Judicial recognition of living customary law in the context of women's matrimonial property rights in South-East Nigeria

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8 August 2016

Declaration

I declare that *Judicial recognition of living customary law in the context of women's matrimonial property rights in South-East Nigeria* has not been previously submitted in whole or in part, and will not be submitted by me for a degree at any other university.

I further declare that this is my own work in design and execution, and that all the materials cited in it have been duly acknowledged.

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Anthony Chima Diala **8 August 2016**

Synopsis

The interaction of customary law with state law raises challenges for policy-makers in postcolonial societies. This study contends that these challenges are primarily caused by state recognition of customary law without proper attention to how people adapt it to modern conditions vastly different from its agrarian origins. Recognition denotes the manner customary law norms and institutions are 'incorporated into the state legal system' or enforced by state organs such as courts. It often raises the question of which version of customary law is recognised. Scholars have identified two broad types – official customary law and living customary law. Generally, they define living customary law as the norms that regulate people's daily lives, while official customary law represents the version perceived by state officials typically as legal rules, and often recorded in codes, legislation, and law reports. Drawing from the semi-autonomous social field theory, this study conceptualises living customary law as the law that emerges from people's adaptation of customs to socio-economic changes. It argues that because it emerges in this manner, its judicial recognition is inhibited by a rule-based approach to adjudication.

The study utilises literature review, interviews, archival searches, and case analysis to investigate the ways in which judges acknowledge living customary law in the context of women's matrimonial property rights in South-East Nigeria. It finds that while women are generally apathetic to matrimonial property claims, judges are generally insensitive to customary law's process-oriented character and pay scant attention to how customs are being adapted to socio-economic changes. It further finds that judicial recognition of living customary law is hampered by a colonial legacy of rule-based adjudication, disregard for the values that inform customary law, and judges' non-resort to constitutional values that could promote women's matrimonial property rights. Connected to this finding is the failure of the Constitution to provide for these rights and define customary law's status in the legal system.

The study concludes that judicial recognition of living customary law is inhibited by Nigeria's poor legal framework and the technical nature of court rules. It suggests that the manner people adapt customs to socio-economic changes should guide judicial and legislative approaches to customary law.

Keywords: Judicial recognition, living customary law, matrimonial property rights, Nigeria

Dedication

To Jane, Chisom, and the ones that did not stay – Comfort and John.

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References to researcher's publications

This thesis referred to an article and a book chapter which I authored. These are:

AC Diala 'Reform of the customary law of inheritance in Nigeria: lessons from South Africa' (2014) 14(2) *African Human Rights Law Journal* 633-654; *Diritto delle successioni e della famiglia* 3 (2015).

AC Diala 'The dawn of constitutionalism in Nigeria' in Mbondenyi, M. K., and Ojienda T. (eds.) *Constitutionalism and democratic governance in Africa: contemporary perspectives from sub-Saharan Africa* (Pretoria: Pretoria University Law Press, 2013) 135-160.

None of these publications are included in this thesis. They are merely used in support of my arguments and are referenced in the same way as other people's works that I cited here.

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Abbreviations

AC	Appeal cases
ACCA	Abia State Customary Court of Appeal
AG	Attorney General
ANLR	All Nigerian Law Report
ANOR	Another
CA	Court of Appeal Division
CAP	Chapter
CC	Customary Court
CCA	Customary Court of Appeal
CIRDDOC	Civil Resource Development and Documentation Centre
DST/NRF	Department of Science and Technology/National Research Foundation
ECCA	Enugu State Customary Court of Appeal
EALR	East Africa Law Reports
ECSLR	East Central State Law Reports
ENLR	Eastern Nigerian Law Report
FIDA	International Federation of Women Lawyers
FWLR	Federal Weekly Law Reports
ICCA	Imo State Customary Court of Appeal
ICCL	Imo State Customary Court Law
IMSLR	Imo State of Nigeria Law Report
INT'L	International
JSC	Justice of the Supreme Court of Nigeria
KB	King's Bench
LFN	Laws of the Federation of Nigeria
LGA	Local government area

LRN	Law Reports of Nigeria
MCA	Matrimonial Causes Act
NGO	Non-governmental organisation
NLR	Nigerian Law Report
NMLR	Nigerian Monthly Law Report
NO.	Number
NRF	National Research Foundation of South Africa
NWLR	Nigerian Weekly Law Report
PARA	Paragraph
PT	Part
PW2	Prosecution witness two
QB	Queens's Bench
SC	Supreme Court of Nigeria
SCNJ	Supreme Court of Nigeria Judgements
WIN	Women Information Network

Chapter one: Setting the stage

1.0 Introduction

The application of customary law, especially in issues concerning women, is challenging for judges and policy-makers in postcolonial societies.[1] 'Customary law' is of course neither a single, unified body of law, nor a flattering terminology.[2] Referred to also as 'people's law, folk law, traditional law,' 'customs,' and 'indigenous law,'[3] it is used here as a convenient phrase for the various forms of norms which a given population uses to conduct its affairs.[4] At the heart of the challenges of applying these norms is the phenomenon of legal pluralism.

Defined here as the operation of more than one normative order within a given population, legal pluralism is a critical subject in sub-Saharan Africa.[5] This is unsurprising, given the problems caused by the wholesale transplantation of capitalist European laws into agrarian African societies. As Merry observed, legal transplants 'overlooked, to a large extent, the complexity of previous legal orders' in colonised societies.[6]

Broadly, there are two forms of legal pluralism. One is strong or deep legal pluralism, which occurs when normative orders such as customary law exist without necessarily depending on the state for recognition of their authority.[7] The other is weak or state legal pluralism, which arises when normative orders within a state's claimed field of jurisdiction are

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[1] P Orebech *et al The role of customary law in sustainable development* (2005).

[2] The main objection to the term, 'customary law,' is its connotation of tradition or unvarying usage.

[3] BW Morse & GR Woodman (eds.) *Indigenous law and the state* (1988); A Allot & GR Woodman *People's law and state law: The Bellagio Papers* (1985).

[4] Here, the term, 'population,' captures any group – big or small – that observes more than one normative order, irrespective of common ancestry or allegiance. *See* GR Woodman 'Legal pluralism in Africa: the implications of state recognition of customary laws illustrated from the field of land law' in H Mostert & T Bennett (eds.) *Pluralism and development: studies in access to property in Africa* (2012) 35-58 at 36. For definition of customary law, see TO Elias *The nature of African customary law* (1955) 55.

[5] Griffiths defines it as 'that state of affairs, for any social field, in which behaviour pursuant to more than one legal order occurs.' *See* J Griffiths 'What is legal pluralism?' (1986) 24 *Journal of Legal Pluralism and Unofficial Law* 2. For a summary of scholarly definitions of legal pluralism, see S Larcom 'Problematic legal pluralism: causes and some potential 'cures'' (2014) 46(2) *Journal of Legal Pluralism and Unofficial Law* 193-217 at FN 3; BZ Tamanaha 'The folly of the "social scientific" concept of legal pluralism' (1993) 20(2) *Journal of Law and Society* 192-217 at 192. Legal pluralism is discussed in chapter two.

[6] SE Merry 'Legal pluralism' (1988) 22 *Law and Society Review* 869.

[7] The degree of autonomy between state law and customary law in deep legal pluralism is unclear. Generally, it seems to be when the state is not obliged to 'incorporate cultural or religious forms of non-state law into state law.' *See* C Rautenbach 'Deep legal pluralism in South Africa: judicial accommodation of non-state law' (2010) 42(60) *Journal of Legal Pluralism and Unofficial Law* 146.

acknowledged and, in varying degrees, incorporated into the state legal system.[8] This dissertation is concerned with the latter.

At first glance, weak legal pluralism may seem incompatible with an empirical study of customary law. This perception may be attributed to Griffiths. Griffiths criticised weak legal pluralism as a confusing appendage of legal centralism because it occurs 'within the internal discourse of state law' and enables the state to acknowledge or refuse the existence of other normative systems.[9] In his words, 'the very notion of recognition and all the doctrinal paraphernalia which it brings with it are typical reflections of the idea that "law" must ultimately depend from (sic) a single validating source' which is the state.[10] Griffiths preferred strong legal pluralism because it occurs within 'an empirical state of affairs, namely the co-existence within a social group of legal orders which do not belong to a single "system."'[11] Arguably, however, Griffith overlooked two things. One, the mere fact that the state acknowledges other normative systems is an admission of its non-monopoly on norm creation. Two, Griffiths' definition of deep legal pluralism as 'the designation of an empirical state of affairs in society' seemingly ignores the fact that the state itself is an empirical state of affairs.[12] In any case, Griffiths admitted that weak legal pluralism is the reality in postcolonial societies.

This study locates the research problem in state recognition of customary law without proper attention to how people adapt it to conditions different from the social settings in which it emerged. Here, 'recognition' means the manner in which the state regards customary law as part of its institutions or part of its norms. This may take one of two forms.[13] 'Institutional recognition … occurs when institutions of [customary] law are incorporated into the state legal system, as for example when customary chiefs become administrative officials or judges of the state.'[14] On its part, 'normative recognition occurs when norms of customary law are' assimilated into the *corpus* of state law or, more commonly, enforced by state organs such as

[8] GR Woodman 'Legal pluralism and the search for justice' (1996) 40(2) *Journal of African Law* 152-167.

[9] Griffiths 'What is legal pluralism?' (note 5) 8.

[10] *Ibid*

[11] *Ibid*.

[12] *Ibid* at 6 and 8. For discussion of the state as a social field, see 1.2 below.

[13] This is not to say that the line between these forms of recognition is clear.

[14] GR Woodman 'Customary law in common law systems' (2001) 32(1) *IDS Bulletin* 29.

courts.[15] This study focusses on the latter, arguing that judicial recognition of living customary law is inhibited by rule-based adjudication, that is adjudication that ignores customary law's process-oriented character and the values that inform it. To understand the ambit of normative recognition, a brief explanation of its origin is required.

1.1 Background of normative recognition

Aware of the impracticality of ignoring the existing norms governing the lives of the local populace, colonial officials allowed these norms to apply alongside imported laws with varying degrees of restrictions.[16] As Woodman observed, 'the usual pattern was to import the law of the coloniser, but to declare it subject to any amendments made by the local legislature, itself modelled on the coloniser's home legislature.'[17] In this normative recognition, state courts were required to 'observe and enforce the observance of native laws and customs existing in [the colonised territories].'[18] In several postcolonial states, these 'laws and customs' went on to constitute 'a substantial component' of state law.[19]

In Nigeria, however, customary law did not become a substantial component of state law in the way it did in several postcolonial states.[20] Indeed, there are no provisions in the Constitution for customary law's status in the legal framework and its relationship with the imported English laws that constitute state law.[21] Its content has not been disturbed and its application is merely subject to the repugnancy tests imposed by colonial judges.[22] Perhaps, it was felt that the repugnancy tests and procedural rules were sufficient to handle the application of customs in social settings different from those in which customs emerged.

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[15] *Ibid*.

[16] AN Allott *Essays in African law, with special reference to the law of Ghana* (1960) chapter 7.

[17] GR Woodman 'Legal pluralism in Africa' (note 4) at 39.

[18] *Ibid*, citing Allot (note 16).

[19] Woodman (note 4) 39.

[20] This is significant, given that customary law affects most Nigerians in issues such as marriage and succession. *See* Nigerian Institute of Advanced Legal Studies *Restatement of customary law of Nigeria* (2013) Preface.

[21] This will be discussed in detail later in this chapter.

[22] *See* for example, Imo State Customary Courts Edict No. 21, 1984; Anambra State Customary Courts Edict No. 6, 1984; Customary Court Rules, 1989; Customary Court of Appeal Law of 2000 (as amended); Customary Court of Appeal Rules of 2010 (Enugu and Anambra); and Bendel State Customary Courts Edict No. 2, 1984.

Furthermore, judges trained in the English legal tradition adjudicated over customary law. In fact, many precedents on customary law were laid by British judges who relied on the knowledge of traditional rulers with sometimes vested interests in the subject matter in issue.[23] To further complicate this situation, the people whose customs were being applied by the courts were compelled to adjust their normative behaviour to the changes brought by colonial rule. It was just a matter of time before question marks arose over what type of customary law was being applied in and outside the courts.[24] The reason for these question marks is obvious.

For agricultural and defence purposes, pre-colonial society was founded on families living in close-knit units.[25] In it, inheritance rules operated on the principle of male primogeniture in order to provide material support to a deceased person's family.[26] Thus, heirs inherited not just the properties of deceased persons, but also responsibilities to maintain dependants of the deceased.[27] In this setting, normative adaptations were in tune with the natural pace of social changes. Colonial rule overturned this natural pace by altering the agrarian organisation of society. Moreover, it brought laws that emphasised individual rather than communitarian values.[28] Unsurprisingly, the application of customs in circumstances markedly different from the settings in which they emerged began causing hardship, especially to females and younger males.[29] This hardship is amplified by the fact that customs are 'captured in legislation, in textbooks, in the writings of experts, and in court decisions, without allowing for the dynamism of customary law in the face of changing circumstances.'[30] As a

[23] For customary law's distortion, see chapter three. In *Okanlawon & Ors* v *Olayanju & Ors* (unreported) Suit No. H05189176 Judgment of Oshogbo High Court of 24 August 1978, Sijuwade, J. stated: 'I have no doubt that the 4th D.W. has given a distorted version of the traditional history and embellished the custom of land tenure in Ogbomosho, presumably to suit his own purpose particularly now that he is the reigning Shoun.'

[24] GR Woodman 'Some realism about customary law – the West African experience' (1969) *Wisconsin Law Review* 128-153.

[25] J Barton *et al Law in radically different cultures* (1983) 41-42.

[26] N Okoro *The customary laws of succession in Eastern Nigeria and the statutory and judicial rules governing their application* (1966) 4. The male primogeniture rule means inheritance by the first-born male.

[27] *Ibid*.

[28] *Agwu* v *Nezianya* (1949) 12 West African Court of Appeal Report 450 [ruling that family property is disposable]. *See* chapter three.

[29] A Atsenuwa 'Custom and customary law: Nigerian courts and promises for women's rights' in A Obilade *Contemporary issues in the administration of justice: essays in honour of Justice Atinuke Ige* (2001) 344. For discussion of these hardships in Southern Africa, see L Mbatha 'Reforming the customary law of succession' (2002) 18 *South African Journal on Human Rights* 259.

[30] *Bhe and others* v *Magistrate Khayelitsha and Others*; *Shibi* v *Sithole; SAHRC* v *President RSA* 2005 (1) BCLR 1 (CC) paras 82 & 83 (Bhe cases). *See* also *Agbai* v *Okogbue* (1991) 7 NWLR (Pt 204) 390 at 417.

judge observed, 'customary laws were formulated from time immemorial. As our society advances, they are more removed from their pristine social ecology. They meet situations which were inconceivable at the time they took root.'[31] The issue is how the state, through its legal framework and judicial institutions, treat these unforeseen situations.

As mentioned above, Nigeria's legal framework is not equipped to handle the hardships that arise when customary law encounters unforeseen situations due to the absence of adequate legislative guidelines for judges' decision-making. Indeed, the interaction of state law with customary law makes customary law's application problematic.[32] Specifically, the status of customary law in the Constitution is undefined. There is no statutory regulation of customary law rules of succession, marriage, and divorce. Above all, there is insignificant law reform.[33] The effect is that case law and legislation are often out of tune with people's adjustments to changes in the legal, religious, and economic structures from which customs emerged.[34] This has important implications. For example, women are unable to legally assert matrimonial property rights under official customary law.[35] This legal incapacitation results in hardship for women, especially after divorce.[36] This background informed this study's investigation of how judges navigate Nigeria's legal framework to recognise adaptations in customary law relationships caused by the application of customs in modern conditions.[37]

1.2 Contextual framework

This investigation may not be adequately understood without an explanation of the character of customary law and the judicial and academic ideas that surround it. Given the impracticality of exhausting these ideas in this chapter, they are presented in two chapters. This chapter sheds

[31] *Agbai* v *Okogbue*, *ibid*, per Nwokedi JSC.

[32] ES Nwauche 'The constitutional challenge of the integration and interaction of customary and the received English Common Law in Nigeria and Ghana' (2010) 25 *Tulane European & Civil Law Forum*.

[33] AC Diala 'Lessons from South Africa on reform of the customary law of inheritance in Nigeria' (2014) 14(2) *African Human Rights Law Journal* 633-654.

[34] *Ibid*.

[35] *See* definition of official customary law in 1.2. Matrimonial property is used in this thesis in a plural form.

[36] *See*, for example, A Atsenuwa 'Custom and customary law' (note 29) at 344.

[37] The phrase, 'recognise adaptations' is used often in this thesis. In the context of judges, it means to acknowledge, allow, admit, uphold, or accept people's adaptation of customs to socio-economic changes.

light on customary law as a legal and academic concept. Chapter two uses literature review to expand the conceptual framework outlined in this chapter.

The conceptual choices made here are qualified with two caveats. One, it is difficult to conceptualise customary law within Nigeria's legal framework because the Constitution is virtually silent on its status. Two, the near-absence of academic literature on a specific type of customary law in Nigeria is a major constraint.[38] Given that the ideas surrounding customary law are discussed throughout this study, they are merely outlined in the following analysis.

1.2.1 Law and legal positivism

Up to the mid-twentieth century, mainstream English legal theorists viewed law 'as the command of a sovereign,' which is 'backed by force.'[39] Not only did this command theory permeate legal philosophy, it also characterised legal positivism – that is the idea that law's existence and content should be traceable to a law issuing authority rather than 'its merits.'[40] By insisting that law's validity depends on authoritative sources rather than its own reasonableness, legal positivism dissociated morality and customs from the definition of law.[41] The only exceptions are when morality and customs are recognised by a political authority. In sum, positivism gave law an enduring, rule-based character. Unsurprisingly, when the command theory was dropped in favour of an emphasis on the normative character of law and the institutions that apply it,[42] the idea that law is rule-based survived. Its survival owes much to Hart's *Concept of Law*, a seminal study that ameliorated the extremities of legal positivism by broadly situating law in a social context.[43] For the purposes of this study, the key aspects of Hart's ideas are his primary and secondary rules, and his rule of recognition.

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[38] This type is living customary law and is discussed in 1.2.3 below and throughout this study.

[39] L Green 'Legal positivism' (2009) *The Stanford Encyclopaedia of Philosophy* (EN Zalta, ed.) <http://plato.stanford.edu/archives/fall2009/entries/legal-positivism/> (accessed 23 June 2016). The chief exponents of the command theory include John Austin, Thomas Hobbes, and Jeremy Bentham.

[40] J Gardner 'Legal positivism: 5 ½ Myths' (2001) 46 *American Journal of Jurisprudence* 199.

[41] Positivism has of course been severely criticised. *See* for example, R Dworkin *Taking rights seriously* (1977) and *Law's empire* (1986).

[42] Green 'Legal positivism' (note 43).

[43] HLA Hart *The concept of law* (1994, 1964).

As Hart aptly put it, law is 'the union of primary and secondary rules.'[44] Primary rules are those that people feel they owe a duty to obey, while secondary rules are mere social habits, which people may violate without serious opprobrium. Whereas primary rules satisfy the command theory because they focus on the actions that individuals must or must not do, secondary rules deviate from it because they hint at other sources of law beyond a sovereign.[45] The importance of Hart's ideas lies in the methods which secondary rules use to specify the manner primary rules may be revealed, introduced, or changed.[46] As canvassed in the following paragraphs, these ideas are significant for the judicial recognition of customary law because of their influence on judges, and because of the nature of customary law.

When Nigerian judges say that custom is a source of law, they usually mean those customs that they consider compatible with primary rules – that is recognised state (positivist) law.[47] This creates a problem, given that 'law covers a continuum which runs from the clearest form of state law through to the vaguest forms of informal social control.'[48] In other words, a positivist or rule-based conception of law is incompatible with non-state law, of which some forms of customary law are prime examples. This is the central argument of this study.

In what follows, this argument is explained by drawing on Sally Moore's semi-autonomous social field theory, which sees law as a process.[49] Next, this theory is advanced by showing how it can help in clarifying the meaning of a peculiar brand of customary law.

1.2.2 Nature of customary law

Before proceeding, it is important to acknowledge certain types of customary law. Sanders identified three.[50] The first is the product of colonial policies of interpreting customary law, re-

[44] *Ibid* at 107.

[45] J Hund '"Customary law is what people say it is" – HLA Hart's contribution to legal anthropology' (1998) 84(3) *Archives for Philosophy of Law and Social Philosophy*.

[46] HLA Hart *The concept of law* (1994) 92.

[47] Most of the interviewed judges defined customary law along rule-based lines. This reality is however not exclusive to Nigeria. *See* R Cotterrell *The sociology of law: an introduction* (1984) 10.

[48] GR Woodman 'Ideological combat and social observation: recent debate about legal pluralism' (1998) 42 *Journal of Legal Pluralism* 45.

[49] SF Moore *Law as process: an anthropological approach* (1978); 'Law and social change: the semi-autonomous social field as an appropriate subject of study' (1973) 7(4) *Law & Society Review* 719-746.

[50] AJGM Sanders 'How customary is African customary law' (1987) 20 *Comparative and International Law Journal of South Africa* 406-409. Sanders' classification did not catch on.

inventing (and arguably distorting) it, and subordinating it to imported laws and standards. This type is official customary law. The second emerged from scholarly perceptions of the discrepancies between orthodox or official views of customs and actual customs observed from anthropological studies. This type is academic customary law. The third refers to the current practices and norms which a community use to regulate itself. This is autonomic customary law. For convenience, however, scholars categorise the 'accepted dominant forms of customary law' into 'official and living customary law.'[51] Generally, they regard official customary law as the version perceived by observers outside the community in which the concerned norms are observed.[52] This broad category embraces the customary law pronounced in court judgments, textbooks, and codifications. On the other hand, living customary law is defined as the norms that regulate people in their daily lives, in contra-distinction with what outsiders, especially legal experts, consider as their norms.[53] To this definition, Himonga and Bosch add the qualifier that 'living customary law is dynamic and constantly adapting to changing social and economic conditions.'[54] As argued below, the definition of living customary law could benefit from a clearer explanation of its adaptability to changing socio-economic conditions.

It is fairly accepted that customary law denotes the cluster of norms which a given population uses to conduct its affairs. These norms emerge from human behaviour, which eventually, are acknowledged as customs. However, human behaviour is neither static nor wholly dependent on the instructions of a law-giving authority. Prior to, and even after modern forms of government emerged, people observed numerous customs as law. Their observance of these customs is in accordance with the state of the society in which they live. As their

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[51] CN Himonga & C Bosch 'The application of African customary law under the Constitution of South Africa: problems solved or just beginning?' (2000) 117 *South African Law Journal* 319 (hereafter Himonga & Bosch); TW Bennett "Official vs 'living' customary law: dilemmas of description and recognition' in A Claassens & B Cousins (eds.) *Land, power & custom: controversies generated by South Africa's Communal Land Rights Act* (2008); J Bekker & GJ Van Niekerk 'Broadening the divide between official and living customary law' (2010) 73 *Journal of Contemporary Roman-Dutch Law* 679; JC Bekker & IP Maithufi 'The dichotomy between 'official customary law' and 'non-official customary law'" (1992) 17(1) *Journal for Juridical Science* 47-60; GJV Niekerk 'Reflections on the interplay of African customary law and state law in South Africa (2012) 3 *Studia Universitatis Babes Bolyai-Iurisprudentia* 5-20.

[52] TW Bennett 'Re-introducing African customary law to the South African legal system' (2009) 57 *American Journal of Comparative Law* 3 (hereafter Bennett, 'Re-introducing customary law'); Himonga & Bosch *ibid*. Woodman refers to official customary law as ''lawyers' customary law.' *See* GR Woodman (note 24).

[53] Himonga & Bosch (note 51) 328, refining the definition in I Hamnett *Chieftainship and legitimacy: an anthropological study of executive law in Lesotho* (1975) 10. Bennett, *ibid* at 138, defines it as 'the law actually observed by the people who created it.'

[54] *Ibid* at 319.

society changes, their normative behaviour also changes to adjust to their social needs.[55] This reality helps to explain why scholars commonly acknowledge customary law as a flexible normative system. Whether its flexibility is external (for example, the influence of state law, religion, or development agents) or intrinsic (for example, internal change) is not necessarily the most important factor. What is important is that it is driven by 'interactive social, economic and legal forces,'[56] and is tailored to the behaviour of the people whose lives it governs. As Moore's theory shows, these forces interact in semi-autonomous social fields containing several normative orders.[57] These orders may be state, semi-state, or non-state law (such as customary law). The definition and boundaries of a social field are not dictated by its organisation, but 'by a processual characteristic, the fact that it can generate rules and coerce or induce compliance to them.'[58] The essence of Moore's theory is threefold.

First, a social field is the fundamental unit of social control, which is directly connected to norms of conduct. Second, individuals may belong to many social fields at the same time.[59] Third, a social field is semi-autonomous because its members can resist the penetration of external norms depending on the degree of members' independence. Ultimately, the interaction in a field feeds into a norm creation process, during which customs compete with state law as 'means of coercing or inducing compliance.'[60] Indeed, state law receives resistant pressure from those it seeks to regulate or change their behaviour.[61] This resistance is, of course, dependent on the dynamics of the concerned social field, as some members of the field adapt to external influences more easily than other members. From this processual view of law, customary law's key peculiarity obviously lies in the fact that its validity is not traceable to an

[55] B Magubane 'A critical look at indices used in the study of social change in colonial Africa' (1971) *Current anthropology* 419-445.

[56] CN Himonga & C Bosch (note 51) 319.

[57] SF Moore 'Law and social change' (note 49); J Griffiths 'What is legal pluralism?' (note 5) at 1.

[58] SF Moore *Law as process* (note 49) at 57. However, Woodman questions the lack of clarity in the membership and rules of semi-autonomous social fields. *See* GR Woodman 'Why there can be no map of law' in R Pradhan *(*ed*.) Legal pluralism and unofficial law in social*, *economic* and *political development* (2002) 385.

[59] Moore 'Law and social change' (note 49) at 720.

[60] Moore *Law as process* (note 49) 56-57.

[61] M Weber *On law in economy and society* (translated by M Rheinstein & E Shils) (1954) 18-19, 38.

external authority, but rather to the social associations of individuals.[62] This conceptualisation clearly rejects the legal positivist idea that law must have a rule-based character. It sets the stage for the following advancement of the concept of living customary law.

1.2.3 Conceptualising living customary law

Of the identified forms of customary law, the type most suited to positivist leanings is official customary law. As stated above, this type is the product of colonial and postcolonial efforts to pigeon-hole customary law into Western systems of law.[63] Scholars have observed that the key mediums, methods, and products of these efforts are judicial precedents, codifications, and reliance on academic descriptions of customary law.[64] The emergence of official customary law was also aided by the fact that court officials were generally ignorant of the customs they applied.[65] They relied on versions given to them by interpreters and community representatives such as chiefs and elders, some of whom had vested interests in the subject matters in question.[66] As literature shows, these interests ranged from property to political power and gender dominance.[67] To compound matters, most judges who adjudicated – and still adjudicate – customary law did or do so with rule-based (positivist) viewpoints that tend to ignore the underlying values that inform customary law.[68] It has been noted that judges prefer official customary law because of the certainty offered by precedents and codifications.[69] Unfortunately, this preference sometimes projects distorted versions of customs, which differ from those that individuals observe for their daily needs. This divergence characterises the meaning of living customary law, which is discussed next.

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[62] A Claassens 'Customary law and zones of chiefly sovereignty: the impact of government policy on whose voices prevail in the making and changing of customary law' in Claassens and Cousins (eds.) *Land power and custom* (2008) 362; E Ehrlich *Fundamental principles of the sociology of law* (1936) 39.

[63] In South Africa, post-colonial efforts would include Apartheid efforts. In Nigeria, they are usually channelled through the repugnancy test, which subjects customary law's judicial recognition to colonial-inherited standards.

[64] *See* note 51: Himonga & Bosch at 319, Bennett at 140, Bekker, Van Niekerk at 679, and Maithufi at 47-60.

[65] M Chanock 'Neither customary nor legal: African customary law in an era of family law reform' (1989) 3 *International Journal of Law and Family* 76.

[66] *Ibid*.

[67] M Chanock *Law, custom and social order: the colonial experience in Malawi and Zambia* (1998); FG Snyder 'Colonialism and legal form: The creation of "customary law" in Senegal' (1981) 19 *Journal of Legal Pluralism*.

[68] G van Niekerk 'Indigenous law and narrative: rethinking methodology' (1999) 32 CILSA 212.

[69] Himonga & Bosch at 329.

1.2.4 Re-thinking the definition of living customary law

As stated earlier, scholars define living customary law as what people do or the norms that regulate people in their daily lives.[70] They have acknowledged flexibility as its key feature – that is its ability to adapt to 'changing social and economic conditions.'[71] Obviously, this creates a problem of internal instability in the content of norms. Himonga and Bosch suggest that 'Stewart's idea of "values" or "underlying principles of customary law" may be helpful in resolving this problem.'[72] According to them, 'if institutions that administer customary law … consistently take actions that correspond with the underlying principles or values of customary law in the field concerned, then the value is translated into action as a custom or a norm.'[73] However, while this may suffice to resolve the problem of rule instability, it gives the impression that social values mutate into customary law. This is only partly correct as values are, arguably, different from customs because they primarily serve as motivations for behaviour. An example is the value of care for the family, especially women and children, which Stewart seems to have misapplied by extrapolating to a norm. As she put it, 'if families, as a matter of practice, consistently administered estates in favour of women and children then the value was translated into action as a custom or a norm.'[74] It needs to be observed that administering estates in favour of women and children is merely a reaction to changes in the social structures in which rules of inheritance emerged. In the past, male heirs used deceased persons' estates to care for women and children because the agrarian, close-knit nature of society left them no choice. Today, socio-economic changes such as acculturation, urbanisation, and changing forms of property make it difficult for heirs to fulfil their duty of care. In Stewart's example, the value of care remains, arguably, unchanged, and merely prompts a change in (estate administration) behaviour in favour of women and children. Thus, it may not be wholly correct to say that the value translated into a custom just because estates

[70] Note 51: Himonga & Bosch; Bennett "Official vs 'living' customary law'; Bekker & Van Niekerk 'Broadening the divide between official and living customary law'; Bekker & Maithufi 'Dichotomy between 'official customary law' and 'non-official customary law.'"

[71] Himonga & Bosch at 319; D Cornell 'The significance of the living customary law for an understanding of law: does custom allow for a woman to be Hosi?' (2009) 2 *Constitutional Court Review* 401 & 403.

[72] Himonga & Bosch at 326.

[73] *Ibid* citing J Stewart 'Why I can't teach customary law' in (J Eekelaar & T Nhlapo (eds.) *The changing family: international perspectives on the family and family law* (1998) 226.

[74] J Stewart 'Why I can't teach customary law' (1997) 14 *Zimbabwe Law Review* 26.

are being administered in this way. Rather, it is more likely the case that the value induced families to adapt an ancient custom to socio-economic changes. The relationship between values and norms is discussed in chapter two. For now, the focus will turn to two key, inter-linked issues in the conceptualisation of living customary law.

The first is the unclear line between official and living customary law. A good example of this conceptual problem is the custom of male primogeniture. Going by the academic definitions given above, this custom, which is observed in many communities,[75] qualifies as official customary law.[76] However, current definitions of living customary law as 'what people do' and 'the practices and customs of the people in their day-to-day lives,'[77] demonstrate that male primogeniture falls under both living and official customary law. If, however, living customary law is defined in terms of people's adaptation of customs to socio-economic changes, then it would be possible for male primogeniture to fall outside the categories of official and living customary law. Rather, it may be classified as non-living customary law.[78]

The second issue is the unexplained flexibility of living customary law. What makes this law flexible? Arguably, a good conceptualisation of living customary law should transcend a semantic use of the word 'living.' If customary law is 'living' simply because people observe it, then one may argue that all (observed) laws are living. To avoid this unhelpful analogy, the definition of living customary law ought to explain its 'livingness.' If people's current practices are the same as their customs centuries ago, shouldn't such practices be regarded as ordinary or non-living customary law? Should the practices be termed living customary law?[79] The example of male primogeniture shows why a negative answer should be given to this question.

Let us assume that in keeping with the male primogeniture custom, the intestate estate of Obi, who was survived by only female children, is inherited by his younger brother, Ibe. Let us assume that Ibe, who has imbibed Western individualistic values, uses the estate exclusively for his own benefit, thereby violating the foundational value of care for Obi's dependants. Should this custom qualify as living customary law even though it is applied without its

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[75] This is evident in litigants' contestations such as in *Onyibor Anekwe & Another* v *Mrs Maria Nweke* (2014) All FWLR (Pt. 739) 1154, *Ukeje* v *Ukeje* (2014) 11 NWLR (Pt. 1418) 384-414. For the situation elsewhere, see *Bhe* v *Magistrate Khayelitsha*; *Shibi* v *Sithole*; *SAHRC* v *President RSA* 2005 (1) BCLR 1 (CC).

[76] Bhe case *ibid*.

[77] Himonga & Bosch at 319.

[78] *See* the explanations below and in 2.2.

[79] *See* 2.2. As Niekerk (note 51) 14 stated, [l]iving customary law … refers to the law that has adapted to the changing needs of society in line with its underlying fundamental postulates.'

accompanying value, and in conditions different from the agrarian settings in which it emerged? Conversely, let us assume that because of constitutional imperatives, women's enhanced status, or other reasons, this custom is ignored and the estate is shared equitably between Obi's female children or administered on their behalf by their mother. Does this action not constitute an adaptation of this custom to socio-economic changes, which is driven by the given reasons? Better still, supposing that Obi had four male children, and the eldest, Randy, who lives far away in the city, is known to be very selfish. Fearing that Randy would mismanage the estate, the extended family decide to share it equitably among all four children. Does this decision not constitute an adaptation of the male primogeniture custom? These illustrations indicate that adaptation to socio-economic changes is the element that makes a custom 'living.' To assert otherwise would be to deny customary law's flexibility. As shown below, this proposition resonates with some of the literature on this subject.

Himonga and Bosch asserted that the content flexibility of living customary law arises from 'interactive social, economic and legal forces.'[80] Citing Bentzon *et al*, they stated that '[i]t is increasingly evident that what might be observed by or recited to researchers as being new customary norms, are the product of the melding of local customs and practices, religious norms and social and economic imperatives.'[81] This quote suggests that living customary law should be defined as the law that emerges from people's adaptation of customs to legal, religious, political, and economic changes, hereafter referred to as socio-economic changes. As proposed here, 'people' mean, primarily, individuals subject to customary law, and secondarily, individuals who observe customary law alongside other normative orders such as state law. As demonstrated in this study, these latter individuals encompass state-appointed customary court judges, who are usually from the same normative community (social field) as litigants. This conceptual framework implies that living customary law is influenced by state law when they interact in a semi-autonomous social field. Importantly, this framework explains the thorny issue of living customary law's emergence. Moore's processual theory of law again offers a basis for understanding this emergence.

[80] *Ibid*.

[81] AW Bentzon *et al Pursuing grounded theory in law: South-North experiences in developing women's law* (1998) 45.

1.2.5 Explaining the emergence of living customary law

Moore's theory posits that a scrutiny of semi-autonomous social fields would reveal an important element: the processes which determine the effectiveness of internally generated rules strongly affect their relationship with state law.[82] This is significant for the emergence of living customary law. Although social fields can generate rules independently, they are not insulated. In other words, they are not immune to the rules or norms of 'other forces' from the outside world.[83] This implies that state law, religion, and other values occasioned by globalisation could end up being adopted within a social field. Indeed, in most postcolonial societies such as Nigeria, many individuals subject to customary law are also subject to state law. They have demonstrated this in remarkable forum shopping.[84] The dual life of individuals who observe customary law implies that there should be no insularity in the definition of living customary law.[85] It also highlights the role of socio-economic changes in the normative behaviour of individuals who observe customary law in today's world. When individuals agree, negotiate, or reject instructions to pay tax, register lands, limit amounts payable as bride wealth,[86] conduct a census that includes women and children, or give up sacred rivers and forests to the government, normative adaptations take place.[87] Similarly, when the state explicitly or tacitly approves curfews imposed by communities to curb crime, or abolishes an animal-inclusive tax policy because it offends customary law, adaptations take place. The extent of these adaptations should not be underestimated. Moore's study in Tanzania shows that even small scale adaptations can cumulatively demolish state policy.[88] In effect, the

[82] SF Moore *Law as process* (note 49) at 57.

[83] *Ibid* at 55 & 78.

[84] ES Nwauche 'Legal pluralism and access to land in Nigeria' in H Mostert & T Bennett (eds.) *Pluralism and development: studies in access to property in Africa* (2012) 59-60, 70.

[85] J Gugler 'Life in a dual system: Eastern Nigerians in town, 1961' (1971) 11(43) *Cahiers d'etudes africaines* 400-421 at 401 [arguing that 'throughout Sub-Saharan Africa, urban dwellers regularly visit their rural homes where they make gifts, find wives, maintain land rights, build houses, intend to retire eventually, want to be buried, receive gifts in return, offer hospitality to visitors from home, and help new arrivals in town'].

[86] The Limitation of Dowry Law, Eastern Region Law No. 23 of 1956.

[87] Some of these examples are taken from F von Benda-Beckmann 'Scape-goat and magic charm: law in development theory and practice' (1989) 28 *Journal of Legal Pluralism & Unofficial Law* 133.

[88] SF Moore 'Changing African land tenure: reflections on the incapacities of the state' (1998) 10(2) *European Journal of Development Research* 33-49.

assimilative interaction of norms in a social field leads to adaptations on the part of customary law and state law, of which judges are the arbiters.[89]

In the above light, judicial decisions may influence normative behaviour, especially if the concerned judge belongs to the same social field as litigants.[90] For example, when a judge imports an alien principle because it complements customary law,[91] or condemns a custom on the ground that it contravenes equality, human dignity, or modern notions of accepted behaviour,[92] individuals' normative behaviours are affected. In sum, when individuals adapt customs to legal, religious, political, and economic forces, the emergent normative behaviours constitute living customary law. An obvious problem is determining when this law emerges. In other words, how do we distinguish between customs that are mere social habits and customs that have the force of law?

Hund's analysis of Hart's notion of social rules, especially his distinction between social habits and social rules, offers suggestions to this question.[93] Hund begins by pointing out the obvious: the word 'custom' is used by lawyers and non-lawyers to refer to social habits – that is 'regular, habitual or convergent behaviour.'[94] A universal African example is the hygienic custom of washing one's hands before eating. Peculiar examples from Nigeria would be the Yoruba custom of showing respect to elders by genuflecting, and the Igbo custom that forbids women from breaking kola nut.[95] What is not so obvious is when judges, or even lawyers, use custom as law or as a source of customary law. When used in this sense, they have in mind 'repetitive behaviour' which constitutes a rule that may not be deviated from, and thus

[89] In South Africa, the statutory incorporation of the common law into customary law has been referred to as 'mixed customary law.' *See* CN Himonga & T Nhlapo (eds.) *African customary law in South Africa: post-Apartheid and living law perspectives* (2014) 35-36.

[90] Himonga & Bosch at 323. *See* also CN Himonga 'Property disputes in law and practice: dissolution of marriage in Zambia' in A Armstrong & W Ncube (eds.) *Women and law in Southern Africa* (1987) 61-66 [showing local courts flexible attitude to customary through divorce awards that recognise socio-economic changes].

[91] *Okwueze* v *Okwueze* (1989) 3 NWLR 321 at 336 per Uwais, JSC

[92] *Mojekwu* v *Iwuchukwu* (2004) 11 NWLR (Pt. 883) 196 per Niki Tobi JCA.

[93] This does not mean an endorsement of Hart's views of customary law, especially his attempt to confine it to a 'pre-legal form of government.' *See* Hart *Concept of law* at 116.

[94] J Hund 'Customary law is what people say it is – HLA Hart's contribution to legal anthropology' (1998) 84 (3) *ARSP* ((Archiv für Rechts-und Sozialphilosophie) 420-429 at 423.

[95] Some may argue that women's forbearance from breaking kola nut in Igboland is customary law, along with the custom that women should not see masquerades. *See* VC Uchendu 'Kola hospitality' and Igbo lineage structure' (1964) *Man* 47-50.

attracts 'pressure for conformity.'[96] An example of this would be refraining from killing a python, for example among the Idemili people of Anambra in South-East Nigeria. Hund proceeds to analyse Hart's definition of a social rule as having 'internal' and 'external' aspects. The external aspect is phenomena that are easily observable. The internal aspect is not easily observable. However, it is not mere emotion. Rather, it refers to standards that explain the behaviour of individuals. Put differently, it denotes conscious attitudes towards acceptable conduct, which examine human behaviour to determine whether a sense of obligation is involved. As Hart put it, it is 'a critical reflective attitude to certain patterns of behaviour as a common standard.'[97] In effect, deviation from a social habit or custom need not attract criticism unless a sense of obligation is involved. It is this sense of obligation that gives customs a legal character. As Fuller stated, an obligation is not incurred in human actions 'simply because a repetitive pattern can be discerned .... Customary law arises out of repetitive actions when and only when such actions are motivated by a sense of obligation.'[98] In sum, where threatened deviations meet with pressure for conformity and actual deviations are seen as violations of acceptable conduct, the custom in question should be regarded as law. Hund compellingly argues that 'it is the existence of this critical reflective attitude which distinguishes custom simpliciter from customary law.'[99]

In the above sense, the internal aspects of customs serve as standards for the conduct of social life. Importantly, they also serve as the basis of contestations or condemnations of conduct, thus giving members of a community reasons for behaving in one way rather than another.[100] If only the external aspects of customs are observed by scholars or applied by judges, the picture would be incomplete because it would neglect the foundational values that inform the customs.[101] These values, which form the core of the internal aspects of customs, explain the ways in which members of a social group view their own behaviour. Their critical

[96] CN Himonga & T Nhlapo (eds.) *African customary law in South Africa* (note 89) 28; J Hund (note 94) 426; Himonga & Bosch at 319.

[97] HLA Hart *The concept of law* (1994) 54.

[98] L Fuller 'Human interaction and the law' (1969) 14(1) *American Journal of Jurisprudence* 16.

[99] *Ibid*.

[100] J Hund (note 94) 424.

[101] Stewart and others referred to these values as underlying general principles. *See* J Stewart (note 73) 18-29; TR Nhlapo 'The African family and women's rights: friends or foes' (1991) *Acta Juridica* 138, 141, 145-6; Dengu-Zvobgo *et al Inheritance in Zimbabwe: law, customs and practices* (1994) 252, 254.

reflective attitude to customs or social practices enables them to determine when a practice has outlived its usefulness or when it needs to be modified to suit socio-economic changes. Thus, judges need to approach customary law from both its external and internal aspects. If they focus only on the external aspects, they could miss the basis of social life, as well as explanations of the way members of a group view their own behaviour. In other words, they could end up with rule-based interpretations of customs. On the other hand, a holistic approach involving the internal and external aspects of customs will enable them to interpret customs in ways that consider their foundational values and adaptations to socio-economic changes.

In summary, this study argues that living customary law emerges in two steps: First, a practice or normative behaviour arises in response to socio-economic changes and the foundational value(s) of existing custom(s). Second, a sense of obligation is attached to the emergent practice, which gives it the character of 'law.' This two-step emergence makes it conceptually reasonable to define living customary law as the law that emerges from people's adaptation of customs to socio-economic changes. Perceiving it through an adaptation lens explains its flexibility, draws a clearer line between it and official customary law, and removes the insularity that has troubled its conceptualisation.[102] This context informs the following brief conceptualisation of customary law in Nigeria's legal framework.

1.3 Customary law in Nigeria's legal framework

The status of customary law in Nigeria's legal framework is problematic in two ways. One, the legal framework is not designed in a manner that aids judges to recognise adaptations in matrimonial property relations. The customary laws of succession, marriage, and divorce are neither subjected to the Bill of Rights nor statutorily regulated;[103] law reform is practically non-existent, and the Constitution pays no attention to 'the proper place of customary law' in the face of social changes.[104] The result is a problematic coexistence of customary law with state law, which manifests in 'a complex and confusing legal regime under which women generally

[102] For criticism of this insularity, see A Claassens 'Contested power and apartheid tribal boundaries: the implications of "living customary law" for indigenous accountability mechanisms' (2011) *Acta Juridica* 176-177.

[103] What could be termed an exception is the Limitation of Dowry Law, Eastern Region Law No. 23 of 1956, which limits amounts payable as bridewealth.

[104] U Ewelukwa 'Post-colonialism, gender, customary injustice: widows in African societies' (2002) 24(2) *Human Rights Quarterly* 446.

are denied adequate legal protection.'[105] For example, a divorcing wife may only claim matrimonial property with evidence showing that it was purchased in her maiden name. Similarly, she cannot claim maintenance rights,[106] even during judicial divorce.[107] Her non-entitlement to maintenance is traceable to social settings in which she usually returned to her father's house for sustenance. Whereas she could return to her family in the pre-colonial era, the diminishing concept of extended families makes this return difficult today.[108] As Ewelukwa put it, 'some customary laws can no longer be justified … (because most) personal laws in pre-colonial Africa flowed from the then existing kinship and family structure, in which the extended family had primacy.'[109] The implication is that women who partook in matrimonial property acquisition are technically left with little financial protection after divorce.[110] For example, the Supreme Court has held that in divorce proceedings, women cannot lead evidence of jointly owned properties by showing acts of ownership such as paintings and improvements.[111] In fact, the old judicial opinion was that women are inheritable chattel.[112]

Furthermore, there is undue deference to customary law in legislation relating to property.[113] This situation results in frequent application of the male primogeniture custom, with attendant hardship to women.[114] For instance, most succession laws in Nigeria are

[105] *Ibid*.

[106] AC Osondu *Modern Nigerian family law and practice* (2012) 100.

[107] *See* chapters four, five and six.

[108] CK Ajaero & PC Onokala 'The effects of rural-urban migration on rural communities of Southeastern Nigeria' (2013) *International Journal of Population Research*.

[109] Ewelukwa (note 104) 430-431.

[110] Chapters five, six and seven discuss judges' ability to justify an award of maintenance to a divorced woman. *See* also E Chianu 'The horse and ass yoked: legal principles to aid the weak in a world of unequals' (Sept. 2007) *Inaugural Lecture* University of Benin 153-154.

[111] *Rabiu* v *Absi* (1996) 7 NWLR (Pt. 462) 505 S.C. (69-70). The Court reasoned that such improvements do not divest the property of its original character of family ownership.

[112] *Aileru* v *Anibi* (1952) 20 NLR 45; *Akinnubi* v *Akinnubi* (1997) 2 NWLR (Pt. 486) 144; *Folami* v *Cole* (1990) 2 NWLR (Pt. 133) 445; *Amusa* v *Olawumi* (2002) 12 NWLR (Pt. 780) 30.

[113] *See*, for example, Section 3(1) of the Wills Law (1958) of Western Nigeria, which restricts testators' rights to dispose of assets governed by customary law.

[114] JN Ezeilo 'Law and practices relating to women's inheritance rights in Nigeria: an overview' (1998-9) 7 *Nigerian Juridical Review* 139; *Arase* v *Arase* (1981) NSCC 101; *Igbinoba* v *Igbinoba* (1995) 1 NWLR (Pt 317) 375 at 381; *Idehen* v *Idehen* (1991) 6 NWLR (Pt198) 422; *Oke* v *Oke* (1974) 3 SC 1.

modelled on section 3 (1) of the Wills Law.[115] It excludes statutory law from the distribution, inheritance or succession to land regulated by customary law. Similarly, section 69 of the Matrimonial Causes Act (MCA) defines marriage to 'include a purported marriage that is void, but does not include one entered into according to Muslim rites or other customary law.'[116] This means that women married in accordance with customary law cannot benefit from the MCA, which is the only law that provides for compensation or reliefs in divorce cases.[117] This exclusion of customary law marriages from statutory protection does not reflect the fact that it is the most common form of marriage in Nigeria, nor that most Nigerians combine customary law marriage with statutory marriage.[118] It also does not take into account difficulties faced by women in the light of social changes. Generally, women's property rights are restricted because of the need to preserve clan perpetuation, which is deemed lost when a woman marries.[119] As recently as April 2013, the Court of Appeal held that 'under the Abagana native law and custom,' women have no right of inheritance in their late father's compound or to partake in the sharing of their father's properties.[120] Even if the legal framework is supportive of women's matrimonial property rights, relying on it is a challenge because of a poor culture of law reform. Statutory laws relating to marital property offer little protection to women because they are applied in Nigeria without the corresponding legislative reforms that have occurred in England since their importation.[121] The reforms in England sought to address the hardship of the doctrine of marital unity, which subsumes the identity of the woman into that of her husband.[122]

The second problem with customary law's status is lack of coherence in how judges recognise litigants' adaptation of customs to changes in the social structures in which customs

[115] Cap. 133, Laws of Western Nigeria 1958.

[116] The Matrimonial Causes Act, Cap 220, Laws of the Federation of Nigeria 1990; M7, LFN 2004.

[117] *Enweozor* v *Enweozor* (2012) LPELR-8544(CA).

[118] IO Agbede 'Recognition of double marriage in Nigerian law' (1968) 17(3) *International and Comparative Law Quarterly* 735-743.

[119] UB Emeasoba 'Land ownership among the Igbos of South East Nigeria: a case for women land inheritance' (2012) 3(1) *Journal of Environmental Management and Safety* 97-117 at 100.

[120] *Eucharia Nwinyi (Nee Okonkwo) & 6 others* v *Anthony Ikechukwu Okonkwo* (unreported) Appeal No. CA/E/189/2008, delivered 19 April 2013.

[121] Section 45(1) of the Interpretation Act, Cap 89, Laws of the Federation of Nigeria and Lagos 1958.

[122] Sir William Blackstone *Commentaries on the laws of England in four books* (Thomas Cooley ed. 1899) 387.

emerged. Judicial attitude is ambivalent, as evident in the *Mojekwu* case.[123] Here, litigants invoked two systems of inheritance in Nnewi, a town close to Onitsha in South-East Nigeria. The first is a *lex situs* rule called Kola Tenancy, under which both male and female children are entitled to inherit. The other is the *oli-ekpe*, a male primogeniture rule of succession. The Court of Appeal found in favour of the Kola Tenancy law. It declared that the *oli-ekpe* custom is repugnant to natural justice, although the parties did not request it to do so.[124] In criticising the Court of Appeal's invalidation of the *oli-ekpe* custom, the Supreme Court stated:[125]

> The [lower court] was no doubt concerned about the perceived discrimination directed against women by the said Nnewi 'oli-ekpe' custom and that is quite understandable. But the language used made the pronouncement so general and far-reaching that it seems … capable of causing strong feelings against all customs which fail to recognise a role for women, for instance, the custom and tradition of some communities which do not permit women to be natural rulers or family heads. The import is that those communities stand to be condemned without a hearing for such fundamental custom and tradition they practise by the system by which they run their native communities.

A cursory reading suggests that the Supreme Court was concerned that the lower court invalidated the *oli-ekpe* custom based on criteria that ignored the practices of Onitsha people. It went on to state that it would hesitate to stir up controversy by ruling on the constitutional validity of certain customs without examining their foundations.[126] However, it failed to examine these foundations, even in subsequent cases on the same subject. Had it done so in the *Mojekwu* case, it might have found, as trial testimony showed, that urbanisation is making people to prefer the Kola Tenancy law.[127]

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[123] *Mojekwu* v *Mojekwu* (1997) 7 NWLR (Pt. 512) 283. Following the substitution of the deceased Respondent on appeal to the Supreme Court, it became *Mojekwu* v *Iwuchukwu* (2004) 11 NWLR (Pt. 883) 196.

[124] *Ibid* at 304-305, per Tobi JCA.

[125] *Mojekwu* v *Iwuchukwu supra* note 123 at 217, per Uwaifo, JSC.

[126] *Ibid*.

[127] Testimony of PW 6 on 7 May 1986. The increasing reliance on the Kola Tenancy was tacitly acknowledged by the Supreme Court when it cited its earlier decision in *Udensi* v *Mogbo* (1976) 10 NSCC 375 at 380.

1.4 Significance of study

Today, most scholars agree that proper recognition of customary law is important for policy and sustainable development purposes.[128] Courts play an important role in this recognition. Judicial recognition of adaptations in customary law relationships is crucial in South-East Nigeria where customs are changing to accommodate the demands of urbanisation, labour migration, and independent income. For example, adaptations are occurring in matrimonial property division and custody of children.[129] However, there is no apparent clarity in how judges recognise these adaptations. This lack of clarity and its potentially negative effect on groups such as females and younger males informs the need for this study.

1.5 Objectives of study

This study aims to:

a) Examine the extent to which Nigeria's legal framework enables judges to recognise people's adaptation of customs to socio-economic changes with emphasis on matrimonial property; and,
b) Examine the extent to which judges recognise the adaptation of customs to socio-economic changes in the context of women's matrimonial property rights.
c) Examine the challenges to judicial recognition of adaptations to socio-economic changes in the context of women's matrimonial property rights in South-East Nigeria.

To achieve these objectives, the study uses women's matrimonial property rights in South-East Nigeria as a unit of analysis.[130] This unit of analysis is useful because of women's marginalised status. The subjects of analysis are primarily widows' inheritance rights and women's right to property and financial awards after divorce. These rights are affected by socio-economic changes, whose role in moulding and transforming gender relations in Nigeria's domestic and public sphere is unclear.[131] These changes, which are mainly products of Nigeria's colonial

[128] P Orebech *et al The role of customary law in sustainable development* (2005).

[129] *See* chapters four, six, and seven.

[130] Generally, property rights are the rights to acquire, enjoy and dispose of tangible and intangible assets such as land, housing, money, furniture, livestock, crops and shares. Under customary law, these rights are restricted.

[131] DJ Smith "Man no be wood': gender and extramarital sex in contemporary southeastern Nigeria' (2002) 19(2) *Ahfad Journal: Women and Change* 4; Ewelukwa (note 104) 427; O Nnaemeka & CJ Korieh *Shaping our struggles: Nigerian women in history, culture and social change* (2010).

experience, include religion, urbanisation, rural-urban migration, women's independent income, rising formal education, Western acculturation, and decreasing extended families.[132]

The study argues that because of the manner living customary law emerges, its judicial recognition is inhibited by a rule-based approach to adjudication. Judgments which are deemed relevant to the adaptation of customs to socio-economic changes are typically financial awards for maintenance or compensation to women after divorce, awards of matrimonial property to women, and awards of custody of children over weaning age to women.[133] These judgements should take into consideration several factors. These are sensitivity to women's contribution to matrimonial property, rural-urban migration, unemployment, and human dignity. The extent to which such judgments reflect living customary law depends on the weight that judges place on litigants' evidence of adaptations.

1.6 Scope of study

When necessary, the study draws from the legal frameworks of Ghana and South Africa to illustrate customary law's status in Nigeria. Ghana is Nigeria's neighbour, shares similar political history, and recognises customary law in its constitution. South Africa is a post-crisis state like Nigeria and constitutionally mandates its courts to apply customary law.[134]

It is in the context of the above objectives, argument, and scope that the research question is formulated.

1.7 Research question

This study investigated one broad question:

In what ways do judges acknowledge living customary law in the context of women's matrimonial property rights in South-East Nigeria?

In line with the objectives, three sub-questions were explored, namely:

a) To what extent does Nigeria's legal framework enable judges to acknowledge people's adaptation of customs to socio-economic changes?

[132] *Ibid*. *See* also Ajaero & Onokala (note 108). This is especially relevant to South-East Nigeria, which is very 'receptive' to change. *See* S Ottenberg 'Ibo receptivity to change' in (Bascom & Herskovits eds.) *Continuity and change in African cultures* (1959) 130-143.

[133] *See* chapters four, six and seven for examples of these adaptations.

[134] Section 211(3) of the Constitution of the Republic of South Africa Act 108 of 1996.

b) What mechanisms do judges use to acknowledge people's adaptation of customs to socio-economic changes?

c) What are the challenges to judicial recognition of adaptations to socio-economic changes in the context of women's matrimonial property rights in South-East Nigeria?

To appreciate the methodology through which these questions are answered, the next chapter presents the literature on living customary law and identifies the theories surrounding its study. First, an outline of this methodology and the structure of the study is provided below.

1.8 Outline of methodology

This dissertation used a socio-legal approach to understand adaptations in matrimonial property rights and judicial attitude to these adaptations.[135] This qualitative approach comprises of analysis of structured and unstructured data involving a triangulation of literature review, content analysis of case law, and surveys.[136] Triangulation offers the advantage of different research approaches and enhanced data validation.[137]

Excluding pilot studies, 86 individuals were interviewed between June 2014 and January 2015 using focus group discussions and one-on-one interviews. Structured interviews were conducted with judges and some key informants, while unstructured interviews were held with litigants, divorcees, and widows. These interviews, sample choices, and the general research design are explained in chapter two after the structure of study below.[138]

1.9 Structure of the dissertation

Following this introductory section, chapter two expands on the theoretical framework of the study using a detailed review of the literature on customary law and legal pluralism. It also

[135] Socio-legal research examines law in the context of broad social and political issues. *See*, for example, HLA Hart's *Concept of law* (1961).

[136] AM Ambert *et al* 'Understanding and evaluating qualitative research' (1995) 57 (4) *Journal of Marriage and the Family* 879 at 880-1.

[137] DJ Todd 'Mixing qualitative and quantitative methods: triangulation in action' (1979) 24 (4) *Administrative Science Quarterly* (Qualitative Methodology) 602-611.

[138] The decision to discuss methodology in chapter two is in order to link it with literature review and also to avoid an unwieldly introductory chapter.

explains the methods used to investigate the research questions, notable research choices, the limitations of the research methods, and key challenges encountered.

Chapter three provides a historical overview of customary law in South-East Nigeria, with emphasis on its distortion by colonial rule. It argues that colonial rule overturned the non-hierarchical normative framework that surrounded matrimonial property rights and created an official customary law that denies women matrimonial property rights.

Chapter four explains matrimonial property relations in South-East Nigeria using the experiences of divorcees, and the opinions of parents, priests, traditional leaders, NGOs, and social welfare officials. Its aims are two-fold: (a) to provide a context for understanding judicial approach to matrimonial property rights in South-East Nigeria; and, (b) to show how litigants, widows, divorcees, traditional authorities, and social welfare officials are adapting customary law to socio-economic changes.

Chapter five's socio-legal analysis assesses the extent to which judges may rely on Nigeria's legal framework to recognise women's matrimonial property rights. Informed by the semi-autonomous social field theory, it advances the study's argument that living customary law also emerges from the interaction of state law with customary law. It examines the intersection of matrimonial property rights under customary law with the constitutional and statutory regime of property rights, arguing that Nigeria's legal framework denies judges a firm platform for acknowledging adaptations in matrimonial property relations.

Chapter six uses judges' perceptions of matrimonial property rights in interviews to assess their recognition of living customary law. It examines their awareness of customary law's processual character and their reliance on rule-based adjudication. It makes this examination using questions on widows' inheritance rights, division of property after divorce, maintenance or compensation, and women's ability to dispose of matrimonial property.

Chapter seven uses content analysis of divorce judgments to assesses judges' approach to matrimonial property rights in customary courts. It tests the study's argument that judicial recognition of living customary law is inhibited by a rule-based approach to adjudication.

Chapter eight summarises the dissertation's findings and reaches a conclusion on judicial recognition of living customary law. It makes relevant judicial and legislative recommendations, and points the way for further research.

Chapter two: Theories and methods – the why and the how

2.0 Introduction

This study's focus on judicial recognition of living customary law owes much to two factors. The first is the loose way Nigeria's legal system situates customary law. As explained in the preceding chapter, the undefined status of customary law contributes to a 'complex and confusing legal regime' that gives women inadequate legal protection.[1] The second factor is scholarly fascination with living customary law despite the arguably weak manner it is conceptualised. For example, the Benda-Beckmans observed that 'living customary law' requires 'more conceptual sophistication.'[2] This is in order for it 'to be able to identify the conditions under which the living law of an association or community might be receptive' enough to changes as 'to serve as a core concept for a social theory of the social working of law under conditions of legal pluralism.'[3] This identification and explanation of change-receptivity is generally what an adaptation theoretical framework offers. To shed further light on this framework, this chapter reviews the literature on customary law, legal pluralism, legal revisionism, and to a lesser extent, legal feminism. Because these concepts overlap, they are reviewed in no specific order, using a partly historical and partly conceptual approach. Thereafter, the adaptation framework is situated within the literature and the methods used to investigate the research question are explained.

2.1 Mapping the concept of living customary law

Although the academic usage of 'living law' is credited to Eugen Ehrlich,[4] Roscoe Pound is the first notable scholar to hint at it when he wrote of law in the books and law in action.[5] Ehrlich used the term 'lebendes Recht' to describe the norms of the seven tribes of the

[1] U Ewelukwa 'Post-colonialism, gender, customary injustice: widows in African societies' (2002) 24(2) *Human Rights Quarterly* 446.

[2] K Benda-Beckmann & F Benda-Beckmann "Living law' as a political and analytical concept' in K Papendorf *et al* (eds.) *Eugen Ehrlich's sociology of law* (2014) 69-91 at 8787.

[3] *Ibid*.

[4] E Ehrlich *Fundamental principles of the sociology of law* (1936).

[5] R Pound 'Law in books and law in action' (1910) 12 *American Law Review* 12-36. On Pound and Ehrlich's disagreement over the parameters of living law, see S Namiga 'Pounding on Ehrlich. Again?' in M Hertogh (ed.) *Living law: reconsidering Eugen Ehrlich* (2008) 157-176.

Bukowina, which differed from the central authority of the Austrian monarchy in Vienna. In Africa, there is an early recorded reference to living law. Schapera quoted the warning of Colonel C.F. Rey, Resident Commissioner of the Bechuanaland Protectorate in the early 20th century that a codification of Tswana law would stultify its further development and make it to fall out of tune with the 'living law.'[6] Although one may dispute the origin of the term 'living law,' what is undisputed is that it finds its basis in how people live their lives. As Hinz noted, it originated from the realisation by social scientists that the 'customary law recorded in textbooks, codes, or court cases, was not necessarily the customary law practiced by the people.'[7] This realisation sowed the seeds of legal revisionism regarding customary law.

Led by Bohannan and Gluckman, the relevance of employing western standards to measure indigenous systems began to dominate legal anthropological debate in the 1960s and 1970s.[8] From the 1980s, customary law studies increasingly adopted ethnographic, comparative and historical methods. Snyder was prominent in revealing its adaptation to the changes brought by colonial rule.[9] In time, academic attention turned to how lawyers, legislators, and judges approach customary law.[10] From this attention emerged the Benda-Beckmanns, Chanock, Fitzpatrick, Mann, Merry, Moore, Ranger, Roberts, Snyder, and others,[11] who showed how colonial and postcolonial interventions such as codifications and case law created a customary law different in form, content, and effect from that lived by the

[6] I Schapera *A handbook of Tswana law and custom* (1938) Introduction.

[7] MO Hinz 'Bhe v the Magistrate of Khayelitsha, or: African customary law before the Constitution' in (Hinz & Patemann eds.) *The shade of new leaves: governance in traditional authority: a Southern African perspective* (2006) 274.

[8] P Bohannan *Justice and judgement among the Tiv* (1957); M Gluckman *The judicial process among the Barotse of Northern Rhodesia* (1955).

[9] FG Snyder 'Colonialism and legal form: the creation of "customary law" in Senegal' (1981) 19 *Journal of Legal Pluralism*.

[10] GR Woodman 'How state courts create customary law in Ghana and Nigeria' in Morse & Woodman (eds.) *Indigenous Law and the State* (1988); A Allot & GR Woodman *People's law and state law: the Bellagio Papers* (1985); SE Merry 'Anthropology, law and transnational processes' (1992) 21 *Annual review of anthropology* 360.

[11] P Fitzpatrick 'Traditionalism and traditional law' (1984) 28 *Journal of African Law* (1 & 2) 21-22; S Moore *Social facts and fabrications: 'customary' law on Kilimanjaro, 1880-1980* (1986); F von Benda-Beckmann 'Law out of context: a comment on the creation of traditional law discussion' (1984) 28(1-2) *Journal of African Law* 29; T Ranger 'The invention of tradition in colonial Africa' in E Hobsbaum and T Ranger (eds.) *The invention of tradition* (1983); AJGM Sanders 'How customary is African customary law?' (1987) 20(3) *Comparative and International Law Journal of Southern Africa* 405-410; K Mann & R Roberts (eds.) *Law in colonial Africa* (1991); Merry *ibid* at 364; FG Snyder 'Anthropology, dispute processes and law: a critical introduction' (1981) 8(2) *British Journal of Law & Society* 141-180, and M Chanock *The making of South African legal culture, 1902-1936: fear, favour and prejudice* (2001) 243-72.

people. This was the origins of official customary law. As explained in chapter one, Sanders identified two other types of customary law – academic customary law and autonomic customary law, which arguably became known as living customary law.[12]

Following studies by the Women and Law in Southern Africa Project, awareness increased regarding the possible differences between the customs lived by people and the customs recognised by the state.[13] By the 1990s, Tanzanian courts began stressing that customary law is a 'living law' which is not 'immutable.'[14] They emphasised its flexible character, which British judges in Nigerian courts had acknowledged long ago.[15] As field studies increasingly stressed the divergence between official perceptions of customary law and the lived realities of people, living customary law became a compelling academic concept.[16]

2.1.1 What the scholars say

A key aspect of this concept is the problems raised by legal pluralism, specifically the interaction of imported (colonial) laws with indigenous norms in postcolonial societies. As previously explained, this problematic interaction arose from the manner colonial officials approached customary law. Allott, Woodman, Bennett, Himonga, Chanock, Santos, Moore, Griffiths, Vanderlinden, Tamanaha, the Benda-Beckmanns, Fitzpatrick, and many others,[17]

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[12] Sanders *ibid* at 406. Allot & Woodman (note 10) 24 used 'autonomic customary law' before Sanders.

[13] The project commenced in 1988. For its initial findings, see J Stewart & A Armstrong (eds.) *The legal situation of women in Southern Africa* (1990).

[14] See *Maagwi Kimito* v *Gibeno Werema*, cited in BA Rwezaura 'Gender justice and children's rights: a banner for family law reform in Tanzania' in (A Bainham ed.) *International Survey of Family Law* (1997) 413 & 443.

[15] *Lewis* v *Bankole* (1908) 1 NLR 81; *Amodu Tijani* v *The Secretary, Southern Nigeria* (1921) 2 AC 399 (PC) 404; *Eshugbayi Eleko* v *Government of Nigeria* (1931) A.C. 622 at 673; *Barimah Balogun and Scottish Nigerian Mortgage and Trust Co Ltd* v *Saka Chief Oshodi* (1931) 10 NLR 36 at 51 per Webber J. *See* also *Owonyin* v *Omotosho* (1961) 1 ANLR 304 at 309.

[16] *See* note 17 and 18 below for this interest, though some scholars do not use the term 'living customary law.'

[17] AN Allot 'What is to be done with African customary law: the experience of problems and reforms in Anglophone Africa from 1950' (1984) 28 *Journal of African Law* 67; TW Bennett *The application of customary law in Southern Africa - the conflict of personal laws* (1985) chapter II; CN Himonga *Family and succession laws in Zambia: Developments since independence* (1995) 16-32; CN Himonga 'The future of living customary law in African legal systems in the twenty-first century and beyond, with special reference to South Africa' in J Fenrich *et al The future of customary law* (2011); B De Sousa Santos 'Law: a map of misreading: towards a postmodern conception of law' (1987) 14 *Journal of Law and Society* 279-302; M Koesnoe 'From folk law towards jurists' law: a critical review of the state courts' practice concerning adat law in Indonesia' in Allot & Woodman *People's law and state law: the Bellagio papers* (1985); M Chanock *Law, custom and social order: the colonial experience in Malawi and Zambia* (1998); J Vanderlinden 'Return to legal pluralism: twenty years later' (1989) 28 *Journal of Legal Pluralism* 149-157; K von Benda-Beckmann *The broken stairways to consensus: village justice and state courts in Minangkabau* (1984); GR Woodman 'How state courts create customary law' (note 10); BZ Tamanaha *Realistic socio-legal theory* (1997) 102; F von Benda-Beckmann 'Law out of context' (note 11) 28-33; Fitzpatrick

highlighted the differences between official representation of customs by judges, legislators, and policy makers, and its actual application by indigenous communities. Bennett, Himonga, Nhlapo, Bekker and others,[18] emphasised living customary in the work of the Constitutional Court of South Africa and the South African Law Reform Commission.

However, only Himonga and Bosch offered a description of living customary law and situated it within the perspectives of legal pluralism and the sociology of law.[19] Variously defined as the rules that evolve 'from the way of life and natural wants of people' and the 'norms which actors in a social situation abstract from practice and … invest with binding authority,'[20] the literature tends to be parallel – that is what communities do among themselves. As a recent, edited book put it, 'scholars are agreed that living customary law consists of the actual practices or customs of the indigenous community whose customary law is under consideration.'[21] In what follows, the literature on the subject is examined to show why living customary law goes beyond its parallel conceptualisation. Thereafter, matrimonial property rights in Nigeria are situated within the literature and linked to the methodology.

2.1.2 Going beyond parallelism

As suggested in chapter one, the meaning of living customary law could become clearer if it is approached from the perspective of norms that emerge from the adaptation of customs to socio-economic changes. An adequate conceptualisation of living customary law needs to emphasise

'Traditionalism and traditional law' (note 11) 20-27; J Ubink *In the land of the chiefs: customary law, land conflicts and the role of the state in peri-urban Ghana* (2008) 27.

[18] Bennett *ibid* at cap II; Himonga & Bosch 'The application of African customary law under the Constitution of South Africa: problems solved or just beginning?' (2000) 117 *SALJ* 319; CN Himonga *Family and succession laws ibid* at 16-32; T Nhlapo 'African customary law in the interim Constitution' in S Liebenberg (ed) *The Constitution of South Africa from a gender perspective* (1995); M Chanock 'Neither customary nor legal: African customary law in an era of family law reform' (1989) 3 *International Journal of Law and Family*; A Costa 'The myth of customary law' (1998) 14 *South African Journal on Human Rights*; J Bekker and GJ Van Niekerk 'Broadening the divide between official and living customary law' (2010) 73 *Journal of Contemporary Roman-Dutch Law* 679; JC Bekker & IP Maithufi 'The dichotomy between 'official customary law' and 'non-official customary law'" (1992) 17(1) *Journal for Juridical Science* 47-60; GJV Niekerk 'Reflections on the interplay of African customary law and state law in South Africa (2012) 3 *Studia Universitatis Babes Bolyai-Iurisprudentia* 5-20.

[19] Himonga & Bosch *ibid*.

[20] JC Bekker & J Coertze *Seymour's customary law in Southern Africa* (1989) 11; D Kleyn & F Viljoen *Beginner's guide for law students* (1998) 96; I Hamnett *Chieftainship and legitimacy: an anthropological study of executive law in Lesotho* (1975) 10; Himonga & Bosch at 319.

[21] CN Himonga & T Nhlapo (eds.) *African customary law in South Africa: post-Apartheid and living law perspectives* (2014) 27.

the forces that drive the application of customs in modern conditions. The common denominator in the application of customary law is its encounter with external or foreign influences, of which state law, religion, urbanisation, and development agents are key elements. A key aspect of this encounter is the interaction of customary law with state law, an interaction that manifests in the phenomenon of legal pluralism.[22]

Generally, legal pluralism emerged from the idea that the state has no monopoly over normative behaviour, since forms of non-state regulation exist outside state law.[23] As pointed out in chapter one, it is a very problematic concept in postcolonial states. Even the term 'legal pluralism' does not escape controversy. The key objection to its usage is the contested meaning of law.[24] In a bid to avoid the difficulties of defining law as a social theory, arguments have been made for a shift from legal pluralism to 'normative pluralism, regulatory pluralism,' and even 'pluralism in social control.'[25] As Tamanaha put it, 'to view law in this [legal pluralist] manner is confusing, counter-intuitive, and hinders a more acute analysis of the many different forms of social regulation involved.'[26] For the same reasons given in chapter one for using the term 'customary law,' the term 'legal pluralism' is also retained. In retaining it, however, two realities should be borne in mind.

One, state law is not as powerful as some legal scholars often assume, given that some social groups order their lives outside the influence of state law.[27] Two, customary law is not as comparable to state law as some sociologists and anthropologists tend to assert. What matters in the usage of 'legal pluralism' is the perception of normative behaviour.[28] Although the scope of this study dissuades a descent into the intractable debate over the definition of law, it seems

[22] SM Weeks 'The interface between living customary law(s) of succession and South African state law' (2010) *DPhil Thesis, University of Oxford* 397.

[23] Examples are religious groups, tribes, sports groups, corporations, and even crime networks. *See* JC Bekker, C Rautenbach, and NMI Goolam *Introduction to legal pluralism in South Africa* (2006).

[24] SE Merry 'Legal pluralism' (1988) 22 *Law and Society Review* 878-879.

[25] J Griffiths 'The idea of sociology of law and its relation to law and to sociology' in M Freeman (ed.) *Law and sociology* (2006) 63-64.

[26] BZ Tamanaha 'Understanding legal pluralism: past to present, local to global' (2008) 30 *Sydney Law Rev*iew (2008) 394.

[27] SF Moore 'Changing African land tenure: reflections on the incapacities of the state' (1998) 10(2) *European Journal of Development Research* 33-49.

[28] W Twining *General jurisprudence: understanding law from a global perspective* (2009) 64.

impossible to conceptualise living customary law without adopting a position on the debate. Adopting a position could also address concerns of whether living customary law is really law.

Himonga and Bosch answer this question affirmatively against the background of the lack of 'a comprehensive theory of African laws.'[29] They argue that living customary law is law so long as 'law is defined within theoretical perspectives other than those belonging to the centralist, rule-based positivist approaches to law.'[30] In aligning with this position, this study restates its argument that a rule-based approach inhibits judicial recognition of living customary law. It proceeds to summarise the debate on the meaning of law in order to adopt a position before situating living customary law in Nigeria.

2.1.3 A normative problem

Scholarly efforts to define law tend to concentrate on norms, or on the institutions that enforce these norms, or on the sanctions that flow from these institutions, or a combination of these elements. As explained in chapter one, Hart proposed a combination of primary rules of obligation, and secondary rules to identify, apply, and modify these primary rules.[31] Kelsen offered a pyramid of norms in which the validity of each norm is ensured by a superior norm that is dictated by a sovereign centre – the so-called 'unity of a plurality.'[32] Some like Hoebel and Weber, who prefer institutionalised enforcement of norms, were confronted with the problem of distinguishing between acceptable forms of norm enforcement and the private and public spheres of sanctions.[33]

On the other hand, some scholars prefer social behaviour as the means of conceptualising law. For example, Ehrlich used 'folk law,' and 'law in action' as the parameter for assessing law and its underlying values.[34] Malinowski's pioneering work on pre-state law proposed that 'the rules of law stand out from the rest in that they are felt and regarded as the obligations of one person and the rightful claims of another.'[35] However, this definition was

[29] Himonga & Bosch at 319 & 327.

[30] *Ibid* at 327.

[31] HLA Hart *The concept of law* (1994).

[32] H Kelsen *et al Introduction to the problems of legal theory* (1992, 1934) 55.

[33] A Hoebel *Law of primitive man* (1954) 28; M Rheinstein *Max Weber on law in economy and society* (1954).

[34] E Ehrlich *Fundamental principles of the sociology of law* (1936) 493.

[35] B Malinowski *Crime and custom in savage society* (1926) 55.

questioned for being 'so broad that it was virtually indistinguishable from a study of the obligatory aspect of all social relationships.'[36]

In sum, state or rule-centred conceptions of law attract criticism for neglecting the reality that people's lives are sometimes regulated outside state law. Conversely, the social behaviour approach is criticised, chiefly, for being so broad as to include any social practice.[37]

However, the literature reveals that law's definitional problem reduces considerably when the persistent perception of coercion as an essential element of law is jettisoned. Fortunately, scholars have softened their hard-line stance on the subject. For example, Griffith admitted that as far as theory formation in the sociology of law is concerned, 'the word "law" could be abandoned altogether.'[38] Tamanaha's non-essentialist approach concedes that 'it is impossible to adequately conceptualise law for social scientific purposes … [for] there is no single phenomenon, "law," about which information can be accumulated and measured.'[39] As he put it, law 'could not be formulated in terms of a single scientific category because over time, and in different places, people have seen law in different terms.'[40] He therefore called it a 'folk concept,' and defined it as 'whatever people recognise and treat as law through their social practices.'[41] In the light of these trends, what remains is the question of whether law includes all social practices that people observe in daily life.

Scholars puzzle over this question. For example, Merry wondered: '[w]here do we stop speaking of law and find ourselves simply describing social life?'[42] Himonga and Bosch asked: how is living customary law 'distinguished from customs and practices …?'[43] In considering this question and adopting a position on the meaning of law, the analysis of living customary

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[36] SF Moore *Law as process: an anthropological approach* (1978) 220.

[37] For discussion of these criticisms, see B Dupret 'Legal pluralism, plurality of laws, and legal practices' (2007) 1 *European Journal of Legal Studies* 1-26.

[38] J Griffiths 'The idea of sociology of law and its relation to law and to sociology' in M Freeman (ed.) *Law and sociology* (2006) 49. *See* also Tamanaha 'Understanding legal pluralism' (note 26) 395.

[39] BZ Tamanaha 'A non-essentialist version of legal pluralism' (2000) 27 *Journal of Law and Society* 319 ['it is not necessary to construct a social scientific conception of law in order to frame and study legal pluralism.']

[40] *Ibid* at 396.

[41] *Ibid*. *See* also BZ Tamanaha *A general jurisprudence of law and society* (2001) chapter five; PS Berman 'Global legal pluralism' (2006) 80 *Southern California Law Review* 1178.

[42] SE Merry *'Legal pluralism'* (note 24).

[43] Himonga & Bosch (note 18) at 320.

law's character outlined in chapter one is expanded.[44] This expansion also addresses possible concerns over the formation of living customary law.

To begin, conceptualising law from the element of coercion ignores the reality that several non-coercive social practices have the character of law. However, as previously explained, not all social practices possess this legal character. This implies that a balance should be struck by using a sense of obligation towards a social practice as the litmus test of its legal character. Although the socio-legal definition of law defies unanimity, law is best understood as the practices to which people within social groups owe a sense of obligation.

In considering living customary law's emergence or whether it is law, an important question should be asked: where does law come from? Field evidence indicates that law comes from society's ideas of acceptable conduct. Accordingly, the way individuals observe customs are expressions of their ideas regarding their normative behaviour. Similarly, their adaptation of customs to socio-economic changes should be regarded as expressions of their normative behaviour. The important thing to note here is that the ideas expressed in behaviour neither emerge collectively nor remain static. They are often expressed individually, spread gradually, and adapt to external influences in much the same way. This suggests that judicial recognition of changes in normative behaviour should follow a similar pattern and avoid a rule-based approach.[45] Put differently, the peculiar manner in which living customary law emerges implies that its judicial recognition should not be dependent on consistent or sustained practice.[46] Rather, its recognition should be dependent on how the foundational values of customary law inform people's adaptation of customs to their social needs.[47] Borrowing from the general

[44] This analysis rejects a rule-based approach to customary law.

[45] In *Mabena* v *letsoalo* 1998 (2) SA 1068 (T), the Constitutional Court of South Africa upheld an isolated adaptation of a custom to socio-economic changes to achieve a result that met constitutional approval. There, a woman asserted a right to accept bridewealth, contrary to the male primogeniture custom. For criticism, see TW Bennett 'Re-introducing African customary law to the South African legal system' (2009) 57 *American Journal of Comparative Law* 13, 18-19; AJ *Kerr* 'The *role of courts in developing customary law* (1999) 4 *Obiter* 41.

[46] D Cornell 'The significance of the living customary law for an understanding of law: does custom allow for a woman to be Hosi?' (2009) 2 *Constitutional Court Review* 403.

[47] *Ibid*; J Hund 'Customary law is what people say it is – HLA Hart's contribution to legal anthropology' (1998) 84 (3) *ARSP* ((Archiv für Rechts-und Sozialphilosophie) 420-429.

principles of law,[48] scholars sometimes refer to these values as underlying general principles.[49] Over a century ago, Osborne CJ remarked:[50]

> In nearly every case (of customary law), I have found that there are general underlying principles not difficult to understand … Indeed, one of the most striking features of West African native custom, to my mind, 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 individual characteristics.

As Osborne CJ pointed out, these 'principles' or foundational values are not difficult to ascertain. They include humaneness, family continuity, duty of care owed by the family head, non-individual nature of marriage,[51] and the need to preserve the ancestral home. How do these values inform people's adaptation of customs to socio-economic changes?

2.1.4 The value of values

As pointed out in chapter one, the foundational values of customary law explain the ways in which members of a social group view their own behaviour. These values serve several key functions. First, they are neon lamps for understanding cultural pluralism. For example, a multi-country study commissioned by the International Institute for Environment and Development found that although 'specific customary laws vary considerably between communities, there are many commonalities in the underlying values or principles of diverse ethnic groups.'[52] Second, foundational values are clues to the norms that emerge from people's adaptation of customs to socio-economic changes. Seen this way, they constitute the philosophy of customary law in its struggles to adapt to modernity. Nhlapo observed with respect to women:[53]

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[48] *See*, for example, J Raz 'Legal principles and the limits of law' (1972) 81(5) *Yale Law Journal* 823-854.

[49] J Stewart 'Why I can't teach customary law,' in (J Eekelaar & T Nhlapo (eds.) *The changing family: international perspectives on the family and family law* (1998) 217; TR Nhlapo 'The African family and women's rights: friends or foes' (1991) *Acta Juridica* 138, 141, 145-6.

[50] *Lewis* v *Bankole* (1908) 1 NLR 81.

[51] AR Radcliffe-Brown & D Forde (eds.) *African systems of kinship and marriage* (1950) 1.

[52] K Swiderska 'Banishing the biopirates: a new approach to protecting traditional knowledge' (2006) *IIED Gatekeeper Series 129* at 14.

[53] TR Nhlapo (note 49 at 141) [Explaining the implications of 'the *values* underlying the African family'].

> The values underlying some African cultural practices in the family sphere can be explained and understood in terms of the needs of the larger group in days gone by. The most striking way in which African society expresses its panic at the march of change is its attempt to preserve or revive these practices, long rendered inappropriate by today's social, political and economic context … If enough understanding of these values is acquired (for example their nature, origin and function) it ought to be possible to salvage from them a 'usable residue' of Africanness which will enhance rather than diminish the human rights ideal in family law.

As Nhlapo noted above, the foundational values of customary law mirrored the needs of societies that differ from ours. It is people's present attitudes to these values that enables them to determine when a custom has outlived its usefulness or when it needs to be modified to suit socio-economic changes. Accordingly, these values are roadmaps to the law that emerges from people's adaptation of customs to socio-economic changes.[54]

Finally, the foundational values of customary law offer a basis for the evolution of an indigenous common law derived from the integration of customary law with state law. As far back as 1960, Allot asserted that 'customary laws in modern Africa are growing more alike.'[55] This assertion is, arguably, borne from pre-independence efforts to integrate customary law with state law. These efforts have been undertaken in Pacific Island nations such as Papua New Guinea, Solomon Islands, Vanuatu, and Western Samoa.[56] Following their independence, these nations tried to place customary law on a higher or equivalent status with the imposed colonial law by making it a primary source of law.[57] These efforts reflected their desire to move their legal systems away from the common law tradition and ground it on 'the customs, values and traditions of the people.'[58] As a commentator put it, the aim was 'to bring about the

[54] B Cousins 'Contextualising the controversies: dilemmas of communal tenure reform in post-apartheid South Africa' in A Claassens & B Cousins (eds.) *Land, power & custom: controversies generated by South Africa's Communal Land Rights Act* (2008) 25 [noting that South African courts have recognised that 'the underlying values [of customary law] inform the living law, which constantly adapts to changing social practice'].

[55] A Allott *Essays in African law: with special reference to the law of Ghana* (1960) 63.

[56] *See*, for example, D Weisbrot 'The post-independence development of Papua New Guinea's legal institutions' (1987) 15 *Melanesian Law Journal* 45-46; CG Powles 'The common law as a source of law in the South Pacific: experiences in Western Polynesia' (1988) 10 *University of Hawaii Law Review* 105.

[57] *See*, for example, the Underlying Law Act No. 13 of 2000 of Papua New Guinea, the Laws of Kiribati Act 1989, the Laws of Tuvalu Act 1987, and the Customs and Adopted Laws Act 1971 of Nauru.

[58] J Goldring *The Constitution of Papua New Guinea* (1978) 150.

development of "a new, culturally sensitive . . . jurisprudence which blend[s] customary law and institutions with modern Western law and institutions in an appropriate mix."[59]

In offering the foundational values of customary law as the basis of legal integration, it should, perhaps, be pointed out that it is state law that should adapt to customary law, not the other way around. This suggestion is based on the argument that custom is a kind of law, and that, indeed, the common law tradition itself is the product of 'a dynamic and essentially customary system.'[60] As values drive changes in normative behaviour, so also should the norms that emerge from people's adaptation of customs to socio-economic changes drive changes in state law. This is the context in which this study conceptualises living customary law within legal pluralism in Nigeria.

2.2 Living customary law and legal pluralism in Nigeria

Nigeria's legal pluralism is difficult to classify. It may be considered deep in the sense that law is neither completely systematic nor uniform.[61] Similarly, law is not exclusive to a single law-making institution,[62] given that power is supposed to devolve between the federal government and the 36 states.[63] On the other hand, it is uncontested that customary law's judicial recognition derives its authority from the state, is subjected to repugnancy criteria, and is largely restricted to personal matters. Customary law in Nigeria is, therefore, best described as operating within a state legal pluralist framework.[64] Nevertheless, its undefined status in the legal framework fits it into the semi-autonomous social field theory.[65]

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[59] J Aleck 'Beyond recognition: contemporary jurisprudence in the Pacific islands and the common law tradition' (1991) 7 *Queensland University of Technology Law Journal* 137-143 at 139, citing D Weisbrot 'Papua New Guinea's indigenous jurisprudence and the legacy of colonialism' (1988) 10 *University of Hawaii Law Review* 2.

[60] Aleck *ibid* at 141-143; L Fuller 'Human interaction and the law' (1969) 14(1) *American Journal of Jurisprudence* [arguing that the primary form of law was customary]; J Webber 'The grammar of customary law' (2009) 54 *McGill Law Journal* 579-582 ['all law is customary'].

[61] J Griffiths 'What is legal pluralism?' (1986) 24 *Journal of Legal Pluralism and Unofficial Law* 8.

[62] *Ibid*.

[63] Section 16 of the Evidence Act of 2011 authorises the application of a custom practiced by an ethnic group 'as part of the law governing a particular set of admissible circumstances.'

[64] GR Woodman 'Customary law in common law systems' (2001) 32(1) *IDS Bulletin* 29.

[65] Moore, *Law as process* (note 36) at 56-57.

As explained in chapter one, the semi-autonomous social field involves the interaction of customary law with state law and other external forces. The customary norms which individuals observe in these fields compete with state law as a means of social ordering. Importantly, this competing relationship does not just occur in individual interactions (horizontal relationship); it also manifests in individuals' interaction with the state and other influences such as religious actors, economic actors, health actors, and development agents (vertical relationship). These interactions lead to adaptations in the ways in which customs are observed. For example, divorcing women in South-East Nigeria are now able to claim matrimonial property with the aid of purchase receipts. Similarly, they can claim marriage gifts that are given in their own names. They may also obtain custody of children based on legislation that promotes the best interest of children.[66] All these changes in normative behaviour are justified on the unsuitability of the official customary law of matrimonial property with modern conditions. They are also justified on the dissonance between some customs and their foundational values.[67] The unsuitability of many customs in modern conditions suggests that living customary law should be regarded as the law that emerges from people's adaptation of customs to socio-economic changes. Indeed, this viewpoint arguably addresses the peculiar character of social change in postcolonial societies such as Nigeria.

Before the advent of colonial rule in Africa, adaptive social change was a reality evident in nomadic settlements, inter-communal trade, conflicts, and marriages. Colonial rule amplified these changes.[68] It is illogical to expect customary law to remain unaffected after encountering changes as monumental as those brought by colonial rule. As Woodman observed, there is fair agreement that although 'customary law has long existed, [it] has never been static. It has always been in processes of development and adaptation, although in recent times social change has occurred more swiftly.'[69] This study argues that the coercive and disruptive character of social change in postcolonial societies makes it logical to perceive living customary law through the lens of adaptation of customs to socio-economic changes. Customs

[66] *See* chapters four and six.

[67] The classic example of this dissonance is heirs' non-adherence to their duty of care, which underlies the male primogeniture custom. *See*, for example, AC Diala 'Lessons from South Africa on reform of the customary law of inheritance in Nigeria' (2014) 14(2) *African Human Rights Law Journal* 633-654.

[68] A Allot 'The future of African law' in H Kuper & L Kuper *African law: adaptation and development* (1965) 220-221; SM Symour *Native Law in South Africa* (1960).

[69] GR Woodman 'Legal pluralism and the search for justice' (1996) 40(2) *Journal of African Law* 156. *See*, generally, DS Koyana *Customary law in a changing society* (1980).

which people observe in the manner they emerged – in other words not adapted to socio-economic changes – should be regarded as ordinary or non-living customary law. It is adaptation to socio-economic changes that makes a custom 'living,' not the mere fact that people live by, or observe that custom. If customs are 'living' merely because they are being observed, then one can argue that all laws (such as criminal and commercial laws) are living. If all laws are living, why should there be a fuss over the categorisation of customary law? A comprehensive explanation of how norms emerge from the interaction of customs with socio-economic changes is missing in the literature.

However, Sanders hinted at this explanation when he asserted that 'African autonomic customary law … has shown a remarkable capacity for adaptation to external influences.'[70] The argument advanced here seeks to explain norm emergence in the semi-autonomous social field. When individuals that observe customary law encounter external influences, their behaviour is almost invariably affected. For example, they may adopt a liberal view of women's rights or tailor their actions to comply with the Bill of Rights. They may also modify the manner they apply customs, by, for example, allowing women to administer estates. Over time, their adaptation to external influences (socio-economic changes) solidifies into norms, which are discernible with the aid of the foundational values that underpin them.

This theoretical framework addresses some of the difficulties inherent in the conceptualisation of customary law. For example, in discussing the merits and demerits of official and living customary law as authoritative sources of law, Bennett urged for caution in distinguishing both sources.[71] He stated that 'the fact that the sources of customary law are so varied in both form and content suggests that we should not make a clear-cut distinction between official and living law.'[72] Himonga and Bosch admitted that '[t]he division of customary law into the categories of living and official customary law is in no way intended to suggest that a clear-cut distinction exists between [them]. Rather, the terms are used relatively to indicate the commonly accepted dominant forms of customary law.'[73] Claassens questioned the 'stereotype of a separate and insulated customary' law, urging for close attention to 'be paid to issues arising [from] intersections between customary law, the formal legal system, and

[70] Sanders 'How customary is African customary law?' (note 11) at 409.

[71] Bennett 'Re-introducing African customary law' (note 45) 21.

[72] *Ibid*.

[73] Himonga & Bosch at 318-319;

the Constitution.'[74] She further noted that 'approaches that seek to insulate customary law from other values and legal rights so that it can "develop uncontaminated" at the local level fail to recognise the processes of integration, assimilation and change that are underway in rural areas.'[75] These processes reflect activities in a social field, specifically the influence of state law on how people adapt customs to socio-economic changes. How does this conceptual framework relate to the literature on matrimonial property rights in South-East Nigeria?

2.3 Tracing women's adaptation to socio-economic changes in Nigeria

There are few historical accounts of gender relations in pre-colonial society in South-East Nigeria. Okonjo offered an insightful analysis of women's considerable social autonomy in mid-west Nigeria. She argued convincingly that social structures allowed women to establish their own political, economic and religious organisations, which gave them considerable autonomy in decision making on matters that directly affected their lives.[76] Amadiume's *Male Daughters and Female Husbands* supports Okonjo's finding on women's autonomy, especially as they progress in age and position within their lineage.[77] Achebe found that colonial rule eroded Nsukka women's avenues to power, especially their religious power.[78] Her argument that 'goddesses were the primary figures of power and authority'[79] reinforces earlier findings on the subject by historians.[80] Apparently, Nigeria's colonial experience changed the pre-colonial structure of fairly balanced gender relations. Obiora challenged claims that tradition has existed since time immemorial, as well as its accompanying subjugation of women.[81] In discussing the legal context of widows' rights, Ewelukwa described Nigeria's legal pluralism

[74] A Claassens 'Contested power and apartheid tribal boundaries: the implications of "living customary law" for indigenous accountability mechanisms' (2011) *Acta Juridica* 176.

[75] *Ibid* at 208.

[76] K Okonjo 'The dual-sex political system in operation: Igbo women and community politics in Midwestern Nigeria' in (Hafkin & Bay eds.) *Women in Africa: studies in social and economic change* (1976).

[77] I Amadiume *Male daughters and female husbands: sex and class in an African society* (1987).

[78] N Achebe *Farmers, traders, warriors, and kings: female power and authority in Northern Igboland, 1900-1960* (2005) 37.

[79] *Ibid*.

[80] *See*, for example, E Isichei 'Ibo and Christian beliefs: some aspects of a theological encounter' (1969) 68 (271) *African Affairs* 121-134.

[81] LA Obiora 'Reconsidering African customary law' (1993) 17(3) *Legal Studies Forum* 217-252.

as a 'fundamental contradiction.'[82] This is primarily because of 'the coexistence of modern, statutory laws with traditional customary laws and practices,' which has created 'a complex and confusing legal regime.'[83] One of the key arguments of this study is that this regime's failure to provide for matrimonial property rights and subject customary law to the Bill of Rights inhibits women's contestation of property. Ewelukwa finds support in Iwobi, who examined widowhood in Nigeria from the perspective of the interplay between cultural forces and patriarchal power.[84] Iwobi found that in many communities, the affairs of widows are regulated by an array of customs, rituals, and practices that struggle to cope with the changes brought by colonial rule.[85] Given that social roles are major determinants of power dynamics in society,[86] the concept of legal feminism is relevant to women's matrimonial property status.

2.3.1 Legal feminism and women's matrimonial property status

Legal feminism, as an offshoot of feminist legal theory, is founded on the belief that law plays a central role in women's historical subordination. Its four popular representations are the liberal equality model, the sexual difference model, the dominance model, and the postmodern or anti-essentialist model.[87]

The formal equality theory, an offshoot of liberal democratic thought, is concerned with ensuring that women are afforded genuine equality. Thus, it argues that women should be treated in the same manner as men.[88] The sexual difference model disagrees with the formal equality model based on what it perceives as patriarchal hierarchies in social relationships. Championed by cultural feminists, it emphasises the significance of biological and physical differences between men and women, holding that rather than be obscured by the law, these

[82] Ewelukwa (note 1) 446.

[83] *Ibid*.

[84] AU Iwobi 'No cause for merriment: the position of widows under Nigerian law' (2008) 20 *Canadian Journal of Women and Law* 37-86.

[85] *Ibid*.

[86] P Shipton *The nature of entrustment: intimacy, exchange and the sacred in Africa* (2007) 173.

[87] For discussion of these four models of feminist legal theory, *see* Becker *et al*, *Cases and materials on feminist jurisprudence: taking women seriously* (1994) 68-98, 110-35.

[88] *Ibid*. *See* also MD Mange 'Formal equality theory in practice: the inability of current antidiscrimination law to protect conventional and unconventional persons' (2007) 16 *Columbia Journal of Gender and Law* 1-42.

differences should be considered when issues affecting women are involved.[89] Anxious to avoid the disagreements between these first two models, the dominance theory focuses instead on the embedded structures of power that enhance men's power over women. In doing this, it holds that the legal system is a mechanism for the perpetuation of male dominance. Scholars such as MacKinnon have argued that women's sexuality is socially constructed by male dominance, and that sexual domination of women by men is a key aspect of women's subordination.[90] The anti-essentialist model, on its part, is concerned with the ways in which race, class, sexual orientation, and other indices of subordination interact with gender, and thereby, shape feminist theory. Each model provides a view of the legal mechanisms that contribute to women's subordination; each offers a discrete method for changing legal attitudes to gender. All of them agree that law is a patriarchal institution that contributes to women's subordination and should be analysed from the perspective of women. These models gave the researcher insights into gender relations and shaped the methodological choices of the study.

From the literature, a revisionist view of women's legal status in Nigeria appears compelling. The premise is that women's matrimonial property rights under official customary law do not reflect the gender dynamics and social settings in which these rights emerged. Generally, early Western anthropologists and missionaries fitted African women within their perceptions of the status and roles of female species in a primitive society.[91] In Nigeria, these perceptions not only ignored the complex system of social relations involving women, they also greatly misrepresented women's decision making roles as priestesses, traders, and farmers.[92] In addition, the introduction of Christianity destroyed the religious power base of women.[93] As shown in chapter three, pre-colonial matrimonial property relations were altered by the new religion of Christianity and new system of political administration. It has been shown that the colonial policy of indirect rule in Africa appealed to the natives placed in charge of customary law. Their manner of asserting 'control over women and over family property'

[89] CA MacKinnon *Sexual harassment of working women: a case of sex discrimination* (1979).

[90] CA MacKinnon 'Feminist legal theory' in JR Hackney, Jr. (ed.) *Legal intellectuals in conversation: reflections on the construction of contemporary American legal theory* (2012) 129-143.

[91] PE Okeke 'Reconfiguring tradition: women's rights and social status in contemporary Nigeria' (2000) 47(1) *Africa Today* 50.

[92] VO Ibewuike *African women and religious change: a study of the Western Igbo of Nigeria, with a special focus on Asaba Town* (2006). *See* also chapter three.

[93] N Achebe (note 78).

found common ground with the colonialists' own coercive 'prescriptions for African societies.'[94] This study posits that women had more access to matrimonial property in Nigeria's pre-colonial era than they presently have. Because of factors such as suspicion, new religion, and the tax system introduced by colonial rule, women did not have much contact with early British officials.[95] Thus, the British saw men as sole family breadwinners, contrary to women's pre-colonial prominence in economic activities.[96] This colonial perception contributed to male dominance of the economic, social, and political sphere, and the corresponding decline of women's economic and social status, especially in property rights.[97] In this light, this study considers judges' perceptions of changes in women's property rights as an important indicator of their recognition of living customary law.

2.3.2 A grounded approach and the gap in literature

To facilitate an effective evaluation of the research questions, this study adopted, at its initial stages, a grounded approach. This involves refining idea(s) as the research proceeded. A grounded approach enables a researcher to be led by the data, as opposed to imposing a theoretical approach on the research.[98] This is the context in which the literature on customary law in Nigeria was reviewed at the beginning of the research.

Generally, this literature focuses on customary law's application standards and its relationship with the imported English law. Okoro gave an excellent account of laws of succession in Eastern Nigeria in 1966 and the rules governing their application.[99] Obi, Nwabueze, and Tobi discussed the exercise of women's property rights in the relatively modern conditions of the 1970s and 1980s,[100] while Dike, Emeasoba and Obioha did so in the context

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[94] M Chanock (note 18) at 76.

[95] The Aba Women's Riot discussed in 3.3.2 validates this argument. Its military-like organisation forced British colonialists to rethink their views of women. *See* J Van Allen 'Aba Riots or the Igbo Women's War? - Ideology, stratification and the invisibility of women' (1975) 6(1) *Ufahamu: A Journal of African Studies* 11-39.

[96] PK Nwanesi 'Development, micro-credit and women's empowerment: A case study of market and rural women in Southern Nigeria' (2006) *PhD Dissertation, University of Canterbury* 36-37.

[97] Okonjo (note 76) at 45. This situation is not peculiar to Nigeria. *See* M Mamdani *Citizen and subject: contemporary Africa and the legacy of late colonialism* (1996) 286.

[98] B Glaser *Basics of grounded theory analysis: emergence vs. forcing* (1992).

[99] N Okoro *The customary laws of succession in Eastern Nigeria and the statutory and judicial rules governing their application* (1966) 4.

[100] SNC Obi *Ibo law of property* (1963); B Nwabueze *Nigerian land law* (1972); N Tobi *Nigerian land law* (1987).

of a Western conception of rights.[101] Park, Obilade, Tobi, Asein, and Ezejiofor,[102] whose studies concern the sources of Nigerian law, did not situate people's lived experiences within the application of customary law. Asiedu-Akrofi examined the judicial adoption of customary law under the repugnancy doctrine, while Anifalaje offered a skeletal outline of its impact on customary law's development in Nigeria.[103] *Law and social change in Nigeria*, a collection of essays edited by Aguda, failed to fulfil its promising title. A reviewer put it this way:[104]

> In the whole collection, the only essay which seems to have some relevance to the theme of law and social change is the chapter by Professor Elias himself entitled "Towards a Common Law in Nigeria." In the process of examining how English law has been adapted to suit the Nigerian environment, he shows how certain rules of customary law have been modified. In all, a comprehensive survey of the role of law in social change in Nigeria is still eagerly awaited.

Elias, Tobi, Aguda, and Nwauche proposed a Nigerian common law.[105] Elias advocated for a Nigerian common law distilled from the English common law (including statutes of general application) and customary law. Aguda gave this task to the two highest courts in the land, and suggests also Sharia law in addition to customary law and the English common law. Tobi offered an ambitious three-step proposal. He suggested uniform teaching in law schools, 'codification of the different customary laws in the country, with a view to ensuring uniformity in their application,' and a 'common hierarchy of court structure and court system.'[106] In agreeing with Aguda's proposition, Nwauche argued that superior courts of record should be

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[101] A Dike 'Land tenure system in Igboland' (1983) 78(5/6) *Anthropos* 853-871; E Obioha 'Change in tenure pattern and customary land practices among the Igbo community in South Eastern Nigeria' (2008) 10(1) *Anthropologist* 45-53; UB Emeasoba 'Land ownership among the Igbos of South East Nigeria: a case for women land inheritance' (2012) 3(1) *Journal of Environmental Management and Safety* 97-117.

[102] A Park *The sources of Nigerian law* (1963); N Tobi *Sources of Nigerian law* (1996); G Ezejiofor 'Sources of Nigerian law' in C Okonkwo, *Introduction to Nigerian law* (1980); A Obilade *Nigerian legal system* (1979).

[103] D Asiedu-Akrofi 'Judicial recognition and adoption of customary law in Nigeria' (1989) 37(3) *American Journal of Comparative Law* 571-593; JO Anifalaje 'Judicial development of customary law in Nigeria' (1988) 9(1) *Journal of Legal History* 40-49.

[104] O Adewọye 'Law and social change in Nigeria' (1973) 7(1) *Journal of the Historical Society of Nigeri*a 151.

[105] T Elias *Groundwork of Nigerian law* (1954) 25; 'Towards a common law in Nigeria' in T Elias (ed) *Law and social change in Nigeria* (1972) 254; T Aguda 'Towards a Nigerian common law" in M Ajomo (ed) *Fundamentals of Nigerian law* (1989) 249; N Tobi *Sources of Nigerian law* (1996) 186-187; E Nwauche 'A Bill of Rights as the basis of a common law in a pluralist Nigeria' (2007) 1 *African Journal of Legal Theory* 45-70.

[106] N Tobi *ibid*.

involved in articulating a common law.[107] He proposed the Bill of Rights as the basis of a common law and suggested 'other complementary modalities such as a unified administration of justice bolstered by a legal education that has the study of customary law and Islamic law as an integral part.'[108]

In summary, Nigerian literature is extensive on descriptions of customary law, the influence of the English common law on its application, and property, succession, and inheritance rights.[109] However, from the literature surveyed, no major work has investigated the judicial recognition of living customary law in Nigeria in the context of matrimonial property rights. The methods adopted to fill this gap in the literature are explained next.

2.4 Methodological pathway

This dissertation employed a two-pronged strategy to investigate judges' recognition of living customary law. The first strategy is recognition through judicial perceptions of changes in women's matrimonial property rights and judicial awareness of the processual character of customary law. The second strategy is judges' approach to matrimonial property rights in case law. Accordingly, the methodology embraced literature review, archival research, case law analysis, and interviews. These mixed methods primarily seek to contrast literature review and key informants' data with judges' perceptions of matrimonial property rights and judges' approach in case law.

In describing this methodology, it should be borne in mind that there is no formula for gathering qualitative data.[110] One may opt for Lewellyn and Hoebel's dispute method by collecting data on norms that are applied in remarkable disputes.[111] Alternatively, one may opt for Holleman's 'trouble-less case method' by observing the norms of daily life outside of

[107] Nwauche 'A Bill of Rights' (note 105).

[108] *Ibid* at 46-47.

[109] Examples are T Elias *The impact of English law on Nigerian customary law* (1958); F Ajayi 'The interaction of English law with customary law in Western Nigeria: II' (1960) 4(2) *Journal of African Law*; W Daniels 'The interaction of English law with customary law in West Africa' (1964) 13(2) *Int'l & Comparative Law Quarterly* 574-616; A Obilade *The Nigerian legal system* (1979) 145-165; F Salamone 'The clash between indigenous, Islamic, colonial and post-colonial law in Nigeria' (1980) 21 *Journal of Legal Pluralism* 15-60; A Oba 'The administration of customary law in a post-colonial Nigerian state' (2006) 37 *Cambrian Law Review* 95-111.

[110] L Spencer, *et al* 'Analysis: practices, principles and processes' in Ritchie & Lewis (eds.) *Qualitative research practice: A guide for social science students and research* (2003) 200.

[111] K Llewellyn & E Hoebel *The Cheyenne way: conflict and case law in primitive jurisprudence* (1941).

exceptional dispute cases.[112] One may also prefer to question individuals who are well positioned to reveal the target norms. All these methods have limitations. For example, the norms observed in dispute resolutions may differ from those observed in daily life, while asking questions may yield idealised versions of norms.[113] The methods adopted here have merits.

Literature review offered an understanding of matrimonial property relations under customary law, especially in the (pre)colonial era.[114] It also gave a better appreciation of how and why case law and legislation became largely out of tune with people's adaptation to changes in the socio-economic structures in which customs emerged. Additionally, it offered useful insights into the extent to which Nigeria's legal framework encourages people's adaptation of customs to socio-economic changes.

On its part, case law analysis provided an understanding of the legal tools which judges use to interpret customary law. These tools are discussed in chapters five and six. Content analysis also offered a good grasp of the procedural and other challenges that militate against judicial recognition of adaptations in matrimonial property relations.

Other than providing a good grasp of judicial perceptions, interviews enabled the researcher to contrast data from literature review with contemporary matrimonial property relations. Crucially, interviews offered in-depth understanding of matrimonial property rights under customary law and judicial attitude to adaptations in these rights. Ultimately, the methodology aimed to discover how judges acknowledge adaptations to socio-economic changes in the context of women's matrimonial property rights in South-East Nigeria.

The review of literature comprised of desktop, archival, and library research involving materials drawn from a variety of sources. These are the University of Cape Town, the Nigerian Institute of Advanced Legal Studies (NIALS), the Customary Court of Appeal Library in Owerri, the Nigerian National Archives, and online resources. These online resources are mainly judicial-related websites such as the Abia State Customary Court of Appeal and the LawPavilion Electronic Law Report. For the University of Cape Town, materials were periodically accessed from the Brand van Zyl Law Library, the African Collection of the Main Library, and the library of the NRF Chair in Customary Law, Indigenous Values and Human Rights at the Faculty of Law. At the commencement of the research in 2013, materials obtained

[112] JF Holleman 'Trouble-cases and trouble-less cases in the study of customary law and legal reform' (1973) 7(4) *Law & Society Review* 585-609.

[113] *Ibid* at 602.

[114] *See* chapter three for discussion of this literature.

during field research conducted by the NIALS on marriage, land and chieftaincy were studied. Books, law reports, and manuals were collected from the Customary Court of Appeal Library in Owerri between June and July 2014. Archival searches in the Enugu Zone of the National Archives were conducted in the same period. These searches sought to obtain information on women's colonial and pre-colonial matrimonial rights status in South-East Nigeria.

For case law analysis, cases decided by trial customary courts and the Customary Court of Appeal of Abia, Anambra, Enugu, and Imo States were collected. The majority of these cases are from court registries, which were visited intermittently between June 2014 and January 2015. Three of the analysed cases are from the Abia State Customary Court of Appeal website, while three are from a customary law review.[115] The decisions from customary courts of appeal ensure representativeness of sample, given that they are drawn from courts spread across communities in the mentioned states.

Interviews were chosen for three key reasons. The first is to obtain current data on matrimonial property rights. The second is to obtain information that cannot be found in legal texts and scholarly literature. The third is to gauge the perceptions of customary court judges, who are the primary focus of the study. Given that these surveys constitute the major source of the study, a brief explanation of how they were conducted is provided below.

The researcher combined interview guides and standardised open-ended interviews. Interview guides enhance systematic questioning of different participants by mapping out in advance the issues to be investigated.[116] Standardised open-ended interviews offer the advantage of simplified data analysis through thematic organisation of questions and easier location of responses to questions.[117] It also enhances time management by making the interview highly focused. This combined strategy gives the interviewer flexibility in probing and 'determining when it is appropriate to explore certain subjects in greater depth,' and when to ask questions about 'new areas of inquiry that were not originally anticipated in the interview instrument's development.'[118] Overall, the interviews aimed to contrast data from case law analysis with data from the perceptions of judges, litigants, and key informants.

[115] Chapters two and seven explain the methods of analysis and sources of cases.

[116] M Patton *Qualitative research and evaluation methods* (2002) 343.

[117] *Ibid* at 346.

[118] *Ibid* at 347.

2.4.1 Research choices and sample description

In conducting the research, criticisms that African customary law narrative is largely male-biased were taken into consideration.[119] These criticisms are well-founded, given that most of the customs captured in books and precedents were presented to colonial officials by males with vested interests in property and privileges.[120] In fact, African customary law has been described as a '"construction'' of the colonial judiciary in complicity with (African) elders … who redesigned most of what is today presented as customary law so as to increase male authority and control over women and children and compensate for the loss of their political and social power to the colonial state.'[121] These criticisms informed the choice to focus the interviews on women, whose voices are only just emerging in customary law discourses. However, because of the gender composition of customary courts and the need to interview key informants, the three-grouped research participants are not all women.

The first group is customary court judges. The second (all-female) group is litigants, divorcees and widows. The third – key informants – is priests, traditional leaders, and officials from social welfare offices and non-governmental organisations (NGOs). Of the 86 individuals interviewed, 49 are women. Of this number, 25 are divorcees, six are widows, three are judges, and the rest are from social welfare offices and NGOs. No female priest was interviewed. The fact that only three out of the 15 judges interviewed are women shows the lop-sided gender composition of customary courts. As women are yet to penetrate traditional leadership in the study area, all the ten traditional leaders interviewed are men.

The second notable research choice was motivated by the need to understand contemporary matrimonial property relations, especially what happens when a marriage is ended by death or separation. Ordinarily, category two informants – that is litigants, widows, and divorcees – could have provided this information. In the first fieldwork in 2014, however, it became obvious that many divorced or separated women do not know the customary law of marriage dissolution. Accordingly, most of them were unable to provide specific information

[119] *See* for example, V Niekerk 'Indigenous law and narrative: rethinking methodology' (1999) 32(2) *Comparative and International Law Journal of Southern Africa* 209-210.

[120] E Afigbo 'Revolution and reaction in Eastern Nigeria, 1900-1929: the background to the Women's Riot of 1929' (1966) 3 *Journal of the Historical Society of Nigeria* 543.

[121] W Ncube, 'The White Paper on marriage and inheritance in Zimbabwe: an exercise in superfluity and mischief' (1993) 5(4) *Legal Forum* 10 &12.

on how customs are adapted or applied to their situations.[122] The initial assumption was that traditional leaders, priests, and NGOs were adequate to provide this information. However, field observations showed that social welfare officials are often the next port of call in matrimonial disputes when family or communal mediation fails.

The Social Welfare Department is a government parastatal established to cater for the interests of women and children.[123] Most disputes that go to the courts pass through them, and they provided vital information on adaptations in matrimonial property relations. They also play key roles in division of property and compensation for loss of matrimonial property. For example, the courts sometimes treat their decisions on custody and maintenance as arbitral awards.[124] The study proceeds to explain the choice of research sites.

2.4.2 Research sites

South-East Nigeria is a geo-political label that describes where the Igbo tribe is located. It comprises of Imo, Abia, Anambra, Enugu, and Ebonyi states. Predominantly Christian, it has a population of about twenty million with generally homogenous demography. It was chosen for three reasons. First, it is relatively under-researched.[125] Second, the researcher lived there for over thirty years and can speak and comprehend most of the dialects. Third, it has demographic features which could help in generalising some of the research findings.

The research participants were randomly but purposively selected from all five states in South-East Nigeria. All these states were visited except Ebonyi State, which being the farthest, would have been financially exhausting for the researcher to visit. Ebonyi was carved out from Abia and Enugu states in 1996 and shares their demographic features.[126]

The research participants were drawn from urban, semi-urban, and rural areas. As the below chart shows, about 15% are from semi-urban areas, 35% are from rural areas, 40% are from urban areas, while the rest are unclassified.

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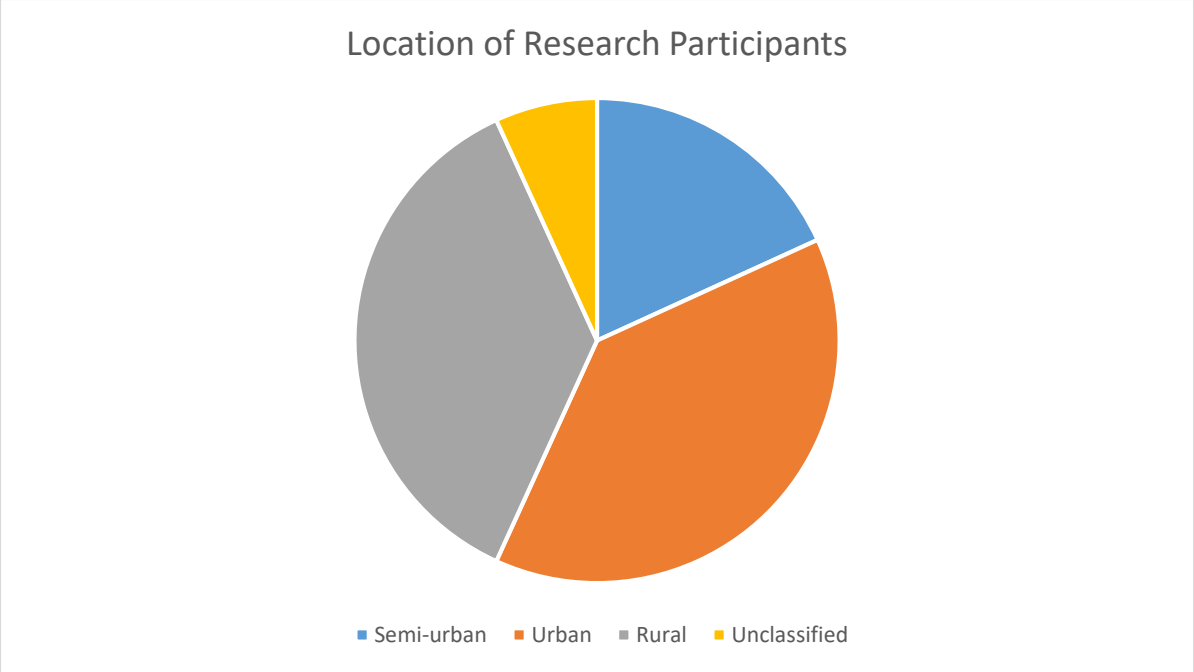
[122] However, their assumptions about customary marriages – for example, monogamy and community of property – helped the researcher's understanding of adaptations in matrimonial relations.

[123] The roles and powers of this agency are described fully in chapter four.

[124] *See* chapter six.

[125] C Tacoli *Changing rural-urban interactions in Sub-Saharan Africa and their impact on livelihoods: a summary vol. 7* (2002) 4.

[126] All the South-East states emerged from Imo State between 1976 and 1996.



The criteria for determining urban and rural areas are mainly level of infrastructural development and official classifications.[127] Most research participants are from Imo, followed by Anambra, Enugu, and Abia. Five are from Ebonyi, six are undisclosed, and one each is from Rivers and Edo, which are neighbours to South-East states. However, exogamy helps the representativeness of this sample, given that the divorcee and widow participants married across the study area.[128] Each of them was asked to describe, if they could, the custom of property division after divorce or separation in theirs and their husbands' communities.

2.4.3 Description of research participants

The research participants were chosen because they play crucial roles in adaptations in matrimonial property relations. The judges are from customary courts and customary courts of appeal.[129] These judges, who are usually from the same normative community as litigants, were

[127] An example is the classification in the Imo State Ministry of Lands, Survey and Urban Planning.

[128] Exogamy is the practice of marrying outside one's own community.

[129] Chapter six describes these inferior courts of record. Unlike high courts and magistrate courts, who may also exercise jurisdiction over customary law, they do not employ English law procedures, nor use the Evidence Act.

chosen because they have original and unlimited jurisdiction in matrimonial causes under customary law.[130]

The key informants are traditional rulers, social welfare officials, priests, some parents of litigants, and staffs of NGOs. The NGOs are staff members of WIN,[131] all the members of the Mediation and Legal Department of CIRDDOC,[132] and Mrs. Chioma Eziaku Emukah, Legal Aid Coordinator in the Owerri regional office of FIDA.[133]

The participants from the clergy represent both Orthodox and Pentecostal churches. They are two priests from the Roman Catholic Church in Imo and Anambra states,[134] two priests of the Anglican Church,[135] and two priests from the Lord's Chosen Charismatic Revival Church.[136] No priest of traditional religion was interviewed.[137]

The traditional leaders interviewed are His Royal Highness, Eze KC Onugwuriobinjo of Isiala-Umuozu Autonomous Community, and the entire ruling cabinet of Agbaja Ancient Kingdom in Nwangele local government area (LGA) of Imo State.

Other than religion, the demographics of participants are wide-ranging enough to ensure data validation.[138] All the judges, priests, and officials from NGOs and the Social Welfare Department are university graduates. While majority of them may be classified as middle income earners, at least seven of the judges, two of the widow/divorcees, and some of the traditional leaders are high income earners, or at least, close to high income earners.[139]

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[130] *See* for example section 14(1) and 55 of the Customary Courts Edict No. 21 of 1984 of Imo State. *See* A Obilade 'Jurisdiction in customary law matters in Nigeria: a critical examination' (1973) 17(02) *Journal of African Law* 227-240; CI Nwagbara 'The nature, types and jurisdiction of customary courts in the Nigeria legal system' (2014) 25 *Journal of Law, Policy and Globalization*. *See* also E Nwogugu *Family law in Nigeria* (2014) 139.

[131] WIN means Women Information Network. The individuals interviewed are Mrs Miriam Menkiti, the executive director, and Mrs Ijeoma Obinna-Onwuka, a programme officer.

[132] CIRDDOC means Civil Resource Development and Documentation Centre. The staff members I interviewed are Mrs Christie Nwankwo, Ms. Onyeka Akunma, and Ms. Odika Ebere.

[133] FIDA stands for the International Federation of Women Lawyers.

[134] The Catholic priests requested anonymity.

[135] The priests are from Saint Andrews Anglican Church Rumuola in Port-Harcourt, Rivers State. They are Reverends Emmanuel Makele and Udoamaka Onwumere from Rivers and Imo States respectively.

[136] The priests are Pastors Samuel Onuoha and Chukwu Favour from Imo and Ebonyi states respectively.

[137] This is caused by the researcher's oversight.

[138] All the research participants are Christians.

[139] By Nigerian standards, 'high income' is considered to be 2500 United States dollars per month.

The widows and divorcees ranged from a PhD holder to secondary school drop-outs and non-formally educated artisans. Most of the widows and divorcees are students, petty traders, farmers, seamstresses, and civil servants, notably teachers.[140] Three of the divorcees are unemployed. Many respondents in this category may be classified as low income earners.

The ages of category one participants (judges) range from 40 to 70, with five judges aged 60 and above, and the average age being 48.[141] The ages of category two participants range from 26 to 65, while the ages of category three informants range from 35 to 79. These age, income, and other variables help to enhance the representative validity of the data sample.

2.5 Research design and ethical considerations

Ethical clearance for the study was obtained from the Research Ethics Office of the Faculty of Law at the University of Cape Town.[142] The Ethics Office also approved the interview guide. In the information sheet, the researcher's desire to understand matrimonial property rights and how judges recognise them was explained. Other than expectations, the time commitments of the interviews and measures to protect the identities of participants with confidentiality issues were explained. Similarly, the potential impact of the research on laws and policies and how these might affect participants in future were explained. Conceptual issues were explained to uneducated interviewees to ensure that they participated on fairly even levels of understanding with educated participants. The voluntariness of participation and interviewees' freedom to discontinue the interview at any time were explained. In fact, a couple of participants were irritated by what they considered the 'complicated' and 'over formal' consent process, especially the requirement for their signature. Some participants refused to sign the consent sheet. Accordingly, the consent process was managed on a case by case basis, taking into consideration factors that affected participants' cooperation. These factors include manner of approach, emotional state, age, environment, and education. There were, of course, several challenges, which are explained towards the conclusion of this chapter.

A legal practitioner acted as a research assistant. He approached some judges using the information sheet and letters requesting for interviews. The researcher used court records, social welfare officials, family, and church connections to initiate contact with most of the non-

[140] The divorce rate of teachers is the highest.

[141] *See* chapter six, which discusses judges.

[142] *See* Appendix D.

judicial participants. For the rest, snowballing and direct approach were used. The researcher personally conducted all the interviews in English and Igbo languages, in accordance with participants' preferences. As much as possible, open-ended, non-directive questions were asked, using the interview guide. However, the focus groups and some of the interviews with widows and divorcees did not involve an interview guide. Interviews and focus group discussions were held in line with categories of participants, as explained next.

2.5.1 Category one: judges

The interview of judges sought to elicit the mechanisms they use to recognise people's adaptation of customs to socio-economic changes in the context of matrimonial property. Divided into two segments, the first segment questioned judges on the following:

- Meaning of customary law, flexibility of customs, and the customary law of marriage dissolution and division of property.
- Basis of judgments such as the Constitution, court laws, rules of natural justice, manuals, precedents, and the evidence of women and traditional leaders.
- Recognition of socio-economic changes such as women's contributions to family income, urbanisation, and labour migration.
- Women's property rights under customary law in the context of contributions to matrimonial property and divorce awards.
- Recognition of a right to culture in the 1999 Constitution.[143]

The second segment of questions involved vignettes. Vignettes may be described as fictitious stories or scenarios to which respondents are asked to respond in order for the researcher to elicit their perceptions, beliefs and attitudes.[144] The vignettes used for judges aimed to assess how they recognise adaptations in matrimonial property relations. Modelled on typical matrimonial disputes, they covered division of property after separation, women's ability to sell land, and maintenance of divorced women. The vignettes are contained in Appendix B. Judges' responses to vignettes were followed up for clarifications, rationale for decisions, influencing factors, and alternative choices. Generally, responses that sounded like idealised versions of customary law were probed.

[143] Appendixes A and B contain the full list of questions.

[144] *See* J Finch 'The vignette technique in survey research' (1987) 21 *Sociology* 105-114 at 105.

2.5.2 Category two: widows and divorcees

On one hand, the questions this category two were asked sought to gain understanding of matrimonial property rights and adaptations in these rights. On the other, they were aimed at contrasting these adaptations with the perceptions of judges and judicial approach in case law. In sum, these questions covered the following:

- Extent to which judgments reflect matrimonial property division.
- Women's matrimonial property rights in divorce and death of a spouse, especially the mode of property division and influencing factors.
- Changes in matrimonial property rights, notably women's contributions to family property and disposal of property rights.
- Male primogeniture rule and the hardships it causes to widows.

During the second field work, questions on perceptions of state law were dropped from the interview guide because they confused participants and added no value to the goals of the research. The snowball technique was used in the interviews of widows and divorcees. It enabled the researcher to find and interview women in similar circumstances as interviewees.[145]

2.5.3 Category three: key informants

Data was obtained from this group using interviews and focus group discussions. Interviews were held with traditional rulers, priests, officials from the Social Welfare Department, and staffs of NGOs. They were asked unstructured questions focussed on dispute resolution mechanisms, enforcement powers, division of matrimonial property, understandings of matrimonial property rights, and challenges facing these rights. Most of the questions sought to shed light on adaptations in matrimonial property rights.

The researcher held three focus group discussions with eleven social welfare officials, three NGO staff, and nine traditional leaders. The welfare officials and NGO staff were asked two broad questions. The first covered their dispute resolution procedure, as well as their enforcement/remedial measures. The second covered their treatment of matrimonial property if parties were resolved to end their marriage. Participants raised their hands in order to speak and follow-up questions were asked where necessary. As explained in chapter five, there was a degree of unanimity in perceptions of matrimonial property rights.

[145] MQ Patton *Qualitative research and evaluation methods* (2002) 44-45.

Traditional leaders were asked to discuss only one question: 'does a woman exit a marriage with properties and what is the nature of these properties?' In the surprisingly heated discussions that followed, follow up questions on the rationale behind property division, marriage gifts, and women's contributions to matrimonial property were asked.

2.5.4 Collection of non-oral data

For judicial data, the record of proceedings of about 100 cases from customary law courts, most of which are handwritten, were copied. Luckily, the proceedings of the Customary Court of Appeal are typewritten. Legislation and law reports were also copied.

For non-judicial data, archival records at the Enugu zonal office of the Nigeria National Archives were perused. This information assisted the arguments and account of (pre)colonial gender relations given in chapter three.

2.5.5 Asking the questions

Most of the interviews were conducted with a battery-powered audio recorder. Roman Catholic priests and a few litigants refused to be audio-recorded. The venues of the interviews were dependent on the participants. For judges, some interviews were conducted in their offices, while some were held in their homes.[146] Such was the latitude that two interviews occurred in a restaurant. For reasons of convenience, confidentiality, and neutrality, most of the widows and divorcees were interviewed in their business places and in the researcher's father in-law's house. A few were interviewed in their houses and inside the researcher's car. Participants' choice of venue reflected their occupations, varying time schedules, and concerns with privacy. Notes were taken on a notepad in addition to the audio-recording.

2.6 Making sense of the data

NVivo software helped the researcher to thematically organise data, generate codes, explore theme relationships, and compare data. Although coding is a tedious affair, the three stages involved in the research were enjoyable. This was probably because the researcher personally transcribed many of the interviews and devoted time to correcting the transcripts of all out-sourced interviews.[147] In transcribing the audios and correcting transcripts of outsourced

[146] This was largely because of a month-long judiciary strike. *See* 2.7.1 below.

[147] Many non-judicial interviews were in Igbo language, for which there were no professional transcribers.

interviews, striking aspects of the data were highlighted and commented on. Eventually, the transcripts were fed into NVivo 10,[148] where formal coding was conducted using themes discussed in chapter five. Next, Excel spreadsheets of demographic data for the three categories of interviewees were compiled. Given the researcher's limited mastery of NVivo, a choice was made to download the thematic nodes developed in NVivo and save them in Microsoft Word. Thereafter, data in the nodes were analysed thematically for the three categories of informants.

Data from judges was broadly grouped under basis of judgments, with emphasis on the ways in which judges recognise urbanisation, labour migration, decreasing extended families, and independent income by women. Judges' responses in the vignettes were analysed separately, contrasting them with their responses in non-vignette questions. Data from non-judges was analysed under perceptions of matrimonial property rights, division of property upon dissolution of marriage, and socio-economic changes.

There were of course challenges in this process and limitations in the research.

2.7 Limitations of study and challenges

The most obvious limitation of this study is the total absence of a developed concept of living customary law in Nigeria. Such a concept could have formed the basis of the study's literature review and helped to lay a foundation for understanding its research problem.

Another limitation is the chosen method of data collection. Arguably, divorcees, widows, and key informants may suppress or give exaggerated information; court records may not give a complete picture of how judges recognise people's adaptation of customs to socio-economic changes, while judicial perceptions may be idealised. Although ethnography is the most appealing means of studying living customary law,[149] certain factors ruled it out.

The first is the limited time span of the research and several judicial strikes, which limited the researcher's observation of trials. The second is the researcher's non-expertise in legal anthropology, which discouraged ethnographic observation of matrimonial property disputes. The third is the study's focus on how judges approach adaptations of matrimonial property rights to socio-economic changes.

Other than these limitations, several field challenges were encountered in the research. These are institutional and functional challenges, and are discussed in turn.

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[148] NVivo 10 is a qualitative data analysis software package produced by QSR International. It is useful for in-depth analysis of data through its thematic, graphical, and cross-referencing tools.

[149] BM Oomen *Chiefs in South Africa: law, power and culture in the post-apartheid era* (2005) 201.

2.7.1 Facing off with officialdom

Bureaucratic bottlenecks were encountered in efforts to access court records. Generally, court officials were reluctant to grant access to files unless they were pressured by their superiors. Fortunately, there were little difficulties at the Customary Court of Appeal in Owerri, given that its President pulled out all stops to assist the research. At trial customary courts, however, the researcher encountered many officials with deadpan expressions who flatly insisted in going through depressingly vague 'official channels.' Some of them justified their conduct on a (long) judiciary strike, which started barely halfway into the research. This attitude and the strike hampered the collection of cases and access to judges. Many judges took the opportunity offered by the strike to travel out of the state, while some court officials were unwilling to risk picketing to open court registries. Strangely, another judiciary strike commenced the day after the researcher began the second field work in early January 2015.

The second significant challenge encountered with officialdom occurred at the Enugu office of the National Archives, whose officials were generally uncooperative.

2.7.2 The ones too ashamed to speak

The biggest functional challenge was difficulty in securing interviews with divorcees. There is strong stigma attached to divorce in South-East Nigeria.[150] Many divorcees refused interviews in order not to 'reopen' their wounds. Others simply live in denial by refusing to be identified as divorcees. In one case, a participant insisted that she was only temporarily separated from her husband and, on that basis, refused to grant an interview. In another case, a headmistress of a faith-based high school flatly denied that she was separated from her husband, obviously because of the negative effect this would have on her job. In yet another case, a woman who has been divorced for over three years was adamant that her husband would come back to her.

Poor access to divorcees was worsened by the fact that the researcher is a male seeking to question women who are competing with teeming single ladies in a society that cherishes marriage. This challenge was obvious on the two occasions in which he was mistaken for a suitor while tracking down divorced women from their paternal homes.

Other than stigma, the tragic circumstances that sometimes surround divorce presented formidable challenges to locating participants and convincing them to grant interviews. For

[150] E Enwereji 'Indigenous marriage institutions and divorce in Nigeria: the case of Abia state of Nigeria' (2008) 5(3) *European Journal* of *General Medicine 165; DJ* Smith 'Legacies of Biafra: marriage, "home people" and reproduction among the Igbo of Nigeria' (2005) 75(1) *Africa* 30-45.

example, the researcher had a close shave in a village where, unknown to him, an estranged couple were fighting (outside the courts) for custody of the sole child of their marriage. The lady had remarried and relocated abroad, leaving the disputed eight-year-old girl in the custody of her parents at their family home. The man had allegedly made several (dis)ingenious attempts to abduct the girl, including using rogue police officers in a destructive midnight raid. When the researcher turned up in the family home one morning asking for the lady, her agitated mother mistook him for an agent of the former husband sent to kidnap the girl child. She raised alarm and her sons responded. The researcher lost his glasses and narrowly escaped from serious injury. In another case, a recently divorced woman, who was contacted on telephone, doubtfully agreed to meet at a popular eatery. She kept the researcher waiting, scouted the venue twice, and shifted the appointment. The next day, she turned up with an imposing bodyguard, her brother, and her sister. She explained with a wintry smile that she was 'at war' with her South Africa-based husband over 'the terms of their relationship.' Even with her impressive entourage, she postponed the interview and eventually sent a message to explain that she cannot tell her story yet until her mother recovers from an 'illness.' In yet another case, the researcher arrived one afternoon in a village on a market day. Already alerted by the bizarre glances and whispers that greeted his enquiries, he halted carefully at a decrepit building. There, a taciturn old man resentfully led him to a grave, pointed at it, and told him to leave.

In any case, it was challenging to interview women who lost custody of their children. Because of privacy concerns, many interviews with divorcees occurred in public places, which affected the quality of the recording. There was also the question of informed consent.

2.7.3 The watchful ones

The nature of divorce in the research area is such that many divorcees live with their parents or relatives. This posed a problem of informed consent in the few cases in which these women required permission from their parents or guardians. Some parents insisted on being present, or even being interviewed alongside their daughters to prevent the researcher from asking 'hurtful' or 'inappropriate questions.' Accordingly, one divorcee gave what may be considered a supervised interview. Two were interviewed together with their mothers.

2.7.4 The 'smart' ones

Litigants and former litigants proved the most difficult informants to access because the researcher often traced them from court records. Some litigants refused to grant interviews on

cases pending in the courts, some mistrusted the researcher, while others referred him to their lawyers.[151] These challenges narrowed the pool of educated research participants.

On the other hand, the skewed research awareness of some participants presented a curious limitation to their participation. Some participants' understanding of interviews is limited to printed questionnaires, making them to initially struggle to answer the questions put to them. In addition, a few informants distrusted the motivation for 'reopening' a case closed by the courts. It was only when they were asked if and how the judgment was complied with, or why they did not go on appeal that they were eventually convinced to grant proper interviews, although some refused to speak on record.

Ultimately, interviewing female divorcees in South-East Nigeria is generally challenging for a male researcher. As a female judge said, 'there is no happy divorce' and only 'mentally strong women can speak freely' about their experiences to a man.

2.8 Summary of chapter

This chapter has explored the literature on living customary law within the context of legal pluralism. In conceptualising living customary law, the theoretical assumption that it is confined to, or develops solely in local communities was questioned. The study argues that such conceptualisation ignores the processes that occur in a social field, especially the normative influence of state law, urbanisation, religion, and development actors on individuals that observe customary law. The study's proposition that living customary law emerges from the adaptation of customs to socio-economic changes was expanded.

In conclusion, the interaction of customary law with state law in a social field largely informs the theoretical framework of this study and its method of investigating judicial recognition of living customary law. This method combines literature review with archival research, surveys, and case law analysis. To understand the findings, it is necessary for the next chapter to explain the historical background of customary law, especially in South-East Nigeria. This explanation will set the stage for the perceptions of matrimonial property rights presented in chapter four, as well as chapter five's assessment of how customary law is acknowledged in Nigeria's legal system.

[151] These include two women whose cases were pending at the Customary Court of Appeal in Owerri.

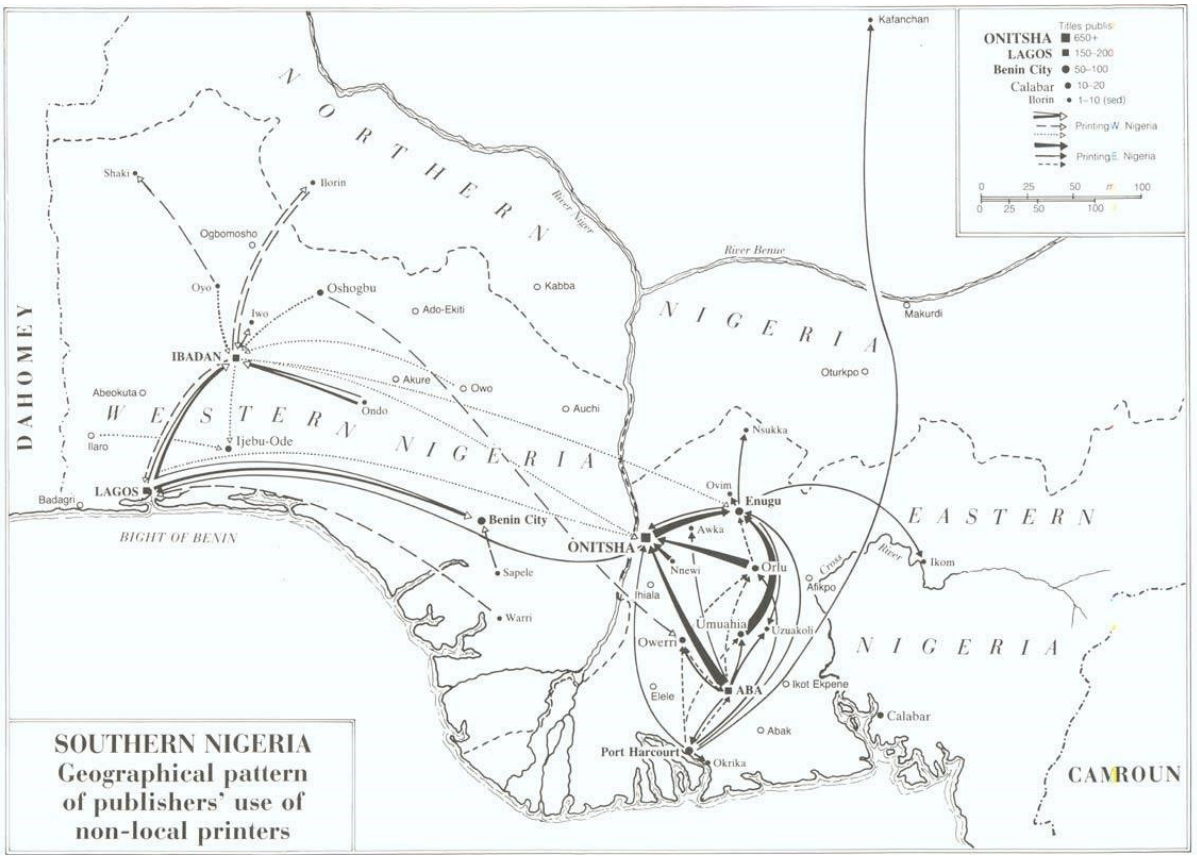
Chapter three: Historical overview of customary law in South-East Nigeria

3.0 Introduction

To contextualise how judges recognise adaptations in the customary law of matrimonial property, this chapter offers a historical overview of customary law in South-East Nigeria. As indicated in the preceding chapter, South-East Nigeria is a geo-political label that describes the location of the Igbo tribe, one of the largest tribes in Nigeria.[1] The chapter highlights Igbo pre-colonial governance system, its relationship with matrimonial property rights, and the impact of colonial rule on this system. It argues that colonial rule distorted matrimonial property rights in two related ways. The first is by turning upside down the social setting in which customary law operated. The second is by introducing a hierarchical gender relationship into social life.

The chapter begins by situating the study population within the Nigerian geo-political space. Next, it examines women's religious, political, and economic status within pre-colonial society as a contrast for their current matrimonial property rights. Thereafter, it reveals how colonial rule changed the social setting of these rights. It uses three indicia to show how the British policy of indirect rule affected customary law. These indicia are changes in the traditional governance structure, land tenure system, and system of customary law adjudication. It argues that the colonial court structure, introduction of English legal procedure, and interpretation of customs turned matrimonial property relations from complementary to hierarchical. It concludes that colonial rule created an official customary law that reinforced patriarchy, diminished women's matrimonial property rights, and injected a rule-based character into customary law adjudication.

[1] For debate on the size and composition of Nigeria's ethnic groups, *see* O Otite *Ethnic pluralism and ethnicity in Nigeria* (1990) 35-6.



Map of Nigeria, accenting the South-East zone (National Archives, Enugu)

3.1 Nature of pre-colonial Nigerian society

The boundaries of the geographical area known as Nigeria were created by British colonialists in the late 19th and early 20th centuries.[2] Situated near the fringes of the Gulf of Guinea and Bight of Biafra on the west coast of Africa, this area comprises of about 923,768 square kilometres. Its boundaries include Chad (north-east), Cameroon (east), Atlantic Ocean (south), Benin Republic (west), and Niger (north-west). Prior to the appearance of European explorers and missionaries on this coastline, Nigeria consisted of small communes, semi city-states, and large empires.[3] Scholars recognise that much of the history of these city states and empires is undocumented.[4] From archaeological findings, however, some sort of Middle Stone Age

[2] T Falola and M Heaton *A history of Nigeria* (2008) 17.

[3] M Crowder *The story of Nigeria* (1973) 21.

[4] *Ibid* at 23 & 27.

industries seem to have existed around 3500 BC.[5] Between 4000 and 1000 BC., agricultural activities led to more organised social life, leading to the development of city-states.[6] Some city-states grew or merged through conquests to become powerful empires such as Kanem and Bornu. A key sign of their organisational advancement is their trade links with empires in Ghana, Mali, and Songhai, and North African ports near the Mediterranean.[7]

In the early 19th century, a Fulani sheikh, Uthman dan Fodio, led a jihad (holy war), which established Islamic Law in large parts of Northern Nigeria, except the area known as the Middle Belt.[8] Although aspects of this Islamic Law touch upon customary law, Islamic Law is, generally, not regarded as customary law in Nigeria.[9] Moreover, the Constitution allocated separate and distinct courts for the administration of Islamic Law and customary law.[10] For this reason, this dissertation does not consider Islamic Law as customary law. Accordingly, references to pre-colonial Nigerian societies exclude Northern Nigeria, and refer, mainly, to South-East Nigeria.[11]

Just like their counterparts in most parts of sub-Saharan Africa, pre-colonial Nigerian societies were characterised by closely-knit family units.[12] Their close-knit nature resulted from their agrarian settings. Their main economic activities were farming, fishing, hunting and gathering, as well as craftworks such as sowing, pottery, weaving, basket-making, and

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[5] C Shaw 'Field research in Nigerian archaeology: (A brief survey and discussion of policy)' (1963) 2(4) *Journal of the Historical Society of Nigeria* 451-452.

[6] T Falola and M Heaton *A history of Nigeria* (2008) 17-20.

[7] *Ibid* at 26; M Crowder *The story of Nigeria* (1973) 35-52.

[8] J Schacht 'Islam in Northern Nigeria' (1957) 8 *Studia Islamica* 123-146. There is no unanimity on the areas that constitute the Middle Belt. On the institutionalisation of Islamic Law, see I Sulaiman *The Islamic state and the challenge of history: ideals, policies, and operation of the Sokoto Caliphate* (1987).

[9] In *Alkamawa* v *Bello* (1998) 6 SCNJ 127, 129, the Supreme Court of Nigeria stated: 'Islamic Law is not the same as customary law, as it does not belong to any tribe. It is a complete system of universal law, more certain and permanent and more universal than the English common law.' *See* also ES Nwauche 'The constitutional challenge of the integration and interaction of customary and the received English Common Law in Nigeria and Ghana' (2010) 25 *Tulane European & Civil Law Forum* 3; A Oba 'Islamic Law as customary law: the changing perspective in Nigeria' (2002) 51(4) *International and Comparative Law Quarterly* 817-850 at 849.

[10] The 1999 Constitution created Sharia Court of Appeal (ss. 260-264 and 275-279) and Customary Courts of Appeal (ss. 265-269 and 280-284) for administration of Islamic Law and customary law.

[11] The time span is from the earliest record of agricultural communities to the eve of colonial rule in the early 19th century, which is the period colonial rule is usually dated. *See* Falola & Heaton *A history of Nigeria* (2008) 17.

[12] Sociologists have referred to these societies as 'kin-dominated' and 'multiplex.' *See* J Barton *et al Law in radically different cultures* (1983) 41 & 42.

embroidery.[13] Although large parts of other tribes had centralised forms of political organisation by the late 18th century, many communities in southern Nigeria did not have clearly visible political structures. This is partly why Horton referred to them as stateless societies.[14] These societies existed among the study population, as well as among the Ibibio, Annang, Idoma and Tiv tribes. In large parts of these communities, political organisation was based on gerontocracy, meaning governance by the oldest members of the community.[15] These elders were sometimes priests or priestesses, and heads of families, age groups, work parties, or lineages. This chapter proceeds to explain the pre-colonial governance structure of the study population, Ndi Igbo.

3.2 Structure of pre-colonial Igbo society

Two prefatory remarks need to be made. First, the word 'pre-colonial' is used in a narrow sense to denote Igbo governance structure in the early 19th century. This is because documented materials on Igbo governance system were not available until the advent of the 20th century.[16] These materials are few, and were based, primarily, on folklore and legends passed on by word of mouth. Indeed, storytelling under the moonlight is a distinctive feature of Igbo social life that is still practiced in some places.[17] Furthermore, some accounts of Igbo pre-colonial governance system ought to be treated with caution. This is because some writers 'adopted the synchronic approach in their research, using evidence they derived primarily from their study of Igbo society in its modern setting to make extrapolations about its past history (sic) and culture.'[18] Thus, preference is given to studies by Nigerian scholars or foreigners who did not extrapolate their accounts of the evolution of pre-colonial Igbo society.

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[13] C Shaw 'Field research in Nigerian archaeology: (A brief survey and discussion of policy)' (1963) 2(4) *Journal of the Historical Society of Nigeria* 453.

[14] R Horton 'Stateless societies in the history of West Africa,' in J Ajayi & M Crowder *History of West Africa*, (1976) 72-113. Horton's position is arguably incorrect, given studies by Elizabeth Isichei (note 15 below).

[15] E Isichei *A history of the Igbo people* (1976) 22.

[16] E Afigbo *Ropes of sand: studies in Igbo history and culture* (1981) 2.

[17] C Azuonye 'Igbo stories and storytelling' in (R MacDonald ed.) *Traditional storytelling today: an international sourcebook* (1999) 36-37.

[18] J Oriji 'The end of sacred authority and the genesis of amorality and disorder in Igbo mini states' (2007) 31 *Dialectical Anthropology* 264.

Secondly, the terms, 'Ndi Igbo,' 'Igbos,' and 'Igboland,' are used here interchangeably. In a broad sense, they represent the people and territory of the former Eastern Nigeria, which now consist of 11 states in two geo-political zones referred to as the South-South and South-East.[19] In a narrow sense, they represent the five South-East states. The 2006 census indicates that out of Nigeria's estimated population of 160 million, Ndi Igbo constitute about 31 million.[20] At the period of their contact with Europeans around 1830, they had an estimated population of five million people.[21]

3.2.1 Political organisation and social classes

Unlike other major tribes in Nigeria, pre-colonial Igbos, generally, were perceived as lacking a centralised political organisation. Presently, this is expressed in the saying, *Igbo-enwe-Eze* (Igbos have no king). This saying, however, is not true for all Igbos, given that coastline Igbo cities had developed sophisticated centralised governance long before the British arrived in Nigeria.[22] For example, archaeological findings at Igbo-Ukwu in present-day Anambra State lend credence to popular belief in an ancient dynastic hegemony in Nri over large parts of Igboland.[23] As Shaw put it, there is 'evidence of a centralized authority … some hundreds of years before the earliest dynasty in Benin.'[24]

[19] These are Abia, Anambra, Ebonyi, Imo, Enugu (South-East), Akwa Ibom, Bayelsa, Cross River, Delta, Edo, and Rivers (South-South). As a result of the Nigerian Civil War (1967-1970) and other factors, many parts of the South-South no longer identify themselves as Igbo.

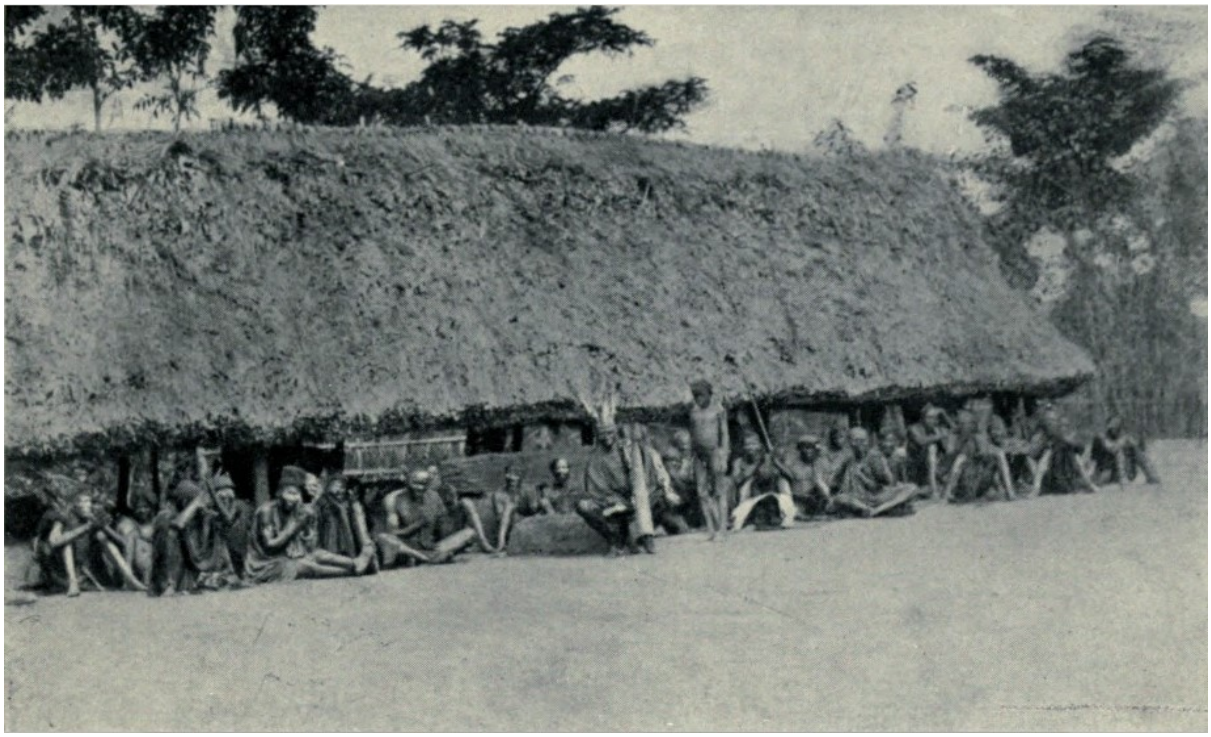
[20] The official 2006 census figures are fiercely disputed. *See*, for example, JA Bamgbose 'Falsification of population census data in a heterogeneous Nigerian state: the fourth Republic example' (2009) 3(8) *African Journal of Political science and International relations* 311-319.

[21] E Isichei *A history of the Igbo people* (1976) 3; SM Martin *Palm oil and protest: an economic history of the Ngwa Region, South-Eastern Nigeria, 1800-1980*. *Vol. 59* (2006) 1, 91.

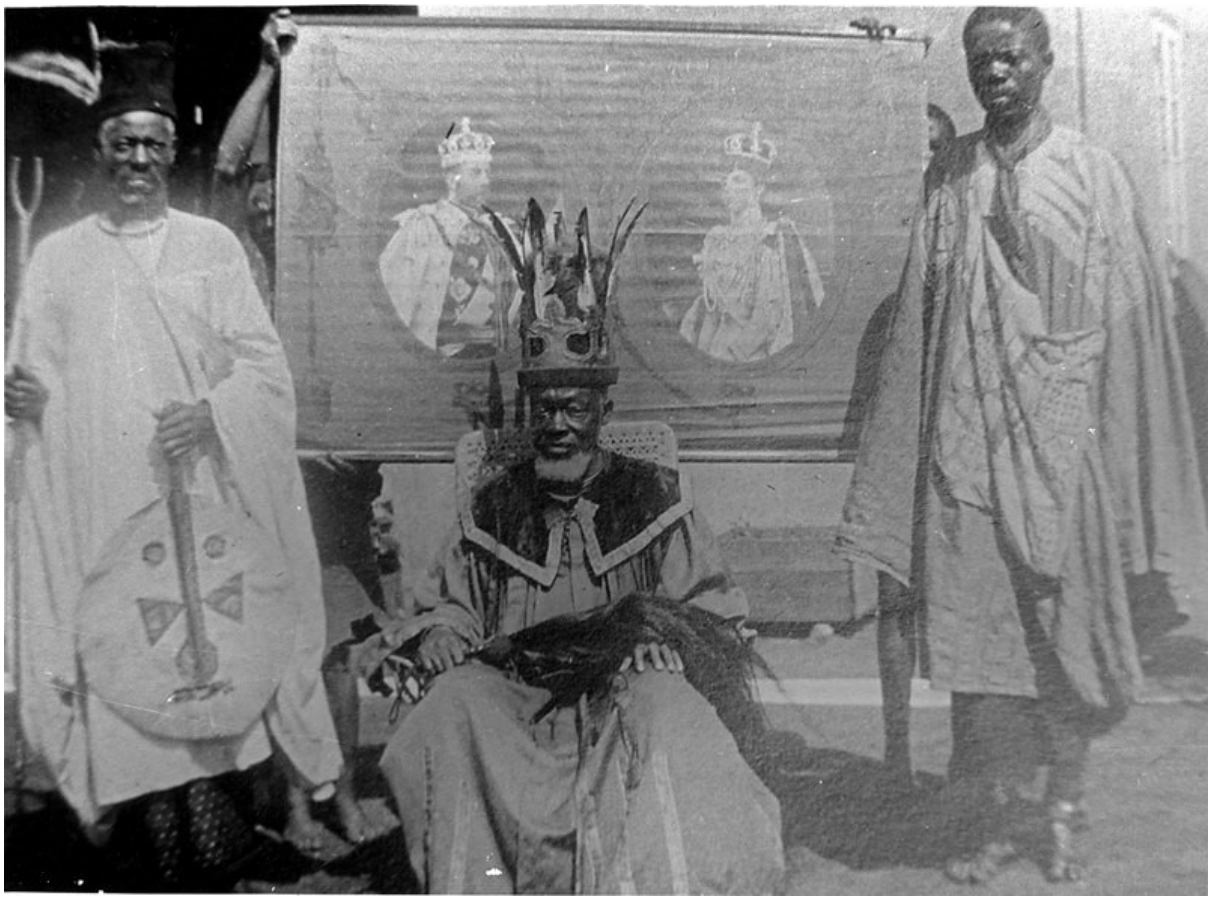
[22] Isichei *Ibid* at 49-63.

[23] M Onwuejeogwu *Nri kingdom and hegemony: an outline of Igbo civilisation, AD 994 to present* (1980).

[24] T Shaw 'The significance of Igbo-Ukwu and future archaeological research in Southeastern Nigeria' (1972) 1(1) *Ikenga: Journal of African Studies* 3.



Eze Obalike of Nri Kingdom (TN Whitridge Anthropological report on the Ibo-speaking peoples of Nigeria (1913) 48)



Obi Okosi I of Onitsha on his installation in 1913 (National Archives, Enugu)

Ndi Igbos' largely republican society is strongly connected to the supernatural, which though not always accurately portrayed, featured in the intelligence reports of colonial officials.[25] It comprises of towns and village groups called *obodo* or *mba*. *Obodo* is the highest political unit and is segmented into smaller groups known as *ama* (path). Each village is in turn, divided into *umunna* (literally meaning children of the same father). The *umunna*, which is the most basic and influential socio-political unit, comprises of male descendants of the founder or ancestor by whose name the lineage is sometimes called.[26]

Generally, three social classes existed in pre-colonial Igbo society. They are the free-born (*Nwa-afo* or *Diala*), the slaves (*Ohu*), and the outcasts or ritual slaves (*Osu* and *Ume*). Governance was highly localised and consisted of two broad types.[27] The first has been described as a constitutional monarchy.[28] It existed among tribes in coastline areas west of the Niger River. The second is a village republican system.[29] This category prevails in the hinterland lying east of the Niger River.

In the so-called constitutional monarchy, eligible members of the community governed with a cabinet after being elected or selected into office by the public. For example, in the Asaba area, a king known as the *Asagba*, ruled communities. Other than his cabinet, he also worked with the leaders of men and women groups.[30] Mature women, who were past child-bearing age, and who were distinguished by their wealth, wisdom, and character, took charge of women's political organisation.[31] Known as the *Omu*, they wielded parallel powers with the *Asagba*.[32] As a female monarch, the *Omu* functioned with her own cabinet and had the final

[25] For example, see V Moult *Intelligence Report on the Oguta Native Court Area* (1932) 15; J Allen *Intelligence Report on the Ngwa Clan Vol. I.* (1933) 21.

[26] V Uchendu *The Igbo of Southeast Nigeria* (1965) 22-25, 30-31 (hereafter Uchendu).

[27] Uchendu *ibid* at 51-52. This categorisation of Igbo governance has been criticised as 'extreme polarities,' given that there are 'middle level political systems' or 'Igbo mini states.' *See* G Jones *The trading states of the oil rivers* (1963) 5; J Oriji (note 18) at 265.

[28] E Afigbo *The Warrant Chiefs: Indirect Rule in Southeastern Nigeria: 1891-1929* (1972) 14-36.

[29] Uchendu (note 26) at 85; E Afigbo 'The indigenous political systems of the Igbo' (1973) 4(2) *Tarikh* 15.

[30] N Achebe *Farmers, traders, warriors, and kings: female power and authority in Northern Igboland, 1900-1960* (2005) 164-171.

[31] V Ibewuike *African women and religious change: a study of the Western Igbo of Nigeria, with a special focus on Asaba Town* (2006) 62 (hereafter V Ibewuike).

[32] In her ethnographic study, Ibewuike, *ibid*, points out that the vast powers of the *Omu* and her parallel duties with the *Asagba* caused some historians to mistake her for a Queen or wife of the *Asagba*.

say in affairs relating to women. Okonjo reports that her economic powers include opening trading sessions, fixing prices, and allocating spaces.[33] Moreover, she functioned as a court and adjudicated over disputes relating to customs.[34] As shown in 3.3 below, the powers of the *Omu* are significant for the status of women in pre-colonial Igbo society.

Contrastingly, power in the village republican system of Igbo governance was decentralised. After observing it, Ormsby-Gore remarked, arguably under a mistaken impression: '[t]hey live in villages, and no one village bears any relation to, or recognizes any affinity with, the people of the next village who may be only a few miles away.'[35] This statement of non-affinity to nearby villages by a non-ethnographic colonial officer is a typical distortion of pre-colonial reality, given that exogamy was common in Igboland. Green reports the correct position as follows: '[s]ince marriage is patrilocal, the wife coming to live in the village of her husband, the result is that the villages are everywhere linked together by their women, the daughters of one village being the wives in a large number of others.'[36]

There were, and still are, two institutionalised age positions – the *Ada* (eldest female child) and the *Opara* or *Okpara* (eldest male child). The *Ada* and *Okpara* occupied, and still occupy important positions with serious social responsibilities.[37] Each extended family is headed by an *Okpara*. Although the oldest male child of every nuclear family is called *Okpara*, only the head of the extended family or *Umunna* is the authentic *Okpara*.[38] This *Okpara* is usually the oldest man of the oldest surviving generation.[39] He holds the family staff of office known as *Ofo*.[40] The *Ofo* symbolises unity, authority, truth, and justice, as well as the link between Chukwu (highest God) and humanity. As *Ofo*-holder, the *Okpara*'s role involves

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[33] K Okonjo 'The dual sex political system in operation: Igbo women and community politics in Midwestern Nigeria' in N Hafkin & E Bay (eds.) *Women in Africa: Studies in Economic and Social Change* (1976) 47-48.

[34] V Ibewuike (note 31) at 64.

[35] Report by Hon. W.G.A. Ormsby-Gore (Parliamentary Under-Secretary for State for the Colonies) on his Visit to West Africa during the year 1926 (1926) 115.

[36] M Green *Igbo village affairs: chiefly with reference to the village of Umueke Agbaja* (1947) 155, 165.

[37] Uchendu (note 26) at 85. Pre-colonial situations that still exist are, hereafter, used in the present tense.

[38] *Ibid* at 40.

[39] E Isichei *A history of the Igbo people* (1976) 22.

[40] The *Ofo* is a short staff derived from a tree known as *Detarium elastica* or *Detarium Senegalese*. It is the equivalent of a parliamentary mace in communal meetings. *See* C Ejizu *Ofo: Igbo ritual symbol* (1986).

offering sacrifices and libations, settling family disputes, and representing his lineage in meetings.[41] Uchendu referred to him as the 'Onye nwe ezi (compound owner), the eye of his compound members,' and the representative of the *Ndi ichie* (ancestors) on earth.[42]

The *Okpara* was duty-bound to uphold communal values. In fact, it was believed that if he abused his *Ofo* staff, ancestral spirits, guided by the *Ndi ichie*, would kill him.[43] Similarly, it was believed that a gross violation of the moral laws of the society by the *Okpara*'s kindred attracted punishment from ancestral spirits. As shown later in the impact of colonial rule on traditional governance, this spiritual check on the exercise of authority, as well as the values symbolised by the *Ofo*, were distorted and, eventually, destroyed.

At the village level, an influential council of elders called the *Amala*, *ndi ichie* or *ndi okenye* wielded political authority.[44] In most parts of Igboland, these councils were made up of *Okparas* and constituted the second-tier level of governance after the *Umunna*.[45] During council meetings, leaders of the *Umuada*, a group of married women, could make representations on issues that affect them.[46] The *Umuada*'s role varies in parts of Igboland. Achebe has described them as a police force in some communities, the most powerful government organ in places like Northern Igboland, a 'supreme court of appeal' in places such as Ohafia, and a 'rotating credit union,' custodians of 'religious morality,' and preservers of market peace and welfare organisation in other places.[47]

The council of elders, comprising of the *Ofo* staff holders of family units, acted as the first layer of the judiciary, while village heads and chief priests of powerful deities acted as the second and final layers.[48] Together with the *Umuada* and age grade societies,[49] the elders were

[41] Uchendu (note 26) at 39-42.

[42] *Ibid* at 40.

[43] *Ibid. See* also J Oriji (note 18) at 268.

[44] E Isichei *A history of the Igbo people* (1976) 22.

[45] F Okafor *Igbo philosophy of law* (1992) 4-5.

[46] T Agbasiere *Women in Igbo life and thought* (2000) 37-47.

[47] N Achebe *Farmers, traders, warriors, and kings* (note 30) at 164-171.

[48] Uchendu (note 26) at 40-42; M Green *Igbo village* affairs (1947) 12, 175.

[49] The *Umuada* wielded tremendous political influence and were/are highly respected.

in charge of the routine administration of their community.[50] In both the two categories of Igbo republican governance described above, the core unit of political organisation was founded on respected men and women. This is the setting in which the male primogeniture custom, a 'cardinal principle of Igbo customary law of succession,' was observed.[51]

3.2.2 Context of the male primogeniture custom

The male primogeniture custom requires that estates are inherited by the eldest male child of a deceased person. In extended families, it sometimes changes to favour the eldest son of the senior wife, even if he is not the first-born son of the family head.[52] It was aimed at family continuity, which is why it was built around the joint production of family income overseen by the *Ofo* staff holder.[53] He organised work parties, assigned tasks, safeguarded the family's lands, livestock, and fishing nets, and represented his lineage in village meetings. Obviously, he did not merely succeed to the assets of a deceased person; he also succeeded to his status.[54] Importantly, he ensured that widows, unmarried daughters, and teenage sons were cared for.[55]

From the foregoing, it is obvious that the male primogeniture custom emerged from the agrarian nature of pre-colonial society. A question that arises is how it reflected on matrimonial property rights in pre-colonial Igboland. This question is best considered in the context of women's status, an enquiry this chapter turns to next.

3.3 Women's status in pre-colonial Igbo society

Matrimonial property rights are inextricably linked to women's social status. However, Igbo women's social status presents an analytical problem.[56] While one part of the problem lies in

[50] M Duru *Socialization among the Igbo: an intergenerational study of cultural patterns, familial roles and child rearing practices* (1980) 30.

[51] E Nwogugu *Family law in Nigeria* (1974, 3rd ed. 2014) 416.

[52] *Ibid* at 416-417.

[53] L Anyanwu *Owerri (Igbo) laws and custom* (2006) 42.

[54] N Okoro *The customary laws of succession in Eastern Nigeria and the statutory and judicial rules governing their application* (1966) 4.

[55] *Ibid. See* also Nwogugu (note 51) at 421.

[56] For literature on women's pre-colonial social status, see N Achebe (note 30); K Okonjo 'The dual sex political system in operation: Igbo women and community politics in Midwestern Nigeria' (note 33) 46-56; I Amadiume

the inadequate representation of women in historical studies,[57] the other lies in the meaning of 'status,' a word that ought to be used with caution. The need for caution is because there is 'something inappropriate about the notion that [pre-colonial African] women and men were everywhere related to each other in a hierarchical fashion.'[58] Put differently, a hierarchical perception of women's status implies a dual-level categorisation of men and women, which neglects the intricate social relationship between them.[59] For example, Sudarkasa argued that the status of African women is 'an obvious distortion of the ethnographic reality,' given that the social domains of men and women traversed each other in pre-colonial society.[60] She supports her arguments with instances of how colonial rule changed the operations of these domains by creating hierarchical conditions. As she put it, 'the development of private property and the market or exchange economy created conditions where female and male became increasingly defined as unitary statuses that were hierarchically related to one another. Such conditions appear to have been absent in various precolonial African societies.'[61] An example of this is the institution of woman-to-woman marriage.[62] Uchendu showed that female wealth and circumvention of the male primogeniture custom, which were the essence of such marriages, demonstrated a non-hierarchical relationship between women and men.[63] This chapter argues that colonial rule changed this non-hierarchical relationship by altering the religious basis, economic substructure, and political system of Igbo society. It achieved this by introducing a new religion (Christianity), which condemned woman-to-woman marriages, an economic system that dismantled the agrarian basis of society, and foreign value systems that

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Male daughters, female husbands: gender and sex in an African society (1989) 119-123; S Leith-Ross *African Women: a study of the Ibo of Nigeria* (1938) 19-21; E Egboh 'The place of women in the Ibo society of South-Eastern Nigeria, from the earliest times to the present' (1973/1974) 23/24(3/4) *Civilisations* 305-316; V Ibewuike (note 31); LN Mbah 'Emergent masculinities: the gendered struggle for power in southeastern Nigeria, 1850-1920 (PhD Dissertation, 2013) [arguing that colonial rule dramatically eroded female socio-political institutions].

[57] C Obbo *African women: their struggle for economic independence* (1980) 1.

[58] N Sudarkasa '"The status of women" in indigenous African societies' (1986) 12(1) *Feminist Studies* 92.

[59] R Linton *The study of man* (1936) 113-31.

[60] N Sudarkasa '"The status of women" (note 58) at 92, 94.

[61] *Ibid* at 94.

[62] Woman-to-marriage is a status-validation marriage under which women 'marry' other women by paying their bride wealth. Scholars proffer two reasons for this: as a status symbol of female wealth and power, and as a means of countering the harshness of the male primogeniture rule. *See* I Amadiume *Male daughters and female husbands* (note 56) at 123 and Uchendu (note 26) at 50 respectively.

[63] Uchendu at 50-51.

rubbished the aim of the male primogeniture custom. These changes influence the manner matrimonial property rights are recognised today.

There is emerging scholarly agreement that women enjoyed more social and economic autonomy than historical writings acknowledge.[64] Several scholars affirm that women, at the very least, played complementary roles to men.[65] Contemporary social phenomena lend credence to these views by indicating the inconsequential importance ascribed to gender as an indicator of behaviour. These, phenomena, which are not peculiar to Ndi Igbo, include costumes, religious rituals, and neutral patterns of comportment.[66] Others are interchangeable use of first names by females and males, and insignificant gender differentials in the pronouns of the Igbo language.[67] Moreover, Igbo women associations wielded equal powers with their male counterparts. They enforced discipline and mediated disputes, including divorce.[68] These realities, together with the discussion below, lend support to theories of fairly balanced gender relations in pre-colonial society.[69] To buttress these theories, the next section reveals women's status in religion, politics, and the economy. The order of analysis builds towards a discussion of matrimonial property rights.

3.3.1 Women's religious status

An analysis of women's religious status is unavoidable because it is heavily linked to women's social agency. A witty incident reported by Anene in his account of the British invasion of Arochukwu gives a clue to women's pre-colonial religious status in Igboland.[70] After the British had conquered the war-like Aros, the women of Arochukwu allegedly pleaded that the dreaded *Ibiniukpuabi* (Long Juju) shrine should not be razed but rather left for them to

[64] *See* the literature in note 56 above.

[65] Nzegwu argues that pre-colonial Igbo gender relations were evenly balanced. After surveying women's multiple social roles, she concludes that this role evolved in a non-patriarchal culture. *See* N Nzegwu *Family matters: feminist concepts in African philosophy of culture* (2006).

[66] N Sudarkasa (note 58) at 101.

[67] *Ibid*.

[68] V Ibewuike (note 31) at 289.

[69] *Ibid* at 100.

[70] J Anene 'The Protectorate Government of Southern Nigeria and the Aros 1900–902' (1956) 1(1) *Journal of the Historical Society of Nigeria* 25.

control.[71] The implication of this request is that they were better diplomats than men.[72] More importantly, it reveals their considerable religious clout, which the Christian religion removed from them. In *Male Daughters, Female Husbands*, Amadiume offers a compelling account of women's religious roles and powerful social agency in pre-colonial society. These roles flowed from the feminine conception of divinity, which was widespread. Amadiume used Nnobi society to show the direct link between women's religious roles, acquisition of wealth, and exercise of power and authority. She demonstrated the flexibility of gender by showing how an eldest daughter could assume the status of an eldest son through certain ritual ceremonies.[73] Being thus empowered, she could inherit property, land and livestock from her father and, effectively, become the family head. In that era, women wore special clothes to indicate prominent titles such as the Ekwe title, which they received through the river goddess, Idemili.

In other works, Amadiume shows that elements of Igbo women's pre-colonial status survive in inheritance, religious practices, and structural gender contestations in kinship relations.[74] She argues that Christianity, the most successful product of colonial rule in Igboland, distorted the social powers of women. As she put it, '[n]ot only did Christianity condemn the goddess religion, it also banned the associated ekwe title. In a short space of time, the focal symbols of women's self-esteem were shattered.'[75] Amadiume went on to assert that 'indigenous customary laws associated with woman-to-woman marriage became confused as a result of its reinterpretation according to cannon law and Christian morality.'[76] She concluded that 'as Christianity introduced a male deity, religious beliefs and practices no longer focussed on the female deity, but on a male God, his son, his bishops and priests.'[77] Her persuasive assertions find support in Achebe's ethnographic study of Nsukka, which shows that women

[71] This request was rejected, and the arguably most famous deity in pre-colonial Nigeria was destroyed.

[72] Green affirms women's social diplomatic roles. *See* M Green *Igbo village affairs* (1947) 176, 152.

[73] I Amadiume *Male daughters* (note 56) chapter 2 titled 'Women, Wealth, Titles and Power.'

[74] I Amadiume *Re-Inventing Africa: matriarchy, religion and culture* (1997) ix-8; *Daughters of the goddess, daughters of imperialism: African women, struggle for culture, power and democracy* (2000). For a contrary opinion, see N Nzegwu 'Chasing shadows: the misplaced search for matriarchy' (1998) 32(3) *Canadian Journal of African Studies* 594-622.

[75] I Amadiume *Male daughters* (note 56) at 123.

[76] *Ibid* at 123.

[77] *Ibid*, chapter 8 titled 'The erosion of women's power' at 134.

played active governance roles as goddesses, priestesses and diviners.[78] Given that religion is inseparable with social life, the pre-colonial political status of Igbo women deserves an enquiry.

3.3.2 Women's political status

Prior to colonial rule, women played influential political roles through institutions such as monarchies (Eze Nwanyi), queen mothers, priestesses, and the Umuada.[79] The institution of indirect rule and the use of Warrant Chiefs changed all these. No event reveals women's reaction to the distortion of their political status more clearly than the events of November 1929. Whereas the British called it the Aba Riots, Ndi Igbo call it *Ogu Umunwanyi*, literarily meaning 'Women's War.'[80] As Allen remarked, the British preference for 'Aba Riots,' was deliberate, since it 'neatly removes women' from a political struggle they initiated and prosecuted with military-like efficiency.[81]

The uprising broke out in November 1929, when thousands of women from Oloko, Bende Division, in former Owerri Province, joined forces with their colleagues in Calabar province to protest oppressive colonial policies and restriction of women's involvement in government.[82] Specifically, it was a protest against British-appointed Warrant Chiefs, whom women accused of planning to levy taxation on them.[83] It began with a dispute between a widow called Mama Nwanyereuwa and one Mark Emereuwa. Emereuwa was conducting a census in Oloko town on behalf of Warrant Chief Okugo, who wanted to improve taxation. When Emereuwa arrived at Nwanyereuwa's house on the morning of 18 November, he

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[78] N Achebe *Farmers, traders, warriors and kings* (note 30) 53-230.

[79] S Jell-Bahlsen 'Female Power: Water Priestesses of the Oru Igbo;' in (O Nnaemeka ed.), *Sisterhood, feminisms and power* (1998) 101-131; I Nzimiro *Chieftaincy and politics in the four Niger states* (1970) and G Chuku *Igbo women and economic transformation in Southeastern Nigeria, 1900–1960* (2005).

[80] Uchendu (note 26) at 5 and chapter four. The researcher's grandmother, nicknamed *Nwanyi-back-chair*, was an Owerri section leader of the revolt.

[81] *See* J Van Allen 'Aba Riots or the Igbo women's war? - ideology, stratification and the invisibility of women' (1975) 6(1) *Ufahamu: A Journal of African Studies* 12. Available online at <http://escholarship.org/uc/item/1700p1w0> (accessed 7 April 2014).

[82] This account is based on oral history, Uchendu chapter four, and the Report of the Commission of Inquiry appointed to investigate the disturbances in the Calabar and Owerri Provinces, December, 1929 (1930). The Report was relied on by E Afigbo 'Revolution and reaction in Eastern Nigeria, 1900-1929: the background to the women's riot of 1929' (1966) 3 *Journal of the Historical Society of Nigeria* 539-557.

[83] C Korieh 'The invisible farmer? women, gender, and colonial agricultural policy in the Igbo region of Nigeria, c. 1913-1954' (2001) 29 *African Economic History* 148-149.

demanded to count the 'goats, sheep, and people' in her household.[84] An infuriated Nwanyereuwa retorted: '[w]as your widowed mother ever counted?' As Afigbo noted, the prospect that women 'would be taxed raised a very strong moral and psychological dilemma' because they were considered partakers in the art of creation.[85] Following a sharp exchange of words, Nwanyeruwa rushed to the town square to report the incident to women gathered in a meeting. Convinced the census was aimed at taxing them, Oloko women mobilised women from other towns. Using fleet-footed young men and oracles, they sent messages as far as Umuahia and Enugu districts. In a matter of days, thousands of women converged at Oloko to protest at the office of Warrant Chief Okugo. They picketed the premises, demanding his resignation and calling for a trial.[86] Words of the protest spread like wildfire. More women joined, and others organised protests in their own towns. They chanted, danced, and sang songs to ridicule Warrant Chiefs. Armed mostly with cassava sticks, they broke into prisons, released prisoners, and torched Native Courts. In return, colonial forces killed about 55 women and wounded many others.[87]

Notably, the protests forced several Warrant Chiefs to resign and led to a partial grant of women's demands to be included in Native Courts.[88] Scholars are united that the protests signified women's attempt to regain their pre-colonial political status.[89] As Korieh put it, the protests were 'directed toward the restoration of equitable gender relations, which had been disrupted by the colonial patriarchal social and political order.'[90] This disruption was an inevitable consequence of the political and economic aims of the British indirect rule policy,

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[84] E Afigbo (note 28) at 13-36.

[85] Afigbo (note 82) at 553.

[86] This picketing is a famous form of protest called 'sitting on a man.' *See* J Van Allen "Sitting on a man: colonialism and the lost political institutions of the Igbo," (1972) 6(11) *Canadian Journal of African Studies* 178. Besides picketing, 'sitting on a man' primarily involves women deploying their highest form of protest: barring their womanhood in public. This form of protest is dreaded in traditional society because of women's association with the earth goddess, the goddess of fecundity.

[87] N Mba *Nigerian women mobilized: women's political activity in Southern Nigeria, 1900-1965* (1982) 76; D Perham and M Perham *Native administration in Nigeria* (1937) 213-214, 216-217.

[88] S Leith-Ross *African women: a study of the Ibo of Nigeria* (1939) 165.

[89] J Van Allen (note 86) at 178; N Nzegwu 'Confronting racism: toward the formation of a female-identified consciousness' (1994) 7(1) *Canadian Journal for Women and the Law* 30; C Ifeka-Moller 'Female militancy and colonial revolt: the women's war of 1929, Eastern Nigeria' in S Ardener (ed.) P*erceiving women* (1975) 128-32.

[90] C Korieh *The land has changed: history, society and gender in colonial eastern Nigeria* (2010) 128.

which is examined in 3.5 below. For now, this chapter turns to women's economic status in pre-colonial society to contextualise their contemporary matrimonial property rights.

Rich Onitsha church members 1880s (Source unknown; credited to G. F. Packer)

3.3.3 Women's economic status

From the political and religious settings described above, it is deducible that women in pre-colonial society occupied a respectable economic position. In fact, some of them were 'ranked higher than their husbands because of their distinctions' in economic activities.[91] Whereas their male counterparts tended to be preoccupied with activities such as hunting, carving and fishing, women combined farming with clothes weaving, basket making, beads making, and ceramics, which archaeological evidence has shown to be prominent economic activities in pre-colonial

[91] Uchendu (note 26) at 86.

times. As farmers, they controlled fruit-bearing trees and had their own crops and vegetables.[92] These included yam the staple crop, and secondary crops such as cassava, cocoyam, maize, melon, breadfruit, okro (okra), lettuce, and tobacco.[93] In fact, the farms and storage facilities of hardworking women rivalled those of their husbands.[94] In her study, Achebe reports that 'Nsukka wives had the right either to intercrop their own produce on their family fields or to cultivate personal plots of their own.'[95] These rights extended to yam cultivation, a crop traditionally ascribed to men. In Nnobi and environs in Anambra State, women were the mainstays of the economy through farming activities.[96] In the Mbaise and Owerri areas, they oversaw palm produce production in plantations.[97] They also engaged in animal husbandry. Even in traditional society today, women take active part in trade and farming activities.[98] It is, thus, obvious that they occupied strong economic positions, which 'in certain cases, was stronger' than men's positions.[99]

Curiously, Egbo offers polygamy as an explanation for women's strong economic position.[100] In his view, men married as many women as they wanted and encouraged them to work for their livelihood on family lands. In these polygamous unions, family income was produced jointly and women's legal status in contractual relations was derived from their husbands.[101] This context lays the platform for the discussion below.

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[92] M Green *Land tenure in an Ibo village in South-Eastern Nigeria* (1941); A Dike 'Land tenure system in Igboland' (1983) 78(5/6) *Anthropos* 856, 863.

[93] Leith-Ross (note 56) at 91-92; Amadiume (note 56) at 31; M Green *Igbo village affairs* (1947) 170.

[94] Uchendu (note 26) at 87.

[95] N Achebe (note 30) at 118.

[96] Amadiume (note 56) chapter one: 'Gender and the economy.'

[97] S Leith-Ross *African Women: A study of the Ibo of Nigeria* (1938) 91. *See*, generally, Korieh (note 83).

[98] NO Madichie & AD Nkamnebe 'Micro-credit for microenterprises?: A study of women "petty" traders in Eastern Nigeria' (2010) 25(4) *Gender in Management* 301 – 319.

[99] E Egboh (note 56) at 310; M Green *Igbo village affairs* (1947) 170-172.

[100] *Ibid. See* also C Achebe *Things fall apart* (1959; 1994) chapter three.

[101] Egbo 'The place of women in Ibo society' (note 56) at 307.

3.4 Igbo pre-colonial matrimonial property rights

Two factors should be borne in mind when considering pre-colonial matrimonial property rights. The first is the tendency to assess women's status based on their conjugal roles in a nuclear family.[102] This tendency ignores the reality of exogamy, which manifests in women's kinship roles as sisters, aunts, and even 'husbands' within extended family units.[103] In these kinship roles, they are 'wielders of power and authority.'[104] The conjugal perception of women's status also fails to adequately reflect the complexities of marriage in pre-colonial society. Some of these complexities still exist. For example, a wife is not married to her husband alone; she is also married to her in-laws, and by extension to her husband's community.[105] This reality is most evident in the rites that precede and accompany a marriage ceremony and its dissolution.[106] It also helps to explain levirate marriage, the practice whereby a brother to a deceased man marries his wife.

The second factor is the paucity of literature on matrimonial property rights. This scarce literature may, in turn, be traced to the rarity of divorce in pre-colonial Igbo society.[107] This is because matrimonial property rights usually become an issue in divorce. A key reason for the low divorce rate is the structure of pre-colonial society, especially the often successful monitoring roles played by families in marriages.[108] In the light of family roles in marriages, the link between matrimonial property rights and the extended family is important.

3.4.1 Matrimonial property rights influenced by 'external' actors

Undoubtedly, marriage is a social institution that involves actors other than the parties. Green identified exogamy as a prominent feature of Igbo marriage. An offshoot of exogamy is that

[102] Sudarkasa (note 58) 96.

[103] Amadiume (note 56).

[104] Sudarkasa (note 58) at 97.

[105] A Kolajo *Customary law in Nigeria through the cases* (2000) 235.

[106] Uchendu (note 26) at 49-54.

[107] High divorce rate has been traced to socio-economic changes: HA Wieschhoff 'Divorce laws and practices in modern Ibo culture' (1941) 26(3) *Journal of Negro History* 299-324; J Ezeokana *Divorce: its psychological effects on the divorced women and their children - a study on the Igbos of Southern Nigeria* (1999) 17; M Ashiru 'Gender discrimination in the division of property on divorce in Nigeria' (2007) 51 *Journal of African Law* 316-331.

[108] V Ibewuike (note 31) at 110-111.

the actual marriage ceremony in pre-colonial society involved a series of intricate formalities dictated by external actors. The core elements of these formalities, some of which are still practiced, are: consent of parties and their parents, betrothal, payment of the bride wealth, and even the rituals that accompany the marriage ceremony.[109] Matrimonial property rights were, thus, influenced by the marriage requirements of concerned communities, which were, in turn, influenced by the extended family.[110] Accordingly, where a man did not complete the formalities of marriage, the extended family invariably became involved. Such involvement could affect the spouses' quantum and control of property.[111] Unfortunately, the ambit of matrimonial property in pre-colonial society is difficult to ascertain.

3.4.2 Ambit of matrimonial property rights

One view holds that, in a legal sense, women had no matrimonial property rights. As Egbo put it, a woman 'had no legal right to her husband's property, whereas the husband, in virtue (sic) of the bride-price he provided, had legal right to her (sic) wife's property.'[112] By linking women's absence of 'legal rights' over matrimonial property to the payment of bridewealth, Egbo failed to address the question of how women's 'legal status' in pre-colonial society differs from their colonial and postcolonial legal status. As argued in 3.3 above, there was a non-hierarchical gender relationship in pre-colonial society, which implies a legal status different from the manner we understand it today.

Egbo also failed to consider changes in the meaning of bridewealth. Prior to colonial rule and even after, bride wealth was primarily a symbol of the union between the bride and groom's families.[113] It was also regarded as a contributor to marriage stability and an appreciation of the fecundity of the bride, who was considered a partaker in the art of

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[109] A Enemali *The formal requirements of the celebration of marriage: a comparative study of canon law, Nigeria statutory law and Nigeria customary law* (2013); *Agwasim* v *Ejivumerwerhaye and Ejivumerwerhaye* (2001) 9 NWLR (Pt 718) 395 at 409.

[110] For discussion of marriage and its requirements, see M Onokah *Family law* (2003) 72-80; Nwogugu (note 51) at 33-34; Enemali *ibid* at 36-41; Green *Igbo village affairs* (1947) 161.

[111] J Agbasiere *Women in Igbo life and thought* (2000) 108-110; M Green *ibid* at 97, 164.

[112] Egboh (note 56) at 307.

[113] U Isiugo-Abanihe 'Consequences of bridewealth changes on nuptiality patterns among the Ibo of Nigeria' in C Bledsoe & P Gilles (eds.) *Nuptiality in sub-Saharan Africa: contemporary anthropological and demographic perspectives* (1994) 74-93.

creation.[114] When colonial rule disrupted the economic and belief system of traditional society, bridewealth began to be referred to as bride price.[115] In fact, its meaning became so distorted that the defunct Eastern Nigerian Government adopted legislation to limit the sum payable as bridewealth.[116] Egbo's assertion that women had no legal right to their husband's property because men paid their bride-price must, therefore, be qualified. In any case, this is how he undermined his own assertion:[117]

> Women in the traditional society could acquire property of their own. In the economic sphere, women occupied a respectable position in the traditional society. Every woman had been not only a farmer but also a petty-trader … From the foregoing, it is easy to see that the women in the traditional Ibo society operated from a very strong economic position which in certain cases was stronger than that of most of the men, with the result that such men had to depend upon their wives for financial support.

It is noteworthy that Egbo's study was conducted after Nigeria's independence when colonial rule had already caused many changes in the social settings of customary law. An example of colonial perception of matrimonial property rights in Igboland is Whitridge's ethnocentric report.[118] In his view, 'it may be suggested that it is only with the advent of European rule that women have been able to stand up for their rights, and that before that time the husband was able to appropriate all that his wife earned.'[119] A more shocking ethnocentric report is Basden's survey, which he conducted during the First World War:[120]

> The woman is ranked with the other property of the husband with a proportionate value attached, but little greater than that of the cows and goats ... A woman cannot divorce

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[114] *Ibid*. *See* also MB Mulder 'Bridewealth and its correlates: quantifying changes over time' (1995) 36(4) *Current Anthropology* 573- 603.

[115] JU Ogbu 'African bridewealth and women's status' (1978) 5 *American Ethnologist* 241-262 at 251.

[116] *See* the preamble to the Limitation of Dowry Law, Eastern Region Law No. 23 of 1956, now Cap 76 Laws of Eastern Nigeria 1963.

[117] Egboh (note 56) at 310 and footnote 8.

[118] TN Whitridge *Anthropological report on the Ibo-speaking peoples of Nigeria: law and custom of the Ibo of the Awka neighbourhood, S. Nigeria* (1913) 125.

[119] *Ibid* at 124.

[120] G Basden *Among the Ibos of Nigeria: an account of the curious & interesting habits, customs & beliefs of a little known African people by one who has for many years lived amongst them …* (1921) 69.

> her husband; she is his property, duly paid for, and she cannot take action against her lord and master any more than one of his cows or goats ... Women have but few rights in any circumstances, and can only hold such property as their lords permit.

Basden's report is questionable, even by his own admission. In his words, 'I am bound to confess that I feel, after seventeen years, more puzzled over many things than I did after the same number of weeks in the country.'[121] As evidence of this confession, he reported that 'the black man himself does not know his own mind ... He is under the influence of an atmosphere which emanates from the whole tribe.'[122] Interestingly, he contradicts his position on the rights of women by reporting that 'in daily life (women) hold a strongly entrenched position, the key of which is food. Every married woman holds the whip hand over her husband by means of this vital weapon.'[123] This finding is more in line with the opinions discussed in the next paragraph. The persuasive view is that legalistic conceptions of women's rights are blurred by not just the communal nature of pre-colonial economic activities, but also by the extended family's role in marriages. Even the ethnocentric Whitridge inadvertently supports a non-legalistic conception of matrimonial property. He gave several instances from communities in Enugu and Anambra, in which men were absolutely barred from their wives' monies, or had only nominal authority over them. He concluded:[124]

> On the whole, therefore, the theory of women's property appears to be in an unsettled state. There is no uniformity, even within the limits of a single town, much less over any wider area. If questions of women's property are to be decided in the courts on rational grounds, native opinion needs to be guided, for there is no native law – properly so-called – that the courts can administer.

The above positions may be contrasted with the views of Uchendu and Green.[125] Uchendu asserted that 'the African woman regarded as a chattel of her husband, who has made a bridewealth payment on her account, is (certainly) not an Igbo woman, who enjoys a high

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[121] *Ibid* at 10.

[122] *Ibid* at 9.

[123] *Ibid* at 100.

[124] *Ibid* at 126. This ridiculous assertion of an absence of laws may be contrasted with chapter nine ('Law Making') of Green *Igbo village affairs* (1947) 132.

[125] *See* also Achebe (note 30) 118; Amadiume *Male daughters* (note 56) cap 2: 'Women, wealth, titles and power.'

socioeconomic and legal status.'[126] Notably, Uchendu was an ethnographer from the study population and conducted his surveys during Nigeria's pre-independence era.

Green's extensive survey of the study population in 1934 and 1937 was motivated by the Women's War. She established that, while men were prominent in public affairs, women were 'the chief breadwinners.'[127] She used several amusing anecdotes to illustrate women's matrimonial control over men. In one of them, a man in a monogamous marriage was committing adultery. Despite warnings from his wife, he was unable to stop, 'the lover being an attractive creature.'[128] Eventually, his wife employed starvation as an economic coercion to secure his faithfulness.[129] In another incident, a group of women killed two pigs belonging to a man. When Green enquired about remedial measures, her male informant shrugged. He then laughingly replied: 'it is the women who own us,' before going on to explain 'the general situation as between' men and women in past and present times.[130] Green also proffered a theory of reciprocity or 'mutual obligations' to demonstrate the absence of a hierarchical gender relationship in pre-colonial society.[131]

In sum, the literature on the subject reveals that women's economic status, and by implication, their property rights, rivalled that of men.[132] The disagreement merely lies in the level of control spouses exercised over matrimonial property. None of the surveyed studies show clear evidence of a hierarchical conception of matrimonial property. The stage is now set for a discussion of how colonial rule affected matrimonial property rights.

3.4.3 Colonial impact on matrimonial property rights

Pre-colonial matrimonial property rights were influenced by two key elements. The first is the consistent colonial application of patriarchal policies to a society with complementary gender

[126] Uchendu (note 26) 87.

[127] M Green *Igbo village affairs* (1947) 170-172 at 170.

[128] *Ibid* at 172.

[129] *Ibid*.

[130] *Ibid* at 174-177.

[131] *Ibid* at 98.

[132] *See* the literature in footnote 56.

relations.[133] As Korieh stated, the British 'initiated rapid economic changes and a transformation of traditional gender relations of production … The most important problem centred on the … separation of the roles of men and women, which had previously been complementary.'[134] With the commercialisation of agriculture and exclusion of women in agricultural policies, women gradually lost their economic power base. Married women's property rights became diminished and increasingly perceived through their husbands' rights.

The second element is erosion of the role of the extended family. This erosion is unsurprising, given that in pre-colonial society, marriage was 'an alliance between two families, rather than a contract between two individuals' that it has now, largely, become.[135] Accordingly, the rights and privileges which accompanied marriage were sometimes determined and shaped by the respective families of the couple. It is natural that an erosion of the roles of families in the marriage institution through decreased extended families, new systems of village administration, and new belief patterns, would necessarily disturb the ambit of matrimonial property rights.

By a similar analogy, an erosion of the non-hierarchical economic system upon which matrimonial property revolved would disturb matrimonial property rights. In analysing the 'relationship between a gendered colonial policy and the agricultural transformation' of Igboland, Korieh showed that 'the gendered nature of colonial policies is inseparably linked to the changes in the pattern of agriculture.'[136] When education was introduced into Igboland, girls were initially not sent to school because females were the mainstays of the agrarian economy. The early entrants into schools were boys, who quickly imbibed individualistic notions of property relations and assumed altered conceptions of women's status.[137] When the agrarian foundation of the economy was swept away, women were caught in the middle. For example, a divorced woman could barely return to her father's home because extended family

[133] *Ibid*. *See* also G Chuku 'Women in the economy of Igboland 1900 to 1970s: A Survey' (1995) 23 *African Economic History* 37-50.

[134] C Korieh (note 83) 124.

[135] Uchendu (note 26) 50.

[136] C Korieh (note 83) 117-118.

[137] Egbo (note 56) 313.

support had been eroded by nuclear families and urbanisation.[138] Indeed, Wieschhoff noted that women separated from their husbands 'frequently [would] turn to prostitution.'[139]

In sum, the patriarchal policies that accompanied the colonial economic system introduced hierarchical gender relations into Igbo society, which disadvantaged women. As Uchendu put it, 'the church, the city, and politics all created new statuses.'[140] The effect is that the contemporary 'relationship between women and men has moved decidedly in the direction of a hierarchical one' in which women occupy a subordinate position.[141] This movement was revolutionary because of the manner and method through which it occurred. It came with a new religion called Christianity, an economic system called capitalism, a migrant labour system called 'white collar jobs,' radical value systems called Western education, and laws from an industrial society called the received English law. The remainder of this chapter specifically examines how colonial policies changed customary law.

3.5 Colonial changes to customary law

The scope of this dissertation discourages an in-depth examination of colonial rule in Nigeria.[142] This section examines the changes that colonial rule caused to customary law through three indices: changes in traditional governance structures, changes in the land tenure system, and judicial changes in customs. These changes occurred under the indirect rule policy, an allegedly pragmatic tool of colonial rule.[143] This policy was spearheaded by two categories

[138] M Hollos 'Migration, education, and the status of women in Southern Nigeria' (1991) 93(4) *American Anthropologist* 852 & 867.

[139] HA Wieschhoff 'Divorce laws and practices in modern Ibo culture' (note 107) 315.

[140] Uchendu (note 26) 92.

[141] N Sudarkasa '"The status of women" (note 58) 102.

[142] For studies on colonialism in Nigeria, see A Ryder *Benin and the Europeans 1485-1897* (1969); A Burns *History of Nigeria* (1972); J Anene 'The foundation of British rule in "Southern Nigeria"' (1885–1891) (1959) 1(4) *Journal of Historical Society of Nigeria*; J Flint *Sir George Goldie and the making of Nigeria* (1960); M Perham and M Bull (eds.) *The diaries of Lord Lugard, Vol. 4: Nigeria, 1894-5 and 1898* (1963); J Schacht 'Islam in Northern Nigeria' (1957) 8 *Studia Islamica* 124; R Dusgate *The conquest of Northern Nigeria* (1985); MS Umar *Islam and colonialism: intellectual responses of Muslims of Northern Nigeria to British colonial rule Vol. 5* (2006); S Pierce 'Review of a history of Nigeria' (October 2009) 812 *Reviews in History* 1.

[143] Reasons given for the indirect rule policy include shortage of staff, quest for cheap administration, official determination to achieve continuity of administration in view of Nigeria's harsh climate, and need to avoid the consequences of abolishing traditional systems. *See*, generally, W Elliot 'The parliamentary visit to Nigeria' (1928) 27(107) *Journal of the Royal African Society* 215-216; M Perham *Native administration in Nigeria* (1937); E Afigbo *The Warrant Chiefs: Indirect Rule in South-Eastern Nigeria*, *1891-1929* (1972); J Atanda *The new Oyo Empire: Indirect Rule and change in Western Nigeria 1894-1934* (1973); O Ikime 'Reconsidering Indirect Rule: the Nigerian example' (1968) 4 (3) *Journal of the Historical Society of Nigeria* 422.

of Nigerians.[144] The first are natives who had learnt English language by their contact with Europeans through the slave trade, legitimate trade, or education. The second category is tribal authorities such as chiefs, monarchs, and elders. However, they were not always chiefs and elders. As Herbert Palmer, one of Lord Lugard's trusted lieutenants remarked, 'Warrant Chiefs were "merely the more adaptable natives of the successful trader type who act as advisers to the Court on the one hand and as subordinates or allies of the Native Court Clerk on the other."'[145] This implies that some Warrant Chiefs were influential traders willing to work with the British to consolidate their positions in the new administration.[146]

In the South-East and South-West, many Warrant Chiefs were former slaves and outcasts who had benefitted from the Western education offered by European missionaries. Their inclusion in governance caused legitimacy problems in Igboland.[147] As shown in the structure of pre-colonial society, governance was led, chiefly, by respected men and women. These individuals were all 'free born,' and majority of them were elderly or otherwise esteemed people.[148] Colonial rule disrupted this system by imposing former slaves, strangers, young men, and people of insignificant social standing as Warrant Chiefs.[149] Rarely were these individuals *Ofo* holders of their respective lineages. To Ndi Igbo, this was tantamount to abomination, as it violated their communitarian values and fiercely independent spirit.[150] Thus, whereas indirect

[144] For detailed explanation of the indirect rule policy, see M Crowder *West Africa under colonial rule* (1968); M Crowder *Colonial West Africa: collected essays* (1978).

[145] E Afigbo 'Herbert Richmond Palmer and indirect rule in Eastern Nigeria: 1915-1928' (1965) 3(2) *Journal of the Historical Society of Nigeria* 298.

[146] E Afigbo 'The Warrant Chief System in Eastern Nigeria: Direct or Indirect Rule?' 3(4) *Journal of the Historical Society of Nigeria* (1967) 690-691.

[147] The Women's War is clear evidence of Warrant Chiefs' absence of legitimacy.

[148] A Harneit-Sievers 'Igbo traditional rulers: chieftaincy and the state in Southeastern Nigeria' (1998) 33 *Afrika Spectrum* 60; Uchendu (note 26) 41 & 88. As Afigbo put it, 'to be a lineage head, one needed not political ability, but free descent, reputation for moral rectitude, and generally the right age.' *See* E Afigbo *The Warrant Chiefs* (note 28) 35; M Green *Igbo village affairs* (1947) 23-24.

[149] Afigbo *The Warrant Chiefs* (note 28) 71 & 104; N Achebe *The female king of colonial Nigeria: Ahebi Ugbabe* (2011) 100. Ogbalu has argued that colonial rule introduced the terminology 'chief' into Igbo social life, as prior to colonial rule, 'chief' had no Igbo equivalent. *See* FC Ogbalu, *Igbo institutions and customs* (1975) 21. *See* also C Ukpokolo 'Power of space, space of power: the sociocultural complexities in the institutionalization of "Ezeship" in non-Igbo States in Nigeria' (2012) 43(4) *Journal of Black Studies* 448.

[150] E Isichie *A History of the Igbo people* (1976) 62, 142-143. However, the British did not always impose Warrant Chiefs. Some communities, who were very suspicious of British motives, 'selected the most insignificant individual in the village – in some cases even a slave – in the hope thereby of being freed from official interference with the village administration.' *See* C Korieh *The land has changed* (note 90) 72.

rule succeeded in Northern Nigeria because of the region's centralised governance system, it failed in Southern Nigeria.[151] In Afigbo's view, this failure is because the British approached Igbo governance system with preconceived notions:[152]

> They, for instance, assumed that chiefs existed … Then there was the view which became dominant from 1914 that the system of local government in Eastern Nigeria should be made to approximate as much as possible to the system which Lugard between 1900 and 1906 had established in Northern Nigeria. These preconceived notions proved dangerous. They were largely responsible for the fact that for three decades, the British made no serious attempt to understand the realities of the indigenous social and political organisation in the area.

The indirect rule policy, thus, directly affected Igbo pre-colonial governance system. More importantly, it altered customary law, as explained below.

3.5.1 Changes in traditional governance

In the coastline, constitutional monarchy described in 3.2 above, many of the Warrant Chiefs were successful individuals who traded in palm produce with British sailors, or acted as middlemen for their communities. For commercial and other reasons, some of them misrepresented the true situation of governance in the hinterlands. Afigbo reports the experience of Mr WV Tanner, the Acting British Vice-Consul at Akwete, in Abia State. Mr Tanner had toured parts of the Ngwa clan in 1895. In his report, he described one man who held himself out as the 'King of Ngwa,' and a '"chief" who was happy to see him and promised to keep things quiet in his domain.'[153] These claims were false, as the Ngwa people never had kings at that period and practiced a system of governance that did not need to keep anyone quiet.[154] Such misrepresentations to the British enabled many Warrant Chiefs to assume powers they never had before colonial rule.[155] It also enabled them to present versions of customary

[151] Other than Oyo and Abeokuta, indirect rule did not work in Western Nigeria. *See* generally, J Atanda *The new Oyo Empire: Indirect Rule and change in Western Nigeria 1894–1934* (1973).

[152] E Afigbo 'Herbert Richmond Palmer and Indirect Rule in Eastern Nigeria (note 145) 295.

[153] E Afigbo 'The Warrant Chief System in Eastern Nigeria: Direct or Indirect Rule?' (note 146) 691.

[154] *Ibid*.

[155] F Ogbalu *Igbo institutions and customs* (1975) 21.

law that suited their motives.[156] A significant aspect of this misrepresentation concerned the Igbo land tenure system.

3.5.2 Changes in the land tenure system

Prior to colonial rule, land tenure system in Southern Nigeria was mainly communal.[157] Most lands were sacred groves or forests, virgin land, and *ala ozuzu* (land held in common by a community or kin group).[158] In effect, there was no real individual concept of ownership, nor was there individual alienation of land. The only exceptions, if they are really exceptions, were allocations of land by the family head to encourage competitive productivity among family members.[159] Significantly, land is an important aspect of life because of its spiritual connotations. An ethnographer described the rationale for the reverence with which land is held in Igboland as follows: 'The feeling partly arises, no doubt, from the belief in the spirits of the earth, the local representative of which is usually regarded as the tutelary guardian of the people and its soil, and partly from the worship of ancestors who dwell in it.'[160] This reverence is evident in the name of land, *ala*, which means mother earth or earth goddess. Indeed, it is common knowledge that swearing with land is a very high form of oath-taking.

However, communal land ownership was antithetical to the exploitative aims of colonial authorities and the assertive aspirations of those who acted as Warrant Chiefs.[161] It is noteworthy that, following Britain's renunciation of the slave trade, agricultural production in its colonies became its foremost colonial policy.[162] After observing the land tenure system and

[156] The distortion of Igbo governance survived colonial rule because the descendants of Warrant Chiefs claim that their chieftaincy is hereditary. *See* E Afigbo *Igbo enwe eze: beyond Onwumechili and Onwuejegwu* (2001) 18.

[157] P Talbot *The people of Southern Nigeria Vol. 3* (1937) 680.

[158] C Meek *Law and authority in a Nigeria tribe: a study of Indirect Rule* (1937) 30.

[159] T Elias *The nature of African customary law* (1956) chapter 9 at 159.

[160] P Talbot *The people of Southern Nigeria Vol. 3* (1937) 682.

[161] P Talbot, *ibid* at 680; C Meek 'A note on Crown land in the colonies' (1946) 3(28) *Journal of Comparative Legislation and International Law* 87-91.

[162] See *Report by Hon. W.G.A. Ormsby-Gore (Parliamentary Under-Secretary for State for the Colonies) on his Visit to West Africa during the year 1926*; cited in J Coleman *Nigeria: Background to nationalism* (1963) 487.

finding it unsuitable for their goals, colonial officials enacted the Crown Land Ordinance of 1900, effectively assuming ownership of all lands.[163] The consequences were profound.

Korieh's insightful study, *The Land Has Changed*, presented a gendered account of the processes and dynamics of agrarian transformation in Igboland. He showed how colonial change of agricultural production reconstructed gender relations and distorted women's property rights. An example is a woman's complaint to the Commission of Inquiry that investigated the Women's War in 1930: 'Our grievances are that the land has changed and we are all dying. It is a long time since the chiefs and the people who know book [Western-educated people] have been oppressing us.'[164] Land was a key centre of struggle between the British and their agents, as well as between the natives. The Warrant Chiefs were happy to oblige in the distortion of land ownership. They even colluded with the British in the violent appropriation of land.[165] Women, who dominated agricultural activities before colonial rule, were systematically schemed out of land ownership.[166] They were also banished to the background in public life.[167] Significantly, the duties of the family head were largely rebirthed as powers and privileges in disregard of Igbo values.[168] In this sense, the biggest changes in customary law occurred in the courts, which handled complaints about colonial excesses.

3.5.3 Changes to customary norms in the courts

Afigbo's authoritative account of the structure of the Warrant Chief System reveals the institutional factors that led to the creation of official versions of customary law.[169] First, the

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[163] T Elias 'Nigeria's contribution to colonial law' (1951) 33(3/4) *Journal of Comparative Legislation and International Law* 51. For the colonial impact on land tenure in Nigeria, see also V Uchendu 'State, land and society in Nigeria: a critical assessment of Land Use Decree' (1978) 6(2) *Journal of African Studies* 62-74.

[164] C Korieh *The land has changed* (note 90) 1.

[165] Umejesi gives the example of how 'ruthless' Warrant Chief Onyema forced villagers to sign a Deed of Grant for coal mines in 1915, which ratified an earlier seizure of land in 1912. *See* I Umejesi 'The nation state, resource conflict, and the challenges of "former sovereignties" in Nigeria' (2012) 13(3) *African Studies Quarterly* 58.

[166] AO Ilumoka 'Legal imperialism and the democratisation of law: towards an African feminist jurisprudence on the development of land law and rights in Nigeria 1861-2011 (2013) *PhD Dissertation, University of British Columbia* 125.

[167] *Ibid* at 99-109, 242.

[168] Uchendu (note 26) 42; C Ifemesia *Traditional humane living among the Igbo* (1979) 73; C Ejizu *Ofo: Igbo ritual symbol* (1986) 34.

[169] E Afigbo *The Warrant Chiefs: Indirect Rule in South Eastern Nigeria: 1891-1929* (1972) chapter three.

Warrant Chief System was synonymous with Native Courts.[170] The powers, privileges, and duties of Warrant Chiefs were linked to their membership of Native Courts. This membership was, in turn, based on the 'warrant' or 'certificate of recognition' which the British granted to them.[171] Even when Warrant Chiefs exercised executive powers, they based it on their authority as Native Courts members.[172] Thus, Native Courts formed the fulcrum of local authority.[173] The question is how Warrant Chiefs contributed to the creation of official customary law.

Most of the individuals who took charge of pre-colonial governance were respected elderly or middle-aged people. Colonial officials made a mockery of this governance system with their unstructured appointment of Warrant Chiefs. Initially, colonial officials partnered with Christian missionaries in venturing into the hinterland.[174] Their contacts with the hinterland were assisted by interpreters. After securing the allegiance of communities through force, threats, deception, or persuasion, they appointed Warrant Chiefs. In some cases, villages nominated social misfits out of mistrust of the British.[175] In other cases, the British imposed on communities unwanted persons, strangers, former slaves,[176] or their sympathisers.[177] In yet other cases, they made appointments in whimsical or bizarre manners. For example, a traditional ruler reported an incident in Umuchieze, Mbaise in Imo State.[178] According to him, twenty-two-year-old Philip Eluwa had remained behind when other villagers fled on sighting the British. Oral accounts held that his refusal to run was out of curiosity. For Philip's act of 'bravery,' however, the British made him a Warrant Chief.[179]

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[170] *Ibid* at 37.

[171] E Afigbo 'The Warrant Chief System in Eastern Nigeria' (note 146) 683.

[172] *Ibid.*

[173] *Ibid* at 684.

[174] F Ekechi 'Colonialism and Christianity in West Africa: the Igbo case, 1900-1915' (1971) 12(1) *Journal of African History* 104. *See* also F Arinze *Sacrifice in Ibo Religion* (I969).

[175] C Korieh *The land has changed* (note 90) 72.

[176] G Tomlinson *Report of a tour in the Eastern Provinces by the Assistant Secretary for Native Affairs* (1923) 13; L Chubb 'Assessment reports: Bende Division, 1927-1929' Enugu National Archives, 2-6.

[177] J Anene *Southern Nigeria in transition* (1966) *1885-1906: theory and practice in a colonial protectorate* (1966) 231.

[178] E Onuoha *The land and people of Umuchieze* (2003) 17–21.

[179] *Ibid* at 18.

The delineation of functions in Native Courts contributed to the emergence of official customary law. Many Warrant Chiefs, on their own, demarcated their jurisdiction and appointed headmen and messengers to assist them. These individuals were often 'strong and audacious young men' suited to the coercive style of colonial administration.[180] Besides headmen and messengers who could barely speak English, were assigned to Native Courts as clerks or interpreters. As mediators between the people and the District Commissioner, they engaged in reckless abuse of power, which involved the distortion of customs.[181] Most of this distortion was unavoidable, considering how Native Courts were structured.

Between 1891 and 1900, there was no clarity regarding the legal regulation of Native Courts.[182] In 1900, the first Native Courts Proclamation was adopted, followed by a reformatory Proclamation in 1901.[183] The 1900 Proclamation created two categories of courts. The first was 'Minor Courts,' which comprised of all courts presided over by a 'native authority' or local chief.[184] Above it was Native Councils, which were presided over by British political officers based at the district headquarters of the colonial government.[185] The political officer was the titular president of all Native Courts in his district. In practice, however, he was unable to sit in all the courts, and was content to perform rotatory supervision.[186] Rather than be guided by native law and custom, these courts applied 'native law modified to suit British conscience … which from the point of view of the people, was far from traditional and customary law.'[187] This is the genesis of the repugnancy test, a key customary law mechanism discussed in chapters five, six and seven.

After the merger of Southern Nigeria with the Colony and Protectorate of Lagos in 1906, the Native Court Ordinance (hereafter '1906 Ordinance') was adopted. This Ordinance gave District Commissioners, as members of the Supreme Court, the power to transfer cases from

[180] E Afigbo *The Warrant Chiefs: Indirect Rule in South Eastern Nigeria* (note 143) 104.

[181] O Njoku *Ohafia: a heroic Igbo society* (2000) 104.

[182] *Ibid* at 79.

[183] Native Courts Proclamation, 1900, No. 5 of 1900 and Native Courts Proclamation No 25 1901, Laws of Southern Nigeria 1900-1901.

[184] Afigbo (note 143) 84.

[185] *Ibid.*

[186] *Ibid* at 83.

[187] E Afigbo 'Revolution and reaction in Eastern Nigeria' (note 82) 543.

Native Courts to their own courts.[188] This subordination of Native Courts to the Supreme Court and use of English standards to apply customary law directly contributed to rule-based interpretations of customary law.[189] As Palmer noted in his memoirs, the Native Courts 'developed in a manner quite contrary to the spirit in which they were designed' and efforts to preserve customary law 'has so far resulted in steadily destroying it.'[190] He went on to add that, 'among these relatively primitive peoples, Europeanised individualistic government is being introduced. The Government machinery is steadily grinding to powder all that is native.'[191] Palmer's correct observation is supported by Lugard himself.[192]

In effect, the 1906 Ordinance introduced English judicial procedure into courts – first in the Lagos Colony, then in Igboland.[193] In addition, the excesses of Warrant Chiefs played a big role in the creation of official customary law. Prior to 1914, chiefs enjoyed sweeping powers that did considerable damage to the processual character of customary law.[194] They derived their revenues exclusively from court fees and fines, and managed their own treasury, on which they practically depended for their livelihood. This gave them significant lee-way to amass fortunes by re-ordering the traditional governance system. A detailed quote from a testimony given at the Commission of Enquiry that investigated the Women's War reveals the governance style of chiefs:[195]

> On one occasion, Okugo called both men and women together and told them that the District Officer had ordered that money should be collected for him to build a house. The villagers contributed 20 pounds towards this project. On another occasion, Okugo told villagers that the District Officer 'had been worrying him for a young wife and that

[188] Laws of the Colony of Southern Nigeria, Vol. II (1908) 1267-1268, National Archives, Enugu.

[189] J Anene *Southern Nigeria in transition* (1966) 266.

[190] E Afigbo 'Herbert Richmond Palmer and Indirect Rule (note 145) 298.

[191] *Ibid.*

[192] Lugard noted that the inclusion of British political officers in the Native Courts had the effect of injecting 'disintegrating alien legal ideas into "primitive" communities.' Afigbo, *ibid* at 693, citing Lugard.

[193] J Flint 'Nigeria: the colonial experience from 1880 to 1914' in (Gann & Duignan, eds.), *Colonialism in Africa, 1870-1960 Vol. I: the history and politics of colonialism*, *1870-1914* (1969) 250.

[194] Lugard himself admitted that this prompted his reforms. *See* F Lugard *Lugard in Nigeria: report on the amalgamation of Northern and Southern Nigeria and administration, 1912-19* (2004).

[195] Report of the Commission of enquiry appointed to inquire into the disturbance in the Calabar and Owerri Provinces, December 1929 (Sessional Paper No. 28) 24-30.

> [we] should collect money to pay the dowry of a young wife for the District Officer … We are sure these women (sic) were not given to the District Officer.'

The coercive nature of colonial rule encouraged the excesses of Warrant Chiefs.[196] Other than this, the process of interpreting customs played a big role in the emergence of official customary law. The court clerks who acted as interpreters to Warrant Chiefs and District Commissioners were 'generally, men of ''little dangerous knowledge.'"[197] Often, their limited language abilities, pecuniary interests, and other motives distorted their presentation of customary law.[198] This distortion was most evident in the reconstruction of gender relations from a relational to a hierarchical structure, culminating in a patriarchal conception of matrimonial property.[199] The alarming extent of this distortion was dramatically portrayed in 'Icheoku,' a popular 1980s television comedy.[200] In this drama, Lomaji Ugorji, a renowned actor, impersonated a colonial court clerk by hilariously misinterpreting the British District Commissioner. Korieh reported a District Officer's record of the havoc interpreters caused:[201]

> The interpreters were either content to tell the Europeans what they thought they wanted to know or to extend a helping and well-greased hand to … ambitious individuals, and the difficulties of the Ibo language and the timidity of the people prevented the Administrative Officers until many years later from learning the truth.

Given the context in which interpreters operated, it is unsurprising that the (official) customary law presented in Native Courts was sometimes far removed from the actual customary law of

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[196] *Ibid.*

[197] Afigbo *The Warrant Chiefs: Indirect Rule in Southeastern Nigeria* (note 143) 111.

[198] *Ibid* at 106-107. *See* also C Akoma 'Verbal miscues or cultural agency? Icheoku: an introduction' (2009) 40(1) *Research in African Literatures* 90-92; N Uzochukwu 'Colonial political re-engineering and the genesis of modern corruption in African public service: the issue of the Warrant Chiefs of South Eastern Nigeria as a case in point' (2005) 14(1) *Nordic Journal of African Studies* 105.

[199] Uchendu (note 26) cap 2; E Isichei *A history of the Igbo people* (1976) 147; Achebe *Farmers, traders, warriors, and kings* (note 30); Okonjo 'The dual-sex political system in operation' (note 33) 55; J Van Allen 'Sitting on a man' (note 86); Mba *Nigerian women mobilized* (note 87) 38-39.

[200] Icheoku was discontinued by the Nigerian Television Authority in 1992. For 'discourse on native agency in the face of colonial cultural and political dominance,' see Akoma (note 198) 86-96.

[201] Korieh *The land has changed* (note 90) 71.

the people.[202] This divergence did not bother the British, who were mainly concerned with maintaining their economic exploitation of the natives.[203] As their approach to the Women's War showed, they were not really concerned with the excesses of the Warrant Chiefs, except in cases where these excesses threatened law and order.[204] In fact, as long as law and order was maintained, Warrant Chiefs and their assistants were rewarded.[205]

By 1929 when the Warrant Chiefs System was abolished as a result of the Women's War, the key blows in the distortionary damage to customary governance had been delivered.[206] Rather than die, however, essential elements of the Warrant Chief System went into hibernation.[207] Following British reforms in colonial administration in Southern Nigeria in 1930, Native Authority Councils and Native Courts were introduced. Although many of them were composed of titled men, village elders, or leaders of age grades, they attracted widespread criticisms for their disconnection with traditional systems of governance, lack of true representativeness, and corruption.[208] Unsurprisingly, this system lasted barely a decade before the British replaced it with the so-called 'Best Man Policy,' which fitted well with their reluctant decolonisation policy. This new policy encouraged communities to choose educated representatives with a view to self-government.[209] However, the ghost of a distorted customary law continued to haunt the emerging system.

By 1956, political agitations for independence had given the three regions of Nigeria some measure of self-government. The Northern and Western Regions set up 'Houses of Chiefs' as second-tier parliamentary chambers. In order not to lose democratic dividends at the

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[202] The presentation of distorted versions of customary law in the courts continued after colonial rule ended. *See*, for example, *Okanlawon & Ors* v *Olayanju & Ors* (unreported) Suit No. H05189176, Oshogbo High Court, 24 August 1978, per Sijuwade, J.: 'I have no doubt that the 4th D.W. has given a distorted version of the traditional history and embellished the custom of land tenure in Ogbomosho, presumably to suit his own purpose.'

[203] Afigbo 'Revolution and reaction in Eastern Nigeria' (note 82) 543.

[204] Ekechi 'Colonialism and Christianity' (note 174) 105.

[205] Afigbo 'The Warrant Chief System in Eastern Nigeria' (note 146) 689.

[206] F Adegbulu 'From Warrant Chiefs to ezeship: a distortion of traditional institutions in Igboland' (2011) 2(2.2) *Afro Asian Journal of Social Sciences*. Note that this article so heavily plagiarised Harneit-Sievers 'Igbo traditional rulers: chieftaincy and the state in Southeastern Nigeria' (note 148) that its value lies in its title.

[207] Many children of Warrant Chiefs assumed chieftaincy posts in parliamentary governance in the 1950s.

[208] E Afigbo *Ropes of sand* (1981) 322-23.

[209] Harneit-Sievers (note 148) 62.

national level, political leaders in Igboland followed suit and established an Eastern House of Chiefs.[210] This marked the return of the chiefs, many of whom were descendants of Warrant Chiefs.[211] Although the 1966 military coup abolished the Eastern House of Chiefs, chieftaincy institutions staged a permanent resurrection in 1976.[212] Significantly, many contemporary chiefs claim hereditary roots, which they trace to their Warrant Chief ancestors.[213] Even more significantly, they claim powers and privileges which find basis in the Warrant Chief System, rather than the pre-colonial governance system. The significance of their claims may be deduced from the powers wielded by Warrant Chiefs, which were so vast that a grandson of a Warrant Chief described him as a 'god.'[214]

In sum, the British did not come to Nigeria to serve it pastries. On the contrary, they came to milk it of its valuable resources.[215] The indirect rule policy was mutually beneficial to them and their lackeys, the Warrant Chiefs. On one hand, it maintained the economic aims of colonial authorities. On the other, it gave Warrant Chiefs significant political relevance, which, unfortunately, distorted customary law. The impact of colonial rule is evident in the spectacular instability in many African states soon after their independence.[216]

3.6 Summary of chapter

This chapter establishes that pre-colonial governance system in South-East Nigeria functioned under two broad categories. The first is a semblance of constitutional monarchy in coastline communities, while the second is a village republican system in the hinterland. In these systems, the clan and extended family played significant mediatory roles, and women's matrimonial property rights thrived within non-hierarchical gender relationships.

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[210] P Agbese 'Chiefs, constitutions, and politics in Nigeria' (2004) 6 *West Africa Review*.

[211] GI Jones *Report of the position, status, and influence of chiefs … in the Eastern Region of Nigeria* (1956).

[212] Harneit-Sievers (note 148) 63.

[213] *Ibid* at 60.

[214] D Onyeama 'Chief Onyeama: the story of an African god: a biography' (1981).

[215] F Daniels 'A historical survey of amalgamation of the Northern and Southern Police Departments of Nigeria in 1930' (2012) 8(18) *European Scientific Journal* 205-217.

[216] M Meredith *The fate of Africa: A history of the continent since independence* (2011) 141-309.

When the British colonialists arrived, they assumed that the forms of political administration they met in coastline communities existed throughout the study population. They therefore made an unsuccessful 'attempt to rule a chiefless society through chiefs.'[217] As Harneit-Sievers remarked, '[t]he Warrant Chiefs of Igboland were installed without much recourse to local traditions of hierarchy and status, without taking into account the details of pre-colonial local political structures.'[218] This policy led to changes in traditional governance structures, land tenure system, gender relations, and, importantly, customary norms. These changes affected matrimonial property rights in two ways. The first is by altering the non-hierarchical socio-economic system in which these rights operated, thereby degrading women's property rights. The second is by creating an official customary law that accords women scant matrimonial property rights. In sum, colonial rule laid the platform for the perception that women's matrimonial property rights are derived from their husbands.

The next chapter shows how widows, divorcees, traditional authorities, and social welfare officials are adapting matrimonial property rights to today's socio-economic realities.

[217] Afigbo *Warrant Chiefs: Indirect Rule in Southeastern Nigeria* (note 28) 59.

[218] Harneit-Sievers (note 148) 60.

Chapter four: Perceptions of matrimonial property rights in South-East Nigeria

> *Customary laws were formulated from time immemorial. As our society advances, they are more removed from (their) pristine social ecology. They meet situations which were inconceivable at the time they took root.*[1]

4.0 Introduction

The preceding chapter explained how colonial rule changed the traditional governance system in South-East Nigeria. To borrow from the above quote, the alterations caused by colonial rule moved many customs from their 'pristine social ecology' into the arena of a foreign culture. Arguably, this movement is largely responsible for adaptations in matrimonial property relations. These adaptations are most evident in contestations for matrimonial property in situations of death and divorce. This chapter provides insight into these adaptations using the experiences of divorcees and the opinions of parents, priests, traditional leaders, NGOs, and social welfare officials. Its aims are three-fold. The first is to provide a context against which judges' approach to the living customary law of matrimonial property in South-East Nigeria may be measured. The second is to contextualise the extent to which Nigeria's legal framework supports women's claims of matrimonial property. The third is to show how litigants, widows, divorcees, traditional authorities, and social welfare officials are adapting the customary law of matrimonial property to socio-economic changes. Although the term 'property' is used here in its conventional sense of moveable and immovable assets, research participants regard human assets as property, of which children are an important component.

The chapter begins with an explanation of the philosophy of matrimonial property rights. This explanation is provided in the context of changing attitudes to marriage gifts, properties bought by women, and custody of children. Even though references are made severally to the nature of customary law marriage, a detailed discussion is reserved for the arguments in chapter seven. Next, the chapter discusses the major ways through which women contribute to matrimonial property. Thereafter, it explains attitudes to the division of property during and after divorce. Finally, it reveals the role of change agents and the influence of

[1] *Agbai* v *Okogbue* (1991) 7 NWLR (Pt. 204) 390 at 417 p. 30-31, paragraphs F-A, per Nwokedi JSC.

legislation in matrimonial property relations, thereby highlighting the study's argument that living customary law emerges from people's adaptation of customs to socio-economic changes.

4.1 Philosophy of matrimonial property rights: the story of the slave and the son

In a bid to explain the philosophy behind married women's property rights, several informants, including judges and priests, recounted, in varying ways, a legendary story:

In the days when trees were the playgrounds of squirrels, a chief lay dying. He called a meeting of his family and issued instructions for the disposition of his vast estate. He decreed that his only son should choose just one portion out of his numerous lands and livestock, while his head slave should inherit the rest. The shocked villagers wondered why he made such a strange will and concluded that he hated his son.

Soon after, the chief died. On the appointed day for sharing his estate, a large crowd gathered. The son, looking depressed, declined to pick anything until the slave had chosen all he wanted. The slave took everything except the ancestral home, which he left for the son. The villagers praised the slave and pitied the chief's son. As they were about to disperse, the son quickly walked up to the slave, threw his arms around his waist and declared, 'since you are part of my father's properties, I choose you!'

This story of the slave and the son reveals that married women's property rights under customary law are regarded as a sub-component of their husbands' rights. Accordingly, the story is usually used by those asserting women's lack of matrimonial property rights. However, this story fails to expose the complicated nature of these rights.[2] After a judge recounted this story, the researcher directed him to a banana tree near the window of his office. He asked the judge if women can harvest banana trees and sell their produce. He replied affirmatively. After the researcher asked several questions concerning freedom to plant the banana tree, uproot it, and pledge its fruits, the judge admitted that women exercise considerable property rights, but cannot legally assert these rights under official customary law.[3] Although many informants do not see matrimonial property rights in the strict sense of the story above, they believe these

[2] Literature from elsewhere shows that this complication is most evident in dispute resolutions. *See*, for example, JF Holleman 'Trouble-cases and trouble-less cases in the study of customary law and legal reform' (1973) 7(4) *Law & Society Review* 585-609; AL Epstein 'The case method in the field of law' in AL Epstein (ed.) *The Craft of Social Anthropology* (1967).

[3] The exception is some 'matrilineal' communities in Afikpo and Ohafia in Ebonyi and Abia states.

rights owe much to the nature of a customary law marriage. In turn, the nature of marriage is influenced by customs that emerged in agrarian societies. For the purposes of this chapter, there are two key aspects of the nature of marriage in the study population.

The first, which persists till today, is that the bride leaves her community after the payment of her bridewealth and joins the groom's family. This process occurs in a manner that makes it clear that her legal rights to property are affected.[4] As Radcliff-Brown summarised it, 'marriage involves some modification or partial rupture of the relations between the bride and her immediate kin … and gives the husband and his kin certain rights in relation to his wife and the children she bears.'[5] This rupture and attachment to a different family setting effectively brings the woman's property rights within the ambit – and, some might argue – control of her husband's property rights.

The second feature, which is changing, is that the family which the woman joins worked as a unit to produce property, which chiefly consisted of land, huts, livestock, fishing nets, and farming tools.[6] In this agrarian setting, the rule of male primogeniture excluded women from inheritance because it recognised inheritance only through the eldest male. This arrangement ensured that an authority figure (the family head) safeguarded the family's assets and ensured the economic maintenance of widows, unmarried daughters, and teenage sons.[7] As seen in the preceding chapter, he was responsible for the debts and other obligations of the wives in his family, a responsibility he exercised with, or through his brothers. This explains why, in some Igbo communities, a wife may not sell livestock without the permission, or at least knowledge, of her husband.[8]

In effect, property acquisition and disposal in the agrarian past were, primarily, based on the need to perpetuate clan lineage, keep wealth within the family, and care for family members. As shown in chapter three, the official customary law created by colonial rule

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[4] P Iroegbu *Marrying wealth, marrying poverty: gender and bride wealth power in an African society: the Igbo of Nigeria* (2007).

[5] AR Radcliffe-Brown & D Forde *African systems of kinship and marriage* (1950) 43-51.

[6] CN Himonga 'Property disputes in law and practice: dissolution of marriage in Zambia' in A Armstrong & W Ncube (eds.) *Women and law in Southern Africa* (1987) 61-66.

[7] N Okoro *The customary laws of succession in Eastern Nigeria and the statutory and judicial rules governing their application* (1966) 4-6.

[8] A Dike 'Land tenure system in Igboland' (1983) 78(5/6) *Anthropos* 863. *See* also OM Ejidike 'Human rights in the cultural traditions and social practice of the Igbo of South-Eastern Nigeria' (1999) 43(01) *Journal of African Law* 71-98.

distorted this preservation philosophy in a manner that gave a patriarchal hue to matrimonial property rights. The result is that in most parts of South-East Nigeria, women's legal rights to property are perceived to be derived from their husbands.[9] In what follows, the ambit of these rights is explained within the context of past and current social realities.

4.2 Ambit of matrimonial property rights

The socio-economic changes brought by colonial rule overturned the agrarian setting in which matrimonial property rights operated. The most notable changes are urbanisation, acculturation, diminished extended family ties, and accrual of income independently of the extended family. Other notable changes are an alien political and judicial system, especially laws that emphasise individual, rather than communal rights in property.[10] The key effect of these changes is adaptations to the perceptions of matrimonial property rights held under official customary law. The past and present social setting of Igbo societies make it easy to understand these adaptations.

Studies in the early to mid-twentieth century have shown that the problem with women's matrimonial property rights in Igboland is not whether women have or exercise property rights, but whether they have a legal claim to these rights.[11] Elias wrote that married women can receive gifts of land, and in coastline Igbo cities, may even purchase or pledge land, or personally lease land.[12] Meek had little doubt that they exercise control over land through purchase or inheritance.[13] Forde and Scott argued that women's ability to provide funds for purchase of land, or their freedom to pledge land using a male proxy, demonstrates

[9] UB Emeasoba 'Land ownership among the Igbos of South East Nigeria: a case for women land inheritance' (2012) 3(1) *Journal of Environmental Management and Safety* 97-117 at 100.

[10] E Colson 'The impact of the colonial period on the definition of land rights' in V Turner (ed.) *Colonialism in Africa, 1870-1960. Vol. III: profiles of change: African society and colonial rule* (1971) 200-201; S Berry *No condition is permanent: the social dynamics of agrarian change in sub-Saharan Africa* 33-40; *Agwu* v *Nezianya* (1949) 12 West African Court of Appeal Report 450. *See* also CP Ekpe 'Social welfare and family support: the Nigerian experience' (1983) 10 *Journal of Sociology & Social Welfare* 489.

[11] *See*, for example, TO Elias *Nigerian land law and custom* (1962) 167-168; SNC Obi 'Women's property and succession thereto in modern Ibo law (Eastern Nigeria)' (1962) 6(01) *Journal of African Law* 6; CK Meek *Law and authority in a Nigerian tribe: a study in Indirect Rule* (1950) 203; D Forde & R Scott *The native economies of Nigeria* (M Perham ed., 1946) 66-67.

[12] Elias, *ibid* at 168.

[13] CK Meek *Land tenure and land administration in Nigeria and the Cameroons* (1957) 186.

that custom does not prohibit them from exercising control over land.[14] In the above context, therefore, married women's property rights will be explained under two broad categories.

Per Obi, 'direct rights and interests' refer to those which a woman obtains and exercises with no dependence on her social or legal relationship with anyone else, while derivative interests are those that she acquires or exercises via her status as a wife or a ward.[15] Under direct rights, a married woman can acquire land personally during her husband's life-time. In fact, over fifty years ago, Obi found that 'this is a common phenomenon among elderly women with grown-up children and among younger but childless wives.'[16] However, women's acquisition of land independently of their husbands usually occurs where they lack a harmonious marital relationship. In this sort of property ownership, the woman's sons, rather than her husband, inherit the land in the event of her death. Direct land acquisition may be distinguished from buying a house. Obi noted that it was rare for married women living with their husbands to buy a house. Yet, it was recognised that 'if the woman intended the house to be her exclusive property at the time she acquired it, then she has only to prove that the purchase money was hers' for her to establish 'absolute title to the property.'[17]

Under directive rights and interests, a married woman's property rights are derived from their husband's families. A key implication is that her husband and his brothers control the exercise of these rights. For example, in several parts of Igboland, women are allocated land by their husbands' families soon after marriage. These lands, which are for farming purposes, are sometimes called 'marriage land.'[18] Women are entitled to farm exclusively on such lands and pass them on to their male children when they die.[19] However, they cannot permanently alienate these lands. Their usage rights over such lands are in addition to their right to farm on their husbands' lands as a collective production unit.[20] In any case, the family retains overall legal control over land, which is exercised through men.

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[14] Forde & Scott *The native economies of Nigeria* (note 11) 66-67.

[15] Obi (note 11) 6.

[16] *Ibid* at 8.

[17] *Ibid* at 10.

[18] The researcher farmed on his mother's marriage land for several years while growing up in the village.

[19] M Green *Land tenure in an Ibo village in South-Eastern Nigeria* (1941) 33-34.

[20] HA Wieschhoff 'Divorce laws and practices in modern Ibo culture' (1941) 26(3) *Journal of Negro History* 300.

Widows may acquire derivative interests in land, which is dependent on whether they have surviving male children. Obi explained it this way:[21]

> She "lives for" them [children] and continues to enjoy the same rights and interests over her late husband's personal land as she did in his life-time. She is also entitled to a share of communal land, according to her needs and the quantity available, "in the name" of her children, however young they may be. As a rule, she is given a farm plot during the annual distribution of plots, as if she represented her husband.

The literature on derivative rights is supported by case law. In *Nezianya* v *Okagbue*,[22] a widow living under Onitsha customary law let out a house to tenants. Later on, she sold a portion of land and, with the proceeds, built two huts. When she wanted to sell more parcels of land, her husband's family objected. Her grandchild, Mrs Julie Nezianya, sued her grandfather's family, seeking exclusive possession of the property on the ground that her grandmother had long adverse possession of it. In the trial court, it was held that possession by a widow of her husband's land cannot be exercised in an adverse manner to the rights of her husband's family. In other words, she could not acquire an absolute right of possession against the family. On appeal, the Supreme Court considered a widow's right to her late husband's estate. Condemning as repugnant to equity and good conscience the Onitsha custom (of male primogeniture), which gives the eldest son (Okpala) the right to alienate the property of his brother during his widow's lifetime, the Court stated:[23]

> It would appear that the essence of possession of the wife in such a case is that she occupies the property or deals with it as a recognised member of her husband's family and not as a stranger; nor does she need express consent or permission of the family to occupy the property so long as the family make no objection to her occupation ... The consent, it would appear, may be actual or implied from the circumstances of the case, but she cannot assume ownership of the property or alienate it. She cannot, by the effluxion of time, claim the property as her own. If the family does not give their

[21] Obi (note 11) 9.

[22] *Nezianya and another* v *Anthony Okagbue* (1963) 1 All NLR 352.

[23] *Ibid* per Ademola, CJN at 356-357.

> consent, she cannot, it would appear, deal with the property. She has, however, a right to occupy the building or part of it, but this is subject to good behaviour.

Twenty-seven years later, the Supreme Court affirmed this decision in *Nzekwu* v *Nzekwu*.[24] In a 74-page judgment, Nnamani JSC declared:[25]

> The rights of a widow in her husband's property in customary law have been settled. A widow who chooses to remain in the husband's house and in his name is entitled, in her own right and notwithstanding that she has no children, to go on occupying the matrimonial home and to be given some share of his farmland for her cultivation and generally to maintenance by her husband's family. Should her husband's family fail to maintain her, it seems that she can let part of the house to tenants and use the rent obtained thereby to maintain herself. Her interest in the house and farmland is merely possessory and not proprietary so that she cannot dispose of it out-and-out.

Notably, the above decisions, which were judicial standards on widows' rights to matrimonial property, were predicated on widows' good behaviour. It took twenty-five years before this subjection to good behaviour was unobtrusively removed in *Anekwe* v *Nweke*.[26]

Although official customary law marriage does not confer women with matrimonial property rights, they may recover some properties under certain conditions after divorce. To understand why these properties are recoverable, this chapter proceeds to explain the ways in which women contribute to matrimonial property, the factors that influence the recoverability of property, and the change agents that drive these factors. Thereafter, the circumstances that influence property division after divorce are explained using the experiences of six women.

4.3 Women's contribution to matrimonial property

As shown in the preceding chapter, colonial rule overturned the agrarian organisation of Igbo society. None of the interviewed divorcees experienced the sort of joint family income

[24] *Nzekwu* v *Nzekwu* (1989) NWLR (Part 104) 373.

[25] *Ibid* at 395.

[26] *Onyibor Anekwe & Another* v *Mrs Maria Nweke* (2014) All FWLR (Pt. 739) 1154.

described in 3.2.1, 3.3.3 and 4.1 above. Only a handful of these women did not contribute in the acquisition of their matrimonial property. A clear majority of them contributed through their individual incomes, as well as through the phenomenon of marriage gifts.

Marriage gifts,[27] known in Igbo parlance as '*Ihe eji edu nwanyi ulo*' are gifts given to the bride at the time of her marriage to assist her transition into the marital journey.[28] These gifts are not to be confused with the gifts brought by a groom as part of the requirements of bridewealth.[29] In the Nigerian context, they must also not be confused with dowry.[30] There are two categories of marriage gifts.

The first is gifts given to a bride by her parents and extended family. The second category is gifts given to the couple by their friends. These may also include gifts given to the bride by her friends, ostensibly for her own benefit. As explained later, this second category could present problems during marriage dissolution, given the difficulty of determining whether such gifts are meant for the couple or only the wife.

In the past, marriage gifts consisted exclusively of cooking utensils and items of adornment such as jewellery, clothes, and sandals. Presently, they include modern gadgets such as cars, refrigerators, television sets, dishwashers, and furniture. In the past, a divorced woman was entitled to return to her parent's house with all her marriage gifts, given that they consisted of kitchen utensils and wearing apparels. Her ability to exit marriage with these properties was aided by the fact that the couple, generally, followed the due process of divorce, which usually involved family members of both parties.[31] Such process often involved the return of the bridewealth, and even some sort of ceremony such as carrying of palm wine.[32] Today, many men do not follow the due process of divorce, while some do not partake in, nor consent to the

[27] In a bid to disown the notion that customary marriage is not a 'woman purchase,' Nsereko inappropriately used the phrase, 'marriage gifts' to refer to bridewealth. *See* D Nsereko 'The nature and function of marriage gifts in a customary African marriage' (1975) 23(4) *American Journal of Comparative Law* 682.

[28] '*Ihe eji edu nwanyi ulo*' reflects the Owerri dialect. It is expressed slightly differently elsewhere.

[29] J Osom 'Moral implication of high bride-price in Nigeria: Annang case survey' (PhD Dissertation, 1989) 34.

[30] The Eastern Nigeria Limitation of Dowry Law of 1956/1963 defines 'dowry' as 'any gift or payment ... in any ... kind of property whatsoever, to a parent or guardian of a female person on account of a marriage of that person which is intended or has taken place.'

[31] *See*, generally, PO Kuye 'Rights of women under customary law' in Y Osinbajo & A Kalu (eds) *Towards a restatement of Nigerian customary laws* (1991).

[32] SO Olisah *The Ibo native law and custom* (1963) 19.

decisions of family mediation. As seen in 4.6, they simply order their wives out of their homes in circumstances that make it difficult for matrimonial properties to be divided between them.

There is fair agreement among most research participants that a divorcing woman is entitled to exit her marriage with whatever her family gave her as marriage gifts. This is especially if the divorce is initiated by the man. As a focus group participant summarised it, 'if her husband drives her away, he is obliged to return all that her relatives gave her as marriage gifts. But if she decided to leave on her own, those things will remain in her husband's house because he performed traditional rites over her.'[33] Women who abandon their marriage or initiate their divorce usually forfeit their marriage gifts because of real or presumed disinterest in matrimonial property.

Marriage gifts are increasingly given to the couple by their friends.[34] Recovery of such gifts is complicated when they are not given to the bride exclusively. Recovery of non-monetary properties given to the bride is also difficult where the couple had made joint use of the properties. While some key informants asserted that properties given by friends should be shared between the couple when the marriage ends, the majority believe that the circumstances of the divorce, especially fault, should determine the sharing. Understandably, divorcees believe that these properties should be shared equitably, although many of them made no significant efforts to claim them. Even the ownership of gifts given to the bride by her family does not escape controversy during marriage dissolution.

Where the groom contributed to the purchase of marriage gifts given to the bride by her relatives, it could result in her loss of these gifts upon dissolution of the marriage. This is because the man could refuse to allow the woman leave with the gifts, especially given the unequal gender relations in South-East Nigeria. A traditional leader explained the rationale:

> [After divorce], the woman has right to take whatever she got from her family as marriage gifts. This is because those gifts were bought for her or in her name or in her family's name. But what I am showing here is this: you see, this was usually in the past. Today's people are cunning. In the past, when marrying, there were requirements that the groom's family must satisfy – things they must bring to contribute to the items that

[33] This position was unanimously approved by the ten other Social Welfare Officials in the group discussion, and by traditional leaders in a separate discussion.

[34] The researcher has attended numerous weddings where marriage gifts from friends outnumbered and out-valued those given by the bride's family.

> will be bought as marriage gifts for the bride. If you are not careful or attentive, you will not really understand what is involved. For example, you may be told to bring five pounds to help us contribute – even if it is twenty pounds – to help us purchase the items to send forth our daughter into marriage. When you bring that five pounds, they may only add three pounds to it and buy kitchen utensils such as pounder, pots, and other things of that era used to send forth a woman. … If she eventually has problem with her husband, she will want to take all those things as her marriage gifts, whereas the man contributed about 70% of the money with which they were bought. This is why the custom in these parts has changed. These days, people are no longer willing for their in-laws to send forth their bride. They prefer to buy whatever their bride will need. This means that … whatever he buys belongs to him. But when the marriage collapses, his authority over the things he bought does not extend to the woman's wearing apparels and adornments. He cannot stop her from taking those things even if she has no child.

As the quoted informant hinted, the question of marriage gifts as an aspect of matrimonial property division is influenced by whether the divorcing couples have children.

4.4 The children connection and the elders' viewpoint

As far as division of matrimonial property is concerned, a childless woman attracts less sympathy than a woman with children. However, if a childless woman is blameless for the divorce and did not initiate it, she could obtain certain properties depending on the circumstances of the case. In any case, regardless of who initiates divorce, the majority opinion is that a childless woman may exit the marriage only with her personal belongings.[35] This is because Igbo customary law regards procreation as a crucial element of marriage.

Indeed, children could have a positive influence on women's ability to obtain property after divorce. Discussions with traditional leaders reveal a shift from zero rights to property after divorce to increasing acceptance that women may exit marriages with properties. However, there is resistance to this acceptance, as evident in the fierce debates that occurred during focus group discussions with traditional leaders. The minority views are captured in this outburst by a chief:

[35] Many divorcees stated that a childless woman is entitled to property because 'she did not make herself childless.'

> This statement that a woman goes with property is not our custom! It is discretionary! What I understand from our custom is that regardless of fault – i.e. whether the man drives her away or she goes on her own – a woman goes with nothing. This is because you went to marry her, and she later decides to leave. She will go with nothing, even if she has a child.

The fact that the customary law of matrimonial property division is changing in favour of increased rights to women was manifested in the discussion that preceded and followed this chief's opinion. In all the focus group discussions, two elements were prominent. The first is the subordinate role of women in marriages; the second is the importance of children.

4.4.1 The influence of children on property division

The mitigating influence of children on property division was summarised by a king:

> Separating them [the couple] is usually difficult where children are involved. If the woman is childless, she goes home empty-handed. This is because the man benefited nothing from her, and she has no links or something to remember her by in that house. But if she has a child, she has a right to leave with some things which belong to her. These include her bed, clothes, and her adornments. The reason is because the trade/venture the man undertook in marrying her produced gain [of children].

The children connection is also evident in the finality or otherwise of marriage dissolution. A chief's paternalistic statement summarises the general opinion:

> The reason why these things [property division during divorce] are tricky is that children complicate issues. This is because even after twenty years, during which [time] the woman could have been whoring, her children could still bring her back to your house on the ground that her things are still there. This is why wise people allow them to go with everything they want to leave with. So that he can then say, "I allowed you to leave with all your things. I have no more links with you." So, I will not really call it divorce, because at the end they could come together through their children. Maybe it is better to call it separation, not divorce.

Other than patriarchy, a surprisingly recurrent issue in the opinions expressed by key informants is fault. Under customary law, men have freedom to marry more than one wife. As argued in chapter seven, this freedom ensured that fault did not play a key role in customary marriage dissolution in the past. Today, this freedom is increasingly being restricted, judging from the monogamous views of marriage expressed by many informants. Together with monogamy, the fault principle and equitable notions of property ownership are products of Christian influences, Western education, and acculturation. Where fault for divorce is traced to the man, the majority opinion is that the woman is entitled to matrimonial property or compensation, depending on the nature of the case. Here is how a chief put it:

> What I understand from our customs is that any woman you have married, who later begins to exhibit bad behaviour, you have the right to send her away with property. This is because you are the one driving her away. But if she decided to leave on her own, she cannot touch any of your property … This is why a woman who decides to leave her matrimonial home leaves with nothing. But if you drive her away, she must leave with all her things and whatever else you decide to give her.

Children also influence attitudes to maintenance and compensation by the man to the woman. Before explaining these attitudes, it is important to highlight how official approaches to children's custody are shaping people's adaptation to custodial rights.

4.4.2 Custody of children as an indication of living customary law

This brief discussion of children's custody during divorce is informed by two reasons. The first is the fact that children are considered an important component of matrimonial property.[36] It need not be stated that one of the most grievous emotional injuries that can be done to women is to take their children away from their custody.[37] The second reason is the theoretical framework of this study, which defines living customary law as people's adaptation of customs to socio-economic changes. Traditionally, children answer their father's name because he paid

[36] N Uka *Growing up in Nigeria* (1966).

[37] J Ezeokana *Divorce: its psychological effects on the divorced women and their children: a study on the Igbos of Southern Nigeria* (1999).

the bridewealth of their mother.[38] Generally, he also gets custody over them unless they are still of tender age.[39] As a focus group discussant explained it, '[w]here the child is of tender age, the woman gets custody – our people say that the mother's body cuddles the child because the child shrinks without the warmth of the mother.' However, most of the judicial decisions analysed in chapter seven reveal that custody of children above tender age is no longer the exclusive preserve of men. This is primarily because court laws require judges to consider the best interests of the child in matrimonial issues. These laws influence judges to award custody to women contrary to non-living customary law.

Similarly, social welfare officials make special efforts to uphold the best interests of the child in their decisions over custody. These officials play significant roles in the resolution of family disputes, which influence matrimonial property relations. Given their huge clientele, it is obvious that their attitude to custody, coupled with the judicial approach, is contributing to the emergence of a living customary law of child custody. It is therefore important to understand the functions of social welfare officials, who are key change agents that drive adaptations in matrimonial property relations.

4.5 The Social Welfare Department as change agents

The origin of the Social Welfare Department ('Welfare Department') in Nigeria is traceable to missionary activities and colonial policies.[40] Presently, it is a parastatal under the Ministry of Social Development.[41] Originally a component of the Social Development Directorate created by the Social Development Act No. 12 of 1974, it came into formal existence with the creation of the Federal Ministry of Culture and Social Welfare. In October 1989, the federal government published a 'Social Development Policy for Nigeria,' which was revised in 2004. This document formed the operational standard of the Welfare Department.

[38] EK Quansah 'Custody of children: customary principles in Ghana and Nigeria' (1991) 17 *Commonwealth Law Bulletin* 351.

[39] As a traditional leader put it, the man usually gets custody 'when the child is able to express [her] needs in words' rather than 'in tears.'

[40] O Ayodele & PA Edewor 'Sociology and social work in Nigeria: characteristics, collaborations and differences' (2013) 16(2) *African Sociological Review* 48.

[41] For States, there are slight variations in names. For example, it is called Ministry of Women Affairs and Social Development in Imo State and Ministry of Social Welfare and Rehabilitation in Rivers State.

As an organ of state, members of staff of the Welfare Department are civil servants dedicated to the promotion of the interests of women and children. They are located in every state of the federation and in almost every local government council. In January 2015, the researcher visited their offices in two councils, observed their dispute resolutions, and held interviews and focus group discussions with their directors, deputies, and eleven other officials.

The Welfare Department is an example of the changes colonial rule introduced into social life in Nigeria. In the past, issues of domestic abuse, divorce, and custody of children were handled exclusively by the family. As an observer noted, the 'services we term social welfare traditionally fell exclusively into the domain of the extended family, [which] had for centuries arrogated to itself social, economic, political and cultural functions.'[42] Presently, the Welfare Department is the first port of call when disputes are not resolved by families, churches, or friends of couples. Their procedures are explained here in their own words:

> They first write a statement as a report. After that, we issue an invitation letter to the Respondent. Then we fix – two weeks or three weeks hearing date. On that day, the parties are expected to come with their witnesses. The report of the Complainant will be read out openly to the floor to discuss. After that, we ask the Respondent whether the statement is right or not. When he accepts, the case will start. After the first hearing … we may decide to adjourn to calm the situation.

When a dispute is not resolved, the Welfare Department proceeds to make varying orders:

> [If a case] is not resolved amicably and they didn't agree to stay together, we may ask the man to pay something to the woman as compensation. Then, if they have issues – i.e. children – that are underage, we will ask the man to take care of the children. That is school, feeding, and health wise. Then the man will secure accommodation for them, because they have to live somewhere … they cannot just be thrown out …

The decisions of the Welfare Department are treated as arbitral awards by the courts, and when required, judges summon its officials to give evidence. Though a statutory body, it has no formal enforcement powers. However, when the occasion demands, it uses force to protect the best interests of children, as an official explained:

[42] CP Ekpe 'Social welfare and family support: the Nigerian experience' (2014) 10(3/11) *Journal of Sociology & Social Welfare* 487.

> Where they (couple) don't take our advice, they can go to a higher level like taking it to court … But in some cases that they don't need to go to court and the man does not want to adhere to our instructions like paying maintenance for the upkeep of the children … after carrying out investigation and we find out that the man just does not want to provide for the children's upkeep, we use the police to get the man to comply.

Other than ordering maintenance and custody of children, the Welfare Department also makes compensation orders in favour of women. The nature of these orders is dependent on the circumstances of the concerned case. Some of these cases are discussed below.

4.6 Division of matrimonial property

Women's inability to claim matrimonial property under official and non-living customary law presents problems when marriages end, as the cases in this section show. As well as providing a contrast, these cases shed light on the factors that influence judicial approach to property division. They also reveal how divorcees, traditional leaders, NGOs, priests, and social welfare officials perceive women's ability to claim matrimonial property in and outside the courts.

4.6.1 The problem of legal technicalities

Janet and John married in 1992.[43] They had four children. John, a businessman, accused Janet of infidelity. Janet, a civil servant, accused him of violent domestic abuse. John eventually chased her away from their matrimonial home and petitioned for divorce in a customary court. Initially, both parties were not legally represented. Janet told the court she wanted custody of her children, even though she did not want the marriage to be dissolved. She briefed her lawyer to demand for her marriage gifts and maintenance for herself and her children. Later, she requested for compensation for the furniture she built, her contributions to the house they built in the village, and the 200,000 naira she contributed to the purchase of their car.[44] Due to her lawyer's incompetence, her Motion, though properly filed, was not argued. Thus, it was struck out. Judgment was granted in favour of John, including custody of their children and an order restraining Janet from answering John's surname. Following family advice 'to wait to see if

[43] All the names used here are pseudonyms.

[44] At the time of writing (December 2015), one USD = 199 naira.

the charm used to bewitch [John] would fall away,' Janet did not appeal the judgment. Seven years on, she is still waiting and has recovered no properties from the marriage.

4.6.2 The problem of double marriage

Sarah was forced by her parents to marry Samuel in 1999 after she became pregnant. They had two children. Samuel's family gave Sarah a parcel of land as marriage gift. With her family's help, she set up a catering business, and helped Samuel to acquire household property such as TV and fridge. She also contributed significantly in building a three-bedroom house. In 2008, Samuel accused her of prostitution and forced her out of their matrimonial home. Few days later, Sarah returned with her brother to take her business materials only. A year later, Samuel remarried and gave out their two children as domestic helps in the city. Following a vicious custody battle involving alleged kidnappings and use of vigilantes, Sarah petitioned the Welfare Department, who awarded her custody. Samuel refused to comply with the order, allegedly using a combination of threats and bribery to avoid enforcement of the order. Sarah petitioned for divorce and custody in a customary court. Samuel showed up with a marriage certificate and claimed he had undergone a statutory law marriage with Sarah. The court declined jurisdiction, stating that a customary marriage becomes subsumed in a latter statutory marriage.[45] Eventually, Sarah, who remarried a year after Samuel's remarriage, used conciliation to obtain custody of the children. Largely due to Samuel's violent nature, neither Sarah nor her family members sought compensation for their three-bedroom building, nor contested any household property. Sarah did not even take her clothes when she left her matrimonial home, and Samuel's new wife allegedly started wearing them.

4.6.3 The problem of unequal gender relations

Gift, a high school teacher married Gerald, a civil servant, in 2001. They had a child. In 2008, co-habitation stopped after Gerald chased her away with a machete. Three months later, Gift returned with her brother to take away her belongings and her baby's clothes. They were unable to do so because Gerald had changed the locks. She later picked up some items from a neighbour's house where Gerald had dropped them. He had also dropped the marriage gifts bought by her parents, but retained those bought by their friends. He claimed that everything else they owned belonged to him, including her shop, which he thoroughly looted. Family

[45] *See* chapter five for the legal consequences of double marriage.

reconciliation efforts, which were aimed at restoring peace, all failed. Gift headed to the Welfare Department. Gerald initially refused to appear, eventually being compelled to appear by the police. Welfare officials awarded custody of the (then) three-year old baby to Gift. They ordered Gerald to provide accommodation for Gift and pay 6000 naira monthly maintenance for the baby. He refused to heed the decision and tried severally to kidnap the baby. In 2011, Gift petitioned for marriage dissolution, custody, and maintenance of the child. She did not ask for maintenance for herself because she loathed Gerald and believed she could take care of herself. Gerald failed to contest the petition, had judgment given against him, and refused to comply with the court order for maintenance. Gift did not enforce the judgment because she 'cannot force him to train [educate] his own child.'

4.6.4 Litigation fatigue and resource constraints

Grace's parents compelled her to marry Greg in 1996. They had four children. In 2006, Greg told her to leave the city and return to her parents because he wanted to bring back his first wife. Grace, who was unaware he had been previously married to two women, refused to leave. Several unsuccessful family mediations occurred. Church officials advised Greg to secure accommodation for Grace and educate her children. One morning in 2008, Greg used a lorry and a van filled with police officers to forcefully repatriate Grace to her parents' house in the village. A month later, Grace reported him to the Welfare Department, who made the same orders as the church. He agreed to comply by a certain date. In the meantime, Grace went to the city and 'rescued' her children. Few days before the Welfare order deadline, Greg petitioned for divorce and custody. Assisted by a human rights lawyer, Grace successfully counter-claimed for custody, the sum of 100,000 naira as monthly maintenance for the children, payment of their school fees, 50,000 naira monthly maintenance for herself, and 5,000,000 naira 'damages' for 'untold hardship' and 'deceit.' She succeeded; Greg appealed. Tired of the emotional, physical, and financial drain of litigation, Grace reached an out of court settlement, wherein Greg agreed to fund the children's education and Grace agreed to drop all other claims. She took only her 'personal belongings' out of the marriage.

4.6.5 Forceful claim of property and widows' inheritance rights

At the age of fifteen, Sandra's parents forced her to marry Simon, a wealthy man in his fifties. The couple resided in Simon's two-storey building in a peri-urban area and had three children.

Simon had earlier married two women at different times and 'driven them away' after some years. For nearly a decade, he allegedly used Sandra as a slave, while failing to fulfil the financial promises he made to her parents, notably building them a house. Emboldened by age, advice, and education, Sandra began resisting her domestic abuse. Problems ensued. Simon accused her of infidelity, theft, and cruelty, and attempted to evict her from their matrimonial home. She resisted and evicted him instead. He petitioned for divorce in a customary court and for reclaim of their residence she was occupying. He obtained judgment allegedly by fraud, which Sandra's lawyer quashed on appeal. While the matter was being re-tried at another customary court, Simon died. Family members divided his estate according to 'kitchens.'[46] They gave Sandra the two-storey building she was occupying with her children. Simon's other buildings were given to the other two widows. Sandra admitted that the widows would have gotten no properties if they had no male child.

4.6.6 Nature of family interventions

Linda, a teacher, married Linus, a lecturer, in 1991. Both hailed from the same town and lived in the city. The marriage produced two boys and a girl. After twelve years, hatred and domestic assault compelled the couple to live apart. Linus denied Linda access to their children, and she obtained access with the help of the Welfare Department. Their families summoned one final meeting attended by twelve persons. Unable to reconcile the parties, the meeting advised them to separate. They ordered Linus to be paying 'something for the upkeep of the kids … especially for their schooling.' They made no order for Linda's maintenance, nor did she demand it. Similarly, they did not order a division of the couple's car, house, and household furniture. Linda merely took her 'personal effects – boxes, dresses, [and] some of the kitchen utensils' and moved into her uncle's house. Later, she obtained her own apartment. Unlike Linus, she never remarried. Although she still bears Linus' surname, she never sought their property, even after Linus died four years after their separation.

The above narratives of property division after divorce reveal the challenges that militate against women's ability to claim matrimonial property under official and non-living customary law. This thesis argues that such claims or contestations are the best avenues for living customary law to emerge from the adaptation of matrimonial property rights to socio-

[46] Division according to kitchens means according to wives, especially those with a male child.

economic changes. As the discussion below shows, women's apathetic attitude to claims of matrimonial property does not encourage the emergence of living customary law.

4.7 Analysis: non-contestation of matrimonial property

The reasons for this attitude range from emotional trauma to ignorance of their property rights, financial incapability, and what Obiora referred to as 'an ideology of self-reliance.'[47] Generally, they limit their claims to maintenance for their children, and in rare cases, for themselves also. The only properties they attempt to recover are items of adornment and business materials such as sewing machines. Of the twenty-five divorcees who were interviewed formally, only two actively contested properties. Both cases are unique.

In the first, the woman's estranged husband remarried while abroad, compelling her to seize their household properties in Lagos. Incidentally, the court ordered her to return them. The second is the case of Sandra (4.6.5 above), who was infuriated by her treatment and Simon's breach of promises to her parents. This is her justification for her uncommon action:

> He had not fulfilled a single one of the promises he made to them [my parents] … That is why I stole his money [#250,000] and gave it to my parents ... [Friends] coached me on how to deal with that man because I don't love him … Before, he used to flog me and kneel (sic) me down. But this time, before he would flog me, I would seize the cane and flog him very well … Then he took drinks and went to my people to divorce me. I refused, saying that I could not go because he had destroyed me. He married me as a virgin and I had four children for him … He [threatened me with a] gun … so that I would carry my property and leave the house. At the end, I passed through the back and grabbed him – he was an old man, about 60 – and collected that gun. I released one bullet myself and told him to pack his things and leave the house. At the end, he packed his property and went to the village. Then he went to court and sued me that I used gun to chase him away from his own house.

As Sandra's justification shows, many divorcees regard matrimonial property as belonging to their ex-spouses. The exceptions are where women or their parents bought the property in their maiden names. Moreover, family and church interventions usually aim at making peace

[47] LA Obiora 'Kindling the domain of social reform through law: A case study' (1995) 13(5) *Third World Legal Studies* 121 [explaining the contradiction of accepting 'help from former husbands who had maltreated and/or betrayed them' and women's insistence 'that they were able, with the grace of God, to fend for themselves.'

between the couple. Few attempts are made at property division because it is seen as contrary to reconciliation. Only the Welfare Department bothers to divide property in fulfilment of its statutory mandate to protect the interests of women and children. In this regard, purchase receipts play a key role in the recovery of marriage gifts and properties bought by women.

4.7.1 Show your receipt

Judges generally demand strict proof of women's contribution to the acquisition of matrimonial property.[48] In Janet's case (4.6.1 above), the judges ruled that it is not enough for her to allege contributions to matrimonial property without tendering evidence. The most accepted means of proof is purchase receipts. Traditional rulers, priests, NGOs, and social welfare officials were unanimous that women may only claim matrimonial property with receipts showing that the property was bought in their own name. The problem, as a female Welfare official said, is that 'when making receipts, [women] will use their husband's surname. When there is any dispute, the husband will now claim the property.' The use of receipts is because official customary law regards women's property rights as derived from their husbands.[49] A Welfare official summarised it:

> In [official] customary law, the woman is a loser as far as divorce is concerned. She goes home almost empty-handed. The man owns the property except where the woman bought certain things with her own money. In such a case, she has to prove that those things really belong to her because the customary law says that the man owns the woman and all her property. But the community [extended family] may, out of pity, grant some part of what the woman is asking for …

There is general agreement that a divorcing woman should exit marriage with the properties she got as marriage gifts from her parents. However, she, generally, forgoes the properties their friends gave them in their marital name, unless her husband or family members allow her to take them. The position is not so clear regarding the division of household property. While

[48] In *Onwuchekwa* v *Onwuchekwa* (1991) 5 NWLR (Pt 194) 739, the Court of Appeal held that a wife must show 'sufficient proof' of her contribution to matrimonial property. *See* also *Amadi* v *Nwosu* (1992) NWLR (Pt. 241) 273; (1992) LPELR-442 (SC).

[49] In *Onwuchekwa*, *ibid*, the Court of Appeal affirmed an Isuikwuato (Abia State) custom, which holds that a wife and her properties are owned by her husband.

many key informants believe that women do not have a legal right to household property, the Welfare Department is guided by the best interest of the child. An official explained it thus:

> If it is joint property, we check the numbers – for example foam – if the woman is seeking to separate from the man, you don't say 'go and lie on the floor.' You check the number of the foams. If it is three or two, let me say for instance, you give the woman one and the man will collect one. And more especially if … the children are under age, you don't allow the children to go and sleep on the floor … Even if the foam is one, you give the children that foam … because the child is our main priority in handling matrimonial matters.

Other than marriage gifts and properties which women buy in their own names, maintenance is another aspect of matrimonial property rights that is undergoing changes.

4.8 Analysis: the question of maintenance

Ordinarily, customary law does not recognise maintenance for divorced women. Indeed, many divorcees seemed surprised at the possibility of them getting maintenance. However, the Welfare Department increasingly makes orders relating to maintenance when they find that a marriage has broken down. The question is whether their orders are compensation or maintenance. For them, maintenance is a regular sum paid to a spouse by the other. Conversely, compensation is a lump sum paid by a spouse to enable the other set up a business or make up for the financial loss caused by the divorce.

The rationale behind compensatory orders is that maintenance implies an element of control on the part of the person providing it. As an official explained, 'If you say maintenance, that means you will even house her, and monitor the house. If she brings a man there, you will know and go there to throw the man away.' A key reason why compensation is preferred to maintenance is the incredible emotional distress involved in divorce cases. Several divorcees affirmed that they would never accept maintenance because it would prevent them from having 'proper closure.'[50] Some only accept maintenance on behalf of their children because they cannot raise the children on their own. Generally, they prefer not to ask for any financial reliefs

[50] Obiora's probe of attitudes to ancillary financial awards during marriage dissolutions suggests that women 'found it contradictory to supplicate for help from former husbands who had maltreated and/or betrayed them.' *See* LA Obiora 'Kindling the domain of social reform through law' (note 47) FN 65.

unless they cannot help it. Indeed, there are only three judicial decisions in which women demanded for compensation.[51] In the case of Grace (4.6.4 above), she termed it 'damages' for 'untold hardship' and 'deceit.'

Welfare officials take the issue of compensation seriously. If a man refuses to comply with an order of compensation, they could use law enforcement agents to enforce it, or assist the woman to institute court proceedings. The sums they order are usually dependent on the circumstances of the divorce. These circumstances include the financial status of the couple, the extent of the woman's contribution to matrimonial property, the party at fault for the divorce, the length of the marriage, and the possibilities of the woman remarrying. Given the huge number of their clientele,[52] the compensatory and child custody orders of the Welfare Department wield normative influence on matrimonial property relations. This influence is aiding the emergence of a living customary law of maintenance.

4.9 Summary of chapter

As outlined in chapter one, there is no statutory regulation of customary law rules of succession, marriage, and divorce in Nigeria.[53] The consequence is that 'the creation of a [customary law] marriage has no immediate effect on the parties' property rights.'[54] This chapter has used the experiences and views of widows, divorcees, and key informants to explain the manner matrimonial property rights are being applied. It finds that official and non-living customary law regard women's matrimonial property rights as subsumed in their husbands' rights.[55] This contributes to women's general apathy to matrimonial property claims. However, changes are clearly occurring in the nature and application of matrimonial property rights.

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[51] *See* chapter seven.

[52] Over two-third of the interviewed divorcees passed through Social Welfare mediation. Nearly all of the others had contemplated using their services.

[53] For the legal framework relating to property rights in Nigeria, see chapter five.

[54] G Woodman 'Judicial development of customary law: the case of marriage law in Ghana and Nigeria' (1977) 14 *University of Ghana Law Journal* 127.

[55] This finding tallies with the literature. *See*, for example, A Oyajobi 'Better protection for women and children' in Kalu & Osinbajo (eds.) *Women and children under the Nigerian law* (1990) 29; PO Kuye 'Rights of women under customary law' in Y Osinbajo and A Kalu (eds) *Towards a restatement of Nigerian customary laws* (1991).

The first notable change is the changing forms of matrimonial property, especially the phenomenon of marriage gifts. In the past, marriage gifts consisted of kitchen utensils and items of adornment, which were given to a woman by her family in order to ease her transition into marriage. Furthermore, as explained in 3.2.1, 3.3.3 and 4.1, family income was produced jointly, thus giving women neither the need nor opportunity for independent property acquisition. After observing this social setting, colonial courts concluded that women's matrimonial property rights are derived from their husbands, thereby birthing the official customary law that women may exit marriage only with their clothes and cooking utensils.[56] Today, however, women partake in the acquisition of matrimonial property through their independent income. Also, marriage gifts have moved beyond kitchen utensils to include modern gadgets such as cars, televisions, and refrigerators. Importantly, these gadgets are not only bought by the woman's family, but also by friends. In cases where they are bought in a woman's name or the name of her parents, opinion is fairly united that she may exit the marriage with them. Where they are bought by the couple's friends, it appears the man would take them, unless he is at fault for the divorce. Where the woman is blameless and has children, change agents such as the Welfare Department may award her marriage gifts in line with their mandate to promote the best interests of women and children. Women's ability to exit marriage with marriage gifts is thus an adaptation to the customary law of matrimonial property.

The second arena of change concerns properties that women buy with their independent income. The general opinion is that they may recover these properties with the aid of purchase receipts issued in their own names. Where a receipt is issued in the marital name of the couple, it is difficult for the woman to recover the concerned property because official customary law regards it as belonging to the man. The ability to use receipts for claims is clearly an adaptation of (official and non-living) customary law to socio-economic changes because it gives married women a novel basis for making property claims.

The third notable change in matrimonial property relations arises from the activities of social welfare officials, who increasingly order men to pay compensation in non-court divorce. The amounts ordered are dependent on the circumstances of each case, notably fault, women's contribution to matrimonial property, and the financial status of the parties. These officials also routinely order maintenance for children. For deviating from official and non-living customary

[56] SNC Obi *et al The customary law manual* (1977).

law, these financial awards and, arguably, their multiplier effect in social fields, constitute adaptations of customs to socio-economic changes.

In summary, adaptations concerning marriage gifts and properties bought by women are avenues through which living customary law is emerging in matrimonial property relations in South-East Nigeria. However, the clearest indication of living customary law is women's ability to obtain child custody contrary to the notion that children belong to men. This routine practice is driven by the courts and the Welfare Department, who act on the best interest of the child principle. This change demonstrates the normative influence of state law on living customary law within a semi-autonomous social field, as well as the blurred line between official and living customary law in the mainstream conceptualisation of customary law.[57] Unfortunately, women's ability to claim matrimonial property does not benefit from state law influence in the same manner as child custody.

The next chapter examines the extent to which the legal framework enables judges to acknowledge the adaptation of customs to socio-economic changes in the context of women's matrimonial property rights.

[57] For discussion of this conceptualisation, see 1.2.4.

Chapter five: Recognition of customary law in Nigeria's legal framework

We can only appreciate the causal factors in labour migration by trying to see town and country or reserve and labour centre as one social field and to analyse the forces within it.[1]

5.0 Introduction

To reframe the quote above, we can only appreciate the causal forces in living customary law's emergence by seeing state law and customary law as one social field and analysing the driving forces within it. The dual life of individuals who observe customary law and state law demands close attention on the interaction of state law with customary law.[2] As shown in the previous chapter, women's ability to assert matrimonial property rights under official and non-living customary law is very limited. This chapter investigates the extent to which Nigeria's legal framework enables them to claim these rights. It does this by assessing how this framework acknowledges customary law, culture, and property rights. By treating state law and customary law as close players in a social field, it analyses the 1999 Constitution and other legislation relating to customary courts, marriage, evidence, and property.[3] This analysis is germane for two main reasons. First, changes in the customary law of matrimonial property could, arguably, be hastened if they occur in the strong shadow of the law.[4] Second, judges do not adjudicate in a vacuum. They adjudicate with enabling laws, which set out litigants' rights and duties and the extent to which judges may enforce these rights and duties.

Informed by the semi-autonomous social field theory, this chapter furthers its argument that living customary law also emerges from the interaction of state law with customary law. This argument is situated within the intersection of the customary law of matrimonial property with the statutory regime of property rights in Nigeria. The chapter reveals how this regime

[1] JC Mitchell 'The causes of labour migration' (1959) 6(1) *Bulletin of the Inter-African Labour Institute* 44; cited in J Gugler 'Life in a dual system: Eastern Nigerians in town, 1961' (1971) 11(43) *Cahiers d'etudes Africaines* 400-421 at 400.

[2] Gugler *ibid* at 401 [showing that individuals who observe customary law have each foot in towns and villages].

[3] As amended by the First Amendment Act, Second Amendment Act, and Third Amendment Act 2010.

[4] For similar argument from elsewhere concerning divorce, see RH Mnookin and L Kornhauser 'Bargaining in the shadow of the law: the case of divorce' (1979) 88 *Yale Law Journal* 950-997.

fails to give judges a firm basis for acknowledging and encouraging changes in the customary law of matrimonial property. The chapter begins with an appraisal of the Nigerian legal system.

5.1 An appraisal of the Nigerian legal system

As shown in chapter three, the legislative and judicial structures created by the British colonial authorities were largely retained after independence.[5] Accordingly, Nigeria's legal system comprises of the Constitution, variants of the imported English law,[6] local legislation, Islamic or Sharia law, and mostly unwritten customary law. Individuals have freedom to choose customary law in personal issues such as marriage and inheritance. Choice of law and the orality of customs make it difficult to predict laws that apply in a particular context.[7] This difficulty is not helped by the diverse nature of Nigeria's 300 plus ethnic groups,[8] nor, as seen shortly, *lacunas* in the constitutional framework.

As the supreme law, the Constitution stipulates that legislative powers are shared between the federal and 36 state governments. Its only notable clauses on customary law are provisions for the establishment of customary courts, their composition, and their position in the hierarchy of courts. In descending order, federal courts are the Supreme Court of Nigeria, the Court of Appeal, the Federal High Court, customary courts of appeal, and the Sharia Court of Appeal of the Federal Capital Territory. State courts are high courts, state Sharia courts of appeal, state customary courts of appeal, magistrate courts, customary courts, and area courts.[9]

The Constitution's silence on the status of customary law arguably gives litigants a weak legal platform on which to assert changes in matrimonial property rights under customary law. Just over a decade ago, judges of the Customary Court of Appeal regarded widows as inheritable property.[10] Indeed, the judicial attitude is, generally, unsympathetic to women's

[5] EO Awa *Federal government in Nigeria* (1964) Part one ['Foundations of the Government'].

[6] Section 45(1) of the Interpretation Act, Cap 89, Laws of Nigeria and Lagos 1958. The imported English law is hereafter interchanged with statutory law since most statutes are verbatim reproductions of these laws.

[7] ES Nwauche 'The constitutional challenge of the integration and interaction of customary and the received English Common Law in Nigeria and Ghana' (2010) 25 *Tulane European & Civil Law Forum*; AO Obilade 'The relevance of customary law to modern Nigerian society' in Osinbajo and Kalu (eds). *Towards a Restatement of Nigerian customary laws* (1991).

[8] For debate on the number of ethnic groups, *see* O Otite *Ethnic pluralism and ethnicity in Nigeria* (1990) 35-6.

[9] Sections 237-288 of the Constitution.

[10] *Amusa* v *Olawumi* (2002) 12 NWLR (Pt. 780) 30 CA; *Akinnubi* v *Akinnubi* (1997) 2 NWLR (Pt. 486) 147; *Folami* v *Cole* (1990) 2 NWLR (Pt. 133) 445.

beneficial or equitable interest in matrimonial property. This attitude is illustrated by the remark of the trial High Court judge in *Onwuchekwa* v *Onwuchekwa*.[11] Here, a woman claimed a share in matrimonial property because she contributed to the purchase of the land on which a disputed building was erected, as well as in the erection of the building. The trial judge remarked: 'It may well be that, as a housewife, she contributed her labour in the course of the building of the house, but I find nothing unusual in that conduct.'[12]

To complicate the legal framework, some judges tend to deny women's beneficial interests in matrimonial property on the ground of rules of pleading.[13] Examples are women's failure to tender sufficient evidence of their contribution to property acquisition, even when such contributions are obvious.[14] In fact, the Supreme Court has affirmed that under customary law, women's non-monetary contribution to matrimonial property may not be recovered.[15] As chapter four showed, women may only claim matrimonial property with the aid of receipts issued in their own name.

Women's weak matrimonial property rights position is arguably sustained by the fact that customary law is usually interpreted by mostly male judges, who are aided by mostly male elders presumed to be repositories of customary law.[16] As pointed out in 1.3, customary law operates in 'a complex and confusing legal regime under which women generally are denied adequate legal protection.'[17] In what follows, the inadequacy of this legal regime is exposed with an analysis of the statutory framework relating to matrimonial property rights in Nigeria.

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[11] *Onwuchekwa* v *Onwuchekwa and Obuekwe* (1991) 5 NWLR (Pt. 194) 739.

[12] *Ibid*.

[13] Pleading is the formal presentation of claims and defences by parties in a lawsuit, usually through their lawyers.

[14] *Amadi* v *Nwosu* (1992) 5 NWLR (Pt. 241) 273.

[15] *Ibid*. Here the Supreme Court, per Kutigi JSC, held that 'no details of (the woman's) contribution, to wit, quantities of sand and water, date of such supplies and their values were given' and 'no evidence as to who made such supplies and payment made was adduced.'

[16] Section 70 of the Evidence Act states that 'the opinions of (usually male) traditional rulers, chiefs or other persons having special knowledge of the customary law and custom,' are relevant and admissible. *See* also the patriarchal opinions expressed by some judges in chapter six.

[17] U Ewelukwa 'Post-colonialism, gender, customary injustice: widows in African societies' (2002) 24(2) *Human Rights Quarterly* 446.

5.2 Intersection of statutory law with customary law

Over the last two decades, the relationship between law (authority), property, and social changes in postcolonial societies has attracted academic interest.[18] This interest reveals that policy makers tend to perceive property rights in the manner they are defined in statutes, 'rather than [in a] diverse and changing' manner that takes into consideration the reality of legal pluralism.[19] The importance of a legal pluralist approach to property is the phenomenon of forum shopping – that is the justification of claims by reference to different normative wardrobes in order to utilise the perceived benefit of legal rules.[20] In this sense, forum shopping provides a platform for contestations of matrimonial property rights in a social field.[21]

In Nigeria, women's ability to contest matrimonial property, especially in the context of marriage under both customary law and statutory law, affect their adaptation of property rights to socio-economic changes. The question is whether women can use the legal framework to assert matrimonial property rights under customary law. In no specific order, the notable laws explored in this framework are the Constitution, the Marriage Act,[22] the Evidence Act,[23] the Married Women Property Edict of Imo State, and state customary court laws. Two elements in this legal framework arguably reveal the creation of living customary law from state law's interaction with customary law in a social field.

First, provisions that clearly acknowledge customary law, right to culture, communal life, and socio-economic changes are platforms on which women could assert, exploit, and maximise constitutional backing for the dynamism of customary law. Second, constitutional

[18] For a sample, *see* S Berry 'Social institutions and access to resources' (1989) 59(1) *Africa* 41–55; 'Debating the land question in Africa' (2002) 44 (4) *Comparative Studies in Society and History* 638-668; *No condition is permanent: the social dynamics of agrarian change in sub-Saharan Africa* 3-21, 101-134; T Sikor & C Lund 'Access and property: a question of power and authority' (2009) 40(1) *Development and change* 1-22; C Lund 'Negotiating property institutions: on the symbiosis of property and authority in Africa' in K Juul & C Lund (eds) *Negotiating property in Africa* (2002) 11; RS Meinzen-Dick & P Rajendra *Legal pluralism and dynamic property rights* (CAPRI Working Paper, 2002) 1-3.

[19] Meinzen-Dick & Rajendra *ibid* at 1.

[20] ES Nwauche 'Legal pluralism and access to land in Nigeria' in Mostert & Bennett (eds.) *Pluralism and development: studies in access to property in Africa* (2012) 59-60, 70; K von Benda-Beckmann *The broken stairways to consensus: village justice and state courts in Minangkabau* (1984); A Griffiths 'Reconfiguring law: an ethnographic perspective from Botswana (1998) 23(3) *Law & Social Inquiry* 587-620 ['the administrative and theoretical separation of legal systems does not extend to people's uses of the law in arranging their own lives'].

[21] Meinzen-Dick & Rajendra (note 18) 2.

[22] The Marriage Act, Cap 218, Laws of the Federation of Nigeria 1990; Cap M6, LFN 2004.

[23] The Evidence Act 2011, which repealed the Evidence Act Cap E14, LFN 2004 ('the Act').

values of gender equality and property rights of women are vehicles for the emergence of living customary law from the interaction of customary law with statutory law.[24] These elements are briefly examined in the following discussion.

5.2.1 Language, culture, gender, and matrimonial property in the Constitution

As chapter three showed, there are insufficient cultural, linguistic, and historical commonalities between the hundreds of ethnic groups which the British lumped into the entity known as Nigeria. A major effect of this forced union is that Nigeria has, since embracing self-rule, been dogged by 'perceived inequality, domination, and agitations for political inclusiveness by different ethnic groups.'[25] This ethnic sensitivity sheds light on why the right to culture is not enforceable in Nigerian courts.

Section 21(a) of the 1999 Constitution states that 'the State shall protect, preserve and promote Nigerian cultures which enhance human dignity and are consistent with the fundamental objectives as provided in this Chapter.' Section 21 (b) states that the state shall 'encourage development of technological and scientific studies which enhance cultural values.' These references to culture – the only ones in the Constitution – are tucked away in a segment of the Constitution that is non-justiciable.[26] This approach to cultural issues is not new, given that culture and customary law were conspicuously absent in the 1963 Constitution and barely recognised in the 1979 Constitution.[27] Indeed, certain words and phrases usually associated with peoples' way of life barely exist in the Constitution. There is neither recognition of cultural and linguistic communities, nor acknowledgement of traditional institutions. Furthermore, there is no specific mention of legislative competence over customary law. Article 61 of the

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[24] CN Himonga & C Bosch 'The application of African customary law under the Constitution of South Africa: problems solved or just beginning?' (2000) 117 *SALJ* 319 ['As the Constitution rubs into the lives of individuals it is bound to filter into the experiences of communities that contribute to the norm-shaping melding process'].

[25] A Diala 'The dawn of constitutionalism in Nigeria,' in (K Mbondenyi & T Ojienda eds.) *Constitutionalism and democratic governance in Africa: contemporary perspectives from sub-Saharan Africa* (2013) 149.

[26] Section 6 (6) (c) of the 1999 Constitution makes provisions in Chapter II of the Constitution non-justiciable. Chapter II is termed Fundamental Objectives and Directive Principles of State Policy, and contains several socio-economic goals of the Nigerian state. *See* discussion in 5.3.

[27] Section 6 (6) (c) of the 1979 Constitution is also non-justiciable. A similarly cautious constitutional approach is displayed in national languages, revealing the unwillingness of policy makers to arouse tribal sensitivities in an ethnically diverse nation. *See* S Oyetade 'Language planning in a multi-ethnic state: the majority/minority dichotomy in Nigeria' (2003) 12(1) *Nordic Journal of African Studies* 108. Indeed, the *travaux préparatoires* of the 1979 Constitution reveals the deep-seated mistrust with which cultural issues are regarded in Nigeria. *See* Federal Republic of Nigeria *Report of the Political Bureau* (1987) 186.

Constitution's Exclusive Legislative List merely gives the federal government exclusive powers to legislate on 'the formation, annulment and dissolution of marriages other than marriages under Islamic law and customary law, including matrimonial causes relating thereto.' This clause, arguably, removes customary law from the legislative jurisdiction of the federal government.[28]

The non-linkage of customary law to a right to culture in the Constitution may be contrasted with the position in South Africa and Ghana. Section 211(3) of the 1996 Constitution of the Republic of South Africa states: 'The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.' As well as providing for an enforceable right to culture and cultural life upon which living customary law is founded,[29] it outlines the duties of courts 'when developing the common law or customary law.'[30] The example of Ghana is particularly pertinent, not just because of Ghana's similarities with Nigeria,[31] but because of the prominent position of customary law in the Ghanaian Constitution. Section 26 (1) of the 1992 Constitution of Ghana states that 'every person is entitled to enjoy, practice, profess, maintain and promote any culture, language, tradition or religion subject to the provisions of this Constitution.' Section 39 mandates the state to adapt 'customary and cultural values' to 'the growing needs of the society,' while section 270 grants traditional institutions a role in customary law's development.

However, the Nigerian Constitution provides for the existence of customary courts and the qualifications of their judges.[32] Specifically, section 288 (1) provides that in exercising his powers to appoint Supreme Court and Court of Appeal judges, the President shall ensure that the nominees include 'persons learned in Islamic personal law and persons learned in customary law.'[33] Regarding the qualifications of judges, it is worth pointing out that legal

[28] IE Sagay 'Intestate succession in the states of the former Western Region of Nigeria' (1998) 42 (1) *Journal of African Law* 112. However, customary law issues may be appealed to federal courts. *See Idehen* v *Idehen* (1991) 6 NWLR (Pt. 198) 382; *Lawal-Osula* v *Lawal-Osula* (1995) 9 NWLR (Pt. 419) 259.

[29] Himonga & Bosch at 329-331 [arguing that the close connection between s. 211 of South Africa's Constitution to the right to culture means that the courts' duty to apply customary law refers to living customary law].

[30] *See* section 39 (2) of the 1996 Constitution of South Africa, which is the second limb of its interpretation clause. *See* also sections 30, 31, and 185.

[31] Both countries are in West Africa, gained independence from the British around the same period (1960 and 1957), and are multi-ethnic and multi-religious states (Islam, Christianity, and traditional African religions).

[32] Sections 237(2) 245, 247(1), 265, 267-269, 280-284, 288 under chapter VII, titled 'Judicature.'

[33] Section 288 (2) of the Constitution states that a person shall be considered as learned in customary law 'if he is a legal practitioner in Nigeria and has been so qualified for a period of not less than fifteen years [and] not less

training is skewed in favour of the English legal tradition.[34] Being drilled in this tradition, many appellate customary court judges favour a rule-based approach to adjudication.[35]

On its part, the Constitution's approach to gender and matrimonial property rights is ambiguous. It has no specific provision on women and is couched in masculine terms.[36] Its references to gender equality are bland and insensitive to the unequal power relations between women and men in Nigeria.[37] It neither recognises matrimonial property rights nor specific property rights for women. Section 43 merely states that 'subject to the provisions of this Constitution, every citizen of Nigeria shall have the right to acquire and own immovable property anywhere in Nigeria.' This provision may be contrasted with the Ghanaian Constitution, which ensures not just women's right to property, but also joint matrimonial property.[38] Notably, section 22 (3) (a) and (b) provide that 'spouses shall have equal access to property jointly acquired during marriage,' and 'assets, which are jointly acquired during marriage, shall be distributed equitably between the spouses upon dissolution of the marriage.' Furthermore, section 36 (6) (7) mandates the state to 'take all necessary steps' 'to ensure the full integration of women into the mainstream of the economic development of Ghana' and 'guarantee' their ownership of property and right of inheritance.[39]

The Constitution's failure to guarantee matrimonial property rights ignores the gendered realities of women's property rights under official customary law.[40] Given official

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than twelve years' for a nominee of the Supreme Court and Court of Appeal, 'and has in either case in the opinion of the National Judicial Council considerable knowledge of and experience in the practice of customary law.'

[34] O Abdulmumini 'Lawyers, legal education and the Shari'ah courts in Nigeria' (2004) 36(49) *Journal of Legal Pluralism and Unofficial Law* 113-161 at 114.

[35] *See* chapter seven.

[36] In fact, the Constitution does not mention women, and uses the word 'woman' only twice in reference to citizenship. *See* sections 26 (2)(a) & 29 (4) (b).

[37] Section 17 (1) & (2) encourages the state to seek 'equality and justice' and 'equality of rights, obligations and opportunities before the law.' This section is, however, not enforceable. The only enforceable provision relevant to women is the prohibition of discrimination in section 42, which fails to mention women.

[38] *See* section 22 of the 1992 Constitution of Ghana.

[39] *See* also sections 27 (3) and 36 (6) of the 1992 Constitution of Ghana. *See* also section 33 of the 1995 Constitution of Uganda, which contains elaborate provisions for protecting the rights of women.

[40] E Nkonya, C Kovarik & H Markelova 'Who shall inherit the land? Exploring gendered patterns of land inheritance in Nigeria' *World Bank Conference on Land and Poverty*, Washington DC (March 24-27, 2014); JC Madu 'Securing land rights in rural communities of Nigeria: policy approach to the problem of gender inequality' (2013) 17 *Law, Democracy & Development* 253-272; Women's Aid Collective 'Widows cry out against disinheritance' (2005) 1(4) *Action Woman* 5.

customary law's non-recognition of their matrimonial property rights, this failure, arguably, denies women a firm platform for asserting property rights.[41] Majority of the divorcees interviewed in this study earned income independently of their husbands and contributed to their matrimonial property acquisition.[42] However, official customary law hampers them from asserting beneficial interests in property.[43] Only a negligible proportion of research participants exited their marriages with properties other than items of adornment.[44] As argued in chapter three, colonial rule cemented the notion that women's matrimonial property rights are subsumed in their husbands. Moreover, the social settings in which matrimonial property relations emerged are no longer suited to the modern forms of marriage gifts and women's property acquisition with their independent income. Accordingly, women require constitutional impetus to make property claims, and thereby hasten adaptations of the customary law of matrimonial property to socio-economic changes.

The need for constitutional impetus to women's challenges to the official customary law of matrimonial property is illustrated by the Supreme Court's April 2014 remark in the *Nweke* case.[45] There, a widow had sought a declaration of entitlement to the right of occupancy of a parcel of land, or alternatively, a share of the proceeds of its sale. She claimed that the customs of Awka people have changed to allow a woman to inherit the property of her deceased husband whether she has a male child or not.[46] As evidence, she relied on an arbitration order made by the Ozo Awka society.[47] The appellants, who were her husband's half-brothers, relied on the male primogeniture custom.'[48] Both the trial High Court and the Court of Appeal granted the widow's claims. In upholding their decisions, the Supreme Court stated:[49]

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[41] For women's legal barriers to asserting property rights, see A Atsenuwa 'Custom and customary Law: Nigerian courts and promises for women's rights' in A Obilade *Contemporary issues in the administration of justice: essays in honour of Justice Atinuke Ige* (2001) 344.

[42] *See* also Madu (note 40) 260-263.

[43] *See* SNC Obi *et al The customary law manual* (1977) sections 321 and 322.

[44] As shown in chapter four's six examples, extenuating circumstances made these few exceptions possible.

[45] *Onyibor Anekwe & Another* v *Mrs. Maria Nweke* (2014) All FWLR (Pt. 739) 1154.

[46] In para 12 of her Claim, she stated that 'under native law and custom of Awka, the wife of a deceased inherits all properties belonging' to him regardless of whether or not she has a male issue.

[47] Evidence of PW2, Ozo Nwogbo Okafor, a member of the Ozo Awka Society.

[48] Paragraph 16 of the Appellants/Defendants' Amended Statement of Defence.

[49] Per Ogunbiyi, JSC 36-37, paras A-B.

> Any culture that disinherits a daughter from her father's estate or wife from her husband's property by reason of God instituted gender differential (sic) should be punitively and decisively dealt with … It is indeed much more disturbing especially where the counsel representing such perpetrating clients, though learned, appear comfortable in identifying, endorsing and also approving of such a demeaning custom.

Arguably, the lawyers reprimanded by the Supreme Court would not have dared to champion the custom of male primogeniture all the way to the apex court if there had been a constitutional provision for women's property rights. However, this judgment was confined to the claims of the parties, and thus, did not expressly strike down this custom. Significantly for its potential to influence attitudinal changes, both the Court of Appeal and the Supreme Court neither attempted to refine the clumsily drafted claims of the parties, nor analysed changes in the social settings in which the male primogeniture custom emerged.[50]

It should, perhaps, be pointed out that there is no significant difference in judges' approach to succession to property after death and division of property after divorce. Having identified constitutional deficiencies relating to customary law, this chapter's enquiry turns to federal and state laws relevant to customary law and matrimonial property rights.

5.2.2 Recognition of customary law in the Evidence Act

The Evidence Act applies to all fact-finding proceedings in Nigerian courts.[51] It was adopted in June 2011 to replace the 1945 Evidence Act, a document inundated with several embarrassing provisions.[52] However, the new Act did not significantly improve the status of customary law as a source of law. Section 258, its interpretation clause, defines 'custom' as 'a rule, which, in a particular district, has from long usage, obtained the force of law.' It gives indirect recognition to customary law marriages by stating that a '"wife" and "husband" mean, respectively, the wife and husband of a marriage validly contracted under the Marriage Act, or under Islamic law or a customary law applicable in Nigeria.'

[50] Nigerian judges do not, as a matter of policy, grant orders not requested by the parties. *See Mojekwu* v *Iwuchukwu* (2004) 11 NWLR (Pt. 883) 196. Moreover, no amicus curia was involved at any stage of the case.

[51] Although S. 256 (1) of the Evidence Act excludes customary law courts from applying the Evidence Act, it makes an exception for where the president or a state governor enables its application through a Gazette.

[52] The 1945 Act used words such as 'native, colonial authority,' and even 'jury' that is not used in Nigeria.

Section 70 of the Evidence Act states that in deciding issues of customary law, 'the opinions of traditional rulers, chiefs or other persons having special knowledge of the customary law and custom and any book or manuscript recognised as legal authority by people indigenous to the locality in which such law or custom applies, are admissible.' Section 16 states that 'a custom may be adopted as part of the law governing a particular set of admissible circumstances if it can be judicially noticed or can be proved to exist by evidence.' Section 18(3) states that 'where any custom is relied upon, it shall not be enforced as law if it is contrary to public policy or is not in accordance with natural justice, equity and good conscience.' This is a key provision, which is reproduced in customary court laws.[53] Considering that it makes customs a question of fact that must be proved by evidence, it offers a platform for women to assert their adaptation of matrimonial property rights to socio-economic changes. Given constitutional deficiencies, it is potentially an effective avenue for judicial recognition of living customary law. As Ashiru aptly paraphrased Nwokedi JSC in *Agbai* v *Okogbue*:[54]

> The doctrine of repugnancy, in my view, affords the courts the opportunity for fine-tuning customary laws to meet changed social conditions where necessary; more especially as there is no forum for repealing or amending customary laws. I do not intend to be understood as holding that the Courts are there to enact customary laws. When, however, customary law is confronted by a novel situation, (as in the case of a woman's beneficial interest in property which she acquired with her husband), the courts have to consider its applicability under the existing social environment.

However, the proof of customs in the context of social changes in Nigeria is dependent on several factors. These include rules of pleadings, legal representation, and the educational background of judicial officers. Chapter seven reveals the limiting influence of pleadings on judges' recognition of matrimonial property rights. For now, the enquiry into how the legal framework aids women's matrimonial property claims turns to customary court laws, the principal legislation through which courts apply customs.

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[53] *See* 5.2.3 below.

[54] *Agbai* v *Okogbue* (1991) 7 NWLR (Pt. 204) 390 at 417, per Nwokedi JSC; cited in MO Ashiru 'Gender discrimination in the division of property on divorce in Nigeria' (2007) 51(2) *Journal of African Law* 322.

5.2.3 Recognition of socio-economic changes in court laws

The customary court laws and rules discussed here are those of the five South-East States, as variously amended.[55] Their contents are adapted from the Evidence Act and the rules of regular courts. Without exception, they define customary law as 'a rule or body of customary rules regulating rights and imposing correlative duties, being customary rules or body of customary rules which obtains and is fortified by established usage, and which is appropriate and applicable to any particular cause, matter, dispute, issue or question.' This convoluted, legal positivist definition is silent on culture and the dynamic character of customary law. However, the criteria for interpreting customary law in customary court laws are modelled on the repugnancy test in the Evidence Act. It is necessary to set them out in detail for two key reasons. The first is to examine the extent to which judges may use them to recognise adaptations to socio-economic changes. The second is to show the intersection of customary law with statutory law in a social field, which, as argued, influences living customary law.

Section 16 of the Customary Court Edict of Imo State, which is nearly identical with the court laws of Abia, Anambra, Ebonyi, and Enugu, provides as follows:[56]

> (1) Subject to sections 247 and 249 of the Constitution and the provisions of this Edict, a Customary Court or a Customary Court of Appeal shall administer the –
>
> (a) customary law prevailing in the area of jurisdiction of the court or binding upon any of the parties, so far as that customary law is not repugnant to natural justice, equity and good conscience or incompatible either directly or by necessary implication with any written law for the time being in force in the State;
>
> (b) Provisions of any written law which the court may be authorised to enforce;
>
> (c) Provisions of any enactment that confers jurisdiction on the court;
>
> (d) Provisions of bye-laws or rules made or deemed to be made by a local government or statutory corporation having authority in the area of jurisdiction of the court;

[55] Customary Courts Edict No. 7 of 1984 of Imo State (applicable in Imo and Abia); Customary Courts Edict No. 6 of 1984 of Anambra State (Anambra and Enugu); Customary Court Rules of 1989 (Imo, Abia, and Ebonyi), Customary Court of Appeal Law of 2000 (as amended), and Customary Court of Appeal Rules of 2010 (Enugu and Anambra). These laws are almost identical and closely resemble the Customary Courts Edict No. 2 of 1984 of Bendel State (Edo and Delta States) as amended by the Amended Customary Court Law of 1985.

[56] The equivalent provisions in Abia, Anambra, and Ebonyi are sections 16, 15, 12, respectively. *See*, generally, T Anyafulude *A Handbook on customary courts' rules in Abia, Ebonyi and Imo states* (2003).

(e) Provisions relating to general tax, rates or levies payable by the local communities or imposed by the State government, local government or town union.

Section 16(2) states that a person is bound by the customary law of the place where that person is an indigene, or being in such a place, violates customary law, or claims the property or estate of a deceased person subject to customary law, or consents to be bound by customary law.

The above provisions imply that a custom will not be upheld if it is contrary to any statutory law in Nigeria. Also, a custom, which does not contravene a written law may nonetheless not be upheld if the court determines that it contravenes natural justice, equity, and good conscience. Finally, the court may apply legislation in a customary law proceeding, notwithstanding that the concerned legislation may be alien to customary law. *Prima facie*, these provisions enable women to assert adaptations of matrimonial property rights to socio-economic changes, since they require customs to be proved. However, the rules of court make this enablement questionable because of their technical nature. These include issuance of summons, service of court process, affidavit evidence, and pleadings. Others are interlocutory applications, injunctions, costs, and joinder of parties. On the other hand, court laws offer judges a window to apply legislation that give women matrimonial property rights. In fact, some judges use this window to apply property laws that exclude customary law.[57] As argued in chapter seven, judges' importation of statutory law into customary law is an important intersection of state law with customary law. In social fields in which judges are members of the same normative community as litigants,[58] this intersection shapes living customary law. A good example of this is the award of child custody rights to women.

The technical nature of customary court laws is noteworthy for the method of proving customs. Although the court 'shall decide in favour of the party in whose favour there is a preponderance of evidence which is believed by the court,' this determination is guided by the best evidence rule.[59] Significantly, the best evidence rule is an exclusionary principle of the imported English law, which 'is now all but defunct' in England.[60] It is unsuitable for proving women's beneficial interest in matrimonial property. The cases analysed in chapter seven show

[57] *See* 6.4.

[58] Such as the judges involved in this study. *See* 2.4.3 titled 'Description of research participants.'

[59] Order 10 Rule 6(1) and 5 (1) respectively of the customary court rules of Imo, Abia, and Ebonyi states.

[60] A Hooper & DC Ormerod *Blackstone's criminal practice* (2008) 2285.

that technicalities in customary courts are an obstacle to judicial recognition of adaptations in matrimonial property relations. This obstacle manifests in the tendency of court rules to perpetuate the myth of unchanging customs. For example, Order 10 Rule 6 (3) of the customary court rules of Imo, Abia, and Ebonyi states that where a 'party wishes to rely on the customary law of the area of jurisdiction of the court, there shall be no need to prove the customary law unless the court thinks otherwise.' Rule 6 (5) adds that anyone dissatisfied with Rule 6 (3) 'may apply to the Appeal Court for leave to adduce evidence of customary law.' Given the adversarial system now practiced in customary courts and their increasing reliance on pleadings,[61] these kinds of provisions encourage a rule-based approach to adjudication.

In essence, the technical rules governing customary courts are reminiscent of common law courts. Recognising the adverse effects of these rules, customary court laws enjoin judges to decide 'matters according to substantial justice without undue regard to technicalities.'[62] However, these laws fail to link the need for substantial justice to the dynamic nature of customary law – that is its ability to adapt to socio-economic changes.

The enquiry turns to the Marriage Act, a key legislation in the intersection of statutory law with the customary law of matrimonial property rights.

5.2.4 Intersection of the Marriage Act with customary law

The phenomenon of double marriage makes the Marriage Act relevant to matrimonial property claims under customary law. A double marriage is one in which parties marry under customary law and the Marriage Act. It is very common in Nigeria,[63] a situation that is not helped by the ambiguous nature of the Marriage Act. Section 33 (1) invalidates marriages in which any of the parties at the time of their marriage is married under customary law to another person. Strangely, section 47 states that 'whoever, having contracted marriage under this Act,' and 'during the continuance of such marriage, contracts a marriage in accordance with customary

[61] A Oba 'Attitude to typographical errors in pleadings – technicalities beyond belief: Eze v Lawal' (1999) 4(1) *Calabar Law Journal* 126-135.

[62] Section 21, 17, and 21 of the Abia, Ebonyi, and Imo Customary Court Laws.

[63] Reasons for double marriage are cultural demands and desire for the proprietary benefits of a statutory marriage. *See* M Onoka *Family Law* (2003) 143; S Olokooba 'Analysis of legal issues involved in the termination of "Double-Decker'' marriage under Nigeria law' (2007-2010) *Nigerian Current Law Review* 194-207; O Agbede 'Recognition of double marriage in Nigerian law' (1968) 17(3) *Int'l and Comparative Law Quarterly* 735-743; *Ohochuku* v *Ohockuwu* (1960) 1 ALL ER 253; *Jadesimi* v *Okotie Eboh* (1996) 2 NWLR 128 at 147-148.

law, shall be liable to imprisonment for five years.' Why customary law was singled out in this manner is a puzzle, and until 1996, it was unclear whether this prohibition included a subsequent marriage by the same parties. Two theories emerged to address this puzzle.

The conversion theory holds that if parties marry under the Act after a customary law marriage, they convert the former marriage into a statutory marriage. This is because 'marriage under the Marriage Act clothes the parties to it with rights and obligations, which are un-known to customary law.'[64] Conversely, the co-existence theory holds that both marriages are valid and need to be dissolved separately in different courts and with different matrimonial reliefs.[65] In *Jadesimi* v *Okotie Eboh*, the Supreme Court considered these theories.[66] Using a combined reading of sections 11 (1) (d), 33 (1), 46 and 47 of the Act, it ruled in favour of the co-existence theory.[67] This ruling implies that, in dissolving marriages separately, women may only make property claims for marriage under the Act. Despite this precedent, some judges insist that a customary law marriage is subsumed in a subsequent statutory marriage.[68]

Notably, property claims under statutory marriage may only be obtained in respect of actions that occurred after the marriage. This is significant for women's ability to exploit double marriage to make property claims. Usually, couples contract marriage under the Act after their customary marriage, in many cases several years afterwards.[69] This implies that women may not claim matrimonial property acquired before the subsequent marriage. Moreover, the Matrimonial Causes Act,[70] which is the only legislation that regulates maintenance under the Act, excludes customary law marriages.[71] This exclusion may be contrasted with section 41(2) of the Ghanaian Matrimonial Causes,[72] which applies also to customary law and polygamous marriages.

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[64] E *Nwogugu Family law in Nigeria* (2014) 59-60.

[65] *Vivian Ugo (nee) Agba & Anor* v *Engr. Samuel Ugo* (Unreported) Suit No. CC/MB/26D/2009 Judgment of Owerri Customary Court of Appeal, Appeal No. CCA/OW/A/38/2011.

[66] *Jadesimi* v *Okotie-Eboh* (1996) 2 NWLR (PT 429) 128.

[67] *Ibid* at 142.

[68] 6.4.1 and 7.3 give examples of the hardships caused by judges' views on double marriage.

[69] M Onoka *Family law* (2003) 144.

[70] The Matrimonial Causes Act, Cap 220, Laws of the Federation of Nigeria 1990; M7, LFN 2004.

[71] *See* section 72 (1) of the MCA, which empowers the court to order the division of matrimonial property.

[72] Act No. 367 of 1971.

However, appellate customary court judges apply property laws, irrespective of whether these laws expressly exclude customary law marriages.[73] In what follows, a typical example of these laws is examined.

5.2.5 Intersection of property laws with customary law

The Married Women's Property Edict of Imo State (the Edict) was promulgated in 1996 as part of volume 1 of the Laws of Imo State 1994. Section 3 accords a married woman right to hold, acquire, and dispose of property. However, section 2(1) of the Edict states that '"married woman" means a woman married under the Marriage Act.' Section 20 states: 'Nothing in this Edict shall affect the capacity, property, or liability of any person married solely in accordance with the requirements of customary law, or Islamic Law.' Despite these exclusionary clauses, appellate customary court judges apply the Edict, emboldened by court laws that authorise them to apply 'any written law which [they] may be authorised to enforce.'[74] One judge affirmed that since the Edict provides for 'married women generally … one can argue that it does indirectly extend to customary law marriages.'[75]

Judges' application of property laws to customary law shows the normative influence of state law on the latter within a semi-autonomous social field. The adaptations within this field involve the intersection of legal regimes with socio-economic forces. In this light, the rest of this chapter addresses social change in the context of matrimonial property rights in Nigeria.

5.3 Social change and the legal regime of matrimonial property rights in Nigeria

Social change may be defined as 'any alteration in the cultural, structural, population, or ecological characteristics of a social system such as a society.'[76] Although there is no universal theory of social change, mainstream theories are framed in flexible terms in order to explain monumental processes of transformation in past and present times.[77] For example, Strasser and

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[73] *See* chapter six

[74] *See* sections 16, 15, and 12 of the Imo, Abia, Anambra, and Ebonyi customary court laws, respectively.

[75] *See* chapter six for the perceptions of customary court judges. *See* also O Adewọye 'Law and social change in Nigeria' (1973) 7(1) *Journal of the Historical Society of Nigeri*a 150.

[76] AG Johnson *The Blackwell dictionary of sociology: a user's guide to sociological language* (2000) 285.

[77] H Haferkamp & NJ Smelser (eds.) *Social change and modernity* (1992) 2.

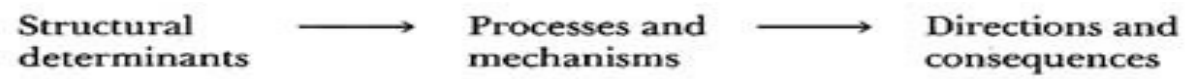
Randall identified the 'magnitude of change, time span, direction, rate of change, [and] amount of violence involved' as key features of the dominant theories of social change.[78] Social change may be driven by cultural, religious, economic, legal, or technological forces.[79] This analysis is confined to the legal and political aspects of social change,[80] and is founded on Haferkamp and Smelser's model:[81]

1. Structural determinants of social change, such as population changes, dislocations occasioned by war, strains, and contradictions.

2. Processes and mechanisms of change, including precipitating mechanisms [such as legal systems], social movements, conflict, reconciliation, and business activity.

3. Directions of social change, including structural changes, effects, and consequences.

Haferkamp and Smelser used a chart to represent these three elements:



As argued here, living customary law emerges from people's adaptation of customs to socio-economic changes. This adaptation involves the intersection of legal regimes with cultural, religious, and economic forces within a social field. In the context of matrimonial property rights in Nigeria, Haferkamp and Smelser's graph may be depicted this way:

[78] S Hermann and S Randall (eds.) *An introduction to theories of social change* (1981) 16.

[79] *Ibid*.

[80] The researcher is aware of 'the myth of a singular theory of change.' *See* WE Moore *Social change* (1963) 23.

[81] Haferkamp & Smelser (note 77).

In the above graph, the legal regime governing matrimonial property interacts in a semi-autonomous social field with cultural, political, economic, and even religious forces. All these forces shape the behaviour of people subject to customary law in a mutually adaptive manner. Two illustrations may be given with the MCA, which excludes customary law marriages from the right to settlement of property after marriage dissolution.

On the one hand, non-living and official customary law only recognise a woman's items of adornment and kitchen utensils as her property after divorce. Where a woman claims that she contributed to property acquisition, some judges, faced with official customary law, could resort to legislation such as the Married Women's Property Edict of Imo State. As justification, they may cite customary court laws or the repugnancy test of customary law. On the other hand, divorcing parties could, on their own volition, decide to divide matrimonial property in an equitable manner, contrary to the official customary law of matrimonial property. Their motivation could be their educational or religious background, their general worldview, or the influence of domestic and foreign laws. Whatever the justification or motivation for matrimonial property division in these two examples, adaptation occurs, which eventually produces living customary law. Given the role of legal regimes in the emergence of living customary law, an enforceable right to culture is crucial for asserting living customary law.

Interpreted generously, 'culture' encompasses language, belief patterns, the norms that regulate these belief patterns, and the foundational values that sustain them.[82] In this sense, a right to culture is practically tantamount to a right to living customary law.[83] As shown in chapters one and two, scholars agree that this law 'emerges from what people do, or – more accurately – from what people believe they ought to do.'[84] Its emergence is fuelled by factors such as legislation, language, belief systems, (un)employment, labour migration, and inflation. This is especially relevant for postcolonial societies with rapid rates of social change such as Nigeria. Because of the often-disruptive character of social change in postcolonial societies, what people do is best understood as adaptations to socio-economic changes.[85] People's

[82] C Himonga 'A legal system in transition: cultural diversity and national identity in post-apartheid South Africa' (1998) 1 *Recht in Afrika* (*Law in Africa*) 1, 3-6.

[83] ES Nwauche 'Affiliation to a new customary law in post-Apartheid South Africa' (2015) 18(3) *Potchefstroom Electronic Law Journal* 569; TW Bennett *Human rights and African customary law under the South African* Constitution (1995) 23-27; Himonga & Bosch at 328-331.

[84] I Hamnett *Chieftainship and legitimacy: an anthropological study of executive law in Lesotho* (1975) 10.

[85] *See* the account of colonial disruption of customary governance in chapter three.

resistance and acceptance of intrusions in their lives contribute to their culture and behavioural norms.[86] As this study argues, these norms are discernible with their foundational values. Regarding matrimonial property rights, these values were distorted by the colonial experience in a manner that subsumed women's property rights in their husbands. Moreover, the social settings in which these values emerged are no longer suited to women's contribution to matrimonial property acquisition through their independent income. To facilitate the emergence of a living customary law of matrimonial property, the state needs to put measures in place for women who observe customary law to assert matrimonial property claims. Other than adopting legislation, there are, arguably, few better measures than linking customary law to a right to culture in the Constitution. The primacy of the Constitution implies that it would have a knock-on effect on all other laws. Compliance with South Africa's constitution is partly what prompted the Recognition of Customary Marriages Act to define customary law as 'the customs and usages traditionally observed among the indigenous African peoples of South Africa, and which form part of the culture of those peoples.'[87] In Nigeria, however, there is arguably no link between the right to culture and customary law.

Section 21(a) of the Constitution encourages the state to 'protect, preserve and promote Nigerian cultures which enhance human dignity.' This provision is bland with respect to those whose cultures are subject to protection, preservation, and promotion. It certainly cannot be assumed to be state culture.[88] Importantly, section 21(a) is not couched as a right; rather, it is couched as a non-enforceable, directive principle of the state. In fact, there is nothing in section 21(a), or in the entire Constitution, which remotely confers a right to culture on individuals or communities.[89] This omission is significant in the light of the nature of rights.

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[86] *Ibid*; J Hund 'Customary law is what people say it is – HLA Hart's contribution to legal anthropology' (1998) 84 (3) *ARSP* ((Archiv für Rechts-und Sozialphilosophie) 420 - 429.

[87] Section 1 of the Recognition of Customary Marriages Act No. 120 of 1998, complying with sections 30 and 31 of the Constitution of the Republic of South Africa 1996.

[88] For similar argument from elsewhere, see Himonga & Bosch at 330-331.

[89] Section 21 (a) may be contrasted with sections 30 and 31 of the 1996 Constitution of the Republic of South Africa. Those sections provide that 'Everyone has the right to use the language and to participate in the cultural life of their choice.' They further provide that 'Persons belonging to a cultural, religious or linguistic community may not be denied the right' to, inter alia, 'enjoy their culture, practise their religion and use their language.'

Despite disagreement over the nature of rights,[90] there is common ground that rights are held and enforced by individuals.[91] The key aim of conferring rights is 'the protection or advancement of individual interests' or 'individual well-being,' not the abstract entity of the state.[92] If the provision in section 21(a) confers a right to culture, then it is a right to state culture, not individual or group culture. Although it could be claimed that section 21(a) is an indirect acknowledgement of individual or group rights to culture, this claim is dismissible with the non-enforceable nature of the provision. Rights are meant to be claimed and enforced,[93] and nothing in the drafting history of Nigerian constitutions suggests that Part II of the Constitution is designed to be enforced.[94]

Furthermore, the Constitution's failure to define Nigeria's legal pluralism makes the status of customary law in the legal framework unclear. This lack of clarity partly contributes to why judges struggle to define customary law. For example, the Supreme Court defined it as: 'Any system of law not being the common law and not being a law enacted by any competent legislature in Nigeria, but which is enforceable and binding within Nigeria as between the parties [who are] subject to its sway.'[95] Contrastingly, the Court of Appeal has defined it as:[96]

> The unrecorded tradition and history of the people practiced from the dim past, and which has grown with the growth of the people to stability and eventually becomes an intrinsic part of their culture. It is a usage or practice of the people which by common

[90] L Wenar 'The nature of rights' (2005) 33(3) *Philosophy & Public Affairs* 223-252 at 223.

[91] L Wenar 'The nature of claim-rights' (2013) 123(2) *Ethics* 202-229; HLA Hart *Essays on Bentham* (1982) 183-186, 192-193; C Wellman *A theory of rights* (1985) 199.

[92] N MacCormick 'Rights in legislation' in (P Hacker & J Raz eds.) *Law, morality and society: essays in honour of H.L.A. Hart* (1977) 192; J Raz *The morality of freedom* (1986).

[93] The traditional schools of rights – the Will and Interest theories – support its claim nature. Will theorists hold that the function of rights is to give right-holders choices, whereas the Interest theorists hold that rights advance the right-holders' interests. *See* L Wenar 'The nature of claim-rights' (2013) 123(2) *Ethics* 202.

[94] Case law support this assertion. *See*, for example, *AG Ondo* v *AG Federation* (2002) FWLR (Pt. 111) 1972; *Bishop Olubunmi Okogie* v *AG of Lagos State* (1981) 2 NCLR 337. For debate, see A Diala 'Lessons from South Africa in judicial power and minority protection' (2011) 1(1) *Madonna University Law Journal* 187; E Azinge & B Owasanoye (eds.) *Justiciability and constitutionalism: an economic analysis of law* (2010); S Ibe 'Beyond justiciability: realising the promise of socio-economic rights in Nigeria' (2007) 7(1) *African Human Rights Law Journal* 225-248; D Olowu 'Human rights and the avoidance of domestic implementation: the phenomenon of non-justiciable constitutional guarantees' (2006) 69 *Saskatchewan Law Review*.

[95] *Kharie Zaidan* v *Fatima Khalil Mohssen* (1973) 1 ALL NLR 86 at 101.

[96] *Aku* v *Aneku* (1991) 8 NWLR (Pt. 209) 280.

> adoption and acquiescence, and by long and unvarying habit, has become compulsory and has acquired the force of law...

None of these definitions was inspired by the Constitution. Even Obaseki JSC's admirable definition in *Oyewunmi* v *Ogunesan* did not situate customary law within a constitutional context.[97] His definition's value is its portrayal of customary law as an 'organic or living law,' and custom as 'a mirror of the culture of the people.'[98]

The reality is that the structure of the Nigerian legal system, in which every person and authority is hierarchically subordinate to the Constitution, is a double-edged sword.[99] On the one hand, it could assist living customary law to emerge in a social field by linking customary law to an enforceable right to culture. On the other hand, it could, as indeed it does, discourage living customary law by failing to define the status of customary law and linking it to a right to culture. To reframe the words of Osborne CJ,[100] the 'great danger' of not giving individuals and groups an enforceable right to culture is denying them a legal platform on which to demonstrate the flexibility of customs. This right enables individuals and groups to approach the courts and demand recognition of the manner their relationships have adapted to socio-economic changes.[101] It also enables them to question legislation, policies, and judicial decisions that contravene their living customary law. More importantly, the absence of a constitutionally enforceable right to culture robs judges of a firm platform for recognising adaptations in matrimonial property relations.[102]

Furthermore, as a product of interactive forces, living customary law is a confluence of culture and 'constitutional imperatives.'[103] Thus, as 'the Constitution rubs into the lives of individuals, it is bound to filter into the experiences of communities' and contribute to their

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[97] *Princess Bilewu Oyewunmi & anor.* v *Amos Owoade Ogunesan* (1990) 3 NWLR (Pt. 196) 182 (C.A.) 207.

[98] *Ibid*.

[99] Section 1 (1) and (3) of the 1999 Constitution.

[100] *Lewis* v *Bankole* (1908) 1 NLR 81.

[101] The Constitution's non-recognition of cultural rights perhaps helps to explain the total non-involvement of NGOs, academic institutes, and legal aid organisations in customary law litigation in Nigeria.

[102] *See* the discussion of judicial perceptions in the next chapter.

[103] CN Himonga & C Bosch at 319.

norm creation process.[104] As oracles of the Constitution, the role of judges is important. An example of how judges can hasten the emergence of living customary law is the Supreme Court's invalidation of the male primogeniture custom in 2014.[105] This judgment lends credence to the unsuitability of this custom to its foundational value of care to family members. The foundational values of customary law are justifications for women's claim of matrimonial property. For example, maintenance is generally unknown after divorce under official customary law in Igboland. However, a foundational value of family law is a man's duty of care to his family, even after a marriage ends.[106] With an enforceable right to culture, women could request judges to use this duty as justification for awarding them maintenance.[107]

Accordingly, Nigeria's legal framework is a key structural determinant and potential mechanism of social change. The question is whether this framework possesses authorisation or thriving space in the highest embodiment of laws – the Constitution. This is the context in which the non-enforceability of the right to culture in the Constitution should be perceived.

5.4 Summary of chapter

Judges drive the key role which law plays in social change. Indeed, 'one cannot draw a line between the role of the law and that of the courts in social change.'[108] However, law's positive role in social change depends on how its institutional framework accommodates and interacts with other forces that drive social change. This is the context in which this chapter analysed the extent to which Nigeria's legal framework enables women to assert adaptations in the customary law of matrimonial property. Conducted on the theoretical platform that living customary law also emerges from the normative influence of statutory law on people that observe customary law in a semi-autonomous social field, this analysis produced four findings.

The first is the difficulties presented by the absence of a constitutional basis for women's assertion of matrimonial property rights under customary law. Closely related to this

[104] *Ibid* at footnote 73.

[105] *Ukeje* v *Ukeje* (2014) 11 NWLR (Pt. 1418) 384-414; *Anekwe* v *Nweke* (2014) All FWLR (Pt. 739) 1154.

[106] Nwogugu *ibid*; FDI Jones *Ibo and Ibibio-speaking peoples of south-eastern Nigeria* (1950) 18; TO Elias *Groundwork of Nigerian law* (1954) 288-9; SNC Obi *Modern family law in Southern Nigeria* (1966) 366-371.

[107] *See* chapter six for how judges approach maintenance after divorce.

[108] O Adewọye 'Law and social change in Nigeria' (1973) 7(1) *Journal of the Historical Society of Nigeri*a 150.

is the non-regulation of customary law marriages. These findings are significant for women whose marriages are terminated by death or divorce. For example, a widow with wicked in-laws encounters great difficulties in accessing matrimonial property. Women's situation worsens dramatically in cases of divorce, since official and non-living customary law recognise only their personal belongings and, lately, marriage gifts given to them by their parents.[109] In the agrarian past, this situation caused insignificant hardship because divorce was rare, property was unsophisticated, and income generation was relatively group-based. Moreover, divorced women were easily absorbed into their extended families. Today, the realities are different. One, the extended family is largely gone. Two, women increasingly acquire properties alongside their husbands through their independent income and sophisticated marriage gifts from friends and families. Three, the nature of matrimonial property has assumed modern hues that are uncontemplated by the non-living customary law of divorce. The effect of divorce is thus two-fold. Firstly, women financially dependent on their husbands exit marriage without matrimonial property and thus suffer hardship. Secondly, women financially independent of their husbands often lose substantial parts of their contributions to matrimonial property. The hardship that women suffer is amplified by the fact that they usually leave the security of their matrimonial home, whether or not they obtain custody of their children.[110]

The next finding is the absence of an enabling legal framework for women's claims to matrimonial property under customary law. As this study argues, state law and customary law are close normative players in a social field. Given the total absence of matrimonial property rights in the Constitution, the undefined status of customary law, and its non-subjection to the Bill of Rights, it is difficult for judges to use Nigeria's legal framework to acknowledge adaptations in matrimonial property relations. This situation may be contrasted with the Ghanaian Constitution, which guarantees matrimonial property rights and articulates customary law's constitutional status. For example, Section 11, which deals with 'the laws of Ghana,' provides that 'the common law of Ghana shall comprise of [among others] the rules of customary law.' It then defines customary law as 'the rules of law, which by custom are

[109] As shown in chapter four, these marriage gifts used to be kitchen utensils and items of adornment.

[110] UC Isiugo-Abanihe 'Reproductive motivation and family-size preferences among Nigerian men' (1994) 25(3) *Studies in Family Planning* 149-161 at 154.

applicable to particular communities in Ghana.' This provision shows that customary law is a respected source of law in Ghana.[111]

The third finding is the technical nature of customary court laws and their failure to acknowledge the dynamic character of customary law.[112] An example is the best evidence rule, an exclusionary principle that is hostile to the proof of women's beneficial interest in matrimonial property. The technical nature of court laws arguably restricts women's ability to present evidence of changes in matrimonial property relations. Moreover, the doctrine of *stare decisis* is an obstacle to claims that a custom has adapted to socio-economic changes.[113]

The last finding concerns the influence of the legal regime of property rights on the customary law of matrimonial property. In this study, the most notable problems with Nigeria's legal framework are its absence of matrimonial property rights, the undefined status of customary law, and a non-enforceable right to culture. These deficiencies discourage strategic litigation on matrimonial property rights, which is evident in the glaring absence of legal aid organisations in customary law litigation. As the supreme law in Nigeria, only the Constitution can give rule-focussed judges a firm legal basis to acknowledge, uphold, and promote living customary law. In the context of the above legal framework, the next two chapters explain judicial perceptions and approach to matrimonial property relations under customary law.

[111] I Owusu-Mensah 'Politics, chieftaincy and customary law in Ghana's Fourth Republic' (2014) 6(7) *Journal of Pan African Studies*.

[112] As argued in chapter seven, these laws heavily imitate the imported English (statutory) law.

[113] Judges' reliance on precedents is shown in chapter seven.

Chapter six: Judicial perceptions of matrimonial property rights

6.0 Introduction

Given the key role judges play in people's adaptation of customs to socio-economic changes, their awareness of the processual character of customary law and the unsuitability of some customs to modern conditions is important. Also important are their general perceptions of matrimonial property rights, and the extent to which they adopt rule-based approaches to these rights. This chapter presents these perceptions and approaches, which were elicited with questions and informal discussions on women's ability to dispose of matrimonial property, division of property during or after marriage dissolution, and maintenance or compensation.[1]

Appellate judges are drawn from the high courts, and are required to have spent at least ten years in the legal profession before their appointment.[2] Trial customary courts comprise of a panel of three judges, who, due to poor staffing, sometimes sit with two members – a chairperson and an assessor.[3] The president of the panel is a legal practitioner, while the other members are retired senior public officials. These officials are predominantly men who are deemed to be knowledgeable in the customs of their communities. They hold office for a term of four years, which may be renewed by one or two years.[4] Their enabling laws contain several interesting eligibility criteria. Some of them are that judges must not be less than 30 years old, must be 'legally married,' of 'good character and proven integrity in the society,' and 'literate in English and Igbo language.'[5] As shown later, some of these enabling laws influence how judges adjudicate women's matrimonial property rights.

The chapter begins by explaining the legal mechanisms that judges use in their decisions. These mechanisms are, mainly, the repugnancy test and customary court laws. Titled 'basis of judgments,' they are explained against the backdrop of the constitutional deficiencies

[1] *See* Appendixes A and B. Other than the 15 interviews with judges, informal discussions were held with four others. As explained in 2.5.1, the judges have original and appellate jurisdiction over customary law.

[2] Section 271(3) of the Constitution.

[3] Section 3 of the Abia State Customary Courts Law (No. 6) of 2011 states: 'A Chairman sitting with one member shall be deemed to constitute a quorum.'

[4] Customary court judges enjoy security of tenure for the duration of their appointment and may only be removed from office by the Judicial Service Commission for gross misconduct. *See* Part 3 of customary court laws of South-East States, which deal with Conditions of Service of judges.

[5] *See*, for example, section 5 of the Abia State Customary Courts (Amendment) Law (No. 6) of 2011, which amended section 8 of the Abia State Customary Courts Law No. 7 of 1984.

identified in the preceding chapter in order to highlight their influence on the cases analysed in chapter seven. Thereafter, judges' perceptions of matrimonial property rights and socio-economic changes are discussed, drawing heavily on judges' responses to vignette questions. Chapter four has already provided a context against which these responses may be measured. Accordingly, they are analysed against the background of the changes in matrimonial property rights explained by widows, divorcees, traditional leaders, clergy, and social welfare officials. These changes are notably women's ability to obtain custody of children, and recover marriage gifts and properties bought with their independent income. Finally, the factors that limit judges from acknowledging changes in matrimonial property rights are discussed.

6.1 Basis of judgments

Using judges' perceptions of matrimonial property rights as a key means of assessing their recognition of living customary law is challenging. This is because of the possibility that these perceptions may be idealised and may not reflect what judges do in actual cases. Accordingly, analysing these perceptions is preceded with an explanation of the mechanisms which judges use to arrive at their decisions. This explanation aims to show the extent to which these mechanisms are influenced by the Constitution and judges' worldview.

6.1.1 Awareness of customary law's nature

As explained in the preceding chapter, section 16 of the Evidence Act states that customs may be judicially noticed or proved by means of evidence. While judicial notice implies the doctrine of precedents, proof with evidence mainly consists of the testimonies of parties and their witnesses regarding the correct interpretation of customs. In certain cases, this evidence also includes the opinions of traditional leaders.[6] However, proof by means of evidence is dependent on the compliance of customs with the so-called repugnancy test. As explained in chapter five, this test requires that a custom 'shall not be enforced as law if it is contrary to public policy or is not in accordance with natural justice, equity and good conscience.'[7] Judicial approach to this test varies in accordance with judges' understanding of the nature of customary law.

[6] *See* section 70 of the Evidence Act.

[7] Section 18(3) of the Evidence Act. However, declaring a custom as repugnant does not mean that the custom cannot be applied in a community. It merely means that the courts will not recognise it. *See* A Kolajo *Customary law in Nigeria through the cases* (2000) 13-14.

Generally, appellate judges displayed significant awareness of customary law's dynamism, especially its tendency to adapt to socio-economic changes. For example, when interviewed, the President of the Imo State Customary Court of Appeal (ICCA), Justice PI Okpara, defined it as 'the living law of the indigenous people within our present environment; living in the sense that it is dynamic and changes with the environment.' Another judge of the ICCA, Justice VU Okorie, defined it as 'an organic law, which is not static, and which is dynamic, and which is the reflection of the customs and conducts of the people.' Judges explained that the flexibility of customary law owes much to its unwritten nature, as well as modern notions of acceptable conduct. They gave examples of customs that have been totally or largely consigned to the dustbin of social practices. These include the killing of twins, Osu Caste system, prohibition of women from seeing masquerades, and the symbolic nature of bridewealth payment. This perception of customary law's flexibility ought to, ordinarily, influence the manner judges acknowledge changes in the customary law of matrimonial property. However, the following analysis shows that this is not always the case.

6.1.2 A sense of justice?

Judges do not regard the Constitution as the basis of their judgments, preferring to use varying terminologies such as 'natural justice,' judgment with 'human face,' and 'substantial justice.' Underlying these terminologies is the sense of what is right or wrong. As Justice RU Anumudu of the Eziama Customary Court put it, 'judgment should be guided by conscience and the need to move the society forward. That is the crux of the whole thing.' This 'conscience' or sense of right and wrong is referred to here as substantial justice. However, as a basis of judgment, substantial justice is problematic because of the subjective manner judges interpret it.

Judicial perceptions reveal that substantial justice is the omnibus phrase for the repugnancy test, which the British imported into Nigeria after apparently using it successfully in India.[8] It is now codified in customary court laws.[9] The philosophy behind this test is founded on the superiority of the imported English law over the laws of the indigenous people in British

[8] TO Elias *Law and social change in Nigeria* (1972) 270.

[9] S. 16 of the Imo State Customary Court Law, which is similar to Abia, Anambra, Ebonyi, and Enugu States.

colonies.[10] In essence, it was meant to ensure that these laws did not offend English law.[11] It is instructive to note how this test has evolved in Nigeria.

In the landmark judgment of *Eshugbayi Eleko* v *Government of Nigeria*,[12] Lord Atkins declared that a barbarous custom is one which is repugnant to natural justice, equity and good conscience. However, the phrase 'natural justice, equity and good conscience' has never been defined. In explaining the difficulty of defining it, Lord Evershed stated that 'the principles of natural justice are easy to proclaim, but their content is far less easy to ascertain.'[13] In fact, the lumping of natural justice with equity and good conscience led to confusion,[14] which was summarised by Speed, Ag. CJ in the case of *Lewis* v *Bankole*:[15]

> I am not sure that I know what the term 'natural justice and good conscience' means. They are high sounding phrases and it would of course not be difficult to hold that many of the ancient customs of the barbaric times are repugnant thereto, but it would not be easy to offer a strict and accurate definition of the term.

Speed's admission seems to have lured Nigerian judges into complacency, for they have neither explored the historical philosophy of the repugnancy test, nor attempted to clearly articulate its meaning.[16] As Elias put it, in 'many of the cases decided on this principle, no consistent principle is discernible and some of the decisions are hard to justify.'[17] Elias' conclusion is evident in the fact that judges use the repugnancy test in a subjective manner.[18] Prior to 2014,

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[10] RN Nwabueze 'The dynamics and genius of nigeria's indigenous legal order' (2002) 1 *Indigenous Law Journal* 176; *Laoye* v *Oyetunde* (1944) AC 170 per Lord Wright; *R* v *Amkeyo* (1917) 7 EALR 14 (HC) per Hamilton, C.J.

[11] English Law was, in turn, heavily influenced by Christian notions of morality. *See* TO Elias *Law and social change in Nigeria* (1972) 270-271.

[12] *Eshugbayi Eleko* v *Officer Administering the Government of Nigeria* (1931) AC 662 at 673.

[13] *Abott* v *Sullivan* (1952) 1 KB 189 at 195.

[14] EA Taiwo 'Repugnancy clause and its impact on customary law: comparing the South African and Nigerian positions – some lessons for Nigeria' (2009) 34(1) *Journal for Juridical Science* 92; A Allot 'The people as lawmakers: custom, practice and public opinion as source of law in Africa and England' (1977) 21(1) *Journal of African Law* 1-23 at 44; JO Fabunmi *Equity and trusts in Nigeria* (1986) 40-41.

[15] *Lewis* v *Bankole* (1908) 1 NLR 83 at 84.

[16] *Ibid* at 301; A Obilade *The Nigerian legal system* (1990) 100.

[17] TO Elias *The judicial process in Commonwealth Africa* (1977) 53.

[18] *Nezianya and another* v *Anthony Okagbue* (1963) 1 All NLR 352; *Nzekwu* v *Nzekwu* (1989) NWLR (Part 104) 373; *Odiari* v *Odiari* (2009) 11 NWLR (Part 1151) 26 at 37.

they tended to use this test to mitigate the hardships of the male primogeniture custom without necessarily invalidating the custom.[19] At the time of writing, they are yet to use it to recognise women's beneficial interest in matrimonial property. Similarly, they are yet to use it to strike down the customary law of matrimonial property division.

Other than substantial justice, precedents and manuals also play key roles in the basis of judgments, as shown below.

6.1.3 Reliance on precedents and manuals

Customary court judges copiously cite precedents, even when these precedents are given by non-customary courts.[20] Some judges explained that their reliance on precedents and the style of the regular courts is borne from their desire to ensure that their judgments are not over-turned on appeal. Understandably, precedents make adjudication easier for judges. However, precedents are not meant to be applied blankly. The issue in dispute must be the same as that in the precedent sought to be relied on. In addition, reliance on precedents is dependent on court laws and rules of procedure. A judge explained it this way:

> We follow judicial precedents, but not strictly on procedural rules. If there are rules that are procedural, we waive it in the interest of justice, but if there are statutory provisions we must be very strict to adhere to the statutory provisions … For instance, jurisdiction; if a litigant is out of time to file an appeal within three months, he can't [do that] just because we want to achieve substantial justice … the court will not have jurisdiction.

Although appellate judges might not uphold precedents that are incompatible with current social realities, case law reveals judicial reluctance to overturn long-standing precedents on matrimonial property rights. This accounts for why judges fail to recognise women's beneficial interest in matrimonial property, insisting instead on documented proof.[21] One instrument that contributes to this failure to recognise women's beneficial interest is manuals.

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[19] *Onyibor Anekwe & Another* v *Mrs Maria Nweke* (2014) All FWLR (Pt. 739) 1154.

[20] *See* chapter seven for a discussion of these cases.

[21] *Amadi* v *Nwosu* (1992) NWLR (Pt. 241) 273; *Onwuchekwa* v *Onwuchekwa and Obuekwe* (1991) 5 NWLR (Pt 194) 739. *See* also the cases discussed in chapter seven.

Customary law manuals are codifications of general customs made by state officials or individuals. The most cited manual in South-East Nigeria is a 393-page compilation of general customs applicable in the old Anambra and Imo states, from where other states in South-East Nigeria were carved out.[22] It was edited by the late Professor Samuel Chinwuba Obi and published in 1977. Although manuals are persuasive, they strongly influence the decisions of judges. Many of the judgments reviewed in chapter seven cited manuals as part of the justification for upholding the custom that a woman exits marriage with only her personal belongings and kitchen utensils. As shown in chapter four, this custom emerged in agrarian settings. In those settings, women had little need and opportunity to acquire independent income because of the collective nature of wealth production and unsophisticated nature of household property. Thus, recognising the custom of matrimonial property division in manuals contradicts judges' description of customary law as a flexible or dynamic normative system.

6.1.4 Reliance on opinion evidence

Although anyone of full age may give evidence of customs, the opinions of certain individuals are considered more seriously than others. These individuals are usually elderly men, most of whom are traditional leaders.[23] They are often called upon as experts to determine disputes over customs. Indeed, they are not only considered knowledgeable about customary law, they are often regarded as the custodians of customs. As a judge put it, elders' 'evidence is given a very high probative value because [they] are, like I said, custodians of the customs and traditions of the people; they have it at their fingertips. So any evidence they give is accepted in court and in the appellate courts too as the prevailing customs of the people.' However, just as precedents, the opinions of elders should not be uncritically relied on. As a judge acknowledged during his interview, elders are not always objective:

> We rely on them depending on their bias. When you are relying on the evidence of any traditional ruler, you have to be careful of where that traditional ruler is coming from. Is he on the side of the plaintiff or the defendant? So also [is] the evidence of elders.

[22] SNC Obi *The customary law manual* (1977).

[23] For convenience, elders shall be used to represent, also, traditional leaders, notwithstanding that some modern traditional leaders are relatively young men.

Even if the opinions of elders are objective, their evidence may be questioned on the same basis as manuals. Manuals and elders often present narratives of customs which developed in social settings that have largely disappeared. Adopting versions of customs narrated by elders without testing their compatibility with modern realities such as women's independent income and the changing nature of household furniture could result in hardship to women. Moreover, as chapter four showed, elders, who are usually male, tend to project patriarchal views of matrimonial property, which might influence their evidence in court. For example, elders repeatedly, and with barely concealed smugness, told the researcher the story of the chief and the slave. As shown in the next sections, some judges also display disturbing patriarchal perceptions of women's matrimonial property rights.

6.2 Judges' perceptions of matrimonial property rights

It is perhaps fair to point out that judges do not have much opportunity to develop the customary law of matrimonial property division. This is largely because majority of divorce cases are filed by men and they never ask for matrimonial property division. In addition, the comparatively few cases which are filed by women rarely attempt to recover matrimonial property. Indeed, a judge asked the researcher why he is stirring 'the hornet's nest by researching matrimonial property. In his words, 'did the women tell you they want to claim property rights?' The vignettes which judges were asked to discuss covered some situations which some judges had never handled. Accordingly, some of the judicial perceptions presented here are possibly idealistic, despite the researcher's efforts to probe judges on the rationale for their views. Although no unanimity exists in these perceptions, there are commonalities on which the analysis is conducted. These are widows' ability to sell family land allocated to their husbands, divorcing women's ability to recover matrimonial property with uncontroverted evidence, and divorcees' right to compensation if they are blameless for the marriage breakdown.

As explained in chapter four, after divorce, women are, generally, neither entitled to matrimonial property nor custody of their non-infant children. However, women's independent income, use of receipts to claim properties, and the activities of social welfare officials are engendering changes in attitudes to matrimonial property division. Notably, these officials promote the best interests of women and children and impute fault for the divorce into property division. The below quick-fire excerpt, which represents changing attitudes to matrimonial property rights, provides a contrast for assessing judicial perceptions of these rights:

Interviewer: What is the tradition of your community in the event of marriage dissolution; what does a woman go back home with?

Interviewee: In marriage dissolution, it is our culture that if a man chases [away] his wife, the wife goes back home with everything in the house: television, fridge, etc. It is hers.

Interviewer: When you talk about properties, is it the ones she bought with her money or the ones her husband bought alone, or the ones they bought together?

Interviewee: She will go with the property she bought herself, the ones used as *idu uno* [marriage gifts] and the ones they bought together.

Interviewer: What if she went on her own?

Interviewee: She gets nothing.

Interviewer: What if the husband sends her away?

Interviewee: She gets everything.

Interviewer: Who gets the children in your community?

Interviewee: The children belong to the husband.

Interviewer: Does it mean the woman can't set her eyes on them?

Interviewee: She has every right to see them.

Interviewer: What if the children are still tender or maybe still breastfeeding?

Interviewee: They will stay with their mother just like this case, they are here with me.

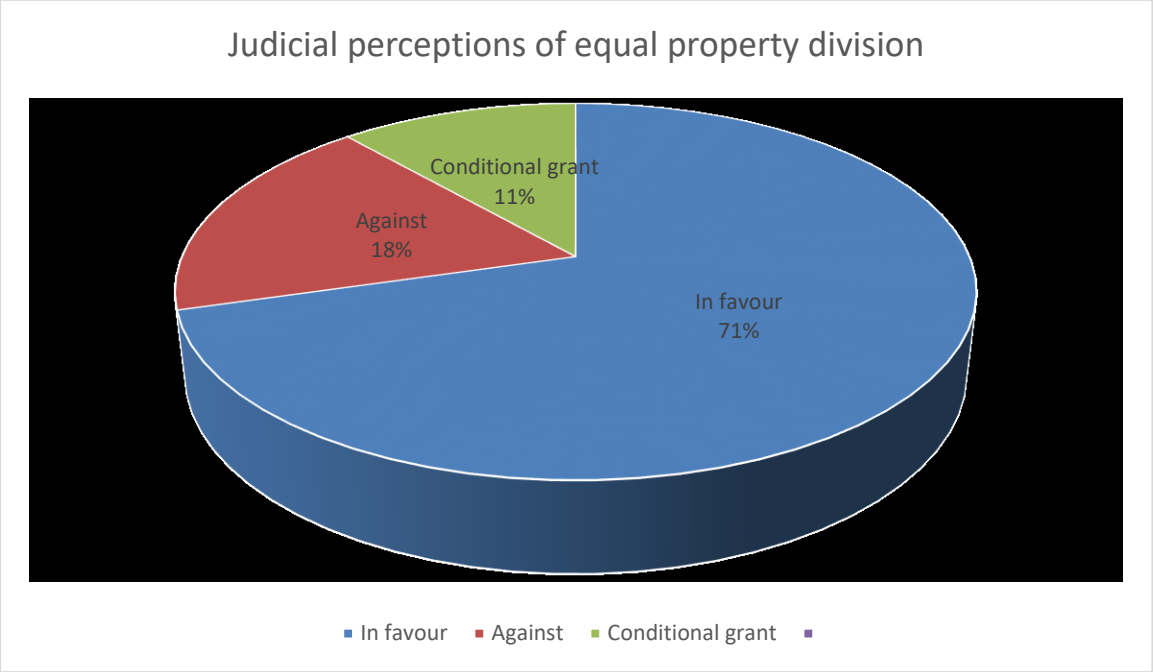
The above excerpt is a fair representation of the opinions of parents, priests, traditional leaders, NGOs, and social welfare officials regarding matrimonial property rights in marriage dissolution.[24] In what follows, vignette discussions are used to present judicial perceptions of property division, maintenance or compensation, and women's ability to dispose of matrimonial property. Thereafter, these perceptions are analysed against the background of data from widows, divorcees, traditional leaders, clergy, and social welfare officials.

[24] Note that social welfare officials' position on custody is subject to the best interest of the child principle.

6.2.1 Division of matrimonial property

Judges' perceptions of matrimonial property division in the event of marriage dissolution were expressed in this scenario:

Supposing an extended family meeting over dissolution of marriage decides to give Ada half of her matrimonial property because 'she is an industrious woman.' Ike, her estranged husband, disagrees, and heads to court, arguing that women have no matrimonial property rights under customary law. How would you treat Ike's claim?



As the above chart shows, judges generally gave positive responses to this vignette. These responses ranged from granting Ada the full fifty percent of matrimonial property to giving her 'thirty to thirty-five percent.'[25] However, the justifications for their positive and negative responses are intriguing. Eleven out of the fifteen judges presented with vignettes were unequivocal that Ada should receive half of her matrimonial property for surprisingly varying reasons. These include respect for arbitral awards, the evolution of customs 'towards progressiveness,' women's rights, 'the repugnancy test, which every custom must pass,' property legislation, the right to non-discrimination, and 'evidence of [Ada's] industriousness.'

[25] Or 'something reasonable,' as a judge termed it.

Of these positive responses, only the president of the ICCA based his position on wrong perceptions of women's matrimonial property rights. He explained it as follows:

> From the beginning, immediately a woman is married under customary law, she is given landed property; a house is built for her. So she retains that property until death. In most cases, the last son of that woman inherits the property of the woman. So it would be wrong [for Ike] to say that women have no property rights. The problem is that … some women believe that they should own property through their husbands.

It is obvious that Justice Okpara disagrees with the custom that women's right to matrimonial property is dependent on, or derived from their husbands. This point shall be returned to later.

Both the positive and negative responses given by judges mentioned the repugnancy test, thereby creating an intriguing paradox. On one hand, an overwhelming majority of the judges acknowledged the official customary law position that 'he who owns the woman owns everything she has.' Indeed, three judges who gave positive opinions expressed their readiness to overturn this custom for contravening the repugnancy test. On the other hand, one of the four judges who gave negative responses to the vignette believes that giving Ada an equal share in her matrimonial property contravenes the repugnancy test. He stated:

> I will not respect that decision because it is repugnant to natural justice, equity and good conscience. Any society that does that [equal division of matrimonial property] is creating room for anarchy. We cannot empower a woman to this point. If you do that, you want to destroy our system.

There is no explanation for this judge's opinion other than patriarchy. As explained in *6.1.1*, judicial approach to the repugnancy test appears to be highly subjective. The above quote shows that judges could apply the test in a rule-based manner that preserves patriarchy. In this sense, patriarchy is evident in the other justifications for refusing Ada an equal share of her matrimonial property. One judge stated that equality in matrimonial property division is 'English Law, not native law and custom.' Another judge declared: 'The [positivist, official customary] law is very clear. She's a chattel … I am not being chauvinistic. I'm just telling you how it is … She is bought and whatever she has is bought with her.' Even the judge that

gave a conditional response of 30-35% expressed a strong patriarchal inclination. In his view, Ada should not get fifty percent because 'God didn't create man and woman equally.'[26]

It is notable that majority of the positive responses to the vignette admitted the impropriety of the customary law of matrimonial property division. The concerned judges also expressed a willingness to invalidate this custom when the opportunity presents itself. This willingness to uphold a challenge to an out-of-tune custom indicates sensitivity to people's adaptation of customs to socio-economic changes.

6.2.2 Women's right to dispose of matrimonial property

The second vignette which the researcher discussed with judges concerns widows' right to dispose of matrimonial property:

Supposing Anna, a widow, sold a piece of her husband's land to DIG, a mining company, in order to pay her four children's tuition. Ike, her brother in-law drags DIG to court, claiming a woman cannot sell land under customary law. What is your opinion of Ike's claim?

Judicial opinion is unanimous that Anna has a right to sell land which belongs to her late husband. Here, 'belongs' means either purchased land or family land allocated to her husband for his exclusive use by his family. The rationales for this unanimity include necessity, 'equity and good conscience,' changing social circumstances, 'property law and evidence,' and the fact that 'inheritance is for the benefit of wives and children.' Two judges went to great lengths to explain that customary law does not prohibit women from selling land. Interestingly, one of them asserted that the prohibition on women's ability to sell land comes from a distorted version of customary law:

> All these things we hear are legends, stories; don't do this, don't do that. They [customs] are flexible because they are not written; they are dynamic, subject to changes … It is repugnant to natural justice, equity and good conscience to deprive women of the right to sell land. Like I said, heavens will not fall if women sell land.

The judicial opinion that customary law does not prohibit women from selling land tallies with the scholarly observations explained in 4.2. There is unanimity among all categories of research

[26] Pressed further, the judge offered the biblical position that women caused the downfall of men. Interestingly, most of these patriarchal-minded judges are legal practitioners.

participants that women may freely acquire and dispose of non-family land in their own names without the involvement of men.[27] With respect to family land that was exclusively allocated to a man in his lifetime, traditional leaders affirmed that his widow may sell it in the name of her male child.[28]

Women's ability to dispose of land owes much to the increasing individualisation of family land. This individualisation results from the activities of communities, landowning families, and 'traditional authority figures' reacting to the socio-economic changes brought by colonial rule.[29] As explained in chapter four, land tenure in the agrarian past recognised the need to perpetuate clan lineage and keep wealth within the family. With steady erosion of the extended family, increasing individualisation of family land, and women's independent income, judges now recognise that the perception that women cannot acquire or dispose of land no longer holds true.

However, the same judges who expressed negative opinions on equal property division placed conditions or restrictions on Anna's ability to sell the land to DIG. While one explained that she may sell only through her male children, another explained that, ordinarily, she requires the consent of her brother in-law. This is because 'the man is the head of the family, and by virtue of the Igbo customary tradition, the woman is supposed to be under the man.' These restrictions on Anna's ability to sell land reflect a rule-based approach to matrimonial property rights. Indeed, a judge confirmed this approach when he cited the Supreme Court's decision in *Nezianya* v *Okagbue*.[30] He used this decision to explain that [official] customary law permits Anna to sell the land 'without malice' in order to maintain herself and her children. When he was asked why Anna's right to sell land should be subjected to absence of malice or good behaviour, he shrugged and stated that the custom promotes family harmony and prevents the loss of family property. He also gave the need to preserve family property as the rationale for the custom of levirate marriage or wife inheritance. However, he admitted that a widow may dispose of land that is exclusively allocated to her husband as his share of family property.

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[27] *See* also Nigerian Institute of Advanced Legal Studies *Restatement of customary law of Nigeria* (2013) 237.

[28] In some communities in Imo State, indigent widows can alienate land even when they have no male children.

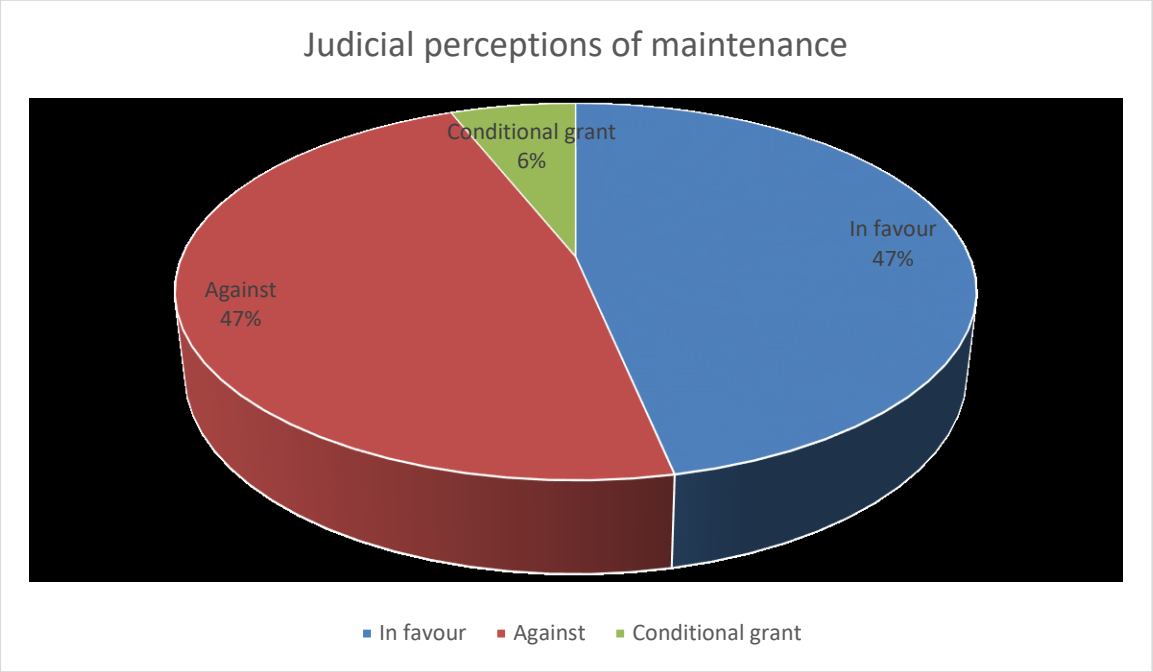
[29] U Ikejiofor 'Equity in informal land delivery: insights from Enugu, Nigeria' (2006) 23(4) *Land use policy* 448-459 at 452 [explaining the role of indigenous communities, landowning families, and traditional authorities in the 'commodification' and 'individualisation' of 'communal land' in Enugu State].

[30] *See* the discussion of this case in chapter four.

6.2.3 Maintenance

Judges were asked to respond to this question on women's maintenance rights after divorce:

Supposing Ada and her husband, Ike, are farmers. Ada sells their joint farm produce at the village market. After three childless years, Ike married Anna, and thereafter, put Anna in charge of selling farm produce. Ada files for divorce at a customary court, claiming for maintenance. Ike, who does not oppose the divorce, argues that under customary law, he has no duty to maintain Ada. What is your opinion regarding these competing claims?



As seen from the above chart, the most divisive issue in vignette discussions with judges is the propriety and ambit of women's right to maintenance after divorce. The key factors in this discord appear to be fault and childlessness. Four of the seven judges who declined to grant a maintenance order in favour of Ada believed that because she opted for divorce, she is disentitled to maintenance. As one of them put it, 'a childless woman who filed [for] divorce knows why she filed [for] divorce. The man has no right to maintain her.' These judges conceded that they might act differently if Ike drove Ada away from her matrimonial home. In stressing the importance of fault, one judge stated that 'law is not based on morality or sentiment.' He went on to concede that if Ada provides evidence that maintenance is practiced in her community, he would reverse his decision.

In sum, majority of the negative responses to the vignette on maintenance were based on the fact that official customary law recognises maintenance only for children and recognises a man's right to marry a second wife.

On the other hand, the seven judges willing to grant maintenance to Ada used substantial justice as the criterion for their decision. One judge summarised this rationale this way: 'I will grant it because Ike has exhausted her (Ada) … both internally and externally … He can't send her away to die.' Other than Justice Okpara, these judges did not base their decisions on the dynamic and processual character of customary law. Justice Okpara, who had asserted that women possess matrimonial property rights, gave this exposition of living customary law as his justification for granting maintenance to Ada:

> Customary law is dynamic in the sense that it follows the times … Under customary law, you can marry as many as you can maintain ... For you to marry more than one wife, it is assumed you have the wherewithal to maintain more than one wife … If you cannot maintain, then you are not supposed to marry … There is nothing under customary law that says you should not look after your divorced wife.

Although he did not use the phrase, 'foundational values,' Justice Okpara went on to link the right to maintenance after divorce to a man's duty of care to his family. In his view, this duty does not end with divorce because the marriage relationship between the couple's families remains unbroken, especially when children are involved. This relationship informs the need for judges to recognise a right to maintenance after customary law divorce.

Generally, judges were willing to make 'backdoor maintenance' orders for women through generous maintenance orders for their children. This is an obvious circumvention of official customary law's non-recognition of maintenance to divorced women. Justice Okorie explained it this way: 'We normally say [maintenance is] for the children, but you know that while trying to feed the children, the woman would benefit from their food ... So, it's assumed that the woman's welfare is also incorporated in the order the court makes.' Social welfare officials confirmed that maintenance awards are made primarily for children. As one of them put it, 'in most cases, the maintenance is for the children of the marriage [because] it is assumed that the wife is leaving the family and therefore does not require x, y and z property or particular amount of money to keep her outside the matrimonial home.' This assumption that the woman is leaving the marriage makes the issue of fault pertinent. Where a man initiated divorce for no

serious reason, judges and social welfare officials were inclined towards generous or punitive maintenance orders.

Just like social welfare officials, some judges preferred to use the term 'compensation,' rather than 'maintenance.' Compensation is often used where blame for the divorce unequivocally rests on the man. Judges' willingness to order compensation and the quantum of the order are dependent on the circumstances of each case. As a judge put it, 'if Mr A gets back to his house and sees Mr B making love to his wife in his own home, will you tell me that … the man will agree to pay the woman money for being unfaithful?'

It should be noted that patriarchy features in judges' attitude to maintenance. While one judge stated that Ada 'could get a maintenance order depending on the circumstances and her good character,' another explained that Igbo society has little sympathy for childless women who leave their matrimonial home for no good reason.

The remainder of this chapter analyses judges' perceptions of women's matrimonial property rights, their willingness to acknowledge changes in these rights, and the factors that limit or encourage this willingness.

6.3 Analysis of judicial perceptions of matrimonial property rights

As noted in 6.2, there is no unanimity in how judges perceive changes in matrimonial property rights. The majority position (about two-third of judges) may be represented with this statement by Chief Innocent Emeadi, a retired judge in the Eziama Customary Court in Ikeduru LGA:

> We can't let her [divorcing woman] go empty handed. There must be compensation. As soon as divorce is granted, the woman goes with her income and the man goes with his own income [and] with his children. But the woman is granted her … domestic utensil materials and wearing apparels and the rest of them. But she can't remove the house … If she bought any land, then the land is for her. The husband has no right to take it from her. Even if she built a mansion in the town, it is for her. Unless, perhaps, they built it jointly … [In that case,] the court must share the property for them ... If they have cars – maybe the woman was wealthy and bought some of the cars – she will be given some. She can't be left without it. … If it is property they bought together – movable property – the woman will be given part of it. She can't be left loose to go like that. So if it is fridges – they have it three or four – the woman will be given one or two to help herself.

> But if it is the children, it is the property of the man. If it is the residential house of the man – old, native residential house – it is the property of the man. They cannot share it.

The above excerpt contradicts the widely-held view that women have no matrimonial property rights after divorce. In what follows, two significant elements in judicial perceptions of matrimonial property rights are explained.

6.3.1 Beneficial interest in matrimonial property

The first element is judges' non-recognition of women's beneficial interest in some types of matrimonial property. For property such as cars and household furniture, nearly all the judges affirmed that a woman is entitled to exit marriage with property she bought with her own independent income, and ideally, in her own name. She is also entitled to leave with marriage gifts from her family. Opinion is divided over her ability to share in the division of property that she jointly acquired with her husband. While some judges believe that she cannot claim a share because her property rights are subsumed in her husband's rights, two-third of the judges believe that she may claim with documentary evidence such as receipts. This reliance on documentary evidence shows how principles of state law are imported into customary law adjudication. A different scenario obtains for the division of immovable property.

The general position is that if the couple built a house in the man's indigenous community, it is regarded as family property, which the woman cannot claim. This official customary law resonates with the narratives of several divorcees and key informants.[31] Where the couple bought land or built a house in an urban area, the woman may not claim the property or a share in the proceeds of its sale unless she provides evidence such as receipts of purchase. This position is sometimes upheld even when the man is deceased. As a judge put it, 'in a situation where they contributed money and went to the extent of putting their names there, then if the man is no longer around, the woman takes the property bona-fide. But if there's a problem, then you look to the documents.' As shown below, these general positions reflect in the judicial approach to matrimonial property rights.

[31] This resonance of official customary law with living customary law (as presently defined) demonstrates the arguments for reconceptualising living customary made in 1.2.4 and 2.1.

6.3.2 A rule-based approach to recognition

Surprisingly, many judges, including females, displayed alarmingly uncritical acceptance of gender inequality and women's non-beneficial interest in matrimonial property. Similarly, they displayed an uncritical, rule-based approach to matrimonial property rights. For example, when asked what happens after marriage dissolution, a judge responded:[32]

> The first thing is the refund of bride price, and then the property will be divided amongst them. *Normally the man gets a bigger share than the woman*. The children are not shared at all, but for custody, we look at the age of the children before granting custody … When a marriage ends, the first property she goes with are her kitchen utensils, the things her parents bought for her as marriage gifts, then her clothing.

The generally rule-based approach of judges to matrimonial property is unhelpful for curbing patriarchal perceptions of matrimonial property relations. For example, some male, non-lay judges were outraged at the prospect of recognising women's beneficial interests in property. When the researcher asked one of them why a woman cannot claim a house that she jointly built with her husband,' he retorted: 'Under what basis would she do that? I am not suddenly being chauvinistic, but the man owns the woman. The woman is a chattel in our cultural parlance. So she is even to be bought. This is why after the man's death, the brother-in laws can come for the family to take over.' Given the rule-based approach of majority of judges, what non-cultural factors affect judges' acknowledgement of matrimonial property rights?

6.4 Factors that influence judicial approach to matrimonial property rights

Puzzlingly, judges fail to invoke the Constitution's equality clause in matrimonial property disputes. This is partly because the Constitution neither defines the status of customary law nor gives women a right to matrimonial property. This situation is a significant constraint on judges' legal freedom to develop the customary law of matrimonial property or acknowledge adaptations therein. Other than making backdoor maintenance orders, the notable way through which judges promote women's matrimonial property rights is by applying statutory provisions that exclude customary law. A typical example is the Married Women's Property Law of 1994. As shown in the preceding chapter, despite this law's exclusion of women married under

[32] Emphasis is supplied.

customary law, appellate judges unhesitatingly apply it. A judge explained that because this legislation 'mentions married women generally … one can argue that it does indirectly extend to customary law marriages.' This reasoning obviously reflects the intersection of customary law with statutory law, especially in the complex context of double marriages.[33]

6.4.1 Double marriage phenomenon

Given that most women marry under customary law and statutory law,[34] it is easy for judges to readily apply an exclusionary statute such as the Married Women's Property Law. *Prima facie*, double marriage appears to be beneficial to women, since it gives them matrimonial property protection. However, it could cause hardship to women when jurisdictional problems arise. As evident in the case of Sarah and Samuel discussed in chapter four, customary courts often decline jurisdiction over divorce cases on the ground that a subsequent statutory marriage subsumes a customary law marriage. However, dissolving a marriage in the High Court is not a guarantee that the customary law marriage is over. The confusion that could arise from dissolving a double marriage is summarised by a judge:

> I insist that even when you have succeeded in carrying out dissolution under statutory law, you must have to remember that there is still an umbilical cord holding the parties because it's just like a contract. So unless that bride price is returned, there's still a subsisting marriage … because in our own custom, the marriage is not just between the man and the woman. It is between families. Therefore, you have to sever that.

By this judge's reasoning, Sarah, whose petition was thrown out in the customary court when Samuel showed up with a marriage certificate, would first obtain a divorce in the High Court and then return to the customary court to re-dissolve her marriage. Faced with this jurisdictional confusion, the high costs of legal services, and the time-consuming nature of court proceedings, many women prefer informal divorce to judicial divorce.[35] Unfortunately, informal divorce often results in their forfeiture of matrimonial property.

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[33] It remains to be seen what the outcome of an appeal on this ground would be.

[34] *See* the discussion in 5.2.4.

[35] Informal divorce usually takes the form of indefinite separation. *See* Women Information Network *Procedure for commencing cases in customary courts in Enugu State, Nigeria - A training manual for the project 'Raising awareness for the utilization of customary courts in five communities in Enugu State'* (WINET Series 3, 2013) 6.

Other than applying exclusionary statutory law to customary law, judges also import statutory law procedures into divorce proceedings. The analysis turns to the influence of statutory law procedure on the judicial approach to matrimonial property rights.

6.4.2 'The court is not Father Christmas'

Several judges repeatedly stated that the court is not 'Father Christmas,' meaning that judges will not make orders for claims not brought by the parties. This key element of pleading is a feature of orthodox courts.[36] Given its highly technical nature, pleading arguably promote a rule-based approach to judicial decision-making. It is also inconsistent with the requirement of substantial justice without undue technicalities, which is found in customary court laws. It is noteworthy that many parties in customary court proceedings, especially in rural areas, are not legally represented. Unfortunately, judges are not always sympathetic to this reality. As one of them put it, 'a litigant who fails to hire the services of a lawyer has himself or herself to blame.'

Interestingly, judges are divided over conflicts between orthodox court procedures and customary law. While some do not see the imported English law as a tool to fix the hardships of customary law,[37] others believe that customary law should be adapted to English law.[38] As one of them put it, 'English law are all the English customs, which evolved, and that's exactly what we are doing here. So they are overlapping, and where there is lacuna, especially in customary law, we use the English law to fill in the gap.' While this willingness to use English law to develop customary law could be useful for promoting women's matrimonial property rights, it could result in hardship if strict rules of pleadings are involved. Indeed, this is evident in courts' reliance on the best evidence rule, a reliance that manifests in their insistence on documentary proof of women's contributions to matrimonial property.[39]

[36] Pleading, generally, means the formal presentation of claims, defences, and counter-claims by litigants.

[37] Five of the 15 judges interviewed held this view.

[38] Six judges held this view; four were neutral or undecided.

[39] *See* Order 10 Rule 5 (1) of the customary court rules of Imo, Abia, and Ebonyi states; *Onwuchekwa* v *Onwuchekwa and Obuekwe* (1991) 5 NWLR (Pt. 194) 739; *Amadi* v *Nwosu* (1992) 5 NWLR (Pt. 241) 273.

6.5 Summary of chapter

As explained in chapter three, colonial interpretation of customs helped to create an official customary law that regards women's matrimonial property rights as subsumed in their husbands. Accordingly, a woman could not exit marriage with property other than her clothes, items of adornment, and the kitchen utensils given by her family as marriage gifts.[40] However, this situation is changing in line with women's independent income, modern nature of household furniture, and increasing disappearance of group production of family wealth. These changes have led to a rise in women's contribution to the acquisition of matrimonial property. They have also increased women's ability to use evidence such as receipts to claim matrimonial property after divorce. The question is how judges approach these changes in matrimonial property relations. In no order, the following are the findings on this question:

First, judges adopt a rule-based approach to matrimonial property rights. Rather than the Constitution, evidence and substantial justice are the key means through which they acknowledge changes in matrimonial property relations. Although they tend not to go against evidence, their approach to substantial justice, the omnibus phrase for the repugnancy test, is very subjective. While some see it as a tool for the evolution of customs 'towards progressiveness,' others interpret it in ways that sustain men's domination over women. Nonetheless, there is little room for subjective interpretations of the repugnancy test in situations where social practices strongly indicate changes in the concerned custom. Two aspects of judicial perceptions illustrate the relationship between subjective application of substantial justice and strong evidence of changing social practices, as follows:

In the vignette concerning equal division of property, judges construed the custom that 'he who owns the woman owns everything she has' in differing ways. While some patriarchal-minded judges see nothing wrong with this custom's prohibition of equal property division,[41] two judges stated that it should be overturned for contravening the repugnancy test.

In the vignette concerning women's right to dispose of land, there is little room for subjective interpretation of the repugnancy test. This is because social practices have substantially changed to allow women to acquire and dispose of landed property. Both judges and non-judicial informants acknowledged that customary law, generally, no longer forbids a

[40] *See* the preceding discussion, as well as chapter four.

[41] However, these judges were inclined to change their position in the face of evidence such as receipts showing the acquisition of property or the arbitral decisions of the extended family.

widow from disposing of family land that is exclusively allocated to her husband during his lifetime. This is especially where the sale is conducted in the name of his son, and is aimed at caring for children. Notably, some of the positive judicial perceptions of women's right to sell land were given on the condition that the widows' brothers' in-law should approve of the sale.

Secondly, majority of judges do not recognise women's beneficial interests in matrimonial property. These judges are united that a woman is entitled to exit a marriage with the properties she bought with her own income, and ideally, in her own name. She is also entitled to leave with whatever property her family gave her as marriage gifts. However, for her to claim a share in the division of property that she contributed in acquiring, she must present documentary evidence. This official customary law position demonstrates the hardship women face from an overly rule-based approach to customary law adjudication.

Thirdly, an overwhelming majority of judges affirmed that (official) customary law denies women a right to maintenance after divorce. However, about a third of judges expressed willingness to make exceptions where the man is at fault for the divorce and can afford maintenance. In such circumstances, they were inclined to make 'backdoor' maintenance orders through their orders for the maintenance of the children in the woman's custody.

Fourthly, majority of appellate customary court judges circumvent the official customary law of matrimonial property division by applying statutory property laws, notwithstanding that they exclude customary law. Given the undefined status of customary law in Nigeria's legal framework, this is a significant aspect of how statutory law could influence normative changes in matrimonial property relations in a social field.

Finally, the ability of majority of judges to recognise changes in matrimonial property relations is negatively affected by their rule-based approach to customary law. As seen in the judgments reviewed in the next chapter, this approach could adversely affect women's ability to successfully claim matrimonial property.

Chapter seven: Judicial approach to matrimonial property in case law

7.0 Introduction

Given that living customary law emerges from the adaptation of customs to socio-economic changes, its judicial recognition is arguably inhibited by a rule-based approach to adjudication. This argument informs chapter six's assessment of judges' awareness of customary law's dynamism, perceptions of matrimonial property rights, and approaches to these rights. It also informs this chapter's analysis of divorce judgments. This analysis aims to assess how judges' perceptions and approaches reflect in their recognition of living customary law in judgments.

The preceding four chapters provide a contrast against which the analysis in this chapter may be measured. Under the official (and distorted) customary law created by colonial rule, women may not claim matrimonial property after divorce. The only exceptions are their cooking utensils and items of adornment.[1] Similarly, they may neither claim right to maintenance,[2] nor right to custody of children over weaning age.[3] In this light, their ability to access these rights indicates adaptations of the (official and non-living) customary law of matrimonial property to socio-economic changes. Accordingly, judicial awards of money, property other than cooking utensils and items of adornment, and custody of children to women indicate judges' recognition of living customary law. Being members of the same semi-autonomous social field as litigants, such awards, arguably, reflect living customary law.[4]

The 30 judgments reviewed here were selected from courts in Abia, Anambra, Enugu, and Imo States. Of this number, 24 are from court registries; three are from the Abia State Customary Court of Appeal website, and three are from a customary law review.[5] Cases decided between 2008 and 2014 were chosen in order to obtain current data. The 12 decisions

[1] *Duruaku* v *Duruaku & Another* (Unreported) Suit No. CC/EZ/IK/2D/2004 Judgment of 26 March 2009 at 2.

[2] AC Osondu *Modern Nigerian family law and practice* (2012) 100; *Virginia Abakam & Another* v *Paul Anyanwu* (1975) 5 ECSLR 305.

[3] Custodial right to men is now, arguably, non-living customary law, rather than official law.

[4] For similar argument, *see* Himonga & Bosch 'The Application of African customary law under the Constitution of South Africa: problems solved or just beginning?' (2000) 117 *SALJ* 322-324. Himonga and Bosch cautioned that the extent to which judgments contain living customary law depends on court personnel, relationship of court personnel to the community, the input made by various actors in the interpretation of norms by the court during the proceedings, the degree of influence of western-based components of the legal system on the judges, and litigation procedure. However, their definition of living customary law slightly differs from this study.

[5] Http://www.abiastatecca.com [last accessed 18 June 2015]; T Anyafulude *Principles of practice and procedure of customary courts in Nigeria through the cases* (2012).

from customary courts of appeal ensure representativeness, given that they encompass the decisions of courts spread across communities in the mentioned states. Since many of the analysed judgments cited statutory marriage laws, the grounds for divorce under statutory law will be explained first to highlight their influence on judges' approach to adjudication.

7.1 Grounds for divorce under statutory law

As explained in chapter five, the statutes that regulate marriage in Nigeria are the Marriage Act and the Matrimonial Causes Act ('MCA').[6] Notably, these statutes were adapted from English laws founded on Christian doctrines of monogamy, near indissolubility of marriage, and marriage between a man and woman only.[7] More importantly, English laws of divorce thrived on the doctrine of matrimonial offence, which considered divorce as a penalty against the spouse deemed to have destroyed a union meant to be permanent.[8] Like a habit, this doctrine accompanied the marriage laws which colonial rule brought to Nigeria.[9] Although these laws were based on the irretrievable breakdown of the marriage relationship, their constituent elements were founded on the fault principle.[10] Regrettably, after colonial rule ended, Nigeria made no attempt to reconcile this principle with local realities through the adoption of a Nigerian law of divorce.[11] One of these local realities is conflicts arising from marriages under both the Marriage Act and customary law, which the MCA did not anticipate when it excluded customary law marriages from its definition of marriage.[12]

The MCA provides that a petition for dissolution of marriage may be presented by either party to the marriage on the ground that the marriage has broken down irretrievably. For the

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[6] The Marriage Act, Cap 218, Laws of the Federation of Nigeria 1990; Cap M6, LFN 2004; the Matrimonial Causes Act, Cap 220, Laws of the Federation of Nigeria 1990; M7, LFN 2004.

[7] GH Joyce *Christian marriage: a historical and doctrinal study* (1948) 446. Nigerian judges are fond of citing the English case of *Hyde* v *Hyde & Woodmansee* (1866) LR 1 P & D 130, 133.

[8] J Eekelaar *Regulating divorce* (1991) 11.

[9] CU Ilegbune 'A critique of the Nigerian law of divorce under the Matrimonial Causes Decree 1970' (1970) 14(3) *Journal of African Law* 195.

[10] For an account of the English law of divorce from 1850, see L Stone *Road to divorce* (1995) 368.

[11] A Rahmatian 'Termination of Marriage in Nigerian family laws: the need for reform and the relevance of the Tanzanian experience' (1996) 10(3) *International Journal of Law, Policy and the Family* 289.

[12] *Anyaegbunam* v *Anyaegbunam* (1973) ANLR 320; AB Kasunmu 'The Matrimonial Causes Decree, 1970: a critical analysis' (1971) 2(1) *Nigerian Journal of Contemporary Law* 88.

court to determine that a marriage has broken down irretrievably, one or more of the following facts must be established under section 15 (2):[13]

(a) wilful and persistent refusal to consummate the marriage;
(b) adultery, which causes the petitioner to find it intolerable to live with the respondent;
(c) conduct which the petitioner cannot reasonably be expected to tolerate;
(d) desertion for a continuous period of at least one year preceding the petition;
(e) uncontested divorce based on separation for a continuous period of at least two years;
(if) separation for a continuous period of a least three years preceding the petition;
(g) failure to comply with a decree or restitution of conjugal rights made under the Act;
(h) presumption of death.

From the above provisions, the main ground for dissolution of marriage is irretrievable breakdown of the marriage relationship, which is founded on certain rigidly defined criteria. This omnibus ground and its wall of 'facts' have connotations different from customary law, and which are pertinent to how judges approach customary law marriage dissolution.

7.2 Grounds for divorce under customary law

There are no formal grounds for dissolution of marriage under customary law.[14] In the past, divorce was the prerogative of men, given their freedom to marry as many wives as they could maintain.[15] It was sought and obtained for flimsy reasons such as a wife's 'loose character,' laziness, disrespect to the man or his family, and lack of care for her husband.[16] In fact, sometimes, no reason is required,[17] and it sufficed to show disinterest in the marriage by one

[13] This section is supported with supplementary provisions in sections 17-28 of the MCA.

[14] SO Olisah *The Ibo native law and custom* (1963) 19; E Nwogugu *Family law in Nigeria* (3rd ed. 2014) 233; SNC Obi *Modern family law in Southern Nigeria* (1966) 366.

[15] G Basden *Among the Ibos of Nigeria* (1921) 76-77. This does not mean that I endorse Basden's view that 'A woman cannot divorce her husband; she is his property, duly paid for.' *See* criticism of Basden in chapter three.

[16] AC Osondu *Modern Nigerian family law and practice* (2012) 98; J Byfield 'Women, marriage, divorce and the emerging colonial state in Abeokuta 1892–1904' (1996) 30(1) *Canadian Journal of African Studies* 32-51 at 35.

[17] O Achike 'Problems of creation and dissolution of customary marriages in Nigeria,' in S Roberts (ed.) *Law and the family in Africa* (1977) 150-151; AP Anyebe *Customary law: the war without arms* (1985) 91; *Chinwe Okpanum* v *Okike Okpanum* 1972 2 ECSLR 561.

of the parties, usually the man.[18] Furthermore, customary law divorce often occurs outside the courts for reasons of cheapness, absence of publicity, and relative ease.[19] In this context, key differences between statutory and customary law marriages are explained in order to show how the rule-based nature of statutory law divorce influences customary law marriage dissolution.[20]

Unlike statutory marriage, a customary law marriage is primarily a union of the spouses' families.[21] Being (potentially) polygamous, the marriage contract is between a man and each of his wives, not a contract with all of them.[22] Furthermore, the customary marriage contract is only ended by divorce or death of the wife. This is because the death of a husband does not necessarily lead to the termination of a marriage, since it is regarded as a union between the families of the spouses.[23] Thus, a widow could retain her status as a member of her husband's family by not remarrying or by marrying her husband's brother.

Secondly, the fault of the party responsible for marriage breakdown did not play a significant role in marriage dissolution in the past.[24] This is because of the polygamous nature of marriage and the ease of its dissolution. Generally, however, impotence of the husband, sterility of the wife, incest, ill-treatment and cruelty, commission of serious crimes, lunacy, desertion, and witchcraft, are recognised as grounds for the dissolution of a customary law marriage.[25] Whereas under statutory law, adultery committed by either party indicates a marriage breakdown, a husband's adultery in a customary law marriage was irrelevant.

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[18] R Stibich 'Family law in some English-speaking African states' (1969) 1(2) *Journal of Legal Pluralism and Unofficial Law* 60.

[19] O Achike 'Problems of creation and dissolution of customary marriages' (note 17) 151; E Nwogugu *Family law in Nigeria* (2014) 234-236; *Eze* v *Omeke* (1977) 1 ANSLR 136. *See* also Women Information Network *Procedure for commencing cases in customary courts in Enugu State, Nigeria - A training manual for the project 'Raising awareness for the utilization of customary courts in five communities in Enugu State'* (May 2013) 6.

[20] AP Anyebe *Customary law: the war without arms* (1985) 50.

[21] A Kolajo *Customary law in Nigeria through the cases* (2000) 235; T Anyafulude (note 5) 290.

[22] SNC Obi *Modern family law in Southern Nigeria* (1966) 155.

[23] In *Yesufu* v *Okhia* (1976) 6 ECSLR 276, the customary court and the high court acknowledged that the death of a husband does not dissolve a marriage if the woman chooses to remain in her husband's family.

[24] E Nwogugu *Family law in Nigeria* (2014) 233-236.

[25] Nwogugu *ibid*; Obi *Modern family law* (1966) 366-367; *The customary law manual* (1977) 291-292; CD Forde & GI Jones *The Ibo and Ibibio-speaking peoples of South-Eastern Nigeria* (1950) 18.

Whereas, also, the petitioner must, in addition, find it intolerable to live with the respondent's adultery, this was unnecessary under customary law.[26]

Furthermore, whereas a court cannot dissolve a statutory marriage unless the petitioner establishes one of the facts in section 15(2) of the MCA,[27] there are no specified grounds under customary law.[28] Also, the fault principle was not as prominent as it is under statutory law. It only played a role in a man's obligation to return the bridewealth. Unsurprisingly, maintenance orders against husbands were unknown.[29] These distinctions between customary and statutory law marriage dissolution are disappearing, as shown in the content analysis of judgments below. This analysis is conducted, broadly, under the influence of statutory law principles on matrimonial property rights, and award of property, custody of children and maintenance orders to women. This influence is discussed next in order to set the context for judges' recognition of adaptations in matrimonial property relations.

7.3 Influence of statutory law principles on matrimonial property rights

The picture that emerges from the case analysis is the absence of a discernible pattern in how judgments acknowledge living customary law. This lack of clarity extends to the influence of statutory law principles on the judicial approach to matrimonial property rights. Due to the largely undefined relationship between customary law and statutory law, judicial approach sometimes results in disturbing contradictions. An example is the case of John and Janet.[30] Here, John petitioned the court for the following reliefs against Janet:

1. An order dissolving their customary law marriage … contracted in 1992.
2. An order forbidding Janet from using John's name or having any contact with him.
3. An order granting John custody of their four children.
4. An order for Janet's father to return John's sixty naira bridewealth.
5. An order restraining Janet or her agents from any acts of intimidation against him.

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[26] SA Adesanya *Laws of matrimonial causes* (1973) 46.

[27] *Ibrahim* v *Ibrahim* (2007) 1 NWLR (Part 1015) page 383 at 397.

[28] Nwogugu *Family law in Nigeria* (2014) 233; Obi *Modern family law* (1966) 364, 366-367; Achike 'Problems of creation and dissolution of customary marriages' (note 17) 151.

[29] *See* the case of Grace and Greg in 7.4 below. *See* also Nwogugu *ibid* at 233.

[30] To protect informants, case identifiers were redacted and parties were assigned pseudonyms.

Both parties were initially unrepresented by counsel. Janet pleaded 'non-liable' to John's claims, but did not file any counter suit or counter claim. In the course of proceedings, her counsel filed a Motion on Notice seeking John to pay her a compensatory sum of one hundred thousand naira for the upbringing and tuition of their two children in her custody. Somehow, this Motion was never moved, although it was properly filed and relied on by Janet's counsel in his written address to the court. Although section 21 of the Imo State Customary Court Law (ICCL) requires judges to 'decide all matters according to substantial justice without undue regard to technicalities,' the president of the court declared:[31]

> It is the duty of counsel to move the court on any application he has before the court and not for the court to search through the files or minds of counsel or parties to know whether they have any application they wish to make … It is only in the course of writing this judgment that I stumbled on that Motion in the case file. Then Respondent's counsel equally mentioned that Motion in his final address in this suit. I do not know what the Respondent's counsel is trying to achieve at this stage by incorporating that Motion in his final address ... This court cannot therefore determine that Motion at this stage ... [nor] incorporate that Motion in this judgment. That Motion is not and cannot also qualify as a counter-suit or counter-claim.

The judges cited statutory law precedents as justification for their decision. They castigated the 'inelegant and un-lawyerly paper' which Janet's counsel filed as her written address.[32] Their decision clearly reveals a rule-based approach to adjudication, which is influenced by statutory law procedure. However, this influence is contradictory, given that the judges refused to apply statutory law standards of marriage dissolution, which would have favoured Janet's desire to maintain her marriage. Rather, they stated that 'there is no legislation on the grounds (sic) for the dissolution of a customary law marriage, [although] there are some recognised reasons … which can warrant or ground [its] dissolution.'[33] Citing textbooks, they gave these reasons as cruelty, adultery (particularly by a wife), a wife's loose character, lack of respect for her husband and his family members, laziness, and, desertion, for which no specified period is

[31] Page 3 of the judgment.

[32] Page 5 of the judgment.

[33] *Ibid* at 6.

stipulated.[34] In evaluating the evidence, they used textbooks and customary law manuals to justify their finding that Janet's failure to cross-examine John's witnesses amounted to an admission. They relied on the Customary Law Manual to rule that a divorced woman has no right to answer the name of her former husband.[35] Citing more statutory law precedents, they held that the marriage had broken down irretrievably and granted all of John's claims.[36]

It is significant that the judges failed to uphold Janet's Motion for monetary compensation. Their failure to grant a Motion duly filed in court indicates how judges treat oral applications for maintenance.[37] On the one hand, judges are mandated to ensure substantial justice when applying unwritten customs with indeterminate standards of marriage dissolution. On the other hand, presiding judges and lawyers that appear before them are accustomed to statutory law procedure. It is thus unsurprising to find contradictory approaches in their application of statutory law procedures to customary law, as evident in *Nonyelu* v *Umennuihe*.[38]

Here, Ethelbert married Regina in 1965 under the customary law of Okwu Akpulu, in Ideato, Imo State. He petitioned the court for the following reliefs:

> (a) Dissolution of the customary marriage between him and Regina on the ground that she deserted her matrimonial home.
>
> (b) Declaration that Regina's three sons born after she unilaterally dissolved the marriage and was living alone are not Ethelbert's sons.
>
> (c) Injunction restraining Regina and her sons from entering Ethelbert's home.
>
> (d) An order for refund of the bridewealth.

Ethelbert claimed that Regina fled to her maiden home and deserted the marriage after he caught her committing adultery. He thereafter demanded the bridewealth from her uncle, who refused to refund it. After allegedly waiting in vain from 1974 to 1992, he married another woman with whom he had four children. He claimed that under their custom, a man cannot be

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[34] *Ibid* at 7, citing E Nwogugu *Family law in Nigeria* (1974); M Onoka *Family law* (2003).

[35] SNC Obi *et al The customary law manual* (1977); cited on page 13 of the judgment.

[36] Page 18-19 of the judgment.

[37] *See Andrew* v *Abigail* discussed in 7.4.1 below.

[38] *Ethelbert Nonyelu* v *Regina Umennuihe & Umennuihe Adawu* (Unreported) Suit No. CC/ID/8D/2004 Judgment of 30 March 2012.

compelled to accept children born to another man by his wife except if he is impotent and adopts the child. He claimed that at 72 years, he was conversant with the custom of bridewealth and brought his petition because Regina's uncle refused to refund it. He claimed that financial incapacity made him wait 24 years to bring his petition, not because Regina's son, who had built a house on his compound without his permission, brought her back with the help of thugs. As a result, he had abandoned his home for them, while his second wife returned to her maiden home with her children. He claimed the Social Welfare Office resolved the matter in his favour. During cross-examination, he admitted he had married Regina at a Roman Catholic Church. His counsel cited *Mathew 5:32*, arguing that any custom which compels a man to accept paternity of a child born during marital separation simply because bridewealth was not returned is repugnant to natural justice, equity and good conscience.

In denying adultery, Regina counter-claimed, arguing that Ethelbert's denial of three of their seven children's paternity contravened section 42 of the Constitution.[39] She claimed that Ethelbert chased her away while she was pregnant because he was having an affair, and that he used to sneak into her maiden home at night to have intercourse with her. She claimed that he reneged on his undertaking to the Social Welfare Office to settle the matter at family level, and that she saved him from being arrested for ignoring repeated summons. She confirmed on cross-examination that a wife's adultery could lead to marriage dissolution, and asserted that her marriage at the church was not 'mere church blessing' but a statutory law marriage.

Both parties cited several appellate court decisions that are unrelated to customary law. In their ruling, the judges adopted the Best Evidence Rule, which is codified as a limitation on the use of hearsay evidence.[40] They approvingly cited *Omotunde* v *Omotunde*,[41] a case involving non-Igbos and decided under the MCA. They relied on this precedent to hold that once parties have lived apart for a continuous period of three years preceding the petition, a court must grant divorce. Citing section 16 of the ICCL and *Edet* v *Esien*, they held that the custom which presumes that a husband owns children born during marital separation in which the bridewealth was not returned 'is uncivilised' and 'encourages promiscuity and uncontrolled prostitution.'[42] They called for legislation to abolish this custom and ruled that the right to non-

[39] Constitution of the Federal Republic of Nigeria 1999, as amended; hereafter referred to as 'the Constitution.'

[40] Order 10 Rule 5(1) of the Customary Court Rules of Imo, Abia, and Ebonyi states that 'In every cause or matter, the Court shall admit only the best evidence available, having regard to the circumstances of the case.'

[41] *Omotunde* v *Omotunde* (2001) NWLR (Pt 718) 252 at 284.

[42] *Ethelbert Nonyelu* v *Regina Umennuihe* at 161.

discrimination did not apply. Citing *Eze* v *Omeke*,[43] they defined bridewealth, traced its distortion by colonial rule, and held that it is *sine qua non* to the validity and dissolution of marriage.[44] They stated their belief 'in the Petitioner more than the Respondent even though he looks quarrelsome and cantankerous.'[45] They labelled Regina a 'schemer and pathological liar,' and cited the biblical Book of Revelation to warn that liars 'shall end up in the lake of fire.'[46] Accordingly, they granted Ethelbert's claims, except his request for perpetual injunction restraining Regina and her sons from entering the house they built in Ethelbert's compound.

The judges' reliance on the omnibus ground of divorce in the MCA, coupled with their reliance on a decision decided under the MCA, reveals the influence of statutory law on customary law marriage dissolution. Their citation of Bible verses shows the impact of Christian notions of morality on judicial perceptions of normative behaviour. Notably, they ignored Regina's assertion of double marriage, which would have entitled her to matrimonial property claims. Since she did not pursue these claims, they felt no need to grant them. However, the most striking aspect of their judgment is their struggle to draw a line on where customary law stops and statutory law begins. Not all judges bother to do this. Some simply make a wholesale application of the MCA, as the next two cases show.

7.3.1 Judges' reliance on the Matrimonial Causes Act

In the first case,[47] Andy sought the dissolution of his marriage with Brenda, who had opposed his affair with another woman. He also sought custody of their three and half year-old child. Brenda brought a Motion of preliminary objection on the ground that the court lacked jurisdiction to dissolve a statutory law marriage. This Motion was overruled, which prompted her to appeal to the Imo State Customary Court of Appeal (ICCA). Three of the four issues on appeal are: Whether the trial court was right to admit affidavit evidence that did not comply with the relevant rules in the Evidence Act; whether it was right to apply the provisions of the MCA; and whether the customary court law permits it to dissolve a statutory law marriage.

[43] *Eze* v *Omeke* (1977) 1 ANSLR 136.

[44] Page 168-169 of the judgment.

[45] *Ibid* at 169.

[46] *Ibid*.

[47] The parties have been assigned pseudonyms: Suit No. CC/MB/26DD/2009, Appeal No. CCA/OW/A/38/2011.

Brenda argued that a subsequent marriage under the Marriage Act subsumed her earlier customary law marriage, thus making it indissoluble without first dissolving the statutory marriage. She further argued that by using the words 'monogamous marriage,' the trial court showed its confusion regarding the definition of a customary law marriage.[48]

Andy did not contest the appeal, which the ICCA upheld. It is remarkable that the trial judges applied the MCA and imported the principle of monogamy into a customary law marriage. If this is remarkable, then the decision in *Anyanwu* v *Anyanwu* is incredible.[49]

Here, Lambert brought a petition for marriage dissolution and custody of four children, claiming cruelty, desertion, and adultery against his wife, Antonia. After several adjournments, Antonia's unrepresented appearances, and her alleged breaches of the peace, the judges entered judgment against her using these words:[50]

> The marriage has broken down irretrievably. The respondent has wilfully and persistently refused to consummate the marriage. The respondent has committed adultery and the petitioner finds it intolerable to live with the respondent. Since the marriage, the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent. The parties … have lived apart for a continuous period of at least three years immediately preceding the petition.

Notably, the words above are identical with section 15 of the MCA. To make the basis of their judgment clear, the judges went on to cite section 15(2) (a-f) of the MCA. The absurdity of their reliance on the MCA is evident in their reference to non-consummation of a marriage that produced four children whom their paternity was not contested.

The preceding two cases reveal judges' explicit reliance on the MCA. In reality, this reliance is often implicit. For example, in one case,[51] Ben petitioned for dissolution of marriage and custody of their two children after seven years of marriage. Bonita counter-claimed for dissolution of the marriage, unrestrained access to their children, and a share in their matrimonial property. During the proceedings, she dropped her counter-claims, except for

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[48] *Ibid* at 3.

[49] *Lambert Anyanwu* v *Anthonia Anyanwu & Another* Suit No. CC/SM/2D/2006 Judgment of 9 May 2008.

[50] *Ibid* at 19 of the Record of Appeal.

[51] Redacted – pseudonyms used (Unreported) Suit No. CC/EZ/IK/1D/98 Judgment of 29 March 2001.

access to their children. The judges did not ask why the counter-claim for property was dropped.[52] They ruled that 'the marriage has broken down irretrievably [and] the parties have been living apart since 1995.'[53] From the framing of the judgment, the rationale for dissolving the marriage was the omnibus ground for divorce in the MCA.

Other than relying on the MCA, judges also import foreign standards of marriage dissolution into customary law, as the next case illustrates.

7.3.2 Judges' importation of foreign standards

Here,[54] Larry married Leslie in 1983. In 2000, he petitioned for dissolution at a customary court.[55] He also sought an injunction compelling Leslie to vacate their matrimonial home. He based his petition on a ten-year separation, insubordination, and Leslie's alleged denial of his paternity of their first daughter. The trial judges articulated three contentious issues: (a) Larry's diversion of money meant for building a house to other use; (b) Leslie's preparation of bad food (yam) for the family; and (c) Leslie's alleged poor care of their twin children (rubbing them with palm oil after their bath). During proceedings, Leslie brought a claim for maintenance of her children by Larry.[56]

The trial judges found that since 1994, Larry had not provided for the upkeep of his family. However, they held that the incessant fights and room separation between the parties 'do not warrant dissolution of marriage.'[57] Accordingly, they refused to dissolve the marriage and ordered Larry to take proper care of Leslie and their children.

Larry appealed to the Abia State Customary Court of Appeal (ACCA) at Umuahia. There, his counsel made a verbatim reliance on section 15(2) of the MCA. Two of the three issues formulated on appeal are relevant for the influence of statutory law principles on customary law marriage dissolution. The first is whether the trial court was right in refusing to dissolve a marriage in which the parties had been separated for a continuous period of ten years.

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[52] Bonita was unavailable for interview, but her uncle stated that the family advised her to drop the counter-claim.

[53] *Ibid* at 24-25 of the Record of Appeal.

[54] Redacted – pseudonyms used (Unreported) Suit No. CCA/UM/A/08/2007 Judgment of 29 October 2008.

[55] Redacted – pseudonyms used (Unreported) Suit No. CC/EZ/39/2000 Judgment of 29 April 2004.

[56] Being unrepresented by counsel, she made the claim under an interlocutory application as envisioned by Order VIII Rules (2) and (3) of the 1989 Customary Court Edict of Imo State (applicable in Abia State).

[57] *Ibid* at page 2 of the appeal court judgment.

The second is whether the trial court was right in refusing to dissolve the marriage after finding that all traditional measures to reconcile the parties had been exhausted.

The ACCA found that the parties' ten-year separation was not authentic, given that Leslie still resided within the extended family compound and Larry did not controvert her testimony that marital intercourse occurred during this period.[58] It found that Larry disobeyed the trial court's interlocutory order to maintain his family, 'even after several adjournments to enable him do so.'[59] It ruled that his conduct amounted to contempt of court, which was fatal to his case. In dismissing the appeal, it declared, 'He who comes to equity must come with clean hands. It is trite law that a contemnor cannot seek relief from the very system he/she holds in contempt, unless he/she purges himself or herself of the contempt.'[60]

The refusals of the trial court and the ACCA to dissolve Larry's marriage are remarkable, given that no serious grounds are needed for dissolution of customary law marriage. These decisions are also indicative of the highly technical nature of proceedings in customary courts, as typified in the next case.[61]

7.3.3 Judges' importation of statutory law procedures

Here, the parties were married in Ehime Mbano. Ken brought a petition for dissolution of his marriage with Keke at an Owerri Urban Customary Court, and for custody of their only child. Keke objected, arguing that the court lacked jurisdiction because Ken was not a native of the area. The trial judges agreed and struck out the petition. Rather than appeal, Ken re-filed the suit on the same facts, claiming it had merely been 'struck out.' The judges accepted his petition. On one hearing date when Keke was supposed to cross-examine PW2, she failed to appear in court. The judges ordered hearing notice to be served on her by Ken's counsel. Rather than serve the notice on her as the rules of court required, Ken's counsel served it on her counsel. Keke was absent on the next adjourned date. In line with statutory court procedure, the judges foreclosed her cross-examination and gave judgment in favour of Ken.

[58] *Ibid* at page 6 of the judgment.

[59] *Ibid* at page 7.

[60] *Ibid*.

[61] Redacted – pseudonyms used (Unreported) CCA/OW/A/37/2011 Judgment of 15 November 2011.

Another case that reveals the technicalities in customary courts is *Okoye* v *Okoye*.[62] Here, the Enugu State Customary Court of Appeal (ECCA) overturned a separation order made by a Nike Uno Customary Court because the petitioner requested for marriage dissolution, not separation.[63] Significantly, it held that customary law had changed to base custody on the best interest of the child principle.[64]

Such is the influence of statutory law that judges apply the reconciliation style of the MCA. For example, in a recent case,[65] the judges initiated three separate conciliation efforts using judicial officers.[66] In undefended cases, however, judges do not follow the strict requirements of statutory law procedure. In one such case,[67] the petitioner stated that he was 'no longer comfortable' with his marriage with the Respondent and requested for its dissolution. The judges held that '[a] formal act on the part of the party who is tired, showing his unwillingness to continue with the union suffices' to dissolve the marriage.[68]

Judges' rule-based approach is despite provisions in court laws requiring judges to promote substantial justice and avoid 'technicalities.'[69] This approach is the inevitable result of allowing legal practitioners to promote undue resort to rules of pleadings.[70] Unfortunately, excessive adherence to pleadings limits judges' acknowledgment of changes in matrimonial property rights. The hardship pleadings cause to women is illustrated in *Abbah* v *Abbah*.[71]

Here, Emmanuel petitioned for divorce at a Customary Court in Bende, Abia State. Aware that women lack matrimonial property protection under customary law, Mary challenged the court's jurisdiction, opting to dissolve the marriage in the High Court. She was

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[62] *Ikenga Okoye* v *Chinelo Okoye* (Unreported) Suit No. CCAE/3D/2010, Judgment of 2 February 2011; reported in T Anyafulude *Principles of practice and procedure of customary courts* (note 5) 318-322.

[63] *Ibid* per EN Nnamani JCCA at 321-322.

[64] *Ibid*.

[65] Redacted – pseudonyms used (Unreported) Suit No. CC/EZ/IK/8D/2012, Judgment of 26 March 2014.

[66] Under customary law, relatives called 'marriage guardians' are commonly used to reconcile marriages.

[67] *Ononiwu* v *Ononiwu & Another* (Unreported) Suit No. CC/EZ/IK/1D/2009 Judgment of 3 June 2010.

[68] *Ibid* at 3.

[69] Sections 21, 17, and 21 of the customary court laws of Abia, Ebonyi, and Imo states, respectively.

[70] Appellate courts have condemned undue resort to technicalities. *See*, for example, *Arum* v *Nwobodo* (2004) 9 NWLR (Pt. 878) 411; *Anyabine* v *Okolo* (1998) 13 NWLR (Pt. 582) 444; Anyafulude (note 5) 332-433.

[71] *Mary Abbah* v *Emmanuel Abbah* (Unreported) Suit No. CCA/UM/A/17/2012 Judgment of 6 December 2013.

overruled. Her application for stay of proceedings was also dismissed, prompting her to file for transfer of the petition. Eventually, an Uzoakoli Customary Court ordered her to 'vacate her matrimonial home' with a choice to collect her personal belongings and marriage gifts.

Following a dizzying series of technical proceedings at customary courts and the Court of Appeal in Owerri, Mary filed an appeal at the ACCA seeking to dissolve her marriage under the Marriage Act.[72] After remarkably striking out most of her grounds of appeal on procedural grounds, the ACCA was left with only one issue: whether Emmanuel proved a valid marriage under customary law. In reviewing the evidence adduced at the trial court, the ACCA affirmed that the Evidence Act does not apply to customary court proceedings. However, it held that it was bound to apply the best evidence available.[73] It found that Emmanuel's evidence was unchallenged because Mary was foreclosed from cross-examining him when she did not appear on one adjourned date. Since this unchallenged evidence 'extensively covered the petition,' it unanimously dismissed the appeal with a cost of 20,000 naira against Mary.[74]

Mary's unsuccessful attempt to have her marriage dissolved under the Marriage Act reveals women's frustration at their inability to assert matrimonial property rights. In what follows, judicial acknowledgement of changes in matrimonial property rights is analysed.

7.4 Judges' awards of maintenance and custody orders to women

Women rarely request for maintenance or monetary compensation in divorce proceedings. Divorcees revealed that this is often because they assume that judges will not grant it.[75] This is quite ironic, given that in the two cases they expressly claimed for maintenance, judges were inclined to grant it. The first is the case of *Grace* and *Greg*.[76]

Here, Greg's marriage with Grace produced four children aged between four and eleven years. After Greg used a van of police officers to send Grace back to her father's house in the

[72] Appeals Nos. CCA/UM/90/2006, CCA/UM/95/2006 and CA/OW/51/2009; available online at http://www.abiastatecca.com/wp-content/uploads/2013/02/LEAD-JUDGMENT-DELIVERED-BY-HON.-JUSTICE-OKEY-I.-MWAMO-ON-MARY-ORI-ABBAH-VS-EMMANUEL-OKORONKWO-ABBAH.pdf (last accessed 2/03/2015)

[73] Section 73 of the Customary Court Law of 1984; Rule 5(1) and 6(1) of the Customary Court Rules of 1989.

[74] Page 19 of the judgment.

[75] Divorcees stated that their assumptions are based on information exchanged in the Social Welfare Office.

[76] Redacted – pseudonyms used. *See* the discussion of this case in 4.6.4.

village, Grace came to the city and took away the children. Greg then petitioned for divorce and custody.[77] Aided by a feminist lawyer, Grace counter-claimed for the following reliefs:

1. Custody of the four children of the marriage;

2. One hundred-thousand-naira monthly maintenance payment for the children;

3. Payment of school fees and education of the children;

4. Fifty-thousand-naira monthly maintenance payment for her own upkeep;

5. Five million naira damages for subjecting her and her children to untold hardship since 2006 despite her near-servile devotion, and for deceit.

Greg's petition used the language of the MCA to claim that Grace had behaved in such an intolerable manner that he could no longer live with her. His testimony was supported by a police officer. Countering, Grace claimed that Greg's wealth was acquired with the help of her brothers. Testifying on her behalf, her eldest child stated the desire of her siblings to stay with their mother. Grace's brother also testified on family efforts to resolve the matter.

The judges found that Greg deceived Grace by not disclosing his previous marriages to two women. They found no evidence of cruelty, persistent quarrelsomeness, or unfaithfulness on Grace's part. They found that Greg failed to care for his family after bringing back his first wife, and acknowledged the decision of the Social Welfare Department. They ruled that the best interests of children include their physical, moral, and social wellbeing, and cited an English case to support this finding.[78] They declared as follows: 'the husband of a customary marriage is under a duty to maintain his wife. His responsibility in this respect is to provide her with necessaries including food, clothing, shelter and medical care.'[79] They held that 'the marriage has broken down irretrievably' and granted all of Grace's claims. However, they reduced her claim of damages from five to two million naira.[80]

Greg's appeal is instructive. It reads in part:[81]

[77] *Ibid* at page 1 of the Statement of Claim.

[78] *Re: B (An Infant)* (1962) 1 All ER 872.

[79] Page 40 of the judgment.

[80] *Ibid* at 40-41.

[81] Greg later withdrew the appeal after reaching an out-of-court settlement with Grace. *See* chapter four.

> The lower court ought to have realised that the claim of fifty-thousand-naira monthly allowance is in form of special damage and unknown to customary law … The lower court was in error when it ordered the payment of fifty thousand naira monthly after dissolution of the marriage as such award is incidence of received English law and unknown to customary law.

What Greg argued as 'unknown to customary law' is clearly judicial recognition of changes in matrimonial property rights. Interestingly, the judges acknowledged that a man 'is under a duty to maintain his wife,' an offshoot of the foundational value of customary law that a man must maintain his family. Indeed, judges use this value to justify backdoor maintenance orders. In *Ude* v *Ude*,[82] Josephine sought an order of court compelling Ferdinand, her estranged husband, 'to start to pay alimony for the upbringing of his children' in her custody. Ferdinand counter-claimed for orders compelling Josephine to return his children and the matrimonial property she carted away from Lagos. An Owelli Customary Court in Awgu, Enugu State, awarded Josephine the sum of 6000 naira as monthly maintenance. Ferdinand appealed, claiming, *inter alia*, that a customary court cannot make maintenance orders without first dissolving the marriage as such practice is unknown to customary law. In dismissing the appeal, the Enugu State Customary Court of Appeal stated: 'a man is under legal obligation to provide for his family … separation does not discharge a father from his responsibility to his children.'[83]

In the second case in which judges expressly ordered maintenance,[84] Stanley sought to dissolve his marriage with Samantha and recover the bridewealth. Having had three previous failed marriages, he had married Samantha under the customary law of Ihioma, Imo State. He claimed that he sent her to his village when she became insubordinate in order to give her a chance to turn a new leaf. He further claimed that Samantha unilaterally dissolved the marriage when she deserted their matrimonial home in 1998. This prompted him to marry another woman with whom he adopted a son whom he desired to inherit his property. Samantha, who was unrepresented by counsel, claimed that Stanley never demanded for his bridewealth as she was pregnant when they separated because his impotency. She claimed that because of their

[82] *Ferdinand Ude & 3 others* v *Josephine Ude* (Unreported) Suit No. CCAE/118/2010 reported in T Anyafulude *Principles of practice and procedure of customary courts* (note 5) 322-326.

[83] *Ibid* at 325-326.

[84] Redacted – *Stanley* v *Samantha*.

childlessness, Stanley's family had advised her to engage in an affair to have a baby. This advice yielded two male children. She claimed that their marriage was still subsisting because Stanley did not collect the bridewealth. Under cross-examination, she admitted that where a woman has children while separated from her husband, the man may decide to accept the children. If, however, the bridewealth was not returned, the children belong to the man. Stanley's elder sister corroborated Samantha's evidence, reiterating that her children belong to Stanley because he never opposed the family decision for her extramarital affair. She affirmed that this widespread custom is aimed at maintaining family continuity.

The judges affirmed that marriage is between the parties and their families. They found that Stanley was impotent and had failed to care for Samantha and her children. They cited the Latin maxim that 'he who comes to equity must come with clean hands.' They also cited section 42 (2) of the Constitution, which prohibits discrimination on account of one's birth.[85] They rejected the argument of Stanley's counsel that Samantha's conduct was repugnant to natural justice, equity and good conscience.[86] In dissolving the marriage, they ruled that Samantha's children belong to Stanley and awarded her custody. They ordered Stanley to pay her 'the sum of fifty thousand naira monthly for her upkeep and feeding of the children,' and for 'the said amount to be charged to his estate' in the event of his demise.[87]

Notably, Samantha did not specifically claim for maintenance. The judges made a backdoor maintenance award in furtherance of a man's duty of care to his family. They were also influenced by section 17 of the ICCL, which enjoins judges to seek the best interests of children. Considering that traditionally, customary law does not recognise maintenance after divorce, this decision is an acknowledgement of changes in matrimonial property rights.

However, the analysed cases reveal that judges' recognition of living customary law is more influenced by legislation than a conscious effort to acknowledge customary law's dynamic character. The next three cases highlight the factors that influence judicial recognition of women's matrimonial property rights.

[85] *Ibid* at 32 (O) para 20.

[86] As held in *Edet* v *Essien* 1932 11 NLR 47.

[87] *Ibid* at 32.

7.4.1 The influence of patriarchy

In one case,[88] an estranged wife seized certain matrimonial properties after her husband abandoned her in Nigeria. The couple's marriage in 2003 produced two children aged five and seven. In 2008, Jack left for South Africa, promising to send for Jill. In 2011, Jill petitioned for dissolution of marriage and custody of their children, citing Jack's abandonment. She sought a maintenance award of six hundred thousand naira for herself and the children and an order compelling Jack to accept a refund of her bridewealth. In his cross-petition though his lawyer, Jack requested the court to maintain the marriage and order Jill to return their matrimonial property in her possession to his family. The properties, estimated by Jack at over one million naira, ranged from household furniture to local and foreign currency. He also sought custody of their children. The judges dissolved the marriage, granted custody to Jack, and ordered Jill to refund not just her bridewealth but also the estimated sum of matrimonial property. This decision not only reveals a patriarchal attitude to matrimonial property, it also highlights judges' non-recognition of women's beneficial interest in matrimonial property. This non-recognition was clear in the next case.[89]

Here, Andrew brought a petition for the dissolution of his 27-year-old marriage with Abigail and custody of their teenage girl. Abigail counter-claimed for the following reliefs: (1) Non-dissolution of their marriage (2) Settlement of their misunderstanding, or alternatively, (3) Custody of their last child. Notably, she did not include maintenance for the child and herself in her counter-claim, but merely asked for it orally. Andrew claimed he had exhausted the customary requirements for divorce and had since remarried. He alleged adultery, lack of care and cruelty on Abigail's part. In denying these allegations, Abigail claimed that Andrew was jobless when they married. She claimed that she was instrumental in building their two houses with her food vending and oil trading business. She claimed that Andrew used her business money to buy the land on which the house in town was built, and that she built it from foundation to lintel level. She submitted as evidence the building and site plans of the house. She claimed that she married Andrew at 16 years as a virgin, and that if she must be divorced at 51, she must be given maintenance. She argued that should the court dissolve the marriage, it should divide their houses, lands, and cars into two so that she could 'move on with her

[88] Redacted – *Jack* v *Jill*.

[89] Redacted – pseudonyms used (Unreported) Suit No. CC/BW/18D/2009 Judgment of 11 April 2012.

life.'[90] She requested for the house in town where they lived, since Andrew had driven her and her children away from the house in the village.

Andrew's attorney stressed the fact that his petition was founded on the MCA, specifically the grounds for dissolution of marriage in section 15(2) (a-e). He urged the judges not to grant Abigail's request for matrimonial property and maintenance on the ground that she did not 'plead' these requests in her statement of claim. He cited the MCA, non-customary law precedents, and the judicial principle that the court is not 'Father Christmas.' Finally, he claimed that maintenance and matrimonial property rights are unknown to customary law.

The judges noted that plea was not taken on Abigail's counter-claims, nor did the claims qualify as proper reliefs. They noted that the marriage was already dissolved customarily. They observed that Abigail seemed 'more interested in her maintenance and custody of the last child of the marriage' than in preserving the marriage.[91] They ruled that since Andrew was already in custody of the child, had put her in a good school, and had alleged that his daughters in Abigail's care were prostitutes, he should have custody. They rejected the evidence of Abigail's sister, holding that she could have called her parents or her children to testify on her behalf. Finally, they granted all of Andrew's claims and dismissed Abigail's counter-claims without mentioning her right of access to the disputed child. Incredibly, the judges failed to mention the building and site plans of the house, which were admitted in evidence.

This failure, coupled with their approval of Andrew's (official customary law) claims, indicates judges' rule-based approach to adjudication. Arguably, this approach inhibits their recognition of living customary law because it ignores women's beneficial interest in matrimonial property. The case of Sandra and Simon illustrates this argument.[92]

Here, Simon sought for marriage dissolution, custody of their three children, and eviction of Sandra from one of their matrimonial properties. He alleged that she stole his money, attempted to kill him, and sold his car. The judges granted all his claims. They ordered Sandra to vacate the building she was occupying, ruling that she should leave only with 'her

[90] Page 64 of the judgment

[91] *Ibid* at 68.

[92] Redacted – *Simon* v *Sandra*.

wearing apparels, beddings, and cooking utensils.'[93] This ruling is a classic demonstration of official customary law's rule-based, non-recognition of women's matrimonial property rights.

7.4.2 Influence of rules of procedure

Procedural rules exert a paradoxical influence on the extent to which judges recognise changes in matrimonial property rights. On the one hand, the cases discussed above show that procedural rules induce judges to adopt rule-based approaches to adjudication.[94] This approach, arguably, restricts their recognition of living customary law. On the other hand, procedural rules compel judges to grant women's uncontested claims. By so doing, they uphold and encourage changes in matrimonial property rights. For example, Amanda petitioned for dissolution of her marriage with Mike and custody of their seven-year-old child.[95] She also claimed fifty thousand naira as monthly maintenance, and one hundred and fifty thousand naira per annum for her child's education. In granting all her claims, the judges held that 'unchallenged, uncontroverted evidence is deemed to be true and correct.'[96] In another case,[97] the Respondent gave his brother a power of attorney to defend a petition. As he did not contest custody of their eight-year-old child, the judges awarded custody to the Petitioner without even bothering to give visitation rights to the Respondent.[98]

Indeed, in all the cases in which the Respondent failed to defend the petition, judges routinely relied on procedural rules to grant the petition. In one case,[99] judges accepted the unchallenged evidence of the Petitioner, dissolved the marriage of 12 years, and granted custody of a 7-year-old girl to the Petitioner. In another case,[100] the Respondent entered

[93] Page 33 of the judgment. *See* also 4.6.5.

[94] In *Uchechukwu Nwafor* v *Iyabo Nwafor* (Unreported) Suit No. CC/EZ/IK/6D/2008 Judgment of 21 April 2010, the Respondent never entered appearance. In speedily dissolving the marriage, the judges cited *Nwangwa* v *Ubani* (1997) 10 NWLR (Pt 526) 243-245 to hold that dissolution of customary law marriages is easy.

[95] Redacted – pseudonyms used (Unreported) Suit No. CC/EZ/IK/6D/2011, Judgment of 15 March 2012.

[96] Page 5 of the judgment. The judges cited three cases decided under statutory law to support their decision.

[97] In another case [Redacted] (Unreported) Suit No. CC/EZ/IK/1D/2008, Judgment of 17 April 2008, the Respondent negligently failed to counter claim for custody and the judges awarded custody to his estranged wife.

[98] A similar decision was given in [Redacted] Suit No. CCON/16D/2011, Judgment of 20 November 2013.

[99] *Felix Ibe* v *Christiana Ibeh* (Unreported) Suit No. EZ/IK/1D/2007 Judgment of 25 February 2008.

[100] *Chief Ejaku* v *Francisca Ejaku* (Unreported) Suit No. CC/EZ/IK/2D/2010, Judgment of 27 September 2010.

appearance but abandoned the suit. The judges dissolved the marriage and granted custody to the Petitioner. In yet another case,[101] none of the parties claimed custody of their ten-year-old child. Despite the best interest of the child principle, the judges ruled that they could not make a custody order because it was not pleaded. These cases demonstrate how procedural rules can encourage and limit judicial recognition of women's matrimonial property rights.

Finally, it is noteworthy that in all the cases in which men contested custody of children over the age of six, judges were inclined to rule in their favour unless the men had re-married or lacked the financial means to care for the children. This inclination demonstrates the state of gender relations under official customary law. For example, in one case,[102] a man sued his deceased brother's wife at a Nenwe customary court in Aninri, Enugu State, claiming custody of his brother's male child. The court awarded him custody, leaving the two female children to the widow. However, the Enugu State Customary Court of Appeal reversed this decision, holding that although children belong to their father's family, their best interest is paramount.

7.5 Summary of chapter

This chapter has analysed how trial and appellate customary court judges recognise or fail to recognise adaptations in matrimonial property rights in South-East Nigeria. These courts, which comprise of mostly male legal practitioners and retired civil servants, operate with procedural rules modified from the imported English law.

The analysis was conducted with a theoretical framework which regards living customary law as the product of people's adaptation of customs to socio-economic changes. In the past, divorce was relatively uncomplicated, often initiated by men, and generally non-accommodative of maintenance rights to women. Similarly, men were deemed to own children, and thus were presumed to always have custody. This situation is changing with the influence of customary court laws and the Matrimonial Causes Act. While court laws mandate judges to consider the best interests of the child, the MCA influences the manner in which judges dissolve marriages.[103] Given women's insignificant matrimonial property rights under official and non-living customary law, judges' awards of maintenance, property other than personal

[101] *Chinyere Igbozurike & Helen Oforji v Remigius Igbozuruike* (Unreported) Suit No. CC/EZ/IK/12D/2010, Judgment of 5 September 2011.

[102] *Chinyere Egbo* v *Augustine Egbo* (Unreported) Suit No. CCAE/115/2010, Judgment of 23 February 2011.

[103] Remarkably, the MCA's influence is despite its exclusion of customary law from the ambit of its application.

belongings, and custody of children to women are indications of their recognition of living customary law. What follows are the chapter's findings.

Firstly, the introduction of legal practitioners and procedural rules into customary courts play a paradoxical role in judicial recognition of women's matrimonial property rights. On the one hand, strict adherence to procedural rules has negative effects on women's ability to claim matrimonial property. For example, their claims of property contribution and requests for maintenance or compensation are sometimes deemed to be insufficiently proved. On the other hand, procedural rules have enabled some women to win uncontested financial claims and obtain custody of their children. Procedural rules thus demonstrate the normative influence of state law on living customary law within a semi-autonomous social field.

Secondly, the influence of state law on the customary law of matrimonial property is most evident in judges' reliance on statutory law standards of marriage dissolution. This reliance reflects in their marriage reconciliation efforts, refusal to dissolve marriages, resort to precedents, and citation of the MCA. However, there is no consistency in their application of statutory law principles. For example, judges sometimes cite the omnibus ground of divorce in the MCA to rule that a petitioner's claims 'do not warrant dissolution of marriage.'[104] At other times, they quickly dissolve marriages on the ground that the dissolution of customary law marriage is easy and unregulated. In effect, judges sometimes struggle to draw a line between where customary law stops and statutory law begins.

Thirdly, no judgment used the Constitution to acknowledge women's matrimonial property rights. Indeed, the Constitution rarely features in issues of customary law affecting women. This is arguably an unfortunate consequence of Nigeria's failure to define customary law's status, subject it to the Bill of Rights, and give women matrimonial property rights. It demonstrates the unhelpfulness of Nigeria's legal framework in judicial recognition of people's adaptation of customs to socio-economic changes.

In summary, judges rarely make conscious efforts to discover how the customary law of matrimonial property is being adapted to socio-economic changes. Arguably, this is largely because of their rule-based approach to adjudication. In the few cases in which they acknowledged changes in matrimonial property rights, they seemed to have been influenced more by the uncontested nature of women's claims and the best interest of the child principle than sensitivity for the dynamic character of customary law. This is clearly a huge challenge to judicial recognition of living customary law.

[104] Case of Larry and Leslie at 7.

Chapter eight: Conclusions

The legal institutions of today are often the ghosts of the social institutions of yesterday.[1]

8.0 Introduction

African customary law has had a troubled history within the phenomenon known as legal pluralism. The Europeans who first studied Afro-Asian societies used their own legal systems as the standard for measuring norms and the means of norm enforcement. Notably, these European systems were imbued with a legal positivist ideology, which insisted that law's existence and content should be traceable to a law giving authority.[2] When scholars such as Radcliffe-Brown and Northcote found that norms of customary law had few or no similarities with their own systems, they declared that their subjects of study had no law.[3] On the other hand, the scholars who acknowledged that pre-colonial societies had law used unflattering titles to describe their study.[4] However, the biggest negative impact on customary law was made by colonial rule. Given that colonialists considered themselves culturally superior to their subjects, it is unsurprising that their policies relegated customary law to the lowest rung of legal relevance.[5] These policies subjected its recognition to imported colonial laws, which often involved the assimilation of approved customary norms into state law, or their enforcement with state standards.[6] This became known as normative recognition of customary law.[7] Although the importance of customary law was underplayed, it could not be ignored. Colonial administrators found that the most efficient way to govern their subjects was to include them in the governance structure. Thus, traditional institutions such as chiefs and native tribunals

[1] A Allot 'The future of African law' in Kuper & Kuper *African law: adaptation and development* (1965) 240.

[2] J Gardner 'Legal positivism: 5 ½ myths' (2001) 46 American Journal of Jurisprudence 199.

[3] AR Radcliffe-Brown *The Andaman Islanders* (1933); T Northcote *Anthropological report on the Ibo-speaking peoples of Nigeria: law and custom of the Ibo of the Awka neighbourhood, Southern Nigeria* (1913) 126.

[4] *See*, for instance, Malinowski *Crime and custom in savage society* (1926); Hoebel *Law of primitive man* (1954).

[5] GW Kanyeihamba *Kanyeihamba's commentaries on law, politics and governance* (2010) 13.

[6] AN Allott *Essays in African law, with special reference to the law of Ghana* (1960) chapter 7.

[7] GR Woodman 'Customary law in common law systems' (2001) 32(1) *IDS Bulletin* 29.

were, at various points, incorporated into the colonial legal system, in what became known as institutional recognition of customary law.[8]

Notably, the way customary law was acknowledged showed clearly that it was considered inferior to the colonial laws that eventually became state law. This is evident in the requirement that customary law must not be repugnant to natural justice, equity, good conscience, public order, and, in the case of Nigeria, 'written law.' The repugnancy test 'reflected the assumption that a state might choose, on the basis of its own evaluation, which customary laws should continue to exist.'[9] Unfortunately, this evaluation sometimes produced an official customary law different from the actual practices of colonial subjects.[10]

In Nigeria, as in most postcolonial states, the end of colonial rule did little to change the status of customary law.[11] The 1999 Constitution defines neither its status nor its relationship with statutory law and the Bill of Rights. Similarly, there is no legislative regulation of customary law rules of succession, marriage, and divorce. Indeed, how Nigeria recognises customary law ignores the consequences of applying it to socio-economic conditions different from its agrarian roots and colonial distortions. For example, the official customary law of matrimonial property emerged in agrarian settings in which the close-knit nature of social life, the joint production of family income, and the simple nature of property ensured that women had little or no need and opportunity for property acquisition. Today, the agrarian settings of social life are largely gone; many women earn income independently of the family, and matrimonial property has become sophisticated. Despite these changes, the official customary law set up by colonial rule denies women matrimonial property and maintenance after divorce, recognising only their kitchen utensils and items of adornment. In effect, the application of this official law in modern conditions causes hardship to women after divorce. As the last resort of justice, the courts are often called on to resolve these hardships.

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[8] *Ibid*.

[9] GR Woodman 'Legal pluralism in Africa: the implications of state recognition of customary laws illustrated from the field of land law' in Mostert & Bennett (eds.) *Pluralism and development: studies in access to property in Africa* (2012) 41.

[10] M Chanock 'Neither customary nor legal: African customary law in an era of family law reform' (1989) 3 *International Journal of Law and Family* 72-88.

[11] As Woodman (note 9) at 38 observed, 'almost all modern states [in Africa] are administratively continuations of the states set up by European powers at the onset of the colonial period.'

Against the above background, this study explored this question: 'in what ways do judges acknowledge living customary law in the context of women's matrimonial property rights in South-East Nigeria?' Three probes were used to answer this question exhaustively. The first probed the extent to which Nigeria's legal framework enables women to assert adaptations of matrimonial property rights to socio-economic changes. The second explored the mechanisms which judges use to recognise people's adaptation of customs to socio-economic changes. The third examined challenges to judicial recognition of adaptations in the official and non-living customary law of matrimonial property. The study used an empirical approach to provide evidence-based support for its literature review and theoretical framework. What follows summarises the study and offers legislative and policy reform recommendations.

8.1 Summary of chapters

The first two chapters of this dissertation explained the theories and methods that inform its argument. While chapter one contextualised the study within the phenomenon of legal pluralism and sketched the methodology of study, chapter two expanded on them. A significant aspect of legal pluralism in postcolonial societies is the 'different, incompatible answers,' which result from the observance of two or more laws.[12] These incompatible answers contributed to the categorisation of customary law into official and living customary law. While the former is used to describe the version codified in legislation and captured in books and precedents, the latter is used to refer to the norms that regulate the daily lives of people.

In expanding on this conceptualisation of living customary law, this study employed Sally Moore's semi-autonomous social field theory to innovatively explain living customary law's emergence. It has argued that individuals who observe customary law in a social field are not immune to the norms of other social fields or forces from the outside world. This implies that state law and other values occasioned by globalisation could be adopted or adapted by individuals who observe customary law. This is especially relevant for postcolonial societies such as Nigeria, where many individuals observe customary law alongside state law. Given the coercive and disruptive character of social change in postcolonial societies, normative interactions in social fields of customary law should be perceived through the lens of adaptation to socio-economic changes. In other words, adaptation to socio-economic changes makes a custom 'living,' not the mere fact that people live by that custom. Accordingly, the emergence

[12] GR Woodman 'Legal pluralism in Africa' (note 9) 52.

of living customary law is described in two steps. First, a practice arises in response to socio-economic changes and the foundational value(s) of existing custom(s). Second, a sense of obligation is attached to the emergent practice, which gives it the character of 'law.'

In the above light, the study suggests that living customary law should be defined as the law that emerges from people's adaptation of customs to socio-economic changes. It argues that customs which are not adapted to socio-economic changes should be regarded as non-living customary law. This conceptualisation, arguably, explains living customary law's flexibility, draws a clearer line between it and official customary law, and removes it from the insularity that has troubled its conceptualisation.

Chapter three used a historical overview of customary law in South-East Nigeria to argue that colonial rule created an official customary law that reinforced patriarchy, diminished women's matrimonial property rights, and injected a rule-based character into customary law adjudication. Using literature review and archival records, it established that women wielded considerable economic power in the pre-colonial social system, which they exercised within non-hierarchical normative frameworks. Colonial rule overturned this system in three ways. First, it distorted traditional governance structures, land tenure system, and customary norms. Second, it altered the non-hierarchical socio-economic system in which gender relations, especially, matrimonial property rights, operated. Third, its judicial institutions created an official customary law that denies women legally enforceable matrimonial property rights.

Chapter four demonstrated the study's argument that living customary law emerges from the adaptation of customs to socio-economic changes. It used individual and focussed group interviews to assess the role of change agents and legislation in matrimonial property relations. These interviews explored the experiences of divorcees and scrutinised the opinions of parents, priests, traditional leaders, NGOs, and social welfare officials.

The chapter found that official customary law regards women's matrimonial property rights as subsumed in their husbands' rights, a situation that makes women apathetic to claims of matrimonial property. It also found that women contribute to matrimonial property through their independent income and the phenomenon of marriage gifts. After divorce, however, they may only recover matrimonial property which they bought with their own income and marriage gifts received from their relatives. Ideally, these gifts would be in their maiden names. They can recover these properties with the aid of purchase receipts, or through change agents such as NGOs and the Social Welfare Department. This Department, which is statutorily mandated

to protect the interests of women and children, increasingly order men to divide matrimonial property and/or pay compensation to women. Generally, the nature of the orders depends on the extent of women's contribution to property acquisition, the couple's finances, and their children's needs. The chapter concluded that living customary law is emerging through marriage gifts, properties bought by women, and child custody awards to women.

Chapter five is based on the study's argument that the causal forces in living customary law's emergence are best identified by viewing state law and customary law as close players in a semi-autonomous social field. It furthers this argument by situating it within the intersection of the customary law of matrimonial property with the statutory regime of property rights in Nigeria. Accordingly, it conducted a socio-legal assessment of the extent to which judges may use Nigeria's legal framework to recognise women's matrimonial property rights.

The chapter found that the most notable problems with the legal framework are its absence of matrimonial property rights, the undefined status of customary law, its non-subjection to the Bill of Rights, and a non-enforceable right to culture. It further found that customary court laws fail to acknowledge the dynamic character of customary law. It argues that the legal framework hinders women's ability to claim matrimonial property, thereby discouraging the emergence of living customary law. It further argues that because of its supremacy, only the Constitution can give rule-focussed judges a firm legal platform for acknowledging, upholding, and promoting living customary law.

Chapter six empirically examined judges' awareness of the processual character of customary law, their perceptions of matrimonial property rights, and the extent to which they adopt rule-based approaches in adjudicating these rights. Its four findings are largely informed by three vignette indicia: women's ability to dispose of matrimonial property, division of property after marriage dissolution, and maintenance or compensation.

Firstly, the key bases of judicial recognition of adaptations in matrimonial property rights are evidence and substantial justice, which reflect in judges' use of the repugnancy test. Although, generally, judges respect evidence, their approach to the repugnancy test is very subjective. While some see it as a tool for the progressive evolution of customs, others give it patriarchal interpretations. However, subjective interpretations of the repugnancy test rarely arise in situations where social practices strongly indicate changes in customs.

Secondly, majority of judges do not recognise women's beneficial interests in matrimonial property. Judges are united that a woman is entitled to exit a marriage with

properties which she bought with her own income, and ideally, in her own name. She is also entitled to leave with marriage gifts given by her family in her maiden name. Other claims of matrimonial property must be supported with evidence such as purchase receipts.

Thirdly, although judges acknowledge that official customary law denies women a right to maintenance after divorce, they demonstrated willingness to make exceptions where the man is affluent and is responsible for the breakdown of the marriage relationship. In this and other circumstances, they were willing to make 'backdoor' maintenance orders through their maintenance orders for the child(ren) in the woman's custody.

Finally, judges circumvent women's inability to claim matrimonial property under official and non-living customary law by applying property laws that exclude customary law. This circumvention demonstrates the influence of statutory law on customary law, as well as how women's matrimonial property rights could thrive in the strong shadow of the law. The chapter concludes that judges' ability to uphold adaptations in matrimonial property rights is negatively affected by their rule-based approach to these rights.

Chapter seven used an analysis of divorce judgments to test the study's argument that judicial recognition of living customary law is inhibited by a rule-based approach to adjudication. It reached four findings on judges' approach to matrimonial property rights.

Firstly, the influence of legal practitioners and procedural rules in customary courts play a paradoxical role in judges' recognition of women's matrimonial property rights. On the one hand, strict adherence to procedural rules has negative effects on women's claims of property contribution and requests for maintenance or compensation. On the other hand, procedural rules have enabled some women to win uncontested financial claims and obtain custody of their children. These rules thus demonstrate the normative influence of state law on living customary law within a semi-autonomous social field.

Thirdly, none of the reviewed judgments used the Constitution to acknowledge women's matrimonial property rights. This demonstrates the unhelpfulness of Nigeria's legal framework in judicial recognition of people's adaptation of customs to socio-economic changes. On the other hand, judges' importation of statutory law standards of marriage dissolution into divorce proceedings has normative implications for the interaction of state law with customary law.

The chapter concludes that judges rarely make conscious efforts to discover how people are adapting the customary law of matrimonial property to socio-economic changes. It blames

this situation on judges' rule-based approach to adjudication and poor awareness of the processual character of living customary law.

8.2 Findings on the research questions

The first probe in the research question investigated the extent to which Nigeria's legal framework may be used to assert people's adaptation of customs to socio-economic changes. In the context of women's matrimonial property rights, this study finds that the legal framework, which includes courts, does not adequately do this.

On the one hand, the Constitution neither provides for an enforceable right to culture nor women's matrimonial property rights. In addition, it neither defines customary law's constitutional status nor subjects its application to the Bill of Rights. These omissions deny women a basis on which to claim matrimonial property rights and assert changes in these rights. It also denies them a basis to assert beneficial interest in property, which arises from their contributions to property acquisition through their independent income.

On the other hand, judges' recognition of women's matrimonial property rights is not informed by any discernible policy or philosophy. This finding partially answers the second probe in the research question, which investigated the mechanisms used by judges to acknowledge people's adaptation of customs to socio-economic changes. The clearest mechanism is the repugnancy test, a test that judges use very subjectively.[13] While some see it as a tool for the evolution of customs 'towards progressiveness,' others interpret it in ways that sustain men's domination over women.

The last probe in the research question investigated challenges to judicial recognition of adaptations in matrimonial property rights. These challenges are mainly huge *lacunae* in the legal framework, technical rules of pleading used in customary courts, judges' rule-based approach to adjudication, and their poor awareness of the processual character of living customary law. On the one hand, the Constitution's failure to define the status of customary law and provide for an enforceable right to culture arguably inhibits judges from adequately acknowledging living customary law. On the other hand, technical rules of procedures hinder women's ability to assert beneficial interest in property. The study therefore concludes that

[13] It is significant that the Constitution rarely features in judicial recognition of matrimonial property rights.

judges' scant interest in how people adapt the custom of matrimonial property to socio-economic changes is a huge challenge to their recognition of living customary law.

8.3 Recommendations

The findings and conclusions that emerge from this dissertation require significant legislative and judicial interventions. The first intervention is to protect and promote women's matrimonial property rights. The second is, generally, to develop customary law in Nigeria. As explained in the empirical chapters, the dynamics of unequal gender relations and the emotional trauma of divorce are so powerful that matrimonial property division must occur in the strong shadow of the law. The evidence from the field indicates that an overwhelming majority of divorce petitions initiated by women in customary courts do not incorporate financial and proprietary claims because there is no legal basis for them.

In the light of the above findings, the study suggests that the manner people adapt customs to socio-economic changes should inform judicial and legislative approaches to customary law in Nigeria. This means that judicial and legislative interventions should foster or promote adaptations in customary law relationships in order to curb the hardships caused by the application of official and non-living customary law. In addition to this general recommendation, the below specific recommendations are offered.

8.3.1 The urgent case for law reforms

As far as customary law and women's matrimonial property rights are concerned, Nigeria's Constitution lags far behind the constitutions of many African countries.[14] A 2010 study noted that 'constitutionally enshrined recognition of customary laws and rights is particularly important' because of conflict of law problems.[15] It is obvious that customary law can no longer remain in its 'pre-colonial status as a full-fledged legal system.'[16] It is also obvious that it adapts to socio-economic changes, including legislation. Accordingly, it should be the subject of law reform. In the event of divorce, these reforms would embolden women to assert, threaten, and

[14] *See*, for example, the constitutions of South Africa, Ghana, Kenya, and Uganda. *See* generally K Cuskelly 'Customs and Constitutions: State recognition of customary law around the world' (2010).

[15] Cuskelly *ibid* at 2-3.

[16] A Oba 'The future of African customary law' in J Fenrich *et al The future of customary law* (2011) 73, 79.

bring matrimonial property disputes to court. There is nothing wrong with legislative intervention in customary law, so long as it is preceded by significant enlightenment campaigns and empirical studies that identify areas of need. After all, people are already used to having their lives regulated by the state.[17] Given the reality of unequal gender relations and women's reluctance to request for maintenance because of emotional reasons, the following legislative interventions are needed.

One, the status of customary law in Nigeria's legal system needs to be urgently clarified in the Constitution. The Constitution should state that customary law is a recognised source of law, should be applied in appropriate cases, and must be applied subject to the Bill of Rights. For over a century, the repugnancy test has been used with varying degrees of success as the judicial yardstick for customary law's application in Nigeria. It is time to transfer this judicial yardstick to the Bill of Rights.

Two, the Constitution must specifically give women matrimonial property rights. In this regard, it could emulate the Ghanaian Constitution by providing that 'spouses shall have equal access to property jointly acquired during marriage,' and 'assets, which are jointly acquired during marriage, shall be distributed equitably between the spouses upon dissolution of the marriage.'[18] The Constitution should also provide affirmative action measures. For example, it could emulate the Ugandan Constitution by specifically giving women 'full and equal dignity' with men, and 'equal opportunities in political, economic and social activities.'[19] Empowering women in this way would enable judges to tackle patriarchal perceptions of women's rights. It would also give them the legal platform and impetus to recognise women's beneficial interest in matrimonial property.

Three, the Constitution needs to give individuals and groups a clear and enforceable right to culture. The present non-enforceable provision on culture is, arguably, the chief reason for the absence of strategic litigation on customary law in Nigeria. As the supreme law of the land, the Constitution could encourage the emergence of living customary law through an enforceable right to culture and subjection of customary law's application to the Bill of Rights.

Four, the Matrimonial Causes Act should be amended to turn the matrimonial property status of couples into community of property and profit and loss. This is especially because of

[17] The researcher found that most people in South-East Nigeria desire legislative reforms of customary law.

[18] Section 22 (3) (a) and (b) of the Ghanaian Constitution.

[19] Article 33 of the Ugandan Constitution.

the prevalence of double marriage in Nigeria. Presently, the MCA merely requires the court to make or compel married couples to make 'a settlement of property … as the court considers just and equitable in the circumstances of the case.'[20] Although the MCA does not apply to customary law marriages, the phenomenon of double marriage will have a knock-on effect on marriage dissolution under customary law.[21]

Finally, customary court laws should be simplified to remove the technical procedures of orthodox courts that hinder judges' recognition of women's claims to matrimonial property.

8.3.2 The case for a judicial philosophy

As a flexible normative system, customary law requires robust judicial interpretation. Robust interpretation is especially crucial for Nigeria because of its poor record of law reform. Such interpretation requires judges to highlight the hardships caused by the application of customs without due regard to their foundational values and people's adaptation of customs to socio-economic changes. As Lloyd noted, 'the future health of customary law' requires judges trained in 'analytical modes of legal reasoning.'[22] The study's finding that judges rarely attempt to discover how people adapt the custom of matrimonial property to socio-economic changes calls for a judicial philosophy.

Presently, substantial justice is the umbrella basis of judgments in customary courts. It usually manifests in judges' use of the repugnancy test. However, this test is interpreted without any discernible philosophy, standard, or principles. It is recommended that judicial decisions should be guided by people's adaptation of customs to socio-economic changes. This policy obviously requires judges to be aware of living customary law's processual character, to move away from a rule-based approach to adjudication, and to make in-depth socio-legal assessments in their judgments. This is not presently the case.

In the above light, judges should be informed by the foundational values of customary law. As explained, these values include humaneness, family continuity, preservation of the ancestral home, non-individual nature of marriage, and duty of care owed by a family head. Compared to living customary law, these values could be more easily ascertained in court.[23]

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[20] Section 72 (1) of the MCA.

[21] As chapter seven showed, judges are influenced by the MCA.

[22] F Lloyd 'Customary law in the new African states' (1962) *Law and Contemporary Problems* 616.

[23] *See* 8.4.2 on the need for further research.

Pending constitutional reform, they could replace the repugnancy test as the standard for assessing the relevance of customs. In due time, also, they could become the platform for integrating customary law with statutory law, with the aim of a common law.

8.4 Going forward: The Common Law as the model for postcolonial societies

As suggested in 8.3 above, the manner people adapt customs to socio-economic changes should guide judicial and legislative approaches to customary law. In the same way that values drive changes in normative behaviour, so also should people's adaptation of customs to socio-economic changes drive changes in state law.[24] This suggestion could not only mitigate the problems associated with legal pluralism in postcolonial societies, it could also, eventually, assist the integration of customary law with state law. The Underlying Law of Papua New Guinea is an example. This law provides a framework for the harmonisation of customary law with state law in Papua New Guinea.[25] This framework consists of 'a unique common law extracted by the courts primarily from customary laws and using [the received English] common law as a secondary source if necessary.[26] Papua New Guinea clearly recognised that the imposed colonial law could not be entirely jettisoned, nor could customary law realistically operate on its own.

In offering people's adaptation of customs to socio-economic changes as the platform for harmonising customary law with state law in postcolonial societies, reference may be made to the history of the English Common Law. The Common Law, as many know, is a product of the melding of English customs with the laws imposed by Roman and Norman conquerors at varying points. Indeed, 'the common law tradition itself is best understood, employed, and developed when it is regarded fundamentally as a system of customary law.'[27] Verhelst explains this in his case for safeguarding African customary law:[28]

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[24] *See* the argument in 'The value of values' in 2.1.4.

[25] *See* Part II of the Underlying Law Act 2000 No. 13 of 2000, which is titled 'Sources of Underlying Law.'

[26] J Corrin 'Getting down to business: developing the underlying law in Papua New Guinea' (2014) 46(2) *Journal of Legal Pluralism and Unofficial Law* 155-171 at 157.

[27] J Aleck 'Beyond recognition: contemporary jurisprudence in the Pacific islands and the common law tradition' (1997) 7 *Queensland University of Technology Law Journal* 139.

[28] TG Verhelst *Safeguarding African customary law: judicial and legislative processes for its adaptation and integration* (1968) 11; L Sheleff *The future of tradition: customary law, common law, and legal pluralism* (2000).

> The history of the English common law is a source of inspiration to all those who are concerned with the adaptation and unification of customary law in Africa. Although originally faced with a large variety of different local laws, the King's courts were able to develop a body of law common to all of England. Not only has the English common law system proved to be a successful means of unification of different rules of law, it also has shown a remarkable ability to adapt and develop this body of law throughout history. Thanks to its great flexibility it has succeeded in moulding the law of the land so as to meet increasingly changing socio-economic conditions.

Verhelst rightly argued that judges should spearhead efforts to develop or adapt customary law to modern conditions. Judicial-led adaptation is more feasible than legislation because legislation could easily rigidify customary law. As Rubin put it, 'well-trained judges approaching an indigenous system with sympathetic understanding … can formulate, over a period of years, a coherent body of consistent law corresponding to social needs and capable of further development.'[29] Judicial development offers the advantage of a bottom-up approach, which legislation clearly lacks.[30] It also makes the logic of change more comprehensible to communities because of their varying involvement in the litigation process of the concerned custom. As pointed out severally, the foundational values of customary law are crucial to an adaptation approach to customary law.[31] This raises the question of ascertaining these values.

8.4.1 The methodology of customary law

As argued in chapters one and two, the foundational values of customary law are more stable than living customary law. They are also relatively easier to ascertain. They may be discovered with 'why' questions, rather than the 'what' questions favoured by restatement efforts.[32] For example, why does a divorced woman get no matrimonial property/maintenance? Why is the ancestral home given to the first/last son? Why must a man maintain his family? Why is bridewealth paid? Why is land no longer communal? Obviously, these kinds of questions

[29] L Rubin 'The adaptation of customary family law in South Africa' in H Kuper and L Kuper *African law: adaptation and development* (1965) 213.

[30] It is also the pragmatic option when legislation is unfeasible in the near future because of cultural dynamics.

[31] *See* 2.1.4 and 8.3.2

[32] AN Allott 'Law and social anthropology' (1967) 17 *Sociologus* 13.

presuppose some basic knowledge of customary law, which only a modest literature review can provide. Armed with this knowledge, a researcher may then proceed to the field.

8.4.2 Further research needed

Scholars have noted that the imported English law directs legal development in postcolonial Africa because of its dominance in the legal system.[33] Accordingly, efforts to develop customary law usually seek to bring it in line with statutory law. As argued in 2.1.4, this need not be the case. Adaptation to state law may only guide the development of customary law until the foundational values of customary law are properly ascertained. Once ascertained, these values could inform reform of state wills laws to base them on a 'best interest of dependants' principle.'[34] They could also deputise for the Bills of Rights as the criterion for judicial interpretation of customary law, rather than the highly subjective repugnancy test.

Ultimately, the extent to which the findings of this study may be generalised is limited by the political dynamics of postcolonial societies. In any case, the nature of customary law is such that in-depth empirical research is needed for better understanding of how people adapt their customs to today's socio-economic realities.

[33] *See* for example, GJV Niekerk 'Reflections on the interplay of African customary law and state law in South Africa (2012) 3 *Studia Universitatis Babes Bolyai-Iurisprudentia*

[34] AC Diala 'Lessons from South Africa on reform of the customary law of inheritance in Nigeria' (2014) 14(2) *African Human Rights Law Journal* 635-638.

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Appendix A – Outline of interview questions for judges

A. Introduction/demographic information

Do you have any objection to this interview being audio-recorded? If you have no objection, would you like to give personal details such as your name, age, and position before I switch on the recorder? Do you mind if your personal details are used in my PhD dissertation? If you do not wish them to be included, I shall assign a pseudonym to you now, if you wish.

B. Background of interviewee

1. Please tell me about your judicial experience with emphasis on customary law cases.

- Number/volume of cases
- Nature of cases/decisions

C. Knowledge of customary law

2. Can you share your views regarding the meaning of customary law?

- Flexibility of customs
- Factors that shape flexibility
- Distortions of customs by colonialism

3. Can you, please, describe the basis for your judgments?

- Repugnancy, rules of natural justice; constitutional compatibility
- Judicial precedents
- Customary law manuals
- Opinions of women, traditional leaders, elders, and community members
- Peoples' contemporary attitude

D. Recognition of socio-economic changes in judgments

4. Can you tell me how you reflect socio-economic changes in your judgments?

- Increased literacy
- Urbanisation
- Labour migration
- Acculturation
- Unemployment

E. Extent that judgments reflect living customary law

5. Can you share your opinion of women's matrimonial property rights under customary law?

- Divorce awards
- Women's education
- Participation in economic activities
- Urbanisation influences
- Religious influences

F. Recognition of living customary law in the legal framework

6. Can you share your opinion on the right to culture in the 1999 Constitution?

- Non-justiciable nature of right to culture
- Interaction of customary law and received law
- Conflict of laws
- Non-recognition of customary law marriages in MA and MCA
- Changes in judicial treatment of customary law
- Reform of customary law – Ukeje vs Ukeje
- Anything you care to add?

Appendix B – Vignettes

G. *Vignettes for judges' response*

7. Supposing an extended family meeting over dissolution of a customary law marriage decides to give Ada half of the matrimonial property on the ground that 'she is an industrious woman.' Ike, her estranged husband, disagrees, and heads to court on the ground that women have no matrimonial property rights under customary law. How would you treat Ike's claim?

8. Supposing that Anna, a widow, 'sold' a piece of her land inherited by her husband before his death to DIG PLC, a mining company, in order to pay her four children's tuition. Ike, her brother in-law drags DIG PLC to court, claiming that a woman cannot sell land under customary law. Can you, please, tell me your opinion on Ike's claim?

9. Supposing Ada and her husband, Ike, are farmers. Ada sells their joint farm produce at the village market. After three years, Ike married Anna, and thereafter, put Anna in charge of

selling farm produce. Ada files for divorce at a customary court, claiming for maintenance. Ike, who does not oppose the divorce, argues that under customary law, he has no duty to maintain Ada. What is your opinion regarding these competing claims?

Appendix C – Outline of questions for litigants, widows, and divorcees

A. Introduction/demographic information

Do you mind if this interview is audio-recorded? Recording your interview will help me not to miss your opinions and not to misquote you … If you agree, do you mind if I use your details in my PhD thesis? If you do not wish them to be included, I shall assign a fictitious name to you, and will thereafter call you by that name ...

B. Background of interviewee

1. Can you tell me the type of marriage (s) you have/had?
2. Can you try to relive your matrimonial experience(s) and describe it/them to me?

C. The extent that judgments reflect contemporary practices

3. What were your feelings about the decision of the court/family/community?
- Sense of fulfilment, disappointment, or apathy
- Reflection of common daily practices of community
- Reflection of matrimonial property division by family/kindred

D. Women's matrimonial property rights

4. Can you, please, describe matrimonial property rights in your community?
- During divorce
- On death of spouse
- Mode of division of property
- Factors that influence division

5. Can you describe changes in matrimonial property rights in your community?
- Nature of changes
- Factors that influence changes
- Channel of resistance to changes

- Negotiating process for changes
- Government approval of changes

E. Male primogeniture rule and hardship to women

6. Can you tell me about the main issues that cause hardship to women in your community?
- Measures to remedy hardships
- Resistance to measures
- Opinion on male primogeniture rule
- Obedience to court judgment on primogeniture

F. Women's inheritance and disposal of property

7. Can you describe the nature of women's inheritance in your community?
- Inheritance by widows
- Inheritance by unmarried females
- Inheritance by younger male children
- Factors that determine inheritance

G. Women's roles in communities

9. Can you describe to me the roles played by women in your community?
- Economic roles
- Influence of family/kin groups on roles
- Influence of customs
- Influence of socio-economic changes
- Influence of religion
- Anything you care to add?

Appendix D – Ethics clearance approval

Faculty of Law

Research Ethics Committee

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23 June 2014

Mr Anthony Chima Diala (DLXANT001)
Rm 4.45, Level 4, Kramer Law Building
UCT

Email: anthonydiala@yahoo.co.uk

Dear Mr Diala

Re: Clearance Process for L14-2014: *"Recognition of Living Customary Law in Nigerian Legal System: Women's Matrimonial Property Rights under Customary Law in South-East Nigeria"*

Thank you for your very detailed and complete response to the points raised in the committee meeting.

Ethics clearance is granted, including your proposed pilot study. The revised information and consent documentation is approved.

Ethics clearance is granted with effect from 23 June 2014 for 12 months subject to renewal for another 12 months. Please note that any material changes to the proposal will need to be cleared as an amendment.

We wish you good luck with your research.

Sincerely

Signed by candidate

Dr Shane Godfrey
Chairperson of REC

cc: Prof Chuma Himonga (Private Law Dept, Faculty of Law, UCT)