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WESTERN CAPE**

**AN ANALYSIS OF THE LEGAL FRAMEWORK ON GENDER DISCRIMINATION
AND WOMEN'S RIGHTS TO PROPERTY IN NIGERIA: A CASE STUDY
OF THE IGALA PEOPLE.**

BY

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CAPE.**

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ABSTRACT

Although Nigeria is a signatory to several international, regional, and homegrown legal instruments seeking to promote the rights of women, like; the Convention on the Elimination of all Forms of Discrimination against Women, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, and supported fundamentally by the Constitution of the Federal Republic of Nigeria 1999, which disallows female gender discrimination and also allows women the right to own immovable property. Evidence, however, abounds in most Nigerian communities and ethnic groupings of the flagrant disregard and abuse of the rights of women, especially in reference to property ownership and inheritance during and after marriage. Since the practices that deepen these manifestations of discrimination are supported by age-long traditional beliefs and customs, it seems to thrive without regard to the position of conventions and laws as those aforementioned. It is believed that the patriarchal nature of the Igala (a minority ethnic group, living in Kogi State, North – Central Nigeria and the focal point of this research) provides an enabling environment for women's exclusion regarding property ownership and inheritance, with culture being used as a tool to justify violations. This research, in specific terms, therefore, leverages the substantive equality approach and the claims of patriarchy, which is the core focus of radical feminism theory, to analyse the extent to which traditional beliefs and customs support the violation of the rights of women, as well as the manifestations of discrimination in the exercise of their rights to property ownership and inheritance during and after marriage under the Igala Native Laws and Customs while identifying factors that impede the enforcement of extant laws and conventions against the violation of the rights of women among ethnic groups in Nigeria. This research adopted the doctrinal approach and the Desk-based research method. The doctrinal approach critically assesses the existing legal and institutional framework for the advancement of women's rights in Nigeria as it relates to property ownership and inheritance. A desk-based research entails gathering and analysing data from existing sources. This research shows that the patriarchal nature of the Igala ethnic group sets the parameters for women's structurally unequal position in families by enabling male dominance in terms of property ownership and inheritance. This research suggests an urgent need to eliminate discriminatory practices that deprive married women, widows, and divorced women of their rights to property and inheritance.

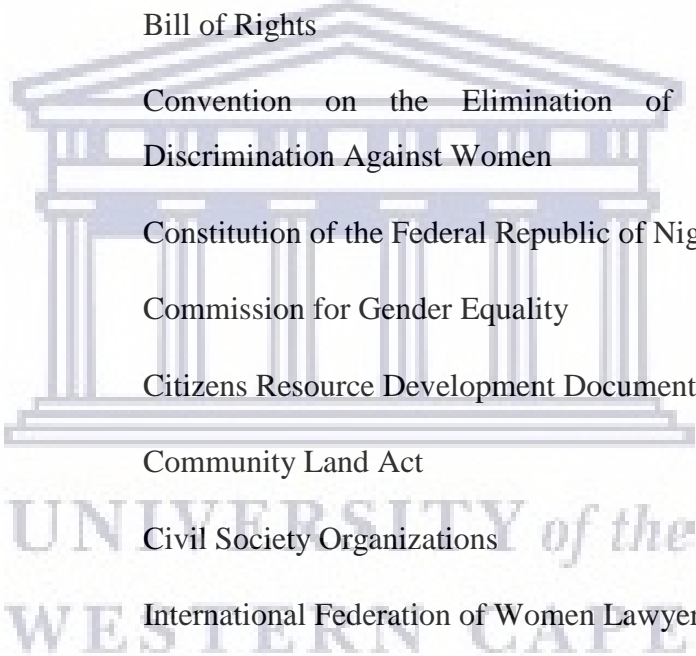
KEYWORDS

1. Customary Law
2. Discrimination
3. Gender
4. Igala people.
5. Inheritance
6. Legal-Framework
7. Marriage
8. Nigeria
9. Patriarchy
10. Property
11. Rights
12. Women



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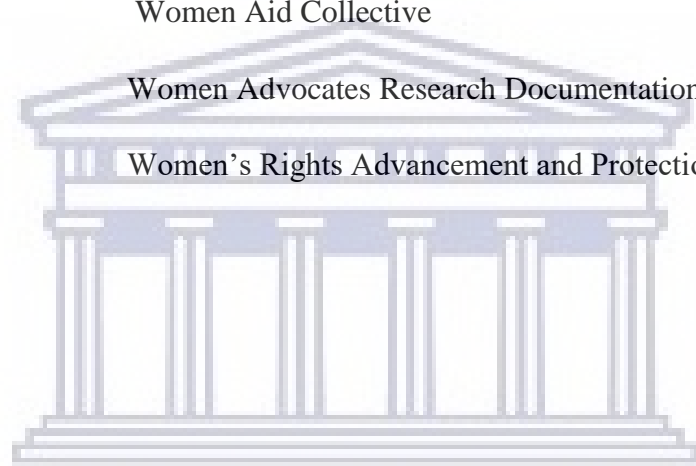
LISTS OF ACRONYMS AND ABBREVIATIONS



ACHPR	African Charter on Human and Peoples' Rights
AELL	Administration of Estate Law of Lagos State
Art.	Article
BAA	Black Administration Act
BoR	Bill of Rights
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CFRN	Constitution of the Federal Republic of Nigeria
CGE	Commission for Gender Equality
CIRDDBC	Citizens Resource Development Documentation Center
CLA	Community Land Act
CSOs	Civil Society Organizations
FIDA	International Federation of Women Lawyers
FMWASD	Federal Ministry of Women Affairs and Social Development
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ISA	Intestate Succession Act
KSVAPPL	A Law to Provide the Elimination of Violence, Prohibition of All Forms of Violence Against Persons, Protection of Victims, and Punishment of Offenders in Kogi State and Other Related Matters Connect Therewith

LA	Land Act
LRA	Land Regulation Act
LSA	Law of Succession Act
LUA	Land Use Act
MA	Marriage Act
MAPUTO PROTOCOL	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
MCA	Matrimonial Causes Act
MPA	Matrimonial Property Act
MWPA	Married Women's Property Act
NGEC	National Gender and Equality Commission
NGOs	Non-Governmental Organizations
NGP	National Gender Policy
NHRC	National Human Rights Commission
NLR	Nigeria Law Reports
NWLR	Nigeria Weekly Law Report
PDRC	Public Defender, and Citizen's Rights Commission
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act
PWD	People With Disabilities
RCLSRRMA	Reform of Customary Law of Succession and Regulation of Related Matters Act
ROCMA	Recognition of Customary Marriages Act

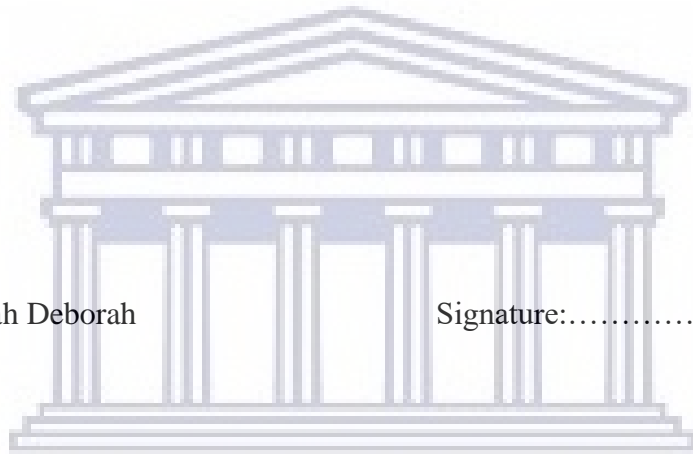
RSPCWRSFPL	Rivers State Prohibition of Curtailment of Women’s Rights to Share in Family Property Law
SC	Supreme Court
SOGA	Statutes of General Application
UDHR	Universal Declaration of Human Rights
VAPP	Violence Against Persons Prohibition Act
WACOL	Women Aid Collective
WARDC	Women Advocates Research Documentation Centre
WRAPA	Women’s Rights Advancement and Protection Alternative



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DECLARATION

I, **Achimugu-Opaluwa Agah Deborah**, declare that ‘An Analysis of the Legal Framework on Gender Discrimination and Women’s Rights to Property in Nigeria: A Case Study of the Igala People’ is my research and that it has not been submitted before for any degree or examination in any other university. All sources I have used or quoted have been indicated and acknowledged as complete references.



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DEDICATION

To God Almighty for making this PhD pursuit a reality, and to my beloved father, HRH (Dr.) AP Opaluwa (of blessed memory) for unfeigned love, encouragement, and support when he was with me.



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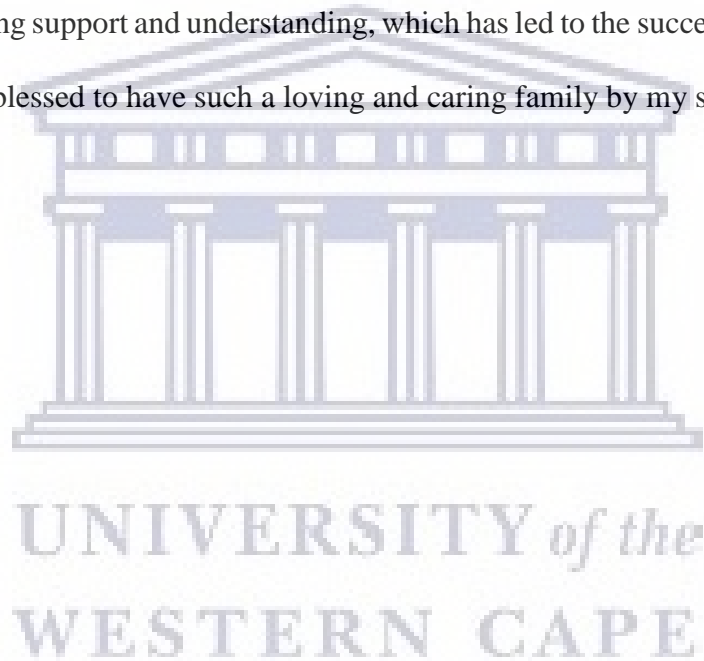


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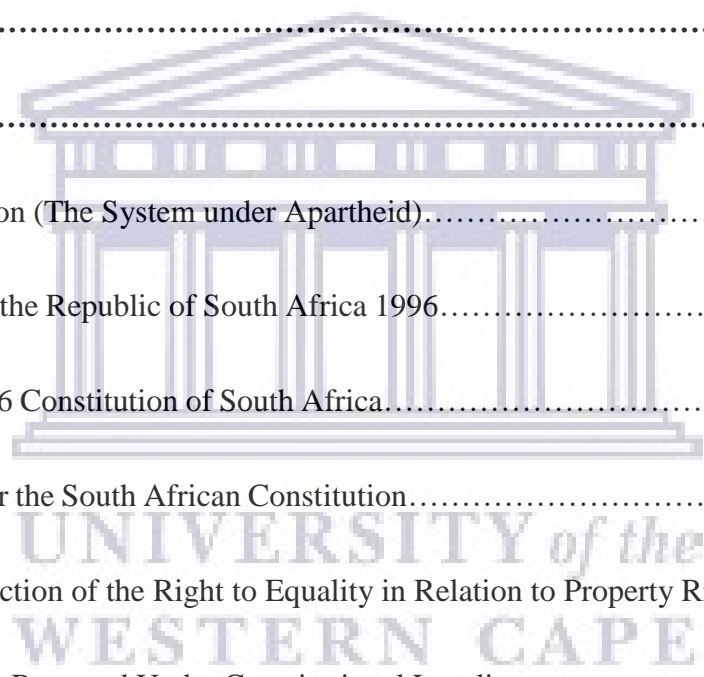
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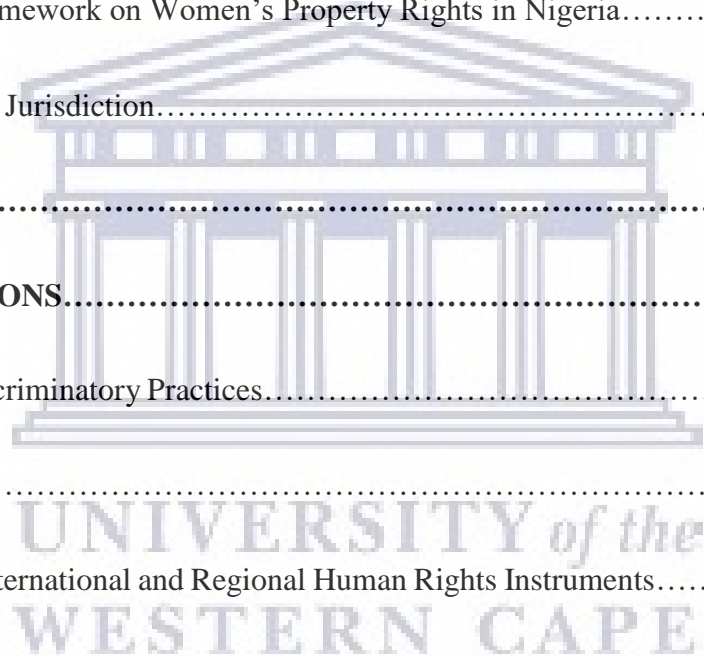
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CHAPTER ONE

GENERAL INTRODUCTION

1.1 Introduction

Nigeria is a signatory to the International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)¹ and the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa (Maputo Protocol),² both of which, as the titles suggest, aim to enhance women's rights and reduce female gender discrimination in relation to women's rights to obtain immovable property during and after marriage and inheritance in Nigeria.³ Similarly, section 42 of the Constitution of the Federal Republic of Nigeria (CFRN) prohibits discrimination on the grounds of gender.⁴ However, female gender discrimination continues to predominate, chiefly accommodated within the frame of cultural practices.⁵

This is evident in the prevalence of ethnic traditions that preclude women from property ownership and inheritance/succession. These cultural practices provide a platform not just for male dominance but also for the exercise of far-reaching authority and control, thereby contradicting the afore-mentioned legal structures, which are of special relevance to protecting and promoting women's property rights in Nigeria.⁶

¹ Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) 18 December 1979, United Nations, Treaty Series, Vol. 1249, 13.

² Protocol to the African Charter on Human and Peoples' Rights on the Right of Women in Africa (the Maputo Protocol), 11 July 2003.

³ Anyogu F *Access to Justice in Nigeria; A Gender Perspective* 2 ed. (2013) ch.3.

⁴ S 42(1) The Constitution of the Federal Republic of Nigeria 1999 (as amended, 2011) (The Nigerian Constitution) "A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion, or political opinion shall not, by reason only that he is such a person;- (a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religious or political opinion are not made subject; or (b) be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religion or political opinions.

⁵ Dickson E, Aloba E, Eni E, & Egbe I, 'Women Gender Equality in Nigeria: A Critical Analysis of Socio-Economic and Political Gender Issues' Vol. 4(1) *Gender Research in Peace, Gender and Development (JKGD)* (2014) 15-20.

⁶ Dickson, Aloba, Eni *etal* (2014) 17.

In addition, the patriarchal nature of the Igala ethnic group establishes the criteria for women's inherently inequitable position by enabling male dominance in terms of property ownership and inheritance. The Igala customary law primarily affect women married under Igala customary law.⁷ This inferior status imposed on women by patriarchy in society, which manifests through subordination, oppression and marginalisation, has attracted the attention of feminists and scholars.⁸ This research employed the substantive equality theory and the radical feminism theory to analyse the legal and feminist perspectives on patriarchy and its effect on the rights of women to property ownership and inheritance. These theories were specifically chosen because they possess an array of perspectives on the best way for advancing and upholding women's rights to property ownership and inheritance during and after marriage, as required in Article 7 (d) of the Maputo Protocol.⁹

This thesis will examine the legal framework that protects women from cultural barriers to ownership of property and inheritance with special reference to Article 7 (d) Maputo Protocol, which categorically states that women and men shall have the right to an equitable sharing of the joint property deriving from the marriage in the event of a separation, divorce or annulment of marriage. In addition, General Comment No. 6 on the Maputo Protocol provides guidance on the interpretation of women's rights during separation, divorce, or annulment of marriage. It aims to ensure that women and men have an equitable share of property jointly owned while the marriage is active. Further, Article 21(1) of the Maputo Protocol clearly states that

⁷ Agbonika J 'The Right of a Woman to Succession and Inheritance under Native Law and Custom in Nigeria: The Need for Reform' Vol. 5 (1) Kogi State University Bi-Annual Journal of Public Law (2013).

⁸ Makama G 'Patriarchy and Gender Inequality in Nigeria: The Way Forward' Vol. 9 (17) *European Scientific Journal* (2013) 115-123.

⁹Article 7(d) Maputo Protocol "*in case of separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of the joint property deriving from the marriage*".

a widow shall have the right to an equitable share in the inheritance of the property of her husband. A widow shall have the right to continue to live in the matrimonial house. In case of remarriage, she shall retain this right if the house belongs to her or she has inherited it.

An examination of Article 7(d), the guidance provided by the General Comment No. 6 of the Maputo Protocol, and Article 21(1) will facilitate a better understanding of how the patriarchal nature of the Igala society contradicts these provisions of the Maputo Protocol that specifically safeguard the rights of women to property ownership in the event of a separation, divorce or annulment of marriage and inheritance in the event of the death of her husband.

In addition, the thesis examined how the exclusion of women in property ownership and inheritance/succession under the Igala customs during and after marriage constitutes female gender discrimination.

To achieve this aim, an analysis of the Igala ethnic group (North-Central Nigeria) in Nigeria was undertaken. The Igala people is situated in Kogi State with about two million people.¹⁰ This ethnic group was chosen specifically for its cultural practice that accords males with a higher status than females. Additionally, the Igala culture views women as property to be inherited, making it difficult for women to own their property. This research demonstrates how the socio-cultural practices of the Igala people contradict the provisions of these legal frameworks that allow women the right to property ownership and inheritance/succession during and after marriage in Nigeria.

The legal obligations for addressing gender discrimination and the extent to which CEDAW, the Maputo Protocol, and the Nigerian Constitution inform judicial decisions on women's rights to

¹⁰ Atawodi S, Olowoniyi O, & Daikwo M 'Ethnobotanical Survey of some Plants Used for the Management of Hypertension in the Igala Speaking Area of Kogi State' Vol. 4 *Nigeria Annual Research & Review in Biology* (2014) 4535-4543.

property ownership and inheritance/succession in Nigeria was also be examined. A critical analysis of how the Nigerian government has responded to this discriminatory practice rooted in cultural practices will facilitate a better understanding of the gaps that need to be addressed in order to eliminate this tradition. Lessons were drawn from other African countries like Kenya and South Africa for the purpose of examining how the South African and Kenyan government advances the rights of women in the area of property ownership and inheritance by incorporating the notion of substantive equality in their national Constitutions. Kenya has greatly achieved gender equality between men and women and has incorporated the notion of substantive equality in their national Constitution. Also, it is imperative to draw lessons from South Africa because they have incorporated the substantive notion of equality in their national Constitution. The South African Constitutional Courts' approach also validates this.

1.2 Statement of Problem

A number of attempts have been made at the global, regional, and domestic levels to eliminate discrimination against women, especially in property ownership and inheritance during and after marriage¹¹. These endeavours have culminated in several human rights instruments such as the Universal Declaration of Human Rights¹², International Covenant on Economic, Social and Cultural Rights,¹³ International Covenant on Civil and Political Rights¹⁴, CEDAW, African Charter on the Human and Peoples' Rights,¹⁵ and the Protocol to the African to the African Charter on the Human and Peoples' Rights on the Rights of Women in Africa, which protects the rights of

¹¹ Ayanleye O 'Gender Rights' in Oliyide O (eds) *Rights*, (2006) 130.

¹² Universal Declaration of Human Rights (UDHR), adopted 1 December, 1948 UNGA Res 217 A (III) (UDHR) Article 17 (1) UDHR "Everyone has the right to own property alone as well as in association with others".

¹³ International Covenant on Economic, Social and Cultural Rights (ICESCR), 16 December 1976.

¹⁴ International Convention on Civil and Political Rights (ICCPR) 1976.

¹⁵ African Charter on Human and Peoples' Rights (African Charter), 27 June, 1981, (AB/LEG/67/13. Rev. 5, 21 I.L.M 58.

women to property¹⁶. Similarly, at the national level, the Nigerian Constitution makes provisions for the protection of women's rights to property¹⁷. However, Igala women are still faced with the challenge of exclusion from property ownership and inheritance rights due to cultural constraints premised on patriarchal assumptions and attitudes.

In addition, land ownership in Nigeria, particularly among the Igala, is either communal or family lands.¹⁸ Traditionally, women had no right to the allocation of either communal or family land because lands were basically acquired by settlement or conquest.¹⁹ Consequently, women are being treated with prejudice with respect to the right to use land and to own property in the Igala ethnic group. In addition, women are not allowed to inherit their deceased husband's property. In the same vein, women who are divorced or going through a separation do not have a right to a share of their husband's property or property jointly owned by them.²⁰

Furthermore, it is an accepted practice within the Igala custom of inheritance and succession that a woman does not inherit from the estate of her husband.²¹ It is believed that upon marriage, she is allowed to remain in the home only for as long as the marriage lasts. While the marriage is still subsisting, it does not confer on her the status of co-owner or joint owner, and she has no right to inherit her husband's property upon his death intestate or divorce. However, a widow is allowed the right to retain, use, and the possession of the matrimonial home if she has male children and is

¹⁶ Adekile O 'Property Rights of Women in Nigeria as Impediment to Full Realization of Economic and Social Rights', available at <https://ssrn.com/abstract=1616270> (accessed 27 September, 2021).

¹⁷ Section 43, Nigerian constitution, "subject to the provisions of this constitution, every citizen of Nigeria shall have the right to acquire and own immovable property anywhere in Nigeria".

¹⁸ Abdullahi A *Igala History and Culture in Igala Language Studies*. (2001) 241, Ateji A *The Influence of Early Marriage on Effective Participation of Igala Women in Human Development; its Implication for Family Counselling*, (unpublished PhD thesis, Faculty of Education, University of Jos, 2006) 18-19.

¹⁹ Abdullahi A (2001) 235.

²⁰ Isaiah A 'The Igala Traditional Religious Belief System: Between Monotheism and Polytheism' available at <https://www.ajol.info/index.php/og/article/view/109609/99374> (accessed 28 February, 2021).

²¹ Okwoli P *Introduction to Igala Traditional Religion* (1996) 53-59.

also subject to her good behaviour. Where a widow has no child and refuses to be inherited by her husband's relations, she will not be allowed to retain their matrimonial home.²² Also, a widow with only female children is regarded as a widow with no child and will not be allowed to retain her matrimonial home unless she accepts to marry her husband's relations.²³ Similarly, in the event of a dissolution of marriage under Igala custom, the woman ceases to retain the right to remain in the matrimonial home even though the house may have been jointly built by them.²⁴ The impact of these discriminatory practices is that women lose their rights to property ownership during and after marriage, perpetuating unfavorable cultural norms and negatively affecting their human rights and economic rights.²⁵

The Nigerian Constitution, which is the foundation of the protection of women's rights in Nigeria, has continued to be violated because of the patriarchal nature of the Igala society.²⁶ Similarly, the Universal Declaration of Human Rights,²⁷ International Covenant on Economic, Social and Cultural Rights,²⁸ International Covenant on Civil and Political Rights,²⁹ CEDAW,³⁰ the African

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²² Olong M 'Cultural Practices and Traditional Beliefs as Impediments to the Enjoyment of Women's Rights in Nigeria', *Nigeria Bar Association Journal of Contemporary Legal Issues, Idah Branch, Kogi State*, (2009) 123.

²³ Boston J *The Igala Kingdom* (1968) 98-146.

²⁴ Okwoli P *Introduction to Igala Traditional Religion* (1996) 23-45.

²⁵ Adeoye O 'Women, Culture and Africa's Land Reform Agenda' (2018) available at <https://doi.org/10.3389/fpsyg.2018.02234> (accessed 1 March 2024).

²⁶ Ngwankwe C "Realizing Women's Economic and Cultural Rights: Challenges and Strategies in Nigeria", available at <http://www.serac.org/Publication/NGWAKWE.pdf> (accessed 8 September, 2021).

²⁷ Article 2, UDHR sets the principle of non-discrimination, including based on sex, in the enjoyment of rights guaranteed in the Declaration. Among many other rights, the Declaration recognizes the rights to property, food, housing and education

²⁸ Article 3, ICESCR, calls on States parties to "undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant" and prohibits discrimination based on sex.

²⁹ International Convention on Civil and Political Rights, 1976, article 3, guarantees equality between women and men, and it prohibits discrimination based on sex, among other grounds,

³⁰ Art. 16 (1)(h) CEDAW provides "The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration".

Charter, and the Maputo Protocol³¹ specifically addresses this discriminatory practice that impedes the right of women to property ownership and inheritance during and after marriage has met very stiff resistance within the Igala ethnic group, because it is believed that strict implementation of these legal instruments will negate the patriarchal system upheld among the Igala people. Despite the clear provisions of these human rights instruments, Nigeria is yet to enact a proactive legislation that would specifically remove the practice of patriarchy that excludes women from property inheritance, especially when a man dies intestate.³²

Lastly, Igala women are largely uninformed about their right to property ownership and inheritance during and after marriage due to a lack of education, hence the flagrant abuse or violation of this right. High illiteracy has made most women ignorant of the existing legislation that protects and promotes their rights to property ownership and inheritance. Similarly, a few court judgments have recognised women's rights to property ownership and the inheritance of immovable property in Nigeria. However, many women are unaware of these court judgments due to the high level of illiteracy.

Existing research lacks examination of the safeguarding and advancement of Igala women's rights to property ownership and inheritance during and after marriage in Nigeria. This research aims to fill this gap. While some researchers have acknowledged the exclusion of Igala women from

³¹ Art. 7(d) the Maputo Protocol provides that "in case of separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of the joint property deriving from the marriage". This provision received further clarification by the General Comment No.6 on the Protocol to the African Charter, which clearly, provided guidance on the interpretation of Article 7(d) on the rights to property during separation, divorce or annulment, and the extent to which men and women shall have equitable rights of joint property deriving from the marriage.

³² Although the Nigerian government has not yet enacted laws specifically aimed at dismantling patriarchy and ensuring women's right to property inheritance, several states, including Enugu, Rivers, and Kogi, have passed laws to protect women's rights in various areas such as female circumcision, marriage, widowhood, maternal care, genital mutilation, prostitution, sexual exploitation, and property rights. Furthermore, the Violence Against Persons (Prohibition) Act 2015 has a positive impact on women's rights. However, it does not specifically safeguard women's rights to property ownership and inheritance during and after marriage.

property ownership and inheritance as a cultural practice rather than a discriminatory practice or human rights concern, this research seeks to challenge that notion. The findings and analyses are anticipated to offer valuable perspectives and recommendations for cultural shifts aimed at safeguarding women's rights to property ownership and inheritance.

1.3 Research Questions

This thesis proposes a detailed examination of whether Nigerian laws and practices on property rights for women are consistent with the country's obligations under international law – using the Igala people as a case study. The primary research question is how gender laws and policies in Nigeria impact the rights of Igala women with respect to property ownership and inheritance during and after marriage.

The secondary research questions that are needed to answer the primary research questions are:

- a. Using the substantive equality framework and the radical feminism theory, how has patriarchy impacted the rights of Igala women to property ownership and inheritance during and after marriage?
- b. Does the legal framework in Nigeria on gender discrimination effectively safeguard the rights of Igala women to property ownership and inheritance?
- c. What are the barriers to the effective implementation of this legal framework?
- d. What are the institutional mechanisms for the advancement of the property rights of women in Nigeria?
- e. What more needs to be done to ensure sustainable improvement in the status of the Igala women in property ownership and inheritance in Nigeria?

1.4 Research Objectives

The main objective of the proposed thesis is to examine and evaluate the impact of gender laws and policies in Nigeria on the rights of Igala women with respect to property ownership and inheritance during and after marriage. In addition, this research used the substantive equality framework and the radical feminism theory to examine the gender laws and give a proper understanding of how these legal instruments impact the rights of women generally and particularly how the patriarchal nature of the Igala society impacts the rights of women to property ownership and inheritance in Nigeria.

1.5 Literature Review

1.5.1 The Nigerian context

Nigeria is located in West Africa with a population of approximately 200 million people,³³ with an estimated 99.13 million women.³⁴ It is the most populous country in Africa and about the seventh-largest in the world, with a multi-ethnic³⁵ composition and culturally diverse group within a federation comprising 36 states and the Federal Capital Territory, Abuja.³⁶ In addition, Nigeria is divided into six geo-political zones namely; the North Central, North East, North West, in the Northern region, and the South East, South-South, and South West in the Southern region.³⁷ There are more than 250 ethnic groups with over 519 languages in Nigeria.³⁸

³³ The World Factbook, 2018.

³⁴ Nigeria People, CIA World Factbook (2018).

³⁵ Nigeria People, CIA World Factbook (2018).

³⁶ Nigeria: The Commonwealth, available at <https://thecommonwealth.org/our-member-countries/nigeria>, (accessed 27 August 2021).

³⁷ Nigeria, The Commonwealth, (2021).

³⁸ Nigeria, The Commonwealth, (2021).

This research seeks to examine the rights of the Igala women (a minority tribe in the North Central zone) to property ownership and inheritance because they still have cultural practices that contradict the provisions of the Convention on the Elimination of all Forms of Discrimination Against Women, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, the Nigerian Constitution and other gender laws that promote and protect the rights of the Igala women.

1.5.2 Female gender discrimination

The socio-cultural space in Nigeria is largely regulated by cultural practices. Ezeilo believes that cultural practices are firmly rooted in patriarchy, excluding women from property ownership and inheritance.³⁹ Also, Elaine and Mama⁴⁰ argue that Africa operates a patriarchal system that encourages women's subjugation. Similarly, Akande⁴¹ is of the view that the Nigerian setting is highly patriarchal in nature. Most feminists are highly critical of how patriarchy impacts adversely on the lives of women.⁴² According to Napikoski,⁴³ the concept of patriarchy is central to many feminist theories. This is because patriarchy imposes a systemic bias on the female gender. Stacey⁴⁴ submits that patriarchy is a structure of social relations that encourages male dominance. In the opinion of Mama,⁴⁵ male dominance, which is what patriarchy represents, was not fully

³⁹ Ezeilo J *Women Law & Human Rights: Global and National Perspectives* (2011) ch.5.

⁴⁰ Elaine S & Mama A *Agenda: Empowering Women for Gender Equity* (2001) 58-63.

⁴¹ Akande J 'Laws and Customs Affecting Women's Status in Nigeria', *International Federation of Women Lawyers Nigeria*, (1979) 47.

⁴² Pierik B 'Patriarchal Power as a Conceptual Tool for Gender History' Vol.26 (1) *Rethinking History* 26 (2022) 71-92.

⁴³ Napikoski L 'Feminist Theories of Patriarchy', *Women's UN Report Network*, 13 March, 2018.

⁴⁴ Stacey J 'Untangling Feminist Theory' in Richardson D & Robinson V (eds.) *Introducing Women's Studies: Feminist Theory and Practice* (1993) 23-32.

⁴⁵ Mama A 'Shedding the Masks and Tearing the Veils: Cultural Studies for a Post-Colonial Africa', in Imam A, Mama A & Sow F (eds.) *Engendering African Social Sciences*, (DAKAR: CODESRIA, 1997) 61-77.

understood until recently. Similarly, Anyogu⁴⁶ believes that patriarchy is the foundation of all forms of women's subordination in society.

Ann⁴⁷ believes that patriarchy is associated with social mechanisms that reproduce and exercise male dominance over women. However, Everistus⁴⁸ posits that radical feminists believe that discrimination against women can be eliminated when patriarchy that exerts male dominance is completely removed. Nkealah⁴⁹ agrees with radical feminists' position that there is a male-based authority and power structure, and it is solely responsible for women's oppression, marginalisation, and discrimination. As long as the system and its values are not totally uprooted, society will not be reformed in any significant way to enhance the rights of women against discrimination.

Additionally, Reginald⁵⁰ submits that in many instances, women have no right to inherit from their husbands or fathers and are treated as property to be inherited. Also, Igwe⁵¹ argues that these notions are condoned largely because of patriarchy and the limited, and sometimes total, lack of education and economic resources of the women whose rights are often breached. In the opinion of Cook & World Health Organization,⁵² the removal of cultural and social barriers to women's equal opportunity amounts to absolute women's health. It is believed that patriarchal cultural barriers do not only discriminate but also affect women's well-being. Further, it is submitted that

⁴⁶ Anyogu F *Access to Justice in Nigeria; A Gender Perspective* (2013) Ch. 3.

⁴⁷ Ann T 'Patriarchy' *Routledge Encyclopedia of International Political Economy*, (2001) 1197-1198.

⁴⁸ Everistus G., 'History and Theory of Feminism', available at https://www.academia.edu/27184077/HISTORY_AND_THEORY_OF_FEMINISM?auto=download&email_work_card=download_paper (accessed 11 November 2021).

⁴⁹ Nkealah N '(West) African Feminisms and their Challenges', Vol. 32 (2) *Journal of Literary Studies* (2016) 61-74.

⁵⁰ Reginald A.O., 'Discriminatory Property Inheritance under Customary Law in Nigeria; NGO to the Rescue' Vol 10 (2) *The International Journal of Not-For-Profit Law* (2008) 1-13; *Nezianya v Okagbue* (1963) 1 ALL NLR p. 352; Boston J *The Igala Kingdom* (1968) 117.

⁵¹ Igwe O 'The Challenges of Domesticating the African Charter on Human and Peoples Rights Holus Bolus: The Case of Nigeria' Vol.2 *Australian Journal of Management, Policy and Law* (2015).

⁵² Cook J & World Health Organization, 'Human Rights in Relation to Women's Health: The Promotion and Protection of Women's Health through International Human Rights Law', (1993) available at <https://apps.who.int/iris/handle/10665/62074> (accessed 1 October 2021).

the reproductive role of women has often been used to defend women's subordination and denial of equal opportunity.

This analyses on patriarchy as the root of female gender discrimination will contribute to knowledge because it will be used to analyse the current status of the Igala women to utilise this knowledge to proffer necessary recommendations to better the lives of Igala women. This is because there is a dearth of scholarship on the proposed thesis that has analysed the rights of the Igala women to property ownership and inheritance during and after marriage using the feminist lenses.

Further, Tilley-Gyado⁵³ asserts that Nigerian parents prefer their male children and teach their girls to be respectful and submissive to male authority and superiority, irrespective of age. Jakayinta,⁵⁴ therefore, submits that in many developing countries, particularly Nigeria, women have few choices in life outside marriage and childbearing. Their rights as individuals are most often denied because they are women.

Additionally, Abara⁵⁵ observes that husbands are generally the heads of families, and women are expected to respect their decisions at all times. The Igala people regard women as men's property by denying women access to property ownership and inheritance.⁵⁶ However, this cultural belief promotes discrimination and violates the goals of CEDAW, the Maputo Protocol, and the Nigerian Constitution. Udoh, Folarin, Isumonah & Amoo⁵⁷ submit that cultural practices that prevent

⁵³ Tilley-Gyado M 'What Shall We Do with Repugnant Customs' in Ayua I.A., (ed.) *Law, Justice and the Nigerian Society* (1995) 201.

⁵⁴ Jakayinta A 'The Status of Female Citizens in the Nigeria Socio- cultural Environments: Implications for Social Education', Vol. 1 *Nigerian journal of Social Studies* (2007) 31.

⁵⁵ Abara C 'Inequality and Discrimination in Nigeria: Tradition and Religion as Negative Factors Affecting Gender', A Paper Presented at the Federation of International Human Right Museums, 8th – 10th October 2012.

⁵⁶ Idoko L *The Igala Tradition and Cultural Values*, (2005) 37-42.

⁵⁷ Udoh O, Folarin S, Isumonah V & Amoo E 'The Influence of Religion and Culture on Women's Rights to Property in Nigeria', (2020) available at <https://doi.org/10.1080/23311983.2020.1750244> (accessed 30 September 2021).

women from inheriting from their husbands or deceased husbands' estates are discriminatory against women on grounds of sex and are, therefore, unconstitutional. Similarly, Tamale⁵⁸ observes that individuals or communities that discriminate against women, thereby violating their rights, are firmly rooted in culture and not within the ambit of human rights.

These commentators did not consider how these unjust cultural practices affect the property rights of the Igala women, as expressly provided for by the international, regional, and domestic human rights legal instruments. Therefore, this research intends to fill this gap. This research demonstrates how these cultural practices contravene the provisions of the Nigerian Constitution, the Maputo Protocol, CEDAW, and other human rights instruments that safeguard the property and inheritance rights of women and recommend the possible measures using the substantive equality theory and radical feminism theory to analyse and devise measures that will help promote the rights of the Igala women to property ownership and inheritance.

1.5.3 Property Ownership and Inheritance under Customary Law

The patriarchal nature of Nigerian society provides an enabling environment for the subjugation of women,⁵⁹ with culture being used as a tool to justify violations.⁶⁰ Aina⁶¹ and Ezeilo⁶² posit that patriarchy is endemic to a traditional society in which gender roles are culturally determined (men are breadwinners, women are homemakers)⁶³, and marginalisation is enshrined in

⁵⁸ Tamale S 'The Right to Culture and the Culture of Rights: A Critical Perspective on Women's Sexual Rights in Africa'. Vol. 16 (1) *Feminist Legal Studies* (2008) 47-69.

⁵⁹ Ukhun C and Inegbedion N 'Cultural Authoritarianism Women and Human Rights Issues among the Esan People of Nigeria', Vol. 5 *African Human Rights Law Journal* 129-147.

⁶⁰ Udoh, Folarin S, Isumonah V & Amoo E (2020).

⁶¹ Aina I 'Women, Culture and Society' in Amadu S & Adetanwa O (eds.) *Nigerian Women in Society and Development* (1998) 54.

⁶² Ezeilo (2011) 288-290.

⁶³ Salaam T 'A Brief analysis on the Situation of Women in Nigeria Today, Democratic Social Movement' [2003] available at <http://www.socialistnigeria.org/women/1-3-03.html> (accessed 2 December 2020). See also Sultana A 'Patriarchy and Women's Subordination. A Theoretical Analysis', Vol. 4, No 1 *Arts Faculties Journal* (2011) Ch. 1.

subjugating laws and practices.⁶⁴ Akande⁶⁵ argues that Nigeria operates an intensely patriarchal system that generates gender differences. This patriarchal reinstatement was reiterated in *Suberu v Sunmonu*,⁶⁶ in which the court determined that it is an accepted rule of Yoruba native law and custom that a wife cannot inherit her husband's property since she is essentially a chattel that has to be inherited by a relative of her husband. Similarly, the Supreme Court (SC), in *Shaibu v Bakare*,⁶⁷ reaffirmed that where a man dies intestate, his property is transferred to his children, not his wife. Once again, these arguments do not consider how these patriarchal values impact the rights of the Igala women to property ownership and inheritance during and after marriage and, therefore, will be examined in this research to bridge the gap not covered by extant literature.

In addition, Meinzen-Dick⁶⁸ opines that in many African societies, women are primarily responsible for food production. However, the absolute ownership and control of land continues to reside with the men. McFerson⁶⁹ argues that women's right to use and own land is an imperative feature of women's fundamental rights. Similarly, John Locke⁷⁰ observed that property is a natural right that an individual is not born with but acquires as a result of an action or transaction. It is believed that property is an important asset everyone must have.⁷¹

⁶⁴ Falana F 'Women's Day and the Gender Day' *This Day Newspaper Online Edition* (2013), available at <https://www.thisdaylive.com/articles/women-s-day-and-the-gender-agenda/141787/> (accessed 9 October 2021).

⁶⁵ Akande J 'Laws and Customs Affecting Women's Status in Nigeria', *International Federation of Women Lawyers Nigeria*, (1979) 47.

⁶⁶ (1957) 2 FSC 31:3.

⁶⁷ (1983) SC 113.

⁶⁸ Meinzen-Dick R 'Property Rights for Empowering Low-Income Women' (2001) available at <https://www.ifpri.org/2020cibferebcm> (accessed 11 October 2021).

⁶⁹ McFerson HM 'Poverty among Women in sub-Saharan Africa: A Review of Selected Issues' Vol.11 (4) *Journal of International Women's Studies* (2010) 57.

⁷⁰ John L *Two Treatises of Government* (1960) 3-8.

⁷¹ Hegel G *Hegel's Philosophy of Right* (1967) 7-10.

In Nigeria, women married under customary law do not have a legal or equitable title to the property even though they contribute to purchasing such property.⁷² Boston submits that the patriarchal structure of the Igala people sees women as property to be inherited by their husbands.⁷³ Akolokwu⁷⁴ observed that the Nigerian custom permits men to inherit their wives as property and has absolute control over every property acquired or gifted their wives before marriage. At death, the woman has no right to inherit her deceased husband's property even though it was owned jointly, but she can retain the use of the matrimonial home if she is of good behaviour.⁷⁵ In addition, the man has absolute control over the woman's property at divorce. Similarly, Gbadebo⁷⁶ is of the view that the registration of jointly owned property in the man's name is one of the causes of the denial of women's rights in Nigeria. Boston⁷⁷ also noted that in the event of a dissolution of marriage or separation, a woman is not allowed to leave with anything except her personal belongings, even where she has given financial support in the building and making of her matrimonial home. These views, however, did not examine the impact of gender laws on the rights of Igala women and is, therefore, a gap this research intends to bridge.

Ajayi and Olotuah⁷⁸ observed that customary laws and cultural practices in Nigeria are violating the property rights of women. They found that women in Nigeria do not have access to property rights in both paternal and matrimonial families, even in cases of divorce or widowhood. The

⁷² Mary A & Abiodun O 'Violation of Women's Property Rights within the Family' (2005) available at <https://www.jstor.org/stable/4066538> (accessed 1 October 2021).

⁷³ Boston J *The Igala Kingdom* (1968) 23.

⁷⁴ Akolowu G 'Property Rights of Married Women under Customary Law in Nigeria: Myth or Reality' (2018) available at <https://www.researchgate.net/publication/333421036> (accessed 3 October 2021).

⁷⁵ Abdulraheem N 'Women's Marital Rights, Perspectives from Nigeria Legal System' Vol. 4(3) *Journal of Law and Conflict Resolution* (2012) 31-44.

⁷⁶ Gbadebo J 'Are we Married into Poverty? Denied Women Land Ownership in Nigeria' Vol. 4(2) *International Research Journal of Agricultural Science and Soil Science* (2014) 51-56.

⁷⁷ Boston J *The Igala Kingdom* (1968) 100-129.

⁷⁸ Ajayi M & Olotuah A 'Violation of Women's Property Rights within the Family' Vol. 19 *Agenda* (2005) 58-63.

culture and attitudes of Nigerians present a barrier to recognizing women's property rights, but this discrimination can be overcome through literacy and legal education. Nanji opined that the patriarchal structure across Nigeria's ethnic diversities contributes immensely toward perpetuating and promoting violence against women.⁷⁹

There are instances where the court upheld customs unfavourable to women's rights to property ownership and inheritance. In *Nezianya v Okagbue*⁸⁰ The court held that according to Onitsha indigenous customs and laws, among the Igbo ethnic group, the fact that a widow possesses the property of her deceased husband does not make her the owner. The consent of the deceased family members is required before she can take any decision on the property. Similarly, in *Oloko v Giwa*,⁸¹ it was determined that a woman who is a divorcee is not entitled to any property in the former husband's home. A divorcee is immediately ejected from the matrimonial home, and she automatically forfeits any land apportioned to her for farming.

This research has examined scholarly literature concerning the discrimination against women, specifically focusing on Igala women. It seeks not only to investigate these discriminatory practices but also to analyze the current status of women through the application of substantive equality theory and radical feminism.

⁷⁹ Nanji N 'I have been treated unfairly': The Harmful Traditional Practice Suppressing Women in Nigeria (2022) <https://minorityafrica.org/i-have-been-treated-unfairly-the-harmful-traditional-practice-suppressing-women-in-nigeria/>

⁸⁰ (1963) 1 ALL NLR 352.

⁸¹ (1939) 15 NLR 31.

1.5.4 Legislative framework

Human rights standards and norms are provided for in the national constitution, regional and international human rights legal instruments.⁸² It is submitted that the role of human rights legal instruments in redressing social and legal inequalities women experience in their communities cannot be overemphasised.⁸³ It is imperative to note that the international and regional human rights instruments were framed using a gendered lens.⁸⁴ Cook⁸⁵ argues that where a law does make a distinction that has the effect of impairing women's rights in any way, it amounts to discrimination as defined by Article 1 CEDAW.

The Nigerian Constitution⁸⁶ is the foundation for protecting women's rights in Nigeria; section 42 addresses discriminatory practices and embodies the principle of gender equality. Similarly, section 43 of the Nigerian Constitution allows every citizen of Nigeria to acquire or own movable or immovable property. This position of the Constitution provides a legal ground for women's property ownership in Nigeria. Despite these provisions of the Nigerian Constitution, the rights of Igala women to property ownership and inheritance continue to face discrimination as a result of the patriarchal nature of the Igala people.

Nigeria exhibited a willingness to eliminate gender discrimination by ratifying the Convention on the Elimination of Gender Discrimination Against Women and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. Both CEDAW and the Maputo

⁸² Balogun V & Durojaye E 'The African Commission on Human and People' Rights and the Promotion and Protection of Sexual and Reproductive Rights' 2 *African Human Rights Law Journal* (2011) 368-395.

⁸³ Cook J *Human Rights of Women: National and International Perspectives* (1994) 45-68.

⁸⁴ Yamin A & Constantin A 'A Long and Winding Road: The Evolution of Applying Human Rights Framework to Health' available at <https://www.law.georgetown.edu/international-law-journal/wp-content/uploads/sites/21/2018/07/GT-GJIL180006.pdf> (accessed 10 October, 2021).

⁸⁵ Cook J *Human Rights of Women: National and International Perspectives* (1995) 56-60.

⁸⁶ The Nigerian Constitution.

Protocol explicitly set forth the rights of women to property ownership and inheritance.⁸⁷ Both CEDAW⁸⁸ and the Maputo Protocol⁸⁹ restate the principle of equality and non-discrimination while also expressing faith in the respect and worth of human persons and the equal rights of women and men. These legal instruments guarantee the right of women to property. Article 7(d) of the Maputo Protocol provides that “in case of separation, divorce or annulment of marriage, women, and men shall have the right to an equitable sharing of the joint property deriving from the marriage.” This provision received further clarification by the General Comment No.6 on the Protocol to the African Charter, which clearly provided guidance on the interpretation of Article 7(d) on the rights to property during separation, divorce, or annulment and the extent to which men and women shall have equitable rights of joint property deriving from the marriage. Similarly, widows are entitled to equal human rights protection with regards to property inheritance as stipulated by Article 21 (1) of the Maputo Protocol.

Further, Nigeria’s legal obligation, therefore, is to promote, protect, respect, enforce, and fulfil its provision so that women in the country enjoy the full realisation of their right to property ownership and inheritance as enshrined in these international, regional and domestic legal instruments.

In response to these legal obligations, Nigeria has initiated institutional mechanisms, such as the Federal Ministry of Women Affairs, the National Centre for Women Development, and the

⁸⁷ Article 16 (h) CEDAW, Articles 7(d) & 21(1) of the Maputo Protocol.

⁸⁸ Article 1 CEDAW ‘For the purposes of the present Convention, the term “discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field’.

⁸⁹ Article 1 (f) Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa “Discrimination against women’ means any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life”.

National Human Rights Commission to promote the advancement of Women through their respective mandates. This includes cooperation with civil society and private sector bodies such as the International Federation of Women Lawyers (FIDA Nigeria), Women Aid Collective (WACOL), Women's Rights Advancement and Protection Alternative (WRAPA Nigeria), the Women Advocates Research Documentation Centre (WARDC), Legal Aid, the Public Defender, and Citizen's Rights Commission (PDRC).⁹⁰ However, most Igala women are ignorant of the existence of these institutional mechanisms in place for the advancement of their rights to property ownership and inheritance due to the high illiteracy level and because most of these civil society organisations and government institutions are situated and operate largely in urban and semi-urban areas.⁹¹

In addition, the advancement of women's property rights in Kenya has been significantly impacted by the substantive equality approach. For instance, the Constitution ensures that men and women have equal rights to acquire, own, and dispose of property.⁹² Further, the Kenyan government allows treaties or Conventions ratified by the Kenyan government to form part of the laws in Kenya.⁹³ This has helped courts apply international and regional human rights instruments without first domesticating the same, unlike Nigeria, a dualist state that requires the domestication of international treaties before recognising them as applicable laws and implementing them.

Further, the Nigerian government shall draw lessons from the South African government. This is because the South African government has incorporated the substantive notion of equality in their national constitution, and the approach of the South African Constitutional Courts has improved

⁹⁰ Joy Ezeilo, (2011) 345-75.

⁹¹ Ogwo B, Ogwo C & Ogwo F 'The Impact of Universal Declaration of Human Rights on Native Law and Custom in Nigeria and the Role of Civil Society' Vol.12-13 *Kogi State University Law Journal* (2020-2021) 290-307.

⁹² Article 45 (3), the Constitution of the Republic of Kenya 2010 (Kenyan Constitution).

⁹³ Article 2 (5) & (6), Kenyan Constitution.

in this regard. As canvased by this research, it is believed that the substantive equality approach will help address the disadvantages imposed on women by patriarchy in property ownership and inheritance during and after marriage.

The implication of section 12 of the Nigerian Constitution⁹⁴ is that human rights treaties ratified by the Nigerian government would not be legally binding until confirmed by the National Assembly. Ekhatore⁹⁵ noted that according to section 19(d) of the Nigerian Constitution, one of Nigeria's foreign policy objectives is to uphold international law. Therefore, Nigeria should aim to abide by and uphold international law within its borders. Additionally, based on Article 27 of the Vienna Convention on the Law of Treaties, *'contracting countries to treaties cannot rely on the basis of its domestic laws as reasons or justification for not performing its expected obligations under such treaties.'*⁹⁶

Although the Convention on the Elimination of Discrimination Against Women is yet to be domesticated in Nigeria, it has influenced judicial decisions in Nigeria. The Court of Appeal relied on CEDAW to determine the case of *Mojekwu v Mojekwu*⁹⁷ where the oli-ekpe custom of Nnewi of Eastern Nigeria, which allows males and not females to inherit their father's property, was held to be inconsistent with constitutional rights to freedom from discrimination on the ground of sex, as guaranteed by section 42(1) of the Nigerian Constitution, and to offend the spirit of CEDAW.

⁹⁴ Section 12 of the Nigerian Constitution provides that "No treaty between the Federation and any other country shall have the force of law except to the extent to which any of such treaty has been enacted into law by the National Assembly. The National Assembly may make laws of the federation or any part there with respect to matters not included in the Executive Legislative list for the purpose of implementing a treaty. A bill for an Act of the National Assembly passed pursuant to the provisions of subsection (2) of this section shall not be presented to the President for assent, and shall not be enacted unless it is ratified by a majority of all the House of Assembly in the Federation". *General Sani Abacha v Gani Fawehinmi* (2000) 6 NWLR 228.

⁹⁵ Ekhatore E 'Women and Access to Environmental Justice in Nigeria' Available at SSRN 3719831 (2020) 223-224.

⁹⁶ Ekhatore (2020) 223.

⁹⁷ (1997) 7 NWLR 238.

Similarly, in *Mojekwu v Ejikeme*⁹⁸ the court held repugnant and unconstitutional the Nrachi customs of the Nnewi people of South-East Nigeria that enable a man to keep one of his daughters perpetually unmarried under his roof to raise male children to succeed him.

Although these cases have become somewhat locus classicus on repugnancy of the customs and cultural practices of the Igala ethnic group, which continue to exclude women from property ownership and inheritance. Until now, the Protocol to the African Charter, which specifically addresses harmful cultural practices, is yet to influence decisions in Nigeria courts concerning the property exclusion of women during and after marriage. It is believed that with greater activism by women's rights groups, women's exclusion of property ownership and inheritance and many more discriminatory customs will come under the repugnancy searchlight that will herald the total elimination of cultural practices that deprive women of equal rights to property ownership and inheritance in the Igala ethnic group.

1.6 Scope of the Research

The thesis is limited to the status of the Igala women on property ownership and inheritance vis-à-vis the gender laws on discrimination and women's right to property in Nigeria during and after customary marriage. The international, regional, and domestic legal human rights instruments that protect and promote the rights against discrimination and particularly, the rights of women to property ownership and inheritance we analysed to understand the extent to which women have the cover of law in this regard. In addition, the judicial response to women's human rights in a bid to safeguard the rights of women to property rights was considered for understanding the impact of these legal instruments.

⁹⁸ (2000) 5 NWLR (pt. 657) 413.

Further, the study critically analyses the institutional mechanisms in place for the advancement of the rights of women to property ownership and inheritance and implementation obligations on the part of the government and non-governmental institutions.

1.7 Theoretical Framework

This research adopts Fredman's⁹⁹ four-dimensional approach of substantive equality theory and radical feminism theory. The substantive equality theory focuses on the fundamental aspect of human rights that borders on equitable outcomes and equal opportunities for the disadvantaged and marginalised people and groups in a society. Fredman¹⁰⁰ conceptualised the right to equality in more substantive ways, with the argument that the right to substantive equality should not adopt a singular formula but provide a four-dimensional approach to redress disadvantage; address stigma, stereotyping, prejudice, and violence; enhance voice and participation, and accommodate difference and achieve structural change.

The objective of Fredman's approach is to provide a comprehensive plan for examining and understanding each dimension and how it answers to those who are excluded, demeaned, ignored, or disadvantaged. It promotes and offers assistance in adjusting and restructuring laws, policies, and practices to achieve substantive equality.

The critics of this approach opine that the four-dimensional approach by Fredman is not as comprehensive as claimed. In MacKinnon's¹⁰¹ response to Fredman, it was argued that there are other areas of law not covered by Fredman's approach that substantive equality is beginning to be

⁹⁹ Fredman S 'Substantive Equality Revisited', Vol. 14, (3) *International Journal of Constitutional Law* (2016) 712–738.

¹⁰⁰ Fredman S., (2016).

¹⁰¹ MacKinnon C 'Substantive Equality Revisited: A Reply to Sandra Fredman' Vol. 14 (3) *International Journal of Constitutional Law*, (2016) 739–746.

recognised under domestic and international human rights laws. It was further observed that Fredman's silence on the issue of sexual abuse, which has been categorised as a sex inequality under human rights, makes her approach not holistic as claimed.

On the other hand, the radical feminism theory argues that the male-controlled capitalist hierarchy is the main feature of women's oppression. They believe that women can only liberate themselves once they have done away with the patriarchal system, which they consider an inherently oppressive and dominant structure.¹⁰²

Some radical feminists who led a group called 'New York Radical Women' in 1967 are Carol Hanisch, Shulamith Firestone, and Robin Morgan. They expressed dissatisfaction with the way their civil rights were being ignored.¹⁰³

Unlike the liberal feminists who desired to be equal to men, radical feminists desired to get rid of patriarchy entirely. They believe that the elimination of women's subordination and male dominance will restructure society in a more significant way.¹⁰⁴

In addition, radical feminism calls for a radical reordering of society whereby male supremacy is eliminated in all social and economic contexts. One of the strengths of radical feminism is that it seeks to abolish patriarchal social norms and institutions with the view of liberating women from unjust societies that advance women's subjugation.

Further, Firestone's argument that women's subordination is specifically rooted in relations and sexuality because there are major differences in the creation of men and women, which enhances

¹⁰² Rowland R. & Klein R *Radical Feminism: Critique and Construct*, 1st edition (1990) 8-17.

¹⁰³ Lee T 'Rethinking the Personal and the Political: Feminist Activism and Civic Engagement', Vol.22 (4), *Hypatia* (2007) 163-179.

¹⁰⁴ Sibani C 'Gender Inequality and its Challenges to Women Development in Nigeria: The Religious Approach, Vol. 18 (2) *Unizik Journal of Arts and Humanities* (2017) 432.

gender discrimination, was criticised by Marxists for putting too much emphasis on reproduction and sexuality. The Marxists believe that the enemy of women is not their male counterparts but the capitalist class, which itself is multi-gendered and multi-racial and not male dominance, rooted in patriarchy.¹⁰⁵

The substantive equality framework and the radical feminist theory are relevant to this research because they help examine the gender laws and give a proper understanding of how these legal instruments impact the rights of women generally and particularly. Also, it analyses how the patriarchal nature of the Igala society impacts the rights of women to property ownership and inheritance in Nigeria. The four-dimensional approach examines how redressing disadvantages can help women avoid experiencing inferior status in a patriarchal society. It also looks at the various facets of gender discrimination and how it can be eliminated.

In addition, this research used the radical feminism theory to analyse the status of Igala women and suggest the possible ways that these legal human rights instruments and institutional mechanisms can redesign or restructure customs that discriminate against women. This helps accommodate the rights of women to property ownership and inheritance in line with the provisions of the Nigerian Constitution, the Maputo Protocol, CEDAW, and other human rights legal instruments.

Further, radical feminism's objective of reordering society by eliminating male dominance that exerts women subordination in order to achieve the goal of women's liberation against marginalisation or discrimination of any form was employed.

¹⁰⁵ Jackson S 'Marxism and Feminism' in Gamble A, Marsh D, & Tant T (eds.) *Marxism and Social Science* (1999) 11-34.

1.8 Significance of the Research

There is no existing research on the protection and promotion of the rights of Igala women to property ownership and inheritance during and after marriage in Nigeria. This research addressed this gap. Some researchers have identified the exclusion of Igala women from property ownership and inheritance as a cultural practice but not a discriminatory practice or a human rights issue. This research intends to address this and the submissions and observations are expected to provide valuable insight and suggestions for cultural changes designed to protect the rights of women to property ownership and inheritance. Additionally, analysing the current status of women, using substantive equality theory and the radical feminism theory, will contribute to knowledge by helping this research examine the different perspectives on the best way to promote and protect women's rights to property ownership and inheritance during and after marriage, as stipulated in articles 7 (d) and 21(1) of the Maputo Protocol. Further, the value of this study is also evident in its examination of the extent to which these human rights instruments inform judicial decisions on women's property and inheritance rights in Nigeria, and highlights areas where the patriarchal structure of the Igala people still poses a challenge, contrary to the legal framework. Raising this awareness will add to the growing body of research in this regard.

1.9 Research Methodology

The primary methods of research for this thesis are doctrinal and desktop-based.¹⁰⁶ The choice of the doctrinal methodology was made due to its emphasis on legal rules, principles, and concepts.¹⁰⁷

This methodology offers clear and precise answers to legal inquiries by analyzing the interpretation and application of these rules in past cases. Additionally, a desktop-based approach was employed to ensure access to a diverse array of legal resources.¹⁰⁸ This includes case law, statutes, regulations, and scholarly articles, all of which are crucial for conducting thorough and comprehensive legal research.

The doctrinal approach is directed at critically assessing and analysing Nigeria's existing legal and institutional framework for the promotion and protection of women's rights to property ownership and inheritance and judicial authorities. This is aimed at ascertaining the application of these laws vis-à-vis the status of women to property ownership and inheritance under the Igala (North-Central Nigeria) native laws. On the other hand, desktop-based research entails gathering and analysing data from existing sources. The sources considered in this thesis shall be included in the bibliography and the footnote of each chapter.

In addition, this research considered statutes, conventions, working papers, reports, resolutions, and legal commentaries targeted toward achieving a workable implementation of the rights of

¹⁰⁶ Salim I, Zuryatii M & Zainal A 'Legal Research of Doctrinal and Non-Doctrinal', Vol. 4 (1) *International Journal of Trend in Research and Development* (2017) 493-495. Ian Dobinson & Francis Johns defines Doctrinal or Theoretical legal research as "a research which asks what the law is in a particular area. It is concerned with analysis of the legal doctrine and how it has been developed and applied. This type of research is also known as pure theoretical research. It consists of either simple research directed at finding a specific statement of law or a more complex and in-depth analysis of legal reasoning. Ian Dobinson & Francis Johns, *Qualitative Legal Research, in Research Methodology for Law*, Edinburgh University Press (2007) 18-19. Aboki Y *Introduction to Legal Research Methodology: A Guide to Writing Long Essays, Theses, Dissertations and Articles* 2 ed (2009) 15-18.

¹⁰⁷ Hutchinson T & Duncan N 'Defining and Describing what we do: Doctrinal Legal Research' Vol. 17 *Rev.*, (2012) 83.

¹⁰⁸ Banakar R & Travers M *Theory and Method in Socio-legal Research* (2005) 28-32.

women to property ownership and inheritance in Nigeria, generally and, particularly, the Igala women. Equally, this research employed the substantive equality framework and the radical feminism theory to show how human rights and feminist-based frameworks are important to the effective realisation of the rights of women to property ownership and inheritance in Nigeria. The substantive equality theory was employed to analyse the impact of the human rights legal instruments that protect and promote women's rights to property ownership and inheritance. Similarly, the radical feminism theory was used to analyse the impact of patriarchy on the rights of the Igala women to property ownership and inheritance during and after marriage.

Further, this research relied on secondary sources, including books, peer-reviewed journal articles, case law, newspaper reports, online sources, and other relevant literature from sociology, history, and socio-legal studies as they relate to women's rights to property in Nigeria.

1.10 Limitations of the Research

Being a research premised on doctrinal/documentary evidence, this study could face the limitation of gaps emanating from the documentation processes, especially in Africa, where oral tradition is heavily relied on. There could be impediments as regards the integrity of such documents. However, I hope to mitigate these limitations by a careful selection of documents limited to those originating from first-hand studies of the Igala people and culture and mostly generated from acclaimed publishers. The views and studies of international organisations of repute would also be harnessed.

1.12 Thesis Structure

Chapter 1 contains the general introduction, background and literature review, problem statement, research questions and objectives, the significance of the research, the research methodology as well as the limitations of the study. The Chapter concludes with the thesis structure.

Chapter 2 considers the substantive equality framework and the radical feminist theory to show how human rights and feminist-based frameworks are important to understanding the impact of patriarchy on the rights of women to property and the effective realisation of the rights of women to property ownership and inheritance in Nigeria.

Chapter 3 takes a critical look at the international and regional legal framework on gender discrimination for analysing the relevant provisions of these laws, which promote the rights of women to property ownership and inheritance during and after marriage. In addition, it discusses the barriers to the effective implementation of these international and regional human rights instruments in Nigeria.

Chapter 4 considers the domestic legal human rights instruments that protect the rights of women to property ownership and inheritance in Nigeria. This chapter considers the Nigerian Constitution, the Land Use Act 1978, the Marriage Act, the Matrimonial Causes Act, the Married Women Property Act, and some State Laws that promote the rights of women to property rights, such as the Prohibition of Infringement of a Widow's and Widower's Fundamental Rights Law 2001 (PIWWFRL) among others. In addition, it shall analyse the status of women in property ownership and inheritance during and after marriage in Nigeria with particular reference to the Igala women, considering the institutional mechanisms in place for the advancement of the rights of women to property ownership and inheritance and implementation obligations on the part of the government

and non-governmental institutions. Further, it shall examine the judicial response to women's human rights in Nigeria with the aim of investigating how the Nigerian judiciary has effectively interpreted and enforced these legal instruments on human rights, especially Articles 7 (d) and 21 (a) of the Maputo Protocol in a bid to safeguard the rights of Igala women's to property rights during and after marriage.

Chapter 5 provides lessons drawn from other jurisdictions, such as Kenya and South Africa, to examine how the notion of substantive equality in their national Constitutions has advanced the property rights of women during and after marriage.

Chapter 6 concludes and offers recommendations to address the situation, including suggestions for the Nigerian government on educating women on their rights and guaranteeing them adequate protection in enforcing their rights to property ownership and inheritance.

The logo of the University of the Western Cape, featuring a stylized classical building with columns and a pediment.

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CHAPTER TWO

THEORETICAL FRAMEWORK

2.1 Introduction

Historically, the perspective of a woman is one of relegation to the background, whereas men played active roles in society and family as decision-makers and breadwinners.¹⁰⁹ In many African communities, women are primarily responsible for food production and procreation. By contrast, men retain entire ownership and control of the property. The elevated status accorded to men perpetuates patriarchal structures that view women as mere chattels or property of men.¹¹⁰ Many indigenous communities in Nigeria recognise a man's right to inherit his wife as personal property, and as such, he owns her and any property she acquired or was gifted before or during the marriage, including income she earned in the course of the marriage.¹¹¹

Under native laws and customs, women in Nigeria are viewed as chattels to be owned and possessed by their male counterparts from birth. Nigerian women have historically experienced discrimination in inheritance, succession, and property sharing for economic as well as to perpetuate male dominance. Despite the adoption and guarantees of numerous agreements, conventions, and charters, the Igala woman's property rights as a married, divorced, or widowed woman continue to be denied.

In traditional societies in Nigeria, marriage is rarely considered an equal partnership, particularly when it comes to spouses' property rights throughout the marriage, during divorce, and following

¹⁰⁹ Adekile O 'Property Rights of Women in Nigeria as Impediment to Full Realization of Economic and Social Rights' *SSRN Electronic Journal* (2010) 23.

¹¹⁰ Udoh O, Folarin S, Isumonah V & Amoo E (2020) 1-10.

¹¹¹ Akolokwu G & Raji B 'Married Women under Customary Law in Nigeria: Myth or Reality' *Legal Network Series* (2018) 1-22.

the death of their husbands. Women married under the Igala customary law are restricted from owning property since they are perceived property of the men.¹¹² This belief stems from the belief that bride price represents a ‘sales’ transaction between the bride’s father and the bridegroom.¹¹³ Similarly, women married under customary law are not allowed to acquire or own property without their husband’s consent.¹¹⁴ Where such consent is rarely obtained, they are not entitled to a share of such property at divorce because it is believed that the woman and everything she owns belongs to the man¹¹⁵. Additionally, an Igala widow is not permitted to inherit her husband’s property, whether in part or whole¹¹⁶. This human rights violation of women’s rights to property ownership and inheritance during and after marriage is evaluated through the lens of substantive equality and radical feminism theories.

Theories are vital in examining whether Nigerian laws and practices on property rights are consistent with the country’s obligations under international law – using the Igala people as a case study. This thesis adopts Friedman’s four-dimensional substantive equality approach and radical feminism theory. This is because both theories are required to understand and address patriarchal obstacles or structures that encourage discriminatory practices against women’s property ownership and inheritance during and after marriage.

This chapter considers the history of the women’s rights movement in Nigeria to explain that the fight for women’s rights is not a recent movement in Nigeria. Additionally, the rights of women to property as a fundamental right was analysed to help understand the need for this right to be protected from every form of discrimination. The position of customary law on the rights of women

¹¹² Boston J (1968) 111-124.

¹¹³ Oputa C ‘Women and Children as Disempowered Groups’ *Federal Ministry of Justice*, (1990) 1-10.

¹¹⁴ Anyogu F (2013) ch.3

¹¹⁵ Okwoli P (1996) 29-31.

¹¹⁶ Idoko L (2005) 40.

to property will also be examined in order to expose and understand the role of patriarchy as the major factor responsible for the subordination of women in Nigeria particularly the Igala ethnic group. The four-dimensional substantive equality approach and the radical feminism theory was considered by examining how these theories can address the obstacles or structures that reinforce patriarchal systems that consistently disallow women from property ownership and inheritance during and after marriage. In conclusion, the relevance of substantive equality and radical feminism theories to property ownership and inheritance in Nigeria was be examined.

2.2 History of Women's Rights Movement in Nigeria

The history of women's rights is intertwined with the development of modern human rights.¹¹⁷ The fight for women's liberation began in the seventeenth century. Barbara Caine gave a chronological account of the fight for women's liberation.¹¹⁸ Most feminist scholars and leaders were predominantly Caucasian women from Western Europe and Northern America. However, as the movement began to gain attention and influence, women of other races proposed alternative feminist theories. The feminist movement has been split into times or periods described by historians as 'waves'. Each wave is characterised by different aims based on prior progress.

The first wave, which occurred in the nineteenth and early twentieth centuries, was largely concerned with obtaining legal rights, political authority, and women's suffrage. Women's right to vote and to be voted for, as well as acknowledgement of women's legal individuality. The second wave in the 1960s and 1970s, pushed women to view portions of their personal life as profoundly politicised and was primarily concerned with other aspects of equality, such as the abolition of

¹¹⁷ Howard R *Women's rights in English-speaking sub-Saharan Africa, Human Rights and Development in Africa* (1984) 24-31.

¹¹⁸ Caine B *English Feminism 1780-1980* (1997) 15-32.

discrimination in society, education, and access to jobs. The third wave emerged in the early 1990s in response to the perceived failings of the second wave and to pushback against programs and movements initiated by the second wave. It is mostly composed of diverse organisations pursuing their forms of feminism in accordance with their respective cultures, interests, social groups, and religions.¹¹⁹

By the time most African countries, including Nigeria, were colonised, the struggles of women in the Western world had emerged and, in some circumstances, resulted in domestic legislation, acknowledging not only the ability of women to be treated as minors but to enter into a contract or to vote and be voted for.¹²⁰ The African women's struggle has been against the state, and feminist debates have been centered on women's oppression and the nature of society. Women's oppression manifested in different shapes and shades depending on the cultural beliefs of the society.¹²¹ Feminists were concerned about understanding and eliminating inequalities and discrimination supported by¹²² – customary or other laws. The feminist struggle is based on the need and acknowledgment of women's rights and values.¹²³

In Nigeria, various communities were governed and deeply rooted in patriarchal systems and the sexist ideologies and practices. Matters relating to property ownership and inheritance were of customary and economic value. Families or clans were in charge of lands and had the responsibility

¹¹⁹ George R & Douglas J *Sociological Theory* 6th edition (2003) 436-458.

¹²⁰ Adele O 'An Assessment of the Role of Women Group in Women Political Participation and Economic Development in Nigeria (2019) available at <https://doi:10.3389/fsoc.2019.00052> (accessed 28 March 2022).

¹²¹ Mama A & Salo E *Talking about Feminism in Africa: Empowering Women for Gender Equality* (2001) 50, 58-63. Nkama U 'The Impacts of the Development of Feminism in the Present Day Nigerian Society' Vol.7 (1) *International Journal of Academic Research and Reflection* (2019) 1-5.

¹²² Charlotte B 'Transforming Human Rights from a Feminist Perspective' in Peters J & Andrea W (eds.) *Women's Rights, Human Rights* (1995) 15.

¹²³ Fraser S 'Becoming Human: The Origins and Development of Women's Human Rights' *Human Rights Quarterly* 214 (1999) 856-891.

to resolve issues of property ownership or inheritance. Due to patriarchal structures, women were not allowed to own or inherit property. They were denied access to property or inheritance because it is believed that property ownership or inheritance was a source of wealth in society. In order to emphasise the superiority of men, women had no access to financial resources or the ability to generate them. They were seen as appendages of their fathers, brothers, and husbands.

Historically, Nigerian women have participated in a variety of activities and initiatives in their own right to improve their lives by combating patriarchy and establishing equal rights for women.¹²⁴ Several women have fought in support of the liberation of women. Queen Amina of Zazzau¹²⁵ and Queen Kambassa of Bonny¹²⁶ are typical examples of feminine strength in Nigeria during the pre-colonial and colonial eras. While Queen Amina led armies, waged wars, and forced emirates like Katsina and Kano to pay tributes to her State, Queen Kambassa spearheaded the Bonny Kingdom's militarisation.¹²⁷ These legends demonstrated the possibility of winning the fight for women's liberation in their various communities. The Iyoba Idia of Benin displayed her ability in Benin City after the death of her husband. She battled for the right of Obaship for her son, Esigie, and restructured the political structure of the Benin Kingdom.¹²⁸ Ebule'Jonu (a woman is king) founded the Igala kingdom and the chieftaincy system in Igala land.¹²⁹

¹²⁴ Abdul M 'Analysis of the History, Organization and Challenges of Feminism in Nigeria' (2012) available at <https://www.nawey.net/wp-content/uploads/downloads/2012/05/Feminism-in-Nigeria.pdf> (accessed 28 March 2022).

¹²⁵ Agbese A 'Maintaining Power in the Face of Political, Economic and Social Discrimination: The Tale of Nigerian Women' Vol. 26 (1) *Women and Language* (2003) 18-25.

¹²⁶ Bristol-Alagbariya E 'Natural Right of Blood Descendant-Females of the Founding Ancestors of Bonny Kingdom to Leadership Positions: Spotlight On Queen Kambasa And Legacies Of Her Reign' Vol. 10 (3) *Developing Country Studies* (2020) 93-102.

¹²⁷ Awe B *Nigerian Women in Historical Perspectives* (1992) 30-35.

¹²⁸ Nzegwu N 'Iyoba Idia: The Hidden Oba of Benin' Vol. 9 *Jenda: Journal of Culture and African Women Studies* (2006) 35-45.

¹²⁹ Boston J *The Igala Kingdom* (1968) 4-17. The Igalas are ruled by a powerful figure known as the "Ata." The term "Ata" means "Father," and the ruler's full title is "Ata Igala," which means "Father of the Igala people." Ebule jo'onu, the first 'Ata Igala,' was a woman.

Nigeria has a large number of organisations that work towards ensuring equal opportunities for women. Some of these organisations focus on the legal issues affecting women, such as women's property rights. Despite the efforts of organisations such as BAOBAB for Women's Rights, Women in Nigeria, National Council of Women's Societies, Women's Consortium of Nigeria, Widening Scope for Rights and Developments, Women Advocates Research and Documentation Centre, Women's Aid Collective, Women's Rights Advancement and Protection Alternative, Legal Aid, International Federation of Women Lawyers and others, the rights of Igala women to property ownership and inheritance are still denied them because of patriarchal or male-dominated structures. This violation persists in spite of the various human rights instruments of the United Nations, the African Union, and the concerted efforts of the Nigerian government and a number of non-governmental organisations that promote the rights of women to property ownership and inheritance.

2.3 Women's Rights to Property as a Fundamental Human Right

The Nigerian Constitution acknowledges and establishes certain fundamental rights for its citizens. These constitutional provisions cover all citizens, including married women.¹³⁰ Nonetheless, despite these and other international instruments' provisions, women continue to be denied their right to own property simply because they are females, as well as because Nigeria's various customary laws dictate and approve the same.¹³¹

Women's human rights are an important and indivisible aspect of human rights and are fundamental freedoms owed to humans as a result of their status as humans.¹³² The Nigerian

¹³⁰ Sections 42 and 43 of the Nigerian Constitution.

¹³¹ Abdulraheem N 'Rights of Women in Pre & Post-Colonial Era in Nigeria: Challenges for Today' Vol. 3(2) *Journal of Public Law, Department of Public Law, Kogi State University* (2010) 83-93.

¹³² Okolie E 'Critical Analysis of State of Women's Rights in Nigeria' Vol. 53 *International Journal of African and Asian Studies* (2019) 51-54.

Constitution guarantees the right to be free from discrimination. No one shall be discriminated against based on their gender, religion, ethnicity, political beliefs, or birth circumstances.¹³³ As a result, it is consistent to state that discrimination against women is an aberration under this constitutional provision.

Nigeria has signed an array of international and regional legal instruments with the objective of safeguarding women's rights. CEDAW, as well as the Maputo Protocol and other human rights instruments,¹³⁴ are examples of these legal instruments. Article 5 CEDAW, adopted by the United Nations General Assembly in 1979 and signed and ratified by Nigeria without reservation in 1984, *"encourages nations to modify men's and women's social and cultural patterns of conduct with the aim of eliminating inferiority and superiority of either sexes"*.

The right of women to use land and own property is a critical component of their fundamental rights, particularly in Nigeria.¹³⁵ In terms of the right of succession and the right to equal opportunity under customary law, it is an unavoidable fact that women are overlooked and treated unfairly. This prejudice is also visible in the treatment of women going through a divorce, divorced women, and the right of a widowed woman to inherit from her deceased husband's estate. The difficulty in bestowing property on a former wife under customary law is that members of a

¹³³ Section 42 Nigerian Constitution, 1999.

¹³⁴ Article 2, Universal Declaration on Human Rights 1948 (UDHR) sets the principle of non-discrimination, including based on sex, in the enjoyment of rights guaranteed in the Declaration. Among many other rights, the Declaration recognizes the rights to property, food, housing and education. Article 3, International Covenant on Economic, Social and Cultural Rights (ICESCR) calls on States parties to *"undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant"* and prohibits discrimination based on sex. Similarly, Article 3, International Convention on Civil and Political Rights (ICCPR) 1976, guarantees equality between women and men, and it prohibits discrimination based on sex, among other grounds,

¹³⁵ Oyewo T, *A Handbook on African Laws of Marriage, Inheritance and Succession* (1999) 12-34.

community typically hold land in trust. This makes it difficult to segregate and divide the land into portions. Most importantly, the wife is regarded as the husband's property.

By allowing male dominance in terms of property ownership and inheritance, the patriarchal nature of the Igala ethnic group is the platform for women's disadvantaged position within families. Feminists and scholars have drawn attention to the inferior status imposed on women by patriarchal societies, which manifests as subordination, oppression, and marginalisation.¹³⁶ In order to understand, address, and eliminate the patriarchal systems that violate the rights of Igala women to property ownership and inheritance, the substantive equality and radical feminism theories shall be used to examine the legal and feminist perspectives on patriarchy and its impact on women's rights to property ownership and inheritance. These theories were chosen specifically because they offer a variety of perspectives on the best way to advance Igala women's rights to property ownership and inheritance during and after marriage, as stipulated in Article 7 (d) of the Maputo Protocol.

2.4 Women's Rights of Inheritance under Customary Law in Nigeria

Inheritance is commonly thought to be intended to make material provisions for surviving relatives linked to the deceased by a special relationship determined by historical, cultural, and religious considerations depending on the legal system in question.¹³⁷ Inheritance under customary laws in Nigeria takes on as many different forms as there are different ethnic groups in Nigeria. However, the Igala ethnic group inheritance practice has become so notorious that it has gone unnoticed.

¹³⁶ Folarin S & Udoh O 'Beijing Declaration and Women's Rights in Nigeria' *European Scientific Journal* Vol. 10 (34) (2014) 239-249.

¹³⁷ Sani I 'An Appraisal of Women's Rights to Inheritance under Islamic Law' Vol. 4(5) *Journal of Islamic Law* (2007) 8-10.

Despite the fact that there is a plethora of legislation protecting women's rights to inheritance, certain ethnic groups in Nigeria still adhere to antiquated practices that discriminate against women's rights to inheritance.¹³⁸ In Nigeria, particularly the Igala people, women have no definite share of inheritance in their deceased husband's property.¹³⁹ At best, women are given the right to care, maintenance, and accommodation in their husband's estate. Whenever a woman raises matters around her right to inheritance, she is subjected to discrimination and inequality in favour of their male counterparts (husband's relatives).¹⁴⁰

Upon the death of her husband, the wife or wives may be allowed to use the portion of the land she had been given to farm on. She is also entitled to continue to live in the room or hut allocated to her by her husband in his lifetime. However, this gesture is subject to her remaining there unmarried or remarrying her deceased husband's relative. The Igala custom allows levirate marriage. Levirate marriage is a practice that specifies that a man's widow must marry his surviving relative in order to continue the relationship between the woman and her deceased husband's family.¹⁴¹ This accounts for the practice of a woman's husband's relation referring to her as "our wife", which means that she is married to the family and not just her husband. Hence, upon the death of her husband, for her to continue enjoying some of the benefits of that marriage, she will need to consider and accept a levirate marriage arrangement with a relation of her deceased husband.

¹³⁸ Okagbue, I (1995) 201-205.

¹³⁹ Anyogu F (2013) 98-105. Boston J (1968) 34.

¹⁴⁰ Amana A *Igala Native Laws and Customs* (1990) 45-47.

¹⁴¹ Kudo Y 'Why Is the Practice of Levirate Marriage Disappearing in Africa? HIV/AIDS as an Agent of Institutional Change' (2016) available at https://www.ide.go.jp/library/japanese/Publish/Reports/InterimReports/2017/pdf/B16_cho1.pdf (accessed 13 April, 2022).

Igala customs provide the wife of a deceased person with little or no status. She is not a beneficiary of her late husband's inheritance; only her children, notably the male children. This patriarchal custom was reinforced in the case of *Ihiama v Akogu*¹⁴² where the court held that “*a daughter under the Igala native laws and customs is not allowed to own land because she will be married to another family*”. A widow's rights to her deceased husband's property are derived from the male children she bore for him.¹⁴³ Where such male child/children are very young, subject to the permission of her deceased husband's family, she may rarely be permitted to administer it in trust for them until they reach the age of majority and are capable of managing the property themselves.¹⁴⁴

When a widow does not have male offspring, she may be allowed to use a portion of her deceased husband's property to support herself and her female children based on the compassionate disposition of her husband's family. Where a widow has no children with her deceased husband, she may be permitted to continue living in his residence, subject to the goodwill of his relatives. However, her status is quite uncertain, as she is not considered part of her husband's family. She may be ejected at any time, especially if she refuses to marry a male relative of her late husband.¹⁴⁵

All over Igala land, a widow has no right of inheritance over her deceased husband's property.¹⁴⁶ Inheritance of property under the Igala custom is the exclusive preserve of male children.¹⁴⁷ This practice is largely encouraged by the patriarchal nature of the Igala society, where male domination

¹⁴² Unreported case of Okpo Area Court Grade II Suit No. MD/26A/78.

¹⁴³ Okwoli P *Introduction to Igala Traditional Religion* (1996) 53-59; Nwaechehu H & Kalama S ‘Discrimination against Female and Widow in Inheritance of Real Estate and Succession in the South Eastern Nigeria: A Breach of International Instrument and the Nigerian Constitution’ *Journal of Law, Policy and Globalization* (2019) 53-60.

¹⁴⁴ Onuoha R (2008) 1-13.

¹⁴⁵ Nworgu E, Nworgu C, Babalola S, et'al, ‘Exploring Land Ownership and Inheritance in Nigeria’ *Part 4: Higher Education, Lifelong Learning and Social Inclusion* (2014) 354-360.

¹⁴⁶ Boston J (1968) 115-117.

¹⁴⁷ Abdullahi A *Igala History and Culture in Igala Language Studies* (2001) 241.

empowers men to subordinate women.¹⁴⁸ Radical feminists are of the opinion that the position of women will not improve as long as patriarchal systems that cause discrimination against women are not effectively addressed.¹⁴⁹

Women are denied inheritance both as a child and as a widow. It is the male child/children that is/are reckoned with in the distribution of property for the purpose of inheritance.¹⁵⁰ The belief is that a female will get married and go to her husband's house, and as such, the property of the father cannot be entrusted to her. On the other hand, a widow is not allowed to inherit her deceased husband's property.¹⁵¹ This practice has been upheld in some instances by the Nigerian courts. In *Nzekwu v Nzekwu*¹⁵² the court held that the interest of the widow in the house is possessory and not proprietary, so the widow cannot dispose of it. However, she has a right to remain in the building after the death of her husband, but this is subject to good behaviour. This decision was also re-affirmed in *Nezianya v Okagbue*¹⁵³ the court held that under the custom and native law of Onitsha among the Igbo Ethnic group, a widow's possession of her deceased husband's property does not make her the owner. She cannot deal with the property without the consent of the family. Furthermore, in a polygamous marriage under customary law, there cannot be implied gifts by the husband to the wife.¹⁵⁴ In *Eze v Okwo*,¹⁵⁵ three customary law widows survived the deceased but had no children. Before his death, the deceased instructed his senior wife to administer his property and use the income to maintain herself and other wives and remain in the compound, hoping they

¹⁴⁸ Ajih L 'The Effects of Son-Preference in Igala Land' Vol.3 (1) *Journal of Multidisciplinary Studies* (2017) 45-56.

¹⁴⁹ Willis E 'Radical Feminism and Feminist Radicalism' (1984) available at <https://www.jstor.org/stable/466537> (accessed 4 April 2022).

¹⁵⁰ Obi S *The Customary Law Manual* (1977) 136.

¹⁵¹ Adekunle T 'Succession and Inheritance Law in Nigeria: Resolving the Discriminatory Proprietary Rights of Widows and Children' available at <https://www.academia.edu/35665674> (accessed 4 April 2022).

¹⁵² (1989) 2 NWLR (Pt. 104) 375.

¹⁵³ (1963) 1 ALL NLR 352.

¹⁵⁴ *Madu v Madu* (2007) 14 NWLR (Pt. 284) 335.

¹⁵⁵ Unreported (1959) Obovo District Court, Suit No. 29159 and Nsukka County Court of Appeal.

may have children for him. The most senior wife attempted to carry out the wishes of her husband but was challenged by the deceased husband's nephew. He claimed that the senior wife and the other wife lacked the capacity to inherit her deceased husband's compound nor administer it. The court held that a widow can neither inherit her husband's compound nor administer it.

However, in recent times, a few decisions of the Nigerian courts frown at the denial of female inheritance rights. In *Mojekwu v Mojekwu*,¹⁵⁶ Niki Tobi J.C.A (as he then was) stated that:

Is such a custom constant with equality and fair play in an egalitarian society such as ours day after day, month after month, and year after year, we hear and read about customs that discriminate against womenfolk in this country? They are regarded as inferior to the menfolk. Why should it be so? All human beings- male and female – are born into a free world and are expected to participate freely, without any inhibition on grounds of sex; and this is constitutional. Any form of societal discrimination on grounds of sex; apart from being unconstitutional, is in antithesis to a society built on the tenets of democracy, which we have freely chosen as people.

The Supreme Court reiterated this position in *Mojekwu v Iwuchukwu*¹⁵⁷, where Fabiyi JSC strongly condemned the Nrachi¹⁵⁸ custom and viewed such practices as repugnant and repulsive. In deciding the rights of a widow to her deceased husband's estate, the court held that customs that denied women of their rights to inherit their deceased husband's or father's property were repugnant to natural justice equity and a good conscience and contrary to section 42(1) of the Nigerian Constitution. Similarly, in the case of *Ukeje v Ukeje* the Supreme Court held that:

no matter the circumstances of the birth of a female child, such a child is entitled to an inheritance from her late father's estate. Consequently, the Igbo customary law that disentitles a female child from partaking in the sharing of her deceased father's estate is in breach of section 42(1) of the Constitution, a fundamental rights provision guaranteed every Nigerian.

¹⁵⁶ (1997) 7 NWLR (Pt. 512) 283.

¹⁵⁷ (2014) LREL-22724 (SC).

¹⁵⁸ Nrachi custom occurs where the head of the family who was not blessed with a male child restricts at least one of his female children from getting married for giving birth to a male child or male children who will carry on the name and legacy of the family or lineage.

The said discriminatory customary law is void as it conflicts with section 42(1) and (2) of the Constitution.

This decision agrees that women are being discriminated against in property inheritance. However, the right of a widow was not considered in this case.¹⁵⁹

The Nigerian Constitution expressly prohibits gender-based discrimination. Also, there are a plethora of international and regional human rights instruments to which Nigeria is a signatory. These include the Universal Declaration on Human Rights, Convention on the Elimination of all Forms of Discrimination Against Women, International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the African Charter on Human and People's Rights and the African Charter on Human and People's Rights on the Rights of Women in Africa. These human rights instruments place a responsibility on State Parties to put measures in place that ensure men and women are treated equally. For these human rights instruments to achieve their aim in Nigeria, the government needs to reflect the notion of substantive equality. The purpose of CEDAW and the Maputo Protocol is to achieve substantive equality. The definition of discrimination by both instruments suggests that the application of the substantive equality approach is key to achieving equality between men and women.¹⁶⁰ The overall obligation of State Parties to these treaties is to take necessary steps and measures to eliminate discrimination against women within their territories. The Maputo Protocol imposes an obligation on the Nigerian government to adopt appropriate legislation to address harmful practices and

¹⁵⁹ (2014) 11 NWLR (Pt. 1418) 384, 408.

¹⁶⁰ Article 1 CEDAW, defines discrimination against women as “Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field”. Similarly, Article 1 Maputo Protocol, defines discrimination against women as “Any distinction, exclusion against or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their mental status, of human rights and fundamental freedoms in all spheres of life”.

protect the rights of women. It is submitted that to attain substantive equality, some corrective actions may be required to offset the patriarchal nature of the Igala society that disallows women to inherit property.

2. 5 Sharing of Property after Divorce in Nigeria

Nigeria's patriarchal system of property ownership discriminates against women regarding property sharing after a divorce.¹⁶¹ Most times, property is acquired in the man's name as the legal owner or inherited through the man.¹⁶² The cultural principle is that the man is responsible for her welfare, and her proprietary interest is through her husband and among his people.¹⁶³ Culturally, women are not allowed to acquire separate property.¹⁶⁴ Women married under customary law are not allowed to obtain and own property to the exclusion of their husbands.¹⁶⁵ This is because, in pre-colonial times, a woman's money and income were considered to belong to her husband.¹⁶⁶ The wife's right to purchase and own real estate was subject to the husband's prior agreement and overall control, and a woman married under customary law was not entitled to property settlement or transfer at divorce other than her personal effects.¹⁶⁷ The distribution and expenditure of family

¹⁶¹ Odiaka N 'The Concept of Gender Justice and Women's Rights in Nigeria: Addressing the Missing Link', *Afe Bablola University Journal of Sustainable Development Law and Policy* (2013) 200-204.

¹⁶² Attah M 'Divorcing Marriage from Marital Assets: Why Equity and Women fail in Property Readjustment Actions in Nigeria' Vol. 6 (3) *Journal of African Law* (2018) 427-446.

¹⁶³ Manji A 'Her name is Kamundage: Rethinking Women and Property among the Haya of Tanzania' Vol. 70 (3) *Journal of the International African Institute* (2000) 483-484.

¹⁶⁴ Efe C & Eberechi O 'Property Rights of Nigerian Women at Divorce: A Case for a redistribution Order' (2020) available at <https://dx.doi.org/10.17159/17273781/2020/v23i0a5306> (accessed 5 April 2022).

¹⁶⁵ Ashiru M 'Gender Discrimination in the Division of Property on Divorce in Nigeria' *Journal of African Law* (2007) 321. Obi S Customary Law Manual para 321. This manual was created by the Ministry of Justice's Law Revision, Research, and Reporting Division in Enugu and comprises the customary laws that are currently in effect in all communities in Anambra and Imo State. Para 322 of the Obi Customary Law Manual also states that "Although the movable and immovable property acquired by a married woman is solely hers, it is subject to the general control of her husband. She must ask her husband's permission before transferring any property gained during marriage to anybody other than her kid, either during her lifetime or by will".

¹⁶⁶ Efe C 'The Need for the Statutory Introduction of the Concept of "Matrimonial Property" in Nigeria' Vol. 63 (1) *Journal of African Law* (2019) 105-125.

¹⁶⁷ Izunwa M 'A Critique of Certain Aspects of the Grounds, Procedure and Reliefs attaching to Customary Divorce Laws in Southern Nigeria' Vol. 7 (6) *Journal of Law and Conflict Resolution* (2015) 31-38.

income and property is the sole business of the man.¹⁶⁸ Even in instances where a marriage is conducted under the Marriage Act in Nigeria, there is still the expectation that the woman should not acquire a property without notifying her husband and without his concurrence.

When a marriage is dissolved under customary law, the woman has no claim to property settlement, even if she assisted in the acquisition of the property.¹⁶⁹ She cannot compel her ex-husband to divide the property he ,or they jointly own. However, under statutory marriage (marriage under the Act), either party can file a property settlement petition to the court with the divorce petition simultaneously.¹⁷⁰ In the case of *Jolugbo & Anor v. Aina & Anor*¹⁷¹ , the Nigerian Court of Appeal upheld the view that where a woman acquires property in her husband's name and conveys it in her husband's name, the presumption is that the husband holds the property in trust for his wife. With respect to marriages conducted under the Marriage Act,¹⁷² for an application for a property right to be successful, the parties must demonstrate, by a preponderance of the evidence, that they are joint owners of the property in question or that their financial contributions to the property's purchase or development were considerable.¹⁷³ The right of women to property after divorce under the Act is not absolute as it requires evidence of financial contributions on her part.

¹⁶⁸ Mann K 'Women, Landed Property and the Accumulation of Wealth in Early Colonial Lagos' Vol.16 (4) *Signs* (1991) 682.

¹⁶⁹ Okeke P 'Reconfiguring Tradition: Women's Rights and Social Status in Contemporary Nigeria' Vol. 47 (1) *Africa Today* (2000) 49-51.

¹⁷⁰ Section 72 of the Matrimonial Causes Act (MCA) 18 of 1970 (Cap M7 Laws of the Federation of Nigeria 2004), provides that "*in proceedings under this Decree, by order require the parties to the Marriage, or either of them to make for the benefit of all or any of the parties to and the children of the marriage such settlement of property to which the parties or either of them is entitled (whether in possession or reversion) as the court considers just and equitable in the circumstances of the cases*".

¹⁷¹ (2016) LPELR – 40352.

¹⁷² Marriage Act, 1914 (Cap M6 *Laws of the Federation of Nigeria*, 2004).

¹⁷³ *Amadi v Nwosu* (1992) Legalpedia SC UJBT 1, 4.

After divorce, women lose all rights and claims in their ex-husband's family and assets. She cannot inherit or be entitled to any form of financial support from her ex-husband.¹⁷⁴ However, the position is changing. In the case of *Mrs. Toyin Arajulu v Mr. James Monday*¹⁷⁵ the court held that “a husband who marries a woman and builds a house during the pendency of the marriage stands the risk of losing that house if he later divorces the woman who had children for him unless such woman, of her own volition, leaves the matrimonial home.” The court further stated that it is irrelevant who owns the property or who pays what (on it) and how much, as long as the arrangement is fair and just in light of the circumstances of the case. This is because the determination of such matters transcends all rights, legal or even equitable. Under the Igala custom, a divorced woman has no stake in her ex-husband's estate. The man is only expected to maintain his wife while the marriage subsists by providing her with necessities of life such as shelter, clothing, and medical care to the best of his ability, regarding his financial capacity. The woman has no right to her husband's assets after divorce.¹⁷⁶

The Maputo Protocol states that in the event of a separation, divorce, or annulment of marriage, both men and women have the right to an equitable share of the joint property derived from the marriage.¹⁷⁷ Furthermore, the Maputo Protocol's General Comment No. 6 gives guidance on the interpretation of women's rights during separation, divorce, or annulment of marriage. It seeks to ensure that women and men receive an equitable share of property jointly owned during the marriage's active period. Similarly, Article 16 (h)¹⁷⁸ provides the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment, and disposition of

¹⁷⁴ Obi S *Modern Family Law in Southern Nigeria* (1966) 245-246; Nwogugu E *Family law in Nigeria* (1974) 215-216.

¹⁷⁵ (2019) Oyo State High Court Suit No. I/169/2015 (unreported case).

¹⁷⁶ Boston J (1968) 115-117.

¹⁷⁷ Article 7(d) Maputo Protocol.

¹⁷⁸ CEDAW.

property, whether free of charge or for a valuable consideration. Despite these provisions, women are still being discriminated against in the area of property sharing or ownership after a divorce.

By virtue of the Marriage Act (MA), the Matrimonial Causes Act (MCA), and the Married Women's Property Act (MWPA),¹⁷⁹ provided married women with the ability to possess their separate property in Nigeria. However, the patriarchal structure of the Igala society makes it difficult for women to have a share in their ex-husband's property after a divorce. This is derived from the concept that women are not allowed to own property in order to reinforce male supremacy and women's submission. It is submitted that women's equal access to property ownership and inheritance during and after marriage will largely eliminate the patriarchal attitudes that reinforce male supremacy in most traditional communities, particularly the Igala ethnic group.

2.6 Substantive Equality Approach

The substantive equality approach originated in opposition to formal equality. The concept of formal equality is traceable to many decades in history. The origin of formal equality can be traced to Aristotle and his dictum that "*things that are alike should be treated alike*".¹⁸⁰ This is currently the most prevalent perspective on equality. According to the notion that fairness requires consistent or equal treatment, individual justice is supported as the foundation for a moral claim to virtue in formal equality. At that time, the application of formal equality was seen as slavery because it reinforced male dominance and women's subjugation. Dissatisfaction and anger with the restrictions of formal equality gave rise to substantive equality. It aspires to pick up where formal equality stops.

¹⁷⁹Married Women Property Act 1870.

¹⁸⁰ Aristotle J *The Ethics of Aristotle the Nicomachean Ethics* (1953) 112-117.

The premise that a person's physical or personal characteristics should be disregarded when evaluating whether or not they are entitled to some social advantage or gain is supported by the formal approach to equality and non-discrimination. The principle of merit is central to most proponents' defence of this model. The liberal argument asserts that formal equality is required in order to uphold the principle of merit in a democratic society.

Unlike formal equality, which seeks to instil a moral principle by consistently applying rules and procedures, substantive equality, which is the equality of outcomes, seeks to invest a moral principle in the application of equality.¹⁸¹ Substantive equality is suitable for addressing property ownership and inheritance of women because it focuses on equal outcomes. Whereas formal equality advocates for equal opportunities.

Rosenfeld¹⁸² believes the concept of formal equality proves to be ambiguous and inconsistent. This is so because formal equality gives people the chance to attain the same goal in the face or absence of the same specified obstacle or set of obstacles.¹⁸³ Formal equality signifies equal treatment of individuals, with little or no regard for their social status.¹⁸⁴ Equal opportunities do not remove the patriarchal structures that reinforce male dominance and women's subordination.¹⁸⁵

The substantive equality approach, on the other hand, focuses on equitable opportunities for disadvantaged and marginalised people. Equally, the substantive equality approach ensures all persons have an equal playing field.¹⁸⁶ The equal treatment of the individual is done with special

¹⁸¹ Department for Communities and Local Government, 'Discrimination Law Review, A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain, a Consultation Paper' (2007) 61.

¹⁸² Rosenfeld M 'Substantive Equality and Equal Opportunity: A Jurisprudential Appraisal' Vol. 74 (5) *California Law Review* (1986) 1687-1688.

¹⁸³ Westen P *The Concept of Equal Opportunity*, 95 *Ethics* (1985) 837-844.

¹⁸⁴ Durojaye E & Owoeye Y (2017) 70-85.

¹⁸⁵ Balot R 'Aristotle's Critique of Phaleas: Justice, Equality and Pleonexia' No. 1. 129 *Hermes* (2001) 32-44.

¹⁸⁶ Durojaye E (2012) 106.

reference to their socio-economic status, race, or gender. The substantive equality approach does not align with the concept of universal individuals.

Albertyn and Goldblatt¹⁸⁷ believe that a commitment to substantive equality necessitates an examination of the circumstances of a purported infringement of rights and its relationship to systematic forms of control within a society. Flowing from this, the substantive equality approach aims at providing correction to cultural and structural disadvantages, such as the patriarchal nature of the Nigerian society, and at the same time, aspires to provide equitable outcomes to women's property ownership and inheritance. Also, discriminatory practices against women contradict the fundamental rights and freedom of women.¹⁸⁸

Fredman¹⁸⁹ has identified a four-dimensional approach to substantive equality. She believes that conceptualising the right to equality in more substantive ways will not only provide equal opportunities but equitable outcomes. The four-dimensional approach seeks to redress disadvantage; address stigma, stereotyping, prejudice, and violence, enhance voice and participation; accommodate difference, and achieve structural change. The goal of Fredman's approach anticipates a thorough plan for the adjustments and restructuring of laws, policies, and practices to achieve substantive equality.

This four-dimensional approach is pertinent to determining if Nigerian property laws and practices are consistent with the country's international legal commitments - using the Igala people. This is because attempts by Nigerian courts to overturn cultural practices prohibiting women from owning or inheriting property have been centred mostly on formal equality rather than substantive equality.

¹⁸⁷ Albertyn C and Goldblatt B 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' 14 *South African Journal on Human Rights* (1998) 248-276.

¹⁸⁸ Durojaye E 'Between Rhetoric and Reality: The Relevance of Substantive Equality Approach to Addressing Gender Inequality in Mozambique' Vol.30 *Afrika Focus* (2017) 31-52.

¹⁸⁹ Fredman S (2016) 712-738.

The courts rarely examine fair results, which explains why, despite apparent progress over the years in promoting women's property rights, many continue to be denied such rights.¹⁹⁰ Using the four-dimensional approach to understand and address the patriarchal nature of the Igala society enhance equitable outcomes which manifest by ways of correcting disadvantages, stigma, stereotyping, enhance voice and participation and achieve structural changes in line with the mandate of UDHR, CEDAW, ICESCR, ICCPR, Maputo Protocol, and the Nigerian Constitution.

2.6.1 Purpose of the Four-Dimensional Substantive Equality Approach

The substantive equality approach is adopted to correct cultural and structural disadvantages and, at the same time, providing equitable outcomes. The goal of substantive equality is to achieve equality of outcome and opportunity. In its most basic form, substantive equality is concerned with creating a more equal society. In some cases, achieving equality may imply treating¹⁹¹ those who are different equally, while in others, it may imply treating those who are different differently.¹⁹² Equality of outcomes is a substantive definition of equality because it tries to give substance to the concept of equality. In different jurisdictions, this concept of equality is manifested through a variety of policies and legal mechanisms.¹⁹³

The four-dimensional approach is based on current understandings of the right to substantive equality. The four-dimensional method tries to provide an analytic framework for better understanding the multi-faceted nature of inequality and assessing whether actions, practices, or institutions inhibit or promote equality. Redressing disadvantage; addressing stigma, stereotyping, prejudice, violence; enhancing voice and participation; accommodating diversity, and achieving

¹⁹⁰ Durojaye E & Owoeye Y (2017) 70-85.

¹⁹¹ *Law v. Canada* [1999] 1 S.C.R. 497.

¹⁹² Durojaye E (2017) 31-52.

¹⁹³ McCrudden C 'The New Concept of Equality' (2003) available at http://www.era.int/web/en/resources/5_1095_2954_file_en.4194.pdf (accessed 29 March, 2022).

structural transformation are all advocated as four-dimensional principles.¹⁹⁴ In assessing whether substantive equality has been broken, the issue should be whether having respect to all relevant facts, the challenged measure reinforces disadvantages or stereotypes.

The focus of the four-dimensional substantive equality approach is on the group that has been disadvantaged, in this case, the Igala women. By focusing on a disadvantage, the prospect of levelling down is eliminated. Women's disadvantage is rooted in power disparities within and outside the family and can be defined in terms of property ownership and inheritance rights.¹⁹⁵ A disadvantage can be seen in the denial of property rights of the Igala women. The Igala women are in a disadvantaged position because of the patriarchal nature of the Igala society. Men are allowed to own and inherit property, but women are not allowed to own or inherit the same. This cultural practice discriminates against women and violates their human rights. It is believed that redressing this disadvantaged position of women will afford women the opportunity to own property, inherit the property of their deceased husbands and give them a right to an equitable share of the property after divorce.

Regardless of relative circumstances, women face gender-based stereotyping. Stereotyping is an often unfair and untrue belief that many people have about all people or things with a particular characteristic. The cultural belief that women are regarded as property or chattels poses a challenge to the rights of women to property ownership and inheritance during and after marriage. As a

¹⁹⁴ Fredman S *Discrimination Law* 2 ed. (2011)13-17; Fredman S 'The Future of Equality in Great Britain' *EOC Working Paper Series* No. 5 (2002) 5-7.

¹⁹⁵ Chant S, 'The "Feminisation of Poverty" and the "Feminisation" of Anti-Poverty Programmes: Room for Revision?' Vol. 43 *J. Dev. Stud.* (2008) 165, 174.

result, substantive equality can address gender stereotypes in ways that a pure equal treatment paradigm cannot.¹⁹⁶

The participative dimension allows Igala women to have a better say in establishing their property ownership and inheritance rights in the future. The participation of women affords them the opportunity to address the importance of community life of individuals.¹⁹⁷ One of the challenges Igala women face is the inability to contribute to the decision-making process. When issues pertaining to property ownership or the distribution of a deceased husband's property are resolved, it is usually within the male relatives of the husband.¹⁹⁸ This makes it difficult for women to lend their voices. It is believed that women's participation in major family and communal decisions will enhance women's rights to property ownership and inheritance.

Substantive equality attempts to acknowledge and accommodate differences, eliminating the disadvantage.¹⁹⁹ Substantive equality is potentially transformative. To achieve structural change speaks to the possibilities of how these legal human rights instruments and institutional mechanisms can redesign or restructure the patriarchal nature of the Igala society that discriminates against women to accommodate the rights of women to property ownership and inheritance in line with the provisions of the Nigerian constitution, the Maputo Protocol, CEDAW and other human rights legal instruments.

The four-dimensional approach proposed by Fredman is not without criticism. The critics of this approach are of the opinion that the four-dimensional approach by Friedman is not as comprehensive as claimed. In MacKinnon's response to Friedman, there are other areas of law not

¹⁹⁶ Fredman S 'Substantive Equality Revisited' Vol. 14, (3) *International Journal of Constitutional Law*, (2016) 712-738.

¹⁹⁷ Fraser N & Honneth A *Redistribution or Recognition* (2003) 47-68.

¹⁹⁸ Boston J (1968) 157-168.

¹⁹⁹ Fredman S (2016) 712-738.

covered by Friedman's approach that substantive equality is beginning to recognize under domestic and international human rights laws. MacKinnon further observed that Friedman's silence on the issue of sexual abuse, which has been categorised as a sex inequality under human rights, makes her approach not as holistic as claimed. Furthermore, determining the nature of the disadvantage this method aims to rectify is difficult. Young²⁰⁰ contends that disadvantage should be defined as more than misdistribution of resources, with a focus on dominance or mechanisms that prevent people from having a say in their actions.

Notwithstanding, adopting a substantive equality approach to implement the provisions of the international, regional and domestic human rights instruments is important to ensure the rights of women to property ownership and inheritance during and after marriage are duly protected.

2.7 Radical Feminism

Radical feminists began to meet in insignificant groups in 1967. Some of the radical feminists who led a group called 'New York Radical Women' are Shulamith Firestone, Ellen Willis, Carol Hanisch, and Robin Morgan. This group was formed when these feminists expressed dissatisfaction with how their civil rights were being ignored.²⁰¹

Radical feminism theory argues that male-controlled capitalist hierarchy is the main feature of women's oppression. Rowland and Klein²⁰² submit that women's liberation is possible when they liberate themselves from patriarchal systems, which they consider inherently oppressive and dominant structures. Also, Jones and Budig²⁰³ observe that radical feminist' sees sexism as the

²⁰⁰ Young I *Justice and the Politics of Deference* (1990) 13-25.

²⁰¹ Lee T 'Rethinking the Personal and the Political: Feminist Activism and Civic Engagement' Vol.22 (4) *Hypath* (2007) 165-168.

²⁰² Rowland R & Klein R *Radical Feminism: Critique and Construct*, (1990) 8-7.

²⁰³ Jones K & Budig M *Feminist Theory*, Encyclopedia of Social Problems (2008) 11-14.

oldest and most persuasive form of oppression; they argue that eradication of patriarchy and heterosexuality are crucial to ending gender oppression. Radical feminism devolved into women's exploitation of males. According to radical feminists, men have mostly benefited from women's subordination.²⁰⁴

Similarly, Lorber²⁰⁵ argues that radical feminism's theoretical watchword is patriarchy, or men's pervasive oppression and exploitation of women. Patriarchy is firmly rooted in the belief that women are inferior and different from men. This belief makes patriarchal systems difficult to eradicate. Vukoicic²⁰⁶ agrees that radical feminism's claim is because men have more privileges as human beings than women as a result of patriarchal principles. Radical feminism sees patriarchy as the primary form of domination.

Unlike liberal feminists who focuses on equality, radical feminist desire to eliminate patriarchy. Liberal feminist argues that women should have similar rights as men. Mill²⁰⁷ states that women should have similar rights related to property as their male counterparts. Egalitarianism, as advocated by liberal feminists, does not eliminate the impediments that sustain gender discrimination, in this case, patriarchy. However, radical feminism believes that the elimination of women's subordination and male supremacy will restructure society in more significant ways.²⁰⁸

²⁰⁴ Sibani C 'Gender Inequality and its Challenge to Women Development in Nigeria: The Religious Approach' (2017) available at <http://dx.doi.org/10.4314/ujah.v18i2.25> (accessed 30 March 2022).

²⁰⁵ Lorber J 'The Variety of Feminism and their Contributions to Gender Equality' *Bis Verlag* (1997) 1-41. Radical feminism begins with the premise that there is a fundamental conflict between the sexes and that oppression against women is a direct result of patriarchy. Patriarchy perpetuates rigidity, which is perceived as oppression. Feminism is founded on the belief that society's patriarchal structure exposes women to numerous forms of injustice.

²⁰⁶ Vukoicic J 'Radical Feminism as a Discourse in the Theory of Conflict' Vol. 3 (5) *Sociološki diskurs* (2013) 33-49.

²⁰⁷ Mill J *The Subjection of Women* (1869) 51.

²⁰⁸ Sibani C 'Gender Inequality and Its Challenges to Women Development in Nigeria: The Religious Approach' Vol.18 (2) *Unizik Journal of Arts and Humanities* (2017) 430-432.

Further, Firestone²⁰⁹ submits that women's oppression is rooted in relations and sexuality because there are major differences in the creation of men and women which promotes gender discrimination. Marxists criticized this submission for putting too much emphasis on reproduction and sexuality. The Marxists are of the opinion that the enemy of women is not their male counterparts but the capitalist class, which itself is multi-gendered, multi-racial, and not male supremacy, rooted in patriarchy.²¹⁰

The radical feminism theory is relevant to this thesis because it helps to analyse the status of the Igala women. The theory suggests possible ways of eliminating the patriarchal system of the Igala people, redesigning and restructuring customs that discriminate against women to accommodate the rights of women to property ownership and inheritance. This is during and after marriage, in line with sections 42 and 43 of the Nigerian Constitution,²¹¹ Maputo Protocol,²¹² Universal Declaration on Human Rights,²¹³ International Covenant on Economic, Social and Cultural Rights,²¹⁴ International Convention on Civil and Political Rights²¹⁵ and the Convention on the Elimination of All Forms of Discrimination Against Women.²¹⁶

²⁰⁹ Firestone S *The Dialectic of Sex, Social Stratification* (2019) 671-673.

²¹⁰ Vukoicic J (2013) 34-39.

²¹¹ See Chapter 1.

²¹² See Chapter 1.

²¹³ Article 17 (1) UDHR "*Everyone has the right to own property alone as well as in association with others*".

²¹⁴ Article 3, ICESCR, calls on States parties to "undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant" and prohibits discrimination based on sex.

²¹⁵ Article 3, ICCPR guarantees equality between women and men, and it prohibits discrimination based on sex, among other grounds

²¹⁶ Art. 16 (1)(h) CEDAW provides "The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration".

2.7.1 Basics of Radical Feminism Theory

Throughout history, patriarchy has been the primary structure of male dominance and female servitude. It has remained the most prevalent and lasting system of inequality over time. Many communities have oppressive structures in which males rule females²¹⁷. Men establish and sustain patriarchy, not because of their wealth but because it subordinates women and forces them to act as submissive instruments.²¹⁸

Patriarchy is the main difference between radical feminism and other feminist theories. Women's subordination is considered the rule of men, which manifests in different ways, such as oppression, inequality, and injustice. The belief that men are superior to women is the basis for all kinds of discrimination against women.²¹⁹ Radical feminist sees patriarchy as the foundation of all other inequalities and oppression.

In Africa, patriarchy is a universal concern.²²⁰ The majority of African nations were and still are profoundly patriarchal societies.²²¹ In spite of the legal structure protecting women's rights in Africa, African women continue to be barred from property ownership and inheritance.²²² Farkhonda submits that “we are all aware that despite achievements and progress made, African women face major challenges and obstacles”.²²³ Gender roles are created by society.²²⁴ The

²¹⁷ Patriarchy allows men to learn how to hold their female counterparts in contempt, to see them as non-human and to control them.

²¹⁸ George R & Douglas J *Sociological Theory* 6 ed. (2003) 436-458.

²¹⁹ Vukoicic J (2022) 165-168.

²²⁰ Albertyn C ‘Law, Gender and Inequality in South Africa’ Vol. 39 (2) *Oxford Developmental Studies* (2011) 139-162.

²²¹ Mama A ‘Heroes and Villains: Conceptualizing Colonial and Contemporary Violence against Women in Africa’ in M. Alexander et al (ed.), *Feminist Genealogies, Colonial Legacies, Democratic Futures*, (1997) 46–62.

²²² Butegwa F *Mediating Culture and Human Rights in Favour Land Rights for Women in Africa* (2002) 108-125.

²²³ Farkhonda H ‘Chair of the UN Economic Commission for Africa’s Committee on Women and Development’ cited in Albertyn C (2011) 139-162.

²²⁴ Tamale S ‘Gender Trauma in Africa: Enhancing Women’s Links to Resources’ Vol. 48 *Journal of African Law* (2004) 50–61.

patriarchal framework of African society is strengthened by the roles that are assigned to men.²²⁵ Typically, men are in positions of authority and consider it essential to prove their superiority and dominance over women.²²⁶ Women are perceived to be genetically inferior, which is then utilised to justify their disadvantageous social position.²²⁷

Male dominance and female subordination are characterised by the social construction of femininity and female sexuality through the creation and presentation of subordinate images, as well as traditional family model institutions that favour male dominance over female dominance. Patriarchal notions are utilised to construct femininity. As a result, femininity is always portrayed as inferior to masculinity. Women as a group do not wield the same cultural clout as men.²²⁸

The concept that a patriarchal society is typically an unjust system in which women are groups of people subject to various forms of discrimination and exploitation is a universal feature of feminist ideology.²²⁹ Radical feminists argue that a patriarchal society is a primary location for power struggles between men and women.²³⁰

However, some argue that individuals existed prior to the establishment of the Patriarchy.²³¹ According to Engels²³² women were not viewed as subordinates prior to the establishment of patriarchy. With the rise of private property, women's servitude began. The patriarchal society is

²²⁵ Oyewunmi O *African Gender Studies: A Reader* (2016) 3-15.

²²⁶ Oyewunmi O 'Visualizing the Body: Western Theories and African Subjects' in Oyewunmi O. *African Gender Studies: A Reader* (2016) 3-21.

²²⁷ Oyeniyi A & Ayodeji I 'Widowhood Practices among the Yorubas of South West Nigeria: Are There Differences in What Women Experience Due to Their Status?' Vol. 8 *Gender and Behaviour* (2010) 3152-3167.

²²⁸ Bonnie J *Television, Media Culture and the Women's Movement since 1970* (1996) 5-17.

²²⁹ Fisher E *Women's Creation: Sexual Evolution and the Shaping of Society* (1979) 11, French M *Beyond Power: On Women, Men and Morals* (1985) 7.

²³⁰ Sultana A 'Patriarchy and Women's Subordination. A Theoretical Analysis' Vol. 4 (1) *Arts Faculties Journal*, (2010) 2-24.

²³¹ Both Fisher E and French M claim that prior to the development of patriarchy, individuals existed and interacted in ways that did not result in the repression of women or anybody else. The patriarchal culture is viewed as a male response to women's authority that begins from childhood.

²³² Engels F *The Origin of the Family, Private Property and the State* (1940) 19-35.

thought to have been founded by men in order to keep power and property and pass it down to their progeny. The right of women to possess property was abolished in order to ensure that women were only subordinates. Furthermore, radical feminists do not believe patriarchy has always been natural. Traditionalists, on the other hand, believe that men are born to dominate and women to be subordinate; they see patriarchy as a natural setting that has existed since the beginning of time. In the western part of Nigeria, it is believed that patriarchy is one of the effects of British colonialization.²³³ Women occupied leadership positions prior to colonialisation. The British colonial government's system of indirect control acknowledged the power of male chiefs at the local level but did not recognise the existence of female chiefs. Consequently, women were excluded from all colonial governmental formations and were relegated to the background.²³⁴

Men are able to dominate women in Nigerian society due to its patriarchal structure.²³⁵ Under most native laws and customs in Nigeria, patriarchy ensures male supremacy, making it impossible for women to acquire property during and after marriage. A woman is seen as property to be inherited by her husband's family, and she is not permitted to own her property during the marriage, nor is she entitled to a share of her husband's property in the event of a divorce.²³⁶ It is submitted that by exposing and critically evaluating its manifestations, the patriarchal structure that denies women the ability to own and inherit property during and after marriage can be overcome.

Radical feminists focus on a theory of social organisation, gender oppression, and strategies for change. The core belief of radical feminists is that women are an absolute positive value as women,

²³³ Oyewunmi O *The Invention of Women: Making an African Sense of Western Gender Discoveries* (1997) 92-126.

²³⁴ Oyewunmi O (1997) 121-126.

²³⁵ Jenyo O 'Patriarchy and Gender Inequality in Nigeria: A Threat to National Development', Vol.6 (7) *Journal of Business and Economic Management* (2018) 147-156.

²³⁶ Ezeilo J 'Rethinking Women and Customary Inheritance in Nigeria' Vol. 47 (4) *Commonwealth Law Bulletin* (2021) 706-718.

a belief asserted against what they claim to be a universal devaluing of women and that women are oppressed all over the world due to patriarchal systems. Individuals or communities that discriminate against women, thereby violating their rights, believed to be are firmly rooted in culture and not within the ambit of human rights.²³⁷ Adopting radical feminism theory is important because it seeks to understand and address the roots of women's oppression. It has been responsible for much of the progress made during what has been called the second feminism wave. There are differing opinionson whether African women are prepared to take a radical shift to eradicate patriarchal structures that continue to limit women's rights. This argument has been rejected due to the belief that African women are prepared for radical feminism.²³⁸

There are claims that radical feminists see men as the victimizers and women as the victims. Critics are of the view that not all women are victims and not all men are victimizers, some are also victims.²³⁹ In addition, the radical feminism theory is less inclusive than liberal feminism. It is believed that radical feminism is in line with the dominant values of the society because of its radicality and profound questioning of patriarchal and heterosexual society. This radicality is necessary to bring about real changes in society.²⁴⁰ Marxists have criticized radical feminism for ignoring the significant differences in power and privilege among various groups of women. Marxist feminists view gender inequality as too far-reaching to be remedied with some legislative actions. Gender equality to Marxist feminists is seen as the root of social class inequality.²⁴¹ It is believed that the capitalist system of production that generates social inequality also generates

²³⁷ Tamale S (2008): 47-69.

²³⁸ Tamale S 'African Feminism: How Should We Change?' Vol. 49 (1) *Development* (2006) 38-41.

²³⁹ Gordon G 'Liberal vs Radical Feminism' Vol. 11(2) *Journal of Applied Philosophy* (1994) 155-170.

²⁴⁰ Robinson V 'Radical Revisionings: The Theorizing of Masculinity and (Radical) Feminist Theory' Vol. 26 (2) *Women's Studies International Forum* (2003) 129-137.

²⁴¹ MacKinnon C 'Feminism, Marxism, Method, and the State: An Agenda for Theory' Vol. 7(3) *Journal of Women in Culture and Society* (1982) 515-544.

women's economic dependence on men. This means that gender inequality can only be eliminated, according to Marxist feminists, through attentiveness to the system of class relations.

However, radical feminists dispute with Marxist feminists on the grounds that women are oppressed in societies other than capitalist ones, and therefore, women's oppression by men is deeper and more harmful than any other form of patriarchy – including economic oppression.²⁴²

Radical feminists argue that male domination of women permeates every aspect of life, including family relationships. They believe that gender oppression is the most harmful form of oppression.

2.8 Relevance of the Substantive Equality Theory and the Radical Feminism Theory to Property Ownership and Inheritance in Nigeria.

In order to comprehend the impacts of patriarchy on women's rights to property ownership and inheritance in Nigeria, particularly on Igala women, it is important to consider both radical feminist theory and the substantive equality framework. The primary goal of substantive equality is to redress the historical injustice or disadvantage that women have had in terms of property ownership and inheritance. In general, patriarchal attitudes and assumptions continue to prohibit women from property ownership and inheritance.²⁴³ Women's exclusion from property ownership and inheritance during and after marriage is considered a historical injustice or disadvantage that women in Nigeria continue to experience. Due to the patriarchal structure of Nigerian society, women are consistently excluded from property ownership and inheritance. The exclusion of women from property ownership is contrary to sections 42 and 43 of the Nigerian Constitution, as well as the obligations imposed on Nigeria by international and regional human rights instruments

²⁴² Mackay F *Radical Feminism: Theory, Culture & Society* (2015) 332-336.

²⁴³ Durojaye E 'Woman But Not Human': Widowhood Practices and Human Rights Violations in Nigeria' Vol. 27 (2) *International Journal of Law, Policy and Family* (2013) 176-196.

such as the Universal Declaration of Human Rights (UDHR) (which serves as the foundation for later women's rights), the Convention on the Elimination of Discrimination Against Women (CEDAW), the African Charter on Human and Peoples' Rights (The African Charter), and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (The Maputo Protocol). In order for the Nigerian government to implement the substantive equality approach, it must address the patriarchal aspects of Nigerian society that support the exclusion of women from property ownership and inheritance, particularly among the Igala people.

The CEDAW and Maputo Protocol reflected the notion of substantive equality.²⁴⁴ This can be seen in Article 7 (d) of the Maputo Protocol, which categorically states that women and men shall have the right to an equitable sharing of the joint property deriving from the marriage in the event of a separation, divorce or annulment of marriage. Similarly, Article 21 of the Maputo Protocol states that widows shall have the right to an equitable share in the succession of their husbands' property in order to mitigate widowhood custom's detrimental effects on women. The right to continue residing in the marital home belongs to widows. She must "*retain this right if the house belongs to her or if she has inherited it*" in the event of a remarriage. This article aims to shield African women from the patriarchal structure that deprives them of their inheritance rights.²⁴⁵ This article is essential because it tries to make up for the inequalities and suffering African women have previously endured when it comes to inheriting from their deceased husbands or parents. Notably, African Women's Protocol uses the term "equitable share" here rather than "equal share."

²⁴⁴ Ezeilo J (2011) 100-156.

²⁴⁵ Chirwa D 'Reclaiming (Wo) manity: The Merits and Demerits of the African Protocol on Women's Rights' Vol. 53 *Netherlands International Law Review* (2006) 63-95.

In Nigeria, women who contribute to the purchase of property do not have legal or equitable ownership of that property.²⁴⁶ The Nigerian culture permits a man to inherit his wife as his property, and as such, he has complete control over any property she obtained or was granted before marriage.²⁴⁷ Boston asserts that the Igala patriarchal structure views women as property to be inherited by their husbands.²⁴⁸ It is considered that a woman has no right to inherit her late husband's property, even if it was jointly owned, although she can keep use of the marital home provided she is well-behaved.²⁴⁹ Moreover, after divorce, the husband retains complete power over the woman's possessions. In addition, the registration of jointly owned property in the man's name is one of the reasons why women's rights are denied in Nigeria.²⁵⁰ In the event of a divorce or separation, a woman is not permitted to leave with anything other than her personal belongings, even if she rendered financial assistance for the construction of her marital home.

A patriarchal society is one in which men predominate.²⁵¹ The majority of radical feminists characterise patriarchy as a wicked social system of control that is oppressive to women because it is an exercise of male domination over women. An institution of male authority and privilege thrives on female servitude.²⁵² Radical feminists believe that women cannot be liberated until the patriarchal system, which they perceive as fundamentally oppressive and powerful, has been abolished. In contrast to liberal feminists, who sought equality with men, radical feminists want to

²⁴⁶ Mary A & Abiodun O (2005) 58-63.

²⁴⁷ Akolowu G & Raji B 'Property Rights of Married Women under Customary Law in Nigeria: Myth or Reality' (2018) available at <https://www.researchgate.net/publication/333421036> (accessed 29 July 2022).

²⁴⁸ Boston J (1968) 23-27.

²⁴⁹ Abdulraheem N 'Women's Marital Rights, Perspectives from Nigeria Legal System' Vol. 4(3) *Journal of Law and Conflict Resolution* (2012) 31-44.

²⁵⁰ Gbadebo J (2014) 51-56.

²⁵¹ Mama A 'The Challenges of Feminism: Gender, Ethics and Responsible Academic Freedom in African Universities' Vol. 9 (1&2) *JHEA/RESA*, (2011) 1-23.

²⁵² Ifechelobi J 'Feminism: Silence and Voicelessness as Tools of Patriarchy in Chimamanda Adichie's Purple Hibiscus' Vol. 8(4) *An International Multidisciplinary Journal, Ethiopia* (2014) 17-27

eradicate patriarchy totally. They believe that eliminating women's subjugation and male supremacy will significantly reorganize society.²⁵³

The substantive equality framework and the radical feminist theory are relevant to this research because they will help examine the gender laws and give a proper understanding of how these legal instruments impact the rights of women generally and particularly how the patriarchal nature of the Igala society impacts on the rights of women to property ownership and inheritance in Nigeria. The four-dimensional substantive equality approach enabled the examination of redressing the disadvantage of patriarchy can help women avoid experiencing inferior status in Nigeria.

2.9 Conclusion

Without a doubt, women's right to property ownership and inheritance during and after marriage is a basic human right. Every person in Nigeria has the right to own and acquire property under the Nigerian Constitution.²⁵⁴ Similarly, international and regional human rights instruments guarantee women the right to hold property as individuals and to inherit it upon the death of their husbands.²⁵⁵ Further, divorced women are entitled to an equitable share of property jointly owned while the marriage subsists.²⁵⁶

However, as individuals, divorced women, or widows, Igala women are still denied the right to acquire or inherit property. This denial derives from the patriarchal structure that allows men to dominate women in the Igala ethnic group. It is submitted that, in order to address the Igala people's

²⁵³ Sibani C 'Gender Inequality and its Challenges to Women Development in Nigeria: The Religious Approach' Vol. 18 (2) *Unizik Journal of Arts and Humanities* (2017) 432.

²⁵⁴ Sections 42-43 Nigerian Constitution.

²⁵⁵ Article 7(d) and 21(1) of the Maputo Protocol, Article 17 (10) UDHR, Article 16 of CEDAW.

²⁵⁶ Ashiru M 'Gender Discrimination in the Division of Property on Divorce in Nigeria' Vol. 51 (2) *Journal of African Law* (2007) 316-331.

patriarchal nature, which disallows women from owning or inheriting property during and after marriage, Friedman's four-dimensional substantive equality approach and radical feminism theory be used to analyse women's rights to property ownership and inheritance, patriarchal structures that obstruct women's rights to own or inherit property, and possible solutions to patriarchal denial. The substantive equality approach examines the gender laws and gives a proper understanding of how these legal instruments impact the rights of women generally and, particularly, how the patriarchal nature of the Igala society impacts the rights of women to property ownership and inheritance in Nigeria. The four-dimensional approach goes beyond achieving equitable outcomes to examine how redressing women as a disadvantaged or marginalised group and addressing stereotypes can help women avoid experiencing inferior status in society. It also looks at the various facets of gender discrimination and how it can be avoided.

Furthermore, radical feminism theory examines the situation of Igala women and proposes ways in which these legal human rights instruments and institutional mechanisms can redesign or restructure customs that discriminate against women in order to accommodate women's rights to property ownership and inheritance in accordance with the Nigerian Constitution, the Maputo Protocol, CEDAW, and other human rights instruments. In addition, radical feminism's goal of reordering society by entirely eradicating male supremacy that subjugates women will be used to achieve the goal of women's emancipation from marginalisation and discrimination in whatever form.

CHAPTER THREE

INTERNATIONAL AND REGIONAL LEGAL FRAMEWORK ON THE RIGHTS OF WOMEN TO PROPERTY OWNERSHIP AND INHERITANCE IN NIGERIA

3.1 Introduction

Women in Nigeria face discrimination in property ownership and inheritance during and after marriage due to the patriarchal structure of Nigerian society.²⁵⁷ Women are prohibited from owning property as individuals, inheriting property from their deceased husbands, and receiving a portion of their family's assets upon divorce as a result of patriarchy.²⁵⁸

Nigeria is a signatory to several international and regional human rights instruments that safeguard and advance the property rights of women.²⁵⁹ The role of human rights instruments in redressing social and legal inequalities faced by women in their various communities cannot be overemphasised.²⁶⁰ The primary focus of human rights has been the equality of men and women. The major purpose of the 1945 United Nations Charter is to "*reaffirm belief in fundamental human rights, the dignity and worth of the human person, and the equal rights of men and women*".²⁶¹ Similarly, the 1948 adoption of the Universal Declaration of Human Rights (UDHR) had as its fundamental objective the promotion of the equal rights of women and men.²⁶² These international and other regional human rights treaties are mostly the result of Declarations, particularly the Universal Declaration of Human Rights.²⁶³ The UDHR is the foundation for later

²⁵⁷ Ekhatore E 'Women and the Law in Nigeria: A Reappraisal' Vol. 16 (2) *Journal of International Women's Studies* (2015) 258-296.

²⁵⁸ Alemika E 'Family Practices and Violations of the Rights of Women' *University of Maiduguri Law Journal* (2010) 25-38.

²⁵⁹ Ezeilo J (2011) 40.

²⁶⁰ Cook J (1994) 45-68.

²⁶¹ The Preamble of the United Nations Charter 1941.

²⁶² Dada F 'The Justiciability and Enforceability of Women's Rights in Nigeria' (2014) Vol. 14(15) *Global Journal of Human Science: E Economics*.

²⁶³ John C *Dictionary of International Human Right Law* (1996) 2-4. Universal Declaration of Human Rights (UDHR), adopted 1 December, 1948 UNGA Res 217 A (III) (UDHR)

declarations on women's rights. Nigeria has ratified the International Covenant on Civil and Political Rights (ICCPR),²⁶⁴ the International Covenant on Economic Social and Cultural Rights (ICESCR),²⁶⁵ and the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).²⁶⁶ These human rights instruments generally protect women from all forms of discrimination; in particular, CEDAW protects women's to property ownership and inheritance. In addition to these international human rights instruments, Nigeria has also signed regional human rights instruments protecting women. The African Charter on Human and Peoples' Rights (African Charter)²⁶⁷ and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)²⁶⁸ are examples of regional human rights instruments. The African Charter deviates from classic human rights instruments since it was based on the cultural relativist notion of human rights.²⁶⁹ The mission of the African Charter is to “*strive for flexibility, balance, and emphasize certain principles and guidelines*”. It tries neither to isolate man from society nor for society to swallow up the individual.²⁷⁰ The African Charter was Africa's first regional human rights instrument and the only legally binding document to specify individual responsibilities to the family, society, and state.²⁷¹

²⁶⁴ International Convention on Civil and Political Rights (ICCPR) 1976.

²⁶⁵ International Covenant on Economic, Social and Cultural Rights (ICESCR), 16 December 1976.

²⁶⁶ Convention on the a of All Forms of Discrimination Against Women (CEDAW) 18 December 1979, United Nations, Treaty Series, Vol. 1249, 13.

²⁶⁷ African Charter on Human and Peoples' Rights (African Charter), 27 June, 1981, (AB/LEG/67/13. Rev. 5, 21 I.L.M 58.s

²⁶⁸ Protocol to the African Charter on Human and Peoples' Rights on the Right of Women in Africa (the Maputo Protocol), 11 July 2003.

²⁶⁹ Weston B “Human Rights” Questions for Reflection and Discussion in Claude R, *Human Rights in the World Community: Issues and Action* (1989) 26

²⁷⁰ Ibidapo – Obe A & Yerima T *International Law, Human Rights and Development* Essays in Honour of Professor Akindele Babatunde-Oyebode (2004) 60-79.

²⁷¹ Ekhatior E ‘The Impact of the African Charter on Human and Peoples' Rights of Domestic Law: A case study of Nigeria’ A Paper Presented at the Kings College London, Seventh International Graduate Legal Research Conference Forum April (2013) 8-9.

Regardless of the adoption of these international instruments under Nigerian law, Nigeria remains a dualist country. That is, international treaties are not part of Nigerian domestic law unless domesticated under section 12 of the Nigerian Constitution.²⁷² Nevertheless, several of these international human rights documents, particularly CEDAW, have a persuasive impact on Nigerian law, and certain courts have cited them in their decisions.²⁷³ In addition, the Nigerian government have adopted and domesticated the African Charter on Human and Peoples' Rights.²⁷⁴ Article 3 of the African Charter mandates that nations address discrimination against women using legislative, institutional, and other methods. Despite having ratified the Maputo Protocol, it has not been domesticated in Nigeria; this is notwithstanding the fact that it is the first regional human rights treaty that safeguards women's rights to property ownership and inheritance during and after marriage.²⁷⁵

This chapter looks at the normative framework that serves as the foundation for international human rights protection, as well as the international and regional human rights instruments relevant to women's rights to property and inheritance during and after marriage. In conclusion, the barriers to the effective implementation of these human rights instruments shall also be considered.

²⁷² “Ekhaton E ‘Improving Access to Environmental Justice under the African Charter: The Roles of NGOs in Nigeria’ Vol. 22 (1) *African Journal of International and Comparative Law* (2014) 63-79

²⁷³ This was illustrated in the case of *Mojekwu v Mojekwu* (1997) 7 NWLR (Pt. 512) 283.

²⁷⁴ Ekhaton E (2013) 8-9.

²⁷⁵ Anekwo N ‘The Additional Protocol to the African Charter on Human and Peoples’ Rights: Indications for African Municipal Systems’ Vol. 13 (2) *Journal of Law, Democracy and Development* (2009) 22-35.

3.2 International Human Rights Instruments

3.2.1 The United Nations Charter

The United Nations Charter was adopted in 1945 at the San Francisco conference.²⁷⁶ The equality of men and women has been included as one of the United Nations basic principles, along with the desire "*to affirm faith in fundamental human rights, in the dignity and worth of the human person, and in the equal rights of men and women.*" Furthermore, members are required by the United Nations Charter to respect the human rights and dignity of both men and women.²⁷⁷ It is trite that all human beings are born with equal rights, known as fundamental human rights. Women and men are meant to enjoy equal property ownership rights if their fundamental human rights are to be safeguarded. Despite the fact that the main principle of the UN Charter is to guarantee the equality of men and women, the Charter does not provide for the equal rights of men and women to property ownership and inheritance.

Additionally, Article 13 (1)(b) requires the General Assembly to launch studies and provide suggestions to assist in the achievement of fundamental human rights to encourage worldwide collaboration in the economic, social, cultural, educational, and health spheres, as well as supporting in the realisation of human rights and fundamental freedoms for everyone, regardless of race, gender, language, or religion. This provision set the path for adopting several human rights instruments that condemn all forms of discrimination.

3.2.2 The Universal Declaration of Human Rights (UDHR) 1948

A pivotal turning point in the history of human rights is the adoption of the Universal Declaration of Human Rights (UDHR). It was proclaimed by the United Nations General Assembly in Paris

²⁷⁶United Nations 'Peace, Dignity and Equality on a Healthy Planet' available at <https://www.un.org/en/about-us/un-charter> (accessed 29 August 2022).

²⁷⁷Simma B *The Charter of the United Nations* (1995) 12-17.

on 10 December 1948²⁷⁸ as a common standard of achievement for all peoples and all nations. The Declaration was drafted by representatives from all regions of the world with diverse legal and cultural backgrounds. It is the first document of its kind to outline fundamental human rights to be universally guaranteed, and it has been translated into more than 500 different languages.²⁷⁹ It is generally accepted that the UDHR served as the impetus and paved the way for the acceptance of more than seventy human rights treaties, which are now permanently in force on a global and regional level (all containing references to it in their preambles).²⁸⁰

The widespread denial of women's rights to property ownership and inheritance during and after marriage is a significant impediment to fulfilling women's human rights in Nigeria.²⁸¹ Property inheritance at death is firmly ingrained in patriarchal attitudes.²⁸² In a patriarchal society, where ancestry is traceable through male relatives, a woman's rights are more secure if she has an older son who is the heir to his father's estate rather than directly through the woman.²⁸³ According to the UDHR, men and women are entitled to equality and non-discrimination, and all rights and freedoms are guaranteed. Article 2 of the UDHR provides that:

Everyone is entitled to all the rights and freedoms set forth in this declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth, or other status...

²⁷⁸ UDHR 1948.

²⁷⁹ Udombana N 'Mission Accomplished-An Impact Assessment of the UDHR in Africa' Vol.30 *Hamline Journal of Public Law and Policy* (2008) 335.

²⁸⁰ Banda F 'Women, Law and Human Rights in Southern Africa' Vol. 32 (1) *Journal of Southern African Studies* (2006) 13-27.

²⁸¹ Jibril I 'Women and Property Rights Under Customary Law in Nigeria' A Paper presented by the former President of the Customary Court of Appeal Nasarawa State at the Virtual Induction Course Organized by National Judicial Institute, Abuja (2021) 1-13.

²⁸² Richardson A 'Women's Inheritance Rights in Africa: The Need to Integrate Cultural Understanding and Legal Reform' Vol. 11(2) *Human Rights Brief* (2004) 1-2.

²⁸³ Izzi M & Fab-Eme C 'Widows and Inheritance Rights in Nigeria: Beyond the Letters' Vol. 8 (3) *International Journal of Innovative Legal & Political Studies* (2020) 1-12.

This provision ensures that everyone is entitled to all the rights and freedoms enumerated in this Declaration without discrimination. It is argued that whenever women are denied the right to property ownership and inheritance, such denial is in contravention of the rights, privileges, and advantages guaranteed by the UDHR. Article 7 of the UDHR guarantees the right to equal protection of the law without discrimination. It states that

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Without exception, men and women are entitled to equal protection under the law.²⁸⁴ The Igala people's patriarchal attitudes prohibit women from owning property and inheriting during and after marriage. In some instances, these patriarchal views have been accepted by Nigerian courts. The courts reinforced the exclusion of women from property ownership and inheritance in Nigeria.²⁸⁵ For instance, in *Ejiamike v Ejiamike*²⁸⁶ the court ruled that the eldest surviving son has an automatic right to succeed his father as head of the family. Only the father, as the owner and originator of the family property, has the authority to deprive the eldest son of this privilege through a legitimate direction.

Regarding property ownership following divorce, Article 16 (1)²⁸⁷ states, “*men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution*”. Men and women have equal rights to marriage, during the marriage, and upon

²⁸⁴ Ogwo B, Ogwo C & Ogwo F ‘The Impact of Universal Declaration of Human Rights on Native Law and Custom in Nigeria and the Role of Civil Society’ Vol.12-13 *Kogi State University Law Journal* (2020-2021) 290-307.

²⁸⁵ *Nezianya v Okagbue* (1963) 1 ALL NLR 352; *Oloko v Giwa* (1939) 15 NLR 31, the court held that generally, widows do not inherit their deceased husband’s property. They are only allowed to remain in the house or a portion of farmland.

²⁸⁶ (1972) 2 ENLR 11.

²⁸⁷ UDHR 1948.

dissolution of marriage. In contrast, Igala women do not have the same rights as their husbands because they are considered property to be inherited. Due to the patriarchal nature of the Igala, which favours men over women, women are only permitted to take their personal belongings with them after a divorce.

Similarly, Article 17 provides for the right to property ownership. It states that “*everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property*”. The Universal Declaration of Human Rights was the first document to protect the right to own property. However, because the Universal Declaration of Human Rights is not a legally enforceable human rights instrument, it is impossible to implement it in Nigeria. There are arguments that the UDHR has become a customary international law because it served directly or indirectly as a framework for many binding international treaties as well as domestic Constitutions, policies, and laws that safeguard basic human rights.²⁸⁸ It is believed that the contribution of the UDHR to the development of human rights and customary international law has earned the UDHR a prominent legal status. The Nigerian government incorporated the non-discrimination rights of the UDHR in the Nigerian Constitution.²⁸⁹ Despite the recognition of the UDHR as customary international law and its influence on national constitutions, the Universal Declaration is not a treaty and, therefore, does not create direct legal obligations for countries. It only provided a global roadmap for the recognition and protection of human rights.

²⁸⁸ Hurst H ‘The Status of the Universal Declaration of Human Rights in National and International Law’ Vol. 25 (287) *Georgia Journal of International and Comparative Law* (1995/96) 289-352.

²⁸⁹ Eze D, Nwosu E, Umahi O, & Nwoke U ‘Assessing the Application of the Principles of Non-discrimination and Gender Equality in Relation to Devolution of Land upon Death in Nigeria’ Vol. 43(1) *Liverpool Law Review* (2022) 77-96.

3.2.3 The International Covenant on Economic, Social, and Cultural Rights (ICESCR)

The United Nations adopted the International Covenant on Economic, Social, and Cultural Rights on 16 December 1966.²⁹⁰ With the adoption of this human rights instrument, the international community has made provisions for its implementation, as the rights of the ICESCR are consistent with the content of each right set forth in the Universal Declaration of Human Rights.²⁹¹ The ICESCR provides a more comprehensive provision than the UDHR.

The ICESCR seeks to advance economic, social, and cultural rights. It offers the framework for the protection and preservation of the most fundamental economic, social, and cultural rights.²⁹²

The ICESCR guarantees the following rights: the right to work, favourable working conditions for women and equal pay for equal work; the right to form and join trade unions; social security; and an adequate standard of living, including adequate food, clothing, and housing; family protection; the highest achievable standard of physical and mental health; education; and participation in cultural life.²⁹³ However, the ICESCR does not explicitly address women's property ownership and inheritance rights.

Article 2 of the ICESCR requires member states to respect and protect the rights of all individuals on their territory, regardless of race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth, or other status. This provision establishes non-discrimination rights. This means everyone, regardless of race, colour, or gender, is entitled to

²⁹⁰ Ladan M 'International Human Rights Law: Development, Scope and Enforcement/Monitoring' in Obilade A, Nwankwo C & Tunde-Olowo A *Texts for Human Rights Teaching in Schools* (eds.) 67-68.

²⁹¹ Chairwood D & Chenwi L *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 3-30.

²⁹² Shedrach C 'Reclaiming Humanity: Economic, Social and Cultural Rights as the Cornerstone of African Human Rights' Vol. 5 (1) *Yale Human Rights and Development Journal* (2002) 177-216.

²⁹³ Craven M 'A Historical Perspective on Economic, Social and Cultural in International Human Rights in Circle of Rights, Internship Program, Circle of Rights' (2000) available at <https://www.umn.edu/humanrts/edumat/IHRIP/Circle.modules/modules2.htm> (accessed 21 August 2022).

such a right. The principles of equality and non-discrimination are the core aim of the ICESCR.²⁹⁴ The Article safeguards the rights of women against all forms of discrimination, particularly gender-based discrimination. Regardless, the patriarchal system of the Igala people discriminates against women with regard to property ownership and inheritance during and after marriage. This prejudice is a result of the unequal treatment of men and women.

Similarly, Article 3 mandates State Parties to provide men and women equal access to all economic, social, and cultural rights. This provision offers men and women equal protection. Although the right of women to property ownership and inheritance was not directly provided for in the article, it can be concluded that State Parties are required to ensure that men and women have equal rights. Women in Igala land do not have equal property ownership and inheritance rights with men and women.²⁹⁵ This is in violation of Article 3 of the ICESCR. The full effect of Article 3 will be undermined if both men and women are not allowed to fully enjoy the rights provided for by the ICESCR.²⁹⁶ The Committee on Economic, Social and Cultural Rights clarified the obligations of States Parties. State Parties must ensure that the covenant's rights are strictly enforced. Furthermore, State Parties bear the burden of ensuring non-discrimination. This means that no one should be subjected to either formal or substantive discrimination. State Parties must combat social constructions of gender, gender stereotypes, and obstacles that continue to discriminate against women. Despite these obligations imposed on State Parties to protect the fundamental rights and freedoms of both women and men, the ICESCR did not significantly address discrimination against women in property ownership and inheritance. To guarantee the

²⁹⁴ Committee on Economic, Social and Cultural Rights, Forty-Second Session, Geneva 4-22 May, 2009, Agenda Item 3, General Comment 20.

²⁹⁵ Okwoli P *Introduction to Igala Traditional Religion* (1996) 53-59.

²⁹⁶ General Comment 20 Committee on Economic, Social and Cultural Rights (CESCR), forty-second session, Geneva, May 4-22, 2009.

effective implementation of the rights stipulated, the ICESCR established the Committee on Economic, Social, and Cultural Rights (CESCR) as its monitoring body.²⁹⁷ The Committee reviews periodic reports presented by State Parties that indicate the actions adopted and progress made in implementing the covenant obligations.

In 2009, the CESCR issued a general comment on the non-discrimination in Economic, Social, and Cultural Rights (ESCR) included in Article 2, paragraph 2 of the ICESCR. It was observed that one of the impediments to the full realisation of the ESCR is discrimination.²⁹⁸ The Committee identified “sex” as a prohibited and express ground of discrimination. The word “sex” was construed to mean the social construction of gender stereotypes, prejudices, and expected roles, which have created obstacles to equal enjoyment of economic, social, and cultural rights.²⁹⁹ Thus, the patriarchal attitudes that exclude women from property ownership and inheritance during and after marriage based on gender fall within the prohibited and express grounds of discrimination, even though the covenant does not directly provide for the right to property ownership and inheritance.

The Committee also mandated State Parties to adopt legislation with the aim of addressing both formal and substantive discrimination. The adopted legislation should be reviewed regularly and amended, where necessary in order to ensure that no form of discrimination is encouraged by the legislation. In addition, State Parties are to have strategies, policies and plans to ensure discrimination in both public and private spheres is effectively addressed.³⁰⁰ In line with this position, the Nigerian government formulated the National Gender Policy in 2006, and more

²⁹⁷ Mamman T ‘Beyond Rhetoric: Challenges for the International and Regional Human Rights in the New Millennium’ Vol. 1 (1) *Nigerian Bar Journal* (2004) 1-16.

²⁹⁸ CESCR General Comment 20.

²⁹⁹ CESCR General Comment 20.

³⁰⁰ CESCR General Comment 20.

recently, the National Gender Policy 2022 was formulated to ensure that the rights of women are being protected from discrimination in Nigeria.³⁰¹

State Parties are responsible for overseeing the comprehensive implementation of the special measures used to comply with Article 2 of the Covenant. They need to make sure that strategies, policies, and plans are appropriately developed, and that the express and prohibited grounds for discrimination are taken into account when choosing the right indicators and benchmarks.³⁰²

3.2.4 International Covenant on Civil and Political Rights (ICCPR)

The UDHR was the first part of the instruments that make up the International Bill of Human Rights. This gave birth to the ICCPR on 16 December 1996, when the UN General Assembly adopted the ICCPR and an optional protocol to the ICCPR, allowing for complaints to be made by individuals on violations of their rights embodied in the covenants.³⁰³ The rights outlined in the ICCPR are consistent with the UDHR.³⁰⁴ The international community set up measures for the implementation of the rights set forth in this covenant. This was further elaborated by the adoption of the first and second optional protocols to the ICCPR.

The ICCPR is a legally binding human rights instrument for member states (Nigeria Inclusive), and they are further obliged to respect the procedures for their implementation, including the submission of periodic reports.³⁰⁵ However, the ICCPR has not been domesticated in Nigeria. The implication is that the ICCPR is not enforceable or legally binding in Nigeria. The ICCPR contains provisions that promote and protect civil and political rights. It is argued that the ICCPR “*speaks to matter deep, lasting and purportedly universal*”.

³⁰¹ National Gender Policy 2021-2026.

³⁰² CESCR General Comment 20.

³⁰³ Tomuschat C ‘Equality and Non-Discrimination under the International Covenant on Civil and Political Rights’ *Staatsrecht-Völkerrecht-Europarecht* (2019) 691-716.

³⁰⁴ Oyewunmi A ‘The Promotion of Sexual Equality and Non-Discrimination in the Workplace: A Nigerian Perspective’ Vol. 13 (4) *International Journal of Discrimination and the Law* (2013) 324-347.

³⁰⁵ Moeckli D ‘Equality and Non-Discrimination’ *International Human Rights Law* (2010) 189-208.

Conversely, the right to own property and the denial of such rights are mentioned in the UDHR but not in the ICCPR. Some of the ICCPR-recognised rights have no direct or indirect influence on women's property ownership and inheritance rights. Article 3 of the ICCPR allows state parties to ensure the equitable enjoyment of all civil and political rights by men and women. This provision promotes the equal civil rights of men and women for women. Article 3 suggests that all human beings shall have equal and total access to the rights enshrined in the Covenant. When any individual is denied the full and equal enjoyment of any right, the full effect of this provision is undermined. As a result, states must ensure that men and women have equal access to all of the Covenant's provisions.³⁰⁶ In addition, Article 23(4) ICCPR states that "*State Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and its dissolution...*" This provision provides men and women equal rights upon divorce. Due to the patriarchal nature of the Igala people, the husband is the head of the household and, often, the sole provider (breadwinner) in the event that the marriage fails and the parties divorce, the man is always in a superior financial position³⁰⁷. This allows the man to strip his wife of all of her property³⁰⁸. This discriminatory practice violates the provisions of Article 23(4) of the ICCPR, which permits State Parties to take reasonable measures to ensure that both spouses enjoy the same rights not only during the marriage but also at its dissolution. It is believed that once the patriarchal structure of the Igala people has been abolished, this practice will cease to exist. This would assist men and women in having equal access to the same rights

³⁰⁶ Human Rights Committee (HRC), General Comment 28, Equality of Rights Between Men and Women, Article 3, U.N. Doc. CCPR/C/21/Rev.1/Add.10(2000).

³⁰⁷ Boston J (1968) 67-93.

³⁰⁸ Allen K 'Feminist Theory in Family Studies: History, Reflection, and Critique' Vol. 8 (2) *Journal of Family Theory & Review* (2016) 207-224.

and obligations to acquire and own property in marriage, as well as having an equitable share of the property upon dissolution of the marriage.

The Human Rights Committee noted that inequality in the enjoyment of rights by women around the world is deeply rooted in tradition, history and society, including religious attitudes. Traditional, historical, religious or cultural attitudes should not be used to justify the abuse of women's rights to equality before the law and equal enjoyment of all covenant's rights.³⁰⁹ States parties should provide relevant information about those aspects of tradition, history, cultural practices and religious attitudes that threaten or might threaten compliance with Article 3 and the steps they have taken or intend to take to address such concerns.³¹⁰

The Committee agreed that the full realisation of the rights is conditional on the removal of obstacles that impede the non-discrimination rights provided for in this agreement. Patriarchy has continued to impede women's rights to exercise property and inheritance rights in Nigeria, particularly among the Igala ethnic group. Eliminating patriarchal attitudes that exclude women from property and inheritance during and after marriage would mean women have equal access to property as men.³¹¹ The Committee also recommended that States Parties not only take protective measures but also take proactive steps in all areas to achieve effective and equal participation of women. States Parties must provide information on the precise participation of women.³¹²

³⁰⁹ HRC General Comment 28, (2000).

³¹⁰ HRC General Comment 28, (2000).

³¹¹ Makama G (2013) 115-142.

³¹² HRC General Comment 28, (2000).

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

CEDAW is the first international treaty that prohibits discrimination against women generally and includes a modest enforcement system.³¹³ It reinforces the belief in women's fundamental human rights, dignity, and worth of the human person, as well as equal rights of men and women.³¹⁴ The most crucial aspect of CEDAW is its affirmation of women's humanity by promoting human rights discourse and the idea that, even when women's rights are unique to the female gender, they are nevertheless fundamental human rights.³¹⁵ Through CEDAW, the world specifically responded for the first time to the need to enhance women's property ownership and inheritance rights.³¹⁶ In light of this, CEDAW has been referred to as "*a powerful instrument for the delivery of development with justice*",³¹⁷ and it is asserted that the convention does not only support formal equality but also actively campaigns to remove obstacles that prevent women from owning or inheriting property both during and after marriage. Notwithstanding, CEDAW is yet to be domesticated in Nigeria and, by implication, not legally binding.

The CEDAW stipulates that everyone is entitled to all the rights and freedoms set forth therein without distinction, including differentiation based on sex, and that all human beings are born free and equal in dignity and rights.³¹⁸ The goal of CEDAW is to advance gender equality in order to stop discrimination against women in matters of inheritance and property ownership. The term

³¹³ Ezeilo J (2011) 48-76.

³¹⁴ Olaide G *Reproductive Health and Rights: African Perspectives and Legal Issues in Nigeria* (2007) 63-67.

³¹⁵ Atsenuwa A 'Reproductive Health Rights – An Overview of the ICPD and CEDAW' in Nnakwo O (eds.) *Gender Inequality and Reproductive Rights: A Case for a Coordinated Judicial Approach*, Proceedings of a Judicial Colloquium and Reproductive Health and Rights (2004) 13-15.

³¹⁶ Atsenuwa A 'Human Rights of Vulnerable and Marginalized Groups' in Obilade A and Nwankwo C (eds.) *Text for Human Rights Teaching in Schools* (1999) 209-238.

³¹⁷ Freeman M *Women, Development and Justice, Using the International Convention on Women's Rights in close to home: Case Studies of Human Rights Works in the United States* (2004) 1-23.

³¹⁸ Ladan M *Introduction to International Human Rights and Humanitarian Laws* (1999) 54-55.

"discrimination against women" is defined in Article 1 of CEDAW and refers to a variety of ways in which a woman may experience discrimination. This article states that

For the purpose of the present Convention, the term “discrimination against women” shall mean any distinction, exclusion, or restriction made on the basis of sex which has the effect or purpose of effect or purpose of impairing or nullifying the recognition, enjoyment, or exercise by women irrespective of their marital status, on a basis of equality of men and women, of human right and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

This definition is thorough, treating the idea of equality as both an obligatory requirement and a goal. Article 1 addresses discrimination's intended and unintended repercussions. Furthermore, broadening the concept to include discrimination against women in "*any other field*" will subject public and private actions to regulation. To meet the non-discrimination standard, men and women must be treated equally. Equality is assured when biological distinctions between men and women are no longer used to grant or deny women the rights to property ownership and inheritance that males normally have. Furthermore, this provision forbids any discrimination, even if it is motivated by the patriarchal nature of society. However, this Article does not regard married status as a prerequisite for exercising the right to property ownership and inheritance. This indicates that equality has no bearing on a woman's intimate connections with men.³¹⁹ State Parties are enjoined by Article 2 (1) CEDAW to condemn discrimination against women in all of its forms ,take the necessary steps to implement policies that eliminate discrimination against women, and commit to implementing the principle of equality between men and women, including appropriate legislative and other measures to eliminate the legal basis for discrimination by revising laws, including customary laws.

³¹⁹ Shavel C 'Rights to Sexual Reproductive Health: The ICDP and the Convention on the Elimination of all Forms of Discrimination Against Women' Vol. 4 (2) *Health and Human Rights* (2000) 38-66.

Furthermore, states were enjoined to include the principle of equality in their national constitutions and to take practical steps to promote the implementation of the principle of equality in order to ensure that women are not discriminated.³²⁰ To abolish gender discrimination, State Parties must ensure that women's rights are protected through competent national tribunals and other public institutions.³²¹ State Parties are not expected to engage in any discriminatory practice against women's rights,³²² to ensure that measures are in place to eliminate all forms of discrimination against women,³²³ to modify or abolish laws and customs that promote discrimination against women,³²⁴ and to repeal all national penal provisions that constitute discrimination against women.³²⁵ Collectively and individually, women have the right to be free from discrimination in property ownership and inheritance. States have an obligation to safeguard these guaranteed rights. State Parties are required by Article 5³²⁶ to address their responsibility toward women in the cultural, economic, and social realms. It seeks to restructure and alter the structural impediments to equality.³²⁷ State Parties are requested to adjust the social and cultural behaviour patterns of both men and women in order to eradicate customary biases or other practices based on the inferiority or superiority of either sex or stereotypical gender roles.³²⁸ Africa operates a patriarchal system that encourages women's subjugation.³²⁹ As a result of patriarchy, women in Nigeria, particularly among the Igala ethnic group, are considered inferior to their male

³²⁰ Article 2 (b) CEDAW.

³²¹ Article 2 (c) CEDAW.

³²² Article 2 (d) CEDAW.

³²³ Article 2 (e) CEDAW.

³²⁴ Article 2 (f) CEDAW.

³²⁵ Article 2 (G) CEDAW.

³²⁶ CEDAW.

³²⁷ Oyedale O 'Women's Rights in Africa: Myth or Reality' (2006) available at <https://www.nigerianlawguru.com/articles/human%20rights%20law/WOMEN%925%20RIGHTS%20IN%20AFRICA%20MYTH%20OR%20REALITY.pdf>. (accessed 13 August, 2022).

³²⁸ Article 5 (a) CEDAW.

³²⁹ Elaine S & Mama A *Agenda: Empowering Women for Gender Equity* (2001) 58-63.

counterparts from birth. The male-based authority and power structure is solely responsible for women's oppression, marginalisation, and discrimination, and as long as the system and its values are not totally uprooted, society will not be reformed in any significant way to enhance the rights of women against discrimination.³³⁰ The patriarchal nature of Igala society necessitates the subordination of women to men. Women are not allowed to inherit or own property. Patriarchy is present in society, the household, and the public realm. Women are seen as the property of their fathers and, upon marriage, as the property of their husbands.³³¹ Women from the Igala ethnic group are not allowed to own property apart from their spouses. When a man dies, his property is inherited by his adult sons or repossessed by his family if his male children are minors. Due to patriarchy, this tradition is still popular among the Igala, which justifies the disinheritance of girls and widows.³³² Whenever a dispute arises in the domain of property ownership and inheritance during and after marriage, it is typically settled at the expense of women's rights under customary law. This provision will serve to alter the patriarchal structure that has been institutionalised via customs and practices that undermine women's property ownership and inheritance rights during and after marriage.

Also, State Parties are obligated under Article 16³³³ to take all relevant steps eliminate discrimination against women and to ensure that men and women have the same rights with regard to property ownership, management, and disposition between spouses. It provides that

States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

³³⁰Nkealah N '(West) African Feminisms and their Challenges' Vol. 32 (2) *Journal of Literary Studies* (2016) 61-74.

³³¹ Ikpeme A 'Legislative Advocacy on the National Bill on Violence against Women' Being a paper delivered at the Regional Workshop, organized by the Federation of International Women Lawyers (FIDA) on 24 June, (2004) 1-5.

³³² Agbonika J 'The Right of a Woman to Succession and Inheritance under Native Law and Custom in Nigeria: The Need for Reform' Vol. 5 (1) *Kogi State University Bi-Annual Journal of Public Law* (2013) 13-24.

³³³ CEDAW.

- (a) The same right to enter into marriage;
- (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
- (c) The same rights and responsibilities during marriage and at its dissolution;
- (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;
- (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;
- (f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;

This article appears to protect the rights of both married and divorced women to own, use, and sell property. It provides equal rights to property ownership for both men and women during marriage and at its dissolution. CEDAW Committee at the sixth session upheld the women's inheritance rights in Tanzania in the case of two women, E.S and S.C, where they argued that millions of other women in Tanzania, like them, also experienced similar violations with regard to their property rights. The CEDAW Committee held this practice discriminatory and stated that State Parties are mandated to adopt laws of intestate succession to comply with the principles of CEDAW.³³⁴

Notwithstanding the above, women continue to face discrimination in property ownership during and after marriage in Nigeria, notably among the Igala people. In addition, this article did not guarantee women's rights to inheritance and property ownership after marriage. As maintained by radical feminists, patriarchy, the underlying cause of women's subjugation and a system in which men rule women, should be abolished so that women can enjoy their

³³⁴ *E.S & S.C. v. United Republic of Tanzania*, CEDAW/C/60/D/48/2013 Communication No. 48/2013.

fundamental human rights.³³⁵ In addition, the CEDAW recognizes the substantive equality of men and women.³³⁶ When the Nigerian Constitution integrates the concept of substantive equality to address the disadvantaged situation of women in Nigeria, it is anticipated that the property rights of women will be protected. Further, it is argued that efforts to alleviate discrimination against women in property ownership and inheritance in Nigeria and among the Igala people, in particular, must be predicated on the realisation of substantive equality. The implication is that women are treated similarly to males while taking into account their unique situations.³³⁷

Patriarchy is the main barrier preventing women from fully realising their rights to property ownership and inheritance.³³⁸ Aina believes that:

...like most patriarchal societies of the world, a Nigerian woman is socialized into a culture of female subordination. A Nigerian woman is not only subordinate to her husband and men in her own family of orientation, but also to the entire members of her husband's family (males and females). The kinship structures, residence, patterns and marital practices and attitudes across the different ethnic groups put men in an advantaged position from the historical past to the present.³³⁹

The patriarchal nature of the Igala society gives men an advantage in property ownership and inheritance, as only men are permitted to own property, and their inheritance is patrilineal. As a result, women are subject to discrimination in these areas. This superior position enjoyed by men is contrary to the provisions of Articles 2 and 5 CEDAW, which require State Parties to condemn discrimination in all its forms and require State Parties to enact laws eradicating discrimination

³³⁵Tamale S (2008) 47-69.

³³⁶ Article 4 CEDAW provides that “*adoption by State Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards, these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved*”.

³³⁷Durojaye E (2012) 106.

³³⁸ Adekile O (2007) 19-41.

³³⁹ Aina O (2002) 9-13.

based on the inferiority or superiority of both sexes and gender-stereotyped roles for men and women.

The CEDAW has earned many accolades for giving women an advantage in society by prohibiting all kinds of discrimination, including property ownership and inheritance. However, there have been some reservations about the lack of an individual mechanism for communicating with the Committee. Tamale and Onyango argue that:

...CEDAW has the weakest implementation and enforcement mechanisms of any human right convention. There is no provision for an individual petition, and the Committee charged with the supervision and implementation of the instrument is generally less well-endowed than any of its counterparts³⁴⁰.

As a result, the lack of an individual mode of communication may undermine CEDAW's aim because not all violations involving discrimination against women in property ownership and inheritance will reach the Committee. Individual communication was, however, made possible by the Optional Protocol to the Convention on the Elimination of Discrimination Against Women (OP-CEDAW).

The concept of matrimonial property and home is alien to the marriages conducted under the Igala native laws and customs. The absence of the concept of matrimonial property or home usually works injustice in the case of a divorce. A divorced woman cannot claim a share in the property acquired by her husband during the marriage. This practice is applicable also in the eastern part of Nigeria. Obi states that:

Property whether movable or immovable acquired by a married man does not become the common property of himself and his wife or wives. A married man does not require the consent of his wife or wives before he can dispose of any property movable or immovable which he acquired

³⁴⁰ Tamale S & Onyango J 'The Personal is Political' or 'Why Women's Rights Are Indeed Human Rights, An African Perspective on International Feminism' Vol. 17(4) *Human Rights Quarterly* (1995) 725.

while married. It makes no difference that he acquired such property with the help of his wife or wives³⁴¹.

The above quotation indicates that even if the woman has contributed to the matrimonial home when she divorces, she usually leaves with nothing but her possessions. Similarly, Igala women are not allowed to inherit their deceased husband's property, even if she contributed to its acquisition. Our society is primarily patriarchal. Most Nigerian women start life from a disadvantaged position due to the value placed on male children at birth. Many cultural practices reflect the widespread belief that women, while recognized as fellow human beings, are far less important than men. This concept is used to justify denying women the same legal rights as men. Women's unequal inheritance rights are based on the notion that married women have no separate legal identity from their husbands; they are or merely own their husbands, who have ultimate power over them.³⁴²

This discriminatory practice continues due to the patriarchal nature of Nigerian society. Since inheritance is patrilineal, it is considered that a woman or widow who is not a paternal relative of her husband or deceased husband has no claim to a portion of his property.

General Recommendation 28 states that the primary duty of State Parties is to "*condemn all forms of discrimination against women*".³⁴³ Patriarchy is one of the factors identified as the cause of gender-based discrimination by the Committee on the Elimination of Discrimination Against Women (CEDAW Committee) and the Committee on the Rights of the Child (CRC

³⁴¹ Article 1 Optional Protocol to the Convention on the Elimination of Discrimination Against Women (OP-CEDAW) 1994 provides that "a State Party to the Present Protocol ("State Party") recognizes the competence of the committee on the Elimination of Discrimination Against Women ("The Committee") to receive and consider communications submitted in accordance with Article 2.

³⁴² Atsenuwa A *Constitutionalism and Legal Feminism: Stepping Stones or Impediments on the Long Road to Freedom for Nigerian Women* (2011) 6.

³⁴³ UN Committee on the Elimination of Discrimination Against Women (CEDAW), General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 16 December 2010, CEDAW/C/GC/28, available at <https://www.refworld.org/docid/4d467ea72.html> (accessed 24 October 2022).

Committee).³⁴⁴ Women's discrimination has its roots in social beliefs that men and boys are superior to women. Patriarchal systems and socially imposed gender norms place women and girls in inferior positions.³⁴⁵

Both CEDAW and CRC have placed obligations on States Parties to respect, protect and fulfil the rights of women and children. States parties are also called upon to remove all obstacles that impede women and girls' enjoyment or exercise of rights. They shall enact laws to ensure the protection and promotion of human rights. In order to achieve this, the State Parties must integrate CEDAW and CRC into the national legal framework.³⁴⁶

This obligation requires the government of Nigeria to condemn discrimination against Igala women in property ownership and inheritance. In addition, State Parties are required to respect, protect, and fulfil the rights of women to non-discrimination and to ensure the growth and advancement of women in order to strengthen their status and implement their right to de jure, de facto, or substantive equality with men. These obligations require the Nigerian Federal Government to go beyond ratifying the CEDAW and protect women from direct or indirect discrimination in the areas of property ownership and inheritance during and after marriage. The State Governments, particularly Kogi State government, can enact a law that will directly reflect the expectations of CEDAW and eliminate direct and indirect discrimination against women in the area of property ownership and inheritance. Despite the domestication of the Violence Against Person Act 2015 and the enactment of the Gender and Equal Opportunities Law (Kogi State) 2013

³⁴⁴ UN Joint Recommendation/General Comment No. 31 of the Committee on the Elimination of Discrimination Against Women and No. 18 of the Committee on the Rights of the Child on Harmful Practices (General Comment No. 31 CEDAW Committee and No. 18 CRC Committee) 4 November, 2014. Yinka O *Human Rights on Gender, Sex and the Law in Nigeria* 2 ed. (2021) 39-45.

³⁴⁵ General Comment No. 31 CEDAW Committee and No. 18 CRC Committee 2014. In *Timothy v Oforka* (2008) 9 NWLR pt. (1091) 204 the inferior status imposed on women by the Oraifite customary law in the area of property inheritance was held unconstitutional and repugnant to natural justice, equity, and good conscience.

³⁴⁶ General Comment No. 31 CEDAW Committee and No. 18 CRC Committee 2014.

by the Kogi State government, the issue of women's rights to property ownership and inheritance remains unaddressed by these laws. The Kogi State government must enact specific legislation that can effectively safeguard and uphold the property rights of women during and after marriage. Indirect discrimination against women occurs when a law, policy, programme, or practice seems neutral as it relates to men and women but has a discriminatory impact on the right of women to property ownership and inheritance because it does not address pre-existing disparities. A discriminatory act may be direct if men and women are treated differently on the basis of their sexes and genders.³⁴⁷ Igala women experience both indirect and direct discrimination. The patriarchal nature of the Igala ethnic group that disallows women to own or inherit property has a discriminatory impact on the rights of Igala women to property ownership and inheritance.

3.2.6 The Beijing Declaration and Platform for Action (BDPfA).

The Fourth World Conference on Women 1995 adopted the BDPfA. The BDPfA reaffirmed in its Declaration 8 that the Fourth World Conference on Women would promote the equal rights and inherent human dignity of women and men and other purposes and principles as provided for in international human rights instruments. Further, the rights of women were viewed as human rights.³⁴⁸ This Declaration elevated the property rights of women to a human rights issue.³⁴⁹ In addition, State Parties are enjoined to remove all obstacles that hinder the equality of men and women to ensure the full enjoyment of women and the girl child of all human rights and fundamental freedoms and take effective action against violations of these rights and freedoms.

³⁴⁷ Afam A 'Examine and Appraise the Discriminatory Laws in Nigeria' (2020) available at <https://legalpediaonline.com/examine-and-appraise-the-discriminatory-laws-against-women/> (accessed 31 August 2022).

³⁴⁸ Declaration 14 BDPfA, T 224, in Report on the Fourth World Conference on Women, U.N. Doc. A/CONF.177/20 (Oct. 17, 1995).

The Nigerian government is saddled with the responsibility of removing the patriarchal attitude of most communities in Nigeria, particularly the Igala ethnic group, that deny women the rights to property ownership and inheritance. This can be achieved by ensuring that any harmful aspect of certain traditional, customary, or modern practices that violates or infringes on the rights of women is prohibited and eliminated. In *Mojekwu v Mojekwu*,³⁵⁰ Niki- Tobi JSC state that:

We need not travel all the way to Beijing to know that some of our customs, including the Nnewi “Oli-ekpe” custom relied upon by the appellant are not consistent with our civilized world in which we all live today, including the appellant...Accordingly, a custom or customary law that discriminates against a particular sex is, to say the least an affront to the Almighty God Himself. Let nobody do such a thing.

The Court of Appeal referred to the Beijing conference, and this decision has become a locus classicus with regard to women’s property ownership and inheritance in Nigeria. However, there is a need for the BDPfA to be integrated into Nigeria’s domestic laws for it to become fully effective and legally binding.

3.3 Regional Human Rights Instruments

3.3.1 The African Character on Human and Peoples’ Rights (African Charter).

In the 1970s, the African human rights domain was marked by flagrant violations of human rights.³⁵¹ The result was the 1981 adoption of the African Human Charter on Human and Peoples’ Rights.³⁵² The African Charter heralded the commencement of regional human rights institutions in Africa³⁵³ and established and served as the foundation for national human rights protection in

³⁵⁰ (1997) 7 N.W.L.R (Pt. 283) 283

³⁵¹ Ibidapo – Obe A & Yerima T (2004) 60-79.

³⁵² The African Charter on Human and Peoples’ Rights June 27, 1981, OAUCAB/LEG/67/3/REV. 15(1981) reprinted in I.L.M 59(1982). The African Charter is also known as the “Banjul Charter” because it was adopted in 1981 by the 18th Assembly of Heads of States and Government of Organization of African Unity (OAU), the official body of the African states in Banjul, the capital of the Gambia.

³⁵³ Carison A ‘Obligation of States Parties to the African Charter on Human and Peoples’ Rights’ 10 *RADIC* (1998) 628.

Africa.³⁵⁴ Prior to the ratification of the African Charter, various international human rights instruments existed. The African Charter was rapidly and widely ratified upon its arrival. Nigeria not only ratified the African Charter but also incorporated its contents into its municipal legislation prior to its implementation.³⁵⁵ The African Charter, therefore, forms part of Nigeria's domestic laws.

Africans drafted the African Charter to reflect African traditions.³⁵⁶ The Charter recognises the historical traditions and goals of African civilisations, which reflect the concept of human rights.³⁵⁷

However, the expression of African values did not or was not a basis for the Charter to deviate from the international principles included in various OAU member States' universal treaties.³⁵⁸

The preamble of the Charter states that *"taking into consideration the virtues of their historic traditions and the values of African civilization, which should inspire and characterize their reflection on the concept of human and peoples' rights"*. This has helped incorporate individual responsibilities to the family, society, and state.³⁵⁹ The preamble of the African Charter acknowledges that traditional African society is founded on duties as the organizing basis of kinship and family relationships. In addition, the preamble of the Charter has clearly noted that *"it is henceforth essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights is a guarantee for*

³⁵⁴Makay W 'The African Human Rights Systems in a Comparative Perspective' *Revue Africaine des Droits de l'Homme* (1993) 5.

³⁵⁵ Nigeria incorporated the provision of the African Charter into its Municipal Law in 1983 known as, the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Cap.10 LFN 1990 (now Cap. A9, 2004).

³⁵⁶ Ndombana N *Human Rights and Contemporary Issues in Africa* (2003) 121-122.

³⁵⁷ Elias T *New Horizons in International Law*, 2 ed. (1992) 110, Umozurike U *Autochthony in the Africa Charter on Human and Peoples' Rights* (1990) 111-113.

³⁵⁸Gye-Wado O 'Human Rights and Reconstruction in Africa' in Ayua I *Law, Justice and the Nigerian Society*, Essays in Honour of Hon. Justice Mohammed Bello, (eds.) NIALS (1995) 175.

³⁵⁹ Weston B (1989) 26.

the enjoyment of civil and political rights". The African Charter provides for civil and political rights as well as economic, social, and cultural rights.

Unlike the Universal Declaration on Human Rights, which was merely a declaration, the African Charter is a binding treaty that must be implemented immediately.³⁶⁰ States Parties are subject to various duties under the African Charter. They are expected to "*recognize the rights, duties, and freedom enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them*".³⁶¹ This obligation was reiterated in Articles 25 and 26 of the African Charter.

It provides that:

States Parties to the present Charter shall have the duty to promote and ensure through teaching, education, and publication, the respect of the rights and freedom contained in the present Charter and to see to it that these freedom and rights as well as corresponding obligations and duties are understood. States Parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedom guaranteed by the present Charter.

State Parties are obligated to promote the rights to property ownership and inheritance through teaching, education, and publication, as well as to ensure the independence of the court and establish national institutions tasked with the promotion and protection of these rights to property ownership and inheritance.³⁶² It is argued that these rights were imposed on State Parties in order to ensure their implementation. However, these responsibilities on States Parties, however, have not ensured strict implementation because, despite ratification and domestication of the African

³⁶⁰ Umorurike U 'The African Commission on Human and People's Rights' in Elias T & Jegede M *Nigerian Essays in Jurisprudence* (eds.) (1993) 378-379. Unlike the ICESCR, which provides that these rights may be progressively achieved, the African Charter requires immediate implementation.

³⁶¹ Article 1 African Charter.

³⁶² Yinka O (2021) 154-158.

Charter, Igala women are still excluded from property ownership and inheritance during and after marriage.

The African Charter guarantees the rights of individuals.³⁶³ Article 2 provides for the enjoyment of rights without distinction of any kind. This article states that:

Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any other status.

The preceding provision makes it clear that the African Charter condemns all types of discrimination. The African Charter followed the established human rights standard-setting paradigm of embracing the concept of equality and non-discrimination.³⁶⁴ This is also found in Article 3 of the African Charter, which advocates equality before the law and equal legal protection. These principles are known as unrestricted rights.³⁶⁵ In Article 2, the African Charter affirms gender equality in the enjoyment of equal rights without any form of discrimination. Despite the Nigerian government's commitment to achieve this goal, the subordination of women in Igala country persists. Women are oppressed, and male supremacy is ingrained in Igala culture as a result of patriarchy. Men can continue to exclude women from property and inheritance because of patriarchy. Until the Nigerian government accepts the tremendous task of eliminating all forms of discrimination and promoting gender equality, women will continue to be controlled and denied their rights to property and inheritance.

The right to property is guaranteed by the African Charter in Article 14. This article provides that

The right to property is guaranteed. It may only encroach upon in the interest of public need or in the general interest of the

³⁶³ Osita O *Human Rights Law and Practice in Nigeria* (2013) 73-77.

³⁶⁴ Ezeilo J (2011) 80-83.

³⁶⁵ Ndulo M 'African Customary Law, Customs, and Women's Rights' *Indiana Journal of Global Legal Studies* (2011) 82-120.

public of the community and in accordance with the provisions of appropriate laws.

According to the above provision, women have the right to property. This right can only be violated or revoked for reasons of public necessity. This is not the case with the Igala ethnic group. Women are not permitted to own and/or inherit property based on patriarchal attitudes and assumptions rather than public interest or necessity, as provided for in the Charter.³⁶⁶ The patriarchal nature of the Igala ethnic group, which fosters women's exclusion from property ownership and inheritance, violates the stipulations of Article 14 of this Charter.

While all of the African Charter's articles safeguard the rights of both men and women, Article 18 is particularly significant for women and children. Article 18 (3) provides that *“the State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions”*. This provision is significant in terms of women's property ownership and inheritance rights. This is because patriarchal structures that discriminate against women in property ownership and inheritance must be abolished before women can enjoy their rights in this regard. Furthermore, this provision intends to combat patriarchy's disadvantageous position on women. Women continue to endure prejudice in property ownership and inheritance in Igala land.³⁶⁷ There is no provision for women's inheritance rights in the African Charter; however, it is believed that if the Nigerian government eliminates discrimination, this right will be granted. Notwithstanding the fact that this obligation is placed on the State because it has the advantage and responsibility to enforce law and order, Igala women can also explore the option of seeking legal redress to enforce these rights against discrimination enshrined in the African Charter.

³⁶⁶ Anyogu F (2013) 37-80.

³⁶⁷ Okwoli P (1996) 23-45.

Similarly, Article 19 provides that “*all peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another*”. Interestingly, the African Charter imposes obligations on individuals in addition to State Parties³⁶⁸. Article 28 states that “*every individual shall have the duty to respect and consider his fellow beings without discrimination, and not to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance*”. The obligation not to discriminate against women in matters of property ownership and inheritance has been imposed on men. However, this obligation has not been fulfilled, as Igala women continue to be excluded from property ownership and inheritance during and after marriage.

3.3.2 The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (The Maputo Protocol)

This Protocol came into being in 2005 due to the shortfalls of the African Charter.³⁶⁹ Although the African Charter charted the course for African human rights, the African Charter, like the UDHR, had flaws. The passage of this Protocol clarified the rights of women throughout Africa. The Nigerian government has ratified the Maputo Protocol. However, it is yet to be domesticated and, therefore, not enforceable in Nigeria.

The Maputo Protocol aims to improve women's rights and minimize female gender inequality in property ownership and inheritance rights during and after marriage.³⁷⁰ The Maputo Protocol deviates from the traditions of the Igala people's patriarchal society by acknowledging women's property ownership and inheritance rights. In its preamble, the Maputo Protocol recognises “*the crucial role of women in the preservation of African values based on the principles of equality,*

³⁶⁸ Ezeilo J (2011) 80-83.

³⁶⁹ Maputo Protocol.

³⁷⁰ Uche U ‘Post-Colonialism, Gender Customary Injustice: Widows in African Societies’ Vol. 24 (2) *Human Rights Quarterly* (2002) 424-486.

peace, freedom, dignity, justice, solidarity and democracy”. As a means of safeguarding African values and establishing a system for the enforcement of women's rights in Africa, this Protocol attempts to recognize the equality of men and women. Article 1(f) of the Maputo Protocol defines discrimination to mean:

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

According to this definition, the exclusion of women from property ownership and inheritance is undoubtedly a discriminatory act. In the Igala ethnic group, a woman cannot inherit her deceased husband's property,³⁷¹ notwithstanding the Maputo protocol's disapproval of any exclusion or restriction. Property ownership and inheritance are governed by the patriarchal structure of Igala society.³⁷² In addition, this definition considers unfair any exclusion of women from property ownership and inheritance based on their marital status, whether married or divorced. In the event of a dissolution of marriage, according to Igala custom, the woman no longer resides in the matrimonial home, even if it was built jointly.

Further, Article 2 (1) of the Maputo Protocol provides that “*States Parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures...*”. Despite this provision, Nigeria has not taken proactive measures to eliminate the patriarchal attitude that excludes or restricts women from property ownership and inheritance during and after marriage. It is submitted that Nigeria needs to take proactive measures and enact laws and institutional mechanisms to promote women's property and inheritance rights during and after marriage so that women's property and inheritance rights can be effectively enforced. In

³⁷¹Boston J (1968) 23-27.

³⁷² Boston J (1968) 26.

addition, Article 2(1) enjoins States Parties to “*take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist*”. The obligation put on the Nigerian government is such that merely condemning discrimination against women is insufficient. In order to guarantee the property rights of women in Nigeria, it is argued that the Nigerian Constitution must reflect the substantive notion of equality and specifically address the patriarchal nature of Nigerian society, which discriminates against women in the area of property ownership and inheritance during and after marriage. It will facilitate the immediate removal of discrimination against women in Nigeria when it comes to property ownership and inheritance.

Similarly, Article 6 (j) of the Maputo Protocol provides that:

State Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that during her marriage, a woman shall have the right to acquire her own property and to administer and manage it freely.

State Parties are expected to ensure that men and women have equal rights in marriage. They must also enact domestic legislation that allows women to own, administer, and manage property during marriage. Aside from the Nigerian Constitution, which allows Nigerian citizens to own movable and immovable property, no other national legislation protects the property rights of married women.³⁷³ However, the government of Enugu State in eastern Nigeria has passed legislation to protect the rights of widowed women.³⁷⁴

While the Maputo Protocol bears certain parallels with other instruments, such as CEDAW and the African Charter, in terms of the definition of discrimination and the actions that must be taken to guarantee its eradication, the Maputo Protocol is unique in a number of respects. The Protocol,

³⁷³ Ezeilo J (2011) 251-259.

³⁷⁴ Prohibition of Infringement of a Widow’s and Widower’s Fundamental Rights Law 2001 (PIWWFRL).

however, includes a number of rights not found in CEDAW and the African Charter. One such is seen in Article 7(d) of the Maputo Protocol, which states that:

State Parties shall enact appropriate legislation to ensure that women and men enjoy the same rights in case of separation, divorce or annulment of marriage”. In this regard, they shall ensure that... (d) in case of separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of the joint property deriving from the marriage.

This provision is exceptional because it is the first time a human rights treaty has directly addressed how jointly owned property should be distributed. The Maputo Protocol article 7 requires State Parties to establish rules that ensure equitable sharing of marital property. The African Commission has attempted to clarify the import of this phrase, which shall be discussed below. In the event of the dissolution of a marriage, the Nigerian government has not yet enacted a law that ensures women and men have the same opportunity at the distribution of jointly owned property.³⁷⁵ Only jointly-owned property is covered by Article 7(d). Therefore, if the property belongs to the man, the woman will receive nothing in the case of a divorce. Providing evidence of joint ownership in a marriage is a heinous task for the woman. In *Madu v Madu*³⁷⁶ the court held that where there is proof that the husband purchased a property for his wife, the husband always owns that property. It is difficult for women to claim joint ownership on the basis of contribution in equity, a share in a family property acquired during the marriage. Similarly, *Mrs. Ada Onwuchekwa v Mr. Ihe Onwuchekwa and Mrs. Beatrice Obueke*,³⁷⁷ the first respondent and appellant, were married in accordance with Isuikwuato native law and custom. The appellant

³⁷⁵ Micheal A ‘Divorcing Marriage from Marital Assets: Why Equity and Women Fail in Property Readjustment Actions in Nigerian Vol.62 (3) *Journal of African Law* (2018) 427-446.

³⁷⁶ (2002) FWLR 1227.

³⁷⁷ Cited in Obi H ‘Statutory Divorce in Nigeria: A Rethink of Division of Marital Property in Accordance with Global Trend’ Vol. 1 *Journal of International Human Rights and Contemporary Legal Issues (JIHRCLI)* (2021) 81. *Adaku Amadi v Edward N. Nwosu* (1992) 5 NWLR (Pt. 24).

claimed that she and the first respondent purchased the land where the building was erected and that she also made financial contributions to the construction of the building that the first respondent sold without her permission. She requested either a ruling that she and the first respondent shared ownership of the property equally or a declaration that she was entitled to receive half of the selling price. The respondent contested the claim and asserted that he had purchased the land by himself and had constructed the building therein using his own money, a loan from a friend, and a loan from the Nigerian Building Society. He also claimed that even if the appellant contributed to the erection of the building, she was not entitled to one-half because, under Isuikwuato customary law under which they were married, the appellant, with her money, is owned by the first respondent. The trial court gave judgment in favour of the respondent and found that he alone bought the land, erected the building therein, and disbelieved the appellant's claim. The appellant appealed against the decision. The Court of Appeal unanimously upheld the decision of the lower court. This case and others like it make it extremely difficult for a wife to establish joint property ownership. In other cases, women contribute to the upkeep of the family while their husbands focus on other family endeavours, such as the purchase and development of real estate. Women do not receive credit for contributions without a receipt or a documented agreement. In other circumstances, women may contribute by donating cash rather than a check, and it is difficult to verify their contribution if the man denies it. It is crucial to note that this position is restricted and does not take into account women who have nothing to give in order to be co-owners or joint owners with their husbands. Upon dissolution of marriage, the woman is denied access to her husband's property despite the fact that she spent her entire life caring for her spouse and their children.

However, General Comment No. 6 on the Maputo Protocol provided guidance on the interpretation of the rights of women during separation, divorce, or annulment of marriage to ensure that women and men have an equitable property jointly owned while the marriage was in effect and to provide guidance on how jointly owned property can be shared fairly and, in a manner, consistent with the principle of substantive equality between women and men. Several terminologies and expressions within the Maputo protocol pertaining to women's property rights were not explicitly defined, undermining the treaty. General Comment No. 6 clarifies the precise meaning of certain terms and obligations in order to enhance the treaty further.³⁷⁸ The African Commission helped to clarify the meaning of the terms "equitable sharing" and "joint property derived from marriage" as defined in Maputo Protocol Article 7(d). The Protocol acknowledges the region's diverse cultural contexts and expands human rights standards to protect women's property under various legal systems and marriage arrangements.³⁷⁹ This General Comment substantiates the regional legal norms that apply to women's equal property rights during and after marriage.³⁸⁰ The General Comment highlights the necessity of considering the various ways in which women contribute to the economic well-being of their families, as well as the crucial need to guarantee that their contribution is adequately recognised in circumstances of divorce, separation, or annulment of marriage. The contribution of women to the development of land and property through unpaid labour and child-care is thus included in General Comment No. 6.³⁸¹ General Comment No. 6 was the first to take into account women's unpaid care work when figuring out who gets what after a divorce or separation. It also

³⁷⁸ General Comment No. 6 on the Maputo Protocol: A Crucial Tool for Women's Marriage and Property Rights in Africa, A joint publication by GI-ESCR and IGED-Africa (December 2021).

³⁷⁹ African Commission on Human and Peoples Rights, General Comment No. 6 on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol): The Right to Property during Separation, Divorce or Annulment of Marriage (Article 7(d)) (2020) Section 43.

³⁸⁰ IGED Africa 'General Comment No. 6 on the Maputo Protocol: A Crucial Tool for Women's Marriage and Property Rights in Africa' (2021) 1-15.

³⁸¹ African Commission on Human and Peoples Rights, General Comment No. 6, Section 47.

sets basic guidelines for how states should take these contributions into account to ensure a fair distribution of property after a divorce or separation. It was noted in General Comment No. 6 that:

Women on the continent find themselves in a vulnerable status in terms of the enjoyment of their socio-economic rights on an equal basis as men. They have limited access to and enjoyment of property rights. Unequal power dynamics in the relations between sexes, discriminatory social and cultural structures and practices, and women's lack of economic empowerment among others, are key factors that affect the women's rights to property in Africa.

It is submitted that the constant application of negative customary norms hinders the contribution of women to the acquisition of marital property despite the clarification given by General Comment 6. The patriarchal nature of Nigerian society, especially among the Igala people, facilitates the continuous exclusion of women's property rights during and after marriage. It is also argued that if the Nigerian government enacts proactive legislation that removes the burden of patriarchy that has impeded women's rights to ownership of jointly owned property, women's in this regard will improve significantly. In addition, the Nigerian Constitution, which serves as the basis for protecting women's rights from discrimination³⁸² and property³⁸³, needs to incorporate substantive equality so that women's rights to property and inheritance are adequately covered. This has been done in other jurisdictions, such as Kenya and South Africa.³⁸⁴

In order to enforce the property and inheritance rights of married, divorced and widowed women without discrimination, the Nigerian government must consider Friedman's four-dimensional approach, which includes redressing disadvantage, combating stigma, stereotyping, prejudice and violence, improving voice and participation; and accommodating differences and achieve

³⁸² Section 42 of the Nigerian Constitution.

³⁸³ Section 43 of the Nigerian Constitution.

³⁸⁴ The Constitution of Kenya 2010, Article 45(3) "*parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage*". Constitution of the Republic of South Africa, 1996, section 25 (1) "*No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property*".

structural changes. This would ensure that the right to equality also accommodates women whose property rights have been excluded or neglected.

Historically, women have faced challenges in attaining equality and equitable legal rights. Laws were more favourable to the men concerning property ownership and inheritance. This was illustrated in *Nezianya v Okagbue*,³⁸⁵ where it was determined that under the custom and native law of Onitsha among the Igbo ethnic group, a widow's possession of her deceased husband's property can never be adverse to the rights of her husband's family, and she cannot, however long she was in possession of the land, acquire an absolute right to the possession of it as against her husband's family. Her descendants, therefore, can make no claim to the land. This decision was re-affirmed in *Nzekwu v Nzekwu*³⁸⁶ where the court held that the interest of the widow in the house is possessory and not proprietary so that the widow cannot dispose of it. She has, however, a right to remain in the building after the death of her husband, but this is subject to good behaviour. These decisions somehow deter women from contesting their rights in the law court.

On the other hand, enforcing women's right to property ownership and inheritance was associated with some costs.³⁸⁷ Few Nigerian women, particularly Igala women, have the financial means to engage the services of a lawyer or afford their transportation costs to the court.³⁸⁸ In the instance of a widow, pursuing legal action against the relatives of her deceased husband to enforce her right of inheritance may imply that she is guilty of her husband's death. However, States Parties are required under Article 8 of the Maputo Protocol to take all necessary steps to ensure women have equal access to justice and protection and reform discriminatory laws and practices currently in place to protect and promote women's equality.

³⁸⁵ (1963) 1 All NLR 352.

³⁸⁶ (1989) 2 NWRL (pt.104) 375.

³⁸⁷ Anyogu F (2013) 37-80.

³⁸⁸ Ezeilo J (2011) 326-337.

In addition, Article 19 (c) of the Maputo protocol promotes women's rights to access and control productive resources such as land and ensure their property rights. This provision is important in that the rights of women to have access to land and own property are guaranteed. Similarly, Article 20 (a) enjoins States Parties to take appropriate legal measures to guarantee widows' enjoyment of all human rights by not subjecting widows to inhuman, humiliating, or degrading treatment.

Widows have the right to an equitable share in the inheritance of their deceased husband's property. Article 21 of the Maputo Protocol provides that:

A widow shall have the right to an equitable share in the inheritance of the property of her husband. A widow shall have the right to continue to live in the matrimonial house. In case of remarriage, she shall retain this right if the house belongs to her or she has inherited it. (2) Women and men shall have the right to inherit, in equitable share, their parent's properties.

The Maputo Protocol clarifies the rights of widows to inherit their deceased spouse's property. In contrast, the patriarchal nature of the Igala people prohibits the widow from inheriting her deceased husband's possessions.³⁸⁹ If she decides to remarry, she will not be permitted to remain in the residence unless she marries a relative of her deceased husband, who automatically inherits the property.³⁹⁰ This discriminatory practice violates Article 21 of the Maputo Protocol.

The Maputo Protocol comprehensively addresses the obstacles that impede the exercise of women's rights and identifies measures to remove these obstacles. Article 25 provides remedies to any woman whose rights and freedom, as contained in the Maputo Protocol, is violated and reaffirms the obligation of States Parties to take specific measures to enable women to challenge such violations. Despite these provisions, women continue to face widespread violations of their rights.³⁹¹ It is argued that the vision of a discrimination-free life for African women is still a long

³⁸⁹ Abdullahi A (2001) 241-245.

³⁹⁰ Boston J (1968) 78-112.

³⁹¹ Article 25 of the Maputo Protocol provides that *"the States Parties undertake to: a) Provide for appropriate remedies to any woman whose rights or freedoms, as herein recognized, have been violated; b) Ensure that such*

way off.³⁹² It is believed that widows' inheritance rights will be free from discrimination by amending the Nigerian Constitution to eliminate patriarchal attitudes that discriminate and support the exclusion of widows from property succession.

There are arguments that there have been recent developments at the sub-regional and regional courts in Africa where the ECOWAS Court of Justice and the African Court on Human and Peoples' Rights have declared acts of government agencies or laws as a violation of the Maputo Protocol in cases involving women litigants, such *Dorothy Njemanze & 3 Ors. V Nigeria*, where Dorothy Njemanze, Edu Ene Okoro, Justina Etim and Amarachi Jessyforth were abducted and assaulted sexually, physically, verbally and unlawfully detained at different times between January 2011 and March 2013 in the hands of the Abuja Environmental Protection Board (AEPB) and other government agencies, such as the police and the military. They were arrested and accused of being prostitutes simply because they were found on the streets at night.³⁹³ While acknowledging the commendable efforts of the ECOWAS Court of Justice and the African Court of Human and Peoples' Rights, it is essential to emphasize that the Nigerian government is obligated under the treaty to domesticate the Maputo Protocol. This is particularly crucial as the Protocol safeguards women's property rights during and after marriage. This research argues that the implementation of the Maputo Protocol by Nigerian courts will lead to the protection of women's rights to property ownership and inheritance.

remedies are determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by law."

³⁹² Farendu B 'Blazing a Trail: The African Protocol on Women's Rights Come into Force' Vol. 50 (1) *Journal of African Law* (2006) 72-84.

³⁹³ Ekhaton E & Obani P 'Women and Environmental Justice Issues in Nigeria': *Intersectionality and Women's Access to Justice in Africa* (2022) 259.

3.4 Barriers to the Effective Implementation of International and Regional Human Rights Instruments

The intention of both the international and regional human rights instruments are aimed at ensuring the equality of both men and women.³⁹⁴ These instruments protect and promote the rights of women generally and specifically; they promote and protect the rights of women to property ownership and inheritance. However, the implementation of the ICESCR, ICCPR, CEDAW, and the Maputo protocol continues to face some challenges in Nigeria. These factors range from non-domestication of international treaties, the tripartite nature of the Nigerian legal system, economic and cultural factors which are all firmly rooted in patriarchy.

3.4.1 The Nigerian Legal System

The government of Nigeria administers a complicated legal system. The Nigerian legal system recognizes multiple legal systems.³⁹⁵ Nigeria's legal system is made up of received English law, common law sharia, and customary law.³⁹⁶ Nigeria is a federation comprised of 36 states, and Abuja the Federal Capital Territory. Aside from the federal legal system, each state may apply its indigenous laws and customs, which may vary from one ethnic group within the same state to another. Women have been disadvantaged by Nigeria's plural legal system, particularly in the sphere of family law and in terms of women's rights to property ownership and inheritance.³⁹⁷ The majority of discriminatory cultural practices against women are determined by customary law. Since women are seen as the property of their husbands, they are not permitted to own property. Typically, the majority of men would ensure that property ownership and inheritance disputes are resolved by customary laws that promote the patriarchal nature of Nigerian culture.

³⁹⁴ Aina O (2002) 9-13.

Aina O (2002) 9-13.

ian Legal System (1979) 55.

³⁹⁶ Malemi E *The Nigerian Legal System: Text and Cases*, 3 ed. (2021) 41-56.

³⁹⁷ Ezeilo J (2011) 326-339.

Nigeria's combination of legislation, customary law, and sharia law makes it difficult to enforce these international and regional human rights instruments. If various legal systems are merged into a single legal system, which is the legislation, it is submitted that discrimination against women in property ownership and inheritance will be eradicated. This is somewhat improbable in Nigeria because of the fact that a single legal system would promote the rights of women in general, which would undermine the patriarchal nature of Nigerian society. In Nigeria, the diverse legal system gives men the ability to hide behind customary laws that favour them and subjugate women. Alternatively, the issue of women's property ownership and inheritance should be inserted into the executive legislative list in the Nigerian Constitution so that the federal government of Nigeria can legislate on it, and it will be binding across the entire federation. As against where most states now have to legislate on such issues, which are not important to state governors.

The UDHR, ICESCR, ICCPR, CEDAW, African Charter, and Maputo Protocol prohibit all forms of gender-based discrimination and inequality.³⁹⁸ In contrast, patriarchal attitudes continue to discriminate against women in all aspects of property ownership. Patriarchy is the primary reason the Nigerian government continues to accommodate this multiple legal systems. The patriarchal nature of Nigerian society allows men to continue oppressing and subjugating women. As long as these patriarchal views are tolerated in Nigeria, women are believed to continue to be denied the right to property ownership and inheritance.

³⁹⁸ Article 2 UDHR, Article 2 ICESCR, Article 2 ICCPR, Article 2 CEDAW, Article 2 African Charter, and Article 2 Maputo Protocol.

3.4.2 Domestication of International and Regional human rights instruments

Domestication of international and regional human rights instruments is a complex process because Nigeria is a federation of thirty – six states.³⁹⁹ Section 12 (1)-(3) of the Nigerian Constitution provision that:

No treaty between the Federation and any other country shall have the force of law except to the extent to which any of such treaty has been enacted into law by the National Assembly. The National Assembly may make laws of the federation or any part there with respect to matters not included in the Executive Legislative list for the purpose of implementing a treaty. A bill for an Act of the National Assembly passed pursuant to the provisions of subsection (2) of this section shall not be presented to the President for assent, and shall not be enacted unless it is ratified by a majority of all the House of Assembly in the Federation.

The implication of section 12 of the Nigerian Constitution is that human rights treaties ratified by the Nigerian government would not be legally binding until confirmed by the National Assembly.

In *General Sani Abacha v Gani Fawehinmi*⁴⁰⁰ the Supreme Court of Nigeria held that:

An international treaty entered into by the government of Nigeria does not become ipso facto binding until enacted into law by the National Assembly and before its enactment, an international treaty has no force of law as to make its provisions actionable in Nigerian law courts.

Further, the law court unanimously held that “*unincorporated treaties cannot change any aspect of Nigerian is a party to those treaties*” but that they may “*however indirectly affect the rightful expectation by the citizen that govern mental acts affecting them would observe the terms of the unincorporated treaties*”. From the decision of the Supreme Court, it is therefore clear that domestication is a requirement for the effective implementation of ratified human rights instruments.

This is due to the supremacy of the Nigerian Constitution.

³⁹⁹ Anyogu F & Okpalobi B ‘Human Rights Issues and Women’s Experiences on Demanding their Rights in their Communities. The Way Forward for Nigeria’ Vol 4 (1) *Global Journal of Politics and Law Research* (2016) 9-16.

⁴⁰⁰ (2000) 6 NWLR 228.

In Nigeria, the procedure for the domestication of international treaties is exceedingly tedious and challenging.⁴⁰¹ This is because the majority of the members of the National Assembly are men. The passage of these human rights treaties will give women equal rights and opportunities to run for office and equal representation in the National Assembly. This would allow women to advocate for human rights in general, particularly in inheritance and property. The patriarchal nature of Nigerian society is the underlying cause of this strict and extremely challenging domestication process. In particular, the Maputo Protocol is the only human rights treaty that mandates an equitable distribution of jointly owned property. When domesticated, women have equal property rights with men during and after marriage. This will eliminate patriarchal attitudes that deprive women of property they jointly own with their husbands and give them the right to share in it.

There are arguments that patriarchy is the reason for the non-domestication of international treaties. This was evidenced at the 9th Nigeria National Assembly, where the lawmakers legitimised the discrimination against women by refusing to pass the bill proposed to promote the rights of women in Nigeria.⁴⁰² Out of the 68 Bills proposed for amending different provisions in the Nigerian Constitution, five bills were on gender equality. The first is a bill to create additional seats for women to increase women's representation in the national assembly – this bill will lead to a significant increase in the number of women in the parliament, which currently stands at five percent. Second, is a bill to enable Nigerian women to transfer citizenship to foreign husbands, a right that every Nigerian man married to a foreign spouse enjoys. Third, is a bill to ensure affirmative action of at least 35% in political party administration and appointive positions across federal and state levels. Fourth, a bill to provide a minimum of 20% of ministerial or commissioner nominees are women.

⁴⁰¹ Dada I 'Impediments to Human Rights Protection in Nigeria' Vol.18 (1) *Annual Survey of International and Comparative Law* (2012) 9-16.

⁴⁰² Shonibare B 'The Brazen Legalization of Gender Inequality in Nigeria' (2022) available at <https://www.cable.ng/the-brazen-legalization-of-gender-inequality-in-Nigeria> (accessed 11 August 2022).

Lastly, a bill to allow a woman to become an indigene of her husband's state after five years of marriage. Conversely, these bills failed to pass as the majority of men in the National Assembly refused to vote for them. The implication for the rejection of these bills is that the progress of Nigerian women, particularly, Igala women, in the quest for a more egalitarian society seems to be momentarily truncated. All the proposed constitutional amendments were meant to end bias against women and ensure the minimization, if not total removal, of barriers that millions of women face based on gender. It is believed that when more women are given equitable opportunities to occupy political positions, especially as lawmakers, they will canvass for laws that would generally protect women's right.

The National Assembly plays an exclusive role in domesticating treaties in Nigeria.⁴⁰³ The Nigerian National Assembly is divided into two parts, the Senate and the House of Representatives. The Senate consists of one hundred and nine senators, with each state electing three senators from the three senatorial districts within each state. Of the one hundred and nine senators in Nigeria, only eight senators are women. The gender gap in the Senate makes it difficult to domesticate treaties that promote women's rights. The patriarchal nature of Nigerian society places men above women, preventing more women from being elected senators. Men are also considered physically stronger and more goal-oriented than women, while women are seen as more emotionally driven and unable to make decisions.⁴⁰⁴ Traditionally, men have been viewed as being able to make better decisions.⁴⁰⁵ It is submitted that treaties are not domesticated in Nigeria because of the rigorous domestication process and the patriarchal nature of Nigerian society. It is further submitted that when patriarchy is

⁴⁰³ Okeke C & Anushiem M 'Implementation of Treaties in Nigeria: Issues, Challenges and the Way Forward' Vol. 9 (2) *NAUJILJ* (2018) 216-229.

⁴⁰⁴ Olorunbunmi B 'Beijing 1995: Its Challenges to Women and Development in Africa' in Ajayi S & Ayantayo J *Women in Development* Essays in Honour of Prof. D.O Akintunde (eds.) (2015) 395-407.

⁴⁰⁵ Okome M 'Domestic, Regional and International Protection of Nigerian Against Discrimination: Constraint and Possibilities' (2002) available at <https://ssrn.com/abstract=2761914> accessed (11 August 2022).

eliminated, women will have equitable opportunities in the decision-making process in Nigeria, treaties that protect and promote the rights of women will be domesticated. The rights of women generally and particularly those of women in property ownership and inheritance during and after marriage will be implemented.

In addition, the non-involvement of the National Assembly in the negotiation of treaties is largely responsible for the poor implementation of treaties in Nigeria. It is argued that there should be an amendment of the Treaties (Making Procedure) Act, 2004, by the National Assembly to make the participation of the National Assembly compulsory in treaty-making in Nigeria. This would enhance adequate and prompt domestication of treaties in Nigeria. However, the National Assembly has, over the years, shown little interest in discharging this all-important constitutional task; hence, most treaties to which Nigeria is a party have not been domesticated many years after their ratification, particularly, treaties that protect the property rights of women. An outright repeal of section 12 of the Nigerian Constitution is believed to allow treaties to which Nigeria is a party to be justiciable in Nigeria without any legislative intervention.

Furthermore, the bureaucratic procedures for enacting treaties into law are partially responsible for Nigeria's poor implementation of treaties. This research argues that poor documentation of treaties to which Nigeria is a party to is equally responsible for the poor implementation of treaties in Nigeria. There is a need for an immediate amendment of the Treaties (Making Procedure Etc.) Act, 2004 by the National Assembly to make the participation of the National Assembly compulsory in treaty making in Nigeria.

The African Charter is one of the human rights treaty that has been domesticated in Nigeria.⁴⁰⁶ The African Charter is thus legally binding and enforceable in Nigeria. Nonetheless, no case involving

⁴⁰⁶African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap 49 LFN (2004) states that "as from the commencement of this Act, the provisions of the African Charter on Human and Peoples' Rights which

women's rights has been considered by Nigerian courts under the African Charter. This research submits that once patriarchy is eliminated, the National Assembly will have more women who will advocate for the immediate domestication of these international and regional human rights instruments.

Some Nigerian states have passed laws to protect women's rights. Some of these laws are the Enugu State Prohibition of Infringement of Widows and Widowers Fundamental Rights Law (PIWWFRL),⁴⁰⁷ the Anambra State Women Reproductive Rights Law,⁴⁰⁸ the Bayelsa State Female Circumcision and Genital Mutilation (Prohibition) Law,⁴⁰⁹ A Law to Provide the Elimination of Violence, Prohibition of All Forms of Violence Against Persons, Protection of Victims, and Punishment of Offenders in Kogi State and Other Related Matters Connect Therewith, 2022 and others. The PIWWFRL of Enugu State is the first state law that protects widows' rights to property inheritance. The PIWWFRL is the most relevant to this research because it addresses the rights of widows to property inheritance. However, there is yet to be a court judgment in Enugu State on the rights of widows to inheritance that has been decided in favour of widows based on this law.⁴¹⁰

3.4.3 Economic factors

Societal values determine the roles that men and women are assigned.⁴¹¹ In Nigeria, most women are groomed and reared for marriage and motherhood.⁴¹² Men are often seen as breadwinners; thus,

are set out in the schedule to this Act shall, subject as hereinafter provided have a force of law in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria.

⁴⁰⁷ PIWWFL 2001.

⁴⁰⁸ WRRL 2005

⁴⁰⁹ FGML 2000

⁴¹⁰ Ezeilo J (2011) 336-339.

⁴¹¹ Adeoye O 'Women, Culture and Africa's Land Reform Agenda' (2018) available at <https://doi.org/10.3389/fpsyg.2018.02234> (accessed 1 September 2022). Afolabi B & Abatan S 'Early Marriage and Its Implications on the Nigerian Economy' (2014) available at <https://www.10.2139/ssrn.2528255> (accessed 12 August 2022).

⁴¹² Ajayi T 'Cultural Explanations Of The Status Of Nigerian Women' (2008) available at <https://www.ajol.info/index.php/jorind/article/view/42397> (accessed 2 September 2022).

they are afforded the opportunity to study a skill, trade, or formal education. Most women were raised as dependents of their fathers and husbands.⁴¹³ Because patriarchal attitudes encourage male supremacy, women do not receive the preferential treatment accorded to their male counterparts.⁴¹⁴ Women are thought to be weak and incapable of making their own decisions⁴¹⁵.

The cultural attitudes and patterns of society establish the parameters of the people's values in a society that considers male superiority over females.⁴¹⁶ Men are seen as breadwinners, while women are viewed as the property of their husbands.⁴¹⁷ Because most women depend on their husbands for everything, being the breadwinner, women lack the financial resources to access justice.⁴¹⁸

There are a number of governmental and non-governmental organisations eager to take on cases for women in order to enforce their rights.⁴¹⁹ The Public Defender and Citizen's Rights Commission, Legal Aid, the International Federation of Women Lawyers (FIDA) Nigeria, Women Aid Collective (WACOL), Women's Rights Advancement and Protection Alternative (WRAPA Nigeria), the Women Advocates Research Documentation Centre (WARDC), and others are among these organizations. However, most Igala women are ignorant of these organisations.⁴²⁰ It has also been argued that access to justice is beyond the intervention of these organizations as it *means "being treated fairly according to the law and if not being able to get appropriate redress"*.⁴²¹

⁴¹³ Elaine S & Mama A (2001) 58-63, Eboiyehi F, Asiazobor M, Okumdi C & Bankole, Adeyinka O 'In their Husbands' Shoes: Feminism and Political Economy of Women Breadwinners in Ile-Ife, Southwestern Nigeria' Vol.17 (4) *Journal of International Women's Studies* (2016) 102-121.

⁴¹⁴ Makama G (2013) 115-144.

⁴¹⁵ Mama A 'Shedding the Masks and Tearing the Veils: Cultural Studies for a Post-colonial Africa' in Imam A, Mama A & Sow F (eds.), *Engendering African Social Sciences* (1997) 61-77.

⁴¹⁶ Olong M (2009) 123.

⁴¹⁷ Alemika E (2010) 25-28. See chapter 2 for a detailed discussion on this.

⁴¹⁸ Lawson D, Dubin A, & Mwambene L 'Ensuring African Women's Access to Justice: Engendering Rights for Poverty Reduction in Sub-Saharan Africa' *Nordiska Afrikainstitutet* (2019) 3-6. See also Chapter 1 of this thesis.

⁴¹⁹ Olusegun O & Olatunji S 'Access to Justice for Nigerian Women: A Veritable Tool to Achieving Sustainable Development' Vol.22 (1) *International Journal of Discrimination and the Law* (2022) 4-29.

⁴²⁰ Abdullahi Z 'Highlights, Challenges and Setbacks Of Providing Access to Justice' A paper presented at a two day workshop organized by the Attorneys General Alliance (AGA) Africa in conjunction with the Kogi State Office of the Public Defender and Citizens' Rights Commission, PDCRC, on the 17th and 18th February, 2022.

⁴²¹ Anyogu F (2013) 13.

3.4.4 Cultural factors

All over Nigeria, the rights of women to property ownership and inheritance are being discriminated against due to patriarchy.⁴²² The customs of most African communities design cultural patterns and behaviours. Various Nigerian customs set the parameters for property ownership and inheritance. This is because culture is the total way of life of a people.⁴²³ These cultural practices in most Nigerian communities specifically, the Igala community, are patriarchal in nature, and patriarchy encourages women's subordination.

In general, women are considered inferior to men.⁴²⁴ The patriarchal nature of African society perpetuates female subjugation.⁴²⁵ For instance, the Yoruba people of Western Nigeria, view the eldest surviving son as the family head. However, the court in the case of *Lewis v Bankole*⁴²⁶ held that women could ascend to the headship of a family where there are no male children. This applies only to female children and not wives or widows. In *Sogunro-Davis v Sogunro-Davis*,⁴²⁷ the court held that in an intestacy under native law and customs, the devolution of property follows blood. Therefore, a wife or widow not being blood has no right to share. Similarly, the Igbos of Eastern Nigeria do not recognise women's property ownership and inheritance rights.⁴²⁸ The majority of lands are family lands; therefore, women are not eligible to acquire family lands. In addition, the

⁴²² Aluko Y (2015) 56-81.

⁴²³ Omolade O *Family Law and Succession in Nigeria* (2021) 357-359.

⁴²⁴ Vogelmann L *The Sexual Face of Violence: Rapists on Rape* (1990) 2.

⁴²⁵ Gatwiri G & McLaren H 'Discovering my own African Feminism: Embarking on a Journey to Explore Kenyan Women's Oppression' Vol. 17 (4) *Journal of International Women's Studies* (2016) 263-73, Ahikire J 'African Feminism in Context: Reflections on the Legitimation Battles, Victories and Reversals' Vol. 19 (7) *Feminist Africa* (2014) 7-23.

⁴²⁶ (1909) 1 NLR 81; *Amuson v Olawunmi* (2002) 12 NWLR (pt. 780) 30; *Abibatu Folami v Flora Cole* (1990) JELR 42966 SC, where all the surviving children were females; it was held that the eldest female should succeed as head of the family.

⁴²⁷ (1928) 8 NLR 79; *Oloko v Giwa* (1939) 15 NLR 31, the court held that in Yoruba land, widows generally do not inherit their husband's property but they are allowed a portion of farmland, and to remain in the house. Their rights to the house are merely possessory.

⁴²⁸ Babatunde A 'Discriminatory Property Inheritance Rights under the Yoruba and Igbo Customary Law in Nigeria: The Need for Reforms' Vol. 19 (2) *IOSR Journal of Humanities and Social Science* (2014) 30-43.

inheritance pattern allows only the eldest son to inherit the deceased father's property. In *Ngwo v Onyejena*,⁴²⁹ the court held that a man's property devolves to his oldest son, who holds it in trust for his other children. Traditionally, other children mean his other male children. Where a man has no children, his property is inherited by his blood brothers; in the absence of blood brothers, his surviving male relatives.⁴³⁰ In like manner, Igala women are not allowed to own property or inherit the property of their fathers or husbands.⁴³¹

3.5 Conclusion

Several international and regional human rights instruments protect the rights of women to property ownership and inheritance. These international and regional human rights instruments prohibit gender-based discrimination. This necessitates that men and women have equal property ownership and inheritance rights. In addition, some of these human rights instruments have committees such as CESCR, CEDAW Committee, Human Rights Committee and Maputo Committee that have made general comments further clarifying the provisions of these instruments.

Despite the fact that the Nigerian government has signed and ratified these international human rights instruments, they have not yet been domesticated. Also, the Nigerian government is expected to go beyond ratifying these instruments to adequately domesticate them to promote and protect women's property and inheritance rights in Nigeria. Furthermore, the patriarchal culture that pervades Nigerian society must be eradicated so that women can acquire, own and inherit property without facing any form of discrimination, as envisaged in the international and regional instruments discussed above.

⁴²⁹ (1964) ANLR 352, where the deceased father was polygamous, the oldest son of each takes part in the sharing of the estate.

⁴³⁰ Ogungbemi M (2003) 58.

⁴³¹ Etuh O *The Igala Traditional Beliefs* (2018) 53-61.

CHAPTER FOUR

THE DOMESTIC LEGAL FRAMEWORK AND THE INSTITUTIONAL MECHANISMS ON THE ADVANCEMENT OF WOMEN'S PROPERTY RIGHTS IN NIGERIA.

4.1 Introduction

Women's status, position, and rights to property ownership and inheritance in Africa have been considered in some ways inferior to that of men.⁴³² In Africa, patriarchy is a universal concern.⁴³³ The majority of African nations were and still are profoundly patriarchal societies.⁴³⁴ This is so because patriarchy sets the parameters for the roles assigned to men and women. In spite of the legal structure protecting women's rights in Africa, traditionally, some African women continue to be barred from property ownership and inheritance.⁴³⁵

Similarly, Nigeria is a multifarious and multicultural society where most native laws and customs allow males to perpetually discriminate against women in many areas, especially in property ownership and inheritance.⁴³⁶ The pattern of property ownership and inheritance in most traditional communities in Nigeria is predicated on the patriarchal nature of most native laws and customs.⁴³⁷ In fact, most customary land tenure systems, permit and authorise that community land can be given to only male offspring and descendants of the community. Most ethnic groups in Nigeria have developed property ownership and inheritance rules by customary rules.⁴³⁸ Property ownership and inheritance of Igala people is by the Igala native law and custom, which is

⁴³² Rebouche R 'Labor, Land, and Women's Rights in Africa: Challenges for the New Protocol on the Rights of Women' Vol. 19 *Havard Human Rights Journal* (2006) 235.

⁴³³ Albertyn C 'Law, Gender and Inequality in South Africa' 39 (2) *Oxford Developmental Studies* (2011) 139-162.

⁴³⁴ Mama A (1997) 46-62.

⁴³⁵ Butegwa F *Mediating Culture and Human Rights in Favour Land Rights for Women in Africa* (2002) 108-125.

⁴³⁶ Anthony D 'Reform of the Customary Law of Inheritance in Nigeria: Lessons from South Africa' Vol. 14 *African Human Rights Law Journal* (2014) 633-654.

⁴³⁷ Atsenuwa A (2011) 6.

⁴³⁸ Izzi M & Fab-Eme C 'Widows and Inheritance Rights in Nigeria: Beyond the Letters of the Law' Vol. 8 (3) *International Journal of Innovative Legal & Political Studies* (2020) 1-12.

predicated on patriarchal attitudes and assumptions.⁴³⁹ Traditionally, Igala women are not allowed to inherit from their fathers because the patriarchal nature of the Igala society allows males and not females to inherit from their fathers.⁴⁴⁰ It is believed that males are saddled with the responsibility of continuing with the family lineage, whereas females will marry and become the property of their husbands.⁴⁴¹

In addition, women are culturally not allowed to inherit the property of their husbands because they are viewed as property or chattels to be inherited by their husbands' relatives.⁴⁴² Igala women have no rights to the allocation of either communal or family lands.⁴⁴³ Consequently, Igala women are being treated with prejudice with respect to the right to use land or own property. In the same vein, Igala women who are divorced or going through a separation do not have a right to a share of their husbands' property or property jointly owned by them.⁴⁴⁴

The Nigerian Constitution is the legal framework protecting women's property rights. Section 42 addresses freedom from discrimination and embodies the principle of gender equality. Similarly, section 43 of the Nigerian Constitution allows every citizen of Nigeria to acquire or own movable or immovable property. The Constitution provides a legal ground for women's property ownership in Nigeria. However, due to the patriarchal structure of the Igala people, the Nigerian Constitution, which serves as the framework for protecting women's rights in Nigeria, continues to be disregarded in relation to property ownership and inheritance. In addition, Nigeria is a signatory to several international and regional human rights instruments that safeguard and advance the

⁴³⁹ Boston J (1963) 5-9.

⁴⁴⁰ *Ihiana v Akogu* unreported case of Okpo Area Court Grade II Suit No. MD/26A/78.

⁴⁴¹ Okwoli P (1996) 53-59.

⁴⁴² Boston J (1963) 98-146

⁴⁴³ Abdullahi A (2001) 241.

⁴⁴⁴ Boston J (1963) 98-146.

property rights of women.⁴⁴⁵ These international and regional instruments imposed some responsibilities on all member states, Nigeria inclusive. Therefore, Nigeria's legal obligation is to promote, protect, respect, enforce, and fulfil its provision so that women in the country fully realise their right to property ownership and inheritance as enshrined in these international, regional, and domestic legal instruments. Further, some Nigerian states have enacted laws to protect women from discrimination in property ownership and inheritance.

In response to these legal obligations, Nigeria has initiated and established governmental agencies as institutional mechanisms, such as the Federal Ministry of Women Affairs, the National Human Rights Commission, the Kogi State Public Defender, and Citizens' Rights Commission (PDRC) to promote the advancement of Women through their respective mandates. This includes cooperation with civil society and private sector bodies such as the International Federation of Women Lawyers (FIDA Nigeria), Women Aid Collective (WACOL), Women's Rights Advancement and Protection Alternative (WRAPA Nigeria), and the Women Advocates Research Documentation Centre (WARDC).⁴⁴⁶ These governmental agencies and non-governmental organizations were chosen for their roles in advancing women's rights, particularly in the area of property ownership and inheritance.

This chapter examines the domestic legal framework on the property rights of women in Nigeria, including laws and policies at the national level and also at state levels, to assess whether these laws and policies are consistent with Nigeria's obligations under international law. In addition, the role of governmental and non-governmental institutional mechanisms in promoting women's rights in Nigeria was assessed to see how they have fared in promoting women's rights to property during

⁴⁴⁵ Ezeilo J (2011) 40.

⁴⁴⁶ Ezeilo J (2011) 345-75.

and after marriage. Further, the status of women (daughters, married women, widows and divorced women) to own and inherit property during and after marriage in Nigeria considered in general and the status of Igala women in particular. This enabled this research to analyse similar cultural practices and draw lessons that would help promote the rights of Igala women to property ownership and inheritance during and after marriage. Also, this chapter examined the judicial response to women's human rights in Nigeria by analysing case laws with the aim of investigating whether the Nigerian judiciary has effectively interpreted and enforced these legal instruments on human rights, especially articles 7 (d) and 21 (a) of the Maputo Protocol in a bid to safeguard the rights of Igala women's rights to property rights during and after marriage.

4.2 Domestic Legal Framework on the Property Rights of Women in Nigeria

4.2.1 The Constitution of the Federal Republic of Nigeria 1999 (as amended)

The Nigerian Constitution is the foundation for women's rights protection in Nigeria. The preamble of the Nigerian Constitution states clearly that Nigeria is built "*on the principles of freedom, equality, and justice*" for all persons. This shows that the Nigerian Constitution aims to treat all Nigerian citizens equally, without gender discrimination.⁴⁴⁷ The essence of this is that no one will hide behind discriminatory practices such as denying women property and inheritance rights, treating others unfairly, or using laws such as customary laws and practices to the advantage of men or disadvantage of women to ensure that men and women are treated equally by applying the same rules to similar situations. Applying the same rules to similar situations means that if men are allowed to own and inherit property, women should be allowed to do so as well.

⁴⁴⁷ Akande J (2000) 1-8.

The Nigerian Constitution is supreme to all other laws in Nigeria. Section 1(1) and (3) of the Nigerian Constitution provides that:

This Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria...if any other law is inconsistent with the provisions of this constitution, this constitution shall prevail, and that other law shall to the extent of the inconsistency be void.

The patriarchal nature of most native laws and customs in Nigeria most times leads to a parallel power struggle between the constitution and customary practices.⁴⁴⁸ The Constitution invalidates cultural practices inconsistent with its provisions. However, patriarchy continues to exert male dominance over women in property ownership and inheritance, contrary to provisions of section 42 of the Nigerian Constitution. Under Igala Indigenous laws and customs, the patriarchal practice that prohibits women from owning or inheriting property is discriminatory and challenges the supremacy of the Nigerian Constitution.⁴⁴⁹ In addition, the Constitution guarantees the right to freedom from discrimination. Section 42 (1) provides that:

A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion, or political opinion shall not, by reason only that he is such a person;- (a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religious or political opinion are not made subject; or (b) be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religion or political opinions.

This provision addresses gender discrimination as addressed in other international and regional human rights instruments. It takes into account both direct and indirect discrimination. This is the

⁴⁴⁸ Ngwankwe J (2002) 142.

⁴⁴⁹ Abdullahi A (2001) 235.

main provision condemning all forms of discrimination in Nigeria. However, the language of this provision appears to encourage the discrimination it is intended to eliminate. The use of "he" rather than "he or she" in this provision indicates a gender-based bias. The use of "he" indicates the extent to which patriarchy has influenced the mentality of Nigerian legislators. Although it can be argued that Section 14 of the Interpretation Act states that the use of the word masculine gender includes female gender; however, the Interpretation Act can only be used as a basis to interpret an enactment, and enactment has also been defined as an Act of the National Assembly or a subsidiary instrument. Therefore, A key question arises whether the Constitution is an Act of the National Assembly and can the Interpretation Act be applied in interpreting it. The answer appears to be in the negative.

This research submits that resolving this discriminatory choice of word would not only eliminate this form of prejudice but also advance women's rights against all forms of discrimination. Further, the court is tasked with adopting a purposive interpretation of this provision of the Constitution to achieve a correct interpretation of this section in order to protect women from gender-based discrimination.⁴⁵⁰ In Nigeria, the practice of formal interpretation has restricted the rights of women.⁴⁵¹ Critically speaking, the prohibition against discrimination by the Nigerian Constitution is limited to discriminatory legal provisions and government or agency actions. This effectively means that any other discriminatory actions or manifestations not flowing from a law or government actions will automatically fall outside the scope of the constitutional protection against discrimination. This means that prejudice against women's property and ownership rights emanates

⁴⁵⁰ Durojaye E & Owoeye Y (2017) 70-85.

⁴⁵¹ Durojaye E & Owoeye Y (2017) 70-85.

from society and the family, perpetrated by their male counterparts, and will not fall within the scope of the protection under the constitutional right against discrimination.⁴⁵²

Many writers have varied views on whether or not the non-discrimination right guaranteed by the Nigerian Constitution is adequate. While some authors believe that the non-discrimination issue has been satisfactorily resolved by section 42, others believe that section 42 is insufficient to address discrimination. Section 42 is believed to have broken the myth and patriarchal attitudes surrounding male preference in succession and inheritance of property in most traditional communities.⁴⁵³ Similarly, section 42 is seen to have reflected some endemic factors in Nigerian communities, such as ethnic groups and circumstances of one's birth.⁴⁵⁴ Cultural acceptance of patriarchy is believed to be the major challenge to women's enjoyment of non-discrimination rights.⁴⁵⁵ The Nigerian courts have interpreted section 42 in favour of women. In the case of *Priye Iyalla – Amadi v Comptroller General Nigeria Immigration Services*⁴⁵⁶, the court held, relying on section 42 of the Constitution, that regardless of their status, religion, ethnicity, country of origin, or political views, all female citizens of Nigeria are treated equally as their male counterparts. In addition, in the case of *Uzoukwu & Ors. v Ezeonu II & Ors.*⁴⁵⁷ The court held that a Constitution must be interpreted in a way that protects or defends what it was intended to do by its very nature. A Constitution must, therefore, be broadly interpreted in order to prevent undermining the clear intent of its drafters.

⁴⁵² Ogunniran I 'Gender Issues and the Nigerian Constitution: A Ray of Light, or Twilight on the Horizon?' Vol. 3 (1) *Gender Questions* (2016) 114-132.

⁴⁵³ Adekunle T (2019) 1-12.

⁴⁵⁴ Anyogu F & Okpalobi B (2016) 9-17.

⁴⁵⁵ Anyogu F & Okpalobi B (2016) 13.

⁴⁵⁶ Suit No FHC/PH/CS/198/2008 (Unreported).

⁴⁵⁷ (1991) 6 NWLR (pt. 200), 708 at 763.

Despite the decisions of the court cited, some feminist writers are of the opinion that the Constitution should be amended to reflect the notion of substantive equality to eliminate gender bias in the Constitution.⁴⁵⁸ The denial of inheritance to widows and the deprivation of divorced women to marital property as a result of patriarchal attitudes has caused untold hardship for women.⁴⁵⁹ It is submitted that eliminating these patriarchal attitudes is key to fully realising women's rights to property. Although section 42 of the Constitution deals with the right to freedom from discrimination, it is not adequate as inherent discrimination exists within the Constitution itself.⁴⁶⁰ This is because section 42(3) departs from the intendment of prohibition of discrimination.⁴⁶¹ This argument has been held to be wrong and represents the traditional views held by academics and lawyers in Nigeria.⁴⁶² There are opinions that the African Charter and other sections of the Constitution, such as section 17 and section 42 (1) and (2) and other international human rights instruments to which Nigeria is a signatory to, serve as a pillar in invalidating some of these state-sanctioned discriminatory practices in Nigeria.⁴⁶³ The case of *Timothy v Oforka*⁴⁶⁴ supports this position. In that case, the Court of Appeal held that no law or custom that stands in the way of our Constitution should be allowed to stand, no matter the circumstances. However, a clear contradiction in this argument is seen in the case of *Uzoukwu v. Ezeonu*,⁴⁶⁵ where the Court of Appeals held, inter alia, that the constitutional right to discrimination must first be based on the letter and spirit of the law, which must result from a law or the actions of any government or its

⁴⁵⁸ Ezeilo J (2011) 174-175.

⁴⁵⁹ Yinka O (2021) 249-250.

⁴⁶⁰ Ezeilo J (2011) 175.

⁴⁶¹ Section 42 (3) of the Nigerian Constitution provides that “*Nothing in subsection (1) of this section shall invalidate any law by reason only that the law imposes restrictions with respect to the appointment of any person to any office under the State or as a member of the armed forces of the Federation or member of the Nigeria Police Forces or to an office in the service of a body, corporate established directly by any law in force in Nigeria*”.

⁴⁶² Ekhatore E (2015) 292.

⁴⁶³ Ekhatore E (2015) 292.

⁴⁶⁴ (2008) 9 NWLR (Pt. 1091) 204.

⁴⁶⁵ (1991) 6, NWLR (pt. 200), p.708 at 760-761.

agencies. It does not apply to other Nigerians and can only be applied if the conditions set forth are the sole grounds for discrimination against the individual.

Specifically, section 43 of the Nigeria Constitution allows citizens to acquire and own property. It provides that *“subject to the provisions of this Constitution, every citizen of Nigeria shall have shall have the right to acquire and own immovable property anywhere in Nigeria”*. This provision promotes women's rights to acquire and own property. In contrast, due to gender discrimination, Igala women have been denied the right to own immovable property in Nigeria and, thus, the opportunity to inherit property. This discriminatory practice violates the property acquisition and ownership rights guaranteed by the Constitution. This provision is nonetheless confined to immovable property ownership. The implication of this is that any customary law or native law and custom, or written law that expressly denies and deprives a woman from owning movable properties, will not in any way violate the Constitution of the Federal Republic of Nigeria. It will mean that such custom, practice, or law will be constitutional, legal, and binding. This is an unfortunate lacuna in the Nigerian Constitution and a gap that is unreasonable. It is clear that the bulk of assets held by most individuals are movable and chosen in action, including cash in banks and other assets. All these non-fixed assets are technically open to the full application of discriminatory practices that deny women the right to inherit or acquire properties.

In addition, this provision did not consider the rights of widows to inherit property and the rights of divorced women to an equitable portion of the property. Feminists contend that the male-dominated inheritance system frequently takes precedence over the constitutional protections intended to protect women. Male family members frequently contest the ownership rights of

women.⁴⁶⁶ Furthermore, feminists argue that the Nigerian legal system is inadequate for addressing issues related to women's property rights. Women often face significant challenges in a bid to enforce their rights in court, and the judicial system is often biased against them.⁴⁶⁷

This research argues that embracing substantive equality in addressing this discriminatory practice against the rights of women to property ownership and inheritance during and after marriage will assist in eliminating the disadvantages and stereotypes women suffer in patriarchal societies. The Nigerian Constitution will be seen as more exhaustive if women's rights to property ownership and inheritance during and after marriage are protected.

Conversely, the South African Constitution has reflected the notion of substantive equality⁴⁶⁸ to protect the rights of women to property. Under Chapter Two, which contains the Bill of Rights, section 25 (1) provides that “no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property”.⁴⁶⁹ This provision protects women's property rights from any form of arbitrary deprivation by any law, including customary law. This facilitates the courts' legal interpretation of substantive equality, which emphasizes context, impact, differences, and values and has some potential to bring about significant social and economic change through the courts. This interpretation is able to address a variety of social and economic inequalities.⁴⁷⁰ Similarly, the Kenyan Constitution has been designed to reflect the idea of substantive equality.⁴⁷¹ By virtue of section 43 (3) of the Constitution, “parties to a

⁴⁶⁶ Adesina O ‘The Gendered Nature of Property Inheritance Laws in Nigeria: A Feminist Analysis’ Vol. 17 (4) *Journal of International Women's Studies* (2016) 8-24.

⁴⁶⁷ Olayemi A ‘Gender and Property Rights in Nigeria’ Vol. 57 (2) *Journal of African Law* (2013) 227-244.

⁴⁶⁸ Albertyn C (2018) 441-468.

⁴⁶⁹ South Africa's Constitution of 1996 with Amendments through 2012.

⁴⁷⁰ Albertyn C ‘Substantive Equality and Transformation in South Africa’ Vol. 23(2) *South African Journal of Human Rights* (2007) 253-276.

⁴⁷¹ Orago N ‘Limitation of Socio-economic Rights in the 2010 Kenyan Constitution: A Proposal for the Adoption of a Proportionality Approach in the Judicial Adjudication of Socio-economic Rights Disputes’ Vol.16 (5) *Potchefstroom Electronic Law Journal* (2013) 169-219.

marriage are entitled to equal rights at the time of the marriage, during the marriage, and at the dissolution of the marriage”.⁴⁷² This provision conforms with Maputo Protocol Article 7(d).⁴⁷³

Although the Nigerian Constitution prohibits gender discrimination and allows all Nigerian citizens the right to own property, the obligation imposed on the Nigerian government goes beyond that.

Although the Nigerian Constitution recognizes women's property rights, it does not fully comply with the Maputo Protocol and CEDAW. CEDAW is an international treaty that seeks to abolish gender discrimination and provide women with equal rights in all aspects of life,⁴⁷⁴ including property rights. Nigeria ratified CEDAW and is therefore obligated to comply with its provisions. According to Article 16,⁴⁷⁵ State Parties must take all necessary actions to eliminate discrimination against women and guarantee that men and women have equal rights with regard to property ownership, management, and division among spouses. This means that positive steps and actions must be taken by Member states that are signatory. In spite of this, section 43 of the Nigerian Constitution is incompatible with CEDAW's standards and the notion of substantive equality. The Constitution allows every citizen to acquire and own immovable property. The Nigerian Constitution does not protect the rights of women to property management and division of marital property. However, CEDAW covers a wide range of rights, such as equal rights of men and

⁴⁷² Kenya's Constitution of 2010. In the case of *CMN v AVM EKLK* where, during the marriage, the husband CMN bought and developed a property, which was subsequently utilized as a joint residential house by CMN, his wife (AWM), and their children. Their marriage was later dissolved, and AWM remarried. AWM, the wife, had made no financial contribution to the purchase or upkeep of the property in question. Following the divorce, CMN sought a Court declaration that he was the exclusive owner of the property, despite the fact that the property was jointly registered in the names of both CMN and AWM. The Court held that the matrimonial property in question must be equally divided between the husband and the wife.

⁴⁷³ See Chapter 3.

⁴⁷⁴ Cook R 'Reservations on the Convention on the Elimination of All Forms of Discrimination Against Women' Vol. 30 (4) *Virginia Journal of International Law* (1990) 643-716.

⁴⁷⁵ CEDAW.

women in property ownership, management, and division among spouses. This covers the rights of women to property ownership during and after marriage.

The role of human rights legal instruments in redressing social and legal inequalities faced by women in their various communities cannot be overemphasised.⁴⁷⁶ It is crucial to state that the regional and international human rights instruments were framed through a gendered lens.⁴⁷⁷ Further, Article 2 (1)⁴⁷⁸ requires States Parties to combat discrimination against women through appropriate legislative, institutional, and other measures. Although Nigeria has some institutional framework for advancing human rights, the government has not taken proactive legislative measures to eliminate the patriarchal attitude that excludes or restricts women from property ownership and inheritance during and after marriage. In addition, Article 7 (d)⁴⁷⁹ requires State Parties to enact laws that ensure equitable distribution of marital property in the case of separation, annulment, and divorce. The Nigerian Constitution is yet to have a section to accommodate this unique provision of Article 7 (d) of the Maputo Protocol. This makes the Nigerian Constitution inconsistent with Article 7(d) of the Maputo Protocol. There is still much work to be done to ensure that women in Nigeria have equal access to property and that their rights are protected in practice. The Nigerian government is required to enact laws prohibiting discrimination against women in the area of women's property rights during and after marriage, as envisaged under the Maputo Protocol. However, the Nigerian government has not taken proactive steps to enact laws that will eliminate patriarchal attitudes that continue to exclude women's rights to property ownership and inheritance during and after marriage. This stance is at odds with the international obligations imposed on the Nigerian government as a State Party. At this juncture, I must mention that the

⁴⁷⁶ Cook J (1994) 45-68.

⁴⁷⁷ Tamale S (2008) 47-69.

⁴⁷⁸ Maputo Protocol 2003.

⁴⁷⁹ Maputo Protocol 2003.

draftsmen of the Maputo Protocol have adopted a principle-based approach in drafting the Protocol, wherein, they only prescribe principles that should guide States when attempting to apply the provisions of the Protocol. The draftsmen should have applied a rules-based approach, where they would have prescribed specific binding provisions on individuals and natural persons. If this approach was adopted, then by ratifying and domesticating these instruments, the prescriptive and rules-based provisions would automatically apply in Nigeria without the need for the government to take an additional step to legislate additional protective measures.

The substantive equality approach allows equitable opportunities for disadvantaged and marginalized people.⁴⁸⁰ In respect of property, women are perceived to be in a disadvantaged position. The Nigerian Constitution has not used the substantive equality four-dimensional approach to address the discrimination against women in property rights.

4.2.2 Matrimonial Causes Act 1970

In a patriarchal society, a man's property does not become the joint property of the man and his wife or wives, even if the wife contributed financially to its development. Under most native laws and customs in Nigeria, the concept of matrimonial property does not exist.⁴⁸¹ Culturally, the husband pursues capital projects and investments with his income, while the wife may be tasked with caring for the home. Her contribution to the family does not entitle her to co-ownership or joint ownership of property owned by her husband.⁴⁸² When a person subject to Igala native law and custom contracts a marriage, Igala native law and custom resolve the issue of marriage

⁴⁸⁰ Albertyn C and Goldblatt B (1998) 248-276.

⁴⁸¹ Ilegbune C 'A Critique of the Nigerian Law of Divorce under the Matrimonial Causes Decree 1970' Vol.14 (3) *Journal of African Law* (1970)178-197.

⁴⁸² Izunwa M (2016) 1-8.

dissolution or property inheritance, which prohibits women from property ownership and inheritance during and after marriage.⁴⁸³

It is possible for the spouse of a statutory marriage upon divorce to rely on the provisions of section 72 of the MCA for property settlement or to take advantage of the Married Women Property Act⁴⁸⁴ for other property rights. A court may settle property for the benefit of either spouse in accordance with MCA 72 (1), which provides that:

The court in proceedings under this Act may, by order require the parties to the marriage, or either of them to make for the benefit of all or any of the parties to and children of the marriage, such a settlement of property to which the parties are, or either of them is, entitled (whether in possession or reversion) as the court considers just and equitable in the circumstances of the case.

As a result of this provision, women's rights have been protected. In *Kaffi v Kaffi*,⁴⁸⁵ the court ordered the man to settle one of his properties for the benefit of his ex-wife and children. Nevertheless, this applies only to marriages under the Marriage Act and not to marriages under customary law. This section cannot be relied on by married women under the Igala native laws and customs in the event of a divorce.

Despite taking into account women's property rights after marriage,⁴⁸⁶ the MCA still does not adhere to the obligations of international and regional human rights instruments. Article 1 of CEDAW refers to a variety of ways in which a woman may experience discrimination.⁴⁸⁷ This article prohibits any exclusion or restriction that impairs or nullifies the recognition or enjoyment of women's rights, irrespective of their marital status. The import of this provision is that women

⁴⁸³ Boston J (1968) 29.

⁴⁸⁴ Married Women Property Act 1882.

⁴⁸⁵ (1986) NWLR 175.

⁴⁸⁶ Article 7 (d) Maputo Protocol, 2003.

⁴⁸⁷ Article 1 CEDAW, see Chapter 3.

married under the Act or customarily should have equal access to property settlement after divorce without restrictions. Similarly, State Parties are required by the Maputo Protocol to establish regulations that guarantee the equitable distribution of marital property.⁴⁸⁸ Although the MCA has a similar provision, it does not cover women married under customary law. This is inconsistent with the obligations imposed by the Maputo Protocol on Nigeria as a State Party. Despite the apparent need for a review and reform of the Act, there has not been a single amendment since the Act's inception in 1970. It is submitted that there is a need for the MCA to be amended to accommodate the property rights of women married under customary law.

4.2.3 Married Women's Property Act 1882 (MWPA)

When Nigeria gained independence, some aspects of British law had a significant impact on the Nigerian legal system.⁴⁸⁹ The English legal system is made up of common law rules, doctrines of equity, and Statutes of General Application (SOGA).⁴⁹⁰ The Nigerian legal system now incorporates English laws. Statutes of General Application are the laws that were in force in England on January 1, 1900, according to the Interpretation Act and the Supreme Court ordinance. These laws have now become effective in Nigeria. The Married Women's Property Act 1882 is a General Application Statute that applies in Nigeria.⁴⁹¹ The Act guarantees women the right to own property. Section 1 of MWPA provides that:

A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise, of any real personal property as her separate property, in

⁴⁸⁸ Article 7(d) Maputo Protocol, 2003.

⁴⁸⁹ Erhum M 'An Appraisal of The Protection of Women's Rights Under Nigerian Laws' *Gender and Power Relations in Nigeria* (2013) 61-76.

⁴⁹⁰ Alkali A, Jimeta U, Magashi A, & Buba T 'Nature and Sources of Nigerian Legal System: An Exorcism of a Wrong Notion' Vol. 5 (4) *International Journal of Business, Economics and Law* (2014)1-0.

⁴⁹¹ Malemi E *The Nigerian Legal System* (2019) 1-5.

the same manner as if she were a feme sole, without the intervention of any trustee.

However, because Nigeria is now a sovereign state, and as such, Nigerian law is supreme, the received English law is simply of persuasive authority. Except in line with the provisions of the Nigerian Constitution, every other law inconsistent with the Constitution is void.⁴⁹² The Nigerian Constitution contains a similar provision that allows all Nigerian citizens to acquire and own immovable property. However, women's rights to property ownership and inheritance continue to be infringed throughout Nigeria, particularly among the Igala people. Traditionally, women in Nigeria were not seen as feme soles but rather as the property of their husbands.⁴⁹³ Women are considered inferior to their male counterparts in a patriarchal system.⁴⁹⁴ The provisions of the Married Women Property Act do not apply to the property ownership and inheritance rights of the Igala people; the applicable law is the Igala native laws and customs, which disallow women from owning or inheriting property. It is submitted that if the Nigerian Constitution adopts the concept of positive discrimination (the practice or policy of favouring individuals belonging to groups known to have been discriminated against previously) by explicitly recognising the rights of women to property ownership and inheritance, the patriarchal nature of the Igala society that has impeded the rights of women will be eliminated.

4.2.4 Land Use Act (LUA) 1978

In Nigeria, land acquisition for both men and women is primarily through inheritance. The customs and norms of various communities in Nigeria heavily influence inheritance rights.⁴⁹⁵ In most cases, men are more likely to inherit land than women, and the patrilineal system of land

⁴⁹² Section 1(2) Nigerian Constitution 1999.

⁴⁹³ Aluko Y (2015) 56-81.

⁴⁹⁴ Strobel M 'African Women' Vol. 8(1) *Signs: Journal of Women in Culture and Society* (1982) 109-131.

⁴⁹⁵ Aluko B and Amidu A 'Women and Land Reforms in Nigeria' *5th FIG Regional Conference* (8th March, 2006) 13.

inheritance continues despite legal provisions that safeguard the property rights of women in Nigeria. As a result, there is a significant gender gap in land ownership in Nigeria, with 17% of men owning land, compared to less than 2% of women.⁴⁹⁶

Nigeria's Land Use Act 1978 introduced a State-owned land system that gave men and women similar opportunities to acquire or inherit land. Section 1 of the Act cedes ownership of all land within each state to the Governor to be held in trust for the use and common benefit of all Nigerians in line with the provisions of the LUA.⁴⁹⁷ However, it did not necessarily improve property and inheritance rights for Nigerian women, as only legally married women could benefit from the LUA. The LUA supports that land ownership and inheritance in Nigeria are still largely influenced by customary practices.⁴⁹⁸ The case of *Madam Safuratu Salami & Ors v Sunmonu Eniola Oke*⁴⁹⁹ In this case, the customary tenants refused to pay 'Ishakole' (land rent) and denied their overlord's title, the Supreme Court held that:

- i. that it is a misstatement of law to say the Land Use Act abolished remedies of forfeiture and injunctions available to the overlord;
- ii. that the Land Use Act did not intend to transfer the possession of land from owner to tenant;
- iii. that there is nothing in the provision of section 36 (2) preventing a holder (customary overlord) of customary right of occupancy from granting customary tenancy and forfeiting the customary tenancy provided the provisions of the Land Use Act are strictly complied with, and
- iv. that the defendants/appellants having by their actions forfeited their rights to possession in addition to their refusal to pay 'Ishakole' (land rent) were not lawfully occupying the land in dispute under

⁴⁹⁶ Mabogunje A 'Land Reforms in Nigeria: Progress, Problems and Prospects' Annual Conference on Land Policy and Administration, World Bank (2010) 1-25.

⁴⁹⁷ Section 1 LUA 1978 "*Subject to the provision of the Act, all land comprised in the territory of each state in the Federation is hereby vested in the governor of that State, and such land shall be held in trust and administered for the use and common benefit of all Nigerians in accordance with the provisions of this Act.*"

⁴⁹⁸ Ajala T 'Gender Discrimination in Land Ownership and Alleviation of Women's Poverty in Nigeria: A Call for New Equities' Vol.17 (1) *International Journal of Discrimination and the Law* (2017) 51-66.

⁴⁹⁹ (1987) 4 NWLR 1.

customary law. They cannot, therefore, invoke section 36 (2) of the Land Use Act to continue their possession of the land.

The LUA supports the existence of the customary system of land ownership concurrently with the operation of the LUA in Nigeria. As long as the traditional system of land ownership is in place, Igala women will continue to face discrimination, as women cannot own land culturally.

The LUA, like the Nigerian Constitution, is inconsistent with international and regional obligations. The LUA does not expressly guarantee women's rights to equal access to the acquisition, enjoyment, or use of land, as well as its disposition. For the LUA to adequately safeguard women's property rights, it must be amended to incorporate the notion of substantive equality.

4.3 State Laws

Nigeria is a federation of thirty-six states with the Federal Capital Territory, Abuja. The idea behind the establishment of states in Nigeria originally aimed to address the issues faced by ethnic minority groups.⁵⁰⁰ In Nigeria, the National Assembly and the State Houses of Assembly are primarily in charge of the legislative process. The State House of Assembly, made up of elected representatives from the state's various constituencies, enacts laws at the state level. The Nigerian Constitution, which establishes a federal system of government with equal legislative authority for the federal and state governments, serves as the framework for how Nigerian states enact laws.⁵⁰¹

State Houses of Assembly are in charge of enacting laws that apply only to their respective states. Members of the state's elected House of Assembly are chosen to represent a variety of interests

⁵⁰⁰ Akinyele R 'States Creation in Nigeria: The Willink Report in Retrospect' Vol. 39 (2) *African Studies Review* (1996) 71-94.

⁵⁰¹ Mamman L 'Law and Development in Nigeria: A Need for Activism' Vol. 55 (1) *Journal of African Law* (2011) 59-85.

within the state. In most Nigerian states, the process of enacting laws begins with the introduction of a bill to the State House of Assembly. After that, the proposed law is referred to the appropriate committee for review, and it is possible to hold public hearings to solicit input from interested parties. The bill may be amended, approved, or rejected after review by the committee. Then, the reviewed bill is sent to the state governor for assent; the governor can either sign the bill into law or withhold his assent. When a bill is signed into law, it becomes a part of the state's legal framework and is upheld by the judiciary and the appropriate state agencies.⁵⁰² Furthermore, laws passed at the state level cannot conflict with or take precedence over laws passed by the National Assembly at the federal level.

Both the National Assembly and the State Houses of Assembly are allowed to make laws with regard to offences, the jurisdiction, powers, practice, and procedure of courts of law; and the acquisition and land tenure under the concurrent legislative list in Nigeria.⁵⁰³ Some states in Nigeria have enacted laws to safeguard the rights of women in the areas of female circumcision, marriage, widowhood, maternal care, genital mutilation, prostitution, sexual exploitation, and property rights. This sub-topic shall examine relevant state laws on the property rights of women. The State laws covered below were picked to examine whether the property rights of women during and after marriage, as envisaged by these state laws, were consistent with the international and regional human rights instruments.

⁵⁰² Section 100 of the Nigerian Constitution 1999.

⁵⁰³ Schedule II, Part III Supplemental and Interpretation of the Nigerian Constitution, 1999.

4.3.1 Prohibition of Infringement of a Widow's and Widower's Fundamental Rights Law 2001 (PIWWFRL)

The government of Enugu State in eastern Nigeria has passed legislation to protect the rights of widowed women.⁵⁰⁴ The law states that no one, for whatever cause, may compel a widow or widower to leave the matrimonial home. Section 4 (2)⁵⁰⁵ states that a widow or widower shall not be dispossessed (of property acquired during the deceased husband's or wife's lifetime) upon the death of the husband or wife without his or her consent, subject to the Marriage Act, the Wills Law, the Administration of Estates Law, or any customary law (that is not repugnant to natural justice, equity, and good conscience). Furthermore, section 6⁵⁰⁶ sanctions violation of the law with an N5,000 fine or two years in prison. However, the law does not address the issue of what constitutes matrimonial property, which is a significant omission, and the penalties for violation are absurd.⁵⁰⁷ It is submitted that the fine is minute, and two years in prison will not discourage the deceased husband's relatives from depriving his widow of her inheritance. Furthermore, there is yet to be a judicial decision by courts in Enugu State based on this law on the rights of women to inheritance.

The PIWWFRL is inconsistent with international and regional treaties that protect the rights of women to property ownership and inheritance. This law does not offer widows full protection to property inheritance due to the provision of section 4 (2). Widows' inheritance rights are restricted to property owned by them before the death of their husbands. Customary law typically governs

⁵⁰⁴ Nwadinobi E 'Eliminating Harmful Widowhood Practices' Vol. 6 (1) *Journal of the Medical Women's Association of Nigeria* (2021) 53.

⁵⁰⁵ PIWWFRL 2001.

⁵⁰⁶ PIWWFRL 2001.

⁵⁰⁷ Nwabueze R 'Securing Widows' sepulchral Rights through the Nigerian Constitution' Vol. 23 *Harvard Human Rights Journal* (2010) 141.

property, and if the custom is not deemed by the court to be inconsistent with natural justice, equity, or good conscience, widows' rights to inheritance are not guaranteed.⁵⁰⁸ In addition, the law did not cover women's rights to property after divorce as envisaged by Article 7 (d) of the Maputo Protocol.

4.3.2 Rivers State Prohibition of Curtailment of Women's Rights to Share in Family Property Law (RSPCWRSFPL)

The Rivers State Government of the Federal Republic of Nigeria enacted a law to specifically protect the rights of girls, married women, divorced women, and widows to property ownership before, during, and after marriage.⁵⁰⁹ Section 1 protects women and girls from all kinds of discrimination. It states that “*every woman and female child is entitled to freedom from every form of discrimination*”.⁵¹⁰ Before the passage of this law, women and girls faced all kinds of discrimination, especially in property and inheritance, during and after marriage. The elimination of all forms of discrimination through this law will allow women and girls to have the same rights as their male counterparts in property and inheritance.

Additionally, section 3⁵¹¹ specifically safeguards the rights of women against discrimination and deprivation in the distribution of property. It provides that “*no woman shall be subjected to any form of discrimination or deprivation in the distribution, allocation or inheritance of family or community property*”. This provision reaffirms the position of both international and regional human rights instruments that protect and promote women's rights.⁵¹² This provision allows

⁵⁰⁸ *Onwuchekwe v. Onwuchekwe* [1991] 5 NWLR 739.

⁵⁰⁹ Gbenga Y ‘Women and Inheritance’ (2022) available at <https://tribuneonline.com/women-and-inheritance/> (accessed 1 February 2023).

⁵¹⁰ Section 1 RSPCWRSFPL, 2022.

⁵¹¹ Section 3 RSPCWRSFPL, 2022.

⁵¹² See Chapter 3.

women to participate in the distribution, allocation, and inheritance of family and community lands. More interesting is that the RSPCWRSFPL criminalises all forms of discrimination against women and female children and the deprivation of property from women. Section 12⁵¹³ provides that:

A person who discriminates or deprives a woman or female child in the distribution, allocation, or inheritance of family or community property, commits an offence, and is liable on conviction, to imprisonment for a term of 5 years or a fine of N500,000.00 or both.

This law not only protected the rights of women and girls but also punished all forms of discrimination and violations of women's property rights during and after marriage.

Further, section 4⁵¹⁴ allows women a right to inherit their father's property. It provides that "*every woman is entitled to share in the inheritance of her parent's property, except as otherwise expressly stated in the will of the parent*". By virtue of this provision, women are allowed to inherit the property of their parents. However, where any of the parents deny his/her daughter the right to inherit in his/her will, the will supersedes this provision.

The RSPCWRSFPL to eliminate discrimination against women, invalidates any practices imposed on women by custom, religious belief, or other laws. Section 5⁵¹⁵ provides that "*any law, regulation, custom or practice which constitutes discrimination against a woman is void*". This provision is a bold move to eliminate the patriarchal structure that supports any form of discrimination against women in general and in the area of property and inheritance during and after marriage.

⁵¹³ Section 12 RSPCWRSFPL, 2022.

⁵¹⁴ Section 4 RSPCWRSFPL, 2022.

⁵¹⁵ Section 5 RSPCWRSFPL, 2022.

The RSPCWRSFPL allow married women to co-own property with their husbands. Section 6⁵¹⁶ states that:

- (1) A wife shall possess the same rights and responsibilities in respect of the acquisition and ownership of the family property with her husband.
- (2) A wife shall possess the same rights and responsibilities in respect of the
 - (a) Management and administration;
 - (b) Enjoyment; and
 - (c) Disposition of the family property in her husband, where the family property was jointly acquired.

Women have the same rights and responsibilities in relation to the family property as their husbands. Additionally, no woman is required to take an oath to prove joint ownership of family property.⁵¹⁷

Widows are allowed under this law to inherit their husband's property. Section 7⁵¹⁸ provides that *"a widow shall not be deprived of her rights and responsibilities in respect of the family property, notwithstanding the fact that she had no child for her deceased husband's property"*. Traditionally, a widow may be allowed to live in the marital household if she has children.⁵¹⁹ However, widows without children are rarely allowed to remain in their marital homes. She can be allowed if she agrees to marry her husband's relationship.⁵²⁰ This is no longer the case in Rivers State, as the RSPCWRSFRL allows widows without children to inherit family property that they owned jointly with their late husbands.

⁵¹⁶ Section 6 RSPCWRSFPL, 2022.

⁵¹⁷ Section 9 RSPCWRSFPL, 2022, provides that *"no person shall require or compel a woman to take an oath to prove that she contributed to the acquisition of any family property"*.

⁵¹⁸ Section 7 RSPCWRSFPL, 2022.

⁵¹⁹ Igwenyi B 'Ukeje v Ukeje: Setting other Issues on Inheritance in Nigeria' Vol.4 (2) *African Journal of Law and Human Rights* (2020) 22-31.

⁵²⁰ Umeh S 'Female Succession Rights under the Native Laws and Customs of Nigeria Societies: An Affront to Justice' Vol. 1 *MUNFLJ* (2021) 84 – 100.

However, the application of the RSPCWRSFPL is limited to legally married women. If a woman is divorced or widowed, this law applies if she has not remarried. If she remarries, this law does not apply. Section 8⁵²¹ provides that *“this part applies to a legally married woman and where a woman is divorced or widowed; it shall apply only where she has not remarried”*. A wife's right to have the same rights and duties in relation to the family property as her husband, a widow's right to inherit property, and divorced women are sufficient only so long as the divorced woman or widow does not remarry. This provision is discriminatory and contrary to sections 1 and 5 of the RSPCWRSFPL.

The RSPCWRSFPL is inconsistent with Article 1 of CEDAW, which prohibits discrimination against women irrespective of their marital status. The RSPCWRSFPL limits the application of this law to women who are legally married. This limitation makes it inconsistent with international and regional human rights instruments. Similarly, Article 1 (f) of the Maputo Protocol prohibits discrimination against women regardless of marital status. When read together with Article 7 (d) of the Maputo Protocol, this provision protects the rights of divorced women to property after marriage. However, the RSPCWRSFPL protects the rights of a divorced woman to property after marriage only when she does not remarry.

4.3.3 A Law to Provide the Elimination of Violence, Prohibition of All Forms of Violence Against Persons, Protection of Victims, and Punishment of Offenders in Kogi State and Other Related Matters Connect Therewith, 2022 (KSVAPPL)

The Kogi State government has enacted a law prohibiting violence against persons.⁵²² The denial of inheritance or succession rights has been classified as economic abuse by the KSVAPPL.

⁵²¹ Section 8 RSPCWRSFPL, 2022

⁵²² KSVAPPL, 2022.

Section 15 (1) “a person who causes economic abuse on another commits an offence and is liable on conviction to a term of imprisonment not exceeding Two Hundred Thousand Naira (R200,000.00) or both such fine and imprisonment”. This law has interpreted economic abuse to mean the following:

- (a) forced financial dependence;
- (b) denial of inheritance or succession rights
- (c) the unreasonable deprivation of economic or financial resources to which any person is entitled or which any person requires out of necessity, including-
 - (i) household necessities,
 - (ii) mortgage bond repayments, or
 - (iii) payment of rent in respect of a shared residence; or
- (d) the unreasonable disposal or destruction of household effects or other property in which any person has an interest.

This law also punishes anyone who attempts to deny widows their inheritance and succession rights.⁵²³ However, this law does not expressly protect the rights of divorced women but provides that no one can forcibly evict their spouse from their home. Section 12 (1) provides that:

a person who forcefully evicts his or her spouse from his or her home or refuses him or her access commits an offence and is liable on conviction to a term of imprisonment not exceeding two (2) years or to a fine not exceeding R200,000.00 or to both such fine or imprisonment.⁵²⁴

The meaning of this provision could be implicitly taken to mean that this law recognizes marital property when men and women are not permitted to evict each other. The KSVAPPL criminalises any eviction with imprisonment for not more than two years or a fine of not more than R200,000.00 and, in some cases, both imprisonment and a fine.

⁵²³ Section 15 (2) KSVAPPL 2022.

⁵²⁴ KSVAPL 2022.

The KSVAPPL has, to some extent, complied with the obligations of international and regional treaties with respect to the protection of women against any form of violence, and recognised the denial of widow's rights to property inheritance as an economic abuse. However, the rights of women to property during and after marriage were not considered. This makes this law inconsistent. Furthermore, there are cases regarding violence against women in Kogi State courts, where reliance is placed on this law.⁵²⁵ However, there is no case law on the property ownership and inheritance of women during and after marriage.

4.3.4 Administration of Estate Law of Lagos State 2015 (AELL)

The Administration of Estate Law⁵²⁶ of Lagos regulates the property of a deceased who married under the Act and died intestate. Section 49 of the AELL provides that the estate of an intestate should be distributed as follows:

- i. If the intestate leaves a spouse but not children and no parent or brother or sister then the surviving spouse inherits the estate.
- ii. If the intestate leaves children whether he had parent or siblings then the surviving spouse shall take the personal chattels and $\frac{1}{3}$ of the real estate while the children would share the remaining $\frac{2}{3}$.
- iii. If the intestate leaves no children but a spouse and a parent or siblings then the surviving spouse shall take the personal chattels absolutely and $\frac{2}{3}$'s of the real estate, while the parent takes the remaining but where there is no surviving parent then it goes to the siblings.
- iv. If the intestate leaves children but no spouse then his estate would devolve on his children.
- v. Where the intestate leaves no spouse or children but both parents.

⁵²⁵ *State v Arome Attai* Suit No. AYHC/18c/23 (2023) (this matter made reference to the KSVAPPL. It is still pending before the High Court Of anyigba, Kogi State).

⁵²⁶ Administration of Estate Law, Cap A5, Vol. 2, Laws of Lagos State of Nigeria 2015.

Although women are allowed to inherit from their deceased husbands under the AELL, this provision only applies to women married under the Marriage Act and not women married under customary law. This discrimination makes the AELL inconsistent with the obligations imposed on the Nigerian government by the international and regional human rights instruments.⁵²⁷

4.4 National Gender Policy (NGP) 2022

The Federal Executive Council (FEC) authorised a revised National Gender Policy in 2022 to promote gender equality, good governance, and accountability throughout the country's three levels of government.⁵²⁸ This document is a redesigned national gender policy for 2021-2026. The NGP provides institutional guidelines for achieving a just and gender-equitable society, with women and men contributing optimally to and benefitting from national development across all sectors.⁵²⁹ The policy outlines a minimum set of conditions for the Nigerian government to meet its responsibilities for gender equality, good governance, accountability, and social responsiveness to the needs of its most vulnerable population. Equity remains the foundation of Agenda 2030's key values: "*Leave no one behind*".⁵³⁰

The policy's guiding principles include integrating gender analysis into all policy formulation, implementation, and evaluation; mandating that all stakeholders, including the government, the private sector, civil society organizations, and community-based organisations, as well as development partners and individual (women and men), participate in the mandate for gender equity and equality. A gender policy can be implemented to encourage cooperative interaction

⁵²⁷ See Chapter 3.

⁵²⁸ NAN, 'FG Revised National Gender Policy' (2022) available at <https://guardian.ng/news/fec-approves-revised-national-gender-policy/> (accessed 4 September 2022).

⁵²⁹ In Nigeria, policy document is not a subsidiary legislation. This was the decision of the Court of Appeal in *UBN Plc v Ifeoruwa Nig. (Ent.) Ltd* (2006)LCN/2055(CA). It can be inferred that the NGP has more of an advisory role than a regulatory one.

⁵³⁰ NGP 2022.

between women and men, as well as a gender culture that emphasizes cooperation and interdependency rather than separation. It is essential to implement policies based on a cultural reorientation that is supported by policies and programmes of gender education, sensitisation, motivation, and responsiveness rather than just legislation to transform the policy environment in which gender equity programmes are implemented.⁵³¹

The establishment of the NGP is consistent with the obligations imposed on the Nigerian government by the international and regional human rights instruments. It is submitted that if the patriarchal structure that hampered NGP 2006 implementation is removed, the 2022 policy will have the ability to promote gender equality at all levels, including property ownership and inheritance.

4.5 Institutional Framework for the Advancement of Women's Rights in Nigeria

Over the years, there has been a significant advancement in Nigeria's institutional framework for women's rights. Nigeria has established a number of institutional frameworks intended to promote gender equality and address discrimination against women because it is a signatory to international and regional human rights instruments on women's rights. These institutional frameworks are discussed below under two sub-topics, governmental and non-governmental bodies.

4.5.1 Governmental Bodies

4.5.1.1 Federal Ministry of Women Affairs and Social Development

The National Women's Commission Act 1986 established a National Women's Commission by Decree No. 30 of the Act.⁵³² With the input of former First Lady of Nigeria Maryam Babagida's

⁵³¹ NGP 2022.

⁵³² (NCWA) now the National Commission for Women Act 1992 No. 42 Cap. N23, LFN 2004.

Better Life Program and the NCWA, the Commission was upgraded to a federal ministry known as the Federal Ministry of Women's Affairs and Social Development (FMWASD). Later, the FMWASD was established in states in Nigeria as the State Ministry of Women's Affairs and Social Development.

The overall mandate of the FMWASD is to advise the government on matters pertaining to children, the elderly, people with disabilities, and gender equality.⁵³³ The ministry also develops and leads the process to ensure gender equality in all spheres of life.⁵³⁴ The law establishing the FMWASD mandates it to do the following: (These are the ones relevant to this research)

1. Initiate policies, carry out programs/projects, and provide services, towards the total elimination of all socio-cultural practices that discriminate against women, promote their economic and political empowerment, and accelerate the peaceful attainment of gender parity in the national development process.
2. Facilitate the domestication of all conventions, treaties, charters, and declarations to which Nigeria is a signatory;
3. Ensures codification of laws to protect women and children where religion and/or culture do not:

The FMWASD is responsible for developing policies and projects aimed at the complete elimination of discriminatory practices against women, including discrimination against women's property rights during and after marriage. In addition, they are tasked with facilitating treaty domestication in Nigeria. Unfortunately, these goals are not yet being effectively achieved as most international and regional human rights instruments protecting women's property rights are not yet domesticated in Nigeria.

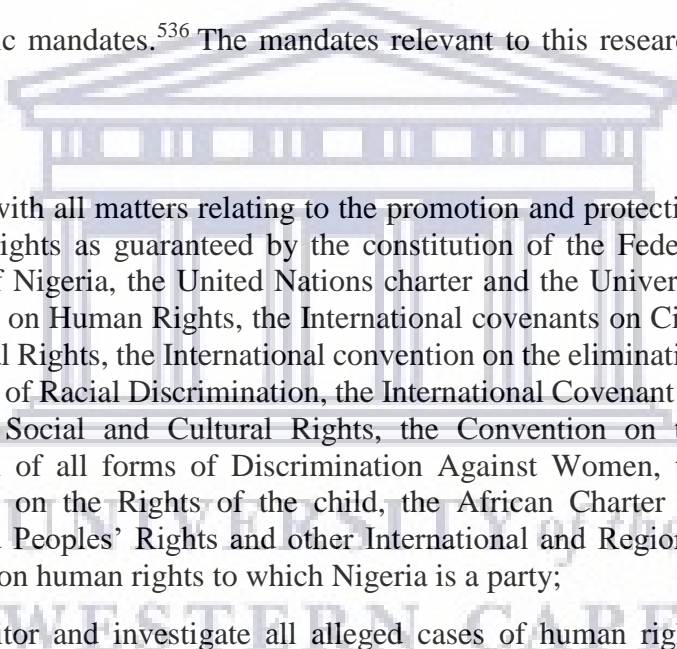
⁵³³ NGP 2022.

⁵³⁴ Federal Ministry of Women Affairs 'Calls for Inputs Nigeria 6th Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)' *Country Report: This Day* Vol. 11, No 3858 (2005) 43, No.14.

4.5.1.2 National Human Rights Commission (NHRC)

The NHRC (Amendment) Act 2010⁵³⁵ gave the Commission greater independence and strengthened its power to promote and protect human rights, investigate alleged human rights abuses, and explore decisions. The Act expanded the Commission's mandate to include evaluating legislation at all levels to ensure compliance with human rights standards.

The NHRC has 18 specific mandates.⁵³⁶ The mandates relevant to this research are considered below:

- 
- a. To deal with all matters relating to the promotion and protection of human rights as guaranteed by the constitution of the Federal Republic of Nigeria, the United Nations charter and the Universal Declaration on Human Rights, the International covenants on Civil and Political Rights, the International convention on the elimination of all forms of Racial Discrimination, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of all forms of Discrimination Against Women, the Convention on the Rights of the child, the African Charter on Human and Peoples' Rights and other International and Regional Instrument on human rights to which Nigeria is a party;
 - b. To monitor and investigate all alleged cases of human rights violations in Nigeria and make appropriate recommendations to the federal government for the prosecution and such other actions as it may deem expedient in each circumstance;
 - c. To assist victims of human rights violations and seek appropriate redress and remedies on their behalf;
 - d. To undertake studies on all matters pertaining to human rights and assist the federal, state, and local governments, where it considers it appropriate to do so, in the formulation of appropriate policies on the guarantee of human rights,

⁵³⁵ NHRC Act 2010.

⁵³⁶ NHRC, 'NHRC Mandate' (2010) available at <https://www.nigeriarights.gov.ng/about/nhrc-mandate.html> (accessed 28 January 2023).

e. To publish and submit from time to time to the president of the National Assembly, the Judiciary, State and Local Governments.

The NHRC handles issues regarding human rights promotion and protection in accordance with the Nigerian Constitution and other relevant international and regional human rights instruments.

The National Human Rights Commission (NHRC) marked a milestone in Ebonyi State, Okhaozara local government area, resolving a long-standing denial of inheritance rights for women in the Ugwulangwu community. The Ebonyi State Office worked with other partners, including MDA, CSOs, NGOs, and others, to visit the community to enforce the decision of the Special Investigation Team on Sexual and Gender-Based Violence (SGB) led by the Secretary-General. On February 16 and 17, 2021, the Commission heard and adjudicated nine SGBV cases and directed the State to contact its other state partners to implement and enforce the Commission's decisions within 30 days of the date of such rulings. In complying with the directives of the panel, the Complainant was assisted in regaining her motorcycle and other items that were confiscated by her community, contrary to the relevant provisions of the Nigerian Constitution as well as other legislations such as the Violence Against Persons Prohibition Act (VAPP). Her previously sealed home was opened following the enforcement of the NHRC panel's decision on SGBV. After the house was unsealed, the woman was helped to get a religious minister of her choice to bless the house so she could enter in peace. Her father's property, which is the bone of contention, will now be shared between her and her half-brother the next time the Commission visits.⁵³⁷

Most of the human rights instruments and the Nigerian Constitution promote and protect the rights of women to property ownership and inheritance. Section 5(j)⁵³⁸ allows the commission to *“receive and investigate complaints concerning violations of human rights and make appropriate*

⁵³⁷ NHRC, ‘News and Events’ (2021) available at <https://www.nhrc.gov.ng/nhrc-media/news-and-events/171/nhrc-restores-woman-s-hope-as-she-regains-access-to-properties-in-ebonyi-community/html> (accessed 26 January 2023).

⁵³⁸ NHRC Act 2010.

determinations as may be deemed necessary in each circumstance". This provision is consistent with the mandates of the NHRC. The NHRC not only receives and investigates complaints but also conducts studies on all human rights issues and makes recommendations to the Federal Government of Nigeria.

4.5.1.3 The Kogi State Office Public Defender and Citizens' Rights Commission

The Kogi State office of the Public Defender and Citizens Rights Commission (PDCRC) was established on 3 June 2019. It is a creation of the law (Kogi State Office of the Public Defender and Citizens' Rights Commission Law, 2018). It is a corporate body with perpetual succession, with the power to sue and be sued in its corporate name. It is an agency of the Kogi State Government with the mandate to render free legal aid and other related services, including legal representation in criminal and civil cases, to the indigent and vulnerable residents of the State. It is also saddled at the State level with the responsibility of ensuring the promotion and protection of human rights.⁵³⁹

The vision is to create a state where the needy, disadvantaged, and vulnerable residents have unimpeded access to justice and guaranteed protection of their basic human rights. The core focus of the PDCRC is to provide free legal services (including representation in courts), promotion and protection of human rights, alternative dispute resolution, family matters, employment, pension matters and other civil claims, and child rights and women's rights issues.⁵⁴⁰

The Office of the Public Defender and Citizens Rights Commission (PDCRC) intervened to ensure justice for a woman who was publicly attacked, ridiculed for allegedly causing her husband's death, and denied access to her husband's property. The victim, Blessing Abbah, married Goodnews

⁵³⁹ PDCRC 'Vision and Mission' available at <https://www.pdcrcokogi.com.ng/about-us/> (accessed 13 February 2023).

⁵⁴⁰ PDCRC 'Vision and Mission' available at <https://www.pdcrcokogi.com.ng/about-us/> (accessed 13 February 2023).

Abbah sometime in November 2020, and both are indigenous people of the Ogugu community in the Olamaboro Local Government Area (Igala Land) of Kogi State. After her husband's death, his family evicted her from their marital home and denied her access to her husband's body. The PDCRC, in cooperation with FIDA, intervened to stop further harassment and degrading treatment in a video that went viral by a gang of youth in the Ogugu community for allegedly causing the death of her husband.⁵⁴¹

Although one of the PDCRC's core areas is promoting and protecting of women's human rights, the Kogi State government has yet to enact legislation protecting women's rights to property and inheritance. It is submitted that the passage of a law protecting women's property rights during and after marriage will allow the PDCRC to promote and protect the property rights of Igala women effectively.

4.5.2 Non-Governmental Organisations

The NGOs covered below were picked for their roles in the advancement of women's rights. Some NGOs have offered free legal services to enable women to contest their property rights in court. Further, a number of these NGOs have contributed to the enactment of the majority of state laws on the rights of women to property and inheritance in Nigeria.

4.5.2.1 Women Aid Collective

The Women Aid Collective (WACOL) was founded in 1997. It is a non-governmental organization. The aim of WACOL is not to make a profit but to promote women's human rights and work to end violence against women in the field of human rights and women's access to justice

⁵⁴¹ Paul O 'Kogi Government Vows To Ensure Justice For Woman Assaulted Over Husband's Death' (2021) available at <https://tribuneonlineng.com/kogi-govt-vows-to-ensure-justice-for-woman-assaulted-over-husbands-death/> (accessed 13 February 2023).

in Nigeria. WACOL has offices in eight Nigerian states: Enugu, Abuja, Anambra, Katsina, Owerri, Port Harcourt, Ebonyi, and Abia.⁵⁴²

The aim of WACOL is to support women and young people whose rights are at risk, have been violated, or have become victims of physical, mental, or sexual abuse. WACOL aims is to advance the legal rights of abused women and children, advocate for better options for them, facilitate organisations to share knowledge and experience, and provide appropriate information, education, and advocacy resources. It also supports women and young people's educational, social, economic, and political development through various services, including training, research, advocacy, shelter, legal and financial help, conflict resolution within families, information, and library services.⁵⁴³

To achieve WACOL's goals, the organisation works with several other organisations, such as the Legal Research and Development Center (LRRDC), Law, National Human Rights Commission, International Human Rights League, New York, National Association of Women Judges, Citizens Resource Development Documentation Center (CIRDDBC), and National Association of Women Journalists to defend Women's Rights in Nigeria.⁵⁴⁴

Over the years, WACOL has offered free legal advice to women in general and specifically to women who have been denied property inheritance in Nigeria. The legal aid program offered by WACOL has helped some women access justice and obtain effective legal remedies. Women's access to justice has been achieved through formal and informal legal systems, such as common law and Sharia, through the effective use of national, regional, and international standards.

⁵⁴² Ezeilo J (2011) 376-383.

⁵⁴³ Obagboye T 'Protecting Women's Rights in Nigeria in the 21st Century: Challenges and Prospects' Vol. 4 (1) *African Journal of Law and Human Rights* (2020) 112-124.

⁵⁴⁴ Ezeilo J (2011) 420-425.

A CEDAW shadow report was written and submitted by a number of Nigerian non-governmental organisations in 2003. This was facilitated by WACOL to improve the proper implementation of CEDAW in Nigeria.⁵⁴⁵ This report should improve the human rights of women in Nigeria while making room for the subordination of gender-oriented organisations. The main aim of the CEDAW Shadow Report was to ensure that the Nigerian government takes proactive steps in implementing CEDAW by issuing national guidelines to promote and protect against all forms of discrimination.⁵⁴⁶ WACOL's insistence on realising gender equality and women's rights has led to legal and political reforms in some states of Nigeria over the years. These include the Inheritance/Widow Protection Laws, the HIV/AIDS Anti-Stigma Laws, the Female Genital Mutilation Prohibition Laws, and the Sexual Harassment Policies for Educational Institutions and Workplaces.⁵⁴⁷

4.5.2.2 Women's Rights Advancement and Protection Alternative (WRAPA) Nigeria.

The Women's Rights Advancement and Protection Alternative (WRAPA) is a non-governmental organization in Nigeria. The wife of the former head of state, Justice Fati L. Abubakar, founded it in 1999.⁵⁴⁸ WRAPA's primary objective is to advocate for the promotion, protection, and realization of women's human rights and to mobilise to eliminate all forms of repulsive and

⁵⁴⁵ Ezeilo J (2011) 420-425.

⁵⁴⁶ During the 30th session of CEDAW in January 2004, the first CEDAW shadow report was presented in response to the 4th and 5th country reports of Nigeria. The second CEDAW shadow report was presented at the 4th CEDAW meeting in June/July 2008.

⁵⁴⁷ Nigerian Group 'Analysis of the History, Organization and Challenges of Feminism in Nigeria' (2011) available at <http://www.nawey.net/wp-content/uploads/downloads/2012/05/Feminism-in-Nigeria.pdf> (accessed 10 February 2023).

⁵⁴⁸ WRAPA Newsletter 'Women's Rights and the Due Process: Benefits and Gains' Vol. 4 (1) October-December, 2003.

discriminatory practices in Nigeria through traditional laws and policies, as well as through regional and international human rights instruments.⁵⁴⁹

The organisation takes a multidimensional approach to realize women's human and socio-economic rights. WRAPA has improved women's rights in Nigeria in several ways, providing legal assistance to over 2,000 women for redress for the various forms of discrimination against them. Over 30 widows have enjoyed legal interventions in property inheritance due to the support of WRAPA.⁵⁵⁰

WRAPA has organised several gender-specific projects, such as providing support services to realize women's rights and improve their ability to contribute to their community and family, organising professional training for the community, and providing support in the area of women's access to justice by updating women's rights mobilising women's groups in private, public and more recently, and promoting dialogue leading up to the 2023 elections and beyond. These projects fuel widespread demand for accountability, social inclusion, and affirmative action. However, there was no specific project on women's property rights after divorce in Nigeria, although widows benefited from free legal representation in situations where property rights were discriminated against.⁵⁵¹

4.5.2.3 Women Advocate Research Documentation Centre (WARDC)

⁵⁴⁹ Ezeilo J (2011) 426-428.

⁵⁵⁰ WRAPA 'Women's Rights Advancement and Protection Alternative (2005-2022) available at <https://www.macfound.org/grantee/women's-rights-advancement-and-protection-alternative-36537/> (accessed 28 January 2023).

⁵⁵¹ WRAPA 'Revisiting Ethno-Religious Conflicts in Nigeria, Women Still Greatest Victims' Vol. Vol.5 (2) *WRAPA Newsletter (Quarterly) Bulletin of the Women's Rights Advancement and Protection Alternative* April – June (2004) 2-4.

The Women Advocate Research Development Center (WARDC) was established in May 2000. WARDC was founded by dynamic feminist advocates with a mission to rid Nigerian society of discrimination against women and girls in Nigeria.⁵⁵² WARDC is a non-profit organisation dedicated to researching and documenting research related to women. The goals of WARDC are to promote education, research, self-development, and positive change in society. Also, to promote gender equality as a development goal, advocate gender realignment in the distribution of resources, legal rights, political participation, and social relations, promote gender justice and the realisation of equality in politics, laws, and social relations and contribute positively to the further development of the legal system in Nigeria.⁵⁵³

WARDC has provided a variety of services, including pro bono legal services for women, children, and people with disabilities. To enable them to challenge discrimination and inequality, consulting services for non-governmental organisations and women groups, advocating gender balancing and equity, training programmes for advocates of women's rights, people with disabilities, children and youths, human rights literacy and good governance programmes for policymakers and legal personnel.⁵⁵⁴

WARDC is committed to promoting gender equality, equity and equal access for Nigerian women through advocacy, litigation and policy reform strategies, including policy-oriented work that creates the necessary political will to enable governments to be pragmatic and to motivate political action. Several projects have been undertaken on various aspects of women's rights to increase women's participation in political processes, the provision of free legal aid to women, access to

⁵⁵² Onobe O 'WARDC Emerges Best CSO Promoting, Advancing Human Rights in Nigeria' *The Guardian* 15th January (2022) 15.

⁵⁵³ Ezeilo J (2011) 430-431.

⁵⁵⁴ Imam A 'The Dynamics of WINning: An Analysis of Women in Nigeria (WIN)' *Feminist Genealogies, Colonial Legacies, Democratic Futures* (2013) 280-307.

justice for women living under Sharia law, and the training of community paralegals. Most of these projects were carried out in cooperation with WACOL.⁵⁵⁵ However, there is still no project on women's property rights, even though this area requires aggressive advocacy to ensure that women's property rights during and after marriage are implemented in accordance with the provisions of international and regional human rights instruments, as well as national laws.

4.5.2.4 International Federation of Women Lawyers (FIDA)

The International Association of Women Lawyers was founded in the United States of America in 1944. FIDA has memberships in over 80 countries, including Nigeria. FIDA Nigeria is a non-governmental, non-profit, and non-political organization. The primary objective of FIDA Nigeria is to promote, protect and uphold the rights, interests, and well-being of women and children. With the coming of the Universal Declaration of Human Rights,⁵⁵⁶ the goals of FIDA were expanded to include the human rights of all.⁵⁵⁷

The goals of FIDA Nigeria are to promote and promote the well-being of Nigerian women and children in all areas based on equality and mutual respect for all people in society.⁵⁵⁸ Over the years, FIDA has raised public awareness of the discriminatory practices imposed on women by indigenous laws and customs in the area of property and inheritance in Nigeria to eliminate such

⁵⁵⁵ Ikeke I 'Agencies Responsible for Protecting Human Rights in Nigeria' available at <https://UJICT2008/30/Documents/WOMENS%20Rights/Agencies%20responsible.Legit.ng.html> (accessed 30 January 2023).

⁵⁵⁶ UDHR 1948.

⁵⁵⁷ Akinrujomu A and Simwa A 'Agencies Responsible for the Protection of Human Rights' (2022) available at <https://www.legit.ng/1116438-what-agency-responsible-protection-human-rights.html> (accessed 29 January 2023).

⁵⁵⁸ MacArthur Foundation 'International Federation of Women Lawyers (FIDA)' (2023) available at <https://www.macfound.org/grantee/international-federation-of-women-lawyers-fida-9600/> (accessed 29 January 2023).

discriminatory practices and promote women's property rights. FIDA also offers free legal advice to women denied property or inheritance rights during and after marriage.⁵⁵⁹

However, most Igala women are reluctant to exercise their property rights due to the patriarchal nature of the Igala ethnic group. Most times, those bold enough to involve FIDA, eventually withdraw the case midway due to pressure from their family or husband's relations. In the event of divorce, women rarely come forward to fight for their property rights because they are castigated and embarrassed about being divorced, especially when their husbands orchestrated the divorce. FIDA is usually hampered when women refuse to be involved in them or drop their cases midway. However, some other women have allowed FIDA to bring cases related to their property rights to a logical conclusion.

FIDA fights specifically against human rights violations, assists women whose rights have been violated, advocates for changes in national and the implementation of regional and international human rights legal instruments, and promotes public awareness and respect for women's rights.

4.6 Current Status of Women in Nigeria

4.6.1 Married women's rights to property ownership

Under most native laws and customs in Nigeria, particularly among the Igala ethnic group, forms of property ownership have been established for centuries.⁵⁶⁰ Land is acquired through first settlement, conquest, customary grants, outright gifts, inheritance, and sale of land. Among the Igala people and other ethnic groups in Nigeria, lands were acquired mainly by first-time settlers

⁵⁵⁹ FIDA 'International Federation of Women Lawyers (FIDA)' available at <https://fida.org.ng/> (accessed 29 January 2023).

⁵⁶⁰ Boston J (1968) 29; Udoekanem N, Adoga D & Onwumere V 'Land Ownership in Nigeria: Historical Development, Current Issues and Future Expectations' Vol. 4(21) *Journal of Environment and Earth Science* (2014) 182-186. (1962) WNLR 1.

in a place.⁵⁶¹ This means that the first person to settle on a given property is free from adverse claims. This traditional position received legal backing in the case of *Owonyin v Omotosho*,⁵⁶² where the court held that:

"Ownership" or title must go to the first settler in the absence of any evidence that they jointly settled on the land or that a grant of ownership was made to the later arrival by the first. The question, therefore, resolves itself to this – who was the first settler on the land?

In addition, lands were acquired through conquest in Igala land. The conqueror is usually viewed as the original owner of the land. Also, there are instances where a community leader or chief allocates land to a person, who is usually male, for their contribution to the community. Similarly, lands were acquired through outright gifts. In this case, it is a gratuitous transmission by a father to one of his children (male or female) or by a community leader to one of his subjects. Further, land is owned by way of inheritance. This occurs when the male children of a deceased are allowed to inherit their father's estate. Also, lands are acquired in Igala land through sales. A share of the property is transferred to a buyer at a certain price.⁵⁶³

A closer look at these means of acquiring property does not favour Igala women. Women are not usually the first settlers, or conquerors, to receive customary grants to own or inherit property. Until recently, women were not allowed to buy land except through their husbands or brothers. This practice persists in many parts of the Igala ethnic group. Women's property rights shall be discussed in two categories under this sub-topic: as a daughter and wife.

⁵⁶¹ Famoriyo S 'Land Tenure, Land Use and Land Acquisition in Nigeria' *Institute for Agricultural Research Ahmadu Bello University Zaria-Nigeria* (2010) 69-75.

⁵⁶² (1961) LCN/0909 (SC).

⁵⁶³ Opaluwa P 'Property Ownership and Inheritance Rule under Igala Native Law and Custom' A paper presented by the Ejeh Ofu (Chairman Ofu Local Government Traditional Council) during the Igala Day Ceremony in Ugwolawo, Kogi State (4 December, 2014) 1-13.

The Igala people allow men, not women, to take over family leadership after the death of their father. The eldest son automatically takes over his father's property and is allowed to share it with other male siblings. This is culturally correct, although he may have female older siblings. This is because the patriarchal nature of Igala society views women as perpetual minors unable to make their own decisions.⁵⁶⁴ The right of daughters to property inheritance in the Igala ethnic group continues to be trampled upon due to the patriarchal nature of the Igala people. This discriminatory practice was maintained in the case of *Ihiama v. Akogu*,⁵⁶⁵ where the court ruled that according to Igala custom, a daughter may not own or inherit land, but her male siblings may own land because the females are married off to another family.

In addition, if an Igala daughter receives a gift from her father before he dies, she is expected to keep it as her own. The property must be transferred to her while her father is alive, in the presence of her other siblings, or with the stipulation that she becomes the sole owner of the property after the father's death. Upon death, the property reverts to her male siblings if she dies without a male child.⁵⁶⁶

This is similar to what is available in the Igbo ethnic group. Under the Igbo culture, the eldest son is allowed to inherit the head of the family.⁵⁶⁷ The consequence is that he is allowed to inherit all the property without sharing it with his other male and female siblings.⁵⁶⁸ It is common practice among the Igbos that the first son inherits the father's possessions and his estate to the exclusion of all others. This practice does not regard the rights of daughters to property inheritance. In the

⁵⁶⁴ Akwu U *The Igala Native Law and Custom: The Way Forward* (2016) 17-26.

⁵⁶⁵ Unreported case of Okpo Area Court Grade II, Suit No MD/26A/78.

⁵⁶⁶ Boston J (1968) 47-49.

⁵⁶⁷ *Ejiamike v Ejiamike* (1972) 2 ENLR 11.

⁵⁶⁸ Hilary N and Stephen T 'Discrimination Against Females and Widows in Inheritance of Real Estate and Succession in South Eastern Nigeria: A Breach of International Instruments and the Nigerian Constitution' Vol. 81 *Journal of Law, Policy and Globalization* (2019) 53-60.

case of *Ugboma v Ibeneme Anor*,⁵⁶⁹ Reverend Ibeneme, a native of Awkuzu in the Anambra Local Government Area in Nigeria, died, leaving a number of properties in Onitsha, including No.44 New Market Road. He was survived by two sons and several daughters. The plaintiff, in this case, was his second son and six of his daughters. The first son was the first defendant and the head of the late Rev. Ibenemes's family. The first defendant sold and transferred No.44 New Market Road Onitsha in Anambra State to the second defendant. The issue before the court was whether the first defendant was entitled to sell and transfer ownership of the said property to the second defendant to the exclusion of the plaintiffs. The reliefs sought by the plaintiffs were (1) A declaration that the property in question, the joint property of all the children of Ibeneme, could be sold by the first defendant without the knowledge of his siblings. (2) An order of the honourable court setting aside the sale, the deed of conveyance, and (3) An order that the second defendant should account for the proceeds of the sale. The court held that following laid down Igbo custom, women are not entitled to inherit their father's property. This custom is, however, discriminating.

The Hausa people of Northern Nigeria are largely Muslims.⁵⁷⁰ Their succession rights are based on Muslim religious law set out in the Qur'an. The pattern of property inheritance is for surviving dependents and relatives of the deceased including females.⁵⁷¹ Daughters are allowed to inherit under the Qur'an, which governs the Hausa people. This position was expressly stated in Qur'an chapter 4, verse 11, which provides that:

God (thus) directs you as regards your children's (inheritance): to the male, a portion equal to that of two females; if only daughters, two or more their share is two-thirds of the inheritance; if only one, her share is a half. For parents a sixth share of the inheritance to

⁵⁶⁹ (1967) FNLR 251.

⁵⁷⁰ Adamu F 'A Double-Edged Sword: Challenging Women's Oppression within Muslim Society in Northern Nigeria' Vol. 7 (1) *Gender & Development* (1999) 56-61.

⁵⁷¹ Ezeilo J 'Feminism and Islamic Fundamentalism: Some Perspectives from Nigeria and Beyond' Vol 32 (1) *Signs: Journal of Women in Culture and Society* (2006) 40-47.

each, if the deceased left children; if no children and the parents are the (only) heirs, the mother has a third; if the deceased left brothers (or sisters) the mother has a sixth. (The distribution in all cases is) after the payment of legacies and debts. Ye know not whether your parents or your children are nearest to you in benefit.

If the deceased has both males and females, the male receives twice the share of a daughter, for example, in a ratio of 2:1. However, if the deceased had no male child, the daughters receive two-thirds of the net estate, which they share equally. If the daughter is the only surviving child, she will receive half of the net worth as her share of the inheritance. It is believed that although women are not excluded from inheritance and succession under Islamic law, men are entitled to double the share of women. This practice is discriminatory, violates the principle of equality between men and women, and encourages sex discrimination.⁵⁷²

The Yoruba inheritance is more favourable to women as daughters. It allows daughters to inherit equally with their brothers. In *Lewis & Ors v Bankole & Ors*,⁵⁷³ in this case, chief Mabinouri died in 1874 in Lagos, leaving a family of twelve children, the eldest of whom was a daughter. The deceased had three pieces of land; a family compound, where he lived with his wives and some of his children and domestic staff; on another, he built houses for his eldest daughter and two of his sons; whilst the third was dedicated to the worship of the family god. An action was brought by some of Mabinouri's grandchildren, including the issue of the children for whom separate houses were built, against certain of the occupants of the family who were daughters of Mabinouri and children of a deceased younger son. The action was for a declaration (1) that the plaintiffs were entitled, as grandchildren of Mabinouri, in conjunction with the defendants, to the family

⁵⁷² Adamu F (1999) 56-61.

⁵⁷³ (1901) 1 NLR 82; *Amusan v Olawunmi* (2001) LCN/1051 (CA).

compound and (2) that the family compound was the family property of Mabinouri deceased. The court held that the right of a woman to be family head among the Yoruba:

The first point in consideration is as to headship of the family, and the main question here at issue is whether or not a woman can be head. The supporters of the old school and the Yoruba witnesses deny this, but the Lagos chiefs hold a contrary view. Lagos is not the only part of his Majesty's dominions where the female sex is seeking for greater recognition of their capabilities; and seeing that a wise and great queen held sway for long years over the British Empire, there seems no reason why, on the ground of sex, a Lagos woman should not be capable of managing the domestic concerns of a family compound. There seems to be no importance attached in Lagos to the headship of a family, outside the family circle, and the attempts that have been made to show that a male must be head for political reasons, have not convinced me.

On whether it is inequitable to recognize women's rights, the court held:

There is nothing inequitable in this recognition of women's rights and the town of Lagos bears striking testimony to the honour here accorded to women in the names of the square wherein this court house stands, and one of the principal markets, both called after women of wealth and importance in bygone days. I must accept the pronouncement of the Lagos chiefs in this matter, and I declare that the proper person to be head of Mabinouri, that is, the defendant, Fakeye. There are certainly no reasons for making exceptions to the rule in her case, for the chiefs appointed her as appearing to them gentle and intelligent and capable, in fact, she should be the mother and the guiding head of this family.

This case, due to its age and the overriding logic of the decision to uphold a woman's right to be the head of a Yoruba family in which she is the eldest, has become something of a locus classicus of women's rights under Yoruba law and custom.

Traditionally, women married in Igala are prohibited from acquiring immovable property as provided in Section 43 of the Nigerian Constitution. The Nigerian Constitution permits any citizen of Nigeria to acquire and own immovable property. Conversely, in Igala land, women are traditionally not allowed to buy land unless it is through their male siblings or husband. Women

have access to agricultural land only through their husbands.⁵⁷⁴ There are cases where women can get land as gifts from their husbands. This must be done in the presence of her husband's relatives and children, who will serve as witnesses to the gift. However, this gift remains with her only during her lifetime. The land reverts to her husband if he is alive after her death or to her husband's family if he is deceased and her male children are minors. If she has no male child, her husband's relative decides who takes possession of the land.⁵⁷⁵

Although the Nigerian Constitution and several human rights instruments promote women's rights against discrimination and property, women continue to be treated unequally. Radical feminists believe that women are not treated the same as men because of patriarchy.⁵⁷⁶ There is still a big difference between males and females in the Igala ethnic group. This practice is discriminatory and contravenes sections 42 (1) and 43 of the Nigerian Constitution and the international and regional human rights instruments that protect and promote the rights of women to property ownership and inheritance during and after marriage.⁵⁷⁷ It is believed that if the Nigerian Constitution should reflect the notion of substantive equality by making women's rights to property and inheritance a constitutional right, it would protect women's rights in this regard.

In Nigeria, the rights of women to property ownership and inheritance during and after marriage are very similar in most communities. Traditionally, women in Nigeria are disallowed from owning and inheriting property, while their male counterparts are allowed to own and inherit land. However, some of these principles and practices have been modified by the courts. Over the years, the Yoruba custom has allowed equal access to land and leadership like their male counterparts.

⁵⁷⁴ Akwu U (2016) 17-26.

⁵⁷⁵ Boston J (1968) 49.

⁵⁷⁶ Mama A 'Shedding the Masks and Tearing the Veils: Cultural Studies for a Post-Colonial Africa' in Imam A, Mama A & Sow F (eds.) *Engendering African Social Sciences* (1997) 61-77.

⁵⁷⁷ See Chapter 3.

In the old case of *Ricardo v Abal*,⁵⁷⁸ the court held that a first-born female has the right of first choice of partitioned property over the second-born male. The equal rights of women to share property was upheld in the case of *Nimota Sule v Ajisegiri*,⁵⁷⁹ in this case, the plaintiffs claimed partition and sale in respect of six properties alleged to form the undistributed portion of their grandfather's estate. The plaintiffs were children of the same mother whose claim was entitled to an equal share of the properties with the defendant. The defendant argued that he was a male, and entitled to a larger share than the plaintiff's mother. The court held that the contention raised by the defendant that under native law and custom, a male has a greater portion than a female in the distribution of the father's estate was void. The distribution of the proceeds of the sale and partitioning of the estate was ordered by the court to be done irrespective of sex. This decision affirms the principle of equality of succession rights of Yoruba women and men in Nigeria.

In *Ramotu Wuraola Salami v Saibu Ladapo Salami*,⁵⁸⁰ the plaintiff and her two brothers were the only surviving children of their father. The plaintiff was seven years old at the time her father died. She travelled to Cameroon for 26 years after the death of her father with some clothes and the two chairs allocated to her. She filed an action against her brothers seeking an order compelling them to account for the proceeds received from their father's estate for about 24 years and an order partitioning the estate. The court held that the defendants took advantage of the plaintiff's absence to deprive her of her rights and render void the purported distribution done without the consent of the plaintiff.

⁵⁷⁸ (1926) 7NLR 58.

⁵⁷⁹ (1973) 13 NLR 146.

⁵⁸⁰ (1957) WNLR 10.

In addition, the court has given life to the rights of women against discrimination. In *Alajemba Uke & Anor v Albert Iro*,⁵⁸¹ the court held that:

Any laws or customs that seek to relegate women to the status of a second-class citizen thus depriving them of their invaluable and constitutionally guaranteed rights are laws and customs fit for the garbage and consigned to history.

Similarly, in *Abibatu Folami & 3 Ors v Flora Cole & 2 Ors*,⁵⁸² the court held that the first respondent, a woman, is the head of the female. The strength of the decision in *Lewis v Bankole*⁵⁸³ was reaffirmed in this case. The concept of Dawodu⁵⁸⁴ in Yoruba custom does not signify a superior position to other siblings, including the women of the family.

The *Mojekwu v Mojekwu* case remains a locus classicus with regard to the rights of daughters to inheritance. This case seems to have changed the tide with respect to women's rights to property. When the Court of Appeal gave this judgment, the human rights community particularly feminists, were overjoyed. The reason is that the case affirmed the rights of daughters to inherit and frowned at the patriarchal attitudes of Oli-ekpe and Nrachi customs.

Similarly, in *Emeka Muojekwu & 2 Ors v Okechukwu Ejikeme*,⁵⁸⁵ the plaintiffs (now appellants) claimed that they were successors-in-title to Reuben Muojekwu, who died intestate on October 1, 1966, without a surviving male child. They argued that by virtue of Nnewi custom called "Oli-ekpe", they were entitled exclusively to the estate of the deceased who had acknowledged Chinwe and Uzoamaka (third Appellant) as his children, entitled to inherit his property, land, and personal goods. In addition, Sarah Muojekwu, the wife of the deceased, with her children, Comfort and

⁵⁸¹ (2001) 17 WRN 172, (2002) AHRLR 155.

⁵⁸² (1986) 2 NWLR (Pt. 22) 367.

⁵⁸³ (1879) 1 NLR 81.

⁵⁸⁴ The concept of Dawodu allows the eldest surviving son to succeed the headship of the family.

⁵⁸⁵ (2000) 5 NWLR (Pt. 457) 413.

Virginia, performed the burial ceremony of the deceased and is entitled to inherit his property. The deceased, late Rueben Muojekwu, married Sarah, and they had a son, Samuel, as well as two daughters – Comfort and Virginia. Samuel predeceased his father, and Comfort also predeceased her father and died childless. Virginia predeceased her father but gave birth to Chinwe and Uzoamaka, the third Appellant, while unmarried. Virginia subsequently got married to one Mr. Eze Rueben, and Sarah Muojekwu lived with Chinwe and Uzoamaka, their grandchildren, until their respective deaths in 1966 and 1975. Chinwe was unmarried. She never gave birth to Izuchukwu Muojekwu, the second appellant. Uzoamaka, the third appellant, also gave birth to the first Appellant while unmarried. It was the case of the Appellant that Rueben performed the “Nrachi” custom on Virginia. The Nrachi custom is a practice whereby a man could keep one of his unmarried daughters under his house indefinitely in order to raise children, particularly sons, to succeed him. The appellants further claimed that they are not related to the Respondents, who unlawfully entered into late Rueben Muojekwu's compound in 1993 without authorisation from them.

The Respondents contended that they are distant cousins of late Rueben and that Rueben’s lineage had become extinct by the fact that he had no male surviving child. They maintained that the “Nrachi” ceremony had been performed on Comfort, who died childless, but not for Virginia, who had children, they further argued that she was not customarily assimilated into the Ejikeme or Muojekwu family, which exercise would have legalised the children and consequently empowered them to inherit the estate of Rueben who died intestate without a surviving male child. They also maintained the “Oli-Ekpe” custom of Nnewi, which is to the effect that since Rueben had no surviving male child, they, being sons of Benneth Ejikeme, a distant cousin, must inherit the estate of Rueben to the exclusion of Rueben’s daughter. The trial court held that Rueben’s lineage

became extinct on the death of his daughter Comfort and that the Appellants are not heirs to Reuben Muojekwu and are not entitled to succeed him or his estate. On appeal, the Court of Appeal considered the provision of section 42 (1) of the Nigerian Constitution and section 18 (1) of the High Court Law of Anambra State and held the “Oli-ekpe” and “Nrachi” as unconstitutional and discriminatory in the light of the provisions of section 42 of the Nigerian Constitution. Further, in the case of *Augustine Nwafor Mojekwu v Mrs. Theresa Iwuchukwu*,⁵⁸⁶ the Supreme Court condemned the Nrachi custom and viewed such practices as repugnant and repulsive.

The Mojekwu case brought a glimpse of hope in Igala land when the court in *Fati Agbanoyi v Ajanigo Agbanoyi*⁵⁸⁷ relied on Mojekwu’s case to recognise the rights of daughters to inherit their father’s property. In this case, the plaintiff sued that their deceased father’s property was partitioned so that she could have her share. The defendants argued that being a female in Igala land, she had no right to inherit their deceased father’s property. The court, in delivering its judgment, recognised the rights of women to inherit their father’s property but did not grant the request to have the land partitioned because it was not in evidence that there was a dispute to warrant the partitioning of the land, which cannot be settled amicably among the Agbanoyi family members. It is submitted that the decision of the court not to partition the land, even though the right of the plaintiff to inherit her father’s property was recognised might occasion injustice on the plaintiff since her faith is in the hands of the family members who believe that women are not entitled to inherit property.

Similarly, in the case of *Ukeje v Ukeje*⁵⁸⁸ the Supreme Court held that:

⁵⁸⁶ (2004) NWLR (Pt. 883) 196.

⁵⁸⁷ Unreported case of Upper Area Court Anyigba Case No. CV/36/2010 was delivered on 23 September 2012. This will be discussed in detail under the sub-topic judicial response on the rights of women to property ownership and inheritance.

⁵⁸⁸ (2014) 11 NWLR (Pt. 1418) 384, 408.

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

The Supreme Court voided the Igbo custom, which forbids a female from inheriting her father's estate because it is discriminatory and conflicts with the provisions of the Nigerian Constitution.

There are arguments suggesting that the Ukeje case only serves to conceal the apathetic stance of the Supreme Court towards women's matrimonial property rights. This indifference is apparent in the Supreme Court's failure to consider the social context of property rights under customary law.⁵⁸⁹ Furthermore, it merely upheld a decision of the Court of Appeal, the relevant aspect of which was not contested on appeal. The Supreme Court affirmed this decision in a seemingly indifferent manner. By affirming the applicability of the Bill of Rights, the Supreme Court failed to clarify whether the Ukeje decision could be applied to women's matrimonial property rights. Perhaps the court was aware that such clarification would have contradicted its previous decisions on the matter.⁵⁹⁰ Similarly, the Supreme Court failed to analyze in *Anekwe's case* how the customary law of succession has deviated from its foundational values. Surprisingly, the Supreme Court did not mention the equality clause, the right to property, or even the right to human dignity. In fact, it avoided discussing the Bill of Rights altogether.⁵⁹¹

⁵⁸⁹ Diala A 'A Critique of the Judicial Attitude towards Matrimonial Property Rights under Customary Law in Nigeria's Southern States' (2018) available at <http://dx.doi.org/10.17159/1996-2096/2018/v18n1a5> (accessed 1 March 2024).

⁵⁹⁰ Diala A (2018).

⁵⁹¹ Aigbovo O & Ewere A 'Adjudicating Women's Rights in Nigeria: Has the Tide Finally Turned? Vol.5(2) *African Journal of Law and Criminology* (2015) 12.

4.6.2 The rights of widows to property inheritance after marriage

Widows are not allowed under the Igala native law to inherit their husband's property.⁵⁹² This practice is the same under the Igbo and Yoruba native laws.⁵⁹³ This position was affirmed by the court in the case of *Suberu v Sunmonu*,⁵⁹⁴ the court ruled that it is a well-established rule of Yoruba native law and custom that a wife cannot inherit her husband's property since she herself is a chattel to be inherited by a relative of her husband. Because of the patriarchal nature of most traditional Nigerian society, widows are denied the right to inherit their husbands proper.

Widowhood in Igala land is a multifaceted tragedy. It is overwhelmingly a woman's problem that reveals atrocious social injustice.⁵⁹⁵ A widow, under the Igala custom is the property of her deceased husband. When a man dies, his widow is only allowed to stay in her deceased husband's house upon good character and with an agreement that she will not remarry. If she decides to remarry, she will not be allowed to remain in her deceased husband's house. A widow without children is sent back to her father's house because, to the deceased relatives, there is nothing left to hold on to.⁵⁹⁶ In this case, the deceased brothers will inherit his property. Where the widow had only female children, she would not be allowed to inherit her deceased husband's property. Where the male child of the deceased is a minor, his brothers will hold the property in trust for him until he attains majority.⁵⁹⁷

However, there are rare cases where a man may, during his lifetime, gift his wife some of his property. This gift or property must be given to her in the presence of the husband's family. If it is

⁵⁹² Boston J (1968) 48-49.

⁵⁹³ Anyogu F (2013) 300-367.

⁵⁹⁴ (1957) 2 FSC 33.

⁵⁹⁵ Boston J (1968) 98-100.

⁵⁹⁶ Boston J (1968) 98-146

⁵⁹⁷ Boston J (1968) 100.

done privately, it would be difficult for his wife to prove it to his family. A widow is usually allowed to remain in the matrimonial home after the death of her husband based on her good behaviour and her relationship with her deceased husband's family.⁵⁹⁸

This discriminatory practice can be seen among the Igbo and Yoruba ethnic groups, respectively. Among the Igbo, widows cannot inherit land or other property upon their husband's demise. This patriarchal position was upheld by the court in the case of *Julie Nezianya & Anor v Okagbue & Anor*,⁵⁹⁹ in this case, the widow gave out her deceased husband's house to tenants. She sold a portion of the land, and with the proceeds, she built two mud huts on the other portion of the land, which she had left. When she tried to sell more of the land, her deceased husband's family objected that she lacked the right to sell off her deceased husband's property. She had a female child who died before her husband. The widow divided the property to her grandchildren, who sued her husband's family, claiming a right to exclusive possession because the widow, their grandmother, had long adverse possession of the land. The court held that under the Onitsha native law and custom, a widow's possession of her deceased husband's property is that of a stranger and, however long it is not adverse to her husband's family and does not make her the owner. Hence, she cannot deal with the property without the consent and approval of his family. She has the right to occupy the building or part of it however, this is subject to her good behaviour. This position was reiterated by the Supreme Court in the case of *Nzekwu v Nzekwu*,⁶⁰⁰ the court held that the interest of a widow in the house is possessory and not proprietary, so she cannot dispose of it. The right of a widow to her husband's property under Onitsha customary law postulates that a married woman, upon the death of her husband without a male child with the consent of her husband's

⁵⁹⁸ Akwu U (2016)18-23.

⁵⁹⁹ (1963) CWLR 19.

⁶⁰⁰ (1989) 2 NWLR (Pt. 104) 373.

family, may deal with the deceased's property. However, the widow's dealings must receive the consent of the family, and she cannot, by exclusion of time, claim the property as her own. She has, however, a right to occupy the building or part of it, but this is subject to good behaviour.

The status of women with regard to property under customary law has been described by Kaganas and Murray⁶⁰¹ as:

Under customary law, women are always subjected to the authority of a patriarch, moving from the control of their guardians to that of their husbands. The male head of the household represents the family and a woman cannot generally contract or litigate without assistance. Husbands control virtually all the family's property while wives' rights are confined to things such as items of a personal nature.

Similarly, the inferior status placed on women by patriarchy was also described by Duncan⁶⁰² as:

Traditionally, the position of women, throughout their lives, is that of a minor child. Before they are married, they are the children of their father, after marriage, they are the children of their husbands; and during widowhood, they are the children of their heirs.

Over the years, patriarchy has negatively impacted the rights of a widow to the inheritance of her deceased husband's property. Among the Yoruba ethnic group, widows are not allowed to inherit their deceased husband's property.⁶⁰³ This patriarchal practice is a clear case of gender discrimination in Nigeria. Unless a property given to the wife as an outright gift is proven by her, the husband's family will retrieve it after the death of her husband.⁶⁰⁴ Although the Administration Estate Law⁶⁰⁵ allows spouses to succeed in each other's property, spouses married under customary law are not allowed to do the same.

⁶⁰¹ Kaganas E & Murray C *Law and Women's Rights in South Africa: An Overview* (1994) 1-11.

⁶⁰² Duncan P *Sotho Laws and Customs: A Handbook on Decided Cases in Basutoland: Together with Written Laws of Leretholi Cape Town* (1960) 14.

⁶⁰³ *Oloko v. Giwa* (1939) 15. NLR. 31

⁶⁰⁴ Ezeilo J (2011) 255.

⁶⁰⁵ Administration Estate Law 1958.

In Islamic law, widows are allowed to inherit their deceased husband's property. The right of wives to inherit is recognised in Islam. The widow without a child is given a share of $\frac{1}{4}$ while a widow with children is given $\frac{1}{8}$.⁶⁰⁶

The effect of this patriarchal practice is that widows of a customary law marriage are economically disempowered and discriminated against in the area of property inheritance.⁶⁰⁷ A widow who might have laboured over the years with her spouse stands the chance of losing everything she worked for at her husband's death.⁶⁰⁸ Her deceased husband's family makes decisions on the method of sharing, especially where her male children are minors or she had no male child. It is safe to say at this point that the patriarchal attitudes that govern inheritance under customary law are highly discriminatory and, therefore, serve as an impediment to achieving the equality of both men and women as provided for under the domestic, regional, and international human rights instruments. Even though Islamic law allows women to inherit, it does not give both men and women an equal share of the property.

However, this position is changing. Some states in Nigeria, such as Kogi, River, and Enugu states, have enacted laws prohibiting discrimination against widows. These laws promote and protect widows' rights to inheritance. Similarly, there are court decisions upholding the rights of widows to inheritance in Nigeria. In the case of *Anekwe v Nweke*,⁶⁰⁹ where the defendants/applicants, in response to a lawsuit filed by a widow who had six female children asserted that under Awka law and custom, a married woman with no male child could not challenge her deceased husband's land

⁶⁰⁶ Izzi M & Fab-Eme (2020) 1-12.

⁶⁰⁷ Igwenyi B (2020) 22-32.

⁶⁰⁸ Ogagboye T (2020) 116-119.

⁶⁰⁹ (2014) 9 NWLR (Pt. 1412) 393.

title with her deceased husband's male family member(s). Thankfully, the Supreme Court has strongly denounced this custom. Thus, in the words of Ogunbiyi, JSC, quoted in extenso:

I hasten to add at this point that the custom and practices of Awka people upon which the appellants have relied for their counterclaim is hereby outrightly condemned in very strong terms. In other words, a custom of this nature in the 21st-century societal setting will only tend to depict the absence of the realities of human civilization. It is punitive, uncivilized, and only intended to protect the selfish perpetration of male dominance which is aimed at suppressing the right of the womenfolk in the given society. Any culture that disinherits a daughter from her father's estate or a wife from her husband's property should be punitively and decisively dealt with. The punishment should serve as a deterrent measure and ought to be meted out against the perpetrators of the culture and custom. For a widow of a man to be thrown out of her matrimonial home, where she had lived all her life with her late husband and children, by her late husband's brothers on the ground that she had no male child, is indeed very barbaric, worrying, and flesh skinning... The repulsive nature of the challenged custom is heightened further in the case at hand where the widow of the deceased is sought to be deprived of the very building where her late husband was buried. The condemnation of the appellants' act is in the circumstance without any hesitation or apology.

However, the fact remains that a customarily married woman cannot inherit her deceased husband's property unless she goes to court to challenge her right to the inheritance of her deceased husband's estate, where, according to native law and custom, she is deprived. If the Nigerian Constitution adopts the notion of substantive equality by giving women's property rights and inheritance rights during and after marriage a proper place in the constitution, this customary discrimination against women's property rights will be eliminated.

In the case of *Ejiye Okenyi v Amana Okenyi*,⁶¹⁰ Ejiye Okenyi, an Igala woman from Ikefi in Igalamela Odolu LGA, Kogi State, married Akowe Okenyi according to the laws and customs of the indigenous people of Igala ethnic group. Akowe Okenyi is the older brother of the defendant Amana Okenyi. Akowe and Ejiye's marriage lasted about 30 years without a child until Akowe Okenyi passed away in November 2016. After her marriage, the plaintiff moved from her hometown of Ikefi to live with her husband in his village of Ogbogbo. While the marriage lasted, her late husband acquired three different lands, two in Ogbobo and one in Egabada, which is not far from Ogbogbo. After observing the period of mourning according to the laws and customs of the indigenous people of Igala, she decided to relocate to her hometown of Ikefi. Accordingly, she offered the three lands for sale. The defendant, a younger brother of the deceased husband, obstructed the sale by warning prospective buyers to steer clear. He insisted that the plaintiff cannot inherit her deceased husband's property because he is the one to inherit from his late brother. The trial court held that the Igala native law and custom disallow women from inheriting from their deceased husbands. On appeal, the judgment of the trial court was rejected on the grounds that such customary practice is repugnant and discriminatory in nature.

In addition, in the case of *Adejoh Matthew v Aladi Onoja*,⁶¹¹ where the plaintiff sought the order of the court to restrain the defendant from taking over her deceased husband's land because she had no male child was held repugnant to natural justice, equity, and conscience.

4.6.3 Rights of divorced women after marriage in Nigeria

⁶¹⁰ Customary Court of Appeal Lokoja Suit No. CCA/17/2019 (unreported).

⁶¹¹ Suit No. CV/25/2022 unreported case of Grade 1 Area Court Aloma.

The Igala ethnic group does not grant a wife married under Igala customary law any right to share in her husband's property in the event of a divorce.⁶¹² According to Igala cultural practice, a man is accountable for his wife or wives' wellbeing, and they have a proprietary stake in him and his people. Women are traditionally prohibited from owning independent property. Also, wives are not permitted to acquire or own property apart from their husbands.⁶¹³ Traditionally, when a marriage is dissolved, a woman is not entitled to a division of property, even if she contributes to the income. She cannot force her husband by court order to share their property.⁶¹⁴

If a spouse claims to have contributed to the acquisition of land or the construction of a building, this must be proven before the court can issue the property division order. This discriminatory practice has been upheld by Nigerian courts in the past. In *Onabolu v. Onabolu*,⁶¹⁵ the wife/applicant alleged against her husband, among others, that their joint marital property is divided or sold equally and that the sale proceeds are shared equally. After carefully examining all of the evidence submitted by the wife/applicant and husband/defendant regarding the joint ownership of the property, the court found that the husband/defendant's evidence clearly established that he had purchased the property over which the property stood built. This discriminatory practice violates the provisions of both the international and regional human rights instruments, especially Article 7(d) of the Maputo Protocol.⁶¹⁶ The Maputo Protocol article 7 requires State Parties to establish rules that ensure equitable sharing of marital property. The Nigerian government has not yet enacted a law that ensures women and men have the same

⁶¹² Akwu U (2016)18-23.

⁶¹³ Idoko L (2005) 40-41.

⁶¹⁴ Okwoli P (1996) 23-45.

⁶¹⁵ (2005) 2 SMC 135.

⁶¹⁶ See Chapter 3.

opportunity at the distribution of jointly owned property in the event of the dissolution of a marriage.

In addition, only jointly-owned property is covered by Article 7(d). Therefore, if the property belongs to the man, the woman will receive nothing in the case of a divorce. Providing evidence of joint ownership in a marriage is a heinous task for the woman.⁶¹⁷ In the case of *Adaku Amadi v Edward N Nwosu*⁶¹⁸, the appellant, Mrs. Amadi, had sued the respondent who had purchased the disputed building from her estranged husband. The Supreme Court affirmed the Court of Appeal's decision, holding that Mrs. Amadi failed to prove that she contributed sand and labour or to whom she made the payments for the sand. The Court affirmed that a woman cannot claim a share in the division of matrimonial property under customary law, nor can she recover contributions to matrimonial property.

In a statutory marriage (marriage under the Act), each of the parties can apply to the court for property distribution together with the application for divorce. As mentioned,⁶¹⁹ the legal framework for property distribution is contained in section 72 of the Matrimonial Matters Act. The assets to be settled must belong to one of the spouses. Also, the court is obliged to make an order which may be considered just and equitable with regard to a request for the division of property in favour of all or one of the parties.⁶²⁰

⁶¹⁷ Diala A 'A Critique of the Judicial Attitude Towards Matrimonial Property Rights under Customary Law in Nigeria's Southern States' Vol. 18(1) *African Human Rights Law Journal* (2018) 100-122.

⁶¹⁸ (1992) NWLR (Pt 241) 273.

⁶¹⁹ See Chapter 3.

⁶²⁰ In *Kafi v. Kafi* 1986 NWLR 175, in this case, the wife argued that she had given the petitioner (husband) all necessary moral and financial support, apart from performing all domestic duties as a wife, and all of this was established. The trial judge held that; "I accept her evidence and therefore find that she contributed towards the purchase of some of the lands on which the houses (now said to be belonging to the husband/respondent) were built and that she contributed towards the development of the said properties as well as to the success of the business of the husband/respondent. The properties can be regarded as products of their joint efforts. She, therefore, deserves in my ruling to have a property settled on her for her benefit and that of the children by virtue of Section 72 (30) of the Matrimonial Causes Act 1970, irrespective of what the husband/respondent would want to do further for the children.

The General Comment No. 6 on the Maputo Protocol provided guidance on the interpretation of the rights of women during separation, divorce, or annulment of marriage to ensure that women and men have an equitable share of property jointly owned while the marriage was in effect, and to provide guidance on how jointly owned property can be shared fairly and, in a manner, consistent with the principle of substantive equality between women and men. This interpretation gives women the right to an equitable share of property jointly owned after the marriage is dissolved.

The court has made pronouncements with regard to the rights of women after marriage. After divorce, women lose all rights and entitlements to their ex-husband's family and property. She cannot inherit nor be entitled to any financial support from her ex-husband. However, the position is changing. In the case of *Mrs. Toyin Arajulu v Mr. James Monday*⁶²¹ the court held that “*a husband who marries a woman and builds a house during the pendency of the marriage stands the risk of losing that house if he later divorces the woman who had children for him unless such woman, of her own volition, leaves the matrimonial home*”. The court further stated that it is irrelevant who owns the property or who pays what (on it) and how much, as long as the arrangement is fair and just in light of the circumstances of the case. Further, in the case of *Jolugbo & Anor v. Aina & Anor*⁶²², the Nigerian Court of Appeal upheld the view that where a woman acquires property in her husband's name and conveys it in her husband's name, the presumption is that the husband holds the property in trust for his wife.

The husband is therefore ordered to settle property at 15, Adeola Adeleye Street, Ilupeju Lagos by deed on his wife/applicant accordingly”

⁶²¹ (2019) Oyo State High Court Suit No. I/169/2015 (unreported case).

⁶²² (2016) LPELR – 40352.

Recently, in the Igala case of *Rose Adaji v Enemali Adaji*,⁶²³ the court ruled that in the distribution of property after a divorce, the fact that the wife did not contribute financially is not sufficient reason to deprive her of the lifestyle she led during her marriage. The wife had invested 13 years in this marriage and is entitled to part of the property her ex-husband acquired during the marriage. Similarly, the court in *Mr Pius Aina v Mrs. Caroline Aina*,⁶²⁴ the court held that “indirect contributions of a wife to the marital property should not be quantified in monetary terms in order to entitle her to a share of the property”.

These cases have given a glimmer of hope to women in Nigeria, particularly Igala women, who have faced discrimination over property and inheritance during and after marriage. It is believed that the patriarchal nature of Igala society will decrease drastically as more women challenge their property rights in court. However, articles 7(d) and 21(a) of the Maputo Protocol have not yet influenced any court decision in Nigeria regarding women's property rights during and after marriage. Because the Maputo protocol is not yet domesticated in Nigeria.

It seems court judgments have influenced the decisions of most traditional rulers in Igala land. In a complaint filed by Mrs. Salome Omale before the Attah Igala, her brother-in-law took over her deceased husband's property after his funeral because she did not have a male child. The Attah Igala instructed that the property be returned to the widow so that she could look after her children since God gives female children.⁶²⁵

⁶²³ (2021) High Court of Justice Idah Suit No. I/154/2018 (unreported case).

⁶²⁴ Ogunsakin M ‘Court gives Wife Equal Rights over Husband's Property’ (2023) available at <https://thegavel.com.ng/court-gives-wife-equal-rights-over-husbands-property/> (accessed 24 May 2023).

⁶²⁵ HRM Matthew Alaji Opaluwa, Chairman Kogi State Council of Chief and Chairman, Igala Area Traditional Council, proceedings of settlement between Mrs. Salome Omale and Mr. Odeh Omale on 17/10/2022.

4.7 Conclusion

The Nigerian Constitution, which forms the basis for all other domestic property rights legal frameworks in Nigeria, condemns any form of discrimination, although the language used in the Constitution is discriminatory. The laws governing the distribution of property tend to favour women married according to the Marriage Act rather than women married according to customary law. Customarily, women continue to face discrimination over property ownership and inheritance during and after marriage. Both the international and regional human rights instruments require the Nigerian government to enact legislation prohibiting discrimination in relation to women's property rights. Although there is no relevant national law yet, this is not in line with the obligations imposed on Nigeria as a signatory to several international and regional human rights instruments. However, some states have enacted laws prohibiting discrimination against women's property rights and discriminatory practices faced by women in their various communities.

Furthermore, the various institutional mechanisms (governmental and non-governmental organizations) promoting women's rights in Nigeria, particularly women's property rights, have in many ways addressed the discriminatory practices faced by women in diverse communities. It is believed that more needs to be done especially in raising awareness of women to fully understand their rights and use these institutional mechanisms such as FIDA, WACOL, and NHRC.

In conclusion, courts have issued pronouncements in favour of women's property rights as daughters, married women, and divorced women. Similarly, widows' right to inherit their deceased husband's property has been upheld by courts in Nigeria. However, the patriarchal nature of Igala society will persist if women refuse to challenge their property rights in court.

CHAPTER FIVE

COMPARATIVE APPLICATION OF THE SUBSTANTIVE EQUALITY FRAMEWORK: LESSONS FOR NIGERIA

5.1 Introduction

The South African government has made constitutional reforms to reinforce equality between men and women in order to eliminate all forms of discrimination.⁶²⁶ The Constitution of the Republic of South Africa, passed in 1996, is known for its emphasis on substantive equality. Formal equality only ensures that people are treated equally before the law.⁶²⁷ Substantive equality, on the other hand, aims to create a level playing field for all people, regardless of their background, by addressing the underlying causes of inequality.⁶²⁸ The principles of human dignity, equality, and freedom serve as the basis for the substantive approach to equality in the South African Constitution. These core principles underpin the Constitution and guide all areas of South African law.⁶²⁹

The substantive equality approach in the South African Constitution clearly recognises historically disadvantaged groups such as black South Africans, women, and people with disabilities. The Constitution recognises that these groups have suffered discrimination in the past and seeks to correct these historical injustices through the passage of laws, affirmative action programs, and social welfare policies, among other things.⁶³⁰

⁶²⁶ Albertyn C (2018) 441-468.

⁶²⁷ Albertyn C & Goldblatt B 'Equality' in Michael B. & Stuart W. (eds.) *Constitutional Law of South Africa* 2 ed. (2013) 35-38.

⁶²⁸ Durojaye E & Owoeye Y (2017) 70-85.

⁶²⁹ Smith A 'Equality Constitutional Adjudication in South Africa' Vol. 2 *African Human Rights Law Journal* (2014) 30.

⁶³⁰ Albertyn C '(In)equality and the South African Constitution' Vol. 36 (6) *Development Southern Africa* (2019) 751-766.

In addition, the substantive equality approach of the South African Constitution recognises socio-economic rights. To achieve this, the Constitution imposes positive obligations on the state to ensure these rights are progressively realised over time. The commitment to create a just and equal society in which everyone can live in dignity and freedom is reflected in the substantive gender equality approach of the South African Constitution. In South Africa, the gender equality strategy provides a solid framework for promoting women's rights. Further, the South African constitutional courts have applied the substantive equality approach in interpreting non-discrimination provisions of the South African Constitution.⁶³¹

The South African Constitution has greatly influenced other African countries' Constitutions particularly the Kenyan Constitution.⁶³² The process of drafting the Kenyan Constitution began four years after the passage of the South African Constitution in 2000. Some of the drafters of the South African Constitution were involved in the drafting of the Kenyan Constitution.⁶³³ To some extent, the Chair of Kenya's Constitutional Review Commission (CKRC) was involved in the South African Constitution review process. In addition, a member of the CKRC interned at the Kenyan High Commission in South Africa and used what he learned to contribute to the deliberations on the Constitution draft.⁶³⁴ The influence of the South African Constitution on the

⁶³¹ Albertyn C 'Substantive Equality and Transformation in South Africa' Vol. 23 (2) *South African Journal on Human Rights* (2007) 253.

⁶³² Richard S 'Policing Democracy: The Influence of South Africa's Post-apartheid Security Arrangements on Police Oversight under Kenya's 2010 Constitution' in Dixon R and Roux T (eds.) *Constitutional Triumphs, Constitutional Disappointments: A Critical Assessment of the 1996 South African Constitution's Local and International Influence* (2018) 341-358.

⁶³³ Ghai J & Ghai Y 'The Contribution of the South African Constitution to Kenya's Constitution' in Dixon R and Roux T (eds), *Constitutional Triumphs, Constitutional Disappointments: A Critical Assessment of the 1996 South African Constitution's Local and International Influence* (2018) 252-293.

⁶³⁴ Ghai J & Ghai Y (2018) 252-293.

Kenya Constitution gave birth to a comprehensive Bill of Rights and other provisions that addressed the age-long issue of gender inequality.⁶³⁵

Like South Africa, the Republic of Kenya has reflected the notion of substantive equality in its national Constitution. The Kenyan Constitution protects the property rights of women.⁶³⁶ The 2010 Kenyan Constitution takes a substantive equality approach in order to advance women's property rights. This approach acknowledges that the mere formal recognition of women's property rights is insufficient and that proactive steps must be taken to eliminate cultural obstacles preventing women from exercising these rights.⁶³⁷

The advancement of women's property rights in Kenya has been significantly impacted by the substantive equality approach. For instance, the Constitution ensures that men and women have equal rights to acquire, own, and dispose of property. Therefore, women do not need a male relative or spouse to serve as a custodian in order to own property in their own right.⁶³⁸ Furthermore, in terms of inheritance and property ownership, the Constitution forbids discrimination based on gender.⁶³⁹

Further, the Constitution gives the courts the authority to order the division of marital property in the event of a divorce or the passing of a spouse. Due to their historical disadvantage in matrimonial property disputes, women have benefited the most from this provision. Women

⁶³⁵ Ghai J & Ghai Y (2018) 252-293.

⁶³⁶ Mutiso B 'Getting to Equal: Resolving The Judicial Impasse on the Weight Of Nonmonetary Contribution In Kenya's Marital Asset Division' Vol.26 (1) *Michigan Journal of Gender & Law* (2019) 121-173.

⁶³⁷ Okoth-Ogendo H 'Reflections on Women's Property Rights in Kenya' Vol. 61 (1) *Journal of African Law* (2017) 47-68.

⁶³⁸ Article 45 (3) of the Constitution of Kenya 2010 (Kenyan Constitution).

⁶³⁹ Article 27 (3), Kenyan Constitution 2010.

frequently lost their property under the previous legal regime after marriage because they were not considered to have rights to property ownership and inheritance.

Various legislative and policy measures aimed at advancing women's property rights have furthered the substantive equality approach. For instance, the Law of Succession Act⁶⁴⁰ was modified to grant daughters and sons the same inheritance rights, regardless of whether they were born within or outside of marriage. The Matrimonial Property Act of 2013 also mandates an equal division of marital assets in case of a divorce or spouse death.

The substantive equality approach adopted by the Kenyan Constitution has significantly advanced women's property rights. Further, the Kenyan government allows treaties or Conventions ratified by the Kenyan government to form part of the laws in Kenya.⁶⁴¹ This has helped courts apply international and regional human rights instruments without first domesticating the same, unlike Nigeria, a dualist state that requires the domestication of international treaties before recognising them as applicable laws and implementing them.

This chapter examines how the Constitutions of South Africa and Kenya have reflected the notion of substantive equality to protect the rights of women to property during and after marriage. In addition, the influence of the South African Constitution on the Kenyan Constitution and areas of convergence and divergence between both were examined. Further, other South African national laws like the Intestate Succession Act, Recognition of Customary Marriage Act 120, 1998, Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, and Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009, were considered.

⁶⁴⁰ Law of Succession Act, Act 11 of 2021.

⁶⁴¹ Orago N (2013) 18.

Similarly, other Kenyan national laws like the law of Succession Act 11 of 2021, the Matrimonial Causes Act, and the Matrimonial Property Bill were examined. These South African and Kenyan national laws helped evaluate the extent to which the South African and Kenyan governments have taken proactive measures in protecting the rights of women to property ownership during and after marriage.

Equally, the attitude of courts in interpreting the provisions of these Constitutions shall also be examined. This will facilitate a better understanding of the steps the Nigerian courts can take in interpreting the rights of women to property ownership and inheritance during and after marriage. In conclusion, lessons were drawn from both countries to explain why the Nigerian government should reflect the notion of substantive equality in the Nigerian Constitution to effectively safeguard women's property rights in accordance with international and regional obligations imposed on Nigeria as a State Party.

5.2 South Africa

5.2.1 Pre-1996 Constitution (The system under apartheid)

The majority of the black population in South Africa was only familiar with customary law. In matters of succession, inheritance, chieftainship, and marriage, indigenous residents could govern themselves in accordance with indigenous rules. Matters relating to property rights and inheritance were resolved by *Iinkosi*⁶⁴² and *Izibonda*.⁶⁴³ The South African government at that time did not

⁶⁴² *Iinkosi* implies traditional leaders.

⁶⁴³ *Izibonda* implies headmen.

recognised the significance of promoting gender equity despite the struggles for gender equality.⁶⁴⁴

According to Van der Meide,⁶⁴⁵ who argues that having control over and access to property is essential for social empowerment, an African woman was legally barred from achieving this goal under section 23(10) of the Black Administration Act⁶⁴⁶ due to patriarchal socio-legal frameworks. Women had limited access to land during apartheid⁶⁴⁷, and inheritance and succession laws left many women disempowered.

Traditional leaders have, since time immemorial, been custodians of customary law. Customary law was initially disregarded by colonial masters, who later tolerated it before finally recognising it—albeit under specific restrictions. Customary law was subject to the limitations imposed on black people by the colonial government.⁶⁴⁸

Both the BAA's and the Intestate Succession Act's⁶⁴⁹ provisions had an impact on these rules. According to Section 23 of the BAA, a black person's whole movable property will pass to and be managed by black law and custom upon his death. This provision distinguished between the property of Blacks and Whites, highlighting the discriminatory nature of the legal system. Additionally, the same provision states that immovable property will pass to a male person in accordance with custom.

⁶⁴⁴ Andrews P 'The Stepchild of National Liberation: Women and Rights in the New South Africa' *New York Law School Articles and Chapters* (2001) 326-335.

⁶⁴⁵ Van der M 'Gender Equality v Right to Culture' Volume 28 *South African Law Journal* (1999) 100.

⁶⁴⁶ Act 38 of 1927, (BAA).

⁶⁴⁷ Mqeke R 'African Family and Statutory, Development affecting the Legal Rights of Women in the New South Africa' Vol 18 (1) *Lovedale Press* (2004) 28.

⁶⁴⁸ Beninger C *Women's Property Law under Customary Law* (2010) 12.

⁶⁴⁹ Act 81 of 1987.

The customary position was that should her husband die intestate, an African woman had no rights to any part of the deceased's estate,⁶⁵⁰ leading colonialists to introduce recommendations on how the estates of black people were to be administered and distributed. The Intestate Succession Act regulated intestate succession. If a person dies intestate in respect of any property succession, the Succession Act applies.

Regulation 2(d) (iii)⁶⁵¹ stipulates that when any deceased Black is survived by any partner who was at the time of his death living with him as his putative spouse or by any issue of himself and any such partner, and the circumstances are such as in the opinion of the Minister render the application of Black law and custom to the devolution of the whole, or some part, of his property inequitable or inappropriate, the Minister may direct that the said property or the said part thereof, as the case may be, shall devolve as if the said Black and the said partner had been lawfully married out of community of property, whether or not such was, in fact, the case, and as if the said Black had been a European. Due to the fact mentioned in this section, women were excluded and discriminated against in terms of succession and inheritance. The apartheid era undermined the property rights of women.

The ex-subjugated and historically oppressed black women in South Africa were excluded from succession, which complicates things even more. Communication between the state and its citizens is essential at all times if equality between men and women is to be attained. Until South Africa became a democratic State when a new Constitution was enacted, customary law regulations were in effect for the majority black population.

⁶⁵⁰ Bennett T A *Sourcebook of African Customary Law for Southern Africa* 1st ed. (1991) 400.

⁶⁵¹ Regulations for the Administration and Distribution of the Estates of Deceased Blacks. No. R. 200 of 06 February 1987.

5.2.2 The Constitution of the Republic of South Africa 1996

The trailblazing South African Constitution, which was approved in 1996, guarantees a wide range of fundamental freedoms and rights to all South Africans.⁶⁵² One of the cornerstones of the Constitution is the commitment to gender equality, which has a long and convoluted history in South Africa.⁶⁵³ The greater fight against apartheid, a system of discrimination and racial segregation that ruled South Africa from 1948 until the early 1990s, is where the push for gender equality in that country first began.⁶⁵⁴ Women of all races were subjected to several discriminatory laws and practices during this period, which restricted their ability to access education, the workforce, political engagement, and property ownership and inheritance.⁶⁵⁵ Women contributed significantly to the anti-apartheid movement despite these obstacles.⁶⁵⁶ Communities and activists who opposed the patriarchal presumptions that supported apartheid were organised and mobilised.⁶⁵⁷

Gender equality consequently became a prominent discussion point during the talks that ended in the adoption of the current Constitution in 1996. The history of gender equality in the South African Constitution ultimately serves as a monument to the strength of mass political mobilisation and collective action. The Republic of South Africa's 1996 Constitution (Constitution)⁶⁵⁸ aims to right historical wrongs and do away with the many types of discrimination that characterize an

⁶⁵² Goldstone R 'The South African Bill of Rights' Vol. 32 *Texas International Law Journal* (1997) 451.

⁶⁵³ Albertyn C (2019) 751-766.

⁶⁵⁴ Francis D & Webster E 'Poverty and Inequality in South Africa: Critical Reflections' Vol. 36 (6) *Development Southern Africa* (2019) 788-802.

⁶⁵⁵ Heyns C & Brand D 'Introduction to Socioeconomic Rights in the South African Constitution' Vol 2 (2) *Law, Democracy and Development* (1998) 153.

⁶⁵⁶ Phaswana E 'Women, Gender, and Race in Post-Apartheid South Africa' in Yacob-Haliso O & Falola T *The Palgrave Handbook of African Women's Studies* (2021) 197-215.

⁶⁵⁷ Thobejane T 'Re-Envisioning the Fight Against Patriarchy: The Case of South African Women' Vol. 5 (27) *Mediterranean Journal of Social Sciences* (2014) 896-899.

⁶⁵⁸ *Constitution of the Republic of South Africa* 1996.

apartheid State. In a new democratic society, gender equality was a major focus of legislative and administrative reforms.

Regarding the progressive rights granted to women, gender and sexual equality, and general justice, South Africa is a pioneer. Political, economic, and social laws and policies in the nation have undergone significant changes since 1994.⁶⁵⁹ Scholars, feminist and women's organisations, and civil society organisations have all actively lobbied for these changes.⁶⁶⁰ In addition to eliminating and resolving racial and class discrimination stemming from the racial capitalist system of apartheid and colonisation, these revisions sought to address prejudice based on a variety of factors, including sex, gender, sexual orientation, and culture.

Revolutionary developments in South Africa's constitutional history were brought about by the 1996 Constitution and the one that came before it.⁶⁶¹ The idea of constitutional supremacy⁶⁶² has largely replaced the doctrine of parliamentary sovereignty as one of the most significant shifts. Along with that, a strong Bill of Rights⁶⁶³ was also passed, and a constitutional court with final authority over constitutional issues was established.⁶⁶⁴

5.2.3 Preamble to the 1996 Constitution of South Africa

The objectives of the 1996 South African Constitution are outlined in the preamble, just like the Nigerian Constitution. Equality is regarded as one of the basic values of both the 1993 and 1996

⁶⁵⁹ Sarkin J 'The Drafting of SA's Final Constitution from a Human Rights Perspective' Vol. 45 (1) *The American Journal of Comparative Law* (1999) 67.

⁶⁶⁰ Hassim S 'Voices, Hierarchies and Spaces: Reconfiguring the Women's Movement in Democratic South Africa' Vol. 32 (2) *Politikon* (2005) 175.

⁶⁶¹ 1993 Constitution.

⁶⁶² Article 4, South African Constitution 1993 and Article 2, South African Constitution 1996.

⁶⁶³ Chapter 3, South African Constitution 1993 and chapter 2, South African Constitution 1996.

⁶⁶⁴ Article 98(1), South African Constitution 1993 and Articles 166 and 167, South African Constitution 1996.

Constitutions, which is not surprising given South Africa's lengthy history of oppression and discrimination against specific groups in society. The 1993 Constitution's preamble made reference to the *"need to create a new order in which ... there is equality between men and women and people of all races ..."* Constitutional principles I, III, and V dealt directly with equality.⁶⁶⁵ In Article 8, unfair discrimination was forbidden, and equality was referred to as a right. In a number of cases,⁶⁶⁶ the 1993 Constitution's equality language was construed in ways that still matter today.

⁶⁶⁷The preamble to the 1996 Constitution provides that everyone be *"equally protected by law."*

5.2.4 Equality right under the South African Constitution

Most academic works and court rulings describe the South African Constitution as *"transformative"*.⁶⁶⁸ In order to create a new society founded on social justice, democracy, and human rights, the Constitution has greatly reduced the political, economic, and social injustices experienced by women during the colonial and apartheid periods. Among the essential values of the Constitution are promoting human rights and freedoms, equality, and human dignity. By Article 1 of the South African Constitution, *"the Republic of South Africa is one, sovereign,*

⁶⁶⁵ Principle I: *"The Constitution of South Africa shall provide for the establishment of [a] ... system of government committed to achieving equality between men and women and people of all races."*

Principle II: *"The Constitution shall prohibit racial, gender and other forms of discrimination and shall promote racial and gender equality and national unity."*

Principle V: *"The legal system shall ensure the equality of all before the law and an equitable legal process. Equality before the law includes laws, programmes or activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour or gender."*

The constitutional principles were contained in schedule 4. Chapter 5 of the 1993 Constitution governed their operation. In terms of Article 71(1) (a) the text of the 1996 Constitution has to comply with the constitutional principles contained in schedule 4 of the 1993 Constitution.

⁶⁶⁶*Brink v Kitshoff NO* 1996 4 SA 197 (CC); *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC); *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC); *Harksen v Lane NO* 1998 1 SA 300 (CC); *Larbi-Odam v MEC for Education (North West Province)* 1998 1 SA 745 (CC); *City Council of Pretoria v Walker* 1998 2 SA 363 (CC); *East Zulu Motors (Pty) Limited v Empangeni/Ngwelezane Transitional Local Council* 1998 1 BCLR 1 (CC).

⁶⁶⁷ In *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 12 BCLR 1517 (CC) par [15] Ackermann J said that *"... the equality jurisprudence and analysis developed by this court in relation to Article 8 of the interim Constitution is applicable equally to Article 9 of the 1996 Constitution, notwithstanding certain differences in the wording of these provisions."*

⁶⁶⁸ Albertyn C (2007) 253.

democratic, state founded on the following values (a) human dignity, the achievement of equality and the advancement of human rights and freedoms”.

The first fundamental right in the Bill of Rights is equality, the late Mahomed DP observed in *Fraser v Children's Court, Pretoria North*⁶⁶⁹, that “*there can be no doubt that the guarantee of equality lies at the very heart of the Constitution. It permeates and defines the very ethos upon which the Constitution is premised*”.

Additionally, Chapter II of the South African Constitution makes provision for the Bill of Rights.⁶⁷⁰ Article 7 (1) and (2) thereof shows that the BOR is instrumental to the democracy in South Africa. It enshrines the rights of all people in the country and affirms the democratic values of human dignity, equality, and freedom. The state is responsible for respecting, protecting, promoting, and carrying out the rights enshrined in the Bill of Rights. The BoR provides for a comprehensive equality clause in Article 9 (3). It provides that “*everyone is equal before the law and has the right to equal protection and benefit of the law*”.

Equality in this context refers to the full and equal enjoyment of all rights and liberties. The state may not discriminate against anyone unfairly, either directly or indirectly, on the listed grounds.⁶⁷¹

This demonstrates a commitment that all human rights are interconnected when political and civil rights are included alongside economic, social, and cultural rights. By addressing the obligation to make remedies for prior disparities, the equality provision incorporates a substantive notion of equality.

⁶⁶⁹ 1997 2 BCLR 153 (CC) par [20].

⁶⁷⁰ BoR.

⁶⁷¹ Article 9 (3) South African Constitution 1996.

The court agreed to establish a substantive definition of equality in the case of *Brink v Kitshoff*,⁶⁷² admitting that discrimination against members of underprivileged groups can result in a pattern of injury and disadvantage for the entire group. Discrimination is wrong because it fosters and institutionalises inequality among different groups in our society. The founding fathers of the Constitution understood the significance of outlawing such types of discrimination and establishing effective measures to rectify or ameliorate their consequences.

The 1996 Constitution's definition of equality goes beyond simple substantive equality. The phrase "*legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination*" is endorsed in Article 9(2). This provision acknowledges the concept of "restitutory" (or remedial) equality.⁶⁷³

Article 9 (2) emphasises that equality entails the full and equal enjoyment of "*all rights and freedoms*." It maintained that the term "all rights" in this context includes a woman's right to own property like her husband before and after marriage. Articles 9(3) and (4) provide more specific definitions of the broad principle of equality found in Articles 9(1) and (2). The former two Articles address discrimination, which is the antithesis of equality. The State may not unduly discriminate against someone on specific grounds, according to Article 9(3).⁶⁷⁴ Race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion,

⁶⁷² NO 1996 (4) SA 197 (CC).

⁶⁷³ The concept of remedial equality was explained in *National Coalition for Gay and Lesbian Equality v The Minister of Justice* 1998 12 BCLR 1517 (CC) par [60-61] as follows: "*Particularly in a country such as South Africa, persons belonging to certain categories have suffered considerable unfair discrimination in the past. It is insufficient for the Constitution merely to ensure, through its Bill of Rights, that statutory provisions, which have caused such unfair discrimination in the past, are eliminated. Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied... one could refer to such equality as remedial or restitutory equality.*"

⁶⁷⁴ According to Du Plessis 1998 *Stell LR* 245 "[s]ome criteria for differentiation, such as race, ethnic origin, sex, gender class, religion and descent are ... so profoundly suspect that differential treatment based on any of them for (almost) every purpose, is most often seen to be discriminatory per se."

conscience, belief, culture, language, and place of birth are only a few reasons.⁶⁷⁵ The discrimination may be direct or indirect.⁶⁷⁶

Kentridge⁶⁷⁷ contends that Article 9(4), which makes it apparent that all people face the need to refrain from discrimination, renders the investigation required by Article 8 (2) unnecessary. However, Nothing in the 1996 Constitution's wording suggests that its authors intended for some rights to be exempt from the investigation required by Article 8 (2). Additionally, nothing in the text of Article 9 (4) requires the direct application of equality on a horizontal scale. A balance of opposing rights and values will be necessary to decide whether discrimination against private individuals is "unfair" as intended in Article 9 (4). Nothing more than an indirect horizontal application of the Bill of Rights occurs when its provisions are used in this balancing process.⁶⁷⁸

Additionally, if one or more of the criteria stated in Article 9 (3) are present, Article 9 (5) establishes a presumption in favour of unfair discrimination subject to rebuttal. In the case of *Harksen v Lane*,⁶⁷⁹ Goldstone J stated that in interpreting Section 8 of the interim Constitution, it must be assessed if the law or conduct discriminates against individuals or groups of persons. Suppose the law or conduct in question differs. In that case there must be a rational connection between the differentiation in question and the legitimate governmental purpose it is designed to

⁶⁷⁵ The list is not a *numerous clausus* and additional grounds that discriminate unfairly may be proved. Van Reenen (1997) *SAPR/PL* 159-161.

⁶⁷⁶ According to Van Reenen 1997 *SAPR/PL* 159, direct discrimination is when a person is disadvantaged simply on the basis of the grounds referred to in Article 9(3). Indirect discrimination, on the other hand, is when a person is disadvantaged when neutral policies are applied in such a way that they adversely affect members of a specified group. See also Albertyn and Kentridge 1994 *SAJHR* 164-167.

⁶⁷⁷ "Equality" in Chaskalson M et al (eds.) *Constitutional Law of South Africa* chapter 14 (1999) 64.

⁶⁷⁸ Sprigman and Osborne (1999) *SAJHR* 39 argue that the language of Article 9(4) strongly suggests that the drafters of the 1996 Constitution intended Article 9(4)'s prohibition of private discrimination to be enforced by the legislature and not by the courts. Article 9(4) mandates the enactment of national legislation to prohibit unfair private discrimination. However, their viewpoint does not acknowledge the fact that the courts have the power in terms of Article 8(2) to apply or develop the common law in order to give effect to constitutional rights. The protection of equality between private individuals is therefore not dependent on the enactment of national legislation.

⁶⁷⁹ (1997) ZACC 12, Dlamini C 'Equality or justice? Section 9 of the Constitution revisited - Part II' Vol. 27 (2) *Journal for Juridical Science* 15-32,

further or achieve in order not to fall foul of section 8(1) of the interim Constitution. However, if there is no proper link between discrimination and government objectives, the law or act in question violates the provisions of Article 8(1) of the Interim Constitution. If there is sufficient relevance, it is necessary to determine whether the conduct constitutes unfair discrimination within the meaning of Article 8(2) of the Interim Constitution, even though it is reasonable. It is necessary to establish whether discrimination exists and whether this discrimination is unfair. However, if this discrimination has arisen for specific reasons, it is the respondent's responsibility to rebut it. If the discrimination is not based on specific grounds, the complainant must prove it.

5.2.5 Constitutional protection of the right to equality in relation to property rights

As mentioned earlier, Article 9(1) clearly states, “[e]veryone is equal before the law and has the right to equal protection and benefit of the law”. This provision provides equal protection for women's claims to ownership of property as fully independent human beings. Article 9(2) provides for full and equal enjoyment of all rights and freedoms and calls for “legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination.” This affirmative action provision promotes substantive equality by ensuring the adequate protection and advancement of those who have been adversely affected by unfair discrimination.⁶⁸⁰ It also expresses the principle of equality as including the equal enjoyment of all rights and freedoms. The foundation for women's property rights and property ownership is provided by this Constitution.

Article 9 (3), which was previously discussed, forbids unfair discrimination on a number of grounds, including gender, sex, pregnancy, and marital status. It is obvious that this non-

⁶⁸⁰ Mubangizi J *The Protection of Human Rights in South Africa: A legal and Practical Guide* 1 ed. (2013) 83.

discrimination provision appears to offer women significant protection against unfair discrimination in the exercise of their property rights and the ownership of real estate. By forbidding such discrimination by and between private individuals, Article 9(4) expands the ban on unfair discrimination to the horizontal level. It also demands that laws be passed to stop or outlaw unfair discrimination. In *Sithole and Another v Sithole and Another*⁶⁸¹ (Sithole), section 21(2) (a) of the Matrimonial Property Act (MPA) was nullified and held to be unconstitutional by the Constitutional Court on the basis that perpetuated the discrimination created by section 22(6) BAA. This provision states that, marriages between Black People were automatically exempt from community property laws unless specific requirements are met. The court decided that with the exception of those couples who deliberately choose marriage outside of the community of property, all Black marriages previously concluded outside of the community of property and under section 22(6) of the BAA would henceforth be in the community of property.⁶⁸² Similarly, Section 7(1) of the ROCMA was also declared to be constitutionally invalid in *Gumede v President of South Africa*,⁶⁸³ in relation to de facto monogamous customary marriages, while leaving open the question of the constitutional validity of section 7(1) regarding polygamous customary marriages.⁶⁸⁴ Section 7(2) of ROCMA was also declared constitutionally invalid in respect of the phrase “*entered into after the commencement of the Act.*”⁶⁸⁵ This phrase had the effect of giving widows married in terms of the Marriage Act⁶⁸⁶ greater rights in the estate of their deceased spouse than those married customarily under the same Act.

⁶⁸¹ (2021) ZACC (W) 7.

⁶⁸² Sithole para 59; Reuters (author unknown) ‘Elderly Black Woman Wins Property Rights in Landmark Ruling’ available at <https://www.timeslive.co.za/news/south-africa/2020-01-31-elderly-black-woman-wins-property-rights-in-landmark-ruling/> (accessed 11 April, 2023).

⁶⁸³ (2009) (3) SA 152 (CC).

⁶⁸⁴ *The Gumede’s* case, para.58.

⁶⁸⁵ *The Gumede’s* case, para 3.

⁶⁸⁶ Marriage Act 1961.

Article 25 of the Constitution particularly protects property rights. Although the entire provision is significant, the most pertinent sections for this consideration are Articles 25(1), 25(4), and 25(5). By Article 25(1), “no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.” Thus, a man passed away intestate in *Moseneke v. The Master*.⁶⁸⁷ His estate contained real estate, automobiles, stock, unit trusts, and insurance contracts. He had four sons and a wife. The deceased's wife was given the right to inherit.

Article 25(4) of the Constitution affirmed the nation’s commitment to a land reform programme “to bring about equitable access to all South Africa's natural resources” while emphasising that property is not limited to land. Article 25(5) states that “the state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.” In so doing, this provision acknowledges ‘equitable access’ as a general principle for all citizens. It thus confirms the unqualified right of women (all women) not to be denied rights in the land on account of their gender”.⁶⁸⁸

In addition, in line with the international obligation imposed on South Africa, the South African government established a Commission for Gender Equality (CGE) in accordance with Section 187 of the Constitution. The CGE protects, promotes, monitors, and evaluates gender equality through research, policy development, public education, legislative initiatives, effective monitoring, and litigation. There is no such commission in Nigeria.⁶⁸⁹

⁶⁸⁷ *Moseneke v The Master* 2001 (2) SA 18 (CC).

⁶⁸⁸ Walker C ‘Elusive Equality: Women, Property Rights and Land Reform in South Africa’ Vol. 25 (3) *South African Journal of Human Rights* (2009) 467-490.

⁶⁸⁹The Bare Minimum: Commission for Gender Equality Report on South Africa’s Compliance with CEDAW Committee 2011 Concluding Observations & Recommendations Research Report 2020.

5.2.6 South African cases reported under constitutional legality

In *Rahube v Rahube*,⁶⁹⁰ the court restrained the eviction of an older woman from her home where she lived for more than 30 years. The court held section 2(1) of South Africa's Upgrading of Land Tenure Rights Act unconstitutional because it undermines women's rights to equality, according to the unanimous ruling of the Constitutional Court. Only men were acknowledged as the head of the family and as legal landowners under the apartheid-era statute, which raised tenancy rights to ownership. This had an especially negative effect on African women who were barred from owning property during apartheid.

In the case of *Bhe v Magistrate Khayelitsha*⁶⁹¹ (*Bhe*), the Constitutional Court challenged the practice of male preference and declared it a breach of women's fundamental rights to equality and dignity. The male primogeniture law, which forbade widows from inheriting the estates of their deceased husbands and daughters from inheriting from their dads, was up for review by the Constitutional Court in that case.⁶⁹² The court determined that Section 23 of the BAA, which established male primogeniture, was unconstitutional because it violated Article 9(3) of the Constitution by unfairly discriminating based on sex.⁶⁹³ As a result, the traditional principle of male primogeniture was abolished in South African law.

The widows of deceased people are entitled to the advantages of the estate, but only if they live in the deceased's kraal or one that the heir approves of. These concepts were determined to be discriminatory in the case of *Ryland v Edros*.⁶⁹⁴ In this instance, the court emphasised that the

⁶⁹⁰ (CCT319/17) [2018] ZACC 42; 2019 (1) BCLR 125 (CC); 2019 (2) SA 54 (CC) (30 October 2018)

⁶⁹¹ (2005) (1) SA 580 (CC).

⁶⁹² *Bhe* paras 88–94.

⁶⁹³ Section 23 of the BAA was also found to be contrary to Article 10 of the Constitution, the right to dignity.

⁶⁹⁴ 1997) (2) SA 690 (C).

judiciary has a responsibility to uphold the principles of public policy, which include tolerance for diversity and equality. This indicates that some traditional traditions were used even though they were against women's rights to inherit and succeed.

The issue in *Shilubana and Others v Nwamitwa*⁶⁹⁵ was whether women should be allowed to serve as traditional leaders of their tribes due to cultural norms. The Constitutional Court stated that a female child heir was not previously permitted by the Valoyi family to hold the position of chief. Due to the equality article in the new Constitution, this amounted to discrimination. Considering democracy and the Republic of South Africa's new Constitution, it is now acceptable for a female child to be heir because she is treated equally to a male child.

According to Sachs J., in *Du Plessis and Others v de Klerk and Another*,⁶⁹⁶ the issue of how the Constitution relates to customary or indigenous law will eventually need to be addressed. The Court also ruled that the Bill of Rights would forbid patriarchal characteristics, which underpin indigenous law.

In *Zondi v The President of the Republic of South Africa*,⁶⁹⁷ the deceased died intestate in 1995 and was married with two illegitimate children. According to the Black Administration Act in section 22(6),⁶⁹⁸ the marriage was not one in the community of property. Therefore, his estate was to be handled using customary law. The heir assumed the duties of the departed family head and was now in charge of the upkeep and welfare of the family.

⁶⁹⁵ (2008) (9) BCLR (CC).

⁶⁹⁶ (1996) (3) SA 850 (CC).

⁶⁹⁷ (1999) (11) BCLR 1313 (N).

⁶⁹⁸ Ntlama N 'The Equality Act: Enhancing Capacity of the Law to Generate Social Change for the Promotion of Gender Equality' Vol 21 (1) *Speculum Juris* (2007) 113.

Similarly, in *Shibi v Sithole*,⁶⁹⁹ the deceased passed away intestate, leaving no wife, children, parents, or grandparents. The deceased's two male cousins were left behind. The deceased's sister was also left behind, however, she was disinherited due to the male primogeniture basis of customary law. The sister obtained a court order stating that the sister is the only inheritor of her brother's estate. Furthermore, she would face sex and gender discrimination if the cousins did succeed in her brother's estate.

5.3 Other South African laws that protect the rights of women to property ownership during and after marriage

5.3.1 Recognition of Customary Marriages Act 1998 (ROCMA)

A woman had previously been regarded as a perpetual minor under her husband's supervision under customary law. According to the ROCMA, in addition to any rights and powers she may have under customary law, a wife in a customary marriage has full status and capacity, including the ability to acquire assets and dispose of them, enter into contracts, and bring legal action.⁷⁰⁰ The ROCMA is unique in its field.

ROCMA makes a distinction between customary marriages contracted before its promulgation and those contracted after its passage. Prior agreements are still in effect and are governed by customary law.⁷⁰¹ On the other hand, unless they specifically exclude it through an ante-nuptial

⁶⁹⁹ *Shibi v Sithole* Case No 7292/01, 19 Nov 2003.

⁷⁰⁰ Section 6 ROCMA.

⁷⁰¹ Section 7(1).

agreement, all partners who were customarily married after the commencement date of ROCMA, 15 November 2000, are married in a community of property and profit and loss.⁷⁰²

In the case of *Ramuhovhi and Others v President of the Republic of South Africa and Others*,⁷⁰³ the Constitutional Court found section 7(1) of ROCMA to be inconsistent with the Constitution and invalid in that it limited women's right to human dignity. That section provided that “[t]he proprietary consequences of customary marriages entered into before the commencement of [the] Act continue to be governed by customary law”.

The implication of *Ramuhovhi* is that a husband and his wives in a polygamous customary marriage made before the ROCMA must equally share in the right to family property ownership as well as other rights pertaining to it, such as the power to administer and control it. In the same vein, everyone involved in that polygamous customary marriage must be accorded the same rights with regard to real estate.⁷⁰⁴ Parliament was entrusted with changing the contested provision in response to this judgment. The Recognition of Customary Marriages Amendment Act⁷⁰⁵ (RCMAA) enabled the controlling of the proprietary outcomes and ownership rights in a customary marriage, Section 2 of the RCMAA aims to reform the ROCMA. This provision allows for joint and equal ownership, management, and control over marital property and exclusive rights only over personal property.

⁷⁰² Section 7(2) ROCMA. See also Maletse T ‘The Recognition of Customary Marriages Act and the practice of lobola through the lens of the SCA’ available at <https://www.derebus.org.za/the-recognition-of-customary-marriages-act-and-the-practice-of-lobola-through-the-lens-of-the-sca/> (accessed 12 April 2023).

⁷⁰³ (2017) ZACC 41.

⁷⁰⁴ *Ramuhovhi* para 71.

⁷⁰⁵ 1 of 2021.

5.3.2 Intestate Succession Act 1987 (ISA)

The Intestate Succession Act,⁷⁰⁶ which came into effect on March 18, 1988, formalized the law of intestacy. The ISA completely repealed all statutory adjustments and established a far more straightforward system of intestate succession.

In the past, the primogeniture concept served as the foundation for the South African customary law of succession, which stipulated that only men could inherit from a decedent's estate. The heir is often the deceased person's eldest son or, in his absence, the deceased person's eldest grandson. In cases when there were no sons, the father of the dead became the heir. However, since the Succession Act was passed, a wife can now receive the deceased estate.⁷⁰⁷ This Act takes into consideration the past disadvantages and stereotypes inflicted on women and has addressed them. This is what the substantive equality approach seeks to achieve.⁷⁰⁸

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

In the preamble of the Promotion of Equality and Prevention of Unfair Discrimination Act⁷⁰⁹ it is stated that in the area of human rights, South Africa also has obligations under binding treaties and established international law that support equality and forbid unfair discrimination. PEPUDA carries out the equality rights guaranteed by the constitution.⁷¹⁰

⁷⁰⁶ Act 81 of 1987.

⁷⁰⁷ Section 1(1) (a) & (c), ISA.

⁷⁰⁸ See Chapter 2.

⁷⁰⁹ PEPUDA 2000.

⁷¹⁰ Article 9 (2), South African Constitution 1996 provides that “*equality includes the full and equal enjoyment of all rights and freedoms, to promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken*” and Article 32(2). These provisions are found in Article 9 (4) of the Constitution where it requires national legislation

Pursuant to Articles 9(2) and 9(4) of the Constitution referred to earlier, the PEPUDA was enacted not only to protect or advance persons or categories of persons disadvantaged by unfair discrimination but also to prevent or prohibit unfair discrimination. Section 8 prohibits unfair discrimination on the grounds of gender and lists specific types of discrimination that are prohibited. These include, but are not limited to, *“the system of preventing women from inheriting family property”*⁷¹¹ and *“any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child.”*⁷¹² They also include *“any policy or conduct that unfairly limits access of women to land rights, finance, and other resources.”*⁷¹³

PEPUDA intends to eliminate discrimination arising from colonialism, apartheid, and patriarchy. The Act states that neither the State nor any person may unfairly discriminate against any person.⁷¹⁴ This Act prohibits the distinction existing between women and men.

5.3.4 Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 (RCLSRRMA)

The main significance of the RCLSRRMA is that it abolished the male primogeniture rule and recognized equal inheritance rights for all surviving children and spouses. *“This fundamental shift*

to be enacted to prevent or prohibit unfair discrimination. In Article 32 (2) of the Constitution requires the enactment of national legislative to give effect to respectively, the rights of access to information. South Africa is confronted by challenges in the rural areas where women have no access to information. At times, the information reaches these areas, but no one have the responsibility to educate others.

⁷¹¹ Section 8(c), PEPUDA.

⁷¹² Section 8(d), PEPUDA.

⁷¹³ Section 8(e), PEPUDA.

⁷¹⁴ In section 6 of the PEPUDA which is the prevention and general prohibition of unfair discrimination.

*was intended to bring succession and inheritance matters in line with the Constitution and the notions of equality and human dignity enshrined therein”.*⁷¹⁵

The RCLSRRMA expanded the meaning of spouse to include any other woman with whom the deceased had a union in accordance with customary law for providing children for the deceased. However, the woman is regarded as a descendant for the purpose of the succession.⁷¹⁶ In addition, the primary goal of substantive equality, as discussed earlier, is to redress the historical injustice or disadvantage that women have had in terms of property ownership and inheritance.⁷¹⁷ The RCLSRRMA portray a substantive equality approach by not only providing equal opportunities but also by recognising and protecting the rights of widows to inherit from their deceased husbands. This law seeks to redress the discrimination faced by widows in the area of property inheritance. The enactment of RCLSRRMA supports the argument that substantive equality does not align with the concept of universal individuals.⁷¹⁸ Equally, the enactment of this law shows that an examination of the context of an alleged violation of rights and its relationship to systematic forms of control within a society has been established, and the law provides a redress of this discrimination. The substantive equality reflected in this law aims at providing correction to cultural and structural disadvantages such as the patriarchal nature of South African society. Feminists are of the view that the elimination of patriarchy is a requirement for the removal of discriminatory practices against women.⁷¹⁹ The RCLSRRMA provides a level playing ground by promoting the rights of widows to inheritance.

⁷¹⁵ Mubangizi J ‘A South African Perspective on the Clash between Culture and Human Rights, with Particular Reference to Gender-Related Cultural Practices and Traditions’ Vol 13 (3) *Journal of International Women's Studies* (2012) 33-48.

⁷¹⁶ Section 1 and 2(b) & (c) RCLSRRMA.

⁷¹⁷ Chapter 2.

⁷¹⁸ Durojaye E (2012) 106.

⁷¹⁹ Sibani C (2017) 432.

5.4 The Constitution of the Republic of Kenya 2010 (Kenyan Constitution)

The South African Constitution has greatly influenced the Kenyan Constitution.⁷²⁰ Significant ideas recognized by the 2010 Kenyan Constitution include gender equality and the preservation of women's property rights. The Constitution specifically takes a substantive equality stance, emphasising tackling the root causes of gender inequality and discrimination against women. This framework recognizes the historical oppression and marginalization of women and seeks to remedy this situation by advancing women's rights and equitable participation in all spheres of society.⁷²¹

Furthermore, Kenya has done a good job of bringing its laws into accordance with the duties that members of international accords are required to fulfil. Particularly in Articles 2(5) and (6) of the Constitution, it is stated that Kenyan law shall be governed by any treaty or convention that it ratifies, as well as by the general rules of international law. This section makes the international and regional human rights instruments ratified by the Kenyan government enforceable and applicable by Kenyan courts.

Women's marginalisation throughout the colonial era deepened as a result of at least two crippling legal rules they were subjected to.⁷²² While traditional beliefs discriminated against women, the colonial legal system, which was already an exclusive system of law by its very nature, solidified

⁷²⁰ Glinz C 'Kenya's New Constitution: a Transforming Document or Less than Meets the Eye?' Vol. 44 (1) *Law and Politics in Africa, Asia and Latin America* (2011) 60-80.

⁷²¹ Odhiambo R & Oduor M 'Gender Equality' in Lumumba P, Mbondenyei M, and Odero S *The Constitution of Kenya: Contemporary Readings* (2012) 99-151.

⁷²² Odhiambo and Oduor (2012) 99.

the idea that women were less valuable than males.⁷²³ The pre-2010 and post-2010 Constitution periods can be used to divide Kenya's history into two basic times.

5.4.1 Equality and property rights pre-2010 Constitution

In Kenya, there are two types of succession or inheritance: testate and intestate.⁷²⁴ Suppose the Constitution allowed people to choose to be governed by personal law in situations like inheritance. In that case they may decide to follow their customs and exclude their female children from the estate. Because women do not inherit from their fathers in many Kenyan communities, only male offspring do.⁷²⁵ In some cultures, even a married woman's right to use the property is limited to her lifetime and terminates upon her remarriage.⁷²⁶ Even though courts might impose restrictions on a testator's ability to divide his or her assets, they frequently adopt the testator's customs.⁷²⁷

Women were discriminated against more severely in intestate succession. The Law of Succession Act⁷²⁸ (LSA) serves as the fundamental law. Section 36 of the Act is discriminatory. It states that in cases of intestate succession, if a spouse and a child or children survived the deceased, the surviving spouse is entitled to a life interest in the remaining portion of the estate but gets all of

⁷²³ Odhiambo and Oduor (2012) 99.

⁷²⁴ The Law of Succession Act cap 160.

⁷²⁵ Kenyatta J *Facing Mount Kenya: the traditional life of the Gikuyu* (1938).

⁷²⁶ Kenyatta J (1938) 5.

⁷²⁷ *In the Matter of the Estate of Mutio Ikonyo (deceased)* Machakos High Court Probate and Administration Number 203 of 1996 (unreported), the court held that a married daughter of the deceased was not entitled to a share of the estate. According to Mwera J the married daughter, being a Kamba, ought to have known that under Kamba customary law only unmarried daughters or those divorced (and dowry returned) could claim to inherit. Before the Court of Appeal intervened in the case of *Rono v Rono* a female judge had invoked customary law to deprive the deceased's daughters from inheriting their deceased father's estate on equal footing with their brothers. See *Rono v Rono* Eldoret High Court Probate and Administration Cause No. 40 of 1998 (unreported); see also the Court of Appeal decision of *Mary Wanja Gichuru v Esther Wach Gachuhi* Civil Appeal No 76 of 1998 (unreported) where the court affirmed the Kikuyu custom of patrilineal inheritance.

⁷²⁸ Chapter 160 of the Laws of Kenya.

the deceased personal and domestic belongings. However, if the surviving spouse is a woman, the life interest ceases if she marries again. If the surviving spouse is a man who marries again, there is no such termination. This practice amounts to direct discrimination against women in most Kenyan communities.⁷²⁹

According to section 39,⁷³⁰ the property passes first to the deceased's father and only to the mother if the father is deceased if neither the spouse nor the child(ren) survives the deceased. The Act states that the personal and household effects will pass to each house proportionately to the number of children in each house when the intestate was polygamous (in this case, always a man). However, the surviving wives will also be included as *"an additional unit to the number of children."* The distribution of the personal and household effects then takes place within each home in accordance with the intestate succession laws found in sections 35 to 38. The same distribution guidelines will apply to the remaining estate as well.

Both a constitutional and statutory foundation were discovered for customary law and practices.⁷³¹ While the previous Constitution claimed to uphold the rights to equality and non-discrimination, it only applied to "personal law." Whilst Article 82(1) provided that *"no law shall make any provision that is discriminatory either of itself or in its effect"*, sub Article (4)(b) of the same Article exempted laws that made provision *"with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law."* Further and fundamentally, the sub Article also excluded laws that *provided "for the application in the case of members of a*

⁷²⁹ It amounts to *"affording different treatment to different persons attributable wholly or mainly to their respective descriptions by ...sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description."* See Article 82(3), repealed Kenyan Constitution and Article 27(4), Kenyan Constitution 2010.

⁷³⁰ LSA CAP 160 of the Laws of Kenya.

⁷³¹ Article 82 (4), repealed Kenyan Constitution and Section 3(2), Judicature Act.

particular race or tribe of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons."⁷³² The above two provisions were given statutory fiat by the Judicature Act, which directed that the courts apply non-repugnant African customary laws in civil cases.⁷³³

The court was completely free to uphold a person's decision to apply customary law in relation to the matters enumerated. Kenyan customary law, which is based on patriarchal attitudes and presumptions, supports discrimination against women. Such discrimination is more severe when it has legal and constitutional support since it normalises prejudices against women. In a society where there is judicial restraint, the courts serve as a means of upholding patriarchal values rather than as a liberating force.⁷³⁴ This was shown in a number of court rulings, according to the court in *Otieno v Ougo & Another*.⁷³⁵ In that case, all wives married to Luo men, regardless of their lifestyles, become subject to the customary rules; hence, the appellant as the deceased's wife must be considered. Due to her mixed-race marriage, the Luo customary law would not provide her with any special status.

By the aforementioned ruling, an African woman who marries an African man is fully assimilated into her husband's culture and is, therefore, subject to his traditions. In this instance, tradition mandated that a wife forfeit autonomy and lose the ability to decide how to bury her spouse; the clan took control. The court dismissed the argument that this practice was discriminatory because

⁷³² Article 82 (4) (c), repealed Kenyan Constitution.

⁷³³ Article 82 (4), repealed Kenyan Constitution and section 3(2) of the Judicature Act.

⁷³⁴ See for instance *Otieno v Ougo* (2008) 1 KLR (G&F) 918.

⁷³⁵ *Otieno v Ougo* (2008) 1 KLR (G&F) 918.

Article 82(4) (b) permits the use of customs in circumstances where they would otherwise be discriminatory.

Judges have frequently upheld the constitutionality of discriminatory acts against women. The court upheld and applied the patrilineal Kikuyu tradition of inheritance, which said that only sons were entitled to their father's land, in the case of *Mary Wanja Gichuru v Esther Wach Gachuhi*.⁷³⁶ According to Kikuyu tradition, the appellant claimed the respondent was unable to inherit because she was married.⁷³⁷ In evaluating whether the custom was applicable, the court of appeal cited *Wambugu v. Kimani*,⁷³⁸ in which the court held that, according to Kikuyu custom, a married woman could not inherit her father's land. In the latter case, Kwach J.A. had stated as follows:

On the right of inheritance by daughters, the late President Jomo Kenyatta in his book *Facing Mount Kenya* says (at page 29):
'After some time the family begun to increase. Let us imagine that each wife had three sons and perhaps some daughters. But as female children do not take part in the ownership of land, we will leave them out, because, having no system of spinsterhood in the Kikuyu society, women do not inherit land on their father's side; they play their part in the family or clan in which they marry'.

The court further cited Kwach's statement that:

Inheritance under Kikuyu law is patrilineal. The pattern of inheritance is based on the equal distribution of a man's property among his sons, subject to the provision that the eldest son may get a slightly larger share. Daughters are normally excluded, but may also receive a share if they remain unmarried. In the absence of sons, the heirs are the nearest patrilineal relatives of the deceased, namely father, full brothers, half brothers, and paternal uncles.

⁷³⁶ *Mary Wanja Gichuru v Esther Wach Gachuhi* Civil Appeal No 76 of 1998 (unreported).

⁷³⁷ *Mary Wanja Gichuru v Esther Wach Gachuhi* Civil Appeal No 76 of 1998 (unreported).

⁷³⁸ [1988-1992] 2 KAR 292

The Court of Appeal overturned the high court's directive for equal distribution based on these sources. A woman was denied the right to inherit her father's property on a basis of custom; the court upheld this discriminatory practice as mandated by the Constitution.

In terms of gender equality, the marriage property regime has been a major failure. After a divorce, the partition of marital property occurs. The Kenyan legal system has been ambiguous regarding how marital property is shared, which has allowed for possibilities for the reproduction of gendered prejudices in society. Due to the lack of legislation outlining the rules to be followed in the partition of matrimonial property, courts had to create some sort of rules to be used in these situations. Because it is a common law country, the judges had to use English law to help them decide.⁷³⁹ Unfortunately, the implementation has not been uniform, resulting in a confusing system of law governing marital property.

The English Married Women Property Act (MWPA),⁷⁴⁰ a statute of general application as defined in the Judicature Act,⁷⁴¹ was imported as a result of the absence of a statutory framework. However, the MWPA did not outline any divisional guidelines. It first overturned a common law rule stating that a married woman could not possess property by confirming that she was capable of owning property in her name apart from her husband. Additionally, it gave the court authority to take into account each party's share of the property after a divorce.

The MWPA was introduced via the *I v I*⁷⁴² case, in which Justice Trevelyan ruled that it applied in Kenya. This decision has since been upheld by courts, including the Court of Appeal. Since then,

⁷³⁹ Kenyan courts have relied on a long line of English decisions to develop their own jurisprudence on the division of matrimonial property. See the *Karanja v Karanja* (1975) KLR 307.

⁷⁴⁰ MWPA, 1882.

⁷⁴¹ (1971) EA 278.

⁷⁴² (1971) EA 278.

courts have created a set of guidelines to be followed when deciding on matrimonial property issues. Although measured, progress has been incremental. Until recently, following a Court of Appeal decision, it would have been possible to argue that the law had developed in response to the specific problems faced by women in matrimonial property matters. Kenyan courts had established the guidelines that would be generally applicable in matrimonial property matters by careful trimming of the English instances. Courts applied a combination of principles of contract and equity to navigate the issue.⁷⁴³

5.4.2 Equality and non-discrimination rights of women in the 2010 Constitution

The Kenyan Constitution of 2010 is perhaps the most pro-women legal framework. It instils a culture of respect for human rights and encapsulates social justice ideas.⁷⁴⁴ Fundamentally, the 2010 Constitution contains a bill of rights that includes an enlarged list of fundamental rights.⁷⁴⁵

The Constitution lays out some specific steps to address the historical discrimination Kenyan women have experienced. Although the Constitution contains certain basic rules that apply to everyone equally, several of its provisions make explicit mention of women.⁷⁴⁶ This is highly important since it eliminates the gender-blind language that many legal provisions had previously used. In any case, BoR is extremely clear about its ban on discriminatory decisions and actions.⁷⁴⁷

⁷⁴³ See the *Karanja* case.

⁷⁴⁴ Preamble, Kenyan Constitution.

⁷⁴⁵ Chapter 4, Kenyan Constitution.

⁷⁴⁶ For example, Article 27(3) of the Constitution provides that “*women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.*” Such phraseology leaves no doubt as to its intended beneficiaries.

⁷⁴⁷ Article 27(1), Kenyan Constitution.

The Constitution provides that “*every person is equal before the law and has the right to equal protection and equal benefit of the law.*”⁷⁴⁸ This equality includes “*the full and equal enjoyment of all rights and fundamental freedoms.*”⁷⁴⁹ For the avoidance of doubt, it provides that “*women and men have the right to equal treatment including the right to equal opportunities in political, economic, cultural and social spheres.*”⁷⁵⁰ Clearly, this provision intends to reverse the historical exclusion that women have endured in society. It is observed that the provisions of sections 7(1) and (2) are word replicas of Article 9(1) and (2) of the South African Constitution, except for the use of the word “every person” by the former and “everyone” by the latter.

However, Jefferson argues that merely providing for equality is not sufficient for, as earlier mentioned, “*there is nothing more unequal than the equal treatment of unequal people.*”⁷⁵¹ More practical measures need to be effected in this equality to be meaningful. For this reason, the Constitution in Article 27(6) imposes an obligation on the state to “*take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination*”.

Additionally, in accordance with Article 59(4) of the Kenyan Constitution, the National Gender and Equality Commission Act, 2011 established the National Gender and Equality Commission (NGEC), which focuses on special interest groups, such as minorities, women, young people, people with disabilities (PWDs), children, and elderly members of society. The Nigerian

⁷⁴⁸ Article 27(1), Kenyan Constitution.

⁷⁴⁹ Article 27(2), Kenyan Constitution.

⁷⁵⁰ Article 27 (3), Kenyan Constitution.

⁷⁵¹ A quote attributed to Thomas Jefferson, third President of the United States (1743 - 1826), See quotation details at <http://www.quotationspage.com/quote/34758.html> (accessed 6 April 2023).

government has yet to enact an NGEC. However, the closest to NGEC in Nigeria is FMWASD⁷⁵² their mandates are not the same.

5.4.3 Property rights of women in the 2010 Constitution

Although the previous Constitution ostensibly guaranteed the right to property, such right was never explicitly declared; instead, Article 75 of that Constitution only set restrictions on the circumstances in which a person's property might have been acquired for use by the public.⁷⁵³ The 2010 Constitution affirmatively declares, “*every person has the right, either individually or in association with others, to acquire and own property*” of any description and anywhere in Kenya.⁷⁵⁴ Subsequent provisions limit the Government’s exercise of its compulsory acquisition powers, and circumstances under an individual’s use and ownership of property may be limited.⁷⁵⁵

With respect to matrimonial property, the 2010 Kenyan Constitution provides for the rights of equality of a husband and wife “*at the time of the marriage, during the marriage and at the dissolution of the marriage.*”⁷⁵⁶ This provision is consistent with Article 7 (d) of the Maputo Protocol.⁷⁵⁷ This provision allows women to have an equitable share of property during and after marriage.⁷⁵⁸ This provision protects the rights of divorced women. The Nigerian Constitution does not expressly protect the rights of women after marriage. Additionally, it is assumed that women have rights during marriage. In the case of *CMN v. AWM*,⁷⁵⁹ in order to maintain the marriage, the

⁷⁵² See Chapter 3.

⁷⁵³ That Article set out conditions under which the Government might acquire private property for public use. Article 75(1) provided that: “*no property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied...* ”.

⁷⁵⁴ Article 40 (1), Kenyan Constitution.

⁷⁵⁵ Article 40 (2)-(6), Kenyan Constitution.

⁷⁵⁶ Article 45 (3), Kenyan Constitution.

⁷⁵⁷ See Chapter 3, Kenyan Constitution.

⁷⁵⁸ See Chapter 4, Kenyan Constitution.

⁷⁵⁹ (2013) eKLR. See also the case of *JAO v NA* (2013) eKLR.

husband CMN bought and built a piece of land, which he, his wife (AWM), and their kids utilized as a shared residence. Following the dissolution of their union, AWM wed again. AWM, the husband's wife, had not contributed any money to the acquisition or upkeep of the subject property. Even though the property was jointly registered in the names of both CMN and AWM, after the divorce, CMN requested a court certification that he was the only owner. The Court cited Kenyan Constitutional Article 45, which stipulates that participants in a marriage have a right to equality at the moment of marriage, throughout the marriage, and at the time of dissolution, and ruled in favour of the woman. The Kenyan Constitution also permits the fundamental principles of international law to be incorporated into Kenyan law. The court referenced the UDHR and CEDAW, which both acknowledge that spouses in a marriage have equal rights. The court also cited the Maputo Protocol's Article 7(d), which grants women an equitable portion of the property upon divorce.

Additionally, the Constitution outlines particular requirements that pertain to land ownership and related behaviours. Accordingly, under Article 60, the land must be held, utilised, and managed in accordance with a number of principles, such as equal access, the protection of rights, and, crucially for women, the "*elimination of gender discrimination in law, customs, and practices related to land and property in land.*" The National Land Policy strengthens this provision.⁷⁶⁰ These measures seek to protect women's property rights, which had previously been disregarded by law. The court in *Re Estate of Re Estate of Mburugu Nkaabu (Deceased)*,⁷⁶¹ which involved questions of inheritance and property distribution, demonstrated that the situation has significantly changed by holding that Articles 27 and 60(f) of the Constitution grant women the right to inherit

⁷⁶⁰ National Land Policy (Sessional Paper No. 3 of 2017) paragraphs 1.6.

⁷⁶¹ (2010) eKLR.

property. The court stepped in to defend a daughter's rights when her brothers denied her inheritance because she was a woman.

Further, Article 68 provides that the Parliament shall “*revise, consolidate and rationalise existing land laws*”, revise sectoral land laws in accordance with the principles set out in Article 60(1), and enact legislation to inter alia, “*regulate the recognition and protection of matrimonial property and in particular the matrimonial home during and on the termination of marriage.*” As a result, Parliament has a strong mandate to pass laws pertaining to marital property both during and after marriage. The State now has a chance to draft rules that will ensure the elimination of unfair practices that affect women's property rights during and after marriage. This gives the parliament the authority to defend widows and divorced women who run the risk of facing prejudice due to patriarchal attitudes and presumptions.

The South African and Kenyan Constitutions share a common background in terms of their historical evolution and the struggles for independence against colonial rule. South Africa achieved its independence from apartheid in 1994, while Kenya gained independence from British colonial rule in 1963.⁷⁶² Both constitutions were subsequently drafted to ensure a more inclusive and democratic society. One key similarity between the South African and Kenyan Constitutions with respect to the non-discrimination and property rights of women is the recognition of gender equality. Both countries acknowledge the importance of equal treatment and non-discrimination based on gender. The South African Constitution explicitly prohibits discrimination based on

⁷⁶² Clark N & Worger W *South Africa: The Rise and Fall of Apartheid* 2 ed. (2004) 94, Glinz C (2011) 60.

gender, while the Kenyan Constitution prohibits discrimination based on gender, but also includes provisions for affirmative action to promote gender equality.⁷⁶³

In regards to non-discrimination rights for women, there are notable differences between the South African and Kenyan constitutions. While both countries have acknowledged the importance of gender equality, the South African Constitution explicitly prohibits discrimination based on gender and sexual orientation.⁷⁶⁴ On the other hand, the Kenyan Constitution does not mention sexual orientation, and the prohibition of gender-based discrimination is not as explicit.⁷⁶⁵ This disparity suggests that South Africa has made significant strides in ensuring comprehensive non-discrimination rights for women, whereas Kenya's Constitution has limitations in this area. Both South African and Kenyan Constitutions guarantee equal rights to property for both genders.⁷⁶⁶ However, the Kenyan Constitution explicitly addressed the issue of property rights after marriage.⁷⁶⁷ The South African Constitution takes a progressive stance by requiring the state to actively promote gender equality and adopt measures to redress historical inequalities. Conversely, the Kenyan Constitution focuses more on the principles of equality and non-discrimination without mandating specific affirmative action measures. South Africa provides comprehensive safeguards, ensuring equal access to land and property, while Kenya guarantees equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage for both genders.

Furthermore, another significant aspect of the South African Constitution is its strong commitment to affirmative action policies. These policies aim to address past injustices and inequalities caused by apartheid and promote the representation and participation of previously disadvantaged groups,

⁷⁶³ Section 9 South African Constitution, Article 27 (6) Kenyan Constitution.

⁷⁶⁴ Section 9 (3) South African Constitution.

⁷⁶⁵ Article 27 (4) Kenyan Constitution.

⁷⁶⁶ Section 25 South African Constitution, Article 40 Kenyan Constitution.

⁷⁶⁷ Article 45 (3) Kenyan Constitution.

particularly Black South Africans, in various sectors of society, including education, employment, and politics. These affirmative action measures are intended to rectify historical imbalances and ensure that opportunities are provided to those who were previously marginalised based on race. It is important to note that while the Kenyan Constitution also prohibits discrimination, it does not explicitly address affirmative action policies as comprehensively as the South African Constitution.

5.4.4 Other Kenyan national laws that protect the rights of women

5.4.4.1 Matrimonial Property Act 2013 (MPA)

The Matrimonial Property Act⁷⁶⁸ was enacted under Schedule 5 of the Constitution and the provisions of the Bill of Rights.⁷⁶⁹ The antiquated Married Women's Property Act of 1882⁷⁷⁰ from colonial times is repealed by the Act. A married woman is given the same rights as a man to acquire, manage, possess, control, use, and dispose of property, whether movable or immovable, to engage in a contract and to bring and defend legal actions in her own name.⁷⁷¹ This Act's provision is consistent with the Kenyan Constitution and the Maputo Protocol, which states that participants in a marriage have a right to equality at the time of the union, throughout the marriage, and at the time of dissolution.⁷⁷² This Act complies with the responsibilities imposed by the regional and international human rights agreements, particularly General Comment No. 6 and Article 7(d) of the Maputo Protocol.

⁷⁶⁸ No. 49, 2013.

⁷⁶⁹ Article 45 (4), Kenyan Constitution.

⁷⁷⁰ Section 19, Matrimonial Property Act, 2013.

⁷⁷¹ Section 4, MPA 2013.

⁷⁷² Article 45 (3), Kenyan Constitution.

The ownership of marital property is vested in the spouses in proportion to each spouse's contribution to its acquisition, and in the event of a divorce or other dissolution of the marriage, the property shall be divided equally between the spouses.⁷⁷³ This is particularly true in cases where there is not a prenuptial agreement.⁷⁷⁴

The concept of property rights in polygamous marriages was introduced by the Act.⁷⁷⁵ It allows women in polygamous marriage to have a share in matrimonial property acquired in the course of the marriage in the event of a divorce. This provision acknowledges the rights of women in polygamous unions. The Act stipulates that subject to the ideals and principles of the Constitution,⁷⁷⁶ the customary law of the communities in question shall apply during the division of matrimonial property between and among spouses. The customary law governing divorce, the principle of protecting future generations' rights to community and ancestral land as outlined in Article 63 of the Constitution, and the principles governing access to and use of ancestral land and the cultural home by a wife or wives, as well as a former wife or wives, all need to be taken into consideration.⁷⁷⁷

The Act also gives protection to both spouses from selling their matrimonial property without the knowledge of each other. Section 12 (1) provides that, *an estate or interest in any matrimonial property shall not, during the subsistence of monogamous marriage and without the consent of*

⁷⁷³ Section 7, MPA 2013.

⁷⁷⁴ A prenuptial agreement otherwise known as an ante-nuptial agreement refers to a written agreement between lovers who are planning to marry, making provisions for the terms of possession of assets, treatment of future earnings, control of the property of each, and potential division if the marriage is later dissolved. These agreements are common if either or both parties have substantial assets, children from a prior marriage, potential inheritances, high incomes, or have been "taken" by a prior spouse. Definition available at <http://legal-dictionary.thefreedictionary.com/Prenup> (accessed 8 April 2023).

⁷⁷⁵ Section 8 MPA 2013.

⁷⁷⁶ Article 2(4) Kenyan Constitution provides that "any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid."

⁷⁷⁷ Section 11, MPA 2013.

*both spouses, be alienated in any form, whether by way of sale, gift, lease, mortgage or otherwise.*⁷⁷⁸ Simply put, a unilateral sale of marital property by one spouse is voidable. Additionally, under any currently in effect law relating to the registration of title to land or deeds, a spouse in a monogamous marriage, or the case of a polygamous marriage, the man and any of the man's wives, has an interest in matrimonial property that may be protected by caveat, caution, or other means.⁷⁷⁹

Similarly, a husband is prohibited by section 12 (3) from evicting his wife from their matrimonial home. It provides thus, *“a spouse shall not, during the subsistence of the marriage, be evicted from the matrimonial home by or at the instance of the other spouse except by order of a court.”*⁷⁸⁰ However, a spouse may only be evicted from the marital residence by another person in the following circumstances: upon the sale of any estate or interest in the marital residence in the execution of a court order, by a bankruptcy trustee, or by a mortgagee or chargee in the exercise of a power of sale or other remedy provided by any law.⁷⁸¹ The matrimonial house may not be leased or mortgaged without both spouses' written and informed consent.⁷⁸² The MPA no longer permits the outright expulsion of a married lady from her matrimonial residence. This safeguards the rights of women going through a separation, particularly when their spouse initiates the separation or divorce.

Any property that is the subject of a legal dispute between a person and their spouse or ex-spouse may be the subject of a court application for a declaration of rights. This application must be made in accordance with any required procedure, may be included in a petition for a matrimonial cause,

⁷⁷⁸ Section 12 (1) MPA 2013.

⁷⁷⁹ Section 12 (2) MPA 2013.

⁷⁸⁰ Section 12 (3) MPA 2013.

⁷⁸¹ Section 12 (4) MPA 2013.

⁷⁸² Section 12 (5) MPA 2013.

and may be made even if no petition has been submitted in line with any law governing matrimonial causes.⁷⁸³

Any debt a spouse accumulated before the marriage related to the property will continue to be that spouse's debt after the marriage. However, unless the couples agree otherwise, the spouses shall, if the property becomes marital property, equally divide any obligation that was incurred reasonably and legitimately.⁷⁸⁴

The parties shall equally share any obligation undertaken during the course of a marriage for the benefit of the marriage, or any reasonable and acceptable expense made for the benefit of the marriage.⁷⁸⁵ This Act permits the equitable division of marital assets as well as the sharing of liabilities incurred during the marriage.

Nigerian law does not expressly protect the rights of women married under customary law; in particular, women in polygamous marriages are not entitled to matrimonial property. MCA does not protect the property rights of women married under customary law.

5.4.4.2 Land Act 2012 (LA)

The LA is an Act of Parliament with the objectives of implementing Article 68 of the Kenyan Constitution, modernising, harmonising, and rationalising land laws, as well as advancing the sustainable administration and management of land and other resources. The Act unifies former land legislation to guarantee legal compliance. The Act covers land, management, and administration. The Act defines Matrimonial home as “...*any interest in land that is owned or*

⁷⁸³ Section 17 MPA 2013.

⁷⁸⁴ Section 10 (1) and (2) MPA 2013.

⁷⁸⁵ Section 10 (3) MPA 2013.

leased by one or both spouses and occupied by the spouses as their family home...' and matrimonial property as "...any interest in land or lease that is acquired by a spouse or spouses during the subsistence of a marriage...".⁷⁸⁶ According to the LA, a spouse's property is recognised as matrimonial property. This means that in order to inherit or receive an equitable share upon divorce, the other spouse does not have to demonstrate that they made a financial contribution to the marital estate.

As stated in Section 5(2), there shall be no discrimination in the ownership of, or access to, land under any tenure system, as well as the equal recognition and enforcement of rights originating under any tenure system. The LA strictly forbids discrimination in any form. This provision guarantees women's equal rights to property ownership and inheritance during and after marriage.

5.4.4.3 Land Registration Act 2012 (LRA)

All land-related registrations and/or transactions are handled by the LRA. It contains a registration framework. A land interest is assumed matrimonial property and must be handled in accordance with the MPA if a spouse acquires it during the marriage for the joint ownership and use of both or all spouses, as stated in Section 93 thereof.⁷⁸⁷ The sale of a spouse's overriding interest in registered land requires the spouse's approval. The Act also allows the proper authorities to register restraints, cautions, and limits to protect a land-related interest.

5.4.4.4 Community Land Act 2016 (CLA)

The Act outlines the management and administration of communal land rights as well as their recognition, preservation, and registration. According to Section 30, every community member

⁷⁸⁶ Section 2 LA.

⁷⁸⁷ LRA 2012.

has the right to benefit equally from community land, including full and equal enjoyment of the rights of use and access. Additionally, women, young people, and marginalised groups have the right to equal treatment when it comes to community land. Additionally, it stipulates that women who marry a member of the community automatically become members and that their memberships last up until a formal divorce.

The Act mandates that conflicts involving community land be resolved through alternative dispute resolution (ADR).⁷⁸⁸ The Law of Succession recognizes 12 areas where pastoral communities with communal land ownership predominate. In order to reflect the requirements of this land tenure system and the ways in which women's inheritance rights may be preserved in such a setting, including the use of ADR, the Act calls for the use of customary rules that disproportionately discriminate against women to be modified.

5.4.4.5 Marriage Act 2014 (MA)

The MA was enacted to update and codify the different laws governing divorce and marriage. It outlines the prerequisites for each marriage and recognises civil, traditional, Islamic, Hindu, and Christian unions as well as marriages. Traditional and Islamic unions are assumed to be polygamous or possibly polygamous.⁷⁸⁹ This Act fixes the long-standing issue of verifying a customary marriage by requiring the registration of all marriages. It has been difficult for women to establish customary marriage, especially when significant customary laws were broken. According to the ruling in *Gituanja v Gituanja*,⁷⁹⁰ the presence of traditional marriage is a fact that can be supported by evidence. The Act establishes customary marriage as a legal entity.

⁷⁸⁸ Section 39 (1), CLA.

⁷⁸⁹ Section 6, MA.

⁷⁹⁰ (1983) KLR.

The Act outlaws child marriages. Widows and widowers can marry or not to re-marry.⁷⁹¹ While cohabitation is not recognised as a form of marriage under the law, it defines cohabit as “... *to live in an arrangement in which an unmarried couple lives together in a long-term relationship that resembles a marriage...*” It should be noted, however that even though cohabitation is not formally recognised under statutes, courts have developed common law principles on the presumption of marriage, conferring some marital rights and duties on cohabiting couples meeting certain criteria. Thus, in *RLA v FO & Another*,⁷⁹² it was determined that Section 6 of the Marriage Act 2014 only recognised the following types of marriages in Kenya: Christian, Customary, Civil, Hindu, and Muslim marriages. While long-term cohabitation is not recognised by the Act, it does not forbid relationships in which a couple has lived together as husband and wife for years and even produced children. The court further added that their lifestyle should show even to strangers that they are married and not in a relationship of convenience while still agreeing with the established criteria on the presumption of marriage, which include actual cohabitation, length of cohabitation, and whether the man and woman held themselves out as husband and wife.

Similarly, in *S.W.G v H.M.K*,⁷⁹³ it was held that “...*where a marriage does not comply with the relevant formalities laid down by the Marriage Actit may be rescued by the presumption of marriage by cohabitation...*”. The unresolved interpretation of Section 3 (5) will be addressed with the alignment of the LSA to the MA. Because there was no specific rule governing customary marriage at the time the rule of Succession was passed, Parliament included Section 3(5). Under common law rules, women in cohabiting relationships can still have their inheritance rights preserved. Additionally, the Act's definition of dependents must reflect contemporary realities. For

⁷⁹¹ Section 15, MA.

⁷⁹² (2015) eKLR

⁷⁹³ (2015) eKLR.

instance, the phrase "dependent" should no longer refer to a former wife or spouse, whether or not the deceased supported them before his death.

5.5 Lesson for the Nigerian Government

5.5.1 Constitutional reforms

The South African government took the bull by the horns when it moved from apartheid to democracy. The Constitution of South Africa took a radical turn from what it was under apartheid. The Constitutional reform of South Africa has greatly influenced the Republic of Kenya in enacting its own Constitution. A conclusion to be drawn from the jurisdiction of South Africa is that its constitutional arrangement has adequately taken care of the property rights of women. The BoR and the protection of the property rights of women by the South African Constitution have positively influenced the attitude of the constitutional courts in their interpretation of equality and defending the property rights of women.⁷⁹⁴ Nigeria needs to learn from them and make relevant provisions to protect the property rights of women during and after marriage beyond section 42 of the Nigerian Constitution. There should be explicit provisions specifically protecting women and giving them property rights equal to men.

South Africa has complied with international obligations under binding treaties and customary international law in human rights, which promote equality and prohibit unfair discrimination. The specific mention of gender, sex, and marital status in Article 9 (3)⁷⁹⁵ as prohibited grounds of discrimination is illustrative for the Nigerian government.

⁷⁹⁴ *The Bhe* case.

⁷⁹⁵ South African Constitution

Further, the Nigerian government needs to safeguard the property rights of women married under customary. The South African government has resolved this aspect by enacting domestic laws that protect women's property rights under customary law. This was done in accordance with the international obligation on South Africa. The Nigerian government is required to do the same.

Equally, Kenya has made strides and demonstrated to the rest of the world that it is always eager to assist women by taking the simple step of modifying the Constitution to give women the voice they so richly deserve. Even more noteworthy is the fact that the Constitution directly refers to women in a number of its provisions, even in generic provisions that apply to everyone equally. Kenya has taken specific measures to ensure equality in accordance with international agreements. Nigeria has no such provision. It is acknowledged that the Nigerian Constitution, in its section 15, provides for political goals, promotes national integration, and forbids "*discrimination on the grounds of place of origin, sex, religion, status, ethnic or religious association or ties.*"⁷⁹⁶ The challenge, however, is that the provision on socio-economic rights in Chapter 2 of the Nigerian Constitution is not justiciable and cannot be asserted as a right by reason of Section 6(6) (c) of the same Constitution.⁷⁹⁷ As a result, the provisions of Chapter II of the Nigerian Constitution have been regarded as serving symbolic and ideological reasons rather than having any tangible impact on people's security and well-being.⁷⁹⁸ The Constitution's non-justiciability of its sections on

⁷⁹⁶ Section 15 (2), Nigerian Constitution.

⁷⁹⁷ Section 6 (6) (c), Nigerian Constitution provides that "*the judicial powers vested in accordance with the foregoing provisions of this section...shall not, except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by authority or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of state Policy set out in Chapter II of this Constitution.*" However, in other areas of law such as environmental law, there are arguments that the right to a safe and healthy environment is enforceable and justiciable in Nigeria. This is based on the domestication of the African Charter and the recognition of enforceable human rights in the Constitution. See Ekhatior E 'Sustainable and the African Union Legal Order' in Olufemi A, Michele O & Konstantinos M (eds.) *The Emergent African Union Law: Conceptualization, Delimitation, and Application* (2021) 335-358; Anaebo O & Ekhatior E 'Realising Substantive Rights to Healthy Environment in Nigeria: A Case for Constitutionalisation' Vol.17(2) *Review* (2015) 82-99.

⁷⁹⁸ Alemika E (2000) 200.

essential purposes and directing principles is a key flaw that has drawn criticism from constitutional scholars and writers.⁷⁹⁹ This demonstrates deliberate ignorance of the internationally recognized principle of interdependence of all human rights, as well as insensitivity to the plight of Nigeria's poor, homeless, illiterate, and marginalised citizens.⁸⁰⁰

Taking rights away from judicial enforcement renders them ineffective and meaningless for the vast majority of citizens, as judicial remedies are the most important safeguards for human rights. When the very organs of government whose role is to comply, follow, and implement the principles outlined in Chapter II are left to their judgment and will, such principles are more likely to be observed in the breach than in practice.

Nigeria also needs provisions in its Constitution like Articles 2 (5) and (6) of the Kenyan Constitution, which provides that the general rules of international law that form part of the law of Kenya and any treaty or convention ratified by Kenya shall form part of the law of Kenya. The position in Nigeria is that Treaties validly concluded between Nigeria and other subjects of international law do not automatically transform into Nigerian laws; the National Assembly in accordance with section 12 of the 1999 Constitution must specifically enact them into law before they can have the force of law. Nigeria needs to provide for enforcement of even ratified treaties as is obtained in Kenya.

⁷⁹⁹ Gye-Wado O 'Fundamental Human Rights and Corresponding Civic Obligations under the 1999 Constitution' in Ayua I and Guobadia D *Political Reform and Economic Recovery in Nigeria*, (2001) 681, Joyce E and Igweike K *Introduction to 1979 Nigerian Constitution* (1982) 56.

⁸⁰⁰ Ladan M *Law, Cases and Policies on Energy, Mineral Resources, Climate Change, Environment, Water, Maritime and Human Rights in Nigeria* (2009) 329.

Furthermore, the equal rights of spouses in section 45(3) of the Kenyan Constitution is a commendable innovation that Nigeria needs to adopt. The Kenyan Court of appeal has given life to the provision in *Agnes Nanjala William v Jacob Petrus Nicolas Vander Goes*⁸⁰¹ as follows:

This article clearly gives both parties to a marriage equal rights before, during and after a marriage ends. It arguably extends to matrimonial property and is a constitutional statement of the principle that marital property is shared 50-50 in the event that a marriage ends. However pursuant to Article 68 parliament is obligated to pass laws to recognize and protect matrimonial property, particularly the matrimonial home....Pending such enactment, we are nonetheless of the considered view that the Bill of rights in our Constitution can be invoked to meet the exigencies of the day.

This case showed that when Article 45(3) is read on its own, it mandates a 50/50 distribution of marital property. The court's decision in *P M S v M S*,⁸⁰² in which the parties were married in accordance with Maragoli customary law, was based on the same justification. The husband kicked the woman out of their marital house. The wife asked the court to halt her husband from offering their marital property up for auction, selling it, or putting it up for mortgage. The property was said to be owned equally by the husband and wife, even though it was registered in the husband's name. The husband is likely keeping the property in trust for his wife. The court ruled that the property had to be shared evenly between the two spouses.

5.5.2 Judicial response to substantive equality

The foregoing analysis shows that Kenyan courts initially contributed to the discrimination against women. However, with the coming of the 2010 Constitution, things changed. The provisions of the Constitution, such as Articles 2 (5) and (6) of the Kenyan Constitution, which provide that any

⁸⁰¹ Civil Appeal 127 of 2011.

⁸⁰² (2016) eKLR.

treaty or convention ratified by Kenya shall form part of the law of Kenya, have encouraged courts to do better in protecting the rights of women.

As it is now, the courts in Nigeria may be constrained not to go beyond the current ordinary provisions of the Constitution in protecting the rights of women. The ruling in *Bhe v The Magistrate, Khayelitsha*⁸⁰³ signaled a successful turning point in South Africa's efforts to modernize customary law. It not only accelerated these reforms but also influenced the public discussion and Constitutional concerns about the constitutionality of customary law in South Africa. The *Bhe* narrative starkly contrasts to two rulings made by the Nigerian Supreme Court on April 11 and 14, 2014.⁸⁰⁴ In Nigeria, which has a common law legal tradition, court hierarchy and precedence are considered seriously. At first glance, the Supreme Court's rulings on male primogeniture in April 2014 seem to be a judicial revision of the traditional law of inheritance. However, that is not the case.

In the case of *Onyibor Anekwe & Another v Mrs. Maria Nweke*,⁸⁰⁵ the Plaintiff sought a declaration that she had a legal right to occupy a certain piece of property or, in the alternative, a portion of the money received from its sale. Interestingly, she said that whether a woman produces a male kid or not, Awka custom permits her to inherit her husband's property. The defendants objected, asserting that she was not entitled to land under Awka customary law since she was a woman. The High Court and the Court of Appeal affirmed the allegations made by the plaintiff. The Supreme

⁸⁰³ *Bhe & Others v Magistrate, Khayelitsha, & Others (Commission for Gender Equality as amicus curiae); Shibi v Sithole & Others; South African Human Rights Commission & Another v President of the Republic of South Africa & Another* 2005 (1) SA 580 (CC) (*Bhe*).

⁸⁰⁴ *Ukeje v Ukeje* 2014 LPELR22724(SC); *Onyibor Anekwe & Another v Mrs Maria Nweke* 2014 LPE-22697(SC).

⁸⁰⁵ (2014) LPELR-22697(SC).

Court highlighted the difficulty of repealing the primogeniture system and rejected the defendants' appeal.⁸⁰⁶

In actuality, the Court only upheld the plaintiff/respondent's requests for relief.⁸⁰⁷ It made no explicit arguments for or against the male primogeniture rule, and neither did it declare the rule invalid. There was no *amicus curiae* in this case, unlike in South Africa.⁸⁰⁸

It is noteworthy that in the judgment above, the Supreme Court did not specify the geographic scope of their rulings. This is because the court does not rule over an issue that is not pleaded before it.⁸⁰⁹ Unfortunately, lower courts can only be held accountable for decisions made by higher courts when the relevant facts are identical to those in the decision that was sought to be relied upon. Additionally, the Court did not attempt to analyse how the primogeniture rule affect women's property rights, nor did it mention the responsibility that family heads have to take care of their members. This failure contrasts with how South African courts operate. In *Mthembu v Letsela*,⁸¹⁰ Le Roux J pointed out that:⁸¹¹

The devolution of the deceased's property onto the male heir involves a concomitant duty of support and protection of the woman or women to whom he was married by customary law and of the children procreated under that system.

Similarly, the South African Constitutional Court overturned the primogeniture system when it determined in the *Bhe* case that it was out of step with contemporary social norms since heirs rarely

⁸⁰⁶ *Per Ogunbiyi*, JSC 36-37 paras A-B.

⁸⁰⁷ Even at the Court of Appeal, no analysis of the changing social conditions that surround the male primogeniture rule was conducted. 115 *Per Ogunbiyi*, JSC 37 paras A-E.

⁸⁰⁸ *Bhe & Others v Magistrate, Khayelitsha, & Others*.

⁸⁰⁹ *Mojekwu v Mojekwu* (1997) 7 NWLR (Pt 512) 283.

⁸¹⁰ *Mthembu v Letsela* 1997 (2) SA 936 (T).

⁸¹¹ *Mthembu v Letsela* paras 945-947.

upheld their obligation to support one another.⁸¹² The Constitutional Court issued a challenge to the legislature to modify the customary law of succession through a new or revised act by bringing it under the purview of the Intestate Succession Act.⁸¹³

It is unlikely that the Nigerian Supreme Court judgment would have the same impact on the reform of South Africa's customary law as the *Bhe* case due to the flaws that have been pointed out. A cascade of consequences from *Anekwe's* case also appears unlikely, given Nigeria's deeply ingrained patriarchy and ethnic sensitivity.⁸¹⁴ It is clear that the Supreme Court has not yet seriously reformed the traditional rule of succession.

5.5.3 Customary reforms

Legislation should also be enacted to supplement the constitutional provisions that protect the rights of women instead of sticking to only section 42 of the Nigerian Constitution. Nigeria needs laws such as the South African Recognition of Customary Marriages Act, which allows a wife in a customary marriage to have the capacity to acquire assets and to dispose of them, to enter into contracts and to sue, along with any rights and powers that she might have under customary law.⁸¹⁵ Similarly, the Promotion of Equality and Prevention of Unfair Discrimination Act⁸¹⁶ protects or advances persons or categories of persons disadvantaged by unfair discrimination, and prevents or prohibits unfair discrimination.

⁸¹² *Bhe* paras 81-100.

⁸¹³ *Bhe* para 115.

⁸¹⁴ Ewelukwa U 'Post-colonialism, gender, customary injustice: Widows in African Societies' Vol 24 *Human Rights Quarterly* (2002) 424-486.

⁸¹⁵ Section 6, Customary Marriages Act.

⁸¹⁶ Promotion of Equality and Prevention of Unfair Discrimination Act, 2000.

The discriminatory challenges of women in most Nigerian communities are rooted in customs and traditions. However, the Kenyan Constitution ensures that the rights of women to property during and after marriage is protected by entrenching equality of spouse in marriage.⁸¹⁷

Kenya did not stop at constitutional provisions; it took further steps by enacting legislation known as the MA, MPA, LA, and the LRA to amend and consolidate the laws relating to marriage and divorce and allow widows and widowers to have a right to marry or not to re-marry.

In Nigeria, the Marriage Act⁸¹⁸, together with the Matrimonial Causes Act,⁸¹⁹ regulates only marriages conducted under the Act. There is no specific legislation regulating customary marriage except provisions scatted in legislation such as the Evidence Act.⁸²⁰ There is a need to harmonise laws relating to marriage into one single legislation, as Kenya has done.

Law reform in the area of customary law has not been given due regard by the Nigerian Constitution. In most cases, the Constitution grants the federal government sole legislative authority; at other times, states are given concurrent and residual authority.⁸²¹ There is uncertainty over who has legislative authority over customary law. For instance, section 4(7) (a) gives states the authority to enact laws relating to "*any matter*" not included by the Exclusive Legislative List. The federal government has the authority to enact laws governing "*the formation, annulment and dissolution of marriages other than marriages under Islamic law and customary law, including matrimonial causes relating thereto,*" according to Item 61 of this List.

⁸¹⁷ Article 45, Kenyan Constitution.

⁸¹⁸ Cap. M6, LFN 2004.

⁸¹⁹ Cap. M7, LFN 2004.

⁸²⁰ Sections 16 and 18 on proof of customary laws and the provision for presumption of marriage.

⁸²¹ Sec 7(5) of the Constitution gives very restricted powers to local government councils.

It is plausible to argue that customary law and, implicitly, its change are outside the legislative purview of the federal government⁸²² based on these sections. Federal courts may, however, interpret any state-codified customary laws. For instance, the Supreme Court has discussed the legal ramifications of section 3(1) of the old Bendel State Wills Law, which, as was already said, restricts the testamentary disposition of properties subject to customary law.⁸²³

In comparison to the federal government, Nigeria's states are more engaged in reforming customary law. The majority of these reforms have been implemented recently because early law reform efforts following independence were hampered by regular military interference in politics. For instance, the January 1966 military coup and ensuing civil war put an end to a draft Estate Administration Law that started in 1965 in Nigeria's then-Eastern Province.⁸²⁴ The Bill was viewed as a groundbreaking attempt to modernise customary law's intestate estate administration regulations.⁸²⁵

The Eastern Province was successful in passing laws prohibiting underage marriage,⁸²⁶ high rates of dowry,⁸²⁷ and caste-based discrimination⁸²⁸ prior to the civil war. A bill intended to set a maximum amount payable for bride price in the former Imo State was unsuccessful in becoming law in 1981.⁸²⁹ States, including Lagos, Abia, Akwa Ibom, and Edo, have established law reform commissions as part of recent initiatives.⁸³⁰ In February 2014, Ekiti approved a Law Reform

⁸²² IE Sagay 'Intestate Succession in the States of the Former Western Region of Nigeria' (1998) 42 *Journal of African Law* 112.

⁸²³ *Idehen v Idehen* (1991) 6 NWLR (Pt 198) 382; *Lawal-Osula v Lawal-Osula* (1995) 9 NWLR (Pt 419) 259.

⁸²⁴ *Eastern Nigeria Gazette* 66, Enugu, 17 September 1965 Vol 14.

⁸²⁵ Nwogugu E *Family law in Nigeria* (1990) 397-398.

⁸²⁶ The Age of Marriage Law, Eastern Region Law 22 of 1956.

⁸²⁷ Limitation of Dowry Law, Eastern Region Law 23 of 1956, now Cap 76 Laws of Eastern Nigeria 1963.

⁸²⁸ Abolition of Osu System Law, Eastern Region Law 13 of 1956.

⁸²⁹ ISN Bill 70 of 1981, Imo State of Nigeria Gazette 22, 18 June 1981.

⁸³⁰ Some websites of these agencies are <http://www.lawrecom.lg.gov.ng> (accessed 23 April 2023); <http://abialawreformcommission.org> (accessed 23, April 2023); http://www.aksgonline.com/aks_agencies.aspx n

Commission Bill.⁸³¹ In 2013, the Jigawa State Justice Law Reform Commission provided conflict settlement training to more than 1,350 traditional leaders.⁸³² While its Abia State counterpart is gathering information for a Customary Law Manual,⁸³³ the Akwa Ibom State Law Reform Commission released its first annual report in 2010. Despite these initiatives, legislation to address the evolving societal circumstances around the male primogeniture rule has not yet been developed.

5.6 Conclusion

In order to combat gender inequality, a nation's constitution should adopt a substantive equality approach to safeguard women's property rights during and after marriage. The post-apartheid South African Constitution mirrored the concept of substantive equality by allowing for the BoR and protecting women's property rights. These constitutional reforms have enhanced the judiciary's approach to interpreting equality and defending women's rights to own and inherit property. The impact of the South African Constitution on Kenya cannot be overstated. The South African Constitution inspired the Kenyan government. Equally, Kenyan Constitution have a comprehensive BoR and further protected women's rights to property ownership during and after marriage, as Article 7 (d) of the Maputo Protocol intended.

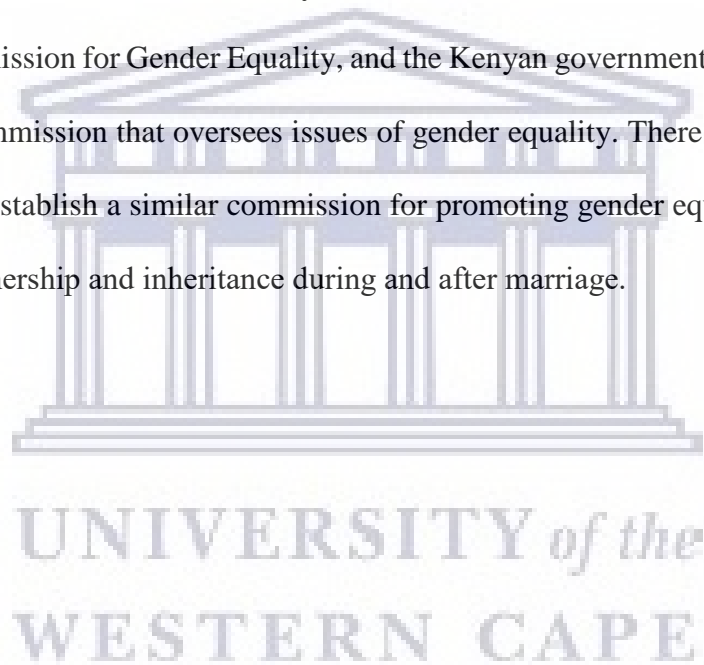
(accessed 23 April, 2023); and <http://www.edostate.gov.ng/law-review-commission> (accessed 23 April, 2023) respectively.

⁸³¹ 'Ekiti Signs Criminal Law, Accuses FG of Neglect' *The Punch* 26 February 2014 <http://www.punchng.com/news/ekiti-signs-criminal-law-accuses-fg-of-neglect/> (accessed 22 April 2023).

⁸³² 'Traditional Rulers in Jigawa get Training on Dispute Resolution' *The Guardian* 20 August 2013 <http://www.ngrguardiannews.com/appointments/130404-traditional-rulers-in-jigawa-get-training-on-dispute-resolution> (accessed 22 April 2023).

⁸³³ See the websites of these Commissions at <http://abialawreformcommission.org/questionnaires.htm> and <http://www.aksgonline.com/articlePage.aspx?qrID=764> (accessed 22 April 2023).

An original constitution does not exist, and there is no wrong with borrowing or learning from the constitutional ideas of another nation.⁸³⁴ South Africa and Kenya can serve as models for the Nigerian government. If Nigeria opts for constitutional reform, as did the South African and Kenyan governments, that women's property rights during and after marriage are expected to be protected. Furthermore, unlike Nigeria, both nations have domestic laws that safeguard the property rights of women married under customary law. These laws have greatly influenced the property rights of women married under customary law. In addition, the South African government has established the Commission for Gender Equality, and the Kenyan government has the National Gender and Equality Commission that oversees issues of gender equality. There is a need for the Nigerian government to establish a similar commission for promoting gender equality in the area of women's property ownership and inheritance during and after marriage.



⁸³⁴ Ghai J & Ghai Y (2018) 252-293.

CHAPTER SIX

SUMMARY OF FINDINGS, CONCLUSION AND RECOMMENDATIONS

6.1 Introduction

This research examined whether Nigerian laws and practices on the property rights of women during and after marriage are consistent with the country's obligation under international law - using the Igala people as a case study. The primary research question was how gender laws and policies in Nigeria impact the rights of Igala women with respect to property ownership and inheritance during and after marriage. To address this research problem, the substantive equality framework and radical feminism theory were used to examine the impact of patriarchy on the rights of Igala women to property ownership during and after marriage. The substantive equality approach was adopted to address cultural and structural barriers while achieving equitable outcomes.⁸³⁵ The purpose of substantive equality is to achieve equality of outcome and opportunity. Substantive equality is concerned with the creation of a more equal society. In certain circumstances, establishing equality may involve treating people who differ equally, in others, it may imply treating those who differ differently.⁸³⁶ On the other hand, radical feminism advocates for a radical reordering of society in which male supremacy is eliminated in all social and economic contexts.⁸³⁷ One of radical feminism's strengths is that it attempts to remove patriarchal social norms and institutions in order to liberate women from unjust cultures that advance women's oppression.⁸³⁸ The substantive equality framework and radical feminist theory were relevant to this research because they helped examine gender laws and provided a proper understanding of how these legal instruments impact women's rights and how the patriarchal nature of Igala society

⁸³⁵ See Chapter 1.

⁸³⁶ See Chapter 2.

⁸³⁷ See Chapter 1.

⁸³⁸ See Chapter 2.

impacts women's rights to property ownership and inheritance in most traditional communities, particularly the Igala ethnic group in Nigeria.

Culturally, women are prohibited from inheriting their deceased husbands' property because they are viewed as property or chattels themselves.⁸³⁹ Native laws and customs, predicated on patriarchal assumptions, regulate the property rights of women in most Nigerian communities, particularly the Igala people. Like other human rights, women's rights to property and inheritance during and after marriage, devoid of discrimination, is a basic human right.⁸⁴⁰ Every Nigerian citizen has the right to own and acquire property by virtue of section 43 of the Nigerian Constitution. Similarly, international and regional human rights instruments⁸⁴¹ safeguard women's rights to own property,⁸⁴² inherit property upon the death of their husbands,⁸⁴³ and have a right to an equitable share of the jointly owned property at divorce.⁸⁴⁴ However, the effective implementation of these international and regional human rights instruments is impeded by the non-domestication of international and regional human rights instruments, the tripartite nature of the Nigerian legal system, and economic and cultural factors firmly rooted in patriarchy. The pluralistic nature of the Nigerian legal system allows men to hide behind discriminatory cultural practices that exclude women from property ownership and inheritance during and after marriage, with a view to subjugating them based on patriarchal attitudes and assumptions.

This research consists of six chapters. Chapter one is the general introduction, background and literature review, problem statement, research questions and objectives, the significance of the

⁸³⁹ See Chapter 2.

⁸⁴⁰ See Chapter 2.

⁸⁴¹ See Chapter 3.

⁸⁴² See Chapter 3.

⁸⁴³ See Chapter 3.

⁸⁴⁴ See Chapter 3.

research, the research methodology, as well as the limitations of the study and thesis structure. Chapter two considered the substantive equality framework and the radical feminist theory to show how human rights and feminist-based frameworks are important to understanding the impact of patriarchy on the rights of women to property and the effective realisation of the rights of women to property ownership and inheritance in Nigeria. Chapter three critically examined the international and regional legal framework on gender discrimination for analysing the relevant provisions of these laws, which promote the rights of women to property ownership and inheritance during and after marriage. In addition, it discussed the barriers to the effective implementation of these international and regional human rights instruments in Nigeria. Chapter four considered the domestic legal human rights instruments that protect the rights of women to property ownership and inheritance in Nigeria. This chapter equally considered specific domestic laws such as the Nigerian Constitution, the Land Use Act 1978, the Marriage Act, the Matrimonial Causes Act, the Married Women Property Act, and some State Laws that promote the rights of women to property rights such as the Prohibition of Infringement of a Widow's and Widower's Fundamental Rights Law 2001 (PIWWFRL) among others. In addition, it analysed the current status of women in property ownership and inheritance during and after marriage in Nigeria with particular reference to the Igala women and equally considered the institutional mechanisms in place for the advancement of the rights of women to property ownership, inheritance, and implementation obligations on the part of the government and non-governmental institutions.

Further, it examined the judicial response to women's human rights in Nigeria with the aim of investigating how the Nigerian judiciary has effectively interpreted and enforced these legal instruments on human rights, especially articles 7 (d) and 21 (a) of the Maputo Protocol in a bid to safeguard the rights of Igala women's to property rights during and after marriage. Chapter five

drew lessons from other jurisdictions, such as South Africa and Kenya, to examine how the notion of substantive equality in their national Constitutions has advanced the property rights of women during and after marriage. Chapter six is the concluding chapter of this research. It offers recommendations to address the situation, including suggestions for the Nigerian government on educating women on their rights and guaranteeing them adequate protection in the enforcement of their rights to property ownership and inheritance.

6.2 Summary of Findings

6.2.1 The research and methodology adopted

Chapter one of this thesis gives a background of this research. It shows that the Nigerian government is a signatory to several international and human rights instruments that protect the rights of women against gender discrimination. Similarly, the Nigerian Constitution prohibits discrimination and protects the rights of women to property rights. However, available literature consulted in this research shows that female gender discrimination continues to predominate, chiefly accommodated within the frame of cultural practices in Nigeria, particularly the Igala ethnic group.⁸⁴⁵ The primary methods of research for this thesis are doctrinal and desktop-based. In addition, substantive equality and radical feminism were used to analyse both the human rights instruments and the impact of patriarchy on the property rights of women.

The summary of my findings in this chapter demonstrates that:

- The socio-cultural space in Nigeria is largely regulated by cultural practices.

⁸⁴⁵ Chapter 1.

- The patriarchal nature of the Igala ethnic group sets the parameters for women's structurally unequal position in families by enabling male dominance in terms of property ownership and inheritance.
- Within the Igala custom of inheritance and succession, women are not allowed to inherit from their husband's estates. They are allowed to remain in the matrimonial home solely for the duration of the marriage.
- While the marriage is still in effect, she does not have the status of co-owner or joint owner, and she thus has no claim to inherit or share in her husband's property if he dies intestate or divorces.⁸⁴⁶
- Available literature recognised that the patriarchal nature of most traditional communities in Nigeria is responsible for the discrimination of women in the area of property rights. However, available literature did not consider how these unjust cultural practices affect the property rights of the Igala women, as expressly provided for by the international, regional, and domestic human rights instruments. This is the gap that this research intends to fill, using the substantive equality theory and radical feminism theory to analyse and devise measures that will help promote the rights of the Igala women to property ownership and inheritance.

6.2.2 The theoretical framework employed

Chapter two considered the substantive equality approach and radical feminism theory. The substantive equality approach was employed to analyze the impact of the human rights legal instruments that protect and promote women's rights to property ownership and inheritance.

⁸⁴⁶ Chapter 1.

Similarly, the radical feminism theory was used to analyse the impact of patriarchy on the rights of the Igala women to property ownership and inheritance during and after marriage. This research demonstrates that reflecting the notion of substantive equality, particularly Friedman's substantive equality approach, in the Nigerian Constitution will redress the disadvantaged position of women and give them a level playing ground in the area of property rights. The summary of findings for this chapter are as follows:

- The primary goal of substantive equality is to redress the historical injustice or disadvantage that women have had in terms of property ownership and inheritance.
- The substantive equality approach goes beyond achieving equitable outcomes to examining how redressing women as a disadvantaged or marginalised group and addressing stereotypes can help women avoid experiencing inferior status in society.
- Radical feminist sees patriarchy as the foundation of all other inequalities and oppression.
- The majority of radical feminists characterise patriarchy as a wicked social system of control that is oppressive to women because it is an exercise of male domination over women.
- Radical feminists believe that women will continue to face discrimination unless the patriarchal system, which they perceive as fundamentally oppressive and powerful, is eliminated.

6.2.3 International and Regional human rights instruments

Chapter three considered the international and regional human rights instruments that promote and protect women from discrimination. Both the international and regional human rights instruments require the Nigerian government to enact legislation prohibiting discrimination in relation to

women's property rights. However, there is no relevant national law that specifically regulates the rights of women to property ownership during and after marriage. This is not in line with the obligations imposed on Nigeria as a signatory to several international and regional human rights instruments. The summary of findings for this chapter are as follows:

- According to the UDHR, both men and women are entitled to equality and non-discrimination, and all rights and freedoms are guaranteed.
- The UDHR is not a legally enforceable human rights instrument, it is impossible to put it into effect in Nigeria. Despite the recognition of the UDHR as customary international law and its influence on national constitutions, the Universal Declaration is not a treaty and, therefore, does not create direct legal obligations for countries.
- The ICESCR prohibits gender-based discrimination and offers the framework for the protection and preservation of the most fundamental economic, social, and cultural rights. However, the ICESCR does not explicitly address women's rights to property ownership and inheritance.
- The ICESCR enjoined State Parties to combat social constructions of gender, gender stereotypes, and obstacles that continue to discriminate against women.
- Despite these obligations imposed on State Parties to protect the fundamental rights and freedoms of both women and men, the ICESCR did not significantly address discrimination against women in property ownership and inheritance.
- Some of the ICCPR prohibits gender-based discrimination. However, most of the recognized rights in ICCPR have no direct or indirect influence on women's property ownership and inheritance rights.

- The Human Rights Committee noted that inequality in the enjoyment of rights by women around the world is deeply rooted in tradition, history and society. The Committee agreed that the full realisation of the rights is conditional on the removal of obstacles that impede the non-discrimination rights.
- The Convention on the Elimination of All Forms of Discrimination Against Women is the first international treaty that prohibits discrimination against women.
- CEDAW mandates State Parties to include the principle of equality in their national constitutions and to take practical steps to promote the implementation of the principle of equality to ensure that women are not discriminated against.
- State Parties are obligated under Article 16 to take all relevant steps to eliminate discrimination against women and ensure that men and women have the same rights with regard to property ownership, management, and disposition between spouses.
- The African Charter recognises the historical traditions and goals of African civilisations, which reflect the concept of human rights.
- Nigeria not only ratified the African Charter but also incorporated its contents into its municipal legislation prior to its implementation. However, as provided for in the Charter, women are disallowed to own and/or inherit property based on patriarchal attitudes and assumptions rather than public interest or necessity.
- The Maputo Protocol aims to improve women's rights and minimise female gender inequality in property ownership and inheritance rights during and after marriage.
- The provision of Article 7 (d) of the Maputo Protocol is exceptional in that it is the first time a human rights treaty has directly addressed how jointly owned property should be distributed. The Maputo Protocol article 7 requires State Parties to establish rules that

ensure equitable sharing of marital property. General Comment No. 6 provided guidance on the interpretation of Article 7 (d). General Comment No. 6 recognises unpaid labour, and child care of married women is seen as their contribution to the development of land and property.

- The implementation of the ICESCR, ICCPR, CEDAW, and the Maputo protocol continues to face some challenges in Nigeria. These factors range from non-domestication of international treaties, the tripartite nature of the Nigerian legal system, and economic and cultural factors firmly rooted in patriarchy.

6.2.4 Domestic legal framework on women's property rights in Nigeria

Chapter four considered the domestic legal framework on the property rights of women in Nigeria. This chapter identified that the pattern of property ownership and inheritance in most traditional communities in Nigeria is predicated on the patriarchal nature of most native laws and customs.

The Nigerian Constitution is the foundation for women's rights protection in Nigeria. Cultural practices that are in conflict with the Constitution are prohibited. Contrary to the requirements of Section 42 of the Nigerian Constitution, patriarchy continues to enforce male domination over women in property ownership and inheritance. The patriarchal practice of excluding women from owning or inheriting property is discriminatory under Igala Indigenous laws and customs, and it violates the supremacy of the Nigerian Constitution. The summary of findings for this chapter are:

- Although section 43 allows every citizen to own and acquire property anywhere in Nigeria, it does not cover the rights of women to inherit property or have an equitable share of matrimonial property at divorce, as covered by the Maputo Protocol.

- The Maputo Protocol is the benchmark for assessing Nigeria’s compliance with international obligations imposed on Nigeria as a State Party provides that “*States Parties are called upon to enact appropriate legislation to ensure that women and men enjoy the same rights in cases of separation, divorce or annulment of marriage.*” Although this provision and General Comment No. 6 of the Maputo Protocol provide guidance on how to interpret the rights of women during separation, divorce, or annulment of marriage and outline the general and specific obligations of States Parties towards promoting the effective domestication and implementation of Article 7(d) of the Maputo Protocol, the Nigerian government is yet to enact the necessary legislation in this regard. General Comment 6 ensures that men and women shall have the right to an equitable sharing of the joint property deriving from the marriage as per Article 7(d) of the Maputo Protocol. General Comment No. 6 highlights the necessity of considering the various ways in which women contribute to the economic well-being of their families, as well as the crucial need to guarantee that their contribution is adequately recognised in circumstances of divorce, separation, or annulment of marriage. The contribution of women to the development of land and property through unpaid labour and child care is thus included in General Comment No. 6. General Comment No. 6 was the first to take into account women's unpaid care work when figuring out who gets what after a divorce or separation. This research found that the constant application of negative customary norms does not consider the contribution of women concerning marital property despite the clarification given by General Comment 6.
- In Nigeria, Igala women continue to face discrimination in the area of property ownership and inheritance during and after marriage. Aside from the patriarchal structures of the Igala

ethnic group that enable men to dominate women, Nigerian laws are inadequate concerning women's property rights. Unlike South Africa and Kenya, which have reflected the substantive equality approach to address the issues of gender equality and promote non-discrimination rights in clear terms, the Nigerian government has yet to introduce the substantive equality approach to address the historical discrimination against women in the area of property rights.

- The MCA⁸⁴⁷ protects the property rights of women married under the Act; it does not cover women married under customary law. Further, Nigerian laws and practices on the property rights of women during and after marriage are inconsistent with the country's obligation under international law.
- This research found that when the Nigerian government enacts proactive legislation that removes the burden of patriarchy that has impeded the rights of women to ownership of jointly owned property, the rights of women in the area of property ownership and inheritance during and after marriage will improve significantly. In addition, the Nigerian Constitution, which serves as the basis for protecting women's rights from discrimination and property, needs to incorporate substantive equality so that women's rights to property and inheritance are adequately covered. This has been done in other jurisdictions, such as Kenya and South Africa.
- This research further demonstrates that the various institutional mechanisms (governmental agencies and Non-Governmental Organisations) have fared well in promoting the rights of women against discrimination. Some of these governmental

⁸⁴⁷ See Chapter 4.

agencies and NGOs have helped to intervene and address some of the discriminatory practices faced by women in diverse communities.

- The prevalent thinking at the beginning of this research was that women are quite ignorant of the rights to property. Based on further research, it was observed that the institutional mechanisms in place for the advancement of women's rights against discrimination have, in no small measure, enlightened more women on their basic human rights. This has also improved women's attitude to seeking judicial interventions against any violation of their property rights. Specifically, the presence of FIDA in each state of Nigeria has encouraged more women to seek redress in courts or in situations where their rights to property ownership and inheritance during and after marriage have been denied and violated.
- The Nigerian courts have given judgments in favour of women's rights to property ownership and inheritance and have upheld customs that disallow women to own or inherit property.

6.2.5 Lessons from other Jurisdiction

Chapter five drew lessons from other jurisdictions like South Africa and Kenya. South Africa was chosen because they have incorporated the substantive notion of equality in their national Constitution, advanced gender inequality in the area of women's property rights, and the approach of the South African Constitutional Courts in deciding cases on women's property rights. Similarly, for examining how the Kenya government advances the rights of women in the area of property ownership and inheritance. Kenya has greatly achieved gender equality between men and women and has incorporated the notion of substantive equality in their national Constitution. The summary of findings from this chapter includes:

- The comparative analysis of the application of substantive equality shows that the South African Constitution's substantive equality approach explicitly acknowledges historically marginalized groups such as black South Africans, women, and those with disabilities. The Constitution acknowledges that various groups have experienced prejudice in the past and, among other things, aims to right these historical wrongs through the enactment of legislation, affirmative action initiatives, and social welfare measures. The non-discrimination rights in the South African Constitution have influenced several court judgments to favour the property rights of women married under customary.
- Equally, the South African government, in compliance with Section 187 of the Constitution, established the Commission for Gender Equality (CGE). Through research, policy formulation, public education, legislative efforts, effective monitoring, and litigation, the CGE defends, promotes, monitors, and assesses gender equality. However, in Nigeria, there is no such commission. South Africa has complied with international obligations under binding treaties and customary international law in human rights, which promote equality and prohibit unfair discrimination.
- The South African Constitution has heavily inspired the Kenyan Constitution. The Republic of Kenya has reflected the notion of substantive equality in its national Constitution. The Constitution ensures that men and women have equal rights to acquire, own, and dispose of property.
- The Kenyan Constitution accords women equal rights with their husbands during and after marriage. This section of the Constitution has influenced a series of judicial decisions that have upheld the concept of equality in marriage. Furthermore, the National Gender and Equality Commission Act of 2011 established the National Gender and Equality

Commission (NGEC) in accordance with Article 59(4) of the Kenyan Constitution, which focuses on special interest groups such as minorities, women, young people, people with disabilities (PWDs), children, and elderly members of society. Nigeria's government has not yet established an NGEC.

- In order to eliminate all forms of discrimination against women, the South African and Kenyan Constitutions have adopted the notion of substantive equality. No doubt, these countries have laws that are consistent with international obligations with regard to women's property ownership and inheritance. This comparative analysis shows that there are lessons for the Nigerian government to learn in order to effectively protect and promote women's property rights during and after marriage.
- Both the South African and Kenyan governments have in place laws that not only protect the property rights of women but also laws that protect the property rights of women married under customary law. This is not the case in Nigeria.

6.3 Conclusion

In reflecting on women's property rights in Nigeria, particularly Igala women's property rights, it becomes evident that traditional customs and laws have predominantly favoured male ownership and control of property. Most communities in Nigeria are deeply rooted in traditional norms and customs, which often prioritise male ownership and control over property. These cultural beliefs perpetuate unequal power dynamics within marriages and hinder women's ability to assert their property rights. Additionally, societal expectations place a significant burden on women to prioritize their roles as wives and mothers, often relegating property ownership and management to men. These cultural and societal factors contribute to Igala women's limited access to and

control over property, directly contradicting international legal standards emphasising gender equality and non-discrimination.

Despite Nigeria's ratification of international and regional human rights treaties, the Nigerian government continues to struggle with effectively enforcing and implementing laws that guarantee equal property rights for women. Thus, it is evident that Nigerian laws and practices surrounding women's property rights during and after marriage are inconsistent with the country's obligations under international law. Similarly, the Nigeria Constitution recognises the right to own property, but customary laws often contravene the provisions of the Constitution to perpetuate a patriarchal system that denies women equal property rights. Additionally, the Matrimonial Causes Act and the Land Use Act further limit women's access to and control over property, particularly during and after marriage. Women face numerous barriers in asserting their property rights, including societal stigma, lack of awareness of their legal rights, and limited access to justice and resources to enforce these rights. As a result, women in Nigeria are disproportionately disadvantaged in matters of property ownership and inheritance, hindering their economic empowerment and contributing to gender inequality.

The evaluation of Nigeria's conformity with international standards on women's property rights reveals major gaps and deficiencies that require immediate attention and reform. The lack of effective enforcement mechanisms as well as appropriate remedies, makes it much more difficult for women to realize their property rights. To address these difficulties effectively and in accordance with international standards, Nigeria must prioritise legal reforms, improve awareness among women and society as a whole, strengthen access to justice, and ensure effective implementation and enforcement of existing laws. Additionally, reflecting the notion of substantive equality will help achieve a more comprehensive legal reform that will eliminate the

patriarchal nature of the Igala ethnic group and safeguard the rights of women to property ownership and inheritance during and after marriage.

6.4 Recommendations

This research has raised overwhelming concerns about the impact of patriarchal attitudes and assumptions that exclude Nigerian women from property ownership and inheritance during and after marriage. This has become a significant barrier to women's enjoyment of their property rights. The discrimination against women in the area of property rights violates the various legal frameworks that safeguard the property rights of women in Nigeria.

Although the Nigerian courts have declared some discriminatory practices that exclude women from property ownership and inheritance void, more needs to be done to effectively promote the rights of women to property and make Nigerian laws and practices on the property rights of women during and after marriage consistent with the country's obligations under international law.

The following recommendations are imperative to the effective safeguarding and proper implementation of the rights of women to property ownership and inheritance during and after marriage in compliance with international human rights law standards.

6.4.1 Abolishment of discriminatory practices

There is an urgent need to abolish the discriminatory practices that exclude the rights of married women, widows, and divorced women to property ownership and inheritance. This can be done by codifying customary laws. This will make customary laws certain while eliminating all forms of discrimination against women's property rights. It is imperative to harmonize the tripartite legal system in Nigeria. When these legal systems are harmonised, no one will be able to hide behind discriminatory customary practices to exclude the rights of women to property ownership and

inheritance in Nigeria. This will help abolish all discriminatory practices against women and resolve the discrimination against women who married under customary laws as against those married under the Marriage Act. The Nigerian government needs to enact a law like the South African Recognition of Customary Marriages Act. This law would allow women in a customary marriage the capacity to acquire, own, and inherit property and sell same. This would help eliminate patriarchal attitudes and assumptions that are responsible for the exclusion of women from property ownership during and after marriage.

In addition, there is also a need to sensitise and enlighten traditional rulers and community stakeholders on the various legal frameworks that safeguard the rights of women to property ownership and inheritance. This will help eliminate the patriarchal attitudes exhibited in most Nigerian communities.

Further, the Nigerian government needs to organise workshops and seminars for women in rural areas to educate them on their basic human rights and guarantee them adequate protection in enforcing their rights to property ownership and inheritance.

6.4.2 Law reforms

To ensure proper and effective implementation of the rights of women to property ownership and inheritance, the Nigerian government has an obligation to eliminate all forms of discrimination against women and safeguard the rights of women.⁸⁴⁸ To achieve this, the Nigerian government needs to amend the Constitution to reflect the notion of a substantive equality approach in order to address the issues surrounding the property rights of women in Nigeria. The amendment of the Nigerian Constitution would allow the Nigerian government to incorporate the provisions of

⁸⁴⁸ Article 18 (3) African Charter.

Article 7 (d) of the Maputo Protocol, which safeguards the rights of women to property during and after marriage, into the Constitution. Further, the Nigerian government should enact national laws and policies that will protect the property rights of women married under customary law during and after marriage, as done in South Africa and Kenya. The South African and Kenyan governments embarked on constitutional reform and have reflected the notion of substantive equality in their various constitutions in order to protect the rights of women against discrimination generally and particularly the property rights of women. These countries have national laws such as ROCMA and PEPUDA in South Africa and the Marriage Act in Kenya that safeguard the property rights of women married under customary law. The substantive equality approach recognises that equality is not just about granting legal rights but also ensuring they are implemented. This approach understands that structural inequalities must be addressed through policy interventions to close the gender gap and reduce discrimination.

Additionally, there is a need to amend the MCA that recognizes the property rights of women married under the Act to cover the property rights of women married under customary law. Further, the issue of women's property ownership and inheritance should be inserted into the executive-legislative list in the Nigerian Constitution so that the Federal Government of Nigeria can legislate on it, and it will be binding across the entire federation. As against where most states now have to legislate on such issues, which are not of importance to state governors.

In addition, Article 9 (3),⁸⁴⁹ forbids unfair discrimination on a number of grounds, including gender, sex, pregnancy, and marital status. The specific mention of gender, sex, and marital status in the South African Constitution shows that this non-discrimination provision appears to offer

⁸⁴⁹ South African Constitution 1996.

women significant protection against unfair discrimination in the exercising of their property rights during and after marriage. There is a need for the Nigerian government to amend section 42 of the Nigerian Constitution to reflect gender and marital status as prohibited grounds for discrimination. Similarly, with respect to matrimonial property, there is an urgent need for the Nigerian government to amend the Constitution to specifically provide for the rights of equality of a husband and wife at the time of the marriage, during the marriage and at the dissolution of the marriage. This right has been provided for in the Kenyan Constitution, in accordance with the obligation imposed on State Parties by the Maputo Protocol. The Nigerian government has an obligation under international and regional human rights instruments to enact laws that will safeguard the rights of women. There is a dire need for legal reform in Nigeria because the domestic human rights laws on property rights are not sufficient in addressing the rights of women to property ownership and inheritance during and after marriage. The government, therefore, should enact laws that promote gender equality by ensuring that women married under customary law have their property rights protected and recognised both in law and in practice. The Nigerian government should also enact laws that will enable widows to inherit the property of their deceased husbands and give an equitable share to women undergoing separation or divorce.

6.4.3 Domestication of International and Regional human rights instruments

The Nigerian government should domesticate international and regional human rights instruments to enable them to become a part of Nigerian laws. The government should remove the complex nature of treaty domestication in Nigeria to enable lawmakers to domesticate international and regional human rights instruments without further delay in order to safeguard the rights of women to property ownership and inheritance during and after marriage.

In addition, Nigeria should incorporate the intendments of international and regional human rights instruments on the rights of women to property ownership and inheritance during and after marriage in the Nigerian Constitution, the same way the Kenyan Constitution reflected Article 7(d) of the Maputo Protocol in Article 45 (3) of the Kenyan Constitution. The National Assembly should take significant steps to incorporate treaties that Nigeria has ratified into our domestic laws, especially human rights instruments that protect and promote the rights of women to property ownership and inheritance.

Further, the Nigerian government should allow treaties or Conventions ratified by the government to form part of the laws, as done in Kenya.⁸⁵⁰ This will help Nigerian courts apply international and regional human rights instruments without first domesticating them. This will encourage the judiciary's attitude to preserve human rights by upholding gender equality in cases of property rights discrimination. It is the duty of courts to enforce human rights and interpret laws. This is possible when these laws are domesticated or incorporated into Nigerian laws. Additionally, the government should provide adequate funding for the judicial system to address property disputes in a timely and gender-sensitive manner. In the same vein, the Nigerian government should remove all cultural, religious, and socio-economic factors that impede the effective implementation of international and human rights instruments in Nigeria.

6.4.4 Advocacy, support, and creation of awareness about women's property rights

Both Governmental Agencies and Non-Governmental Organizations (NGOs) have important roles to play in the area of advocacy and the creation of awareness of the property rights of women in Nigeria. There is a need to disseminate international and regional human rights instruments that

⁸⁵⁰ See Chapter 5.

protect and promote the rights of women to property ownership and inheritance amongst stakeholders, policies and lawmakers, traditional rulers, and the public, especially people living in rural areas.

In addition, the Nigerian government should prioritise educating citizens on the importance of gender equality and the legal backing provided by international human rights treaties. Traditional rulers could also use their influence to promote gender equality by collaborating with advocacy groups to organise public engagements, sensitisation campaigns, and cultural events that promote women's rights.

Further, NGOs should focus on providing support to women who face cultural barriers to accessing their inheritance and property rights. This support may include legal counselling, advocacy support, and financial assistance for legal fees to ensure women can effectively defend their rights.

The National Centre for Women's Development should collaborate with NGOs to promote and protect the rights of women to property ownership and inheritance during and after marriage in Nigeria by setting up a monitoring Committee that will investigate and make reports on any form of discrimination against women in the area of property rights to the FMWAD.

6.4.5 National human rights institution

The Nigerian government should establish the National Gender Equality Commission NGEC at the Federal level with offices in each state of the federation that will specifically promote and protect the property rights of women during and after marriage. The NGEC will be in charge of examining Nigerian communities that exclude women from property ownership and inheritance, as well as organising workshops and seminars to educate them on non-discrimination rights and women's property rights during and after marriage. Equally, the Commission shall be responsible

protecting, promoting, monitoring, and evaluating gender equality through research, policy development, public education, legislative initiatives, effective monitoring, and litigation. This is similar to the roles of the Commission for Gender Equality in South Africa and the National Gender and Equality Commission in Kenya.

6.4.6 The approach of the Judiciary

The Nigerian court needs to formulate a proper approach by reflecting the notion of substantive equality in determining and interpreting the non-discrimination rights in the Nigerian Constitution. When interpreting the non-discrimination provision, the court should consider the historical injustices and the patriarchal nature of most traditional communities. There is an urgent need for the Nigerian courts to take judicial notice of the discrimination against women in property rights during and after marriage to effectively interpret the non-discrimination rights enshrined in the Nigerian Constitution. The lesson could be from the South Africa Constitutional Court, which established a substantive definition of equality in *Brink's* case, admitting that discrimination against members of underprivileged groups can result in a pattern of injury and disadvantage for the entire group. Because it fosters and institutionalises inequality among different groups in our society, discrimination is wrong.⁸⁵¹

⁸⁵¹ See also the *Harksen's* case.

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