

**MODERNISM AND INTESTATE INHERITANCE IN SOUTH EAST NIGERIA:
RETHINKING THE DISTRIBUTIVE JUSTICE THEORY**

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ABSTRACT

In Nigeria, the practice of disinheriting some heirs from intestate property is prevalent in the majority of south eastern states, especially amongst custodians who insist on age-long traditions. Despite Supreme Court decisions that have voided unequal and discriminatory inheritance in accordance with section 42(1) and (2) of the Constitution of the Federal Republic of Nigeria 1999 (as amended), some of these customs continue to discriminate in intestate situations. This paper will adopt a doctrinal approach to give an overview of intestacy and the practice of intestate inheritance in south east Nigeria. It will identify two modern theories, and explain them in light of inheritance. The objective of the paper is to proffer a modern theory of law that accommodates a fair distribution of property in intestate circumstances while having regard to the maintenance of the legacy of the deceased. The work professes a more accommodating approach to the problem of discriminatory inheritance, and recommends amongst others, a capability dependent distributive justice theory which it believes is a modern, non-discriminatory, and fair approach to intestate issues in Nigeria.

Keywords: Intestate inheritance, Distributive justice, Equality, Capability dependent distribution

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Introduction

Inheritance is property received by bequest or device.² It can also be described as hereditary succession to an estate, title, among others. It is the right of an heir to inherit property on the death of an ancestor.³

In Nigeria, state law or customary law determines who inherits the property of a deceased. The focus of this paper is inheritance under customary law in south east Nigeria. In applying customary law in the devolution of a deceased's property, the custom and tradition of the place in question have to be considered. Some customs allow some relatives to inherit while disinheriting others. This discriminatory aspect of property inheritance under customary law in Nigeria manifests in different forms ranging from primogeniture rules, rights of spouses, rights of adopted children, rights of illegitimate children, and inheritance by blood.⁴ The existence of laws on the subject matter of discriminatory customary intestate succession seems not to have any effect. Some communities out rightly disinherit women and in some other communities men are completely eliminated in the sharing formula of the estate of a deceased relative.

This work will therefore give an overview of intestate inheritance practices in south east Nigeria, reveal the existence of discriminatory intestate customary practices, expose the socio-economic disadvantages of discriminatory inheritance practices and identify modern theories that call for a better approach to customary inheritance practices in Nigeria. The paper is divided into 2 major parts - the first part will discuss the concepts around inheritance in Nigeria and the second part will discuss the modern theories identified by the writer as related to the discussion. The theories of equality, distributive justice and equity have been identified and fully explained in context. The work does an appraisal of each of these theories, drumming up support for the advantages of the theories while rethinking some of the limitations. This work will align with the distributive justice theory because this theory is reflective of the other identified theory and the need of society. The work takes a step further to propose a better version of the distributive justice theory as a way of ensuring a just and fair distribution of inheritance across all parties

² E Azinge and O Azoro (eds), Nigerian Institute of Advanced Legal Studies (NIALS) Dictionary of African customary Laws, (NIALS Press 2013) 95.

³ See *Balori v Gonimi & Anor* (2014) LPELR. Also, *Mojekwu v Iwuchukwu* (2004) 11 NWLR (pt 883) 196 SC.

⁴ RA Onuoha 'Discriminatory Property Inheritance under Customary Law in Nigeria: NGOs to the Rescue', *International Journal of Not-for-Profit Law* Volume 10, Issue 2, April 2008, <http://www.icnl.org/research/journal/vol10iss2/art_4.htm > accessed 25th January, 2021.

Conceptual Framework

This sub-head briefly explains the important concepts of inheritance and succession.

Inheritance and Succession

The word succession means the entry of living persons into the possession of a living or dead person's property.⁵ It also means the process of transmitting the rights and duties of a deceased person pertaining to his estate, office and dignity to persons who succeed him, such as his heirs, in a manner sanctioned by the law.⁶ To 'inherit' is to receive (property) from an ancestor or person under the laws of intestate succession upon the ancestor's death.⁷ In the case of *Bolori v Gonimi & Anor*⁸, the court held that to inherit means to receive. A dictionary of African Customary Laws defines inheritance to mean property received from an ancestor by bequest or devise.⁹

From the foregoing, there is really no substantive difference between inheritance and succession. A writer like Emelia, is of the opinion that inheritance is different from succession because while the former mean an estate or property that a man acquired by descent which can be transmitted to his heir in the same way on his death in intestacy, the later includes the devolution of title to land by will as well as accession to office and dignity.¹⁰ In both cases of succession and inheritance, there is a passage of property to descendant(s) and so it is impossible to use the word 'succession' without accompanying it with its twin concept, 'inheritance'. The two concepts touch on each other and this is the reason why in this paper, succession and inheritance will be used interchangeably to mean property received from an ancestor.¹¹

As a foundation, when a person dies, his property or belongings do not die with him. Whether such belongings or property was acquired under statutory law or customary law, the property is handed down to the heirs of the deceased in accordance to his

⁵GK Babawale, T Nubi, (2011) "Property tax reform: an evaluation of Lagos State land use charge, 2001", *International Journal of Law and Management*, Vol. 53 Issue: 2, pp129-148.

⁶ T Adekunle, Succession and inheritance law in Nigeria: Resolving the Discriminatory proprietary Rights of Widows and Children, Academia on-line publications, <https://www.academia.edu/35665674/succession_and_inheritance_law_in_nigeria_resolving_the_discriminatory_proprietary_rights_of_widows_and_children accessed 21st August, 2020.

⁷ BA Garner, (ed) BlacksLaw Dictionary, (2014) 10th edition, p. 903

⁸ (2014) LPELR- 23543 (CA).

⁹ NIALS, n.1 Ibid

¹⁰ A. Emiola, *Emiola's African Customary Law* (Emiola (Publishers) Limited, Ogbomosho, Nigeria, (2011) p.177.

¹¹BA Garner, n 11 ibid.

personal law which is the law he or she was subject to at the time they lived.¹² This paper will focus on inheritance under customary law. The application of customary law in the devolution of a deceased's property in Nigeria depends on the tradition of the place in question. Some traditions allow every member of the family of the deceased to inherit. As observed in practice however, some categories of persons are disinherited especially when the property to be inherited is land. These persons are mostly women, children and strangers.¹³ In the South Eastern part of Nigeria, the principle of primogeniture, that is, succession through the male line, generally governs the customary law of succession. Under this principle, when a man dies intestate, the eldest male member of his family succeeds to the position of the head of the family, the residence of the father, as well as the surrounding land.¹⁴

It is a practice that most customary laws of inheritance disinherit women from their late husband's or father's property in the south eastern part of Nigeria. Widows are only accorded rights to reside in the deceased husband's land or home for the rest of their lives, subject to good behavior.¹⁵ Daughters are not allowed to inherit lands because it is said that they do not reside permanently in the family as they are expected to marry. As a writer pointed out, allowing daughters to inherit or own land in their father's family would amount to introducing strangers to the land through the back door.¹⁶ Thus, the general practice is that customary succession goes by male blood.¹⁷ This was affirmed in the case of *Daniel Ayotunde Fakoya v Asimowu Ilori & Ors*¹⁸.

¹² See *Anusiem v Anusiem* (1993) 2 NWLR (pt. 276) 485 where the Court, unanimously allowing the appeal and ordering a retrial, said that in the absence of proof of a Will or Wills, the presumption is that the deceased died intestate. All his property would, by the operation of the native law and custom practiced in the area, devolve on those entitled. See also *Rabiu v Abasi* (1996) 7 NWLR (pt. 462) 505; Again, *Tapa v Kuka* (1945) 18 NLR 5. See generally, Reform of the customary law of inheritance in Nigeria: Lessons from South Africa [2014] *AHRLJ* (Chapter 15 Vol 2) 31

¹³ LO Ogiji *Elimination of Discrimination in Land Ownership among Nigerians under the Land Use Act* (2012) 1 *BSUJCP*, 91. Significantly, in the case of *Amodu v Abayomi* (1992) 5NWLR (Pt. 242) 503, the court held that by Yoruba customary Law the real property of a deceased person who died intestate leaving children surviving him goes to the children to the exclusion of other blood relations.

¹⁴ See *Nwafor v. Ububa* (1966) 1 All N.L.R. 80; *Osulu v Osulu* (2003) All N.L.R. 252 (SC). See also El Nwogugu, Emancipation of female rights to intestate succession under Igbo customary law, *The Nigerian Juridical Review*, Vol 12 (2014), 1.

¹⁵ LO Ogiji, *Ibid.*

¹⁶ *Ibid.*

¹⁷ RA Onuoha, n 8, *ibid.*

¹⁸ (1983) 2 FWLR 402. Inheritance rights under customary law tilt towards the males because they are seen as possessing a permanent status that would keep inherited properties within the blood line.

Notably, there are few exceptions to the practice of discriminatory customary inheritance. For instance, some matrilineal communities in eastern Nigeria have bilinear succession which allows women to inherit from deceased relatives while the men are disinherited.¹⁹ These communities include the Afikpo area in Ebonyi state, as well as Bende, Abriba and Ohafia communities in Abia state.²⁰ However, whether the victims are women or men, the issue of discriminatory intestate inheritance persists in south east Nigeria, causing hardships and has thus warranted this paper.

The Legal Regime of Inheritance in Nigeria

An Overview

The Supreme Court ordinance that was introduced into Nigeria in the 18th century, and which later became the substantive law, mandated the court to apply the common law of England, the doctrines of equity (the repugnancy test), and the statutes of general application over other existing laws, that is customary law and Islamic law.²¹ The various constitutional transitions from 1922 to 1954,²² the period of regionalism into the three regions of North, East and West, and the independence of Nigeria in the year 1960, did not take away the plural legal state of the country. The independence Constitution that metamorphosed into the Republican Constitution, the 1979 and 1989 Constitutions and finally the 1999 Constitution, maintained state laws, customary law and sharia law as the legal systems of the country. As such, Nigeria is a legal plural state consisting of the Constitution, the received English law, local Legislation, sharia Law and customary

¹⁹ For instance, in the Ohafia, Ihechiowa, Abam in Edde/Afikpo communities, there is an existing matrilineal mode of inheritance, whereby inheritance is traced through the mothers and females. For example the Akan and Fante (of Ghana), the Lonwe and Yao (of Malawi) and the Yakalangwa, areas in the Eastern parts of Nigeria. See: A. Ibidapo-Obe, *A Synthesis of African Law* Lagos Concept Publications Ltd (2005) p 162.

²⁰ B.A. Oni, "The Rights of Women to Inheritance under Nigerian Law: An Evaluation" (2008) 2 Nigerian Journal of African Law.

²¹ See O. J. Asien, *Introduction to Nigerian Legal System*, Sam Bookman Publisher, Ibadan, 1997, pp. 109-110

L. A. Ayinla, *The Nigerian Living Law and Its Relegation, the Sociological and Historical Perspectives*, University of Ilorin Law Journal, Vol.1, pp. 202-203, 2006. See also, M. E. Nwocha, *Customary Law, Social Development and Administration of Justice in Nigeria*, Beijing Law Review, 2016, Vol.07 No.04, https://www.scirp.org/html/10-3300501_73207.htm, accessed 30 September 2021.

²²The Clifford Constitution of 1922, the Richard's Constitution of 1946, the Macpherson's Constitution of 1951 and the Oliver Littleton's constitutions of 1954.

laws.²³The existence of plural laws in Nigeria has led to a lack of uniformity of inheritance laws, especially on intestacy.²⁴

Intestacy

Sections 36 and 49 of the Marriage Act Administration of Estate Law, contained in the statutes of distribution, 1670 and 1685 as modified by the Intestate Act, 1890,²⁵ contain rules on distribution of intestate estate. These rules are also applicable to the distribution of personal property. Accordingly, subject to the rights of the widow/widower, the intestate estate is shared equally among the children of the deceased. Where a wife dies intestate survived by her husband, the latter is entitled to the whole intestate estate and where the intestate husband leaves a widow and child, the widow takes one-third of the estate absolutely while the child takes the remaining two-thirds. Where the intestate husband leaves a widow but no child, the widow takes one part absolutely and the remaining half is divided among his nearest relatives or next-of-kin. Relatives of half -blood take equally with relatives of full blood. Where there are no surviving spouse or child, the intestate's father is entitled absolutely; and where the father pre-deceased the intestate, the mother takes absolutely.²⁶

Generally, the applicable law in an intestate situation is that immovable property is governed by the law of the place where the property is situated, while movable property is governed by the law of domicile of the intestate at the time of death.²⁷ So, where the deceased or his property is subject to customary law, or the deceased was married under customary law, customary law applies in distributing his or her property.²⁸ To reiterate, devolution of property in an intestate circumstance depends on the kind of

²³A.C. Diala 'Reform of the customary law of inheritance in Nigeria: Lessons from South Africa' (2014) 2 *AHRLJ* at 639 <www.safii.org/za/journals/AHRLJ/2014/31.html> accessed 12th November, 2020.

²⁴P.O. Itua, 'Legitimation and succession in Nigeria: An appraisal of section 42(2) of the Constitution of the Federal Republic of Nigeria, 1999 as amended on the rights of inheritance' (2012) 4 *Journal of law and Conflict Resolution*, 36.

²⁵ Statute of Distribution 1670, Carr 2, C. 10 6 III-VI, Statute of Distribution, 1685, Jac. 2 c. 17, VII

²⁶ Ibid. Other provisions are that the deceased's mother shares an intestate estate with the deceased's brothers and sisters and where there are no surviving parents of the deceased nor brother or sister, but only the children of the latter, the estate is distributed among them in equal shares regardless of sex. Again, stepmothers, mothers-in-law or grandparents inherit the intestate estate of the deceased where there are no other relatives. The Act recognizes that intestate estate is distributed in accordance with customary law.

²⁷See the case of *Cole v Cole* 1898 1 NLR 15

²⁸ Ibid.

marriage contracted while the deceased was alive,²⁹ the nature of the deceased's land holding, and the type of property the deceased had in his lifetime.³⁰

Remarkably, there are instances where intestacy inheritance depicts, to a large extent, discriminatory practices against women. For instance, the rules of distribution of intestate property allow the surviving male spouse to inherit all where there are no children, parents, or siblings of the same blood.³¹ But the surviving wife's interest in the estate of her deceased husband fails when she dies or remarries in which case the deceased's surviving siblings inherit in equal shares. Clearly, the extant law allows a surviving husband to inherit the estate of his deceased wife absolutely even when he remarries but the surviving wife has no such privilege.³² Fair enough, the law makes provision for children, parents, siblings, half-brothers/sisters in intestate circumstances, applying the notion of who the dependents of the deceased were during his or her life time. It is thus the position of the law that any child who got acknowledged by his father at the time he lived is said to be a legitimate child of the deceased.³³ As such, where for instance, it is shown that a man before his death, provided for the needs of a child or that such a child lived with the man until his death, it will be sufficient proof of acknowledgement.³⁴

Customary Intestacy Inheritance

Customary intestate inheritance in most parts of Nigeria is patrilineal – that is, relating to, based on, or tracing descent through the paternal line.³⁵ This practice simply conforms to the primogeniture rule, which is a system of inheritance or succession by the firstborn child, specifically the eldest son. The eldest son becomes the head of the family upon the death of his father and inherits the residence of his father.³⁶ This

²⁹B.A. Oni, n. 27, *ibid*, p35.

³⁰ There is also another factor known as 'making a nuncupative Will'. This simply means that where a man makes a dying declaration as to the manner in which he intends to distribute his properties, such declarations would be adhered to as if he had made a Will. See BA Oni, *ibid*.

³¹See s. 49 (ii) of the Administration of Estates Law, Cap 1 Laws of Western Region of Nigeria, 1959. See also Anambra state Administration of succession of Estate of the Deceased Law of 1987 and the Administration of Estate, Cap 1 Laws of Rivers State of Nigeria, 1999.

³² *Nwugege v Adigwe* (1934) NLR 134

³³ U. Chioma, "The Discrimination of property inheritance under the Nigerian customary law", <<http://thenigerialawyer.com/the-discrimination-of-property-inheritance-under-the-nigerian-customary-law/>>, accessed 2nd February, 2021.

³⁴ *Ibid*.

³⁵ See O.K. Edu, A Critical Analysis of the Laws of Inheritance in the Southern States of Nigeria. (2016) *Journal of African Law*, 60(1), 141-155.

³⁶ This is what is called 'obi' and 'aniisi obi' in igbo land. See *Nwafa v Ububa* (1966) 1ALL NLR 80; *Osolu v Osolu* (2003) All NLR 252 (SC). See generally, El Nwogugu, *Ibid*.

primogeniture rule governs most of the traditional societies in the southern part of Nigeria, especially the south eastern parts.

Basically, the custom and tradition that a person was subject to at the time he or she lived determines how their property will be distributed upon death. It does not matter in this instance that the deceased died somewhere else or that the property to be distributed is situated elsewhere. Accordingly, where a man chooses a particular custom to govern his entire life, that custom will apply in the devolution of his property if he dies intestate.³⁷ In *Olowu v Olowu*,³⁸ the question before the court was whether Ijesha or Bini customary law applied to an Ijesha man who died intestate but was naturalized and married in Benin. It was held that the distribution of the property of such a man who had even renounced his Ijesha origin when he naturalized in Benin, will be governed by the Benin customary law. Also, in *Obusez v Obusez*³⁹, the court held that where the deceased's manner of life is suggestive of customary law, then customary law will apply in the devolution of his property. Again, where marriage is contracted under native law and custom, or where the man (deceased) had married under statute but went on to contract another marriage under native law and custom and had remained guided by such custom, then his property will be distributed in accordance to his customary law.⁴⁰ These customs to a large extent disinherit women.

Under the Yoruba customary law for instance, a widow does not inherit the property of her late husband but her children will inherit.⁴¹ Upon the death of a man, the head of the family whose duty it is to share his property can either choose to share the estate equally, using the *ori-ojori* rule which allows both male and female children of the deceased to inherit equally from the properties of the deceased;⁴² or, the family head may choose to employ the *mother-head* rule which mostly applies under polygamous situations in which case property is divided according to each branch of the surviving wives of the deceased.⁴³ Where there are no surviving children however, upon the death of a man, his property will be inherited by the members of the family where the property

³⁷ *Dawodu v Danmole* (1958) 3 FSC 46; (1997) 4 NWLR (Pt. 498) 216.

³⁸ (1985) 3 NWLR Pt 13, 372, (1985) 12 SC 84

³⁹ (2001) FWLR (PT 73) 25 at 40

⁴⁰ That is, such a person had chosen his personal law to be his native law and custom.

⁴¹ See *Johnson v Macaulay* (1960) All NWLR 743. See also *Suberu v Sunmonu* (1957) 2FSC.

⁴² *Sule & Ors v Ajisegiri* (1937) 13 NLR 146, *Lewis v Bankole* (1960) NLR 82, *Salami v Salami* (1957) WRNLR 10. In this last case, a returnee daughter was held to have the right to partition the estate of her late father together with her brothers.

⁴³ *Taiwo v Lawari* (1961) ANLR 733. The Court also ruled that this custom of inheritance among the children and wives, otherwise known as *Igi Kankan* or *Idi-igi*'s not repugnant to natural justice, equity or good conscience.

originally came from. This practice is also discriminatory against widows as they are not entitled to the inheritance of their late husbands. A widow may only hold property in trust for her under-aged children if the sharing was done using the mother-head formula. Again, in dividing inheritance between the male and female children of the deceased, property received by female children is usually smaller when compared to the property of the males.

In the Igbo case of *Ugboma v Ibeneme*,⁴⁴ the Supreme Court held that a widow cannot take ownership of her late husband's estate or alienate it. According to the court,

...Female children are not entitled to inherit from their father's estate in Igbo land. If a man who is subject to Igbo customary law dies intestate without any male issue, his property will be inherited by his brothers to the exclusion of his female children⁴⁵

Again, in *Nezianya v Okagbue*,⁴⁶ the Court held in favour of the eldest male child who sold a land belonging to his late father to the exclusion of the female family members. Under the Onitsha customary law, a married woman upon the death of her husband without a male child, may, with the permission of her late husband's family, deal with the deceased's property but she cannot assume ownership of it or alienate it. She occupies the building or part of it subject to good behavior.⁴⁷ Clearly, daughters and wives are not contemplated in the sharing formula in south-eastern Nigeria. A daughter only has a right to be taken care of by the person who inherits her father's estate, that is, her brothers or uncles until she becomes financially stable, marries, or dies.⁴⁸ An unmarried daughter also has a right to be shown a portion of her father's land for annual farming needs until she marries or dies.⁴⁹

Remarkably, in the case of *Ukeje v Ukeje*,⁵⁰ upon the death intestate of one Lazarus Ogonnaya in December 1981, his wife and son obtained letters of administration to the exclusion of his daughter, for and over the his estate. The said daughter went to court to establish that she was a daughter to the deceased and should be included in the sharing of her late father's estate. The court of first instance as well as the court of appeal gave judgment upholding the reliefs sought by the daughter but the appellants

⁴⁴ Ibid.

⁴⁵ *Ugboma v Ibeneme* (1967) ANLR 257; (1967) ENLR 251

⁴⁶ (1963) All NLR 358.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ (2014) 11 NWLR (PT.1418) 384.

took the matter to the Supreme Court. The appeal was unanimously dismissed at the Supreme Court on the grounds that no matter the circumstances of the birth of a female child, she is entitled to an inheritance from her late father's estate. The court also stated that the Igbo customary law which disentitles a female child from participating in her deceased father's estate is in breach of section 42(1) and (2) of the constitution of the Federal Republic of Nigeria, 1999, a fundamental right provision guaranteed to every Nigerian. Despite this landmark decision, women (and children) are still being disinherited in practice by customs in south east Nigeria.⁵¹

Flowing from the overview of the concepts and the legal regime of intestate inheritance, this work will now shift focus to select theories that support a modern approach to inheritance in Nigeria. This is a way to lend support to already existing constitutional tenets over the subject matter of intestate inheritance in south east Nigeria.

An Appraisal of Modern Theories

This section identifies the theories of distributive justice and equity as modern theories that can be tied to inheritance. These theories will be appraised under this heading.

Distributive Justice Theory

The theory of distributive justice was founded on Rawl's theory of justice.⁵² The theory is a moral, philosophical and political ideal that seeks to reorder economic relations to achieve a just distribution of benefits.⁵³ Distributive justice aims to initiate and maintain a just distribution of benefits and burdens in the society.⁵⁴ Accordingly, to maintain justice in the society, benefits and burdens are distributed in a just manner,⁵⁵ which means that distributive justice is seen in the manner goods are distributed or allocated to members of the society.⁵⁶ In the context of organizational justice, distributive justice

⁵¹Especially over property situated in rural areas. In practice, such women are disinherited and when they revolt or go to court to seek justice, they are labelled bad and ostracized from the community.

⁵²J Mandle, 'Rawls's 'A Theory of Justice': An Introduction', Cambridge University Press (2009). *A Theory of Justice, by John Rawls, is widely regarded as the most important twentieth-century work of Anglo-American political philosophy. It transformed the field by offering a compelling alternative to the dominant utilitarian conception of social justice including the theory of just distribution.*

⁵³M Deutsch, 'Equity, Equality, and Need: What determines which value will be used as the basis of distributive justice?' (1975). *Journal of Social Issues*, 31, 137–149.

⁵⁴DR Forsyth, *Conflict in Forsyth*, (2006, 5th Edition, D. R., Group Dynamics Belmont: CA, Wadsworth, Cengage Learning) (P. 388 - 389)

⁵⁵Ibid.

⁵⁶RG Laczniak, PE Murphy, 'Distributive Justice: Pressing Questions, Emerging Directions, and the Promise of Rawlsian Analysis', 2008 *Journal of Macromarketing*, Vol. 28 Issue 1, p5–11, 7p, 1 diagram

is viewed as fairness associated with decisions and the distribution of resources.⁵⁷ The outcomes or resources distributed may be tangible such as payment or intangible such as praise. As such, the more equal outcomes are perceived, the more distributive justice is said to be applied.⁵⁸

Distributive justice also creates a bridge that links pasts that were characterized by inequality, racial segregation and marginalization to futures that are characterized by dignity, social justice and equal opportunity for all persons regardless of their race, gender and skin colour.⁵⁹ For instance, a study has shown that distributive justice affects performance of individuals.⁶⁰ Accordingly, when distribution is just, performance is enhanced within any organization.⁶¹ Where organizational actions and decisions are perceived as just in a work place for example, the employees are more likely to engage in high performance actions to improve that organization. However, where it is perceived that there is no just distribution, employees are more likely to withdraw from that organization.⁶²

Juxtaposing Distributive Justice and inheritance

Distributive justice is all about fairness in what people receive. The theory therefore provides a form of social order.⁶³ Social order in turn, fosters peace in any society. However, when people do not think that they are getting their fair share of something, they will seek first to gain what they believe they deserve,⁶⁴ by seeking 'other forms of justice'.⁶⁵ In trying to achieve this 'other form of justice', loss of lives and property may occur and the peace of the society may be drained.

⁵⁷ SE Phelps, *Distributive justice, The New Palgrave: A Dictionary of Economics*, (1987, vol. 1) pp. 886–888.

⁵⁸ Ibid.

⁵⁹ Transformative constitutionalism, substantive equality and the role of the courts: Lessons from South Africa and Zimbabwe, <<http://www.nylslawreview.com/wp-content/uploads/sites/16/2014/11/Moyo.pdf> > accessed October 4th, 2020.

⁶⁰ Y Cohen-Charash, and PE Spector, *The role of justice in organizations: A meta-analysis*. (Organizational Behavior and Human Decision Processes, 2001) 86, 278–321.

⁶¹ JH Karriker, and ML Williams (2009). 'Organizational Justice and Organizational Citizenship Behavior: A Mediated Multifoci Model', *Journal of Management* 35-112.

⁶² Ibid.

⁶³ By social order, I mean a state of peaceful co-existence, where everyone is assured that the fundamental principle of justice which is equality exists.

⁶⁴ By this, I mean justice- what is just is relative to what the initial agreement was between such persons and the organization.

⁶⁵ This may include trying to appeal to a higher authority and where they become frustrated because the higher authority fails, refuses or neglects to give them the desired attention, they may resort to violence or other illegal measures. A practical example is the case of the Niger Delta community indigenes of Nigeria who had to resort to violence because, for them, the government has not acted justly in the distribution of the resources of the state;

The Courts have always been on the part of just distribution of inheritance. In the Court of Appeal case of *Gah v Adinnu*⁶⁶, the Court's interpretation of section 36(1) of the 1999 Constitution of Nigeria (as amended) can be likened to an affirmation of the theory of distributive justice. In advocating for equal opportunities to be accorded to both parties, Denton-West JCA explained that section 36(1) of the Constitution meant that whatever ample opportunity was given to the gander to bite should also be given to the goose. According to the Court, equal treatment before the law is one of the most fundamental principles of Rule of law of any given society.⁶⁷ Also, in the case of *Olatunji v. Akingbasote & Ors*⁶⁸, the Court was clear in laying out the rules of succession to be the equal division of shares between the heirs of the deceased.⁶⁹

An appraisal of the distributive justice theory

This paper aligns with the theory of distributive justice because the theory ensures that social order is maintained in the equal distribution of property or privileges. However, the paper queries the place of intangible things such as morality and hard work in the social order sought to be maintained under the theory. Where for instance a person, male or female, fails, refuses or neglects to be productive or hardworking because he or she believes that an inheritance will be justly distributed in the future, will an equal distribution of inheritance between this redundant heir and another who is hardworking and productive be said to be fair? Will the fair distribution be measured by the output of individuals or by the feeling of entitlement of the parties? Is there a place for fairness on the part of the deceased to ensure that his estate or property is sustained by capable descendants?⁷⁰

Again, questioning the issue of equal satisfaction, the distributive justice theory as espoused by Rawls and other writers,⁷¹ are silent as to the degree of satisfaction in the circle of equal consideration and opportunities. Satisfaction in itself is relative and

they live in a depreciating environment while the government 'lavishes' the wealth flowing from the resources in the area on other parts of the country.

⁶⁶ (2003) LPELR- 22116 (CA). Per Denton-West, JCA, p 17, para. A-C.

⁶⁷ Ibid.

⁶⁸ (2015) LPELR-24275 (CA)

⁶⁹ Per Abiriyi JCA, pp 15-16, para A.

⁷⁰ By capable descendants, I mean beneficiaries who have the ability to reproduce whatever they receive as inheritance

⁷¹ Writers who expanded Rawl's theory like B. Jackson, 'The Conceptual History of Social Justice' (2005), *Political Studies Review* 3: 356–73; R. Nozick, *Anarchy, State, and Utopia* (1974) Oxford, UK and Cambridge, MA: Blackwell; D. D. Raphael, *Concepts of Justice*. Oxford: Oxford University Press (2003); and T. Christiano, *The Constitution of Equality: Democratic Authority and Its Limits* (2008), Oxford: Oxford University Press.

as it depends on the degree of hunger of each person.⁷² In the example painted above, where the expectation of party A is to step into an inheritance or possession for the mere purpose of satisfying his or her feelings of entitlement without more (probably not able to sustain such an inheritance not to mention improving on it) whereas party B if given a little over what he is entitled in the distribution formula, is able to sustain the entire estate for instance, what will then amount to a fair distribution?⁷³ It is the opinion of this article that to make a just distribution of inheritance, persons who have proven to sustain wealth in their everyday living should be entrusted with the responsibility of over-seeing a greater portion of the inheritance.⁷⁴

The above opinion accommodates the interest of the deceased who should be accorded the right to the maintenance of his or her legacy. Thus, justice in the distribution process would be to probe the integrity of the heirs to the inheritance in order to determine which persons are capable of sustaining the inheritance and would have as a matter of fact, inherited from such estate if the deceased had made a Will before his or her passing. This recalls one of the dictums of the revered Justice Oputa JSC who stated that justice is not a one-way traffic or even a two-way traffic,⁷⁵ but justice for the society at large.⁷⁶ While this dictum is not intended to veer off from the present discussion, the point to take away from it is that justice will have to be for all parties involved including the dead because it is a duty owed to the dead to ensure that their possessions are not squandered by persons who, even though heirs to the inheritance, are most likely to waste such property inherited either through mismanagement, carelessness or outright squander.

Therefore, this work seeks to adjust the distributive justice theory and propose the *capability-dependent* distributive justice theory over intestate succession. This is intended to distribute inheritance to each heir according to their capabilities.⁷⁷ To

⁷² 'Hunger' as used here depicts *burning expectation*.

⁷³ Emphasis by the writer.

⁷⁴ In Matthew 25 v. 14-15, the Bible narrates the parable of the man who gave out his talents to his servants according to the ability of each. This work therefore relies on this passage of the Bible to reiterate the importance of inheritance by capable descendants or persons while applying the theory of distributive justice. See Thomas Nelson, *The Bible* (2001) King James Version (KJV) 638.

⁷⁵ This is a paraphrase of Justice Oputa's dictum that *justice is not a one-way traffic. It is not justice for the appellant only. Justice is not even only a two-way traffic. It is really a three-way traffic- justice for the appellant (accused) of a heinous crime of murder; justice for the victim...; whose blood is crying out to heaven for vengeance and finally justice for the society at large- the society whose social norms and values had been desecrated and broken by the criminal act complained of*. See the case of *Godwin Josiah v the state* (1985), 1 NWLR, Pt. 11, p 125 at 141.

⁷⁶ *Ibid.* see also- Chukwudifu 'Socrates' Oputa (1918-2014), *The Nation Newspaper*, 23rd August, 2014 <thenationonline.net> accessed 23rd August, 2020.

⁷⁷ See Matthew 25 v. 15, n 115, *Ibid.*

achieve this *capability dependant distributive justice* in intestate inheritance, there has to be a codified legal framework around inheritance or succession that will enable the appointment of customary administrators of intestate estates. These administrators will be made up of persons of high moral standing and who are natives of the same community as the deceased owner of the intestate property. They will be tasked with looking inwards to accommodate all the beneficiaries of the inheritance (male and female) and in addition, to identify persons amongst the beneficiaries who are more likely to regenerate the inheritance. This means that every one of the beneficiaries will inherit but persons who have shown they can improve on the inheritance will be entrusted with more responsibilities over the inheritance. The holder(s) of the *capable inheritance* will be restricted from transferring the property by any means whatsoever. He or she will enjoy full proceeds of the *capable inheritance* without interference. He or she may choose to share such proceeds with anyone. Upon the death of the holder of the *capable inheritance*, responsibility for the property will be transferred to the most capable holder amongst the initial beneficiaries.

As part of the workability of this proposed theory, decisions of the administrators as regards the capable inheritance could be appealed at the customary court of appeal. This process will eliminate discriminatory inheritance as both men and women become active beneficiaries; ensure continuity over the legacy of the deceased because capable hands are entrusted with its maintenance; be easy to adapt because of its traditional undertone that allows fellow kinsmen to be administrators; and encourage hard work amongst beneficiaries because if the condition to receive more inheritance is hard work and productivity, healthy competition that will lead to better output will be sustained in the family and by extension, the society.

The Equity Theory

Equity as a term has a broad popular meaning and a narrow technical meaning.⁷⁸ Popularly, Equity is equivalent to natural justice or morality, yet this definition is not all exhaustive because most concepts that fall under natural justice are often left to the dictates of public opinion or to the conscience of each individual.⁷⁹ Equity is perhaps an attempt by the English legal system to meet a problem which confronted the legal systems in the eighteenth century. It has been described thus:

⁷⁸ RE Megarry and RV Baker, *Snell's Principles of Equity*, Twenty-seventh Edition, (1973) London Sweet and Maxwell Ltd, p5

⁷⁹ *Ibid.*

Equity is no part of the law, but a moral virtue, which qualifies, moderates and reforms the rigour, hardness and edge of the law, and is a universal truth; it does also assist the law where it is defective and weak in the Constitution (which is the life of the law) and defends the law from crafty evasions, delusions, and new subtitles, invented and contrived to evade and delude the common law...Equity therefore does not destroy the law, nor create it, but assists it.⁸⁰

Thus, attempting to define Equity would be to describe equity as a portion of natural justice.⁸¹ Historically, the position at common law was that during marriage, the wife's personality was merged with that of her husband and as such, she could not own property independent of him.⁸² Whether the wife acquired property before or after marriage, under common law, the husband had extensive rights over such property, including being entitled to rents and profits of such property.⁸³ The only exception was that the husband could not alienate his wife's real estate for an estate greater than his own without her concurrence.⁸⁴

Equity however brought some modifications to this common law. Firstly, on the principle that equity follows the law, equity protected the interest of the husband and sets aside a conveyance by the wife to a third party other than a purchaser without notice, if made within the existence of the marriage.⁸⁵ Secondly, equity gave the wife an entitlement that compels the husband to settle his wife and children with part of the property that he ordinarily would have been free to dispose of. Thirdly, equity invented the separate estate principle which allows the sole ownership and use of property by the wife who acquired the said property to the exclusion of the husband and his creditors.⁸⁶ The doctrine of Equity on separate estate was further reiterated in the Married Women's Property Act of 1882 and in 1935. Thus, a broader provision which

⁸⁰ Lee's Elements of Roman Law (4th Ed., 1956), pp 10,11; also, Buckland's equity in Roman Law (1911)

⁸¹ Ibid.

⁸² *Murray v Barlee* (1834) 3 My. & K. 209 at 220.

⁸³ *Cooper v Macdonald* 1877 7 Ch. D. 288; *Hope v Hope* (1892) 2 Ch. 336. Yin and Black make similar arguments for the case of the northern people of Ghana.

⁸⁴ This concurrence can either be a fine or deed acknowledgement. For details, see *Johnson v Clarke* (1908) 1 Ch. 303 at 313 *et seq.*

⁸⁵ *Countess of Strathmore v Bowes* (1789) 1 Ves. Jun. 22: 1 w. & T.L.C. 537

⁸⁶ *Bennet v Davis* (1725) 2 P. Wms. 316; *Parker v Brooke* (1804) 9 Ves. 583; *Newlands v Paynter* (1840) 4 My. & Cr. 408; *Wassell v Leggatt* (1896) 1 Ch. 554

allows married women and women generally to own property just like men was adopted.⁸⁷ The only exception was where there was alimony to be paid.⁸⁸

Equity as a theory proposes that a person's motivation is based on what he or she considers being fair when compared to others.⁸⁹ According to J. Stacey Adams,⁹⁰ motivation can be affected by an individual's perception of fair treatment in social exchanges.⁹¹ This means that people want to be compensated fairly for their contributions; they want their input to be equal to the outcomes of such inputs. Thus, a person's beliefs as to what is fair and what is unfair can affect their motivation, attitudes, and behaviors.⁹²

Juxtaposing Equity Theory and Inheritance

The practice of disinheriting some heirs while allowing some other heirs of the same parent to inherit goes against the equity theory. Unequitable inheritance affects the outputs, motivation, and contribution of those disinherited. To break it down, when people are disinherited, they are deprived of the raw material to start-up and sustain life. They become dependents at the whims and caprices of those who have inherited.

Stressing on the importance of equitable inheritance, the court of appeal in *Mojekwu v Mojekwu*,⁹³ held that:

Nigeria is an egalitarian society where civilized sociology does not discriminate... thus any form of social discrimination on the grounds of sex apart from being unconstitutional, is an antithesis to a society built on the tenants of democracy. The... custom which permits the son of the deceased person's brother to inherit his property to the exclusion of his

⁸⁷ *Rees v Hughes* (1946) KB 517.

⁸⁸ *Tickle v Tickle* (1945) 114 LJP 29

⁸⁹ B.F Redmond, Equity Theory: Equity Theory: Is what I get for my work fair compared to others? Work attitudes and motivation. The Pennsylvania State University World Campus, (2009) Lesson 5.

⁹⁰ J. S Adams' equity theory is of the view that pay and conditions alone do not determine motivation. It explains why that when one person is given a promotion or pay-rise, it can have a demotivating effect on others who were not given. Thus, "when people feel fairly or advantageously treated they are more likely to be motivated; when they feel unfairly treated they are highly prone to feelings of disaffection and demotivation." See S Adams equity theory, accessed on <<http://www.yourcoach.be/en/employee-motivation-theories/stacey-adams-equity-theory.php>>, accessed 29th January, 2020.

⁹¹ *Ibid*.

⁹² Equity Theory, Created by Brian Francis Redmond, last modified by Nicole Margaret Wood on Sep 25, 2016, accessed on < <https://wikispaces.psu.edu/display/PSYCH484/5.+Equity+Theory>> accessed 25th January, 2020.

⁹³ (1997) 7 NWLR (pt 512) 283.

female children is discriminatory and therefore inconsistent with the doctrine of equity.

Another dimension to the equity theory is drawn from Stacy Adams' propositions on the premise of fair treatment in social exchanges.⁹⁴ Relative to inheritance, therefore, equity should be applied to ensure that all the heirs inherit. As such, children born in and out of wedlock, wives, husbands, daughters and sons should be allowed to inherit as long as the deceased person acknowledged them while alive.⁹⁵ In *Mgbodu v Mgbodu*⁹⁶, the Court of appeal, deciding whether or not children born out of wedlock can be deprived of the inheritance of their late father, emphasized section 42(2) of the Constitution of the Federal Republic of Nigeria, 1999 to the effect that:

...no custom in Nigeria can deprive children born out of wedlock from sharing or inheriting their father's estate...No child came into the world by himself or herself so why should such a child be put at a disadvantage because of the conduct of a randy father and a promiscuous mother? It would be unconscionable therefore to disinherit such a child from partaking in the father's estate...Hence, the appellant is entitled to share equally with the respondent in the estate of their father, the late Gregory Mgbodu.⁹⁷

Again, in *Ukeje v Ukeje*,⁹⁸ the Court held *inter alia* that the native law and custom which deprives children born out of wedlock from sharing the benefit of their father's estate is conflicting with section 42(2) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

Appraisal of theories

Having identified the strengths and limitations of the theories, this paper aligns with the theory of distributive justice because the theory captures the equitable distribution of goods and attention (inheritance). The distributive justice theory also creates a bridge that links pasts characterized by inequality to a better and dignified future characterized by social and economic justice. It further enhances the performance of people within any organization. With the modification and application of the theory of

⁹⁴ J. S Adams, n 89, *ibid*.

⁹⁵ See the case of *Mgbodu v Mgbodu* (2018) LPELR-43770 (CA)

⁹⁶ (2018) LPELR 43770 (CA)

⁹⁷ Per Yakubu, JCA, pp 22-23, para 8.

⁹⁸ (2014) LPELR 227224 (SC)

distributive justice earlier proposed, fairness over intestacy will be achieved, and wealth will be regenerated.

Conclusion and Recommendations

This paper has demonstrated that the practice of disinheritance still persists in south east Nigeria despite court rulings against such practices. In a bid to propose a workable solution and lend advocacy to the stance of the bench, this paper has juxtaposed select theories with inheritance and further aligned with the theory of distributive justice. The writer believes that it is less cumbersome to change age-long traditions when a formula that is fair, practical, and traditional is applied over intestate inheritance. In addition to having human rights undertones, the distributive justice theory proposed in this work resonates with salient customary practices which will make it easier to assimilate the theory into existing customs. Since customary law is a mirror of accepted usage,⁹⁹ and forms the living law of the people, this paper believes that customs should undergo regular reviews such as the one proposed in this work so as to truly interpret the experiences of the people it is intended to gratify.

This research recommends the capability-dependent distributive justice theory. As earlier pointed out, heirs who have shown commitment, resilience, hard work and result in handling resources should be accorded the responsibility of overseeing a greater portion of the inheritance, and it should not matter whether they are male or female. Doing this eliminates discrimination because each descendant is accommodated in the sharing process. It also ensures that the estate of the deceased is sustained.

Customary intestate laws should move away from the practice of primogeniture, patriarchy and matriarchy to embrace a system that seeks to balance the scale for all parties in intestate situations. Infusing modern and international best practices into customary law will bring popularity and acceptability of customs from members of the society.

There is need for uniformity in the practice of customary law especially over intestate inheritance in south east Nigeria. Therefore, customary inheritance practices should be codified or restated so as to make for easy access and application.

⁹⁹ *Lewis v Bankole* (1908) 1NLR 81 @ 83.

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