

## **WOMEN AND THE RIGHT TO ACQUIRE AND OWN LAND IN NIGERIA: EXAMINING THE CONFLICTS BETWEEN STATUTORY AND CUSTOMARY LAW\***

### **Abstract**

*The right of every Nigerian citizen to acquire and own land in any part of the country is encapsulated in Section 43 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) which guarantees the right to acquire and own immovable property; this is irrespective of sex as contained in Section 42 of the Constitution. The relevance of land to man and the constitutional guarantees highlighted above notwithstanding, land and issues connected therewith have consistently been a subject of controversy among persons of different strata. One issue which has been a subject of raging controversy in Nigeria has been the right of women to land rights especially in view of various derogatory and obnoxious customary rules and practices that are prevalent in Nigeria which limit the rights of women to land rights. It is against the following background that this work undertakes a critical evaluation of customary law and its implications on women's land rights in Nigeria with a view to highlighting how such customary practices and rules have impacted on women's access to land rights in Nigeria.*

**Keywords:** *Land, Statutes, Customary Law, Constitution, Women*

### **1. Introduction**

The relevance of land as a gift of nature to mankind cannot be over-emphasized; this is because human society world over is heavily dependent on land and its resources.<sup>1</sup> This assertion is true predominantly because it is from land that man gets items very essential for his survival such as food, fuel, clothing, shelter, medication and other necessities of life.<sup>2</sup> In the light of the foregoing, it is crystal clear that the life of man and that of the society revolve around land and its resources.<sup>3</sup>

The relevance of land to man as highlighted above notwithstanding, it is unfortunate that land and issues connected therewith have been a subject of controversy among

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E E Essien, *Law of Credit and Security in Nigeria* (2<sup>nd</sup> edn, Uyo: Toplaw Publishments Ltd, 2012) p. 1;  
D E Nelson, 'Mortgage of Land as Security under the Land Use Act' (2013) *11 Nig. J.R.*, 137.

<sup>2</sup> P Z Datong 'The role of the State Government in the Implementation of the Land Use Act' in O Adigun (ed) *The Land Use Act Administration and Policy Implementation* (Lagos: University of Lagos Press, 1991) 64.

<sup>3</sup> A C Onah, 'The Land Use Act and Abolition of Private Ownership of Land in Nigeria: Law and Practice' being the text of a Thesis submitted to the Faculty of Law, Nnamdi Azikiwe University Awka.

persons of different strata in the society. One issue which has been a subject of raging controversy in Nigeria has been the right of women to land rights as enshrined in the statutes *vis-a-vis* customary law practices. The issue of gender inequality in land access has attracted attention from land administrators, gender activists, world bodies and development associations and how these are addressed in development has a direct impact on the livelihood and security of people not only in rural areas, but in urban areas as well.<sup>4</sup>

The role of land tenure in sustainable development cannot therefore be overemphasized, and failure to address the land tenure interests of all stakeholders in land development can cause problems and inequities.<sup>5</sup> Land tenure issues therefore need to be addressed as part of a wider effort to improve urban services and infrastructure.

The issue of women's land rights under customary law in Nigeria and even in Africa generally has, over the years, generated a lot of controversies as evidenced in the vast amount of literature that have been made in that regard.<sup>6</sup> These literatures highlight questions of cultural bias and discrimination against women in accessing land for development not just in Nigeria but across Africa. One of the resultant questions relates to whether or not the legal regimes in Africa are well and adequately positioned to tackle the issue of discrimination which are manifestly against women in relation to right to property especially right to land.

It has been asserted that women constitute the majority of small or subsistent farmers; yet in countries around the world, they continue to be denied the right to own the ground that they cultivate and on which they raise their families.<sup>7</sup> This situation has led

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<sup>4</sup> W M Adolwine & A Dudima, 'Women's Access to Emerging Urban Land in the Sissala East District In Northern Ghana' (2010) *Journal of Science and Technology*, Vol. 30, No. 2 pp 94-104

<sup>5</sup> FAO (2002). 'Gender and Access to Land', MM Land Tenure Studies 4, UN, Rome, Italy

<sup>6</sup> M Ayua, 'Land and Property Rights of Women in the Northern State of Nigeria' in A Kuenyehia, (ed), *Women and Law in West Africa: Situational Analysis of some Key Issues Affecting Women* (Ghana: WaLWA University of Ghana, 1998); S Ifemeje & O Ikpeze 'Global Tread Towards Gender Equality Nigeria's Experience in Focus' (2012) *Kuwait Chapter of Arabian Journal of Business and Management Review* Vol. 2 No. 3, pp. 51-64; S Tivuyanago 'Is Customary Law a Hindrance to Women's Right in Democratic South Africa?' (2015) *Global Journal of Human Social Science: Sociology & Culture* Vol XV issue viii, p. 14-32; Felicia Anyogu and B.N. Okpalobi, 'Human Right Issues and Women's Experiences on Demanding their Rights in their Communities: The Way Forward For Nigeria' (2016) *Global Journal of Politics and Law Research* Vol.4, No.1, pp.9-17.

<sup>7</sup> N Heyzer, the Executive Director of UNIFEM in the preface written in A Buregeye *et al*, *Women's Land and Property Rights in Situation of Conflict and Reconstruction*. (New York: United Nations Development Funds for Women, 2001) p. 6

to series of consultations on land and properties held in different countries of the world to determine among other things, the discrimination against women in respect of property, land and inheritance rights.

It is not in doubt that even as at the beginning of the twenty-first century, women are still excluded from many of the formal and legal structures of society and from full participation in economic life. It is also not in doubt that the recent terrorist attacks that have happened in Nigeria and other parts of Africa have left a lot of women without husbands or sons to take care of them. This has grave negative implications and results for women: having no formal rights to land and properties and little means to create stable and sustainable livelihoods. This contributes to poverty and perpetrates social and political inequality that can lead to more conflicts.<sup>8</sup>

In recent years, women's land and property rights have received considerable attention within the United Nation System and other regional associations. Thus the Global Platform for Action emanating from the World Conference held in Beijing in 1995 acknowledged that women's right to inheritance and ownership of land and property shall be recognised. The Habitat Agenda adopted at the Habitat II Conference held in Istanbul in 1996 includes commitment from government to;

Providing legal security of tenure and equal access to land to all people, including women... and undertaking legislative and administrative reforms to give women full and equal access to economic resources, including the right to inheritance and ownership of land and other property....

Since 1997, the UN sub-commission on human rights have passed several resolutions on women's right to adequate housing, and to land and to property. It is however regrettable that customary law in Nigeria promotes the idea of gender disparity which implicitly reflects ideas that women are not capable of effectively owning or managing lands. Thus, these resource is often lost in the event of divorce, death or marriage.<sup>9</sup> It is not in doubt that challenging such ideas is critical to the future of women's right to own land. A major element of the enduring challenge revolves around enforcement and implementation.<sup>10</sup> Thus, it has been asserted that even in countries where laws exist that

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<sup>8</sup> *Ibid*

<sup>9</sup> W H Alazmi, 'Women's Right to Accessing and Owning Land in the United States, Saudi Arabia, Brazil and South Africa' being the text of a research paper submitted to the Graduate School of Ball State University Muncie, Indiana in partial fulfilment of the requirements for the Degree of Masters of Arts, July, 2016. P.2

<sup>10</sup> *Ibid*

ought to protect the rights of women, implementation is too often hindered by women's lack of knowledge of their rights, entitlement and socio-cultural norms.<sup>11</sup>

In Nigeria for instance, it is not in doubt that the Constitution of the Federal Republic of Nigeria,<sup>12</sup> in Sections 43 and 44 respectively makes adequate provisions for the right of every Nigerian man and woman to acquire and own immovable properties in any part of the country and the protection of property rights which includes land.

## **2. General Overview of the Legal Framework for the Protection of Land Rights in Nigeria**

Land right has been defined as the inalienable capacity of persons to freely obtain, possess and make use of land at their discretion provided their activities on the land do not infringe the rights of others.<sup>13</sup> It is against the forgoing background that we shall proceed to evaluate the statutory framework for the protection of land rights in Nigeria.

### **2.1. The Constitution**

The Constitution of the Federal Republic of Nigeria,<sup>14</sup> just like most modern constitutions, makes adequate provision for the protection of land rights. Sections 43 and 44 of the Constitution make provision for the right of every Nigerian man and woman to acquire and own immovable properties in any part of the country. The said sections of the Constitution provide as follows:

- 43.** Subject to the provisions of this Constitution, every citizen of Nigeria shall have the right to acquire and own immovable property anywhere in Nigeria.
- 44.** (1) No moveable property or any interest in an immovable property shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of Nigeria except in the manner and for the purposes prescribed by a law that, among other things
  - (a) requires the prompt payment of compensation therefore and

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<sup>11</sup> K Kinoti, 'Lands Grabs: The Threat to African Women's Livelihoods' <[http://www.farmlandgrab.org/post /view/2011-land-grabs-the-threat-to-african-women's-livelihoods](http://www.farmlandgrab.org/post/view/2011-land-grabs-the-threat-to-african-women's-livelihoods)> accessed on 23/11/2018

<sup>12</sup> Cap C23 LFN 2004

<sup>13</sup> D Nadi, 'Critical Mass Representation in Uganda' (2009), 1-38; available at <[https://www.google.com/url?sa=t&source=web&cd=17&ved=0ahUKEwj7puHp\\_IPVAhUHmbQKHRxvBw0QFgh9MBA&url=http%3A%2F%2Fdigitalcollections.sit.edu%2Fcgi%2Fviewcontent.cgi%3Farticle%3D1674%26context%3Ddisp\\_collection&usg=AFQjCNH6yvAX-xdk7L2Tig\\_1uPqt\\_WUdNQ](https://www.google.com/url?sa=t&source=web&cd=17&ved=0ahUKEwj7puHp_IPVAhUHmbQKHRxvBw0QFgh9MBA&url=http%3A%2F%2Fdigitalcollections.sit.edu%2Fcgi%2Fviewcontent.cgi%3Farticle%3D1674%26context%3Ddisp_collection&usg=AFQjCNH6yvAX-xdk7L2Tig_1uPqt_WUdNQ)> last accessed on 12/07/2017

<sup>14</sup> Constitution of the Federal Republic of Nigeria Cap C23 LFN, 2004.

- (b) gives to any person claiming such compensation a right of access for the determination of his interest in the property and the amount of compensation to a court of law or tribunal or body having jurisdiction in that part of Nigeria.

It is clear from the tenure of the above provision that every Nigerian has the fundamental right to acquire and own properties which includes land in any part of the country, irrespective of their sex.

When the said provision is read in conjunction with the provision of Section 42 of the Constitution which prohibits discrimination of any form including on ground of sex it would be safe to conclude that under the Constitution, both men and women are constitutionally guaranteed of the right to own properties which include land. For the avoidance of doubt and clarity of thought, Section 42 of the Constitution provides, *inter alia*, thus:

- (1) 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, religions or political opinions are not made subject; or ...

From the foregoing provision, it is clear that there nothing in the Constitution precluding a woman from acquiring, inheriting or retaining an interest in land in Nigeria. The implication being that land rights are protected by the Constitution irrespective of sex.

## **2.2. The Land Use Act<sup>15</sup>**

The Land Use Act was promulgated for the purpose of unifying, defining and regulating enjoyment of land rights in Nigeria;<sup>16</sup> thus, all other laws affecting title to land or the transfer of interest in land including those existing before the promulgation

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<sup>15</sup> Cap L5, LFN, 2004.

<sup>16</sup> A Nnamani, 'The Land Use Act, 11 years After' (1989) *GRBL*, 31 S Butter, 'The Nigerian Land Market and the Land Use Act of 1978' <<http://www.focusonland.com/download/525525442d643>> accessed on 16/2/2016; I A Umezulike, 'The Review of the Land Use Act 1978; A needless and Futile Exercise' (1995) *Vol. 2 No. 1 Lawyers Bi-Annual*, 172.

of the Act, except for the Constitution, are subject to the provisions of the Act.<sup>17</sup> The Act regulates ownership, alienation, acquisition, administration and management of land in Nigeria.

It is not in doubt that the Land Use Act was a product of state intervention based on noble aspirations of the people of Nigeria.<sup>18</sup>

In furtherance of its general principles Section 1 of the Act provides thus:

Subject to the provisions of the Act, all land comprised in the territory of each state in the federation are vested in the Governor of that state and such land shall be held in trust and administered for the use and common benefit of Nigerians in accordance with the provisions of the Act.

It is also important in this respect to recall in the above regard the preamble to the Act which describes it in the following terms:

An Act to rest all land comprised in the territory of each state (except land vested in the Federal Government or its agencies) solely in the Governor of the state, who would hold such land in trust for the people and would henceforth be responsible for allocation of land in all urban areas of individuals resident in the state and organisations for residential, agricultural, commercial and other purposes while similar power with respect to non-urban areas are conferred on local government.

The general effect of the Act on title to land is to vest abstract title and control title over land within the territory of each state upon the Governor of the state whilst preserving the title of the Federal Government and its agencies<sup>19</sup> over limited areas of land belonging to the Federal Government.<sup>20</sup> The absolute forms of ownership that existed before the introduction of the Act became extinguished and became vested in the

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<sup>17</sup> Land Use Act s. 48. N B Udoekanem *et al*, 'Land Ownership in Nigeria: Historical Development, Current Issues and Future Expectations' (2014) *Journal of Environment and Earth Science Vol. 4 No. 21*, 185.  
<[https://www.google.com/url?q=http://www.unoosa.org/pdf/reports/unispace/viennadeclE.pdf&sa=U&ved=0ahUKEwj3\\_fCd3ePLAhXLQBQKHb2NB1EQFggNMAA&sig2=eC\\_FiMHlc7BAXH5YYW S8Yg&usg=AFQjCNEMfvkBK7sZ71Yy-nvw-Upl7f\\_Kog](https://www.google.com/url?q=http://www.unoosa.org/pdf/reports/unispace/viennadeclE.pdf&sa=U&ved=0ahUKEwj3_fCd3ePLAhXLQBQKHb2NB1EQFggNMAA&sig2=eC_FiMHlc7BAXH5YYW S8Yg&usg=AFQjCNEMfvkBK7sZ71Yy-nvw-Upl7f_Kog)> accessed on 05/03/2016.

<sup>18</sup> M I Jegede, 'Land Use Act: Six Years After', A Paper delivered at the National Symposium of Nigerian Institute of Estate Surveyors and Valuers in Lagos on 22<sup>nd</sup> November, 1984.

<sup>19</sup> Land Use Act s. 48.

<sup>20</sup> I O Smith "Title to Land in the Former Federal Capital Territory of Lagos upon Creation of Lagos State: Matters Arising" (2004) *Vol. 25 JPPL*, 21.

Governor of the state.<sup>21</sup> In a loose sense the Governor became the ‘land owner’ or ‘landlord’ with power to grant rights of occupancy to citizens.

In fulfilment of the government’s policy of control over land in Nigeria, the Act introduced the certificate of occupancy to evidence or articulate the rights granted by it.<sup>22</sup> The State recognizes no other superior or complementary document for that purpose provided the title of the bearer is not defective.<sup>23</sup>

When a person, whether a man or a woman, applies and fulfils the necessary conditions, he is granted a right of occupancy which is evidenced by a certificate of occupancy containing the terms and conditions of the grant including the amount to be paid as well as other covenants and conditions.

In the light of the foregoing exposition, the legal regime for land use and administration under the Land Use Act affords equal opportunity to men and women to acquire and own land anywhere in Nigeria. Apart from the general problems associated with the Act it seems not to draw any distinction between men’s right to acquire and own land and women’s right to so do.

### **2.3. Other Statutory Provisions for the Protection of Property Rights in Nigeria**

Nigerian law on testate inheritance/succession includes: The Wills Amendment Act, 1837 and the Wills Amendment Act, 1852, regarded as statutes of general application, which were in force in England on January 1, 1900. In some states of the federation, the Wills Law, CAP 133, Laws of Western Nigeria applies. This 1958 law is essentially a re-enactment of the above-mentioned laws on Wills. Further, testate inheritance in some states in Eastern Nigeria is governed by the Succession Law Edict, 1987. The provisions of part 4 of the 1987 Edict are similar to those in the Wills Act, 1832 and Wills Law, 1958. It is important to note that these laws apply in respect of the spouses of a statutory marriage and their children. These laws place no restrictions on women with regard to inheritance under a testamentary disposition. Thus, women and men are generally treated equally with all other beneficiaries.

However, these Acts apply only to women married under civil law, not under customary law. By law of custom, certain real property cannot be affected by

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<sup>21</sup> *Nkwocha v Governor of Anambra State* (1984) 6 SC 362. *Savannah Bank v Ajilo* [1989] 1 NWLR (Pt. 97)p. 305.

<sup>22</sup> Land Use Act s. 9.

<sup>23</sup> *Ademola v Amao & Ors.*(1982) CGSLR 273, reported in JA Omotola, *Cases and Materials on the Land Use Act* (Lagos: Lagos University Press, 1983).

testamentary disposition.<sup>24</sup> Instead, it must descend by way of such customary law, and thus cannot be affected by any of the Wills Act(s).

This deference to customary law can be very harmful to women: it usually means that they are denied use of a fair portion of the estate which is subject to customary law. Apart from the above manifest identified problem inherent in testate succession, the properties generally devolve on the beneficiaries according to the intentions and dictates of the maker of the will; so there are usually very little problem.

Generally, intestate inheritance in Nigeria is governed by the Administration of Estates Laws of various states of the federation.<sup>25</sup> By virtue of Section 120 of the Administration of Estates Law of Enugu State, which is *in pari materia* with the provisions of the Administration of Estates Laws of various other states, while a surviving husband is meant to inherit absolutely, a surviving wife's title is only meant to last for her life or until her re-marriage, whichever first occurs. The implication of this is that the woman can neither transfer her interest in the property to another person nor transfer it by her will or intestate devolution upon her death. It is the opinion of the researcher that the above provision is a manifestation of the cultural and customary inclinations of the people which is usually unduly detrimental to women.

### 3. Customary Law and Women's Land Rights

As has been posited by J.O. Essien,<sup>26</sup> there is no universal definition of Customary law as different terms such as 'native law and custom', 'native law', 'native customary law' and 'local law' have been used interchangeably to refer to this class of law. Customary law has been defined as 'a body of customs and traditions which regulates the various kinds of relationship between members of the community in a traditional setting.'<sup>27</sup>

Customary law is the law that captures the norms, traditions and rules of behavior of the people. It is the law propelled by the world view, beliefs, philosophies and value system of the people.<sup>28</sup> In traditional societies, customary laws were largely unchallenged save by compelling innovations that re-channelled aspects of the practices of the people and subsequently altered its traditions. Since the introduction of English law in the administration of justice in Nigeria about a century ago, customary law has

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<sup>24</sup> Such as the Igiogbe which belongs exclusively to the first son of a Bini man

<sup>25</sup> Administration of Estates Law Cap 5 Laws of Enugu State of Nigeria 2004

<sup>26</sup> J O Essien, *Introduction to Nigerian Legal System* (2<sup>nd</sup> edn, Lagos: Ababa Press Ltd, 2005) p. 14

<sup>27</sup> C O Okonkwo, *Introduction to Nigerian law* (London: Sweet & Maxwell, 1979) p. 41

<sup>28</sup> M N Nwocha, 'Customary Law, Social Development and Administration of Justice in Nigeria (2016) *Beijing Law Review Vol. 7 No. 4*, 430-442 at p. 430

been fighting for breath and a large chunk of it has not survived the conflict that was the necessary outcome of the contact.<sup>29</sup>

The Blacks Law Dictionary defines custom as a practice that by its common adoption and long unvarying habit has come to have the force of law. It also defines customary law as consisting of customs that is accepted as legal requirement or obligatory rules of conduct, practices and beliefs, that are so vital and intrinsic a part of a social and economic system that they are treated as if they were laws.<sup>30</sup> The Evidence Act, though it did not define customary law defines custom as a rule, which in particular district has, from long usage obtained the force of law.<sup>31</sup>

Customary law, unlike statutes does not owe its existence to the positive enactment of a sovereign parliament or the declaration of a court. However, for a rule of customary law to be applicable and enforced by the courts, it is required to meet some basic criteria necessary for its validity and acceptance. It has been argued that this requirement is merely to facilitate its application while the law itself derives its existence and authority from the attitude of the very people whose affairs it seeks to regulate.<sup>32</sup>

As a representation of the behavioural patterns of a community, the rule in question, to qualify as a rule of customary law must be seen as an implicative norm; something more than a casual social observance.<sup>33</sup> Customary law should be dynamic and adaptable. In the first place, to be applicable, it must be shown to be the prevailing law in the community in question. Customary law should also have the capacity to adjust to changing circumstances, thereby absorbing the strain of dynamism to comply with the demands of a developing society.<sup>34</sup> This is because as our society advances, they are more removed from its pristine social ecology. They meet situations which were inconceivable at the time they took root. This should be a merit accruing from the flexible and adaptable nature of Customary law.

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

<sup>30</sup> B A Garner, (Ed), *Black's Law Dictionary* (9<sup>th</sup> edn, Minesota: West Publishing Co., 2009) p. 443, A A Kolajo, *Customary Law in Nigeria Through Cases* (Ibadan: Spectrum Books, 2000) p. 1

<sup>31</sup> Evidence Act 2011 (as amended), S. 258. See also – S. 2 of the Ebonyi State Customary Court Law Cap 47 Law of Ebonyi State 2009. *Okafor v Okafor* (2005) 2 SMC 416 ratio 5; *Kindley v Military Governor of Gongola State* [1988] 2 NWLR (Pt. 77) 445, *Nwigwe v Okere* (2008) 34 NSCQR 1325. It is not in doubt that customary law is a law as it regulates rights and obligation. P U Umoh, 'Law in African Context', in ME Nwocha, (ed), *Human Right and Criminal Justice in Nigeria* (Abakaliki: C.E. Darrolls Publishers, 2013)

<sup>32</sup> J O Essien, *op cit*, p. 116.

<sup>33</sup> *Owoniyyin v Omotosho* (1961) 1 All NLR 304 at 809

<sup>34</sup> *Agbai v Okagbue* (1991) 7 NWLR 391 at 417

By virtue of Section 18 of the Evidence Act, customs are treated as a fact that has to be strictly proved, not only by the evidence of person alleging it. There should also be corroborative evidence.<sup>35</sup> The only instance when the strict proof may be dispensed with is where the particular custom has been judicially noticed.<sup>36</sup> The burden of proving a custom lies on the party who asserts and seeks to rely on it.<sup>37</sup>

The courts in Nigeria treat customary law as a question of fact which must be pleaded and evidence of same must be proved in the first instance by calling witnesses acquainted with the native custom unless the particular custom is judicially noticed.<sup>38</sup>

By Section 17 of the Evidence Act 2022 a custom may be judicially noticed by the court if it has been adjudicated upon once by a superior court of records. This is different from what obtained under the old Evidence Act where it can only be judicially noticed if it has been acted upon by a court of superior or coordinate jurisdiction in the same area to an extent which justifies the court asked to apply it in assuming that the persons or the class of persons concerned in that area look upon the same as binding in relation to circumstances similar to those under consideration.<sup>39</sup> B O Nwabueze<sup>40</sup> posits that a major disadvantage of ascertaining customary law by means of judicial notice is its tendency to rigidify customary law and impair its characteristics of flexibility and adaptability. It must be observed that even before the promulgation of the Evidence Act, the courts had taken judicial notice of some rules of customary law which through frequent proof in the courts, had become sufficiently notorious.<sup>41</sup>

Every rule of Customary Law, even after it has been established as accepted in the community concerned, must necessarily meet the statutory requirements laid down for its applicability. Almost all laws providing for the application of customary native law and custom contains a further qualification that it shall not be enforced as law if it is repugnant to natural justice, equity and good conscience or incompatible, either directly or by its implication, with any law for the time being in force.<sup>42</sup> In addition to the above requirement, the Evidence Act provides that the custom must not be contrary to public

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<sup>35</sup> *Lipede v Sonekan* (1995) 1 NWLR 668; *Padiora v Abonde* (1992) 6 NWLR 221.

<sup>36</sup> Evidence Act, S. 17

<sup>37</sup> *Nsirim v Nsirim* (2002) 12 WRN 1150 at 17

<sup>38</sup> Evidence Act, S. 18.

<sup>39</sup> *Fediora v Abonde* (1992) 6 NWLR 221; *Olagbemiro v Ajagunbade III* (1990) 3 NWLR 37

<sup>40</sup> R O Nwabueze, 'The Dynamics and Genius of Nigeria's Indigenous Legal Order' (2002) *Indigenous Law Journal Vol 1 p. 173*

<sup>41</sup> *Larinde v Afiko* (1940) 6 WACA 108.

<sup>42</sup> J O Essien, *op cit*, p. 129.

policy.<sup>43</sup> By the combined effect of these provisions the following criteria must be satisfied by every rule of customary law for it to be valid:

- a) The rule must not be repugnant to natural justice, equity and good conscience.
- b) The rule must not be incompatible either directly or by implication with any law for the time being in force.
- c) The rule must not be contrary to public policy.

#### 4. Customary Land Tenure System in Nigeria

The predominant land tenure system in Nigeria prior to the Act especially during the pre-colonial period was the customary system of land tenure.<sup>44</sup> Customary land tenure system is indigenous to the various ethnic groups that constitutes Nigeria and like all other customs, varies from one part of the country to another. The evolution of this system of land tenure and the principles regulating it exhibit the historical credentials rooted in the customs and traditions of the different ethno-cultural groups in Nigeria.

The basic rule under customary law is that land belongs to the communities, villages or families with the community head or family head, as ‘manager’ holding the land in ‘trust’ for the use of the whole community or family. The legal estate under customary land tenure is vested in the family or community as a unit.<sup>45</sup>

It is pertinent to note that although as a general rule, the absolute title in communal land vest in the community as a social unit, in some communities, such title vests in the traditional ruler of the community as a kind of trustee for the community. Benin and Itsekiri communities are examples of such communities. All Benin lands and Itsekiri lands are vested in the Oba of Benin<sup>46</sup> and Olu of Warri respectively.<sup>47</sup>

Such communal or family property is vested in the community or family as a whole such that ownership of the land is joint and indivisible and since it is impracticable for every member of the community or family to be part of the controlling nucleus of the family property, the administrative control and management of communal or family land is vested in the family or communal head in conjunction with principal members of the family who are usually the male members of the family. The family or

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<sup>43</sup> Evidence Act, S. 18 (3);

<sup>44</sup> O G Amokaye, ‘The Impact of the Land Use Act upon Land Rights in Nigeria’ in R Home, *Local Case Studies in African Land Law* (South Africa: Pretoria University Law Press, 2011) p. 61.

<sup>45</sup> O Ojo, ‘Alienation of Family Property under the Yoruba Native Law and Custom: Suggestion for Reforms’ (2008) 6(1) *LASU LJ*, 116; B A Shogunle, ‘The Enactment of the Land Use Act on 29<sup>th</sup> March, 1978; Naturalization or Expropriation’ in I O Smith (ed) *Land Use Act – Twenty five years after*, (Lagos: Forlan Printers, 2003) pp49-60 at p. 51.

<sup>46</sup> *Uwagbu v Ewbwomwan* (1959) 4 FSC 91.

<sup>47</sup> C Ilegbune, *op cit*, 27.

community head is regarded as symbol ultimate ownership of all lands held by the family community.<sup>48</sup> Thus, though all male members of the family, community or village have an equal right to the land, in every case, the head of the group occupies a superintendent position over the land.

The chief of the community or family head, who must be a male, occupies a unique position in relation to the family land. He has charge or control over the land and any member who wants a piece of land to cultivate or building a house upon goes to him for it.<sup>49</sup>

In view of the foregoing exposition, it is obvious that land holding under customary law is entirely a male affair as only the male surviving children can be either the head of a family or the principal members of a family. Women are only entitled in some cases to a right of use where the principal members allocate some portions of the family property to them for use. It must be observed however that in most cases their right to use is usually predicated on their husband's right to use.

##### **5. Analysing the Conflict between the Statutes and Customary Law**

The task of this research has been to evaluate whether the recognition of customary law and the practice of customary law provides a hindrance to the development of women's rights which seems to have been guaranteed under the various statutes. In order to achieve this, the issues now become, firstly does customary law hinder the seeming progress that has been made by statutory law; and secondly, what is the practical implication of the continuous observance of this customary practices?

One feature of the Nigerian customary law is its inclination to deprive the women folks of their rights to land especially as it relates to their right to inherit same. For instance, in Nigeria, in most societies, right to inheritance of landed properties are exclusive preserves of the male folks. The issue then becomes whether such customary law practices which deprive women of their right to inherit, acquire or own land are valid in view of the fact that they seem to undermine the constitutional and statutory rights of women to acquire and own immovable properties.

It is obvious that the courts especially the Supreme Court are usually inclined to protect the constitutional rights of women to acquire and own immovable properties as manifest in a plethora of cases.<sup>50</sup> It is however regrettable that even in the face of the

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<sup>48</sup> T O Elias, *The Nature of African Customary Law* (England: Manchester University Press, 1956) p. 104.

<sup>49</sup> *Tijani v Secretary of Southern Nigeria* (1921) 2 AC 399 p. 401.

<sup>50</sup> *Ukeje v Ukeje* (2014) 11 NWLR (Pt. 1418) 384; *Mojekwu v Ejikime* (2000) 5 NWLR Pt. 65 7 P.402; *Anekwe v Anekwe* (2014) 9 NWLR (Pt. 1412) 393.

manifest disposition and inclination of the Supreme Court and other courts in Nigeria to protect the rights of women, in many parts of the country women are still subjected to a plethora of customary law practices which undermine their right to property as protected under the Constitution.

The real issues therefore lie not in the question of whether there are requisite constitutional or statutory provisions for the protection of the right of women to acquire and own land in Nigeria but rather on what practices actually amount to a breach or derogation of these provisions; whether there are factors or laws existing in Nigeria that support or amount on their own, to a breach of these constitutional safeguards; what steps the government or the courts have taken in order to enforce the protection of the said rights.

Although there is a constitutional and statutory framework for the protection of land rights in Nigeria for men and women, the said rights have been drastically undermined by a lot of customary practices especially as it relates to the right of women.

It is the finding of this research that customary law *per se*, does not inhibit the right of women to properties and does not also, in itself constitute a hindrance to the development of women's rights in Nigeria. This is because before a rule of custom can be referred to as customary law, it must have passed the validity test; in which case it must not be repugnant to natural justice, equity or good conscience or contrary to any law in force in Nigeria; especially the Constitution. The implication being that the courts will not uphold any rule of customary law that militates against the rights of women.

It must however be emphasised that there are plethora of customary tradition and practices that undermine the right of women to property; such practices or traditions do not make the whole residue of customary law anti-progressive. This is because customary law is a collection of numerous traditions and practices. The fact that one tradition has contravened certain principles does not mean that customary law as a system has failed. Thus practices or traditions that are inconsistent with the Constitution or other Statutes that protect the rights of women to property will be invalidated so as to make sure that the customary laws or practices that are accepted and practised are in line with the constitutional and other legal stipulations of the nation.

It is submitted that if any practice has become archaic or threatens the realisation of the rights guaranteed in the Constitution and gender justice, such custom or practice is susceptible to severance or at least development to align it with the Constitution.

The social and economic necessities of the country as a nation justify the underlying philosophy for the recent inclination of our courts to invalidate customary practices that militate against the right of women to acquire and own land in a country that is in dire need of property law revolution. The customary practices relating to land right identified in this work which deprive women of the right to inherit necessarily questions the foundation of the classical theories on the fundamental right to acquire and own property without undue prejudicial interference as encapsulated under the Constitution and various international treaties to which Nigeria is a party;<sup>51</sup> and indeed as widely acknowledged by various other international treaties; which in general provides what constitutes the ‘best practices’ on these processes.<sup>52</sup>

## 6. Conclusion

In view of the provisions of the Constitution, Land Use Act and other statutes examined in this study, it is safe to assert the Constitution makes adequate provision for the protection of land rights whether the right inures in a man or a woman. The implication being that such rights cannot be derogated from except as contemplated by law.<sup>53</sup>

It is also obvious that the Constitution in providing for the right to acquire and own immovable properties does not provide for any discrepancies or discrimination in relation to the right of men and women to own land. It is also not in doubt that the provisions of Section 1 of the Land Use Act<sup>54</sup> which vests all land comprised in the territory of each state on the Governor of the State to be held in trust and administered

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<sup>51</sup> The Universal Declaration of Human Right, Article 17 which provides that ‘Everyone has the right to own property alone as well as in association with others’ and that ‘no one shall be arbitrarily deprived of his property’. See also the African Charter on Human and Peoples’ Right 1986 which by virtue of Article 14 provides that ‘The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.’ Article 21.1 also provides that ‘All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it. While sub-Article 2 provides that In case of spoliation, the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.’

<sup>52</sup> The American Convention on Human Right, adopted at the Inter – American Specialized Conference on Human Right, San Jose; Costa Rica, 1969 vide Article 21 providing for Right to property. See also Article 8 of the European Convention on Human Rights and Fundamental Freedoms, 1950; First Protocol, The habitat Agenda, reaffirmed by the Istanbul Declaration on Human Settlements (1996); The International Labour Organization’s Convention Concerning Indigenous and Tribal Peoples in Independent Countries (No 169) vide Article 14 (1).

<sup>53</sup> CC Chigbo, *The Nature of Land Ownership and the Protection of the Purchaser* (2013) *AfeBabalola University: Journal of Sustainable Development Law and Policy Vol. 1 Iss, 1* pp. 1-20; Clement E A Taiwo, *The Nigerian Land Law*, (Ibadan: Ababa Press, 2011) p.16. See also *Agheghen v Wighareghor* (1974) 1 S C 1; *Orhu v GogoAbite* [2010] 8 NWLR (Pt. 1196) 307 at 324; *Da Costa v Ikomi* (1968) 1 All N L R 394.

<sup>54</sup> Cap L5 LFN, 2004

for the use and common benefit of all Nigerians does not also make any discrimination or discrepancy between men and women.

The provisions of the Constitution and the Land Use Act especially when read in conjunction with the provision of Section 42 of the Nigerian Constitution which prohibits discrimination of any sort against any person, it would be safe to conclude that in Nigeria there are Constitutional and statutory safeguards for the protection of women's land right in Nigeria. The question now becomes whether these are enough especially when one considers the fact that there are a lot of customary practices that inhibit the rights of women to property.

It is against the forgoing background that this study recommends the promulgation of laws which shall regulate the application of customary rule of inheritance making provisions for the equal rights of men and women in that regard. In this wise, we recommend the criminalization of all the various customary practices which have the implication of violating the fundamental rights of women to property. Such will act as a deterrent to people who may want to perpetrate such acts. The criminalization of such customary law practices that impede the right of women to land rights will help to ensure compliance thereto. We also recommend the review and amendment of the Administration of Estate laws of various states of the Federation and all other gender discriminating laws to conform to international standards.

There should be increased stimulation of internal dialogue among women on their status in society and their role in the current periods of social and economic transformation and reconstruction. They should also be made to understand the need for their increased participation in the ventilation of their rights.