

CHAPTER 5

‘EZE NDI IGBO’ Customary law and associational ethnicity in a federal Nigeria

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Abstract

This chapter examines the freedom of movement and association as an attribute of citizenship in Nigeria and the attendant desire of ethnic groups to ‘carry’ ‘practice’ and ‘observe’ their customary norms in their new ‘domain’ as well as the reaction of their ‘host’ communities who accept tolerate or oppose such norms. This chapter examines the claim of Nigerian ethnic groups to the promotion and protection of their chieftaincy institutions in foreign domains in and outside Nigeria. One of such chieftaincy institution is the ‘Eze Ndi Igbo’ of the Igbo ethnic group who have achieved varying degrees of success in replicating their chieftaincy institutions and attendant customary norms within and outside their traditional domain. This chapter engages with the normative framework of sub-national belonging within the context of the rights which citizenship endow on citizens to tease out the nuances contradictions and tensions of an ethnically diverse Nigeria. The core of this chapter interrogates the extent to which Nigerians are able to enjoy their right to live by their customary law in spaces that are ‘foreign’ within Nigeria in the exercise of the right to freedom of movement and association.

Keywords: Ethnicity, Customary Law, Nigeria, Freedom of Association, Freedom of Movement

1. Introduction

This chapter examines the freedom of movement and association as an attribute of citizenship in Nigeria and the attendant desire of ethnic groups to ‘carry’ ‘practice’ and ‘observe’ their customary norms in their new ‘domain’ as well as the reaction of their ‘host’ communities who accept tolerate or oppose such norms. This chapter examines the claim of Nigerian ethnic groups to the promotion and protection of their chieftaincy institutions in foreign domains in and outside Nigeria. One of such chieftaincy institution is the ‘Eze Ndi Igbo’ of the Igbo ethnic group¹ who have achieved varying

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¹ The *Eze Ndi Igbo* represents a chieftaincy institution of ethnic Igbos outside their traditional domain. The Igbo are Nigeria's third largest ethnic group and are found principally in South Eastern Nigeria. Commonly regarded as made up of acephalous communities, diasporic

degrees of success in replicating their chieftaincy institutions and attendant customary norms within and outside their traditional domain. This chapter engages with the normative framework of sub-national belonging within the context of the rights which citizenship endow on citizens to tease out the nuances contradictions and tensions of an ethnically diverse Nigeria. The core of this chapter interrogates the extent to which Nigerians are able to enjoy their right to live by their customary law in spaces that are 'foreign' within Nigeria in the exercise of the right to freedom of movement and association.

Chieftaincy Institutions in Nigeria are emblematic of the culture and identity of an ethnic group² and is, therefore, a manifest means of representing a community outside her traditional domain. When members of an ethnic group live outside their traditional domain, it appears natural that they carry their culture with them including the institutions that manage and represent their communal identity. Such institutions perform intra communal governance³; cultural functions and external relations. As Africa urbanized principally in the colonial era, migrant workers found ethnic identities and communities a source of comfort support sustenance and protection. It is the contestation for resources in heterogeneous communities of colonial and post-colonial Africa that is credited with the rise of ethnic consciousness and ethnic communal organization.⁴ An example of such an ethnic institution is the *Eze Ndi Igbo* of diasporic ethnic Igbos outside their traditional domain in Southeastern Nigeria. The *Eze Ndigbo* controversy has arisen from the desire and demand of Igbo ethnic groups Nigeria within and outside Nigeria to choose a traditional ruler emblematic of Igbo identity and a manifestation of ethnic associational impulses.⁵

The choice installation and provisioning of the *Eze Ndi Igbo* chieftaincy are in furtherance of customary normative frameworks imported as it were, from the 'homeland'. What the *Igbo* desire and demand is not out of place in Nigeria because other ethnic groups such as the *Yoruba*⁶ and the

ethnic Igbo within and outside Nigeria have coalesced around chieftaincy institutions for reasons of identity culture and survival.

² See for example A Harneit-Sievers " Igbo 'Traditional Rulers': Chieftaincy and the State in Southeastern Nigeria" 33(1) *Africa Spectrum* 57-79;

³ Such governance functions would include the settlement of disputes. See for example

⁴ See for example O Nnoli *Ethnic Politics in Nigeria* (Fourth Dimension Publishers 1978)

⁵ See EE Osaghae *Trends of Migrant Political Organisation in Nigeria: The Igbo in Kano* (IFRA-Nigeria, 2013)

⁶ See for example R Olaniyi *Approaching the Study of Yoruba Diaspora in Northern Nigeria in the 20th Century* in T Falola & A Genova (eds) *Yoruba Identity and Power Politics* University of Rochester Press 2006 231 -250 ; " Aare Gani Adams Condemns Installation of obas in diaspora by Olugbo" The Guardian (Nigeria). Available at

*Hausa*⁷ have organised themselves around their customary ordering in Nigeria and in the diaspora.⁸ Indeed, it appears logical that individual ethnic consciousness would coalesce into group dynamics in different forms and configurations especially in the diaspora where their identity is a vehicle of consciousness mobilisation struggle and survival.⁹ What sets the *Igbo* ethnic group apart in respect of diasporic chieftaincy institutions is their relentless and concerted efforts to enthrone an *Eze Ndigbo* in foreign domains and the crisis generated amongst them¹⁰ and with their hosts.¹¹

It is the reluctance and even downright opposition of hosts of ethnic chieftaincy institutions that throw up conceptual issues of the nature of the exercise of citizenship and customary law in a federal Nigeria. In an ethnicised polity such as Nigeria, it is important to examine whether diasporic Nigerians are entitled as Nigerian citizens to their customary law in general and their chieftaincy institutions? One question that will be addressed later in this chapter is whether the opposition of hosts of diasporic chieftaincy institutions is rooted in law practice or reality? One of the arguments that this chapter makes is that such opposition to diasporic chieftaincy institutions in Nigeria is rooted in the emergent principle of indigeneity in the Nigerian political and cultural space. Along this line this chapter demonstrates that the distinction between 'indigenes' and 'non-indigenes' has led to an attenuated application of customary law and chieftaincy institutions in foreign domains despite the rights of diasporic Nigerian citizens. Nigeria's ethnoreligious violent conflicts are traceable to

<https://guardian.ng/news/aare-gani-adams-condemns-installation-of-obas-in-diaspora-by-olugbo> (accessed 19-06-2019)

⁷ See for example A Tijani "The Hausa Community in Agege, Nigeria 1960-1967" 17(2) 2008 *Journal of Social Sciences* 173; Albert IO "The Growth of an Urban Migrant Community: The Hausa Settlement in Ibadan, c. 1830 to 1979" 4 IFE: Annals of the Institute of Cultural Studies 1.

⁸ See for example 'Suddarkasa, N 'From Stranger to Alien: The Socio-Political History of the Nigerian Yoruba in Ghana 1900-1970; in W A Shack & EP Skinner (eds) *Strangers in African Societies*, University of California Press Berkeley 143.

⁹ See O Nnoli, note 4.

¹⁰ See for example D Johnson "How Market Leadership Tussle Demotes Akure's Eze Ndigbo" Available at www.vanguardngr.com/2015/10/how-market-leadership-tussle-demotes-akures-eze-ndigbo (Accessed 23.10.2015); O. Ajayi "Three Factions contesting Eze Ndigbo Title in Oyo" Available at www.vanguardngr.com/2015/thr,ee-factions-contesting-ezendigbo-title-in-oyo Accessed 23.10.2015; D Olatunji "Mixed Reactions trail Eze Ndigbo Title in Ogun" Available at www.vanguardngr.com/2015/10/mixed-reactions-trail-ezendigbo-title-in-ogun (Accessed 23.10.2015)

¹¹ See J Sowole "Akure Traditional Ruler, Igbo Leaders Crisis Resolved" Available at www.thisdaylive.com/articles/akure-traditional-ruler-igboleaders-crisis-resolved/223562 (Accessed 23.10.2015).

the dichotomy between 'Indigenes' and 'non-indigenes' making it compelling to interrogate the relationship between citizenship and customary law.

Nigerian citizens are entitled by the 1999 Constitution to associate as they see fit in any part of Nigeria in all forms and manner including their engagement in practices rooted in their customary ordering such as their chieftaincy institutions. When the hosts of diasporic Nigerians oppose the manifestation of their customary ordering, often because of their customary law, this is often a message that they do not 'belong' in their 'foreign' domain because they are not indigenes. Indigeneity fosters a sense of diminished citizenship if non-indigenes are not able to enjoy their constitutionally endowed rights.

Customary law is crucial for citizenship because it partly constitutes the latter. Customary law represents cultural peculiarities that help to define a citizen. When citizens are allowed to practise their customary law in any part of Nigeria, customary law facilitates citizenship. Where however customary law reinforces indigeneity because the hosts of diasporic Nigerians regard the latter as non-indigenes and unable to enjoy their customary laws, customary law impedes citizenship rights. Here lie the contradiction and tension which this chapter addresses. To what extent it can be asked does customary law impede or facilitate citizenship rights in Nigeria.

This chapter is organized as follows. The next chapter interrogates the theoretical perspectives of customary law and citizenship in Nigeria. The third section explores how residence affects the judicial mediation of the challenges of associational ethnicity. Concluding remarks follow.

2. Customary law and citizenship in Nigeria: Theoretical perspectives

This section of the chapter addresses the relationship between citizenship and customary law and argues that this relationship can be complementary or contradictory. A theoretical construct of this relationship is that they are complementary because customary law constitutes citizenship since it addresses the cultural peculiarities values and practices that are part of the content of citizenship. Customary law, therefore, enables full enjoyment of citizenship rights which includes the rights recognised in the 1999 Constitution. Citizenship entitles citizens to certain human rights which can be enjoyed because of customary law. Human rights such as the freedom of association and movement allow citizens to be able to move and reside in any part of the country. Customary law defines the cultural peculiarities that breathe life and define the content of the freedom of movement and association.

An alternative theoretical construct is that the relationship between customary law and citizenship can be contradictory if customary law becomes the basis of discrimination of citizens by determining those who are 'indigenes' and 'non-indigenes'. While a constitutionally defined citizenship is homogenous and is based on the values of freedom and equality since all citizens have equal rights within the nation-state; customary law is heterogeneous parochial and organised principally around consanguinity. Customary law is thus inherently discriminatory. Customary law thus operates like citizenship on an international plane. Customary law can be described in relation to citizenship as 'domestic discrimination'¹² especially if it leads to a distinction between 'indigenes' and 'non-indigenes'. 'Indigenes' are members of an ethnic group and entitling them to political and economic participation within the territory of the ethnic group. Non-Indigenes are the other Nigerians who even though they are Nigerian citizens are in practice, not able to fully enjoy the benefits of citizenship outside their ethnic area. In their 'foreign' domain, non-indigenes are unlikely to fully participate in the social economic and cultural life of host communities. Where this is true, indigeneity encourages the exclusionary potential of customary law to deprive Nigerian citizens the enjoyment of cultural peculiarities. Indigeneity is, therefore, a confounding variable in the relationship between customary law and citizenship. Were it not to exist in Nigeria, it is plausible that customary law would be largely complementary to citizenship.

To appreciate how indigeneity is a confounding variable in the relationship between customary law and citizenship, one crucial question to address is the nature of citizenship contemplated by the Nigerian constitution. In short, the nature of Nigeria's citizenship is a product of the interaction tension contradiction and complementarity of civic and cultural citizenship. This is evident in different constitutional provisions that reinforce citizenship and customary law. First, the 1999 Constitution of the Federal Republic of Nigeria contemplates citizenship in terms of belonging to a community indigenous to Nigeria.¹³ While the term 'community indigenous to Nigeria' may seem ambiguous, it would appear to refer to communities organized around consanguinity. Accordingly, a Nigerian citizen is contemplated as an ethnic Nigerian. Along this line, the indirect recognition

¹² See L Fourchard "Bureaucrats and Indigenes: Producing and Bypassing Certificates of Origin in Nigeria" 2015 85(1) *Africa* 37.

¹³ See the provisions of section 25(1)(a) defines citizens by birth as including every person born in Nigeria before the date of independence, either of whose parents or any of whose grandparents belongs or belonged to a community indigenous to Nigeria.

of customary law in the Nigerian constitution¹⁴ reinforces a cultural belonging since the normative framework of ethnic Nigerians is constitutionally protected. It can, therefore, be said that ethnic Nigerian communities are the basis of Nigerian citizenship. It is, therefore, true that Nigerian citizens are at the same time civic, 'liberal'¹⁵ as they are 'cultural' citizens. It is therefore not surprising that there are manifestations of the tension and contradiction between citizenship and customary law which can be found in different parts of the Constitution including the Fundamental Objectives and Directive Principles of State Policy found in chapter 2 of the Constitution. Even though chapter 2 is non-justiciable,¹⁶ it is a significant philosophical ethos of the Nigerian State. In sections 14(3) and (4) of this chapter, the 1999 Constitution speaks to national unity, within the concept of federal character developed to ensure that different parts of the country are recognized in the public sphere. Federal Character as a principle reinforces ethnic identity and solidarity since it highlights how ethnic groups are performing and participating in federal Nigeria. Furthermore, sections 15(2) and (3) of chapter 2 seek to manage the discriminatory tension between citizenship and customary law by requiring the Nigerian State to promote national integration by providing adequate facilities for and encouragement of free mobility of people goods and services across Nigeria and securing 'full residence rights for every citizen in all parts of the federation'. What would a full residence right mean it can be asked? One answer within the contemplation of this chapter is the ability to observe and practice one's customary law in any part of the country where one resides and which should include the ability of a community of these residents to practice their chieftaincy institutions. While the obligation to realise full residence rights fosters a civic/cultural citizenship the differentiation between indigenes and non-indigenes emphasizes attenuated citizenship of which Nigerians are unable to realise their full residence rights. Indigeneity is, therefore, a crucial variable especially when it is facilitated by customary law. It is important to determine if there can be alternative interpretations of customary law first that encourages a distinction between 'indigenes' and 'non-indigenes' and another interpretation that makes no such distinction.

Customary Law must necessarily be organized on a territorial basis because it is the system of law based on a cultural community that has an

¹⁴ There is no express recognition of customary law even though numerous provisions of the 1999 Constitution recognise the judicial structures for the enforcement of customary law. See for example section 280 of the 1999 Constitution.

¹⁵ See I Nwachukwu "The Challenge of Local Citizenship for Human Rights in Nigeria" 2005 (13) *African Journal of International and Comparative Law* 235, who regards this type of citizenship as 'civic'.

¹⁶ See section 6(6)(C) of the 1999 Constitution.

identifiable physical domain. This is important in many respects for the land on which the community exists for persons from that community who remain in that community and for people outside that community who live and reside there. This association of customary law to a physical space is manifest in a number of ways including the jurisdiction of Nigerian customary courts where land is not involved.¹⁷ The appropriate question to ask is how a Nigerian's personal law is determined and whether this personal law can be changed since a Nigerian's personal law is her customary law.

At birth, a Nigerian acquires a personal law which is that of his/her parents. Through this connection, a Nigerian becomes attached to customary law as appropriate. An important question is whether this customary law attached to a Nigerian for life or whether it can be changed. For long it was thought that a personal law at birth continued for life. Thus in *Osuagwu v Soldier*¹⁸ the Northern Nigerian Court decided to apply Ibo Customary Law to a dispute between two Ibo men living in Northern Nigeria. It was open to the Court to apply rather Islamic law which is the law applying in the area where the Court was situated. The Court said:

We suggest that where the law of the Court is the law prevailing in the area but a different law binds the parties, as were two Ibos appear as parties in the Moslem court in an area where Moslem law prevails, the native court will- in the interests of justice- be reluctant to administer the law prevailing in the area and if it tries the case at all, it will- in the interests of justice- choose to administer the law binding between the parties.¹⁹

In *Tapa v Kuka*²⁰, a Nupe Moslem from the Northern part of Nigeria died intestate in Lagos in the Western part of the country. It was held that his personal law as a Moslem was applicable to distribution of his property and not the law that applied in Lagos where he died. In *Zaidan v Zaidan*²¹ the personal law of a Lebanese who lived and died in Nigeria was used to

¹⁷ Everybody has an audience before a customary court even though the appropriate customary law that will apply varies. Thus section 7 of the Customary Courts Law of Rivers State 2014 provides that ' Any person who (i) is an indigene of a place in which customary law is in force; (ii) being in a place where customary law is in force does an act in violation of that customary Law; (iii) makes a claim in respect of property or estate of a deceased person under a customary law of inheritance in force in the area of jurisdiction of a Customary Court and the deceased was an indigene of the place in which the customary law is in force; (iv) institutes proceedings in any Customary Court or has by his conduct submitted to the jurisdiction of the Court.

¹⁸ 1959 NRNL 39

¹⁹ As above at 41.

²⁰ (1945) 18 NLR 5.

²¹ (1974) UILR 283.

distribute his property which included immovable property situated in the then Mid-Western part of Nigeria where he lived and did business.

There are many circumstances by which the personal law of a Nigerian may be changed. They may be summarized as first by contracting a Christian marriage, and secondly by the process of acculturation. With respect to the effect of contracting a Christian marriage *Cole v Cole*²² is a locus classicus. In that case, a deceased person who lived most of his life in Lagos contracted a Christian marriage. On his death, the question was whether customary law or English Law governed the distribution of his estate. The Court held that the applicable law was English Common Law and this was because by contracting a Christian marriage he had changed law applicable to the distribution of his estate from customary Law to English Law. Following the decision in *Olowu v Olowu*²³ it is now possible that a person may shed his personal law at birth and acquire a new one in certain circumstances. In that case, a deceased intestate from the Yoruba ethnic group lived all his life outside in Benin Mid-Western Nigeria. He married Benin Women and even successfully applied to the traditional ruler of Benin to be 'naturalised' as a Benin citizen. The Supreme Court held that although the deceased was from a Yoruba extraction, he had by his actions acquired Benin personal Law and had shed his personal law of origin. The applicable customary law for the distribution of his estate was, therefore, Benin Native Law and Custom. The euphoria in the wake of *Olowu* was short-lived and over the years the immutability of customary law continues as orthodoxy. Had *Olowu* wrought large scale changes in Nigeria's cultural fabric, it may have been possible to witness and promote acculturation by non-indigenes involved in large scale migration in a federal Nigeria. Such acculturation would largely render the distinction between indigenes and non-indigenes meaningless.

Indigeneity as a variable transforms customary law into a challenge of Nigeria's citizenship because it enables a juridical resistance to the incidents of citizenship. The point which is examined fully in the next section is that if citizens are regarded as 'non-indigenes' in 'host' communities, their claim to exercise their rights of citizenship could be severely attenuated. If customary law were mutable and can be changed on a number of grounds, it could mean that residence in addition to other factors would determine the personal laws of a citizen whose estate, for example, would be governed by the cultural choices that a citizen makes through facts such as residence.

²² (1898) 1 NLR 15.

²³ (1985) 3 NWLR (Pt 13) 372 (Hereafter *Olowu*). See I.E Sagay 'The dawn of Legal Acculturation in Nigeria- A Significant Development in Law and National Integration: *Olowu v Olowu*' 30 *Journal of African Law* 179-189.

If residence becomes a significant basis for choice of law in a plural Nigeria it would mean that Nigerians could become 'indigenous' in places where they reside and participate in her public life without the strictures of their birth as it were. Residence would not destroy customary law since one's birth as a connecting factor to customary law is changed by the voluntary acts of a person such as choosing a place of residence anywhere in Nigeria. The new customary law chosen through residence would then govern the personal laws of a citizen.

The importance of recognising residence as a central determinant of customary law has a huge impact on citizenship because it scrubs customary law of its exclusionary potential. Scholarly reflection have pointed to a number of reasons why ethnic identity has manifested and is managed in Nigeria's public sphere through the federal character principle²⁴ around which the 1999 Constitution seeks to manage the participation of Nigerian ethnicities in her public life. In this regard the State is enjoined to ensure in section 14(3) of the 1999 Constitution that:

The composition of the Government of the Federation or any of its agencies and the conduct of its affairs shall be carried out in such a manner as to reflect the federal character of Nigeria and the need to promote national unity, and also to command national loyalty, thereby ensuring that there shall be no predominance of persons from a few State or from a few ethnic or other sectional groups in that Government or in any of its agencies.²⁵

Several other constitutional provisions reinforce this fundamental objective and directive principle. For example, section 147 requires the President of the federation in the appointment of ministers of the federation to appoint at least one Minister from each State²⁶ who shall be an indigene of that State. Another example is section 217(3) which requires a reflection of federal character in the composition of the officer corps of the Nigerian armed forces. Even though the federating states and local governments of Nigeria are not equivalent to Nigeria's ethnicity, the requirement that federal character is reflected in Nigerian's public life heightens ethnic consciousness and exclusivity that is so crucial in the manifestation of

²⁴ See for example PP Ekeh & E Eghosa (eds) *Federal Character and Federalism in Nigeria* (Heinemann Educational Books Nigeria 1989),

²⁵ Nigeria's states and local governments are similarly tasked in section 14(4) of the 1999 Constitution which provides that: The composition of the Government of a State, a local government council, or any of the agencies of such Government or council, and the conduct of the affairs of the Government or council or such agencies shall be carried out in such manner as to recognise the diversity of the people within its area of authority and the need to promote a sense of belonging and loyalty among all the people of the Federation

²⁶ Nigeria is presently made up of 36 States.

Nigerian identity and ethnicity. The politics of establishing²⁷ an indigene or non-indigene essentially depends of belonging to a community indigenous to Nigeria and a citizen's immutable customary law as we saw above. Nigerians carry their ethnicity from birth and even with the judicial recognition that one's personal laws are capable of being changed mean little. Residence does not affect indigeneity and indigenes of a state are those who can connect to a state of the federation on the basis of birth which is also the basis of customary law. If residence were to mean much as a connecting factor in Nigerian public life; one's birth and therefore indigeneity would be relegated to the background and there would be little need for principles such as federal character.

3. Residence and judicial mediation of the challenges of associational ethnicity

The narratives of associational ethnicity reveal the struggles of individual desires and communal identity often intertwined in a multi-ethnic society. On one hand, citizens seek to embrace new cultures and yet, on the other hand, there are individuals who in the furtherance of their identity cling to what is familiar in 'foreign' domains. And these two demands are legitimate and compelling. And they are couched in the rights which are due to citizens. Clearly, each of claims set out above demand consideration and reconciliation if they are brought before Nigerian courts. Accordingly, this section sketches the architecture of the human rights framework to forecast how Nigeria n courts would react to each of the claims.

Claimants of associational ethnicity including those who seek the right to choose to install an *Eze Ndigbo* in foreign 'domains' in a federal Nigeria are likely to base their claims on a combination of the right to the freedom of movement; the right to freedom of association and the right to freedom from discrimination. The right to freedom of movement is crucial to citizens in a federal state because the cast of section 41(1) entitles citizens to move freely throughout Nigeria and to reside in any part thereof. It appears that the implied right to residence could be the basis of a claim to observe cultural practices. After all, if the residents form a community, it would be difficult to deny them the right to observe their cultural practices as they see fit. Nigerian courts in a number of cases have recognised the autonomy of Nigerians to join any association they deem fit in any part of the country.²⁸

²⁷ See Fourchard, note 12.

²⁸ See for example the cases of *Agbai v Okagbue* 1997 7 NWLR (Pt 2914) and *Anigbogu v Uchejigbo* [2002] (Pt 776) 472

To depend on the right to freedom of movement to sustain cultural practices is indicative of the reality that the Nigerian Bill of Rights has no right to culture even though customary law is recognised and protected indirectly through the recognition of customary courts. Even though customary law is not directly protected it is the basis of claims made by communities such as *Ndigbo*. Nigerian courts have since the introduction of the Nigerian Bill of Rights evaluated the propriety of customary law rules against human rights standards and have found many of these rules discriminatory on a number of grounds such as gender.²⁹ Other grounds such as membership of a particular community, or ethnic group as well as sex, religion or political opinion is declared by s. 42 as grounds on which a citizen of Nigeria shall not be subjected expressly by or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of similar characteristics are not subjected to. Communities could argue that their entitlement to their customary law in whatever part of Nigeria they reside is an indication that they are not discriminated against.

Host communities in whose territories customary law is sought to be enforced by communities who are not indigenes would be faced with two options. On one hand, the 'host' community would be acting in furtherance of the constitution to accommodate the observance of such customary rites. The situation could be different if the 'host' community in furtherance of its customary rites imposes conditions or even refuses to allow such customary rites. Such restrictions and prohibition challenge the thrust of the residence rights which entitle communities like *Ndigbo* to observe their customary practices without any restriction. The host community could also rely on the provisions of the derogation clause of the Nigerian Bill of Rights which specifically subjects the exercise of the right to freedom of movement to any law that is reasonably justifiable in a democratic society in the interest of defence, public safety, public order³⁰, public morality or public health; or for the purpose of protecting the rights and freedom of other persons. Since 'customary law' qualifies as 'any law'³¹ and the grounds of derogation broad

²⁹ See for example the cases of *Muojekwu v Muojekwu* [1977] 7 NWLR (Pt 512) 283; *Muojekwu v Ejikeme* [2000] 5 NWLR (Pt 657) 419; *Muojekwu v Iwuchukwu* [2004] ALL FWLR (Pt 211) 1406; *Uke v Iro* [2001] 11 NWLR (Pt 723) 196; *Asika v Atuanya* 2008 All FWLR (Pt. 433) 1293

³⁰ See the following cases: *Inspector General of Police v All Nigeria Peoples Party* [2007] 18 NWLR (pt. 1066) 457; *Chukwuma v Commissioner of Police* [2006] All FWLR (Pt. 335) 177; *Osawe v Registrar of Trade Unions* (1985) 1 NWLR (Pt 4) 755.

³¹ In *Anzaku v Governor Nassarawa State* [2006] ALL FWLR (Pt 302) 308 341: "Any Law" is so encompassing an expression, not limiting the type of law. It applies to any system, whether statute law, customary law, Islamic law or common law, applicable in Nigeria which subjects

enough, the complaints of the host community that seeks to restrict or prohibit customary practices such as the installation and maintenance of the *Eze Ndigbo* institution can be sustained. On the other hand, it is plausible that the 'host' community could argue that the exercise of the customary law of the community seeking to practice its customary law should be limited according to the tenor of s. 45.

It is important to look quite closely at the cast of s. 45. First, the phrase 'reasonably justifiable in a democratic society' governs the operation of s. 45. While this is a vague term, surely it must be the Nigerian democratic scene conceived by the Constitution as a democratic state with foundational values of freedom equality and social justice and with the fundamental objectives and directive principles of state policy as found in chapter two of the Constitution. Second, the examples of the public interest - defence, public safety, public order, public morality, and public health- are themselves vague and throw up fundamental questions of the nature of the Nigerian society. If 'defence, public safety and public health' seem easier to define, 'public order and public morality' appear to be more difficult. For example, the question can be asked what is to be constitutive of Nigeria's public morality? There is no doubt that these communitarian values can be found in customary law rules even if indirectly. Accordingly, host communities can claim the broad derogatory principles of s.45 as a basis of the restriction of the exercise of diasporic cultural rights such as the *Eze Ndigbo* chieftaincy. The possibility of a restrictive application of cultural rights does not mean that such rights do not exist. In fact, derogation is evidence of the existence of a right.

In addition to the right to freedom of movement and association, there is abundant evidence that the right against non-discrimination will be used by Nigerian citizens to attack the distinction between indigenes and non-indigenes. Unfortunately numerous attempts to challenge the federal character principle and related issues such as the status of 'indigeneity' and 'non-indigeneity' as well as the use of quotas in the allocation of public goods have failed because of procedural challenges such as a lack of standing³² mootness³³ and juridical avoidance findings such as the non-justiciability of

a citizen to discrimination, or disability, or restriction on account of any of the grounds specified in the section.

³² See for example *Badejo v Federal Ministry of Education* 1996 8 NWLR (Pt 464) 8.

³³ See *Badejo* Ibid. A suit alleging discrimination on the basis of birth in terms of quotas in admission into post-primary education in Federal government colleges was struck out on the basis of a lack of standing. By the time an appeal was upheld by the Court of Appeal, the admission process had been completed a fact which led the Court of Appeal to strike out the appeal which was upheld by the Supreme Court.

chapter 2 of the 1999 Constitution.³⁴ Cumulatively, it would be fair to conclude strongly that Nigerian courts are wary of engaging with the challenge of customary law and citizenship. One needs to look beyond the constitution for a reason(s). It may well be that Nigerian courts imagine that the process of managing cultural peculiarities is intuitively a political process not easily amenable to judicial determination.³⁵ In this regard, there is evidence from parts of Nigeria for the management of 'indigene-non-indigene' dichotomy. In Kaduna State the Governor El-Rufai declared that this dichotomy has been abolished preferring to recognize the difference between residents and non-residents through the establishment of a Kaduna State Resident Registration Agency.³⁶ The fact that residents have been singled out appears to be an admission that the difference between indigenes and non-indigenes has become a significant part of Nigeria's political space. It may also be part of the political process of dealing with the exclusion of resident/citizens from the public space. This intervention can also be meaningful in ensuring that host communities respect the rights of citizens to enjoy their cultural rights. The provisioning of the *Eze Ndigbo* chieftaincy institution will certainly benefit from the mediation of State intervention. Perhaps, it is a political intervention that will arrest the inability of Nigerian courts through the Bill of Rights to act as a credible site for the engagement of the challenge posed by customary law and citizenship is unfortunate and costly. Since this dichotomy between indigenes and non-indigenes has led to violent ethnic protests confrontations and destruction³⁷ political initiatives to ensure that diasporic Nigerians are able to enjoy their citizenship rights are welcome.

It is unfortunate that the effect of *Olowu* has not been further explored in Nigerian jurisprudence because that decision comes down on the side of national integration. In this case, the Supreme Court clearly utilised the law as an instrument of social engineering, towards the promotion of national integration in Nigeria. In particular, the Court has clearly promoted the attainment of one of the goals of Chapter II of the 1979 Constitution on fundamental objectives and directive principles of State policy, namely section 15 which calls for unity and national integration and the prohibition

³⁴ See *Adamu v Attorney General of the Federation* (1996) 8 NWLR (Pt. 465) 203 where issues of religious discrimination were sidestepped because of a finding by the Court of Appeal that the suit bordered on section 18 of chapter 2 of the 1979 Constitution.

³⁵ This would fit within the classic example of the political question doctrine recognised by Nigerian courts in *Onuoha v Okafor* (1983) 2 SCNLR 244.

³⁶ See Premium Times Editorial 'Why El-Rufai's Concept of Equal Citizenship Deserves Support' Available at <https://opinion.premiumtimesng.com/2019/04/30/editorial-why-el-rufais-concept-of-equal-citizenship-desrves-support> (accessed 19 June 2019).

³⁷ See W Adebaniwa "Terror Territoriality and the struggle for Indigeneity and Citizenship in Northern Nigeria" 2009 13 *Citizenship Studies* 349-363.

of discrimination based on place of origin, sex, religion, status, ethnic and linguistic association. While that decision speaks to Nigerian citizenship, it is also in support of a residence based customary law that is crucial in resolving the challenge posed by customary law to citizenship. If Nigerian citizens could change their customary law by cultural choices, it would mean that the exercise of their residence rights does not prejudice or 'reduce' the worth of their citizenship.

4 Concluding remarks

This chapter has engaged with the challenge of the normative relationship of customary law and citizenship rights mediated by indigeneity and residence through a human rights methodology to frame the tensions and contradictions in a federal Nigeria. The fact that the *Eze Ndigbo* chieftaincy institutions thrive in different parts of Nigeria is evidence of civic Nigerian citizenship constituted by cultural peculiarities. The emerging turn to the political process in resolving the tensions generated by this example of associational ethnicity is also to be welcomed. The articulation of the jurisprudence of a residence based customary law along the lines of *Olowu* is more than overdue by Nigerian courts.

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