Journal of Law, Policy and Globalization
ISSN 2224-3240 (Paper) ISSN 2224-3259 (Online)
Vol.117, 2022

Succession Rights under Esan Customary Law in Nigeria: The Problems of Applicability of Esan Customs and the Challenges of Fundamental Rights

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Abstract
Esan Native Law and Customs like any other customary laws in Nigeria is recognised as law that regulated the customary aspect of the people subject to its jurisdiction. One of such aspect, is succession and inheritance rights. Although, Esan customary law has from time immemorial made adequate and sufficient rules that regulate and govern succession rights, recently these rules have come under vigorous legal scrutiny concerning their applicability *vis-à-vis* the enforcement of fundamental rights of citizens that are constitutionally guaranteed. This article therefore seeks to examine critically the application of Esan Native Law and Customs regulating succession and inheritance rights in general, identify its deficiencies and advocate for sustainable ways to harmonise them by making them to conform with the current state of the law dealing with the enforcement of fundamental rights of citizens. This approach has become imperative in other to prevent certain aspect of Esan Native law and customs dealing with succession rights from being adjudged repugnant to natural justice equity and good conscience.
Keywords: Succession Rights, Esan Customary Law, and Fundamental Rights
DOI: 10.7176/JLPG/117-09
Publication date: January 31st 2022

1. Introduction

1.1 Origin and brief history of Esan people

The term Esan has more than one meaning depending on the context in which it is used. According to Izibili[1] the word Esan is a nomenclature for a territory occupied by a people of a known location and land.[2] Linguistically, it is a language spoken in that locality. Historically, there were already existing fixed names for the people that lived in the present-day location now called Esan, for mere political and social reason. For example, fixed names like Ugboha, Uromi, Ubiaja, Ebhoikhimi.[3] On the historical account concerning the origin of the Esan people, "there is a rather popular school of thought that believed that the Esan came or migrated from Benin Empire at different period and the earliest batch of such migrations which happened in about 1025 BC actually met some inhabitant at Egbelle in the present day Uromi"[4]. Okojie on the other hand asserted that "all Esan people came directly and indirectly from Benin as could be seen from the uniformity of their features, languages and custom,"[5] but he was quick to add that "the history of the Ruling Houses, that is the Enijie, is quite different from that of the subjects or commoners".[6] This narrative seems to give credence to the "*Esan fia*" theory which literally means they have fled.[7] Commenting on the origin of the Esan people Bradbury[8] observed that there are a few references in Ishan tradition to aboriginal people who lived in the area before the migrations, which resulted in the founding of the present- day communities. The implication of this statement is that most accounts about the origin of the Esan are based on the individual account as it affects a particular village, clan, or kingdom. For example some elements in the population of Egoro, Okpoji, Ewu, Uromi

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[1] See Izibili M.A "The role of Traditional Rulers in Promoting Peace, Development and Ensuring Security in Esan Land." Being a text of lecture delivered at the instance of His Royal Highness, Ogirrua of Irrua and the Okaijesan of Esanland on his 50th coronation anniversary to the throne of his fathers on 22nd June 2021. Page 6
[2] Izibili., M.A. *Esanology Essays and Reflection on Esan worldview: Yesterday, Today and the Future*. (2020 Mauritius: Ks Omniscriptum Publishing) pp-2-3.
[3] See footnote 1 above.
[4] Izibili M.A "The role of Traditional Rulers in Promoting Peace, Development and Ensuring Security in Esan Land." Being a text of lecture delivered at the instance of His Royal Highness, Ogirrua of Irrua and the Okaijesan of Esanland on his 50th coronation anniversary to the throne of his fathers on 22nd June 2021. Page 6. See also, Ojiefo. A.P. Uromi Chronicles 1025-2002 (2002 Aregbeyeguale Publisher Uromi) page 2.
[5] Okojie. C.G., *Esan Native Laws and Customs with Ethnographic Studies of the Esan People* (1994 Ilupeju Press Ltd. Benin.) p 17.
[6] Ibid.
[7] For further reading on the nature of the theory, see Okojie. C.G., *Esan Native Laws and Customs with Ethnographic Studies of the Esan People* (1994 Ilupeju Press Ltd. Benin.) p17-24
[8] Bradbury R.E., The *Benin Kingdom and the Edo-Speaking People of South-Western Nigeria.* (1957 International African Institute London) 63.

and Ewohimi claimed to be descended from ancestors who "dropped from the sky" or who emerged from the ground or from rivers.[1] In Iruekpen, according to available written materials, supported by local oral account, human settlement existed in Iruekpen during the reign of the *Ogisos'* in ancient Benin around 1000 A.D. -1170 A.D. it is not particularly clear under which *Ogiso* the settlement began or flourished. Oral sources tell of the arrival in Iruekpen of a powerful military group from Benin led by one Chief Iken of Uselu quarters. This group were said to settled and intermixed with the aborigines of the settlement now called Iruekpen.[2] Also, in Ewu tradition it is generally believed that one of their ancestors fell from the sky and was conquered by the Oba of Benin who gave him a wife and followers, and later sent him back with the title *Onogie.* However, most oral traditions are particularly concerned with the origins and growth of their respective kingdoms, villages, and village-groups that claim to have been founded directly or indirectly from Benin or by natives of other areas (especially Ife and Ifeku Island) who were absorbed, peacefully or by conquest, into the Benin empire. Traditional history provide that emigrant from Benin fled from injustice or oppression though a few Enigie[3] were apparently deliberately placed by the Oba of Benin to look after shrines or to guard his interest in the area.[4] It has been suggested that some of the chiefdoms were undoubtedly offshoots of the other already established communities and that their Enigie did not, perhaps, in all cases, secure the Oba's recognition.[5] Existing literatures concerning the origin of the Esan suggested that it is not possible to say with precise accuracy the date these chiefdom were formed. According to Okojie the actual event that came to bring them together was Ewuare's wooing of 1463. At Benin the leader or *Ekakulos* (war lords) met and were given similar titles to enable them to rule their respective communities. Yearly they went personally or through accredited agent to pay homage to their overlord, the Oba of Benin. Their re-union in the place of their origin with the common description of how they broke away resulted in the group name of ESAN.[6] On the other hand, Bradbury is of the view that it is possible to date satisfactory the founding of the kingdoms though the traditions of Igueben and Urohi, because accounting to oral tradition, they were founded by warriors who followed the Oba of Benin to the war against the Ata of Idah, presumably the one which historian recorded to have taken place early in the 16th century.[7] Also, he went further to posit that the 26 kingdoms for which information were available could recall the names of their *Onojie* i.e., king from the six (6) to the sixteen (16) *Enigie*, with the exception of Igueben which could names twenty-six (26) *Ekaigu*. Sixteen kingdoms list a succession of between Twelve (12) and sixteen (16) Enigie but in a few cases the list is said to be incomplete, some names having been forgotten. In terms of demography, all the kingdoms appear to have grown by the addition of immigrants of widely diverse Edo-speaking origins, who have accepted the authority of the *Onojie* in whose territory they have settled. This has resulted in all the Kingdom having heterogeneous composition. Also, there is another school of thought which postulated that most of the people claim descent from people who emigrated from the Benin kingdom for widely very reasons. They included warriors who did not return to Benin after fighting campaigns (e.g., against Idah and Uzia); relatives of the Oba and others who offended him; individual placed by the Oba to guard the shrines; craft, trading and ritual specialist who came to seek their fortunes or were invited by the *Enigie*; slaves or servants sent down to farm for chief in Benin who were responsible to the Oba for administration of Ishan, etc. The *Enigie* often encouraged settlers by giving them title and other honours and privileges.[8]

Some historians have questioned the account that seem to suggest that the original founder of Esan migrated from Benin Kingdom from about the late 14th century AD, thereby classifying such an account as one of the stereotypes in history.[9] According to Oseghale,[10] "on the question of origin of the Esan people, there appears to be a consensus in the historical writings that the Esan and Benin people have a common ancestry. The narratives are to be found not only in oral histories[11] of both people but also in written texts[12] over several decades."

[1] Ibid.
[2] For further reading, see Iregbeyen. X., Iruekpen *History, People & Culture* (2012 Anointed Publishing Company Benin) page 2.
[3] The plural form of Onigie.
[4] Amongst such Enigie were the Onogie of Urohi and the Okaigū of Igueben.
[5] See Bradbury, R.E The *Benin Kingdom and the Edo-Speaking People of South-Western Nigeria.* (1957 International African Institute London) at 63.
[6] Okojie C.G., *Esan Native Laws and Customs with Ethnographic Studies of the Esan People* (1994 Ilupeju Press Ltd. Benin. P1.
[7] Bradbury, R.E The *Benin Kingdom and the Edo-Speaking People of South-Western Nigeria.* (1957 International African Institute London) at 64.
[8] Ibid.
[9] Oseghale. E.B., *Stereotypes in History.* An inaugural lecture series No 81 of Ambrose Alli University Ekpoma, Edo State 2019, 16-17.
[10] Ibid.
[11] See Oseghale. B.E., "Warfare and Diplomacy in Pre- Colonial Esanland (1463-1900)" Long Essay submitted to the Department of History, Bendel State University, Ekpoma, June 1987; Oseghale. B.E., "Esan -Benin Relations 1500-1800 AD; A study in inter-group relations", M.A. Dissertation submitted to the Department of History, University of Ibadan, Ibadan, September 1990. Oseghale. B.E., "On ideological development pre-colonial Esan; the role of Benin", A.I. Okoduwa (ed) Studies in Esan History and Culture: Evolution of Esan Polities. Vol.1 pp-23-36. Oseghale. B.E., *Issues in Ishan History and Relation, 1500-1800* (2003 Rasjel Publisher) p1, Oseghale. B.E., "The Benin Factor in Esan origin Traditions*" Journal of Teacher Education and Teaching,* Vol.7 Nos 1 and 2, 2004 pp.130-139.
[12] See for example, Egharevba. J.U. *A Short History of Benin*. (1968 University of Ibadan Press Ibadan). Omokhodion. O.J., The Sociology of Esan, (1998 Pearl Publication Chicago-Illinois)

Explaining further, he posted that:

> …the overriding submission are claims to the effect that Esan people and their socio-political institution derived directly from Benin through waves of migrations, which started from about the late 14th Century AD. The migration from Benin to an area which became Esan was said to have been triggered, in most cases by conflicting interest inside the monarchy in Benin Kingdom. Hence, the original Esan ancestors, comprised aggrieved Benin dissident as well as those that fled from socio-economic persecution.

Oseghale then articulate the bases of the Benin migration theory of Esan origin as formulated and developed around the following parameters by the proponent of the theory.

1. That the predominance of Benin origin claims contained in "received traditions" and transmitted through oral interviews and field work to researchers and historians;
2. The contiguity of Esan and Benin landmasses and the apparent absence of absolute borderlines;
3. The Esan and Benin language belonging to the same Kwa family group of languages and are mutually intelligible;
4. The political institutions in Esan and Benin, notwithstanding the absence of an all- encompassing central monarchical system in former, have visible similarities;
5. Social organization in both Esan and Benin including family and age-group stratifications having strong similarities; and
6. There are commonalities in cultural belief, marriages, birth, and death rites, among others.

Finally, Oseghale concluded by stating his own understanding of what this stereotype explanation of Esan origin translate into as follows:

a) That Esan people and their polities did not exist until about 500years ago when the said waves of migration from Benin occurred;
b) That the entire land mass, which eventually became Esan land (the entire 2,814 sq km), was a cul-de-sac meaning an empty place or space, devoid of human habitation, until it was peopled by migrants from Benin in the late 14th century;
c) That Esan political and socio-cultural institutions and practice are direct carry-over from Benin King.[1]

From Oseghale's understanding of what the stereotype means to the search of the historical origin of the Esan people, it means that that stereotype is totally misleading and a distortion of history. Thus, for Okojie, the name Esan "came to be applied to all the district now forming what the British had corrupted to ISHAN, during the reign of OBA EUARE the selfish. By then, many of the important districts in this territory were already in existence as important groups, e.g., URUWA (Irrua), URONMU (Uromi), EKUNMA (Ekpoma), UBIAZA (Ubiaja) etc, but they were known by their individual names and there were no common names. They knew they had a common stock and that was all" [2]

From the foregoing, the origin of Esan people can be traced to three categories of persons that later came together to eventually formed what is today known as the Esan tribe in Edo Central Senatorial District of Edo State. The first group were the aborigine people who were already leaving in places like Irrua and Ekpoma. The second groups were the immigrant that came from Benin kingdom and the final group were the warriors that accompanied the Oba Esigie of Benin to fight in the war between the Attah of Idah, in the Idah war of 1515-1516. One of the warriors' called Eben on his return to Benin later settled with his party at a place that later became known as Igueben. Thus, this explain the fact that in computing the history of all the kingdoms in Esan land, Igueben is the youngest.[3]

In the fifties, Esan was administered through eleven Native Authorities. They are as follows.

1. Uromi (*Urhomu*)[4] – Uzea (*Uzeea)* Native Authority.
2. Unbegun (Ugbegü) Native Authority.
3. Southwest Federation:
    a) Amahor (*Amaho*) Clan};

[1] Oseghale. E.B., *Stereotypes in History.* An inaugural lecture series No 81 of Ambrose Alli University Ekpoma, Edo State 2019, 17.
[2] Okojie C.G., *Esan Native Laws and Customs with Ethnographic Studies of the Esan People* (1994 Ilupeju Press Ltd. Benin). P1.
[3] For further reading concerning the origin and history of all the thirty -five (35) kingdoms in Esan land. See Okojie C.G., *Esan Native Laws and Customs with Ethnographic Studies of the Esan People* (1994 Ilupeju Press Ltd. Benin. Pp 236-586.
[4] The phonetic spellings in parentheses are taken from the speech of Dr Okojie, a native of Irrua and Ugboha. Also, for the corresponding numbers of villages under each Kingdom see [4] Bradbury, R.E The *Benin Kingdom and the Edo-Speaking People of South-Western Nigeria.* (1957 International African Institute London) at 64. For the table containing the names and villages that made up each Kingdom. The column is based on the names of the villages given in Administrative Report and does not include temporary or recent "camps" distinguishable by the prefixes *eko* or *ago*, which may be or may not have the social organization and social status of villages. The numbers of villages do not coincide with those given in the 1952 Census report where the term village is apparently not used in the same sense or consistently. In any case it is probable that the same criteria for distinguishing villages from wards on the one hand and village group on the other have not been used in all our sources. For further reading see Bradbury, R.E. *The Benin Kingdom and the Edo-Speaking People of South-Western Nigeria.* (1957 International African Institute London) at 64.

b) Ebelle (*Ebene*) Clan};
c) Ogwa (*Orwa*) Clan} with its Headquarters at Ebelle;
d) Ugun (*Ugü*) Clan};
e) Ujiogba (*Ujogba*) Clan}.

4. Southeast Federation:
   a) Emu (*Emunu)* Clan};
   b) Ohordua (*Ohodua*) Clan};
   c) Okhuesan (Oxuesâ) Clan} with its Headquarters at Emu;
   d) Orowa (Orowa) Clan}.
5. Northeast Federation:
   a) Ubiaja (Ubiaza) Clan};
   b) Illushi (*Ozigono*) Clan};
   c) Udo (Udo) Clan} with its Headquarters at Ubiaja;
   d) Ugboha (*Owoha*) Clan};
   e) Oria (*Oria*) - Onogholo (*Onogholo*)}.
6. Ivie -Uda – Esaba Federation:
   a) Ekpoma (*Ek'ma*) Clan};
   b) Egoro (*Egholo)* Clan};
   c) Opoji (*Ukpozí*) Clan} with its Headquarters at Ekpoma;
   d) Ukhun (*Uxü*) – Idoa (*Idoa*) Clan};
   e) Urhohi (*Uroí*) Clan};
7. Ewohimi Federation:
   a) Ewohimi (Evoíxíví or Oríxíví)};
   b) Ewatto (Evoato)} with its Headquarters at Ewohimi;
   c) Ewossa (Evoosa)}.
8. Ekpon (Ekpo) Native Authority.
9. Ewu (*Éilu)* Native Authority.[1]
10. Igueben (Iguebé) Native Authority.
11. Irrua (*Urua*) Native Authority.

From the eleven Native Authorities of the fifties emerged single Divisional Council at the centre. The then Military Government of Bendel State set up Ishan Divisional Development Council under the chairmanship of late Dr Christopher Gbelokoto Okojie OFR, with thirty-four Development Committees. (One for each town) in 1975. However, there were agitation that Esan should be divided into two local government area because of its size; and for adequate economic development. Eventually, two local government councils were established. They were Agbazilo and Okpebho local Government Councils. Agbazilo Local Government Area, which had it headquarter at Ubiaja, consisted of the following towns/clans. Uromi, Ewohimi, Ubiaja, Ugboha, Emu, Ohordua, Ewatto, Ewossa, Illushi, Okhuesan, Ifeku, Uroh, Oria, Onogholo, Orowa, Iyenlen, Uzea, and Udo. On the other hand, Okpebho Local Government Area, which had it headquarters at Ekpoma, was made-up of the following towns/clans as well. Ekpoma, Irrua, Igueben, Ewu, Ebelle, Opoji, Egoro, Ogwa, Amahor, Urhohi, Ujiogba, Ekpon, Ugun, Ugbegun, Ukhun, Idoa, and Okalo.

Furthermore, on the 27th of August 1991, Esan was further spit into four Local Government Areas. These are Esan West with its headquarters at Ekpoma, Esan Central with it headquarter at Irrua, Esan North-East with its headquarters at Uromi, Esan South East with its headquarters at Ubiaja. A fifth local government Area known as Igueben Local Government Area, with its headquarters at Igueben was further created in 1996 by the administration of late General Sani Abacha.

On the political and administrative structure, a total of 35 (thirty-five) autonomous kingdoms[2] consisting of large villages / township ruled traditionally by monarchs known as *Enijies*[3] constitute Esan land.[4] Esan people presently occupy an area of land approximately about 298.52 sq. Km and is bounded on the north by Owan East, Etsako West and Etsako Central; Owan West in the Northeast, Orhionmwon in the South and river Niger by East. The Northern half is a plateau with the highest point of some 450m above sea level.[5]

[1] Ujagbe village was formally under Ewu, during the British Colonial administration. However, under the present democratic dispensation, they are now grouped with the Agbede in the present day Etsako West Local Government Area of Edo State.
[2] The kingdoms are as follows: Amahor, Ebelle, Egoro, Ewohimi, Ekekhenlen, Ekpoma, Ekpon, Emu, Ewu, Ewatto, Ewossa, Idoa, Ifeku, Igueben, Ilushi, Inyelen, Irrua, Ogwa, Ohordua, Okalo, Okhuesan, Onogholo, Opji, Oria, Orowa, Uromi, Udo, Ugbengun, Ugboha, Ubiaja, Urhohi, Ugun, Ujiogba, Ukhun and Uzea.
[3] The plural form of the word "Onojie", which means a traditional ruler or King.
[4] For further reading, see "Esan people on Wikipedia, the free encyclopaedia" available at: http://en.wikipedia.org/wiki/Esan_people (last accessed on the 14 of August 202).
[5] Izibili M.A "The role of Traditional Rulers in Promoting Peace, Development and Ensuring Security in Esan Land." Being a text of lecture delivered at the instance of His Royal Highness, Ogirrua of Irrua and the Okaijesan of Esanland on his 50th coronation anniversary to the

2.0 Succession and inheritance rights

According to Black Law dictionary[1], succession is defined as "the devolution of title to property under the law of descent and distribution. The act or right of legal or official investment with a predecessor's office, dignity, possession, or functions; also, the legal or actual order of so succeeding from that which is or is to be vested or taken. The word when applied to realty, denotes persons who take by will or inheritance and excludes those who take by deed, grant, gift or any form of purchase contract." Inheritance on the other hand is equally defined by the same Black law dictionary as "that which is inherited or to be inherited. Property which descends to an heir on the intestate death of another. An estate or property which a person has by descent, as heir to another, or which he may transmit to another, as his heir." Right has also being defined as "a legally enforceable claim of one person against another, that the other shall do a given act, or shall not do a given act."[2] Thus, the law of Succession involves the transmission of the rights and obligation of the deceased persons in respect of his estate to his heirs and successors. The term succession has also been defined as the act or right of legally or officially taking over a predecessor's office, rank, or duties. It goes further to state that it is the acquisition of rights or property by inheritance under the laws of descent and distribution. In *Audu v. Shedrack*[3] the Court of Appeal define inheritance as follows: "inheritance means Property received from an ancestor under the law of intestacy…2 Property that a person receives by bequest or devise" On the other hand, Emiola emphasised that 'Succession' has "broader meaning of the acquisition of rights upon the death of another. The word encompasses what, in English law, are governed by three different rules of law, viz, the law of wills, the law of intestacy, and the law relating to accession to titles and dignities.[4]

Under Islamic law, the word succession has the same terminology in Arabic language. The Arabic word for succession is "*Al-Mirath*" especially with due regard to instance of intestate and partial testate succession under the Islamic law[5]. The term "*Mirath"* is not a novel term under the Islamic law. Indeed, as a noun, it appears among the beautiful name of Allah [SWT] in Qur'an 2:180 as Al-warith. An Arabic term which translates to mean "the successor" in English language. As a literal concept, this term lends itself to two significant meaning. One of such translation means "the transfer of something from one person to another". This is term that is relevant to the focus of this research. Thus, the things that are capable to be transferred under this context includes tangible or intangible asset, e.g., like money, houses, and choses in action or chattels either personal or real. Therefore, the term *Mirath* is simply used under the legal context of the Islamic law to refer to "Any property or right (legal or equitable) distributable to the legal heir(s) of a person upon the demise of a praepositus person"[6].

From the definitions examined above it become clearer why most times, issues that qualify as succession matters are most times interwoven with inheritance, thereby requiring a careful consideration and examination in other to be able to make the correct distinction. Some scholars and authors[7] classify matters concerning inheritance and succession as Human Rights issues. In Nigeria, this classification might not be out of place because of some discriminatory customary practises that are prevalent in some communities. Under Esan customary law, for example most customary practices concerning inheritance and succession appears to be highly discriminatory against women. The reasons for this sourly state of affairs are not farfetched. Succession and inheritance under Esan Customary law is primarily regulated and governance by the rule of primogeniture that ensures male domination at the detriment of the women. Gender sensitivity in matters concerning inheritance and succession is almost non-existence.

3.0 Inheritance as Human Right issue

Rights *simplicita*, is a claim which is supported by law.[8] It could also be power, privilege or immunity which is guaranteed a person by the law. As it concerns Human Rights, inheritance is seen as the right one has to benefit from the estate or interest of a deceased ancestor or relative, while inheritance which includes succession is the acquisition of the rights to property under the law of descent and distribution. In *Osondu & Anor v. A-G Enugu State & Ors*[9] the Court of Appeal defined the term "fundamental Right" and Human Rights in the following manner. "Fundamental Right - means any of the rights provided for in chapter IV of the Constitution and includes any of the rights stipulated in the Africa Charter on Human and People's Rights (Ratification and

throne of his fathers on 22nd June 2021. Page 6
[1] Black Law Dictionary with Pronunciations. 6th Edition, P 1431.
[2] Ibid at 1325.
[3] (2016) LPELR-40771(CA)
[4] Ibid,
[5] Yusuf, A. and Sheriff, E. E. Okoh *Succession under Islamic law* (2011) Malthouse Press Limited. Page 3.
[6] Ibid.
[7] Ogugua v. c. *Gender Dynamics of Inheritance Rights in Nigeria Need for Women Empowerment* (2009) Folmech Printing & Pub.Co. Ltd page 17.
[8] Ibid.
[9] (2017) LPELR-43096(CA).

Enforcement) Act. Human Rights – includes fundamental rights." Therefore, inheritance here encapsulates the receipt of property or interest from or an ancestor under the law of intestacy.[1] This further demonstrate that inheritance qualify as a Human Right. The Protocol to the Africa Charter on Human and Peoples' Rights (Pro-ACHPR) which was adopted in Mozambique in 2003 and came into force in 2005 provides on the right to inheritance thus: "A widow shall have the right to an equitable share in the inheritance of the property of her husband. A widow shall have the right to continue to live in the matrimonial house; in case of remarriage, she shall retain her right if the house belongs to her or she has inherited it. That women and men shall have rights to inherit in equitable shares their parents' properties.[2] Also relevant, are some provisions of the 1999 Constitution (as amended) dealing with fundamental rights. The provisions of section 42 (1) and (2) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) which specifically prohibit discrimination on the bases of gender or the circumstance of birth of any Nigerian is apt. In Mrs. *Lois Chituru Ukeje & Anor v. Mrs Gladys Ada Ukeje* [3] the Supreme Court had the opportunity to evaluate the provisions of Section 42 (1) and (2) of the 1999 Constitution *vis-a-vis* an Igbo native law and customs which deprive children born out of wedlock from sharing from the benefits of their deceased father's estate. The court per Rhodes - Vivour JSC held as follows: -

> …L.O. Ukeje deceased is subject to Igbo customary law. Agreeing with the High Court the Court of Appeal correctly found 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) and (2) of the 1979 Constitution (as amended). This finding was affirmed by the Court of Appeal…No matter the circumstances of the birth of a female child, such a child, is entitled to an inheritance from her late father's estate. 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, a fundamental rights provision guaranteed to every Nigerian. The said customary law is void as it conflicts with section 42(1) and (2) of the Constitution.

This judgment reaffirms that issues concerning inheritance are human rights issues that must be enforced in accordance with the provisions of the Constitution. The legal implication of this judgements of the Supreme Court concerning the rights of female children and widows to inheritance, particularly in relation to the estate of their late father and husband is revolutionary in nature. This judgment effectively ended the discriminatory practices against daughters and widows which were hitherto considered as the accepted interpretation of the native law and custom in most communities in Nigeria. Also, of important is that apart of the judgment dealing with the issue of disinheritance of female children under customary law. This case i.e., *Mrs. Lois Chituru Ukeje & Anor v. Mrs Gladys Ada Ukeje* [4] also dealt with the status of children born out of lawful wedlock under Igbo native law and custom *vis-à-vis* their right of inheritance in the estate of their deceased father. The Court per Ogunbiyi JSC held that:

> The trial court, I hold did rightly declare as unconstitutional, the law that dis-inherit children from their deceased father's estate. It follows therefore that the Igbo native law and custom which deprives children born out of wedlock from sharing the benefit of their father's estate is conflicting with section 42(2) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). The reproduction of that section states thus: 42(2) No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth.

Thus, this case also established the principle that the mere fact that a child is born out of lawful wedlock should not be a bases for disentitlement for inheritance. This decision being the decision of the apex court, bind all court within the Nigeria Legal system. The position of the law is that any custom that tend to discriminate against female children by depriving them of their rights of inheritance in the estate of their deceased father shall be declared null void and of no effect.

4.0 Succession under Customary Law

The legal framework for succession in Nigeria is divided into two broad classifications. Testate and Intestate succession. Testate succession essentially deals with Wills, while intestate succession on the other hand deals with the distribution of a deceased estate through the instrumentality of customary law. In *Zaidan v. Mohssen*[5] the Supreme Court define the meaning of customary law as follows:

[1] Ogugua v. c. *Gender Dynamics of Inheritance Rights in Nigeria Need for Women Empowerment* (2009) Folmech Printing & Pub.Co. Ltd page 17.
[2] See Article 21 (1)
[3] (2014) LPELR-22724 (SC)
[4] (2014) LPELR-22724 (SC)
[5] (1973) LPELR-3542 (SC)

> We are of the view that, in this context, customary law is any system of law not being the common law and not being a law enacted by any competent legislature in Nigeria, but which is enforceable and binding within Nigeria as between the parties subject to its sway. We are also of the view that anyone subject to any such law is excluded from the operation of section 49 of the Administration of Estate Law (Cap 1) of Western Nigeria 1959 applicable in the Mid-Western State of Nigeria.

Also, in *Ejike & Anor v. Onuzulike & Ors*[1] Isaiah Olufemi Akeju JAC at Pages 30-31 Para E-C of the record held as follows when defining the meaning of Customary law thus:

> In NWAIGWE V. OKERE (2008) ALL FWLR (PT. 431) 843 at 870. TOBI J.S.C defined Customary Law as follows: - 'And what is Customary Law? Customary Law generally means relating to custom or usage of a given community. Customary Law emerges from the tradition, 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 customs rules, traditions, ethos and cultures which concern the relationship of members of a community are generally regarded as Customary Law of the people' it follows from the foregoing that for custom, usage, convention or tradition to be binding and enforceable among the people of a particular community it must have either been accepted, adopted or acquiesced to over a long period of time.

Furthermore, according to the learned author Salacuse, Customary law can be defined as "a mirror of acceptable usage, a reflection of the social attitude and habits of various ethnic group and it derives its validity from the consent of the community which it governs, applicable only to the people indigenous to the locality where such customary law holds sway." [2] Also, the court has held that custom must be flexible and changes with time. Therefore, any applicable customary law at any particular time must be an existing customary law and not merely a custom of ancient time[3] Basically, succession under customary law is intestate succession. It is applicable to the estate of a person who is subject to customary law, contracted a statutory or Christian marriage and dies without being survived by a spouse or a child of that marriage[4] and persons who *ad initio* contracted customary marriages.

4.1.0 Succession under Esan Customary Law

The position under Esan customary law concerning succession and inheritance is straightforward. Matters of inheritance and succession are determined by the application of the rule of primogeniture. Under this rule, the eldest surviving son of the deceased inherit the property of his late father exclusively. He alone makes the determination as to what property he intends to share with his other brothers. Okojie aptly described the position of the customary law thus:

> Basically, the first son inherited the father's property and sheared to any of his junior brothers and sisters at his pleasure. It is true that some brothers particularly the second and the third could challenge his unfairness in taking everything to himself and reported the matter to the *Egbele*.[5] In this, the *Egbele* could only advice, they could not force the first son to part with what has come to him by right. [6]

In *Ogiefo v. Isesele1 & Ors*.[7] The Court of Appeal define primogeniture as per Saulawa J.C.A. as follows:

> …the term primogeniture denotes the state of being the firstborn child among siblings. Jurisprudentially, the term primogeniture connotes - 'The common-law right of the first-born son to inherit his ancestor's estate. Usu. to the exclusion of younger siblings. Also termed (in sense 2) primogeniture ship'…however, according to Radhadinod Pal primogeniture embraces all the cases of single inheritance and may indeed be define

[1] (2013) LPELR-21220 (CA).
[2] W. J. Salacuse in *"A Selection Survey of Nigeria Family Law* (1965 Ahmadu Bello University Book shop Zaria) at 2 & 8.
[3] See Bairaiamia CJ in *Owonyin v Omotosho* (1961) ALL NLR 304 at 309
[4] See the case of *Salubi v. Mrs Benedicta Nwariakwu & Ors* [1997] 5 NWLR (Pt. 505) 442. Here the court held that where a person who is subject to native law and custom marries under the Marriage Act, and he dies interstate, the applicable law for the distribution of his estate is the Marriage Act. It should be noted that Sec. 36 of the Old Marriage Act deal with the issue of distribution of the estate of any person who is married under the Marriage Act upon intestacy. However, this provision has been removed from the current Marriage Act Cap M7 law of the Federation of Nigeria 2014. Issues of intestacy are now death with by the provisions of the Administration of Estate Laws of the various states. In Edo State, the relevant law is the Administration of Estate Law Cap 2 Law of Bendel State of Nigeria 1976 applicable to Edo State.
[5] Elderly male members of his extended family.
[6] Okojie. C.G., *Esan Native and Custom with Ethnographic Studies of the Esan People*, (1st ed, Reprinted 1994 Ilupeju Press Ltd) at 119.
[7] (2014) LPELR-22333 (CA)

> as prerogative enjoyed by an eldest son or occasionally an eldest daughter, through law or custom to succeed their ancestor's inheritance in preference to younger children.

However, before the eldest surviving son of the deceased is entitled to inherit his late father's estate, he must comply with the customary rules that govern succession under Esan customary law. Apart from the rule of primogeniture, inheritance and succession is patrilineal among the Esan people. Patrilineal inheritance is a system whereby property is inherited from one's father or another paternal ancestor[1]. This system is also known as patrimony.[2] This system is a very common feature of most communities in Nigeria. The philosophy behind the practice of this system of inheritance is to ensure that property remains within the family from generation to generation. Apart from the above stated reason, this system of inheritance seeks to ensure that family identity and traditions are maintained[3]. Chieftaincy titles, which are hereditary under customary law can only be inherited through patrilineal mode of inheritance. However, in many instances of patrilineal inheritance, male children inherit to the exclusion of the female children.[4] However, there are limited situation where female children are part of patrilineal inheritance. In such instances, a distinction is usually drawn between family property and personal property of the deceased.[5]

4.2.0 Laws governing Inheritance and Succession Rights under Esan Customary law

For many centuries, the laws the regulate and governed issues affecting succession and inheritance in almost all the 35 kingdoms[6] in Esan land have crystalized into seven recognisable laws. These laws, regulate customary succession and inheritance rights under Esan customary law. Amongst these seven laws, two are directly imparting succession to the throne as a traditional ruler called the *Onojie*, (king) in Esan language. while the remaining five laws, i.e., (1), (2), (3), (4) and (6) have dual application under Esan customary law. In other words, these laws regulate inheritance matters that effect both the crown and the ordinary citizens of the community. Unfortunately, these rules are not of universal application throughout all the kingdoms in Esan land. Two kingdoms, and a cosmopolitan clan does not observe these rules particularly as it concerns succession to the throne. These kingdoms are the kingdom of Idoa, Ukhun, and the cosmopolitan clan of Illushi.[7] Although the rule of primogeniture was introduced into Esan land as a result of the introduction and adoption of the Benin Court Tradition in 1463 AD during the reign of Oba Ewuare over the years, the Esan communities have modified the rules in its application and scope, when compared to what is presently obtainable among the Binis.[8] Some Esan historian had opined that these variations are not unconnected with the traditions of the aborigine that had already settled before the conferment of the Benin traditional court practices in Esan land. These two ethnic groups, the Binis and Esan, are among the key ethnic groups in present-day Edo State in Nigeria. Historically, one of the accounts of origin of the Esan people is that the initial settlers / founders of Esan land were said to have migrated from Benin Kingdom.[9] This explains the similarity in the customs and traditions between these two groups. Esan land consists of 35 (Thirty-five) kingdoms with their autonomous traditional rulers known as the *Onojie*[10]. Within these, 35 autonomous communities, it is not difficult to find areas of notable variations in the application of certain aspect of the customary law rules regulating succession and inheritance rights. Despite these differences, these seven basic laws governing the selection, succession, and installation of the traditional ruler, the *Onojie* [11] are of general applicable throughout Esan land. The rule of primogeniture is strictly adhered to in almost all these kingdoms except for the kingdom of Idoa, Ukhun and the cosmopolitan clan of Illushi where the succession to the throne is based on the principles of rotation among the various ruling houses. Apart from the rule of primogeniture, there are other rules that must be observed in conjunction with this rule of primogeniture. These rules are as follows: (1) the title of *Onojie* (traditional ruler) is hereditary, which passes from father to son. The same position applies to succession to a hereditary chieftaincy title. (2) The first

[1] Ogobobine. R.A.I., *Materials and Cases on Benin Land Law* at 190
[2] Oxford Dictionary of English (ODE) Second Edition revised (2005 Oxford University Press). iPhone version.
[3] Ogobobine. R.A.I., *Materials and Cases on Benin Land Law* at 179.
[4] Azinge. E., *Restatement of Customary Law in Nigeria* (1st ed, 2013, Nigerian Institute of Advance Legal Studies Lagos at 110
[5] Ibid at 111.
[6] The kingdoms are as follows: Amahor, Ebelle, Egoro, Ewohimi, Ekekhenlen, Ekpoma, Ekpon, Emu, Ewu, Ewatto, Ewossa, Idoa, Ifeku, Igueben, Ilushi, Inyelen, Irrua, Ogwa, Ohordua, Okalo, Okhuesan, Onogholo, Opji, Oria, Orowa, Uromi, Udo, Ugbengun, Ugboha, Ubiaja, Urhohi, Ugun, Ujiogba, Ukhun and Uzea.
[7] For further reading why these laws are not applicable to these kingdoms, see Itua. P.O., "Succession Under Customary Law in Nigeria. The Rule of Primogeniture versus the Deposition of a Traditional Ruler (Onojie) in Edo State: A critique of the Provisions of the Traditional Rulers and Chiefs Edicts No 16 of 1979." *International Journal of Culture and History.* Vol. 6 No 2 September 2019. Available online at www.ijch@macrothink.org (last accessed 12th August 2021).
[8] For further reading, see Itua. P.O., "Succession under Esan customary law in Nigeria: Grounds for Disinheriting an Heir from inheriting from his Deceased father's Estate under Esan Customary Law" *International Journal of Innovative Research and Development* Vol.7 August 2018 Page 428. Available online at www.ijird.com (last accessed 12th August 2021).
[9] Oseghale. E.B., *Stereotypes in History.* An inaugural lecture series No 81 of Ambrose Alli University Ekpoma, Edo State 2019, 16-17.
[10] See footnote 56 above
[11] Okojie. C.G., *Esan Native and Custom with Ethnographic Studies of the Esan People*, (1st ed, Reprinted 1994 Ilupeju Press Ltd) at 67

surviving legitimate[1] son success his father estate as of right. This rule is of general application to every family in Esan land. (3) There can be no lawful succession until after the burial ceremonies of the late traditional ruler (*Onojie)* have been completed, in accordance with native law and custom. Also, concerning the ordinary citizen, the eldest surviving son cannot inherit his deceased father's estate until the performance of the final burial ceremonies as stipulate by custom. (4) He who performs these burial ceremonies inherits the family property, which is not shared and succeeds to the title and throne absolutely. Also, with respect to ordinary citizens of the communities, it is the person who performed the burial ceremonies that inherit the deceased estate amongst his children. Okojie, emphasise that these burial ceremonies have the greatest significant under Esan customary law of inheritance, and hence this fourth law is of overriding importance both to the throne and ordinary family. (5) Once an *Onojie,* always an *Onojie.* In other words, once someone has been duly installed as a traditional ruler, (*Onojie)* in accordance with native law and custom, nothing, except death that can remove him from the throne. In relation to this rule, deposition of any Esan Onojie from the throne will amount to an exercise in futility.[2] (6) The title Onojie, being that of a Constitutional Monarch, which is held in trust for the community cannot be willed or voluntarily relinquished in favour of any son, brother, uncle, or a trusted friend. The same law is equally applicable to any testator who intends to make a will. This rule prohibits and foreclose a testator from making a will and disinherit his eldest son of his *Ijiogbe* which he is entitled to under customary law[3]. (7) The official burial place of an *Onojie* is at a special spot or location in *Eguare*.[4]

These rules ensure that a uniform system of succession is maintained throughout Esan land except in kingdoms where they are not applicable. The importance of these laws towards ensuring the stability of traditional institution and private lives in Esan people for centuries cannot be over emphasised. By way of adumbration, the first rule ensures that a son succeeds to the property of his later father, and a single line of succession is maintained. The advantage of this system is that it eliminates all strife and competition for the throne because it is known that the eldest son of the incumbent ruler is alive, or there is an identified next of kin in the line of succession to the throne. The only exception is when the traditional ruler (*Onojie)* dies without an heir. In such a situation, the right to succession passes to the late king's surviving most senior brother. If no brother, the right passes to his eldest uncle.[5] On the other hand, concerning private individual the same law is also applicable. However, the situation would be different if the dead man does not have a male child to succeed him. In such a situation his younger brother will inherit his properties irrespective of the fact that he is survived by daughters. The application of this rule concerning the estate of a man who dies without an heir but survived by daughters who are discriminated against because they are female is an aspect of the Esan custom that confront the fundamental rights provisions of the 1999 Constitution (as amended). This is an outright case of discrimination based on gender, which must not be allowed to continue.

The second rule satisfy the customary law dealing with the rule of primogeniture that provides that every first son inherits his late father's worldly possession. This law is of uniform application across Esan land. With reference to the *Onojie's* stool, if an *Onojie* has several sons and the eldest of them dies, i.e., he pre-deceased his father who is the traditional ruler, and leaving behind male children of his own who could have succeeded him with respect to the throne if he had lived to become the king. Despite his death, nothing precludes his children from inheriting his personal estate. However, his eldest child cannot lay any customary claim to the throne after the death of the current Onojie who his grandfather, although his late father was the late Onojie's first son. The reason being that by the operation of native law and custom, since the first son predeceased his father, the right to succession automatically falls on the late king second son who now become the eldest surviving son of the late Onojie or king at the time of his death. The children of the deceased former first son under customary law have no legal claim whatsoever to the title if their uncle is alive. In other to illustrate the application of this rule, two examples readily come to mind. According to Esan historian sometime around 1905 Ozigue of Okhuesan died, and within nine days of his death, his son Isi, the heir apparent to the throne also died. The traditional right of succession to the throne automatically shifted to the late king second son called Ataimen who then performed the burial ceremonies of their late father Ozigue, and he was thereafter installed as the *Onojie* in accordance with the custom. However, on the 20th of September 1920 he too also died leaving a son called Ehidiamen who was a

[1] The word legitimate is used here to include children born in lawful wedlock both under customary law and statutory law. They also include children born outside lawful wedlock, but who paternity has been acknowledged by their father.

[2] See Itua. P.O., "Succession Under Customary Law in Nigeria. The Rule of Primogeniture versus the Deposition of a Traditional Ruler (Onojie) in Edo State: A critique of the Provisions of the Traditional Rulers and Chiefs Edicts No 16 of 1979." *International Journal of Culture and History.* Vol. 6 No 2 September 2019. Available online at www.ijch@macrothink.org (last accessed 12th August 2021).

[3] See Itua. P.O., "Succession under Benin Customary Law in Nigeria; Igiogbe Matters Arising" (2011) Vol. 3(7) *Journal of Law and Conflict Resolution* Page 119 Available online at: < http://www.academicjournals.org> (last accessed 19th August 2021). See also, the following cases. *Mr Victor Ayemwenre Eigbe & Anor v. Mr Benjamin Izibiu Eigbe & Ors* (2013) LPELR – 20292 (CA)*, Idehen v. Idehen* [1991] 6 N.W.L.R. (Pt.198) at 382; *Ogiamien v. Ogiamien* [1967] NMLR 247; *Lawal –Osula v. Lawal –Osula* [1993] 2N.W.L.R. (Pt.274) 158

[4] See Okojie. C.G, *Esan Native and Custom with Ethnographic Studies of the Esan People*, (1st ed, Reprinted 1994 Ilupeju Press Ltd) at 67-68.

[5] Ibid

minor. Isi's first son called Eigbokhan, who was of age had no right to the title, and so a regent called Oobo was appointed by the kingmaker. Oobo was the minor most senior uncle as a regent to act until Ehidiamen was old enough to be installed as the king. This example helps to illustrate and to point out the fact that even though Eigbokhan who was Isi eldest surviving son was alive, he was not appointed by the kingmaker because they were following the strict application of the rule of primogeniture. The regent administered the kingdom till 1933 when Ehidiamen was installed as the Onojie. Also, the second example is the case of Usiahon 1 of Okolo kingdom. This case is very apt and instructive on the strict application of this rule under consideration. Usiahon succeeded his father Ehirenmen who had reigned from 1892-1956. He performed the burial ceremonies and of his late father in 1957, and he was installed as the king or Onojie in 1957. Unfortunately, he died in 1973 leaving a son called Jonathan Izebhokhae to succeed him. Unfortunately, Jonathan Izebhokhae was a very sick man. He succeeded his father but hoping to fully validate his position by completing all the processes of the final burial ceremonies. Sadly, on the 27th of January 1974 he died without completing the final burial rites of his late father. The Odionwele and Ibhijie of Okalo (the Kingmakers) called on the next surviving son of Usiahon 1, Prince Andrew Ilenbarenemen to perform the burial ceremonies of their late father Usiahon, which he did, and he was installed as the Onojie (traditional ruler) of Okalo on the 9th of February 1974. Thus, according to Esan native law and customs it was immaterial whether later Jonathan Izebhokhae had sons who could have succeeded him or not.[1]

It is important to emphasise that for a male child to benefit under the operation of the rule of primogeniture, such a son must be a legitimate child of the deceased king. Children from a lover or lovers, known as (*Omon Osho)* in *Esan* language or from an *Arebhoa*[2] do not qualify and they are excluded from consideration. Therefore, children that falls under this classification do not have any "customary rights" to lay claim to the title or throne under Esan customary law.[3] The application of this rule restricting succession to the throne by foreclosing children from "*Omon Osho"* who happens to be the late *Onojie's* first surviving son is discriminatory in nature, and such practice offend the fundamental rights provisions of the 1999 Constitution (as amended) when juxtapose against the provisions of section 42 (2) of the Constitution.[4] The reason being that such a child, even though his father might have accepted his paternity, he is still being discriminated against by the custom because of the circumstance of his birth and he is thus considered as not being a "fit and proper" person customarily to succeed to the throne because his mother was never married properly as customs demands. In line with the current judicial attitude towards cases of this nature that clearly violate the human rights of the persons concern, this rule of Esan customary law would be declare void and repugnant to natural justice equity and good conscience. However, the situation could be interpreted differently if the late *Onojie* does not have any other male child to succeed him. Rather than allowing the title to shift to the late *Onojie's* younger brother, the kingmaker would rather prefer the child of an "*Omon Osho"* whom paternity has being acknowledged by the late king than seeing the crown being transfer to the late king younger brother. However, the same cannot be said for a child given birth to by an *Arebhoa* for obvious reasons. Encouraging such a child, will amount to disruption in the line of succession.[5]

The third law ensures that the proper customary burial ceremonies are observed and performed. There is an idiomatic expression in Esan language that goes thus: "*Ei se bhe Eguale abha mien ojie*" meaning the throne is never vacant. Immediately after the death of an incumbent *Onojie,* the kingmakers will immediately install the heir and he must as a matter of urgency commence the burial ceremonies at once. The implication of failure to perform the burial ceremonies or not completing it after stating one is the loss of the throne by the linage of the heir. In such a situation, the next senior brother will be called upon to ascend the throne not withstanding that the deceased heir has children who could have been installed as the next *Onojie* to succeed him. This also epitomise the common saying amongst the Esan people that no man is legally an *Onojie* until he has performed the burial ceremonies of his late father. A good illustrate of the application of this law occurred at Ebelle kingdom[6]. This case concerns the quest of Emovuon of Ebelle (1907-1910) to succeed to the throne of his late father. The custom at Ebelle is to the effect that once the Onojie is dead, his is interred immediately. Then the Royal Family

[1]Okojie. C.G., *Esan Native and Custom with Ethnographic Studies of the Esan People*, (1st ed, Reprinted 1994 Ilupeju Press Ltd) at 67-68.
[2] An Arebhoa was usually a man's first daughter (his *Ehale*). She is encouraged not to be married to any man. When she attained puberty, she lives in her father's house where she is permitted to have sexual relationship with any man of her choice. All the children from this association are deemed to be the children of her father. The only reward for the husband is uninhibited companionship at the girl's father compound. Also, the man is not expected to pay any bride price on the girl. This practice is encouraged where a man does not have male children that will inherit his estate when he is dead. This procedure provides an alternative means of having male children.
[3] Okojie. C.G., *Esan Native and Custom with Ethnographic Studies of the Esan People*, (1st ed, Reprinted 1994 Ilupeju Press Ltd) at 69.
[4] See Cap C23 Laws of the Federation of Nigeria, 2004.
[5] For further reading on the application of this law see Itua. P.O., "Succession Under Customary Law in Nigeria. The Rule of Primogeniture versus the Deposition of a Traditional Ruler (Onojie) in Edo State: A critique of the Provisions of the Traditional Rulers and Chiefs Edicts No 16 of 1979." *International Journal of Culture and History.* Vol. 6 No 2 September 2019. Available online at www.ijch@macrothink.org (last accessed 12th March 2020).
[6] Ebelle, is one of the major Esan Kingdom in Edo State, Nigeria. It is a populated place located in Iguenben Local Government Area of Edo State. For further information see Wikipedia at https:// en.m.wikipedia.org (last accessed 12th March 2020

of Ebelle install his heir at once, and he too is expected to commence the burial ceremonies immediately with the commencement of the *Ihavie* ceremony which is considered as the most important aspect of the burial ceremonies. The custom dictates that the *Ihavie* ceremony should never be postponed for any reason whatsoever. Emovuon commenced the Ihavie ceremony and stopped midway without completing the ceremony with the "*Ema Edion*".[1] Unfortunately, Emovuon died without completing even the first part of the burial ceremonies. The kingmakers called on prince Igbinijie, late Emovuon's younger brother to perform the final burial ceremonies which he did, and he was then installed the *Onojie*. He reigned from 1910-1971. The reason for the immediate installation of the heir after the death of an Onojie is to prevent what is term in Esan language as "*O re Okpu or Uwedia fi Ukhuo don.*" [2] The installation of the heir as the *Onojie* designate is to prevent the throne from being empty. In reality, the heir does not exercise any form of authority, until the burial ceremonies are completed. Thus, during the interval between installation and the completion of the burial ceremonies, the kingdom is being administered by the "*Oniha*" who the traditional Prime Minister.[3]

The fourth rule appears to be the most important having its uniform application to the crown and the ordinary citizens. This rule stipulates thus: "*Onon luogbe ole nab he ogbe"* meaning (he who performs the burial ceremonies owns the house and all therein) this customary law is based on the necessity to bury the dead *Onojie* and bring him in harmony with, and association with the spirits of the departed *Enijie*[4]. It is believed among the Esan people that the spirit of the newly departed *Onojie* merely hangs about in the next world with no abode or respect until he has been buried according to native law and custom.[5] Since succession right to the throne is conferred on the person who performs these burial rites, this in tune places a grave responsibility on shoulders of the kingmakers by not allowing or accepting any person other than the first surviving legitimate son of the departed *Onojie* to perform the burial ceremonies. Furthermore, this rule of customary law is also applicable to ordinary citizen within the community. It is the deceased first surviving son that performs the final burial rites of his late father before he is entitled to inherit his estate. However, where the son is a minor, it is permissible for an older uncle to perform these burial ceremonies on behalf of his nephew, the uncle then inherits the property which he holds in trust until the boy attain majority. but, where the heir to the throne as in the case of an *Onojie*, is a minor, the rules are completely different from the position enumerated above concerning the ordinary citizens. Where an heir is a minor the kingmakers will appoint an *Akheoa* (Regent) to administer the affairs of the kingdom until the minor comes of age and performs the burial rites afterwards, he is then installed as the *Onojie*. Under Esan native law and customs, the Regent must be the minor oldest uncle. He is not allowed under any circumstance to perform the burial ceremonies; and in any case, he cannot perform them on his dead brother because customarily he is forbidden from doing so. This is one of the safeguards introduced by the founding fathers of Esan land to ensure that the rule of primogeniture as it affects the throne is preserved.

Furthermore, it important to discuss what happens if the first surviving son who is legally and customarily entitled to ascend the throne is either incapacitated by mental illness or he is an imbecile. What of a situation where it become impossible to trace the where about of the first son or the heir apparent to the throne? What happens in these circumstances? This kind of scenarios were very common in the olden days. But today with the advancement in technology this kind of situation can rarely happen. However, whenever such a situation does arise, the system has an inbuilt mechanism for resolving these kinds of conflicts. The position under Esan native law and custom is to the effect if any heir is known to be suffering from or affected by any of the condition(s) mentioned above, which will ultimately make it impossible for him to participate and fully understand the essence and the nature of the burial ceremonies; and since the burial ceremonies cannot be shelved, then the kingmakers will have no option than to call on the second son of the deceased king (*Onojie*) to perform the burial ceremonies. Once the second son performs the ceremonies successfully, he will be installed as the *Onojie* (king) in accordance with the fourth rule that provides that he who performs the final burial ceremonies is entitled to inherit the deceased *Onojie's* property and the throne. But, Okojie has warned that before this alternative procedure is adopted particularly in relation to not being able to identify and locate the where about of an heir, due diligence must be the watch word in other not to repeat the mistake of the past, which occurred sometime ago at Ewu kingdom.[6]

The fifth law strongly support and entrench the existence of the *Onojiship*. The rule ensures that once a person has been installed as the *Onojie* after the performance of the second burial ceremonies, he cannot be removed as an *Onojie.* Only death can effectively remove an *Onojie* from the throne under Esan native law and custom.[7] In the event that the *Onojie* become sick and unable to discharge the function of his office, an *Akheo*a

[1] Translated to mean the elders feasting.
[2] Translated to mean missing the throne.
[3] G. Okojie. *Esan Native and Custom with Ethnographic Studies of the Esan People*, (1st ed, Reprinted 1994 Ilupeju Press Ltd) at 69.
[4] The plural form of *Onojie*.
[5] C.G. Okojie. *Esan Native and Custom with Ethnographic Studies of the Esan People*, (1st ed, Reprinted 1994 Ilupeju Press Ltd) at 70
[6] Ibid at p.71.
[7] See Itua. P.O., "Succession Under Customary Law in Nigeria. The Rule of Primogeniture versus the Deposition of a Traditional Ruler (Onojie) in Edo State: A critique of the Provisions of the Traditional Rulers and Chiefs Edicts No 16 of 1979." *International Journal of*

(Regent) will be appointed to perform his duties on his behalf. In most cases, the *Onojie* first son is usually appointed or the *Onojie's* immediate brother. However, Okojie[1] argued that the notion or opinion, which, states that an *Akheoa* can become a substantive *Onojie*, is not correct and not part of Esan customary law. This view is something new among the Esan people, which cannot be supported by any traditional or historical records. Its origin cannot be ascertained, and it is an aberration to Esan Native Law and Customs. It does not represent the correct position of Esan customary law of succession to the throne. The correct position of the law is that an *Akheoa* can never be a substantive *Onojie*[2].

The sixth rule ensure that the succession to the throne follows the age long tradition as provided by Native Law and Customs. Thus, an *Onojie* cannot by a testamentary instrument executed by him bequeath the throne to any other person apart from his first son, who is the customary heir to the throne. Where any of such testamentary bequeath is made, that disposition will be declared void *ab initio*. The reason being that the title (the throne) is not his personal property. It belongs to all the communities constituting the kingdom and he (the king) does not possess the powers to single headedly alter the age long customary law in favour of anyone else apart from the first son who is customarily recognised as the heir to the throne. Although a situation could arise where an heir would refuse ascending to the throne for reasons best known to him. Whenever such a situation does arise, it will be easily resolved because the system had already envisaged the occurrence of such a situation and a solution already provided by the customary law. The implication of such an act of rejecting the throne is an automatic forfeiture of the customary right to the throne and the attendant right to inherit any property of his late father the *Onojie*. Under Esan customary law, the option of who then become the *Onojie* is left for the kingmakers to decide. Also, another senecio could arise where the heir to the throne performs the burial ceremonies of his late father in in accordance with the customary law but refuses to ascend to the throne for reasons best known to him. The position of Esan native law and customs is that whenever such a situation arises, succession to the throne will be shifted to a named person, to be chosen by the kingmakers of that kingdom. The person so chosen by the kingmakers will only occupy the throne legitimately during his lifetime only to serve the period the legitimate heir who refused to occupy the throne. Whenever the "selected" *Onojie* dies, the line of succession to the throne does not continue with his children or his lineage. But because of the operation of the rule of primogeniture and the need to preserve a single linage of succession to the throne in that kingdom, any legitimate claim he might have is automatically extinguish by his death. Succession to the throne automatically reverts to the linage of the heir who performed the final burial rites of his deceased father (the *Onojie*) but refused to ascend to the throne. Thus, by performing the burial ceremonies, the heir has established an irrevocable claim to the throne not only for himself, but also for his own offspring. Therefore, after the death of the prince that renounced the throne and the person so chosen/ selected to replace him by the kingmakers, his own children and not the children of the 'selected' *Onojie* that possess the customary mandate to ascend and be enthrone as the Onojie, thereby enjoying uninterrupted and legitimate right to succeed to the throne.[3]

Finally, the seventh law deal with the final resting place of an *Onojie*. The rule provides that no matter the place and location where an *Onojie* dies, he must be brought to Eguare (the place) and be interred at the official place. This spot is reserved for the interment of the *Onojie.* Under Esan customary law no other person or persons no matter how popular or highly placed he might be in the kingdom; he cannot be buried on these sacred grounds exclusively reserved for the burial of the departed *Enijies.*

4.3.0 Order of inheritance under Esan customary law

Under Esan native law and custom, the children of the deceased are the ultimate beneficiaries to his estate. Reaffirming this customary law position, Okojie stated thus: "let it be understood at the onset that it was a basic Esan law and custom that when a man died his property and all he possessed were inherited by his children in the first instance."[4] His properties are shared in according with the rules already discussed. If the man died without any child or children, then the right to inherit goes to his maternal brothers. If he does not have any maternal brother or brothers, then his paternal brother will be considered for inheritance. But, if the deceased does not have any paternal brother, the right to inheritance passes to the *Ominjogbe* of the *Uelen*.[5]

4.3.1 Property

When Esan man who has properties to be inherited is dead and he is survived by children, ordinarily, the children are entitled to inherit his estate. Under Esan customary law where the rule of primogeniture is fully in operational, the first son of the deceased inherits his father's properties and share to any of his junior brothers

Culture and History. Vol. 6 No 2 September 2019. Available online at www.ijch@macrothink.org (last accessed 12th March 2020).

[1] C.G. Okojie. *Esan Native and Custom with Ethnographic Studies of the Esan People*, (1st ed, Reprinted 1994 Ilupeju Press Ltd) at 71

[2] Ibid at 72.

[3] Id. at 75.

[4] C.G. Okojie. *Esan Native and Custom with Ethnographic Studies of the Esan People*, (1st ed, Reprinted 1994 Ilupeju Press Ltd) at 119.

[5] Means the first born (son) among the first born (sons) of members of the same family who traces their origin to the same person on the family genealogical tree under Esan native law and customs. Sometimes, an Ominijiogbe of the Uelen could be the deceased's uncle or a cousin.

and sisters at his pleasure[1]. Technically, he cannot be compelled to share if he desires not to. It is not uncommon to see the younger brothers or other children challenging the rationale for the eldest son to inherit all their deceased father's property. Instances abound when the matter have been reported to the elders or the *Egbele.* Customarily, the Egbele cannot compel the eldest son to change his mind. At best, "the Egbele could only advise, they could not force the first son to part with what has come to him by right."[2] Thus, no junior can inherit any property of his late father unless with the full consent of his senior brother. It is interesting to note that "every property such as a house, coconut tree etc, a father gave to the younger children in his lifetime, could be successfully demanded by the first son, unless the deposition was made at the ancestral shrine before the *Egbele.*"[3] Before the eldest son can inherit the property of his deceased, he must fully comply with rule four governing inheritance and succession rights under Esan customary law which provided that: "*Onon luogbe ole nab he ogbe"* meaning (he who performs the burial ceremonies owns the house and all therein). It is on this basis; the eldest child can inherit the *Ijiogbe.* This right of the eldest son to inherit his deceased father *Ijiogbe* under Esan customary law has been judicially recognised and enforced. in *Mr Victor Ayemwenre Eigbe & Anor v. Mr Benjamin Izibiu Eigbe & Ors.*[4] The Court of Appeal Per Ogunwumiju JCA held as follows:

> I have made a thorough consideration of this court's decision in *Egharevba v. Oruonghae* supra. The facts are almost on all fours with the facts of this case. The court held unanimously that a Bini man can have only one *Igiogbe* which must be located in Benin Kingdom. I think what was of most consideration in that case as in this case was the fact the testator gave the house in his hometown to his eldest son and being regarded as his ancestral home, was thus regarded as his *Igiogbe* as opposed to another house in another city where he had at once lived. In the case under review, I am convinced that the testator categorically identified his *Igiogbe* by clause 3 of his will. Having held that the Will was duly executed, the testator having stipulated the house he considered to be his Igiogbe, situate in his ancestral home, I have to arrive at the conclusion that the house in Irrua is the *Igiogbe* of the testator.

Furthermore, a situation could arise where the eldest son of the deceased could be a minor. His age does not preclude the applicable of the customary law. What the custom prescribed in such circumstances is for the minor's customary next of kin to step into his shoes and perform the burial ceremonies on his behalf. Suitable persons are "the minor's maternal brother, ordinary brother, or *Ominijiogbe.* The minor paternal uncles are precluded because under native law and custom they cannot be performing the burial ceremony of their younger brother which is taboo under Esan customs. Once the next of kin performs the ceremonies, he inherits the deceased estate on behalf of the minor. The role goes with the responsible. It some worth akin to standing in *locus parentis.* But the different is that he holds the estate in trust for the minor and he must return the estate to the minor when he attains majority with the duty to account.

In recent times, some Human Rights activist have questioned the rationale for the continue adherent and practise of this custom that prescribe that the eldest son succeeds to all the property of the deceased father to the exclusion of other children as discrimatory in nature and that it practices should not be accommodated or encourage in the in the 21st century. They further argued that this custom is discriminatory in nature, and that it ought to have been abandon. One the other hand, supporters of the custom are quick to defend the custom as being not discriminatory. They find judicial backing in the case of *Ogiamien v. Ogiamien*[5] where the Supreme Court in interpreting a similar custom under Bini native law and custom held that the repugnancy doctrine had no place in Bini custom.

Also, in *Lawal-Osula v. Lawal Osula* [6] Adio J.C.A who read the judgment of the court held while considering the meaning of the phrase "subject to customary law relating thereto" in section 3(1) of the Wills Law of Bendel State applicable to Edo and Delta State that:

> A native law and custom to the effect that the eldest son succeeds to all the property of the deceased father to the exclusion of the other children is not repugnant to natural justice, equity, and good conscience…

Thus, by extension there is nothing repugnant to natural justice equity and good conscience in the Esan customary law that also entitled the eldest son to inherit all the property of his deceased father. Historically, the Esan people and the Bini share certain aspect of custom because of their link, and historical connection that date back to centuries. It is therefore not surprising That the operation of this custom has been largely responsible for the smooth customary transition from one head of the family to the other after death the founder and the former

[1] C.G. Okojie. *Esan Native and Custom with Ethnographic Studies of the Esan People*, (1st ed, Reprinted 1994 Ilupeju Press Ltd) at 119.
[2] Ibid.
[3] Id.
[4] (2013) LPELR – 20292 (CA).
[5] [1967] NMLR 245.
[6] [1993] 2N.W.L.R. (Pt. 274) 158.

head of the family. Even though this custom on the face of it may appear discriminatory against the other children, it is noteworthy to point out that the custom has its own inbuilt mechanism that ensures that the rest children of the deceased are provided for. Although, the custom provides that the first son should inherit all his father's properties, in practise he is enjoined to share these inherited properties with all his brothers and sisters. The reason for encouraging inclusiveness in sharing is simple. If he wants to live in peace and harmony with his brothers and sisters; he is bound to share with them. If his siblings are of the opinion that he might not share the property with them, they too could refuse to assist him financially during the burial ceremonies. In such a situation, he has no choice, other than to single handily performed the burial ceremony without any assistance from them. Sometimes the whole ceremony might be too expensive for him alone to bear.

4.3.2 Wives

Generally, under Esan native law and custom, wives of a deceased man except a princess are legible to be "inherited" in accordance with custom. This procedure is what is referred to in Esan language as "*Uhanmin.*"[1] During this second marriage, bride price is not collected because under Esan native law custom, bride price is only paid once on a woman marrying into a family. It must be emphasised that these women are not under any customary compulsion to agree to be inherited. The eldest son of the deceased can inherits the wives of his late father with the exception of his own mother who is normally inherited by the son's uncle or the *Ominjiogb*e of the *Uelen*.[2] Sometime when there is no person i.e., among the children and the uncles who are interested in inheriting these women, the right to inherit moves to any old man in the *Uelen.*[3] This procedure of *Uhanmin* dealing with inheritance of wives or widows under Esan native law and customs is not applicable to a princess (the daughters of an *Onojie* or traditional ruler). When the husband of a princess dies rather than the princess being inherited as applicable to ordinary citizen, the princess goes home free. However, if the princess decided to stay behind and take care of her children, then she must be "remarried" again before her father the king. Even though the princess is "remarried" again for the second time, no bride price is paid for the "second" marriage. It important to clarify that although bride price is usually paid as an incident of customary marriage, but where it concerns customary marriages contracted by princesses in Esan land, no bride price is paid on any princess[4]. This example is the only situation where a widow is "remarried' again for the second time in all the 35 (Thirty - five) kingdoms that constituted Esan land.

Also, a woman who has been inherited once, cannot be the subject of another inheritance. In other words, once a woman has been inherited before, she can no longer be subjected to another form of inheritance for the second time by the heir of the person that inherited her, when that person eventually dies. For example, if a man inherits the wife of his brother or of an *Ominjiogbe* or the wife of any member of their kindred, when he dies, such an inherited woman is not inheritable by the dead man's heir. In such a situation, the right to inherit passes to the dead man's senior brother. As mentioned earlier, in all situations of widow inheritance, under Esan native law and customs the widow has the option to choose whether she consented to being inherited by her late husband's first son or any other member of his family or not. The woman fundamental rights are respected. In a situation where the first son is the widow's child, she has the right either to agreed or to refused to being remarried by her late husband's brother because she cannot marry her own son. The widow has the right to determine whether she want to be married to any member of her late husband's family or whether she chooses to exercise her right to remain unmarried and remain in her late husband's house in other to take care of her children until her death. Where the widow decides to return to her family after the death of her husband, her former- in- law has not choice than to respect her opinion. From the foregoing, this article has established the fact that it is not automatic that once a man dies, his wife or wives are immediately subjected to being inherited under Esan native law and customs. From either of the options opened to the widow under Esan customary law; either to remain unmarried and stay in late husband's house to take care of his children, or she decided to be "inherited" according to custom, the woman does not have any right to inheritance in her deceased husband's estate. This unfortunate situation is not peculiar to Esan native law and custom. In fact, most customs in other part of Nigeria see women as part of the estate to be inherited. In Chief *Meburami Akinnubi & Anor v. Grace Olanike Akinnubi (Mrs) & Ors*.[5] The Supreme Court held as per Onu J.S.C as follows:

[1] The procedure where the wife or wives of the deceased man is "inherited" by either the eldest son, his uncle or Ominijiogbe of the Uelen.

[2] An *Ominjiogbe* is the head, not necessary by age of the family or Uelen. It is a hereditary position in as much as each successor duly performed the burial ceremonies of his father, and within Uromi kingdom, he must also perform the Ogbe ceremony as well. Thus, the easiest definition of Ominjiogbe is the first son of the first sons traced from the progenitor of the family. On the death of the head of a family, his first son performs the burial ceremonies and customarily assumed the position of headship of that family. All his other brothers, sisters, whether married or not, uncles, are automatically under his control. Yearly, they pay homage to him as the keeper of the family ancestral shrine during the "*Iluobo Ukpe.*" Thus, it is not uncommon in some part of Esan land for the term "Akheoa" to be used synonymously with *Ominjiogbe.*

[3] Means family.

[4] C.G. Okojie. *Esan Native and Custom with Ethnographic Studies of the Esan People*, (1st ed, Reprinted 1994 Ilupeju Press Ltd) at 121.

[5] (1997) LPELR -352 (SC). The position of the law is different when compare with the status of a widow of a statutory marriage whose husband died intestate. For further reading see the case of *Obusez v. Obusez* (2001) 5NWLR (Pt. 736) 377. Where the court held that the widow was the appropriate person to be granted letters of administration to administer the estate of her late husband and not the deceased

> …Under Yoruba customary law, a widow under an intestacy is regarded as part of the estate of her deceased husband to be administered or inherited by the deceased's family; she could neither be entitled to apply for a grant of letters of administration nor to be appointed as co-administratrix of her deceased husband's estate

Generally, the rule of succession under most customary law in Nigeria is that a widow or widows of a deceased man are not entitled to inherit in his intestate estate. The reason being that wife or wives are generally not included in the definition of the family. In *Fakoya v. Ilori* [1] the court held that the widow of a deceased owner is not competent, under Yoruba customary law to effect a valid sale of a property of the deceased because upon intestacy, devolution of the property follows the blood and a wife or widow not being of the blood has no claim to any share of the inheritance. In *Akinubi v. Akunubi* [2] the court held as that:

> A widow under an intestacy is regard as part of the deceased husband's estate to be administered or inherit by the deceased's family. It is for this reason that under customary law a widow cannot be an administrator of the estate of her deceased husband.

However, a widow of a statutory marriage does not suffer from the aforementioned legal disabilities even when her husband dies interstate.[3]

4.3.4 Daughters

The eldest son of the deceased is expected in accordance with custom to inherit all the assets and liabilities of his father. Thus, the responsible of taken care of his sisters falls squally on his shoulders. Therefore, he has the responsible of marrying out his sisters who are not married and collect the bride price. In addition, he also has the responsibility of collecting all the items brought by his sisters' husband during the yearly homage usually paid to in-law customarily. Apart from those already married, the responsibility of taken care of his unmarried sisters rest on him as well because daughters are customarily not taken into consideration when inheritance issues are been considered. The reason being that a woman does not possess the customary right to inherit in her late father's estate under Esan customary law. This is encapsulated in two Esan language idiomatic expressions depicting this age long custom. They are as follows: "*Okhuo ile Aghada bhe Uku*" meaning a woman never inherit the sword and "*El bie Omokhuo he ole Iriogbe*" meaning no one give birth to a girl child and named her the family keeper.[4] By the principles of Esan native law and customs, the rights of a female child to inheritance, reside in her husband house. But this expression is ironic in nature. A woman that is deprived of the right of inheritance in her father's estate would soon or later discover that such rights she is supposed to enjoy in her husband's estate is an illusion. This makes women right to inheritance precarious. But to every general rule, there is an exception. To the general rule stated above, an exception exists. In most of the kingdoms where the system of *Arebhoa* is accepted and practised, a woman assumes the role of a man for the benefit of her heirless father by performed the burial ceremonies according to Esan native law and customs which will automatically entitle her to inherits her late father's estate. This situation must not be confused with the privileges that the *Ehale non odion* (the first daughter) enjoys during her father's lifetime. All those privileges cease once the father is dead. Okojie provided the philosophy and the rationale behind this reasoning by the foundering fathers of Esan land[5]. He posited that "it was this attempt to keep property in the family that led to the custom that a woman, however wealthy, she may be is not allowed to bury her father". Okojie further explain as follows:

> It was this attempt to keep property in the family that led to the custom of a woman, however wealthy, not being allowed to bury her father, since he who perform the ceremonies inherit the property. If she was very influential and her brothers are minors, she could prevail on the Egbele to allow her to perform these ceremonies, strictly on the understanding that she was only doing this because she did not want their father to remain unburied and that she did everything on behalf of her brothers.[6]

The rationale behind this custom is based on the rule governing inheritance and succession that stipulate that "he who performed the burial ceremonies inherits the property," it will be inequitable to denial the woman the right to inherit after performing the final burial ceremonies. Therefore, if a man decides to share his properties amongst his children, irrespective of gender, during his lifetime before his death, whatever he shares to his daughter or daughters remain their inheritance for life. The eldest son or any member of the family cannot

younger brother in accordance with Agbor native law.

[1] (1983) 2 FNC 602. See also Sogunro-Davies v. Sogunro-Davies (1928) 8NLR 79.

[2] [1997] 2 NWLR (Pt. 486) 144 at 159.

[3] For further reading see Itua P.O., "Disinheritance of Women under Esan Customary law in Nigeria: The Need for Paradigm Shift Towards Gender Equality" *Advances in Social Sciences Research Journal,* 8(2), 668-723. Available online at www.https://doi.org/10.14738/assrj.82.9788.

[4] Ibid at 124.

[5] Ibid.

[6] C.G. Okojie. *Esan Native and Custom with Ethnographic Studies of the Esan People*, (1st ed, Reprinted 1994 Ilupeju Press Ltd) at 125.

deprive them of such inheritance after the death of their father. In so acting, the man must be mindful not to give out his *Ijiogbe* to his daughter or any other child because of the customary implication of such a gift.

Closely associated with the above is the Esan custom that prohibit a woman from handling the "*Ukhure*".[1] The traditional implication is that since a woman cannot handle the *Ukhure,* she cannot customarily take possession of the family shrine, thereby being incapable of performing the burial ceremonies which, would have entitled her to inherit the family property. The discriminating aspect of this custom becomes obvious when the deceased is survived by only one child who happens to be a woman. In such situation, the custom will prevent the daughter from performing the burial ceremonies. The only customary remedy is to allow a male member of the family to perform the burial and inherit the property. Okojie further explained the custom as follows that

> the next male in line of succession stood to perform the burial ceremonies, the woman and her wealth fading away behind, so that after the ceremonies, she had no clam to the property. This type of burial is only allowed to prevent property in the family passing outside the family and village as would otherwise happen if the daughter had been permitted by the Egbele to perform the burial ceremonies of her father[2]

On the other hand, different rules apply to the property of a woman. When a married woman dies, customarily, her property is inherited by her children. If the deceased is only survived by a daughter who is already married, the custom permit her to perform the burial ceremonies of her late mother. She must come from her husband's house to her parent house to perform the ceremonies. Once these ceremonies are completed, she then inherits her late mother's estate. But the situation is different if the woman died without any child. In such situation, the husband inherits all her properties.

Furthermore, in the past, where a man dies without an heir, but he is survived by a daughter or daughters, the next male in line of succession in his family steps in to perform the burial ceremonies. The daughters are prevented from performing the burial ceremonies which by implication means denial of the right to inherit. At the completion of the burial ceremonies, the male member of the deceased family most times, his younger brother inherits the deceased properties to the detriment of his biological daughters. This discriminatory custom is not peculiar to Esan native law and customs alone, its application is found in some other part of the country. For example, in the south-eastern part of the country. The court has held in plethora of cases that this custom apart from being discriminatory against female children; is also in conflict with the provisions of the Nigerian Constitution.[3] Such conflict and other discriminatory aspect of the Esan customs have been discussed extensively by Itua and other academic on the right of female children to inheritance under Esan customary.[4] Although Esan native law and custom expressly encourages the rule of primogeniture, the modern trend arising from judicial activism is that certain customary law principles that tend to discriminate against female children from inheriting any property from their late father's estate will no longer be encourage and given validity by our courts. Once a man dies without an heir, the court will not hesitate in allowing the daughter or daughters to inherit their father's estate at the expense of their paternal uncles. Consequently, the courts in recent times have always ruled that the children of the deceased no matter their gender are entitled to inherit his estate.

4.3.5. Inheritance of domestic animals

Usually, under Esan native law and custom, domestic animals like cows, goats, sheep, fowls belong to the children of the deceased as inheritable property. The first son has absolute rights over these domestic animals. However, in the interest of peace, the first son ensure that he share some to his other brothers where the livestock is large. The sharing is usually done according to the numbers of wives the deceased had when he was a life. Where the deceased was married to more than one wife, then the sharing is conducted among the first son from each woman represent each door, in the other of inheritance. This practise is to ensure that at least a child from each wife is taken into consideration. Where the first child, the heir is a minor, then his uncle will inherit the livestock and take care of them till the heir attained majority.

4.3.6. Inheritance of debts

As mentioned earlier in this research, assets and liabilities are inheritable under Esan native law and custom.[5] Therefore a dead man's unpaid debt passes squarely unto his heir after his death. The custom expects the heir to inherit both the assets and the liabilities of his dead father. While he has the benefit of enjoying the assets, he must also liquidate the debt. The remaining children of the deceased are not under any obligation to assist the

[1] The *Ukhure* is the family ancestral staff keep at the family shrine used for ancestral worship by the Head of the family.
[2] C.G. Okojie. *Esan Native and Custom with Ethnographic Studies of the Esan People*, (1st ed, Reprinted 1994 Ilupeju Press Ltd) at 125
[3] See *Salami v. Salami* [1957] WRNLR 10; *Adeseye v. Taiwo* 1 FSC 84; *Taiwo v. Taiwo* 3 FSC 80*; Lopez v. Lopez* 5 NCR 43. See also the provision of Sec. 42(1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended). Cap.C23 Laws of the Federation of Nigeria 2004.
[4] See Itua P.O., "Disinheritance of Women under Esan Customary law in Nigeria: The Need for Paradigm Shift Towards Gender Equality" *Advances in Social Sciences Research Journal,* 8(2), 668-723. Available online at www.https://doi.org/10.14738/assrj.82.9788 accessed on the 24th of August 2021.
[5] Okojie. C.G., *Esan Native and Custom with Ethnographic Studies of the Esan People*, (1st ed, Reprinted1994, Ilupeju Press Ltd) at123.

heir with the payment of the debts. In fact, their intervention is done at their own pleasure. The only way the heir can escape the payment of the debts is to renounce his claim to the inheritance of his father's estate. In such a situation the "*Egbonughale"* age group then takes the responsibility for the burial of his deceased father. Since technically the deceased died without an heir, his properties, both assets and liabilities are inherited by the *Onojie* (the traditional ruler) that has jurisdiction over the community. In recent times, is it very difficult for the application of this rule concerning inheritance of the deceased man's properties by the traditional ruler as a result of the inability of the heir to offset his late father's indebtedness, and also renouncing his customary rights to inheritance thereby allowing the *Egbonughale* age group the authority to then perform the burial rites. Such a situation could be highly embarrassing for the deceased family within the community, and they would everything possible to avoid it.

5.0 Problems confronting applicability of Esan customs dealing with succession rights

This research has so far discussed succession and inheritance rights under Esan customary law, laws governing inheritance and succession rights, and the order of inheritance among the children of the deceased who are the ultimate beneficiaries under Esan native law and custom. Over the years, it has become increasing difficult to apply some rules of Esan native law and customs concerning succession and inheritance rights without confronting or running into difficulties with fundamental rights provisions of the Constitution of the Federal Republic of Nigeria 1999 (as amended). the various problems bedevilling succession rights under Esan Customary shall be examine, and an attempt shall be made to proffer solutions to these identified problems, discuss them against the current position of the law, with a view to find a part way that will make the applicability of these customary laws, particularly those governing inheritance and succession rights from being declared as repugnant to natural justice equity and good consciences by the courts, because of the significant role they play in regulating the lives every Esan person.. The need to preserve these customary laws cannot be over emphasised. This position underscores the urgent need for reforms in these aspects of our native law and customs by making them more gender friendly and compactable with the fundamental rights of citizens and in conformity with international Human Rights standard.

5.1.0 Gender discrimination against female children

Under Esan customary law, the children of the deceased are the ultimate beneficiaries to the estate of their deceased parents. However, because of the application of the rule of primogeniture, the customs tend to encourage gender discrimination against female children, and further ensure that even amongst male children, the first son of the deceased is placed at an advantage position over the other children. The customs further encourage the first son to inherit all the properties of his late father and subject to his conviction, he can decide to share part of the estate with his other brothers and sisters. This custom does appear to offend section 42 (1) (2) of the 1999 Constitution (as amended). Although the apex court has held that there is nothing repugnant with this custom which is common amongst the Bini and Esan tribe.[1] As it concern the discrimination against female children and widows, there are plethora of judicial authorities where the Supreme Court has criticised and declared similar customs in other communities within the country that tend to encourage discriminatory customary practises against female children and widows as void, contrary to section 42(2) of the 1999 Constitution (as amended), and repugnant to natural justice, equity, and good conscience. In Mrs. *Lois Chituru Ukeje & Anor v. Mrs Gladys Ada Ukeje* [2] the Supreme while considering the effect an Igbo customary law that disinherit a female child from inheriting from her deceased father's estate held per Rhodes - Vivour JSC as follows:

> …L.O. Ukeje deceased is subject to Igbo customary law. Agreeing with the High Court the Court of Appeal correctly found 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) and (2) of the 1979 Constitution (as amended). This finding was affirmed by the Court of Appeal…No matter the circumstances of the birth of a female child, such a child, is entitled to an inheritance from her late father's estate. 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

[1] see *Ogiamien v. Ogiamien* [1967] NMLR 245 and *Lawal-Osula v. Lawal Osula* [1993] 2N.W.L.R. (Pt. 274) 158.

[2] (2014) LPELR-22724 (SC). See also *Onyibor Anekwe v. Maria Nweke* (2014) 4 All FWLR (Pt. 739) 1154 where the court through Ngwuta JSC., held as follows: "…My noble Lords, the custom pleaded herein, and is a similar custom in some communities wherein a widow is reduced to chattel and part of the husband's estate, constitutes, in my humble view, the height of man's inhumanity to woman, his own mother, the mother of nations, the hand that rocks the cradle. The respondent is not responsible for having only female children. The craze for male children for which a woman could be denied her rights to her deceased husband or father's property is not justified by practical realties of today's world. Children, male or female are gift from the creator for which the parent should be grateful. The custom of Awka people of Anambra State pleaded and relied on by the appellant is barbaric and take the Awka community to the era of cave man. It is repugnant to natural justice, equity and good conscience and ought to be abolished"

> the Constitution, a fundamental rights provision guaranteed to every Nigerian. The said customary law is void as it conflicts with section 42(1) and (2) of the Constitution.

similarly, in *Onyibor Anekwe v. Maria Nweke*[1] Ngwuta JSC, while considering the discriminatory customary law practice that deprived a widow of the proprietary rights to her deceased husband estate under Igbo customary law held that

> …My noble Lords, the custom pleaded herein, and is a similar custom in some communities wherein a widow is reduced to chattel and part of the husband's estate, constitutes, in my humble view, the height of man's inhumanity to woman, his own mother, the mother of nations, the hand that rocks the cradle. The respondent is not responsible for having only female children. The craze for male children for which a woman could be denied her rights to her deceased husband or father's property is not justified by practical realties of today's world. Children, male or female are gift from the creator for which the parent should be grateful. The custom of Awka people of Anambra State pleaded and relied on by the appellant is barbaric and take the Awka community to the era of cave man. It is repugnant to natural justice, equity and good conscience and ought to be abolished.

Thus, in line with the current position of the law, an application of Esan customary law that discriminate against female children from inheritance in their deceased father's estate will be declared null and void by the courts. Similarly, any Esan custom that deprived a widow of the proprietary rights to her deceased husband estate will suffer the same faith according to law. In *NMCN v. Adesina*[2] Ugochukwu Anthony Ogakwu JCA define "discrimination" as follows: The Black's Law Dictionary, Ninth Edition defines discrimination on page 534, inter alia, as "Differential treatment; a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured". Apart from the discriminatory effect resulting from the application and practise of the rule of primogeniture concerning inheritance in Esan land, the practise of denying children born by "*Omo Osho*" i.e., children born by mistresses of the king or *Onojie* from succession to the throne as a traditional ruler after the death of the *Onojie* because their mothers were not properly married in accordance with customary law present another challenge that brings the custom into direct conflict with Section 42(2) of the 1999 Constitution (as amended).[3] The customary law position is that before an heir can inherit the throne after the death of his father, he must be a product of legitimate customary law marriage between his father and his mother. Where an heir to the throne is born by an "*Omo osho",* such child is automatically disqualified because of the defect in the marital status of his mother, irrespective of the fact that the paternity of the child was acknowledged by the deceased king. This is the true interpretation of the custom. Applying the custom strictly, present a classic example of one been discriminated against because of the circumstance of one's birth a situation that the 1999 Constitution (as amended) clearly forbid. Section 42 (2) of the 1999 Constitution (as amended) clearly prohibits this kind practises. The section provides that "No citizen of Nigeria shall be subject to any disability or deprivation merely by reason of the circumstance of his birth". Concerning children born outside wedlock, the law is settled that under customary law, once a father acknowledges the paternity of his child, for all intent and purposes, the child become legitimate. In *Obasohan v. Obasohan.* [4] Moore Aseimo Abraham Adumein JCA., held as follows:

> In the case of Lawal & Ors. v. Messrs A Younan & Sons (1961) All NLR 254 at 250, Per Sir Adetokunbo CJ; the former Federal Supreme Court distinguished between illegitimate and legitimate children in England and Nigeria by stating elaborately as follows: 'Now to what extent have these laws been applied to illegitimate children, or how far can illegitimate children claim under the Act? In England prior to 1934 when the Law Reform Act was passed, an illegitimate child could not claim under the Act: Dickson v. The North Eastern Railway Co. Lt. vol. 9 New Series 1863. This latter Act certainly does not apply to Nigeria as it is a statute, though of general application, passed after 1900. When considering the present action therefore, it is not possible to go beyond English Law in 1900. This raises the question; who are illegitimate children in Nigeria? Unlike in England, legitimate children in Nigeria are not confined to children born in wedlock or children legitimate by subsequent marriage of their parents. In Nigeria, a child is legitimate if bone in wedlock according to the

[1] (2014) 4 All FWLR (Pt. 739) 1154
[2] (2016) LPELR-40610(CA)
[3] See Itua. P.O., "Legitimacy, legitimation and succession in Nigeria: An appraisal of Section 42(2) of the Constitution of the Federal Republic of Nigeria 1999 as amended on the right of inheritance" Journal of Law and Conflict Resolution Vol.4(3), pp31-44 March 2012. Available online at http://www.academicjournals.org/JLCR Access on 28th August 2021.
[4] (2019) LPELR – 47187 (CA). See also, *Aderinola Adeyemi & 6 Ors v. Alhaji Shittu Bamidele & Anor* (1968) NSSC 26 at 30.

> Marriage Ordinance. There are also legitimate children born in marriage under native law and custom. Children not born in wedlock (Marriage Ordinance) or who are not the issue of a marriage under Native Law and Custom, but are issues born without marriage can also be regarded as legitimate children for certain purposes. If paternity has been acknowledged by the putative father'… therefore in Nigeria, irrespective of the circumstance of his birth, a child 'would be legitimate if his paternity is acknowledged by the putative father.

Therefore, once a child's paternity has been acknowledged by the father, irrespective of gender, such child is entitled to inherit in the estate of his deceased father. In *Mrs. Lois Chituru Ukeje & Anor v. Mrs Gladys Ada Ukeje*[1] Ogunbiyi JSC held that:

> …I hold did rightly declare as unconstitutional, the law that dis-inherit children from their deceased father's estate. It follows therefore that the Igbo native law and custom which deprives children born out of wedlock from sharing the benefit of their father's estate is conflicting with section 42(2) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). The reproduction of that section states thus: - '42(2) No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth.

5.2.0. The concept of Abieke

The custom of "*Abieke"* which has been abandon in most communities in Esan land, but still being practice in some, is another example of an Esan custom which is in direct conflict with certain constitutional provisions. Under this system,[2] a wealthy man will marry a woman for his son when is still a child or a teenager, or in some extreme circumstances immediately the child is born. In most case, the wife, is usually a baby or a young child. The girl child is then "married" to the little boy based on the arrangement between their parents. Naturally, the baby girl will grow to maturity before the boy. When the girl is matured, she starts having sexual relationship with other men and when children result from such relationship, these children are regarded as the children of her infant husband under customary law irrespective of their paternity. By the time the boy 'husband' eventually comes of age, he then starts to have sexual relationship with his wife, who before now would have been given birth for other men because of her earlier sexual relationship with them, although they are chosen by her freely. The children from the previous relationships with other men are regarded as the husband children, and they assume position of seniority to his biological children born by his wife, the same woman. This system is obviously defective, and unfair for two reasons. Firstly, this custom denies the children from the earlier sexual relationship of their paternity with their biological parents. Also, their biological fathers cannot lay any legitimate claim to their paternity as well. Secondly, the children who are the product of earlier sexual relationship rank in terms of seniority to the biological children of her husband. The application of this custom is totally unfair when applied to issues concerning succession and inheritance. This *Abiekhe* system is obviously discriminatory and repugnant to natural justice equity and good conscience. Historically, the application of the repugnancy doctrine in Nigeria emerged from the decision in the case of *Eshugbayi Eleko v. Officer Administering the Government of Nigeria* [3] where Lord Arkin held that "the court cannot itself transform a barbarous custom into a milder one. If it stands in its barbarous character, it must be rejected as repugnant to natural justice, equity, and good conscience."[4] Therefore, it is expected that a good custom or law must be able to conform to that which has be universally acceptable as being good and just. This doctrine of repugnancy was applied in the case of *Mariyama v. Sadiku Ejo,*[5] where the court was invited to consider whether the customary law of the area that provided that a child born within 10 months after divorce belongs to the former husband of the mother of the child. The court held affirming the custom. On appeal to the High Court, the decision of the low court was reversed on the ground that the custom was repugnant, and that the child should be returned to its natural father. On the strength of this authority and other similar discissions' of the apex court, denying the children from *Abiekhe* system the right of paternity to their natural father is surly repugnant to natural justice, equity, and good conscience.

5.3.0 Children from customarily legalised adulterous relationships

Furthermore, under Esan customary law, it is an acceptable practise for a man who for some reasons is unable to

[1] (2014) LPELR-22724 (SC).
[2] For full appreciation of the operation of this concept, see Okojie. C.G, *Esan Native and Custom with Ethnographic Studies of the Esan People*, (1st ed, Reprinted1994, Ilupeju Press Ltd) p118.
[3] (1931) AC 262 at 273.
[4]For further reading on the repugnancy test see Uweru. B.C., "Repugnancy Doctrine and Customary law in Nigeria: A positive Aspect of British Colonialism. *African Research Review* Vol.2 (2) 2008. Available @ https://www. ajol.info last accessed 20th June 2021.
[5] 1961 N.R.N.L.R. 81.

father a child, to grant his wife or wives permission by allowing them after the performance of the necessary traditional rites at the ancestorial shrine before his *Egbele* freedom to have unlimited sexual relationship with any man or men of their choice save for members of her husband *Egbele.* This practise is what Okojie referred to as "children from legal harlots" in his book.[1] Although this practise is acceptable and approved by Esan customs, its application run the risk of coming into direct confrontation with certain sections of the 1999 Constitution (as amended) because of its overall goals and objectives. One of the objectives of this custom is to ensure that the heirless husband can have children that will succeed to his estate after his death. The essence of the scarifies before the ancestral shine is to remove any element of adultery called "*Oghęlę"* in Esan language on the part of the wives because adultery, is a taboo in Esan customs and it attracts severe customary sanction under Esan customary law. Any child born by the wife or wives under this arrangement is regard as the child or children of the husband under customary law, and they are automatically entitled to inherit in their husband estate after his death. The legal question that is begging for answers with this customary practise is, can the application of this customary recognised custom deprive or prevent the natural/biological fathers of these children from making legitimate paternity claims for their children under the law? Legally speaking, the answer is certainly in the negative. The reason being that this kind of practise is certainly repugnant to natural justice equity and good conscience. But it must be appreciated that the Judicial Committee of the privy Council in the case of *Dawodu v Danmole* [2] opine and state "that the principles of natural justice equity and conscience applicable in country where polygamy is generally accepted should not be readily equated with those applicable to a community governed by the rule of monogamy[3]. Despite the quotation above, any customs that is clearly below any civilised standard of behaviour would be held to be repugnant to natural justice equity and good conscience.[4] One of the earliest cases to be decided by the Nigerian court on this principle of law is the case of *Edet v. Essien.*[5] Here, the appellant had paid dowry in respect of a certain woman, when she was a child. Later, the respondent also paid dowry on the same woman to the woman's parents and married her. The appellant claimed custody of the children of the marriage on the ground that under customary law, he was the husband of the woman, and that she lacks the capacity to contract another legal marriage until the dowry he paid on her has been refunded to him and that until the dowry is refunded, he is entitled to the children born by her. The court found that although the alleged customary law was not established, it further held even if the custom was established, the custom is certainly repugnant to natural justice equity and good consciences.[6] In *Messrs A. Younan & Sons v. Lawal & Ors*[7] the Supreme Court, considering under what circumstance would the law make a presumption regarding the paternity of a child held as follows:

> …this raises the question; who are illegitimate children in Nigeria? Unlike in England, legitimate children in Nigeria are not confined to children born in wedlock or children legitimated by subsequent marriage of the parents. In Nigeria, a child is legitimate if born in wedlock according to marriage Ordinance. There are also legitimate children born in marriage under Native Law and Custom. Children not born in wedlock (Marriage Ordinance) or who are not the issues of a marriage under Native Law and Custom, but are issues born without marriages can also regarded as legitimate children for certain purposes, if paternity has been acknowledged by the putative father.

Also, in *Ekong & Anor v. Akpan*[8] the Court of Appeal per Muhammed Lawal Shuaibu JCA in deciding whether proof of paternity must necessarily imply marriage between the parties involved held that:

> Before embarking on the task of discovering whether the trial Court had abdicated its duty of properly evaluating the evidence in this case, let me say straight away that paternity and marriage are not so interwoven that proof of paternity must necessarily imply marriage between the parents involved.

From the above judicial authorities, it very clear that if the putative father of any of the children born by the wife or wives that have been given the customary permission to have extra-marital affairs with other men with a bid of raising children for their heirless husband that will eventually be regard as the legitimate children of their husband for purposes of succession and inheritance, make any legitimate claim to their paternity, their husband customary claim to these children cannot withstand the superior and legal rights of the children biological fathers. Thus, under the current position of our laws, this custom is no longer effective, and stand the risk of being

[1] Okojie. C.G., *Esan Native and Custom with Ethnographic Studies of the Esan People*, (1st ed, Reprinted1994, Ilupeju Press Ltd) p118.
[2] (1908) 1 N.L.R. 81 at pp. 99-102.
[3] [1962]1 W.L.R. 1053 at p. 1060. See also *Rufai v. Igbirra N.A.* 1957 N.R.N.L.R. 178.
[4] See Park. A.E.W., *The Sources of Nigeria Law* (1963) p.72
[5] (1932) 11 N.L.R. 47.
[6] See also *Mariyama v. Sadiku Ejo* 1961 N.R.N.L.R. 81.
[7] (1961) LPELR -25073(SC). See the case of Bamgbose v. Daniel 14 WACA 111 at page 115. See also the case of Alake v. Pratt 15 WACA 20.
[8] (2020) LPELR-4957(CA). See the case of Anwadike & Anor v. Anwadike (2019) LPELR-469.

adjudge as being repugnant to natural justice equity and good conscience.

5.4.0 Children from Woman-to-Woman marriage

Under Esan customary law of inheritance, it is not uncommon to find a custom or practise commonly referred to as "woman to woman" marriage. It must be noted that this custom is not peculiar to Esan tribe alone and must be distinguished from same-sex-marriage. According to Nwogugu[1] "under some customary laws in Nigeria, certain marriages are contracted which may superficially be described as the union of two women. On the surface, such arrangement may be said to contravene the basic precept of marriage as a union between a man and a woman." Two types of arrangement can be deduced from this concept. One of such arrangement is a situation where a barren married woman in other to ensure that her position in the marriage is secured even though she has no children, will provide her husband with the necessary resources including, but not limiting to fund for the bride-price in respect of a new wife who is expected to bear children in her place. This practice is common amongst the Ibo of the South-Eastern part of Nigeria. Under this arrangement, it is the husband that marries the new wife as opposed to the barren woman marrying the new wife for herself. On the other hand, the second method which is common among some communities within Edo and Delta States, usually involves an unmarried but prosperous woman who desires to have a family of her own may if she cannot bear children 'marry' another woman to do so on her behalf. She basically provides the bride-price for the new wife who is expected to live with her while she bears children for her. In some cases, the new wife can bear children from a particular member of the family or through paramour.[2] In *Meribe v. Egwu*[3] the Supreme Court was invited to pronounce on the validity of the first type of woman-to-woman marriage considered above. The court after conclusion of hearing held that:

> In every system of jurisprudence know to us, one of the essential requirements for a valid marriage is that it must be a union of a man and a woman thereby creating the status of husband and wife. Indeed, the law governing, and decent society should abhor and express its indignation of a 'woman to woman' marriage; and where there is proof that a custom permit such an association, the custom must be regarded as repugnant by virtue of the proviso to section 14(3) of the Evidence Act and ought not to be upheld by the court.

The method and the mode of contracting this form of marriage under Esan customary law was aptly captured by Okojie[4] as follows. "If a childless, but very rich woman not wanting her property to pass to her husband and desiring a befitting burial ceremony 'married' a girl by paying her bride-price in full and bring her to live with her. The girl was permitted to have sexual relationship with any man chosen by the childless woman." All the off springs of this relationship are regarded as the children of the rich but childless woman i.e., she was the legal though not the natural father of this children. Thus, the man involved "was merely a donor and for this privilege he gave the rich woman the services of a dutiful son-in-law"[5]

It is obvious that in contemporary Nigeria the validity of this customary law that permit the application of this kind of custom cannot go unchallenged. In *Emmanuel Nwodo & Anor v. Nwodo*[6] the Court of Appeal while considering the validity of an Igbo native law and custom which allows a woman to bring another woman into the marital home of her husband who dies without a surviving son for the sole purpose of continuing the line of succession of her late husband was held to be repugnant to natural justice, equity, and good consciences. According to George Mbaba JCA,

> In my view, Appellant's claim to be the Nwodo family land founded on the alleged woman to woman marriage and claim to a father, who died 15 years before the 1st Appellant was born, revolts against public policy as the alleged custom is repugnant to natural justice, equity, and good conscience. The fact that 1st Appellant's mother was married by another woman (Kesiah) who was an adopted wife of Ubaegbulem (having been inherited by Ubaegbulem at the death of his father, Nwodo) made the whole story of the 1st Appellant's right to alienate the property of Nwodo Njoku to the 2nd Appellant, laughable, ridiculous, and also offensive to sound logic and morality. To allow a married woman such leverage/ power to 'marry' or bring another woman into the marital home of her late husband, many years after the death of the said husband, and arrange for the strange relationship between that woman with the other woman/men to produce a child (son), in the name of the late husband for the

[1] *Family law in Nigeria* (Revised Edition) 2006 Heinemann Educational Books Ltd 63.
[2] See *Iweze v. Okocha* (1967/68) M.S.N.L.R. 64.
[3] (1976) 1 ALL.NLR 266
[4] Okojie, C.G., *Esan Native and Custom with Ethnographic Studies of the Esan People*, (1st ed, Reprinted 1994 Ilupeju Press Ltd) at 118.
[5] Ibid.
[6] (2018) LPELR-43948 (CA)

> alleged purpose of continuity of the family line of the late husband, is to me, absurd; immoral and an unnatural/strange mode of procreation, especially where the motive of the strange arrangement, is to corner and possess the family property of the deceased! It is even more so, where the deceased had female children who by our modern law are entitled to their father's property…of course, the lower court had appropriately relied on the case of MERIBE VS EGWU (1976) LPELR 1861 SC, and Okonkwo vs Okagbue (1994) NWLR (Pt.308) 301 to reach its conclusion on the fact that woman to woman marriage is an aberration, repugnant to natural laws, and a revulsion to public policy.

From the current position of the law, any customary law that seek to encourage or give effect to the practice of woman-to-woman marriage will be declared repugnant to natural justice, equity, and good conscience by the courts. Although Okojie suggested that his practice or the application of this custom appears to have disappeared in some part of Esan land because of the "psychological harm any suggestion of bastardy could inflict on innocent children, and so these arrangements forced upon men afraid to die without heirs' laps without any formal annulment."[1] The legal implication of the current state of the law is that those who would have intended to ensure succession to their estate through this customary method can no longer take advantage of this custom. In any event, the law and custom also provide other alternative method of achieving the same result.

5.5.0 Adultery with the Onojie' Wife

Also, in the past, under Esan native law and customs any person that has been found guilty of committing adultery with the Onojie's (king) wife is liable to be sentence to death or face banishment from the kingdom. Depending on the terms of conviction, by the "*inotu"* In certain circumstances, the woman and the man could be sentence to death. This used to be the position in the past before constitutionalism became entrenched. Today this kind of punishments, i.e., death and banishment being punishments resulting from committing adultery with the wife of an Onojie, which could deprive a beneficiary from inheritance does long exist under Esan customary.

5.6.0. Banishment (*Anolen Ubi Kua)*

Closely related to the above is the punishment of banishment which is called "*Anolen Ubi Kua*" in Esan language. In Esan custom, banishment is further divided in two forms known as I*kpotoa* and *Isunfia*. Ultimately, the aim despite the form, is to ensure the victim is banish from the community.[2] Customarily, ones a person has been banish from the community, depending on his status, his right to inheritance is seriously affected if he is a beneficiary. Having been banished, he automatically losses his right to return to the community, and his right to inheritance is extinguished. However, the result would be different if it was the father that was banished. Banishment in any form raises serious legal questions. The constitutionality of banishment under Esan customary law shall be examine against the backdrop of the clear provisions of the 1999 Constitution (as amended), dealing with fundamental right. In *AG & Commissioner of Justice, Kebbi State v. Jokolo & Ors*[3] the Court of Appeal Per Moore Aseimo Abraham Adumein JCA held as follows:

> The Governor of Kebbi State has no right to act outside the clear and unambiguous provisions of the Constitution of the Federal Republic of Nigeria, 1999 (applicable to this case). Section 35 (1) of the said Constitution provides that every citizen of Nigeria is 'entitled to his personal liberty and no person shall be deprived of such liberty' except in the circumstances set out in Subsection (a) to (f) thereof. Section 40 of the same Constitution provides that 'every person is entitled to assemble freely and associate with other persons.' On the issue at hand, Section 41(1) of the Constitution is germane and it provide thus: "41-(1) Every citizen of Nigeria is entitled to move freely throughout Nigeria and to reside in any part thereof , and no citizen of Nigeria shall be expelled from Nigeria or refuse entry thereto or exist therefrom…the appellant has not been able to show that the banishment of the 1st respondent from Gwandu Emirate in Kebbi State and his deportation to Obi in Nasarawa State were in accordance with the clear provision of Section 41 of the Constitution of the Federal Republic of Nigeria, 1999. The banishment and the deportation from Kebbi State, on or about the 3rd of June, 2005 of the 1st respondent to Lafia in Nasarawa State, and later to Obi, also in Nasarawa State is most unconstitutional, and illegal. By the said banishment and deportation, the 1st respondent has been, unduly and wrongfully denied his Constitutional rights "to respect for dignity of his person"; to assemble freely and associate with other persons"- including the people of Gwandu Emirate of

[1] Okojie, C.G., *Esan Native and Custom with Ethnographic Studies of the Esan People*, (1st ed, Reprinted 1994 Ilupeju Press Ltd) at 119.
[2] Ibid at 103.
[3] (2013) LPELR- 22349 (CA)

> Kebbi State; and to reside in any part thereof" as respectively provided in the Constitution of the Federal Republic of Nigeria 1999.

From the above judicial authority, the position of the law is unambiguous. Therefore, in any Esan community that tend to enforce the customary punishment of banishment which is known as "*Anolen Ubi Kua*" in Esan language will be contriving the clear constitutional provisions. Once the matter is brought before a court of competent jurisdiction, that customary order of banishment will be set aside, and the constitutional rights of the citizen restored. Once his rights are restored, his rights to inheritance are also restored automatically as well.

5.7.0 The concept of Arebhoa or Omogbe

The concept of "*Arebhoa"* also known in other part of Esan land as "*Omogbe"* under Esan native law and customs was designed by the founding fathers to solve the problem associated with inability of any man to produce an heir for the sole purpose of succession and inheritance. Surprising, this custom is forbidden in Ugboha[1] Basically, there exist two types of *Arebhoa* system. Most time, the social status of the heirless man often determine the type to adopt. Under the first type, a man that has only female children would encourage his "*Ehale"*[2] to remain unmarried, i.e., not married traditionally to any man. Under Esan custom, she is seen as and treated a 'man' though a woman, she traditionally has all the rights and privileges of a first son in the family. She lives in her father's compound where she keeps a particular man as her paramour. This relationship would produce children who would in turn by regarded as the children of her father for the sole purpose of inheritance. Under this arrangement, the natural father of these children only reward is his uninhibited companionship at the girl's father compound.[3] One of the characteristics of this arrangement is that bride-price is excluded. The customary implication of the non-payment of bride-price is that the man cannot under custom claimed to have been married to the girl. This therefore rub him of his ability to claim paternity over these children customarily.

The second type of *Arebhoa* is not as straightforward as the first example. Under this arrangement, there is a significant modification. "It consisted of the acceptance of half pride-price, by the father from the suitor. First, an arrangement was made that the marriage was going to be part-*Arebhoa*, and on this understanding the father accepted the half dowry"[4] secondly, the woman after the payment of the half bride-price moved to live with her husband. Thirdly, unlike the first type of Arebhoa system, the children from the marriage are shared between the husband and his father-in-law. Whereas, unlike what is obtainable under the former system, the husband does not have any claim to the paternity of the children of the relationship. This order of sharing these children is so complex that it goes beyond the first generation.[5] The rational for the adoption of this system was fully examined by Okojie thus:

> The reasons are to be found in Esan anxiety over ensuring perpetuity in a family, an attempt to curb extinction of an *Ijogbe* or *Uelen*- the family unit. This could easily happen within two or three generations: Mr 'A' inherited the property and wives of his father; now 'A' dies leaving only a daughter who was already fully married, i.e., the bride price had been accepted. According to Esan custom, a woman is never allowed to come from her husband's place to inherit her father's property, so the male next-of-kin inherit the property and the door of 'A's father's house was shut for ever.[6]

Justifying the necessity for the *Arebhoa* or *Omogbe* custom, Okojie further posited that where this custom is practice, it is very rare for a man to die without an heir. He asked a rhetorical question thus:

> Now suppose 'A' had made his daughter an Arebhoa, all the children of this woman, male, or female, could have been his own children, so that on his death he could have sons to bury and inherit his property instead of its passing to another door. Still more important was the fact that an Arebhoa had the same rights as a son; she could 'marry' wives who would be having issues for her and she could perform the burial ceremonies on her father's death, exactly as if she had been a male.

Thus, apart from ensuring that an heirless man has someone to inherit his estate and perform his final burial ceremonies, the custom of *Arebhoa* or *Omogbe* further ensure that in kingdoms where the Onojie was empowered by the custom to inherit the property of any heirless man after death was practically eliminated, because once the *Arebhoa* has children, it will be difficult and customarily impossible to classify his estate as

[1] Ugboha is a kingdom in the present-day Esan North East Local Government Area of Edo State. See also Okojie, C.G., *Esan Native and Custom with Ethnographic Studies of the Esan People*, (1st ed, Reprinted 1994 Ilupeju Press Ltd) at 115
[2] Ehale is usually the first daughter of an Esan man.
[3] Okojie, C.G., *Esan Native and Custom with Ethnographic Studies of the Esan People*, (1st ed, Reprinted 1994 Ilupeju Press Ltd) at 115
[4] Ibid.
[5] For further reading see Itua P.O., "Succession Under Esan Customary Law in Nigeria: Grounds for Disinheriting an Heir from Inheriting His Deceased Father's Estate under Esan Customary Law" *International Journal of Innovative Research and Development* Vol.7, issue 8. Available online at http://w.w.w. ijird.com last accessed on 25th July 2021; Okojie, C.G., *Esan Native and Custom with Ethnographic Studies of the Esan People*, (1st ed, Reprinted 1994 Ilupeju Press Ltd) at 116.
[6] Ibid.

such. On the other hand, concerning succession to the throne as a traditional ruler (*Onojie*), Esan native law and custom prohibits succession to the throne by any person that is not a legitimate first son of the deceased king. Okojie, restating the custom further posted that "…this recognised first son must be legitimate and must not be an issue from a lover or an *Arebhoa*. His position is daily confirmed as the recognised son and heir, by the custom of his eating all the heart of the animals slaughter at the ancestral shrine in the palace."[1]

As convincing as the philosophy behind the adoption of this *Arebhoa* or *Omogbe* custom is, its operation under the current 1999 Constitution (as amended) is doubtful. The reasons being that the custom seems to encourage the denial of paternity rights of the biological father of the children born under the *Arebhoa* relationship. Under the first type of the *Arebhoa* system, the biological father of the children from the relationship is completely denied his paternity rights to his children on the basis that he did not pay the bride-price on their mother,[2] which is an essential ingredient to establish the existence of valid customary law marriage under Esan customary law. In *Obi & Obi v. Bosah & Ors* [3] the court held that "it is the law that there are two essentials of a valid customary marriage. These are (1) payment of bride-price and the handing over of the bride to the groom." Apart from the first essential ingredient, the second element identified in Obi's case above which is the handing over of the bride to the groom is also missing under the *Arebhoa* system. However, the same cannot be said for the second form of Arebhoa system. Under the second of *Arebhoa* system, the two elements are complete despite the payment of half bride-price. Irrespective of the method adopted, the custom still faces the constitutional compatibility test and the repugnancy test. Unfortunately, in line with the current judicial authorities on repugnancy, it is impossible for this custom of *Arebhoa* to pass the validity test because it sought do deny the natural father of the paternity of his children.[4]

5.8.0 Posthumous Parentage

Esan native law and custom make provision for and recognised the practice of posthumous parentage. In other words, a death man can father a child posthumous. It must be stressed that this custom is almost extinct in most kingdoms in Esan land because of civilisation. However, where it is still being practised, the sole aim is accessing the estate of the death person for the purposes of inheritance. In certain circumstances, the deceased sister could "marry" a woman for his dead brother, and the woman is given liberty to have sexual relationship with any man of her choice and the children from that relationship are regarded as the children of the dead man. This practise denies the natural father of these children their paternity. This custom is also common amongst the Ibo tribe in the South-Eastern part of Nigeria. In some part of Ibo land, their custom allows a woman to have posthumous children for her dead husband. In *Okeke v. Okeke*[5] the Court of Appeal was invited to consider whether a custom which allows a woman to have posthumous children for her deceased husband is repugnant to natural justice, equity, and good conscience. After a careful consideration of the records, the Court held as follows:

> Now, let us examine the vexed issue of whether or not the learned trial judge was right when he came to the decision to the effect that since the appellant was born in 1952, five years after the demise of Simon Okeke in 1947, the appellant was a stranger to the family of late Simon Okeke. That the appellant could not have been a posthumous son of the late Simon Okeke, hence the former cannot inherit anything from the late Simon Okeke. A similar situation with respect to Nnewi native law and custom pertaining to inheritance of a dead man's property by four children borne by his widow after his demise had arisen in the unreported appeal No. CA/E/115/2000 between Benedict Ojukwu v. Gregory Agupusi and Anor, decided by this court on the 22nd January, 2014…My Lord I.I. Agube, JCA in his lead judgement at pages 22-28 thereof held thus: 'In Nwachinemelu Okonkwo vs. Mrs Lucy Udegbunam Okagbue and 2 Ors (1994) 9 NWLR (Pt. 308) 301, the Supreme Court in an appeal that emanated from this Honourable Court in a case from the High Court of Anambra State, Onitsha judicial division where the custom of the Onitsha people that enable a woman to marry another woman 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 JSC concurred, reasoned thus- 'The institution of marriage is between two living persons. Okonkwo died 30 years before the purported marriage of

[1] Okojie, C.G., *Esan Native and Custom with Ethnographic Studies of the Esan People*, (1st ed, Reprinted 1994 Ilupeju Press Ltd) at 76.
[2] See *Edet v. Essien.* (1932) 11 N.L.R. 47.
[3] (2019) LPELR-47243(CA). See also *Agbeja v. Agbeja* (1985) 3NWLR (Pt. 11) page 11., *Okolonwamu v. Okolonwamu* (2014) LPELR-22631 (CA) at 44-45 (E-B)
[4] See *Edet v. Essien* (1932) 11N.L.R. 47 and *Mariyama v. Sadiku Ejo*, 1961 N.R.N.L.R. 81
[5] (2017) LPELR-42582(CA)

> the 3rd defendant to him. To claim further that the children 3rd defendant had by other man or men are the children of Okonkwo deceased is nothing but an encouragement to promiscuity. It cannot be contested that Okonkwo (deceased) could not be the natural father of these children. Yet 1st and 2nd defendants would want you to integrate them into the family. A custom that permits of such a situation gives licence to immorality and cannot be said to be in consonance with public policy and good conscience. I have no hesitation in finding that anything that offends against morality is contrary to public policy and repugnant to good conscience. It is in the interest of the children to let them know who their true father are (were) and not to allow them live for the rest of their lives under the myth that they are the children of a man who had died many decades before they were born' I hold the view that the observation of the learned justice of the Apex Court apply to this case where a man who died in 1987 could still father children long after his death…I am in complete agreement with the decision of the learned trial judge at page 175 of the record of appeal to the effect that since the appellant was born five years after the demise of Simon Okeke, he cannot lay claim to a right of inheritance to the estate of late Simon Okeke nor can the appellant contend successfully that he was denied his right of inheritance to the estate of the late Simon Okeke because of the circumstance of his birth. It is up to the appellant and his siblings to demand from their mother, who their real and biological fathers are because their inheritance lay only in the estate of their real and biological fathers and not to the estate of their make-belief father- Simon Okeke who predeceased their conception and birth.

From the extensive quotation above from the decision of the Court of Appeal Per Tom Shaibu Yakubu JCA in the case of *Okeke v. Okeke*, it is now settled law that any claim of paternity based on any form of posthumous conception gear towards achieving a desire goal, particularly as it concerns inheritance will be declared repugnant to natural justice equity and good conscience.

5.9.0 Conviction by Inotu

Esan customary law also make adequate arrangement, albeit customarily on how the estate of a person who has been convicted by the "*Inotu"* [1] for murder can be administer. Before the advent of the British colonial administration in Esan land, when the Onojie was an autocratic ruler, a murderer not only forfeit his/her right to live, but also forfeit the object with which the crime was committed, he too automatically become the property of the Onojie.[2] The murderer's right to live, is dependent on many factors such as the circumstances that led to commission of the crime in first instance. If the murder was not intentional, then the life of the murderer would be spared, and he become a slave to the Onojie. Also, the custom does not spare anyone convicted of attempted suicide.[3] If a man commit suicide, the customs also treat him as a murderer and his properties are automatically taken over by the Onojie thereby depriving his beneficiaries of their right to inherit their father's estate. It has been argued that the rationale behind this custom was to prevent and discourage suicide. However, under the current Constitution, and extant laws in the country, the power to investigate and prosecute any offender for any crime including murder reside in the Nigeria Police. Section 4(a) and (b) of the Police Act[4] is very explicit. Thus, all the powers that used to be exercised by the "*Inotu"* and the Onojie in the pre-colonial era Esan now reside with the Nigerian Police. The implication is that once an Esan person is found guilty of murder and sentences to a term of imprisonment or death as the case maybe, his properties are now longer liable to be inherited by the Onojie, but his beneficiaries. Same goes for anyone that commit suicide.

5.10.0 An heir causing his father's death to facilitate his inheritance

Having discuss the position of Esan native law and custom concerning person who commit murder, and those that either attempted to commit suicide, and those that succussed in committing suicide, the next issue for consideration is the position of Esan native law and custom on the right of inheritance of the eldest son who killed his father in other to facilitate his rights to inheritance. The position of the custom is very clear and unequivocal to the effect that such a child cannot benefit from his own crime. Once the crime is reported, and the accused is convicted and sentenced to prison he loses his right to inherit. Under Esan customary law, such a

[1] "Inotu". This consisted of all the strong able-bodied and courageous elements of the town or village. They are called upon when there was murder, or fatal accidents like a wall falling on people, the lintels of the wall being 'arrested' by Inotu and carried to the Onojie as the would do to a murderer. For a proper understanding of the various age groups in Esan land and their respective duties as determine by customs see Okojie, C.G., *Esan Native and Custom with Ethnographic Studies of the Esan People*, (1st ed, Reprinted 1994 Ilupeju Press Ltd) pages 50-51.
[2] Okojie, C.G., *Esan Native and Custom with Ethnographic Studies of the Esan People*, (1st ed, Reprinted 1994 Ilupeju Press Ltd) at 126.
[3] Ibid.
[4] Nigeria Police Force (Establishment) Act, 2020.

person is also seen as a murderer, and he loses his right of inheritance to his immediate younger brother in other of seniority.[1] The question now is, can a testator make a Will and disinherit his eldest surviving son of the property he is customarily entitled to under native law and custom, when such a child has attempted to kill him, or he is in fact convicted of the killing of his father. To effectively answer this question, it is appropriate to examine the provisions of the Wills Law of Bendel State. Surprisingly, the Wills Law of Bendel State[2] seem not to have envisage such a situation, thereby failing to make adequate provisions to address this kind of problems. The only solution is to have recourse to the Court under the maxim *Commodum Ex Injuria Sua Nemo Habere Debet.*[3] Section 3(1) of the aforesaid Wills Law, which provides as follows:

> Subject to any customary law relating thereto, it shall be lawful for every person to devise, bequeath or dispose of, by his will executed in a manner hereinafter required, all real and all personal estate which he shall be entitled to, either in Law or in equity, at the time of his death and which if not so devised, bequeathed and disposed of would devolve upon the heir at law of him, or if he became entitled b descent, of his ancestor, or upon his executor or administrator.

By the provisions of Section 3(1) of the Wills Law of Bendel State, a testator is Edo cannot disinherit his eldest surviving son of any property which customary law has made express provision for concerning such a child. Amongst the Bins and Esan tribe, the principal house which is regarded as the family seat called the *Igiogbe* in Bini language and *Ijiogbe* in Esan language, customarily belongs to the eldest surviving son of the testator and he the testator cannot make a will to disinherit his eldest surviving son of it. Thus, this section of the Wills law placed a restriction on the freedom of testamentary power of a testator in Edo State, regarding the nature of property he can bequeath in his will.[4] The court have in a plethora of case[5] held that the *Igiogbe* [6] which is one of such property is automatically inherited by the eldest surviving son of a Benin man and that the testator cannot make a will and bequeath the said *Igiogbe* to someone else. In *Idehen v Idehen*[7] Belgore JSC, stated as that:

> By Benin customary law, the Family Seat called the 'Igiogbe' automatically goes to the eldest son on the death of his father. Thus, the law for the first time in Nigeria takes into consideration the local situation in testamentary capacity. Hitherto, by virtue of the English Wills Act 1837 seemed every Nigerian could make a will on virtually all property he has and could avoid providing for his eldest male child or any child. See Adebusokan v Yinsua (1971) 1 A N.L.R. 225.

The same principle of law discussed above, is also applicable under Esan Native law and Custom. The right of the first son to inherit his deceased father's "*Ijiogbe"* came up for determination in *Mr Victor Ayemwenre Eigbe & Anor v. Mr Benjamin Izibiu Eigbe & Ors.*[8] The Testator Mr Peter Kadiri Eigbe was an Esan man from Irrua. The children of the Testator instituted a suit against their father's brother seeking among other reliefs, an order setting aside the device in respect of the Bungalow at No. 20 Esan Street, Equare, Irrua Esan Central Local Government Area Edo State as contained in clause 4 of the Testator's Will for being inconsistence with Esan Native Laws and custom on inheritance. The appellant the Testator's children contended the Will violates section 3(1) of the Will Law of Bendel state because the Testator did not devise his *Ijiogbe* to the first appellant in accordance with native law and custom. They contended that both the house No 43, Muritala Mohammed way Benin city and No 20 Esan Street, Equare, Irrua constitute their late father's Ijiogbe under Esan native law and custom. The Court of Appeal Per Ogunwumiju JCA, after evaluation of the evidence came to the following conclusion

> I have made a thorough consideration of this court's decision in *Egharevba v. Oruonghae* supra. The facts are almost on all fours with the facts of this case. The court held unanimously that a Bini man can have only one *Igiogbe* which must be located in Benin Kingdom. I think what was of most consideration in that case as in this case was the fact the testator gave the house in his hometown to his eldest son and being regarded as his ancestral home, was thus regarded as his *Igiogbe* as opposed to another house in another city where he had at once lived. In the case under review, I

[1] This is the position under Esan customary law as expressed by High Chief Umolu Abhulimen, the Otota of Irrua Kingdom in Edo Central Senatorial District of Edo State.
[2] Cap 172, Laws of Bendel State of Nigeria 1976 applicable to Edo State.
[3] This Latin maxim means a wrongdoer should not be enabled by the law to take any advantage from his actions.
[4] See Sagay. I E., "Customary law and freedom of testamentary power" (1995) *Journal of African Law* Vol. 39 (2). For further reading, see Sagay I.E., *Nigeria Law of Succession Principle, cases, statutes, and Commentaries* 1st Ed. 2006 Malthouse Press Limited.
[5] See *Idehen v Idehen* [1991] 6 NWLR (Pt.198) 382, *Agidigbi v. Agidigbi* [1992] 2 NWLR (Pt. 221) 98.
[6] Also known as Ijiogbe under Esan Customary is the principal house of the family seat where the deceased lived in his lifetime, but not necessary where he died. This house, under customary law belongs to the eldest surviving son of the deceased after performing the final burial rites.
[7] [1991] 6 NWLR (Pt.198) 382.
[8] (2013) LPELR – 20292 (CA).

> am convinced that the testator categorically identified his *Igiogbe* by clause 3 of his will. Having held that the Will was duly executed, the testator having stipulated the house he considered to be his Igiogbe, situate in his ancestral home, I have to arrive at the conclusion that the house in Irrua is the *Igiogbe* of the testator.

Therefore, like in Benin Kingdom, the eldest surviving male child of the deceased Esan man automatically inherit his late father *Ijiogbe* after the performance of the final burial ceremonies.

Some legal jurists have questioned this automatic right of inheritance by the eldest son of the deceased. The need to review the automatic application of the Bini customary law that devolve the *lgiogbe* on the eldest surviving son of the deceased was muted by Kolawole JCA., in the case of *Agidigbi v. Agidigbi*[1] according to the learned Justice, he had experienced great anxiety in the application by the courts of the opening phrase, "subject to customary law relating thereto" in section 3(1) of the Wills Law of Bendel State which take away the power of the testator to dispose of his property by Will the way he wishes after his death, without the court finding out why a particular son as the eldest surviving son of the deceased testator was disinherited. Similarly, Kabiri-Whyte JSC also had dropped a hint in *Idehen's* case where he suggested that if there is credible evidence why the eldest son was disinherited by his deceased father, the Supreme Court might be persuaded to reconsider the matter.[2] Kolawole JCA, in *Agidigbi v. Agidigbi* further provided circumstance in which the rule of automatic succession by the eldest son should be disregarded as follows:

> If the eldest son attempted to exterminate his father in order to succeed to the *igiogbe* and the testator decided to disinherit the eldest surviving son for that purpose, would section 3(1) of the Wills Law ensure for the benefit of the eldest surviving son in the face of such criminal act? If the eldest surviving son is an imbecile, an idiot, a mentally incompetent son who was to be looked after, what does the Court do? What is the position when the eldest surviving son has been imprisoned to a long term of imprisonment for crime against his father? Would such eldest son be able to undertake and discharge the responsibilities of the status of the head of the family? Is the testator not entitled to disinherit such a son? Is the testator not entitled to disinherit such a man? I am of the view that it is contrary to public policy that a man should be allowed to claim a benefit resulting from his own crime…it seems clear to me therefor that a son who is proved to be guilty of the murder or manslaughter of the testator ought not to take any benefit under his will notwithstanding the provisions of section 3(1) of the Wills Law[3]

It is hereby recommended, that in line with the sound judicial reasoning quoted above as enunciated by Kolawole JCA, and by the operation of the maxim "*Commodum Ex Injuria Sua Nemo Habere Debet"* which means that a wrongdoer should not be enabled by the law to take any advantage from his actions, there is need from the standpoint of public policy for the Court to interrogate the automatic application of the provision of section 3(1) of the Wills Law of Bendel State, applicable to Edo State as it relate to the inheritance of the *Igiogbe* and the *Ijiogbe* both in Benin Kingdom and in Esan land respectively.

6.0 Esan Native Law and Customs on Paternity

In other to be able to effectively discuss the various challenges confronting Esan custom concerning succession, it is imperative to discuss the laws on paternity under Esan native law and custom. These laws are as follows. The general rule of Esan native law and custom concerning paternity is that a man is recognised as the father of his children once he acknowledges their paternity. Before the advent of the British colonial administration in Esan land, there were little or no dispute at all over the paternity of a child. Paternity dispute was almost non-existence. A man first son is his first male child by his lawful wife, or if born before marriage, provided the child is acknowledged, he become legitimate. An *Omo-Osho* could only aspire to this unique position in the family when all the conditions concerning his recognition as such have been fulfilled by his father. One of such condition is that the man make a public testament of his first son by given him the hearts of all animals slaughtered in his compound.[4] The implication of this practise is to inform his *Egbele* who his heir is.

Secondly, if a woman was an "*Arebhoa",* then the children from that relationship will be regard as her father's children. The children grandfather will now be their natural father. The children biological father is displaced. However, if the woman has an intended husband, then the children belong to her intended husband who might not be their natural father.[5]

Thirdly, the law on paternity is different when it concerns children born by a woman who is separated from

[1] (1992) NWLR. (Pt.221) 98
[2] Sagay I.E., *Nigeria Law of Succession Principle, cases, statutes, and Commentaries* 1st Ed. 2006 Malthouse Press Limited. P.151.
[3] (1992) NWLR. (Pt.221) 125.
[4] Okojie, C.G., *Esan Native and Custom with Ethnographic Studies of the Esan People*, (1st ed, Reprinted 1994 Ilupeju Press Ltd) at 167
[5] Ibid at 165.

her husband. If the bride price has not been returned to the former husband, any child or children given birth to by the woman, belongs to her first husband irrespective of who impregnated her[1]. But if the dowry had been fully refunded by the woman's father, then the children will be regarded as her father's children. But if the woman refunded the bride-price herself, then the children belong the man that impregnated her if the man later married her. But if he does not marry her, then the practice was for the suitor who would later marry her to make arrangement to cover both the mother and her child who then become his child, in other words the woman's father had an extra-large bride-price. [2]

Fourthly, any child or children born from an adulterous union, belongs to the lawful husband of the woman. The rationale behind this customary claim of paternity is because the woman is still married to her husband, and the bride-price paid by the husband has not been returned. [3]

Fifthly, this law concern children born from "I*bhalen"* association. "*Ibhalen"* in Esan language simply mean "I am not aware." This cover person who are within the prohibited degree of consanguinity and affinity under customary law. Thus, where two members of the same kindred (*Egbele*) have sexual relationship and pregnancy resulted from such association, when the child is eventually given birth to, the child will be regard as the son of the prospective husband of the woman. But if the woman does not have any prospective husband, then the child will be regarded as her father's child, or better still for an extra-large dowry, to the man who will eventually marry the woman.[4]

In Esan land, it used to be the practice for a man to marry a wife for his son who is a minor. The wife too also must be a minor. This is what is refer to as "*Abiekhe*" under Esan native law and custom. However, once the girl attained maturity, which is usually the case, she starts to have children from other men while waiting for the boy to grow into a man. By the time the boy attain majority, they are then united in marriage. Under this kind of arrangement, all the children given birth to by the woman are regarded as the lawful children of the minor and they took precedence over the natural children the man would later have when he had overcome his minority.[5] It is important to re-instate the custom as it concern the stool. For any child to be recognised as an heir to the throne, such a child must be legitimate.

Finally, if a woman was known to be pregnant before the death of her husband, on delivery, such a child is regard as the child of the deceased husband, and the child is entitled to inherit from her father's estate. This circumstance explains the origin of names such as "*Umoera*"[6] in Esan language. In certain part of Esan land, the practise is that before the woman delivery the child, she is inherited so that the child would belong to the man that inherited the mother. Explaining the custom further Okojie said "sometimes if the pregnancy was very early, when the husband died, and by the third month it was still not known generally, the man who inherited her successfully claimed the child. It was immaterial if she gave birth to a child six months after the last husband's death" Okojie further opine that "this should cause no surprise because in certain parts of Esan 'B' a man could adopt his father's youngest son from another mother, as his own first son particularly if it is vital for him to perform certain ceremonies like "*OGBE*" before he had his own son." These are the various part ways to succession and inheritance under Esan customary law. Having discussed these various customary methods of seeking to achieve succession and inheritance, this research shall now focus on the challenges posed by the application of the principles of Fundamental Rights as enshrine under the 1999 Constitution (as amended).

7.0 Challenges of Fundamental Rights

The major challenge confronting the application of some Esan customs governing succession and inheritance is the applicability of these customs *vis-à-vi*s the application, enforcement, and protection of fundamental rights as guaranteed by the 1999 Constitution (as amended). In *Ransome-Kuti v. A.G. Federation*[7] the Supreme Court define fundamental rights as follows:

> What is the nature of a fundamental right? It is a right which stands above the ordinary laws of the land and which in fact is antecedent to the political society itself. It is the primary condition to a civilised existence and what has been done by our constitution, since independence, starting with the Independence Constitution, that is, the Nigeria (Constitution) Order in Council 1960 up to the present Constitution, that is , the Constitution of the Federal Republic of Nigeria, 1979…is to have these rights

[1] See *Edet v. Essien* (1932) 11N.L.R. 47 and *Mariyama v. Sadiku Ejo*, 1961 N.R.N.L.R. 81
[2] Okojie, C.G., *Esan Native and Custom with Ethnographic Studies of the Esan People*, (1st ed, Reprinted 1994 Ilupeju Press Ltd) at 166
[3] Ibid.
[4] Ibid.
[5] Ibid.
[6] Meaning "you have a father" in Esan language. According to Okojie, this name should not be confused with "*Omoera"* which means "he has a father" in Esan language. This name is usually given to child who father was seriously ill when the mother was pregnant, but he lives to see his child. For further reading, see Okojie, C.G., *Esan Native and Custom with Ethnographic Studies of the Esan People*, (1st ed, Reprinted 1994 Ilupeju Press Ltd) at 166.
[7] (1985) NWLR (Pt.6) 211. See also *Ibanga & Ors v. Akpan & Ors* (2018) LPELR-46167(CA).

> enshrined in Constitution so that the right could be "immutable" to the extent of the of the non-immutability" of the Constitution itself. It is not in all countries that the Fundamental Rights guaranteed to the citizen are written into the Constitution. For instance, in England, where there is not written constitution, it stands to reason that a written code of fundamental rights could not be expected. But not with standing, there are fundamental rights. They guarantee against inhuman treatment, as specified in section of the 1963 Constitution, would, for instance, appear to be the same as of the fundamental rights guaranteed in England, contained in the Magna Carter 1215-Article 19 and 40 which provide-"no freeman may be taken or imprisoned, or disused of his freehold or liabilities in free customs or be outlawed or exiled or in any way molested nor judged or condemned except by lawful judgment or in accordance with the law of the land and the crown or its ministers may not imprison or coerce the subject is an arbitrary manner. In the United States, the Eighth Amendment to the United Constitution provides- "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted"[1]

Also, in *Chief Francis Igwe & Ors. v. Mr. Goddy Ezeanochie & Ors*[2] the Court of Appeal define fundamental rights as follows:

> What is a fundamental right? It is a right derived from natural or fundamental, or Constitutional law. See; Black Law Dictionary, 8th Edition, page 692. In this country, the fundamental rights of the citizen though acquired naturally, are constitutionally guaranteed. Chapter IV of the 1999 Constitution of the Federal Republic of Nigeria clearly provides for the Fundamental Rights.

It is a trite principle of law that a court has a duty to protect the fundamental rights of citizens. In *Chief Francis Igwe & Ors. v. Mr. Goddy Ezeanochie & Ors*,[3] the Court of Appeal also held that "it is indeed the duty of the court to protect the constitutionally guaranteed rights of citizens."[4] Therefore, in any instance where it appears that the fundamental rights of any Nigerian that is constitutionally guaranteed is about to, or has been breached as a result of the application of rule of customary law is brought before court, the court has no choice than to protect the rights so guaranteed as against the application of the custom. In *Attorney- General & Commissioner of Justice, Kebbi State v. Jokolo.*[5] The Court of Appeal Per Akomolafe-Wilson. JCA held as follows:

> It is the duty of courts in this country to safeguard the fundamental rights of each individual. Human rights are usually described as inalienable and constitute birth right. The important of these rights in this country is obvious by the entrenchment of such rights in our constitution. In *F.R.N. v. Ifegwu* (2003) (supra) Uwaifo JSC at p.1844 stated thus- "If I may say so, as for the Court is concerned whenever an aspect of personal liberty is properly raised in any proceeding the focus on the constitutional question is intense and intensive, and a solution which projects the essence of the constitutional guarantee is preferred

Thus, the law is settled that once there is a breach of any the constitutional guaranteed fundamentals rights of citizens, the Court has a duty to protect and defends these rights. As have been observed, majority of the Esan native law and customs dealing with how a man acquires paternity in relation to some children appears not only to be repugnant to natural justice equity and good conscience, but totally offend the fundamental rights provisions of the 1999 Constitution (as amended). As discuss earlier, apart from circumstances where a man claims paternity of his children born by his wife, other mode of acquiring paternity appears to be repugnant to natural justice. For example, it is totally repugnant to natural justice to deny a man the paternity of this child merely because he has not returned the bride-price paid on the child's mother paid by her former husband to him. Same applies to children born under '*Arebhoa*' system. Concerning the throne, it is the custom that before a child can be recognised as an heir or crown prince, he must be "legitimate" in the eye of the custom. To be legitimate, his mother must be properly married in accordance with native law and custom, and he must not be the child of an '*Omo-Osho.'* It is immaterial whether his father acknowledged him before his *Egeble*. This custom, if applied strictly is discriminatory against the child. His refusal for consideration as a crown prince is purely based on the circumstances of his birth. This is a direct affront to the provision of section 42 (2) of the 1999 Constitution (as mended). In *Chiduluo & Ors v. Attansey & Anor.*[6] The Court of Appeal was invited to

[1] Per ESO JSC (Pp. 33-34, paras. A-C).
[2] (2009) LPELR-11885(CA). See also *Chief (Dr) O. Fajemirokun v. Commercial Bank Nig. Ltd. Anor.* (2009) 2 SCM 55 at 71.
[3] See footnote 801
[4] See *Federal Republic of Nigeria v. Ifegwu* (2003) 13 NWLR (Pt. 237) 382.
[5] (2013) LPELR-22349(CA)
[6] (2019) LPELR-48243 (CA)

consider whether any law or custom which deprives children born out of wedlock from sharing the benefit of the estate of their father conflicts with Section 42(2) of the Constitution of the Federal Republic of Nigeria ,1999 (as amended). The court Per Oludotun Adebola Adefope-Okojie held that:

> It is also settled that the children born out of wedlock can also no be deprived from sharing from the estate of their deceased father. Any law that seeks to do this is in violent conflict with Section 42(2) of the Constitution of the Federal Republic of Nigeria Supra. See Ukeje v. Ukeje Supra at page 410 Para D-E Per Ogunbiyi JSC.

The consequences for any custom being declared repugnant to natural justice equity and good consciences or in conflict with fundamental rights guaranteed by the Constitution of the Federal Republic of Nigeria 1999 (as amended) is a declaration of nullity. In *Nurses and Midwifery Council of Nigeria (NMCN) v. Adesina*[1] the Court of Appeal while considering the effect of a breach of the fundamental right provision in the 1999 Constitution (as amended) held that:

> The Courts guard fundamental rights provisions very jealously. Therefore, any law or action that perpetrated against the provision of the fundamental rights of any individual which is against the spirit of the Constitution would not be allowed to stand. The spirit of the Constitution must be upheld at all times, the fundamental rights of the citizen which are immutable and inalienable cannot be subsumed or swept aside by a side wind such as the Appellant's policies and procedures on change of name. Any breach of the provisions of the fundamental rights provision renders any act subsequent to the breach a nullity…[2]

In *Oyeniyi & Ors v. Bukoye* & Ors[3] the Court of Appeal held that "A customary law, which is repugnant to Natural justice equity and good conscience is not recognizable as law and cannot be applied. For a customary law to be recognized and applied in our Courts, it must pass the repugnancy test."[4] The conditions that must be fulfilled for a custom to be valid and enforceable by the Courts were considered in *Ogbuli* & Anor v. *Ogbuli* & Anor.[5] The Court of Appeal Per Amiru Sansui JCA held as follows:

> In Nigeria today, for a custom to be valid and therefore be enforceable by the Courts as a customary law, the custom must satisfy three main test which are: 1. The repugnancy test which is made up of Natural Justice Equity and Good Conscience. 2 The incompatibility test and 3. The public policy test. The above three (3) test presupposes that for custom under consideration to be valid in Nigeria; it (a) Must not be contrary to natural justice (b) Must not be contrary to equity (c) Must not be contrary to good conscience (d) Must not be incompatible with any law for the time being in force and it (e) Must not be contrary to public policy in the case of Mojekwu v. Mojekwu (1997) 7 NWLR (Pt.512) page 283, NIKI TOBI JCA (as he then was) frowned at the custom that discriminate and degrade our people thus: "We need not travel all the way to Beijing to know that some of our customs are not consistent with our civilized world in which we all live today, including the Appellants. In my humble view, it is the monopoly of God to determine the sex of a baby and not the parents. Although the scientific world disagrees with this divine truth, I believe that God the creator of human beings is also the final authority of who should be made male or female. Accordingly, for a custom or customary law to discriminate against a particular sex is, to say the least an affront on the Almighty God Himself. Let nobody do such a thing. On my part, I have no difficulty in holding that the custom is repugnant to natural justice, equity, and good conscience.

Furthermore, the provisions of the 1999 Constitution (as amended) are very clear regarding the supreme nature of the Constitution vis-à-vis any other law or custom in Nigeria. In *Ogbuli* & Anor v. *Ogbuli* & Anor[6] the court further held that:

> Section 1 of the Constitution provides that the Constitution is Supreme, and its provisions shall have binding force on all authorities and persons throughout this Nation. Thus, any customary practice, Native Law and Custom which is contrary to or conflict with the provisions of the Constitution must give way to the supremacy of the Constitution. It is no longer acceptable to exclude female children from benefitting

[1] (2016) LPELR-40610 (CA)
[2] Per Ugochukwu Anthony Ogakwu, JCA (Pp 27-27 Paras A-E). See also *Onyemeh v. Egbuchulam* (1996) LPELR (2739) 1 at 21, *Okafor v. A-G Anambra* (1991) LPELR (2414) 1 at 28 and *Tolani v. Kwara State Judicial Service Commission* (2009) LPELR (8375) 1 at 52-53.
[3] (2013) LPELR-22087(CA)
[4] Per Hussein Mukhtar, JCA (Pp 46-46 Paras E-F)
[5] (2015) LPELR-24488(CA)
[6] See foot note 840 above.

from the estate of their late parents solely on the basis of their gender. I am in full agreement with my learned brother that this appeal has merit and should be allowed.

In the light of the above, it is self-evident that any Esan Native Law and Custom that fails the repugnancy test or in conflicts with the fundamental rights of citizens as guaranteed by the Constitution of the Federal Republic of Nigeria 1999 (as amended) will be declared a nullity. The way forward is for the practitioners and the custodian of Esan Native Law and Customs i.e., the traditional institutions to adapt and modify the custom to face of current challenges pose by the enforcement of fundamental rights even though, the same Constitution in Section 21 provides that "the State shall: (a) protect, preserve and promote the culture which enhance human dignity and are consistent with the fundamental objective as provided in this Chapter."[1] Thus the Constitution is in total support of any preservation of cultural rights so long they do not offend against fundamental rights provisions, and they are not repugnant to natural justice equity and good conscience.

8.0 Recommendations

8.1.0 The role of Traditional Rulers

In *Ogolo & Ors v. Ogolo & Ors*[2] the Supreme Court define the meaning and nature of customary law as follows: "Customary law is the organic or living law of indigenous people of Nigeria regulating their lives and transaction. It is a mirror of the culture of the people." Thus, there is no gainsaying that the traditional rulers and other traditional institution who are the custodian of Esan culture owe it as a duty to ensure that some of their customs that are discriminatory to female children and widows are modified in other to being them into conformity with fundamental rights provisions of the 1999 Constitution (as amended). According to Izibili "The word traditional rulers are commonly heard in our day to day language; yet its conceptual configuration may not be seen by all in the same way."[3] But "contextually however, it refers to the indigenous arrangement deliberately made either by nature or nurture; this is the situation whereby leaders or person by virtue of heredity or people with proven track record are nominated, appointed when they are found credible, and eventually installed in line with the permissible provisions of their native laws and customs.[4] Thus, "it is an institution that is saddled with enormous responsibilities amongst others, these: to preserve the custom and traditions, cultural heritage of the people and to manage, settle and resolve dispute or conflict that may arise within and between members of the community or society."[5] It is in the discharge of these duties that they are enjoined to change the narrative concern inheritance rights of female children and widows in their respective kingdoms in Esan land.

8.2.0 Adoption of modified Bini Customary Law rules

Secondly, since the rule of primogeniture mainly govern the distribution of the estate of a deceased Esan man, it is suggested for equity's sake amongst the deceased children who are his beneficiaries, the modified position now prescribed for the sharing a deceased Bini man property as adopted few years ago by the Bini Traditional Council is hereby recommended. The position is reproduced below as follows.

a) The Igiogbe[6] i.e., the house in which the deceased lived and died and usually, though not where he was buried automatically devolves on the eldest son.
b) Custom enjoins the eldest son to accommodate all his brothers and sisters (subject to good behaviour) until they are able to build their own house and move out or (if women) until they get married.
c) Where the deceased has other landed properties, these are distributed to other children according to "*urho*" in other of seniority, i.e., according to the number of wives, the male child taken precedence in each "*urho*". The eldest son is still entitled to a share of the remaining properties.
d) All the other properties are similarly distributed among all the children starting with the eldest son.
e) It may happen that the most senior of the deceased person's children is a female. In such a case, while custom places all responsibility on the eldest son, and give him all the precedence, it is permissible, and expected, by mutual agreement between the family eldest and the children, for something reasonable to be given to the woman being the most senior of all the children.[7]

[1] Constitution of the Federal Republic of Nigeria 1999 (as amended).
[2] (2003) LPELR-2309(SC)
[3] Izibili M.A "The role of Traditional Rulers in Promoting Peace, Development and Ensuring Security in Esan Land." Being a text of lecture delivered at the instance of His Royal Highness, Ogirrua of Irrua and the Okaijesan of Esanland on his 50th coronation anniversary to the throne of his fathers on 22nd June 2021. Page 8
[4] Abanyan N.L. and Otikwe. S "The role of traditional rulers in community development in Nigeria: A theoretical Discourse", *in International Journal of Social Sciences.* 13(2), 2019.pp177-178.
[5] Izibili M.A "The role of Traditional Rulers in Promoting Peace, Development and Ensuring Security in Esan Land." Being a text of lecture delivered at the instance of His Royal Highness, Ogirrua of Irrua and the Okaijesan of Esanland on his 50th coronation anniversary to the throne of his fathers on 22nd June 2021. Page 8
[6] Which in Esan language is called *Ijiogbe*.
[7] For further reading see Itua P.O., "Disinheritance of Women under Esan Customary law in Nigeria: The Need for Paradigm Shift Towards Gender Equality" *Advances in Social Sciences Research Journal,* 8(2), 668-723. Available online at

Once these positions are adopted, it will elimination any form of discrimination against the female children of the deceased, and the other male children of the deceased will equally be accommodated in the sharing of the properties of the deceased.

8.3.0 Legislative initiative

Also, it is recommended that the Edo State of Assembly should as a matter of urgency enact a law in the state that will be gender friendly, that would guarantee equal rights for both male and female children in matters involving inheritance and succession. The proposed law should also address the rights of widows to inheritance in the state. Since there are provisions in the 1999 Constitution as (amended) dealing with equality based on sex or gender, for example section 1(1), 16(1)(a) and 17(1)(2)(a) of the constitution. With the existence of these provision, one would have expected nationwide application of this sections. However, the problem with these sections is that the provisions are not justiciable *per se*. Despite these inadequacies, the Edo State House Assembly can enact a law that clearly prohibit any customs that discriminate on the bases of gender, the efficacy of the proposed law will be strengthen by the provision of section 42(1)(a)(b) 2 and section 43 of the 1999 constitution that deals with right to freedom from discrimination. The need for this law cannot be over emphasised since the provision of the Administration of Estate Law of Bendel State[1] does not apply to the administration of estate of any person under the authority of any customary court.[2]

8.4.0 The role of the Civil Societies (The NGOs)

The role of the civil societies (NGOs) in the sensitisation, mobilisation, and creation of awareness on issues concerning the populace have been commended.[3] However, it is suggested that they should as a matter of urgency intensified their efforts to ensure that Bills for domestication of treaties that will enhance women's' position in the society. For example, the Convention on Elimination of All forms of Discrimination Against Women. CEDAW. Also, these NGO are encouraged to provide legal assistance to women especially the indigent one and maintain records (data) for the purposes of referencing especially segregated data base. They should be encouraged to sponsor publication of judgments both positive and negative for assessment and evaluation.[4] This kind of action will spur positive obedience to the Rule of law.

8.5.0 Paternity claim litigation

It is recommended that putative fathers should be encouraged to seek legal redress in court through paternity claims litigations in situation where biological fathers are denied or deprived of their paternity rights to their children, because of the operation of Esan native law and customs on paternity. They such approach a court of competent jurisdiction for the enforcement of their fundamental rights. Based on the current position of the law, the court will definitely enforce the fundamental rights of the biological father without hesitating to declare the custom as contrary to public policy, repugnant to natural justice, equity, and good conscience.

9.0. Conclusion

This research discussed the various succession rights under Esan customary law, and the various problems associated with its applicability *vis-à-vis* the challenges posed by the enforcement of fundamental rights as guarantee by the 1999 Constitution (as amended). It is hope that once these recommendations are implemented, those aspect of Esan customary law governing succession and inheritance will be modified as it was done by his Royal Majesty the Oba of Benin, Omo N'Oba Erediauwa so that they shall continue to be the organic or living laws of Esan people of Edo Central Senatorial District, which said customary law have continue to regulating their lives and transactions for centuries because it has always been a mirror of acceptable usage for Esan people.

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