CUSTOMARY LAW IN NIGERIA: INTERROGATING THE ISSUE OF JUDICIAL NOTICE*

Abstract

This concept of Igiogbe has since then gained notoriety and prominence. These controversies, increase in litigations and counter-litigations over the subject matter of Igiogbe has brought about a shift in the practice but the Binis still claim Igiogbe practice is and should be rigidly adhered to. An Igiogbe is the house where a Bini man lived, died and usually in most cases is buried. It devolves absolutely without any contradiction on his eldest surviving son as soon as the burial rites are performed and completed by him (in rare instances supported by family members) in accordance with the Bini Customary burial rites. The work critically examined the prove of customary law, validity of customary law in Nigeria, the constitutionality of customary law / customary law as a grundnorm. This work found that Igiogbe practice is still relevant in modern Benin kingdom and that the discriminatory practice against the women folk in relation to this concept is alarming and ridiculous. The work is concluded with some recommendations. Amongst which includes mass enlightenment campaigns being mounted by the Ministry of Women Affairs at both the Federal and State levels to enlighten the people about the hardship and injustice which discriminatory customary laws impose on women and that any customary law that is discriminatory against women should be declared invalid on the grounds that it is unconstitutional and repugnant to natural justice, equity and good conscience.

Keywords: *Igiogbe*, Customary Validity, Evidence, and Judicial Notice

1. Introduction

A custom is a question of fact which has to be proved by evidence.[1] The court may however take judicial notice of a custom if it has been acted upon by the higher courts several times. Custom is a question of fact which has to be pleaded and proved in the first instance by calling witnesses acquainted with the native custom until the particular custom, by frequent proof in the courts, has become so notorious that the courts will take judicial notice of it. Once a particular custom has been so frequently proved before the courts as to be well established and notorious, it is no longer necessary to bring evidence to prove that particular custom.[2] Thus, customary law may be proved by evidence or it may be judicially noticed if it has become notorious by frequent proof in the courts or has been frequently followed by the courts.[3] A law need not be proved before a court.[4] It is a question of fact that needs to be proved. In Nigeria, the received English law; Rules of common law, doctrine of equity and provisions of statutes need no proof before being accepted by a court of competent jurisdiction.[5] This is so because judges are deemed to know the law and judicial notice has been taken of them.[6] Regrettably, rules of customary laws do not enjoy the same treatment as the received English laws. The courts in Nigeria treat customary law as a question of fact and evidence that must be proved.[7] Two reasons can be adduced for this position. The first is that judges were originally not trained in customary laws. Secondly, customary laws are largely unwritten and vary from culture to culture.[8]

2. Proof of Customary Law

There are two ways of establishing customary laws. These are; by proof[9] and by judicial notice.[10] Section 16(1) of the Evidence Act[11] provides that 'a custom may be adopted as part of the law governing a particular set of admissible circumstances if it can be judicially noticed or can be proved to exist by evidence'. Section 16(2) of

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[1] Kolajo A. A., *Customary Law in Nigeria through the cases*, (Spectrum Books Limited, Ibadan, 2000). 25-26.
[2] *Ibid.*
[3] *Ibid.*
[4] Aguda T. A., *The Law of Evidence,* (Fourth Edition, Spectrum Law Publishing Limited, Ibadan, 2001), p. 156.
[5] *Ibid* and Osinbajo Y. O. and Kalu U. A., 'Towards A Restatement of Nigerian Customary Laws' available on http://martinslibrary.blogspot.com/2014/08/customary-law-characteristics.html accessed on 22nd May, 2021.
[6] Aguda T. A., *The Law of Evidence,* 157.
[7] Osinbajo Y. O. and Kalu U. A., 'Towards A Restatement of Nigerian Customary Laws' available on http://martinslibrary.blogspot.com/2014/08/customary-law-characteristics.html accessed on 22nd May, 2021.
[8] WIPO: World Intellectual Property Organization, 2013, 'Customary Law, Traditional Knowledge and Intellectual Property: An outline of the issues', available at https://www.google.com.ng/search?newwindow=1&site=&source=hp&q=meaning+of+customary+law&oq=meaning+of+customary+law&gs_l=hp.3...4984554.4991352.0.4991685.24.18.0.0.0.0.0.0..0.0....0...1c.1.64.hp..24.0.0.j-Sa0mGwHGs accessed on 17th June, 2021.
[9] Section 14 (1) of The Evidence Act, Cap. E14, LFN, 2004 (as amended).
[10] *Ibid.*
[11] Cap. E14, LFN, 2004 (as amended).

the Evidence Act[12] provides that 'the burden of proving a custom shall lie upon the person alleging its existence'. Section 17 of the Evidence Act[13] provides that 'a custom may be judicially noticed when it has been adjudicated upon once by a superior court of record'. It follows therefore from the purport of the provisions of sections 16 and 17 of the Evidence Act that in ascertaining customary law, two modes are basically employed. These are by proof and by judicial notice. The import of the above provision is that if a custom is judicially noticed then its existence need not be proved. However, if a custom has not attained notoriety to be judicially noticed then its existence must be proved by the person alleging its existence by evidence. There are different modes of proving customary law. Customary law can be proved by adducing oral evidence, expert opinion, non-expert opinion, assessors, use of textbooks and manuscripts.[14] This is informed from the provisions of Section 70 of the Evidence Act[15] that provides thus:

> In deciding questions of customary law and custom, the opinions of traditional rulers, chiefs or other persons having special knowledge of the customary law and custom and any book or manuscript recognized as legal authority by people indigenous to the locality in which such law or custom applies, are admissible.

Another mode of ascertaining and proving customary law is by taking judicial notice of such custom. Section 17 of Evidence Act[16] provides as follows: 'A custom may be judicially noticed when it has been adjudicated upon once by a superior court of record'. The word 'may' as used in the above provision implies the discretionary power of the court. Judicial discretion is vested in the court to determine whether to judicially notice a custom or not. It is the opinion of this work that this discretionary power drawn from the provisions of the above section of the Evidence Act[17] is one of the problems hindering the development of customary law in Nigeria. This is so because the court may decide to use the discretionary power adversely by calling on the plaintiff to prove the existence of a custom which had already been proven before. When certain facts and matters are so clearly established before a court there is no need to give formal evidence of their existence.[18] Thus if certain rules and institutions of customary law becomes obvious to the courts they need not be proved.[19] The courts take judicial notice of them and they become matters of law and not fact.[20] In considering proof of customary law, recourse must be made to emphasize proof of customary law before customary courts and proof of customary law before non-customary courts. In appraising proof of customary law before customary courts, section 16(1) of the Evidence Act[21] provides that 'a custom may be adopted as part of the law governing particular set of circumstances if it can be noticed judicially or can be proved to exist by evidence'. However, by virtue of the provisions of section 1 (4) (c) of the Evidence Act,[22] the Evidence Act does not apply to judicial proceedings in or before native court unless the Governor-in-council shall by order confer upon any or all native court jurisdiction to enforce any or all of the provisions of the Act. With regard to the above, there is no evidence that a state in the country has extended the application of the Evidence Act[23] to customary or area courts as provided by the above law. Consequently, the modes of establishing customary law as provided by the Evidence Act does not apply to customary and Area courts. Judges of Customary and Area courts are assumed to know the custom of their people. Therefore, customary law is not required to be proved before customary or Area courts. Thus, in *Nsemfo v. Ababio*,[24] the West Africa Court of Appeal held that it is not obligatory for a native court to require a custom to be proved through witnesses if the members of such courts are familiar with the custom.

The High Court of Western Region of Nigeria took a contrary position in *Fijabi v. Ogumola*[25] when it set aside the decision of a customary court on the ground that the customary court without proof applied a rule of customary law. This decision was however over ruled by the Supreme Court on appeal. The Supreme Court was of the view that if the defendant/respondent wishes to challenge the president's ruling on specific points of customary law, he

[12] *Ibid.*
[13] *Ibid.*
[14] *Ibid.*
[15] *Ibid.*
[16] *Ibid.*
[17] Section 17 of the Evidence Act, Cap. E14, LFN, 2004 (as amended).
[18] Osinbajo Y. O. and Kalu U. A., 'Towards A Restatement Of Nigerian Customary Laws' available on http://martinslibrary.blogspot.com/2014/08/customary-law-characteristics.html accessed on 22nd May, 2021.
[19] Babatunde I. O., 'People perish for lack of knowledge: Revisiting of the role of custom in the development of Nigerian Legal System' available on http://moj.ekitistate.gov.ng/online-journal/people-perish-for-lack-of-knowledge-revisiting-of-the-role-of-custom-in-the-development-f-nigerian-legal-system/ accessed on 29th August, 2021.
[20] *Ibid.*
[21] Cap. E14, LFN, 2004 (as amended).
[22] *Ibid.*
[23] *Ibid.*
[24] (1947) 12 W.A.C.A 127.
[25] (1955-56) W.E.N.L.R. 133.

ought to give notice that he would apply to call evidence on the point and this notice is at the discretion of the judge to grant to disallow. A different dimension was displayed in the case of *Ehigie v. Ehigie.*[26] The respondent was the eldest son and the appellant the eldest daughter of one Ehigie Edise who died intestate. The question before the Customary Court was which of the two children of the deceased- his eldest son or his eldest daughter was entitled to succeed to his property according to Bini native law and custom. No evidence was led before the court by either party to the dispute as to what the Benin customary law of inheritance was. The President of the Customary Court Grade A entered judgment in favor of the respondent. The court said that it was a fundamental principle of Benin customary law of inheritance that the eldest surviving male child of the deceased who performed all the custom and funeral ceremonies is the one entitled to inherit all of the deceased's properties except those the deceased had made gifts of before his death. On appeal to the High Court, Fatayi Williams J., held that the ends of justice will be better served if a customary law which has not been 'so frequently before the court as to be well established and notorious' is proved by evidence in Customary Courts. In distinguishing this case from that of *Nsemfo v. Ababio*,[27] the learned judge pointed out that the Customary Court that decided the latter case was a court of the paramount chiefs of the Gold coast. The members are familiar with their own native customary law so it was not necessary to prove the customary law of the community before the court. On the other hand, the court that decided the former case was a Grade A Customary Court presided over by a President statutorily qualified to do so as a legal practitioner irrespective of whether he is from that locality or not. A different interpretation was adopted by Belgore C.J., in *Usman Waziri v. Musa Ugye & Ors.*,[28] where he observed that 'the Area Court of the area of action is presumed to know the native law and custom of the area, it is a rebuttable presumption and until it is rebutted, this statement of the law must not be interfered with'. The Court towed a similar line in reaching the decision in *Edokpolor v. Idehen*[29] where the plaintiff brought an action for trespass against the defendant before the Benin Grade A Customary Court. The President of the Court prevented the defendant from adducing evidence of the custom which was different from the one pleaded by the plaintiff. According to the president, as evidence of English law is not required in English Courts, so also evidence of customary law is not required in customary courts.

The following propositions can be inferred from decided causes on the matter before Customary Courts. Customary law is a question of law and need not be proved to the court. However, this is only a rebuttable presumption. The presumption can be rebutted by showing that the law of the court is not the law prevailing in the area of jurisdiction of the court, that the members of the court are from an area different from the area of jurisdiction of the court, that the area of jurisdiction of the court is so wide that the members of the constituent areas and the members of the customary are for other reasons not versed in the custom sought to be relied upon.
In Edo State, it has now been statutorily provided that a customary court is presumed to know the appropriate customary law of the area within its jurisdiction.[30] On the other hand, in non-Customary Courts, customary law is a question of fact to be proved by adducing sufficient evidence by the party who alleges the existence of the custom. This much is stated by the provisions of section 16(2) of the Evidence Act[31] that governs the matter. The Evidence Act[32] provides that 'A custom may be adopted as part of the law governing a particular set of admissible circumstances if it can be judicially noticed or can be proved to exist by evidence.'[33] Section 18 (1) of the Evidence Act[34] provides that 'where a custom cannot be established as one judicially noticed, it shall be proved as a fact'.

The requirement of proof of customary law to non-customary courts is based on the assumption that the judges in non-customary courts are not versed in customary law. A court is required by virtue of to take judicial notice of a law.[35] However, these provisions do not extend to rules of customary law. There are different modes to prove customary law in non–Customary Courts[36]. These modes by which customary law is proved in non-customary court includes; adducing oral evidence, testimonies of witnesses of expert opinion, use of assessors and use of textbooks or manuscripts.[37] Section 68(1) of the Evidence Act[38] provides that 'when the court has to form an

[26] (1961) 1 N.L.R. 842.
[27] (1947) 12 W.A.C.A 127.
[28] (1977) N.W.L.R (pt. 129) 130.
[29] (1961) W.N.L.R. 11.
[30] Order 10 Rules 6 (3), Customary Court Rule of Bendel–State, 1978.
[31] Cap. E14, LFN, 2004 (as amended).
[32] *Ibid.*
[33] *Ibid,* Section 16 (1).
[34] Cap. E14, LFN, 2004 (as amended).
[35] *Ibid,* Sections 73 and 74.
[36]Osinbajo Y. O. and Kalu U. A., 'Towards A Restatement of Nigerian Customary Laws' available on http://martinslibrary.blogspot.com/2014/08/customary-law-characteristics.html accessed on 22nd May, 2021.
August, 2015and Section 70 of the Evidence Act, Cap. E14 LFN, 2004 (as amended).
[38] Cap. E14, LFN, 2004 (as amended).

opinion upon a point of…customary law or custom. Or … the opinions upon that point of persons specially skilled in such … customary law or custom … are admissible'. Section 68(2) of the Evidence Act[39] provides that 'persons so specially skilled as mentioned in subsection (1) of this section are called experts'. Section 70 of the Evidence Act[40] provides that:

> In deciding questions of customary law and custom, the opinions of traditional rulers, chiefs or other persons having special knowledge of the customary law and custom and any book or manuscript recognized as legal authority by people indigenous to the locality in which such law or custom applies, are admissible.

In all these, the burden of proof of a custom is on the person alleging its existence. That is, the onus is on the person or party who claims a particular evidence to establish the custom.[41] In *Ibrahim v. Barde*,[42] the Supreme Court held admissible, a book called the Abuja Chronicle, which according to some witnesses, is regarded in Suleja as authentic account of the history and culture of the people of the area. For the book to satisfy the requirement of the Evidence Act,[43] such book must have gained sufficient eminence to warrant its citation to the court. Secondly, the parties should have introduced it in evidence.

Another means of proof of customary law in non – Customary Courts is by the use of assessors. The use of assessors is common in Northern Nigeria and alien to Southern Nigeria. Assessors sit with judges for the sake of assisting them with expert knowledge of the matter under consideration. Within the ambit of the provision of Section 68(2) of the Evidence Act,[44] they are deemed as experts. They are neither a part of the court nor witnesses. They merely sit with judges and proffer opinion when their opinions are sought by the courts. These opinions are however not given in the open court but in chamber. They cannot testify before the court but may put any question to the witnesses through or by leave of the judge. The Evidence Act provides that 'in cases tried with assessors, the assessors may put any question to the witnesses through or by leave of the judge which the judge himself may put and which he considers proper'.[45] Laws are not required to be proved in courts because it is the requirement of the court to take judicial notice of them.[46] However, in non-customary courts, customary law is initially a question of fact which must be proved by evidence. Once proved and a judicially noticed, it may not be proved again. This position is governed by the provisions of Section 17(1) of the Evidence Act[47] which provides that 'a custom may be judicially noticed when it has been adjudicated upon once by a superior court of record'. This means that the custom must have been acted upon by a court of superior jurisdiction. The earlier court should have been acted upon the custom to such extent as would occasion justice to infer that the persons or class of persons concerned in that area look upon the custom under consideration. When certain facts and matters are so clearly established before a court there is no need to give formal evidence of their existence.[48] Thus if certain rules and institutions of customary law becomes obvious to the courts, they need not be proved.[49] The courts take judicial notice of them and they become matters of law and not fact.[50] For example *Igiogbe* concept under the Bini Customary Law of Inheritance has attained that status of notoriety[51] that the courts (not the courts in the area were this custom is practiced) in Nigeria even the apex court are to a very large extent aware of its existence and had taken judicial notice of it.[52]

3. Validity of Customary Law in Nigeria

The customary laws of Nigerians where initially recognized by the British when they first came to Nigeria. They however did not leave them intact all through the period of colonization. They enacted Ordinances which abolished and/or abrogated some of the customary laws which they regarded as barbaric and primitive.[53] As part of colonial agenda, the British government super-imposed English laws on the indigenous laws of the various Nigerian cultural groups and christened it customary laws which were not to be applicable in all situations. The

[39] *Ibid.*
[40] *Ibid.*
[41] Section 17(2) of the Evidence Act, Cap. E14, LFN, 2004 (as amended).
[42] (1996) 9 N.W.L.R. (pt. 474) 513.
[43] Cap. E14, LFN, 2004 (as amended).
[44] *Ibid.*
[45] Section 247 of the Evidence Act, Cap. E14, LFN, 2004 (as amended).
[46] Aguda T. A., *The Law of Evidence*, (Fourth Edition, Spectrum Law Publishing Limited, Ibadan, 2001), p. 156.
[47] Cap. E14, LFN, 2004, (as amended).
[48] Osinbajo Y. O. and Kalu U. A., 'Towards A Restatement Of Nigerian Customary Laws' available at http://martinslibrary.blogspot.com/2014/08/customary-law-characteristics.html accessed on 22nd May, 2015.
[49] Aguda T. A., *The Law of Evidence*, (Fourth Edition, Spectrum Law Publishing Limited, Ibadan, 2001), p. 157.
[50] *Ibid.*
[51] *Arase v. Arase* (1981) N.S.C.C. 101.
[52] *Ibid.*
[53] Niki T., S*ources of Nigerian Law*, (MIJ professional publishers Limited, Lagos, 1996), p. 111.

notion of customary law itself is seen as an ideology of colonial domination. Nigerian indigenous laws were to be screened before they can attain the status of customary law.[54] Before a court could observe and enforce the observance of a rule of customary law, such rule must pass the repugnancy test. That is, it must not be repugnant to natural justice, equity and good conscience. It must also pass the incompatibility test, meaning that it must not be incompatible with any law for the time being in force.[55] These provisions have its root in the Supreme Court of Lagos established in 1876 as a Supreme Court of record by virtue of Supreme Court Ordinance No 4 of 1876. The court was empowered to administer the common law, the doctrine of equity and statute of general application in force in England as at July 24, 1874. With respect to customary law, Section 19 of the Supreme Court Ordinance No. 4 of 1876 provides that:

> Nothing in this ordinance shall deprive the supreme court of the right to observe and enforce the observance, or shall deprive any person of the benefit of any law or custom existing in the said colony and territories subject to its jurisdiction, such law or custom not being repugnant to natural justice, equity and good conscience, nor incompatible either directly or by necessary implication with any enactment of the colonial legislature.

Similar provision was enacted in 1900 in the Supreme Court Ordinance. By virtue of the provisions of Section 13 of the Supreme Court Ordinance 1900, it provides that:

> Nothing in this proclamation shall deprive the Supreme Court of the right to observe and enforce the observance, or shall deprive any person of the benefit of any law or custom existing in the protectorate such law and custom not being repugnant to natural justice equity and good conscience.[56]

Preceding independence, another test was added to the two mentioned above, that is, the public policy tests. The public policy test says a court cannot and will not enforce any custom that is contrary to public policy. Since the above enactment which makes customary laws inferior to imperial laws, every subsequent enactment after independence till date has similar provision that before a court can observe and enforce the observance of a rule of customary law, such must pass repugnancy, public policy and incompatibility test.[57] There are however current enactments embodying repugnancy and public policy test. Throughout colonial period, customary law was subjected to repugnancy tests and this position continued after independence. Each region had been empowered to administer customary law. The High Court laws also gave effect to the recognition of customary law. There are several enactments currently postulating the repugnancy doctrine. These enactments are in force in the various states of the federation. They include; the High Court Laws of Bendel – State.[58] There are only a few reported cases in which reference has been made to public policy in relation to customary law. The test of public policy was considered by Verity J. in the case of *Re Adadevoh*[59] that 'if the Yoruba custom of acknowledging paternity of illegitimate children would encourage promiscuity, then it would be contrary to public policy'. The public policy test was considered as a common law rule forming part of the incompatibility test. In *Alake v Pratt*,[60] the court rejected the view expressed by the trial judge that it was incompatible with public policy to place children born out of wedlock in the same position as children born in wedlock in distributing the estate of the deceased father of all the children. Also, in *Cole v. Akinyele*,[61] the Federal Supreme Court held that 'the Yoruba custom of legitimation by acknowledgment of paternity was void on the ground of public policy in its application to a child born outside wedlock during the subsistence of a statutory marriage under the Marriage Ordinance'. It is pertinent to note that the courts have not been able to come out with the clear meaning of the phrase 'public policy'. Hence Burrough J. in *Richardson v Mellish*[62] described it as; 'A very unruly horse and when once you get astride it you never know where it will carry you'.[63]

From the foregoing, it is right to say that there is no precise meaning, definition and explanation for the phrase; 'public policy' rather it depends on the circumstances of each case. The Supreme Court Act[64] also contains these

[54] Badaiki A. D., *Development of customary law*, (Tiken publishers, Lagos, Nigeria, 1997), pp. 27-29.
[55] *Ibid* and Badaiki A. D., *Development of customary law*, p. 27.
[56] Niki T., S*ources of Nigerian Law*, (MIJ professional publishers Limited, Lagos, 1996), p. 111.
[57] *Ibid.*
[58] Section 13(1) High Court Laws, Cap. 65, Laws of Bendel-State, 1976, (now Edo and Delta states) and Section 24(a) of the Customary Court Edict No. 2 of 1984 of Bendel–State (now Edo and Delta–States).
[59] (1951) 13 W.A.C.A. 304.
[60] (1955) 15 W.A.C.A. 20.
[61] (1960) 5 F.S.C. 84.
[62] (1824) 2 Bing 258.
[63] *Ibid.*
[64] Cap. S15, LFN, 2004.

doctrines. As regards the observance and enforcement of the observance of customary law, Section 17 of the Supreme Court Act[65] provides as follows:

> With respect to the exercise of the original jurisdiction conferred upon the Supreme Court by subsection (1) of section 232 of the Constitution or which may be conferred upon it in pursuance of section 232(2) of the Constitution, the following provisions shall apply… (e) The Supreme Court shall observe and enforce the observance of customary law to the same extent as such law is observed and enforced in Nigerian courts.

Section 26 of High court of Lagos-State[66] makes provisions for repugnancy and incompatibility test and provides that;

> The High Court shall observe and enforce the observance of customary law which is applicable and is not repugnant to natural justice, equity and good conscience, nor incompatibility either directly or indirectly with any law for the time being in force, and nothing in this Act shall deprive any person of the benefit of any such native law or custom.

Looking at the provision of Section 26 of the High court of Lagos–State Act, it is clear that the intention of the drafter of the statute is for customary law to exit side by side with received English law provided the custom which because of usage overtime has acquired the status of Customary Law is not repugnant to natural justice, equity and good conscience and is not incompatible directly or indirectly with any law for the time being in force. The various statutes empowering the courts to apply customary law prescribe some criteria for determining the validity of any particular rule of customary law sought to be applied and enforced. The High Court Laws of various states direct the courts to observe and enforce the observance of native law and custom, but only if the particular rule is not repugnant to natural justice, equity and good conscience either directly or indirectly with any law for the time being in force or incompatible with public policy. Also, Section 18(3) of the Evidence Act[67] provides that 'In any judicial proceeding where any custom is relied upon, it shall not be enforced as law if it is contrary to public policy, or is not in accordance with natural justice, equity and good conscience'. The combined effect of these provisions is that the courts cannot enforce a rule of customary law unless these criteria are satisfied. This work terms these criteria the validating criteria of customary law and they are that;

a) The custom must not be repugnant to natural justice, equity and good conscience.
b) The custom must not be incompatible either directly by implication with any law for the time being in force.
c) The custom should not be contrary to public policy.

These validating criteria will now be closely examined. A rule of customary law which is repugnant to natural justice, equity and good conscience, cannot be forced and applied by the courts. What then is the meaning of the phrase; 'natural justice, equity and good conscience'? Speed J., in *Lewis v. Bankole*[68] attempted a disjunctive interpretation of the phrase and gave separate meanings to 'natural justice', 'equity' and 'good conscience' but this interpretation was rejected on appeal. Niki Tobi J.C.A., (as he then was) in *Mojekwu v. Ejikeme*[69] examined the phrase thus: 'The word 'repugnant' ordinarily means offensive, distasteful, inconsistent, or contrary to... The expression 'natural justice' generally means justice according to or pertaining to nature and therefore inborn'. The Supreme Court in *Okonkwo v. Okagbue*[70] maintained that:

> The phrase 'repugnant to natural justice, equity and good conscience' means equity in its broad sense as used in the repugnancy doctrine is equivalent to the meaning of 'natural justice' and embraces almost all, if not all, the concepts of good conscience. Equity is not used here in its technical sense, but in its broad sense. Also, natural justice is not used in its modern technical sense but synonymously with natural law.

According to Ezejiofor,[71] the phrase is interpreted to mean, 'fair and just or conscionable'. In other words, a rule of customary law that is unjust, unfair or unconscion0able is repugnant to natural justice, equity and good conscience. It is however of utmost importance to note that the courts have not adopted a general theory of repugnancy. Rather each case is determined by time and its circumstances. The word 'incompatible' was

[65] *Ibid.*
[66] Cap. 60 Laws of Lagos-State 1994.
[67] Cap. E14, LFN, 2004 (as amended).
[68] (1908) 1 N.L.R. 81.
[69] (2001) C.H.R. 179, 208.
[70] (1994) 9 N.W.L.R. (pt. 368) 310.
[71] Ezejiofor A., *Sources of Nigerian Law*, (Sweet & Maxwell, London, 1980), p. 43.

judicially interpreted by Niki Tobi J.C.A., (as he then was) in *Mojekwu v. Ejikeme*[72] to mean not compatible, not consistent and contradictory. The Supreme Court in the case of *Okonkwo v. Okagbue*[73] maintained that the phrase 'public policy' means the ideas in vogue for the time being in the community as to the conditions necessary to ensure its welfare.

From the above definition, it means that a thing will be treated as against public policy if it is generally regarded as injurious to the public interest. The Supreme Court also observed that public policy is not fixed and stable. It fluctuates with circumstances and time. There is however a new suggested criterion for evaluating and ascertaining customary law.[74] This is the human right test. It postulates the human rights and fundamental freedoms paradigm as a criterion for the determination of the validity of customary law. However, it seems that this clause; 'not repugnant to natural justice, equity and good conscience and is not incompatible directly or indirectly with any law for the time being in force' are invented as calculated attempt by the originator of the phrase, that is, the British colonial administrator to perpetually subject the native customs and tradition as inferior laws when compared to the received English laws.[75]

4. The Constitutionality of Customary Law / Customary Law as a *Grundnorm*

Historically, the relative influence of each of natural law, customary law and positive laws has fluctuated throughout time and space.[76] This influence may be at least partially due to the acceptance by the community that is inherent in customary law.[77] The effectiveness may be explained by the fact that customary law, by its very nature, has evolved to suit the communities and environments in which it operates. Despite the growing awareness of the importance of customary law, State recognition of customary law is still lacking in many countries, and even where it is recognized there is often conflict between statutory regimes and customary law. This may be partially explained by the fact that customary law may be seen as a challenge to a nation's sovereignty,[78] rightly or wrongly so.[79] Constitutionally enshrined recognition of customary laws and rights is particularly important because, in many States, statutory law prevails over conflicting customary law, unless there is constitutional protection.[80] However, it is acknowledged that States may recognize customary law in other domestic law and policy without constitutional provisions relating to customary law. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) similarly recognizes the rights of indigenous people to traditional lands, including respect for their traditions, customs and land tenure systems.[81] There is a high level of recognition of traditional and customary institutions, as well as a broad recognition of customary law in the courts.

The Constitution of the Federal Republic of Nigeria, 1999[82] contains provisions relating to customary law in the Courts. Jurisdictions preserve, establish and permit establishment of specific Customary Law Courts and dictate the jurisdiction of Courts in relation to Customary Law.[83] The Constitution of the Federal Republic of Nigeria, 1999[84] also has an integrative measure requiring that some Justices of the Supreme Court and the Court of Appeal

[72] (1996) 8 N.W.L.R. (pt. 468) 357.
[73] (1994) 9 N.W.L.R. (pt. 368) 301, 345.
[74] Onyekpere E., 'Justice for Sale' (A Report of the Administration of Justice in the Magistrate and Customary Courts of Southern Nigeria, Civil Liberties Organization, Lagos. 1996), pp. 46–47.
[75] Babatunde I. O., 'People perish for lack of knowledge: Revisiting of the role of custom in the development of Nigerian Legal System' available on http://moj.ekitistate.gov.ng/online-journal/people-perish-for-lack-of-knowledge-revisiting-of-the-role-of-custom-in-the-development-f-nigerian-legal-system/ accessed on 29th August, 2021.
[76] Katrina C., 'Customs and Constitutions: State recognition of customary law around the world', Published in *IUCN, Asia Regional Office, Bangkok, Thailand,* 2011. Also available on www.iucn.org/publications and https://www.google.com.ng/url?sa=t&rct=j&q=&esrc=s&source=web&cd=5&ved=0CDoQFjAE&url=https%3A%2F%2Fportals.iucn.org%2Flibrary%2Fefiles%2Fdocuments%2F2011-101.pdf&ei=RPGTVcrMNYnU7Ab5-rSAAw&usg=AFQjCNG1YYuPxIElDKgS-gDbnHGSLV1Cjgand accessed on 01st July, 2021.
[77] *Ibid.*
[78] *Ibid.*
[79] *Ibid.*
[80] Mukoro A., 'The Interface between Customary Law and Local Government Legislation in Nigeria: A Retrospect and Prospect', published in *International NGO Journal,* Volume 4 (4), April, 2009, pp. 167-172. Available on http://www.academicjournals.org/INGOJISSN1993–8225and http://www.google.com.ng/url?sa=t&rct=j&q=&esrc=s&source=web&cd=8&ved=0CEsQFjAH&url=http%3A%2F%2Fwww.academicjournals.org%2Farticle%2Farticle1380901170_Mukoro.pdf&ei=bvyTVY-NIrKR7Aat-5m4Aw&usg=AFQjCNEE7kkS09hDn-dbfE9DXHLzxZoScg accessed on 01st July, 2021.
[81] United Nations Declaration on the Rights of Indigenous Peoples, 13 September, 2007, G.A. res. 61/295, U.N. GAOR, 107th Session, United Nations Document; A/RES/61/295 (2007), Article 26. Available on http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf accessed 03rd July, 2015.
[82] Cap. C23, LFN, 2004, as amended 2011.
[83] Sections 265 and 280 of the Constitution of the Federal Republic of Nigeria, 1999, Cap. C23, LFN, 2004, as amended 2011.
[84] Cap. C23, LFN, 2004, as amended 2011.

be learned in customary law.[85] Customary law jurisdiction is sometimes expressly limited to civil cases and excluded from operation in criminal cases.[86] There is provision for Customary Courts in every federal state for the administration of justice. Nigerian law recognizes both monogamy and polygamy. Polygamy is recognized by customary law of the spouses and the Nigeria Constitution.[87] The judiciary as presented by the Constitution of the Federal Republic of Nigeria 1999[88] provides some considerations that are worth our attention. The Constitution of the Federal Republic of Nigeria, 1999[89] also recognizes both Islamic and customary law just to do justice to the indigenous people, their culture and religion. *Inter alia*, it accorded honor to the study of Customary Law.[90] This is a point proving that the future of customary law is also promising in Nigeria. Furthermore, the Constitution of the Federal Republic of Nigeria 1999[91] also makes provision for the recognition of existing laws. Section 315 (1)[92] provides that: 'Subject to the provisions of this Constitution, an existing law shall have effect with such modifications as may be necessary to bring it into conformity with the provisions of this Constitution….' Section 318[93] defines existing law in Section 315 (4) (b)[94] to mean 'any law and includes any rule of law or any enactment or instrument whatsoever which is in force immediately before the date when this section comes into force after that date'.

From the above, this work contends that existing laws also mean customary laws and rules of customs that were in force before the enactment of this Constitution. It therefore follows that the Constitution also gives cognizance and validity to customary laws. In this light and to the extent that the Constitution provides that its provisions are supreme,[95] this work safely contends that customary laws can be deemed as the *grundnorm*. It is useful to add here, in order to emphasize this point that many African societies did not only have well settled rules of behaviors, but also distinguished among them what we would now call legal rules from moral rules.[96] This much can also be deciphered from recognized standards of behavior and how the standards of the 'upright man' which is the equivalent to our moral standards are distinguished from the standards of the 'reasonable man' which is the equivalent to our legal standards which are enforced on everybody.[97] Traditional African societies certainly did have systems of social control which closely resembled modern legal system.[98] A careful and close analogy of these African legal systems and the laws of other people would reveal that the differentiation between them is only superficial.[99]

5. Conclusion and Recommendations

This work concludes that when a native custom fails the tests of validity enunciated above, that native custom shall to the extent of failing these tests be null and void. Conclusively, it is pertinent to note that the status of customary law in Nigeria is deemed to exist side by side with the received English law which forms the bulk of Nigeria statute today and these customs are also given constitutional backings. However, the customary laws in Nigeria should conform to the repugnancy, public policy and incompatibility doctrines/tests. This work will examine these conformity patterns in the next and subsequent chapters contained herein. From the above analysis, it is clear that the decision of the Nigeria Supreme Court in *Idehen v. Idehen* created a lot of anxiety as to whether the Supreme Court has expanded the scope and definition of *Igiogbe* under Bini Customary Law of inheritance and succession. The Oba of Benin quickly responded to correct this impression and restore the age long traditions of the Bini people. With the reform he introduced in his book[100] affecting succession to the *Igiogbe*, the eldest surviving son of the deceased now has a choice as to which property he would prefer as *Igiogbe* in a situation where the deceased had more than one house provided the deceased had lived in that house during his lifetime, died in the house, may be buried in it and the first son had performed the second burial rites of his father according to the burial rites of the Bini custom. These reforms which are documented and widely circulated in the state has to a large extent reduced the efficacy of the Supreme Court's decision in *Idehen v. Idehen* concerning the concept

[85] *Ibid*, Sections 237 (2) (b) and 288.
[86] *Ibid*, Section 282.
[87] Onyango P., *African Customary Law: An Introduction*, (Law Africa Publishing (K) Ltd., Nairobi, Kenya, 2013), pp. 61-63.
[88] Cap. C23 LFN, 2004, as amended 2011.
[89] *Ibid.*
[90] Section 288.
[91] Cap. C23, LFN, 2004 as amended 2011.
[92] *Ibid.*
[93] *Ibid.*
[94] *Ibid.*
[95] Section 1(1) and (3).
[96] Elegido J. M., *Jurisprudence: A textbook for Nigerian students*, (Spectrum Law Publishing, 2010), p. 127.
[97] Gluckman M., *Judicial Process Among the Barotse* (Revised Edition, Manchester University Press, 1967), p. 126.
[98] Elias T. O., *The Nature of African Customary Law* (Manchester University Press, 1962), p. 1.
[99] *Ibid.*
[100] Benin Traditional Council, A Hand Book On Some Benin Customs and Usages (First Edition, Soben Printers Limited, Benin – City, 1996).

of two *Igiogbe* under Bini native law and custom. Consequently, inheritance to the *Igiogbe* is now done on the bases of the Oba's proclamation rather than in accordance with the principles in *Idehen v. Idehen* thereby reducing if not eliminating completely the conflict introduced by the concept of two *Igiogbes.* In the *Igiogbe* concept under the Bini Customary Law of Inheritance and Succession, the provision of Section 42(1) of the Constitution of the Federal Republic of Nigeria 1999, Cap. C23, LFN, 2004 (as amended 2011) is not strictly followed, in that the *Igiogbe* concept forbids discrimination on grounds of circumstances of birth being that a legitimated first son can inherit an *Igiogbe* but a child is forbidden from inheriting an *Igiogbe* simply because she is a female. A daughter who is the eldest surviving child of a deceased is not accorded a special status or treatment under the customary laws of inheritance but a son who is the eldest surviving child is generally accorded a special status and treatment as the head of the immediate family of the deceased man. It observed that the problems of discrimination against women are both international and national and not peculiar to the Bini's alone.

In view of the foregoing, this work recommends the following suggestions as the way forward in achieving a reasonable advancement of women's rights in the contemporary Nigerian society.

f) Customary laws of inheritance that are discriminatory against women on the basis of sex needs to be reformed, so that wives and daughters can be given the right to inherit the property of their deceased husbands and fathers. The enlightenment campaign should be a collective duty of traditional rulers, religious leaders/bodies, community leaders and heads of family who are regarded as the custodians of the culture of their people considering the fact that customary laws are deeply rooted in the culture of the people. It is necessary to involve these categories of people because it is under their auspices that these customary laws which cause a lot of hardships to women operate. Their support is therefore necessary for the reform to be effective.

g) Mass enlightenment campaign should be mounted by the Ministry of Women Affairs at both the Federal and State levels to enlighten the people first about the hardship and injustice which the discriminatory customary laws impose on women. Secondly, to make people appreciate that the basis for which custom denied women the right to inherit property in the past is no longer sustainable in contemporary times. Therefore, there is need to reform the laws. The campaign should be through jingles on electronic media, discussions over the radio, advertisements on bill boards, in newspapers in both English and local languages so as to reach the literate and illiterate members of the public. These enlightenment programmes are necessary to change the social attitudes of the people particularly the men. This will aid change the popular misconception that women are inferior to men and eventually facilitate a reform of the customary laws. This is because many women, owing to illiteracy or ignorance are not aware of the existing laws on inheritance which provide the rights of inheritance for them. Even the educated ones who have some knowledge of the laws do not bother to know the contents of such laws and how they can access the laws to protect their rights of inheritance. In this connection, women social groups/organisations, religious leaders in rural communities, non-governmental organisations, mass media, Ministries of Women Affairs and Justice at both Federal and State levels should embark on educational and enlightenment programmes to educate women of their rights of inheritance under the existing laws. It is hoped that such concerted efforts will help to promote women's rights of inheritance.

h) Reform of States' Laws on Inheritance starting from the grassroots should be followed by legislation. Such legislation should abolish the indigenous customary laws of inheritance that are discriminatory against women. Also, it is the recommendation of this work that new Wills Laws should be enacted. States that have not enacted Wills Laws should enact such laws to replace the English Wills Acts of 1837 and 1852 that are still applicable in those states.

i) Free legal aid for matters relating to the rights of inheritance should be provided by the Legal Aid Council for poor women to seek redress in courts in cases of the violation of their rights of inheritance. It is pertinent to state that the Legal Aid Council Act presently empowers the Legal Aid Council to render free legal assistance in respect of civil claims to cover breach of fundamental human rights as guaranteed under Chapter IV of the Constitution of the Federal Republic of Nigeria 1999, Cap. C23, LFN, 2004 (as amended 2011). This will make women have better access to legal representation when their rights of inheritance are violated or about to be violated.

j) The role of the Judiciary should not be under-emphasized. Our courts should be bold and imaginative in their determination of issues on customary laws affecting inheritance rights of women. Any customary law that is discriminatory against women should be declared invalid on the grounds that it is unconstitutional and repugnant to natural justice, equity and good conscience. In this way, the judiciary will help to develop our customary laws to meet changes in global trends to women's rights and uphold the fundamental human rights of women as guaranteed under our Constitution.