

## Reform of the customary law of inheritance in Nigeria: Lessons from South Africa

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### Summary

*Apart from preserving bloodlines, the male primogeniture rule of inheritance is aimed at providing material support to deceased persons' dependants. This 'inheritance-with-responsibilities' principle is being eroded by socio-economic changes, such as urbanisation, labour migration and the diffusion of extended families, thereby causing hardship to widows, girls and younger male children. So, to what extent has Nigeria reformed customary law inheritance rules in order to reconcile them with changing social conditions? Whereas South Africa has adopted judicial and legislative measures to reform customary laws of inheritance, the same cannot be said for Nigeria, despite recent Supreme Court decisions. Using the best interests of dependants' principle as a lens, the article offers to Nigeria lessons in customary law reform from South Africa. It argues that reform efforts and public debate in Nigeria do not adequately engage the changing social conditions that influence the customary law of inheritance, and suggests two options to remedy this situation.*

**Key words:** Customary law reform; succession; best interests of dependants

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## 1 Introduction

The decision in *Bhe v The Magistrate, Khayelitsha*<sup>1</sup> marked a positive turning point in customary law reforms in South Africa. It not only hastened these reforms, but it also shaped public debate and constitutional challenges of customary law's compatibility with the South African Bill of Rights.<sup>2</sup> The *Bhe* narrative is in stark contrast to two judgments delivered by the Supreme Court of Nigeria on 11 and 14 April 2014.<sup>3</sup> Although these judgments abolished the male primogeniture rule in South-East Nigeria for its incompatibility with the Constitution's equality clause,<sup>4</sup> they failed to address the social context of inheritance rules.<sup>5</sup> Furthermore, they appear to offer protection only to women in South-East Nigeria, leaving the inheritance rights of younger male children unaddressed.<sup>6</sup> Given that the social settings in which inheritance rules originated have vastly changed, the operation of these rules is expected to adapt to these changes in order to curb hardship to women, girls and younger male children. In a bid to curb this hardship, some Southern African states have reformed customary law inheritance rules in order to reconcile them with changing social conditions.<sup>7</sup> These efforts, which are anchored on human dignity and equality rights, centre on the overall welfare of family members, especially those maintained by the deceased person. So, the question is: To what extent has Nigeria reformed customary law inheritance rules in order to reconcile them with changing social conditions? Using the best interests of dependants' principle as a lens, the article examines customary law reform in Nigeria. The best interests principle posits that individuals maintained by the deceased person shortly before death should be the main beneficiaries of an intestate estate. For purposes of scope, the article focuses on Southern Nigeria, where the male primogeniture rule is prevalent.<sup>8</sup> Northern Nigeria observes Islamic law, while customary law inheritance rules in Western Nigeria, generally, contain the best interests of dependants' principle. This

1 *Bhe & Others v Magistrate, Khayelitsha, & Others (Commission for Gender Equality as amicus curiae); Shibi v Sithole & Others; South African Human Rights Commission & Another v President of the Republic of South Africa & Another* 2005 (1) SA 580 (CC) (*Bhe*).

2 The *Bhe* case and law reform in South Africa are discussed in part 3 of the article.

3 *Mrs Lois Chituru Ukeje & Another v Mrs Gladys Ada Ukeje* (unreported) 2014 LPELR-22724(SC); *Onyibor Anekwe & Another v Mrs Maria Nweke* (unreported) 2014 LPELR-22697(SC).

4 Secs 42(1) & (2) of the 1999 Constitution of the Federal Republic of Nigeria, as amended.

5 *Anekwe v Nweke* (n 3 above) *per* Ogunbiyi, 36-37, paras A-B.

6 See discussion in part 4 for reasons why the judgment may be construed as restrictive.

7 CN Himonga 'The advancement of African women's rights in the first decade of democracy in South Africa: The reform of the customary law of marriage and succession' (2005) 82 *Acta Juridica* 83.

8 This area encompasses the south-east and south-south geopolitical zones.

principle is articulated with the aid of a micro-comparison of customary law reform in Nigeria and South Africa.

Three reasons inform the choice of South Africa as a comparator. First, Nigeria and South Africa have contrasting approaches to their legal pluralism. Two, South Africa offers valuable lessons to Nigeria through the tremendous legislative and judicial progress it has made in customary law reform. Unlike its skeletal recognition in Nigeria's 1999 Constitution, customary law is clearly recognised in the South African Constitution.<sup>9</sup> Finally, both countries emerged from crises – military rule and apartheid respectively – in the 1990s and adopted constitutions at roughly the same period.

Part two of the article argues that Nigeria's legal framework is ill-suited to prevent or reduce hardship to deceased persons' dependants. It further argues that the interaction of customary law and statutory law has not impacted positively on the inheritance rights of females and younger male children in Nigeria. It uses the best interests of dependants principle as a lens to evaluate the protection of the human rights of females and younger male children. Part three gives a brief account of customary law reform in South Africa. Part four examines law reform in Nigeria against the background of similar reform in South Africa. It argues that, despite recent judgments, there is insufficient judicial and legislative consideration of the changing social conditions that surround inheritance laws. Part five concludes the article and proffers suggestions in light of its findings on customary law reform in Nigeria.

## 2 Best interests of dependants principle in customary laws of inheritance in South-East Nigeria

### 2.1 Introduction

The term 'customary law' is used here as a matter of convenience to describe, broadly, indigenous law – that is, the widely-accepted norms that regulate the conduct of a population.<sup>10</sup> Unlike Western individualistic notions of property ownership, pre-colonial inheritance rules in Nigeria were concerned with the overall welfare of the family.<sup>11</sup> Since these rules centred on family structures, heirs inherited not only the properties of deceased persons, but also responsibilities

9 See secs 211(3) & 39(2) of the Constitution of the Republic of South Africa, 1996.

10 TO Elias *The nature of African customary law* (1956) ch 9. This clarification flows from criticisms of customary law's usage as an analytical description of pre-colonial law. See FG Snyder 'Colonialism and legal form: The creation of customary law in Senegal' (1981) 19 *Journal of Legal Pluralism* 49. 'Population' is preferred to 'community' due to increasing globalisation. 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) 39.

11 SNC Obi *Modern family law in Southern Nigeria* (1966) 337.

to maintain the deceased's dependants and to preserve the continuity of the family.<sup>12</sup> As Chief Gboteyi, the Elesi of Odogbolu, told the West African Lands Committee in 1912: 'I conceive that land belongs to a vast family of which many are dead, few are living, and countless members are unborn.'<sup>13</sup> This is the context of the male primogeniture rule, which requires that the eldest male child of a deceased person should inherit his estate. It is also the context in which the article advocates the best interests of dependants principle in customary laws of inheritance.<sup>14</sup>

## 2.2 Situating the best interests of dependants principle

Succession, whether testate or intestate, consists of rules that govern the devolution and administration of a deceased person's estate.<sup>15</sup> The common law<sup>16</sup> regards it as the devolution of title to property under the law of descent and distribution. However, succession under customary law is wider than this definition because it encompasses the status and obligations the deceased person held and was subject to in society.<sup>17</sup> The distinction between succession under customary law and succession under the common law, thus, is the absence of conferred status and obligations on the heir under the latter. Their meaning is often mixed up because of the tendency to interpret customary law rules from a common law perspective.<sup>18</sup> This tendency is, in turn, traceable to the colonial influence on customary law in Nigeria. For administrative and financial reasons, the British were unable to jettison the indigenous legal order which they found in Nigeria. They subjected customary law to English law, using legislation that enforces the common law and doctrines of equity in force in England in 1900.<sup>19</sup> For customary law to be applicable, it must not be contrary to public policy, natural justice, equity and good conscience.<sup>20</sup> What constitutes public policy and good conscience was initially determined in accordance with the received English law. Later, section 42(1) – the Constitution's non-discrimination clause – became the main applicability criterion.<sup>21</sup>

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

13 Elias (n 10 above) 162.

14 For convenience, the terms 'inheritance' and 'succession' are used interchangeably.

15 Intestate succession refers to the devolution of a deceased person's estate in the absence of a valid will. Testate succession is the reverse.

16 As used here, the term 'common law' refers to both the received English law and statutory law.

17 Okoro (n 12 above).

18 MJ de Waal 'The social and economic foundations of the law of succession' (1997) 8 *Stellenbosch Law Review* 159-161.

19 Sec 45(1) of the Interpretation Act, Cap 89, Laws of the Federation of Nigeria and Lagos 1958.

20 Sec 18(3) of the Evidence Act 2011.

21 Sec 42(1) prohibits discrimination on grounds of 'ethnic group, place of origin, sex, religion or political opinion'.

Colonial rule changed the setting in which the primogeniture rule emerged by introducing Christianity, the migrant labour system, and new laws. In sum, it led to the following socio-economic changes: (a) diffused family structures no longer based and organised on close-knit units; (b) nuclear families accustomed to a Western culture that cares little for the notion of extended families; (c) the disappearance of a correlation between heirs' inheritance of deceased persons' assets and duties to provide support and maintenance to the deceased's dependants; and, finally, (d) the changed land tenure system.<sup>22</sup>

Since the colonial recognition of customary law was for administrative rather than development purposes, customary law evolved into a strange creature.<sup>23</sup> It became fashionable to refer to official customary law and living (unofficial) customary law. Whereas official customary law is the version that is codified in legislation and recorded in textbooks and court precedents,<sup>24</sup> living customary law is regarded as the norms that regulate communities in their daily lives.<sup>25</sup> This article argues that, because the norms of living law crystallise from people's adaptations to internal and external social changes, they ought to be the beacon of the best interests of dependants principle in the customary law of succession.

The best interests of dependants principle requires that legislative or judicial actions taken with respect to customary law of intestate succession must consider the overall welfare of everyone maintained by the deceased person shortly before death. Here, the term 'everyone' comprises of spouses and children, as well as siblings, parents and cousins of the deceased person. In advocating this principle, inspiration is drawn from the best interests of the child principle.<sup>26</sup> Thus, consideration should be given to distributing family property in a manner that accommodates everyone previously dependant on the deceased person. To arrive at the best interests principle, judges should be guided by two factors. The first is the manner people have adapted or are adapting to the changed social structures in which the male primogeniture rule emerged. Since living customary law constantly changes, the determination of this adaptation could be aided by the foundational value of the customary law of succession. The reasoning is that, whereas living customary law changes, its foundational value is fairly stable. For example, the author's research in South-East Nigeria shows that a foundational value guiding adaptations to intestate succession is the duty of care owed to family members by family heads. Generally, under Igbo

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22 CJ Korih *The land has changed: History, society and gender in colonial eastern Nigeria* (2010).

23 GR Woodman 'Some realism about customary law – The West African experience' (1969) *Wisconsin Law Review* 128-151.

24 Himonga (n 7 above).

25 I Hamnett *Chieftainship and legitimacy: An anthropological study of executive law in Lesotho* (1975) 10.

26 Art 3(1) Convention on the Rights of the Child (CRC).

customary law, a woman cannot sell land that she did not purchase with her own money. However, informants agree that a woman may sell land inherited by her deceased husband in order to care for her children when there is a breach of a duty of care by the family. This foundational value of duty of care is, as seen in part four, not mentioned in the judicial abolition of the male primogeniture rule in South-East Nigeria.<sup>27</sup>

Second, judges should robustly apply the equality clause in the Constitution in order to give weight to the best interests principle. When adjudicating disputes, they must consider what is fair, just and equitable, taking into consideration the following: the assets and liabilities of the estate; the surviving spouse's contribution to the acquisition of matrimonial assets; family members' contribution to such assets; and the existence of minor children or other dependents of the deceased person who require maintenance.<sup>28</sup> Problems usually arise in intestate succession when male relatives appropriate the deceased's estate on the ground that women have limited property rights under customary law.<sup>29</sup> Such appropriation of estates is a common problem in South-East Nigeria, and it is usually justified on tradition. However, customs are rarely received and preserved in their old forms. This is because the manner in which people utilise customs is heavily influenced by events around them. Notably, living customary law is regarded as the law that 'emerges from what people do', or 'what people believe they ought to do'.<sup>30</sup> I argue that 'what people do' is better seen as people's adaptation to socio-economic changes, since their reaction to these changes informs and influences their behaviour. In this light, a best interests principle should be anchored on the non-static nature of the customary law of succession. On the face of it, there is nothing wrong with the male primogeniture rule. Rather, the problem lies in how present generations have received, applied and adapted it. According to Gyekye, cultural preservation<sup>31</sup>

... in part or in whole, would depend very much on the attitude the new generation adopts towards it ... This means that the continuity and survival of a pristine cultural product depends on the normative considerations that would be brought to bear on it by subsequent generations.

The individuals who currently benefit from the primogeniture rule do so based on their adaptation to an individualistic notion of property,<sup>32</sup>

27 Other foundational values discernible from succession and marriage are dignity, the preservation of the homestead, and a man's duty to maintain his family, irrespective of divorce.

28 Minority judgment of Ngcobo J in the *Bhe* paras 239 & 240.

29 JN Ezeilo 'Law and practices relating to women's inheritance rights in Nigeria: An overview' (1998-9) 7 *Nigerian Juridical Review* 131-139.

30 Hamnett (n 25 above).

31 K Gyekye *Tradition and modernity: Philosophical reflections on the African experience* (1997) 221.

32 *Aniokwe & Another v Nweke* 2013 Law Pavilion Electronic Law Reports 20386 (CA).

a notion that is inconsistent with the egalitarian purpose of the customary law of succession. In much the same way as they have imbibed inheritance without responsibility, they should also be able to come to terms with a best interests principle anchored on the notion of equality. The enquiry turns to the legal framework relating to customary law of inheritance in Nigeria in order to see how it accommodates a best interests principle.

### 2.3 Legal framework of inheritance

Nigeria is composed of about 300 ethnic groups, the largest of which are the Hausa (Northern Nigeria), Igbo (south-east) and Yoruba (south-west).<sup>33</sup> Other than the Hausa that mostly practise Shari'a law, each ethnic group has a system of customary law, although variations are noticeable among communities in these groups.<sup>34</sup> In 1914, the Supreme Court Ordinance established the Supreme Court of Nigeria and mandated it to apply the common law of England, the doctrines of equity, and the statutes of general application in force in England on 1 January 1900. On 1 October 1954 Nigeria became a federation with a central government in Lagos and three regional governments in the north, west and east. On 1 October 1960 it became independent with a federal constitution and constitutions for the three regions.<sup>35</sup> On 1 October 1963 it became a republic, and severed judicial and political ties with Britain. Following a civil war that lasted from 1967 to 1970, and several *coups d'état*, a constitution was adopted in 1979, and later modified into the current 1999 Constitution.

Nigeria's legal system, thus, is based on the Constitution, the received English common law, local legislation, Shari'a law, and customary law. As a federation consisting of a central government, 36 states grouped under six geo-political zones, and nearly a thousand local government councils, law making is shared.<sup>36</sup> Unlike federal law with unlimited territoriality, state and local council laws are limited to their respective territories. Broadly, federal law regulates marriage, land and evidence, while inheritance is regulated by state laws. The key laws governing testate inheritance include the Marriage Act, the Administration of Estates Law of 1959,<sup>37</sup> the Succession Law Edict of 1987 (as amended by south-east states), the English Wills Act of 1837, and the Wills Amendment Act of 1852 (generally applicable except in the south-west). Others are the Wills Law of 1959 (south-west),<sup>38</sup> the Wills (Soldiers and Sailors) Act of 1918, and the Wills Law of old

33 For debate, see O Otite *Ethnic pluralism and ethnicity in Nigeria* (1990) 35-36.

34 *Egharevba v Orunonghae* (2001) 11 NWLR [Pt 724] 318 [CA] 337 per Ibiyeye JCA.

35 Nigeria Independence Act of 1960 8 & 9 Eliz 2 cap 55.

36 Secs 2(2) & 4 of the Constitution.

37 Cap 133 Laws of Western Nigeria 1959, as amended by states in the former western region.

38 Wills Law 28 of 1958, which subsequently became Cap 113, Laws of Western Region of Nigeria 1959.

Bendel State.<sup>39</sup> Some states, such as Anambra and Rivers, copied sections of the above laws.

There is no uniformity in inheritance laws in Nigeria.<sup>40</sup> When a person subject to statutory law dies intestate, local enactments relating to the administration of estates apply. Where no local enactments exist, English law applies. When, however, a person subject to customary law dies intestate, native law applies. Generally, the applicable law in intestate situations is as follows:

- (i) Immovable property is governed by *lex situs*, or the law of the place where the property is situated. If the immovable property is based in Lagos, Ogun, Oyo, Ondo or Bendel state, the Administration of Estates Law of 1959 applies when customary law does not apply. If the immovable property is based in any of the northern or eastern states, English common law applies, as laid down in *Cole v Cole*.<sup>41</sup>
- (ii) Movable property is governed by the law of domicile of the intestate at the time of death.<sup>42</sup> If the intestate died domiciled in Lagos, Ogun, Oyo, Ondo or Bendel state, the Administration of Estates Law, as amended by states, applies, irrespective of the location of the property. When a person dies domiciled in any of the northern or eastern states, the law of the state in which he died applies with respect to movable property, irrespective of its location.
- (iii) Where the property is subject to customary law, or the deceased was married under customary law, or was otherwise subject to native law, customary law applies.

A best interests of dependants principle is evident in some of the laws governing intestate estates in Southern Nigeria. These laws are modelled on the Administration of Estates Law of 1963<sup>43</sup> and the Administration of Estates Law of 1959. Generally, these laws prescribe rules for distribution of intestate property as follows:<sup>44</sup>

- (a) A surviving spouse inherits a deceased's personal chattels. Where the deceased person is survived by a spouse but no children, parents or siblings of the same blood, the surviving spouse inherits all. However, where the surviving spouse is the wife and the intestate is survived by siblings, the wife's interest fails on her death or remarriage, and devolves to the intestate's siblings in equal shares.
- (b) Where the deceased is survived by a spouse as well as children, one-third of the residuary estate is held in trust for the surviving spouse. The interest of such spouse is absolute for a husband; for a wife, it is for life or until remarriage. The remainder of the estate, together with

<sup>39</sup> Cap 172, Laws of Bendel State, 1976.

<sup>40</sup> PO Itua 'Legitimacy, legitimation and succession in Nigeria: An appraisal of section 42(2) of the Constitution of the Federal Republic of Nigeria 1999 as amended on the rights of inheritance' (2012) 4 *Journal of Law and Conflict Resolution* 36.

<sup>41</sup> *Cole v Cole* (1898) 1 NLR 15 is authority that when a person who contracted a Christian marriage outside Nigeria dies intestate while domiciled in Nigeria, the English common law governs the distribution of his estate.

<sup>42</sup> *Tapa v Kuka* (1945) 18 NLR 5; *Zaidan v Zaidan* (1974) 4 UILR 283.

<sup>43</sup> Cap 5 Laws of Eastern Nigeria 1963. These laws include the Anambra State Administration of Succession to Estate of the Deceased Law of 1987, and the Administration of Estate Law, Cap 1 Laws of Rivers State of Nigeria 1999.

<sup>44</sup> Sec 49(ii) of the Administration of Estates Law, Cap 1 Laws of Western Region of Nigeria 1959.



- any residue from the wife's interest, is held in trust for surviving children or grandchildren of the intestate in equal shares.
- (c) Where the deceased is survived by a spouse, as well as one or more of the following: a parent, a sibling, or children of a sibling, but does not leave a child, two-thirds of the residuary estate is held in trust for the surviving spouse. The interest of such spouse is absolute for a husband; for a wife, it is for life or until remarriage. The remainder of the estate, together with any residue from the wife's interest, is held in trust for male siblings of the intestate in equal shares. In the absence of male siblings or their children, the portion devolves to parents.
  - (d) Where the deceased is survived by children or children of deceased children but no spouse, two-thirds of the residue of the estate is held in trust for these children equally. Of the remaining one-third, one-sixth is held in trust for the intestates' parents and one-sixth for siblings.
  - (e) Where the deceased is not survived by a spouse, children or grandchildren, but is survived by both parents, two-thirds of the residuary estate is held in trust for the parents in equal shares. The other one-third is held in trust for siblings in equal shares. If no siblings survive, their share goes to the parents.
  - (f) Where the deceased is neither survived by a spouse nor children, but is survived by one parent, two-thirds of the residuary of the estate is held in trust for the surviving parent. One-third of the estate's value is held in trust for siblings in equal shares. If no siblings survived, it goes to the surviving parent.
  - (g) Where the deceased is neither survived by spouse, children, nor parents, the residuary estate is held in trust for siblings, half-brothers and sisters, grandparents, and the uncles and aunts of the intestate, respectively.
  - (h) In default of any person taking an absolute interest under the foregoing provisions, the residuary estate goes to the head of the family of which the intestate was a member. Such family head shall, out of the whole of the property devolving to him, provide for any dependant of the intestate and person whom the intestate might reasonably have been expected to include in a will.

Even where a person died testate without reasonable provision for the maintenance of dependants, some testamentary laws provide for rights of maintenance for such dependants. For example, section 2(1) of the Wills Law of Lagos State provides that spouses or children of the deceased 'may apply to the court for an order on the ground that disposition of the deceased's estate effected by will is not such as to make reasonable provision for the applicant'.<sup>45</sup> Not only does the succession law of Anambra State contain provisions similar to section 2(1) above, but it goes further to include the estates of deceased persons that died intestate.<sup>46</sup> Its provisions, modelled after the English Inheritance Act,<sup>47</sup> enable dependants such as spouses, male children below the age of 18 years, and unmarried females below the age of 18 years, to apply to the High Court for relief. The difference between

45 Sec 2, Wills Law of Lagos State, Cap W2 Laws of Lagos State (2004), and sec 4(1) of the Wills Edict 12 of Oyo State (1990).

46 Sec 58 Administration and Succession (Estate of Deceased Persons) Law Cap 4 Laws of Anambra State of Nigeria 1987.

47 English Inheritance (Provisions for Family and Dependants) Act of 1975.

these state laws is that, while some recognise only spouses and children, others include parents or siblings who the deceased had been maintaining immediately before death.<sup>48</sup>

Unfortunately, many succession laws do not apply where the distribution of an estate is governed by customary law. This is most common in laws that restrict testators' rights to dispose of their property, which the courts have upheld in a long line of cases.<sup>49</sup> In April 2013, the Supreme Court revisited section 3(1) of the Wills Law of old Bendel State in the case of *Uwaifo v Uwaifo*.<sup>50</sup> It held that the *Igiogbe* custom of the Benin, which gives the eldest son the right to inherit the family home, overrides a father's testamentary wishes. However, uncertainty surrounds the ambit of this restriction of testamentary freedom. While some opinions consider provisions such as section 3(1) as limiting a testator's freedom, others view it as merely limiting the subject of testamentary dispositions. In *Agidigbi v Agidigbi*,<sup>51</sup> the court held that the phrase 'subject to any customary law relating thereto' is not a qualification on the testator's capacity to make a will, but rather a qualification of the subject matter of the property disposed of or intended to be disposed of by a will. In any case, whether it is testators' freedom or the subjects of testators' freedom that are restricted, the result is the same. As Nwogugu puts it, legislation such as section 3(1) of the Wills Law means that 'real property, which cannot be effected by testamentary disposition under the applicable customary law, cannot be disposed by will'.<sup>52</sup> The crucial consequence of such restrictions is that land, which is mostly governed by customary law, is hardly disposed of by will. In reality, where a man married under the Marriage Act dies intestate, the statutory entitlements of his widow do not extend to land he received from his family or kin group, since it is deemed to devolve in accordance with customary law. Numerous incidents have been documented of widows who, although married under the Marriage Act, were nevertheless barred by male relatives from their deceased husbands' assets.<sup>53</sup> These incidents symbolise the problem of the primogeniture rule in Southern Nigeria.<sup>54</sup>

48 See, eg, Lagos and Oyo states.

49 The notable ones are *Arase v Arase* (1981) NSCC 101; *Igbinoba v Igbinoba* (1995) 1 NWLR (Pt 317) 375-381; *Idehen v Idehen* (1991) 6 NWLR (Pt198) 422; *Oke v Oke* (1974) 3 SC 1; *Olowu v Olowu* (1985) 3 NWLR (Pt 13) 372.

50 *Uwaifo v Uwaifo* (2013) Law Pavilion Electronic Law Reports 20389 (SC) *per* Galadima JSC.

51 *Agidigbi v Agidigbi* (1992) 2 NWLR 98.

52 El Nwogugu *Family law in Nigeria* (1990) 379. See also IE Sagay 'Customary law and freedom of testamentary power' (1995) 39 *Journal of African Law* 173-182.

53 Ezeilo (n 29 above) 139.

54 JA Omotola 'Primogeniture and illegitimacy in African customary law: The battle for survival of culture' (2004) 15 *Indiana International and Comparative Law Review* 115; Ezeilo (n 29 above) 131-139; PO Nwankwo & PI Ibe *Critical analysis of women's conditions in Nigeria: Violence, discrimination, and other maltreatments* (2013).

## 2.4 Exclusion of the best interests principle in succession laws

Notably, certain succession laws do not apply where the distribution, inheritance and succession to an estate are governed by customary law.<sup>55</sup> Section 49(5)(b) of the Administration of Estates Law of 1959 states:

Any real property, the succession to which cannot by customary law be effected by testamentary disposition, shall descend in accordance with customary law, anything herein to the contrary notwithstanding.

Section 3(1) of the Wills Law of old Bendel State provides:<sup>56</sup>

Subject to any customary law relating thereto, it shall be lawful for every person to devise, bequeath or dispose of by his will executed in a manner hereinafter required, all real and all personal estate which he shall be entitled to, either in law or in equity, at the time of his death and which if not so devised, bequeathed and disposed of would devolve upon the heir at law.

The above law is similar to several state laws. For example, section 1 of the Wills Law of Bayelsa State, 2006, states as follows:

It shall be lawful for everyone to bequeath or dispose by will executed in accordance with the provisions of this Law, all property to which he is entitled in law or in equity, at the time of his death: Provided that the provisions of this Law shall not apply (a) to any property which the testator had no power to dispose of by will or otherwise under customary Law to which he was subject; and (b) to the will of any person who immediately before his death was subject to Islamic Law.

The above laws, which have received approval from the Supreme Court, are inimical to the best interests principle.<sup>57</sup> Their inimicality lies in their limitation of the testamentary capacity of Nigerians subject to customary law, a limitation that enables the operation of the male primogeniture rule. It is worth noting that the majority of land in Nigeria is in rural areas and customary law regulates the lives of most Nigerians.<sup>58</sup> Also, Nigerians are not enthusiastic about making wills because of cultural and religious phobias of death. In fact, 'it is normal to die intestate'.<sup>59</sup> The result is that the primogeniture rule applies in many parts of the country without an accompanying best interests of dependents principle. Such is the prevalence of male primogeniture that some probate divisions of the High Court are reluctant to grant women letters of administration unless they are accompanied by male children of over 21 years or a male relative of the deceased

55 *Zaidan v Mohsons* (1973) All NLR 86.

56 Wills Law of old Bendel State, Cap 133 Laws of Western Nigeria 1958, applicable to Lagos, Ogun, Osun, Ondo, Edo and Delta States.

57 *Arase v Arase* (1981) NSCC 101; *Igbinoba v Igbinoba* (1995) 1 NWLR (Pt 317) 375 381.

58 Nigerian Institute of Advanced Legal Studies (ed) *Restatement of customary law of Nigeria* (2013) Preface.

59 Okoro (n 12 above) 64.

husband.<sup>60</sup> In fact, women were, until recently, considered part of the estate of their husbands.<sup>61</sup> The worrying significance of this problem is that a best interests principle is hardly invoked in the few cases that challenge male primogeniture.<sup>62</sup> It is this harsh reality that necessitates an enquiry into reform of the customary law of succession in Nigeria. In order to highlight the state of customary law reform in Nigeria, it is important to first give a brief account of customary law reform in South Africa.

### 3 Customary law reform in South Africa

South Africa practises a mixed legal system, comprising of indigenous law and laws inherited from the Dutch and the British. Its customary law reforms were mainly prompted by the historical injustices occasioned by colonial rule and apartheid, during which customary law was not taken seriously.<sup>63</sup> The 1996 Constitution gives customary law equal standing with the received law.<sup>64</sup> Sections 30, 31 and 185 of the 1996 Constitution provide for the right to culture and cultural life, upon which customary law is founded. Section 211(3) 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.' Furthermore, section 39(2), the second limb of the Constitution's interpretation clause, outlines the duty of courts 'when developing the common law or customary law'.

Law reform in South Africa, primarily, is the duty of the South African Law Reform Commission (SALRC).<sup>65</sup> However, the courts, the Ministry of Rural Development and Land Reform<sup>66</sup> and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities<sup>67</sup> also engage in activities related to customary law reforms. For example, the Commission on Restitution of Land Rights works closely with parliament and civil society groups to reverse the legacy of the 1913 Natives Land Act.<sup>68</sup> Although most of the SALRC's successes in

60 This finding is based on the author's field research in January and June 2014. See also *Suberu v Summonu* (1957) SCNLR 45.

61 *Neziyana v Okagbue* [1963] All NLR 358 SC; *Nzekwu v Nzekwu* (1989) 2 NWLR (Pt 104) 373; *Akinnubi v Akinnubi* [1997] 2 NWLR (Pt 486) 144; *Obusez v Obusez* [2001] 15 NWLR 377.

62 *Aniekwe & Another v Nweke* (n 32 above) is a classic case that failed to invoke the best interests principle.

63 TW Bennett 'Legal pluralism and the family in South Africa: Lessons from customary law reform' (2011) 25 *Emory International Law Review* 1029-1035.

64 See sec 211(3) of the Constitution of South Africa. See also sec 1(1) of the Law of Evidence Amendment Act 45 of 1988, as amended by the Justice Laws Rationalisation Act 18 of 1996.

65 South African Law Reform Commission Act 19 of 1973.

66 The Ministry's website is <http://www.dla.gov.za/>.

67 Sec 185 South African Constitution.

68 See Commission on Restitution of Land Rights Annual Report 2013/2014.

reforming the customary law of succession came after the end of apartheid in 1994, it had done significant work before that period. For example, it was instrumental in the promulgation of the Intestate Succession Act 81 of 1987. This Act codified the common law of intestate succession and the customary law of succession applicable to black South Africans living in rural areas. The SALRC also played a role in the enactment of the Law of Succession Amendment Act 43 of 1992, which made fundamental changes to the Intestate Succession Act of 1987 and the Wills Act of 1953. Since the end of apartheid and the adoption of new Constitutions in 1994 and 1996 respectively, the SALRC's work has accelerated. It investigated the intersection of inheritance with customary marriages,<sup>69</sup> which led to the adoption of the Recognition of Customary Marriages Act.<sup>70</sup> Furthermore, it investigated the possible harmonisation of the common law of succession and the customary law of succession with values in the Constitution's Bill of Rights.<sup>71</sup> In order to examine issues arising from this harmonisation, it launched Project 90 and called for public debate.<sup>72</sup> Oral and written submissions were made by individuals, the judiciary, traditional leaders, the Ministry of Justice, civil society, community-based organisations and the academia. Such was the massive interest it generated that parliament introduced a Customary Law of Succession Amendment Bill to extend the general common law of succession to all South Africans. Following opposition from traditional leaders, the Bill was withdrawn and the matter was referred for public debate to the SALRC. In recognising the tension between constitutional values and the changing social realities of the male primogeniture rule, the SALRC considered two key issues:

- (i) Should the customary law of succession be abolished in favour of a single legal regime that would eliminate any sense of racial discrimination and promote national unity?
- (ii) Should the customary law of succession be retained with little modifications but made compatible with the Constitution?

The SALRC unanimously found that, in order not to contravene constitutional values, the customary law of succession must not prejudice widows, daughters and younger male children. In April 2004, it published its report, attaching a draft Bill on reforming the customary law of succession.<sup>73</sup> The Bill, later revised, sought to provide for the devolution of certain property in line with the customary law of intestate succession; the disposition of house property by will; the protection of property rights in customary

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69 SALRC *Report on Customary Law of Succession* (2004); SALRC *Report on Customary Marriages* (1998).

70 Recognition of Customary Marriages Act 120 of 1998, adopted 15 November 2000.

71 SALRC *Harmonisation of the common law and indigenous law* (1999); SALRC *Report on Customary Law of Succession* (2004).

72 SALRC *Report: Customary Law: Succession Discussion* (2000); SALRC *Report: Customary Law: Administration of Estates* (2001).

73 SALRC *Report on Customary Law of Succession* (2004).

marriages; an amendment of the Intestate Succession Act to protect the rights of younger male children; and an amendment of the Maintenance of Surviving Spouses Act of 1990 to enable wives in customary marriages to make claims for maintenance. On 21 April 2009, parliament approved these findings by passing the Reform of Customary Law of Succession Act (Reform Act).<sup>74</sup>

The passing of the Reform Act reveals how South African courts complement the SALRC in reforming the customary law of succession. In two cases<sup>75</sup> the Cape High Court and the Pretoria High Court declared as unconstitutional provisions of the Black Administration Act and section 1(4) of the Intestate Succession Act, which relate to the male primogeniture rule. In the *Bhe* case, two minor children born from an extra-marital union had failed to qualify as heirs in the intestate estate of their deceased father under the system of intestate succession created by section 23 of the Black Administration Act and its regulations. According to these provisions, the estate was to be distributed according to 'black law and custom'. For similar reasons, in the *Shibi* case, Ms Shibi was prevented from inheriting the estate of her deceased brother. When these two cases were brought to the South African Constitutional Court for confirmation of the orders of the High Court, they were consolidated with a third application. This application was brought jointly by the South African Human Rights Commission and the Women's Legal Centre Trust, seeking to invalidate section 23 of the Black Administration Act<sup>76</sup> or, alternatively, portions of it.<sup>77</sup> The Constitutional Court found that, due to socio-economic changes, heirs often do not reside with the entire extended family and<sup>78</sup>

succession of the heir to the assets of the deceased does not necessarily correspond in practice with an enforceable responsibility to provide support and maintenance to the family and dependents of the deceased.

It struck down section 23 of the Black Administration Act and section 1(4)(b) of the Intestate Succession Act 81 of 1987 for infringing the rights to equality and human dignity. It declared *inter alia*:<sup>79</sup>

The rule of male primogeniture as it applies in customary law to the inheritance of property is declared to be inconsistent with the Constitution

74 Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009.

75 *Bhe & Others v The Magistrate, Khayelitsha & Others* 2004 (2) SA 544 (C) and *Shibi v Sithole and Minister for Justice and Constitutional Development* Case 7292/01, 19 November 2003 (unreported).

76 Black Administration Act 38 of 1927.

77 The portions are secs 23(1), (2) & (6). The Commission for Gender Equality acted as *amicus curiae* in the matter.

78 *Bhe* (n 1 above) para 80.

79 *Bhe* para 136. The majority judgment was delivered by the then Deputy Chief Justice, Langa DCJ. Chaskalson CJ (as he then was), Madala J, Mokgoro J, Moseneke J, O'Regan J, Sachs J, Skweyiya J, Van der Westhuizen J and Yacoob J concurred in the judgment of Langa DCJ.

and invalid to the extent that it excludes or hinders women and extra-marital children from inheriting property.

The majority judgment's restriction of the unconstitutionality of the male primogeniture rule to inheritance marked its departure from the minority judgment. Delivered by Ngcobo J, the minority judgment opted to develop customary law by simply removing the reference to 'a male' in the impugned legislation so as to allow women to succeed to the intestate estate of deceased persons. Ngcobo J based his reasoning on the courts' duty to develop customary law in line with the Bill of Rights.<sup>80</sup>

The importance of the *Bhe* decision is two-fold: The first is the impetus it gave to law reform in South Africa as, following the judgment, parliament passed the Reform Act. The second is the insight it gives into the unsuitability of the male primogeniture rule in modern conditions. Quoting the views of the SALRC, the Constitutional Court observed as follows:<sup>81</sup>

The application of the customary law rules of succession in circumstances vastly different from their traditional setting caused much hardship. Widows were ... often kept on at the deceased's homestead on sufferance or ... simply evicted. They then faced the prospect of having to rear their children with no support from the deceased husband's family.

South Africa's reforms recognise that social circumstances have so changed that the customary law of succession no longer provides adequately for widows, female children, younger male children and children born out of wedlock. Zambia,<sup>82</sup> Zimbabwe<sup>83</sup> and Malawi<sup>84</sup> have also made extensive reform efforts. Other states address customary law reforms through the judiciary. For example, in September 2013, the Botswana Court of Appeal invalidated a Ngwaketse ultimogeniture rule, which holds that 'only the last born son is qualified as intestate heir to the exclusion of his female siblings'.<sup>85</sup> In sum, customary law reform efforts in South Africa reveal three key aims:

- (a) the need to provide 'adequate material support for vulnerable members of the family in changing social and economic conditions';
- (b) the need to 'promote the human rights of family members with respect to inheritance under customary law'; and
- (c) the need to cater for deceased persons' dependants by introducing flexibility in inheritance rules.

80 *Bhe* (n 1 above) paras 222 & 239. Ngcobo J's approach was based on the foundational value of human dignity (*ubuntu*), and favoured the status of women in other areas, such as succession to traditional leadership.

81 *Bhe* (n 1 above) paras 82 & 83.

82 Intestate Succession Act 5 of 1989 (effective 14 May 1989).

83 Administration of Estates Amendment Act 6 of 1997 (effective 1 November 1997).

84 Deceased Estates (Wills, Inheritance and Protection) Act 14 of 2011 (effective 18 August 2011).

85 *Ramantle v Mmusi & 3 Others* CACGB-104-12 3 September 2013 (AC) para 80 <http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2013/07/Mmusi-Court-of-Appeal-Judgment.pdf> (accessed 7 November 2014).

Part 4 examines how these key aims feature in law reforms in Nigeria.

## 4 Customary law reform in Nigeria

Given the hardship caused to women and children by socio-economic changes, it is reasonable to expect serious efforts to reform customary laws of inheritance in Nigeria. This, however, is not the case. In what follows, I critique legislative and judicial interventions in Nigeria aimed at aligning the customary laws of inheritance with changing social conditions in order to highlight the need for a best interests of dependants principle.

### 4.1 Law reform and the Constitution

The 1999 Constitution does not dignify law reform or review with a mention. It gives the federal government exclusive legislative powers in most matters, and gives states concurrent and residual powers in the rest.<sup>86</sup> It is ambiguous on who possesses legislative competence over customary law, thereby making it difficult to assess customary law reform. For example, section 4(7)(a) empowers states to make laws with respect to 'any matter' outside the Exclusive Legislative List. Item 61 of this List gives the federal government 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'. From these provisions, it is possible to argue that customary law and, impliedly, its reform, are outside the legislative jurisdiction of the federal government.<sup>87</sup> However, customary laws codified by states are subject to interpretation by federal courts. For example, the Supreme Court has severally debated the legal implications of section 3(1) of the Wills Law of old Bendel State which, as shown above, limits the testamentary disposition of properties governed by customary law.<sup>88</sup> Because of Nigeria's system of governance, the enquiry into customary law reform is undertaken at federal and state levels.

### 4.2 Customary law reform at federal level

Customary law reform at federal level is practically non-existent. The statutory body charged with reform of federal laws is the Nigerian Law Reform Commission (Commission), which was established in 1979. Section 5(1) of its enabling Act states that the Commission shall 'keep under review all federal laws with a view to their systematic and

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86 Sec 7(5) of the Constitution gives very restricted powers to local government councils.

87 IE Sagay 'Intestate succession in the states of the former western region of Nigeria' (1998) 42 *Journal of African Law* 112.

88 *Idehen v Idehen* (1991) 6 NWLR (Pt 198) 382; *Lawal-Osula v Lawal-Osula* (1995) 9 NWLR (Pt 419) 259.



progressive development and reform in consonance with the prevailing norms of Nigerian society'.<sup>89</sup> Although this is a broad and laudable mandate, the Commission is neither autonomous in structure nor in operations. Rather than parliament having oversight control over the Commission, its functions, proposals and recommendations are approved by the Attorney-General of the Federation (AGF), who is a political office holder. The AGF, in turn, forwards the Commission's findings and recommendations to the President.<sup>90</sup> Moreover, the Commission lacks sufficient qualified personnel and operates on a 'shoestring' budget.<sup>91</sup> While it is active in penal reform, access to justice and juvenile justice, it has no significant achievement with respect to customary law. Of its 19 major publications from 1980 to 2010, only three are mildly related to customary law. These are reports published in 1991 and 1987 titled *Review of Pre-1900 English Statutes in Force in Nigeria*. The other two are the Report on the Reform of the Land Use Act of 1992, and the Report on the Reform of the Evidence Act of 1998.<sup>92</sup> In October 1984, it submitted recommendations for the registration of all categories of marriages, as well as a scheme for intestate succession for registered marriages.<sup>93</sup> This recommendation was never implemented. In July 2013, the federal government set up a Presidential Committee on Land Reform with little involvement from the Commission.

Other than the above efforts, there are no notable efforts at federal level to reform the customary laws of inheritance in Nigeria. In September 1976, the federal military government appointed a Customary Courts Reform Committee.<sup>94</sup> The Committee was mandated to, *inter alia*, examine the continued existence of customary courts, their structure, enabling laws, jurisdiction, composition, the role of traditional chiefs, and whether, and to what extent and basis, customary laws and usages should be codified. The Committee submitted its findings in 1978. Notably, it recommended the establishment of a 'permanent Customary Law Commission charged with the responsibility of investigating, ascertaining and recording customary laws throughout the country'. No significant action emerged from its recommendations, as the military

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89 Nigerian Law Reform Commission Act Cap 118, Laws of the Federation of Nigeria 2004 (Law Reform Act).

90 Sec 5(6) Law Reform Act. In recognition of the Commission's weaknesses, a Bill is pending in parliament to grant it more autonomy. See Nigerian Law Reform Commission Act (Amendment) Bill 2012.

91 AO Nzoma 'The process of law reform' (2012) 1 *NIALS International Journal of Legislative Drafting* 126.

92 World Catalogue search result: <http://orlabs.oclc.org/identities/lccn-no89-3146> (accessed 16 August 2013).

93 Nigerian Law Reform Commission *Law Reform Report No 2* (November 1981) 15-57.

94 White Paper on the Federal Military Government's views on the Report of the Customary Courts Reform Committee 1978, reproduced in A Collett 'Recent legislation and reform proposals for customary and area courts in Nigeria' (1978) 22 *Journal of African Law* 161-187.

government relinquished power the following year. On 14 April 2014, a state-sponsored 'roundtable discussion on law reform in Nigeria' issued a Communiqué, which failed to mention customary law.<sup>95</sup>

Poor law reform is not restricted to the Commission. Agencies such as federal and state ministries of socio-cultural affairs and, until recently, the National Commission on Human Rights, suffer from the same lack of political will that inhibits the Commission. However, the Nigerian Institute of Advanced Legal Studies (Institute) has recently undertaken activities which could lead to and assist customary law reform. The Institute is a statutory body mandated to, *inter alia*, 'co-operate with ... the Nigerian Law Reform Commission and such other bodies ... engaged in any major field relating to law reform'.<sup>96</sup> It has published several empirical findings on customary law, including inheritance and succession practices in local communities.<sup>97</sup>

The absence of customary law reform at federal level in Nigeria may be traced to three reasons. The first and most obvious is political instability resulting from several military interventions in governance.<sup>98</sup> The second is corruption.<sup>99</sup> The third is a lack of political will arising from a desire to avoid potentially-divisive legislation in an ethnically large and diverse nation. In fact, the introduction of a Bill of Rights in the 1960 Independence Constitution is, largely, the result of agitations by ethnic minorities.<sup>100</sup> This is evident in the Harry Willink Commission of Inquiry, which sat in 1958 to 'enquire into fears of minorities and the means of allaying them'.<sup>101</sup> Furthermore, it is unclear whether Item 61 of the Exclusive Legislative List contributes to the federal government's reluctance to carry out customary law reforms. Notably, the Customary Courts Reform Committee was set up by a military government that had suspended the Constitution. It would probably not have been set up in a constitutional democracy. Our enquiry turns now to the reform efforts of states.

95 Communiqué issued at a roundtable discussion on law reform in Nigeria, organised by the National Institute for Legislative Studies, in collaboration with the National Assembly Committees on Judiciary and Justice at the Transcorp Hilton Hotel on 14 April 2014' <http://nils.gov.ng/uploads/LawReformCommunique.pdf> (accessed 21 May 2014).

96 Sec 4(f) Institute of Advanced Legal Studies Act Cap 345, Laws of the Federation of Nigeria 2004.

97 See, eg, *Restatement of customary law of Nigeria* (2013); *Traditional administration of justice in Nigeria* (2013), *NIALS dictionary of African customary laws* (2013); E Azinge & A Awah (eds) *Legal pluralism in Africa: A compendium on African customary law* (2012).

98 USAID 'Legal and judicial sector reform in Nigeria: Report back to rule of law assessment mission to Nigeria' (19-30 June 2000) 33.

99 USAID (n 98 above) 7 17.

100 JI Dibia *Modernisation and the crisis of development in Africa: The Nigerian experience* (2006) 73.

101 M Vickers *A nation betrayed: Nigeria and the Minorities Commission of 1957* (2010) 14.

### 4.3 Customary law reform at state level

States in Nigeria are relatively more active in customary law-related reforms than the federal government. Most of these reforms are recent, as the frequent military intervention in governance disrupted the early progress made in law reform after independence. For example, a draft Bill on Administration of Estates, initiated in 1965 in the then Eastern Province of Nigeria, was terminated by the January 1966 military *coup* and subsequent civil war.<sup>102</sup> The Bill was seen as a revolutionary effort to streamline the law on intestate administration of estates under customary law.<sup>103</sup> Before the civil war, the Eastern Province succeeded in passing legislation against caste-based discrimination,<sup>104</sup> high rates of dowry,<sup>105</sup> and underage marriage.<sup>106</sup> In 1981, a Bill to fix a maximum sum payable for bride wealth in the old Imo State failed to be passed into law.<sup>107</sup> Regarding recent efforts, states such as Lagos, Abia, Akwa Ibom and Edo have set up law reform commissions.<sup>108</sup> Ekiti signed a Law Reform Commission Bill in February 2014.<sup>109</sup> The Jigawa State Justice Law Reform Commission trained over 1 350 traditional rulers in dispute resolution mechanisms in 2013.<sup>110</sup> The Akwa Ibom State Law Reform Commission presented its first annual report in 2010, while its Abia State counterpart is collecting data for a Customary Law Manual.<sup>111</sup> Despite these efforts, no legislation has emerged to address the changing social conditions that surround the male primogeniture rule. Our enquiry now turns to judicial law reform.

### 4.4 Supreme Court and customary law reform

As a country with a common law legal tradition, judicial precedents and court hierarchy are taken seriously in Nigeria. At face value, the April 2014 judgments of the Supreme Court on male primogeniture appear like the judicial reform of the customary law of inheritance.

102 *Eastern Nigeria Gazette* 66, Enugu, 17 September 1965 Vol 14.

103 Nwogugu (n 52 above) 397-398.

104 Abolition of Osu System Law, Eastern Region Law 13 of 1956.

105 Limitation of Dowry Law, Eastern Region Law 23 of 1956, now Cap 76 Laws of Eastern Nigeria 1963.

106 The Age of Marriage Law Eastern Region Law 22 of 1956.

107 ISN Bill 70 of 1981, published in *Imo State of Nigeria Gazette* 22, 18 June 1981.

108 Some websites of these agencies are <http://www.lawrecom.lg.gov.ng>; <http://abialawreformcommission.org>; [http://www.aksgonline.com/aks\\_agencies.aspx](http://www.aksgonline.com/aks_agencies.aspx); and <http://www.edostate.gov.ng/law-review-commission> respectively.

109 'Ekiti signs criminal law, accuses FG of neglect' *The Punch* 26 February 2014 <http://www.punchng.com/news/ekiti-signs-criminal-law-accuses-fg-of-neglect/> (accessed 21 May 2014).

110 'Traditional rulers in Jigawa get training on dispute resolution' *The Guardian* 20 August 2013 <http://www.nguardiannews.com/appointments/130404-traditional-rulers-in-jigawa-get-training-on-dispute-resolution> (accessed 19 September 2013).

111 See the websites of these commissions at <http://abialawreformcommission.org/questionnaires.htm> and <http://www.aksgonline.com/articlePage.aspx?qrID=764> (accessed 21 May 2014).

Regrettably, they are not. In the first case, the plaintiff/respondent's husband was the younger half-brother of the defendants' father.<sup>112</sup> She sought a declaration that she was entitled to a statutory right of occupancy of a parcel of land or, in the alternative, a share of the proceeds of the sale of the land. Interestingly, she contended that the customs of the Awka people allowed a woman to inherit the property of her husband, whether she has a male child or not. From her evidence, it appears that the customs of the Awka people have changed to extend inheritance rights to women. In support of this claim, she relied on the arbitration order made by the Ozo Awka society. The defendants disagreed, claiming that, as a woman, she had no right to land under Awka customary law. Both the High Court and the Court of Appeal upheld the plaintiff's claims. In dismissing the defendants' appeal, the Supreme Court underlined the difficulty of abolishing the primogeniture rule as follows:<sup>113</sup>

Any culture that disinherits a daughter from her father's estate or wife from her husband's property by reason of a God-instituted gender differential 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 ... Consequently, the appellants' two issues raised in this appeal are both resolved against them. The appeal is without merit and is hereby dismissed while the judgment of the Court of Appeal, Enugu Division, which affirmed that of the trial High Court of Anambra State, Awka is hereby also affirmed.

In effect, the Court only affirmed the reliefs sought by the plaintiff/respondent.<sup>114</sup> It did not formulate any issue for determination regarding the male primogeniture rule, nor did it make any direct invalidation of the rule. Unlike in South Africa, no *amicus curiae* was involved in the case. As the Court's complaint against the defendant/applicant's lawyers indicates, the impact of this case on the abolition of the male primogeniture rule is not encouraging.

In the second case, the plaintiff/respondent was born out of wedlock. She sought a declaration against her step-mother and half-brother that, as a daughter of the deceased, she was entitled to his estate. The defendants/appellants contended that, under Igbo customary law, she was not entitled to a share in the estate. Both the trial High Court and the Court of Appeal found that she was a daughter of the deceased and upheld her claims. The Supreme Court agreed. It ruled that 'the Igbo native law and custom which deprives children born out of wedlock from sharing the benefit of their father's estate' is void because it conflicts with section 42(2) of the Constitution.<sup>115</sup> The judgment did not address the position of widows

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112 *Anekwe v Nweke* (n 3 above).

113 *Per Ogunbiyi*, JSC 36-37 paras A-B.

114 Even at the Court of Appeal, no analysis of the changing social conditions that surround the male primogeniture rule was conducted.

115 *Per Ogunbiyi*, JSC 37 paras A-E.

and younger male children. Once again, no *amicus curiae* was involved and no attempt was made to refine the rather inelegantly-drafted claims of the parties.

It is notable that the Supreme Court did not clarify the territorial reach of its decisions in these two judgments. This is understandable, given that the common law rules of pleadings discourage courts from granting prayers not asked for by parties.<sup>116</sup> Unfortunately, lower courts are only bound by the decisions of higher courts when the facts are the same as the previous decision sought to be relied on. Moreover, the Court made no effort to analyse the changing social conditions that affect the primogeniture rule, nor mentioned the duty of care owed by family heads, nor even made a case for reform of the customary law of succession. This failure is in contrast with the approach of courts in South Africa. In *Mthembu v Letsela*,<sup>117</sup> Le Roux J pointed out that<sup>118</sup>

the devolution of the deceased's property onto the male heir involves a concomitant duty of support and protection of the woman or women to whom he was married by customary law and of the children procreated under that system.

When the Constitutional Court found in the *Bhe* case that the primogeniture rule was out of tune with current social conditions because heirs hardly adhered to their duty of support, it struck down the rule.<sup>119</sup> It is worth noting that its approach gave voice to earlier recommendations made by the SALRC to parliament.<sup>120</sup> By bringing the customary law of succession under the umbrella of the Intestate Succession Act, the Constitutional Court threw a challenge to the legislature to reform the customary law of succession through a new or amended statute.<sup>121</sup> As shown in part 3, the result is the Reform Act. With the identified deficiencies in the two Supreme Court judgments, it is unlikely that they will have the same effect as the *Bhe* case on customary law reform in South Africa. Due to deeply-entrenched patriarchy and ethnic sensitivities in Nigeria,<sup>122</sup> a ripple effect from these two judgments also seems remote. The inescapable conclusion from these judgments is that the Supreme Court has yet to undertake serious reform of the customary law of succession.

116 See *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.

117 *Mthembu v Letsela* 1997 (2) SA 936 (T).

118 *Mthembu v Letsela* (n 117 above) paras 945-947.

119 *Bhe* (n 1 above) paras 81-100.

120 *Bhe* para 121; South African Law Reform Commission Discussion Paper 93 on Customary Law: Succession xvi, 38-40 & 70-73.

121 *Bhe* (n 1 above) para 115.

122 U Ewelukwa 'Post-colonialism, gender, customary injustice: Widows in African societies' (2002) 24 *Human Rights Quarterly* 424-486.

## 5 Conclusion

The foregoing analysis shows that Nigeria has neither harmonised customary law inheritance rules in order to reconcile them with socio-economic changes, nor adopted legislation with human rights benchmarks to regulate the customary law of succession. This situation of law reform is not likely to change soon because of the devolution of power between the federal government and the states. Customary rules of succession in Western Nigeria already observe a best interests of dependants principle, leaving Southern Nigeria behind, where states are, unfortunately, not active in the reform of the customary law of succession. There are two options to address this situation: The easier option is to leave customary law reform for the states and to create awareness of the need to imbibe a best interests of dependants principle in all judicial decisions and legislative policies concerning the customary law of succession. In this regard, research into living customary law is crucial. This is because superior courts could be applying obsolete rules of succession. In 1971, a government inquiry found that the difference between decisions of local customary courts and superior courts could be alarmingly wide.<sup>123</sup> The arbitral award of the Ozo Awka society in the *Anekwe v Nweke* case is indicative of changes in living customary law. This is significant, as research in Southern Africa showed that local courts considered changing social conditions when making divorce awards, whereas appellate courts, situated far from litigants, failed to do so.<sup>124</sup>

The second and difficult option is to properly give customary law a place in the Constitution and to subject it to human rights benchmarks.<sup>125</sup> It has been noted that 'the coexistence of modern, statutory laws with traditional customary laws and practices' in Nigeria 'has created a complex and confusing legal regime under which women generally are denied adequate legal protection'.<sup>126</sup> Side by side with constitutional reform should be the abolition of laws that enable the operation of the male primogeniture rule. These are, primarily, laws based on section 3(1) of the Wills Law of the old Bendel State and section 49(5)(b) of the Administration of Estates Law. As long as courts fail to take into consideration the role of socio-economic changes in the customary law of succession, the best interests of dependants principle would suffer along with females and younger male children.

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123 Integrating the Administration of General Law and Customary Law – East Central State Official Document 7 of 1971.

124 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* (1983) 61-66. See also L Mbatha 'Reforming the customary law of succession' (2000) 18 *South African Journal on Human Rights* 273.

125 An even more difficult sub-option is to adopt federal legislation with a human rights benchmark to regulate inheritance.

126 U Ewelukwa 'Post-colonialism, gender, customary injustice: Widows in African societies' (2002) 24 *Human Rights Quarterly* 446.