1. WILLS

Will when used as a noun [1]is the faculty by which a person decides on and initiates action, control deliberately exerted to do something or to restrain one's own impulses, a deliberately or fixed desire or intention. In legal parlance, it is defined as "a legal document containing instructions as to what should be done with one's money and property after one's death."

The Black's Law Dictionary defines a Will as [2] The legal expression of an individual's wishes about the disposition of his or her property after death especially a document by which a person directs his or her Estate to be distributed upon death. It is also termed testament: Will and testament; or in an archaic form, testamentary instrument.

Section 1 of the Wills Law Cap 170 of Oyo State 2000 defines Will as follows:

> *"Will includes a testament, a council and an appointment by will or by writing in the nature of a will in exercise of a power."*

[3]The word "Will" has two distinct meanings. The first, and strict meaning is metaphysical, and denotes the sum of what the testator wishes, or "Wills" to happen on his death. The second, and more common meaning is physical, and denotes the document or documents in which that intention is expressed.

[4]Dr. Kole Abayomi former Director of the Nigeria Law School and erudite lecturer defines a Will as "a testamentary and revocable document, voluntarily made, executed and witnessed according to law by a testator with sound disposing mind wherein

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[1] Oxford Dictionary
[2] Black's Law Dictionary, Tenth Edition page 1833
[3] Anthony R. Mellows, The Law of succession 6 (3rd Edition)
[4] Kole Abayomi Wills and Practice (Mbenyi & Associates Nig. Ltd.)2004

he disposes of his property subject to any limitation imposed by law and wherein he gives such other directives as he may deem fit to his personal representatives otherwise known as his executors, who administer his estate in accordance with the wishes manifested in the Will."

[5]A will generally is the disposition of real and personal property to take effect after the death of the testator. When a Will operates upon personal property, it is sometimes called a testament, and when it operates upon real estate, it is called a devise. The more popular description of the instrument embracing real and personal estate is "last will and testament".

1.1. What is An Oral Will?

An Oral Will takes the form of an oral declaration made voluntarily by the testator during his lifetime. The declaration may be made whilst the testator was in good health or in anticipation of death. The declaration must be made while the testator is in full control of his mental faculty/capacity and in the presence of witnesses. Like in English Law, the identity of the subject matter of the Will must be specific. For instance, a testator cannot dispose of his undivided share in a family or communal land.

1.2. Nuncupative Will

An oral, unwritten Will or verbal Will is also termed nuncupative Will. Blacks Dictionary defines it as an oral Will made in contemplation of imminent death especially from a recent injury. Nuncupative Wills are invalid under the Wills Acts/Laws. E.g.

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[5] Kwentoh Vs Kwentoh (2010)5 NWLR (pt. 1390)151 SC

Section 6(1)(a) Wills Law Cap 170 Laws of Oyo State 2000 provides:-

"No Will shall be valid unless it is in writing."

An oral Will is made by the spoken declaration of the testator and usually dependent on oral testimony for proof.

1.3. Other forms of Dispositions.

i. **Gift Inter Vivos**: This is so called when a person gives another his property either Real or Personal during his lifetime. As the name implies, it is a gift which the donee does not provide or give any consideration for. This gift is transferred to the donee during the donor's lifetime and the property devolves on the donee, unlike the gifts in a Will which comes into effect only after the death of the testator. Quoting from the [6]Holy script "For where a testament is, there must also of a necessity be the death of the testator. For a testament is at force after men are dead; otherwise it is of no strength at all while the testator liveth."

It is also described as [7]an act whereby something is voluntarily transferred from the true person to another person with full intention that the thing shall not be returned to the donor and with full intention on the part of the receiver to retain the thing entirely as his own without restoring it to the giver. The essential thing is to consider that the gift is complete when the donee accepted it. If that condition is satisfied, the donor has no right to revoke it.

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[6] The Holy Bible, Hebrews Chapter 9 Verses 17 & 18

[7]Giwa Osagie Vs. Giwa Osagie (2011)A FWLR Pt. 55 page 384

ii. Donatio Mortis Causa/donatio causa mortis

This is a gift made in contemplation of the donor's imminent death. It is also called death bed disposition. It must have the following four essential elements:-

(a) The gift must be made because of the donor's life threatening illness/peril.
(b) The donor must intend to make an immediate gift
(c) The donor must deliver the gift
(d) The donee must accept the gift

They are conditional like legacies and it is essential that the donor make them in his last illness or in contemplation and expectation of death; They are good, notwithstanding a previous Will and if he recovers, the gift becomes void. It is similar to testamentary disposition in that there remains with the donor the power to revoke the gift (*causa mortis*) until his death. It may be said to resemble a contract, for mutual content and the concurrent will of both parties are necessary for the validity of the transfer.

In the case of a gift, the requirements differ from the requirements of a Will which is required to be in writing and to be signed and executed. If for instance a gift of land is being transfered, it must be by deed.

If the gift is not transferred before the death of a donor, it may be admitted to probate as a testamentary act and it must meet the requirements of a Will before the donee can obtain the benefit.

iii. Settlements:

A settler can by an instrument effect a disposition of beneficial interest to another person by way of succession. This can immediately create an interest in the property. It is irrevocable unlike the Will which is revocable until the death of the Testator and which confers interest only after the Testator's death.

iv. Nominations

A nomination directs someone owing funds on behalf of another, on the death of that other to pay the funds to a nominated third party. Like a Will, it must be in writing and must be attested to by a witness but does not need to be executed.

1.4. Features/Requirements of A Will

As stated earlier it is a declaration of the testator's wishes or his intention at the time of the making the Will. If the testator gives out a property under his Will and he goes ahead to otherwise dispose of it before he dies, that leaves the supposed beneficiary with nothing. The propounders of a Will must therefore proof or establish the fact that it is validly made by the testator.

Section 6 of the Wills Law Cap 170 Laws of Oyo State 2000 states as follows:

6(1) No Will shall be valid unless:

(a) It is in writing;

(b) It is signed by the testator or signed in his name by some other person in his presence and his direction in such a place on the Will so that it is apparent on

the face of the Will that the testator had intended to give effect by the signature to the writing signed as his Will;

(c) The testator makes or acknowledges the signature in the presence of at least two witnesses present at the same time;

(d) The witnesses attest and subscribe the Will in the presence of the testator but no form of attestation or publication shall be necessary.

(2) No signature under this Section or under any other provision of this law shall be operative to give effect to any disposition or direction which is underneath as follows it nor shall it give effect to any disposition or direction inserted after the signature shall be made.

See also Ajakuwe Vs. Ajakuwe & ors (2016)LPELR 41046(CA) page 9 – 10.

i. The Will has to be in writing and shall be attested by at least two witnesses. This does not connote that it must be in the Testators' handwriting.

A Will may be typed, printed, lithographed in whole or in part. The most important thing is that it is in writing in order to conform with the provisions of statute.

Section 8(1) and (2) of the law exempts members of the Military forces and Mariners at sea from this strict rule.

ii. The testator has to have testamentary disposition i.e. to be of sound mind. Testamentary capacity means legal capacity to make a Will. The law requires that a testator must have a sound disposing mind both at the time of giving instructions and execution.

It must be established that:

[8]*(a) The testator understands the nature of the Act that he is making in his will and its effect.*

(b) He must understand and recollect the extent of the property that he is disposing.

(c) He must understand and appreciate the nature and extent of the claims upon him by those whom he is including in his Will.

(d) *The manner in which the property is distributed must be rational that no disorder of the mind has poisoned his affection or penetrated the exercise of his Will.*

2. CUSTOM/CUSTOMARY LAW

2.1. History of Customary Courts

The history of Customary Courts/Law in Nigeria dates to the Pre-colonial Era. At the wake of British's colonization they established various Courts. There was the Supreme Court for the Colony of Lagos, established by the Supreme Court Ordinance N0 4 876 Courts of Equity were established in the Eastern Part of the country to regulate affairs between the European Merchants and the indigenous rulers. Later, consular Courts which were staffed by the British Officers were established. In the Northern Parts of the Country, there was the Royal Niger Company with its headquarters

[8]Per Ogunwumiju JCA in Okolonwamu Vs. Okolonwamu & ors (2014) LPELR – 22631(CA) pp 24 – 26 para A - C

later Zungeru; its first headquarters was established at the mouth of River Niger in Asaba. The Company established a Supreme Court with a Chief Justice and one or more Judges to exercise both Civil and Criminal Jurisdiction. The Local/Native Courts were established to function alongside these (foreign Courts).

The chatter of the Royal Niger Company provided that the laws and customs of the indigenes were to be respected if they were not "repugnant to humanity".

According to Sir James Marshall, Director of the Company

> "My own experience of the West Coast of Africa is that government has for the time succeeded best with natives, which has (sic) treated them with consideration for their native laws, habits and customs, instead of ordering all these to be suppressed as nonsense, and insisting on the wondering negro at once submitting to the British Constitution, and adopting our idea of life and civilization ..... what I wish to say is that the natives of the Gold Coast and the West Coast of Africa have a system of laws and customs which it will be better to guide, modify and amend; rather than to destroy by ordinance and force".

That is the foundation of the different strata of Customary Courts that we have today.

In May 1900, proclamations were made to establish the English statues and English style legal system into Nigeria.

The Supreme Courts of the Protectorate of Northern and Southern Nigeria became superior Courts of Record which possessed and

exercised Jurisdiction vested in them by her Majesty the Queen of England.

These established Courts were to administer the common law, doctrines of equity and the statute of general application in force in England on the 1st of January 1900. To stem the conflict that would/may arise with the natives who have lived with their own distinct customary laws from time immemorial there was a necessity to proclaim in Section 13 of the Supreme Court Proclamation of 1900 enacted by Lord Lugard the High Commissioner for Nigeria thus:-

> "Nothing in this proclamation shall deprive the Supreme Court of the right to observe and enforce the observance or shall deprive any person of the benefits of any law or custom existing in the protectorate, such law or custom not being repugnant to natural justice, equity and good conscience....."

He directed the political office holders to further recognize the Native Laws and Custom in matters relating to marriage, land and inheritance and also for the native Moslem, the Maliki Code of Mohammedain Law which are not repugnant to natural justice and humanity or to any ordinance in Nigeria.

This policy laid down by Lord Lugard as far back as the time the Northern and Southern Protectorates were amalgamated resounds in our statute books today.

All the Customary Courts and Area Courts that replaced the Native Courts have similar provisions.

Section 13(1) of the High Court laws of Oyo State Cap 55 2000 states: *"The High Court shall observe and enforce the observance of every Customary law which is applicable and is not repugnant to natural justice, equity and good conscience nor incompatible either directly or by implication with any written law for the time being in force and nothing in this law shall deprive any persons of the benefit of any such customary law."*

The provisions of the above section is replicated in Section 15(a) of the Customary Courts Law of Oyo State 2018 and Section 50(1) of the Customary Court of Appeal Law of Oyo State 2008.

2.2. Evolution of Customary Courts

Custom comprise of the regular practice, tradition and way of life of a people that has become accepted as a norm after a period of time. It has been defined as [9]a rule of conduct, obligatory on those within its scope, established after long usage. [10]It is the habitual practice of a people.

In **Oyewumi Vs. Ogunesan**[11], it was defined as *"the organic or living law of the indigenous people of Nigeria regulating their lives and transactions. It is organic in that it is not static. It is regulatory in that it controls the lives and transactions of the community subject to it. It is said that Custom is a mirror of the culture of the people"*.

Customary Law has been defined as any rule or body of rules of human conduct regulating the rights and duties of a particular indigenous Nigerian Society whether by immemorial custom or usage or not but which are considered binding by such indigenous

[9]Osborne's Consice Law Dictionary London Sweet and Maxwell 9th Edition (Sheila Bone Edition)
[10]A. Atesua Custom and Customary Law; Nigerian Courts and Promises for Women's Rights in contemporary issues in the Administration of Justices Essays in Honour of Justice Atinuke Ige TREASURE HALL CONSULT REHOBOTH PUBLISHING P. 344
[11](1990)3 NWLR (Pt.37) 182 @207.

Nigerian Society and breach of which attract sanctions by external from such indigenous group[12].

Customary Law grows from the custom of the people. It is subject to usage and growth of a people as they evolve and is handed down from generation to generation. It can be discarded or done away with when it no longer satisfies the yearnings or aspiration of a people, and ceases to attract obedience from the people which activities it regulates.

The Supreme Court defines Customary law in the case of [13]**Kharie Zaiden Vs. Fatima Khalil Mohssen** thus "*Customary Law is a system of law not being the common law (of England) and not being enacted by a competent legislature in Nigeria but which is enforceable and binding within Nigeria between parties subject to its sway*."

It is further described as [14]*"a mirror of accepted usage, a reflection of social attitude and habits of various ethnic groups; and derives its validity from the consent of the community which it governs, applicable only to people indigenous to the locality where such customary law holds sway."*

A school of thought believes that custom is different/distinct from Customary Law in that where custom is an accepted usage or behavioural pattern acceptable to a particular set of people in a particular locality. Customary law on the other hand is a set of custom that have evolved into law which carries or attracts sanctions if breached. It may be rightly concluded however that they both mean one and the same thing.

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[12] Onuh J, the case for the reinstatement of Customary Law in Nigeria (Okeudo & Sons Press) page 3

[13](1973)1 ALL NLR 740 @ 753

[14] Salacuse J.W.; A selection Survey of Nigeria Family Law, 1965 (Ahmadu Bello University Bookshop Zaria) P. 288

2.3 How Customary Law Is Established

i. Evidence Act

Under the Evidence Act, [15]"A custom may be adopted as part of the law governing a particular set of circumstances if it can be judicially noticed or can be proved to exist by evidence. [16]A custom may be judicially noticed when it has been adjudicated upon once by a Superior Court of record. [17]Where a custom cannot be established as one judicially noticed, it shall be proved by fact.

Customary Law can therefore be established by proof in the courts. The proponent must provide proof for the law to be judicially noticed. The burden lies squarely on him [18]**Ibrahim Vs. Bade**. Unless a Customary Law has become so notorious that judicial notice is taken by the Courts, then it shall be decided based on the evidence placed before the Court in each particular case. This is so because the laws are not written and there are numerous customs and people groups in Nigeria.

In **Okere Vs. Orianwo**[19], the plaintiff's custom that precludes a minor from inheriting his father's property because he does/cannot perform burial rites was not enforced by the Court because it had to be specially proved.

Contrary wise in **Cole Vs. Akinyele**[20] the custom which was sought to be enforced was only supported by a previous earlier Judgment. The plaintiff submitted that under the Yoruba Customary Law, the acknowledgement of paternity of a child born out of wedlock by a man in his lifetime made the child/children legitimate and entitled to share in his estate with the children born

[15] Section 16(a) Evidence Act 2011
[16] Section 17 Evidence Act 2011
[17] Section 18(1) & (2) Evidence Act 2011
[18] (1966)6 NWLR (Pt. 474)513
[19] (1998)9 NWLR (Pt. 566)P A18
[20] (1960)5 FSC 84

No evidence was called. However, the Court was called to take Judicial Notice of the rule under Section 14(2) based on an earlier decision in **Alake Vs. Pratt**[21] in which the trial Court and the West African Court of Appeal upheld the custom as proved.

Where the existence or the nature of a custom applicable to a given case is in issue there may be given in evidence the opinions of persons who would likely know of its existence in accordance with Sections 73 of the Evidence Act.

Now the Act provides for the acid test for any custom or customary law thus: [22]"In any judicial proceedings where any custom is relied upon, it shall not be enforced as law if it is contrary to public policy, or is not in accordance with natural justice, equity and good conscience."

Section 73 of the Act provides:

> *"When the Court has to form an opinion as to: the existence of any general custom or right, the opinions as to the existence of such custom or right, of persons who would be likely to know of its existence if it existed is admissible.*
>
> 2. *The expressions "general custom or right" include customs or rights common to any considerable class of persons."*

ii. State Laws

Section 2 (Part 1) of the Customary Courts Law of Oyo State 2018 interprets Customary Law as "any declaration of local customary law made and approved under the provision of Part 2 of the Chiefs Law;"

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[21](1955)15 WACA 20

[22]Section 18 (3) Evidence Act 2011

Section 15(a) of the same Law provides as follows:

"subject to the provisions of this law, a customary court shall administer the appropriate customary law specified in Section 16 in so far as it is not repugnant to natural justice, equity and good conscience nor incompatible either directly or by necessary implication with any written law for the time being in force."

From the foregoing, it can be safely concluded that Customary Law can be established in line with the provision of statute/law in force. An example is the Chiefs Law of Oyo State referred to above[23].

In **Oyefelu Vs. Durosimi**[24], it was held by the Supreme Court that the Registered Chieftaincy declaration made pursuant to Section II of the Obas and Chief's Law of Lagos State 1981 provides proof of Customary Law in relation to the chieftaincy for which the declaration is made and registered. Such registered chieftaincy is declaratory of the tradition, customary law and usage relating to the section and appointment to a particular chieftaincy stool; and obliviates the necessity of proof by oral evidence of such tradition custom and usage on each occasion that the usage arises for determination by the courts.

iii. Repugnancy doctrine

A customary law is also acceptable when it is not repugnant to the principles of natural justice, equity and good conscience and not contrary to any law for the time being in force[25].

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[23]Ibid
[24] (2011)7 NSCQR 6
[25] ibid

In **Laoye Vs. Oyetunde**[26] Lord Wright was of the view that the doctrine was intended to invalidate barbarous customs.

Over the years, the courts have held variously that some custom and practices are repugnant though a custom will not fall under the harmmer only because it does not conform to the standard of behavior acceptable in other communities. In the case of **Dawodu Vs. Dawodu**[27], the judicial committee of the privy council rejected the view of the trial Judge, Jibowu 'J' that the Yoruba system of inheritance per unit also known as 'idi igi" (whereby inheritance was distributed per mothers/widows)other than per stripe 'ori ojori' (which was per child) was repugnant to equity. The privy council held that the principles of natural justice, equity and good conscience applicable in a country where polygamy is generally accepted should not be readily equated with those applicable to a community governed by the rule of monogamy. The question therefore whether the particular rule of customary law is repugnant is that of law and not fact.

It has been held that a Maliki Law that prevented a person accused of highway robbery from defending himself is repugnant[28].

A customary court that orders the children of customary law marriage where the groom had not paid the bride prize to be given to the husband in an earlier marriage was held to be repugnant to natural justice, equity and good concisence[29]. The Supreme Court held that a custom that allowed a woman to be married to a deceased man as repugnant to good conscience and public policy[30].

Niki Tobi JCA (as he then was) of blessed memory held in respect of a custom whereby a brother is allowed to inherit the

[26]1994 AC 170
[27] (1931) AC 662 Page 673
[28] Curi Vs. Hadeja 9 N.A. (1959)4 FSC 44
[29] Edet Vs. Essien (1932) 11 NLR 47
[30]Okonkwo Vs. Okagbue (1994)9 NWLR Pt. 368 P 301

property of his deceased brother because the deceased did not have a male child.

"We need not travel all the way to Beijing to know that some of our customs including the Nnewi "oli-okpe" custom relied upon by the appellant are not consistent with our civilized world in which we all live today. In my humble view, it is the monopoly of God to determine the sex of a baby and not the parents. Although the scientific world disagrees with this divine truth, I believe that God, the creator of human beings is also the final authority of who should be male/female. Accordingly, for a custom or customary law to discriminate against a particular sex is to say the least an affront on the Almighty God Himself. Let nobody do such a thing. On my part I have no difficulty in holding that the "Oli Ekpe" custom of Nnewi is repugnant to natural justice, equity and good conscience."

The Supreme Court however in subsequent case cautioned against the use of strong words and ruled that the courts should not classify customs as uncivilized. Customs are to be interpreted in the context of the totality of the Nigerian Customary Laws and not to pick and choose which customs to condemn.

3. WILLS UNDER CUSTOMARY LAW

3.1. Written Wills

Written Wills are unknown to Customary Law, but as stated earlier there are nuncupative Wills i.e. oral Wills and death bed declarations. This do not preclude persons subject to Customary Law from making Wills under the English format. The laws

however place a limitation to the testamentary disposition of such a testator.

The States in Nigeria do not have a uniform Law relating to Wills. [31]The Western States adopted the Western Nigerian Law and the states from the Northern and Eastern parts of Nigeria still apply the Wills Act 1837 and Wills Amendment Act 1852.

Section 3(1) of the Wills Law Cap 170 Laws of Oyo State 2000 provides that:-

> *"it shall be lawful for every person to bequeath or dispose of by his Will executed in accordance with this law, all property to which he is entitled, either in law or in equity, at the time of his death. Provided that the provision of this law shall not apply:*
>
> *(a) to any property which the testator had no power to dispose of by Will or otherwise under Customary Law, to which he was subject.*
>
> *(b) to the Will of a person who immediately before his death was subject to Islamic Law.*

Section 4(1) provides that:-

> *Notwithstanding the provisions of Section 1 of this Law, where a person dies and is survived by any of the following persons:*
>
> *(a) the wife or husband of the deceased;*
>
> *(b) a child of the deceased;*

[31] Cap 133 Laws of Defunct Western Nigeria

(c) a parent, brother or sister of the deceased who immediately before the death of the deceased was being maintained either wholly or partly by the deceased that person may apply to the Court for an Order on the ground that disposition of the deceased's estate effected by his Will is not such as to make reasonable financial provision for the Applicant."

The above two sections imposes some restriction on the testamentary capacities of testators.

The right of a testator to dispose of his properties is therefore limited.

In Oyo State, the Wills Law limits the right of a testator to dispose of property if he cannot do so under Customary Law and under Islamic Law if he is subject to it.

There are similar provisions in the Wills Law of Lagos State. This provisions may give rise to spurious claims on the property of a testator if the family members are meddlesome interlopers.

In **Lydia Lawal Osula Vs. Chief Saka Lawal-Osula**[32], the Supreme Court held that the phrase in Section 3(1) above is not a qualification of the testator's capacity to make a Will but a qualification of the subject matter of the property disposed of or intended to disposed of by Will. It was held further that all the Wills Law seeks to achieve is to make a disposition in a Will a possibility for every citizen of Bendel State. Every person can make a Will, but that capacity is subject to entrenched Native Law and Custom. The testator must bear in mind what his position in his

[32] (1995) SCNJ 84, (1995)3 NWLR Pt. 382, page 128

community is before he embarks on making devices, bequeath or disposition in a Will. The Will in this case is valid subject to the device on Igiogbe (the house wherein the deceased lived during his life time) which the testator could not by Will, dispose of to any one as it automatically devolves on the 1st plaintiff at the testator's death. The Wills Law of defunct Bendel State is a replica of former Western Nigeria which is also similar to that of Oyo State.

3.2. Death Bed Declarations

Death bed declarations are also means of disposing property under Customary Law by the testator. Like in nuncupative Wills, such declarations must be made in the presence of witnesses.

3.3. Secret Trusts

Secret Trusts are also foreign to Customary Law but it was held in **Ayinke & Balogun Vs. Ibiduni**[33], that though Secret Trusts are alien to Customary Law, they are means by which a person may dispose of certain properties before his death in accordance with native law and custom e.g. by a gift followed by the transfer of property. This is similar to Gift inter Vivos. Among the Akans of Ghana a testator might make a secret trust; but the testator's family must consent to the transaction[34].

With the introduction of writing, it is submitted that nun cupative Wills reduced into written form should be treated as valid under Customary Law since writing in such cases is no more than a mere evidence of the transaction. Such will encourage the growth of customary law.

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[33](1959) 4 FSC 280

[34] Ollenu N.A. The Law of Testate and Intestate Succession in Ghana (Sweet ad Maxwell London, 1966)273.

4. APPLICABILITY

4.1. Section 13 of the Customary Courts Law of Oyo State provides that "A Customary Court shall have jurisdiction over all persons resident in the state:

Section 16(2) provides:

"In causes and matters arising from inheritance, the appropriate customary law shall subject to subsection (1) and (4) of this section be the customary law applying to the deceased.

16(3) provides:

In cause or matters involving marriage or custody of children, the appropriate law shall be the law under which the marriage was conducted.

Section 4 provides:-

"subject to the provisions of subsection (1) and (2) of this section

(a) in civil matters where:-

(i) both parties are not natives of the area of jurisdiction of the customary court or

(ii) the subject matter of transaction the cause or matter was not entered into the area of Jurisdiction of the Customary Court or

(iii) one of the parties is not a native of the area of jurisdiction of the Customary Court and the parties

agreed or may be presumed to have agreed that their obligations should be regulated, wholly or partly, by the Customary Court; or

(iv) one of the parties is not a native of the area of jurisdiction of the customary court and the parties agreed or may be presumed to have agreed that their obligations should be regulated, wholly or partly, by the Customary law applying to that party;
the appropriate customary law shall be the customary law binding between the parties;

(v) in all other civil causes and matters the appropriate customary law shall be the law of the area of jurisdiction of the Court.

Section 5 provides where the Customary Law applying to land prohibits, restricts or regulates the devolution on death to any particular class of persons of the right to occupy such land, it shall not operate to deprive any person of any beneficial interest in such land (other than the right to occupy the same) or in the proceeds of sale thereof to which he may be entitled under the rules of inheritance of any other customary law.

The purport of the law is that persons that chose to conduct their affairs under customary laws will have their estates dealt with under the customary law applicable to them if they die intestate. If they die testate, their Wills will also be validated/executed subject to the customary law applicable.

4.2. In deciding on the test for the applicability of customary law, Tur JCA held in **Chukwu Vs. Okoh**[35] as follows:

> *"In Law of Evidence, 4th Edition by T.A. Aguda, paragraph 49 page 105 appears the following passage "In regard to the application of the rules of customary law in Nigeria, the general rule is that if there is a rule of customary law applicable to the matter in controversy between two Nigerians, the matter must be determined in accordance with such rule of customary law unless such rule is repugnant to natural justice, equity and good conscience, or it is established that it was intended by the parties that the obligations under the transaction should be regulated by the received common laws; Labinjoh Vs. Awanotu Abake. Again where both parties have agreed that the transaction is based on customary law and previous decisions in suits relating to the transaction have been given on this basis, the parties would be estopped from contending in a subsequent action that the transaction is based on the received common law. Egbeyemi Ogundiran Vs. Egunyemi Balogun. In deciding questions of customary law, the opinion of local chiefs or other persons having special knowledge of customary law are relevant (section 58) As Taylor F.J. pointed out in Liadi Giwa Vs. Bisiriyu Erinmilokun "it is a well established principle of law that native law and custom is a matter of Evidence to be decided on the facts presented before the Court in each particular case, unless it is of such notoriety and has been so frequently followed by the courts that*

[35](2016)LPELR – 42117(CA) PP 52 – 53 paragraph C - E

judicial notice would be taken of it without evidence required in proof".

This is more so as Nigeria is an heterogeneous country with several Nations. The common English meaning of the word Nation is "a group of people sharing aspects of language, culture and/or ethnicity or a historically constituted, stable community of people, formed on the basis of a common language, territory, economic life, and psychological makeup manifested in a common culture." Nigeria has over two hundred and fifty ethnic groups and even greater number of Customary Laws.

In **Eigbe & Anor Vs. Eigbe & ors (213)LPELR 20292(CA) page 26 – 27** per Ogunwumiju JCA

"It has been held in a plethora of authorities on this point that a person can make a Will, but the devises bequest or disposition therein shall not be inconsistent with the established customary law and shall at any rate be governed by the relevant customary law. The phrase relating thereto" as used in the law relates to the customary law in respect of the devise, bequest or disposition."

See also Osula Vs. Osula (Supra)

Idehen vs. Idehen (1991)6 NWLR 198 page 382 @ 433/494

4.3. Customary Law may operate even outside a particular locality of its origin if the person to which it applies finds him/herself residing in another locality. It was held that Ijebu woman who resided in Lagos and died there intestate will have the customary law of Ijebu apply to the distribution of her estate. On the contrary,

in **Olomu Vs. Olomu**[36] the deceased was a Yoruba of Ijesa by birth but lived in Benin, married Bini women and naturalized as a Bini man had his property distributed in accordance with Bini law and custom when he died intestate in Bini. Each case will be considered on their merits.

In **Tapa Vs. Kuka**[37] the deceased, an Nupe from Bida in Niger State died intestate, leaving some properties in Lagos. It was held that the appropriate law to be applied in the distribution of his properties was his personal law i.e. Nupe of Bida and not the Customary law applicable in Lagos. In **Obusez Vs. Obusez**[38] Aderemi JCA as he then was held that Customary Law would apply to the inheritance of the deceased who died intestate if he married under Native Law and Custom and dies without going through any other form of marriage.

4.4. In modern times couples tend to marry both under the Customary Laws and under the Act that is they first celebrate "Introduction/Engagement which is customary law marriage before going to the registry/church to celebrate the marriage under the Act.

It was held by the Supreme Court in **Jadesimi Vs. Okotie Eboh**[39] that it was never intended that the marriage under the Act would nullify the Customary Law Marriage, but complement it. By applying the Marriage Act to their relationship however, the marriage becomes monogamous, an infraction will amount to the crime of bigamy. In the event the decease of such participants, it can be safely assumed that the distribution of their properties will

[36](2016)LPELR – 42117(CA) PP 52 – 53 paragraph C - E
[37](1945) 18 NLR 5
[38](2001)FWLR (PT. 73)25 @ 40
[39]For Example Section 49(1) Administration of Estate Law Cap 1, Laws of Oyo State 2000

be subject to the Administration of Estate Laws of the States that have enacted laws in this respect.

In **Cole Vs. Cole**[40] the deceased contacted a monogamous marriage with the defendant died intestate, leaving the defendant and a child. His brother brought an action claiming to be the customary heir of his Estate. The court held that it would be contrary to the principles of justice, equity and good conscience to apply the customary rule of succession since by contracting of his marriage under the Act, the deceased chose to regulate his life by English law. This presumption can only be rebutted by the deceased's manner of life suggestive that he wanted customary law to apply. See also **Obusez Vs. Obusez**[41].

5. WILL, LEGITIMACY AND THE CUSTOMARY LAW

5.1. The Black's Law Dictionary[42] defines legitimacy as "The status of a person who is born within a lawful marriage or who acquires that status by later action of the parents; legal kinship between a child and its parent or patents".

Illegitimate[43] is defined as "(of a child) born out of lawful wedlock and never having been legitimated. Under modern ecclesiastical law, a child born out of wedlock may be automatically legitimated if the parents later marry. A child conceived while the mother is married but born after she is divorced or widowed is considered legitimate.

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[40](1898) 1 NLR 18 Sahibi V Nwariakwu (2003)FWLR (Pt. 154)401
[41](2001)FWLR (PT. 73)
[42]ibid at page 1040
[43] ibid at page 863

Harry D Krawe[44] discussing what obtain in America states:

> *"In this age of equality the question might be fairly asked whether a discussion of child support should even be concerned about 'legitimacy and 'illegitimacy'. The answer is 'yes' for several reasons. Most rules regarding child support were fashioned at a time when legitimacy was the precondition to full support entitlement and illegitimate paternity had only limited legal consequences. True, by U.S. Supreme Court doctrine, distinctions between 'legitimate' and 'illegitimate' children should not longer be maintainable but many state statues have not yet been adapted to this view. Distinctions on the bases of legitimacy however unconstitutional, continue to be made."*

In Nigeria any child born in wedlock according to the Marriage Act, or a marriage under the Customary Law or Morterm/Sharia Law is legitimate. Children who are not born under the above stated marriages are referred to illegitimate in certain circumstances for the purpose of inheritance, **Adeyemi Vs. Bandele**[45].

Section 2 the Torts law of Oyo State Cap 161, 2000 provides:

> *"Reference to a 'child' shall include son and daughter, and grandson and granddaughter and stepson and stepdaughter a child whose paternity has been acknowledged in accordance with any customary law applicable in Nigeria, a child adopted whether before or after the commencement of this Laws or any statute in force in Nigeria or in any other country, a child en laws sa mere, and a child legitimated under the legitimacy laws."*

[44]Child Support in America 103 (1981)
[45](1968)1 ANLR 31, 37, 38

In **Bamgbose Vs. Daniel Foster Sulton P**[46], relying on in Re Sarah 1, Adadevoh & ors and in Re Estate of Hebert Macaulay[47] formulated the following tests for determining the legitimacy of a child under Customary Law for purposes of inheritance upon intestacy:-

(1) Whether the mother of the child was married to the intestate in accordance with Customary Law

(2) Whether the child is an issue of such customary marriage

(3) Whether by Customary Law applicable in the case, the child has the status of a legitimate child.

In **Alake Vs. Pratt (supra)** it was held that under Yoruba custom once a father in his lifetime acknowledged the paternity of a child, such a child is regarded as legitimate. But where there are children born in wedlock then the children born outside wedlock would be excluded from participating in the distribution in the Estate of their father. The rationale behind this finding is that the former position is against public policy against the encouragement of promiscuity.

Later in the case of **Cole Vs Akinyele**[48] the same issue arose for determination. The appellants claimed a declaration of the court that they were the legitimate children of the deceased with a consequential right to share in the distribution of his estate. The evidence revealed that the deceased married under the Marriage Ordinance and during the marriage he maintained a relationship with the appellants' mother. The relationship resulted in the birth of the first appellant when the statutory wife was still alive and the

[46] 14 WACA 111, 115
[47] (1951)12 WACA 30, 307
[48] supra (note 36)

birth of the second appellant six weeks after the death of the statutory wife. The deceased acknowledged the appellants in his life time and openly cared for them. The trial court dismissed the claim of the appellants and they eventually appealed to the Supreme Court. The court unanimously dismissed the appeal of the first appellant and allowed that of the second appellant. In doing this it held that a child born outside a subsisting marriage under the Marriage Ordinance cannot be made legitimate by the mere acknowledgement of paternity by the man. It held that when a man who might have married under the Native Law and Custom voluntarily accepts the obligations of a marriage under the Marriage Ordinance, then such a man must, in order to legitimate the children of the adulterous union, follow the same procedure as a person to whom a marriage under Marriage Ordinance is the only form of lawful marriage open. It was decided that it would be contrary to public policy[49] to allow him to legitimate the child by any other method other than that provided by the Legitimacy Act and that **Alake Vs. Pratt** cannot be treated as authority for the proposition that while a man is married under the Marriage Ordinance he can make a child born to him during the continuance of that marriage by another woman other than his wife legitimate by the mere acknowledgement of paternity[50]. According to Brett FJ, the deceased could have married the mother of the appellants on the death of his statutory wife and thereby legitimate the children but he chose not to do so but to marry another woman, the second respondent in this case.

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[49]The court considered that section 35 of the Marriage Act provides that any person who is married under the Act shall be incapable, during the continuance of such marriage, of contracting a valid marriage under Native Law and Custom

[50] See also Abisogun Vs. Abisogun (1963)1 ALL NLR 237; Craig (1964)LLR 96; Esther Osho Vs. Gabriel Phillips & 13 ors (1973) UILR 316. Awobudu Vs. Awobudu & ors (1979)2 LRN 33

In the Estate of Somefun, in Re Williams[51], the deceased was survived by an issue of his marriage under the Ordinance and another issue of a marriage he contracted under the Customary law it was held that the issue who was claiming under the Customary Law and not English Law is excluded from the succession on the death of the intestate of a person who married under the ordinance.

On appeal to the West African Court of Appeal, it was held that the evidence in this case is that under Yoruba Law and Custom, all legitimate children are entitled to share in their father's estate, and as the appellants have been held to be legitimate, they are entitled to share their father's estate and the question of their parent's marriage is not relevant, and this would not be contrary to public policy.

It would then seem that the rule of Customary Law on intestacy established in Pratt's case (supra) relates only to children who were born under Customary Law and whose father acknowledged their paternity in his lifetime.

Such segregation of the right of legitimation by acknowledgement was a systematic nullification of legitimation at customary law. It has been established that customary law permits legitimization of acknowledgement. By these judicial restrictions, the option available was to wait for the subsequent marriage of the parents of the illegitimate child before legitimation could take place. What is then meant was that only illegitimate children of unmarried putative parents could be legitimated by acknowledgement and thereby qualifies for inheritance in the

[51] 7 WACA 156

father's estate on intestacy. Once the father was married to someone else other than the child's mother, the illegitimate child became incapable of been letigitimated by acknowledgement and remains in the status of illegitimacy with the consequential denial of succession rights. It was only the subsequent marriage of the parents of the illegitimate child's parents that could provide the other option of legitimation as provided under the legitimacy Act 1929 unless the parents subsequently marry. The child is consequently denied a claim to the putative father's estate.

Based on the decisions, the option open to a person desirous of benefiting illegitimate issue of his was to make a life time gift or to identify the illegitimate child specifically by name in his will. However in situations of intestacy the illegitimate child was without a legal claim. This separate treatment of people of the same status is discriminatory i.e. discriminatory as between one illegitimate child to another and discriminatory as between the illegitimate and the legitimate child. Since the enactment of the 1979 Constitution of Nigeria the attitude of the courts in Nigeria to the issue has been interesting. In the early case of **Da Costa Vs. Fasheun**[52] the issue was whether the illegitimate children of an intestate who had been acknowledged in his lifetime when he was married under the Act could share equally with the children from the statutory marriage. The deceased was married to Jualiana Fasheun under the Marriage Act in 1948. There were five issues of the marriage. He also have five other children from two other women during his statutory marriage and he acknowledged these children and provided for them. On his death intestate the acknowledged children were held not entitled to a share in the deceased estate as they remained

[52] Suit N0 M/150/80 unreported Lagos High Court

illegitimate and this was despite the provisions of Section 39(2) of the 1979 Constitution. The trial judge held that it would be contrary to public policy to allow them to a claim in the estate and that the constitution does not give them a right of inheritance. In arriving at this decision it relied on the case of **Cole Vs. Akinyele**[53].

In **Salubi Vs. Nwariaku**[54] the Court of Appeal, sitting in Benin, held that since the coming into force of the 1979 Constitution, the term illegitimate children used to describe children born out of wedlock had been rendered illegal and unconstitutional. It held that the trial judge erred in law in holding that children born out of wedlock are not entitled to benefit from the estate of their acknowledged father who died intestate. To do so would amount to subjecting them to disability or deprivation merely by reason of the circumstances of their birth out of wedlock. In giving the decision the court referred to but departed from the case of **Cole Vs. Akinyele**[55]. Delivering the lead judgment, Galadima JCA stated that:

> *"I have held the opinion that the igbo native law and custom which disentitles a female,* ***whether born in or out of wedlock*** *from sharing in her deceased father's estate is void as it conflicts with section 39(1)(a) and section 39(2) of the constitution of the Federal Republic of Nigeria, 1979 (as emended). These provisions are now contained in Section 42(1) and (2) of the 1999 Constitution of the Federal Republic of Nigeria." (emphasis added)*

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[53] Supra (note 36)

[54](1997)9 NWLR (Pt. 505) P 442 CA; See also Olulade Vs. Oyiosu Suit N0 M/133181 High Court of Lagos State.

[55](1990) SCNLR 192; See J.A. Akande, Introduction to the Constitution of the Federal Republic of

The judge referred to the decision of Wali JSC in **Agbai Vs. Okogbue**[56] where he held that 'I have no hesitation in coming to the conclusion that any customary law that sanctions the breach of an aspect of the rule of law as contained in the fundamental rights provisions guaranteed to a Nigeria in the constitution is barbarous and should not be enforced by our courts.

In the same vein, the Courts now frown on customs that disinherit the girl (female) child.

Similarly in **Ukeje Vs. Ukeje**[57] the respondent as plaintiff claimed that she is daughter of late L.O. Ukeje. That as her paternity was acknowledge by the deceased, she was entitled to share in the estate of the deceased. Upon the decision of the trial court in favour of the plaintiff an appeal to the Court of Appeal formulated the issue inter alia, whether the trial court was right to have held that ibo customary law which disentitles the female child from inheritance in her father's estate was unconstitutional. The court held *that the issue whether there was a marriage between the deceased and the respondent's mother was irrelevant having regard to the provisions of Section 39(2) of the 1979 constitution. This is because the circumstances of the birth of the respondent should not constitute a disadvantage to her in view of the clear provisions of section 39(2) of the 1979 Constitution.*

It appears fairly settled, at least as far as judicial attitude is concerned, that the provisions of section 49(2) of the Constitution has removed the discriminatory practice regarding illegitimate or children born out of wedlock in Nigeria.

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[56] (1991)7 NWLR (Pt. 204) 391
[57](2001)27 WRN 142 at 160

Customary law of inheritance and succession is a corpus law, independent of the law of Wills and Intestacy.

Customary Law has a life of its own. It is still evolving like any other law. Many states who hitherto do not have the Customary Courts of Appeal are in recent times establishing the Courts in their States. This is a welcome trend and attestation to the growth and importance of Customary Law. The era of leaving our customary law in the hands of laymen is gradually giving way to a vibrant system which will be attractive to all and sundry, especially the elite. Only the Customary Courts Grade 'C' are still being presided over by laymen in Oyo State. In some other states I believe, every cadre of their customary courts are now being presided over by the legal practitioners. This is a welcome development.

Once again, it is a priviledge to address this gathering of eminent Jurists. Thank you for your attention.

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