International Journal of Law, Policy and Social Review
www.lawjournals.net
Online ISSN: 2664-6838; Print ISSN: 2664-682X
Received: 02-11-2019; Accepted: 03-12-2019; Published: 07-01-2020
Volume 2; Issue 1; 2020; Page No. 11-14

Apprisal of intestate and inheritance rights in Nigeria

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Abstract
Succession in Nigeria has become a sensitive issue under the Nigeria plural legal system. The law of intestate succession is particularly problematic because of the nature of inheritance which is subjective and at the mercy of the applicable legal framework. This article therefore critically examines the laws, practices and jurisprudence of intestate succession in Nigeria, the human rights perspectives to succession and administration of estate and the way forward to create a robust legal framework for intestate governance.

Keywords: inheritance, Plural, system, particularly, governance

Introduction

Nigeria operates a pluralist legal system. Broadly, this can be divided into general law and customary law [1]. The general law includes received English law, (common law, statutes of general application, doctrines of equity), legislations by the National Assembly and state Houses of Assembly and byelaws made by local government councils. On the other hand, there are as many customary laws as there are distinctive areas or groupings of peoples. Apart from Islamic law, these laws are generally unwritten. The Constitution of the Federal Republic of Nigeria 1999 recognizes and preserves these sources of laws in Nigeria and projects a policy of keeping them segregated. The law of intestate succession deals with transmission of inheritance rights upon the death of a property owner who did not make a valid will. This subject is impacted by a variety of laws from the two broad systems of laws. It is a residual matter over which all levels of government can make laws. A good number of states have legislations regulating qualification for and scheme for distribution of and benefiting from a deceased property-owner's estate (Administration of Estate laws). Others rely on English statutes. In many other situations (and where written laws cannot apply), principles of customary law apply. Nonetheless, irrespective of the source of intestacy rules and principles, one problem that presently confronts the subject is human rights advocacy. From the middle of the twentieth century, particularly following the coming into force of the International Covenant on Economic Social and Cultural Rights 1966, there has been increased expansion of, and consensus among states, regarding the normative content and application of the so-called second generation rights. Furthermore, in the application of human rights generally, the international community is paying greater attention to certain identified vulnerable classes, particularly women and children and sub-groups within them such as those with disabilities, displaced persons and refugees. With regards to the intestate succession context, the issues that have been foremost involve the position of female children, widows, children born out of wedlock and members of non-formal (cohabitant) families who desire to participate in the succession to property of immediate family members who die intestate but would ordinarily have made provisions for them if they were alive or made a will. With advancement in assisted human reproductive technology, another category of potential inheritors is identifiable: posthumously procreated children. These are children procreated by implantation in a female's womb after the death of at least one parent. An important discourse is how best to promote and protect specific human rights of these classes of potential successors such as the rights to freedom from discriminatory inheritance practices, family life and housing. The problem is that protection of these rights for individuals is challenged by customary or cultural structures that affect family linkages or are exclusionary in their operation. These often include primogeniture, Caste system and other indigenous family and group property holding arrangements which the Nigerian legal system has chosen to preserve. One central issue in relates to how principles of internationally recognized human rights norms can be applied to individuals in the intestate succession context. One view is that rights should be applied in the same way to individuals across all civilizations as it is understood in international law (the doctrine of universality of human rights). Another view is that application of rights should be shaped by the social standards, structures and institutions existing where an individual lives (cultural relativism in the application of human rights). This study proceeds from the understanding that both doctrines have their merits in the succession context and could be useful in effectively catering to the welfare of vulnerable groups in the context of intestate succession. Consequently, focusing on three rights, the aim of this study is to engage how best Nigeria's contemporary legal system can support the internationally recognized principles/standards relating to rights to freedom from discriminatory inheritance practices, family life and housing in the intestate succession context given the progress made thus far.

[1] Islamic law is usually subsumed under customary because it is often treated in the same way as other customary laws of various areas in the country.

2. Succession and Inheritance: Any Distinction?

Succession involves the transmission of the rights and obligations of a deceased person in respect of his estate to his heirs and successors. It deals primarily with the distribution of a deceased person's estate to his heirs and successors [2]. It also includes the rules governing the administration of a deceased person's estate by personal representatives of the deceased person including state participation in respect of real estate situate within its territory and personal estate of the deceased person subject to its jurisdiction. Intestacy occurs where a person dies without making a legally valid will in respect of his estate. It appears that most scholars take the above description as a given and do not toil to engage any conceptual analysis of the terms. Osondu's response to his own question "what is succession?" is this: "[S] uccession is a means by which the living enters into possession of the property of the dead. In other words, it is a means by which the living inherits the property of the dead [3]." For him therefore, there is no difference between succession and inheritance. Apart from stating that the law of succession (in England and Wales) is based on the principle of freedom of testation and that it relates to rules governing the disposition of property on death, Lowe and Douglas do not expend any effort on the concept [4]. Kerridge and Brierley define the law of succession to be concerned with the transfer or devolution of property on death [5]. Importantly they note that not all transfers on death are covered by the law of succession, that is, the law of intestate succession and the law of wills – the two principal topics into which succession is divided. This is because there are a number of ways in which property which belongs to, or which may appear to belong to, an individual during his lifetime may pass on his death other than by his will or in accordance with intestacy rules [6]. A ready example is the right of survivorship (*jus accrescendi*) applicable to a beneficial joint tenancy. As each joint owner dies, his rights are extinguished and vest in the surviving joint owner or owners. They are of the view that the creation of joint ownership and the failure to sever a joint tenancy (so as to create a tenancy in common) are both acts or omissions which are part of the law of succession in the wider sense [7]. Other examples include property held on trust (the beneficial interest will remain vested in the beneficial title holder upon trustee's death); and nominations under say a pension scheme or under a life insurance policy. Miller stated that the law of succession is traditionally regarded as being concerned with the transmission of property vested in a person at his death to some other person or persons [8]. He notes that the person or persons beneficially entitled will be those specified by the law of intestate succession except and in so far as the deceased has made a valid will. He argues that a more "realistic" view of succession must take account of gratuitous *inter vivos* transfers as well as of testamentary dispositions [9]. However one must regard with caution his view that the law of succession presupposes the existence of private property; that is, property owned or possessed by individuals. He claimed that "the question of succession does not arise in a society in which articles or the right to possession thereof, is regarded as vested in a group such as a clan or tribe or family of which individual is a member and which, unlike him, does not die. Membership of the group changes over time, but no provision for the transmission of property on the death of an individual member of the group is necessary [10]." Ikpeze supports this view; citing *Oke* v *Oke* [11] where the Supreme Court held that where a testator build a house on unpartitioned family land, he could not dispose of it by will [12]. Our disagreement is because, in Africa where group ownership is a norm, most group ownership regimes can be terminated resulting in immediate private property. Therefore even while the group ownership structure subsists, African legal system preemptively protects such individual rights until they ripen in fact. In the circumstance of the facts in *Oke* v *Oke*, there is no rule that the descendants of the testator would not have a right to remain in the building pending when the family land was partitioned. Nonetheless, Miller seems to suggest that there is a subtle distinction between succession and inheritance: while succession is seen from the view of the private property owner, the idea of inheritance is perceived from the view of successors. In raising queries on the limits of rules of succession, he asked "to what extent should the law of succession determine the successors? To what extent should the freedom of the individual holder of property to dispose it on his death be curtailed by rights of inheritance that is, fixed rights of other people to receive his property? [13]" furthermore, Ikpeze while positing that inheritance and succession are essentially the same, she notes the "minor difference" between them. She states that "while inheritance connotes the possession of a dead person's property or interest by a living person or persons, succession is more elaborate and includes the act or right of legally or officially taking a predecessor's office, rank and duties. It involves the absorption of rights and liabilities of the deceased in respect of the estate of the deceased [14] Given these views of scholars, this study adopts a neutral approach. While the distinctions some scholars have drawn between succession and inheritance are appreciated, the underpinning of both ideas relate to dealings with a deceased person's property. Therefore, throughout this study, 'succession' and 'inheritance' will be used interchangeably unless a distinction is specifically intended and made.

3. Intestate succession and applicable human right norms

The historical development of the concept of human rights links to natural rights in some quarters. Its definition of human rights sets out that they are rights we are born with as human being, they inhere in us attached to all human beings everywhere and in all societies by virtue of humanity; and since it is natural and God-given, it cannot be taken away by state, fiat (government) [15].

[2] TOG Animashaun & AB Oyeneyin, *Law of Succession, Wills and Probate in Nigeria* (Lagos: MIJ Professional 2002) 3
[3] AC Osondu, *Modern Nigerian Family Law and Practice* (Lagos: Printable Publishing 2012) 201
[4] Nigel Lowe and Gillian Douglas *Bromley's Family Law* (11th edn Oxford: OUP 2015), 960-961
[5] Roger Kerridge and AHR Brierley Parry and Clark The Law of Succession (12th edn London: Sweet & Maxwell, 2009)1
[6] Ibid
[7] Ibid,
[8] JG Miller, *The Machinery of Succession* (Oxon: Professional Books 1977) 1
[9] Ibid
[10] Ibid, 1-2
[11] [1974] 3 SC 1
[12] Ogugua V.C Ikpeze *Gender Dynamics in Inheritance Rights in Nigeria: Need for Women Empowerment* (Onitsha: Folmech 2009) 7, 18
[13] Ibid, 3. Emphasis added.
[14] Ikpeze (n 11) 7
[15] JN Ezeilo *Women, Law and Human Rights: Global and National Perspectives* (Enugu: Acena 2011)5

They are held equally by all [16]. Ramcharan considers that the nature of human rights is part of the intellectual patrimony of human kind [17]. Therefore law should recognize these rights and enforce respect for them. An opposing view of rights sees them as legal abstractions, notions and entities. They therefore owe their being and nature exclusively to the law to the substantive and procedural apparatus of a legal system. According to this view law creates rights [18]. Whichever view one takes of the juridical nature of rights, there is no doubt that the subject is a fluid and dynamic one. It is not a closed subject. New rights and new dimensions of existing rights, new contexts of application emerge on a regular basis requiring state recognition and endorsement. As Eze puts it "human rights represent demands or claims which individual groups make on society, some of which are protected by law and have become part of the *lex lata* while others remain aspirations to be attained in the future [19]. Given this reality, Ezeilo concludes that "if the obligation to protect is on the state, it then means that it is only in the Constitution or other legal framework that could be called human rights 'law [20].'"In the end, the state recognition apparatuses are fundamental and must intersect with nature for rights to arise. What we call human rights today as documented in international instruments or constitutions or other legal documents have been dictated by states as a collective or by the state as the evaluator of rights [21]. No matter how broadly a right may be conceptualized by legal theorists and no matter how broadly they are defined in legal instruments, the state wields sufficient power to delimit and contain human rights in order to protect its own sovereignty [22]. In all rights instruments, there are derogation provisions that endorse state powers and capture the relativity of rights. This study is of the view that there is no one absolute view of the nature of rights: Once rights become legally accepted as such, they are claimable by all by virtue of being humans. More importantly, a basic feature of rights is directionality. According Rivlin, Rights come to the normative world with a direction … rights have correlates. Liberty rights do not imply positive obligations of others; claim-rights do come with a correlate duty of another; immunity rights come with lack of power of the other. An assertion of a right is dyadic: It states who the right holder is and implies or specifies a correlative normative property, be it an obligation (as with a claim-right), or the absence of a conflicting claim-right (as with a liberty right), or the absence of a conflicting power (as with an immunity right) [23]. In this section we generally x-ray and isolate important provisions of International human rights instruments that touch on or are touched by intestate succession. There is no effort to explore the normative contents of these provisions other than what they provide. However, three specific rights which are usually affected directly in intestate succession contexts namely: right to freedom from discrimination.

4. Conclusion

There are a number of important intersecting factors that have always and continue to confront the law of intestate succession in Nigeria. The law has sought to grapple with the question as to what ideals should be ascendant in any regime of intestate succession. Such identified ideals include unfettered freedom of disposition; familial preservation of wealth as endowment to future generations; and the entrenchment of egalitarian precepts in property devolution. A property owner enjoys proprietary freedom while alive and can deal with his self-acquired property in any manner he desires. This could take any form of disposition whether for valuable consideration or gratuitous. Yet, self-acquisition is not the only means of acquiring property rights in Nigeria. Under customary law, inheritance or devolution of property continues to be a major avenue to acquiring property rights. Furthermore, the legal system has preserved property rights transmission effected under relevant state statutes such as the Administration of Estates Laws or the Statutes of Distribution and the Intestates' Estate Act 1890, a statutorily specified scheme is used. As simple and straightforward as it sounds, individual eligibility is often a controversial issue. The challenge for the woman is the validity of the basis of her claim. She must qualify as a "wife" and show that her marriage to the intestate property owner is valid in accordance with the law – the Marriage Act 1914. This brings into question the state's treatment of "marriage law" in the context of intestate succession. In the same vein, children must show that they are *children* (descendants or issues) of the statutory marriage contracted between the parents. Proof may be herculean for the woman as relevant documents may be lost in the course of a long marriage. The courts may choose to disqualify her: adopting a strict adherence to the stipulations of the law. On the other hand, they may favour a functional view of marriage and only require the establishment of primary indices of marital relations. Since the general statutory law seems to be more protective of women and children, collaterals (relatives) of an intestate who usually challenge the application of the general law in preference of customary law distribution schemes (as they cater to the welfare of collaterals to a large extent) endeavour to show that the statutory marriage is invalid. A number of cases dealing with this issue have gone as far as the Supreme Court. This is one problem which this study investigates: How do the courts treat claims of "marriage" in order to admit women and children to succession rights or disqualify them and exclude them from succession rights? It touches on the right to family life and often, housing.

Under customary law, apart from the issue of establishing the validity of customary law marriage, individual property rights are often complicated by cultural property holding structures and customary family structures. Specifically, polygamy, multiple marriage

[16] J Donelly *International Human Rights* (3rd edn Denver: West View, 2007) 21
[17] BG Ramcharan 'A Debate about Power Rather than Rights' [1998] (4) *Debate: How Universal are Human Rights?* 423
[18] Ezeilo (n 14) 6
[19] O Eze, Human Rights in Africa: Some selected Problems (Lagos: NIIA & Macmillan, 1984) 4
[20] Ezeilo (n 14) 7
[21] M Evans (ed) *International Law* (2nd edn, New York: Oxford University Press, 2006) 313
[22] M Koskenniemi, 'International Law' in *International Library of Essays in Law and Legal Theory* (ed) (Aldershot: Dartmouth 1991) 406
[23] R Rivlin "The Right to Divorce: Its Direction and Why it Matters" [2013] (4) *International Journal of the Jurisprudence of the Family* 133 at135. Citing Wesley Newcomb Hohfeld 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' [1913] (23) *Yale Law Journal* 16, 28-59

System, group property ownership patterns, hierarchical and extended family patterns as well as the virilocality of marriages confront inheritance rules and the application of human rights norms to them. While the law has remained rigid over time, contemporary human rights advocacy proclaims that intestate succession generally, and customary rules of inheritance in particular, are discriminatory against women, and to a limited extent, children born out of wedlock. It claims that the precepts of equality, fairness and dignity that should guide inheritance regimes are either absent in the jurisprudence of the laws or are often disregarded by implementers or interpreters of the rules. Indeed extreme views are that the rules place females as sub-citizens by making them objects of inheritance (a less-objective view of females) or absolutely disabling them from succession rights even where it is evident that the female family member has contributed to the acquisition of the properties in question. This touches on the right to freedom from discrimination. On the other hand, customary interpretation of rules of succession cite traditional jurisprudence based on established cultural structures, institutions and norms as acceptable interveners in the wholesale application of human rights precepts to the intestate succession context. It is this conflict that constitutes the second problem of this study.

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13. Ibid, 3. Emphasis added.
14. Ikpeze (n 11) 7
15. JN Ezeilo Women, Law and Human Rights: Global and National Perspectives, Enugu: Acena, 2011, 5
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