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Okoli, Chukwuma; Yekini, Abubakri; Oamen, Philip

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"*IGIOGBE* CUSTOM AS A MANDATORY NORM IN CONFLICT OF LAWS: AN EXPLORATION OF NIGERIAN APPELLATE COURTS' DECISIONS"

CHUKWUMA SAMUEL ADESINA OKOLI* ABUBAKRI YEKINI PHILIP OAMEN*****

Abstract

Under the Igiogbe custom of the Bini Kingdom of Edo State Nigeria, the eldest surviving son, exclusively inherits the ancestral home of his deceased father. This custom is a mandatory norm in conflict of laws. Litigation on the custom has been described as a matter of life and death. There is a widely shared view among academic writers, practitioners, and judges that this customary rule is absolute. Contrary to this popular view, this work argues that the Igiogbe rule can be displaced by statute and other customary or religious laws. To substantiate this position, we examine all the reported appellate court decisions on the Igiogbe rule and other connected principles. We find that it is often taken for granted that every Bini man is subject to customary law, thereby leading to the overriding application of the Igiogbe rule. Recent developments in case law suggest otherwise. We find that there is a conflict of personal law question that is often ignored in most litigation concerning the Igiogbe. Careful consideration of this question can potentially lead to the application of other systems of succession law (statutory, religious, and other customary laws) other than the Igiogbe rule. Besides, these conflict of laws techniques and constitutional human rights norms can be used to strike the appropriate balance between competing interests and reasonable legitimate expectations of the deceased and their heirs.

A. INTRODUCTION

One of the lasting features of post-colonial Nigeria and Africa has been legal pluralism – the co-existence of customary law and religious law alongside other laws, such as other customary laws, statutes, and constitutional provisions within a given geographical area.[1] Customary law can potentially govern a wide range of civil actions including land, contract, and tort matters. They are however prominent in family matters such as marriage, divorce, and succession. A typical transaction mentioned above can be governed by customary laws, religious laws and statutory laws with each law producing a conflicting result. The potential clash between customary law and other laws is the domain of conflict of laws – specifically labelled as "internal conflict of laws".[2]

*Assistant Professor in Commercial Conflict of Laws, University of Birmingham, c.okoli@bham.ac.uk.
**Lecturer in Conflict of Laws, University of Manchester, abubakri.yekini@manchester.ac.uk.
***Lecturer in International Human Rights Law, Birmingham City University, philip.oamen@bcu.ac.uk.

[1]IO Agbede, *Legal Pluralism* (Shaneson CI, Ibadan, 1991); RN Nwabueze, *The History and Sources of Conflict of Laws in Nigeria*: *With Comparisons to Canada* (VDM Verlag, Saarbrücken, 2009).
[2]AN Allot, *New Essays in African Law* (Butterworth-Heineman, London, 1970) 115.

Nigeria operates a Federal Constitution with 36 legal territories -federating states- and the Federal Capital Territory. These legal territories are "countries" in the eyes of conflict of laws.[3] Prior to the existence of what is now called "Nigeria", there was a legal territory within Nigeria called the Benin Kingdom.[4] The Benin Kingdom, composed of the Bini people, had a very long history of trading with other pre-existing legal territories in Nigeria, Africa, and Europe.[5] The Bini people have customs from time immemorial, and their *Oba* -monarch- who is highly revered, is the custodian of their native law and custom. The Benin Kingdom now falls within Edo State of Nigeria.[6]

The Bini people have a custom called *Igiogbe*. The *Igiogbe* custom has been singled out for special attention in this article for three main reasons. First, litigation on *Igiogbe* is a matter of life and death for the Bini people.[7] Second, it is the most litigated customary law of succession issue in the Nigerian Court of Appeal and Supreme Court.[8] There have been a total of 34 reported cases of the appellate courts[9] - 14 from the Supreme Court,[10] and 20 from the Court of Appeal[11] as of 1 September 2022. Third, the *Igiogbe* has been judicially noticed several

[3]In *Barzasi v Visinoni Ltd* (1973) NCLR 373, 377, Wheeler J observed that "Now Nigeria having a federal form of constitution with separate High Courts for each state, it would seem to me on principle that this question of jurisdiction of the various State High Courts, in the absence of legislation on the point, is governed by the rules of the common law on the position in private international law". See also *Swissair v African Continental Bank Limited* (1971) NCLR 213, 225 (Lewis JSC).

[4] The Benin Kingdom is not the same as the Republic of Benin, a neighbouring sovereign State that shares a border with the Federal Republic of Nigeria.

[5]See also AO Obilade, *The Nigerian Legal System* (Sweet & Maxwell, London, 1979) 18.

[6]It was formerly Bendel State.

[7]SI Eghobamien, "Idehen v Idehen: Why the Supreme Court Must Review the Decision" The Guardian (Nigeria), Tuesday, July 14, and Tuesday July 211998 respectively, cited in O Aigbovo, "The Principal House in Benin Customary Law" (2005) 8 *University of Benin Law Journal* 6.

[8]The Nigerian Court of Appeal and Supreme Court are hereafter referred to as "Nigerian appellate courts."

[9]These decisions are important because they are binding on lower courts in Nigeria. Many cases from lower courts do not go on appeal due to delay and expense. Lower courts' decisions on the *Igiogbe* rule are also usually unreported. The implication of this is that there are numerous judicial decisions on the *Igiogbe* rule.

[10]*In Re*: *Edogiawerie* (2022) 3 NWLR (Pt 1818) 555; *Imaruagheru v Aiguokunrueghian* (2021) 18 NWLR (Pt. 1808) 307; *Omokaro v Omokaro* (2021) 17 NWLR (Pt. 1806) 449; *Uwaifo v Uwaifo* (2013) 10 NWLR (Pt. 1361) 185; *Ibrahim v Osunde* (2009) LPELR-1411 (SC); *Ovenseri v Osagiede* (2008) 9 NWLR (Pt. 1091) 204; *Abudu v Egakun* (2003) 14 NWLR (Pt 840) 311; *Imade v Otabor* (1998) 4 NWLR (Pt. 554) 20; *Agidigbi v Agidigbi* (1996) 6 NWLR (Pt. 454) 300; *Lawal-Osula v Lawal-Osula (*1995) 9 NWLR (Pt. 419) 259; *Idehen v Idehen* (1991) 6 NWLR (Pt. 198) 382; *Olowu v Olowu* (1985) 3 NWLR (Pt.13) 372; *Arase v Arase* (1981) 5 SC 33 Vol 12 NSCC 101; *Ogiamen v Ogiamen* (1967) NMLR 245.

[11]*Lovedale v Iregbeyen* (2021) LPELR-56271 (CA); *Amos v Irabor* & *Others* (2021) LPELR-54871 (CA); *Ogiemwanre & Others v Abiodun* (2020) LPELR-52242 (CA); *Asaolu & Others v Omoregie* & *Another* (2020) LPELR-50125 (CA); *Obasohan v Obasohan* (2019) LPELR-47187 (CA); *Ezekiel v Ezekiel* (2019) LPELR-46425; *Ogbebo v Ogbebo* & *Others* (2017) LPELR-45678 (CA); *Uwadiae v Uwadiae* (2017) LPELR-43408 (CA); *Isu v Abasa & Others* (2017) LPELR-42014(CA); *Ekhator v Ekhator* & *Others* (2014) LPELR-24490 (CA); *Igori v Igori* (2013) LPELR-21027 (CA); *Eigbe v Eigbe* (2013) LPELR-20292 (CA); *Osemwingie v Osemwingie* (2012) LPELR-19790 (CA); *Irabor v Ogieva* & *Others* (2012) LPELR-9838 (CA); *Osemwenkha v Osemwenkha* (2012) LPELR-9580 (CA); *Saidi v Ibude* (2010) LPELR-4521(CA) (appeal allowed in *Ibude v Saidi* (2021) 10 NWLR (Pt 1785) 567 – *Igiogbe* not discussed at the Supreme Court); *Giwa-Osagie v Giwa-Osagie* (2009) LPELR-4533 (CA); *Ogbahon v Registered Trustees CCC* (2002) 1 NWLR (Pt 749) 675; *Egbarevba v Oruonghae* (2001) LPELR-10341 (CA); *Igbinoba v Igbinoba* (1995) 1 NWLR (Pt 317) 375.

times in the appellate courts,[12] which makes the custom a very strong exception to the rule that customary law as foreign law must be proved as a matter of fact in Nigerian conflict of laws.[13]

Previous scholarly work on the subject largely restates judicial pronouncements which affirm the bindingness and superiority of *Igiogbe* custom while a few other scholars have questioned the validity of excluding women from inheritance under the custom.[14] Besides, the existing literature has addressed a very limited number of these appellate decisions and thus certain emerging issues from recent developments in case law are yet to be critically explored.

Contrary to the prevalent view that the *Igiogbe* custom is a mandatory norm and applies without question, the central claim of this paper is that the *Igiogbe* is not and ought not to be an absolute mandatory norm. This paper significantly contributes to the body of literature by demonstrating how the *Igiogbe* rule may be displaced through conflict of laws and constitutional techniques. The paper analyses all the appellate court decisions on the *Igiogbe* custom and closely connected issues. It critically explores recent developments in case law and how these developments can reshape the understanding, application, and enforcement of the *Igiogbe* custom. The significance of this work lies in the fact that it provides a framework -escape devices- through which the courts can strike an appropriate balance between the competing interests and reasonable legitimate expectations of both the deceased and his heirs. The repugnancy doctrine (that is a custom declared contrary to natural justice, equity and good conscience) is not engaged here because it does not assume central importance as a constitutional human rights and conflict of laws issue. It is also excluded due to space restrictions.

This article is divided into five main sections, including the introduction and conclusion. Section II discusses the meaning and scope of the *Igiogbe*. Section III considers the issue of the *Igiogbe* as a mandatory norm in Nigerian conflict of laws. Section IV discusses the impact of other systems of law such as customary, religious, statutory and constitutional human rights laws on the *Igiogbe.* Section V concludes the paper.

B. MEANING AND SCOPE OF THE *IGIOGBE*

It is important to explain the meaning of *Igiogbe* and the scope of its principles, as stated by Nigerian appellate courts, before critically analysing the custom as a mandatory norm. *Igiogbe*

[12]*Uwaifo* (n 10); *Ibrahim* (n 10); *Agidigbi* (n 10); *Idehen* (n 10); *Ogiemwanre* (n 11); *Isu* (n 11); *Ekhator* (n 11); *Ogbahon* (n 11); *Egbarevba* (n 11). However, these cases also establish that any aspect of the *Igiogbe* that has not been judicially noticed still requires proof.

[13]Section 18(1) of the Evidence Act, LFN 2011.

[14]EB Omoregie, "Validity of the Benin Custom of Male Progeniture for Succession to Property" (2014) 20 *East African Journal of Peace and Human* Rights 265; PO Itua, "Succession Under Benin Customary Law in Nigeria: Igiogbe Matters Arising" (2011) 3 *Journal of Law and Conflict Resolution* 117–129; Aigbovo (n 7); Eghobamien (n 7); AI Fenemigho and DO Oriakhogba, "Statutory Limitations to Testamentary Freedom in Nigeria: A Comparative Appraisal" (2013) 4 *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 69-83; IE Sagay, "Customary Law and Freedom of Testamentary Power" (1995) 39 *Journal of African Law* 173; IE Sagay, "Intestate Succession in the Sates of the Former Western Region of Nigeria" (1998) 42 *Journal of African Law* 109; BO Nwabueze, "Power of testamentary Disposition in Bendel and the Western States of Nigeria" (1992) *The Journal of Nigerian Law* 121. See also JN Ezeilo, "Rethinking Women and Customary Inheritance in Nigeria" (2021) 47 *Commonwealth Law Bulletin* 706.

is a Bini word which literally means "ancestral home",[15] "family home",[16] "principal house,"[17] "main house,"[18] "main place of abode,"[19] "family seat,"[20] or "main seat"[21] where the deceased *Bini* man lived, died and was usually (or possibly) buried. It connotes "a setting where the head of a family lives in the family land built by his ancestors."[22] However, what makes the *Igiogbe* is "not necessarily the history behind the house but the fact that the particular deceased man lived and died in that house."[23]

It has been held that the *Igiogbe* "cannot be a piece of vacant land whether adjacent or adjoining",[24] "unoccupied building,"[25] nor "a general area occupied by several inhabitants."[26] Simply put, it must be "an identifiable spot or space specifically occupied and lived on by a deceased…"[27] The *Igiogbe* is like the Itsekiri,[28] Urhobo,[29] Isoko,[30] Esan[31] and Igbo *Isobi*[32] customs in Nigeria, though they should not be confused as the same.

The *Igiogbe* operates on "certain preconditions"[33] because it is "strictly construed."[34] We have deduced ten principles that apply to the *Igiogbe* from the totality of the appellate courts' decisions. These principles will be stated succinctly due to space restrictions in this article.

First, the *Igiogbe* is governed by Bini customary law and not the statute(s) such as the Wills Act or Wills Law.[35]

Second, the *Igiogbe* can only be devised exclusively to the eldest surviving son of the deceased person.[36] It cannot be devised to the female or any other sibling of the eldest surviving son,[37] nor can it be devised to the eldest son (or any of his children) that predeceases the deceased person.[38]

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[15]*Imaruagheru* (n 10) 324; *Omokaro* (n 10) 472; *Uwaifo* (n 10); *Imade* (n 10) 31 and 33; *Amos* (n 11); *Ogiemwanre* (n 11); *Asaolu* (n 11); *Eigbe* (n 11); *Giwa-Osagie* (n 11). See also *Ozomaro* & *Others v Ozomaro & Others (*2014) LPELR-22663 (CA).
[16]*Eigbe* (*Ibid*).
[17]*Imaruagheru* (n 10) 324; *Omokaro* (n 10) 469-472; *Uwaifo* (n 10); *Imade* (n 10) 31 and 33 *Idehen* (n 10) 421; *Amos* (n 11); *Ogiemwanre* (n 11); *Asaolu* (n 11); *Uwadiae* (n 11); *Irabor* (n 11); *Giwa-Osagie* (n 11).
[18]*Omokaro* (*ibid*) 467-468; *Asaolu* (*ibid); Giwa-Osagie* (*Ibid*); *Irabor* (*ibid*).
[19]*Ekhator* (n 11).
[20]*In Re*: *Edogiawerie* (n 10) 572; *Idehen* (n 10); *Giwa-Osagie* (*ibid*).
[21]*Abudu* (n 10) *Obasohan* (n 11); *Igori* (n 11); *Osemwenkha* (n 11).
[22]*Giwa-Osagie* (n 11).
[23]*Isu* (n 11).
[24]*Imaruagheru* (n 10) 324 & 334; *Uwaifo* (n 10)19, 25; *Imade* (n 10) 31 & 33-34; *Agidigbi* (n 10); *Amos* (n 11); *Ogiemwanre* (n 11); *Giwa-Osagie* (n 11). *Cf. Omokaro* (n 10).
[25]*Giwa-Osagie* (*ibid*).
[26]*Irabor* (n 11).
[27]*Ibid.*
[28]*Oke v Oke* (1974) 1 All NLR 443.
[29]*Odjegba v Odjegba* (2004) 2 FWLR (Pt. 198) 952 (CA).
[30]*Ozomaro* (n 15).
[31]*Usiobaifo v Usiobaifo* (2005) 3 NWLR (Pt. 913) 665.
[32]*Onyenawuli v Onyenawuli* & *Another* (2017) LPELR-42661(CA).
[33]*Ibrahim* (n 10).
[34]*Imaruagheru* (n 10) 334.
[35]*Ibid* 336.
[36]*Uwaifo* (n 10); *Lawal-Osula* (n 10); *Agidigbi* (n 10); *Idehen* (n 10); *Amos* (n 11); *Ezekiel* (n 11); *Uwadiae* (n 11); *Osemwenkha* (n 11); *Ogbahon* (n 11); *Egbarevba* (n 11).
[37]*Ezekiel* (*ibid*).
[38]*Idehen* (n 10).

Third, the eldest surviving son of the deceased inherits the *Igiogbe* after a second burial ceremony during which the family distributes the property of the deceased. Thus, in one case the Supreme Court regarded a claim based on the *Igiogbe* as incompetent where the deceased eldest child had not performed the second burial ceremony.[39]

Fourth, there can be no valid gift of the *Igiogbe* to a person (other than the eldest surviving son of the deceased) during the lifetime of the owner of the property, and succession to *Igiogbe* can only be by inheritance not by gift.[40]

Fifth, although, the *Igiogbe* is governed by Bini customary law, it can be devised by will, if the testator so wishes, and provided that the beneficiary is the eldest surviving son of the testator at the time of the latter's death.[41] So in a case where the testator devised the *Igiogbe* by a will to the eldest surviving son, the Supreme Court regarded the disposition as valid.[42]

Sixth, a Bini man cannot have more than one *Igiogbe*.[43] The Supreme Court has particularly held that the concept of multiple or more than one *Igiogbe* is unknown to Bini customary law.[44] This principle has been endorsed in several decisions of the appellate courts.[45] Thus where a Bini man has other properties that he rents out for commercial purposes, other than the main house he resides in Benin City, the house rented for commercial purposes cannot be the *Igiogbe*.[46] Besides, the *Igiogbe* must be inseparable, so that where there is the main house on the land and a kitchen and toilet in the other part of the land, they all constitute one *Igiogbe*.[47]

However, it should be noted that the principle that there can be only one *Igiogbe* is very fact-dependent because what constitutes "one *Igiogbe*" is not entirely clear. In *Idehen,* the Nigerian Supreme Court recognised two separate houses where the deceased lived and died and recognised them as constituting the *Igiogbe*.[48] This decision was heavily criticised by some scholars for not properly reflecting the Bini custom and creating uncertainty.[49] In response, the Oba of Benin made it clear in writing that there cannot be more than one *Igiogbe.* So, if the deceased person lived and died in two houses, the eldest surviving son will have to pick one of those houses as the *Igiogbe* for inheritance.[50]

The decision in *Idehen* can however be rationalised on the basis that it was not an issue in the case before the Supreme Court whether the eldest surviving son of the deceased can have more than one *Igiogbe*. In addition, it was common ground between the parties in that case that the deceased lived and died in two houses. In other words, they consented to the existence of two

[39]*Ovenseri* (n 10).
[40]*Imade* (n 10); *Idehen* (n 10); *Ezekiel* (n 11); *Giwa-Osagie* (n 11).
[41]*Imaruagheru* (n 10) 382; *Egbarevba* (n 11).
[42]*Imaruagheru* (*ibid*).
[43]*Omokaro* (n 10); *Uwaifo* (n 10); *Agidigbi* (n 10); *Lovedale* (n 11); *Asaolu* (n 11); *Igori* (n 11); *Eigbe* (n 11); *Egbarevba (*n 11). *Cf. Idehen* (n 10); *Ezekiel* (n 11); *Giwa-Osagie* (n 11).
[44]*Agidigbi* (*ibid*).
[45]See footnote 43.
[46]*Giwa-Osagie* (n 11) – see the dissenting judgment.
[47]*Omokaro* (n 10).
[48](n 10).
[49]Eghobamien (n 7); Aigbovo (n 7); Itua (n 14).
[50]*A Handbook on some Benin Customs and Usages, Benin Traditional Council*, 1996, 14 cited in Aigbovo (n 7).

separate houses constituting the *Igiogbe*. There was nothing the Supreme Court could have done than grant their wishes.[51]

Seventh, the *Igiogbe* cannot be situated outside Benin.[52] This means that if the deceased person principally lived and died in a house outside Benin, that house cannot constitute *Igiogbe* even if it is situated in Nigeria.[53] This arguably is in consonance with the reasoning that the *Igiogbe* constitutes the ancestral home of a Bini man, and such home cannot be situated outside their hometown.

Eighth, inheriting the *Igiogbe* does not stop the eldest surviving son of the deceased from inheriting other properties of the deceased person by will or laws of intestacy.[54]

Ninth, other properties of the deceased person that are not the *Igiogbe* can be disposed of by will or rules of intestacy to persons other than the eldest surviving son of the deceased person.[55] Thus, Bello CJN held in one case that: "The appellant or first son of the family having duly shared the Igiogbe to him, cannot quarrel with the way and manner the other properties were shared out to other beneficiaries."[56]

Tenth, there is no limitation period for the *Igiogbe*.[57] The justification for this is that the *Igiogbe* is based on an ancient custom.[58]

C. *IGIOGBE* AS A MANDATORY NORM IN CONFLICT OF LAWS

In Nigerian conflict of laws, the *Igiogbe* rule can govern testate and intestate succession depending on the circumstance of the case. If the deceased died intestate and was subject to Bini customary law, it is without question that the customary rule of *Igiogbe* would apply. In the case of testate succession, as it relates to a Bini man subject to Bini customary law, it will be seen that devising the properties in the will is subject to the *Igiogbe.* In the case of a Bini man that dies intestate subject to Bini custom, the general rule is that the *lex situs* governs matters of succession to the estate of a deceased person.[59] Since the *Igiogbe* is situated in Bini, the *Igiogbe* custom applies. This section submits that the *Igiogbe* custom is a mandatory norm in Nigerian conflict of laws, but queries whether the *Igiogbe* rule is absolute that admits of no exceptions or limitations.

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[51]See also Aigbovo (n 7).
[52]*Eigbe* (n11); *Egbarevba* (n 11). See also *Ozomaro* (n 15).
[53]*Ibid.*
[54]*Ezekiel* (n 11).
[55]*Imaruagheru* (n 10); *Idehen* (n 10); *Asaolu* (n 11); *Ogbebo* (n 11); *Uwadiae* (n 11); *Egbarevba* (n 11).
[56]*Idehen* (*ibid*).
[57]*Lawal-Osula* (n 10); *Ogbahon* (n 11). See Section 1(2) & (3) of the Limitation Law, Cap. 89 Laws of Bendel State 1976.
[58]*Ibid.* We however query whether equitable principles such as waiver, laches and acquiescence may limit the operation of the *Igiogbe.* We do not think that it accords with equity to allow the eldest surviving son of the deceased to make a U-turn after he has expressly waived or rejected his right to the *Igiogbe* by allowing his siblings or other persons to acquire the *Igiogbe* unconditionally for many years.
[59]Section 13(4) and 14(4)(b) of the High Court Law of Bendel State. See also *Mojekwu v Iwuchukwu* (2004) 11 NWLR (Pt. 883) 196; *Olowu* (n 10) 387 (Coker JSC); *Giwa-Osagie* (n 11).

1. A Bini Man who was Subject to Bini Customary Law

Prior to the advent of colonialism and Nigeria's contact with western civilisation, the idea of making written wills was alien to native laws and customs. Although deathbed dispositions and "nuncupative wills" were recognised under some native laws and customs, this type of will did not fit into the scheme of the English idea of a testamentary disposition, whereby a person can freely distribute their property as they wish.[60] Under native laws and customs in Nigeria, including the *Igiogbe*, a person could not freely distribute their property as they wished because their personal law controlled the way property was devised.

Section 3 of the Wills Act 1837 (an English Statute of General Application) provided that:

> It shall be lawful for every person to devise, bequeath, or dispose of, by his will executed in manner herein-after required, all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death.

The implication of Section 3 of the Wills Act 1837 was that the testator was free to dispose of their property in any manner and any customary law to the contrary was regarded as nugatory.[61] This created an internal conflict of laws situation between customary law and the Wills Act of 1837. Initially, some Nigerian judges that preferred the customary law of the testator resolved the conflict in favour of that customary law.[62] These decisions, however, contradicted the literal meaning of Section 3 of the Wills Act 1837. In the subsequent case of *Adesubokan v Yinusa*,[63] the Supreme Court gave the provision its literal meaning to the effect that a testator could dispose of their property as they pleased, notwithstanding any customary law to the contrary.

The idea that a testator could dispose of their property contrary to their personal or customary law did not sit well with some States in Nigeria.[64] The States comprising the former Western Region of Nigeria (Delta, Edo, Ekiti, Lagos, Ogun, Ondo, Osun and Oyo States) repealed the Wills Act, 1837 and enacted a new Wills Law[65] which provides that:

> *Subject to any customary law* relating thereto, it shall be lawful for every person to devise, bequeath or dispose of, by will, executed in a manner hereinafter required, all real estate and all personal estate which he shall be entitled to either in law or in equity at the time of his death (emphasis added).[66]

Benin is under the jurisdiction of Edo State, where the Wills Law applies. In the context of this paper, "Subject to any customary law thereto" means "Subject to the *Igiogbe*."

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[60] *Idehen* (n 10) 418. See also *Okafor v Okafor* (2015) 4 NWLR (Pt 1449) 335, 369.
[61] *Idehen* (n 10) 409 (Bello CJN); 416 (Karibi-Whyte JSC).
[62] See the analysis of Karibi-Whyte JSC in *Idehen* (*ibid*) 417.
[63] (1971) 1 All NLR 225.
[64] See also AA Oba, "Islamic Law as Customary Law: The Changing Perspective in Nigeria" (2002) *International and Comparative Law Quarterly* 817, 848.
[65] "…the Wills Act 1837 of the United Kingdom…was re-enacted for Western Nigeria and came into force first on 24th July, 1958 as W.R. 1958, Cap. 133 of the Laws of Western Nigeria". *Idehen* (n 10) 416 (Karibi-Whyte JSC).
[66] In our context, it is Section 3(1) of the Wills Law, Cap 172, Laws of Bendel State, 1976. See also *Idehen* (n 10) 416 (Karibi-Whyte JSC), 422 Belgore JSC.

The phrase "subject to customary law thereto" under Section 3 of the Wills Law could be classified under the subject of conflict of laws as a mandatory norm because the testator's power or autonomy to dispose of their properties is subject to or limited by their customary law.[67] In other words, the testator cannot purport to derogate from their customary law in making a will.

However, the meaning of this phrase has been controversial.[68] In particular, it was unclear if the phrase means that a violation of customary law would render the entire will void, or if the violation of customary law simply rendered only the property devised invalid, such that the will remains valid and the capacity of the testator to make the will was not affected.

In *Idehen*, the key issue for consideration before the Supreme Court was whether the phrase "subject to any customary law relating thereto" in section 3(1) of the Wills Law of Bendel State (now Edo and Delta States) is a qualification of the testator's capacity to make a will or whether it is no more than a qualification of the subject matter of the property disposed of under the will. The Supreme Court constituted a full bench,[69] to clarify the ambit of "subject to customary law relating thereto" under Section 3 of the Wills Law of the [then] Bendel State. The majority (5 to 2) of the Supreme Court interpreted the phrase to mean that it qualified the extent to which the testator could dispose of their property but did not affect the overall capacity of the testator to dispose of their property. Kawu JSC[70], Karibi-Whyte JSC,[71] Belgore JSC[72] Wali JSC,[73] and Nwokedi JSC[74] were in the majority. Bello CJN[75] and Olatawura JSC[76] dissented by holding that it both qualified the extent to which the testator could dispose of their property and affected the overall capacity of the testator to dispose of their property.

In several cases that were decided subsequently, the majority decision of *Idehen* has been regarded by Nigerian appellate courts as the law.[77] However, recently in *Omokaro*, Aboki JSC quoted with approval the dissenting judgment of Bello CJN in *Idehen*.[78] It is not clear if this was done accidentally or intentionally. In other words, it is not clear if Aboki JSC appreciated the fact that Bello CJN's judgment in *Idehen* was a dissenting opinion. In any event, the phrase "subject to customary law relating thereto" was not the key issue in *Omokaro* as it was in *Idehen*. Moreover, the decision in *Omokaro* did not hold that the *Igiogbe* in that case invalidated the entire will or testator's capacity to make a will. On the contrary, on the facts of the case, it was held that the first son, having performed the second burial ceremony, was entitled to the *Igiogbe*. The quotation by Aboki JSC of Bello CJN's dissenting judgment should

[67]CSA Okoli and RF Oppong, *Private International Law in Nigeria* (Hart Publishing, London, 2020) 301; CSA Okoli, "Sowing the Seeds of a Future African Union Private International Law: A Review of Private International Law in Commonwealth Africa" (2014) 10 *Journal of Private International Law* 517, 522-23.
[68]See for example *Oke* (n 28); *Olowu* (n 10) 397 (Obaseki JSC); *Idehen* (n 10); *Agidigbi* (n 10); *Lawal-Osula* (n 10).
[69]The Supreme Court of Nigeria normally consists of 5 Judges when sitting. In exceptional cases, there could be 7 Judges where the court is invited to overrule its previous decision, or where its original jurisdiction is invoked.
[70]*Idehen* (n 10) 408.
[71]*Ibid*, 418-419.
[72]*Ibid* 422.
[73]*Ibid* 424.
[74]*Ibid*, 429.
[75]*Ibid*, 411.
[76]*Ibid*, 426.
[77]*Lawal-Osula* (n 10); *Uwaifo* (n 10); Ezekiel (n 11); *Uwadiae* (n 11); *Eigbe* (n 11).
[78]*Omokaro* (n 11) 467.

be regarded as one that was done in error and should not be followed by lower courts in Nigeria. We submit that the correct law is that stated by the majority of the Supreme Court Justices in *Idehen*. A testator's capacity to make a will in Benin is not limited by the *Igiogbe*; it is only the devise, bequest or disposition that is limited by the *Igiogbe*.

The overall implication of these appellate court decisions is that the *Igiogbe* rule is a mandatory norm that applies to the inheritance and administration of the estate of any Bini man that is subject to native law and custom. Considering the pluralist nature of the Nigerian legal system and the tendency or possibility for a Bini man to be subject to other customary, religious, and statutory laws, the question that begs for an answer is whether the *Igiogbe* rule is absolute and admits of no exceptions or limitations.

2. Is the *Igiogbe* Rule Absolute?

The extent to which the *Igiogbe* rule as a mandatory norm (in the sense that it cannot be derogated from) applies was not clarified by the Supreme Court in *Idehen, Lawal-Osula,* or *Uwaifo*. Thus, there is a question about whether the *Igiogbe* rule is absolute. Nevertheless, it can be deduced from several appellate decisions that the *Igiogbe* rule is absolute. In other words, the eldest surviving son, "without question", is entitled to the *Igiogbe*.[79] For example, Karibi Whyte JSC noted that "It has been stated emphatically that this is the normal rule. No exceptional situations have been shown when an eldest son is denied this right by his father, even on account of demonstrable unsuitability to undertake and discharge the responsibilities of the status of the head of family".[80] Ogunbiyi JSC held in another case that "The tradition takes precedence over and above the wishes of a deceased father no matter how strong he feels against his son as the prospective heir".[81] In *Igbinoba,* the Court of Appeal decided that neither testamentary disposition nor family arrangement can deprive the eldest surviving son of "Igiogbe".[82]

There have been a few appellate Judges that have held that if the deceased during their lifetime disinherits the eldest surviving son, he (eldest surviving son) will not be entitled to inherit the *Igiogbe*.[83] This is however not consistent with the dictum of Ogunbiyi JSC in *Uwaifo.* Nevertheless, in *Agidigbi v Agidigbi*,[84] Kolawole JCA made a case for exceptions to applying the *Igiogbe* as a mandatory norm:

> 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 enure for the benefit of the eldest 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 [sic] 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

[79]*Uwaifo* (n 10); *Agidigbi* (n 10); *Idehen* (n 10); *Olowu* (n 10); *Osemwingie* (n 11); *Osemwenkha* (n 11); *Igbinoba* (n 11).
[80]*Idehen* (*ibid*) 421.
[81]*Uwaifo* (n 10) 206
[82](n 11).
[83]*Ezekiel* (n 11); *Ogbahon* (n 11).
[84](1992) 2 NWLR (Pt. 221) 98.

> family? Is the testator not entitled to disinherit such a son? 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 therefore that a donee who is proved to be guilty of the murder or manslaughter of the testator ought not to take any benefit under this will notwithstanding the provisions of Section 3(1) of the Wills Law.[85]

Is the *Igiogbe* truly an absolute mandatory norm in the Nigerian conflict of laws? Can it be significantly impacted by statute or other customary and religious laws? Can it be significantly impacted by constitutional human rights law in Nigeria? These questions are answered in the subsequent parts of this article. The underlying submission in the subsequent parts of this article is that based on other judicial, statutory, and constitutional authorities, we refute the view held by some Nigerian appellate Judges that the *Igiogbe* is absolute and is not subject to limitations or exceptions.

D. IMPACT OF OTHER SYSTEMS OF LAW ON THE *IGIOGBE* RULE

1. Impact of Statute

The pluralist nature of the Nigerian legal system implies that there can be a potential conflict between a rule of customary law and statutory provisions. For questions bordering on intestate succession, for instance, the starting point is to determine the personal law of the deceased. Where a Bini man had a statutory marriage, then he would ordinarily be subject to Bini customary law, including the *Igiogbe* rule, and the Marriage Act/Administration of Estate Law.[86] It is not impossible for these two competing laws to have overriding mandatory rules. In fact, this is the reality. While the *Igiogbe* prescribes a mandatory rule of succession, the Administration of Estate Law equally has mandatory rules on intestate succession.

The subtle question that is often ignored by legal commentators and judges is whether the deceased is subject to customary law or some other system of law. It is often assumed that any Nigerian who died intestate is subject to the personal law of his ancestral community.[87] Little wonder one finds that in many cases the question of conflict of personal laws or the potential application of other systems of law does not arise.

In *Salubi v Nwariaku*,[88] one of the issues presented before the Supreme Court was the governing law of distribution of the estate of a deceased who married under the Marriage Act. The Supreme Court decided that the clear legislative intention of Section 49 of the Administration of Estate Law of Bendel State (now Edo and Delta States) is that intestate succession of anyone who married under the Marriage Act is governed by the provisions outlined under that section notwithstanding any customary law to the contrary. The Supreme Court restated this position in *Obusez v Obusez*[89] noting that although the deceased and his spouse were subject to customary law prior to their marriage under the Act in 1972, the implication of the marriage and Section 49 of the Administration of Estate Law of Lagos State

[85] *Ibid* 125.
[86] Marriage Act, Cap 218, LFN 1990; Administration of Estates Law, Cap. 2 Vol 1, Laws of Bendel State, 1976.
[87] See *Onyekwuluje v Animashaun* (2019) 4 NWLR (Pt 1662) 242, 259.
[88] (2003) 7 NWLR (Pt. 819) 426.
[89] (2007) 10 NWLR (Pt. 1043) 430.

was that customary law would not apply.[90] Onnoghen JSC (as he then was) did not mince words when he held that "the deceased by contracting marriage under the Act opted out of the system of customary law of succession in case of intestacy".[91] Following this line of authorities, a Shariah Court of Appeal in Kwara State in *Mohammed & Anor v Mohammed* & *Ors*[92] very recently held that a deceased Muslim who married under the Act (ie statutory marriage) had opted out of Islamic personal law.

The principle that can be deduced from these Supreme Court decisions is that where a Bini man, who is ordinarily subject to Bini customary law contracts a statutory marriage but later dies intestate, his estate is no longer governed by the *Igiogbe* rule, but rather by the applicable succession statute in Edo State – Section 49 of the Administration of Estates Law[93] as he might be deemed to have opted out of customary personal law.[94] This is an effective way of avoiding the *Igiogbe* rule as a mandatory norm in conflict of laws. In other words, if a Bini man wants to avoid the application of the *Igiogbe* rule, he may contract a statutory marriage.

It is important to note that the Administration of Estates Law in Edo State does not apply to persons who contract a customary or Islamic law marriage.[95]

2. Impact of other Customary Laws

If a person changes their personal law from Bini customary law to another customary law or religious law, the *Igiogbe* ought not to apply to that person. A change to another customary law or Islamic law operates as what we call the "escape device" in conflict of laws. This is because their utilisation avoids the application of the *Igiogbe* as a mandatory norm. Although customary law and religious laws are all personal laws, they are different and administered differently in Nigeria. For instance, the Constitution provides for the application and enforcement of both systems of law and a distinct court system for both. This distinction was recently re-echoed by the Court of Appeal in *Giwa-Osagie*.[96]

Every Nigerian citizen by birth belongs to an indigenous community, tribe or ethnic group and each group has its distinct native law and custom. Before the decision of the Supreme Court in *Olowu*,[97] it was unclear whether a person could change their native law and custom as this was part of their identity. In *Olowu*, the deceased was a Yoruba man by birth and ordinarily subject to a form of Ijesha customary law. He lived most of his life in Benin City, Bendel State (now

[90]Peter-Odilli JSC complicated the matter in *Ayorinde v Kuforiji* (2022) 12 NWLR (Pt 1843) 43, 99 when she held that the question of personal law of a deceased is not sacrosanct but depends on the way they lived their life.
[91]*Obusez* (n 89) 461.
[92] *Appeal No: KWS/SCA/CVIAPIIL/14/2022* delivered on 3rd August 2022 (unreported), on file with the authors.
[93]*Salubi* (n 88); *n* (n 89) applying Section 49 of the Administration of Estates Law, Cap. 2 Vol 1, Laws of Bendel State, 1976.
[94] It is imperative to sound a note of caution here. While Section 49(1) provides mandatory rule for intestate succession, Section 49(5)(b) contains a proviso that subjects the application of the law to limitations prescribed by customary law. However, this proviso affects only testamentary dispositions. It implies that s.3(1) of the Wills Law is reinstated favouring the overriding rules of customary law. It is open to question whether the court will extend Section 49(5)(b) to intestacy.
[95]*Ayorinde* (n 90); *Olowu* (n 10) 382, 395; *Zaidan v Mohssen* (1973) 1 All NLR 86, 98, 101.
[96] See also K Olatoye and A Yekini, "Islamic Law in Southern Nigerian Courts: Constitutional Law and Conflicts of Laws Perspectives" (2019/2020) 6 *Benin Journal of Public Law* 120.
[97]*Olowu* (n 10).

Edo and Delta States). He married a Bini woman, and they gave birth to the plaintiffs and defendants in this case. In 1942, the deceased expressly renounced his Yoruba status and applied to the *Omo N'oba of Benin* (the traditional Ruler of Benin) to be "naturalised" as a Bini citizen. His application was granted. The change of status of the deceased person enabled him to acquire immovable property in the then Bendel State. The deceased died intestate in 1960. The defendants were granted letters of administration to administer the deceased's estate. The first defendant distributed the estate in accordance with Bini customary law, but the plaintiffs and the second defendant were dissatisfied and claimed that the estate ought to have been distributed according to Ijesha customary law.

The plaintiffs brought an action against the defendants in the High Court challenging the distribution done according to Bini customary law and seeking a declaration that Ijesha customary law was the applicable law. The plaintiffs' case was dismissed at the High Court, the Court of Appeal and the Supreme Court respectively. The principal issue before the Supreme Court in *Olowu* was whether Ijesha customary law or Bini customary law was the applicable law in relation to the distribution of the estate of the deceased. The Supreme Court unanimously[98] concluded that the deceased, by validly changing his personal law from Ijesha customary law to Bini customary law while he was alive, preferred the Bini customary law on the *Igiogbe* as the law that should govern his estate.

The principle in *Olowu* on the change of a person's personal law, such as the Ijesha customary law to another personal law, such as the Bini customary law on the *Igiogbe*, has been endorsed by some other appellate court Judges.[99]

The principle in *Olowu* advanced the manner of life theory. This theory suggests that where the personal law of a deceased is in issue, the question should be determined by considering the personal law with which the deceased was closely connected when he was alive. Factors such as his belief system, lifestyle, preferences, and associations amongst others may be relevant.[100] Going by the principle in *Olowu*, a Bini man can validly change his personal law from the Bini customary law to another customary law such as the Ijesha customary law and this may affect the disposition of *Igiogbe*. For example, if a Bini person had lived and died in Yoruba land, manifestly assimilated into the Yoruba culture, and had clearly distributed his property in accordance with Yoruba customary law (eg by testament), this may be a case to imply the change from *Bini* customary law to Yoruba customary law. On this issue, it is submitted that in advancing the principle of certainty and predictability in Nigerian conflict of laws, the change from one customary law to another should be effected expressly. The change should only be implied in truly exceptional circumstances.

3. Impact of Religious Law

A change from Bini customary law to religious law can result in avoiding the application of the *Igiogbe* rule as a mandatory norm. The change to religious law can occur when a Bini man professes a particular religion such as Islam, or Christianity among others. It is submitted that

[98]Though their reason for reaching their decision varied. See Okoli and Oppong (n 67) 324-326 for more analysis.
[99]*Giwa-Osagie* (n 11) citing other Nigerian cases.
[100] This test was recently re-echoed by Peter Odili JSC in *Ayorinde* (n 90) 99.

a Bini person who clearly does not subscribe to any religious belief or custom should also be able to avoid the application of the *Igiogbe*, though there is no direct authority on this point.

(a) Islam

A person that changes their personal law from Bini customary law to Islamic law avoids the application of the *Igiogbe* rule. The Court of Appeal has held that once a person is born into Islam or converted to the same by believing that *La Illaha Illa Allah Mohammed Rasulullahi* (meaning I accept the oneness of Allah and the prophethood of Mohammed), they are a Muslim and Islamic law becomes the personal law of that person.[101] In such a case, the person avoids the application of the *Igiogbe* rule. [102] The rationale for this is that the concept of *Igiogbe* is inconsistent with and unknown to Islamic law.[103]

In *Giwa-Osagie,* one late Pa Saliu Giwa Osagie, the eldest surviving son of late Mr Yesufu inherited the main house at No. 6 Ugbague Street, Benin City from his father, a Moslem, the 1st *Mogaji* of Benin Kingdom under Benin Native Law on 22 October 1943. Late Pa Saliu Giwa Osagie later in his lifetime developed two bungalows known as No. 6A and 6B Ugbague Street, Benin City within the premises known and called No. 6 Ugbague Street, Benin City. He thereafter lived and died in No. 6A, Ugbague Street, Benin City on 17 January 1994. He was a Moslem and a Bini man. Prior to his death, he made a transfer of the building he inherited as *Igiogbe* known as No. 6 Ugbague Street to his eldest son, the 1st respondent-defendant. He also made a deed transferring the building where he lived and died at No 6A Ugbague Street to the plaintiff-appellant. The 1st respondent-defendant prevented the plaintiff-appellant from taking possession of No. 6A Ugbague. The plaintiff's suit against the defendant was unsuccessful. The majority of the Court of Appeal held that though there could be a successful change from the Bini customary law on the *Igiogbe* to Islamic personal law, there was no clear evidence that the deceased wanted his personal law to be Islamic personal law, for example, he did not distribute his property in accordance with Islamic law.[104] The implication of this was that the Court of Appeal was left with the application of the *lex situs*, which was the Bini customary law on the *Igiogbe*.[105] In applying the *Igiogbe* rule, it was held that the plaintiff-appellant could not be given an *inter vivos* gift of No 6A Ugbague Street because it was the *Igiogbe*.[106]

Giwa-Osagie further exposes the problem of conflict of personal laws and the uncertainty surrounding the manner of life theory. It further strengthens the bias that Nigerian courts have in favour of customary laws -eg Igiogbe- especially if there is no explicit and unequivocal denunciation of customary law. In *Osagie*, while there was strong evidence that the deceased was a practising Muslim with an Islamic chieftaincy title, the court could not find these pieces of evidence strong enough because the deceased did not comply with Islamic law in his testamentary disposition. Unlike the related case of *Olowu* where the change of personal law

[101]*Ibid* citing other Nigerian cases.
[102]*Ibid.*
[103]*Ibid.*
[104]*Ibid.*
[105]There was a dissenting judgment on this issue in the case.
[106]This aspect of the decision is open to question, because although the property that was devised to the plaintiff was within the same premises of the *Igiogbe* that the deceased inherited from his father, it was not the property the deceased lived and died in. In other words, it was not the *Igiogbe* as far as the deceased was concerned. The majority decision in *Giwa-Osagie* therefore contradicts the principle that there cannot be more than one *Igiogbe* under Bini customary law. See the text accompanying footnote 43 and the footnotes.

was expressed and confirmed by relevant authorities, the deceased in *Giwa-Osagie* left it for the court to imply a change of personal law. It is thus recommended that parties who want Islamic law to govern succession to their estate should do so expressly. This can for example be done in writing and notarised.

(b) Christianity

Just like Islamic law, if a person professes Christianity, their personal law may change from Bini customary law to English common law. This may be achieved by expressly renouncing the *Igiogbe* custom in favour of Christian religious values in writing. A person becomes a Christian by accepting Jesus Christ as the only begotten Son of God and their Lord and Saviour.

In one very early case of *Cole v Cole*,[107] the court implied that where a person who is ordinarily subject to customary law contracts a Christian marriage, that person's property is distributed in accordance with English common law. This decision has been controversial among Nigerian Judges, because, while some have endorsed it,[108] other Judges[109] and scholars[110] have questioned it.

Recent judicial authorities have restated the position in Cole. In *Ugbene v Ugbene*,[111] the Court of Appeal noted that it would be contrary to natural justice and equity to apply customary law of succession to the estate of a deceased who had clearly manifested an intention to the contrary by conducting a Christian marriage. In *Ugolo v Odiama*,[112] the Court of Appeal went further to hold that if a couple were earlier subject to native law and custom but subsequently embraced Christianity and went through a form of Christian marriage, their Christian life meant that they would no longer be subjected to customary law of succession. With this recent affirmation from the appellate courts, it now seems indisputable that subscription to Christian values can potentially displace the application of the *Igiogbe* rule if the appropriate question concerning the change of personal law is posed to the court.

Nevertheless, determining how a person (in Christian marriage) changes their customary law (Bini customary law on the *Igiogbe* in our context) to Christian values is fact dependent. This is a view that is also subscribed to by some Nigerian Supreme Court Judges even in a very recently reported case.[113] Therefore, the peculiar facts of each case will determine the impact of Christian values on the *Igiogbe* rule just as the Islamic religious values almost flipped the decision in *Osagie* in favour of Islamic law as the personal law of the deceased.

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[107](1898) NLR 15.
[108]*Olowu* (n 10) 390-391 (Bello JSC as he then was); *Gooding v Martins* (1942) 8 WACA 108; *Adegbola v Folaranmi* (1921) 3 NLR 89.
[109]*Onwudijoh v Onwudijoh* (1957-58) 11 ERLR 1; *Smith v Smith* (1924) 5 NLR 105; *Onikepe v Goncallo* (1900) 1 NLR 41.
[110]Nwanbueze (n 1) 112.
[111] (2016) LPELR-42110 (CA).
[112] (2019) LPELR-47168(CA). Similar decision was reached in *Nebuwa v. Nnenna* (2018) LPELR-45097(CA).
[113]*Ayorinde* (n 90) 99 (Peter-Odilli JSC) citing *Olowu* (n 9) 420-423 (Oputa JSC). See also *The Administrator General v Egbuna* (1945) 18 NLR 1; *Haastrup v Coker* (1927) 8 NLR 68.

4. Unexplored Impact of Constitutional Human Rights Law

Nigeria operates a Federal Constitution that guarantees fundamental human rights.[114] The Constitution is supreme over any other law in Nigeria.[115] The *Igiogbe* custom is "existing law"[116] under Section 315 of the 1999 Constitution "being a body of rules of law in force immediately before the coming into force"[117] of the 1999 Constitution and is therefore subject to the Nigerian Constitution like any other law.[118]

In conflict of laws, the Nigerian Constitution is a "countervailing super mandatory norm" to customary law, including the *Igiogbe* rule. This means that though the *Igiogbe* is a mandatory norm under Section 3(1) of the Wills Law, the Nigerian Constitution as the grundnorm has overriding superiority over the *Igiogbe*.

The focus here is on Nigerian constitutional law in advancing human rights norms as they impact the *Igiogbe*. There are other human rights provisions such as the African Charter.[119] These provisions are not as effective as the Nigerian Constitution, which is supreme over any other law, including domesticated international law.[120] It will be submitted in this section that the *Igiogbe* violates the Nigerian constitutional provisions that protect against discrimination, and freedom of thought, conscience and religion.

a. Discrimination

Section 42 of the 1999 Constitution provides that:

> 1. A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person:
>
> a. be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions are not made subject; or
>
> b. be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions.

[114] See Chapter IV of the 1999 Constitution (as amended).
[115] Section 1 of the 1999 Constitution.
[116] *Agu v Ikewibe* (1991) 3 NWLR (Pt 180) 385, 407.
[117] *Ibid.*
[118] *Ibid.* See also Omoregie (n 14); EO Ekhator and NU Richards, "The Continuing relevance of Customary Law Arbitration in Nigeria: Implications of the recent Supreme Court Judgment in *Umeadi v Chibunze*" (2023) *Legal Pluralism and Critical Social Studies* (forthcoming). *Cf.* RN Nwabueze, "The Dynamics and Genius of Nigeria's Indigenous Legal Order" (2002) 1 *Indigenous Law Journal* 153, 192-197.
[119] See for example African Charter on Human and Peoples' Rights (Ratification and Enforcement) CAP A 10 LFN 2004.
[120] Nigeria is a dualist country, so international law is generally domesticated into Nigerian law like any other statute. See *Fawehinmi v Abacha* (2000) 6 NWLR (Pt. 660) 228.

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

Section 42 protects against gender discrimination, which mostly affects women.[121] Although Section 42(2) above is sometimes utilised in cases regarding (il)legitimacy of children,[122] it is argued that the same applies to the *Igiogbe* custom. It, therefore, means that a person ought not to be subject to disability or deprivation in inheriting the property of their father because they are not the eldest surviving son. It is the circumstances of their birth that make them not to be the eldest son. Taken to its logical conclusion, Section 42(2) is gender-neutral and protects men and women against the harshness of the *Igiogbe* custom. A father that is unhappy with the behaviour of their eldest son should be free to devise his *Igiogbe* legally to other persons that are not the eldest child.

It is surprising that Section 42 has not been engaged by Nigerian appellate courts in decided cases on the *Igiogbe* rule. It is even more surprising that lawyers have not used this constitutional route to challenge the validity and fairness of the *Igiogbe* rule. There are cases where Section 42 has been used to successfully override discriminatory customs. For example, in *Ukeje v Ukeje*,[123] Rhodes-Vivour JSC held 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 sections 39(1)(a) and (2) of the 1979 Constitution (as amended)"[124]

In *Timothy v Oforka*,[125] the plaintiff-respondents were grantees of land by their late grandfather. The defendant-appellant challenged their father's grant on the ground that it breached the Oraifite customary law which forbade women and children from dealing with land. The plaintiff-respondents sought a declaration that the defendant-appellant violated their fundamental right to freedom from discrimination and the right to acquisition and ownership of property guaranteed by the 1999 Constitution. The High Court and Court of Appeal both held in favour of the plaintiff-respondents by *inter alia* applying Section 42(1) of the 1999 Constitution.

Given the significant number of cases where Nigerian appellate courts have relied on Section 42 of the 1999 Constitution to override discriminatory customs, it is submitted that Nigerian courts can declare the *Igiogbe* custom as contravening Section 42 of the 1999 Constitution. No person should be deprived of an inheritance simply on the ground that they are not the eldest surviving son of the deceased. This argument becomes even more forceful where the *Igiogbe* is the only property that the deceased has left behind.

b. Freedom of Thought, Conscience and Religion

Section 38 of the 1999 Constitution provides that:

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[121]See also *Okoli v Okoli* (2002) LPELR-CA/E/138/99, 15; *Okonkwo v Okonkwo* (2014) 17 NWLR (Pt. 1435) 78; *Ugbene v. Ugbene* (2016) LPELR-42110(CA) 64-67; *Okeke v. Okeke* (2017) LPELR-42582(CA). See further Ezeilo (n 14).
[122]See for example *Salubi* (n 88).
[123](2014) LPELR-22724 (SC).
[124]*Ibid.* Section 39 of the 1979 Constitution is now Section 42 of the 1999 Constitution.
[125] (2008)9 NWLR (pt. 1091) CA.

> 1. Every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief, and freedom (either alone or in community with others, and in public or in private) to manifest and propagate his religion or belief in worship, teaching, practice and observance.

The implication of the foregoing constitutional provision is that anybody practising any religion or belief or who does not believe in any religion can declare they do not want to be subject to the *Igiogbe* custom which has its roots in Bini traditional belief system. The *Igiogbe* custom in its traditional form involves ancestral worship which is inconsistent with Christian and Muslim beliefs in Nigeria.[126] The *Igiogbe* custom is also inconsistent with the position of atheists or agnostics in Nigeria.

If a deceased in their lifetime makes it clear that their belief system is inconsistent with the *Igiogbe* custom and so does not want it to apply to their estate, it would be unconstitutional, in line with Section 38(1) above, to do otherwise. On the flip side, if a Bini person who practises the *Igiogbe* custom or subscribes to ancestral worship has an eldest surviving son who does not subscribe to the ancestral worship, section 38 can preserve the *Igiogbe* for the eldest surviving son. It would be unconstitutional to deprive the eldest surviving son of the *Igiogbe* based on their opposing belief, change of belief or absence of belief.

However, in *Ovenseri*,[127] the first defendant who was the eldest surviving son of the deceased refused to perform the second burial ceremony on the ground that, as a Christian of the Jehovah's Witness sect, he found the belief and practice of the second burial paganistic and repulsive to his faith. The Supreme Court upheld the decision of the trial Judge; that until the performance of the second burial ceremony, the estate (including the *Igiogb*e) of a deceased Bini man cannot vest on any of the children and such children do not have the *locus standi* to sue on behalf of their father's estate. *Ovenseri* should no longer be a good law considering Section 38.

While it is conceded that the performance of the second burial ceremony is a condition precedent under the *Igiogbe* rule, it is argued that this condition precedent is inconsistent with the constitutional provisions in section 38 which guarantees one's right to hold or change one's religious belief and practices. By virtue of section 1(1) and (3) of the Constitution, any law, custom or condition precedent that runs contrary to the constitutional provisions must perforce give way. In *Giwa-Osagie*,[128] Gumel JCA endorsed this approach in a dissenting opinion, though the issue of Section 38 was not squarely before the court. It is submitted that should a case like *Ovenseri* come before any Nigerian court, the court should consider applying Section 38.

E. CONCLUSION

There has continued to be significant litigation on the *Igiogbe* rule to date for several reasons. First, the Bini people take the *Igiogbe* rule very seriously and are prepared to litigate it to the apex court. It demonstrates the strong value they attach to the custom. Second, the contours of the *Igiogbe* rule are not completely clear. For example, what constitutes the *Igiogbe*, especially

[126] *Aigbovo* (n 7) citing others.
[127] *Ovenseri* (n 10).
[128] *Giwa-Osagie* (n 11).

the concept of one or double *Igiogbe* has generated significant litigation. Third, the *Igiogbe* rule has not been struck down by Nigerian appellate courts based on constitutional human rights norms and the repugnancy doctrine because of the deference and reverence that Bini people, lawyers, and judges attach to this custom and the Oba of Benin who is the custodian of Bini custom. Judges, lawyers, and litigants are part of the local community and are influenced by community psychology. It thus appears that there is an unarticulated phobia for challenging the *Igiogbe* custom, especially based on constitutional human rights norms. While some other tribal customs have been struck down by Nigerian appellate courts, the *Igiogbe* custom has survived such fate for many years, since 1967 when the Supreme Court upheld the custom in *Ogiamen*.[129] Fourth, the *Igiogbe* custom creates unfairness to persons who are not the eldest surviving son of the deceased, especially where the only property left is the *Igiogbe*.

This article has refuted the widely held view that the *Igiogbe* rule as a mandatory norm is absolute. Such a view had remained unchallenged because academic writers, practitioners and judges have not critically considered this view from both conflict of laws and constitutional perspectives. The *Igiogbe* rule can be impacted by statute, other customary laws, religious laws, and constitutional human rights norms in Nigeria.

It is submitted that the time is ripe for Nigerian appellate courts to revisit their positions on the *Igiogbe* custom. This submission is not to denigrate the age-long Bini custom. Rather, the aim here is to weigh the custom against the constitutional architecture of Nigeria since no custom enjoys superiority over the Constitution. We are attentive to the views of scholars like Nwabueze who has cautioned against using the Constitution to strike down indigenous customs in Nigeria.[130] However, culture or custom is not static; it does change. Constitutional and conflict of laws techniques can be used to reform the *Igiogbe* rule to pave the way for fair dealings among siblings (and other persons interested in the deceased person's property) in the Benin Kingdom.

The time to act is now.

[129] *Ogiamen* (n 10).
[130] Nwabueze (n 118) 192-197.