

REVISITING THE CONSTITUTIONALITY AND SUSTAINABILITY OF IGBO CUSTOMARY LAW VESTING SOLE INHERITANCE OF 'OBI' IN ELDEST SURVIVING SON*

Abstract

Generally, under the Igbo native law and custom, a man's dwelling house where he lived and died often referred to as 'Obi or Ngwulu' is traditionally inherited and owned by his eldest surviving son, to the exclusion of his other children. Regrettably, this discriminatory practice, which favors one child over others solely on the basis of birth order, has long been recognized, upheld, and enforced by Nigerian courts even in contemporary times. Using the extant Constitution as a gauge, this paper interrogated and reassessed the constitutionality and sustainability of this aspect of Igbo customary inheritance. It found that the exclusive inheritance of Obi by the first son is incompatible with the principles of natural justice, equity, and good conscience and that it contravened Section 42 of the 1999 Constitution (as amended), which prohibits discrimination on the grounds of birth or status. It advocated that this Igbo customary law be revisited and replaced with law where a man's Obi would be jointly inherited by all his children irrespective of birth order or status.

Keywords: Igbo Customary Law, Obi, Eldest Surviving Son, Sole Inheritance, Constitutionality, Sustainability

1. Introduction

Custom is a rule which, through long-standing usage within a particular community, has acquired the force of law with respect to the place or the subject matter to which it relates¹. Customary laws, having been formulated from time immemorial, often reflect the values and societal structures of the time they were conceived. However, as society evolves, new social realities emerge many of which could not have been foreseen at the time these customs were established. True enough, it has been widely stated that for law to remain relevant and effective, it must evolve alongside the norms and developmental stages of the society in which it operates². In a developing society such as Nigeria, the courts are expected to uphold the law not merely as a rigid set of rules but as a dynamic instrument for social re-engineering and national rebirth. Through seasoned legal activism and liberal interpretative powers, the judiciary must focus on promoting egalitarian values and the principles of justice³. Put differently, it is the duty of judges to utilize the privileged position conferred upon them by law to interpret and apply the law as a tool for meaningful social transformation. Thus, in cases where laws especially customary laws present problems or injustices, the courts must shape their interpretation to align with contemporary values and notion of justice⁴. Only through such judicial engagement that the aspiration for a just and fair society can be realized or concretized⁵. Notably, there is no formal forum for repealing or amending customary laws. However, under the Nigerian legal system, where a customary law is confronted with a novel or unjust situation, the courts have the discretion to assess its relevance and applicability in light of current social conditions and fairness. Also, the doctrine of repugnancy affords the courts the opportunity and authority to refine or reject customary laws where necessary or where they are inconsistent with principles of natural justice, equity, and good conscience⁶.

An academic or scholarly criticism of the greatest learning of an existing law does not wipe out the existing law, and the courts are bound to interpret the existing law and not do a critique of it⁷. The law is trite that a

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¹ *Aku v. Aneku* (1991) 8 NWLR (Pt. 209) 280.

² *Packer v. Packer* (1954) AER p. 22.

³ *N.B.N. Ltd. v. Savol W.A. Ltd.* (1994) 3 NWLR (Pt. 333) 435.

⁴ *Compt. Nig. Prisons Serv. v. Adekanye* (1999) 6 NWLR (Pt. 607) 381.

⁵ *Ekwenugo v. F.R.N.* (2001) 6 NWLR (Pt. 708) 171.

⁶ See for instance the cases of *Okonkwo v. Okagbue* (1994) 9 NWLR (Pt. 368) 301 and *Muojekwu v. Ejikeme* (2000) 5 NWLR (Pt. 657) 402.

⁷ See *F.C.D.A. v. Koripamo-Agary* (2010) 14 NWLR (Pt. 1213) 364.

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custom which is not linked with any crime and has not been declared repugnant through the action of any interested party who has been affected by it will continue to have a legal force being a manifestation of the inner consciousness of those who give their consent to its application. However, once a custom is challenged in a court of law by anyone who is interested or adversely affected by its application or where a call has been made to examine whether it offends natural justice, the courts would pursue such complaint diligently in order to establish whether the custom is inconsistent with the principles of sound reason and good conscience⁸.

This study acknowledges that Igbo customs are not entirely uniform. However, under Igbo customary law, it is generally accepted that the house where a deceased man lived in his lifetime is inherited by his eldest surviving son irrespective of whatever structures that are erected thereon⁹. Unfortunately, this practice is often exploited by some first sons who, adopting a "Shylock-like" attitude, use this custom to marginalize their siblings and treat them as mere tenants or second-class citizens in their own father's home¹⁰. It is important to note that this traditional system was established during a period when land was more abundant, and strangely it has not been revised to accommodate contemporary changes in land availability and societal dynamics. In present-day society, this discriminatory, inhuman and repugnant customary law has strangely continued to receive judicial approval or validation and has become notorious or judicially noticeable as a result of its application in courts¹¹. While the campaign against gender-based discrimination in Igbo customary inheritance laws have received serious attention from many quarters including the courts, this aspect of the Igbo native law and custom which similarly preaches exclusion on ground of time of birth has remained unchallenged.

The purpose of this paper is to expose the unspoken and unjust exclusion of non-first sons under the Igbo customary inheritance practice with respect to Obi. It posits that such customary law which discriminates against non-first sons or children of same parents on basis of seniority is repugnant to natural justice, equity and good conscience and unsustainable in this modern era. This paper advocates for an inclusive and equitable approach to all form of inheritance under Igbo customary law. It recommends the reform of this outdated cultural practice to reflect contemporary values of fairness, equality, and social justice. The courts, as custodians of justice and social transformation, are urged to apply the principles of equity, fairness, and global legal trends in their interpretation and application of such customary laws. Through such efforts, the legal system can foster a more just and inclusive society for all children, regardless of birth order.

2. Right of First Son to Inherit the Father's Compound to the Exclusion of His Siblings under Igbo Customary Law

Every responsible Igbo father has a moral duty to ensure that his children have shelter, as homeless children are unlikely to benefit themselves, their parents, or the society. Primarily, under Igbo customary law, a man has the right to determine how his property should be distributed upon his death or to whom his property should be given. A testator under Igbo custom has the latitude to extend the category of beneficiaries of his beyond his nuclear family. However, there remains some uncertainty regarding whether the Obi (ancestral home) can be validly given away as a gift during the lifetime of the owner or whether this custom apply when the deceased is a Christian and dies intestate. However, it is relatively settled under customary law that where the first son, or eldest surviving son, is expressly disowned by his father, he may lose his right to inherit the Obi. In *Ejimaike v Ejimaike*¹² it was held that the right of the eldest surviving son to succeed his father is automatic and only his father who is the owner and the creator of the family property can deprive the eldest son of this right. That in the absence of any direction by the father, the right of the eldest son

⁸ *Okonkwo v. Okagbue supra.*

⁹ *Mba v. Mba* (2018) 15 NWLR (Pt. 1641) 177.

¹⁰ *Ibid.*

¹¹ See recent decision in *Mba v. Mba supra.*

¹² (1972) 2 ENLR P. 11.

cannot be taken away¹³. Comparatively, it has been held in plethora of judicial authorities that under Benin customary law that an eldest son who survives his father and who is entitled to inherit the house in which his father lived and was buried cannot be deprived of it in a will made by the father. That any disposition of the dwelling house under the will of the testator was null and void being in violation of the customary law regulating the disposition of the property¹⁴. This Benin customary law shares remarkable similarities with the Igbo custom regarding inheritance of Obi. Therefore, the court may adopt a similar position when confronted with a comparable or analogous issue under Igbo customary law.

Predominantly, under Igbo customary law, the house where a deceased man lived in his lifetime is inherited by his eldest surviving son irrespective of whatever structures that are erected thereon. It has been held that for a house to qualify as obi, the dwelling house must be located in the deceased traditional or ancestral hometown¹⁵. It has been argued that the customary rationale behind the first son's entitlement to Obi is that the eldest son is viewed as the "father of the family" and is entrusted with legal and moral responsibilities toward his siblings. These responsibilities include managing the deceased's compound, overseeing family affairs, and preserving and continuing the family's legacy. The eldest son also assumes the duty of caring for the deceased's house and fulfilling any other responsibilities his father had while alive¹⁶.

When a man dies without a will under Igbo native law and custom, his properties except the Obi will automatically be under the custody of his first son who will hold them in trust and manage them on behalf of the other members of the family until the man's estate is divided or shared. The first son has a customary obligation or prerogative to allocate a homestead to his brothers from their late father's estate. However, where the first son, for any reason, is unable or unwilling to provide such homesteads or fails to distribute the estate, the Umunna (the extended family or kindred) has the customary authority to intervene and ensure the proper distribution of the estate among the children of the deceased.

The eldest son's entitlement to Obi under the Igbo customary law is subject to the right of occupancy by his male siblings, including continuing to live thereat, until each one of them build his own house outside the compound and move out¹⁷. The rights of non-first sons to Obi are limited to only the use and occupation of the Obi as all title and proprietary rights in Obi are vested in the eldest surviving son. In other words, the right of a child of a deceased in the father's residential compound is strictly a right to reside and live therein and is not a right of ownership. The right to use and occupy the Obi by non-first sons is liable to be extinguished once they build his own house outside the compound. The infinitude of such an occupation for any reason cannot turn it into ownership.

The children of a deceased person are entitled to the peaceful and quiet enjoyment of their residential in Obi and as joint occupants of the compound, each has a duty not to disturb the other's peaceful and quiet enjoyment of his own area of occupation and to live in peace and harmony with the other occupants. Thus, any of them has the right to take lawful steps to prevent or stop the violation of his or her said right to peacefully live in and enjoy his area of occupation. This, however, does not derogate from the ownership of the Obi by the first son as the Diokpala. The Diokpala has a duty to ensure that he does not exercise his right of inheritance to their father's Obi or exercise any of his powers as Diokpala in a manner as to diminish or interfere in any respect with the right of any sibling to the exclusive occupation and peaceful enjoyment of

¹³ Motun, 'A Review of the Igbo Traditional System of Inheritance and an Examination of the Discriminatory Aspects Considering Recent Pronouncements by the Courts in Nigeria' Available on <https://motun911.wordpress.com/2019/09/13/igbo-law-of-succession/>. Accessed on 29th July, 2025 by 3:05 PM.

¹⁴ See *Ogiamen v. Ogiamen* (1967) NMLR 245; *Agidigbi v. Agidigbi* (1992) 2 NWLR (Pt.221) 98 and *Lawal-Osula* (1993) 2 NWLR (Pt. 274) 158.

¹⁵ *Idehen v Idehen* [1991] 6 NWLR Part 198, 382

¹⁶ Reginald Akujobi Onuoha, 'Discriminatory Property Inheritance Under Customary Law in Nigeria: NGOs to the Rescue' Available on <https://edojudiciary.gov.ng/wp-content/uploads/2016/10/Discriminatory-Property-Inheritance-Under-The-Customary-Law-In-Nigeria.pdf>. Accessed on 29th July, 2025 by 3:05 PM.

¹⁷ *Mba v. Mba supra*.

the area he or she is residing in within the compound¹⁸. It is important to state that this traditional system was developed during a time when land was more abundant and has not been reviewed since then.

3. Brief Review of some Decisions of Nigerian Courts on Inheritance of Obi under Igbo Customary Law

As an officer in the temple of justice, a counsel can decently attack or criticise the decision of the court¹⁹. For once made, a decision of court control or guides future judgments of the courts in like or similar cases. The power of the court to overrule itself when it appears that any of its decision is given in error is predicated on the fact that it is far better to admit an error than to persevere in it. The court is not infallible. Justices of the court are human beings, capable of erring. It will certainly be short-sighted arrogance not to accept this obvious truth. It is also true that the court can do inestimable good through its wise decisions. Similarly, the court can do incalculable harm through its mistakes. When therefore it appears to learned counsel that any decision of the court has been given *per incuriam*, such counsel should have the boldness and courage to ask that such a decision be over-ruled by such court or its superior. The court has the power to over-rule itself and has done so in the past for it gladly accepts that it is far better to admit an error than to persevere in error²⁰.

There have been judicial decisions on the right of the eldest surviving to inherit Obi under Igbo Customary law. In *Mba v. Mba*²¹, the Supreme Court of Nigeria considered the customary right of the eldest surviving son (Diokpala) to inherit his late father's compound under Igbo native law and custom. The parties in this case were full brothers and children of Mba Utobo of Amanowelle village, Amansea, Anambra State. The appellant who was the defendant at the trial court is the first son (Diokpala) of late Mba Utobo. The respondent wanted to have his own nucleus family and their father, late Mba Utobo, gave him a portion in his compound where the respondent erected a storey building and lived with his own family. After the death of Mba Utobo, the brotherly love, affection and harmonious relationship between the siblings had broken down with constant quarrel and assault, resulting in threat to the security of lives and properties in the compound, in particular between the appellant and the respondent, and their respective families. Following the conflict, the respondent sued the appellant and sought several reliefs from the High Court, including separate access and division of obi. The appellant counterclaimed, asserting exclusive ownership of the entire compound including the house build by the respondent as the Diokpala, in line with Amansea native law and custom. The High Court granted the respondent's reliefs and dismissed the appellant's counterclaim.

On appeal, the Court of Appeal affirmed some of the reliefs granted to the respondent based on his right of occupancy, while also upholding the appellant's ownership of the entire compound as Diokpala by allowing his counterclaim. Dissatisfied, the appellant further appealed to the Supreme Court. The Supreme Court dismissed the appeal, affirming that while the respondent had no ownership rights over the portion he occupied, he had the customary right to reside there as a son of the deceased. However, this did not derogate from the appellant's legal ownership of the entire family compound and the structures therein as the Diokpala, a position recognized under Igbo customary law. The Court of Appeal of Nigeria also considered the customary right of the eldest surviving son (Diokpala) to inherit his late father's compound under Igbo native law and custom in *Okonkwo v. Okonkwo*²². The appellants and the respondent are full-blood siblings and children of the late Chief Ruben Nwoye Okonkwo of Umudunu village, Abagana. The respondent is the eldest son and Diokpala of the family. During his lifetime, Chief Ruben built a four-storey building consisting of ten flats (each with three bedrooms and a living room), which served as his Obi where he lived with his family. At the request of the respondent, Chief Ruben allocated him a separate and sizeable parcel of land outside the Obi as a personal homestead (Ana-Obi) in accordance with Abagana native law and custom. The respondent developed this land, erected a storey building therein, fenced it, and resides there

¹⁸ *Ibid.*

¹⁹ *Adeokin Records v. M.C.S.N. (Ltd GTE)* (2018) 15 NWLR (Pt. 1643) 550.

²⁰ *Adegoke Motors Ltd. v. Adesanya* (1989) 3 NWLR (Pt. 109) 25.

²¹ *Supra.*

²² CA/E/189/2008 unreported.

with his family. No other sons of Chief Ruben were given Ana-Obi by their father. The Obi remained the residence of the other children of Chief Ruben, excluding the respondent. Chief Ruben occupied two flats within the Obi and had, during his lifetime, granted one flat each to the appellants for use as residential dwellings. The appellants peacefully occupied these flats during their father's lifetime without any dispute.

Following the death of Chief Ruben Nwoye Okonkwo, the respondent instituted a suit at the High Court of Anambra State, Awka, claiming exclusive ownership of the Obi by virtue of his position as Diokpala. The appellants contested the claim, arguing that since the respondent had already been given a personal homestead (Ana-Obi) by their father during his lifetime, he could no longer lay claim to the Obi. The High Court ruled in favour of the respondent, affirming his right to inherit the Obi as the eldest son under Abagana native law and custom. However, the court recognized the continuing right of the other children to reside in the Obi until they have built their own homesteads and moved out. The appellants' appeal to the Court of Appeal was dismissed, affirming the trial court's findings. The appellants were not allotted Aniobi (homestead) as they left no other land in Abagana. Despite this, while the appellants had not yet built, the respondent proceeded to file a suit before the Magistrate's Court, seeking to evict appellant from the Obi.

Unfortunately, in the decisions reviewed above, none of the parties raised the issue of the fairness of the Igbo custom regarding the inheritance of the Obi. They did not invite the courts to invoke Section 14(3) of the Evidence Act, 2011. Also, the courts did not raise the issue of repugnancy *suo motu*. It is hoped that, when presented with the opportunity, the Supreme Court will revisit and overrule the decisions previously analyzed.

4. Brief Assessment of the Constitutionality of the Igbo Customary Law that grants the First Son sole Right to inherit his Father's Compound

Law is generally perceived, and rightly so, as a vehicle that drives social change in the society. Law is a vehicle through which a programmed social evolution can be brought about. It is through the instrumentality of law and particularly legislation, that culturally entrenched harmful practices are usually abolished. Abolition of harmful cultural practices may require the enactment of specific legislations in that regard.²³ The law is trite that customary law will be enforced by the courts unless it is shown: a) to have been altered or repealed by the applicable statute; b) to be repugnant to natural justice, equity and good conscience; or c) to be against public policy; or d. that it is contrary to any statute or the Constitution of the Federation or incompatible with an existing law in force. Section 14(3) of the Evidence Act, 2011 reinforces the above position by stipulating that any custom relied upon in judicial proceedings shall not be enforced as law if it is contrary to public policy or does not conform to principles of natural justice, equity, and good conscience. While Section 42(1) of the Constitution of the Federal Republic of Nigeria, 1999 prohibits discrimination against any Nigerian citizen on the basis of community, ethnic group, place of origin, sex, religion, or political opinion, Section 42(2) further prohibits any form of disability or deprivation based solely on the circumstances of one's birth. Similarly, Article 2 of the African Charter on Human and Peoples' Rights guarantees every individual the right to enjoy the rights and freedoms recognized in the Charter without discrimination on grounds such as race, ethnicity, sex, religion, birth, or social origin.

The combined effect of these constitutional and international provisions stated above is to prohibit any form of discrimination, including that rooted in customary practices. The Constitution, being the supreme law of the land, overrides any customary norm or tradition that contradicts its provisions. Regrettably, Nigerian courts have for long sustained the Igbo customary law practice that promotes inequality and enthrone discriminate against non-first sons time of birth and other status. The courts have previously held that native law and custom where the eldest son succeeds to all the property of the deceased father to the exclusion of other children is not repugnant to natural justice, equity and good conscience²⁴. This study finds that the

²³ M. Udowoima and Q. Ukpo, 'Law as An Agent of Social Change: A Case Study of Female Genital Mutilation in Nigeria'. Available at SSRN: <https://ssrn.com/abstract=3986554> or <http://dx.doi.org/10.2139/ssrn.3986554>

²⁴ See Lawal-Osula (1993) 2 NWLR (Pt. 274) 158 and *Ogiamen v. Ogiamen* (1967) NMLR 245.

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Igbo customary law that discriminates against non-first sons in matters of inheritance is unjust and constitutionally untenable in today's world. It violates the principles of equality before the law and fairness, which are fundamental to both domestic and international human rights law.

5. Conclusion

It is the observation of this study that the customary practice that empowers the first son to inherit Obi to the exclusion of other children originated during a time of land abundance, and did not contemplate modern realities, such as situations where the deceased left behind only the Obi, with no additional land available to allocate to the other sons for homesteads. It is the opinion of this paper that the Igbo customary law that allows the first son to inherit Obi to the exclusion of other children is repugnant to natural justice, equity and good conscience and is incompatible with Section 42 of the extant Constitution. It recommended that Obi treated as family estate as family house and should be treated as ancestral home that cannot be sold. The courts owe a higher duty and responsibility to the Constitution. The Constitution has left the courts as the bulwark of liberties and the bastion to oversee and stave off any dangerous or unwarrantable or stealthy encroachments²⁵. It is the duty of the court to guard the constitutional rights of the citizens. Consequently, the court must never uphold any law which derogate from the constitutional rights of the citizens.

²⁵ See *Ikomi v. State* (1986) 3 NWLR (Pt.28) 340 at 376.