Chapter One

Introduction

1.1 Background to the Study

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[1]. 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 due to their incompatibility with contemporary laws and societal practices and their inconsistencies with human rights provisions, most especially, equality[2]. The primogeniture rule is one of such custom whose existence, contemporaneity, legality and compatibility with human rights have been queried rigorously[3].

Etymologically, the word 'primogeniture' is of Latin origin; it is a fusion of two words: 'primo' and 'genitura' and it means first born or first birth. This rule of succession and inheritance is largely evidenced in the customary laws of succession of a number of African countries such as Nigeria as seen in her Oli-ekpe practice, Igiogbe practice, South-Africa as seen in Section 23 of the Black Administration Act; Swaziland customary law of succession[4]. It also forms a large part of customary law of succession of some European countries, for example, the ascension laws of the Russian, British and Swedish monarchical systems[5,6]. The existence and practice of the rule may be best described as endangered as most Western countries have abolished its practice. Its existence in other countries where it is being currently practiced is critically opposed by some who believe in the universality of human rights on one hand[7]. On the other

hand, culture enthusiasts who are of the belief that African cultures and customs are being threatened by the effects of rapid socio-economic transformation processes and by the invasion of foreign models and mass cultural products summarily support this custom[8].

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.

The rules of inheritance and succession form the genetic code of a society. They dictate the ways properties of a deceased devolve to living persons. Devolution of property is not by choice but an act of necessity as it ensures the continuance of certain familial affairs, the care of the minority in the family such as children and disabled persons and the safekeeping of items of sentimental value such as heirlooms. These rules differ from one society to another. This difference is not exactly strict, because, upon a close scrutiny, one may be able toidentify elements of similarities among the rules that govern devolution in various societies. One of these commonalities is the value put on kinship, which is based on the recognition of ancestral relationships that arise through having children and conceiving them[9]. People may identify their interest in a family member's wealth, lay a legal claim to some of it, and have their rights to such claims recognised depending on how they are connected to the progenitor (the biological parent). Another is the hierarchy of birth taken into account. Virtually all societies place a modicum of importance on the order of birth of the living persons who are in line to inherit the properties of a deceased, especially where the deceased dies intestate. There are various rules which support this line of thought and some of them include ultimogeniture,

secundogeniture, primogeniture and agnatic seniority[10,11]. The most common of these is the rule of primogeniture whose practice cuts across Western societies, African societies and even Oriental societies. Although this rule is, *strictusensu,* no longer applicable in the devolution of real properties in the Western societies, the rule is still eminent in the transfer of titles and offices. The rule, however, still holds sway in the devolution of property and transfer of titles and offices in African and Oriental societies[12].

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 practise, 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[13]. It was confirmed that primogeniture is the most reliable safeguard against the disintegration of patrimony and family.

The rule's proponent claims that by protecting affluent families' estates throughout time, the rule's continuation helped them consolidate their power and money, which in turn had a significant impact on the social and political life of the nation[14]. When a landowner passes away intestate, the usual norm of customary law is that his self-acquired property passes to his offspring as family property[15]. The deceased's oldest male child, who lives in the family home and retains it as a trustee for the other children, whether they are male or female, is the head of the family. In other areas, the regulation is, nevertheless, different.

The primogeniture law stipulates that the oldest son should take care of younger children and have the right to sell the family home regardless of the views of the other children; the deceased's property may solely revert to the eldest son in certain communities[16]. The law of ultimogeniture, which states that inheritance is given to the youngest son and excludes other heirs of the dead

landowner, is in place among the Markis group of the Verbe in Northern Nigeria. Primogeniture is a norm that is obviously unjust to the younger family members, and as a result, it violates natural justice, equality, and morality. However, it has been suggested that the system is in line with native beliefs, notably the oldest son's position as the "family father" who has a duty to the children under the law. It has also been noted that primogeniture or ultimogeniture is "likely to provide a solution to the issue of fragmentation in land tenure," which has hampered extensive agricultural and economic growth.

Nearly as many variants exist in Nigerian customary law's inheritance and succession practices as there are ethnic groups in the nation, and many of these variances are discriminatory in actuality. The laws governing inheritance and succession in Nigeria are diverse. The traditional canon of descent was used by indigenous customary law to create the rules of inheritance for intestacy. These laws were then modified through time to account for social developments and the rule of natural justice as it was administered by the courts. Thankfully, non-profit groups are actively working to address the issues with prejudice. Moreover, the United States Charter declares its belief in "basic human rights, in the dignity and value of the human person, in the equal rights of men and women and of nation great and small" at the outset of its first chapter. In truth, Article 1, paragraph 3 of the United Nations states that one of its missions is to advance and encourage respect for human rights and basic freedoms for all people without discrimination based on, among other things, sex. While Article 76(c) urges respect for human rights and basic freedoms for everyone without discrimination on the basis of race, sex, or other factors, Article 13 Paragraph 1(b) has a comparable obligation. Despite not being a treaty, the Universal Declaration has evolved through time into a cornerstone of Customary International Law that applies to all governments, not only those who are United Nations members. The Universal Declaration of Human Rights, which lays out the guiding principles and standards for ensuring

respect for the right of man everywhere in the world, provides a reliable definition of human rights.

Matrilineal societies may be found in many different forms among the tribes of South-East Asian nations like China (Mosuo), Indonesia (Minagkabau), the Maldives, Ghana (Akan), Kenya (Umoja), etc. as well as among certain groups in India (Khasi). The Minangkabau people of West Sumatra are said to be the world's biggest matrilineal civilization. Kerala, Laksha Dweep, and Meghalaya in India still have tiny populations that adhere to the matrilineal social structure. A tiny state called Meghalaya may be found in north-eastern India. The 2011 Census recorded the state having a total population of 29,64,007 people, 86% of whom are tribal and 70% of whom practice Christianity. It is a state where the majority of people use the matrilineal system.

Son preference is a well-known feature among patrilineal societies, particularly in India. Studies have also shown instances of infanticide and female foeticide in a few areas of the nation because of the demand for sons. The country's dropping sex ratio, or reduction in the proportion of women to men, is more evidence of a strong son preference. A research based on the Provisional Census Data from 2001 stated a small portion of the nation's districts have been labelled as DEMARU, or "daughter eliminating male aspiring rage for ultrasound"[17]. On the basis of the 0–6 years' sex ratio. However, it doesn't seem that sex preference has been well researched in matrilineal societies. Therefore, nothing is known about children's sex preferences in matrilineal tribal communities[18].

In Meghalaya's Jaintia community, a female child's birth is celebrated with tremendous enthusiasm. It may not be overstating things to suggest that parents are often happy when they get a female kid for the obvious reason of knowing that the family and the clan will continue to exist. Nevertheless, it seems that both male and female children are raised equally[19]. Parents in Jaintia community provide their daughters the due attention in terms of their health and

education[20]. Similar to this, a research asserts that Meghalaya's matrilineal cultures value their female offspring in particular and treat them better as a result. Since children inherit their mother's lineage but not their father's, girls are the ones who start families and clans. Further, Meghalaya's Khasi matrilineal tribal women have a significant desire for daughters [20]. Therefore, it may be claimed that in Meghalaya's matrilineal tribal communities, daughters are preferred. However, a survey carried out in West Sumatra discovered that, except in the rural Matriarchat Center region, respondents in the matrilineal Minangkabau population preferred "more males than girls"[21]. Thus, it seems that there is some room for debate on fertility choice in matrilineal communities across the globe.

The idea of male primogeniture underlies the succession to rank in the majority of African tribes[22]. This idea may be stated as follows: A Native American's inheritance passes to his eldest son or the oldest male descendant of his eldest son upon his death. The next son or his oldest male descendant and so on through the sons, inheritance if the eldest son has passed away without leaving any male offspring[23]. Due to the norm of primogeniture, women and girls are not allowed to inherit property or accede to positions of power under African customary law.

Intestate succession in African customary law has historically been recognized to discriminate against women. South Africa, Ghana, and Swaziland have all passed laws as a method of easing some of the challenges experienced by African women in this area in an effort to address this issue. Ghana passed the Intestate Succession Law, 19851, and South Africa passed the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009[24]. Constitutions, on the other hand, often place a strong emphasis on the rights of the person and protect certain human rights for individuals, such as the right to life, human dignity, equality, and freedom from discrimination. The constitutions of South Africa, Ghana, and Swaziland all reflect this. However, the Constitution of South Africa is special in that it provides for a group's freedom to

exercise its culture. Minority communities have the right to enjoy their culture under the 1966 International Covenant on Civil and Political Rights (ICCPR). The 1948 Universal Declaration of Human Rights (UDHR) also stipulates that a group has the right to cherish its culture[25].

Despite the principle of male primogeniture, a woman was acknowledged as the traditional leader of the Valoyi in the South African case Shilubana v. Nwamitwa and Others. Due to the community's constitutionally protected freedom to develop its own customary law, the court found that her appointment by the community's traditional authority was valid. In contrast to western law, African customary law is adaptable and evolves through time to meet the needs of traditional cultures and the challenges they face. In demonstrating how community-driven reform may be an effective strategy for reconciling gender equality and customary law, Shilubana demonstrates how living law interacts with the supreme law of the Constitution[26]. Initiating change from within the community will increase the likelihood that the revised customary law norms and/or practices are accepted by the community at large and are effectively implemented within the relevant customary communities. That's a good start that might help women's intestate succession rights go forward. Women themselves may be able to significantly influence their own situations. They should educate themselves on their status in society, as well as their rights and responsibilities[27].

By teaching African males in particular about the beneficial role that women play in traditional societies, negative misconceptions about women may be dissipated. Women must understand that culture and tradition may change in order to unite and analyse long-standing instances of injustice and gender discrimination as well as to call these practises into question[28,29]. To clarify, the purpose of the law of primogeniture was to protect the extended family's structure and stability, and eventually the community as a whole. Numerous purposes were served by this, not the least of which was to maintain compliance within the clan or extended family. Every person

in the community had a responsibility to fulfil, and each responsibility was designed to further the wellbeing of the whole. Not only did the successor take over the deceased's property, but also his or her obligations. Property was held in common ownership, and the family head, who had legal possession of it, administered it for the benefit of the entire family[30].

The successor assumed the role of the family head, acquiring all of the rights and being liable for all of the duties. The family members under the deceased's custody were now under the guardianship of the deceased's successor. The successor also acquired the obligation to care for and assist all of the family members who benefitted from his maintenance and support and were assured of his safety. He merely succeeded to the deceased's property in the sense that he took control of and managed it while abiding by his duties and rights as the head of the household. The traditional customary law states that only a male may fulfil a successor's duties. However, customary groups that insist on using the primogeniture system when choosing a successor ignore the reality that women's roles in traditional African civilizations have undergone a significant shift. Women are no longer remaining at home as a result of modernization and industrialization; instead, they are actively participating in the economy[31].

Though saddening, it is clear that the extinction of the rule of primogeniture is imminent, thus creating a dearth in the substance of customary law. The reality is that primogeniture can and does cause severe hardship for women married under indigenous law and persons who are subject to customary laws of succession. Not only does it inhibit the right to testamentary freedom, it disinherits widows whom, equitably, deserve a share of their deceased spouse's estate due to their substantial contribution to the growth of the family estate. Like other societies, the African society is continually evolving and changing. The social context now is different from the pre-colonial and colonial times. Africans need to abandon the ideology that the total assumption of norms of human rights would result in the total eradication of customary

law and westernization of African communities. It is ridiculous to associate negativity with human rights. These are rights which provide for and guarantee the best possible life for any human. In a bid to elucidate the dilemma which encompasses this rule, this study shall delve into what comprises the primogeniture rule, the reasons behind its practice, its position within contemporary legal system and the reason for its inclination towards opposition and compromise. This study aims to provide an abridged, apt and contemporary analysis of the primogeniture rule[32].

1.2 Statement of the Problem

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[33]. 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 owned to the international community as a whole in

which everyone have legal interest and rights[34].

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. This opens up a discourse in which the nature and background of the primogeniture rule shall be examined, so also the rationale behind the rule, its position at the international human rights platform and its inconsistencies, if any, with contemporary laws and international human rights laws. The study seeks to the concept of the primogeniture rule and its position under international human rights law.

1.3 Aim and Objectives of the Study

The aim of this study is an analysis of the principles of primogeniture rule and its position under international human rights law: a case study of Nigeria, South Africa and United Kingdom. The objectives of the study were to:

i. examine the practice of the primogeniture rule in Nigeria, South Africa and the United Kingdom.

ii. unveil the position of the primogeniture rule in international human rights law.

iii. expose the inconsistencies of the primogeniture rule with international human rights instruments.

iv. find the opposition and compromise of primogeniture rule.

v. find the implications of replacement of customary law of succession with international law of succession.

1. 4 Research Questions

The following research questions were raised to guide the study:

i. How did the practice of the primogeniture rule affect Nigeria, South Africa and the United Kingdom?

ii. Does primogeniture rule have a position in international human rights law?

iii. What are the inconsistencies of the primogeniture rule with international human rights instruments?

iv. What is the opposition and compromise of primogeniture rule?

v. Are there any implications of replacement of customary law of succession with international law of succession?

1.5 Significance of the Study

This study aims to contribute to existing literature on the primogeniture rule and to educate readers. This study will be of immense benefit to students of succession law and international human rights law.

This study will bring out the negative positions of primogeniture rule under the international human rights law and everything the human rights instruments stand for.

The study findings will contribute to the body of knowledge by determining opposition and compromise of primogeniture rule and that if addressed appropriately could lead to the betterment of the society.

This study is a relevant source of knowledge for researchers and policy makers dealing with succession law and international human rights law.

1.6 Scope of the Study

Succession, inheritance and international human rights are wide and complex fields of study. For the sake of brevity and accuracy, this study shall only encompass the customary law of primogeniture rule. It shall provide information on the nature, types, background and relevance of this rule. In establishing a historical and legal background and also a legal framework, this study shall include an inquiry into the practice of the primogeniture rule in the Nigerian, South African and United Kingdom jurisprudence.

In the Nigeria jurisprudence the communities of the Igbo, Bini and Kalabari would be studied. In South Africa, *section 23 of the Black Administration Act* will be used to analyze this study and in the United Kingdom, the concept of feudalism and monarchical system in the succession to the British throne will be analyzed for further understanding to the study. This study shall also look into the position of this rule at international human rights law while inquiring into relevant international human rights conventions in order to bring to limelight any inconsistency or incompatibility the primogeniture rule might have with them.

1.7 Limitation of the Study

Every research thesis has constraints and this thesis is no exception. The researcher's main was its reliance on secondary data. Recent works from secondary data on this area of research were not feasibly enough. Hence, the inability to gather a lot of recent information from secondary data.

1.8 Operational Definition of Terms

Customary Law: A collection of traditions that are regarded as binding by community members is known as customary law. The norms that make up customary law are those that derive from a widespread practise that is regarded as legal and that does not rely on treaty law. Law is what

codifies societal norms, customs, and guidelines for conduct. It is also a law made up of behaviours and ideas that are so fundamental and integral to a social and economic system that they are recognised as laws or established as legal requirements or mandatory standards of conduct.

Human Rights: All people, regardless of whether they are at peace or at war, have certain rights and protections under the law that the state must respect. Human rights are a set of principles with the goal of safeguarding all individuals against significant violations of their rights in the political, legal, and social spheres.

Inheritance: This is the property a person acquires by a bequest or devise, or property they inherit from an ancestor under the rules of intestacy. It is something passed down from an ancestor to the next person or generation. It could be money, property, or assets that someone receives from an ancestor or deceased parents. It can also be called succession. The devolution of property on an heir or heirs upon the death of the owner.

International Human Rights Instruments: These are several international agreements, such as treaties, that pertain to the protection of human rights under international law. The international human rights treaties are the authoritative expressions of such norms. A state's legal obligations under these treaties cannot be waived by another state. Each of these documents has its own committee of experts whose job it is to ensure that the treaty terms are being followed by the states that have signed up to them.

Primogeniture: This refers to the position of being the oldest sibling or the common-law right of the eldest son to inherit his grandfather's property, frequently to the detriment of his younger siblings. Primogeniture is a common law rule of succession that gives an advantage to a person because of their gender or birth order. Succession is the acquisition of rights or property under

the rules of descent and distribution, or the act or right of legally or formally succeeding to a position, rank, or obligations formerly held by another.

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Chapter Two

Literature Review

2.1 Conceptual Review

2.1.1 Concept of Primogeniture Rule

Primogeniture is defined as an ancient rule from feudal England where the eldest son inherits his parents' (or closest ancestor's) full wealth and, if no male heir, the females take (get the land) in equal portions. The intent was to preserve larger properties from being broken up into small holdings, which might weaken the power of nobles[1].

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 anyperson deceased shall represent their ancestor; that is, shall stand in the same place as the person himself would have done, had he been living[2].

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[3].

It was described as a customary law of intestate succession which prefers males and whose application victimizes many women, particularly when a family's communal estate devolves upon a distant family member of the deceased, and this heir does not adhere to his customary law responsibility of maintenance which is a corollary of the primogeniture rule. Also, primogeniture is defined as the rule which permits only male issues to inherit the property of a person who dies intestate[4]. The hierarchy of devolution places the eldest son as the foremost beneficiary and at the death of the eldest son, the eldest son's eldest male descendent shall be the sole heir. If the eldest son has no male issue, the next son shall be the sole heir or the next son's eldest male descendent in the incident of his death and this goes on through the sons to the exclusion of the female progeny[5].

The common law norm under which all real estate (immovable possessions) vested in the intestate flows to the heir, i.e., the oldest male child, is the rule under African customary law, which has been compared to this[6]. The law of primogeniture is more clearly described as follows: Under English law, the oldest son succeeded to everything, to the exclusion of the younger children and even of the widow, if a man passed away intestate, that is, without making any plans for the succession of his real property. If there were no males, the girls received an equal share of the real estate[7].

The distinction between the law and the custom of primogeniture was made by the nature of primogeniture, as stated. In addition, the terms "eldest son" and "heir-at-law" were defined. The former is the practise of transferring land to an eldest son born of an anticipated marriage to a living person in such a way that, should the son survive his father, it will be impossible to

prevent the son from inheriting the property, and the latter is the rule that states that, upon an individual's intestate death, all of his real estate passes to his eldest son or heir-at-law[8].

Male-line primogeniture is another name for the primogeniture system, which was formerly common in European countries and other places up to the early 20th century. Variations were proposed to provide a daughter or a brother, or, in the lack of either, to another collateral cousin, in a certain sequence, in the absence of male-line children (e.g., male-preference primogeniture, Salic primogeniture, semi-Salic primogeniture). The conventional sole-beneficiary privilege has been modified (such as French appanage) or, in the West following World War II, the preference for men over women has been eliminated (absolute male-preference primogeniture). Most monarchies in Western Europe have eliminated this, in succession: Belgium, Denmark, Luxembourg, Netherlands, Norway, Sweden and the United Kingdom. Primogeniture (/ˌpraɪm-ə-/ *also*/-oʊ-ˈdʒɛnɪtʃər/) is the presumption that the firstborn legitimate child has the right, by law or tradition, to inherit the whole of the parent's wealth, as opposed to a divided inheritance amongst all or some children, any illegitimate offspring, or any collateral relatives. The majority of the time, it refers to the firstborn son's inheritance (agnatic primogeniture)[9]. Nevertheless, it may also refer to the firstborn daughter's inheritance (matrilineal primogeniture).

The first son inherits the whole family estate under the principle of primogeniture. Primogeniture began to take hold in Europe in the thirteenth century and continued to grow until the nineteenth. When land was the main source of income and it was most prevalent among the feudal elite. In England, Scandinavia, and portions of France, Germany, Spain, and Italy, it was prevalent. Outside of Europe, Japan and the southern American colonies embraced it, but sub-Saharan Africa and the Islamic world continued to practise division. Primogeniture was abolished during the French Revolution, and the majority of European nations did the same throughout the

nineteenth century. Nowadays, equitable distribution is the rule. Primogeniture is often explained by the indivisibility of property due to growing returns to scale, according to one popular hypothesis. Reasons for the latter to arise may be found in the realms of politics, economics, and anthropology[10].

To a scholar primogeniture is defined as an ancient rule from feudal England where the oldest son wouldinherit 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[11].

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 anyperson deceased shall represent their ancestor; that is, shall stand in the same place as the person himself would have done, had he been living[12].

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 was defined as the prerogative enjoyed by an eldest son or occasionally an eldest daughter, through law or custom, to succeed to their ancestor's inheritance in preference to younger children. He opines that the rule encompasses all cases of single succession depending upon priority of birth[13]. It was also described as a customary law of intestate succession which prefers males and whose application victimizes many women, particularly when a family's communal estate devolves upon a distant family member of the

deceased, and this heir does not adhere to his customary law responsibility of maintenance which is a corollary of the primogeniture rule[4].

Primogeniture was described as the rule which permits only male issues to inherit the property of a person who dies intestate. The hierarchy of devolution places the eldest son as the foremost beneficiary and at the death of the eldest son, the eldest son's eldest male descendent shall be the sole heir. If the eldest son has no male issue, the next son shall be the sole heir or the next son's eldest male descendent in the incident of his death and this goes on through the sons[12] to the exclusion of the female progeny[7].

The norm is analogous to the common law system under which all realty (immovable possessions) held in the intestate transfers to the heir, that is, the oldest male child, in African customary law. The law of primogeniture is more clearly described as follows: Under English law, the oldest son succeeded to everything, to the exclusion of the younger children and even of the widow, if a man passed away intestate, that is, without making any plans for the succession of his real property. If there were no males, the girls received an equal share of the real estate[14]. In describing the nature of primogeniture, there a bit difference between the custom and law of primogeniture. If a person dies without a will, his or her oldest son or next of kin is automatically awarded all of the property. To encumber land on the oldest son born of an expected marriage to a living person in such a manner that he cannot be disinherited should he outlive his father is considered a custom.

It is believed that the rule was undoubtedly developed to preserve the family estate while establishing the regulation's basis. Furthermore, the rule's intention is to provide for family members other than the oldest son. In practise, the detrimental effects of primogeniture on wives, daughters, and younger sons are offset by making provisions for them in the form of jointures, marriage portions, capital sums, and/or life annuities, as appropriate. Primogeniture

was once thought to be the surest defence against the dissolution of patrimony and family. It was claimed in defence of the rule that its continued application helped affluent families consolidate their wealth and influence by safeguarding their estates over time, and that this in turn had a significant impact on the nation's social and political life[15].

Primogeniture, which translates to "first born" in Latin, refers to the privilege of being born first among many children who share the same parents. Male primogeniture is the term used to describe the common law inheritance system where the eldest male child is given the right to inherit or succeed to an ancestor's wealth. All female siblings, younger male siblings, and other family members are not included in this right of succession[16,17].

Primogeniture has also been used to refer to the scenario under African customary law where the oldest son inherits his father's inheritance, regardless of whether the family is monogamous or polygynous. As previously mentioned, in a polygynous marriage in South Africa, the oldest son of each house succeeds to the husband's moveable goods after death. The son, who is the oldest of the family, inherits the property of that particular home as well as responsibility for the upkeep and care of the widow and any minor children. Primogeniture will be used in this study to refer to the traditional African law and practise where the eldest son inherits property. The use of the male primogeniture rule guarantees that the family's assets are not split and lost. Instead, it protects the assets for any unmarried daughters, younger sons, and widows. Thus, the heir's upkeep and support, as well as his protection, will be for the benefit of the dead person's family members[18]. Primogeniture always occurs in the male line; this is the fundamental goal of this rule. When there are no male descendants of the dead, attention shifts to the male ascendants. According to seniority, these ascendants will be taken into account.

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 symbolised authority.

2.1.2 Concept of Succession

The term "success" refers to a live individual taking ownership of a deceased person's property. It also refers to the legal process of transferring to the people who succeed a dead person, such as his heirs, the rights and obligations of that person with regard to his estate, office, and dignity. The term "inherit" refers to receiving (property) from a deceased ancestor or other person in accordance with the rules of intestate succession[19].

The court ruled in Bolori v. Gonimi & Anor that inheriting meant receiving. Inheritance is defined as property acquired from an ancestor by bequest or devise in an African Customary Laws dictionary. There isn't actually a significant distinction between succession and inheritance. Succession is distinct from inheritance because the latter includes the transfer of land title by will as well as the ascension to office and dignity, whereas the former refers to an estate or property that a man acquired by descent and can be transmitted to his heir in the same manner upon his death due to intestacy. It is difficult to use the term "succession" without also referring to its twin notion, "inheritance," since in succession and inheritance circumstances, property is transferred to the descendant(s). In this essay, the terms succession and inheritance will be used synonymously to refer to property acquired from an ancestor since the two ideas overlap[20].

As a general rule, a person's possessions and property do not pass away with him when he passes away. Whether or whether such possessions or property were obtained in accordance with statute law or tradition, the deceased's property is distributed to his or her heirs in line with his or her personal law, which is the law that applied while they were alive[21].

2.1.3 Origin of the Primogeniture Rule

The origin of the primogeniture rule is very sketchy. This is due to the fact that it is an ancient rule and its practice was spread across virtually all primitive societies ranging from the Aryan societies, the Medieval European culture to the primitive African societies. With regards tothe origin of primogeniture in medieval Europe, the idea that it is a creation of feudalism isthe most plausible as the practical application of the rule cannot be evidentially traced to any time before the feudalistic period. The origin of the rule in African societies is, however, almost unascertainable due to the lack of texts documenting the practices of those societies before the advent of colonialism[22].

The most accepted idea with regards to the origin of primogeniture in European society is the idea that it is a creation of the feudalistic system. In an opinion, primogeniture is essentially a feudal institution. He claims its origins are lost in antiquity that it exists only in nations that are known to have accepted the feudal system, and that it has been largely abandoned by countries that have experienced a comprehensive de-feudalizing process[23].

The practice of the Origin of Primogeniture in Medieval Europe originated under feudalism as a response to the bourgeois revolutions in England and France, which aimed to create a newly established socioeconomic group to pave the way for democratic capitalism to triumph over agricultural elitism (feudalism)[24]. This is stated as follows: It was deemed preferable for land to descend undivided to one during the time when it was supposed to be the means—not only of subsistence—but also of power and protection. A landed estate's safety... hinged on how impressive it was. Its division would have been its demise, exposing every area to oppression and being engulfed by the intrusions of its neighbours.

The idea that primogeniture was a consequence of feudalism, was, however vigorously opposed

in a comment that: It seems that some people believe that a hazy explanation involving feudalism adequately explains how primogeniture came to be. Maybe we've lost some of our judgement because we're so used to following this rule. Nothing shocks us now since we're used to our 19th century legislation being a mishmash of every era, and any explanation which may be made for existing institutions is recognised as adequate[25]. Feudalism is a good word, and will cover a multitude of ignorance. Proposition was made that the rule originated from the Aryan laws and laws relating to the land tenures of lower Bengal[26]. While executing the proposition a difficulty was encountered in proving this as there was no evidence of the rule in the annals of the early Aryan societies.

2.1.4 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 familyas 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[27]. The rule was deemed to be partly inconsistent with bills of right. One commenter said that the continuation of men via men is incompatible with the statute against unfair gender discrimination. If the succession is to a position that can only be held by one individual, such the headship of a tribe, whose position does not need the legal guardianship of others and does not deny others equitable treatment in the division of assets, primogeniture does not discriminate unjustly[28].

In addressing the position of culture and customs at international law, indirectly addresses the position of the rule at international human rights law. This opines that the protection of cultural

rights and indigenous practices and customs is less developed when compared with human rights because they are perceived to be less important than cultural rights and where there is a conflict between a cultural practice and a human right, international law instruments addresses the tension in favour of internationally proclaimed human rights[29]. The effect of this is that should any custom be inconsistent with any provisioncontained in the international bills of right, such custom will be deemed null and void at international law.

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 a disadvantage under international human rights law.

2.1.5 Nature of Primogeniture Rule

The oldest son would receive the whole of an intestate's real estate under the mediaeval system of inheritance known as primogeniture, which is defined as the principle, tradition, or law that provides that the property or title passes to the eldest son or eldest child[30]. Firstborn boys are legally or customarily entitled to inherit their parents' whole or substantial assets, as well as any previous daughters, older illegitimate sons, younger sons, and collateral relations. Due to the right of substitution for the deceased heir, the son of an older brother who has passed away inherits before a younger brother who is still alive. Brothers inherit separately depending on age seniority when there are no offspring (subject to substitution)[31].

In determining the nature of primogeniture, certain deductions may be made from the above definitions. First is the distinction between the law of primogeniture and the custom of primogeniture. The former is the rule under English law that states that when a person dies

intestate, his entire estate passes to his eldest son or heir-at-law in accordance with the canons of descent, and the latter is the practise of entailing land to the eldest son born of the anticipated marriage of some living person, in such a way that it would be impossible to prevent the son from succeeding to the inheritance should the father die before the son[7].

Second, is the use of terms: 'paternally acknowledged', 'feudal' and 'child' as opposed to 'son'. The use of these terms creates the impression that primogeniture also encompasses the exclusive right of inheritance of the eldest child irrespective of the gender as opposed to the general interpretation that it refers to the exclusive right of inheritance of the eldest son alone. It may also be deduced that legitimacy is an essential factor in invoking the rule of primogeniture in establishing a right to inherit. Moreover, the use of the term 'feudal' is of historical significance. It suggests a long history and creates the deduction that primogeniture is a creation of feudalism.

The practice and application of this rule, on the face of it, might seem rigid, but now, in most societies, especially African societies, the rule is characterized with indigenousness, that is, it operates solely as a customary law of succession and it is usually at the discretion a family unit if it wants to apply the rule in the distribution of estate or be subject to the relevant Administration of Estate Laws. There are also instances where certain stipulations of therule are manipulated to accommodate particular situations, for example, the appointment of a female regent (in a monarchical system where succession to the throne is determined by agnatic primogeniture) where the heir apparent is too young or incapacitated and the setting aside of the rule where it is established that it is not in the best interest[7].

2.1.6 Types of Primogeniture Rule

Primogeniture has always meant male primogeniture alone. Ancient Norman custom, a parent's firstborn son had the sole right to inherit his entire estate, title, and/or office, and it was his

responsibility to distribute the inheritance among his siblings. If there were no surviving children, the inheritance would go to the first male ancestor in each collateral line. To settle an inheritance in a manner analogous to a depth-first search, the eligible descendants of a dead sibling's older siblings are given priority over those of the deceased sibling's live younger siblings[32]. Now, there are variations to this rule, therefore, debunking the general idea that it strictly means the exclusive right of the eldest male child to inheritance. The matrilineal variation allows for the exclusive right of inheritance eldest female child. The agnatic-cogntic variation allows for the inheritance of females in order of seniority upon the total extinction of all male descendants. The various types of primogeniture are explained below;

- **Absolute Primogeniture**

Absolute primogeniture, also known as equal or lineal primogeniture or *'ainesseintergrale'* which means integral primogeniture or full cognatic primogeniture, is the giving of absolute preference along with the firstborn and representational principles, gives preference to the direct descending line over the collateral and ascending line, the closest degree takes priority over the more distant degree, and, within the same degree, the older over the younger. In simplified words, it is the eldest surviving kid inheriting without taking gender into consideration, or a kind of primogeniture where sex is unimportant for inheritance[7].

In a monarchy, the law states that the oldest child of the sovereign automatically succeeds to the throne, and that females (and their descendants) have the same right of succession as men. No contemporary monarchy, however, used this method of primogeniture before to 1980.

- **Agnatic Primogeniture**

Agnatic primogeniture, also known as patrilineal primogeniture, is the inheritance system where sons and their male offspring inherit before brothers and their issue, according to the seniority of

birth among the sons of a monarch (in the event of a monarchy) or head of family. Inheritance could thus only be tracked via the male line, completely excluding females[33]. It is often known as the "Salic law". It is the variation of primogeniture which dictates that only men could inherit, that elder sons inherited before younger ones and that sons of the monarch inherited before brothers and brothers before cousins. Kinship (of males and females) is determined by tracing through only male ancestors to commonality: Those who share agnatic kinship are termed agnates.

Agnatic primogeniture dates back to early France and it developed in the course of a series of successions in the later Middle Ages. It was the most common law used in England, at least until the sixteenth century, though it was never as ubiquitous as in France where on a few occasions the king was succeeded by a distant male-line cousin, even when the deceased king had surviving daughters or sisters who had male children. In terms of inheritance of real property, the tenets of the Salic law provided that: …but of Salic land no portion of the inheritance shall come to a woman: but the whole inheritance of the land shall come to the male sex'[33].

This form of primogeniture is commonly practiced in Africa. An example is the Eastern Nigerian customary rule of inheritance known as '*Oli-ekpe'* which totally excludes woman from the line of inheritance.

- **Agnatic-Cognatic Primogeniture**

Agnatic-Cognatic primogeniture, also known as 'semi-Salic law' is a type of primogeniture which stipulates that all male descendants are first considered in the line of inheritance or succession, including all collateral male lines; but if all agnates become extinct, then the closest heiress (such as a daughter, niece or female cousin) of the last male holder of the property shall be considered, and after her, her own male heirs according to the agnatic primogeniture rule. In other words, the female closest to the last incumbent is regarded as a male for the purposes of

inheritance or succession. In simpler terms, it includes women in the line of inheritance only upon the total extinction of all the male descendants in the male line. Kinship, under this variation, is calculated patrilineally, through males back to a common ancestor, though the agnate may be male or female[5].

There are variations to this type of primogeniture. Sometimes, the female with the closest consanguity or proximity of blood to the last heir is preferred or preference is determined according to seniority, that is, the eldest female child. This was the practice in Bourbon Spain until 1833 and some parts of Austria-Hungary, as well as most realms within the former Holy Roman Empire, that is, most German monarchies. This was also the law of Russia under the Pauline Laws of 1797. This was also the law of Luxembourg until absolute primogeniture was introduced on 20 June 2011[30].

- **Male-preference Primogeniture**

Male-preference primogeniture, also known as, male-preference cognatic primogeniture is a type of primogeniture which allows female members to succeed or inherit in the absence of any living brothers or legitimate descendants of deceased brothers. Eligibility for inheritance is determined in accordance to seniority of birth, that is, the eldest daughter and her progenies are considered before the younger daughters. Under this type, the distinction between 'heir apparent' and 'heir presumptive' is emphasized. An heir apparent is an heir which cannot be displaced except by ways of his own death or the express order of the main character, under this form of primogeniture, an heir apparent may only be a male character[34]. An heir presumptive, on the other hand, is an heir which can be displaced by another person who is closer to the main character. A female child with no brothers, under this variation, is regarded as an heir presumptive because her position as an heiress is not set in stone and will be extinguished upon the birth of a male child; that male child will assume the position of heir apparent.

2.1.7 Difference between 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.

- **Uterine Primogeniture**

Uterine primogeniture stipulates that succession or inheritance to property is passed to the male most closely related to the deceased through female kinship. In addition, a man may get a succession right from a female spouse or ancestor, to the exclusion of any female relatives who may be older or closer in blood. Therefore, under a monarchical system, a king would normally be replaced by his sister's son as succession relies on uterine connection.

Similarly, to the Picts of Northern Britain and the Etruscans of Italy, whose royal thrones were passed down via this specific line of succession[35]. Africa is home to a number of kingdoms and people groups who observe this custom. Sons and daughters of a sister are his kinfolk (mater semper certaest), even if they do not have the same father, which may explain why this term is used in this context.

- **Matrilineal Primogeniture**

Matrilineal primogeniture, also known as female-preference uterine primogeniture, is a kind of

primogeniture that certain civilizations practise, in which the oldest female child inherits only from females[36]. The succession is a prime example of matrilineal primogeniture in African culture, where only women are allowed to inherit and dynastic ancestry is tracked via the female line.

But as time went on, cultures all across the world shifted towards a more patriarchal framework, and today, that model still predominates in most communities throughout the world. However, matriarchal cultures do still exist, and in these places women serve as the primary political, economic, and social decision-makers. Below are the examples[36]:

- ***Akan, Ghana***

The matriclan is the cornerstone of Akan social order. Identity, lineage, riches, and political standing are all settled inside the matriclan. True to their name, matriclans are not female entrepreneur types. It is important to note, however, that males do occupy positions of authority within the Akan Matriclan.

Among the Chinese people, only the Mosuo women still practise matriarchy. The Independent, there are perhaps 40,000 of them, and they adhere to Tibetan Buddhism. Women have a crucial role in establishing family history and continuity. Additionally, this civilization is matrilineal, whereby property is transferred only within a given family's female line. Women among the Mosuo also seldom wed. Even if they do choose to have a partner, the mother is responsible for the majority of child care.

- ***Bribri, Costa Rica***

According to some estimates, between 12,000 and 35,000 individuals call the BriBri people their home. Mothers have a vital role in passing land along to their offspring in this culture. Due to their elevated status, women are the only ones entrusted with making the holy cacao drink used in religious ceremonies.

- ***Umoja, Kenya***

True No Man's Land, the Umoja tribe has no male members. Women who have been victims of sexual or gender-based abuse call this community home. Umoja, which means "unity" in Swahili, is the name of a community that was established back in 1990. Women and children's main sources of income come from giving tours of their hamlet to visitors and spreading awareness about human rights issues.

- ***Minangkabau, Indonesia***

In 2017, the Minangkabau people were a member of the world's biggest surviving matriarchal culture, consisting of around four million individuals. The mother is seen as paramount in this culture. Domestic life is dominated by women. Also, in the Minangkabau culture, married couples may have separate living spaces, but not bathrooms.

- ***Khasi, India***

In 2011, the population of this matriarchal community was estimated at one million. Mothers and mothers-in-law are the only adults permitted to care for children, and males are not even welcome at family gatherings, as reported by The Guardian. Women of the Khasi tribe take their husband's surname when they marry, rather than his.

2.1.8 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[31]. 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. In the case of *Du Plessis v. De Klerk*, Mokgoro recognised this when he commented that customary law has been lamentably marginalised, and allowed to degenerate into a vitrified set of norms alienated from its roots in the community[37].

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[38].

- ***Dynastic Stability***

In many civilizations with monarchical systems of governance, male leadership or inheritance was and is preferred above female leadership or inheritance in order to maintain some stability in the monarchical system. It was and still is believed that males are more able than women to lead in both the physical and intellectual realms. Since they could surround themselves with (male) counsellors and other people who could steer them in the right direction, society did not view the men's lack of intellectual accomplishments as a barrier. Men historically receive military training and better education than women in many cultures. Even if they did not necessarily receive more education than the women in their families[39].

A ruler did not think he required daughters or other female successors to manage a nation, transmit his throne to the next generation, and maintain his dynasty. He did think that in order to uphold his rights as he saw them, he required male successors, especially sons. He might get the females he may someday need by marrying his sons to ladies from other nations' royal households. Ironically, this rationale of stability never truly achieved its goal since the ladies who eventually became the sons' spouses had to come from someplace, and often these young women generated political and dynastic, if not social, turmoil, not only at court but also via improperly drafted marriage contracts by their parents or attorneys, for example, offspring of the union would demand rights to the thrones and kingdoms from which these princesses had originated[40]. Even though these princesses did relinquish any dynastic claims to the thrones of their families, their ambitious husbands or successors may very easily revive these claims for political or other reasons, as did Edward III of England.

- ***Trust***

The primogeniture rule was never established for the purpose of the unjust enrichment of a single member of the family. The estate which devolves to the sole heir is not for his personal enjoyment nor does he necessarily hold the estate in a personal capacity; the estate is for the benefit of all family members who falls under his care[41]. This is in accordance with the English law of trust. Simply defined, trust is a three-party fiduciary relationship in which the first party, the trustor or settlor, transfers or settles a property upon a second party known as the trustee for the benefit of the third party known as the beneficiary[42].

- ***Creation of the Duty of Support and Care***

Every right has a corresponding duty and with the exclusive right of inheritances comes the corresponding duty to support and care for the other members of the family. This duty of support and care is in furtherance of the trust relationship the primogeniture rule creates

between the sole heir and the members of the family. By virtue of this trust relationship, the heir is vested with the important duty of ensuring that all members of the family duly benefit from the intestate estate. This duty of care and support, as an immutable part of the primogeniture, is judicially recognised[43]. In the Nigerian case of *Ogamien v. Ogamien*, the court upheld the application of the custom of male-preference primogeniture when it was established to the satisfaction of the court that the custom imposed responsibility on the eldestson to look after the young members of the family. It is also challenging to equate this form of differentiation between men and women with the concept of unfair discrimination, as the court in the South African case of Mtembu v. Letsela held that the duty to provide sustenance, maintenance, and shelter is a necessary corollary of the system of primogeniture[31].

The sole heir is strictly bound by this duty of care and support to the extent that where he fail to perform his duties, the members of the family have a *locus standi* to judicially compel him to perform his duties. In addition to this, the family members may also seek a court order to disinherit the eldest male child and have the right of inheritance transferred to another male child in the family. In the Zimbabwean case of *Masango v. Masango,* the court refused to grant an order to evict the heir's late father's wife and children because the heir did not provide alternative accommodation for them. Also, in *Matombo v. Matombo*[44]. A Zimbabweancase, the court approved a deviation in which the most senior male was bypassed and the majority of the deceased's property was given to a junior male on the grounds that if the most senior male child had received all of the property, he might not handle it in the best interest of all other family members.

- ***Maintenance of the Structure and Stability of the Extended Family Unit***

The maintenance and protection of the family unit was the main goal of the customary rule of primogeniture in African communities. It was clarified that the rule came into existence in order

to guarantee the survival of the family or group. It is clear that bias towards certain members of the society could not have been the law of male primogeniture's main objective. Ubuntu states that the person and the community are, after all, two sides of the same coin which forms the basis of indigenous law[45]. The idea that an individual's wellbeing is intrinsically tied to the welfare of the group or family, which is related to a peaceful connection with the ancestors and with nature, captures the core of "ubuntu." The balance and welfare of society are guaranteed by the wellbeing of all community members. The group or family as a whole cannot be seen as an entity apart from its individual members.

Despite the replacement of communal living with smaller family units, the idea of communalism in African societies has not been completely eradicated and there are still a lot of African tribes out there who regard as alien, the concept of individual ownership. In order to keep alive the idea of communalism, the properties and status of a deceased is not ripped apart and given to various persons but is vested wholly in single heir who holds in trust and oversee the communal enjoyment of that property by all members of the family, group or community[46].

2.1.9 Historical Development of the Primogeniture Rule

Inheritance as a fundamental institution has existed since before the Roman era. Rules of succession were important when individual ownership took the role of family ownership, disconnecting the family's rights and duties to property. Primogeniture required that all of a parent's land immediately pass to the eldest son during the middle Ages, century's afterwards[47]. Primogeniture as a law of succession for real property does not seem to have been widely embraced by families until relatively recently, according to what can be deduced from pertinent history texts. However, there is no clear evidence of when or how this happened.

When determining the origin of a rule, historians more often than not state "where it was not" and the civilizations to which it was foreign. Statements like "The Romans did not know it and it

also remained rare among Islamic cultures" or, in the case of England, "We may infer with as much certainty as is possible in studies of this sort, that primogeniture is fundamentally a feudal institution," are typical. It cannot be linked to a period before feudalism[48]. A lot has to be done in order to fully understand the origins of primogeniture as well as other facets of this social phenomenon and its impacts, according to the caution that characterises such comments.

However, it is generally agreed upon that in England, the introduction of primogeniture was not only contemporaneous with the Norman invasion but also inextricably linked to the feudal structure that arose in its wake. In reality, over the two centuries after the Conquest, primogeniture gradually extended across England at the expense of the Saxon system of inheritance based on the law of gavelkind or partibility, under which sons of the same parents were entitled to more or less equal parts of the property[48].

Although its application was favoured as early as the 12th century through the numerous contests between brothers claiming by proximity of blood and their nephews claiming by representation, the rule does not appear to have been firmly established in England until the reign of Henry III and it applied primarily to the transfer of landed property. Not only did the eldest son inherit the family farm, but there were also numerous traditions in England that followed a similar pattern when it came to the distribution of other types of "principals" or "heirlooms," such as the family's favourite bed, the finest piece of furniture, the family's horse and cart, and so on. In reality, the law of primogeniture was followed when it was decided that the royal jewels should be passed down to the oldest son[49]. In certain areas of Germany, as well as in France (where it was known as "le préciput"), it was common practise to provide special privileges at birth to the firstborn son or child. The home, some furnishings, and "as much land as a chicken could fly" were all left to the oldest son or firstborn child.

The origin of primogeniture is, in fact, not limited to medieval Europe, historians have traced it

as far back as to the Aryan periods, establishing that the principles of primogeniture are closely connected to the early Aryan institutions which are still surviving in practice among the Hindus today. The reasoning for this is based on the idea that a system of family religion that was common among the tribes from whom the Aryan countries have originated may have been the long-lost ancestor of all the aforementioned ancient types of primogeniture[50]. Manu's Laws states that the oldest son's whole existence is dedicated to carrying out the rituals of the family religion, baking the funeral cake, and preparing the repasts for the souls of the departed ancestors. The one who entered the earth first has the privilege of reciting the prayers aloud. It is expected that a guy would hold his older sibling in the same esteem as his own father. The father pays off his obligation to his own ancestors at the time of the oldest son's birth, therefore the eldest son should have full control of the family's assets before any divisions are made[51]. The origin of the custom primogeniture within African societies remains unknown for want of written texts, annals or laws chronicling the developments of laws of inheritance. It has been, however, established that the custom emerged as a means of ensuring the continuous existence of the community and family.

After extensive research, only the origin of the practice of primogeniture among the Bini tribe of West Africa was ascertainable. It is established that the origin lies in the tradition of ancestral worship. The *'Igiogbe'* was believed to be a shrine for serving and communicating with the ancestors. It also served as the dwelling place of the patriarch of the family. The patriarch of the family was the representative of the family who communicated with the ancestors on behalf of the family members. Upon the death and burial of the patriarch, the eldest son assumes the role of representative and communicator and he takes sole ownership of a wooden staff (*'ukhure'*) which serves as a symbol of the role which the eldest child has assumed. This wooden staff is to be installed in the *'igiogbe'*[52].

Since the eldest son takes sole ownership of the wooden staff, he automatically takes sole ownership of the dwelling place of his deceased father. This is because the dwelling place of the deceased father is the *'igiogbe',* which in turn, is the wooden staff's abode. Thus, the sole exclusive right of the eldest son to inherit his father's real property was not for the purpose of the enrichment of the legatee but for the purpose of carrying on the family tradition. This custom is judicially recognised by Nigerian courts and while the ritual of ancestral worship is no longer paramount among the *Bini* people, an overwhelming majority of whom today are Christians, the inheritance rules that require the automatic devolution of the *Igiogbe* to the eldest son endure[53].

2.1.10 Primogeniture as determinant of Succession

In hereditary monarchs, primogeniture was often used to determine the order of succession. Primogeniture with a male predilection was more typical in the past. Cognatic primogeniture refers to a system wherein all boys are guaranteed to succeed to the throne before any daughters. If there are no surviving sons of the father, the daughter is the heir under semi-salic law. Agnatic primogeniture was used by other governments; under this system, anybody descended from a male member of the royal line might assume the throne. In this case, the eldest daughter may be crowned, but none of her offspring would be eligible to take the throne after her. Instead, the eldest daughter's successor would have to be a male relative. While some monarchs continue to use male-preference primogeniture, the vast majority of countries now use absolute primogeniture instead. Some regimes have also adopted matrilineal primogeniture, which gives more weight to the female line[54]. Both under the more formal system of law (i.e., statutory laws) and, more crucially, under customary law, the principles of inheritance and succession play a crucial role in Nigerian culture. Succession is the transfer of property title. It is the transfer to another person or individuals of property that belonged to a person at the time of his death[55].

In everyday speech, succession refers to inheritance. The English dictionary lists the phrases inheritance and succession as twins, yet they are not in any sense "Siamese" twins. In customary law, the difference between the two is very important. The act of legally or formally taking over an incumbent's position, rank, or responsibilities is known as succession. Additionally, it refers to acquiring rights or property by inheritance in accordance with the rules of descent and distribution[4]. As a result, inheritance is an estate or piece of property that a person earned via descent and may pass on to their successor in the same manner upon passing due to intestacy. While succession also has a wider definition. It refers to the acquiring of rights upon another person's death. Thus, the term includes things that fall under three separate legal regimes in English law, namely the law of wills, the law of intestacy, and the law pertaining to accession to title and dignities. Customary law also has analogues for all of these.

The use of the term succession is thus more relevant under customary law since it encompasses customary deathbed statements, inheritance of property, and succession to office and dignity/titles. In its most basic sense, succession refers to the act of substituting a live person for a person who has passed away in respect to all the rights and obligations that person possessed[56]. As a result, it follows that the rules of inheritance and succession control the transfer of a dead person's physical or intangible property to another person(s). Typically, a basic tenet of inheritance is that "succession" is a natural, unalienable right, and not something that may be granted[36].

By "primogeniture," we mean the practise of giving preference in inheritance to the eldest son. The oldest son of a monarch is automatically declared the king upon his death. Primogeniture has been practised at least as far back as the Old Testament, despite widespread perceptions to the contrary. This tradition, in which the firstborn son is given priority in the event of an inheritance, is not limited to any one time or place in history, but may be seen anywhere from the Middle

East to Medieval Europe. One of the most well-known examples of primogeniture in use today is the British system of determining who will succeed to the throne. Right of inheritance belongs exclusively to the eldest son that which is inherited; a title or property or estate that passes by law to the heir on the death of the owner[57].

Male Primogeniture Rule affirms that only the senior legitimate son may inherit the dead person's inheritance, excluding the other siblings. Despite being in conflict with the Constitution, the country's highest legislation, many South Africans lives by customary law principles and consider them to be legally binding. The Male Primogeniture Rule was disregarded by the South African government before the time of the Constitution and was encouraged by the Black Administration Act 38 of 1927[58].

The South African Constitution of 1996 enshrines human rights, Ubuntu, and democratic principles while also recognising customary law as one of the sources of law, subject to The Bill of Rights. This is further backed by Section 39(2) of the Constitution, which stipulates that "any court, tribunal, or forum should promote the spirit, meaning, and purposes of the Bills of Rights in construing any statute and in establishing any common law or customary law[59]".

Male Primogeniture Rule has been criticised for being against natural justice and public law since it discriminates against women and children from extramarital relationships. Due to matrilineal inheritance and ancestry being tracked via female lines, the customary law of the Akan (Asante) people of Ghana favoured women[60]. The Asante Kingdom is also ruled by a King known as the Asante-hene who holds the illustrious matrilineal "golden" throne, but whose appointment, office, and authority are solely subject to the Queen Mother who is regarded as the most significant sociocultural, spiritual, and political figure in the kingdom.

The Asante saying "*Obaa na owoo obarima, Obaa na owoo ohene"* reflects the universal regard for females in Asante mythology (meaning, it is a woman who gives birth to a man, it is a woman who gives birth to a king)[61]. A male family leader of the Kalbeo people in Northern Ghana may designate one of his only daughters to forgo marriage and have children at home instead in order to carry on the family lineage. Similar to this, a wealthy lady without children may retain other women as "wife" in order to have children. Both times, the women are treated as "men," and they have the same rights to own property as other males in the neighbourhood.

2.1.11 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. 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[62].

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. 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[25].

The effect of this is that most societal affairs and activities, especially civil affairs are simultaneously regulated by indigenous laws, statutory laws and English common law. For example, the institution of marriage is governed not only by statutes, but also by customary laws

and religious laws too. In fact, the pluralism of Nigeria's legal system is most evidenced in the practice of succession and inheritance. This practice is regulated not only by statutesbut also by customary laws, Islamic laws and Received English laws. Pluralism might seem advantageous in the sense that *non liquet* cases may be easily addressed, for example, inthe adjudication of cases which are not provided for by laws enshrined in local statutes, received English laws such as principles of common law and equity may be applied. However, it causes a complex interplay between received English laws, statutes and customary laws which usually results in serious conflict of law issues[63].

Generally, in practice, the source of law which would apply in the devolution of the estate ofa 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 shallapply in the devolution of property; where he contracts a customary marriage, customary laws shall apply same as Islamic marriage. It is however important to point out that other issue such as domicile, legitimacy, *lexsitus* and double-deck marriage usually arise, thereby, resulting in conflict of laws[64].

2.1.12 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 good disposition creates a will, a testamentary and revocable

instrument, and witnesses it in accordance with the law. In it, he disposes of his property subject to any legal restrictions.

In Nigeria, the laws regulating wills vary. States have distinct laws that are in effect. Wills Legislation from the former Western Region is the relevant law in the majority of states formed from the old Western Region[65]. While Oyo and Delta States have passed their own wills laws, the other states that were formed from the old Western region have laws that are essentially identical to the old ones with minor variations in state names and enacting bodies. By the Applicable Laws Edict of 1972, Lagos State adopted the law that applied to wills in the old Western Region. The English Wills Act of 1837 continues to be in force in various states in the erstwhile Northern and Eastern Region of Nigeria. States in Kaduna and Abia each have a separate wills law Kwara, Bauchi, Plateau, and Jigawa are other States from that have passed their own wills legislation[66].

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[67].

This principle is however, absent in the Wills Law of other states that do not apply the Wills Act. The provision of the Wills Law prescribes customary and religious limitations in the creation of a will. In the former Western Region, for example, section 3(1) of the Wills Law states that: Subject to any Customary Law relating thereto, it shall be lawful for every person to demise, bequeath, or dispose of, by his will executed in a manner hereinafter required, all real and personal estate which he shall be entitled to, either in law or in equity, at the time of his death and which if not so demised, bequeathed, and disposed of would descend to his successor at law,

his ancestor's heir if he acquired the right by descent, or his executor or administrator. Additionally, section 2 of the Kaduna Wills Law stipulates that it is legal for any person to leave or dispose of all property to which he is entitled, either in legislation or equity, at the time of his death, via a will that is made in conformity with the rules of this law. With the caveat that a person whose will is exempt from this legislation if they were under Islamic Law at the time of their death[68].

The reason for this limitation is that complete testamentary freedom could upset some established rules in Islamic laws and customary Laws. This reason recognized by Belgore JSC in the *case Lawal - Osula v. Lawal – Osula* when he states: … Binis, like several other tribes in Nigeria, have age-old customs and practises, some unique to them, others shared with other races throughout the globe, that cannot be erased by law. Legislation prohibiting some of these indigenous laws and practises would create severe chaos, making government and compliance impossible. In light of these considerations, rather than completely abandoning a centuries-old tradition, legislation is carefully designed to accommodate and govern the laws and practises in issue[66].

It was unclear how section 3(1) of the Wills Law of Western Nigeria functioned, whether it eliminated all testamentary ability for those subject to customary law or only limited the types of property that might be distributed in a will. In Idehen v. Idehen, the Supreme Court provided clarity to this ambiguity. This issue concerns the primogeniture tradition of the Bini people. The dead wrote a testament, in which he bequeathed to his oldest son the two homes he resided in throughout his lifetime. The two homes were explicitly bequeathed to the son, therefore when the son predeceased him, they were included in the remaining estate. However, these two homes together comprised the "Igiogbe," which, according to Bini customary law, automatically passed to the testator's eldest surviving son after the testator's second burial rituals, to the exclusion of

all his other children. Because the will conflicts with Bini customary law, the eldest surviving son of the testator and a few other children filed a lawsuit to have the will declared void[69].

The trial court determined that the petitioner was, in fact, entitled to inherit the two homes that make up the "Igiogbe" as the eldest surviving son under Bini customary law. The court accordingly declared the portion of the will that left the residences to the dead oldest son to be invalid, while upholding the validity of the remainder of the will. The plaintiff's claim to the two residences was affirmed by the Court of Appeal, but the whole will was found invalid for the same reason: invalid dispositions. The Supreme Court, however, ruled on further appeal that section 3(1) of the Old Bendel State Wills Law only related to the subject of a demise, i.e., it only restricted the property that could be passed under a will, and that it was not intended to remove a testator's testamentary capacity, or his ability to make a will. Therefore, the Court of Appeal's decision was overturned, and the trial court's decision was reinstated[70].

In fact, the common law restriction is so rigid that a testator cannot choose to leave anything out of his will, and this is acknowledged by the courts. Lawal-Osula v. Lawal-Osula included a testator who included the following statement in his will: I declare that I make the above devise and bequest when I am completely sane and healthy. It is my wish that this will not be changed or modified by anybody. It is my intention that this will not be affected by Beninese law or tradition in any way. Despite this assertion, the Supreme Court ruled that the testator's devise of his "Igiogbe" to anyone other than his oldest son—who was subject to Bini customary law—was void. Similar to this, it was determined in Uwaifo v. Uwaifo that a father's testamentary desires are superseded by the Bini "Igiogbe" tradition, which grants the oldest son the right to inherit the family house[71].

The implication of this is that the rule of primogeniture, although, a customary rule with no express statutory authority providing for its application has, nevertheless, wormed its way into

domestic legislations as to become part of the statutory rule of succession and its application is indirectly sanctioned by both statutes and judiciary.

- **Intestate Succession**

When a person dies intestate, he dies without leaving behind any form of testament as to the disposition of his estate. There is no uniformity in the intestacy laws of Nigeria. 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. Generally speaking, the law that applies in intestate cases is as follows[36]:

a) The lexsitus, or local law, of the location where the property is located, governs immovable property. If customary law is not applicable and the immovable property is located in Lagos, Ogun, Oyo, Ondo, or ancient Bendel state, the Administration of Estates Law of 1959 applies. English common law is applicable if the immovable property is located in one of the northern or eastern states, as stated in Cole v. Cole.

b) The law of the deceased person's residence in effect at the time of death applies to movable property. 167 Regardless of where the property is located, the Administration of Estates Law, as revised by states, applies if the intestate passed away domiciled in Lagos, Ogun, Oyo, Ondo, or ancient Bendel state. When a person who is domiciled in one of the northern or eastern states passes away, the law of that state is applicable to any moveable property, regardless of where it is located.

The applicable common law rule is that where a person who contracted a Christian marriage dies intestate, that Christian marriage shall totally exclude the application of customary intestacy law and his widow and issues shall be deemed the heirs apparent. This principle was established in

the case of *Cole v. Cole.* In this instance, Mr. Cole, a native of Lagos who spent the most of his life there and passed away there, married Mary Cole in Sierra Leone while he was still alive, and the couple bore Alfred Cole. 1897 saw Cole's death. In an effort to be recognised as the rightful successor of his deceased brother under customary law, his brother, A.B. Cole, filed a lawsuit. The widow Mary Cole opposed him and argued that English law governing the division of intestate personal estate should apply to the inheritance to the Cole wealth. The widow and her son had the right to the inheritance under English Common law, instead of the brother. The court determined that Cole had changed the way his inheritance was divided from customary law to the English system by entering into a Christian marriage[4].

The rule of devolution under the Administration of Estates Laws is based on English Law and *section 49(1) Administration of Estates Law of 1959* states: A surviving spouse receives the dead person's personal belongings. If a dead individual leaves behind a living spouse but no children, parents, or blood siblings, the surviving spouse gets everything. The wife's interest, however, fails upon her death or remarriage and passes to the intestate's siblings in equal parts when the surviving spouse is the wife and the intestate is survived by siblings. Unsurprisingly, it is obvious that the provision of this section runs counter to the main norms of customary law of succession in which the oldest son is favoured to other siblings and the surviving spouse, if it is the woman, is often disinherited. Despite anything to the contrary hereof, any real property whose succession cannot by customary law be realised by testamentary disposition must descend in accordance with customary law, according to Section 49(5) (b) of the Administration of Estates Law of 1959. This provision has the same effect as that *section 3(1) of the Wills Law of the former Western Region,* thereby, indirectly endorsing the application of the customary rule of primogeniture.

2.2 Theoretical Framework

In this study, looking at in the principles of primogeniture both in customary law and common law, our theoretical base will stress the Functionalist perspective, Distributive Justice Theory as well as The Equity Theory as a means of explaining the concept.

2.2.1 Functionalism Theory

Functionalism focuses primarily on the function of cultural components in upholding the social order as a whole. It emphasises what preserves the system rather than what modifies it. However, functionalists have made a unique addition to our knowledge of social change, as Talcott Parsons' work reveals. Society is in an equilibrium which is described equilibrium as the tendency of society to a condition of stability or balance. Parsons would see civic unrest or even protracted labour strikes as transient changes to the status quo rather than fundamental changes to the social order of a society. His equilibrium model thus predicts that if changes are made in one area of a society, adjustments must also be made in other areas[72]. A society's balance will be in danger and under stress if this doesn't happen. One may thus draw the conclusion from the explanation above that the standardisation of social practises or cultural artefacts serves the needs of the whole social or cultural system. Second, the continuous presence of these social and cultural components serves to sustain societal balance and stability. Last but not least, although emphasising the continuity of social life and minimising change, the functionalist approach sees change as important to preserve a society's balance[73].

As such, functionalism theory seeks to understand the role of this rule in traditional African societies, its functions in maintaining social order. Proponent of this idea may argue that the rule serves the function of preserving family and community cohesion in Nigeria and South Africa.

However, critics may argue that the rule is outdated an inconsistent with the principle of equality and non-discrimination upheld buy international law.

2.2.2 Distributive Justice Theory

Rawl's idea of justice served as the basis for the distributive justice theory. The theory aims to restructure economic relationships to create a reasonable distribution of rewards. It is a moral, intellectual, and political goal. The goal of distributive justice is to establish and maintain an equitable division of responsibilities within society. Benefits and costs are thus assigned to society's members in a fair way in order to sustain justice, which implies distributive justice is reflected in how products are allocated to society's members[74]. Distributive justice is considered as fairness in relation to choices and resource allocation in the context of organisational justice. Results or resources may be given away in both concrete (like money) and intangible (like praise) ways. As a result, distributive justice is said to be implemented more when results are regarded as being equal.

Additionally, distributive justice builds a link between the past, which was marked by inequality, racial segregation, and marginalisation, and the future, which will be marked by respect for human dignity, social justice, and equal opportunity for all people, regardless of their race, gender, or skin colour. For instance, research revealed that distributive justice has an impact on people's performance. As a result, performance is increased inside any company when distribution is fair. Employees are more inclined to participate in high-performance activities to advance an organisation if actions and choices are seen as purely workplace-related, for instance. However, workers are more inclined to leave an organisation when they believe there is an unjust distribution of wealth[75].

Distributive Justice however could be used in assessing the fairness of the primogeniture rules of inheritance practices in Nigeria and South Africa. Since the concept borders around fairness in distribution of resources in the Society.

2.2.3 The Equity Theory

The word "equity" has both a wide-ranging public connotation and a specific technical one. Equity is sometimes equated with natural justice or morality; however, this definition is not entirely accurate since many of the ideas covered by natural justice are often left to the dictates of the general public or to each person's conscience. The English legal system's use of equity may be an effort to address a challenge that faced the legal systems of the seventeenth century. Equity has been characterised as a moral virtue that qualifies, moderates, and reforms the rigour, hardness, and edge of the law and is a universal truth; it also aids the law when it is deficient and weak in the Constitution (which is the life of the law) and protects the law against cunning evasions, delusions, and new captions, manufactured and designed to avoid and fool the common law. Therefore, equity neither creates nor abolishes the law; rather, it supports it[76].

In an effort to define equity, we may say that equity is a component of natural justice. At common law, it was historically believed that because a wife's personality was fused with her husband's during marriage, she was unable to acquire property on her own. Whether the woman obtained property before or after the marriage, the husband had considerable rights over it under common law, including the right to rentals and profits from it. The sole caveat was that the husband needs his wife's permission before selling her real estate in exchange for an estate larger than his own.

However, equity made some changes to this common law. First, the rule that equity follows the law, if a transfer by the wife to a person other than a purchaser without notice is done while the

marriage is still in existence, equity protects the husband's interest and sets it aside. The woman was granted a right by equity, which obliges the husband to provide his wife and children a portion of the property that he would have otherwise been free to dispose of. Thirdly, equity created the separate estate concept, which permits the woman who purchased the property to exclusively own and utilise it, excluding the husband and his creditors. The Married Women's Property Act of 1882 and in 1935 both reaffirmed the equity on distinct estate theory. Thus, a more inclusive clause was enacted, allowing married women and women in general to possess property in the same manner as males. There was only an exemption in cases when alimony had to be paid[77].

A person is motivated by what they believe to be fair in comparison to others. The degree to which a person feels treated fairly in social interactions might have an impact on their motivation. People want to be appropriately paid for their effort which implies that they want their input to be equivalent to the results of those inputs. As a result, a person's motivation, attitudes, and actions may be influenced by their opinions about what is fair and what is unjust

In the context of primogenitures rule in relationship with International Human right law in Nigeria and South Africa has been a topic of debate, with the rule being criticized for its discriminatory nature. Equity theory can be applied to access the fairness of the rules inheritance practices.

2.3 Review of Empirical Studies

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.

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[78]. 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 practise 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[10].

Primogeniture was used by social classes other than the aristocracy more often when land made up a significant amount of income. Primogeniture was used by German peasants in areas with vast land holdings, but in the British Midlands only repeatable resources like fishing and forestry were subject to division. Primogeniture was a widespread practise among the nobility in England, and by the nineteenth century, it had been embraced even by the middle classes. Primogeniture was used outside of Europe in largely agrarian Japan and the southern colonies of pre-civil war America, whereas partition predominated in sub-Saharan African and nomadic Islamic communities[79,80].

The French Revolution did away with obligations. Primogeniture was abolished in the majority of European nations throughout the nineteenth century as a result of the Napoleonic code. Even while parental discretion still exists in certain legal frameworks and in actuality, equitable sharing is the norm nowadays. Eminent political and social scholars disagreed on primogeniture. It was understood that maintaining landed estates intact served to sustain their authority and security. Primogeniture was blamed for the potential to consolidate power and wealth in the hands of the aristocracy and for associating social mobility and equality with division[58]. The distribution of land over primogeniture was seen as a bourgeois achievement by the Marxist worldview.

Primogeniture's growth and fall has been attempted to be explained by a number of hypotheses. Primogeniture emerged as an effective method of wealth transfer as a result of the notion of growing returns to scale, which presupposes indivisibility. Increasing returns may occur in a variety of situations. Indivisibility arose from the necessity for political authority in mediaeval Europe, when feudal lords were given landed estates in exchange for military service and the local administration of justice[81]. The plantation system in the pre-civil War American South demonstrated financially growing returns in agricultural techniques. Overall, the indivisibility defence holds true wherever land is the dominant source of income, which explains why primogeniture declines when an economy shifts toward industrialization[82]. An anthropological variation places emphasis on the need to perpetuate a lineal succession as a source of indivisibility; as a result, couples have only one child to reduce the likelihood of extinction[83].

Primogeniture had many major social, political, and economic effects, including preserving aristocratic rule, preventing property fragmentation, increasing income disparity, delaying the emergence of a land market, and slowing population growth (by discouraging younger offspring from marrying). The younger children who were disinherited are seen to have had a significant

economic impact on the middle class during the early stages of capitalism's development and to have symbolised revolutionary potential in politics as the world moved toward democracy[84,85].

Concern for females' inheritance and property rights as a crucial tenet of social justice and equality is widely acknowledged on a global scale. Regionally, the prohibition on discrimination on the basis of gender is included in article 66 of the Protocol to the African Charter on Human and Peoples' Rights. All state parties are obligated under Article 18 of the African Charter to end gender discrimination and safeguard children's and women's rights. Consequently, the maximum possible enjoyment of women's human rights will be made possible by state parties' fulfilment of the requirements[86,87].

Article 2 of the convention, which instructs state parties to use the proper institutional, legal, and other measures to eliminate all kinds of discrimination against women, is one of its most important provisions. The elimination of gender discrimination is an issue. Importantly, it seems that article 2 protects the rights of widows (1). (b). Article 2(2), which calls for an end to detrimental cultural and customary practises that support prejudice and discrimination, seems to be repeating the same message. The right to dignity is included in Article 3 and is seen to be an inalienable right shared by both men and women. The clause stipulates that this right must be acknowledged and safeguarded. Additionally, the article exhorts all state parties to take the proper steps to safeguard women's rights, including shielding them from all types of abuse and upholding their dignity. Article 4 deals with the rights to life, integrity, and security of the person in a similar manner. As a result, every woman has the same rights to life, integrity, and personal safety as every male. Article 7 states that the government must pass legislation to guarantee that men and women have equal legal rights in the event of a divorce, separation, or annulment of a marriage. Equal legal protection and access to justice are likewise covered under Article 8. It conveys the idea that women and men should have equal rights and protection under the law[88].

The fact that the first eight articles of the Protocol made provisions that seemed to specifically address different categories of women, like widows, divorcees, or women who are no longer married, and insisted that these groups of women should enjoy the same access to legal frameworks and respect as men, is significant and refreshing. Widows shall not be refused custody of their children stated as Article 20 of the Constitution, which also emphasises how widows "are exposed to all forms of insulting and degrading behaviour as a consequence of their condition as widows." Levirate weddings, which are common in many African countries and compel widows to wed, are also criticised in the piece[89]. The issue of widows not inheriting their husbands' property is brought up in Article 21(1). A widow ought to be qualified for an equitable portion of the estate left by her husband. Widows are entitled to remain in the marital residence. If she gets remarried and the house is hers or one she inherited, she will keep this privilege.

The Protocol to the African Charter is silent on how women in non-marital relationships and female offspring are to be treated when it comes to property succession. Discrimination based on sex is specifically mentioned as a breach of human rights in the fundamental human rights instruments, such as the Universal Declaration of Human Rights and the United Nations Charter. The Covenants on Civil and Political Rights and on Economic, Social, and Cultural Rights, both of which were ratified by the United Nations General Assembly in 1966, also make reference to this concept[90].

The first generation of rights emphasises freedom of speech and guards against arbitrary government arrest and torture for all citizens, including women. However, it falls short in addressing some concerns, such as the pervasive forms of physical and psychological abuse against women that are perpetrated by family members and non-state actors and have the potential to kill many women. Violence sometimes has a connection to conflicts about property. It gives the appearance that the worldwide "building of civil and political rights...obscures the

most constant damage done to women" since the first generation of rights failed to acknowledge this[91].

The second generation of rights, however, focuses on social, economic, and cultural rights. In general, it takes into account factors such as how women are treated within the family, their socioeconomic standing, and cultural influences that influence, define, and constrain their lives. The second generation of rights disregards women's unpaid employment when it comes to economic rights. Furthermore, "the special economic circumstances of women, in many instances, their economic dependency on others, notably in marriage, was not taken into consideration[92]".

The right to cultural self-determination is also a part of the third generation of rights. Individual rights are subordinated in favour of communal or group rights. This bundle of rights may put women in risk because "the prevalence of group rights over individual rights is likely to make women's subjugation within collectives more difficult to oppose." This is troubling since cultural self-determination has often been used to defend anti-women traditional cultural practises and is not susceptible to judicial examination because it is a private concern. Women are not acknowledged as a category to which self-determination would apply, on the other hand[93].

By emphasising discrimination as the principal cause in the majority of cases of human rights breaches against women, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) was created to remedy gaps in existing international law. The Convention states that discrimination might be either explicit or implicit. As stated in the Convention on the Elimination of All Forms of Discrimination Against Women, discrimination is defined as "any distinction, exclusion, or restriction based on sex that has the effect or purpose of hindering or negating the recognition, enjoyment, or exercise of human rights and

fundamental freedoms by women, regardless of marital status, on the basis of equality of men and women, in the political, economic, social, cultural, civic, or any other field[94].

The CEDAW aims to eliminate sex-based structural obstacles that lead to discrimination against women by recognising discrimination as both explicit and implicit. Even though this international agreement went into force in September 1981, egregious breaches of women's human rights seem to be continuing. The problem is made worse by the fact that many women are unaware of their legal rights, much alone the systems in place to stop such abuses. It was required to add an optional protocol to the convention in order to address the issues the situation created. The Optional Protocol to CEDAW was approved by the United Nations Commission on the Status of Women on March 11, 1999. Women from the signatory nations may utilise the CEDAW and the Protocol to file a complaint with the CEDAW Committee when local remedies are unsuccessful[95]. The Optional Protocol also includes a method for conducting inquiries. This shows that the CEDAW Committee has the authority to look into grave and persistent violations of women's human rights in signatory nations. This approach is in addition to the regular reports that each member nation submits to the Committee. Non-governmental organisations (NGOs) are also permitted to submit "shadow reports." This might either accept or reject the state parties' proposal. The Committee delivers its conclusions and suggestions in areas where one nation may be violating the Covenant by combining these three methods. It is clear from this that the techniques work. This is due to the fact that each nation report that is submitted to the Committee separately will be supplemented by the Committee's recommendations and final remarks. Additionally, it gives women immediate access to CEDAW[96].

Other international organisations established by the UN for the promotion of women's rights, besides CEDAW and the Optional Protocol, also play significant roles by advancing women's concerns throughout the UN system. These include the International Research and Training

Institute for the Advancement of Women, the United Nations Development Fund for Women, and the Commission on the Status of Women (CSW) (INSTRAW). For instance, INSTRAW and UNIFEM were established as a result of the Mexico City Conference (Declaration and World Plan of Action for Implementation of the Objectives of International Women's Year). The two institutes support operational and training initiatives related to women and development in addition to providing the institutional foundation for research[97].

The Commission on Human Rights' adoption of Resolution 2000/13, which addressed women's equal ownership of, access to and management of land as well as their equal rights to own property and sufficient housing, was undoubtedly one of the UN's finest achievements. Another attempt was made on April 23, 2001, when the Commission on Human Rights passed Resolution 2001/34, which addressed women's equal access to property[98,99]. The resolution further urged the Secretary General to support additional projects that would advance women's equal access to, control over, and ownership of land as well as their equal right to appropriate housing and property ownership. It allots funds for researching and analysing the effects of difficult and dangerous circumstances, especially in relation to women's equal rights to own land, property, and decent housing[100,101].

The African Charter and the Protocols to CEDAW share many of the same fundamental principles. It is evident that the latter relies on the standards and ideas of CEDAW, even if it may not be accurate to say that it is a carbon replica of the former. The difference between the two instruments is how they see women's rights in private areas. For instance, the African Charter strives to impact and safeguard women's rights in private domains whereas CEDAW is silent on the subject[102]. While CEDAW simply seeks to guarantee equality between husband and wife in marriage, the Protocol to the African Charter believes that traditional marital customs must be altered or changed. Therefore, the African Charter demands state parties "enact relevant national

legal measures to assure that monogamy is advocated as the preferable form of marriage...," in contrast to the CEDAW, which is quiet on polygamy. (Articles 6(c) and 7(c) of the African Charter Protocol). As opposed to this, the CEDAW Protocol requires state parties to address "the unique issues encountered by rural women."[103]

The majority of African women, according to current demographic predictions, reside in rural regions. In Africa, 67% of the population resides in rural regions, compared to 33% who live in urban areas. Estimated 30% of people in sub-Saharan Africa live in cities, while 70% reside in rural regions. 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 are combined with the CEDAW's worldwide framework, this omission may be closed[104].

2.4 Conceptual Model

Independent Variable

Primogeniture Rule
• Absolute Primogeniture • Agnatic Primogeniture • Agnatic-cognatic Primogeniture

Dependent Variable

International Human Right Law
• Testate Succession

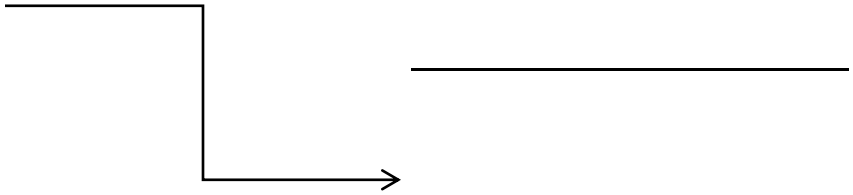

Figure 2.1: Conceptual Model

Source: The Researcher, 2023

The conceptual model above demonstrates the interconnection and interdependence of primogeniture rule and international human right law in Nigeria, South Africa and United Kingdom. The model displayed the position of the primogeniture rule (absolute, agnatic, agnatic-cognatic and male-preference primogeniture rule) under international human rights law.

2.5 Summary of Gap in Literature Reviewed

The literature reviewed encompasses a comprehensive exploration of various aspects related to primogeniture rule and its legal implications. Primogeniture Rule, the central focus of this study, is examined from multiple dimensions. Its conceptual framework is established, encompassing the core understanding of primogeniture rule and its significance in the context of succession. The origins of this rule are explored, tracing its historical development through time. The review also touches upon the positioning of the primogeniture rule within the realm of international human rights law, shedding light on its legal implications.

The nature of the primogeniture rule is examined in detail, and various types of primogeniture are discussed. These include absolute primogeniture, agnatic primogeniture, agnatic-cognatic primogeniture, and male-preference primogeniture. Distinctions between male preference

primogeniture and agnatic-cognatic primogeniture are elucidated, along with variations such as uterine primogeniture and matrilineal primogeniture. Also, the literature delves into the rationale behind the primogeniture rule, addressing the historical and cultural underpinnings that have contributed to its establishment and persistence in various societies. The historical development of the primogeniture rule is scrutinised, offering insights into how this principle has evolved over time and influenced succession practices. Furthermore, the relationship between primogeniture and the Nigerian Laws of Succession is explored, highlighting the role of primogeniture in shaping legal norms in Nigeria. The study also examines statutory laws of succession, both in testate and intestate scenarios, shedding light on how these legal frameworks interact with primogeniture.

Theoretical frameworks, including functionalism theory, distributive justice theory, and equity theory, are introduced to provide a deeper understanding of the philosophical and ethical aspects of primogeniture rule. These theories offer lenses through which the implications of primogeniture can be analysed from various angles. The literature review also addresses empirical studies, that offer real-world data and insights that can inform the research's analysis and findings. Overall, the reviewed literature serves as a comprehensive foundation for the research, offering a multifaceted perspective on primogeniture rule, its historical context, legal ramifications, and theoretical underpinnings. This groundwork sets the stage for the subsequent analysis and examination of the specific cases of Nigeria, South Africa, and the United Kingdom in relation to primogeniture and international human rights law.

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Chapter Three

Methodology

3.1 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 utilised to get in-depth insights into an issue or spark new research ideas[1]. Positive sociology is rejected by interpretative sociologists who use these approaches.

3.2 Description of the Research Instruments

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[2].

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.

3.3 Method of 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.

3.4 Method of 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 analyse the frequency, relevance, and linkages of such key words, themes, or concepts. As an example, researchers may analyse 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[3]. 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.
- Gives information on intricate theories about how people think and speak.
- Is regarded as a reasonably "precise" research approach when used properly.
- Content analysis is a simple and affordable research technique.

- It is most useful in combination with other research methods such as interviews, observation, and the examination of historical records. It's possible that historical analysis is useful, especially for discovering trends throughout time.

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Chapter Four

Results and Discussion of Findings

4.1 Articulation of the practice of the primogeniture rule in Nigeria, South Africa and United Kingdom

The rule of primogeniture is one of such rules of succession whose application is usually controversial and conflicting. The application of the rule and its present position in the Nigerian, South African and English jurisprudences shall be examined below.

4.2 Presentation of Data

4.2.1 Research Questions

4.2.1.1 Practice of the Primogeniture Rule in Nigeria, South Africa and the United Kingdom

1. 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[1]. 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[2].

The effect of this is that most societal affairs and activities, especially civil affairs are simultaneously regulated by indigenous laws, statutory laws and English common law. For example, the institution of marriage is governed not only by statutes, but also by customary laws and religious laws too. In fact, the pluralism of Nigeria's legal system is most evidenced in the practice of succession and inheritance. This practice is regulated not only by statutesbut

also by customary laws, Islamic laws and Received English laws. Pluralism might seem advantageous in the sense that *non liquet* cases may be easily addressed, for example, inthe adjudication of cases which are not provided for by laws enshrined in local statutes, received English laws such as principles of common law and equity may be applied. However, it causes a complex interplay between received English laws, statutes and customary laws which usually results in serious conflict of law issues[3].

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 whetheror 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[4]. It is however important to point out that other issue such as domicile, legitimacy, *lexsitus,* and double-deck marriage usually arise, thereby, resulting in conflict of laws.

- **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.

i. 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.

In Nigeria, the laws regulating wills vary. States have distinct laws that are in effect. Wills Legislation from the former Western Region is the relevant law in the majority of states formed from the old Western Region[6].

While Oyo and Delta States have passed their own wills laws, the other states that were formed from the old Western region only made minor changes to the old law, such as the state's name and the enacting authorities; by the Applicable Laws Edict of 1972, Lagos State adopted the law that applied to wills in the old Western Region. The English Wills Act of 1837 continues to be in force in various states in the erstwhile Northern and Eastern Region of Nigeria. States in Kaduna and Abia each have a separate wills law. Kwara, Bauchi, Plateau, and Jigawa are other States from that have passed their own wills legislation[6]. 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[7].

This principle is however, absent in the Wills Law of other states that do not apply the Wills Act. The provision of the Wills Law prescribes customary and religious limitations in the creation of a will. The old Western Region's Wills Law, for example, provides as follows in section 3(1): "Subject to any Customary Law pertaining thereto, it shall be legal for any person to demise, bequeath or dispose of, by his will signed in the manner hereby required, all real and personal assets which he will be entitled to, either in law or in equity, at the time of his death and which if not so demised, bequeathed and disposed of would devolve upon the heir at law of him[8]. Additionally, section 2 of the Kaduna Wills Law stipulates that it is legal for any person to leave or dispose of all property to which he is entitled, either in legislation or equity, at the time of his

death, via a will that is made in conformity with the rules of this law. With the caveat that a person whose will is exempt from this legislation if they were under Islamic Law at the time of their death.

The reason for this limitation is that complete testamentary freedom could upset some established rules in Islamic laws and customary Laws. This reason recognised by Belgore JSC in the case Lawal - Osula v. Lawal – Osula when he states: … The Binis, like several other tribes in Nigeria, have long-standing customs and traditions, some unique to them and others shared with other races throughout the globe. These customs and traditions cannot be abolished by simple law. Banning some of these tribal laws and practises by legislation would cause major chaos that would make adherence and rule of law impossible. In light of this, legislation is carefully written to fit the laws and traditions in issue and to control their practise rather than completely dismissing one that has been tried and established over generations[9].

It was unclear how section 3(1) of the Wills Law of Western Nigeria functioned, whether it eliminated all testamentary ability for those subject to customary law or only limited the types of property that might be distributed in a will. In Idehen v. Idehen, the Supreme Court provided clarity to this ambiguity. This issue concerns the primogeniture tradition of the Bini people. The dead wrote a testament, in which he bequeathed to his oldest son the two homes he resided in throughout his lifetime. The two homes were explicitly bequeathed to the son, therefore when the son predeceased him, they were included in the remaining estate[10]. However, these two homes together together comprised the "Igiogbe," which, according to Bini customary law, automatically passed to the testator's eldest surviving son after the testator's second burial rituals, to the exclusion of all his other children. Because the will conflicts with Bini customary law, the eldest surviving son of the testator and a few other children filed a lawsuit to have the will declared void[11].

The trial court determined that the petitioner was, in fact, entitled to inherit the two homes that make up the *"Igiogbe"* as the eldest surviving son under Bini customary law. The court accordingly declared the portion of the will that left the residences to the dead oldest son to be invalid, while upholding the validity of the remainder of the will. The plaintiff's claim to the two residences was affirmed by the Court of Appeal, but the whole will was found invalid for the same reason: invalid dispositions. The Supreme Court, however, ruled on further appeal that section 3(1) of the Old Bendel State Wills Law only related to the subject of a demise, i.e., it only restricted the property that could be passed under a will, and that it was not intended to remove a testator's testamentary capacity, or his ability to make a will. As a result, the trial court's decision was reinstated and the Court of Appeal's decision was overturned[12].

In fact, the common law restriction is so rigid that a testator cannot choose to leave anything out of his will, and this is acknowledged by the courts. Lawal-Osula v. Lawal-Osula included a testator who included the following statement in his will: I declare that I make the above devise and bequest when I am completely sane and healthy. It is my wish that this will not be changed or modified by anybody. It is my intention that this will not be affected by Beninese law or tradition in any way. Despite this assertion, the Supreme Court ruled that the testator's devise of his "Igiogbe" to anyone other than his oldest son—who was subject to Bini customary law—was void. Similar to this, it was determined in Uwaifo v. Uwaifo that a father's testamentary desires are superseded by the Bini "Igiogbe" tradition, which grants the oldest son the right to inherit the family house. The implication of this is that the rule of primogeniture, although, a customary rule with no express statutory authority providing for its application has, nevertheless, wormed its way into domestic legislations as to become part of the statutory rule of succession and its application is indirectly sanctioned by both statutes and judiciary[13].

ii. 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. Generally speaking, the law that applies in intestate cases is as follows[6]:

a) The lexsitus, or local law, of the location where the property is located governs immovable property. If customary law is not applicable and the immovable property is located in Lagos, Ogun, Oyo, Ondo, or ancient Bendel state, the Administration of Estates Law of 1959 applies. English common law is applicable if the immovable property is located in one of the northern or eastern states, as stated in Cole v. Cole.

b) The law of the deceased person's residence in effect at the time of death applies to movable property. Regardless of where the property is located, the Administration of Estates Law, as revised by states, applies if the intestate passed away domiciled in Lagos, Ogun, Oyo, Ondo, or ancient Bendel state. When a person who is domiciled in one of the northern or eastern states passes away, the law of that state is applicable to any moveable property, regardless of where it is located.

When a person who entered into a Christian marriage passes away intestate, the common law rule that applies is that the Christian marriage should completely preclude the application of traditional intestacy law, and the decedent's widow and children shall be regarded as the heirs apparent. In the Cole v. Cole case, this theory was established. In this instance, Mr. Cole, a native of Lagos who spent the most of his life there and passed away there, married Mary Cole in Sierra Leone while he was still alive, and the couple bore Alfred Cole. 1897 saw Cole's death. In an effort to be recognised as the rightful successor of his deceased brother under customary law,

his brother, A.B. Cole, filed a lawsuit. The widow Mary Cole opposed him and argued that English law governing the division of intestate personal estate should apply to the inheritance to the Cole wealth. The widow and her son had the right to the inheritance under English Common law, instead of the brother.

The court determined that Cole had switched the division of his inheritance from customary law to the English system by entering into a Christian marriage. A surviving spouse inherits a dead person's personal belongings, according to section 49(1) of the Administration of Estates Laws of 1959, which is based on English law. If a dead individual leaves behind a living spouse but no children, parents, or blood siblings, the surviving spouse gets everything. However, if the intestate is survived by siblings and the surviving spouse is the wife, the woman's interest will fail upon her death or remarriage and will pass to the intestate's siblings in equal portions[14].

Unsurprisingly, it is obvious that the provision of this section runs counter to the main norms of customary law of succession, according to which the oldest son is favoured to other siblings and the surviving spouse, if it is the woman, is often disinherited. However, notwithstanding anything to the contrary in this section, real property that cannot pass by testamentary disposition due to customary law must instead pass through customary law, according to Section 49(5) (b) of the Administration of Estates Law of 1959. This clause has the same effect as section 3(1) of the old Western Region's Wills Law, which indirectly supports the use of the primogeniture system.

- **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[15]. For instance, the *Yorubas, Igalas, Itsekiri* and *Agbors* do not practice the primogeniture customary rule of succession.

As it is not possible to examine the individual succession rules applicable in all ethnic groups, selected groups shall be considered and they are the *Igbo* ethnic group, the *Bini* ethnic group and the *Kalabari* ethnic group.

i. Igbo Customary Law of Succession

When a man dies intestate, his oldest son inherits his property under the Igbo traditional law of succession, which is mostly patrilineal and controlled by the concept of primogeniture. As a result, he takes over as the family patriarch and is granted the right to cultivate the estate or its immediate environs, as well as any other unique assets that his father owned and used throughout his lifetime, including the right to continue living in the family home. In effect, this means he may live anywhere he likes, decide which of his brothers gets to move into their late father's home, and divide up any construction lots among themselves as he sees fit. Even if he receives all of his father's personal belongings, the oldest son acts as trustee-beneficiary of the family's real estate on behalf of his brothers and himself after his death[16]. In other words, he has the legal right to manage his father's properties and must do so for the sake of his siblings. This is recognized by Okoro when he states: It is often said that the eldest son succeeds to his father’s estate, but what is meant is that, as the head of the family, he succeeds to the estate not exclusively, but for himself and his junior brothers.

In the case, of *Uboma and ors v. Ibeneme and anor,* it was held that among the *Igbos*, landis inherited by all the sons of the deceased as family property and that the eldest son, as the new head of the family, is only a ‘caretaker’ and the testimony of an expert witness who testified that the oldest son could dispose of his father’s estate however he wished without his brothers’

consent was rejected.

Where a deceased is not survived by any male issue, the agnatic form of primogeniture applies in that his estate is inherited by his surviving brother of full blood; failing a full brother, the estate devolves on to the deceased father. However the Customary Law Manual states that exception to this may be found in some *Igbo* communities of *Ezikwo, Anambra* and *Mbaitoli* and *Ikeduru*. This exception is explained by Okoro when he states: …the brothers of a deceased man without male issue have a right of succession which takes precedence over that of the brothers of the deceased's father and in most societies, the full brothers have a claim prior to that of their father. It is true that there are variations on this principle in some societies, but these variations arise from the conflicting claims of fathers as against full brothers. In some societies, the father has only a life interest which entitles him to make use of some of his deceased son's property, but the true successors are the full brothers of the deceased. In some societies, the father has no right whatsoever[17]. Also, where a deceased is survived only by daughters, the agnatic-cognatic form primogeniture may apply to allow the daughter to inherit movable properties such as economic plants. This, however, does not apply in every *Igbo* community. *Nezianya and Azika v. Okagbue and ors* is an authority that the real property of a man who dies intestate in Onitsha without a male issue does not devolve to his female issue, but remains in the family as family property to the exclusion of a share by his female issue. The female issue may however live in the house with the consent of her father's family.

The agnatic-cognitc form of primogeniture also applies to the *'Idegbe'* or *'Nrachi'* custom when a man passes away without a male heir, it is traditional for his daughter to stay unmarried and raise her children in the family home. Until she gives birth, she is the legal owner of her father's diminished estate, and her male offspring are the only ones who may inherit it under the law of primogeniture.

ii. Bini Customary Law of Succession

The *Bini* customary law of succession is also governed by primogeniture rule. Customarily, the eldest son succeeds to the entirety of his father's estate, most especially, the father's dwelling house referred to as '*igiogbe*' and the eldest son's sole right of inheriting his father's dwelling house cannot deviated from. Similarly, to the *Igbo* customary law of succession, the eldest son assumes responsibilities for the upbringing and care of the household. Title to the intestate estate passes to the eldest son by operation of law upon the conclusion of the funeral ceremonies. The court held in the case of *Ehigie v. Ehigie* that one of the fundamental tenants of Bini customary law of succession is that the eldest surviving male child of a deceased person who performs all customary funeral rites at his father's burial succeeds to his deceased father as heir and inherits his properties, with the exception of those that he gave away prior to his death[18]. The right to inherit transfers to the next younger brother who conducts the usual funeral rites if the last male child alive passes away without completing them for his father's burial. The court added that where the deceased intestate left a lot of properties, the eldest male child who performed the funeral ceremonies with substantial contribution by his brothers and sisters, at his own discretion give such siblings some share of the intestate estate and this would constitute gifts from him.

Thus, in the case of *Osazuwa v. Osazuwa,* where the prospective heir died without performing the burial ceremonies of his deceased father, thereby, forfeiting his inheritance rights *inter vivos,* and the plaintiff/daughter sought a declaration against her half-brother, the defendant, that she was entitled to succeed to the estate in accordance with the decision taken at the family meeting, the court held that the defendant who had performed the burial ceremony had become the sole heir[19].

Where this custom was brought before the court on grounds of its repugnancy to natural justice,

equity and good conscience in the case of *Ogamien v. Ogamien,* it was held by the Supreme Court that there was nothing wrong with the custom and that it can only be said that it is unknown in some other highly civilised countries of the world.

iii. 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[20]. 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. If the deceased is not survived by any sons, his brothers of full blood inherit.

2. 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.

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[21].

Prior to 1994, the law of intestate succession in South Africa was regulated on a racial basis, thereby, indirectly endorsing the recognition and applicability of the rule of primogeniture

where a 'Black' dies intestate. So, since the rule of primogeniture applied only to the 'Black' population of South Africa, the law of succession which governed that race would be examined in this section[22].

- **Testate Succession**

A black person's ability to make a will in testate succession was restricted. Freedom of testation was limited to certain types of property by virtue of *section 23 of the Black Administration Act* which states:

1. Any woman with whom a black man lived in a customary union, or any home (a customary marriage formed a "house"), will get all moveable property belonging to him or accruing to them under black law or custom upon his death, and shall be handled in accordance with black law and custom;
2. Upon the death of a black person holding individual tenure on quitrent terms over any property in a tribal settlement, the land must pass to one male person in line with the tables of succession specified in subsection (10);
3. Any other property owned by a black person, regardless of its kind, may be transferred by will.

While customary law varies from community to community in terms of specifics, there are certain fundamental rules governing succession:

a) People are not allowed to freely choose how and to whom their estates will pass.

b) Customary property, which mostly consists of land and cattle, is of interest to the community and cannot be transferred by will.

Additionally, there are distinctions between succession in a polygamous family and a monogamous household. Studies also demonstrate that the "official" and "living" forms of customary law vary from one another.

- **Intestate Succession**

A black person's intestate estate was distributed by either customary law or in accordance with the Regulations promulgated under the *Black Administration Act*. In the absence of a will, if there was any property whose devolution *section 23 of the Black Administration Act* did not provide for, such property had to devolve in accordance with *Section 2 of the Regulation* which gave legislative recognition to the rule of primogeniture. Accordingly, the order of customary succession was based on three principles:

a) A family is a cultural construct in which the individuals' material needs are secondary to those of the whole

b) Primogeniture

c) The paternal male lineage.

These statutory and customary laws, however, led to debate concerning the apparent conflict between equality and culture when they were challenged judicially due to their racists and gender discriminatory provisions. The hallmark cases in this regard include:

I. **Mthembu v. Letsela**

The question before the court in this case was whether the customary rule of succession (primogeniture) unfairly discriminated between persons on the grounds of sex or gender and whether it was in conflict with the concept of equality. The petitioner was a legally married adult Zulu lady whose husband had passed away. When her spouse was murdered, he passed away without leaving a will. The deceased owner of the leasehold title to the home in which the

petitioner and their daughter resided. The first respondent, the decedent's father, asserted that the property rightfully belonged to him under section 23 of the Black Administration Act.

The applicant brought an application for an order declaring the customary law rule of primogeniture, which generally excludes African women from intestate succession, regulation 2 of *the Regulations for the Administration and Distribution of the Estates of Deceased Blacks and Section 23 of the Black Administration Act*, to be invalid on grounds of being inconsistent with *section 8 of the Constitution of the Republic of South Africa* which prohibited unfair discrimination.

In dismissing the applicant's petition, Roux J. justified the primogeniture rule by stating that: If one accepts the need to provide nourishment, maintenance, and shelter as an essential consequence of the primogeniture system... I find it difficult to reconcile this kind of gender distinction with the idea of unjust discrimination as defined in Section 8 of the interim Constitution... Given the Constitution's explicit recognition of customary law as an alternative system to common law... and the choice afforded to individuals to select this system to manage their relationships (as implied by section 31). I cannot accept the argument that the succession rule is inherently incompatible with Section 8, nor is it opposed to public interest or natural justice.

It was appealed in *Mthembu v. Letsela* and others. The main judge, Mynhardt J., did not provide a fundamentally different ruling. He predicated his decision to reject the applicant's appeal solely on principles of customary law. According to his view, Parliament should be responsible for shaping the customary law principles of succession.

II. Shilubana and Others v. Nwamitwa

This was the first case to come before the South African Constitutional Court with regards to

traditional title and primogeniture and the question before the court was whether the application of the primogeniture rule to succession to traditional leadership amounted to gender discrimination. In overturning the primogeniture rule, the final Appellate Court recognised that traditional authority had the authority to consider the Constitution when determining matters of traditional leadership and that the Royal family's appointment of Ms. Shilubana, the female applicant, as Hosi of the Valoyi tribe amounted to a development of African customary law.

The Court determined that Sidwell Nwamitwa, the male respondent, had no legitimate claim to the Valoyi chieftainship. At most, he assumed that as Hosi Richard's eldest male child, he would be his father's heir. It was also shown that the Valoyi community's historical practise does not guarantee that Sidwell Nwamitwa's expectation would be met. The Valoyi's present customs and traditions indicate to a genuine legal shift that resulted in or culminated in Ms. Shilubana's ascension to the chieftainship. Sidwell Nwamitwa could not be selected or installed as chief as a result of this changed status and current Valoyi customary law.

III. Bhe and Others v. Magistrate, Khayelitsha, and Others (Commission for Gender Equality as Amicus Curiae; Shibi v. Sithole and Others; South African Human Rights Commission and Another v. President of the Republic of South Africa and Another).

The cases challenged the constitutionality of several pieces of legislation, including the rule of male primogeniture under African customary law of succession, Section 23 of the Black Administration Act of 1927 and its implementing regulations, and Section 1(4)(b) of the Intestate Succession Act of 1987. Following the upholding of the challenges, the Constitutional Court abolished the challenged rules and regulations and established a new temporary framework to govern intestate succession for black estates.

An opposing opinion was written by Ngcobo J. He agreed with the majority that the Intestate Succession Act's section 1(4)(b) and the Black Administration Act's section 23 violated people's

rights to equality and dignity. As a man, he also believed that male primogeniture was unfair to females. Primogeniture, he argues, does not unfairly favour older siblings over younger ones since one of the rule's primary purposes is to determine who will assume the responsibilities of the deceased head of the family.

In addition, he argued that the Constitution mandates that the courts advance indigenous law to make it consistent with the rights guaranteed by the Bill of Rights, most notably the right to equality. Rather than eliminating the concept of primogeniture, he thought it should be refined such that it is compatible with the right to equality, for as by allowing women to succeed to the deceased as well.

3. 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[23]. The rules that govern intestacy are now provided for in the *Administration of Estate Act* and the *Inheritance (Provision for Family Dependants) 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. 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[24].

Another important feature of feudalism was the imposition of feudal rights on peasants in the form of various services and dues. Despite the fact that agricultural interactions were sometimes antagonistic, the feudal system was successful in creating a secure and stable environment for peasants. The landlord-peasant relationship developed through time in terms of organizational structure. Another consideration is class structure. The feudal society had a class structure centered on the division between lords and peasants, with the nobility officially engaged in the exercise of exclusive political authority[25].

The first resistance to this kind of aristocratic rule, predictably, came from affluent merchants desiring liberation from feudal control over society. The function of a newly constituted socioeconomic group was established by the bourgeois revolutions in England and France, paving the path for democratic capitalism to triumph against agricultural elitism[26].

Primogeniture arose about the 13th century as a response to increased population pressure, and it extended across Europe until the 17th century. Despite considerable regional differences, it remained the norm among the aristocracy for generations, especially wherever land comprised a major share of wealth, due to the necessity to maintain huge estates intact[27].

- **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[28].

The terms of the 2011 Perth Agreement, the Succession to the Crown Act of 2013 made changes to the rules governing the succession to the British crown. For children born into the line of succession after 28 October 2011, the legislation changed male-preference primogeniture to absolute primogeniture, meaning the oldest child, regardless of sex, would take precedence over younger siblings. In addition, the legislation abolished the need for anybody beyond the immediate top six in line to the throne to obtain the Sovereign's assent to marry, ending the historical exclusion of a person who married a Roman Catholic from the line of succession. On March 26, 2015, it entered into effect with the Perth Agreement's enactment in the domestic legislation of the other Commonwealth realms[29].

4.2.1.2 Position of Primogeniture Rule under International Human Rights Law

- **International Human Rights Law**

The corpus of international legislation designed to advance and defend human rights at the

national, regional, and international levels is referred to as international human rights law. Treaties, agreements between nations and customary international law make up the majority of the duties that governments are required to uphold[24]. The rules of human right are unique in the sense that possess *'ergaomnes'* and *'juscogens'* qualities. They are binding on all states of the world and its individuals as an obligation whether or not domestically recognized and no derogation or commission of acts contrary to these rules of human rights are permitted[30]. This law is represented in instruments called 'bills of rights'. These bills of rights include:

i. The Universal Declaration of Human Rights

ii. The International Covenant on Civil and Political Rights

iii. The International Covenant on Economic, Social and Cultural Rights

iv. The African Charter on Human and Peoples' Right (within an African context).

Human rights, on the other hand, are inalienable rights, moral principles and norms that describe certain standards of human behaviour and regularly protected as legal rights in municipal and international law. Although it is a generally assumed that the norms of human rights are of Western heritage, it is however erroneous to conclude that the norms of human right were foreign to indigenous African communities before the advent of Western influences. Human rights are not a new morality just developing in contemporary society. The history of human right is one of antiquity. It is inherent in every man and it arises from the very nature as a social animal[31]. This does not, however, change the fact that the prevalent universally recognized norms of human rights are heavily infused with Western influences; beliefs and cultures which inadvertently make it conflict with African customary rules and beliefs.

- **International Human Rights Law on Primogeniture**

There is no express or specific provision for the rule of primogeniture under international law. Any connection between the rule and international human rights law is implied and stems from the fact that the rule is largely a customary rule whose practice is challenged judicially on the ground that it is inconsistent with human right norms of equality and freedom from discrimination[32].

a. Indigenous Customs and Human Rights

African jurisprudences have the greatest degree of recognition of customary law, both in terms of the number of nations that have relevant rules and the range of customary law topics that are addressed. In relation to human right provisions, most of these jurisprudences have no applicable legislation that would suffice should any conflict arise between customary laws and human rights law. In this instance, resolution is usually left to the interpretation and discretion of the court[33].

That human rights law and customary law have a thorny connection is nothing new in the legal realm. In spite of the fact that they are both recognised by the law, the two seldom get along since they have fundamentally different beliefs. Customary law has its own distinct characteristics, despite its foundation in ethnicity. There are aspects of it that go against basic human rights. Among these are the following: human rights are supposedly universal, but customary law is incomplete; customary law stresses familial rights and the responsibilities of people to their communities, whereas human rights are seen as individualistic in character; Human rights laws are based on the idea that women's rights under international agreements are universal principles that all nations must uphold and that the defence of the family as a social structure should not be used as an excuse to limit the personal freedoms of family members[34].

Another reason for the conflict between these laws is the occasional reluctance of the judiciary

to judge customary rules by Western standards. As observed by B.A. Rwezaura, the ideological basis for the conflict between customary law and human rights is the idea that efforts to alter customary law are incompatible with African customs and culture and an effort to westernize African society. This philosophy is essentially an endeavor to preserve African dignity as well as a political response to how common law was imposed on African governments by colonial powers. In such a setting, attempts to bring customary law into compliance with human rights standards may be mistakenly seen as an attempt to instil Western ideals in African nations. Cobbah, in fact, serves as an example of this political response in favour of customary law. He claims that it is not essential to convert everyone to Western values in order to address inequalities that exist within many cultural systems throughout the globe. Human rights as a cornerstone of Western liberalism have benefited many people across the globe, not only those in the West. However, it is via equivalence and the pursuit of odd functional equivalence in many cultural contexts[35]. However, it is crucial to recognize that African theory and practice have been influenced and have joined the global movement for the globalization of human rights. This is because most Western understandings of African customary law are influenced by their negative attitudes toward all things African. African states are embracing the international human rights movement and its universality by fervently ratifying international human rights instruments and adopting their own African instruments, such as the Charter on African Human and Peoples' Rights and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. They are also starting to declare customs that are incompatible with human rights instruments void· Not the only sensible way to live as a human being. One should focus their efforts on looking for homeomorphic analogues in many civilizations rather than imposing the Western ideology of human rights on all cultures[36].

b. Cultural Relativism and International Human Rights Law

Before the theory of cultural relativism is examined, it shall first be established that no religious belief or custom refutes the unquestionable existence of human rights; the early contributions of Islam, Christianity, Buddhism, Confucianism and the rest of the world's major faiths can prove it. According to the notion of cultural relativism, each culture can only be understood and judged via reference to the norms and practises of its own culture. It makes the following assumptions: Both the existence of moral standards and their cultural specificity imply that there are no objective, universal moral guidelines. It's a theoretical stance that was formulated in opposition to ethnocentrism. Ethnocentrism is the view that one's own cultural norms and values are inherently superior to those of other people, with the underlying premise that one's own cultural standards may be used as a proxy for assessing and ranking other cultures[37].

It is clear that this theory has some positivist undertones to it as it rejects a natural oruniversal idea of law; if the set of laws that govern a group of people do not provide for certain rights, then such rights are non-existent and inapplicable to them. The reluctance of most African judiciaries to judge customs by Western standards is culture relativist. The application of the law of reservation of treaties in the signing and ratification of certain treaties is culture relativist. It should however be noted that for the theory of cultural relativism to apply, the customs, norms and practices must be consistent and applicable to a society or individual's culture or way of life, for instance, a person who lives in an African society but has subsumed and adopted Western standards of living or culture might have his way of life judge by Western standards and may not be able to invoke the theory of cultural relativism[36].

This is the dilemma that surrounds the primogeniture rule. The primogeniture is a custom whose origin in African societies is founded upon and justified by ancestral worship and communal living. However, when the African individuals that this rule purports to govern abandon their

African way of life and adopt Western culture, the theory of cultural relativism fails because the indigenous culture against which a custom or indigenous practice should bejudged is no longer existent.

c. Equality Clause

Common to all international human rights instruments is the equality clause; every international human rights instrument provides either expressly or implicitly that everyone be treated equally irrespective of sex, age, race or nationality. What then is equality? The term 'equality' is one which is difficult to define. It is a loaded and highly contested concept. The complexity of this term has not, however, deterred scholars from attempting a definition. A normative understanding of equality, according to this view, all humans are in fact equal in some specific regard, but that their factual equality compels us to treat them in a special manner. The term "special treatment" may refer to either the provision of identical therapy or the provision of differentiated treatment in order to return the individual to or to assist the individual in attaining the desired factual condition[38]. In explaining the term, the Bentham dictum: 'every man to count for one and no one to count for more than one' forms the heart of the doctrine of equality or of equal rights.

In understanding the concept of equality, a distinction is usually made between 'equality in law' and 'equality in fact'. The story of the Minority Schools in Albania explains this discrepancy. According to the Permanent Court of International Justice, although equality in law prohibits all forms of discrimination, it may be necessary to treat people differently in order to achieve a goal that creates equilibrium between various circumstances. The proper standard of permissible distinction will typically focus on what is just, fair, or objectively and reasonably justified in such situations when the court must decide whether to apply "equality in law" or "equality in reality[39]."

In relation to the equality clause and indigenous customs, there is generally confusion as to how equality is interpreted in terms of customary laws and beliefs. According to the argument, it is crucial to consider the equality clause as defining a substantive idea of equality when interpreting it. The following justifies the argument: Formal equality assumes that all people are equally capable of exercising their rights. It creates norms that seem to be neutral but really reflect a certain set of wants and experiences that come from socially privileged groups, ignoring genuine social and economic gaps between groups and people. Therefore, relying too much on the idea of legal equality could make things worse. Contrarily, substantive equality necessitates a review of the real social and economic circumstances in which groups and people find themselves in order to ascertain if the law's commitment to equality is being respected. Such research uncovers a world of institutionalized and widespread group-based injustices, which must be considered in the development of legislative frameworks for equality rights[40]. Therefore, in order to effectively invoke the right to equality, it must be understood in the context of underlying constitutional, societal, and indigenous principles as well as the interests that the right is intended to defend. This examination of intent and principles gives the equality right its substantive meaning and answers the query[41]: 'equality of what?'

In the invocation of the right of equality, a test was laid down in the South African case of *Harksen v. Lane N.O. and ors.* The test comprises of a series of questions and they are:

i. Does the provision (this refers to the law or rule which is being challenged and, in this context, refers to the customary rule of primogeniture) differentiate between people or groups? And if so, does the differentiation bear a rational connection to a legitimate government purpose?

ii. Does the differentiation amount to unfair discrimination?

The unfairness test considers the following factors:

a) the place of the complainants in society, including whether or not they have a history of disadvantage.

b) the kind of discriminating authority or provision and the goal it aims to accomplish;

c) the degree to which the complainants' rights or interests have been harmed, and if this has resulted in a loss of their basic human dignity or in a loss of an equally severe kind.

d) Can the unfair discrimination be justified?

This question shifts the perspective to the government and away from the impact on the complainant, away from the internal morality of the right itself to a balancing of rights or an important public policy issue.

In relation to the primogeniture rule, it is *prima facie* clear that the rule fails the test of equality:

i. The rule differentiates between genders and differentiates based on circumstances of birth, that is, hierarchy of birth. It does not fulfil nor bear any form of connection to a legitimate government purpose.

ii. Non heirs under the primogeniture rule have been known to challenge the application of the rule due to the hardship it brings them.

iii. The rule may be justified but when one considers the original purpose of the rule, its current application, the social and political changes in the society today, the current feminist movement and so on, that justification is totally undermined.

To expose the inconsistencies of the primogeniture rule with international human rights instruments.

4.2.1.3 Inconsistencies of the primogeniture rule with International Human Rights Instruments

Without prejudice to various types of primogeniture, the general conception of primogeniture is the preference of the eldest male child to other siblings and the disinheritance of the surviving spouse where it is the wife. The right to equality as stated in different human rights documents is violated when women are excluded from inheriting on the basis of gender. Primogeniture can be seen as a form of discrimination that reinforces historical trends of inequality among a particularly vulnerable group, which is made worse by antiquated ideas of patriarchy and male dominance that are incompatible with the guarantee of equality provided by a constitutional order[42]. Primogeniture may also violate a woman's right to dignity since it indicates that women are incapable of managing their own affairs or occupying high-status jobs.

When one peruses the provisions of human right instruments, it is clear that they are more in line with contemporary affairs and activities than most customs. Under reality, it is widely believed that the circumstances in which the primogeniture rule applied have altered significantly. The primogeniture rule operates in African communities within an extended family and communal context while it operated in the English jurisprudence as a corollary of the feudalistic system of governance which is totally extinct. African societies, on the other hand, are changing on a daily basis, with causes such as westernization, commercialization, industrialization, urbanization, destitution, and the abolition of apartheid all playing a role (within a South African context)[43].

Nuclear families have largely superseded traditional extended families in the form and organization of modern metropolitan communities and households. Single-parent or even child-run families seem to be on the rise. In this case, the successor does not have to live with the deceased's widow, as well as other relatives and dependents, as the extended family. In this case,

the successor often just inherits the deceased's estate without taking on, or even being in a position to take on, any of the deceased's duties. In these changing conditions, the heir's succession to the estate does not always equate in reality with an enforceable duty to pay assistance and maintenance to the deceased's family. As a result, compliance with the obligation of assistance is usually more illusory than actual. Reasons offered for non-compliance with the obligation of assistance include, on the one hand, poverty, greed, chronic unemployment, and a rejection or disregard of the traditional idea of 'ubuntu' (in a South African setting), allegedly as a result of the westernization of the way of life[44]. From this vantage point, the heir's obligation to support cannot be used to justify a breach of the rights to equality and dignity.

- **Global International Human Rights Instruments**

Global international human rights instruments are instruments to which any state in the world can be a party to. They include conventions and declarations that don't have the same legal weight as later international treaties but uphold principles that have been expanded upon in regional human rights agreements, national constitutions, and other legislation. A couple of global instruments shall be addressed in this section with emphasis on their relevant provisions which echo the right to equality. Those global instruments include[45]:

a) The United Nations Charter of 1945

b) The Universal Declaration of Human Rights of 1948

c) The International Covenant on Civil and Political Rights of 1966

d) The International Covenant on Economic, Social and Cultural Rights of 1966

e) The Convention on the Elimination of All Forms of Discrimination against Women of 1979

f) The UNESCO Universal Declaration on Cultural Diversity, 2001.

The biggest international organization, the United Nations, is governed by its Charter, which serves as its founding document. In addition to outlining a broad range of principles for achieving "higher standards of living," addressing "economic, social, health, and related problems," and universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion, the Charter expresses a commitment to uphold the human rights of citizens. Accordingly, Article 1(3) of the United Nations Charter states that the organization's goal is to "achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian nature and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."

The 1948 Universal Declaration of Human Rights is an endorsement of all subsequent international human rights documents but is not a legally enforceable document. But now that it has been cited by nations for more than 50 years, it is enforceable under customary international law. All human beings are born free and equal in their rights and dignity, according to Article 1 of the Declaration, extending the equality right found in later documents. Since they possess reason and conscience, they ought to treat one another with brotherly affection. As a global bill of rights for women, the United Nations General Assembly enacted the Convention on the Elimination of All Forms of Discrimination Against Women in 1979[46]. The agreement requires governments to take legislation and other measures that prohibit discrimination against women in order to advance strategies of eradicating such discrimination. Article 1 of the Convention defines discrimination against women as any sex-based distinction, exclusion, or restriction that prevents or lessens women from recognising, enjoying, or exercising their human rights and fundamental freedoms in the political, economic, social, cultural, civil, or other spheres, regardless of their marital status and in accordance with the equality of men and women. Article

13 of the Convention states that Parties must take all necessary actions to end discrimination against women in various spheres of economic and social life in order to guarantee, on the basis of gender equality, the same rights, particularly: the right to receive family benefits.

Another proclamation that acknowledges cultural variation and culture as the shared legacy of mankind is the 2001 UNESCO Universal Declaration on Cultural Diversity. This statement supports the continuation of culture and acknowledges the value of all its components. According to Article 1 of the Declaration, "cultural variety is as vital for humans as biodiversity is for nature as a source of trade, innovation, and creativity." In this sense, it is a shared human inheritance that ought to be acknowledged and respected for the good of both the current and the next generation[47]. However, Article 4 of the Declaration declares that human rights take precedence over all cultural beliefs. It states: Upholding cultural diversity is a moral need that is inextricably linked to treating people with respect. It suggests a devotion to basic freedoms and human rights, particularly the rights of indigenous peoples and members of minorities. No one has the authority to restrict the application of international law's guarantees of human rights by citing cultural variety.

- **Regional Human Rights Instruments**

Regional human rights instruments are instruments restricted to states in a particular region ofthe world. Since the only part of the world where the rule of primogeniture is still of great significance is Africa, selected African human rights instruments shall be addressed in this section with emphasis on the equality provisions of those instruments. Those instruments include[48]:

g) The African Charter on Human and Peoples' Rights (the Banjul Charter) of 1986.

h) The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol) of 2005.

Since the adoption of the African Charter on Human and Peoples' Rights in 1981, human rights in Africa have entered a new era. The day it went into force was October 21, 1986, and as of April 29, 2002, 53 states have signed on. Though it was heavily influenced by the Universal Declaration of Human Rights, the two International Covenants on Human Rights, and regional human rights conventions, the African Charter displays a high degree of specificity due to the African conception of the term "right" and the weight it accords to human obligations. In addition to civil and political rights, the Charter provides a comprehensive list of economic, social, and cultural rights. The African Commission on Human and Peoples' Rights was furthermore established by the African Charter "to promote human and peoples' rights and assure their protection in Africa."

Every person shall be equal before the law, which also deals with equality. In accordance with international declarations and agreements, the State is required to secure the abolition of all forms of discrimination against women and children, according to Article 18(3). The Maputo Protocol, which was added to the African Charter on Human and Peoples' Rights in 2005, is a response to the realization that women's rights are often neglected while discussing human rights. The Protocol ensures that women have full legal protections, such as the ability to vote, the right to social and political parity with men, more autonomy over their reproductive health choices, an end to female genital mutilation, among many other things[49]. The Protocol's Article 1(f) defines discrimination against women as well. It reads as follows: "Violence against women is defined in subsection j of the same article as any distinction, exclusion, restriction, or differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment, or exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life." Article 17(1) of the Convention on the Elimination of All Forms of Racial Discrimination defines violence against women as any act committed against them that

causes or could cause them physical, sexual, psychological, or economic harm, including the threat to commit such acts; or to undertake the imposition of arbitrary restrictions on, or deprivation of, fundamental freedoms in private or public life. This definition is meant to protect women from harmful and barbaric cultural practises[49].

Article 25 outlines the potential remedies for enforcing the Protocol's requirements. States Parties are obligated to: (a) offer appropriate remedies to any woman whose rights or freedoms, as recognized in this document, have been violated; and (b) make sure that these remedies are decided by competent judicial, administrative, or legislative authorities, or by any other competent authority specified by law. In accordance with Article 25 of the Protocol, Article 26 states that States Parties shall ensure that this Protocol is implemented at the national level and shall specify in their periodic reports submitted in accordance with Article 62 of the African Charter the legislative and other steps taken to fully realize the rights herein recognized. States Parties agree to take all necessary steps, including allocating funds and other resources, to ensure that the rights recognized here are fully and effectively implemented.

4.2.1.4 To find opposition and compromise of primogeniture rule

It was stated that the indigenous law inheritance laws discriminate against women and had a negative impact on them. The rules were also said to be corrupted versions of the original notions that had been codified in a manner that prevented them from adapting to societal change. I further contend that these laws go against the standards and commitments made by the international community on human rights. In nations that either lack national bills of rights or have national bills of rights that do not include customary law in its scope, it is especially crucial to take international human rights law into consideration[50].

A. Universality and Indivisibility of Human Rights

All human rights are indivisible, universal, interdependent, and tied to one another. Article 1 of the Universal Declaration of Human Rights (UDHR) serves as an example of the universality principle: "All human beings are born free and equal in dignity and rights. The implementation of indigenous law does not deprive its subjects of their human rights since everyone is entitled to respect for their human rights without limitation.

International human rights legislation likewise rests on the inalienability and interdependence of rights. All rights have equal standing; while exercising one, all other rights must also be taken into account. Male primogeniture violates particular articles of international human rights accords, but as we will argue, when these provisions are taken together as complementing and bolstering one another, the case is unavailing[46].

B. Accountability

144 nations have signed the International Covenant on Civil and Political Rights (ICCPR), including South Africa, Zimbabwe, and numerous other African nations. 142 nations have signed the International Covenant on Economic, Social, and Cultural Rights (ICESCR), including some sub-Saharan African governments as such as Namibia, Nigeria, Rwanda, and Zimbabwe. South Africa has signed it, indicating its intention to ratify it at a later date, but has not yet done so. As of September 7, 2000, 166 governments have signed the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), including South Africa, Zimbabwe, and almost every other country in sub-Saharan Africa. All UN countries have accepted the Convention on the Rights of the Child (CRC), with the exception of Somalia and the USA. This indicates that, with the exception of Somalia, all nations whose women are subject to African indigenous law are party to the CRC[51].

When a state signs, ratifies, or accedes to a treaty, they freely assume the responsibility to carry it through. It was highlighted that in addition to signing, treaties often call for ratification, and that this is typically specified in the treaties themselves. This gives nations the opportunity to modify their minds and, if required, their own laws in order to fulfill their treaty responsibilities. For instance, South Africa ratified CEDAW in 1995 after signing CEDAW in 1993. This was done by passing the General Law Fourth Amendment Act, which "eradicated all remnants of legal discrimination against women."

Before a treaty becomes a component of domestic law in certain countries, official approval by the legislature may be necessary after ratification by the administration. This is the case, for instance, in South Africa, where the adoption of treaties into municipal law "needs an Act of Parliament or other kind of 'national legislation,' in addition to the resolution of ratification." A state is "must to abstain from conduct which would destroy the goal and purpose of [the] treaty" during the interim period between signing or ratifying a treaty and it coming into effect[52].

Once a treaty is in effect, the State Party is responsible for adhering to its terms in good faith, as well as for taking the necessary actions to ensure that they are implemented. The specifics of the relevant treaty will determine what this commitment includes. Every article of the CRC, for instance, has requirements, but it also states more generally that "States Parties should adopt all relevant legislative, administrative, and other measures for the realization of the rights established in the present Convention." States Parties must adopt such actions with respect to economic, social, and cultural rights to the fullest degree possible given their resources and, if necessary, within the framework of international cooperation. "States Parties... commit to pursue by all reasonable methods and without delay a policy of eradicating discrimination against women," reads article 2 of CEDAW. They promise to "take all relevant steps, including legislation, to amend or eliminate existing laws, rules, norms, and practices that constitute

discrimination against women," among other things. Taking "appropriate legislative and other measures," "legal protection of women's rights on an equal basis with those of men," and "all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs, and practices which constitute discrimination against women" are among the other actions that are specifically listed. In order to promote women's equal enjoyment of human rights, Article 3 provides a wide clause referring to measures to "ensure the complete development and progress of women[52]."

"[W]here not already provided for by existing legislative or other measures... to take the necessary steps, in accordance with its constitutional procedures and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant," a State Party undertakes when ratifying the ICCPR. A State Party to the ICESCR agrees to "take action... to the best of its ability, with a view to gradually attaining the full fulfillment of the rights recognized in the present Covenant by all necessary methods, notably the adoption of legislative measures.

As a result, when a State Party fails to take action (in particular legislative action) to stop a practice that violates any of the treaties to which it is a party or gives legal sanction to a practice that does so, it is failing to uphold its international obligations under the terms of that treaty. The numerous treaties have established Committees made up of impartial specialists, commonly referred to as treaty bodies, to keep an eye on States Parties' adherence to the provisions of the agreements. The Committees must receive periodical reports from States Parties detailing the actions taken to implement the applicable treaty. The appropriate Committee reviews these findings and produces its own report with observations and suggestions to the State Party on matters that need further attention[52].

C. Non-Discrimination

Without regard to any difference of any sort, including race, color, sex, language, religion, political opinion, national or social origin, property, birth, or other status, Article 2 of the UDHR protects the rights it includes." In talking about this non-discrimination concept, Dugard says that "There is no question that such a standard exists and that it is drawn from convention, basic legal principles, and tradition. In terms of customary law, a number of international agreements have endorsed the affirmation of the concept of non-discrimination on the basis of race and sex found in article 55 of the United Nations Charter. " These include the ICCPR, the ICESCR184, the CRC, CEDAW, and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). The essential foundation of both CERD and CEDAW is non-discrimination. It is a key tenet of pertinent regional human rights accords like the African Charter on the Rights and Welfare of the Child and the African Charter on Human and Peoples' Rights (often referred to as the Banjul Charter). This important international human rights principle of non-discrimination is obviously violated when girls and women are denied the ability to inherit property from their dads or spouses[51].

D. Relevant Human Rights Provisions

The UDHR and numerous international and regional human rights treaties include further provisions relevant to the right of women and girls to inherit, in addition to the principle of non-discrimination contained in the treaties that followed it[48].

1. The Universal Declaration of Human Rights

The UDHR is a recommendation of the General Assembly rather than a treaty to which States might accede. However, it has had a significant influence on the growth of international human rights, providing as a model for national bills of rights and a yardstick by which to evaluate state behavior. It was the inspiration for the International Covenants and other treaties. As a result, it is claimed that the Universal Declaration is now an element of international law that is regarded

as customary. Membership in the UN "nearly unanimously agreed that involves commitment to its values." In addition to the non-discrimination clauses mentioned above, the following articles are pertinent to the topic at hand: Articles 6 (recognition as a person before the law), 7 (equal protection of the law), 17, (right to possess property), 22, (social security) and 25, (economic, social, and cultural rights) (standard of living, including housing, social protection of children). Male primogeniture is a law that is easily defended as being against the UDHR. However, it is more beneficial to go to the covenants and conventions that were built upon the UDHR since they are without a doubt legally obligatory on States Parties who have freely accepted to be bound by them and because they include explicit provisions that address the topic at hand[46].

2. The International Covenant on Economic, Social and Cultural Rights

Economic, social, and cultural rights outlined in the ICESCR"8 sometimes get less attention than civil and political rights because of the economic repercussions of implementing them. However, they are widely acknowledged under international human rights legislation. States Parties "undertake to secure the equal right of men and women to enjoy all economic, social, and cultural rights set out" in the ICESCR by ratifying it. The right to a decent quality of life, which includes the right to appropriate housing, is guaranteed under the ICESCR. Conflicts between widows and heirs often center on whether the widow will be permitted to continue living in the marital house[53].

The only right to which the Committee on Economic, Social, and Cultural Rights has given a whole general remark is the right to housing. The Committee explicitly emphasizes in General Comment 4 that "everyone has a right to decent housing. In particular, in line with article 2 (2) of the Covenant, no form of discrimination may be used in the exercise of this right. The right to housing is described by the committee as "the right to live anywhere in security, peace, and dignity." The Committee's definition of "adequate Housing" includes the idea of security of

tenure. Women are "especially vulnerable given the extent of statutory and other forms of discrimination which often apply in relation to property rights (including home ownership) or rights of access to property or accommodations, and their particular vulnerability to acts of violence and sexual abuse when they are rendered homeless," the Committee said in its General Comment 7, which addresses forced evictions. In addition, governments are required under the non-discrimination clauses of articles 2.2 and 3 of the Covenant to make sure that, in the event that evictions do take place, the necessary steps are taken to guarantee that there is no prejudice involved. 197 In light of this, it is a breach of a woman's right to "adequate Housing" under the ICESCR when the rule of male primogeniture causes her to be evicted by the heir or even threatens her security of tenure[53].

3. The Convention on the Elimination of All Forms of Discrimination against Women

The preamble to CEDAW expresses the concern of States Parties that "extensive discrimination against women continues to persist notwithstanding these many instruments." Therefore, it was felt important to pass a treaty that would put a special emphasis on ending on going discrimination against women. The CEDAW's Article 5 States Parties are required to take all necessary steps to "modify the social and cultural patterns of conduct of men and women, in order to achieve the elimination of prejudices and customs and all other practices which are based on the inferiority or superiority of either of the sexes or on stereotyped roles for men and women." It is obvious that cultural customs or indigenous law cannot be used to deny women and girls the same inheritance rights as males and boys. Even more specifically, the Convention requires States parties to "guarantee, on a foundation of equality of men and women... [t]he same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment, and disposal of property... "in Article 16(1) (h). The CEDAW Committee requested States Parties to "provide comment on the legal or customary provisions pertaining to inheritance

laws as they impact the position of women" in their reports to the Committee when commenting on Article 16(1)(h) in its general suggestion 21[51]. The Committee went on to say, "In many nations, laws and customs governing inheritance and property lead to blatant discrimination against women. In certain cases, women are allowed restricted and regulated rights and get income exclusively from the deceased's property as a consequence of this unequal treatment and may receive a lower percentage of the husband's or father's estate upon his death than would widowers and sons. Frequently, widows' inheritance rights do not adhere to the ideas of equal ownership of assets gained via marriage. Such clauses should be eliminated since they violate the Convention.

There is no longer any room for dispute after the CEDAW Committee's clear declaration that the male primogeniture rule is against CEDAW. This was supported by the CEDAW Committee's final remarks on the report South Africa submitted to it in 1998, which noted with concern "the continuing acceptance of customary and religious laws, as well as their detrimental effects on women's rights to land and inheritance, as well as their rights in family relationships.

The CEDAW Optional Protocol was approved in 1999 by the General Assembly. It allows for the delivery of certain grievances to the CEDAW Committee. These grievances must be in relation to a State Party's breach of a person's rights under CEDAW. When the Optional Protocol comes into effect, it will open up a hitherto unattainable path for women to seek redress for abuses of their human rights. There is a chance that the CEDAW Committee may receive a complaint over the inheritance rights of women under indigenous law. In this situation, the Committee will conduct an investigation and make recommendations to the State Party, who may be requested to give a report on corrective measures taken to the Committee after six months[51].

4. The Convention on the Rights of the Child

The CRC has received the most ratifications of any human rights pact to date. It has unmatched validity as a result. It might be claimed that the law of male primogeniture breaches the CRC's essential principles of the best interests of the child (Article 3) and the right to life, survival, and growth in addition to the concept of non-discrimination that it includes (Article 6). The rights of children to survival and growth are compromised when a woman is denied the resources to provide for her family or forced out of the family home.

According to indigenous law, the offspring of a marriage belong to the husband's family. According to Article 9 of the CRC, which protects a child's right to not be taken away from his or her parents without their choice, a widow who is in dispute with the heir may be forced to depart without her children. A variety of children's rights, including the one described in Article 3 as well as those to health (Article 24), an appropriate standard of living (Article 27), education (Article 28), etc., may be violated as a consequence of this scenario. According to the concept of indivisibility, all of a child's rights must be taken into account as a single, cohesive entity when evaluating a possible infringement.

E. Regional Human Rights Treaties

African human rights instruments are different from international human rights instruments in that they were created in the context of African culture and have, in the words of Dugard of the Banjul Charter, "A essentially African character," while being "influenced by other human rights accords." The debate here pertains to two African human rights conventions.

1. The African (Banjul) Charter of Human and Peoples' Rights

Article 2 of the Banjul Charter forbids discrimination and ensures equality before the law (Article 3). Article 28, which states that "every person should have the obligation to respect and contemplate his fellow beings without discrimination, and to maintain relations aimed at

developing, maintaining and strengthening mutual respect and tolerance," serves as more support for this idea.

The Banjul Charter differs from the previous documents that have been reviewed in that it is not just a regional document but also heavily emphasizes collective rights as opposed to individual rights. The family, which is "the natural unit and base of society" and "the guardian of morality and traditional values acknowledged by the community," is protected, for instance, under Article 18. States Parties are obligated to "ensure the eradication of all forms of discrimination against women and to guarantee the preservation of the rights of the woman and the child as set out in international declarations and conventions," even if this is stated in this article[54]. In other words, morality and traditional values are exclusively the responsibility of the family inasmuch as they do not discriminate against women. When women and girls are treated equally to men and boys in the family, everyone is safeguarded.

2. The African Charter on the Rights and Welfare of the Child

The African Charter on the Rights and Welfare of the Child, which was based on the CRC but also has essentially African characteristics, is the other important regional human rights document. It recognizes the family as the "natural unit and basis of society," while guaranteeing the equality of spouses (Article 18), and it protects the child's right not to be separated from his or her parents against their will. It also contains the principles of non-discrimination (Article 3), the best interests of the child (Article 4) and the survival and development of the child (Article 5). (Article 19). The same defenses of the male primogeniture system that were previously explored in reference to the CRC and the Banjul Charter are also applicable here.

F. World Conferences

States vowed to act to protect human rights and promote development at a number of world conferences in the 1990s. The agreements made at these international conferences are not subject

to the same obligations on the part of States as treaties are. Governments are often asked to report on progress, and the accords have a significant norm-setting significance.

The agreements made during the 1995 Fourth World Conference on Women, held in Beijing, and the 1993 World Conference on Human Rights, held in Vienna in 1993, are especially pertinent in regards to the norm of male primogeniture. Governments must, according to the Beijing Platform for Action, specifically remove "the unfairness and impediments in connection to inheritance suffered by the girl-child so that all children may enjoy their rights without discrimination, by, among alia, implementing, when appropriate, and enforcing legislation that provides equal right to succession and secures equal right to inherit, independent of the sex of the child[55]."

4.2.1.5 Implication of replacement of customary law of succession with international law of succession

The legislation established to address the problems brought on by the intestate succession provisions of customary law are incompatible with current customary law. In this sense, it has also been traditional for the legislatures of Nigeria, South Africa, and the United Kingdom to simply replace the current customary law with the norms of common law when altering the customary law of intestate succession. The simple substitution of common law for customary law has or may have a number of detrimental effects for customary law as a body of law as a whole. The first effect of replacement is that it completely destroys the corpus of law known as customary law[56]. The common law does not reflect living customary law, which could further impede women's rights. Secondly, it could result in circumstances where traditional or community leaders (who are "there to uphold the people's norms and values") could obstruct the acceptance and application of the new laws in the customary communities in which they serve. Thirdly, it is assumed that the traditional communities would easily accept the modifications made to live customary law by the legislative and judicial branches. Because common law

standards are alien to customary cultures, it is possible that people would reject the applicable legislation if they cannot relate to it, reducing it to a meaningless piece of paper that has no bearing on their lives or the lives of those it is intended to protect. Fourthly, it has been shown historically in Ghana that laws that make a significant deviation from customary practice are nearly usually disregarded[40].

Therefore, it is advised that the legislature create customary law "properly" rather than always choosing a "substitutionary" development, since the common law is not an appropriate method for change and may in fact overstate what customary law truly comprises. Sections 39(1) and (2) of South Africa's Constitution may be useful in this respect[57].

These sections provide that:

(1) When interpreting the Bill of Rights, a court, tribunal or forum –

(a) must further the ideals of an inclusive, democratic society founded on liberty, equality, and human dignity;

(b) must take into account international law; and

(c) Must take into account foreign law.

(2) Every court, tribunal, or forum must uphold the spirit, purpose, and objectives of the Bill of Rights while interpreting any legislation and when creating common law or customary law.

As a result of the above, it follows that the legislature should really write laws that are in keeping with the traditions of traditional communities and the principles of the Constitution. Contrary to the notion of male primogeniture, women often inherit under customary law in South Africa, where traditional societies are actually highly receptive to allowing women to inherit property[57]. "The values of all parts of society must be taken into consideration and given fair weight," according to the ideals of an open and democratic society. Thus, we may conclude that when the South African Constitution is read, the values of traditional communities must also be taken into

account. If this is done, the legislature will be able to pass laws and the judiciary will be able to issue rulings that "encourage change in socio-cultural patterns of behavior which would bring such behavior into line with the underlying values of the Constitution" and that are sensitive to cultural differences. In spite of this, customary law should be treated with the respect it deserves, and any amendments should be made through proper development of customary law rather than by replacing existing law with customary law. This is because it is specifically listed as a law or as a source of law in the constitutions of these countries.

4.3 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 studies in three ethnic group in this study. That is, the Igbo, Bini and Kalabari ethnic group.

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 Bini customary law of succession, the eldest son succeeds to the entirety of his father's estate and also the father's dwelling house referred to as *"igiogbe"*. The Bini customary law of succession is similar to that of the Igbo as it is also patrilineal. In the Kalabari customary law of succession, the eldest son receives the largest share while the youngest son receives the smallest share irrespective of the legitimacy of the sons. If the deceased is not survived by any male heir or child, his brothers of full blood take over the estates.

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 has its characteristics, and has its foundation in ethnicity and traditions. Many of these aspects go against basic human rights.

The primogeniture rule has a general conception of preferring the eldest male child to the other siblings and disinheriting the surviving spouse of the deceased which is the wife. The right to equality is violated when women are excluded from inheriting and benefitting from their ancestors assets or deceased spouse. Global International Human Rights Instruments and Regional Human Rights Instruments are addressed with emphasis on their relevant provisions which echo the right to equality.

The oppositions and compromise of the primogeniture rules tends that this law of succession and inheritance is a discrimination against women and have a negative impact on them. These laws go against the norms and standards of the human rights in the international community.

Article 1 of the UDHR states "All human beings are born free and equal in dignity and rights" but the male primogeniture is seen to conflict and violates the international human rights accords.

However international treaties such as the ICCPR, ICESCR, CEDAW and CRC were signed into by African States including South Africa, Zimbabwe and other numerous African nations with the objective to eradicate all legal discrimination against women.

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Chapter Five

Conclusion

5.1 Summary of Findings

This study examines the underlying an analysis of the principles of primogeniture rule and its position under international human rights law: a case study of Nigeria, South Africa and United Kingdom. Consequently, it finds that: the primogeniture rule also means the preference of the eldest female child over all other siblings. It is an analytical brief essay based on existing literary works on the primogeniture rule but it is shaped to give a fresh outlook on what constitutes the rule.

The term primogeniture is not restricted to the universal conception of the preference of the eldest male child to the other children in inheritance. Looking at the content of the chapters, it is clear that there are other various forms of primogeniture such as the matrilineal form which is the direct opposite of the universal conception of what primogeniture rule is. With regards to the origin of primogeniture in Western societies, it is staunchly established that the rule is a direct consequence of feudalism and entail which became abolished upon the abolition of the system of government and land tenure. The origin of the rule in Africa can be attributed to religion and to the communal nature of the African societies prior to colonialism.

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. It is clear that there exists some tension between the primogeniture rule and formal rules.

In South Africa, after the landmark case of *Bhe v. Magistrate*, the rule of primogeniture totally lost its power and applicability as an aspect of the law of intestate succession. The *Intestate Succession Act* is now applicable to all South Africans irrespective of the race, customary background and type of marriage contracted when there is a death intestate.

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. Itis 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.

5.2 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.

5.3 Recommendations

The following recommendations are given as regard to the study:

- In addressing the conflict between customary law and human rights, the ideal solution is the harmonization and codification of existing customary laws in such a way that they conform with human rights law and other contemporary laws.
- A legal framework should be laid down to address any default in the commission of the duty of support and care. There should be *locus standi* for dependents under the rule to bring an action to court to enforce this duty and if this does not work there should be available to the dependents, the right to petition for the disinheritance ofthe sole heir.
- A forum to choose whether or not to be governed by the customary rule of primogeniture or a codified customary law of intestate succession should be made available to the family of a deceased who dies intestate. In pursuance of this, the

customary limitations to creating wills and administering estates under the Act which indirectly endorse the strict applicability of primogeniture rule need to be repealed.

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The University Compliance Certification

This is to certify that this thesis written by MIRIKI Tonye Sharon with matriculation number LCU/PG/001830 in the Department of Politics and International Relations, Faculty of Management and Social Sciences, Lead City University, Ibadan, is in full compliance with the approved University format and style.

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Signature **Date**