

A Comparative Analysis of the Principles of Primogeniture Rule and its Position under International Human Rights Law: A Study of Nigeria, South Africa and United Kingdom

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Abstract

The work aims to analyze the principles of primogeniture rule and its position under international human rights law; studying cases in Nigeria, South Africa and United Kingdom. The research used a qualitative research design method which is deemed the ideal design to use within the qualitative methodology because of its ability to facilitate exploration of the phenomenon within its context, using a variety of secondary data. The study collected and analyzed non-numerical data (e.g., text, and video) which are all secondary. It is obvious that the primogeniture system has a negative standing in international human rights legislation. The study discovered that primogeniture rule is still significant and applicable in Nigeria, where it is recognized and applied. Customary law and statutes both directly and indirectly support its application. The work suggests a legal framework to be established to handle any failure to uphold the obligation of assistance and care.

Keywords: Inheritance, Primogeniture, International Human Rights, Customary Law, Statutes, Intestate Succession.

Word Count: 5506

INTRODUCTION

The primogeniture rule is a common practiced rule whose practice is not limited to African community, despite the universal conception that the rule is an African customary rule of succession. The laws of inheritance are vast spheres of law and their contents are made up of a myriad of customs, religious beliefs, ethics, societal practices and formal rules (Linde and Bodley 2012). This law is still used in today's era in some hereditary monarchies where is used to maintain undivided property. The customary aspect of these laws, although the foundation of some of the legal rules that make up these laws, are largely ignored and dominated by formal rules (Shaw, 2008) due to their incompatibility with contemporary laws and societal practices and their inconsistencies with human rights provisions, most especially, equality. The primogeniture rule is one of such custom whose existence, contemporaneity, legality and compatibility with human rights have been queried rigorously (Taiwo, 2011). There is consistency in the description of the nature of the primogeniture rule and that is the preference of the eldest child, most especially the male child, over other children in the course of devolution of property. One other coherent factor is the application of the rule strictly in a customary context, this however applies solely to African societies. In European countries, the rule was largely codified, for example, the Salic laws which were applicable in Western Europe forbade the devolution of monarchical titles and properties to women. Scholar believes that the rule was undoubtedly intended to preserve the family estate while establishing the regulation's basis. Furthermore, it was asserted that the rule's intent was to provide for family members other than the oldest son. In practice, the adverse effects of primogeniture on wives, daughters, and younger sons are counterbalanced by making provisions for them in the form of jointures, marriage portions, capital sums, or life annuities, as appropriate (Longstreth, 2013). It was confirmed that

primogeniture is the most reliable safeguard against the disintegration of patrimony and family.

Problems and Mis-conceptualization

The practice of the primogeniture is not limited to African societies. Its practice cuts across Western societies and even oriental Societies. Although the primogeniture is a customary law of succession in Nigeria, its practice is indirectly endorsed by various legislations. The justifications for the practice of the rule in African societies no more holds sway due to the westernization of these societies, thus making the rule irrelevant and inconsistent with ways of life the individuals it is meant to govern. In Africa, the judiciary is disinclined to set aside the rule by judging it based on Western standards. The primogeniture rule is inconsistent with international human rights instruments which encourage equality and prohibit unfair discrimination. Primogeniture is the most common inheritance rule used to maintain undivided property but has been criticized on the ground that it prohibits female children from inheriting. Many customary practices and laws are extinct not for lack of practice, but usually for their inability to co-exist with modern formal laws, both municipal and international. International human rights law as a sphere of law can be deemed as one of the extinctive factors which have rendered many of these customary practices obsolete. This is due to the peremptory norms of general international law give rise to obligations owed to the international community as a whole in which everyone has legal interest and rights. Primogeniture rule as part of the customary law of succession in various states is viewed in many ways. Many see it as a barbaric rule, the practice of which has no place in modern life while others see it as a cultural practice, the existence of which needs to be preserved in the face of the continual suppression of practices and customs which define the origin of indigenous people. Hence, this study aims to analyze the principles of primogeniture rule and its position under international human rights law: with a case study of Nigeria, South Africa and United Kingdom.

LITERATURE REVIEW

Conceptual Review

The principle of primogeniture rule in the following words: ... Inheritances shall fall indefinitely to the offspring of the person last really taken, but shall never climb indefinitely.... the male issue shall be admitted before the female ... where there are two or more males of equal degree, only the oldest shall inherit; but the females all together shall inherit. The lineal descendants, in infinitum, of any person deceased shall represent their ancestor; that is, shall stand in the same place as the person himself would have done, had he been living (Blackstone, 1969). In simpler terms, it means that sons will be preferred above daughters in the line of succession and where there are two or more sons, the eldest shall be preferred and should the eldest son die, his male issues shall be higher in line of succession; in the absence of male progeny, the daughters shall inherit equally. The rule is described as the right granted to an oldest son or, in certain cases, an eldest daughter by law or tradition to ascend to their ancestor's estate before younger offspring. According to this, the rule embraces all circumstances of single succession based on birth priority (Alessandro et al., 2014). To a scholar primogeniture is defined as an ancient rule from feudal England where the oldest son would inherit the entire estate of his parents (or nearest ancestor), and, if there was no male heir, the daughters would take (receive the property) in equal shares. The intent was to preserve large properties from being broken up into small holdings, which might weaken the power of nobles (Mills, 2019). The principle of primogeniture rule in the following words: ... Inheritances shall fall indefinitely to the offspring of the person last really taken, but shall never climb indefinitely.... the male issue shall be admitted before the female ... where there are two or more males in equal degree, the eldest only shall inherit; but the females all together. The lineal descendants, in infinitum, of any person deceased shall represent their ancestor; that is,

shall stand in the same place as the person himself would have done, had he been living (Sergio et al., 2020). In conclusion, the condition of being the oldest or firstborn child of the same parents. the right to receive the full fortune of one or both parents as the oldest child, particularly the eldest son. An old kind of inheritance where the firstborn son, often to the exclusion of all other children, receives the whole estate of his dead father. Primogeniture was instituted to prevent further subdivision of the estate (real property), whose possession symbolized authority.

Position of Primogeniture Rule under International Human Rights Law

The opposition of this rule mainly arises from its preference of the eldest child in the family against other members of the family. The rule is denounced in unequivocal terms in a statement that: Because it defies both natural law and paternal piety for the father to die intestate and the eldest son to succeed him as Lord Paramount of all his father's lands, free from any legal obligation to care for his siblings save as he sees fit. Due to an opinion the rule is fully inconsistent with human rights provision. The rule is seen as discriminatory and contrary to human right instruments which emphasize equality of all persons (Taiwo, 2011). International human rights law can be said to be opposed to the primogeniture rule because it contains elements of 'unwarranted preference' which is interpreted by many to mean inequality or unfair discrimination. Although, this preference may be justified, by virtue of the operation of the provisions of the bills of rights, the primogeniture rule is still at disadvantage under international human rights law.

Male-Preference Primogeniture and Agnatic-Cognatic Primogeniture

These two forms of primogeniture allow for female inheritance but they are different in the sense that the former allows for females to inherit when there are no living brothers or any descendants of deceased brothers while the latter allows for female inheritance only upon the total extinction of all male lines in the family ranging from nuclear male relatives to collateral relatives such as

uncles and great-uncles. The chances of this happening seem very low but it is not an impossibility. For example, where a deceased with only female children is an only child, born of a father who is an only child himself, his eldest female child shall have a legitimate claim to the entirety of his estate.

Rationale behind the Primogeniture Rule

At first glance, the importance attached to the eldest child by virtue of the stipulations of the primogeniture rule might seem unappealing, discriminatory and inconsiderate of the interests of the other children in the family. However, historically, this rule of inheritance was not established in order to relegate any member of the family to the background; it developed in Medieval Europe during the period of feudalism (landed aristocracy) in order to ensure that real property remained in the family and stayed indivisible and it developed in the African societies as a direct consequence of the communalism of the societies. It was a means to ensure the continual existence of the family and community, although in most cases, it has been manipulated to accommodate the greed and selfishness of the apparent heir (Nhlapo, 1991). In the case of *Du Plessis v. De Klerk* (Corcos, 2012), Mokgoro recognized this when he commented that customary law has been lamentably marginalized, and allowed to degenerate into a vitrified set of norms alienated from its roots in the community (Madaus, 2019). Building on this, it is important to point out that the aforementioned justifications for the development of primogeniture are no longer of contemporary relevance because the days of landed aristocracy are long gone and what is present now is the industrial and technological age and the indigenous practice of communalism is being replaced with individual ownership and smaller nuclear family units. However, these have, by no means, totally eradicated the applicability of the rule in the world today and other justifications have been laid down to defend the continual existence of the rule.

Primogeniture Rule and the Nigerian Laws of Succession

It is a notable fact that succession, generally, is a kinship institution and kinship could be either matrilineal or patrilineal; it stands as a natural dominant pattern in family organization in any society (Kingsley, 1981). However, natural as practice of succession may seem, it nevertheless creates a troublesome social environment as a source of conflicts. This is based on the fact that no scheme of division has ever done full justice to all parties concerned and on the problem which arises when the various laws which provide for succession conflict with each other. The concept of 'legal pluralism' (Merry, 1988) exists in Nigeria; this is because Nigeria's legal system consists of received English laws, common law (Garner, 2004), statutory laws and customary law. The pluralism of Nigeria's legal system owes its existence to Nigeria's colonial heritage; Nigeria was a British colony before it gained its independence in 1960. After the independence, virtually all the implemented laws and policies of the British colonialists got imported into Nigeria's legal system.

Empirical Review

The first child, usually the first son, inherits the whole family estate under the principle of primogeniture. Partition, or an equal-sharing rule, is an alternative to primogeniture, although other flexible arrangements are also possible. Unigeniture, which may take the form of ultimogeniture when the intended heir is the youngest child, is a variation of primogeniture. For ancient Mesopotamia and imperial India, as well as other early civilizations, there is evidence of the practice of primogeniture. 107 Primogeniture first appeared in Europe in the thirteenth century as a response to population pressure and land fragmentation, and it continued to develop into the eighteenth century despite variations in regional rules and real traditions. It was most prevalent among the feudal nobles, whose legal system of entails, which prevented alienation and hence

required the firstborn to pass the estate to the following generation's firstborn, governed the succession of land. 108 Younger boys were often excluded with financial compensation as part of the deal, while dowries were given to girls. Primogeniture had become prevalent in England and Scandinavia by the sixteenth century. Primogeniture predominated in the South and Walloon regions of France, whereas partition predominated in the West (however, even where the law did not allow entails, in actual practice the first son was still privileged). To limit the influence of the nobility in Russia, the tsars' absolutist policies enforced division. In Germany, division was the norm throughout the Middle Ages, although primogeniture later gained traction. Castile used a similar strategy. Trade-oriented Italy in the fourteenth century accepted division, but entails and primogeniture were introduced during the Spanish era and expanded when the nation's economy shifted to one based mostly on agriculture. In Africa, 67% of the population resides in rural regions, compared to 33% who live in urban areas. According to estimates, 30% of people in sub-Saharan Africa live in cities, while 70% reside in rural regions (Mehdi *et al* 2019). It is consequently remarkable that the Protocol to the African Charter, which predates the Protocol to CEDAW, does not take into account this crucial component given that the majority of gender-based violence and discrimination seem to take place in rural areas. When the Protocol to the African Charter's provisions is combined with the CEDAW's worldwide framework, this omission may be closed.

METHODOLOGY

Research Design

The study opted for a qualitative approach. This study design is recommended for use in qualitative research because it allows for investigation of the phenomena in its natural habitat by drawing on a wide range of secondary sources of information. In order to better comprehend ideas, viewpoints, or experiences, qualitative researchers gather and examine information that cannot be reduced to

numbers (such as text, video, or audio). Participant observation and case studies are two examples of qualitative research methodologies that provide a narrative, descriptive account of a location or activity that may be utilized to get in-depth insights into an issue or spark new research ideas (Bhandari, 2022). Positive sociology is rejected by interpretative sociologists who use these approaches (Parkinson and Drislane, 2011).

Description of the Research instrument

The study's data came from a variety of secondary sources. Information that has previously been made public, such as that which appears in print media such as books, newspapers, magazines, journals, and online resources, is known as secondary data. These resources for business studies provide a plethora of data applicable to every area of study. Using the appropriate criteria while selecting the secondary data to be included in the study is vital for boosting the validity and reliability of the research. Date of publishing, author's qualifications, reliability of source, degree of debate, depth of analysis, and impact on the development of the discipline are all important considerations. Secondary data collection is covered more thoroughly in the Literature Review chapter. Saving money, time, and energy are just a few of the many advantages of using secondary data collection techniques. However, they do have a major negative that should not be ignored. In particular, secondary research does not provide new (original) data to the existing body of literature.

Data Collection

An extensive literature search was conducted as part of the study project. The library and the internet were gold mines of information. Books, journals, conference papers, articles, magazines, newspapers, and the internet were consulted for both published and unpublished data.

Data Analysis

The outcomes of the investigation were dissected using the content analysis technique. To determine the prevalence of certain terms, themes, or concepts in qualitative data, researchers use a method called content analysis (i.e., text). Content analysis allows researchers to quantify and analyze the frequency, relevance, and linkages of such key words, themes, or concepts (Elo *et al*, 2014). As an example, researchers may analyze a news article's wording for signs of bias. Scholars may draw inferences about the text's contents, author(s), intended audience, and even the text's cultural and historical context. The use of content analysis has the following advantages:

- It directly explores text-based communication.
- Both quantitative and qualitative analysis is possible.
- Throughout time offers insightful historical and cultural information.
- Enables proximity to the data.
- The text may be statistically examined in its coded form.
- Unobtrusive methods of interaction analysis.

RESULTS AND DISCUSSION OF FINDINGS

Controversies in the Practice of the Primogeniture Rule in Nigeria

The concept of 'legal pluralism' exists in Nigeria; this is because Nigeria's legal system consists of received English laws, common law, statutory laws and customary law (Garner, 2004). The pluralism of Nigeria's legal system owes its existence to Nigeria's colonial heritage; Nigeria was a British colony before it gained its independence in 1960. After the independence, virtually all

the implemented laws and policies of the British colonialists got imported into Nigeria's legal system. Generally, in practice, the source of law which would apply in the devolution of the estate of a deceased depends largely on the type of marriage contracted during his lifetime and whether or not he dies intestate or testate. Where he contracts a statutory marriage, statutory laws shall apply in the devolution of property; where he contracts a customary marriage, customary laws shall apply same as Islamic marriage (Uchechi, 2020). It is however important to point out that other issues such as domicile, legitimacy, *lex situs*, and double-deck marriage usually arise, thereby, resulting in conflict of laws (Onakah, 2012).

Statutory Laws of Succession

Succession under statutes could be testate or intestate. The main legislations governing testate succession are the *Wills Act of 1837* (a statute of general application) and the *Wills Law* of various states while the legislation for intestate succession is the *Administration of Estate Laws* of various states.

Testate Succession

As the name suggests, testate succession is succession based on a will or other testamentary disposition. A testator with competent decision-making capacity creates a will, which is a testamentary and revocable instrument in which he disposes of his property subject to any legal restrictions (Onoshioke, 2021). Generally, since the dictates of a will is founded upon the voluntary wishes of the deceased, he need not succumb to other laws, customs and beliefs; this is based on the principles of testamentary freedom. The Wills Act of 1837 contains this notion and grants testators the freedom to freely dispose of their property to anyone they like, even if they chose to ignore their family members and dependents and donate all of their property to strangers.

Intestate Succession

When a person dies intestate, he dies without leaving behind any form of testament as disposition of his estate. The intestacy laws in Nigeria are not consistent. When a subject of statutory law passes away intestate, local enactments governing the administration of estates take precedence over customary law. In the absence of any local legislation, applicable English common law rules.

Customary Laws of Succession

Under customary law, the rules of succession are not uniform. The causes of this situation are not implausible. In Nigeria, there are several ethnic groupings, each with unique traits, even within a broader ethnic categorization. In certain regions of Nigeria, as among the Yoruba-speaking ethnic groups in the southwest, succession is based on the idea of family property, but among the Bini people in the current Edo State in the middle of Nigeria, the idea of male succession predominates with little changes. It is to be noted that the rule of primogeniture does not necessarily exist within all ethnic groups. For instance, the *Yorubas*, *Igalas*, *Itsekiri* and *Agbors* do not practice the primogeniture customary rule of succession (Onokah, 2012).

Kalabari Customary Law of Succession

Under this custom, intestate succession depends upon which of the two kinds of customary-marriage was celebrated by the deceased during his lifetime and the two kinds are the big marriage symbol (*iya*) and the small marriage symbol (*igwa*). Where he contracts the ‘*iya*’, upon his death intestate, a variation of the agnatic form of primogeniture applies. His estate devolves on his sons in gradation, that is, the eldest son receives the largest share while the youngest son receives the smallest share irrespective of the legitimacy of the sons (Nwogugu, 2014). If the deceased is not survived by any sons, his brothers of full blood inherit (Linder and Bodley, 2012).

Practice of Primogeniture Rule in South African

The South African law of succession governs the distribution of an individual's inheritance upon death and the ancillary issues that arise. It establishes who will get what from the dead person's estate, and how much of it they will receive, as well as the various responsibilities and rights that other parties (such as beneficiaries and creditors) have with respect to that estate (Kooffreh and Kooffreh, 2018). If the deceased person had a valid will or other legal document containing testamentary provisions, such as an antenuptial contract, then its terms would govern the distribution of assets. If the deceased person did not leave a valid will or other document having testamentary provisions, or if the will did not distribute all of the decedent's assets, then intestacy will arise. If a person dies without a will, their property will be distributed to their heirs in accordance with the Intestate Succession Act.

Practice of Primogeniture Rule in United Kingdom

The primogeniture rule is historically significant to the laws of succession of the United Kingdom. It forms a large part of the law which governs the succession to its monarchical thrones. Although the rule was historically applicable in the intestate devolution of real property during the feudalistic period, it is of no significance today as its applicability in this aspect was abolished in the year 1926 upon the enactment of the *Administration of Estate Act of 1925*. Prior to the enactment of this Act and *Statute of Wills of 1540*, a will could only control the devolution of personal property and all real property passed to the eldest male son by operation of the law and in the absence of a will, all property devolved solely on the first son by operation of the law (Laurence, 1878). The rules that govern intestacy are now provided for in the *Administration of Estate Act* and the *Inheritance (Provision for Family Dependents) Act 1975*.

Primogeniture and Feudalism

During the Middle Ages, Europe was mostly an agricultural economy dominated by a feudal elite centered on land. This agricultural foundation of European political order may be traced back to the establishment of feudalism at the turn of the first millennium. Feudalism was comprised of the following arrangements (Bertocchi, 2006). First and foremost, feudal lords were handed revenue from large estates by monarchs in exchange for military service and local administration of justice. The indivisibility of estates was critical to generating adequate revenue and was enforced by a legal system. The form of maintenance expenditures changed with time, but they remained relatively high. Initially, military expenditures predominated, but the costs of running a court and maintaining a high quality of life for prestige purposes grew more significant later on.

Primogeniture and Succession to the British Throne

In the United Kingdom, the monarchy is passed down via families. When a king dies or abdicates, the next in line to the throne is determined by the order of succession under a hereditary monarchy. When a monarch's position becomes vacant, the rules established by law or custom that determine the line of succession are used to determine which member of the monarch's immediate family or other eligible individual has the highest claim to the throne. There are many factors that go into deciding who will succeed to the British monarchy, including bloodline, gender (for those born before October 2011), legitimacy, and religion. Generally speaking, the Crown passes to the sovereign's offspring or, in the event of childlessness, the next closest collateral heir. The Bill of Rights (1689) and the Act of Settlement (1701) both supported the male-preference system of primogeniture until the Succession to the Crown Act of 2013 was passed. It ensured that only male agnates could ascend to the throne. Electress Sophia of Hanover and the "heirs of her body" were given the right to succeed to the throne of England in the Act of Settlement 1701, with "heirs of

her body" being interpreted as implying male-preference primogeniture under English common law (Corcos, 2012).

Discussion of Findings

This study underlines the practice of the primogeniture rule in Nigeria, South Africa and the United Kingdom. It also examines the position this rule of succession under the International Human Rights Law as well as the inconsistencies of the primogeniture rule with International Human Rights Instruments. The study also finds the opposition and compromise of the primogeniture rule and lastly analyzes the implications of replacement of the customary law of succession with the international law of succession. The practice of primogeniture rule in Nigeria is being studied in three ethnic groups in this study. That is, the Igbo, Bini and Kalabari ethnic groups. In the Igbo ethnicity, the customary law of succession is patrilineal whereby the oldest son takes over as the family patriarch and also the assets and properties left behind by his deceased father or ancestors. However, land is inherited by all the sons of the deceased as the land is termed to be a "family property". The eldest son as the new head of the family is only a caretaker. When a deceased is not survived by a male heir or child, the agnatic form of primogeniture applies, in that the deceased property can be inherited by his surviving brothers of full blood. However, where a deceased is survived by only daughters, the agnatic-cognatic form of primogeniture may apply to allow the daughters to inherit only movable properties. In South Africa law of succession, if the deceased has a valid will or any legal documents prior to the distribution of properties, then its terms will govern the distribution of assets. However, if the deceased dies without a will or if the will does not contain all the deceased assets, then intestacy will arise. The property or assets will be distributed to their heirs in accordance with the *Intestate Succession Act*. In 1994, the Law of Intestate Succession was regulated on racial basis. The rule of primogeniture applied only to the

‘Black’ population of South Africa which is categorized into the Testate succession and Intestate succession and analyzed in this study. The rule of primogeniture in the United Kingdom is examined prior to the enactment of the Administrative of Estate Act of 1925 and Statute of Wills of 1540, a will could only determine the devolution of personal property and all real property passed to the eldest son by operation of the law and even in the absence of a will. The *Administration of Estate Act and the Inheritance (provision for family dependents) Acts 1975* provides the rules that govern intestacy. This study also finds that the customary law of succession does not conform with the International Human Rights Law. As a matter of fact, they conflict with one another. The rule of primogeniture is a customary rule and inconsistent with human rights norms of equality and freedom from discrimination. The customary law and human rights law, though may both be recognized as laws by the law, but both have fundamentally different beliefs and therefore cannot get along. Customary laws have its characteristics, and has its foundation in ethnicity and traditions. Many of these aspects go against basic human rights.

Conclusion

Based on the study, it is clear that the rule of primogeniture occupies a negative position under international human rights law. Since the rule of primogeniture is founded upon the preference of the eldest male child to the female child and other siblings and; the eldest female child to the male child and other siblings in the matrilineal form of primogeniture, it is going against everything the human rights instruments stand for. The time has come to remove elements of age and gender discrimination from the law and to provide the deceased's immediate family with more secure rights. There are fears that such changes will result in the destruction of African culture. This so-called conflict between culture and equality is greatly exaggerated. Indeed, changing inheritance laws to ensure equality of women will merely bring them into step with changes that have already

taken place in African society. As we have already seen, "the 'lived' customary law is very different from the formal recorded rules. Under the stewardship of Parliament, the formal rules can be changed to reflect the reality. The recognition and applicability of the primogeniture rule in Nigeria is still significant and relevant. Its application is not only endorsed by customary law, it is also indirectly endorsed by statutes. Although the rule is constantly challenged judicially on the grounds of unfair discrimination, the court is usually reluctant to set aside the rule. This is because it has been established time and again, that the rule is not bad nor discriminatory in itself; it creates in the sole heir the responsibility and duty of support and care of the other members of the family. It is only when the sole heir errs with regard to this duty and unjustly enriches himself from the progenitor's estate that the court sets aside the rule on grounds of unfair discrimination.

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