

The Repugnancy Test and Esan Inheritance Practices: Protecting Culture Without Violating Fundamental Rights in Nigeria

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Abstract

Section 18(3) of the Evidence Act 2011 empowers Nigerian courts to refuse enforcement to any custom contrary to public policy or offending natural justice, equity and good conscience. Esan inheritance custom in Edo State rests on male primogeniture: the eldest surviving son performs the second burial rites, takes the *Igiogbe* and controls the residue, while daughters and widows take nothing as of right. Using the doctrinal method, this paper asks whether the repugnancy test can correct that exclusion without dismantling the institution it regulates, and argues that it cannot, because the test is colonial in origin, indeterminate, inconsistently applied, negative in remedy and invisible outside the courtroom. The paper separates the seniority principle that organises Esan succession from the sex qualification attached to it, which imposes a disability on the female child within the meaning of section 42(1) of the Constitution. It examines *Idehen v Idehen* and *Lawal-Osula v Lawal-Osula*, which protect the *Igiogbe* against even a valid will, alongside *Ukeje v Ukeje* and *Anekwe v Nweke*, which void discriminatory succession customs, and shows the two lines unreconciled, no reported decision having placed an Esan or Bini daughter's claim before the Supreme Court. Drawing on South African, Ghanaian and Kenyan experience, it recommends an Edo State Succession and Family Property Law distributing the estate equally among all children irrespective of sex and vesting the *Igiogbe* in the eldest surviving child, male or female, as a status asset held on trust. It rejects repeal of section 18(3).

Keywords: *repugnancy test; Esan customary law; primogeniture; Igiogbe; fundamental rights; legal pluralism*

1. Introduction

The Esan occupy the five local government areas of the Edo Central Senatorial District of Edo State, whose population at the 2006 census was roughly six hundred thousand and is now projected at over one million.¹ Esanland is a confederation of chiefdoms, each headed by an *Onojie*, and the *Enijie* constitute its traditional leadership.² Inheritance follows male primogeniture: the eldest surviving son performs the second burial rites, takes the *Igiogbe*, the house in which the deceased lived and died, and controls distribution of the residue among his younger brothers, while daughters inherit no land and widows are not heirs but persons whom the heir must maintain.³ The arrangement is not a bare preference for sons, because property and obligation travel together within it. The heir must bury the father, maintain the widow for life, settle estate debts and provide for unmarried sisters, and the Supreme Court has characterised him as taking the estate in the first instance as a trustee for all the children pending the final burial rites.⁴ Removing the property from the heir without removing the obligation would not be reform but dismantling.

Section 18(3) of the Evidence Act 2011 provides that a custom 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.⁵ That provision, the repugnancy test, entered Nigerian law through colonial ordinances and has served for over a century as the filter for customary rules, although Diala argues that it operates as an instrument of cultural evaluation rather than as a legal test with ascertainable content.⁶ The constitutional tension is sharp, because section 42(1) forbids subjecting a citizen to disabilities or restrictions by reason only of the circumstances of birth or of sex, while section 21 directs the State to protect cultures that enhance dignity.⁷ The *Igiogbe* rule is no vestigial practice, since the Supreme Court has repeatedly upheld it as a fixed

¹ Esan West, Esan Central, Esan North-East, Esan South-East and Igueben. National Population Commission, *Report on the 2006 Census* (Federal Republic of Nigeria 2009); the projection is the authors' own, applying the Commission's intercensal growth rate to the 2006 returns.

² P O Itua, 'Succession under Customary Law in Nigeria: The Rule of Primogeniture versus the Deposition of a Traditional Ruler (Onojie) in Edo State' (2019) 6(2) *International Journal of Culture and History* 39, 41. The plural of *Onojie* is *Enijie*; the Benin equivalents are *Enogie* and *Enigie*.

³ A I Imiefoh and R O Akpata, 'Exploring the Customary Inheritance Practices of the Esan People of Edo State, Nigeria' (2025, manuscript submitted for publication).

⁴ *Abudu v Eguakun* (2003) 14 NWLR (Pt 840) 311 (SC).

⁵ Evidence Act 2011 (Nigeria), s 18(3).

⁶ A C Diala, 'Curbing the Excesses of the Repugnancy Doctrine in African Customary Law' (2022) 66(2) *Journal of African Law* 227; A C Diala, 'A Butterfly That Thinks Itself a Bird: The Identity of Customary Courts in Nigeria' (2019) 51(3) *Journal of Legal Pluralism and Unofficial Law* 381.

⁷ Constitution of the Federal Republic of Nigeria 1999 (as amended), ss 42(1) and 21.

incident of Bini and Esan custom which even a validly executed will cannot defeat.⁸ Striking it down entirely would dismantle an institution the same court has protected for over half a century. Most Esan estates moreover never reach a courtroom, so a rule addressed to judges never engages the transaction it governs.⁹

This paper asks four questions. What is the content and doctrinal history of the repugnancy test, and what standard does it apply? How has it been applied to Esan and neighbouring Edo inheritance custom, and what do the leading decisions in fact decide? Does it do the work that constitutional review of custom now requires? What reform would remove sex discrimination from Esan inheritance while preserving those parts of the custom that violate no right? The inquiry is confined to succession to immovable property among the Esan, with reference to Benin custom where the two share the *Igiogbe* rule. Its significance lies in the gap it identifies, since Edo State has no succession statute of the kind now enacted in Rivers and Abia States, and no reported decision has applied the constitutional standard to Esan custom.

2. Methodology

This paper applies the doctrinal method, which identifies the applicable sources, arranges them into a coherent statement of the law and evaluates that statement against a normative standard.¹⁰ It suits an inquiry into the content of a statutory test, its judicial application and its constitutional compatibility. The primary sources are the Constitution, the Evidence Act 2011 and the statutes governing wills, estates and land in Edo State, together with the two state laws that have recently codified female inheritance rights.¹¹ The decided cases fall into three groups, the early repugnancy decisions, the *Igiogbe* cases and the equality cases of 2014, each cited in full at first discussion.¹² The instruments consulted are the Convention on the Elimination of All Forms of Discrimination Against Women, the African Charter on Human and Peoples'

⁸ *Ogiamien v Ogiamien* (1967) NMLR 245 (SC); *Arase v Arase* (1981) 5 SC 33; *Idehen v Idehen* (1991) 6 NWLR (Pt 198) 382 (SC); *Lawal-Osula v Lawal-Osula* (1995) 9 NWLR (Pt 419) 259 (SC); *Agidigbi v Agidigbi* (1996) 6 NWLR (Pt 454) 300 (SC); *Abudu v Eguakun* (n 4).

⁹ D T Eyongndi and others, 'Realising Female Inheritance Rights in South Eastern Nigeria: The Imperativeness of Going Beyond Legal Rhetoric' (2024) 22 *The Age of Human Rights Journal* 1.

¹⁰ T Hutchinson and N Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17(1) *Deakin Law Review* 83.

¹¹ Constitution (n 7) ss 1(3), 6(6)(c), 12, 21, 42(1), 43; Evidence Act 2011, ss 16-18, 73; Land Use Act 1978, s 24; Wills Law 1976, s 3(1), and Administration of Estates Law 1976, s 49(5), both Laws of Bendel State applicable in Edo State; Marriage Act, Cap M6 LFN 2004, s 36; Rivers State Prohibition of the Curtailment of Women's Right to Share in Family Property Law 2022; Abia State Female Persons' Right of Inheritance of Property Law 2022.

¹² *Eshugbayi Eleko v Officer Administering the Government of Nigeria* [1931] AC 662 (PC); the *Igiogbe* cases at n 8; *Anekwe v Nweke* (2014) 9 NWLR (Pt 1412) 393 (SC); *Ukeje v Ukeje* (2014) 11 NWLR (Pt 1418) 384 (SC).

Rights, and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, referred to hereafter as the Maputo Protocol.¹³ The secondary sources are peer-reviewed articles published between 2018 and 2026,¹⁴ and the paper draws in particular on the works of Diala, Imiefoh and Akpata, Itua, Eyongndi and others, May and others, Oduro and Harari.¹⁵ Doctrinal analysis cannot measure how many families in fact exclude daughters, so published socio-legal studies supply the evidence of community practice.¹⁶

3. Analysis and Discussion

3.1 The Repugnancy Test: Origin, Content and Weaknesses

The repugnancy test arrived as an instrument of colonial administration rather than as a product of Nigerian legal thought, since indirect rule required that African normative systems keep operating while imperial policy required limits upon them, and the proviso reconciled the two by permitting custom subject to a veto whose content the colonial judiciary alone determined.¹⁷ The Privy Council gave the doctrine its most cited formulation in *Eshugbayi Eleko v Officer Administering the Government of Nigeria*, where Lord Atkin observed that a barbarous custom must be rejected, while cautioning that the court cannot itself transform a barbarous custom into a milder one, since if it is recognised at all it must be recognised as the community observes it.¹⁸ That caution marks the boundary of the judicial function and is often overlooked, because a court may refuse to enforce a rule but may not redraft it, the redrafted rule being the creation of the court rather than the custom of the community.

Three weaknesses attend the doctrine. The first is indeterminacy, since natural justice, equity and good conscience are undefined in the Act and were English formulations imported to measure African custom, so the measuring instrument and the object measured come from

¹³ CEDAW (1979) 1249 UNTS 13; African Charter on Human and Peoples' Rights (1981) 1520 UNTS 217; Protocol to the African Charter on the Rights of Women in Africa (2003, in force 25 November 2005).

¹⁴ Principally the *Journal of African Law*, the *Journal of Legal Pluralism and Unofficial Law* and *The Age of Human Rights Journal*.

¹⁵ Diala (n 6); Imiefoh and Akpata (n 3); Itua (n 2); Eyongndi and others (n 9); C May, K Motileni and S Madlala, 'The Continued Struggle of Customary Law Wives for Recognition of Their Inheritance Rights in South Africa' (2025) 17(4) *African J of Legal Studies* 461; A D Oduro, 'Examining Land Inheritance Patterns in Ghana through a Gender Lens' (2026) 26(1) *Jl of Agrarian Change* 1; M Harari, 'Women's Inheritance Rights and Bargaining Power: Evidence from Kenya' (2019) 68(1) *Economic Development and Cultural Change* 165.

¹⁶ V Adeleke and A C Diala, 'The Right of Women to the Inheritance of Their Husbands' Estate in Nigeria' (2024) 11 *Jl of Law, Society and Development* 1; O S Okwuadinma and P I Gasiokwu, 'The Right to Female Succession-Inheritance under Native Laws and Customs in Nigeria' (2024) 12(6) *Global Jl of Politics and Law Research* 98; *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC) [45]-[49].

¹⁷ T O Elias, *The Nature of African Customary Law* (Manchester UP 1956) 82-115; Diala, 'Curbing the Excesses' (n 6) 229.

¹⁸ *Eshugbayi Eleko* (n 12) 673.

different normative systems. Courts refused to enforce customs concerning dowry and paternity, marriage between women, and marriage to the name of a dead man,¹⁹ yet in *Dawodu v Danmole* the Privy Council upheld the Yoruba rule of *idi-igi*, holding that a custom is not repugnant merely because English notions of fairness would decide differently.²⁰ A custom not judicially noticed must in any event be proved as a fact.²¹ The second weakness is inconsistency, and the Esan position is directly implicated, because the Court of Appeal invalidated the Nnewi *oli-ekpe* custom, which excluded a daughter in favour of her father's brother,²² while the Supreme Court has upheld Bini and Esan primogeniture, which excludes daughters just as completely and additionally overrides a valid will.²³ No reported judgment explains the distinction, and a test whose results can only be rationalised after the event guides nobody.

The third weakness is remedial. It is sometimes said that striking down a customary rule of succession creates a vacuum, and that is too strong, because Edo State has an Administration of Estates Law regulating intestacy in detail. The difficulty is that such statutes were drafted so as not to disturb customary succession, the standard provision preserving customary law for property whose devolution customary law governs, while the Land Use Act provides for devolution of a customary right of occupancy under the holder's customary law, and the statutory scheme applies in full only where the deceased married under the Marriage Act, which most Esan spouses do not.²⁴ The problem is therefore not a vacuum but uncertainty as to the applicable regime, which must be resolved by further litigation and which the court cannot resolve by reconstructing the custom. The effect on an Esan daughter is the same either way, since she wins her point of principle and remains without a rule that tells her what she takes.

3.2 The Anatomy of Esan Inheritance Custom

Esan inheritance custom performs three functions which are easily confused, and distinguishing them is the key to the reform problem. The first is distributive, deciding who takes what economic value. The second is the allocation of status, deciding who heads the family, performs the ancestral rites and represents the lineage, these being offices rather than

¹⁹ *Edet v Essien* (1932) 11 NLR 47; *Mariyama v Sadiku Ejo* (1961) NRNLR 81; *Meribe v Egwu* (1976) 3 SC 23; *Okonkwo v Okagbue* (1994) 9 NWLR (Pt 368) 301 (SC).

²⁰ *Dawodu v Danmole* [1962] 1 WLR 1053 (PC).

²¹ Evidence Act 2011, ss 16-18, 73; A N Allott, 'The Judicial Ascertainment of Customary Law in British Africa' (1957) 20(3) *MLR* 244; Diala, 'Curbing the Excesses' (n 6) 231.

²² *Mojekwu v Mojekwu* (1997) 7 NWLR (Pt 512) 283 (CA).

²³ *Idehen v Idehen* (n 8); *Lawal-Osula v Lawal-Osula* (n 8).

²⁴ Administration of Estates Law (n 11) s 49(5); Land Use Act (n 11) s 24; Marriage Act (n 11) s 36.

assets and incapable of division into shares, and Itua shows that primogeniture in Edo State operates in the first instance as a rule about succession to authority, the *Igiogbe* functioning as the physical marker of that authority.²⁵ The third is the allocation of obligation, since the property is the fund out of which burial, widow maintenance and estate debts are discharged. It is tempting to conclude that only the distributive function raises a constitutional difficulty, and that status may be left untouched. That conclusion cannot be sustained. Section 42(1) forbids any disability or restriction imposed by reason only of the circumstances of birth or of sex, and those words are not confined to economic value.²⁶ A rule under which the eldest child may head the family if male and may not if female restricts the eldest daughter by reason only of her sex, and calling the *Igiogbe* a status asset changes the nature of the entitlement without removing the sex qualification attached to it.

The distinction that does the reform work is therefore not between distribution and status but between the seniority principle and the sex qualification. The seniority principle holds that where a family must have one head and one custodian of its principal house, the role falls to the senior child, and it serves purposes unconnected with sex, identifying the office holder by an objective criterion, avoiding fragmentation of the house, and locating the obligations of burial, maintenance and debt in one person against whom they can be enforced. The sex qualification holds that the senior child must be male, and it serves no purpose surviving constitutional scrutiny. Once the two are separated, the question is not whether Esan custom must be destroyed to satisfy the Constitution but whether the seniority principle can be stated without the sex qualification, and the answer is plainly yes. Esan custom already contains internal variation, because where a man dies leaving no son the family house has been dealt with variously by reference to a brother, a grandson or in some communities the senior daughter, which shows that the identity of the custodian has always been a matter of judgment rather than a fixed incident.²⁷ The economic assumptions behind it have also dissolved, since the rule suited a system in which a daughter married out of the lineage and took her security from her husband.²⁸

²⁵ Itua (n 2) 47; Imiefoh and Akpata (n 3).

²⁶ Constitution (n 7) s 42(1)(a).

²⁷ Itua (n 2) 45-47; Imiefoh and Akpata (n 3).

²⁸ Y A Aluko, 'Patriarchy and Property Rights among Yoruba Women in Nigeria' (2015) 21(3) *Feminist Economics* 56; B A Aliegba and others, 'Impact of Patriarchal Norms on Economic Security of Women in North Central Nigeria' (2025) 14(2) *Kogi Jl of Politics and IR* 45.

3.3 The Case Law: Two Lines of Authority That Have Never Met

The Igiogbe line. In *Ogiamien v Ogiamien* the Supreme Court recognised that under Benin custom the house in which the deceased lived and died descends to the eldest surviving son upon performance of the second burial rites, and *Arase v Arase* confirmed the position.²⁹ The Wills Law applicable in Edo State confers testamentary power subject to the customary law binding the testator in his lifetime. In *Idehen v Idehen* a Benin testator devised his two *Igiogbe* houses to his eldest son, who predeceased him so that the devise lapsed, and the next surviving son claimed them under Benin custom against the beneficiaries named in the will. The Supreme Court upheld the claim, holding that the power conferred by the Wills Law is subordinated to customary law and that a devise depriving the eldest surviving son of the *Igiogbe* is void to that extent.³⁰ The ratio is not a holding about the merits of primogeniture but a holding that where a statutory power of disposition collides with a customary incident of property, the statute yields.

Lawal-Osula v Lawal-Osula pressed the principle further. A Benin chief made a will in English form omitting his eldest son and directing expressly that Benin custom should not modify its provisions. The eldest son, who had succeeded to his father's title and performed the second burial rites, challenged the will, and the Supreme Court held that the testator could not by an express direction escape the limitation the Wills Law itself imposes.³¹ The rule is therefore a mandatory incident rather than a default rule or a displaceable presumption, and later authority has consolidated it without qualification.³² *Abudu v Eguakun* added a characterisation that matters below, holding that on the father's death the eldest son takes over the estate as a trustee for all the children pending the final burial rites, after which he inherits the seat of the deceased.³³ The heir is therefore, for a period and a purpose, a fiduciary rather than an absolute owner, so the custom already contains the vocabulary of trusteeship on which a reformed scheme could build.

The repugnancy line in the East. In *Mojekwu v Mojekwu* the Court of Appeal considered the Nnewi *oli-ekpe* custom, under which the property of a man who died without male issue devolved on his brother to the exclusion of his daughters, held it repugnant, and added through

²⁹ *Ogiamien v Ogiamien* (n 8); *Arase v Arase* (n 8); Wills Law (n 11) s 3(1).

³⁰ *Idehen v Idehen* (1991) 6 NWLR (Pt 198) 382 (SC).

³¹ *Lawal-Osula v Lawal-Osula* (1995) 9 NWLR (Pt 419) 259 (SC).

³² *Agidigbi v Agidigbi* (n 8), approving *Oke v Oke* (1974) NMLR 351 and *Olowu v Olowu* (1985) 3 NWLR (Pt 13) 372.

³³ *Abudu v Eguakun* (n 4) 331-332.

Tobi JCA a broader condemnation of any custom discriminating against women on the ground of sex.³⁴ On appeal in *Mojekwu v Iwuchukwu* the Supreme Court affirmed the outcome but disapproved that breadth, holding that the lower court should not have condemned an entire body of customary law in proceedings in which the affected communities were unrepresented.³⁵ That correction is better understood as a statement about institutional competence than as a retreat, since the wholesale reform of a system governing millions is not a task a court can discharge on a record in which one family appears. The same court nevertheless refused to shelter the *nrachi* custom, under which a daughter was retained unmarried in her father's house to raise male issue for him.³⁶

The constitutional turn. On 11 April 2014 the Supreme Court delivered *Anekwe v Nweke* and *Ukeje v Ukeje* on the same day. In *Anekwe* a widow who had borne her husband no male child was sought to be evicted from the family property by his relatives, relying on a custom under which a widow without male issue has no place in her late husband's home, and the Court held it repugnant and affirmed her right to remain, continuing *Nzekwu v Nzekwu*.³⁷ In *Ukeje* a Lagos resident of Umuahia origin died intestate, and his widow and son obtained letters of administration without the knowledge of his daughter, who was born outside the marriage. When she learned of the grant she sued, and the defendants relied on an Igbo custom excluding a female child from her father's estate. The Supreme Court held the custom void because it conflicts with section 42(1) and (2) of the Constitution.³⁸ That choice of ground matters, since the Court could have decided on repugnancy grounds alone, as *Anekwe* did the same day, but rested the invalidation on constitutional supremacy instead.

3.4 The Two Lines Compared

The two lines must be examined in contradistinction rather than cited in sequence, and the first difference lies in what each actually decided. *Idehen* and *Lawal-Osula* were contests between men, the dispute in the former lying between a surviving son claiming under custom and the beneficiaries named in a will, and in the latter between the eldest son and the testator's widow and other children taking under it. In neither case did a daughter assert an entitlement to the *Igiogbe* on the ground that its allocation to a son by reason of his sex offended the Constitution,

³⁴ *Mojekwu v Mojekwu* (n 22) 304-305 (Tobi JCA).

³⁵ *Mojekwu v Iwuchukwu* (2004) 11 NWLR (Pt 883) 196 (SC).

³⁶ *Muojekwu v Ejikeme* (2000) 5 NWLR (Pt 657) 402 (CA).

³⁷ *Anekwe v Nweke* (n 12); *Nzekwu v Nzekwu* (1989) 2 NWLR (Pt 104) 373 (SC).

³⁸ *Ukeje v Ukeje* (n 12).

and the issue was never pleaded, argued or decided. A decision is authority only for what it decides, so neither case holds that a female child may lawfully be excluded from the family house. The Supreme Court has therefore never held that Bini or Esan primogeniture survives section 42(1).

The second difference lies in the source of the norm, since in the *Igiogbe* cases it is a state statute read with a customary incident and the constitutional dimension is absent, whereas in *Ukeje* custom is measured against a superior instrument, and where the reasoning of a line of cases proceeds on a lower plane its conclusions cannot foreclose a challenge mounted on a higher one. The third difference is temporal, since *Idehen* and *Lawal-Osula* were decided in 1991 and 1995, long before the equality reasoning of 2014, and there is no reason why the reasoning voiding the Igbo exclusion should not reach the Esan and Bini exclusion, the customs sharing the feature the Constitution condemns. The fourth difference is remedial, since in protecting the house the Court identified the person in whom it vested and the obligations carried, whereas *Ukeje* supplied no scheme for families not before it. The caution in *Mojekwu v Iwuchukwu* does not insulate discriminatory customs from constitutional review, and the better reading is that a court must decide the case before it on constitutional grounds while structural reform belongs to the legislature acting with the institutions that administer the custom.

3.5 The Constitutional Standard and the Enforcement Gap

Section 1(3) provides that where any other law is inconsistent with the Constitution, the Constitution prevails and that other law is void to the extent of the inconsistency. Customary law is law for this purpose, since customary rules are enforced by courts and determine title to property, so the Evidence Act is itself subordinate to the Constitution and a custom may be unconstitutional whether or not it also fails the repugnancy test.³⁹ The relationship is hierarchical, so where discrimination is the vice alleged the constitutional inquiry precedes the statutory one, and section 43 guarantees every citizen the right to acquire and own immovable property anywhere in Nigeria.⁴⁰ Section 21 pulls the other way, but two limitations confine it, the first being that it sits within Chapter II, which section 6(6)(c) removes from the jurisdiction

³⁹ Constitution (n 7) s 1(3); Evidence Act 2011, s 18(3).

⁴⁰ Constitution (n 7) s 43.

of the courts, and the second, more fundamental, being that it protects only cultures which enhance human dignity, which is a qualification and not a shield.⁴¹

Article 16(1)(h) of the Convention on the Elimination of All Forms of Discrimination Against Women requires equal rights for women in the ownership, acquisition, management and disposition of property, and article 21 of the Maputo Protocol gives women and men the right to inherit their parents' property in equitable shares.⁴² Neither is domesticated under section 12 of the Constitution, so neither is directly enforceable, but the African Charter has been domesticated and held enforceable while remaining subordinate to the Constitution, and its article 18(3) requires the elimination of every discrimination against women.⁴³ The treaties therefore aid the construction of section 42(1), and reform at state level would discharge an obligation now unperformed.⁴⁴

Even a sound constitutional rule fails if it never reaches the household. Most Esan estates are distributed without litigation, since the family assembles after the second burial, the elders speak and the heir enters the *Igiogbe* without a document or a judicial officer, and a daughter who objects must sue her own brothers, fund proceedings costing more than her share, and absorb a social cost her community reads as an attack on the family.⁴⁵ Customary courts apply customary norms while formally bound by constitutional law, and their adjudicators are frequently untrained in it.⁴⁶ A less discussed obstacle lies in probate practice, because *Ukeje* arose from a grant of letters of administration obtained without notice to the deceased's daughter, and nothing ordinarily requires that every child be put on notice before a grant issues, so exclusion is often accomplished by an administrative act complete before the excluded party learns that the estate is being administered.⁴⁷ The repugnancy test closes no part of this gap, since it operates only when a court is seised of a dispute.

⁴¹ *ibid* ss 21 and 6(6)(c).

⁴² CEDAW (n 13) art 16(1)(h); Maputo Protocol (n 13) art 21.

⁴³ African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap A9 LFN 2004; *Abacha v Fawehinmi* (2000) 6 NWLR (Pt 660) 228 (SC); African Charter (n 13) art 18(3).

⁴⁴ A I Imiefoh and F Dimowo, 'The Future of Inheritance Laws in Nigeria' (2025) 10(2) *NIU JI of Legal Studies* 19, 30.

⁴⁵ Eyongndi and others (n 9) 14.

⁴⁶ Diala, 'A Butterfly That Thinks Itself a Bird' (n 6) 385; A C Diala and J C Diala, 'Normative Intersectionality in Married Women's Property Rights in Southern Nigeria' (2020) 24 *Law, Democracy and Development* 84.

⁴⁷ *Ukeje v Ukeje* (n 12); H O Obi and O C Aduma, 'Gender Relations and Power Dynamics in Nigerian Family Law' (2025) 12(1) *Awka Capital Bar JI* 55.

3.6 Comparative Lessons

In *Bhe v Magistrate, Khayelitsha* the South African Constitutional Court considered two minor daughters whose father died intestate and whose home stood to pass, under customary male primogeniture, to the deceased's father rather than to his children. The Court struck the rule down as inconsistent with the equality and dignity guarantees and ordered that the Intestate Succession Act govern all intestate estates until the legislature acted, so the remedy did not stop at invalidation but supplied a functioning replacement at once,⁴⁸ and the legislature then enacted a single intestate regime applying irrespective of the cultural background of the deceased.⁴⁹ In *Shilubana v Nwamitwa* the Court upheld the decision of traditional authorities to appoint a woman as *Hosi* where previous practice had confined the office to male successors, holding that those authorities were entitled to develop their own custom in line with constitutional values and that a court should recognise the custom as the community now practises it.⁵⁰ Removing a sex qualification from a rule of traditional succession need not therefore be experienced as an external imposition, and an institution that participates in the change retains authority over the reformed rule.

The South African record is not one of unqualified success, and its implementation difficulties are the part most relevant to Edo State. May and others report that wives in customary marriages still face substantial obstacles fifteen years after the reform statute, and the obstacles are administrative rather than doctrinal, since many customary marriages remain unregistered despite the statutory requirement, leaving surviving spouses without proof of the status their claim depends on, estates must be reported to offices of the Master of the High Court which are often distant and understaffed, legal aid is limited, rural magistrates apply the reformed law unevenly, and relatives in possession resist claims by attrition.⁵¹ Ghana shows the limits of statutory reform standing alone, because the Intestate Succession Law 1985 reallocated shares in favour of spouses and children across both patrilineal and matrilineal systems, yet Oduro finds that outcomes for women changed far less than the statute promised, since customary allocation continued to determine access to family land.⁵² Kenya illustrates the obstacle created by partial reform, since the Law of Succession Act exempted certain communities and

⁴⁸ *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC) [136]; Intestate Succession Act 81 of 1987 (South Africa).

⁴⁹ Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 (South Africa).

⁵⁰ *Shilubana v Nwamitwa* (n 16) [45]-[49] and [81]-[85]; and see *Alexkor Ltd v Richtersveld Community* 2004 (5) SA 460 (CC) [51].

⁵¹ May and others (n 15) 465-476; Recognition of Customary Marriages Act 120 of 1998 (SA), s 4.

⁵² Intestate Succession Law 1985 (PNDCL 111) (Ghana); Oduro (n 15) 8-14.

agricultural land, leaving customary rules to govern the estates where exclusion was most likely, until the courts narrowed those exemptions and the 2010 Constitution required the elimination of customs that discriminate in relation to land.⁵³ Harari adds that stronger inheritance rights raised women's bargaining power within marriage.⁵⁴ One pattern holds across the three jurisdictions: reform advanced where courts applied constitutional norms directly, where legislatures supplied a replacement rule, and where traditional authorities were engaged as participants rather than objects.⁵⁵

3.7 Assessing the Reform Options

Four options remain, assessable against conformity with section 42(1), preservation of the functions the custom performs, enforceability among families that do not litigate, and cost to those the reform should protect. Leaving the matter to the repugnancy test fails on every criterion, since it has never been applied to Esan custom, supplies no replacement rule, and engages only where a case reaches court. Direct constitutional litigation rests invalidation on a Nigerian norm of superior authority, but still requires a claimant with means and resolve, proceeds case by case, and leaves the replacement rule to emerge through successive appeals. Wholesale statutory abolition of primogeniture on the South African model is constitutionally unimpeachable, but it would extinguish family headship as a recognised status, dissolve the link between the house and the obligations of burial, widow maintenance and debt settlement, and often require sale of a house occupied by a widow to realise the shares of children who do not live in it.

The fourth option is sex-neutral reconstruction of the custom by statute, under which the estate is divided equally among all children irrespective of sex, while the *Igiogbe* is preserved as a distinct category and vested in the eldest surviving child, male or female, as a status asset held on trust, excluded from the divisible pool and burdened with the customary obligations. This satisfies section 42(1) on both the distributive and the status rule, preserves the seniority principle and the office of family head, is consistent with the trusteeship characterisation adopted in *Abudu v Eguakun*, and follows the path *Shilubana* recognised as legitimate. One objection should be confronted rather than avoided, namely that vesting the house in the eldest

⁵³ Law of Succession Act, Cap 160, Laws of Kenya, ss 32-33; *Rono v Rono* [2005] eKLR (CA); *Re Estate of Lerionka Ole Ntutu* [2008] eKLR (HC); Constitution of Kenya 2010, arts 27, 45(3), 60(1)(f).

⁵⁴ Harari (n 15) 167-170.

⁵⁵ O Durotolu and others, 'Exploring Customary Law Conflict Resolution Strategies for Democratic Consolidation in Nigeria' (2024) 30(11) *Educational Administration* 2537.

child still discriminates because birth order is a circumstance of birth. Three answers meet it. The settled understanding of that phrase, and its application in *Ukeje*, concerns community, ethnic group, place of origin and legitimacy rather than birth order among siblings. The entitlement proposed is an office rather than a windfall, since the holder takes no additional economic value and assumes enforceable burdens the others do not bear. The scheme should also permit the eldest child to renounce in favour of the next in seniority and provide for removal of a custodian who fails in the obligations.

4. Conclusion and Recommendations

The repugnancy test is the wrong instrument for this problem, being colonial in origin, indeterminate, inconsistently applied, negative in remedy and invisible outside the courtroom. That conclusion does not support the repeal of section 18(3), and this paper expressly declines to recommend it, because the provision does work the Constitution does not do. Section 42(1) addresses discrimination, whereas section 18(3) reaches customs which are not discriminatory in the constitutional sense but are unfit for enforcement because they are obnoxious, anachronistic or contrary to public policy. The conclusion is one of priority rather than abolition. Esan custom requires correction on one point only, since it allocates both economic value and family authority by reference to sex, which section 42(1) permits in neither aspect, while the seniority principle, the office of family head, the *Igiogbe* as an indivisible asset attached to it and the obligations it carries breach no right.

Six recommendations follow. First, the Edo State House of Assembly should enact a Succession and Family Property Law providing for equal shares among all children irrespective of sex, with a compulsory entitlement for the surviving spouse, whatever the form of the marriage, modelled on the Rivers and Abia statutes. Second, that law should preserve the *Igiogbe* and vest it in the eldest surviving child, male or female, as a status asset held on trust rather than as personal property, excluded from the divisible pool so that the custodian gains no economic benefit, inalienable without family consent, and burdened with statutory duties of burial, lifelong residence and maintenance for the surviving spouse, and settlement of estate debts. Third, section 18(3) should be retained, with a clear articulation, by appellate guidance or practice direction, that where a custom is challenged for discrimination the court should decide under sections 1(3) and 42(1), leaving the repugnancy test its residual role. Fourth, the Administration of Estates Law applicable in Edo State should be amended to remove the carve-out preserving customary succession, so that where a customary rule is set aside the statutory

scheme applies of its own force, and to require that every known child be put on notice before letters of administration issue. Fifth, the Judiciary should train customary court adjudicators on section 42(1) and the new scheme, and the Legal Aid Council should establish an inheritance rights desk covering the five Esan local government areas.⁵⁶ Sixth, the Government should convene the *Enijie* and the traditional councils before any Bill is introduced and record their input, since an institution that participates in developing its own rule enforces it, whereas a rule imposed from outside is complied with formally and ignored in substance.⁵⁷

Culture and rights are not in fundamental opposition here. The conflict is confined to one qualification inside an institution that performs functions no Nigerian statute performs. Removing it leaves the institution standing, the house intact and the widow in her home, whereas retaining it leaves half of every Esan family outside the protection of the Constitution, on the strength of authorities that have never decided the question.

⁵⁶ Okwuadinma and Gasiokwu (n 16) 120; Aliegba and others (n 28) 52.

⁵⁷ *Shilubana v Nwamitwa* (n 16) [81]-[85]; Diala, 'Curbing the Excesses' (n 6) 240.