

# Women's Inheritance Rights in Nigeria: Transformative Practices

## By Vanessa Emery

### Introduction

As the HIV Pandemic continues its stranglehold on the African continent, new challenges are raised for African nations to recognize the rights of their citizens and thereby protect them from additional vulnerability that places them at risk for contracting, spreading, and in coping with the fallout of HIV. One nation facing a particularly challenging legal situation is Nigeria, a state composed of over 250 peoples which has a complex tripartite legal system entrusted with maintaining a harmonious and equitable balance amongst diverse peoples. However, with the prevalence of HIV in Nigeria now at a rate of 5.4% amongst the adult population, with a total of approximately 3,600,000 adults and children currently living with HIV,<sup>1</sup> there is a need to critically assess the ability of this legal framework to support the crisis.

Widows' inheritance rights are an excellent place to begin a critical re-examination of Nigeria's legal framework. Widows are beginning to come to public attention as a set of individuals who are particularly vulnerable in the face of HIV. As many AIDS widows have limited rights to inheritance, their ability to subsist in a land-based economy is placed in jeopardy. At the same time, widows may play a pivotal role in provision for AIDS orphans and sick relatives as HIV incident rates continue to grow in Nigeria. Researching widows' inheritance rights is therefore a necessary step in developing a holistic approach to combating the pandemic. In this spirit, this paper is an opening into the complex topic of widow inheritance in Nigeria.

This paper has five sections. The first will develop the normative framework for examining the issues. This framework will focus on the importance of the cultural transformation approach in informing the analysis. The second section will set out the sources of law in Nigeria, particularly focusing on the interaction between the common law, and the customary law and sharia law as the living law of the nation. It will also explain how land and marriage impact upon the bundle of rights that individuals possess regarding inheritance. Third, inheritance laws in all three systems will be surveyed for both testate and intestate succession. Fourth, there will be a brief survey of key social factors that impact upon widows' ability to access, enforce, and advocate for inheritance rights. Such factors will include: degrading widow rites, levirate marriage, suspicion regarding wills, the polygamous structure of many Nigerian families, the disconnect between customary law and the lived law due to neo-liberalism, globalization and urbanization, the stigma and vulnerability of HIV, and the women's movement.

---

<sup>1</sup> UNAIDS, 2004 Report on the Global AIDS Epidemic, [Table of country-specific HIV/AIDS estimates and data, as of end 2003](http://www.unaids.org/bangkok2004), (July 2004). Accessed at <http://www.unaids.org/bangkok2004>.

The final section will explore both top-down attempts at reform, through legislative reform, adoption of international conventions and judicial intervention, and grass roots options, focusing on cultural transformation rooted in the work of women in developing normative community, local judicial processes, and revitalization of customary values. There is no simple prescription for how to make cultural transformation work. Any successful approach must be multi-faceted in order to engage with different audiences and loci of power. It must also negotiate difficult value judgements about the relationship between women, human rights, and culture. In recognizing these challenges, this paper is tentative in adopting an approach that favours cultural transformation grounded in grassroots actions, and supported through appropriate legislative reform and dynamic interaction with the normative claims of the international rights community.

## **1. Normative Framework**

Before discussing the issue of widow's rights to inheritance in Nigeria, as a western law student, it is necessary for me to do the challenging work of world traveling. Gunning describes this as a reflexive process to undertake prior to an inquiry into the position of the "other", which permits one to examine preconceptions entering the field of inquiry.<sup>2</sup> In particular, she sets out three critical steps: seeing oneself in historical context, seeing oneself as the "other" sees you, and seeing the "other" in her own context. Such a method allows for a "playful journey" in which "once can recognize and respect [the other's] independence and yet understand their interconnectedness with oneself."<sup>3</sup>

Before raising judgements about the violence and discrimination experienced by widows in Nigeria, or Nigeria's failure to adequately reconcile constitutional, common law and customary systems of law, it is necessary to turn a critical eye on Canada's treatment of these same issue. Of particular relevance to this inquiry is our own inability to resolve debates about not only Aboriginal sovereignty, but the correct balance between common law, Aboriginal living law, and the constitution. Debates in Nigeria may be worlds apart from those that happen in Canada, but they also similarly reflect the fallout of British colonialism and deep cleavages around the scope of indigenous rights to self-governance.<sup>4</sup> Second, like Nigeria, Canada has also been challenged in providing for the safety and financial support of many of its women. The status of women in Canada is also relevant. According to the Violence against Women Survey, half of all Canadian women over 16 have been the victims of at least one act of physical or sexual violence.<sup>5</sup> Elderly women, including aboriginal women, are also particularly vulnerable to poverty in Canada.<sup>6</sup>

---

<sup>2</sup> Isabelle R. Gunning, "Arrogant Perception, World-Travelling and Multicultural Feminism: The Case of Female Genital Surgeries" 23 Columbia Human Rights Law Review (1991-92) 189.

<sup>3</sup> *Ibid* at 204.

<sup>4</sup> See for example Patrick Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill Law Journal 383.

<sup>5</sup> Statistics Canada, Violence Against Women Survey, (1993) at 4.

<sup>6</sup> CEDAW, A/58/38 (part 1, paras. 336-389) (January 2003) (Concluding Comment on Canada's 5<sup>th</sup> Periodic Report) at 357: While appreciating the federal Government's various anti-poverty measures, the

The second stage, seeing oneself as other sees one, requires understanding how people in the Global South have been objectified through colonialism and globalization; a process replicated in research in which they are too often the objects rather than subjects of the writing.<sup>7</sup> While I may position myself as a feminist researcher, I enter the field with this particular set of baggage.

One part of understanding this position is to consider the basic question this paper starts from: what are the inheritance rights for widows in Nigeria? In fact, the choice to focus upon the study of the widow, rather than of daughters or other members of the extended family, marks a Western move to privilege the marital relationship over other kinship relationships.<sup>8</sup> It reflects in part a prioritization in feminist inquiry on making the experience of the nuclear family public. As such, it may be a move to use the experience of Western feminist successes in gaining rights for women within the family. Instead, this inquiry must remain open to traveling the conceptual and ideological space to understand African conceptions of family that may focus on lineage and kinship over the particular relation of a conjugal couple.

The final stage is to understand the other within her context, first by exploring what the other may see as culturally challenging in our society, and second, by looking in “careful detail at the organic social environment of the other which has produced the culturally challenging practice being explored.”<sup>9</sup> The focus of this paper is on the second branch of this analysis, seeking understanding from the position of the other. This paper will wrestle with attempts to understand women from within their own contexts, while recognizing both the normative and spatial barriers to gaining authenticity of understanding across difference.

The first step to seeking such understanding is to recognize that this paper enters into a particularly volatile debate about the conflict between universal norms of human rights, as embodied in constitutional and international documents, and respect for culturally diverse practices, as found in customary and religious law. This project must therefore retain both a theoretical awareness of this tension but, more importantly, an understanding of what it means for attempts to make concrete changes to the reality of women’s experiences. Arguments that are framed in terms of finding solutions within a cultural framework and that stem from the people themselves, such as working with community leaders to reinterpret customary law, will have greater legitimacy than will

---

Committee is concerned about the high percentage of women living in poverty, in particular elderly women living alone, female lone parents, aboriginal women, older women, women of colour, immigrant women and women with disabilities, for whom poverty persists or even deepens, aggravated by the budgetary adjustments made since 1995 and the resulting cuts in social services. The Committee is also concerned that those strategies are mostly directed towards children and not towards these groups of women.

<sup>7</sup> See for example Ratna Kapur, “The Tragedy of Victimization Rhetoric: Resurrecting the “Native” Subject in International/Post-Colonial Feminist Legal Politics” (2002) 15 Harv. Hum. Rts. J. 1.

<sup>8</sup> Oyeronke Oyewumi, “Conceptualizing Gender: The Eurocentric Foundations of Feminist Concepts and the Challenge of African Epistemologies” (2002) 2:1 Jenda: A Journal of Culture and African Women Studies 1.

<sup>9</sup> Gunning, *supra* note 2 at 213.

attempts to impose reform to constitutional and state inheritance laws from above.<sup>10</sup> While culture may be seen as a barrier to reform, and identified as such when necessary, it can more fruitfully be seen as a site of tension and resistance that can provide for differing interpretations and potentialities to expand opportunities for women. Culture is dynamic, and both customary laws and the common law have developed to protect particular world views but may need to evolve in order to remain relevant to needs of the people.

As the central focus of this paper are women, particularly women widowed by HIV or at risk of contracting HIV should they lack a secure land base seeking, it is also necessary to adequately explore who these women are and to provide scope for their voices. Even the term widow itself requires scrutiny. As Margaret Own points out, it is difficult to say who is captured by the category of widow, and it may depend upon how the woman sees herself, the perception of her community, her form of marriage or cohabitation, the status of other women such as other wives, and the need to perform rituals.<sup>11</sup> This paper need not specify who is captured within this concept, but it is important to recognize that this label may differ in its meaning for the women themselves. It is a simple label that captures a great diversity amongst women on the basis of religion, culture, kinship, age, class, education, and rural/urban location. These differences should not be overlooked, as they may greatly impact upon women's ability to meaningfully access those rights that are available both under state and customary law. Therefore, this paper will attempt to balance the practical need to speak in aggregates with the recognition that women are different, and their different positions impact upon their relative power and resources in accessing land and other property. In particular, marriage status and family affiliation are key determinants of options. This paper is also particularly focused upon the position of rural women given that land is so vital to their daily survival and that less than 25% of Nigerians live in urban environments.<sup>12</sup> Nigerian women make up more than 60% of the agricultural labour force and do up to 80% of food production.<sup>13</sup> Finally, this paper must also recognize the tension between the particular vulnerability that widows may experience, as is evidenced through practices such as widows rites, as well as the resistance and agency that such women display in both finding options for themselves in the absence of adequate inheritance, and in being active in work to reform inheritance rights.

It is important to acknowledge, however, the difficulty of speaking to the issue of women's rights without falling into the trap of overly simplifying the category of "Nigerian widows". Zimmerman struggles with these issues in her attempt to unpack culture, recognizing that while she is seeking a dominant and homogenous understanding of culture, lurking beneath her work is "the spectre of a monolithic collectivity of "African women," whom [she] wish[es] to empower, in effect, to "speak for

---

<sup>10</sup> For development of this framework, see Abduhalli A. An-Nai'im, ed., *Cultural Transformation and Human Rights in Africa* (New York: Zed Books Ltd., 2002).

<sup>11</sup> Margaret Owen, *A World of Widows* (London: Zed Books, 1996. Margaret Owner is the founder of WIDO, a transnational organization involved in widow's rights advocacy projects.

<sup>12</sup> U.S. Department of State, Background Note: Nigeria, January 2005 at 2.

<sup>13</sup> Nigerian Federal Ministry of Women Affairs. Nigeria's Report on the Implementation of the Beijing Platform for Action and Commonwealth Plan of Action. April 2004 at 7.

themselves.”<sup>14</sup> Similarly, in this paper, the intent is not to dismiss the reality of great cleavages amongst women, or to negate the fact that they may have conflicting interests, including roles in upholding male patriarchy. While general labels such as widow will be used, this is due to the necessity of finding a language to speak to the law in categories it understands, while remaining cognizant of the need to simultaneously unpack those categories.

Finally, in ensuring that the concept of inheritance rights is relevant to widows in Nigeria, it is necessary to define rights to property in ways useful to the women who hope to access the land, rather than against an abstract standard of common law private property rights. Muthoni Wanyeki suggests that a gendered analysis of land requires that:

land rights are not conceptualized only as the rights to access and control land as a productive resource, but as information about, decision-making around (for example, to mortgage, lease, sell or bequeath land) and benefit from the land.<sup>15</sup>

This conceptualization suggests a need to go beyond who has bare title to look at who benefits from the use of the land and to be open to looking at how women may benefit under certain systems of communal land tenure. In particular, under customary law systems, women may benefit from land through possession and the ability to sell profits of the land, while being limited, like their male family members, in their ability to alienate the land. What is important in developing a conception of women’s rights to land through inheritance and other means is not ensuring they have a bundle of rights equivalent to that measured against a common law standard, rather, that women have access to those entitlements necessary to maximize their life options within their familial and social context.

### **A final note on methodology**

This paper refers where possible to primary source material. However, given that there is poor access in North America to Nigerian law reports and statutes, secondary sources have been used as necessary. In particular, this lack of resources makes it difficult to determine the precise sets of state laws present within all 36 states, each of which has the authority to pass its own laws regarding succession, as well as being home to diverse customary laws. Therefore, this paper provides an overview based on the best material accessible. Any limitations in reporting on the law of Nigeria may be reflective of the fact that limited publication and public accessibility of legal information further complicates the ability to manoeuvre the interplay of laws in Nigeria.

## **2. Nigerian Systems of Law**

Nigeria is a federal republic composed of 36 states<sup>16</sup> made up of over 250 diverse peoples with the Yorubas predominant in the South-West, the Igbo in the South-East,

---

<sup>14</sup> Jill Zimmerman, “The Reconstruction of Customary Law in South Africa: Method and Discourse” (2001) 17 Harv. L.J. 197 at 226.

<sup>15</sup> L. Muthoni Wanyeki, “Introduction”, in Muthoni Wanyeki, ed., *Women and Land in Africa: Culture, Religion and Realizing Women’s Rights* (New York: Zed Books Ltd. 2003) at 2.

along with the Efik, Ibibio and Ijaw, and the Hausa-Fulani, along with the Nupe, Tiv and Kanuri, dominant in the North.<sup>17</sup> Nigerians subscribe in the main to Islam, Christianity and forms of indigenous worship.<sup>18</sup>

On May 29, 1999, Nigeria's most recent constitution was enacted.<sup>19</sup> While Nigeria has struggled with sustained periods of civil war and military leadership, this constitution represents an attempt to recognize the rule of the law and the dignity of all of the Nigerian peoples. The Constitution is the supreme law of Nigeria, with all other laws, be they common law, statute, or customary, being subordinate.<sup>20</sup> The Constitution protects the equal rights of all citizens before the law,<sup>21</sup> as well as the right not to be discriminated against either expressly or through practical application of any law.<sup>22</sup> Customary law is also recognized and protected within the Constitution under s.21, subject to the caveat that it enhances human dignity and is consistent with fundamental objectives of the Constitution, which would significantly include equality rights.<sup>23</sup> The

---

<sup>16</sup> *Constitution of the Federal Republic of Nigeria*, 1999. Accessed at [www.nigeria-law.org](http://www.nigeria-law.org).

<sup>17</sup> U.S. Department of State, *supra* note 12 at 2.

<sup>18</sup> The 1963 Census, the most recent, stated 49 percent are Muslim, 34% Christian and 17% traditional worshippers. In J.N. Paden, *Ahmadu Bello Sarduana of Sokoto: Values and Leadership in Nigeria* (Zaria: Hudaduda Publishing, 1988) at 117. According to John Paden, "Islamic and Democratic Federalism in Nigeria" (March 2002) 8 Africa Notes (Washington: Africa Program of Center for Strategic and International Studies) at 1, while the 1991 census did not ask for religion to be identified, "common wisdom", on the basis of the past census, is numbers are about 50% Muslim, 40% Christian and 10% "traditional". The 19 Northern states are predominantly Muslim, while the 17 Southern are predominantly Christian.

<sup>19</sup> The *Constitution* was enacted by decree, as it was the act of a military government at the federal level. Such state enactments are called edicts. G. Ezejirofor, "Sources of Nigerian Law" in C.O. Okonkwo, ed., *Introduction to Nigerian Law* (London: Sweet & Maxwell, 1980) at 10.

<sup>20</sup> *Constitution*, 1 (1) This Constitution is supreme and its provisions shall have binding force on the authorities and persons throughout the Federal Republic of Nigeria.

(3) If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void.

<sup>21</sup> *Constitution*, 17. (1) The State social order is founded on ideals of Freedom, Equality and Justice.

(2) In furtherance of the social order-

(a) every citizen shall have equality of rights, obligations and opportunities before the law;

<sup>22</sup> *Constitution*, 42. (1) A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person:-

(a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions are not made subject; or

(b) be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions.

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

(3) Nothing in subsection (1) of this section shall invalidate any law by reason only that the law imposes restrictions with respect to the appointment of any person to any office under the State or as a member of the armed forces of the Federation or member of the Nigeria Police Forces or to an office in the service of a body, corporate established directly by any law in force in Nigeria.

<sup>23</sup> *Constitution*, s.21. The State shall –

(a) protect, preserve and promote the Nigerian cultures which enhance human dignity and are consistent with the fundamental objectives as provided in this Chapter; and

Constitutional framework is clear in establishing that women and men are equal whatever legal system they subscribe to, and cannot be treated inequitably under the law due to their membership within a particular cultural community

### **English Common Law**

Nigeria has four other main sources of law: common law, statutory law, customary law, and sharia law. The English common law, as well as statute law, remains an integral part of the Nigerian legal landscape, defining the default position in the absence of domestically enacted law or adherence to customary law.<sup>24</sup> English law entered Nigeria through the Doctrine of Reception. Generally, reception is dated as of January 1, 1900, concomitant with the British government gaining control over the territory of the Royal Niger Company. This position is reinforced by the federal *Interpretation Act*, which confirms the default date of reception is January 1, 1900 for federal legislation.<sup>25</sup> Any statutes of general application enacted in England prior to this date, and not subsequently replaced by domestic Nigerian law, will continue in force, regardless of repeal within England itself, as binding Nigerian law.<sup>26</sup> Therefore, Nigeria does not have the benefit of the increased provision made for women's rights throughout British twentieth century law. Conversely, while common law and equity were also received in 1900, they continue to evolve with the law in England.<sup>27</sup>

At the state level, there are also reception statutes through which English inheritance laws, as matters of state jurisdiction, become applicable. It is important to note that at independence in October 1960, there were three regions, Northern, Western, and Eastern, and the reception of English law, as well as particular acts of these states, has continued within states of those former regions.<sup>28</sup>

While the majority of states continue to recognize the 1900 date, there is some variation. First, probate law has its own particular reception statute, which provides that probate law continues to be the British law presently in force. According to *Taylor v. Taylor*, the dominant position on the interpretation of the statute is that "it is clear that in probate causes and proceedings the law and practice in Nigeria change as the law and practice in England change."<sup>29</sup> However, *Godwin v. Crowther* interprets this to mean that

---

<sup>24</sup> Given that English law continues to predominate in Nigeria, the term English law will be used to refer to laws which are neither customary or sharia laws.

<sup>25</sup> *Interpretation Act* Cap. 192. Laws of the Federation of Nigeria 1990 s.32. (1) Subject to the provisions of this section and except in so far as other provision is made by any Federal law, the common law of England and the doctrines of equity, together with the statutes of general application that were in force in England on the 1st day of January, 1900, shall, in so far as they relate to any matter within the legislative competence of the Federal legislature, be in force in Nigeria.

<sup>26</sup> *Young v. Abina* (1940) 6 W.A.C.A. 180.

<sup>27</sup> Alfred B. Kasunmu & Jeswald W. Salacuse, *Nigerian Family Law* (London: Butterworths, 1966) at 14.

<sup>28</sup> For example, according to *The States (Creation and Transitional Provisions) Decree 1967*, No. 14 of 1967, sec. 1(5), "all existing law in the Region out of which a new state under the Decree was created shall have effect in the new state, subject to the modifications necessary to bring it into conformity with the provisions of the Decree."

<sup>29</sup> (1935), 2 W.A.C.A. 348 at 349.

there was reception of the law and practice in England at the time of the statute.<sup>30</sup> Second, those states in the former region of Western Nigeria no longer recognize British statutory law, but they have maintained common law and equitable jurisdiction.<sup>31</sup> In the place of British statutes, they have enacted their own laws modeled on those of the British, which will be discussed below under particular inheritance legislation.

## Customary Law

In contrast to the law of reception, which originally provided laws predominantly for colonialists and Christian Nigerians who chose to live under the British system, the British had a policy throughout first the protectorate, and then the colony, of respecting the laws of the people indigenous to Nigeria. As Lord Lugard aptly described, the doctrine of continuity required that:

The British courts shall in all cases affecting natives (and even non-natives in their contractual relations with natives) recognize native law and custom when not repugnant to natural justice, and humanity or incompatible with any ordinance, *especially in matters relating to marriage, land, and inheritance*.<sup>32</sup>

Customary law continues to be recognized in Nigeria as a branch of the law, subject to the repugnancy doctrine.<sup>33</sup> While it is not clear what is prohibited as being repugnant, historically, the position has been that repugnancy is not measured against the standard of British conduct, but against standards internal to Nigeria.<sup>34</sup> While there is no clearly articulated test for repugnancy<sup>35</sup>, it is clear it will depend upon dominant views of the time and, given that those traditionally exercising the power to hold laws to be repugnant were British or British-trained judges, the repugnancy clause may have in part been a means to enforce English morality. For example, *Meribe v. Egwu*<sup>36</sup> is commonly cited as an example of a repugnancy case. In this case, it was held that if there was proof that a custom permitted a woman to marry another woman, such a custom would be repugnant. However, it was found that the practice of a barren woman marrying another woman for her husband, whose issue would then be hers for the purposes of inheritance, was not repugnant as it was actually an act of procurement, with the actual marriage

---

<sup>30</sup> (1934), 2 W.A.C.A. 109.

<sup>31</sup> *Laws of England (Application Law (Cap. 60) s. 4* “no Imperial Act hitherto in force within the Region shall have any force or effect therein”.

<sup>32</sup> Lord Lugard, exponent of indirect rule, explaining the principle to political officers, *Political Memoranda*, 1913-1916 at 84.

<sup>33</sup> The *Evidence Act* re-enacts the repugnancy requirement at s. 14: Provided that in case of any custom relied upon in any judicial proceeding it shall not be enforced as law if it is contrary to public policy and is not in accordance with natural justice, equity and good conscience

<sup>34</sup> For example, in *Dawodu v. Danmole*, [1962] 1 W.L.R. 1053, the Privy Council upheld a Yoruba custom of inheritance through the *Idi-Igi* system, in which the estate is divided in equal shares by the number of wives, with each child then taking an equal share of the portion allotted to his mother’s branch of the family. While this was contrary to the British principle of equal division to all children, the Privy Council held at 1060 “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”.

<sup>35</sup> Kasunmu, *supra* note 27 at 18.

<sup>36</sup> *Meribe v. Egwu*, [1976] 1 All N.L.R. [Part 1] (S.C.)



being between the woman and man.<sup>37</sup> Given that the Constitution now provides a clear set of values with which all laws must conform, the repugnancy doctrine may now in part be sublimated to the question of constitutionality.<sup>38</sup>

Questions of repugnancy aside, customary law is meant to be the living law of the peoples, which gains strength through its acceptance by community members as obligatory.<sup>39</sup> As recognized in *Owonyin v Omotosho*, “Customary law is a mirror of accepted usage. In other words, a particular customary law must be in existence at the relevant time and it must be recognized and adhered to by the community.”<sup>40</sup> As such lived law, customary law must be proven as a matter of fact rather than as law within the formal court system.<sup>41</sup> However, the *Evidence Act* does not apply to area or customary courts, and customs need not be proven before these lower courts which are assumed to have competence over such matters.<sup>42</sup> Additionally, judicial notice can be taken of customs frequently acted upon or of “notoriety”.<sup>43</sup> While courts of inferior jurisdiction can therefore rely upon such customs as proven, they should do so with caution on the basis a single, older judgement given the dynamism and variance of customary law.<sup>44</sup>

Generally, customary law has not been captured within codified form, although provision has been made to codify such laws as will be useful.<sup>45</sup> A notable modern exception is the publication by the Anambra State Ministry of Justice of a manual of customary law for use in Anambra and Imo states. While this manual has no official legal status and is therefore not binding, it is meant to be authoritative, but displaceable by other evidence.<sup>46</sup>

## Sharia Law

The fourth dominant form of law in Nigeria is Sharia law. The particular form of sharia recognized in Nigeria is the Maliki form, which predominates throughout Western Africa. While much ink has been spilled about the recent resurgence of sharia law within

---

<sup>37</sup> It would be interesting to re-consider this case today, as same-sex marriages as understood in common law jurisdictions may now be permissible. However, the point of the marriage at issue is not a conjugal relationship between the women, but a matter of protecting the family lineage. The court seems to have failed to fully understand this dynamic.

<sup>38</sup> For example, see *Mojekwu v. Mojekwu* (1997) 7 N.W.L.R. (C.A.) at 283. For example, Justice Tobi held: “The “*Oli Ekpe*” custom which permits the son of the brother to inherit to the exclusion of his female child, is discriminatory and therefore inconsistent with the doctrine of equity....We all need not travel all the way to Beijing to know that some of our customs including the Nnewi “*Oli-ekpe*” custom relied upon by the appellant are not consistent with our civilized world in which we all live today, including the appellant...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.” Justice Tobi then goes on to hold the practice repugnant.

<sup>39</sup> *Eshugbayi Eleko v Government of Nigeria*, [1931] A.C. 622 at 673.

<sup>40</sup> *Owonyin v Omotosho* (1961) 1 All NLR 304 at 309.

<sup>41</sup> *Giwa v Erinmilokun* (1961) 1 SCNLR 337.

<sup>42</sup> *Evidence Act*, S.12.

<sup>43</sup> *Giwa v. Abiodun v. Erinmilokun*, [1961] 1 All N.L.R. 294 at 296 (Fed.S.C.).

<sup>44</sup> C. Eche Adah, *The Nigerian Law of Evidence* (Ikeja, Lagos State: Oxford, 2000) at 36.

<sup>45</sup> See Western Nigeria, Local Government Law (Cap. 68) s.78 and Eastern Nigeria, Local Government Law (Cap 79) s. 90.

<sup>46</sup> As explained in Ezejifor, *supra* note 19 at 42.

Nigeria, it actually had legal standing as a form of customary law active at the time of colonization, and has continued through the doctrine of continuity like other customary law systems. While sharia criminal jurisdiction has recently been revitalized, jurisdiction over “personal law”, including marriage, property and inheritance, has been constant.<sup>47</sup>

In fact, there is an active debate over whether or not sharia law should be considered a form of customary law, given that it based upon written sources, is the revealed will of God, and is therefore fixed and immutable. In contrast, customary law is meant to reflect the living traditions of those who follow it, and is therefore amenable to change at a very local level.<sup>48</sup> J.M. Elegido identifies seven additional factors that make sharia law distinctive: the intimate link between law and religion; its basis on standards of good and evil that are viewed as objective; its ethical standards cannot be rationally known, rather, depend on divine revelation; as God’s law shariah law has precedence over the state; it is traditionalist in that it is based closely on original sources; it has four roots- the Qur’an, the Sunna (traditions or practices) of the Prophet, consensus of scholars and analogical reasoning; and was developed through private jurists, not a state legislator.<sup>49</sup> In fact, sharia law itself distinguishes between sharia law and customary law, and like the common law, has a mechanism to accommodate the latter when necessary.<sup>50</sup> Given that the common law that predominates in Nigeria is associated with Christianity, classifying sharia law as customary is highly volatile. Furthermore, it fails to account for the fact that many states in Northern Nigeria have adopted the precepts of sharia, particularly with the recent trend starting in Zamfara state to shift towards a penal system of Sharia law.<sup>51</sup> However, for the purpose of enhancing inheritance rights for women, it is helpful to recognize that sharia law remains customary law unless formerly codified, and is therefore amenable to continued interpretation in keeping with lived experiences. Such

---

<sup>47</sup> Aa Ob, “Islamic Law as Customary Law: the Changing Perspective in Nigeria” (2002) 51 ICLQ 817 at 826.

<sup>48</sup> For a more complete review of these issues, refer to Aa Ob, “Islamic Law as Customary Law: the Changing Perspective in Nigeria” (2002) 51 ICLQ 817. Note 94 recommends a series of articles by Muslim jurists critical of this classification including Y.K., “Islamic Law is NOT Customary Law” (1997) 6 Kwara Law Review 136 & Jamil Abun-Nasr, “The Recognition of Islamic Law in Nigeria as Customary Law: Its Justification and Consequences” in Abun-Nasr et al. (ed.) *Law Society and National Identity in Africa* (1990). Ob suggests that the courts in Nigeria may be shifting away from recognizing such law as customary, quoting the dicta of Justice Wali of the Supreme Court in *Alhaji Ila Alkumawa v. Alhaji Hassan Bello and Alhaji Malami Yaro*, [1998] 6 SCNJ 127 at 136 “Islamic Law is not the same as customary Law as it does not belong to any particular tribe. It is a complete system of universal Law, more certain and permanent and more universal than the English Common Law.”

<sup>49</sup> J. M. Elegido, *Jurisprudence* (Spectrum Law Publishing: Ibadan, Nigeria, 1994 at 137-140.

<sup>50</sup> Ob, *supra* note 47 at 829-830

<sup>51</sup> Ob, *supra* note 47 - The Shariah Penal Code Law (No. 10, 2000, Zamafra State). Other states have also recognized a distinction between Islamic personal (although not statutory) and customary law by statute. For example, see s. 2 of the *Statute of the Plateau State Customary Court of Appeal Law 1979*: “Customary law’ means the rule of conduct which governs legal relationships as established by custom and usage and not forming part of the common law of England nor formally enacted by the Plateau State House of Assembly but includes any declaration or modification of customary law under the Local Government Edict but does not include Islamic personal law.” Similarly, J.M. Elegido, states in the former Region of Northern Nigerian , Islamic law is applied as an independent legal system rather than as a form of customary law, *supra* note 49 at 137, footnote 34.

an interpretation is supportable within the Nigerian framework, as sharia law defined as customary law remains subject to flexible application.<sup>52</sup>

A complete exposition of the judicial system is not necessary. However, it is important to recognize that the Supreme Court is the court of supreme jurisdiction for all three systems of law, but that there is a Sharia Court of Appeal and Customary Court of Appeal for each state.<sup>53</sup> While the jurisdiction of the Customary Court of Appeal is merely described as supervision and review of customary law, the jurisdiction of the Sharia Court of Appeal is spelled out in detail, and limited to matters exclusively or primarily involving Muslims.<sup>54</sup> There are also a series of lower level area and customary courts that apply customary law, as well as indigenous systems of justice which are outside of the formal court system.

Prior to providing a summary of the inheritance laws applicable in Nigeria, it is necessary to briefly review how land tenure and marriage form dictate the scope of inheritable rights.

## Land

Speaking about property in Nigeria is closely linked with speaking about land, as this is the primary good for the majority of the population in a subsistence economy.<sup>55</sup> Therefore, systems of land tenancy have a major impact on the sets of rights to property that can be inherited in Nigeria.

---

<sup>52</sup> See for example, *Yakuba v Paiko*, Suit No. CA/K/80S/85, Court of Appeal, full text in Yahaya Mahmood, *Sharia Law Reports of Nigeria (1961-1989)* (Ibadan: Spectrum Books Limited, 1993) 126 at 139: "In my view, Islamic Law is not a static law. It is a living law, subject to interpretation, like any other law to suit all times and circumstances".

<sup>53</sup> *Constitution*, s. 282. (1) A Customary Court of Appeal of a State shall exercise appellate and supervisory jurisdiction in civil proceedings involving questions of Customary law.

<sup>54</sup> *Constitution*, 277. (1) The sharia Court of Appeal of a State shall, in addition to such other jurisdiction as may be conferred upon it by the law of the State, exercise such appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic personal Law which the court is competent to decide in accordance with the provisions of subsection (2) of this section.

(2) For the purposes of subsection (1) of this section, the sharia Court of Appeal shall be competent to decide –

(a) any question of Islamic personal Law regarding a marriage concluded in accordance with that Law, including a question relating to the validity or dissolution of such a marriage or a question that depends on such a marriage and relating to family relationship or the guardianship of an infant;

(b) where all the parties to the proceedings are muslims, any question of Islamic personal Law regarding a marriage, including the validity or dissolution of that marriage, or regarding family relationship, a founding or the guarding of an infant;

(c) any question of Islamic personal Law regarding a *wakf*, gift, will or succession where the endower, donor, testator or deceased person is a Muslim;

(d) any question of Islamic personal Law regarding an infant, prodigal or person of unsound mind who is a Muslim or the maintenance or the guardianship of a Muslim who is physically or mentally infirm; or

(e) where all the parties to the proceedings, being muslims, have requested the court that hears the case in the first instance to determine that case in accordance with Islamic personal law, any other question.

<sup>55</sup> Musa G. Yakubu, "Principles of Property Law" in M. Ayo Ajomo, ed., *Fundamentals of Nigerian Law* (Lagos: Nigerian Institute of Advanced Legal Studies, 1989) at 63-64.

Land is divided into three major types: communal land: individual (or private) land, and public (or state) land.<sup>56</sup> Customary land is held as “corporate aggregate”, through groups such as towns, patrilineal or matrilineal groups, and family systems. Such land can be used jointly, by any member, or divided amongst families for use. This land may be distant farmland, forest, or spaces like the market square. Alienation of such land is not possible without consent of the community. In contrast, private tenure in customary systems tends to be on the basis of the family unit; with the family head distributing rights to land that are inheritable to children, but non-alienable without consent of the family head. The requirement of family consultation is a rule of law, and not a matter of convenience.<sup>57</sup> While all individuals who are members of the community or family have a right to a portion of the land, this does not hold true for women as they are viewed as temporary members. Therefore, they do not have permanent and inheritable rights to the land, but rights to use and enjoyment of land while physically in the family. Individuals may also hold land in their own right, for example, through clearing vacant land. However, most land is acquired through inheritance within customary systems.<sup>58</sup> Finally, in considering inheritance rights to land, it is also important to recognize that land has a spiritual value for many Nigerians as home to ancestors.<sup>59</sup>

Conversely, under Islamic law, both men and women have equal rights to hold property and typically do so individually. Land tenure is divided into three categories: occupied land, which is land in use; unoccupied land, which can be obtained either by grant from the emir if located in town, or by clearing if it is land outside town; and common land, known as waaf, which is used for public activities.<sup>60</sup>

Public land is land held by the government, including those lands held by the Crown at independence or acquired by the government through laws such as the *Land Use Decree*. While communal and family systems of land tenure have traditionally dominated in Nigeria, there is a gradual shift towards more family and private holding with communal land being limited to plots such as the market, graveyard, and areas for worship.<sup>61</sup>

The current land policy of Nigeria is governed by the federal *Land Use Decree*, 1978. In effect, this official federal policy is grafted onto the pre-existing customary land system. This policy was enacted to ensure that land was available for use by government, for development, for urban residential areas, and to eliminate land speculation and

---

<sup>56</sup> See a description of land tenure in Emea O. Arua, “Multidimensional analysis of land tenure systems in eastern Nigeria”, Land Reform Bulletin 1997/2, Sustainable Development Department, Food and Agriculture Organization of the United Nations. [www.fao.org/sdLTdirect/LR972/w6728t14.htm](http://www.fao.org/sdLTdirect/LR972/w6728t14.htm) and Yakubu, *supra* note 55.

<sup>57</sup> *Archibong v Archibong*, 18 N.L.R. 117 (71) as explained in Yakubu, *supra* note xxx at 71.

<sup>58</sup> *Lopez v. Lopez* (no further citation provided) as in Yakuba at 73.

<sup>59</sup> Arua, *supra* note 56 at 2.

<sup>60</sup> Hussaina J. Abdullah & Ibrahim Hamza, “Women and Land in Northern Nigeria: The Need for Independent Ownership Rights” in Wanyeki, Muthoni, ed., *Women and Land in Africa: Culture, Religion and Realizing Women’s Rights* (New York: Zed Books Ltd. 2003) 133 at 147.

<sup>61</sup> Yakubu, *supra* note 55 at 69-70.

fragmentation of farmland.<sup>62</sup> Udo provides an overview of the impact of the Decree on customary rights to land.<sup>63</sup> Under s. 1 of the decree, all land is vested in the Governor of the state, rather than traditional leaders. Individuals can gain occupancy rights to the land as a statutory right to occupancy granted by the governor, which extinguishes all prior rights to that land, or from local governments which have the power to grant customary rights of occupancy in non-urban areas. Such grants cannot exceed 500 for agriculture, or 500 hectares for grazing. Grants last for 99 years. If a customary right of occupancy is held, the customary law where land is situated will apply, with the caveat that no person be deprived of beneficial interest under rules of inheritance of any other customary law. Such an individual would have a right to compensation by the individual holding the customary right of occupancy. Under a statutory right, it is customary law of the hometown of the deceased on death that applies. Further, under the statutory right of occupancy, land cannot be more than subdivided without the consent of the Governor. While a certificate of occupancy is issued with statutory right to occupancy, it is also possible to get one to evidence a customary occupancy.

The consensus appears to be that the *Land Use Act* has had minimal impact upon the customary holding system. For example, in his study of perceptions of the Act, Udo found that in his sample of 525 individuals, 39% thought that the government had taken control of the land, 29% that there was no impact on rights to the land, and 25% that the State Governor had replaced traditional rulers as trustee of the land.<sup>64</sup> Udo claims all of the interpretations are partially correct, and that customary tenancy does continue in spite of the decree. Given these varied understandings of the law, there is little impetus for individuals to gain a certificate of occupation, and the government has not pushed those in rural communities to do so. However Abdullah and Hamza suggest further gendered analysis of the Act is required. As it is premised on the basis that men and women have equal access to land, it fails to recognize de facto land ownership of women, and that registration of occupancy may threaten the rights of women with secondary rights non-convertible to ownership rights.<sup>65</sup> Abdullah and Hamza provide the example of a widow whose sons inherited three farms, but when she went to pick up the three certificates of occupancy to which they were entitled, she was informed her brother-in-law had already collected two, and was only given the remaining one.<sup>66</sup> More research in this area would be useful to further explore if it could impact upon widow's rights to possession, or if they are protected as beneficial interests under inheritance.

## Marriage

The major means through which individuals are differentiated and placed into a system of inheritance is through the form of marriage that they choose to adopt, be it a

---

<sup>62</sup> R.K. Udo, *The National Land Policy of Nigeria*, Research Report, No. 16 (Ibadan, Nigeria: Development Policy Centre, 1999) at 30-34.

<sup>63</sup> *Ibid* at 30-34.

<sup>64</sup> Udo at 45-46.

<sup>65</sup> Abdullah & Hamza, *supra* note 60 at 150.

<sup>66</sup> *Ibid* at 162.

civil marriage, or under a customary or sharia system.<sup>67</sup> It is of brief note that the form of marriage should have such a major impact on both the rights of the couple and of their children, given that marriage may not be viewed as a contract between two individuals within Nigerian societies. As will be described below, marriage should not be understood as an absolute marker of rights entitlement, but a prima face signal to the courts of the intended system of inheritance.

Individuals must make the choice to contract either a statutory, monogamous civil marriage, or a marriage under a customary or sharia system which is permissive of polygamy.<sup>68</sup> Polygamy remains common in Nigeria, with approximately 42.6% of women having such marriages, and 56.7% having some form of monogamous marriage.<sup>69</sup> In order to have a valid civil marriage under the *Marriage Act*, it is necessary to both complete a formal registration process and to get married within a licensed facility. Thus, while many Christian marriages will also be civil marriages, given that Churches can be licensed to perform these services, a Christian marriage alone does not mean that an individual will have rights under the civil system.

A civil marriage establishes the presumption that the couple intend to subscribe to the British inheritance system. This presumption is established on two primary bases. First, *Cole v. Cole*<sup>70</sup> established that individuals being married in the Christian form had the right to succession on Christian principles. This principle was later varied in *Smith v. Smith*<sup>71</sup> to establish a mere presumption. The manner in which the couple lived would provide the ultimate determination of whether or not the couple intended to have bound themselves to the British system. No particular indications are provided as to the meaning of living in a customary mode of life, but presumably at the time these cases were decided it was considered obvious, and would likely look at factors such as urban versus rural life, and whether or not a man took further polygamous wives in contravention of the *Marriage Act*. Since this early case law, the principle of a Christian marriage has been converted into that of a civil marriage, with a Christian marriage itself not attaching civil rights.<sup>72</sup>

---

<sup>67</sup> According to Kasunmo, *supra* note 27 at 27, marriage will impact the rights of both the couple and their children. The particular rights of a wife and children under a civil marriage also include rights to actions for property, maintenance and child custody on divorce. See the *Matrimonial Causes Act*. It is of note while not everyone will get married, although marriage is the norm, those who do not will then inherit according to manner of life.

<sup>68</sup> *Marriage Act*, Cap. 218, Laws of the Federation of Nigeria 1990, at s. 35 “Any person who is married under this Act, or whose marriage is declared by this Act to be valid, shall be incapable, during the continuance of such marriage, of contracting a valid marriage under customary law, but, save as aforesaid, nothing in this Act contained shall affect the validity of any marriage contracted under or in accordance with any customary law, or in any manner apply to marriages so contracted”.

<sup>69</sup> Centre for Reproductive Rights, “Women of the World: Laws and Policies Affecting Their Reproductive Lives: Nigeria” (2003) at 75.

<sup>70</sup> (1898), 1 N.L.R. 15.

<sup>71</sup> (1924), 5 N.L.R. 105.

<sup>72</sup> See for example *Obiekwe v. Obiekwe*, as quoted in Abdullah, *supra* note xxx at 162 (no citation provided): “A good deal has been said about ‘church marriage’. So far as the laws of Nigeria is concerned, there is only one form of monogamous marriage and that is marriage under the Act . Legally, a marriage in a church (of any denomination) is either a marriage under the Act or it is nothing.”

Second, this principle was codified in *The Marriage Act of 1915 (Marriage Ordinance)*, and continues to be cited as good authority.<sup>73</sup> The proposition is aptly laid out in *Salubi v Nwariaku*<sup>74</sup>:

Where a person, subject to native law or custom marries under the Marriage Act and dies intestate, the applicable law for the distribution of his estate would be the Marriage Act and not the Administration of Estates Law or Customary Law. This is because his intestacy is governed and regulated by English Law.<sup>75</sup>

In summary, inheritance is possible under the British system if the marriage is itself a civil marriage, the couple does not live in a customary marriage, and the land is not subject to customary prohibitions. As will be discussed below, in the alternative, a couple that does not have a civil marriage can also opt into this system through using a British will. Inheritance will occur under a customary law if the couple marries under a customary system, marries under a sharia system but is not aware of their rights under the sharia system of inheritance, had a Christian marriage which was not registered in compliance with the *Marriage Act* and, potentially, in the case the couple lives a “traditional lifestyle” but had a civil marriage. Alternatively, inheritance will be governed by the sharia system in the case of a sharia marriage.

### **3 The Laws of Succession**

#### **Testate Succession**

While Marriage falls under the jurisdiction of the federal marriage act, issues including property rights of spouses fall under state jurisdiction and may vary by state. However, testate succession is governed in the majority of Nigeria by *The Wills Act 1837*, and *The Ammended Wills Act 1867*. As only British law received prior to 1900 persists in the main, changes to British law, including the *Inheritance (Family Provision) Act, 1938*, that enables dependents to apply to court for maintenance, does not apply in Nigeria. Therefore, if an individual makes a will, he is not bound to provide for his family.<sup>76</sup> A notable exception to this testate regime is that the states that make up the former region of Western Nigeria are governed by the *Wills Law Cap. 133, 1959 Laws of Western Nigeria*.<sup>77</sup>

Under customary systems, wills may also be recognized. For example, the Ibos may make a death bed disposition, or Ilke Ekpe, which is an oral will.<sup>78</sup> Written wills

---

<sup>73</sup> Note that s.55 of the *Marriage Act* specifically repeals the Marriage Ordinance provided that “said enactments shall continue to apply to every marriage contracted thereunder or validated thereby as if this Act had not been made.” I have been unable to locate any sources that indicate the Marriage Ordinance is no longer good law, see for example *infra* note 55.

<sup>74</sup> (1997) NWLR (Pt. 505) 442.

<sup>75</sup> *Ibid* at 447.

<sup>76</sup> Yakubu, *supra* note 55 at 77. He calls for reform of this statutory scheme in Nigeria that leaves dependents vulnerable.

<sup>77</sup> As explained by Nwogugu 301.

<sup>78</sup> Kasunumu, *supra* note 27 at 281.

may also be made under customary law. If a written will is made that meets the requirement of the *Wills Act*, by being signed and witnessed by two individuals, then it will be applicable to an individual whether married under a customary or Muslim marriage.<sup>79</sup> A customary disposition evidenced in writing need not comply with the *Wills Act*, but rather must only comply if the intention is to leave under the English system.<sup>80</sup> Whether the will is found to be a customary or English will, it cannot transfer property held as family property, including a title (such as family head), which is not alienable by individual will.<sup>81</sup>

Amongst the Hausa of Northern Nigeria, sharia law is the dominant form of “customary law”. Under sharia law, only up to one third of property is devisable by written document, or oral will (*wasiyya*).<sup>82</sup> This one-third testamentary disposition may be more accurately described as a gift,<sup>83</sup> or as an exception to the general principles of succession under sharia law.<sup>84</sup> However, it is a matter of some debate as to the ability of a Muslim to make a valid will under the *Wills Act* that disposes of more than one-third of his property. In *Yanusa v. Adesubokun*, it was held by the Sharia Court of Appeal that disposition under the *Wills Act* was limited to a one-third portion in keeping with the principles of Islamic law. However, this was over-ruled by the Supreme Court which held that under the provisions of the Supreme Court Ordinance, it cannot enforce a custom in so far as it is incompatible with a law in force. The court therefore held that the “provisions of Maliki Islamic Law is undoubtedly incompatible with section 3 of the

---

<sup>79</sup> *Rasaki Yinusa v. Adesubokan* [1971] N.N.L.R. 77.

<sup>80</sup> *Nwabuoku v. Ottih* (1961), 1 All N.L.R. 487. Similarly, in *Apatira v. Akanke* (1944), 17 N.L.R. 149 if the intent is for a Moslem to make an English will and it does not comply with the *Wills Act*, then it will be judged by English law.

<sup>81</sup> Kasunumu, *supra* note 27 at 289; *Aparita v. Akanke* (1944), 17 N.L.R. 149; According to *Idehen v. Idehen* (1991) 6 NWLR (pt 198) 382 at 173, per Nwokedi: “It is my view that section 3(1) of the Wills Law Cap 172 Bendel State, did not compel a Bini man to make his Will in accordance with his customary law except where, from the nature of the property devised, Bini customary law deprives him of the capacity to dispose of that particular property.”

<sup>82</sup> Kasunmu, *supra* note 27 at 289; *Yanusa v Adesubokun* (1968), Suite No. J23/67, Reported 1968 N.N.L.R. 97. Full text as compiled by Yahaya Mahmood, *Sharia Law Reports of Nigeria (1961-1989)* (Ibadan: Spectrum Books Limited, 1993).

<sup>83</sup> According to *Rabiu v Fatima* (1963), SCA.CV.40/63, Sharia Court of Appeal of Northern Nigeria, “In Islamic Law instructions do not serve to divide an inheritance. If the instructions are followed, it is not a question of inheritance but of gift. If instructions give property to one person out of a family, then he could not receive more than a third of the whole property, without the consent or authority of the other persons inheriting the properties [heirs]. Full text of case as compiled by Yahaya Mahmood, *Sharia Law Reports of Nigeria (1961-1989)* (Ibadan: Spectrum Books Limited, 1993).

<sup>84</sup> The rules for making wills set out in *Yanusa v Adesubokun* (1968), Suite No. J23/67, Reported 1968 N.N.L.R. 97 (Sharia C.A. Northern Nigeria) sets out a series of principles Maliki Islamic law, including “that a moslem is entitled to make a Will and by it dispose of one-third of his estate to persons who are not his heirs entitled to share his estate and the remaining two-thirds would be distributed to his heirs as if he died intestate and he cannot by that Will affect any alteration of the shares of these heirs in the heirs.” and that “where a person makes a Will in favour of his heirs, the same rule holds as in the case of bequeathing more than a third to the stranger, in other words, the deed is not valid unless the heirs gave their consent to the disposition after the death of the testator; and their consent previous to his death Will have no effect”. Text as laid out at 15 in Yahaya Mahmood, *Sharia Law Reports of Nigeria (1961-1989)* (Ibadan: Spectrum Books Limited, 1993).



Wills Act, 1837”, and therefore a disposition in excess of one-third of the property would be permissible.<sup>85</sup>

It is also of note that just because a will is made, does not mean it will be enforced if it does not accord with local customary traditions. For example, a testimonial provided by the International Federation of Women Lawyers working with widows in Edo State reports a Bini woman who went through widow rites and experienced property grabbing by her husband’s family of a house devised to her by will. It was only through the assistance of FIDA that she was able to retain the house, but not the other properties.<sup>86</sup>

## **Intestate Succession**

The most frequent form of succession in Nigeria is intestate, which raises a much more complex set of rules under the English system. As Harvey identified in 1968, in an observation which holds true today, “we must start with the warning that the relevant law is in a state of total confusion and in many cases such principles as can be stated have to be qualified so far that they are more suppositions than rules.”<sup>87</sup> One particular challenge arises from lack of agreement of the precise date of reception of succession law as incorporated under the *Marriage Act of 1915*.<sup>88</sup> Given the difficulty in piecing together the relevant statutes and common law positions, it would be challenging for the Nigerian layperson to be confident in her understanding of succession practices.

As discussed, above, in those states without their own statutory scheme, the applicable rule is *Cole v. Cole*: that those married in a Christian (read civil marriage) are subject to English intestate legislation. Again, the 1900 date of reception means that intestate legislation is dated in much of Nigeria. The primary applicable statutes are the *Statute of Distribution 1670*, *Statute of Distribution 1685*, and *Intestates’ Estates Act*

---

<sup>85</sup> *Adesubokun v. Yunusa* (1971), NSNLR 7, quoted from 24 of full text of ... Notably, the difference in the two positions turned upon interpretation of s.17[1] Supreme Court Ordinance, Cap 211 Laws of Nigeria 1948, 34(1) High Court: “Nothing in this Ordinance shall deprive the Supreme Court of the right to observe and enforce, the observance, of shall deprive any person of the benefit of any existing native law or custom, such law or custom not being repugnant to natural justice, equity and good conscience, *nor incompatible either directly or by necessary implication with any law for the time being in force*” (emphasis added).

<sup>86</sup> Centre for Development and Population Activities, “Case Study No. 2: Engendering Legislative Issues (ELI) Project”, December 2002. Accessed at <http://www.eldis.org/static/DOC17301.htm>.

<sup>87</sup> Brian W. Harvey, *The Law and Practice of Nigerian Wills, Probate and Succession* (London: Sweet & Maxwell, 1968) at 147. Complicating the matter, I was not able to local authoritative sources post the 1990 *Marriage Act*. Rather, more recent sources continue to rely upon the same sources used within this text or fail to provide authority for their assertions of the state of law in Nigeria

<sup>88</sup> See Brian W. Harvey, *The Law and Practice of Nigerian Wills, Probate and Succession* (London: Sweet & Maxwell, 1968) at 157 where he surveys four possible theories of reception. These are one, 1884 on the basis that this was the date of the first marriage ordinance being introduced into the Gold Coast and therefore incidentally into Nigeria, (which is unpopular as it would disqualify the *Intestates’ Estate Act*), two, 1900 as the general date of reception, three, 1914 as held in *Johnston v. United Africa Co.* (1936) 13 N.L.R. because that was the date of the enactment of the Marriage Ordinance of 1914, to be applied specifically to the colony of Lagos and four, that it is the law as continues to apply in England. Harvey finds this last interpretation unpersuasive as the language used is “for the time being” and states that there can at least be certainty that received law is pre-1926 English law.

1890.<sup>89</sup> The *Statutes of Distribution* provide that if there is a widow and issue, the widow will get one third of the personal property, and that if there is no issues, one half. The *Intestates' Estate Act* provides additional protection in that if a widow has no issue, she will receive all personal property that is not in excess of 500 pounds, or get 500 pounds absolutely and her share in the residue. The rest would go to the next of kin by proximate degree, being either the father or mother. In either case, under the English statutes, the widow does not get real property, rather, it devolves onto the heir through the principle of primogeniture. Should the wife die intestate, however, the husband takes everything.

Originally enacted in the colony of Lagos, s.36 of the *Marriage Act*<sup>90</sup> applied the English law, but with an important variation: that the statutory scheme applied not only to personality, but also to realty, thereby greatly increasing the rights of widows. Ewulekwa argues that this provision was extended in scope to the eastern states by *Administrator-General v Egbuna*.<sup>91</sup> However, my own reading of the text, substantiated by Harvey, suggests that it only served to establish the *Coke v. Coke* principle within the eastern region, and not to extend the realty provisions of the *Marriage Act*.<sup>92</sup>

However, some Eastern states have also enacted their own inheritance laws, including Enugu, Ebonyi and Anambra State.<sup>93</sup> For example, under *The Succession Law Edict, 1987, Laws of Anambra State*:

If the intestate leaves a husband or wife but no children, parent or brothers or sisters of the whole blood, the residuary estate shall be held in trust for the supervising spouse absolutely. However, where the surviving spouse is a wife, and the intestate leaves brother or sisters of the half blood, the wife's interest will be for life or until she marries whichever first occurs. Thereafter, the residue of her interest shall go to the intestate's brothers and sisters absolutely in equal shares.<sup>94</sup>

Those states that were in the Western and Mid-Western region have a different scheme of intestate succession, as enacted in the *Administration of Estates Law 1959* s.49 (5) Cap 1.<sup>95</sup> Under this scheme, if there are no issue or other surviving relatives (parents,

---

<sup>89</sup> Harvey, *supra* note 88 at 160.

<sup>90</sup> *The Marriage Act of 1915*, s.36(b).

<sup>91</sup> (1945), 18.N.L.R. 1. In this case at issue was whether the *Marriage Act*, applicable to the Colony, was also applicable to the protectorate.

<sup>92</sup> *Ibid* at 2 "Because section 36 of the Marriage Act applies only to the Colony, it does not follow that the opposite, so to speak, is the law in the Protectorate. It only means that one must look elsewhere than to this section for guidance on this point. I do not think it is necessary to look very far. It seems to me that the principle enunciated in the well-known case of *Cole. v Cole* covers the point." Described in Harvey, *supra* note 88 at 165-170.

<sup>93</sup> *Administration and Succession (Estate of Deceased Persons) Law 1987*, as described is made in Banke Akinrimisi, "Women's Inheritance Rights – The Nigerian Situation & Options Available at all Levels" in Uju Obiora, ed., *Women and the Right to Inheritance in Nigeria* (Lagos: Shelter Rights Initiative, 2001). Note, however, that Ewulekwa, *infra* note 94, provides a different name for this legislation.

<sup>94</sup> As quoted in Uche U. Ewuluka, "Post-Colonialism, Gender, Customary Injustice: Widows in African Societies" (2002) 24 Human Rights Quarterly 424 at footnote 103.

<sup>95</sup> According to Ewuluka, *supra* note 94 at footnote 99, this law is modeled on the *English Administration of Estate Act, 1925*, and applies to Lagos, Ogun, Ondo Oyo, Bendel and Delta States. These individual states have also re-enacted these provisions as state laws.

siblings), then all property goes to the wife absolutely in trust. In the case that there is issue and other surviving relatives, the spouse will get all personal chattels absolutely, the sum of 1/3 of the residuary estate, with 1/3 of the estate held on trust during life subject to payment. If there is no issue, but other relatives, then the spouse will take the chattels and 2/3 of the value of the estate, with 1/2 of the residuary estate held on trust for life subject to payment.<sup>96</sup>

For those states not covered by either the *Administration of Estates Law*, their own state law, or s.36 of the *Marriage Act*, being those primarily in the North (who do not follow the sharia system) and probably some areas of the East of Nigeria, the English law continues to exist unmodified. This intestate position therefore means that widows have no right to real property, and could therefore in theory be evicted by the family heir. This position is very similar to that under customary law systems to be discussed below, although more readily amenable to legislative reform.

## Sharia

Unlike the English system of intestate succession, the sharia system is clear and simple, as it is specified within the Qu'ran. The basic principle under the Maliki system is:

that if a Muslim dies intestate his estate must be shared between his heirs entitled to share under Islamic Law, and that his male children must have equal shares and his female children half share each of a male child.<sup>97</sup> Only children who are non-Muslims or commit patricide to inherit lose these rights.<sup>98</sup>

The general division is that if there are children, widows are entitled to one eighth of the property, including realty, and they are entitled to one quarter of the property if there are no children. Daughters take half the share of their brothers, and if they are the sole survivor, will take half of the net estate. In total, woman can inherit under six of the nine categories as "Qu'ranic sharers": as wives, mothers, daughters, and germane, consanguine, and uterine sisters.<sup>99</sup> Women can also inherit from slaves and by gift or purchase.<sup>100</sup> Finally, a non-Muslim cannot share in the intestate succession of a Muslim, although a Muslim is not precluded from taking under the personal law system of a non-Muslim.<sup>101</sup>

---

<sup>96</sup> Provisions as set out in Harvey, *supra* note 88 at 162.

<sup>97</sup> *Yanusa v Adesubokun* (1968), Suite No. J23/67, Reported 1968 N.N.L.R. 97, full text of case as compiled by Yahaya Mahmood, *Sharia Law Reports of Nigeria (1961-1989)* (Ibadan: Spectrum Books Limited, 1993) 15 at 15.

<sup>98</sup> *Yanusa v Adesubokun* (1968), Suite No. J23/67, Reported 1968 N.N.L.R. 97, full text of case as compiled by Yahaya Mahmood, *Sharia Law Reports of Nigeria (1961-1989)* (Ibadan: Spectrum Books Limited, 1993) 15 at 16.

<sup>99</sup> Pat U. Okoye, *Widowhood: A Natural or Cultural Tragedy* (Enugu: Nucik Publishers, 1995) at 164.

<sup>100</sup> Abdullah & Hamza, *supra* note 60 at 157.

<sup>101</sup> I. Olu Agbede, "Legal Pluralism: The Symbiosis of Imported Customary and Religious Laws: Problems and Prospects" in *Fundamentals* at 239.

It is important to know that there is a history of non-enforcement of women's rights to inheritance under the sharia system amongst the Hausa people.<sup>102</sup> When Kano was first made into an Islamic state in 1804, similar to the doctrine of continuity, those laws consistent with sharia were maintained, and all others abolished. However, women's rights to inheritance under sharia were not consistently applied. In 1923, Emir Abdullahi issued an edict saying women were not entitled to inheritance. On March 7<sup>th</sup>, 1924, Emir Abdullahi partially remedied his position by issuing an edict that recognized widow's right to inherit the deceased's house on his death if there were no male heirs. However, this edict also recognized women's non-inheritance of farmland, and did not recognize inheritance of the house if there was a male next of kin. It was not until April 1<sup>st</sup>, 1954 that Sarki Sanusi annulled this practice to ensure that Hausa women could inherit under sharia principles.

The necessary adjunct to recognizing women's ability to hold land and receive land through inheritance is the caveat that male family members retain control over the property. In Abdullah and Hamza's study of inheritance practice in Northern Nigeria, this practice was attributed to the perspective of male family members that women did not need independent legal rights to the land, and that they would be catered to by their husbands and male relatives.<sup>103</sup> It is of additional note that many Hausa women practice *purdah* and therefore may be limited in their ability to independently administer their land.<sup>104</sup>

### **Customary Law**

It would be impossible to review the diverse customary inheritance practices that exist within Nigeria in the scope of a short paper, given that not only each peoples, but also family group, may have their own unique inheritance practices. Any attempt to provide a working sketch of customary practices is reductionist, which is particularly problematic given that this replicates an overly simplistic view of African peoples as well as the abstraction of their practices from their context and worldview. Instead, this paper will sketch out some broad trends of the inheritance practices that have been recognized by the courts, and therefore provide a general picture of the formal customary law rights of widows. It is therefore useful to provide the examples of the Yoruba and Ibo peoples as the two dominant ethnic groups in Southern Nigeria. Their rights have been well documented and discussed within the court and their inheritance patterns are representative of two general trends found amongst other groups: that of inheritance equally to all children and of primogeniture. As Theresa U. Akuadu found in a survey conducted by the Women's Rights Project of the Civil Liberties Organization between 1995-1997 in what would today constitute 18 diverse states, 51% of respondents

---

<sup>102</sup> See Abdullah & Hamza, *supra* note 60 at 150-156.

<sup>103</sup> Abdullallah & Hamza, *supra* note 60 at 158. She states her findings replicate those of B. Callaway, *Muslim Hausa Women: Tradition and Change* (Syracuse NY: Syracuse University Press, 1987) at 27: "while women have access to property in that they inherit and technically own it and that they can keep and spend or invest any income they might generate, in Kano actual managerial rights (particularly to land and to real estate) usually belong to fathers, brothers and husbands."

<sup>104</sup> Okoye, *supra* note 99 at 177.

identified patterns of inheritance solely to all of the children, whereas 37% identified inheritance solely to the eldest son.<sup>105</sup>

Generally, for intestacy, the rule is that the binding law is personal law, not that of *lex situs*.<sup>106</sup> For the Yoruba peoples, property devolves equally to all children, regardless of age or gender,<sup>107</sup> while the eldest male typically succeeding as the dawodu, or family head, with responsibilities as trustee of the family property.<sup>108</sup> However, in the absence of a male child, the eldest daughter can also become the dawodu.<sup>109</sup> There are two different systems of equal distribution between the children, being *Idi-Igi*, in which an equal portion is attributed to each wife and equally distributed amongst her children, versus *ori-ojori*, in which each child gets an equal share.<sup>110</sup> There can be no alienation of this family property without consent of the other members.<sup>111</sup>

The wife has no right either to inherit or administer the property as she is herself considered as part of the chattel of the estate.<sup>112</sup> She can, however, sue on behalf of her minor children to protect their property rights.<sup>113</sup> Nor are the contributions of the wife to the property recognized, as *Rabiu v Absi* holds that improvement of family property by another member does not divest the property of its original character.<sup>114</sup> Lack of recognition of contribution is significant, as widows may lose rights to jointly owned properties or property in which they have invested.

For the Ibo, succession is on the principle of primogeniture and primarily patrilineal, with both the rights of control and property itself flowing to the eldest son or, if there is none, to the brother.<sup>115</sup> The eldest son therefore holds land on trust for himself and his brothers.<sup>116</sup> Even if there are female children, property will pass to the brother of the deceased.<sup>117</sup>

---

<sup>105</sup> Theresa U. Akumadu, *Beasts of Burden: A Study of Women's Legal Status & Reproductive Health Rights in Nigeria* (Lagos: Civil Liberties Organisation, 1998) at 68.

<sup>106</sup> *Ghamson v. Wobill* (1947), 12 W.A.C.A. 181.

<sup>107</sup> *Lopez v. Lopez* (1924), 5 N.L.R. 43; *Yusuff v Dada* (1990) 4 NWLR (pt. 146) 657;

*Amusan v. Olawumi* (Nigeria, Court of Appeal, [2002] FWLR 1385.

<sup>108</sup> *Lewis v Bankole* (1908), 2 N.W.L.R. 66.

<sup>109</sup> *Lewis v Bankole* (1908), 2 N.W.L.R. 66 recognized the eldest son could himself be replaced by the eldest daughter, and *Abibatu v Flora Cole*, [1986] 2 NWLR 369 held that when all of the children are female, the eldest female should be the head; *Ashipa v. Ashipa* (Nigeria, High Court of Lagos State, [2002] LHCR 60-84

<sup>110</sup> *Taiwo v Lawani* (1961) ANLR 733.

<sup>111</sup> Kasunmu, *supra* note 27 at 293.

<sup>112</sup> *Iwelo Awero v Raimi SAdipe* (1983) 11 O.Y.S. H.C. (pt. 11) 790, states that a widow without issue is part of the property, and liable to be inherited with the other property of the husband; *Akinnubi v. Akinnubi* (1997), 2 N.W.L.R. 144 (S.C.).

<sup>113</sup> *Aileru v. Anibi* (1952) 20 N.L.R. 46, *Bolaji v. Akapo* 2 FNR 241 at 245, *Suberu v Summonu* (1957) S.C.N.L.R. 45. As summarized in P.O. Aderemi, *Modern Digest of Case Law* (Ibadan: Spectrum Books Limited, 2000) at 68. This topic will be discussed further below.

<sup>114</sup> (1996) 7 N.W.L.R. (Pt. 462) 505 S.C. (69-70).

<sup>115</sup> Harvey, *supra* note 88 at 180

<sup>116</sup> E.I. Nwogugu, "Family Law" in C.O. Okonkwo, ed., *Introduction to Nigerian Law*, ed. C.O. Okonkwo (London: Sweet & Maxwell, 1980) at 303.

<sup>117</sup> *Uboma v. Ibeneme* (1967), E.N.L.R. 251; *Udensi v. Mobgo* (1976) 7 S.C. 1.

The widows' rights are also very limited. As Kasunmu explains:

The spouses have no right in each other's property either during marriage or on the death of one of them. The husband may during his lifetime allocate a house or land to the separate use of his wife. Unless an outright gift is proved, the property allocated to the wife will on the death of the husband still pass as family property. Rather, the widow's right in the land is to mere possession of a parcel of family property subject to her good behaviour.<sup>118</sup>

Therefore, the widow lacks any rights to control the property, and is vulnerable should an absentee son or family member fail to ensure she has access to land.

#### **4. The Cultural Context of the Living Law**

Regardless of what system recognizes a woman's rights, her ability to enforce her rights to land will depend upon a series of extra-legal factors.

#### **Widow's Status in Nigerian Society**

Perhaps the most well documented factor of the widow's cultural context is the practice of widow rites, a series of practices through which a widow must proceed upon the death of her husband before being able to rejoin her community. Many of these practices are potentially dehumanizing and make women vulnerable to property-grabbing.<sup>119</sup> While they differ by region, and an exhaustive analysis being beyond the scope of the paper, understanding some of the common practices is important to understanding the full legal and cultural status of widows in Nigeria. Ewelukwa identifies that while widow rites vary across Nigeria, that common elements include "varying degrees of isolation and confinement, restricted freedom of movement and association, and hair shaving."<sup>120</sup> For example, amongst the Edo in the south-west, practices include

---

<sup>118</sup> Kasunmu, *supra* note 27 at 296.

<sup>119</sup> For an extensive survey of widowhood practices in Nigeria, refer to Okoye, *supra* note 99. Okoye is openly critical of many of the factors influencing widowhood practices, including cosmology, and therefore presents a more confrontational mode to addressing widowhood practices. Her account is not well-referenced as it is based in large part on anonymous interviews, but it accords with the findings of other less-detailed accounts of widowhood practices. Another excellent overview of such practices amongst the Igbo in Chima Jacob Korie, "Widowhood Among the Igbo of Eastern Nigeria" Thesis submitted for degree of master philosophy in history, University of Bergen Norway, 1996. Available at [www.ub.uib.no/elpub/1996/h/506001/korieh/chima.html](http://www.ub.uib.no/elpub/1996/h/506001/korieh/chima.html). Study included 80 life histories of widows, court reports and secondary sources. Unlike Okoye, Korie is more sympathetic to attempts to explain widowhood rites from within the Igbo worldview. On property rights, see for example s.2 that describes property-grabbing. One widow reported "I was ordered home from Lagos to explain the cause of his death. After I had narrated everything to them (in-laws), they asked for his pass book (bank saving book) and other valuable items which I gave over to them." Another widow reported "Our entire property was confiscated. A lorry was sent from home to come and pack all the merchandise in his supermarket. All of his electronic items were also packed away. For the past year the house has been like a battle ground between me and them." Significantly, these cases suggest that women also experienced property-grabbing not just related to land.

<sup>120</sup> Ewelukwa, *supra* note 99 at 437. Data based on interviews with over 60 widows in Southern Nigeria during a six-weeks monitoring mission to Nigeria in 1994, with informal discussions confirming the situation to be the same in 2000.

an enforced period of mourning for seven days, shaving of the hair, eating from unwashed plates, being forced to cry, and washing the dead man's body and drinking the water. In Rivers state, the widow may have to swim across the river and throw herself over the body of the deceased several times.<sup>121</sup>

Understanding the underlying motivation for widow rituals is important to identifying their persistence. First, these practices are linked to a belief that the widow may have been involved in the death of her husband. For example, amongst the Igbo, where widow rites are particularly strong, there is a belief that any death is unnatural, and that the widow must therefore prove her innocence to the family through undergoing the rites. In effect, she is under oath during the period of the rites.<sup>122</sup> A practice such as a widow having to scratch herself with sticks can be understood as the widow being in a state of ritual impurity on the death of her husband, seeking to protect herself from further defilement. Furthermore, as Okeye explains, the widow must rectify the breach in conduct that has caused death in the community.<sup>123</sup> The wife's inability to wash, and her shaved head, may also make her unattractive to her deceased husband and thereby stop him returning as a jealous ghost to dispute his property, including his wife.<sup>124</sup> As Okoye explains

There is, so to speak, no demarcation between the living, the dead and indeed the spirit. Yet it is accepted that two of these three beings, the dead and the spirit, possess supernatural qualities and powers. Man thus becomes a puppet in the hands of the dead and the spirits of the world.<sup>125</sup>

While it may be possible to justify widow rites within a local cosmology, it should also be recognized that traditional beliefs that the widow is married to the family, along with Christian influences, may in fact be tempering practices in regions such as Plateau state.<sup>126</sup>

Conversely, in Muslim communities, widows do not typically perform widow rites, but do go through a period of ritual mourning followed by a period of purification. For example, in Plateau state and Bauchi, Muslim women have 40 days of mourning, and 30 days of seclusion. In Kano, there is a four month period of mourning followed by 10 days of *takaba* or seclusion.<sup>127</sup>

One particular widow practice is that of levirate marriage, or marriage typically to a sibling of the deceased husband. Levirate practice recognizes that an individual is not so much married to a spouse, as to a particular lineage. As a consequence, it can even be possible to marry a female relative in order to maintain paternity for a widow's children

---

<sup>121</sup> Okeye, *supra* note 99.

<sup>122</sup> Korieh, *supra* note 119 at s.2.3. & Okeye, *supra* note 99.

<sup>123</sup> Okeye, *supra* note 99 at 133.

<sup>124</sup> Korieh, *supra* note 119 at s.2.3.

<sup>125</sup> Okeye, *supra* note 99 at 130.

<sup>126</sup> *Ibid.*

<sup>127</sup> *Ibid* at 63.

after her husband's birth. For example, in *Okonkwo v. Okagbue and 2 Others*<sup>128</sup>, two sisters claimed under OniTSha (Igbo) native law and custom that they could marry their deceased brother's wife, even if there were surviving male issue. While this argument was accepted by the Court of Appeal, the Supreme Court held the practice to be repugnant, as it is unsustainable in contemporary Igbo society. Interestingly, by allowing for a levirate practice amongst female as well as male kin, there may have been greater flexibility to ensure that the widow was provided for by the family. In fact, this case was brought by a son of the deceased who wanted to ensure the six children of the widow could not inherit.

While levirate marriage traditionally provided protection for the widow, in that she remained a member of her husband's family and retained access to his property, studies repeatedly report a decline in this practice.<sup>129</sup> According to Michael C. Kirwen, as Christianity does not condone levirate practice, there has been serious discord for Christian women who feel they have no option but to choose between a levirate practice, which will maintain her husband's lineage and provide for her care, and respect for Christian teachings and the ability to receive the sacraments.<sup>130</sup> As a result, Christianity is a key factor in the decline in the practice. However, as Korieh suggests, other factors have a role in the reduction in levirate marriage, and it is not possible to identify a uniform trend. Amongst the Igbo, relevant factors included the civil war, new marriage and inheritance laws, new modes of economic support, land shortage, availability of hired labour, and a shift from prestige based on family size.<sup>131</sup> Furthermore, women with AIDS may not want to remarry for risk of spreading the illness.<sup>132</sup> Levirate marriage is also only typically with women of child-bearing age. Post-menopausal widows with children may reside with their children without requiring a levirate, but those who are childless may have no option but to return to their family for support.

Forms of marriage also have an impact upon the vulnerability or resiliency of women faced with limited inheritance rights. Polygamous marriages mean that even if women had rights to inherit property, there may be an insufficient land base to provide for all women and children. Furthermore, polygamous marriage means that even before HIV, widows at all stages of the life cycle were common, with junior wives being relatively young women on the death of their husbands. For example, in Korieh's study of census data of four villages in Mbaise, she found that 24% of the 600 adult women were widows due to high age disparity between spouses as well as the Nigeria-Biafra civil war.<sup>133</sup> Another factor that should be recognized is the fluidity of marriage within

---

<sup>128</sup> (1994), 12 SCNJ89, based upon a summary and discussion in Nonso Okereafoezeke, *Law and Justice in Post-British Nigeria: Conflicts and Interactions Between Native and Foreign Systems of Social Control in Igbo* (Westport, Connecticut: Greenwood Press, 2002) at 103-104.

<sup>129</sup> Akumadu, *supra* note 105 at 64, Okoye, *supra* note 99 at 216.

<sup>130</sup> Michael C. Kirwen, *African Widows: An empirical study of the problems of adapting Western Christian teachings on marriage to the leviratic custom for the care of widows in four rural African societies* (Maryknoll, N.Y.: Orbis Books, 1979) (Maryknoll Catholic Foreign Mission Society of America) at 9-11. Supported by observations of Abdullah & Hamza, *supra* note 60 at 161. They note that the result is that divorced women and childless women therefore have no place to go when they become single.

<sup>131</sup> Korieh, *supra* note 119 at s.1.5.2.

<sup>132</sup> Owen, *supra* note 11 at 86.

<sup>133</sup> Korieh, *supra* note 119 at s.1.5.2.



certain cultures. Abdullah found such fluidity present in her study of Northern Nigerian both amongst the Muslim Hausa and Maguzawa. Upon divorce, the Hausa women would lose their inheritance rights to their ex-spouse.<sup>134</sup>

Suspicion targeted at widows also plays a primary role in preventing women from encouraging their husband to write wills. The same suspicion around witchcraft that in part motivates widow rites also means that if a woman encourages her husband to write a will, she is accused of plotting his death and liable to be accused of his death.<sup>135</sup> This reluctance is further supported by the impediment that the majority of rural women in Nigeria are illiterate, and have neither the capacity to themselves write wills, read wills, or read popular literature targeted at educating them about such rights.<sup>136</sup>

### **A Society in Transition**

Many of the writers speaking from a stance of cultural respect for the diverse customs in Nigeria point to the ability of the customary system to provide for all family members, including widows, through traditional practices. Traditional strengths included that a son did not only inherit property, but had duties as successor in title to his father to care for his family, that levirate marriage provided a means to ensure women remained family members with a male provider, and indigenous conflict resolution based in reciprocity and social justice provided a non-adversarial method to settle disputes.<sup>137</sup> These practices are no longer functioning to protect widows as a variety of factors have led to a loss of social cohesion and community ways of being and a shift to more individualized modes of living. Lastarria-Cornhiel points to several important factors including: “commercialization of agriculture and land, migration, poverty, population pressure on land and resources, restructuring problems, urbanization, AIDS.”<sup>138</sup> Even those writers skeptical about the strength of African cosmologies in providing for women, such as Ewelukwa, note that whether or not customary practices were based on family need or subservience of women, now that many heirs migrate to urban centres, they are unable to fulfill duties to the family.<sup>139</sup> As will be discussed in more detail below, a collapsing of the concept of duty with a concept of male right to land under a common law conception of land rights has led to men exercising property rights, but without the adjunct responsibility that is the primary justification for them being granted that land. As Nyamu states in her study on women’s property rights in Africa, focused on Kenya:

[the] ongoing process of individualization and formulation of title to land is shaped by contemporary cultural perceptions of men as the proper

---

<sup>134</sup> Abdullah & Hamza, *supra* note 60 at 164.

<sup>135</sup> Ewelukwa, *supra* note 94 at 435. This statement is based on interviews Ewelukwa had with eight women in Port Harcourt, Rivers State, July 25, 1994. Only two of the eight women reported their husband had left a will.

<sup>136</sup> Okeye, *supra* note 99 at 167.

<sup>137</sup> Ewelukwa, *supra* note 94 at 439.

<sup>138</sup> Susana Lastarria-Cornhiel, “Impact of Privatization on Gender and Property Rights in Africa” (1997) 25:8 World Development 1317 at 1324.

<sup>139</sup> Ewelukwa, *supra* note 94 at 443-444.

authority in land matters and by narrow, individualistic conceptions of ownership in the formal legal regime.<sup>140</sup>

## HIV

While there is a lack of research on the impact of HIV on the status of widows in Africa generally, there is some helpful research conducted in Uganda and Kenya that may suggest similar trends hold in Nigeria.<sup>141</sup> In Owen's study, mostly focused upon Uganda due to its superior data collection, she noted that families already challenged by economic and environmental stressors are unable to cope with the pandemic. In this context, AIDS widows are particularly stigmatized and often blamed for having ill husbands.<sup>142</sup> It would seem that this finding would resonate in Nigeria, given that widows are already blamed for deaths from illness. They also suffer financially, as they may not have the support of sons, yet being caring for dependent children.<sup>143</sup> Interestingly, Owen points to the double bind of polygamous marriage: co-wives may provide support for women struggling with care-giving tasks in the pandemic, but they also increase women's risks of themselves contracting the disease.<sup>144</sup>

Research done by Human Rights Watch in Kenya is more explicit in making the link between women's property rights and HIV status.<sup>145</sup> They identify that women with HIV are more vulnerable to property grabbing by relatives with the result that they may lack the property necessary to secure any form of medical treatment. Furthermore, property practices may increase women's vulnerability to HIV as lack of property rights may make them one, unwilling to leave a violent relationship where they have a higher risk of getting HIV and two, force them to undergo sexual cleansing and levirate marriages to remain with the husband's family.<sup>146</sup>

In fact, it would seem that the major role of widows and other elder women in caring for AIDS orphans and other family members may in fact serve as a justification for a new system of inheritance based upon compensation for women's care work.<sup>147</sup>

---

<sup>140</sup> Celestine I. Nyamu, "Gender, Culture, Development, and Human Rights" (2000) 41 *Harvard International Law Journal* at 396.

<sup>141</sup> Owen, *supra* note 11 at 82.

<sup>142</sup> Owen, *supra* note 11 at 85-87.

<sup>143</sup> Owen, *supra* note 11 at 99.

<sup>144</sup> Owen, *supra* note 11 at 90.

<sup>145</sup> Human Rights Watch, "Congressional Testimony on HIV/AIDS and Women's Property Rights Violations in Sub-Saharan Africa, Testimony of Janet Walsh, Deputy Director, Women's Rights Division, Human Rights Watch" at [www.hrw.org/press/2003/04/us041003-test.htm](http://www.hrw.org/press/2003/04/us041003-test.htm).

<sup>146</sup> The Kenyan study identifies the role of cleansers, outcasts who have sex with widows to cleanse them of the deceased husband's evil spirit. Clearly, such a practice would have a great risk for spreading HIV. Most of the studies I referred to in Nigeria did not mention this practice. However, it was reported in an online article which quoted Eleonor Nwadinobi, President of Widows Development Organisation as stating "The practices which have direct relationship to HIV/AIDS are early marriages, widow inheritance and sexual cleansing." In "What AIDS Does to Widows" by Toye Olori, Commonwealth Peoples's Forum, [www.ipsnews.net/focus/tv\\_abuja/02122003/page\\_4.asp](http://www.ipsnews.net/focus/tv_abuja/02122003/page_4.asp).

<sup>147</sup> Likhapha Mbatha, "Reforming the Customary Law of Succession" (2002) 18 *SAJHR* 259 at 283.

## Women as Agents in Nigeria

In providing a full survey of the most pertinent cultural factors that contribute to the conditions of widow inheritance, it is important to acknowledge the role of Nigerian women as agents in their own lives. Feminism has a strong history in Nigeria, and women's groups continue to remain active, particularly in projects such as passing widow's legislation.<sup>148</sup> At the same time, women do not have a unity of interests, and may be complicit in practices that are harmful to other women. Most notably, the literature points to a vital role for the umuokpu or umaada, daughters of the lineage, in enforcing widowhood rites.<sup>149</sup> These women gain power through their ability to enforce morality in their communities. However, as women, they will themselves in turn be subjected to such rituals. Therefore, there may be potential to work to transform how the umaada conceptualize their powers as the keepers of the community morality, and to use this power to find less harmful widowhood practices that nonetheless maintain their symbolic function.

Finally, it is of note that widows are not necessarily in a worse economic position than their married counterparts. In fact, those women who practice purdah may have greater economic independence because as widows they are able to work outside of the home.<sup>150</sup> While women in customary systems may lack the land base to make a living, they are resourceful, and will supplement their farming income with trade, as well as minimal support from kin. As Korieh notes, these women are able to find options to finance this trade, such as taking loans from rural banks and friendly societies.<sup>151</sup> The successful economic survival strategies of these women shows the importance of grass-roots organizing between women to provide economic support and loans, as well as the need to increase the number of micro-loans available to widows.<sup>152</sup> Owen also points to successful mutual aid organizing models in Uganda, including the Aids Support Organisation of Uganda which encourages mutual support amongst widows and speaking out about their experiences of AIDS, and Irish Concern, a group of 12 AIDS widows who have a self-help system and have started a cottage industry selling traditional herbal therapies.<sup>153</sup> While such organizing does not stop the problems with inheritance legislation, it is an immediate means for widows to gain more control over their financial resources, and can assist them in building institutional capacity to challenge their rights.

---

<sup>148</sup> See for example WIDO at <http://www.widowsrights.org/wido.htm>. For an overview of some trends in women's organizing in Nigeria, see Hussaina J. Abdullah, "Religious Revivalism, Human Rights Activism and the Struggle for Women's Rights in Nigeria" in *Cultural Transformation*.

<sup>149</sup> Ewelukwa, *supra* note 94 at 441; Okeye, *supra* note xxxx at 146.

<sup>150</sup> Enid Schildkrout, "Widows in Hausa Society: Ritual Phase or Social Status?" in Betty Potash (ed.) *Widows in African Society: Choices and Constraints* (Stanford: Stanford University Press, 1986).

<sup>151</sup> Korieh, *supra* note 119 at s.4.

<sup>152</sup> According to Nigerian Federal Ministry of Women Affairs, *supra* note 13 at 7, Nigerian women only have 27% of the micro credit provided by Community Banks and NAPEP accessible to them.

<sup>153</sup> Owen, *supra* note 11 at 96-97.

## **5. Transformative Practices**

Given that widows in Nigeria continue to suffer from widow rites and a lack of equal inheritance rights under all three systems of law active in Nigeria, despite this being in clear contravention of the protection of equality rights under the Constitution, it is clear that a more pro-active approach to protecting their rights is necessary. The following section of this paper will explore both potential top-down and grassroots based interventions that are being tested in Nigeria and other African nations that may ameliorate the conditions of widows while respecting their particular cultural milieus.

There are a few uncontroversial changes that are possible. One, intestate legislation should be re-enacted within all states within Nigeria so as to clarify what legislation is applicable and to whom. Whether states choose English law, or to opt for legislation more similar to that found in Western Nigeria, they should also ensure such legislation conforms to the Constitutional guarantee of equality between men and women and abolishes the principle of primogeniture for real property. As this principle is contained in the legislation due to being enacted, and subsequently repealed, in Britain, abolishing this practice may not invoke the same concerns as will be discussed below regarding culturally appropriate legislation. Second, testate legislation should similarly be changed to ensure that widows and children who do not inherit under the will have a means to apply for a right to maintenance from the estate.

### **Targeted National Legislation**

To reach those individuals beyond the limited scope of the English law system, one approach has been targeted legislation, aimed at protecting the rights of widows, which has been enacted in Edo, Oyo, and Enugu states.<sup>154</sup> For example, the legislation in Enugu prohibits the compulsion of a series of widow's mourning rights including the shaving of the head, being locked with the corpse of the husband, not receiving condolence visits, levirate marriage, sitting on the floor or naked during the burial right, drinking water used to bath the husband's corpse, having to weep at loud intervals not of one's volition or involuntary action, a period of confinement, vacating the matrimonial home, or anything else contrary to the fundamental rights protected in the constitution.<sup>155</sup> The prevention of these rites protects the dignity of the widow but also protects her property or inheritance rights by preventing her being sent from her home and thereby being dispossessed of her property by male relatives, preventing inheritance being dependent upon levirate marriage, and by prohibiting degrading practices that may make the widow vulnerable to family coercion in giving up her rights. In addition, section 2 expressly addresses inheritance rights stating that "A widow shall not be dispossessed upon the death of the husband of any property acquired by the deceased husband/wife (during the deceased husband's/wife's life time) without his/her consent."<sup>156</sup> This provision therefore protects the widow's rights of possession to marital properties,

---

<sup>154</sup>Nogi Imoukhuede, Women's Rights Watch-Nigeria, 2003 Report on the State of Women's Rights in Nigeria, available at <http://www.rufarm.kabissa.org/pressrelease/report03.htm>.

<sup>155</sup>*A Law to Make it Unlawful to Infringe the Fundamental Rights of Widows and Widowers, and for Other Related Matters*, enacted by the Enugu State House of Assembly, 8<sup>th</sup> March 2001.

<sup>156</sup> *Ibid* at s.2.

particularly of relevance being the family home or farming properties, consistent with some customary law systems, but without being contingent upon factors such as her good behaviour. It therefore is largely consistent with customary practices that do not vest absolute property within a widow, but ensure that provision is made for her care. It therefore may act to rebalance the power of widows within customary systems in which absentee landlords no longer protect their rights. However, an important caveat is necessary. This provision hinges upon the notion of widow's consent, without specifying the factors required to vitiate consent. Clearly, determining whether or not a widow is freely consenting, or being coerced into giving up her property, will have to be explored by the courts to effectively enforce this legislation. Widows also need to be aware of this legislation to know they have the power to withhold consent.

The success of such a legislative intent will therefore rest upon the ability to educate women about the rights contained within the legislation, creating conditions under which women can enforce those rights, and developing a protocol to establish the presence or lack of consent that is appropriate to the widow's social and cultural milieu. One such project that reports some success is the work of the International Federation of Women Lawyers in Edo state through the support of CEDPA.<sup>157</sup> This organization is working not only to teach women about their rights, but has a much broader mandate to make these rights achievable for women by providing legal clinics, discussion programs on popular media, rural paralegal workers to extend the reach of the clinic, and doing advocacy and workshops with local leaders to sensitize them to the status of widows.

### **International Conventions**

Just as this legislation is necessarily supported through actions on the ground in a dynamic process to obtain support for the legislation within particular Nigerian cultures, there are also efforts to strengthen these initiatives through the Pan-African rights framework. In particular, the *Protocol to the African Charter on Human and Peoples' Rights of Women in Africa* was adopted in Maputo, Mozambique on 11 July 2003. Since that date, 37 of the eligible 53 countries have signed the protocol, and 10 have ratified and deposited those ratification. Nigeria deposited its ratification on February 18, 2005.<sup>158</sup> Given the active work of many women's groups within Africa to promote the *Charter*, and the rapid rate of ratification, it appears promising that the *Charter* will come into force within the next year.

The *Charter* particularly recognizes the need to protect the rights of widows from widow rituals and property grabbing. In particular, article 20, addresses widows rights<sup>159</sup>,

---

<sup>157</sup> Centre for Development and Population Activities, "Case Study No. 2: Engendering Legislative Issues (ELI) Project", December 2002. Accessed at <http://www.eldis.org/static/DOC17301.htm>.

<sup>158</sup> African Union, "List of [List of Countries which have Signed, Ratified/Acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa](#)", last accessed on April 27, 2005 at <http://www.africa-union.org/home/Welcome.htm>.

<sup>159</sup> African Charter, Article 20

#### **Widows' Rights**

States Parties shall take appropriate legal measures to ensure that widows enjoy all human rights through the implementation of the following provisions:

a) that widows are not subjected to inhuman, humiliating or degrading treatment;

and article 21 protects inheritance rights of both widows and daughters. According to article 21:

1. A widow shall have the right to an equitable share in the inheritance of the property of her husband. A widow shall have the right to continue to live in the matrimonial house. In case of remarriage, she shall retain this right if the house belongs to her or she has inherited it.
2. Women and men shall have the right to inherit, in equitable shares, their parents' properties.

This statement is consistent with domestic law in that it ensures basic possession rights for women, but it also goes further in providing for equitable shares for widows and daughters in inheritance. Therefore, there is provision for a fair, if not equal, distribution to women. This law therefore goes some way to recognize that a mere equal distribution may not adequately account for differential gender roles and responsibilities in providing for the extended family and maintaining family property, but that women nonetheless require a fair portion of family property to be able to fulfill the needs of themselves and dependent children or relatives. The particulars of what is equitable would need to be further specified within each country on the basis of what is equitable within that society. It is in interpreting this provision that there would therefore be scope for the Nigerian government to dialogue with different ethnic groups about what would be a system that would be fair in the context of evolving family responsibilities in the twenty-first century.

What effect will such legislation have upon Nigerian law? Women's equal rights, including property rights, have long been protected through the international rights regime under the *Convention on the Elimination of Discrimination against Women (CEDAW)* under Article 16(1)(h).<sup>160</sup> This clause would apply to inheritance laws that distinguish between the widows and widowers rights on interstate succession. While an African *Charter* may have greater legitimacy, as it was drafted by those who understand African conceptions of kin and duty versus those of family and rights, at most its strength would appear to be as an aspirational or normative document. Notably, widow's protection legislation was enacted prior to the adoption of the *Charter*, but the majority of states continue to lack such legislation. The *Charter* may therefore be a powerful document for those widow's rights activists working on the ground to extend the reach of widow's protection legislation. That said, the direct impact of the *Charter* on the lives of women in Nigeria may be negligible. Merely eliminating potentially harmful cultural

---

b) that a widow shall automatically become the guardian and custodian of her children, after the death of her husband, unless this is contrary to the interests and the welfare of the children;

c) that a widow shall have the right to remarry, and in that event, to marry the person of her choice.

<sup>160</sup> Article 16 reads:

1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

- (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

practices is not helpful for women as such frontal attacks will lack legitimacy and therefore be unenforceable. Rather, change must be rooted within the many cultural norms present in Nigeria. As Celestine Nyamu identifies:

abolition is not conducive to a positive dialogue that achieves a balance between gender equality and cultural identity. CEDAW offers a starting point, but it does not dictate the process for achieving change. CEDAW leaves open the possibility of a flexible process of evaluating assertions of culture in context.<sup>161</sup>

### **Transformative Case Law**

While statutory reform may provide more rights for widows, further development of such law may be to the detriment of recognizing the important role of customary law in the lives of many Nigerians. Rather, as customary law has long been recognized as fluid,<sup>162</sup> there may be scope for courts to work with this flexibility to evolve more equitable principles of inheritance that continue to resonate with the cultural values important to the peoples of Nigeria.

Clearly, the repugnancy test, as discussed above, continues to be a means to strike down, if not to transform, customary law. It may now have greater juridical meaning as the constitution can serve as a guide both to what is repugnant within a custom, as well as to simply deem a customary law unconstitutional. The Court may use s.42, equality rights, and s.21, recognition of the cultures of Nigeria subject to the promotion of dignity, to declare customs unconstitutional. Yet, as Elegido explains, the repugnancy test has only been used in the past as a blunt tool, in that a law could be either struck down or maintained, but would not be adapted so as to be made not repugnant.<sup>163</sup>

While Elegido recognizes there has been a general push to in fact modernize customary law, to do so through the courts would not make it enforceable, as it is:

not possible to change customary law by decree and still have a real and vital customary law which derives its validity from ‘the assent of the native community’. In the last analysis the project to ‘adapt’ customary laws is simply the project to abrogate it and substitute it with either statutory or judge-made rules.<sup>164</sup>

Elegido does not say that this approach is therefore wrong, in fact, he recognizes that it may be justified to protect the human rights of a portion of society. Rather, he wants to ensure there is no mistake that what is being done is mere adaptation. In exploring the possibilities to reform customary law through the judicial process, it is

---

<sup>161</sup>Nyamu, *supra* note 140 at 416.

<sup>162</sup> “One of the most striking features of West African native custom...is its flexibility; it appears to have been always subject to motives of expediency, and it shows unquestionable adaptability to altered circumstances without entirely losing its character.” *Lewis v Bankole* (1908), 1 NLR 81 at 100-1.

<sup>163</sup> Elegido, *supra* note 49 at 133. For this proposition, he quotes for example *Eshugbayi Eleko v. Officer Administering the Government of Nigeria*, [1931] A.C. 662 at 673 that “the court cannot itself transform a barbarous custom into a milder one. If it still stands in its barbarous character it must be rejected as repugnant to ‘natural conscience, equity and good conscience’”.

<sup>164</sup> Elegido, *supra* note 49 at 134.

therefore useful to keep in mind Elegido's caution, and to question if what is being done is merely manipulating customary law to fit it within a western rights project and therefore creating judge-made rules, or really can be characterized meaningfully as cultural transformation.

One important factor in making that assessment would be recognizing who has the power within the legal system to make these decisions. As Akinola Aguda notes, the key precedents in the areas of customary law (including land, family, and succession) have not been made by Nigerians or individuals with special knowledge of customary law. As most decisions were made in the early 1900s, these were made by British jurists.<sup>165</sup> Should the Courts today take on the role of transforming customary law, it is necessarily similar to be critical if their training is primarily in English law systems, and they lack a sufficient training in customary and sharia traditions.

Any attempt to look to the judiciary as the locus of transforming customary law must begin with an analysis of *Mojekwu v. Mojekwu*.<sup>166</sup> This Supreme Court decision is particularly notable as it over-rules a much heralded Court of Appeal Decision, described by the Centre for Reproductive Rights as standing for the proposition that: "a customary law that allows only males to exercise a right to inheritance, despite a closer surviving female family member, is unconstitutional"<sup>167</sup> The Court of Appeal decision was also quoted in the landmark South African case, *Bhe*. Perhaps due to the seven year delay in the Supreme Court's decision, it appears to have escaped commentary. However, it provides a useful entry point into the Court's thinking on the issue of transforming customary law.

In this case, at issue was the ability of a daughter to inherit under a particular set of Nnewi customs. There were two potential systems of inheritance invoked in this case: the first was the Kola tenancy system, under which both male and female children are entitled to take. The other practice was the oli-ekpe, a primogeniture rule of inheritance. Both the Court of Appeal and the Supreme Court held that the relevant law in this case was that of the *lex situs*, i.e. the kola tenancy.<sup>168</sup> Therefore, the daughter was eligible to inherit. However, the Court of Appeal went on to hold the oli-ekpe custom to be repugnant to natural justice, and it was these obiter comments that have come to be stated as the ratio of this case.<sup>169</sup>

---

<sup>165</sup> T. Akinola Aguda, "Towards a Nigerian Common Law" in M. Ayo, ed., *Fundamentals of Nigerian Law* (Lagos: Nigerian Institute of Advanced Legal Studies, 1989) at 258. For example, Speed, Ag. C.J. in *Lewis v. Bankole* (1908), 1 N.R.R. 66; the Privy Council in *Amodu Tijani v. Secretary, Southern Nigeria* (1921), 2 A.C. 399; & Brandford Griffith J. in *Cole v. Cole* (1898), 1 N.L.R. 15.

<sup>166</sup> *Mojekwu v. Mojekwu* (2004), 4 S.C. (Pt. 11). (Reporter available in Robarts Law Library, University of Toronto).

<sup>167</sup> Centre for Reproductive Rights, "Legal Grounds: Reproductive and Sexual Rights in African Commonwealth Courts (New York: Centre for Reproductive Rights, Feb. 2002) at 66, Description of *Mojekwu v. Mojekwu* (1997), 7 N.W.L.R. (Pt. 512) 283.

<sup>168</sup> *Mojekwu* (SC), *supra* note 166 at 10.

<sup>169</sup> CA at 304-305, per Tobi: "Is such a custom consistent with equity and fairplay in an egalitarian society such as ours where the civilised sociology does not discriminate against women? Day after day, month after month and year after year, we hear of and read about customs which discriminate against the women folk in



The Supreme Court's response to the Court of Appeal's repugnancy ruling was highly critical. It had a number of concerns including: one, that the issue was not joined by the parties, two that it was "an emotive and highly homilized pronouncement", and three, it was obiter given the decision on the kola tenancy. However, the most important point for this analysis was the fourth critique:

But the language used made the pronouncement so general and far-reaching that it seems to cavil at, and is capable of causing strong feelings against, all customs which fail to recognize a role for women, for instance, the customs and traditions of some communities which do not permit women to be natural rulers or heads or family heads. The import is that those communities stand to be condemned without a hearing for such fundamental custom and tradition they practice by the system by which they run their native communities. It would appear, for these reasons that the underlying crusade in that pronouncement went too far to stir up a real hornet's nest even if it had been made upon an issue joined by the parties, or properly raised and argued."<sup>170</sup>

This case suggests that the Courts will be cautious in using judicial process to alter customary law. It indicates the Court will not permit an examination of the constitutionality of customary practices unless the process rests upon a proper evidentiary foundation, the point is argued by the parties, it is necessary to the determination of the case, and limited to the particular custom which is argued. The Court therefore adopts a pragmatic stance towards evolving the customary law, which avoids making general statements that may condemn cultural communities with a fair hearing of the relevant issues.

The judicial restraint in this area has a strong foundation. First, given that customary laws are part and parcel of indigenous world models, it is dangerous to make a pronouncement upon their constitutional validity without exploring their rationale, which, while it may not conform to western rights discourse, may protect the rights of women within their social and cultural milieu. This will be discussed in more detail below. Second, at a practical level, if a decision is to be reached by the judiciary rather than by either a legislature or community of individuals, it will be necessary to gain legitimacy amongst the people. Such accountability and resonance with the people will require an awareness of the particular practice to be implicated by the ruling, and how this interacts

---

the country. They are regarded as inferior to the men folk. Why should it be so? All human beings- male and female- are born into a free world, and are expected to participate freely, without an inhibition on grounds of sex; and that is constitutional. Any form of societal discrimination on grounds of sex, apart from being unconstitutional, is antithesis (sic) to a society built on the tenets of democracy which we have freely chosen as a people. We need not travel all the way to Beijing to know that some of our customs, including the Nnewi 'Oli-Eke' custom relied upon by the appellant, are not consistent with our civilised world in which we all live today, including the appellant. 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 being, is also the final authority of who should be male and 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."

<sup>170</sup> *Mojekwu (SC)*, *supra* note 166 at 14.

with other cultural practices. Third, by encouraging individuals to bring before the court evidence of particular customs, the court may be encouraging the articulation of diverse modes of the cultural practices. Having an airing of the evidence means that minority voices within the community could also present their views, perhaps through the mechanism of status as an intervener. However, if the Court's stance is ultimately useful in that it encourages the creation of a forum in which there can be debate over what are the particular customs recognized by a community, the question arises as to why the court should have the role of final arbiter in such a discussion?

In fact, the question of who is the final arbiter of custom, with the ultimate authority to speak to customary law, has already been delegated to Nigerian peoples, through respected figures of authority. The *Evidence Act* specifically provides that when a customary practice has not yet been judicially noticed, that it can be:

established and adopted as part of the law governing particular circumstances by calling evidence to show that persons or the class of persons concerned in the particular area regard the alleged custom as binding upon them.<sup>171</sup>

The people themselves are the bearers of such evidence.

Zimmerman points to how in South Africa, the work of two prominent academics of customary law, T.W. Bennett and A.J. Kerr, has come to be privileged, so that "scholarship becomes law", and the golden era of customs comes to be privileged.<sup>172</sup> This type of result should be prevented in Nigeria, given that such textbook evidence is not evidence of the living law, but of how an anthropologist or jurist, who may be an outsider, has interpreted such customs. According to *Adewoyin and Adeji* (1951) 13 W.A.C.A. 191 (West Africa Court of Appeal), legal texts can only be used to prove custom if they are recognized by the indigenous peoples as authoritative. It is unlikely that such recognition would be forthcoming. However, this rule has not been strictly enforced. Ezejiofor points to two particular cases, *Adeseye v Taiwo* (1956) 1 F.S.C. 84 and *Suberu v. Sunmonu* (1957) 2 F.S.C. 33, in which texts were used by judges to establish inheritance rules, without being introduced by either party.

---

<sup>171</sup> *Evidence Act*, Cap. 112, Laws of the Federation of Nigeria 1990, at s. 59.

14. (1) A custom may be adopted as part of the law governing a particular set of circumstances if it can be noticed judicially or can be proved to exist by evidence; the burden of proving a custom shall lie upon the person alleging its existence.

(2) A custom may be judicially noticed by the court if it has been acted upon by a court of superior or coordinate jurisdiction in the same area to an extent which justifies the court asked to apply it in assuming that the persons or the class of persons concerned in that area look upon the same as binding in relation to circumstances similar to those under consideration.

(3) Where a custom cannot be established as one judicially noticed it may be established and adopted as part of the law governing particular circumstances by calling evidence to show that persons or the class of persons concerned in the particular area regard the alleged custom as binding upon them:

Provided that in case of any custom relied upon in any judicial proceeding it shall not be enforced as law if it is contrary to public policy and is not in accordance with natural justice, equity and good conscience.

<sup>172</sup> Zimmerman, *supra* note 14 at 216.

If it remains good law that custom reside within the knowledge of the peoples themselves, then a paper such as this would have no judicial weight when a judge comes to examine customary law. The power of this, and other academic examinations of the law, would be in speaking to chiefs and heads of families who themselves have the ability to speak authoritatively to the law of their communities.

While the Court has the power to recognize the custom through weighing the evidence presented, the judge does not have the same expertise in evolving customary law as he may in developing judge-made common law. He may be capable of searching out strands of living law that accord with modern rights discourse, and therefore conclude which is the most useful law to apply. However, to go further, and seek to actually hold the law constitutional subject to an adaptation, may be beyond his expertise.<sup>173</sup> Conversely, the Court clearly has the power to hold a law to be repugnant or unconstitutional.

The Court has used its powers to consider the repugnancy of laws in the scope of inheritance rights. In terms of widow rights, two cases are of note. First, in *Nzekwu v. Nzekwu*,<sup>174</sup> the court held that an OniTSha customary law in which a widow, even without children, has a right to occupy the buildings of the deceased and to receive maintenance from his family, subject to her good behaviour, was not repugnant. Rather, the court stated that a law that absolutely denied a widow's rights to the property would be repugnant. This ruling is useful in that it affirms the importance of rights of access and use, if not ownership, which is consistent with widow's rights legislation. It recognizes that absolute rights to ownership may not be the only means to provide rights for women. However, by allowing the rights subject to the caveat that a widow must maintain "good behaviour", it also authorizes a high level of control of the widow by the deceased's family and increases the instability of her life estate.

An older repugnancy case that speaks to widow's rights is *Neizianya v. Okagbue*, 1963. According to this case, a wife who has a right to occupy her deceased husband's property subject to good behaviour, who deals with that property as her own, does not through equity establish rights to the land as the wife is not a stranger to the property. Again, this practice was upheld and found not to be repugnant.

Further legal barriers to widow's rights are created by the courts failure to address legal requirements that have an inequitable gendered effect on women. For example, in *Amadi v. Nwosu*<sup>175</sup>, a widow was unsuccessful in her attempts before the Supreme Court to challenge her husband's attempt to sell jointly owned matrimonial property because she could not provide documented evidence of material contribution. In fact, in *Onwuchekwa v. Onwuchekwa*,<sup>176</sup> the court of appeal accepted that a wife could not make

---

<sup>173</sup> This possibility will be discussed further in the examination of the *Bhe* case.

<sup>174</sup> [1989] (2) N.W.L.R. 373. Based on a brief headnote in the Centre for Reproductive Rights.... It should be noted that this document provides very brief summary of cases, and full cases were not available to the author. Given that the Centre provided inaccurate information in its headnote for Mag, caution should be placed in relying on their presentation of the ratio of each case.

<sup>175</sup> (1992), 5 N.W.L.R. 273 (S.C.), as described in Ewelukwa, *supra* note 94 at 463.

<sup>176</sup> (1991), 5 N.W.L.R. 739 (C.A.)

joint contribution to property as she herself was property. This conclusion was made on the basis of accepting the husband's explanation of customary law in his area. If widows are not able to effectively bring evidence before these courts, it is questionable if they will have much success in having practices held to be repugnant.

In conclusion, while the constitution may be a blunt tool to strike down customary laws, it is not clear how it can participate in the more challenging work of transforming customary laws in line with their core values to respond to the twenty-first century needs of the Nigerian peoples. Since Nigeria has such a myriad of different customary laws, even if it was advisable for the Court to use its constitutional powers to strike down the law, or seek a power to transform the law, this would be a long, slow, and piecemeal process. In contrast, such arguments have been brought in South Africa in the *Bhe* in the context of a more streamlined customary system.<sup>177</sup> As a lengthy consideration of customary inheritance rights, this judgement provides a lot of thoughtful commentary on how the court could transform customary law.

In South Africa, customary law was codified through the *Blacks Administration Act*. As such, in *Bhe*, both the law itself, which provided for a separate stream of inheritance for all Blacks in South Africa, and the underlying principle of primogeniture found within the customary law, were challenged. The majority, speaking through Langa, determined that the act was unconstitutional as it discriminated on the basis of race, and that the principle of primogeniture was also unconstitutional as it discriminated against other heirs.<sup>178</sup> There was consideration of the possibility that the principle of primogeniture be allowed to continue to evolve, by recognizing that the eldest daughter could also take under the primogeniture system.<sup>179</sup> However, in the end, Langa chose to merely strike down the legislation, and instead have all individuals take under the *Interstate Succession Act*, subject to the proviso that an alternative scheme be worked out for polygamous marriages. In choosing to strike down the act absolutely, Langa explains it is not his intent to thereby end the customary system, rather, it appears to be a signal of dialogue with the legislatures that a new solution to customary law must be found.<sup>180</sup> Here, Langa recognizes the limited capacity of the courts to render such a complex remedy, and provided what was in effect an interim measure.

Speaking in the minority, Ngcobo provides a particularly thoughtful analysis that could be a potential blueprint for cultural transformation. First, he goes further than the

---

<sup>177</sup> [2004] Case. No. 49/03.

<sup>178</sup> *Ibid* at para. 100.

<sup>179</sup> *Ibid* at para. 110-111 "It was suggested in argument that if the Court is not in a position to develop the rules of customary law in this case, it should allow for flexibility in order to facilitate the development of the law....It was suggested this could be done by using the exceptions in the implementation of the primogeniture rule which do occur in the actual administration of intestate succession as the applicable rule for customary law succession in order to avoid unfair discrimination and violation of the dignity of the individuals affected by it. Those exceptions would, according to this view, constitute the "living" customary law which should be implemented instead of official customary law. There is much to be said for the above approach. I consider, however, that it would be inappropriate to adopt it as the remedy in this case. What it amounts to is advocacy for a case by case development as the best option."

<sup>180</sup> *Ibid* at para. 171. "It would be undesirable if the order were to be regarded as a permanent fixture of the customary law of succession."

majority in exploring the values underlying the principle of primogeniture. In particular, he is concerned that in judging the concept and holding it to be unfair, there is a collapsing of two concepts: that of succession to the title of family head, and that of inheritance of property.<sup>181</sup> Traditionally, the principle of primogeniture is concerned primarily with the former, to ensure there is a trustee for the family property. However, over time, foreign concepts have been applied to the primogeniture principle and it has come to be associated with rights to inheritance rather than as a duty to protect and care for the family. Ngcobo proceeds to recognize two distinct practices that a court may perform: one, to adapt indigenous law to changed circumstances or two, to consider the development of the indigenous law in keeping in line with constitutional protections.<sup>182</sup> Holding this case to be the latter, Ngcobo brings the law in line with equality rights by recognizing the eldest daughter can also take under this principle.<sup>183</sup> In adopting a remedy, Ngcobo further concludes it is necessary to consider respect for the communities' cultures, preservation of indigenous law subject to the Constitution, and protection of vulnerable family members.<sup>184</sup> Furthermore, he is cognizant of the fact that family members no longer have the means to ensure that an absentee family head enforces his duties.<sup>185</sup> In the end, Ngcobo concludes that the most appropriate remedy is to give families the opportunity to agree upon distribution of the property under customary principles but, should they disagree, the local Magistrate should fashion a fair remedy on a case by case method.<sup>186</sup>

In international discussion, this case is usually contrasted with *Magaya v. Magaya*,<sup>187</sup> a consideration of the rule of primogeniture by the Zimbabwean Supreme Court. In this case, a fundamental difference was present than in Nigeria and South Africa: the constitution insulates customary practice. While s.23(1) of the Constitution prohibits discrimination, this does not apply to succession because of s.23(3).<sup>188</sup> Nonetheless, in refusing to overturn this custom, the court also appears to be motivated

---

<sup>181</sup> *Ibid* at para. 171 “Once it is accepted that the *indhalifa* holds the family property on behalf of and for the benefit of all family members, it cannot be said that he is the owner of the family property or that he inherits it in the sense understood in common law.”

<sup>182</sup> *Ibid* at para. 216-218. He holds in the latter case “the Court is not primarily concerned with the changing social context in which indigenous law of succession operates or the practice of the people. The dearth of authority on what the living indigenous law is, should not therefore preclude a court from bringing a rule of indigenous law in line with the rights in the Bill of Rights.”

<sup>183</sup> *Idid* at para. 222.

<sup>184</sup> *Ibid* at para. 236.

<sup>185</sup> *Ibid* at para. 237.

<sup>186</sup> *Ibid* at para. 139 “In my view, the rule of primogeniture should be developed in order to bring it in line with the rights in the Bill of Rights. Pending the enactment of the legislation to determine when indigenous law is applicable, both indigenous law of succession and the Intestate Succession Act should apply subject to the Constitution and the requirements of fairness, justice and equity, bearing in mind the interests of minor children and other dependents of the deceased family head.”

<sup>187</sup> *Magaya v. Magaya*- [1999] (3) L.R.C. 35.

<sup>188</sup> Section 23(1) of the Constitution forbids sex discrimination however s 23(3) of the Constitution provides: ‘Nothing contained in any law shall be held to be in contravention of subsection 1(a) to the extent that the law in question relates to any of the following matters – (a) ... devolution of property on death or other matters of personal law; (b) the application of African customary law in any case involving Africans ...’ and section 89 of the Constitution generally sanctions the application of customary law. (as summarized in *Magaya v Magaya* [1999] ICHRL 14 (16 February 1999) headnote.

by concerns similar to those in Nigeria and South Africa about treading into the area of customary reform.<sup>189</sup> Therefore, the Court prefers to remedy customary law in a gradual and pragmatic manner, rather than through judicial decree. Like Justice Ngcobo, the court also appears particularly concerned with recognizing the relation between duty and succession. While this case has been judged harshly by the international community, read in this context, it becomes clear that attempting to transform cultural laws may be beyond the expertise of common law courts, and therefore may lead to unsatisfactory results. In fact, it is of note that prior to this judgement, a new legislative scheme was enacted to deal with customary law that is quite similar to the position reached by Justice Ngcobo in *Bhe*.

### **Codification of Customary Law**

Another possibility would be a greater push to codify particular customary laws, therefore opening up the potential for dialogue in determining how these laws are going to be recorded. Codifying customary laws would have the obvious benefit of enabling a re-negotiation of the laws to be recorded, and would provide a clear records of such laws, thereby minimizing evidentiary issues and putting citizens (at least those who are literate) “on notice” as to their rights. For example, Cammack describes how the codification of sharia law in inheritance in Indonesia has created some space, albeit limited given the clear textual basis of sharia, to re-negotiate interpretation of the law.<sup>190</sup> Clearly, in the case of oral customary cultures, there would be greater scope to explore alternatives.

The danger in such a process is that any short-term gains made through a deliberative process may be lost through freezing the living law. In fact, codification in the past has been identified by indigenous scholars as a process of ossification, which led to a colonial and patriarchal gloss being put on the living law. As Zimmerman identifies:

---

<sup>189</sup> For example, per Per Mchetchere JA:

1. It was never contemplated that the courts would interpret the Majority Act so widely that it would give women additional rights which interfered with and distorted some aspects of customary law. The court does not have the capacity to make new law in a complex matter such as inheritance and succession. All they can do is to uphold the actual and true intention and purport of African customary law of succession against abuse. Matters of reform should be left to the legislature.
2. While there is a need to advance gender equality in all spheres of society, great care must be taken when African customary law is under consideration. It has long directed the way African people have conducted their lives and the majority of Africans in Zimbabwe still lives in rural areas and still conducts their lives in terms of customary law. In the circumstances it will not readily be abandoned, especially by those such as senior males who stand to lose their positions of privilege.
3. The application of customary law, especially in inheritance and succession, is in a way voluntary, that is to Africans married under customary law or those who chose to be bound by it.
4. In light of the above it is prudent to pursue a pragmatic and gradual change which would win long term acceptance rather than legal revolution by the courts. (as taken from *Magaya v Magaya* [1999] ICHRL 14 (16 February 1999) headnote.

<sup>190</sup> Mark Cammack, “Inching toward equality: Recent developments in Indonesian inheritance law” Dossier 22 (Women Living Under Muslim Laws: November 1999). Available at [www.wluml.org](http://www.wluml.org).

Women are subjects, their identities, desires, and identified “interests” are constantly in flux against an ever-changing social background. Space between social reality and the law is necessary such that as the factors that influence women’s perceived needs change and develop, the parallel reformulation of need itself is legally validated.<sup>191</sup>

Therefore, what is required is not an absolute document that is an authoritative source of customary law, but one that has the potential to either remain amenable to adapt with the living law itself, or is only a starting point for discussion. Two examples are of note. First, as mentioned above, Anambra State has a customary manual that provides some guidance to the customary laws practiced in the state.<sup>192</sup> Second, Zimbabwe has attempted to codify customary practice through new inheritance laws which obligate families to prepare a plan upon the death of a member interstate, and to present this for approval of a Magistrate who will assess the plan’s ability to meet the needs of the family on the basis of guidelines.<sup>193</sup> The initial power therefore lies with the family to ensure all members are provided for, with the guidelines providing standards of what is considered to be fair in the context of differently structured families. In particular, the guidelines suggest women should be owner in her own home, or share ownership if multiple wives share the same residence.<sup>194</sup> The Women and Law in Southern Africa Research and Education Trust provide a popular education pamphlet on the rights of women to inheritance, setting out the structure of this law. In the pamphlet, they emphasize to readers the importance of the family making the plan together and in considering everyone’s need. In particular, they state: “When this plan is being discussed, women must speak up. They had and still have a special role in these matters and they must ensure that they look after the needs of the women and children as in the old tradition and they must ensure that this is continued”.<sup>195</sup> Notably, therefore, this law captures the important customary value of provision for all family members, identified as being linked to the primogeniture principle of succession, but provides limits to this principle by requiring family deliberation and magistrate’s approval to the final scheme.

### **Women’s Role in Changing Customary Law**

In the transformative practices discussed thus far, there has been an implicit tension arising between the need to ground widow’s inheritance rights within their social milieu to ensure that they resonate with the people, and the retreat into a simplistic

---

<sup>191</sup> Zimmerman, *supra* note 14 at 227.

<sup>192</sup> S.N.C. Obi. et. al. *The Customary Law Manual: A Manual of Customary Laws Obtaining in Anmbra and Imo States in Nigeria (Customary Law Manual)* (1977). However, just because the document is in writing, does not mean it is progressive. For example, s.225(1) provides of customary laws amongst the Ibos, “A widow, even if she has no son, has a right to live as a member of the family in her late husband’s compound till she remarries or dies. But the family has power to remove her for persistent bad conduct.” There may be space, however, to negotiate around the particular wording of what is recorded. For example, the choice of the word “persistent” bad conduct, suggests it will be difficult to remove a widow for bad conduct.

<sup>193</sup> *The Administration of Estate Act, Amendment of Act 6 of 1997*. As described in Women and Law in Southern Africa Research Trust, “A Guide to Inheritance Laws in Zimbabwe” Harare: Women and Law in Southern Africa, 2000).

<sup>194</sup> As described in WLSA, *ibid* at 11.

<sup>195</sup> *Ibid* at 13.

cultural relativist position in which all practices condoned within particular cultures are seen as essential to that culture, as valid, and as supported by all segments of that culture. If women are going to meaningfully be able to participate in this dialogue, it is necessary to break down this divide between culture and women's rights, and the assumption that one cannot reside within the other, and to open up space to consider what women's rights may look like from within a culture. As Bronstein explains: "[i]t is more fruitful to see customary law disputes about gender equality as intra-cultural conflicts between 'internal' women and other members of the group."<sup>196</sup> In particular, it is necessary to move past debates in which individuals are forced into a position of "balancing interests" between constitutional rights of cultures and of women.<sup>197</sup> In fact, the Constitution of Nigeria recognizes this tension in part by protecting cultures of Nigeria that enhance the dignity of the peoples, therefore permitting a recognition of the ability of a culture to internally provide protection to all members of the community.

Nyamu suggests there are three conceptual failings to approaches that pit women against culture:

1. At a conceptual level, the conventional approach obscures the overlap between formal law and culture in plural setting and the active role that the state apparatus plays in defining culture
2. The conventional approach implicitly endorses dominant articulations of culture as accurate representations of a community's way of life. By distancing themselves from the debate on the construction of culture, proponents of gender equality allow culture to be defined exclusively by those whose view of culture disadvantages women; and,
3. The conventional approach prevents proponents of gender equality from recognizing and utilizing a role for culture in the pursuit of gender equality.<sup>198</sup>

Responding to Nyamu's observations does not mean seeking to distill an "authentic" pre-contact culture from that adopted through interaction with the British. As Zimmerman has identified in South Africa, while raising new visions of the African past has been important in combating western ethnocentricity and fuelling liberation movements, there is also a danger of falling into a vision that romanticizes the past, thereby concealing past power cleavages and, potentially, inequality of women. Thus while a value such as reciprocity may be important within a culture, the danger comes when there is an inability to look beyond ideal articulation of a culture, and the:

Rural peoples, the objects of the nationalist academic discourse, become in a sense repositories for the cultural symbolism that their urban counterparts cherish, but the strictures of which they themselves escape.<sup>199</sup>

---

<sup>196</sup> Victoria Bronstein, "Reconceptualizing the Customary Law Debate in South Africa" (1998) 14 S. Afr. J. on Hum. Rts. 388 at 392.

<sup>197</sup> Zimmerman, *supra* note 14 at 210.

<sup>198</sup> Nyamu, *supra* note 140 at 401.



Similarly, Phil Okeke identifies that relying upon restored histories of Nigerian women as “mothers, wives, and queens, their roles in religious rituals and community decision making, and their work as traders and farmers”<sup>200</sup> has meant that “[t]he struggle to improve women’s rights and social status must wrestle with a weak and controversial data base which attempts to erase time and space”.<sup>201</sup> The point is not to retreat into symbolism, but to revitalize the living law as a process that is evolving, rather than fixed in either a pre or post colonial period. Only then is it possible to move past the issues of “good laws” or “bad laws”, to laws which continue to meet the evolving needs of society and to provide the social strength and cohesion necessary to challenge the pandemic of HIV.

Sunder suggests that law must evolve through women having a voice in shaping normative community to challenge patriarchal accounts that do not conform to their understandings of their culture.<sup>202</sup> In particular, given that widows may be particularly vulnerable within some Nigerian cultures, it is necessary to examine their ability to be involved in this development of normative community. One particular strategy has been the work of transnational organizations and local organizations in seeking to present diverse customary practices to women and to therefore provide them with knowledge they can use to challenge the dominant understanding of practices. For example, in their public information pamphlet in Zimbabwe, WLSA explains that their researchers have found evidence of practices challenging the dominant practice of primogeniture, including daughters getting a share of wealth. They therefore explain:

So women should not be afraid to push for this approach if it seems the right thing to do...To meet the changing needs of the people, the adaptations that ordinary people have made in dealing with a deceased person’s property give very interesting ideas on how customs change and how new answers to old problems have emerged. Individuals should try to argue that the court’s views of the law are now old fashioned.<sup>203</sup>

The work of WLSA in identifying the pragmatism and flexibility in which customary practices are interpreted at a local level is also identified by Zimmerman.<sup>204</sup> Notably, in its brochure, WLSA draws on the traditional roles of women as mothers to grant them an authoritative space from which to speak.

A similar strategy to educate women about the diversity of Islamic practices is used by the transnational organization, Women Living under Muslim Laws Network. This organization, which has a regional headquarter with Baobab in Nigeria, works with women throughout the Muslim world, contesting the identity of Muslim womanhood, and

---

<sup>199</sup> Zimmerman, *supra* note 14 at 205.

<sup>200</sup> Phil E. Okeke, “Refiguring Tradition: Women’s Rights and Social Status in Contemporary Nigeria” (2000) 49 *Africa Today* at 50.

<sup>201</sup> *Ibid* at 53.

<sup>202</sup> Madhavi Sunder, “Piercing the Veil” (2003) 112 *Yale L.J.* 1.

<sup>203</sup> WLSA at 14.

<sup>204</sup> Zimmerman, *supra* note 14 at 213.

dominant interpretations of sharia law.<sup>205</sup> WIDO is another transnational organization that support widow's rights work throughout the world. Such networking on a Pan-African basis, or working with those living under customary systems of law (including aboriginal peoples), would also be helpful in enabling women to build a safe space in which to start to study dominant understandings of cultural practices and to dialogue with local and disparate communities about alternative conceptions of culture, tradition, and women's rights.

### **Traditional Rulers, Indigenous Justice and Customary Courts**

What about the potential to use local leaders and court systems themselves as the locus of cultural transformation? While it may not be appropriate for courts to engage in large-scale changes while removed from the particular context of the lived-law experience, it may be appropriate for the local customary courts to engage in this transformative process. Understanding the potential for change at this level requires a greater understanding of the current dynamics within customary institutions, difficult to track given the paucity of studies into these courts. Those individuals interested in greater change therefore need to study their own community systems to find the spaces in which it is possible to contest culture.<sup>206</sup> For example, in the Zimbabwe context, Julie Stewart has used field research to discover that magistrates' courts are actually more pragmatic than is the Supreme Court in distribution of estates.<sup>207</sup>

In fact, in Nigeria, the majority of customary disputes may not even reach the customary court system, but are resolved through local mechanisms such as village counsels. For example, in his thesis study of indigenous modes of disputing and legal interactions in Igbo communities, Ernest E. Uwazie identified six systems of dispute resolution that are lay systems, separate from the customary court, and through which the majority of land disputes were settled.<sup>208</sup> These included the family head who is the first mediator for internal family disputes; the umuadas, or married daughters who may return to enforce morality and prevent issues such as spousal abuse, theft and corruption; the village tribunal composed of 10 to 15 lineages which settles the majority of land issues, and its extension to the city through organizations like town unions; age grades (cohorts) who have responsibilities to each other such as burial and enforcement of discipline amongst each other; chiefs (titled men) who has statutory authority to reconcile parties in civil matters; and oracles, used in cases of unknown offender identity such as cases of mysterious death or illness. In his survey, Uwazie identified that 89 percent of respondents would use the amala, or village tribunal for land cases, and 66 percent for disputes between fellow villagers.<sup>209</sup> In addition, of those he surveyed, 29 percent of the 76 had cases referred from the formal system to the village tribunal, and a senior

---

<sup>205</sup> See [www.wluml.org](http://www.wluml.org); Farida Shaheed, "Controlled or Autonomous: Identity and the Experience of the Network, Women Living under Muslim Laws" (1994) 19:4 Signs 997 & Sunder, *supra* note 202.

<sup>206</sup> As recommended by Stewart, "Why I Can't Teach Customary Law", in John Eekelaar & Thandabantu Nhlapo, *The Changing Family: Family Forms & Family Law* (Oxford: Hart Publishing, 1998) 217.

<sup>207</sup> *Ibid* at 224..

<sup>208</sup> Ernest E. Uwazie, "Modes of Indigenous Disputing and Legal Interactions Among the Ibos of Eastern Nigeria", (1994) 34 Journal of Legal Pluralism 87.

<sup>209</sup> *Ibid* at 92.

magistrate told him 99 percent of land cases in his court were appealed from the indigenous system, with most referred back. The magistrate had a general sense of a cooperative system between the two.<sup>210</sup> Uwazie also witnessed police referrals to the court, including one particular case between a man and his brother's widow. The police became involved when the widow alleged assault and that she would not get fair treatment by the village moot due to him labelling her a troublemaker.<sup>211</sup> Nonetheless, the police sought to resolve the matter, as it was founded in a land dispute, by referring it to the village tribunals. The disputants also told Uwaize bribes had been paid to the police to ensure this resolution.

Studies such as this suggest that primary reform must occur at the local level, and will include not only changing the courts, but also ensuring that systems like the local police have adequate training to know when to divert a case through the customary indigenous system, and when to recognize that factors such as violence are present that may indicate greater police, or legal, support for the widow is indicated.

Working within local leaders and systems of justice brings out the tensions in women's' ability to be active in the process of cultural transformation. First, it is assumed that knowledge of customs rests within knowledgeable leaders who are the gatekeepers to such knowledge. These traditional authority figures may be important to ensuring the stability in the society in times of rapid modernization and HIV, however, they may also serve as a barrier to women who are unable to get them to hear their cases in local courts. In fact, Ewelukw refers to these individuals as "the indispensable enemy". For example, she points to a number of towns in which traditional leaders have been instrumental in moderating widow rites, through practices such as minimizing periods of confinement and getting rid of the more degrading practices such as shaving of the head.<sup>212</sup>

Second, legal space itself may be hostile to women. Beverly Stoeltje recognizes how the same law that has been so important within multiple legal systems in Africa in negotiating relationship between Europeans and Africans, has also had a role in constructing and perpetuating constructions of gender. When women seek to engage in legal spaces, they therefore experience constraints on both their ability to speak and to be heard. In particular:

gender ideologies, activities related to gender roles, contexts for the performance of gender, and the genres of women's speech" are contingencies which structure how women must "perform, negotiate, and contest their positions in regard to legal matters."<sup>213</sup>

---

<sup>210</sup> *Ibid* at 99-100.

<sup>211</sup> *Ibid*, at 98 at note 9.

<sup>212</sup> Ewelukwa, *supra* note 94 at 472-473.

<sup>213</sup> Beverley J. Stoeltje with Kathryn Firmin-Sellers & Okello Ogwang: Introduction to Special Issue: Women, Language, and Law in Africa (2002) 49 *Africa Today* vii.

An example of this analysis is provided by Anne Griffiths, who explores women's experiences in sibling inheritance disputes in Botswana.<sup>214</sup> She contrasts two disputes. The first is between two sisters, both who spoke before the kgotla, or assembly centre, but who were limited in their ability to present their claims by the fact that the property, cattle, was mediated by their husbands. These women's arguments mirrored a classic familial dispute, and did not evidence a particularly gendered strategy. In contrast, in a second case between a sister and brother, the sister had the advantage of being educated and having access to resources. In her argument that she should gain the right to the main house, she was able to combine a traditional argument, that she had a right to the house as an unmarried daughter, with a more modern argument, that she should get the house due to investment in the property. She was able to win this dispute through grounding her claim within the traditional, but seeking to strengthen this argument with a more innovative claim.<sup>215</sup> This study suggests that women's ability to present their rights is not sufficient, rather, if they lack control of resources and social status they will remain dependent upon men in establishing their claims.<sup>216</sup> In her study of widow's rights in Nigeria, Ewelukwa similarly identified that absence of family and social support and finances were considerations in women choosing not to take cases through the court system.<sup>217</sup>

Given that co-ownership of property is not recognized in Nigeria, one area in which women may seek to use indigenous and customary court mechanisms to push for change, like in the case study above, is to gain recognition of women's contribution to property. Such arguments have been useful in the common law, through doctrines such as the constructive trust, as creative devices that can bridge the reality of legal entitlement and women's needs. Furthermore, a device that recognizes material contribution may also be able to capture widow's contribution to care of sick family members.

### **A Values Based Approach**

Work in other jurisdictions points to the success in focusing upon the values that underlie the customary laws as a means to develop the customary law in the context of modern needs. For example, Julie Stewart suggests such values may have been missed in compiling customary law and, must now be reinvigorated to find workable solutions. In her work with the President of the Council of Chiefs and Members of Parliament, she was able to receive agreement from the Chiefs that the overarching principle of family inheritance is ensuring the family of the deceased is provided for, although the Chiefs varied in how this was to be done.<sup>218</sup> Such consensus on core values could be used to push for new ways to concretize those values in their communities.

Similarly, Likhapha Mbatha describes a process in which codification of customary law in South Africa led to abandonment of the underlying value that the

---

<sup>214</sup> Anne Griffiths, "Women's Worlds, Siblings in Dispute over Inheritance: a View of Botswana" (2002) 49 *Africa Today* 61.

<sup>215</sup> *Ibid* at 77.

<sup>216</sup> *Ibid* at 78.

<sup>217</sup> Ewelukwa, *supra* note 94.

<sup>218</sup> Stewart, *supra* note 206.

customary law of succession is about protecting the community as whole from the burden of looking after dependents.<sup>219</sup> As was recognized in *Bhe*, she identifies that the principle of primogeniture was about making the heir the trustee for the family. However, due to changing social and economic forces, many heirs have “realized that their individual claims are enforceable if phrased or based on the codified customary law.”<sup>220</sup> She quotes the studies of the Gender Research Project and the Centre for Applied Legal Studies, in which researchers found that the heirs claimed that they were unable to shoulder responsibilities due to unemployment, migration and poverty, and communities identified they had taken on many of the responsibilities of the heir.<sup>221</sup> The conclusion of the research was that the “men and women we interviewed want courts to stop implementing rules that oppress certain family members in the name of culture, while failing to uphold the real values underlying that culture.”<sup>222</sup>

Mbatha suggests a three step process to determine when a customary law should be implemented:

1. identify the culture value to be protected
2. ascertain the different ways in which community members protect that culture value; and
3. look into the constitutionality of these practices.<sup>223</sup>

While such work may be possible within the formal court system, there may be greater scope, and legitimacy, to tease out these values at a local level.

## Conclusion

Writing about Nigerian inheritance practices from Canada means a necessary disconnect between the lived experience of the law in African and law captured in texts and filtered through to a Western audience by the gatekeeper academic. Strategies to reform inheritance practices that remain equally disconnected from people on the ground will replicate patterns of colonization. Instead, Julie Stewart speaks to the need to research the lived customary law, not as explained through a casebook model, but rather through the dynamic conditions of the people. In particular, she says there is a need for a gender sensitive approach that can challenge the accounts provided from authoritative sources such as chiefs. She recognizes a need to engage with “law games”, but only if done while ensuring an open-ended framework in which “the principles are the focus of the research not ossified end product rules.”<sup>224</sup>

---

<sup>219</sup> Likhapha Mbatha, “Reforming the Customary Law of Succession” (2002) 18 SAJHR 259.

<sup>220</sup> *Ibid* at 267.

<sup>221</sup> *Ibid* at 269-272.

<sup>222</sup> *Ibid* at 273.

<sup>223</sup> *Ibid* at 284.

<sup>224</sup> Stewart, *supra* note 206.

This paper is just a starting point in accumulating evidence about current inheritance practices in Nigeria, and exploring possible options for ensuring widows do receive adequate property rights. For this project to continue, there must be more connection between those already doing the important work of transforming inheritance practices in the field, and those who can record their efforts to track experiments with different modes of cultural transformation.