AN EVALUATION OF THE NIGERIAN JUDICIAL ATTITUDE TO THE IGBO CUSTOMARY LAW OF SUCCESSION*[1]

Abstract
Although the Igbo customary law of succession, which espouses the primogeniture principle, has recently been lambasted by the Nigerian courts for violating the equality provisions of the Nigerian Constitution and discriminating against women, the judicial engagement with the Igbo inheritance law in Nigeria remains evasive and reductionist. The Nigerian courts have failed to examine the Igbo customary inheritance law in the context of the social settings under which it developed from pre-colonial and colonial times till date, and the purposes which the law was originally meant to serve. Against this backdrop, this article critically engages the primogeniture principle and the Igbo customary succession law without neglecting its socio-historical context and raison d'etre. The study finds that the problem with the Igbo succession law today lies more with the lived unofficial practice of the Igbo inheritance custom over time than with the official customary law, which ultimately aims at securing the best interests of all the dependants of intestates. The article, therefore recommends that rather than totally discountenancing the Igbo customary succession law on the basis of the 'Bill of Rights approach', a more holisitc judicial review of the Igbo inheritance law should recapture the 'the best interests of all dependants approach' inherent in pre-colonial Igbo inheritance custom albeit without its patriarchal garb. The work adopts the methodology of doctrinal analysis.

Keywords: Judicial Attitude, Nigerian, Igbo Customary Law, Succession

1. Introduction

The *Igbo* custom is one of the richest and deeply symbolical cultures in Nigeria and indeed the whole of Africa. This rich cultural matrix is not just evidenced in the *Igbo* history, folklore, artifacts, institutions, dance, marriage and family. In a very special way, it is manifested through the *Igbo* customary inheritance laws. As a people, *Igbos* do not joke with property. The property of the *Igbo* man not only represents the fruit of his labour while on earth, it affords him something to hand over and so, assures him of a future in his successors, long after he has joined his ancestors. As such, the *Igbo* custom does not joke with succession and the attendant rights it confers on those who inherit under the custom. Even in situations where the deceased leaves a will behind, devolution of property in *Igbo* land (especially where the deceased is a man of means) sometimes could be very complex and precarious.[2] Apart from the above, of all the customary laws of inheritance in Nigeria, none has enjoyed judicial attention as the *Igbo* customary law.[3] In fact, it's complicated and rough relationship with the courts in Nigeria has given rise to reactions from scholars and notable people in *Igbo* land and beyond.[4] An examination of the relevant cases and resultant scholarly reactions reveal two discernible clusters of opinions. On the one hand are judges and scholars who campaign for the preservation of the *Igbo* culture, and therefore, lampoon decisions critical of same;[5] on the other hand, more recent decisions and opinions find some elements in the *Igbo* succession custom not only repugnant to natural justice, equity and good conscience but also discriminatory to females in a democratic society.[6]

However, despite the subjection the *Igbo* inheritance laws to the Bill of rights in recent times by the Nigerian courts, this article argues that the judicial attitude to the *Igbo* customary law of inheritance in Nigeria remains reductionist and evasive. It is not enough for courts to levy theoretical condemnations on the Igbo inheritance custom, hence, further widening the gap between law and practice, with regard to customary practice in Nigeria. The Nigerian courts have not taken time to examine the socio-economic settings under which these inheritance rules originated and the rationales behind them, so as to formulate a more robust, balanced and acceptable

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[2] See Vincent Ujumadu, 'Missiles Trail Ojukwu's Will' (*Vanguard*, 8 December 2012).<https://www.vanguardngr.com/2012/12/misssiles-trail-ojukwus-will/amp/> accessed 5 May 2021.

[3] The *Igbo* customary law of succession has drawn the attention of the Nigerian courts because of some discriminatory elements of the custom, especially, the principle of primogeniture, which, in its application, discriminates against women. Examples of cases dealing with the *Igbo* customary law of succession include: *Onwusike v Onwusike* (1962) 6 ENLR 10; *Nezianya v Okagbue* (1963) 1 All NLR 52; *Muojekwu v Muojekwu* (1997) 7 NWLR 283; *Anaekwe v Nweke* (2014) 9 NWLR [Pt 1412] 393; *Muojekwu v Iwuchukwu* (2004) 11 NWLR [Pt 883] 196; *Ukeje v Ukeje* (2014) 11 NWLR (Pt 1418) 384.

[4] See TOG Animashaun & AB Oyeneyin, *Laws of Succession, Wills and Probate in Nigeria* (Lagos, MIJ Pub 2002) 3; I E Sagay, *Nigerian Law of Succession Principles, Cases, Statutes and Commentaries* (1st edn, Malthouse Press 2006) 73; Ben Nwabueze, *Nigerian Land Law*, (Nwamife Pub Ltd 1974) 381-402; EI Nwogugu, *Family Law in Nigeria* (HEBN Pub Plc 1974) 401; IP Enemuo, *Basic Principles of Family Law in Nigeria* (Spectrum Books Ltd, 2008) 398-406.

[5] See *Muojekwu v Iwuchukwu* (n 3 above), per SO Uwaifo (JSC); *Nezianya v Okagbue* (n 3 above) *; Nzekwu v Nzekwu* (1989) NWLR (Pt 104) 373; AC Diala, 'A Critique of the Judicial Attitude Towards Matrimonial Property Rights under Customary Law in Nigeria's Southern States' (2018) 18 AHRLJ 113.

[6] See *Ukeje v Ukeje* (n 3 above), per Rhodes-Vivour (JSC); See also AC Diala (n 3 above) 100-113.

response/reform.[7] The article contends that such a robust examination will help in demonstrating that, given the fact that the socio-economic circumstances under which the *Igbo* customary rules of inheritance were formulated have changed,[8] it makes no sense clinging to a pristine principle of primogeniture that discriminates not only women but also other dependents of a deceased intestate.

This article is divided into three main parts. The first part introduces the discussion by explaining the central ideas of succession and intestate succession. The second part approaches the examination of the *Igbo* customary law of inheritance through a case-by-case and issue-by-issue analysis in order to distil the different elements of the custom, paying attention to the progression and developments in these customary rules, and the rationales behind them. The article ends with an evaluation which engages the judicial attitude to the *Igbo* customary law of inheritance, and proposes a more robust reform of same.

2. General Idea of Succession and Succession Law

According to the Black's law Dictionary, succession is defined as 'the acquisition of rights of property by inheritance under the law of descent and distribution.'[9] Put in another way, 'it is the transfer of property or legal rights to another at the death of the owner… the law governing the transmission of property vested in a person at his death to some other person or persons.'[10] Animashaun and Oyeneyin see it as 'the passing of property to persons upon the death of the owner of the property.'[11] Therefore, the law of succession deals with the legal rules that regulate the transmission of the rights and obligations of the deceased person in respect of his estate to his heirs and successors. Scholars agree that the purpose of the law of succession is to ensure the continuance of the property of the deceased, and to provide machinery for the proper distribution of property among those who are beneficially entitled thereto.[12] Hence, succession 'provides a pattern for the devolution of the deceased estate. Upon the death of a person, his assets devolve upon a new owner, and some clearly defined patterns of devolution and institutions charged with its control must exist to preserve peace and order among the members of the community. The law of succession provides this pattern'.[13]

Succession may be testate or intestate. Where a deceased person makes a will, he is said to have died testate. The effect of this is that his property would be distributed to his heirs and successors in accordance with his will, regulated by necessary laws.[14] But where he has no will or has made one which at his death has become totally inoperative, he is said to have died intestate.[15] When a person dies intestate, succession to his/her self-acquired property could be regulated by three systems of law: the common law rules of intestacy, the Administration of Estate laws of various States or Customary law.[16] According to Sagay, 'the factor which determines which system is to apply in every case is the type of marriage contracted by the intestate person. In the case of Muslims, the religion practiced by the deceased is also relevant.'[17] Where the intestate contracts statutory marriage and dies domiciled in any of the sates comprising the former Northern or Eastern Regions, which are yet to enact their Administration of Estates Laws, the distribution of his estate is governed by Common law rules of intestacy.[18] However, where the intestate contracts a statutory marriage in Nigeria but dies domiciled in Lagos or any of the states comprising former old Western or Mid-Western Regions, then, respectively, the Administration of Estates Law of Lagos state or of any of the concerned states (where they have enacted their own laws) or of the Old Western or Mid-Western Region (where no autochthonous law has been enacted) will govern the distribution of the deceased's estate.[19] Lastly, if the intestate Nigerian dies without contracting a statutory marriage, the mode of

[7] By contrast, the courts in South Africa have pursued a more robust reform of her customa ry laws. See *Bhe & Others v The Magistrate, Khayelitsha & Others* 2004 (2) SA 544 (C) and *Shibi v Sithole and Minister for Justice and Constitutional Development* Case 7292/01, 19 November 2003 (unreported); CN Himonga, 'The Advancement of African Women's Rights in the first Decade of Democracy in South Africa: The reform of the Customary Law of Marriage and Succession' (2005) 82 *Acta Juridica* 83.

[8] AC Diala, 'Reform of the Customary Law of Inheritance in Nigeria: Lessons from South Africa' (2004) 14 AHRLJ 634.

[9] B Garner, *Black's Law Dictionary* (11th edn, Thomas Reuters, 2029) 1569.

[10] DH Parry, *The Law of Succession* (Sweet and Maxwell, 1961) 1.

[11] TOG Animashaun & AB Oyeneyin, *Laws of Succession, Wills and Probate in Nigeria* (MIJ Pub Ltd, 2002) 3.

[12] ibid.

[13] F Hutley & R Woodman, *Cases and Materials on Succession* (The Law Book Company, 1967) 1.

[14] See *Wills Law of Lagos State, s 1.*

[15] See BN Otunta, 'Nigerian Intestacy Law: Appraising the Impact of the Pluralist System' (2020) 6 International Law Journal No 2 70-71.

[16] IE Sagay, *Nigerian Law of Succession Principles, Cases, Statutes and Commentaries,* (1st edn, Malthouse Press Ltd 2006) 73.

[17] ibid 73.

[18] ibid 73; for example, Anambra State in Southeastern Nigeria has enacted *The Administration and Succession (Estate of Deceased Persons) Law* to govern intestate succession in the State.

[19] See *Administration of Estate Laws of Lagos State 2004.*

distribution of the deceased's estate will be governed by customary law or Islamic law, as the case may be.[20] This article is concerned with customary succession law in Nigeria.

3. Intestate Succession under Customary Law in Nigeria

Customary law has been defined as 'a mirror of accepted usage, a reflection of the social attitudes and habits of various ethnic groups and derives its validity from the consent of the community which it governs, applicable only to the people indigenous to the locality where the customary law holds sway.'[21] It is 'any system of law different from Common Law and Law enacted by Legislation, but which is enforceable and binding within Nigeria as between the parties subject to its way.'[22] Therefore, customary succession is succession that is not in accordance with common law or statute, but in accordance with the traditions, customs and practices of the local people which are enforceable and binding between the parties which are subject to it. For any court in Nigeria to enforce any customary law, it must pass the validity test.[23] Hence, it must not be repugnant to natural justice, equity and good conscience;[24] and it must not be incompatible either directly or indirectly with any law for the time being in force in Nigeria, and neither would it be inconsistent with the provisions of the Nigerian Constitution,[25] or public policy.[26] In Nigeria, there are about 300 different ethnic groups with even a greater number of customary laws.[27] Customary succession implies that distribution of deceased persons' estates would be done according to each of these customary laws. According to Nwabueze, in each case, the mode of customary succession is determined by doctrines of inheritance espoused by each custom.[28] He identified three doctrines of inheritance evident in the Nigerian Customary law of succession: patrilineal succession, matrilineal succession and bi-lineal succession.[29] Among patrilineal societies, two main patterns of succession are found - succession by all the surviving children jointly, and succession by a sole heir under the doctrine of primogeniture.[30] The Igbo customary law of succession belongs to the latter category.

4. Succession under the Igbo Customary Law

Granted that the rules of customary law of succession in *Igbo* land are not uniform, certain similarities are discernible.[31] Hence, according to Nwogugu, 'although there are slight variations in the prevailing customary law of succession in various parts of Iboland, the main principles are basically the same.'[32] The cardinal principle of the customary law of succession in various parts of Igbo land is primogeniture, that is, succession by the first born of the male line.[33] Under the principle of primogeniture,

> succession is through the eldest male in the family who is known as 'Okpala' 'Diokpala' or 'Diokpa'. In the case of a nuclear family, succession is through the eldest male child of the deceased. With regard to the extended family, succession is through the eldest son of the ancestor and so on in that line irrespective of the fact that the 'Okpala' may in fact be junior in age to other members of the extended family.[34]

There is often the erroneous impression among some scholars that the principle of primogeniture, as espoused by the Igbo succession custom, always entitles the eldest surviving son to inherit the estate of his deceased father absolutely, to the exclusion of other children.[35] This notion has been rebutted by Nwabueze, who distinguished between two ways in which the principle of primogeniture could operate in customary law.[36] According to him, the principle of primogeniture could operate in two forms: (a) succession to the headship of the deceased's

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[20] ibid, s 1(3); In *Obusez v Obusez* (2001) FWLR (Pt 73) 40, Aderemi JCA stated: 'Where however, a person subject to customary law went on to transact a marriage under the Act, this raises a presumption that the distribution of his estate shall be regulated by the Marriage Act. This presumption can be rebutted if the manner of life of the deceased is suggestive that the deceased wanted customary law to apply.'

[21] S Jeswald, *A Selection Survey of Nigerian Family Law* (Ahmadu Bello University Bookshop 1965) 6-8.

[22] *Kharie Zaiden v Fatima K Mohassen* (1974) UILR 283 at 284.

[23] The "validity test" as a judicial criterion comprises of the "repugnancy test", the "incompatibility test" and the "public policy test". See *Evidence Act 2011, s 18 (3);* Eshygbaye Eleko v Government of Nigeria (1931) AC 662.

[24] This standard is known as the "repugnancy test" as applied by the courts in *Okonkwo v Okagbue [*1994] 9 NWLR (Pt 368) 301 and *Mojekwu v Ejikeme & Ors* (2000) 5 NWLR 402.

[25] This test is known as the "incompatibility test" as demonstrated by sections 14 and 42 of the Constitution of the Federal Republic of Nigeria 1999 (as amended), and applied by the courts in *Ukeje v Ukeje* [2014] 11 NWLR (Pt 1418) 384.

[26] The "Public policy test" has been applied by the court in *Okonkwo v Okagbue* [1994] 9 NWLR (Pt 368) 301.

[27] See O Otite *Ethnic pluralism and ethnicity in Nigeria* (Shaneson CI Ltd, 1990) 35-36.

[28] B Nwabueze, (n 4) 381-402.

[29] ibid.

[30] ibid

[31] Enemuo (n 4) 398.

[32] EI Nwogugu (n 4) 401.

[33] ibid 416.

[34] ibid 417-417.

[35] Nwabueze (n 4) 392-398.

[36] ibid.

immediate family; and (b) succession to the deceased as sole inheritor.[37] Where the first form of primogeniture operates, (as in patrilineal societies, including the *Igbos*), the eldest surviving son inherits from his deceased father only as the new head of the family.[38] This does not make him the sole inheritor in such a way that he could sell the deceased's property without the consent of other children of the deceased. He holds the property in trust for other children.[39] This is different from the second idea of primogeniture, where the eldest surviving son, upon the death of his father and upon fulfillment of some customary obligations, inherits absolutely from his father, as a sole inheritor.[40] This latter form is found in the Bini customary law, where the eldest surviving son's right extends not only to the *igi-ogbe*,[41] but also, to the whole real property of his deceased father,[42] as demonstrated by the Nigerian courts in the popular case of *Ogiamen v Ogiamen.*[43]

The rationale behind the principle of primogeniture which underlines the *Igbo* customary law of succession was the maintenance of family welfare and stability.[44] Hence, according to Obi, pre-colonial inheritance rules in Nigeria were concerned with the overall welfare of the family.[45] Since the *Igbo* customary rules of inheritance were centered on protecting family structures, to perpetuate clan lineage and keep wealth within the family, heirs inherited not only the properties of the deceased persons, but also responsibilities to maintain the deceased's dependants and to preserve the continuity of the family.[46] Ideally, it was in this context that the male primogeniture rule, which aimed principally at caring for the whole family,[47] was developed. Ultimately, underlying the primogeniture principle in the traditional *Igbo* society was the best interests of the family (males and females, inclusive).[48] Therefore, from this perspective, it becomes easier to dispassionately understand the different elements of the *Igbo* customary laws of succession, which are discussed below.

The Method of Inheritance in Igbo land

True to the *Igbo* primogeniture principle, at the death of the founder of the family, his eldest son succeeds him as the head of the family.[49] Unlike in the Yoruba custom,[50] a female cannot assume the position of family-head in *Igbo* land, no matter her position or seniority in the family. The eldest son inherits the father's personal 'Ofo' and other objects of worship.[51] Where a title survives the holder, the eldest son inherits the father's title.[52] He is also entitled to the insignia of the intestate's hereditary office, which he has no right to sell, because this is considered as family property.[53] With regard to the personal and real estates of the deceased intestate, the rules of inheritance in Igbo land are as follows:

> The eldest son inherits his father's furniture to the exclusion of his brothers and the widows. He also inherits his father's wearing apparels and other articles of dressing. Where the intestate left behind some money, this is inherited by all his sons. The sons also inherit their fathers farming implements or tools and his livestock. Succession to the intestate's real estate is determined by the nature of the particular property. The eldest son inherits, as of right, the late father's dwelling house – obi and the immediate surrounding compound. He is in addition entitled, by virtue of his position, to one distinct piece of land sometimes called 'ani isi obi', that is, land for the head of the family. The right to succeed to the other lands and houses of the intestate is vested in his sons as a body. In the absence of sons, the right to inherit such property is that of the eldest full brother.[54]

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[37] ibid.
[38] ibid.
[39] See *Ngwo & Ors v Onyejena* (1964) 1 All NLR 1352.
[40] Nwabueze (n 4) 391-393.
[41] *Igi-ogbe* is the 'principal house' where the deceased lived during his lifetime. See *Idehen v Idehen* (1991) 6 NWLR [Pt 198) 382.
[42] See *Ogiamen v Ogiamen* (1967) NMLR 243 at 247.
[43] ibid.
[44] SNC Obi, *Modern Family Law in Southern Nigeria* (Cambridge University Press, 1966) 337.
[45] ibid.
[46] N Okoro, *The Customary Laws of Succession in Eastern Nigeria and the Statutory and Judicial Rules Governing their Application* (Sweet & Maxwell, 1966) 4.
[47] ibid.
[48] See N Nhlapo, 'The African Family and Women's Right: Friends or Foes' (1991) *Acta Juridica* 138 141 145-146.
[49] IP Enemuo (n 4) 398.
[50] Under the Yoruba Native Law and Custom, both male and female children of an intestate succeed to the estate of intestate as a single entity. See Amadi *v Abayomi* (2002) FWLR (Pt 132) 136*; Lewis v Bankole* (1908) 1 NLR 81. In fact, the Nigerian Court of Appeal in *Amusan v Olawunmi* (2002) 12 NWLR [Pt 780] 30 held that, under the Yoruba custom, in some situations, women can be family head for the purpose of customary succession.
[51] EI Nwogwugwu (n 4) 417.
[52] ibid.
[53] SNC Obi, *The Customary Law Manual* (Government Printer, 1977) 117-137.
[54] EI Nwogugu, op. cit. pp. 401-402

In *Ngwo & Nwojie v Onyejena,*[55] it was held that where there is no issue, the deceased's brother or uncle succeeds the intestate, but only as a trustee or custodian, to administer the deceased's estate for the benefit of the deceased's family.

The right of the eldest surviving son to succeed his father in the headship of the family is automatic, and arises by operation of law from the fact of seniority of age.[56] Only the father can deprive the eldest son of this birthright with a valid direction made with the aim of ensuring that the affairs of his family are properly managed by a person best-fitted on the ground of intelligence and education to do so.[57] Most times, this direction must be made in the father's life time before witnesses who should be family members.[58]

The Extent of the Inheritance Right of the Eldest Surviving Son in Igbo Succession Law

In the 1967 case of *Ugboma v Ibeneme,*[59] the defendant called some expert witnesses who testified that, by the customary law of the *Igbo* people, the eldest son inherits all his father's landed property (including houses) to the exclusion of his brothers, and could dispose them without his sibling's consent; and that, though it was usual for the younger brothers to be given allotments of farmland, they had to approach their eldest brother for it. Egbuna J. emphatically rejected this as the law in *Igbo* land, and held rightly that land, among the *Igbos,* is inherited by all the sons as family property, and that the eldest son, as the new head of the family, is only a 'caretaker.'[60] Nwabueze also rejected the often-believed idea that the eldest son could exclusively inherit the father's residential house (obi).[61] According to him,

> this is certainly an over-statement based upon a confusion between ownership and possession. The eldest son's right is merely one of exclusive occupancy of the *obi*; the ownership belongs to all the male issue jointly as family property. In most cases, the *obi* is built upon the land of the extended family, so that no question of the ownership of the land itself by the deceased or by his eldest son arises.[62]

Nwabueze's perspective is supported by the case of *Onwusike v Onwusike,*[63] where the court held that even though Onitsha has roots in Benin, it follows the *Igbo* principle of inheritance that succession to land is by all male issues jointly as family property. In *Ngwo v Onyejena*[64]*,* the Nigerian Court of Appeal found, on the evidence of the Asaba customary law of succession that, 'when a father dies, his land is inherited by his eldest son who holds it in trust for his other children. The other children have a beneficial interest in the land and have a right to farm on it.'[65] The primogeniture rule, therefore imposes an obligation on the eldest surviving son - *Okpala.* Since the real property of the deceased vests on his eldest son (*Okpala),* it is his duty to manage and administer such property for the benefit of himself and his brothers and half-brothers. The position of the eldest son in this respect was discussed in *Ejiamike v Ejiamike,*[66] where the learned trial judge found, through evidence, that in accordance with the Onitsha customary law, the eldest son (*Okpala)* has the right to manage and administer the real estate of his deceased father for the benefit of himself and his brothers. However, in the exercise of this right, as was held in *Onwusike v Onwusike,* the *Okpala* is accountable to his younger brothers and so, he must tell them if he desires to sell any such-inherited piece of land, since they are entitled to the proceeds of the sale or rent, where he lets it to a third party. The younger brothers have no right to oust the *Okpala* in the administration of their late father's real estate, even if he is profligate.[67] They can, however, report his profligacy to the extended family.[68]

Succession Rights of Daughters and Widows in Igbo Customary Law

Under the *Igbo* customary law of succession, the position of law used to be that females do not possess the right to inherit.[69] Hence, neither the daughters nor the widows of the deceased intestate were allowed to succeed to the deceased's real estate.

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[55] (1964) 1 All N.L.R. 352
[56] B Nwabueze (n 4) 392.
[57] ibid
[58] ibid 393.
[59] (1967) F.N.L.R. 251
[60] ibid.
[61] B Nwabueze (n 4) 395.
[62] ibid
[63] (1962) 6 E.N.L.R. 10
[64] (1964) 1 All NLR 1352.
[65] ibid.
[66] (1972) 2 ECSLR 11
[67] See *Onwusike v Onwusike (*1962) 6 ENLR 10*; Ejiamike v Ejiamike* (1972) 2 ESLR 11.
[68] EI Nwogwugwu (n 4) 418-419.
[69] IP Enemuo (n 4) 398.

Daughters

With regard to daughters, the rule was that a woman cannot succeed to the headship of the family, since it is to the head that the powers incident to family ownership of land belong.[70] In *Ugboma v Ibeneme*[71], the daughters of a deceased intestate from Awkuzu in the Onitsha Province of South-Eastern Nigeria claimed to be jointly entitled with their brothers to their father's land. However, the court emphatically rejected this testimony, and held that among the Awkuzu people of South-Eastern Nigeria, as also among the rest of the Igbo people, 'women have no such right….'[72] Experience and exposure to the Igbo custom reveal the rationales behind the disinheritance of daughters in *Igbo* customary law. Apart from the fact that the *Igbo* customary law of inheritance is essentially patrilineal, with regard to the inheritance of real estate, in *Igb*o culture, land, for example, has a ritual significance which connects the living to the ancestors of the land. Only men are considered custodians of family land as women born within *Igbo* communities often get married to other communities and so, are not allowed to inherit. Secondly, as Nwabueze noted, if daughters are allowed to inherit from their father's real estate, the implication is that a daughter's share in her father's land may be inheritable by her issue, even without partition of the land.[73] What this means is that where the daughter is married, her issue may inherit both from her nuclear family and her father's family. *Igbo* customary law, therefore, opted to lean against this inequitable double portion.[74] What is however provided is that the daughter who is not entitled to inherit her father's estate is entitled to be maintained by the person who inherits her father's estate until she marries or becomes financially independent or dies.[75] Moreover, the unmarried daughter has a right to be shown a portion of her father's land or family group farmland for her annual farming needs, and this right lasts until she marries or leaves the family group or dies.[76] This was the rationale that informed the *Iri-ekpe* or *Ili-ekpe* custom.[77] In some parts of *Igbo* land, where this custom obtains, if the intestate dies without sons, brothers or father, his estate is inherited by the eldest nearest paternal male relation, who is called the *ori-ekpe,* and not any of the surviving daughters of the deceased. However, under the *Iri-ekpe* custom, the *Ori-ekpe* does not inherit absolutely and exclusively.[78] His rights cannot be more than that of the eldest son (*Okpala),* where there is one. He holds the property in trust and for the benefit of the family, which includes the daughters.[79] The unmarried daughters of the deceased do thereby not lose their rights to maintenance nor are they disentitled from using a portion of their father's land for their annual farming needs.[80]

The *Iri-ekpe* custom received judicial acknowledgement until 1997 when the Nigerian Court of Appeal in *Muojekwu v Muojekwu*[81] lambasted the '*Iri-ekpe'* customary law of the *Igbos* for being repugnant to natural justice, equity and good conscience and employed international instruments like *The Convention on the Elimination of all forms of Discrimination Against Women* to make a case against the *Igbo* culture in defense of women rights, on the basis of discrimination on the ground of sex. The hardline judicial attitude against this custom has been maintained in cases like *Nzekwu v Nzekwu*.[82] In *Muojekwu v Muojekwu*, the appellant claimed ownership of the property of the deceased, who was his paternal uncle, against the daughters of the deceased, on the basis of the '*Ili-ekpe'* custom of the Nnewi people of South-Eastern Nigeria. Rejecting his claims, Niki Tobi JCA (as he then was) held as follows:

> We need not travel all the way to Beijing to know that some of our customs, including the Nnewi *Oli-ekpe* custom…are not consistent with our civilized world, in which we all live today, including the appellant…. Accordingly, for a custom or customary law to discriminate against a particular sex is to say the least, an affront on the Almighty God Himself. Let nobody do such a thing. On my part, I have no difficulty in holding that the *Oli-ekpe* custom of Nnewi is repugnant to natural justice, equity and good conscience.[83]

While this decision was lauded in some quarters as a 'radical change of all customary practices relating to inheritance in Nigeria to ensure equality of all persons,'[84] it was not well-received in some others. Hence, in 2004,

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[70] ibid.
[71] (1967) FNLR 251 4.
[72] ibid
[73] See B Nwabueze (n 4) 383.
[74] ibid
[75] EI Nwogugu (n 4) 421.
[76] ibid.
[77] This custom empowers the nearest eldest male relation of the intestate to inherit the estate of the intestate where the latter's widow has not male issue.
[78] SNC Obi (n 53) 187-188.
[79] ibid.
[80] ibid.
[81] (1997) 7 NWLR (Pt. 512) 283.
[82] (1989) 2 NWLR 373.
[83] See *Muojekwu v Muojekwu* (n 3 above).
[84] See I Ogugua, *Gender Dynamics of Inheritance Rights in Nigeria: Need for Women Empowerment* (Folmech Printing Co Ltd, 2009) 162.

when there was a further appeal of the case to the Nigerian Supreme Court in *Muojekwu v Iwuchukwu*,[85] Justice Uwaifo criticized the earlier Court of Appeal pronouncement as follows:

> I cannot see any justification for the court below to pronounce that the Nnewi native custom of *Oli-ekpe* was repugnant to natural justice, equity and good conscience….The learned Justice of Appeal was no doubt concerned about the perceived discrimination directed against women by the said Nnewi *Oli-ekpe* custom and that is quite understandable. But, the language used made the pronouncement so general and far-reaching that it seems to cavil at, and is capable of causing strong feelings against, all customs which fail to recognize a role for women. For instance, the custom and traditions of some communities which do not permit women to be natural rulers or family heads. The import is that those communities stand to be condemned without a hearing for such fundamental custom and tradition they practice by the system by which they run their native communities.[86]

Subsequently, in *Anaekwe v Nweke*[87] and *Ukeje v Ukeje*[88] the Nigerian Supreme Court deprecated all Nigerian native customs which disinherit females as discriminatory and therefore, unconstitutional. In the latter case, the Supreme Court, per Justice Rhodes-Vivour, held that:

> the Igbo native law and custom which disinherits a female from inheriting in her father's estate is void…. No matter the circumstances of the birth of a female child, such a child is entitled to an inheritance from her late father's estate…the Igbo Customary Law which disentitles a female child from partaking in the sharing of her deceased father's estate, is in breach of S 42(1) and (2) of the Constitution, a fundamental right provision guaranteed to every Nigerian.[89]

It must be noted that in some parts of *Igbo* land, there used to be an exception to the rule that daughters do not inherit from their late fathers. In some parts of Idemili Local Government Area, and in Nnewi town, both of Anambra State, Nigeria, a daughter in respect of whom the *nrachi* ceremony has been performed inherits her father's compound and other lands and houses.[90] The *nrachi* ceremony is usually performed where a man has only daughters but no son. In order to ensure the continuation of the family line, he persuades one of his daughters not to marry but to remain in the family with the hope of bearing a male heir to the estate of the intestate.[91] However, in *Amade v Nmechi*[92] and *Muojekwu v Ejikeme*,[93] the Nigerian courts have held that the *nrachi* custom not only failed the repugnancy test because children born to a woman who had undergone this ceremony are denied the paternity of their natural father, but also offended section 42 (2) of the 1999 Constitution, and so is discriminatory.

Widows, Widowers and Unmarried WomenIt was the rule in the *Igbo* customary law that a widow is not entitled as of right to succeed to the personal or real estate of her deceased husband.[94] This is because in customary intestacy, devolution of property follows the blood line.[95] Therefore, a wife or widow, not being of blood, has no claim to any share. However, according to Nwabueze,

> a widow who chooses to remain in the husband's house and in his name is entitled, in her own right and, not withstanding that she has no children, to go on occupying the matrimonial home and to be given some share of his farmland for her cultivation, and generally to maintenance by her husband's family. Should her husband's family fail to maintain her, it seems that she can let part of the house to tenants and use the rents obtained thereby to maintain herself. Her interest in the house or farmland is merely possessory, and not proprietary, so that she cannot dispose of it out-and-out.[96]

The right of maintenance of widows in *Igbo* customary law was stated in *Nezianya v Okagbue*[97] and restated in *Ejiamike v Ejiamike.*[98] However, there has been a change in the judicial attitude to the right of succession of widows in Southeastern Nigeria with the Supreme Court decisions in *Anaekwe & Ors v Nweke*[99] *and Ukeje v Ukeje.*[100] In *Anaekwe v Nweke*, the question for determination before the Nigerian Supreme Court was whether the respondent who had no male child could inherit the property of her late husband. Justice Ogunbiyi, with a very strong language stated that:

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[85] [2004] 11 NWLR [Pt 883] 196.
[86] ibid.
[87] (2014) 9 NWLR [Pt 1412] 393.
[88] (2014) 11 NWLR [Pt 1418] 384.
[89] ibid.
[90] IP Enemuo (n 4) 404-405.
[91] EI Nwogugu (n 4) 426.
[92] (2008) 10 NWLR [Pt 1094] 1 CA.
[93] (2005) 5 NWLR [Pt 657] 402.
[94] *Nezianya v Okagbue* (1963) 1All NLR 352; EI Nwogugu (n 4) 426.
[95] B Nwabueze (n 4) 389-390.
[96] ibid.
[97] (1963) 1 All NLR 352.
[98] (1972) 2 ESLR 11.
[99] See (n 3 above).
[100] See (n 3 above).

> Any culture that disinherits a daughter from a father's estate or wife from her husband's property by reason of God instituted gender differential should be punitively dealt with. The punishment should serve as a deterrent measure and ought to be meted out against the perpetrators of the culture and custom. For a widow of a man to be thrown out of her matrimonial home, where she had lived all her life with her late husband and children, by her late husband's brothers on the ground that she had no male child, is indeed very barbaric, worrying and flesh skinning.[101]

A related question to the succession of widows to their late husband's estate is whether husbands have the right to inherit the estate of their dead wives under the *Igbo* customary law. This issue came up for determination in *Nwugege v Adigwe.*[102] It was held that a husband's right of inheritance depends upon whether the wife left any surviving issue and whether the property was acquired before or during coverture.[103] The general principle is that the wife's ante nuptial property is not inherited by the husband or his family.[104] Even where a man goes to live with the wife in a house built by her before marriage, the real property retains its character as ante-nuptial property of the wife unless it has become mixed with other properties acquired during coverture.[105] On the other hand, property acquired by a wife during coverture devolves upon her children, subject to the husband's right to use it concurrently with the children during his lifetime.[106] Where the wife leaves no issue to inherit, the husband succeeds to the property.[107] However, where the deceased wife leaves no issue or husband to inherit, the wife's family has no claim to the property which she acquired during coverture, as these properties will go to the husband's relatives – his children by other wives, brothers etc.[108] According to Nwabueze, ordinarily,

> inheritance of a wife's property by her husband in default of issue contradicts the general principle that devolution follows the blood, but is explainable by the fact that marriage has the effect of transferring the wife to the husband's patri-lineage, and subjecting her to the control of the husband and his patri-lineage.[109]

Illegitimate Children

An illegitimate child is a child born out of wedlock (whether statutory, customary or Islamic marriages).[110] Under strict *Igbo* customary law of inheritance, an illegitimate child is deprived of succession rights to the estate of his natural father unless there is evidence, whether expressly or impliedly that there was subsequent acknowledgement by the father during his lifetime.[111] This is the product of the decision in *Onwudinjo v Onwudinjo*[112] where the court did not allow the illegitimate child to inherit the estate of his putative deceased father, since there was no evidence of subsequent acknowledgement. However, the disinheritance of illegitimate children under *Igbo* customary succession law has been struck down by section 42(2) of the 1999 Nigerian Constitution, which prohibits any form of discrimination based on the circumstances of one's birth.[113]

5. Evaluation of the Judicial Engagement with the *Igbo* Customary Succession Law

In evaluating the Nigerian judicial engagement with the *Igbo* customary law of succession, one is tempted to ask 'have the Nigerian courts done enough to engage with the primogeniture principle which is at the centre of *Igbo* customary law of inheritance?' Since the Supreme Court's decision in *Ukeje v Ukeje*, scholars have massively hailed that decision as a development of customary law in Nigeria.[114] Admittedly, that decision climaxed the subjection of Nigerian customary laws to Constitutional provisions and Bill of Rights, and in a major way, facilitated the movement of the Nigerian courts away from the so-called colonial 'validity test.'[115] Since Lord Atkins in *Eshugbayi Eleko v Officer Administering the Government of Nigeria*[116] declared that a barbarous custom is one that is repugnant to natural justice, equity and good conscience, this standard has been applied unwittingly by Nigerian courts to strike down indigenous customs, despite the fact that 'natural justice, equity and good conscience' has never been defined, nor have judges attempted to clearly articulate its meaning.[117] As Elias put it, 'in many of the cases decided on this principle, no

[101] (2014) 9 NWLR [Pt 1412] 393.
[102] (1934)11 NLR 134.
[103] ibid.
[104] B Nwabueze (n 4) 390-391.
[105] ibid.
[106] ibid
[107] ibid.
[108] ibid.
[109] ibid.
[110] EI Nwogugu (n 4) 429.
[111] ibid.
[112] (1958) 11 ERNLR 1
[113] See *Salubi v Nwariaku & Ors* (2003) 7 NWLR [Pt 819] 426.
[114] See N Chinwuba 'Ending inequality in Nigeria: A refreshing approach from the nation's judiciary' (2015) 29 *International Journal of Law, Policy and the Family* 341; O Edu 'A critical analysis of the laws of inheritance in the southern states of Nigeria' (2015) 60 *Journal of African Law* 149.
[115] See AC Diala (n 5) 100, 105.
[116] (1931) AC 662 673.
[117] A Obilade, *The Nigerian Legal System* (Sweet & Maxwell, 1990) 100.

consistent principle is discernible and some of the decisions are hard to justify.'[118] By subjecting the primogeniture principle to the equality and discrimination sections of the Nigerian Constitution,[119] the Nigerian Supreme Court surely applied an acceptable standard.

However, this article argues that the decision's overwhelming commendation masks its reductionist and inadequate engagement with the *Igbo* customary succession law, especially the primogeniture principle. Perhaps, this explains why it has been difficult to implement the recent decisions in real practice. The major problem is that in outlawing the primogeniture rule, the Nigerian courts have not adequately examined the social settings under which the rule developed, in order to comprehensively address its ills. The truth is that the primogeniture rule is a product of a patri-lineal culture aimed at preservation of the family and protection of the overall family welfare. From pre-colonial times, its original purpose was to preserve the best interests of all the dependants of an intestate under the supervision of the eldest surviving son.[120] It was not originally packaged as an instrument of discrimination within the *Igbo* traditional family set-up. The problem was that 'colonial rule changed the setting in which the primogeniture rule emerged.'[121]According to Korieh, this change led to the following socio-economic changes: (a) diffused family structures no longer based and organised on close-knit units; (b) nuclear families accustomed to a Western culture that cares little for the notion of extended families; (c) the disappearance of a correlation between heirs' inheritance of deceased persons' assets and duties to provide support and maintenance to the deceased's dependants; and, finally, (d) a changed land tenure system.[122]

Since the colonial masters only recognized customary law for administrative purposes, they cared less about its development.[123] With time, customary law in Nigeria (as in *Igbo* land) evolved into a strange creature with the effect that there seemed to be a divide between the 'official customary law' and the 'unofficial living customary law.'[124] Hence, today, while the 'unofficial living customary law' of inheritance in *Igbo* land has changed from what it was or was meant to serve in pre-colonial times, the 'official customary law' in the books has not. Unfortunately, with the influence of colonialism, unofficially, eldest surviving sons in *Igbo* families today inherit properties of their intestate fathers without taking over the responsibility of social welfare to other members of their families, male and female. Yet, the Nigerian courts continue to condemn the 'official *Igbo* customary law of inheritance' as it would the 'unofficial *Igbo* customary law of inheritance.'

The challenge before the Nigerian courts today, therefore, is to engage the primogeniture principle in the context of its evolvement from pre-colonial to colonial times, in order to distil what the law really is and what the practice has come to be. If the Nigerian courts would serve the democratic ideals of the modern-day Nigerian Society, its condemnation of the primogeniture rule in the post-colonial era must recapture the pre-colonial 'best interest of all the depandants' principle, albeit without the need for the gargantuan supervisory role of the eldest surviving son. The fact that, in prohibiting the primogeniture principle, the Nigerian courts only recognize the discrimination and deprivation of female heirs in *Igbo* succession law, without paying equal attention to the discrimination and deprivation of all other younger male heirs is, at best, reductionist and limited.

No doubts, given modern factors like the dispersion of traditionally closely-knit family units, demographic movements from villages to the cities, ownership of properties by intestates in cities and not on family land etc, it makes no sense in modern times maintaining the primogeniture principle whose utility served a pre-colonial agrarian society. However, in prohibiting the primogeniture principle, it is not enough for the Nigerian courts sitting far away from the *locus in quo*, to levy condemnations on the *Igbo* inheritance culture without having regard to the functions the particular custom was meant to serve and the social settings under which it originated and evolved. There is need for the Nigerian courts to wholesomely engage the *Igbo* customary law of inheritance so as to make sure that the prohibition of the primogeniture principle will secure the best interest of all the dependants of an intestate, males and females inclusive.

6. Conclusion

The *Igbo* customary law of succession, which ultimately espouses the primogeniture principle, has been lambasted by the Nigerian courts for violating the equality provisions of the Nigerian Constitution and discriminating against women. As laudable as these decisions appear, this article argues that the judicial engagement with the *Igbo* customary law of inheritance has been anything but thorough and comprehensive. There is need for the courts to examine the social settings within which the *Igbo* succession law evolved and developed in order to properly distinguish the purposes which the custom came to serve and the problems which its current practice precipitates.

[118] T Elias, *The Judicial Process in Commonwealth Africa* (University of Ghana, 1977) 53.
[119] *Constitution of the Federal Republic of Nigeria (As Amended) 1999, s 42 (1) & (2).*
[120] AC Diala (n 8) 632-637.
[121] ibid 637.
[122] CJ Korieh, *The Land has Changed: History, Society and Gender in Colonial Eastern Nigeria* (University of Calgary Press, 2010) 37-58 , 97-121.
[123] GR Woodman 'Some realism about customary law – The West African Experience' (1969) Wisconsin Law Review 128-151.
[124] CN Himonga (n 7) ibid.