

## THE DISTINCTION BETWEEN CUSTOM AND CUSTOMARY LAW: DIVISION WITHOUT PARTITION

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### ABSTRACT

*Nigerian legal system is a plural and multifaceted one. Customary law forms an integral part of that complex system. The problem lies in the distinction between customary law and its source, custom. When does a custom transcend the village property status to a legal authority category? When does a custom become customary law? When the custom fails the court and statutory tests does it stop governing the people? Do courts make customary law? This work examines the true relationship between custom and customary law.*

**KEYWORDS:** Custom, Customary Law, Repugnancy Doctrine, Jurisprudence.

### A. INTRODUCTION

The question as to when a custom becomes customary law is no doubt, one of vexed jurisprudential contention. The origin of the contention in Nigeria perhaps dates back to the colonial era. With the colonization of Nigeria in 1900, the British Government did not abolish the customs and practices of Nigerians but introduced into the country some standards or doctrines upon which all customs and traditions of native Nigeria could be assessed before they are applied as law. One of such doctrines, is the 'the repugnancy and

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compatibility test'. The Nigerian Evidence Act and case laws also stipulate the doctrines of 'Judicial Notice' and of 'proof'.

In the light of the above, the question then becomes inevitable-when does a custom become customary law? Is it when it is proved before a superior court and the court says that it is law? Is it when it is judicially noticed or when it does not violate the repugnancy and incompatibility test? What if a custom does not pass the repugnancy doctrine, does it cease to become the custom of the people? How about customs that have not been submitted for judicial determination as to their compatibility or repugnancy status-do those customs cease to be the binding laws of the people? This work sets out to answer these vexed questions.

## B. CUSTOM AND CUSTOMARY LAW

The jurisprudence of the Nigerian legal system is replete with case laws as well as opinion of writers on the meaning of custom and customary law. In the case of *Dakur v. Dapal*,<sup>1</sup> the Nigerian Court of Appeal per Edozie JCA (as he then was) defined custom thus:

*As defined in section 2(1) of the Evidence Act, custom is : "a rule which in particular district has for long usage obtained the force of law "*

Similarly in *Falowo v. Banigbe & ors*<sup>2</sup> Adekeye JCA defined custom thus:

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<sup>1</sup> (1998)10 NWLR (PT. 571) 573 at 583 para H

<sup>2</sup> (2007) LPELR-11850

*What then is native law and custom? Section 2(1) of the Evidence Act Cap 112 Laws of the Federation of 1990 defines custom as a rule which in particular district has from long usage obtained the force of law.*

Generally at law, custom refers to the established pattern of behavior that can be objectively verified within a particular social setting. A claim carried out in defense of 'what has always been done and accepted by law'.<sup>3</sup>It consists of customs accepted by members of a community as binding among them.<sup>4</sup>

On the other hand customary law has also received definite exposition as to its meaning. In *Nwaigwe v. Okere*,<sup>5</sup> the Supreme Court per Tobi JSC (as he then was) defined customary law thus:

*And what is customary law? Customary law generally means relating to custom or usage of a given community. Customary law emerges from the tradition, custom and usage and practice of people in a given community which, by common adoption and acquiescence on their part and by long and unvarying habit, has acquired, to some extent, element of compulsion and force of law with which it has acquired over the years by constant, consistent and community usage, it attracts sanctions of different kinds and is enforceable. Putting it in a more simplistic form, the custom, rules, traditions, ethos and cultures which concern*

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<sup>3</sup> en.m.wikipedia.org/wiki/custom-law, assessed on the 9th day of December, 2014.

<sup>4</sup> A. O Obilade 'The Nigerian Legal System' (Ibadan: Spectrum Law Publishing 2003)p.83

<sup>5</sup> (2008) ALL FWLR (PT 431) AT 870

*the relationship of members of a community are generally regarded as the customary law of the people.*

Consistent with the above, is section 2 of the Customary Court of Appeal Law of Plateau which defines customary law as “the rule of conduct which governs the legal relationships as established by custom and usage and not forming part of the common law of England nor formally enacted by the Plateau State House of Assembly but includes any declaration or modification of customary law but does not include Islamic personal law.”<sup>6</sup>

Customary law exists when a certain legal practice is observed and the relevant actors consider it to be law (*opinio juris*). Most customary laws deal with standards of communities that have long been established in a given locale. However the term can only apply to areas of international law where certain standards have been nearly universal in their acceptance as correct bases of action –for example laws against piracy or slavery. In most instances, customary laws will have supportive rulings and case law that has evolved over time to give additional weight to their rule as law and also to demonstrate the trajectory of evolution in the interpretation of such law by relevant courts.<sup>7</sup> Our notion of custom in this work is limited to municipal law.

In Nigeria, customary law may be divided in terms of nature, into two classes, namely, ethnic or non-Moslem customary law and Moslem law. Ethnic customary law in Nigeria is indigenous whereas the Moslem customary law is based on the Islamic

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<sup>6</sup> See cited in *Usman v Umatu* (1992) NWLR (PT 254) 399, (1992) 7 SCNJ 388

<sup>7</sup> en.m.wikipedia.org/wiki/custom-law, assessed on the 9th day of December, 2014.

faith.<sup>8</sup> Ethnic customary law is unwritten yet generally accepted as law by members of the community.<sup>9</sup> It is a mirror of accepted usage.<sup>10</sup>

Customs acquire force of law when they become the undisputed rule by which certain rights, entitlements and obligations are regulated between members of the community. In *R V. Secretary of State for Foreign and Commonwealth Affairs*,<sup>11</sup> Lord Denning said:

*These customary laws are not written down. They are handed down by tradition from one generation to another. yet beyond doubt they are well established and have the force of law within the community*

#### C. WHEN DOES CUSTOM BECOME CUSTOMARY LAW?

From the barrage of cases earlier cited on the meaning of customs on the one hand and customary law on the other, it does appear that the law creates a measure of distinction between custom simpliciter and customary law. In view of this, the inevitable question then is-when does a custom become customary law?

The prevailing argument is that a custom becomes customary law when:

- a. It passes the repugnancy/ Incompatibility tests
- b. When it is judicially noticed or;

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<sup>8</sup> Obilade, *ibid* p.83

<sup>9</sup> *Eshugbayi Eleko v. Government of Nigeria* (1931) A.C 662 at p.673

<sup>10</sup> *Owoyin v. Omotosho* (1961) 1 All NLR 304 at 309

<sup>11</sup> (1982) 2 All E.R 118

c. When it is proved before a court of law

The categorization above is not entirely effective in the wake of contemporary revelations. Certain customs are nonetheless the binding laws of a particular set of people even when they have not been submitted for judicial determination as per their repugnancy status or judicially noticed. Even when some customs have been out rightly prohibited by legislation or declared repugnant, a vast majority of the practitioners of the custom still have themselves willingly tied to the apron string of the custom. However, the classification above shall be examined in turn.

#### I. *THE QUESTION OF THE REPUGNANCY TEST*

By way of introduction, the point may be made that the contention of the realist is that the law is what the courts say it is. In the words of Justice Oliver Wendell Homes, ‘The prophecies of what the court will do in fact and nothing more pretentious are what I mean by the law’.<sup>12</sup>

For the realists therefore, if the courts say that a supposed law is not law then it is not law and if the courts say that a law is law, then it is law. In view of the above, the opinion of the realist will be that a custom becomes customary law when the court says it is.

The above reasoning seems to have intercourse with the Repugnancy doctrine introduced into the Nigerian legal system by the British. The doctrine is an overt recognition of the role the courts play in the determination of when custom becomes law. It is a call upon the courts to determine what custom become customary law and which does not using the

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<sup>12</sup> O. W. Holmes, *Collected Legal Papers* (1897) p.173 cited in Micheal E Ibanga , *Learning Legal Theory and Legal Method* (Calabar: Associated Publishers Limited ,1996)p 41.

yardsticks of natural justice, equity and good conscience. This point was made by the Court of Appeal in *Omaye v. Omagu*<sup>13</sup> thus:

*Under section 14 of the Evidence Act, 1990, no custom relied upon in judicial proceedings shall be enforced as law if it is contrary to public policy and is not in accordance with natural justice, equity and good conscience*

Accordingly, if a custom fails the repugnancy test, the courts are precluded from recognizing and enforcing it as law. But if it passes the test, the court will declare it to be law and it will indeed become a customary law.

The necessary questions at this point are; does a custom which is not recognized and enforced by the court as customary law lose its efficacy by reason of its non-recognition? Do the bearers or practitioners of the custom cease to practice and or apply same because it has not been recognized by the court? Do the customs which have not been subjected to judicial determination as to their 'repugnancy status' cease to apply in their communities of bearing?

Attempt shall be made to answer these questions in the succeeding discourse.

## II. THE REPUGNANCY/ INCOMPATIBILITY TEST

By virtue of the Colonial proclamation No. 6 of 1900 made by the British colonial administration, the repugnancy test is the official government's legal requirement that for a custom or tradition, to be enforced, it must neither be repugnant to natural justice,

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<sup>13</sup> (2008) 7 NWLR (pt 1087) 477 at 507, per Adekeye JCA (as he then was)

equity and good consciences nor contrary to any written law. Under this proclamation, the term 'repugnant' connotes that which is highly distasteful or offensive or contrary to nature.

It is instructive to note that even today; this doctrine is still an integral part of the Nigerian *corpus juris* in that all states still retain an equivalent provision in their laws. For example, In Akwa Ibom State, the Akwa Ibom State Customary Court law, empowers a customary court to apply native laws and customs except where a native law or custom violates the repugnancy test. For ease of reference, the law states:

*Subject to the provisions of this Law a customary court shall administer-*

(a) *The customary law prevailing in the area of the jurisdiction of the court or binding between the parties, so far as it is not repugnant to natural justice, equity and good conscience or incompatible either directly or by necessary implication with any written law for the time being in force in the state;*

(b) *The provision of any written law (including in that expression subsidiary legislation) which the court may be authorized to enforce by an order under section 9<sup>14</sup>*

The repugnancy doctrine also receives statutory approval under the Nigerian Evidence Act. Section 18(3) which states:

*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 repugnancy doctrine has been the subject of judicial interpretation in a myriad of cases<sup>15</sup> all of which are instructive on the doctrine. But in the recent 2014 decision, the

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<sup>14</sup> Section 10 of the Akwa Ibom State Customary Courts Law CAP. 40 laws of Akwa Ibom State of Nigeria, vol. 2

Court of Appeal in *Ojukwu v. Agupusi & Anor*<sup>16</sup> citing with approval the case of *Nwachimemelu Ikemefuna Okonkwo V. Mrs Lucy Egbunam Okgabue & 2 Ors*<sup>17</sup> held as follows:

*In Ikemefuna Okonkwo v. Mrs Lucy Egbunam Okgabue & 2 ors, the supreme court in an appeal that emanated from this Honourable court from the High Court of Anambra State , Onitsha Judicial division where the custom of the Onitsha people that enabled a woman to marry another man for the purpose of raising children for her deceased brother fell for consideration, Ogundare JSC at page 343 paragraph H to page 344 paragraph A-B of his contribution to the lead judgment of Uwais JSC wherein Wali, Ogundare, Mohammed and Adio JJSC concurred, reasoned thus:-‘the institution of marriage is between two living persons. Okonkwo died 30 years before the purported marriage of the 3rd defendant to him. To claim further that the children of the 3<sup>rd</sup> defendant had by other man or men are the children of Okonkwo deceased is nothing but an encouragement of promiscuity. It cannot be contested that Okonkwo could not be the natural father of these children. Yet 1<sup>st</sup> and 2<sup>nd</sup> defendants would want to integrate them into the family a custom that permits of such a policy gives license to immorality and cannot be said to be in consonance with public policy and good*

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<sup>15</sup> Edet v. Essien 91932) 11 NLR 47, Mariyama v Sadiku Ejo (1961) NRNLR 81, and Meribe v. Egwu 919790 3 SC 23

<sup>16</sup> (2014) LPELR-22683(CA)

<sup>17</sup> (1994) 9 NWLR (PT 308) 301

conscience. I have no hesitation in finding that anything that offends against morality is contrary to public policy and repugnant to good conscience<sup>18</sup>. It is in the interest of the children to let them know their real fathers and not to allow them live for the rest of their lives under the myth that they are children of a man who had died many decades before they were born '...Ogundare alluded to the case of *Edet v. Essien* (1932) 11 NLR 47 per Cecil Carey, J. who held in a case where a man claimed the child of his former wife who had left and married another man who impregnated her, on the ground that the divorced wife had not returned his bride price, that such a custom is repugnant to natural justice, equity and good conscience, to be rightly decided<sup>19</sup>.

Accordingly, the court declared that the custom of the Onitsha people that enabled a woman to marry another man for the purpose of raising children for her deceased brother as repugnant. The court took the view that such custom being repugnant to natural justice, equity or good conscience cannot be enforced as customary law.

### III. CAN A CUSTOM NOT DECLARED REPUGNANT BE ENFORCED AS A CUSTOMARY LAW BY THE COURT EVEN IN THE FACE OF ITS BARBARIC PROVISIONS?

The extant judicial view is that where a custom is repugnant or barbaric, not even the court can transform it into law. In the *locus classicus* case of *Eshugbayi Eleko v Officer Administering The Government Of Nigeria & Ors*<sup>20</sup>, the court held:

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<sup>18</sup> Emphasis ours

<sup>19</sup> Emphasis ours

<sup>20</sup> (1931) AC 662

*The court cannot itself transform a barbarous custom to a milder one. If it still stands in its barbarous character; it must be rejected as repugnant to natural justice equity and good conscience*

The purport of the above decision is that it is not the function of the court to remove the garment of filth worn by a custom. The court's duty is to assess such custom on the mirror of equity, natural justice and good conscience. These three variables provide the litmus test for the transformation of a custom into customary law.

**IV. ARE THERE FALLEN CUSTOMS BY VIRTUE OF FAILING THE REPUGNANCY TEST?**

Will a custom that fails this test cease to be applicable to the people? Will the custom that has not been subjected to judicial determination lose force of law merely because it has not been adjudicated upon? While it is conceded that a declaration by a competent court of jurisdiction that a custom is repugnant may serve as a foundation for the erection of opposition against the continuous adherence to the custom, that custom so declared as repugnant may not necessarily cease to be applicable for the simple reason that it has failed the repugnancy test. The custom of a typical African society and its people are almost always inextricably intertwined. It hangs on them almost like the proverbial sword of Damocles. They are held as sacred and are unavoidably binding on them. This is especially true with regard to customs that have risen to 'peremptory status'. A custom with peremptory status is that which is admissible of no refusal or contradiction. It is coercively or near coercively binding on all members of the society. Even when compliance with them is at great personal and social inconvenience, they are

nonetheless complied with. In fact, an outright legislation against them may attract little or no compliance.

In support of this position, we shall place reliance on some select customs of the south southern states of Nigeria.

### ***Customs as Per Marriage***

The custom of the Akwa Ibom people and indeed a good number of the states in the south-southern and South-Eastern parts of Nigeria encourages elaborate celebration of marriages. In Akwa Ibom for instance, the process of customary marriage involves three or four stages and phases depending on the culture involved. Generally however, the first phase is the process of 'knocking on the door' called *Nkong Udok*. This phase is the stage when the family of the intending husband formally approaches that of the woman in order to familiarize themselves or make friends with them. When the family of the intending husband has made friends with that of the lady the second phase sets in. The second phase is that of 'asking the girl's hand in marriage' It is called *Mbeb*. At this point the family of the intending husband formally asks for 'a list' detailing the items needed and financial implication for the obtaining of the consent of the girl's family. Among some members of the Ibibio ethnic group, the formal celebration of marriage is not the 3<sup>rd</sup> phase. The 3<sup>rd</sup> phase involves a ceremony where there is the traditional bathing of the intending couple. It involves pouring water on the roof of the bride's family home and having the man and woman drenched by the drizzles from the roof. The last phase is the formal celebration of customary marriage.

Each of these phases involves huge financial implication. The most expensive usually are the items on 'the list' and those needed for the formal celebration of marriage. It is the custom of the people.

In apparent realization of how exorbitant the marriage rituals are, a law christened 'A Law to limit Gifts and Payment on Account of Marriage and for Purposes Connected Therewith' was enacted. Section 1 of the law states:

*Notwithstanding any custom or practice-*

*(a) where no incidental expenses of a marriage are paid by the husband or intended husband or on his behalf, dowry shall not exceed in amount or value the sum of twenty thousand Naira;*

*(b) Where incidental expenses of a marriage are paid by the husband or intending husband or on his behalf, dowry shall not exceed in amount or value the sum of ten thousand Naira and the incidental expenses aforesaid shall not exceed in amount or value the sum of ten thousand naira.*<sup>21</sup>

From the underlined portions of the law, it is obvious that the primary intention of the law is to limit the expenses on marriage. Where any one contravenes the law, a penalty applies. Section 2 of the law prescribes the penalty in the following terms:

Any person who-

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<sup>21</sup> Limitation of Dowry law Cap 79 Laws of Akwa Ibom State.

*2(a) asks, receives or obtains, or agrees or attempts to receive or obtain for himself or any other person, any dowry in excess of the maximum prescribed in section 1; or*

*(b) Gives, or pays, or promises or offers to give or pay to any person any dowry in excess of the maximum prescribed in section 1;*

*(c) Incurs, promises or offers to incur or attempts to incur any incidental expenses of a marriage in excess of the maximum prescribed in section 1;*

*(d) Shall be guilty of an offence*

Under section 3, any person found guilty of an offence under the provisions of section 2 shall be liable upon conviction to a fine not exceeding twenty thousand naira or to imprisonment for a term not exceeding two years.

Irrespective of the punitive measures attachable to an elaborate celebration of marriage as is customary with the people, customary marriage still involves huge financial expenses far in excess of the prescribed fees.

### ***Age of Customary Marriage***

It is no longer fashionable in Akwa Ibom state for a girl under the age of 16 to be married. This is due to the increasing awareness on the health dangers of early child marriage and may be to lesser extent because of the Age of Customary Marriage Law.

The Age of Customary Marriage Law<sup>22</sup> prohibits any marriage or promise of marriage between or in respect of persons either of whom is under the age of sixteen.

In the northern parts of Nigeria, particularly amongst the Hausa-Fulanis, the custom of marrying girls under the age of 16 is still a common practice. Legal prohibition has not stopped it.

### ***Masquerades' Control***

One of the commonest customary practices of the Akwa Ibom people, is the custom of masquerades. Some of these masquerades are violent while some others restrict the liberty of movement of non-initiates. Among the people of Ibiono Ibom Local Government Area of the State, there is a masquerade society known as '*Ekoong*'. It has a special season in each year. During its season, when it comes to the public, all women, children and adult males who are non-initiates must be behind closed doors. They can only come out if led and protected by an initiate. Clearly, this customary practice is incompatible with existing Nigerian law in that it violates the freedom of movement and right to liberty guaranteed to every Nigerian under section 41 of the Constitution of the Federal Republic of Nigeria, 1999. This has however not stopped the people from continuously observing the custom. Indeed not even the *Masquerade Control law Cap 83 Laws of Akwa Ibom State* has been helpful in this regard.

### ***The Ndiukwu Umuiyi Akabo Custom***

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<sup>22</sup> Cap 8 Laws of Akwa Ibom

The *Ndiukwu Umuiyi Akabo* custom in some part of Imo State permits a father who has not had a male child to keep his daughter in the family to procreate out of wedlock.

There is a similar custom among the Ndoki people of Rivers state. That custom has been declared repugnant to natural justice, equity and good conscience. In *Anode v Mmeka*<sup>23</sup> the court held per Saulawa JCA that:

*It is not in doubt, as alluded to above, that the custom applicable to Ndiukwu Umuiyi Akabo community, which permits a father to keep his daughter in the family to procreate out of wedlock, due to lack of a male child, is morally, religiously and culturally obnoxious. Such a custom is repugnant to natural justice, equity and good conscience .It is antithetic to the well cherished tenets of fundamental human rights. As enshrined under chapter IV of the 1999 constitution. The custom in question no doubt promotes sexual promiscuity in the society and it is thus highly abominable.*

This decision, notwithstanding the custom, is still being adhered to by its faithful.

### ***Custom Relating to Discrimination against Women in Matters of Inheritance***

A popular custom amongst a cross section of the Igbos is the custom that forbids the female child from inheriting the property of her late father. In 1997, in the Case of *Mojekwu V. Mojekwu*<sup>24</sup> the Court of Appeal declared repugnant the *Nnewi oli-Ekpe* custom that inhibits a female child from sharing in the estate of her deceased father. In the words of Tobi JCA( as he then was):

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<sup>23</sup> (2008) 10 NWLR (PT 1094) 1 at 19 paras B-C,

<sup>24</sup> (1997) 7 NWLR 284 PT., 512 PAGES 283

*We need not travel all way to Beijing to know that some of our customs including the Nnewi Oli-Ekpe custom relied on by the appellants are not consistent with our civilized world in which we all live in totally including the appellants...Accordingly, a custom or customary law to discriminate against a particular sex is to say the least an affront on Almighty God himself. Let no body to such a thing on my part, I have no no difficulty in holding that the Oli-Ekpe custom of Nnewi is repugnant to natural justice, equity and good conscience.*

This decision was cited with approval in *Mrs Bridget Motoh v. Emmanuel Motoh*<sup>25</sup> per Aboki JCA thus:

*I will have no hesitation in declaring such customary law which discriminates against female children in terms of inheritance to be repugnant to natural justice, equity and good conscience. I find support in the case of Mojekwu V. Mojekwu (1997) 7 NWLR 284 PT., 512 PAGES 283 where Tobi JCA (as he then was) said:-We need not travel all way to Beijing to know that some of our customs including the Nnewi Oli-Ekpe custom relied on by the appellants are not consistent with our civilized world in which we all live in totally including the appellants...Accordingly, a custom or customary law to discriminate against a particular sex is to say the least an affront on Almighty God himself. Let no body to 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.*

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<sup>25</sup> (2010) LPELR-8643 (CA) , pp. 72-73, paras G-

In the very recent 2014 case of *Mrs Lois Chiteru Ukeje & Anor V. Mrs Gladys Ada Ukeje*<sup>26</sup>, the Supreme Court per Rhodes Vivour JSC held:

*L. O.Ukeje deceased, is subject to the Igbo customary law. Agreeing with the High Court, the Court of appeal correctly that the igbo native law and custom which disentitles a female from inheriting, in her late father's estate , is void as it conflicts with section 39(1) (a) (2) of the 1979 constitution (as amended) This finding was affirmed by the court of Appeal. There is no appeal on it. The finding remains inviolable. Section 39(1) (a) (2) of the 1979 constitution is now contained in the 1999 constitution as section 42(1), a, (2) and it states that: '42. (1) A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person:-*

*(a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religion or political opinions are not made subject; or*

*(b) be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religion or political opinions.' No matter the*

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<sup>26</sup> (2014) LPELER-22724(SC), pp. 32-33 paras E-G

*circumstance of the birth of a female child, such a child is entitled to an inheritance from her late father's estate. Consequently, the Igbo customary law which disentitles a female child from partaking in the sharing of her deceased father's estate, is in breach of section 42(1) and (2) of the constitution.*

*(2) No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth.*

#### V. *WHEN A CUSTOM IS JUDICIALLY NOTICED*

A custom can also become customary law if it is judicially noticed. This view receives statutory support under section 16 of the Nigerian Evidence Act. The section states:

*(1) A custom may be adopted as part of the law governing a particular set of circumstances if can be judicially noticed or can be proved to exist by evidence.*

*(2) The burden of proving a custom shall be upon the person alleging its existence*

The above section was decided upon in *Ajikanle & Ors v. Yusuf*<sup>27</sup> the court held:

Section 14 of the Evidence Act reads:

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<sup>27</sup> (2008) 2 NWLR (PT 1071)

*A custom may be adopted as part of the law governing a particular set of circumstances if can be judicially noticed or can be proved to exist by evidence.*

*(2) The burden of proving a custom shall be upon the person alleging its existence (2) a custom may be judicially noticed by the court if it has been acted upon by a court of superior or co-ordinate jurisdiction in the same area to an extent which justifies the court asked to apply it in assuming that the persons or class of persons concerned in relation to circumstances similar to those under consideration*

Similarly in *Onwuchekwa v Onwuchekwa*<sup>28</sup> the court states,

*It is not all customs or customary law that must be proved. Where a custom has received judicial notice by the court and has been acted upon by a court of superior or coordinate jurisdiction, proof of such custom is not necessary .That is the essence of section 14(2) of the Evidence Act. Although the subsection has given rise in the past and will continue to give rise in the future to interpretational problems, unless amended , the courts have in the exercise of their interpretational jurisdiction, dealt with the apparently fluid, vague and generic provision.*

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<sup>28</sup> 91991) 5 NWLR (PT 194) AT 750 PARAS C-E

The section is revamped by section 17 of the Evidence Act which states an instance when a custom may be judicially noticed. A custom is to be judicially noticed when it has been adjudicated upon once by a superior court of record.

Again the question arises as to whether the failure and or refusal by a court to judicially notice a custom will make it lose its efficacy or applicability. We do not think so.

## VI *PROOF OF CUSTOMARY LAW*

Another way through which a custom can become customary law is when it is proved before a court of law. Section 18 (1 & 2) Evidence Act states:

*Where a custom cannot be established as one judicially noticed, it shall be proved as a fact*

*(2) where the existence or the nature of a custom applicable to a given case is in issue, there may be given in evidence the opinions of persons who would be likely to know of its existence in accordance with section 73*

In *Ojiogu V Ojiogu*,<sup>29</sup> the Supreme Court held per Onnoghen JSC thus:

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<sup>29</sup> (2010) 9 NWLR (PT 1198) 1(2010) LPELR-2377 p. 31, para G

*It is trite law that customary law is a question of fact which must be proved or established by evidence*

Again in *Ogene v Ogene*<sup>30</sup> the court affirms that.

*Customary law or native law and customs are questions of facts which must be proved by evidence if judicial notice is not available through decided cases of superior courts. In the instant case, the appellant should have taken the advantage of customary court to establish his case by evidence*

#### D. CONCLUSION

The role of the court in the determination of when a custom becomes customary law is invaluable. A custom can become law when it has been judicially noticed by the court or proved to exist before it. One other way through which a custom becomes law is when the courts say it is using the basic standard of repugnancy. A custom that is repugnant to natural justice equity and good conscience or incompatible with any extant law is deemed not to be law. The pertinent question is-will a law declared repugnant or not judicially noticed by the court lose its efficacy or become instantly ousted from applicability because it has been declared repugnant or has not been judicially noticed?

It is axiomatic from the discourse above that even when a custom has been declared repugnant to natural justice, equity and good conscience like the Oli-Ekpe custom of the Nnewi people which

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<sup>30</sup> (2008) 2 NWLR (PT 1070) 29 at p.48 paras D-E p. 48 pars A-C:

discriminates against a female child in terms of inheritance, such declaration does not in itself make the custom to lose the force of applicability. While it is conceded that a declaration by a competent court of jurisdiction that a custom is repugnant may serve as a foundation for the erection of opposition against the continuous adherence to the custom that custom so declared as repugnant may not necessarily cease to be applicable for the simple reason that it has failed the repugnancy test. The custom of a typical African society and its people are almost always inextricably intertwined. It hangs on them almost like the proverbial sword of Damocles. They are held as sacred and unavoidably binding on them. This is especially true with regard to customs that have risen to 'peremptory status'. A custom with peremptory status is that which is admissible of no refusal or contradiction. It is coercively or near coercively binding on all members of the society. Even when compliance with them is at great personal and social inconvenience, they are nonetheless complied with.

In some cases, even when certain customs have been proscribed they are still practiced because such custom have risen to peremptory stage.

It is therefore submitted, that it is not entirely correct to argue that in the absence of judicial notice, proof before a court or positive pronouncement by the court, a custom is not customary law.

In this work, the notion of custom is restricted to municipal law as against customary international law. Within that realm, custom is a rule which in a particular district or society has for long usage obtained the force of law and pronounced so by a superior court or court of record.