

RESTATING THE RELEVANCE OF CUSTOMARY COURTS IN INTESTACY: FINDING THE NEXUS OF PLURAL LEGAL ORDERS

NNENNA JOY EBOH, PHD.¹

Abstract

Nigeria operates a legal plural system where English law, statutory law, Sharia law, and customary law coexist. This plurality is most evident in matters of intestate succession, where the rules for distributing the estate of a deceased person who dies without a will are often contested. The existence of plural legal systems raises conflict especially in intestate situations because all three legal systems can adjudicate succession matters. Thus, even though customary courts have original jurisdiction over intestate succession, their jurisdiction is limited, and as such, lawyers prefer to file intestate matters in the high courts with higher jurisdiction. This paper therefore seeks to solve the complications around intestate succession by restating the relevance of customary courts, first as the primary custodians of indigenous law, and second, as central role players in adjudicating succession disputes. The paper appraises the origin of customary courts in Nigeria, tracing their evolution from pre-colonial times. Adopting doctrinal analysis and limiting the scope to the South-East Nigeria because customary courts only exist in those locations, the paper finds that while customary courts remain culturally relevant and accessible, their effectiveness is hampered by limited jurisdiction, conflict of laws, and limited resources. The paper concludes by recommending harmonization reforms, improved training of customary court personnel, and clearer statutory guidelines to enhance the role of customary courts in ensuring just and culturally sensitive succession outcomes in a legal plural South-Eastern Nigeria.

Keywords: Customary Courts, Intestate Succession, Legal Pluralism, Nigeria, Customary Law.

1. Introduction

In many Nigerian communities where customary courts exist, customary law remains the dominant framework governing family relations and inheritance. Consequently, customary courts serve as the primary institution for adjudicating intestate succession disputes (disputes arising from inheritance where no will or testament was made). Their origin can be traced to

¹ LLB (Imo state University, Owerri), LLM (University of Lagos, Akoka), PhD (University of the Western Cape, South Africa), Senior Research Fellow, Nigerian Institute of Advanced Legal Studies, Supreme Court Complex, 3 Arms Zone, Abuja. n.eboh@nials.edu.ng, +2348039384143.

pre-colonial indigenous systems of dispute resolution, which were later recognized and formalized under colonial and post-independence legislations.

Despite constitutional recognition,² and customary court law provisions granting original jurisdiction to customary courts,³ the role of customary courts today is marked by challenges. Issues of jurisdictional scope, procedural informality, conflict with statutory and constitutional provisions, and concerns about gender equality have raised questions about their continued relevance and effectiveness.

This paper therefore seeks to appraise the origin, present condition, and relevance of customary courts in handling intestate succession in South-Eastern Nigeria. It examines how these courts balance cultural legitimacy with the demands of a modern legal system, and whether reforms are needed to ensure justice, uniformity, and human rights compliance in a plural legal order. The scope of the paper is limited to the South-East for reasons of convenience. First, the South-Eastern states have several customary courts in existence and second, we find many cases on intestate succession in the South-East because of the clash between customary law practices and state laws.⁴

The paper is divided into five parts. Part one, traces the origin of customary courts in Nigeria, describing what the courts were in pre and post colonial era. This historical background is considered necessary in order to establish that customary courts still retain age long characteristics of pre-colonial indigenous courts which the people identify with. In part two, features of customary courts that make them suitable destination for intestate matters are discussed in detail. The third part take on the legal framework, that is the applicable laws on

² The Constitution of the Federal Republic of Nigeria, 1999 (as amended) hereafter referred to as the Constitution or the CFRN, provides for the establishment of customary court of appeal for any state that requires it in Nigeria. Even though it does not explicitly provide for the establishment of customary courts because matters of customary law fall within the residual list of the sub federal entities, one can say that the Constitution recognises the existence of customary courts because it allows for their establishment where required. Again, the state houses of assembly are empowered by the Constitution to establish customary courts where such courts are required by the state. Technically therefore, Customary courts have their foundation rooted in the Constitution. See section 280 of the Constitution for the establishment of customary court of appeal and section 265 for the establishment of customary court of Appeal of the Federal Capital Territory (FCT). See also, section 6(5)(k) of the CFRN 1999 for the Constitutional conferment of power to the state houses of assembly to establish customary courts where they are needed.

³ Section 13 and 16 of the Customary Court Law of Anambra, Enugu, Ebonyi

⁴ *Ukeje v Ukeje* (2014) 11 NWLR (Pt. 1418) 384 SC, *Anekwe v Nweke* (2014) 9 NWLR (Pt. 1412) 393 SC, *Mojekwu v Mojekwu* (1997) 7 NWLR (Pt. 512) 283 CA, *Nzekwu v Nzekwu* (1989) 2 NWLR (Pt. 104) 373 SC, *Nezianya v Okagbue* (1963) 1 All NLR 352 SC, *Uke v Iro* (2001) 11 NWLR (Pt. 723) 196 CA, etc.

intestacy. Part four identifies the challenges of customary courts as a result of legal pluralism in Nigeria. The fifth and final part concludes the paper with recommendations.

1.1 Central question

Given that matters of intestacy are rooted in custom, the central questions raised in this paper are-

- 1) To what extent are customary courts relevant in the contemporary administration of intestate succession, particularly in balancing cultural legitimacy with statutory provisions?
- 2) Tracing the origin of courts in Igboland, how does customary court reflect the living experiences of the people in such a manner that project confidence and reliability in their practice and procedure over intestacy?

1.2 Methodology

This research adopts a doctrinal methodology, relying on primary statutory sources as well as secondary data to establish the jurisdictional competence of customary courts over intestate succession on one hand, and the statutory restrictions in scope and monetary threshold of customary courts on the other hand in the South-Eastern Nigeria. The paper will analyse the exclusive original jurisdiction of customary courts as well as the limitations. Accordingly, section 16(1) (d) and (e) of the customary court law of Anambra 2011 (No 7 of 2010) which empowers customary courts to adjudicate over causes and matters relating to intestate inheritance under customary law is analysed. Similar provisions as replicated in section 15(1) (c) and (d) of the customary court law, Cap 32, Laws of Enugu state 2004; section 13(1) and second schedule, paragraph 6 of the customary court law of Imo state No 7 of 2010; and section 14(2) and third schedule, Table A, item 6 of the customary court law, Cap 82, Laws of Abia state 2006 (as amended by Law No 6 of 2011) are also analysed. Also, section 16(1) of the customary court law of Ebonyi state 2010 which confers unlimited jurisdiction on customary courts in land matters and matters of inheritance within the local government area is analysed paying attention to its expansive scope.

1.3 Clarification of terms

Some terms used in the paper need clarification as they may not be construed exactly the way they mean in contemporary grammar. The following terms are therefore explained-

- i. Intestacy- this means the state of dying without a valid will. In Nigeria, when a person dies intestate, their property cannot be distributed according to their personal wishes, so the law steps in to decide who gets what.
- ii. Intestate succession-Intestate means absence of a valid will upon death. Succession, also known as inheritance means taking over the property of a deceased relative. Thus, the rules and process for distributing the estate of a person who died intestate is referred to as intestate succession. Succession will be used interchangeably with inheritance to mean one and the same thing.
- iii. Legal pluralism- This is the co-existence of multiple legal systems or order within one country. In Nigeria: English law/statute, Customary law, and Sharia law all operate side by side. Legal pluralism often leads to conflicts, especially when parties are at liberty to choose any of the available legal systems. This is prevalent in family and succession matters for instance.
- iv. Customary law/ living customary law- Customary law is the indigenous rules, norms and traditions of a particular community that regulate conduct, family, marriage, inheritance, etc. An expanded meaning of customary law is given in part 2 of this paper. Living Customary Law is customary law as it is actually practiced and evolving today, not just what was recorded in colonial books. By section 18(3) Evidence Act 2011, customary law cannot be enforced if it is repugnant to natural justice, equity and good conscience or contrary to public policy.
- v. Customary court-These are lower courts established by state laws to administer customary law. In Nigeria, states have Customary Courts that handle civil matters like marriage, custody, chieftaincy, land, and sometimes, intestate succession where the parties are subject to customary law.
- vi. Customary court of Appeal - This is a superior court of record in each state, established under Section 280 of the 1999 Constitution. In Nigeria: It hears appeals from Customary Courts on matters involving customary law. It ensures uniformity and checks that customary law applied does not conflict with the Constitution.

1.4. Origin of Customary Courts (Pre-colonial Court System)

Customary courts have their origin in pre-colonial era native courts. Obilade recounts that before the advent of colonial rule and the amalgamation of the protectorates of northern and southern Nigeria, the pre-colonial institutions included courts.⁵ Thus, before the introduction of the colonial legal system, there were systems of law and dispute settlement in many Nigerian communities. These systems were governed by native law and custom. Typically, the type of native law and custom applied in any dispute was dependent on the social system operating in the area. For a country with diverse customs like Nigeria therefore, the native laws and customs applied were reflections of the communities themselves and their belief systems.⁶ What was the nature of these societies?

There were aristocratic societies comprising the western and the northern dwellers on one hand and the horizontal or acephalous communities comprising the eastern dwellers, that is the Igbo people.⁷ Irrespective of the social classification, the goal was always to apply native law and custom to achieve peace in the communities. Akin Ibidapo-Obe and Abayomi Williams recount how disputes were settled in traditional communities.⁸ According to them, when conflicts occur in the rural communities, the people resort to traditional system of dispute resolution because they are designed to establish peace and harmony in order to prevent future feuds.⁹ Therefore, the end result of the application of the native law and custom is peace and stability. For this reason, a writer like Umoh observes that any rule that resolves conflict and stabilises society is law, however crude.¹⁰

In the traditional courts that existed in the pre-colonial era, the dispute resolution processes were sometimes informal, but they always followed recognised lines. Okafor observes that the age grade society, the *dibia* fraternity, societies of titled fellows, village elders and *Okonko* or *mmanwu* (masquerade) societies, were recognised traditional courts that engaged in dispute settlements.¹¹ Intra-family disputes, rudeness to elders, adultery, debts, succession

⁵ Obilade AO, *The Nigerian Legal System* (London: Sweet & Maxwell 1979) at 17.

⁶ Park, AEW, *The Sources of Nigerian Law*, (Lagos: African Universities Press Ltd, 1963) 6.

⁷ Elias TO, *Nature of African Customary Law*, Manchester University Press, (1956) 213

⁸ Ibidapo-Obe A and Williams FA, *Arbitration in Lagos state A synoptic Guide*, Concept Publications Limited (2010) 123.

⁹ Ibidapo-Obe A and Williams FA (2010) 123.

¹⁰ Umoh PU, *Law in African Context* cited in Nwocha ME (2013) *Human Rights and Criminal Justice in Nigeria*, Abakaliki, CE Dorrolls Publishers, 5-10.

¹¹ Okafor FU, *Igbo Philosophy of Law*, Fourth Dimension Press Ltd (1992) 6.

to family property, paternity, and assaults, were some cases usually handled by the family head and the principal members.¹²

In the traditional Igbo community setting, each family was made up of compounds referred to as *ezi* or *obi*.¹³ So, family or principal heads were simply the heads of families that make up the communities. When dispute arises, the injured party would report to the head of the compound of the offender or to a body of arbitrators who will try to settle the dispute amicably and appeals on such matters will be to *ndi amala* (council of elders), or to the age-grade association or the *dibia* fraternity.¹⁴

There were also the supernatural tribunals where grave offences which could not be resolved by the ordinary tribunals were brought.¹⁵ For instance, as Elias observed, the *dibia* fraternity could be approached to summon a meeting of the fraternity for the purpose of judging a matter.¹⁶ The recognition and influence of such fraternities could go way beyond the immediate community to surrounding villages.¹⁷ Thus, intending litigants only brought important cases to this important body.¹⁸

Notably, in the traditional court system that existed, civil wrongs were distinct from criminal wrongs. The interesting thing about offenders, offences and punishment was that the entire family of the offender got punished for wrongs done.¹⁹ This promoted the culture of collective responsibility amongst members of the family and the community at large. So, in a typical traditional society, members of a family are viewed as one. Therefore, where one member commits an offence, his or her punishment is meted out to all other members of the family he or she comes from. Collective responsibility therefore encouraged collective child discipline among members of the family, knowing that such children grew to either project or ridicule the entire family.²⁰

¹² Ibidapo-Obe A and Williams FA (2010) 133.

¹³ See Okafor FU (1992) 6.

¹⁴ Okafor FU (1992) 6.

¹⁵ Okafor FU (1992) 6.

¹⁶ Elias TO (1954) 213.

¹⁷ Elias TO (1954) 213-218.

¹⁸ Elias TO (1954) 213-218.

¹⁹ Elias, TO, *The Nature of African Customary Law*, (Manchester: The University of Manchester Press, 1956) 109-110.

²⁰ Elias, TO, *The Nature of African Customary Law*, (Manchester: The University of Manchester Press, 1956) 110.

Again, the traditional dispute resolution system allowed for compensation of victims of crime. This is what is known as restorative justice.²¹ Restorative justice allowed for effective re-socialisation or reintegration of an offender into the society. According to Adeyemi, reconciliation is the overriding aim of the African judicial process, including criminal law administration.²² Onwubiko puts it succinctly when he observed that the purpose of restorative justice is the maintenance of group solidarity, cohesion, and social equilibrium in these words-

The process of reconciliation and, consequently, reconstruction of relationships between the criminal and the victim, does not stop at the point of adjudication. No offence is too grievous to foreclose reconciliation, even murder. The traditional judicial organs, being an out growth (sic) of the people, were accepted and respected...the age grade associations were the primary judicial organs in the horizontal or republican African societies. Since there were no formalised courts entrusted with judicial matters, adjudication (essentially dispute resolution) was merely another level of social interaction and existence.²³

This was the traditional court system until the advent of colonialism. In what could be described as the actual conquer of the nation of Nigeria, the annexation of Lagos by British colonialists happened in 1861. Eventually, the colony of Lagos, together with the northern and southern protectorates, were amalgamated in 1914 to form Nigeria. Lord Frederick Lugard was appointed Governor-General, assisted by two Lieutenant Governors for Northern and Southern provinces of Nigeria and an administrator for the Lagos colony. This political arrangement impacted on the customary courts as discussed in the next section.

1.5. Colonial court system (Colonial formalisation of customary courts)

The colonial legal system in Nigeria permitted natives to observe their native laws and customs as far as they were not repugnant to natural justice, equity and good conscience, and also not incompatible with the relevant statutes.²⁴ Thus, section 19 of the Supreme Court Ordinance of 1876 provided that –

Nothing in this Ordinance shall deprive the Supreme Court of the right to observe and enforce the observance, or shall deprive any person of the

²¹ Restorative justice as *an idea of criminal justice that centres around systematic provision of adequate and accessible remedies for victims of crime*. See Ibidapo-Obe A and Williams FA *Arbitration in Lagos State: A synoptic Guide* (2010) Concept Publications Limited, 99.

²² Ibidapo-Obe A and Williams FA (2010) 108.

²³ Onwubiko AO, *African thought, religion and culture*, Snapp Press (1991) 83.

²⁴ This was known as the repugnancy test. It was a demand for all native law and custom to pass this test in order to be admissible in any matter in court. This is in accordance with the Supreme Court Ordinance of 1876.

benefit, of any law or custom, existing in the said Colony and Territories subject to its jurisdiction, such law or custom not being repugnant to natural justice, equity and good conscience...”

The repugnancy doctrine gained popularity in Nigeria following the decision in the case of *Eshugbaye Eleko v. Government of Nigeria*, where Lord Atkin noted that the Court cannot itself transform a barbarous custom into a milder one. According to Lord Atkin, barbarous customs must be rejected as repugnant to “natural justice, equity and good conscience.”²⁵

The repugnancy test, together with other compulsory requirements of the Evidence Act, are the tripartite hurdle customary law has to cross to gain admissibility in Nigerian courts.²⁶ Significantly, under the regime of the repugnancy test, natives were allowed to administer their own native laws and customs during the colonial era, while disputes involving natives and non-natives were referred to the Governor.²⁷ Subsequently, for administrative convenience and to avoid irregularities, the colonial administrators brought the native courts within the statutory ambit. Thus, some of the traditional attributes of the native courts were eliminated because repugnancy was entrenched. For instance, the culture of collective responsibility gave way to individual punishment systems and families were no longer accountable for the wrongs of a family member.²⁸

Interestingly, Elias believes that repugnancy is a positive aspect of colonial rule not just in Nigeria but across the globe.²⁹ He argues that the doctrine of repugnancy has positive effect on the development of our customary law because it eliminates those aspects of our laws that have gross injustice inherent in their application.³⁰

Again, the court held in *Okonkwo v. Okagbue* that equity in its broad sense, as used in the repugnancy doctrine is equivalent to the meaning of ‘natural justice’ and embraces almost all, if not all, the concept of good conscience”³¹ This decision of the court seems to suggest that

²⁵ (1931) AC 262 at 273. See section 16 (1) of the Evidence Act, 2011 Cap 112 Laws of the Federation 2010

²⁶ See section 16 (1) of the Evidence Act, 2011 Cap 112 Laws of the Federation 2010.

²⁷ In accordance with the Supreme Court Ordinance of 1876.

²⁸ In *A.C.B. v. Okonkwo & Others* (1997) 1 N.W.L.R. (pt. 480) 194 the Court held that the sin (offence) of the son cannot be visited on the mother simply on the basis of the mother-son relationship. According to the court, to do so without any reason is inimical to justice. (Per Akintola Olufemi Ejiwunmi (JCA).

²⁹ Elias, T. O. (1956): *The Nature of African Customary Law*, England: Manchester University press, 220-225.

³⁰ Elias, T. O. (1956).

³¹ *Okonkwo v. Okagbue and Others* (1984).

customary laws in Nigeria are subjected to the test of repugnancy as much as other customs elsewhere.³²

Asides repugnancy, another constraint to the application of native law and custom during the colonial era, was the Native Courts Proclamation that gave rise to minor courts and native courts.³³ By this proclamation, the courts had defined limits and could hear both civil and criminal cases between natives and non-natives.³⁴ Within the same period, the British introduced the Native Courts Proclamation in 1906, which reviewed the native courts system in northern Nigeria.³⁵

By the Native Courts Law 1956 (N.R No.6 of 1956), 600 Native Courts were established in northern Nigeria with civil and criminal jurisdiction, supervised by the British.³⁶ In eastern Nigeria, native courts were established with warrant chiefs and judicial officers at village and community levels.³⁷ In the western part of the country, native courts developed into customary courts, so that by 1957, there was a Customary Courts Law 1957 (Cap 31) Laws of Western Nigeria, just like the Customary Courts Law (Eastern Region no. 21 of 1956) in eastern Nigeria.³⁸ Each of these native courts were supervised by the colonialists. As such, the operation of the native laws and customs was restricted.

This restriction in the practice and procedure of customary courts continued so that presently, customary courts still struggle for recognition and relevance, this will be buttressed as the paper progresses. In the meantime, the paper will discuss some of the features of customary courts in relation to customary law and pre-colonial courts and then subsequently, how these courts impact on intestacy in South-East Nigeria.

2. Features of customary courts in comparison with historical courts

³² Uweru BN, Repugnancy Doctrine and Customary Law in Nigeria: A Positive Aspect of British Colonialism, (2008) African Journals On-line, 294.

³³ Native Courts Proclamation, 1900, No. 5 of 1900 (Northern Nigeria), Statutory courts established in Nigeria by the British administration and the Native Courts Ordinance, 1918 (No. 5 of 1918).

³⁴ In criminal proceedings, only native courts had original jurisdiction in customary criminal law matters. See Criminal Code Act, cap. 42, Laws of the Federation of Nigeria and Lagos, 1958 Revision, s. 4 as at June 1st, 1916, cited in *Gubba v. Gwandu* N.A. (1947) 12 W.A.C.A. 141 <https://www.lawglobalhub.com/tsofo-gubba-v-gwandu-native-authority-1947-ljr-waca/>, accessed on 24th January, 2024.

³⁵ Native Courts Proclamation, 1900, No. 5 of 1900 (Northern Nigeria).

³⁶ Perham M, *Lugard: the years of authority 1898–1945*, 138 cited in Elias TO, ‘Government and politics in Africa’ (2nd ed. 1963) 25.

³⁷ Elias TO, (1963) 25-26.

³⁸ Elias TO, (1963) 26.

Under this head, the paper establishes some of the key features of customary courts and how these features are fused with customary law to express the indigeneness of the courts. This section is important because it shows how customary law is a resource for customary courts while still being statute compliant.

1. **Statutory and State-Created:** Customary courts are creatures of statute. They are formal institutions created by the state or government legislative Acts.³⁹ One can call them an improvement of the traditional village squares or elders' councils because they are created by representatives of the people empowered to do so by the people.
2. **Lowest Tier in the Judicial Hierarchy:** Customary courts operate at the grassroots level and represent the foundational rung of a country's formal court hierarchy. This enables them to have the closest contact with indigenes and core practitioners of custom. Accordingly, in the case of *Faleye v. Dada*,⁴⁰ over a declaration of title and land dispute in Ota, the Supreme court ruled that an appellate high court should not improperly interfere with a trial customary court's evaluation of witness credibility, findings of fact, or local customary law because the lower court had the direct advantage of assessing the evidence and visiting the locus in quo (the scene of the event). Thus, it is established that customary courts have a direct and unhindered interaction with the grass root or members of the community at the lowest level. This is evident in the historical courts where the people easily assessed their kinsmen and traditional chiefs for dispute resolution because these traditional institutions were cited in the same location with the people concerned.
3. **Relaxed Rules of Procedure:** Customary courts are characterized by simplicity. They purposefully bypass the strict technicalities, evidentiary rigors, and complex adjectival laws found in higher common law courts to ensure speedy justice. This is typical of the indigenous courts that existed pre colonialism. Customary courts retain that simple and free ambiance that encourage indigenes to appear before it. Rules of courts are relaxed for customary courts for two reasons. First, is that Section 256 of the Evidence Act, 2011 explicitly excludes customary, area, and Sharia courts from its application. Second is the notion of judicial notice of custom. Under cases like *Ababio*

³⁹ CFRN, S. 280.

⁴⁰ *Faleye and others v Dada and others* (SC 315/2006).

II v. Nsemfoo, it is recognized that customary court judges are presumed to know the custom of their locality, dispensing with the need for strict, formalized proof. Historical courts also had these attributes where parties only had to call witnesses or relatives to back their claim. This fostered the culture of easy mediation and peace in agrarian times.

Interestingly, customary courts with the aforementioned advantages, still face serious challenges, ranging from statutory limitation to recurring bottle necks in practice and procedure. Some of these challenges include:

1. **Restricted Jurisdiction:** The judicial reach of customary courts are severely limited. They generally possess zero jurisdiction over serious criminal matters (which are strictly governed by statutory codes) and are restricted primarily to civil issues like land tenure, matrimonial disputes under native law, and inheritance.⁴¹
2. **Institutional Supervision:** Their decisions are not final. They are subject to appeals and judicial review by higher specialized appellate courts, such as the Customary Court of Appeal
3. **Unqualified or Poorly Trained Personnel:** Many customary court judges and panel members lack formal legal training, sometimes comprising retired civil servants or individuals with limited legal education, which impacts the quality of judicial reasoning.⁴²

Notwithstanding these challenges of customary courts, they still retain certain features which make them the most suitable to adjudicate on intestate succession. A critical analysis of the nature of judicial proceedings in customary court backs up this claim.

Importantly and as already stated, Customary Courts are the lowest courts in the hierarchy of courts in the South-Eastern part of Nigeria. These courts are vested with original jurisdiction to adjudicate civil causes and matters involving application and enforcement of customary law applicable in their areas of jurisdiction. Customary courts are set up to provide

⁴¹ Udosen Idem, *The Judiciary and the role of Customary Courts in Nigeria*, (2017) *Global Journal of Politics and Law Research*, 4-5.

⁴² Odinna Chima, *Inadequacy of customary law in coping with law and order in Nigeria*, https://www.academia.edu/5818398/INADEQUACY_OF_CUSTOMARY_LAW_IN_COPING_WITH_LAW_AND_ORDER_IN_NIGERIA, accessed 25th May, 2025.

substantial justice to the parties without recourse to the technicalities of the common law.⁴³ Their function is to interpret the prevailing customary law of the area that is binding on the parties – without necessarily following the state laws. For instance, section 2 of the Customary court law of Anambra state defines customary law to mean a body of rules regulating rights and imposing correlative duties.⁴⁴ So, customary courts are established to regulate rules known as customary law. This regulation is not as technical or rigorous as one finds in superior courts of record in Nigeria.⁴⁵ As such, in the case of *Onwuama v. Ezeokoli*,⁴⁶ the court held that-

appellate courts are to consider the substance of the proceedings of Native, Customary or Area Courts liberally and this is done by reading the record to understand what the proceedings were all about so as to determine whether substantial justice has been done to the parties within the procedure permitted by such courts.⁴⁷

Anyafulude attempts to give the reasoning behind the above court judgement. He explains that customary courts are not required to strictly comply with the rules of practice and procedure or evidence because, the rationale for creating the customary court is to make the administration of justice available to the common man in a simple, cheap and uncomplicated form.⁴⁸ This reasoning resonates with some of the practice and procedure of customary courts.

Again, buttressing on customary court procedure, the court in *Ogunnaike v. Ojayemi* held that a customary court cannot make use of the Evidence Act unless authorized by law.⁴⁹ This means that even though customary courts are presided over by legally qualified persons (as the rules and laws of customary court demand) or have legal practitioners who may appear

⁴³ See *Dincey v. Ossie* 5 WACA 177, *Ajayi v. Aina* 16 NLR 67; *Ogunnaike v. Ojayemi* (1987) 1 NWLR PT 53 (a) p.670

⁴⁴ Customary Court Law of Anambra state, 2010. Section 2.

⁴⁵ Superior courts of record include the Supreme Court of Nigeria, the Court of Appeal, the Federal High Court, the High Court of the Federal Capital Territory, Abuja, a High Court of a State, the Sharia Court of Appeal of the Federal Capital Territory, Abuja, a Sharia Court of Appeal of a State, the Customary Court of Appeal of the Federal Capital Territory, Abuja, and a Customary Court of Appeal of a State. See the CFRN, section 6(5).

⁴⁶ *Onwuama v. Ezeokoli* (2002) 5 NWLR PT 760@ p.353.

⁴⁷ Per Uwaifo, JSC.

⁴⁸ Anyafulude T, *Principles of Practice and Procedure of Customary courts in Nigeria through the Cases*, Mercele Press, Enugu, Nigeria (2012) 3.

⁴⁹ (1987) NWLR PT 53 p. 760.

before it as representatives of the parties, it still does not justify the application of the Evidence Act in any matter in a customary court.⁵⁰

The balance in customary courts regarding the application of the rules of court on the one hand and the elimination of complications surrounding the Evidence Act on the other hand, stands out and makes customary courts the best fit for certain personal matters including intestacy. Although Diala argues that customary courts are creations of the state legal system because they have judges who are trained within this system, as well as litigants in customary courts who are within the same system, this paper is of the opinion that customary courts only grew to become what they are presently.⁵¹

Customary courts are not indigenous anymore compared to what they were in the pre-colonial times. However, given Nigeria's legal plural state, it is not possible to adjust the legal systems in order to have indigenous norms the way they used to be. Even if we cleanse indigenous laws of the common laws (or the imposed English laws), we may still not succeed in absolutely ridding the indigenous laws of colonial influence or any other influence at all. This is because the nature of the laws (customs, native or indigenous laws) is such that will still allow it to go through the crucible of change within the society. For example, once upon a time, it was customary among some ethnic groups in Nigeria to kill twins because twins were considered bad omen that could bring devastation or calamity on the society.⁵² Today, twin murder is no longer part of customary law anywhere in Igbo land. So, the custom of twin murder naturally took the route of change and is no longer in vogue. In the same vein, indigenous laws and traditional dispute settlement mechanisms could have still changed and emerged better versions in the face of social changes such as urbanisation, technological discoveries and eventually industrialization – arguably with or without the colonialists' influence.⁵³

⁵⁰*Ogunnaike v Ojayemi* (1987) NWLR PT 53 p. 760.

⁵¹Diala AC, "Judicial Recognition of Living Customary Law in the Context of Matrimonial Property Rights in South-East Nigeria" (2016) cited in Diala AC (2019) A butterfly that thinks itself a bird: the identity of customary courts in Nigeria, *The Journal of Legal Pluralism and Unofficial Law*, (2019) 51:3, 383.

⁵²Twin murder was the exposure or suffocation of multiple neonates, whose bodies were then disposed of in the *ajoo ofia* (bad bush) outside Igbo towns. See Misty L.B "The Demon Superstition": Abominable twins and Mission Culture in Onitsha History, Vol 40, No 1, Special Issue: Reviewing Twinship in Africa (Winter, 2001) pp 13-27.

⁵³See Diala's remarks on the widespread changes that occurred in Africa since Africa's encounter with invaders, slave raiders, and, eventually, European colonialists in Diala AC, A butterfly that thinks itself a bird: the identity of customary courts in Nigeria, *The Journal of Legal Pluralism and Unofficial Law*, (2019) 51:3, 382.

In the proceeding sections, this paper will analyse the legal framework of succession in South-East and how customary courts enable better settlements in intestate situations. this is done in the next section.

3. Legal framework on intestacy

This part briefly describes the legal regime of intestate succession in South-East Nigeria. The objective is to give a background understanding of what laws govern intestacy in the South-East and to showcase how these laws are insufficient and may require more actions or reviews in order to fully situate customary courts as the hub for intestate succession matters.

First, this part clarifies the relationship between intestacy and customary law, being that where a person dies intestate, the property of that person will be determined by the personal law of such a person.⁵⁴ Thus, where there is no will or testament, it is assumed that the deceased intended for his or her property to be administered by customary law. As will be shown later in this part, the custom or tradition of an intestate or the law of the place where his or her property is located impacts heavily on who inherits them. Bearing in mind that succession is on the residual legislative list,⁵⁵ which means that each state in Nigeria is allowed to enact its own succession laws, this part will briefly interrogate the Constitution, in addition to state laws that are relevant to intestate succession in South-East Nigeria.

Nationally, the rules of intestate succession are governed by the Constitution, the Evidence Act, the Land Use Act, the Marriage Act and the Matrimonial Causes Act. As the ultimate law, the provisions of the 1999 Constitution are binding on all authorities and persons in Nigeria because it determines the validity of every other law.⁵⁶ In South-East Nigeria therefore, the provisions of the Constitution govern and supersede any law on intestate succession.

⁵⁴ In south-East Nigeria, the property of an intestate is determined by Igbo customary law. The authority for this is derived from case law and state laws. For instance, in *Nezianya v Okagbue* (1963) 1 All NLR 352, the court held that where the deceased was an Igbo man domiciled in Igboland, his estate on intestacy is governed by Igbo Customary law. This was affirmed in *Ukeje v Ukeje* (2014) 11 NWLR Pt. 1418 384 SC where the supreme court struck down discriminatory aspects but confirmed that Igbo customary law governs intestacy. See also, *Agbai v Okogbue* (1991) 7 NWLR Pt. 204 391 SC. Meanwhile, the Administration of Estates Law Cap A4 laws of Anambra state 1991, section 49 says the law does not apply where the deceased was governed by customary law. In effect, if the parties are Igbo and subject to customary law, then customary law applies in the devolution of the property.

⁵⁵ CFRN, 1999 (as amended).

⁵⁶ Section 1 (3) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) afterwards referred to as the Constitution or CFRN.

Informed by the constitutional right to own property anywhere in Nigeria, the position of state laws regarding the administration of intestate property creates difficulty. It is difficult because, while there is a right to own property, the property itself is subjected to various twists when the owner dies intestate.⁵⁷ This depicts the tension between plural legal orders in Nigeria, such that property acquired by statutory means cannot easily be devolved by customary means.

Significantly, the Evidence Act is another important national legislation that impacts intestate succession in the South-East.⁵⁸ In order to prove intestate succession, the court usually requires evidence of the custom of the deceased person. This means that the courts usually look into the customary laws of the deceased person in order to determine his or her estate. Therefore, in intestate succession discussions, the main question will centre on the proof of customs.⁵⁹

Remarkably, section 24 of the Land Use Act provides that in the case of customary right of occupancy, the devolution of the right of an occupier upon death shall be regulated by the customary law existing in the locality in which the land is situated except where non-customary law or any other customary law applies.⁶⁰ Some state laws require property acquired by statutory means to devolve by statute, in which case survivors of the intestate will have to make applications for letters of administration, etc.⁶¹ This process puts the survivors in an awkward position of making formal applications over property that would have been devolved customarily. Again, section 39 of the LUA takes land out of customary court when it is in the urban area or land with statutory right of occupancy. Proceedings in

⁵⁷ This includes issues of balance between the law of the place where the property is situated and the law of the place where the intestate originated from. Sometimes, the succession law of the place where the property is situated is different from the succession law of the place where the intestate originated from. Sometimes again, a succession law may provide for the administration of the property in certain way but subject that way to another system of law. For instance, The Administration (Real Estate) Law, Cap 6, Laws of Ebonyi State, 2009 provides that in intestacy, real estate will be administered as a personal estate. However, in paragraph 2 of the same section, the law exempts property deemed to be disposed by customary law notwithstanding the provisions of the Administration Law. See Administration (Real Estate) Law of Ebonyi state, section 2, paragraph 1.

⁵⁸ The Evidence Act, 2011, afterwards referred to as the Act.

⁵⁹ See section 16 (1) of the Evidence Act, 2011 Cap 112 Laws of the Federation 2010.

⁶⁰ LUA, section 24 (a).

⁶¹ For instance, section 6 of the Administration General Law, Cap 7, 2009 of Ebonyi state places a demand for certified copy of a register of death, certificate of Local Government Council, amongst others.

respect to such property in the urban area are only subject to the jurisdiction of high courts.⁶² If the property is in rural or non -urban area, then customary court has jurisdiction.⁶³

Notably, for all intents and purposes, the Marriage Act makes marriages celebrated under the Act valid in law.⁶⁴ In determining the appropriate law for the administration of the estate of a deceased person, the court will probe the lifestyle of the deceased. This lifestyle will include the type of marriage he or she entered into with his or her spouse. As a writer observes, the formation and dissolution of marriage are considered when the matter of succession arises.⁶⁵ Thus, it was decided that a person who contracted a marriage under the Act intended to be regulated by statute.⁶⁶ Other legislations that have interactions with intestate succession include the Child Rights Act (141); Violence Against Persons Act (s.4); African Charter on Human and People's Rights (Article 14) etc.

Locally, the Customary Court Law of Anambra State 2011,⁶⁷ provides that customary court shall have and exercise jurisdiction over all or any of the causes and matters relating to inheritance upon intestacy under customary law; and grant of power or authority to any person to administer the estate of an intestate under customary law. However, there is a monetary limit of N2,000,000 value for landed property in rural areas.⁶⁸ Where the amount of the claim exceeds two million naira, the case is redirected to the Magistrate or the High Court.⁶⁹

In Ebonyi State, the Ebonyi Customary Court Law (ECL),⁷⁰ grants unlimited jurisdiction to customary court in land matters and matters of inheritance (under customary law) within the local government area.⁷¹ It also provides that customary law will be binding on indigenes of the area or any person who makes a claim under customary law of inheritance over property

⁶² LUA, section 39(1) (a).

⁶³ LUA, section 41.

⁶⁴ Act No. 18 of 1914, amended by Acts No. 18 of 1916, 3 of 1922, 58 of 1933, and 1 of 1958 Chapter 218, Laws of the Federation of Nigeria 1990. <[M6.pdf \(placng.org\)](#)> accessed on 9th October, 2022. Section 34.

⁶⁵ Taiwo, A.A., Imosemi, A., Apampa, S. and Emmanuel, C., "Customary Law of Succession in Nigeria: Rethinking the Legal Status of Women" in *Nigerian Women in Cultural, Political and Public Spaces* (Cham: Springer International Publishing, 2023) pp. 227-241.

⁶⁶ See *Olowu & others v Olowu & Anor*, (1985) 3 N.W.L.R., Pt. 13 at 372. See also *Adesunbokun v Yanusa* (1970) N.L.R. 92; *Onwudinjoh v Onwudinjoh* (1957) Vol. 11 E.R.L.R. p1.

⁶⁷ (No.7 of 2010) Section 16(1) & First Schedule, Paragraph 2(d) & (e).

⁶⁸ Customary Court Law of Anambra State 2011, section 16(2).

⁶⁹ Ibid.

⁷⁰ 2001 as amended 2010 in Section 16(1) & (2).

⁷¹ ECL, section 16(1).

of a deceased indigene.⁷² Notably, Ebonyi state gives customary courts exclusive original jurisdiction for all intestate inheritance regardless of value, provided it is customary law.

In Enugu state, the Customary Courts Law,⁷³ is quite instructive. Under section 15(1)(c), causes and matters relating to inheritance are brought under customary law upon intestacy. Customary courts are also empowered to grant power or authority to any person to administer the estate of an intestate under customary law.⁷⁴ Importantly, Section 14 provides that customary courts shall be the courts of first instance for any cause where all parties are subject to customary law, unless excluded by law.

Similar provisions are replicated in paragraph 6 of the customary courts law of Imo state.⁷⁵ This law sets out the jurisdiction of customary courts under the second schedule. Accordingly, item 6 of the second schedule provides that causes and matters relating to inheritance upon intestacy and the grant of power or authority to any person to administer the estate of an intestate under customary law, shall come under customary courts. This law is only applicable where all parties are subject to customary law and the property is within the magisterial district of the court.⁷⁶

Again, in Abia state, the customary courts law,⁷⁷ provides for intestate succession under customary law. This law grants the customary court jurisdiction over causes and matters relating to succession and or inheritance upon intestacy under customary law and the grant of authority to any person to administer the estate of an intestate under customary law.⁷⁸ The amendment law puts a monetary limitation of five hundred thousand naira for rural land and inheritance.

From the above assessment of the local laws, it is clear that Customary Court Laws of Anambra, Enugu, Imo, Abia and Ebonyi confer jurisdiction on these courts in intestate situations. However, the Land Use Act places a limitation on the jurisdiction under section 39 if such intestate property is located in the urban area. Thus, for most modern houses which are in the areas declared urban by governors, intestate cases legally bypass customary courts

⁷² ECL, See s. 16(2).

⁷³ Cap 32, Laws of Enugu State 2004.

⁷⁴ Customary Courts Law Enugu state, Cap 32, Laws of Enugu State 2004, Section 15(1) (d).

⁷⁵ See the customary court Law of Imo state No 7 of 2010 (formerly Edict No 7 of 1984).

⁷⁶ See section 13(2) of the Customary Courts Law of Imo state No. 7 of 2010.

⁷⁷ Cap 82, Laws of Abia State 2006 as amended by Law No. 6 of 2011.

⁷⁸ Customary Court Law, Cap 82, Laws of Abia state 2006 as amended by law No 6 of 2011. A combined reading of section 14(2) and the third schedule, Table A, Item 6.

because of section 39 of the LUA even when customary court laws say otherwise, Customary courts thus have lingering limitation since the LUA is a national legislation that over rules the provisions of the customary court laws. This means that in order to restore customary courts, there has to be amendment of section 39 of the LUA or a de-classification of family houses from urban areas.

Again, where a deceased dies intestate and is subject to Igbo customary law, the proper forum is the customary court, not the High Court. However, the statutory ouster in these state customary laws that limit jurisdiction of the courts to two million naira at most, clearly explains why landmark appellate decisions such as *Ukeje v Ukeje*,⁷⁹ *Anekwe v Nweke*,⁸⁰ etc. were instituted at the High court, as the value of the estates exceeded the customary court's pecuniary limits.

Ultimately, the legal framework on intestate succession creates more problems than solutions when it comes to the question of who inherits and how inheritance should devolve under customary law. The customary courts are vested with original jurisdiction and are also equipped with customary law which is an essential ingredient to navigate such cases, yet, the statutory limitation hinders them. What then is the way forward? How can these gaps be bridged? The next section attempts to build a bridge over this challenge.

4. Bridging the gaps of legal pluralism

It has been established that there is a sort of conflict between the state law which is the anglicised common law and the customary law which is the diluted indigenous law.⁸¹ The task therefore is to find a synergy between the state laws and the customary laws. The point where the state law and the customary law agree as it relates to intestacy becomes the focus of this paper. In the opinion of this paper, customary courts to a large extent, bridge this gap.

Recalling that earlier, this paper showed the nomenclature of customary courts in South-East Nigeria and the semblance of these courts with the indigenous traditional justice system. The detailed analysis of the customary court is to affirm that the customary courts are the most

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ This word is borrowed from Diala who used the term 'anglicised courts' to describe what the colonialists did with the indigenous courts as regards transforming the courts to suit their administration. See Diala AC, A butterfly that thinks itself a bird: the identity of customary courts in Nigeria, *The Journal of Legal Pluralism and Unofficial Law*, (2019) 51:3, 381.

suitable courts to tackle issues on intestate succession in the South-East. This is for many reasons.

1. *Administrative convenience* - First, the customary courts to a large extent retain the indigenous features of the traditional justice systems. The composition of the courts allows for members knowledgeable in the custom and tradition of the place where the customary court is situated. This is quite similar to what obtains in the traditional justice system. Remarkably, these members do not just sit to complete the number as presiding officers but they help to direct the court as to the customs of their people;⁸² likened to putting round pegs in a round hole. The parties who have approached the court for settlement sit in to listen to proceedings similar to what they are already used to. The proceedings are akin to their indigenous system and so, the procedure builds some sort of confidence and further helps them accept the customary court decisions afterwards. Therefore, in an intestate situation, the customary courts are able to ensure a balance in the application of the custom with statutory guidance.
2. *Balancing cultural legitimacy with Constitutional guarantees of equality and due process* - Customary courts are enjoined to allow for out of court settlement or to try alternative dispute settlement techniques. This is usually a period where the village head and the council members are given ample time to attempt to resolve the issues involving their fellow kins men and women. It is only when such efforts of the village head fail that the matter is brought back to customary court. This system like the traditional justice system, encourages peace and amicable settlement of disputes while ensuring that the parties have a relaxed environment to settle their disputes. The system also allows for the expression of the legal systems such that both state and customary law come into play in the adjudication process. A writer notes that the interplay of the state law and the customary law in the customary courts ensures legal and social justice at the same time,⁸³ since the law aims to ensure both legal and social justice in a way that ensures justice for all the parties involved.⁸⁴ In an intestate

⁸² The law provides for a president who is a lawyer and 2 members who are knowledgeable in the customs. See for instance, the Ebonyi state customary court Law, section 4.

⁸³ See Nwocha ME, (2016) 433. See also Holmes comparison of law and morality in Holmes OWJ, *The Path of the Law*, 10 Harvard Law Review 457 (1897) 1-6.

⁸⁴ This re-echoes one of the dicta of Oputa JSC in the case of *Josiah v State* (1985) 1 NWLR (Pt 1) 125 where he described justice as a three-way traffic. Although this description was used over criminal law involving

situation therefore, matters brought to customary court undergo out of court settlement to ensure that the conflicting parties are settled amicably while taking into consideration the interest of the deceased intestate. This is the reason dying declarations,⁸⁵ gifts *inter vivos* (gift of a property to someone while still alive),⁸⁶ etc. are admissible in courts. Moreso, South-East (Nigeria) is a mix of people with various customs and traditions. As such, what is customary law in Abakiliki of Ebonyi state, may not be applicable in Onitsha of Anambra state even though they are both South-Eastern states of Nigeria. Interestingly, customs may even vary within the same state such that what is custom in one part of the state may not be in another part.⁸⁷ Therefore, customary courts represent the entity that ensures a common ground for the existing customs. This means that the rules of customary court could be applied where two or more customs clash within a particular place.

3. *Adequate composition of the court* - The composition of customary courts requires the president and two members.⁸⁸ This is a good blend of the two existing legal systems in the South-East. The president or the chairman is knowledgeable in state law while the other two members are knowledgeable in the custom and tradition of the place where the court is situated. This composition of court ensures that both legal systems are represented and applied at the same time. This important composition is evident in the requirement of the law to ensure that all members are sited during hearings.⁸⁹ Therefore, over intestacy which hinges on inheritance and falls within the jurisdiction

murder, the description can fit into the context of intestacy to guarantee justice for the individual parties disagreeing over the inheritance and the third party who is the intestate.

⁸⁵ Evidence Act, 2011 (as amended) Section 40(1).

⁸⁶ *Inter vivos* gift is the legal term that refers to a transfer or gift made during the grantor's life. See the following cases: *Enadeghe v Eweka* (2014) LPELR-24479 (CA); *Gabdo v Usman* (2015) LPELR-25678 CA; *Orido v Akinlolu* (2012) LPELR-7887 CA.

⁸⁷ Reference is made to field research undertaken by the Nigerian institute of Advanced Legal studies (NIALS) in 2011 where I was part of the field researchers covering the South-East. The Institute had sent official letters to traditional rulers, weeks before we arrived and so they were pre-informed that we were coming. I was therefore surprised to discover on ground that while some communities in Anambra allowed me free entry into the Igwe's (King's) palace, some insisted that I could never see the king as a female. Aguleri, Umuokpara, Nnewi, etc allowed me entrance into the palace to see and interview their Kings but in places like Onitsha, Awka, Amawbia communities, I was asked to wait somewhere away from the palace and was attended to by a spokesperson of the king. The findings of this field research are contained in Azinge E. (ed), *Restatement of Customary Law of Nigeria*, Nigerian Institute of Advanced Legal Studies Book Project, African Books Collective (2013), 1-385.

⁸⁸ See for instance, the Ebonyi state Customary Court Law (ECCL), section 4(1) (2) (3) and the Customary Court Law of Anambra state, section 4(1).

⁸⁹ See for instance the ECCL, section 4(3) that provides that all three members of the customary court have to be present and sited during hearings.

of the customary court, substantial justice is achieved when the members sit together on a matter because by their combined efforts, they are knowledgeable in both the rules of court and the custom of the land.

4. *Absence of procedural bottlenecks* - Unlike the superior court of record where customary law is treated as a question of fact to be proved by evidence adduced by the parties,⁹⁰ members of the customary court are presumed to know the applicable customary law relevant to the matter before the court and are empowered to apply it without proof by the party seeking to rely on it unless the court thinks otherwise.

Notably, the above presentation of customary courts as the most suitable court for the adjudication of intestate matters in a plural legal Igboland does not mean that customary courts are without challenges. As already discussed, issues of limited jurisdiction of customary courts; the lack of uniformity arising from scarce or absence of relevant laws; and the conflict between it and other legal systems are some of the challenges bedeviling customary courts. However, as regards general administration and rulings on intestacy, customary courts seem to blend state and customary laws in such a manner that guarantee fairness to all parties especially in intestate situations.

5. Recommendation and Conclusion

5.1 Recommendations

In light of the findings of this paper, it is important to strengthen the role of customary courts first in the area of legislative harmonization. There should be clearer statutory provisions that define the jurisdiction of customary courts over intestate succession matters. The conflict between customary law and other state laws must be addressed through uniform legislation to reduce legal uncertainty.

Again, customary law should be codified in such a way that relevant aspects of the law on succession could be documented and, where appropriate, codified by state Houses of Assembly. This will promote uniformity while preserving the core values of each community's customs.

⁹⁰ This paper has already alluded to how the Evidence Act requires customary law to be proven through repeated usage or precedent, through an assessor, etc. See the Nigerian Evidence Act, section 14.

Further, the jurisdiction of customary courts should be expanded from the two-million-naira benchmark to an amount commensurate with present realities. Also, improved funding and infrastructure at both federal and state levels would provide adequate funding, better court facilities, and record-keeping systems for customary courts. This will enhance efficiency and public confidence in their administration of justice. Customary courts must be repositioned not as inferior courts, but as integral components of Nigeria's justice system. With legislative clarity, institutional support, and human rights compliance, they can effectively deliver justice that is both culturally legitimate and legally sound.

5.2 Conclusion

This paper has appraised the origin, present condition, and relevance of customary courts in the administration of intestate succession in Nigeria's legal plural system. From their roots in pre-colonial indigenous dispute resolution mechanisms to their statutory recognition under colonial and post-colonial laws, the paper argued that customary courts have remained the closest judicial institutions to the people. The paper therefore maintained that accessibility, cultural legitimacy, and procedural flexibility make customary courts indispensable in resolving succession disputes for the majority of Nigerians who live by customary norms.

Despite the challenges faced by the customary courts such as limited jurisdiction, inadequate training, and occasional conflict with other legal systems, this paper strongly argued that customary courts remain highly relevant because they bridge the gap between formal law and lived realities, ensuring that succession is handled in ways that reflect community values.

Ultimately, the paper showcased that administrative patterns, balance of state and native laws in practice and procedure, and compliance with good practice of exploring alternative settlement techniques, make customary courts the best fit for adjudication of intestate matters. Thus, customary courts are not relics to be discarded, but vital institutions to be strengthened. With appropriate reforms, they can continue to deliver culturally sensitive and just outcomes in intestate succession, thereby preserving the integrity of legal pluralism in Igboland.

