow rarely remarries and if she does, she is still regarded and referred to as widows of her deceased husband. For instance a widow whose deceased husband was named Dlamini would after remarriage still be referred to as ‘widow’ Dlamini even though her new husband has a different name.<sup>166</sup>

Most widows in South Africa rarely remarry this is due to some customary restrictions which operate on widows alone and does not affect widowers. For instance, the fact that the status of their children with their deceased husbands would be complicated and compromised by their remarriage militates against such a move. If a widow stays within her husband’s family in a levirate union, then her remarriage in this sense would be acceptable. In patrilineal societies, if a widow decided to remarry outside her husbands’ family, she risks loosing her children and property as these are regarded as belonging to the deceased husband’s family.

## **9.5 A COMPARISON OF INTESTATE SUCCESSION AND WIDOWHOOD RITES IN NIGERIA AND SOUTH AFRICA**

African customary law in Nigeria and South Africa is largely similar. Establishment and proof of customary law in the two jurisdictions are alike. One major difference between Nigeria and South Africa in this respect is that African customary law is highly developed in South Africa. There are choices of law problem in both countries, but customary law is usually applied in South Africa where the parties are black. While only “living” customary law exists in Nigeria, official customary also exist in South Africa in addition to the living customary law.

---

<sup>166</sup> WLSA Working paper No. 13 1995 14.

In respect of intestate succession, the position of the widow under the customary law in South Africa is the same as what obtains in Nigeria. The customary rule of succession that operates is the rule of primogeniture. In both jurisdictions widows cannot inherit the property of the deceased husband.<sup>167</sup> In the absence of a male child, the father or brothers of the deceased inherit the property. The primogeniture rule applies strictly in South Africa, but in some parts of Nigeria, daughters are able to inherit equally with sons.<sup>168</sup>

One rule of customary law which all the traditional African societies are unanimous about is that in the customary law of intestate succession the widow has no place in the sense that she can never inherit from her husband on intestacy. It is remarkable to find such uniformity in the customary laws of so many people with different origins, histories and customs. The rule applies irrespective of the services the widow may have rendered to her deceased husband, or of her contributions, financial or otherwise.

Widowhood rites exist in both jurisdictions but the conditions of the widows are worse in Nigeria than in South Africa. Most of the barbaric rituals associated with widowhood in Nigeria are absent in South Africa. The Constitutions of both countries prohibit inhuman and degrading treatment<sup>169</sup> yet in Nigeria widows are subjected inhuman and degrading

---

<sup>167</sup> *Mthembu v Letsela (Supra)*; *Adeseye v Taiwo (Supra)*.

<sup>168</sup> For example, among the Yorubas of South western Nigeria and the Efiks of South eastern Nigeria.

<sup>169</sup> S. 34 1999 Constitution of the Federal Republic of Nigeria and S. 10 Constitution of the Republic of South Africa Act 108 of 1996.

punishment all in the name of widowhood rites. Such inhuman and degrading treatment would not have escaped constitutional scrutiny in South Africa. It is submitted that the infliction of inhuman and degrading punishment in the name of custom should be outlawed in Nigeria. The government and NGOs in Nigeria should take up this challenge.