Article

A Legal Pluralist Analysis of State Protection of Women's Child Custody Rights in Southern Nigeria

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Abstract

Nigeria has treaty obligations to protect and promote women's rights. This article examines the state's protection of women's child custody rights in Southern Nigeria within the context of co-existing normative orders. Informed by key informant interviews, focus group discussions and a literature review, it probes the legislative and judicial approach to women's custody rights, arguing that the statutory framework fails to support these rights, despite Nigeria's ratification of gender equality treaties. A robust statutory framework is important because the dynamics of divorce and unequal gender relations are so powerful that claims for custody rights must occur in the strong shadow of statutory law. The article finds that Nigeria's constitutional protection of women's rights is alarmingly deficient for regulating social fields involving customary laws. Accordingly, it recommends law and policy reforms to enhance women's rights.

Keywords: child custody; customary law; legal pluralism; gender equality; law reform

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Introduction

Thirty years ago, 189 countries adopted the Beijing Declaration and Platform for Action as a framework for promoting women's empowerment. The Declaration is regarded as the most important global policy on gender equality. It states that the full realisation of human rights and fundamental freedoms for all women is essential for their empowerment and development.[1] It gave serious impetus to the rise of feminism and motivated a plethora of treaties and policy measures that seek to promote women's rights across the globe, including in Nigeria.[2] So, 30 years later, how are women's rights to child custody protected in Nigeria's plural legal framework? To appreciate the answer to this question, one requires an understanding of how legal pluralism operates in Nigeria.[3]

Legal pluralism occurs when multiple normative systems coexist within the same population.[4] When this coexistence is on equal terms, strong or deep legal pluralism is said to exist.[5] However, when a normative system is subordinate to or regulated by another system, weak legal pluralism is said to exist. The latter is the situation in Nigeria.[6] Here, the English common law co-exists with Islamic (Sharia) law, local statutory laws and indigenous customs or customary law. Customary law is dominant in the southern part of the country and Islamic law prevails in the north.[7] The phrase 'English common law' denotes the laws and principles imported by the British when they colonised Nigeria.[8] These importations encompass English statutes, court procedures, principles of legal reasoning and judicial decisions.[9]

1 United Nations General Assembly, Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) UNGA Res 34/180 <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women>

2 ME Hawkesworth, *Globalization and Feminist Activism* (Rowman & Littlefield 2006) 25–27; C Beasley, *What is Feminism?* (SAGE Publications 1999) 3–11.

3 Although the title refers to Southern Nigeria, the paper focuses on the Igbo tribe.

4 S Larcom, 'Problematic Legal Pluralism: Causes and Some Potential "Cures"' (2014) 46(2) Journal of Legal Pluralism and Unofficial Law 193–217.

5 C Rautenbach, 'Deep Legal Pluralism in South Africa: Judicial Accommodation of Non-State Law' (2010) 42(60) Journal of Legal Pluralism and Unofficial Law 143–177.

6 *SA St Emmanuel,* 'Legal Pluralism: An Examination of Conflicting Standards in Statutory, Customary and Islamic Law Marriage in Nigeria' (2021) 4 (1) Ajayi Crowther University Law Journal 1–20.

7 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.

8 See s 45(1) of the Interpretation Act, Cap 89, Laws of Nigeria and Lagos 1958 and s 315 of the 1999 Constitution, which includes such statutes among existing laws. See also T Elias, *Groundwork of Nigerian Law* (1954) 25; T Elias, '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.

9 N Tobi, *Sources of Nigerian Law* (1996) 186–187.

Given that Nigeria retained its colonial legal structures after it gained political independence, we refer to the 1999 Constitution of the Federal Republic of Nigeria, English common law principles and all the local statutes that copied English laws as state laws. Used in a plural sense, state laws govern Nigeria's formal justice system, consisting of a federal Supreme Court and Court of Appeal, High Courts, and Magistrates' Courts in the states of the federation and the Federal Capital Territory. Also, they regulate Sharia and customary courts. Despite the regulation of other normative systems by state law, each system retains its own personal or family laws, complicating the issue of child custody rights.[10] Importantly, the Constitution leaves the regulation of customary law to states. This is significant because the Constitution is the supreme law, and many states do not regulate their customary laws.[11] This situation encourages discrimination against women. If the Constitution subjected the application of customary law to human dignity, gender equality and non-discrimination, it could encourage respect for women's rights.

With respect to state laws, the key statutes related to child custody are the Marriage Act, the Matrimonial Causes Act (MCA) and the Child Rights Act, which have now been adopted by all of Nigeria's federating states.[12] The first two statutes do not recognise customary law marriages because Nigeria's federal system of governance limits the federal government's legislative authority over non-Islamic and non-customary law marriages.[13] Significantly, many Nigerians marry under both the Marriage Act and customary law. This 'double marriage' or 'double-decker marriage' is very common in Southern Nigeria.[14] State law is advantageous because, unlike customary law, it does not favour one parent over another based on their gender. As shown in this paper, customary court judges in Imo, Abia, Anambra and Enugu States adhere to procedural rules, including the constitutive laws of their courts, which require them to promote substantial justice. Accordingly, they use the Child Rights Act in custody cases to consider factors such as the couple's emotional attachment to the child, their income and their living conditions.

10 EI Nwogugu, *Family Law in Nigeria* (3rd edn, Heinemann 2014).

11 Section 1 of the 1999 Constitution; EO Ekhator, 'Women and the Law in Nigeria: A Reappraisal' (2015) 16(2) Journal of International Women's Studies 285–296.

12 The Child Rights Act was passed in 2003. Some northern states initially refused to adopt it due to its restrictions on underage marriage. In August 2022, Zamfara adopted the Act, and on 28 December 2023, Bauchi became the last state to do so.

13 See Item 61 of the Exclusive Legislative List in the 1999 Constitution.

14 The reasons for marrying under the Marriage Act include cultural demands and desire for the proprietary benefits of a statutory marriage, such as certification. 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) International 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; MK Imam-Tamim, N Zin, N Ibrahim and R Che Soh, 'Impact of Globalisation on Domestic Family Law: Multi-tiered Marriage in Nigeria as a Case Study' (2016) 48(2) Journal of Legal Pluralism and Unofficial Law 256–272.

With respect to customary laws, it is worth noting that Nigeria has staggering cultural diversity.[15] It comprises over 370 distinct ethnic groups, each with its own unique language, traditions and cultural practices.[16] Cultural pluralism is rife in South-East Nigeria, which comprises nine of Nigeria's 36 states.[17] The Igbo tribe dominates these states. Cultural pluralism results in significant variations in child custody norms, often leading to contradictory testimonies in court. As a normative system, customary law disadvantages women because it is rooted in male-centred traditions, most of which emerged in agrarian societies.[18] Indeed, patriarchy—arising from the male primogeniture rule of customary law and its preference for sons—mostly favours men in custody disputes.[19] Its application is especially discriminatory in Southern Nigeria.[20] In this region, a patrilocal surname system is prevalent.[21] Accordingly, the general rule is that the father owns the children because they bear his name.[22] Non-judicial decisions on child custody under customary law are often based on notions of fault. Due to unequal power relations between women and men, the latter often win custody of children over weaning age, while women merely get access to the children. For example, only one of 15 cases of divorce in a customary court in Ekiti State, South-West Nigeria, favoured the estranged wife.[23] This is even though 12 of the cases were initiated by women, mainly for neglect or domestic violence.

Regarding Islamic law, Sharia principles govern family matters such as marriage and divorce.[24] However, the Maliki school recognises local customs and traditions that are

15 F Chidozie and MC Orji, 'Cultural Pluralism and Democratic Survival in Nigeria' (2024) 22(3) African Identities 506–519.

16 For debate on the number of ethnic groups, see O Otite, *Ethnic Pluralism and Ethnicity in Nigeria* (Shaneson Publishers 1990) 35–36.

17 The nine states are Abia, Akwa Ibom, Anambra, Bayelsa, Cross River, Ebonyi, Enugu, Imo and Rivers.

18 UE Chigbu, 'Repositioning Culture for Development: Women and Development in a Nigerian Rural Community' (2015) 18(3) Community, Work and Family 334–350; CT Iruonagbe, 'Patriarchy and Women's Agricultural Production in Rural Nigeria' (2009) 2 Journal of Cultural Studies 207–222; AC Diala, 'An African Perspective on Family Property and Customary Law' in M Briggs and A Hayward (eds), *Research Handbook on Family Property and the Law* (Edward Elgar 2024) 104–119.

19 LFC Ntoimo, 'Customary Law in Nigeria Favours Men over Children in Custody Cases' (18 February 2021) *The Conversation* <https://theconversation.com/customary-law-in-nigeria-favours-men-over-children-in-custody-cases-154420> accessed 29 January 2025.

20 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.

21 ED Babatunde, *Culture, Religion, and the Self: A Critical Study of Bini and Yoruba Value Systems in Change* (Mellen 1992).

22 *Abiakam and Others v Anyanwu* (1975) 5 ECSLR 305, 310–311, Nwogugu (n 10).

23 LFC Ntoimo and FC Ntoimo, 'Who Owns a Child? Conflict Of Culture and Human Right in the Dissolution of Customary Law Marriage in Nigeria' (2021) 62(5) Journal of Divorce and Remarriage 398–409.

24 AA Oba, 'Judicial Practice in Islamic Family Law and its Relation to "Urf" (Custom) in Northern Nigeria' (2013) 20(3) Islamic Law and Society 272–314.

not contrary to Islamic law in letter or spirit as a source of Islamic law or in any other like manner.[25] Generally, the mother has the greatest right to the custody of tender children. This right is followed by the right of her mother and her female relatives.[26] However, the custody of children generally reverts to fathers once the children are weaned, although the welfare of the child remains an important consideration.[27] As Oba explained: 'The granting of custody to the father is probably reinforced by the patrilineal emphasis of Nigerian customary law. Area courts often give custody of children to their fathers on the ground that their mothers and her relatives are not suitable to co exercise child custody. However, the courts [appellate court, i.e. the Sharia Court of Appeal] usually uphold the right of the wife whenever a complaint comes before them. Under Maliki law, custody terminates at puberty for males and at marriage for females.'[28] A widow is entitled to custody of her children, but she loses this right if she remarries, unless she marries a close relative of her deceased husband under a levirate union.[29]

Significantly for legal pluralism, litigants are free to choose state law, customary law or Islamic law in personal issues. This choice of law, the orality of customs and patriarchal notions of gender relations make it difficult to establish the applicable laws in child custody disputes.[30] To complicate matters, gender equality is not really promoted by state law. There is no independent or specific gender equality law. Although sections 15(2) and 42(1) of the 1999 Constitution prohibit gender-based discrimination, section 15(2) cannot be enforced in the courts, while section 42 is gender-insensitive. Indeed, Nigeria's Bill of Rights is couched in masculine language. Other laws, policies and guidelines follow a similar pattern.[31]

This paper, therefore, examines the extent of women's custody rights in the context of legal pluralism. It argues that women's right to child custody in South-East Nigeria is heavily influenced by customary laws because of deficiencies in Nigeria's statutory framework, especially in the 1999 Constitution. This framework is significant because

25 The Maliki school derives its religious law from the Hadiths and is commonly associated with Hadith specialists. See G Makdisi, 'The Significance of the Sunni Schools of Law in Islamic Religious History' (1979) 19(1) International Journal of Middle East Studies 1–8.

26 B Owasanoye, 'The Regulation of Child Custody and Access in Nigeria' (2005) 39(2) Family Law Quarterly 405–428.

27 JAM Audi, 'Child Custody (Hadanah) under Islamic Law in Nigeria: Looking at the Best Interests of the Child' (2006) 1(1) ABU Journal of Private and Comparative Law 226.

28 AA Oba 'Judicial Practice in Islamic Family Law and Its Relation to "Urf" (Custom) in Northern Nigeria' (2013) 20(3) Islamic Law and Society 272–318 at 303.

29 ibid.

30 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 and Civil Law Forum; AO Obilade, 'The Relevance of Customary Law to Modern Nigerian Society' in Y Osinbajo and K Kalu (eds), *Towards a Restatement of Nigerian Customary Laws* (1991).

31 For example, the third line of the third stanza of the national anthem contains a prayer to 'help us build a nation where no man is oppressed.' Here, the word 'man' is used to refer to every citizen of the country, including women and girls. See AV Oyatobi, 'Gender Discrimination and Fundamental Rights of Women in Nigeria' (1991) (25) 6 Journal of Human Rights Law and Practice 76–96.

statutory laws regulate customary norms.[32] This article argues that while Western human rights norms may not always suit the African cultural context, evolving social conditions in Africa demand gender equality. Most customs emerged in agrarian settings in which communal wealth production and group notions of rights and obligations protected women. Despite their patriarchal flavour, these settings did not prejudice women unduly because there were no binary notions of gender relations. However, these social settings have been irreversibly altered by socio-economic changes introduced by colonialism, including new philosophies, personal income and new forms of property. The continued application of customary laws in these transformed social conditions infringes women's rights. Therefore, gender equality is required to protect women's custody rights.

In probing how Nigeria's statutory framework promotes women's rights to child custody, this paper relies on a literature review, field insights and content analysis of legislation. The notable literature reviewed includes works by Adelakun,[33] Ntoimo and Ntoimo,[34] Uzodike,[35] Owasanoye,[36] Okome,[37] Owolabi,[38] and Obi's *Modern Family Law in Southern Nigeria*.[39] We contrasted the literature with data from the co-author's (post)doctoral research on matrimonial laws under customary law in Southern Nigeria between 2014 and 2020. The research was conducted in Imo, Abia, Anambra, Enugu, Delta, Rivers and Lagos States. It involved focus group meetings, structured interviews of key informants and non-participant observations of dispute resolutions by customary court judges and social welfare officials. The observations concern divorce, maintenance and custody disputes in customary courts, while the interviews and focus group meetings involve 86 widows, divorcees,[40] traditional leaders, customary court

32 Most customary court laws enjoin judges to apply the '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.' For example, see ss 16, 15 and 12 respectively of the customary court laws of Imo, Abia, Anambra and Ebonyi States.

33 OS Adelakun and A Adelakun, 'The Child Support System and Women's Access to Child Support in Nigeria' in K Cook, T Meysen and A Byrt (eds), *Single Parents and Child Support Systems: An International Comparison* (Edward Elgar Publishing 2024) 161–176.

34 Ntoimo (n 23).

35 EN Uzodike, 'Custody of Children in Nigeria—Statutory, Judicial and Customary Aspects' (1990) 39(2) International and Comparative Law Quarterly 419–433.

36 B Owasanoye, 'The Regulation of Child Custody and Access in Nigeria' (2005) 39(2) Family Law Quarterly 405–428.

37 MO Okome, 'Domestic, Regional, and International Protection of Nigerian Women Against Discrimination: Constraints and Possibilities' (2002) 6(3) African Studies Quarterly 33–64.

38 AA Owolabi, 'Some Reflections on the Custody of an Infant in Divorce Proceedings' in O Ajai and T Ipaye (eds), *Rights of Women and Children in Divorce* (Friedrich Ebert Foundation 1997).

39 See also UR Efobi and JB Ajefu, 'Reforming of Women's Litigant Rights and Child Wellbeing: Evidence from Nigeria' (2023) 59(1) The Journal of Development Studies 58–72 and EK Quansah 'Custody of Children: Customary Principles in Ghana and Nigeria' (1991)17 Commonwealth Law Bulletin 347–355 at 351.

40 Five of the divorcees are litigants in the cases discussed under the heading 'Judicial approach to custody'.

judges and social welfare officials. The content analysis of legislation scrutinised the 1999 Constitution, the Child Rights Act, the Marriage Act and the MCA. Some of these laws are cited in unreported judgments issued by customary courts and customary courts of appeal in South-East Nigeria. Following this introduction, the next part of this paper analyses the concept of human rights. This conceptualisation includes the historical recognition of human rights and the situation of Nigerian women. The next section examines women's custody rights under statutory and customary laws. Following that, the discussion turns to the weaknesses in Nigeria's statutory framework on women's custody rights. Also, it discusses official attitudes to custody rights. The final section concludes the analysis by suggesting reforms to enhance women's custody rights in legal pluralist settings.

Concept of Human Rights

Human rights are fundamental entitlements that belong to everyone simply by virtue of being human. They are meant to be enjoyed by every individual, regardless of their race, sex, nationality, ethnicity, language, religion or any other status. Early documents that asserted individual rights include the Magna Carta (1215) and the English Bill of Rights (1689). Inspired by the American Declaration of Independence and the spirit of the Enlightenment, the French people adopted the Declaration of the Rights of Man and of the Citizen in 1789. But it took World War II to give birth to the human rights movement as we know it today. Appalled by the massive loss of life and property during the war, world leaders gathered in San Francisco in October 1945 to establish the United Nations (UN). This body aims to promote peace, security and human rights through international cooperation. On 10 December 1948, the UN General Assembly in Paris adopted the Universal Declaration of Human Rights (UDHR), a milestone document.[41] World leaders proclaimed it 'a common standard of achievement for all peoples and all nations' since it marked the first time that fundamental human rights were declared to be universally protected. The UDHR inspired the adoption of over 70 human rights treaties, many of which, as seen below, are significant for women's custody rights. Eventually, the 1993 World Conference on Human Rights, held in Vienna, declared that 'All human rights are universal, indivisible, interdependent and interrelated.'[42] This integrated idea of human rights underlies the arguments in this paper.

Today, human rights are enshrined in almost all the constitutions of the world. Other than the UDHR, the global legal framework related to women's custody rights includes the International Covenant on Civil and Political Rights,[43] the International Covenant on Economic, Social and Cultural Rights[44] and the Convention on the Elimination of

41 Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III).

42 Vienna Declaration and Programme of Action (adopted 25 June 1993) UN Doc A/CONF.157/23.

43 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

44 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

All Forms of Discrimination against Women (CEDAW).[45] The relevant regional treaties are the African Charter on the Rights and Welfare of the Child[46] and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.[47] Of these treaties, the most specific is the CEDAW. The UN General Assembly ratified it in 1979 as an international charter of women's rights. It is the first treaty to recognise culture and tradition in gender roles and family interactions. How have treaties influenced women's rights in Nigeria?

Human Rights of Nigerian Women

Women's rights elicit emotional reactions with deep-rooted cultural divides, which are evident in customary norms, legal frameworks and religious norms.[48] On face value, women's rights appear to be well protected in Nigeria. Afterall, the country is a signatory to international treaties and declarations such as the CEDAW, the African Charter on Human and Peoples' Rights[49] and the Solemn Declaration on Gender Equality in Africa.[50] However, the reality is different because their human rights reflect a complex interplay of ancient complementary gender relations, colonial disruptions and post-colonial struggles for gender equality.[51]

This situation owes much to the British colonisation of Nigeria. Prior to colonial rule, Nigerian women enjoyed considerable social autonomy that promoted their human rights. They played influential political roles through dual-sex governance systems, serving as monarchs (*Eze Nwanyi*), queen mothers, priestesses and members of the *Umuada*.[52] They controlled markets, led age-grade associations and participated in decision-making through women's councils. While patriarchal structures existed, women often exercised autonomy in economic and communal matters, such as managing trade networks. For example, Okonjo argued convincingly that social structures allowed women to establish their own political, economic and religious

45 Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.

46 African Charter on the Rights and Welfare of the Child (adopted 11 July 1990, entered into force 29 November 1999) OAU Doc CAB/LEG/24.9/49.

47 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 11 July 2003, entered into force 25 November 2005) AU Doc AHG/Res.240 (XXXI).

48 J Rehman, *International Human Rights Law* (2nd edn, Pearson Education Ltd 2010) 511.

49 African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217.

50 Solemn Declaration on Gender Equality in Africa (adopted 6–8 July 2004) AU Doc Assembly/AU/Decl.12(III).

51 AC Onuora-Oguno, C Ike and C Barau, 'Deliberative and Struggle Theories of Rights Realisation: Examining the Protection of Women in Nigeria' (2018) 5(1) Journal of Law, Society and Development 1–16.

52 S Jell-Bahlsen, 'Female Power: Water Priestesses of the Oru Igbo' in O Nnaemeka (ed), *Sisterhood, Feminisms and Power* (Africa World Press 1998) 101–131; I Nzimiro, *Chieftaincy and Politics in the Four Niger States* (Nok Publishers 1970) and G Chuku, *Igbo Women and Economic Transformation in Southeastern Nigeria, 1900–1960* (Routledge 2005).

organisations, granting them considerable autonomy in matters that affected their lives.[53] Amadiume's *Male Daughters and Female Husbands* supports Okonjo's findings on women's autonomy, especially as they progressed in age and position within their lineage.[54] Achebe found that colonial rule eroded Nsukka women's avenues to power, especially their religious power.[55] Her argument that 'goddesses were the primary figures of power and authority'[56] reinforces earlier findings on the subject by historians.[57] Obiora challenged claims that pre-colonial customs subjugated women, and instead showed how colonialism altered the pre-colonial structure of complementary gender relations that was built on communal living and group production of wealth.[58] Colonialism introduced personal income, rural-urban migration, new religion and other socio-economic changes that introduced or reinforced patriarchy. Iwobi found that many customs, rituals and practices struggled to cope with the changes brought by colonial rule.[59] Amadiume argues that Christianity distorted the human rights of women. As she put it, '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.'[60] Her work finds support in Achebe's ethnographic study of Nsukka, which shows that women played active governance roles as goddesses, priestesses and diviners.[61] Ultimately, the British use of indirect rule and Warrant Chiefs changed the human rights situation of women. In Southern Nigeria, no event reveals women's reaction to the distortion of their social status more clearly than the events of November 1929. Whereas the British called it the Aba Riots, the Igbo people refer to it as *Ogu Umunwanyi*, literarily meaning 'Women's War'.[62] 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.[63]

53 K Okonjo, 'The Dual-Sex Political System in Operation: Igbo Women and Community Politics in Midwestern Nigeria' in NJ Hafkin and E Bay (eds), *Women in Africa: Studies in Social and Economic Change* (Stanford University Press 1976).

54 I Amadiume, *Male Daughters and Female Husbands: Sex and Class in an African Society* (Zed Books 1987).

55 N Achebe, *Farmers, Traders, Warriors, and Kings: Female Power and Authority in Northern Igboland, 1900–1960* (Cambridge University Press 2005) 37.

56 ibid.

57 See, for example, E Isichei, 'Ibo and Christian Beliefs: Some Aspects of a Theological Encounter' (1969) 68 (271) African Affairs 121–134.

58 LA Obiora, 'Reconsidering African Customary Law' (1993) 17(3) Legal Studies Forum 217–252.

59 AU Iwobi, 'No Cause for Merriment: The Position of Widows under Nigerian Law' (2008) 20 Canadian Journal of Women and Law 37–86.

60 Amadiume (n 54), ch 8, 134.

61 Achebe (n 55) 53–230.

62 V Uchendu, *The Igbo of Southeast Nigeria* (Cambridge University Press 1965) 5.

63 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 <http://escholarship.org/uc/item/1700p1w0> accessed 7 April 2014.

Today, Nigerian women often face physically or emotionally harmful cultural practices.[64] This is largely because their inheritance, matrimonial property and custody rights in the family sphere operate in patriarchal settings.[65] The structural power of these social settings stifles women's agency in various aspects of social life such as education, health, community involvement, workforce participation and inheritance.[66] Girls are often viewed as having a transient role, primarily judged by their ability to marry (if possible, early) and bear children. As they transition to womanhood, they struggle with a cycle of gender-based marginalisation that is often passed on to future generations.[67] In what follows, we analyse how the statutory framework protects women's custody rights. We precede this analysis with a contextual overview of women's custody rights.

Women's Custody Rights in Southern Nigeria

Child custody involves mentoring, maintenance, guardianship and the preservation and provision of a child's day-to-day needs, including feeding, clothing, shelter, education and moral training.[68] Several factors affect custody rights in Nigeria. These include divorce, death of a parent, inability of parents to care for their children or the fact that one of the parties has remarried someone who, not being the biological father or mother of a child, may not care sufficiently for the child. Child custody comes in different forms.

Physical custody is the day-to-day care and maintenance of the child. Usually, parents who have physical care of the child also have legal custody. Sole custody gives custodial authority to one parent, while joint custody requires both parents to cooperate in the guardianship, welfare and education of the child. On the other hand, split custody refers to a situation where the physical care and control of the child are divided between both parents. We turn to how women's custody rights play out in statutes and in practice.

Child Rights Act 2003

The Child Rights Act aims to protect and promote the rights of all children in Nigeria. It has 278 sections covering a range of issues, including the right to health services, the prohibition of child marriage and the duty of the state to implement the Act. Section 1

64 Iwobi (n 59); UC Kalu and O Umunna, 'Harmful Cultural Practice and Women's Rights in Nigeria' (2022) 3 Law and Social Justice Review 107–115.

65 CJ Efe and OE Eberechi, 'Property Rights of Nigerian Women at Divorce: A Case for a Redistribution Order' (2020) 23(1) Potchefstroom Electronic Law Journal 1–39; A Diala, 'The Shadow of Legal Pluralism in Matrimonial Property Division Outside the Courts in Southern Nigeria' (2018) 18(2) African Human Rights Law Journal 706–731; EO Ekhator, 'Women and the Law in Nigeria: A Reappraisal' (2015) 16(2) Journal of International Women's Studies 285–296.

66 PE Okeke, 'Reconfiguring Tradition: Women's Rights and Social Status in Contemporary Nigeria' (2000) Africa Today 49–63; E Ekhator, 'Protection and Promotion of Women's Rights in Nigeria: Constraints and Prospects' in M Addaney (ed), *Women and Minority Rights Law: African Approaches and Perspectives to Inclusive Development* (Eleven International Publishing 2019) 145.

67 UN, *Human Rights and the Girl Child* (1993).

68 Matrimonial Causes Amendment Act 2009.

states: 'In every action concerning a child, whether undertaken by an individual public or private body, institutions or—service, court of law, or administrative or legislative authority, the best interest of the child shall be the primary consideration.' Part VIII of the Act is titled 'Possession and custody of children.' Under it, section 68 gives unmarried couples equal 'parental responsibility for the child.' Section 69(1) states: 'The Court may on the application of the father or mother of a child, make such order as it may deem fit with respect to the custody of the child' and parental access to the child, having regard to 'the welfare of the child and the conduct of the parent' and 'the wishes of the mother and father of the child.'

Women do not have any special custody rights under the Act. However, section 70 is interesting because it implies that men have an inherent right to custody: 'No agreement contained in any separation deed made between the father and the mother of a child shall be invalid by reason only of its providing that the father of the child gives up the custody or control of the child to the mother.' Section 79(1) is the most important provision for women's custody rights. It states: 'The Minister may, by order, notwithstanding any customary law to the contrary, prohibit (a) the giving or acquiring of the custody, possession, control or guardianship of a child; or (b) the removal of a child from any part of a state.' When read with section 80(3), this provision appears to recognise that women may be prejudiced by customary law in child custody matters.[69]

Child custody under customary law

Child custody rights under customary law are tied to the nature of customary law marriages. Unlike statutory marriage, a customary law marriage is primarily a union of the spouses' families.[70] This union is eternal and rite-filled, which explains why some Igbo communities require some marriage rites to be performed for a wife when she dies.[71] Thus, in some communities, the death of a husband does not necessarily terminate a marriage, since his brother can continue the union between the two families by 'inheriting' the widow. In *Yesufu v Okhia*, both the customary court and the High Court acknowledged that the marriage continues if the woman chooses to remain in her deceased husband's family.[72] Usually, a widow retains custody of her children by not

69 Customary law is mentioned six times in the Act. Section 80(3) prohibits the acquisition of custody for the purpose of exploiting the child, unless 'the child concerned was given or acquired in accordance with customary law, provided that the customary law is not repugnant to natural justice, morality or humanity or inconsistent with any written law.'

70 A Kolajo, *Customary Law in Nigeria Through the Cases* (2000) 235; T Anyafulude, *Principles of Practice and Procedure of Customary Courts in Nigeria Through the Cases* (Mercele Press 2012) 290.

71 See, generally IN Onwuatuegwu, 'The Notion of Family in Igbo African Society: A Philosophical Appraisal' (2020) 4(1) European Journal of Philosophy, Culture and Religion 17–23; IA Kanu and SE Igboechesi, 'African Society, Marriage and the Global Community (2023) 3(2) Nigerian Journal of Arts and Humanities (Njah) 1–8 and J Mbiti, *African Religion and Philosophy* (Heinemann 1969) 133.

72 *Yesufu v Okhia* (1976) 6 ECSLR 276.

remarrying or by marrying her husband's brother. Problems arise only where she wishes to divorce her husband or remarry outside his family.

In most South-East Nigerian communities that are not matrilineal, children trace their identity to their father's lineage due to ancient customs of bridewealth, inheritance and widowhood.[73] For example, many traditionalists insist that a man has a legal claim to a child as long as he has paid the woman's bridewealth.[74] This is a fundamental aspect of customary law, and it informs the tendency to grant the father absolute rights over the custody of his weaned children.[75] Although mothers may have day-to-day care responsibilities, legal custody typically resides with the father. In short, the grant of child custody is based on the belief that men are the rightful 'owners' of their children, even when awarding them custody could be detrimental to the child's welfare.[76] Examples of detriment are when the father is morally deficient or living with another woman who may not treat the child well. So, how does the constitutional framework cover deficiencies in customary laws of custody?

Constitutional protection of custody rights

Nigeria has no explicit protection of women's rights. The Bill of Rights lacks clear provisions on gender equality or affirmative action. However, some provisions can be interpreted to support women's rights to child custody. We examine these provisions because the Constitution is the highest law in Nigeria.

Section 42(1) of the Constitution states that a citizen of Nigeria shall not be subjected to differential treatment based on 'ethnic group, place of origin, sex, religion or political opinion.' Section 33(1) provides that 'every person has a right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a court ...' The right to life is so fundamental that the courts have extended it to encompass other dependent rights such as health, well-being and the dignity of persons. The UN Human Rights Commission explained that the concept of 'inherent right to life' ought not to be

73 JN Ezeilo, 'Rethinking Women and Customary Inheritance in Nigeria' (2021) 47(4) Commonwealth Law Bulletin 706–718, 713; JC Diala and AC Diala, 'Child Marriage, Bride Wealth, and Legal Pluralism in Africa' (2017) 4(2) Journal of Comparative Law in Africa 77–104. The exceptions are matrilineal Cross River Igbo groups such as Ọhafịa, Ẹbịrịba, Abam, Ẹdda, Otutu, Ihechiowa, Amasiri, Ẹhugbo (Afikpo), Nkporo and Unwana, where inheritance and lineage are traced through the maternal line. However, these communities make up a tiny proportion of Igboland. Also, colonialism eroded their matrilineal culture, leading to the prevalence of a patrilineal surname system. See N Nzegwu, 'Review: Chasing Shadows: The Misplaced Search for Matriarchy' (1998) 32(3) Canadian Journal of African Studies / Revue Canadienne des Études Africaines 594–622; KC Nwoko, 'Female Husbands in Igbo Land: Southeast Nigeria' (2012) 5(1) Journal of Pan African Studies 69–82.

74 The Vanguard, 'Reactions Trail Court Judgment Condemning Igbo Custom on Fatherhood' 8 November 2023 <https://www.vanguardngr.com/2023/11/reactions-trail-court-judgment-condemning-igbo-custom-on-fatherhood/> accessed 2 February 2025.

75 Uzodike (n 35).

76 Ntoimo (n 23).

used in a restrictive manner but rather in a positive way, wherein the state takes steps to actualise the right.[77]

In the context of interrelated rights, a key concept that could be used by judges to promote the custody rights of women is section 34 of the Constitution.[78] It provides for freedom from inhuman and degrading treatment. Degrading treatment may be physical, mental or emotional. Since women usually have a strong emotional attachment to their children, degrading treatment may include the denial of custody where they are good grounds to grant it. These denials often occur under customary law.[79] Several aspects of customary law are bedevilled by degrading treatment unsuited to modern conditions.[80]

Given the weak constitutional provisions on gender equality, women challenging custody under customary law lack a firm legal basis to enforce their rights. As shown below, the statutory framework is not robust enough to deter discriminatory customary practices.

Custody Rights within Legal Pluralism

The interaction of normative orders is not defined in Nigeria's Constitution. Significantly, judges are not mandated to subject customary law to values of human dignity, equality and non-discrimination. Also, the Constitution's equality clause is insensitive to the unequal power relations between women and men. However, the Constitution recognises customary courts and stipulates the qualifications of their judges. Specifically, section 288(1) provides that, in exercising his powers to appoint Supreme Court and Court of Appeal judges, the President of the Republic of Nigeria shall ensure that the nominees include 'persons learned in Islamic personal law and persons learned in customary law.' Given the unclear status of customary law and women's rights in the Constitution, judges often resort to the Evidence Act and other legislation to resolve issues of customary law and gender equality.

The Evidence Act

The Evidence Act applies to all fact-finding proceedings in Nigerian courts, except for customary law and Sharia courts.[81] It was adopted in June 2011 to replace the 1945 Evidence Act, a colonial-era document that contained several embarrassing provisions.

77 UN Human Rights Committee General Comment 6, Article 6 (Right to Life) https://www.ohchr.org/documents/hrbodies/tb/hri-grn-1-rev-9-vol-i_en.doc> accessed 11 August 2024.

78 Constitution of the Federal Republic of Nigeria, 1999.

79 Iwobi (n 59).

80 U Ewelukwa 'Postcolonialism, Gender, Customary Injustice: Widows in African Societies' (2002) 24(2) Journal of Human Rights Quarterly 427–428.

81 Evidence Act 2011. However, s 256(1)(d) of the Evidence Act does not apply 'in any civil cause or matter in or before any Sharia Court of Appeal, Customary Court of Appeal, Area Court or Customary Court, unless an authority empowered to do so under the Constitution, by order published in the Gazette, confers such power.'

The new Act gives indirect recognition to customary law marriages (and, by implication, women's custody rights) 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.

Significantly, the method of proving customs could promote women's custody rights by asserting changes in social conditions. Section 70 of the Evidence Act states that '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 most customary court laws.[82] Considering that it makes the proof of customs a question of fact that must be supported by evidence, it potentially offers a platform for women to assert custody rights.

However, where judges defer to the opinions of traditional rulers and chiefs under section 70 of the Evidence Act, it could perpetuate patriarchal interpretations of custody rights. We turn to matrimonial laws.

Custody rights in matrimonial laws

The MCA of 1970 is the primary law governing matrimonial matters. It regulates issues such as separation, divorce, annulment, maintenance and custody of children. Section 71(1) states: 'In proceedings with respect to the custody, guardianship, welfare, advancement or education of children of a marriage, the court shall regard the interests of those children as the paramount consideration; and subject thereto, the court may make such order in respect of those matters as it thinks proper.' Section 71(2) states: 'The court may, if it is satisfied that it is desirable to do so, make an order placing the children, or such of them as it thinks fit, in the custody of a person other than a party to the marriage.'

However, the MCA excludes customary law marriages.[83] This is regrettable, since most people marry under customary law before marrying under the Marriage Act.[84] The

82 The 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) are almost identical. They 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.

83 MCA of 1970.

84 See n 14.

exclusion of customary law marriages implies that women who divorce in informal settings that do not involve the courts would have their custody disputes decided under customary or religious law or mediation. Customary law marriages should be subject to the rules governing statutory marriages because of the intersectional nature of modern fields of behaviour.

We have argued that the agrarian origins of most customs are no longer suited to modern conditions and the forces of globalisation. In recognition of this reality, countries such as Kenya and South Africa have defined the status of customary law in their constitutions and adopted uniform marriage laws that infuse principles of equality, human dignity and non-discrimination into all forms of marriage and life partnerships. For example, Kenya's Marriage Act No 4 of 2014 governs all forms of marriage in the country, including customary, Christian, Hindu, Islamic and civil marriages. It aims to harmonise all matrimonial laws, ensure equal rights for all spouses and provide a framework for marriage registration and dissolution. Section 3(2) of the Act states: 'Parties to a marriage have equal rights and obligations at the time of the marriage, during the marriage and at the dissolution of the marriage.' Section 85 is titled 'Order concerning children.' It states: 'Custody and maintenance of children shall be dealt with in accordance with the Children Act (Cap. 141) and any other written law relating to children.' Regarding legal pluralism, section 211(3) of the 1996 Constitution 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.' Section 39(2) states: 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'

Significantly, customary law regulates the lives of most Nigerians. As we argue, Nigeria's statutory framework affects how custody disputes are resolved outside the courts. Judges, government officials and even traditional leaders are increasingly recognising that the father's custodial rights should not override the best interests of the child. Below, we analyse the views of our research participants.

Official attitudes to custody in Southern Nigeria

We draw on semi-structured interviews of 10 traditional leaders, 15 judges and 36 officials from social welfare offices and non-governmental organisations. All 10 traditional leaders are men, and only three of the judges are women. All the informants affirmed that traditionally, children answer to their father's name because marriage is patrilocal. Under customary law, the father gets custody of children unless they are still of tender age. As a traditional leader in Imo State put it, tender age passes 'when the child is able to express [her] needs in words' rather than 'in tears.' Another traditional leader added: '[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 extrajudicial decisions reveal that the 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 some judges to award custody to women, contrary to indigenous customs. Similarly, social welfare officials make special efforts to uphold the best interests of the child. These officials play significant roles in family disputes, which influence children's custody.

Government departments and child custody

Social welfare services are provided by the Federal Ministry of Health and Social Welfare, the Federal Ministry of Humanitarian Affairs and Disaster Management, and the Ministry of Social Development, Youth and Sport.[85] Its officials are civil servants dedicated to the promotion of the interests of women and children.[86] In states, their equivalents are also diversely located, but are found primarily in the Ministry of Women Affairs and Social Development.[87] Here, we refer to these state organs as the 'Welfare Department.' One of the authors visited their offices in Owerri North Local Government in Imo State and Enugu South Local Government in Enugu State, observed their dispute resolutions and held interviews and focus group discussions with their directors, deputies and 11 other officials.

The role of the Welfare Department exemplifies how the state is replacing traditional dispute resolution mechanisms. 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.'[88] Presently, the Welfare Department is the first port of call when disputes are not resolved by families, churches or friends of the disputants.

When a dispute is not resolved, the department proceeds to make various orders. Its decisions 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. An official in Owerri North Local Government, Imo State, explained during a focus group meeting that 'after carrying out investigation and we

85 O Ayodele and PA Edewor, 'Sociology and Social Work in Nigeria: Characteristics, Collaborations and Differences' (2013) 16(2) African Sociological Review 40–55, 48.

86 AO Irele, 'The Evolution of Social Welfare and Social Work in Nigeria' (2019) 16(4) LWATI: A Journal of Contemporary Research 64–85.

87 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.

88 CP Ekpe, 'Social Welfare and Family Support: The Nigerian Experience' (2014) 10(3/11) Journal of Sociology and Social Welfare 484–496, 487.

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.'

Since child custody decisions occur in the context of divorce and maintenance proceedings, the approach of judges is crucial. Below, we analyse the attitude of judges to child custody claims.

Judicial approach to custody

Appellate customary court judges are required to have at least 10 years of experience in the legal profession before their appointment.[89] Trial customary courts comprise a panel of three judges.[90] 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. Due to poor staffing, trial customary courts sometimes sit with only a chairperson and an assessor. They decide custody disputes contextually because custody claims form a part of wider claims for divorce, separation and maintenance. In fact, custody is used as the primary ground for maintenance claims.

In one case,[91] A filed a petition seeking the dissolution of a long-standing marriage of nearly three decades and custody of a teenage daughter. B responded with a counter-claim opposing the dissolution, requesting reconciliation to resolve their differences, or alternatively, seeking custody of their youngest child. Notably, she did not include maintenance for herself and the child in her counterclaim but instead requested it orally. A claimed he had exhausted the customary requirements for divorce and had since remarried. He alleged adultery, lack of care and cruelty on B's part. In denying these allegations, B claimed that A 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 said A 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 was a virgin when she married A at age 16, and that if she were to be divorced at 51, she must be granted maintenance. She argued that if the court were to dissolve the marriage, their houses, lands and cars should be divided equally to allow her to 'move on with her life.'[92] She requested the house in town where they lived, explaining that A had driven her and her children away from the house in the village.

Among other claims, A argued that maintenance and matrimonial property rights were not recognised under customary law. The judges noted that no plea was taken on B's

89 Section 271(3) of the Constitution.

90 Section 3, Abia State Customary Courts Law (No 6) of 2011: 'A Chairman sitting with one member shall be deemed to constitute a quorum.'

91 Names redacted (unreported) Suit No CC/BW/18D/2009 Judgment of 11 April 2012.

92 ibid 64.

counterclaims and that her claims did not constitute proper reliefs. They also found that the marriage had already been dissolved under customary law. The court observed that B appeared 'more interested in her maintenance and custody of the last child of the marriage' than in preserving the marriage.[93]

The judges ruled that since A already had custody of the child, had enrolled her in a good school and had alleged that B's daughters were prostitutes, custody should remain with him. The court rejected the testimony of B's sister, reasoning that B could have called her parents or children to testify on her behalf. Ultimately, the court granted all of A's claims and dismissed B's counterclaims without addressing her right of access to the child. Their dismissal illustrates how patriarchal attitudes may be reinforced through procedural technicalities that undermine women's rights.

Generally, judges determine the best interests of the child based on the conduct of their parents. This includes factors such as who the child is comfortable with, who cares best for the child, how the child will fare financially, and who has provided for the child, especially before the custody dispute arose. In *Ude v Ude*,[94] Josephine sought an order from the Owelli Customary Court in Awgu, Enugu State, compelling Ferdinand, her estranged husband, 'to start to pay alimony for the upbringing of his children' in her custody. Ferdinand counterclaimed for orders compelling Josephine to return his children and the matrimonial property she carted away from Lagos. The court awarded Josephine the sum of 6 000 naira as monthly maintenance. In dismissing Ferdinand's 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.'[95]

In *Nwosu v Nwosu*,[96] the appellant filed for dissolution of the marriage and custody of the children. The respondent did not oppose the dissolution but sought custody of the children. The trial court granted custody to the respondent. The Court of Appeal reversed this decision and ruled that both parents have equal rights to custody based on the best interests of the child. In *Okwueze v Okwueze*,[97] the Supreme Court held that under most systems of customary law in Nigeria, the father is accorded absolute custody rights. However, the court clarified that such rights would not be enforced where doing so would prejudice the welfare of the child.

Thirteen of the 15 interviewed customary court judges affirmed that customary law favours men in custody after divorce. Of these, five were willing to make exceptions

93 ibid 68.

94 *Ferdinand Ude and three others v Josephine Ude* (unreported) Suit No CCAE/118/2010, reported in T Anyafulude, *Principles of Practice and Procedure of Customary Courts* (Mercele Press 2012) 322–326.

95 ibid 325–326.

96 *Nwosu v Nwosu* (2012) 8 NWLR Pt 1301 paras B–E.

97 *Febisola Okwueze v Paul Okwueze* (1989) 3 NWLR (Pt 109) 321.

where the man is at fault for the divorce and the child is still tender. Judges were inclined to rule in men's favour in all cases in which they contested the custody of children over the age of six, unless they had re-married or lacked the financial means to care for the children. This inclination demonstrates the patriarchal state of matrimonial relations in Southern Nigeria. For example, in one case,[98] a man sued his deceased brother's wife before a Nenwe customary court in Enugu State, claiming custody of his brother's male child. The court awarded him custody of the boy, leaving his two female siblings to the widow. However, the Enugu Customary Court of Appeal reversed the decision, holding that although the children traced their ancestry through their father, their best interests—to live together—were paramount.

Legal technicalities play a significant role in determining custody rights. For example, in *Ejiaku v Ejiaku*,[99] custody of the six children was awarded to the petitioner after the woman failed to appear on two adjourned dates. Judges generally give weight to uncontroverted evidence presented by a party, provided it is reasonable. Thus, in one case where a man alleged adultery by his wife and sought custody of their six-year-old daughter, the court readily granted his request.[100] In another case, the court awarded a woman custody of her two children, aged seven and five, based on her largely uncontested evidence of cruel treatment by her husband and their separation for over two years.[101] Also, some customary court judges tend to decline jurisdiction where the parties entered into a civil marriage following their customary marriage.[102]

Finally, state laws play a significant role in determining the award of custody rights. On the one hand, strict adherence to procedural rules hinders women's claims for custody and maintenance. On the other, customary court laws and the best interests of the child principle sometimes enable women to succeed in custody claims. This dynamic illustrates how statutory law influences customary law within evolving social contexts in which women assert their custody rights.

Conclusion

This study has analysed women's child custody rights within the context of Nigeria's co-existing legal orders. While respect for the human rights of women has been historically poor, child custody is an important component of marital relations.[103]

98 *Chinyere Egbo v Augustine Egbo* (unreported) Suit No CCAE/115/2010, Judgment of 23 February 2011.

99 *Chief Nnamdi Ejiaku v Francisca Ejiaku (nee Ekezie) and Ogbonna Ejiaku* (unreported) Suit No CC/EZ/IK/2D/2010.

100 *Chief Timothy Duruaku v Pauline Duruaku and Another* (unreported) Suit No CC/EZ/IK/2D/2004.

101 *Nkiruka Chibundu (nee Adibe) and Two Others v Darlington Chibundu and Daniel Chibundu Ahumibe* (unreported) Suit No CC/SM/5D/2011; CC/SM/1D/2012.

102 *Cynthia C Uzoeshi and Alexander Mbilitem vs Leonard Uzoeshi* (unreported) Suit No CC/EZ/IK/8D/2010.

103 N Uka, *Growing up in Nigerian Culture: A Pioneer Study of Physical and Behavioural Growth and Development of Nigerian Children* (University of Ibadan, Institute of Education 1966).

Indeed, one of the most grievous emotional injuries suffered by women is involuntary separation from their children.[104] Contrary to the position under many customary laws in Southern Nigeria, modern human rights ideas accord custodial rights to both women and men. Regrettably, despite Nigeria's treaty obligations, its statutory framework does not promote women's rights to child custody.

The Constitution, which is couched in masculine terms, is gender insensitive. It neither contains an affirmative action clause nor does it guarantee women's matrimonial rights. In addition, it does not subject the application of customary laws to core human rights values of equality, dignity and non-discrimination. We have argued that a porous constitutional framework limits women's ability to claim custody rights. A robust constitutional framework is needed because social stereotypes encourage unequal gender relations.[105] As Ezeilo observed, social stereotypes include male primogeniture or son preference, women's 'fear of stigma' in contesting customary laws and the undue moral standards with which women are evaluated.[106]

Towards Effective Protection of Women's Rights

The dynamics of unequal gender relations and the emotional trauma of divorce are so powerful that claims for custody rights must occur in the strong shadow of the law. Our data indicates that an overwhelming majority of divorce petitions women initiate in inferior courts do not incorporate proprietary claims because there is weak statutory basis for them. In any case, social stereotypes inhibit fair and equal treatment of women.[107] Whereas women lacked legal personhood in pre-industrial societies, the contemporary concept of human rights gives them equal status with men.[108] Our findings show that while their equality situation is improving, it requires urgent legislative backing to gain impetus.

Women now primarily lay claim to the custody of their children due to the best interests of the child principle in the Child Rights Act and the MCA. Judges are more willing to allow children to live with their mothers—at least until they attain the age of majority. However, without the support of a strong legal framework, women face formidable challenges from patriarchal customs and unequal economic power. There is, therefore,

104 J Ezeokana, *Divorce: Its Psychological Effects on the Divorced Women and Their Children: A Study on the Igbos of Southern Nigeria* (Peter Lang 1999).

105 E Durojaye and Y Owoeye, '"Equally Unequal or Unequally Equal": Adopting a Substantive Equality Approach to Gender Discrimination in Nigeria' (2017) 17(2) International Journal of Discrimination and the Law 70–85.

106 JN Ezeilo, 'Rethinking Women and Customary Inheritance in Nigeria' (2021) 47(4) Commonwealth Law Bulletin 706–718 at 714.

107 NE Mba, *Nigerian Women Mobilized: Women's Political Activity in Southern Nigeria, 1900–1965* (University of California 1966) 36–47.

108 C Oputa, 'Women and Children as Disempowered Groups' in A Kalu and Y Osinbajo (eds), *Women and Children Under Nigerian Law* (Federal Ministry of Justice 1969).

a crucial need for the adoption of gender equality clauses in the Constitution, as well as specific recognition of women's matrimonial rights. We offer three reform proposals.

Recommendations

Firstly, the status of customary law should be defined in Nigeria's Constitution. Most appellate customary court judges in Southern Nigeria circumvent customary laws of matrimonial relations by applying statutory laws, notwithstanding whether these laws exclude customary law. Given the undefined nature of legal pluralism in Nigeria's Constitution, this judicial tendency is a significant indication of how statutory law could positively influence matrimonial relations.[109] Through judges' remarkable importation of exclusionary statutory laws, some divorcing women are able to obtain custody of their children based on the best interests of the child principle.

Secondly, the Constitution should subject the interpretation and application of customary law to the Bill of Rights. Presently, substantial justice is the umbrella basis of judgments in the courts. It usually manifests in judges' use of the repugnancy test. However, this test is interpreted without any discernible philosophy or standard. Judges' reliance on the repugnancy test is a double-edged sword because it could be used very subjectively. While some judges we interviewed see it as a tool for the evolution of customs towards modernity, others interpret it in ways that sustain men's domination over women.

Finally, the MCA should be amended to recognise customary marriages and to establish equality and a community of property between spouses. This is especially because of the prevalence of double marriages. Presently, the MCA merely requires the courts to award custody and make 'a settlement of property … as the court considers just and equitable in the circumstances of the case.'[110] It is anticipated that the phenomenon of double marriage will have a knock-on effect on marriage dissolution under customary law and thereby improve women's custody rights. Countries like Kenya and South Africa have already adopted uniform marriage laws that provide legislative protection to customary law marriages. Nigeria should emulate them to improve the protection of women's rights.

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109 For a similar view, see A Diala, 'The Shadow of Legal Pluralism in Matrimonial Property Division Outside the Courts in Southern Nigeria' (2018) 18(2) African Human Rights Law Journal 706–731.

110 MCA 1970.

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