

Custom and the Constitution in the Nigerian Supreme Court:

Commentary on *Anekwe v Nweke*

Justice Susan Glazebrook DNZM¹

Introduction

I am very honoured to have been invited to this very important conference on judging with a gender perspective.² My task today is to comment on a decision of the Nigerian Supreme Court: *Anekwe v Nweke*.³ The facts are a bit complicated⁴ but for our purposes can be simplified. Essentially the case concerned whether a widow could inherit the family home after her husband's death. If she was not entitled to inherit, then the property would go to the eldest living male in the family – in this case the eldest son of her deceased husband's half-brother.⁵

There were a number of procedural issues in the case related to the pleadings for the claim and counterclaim⁶ and an allegation that the trial Court had misunderstood the issues. There was

¹ Judge of the Supreme Court of New Zealand.

² This paper is based on a speech given at the Fourth International Meeting: Judging with Gender Perspective held on the 27th to 28th September 2018 in Mexico City. The conference was hosted by the Mexican Supreme Court and is the fourth meeting on this topic. It was attended by over 400 judges from Mexico and around the world. My thanks to Mexican Supreme Court Justice and International Association of Women Judges (IAWJ) Vice-President, Margarita Beatriz Luna Ramos, for her leadership on these issues. My thanks also to the staff of the Mexican Supreme Court and especially Maria Esther Hernández y Chávez and Mauricio Tapa Maltos and also to my clerks Nichola Hodge and Rebecca McMenamin for their assistance with this paper.

³ *Anekwe v Nweke* SC 129/2013, (2014) LPELR-22697 (SC). I was assigned this case to comment on by the conference organisers. I am of course not an expert in Nigerian law and so apologise in advance for any inaccuracies.

⁴ The respondent was the widow of Nweke Nwogbo. He was the younger half-brother of Anekwe Nwogbo, the appellant's father. (Anekwe Nwogbo had been the original appellant in the case, but he died before the case reached the Supreme Court, with his claim passing to his eldest son.) Both the husband and his half-brother were sons of Nwogbo Okonkwo Eli (the Grandfather). When the Grandfather died, both sons went to live with the Grandfather's half-brother, Obiora Okonwo Eli (the Uncle), who moved the brothers onto the land that was the subject of the dispute. The appellant argued that the property had never been partitioned and that, in any event, upon the respondent's husband's death, because the widow had no male child, the title passed to the half-brother and thus to the appellant: his eldest son. The widow disputed this, arguing that half the land had belonged to her husband and had passed to her upon his death. Her husband had been buried in their house and she had continued to live there.

⁵ Under the primogeniture rule that the appellant was contending for, the right of succession to the family estate went to the first-born male child.

⁶ For example, the original action had been brought by the widow in trespass and sought an injunction preventing the half-brother, his servants and agents from entering on the disputed parcel of land: at 4. Before the Supreme Court, the appellant nephew challenged the failure of the widow to plead her title to the land.

also a factual dispute about whether or not the husband had any right to the land.⁷ The Court found for the widow on all these issues but, in terms of a gender perspective, a detailed discussion of these points is not necessary.

The interesting issue for us in the case is the rejection by the Supreme Court (and indeed by the courts below) of a customary law that discriminated against women and, in particular, the very strong terms in which this rejection was expressed. This is in marked contrast to earlier decisions that had upheld customary law in inheritance matters.⁸ For example, one earlier case from the Federal Supreme Court⁹ had held that women could not inherit as they themselves are part of the inheritance¹⁰ – essentially a custom that treated women as chattels to be passed on to the remainder of his family after the death of a spouse.¹¹ The Federal Court of Appeal of Nigeria had, before *Anekwe v Nweke*, been starting to liberalise the approach to issues of customary law and women, but it was not until the Supreme Court’s decision in *Anekwe* that discriminatory customary laws were firmly invalidated.¹²

The Supreme Court held that, in claims of this nature, title automatically becomes an issue before the courts: at 11.

⁷ At 6. This argument related to the issue of whether the Uncle had partitioned the land between the brothers or simply given it to them jointly to share. The Supreme Court chose not to interfere with the findings of the lower Courts which had both held that the land had been partitioned: at 12–15.

⁸ Most of the cases discussed in this paper, with the exception of *Anekwe*, could not be sourced directly from available databases such as NigeriaLii and WorldLii. They have therefore been sourced from commentary in this area including Oyeniyi Ajigboye and Temiloluwa Alabi “The Protection of Women’s Rights in Nigeria: An Appraisal of Judicial Intervention on Women and Inheritance” (2015) <www.researchgate.net>, Emmanuel O C Obidimma and Angela E Obidimma “Mitigating the Injustice of the Customary Law Relating to Inheritance of Landed Property by Women amongst the Igbo People of Nigeria” (2015) 4 IJIRD 71; and Opeyemi Aladetola “Analysis of the Nigerian Supreme Court’s Constitutional Duty Regarding Women’s Inheritance Right under Customary Law” (LLM dissertation, University of Cape Town, 2017).

⁹ The Federal Supreme Court was, at the time of the case, subject to further appeal to the Judicial Committee of the Privy Council. By contrast, the Supreme Court that heard *Anekwe v Nweke* is the final appellate court for Nigeria and was constituted under Chap VIII of the Nigerian Constitution (1999). Appeals to the Privy Council were abolished in 1963.

¹⁰ In *Suberu v Sunmonu* (1957) 2 FSC 31, Jibowu FJ said: “It is a well settled rule of native law and custom of the Yoruba people that a wife could not inherit her husband’s property since she herself is, like a chattel, to be inherited by a relative of her husband.”

¹¹ Other examples of customary law prevailing in cases before the Federal Supreme Court that raised issues of discrimination include *Nezianya v Okagbue* (1963) 1 ANLR 352 and *Osilaja v Osilaja* (1972) 10 SC 126 where women were prohibited from inheriting the property on the basis of their sex under customary law. In *Nezianya v Okagbue* the Federal Supreme Court recognised limited rights of women to inherit, such as providing a life interest in the property dependent on their good behaviour.

¹² For example, in *Mojekwu v Mojekwu* (1997) 7 NWLR (Pt 512) 283 the Court of Appeal held that the custom in question, which only allowed male children to inherit the father’s property, was unconstitutional. The reasoning was criticised on appeal to the Federal Supreme Court of Nigeria, although the decision was overturned instead on procedural grounds: *Mojekwu v Iwuchukwu* (2004) 11 NWLR (Pt 883) 196. Other Court of Appeal cases in a similar vein were *Asika v Atuanya* (2008) 17 NWLR (Pt 1117) 484 and *Motoh v*

Custom and the Common law

The general common law position was to recognise indigenous customary law¹³ as part of the common law, except where this was “repugnant to justice and morality”.¹⁴ Custom would be repugnant if it clashed with the core principles or foundations of the legal system in question.¹⁵ This approach was used in the imperial legislation introduced into Nigeria, with the statutory origins being traced to the Supreme Court Ordinance of 1876 which said:¹⁶

Nothing in this Ordinance shall deprive the Supreme Court of the right to observe and enforce the observance, or shall deprive any person of the benefit, of any law or custom existing in the said Colony and Territories subject to its jurisdiction, such law or custom not being repugnant to natural justice, equity and good conscience, nor incompatible either directly or by necessary implication with any enactment of the Colonial

Motoh (2011) 16 NWLR (Pt 1274) 474. The Federal Supreme Court had also occasionally recognised discriminatory customs as unconstitutional, for example in *Nzekwu v Nzekwu* (1989) NWLR (Pt 104) 373 where Nnamani JSC, delivering the lead judgment, endorsed the trial judge’s conclusion that a custom that allowed the head of the deceased’s family “the right to alienate [the widow from the property in her lifetime] is in my view a barbarous and uncivilized custom which in my view should be regarded as repugnant to equity and good conscience and therefore unacceptable to me”. For discussion of the cases see AC Diala “A critique of the judicial attitude towards matrimonial property rights under customary law in Nigeria’s southern states” (2018) 18 AHRLJ 100 at 102 [Diala “A critique of the judicial attitude”]. See also Aladetola, above n 8, at 1.2 and 2.

¹³ For the purposes of this paper I use a broad definition of custom which was adopted by the Supreme Court of Nigeria in *Nwaigwe v Okere* (2008) 34 NSCOR 1325 where the Court said that “[p]utting it in a more simplistic form, the customs, rules, relations, methods and cultures which govern the relationship of members of a community are generally regarded as customary law of the people”: cited in Matthew Enya Nwocha “Customary Law, Social Development and Administration of Justice in Nigeria” (2016) 7 Beijing LR 430 at 432. A discussion on the difficulties that arise in defining customary law is beyond the scope of this paper: for discussion, see Martin Chanock “Neither Customary nor Legal: African Customary Law in an Era of Family Law Reform” (1989) 3 Intl JL & Fam 72 at 75. For the purposes of this discussion, customary law is used to refer generally to the customs of the indigenous peoples of Nigeria. It is noted that customary law differs depending on the region/peoples, and multiple customs are referred to throughout this paper.

¹⁴ PG McHugh “The Aboriginal Rights of the New Zealand Māori at Common Law: (PhD thesis, University of Cambridge, 1987) at 182. There were certain other requirements but these were not relevant to this case. See also discussion in *Takamore v Clarke* [2011] NZCA 587, [2012] 1 NZLR 573 (*Takamore* (CA)) at [109] for the test for when custom forms part of the common law of England and at [109]–[196] for detailed discussion of the limbs of that test.

¹⁵ *Takamore* (CA), above n 14, at [14] and [126]–[127].

¹⁶ The Supreme Court Ordinance 1876 (Imp), art 19. Article 19 also noted that “...in cases where no express rule is applicable to any matter in controversy, the Court shall be governed by the principle of justice, equity, and good conscience”. The phrase has been echoed in modern statutes in Nigeria. See for example the Evidence Act 2011, s 18(3) which states that “In any judicial proceeding 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 and good conscience”. For a discussion on the statutory incorporation of this test: see Aladetola, above n 8, at 2.2.

Legislature existing at the commencement of this Ordinance, or which may afterwards come into operation.

This became known as the repugnancy clause. It has however been the subject of controversy as the terms have been criticised as being imprecise, with no set definition in the Nigerian legal system.¹⁷ The Federal Supreme Court (as it was then),¹⁸ in the 1994 case of *Okonkwo v Okagbue*, said:¹⁹

The phrase “repugnant to natural justice, equity, and good consciousness” has not been interpreted disjunctively by the courts. “Equity” in its broad sense, as used in the repugnancy doctrine is equivalent to the meaning of “natural justice” and embraces almost all, if not all concepts of “good conscience.” The term “equity” has a broad popular sense and a narrow technical sense. In its popular sense equity is practically equivalent to natural justice or morality.

It is also worth making the point that customary law, although it still remains active in areas such as criminal and land disputes, generally applies to family related issues such as divorce, custody and inheritance. This means that customary law tends to affect women in legal disputes disproportionately.²⁰

Constitutional overlay

As noted above, customary law is, along with the common law, part of the underlying sources of the law of Nigeria.²¹ Like the common law, customary law is subject to the Constitution of

¹⁷ Nwocha, above n 13, at 437–438. See also “Legal Research Guide: Customary Law in Africa” Library of Congress <www.loc.gov> at n 25.

¹⁸ See n 9 above.

¹⁹ *Okonkwo v Okagbue* (1994) 9 NWLR (Pt 368) 301 at 314.

²⁰ Susan H Williams “Women and Judging: A Feminist Approach to Judging and the Issue of Customary Law” (2013) 36 T Jefferson L Rev 25 at 27; and Nwifo Cecilia Chinwe and Okoli Chinwe Kate “Customary Law, Law and Women Rights to Inheritance and the Challenges” (2016) 19 Nigerian LJ 199 at 199–200.

²¹ Nwocha, above n 13, at 433. I recognise that customs are not the same in all parts of Nigeria (which could raise added complications in cases of a possible clash of customs).

the Federal Republic of Nigeria 1999,²² which is supreme law and prevails over any inconsistent laws.²³

The Constitution expressly provides for the guarantee of fundamental human rights, which among other rights includes provisions outlawing discrimination on the basis of sex:²⁴

A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person:

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

The fundamental rights are outlined in Chapter IV of the Constitution from ss 33 to 44. The Chapter IV rights include the rights to life, property, a fair hearing, personal liberty and the dignity of human persons. Section 45(1) provides that nothing contained in ss 37 to 41 will invalidate a law that is “reasonably justifiable in a free and democratic society” or “in the interest of defence, public safety, public order, public morality or public health” or “for the purpose of protecting the rights and freedom of other persons”. That is, the rights in those sections can all be limited if the requirements of s 45(1) are met.

²² The history of the Nigerian Constitution is complex. The original 1960 post-independence Constitution that was passed when Nigeria achieved independence from Britain in 1960 was amended and superseded various times. The current Constitution is the 1999 Constitution which was established by the military administration of General Abdulsalami Abubakar: “Nigeria: Constitution Development History” *Constitution Hub* <www.lawnigeria.com>. For a discussion on the Nigerian federation see Amah Emmanuel Ibiam “Federalism, Democracy and Constitutionalism: The Nigerian Experience” (2016) 53 *Journal of Law, Policy and Globalization* 1. See also Amah Emmanuel Ibiam “Nigeria – The Search for Autochthonous Constitution” (2017) 8 *Beijing LR* 141.

²³ Constitution of Nigeria 1999, s 1(3): the Constitution is supreme law and prevails over laws that are inconsistent with it; to the extent of the inconsistency, the inconsistent law is void.

²⁴ Constitution of Nigeria 1999, s 42(1).

Although the Supreme Court of Nigeria has the ability to strike down legislation that is inconsistent with the provisions of the Constitution, commentators have noted that it is extremely reluctant to do so.²⁵ It is also noticeable that, unlike constitutions from countries that share similar sources of law to Nigeria, the Nigerian Constitution does not expressly provide for customary law,²⁶ although s 21 of the Constitution places the State under an obligation to “protect, preserve and promote the Nigerian cultures which enhance human dignity and are consistent with the fundamental objectives as provided in [Chapter II of the Nigerian Constitution]”.²⁷

The judgment in *Anekwe v Nweke*

The applicable customary law in *Anekwe v Nweke* was that of Awka (Igbo) people who live in the south east of Nigeria.²⁸ Under Awka customary law (at least as contended for by the male appellant), a widow could only inherit if there was a surviving male child.²⁹ In this case the marriage had produced only daughters.³⁰ The Nigerian Supreme Court held unanimously that the Awka customary law that disinherited a widow because the marriage had not produced a male child was repugnant to natural justice, equity and good conscience and could not be upheld.³¹

²⁵ See for example, the discussion of Hakeem O Yusuf “The judiciary and political change in Africa: Developing transitional jurisprudence in Nigeria” (2009) 7 ICON 654 at 664–666.

²⁶ Compare the Constitution of the Republic of South Africa (8 May 1996, amended 11 October 1996). Section 211 of the South African Constitution for example recognises traditional leadership, authority and customary law. Section 39(2) of the South African Constitution, however, expressly states that customary law should be developed in accordance with the Bill of Rights. A similar approach is also seen in the Constitution of the Independent State of Papua New Guinea which, like Nigeria, is a heterogenous society comprised of hundreds of different cultural groups. Section 9 of the Papua New Guinean Constitution (16 September 1975) expressly recognises the underlying law (customary law) as a source of law. See also Anthony C Diala “Reform of the customary law of inheritance in Nigeria: Lessons from South Africa” (2014) 14 AHRLJ 633 at 635 [Diala “Reform of the customary law of inheritance in Nigeria”].

²⁷ Chapter II of the Constitution of Nigeria sets out that the Federal Republic of Nigeria will be based on the principles of democracy and justice and that the motto of the Republic will be “Unity and Faith, Peace and Progress”: ss 14 and 15. Equality and freedom from discrimination are listed as objectives for the furtherance of social order in s 17 (see also ss 13–24 also in Chapter II, as to Fundamental Objectives and directive Principles of State Policy).

²⁸ Awka is the name of the capital of the Anambra State in Nigeria. The term Awka people seems to be the collective name given by the Supreme Court to the seven Igbo groups which occupy the 33 villages that comprise Awka: Awka Capital Territory Development Authority “History of Awka Capital Territory” <actda.com.ng>.

²⁹ *Anekwe v Nweke*, above n 3, at 10.

³⁰ *Anekwe v Nweke*, above n 3, at 19.

³¹ *Anekwe v Nweke*, above n 3, at 16 and 18–20.

The lead judgment was given by Clara Bata Ogunbiyi JSC.³² Among other things, she said:³³

[A] custom of this nature in the 21st century societal setting will only tend to depict the absence of the realities of human civilization. It is punitive, uncivilized and only intended to protect the selfish perpetration of male dominance which is aimed at suppressing the right of the womenfolk in the given society. One would expect that the days of such obvious differential discrimination are over.

She also condemned the male appellants and their counsel for their actions in arguing that the widow should be disinherited. She said:³⁴

For a widow of a man to be thrown out of her matrimonial home, where she had lived all her life with her late husband and children, by her late husband's brothers on the ground that she had no male child, is indeed very barbaric, worrying and flesh skinning. 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.

The other judges agreed with the condemnation of the custom and a number of them referred to it being a challenge to God's will.³⁵ For example, Nwali Sylvester Ngwuta JSC said:³⁶

The custom pleaded herein, and is a similar custom in some communities wherein a widow is reduced to chattel and part of the husband's estate, constitutes in my humble view, the height of man's inhumanity to woman, his own mother, the mother of nations, the hand that rocks the cradle.

³² Each of the other judges (Ibrahim Tanko Mohammad, Muhammad Saifullahi Muntaka-Coomassie, Nwali Sylvester Ngwuta and Olukayode Ariwoola JJSC) wrote brief concurring judgments and all of them expressly agreed with Ogunbiyi JSC. Justice Ogunbiyi was the only woman on the panel. At the time of her appointment Ogunbiyi JSC was the first woman to be appointed from north eastern Nigeria, and the fourth woman appointed to the Supreme Court overall: for more information see: "Justice Ogunbiyi: From Village Girl to Supreme Court Justice" (21 March 2018) *Leadership* <leadership.ng>. As at the date of this paper, four of the 16 judges of the Supreme Court of Nigeria are female: Mary Ukaego Peter-Odili, Kudirat Motonmori Olatokunbo Kere-Ekun, Amina Adamu Augie, and Uwani Abba Aji. Uwani Abba Aji was appointed in January 2019 and is the second woman appointed from north eastern Nigeria and the seventh woman to be appointed to the Supreme Court. Justice Ogunbiyi retired in February 2018, having reached the mandatory retirement age of 70.

³³ *Anekwe v Nweke*, above n 3, at 15.

³⁴ *Anekwe v Nweke*, above n 3, at 16.

³⁵ See for example the discussion at 16 per Ibrahim Tanko Mohammad JSC, 18 per Muhammad Saifullahi Muntaka-Coomassie JSC and 19 per Olukayode Ariwoola JSC.

³⁶ *Anekwe v Nweke*, above n 3, at 18.

The respondent is not responsible for having only female children. The crave for male children for which a woman could be denied her rights to her deceased husband or father's property is not justified by practical realities of today's world. Children, male or female, are gifts from the creator for which the parents should be grateful.

The custom of the Awka people of Anambra State pleaded on and relied on by the appellant is barbaric and takes the Awka community to the era of cave man. It is repugnant to natural justice, equity and good conscience and ought to be abolished.

The various sets of reasons therefore raise a number of justifications for the result. The first is the idea that the custom is outmoded in the 21st century. But at the same time, with the reference to God in a number of the judgments, there is a view expressed that this custom is repugnant to a more fundamental natural law based on God's will. Further, running through all the judgments is a strong sense of the need for gender equality in a civilised society.

A significant omission is the absence of the Nigerian Constitution in the Court's reasoning. The "natural justice, equity and good conscience" phrase from the judgment does not appear in the Nigerian Constitution. As noted above, its origins seem to lie in the Supreme Court Ordinance of 1876. The absence of express constitutional reliance in *Anekwe* is notable as similar cases relating to customary law were decided in reliance on the Constitution.³⁷ The approach in *Anekwe* can be also be contrasted with the constitution-centric approach taken by the Constitutional Court of South Africa in *Bhe v Magistrate, Khayelitsha*,³⁸ discussed below.

³⁷ For example, in *Ukeje v Ukeje* SC 224/2004 which was released at the same time as *Anekwe v Nweke* in 2014. *Ukeje* also concerned an issue of inheritance of the property of the deceased who had died intestate. The Supreme Court was unanimous when it found that it was unconstitutional to exclude female children from the inheritance. Rhodes-Vivour JSC, delivering the lead judgment, noted that such exclusion would violate ss 39 and 42 of the Constitution. For a discussion on these cases see Israel NE Worugji and Rose O Ugbe "The Supreme Court has cleared the customary law inhibitions on the inheritance rights of women in Nigeria" (2016) 2 Intl J of Law 27.

³⁸ *Bhe v Magistrate, Khayelitsha* (2005) 1 SA 580 (CC), (2004) 1 BCLR 1 (CC). The decision of the Supreme Court consolidated three cases: *Bhe v Magistrate, Khayelitsha* CCT 49/03, *Shibi v Sithole* CCT 69/03 (a case where a woman was prevented from inheriting her deceased brother's estate) and *South African Human Rights Commission v President of the Republic of South Africa* CCT 50/03 (a class action brought in the public interest on behalf of women and children prevented from inheriting by the male primogeniture rule). See Diala "Reform of the customary law of inheritance in Nigeria" above n 26, at 634 for more information on the cases that were consolidated in the proceedings.

Despite the absence of discussion of the Constitution in *Anekwe*, many of the commentators on this case nevertheless see it as based on the Constitution's anti-discrimination provisions.³⁹

Another interesting point about the decision is that the Supreme Court did not deal with the widow's argument that customary law allowed for women to stay in and inherit the matrimonial home regardless of whether she had a male heir. Instead, the Court accepted without discussion the appellant's argument that the male primogeniture rule worked as he alleged. This was despite the fact that the disputed custom had been the subject of a series of arbitrations between the widow and the nephew that were resolved in the widow's favour.⁴⁰

Criticism of the decision

The decision *Anekwe v Nweke* has been criticised as not going far enough. Diala argues that these types of inheritance customs are outdated and are no longer applicable in modern society especially as traditional social structures have broken down.⁴¹ In the past in traditional societies, duties were attached to inheritance. For instance, male heirs traditionally assumed responsibility for providing for the widow and for all her children, regardless of their sex.⁴² Diala considers that society has moved on to such an extent that the primogeniture rule should be abolished altogether. In his view, the decision in *Anekwe v Nweke* did not go that far.⁴³ He contrasted the approach taken by the Constitutional Court of South Africa in *Bhe v Magistrate, Khayelitsha*.

Bhe concerned a similar situation to that in *Anekwe*. In *Bhe* the deceased, who had lived with Ms Bhe (he had not married her) and their two minor daughters, died intestate.⁴⁴ Under the

³⁹ For a discussion on the rights under the 1999 Constitution which apply to these cases see Aladetola, above n 8. Aladetola considers, among other rights, that the right to dignity encompasses the right to have property rights respected: at ch 3.

⁴⁰ Evidence from an arbitrator on the dispute, Ozo Nwogbo Okafor, indicated that complications arose because the husband had built the house in dispute. These arbitrations appeared to involve the referral of the matter to extended family.

⁴¹ Diala "Reform of the customary law of inheritance in Nigeria", above n 26, at 653.

⁴² Diala "A critique of the judicial attitude", above n 12, at 102. Diala also points to the "best interests of dependants' principle" seen in Western Nigeria where the customary law requires that the deceased's estate be handled in a manner that is best for the individuals dependent on it: Diala "Reform of the customary law of inheritance in Nigeria", above n 26, at 634–635 and 638–369.

⁴³ Diala "Reform of the customary law of inheritance in Nigeria", above n 26, at 651–654.

⁴⁴ At [14]–[16].

relevant legislation the estate would “be distributed according to ‘Black law and custom’”.⁴⁵ This meant it would be passed to the deceased’s father who threatened to sell the property and render the family homeless.⁴⁶ Ms Bhe, on behalf of her daughters, brought an action challenging the appointment of the deceased’s father as heir and representative of the estate.⁴⁷ The Court struck down the primogeniture rule as inconsistent with the South African Constitution, noting that “[i]n the changed circumstances [of modern society] therefore, the 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 dependants of the deceased”.⁴⁸ As Diala noted, the Court found the primogeniture rule to be “out of tune with current social conditions because heirs hardly adhered to their duty of support”.⁴⁹ I comment too that it is certainly arguable that such customs, even with duties attached, do not conform to the modern understanding of the role of women and their right to autonomy.⁵⁰

Colonial influence on customary law and the role of women

The counterargument to Diala’s criticisms are two-fold. First it is argued that custom has been distorted by colonialism and thus what is required is a return to the true custom. It is argued that modern customary laws that incorporate discriminatory practices are the result of colonial and imperialist influences and do not reflect traditional customs. Indeed, this has been argued to extend to the overall concept of customary law. Martin Chanock observed:⁵¹

The law was the cutting edge of colonialism, an instrument of the power of an alien state and part of the process of coercion. And it also came to be a new way of conceptualizing relationships and powers and a weapon within African communities which were undergoing basic economic changes, many of which were interpreted and

⁴⁵ At [16].

⁴⁶ At [17].

⁴⁷ At [18].

⁴⁸ At [97].

⁴⁹ Diala “Reform of the customary law of inheritance in Nigeria”, above n 26, at 646.

⁵⁰ Diala “A critique of the judicial attitude”, above n 12. For example, in the case of *Suberu v Sunmonu*, discussed above n 10, the wife of the deceased was expected to be “inherited” by and often then married to a relative of her husband.

⁵¹ Martin Chanock *Law, Custom, and Social Order: The Colonial Experience in Malawi and Zambia* (Cambridge University Press, 1985) at 4 as cited in Uche U Ewelukwa “Post-Colonialism, Gender, Customary Injustice: Widows in African Societies” (2002) 24 Hum Rts Q 424 at n 24.

fought over by those involved in moral terms. The customary law, far from being a survival, was created by these changes and conflicts.

Moreover, traditional societies accorded women prestige and protection because of their gender specific roles as child bearers, food producers and managers of domestic affairs.⁵² It is argued that western influences changed these roles and, as the colonial structure offered no equivalent roles, women became excluded from their customary roles and leadership positions. In terms of primogeniture custom, it is argued that the traditional custom of duties attached to inheritance was distorted because of the position of women in England at the time and English primogeniture rules.⁵³ So, it is argued, what is required is a return to true pre-colonial customary practices which valued women.⁵⁴

Development of custom by the courts

The second counterargument to Diala is that it is better to adapt or modify custom to modern conditions than to abolish it. Aladetola, for example, argues that the Supreme Court in *Anekwe* should have developed the custom and only invalidated the discriminatory aspect.⁵⁵

The approach taken by the Privy Council in 1931, on appeal from the Federal Supreme Court of Nigeria, was that courts are able to overturn custom but are not the right bodies to develop it. In a case concerning whether a custom relating to the deportation of deposed chiefs was repugnant to the common law and should therefore not be recognised, Lord Atkin said:⁵⁶

The court cannot itself transform a barbarous custom into a milder one. If it stands in its barbarous character it must be rejected as repugnant to natural justice, equity and good conscience.

⁵² Jennifer Corrin Care “Negotiating the Constitutional Conundrum: Balancing Cultural Identity with Principles of Gender Equality in Post-Colonial South Pacific Societies” (2006) 5 *Indigenous L J* 51 at 62.

⁵³ See for example MJ Maluleke “Culture, Tradition, Custom, Law and Gender Equality” (2012) 15 *Potchefstroom Elec L J* 1 at 16–18 that the primogeniture rule is an introduced concept, a “colonial and imperial construct imposed on Africans”.

⁵⁴ Catherine Albertyn “The Stubborn Persistence of Patriarchy: Gender Equality and Cultural Diversity in South Africa” (2009) 2 *Const Ct Rev* 165 at 171.

⁵⁵ Aladetola, above n 8, at [2.2.4].

⁵⁶ *Eleko v Government of Nigeria* [1931] AC 662 (PC) at 673. See also Bethel Chuks Uweru “Repugnancy Doctrine and Customary Law in Nigeria: A Positive Aspect of British Colonialism” (2008) 2 *Afr Res Rev* 286 at 292.

Lord Atkin saw the powers of the court as limited and that it was the community, not the court, that could modify custom. He noted that “[i]t is the assent of the native community that gives a custom its validity”. This was essentially an all or nothing approach. Either accept the custom or declare it repugnant and refuse to recognise it.

I agree that assent gives custom its validity. I also consider the preservation of cultural identity is important and that, by its very nature, custom relies on the community in which it operates. However, where a custom has become distorted through outside (colonial) influences, these issues may be of lesser significance. Lord Atkin’s approach to reject a “repugnant” custom outright may therefore be outmoded in modern society. Commentators argue that the concept of a living customary law is the best way to help customary law survive in the modern world.⁵⁷

Custom and constitutions

Constitutional protections can either help or hinder the concept of living customary law, depending on the balance struck between customary law and equality provisions, as well as on the rigidity of the constitution.

A conflict?

The question of how to adapt custom highlights the need to examine what is often seen to be a conflict between what are characterised as western-imposed individualistic notions of human rights as against the collectivist community-focused nature of customary law and the right to culture.⁵⁸

The twin International Conventions on Civil and Political Rights and on Economic, Social and Cultural Rights both contain rights to “self-determination”, allowing people to “freely determine their political status and freely pursue their economic, social and cultural

⁵⁷ See Anthony C Diala “The Concept of Living Customary Law: A Critique” (2017) 49 J Legal Plur 143.

⁵⁸ See for example Muna Ndulo “African Customary Law, Customs, and Women’s Rights” (2011) 18 Indiana J of Global Leg Stud 87 at 90. On solutions of reconciling legal pluralism through an interpretative paradigm: John Andrew Faris “African Customary Law and Common Law in South Africa: Reconciling Contending Legal Systems” (2015) 10(5) Intl J of Afr Renaissance Studies – Multi-, Inter- and Transdisciplinarity 171.

development”.⁵⁹ The United Nations Declaration on the Rights of Indigenous Peoples states in art 11 that “Indigenous peoples have the right to practise and revitalize their cultural traditions and customs.” Article 7 states that indigenous peoples have the right to maintain and strengthen “their distinct political, legal, economic, social and cultural institutions”. Ensuring that communities are empowered to use and adapt their customs is vital.

On the one hand, there can be a conflict between preserving customary law and upholding human rights, especially in matters of family law, where custom may breach an individual’s constitutional rights such as freedom from discrimination. The contrary consideration is that giving individual rights primacy over customary practices could give rise to the risk that customary practices are lost.

There are no easy ways to reconcile these conflicts. However, a possible starting point is recognition of various types of rights arising from customary law. A New Zealand academic Claire Charters has conceptualised three categories of rights: indigenous individuals’ rights (that belong to all individuals, including indigenous individuals), indigenous peoples’ human rights (that belong to the collective so that indigenous individuals can flourish in the same way as individuals from the dominant culture), and indigenous peoples’ collective rights (from customary law and historical authority over their territories).⁶⁰

Reconciling customary law and constitutional equality provisions

Of interest is how these issues can be resolved in countries where the constitution recognises and protects customary law directly and has constitutional protections relating to gender equality, but lacks a mechanism to resolve any conflict between customary law and the equality provisions.

⁵⁹ International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 19 December 1966, entered into force 23 March 1976), art 1(1); and International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 19 December 1966, entered into force 3 January 1976), art 1(1).

⁶⁰ Claire Charters “Finding the Rights Balance: A Methodology to Balance Indigenous Peoples’ Rights and Human Rights in Decision-making” [2017] NZ L Rev 553 at 562–563.

South Africa's constitution is an example of a constitution that gives primacy to human rights.⁶¹ It also protects the right of all persons to enjoy their culture.⁶² However, that right "may not be exercised in a manner inconsistent with any provision of the Bill of Rights",⁶³ including, of course, the anti-discrimination provisions.⁶⁴ This suggests that customary practices which are discriminatory will be unconstitutional. However, given the historical and cultural significance of customary law, arguably it should not be dismissed or outlawed without attempts to modernise it. Further, if the community does not accept the custom has been overridden, the practices are likely to continue anyway.

Some constitutions, such as Lesotho's Constitution, go the other way and say that customary law is not subject to the anti-discrimination provisions of the constitution.⁶⁵ One answer to constitutional structures such as that in Lesotho might be to encourage customary law to adapt to the times. Customary law is not frozen in time and must embrace changes in society, including recognising gender equality.

Do equality provisions serve a useful purpose?

Another issue worth discussing is whether constitutional provisions relating to equality do in fact serve to protect women. Professor Susan Williams, an expert on the intersection of customary law and constitutional norms, has pointed out that in many countries, particularly in rural areas, recourse to the formal legal system of the state is not practical for reasons ranging from logistical and financial access barriers to community backlash.⁶⁶ Traditional justice processes are often without standardised rules of evidence or procedure.⁶⁷ Further, as women cannot normally be chiefs, they cannot act as judges in customary disputes.⁶⁸ Women therefore

⁶¹ Constitution of the Republic of South Africa (1996).

⁶² Article 31(1).

⁶³ Article 31(2).

⁶⁴ Article 9 outlines the right to equality expressly prohibiting the state, or any person, from unfairly discriminating on grounds of "race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth".

⁶⁵ Constitution of Lesotho (1993), s 18. For a discussion on constitutions which prioritise preservation of custom over equality see Johanna E Bond "Constitutional Exclusion and Gender in Commonwealth Africa" (2007) 31 Fordham Int'l LJ 289.

⁶⁶ Williams, above n 20, at 30–32. Customary law continues to operate in the daily lives of many Nigerians: see for example Chinwe and Kate, above n 20, at 199; and Nwocha, above n 13, at 436.

⁶⁷ Williams, above n 20, at 27.

⁶⁸ Williams, above n 20, at 29.

can be at the mercy of discriminatory customs and discriminatory cultural procedures for resolving disputes.

Professor Williams argues merely giving women rights will never be sufficient because the rights operate within a cultural context in which women are disempowered. In her view it is necessary to see “women not merely as victims of culture” but as “active agents” who should engage with and reform cultural policy.⁶⁹ They should thus not be regarded as passive rights holders or “beneficiaries of the legal system; they must also be the makers and masters of that system.”⁷⁰ Only by giving women power to change culture from the inside can there be any assurance that women will be able to enjoy their constitutionally protected rights.⁷¹

Professor Williams points out that giving women power in the systems that exist is the approach taken by art 17(1) of the Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa, which says that “Women shall have the right to participate at all levels in the determination of cultural policies.”⁷² Article 17(2) places a positive obligation on State Parties to “take all appropriate measures to enhance the participation of women in the formulation of cultural policies at all levels”. Incidentally art 21 of the Protocol specifically provides for the inheritance rights of women and widows.⁷³

⁶⁹ Williams, above n 20, at 31.

⁷⁰ Williams, above n 20, at 34.

⁷¹ Williams, above n 20, at 33–41.

⁷² Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa (opened for signature 11 July 2003, entered into force 25 January 2004) (a special Protocol per art 66 of the Charter). Twenty-four States, including Nigeria, Lesotho and South Africa, have signed and ratified the Protocol; twenty-five States have signed but not ratified the Protocol: see African Commission on Human and People’s Rights “Ratification Table: Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa” <www.achpr.org>.

⁷³ Article 21(1) for example provides that a widow has the right to an equal share in the inheritance property of her husband and that she has a right to continue living in the matrimonial home. Article 21(2) provides that men and women have the right to inherit their parents’ properties in equal shares.

Moving Towards Substantive Equality

Empowering women through education and legal protections is vital for reducing inequality and contributing to overall economic development.⁷⁴ For example it has been estimated that, if female employments rates in all OECD countries matched those of Sweden (69 per cent), it would provide a \$6 trillion boost to OECD GDP.⁷⁵ Indeed, commentators on customary law and women's rights note how the economic ramifications of such customs can force women and their children into extreme poverty.⁷⁶

These comments, of course, apply not only to customary law systems but also to all our legal systems, including those based on statute. There can be formal equality in law, but the effect of these laws can nevertheless be discriminatory because of how they are applied in practice. New Zealand Māori, for example are over-represented in the criminal justice system and face higher rates of imprisonment,⁷⁷ poor performance in health,⁷⁸ employment⁷⁹ and education statistics⁸⁰ due to issues of bias and social-economic disparities resulting from societal discrimination, despite being entitled to freedom from discrimination in the New Zealand Bill of Rights Act 1990.⁸¹ As another example, in the United States, New York City reportedly has

⁷⁴ See for example OECD *Gender and Sustainable Development: Maximising the economic, social and environmental role of women* (2008); Endalcachew Bayeh "The role of empowering women and achieving gender equality to the sustainable development of Ethiopia" (2016) 2 Pacific Science Review B: Humanities and Soc Sci 37 at 39–49; Esther Duflo "Women Empowerment and Economic Development" (2012) 50 J Econ Lit 1051; and UN Panel on Women's Economic Empowerment "Resources" (2019) <www.empowerwomen.org>.

⁷⁵ Price Waterhouse Cooper *Women in Work Index: Closing the gender pay gap* (London, March 2019) at 4 and 13. It is worth noting that Sweden is ranked second, with Iceland's female employment rate over 80 per cent: at 39.

⁷⁶ For example Tamar Ezer "Inheritance Law in Tanzania: The Impoverishment of Widows and Daughters" (2006) 2 Geo J Gender & Law 599.

⁷⁷ Māori comprise 16.5 per cent of the national population (but 51.3 per cent of the prison population is Māori: see Statistics New Zealand "2018 Census totals by topic – national highlights" <www.stats.govt.nz>; and Department of Corrections "Prison Facts and Statistics – March 2019" <www.corrections.govt.nz>.

⁷⁸ Māori have a lower life expectancy at birth than non-Māori: Statistics New Zealand "Life expectancy" (May 2015) NZ Social Indicators <archive.stats.govt.nz>. Māori also have higher rates of mental illness, suicide and diabetes: see Ministry of Health "Tatau Kahukura: Māori health statistics" (8 October 2015) <www.health.govt.nz>.

⁷⁹ Māori comprise 28.1 per cent of the unemployed population, and the Māori unemployment rate is 10.8 per cent as compared to the national unemployment rate of 4.9 per cent: Ministry of Business, Innovation and Employment Hīkina Whakatutuki *Māori in the Labour Market* (September 2017) at iv.

⁸⁰ Māori have the lowest rate of students leaving secondary education with the highest level of school qualification, NCEA level three: 35.6 per cent of Māori obtained level 3, compared to European/Pākehā rates of 57.2 per cent: "School leavers with NCEA level 3 or above" (September 2018) Education Counts <www.educationcounts.govt.nz>.

the most segregated schools in the country due to school selection and funding policies,⁸² despite racial segregation being outlawed in 1954 with the federal decision of *Brown v Board of Education Topeka*.⁸³

Diversity in legislative and judicial bodies, with representative numbers of female and minority candidates, is lacking around the world. On average, females comprise 22.2 per cent of parliaments globally.⁸⁴ Figures of gender representation in the judiciary are less available. The average in the United Kingdom and the United States is approximately 30 per cent.⁸⁵ In Europe, it is higher (51 per cent) but the glass ceiling persists: women are overrepresented in lower courts and underrepresented in appellate courts.⁸⁶ In accordance with diversity research around the world, having decision-makers (namely a judiciary and a legislature) that are truly representative of the society they serve will go some way to begin to redress gender inequality.⁸⁷

⁸² Beenish Ahmed “Report: School Choice Makes NYC Schools More Segregated” *WNYC* (2 May 2018) <www.wnyc.org>; Winnie Hu and Elizabeth A Harris “A Shadow System Feeds Segregation in New York City Schools” *New York Times* (17 June 2018) <www.nytimes.com>.

⁸³ *Brown v Board of Education Topeka* 347 US 483 (1954).

⁸⁴ Inter-Parliamentary Union “Women in Parliaments: World Classification” (1 February 2019) <<http://archive.ipu.org/wmn-e/world.htm>>; and UN Women “Women in Politics 2017 map” (2017) <www.unwomen.org>.

⁸⁵ Owen Bowcott “Proportion of female judges in UK among lowest in Europe” *The Guardian* (6 Oct 2016) <www.theguardian.com>; and Tracey E George and Albert H Yoon *The Gavel Gap: Who Sits in Judgment on State Courts?* (American Constitution Society for Law and Policy, 2016).

⁸⁶ In 2016, women comprised 57 per cent of first instance judges, 50 per cent of second instance judges, and only 37 per cent of final court judges: Council of Europe European Commission for the Efficiency of Justice (CEPEJ) *European judicial systems: Efficiency and quality of justice* (CEPEJ Studies no 26, 2018) at 113.

⁸⁷ See for example Justice (UK) *Increasing judicial diversity* (London, 2017); Rosemary Hunter “More than Just a Difference Face? Judicial Diversity and Decision-making” (2015) 68 *Current Legal Problems* 119; International Commission of Jurists *Women and the Judiciary* (Geneva Forum Series no 1, 2013); Williams, above n 20, at 33–41; and Lord Burnett of Maldon “A Changing Judiciary in a Modern Age” (Treasurer’s Lecture, London, 18 February 2019).