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Where Custom Dictates: A Comparison of the Integration of Customary Law in Nigeria and South Africa as Applicable to Custody and Family Law Dispute

Madelyn Cameron

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**WHERE CUSTOM DICTATES: A COMPARISON OF THE
INTEGRATION OF CUSTOMARY LAW IN NIGERIA AND
SOUTH AFRICA AS APPLICABLE TO CUSTODY AND
FAMILY LAW DISPUTES**

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INTRODUCTION

“The best interests of the child shall be a primary consideration.”¹ This doctrine is the cornerstone² of the Convention on the Rights of the Child (the Convention) and is intended to impose an absolute obligation on state parties to “undertake all appropriate legislative, administrative, and other measures” in order to fulfill this doctrine.³ Moreover, the Convention vests equal responsibility for the upbringing of the child in both parents and requires that state parties “ensure recognition” of this right.⁴ The Convention acknowledges this doctrine in the context of the child’s specific culture and guarantees participation in their cultural right.⁵ However, what results when a country has to balance cultural right with international obligations such as the Convention? The question, then, is not simply if the child has a right to participate in culture, but whether that culture should control decisions regarding the child’s upbringing.

The conflict between custom⁶ and international obligation has been continuously confronted in South Africa and Nigeria since the imposition of English law in 1692 and 1863, respectively.⁷ What has since transpired has been called a “malicious legal transplant,” which forced South Africans and Nigerians to submit to unbending and foreign legal systems.⁸ Upon independence, both countries were faced with a seemingly impossible task: creating a constitution that reflected their history and culture while reconciling a foreign legal system

¹ Convention on the Rights of the Child art. 3(1), Nov. 20, 1989, 1577 U.N.T.S. 150 [hereinafter Convention on the Rights of the Child].

² The phrase “best interests” is mentioned eight times throughout the Convention. *See id.* art. 3(1), 9(1), 9(3), 18(1), 20(1), 21, 37(c), 40(2)(b)(iii); *see also* Dominic McGoldrick, *The United Nations Convention on the Rights of the Child*, 5 INT’L J. L. & FAM. 132, 135 (1991) (“Article 3 of the Convention is of fundamental importance to the whole Convention because it contains the general standard which underpins the application of the rights guaranteed.”).

³ Convention on the Rights of the Child, *supra* note 1, art. 4.

⁴ *Id.* art. 18.

⁵ *Id.* art. 30.

⁶ It should be emphasized that when law is referred to as “custom” it is not a uniform set of laws throughout each respective country. Instead, custom is regional and dependent on the specific communal group. *See* EA Taiwo, *Repugnancy Clause and Its Impact on Customary Law: Comparing the South African and Nigerian Positions – Some Lessons for Nigeria*, 34 J. JURID. SCI. 89, 92 (2009).

⁷ *History*, GOV’T COMM’N & INFO. SYS., 2 (2020), <https://www.gcis.gov.za/official-guide-south-africa-202021> [hereinafter *History of South Africa*]; Bethel Uweru, *Repugnancy Doctrine and Customary Law in Nigeria: A Positive Aspect of British Colonialism*, 2 AFRICAN RSCH. REV. 286, 286–87 (2008).

⁸ Anthony C. Diala & Bethsheba Kangwa, *Rethinking the Interface between Customary Law and Constitutionalism in Sub-Saharan Africa*, 52 DE JURE L. J. 189, 190 (2019).

that lacked trust.⁹ The result is a dual legal system characterized by conflicting provisions and inconsistency between state courts and traditional customary courts.¹⁰

One area of the law that has seen disparate outcomes between customary and state court cases is child custody. Where custom dictates, the mother finds herself secondary to the child's father.¹¹ Statistical evidence from Nigeria shows overwhelming preference for granting the father custody of the child in divorce cases with custody going to the mother often only temporarily.¹² This is in spite of eighty percent of the custody cases being filed by the mother of the child,¹³ and the reason for divorce being paternal neglect.¹⁴ Patriarchal preference takes priority over western child custody perspectives.¹⁵ This preference can result in extreme outcomes described as giving "the father [an] absolute right to the custody of his legitimate or legitimated child."¹⁶ Even at the father's death, custody may not transfer to the mother, as "the male head of the father's family is vested with the right although the day-to-day care of the children may be the responsibility of the mother."¹⁷ South Africa has recently seen a clarifying initiative¹⁸ that would require child custody cases to be heard by the state court

⁹ See *infra* Part II(B) for discussion on the Nigerian constitutional integrations of statutory and customary law and *infra* Part III(B) for discussion on the South African integration of customary and statutory law.

¹⁰ See also Anthony C. Diala, *A Butterfly that Thinks Itself a Bird: The Identity of Customary Courts in Nigeria*, 51 J. LEGAL PLURALISM & UNOFFICIAL L. 381, 382 (2019) ("As a concept, legal pluralism has fascinated scholars since problems began arising from the colonial transplantation of relatively industrial European laws into agrarian African societies.").

¹¹ Loretta Favour Chizomam Ntoimo & Favour Chukwunonyerem Ntoimo, *Who Owns a Child? Conflict of Culture and Human Right in the Dissolution of Customary Law Marriage in Nigeria*, 62 J. DIVORCE & REMARRIAGE 398, 404 (2021).

¹² *Id.* at 404–05 ("Joint custody was granted in five cases, but in four of the five cases the custody of the child who is awarded to the woman was temporary because the said child is either underage or the man has no income.").

¹³ *Id.* at 405–06.

¹⁴ *Id.* at 407.

¹⁵ For example, in a study taken from an Indiana family court of 110 divorce cases, all of which involved custody of minor children, in half of the cases, the judge granted joint custody to both parents. Margaret Ryznar, *The Empirics of Child Custody*, 65 CLEV. STATE L. REV. 211, 226 (2017). In over half of the cases, the court gave primary custody to the mother. *Id.*

¹⁶ Hon. Justice Folashade O. Aguda-Taiwo, President of the Customary Court of Appeal: Ondo State, Guardianship and Custody of Children: A Customary Perspective (Mar. 11, 2019) (delivered at the Refresher Course for Judges and Kadis).

¹⁷ *Id.*

¹⁸ Current South African law is unclear on whether a customary court can hear custody cases. Compare Children's Act 38 of 2005 § 21(b)(i) (S. Afr.), with Recognition of Customary Marriages Act 120 of 1998 § 8(5) (S. Afr.).

rather than customary courts.¹⁹ Empirical research shows that positive legislation to combat sex-based discrimination is often effective in the face of differing customary laws.²⁰ However, gaining access to the courts remains a prevalent issue within traditional South African communities.²¹

South Africa and Nigeria have pledged themselves to various human rights treaties imposing positive obligations to combat discrimination in whatever form it takes.²² Despite this pledge, sex-based discrimination remains prevalent throughout customary courts, conflicting with human rights and equality without resolve.²³

This Comment will analyze the impact that a dual legal system has on family law matters, particularly divorce and child custody cases in traditional Nigerian and South African customary courts. Part I analyzes major international treaties both Nigeria and South Africa have ratified on topics such as children and women's rights, which require both countries to actively combat sex-based discrimination and effectuate the best interests of the child doctrine. Part II focuses on Nigeria by first briefly analyzing issues of colonization and the eventual independence of Nigeria. The section further analyzes the integration of customary law into Nigeria's constitution and prevalent issues in Nigerian family law matters. Part II concludes with statistical evidence showing the disparate treatment of women in child custody cases.

Part III focuses on South Africa, with an introductory comment on colonization and the country's dual legal system. Part III continues with an analysis of current reforms and legislation affecting family law matters, noting the issues that still prevail within customary family law. This section concludes by analyzing statistical and case law evidence providing examples of how a state court in South Africa would apply the Best Interests of the Child Doctrine to a custody case. Part IV concludes this Comment by noting the potential for reform

¹⁹ See generally The Traditional Courts Bill 2017 § 1(1) (S. Afr.). The Traditional Courts Bill defines a traditional [customary] court to mean "a customary institution or structure, which is constituted and functions in terms of customary law, for the purposes of resolving disputes, in accordance with constitutional imperatives and this act." *Id.* § 1.

²⁰ Fatima Osman, *The Consequences of the Statutory Regulation of Customary Law: An Examination of the South African Customary Law of Succession and Marriage*, 22 POTCHEFSTROOM ELEC. L. J. 1, 6 (2019).

²¹ *Id.* at 5.

²² See generally Convention on the Rights of the Child, *supra* note 1; Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, July 11, 2003, <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-women-africa> [hereinafter Maputo Protocol].

²³ Muna Ndulo, *African Customary Law, Customs, and Women's Rights*, 18 IND. J. GLOB. LEGAL STUD. 87, 89 (2011).

in South African courts with the implementation of the Traditional Courts Bill, and how Nigeria could similarly apply such a provision.

I. THE PRESENT STATE OF CUSTOMARY LAW AND THE CHALLENGES THIS IMPOSES ON FAMILY LAW

This section introduces two significant international treaties signed by Nigeria and South Africa. Part A begins by introducing the drafting history of the two international treaties: the Convention and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. Subsection one focuses on the Convention, including the use of the Best Interests of the Child Doctrine and how the doctrine should be implemented according to the Convention. Subsection two then considers the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa for a regional perspective on women's rights.

A. *Governing International Legal Treaties*

Two predominant international treaties govern the rights of the child and the equal protection of women: the Convention and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.²⁴ Both South Africa and Nigeria are parties to these treaties.²⁵

The 1959 Declaration on the Rights of the Child introduced an initial and non-comprehensive document on the rights of children into the international conscience, which sparked the need for an all-encompassing treaty.²⁶ Thus, the drafting process of the Convention on the Rights of the Child began in 1979 with an initial draft procured by the Government of Poland.²⁷ Before the Convention's adoption, the rights of children had been discussed as a part of smaller humanitarian treaties; however, as injustices towards children became more prominent in the discussion of human rights, it became clear that an

²⁴ Convention on the Rights of the Child, *supra* note 1; Maputo Protocol, *supra* note 22.

²⁵ See *Status of Treaties: Convention on the Rights of the Child*, U.N. TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&clang=_en (last visited Feb. 18, 2023); Maputo Protocol, *supra* note 22, at 24.

²⁶ Felicia Anyogu & Chinazor Queen Umeobika, *Children's Rights and Current Trends in Child Protection in Africa*, 2 INT'L REV. L. & JURIS. 47, 48 (2020).

²⁷ *Background to the Convention: Committee on the Rights of the Child*, OFF. U.N. HIGH COMM'R HUM. RTS., <https://www.ohchr.org/en/treaty-bodies/crc/background-convention> (last visited Feb. 19, 2023) [hereinafter *Background to the Convention*]. However, recognition and debate over the need for an international treaty defining the individual rights of children began as early as 1924 with the League of Nations. *Id.*

international treaty was needed to further develop the standard of rights afforded to children.²⁸ Specific to the region of Africa, the Soweto Massacre gained international attention and is cited as the beginning of a children's rights movement in Africa.²⁹ At its conclusion, the Convention highlights four general principles including (1) non-discrimination, (2) the best interests of the child, (3) the right to life, survival and development, and (4) the views of the child.³⁰ Today, 196 countries are parties to the Convention, making it the "most widely ratified Convention."³¹

Regionally, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, otherwise known as the Maputo Protocol of 2003, entered into force on November 25, 2005.³² Drafting for the Maputo Protocol began in March of 1995 and it was formally adopted in Maputo, Mozambique on July 11, 2003.³³ The Maputo Protocol is praised for its acknowledgement of women's rights in Africa while recognizing that aspects of custom can have a positive role in women's lives.³⁴ Furthermore, the Maputo Protocol requires that ratifying countries submit reports every two years detailing the positive steps taken to preserve the Maputo Protocol.³⁵ This creates a state-level obligation to readily combat instances of discrimination.³⁶

1. *Convention on the Rights of the Child*

One of the fundamental principles embodied in the Convention is "the right to have [the child's] best interests assessed and taken into account as a primary

²⁸ *Id.*

²⁹ Beginning on June 16, 1976, the Soweto Massacre or Soweto Student Uprising involved anywhere from 3,000 to 10,000 students who protested the Apartheid government and the lack of adequate schooling as promulgated by the Bantu Education Act. *The June 16 Soweto Youth Uprising*, S. AFR. HIST. ONLINE, <https://www.sahistory.org.za/article/june-16-soweto-youth-uprising> (last visited Feb. 19, 2023). The march sparked national outrage against the Apartheid government as students were brutally confronted by police force. *Id.* The aftermath was horrific and the exact number of students who were killed is estimated to be 176, but that number is unreliable as the police attempted to cover up the number of students killed. *June 16, 1976: Soweto Uprising*, ZIN EDUC. PROJECT, <https://www.zinnedproject.org/news/tdih/soweto-uprising/> (last visited Feb. 18, 2023); see also Anyogu & Umeobika, *supra* note 26, at 47 ("The Soweto Massacre of children indeed created the awareness of the plight of children not only in Africa but in many parts of the world.").

³⁰ *Background to the Convention*, *supra* note 27.

³¹ *Id.*; Anyogu & Umeobika, *supra* note 26, at 48.

³² Maputo Protocol, *supra* note 22.

³³ *Id.*

³⁴ *Women's Rights in South Africa*, OFF. U.N. HIGH COMM'R HUM. RTS., https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WRGS/WomensRightsinAfrica_singlepages.pdf (last visited Feb. 19, 2023).

³⁵ *Id.*

³⁶ *Id.*

consideration in all actions or decisions that concern [them].”³⁷ This is proficiently stated in Article 3 which dictates that in “all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”³⁸ General comment No. 14 by the United Nations Committee on the Rights of the Child (the “Committee”) describes the right as a “dynamic concept that requires an assessment appropriate to the specific context.”³⁹

Moreover, an adult cannot dictate the definition or application of the best interests of the child under the Convention.⁴⁰ In other words, the adult cannot impose their own ideals or understandings of what is best for any given child, and instead the court must impose its own analysis on a case-by-case basis.⁴¹ This seems to place a heavy obligation on developing the best interests of the child standard at the state and court level, but the Convention does not develop that obligation further.⁴²

However, the Committee gives three points of guidance on the application of this doctrine in the Committee’s General comment No. 14. The first point of guidance clarifies the doctrine is a substantive one that “creates an intrinsic obligation for state parties, is directly applicable (self-executing), and can be invoked before the court.”⁴³ By noting that the doctrine is a self-executing one, courts are able to directly apply the doctrine without specific state legislation.⁴⁴ The second point of guidance provides that the doctrine is a fundamental and interpretive legal principle.⁴⁵ If an applicable piece of legislation could be subjected to multiple forms of interpretation, the guidance requires it to be interpreted in a way “which most effectively serves the child’s best interests.”⁴⁶

³⁷ U.N. Comm. Rts. Child, General comment No. 14, ¶ 1, U.N. Doc. CRC/C/GC/14, (May 29, 2013) (edited from original).

³⁸ Convention on the Rights of the Child, *supra* note 1, art. 3 ¶ 1.

³⁹ U.N. Comm. Rts. Child, *supra* note 37, ¶ 1.

⁴⁰ *Id.* ¶ 4.

⁴¹ *See id.*

⁴² *Id.* The Committee further states that “there is no hierarchy of rights in the Convention; all rights provided for therein are in the ‘child’s best interests.’” *Id.* It would seem then to imply a holistic review of the whole Convention to find what exactly are the best interests of the child. *Id.*

⁴³ *Id.* ¶ 6(a).

⁴⁴ This is particularly important to Nigeria as a signor of the treaty because the structure of Nigeria’s constitution prevents automatic application of treaties into Nigerian courts. Anyogu & Umeobika, *supra* note 26, at 48.

⁴⁵ U.N. Comm. Rts. Child, *supra* note 37, ¶ 6(b).

⁴⁶ *Id.*

The third point of guidance asserts the doctrine is a rule of procedure that requires any decision made in connection with a child to “include an evaluation of the possible impact (positive or negative) of the decision on the child.”⁴⁷ In making these decisions, the judge or administrator must explain the incorporation of the best interests of the child standard within their decision.⁴⁸ Moreover, the Committee stipulates a standard for the judicial explanation resolving that the decision-maker must explain “what has been considered to be in the child’s best interest; what criteria it is based on; and how the child’s interests have been weighed against other considerations.”⁴⁹

The Committee stresses the definition of the best interests of the child “is flexible and adaptable,”⁵⁰ and that it should be “adjusted and defined . . . according to the specific situation of the child . . . concerned, taking into consideration their personal context, situation and needs.”⁵¹ While this flexible definition vests great deference within the courts purview, its flexibility can effectuate inconsistent results.⁵² The Committee recognizes the potential for harm in the open-ended nature of the doctrine, but insists that the structure of the doctrine “allows [for] it to be responsive to the situation of individual children and to evolve knowledge about child development.”⁵³ As a remedial measure, the Committee obligates the state parties to “predict the impact of any proposed law, policy or budgetary allocation on children and the enjoyment of their rights, and child rights impact evaluation to evaluate the actual impact of the implication.”⁵⁴

The Committee also provides elements that may be considered when evaluating the best interests of the child. These include “(a) the child’s views,” “(b) the child’s identity,” “(c) preservation of the family environment and maintaining relations,” “(d) care, protection and safety of the child,” “(e) situation of vulnerability,” “(f) the child’s right to health,” and “(g) the child’s

⁴⁷ *Id.* ¶ 6(c).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* ¶ 32.

⁵¹ *Id.*

⁵² *Id.* ¶ 34. For example, one traditional leader from Eastern Cape, South Africa, notes that they primarily consider the welfare of the child when evaluating the best interests of the child. *See* CHUMA HIMONGA & ELENA MOORE, REFORM OF CUSTOMARY MARRIAGE, DIVORCE AND SUCCESSION IN SOUTH AFRICA: LIVING CUSTOMARY LAW AND SOCIAL REALITIES 186 (2015). However, another traditional leader from Limpopo, South Africa, unequivocally states that “[c]hildren belong with their father.” *Id.* at 189.

⁵³ *See id.* (“However, it may also leave room for manipulation; the concept of the child’s best interests has been abused by Governments and other State authorities to justify racist policies for example.”).

⁵⁴ U.N. Comm. Rts. Child, *supra* note 37, ¶ 35.

right to education.”⁵⁵ General comment No. 14 notes that while these factors cannot be given a definite weighing system and all factors may not be relevant at once, it is necessary for the courts to consider present and future impacts of their decisions.⁵⁶ Finally, the Committee imposes an obligation on states to develop an appropriate review for decisions concerning the well-being of the child.⁵⁷

2. *Protocol on the Rights of Women in Africa*

Specific to the region of Africa, fifty-three countries, including Nigeria and South Africa, have committed themselves to the Maputo Protocol.⁵⁸ Generally, state parties to the Maputo Protocol “shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures.”⁵⁹ Furthermore, the states shall “take corrective and positive action in those areas where discrimination against women in law and *in fact* continues to exist.”⁶⁰ Therefore, the Maputo Protocol imposes a positive action for the states to readily combat non-state discrimination.

Addressing marriage rights, Article 6 notes that state parties “shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage.”⁶¹ Additionally, “[e]very marriage shall be recorded in writing and registered in accordance with national laws, in order to be legally recognized.”⁶² The emphasis on “*every* marriage” does not make a distinction between customary and statutory marriages.⁶³ Furthermore, Article 7 regulates the dissolution of marriage and provides that state parties “shall enact appropriate legislation to ensure that women and men enjoy the same rights in case of

⁵⁵ *Id.* ¶ 52–79.

⁵⁶ *Id.* ¶ 80.

⁵⁷ *Id.* ¶ 98 (“States should establish mechanisms within their legal systems to appeal or revise decisions concerning children when a decision seems not to be in accordance with the appropriate procedure of assessing and determining the child’s or children’s best interests.”).

⁵⁸ *Maputo Protocol*, *supra* note 22, at 22.

⁵⁹ *Id.* art. 2.

⁶⁰ *Id.* art. 2(d) (emphasis added).

⁶¹ *Id.* art. 6.

⁶² *Id.* art. 6(d).

⁶³ *Id.* Nigeria requires that the marriage be registered in order to be validly celebrated under the Marriage Act. However, marriages that are not registered in accordance with that are not deemed null. Marriage Act of 2004 Cap. (218), § 33(3) (Nigeria). South Africa requires that marriages be registered in order to be legally recognized, but the South African Act does not seek to invalidate those marriages that are not registered, thus creating a gap in the validity versus legality of a marriage. Recognition of Customary Marriages Act 120 of 1998 § 9 (S. Afr.).

separation, divorce or annulment of marriage.”⁶⁴ If a divorce involves the custody of minor children, both women and men have “reciprocal” rights and obligations towards the children after separation.⁶⁵ Moreover, Article 7 dictates that the best interests of the child shall govern in cases of custody, reaffirming the doctrine’s applicability and importance as a framework in which the reality of courts in Africa should be viewed.⁶⁶

II. NIGERIA

Part II of this Comment details the incorporation of customary law within the constitutional framework established at the independence of Nigeria and the effect of this incorporation on child custody cases. The dual legal system in Nigeria and the development of the current legal system is introduced in Section A. Section B addresses Nigeria’s approach in its statutory and constitutional incorporation of customary law, followed by a discussion of the repugnancy doctrine, a prominent feature of the Nigerian incorporation of customary law, in Section C. Then, Section D provides insight into the hearing process within customary courts in Nigeria for a foundational basis of understanding its operation. Sections E and F discuss statutory provisions governing family law matters in Nigeria, and this part concludes by documenting statistical evidence on customary custody cases in Section G.

A. *A Brief History of the Development of the Nigerian Legal System*

An important perspective to consciously integrate into conversations regarding the Nigerian legal system is the impact of colonization on both the history and the people of Nigeria. Colonization is a painful part of Nigerian history and undoubtedly has created tension between the people and the law. Although this Comment does not seek to expound upon the enormities of

⁶⁴ Maputo Protocol, *supra* note 22, art. 7.

⁶⁵ *Id.*

⁶⁶ *Id.* art. 7(c) (“In any case, the interests of the children shall be given paramount importance.”). Additionally, a tangentially related treaty, the African Charter on the Rights and Welfare of the Child, broadly defined the best interests of the child and notes that is the “primary consideration.” African Charter on the Rights and Welfare of the Child art. 4, *adopted* July 1, 1990, 3 AFR. J. INT’L & COMP. L. 173 (1991) [hereinafter African Charter]. Both Nigeria and South Africa are parties to this treaty. *See List of Countries Which Have Signed, Ratified/Acceded to the African Charter on the Rights and Welfare of the Child*, AFR. UNION (Feb. 14, 2023), https://au.int/sites/default/files/treaties/36804-sl-AFRICAN_CHARTER_ON_THE_RIGHTS_AND_WELFARE_OF_THE_CHILD.pdf. However, the African Charter on the Rights and Welfare of the Child does not further elaborate on how the application of the provision of note should be applied. *See* African Charter.

colonization, it is important to briefly account for colonization and its impact on the Nigerian legal system.

It would be far from the truth to state that the legal system in Nigeria began with the formal codification of English law in 1900.⁶⁷ Pre-colonization, Nigeria was governed by customary ethnic units using “customs, practices and mores” that were orally passed down from one generation to the next.⁶⁸ Each community had jurisdiction over disputes arising from the community and applied law derived from custom and communal norms.⁶⁹ Customary law applied to the members of the tribe in the same geographical area as one another and the type of custom was specific to that tribe.⁷⁰ Nigeria is made up of over 250 ethnic groups that are further divided by “distinctive subgroups and communities,” which results in a multifaceted legal system throughout the country.⁷¹

A prominent feature of customary law is its orientation around the people it has governed, since customary African society derives from the idea of the unit rather than the individual.⁷² When decisions regarding an individual are made, community values are always emphasized in the resolution of the dispute and the impact of such dispute is felt by the community at large.⁷³ Therefore, the theme of the law reflects restorative justice where “parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications in the future.”⁷⁴ This provides for emphasis on the “welfare of the community” as the resolution of the dispute.⁷⁵

⁶⁷ Derek Asiedu-Akrofi, *Judicial Recognition and Adoption of Customary Law in Nigeria*, 37 AM. J. COMP. L. 571, 571 (1989) (“The common law, the doctrines of equity, and the statutes of general application which were in force in England as at January 1, 1900, shall be in force within the jurisdiction of the court.”); see Diala, *supra* note 10, at 384–385 (“Prior to colonial rule, indigenous law enjoyed a legal monopoly in Nigeria, with its dominance challenged only by Islamic Law, which overwhelmed northern Nigeria in the early 19th century.”).

⁶⁸ Asiedu-Akrofi, *supra* note 67, at 572.

⁶⁹ Lisa Owino, *Application of African Customary Law: Tracing Its Degradation and Analysing the Challenges It Confronts*, 1 STRATHMORE L. REV. 143, 143 (2016).

⁷⁰ *Id.*

⁷¹ Abdulumuni A. Oba, *Religious and Customary Laws in Nigeria*, 25 EMORY INT’L L. REV. 881, 881 (2011). *But see* Uweru, *supra* note 7, at 286 (noting that at the time of British colonization, there were 350 groups, including Islamic groups).

⁷² Owino, *supra* note 71, at 144 (“It was fundamental as people did not exist as individuals but more as part of a community.”).

⁷³ *See id.* For example, in Kenya, “the Kikuyu community granted rights of use of land to individuals according to their need whether the grantee had a right to control that land or not.” *Id.* A further example is that of the Xhosa community in South Africa and the community’s belief in “ubuntu” which translates to “I am because we are.” *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

During the implementation of English rule, the attitude of the colonizers towards customary law was less than accepting. Defined as “malicious legal transplants,” English laws sought to dramatically transform and impose foreign law on the Nigerian people.⁷⁶ This unforgiving application of English law was “a comprehensive, self-replicating phenomenon, which was accompanied by radical socioeconomic changes that irrevocably affected the education, philosophy, religion, work, food, and dressing of Africans.”⁷⁷ Furthermore, customary law was orally communicated, but English law was statutorily codified and “applied within the contest of a cultural set up that was alien to Nigeria.”⁷⁸

Thus, the conflict between the people and the statutorily imposed law can be readily discerned. At its most basic, the root of the problem stems from the fact that a person is “unlikely to accept all the social norms wholeheartedly if the society itself and the people with whom [they come] into contact do not [agree] about the norms that are being transmitted.”⁷⁹ If law is “a product of human needs and aspirations, which emerges in a social contest characterized by dynamism – that is an ability to respond to changing needs and situations,” the sharp contrasts and quick application of English law to the Nigerian people result in a lack of acceptance of English law.⁸⁰ When Nigeria gained its independence in 1960, it became critical for the new legal system to respond to the will of the people.

B. The Constitution and Statutory Incorporations of Customary Law

The Constitution of the Federal Republic of Nigeria was established in 1999.⁸¹ The Constitution established itself as the supreme law of the land and declared that any inconsistencies shall be void.⁸² It vests its legislative powers in a National Assembly for the Federation consisting of both a Senate and a House of Representatives.⁸³ Nigeria has a federal system, but does not address

⁷⁶ Diala & Kangwa, *supra* note 8, at 190 (citation omitted).

⁷⁷ *Id.*

⁷⁸ Cali Ojimba, *The Place of Customary Law in Nigeria's Contemporary Jurisprudence*, 1, 8 (June 22, 2021), <https://ssrn.com/abstract=3865206>. The essence of the distinction and its impact on Nigeria is the rigidity of the English law. Customary law is highly deferential depending on the region and is based on community values. T.W. Bennett & T. Vermeulen, *Codification of Customary Law*, 24 J. AFR. L. 206, 214 (1980). Thus, applying an invariable set of laws is a foreign structure for customary communities. *See also id.*

⁷⁹ Uweru, *supra* note 7, at 288.

⁸⁰ Diala & Kangwa, *supra* note 8, at 194.

⁸¹ CONSTITUTION OF NIGERIA (1999).

⁸² *Id.* § 1(3).

⁸³ *Id.* § 4.

the integration and interaction between customary law and English statutory law in the Constitution itself.⁸⁴ The system designed by the Constitution supports the dual legal system in the lower courts, but fails to integrate the courts at the appellate level.⁸⁵ Furthermore, the Constitution addresses the courts of Nigeria, including the Supreme Court of Nigeria, the Court of Appeal, the Federal High Court, and the Customary Court of Appeal of a State.⁸⁶ Although the Constitution does not specifically name local customary courts, it provides that the list of courts is not definite and that “such other courts as may be authorize[d] by law” are allowed to be created at the local levels.⁸⁷ While these courts may be diverse and plentiful at the local levels, they must be “integrated at the appellate level.”⁸⁸

The structure of the court system in Nigeria has led to a plural legal system.⁸⁹ This plural legal system is especially complex in Nigeria and takes on three distinct forms. First, “legal pluralism aris[es] from the multifarious legal traditions or legal cultures in the country,”⁹⁰ resulting in three different legal systems: English-imposed statutory law, customary law, and Islamic law.⁹¹ Second, the country has a federal system where the “state and legislative governments share legislative power.”⁹² This further complicates discerning the law alongside regional customary law and results in “differences between federal and state laws as well as differences among the individual states’ laws.”⁹³ An example of this can be seen in the laws governing marriages, as state law will govern customary marriages and federal law will govern statutory marriages.⁹⁴ Lastly, colonialism has impacted the way laws developed in the country, because under colonial rule, the country was administrated through

⁸⁴ E.S. Nwauche, *The Constitutional Challenge of the Integration and Interaction of Customary and the Received English Common Law in Nigeria and Ghana*, 25 TUL. EUR. & CIV. L. F. 37, 38 (2010); see also CONSTITUTION OF NIGERIA (1999), § 14(3) (“The composition of the Government of the Federation or any of its agencies and the conduct of its affairs shall be carried out in such a manner as to reflect the federal character of Nigeria . . .”).

⁸⁵ Nwauche, *supra* note 84, at 39.

⁸⁶ CONSTITUTION OF NIGERIA (1999), § 6(5)(a)-(k).

⁸⁷ *Id.* § 6(5)(j)-(k).

⁸⁸ Nwauche, *supra* note 84, at 39.

⁸⁹ A plural legal system is defined as one “in which two or more legal systems coexist in the same social field.” S. E. Merry, *Legal Pluralism*, 22 L. & SOC’Y REV. 869, 870 (1988). This is important in defining the cultural and legal context in Nigeria where two legal systems operate in parallel. See *generally id.*

⁹⁰ Oba, *supra* note 71, at 882.

⁹¹ *Id.*

⁹² *Id.* at 883.

⁹³ *Id.*

⁹⁴ *Id.*

three regional factions.⁹⁵ Beginning in 1967, Nigeria subsequently created thirty-six states, but the current statutory law is still reflective of the initial regional administration.⁹⁶

The Constitution of the Federal Republic of Nigeria is heavily criticized.⁹⁷ First, the Constitution bans discrimination by state actors, but fails to remedy discrimination by non-state actors, “leaving no form of redress where discrimination is meted out by non-state actors.”⁹⁸ Upon examining the Constitution, it continues to note that discrimination shall not be practiced under the law but fails to mention reforms outside of the law.⁹⁹ Additionally, there are still sex-based discriminatory provisions specifically mentioned in the Constitution. Section 26(2) discriminates based on citizenship in that “a woman who is or has been married to a citizen of Nigeria may be registered as a citizen of Nigeria but is silent as to whether a woman married to a foreign national can confer Nigerian nationality on her foreign husband.”¹⁰⁰

In terms of customary law specifically, Nigeria’s Evidence Act of 2011 makes evidence of custom a question of fact, not a question of law, in judicial proceedings.¹⁰¹ This raises several difficulties in its application. First, because evidence of custom is often difficult to prove or obtain, it can distort the law because judges are trying to apply rules that may not be clearly articulated.¹⁰² This culminates in a disconnect between the law and the people it governs because the law is not truly reflective of custom.¹⁰³ Additionally, judges at the trial level are given substantial discretion in the application and interpretation of

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ See, e.g., Sope Williams, *Nigeria, Its Women and International Law: Beyond Rhetoric*, 4 HUM. RTS. L. REV. 229, 236 (2004).

⁹⁸ *Id.*

⁹⁹ See CONSTITUTION OF NIGERIA (1999), § 17(2)(a) (“Every citizen shall have equality of rights, obligations and opportunities before the law.”). Section 24 of the Constitution may provide some basis for refuting this point, but does not provide an adequate redress, and instead just states a “duty” of the citizens to “respect the dignity of other citizens and the rights and legitimate interests of others and live in unity and harmony in the spirit of common brotherhood.” *Id.* § 24.

¹⁰⁰ Williams, *supra* note 97, at 237 (“A woman is thus unable to confer Nigerian citizenship on her foreign husband, and this provision exists despite the fact that such provisions have been recognized and abrogated as discriminatory in other parts of the world.”); see CONSTITUTION OF NIGERIA (1999), § 26(2).

¹⁰¹ The Evidence Act (2011), § 16(1) (“A custom may be adopted as part of the law governing a particular set of circumstances if it can be judicially noticed or can be proved to exist by evidence.”). *Id.* § 18(1) (“Where a custom cannot be established as one judicially noticed, it shall be proved as fact.”).

¹⁰² Nwauche, *supra* note 84, at 43.

¹⁰³ See *id.* (“Thus the interpretation and conclusion of a judicial officer from the evidence of a customary law may significantly differ from the customary law practiced by people.”).

customary law.¹⁰⁴ These impediments lead to inconsistency and instability within customary law's application in courts.

C. *The Repugnancy Doctrine*

The repugnancy doctrine is a distinguishing feature of Nigeria's law in terms of the integration of customary and statutory law. There is an extensive divide in scholarship over whether the repugnancy doctrine has benefited Nigerians or destroyed part of their culture by strictly imposing English law.¹⁰⁵ The doctrine first emerged in Nigerian courts in *Eshugbaye Eleko v. Nigeria*, where the judge stated "[t]he court cannot itself transform a barbarous custom into a milder one. . . it must be rejected as repugnant to natural justice, equity and good conscience."¹⁰⁶ Therefore, customary law can be enforced in the High Courts of Nigeria if (1) "the customary law is not repugnant to natural justice, equity and good conscience," and (2) the customary law does not conflict with any current statutory provision.¹⁰⁷ This imposes a strict, but highly subjective, application of customary law.

The repugnancy doctrine has been heavily critiqued¹⁰⁸ by those who note that the doctrine was imposed during colonization and forced Nigerians to comply with Western morals and values. This created a tension between the people and their law, as the law was seen as enforcing foreign values.¹⁰⁹ However, some scholars point to the repugnancy doctrine as a justifiable constraint for those being harmed by particularly harsh traditions still practiced.¹¹⁰ For example, in *Mojekwu v. Ejikemi*, the court employed the repugnancy doctrine to declare a Nrachi custom unequitable, because the custom allowed a father to "keep one of his daughters perpetually unmarried" so that she may raise male successors for her father.¹¹¹

¹⁰⁴ *Id.* Additionally, the judges at the trial level may not be sufficiently competent in customary law to discern the regional practice. This leads to further distortion and frustration of the law. *See id.* at 44.

¹⁰⁵ *See generally* Uweru, *supra* note 7. *But see* Ojimba, *supra* note 78, at 1.

¹⁰⁶ Uweru, *supra* note 7, at 292 (citations omitted) (internal quotations omitted).

¹⁰⁷ Uweru, *supra* note 7, at 293. The repugnancy doctrine is consistent with Section 36 of the Nigerian Constitution. CONSTITUTION OF NIGERIA (1999), § 36(1)-(2); *see* Uweru, *supra* note 7, at 294 ("The logic here is that a good custom or law must conform to the universal concept of what is 'good, just and fair' and this is consistent with Section 36(1) of the 1999 Nigerian Constitution.").

¹⁰⁸ *See* Ojimba, *supra* note 78, at 8 ("The English legal system which was imposed to Nigeria was written and applied within the contest of a cultural set-up that was alien to Nigeria.").

¹⁰⁹ *See id.* ("The repugnancy doctrine excluded several of [their] cultural law practice which Britain did not see as representing modern civilization.").

¹¹⁰ Uweru, *supra* note 7, at 295.

¹¹¹ *Mojekwu v. Ejikeme* [2000] 5 NWLR 402 (Nigeria).

However, the repugnancy doctrine has not been able to effectively remedy sex-based discriminatory practices that remain. In *Mojekwu v. Iwuchukwu*, the Supreme Court of Nigeria held that the Oli-ekpe custom, which allows the brother of the deceased to inherit property to the exclusion of the deceased's daughters, was not invalid under the repugnancy doctrine.¹¹² The Supreme Court cautioned against the invalidity of all customs which may dictate roles for women including those customs "which do not permit women to be natural rulers or family heads."¹¹³ The Supreme Court's decision in *Mojekwu v. Iwuchukwu* has been extensively critiqued as an impediment to women's rights in customary communities.¹¹⁴ Furthermore, this presents a question of the role of international treaties in the face of conflicting customary practices, as well as the precision of the repugnancy doctrine in overruling instances of sex-based discrimination.¹¹⁵

D. Customary Courts: Operations

For a customary court to be able to hear a case, it must have proper jurisdiction. In *Madukolu & Ors v. Nkemdilim*, the Supreme Court of Nigeria describes the competence of a court as (1) "property constituted as regards numbers and qualification of the members of the bench," (2) the "subject matter of the case is within its jurisdiction," and (3) "initiated by due process of law."¹¹⁶ Jurisdiction must exist as the case is presented and throughout the arguments heard before the court.¹¹⁷

In order for a complaint to be heard by a customary court, "every civil cause of matter shall be commenced by a summons."¹¹⁸ Next, the applicant must pay

¹¹² See I. N. Eme Worugji & R. O. Ugbe, *Judicial Protection of Women's Rights in Nigeria: The Regrettable Decision in Mojekwu v. Iwuchukwu*, 16 U. BOTSWANA L. J. 59, 59 (2013).

¹¹³ *Id.*

¹¹⁴ Taiwo notes the "chilling effect" this decision could have on future court decisions involving human rights treaties and customary laws because courts may not be as eager to overrule customs that violate human rights norms after this decision. Taiwo, *supra* note 6, at 107.

¹¹⁵ As Taiwo notes, South Africa's constitutional incorporation of customary law does not raise this concern because their constitution subjects customary law to their Bill of Rights directly. *Id.*; S. AFR. CONST., 1996 § 31(2).

¹¹⁶ Hon. Justice S.H. Makeri, President, Customary Ct. of Appeal, Kaduna State, *Jurisdictional Issues in the Application of Customary Law in Nigeria* 9 (Nov. 5–9, 2007) (transcript available at <http://www.nigerianlawguru.com/articles/customary%20law%20and%20procedure/JURISDICTIONAL%20ISSUES%20IN%20THE%20APPLICATION%20OF%20CUSTOMARY%20LAW%20IN%20NIGERIA.pdf>) (citation omitted) (internal quotations omitted).

¹¹⁷ *See id.*

¹¹⁸ Hon. Justice Joseph Otabor Olubor, President, Customary Ct. of Appeal, Benin City, Edo State, *Customary Laws, Practice and Procedure in the Area/Customary Court, and the Customary Court of Appeal*, at

the “necessary fees” in order to file the summons.¹¹⁹ The court then serves process on the person against whom the claim is being made.¹²⁰ Service of process can be satisfied by physically servicing the document on the recipient or even by substituted service.¹²¹ However, service is an essential component in commencing a case in the customary courts.¹²²

The dual nature of the court system in Nigeria presents a complicated aspect to jurisdiction because multiple courts may confer jurisdiction over the subject matter of a case. Initially, courts will look to the subject matter of the case in order to determine whether jurisdiction exists.¹²³ Each judicial division may appropriate jurisdictional power in different ways, but generally the subject matter jurisdiction of customary courts is broad.¹²⁴ For example, under the First Schedule to the Customary Courts Law promulgated in 2001 by the Kaduna State,¹²⁵ the category of “Guardianship and Custody of Children under Customary Law” gives the customary courts unlimited jurisdiction in this area.¹²⁶ Therefore, where the initial applicant chooses to initiate the case is crucial; once the customary court hears the case, “[n]o proceedings in the Customary Courts and no summons, warrants, process or order issued or made thereby shall be varied or declared void upon appeal solely by reason of any defect in procedure or want of form.”¹²⁷

Appeals will be heard in the Customary Court of Appeal established under the 1999 Constitution.¹²⁸ The 1999 Constitution grants the Customary Court of Appeal “appellate and supervisory jurisdiction in civil proceedings involving questions of Customary law.”¹²⁹ The Edo State Customary Court originally held

6. A summons must be applied for and can be in the form of a written or oral request. *Id.* If the applicant is making an oral request, “it is the duty of the clerk to prepare the summons on behalf of the complainant, and the complaints are duly reflected in the summons.” *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ Hon. Justice Joseph Otabor Olubor, *supra* note 118, at 6.

¹²² *Id.* (“The court shall not proceed to adjudicate upon any cause or matter which depends upon any process or other document having been served unless service is admitted by the person concerned or proved or deemed to have been effected.”).

¹²³ See Hon. Justice S.H. Makeri, *supra* note 116.

¹²⁴ See Hon. Justice Joseph Otabor Olubor, *supra* note 118, at 1 (“Each area and customary court has its law and rules governing its practice and procedure.”).

¹²⁵ Kaduna is a state located in northern Nigeria. See generally KADUNA STATE GOVERNMENT, <https://kds.gov.ng/> (last visited May 27, 2022).

¹²⁶ Hon. Justice S.H. Makeri, *supra* note 116, at 10 (citation omitted).

¹²⁷ See *id.* at 11 (citation omitted).

¹²⁸ CONSTITUTION OF NIGERIA (1999), § 280.

¹²⁹ *Id.* § 282.

in *Osaretin Aimuaenmwosa v. Madam Edowaye Joshua* that the “determining factor” in deciding whether a Customary Court of Appeal has jurisdiction over a case is if the lower customary court case “raised any issue involving questions of customary law.”¹³⁰ However, the Supreme Court limited the Customary Court of Appeal jurisdiction in this matter and held that the determining factor in what type of court will hear an appeal is not the subject matter of the underlying case but “the issue(s) raised in the grounds of appeal.”¹³¹ Judges sitting on the Customary Courts of Appeal “should decide all matters according to substantial justice without undue regard to technicalities.”¹³²

E. Marriage and Divorce under Nigerian Law

Entrance into marriage under Nigerian law is primarily governed by the Marriage Act of 2004.¹³³ The Marriage Act first provides that all marriages must be registered in order to be recognized legally, but does not invalidate marriages conferred in accordance with customary law.¹³⁴ Moreover, the Marriage Act aims to prevent polygamy as a matter of law in relation to customary law.¹³⁵ However, it does not bar a couple, who are first married under customary law, to then confirm their marriage statutorily.¹³⁶ The Marriage Act also provides that if either party to a potential marriage is under the age of twenty-one, they must have written consent.¹³⁷ But the consent must be from the father, not the mother, which shows the flawed provisions of the Act that still enforce discriminatory treatment towards mothers.¹³⁸

¹³⁰ Hon. Justice Joseph Otabor Olubor, *supra* note 118, at 7.

¹³¹ *Id.* at 7–8. Appeals must be filed within thirty days of a final decision or fourteen days after an interlocutory decision and appeal notices will be served on all relevant parties. *Id.* at 9.

¹³² *Id.* at 11.

¹³³ Marriage Act of 2004 Cap. (218) (Nigeria).

¹³⁴ *Id.* § 30(1), § 35.

¹³⁵ *Id.* § 33(1) (“No marriage in Nigeria shall be valid where either of the parties thereto, at the time of celebration of such marriage, is married under customary law to any person other than the person with whom such marriage is had.”). In comparison, the South African legislature explicitly recognizes polygamous marriages to not discriminate against these customary marriages and prevent registration of the marriages under the state. *See* Recognition of Customary Marriages Act 120 of 1998 (S. Afr.).

¹³⁶ *But see* Marriage Act of 2004 § 35 (Nigeria) (“Any person who is married under this act . . . shall be incapable, during the continuance of such marriage, of contracting a valid marriage under Customary Law.”). So, while a couple who is first married under customary law may then contract a statutory marriage, the reverse is not equally true.

¹³⁷ *Id.* § 18.

¹³⁸ Marriage Act of 2004 § 18 (Nigeria) (“If either party of an intended marriage . . . is under twenty-one years of age, the written consent of the father, or if he be dead or of unsound mind or absent from Nigeria, of the mother.”); *see* Williams, *supra* note 97, at 239 (“The Marriage Act provides that written consent is necessary where either party to an intended marriage is under 21 years. However, this consent must be from the father: a mother’s consent is only acceptable if the father is dead or of unsound mind.”).

Dissolution of a marriage is governed primarily by the Matrimonial Causes Act.¹³⁹ The Matrimonial Causes Act holds that dissolution of a marriage may only be granted if the court determines that the “marriage has broken down irretrievably.”¹⁴⁰ The act then lists eight different ways of satisfying the “broken down irretrievably” requirement including desertion, separation, and behavior of one spouse.¹⁴¹ Interestingly, the Act grants jurisdiction to only the High Courts for a divorce of any kind.¹⁴² This seemingly grants only the High Courts the ability to legally dissolve a customary marriage, although customary marriages are not mentioned within the granting of jurisdiction.¹⁴³ Moreover, later provisions in the Act specifically disallow the Matrimonial Causes Act to apply to aspects of customary marriages, including the custody of children.¹⁴⁴ The specific mentioning of customary marriages in one portion, while failing to acknowledge them in another, has led to the continuance of dissolution of customary marriages within customary courts.

Under Nigerian law, a significant aspect of customary marriage is that it need not go through the court system in order to be customarily dissolved.¹⁴⁵ This creates an informal process of dissolution where the couple, along with their families, can mutually agree to divorce and be granted a divorce without ever reaching the court.¹⁴⁶ The families may intervene to decide whether the bride-price¹⁴⁷ will need to be repaid and other consequences of the dissolution.¹⁴⁸ The informality creates the potential for unilateral dissolution of the marriage through forcefully evicting the wife from the home or by one spouse abandoning

¹³⁹ See generally Matrimonial Causes Act (1990) Cap. (220) (Nigeria).

¹⁴⁰ *Id.* § 15(1).

¹⁴¹ *Id.* § 15(2). Behavior of the spouse is then defined in the following section to include committing of rape by one spouse, conviction of murder, attempt of murdering the other spouse, or alcoholism. *Id.* § 16.

¹⁴² *Id.* § 2(1).

¹⁴³ *Id.* § 2.

¹⁴⁴ *Id.* § 69 (“In this Part of this Act- ‘marriage’ . . . does not include one entered into according to Muslim rites or other customary law.”).

¹⁴⁵ Mary-Ann Ajayi, *The Dissolution of Customary Law Marriage in Nigeria and Intestate Inheritance: A Review of the Supreme Court Decision in Okonkwo v. Ezeaku*, 6(1) BILD L. J. 89, 94 (2021) (“There are two modes through which a customary law marriage may be dissolved. It could be through non-judicial divorce or by an order of a competent customary court.”).

¹⁴⁶ *Id.* at 94.

¹⁴⁷ *Id.* at 95 (“The refund of the bride price, is an integral element for non-judicial dissolution of customary marriage.”).

¹⁴⁸ *Id.* at 94.

the other.¹⁴⁹ The head of the family would then likely proceed to arrange the separation of the couple.¹⁵⁰

Alternatively, the couple may choose to initiate the divorce process within a competent customary court.¹⁵¹ Resort to customary courts usually occurs if non-judicial dissolution processes have failed or the couple cannot reach a result on their own.¹⁵² The judicial initiation would then vest the customary court with the authority to decide both the amount of the bride-price that should be refunded and the custody of children if there are children involved.¹⁵³

F. *Child Custody in Nigeria and Best Interests of the Child*

The Constitution of the Federal Republic of Nigeria “imposes a non-actionable obligation on the Nigerian Government to ensure that children are adequately protected from exploitation, as well as moral and material neglect.”¹⁵⁴ Because of Nigeria’s pluralistic legal system, in order for a marriage to be governed by customary law and the customary courts, the marriage must have a ceremonial component and the bride price must have been paid.¹⁵⁵ Once a marriage becomes governed by customary law, the customary court in that region has “unlimited jurisdiction” in both procedures related to the marriage itself and custody of children resulting from the customary marriage.¹⁵⁶ This creates an absolute control over customary marriages through the customary court system.

Because of the international treaties Nigeria has become a party to, the determination of custody over the children must adhere to the best interests of the child doctrine.¹⁵⁷ The doctrine is codified in the Matrimonial Causes Act; however, the Act carves out customary marriages.¹⁵⁸ Therefore, it is unclear if the Best Interests of the Child Doctrine is applicable to children of customary marriages under the Matrimonial Causes Act. Some customary courts have

¹⁴⁹ *Id.* (“For instance, a wife who is being maltreated by the husband, may runaway to her father’s house with the intention of never returning thereby bringing to an end, the marriage.”).

¹⁵⁰ *Id.*

¹⁵¹ *Id.* A competent court would include a customary or area court. *Id.* at 95.

¹⁵² *Id.* at 95.

¹⁵³ *Id.*

¹⁵⁴ Hon. Justice Folashade O. Aguda-Taiwo, *supra* note 16, at 5; see CONSTITUTION OF NIGERIA (1999) § 17(3)(f).

¹⁵⁵ Hon. Justice Folashade O. Aguda-Taiwo, *supra* note 16, at 6.

¹⁵⁶ *Id.*

¹⁵⁷ See generally Matrimonial Causes Act (1990) Cap. (220) (Nigeria).

¹⁵⁸ *Id.* § 69.

noted that, according to the Best Interests of the Child Doctrine “the interest and welfare of the children shall be of paramount consideration.”¹⁵⁹ As a result, “[t]he interests and welfare of the child. . . takes precedence over any law or custom that might confer custody of the child on anybody.”¹⁶⁰ Some of the factors that may be considered in statutory courts include:

an emotional attachment to a particular parent; the degree of familiarity and wishes of the child; adequacy of facilities . . . respective income of the parties; if one of the parties lives with a third party; the age of the child; the sex of the child . . . opportunities for a proper upbringing; and conduct of the parties.¹⁶¹

Despite the codification of the best interests of the child doctrine, customary courts primarily consider the customs of the ethnic group of the child and parents.¹⁶²

As a result, when the customary courts begin to look at the custom that applies to a particular ethnic group, it creates a gap in the law where a custody decision is governed largely by patriarchal rules instead of primary considerations of the best interests of the child.¹⁶³ For instance, the belief under the majority of customary law systems is “the father has absolute right to the custody of his legitimate or legitimated child.”¹⁶⁴ This belief enforces the patriarchal order of society even upon the death of the father, as “the male head of the father’s family is vested with the right.”¹⁶⁵ Customary courts may enforce a “tender age” doctrine where the mother will be granted custody of children who are young and “in need of motherly care and affection.”¹⁶⁶ However, the tender age doctrine is limited in its enforcement because once the children are deemed to exceed this judicially prescribed “tender age,” it is common practice

¹⁵⁹ Hon. Justice Folashade O. Aguda-Taiwo, *supra* note 16, at 7.

¹⁶⁰ *Id.*

¹⁶¹ Ntoimo & Ntoimo, *supra* note 11, at 340.

¹⁶² *Id.*

¹⁶³ *See id.* at 400 (For example, in “Southwest Nigeria among the Yoruba, as in many patriarchal communities in Nigeria, women do not ‘own’ children; their sexuality is owned and controlled by the partner who pays her bride price”).

¹⁶⁴ Hon. Justice Folashade O. Aguda-Taiwo, *supra* note 16, at 7.

¹⁶⁵ *Id.* Justice Aguda-Taiwo also notes that “the day-to-day care of the children may be the responsibility of the mother,” which is an interesting concept that allows the male head of the family to stake his claim over the children but still vest the traditional caretaking role in the mother. *But see id.* (noting that the codification of the best interest of the child prevents giving custody to the father if it is not in the best interest of the child).

¹⁶⁶ *Id.* This should not be regarded as a positive step towards equality, though, because it begs the question: when will children reach an age where they are no longer in absolute need of the mother’s care? This doctrine allows too much discretion for the courts in granting custody of the children to the mother for limited circumstances.

for them to be “safely separated from their mother and returned to their father.”¹⁶⁷ This creates a dangerous practice resulting in instability for both the children and the parents.¹⁶⁸

G. *Statistical Evidence on Child Custody*

When it comes to custody decisions, a study conducted in 2017 further illustrates the pervasive and strict application of patriarchal norms in customary courts. The study sampled fifteen cases of divorce from a singular customary court in Southwest Nigeria.¹⁶⁹ It was conducted in Ekiti State which, on the surface, is depicted as a more progressive society where the “median age at first marriage for women is 21.5” and most women “are economically active and contribute substantially to household expenditure.”¹⁷⁰ Ekiti is dominated by the Yoruba ethnic group and this study utilizes customary divorce cases only from the Yoruba ethnic group.¹⁷¹ The fifteen cases that were analyzed reflect the progressive household structure that has become common in Yoruba.¹⁷² For instance, the women involved in these divorces held various jobs such as “farmers, petty traders, hairstylists, teachers (primary school), [and] civil servants.”¹⁷³

Out of the fifteen divorce cases, “[twelve] (80%) were initiated by the wife, and divorce was granted in all but two cases.”¹⁷⁴ The reasons cited for the dissolution of the marriage differed between the men and the women.¹⁷⁵ The women primarily cited “[n]eglect of wife and children’s welfare, poverty, and domestic violence,” whereas the men cited “insubordination, adultery and uncaring attitude to children and the man.”¹⁷⁶ The study notes that while courts seem to cite the best interests of the child as a consideration in the custody dispute process, “[i]n all the cases where the divorce was granted, the custody

¹⁶⁷ *Id.* at 8.

¹⁶⁸ *Id.* (citation omitted) (internal quotations omitted) (“The court granted the custody of two male children to their father in spite of the fact that the children lived with their mother for two years since the separation of their parents.”).

¹⁶⁹ Ntoimo & Ntoimo, *supra* note 11, at 401. It should be noted that from the years 2002 to 2016, only twenty-one cases of divorce were filed in this singular customary court. The study takes fifteen of those cases that have “clear and complete records” in order to conduct this study. *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 401–02.

¹⁷² *Id.*

¹⁷³ *Id.* at 402.

¹⁷⁴ *Id.* at 404.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

of the children was granted to the man, [but] when it was granted to the woman, it was temporary.”¹⁷⁷

The study also gives examples of specific cases of divorce in which the husband was granted sole custody of the children.¹⁷⁸ In many of these cases, despite the mother being the party who filed for divorce, the father was awarded custody.¹⁷⁹ Even in instances where divorce was filed on the grounds of “lack of care for the children and wife,” “desertion,” and “constant fighting,” custody was still granted solely to the father.¹⁸⁰ Custody was granted in five of the cases to both the mother and father “but in four of the five cases the custody of the child who [was] awarded to the woman was temporary because the said child is either underage or the man has no income.”¹⁸¹ These types of cases gave conditional custody to the mother and ordered the child to be returned to the father upon reaching a certain age or upon the father making a stable income.¹⁸² Out of all the cases, sole custody was granted to the mother only in one instance.¹⁸³

Throughout this study, one fact becomes clear: the treaties that Nigeria has pledged itself to are “secondary under customary law because a man ‘owns’ the child.”¹⁸⁴

III. SOUTH AFRICA

Part III of this Comment delves into South Africa’s dual legal structure and incorporation of customary law in comparison to Nigeria. The proceeding sections differentiate South Africa’s application of customary law from that of Nigeria’s as well as introduce an initiative recently promulgated within the South African legislature that could have a positive impact on consistency within child custody cases. Section A begins with a brief history of the South African legal system and the implications of this legal system within the current legal

¹⁷⁷ *Id.* This reinforces the patriarchal social norms where it is emphasized that “the man owns the children, not the woman.” *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* (“In half of the [twelve] cases where child custody was involved, sole custody of the children was given to the man.”).

¹⁸⁰ Ntoimo & Ntoimo, *supra* note 11, at 404.

¹⁸¹ *Id.* at 405.

¹⁸² *Id.* at 401. For example, Couple #6 “was a case of frequent beating and disrespect for the woman’s parents,” and custody was given to the mother for two years before the younger child would be given to the father. *Id.* The oldest child would live with the father from the instance of the divorce. *Id.*

¹⁸³ *Id.* at 405.

¹⁸⁴ *Id.* at 407.

framework. Then, Section B notes the structure of the court system in South Africa and the statutory incorporation of customary law, followed by the operation of customary courts in Section C. Statutory provisions that address family law matters are analyzed in Section D. Finally, Section E concludes by analyzing general statistical evidence on divorce rates in South Africa.

A. *A Brief History of the Development of the South African Legal System*

The South African legal system has a complex history relating back to early periods of colonization. European settlement began in 1652 with the Dutch East India Company in Cape Town.¹⁸⁵ The arrival of the British settlers took place in 1820 in modern-day Nelson Mandela Bay.¹⁸⁶ This time period was characterized by conflict between Bantu chiefdoms, resulting in the Dutch moving towards the northern front of South Africa.¹⁸⁷ In 1826, the British government appointed a “two-man commission . . . to inquire into Cape [Town] affairs reported on Cape judicial matters.”¹⁸⁸ The commission recommended that “existing Roman-Dutch principles be assimilated into English principles, that future legislation follow principles of English jurisprudence, and that English common law be adopted gradually.”¹⁸⁹ This recommendation continued to guide the legal formation of the colonial period as the “cape adopted many statutes from English law verbatim or by repromulgation.”¹⁹⁰ The end of the nineteenth century was characterized by Roman-Dutch common law, modified by English law, including English principles of constitutional law.¹⁹¹

Customary law was not formally recognized by the British during this time period, but “[the Cape] generally recognized transactions based on customary law when they were not immoral, contrary to public policy, or in conflict with Cape law.”¹⁹² At the time the Union of South Africa was formed in 1910,¹⁹³ English law had spread through the remaining territory of South Africa.¹⁹⁴ The Union of South Africa was characterized by discriminatory practices that

¹⁸⁵ *History of South Africa*, *supra* note 7, at 2.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ Lynn Berat, *Customary Law in a New South Africa: A Proposal*, 15 *FORDHAM INT'L L.J.* 92, 103 (1991).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.* at 104.

¹⁹³ *History of South Africa*, *supra* note 7, at 7. The Union of South Africa consisted of the Cape, Natal, Transvaal, and Free State. *Id.*

¹⁹⁴ Berat, *supra* note 188, at 104.

materialized into their legal system at the time.¹⁹⁵ This was effectuated by intense demonstrations of segregation to enforce ideas of “racial purity” including physically dividing the country into artificially imposed “ethnic nations,” and “forced removals from ‘white’ areas,” which had an effect on 3.5 million people.¹⁹⁶

Customary law was applied when necessary, but each region applied customary law in different ways with some applying a form of the repugnancy doctrine and others applying customary law when it was not “inconsistent with general principles of civilization.”¹⁹⁷ Specifically, in the British Colony of Natal (modern-day Kwa-Zulu Natal), “customary law functioned alongside segregation in the service of indirect rule.”¹⁹⁸ In Natal, this dual system was formed by the British negotiating with African leaders, “giving them license to rule by their customary laws, subject to [the British’s] ultimate authority.”¹⁹⁹ The British further attempted to codify the customary law that resulted in the Natal Code, which has been criticized for not reflecting actual cultural norms at the time.²⁰⁰ The Natal Code cemented the patriarchal society by noting in its preamble that one of the bases of the customary law was “the subjection of women.”²⁰¹

The British, who had politically taken control over the South African Region,²⁰² passed the Native Administration Act in 1927 as a further attempt to effectuate and implement control over native South Africans.²⁰³ The basis of the Native Administrative Act was “premised on the idea that many Africans were becoming degenerate and detribalized,” and could “only be checked by forced reconsolidation of the traditional African system.”²⁰⁴ The Native Affairs Department gave authority to chiefs and “white native commissioners” to govern by their own definition of native African laws.²⁰⁵ Essentially, this

¹⁹⁵ *History of South Africa*, *supra* note 7, at 7 (“It was essentially to be a white union.”).

¹⁹⁶ *Id.*

¹⁹⁷ Berat, *supra* note 188, at 104, n.67.

¹⁹⁸ Jill Zimmerman, *The Reconstitution of Customary Law in South Africa: Method and Discourse*, 17 HARV. BLACKLETTER L. J. 197, 200 (2001).

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 200–01. The actual purpose and motives of the British in forming the Natal Code was to effectuate control over native Natal: “Whatever the Code may have lacked in cultural legitimacy it more than made up in effectiveness as a mechanism of social control.” *Id.*

²⁰¹ *Id.* at 200.

²⁰² *Id.* at 201.

²⁰³ *Id.* at 202.

²⁰⁴ *Id.* (internal quotations removed) (citation omitted).

²⁰⁵ *Id.*

codified the dual system of law as implemented by the British in Natal.²⁰⁶ However, the system of customary law was artificially imposed on the people under the guise of “tradition” and custom.²⁰⁷ Bearing the expense of this imposition and artificial adherence were women.²⁰⁸ Customary law, as viewed from the modern perspective, was “produced through processes that privileged elite male responses to changing socio-economic conditions as singularly culturally authentic.”²⁰⁹

B. *Structure of the Courts and Infusion of Customary Law*

The South African Constitution states unequivocally that it is “the supreme law of the Republic” and that any law inconsistent with the Constitution must be invalidated.²¹⁰ In turn, this subjects customary law to the Constitution and deems any inconsistent custom, such as those that discriminate on the basis of sex to be invalid on its face.²¹¹ However, the Constitution recognizes a right of the people to be governed by customary law as it “is recognized on the basis of a cultural or religious affiliation, for such systems of law are derived from the right to culture or religion.”²¹² Furthermore, the Constitution combats instances of non-state-based discrimination as “no person may unfairly discriminate directly or indirectly against anyone” on the basis of sex or gender.²¹³

The court system in South Africa is governed by Chapter 8 of the South African Constitution.²¹⁴ As stated in Section 166 of the Constitution, South Africa has five prescribed courts, with the addition of “any other court established or recognized in terms of an Act of Parliament.”²¹⁵ The Constitutional Court is the highest court in South Africa with two lower courts: the Supreme Court of Appeal and the High Court of South Africa.²¹⁶ The

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 203.

²⁰⁸ *Id.* at 202–03.

²⁰⁹ *Id.* at 203. (internal quotations removed) (“To the extent that the legal system of a new and democratic South Africa absorbs customary law unchanged, it incorporates a historical female exclusion.”).

²¹⁰ S. AFR. CONST., 1996.

²¹¹ *See id.* § 9 (“The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy . . .”). This also places responsibility on the legislature to “ensure that discriminatory customary law practices are struck down.” Osman, *supra* note 20, at 3; *see* S. AFR. CONST., 1996 § 9(4) (“National legislation must be enacted to prevent or prohibit unfair discrimination.”).

²¹² T. W. Bennett, *Legal Pluralism and the Family in South Africa: Lessons from Customary Law Reform*, 25 EMORY INT’L L. REV. 1029, 1035 (2011).

²¹³ S. AFR. CONST., 1996 § 9(4).

²¹⁴ *Id.*

²¹⁵ *Id.* § 166.

²¹⁶ *See id.* § 167–69.

Constitution also recognizes the role of traditional leaders at the local level and provides that “a traditional authority that observes a system of customary law may function subject to any applicable legislation and customs.”²¹⁷ Court systems “must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.”²¹⁸ Furthermore, the Constitution suggests that local tribunals that function according to customary law may continue to be recognized since “[n]ational legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.”²¹⁹

Additionally, the Constitution gives guiding principles to the various courts on how to apply and interpret conflicting laws. Section 39 governs the “Interpretation of Bill of Rights” and states that “[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.”²²⁰ In other words, the Constitution explicitly subjects customary law to the principles of the Bill of Rights. In this respect, South Africa differentiates itself from the Nigerian court system by directly subjecting customary law to the Bill of Rights and imposing a positive obligation on the legislature to combat instances of discrimination, wherever it is found.²²¹

Traditionally, customary courts in South Africa have been governed by the Black Administration Act of 1927 (BAA).²²² The BAA was repealed and replaced by the Repeal of the Black Administration Act and Amendment of Certain Laws Act of 2005 (Repeal Act).²²³ The BAA vested power in the Governor-General to create the jurisdiction of the customary courts and any procedural rules governing each individual court.²²⁴

²¹⁷ *Id.* § 211(2).

²¹⁸ *Id.* § 211(3).

²¹⁹ *Id.* § 212(1). This allows for the local customary officers to have a say and role in the communities. *Id.* In turn, this explicit recognition by the Constitution allows for the continuance of the cultural rights on one hand, and on the other gives the legislature a concrete role in regulating customary law. *Id.*

²²⁰ *Id.* § 39(2). Section 39(3) further notes that the Bill of Rights “does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.” *Id.* § 39(3). In other words, this provision of the Constitution is the minimum standards set for customary law and practices. *Id.*

²²¹ Christa Rautenbach, *A Family Home, Five Sisters and the Rule of Ultimogeniture: Comparing Notes on Judicial Approaches to Customary Law in South Africa and Botswana*, 16 AFR. HUM. RTS. L. J. 145, 150 (2016).

²²² See Black Administrative Act 38 of 1927 § 3 (S. Afr.).

²²³ See Repeal of the Black Administration Act and Amendment of Certain Laws Act 28 of 2005 (S. Afr.).

²²⁴ See Black Administrative Act 38 of 1927 § 10 (S. Afr.).

Recently, the South African legislature promulgated an act called the Traditional Courts Bill as a way of directly guiding lower courts in their application of customary laws.²²⁵ The Traditional Courts Bill was a legislative project for fourteen years and is now awaiting signature by the President of South Africa.²²⁶ This act has received criticism from the people of South Africa who do not want to see any further legislative initiatives regulating their practice of custom.²²⁷ Primarily, the Traditional Courts Bill seeks to “transform the traditional justice system to conform with constitutional values.”²²⁸ Given how the South African Constitution directly applies to customary laws and traditions, it seems the Traditional Courts Bill would serve an important function within this system that seeks to regulate some of the disparate treatment within the customary courts.²²⁹ However, the act lacks support in three key areas.

The first key area is “inadequate consultation with ordinary members of the public,” which has resulted in a lack of transformative protections for members that this act served to protect.²³⁰ Namely, women were not adequately consulted with throughout the drafting process despite being the ones who “face particular problems in customary courts and are most likely to be affected by the Bill.”²³¹ The effect of this can mainly be seen in the second key area, “the recognition and constitution of customary courts consisting of the senior traditional leader only,” mainly elderly men of the community.²³² The customary dispute resolution process entails a complex hierarchy of dispute resolution that seeks to resolve underlying claims before it reaches senior leaders.²³³ If the Traditional Courts Bill is implemented, it will “effectively [empower] senior traditional leaders to interpret custom, enforce it and make the final decision in case of an

²²⁵ Anthony Diala, *South Africa Has a New Traditional Courts Bill: But It Doesn't Protect Indigenous Practices*, THE CONVERSATION (Sept. 22, 2022), <https://theconversation.com/south-africa-has-a-new-traditional-courts-bill-but-it-doesnt-protect-indigenous-practices-190938>.

²²⁶ *Id.*

²²⁷ *Id.* (“Traditional courts are supposed to be informal, based on African customary laws, and as independent from State authority as possible.”).

²²⁸ *Id.*

²²⁹ *See id.* (“In addition, the structure of traditional courts ensures that they are simply extensions of the State.... Lest we forget, the State is a colonial clone, since it retained colonial socioeconomic systems. It imposes European culture on Africans.”).

²³⁰ Else A. Bavinck, *Conflicting Priorities: Issues of Gender Equality in South Africa's Customary Law*, 5 AMSTERDAM L. F. 20, 37 (2013).

²³¹ *Id.*

²³² *Id.*; *see also* Diala, *supra* note 225 (“Moreover, traditional courts are presided over by mostly male traditional leaders, many with questionable legitimacy. Some are direct descendants of apartheid-imposed rulers. Others are accused of being appointed without adherence to indigenous laws.”).

²³³ *See* Traditional Courts Bill, Custom Contested: Views and Voices (last visited Feb. 18, 2023), <https://www.customcontested.co.za/laws-and-policies/traditional-courts-bill-tcb/>.

appeal.”²³⁴ Members of traditional customary communities note that this change vests new power in the senior leaders.²³⁵ Lastly, the third key area notes the Traditional Courts Bill could further hinder access to justice in these communities especially within the female population. Namely, Section 7 of the Traditional Courts Bill prohibits representation by a legal representative.²³⁶ Instead, the parties may be represented by “any person of [their] choice in whom [they] have confidence,” but neither party may “be represented by a legal practitioner acting in that capacity.”²³⁷

However, the Traditional Courts Bill could have a positive effect on the resolution of divorce and custody disputes as it does not allow the customary courts to hear matters of divorce or custody disputes and instead empowers state courts to hear all matters in relation to divorce and child custody.²³⁸ This could decrease discrimination and disparities in child custody decisions that are traditionally regulated by customary courts. Despite the potential for a positive change, this does not completely remedy the inability to access the courts in many rural areas.²³⁹

C. Operation of the Customary Courts in South Africa

Customary courts are an integral part of the South African legal system, and their value to the community cannot be understated. Given South Africa’s history of rapid colonization and attempts at erasing traditional values, the role of customary courts in the communities are a welcome part of their legal system as “the language is not foreign and people can easily follow the process.”²⁴⁰ Customary courts emphasize values that are most important to people who are a part of these traditional communities, particularly in the way it emphasizes community relationships.²⁴¹ Additionally, customary courts are easily accessible

²³⁴ *Id.*

²³⁵ *See id.*

²³⁶ Traditional Courts Bill of 2017 § 7 (S. Afr.).

²³⁷ *Id.* § 7(4)(a), (b).

²³⁸ *Id.* sched. 2.

²³⁹ Elena Moore & Chuma Himonga, *Living Customary Law and Families in South Africa*, SOUTH AFRICA CHILD GAUGE 61, 64 (2018) (“In practice, many marriages are dissolved informally between families rather than through the court system and the parties therefore do not enjoy the benefits of the protection provided by the RCMA.”).

²⁴⁰ C.B. Soyapi, *Regulating Traditional Justice in South Africa: A Comparative Analysis of Selected Aspects of the Traditional Courts Bill*, 17 POTCHEFSTROOM ELEC. L.J. 1440, 1444 (2014).

²⁴¹ *Id.* (“The system is based on mediation and is more restorative than retributive. In this regard, the community is more important and relations are meant and expected to exist after the process.”).

and local, making access to the legal system readily available towards the people it governs.²⁴²

However, customary courts have been criticized as being primarily patriarchal because “males are considered to be superior.”²⁴³ Moreover, the expedited process and readily available dispute resolution process may lead to rushed decisions that are not meaningful in modern society.²⁴⁴ Furthermore, customary courts are unique because “the inquisitorial nature of the proceedings amounts to a presumption of guilt against the accused because [they] ha[ve] to prove [their] innocence.”²⁴⁵ The lack of the presumption of innocence standard stands in direct contrast to the South African Constitution.²⁴⁶ Although these differences may stand in opposition to some legal standards prevalent in modern legal systems, they do not invalidate the importance of the customary courts in obtaining justice in traditional communities.

In 2003 the South African Law Commission prepared a report detailing the role of Customary Courts in South Africa under the BAA.²⁴⁷ The report details common issues plaguing the role of customary courts in South Africa and potential solutions to some of these problems that are noted in the Traditional Courts Bill.²⁴⁸

Under the BAA, the jurisdiction of the court did not extend to cases of “nullity, divorce or separation arising out of civil marriage.”²⁴⁹ Restricting jurisdiction to non-civil marriages leaves open the possibility for the customary courts to hear customary marriage cases.²⁵⁰ The BAA grants the Governor-General, defined under the Act as “the supreme chief of all Natives . . . vested with all such powers and authorities of all Natives,” a wide array of powers in terms of conferring both criminal and civil jurisdiction in the customary courts.²⁵¹ Additionally, the Governor-General may prescribe the mode of hearing the cases and any “other matters as the Governor-General may deem

²⁴² *Id.*

²⁴³ *Id.* at 1445.

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 1444.

²⁴⁶ *Id.* at 1444–45.

²⁴⁷ S. AFR. L. COMM’N, PROJECT 90: REPORT ON TRADITIONAL COURTS AND THE JUDICIAL FUNCTION OF TRADITIONAL LEADERS 10 (2003).

²⁴⁸ *Id.*

²⁴⁹ Black Administration Act of 1927 § 10(1)(e) (S. Afr.); *see also* S. AFR. L. COMM’N, *supra* note 247, at 10.

²⁵⁰ Black Administration Act of 1927 § 10(3) (S. Afr.).

²⁵¹ *Id.* §§ 1, 9, 10(1).

necessary for the proper carrying out of the purpose of this section.”²⁵² When a conflict of customary laws exists in terms of geographic adherence, the law that should be applied is that “prevailing in the place of residence of the defendant.”²⁵³

The BAA further authorized the Governor-General to create a hierarchy of dispute resolution by allowing traditional leaders to adjudicate part or all of the dispute process.²⁵⁴ This includes the establishment of a customary appeals courts under Section 13 of the BAA.²⁵⁵ Overall, the BAA gives wide discretion to the Governor-General to administer the court in whatever way they find applicable for the given region. This has the potential to create inconsistencies in the various regions of South Africa in the outcomes of various cases. It also leads to inadequate regulation of the customary courts in terms of constitutionality and discriminatory practices.

In contrast, the Traditional Courts Bill sets forth as a founding principle “[t]he need to align traditional courts with the Constitution in so far as they relate to the resolution of disputes, so as to embrace the values enshrined in the Constitution.”²⁵⁶ Instead of vesting authority in the Governor-General to create a hierarchal dispute resolution process, the Traditional Courts Bill provides for a “traditional leader or any person designated by the traditional leader” to serve as the head of each customary court.²⁵⁷ The Traditional Courts Bill purports to limit the jurisdiction of customary courts by not allowing questions of divorce or child custody to be heard by customary courts.²⁵⁸ This seemingly aims to resolve the discrepancies found in the BAA regarding which marriages can be regulated by the customary courts. Furthermore, the Traditional Courts Bill sets forth a more detailed process for conflict of laws claims between different regional areas.²⁵⁹ The process begins by noting that any dispute should first be

²⁵² *Id.* § 10(4)(h).

²⁵³ *Id.* § 11(2).

²⁵⁴ *Id.* § 12(1). *But see id.* § 11(1) (“[P]rovided further that a [customary] chief shall not under this or any other law have power to determine any question of divorce or separation arising out of any marriage which is not a customary union . . .”).

²⁵⁵ *Id.* § 13.

²⁵⁶ Traditional Courts Bill of 2017 § 3(1)(a), pmbl. (S. Afr.) (“[I]t is necessary to replace the current legislative framework in terms of which disputes are resolved in terms of customary law, in line with constitutional imperatives and values . . .”).

²⁵⁷ *Id.* § 5(1)(b).

²⁵⁸ *Id.* sched. 2. Schedule 2 mentions custody and divorce under the category of “advice relating to customary practices,” leaving the possibility open for customary courts to provide guidance to state courts on matters of customary divorce and child custody. *Id.*

²⁵⁹ *Id.* at pmbl.

resolved by consent between the two parties.²⁶⁰ If the parties cannot agree on the customary law that should govern their dispute, then the courts shall look to either the customary laws relevant in the district in which the court resides or the law in which the parties have their “closest connection.”²⁶¹

The Traditional Courts Bill provides for similar appeals to magistrate courts for both criminal and civil disputes.²⁶² It further allows for a procedural review if either party wishes to have the magistrate court examine procedural deficiencies within the customary courts.²⁶³ The order of the customary court is considered final unless either party appeals or seeks a procedural review in the magistrate court.²⁶⁴

D. Divorce and Child Custody in South Africa under Customary Law

The strict regulation of customary law by statutory law in South Africa creates conflicts throughout the South African legal system especially when it comes to regulating the dissolution of marriage and custody. While the legislature can present a system that promises to abide by rules of equality, “the oft unanswered question is whether legislative changes are effected in practice.”²⁶⁵ Given the aforementioned plural legal system in South Africa,²⁶⁶ “the regulation of non-state law through statute carries the risks associated with codification; namely the ossification and distortion of the law.”²⁶⁷ Regardless of whether the regulation of customary law in this manner has a positive or negative effect on the customary law itself, when a state tries to regulate customary law it inevitably leads to questions of whether the law is authentic.²⁶⁸

One area in which the courts have struggled to implement effective control is customary marriages. Namely, the South African legislature has tried to codify these marriages through the Recognition of Customary Marriages Act (RCMA).²⁶⁹ The RCMA seeks to address several aspects of customary marriages including when a marriage will be considered valid under the laws of the state, the equality of the husband and wife in a marriage, regulating the

²⁶⁰ *Id.* § 7(5)(a).

²⁶¹ *Id.* § 7(5)(b).

²⁶² *Id.* § 13(1).

²⁶³ *Id.* § 14.

²⁶⁴ *Id.* § 12.

²⁶⁵ Osman, *supra* note 20, at 5.

²⁶⁶ *See supra* Part II(B).

²⁶⁷ Osman, *supra* note 20, at 1.

²⁶⁸ *Id.* at 2.

²⁶⁹ Recognition of Customary Marriages Act 120 of 1998 (S. Afr.).

dissolution of these marriages, and recognizing polygamous marriages under customary law.²⁷⁰ Interestingly, the RCMA gives jurisdiction to both the High Court of South Africa, as well as a family or divorce Court,²⁷¹ which may be subsequently established by the Jurisdiction of Regional Courts Amendment Act, to hear divorce and custody cases.²⁷² This grants authority to the Minister²⁷³ to establish any regional court for the purpose of dissolving a marriage or deciding custody disputes.²⁷⁴

Among other provisions, the RCMA sets a minimum age requirement of eighteen and precludes marriages entered without consent.²⁷⁵ It also imposes an obligation on the parties to register their marriage and give to the registering office information such as “the identity of the spouses, the date of the marriage, any lobolo agreed to and any other particulars prescribed.”²⁷⁶ However, the RCMA does not invalidate marriages that are not registered under this section.²⁷⁷ Therefore, it may not serve to impose a heavy burden on the parties to register the marriage in order to validly celebrate it. Furthermore, the RCMA only allows state-made courts to dissolve a marriage legally, not traditional customary courts.²⁷⁸ While the High Court and Family Courts may have the authority to grant the dissolution of the marriage, the RCMA does not “limit[] the role, recognized in customary law, of any person, including any traditional leader, in the mediation, in accordance with customary law, of any dispute or matter arising prior to the dissolution of a customary marriage by a court.”²⁷⁹

The RCMA has been critiqued as too “nuanced” with “poor drafting and significant lacunae in legislation,” resulting in “the expense of mostly women.”²⁸⁰ Statistical evidence shows that some of these provisions are not effectuated in reality.²⁸¹ For example, while Section 8(1) of the Act prevents a customary court from dissolving a marriage, in practice, the dissolution of a

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² Jurisdiction of Regional Courts Amendment Act 31 of 2008 (S. Afr.).

²⁷³ The Recognition of Customary Marriages Act defines “Minister” as the Minister of Home Affairs. Recognition of Customary Marriages Act 120 of 1998 (S. Afr.).

²⁷⁴ Jurisdiction of Regional Courts Amendment Act 31 of 2008 § 2 (S. Afr.). *But see* Children’s Act 38 of 2005 § 24(1) (S. Afr.) (conferring jurisdiction only to the High Court).

²⁷⁵ Recognition of Customary Marriages Act 120 of 1998 § 3 (S. Afr.).

²⁷⁶ *Id.* § 4(4).

²⁷⁷ *Id.* § 4(9) (“Failure to register a customary marriage does not affect the validity of that marriage.”).

²⁷⁸ *Id.* § 8(1).

²⁷⁹ *Id.* § 8(5).

²⁸⁰ Osman, *supra* note 20, at 2.

²⁸¹ *See* HIMONGA & MOORE, *supra* note 52, at 162.

customary marriage is informal.²⁸² An empirical study surveying twenty customary divorces found that only four sought court dissolution.²⁸³ The remaining dissolved simply by “repudiation.”²⁸⁴ Divorce by repudiation often excludes the woman from voicing an opinion regarding the dissolution of the marriage and leaves the marriage to the will of her husband and his family.²⁸⁵ As one divorcee recounts:

My divorce was very strange. I was never divorced . . . He met with his family and they agreed with the divorce. I didn’t know what happened before the finals. I don’t know this divorce I really don’t know. I just got a finalizing certificate but what happened before?²⁸⁶

The Children’s Act of 2005 attempts to bring South Africa into conformity with international treaties.²⁸⁷ However, specific sections of the Children’s Act are internally inconsistent and conflict externally with the RCMA, and the Children’s Act mentions customary law in only a couple of areas.²⁸⁸ First, the Children’s Act grants jurisdiction only to the High Court of South Africa to hear customary custody disputes.²⁸⁹ However, Section 29 later notes that an application for custody may be brought before “the High Court, a divorce court in a divorce matter or a children’s court.”²⁹⁰ Second, the Children’s Act specifically addresses the rights of unmarried fathers.²⁹¹ If the father of the child is considered to be the biological parent of the child, the father may acquire “full parental responsibilities and rights in respect of the child” if the father “pays damages in terms of customary law.”²⁹² By referencing Section 3 of the Children’s Act, paying damages under customary law shows acknowledgement by the father of his biological connection to the child.²⁹³

The Children’s Act codifies the Best Interests of the Child Doctrine and provides guidance on its application within the courts.²⁹⁴ The act lists fourteen factors that “must” be applied whenever the Best Interests of the Child Doctrine

²⁸² *Id.* at 162–63.

²⁸³ *Id.* at 162.

²⁸⁴ *Id.* at 164–66.

²⁸⁵ *Id.* at 166.

²⁸⁶ *Id.*

²⁸⁷ *See* Children’s Act 38 of 2005 pmbl. (S. Afr.).

²⁸⁸ Recognition of Customary Marriages Act 120 of 1998 § 8(5) (S. Afr.).

²⁸⁹ Children’s Act 38 of 2005 § 24(1) (S. Afr.).

²⁹⁰ *Id.* § 29(1).

²⁹¹ *See id.* § 21.

²⁹² *Id.* § 21(b)(i).

²⁹³ *Id.* § 236(4)(c).

²⁹⁴ *See id.*

is used, including the extent of the relationship between parent and child, the ability of the parent to be able to provide for the child, and the need for the child to be brought up in a stable environment.²⁹⁵ Any branch or organ of the state has an obligation to “respect, protect and promote,” the best interests of the child.²⁹⁶ The doctrine is connected to a child’s cultural right in Section 12 of the Act which provides that a child has the right “not to be subjected to social, cultural, and religious practices which are detrimental to his or her well-being.”²⁹⁷ Nevertheless, the child also has a right to practice their culture and maintain relations with a cultural community.²⁹⁸ Thus, this Act does not resolve the conflict between custom and the best interests of the child doctrine.

E. Statistics and Case Law

A 2010 qualitative study detailed the divorce records from regional courts established under the Magistrates’ Courts Act 32 of 1944.²⁹⁹ It found that, in 2007, there were 1,861 total divorce summons filed in the regional court and only 21 were filed with respect to customary marriages.³⁰⁰ The study also sampled customary divorce cases across different regional courts in South Africa and found that most customary divorce cases occurred in Gauteng, Limpopo, and the Eastern Cape.³⁰¹ While divorce and child custody are seen as a family affair, the study detailed that parents rarely conferred with family members or traditional leaders in resolving custody matters.³⁰² The mother was granted primary custody of the child in 17 cases with little dispute recorded by the father.³⁰³ The father and paternal grandfather were granted custody in only 3 cases.³⁰⁴

²⁹⁵ *Id.* § 7(1). The full list of factors include: (1) “the nature of the personal relationship;” (2) the attitude of the parent towards the child; (3) capacity of the parent to be able to provide for the child; (4) how the decision will affect the child; (5) whether the decision will affect the child’s ability to contact any other parents; (6) need to maintain familial relations and cultural relations; (7) the child’s demographics; (8) child’s mental and emotional state; (9) “any disability that a child may have;” (10) “any chronic illness from which a child may suffer;” (11) the need for a stable environment in which to raise the child; (12) protection from harm; (13) history of family violence; (14) minimize further legal proceedings. *Id.* § 7(1)(a)-(n).

²⁹⁶ *Id.* § 8(2).

²⁹⁷ *Id.* § 12(1).

²⁹⁸ *Id.* § 7(f)(ii).

²⁹⁹ HIMONGA & MOORE, *supra* note 52, at 39.

³⁰⁰ *Id.* at 40.

³⁰¹ *Id.* at 41.

³⁰² *Id.* at 183.

³⁰³ As detailed by one mother who went through the court in order to get official recognition of her referral of custody: “My husband never had a good upbringing, he has no family values. So he did not mind the fact that I was given custody of the children.” *Id.*

³⁰⁴ *Id.*

The study obtained data from the dissolution of marriages and subsequent child custody cases from cases heard outside of the court system, with a few instances of inter-court dissolution to serve as a corollary.³⁰⁵ In eight of the cases that were not conferred within the court system, there was little to no dispute as the mother was granted custody of the children.³⁰⁶ The outcome was due in part to the absence of the father and his lack of interest in raising his children.³⁰⁷ While the outcome was not heard by or conferred with a customary court, the study consulted with traditional leaders who reviewed and supported the decision of granting custody to the mother noting that “[t]he law works in the best interest of the children.”³⁰⁸

The study found three cases in which the children were granted custody to the father or his family.³⁰⁹ After interviewing some of the mothers involved in these cases, they expressed discontent with the decision to grant custody to the father saying: “No, it is painful, and hard to accept. I cannot sleep well at night; even my mother is against it.”³¹⁰ In one case, after seventeen years of marriage, the father expressed that he was divorcing the mother of his children by starting a new family and returning his former wife to her family.³¹¹ Her former husband took their children with him, and she was unable “to exercise her legal right to her children.”³¹² Unfortunately, her abandonment occurred six years ago and she was of the belief that “in her culture, children belong to the father.” Therefore, it is unlikely that she will be reunited with her children.³¹³

The study consults with the traditional leaders on how they resolve custody cases with the best interests of the child doctrine.³¹⁴ The results show vastly different applications of the doctrine as varied by regional customary law. One traditional leader from Eastern Cape noted that they usually consider the “social

³⁰⁵ *Id.* at 182.

³⁰⁶ *Id.* at 183.

³⁰⁷ *Id.*

³⁰⁸ The study group of traditional leaders noted that generally, the best interests of the child are served by granting custody to the mother, at least while the children are young. *Id.* at 185.

³⁰⁹ *Id.* at 188.

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.*

³¹³ Of particular note in this case is that the mother has recognized that she has a legal right to her children. She knows this, but also knows the emphasis in her culture of the children remaining with the father. This illustrates the lack of legal remedy for mothers in these situations as she feels that there is no choice between her culture and access to her children. *Id.*

³¹⁴ *Id.* at 186.

state” of the child first, alongside the stability of the home environment.³¹⁵ That traditional leader agreed with the granting of custody to the mother in the cases he reviewed and emphasized the need for protecting the children as opposed to granting custody based on custom.³¹⁶ On the other hand, many traditional leaders expressed their belief that custom should dictate in all instances and that the father should be granted custody of his children.³¹⁷ One traditional leader noted: “I will never agree with the court’s decision. The children belong to the man.”³¹⁸

This study provides a sharp contrast to the Nigerian study of customary custody decisions. While the Nigerian study saw a majority of custody decisions resolved in favor of the father, the South African study had a minority of cases in which the father was granted sole custody of the children.³¹⁹

IV. RECOMMENDATIONS

In both Nigeria and South Africa, the role of traditional courts in the administration of justice cannot be understated.³²⁰ With inconsistent or ignored legislation regarding the administration of customary laws,³²¹ the state has an obligation to ensure that justice is being met in accordance with constitutional values, particularly in eliminating sex-based discrimination.³²² In South Africa, women’s claims are seen as secondary to men’s claims, and particularly in divorce cases, “it is not unusual for a women’s claim for divorce to be dismissed or for her to be evicted from the home upon divorce with no right to matrimonial

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Id.* at 189.

³¹⁸ *Id.*

³¹⁹ One scholar points to a potential source of the preference for giving custody to the mother and lack of contentious custody cases in the history of Apartheid legislation in South Africa. Wessel van den Berg & Tawanda Makusha, *State of South Africa’s Fathers 2018*, SONKE GENDER JUST. & HUM. SCI. RSCH. COUNCIL 5, 17 (2018) <https://repository.hsrc.ac.za/bitstream/handle/20.500.11910/12398/10434.pdf>. This was because of racial segregation restricting Africans to rural areas of town and only allowing them to enter “white areas” if they worked as laborers. *Id.* at 17. This caused many fathers to be forced to move away in order to provide for their families. *Id.* at 18. After Apartheid legislation was revoked, the effects of the separation remained. *Id.* at 8. This results in fathers who are “not sufficiently involved in childcare in South Africa.” *Id.*

³²⁰ Fatima Osman, *The Omission of the Opt-Out Clause: The Revised (and Improved?) Traditional Courts Bill 2017*, 69 S. AFR. CRIME Q. 69, 70 (2020) [hereinafter *The Omission of the Opt-Out Clause*] (“Nonetheless, traditional courts remain predominantly responsible for the administration of justice in rural areas today.”).

³²¹ *See id.* (“The Black Administration Act—the central tool in the apartheid state’s segregation policy—currently regulates traditional courts but its provisions are largely outdated and ignored.”). *Compare* Children’s Act 38 of 2005 § 21(b)(i) (S. Afr.), with Recognition of Customary Marriages Act 120 of 1998 § 8(5) (S. Afr.).

³²² *See The Omission of the Opt-Out Clause*, *supra* note 320 (“Furthermore, women’s interests are often dismissed and considered subordinate to men.”).

property.”³²³ Furthermore, inconsistent legislation in South Africa leaves the scope of the law unclear in the jurisdiction of customary courts to hear child custody cases.³²⁴ Nigerian customary courts have jurisdiction to hear customary cases as do the state courts.³²⁵ Although the Best Interests of the Child Doctrine should govern customary custody decisions, “the custom of the particular ethnic group or community [] is a major consideration.”³²⁶ For example, among the Yoruba, an ethnic group in Southwest Nigeria, “women do not ‘own’ children; their sexuality is owned and controlled by the partner who pays her bride price.”³²⁷ Thus, children born to a marriage are automatically considered to be within the customary right of their fathers.³²⁸

There are three reasons why divorce and child custody cases governed by customary law warrant exceptional treatment in comparison to other types of customary cases. First is the nature and sensitivity of custody cases in their involvement of a minor, an unrepresented third party.³²⁹ Unlike property disputes or contract settlements, custody cases involve a third party often unrepresented in the legal system.³³⁰ In order to promote the welfare of the child involved and to implement legislation in both Nigeria and South Africa protecting the best interests of the child,³³¹ cases involving custody disputes ought to be afforded specialized treatment in order to ensure these interests are being met. The best interest of the child cannot be protected through a decentralized and inconsistent court system. Second, Nigeria and South Africa have pledged themselves to international treaties guaranteeing the equal treatment of women in the administration of justice.³³² In order to align themselves with these treaties, both South Africa and Nigeria must take positive legal action in order to combat the inconsistencies prevalent throughout the

³²³ *Id.* at 71.

³²⁴ Compare Children’s Act 38 of 2005 § 21(b)(i) (S. Afr.), with Recognition of Customary Marriages Act 120 of 1998 § 8(5) (S. Afr.).

³²⁵ Ajayi, *supra* note 145, at 94 (“There are two modes through which a customary law marriage may be dissolved. It could be through non-judicial divorce or by an order of a competent customary court.”).

³²⁶ Ntoimo & Ntoimo, *supra* note 11, at 401.

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ See generally Monroe L. Inker & Charlotte Anne Perretta, *A Child’s Right to Counsel in Custody Cases*, 5 FAM. L. Q. 108 (1971).

³³⁰ *Id.*

³³¹ See Matrimonial Causes Act (1990) Cap. (M7), § 71 (Nigeria); S. AFR. CONST., 1996 § 28(2).

³³² See *supra* Part I.

customary court systems.³³³ Third, the history of discrimination towards women in custody and divorce cases creates a need for differential treatment of these particular cases.³³⁴

As previously discussed,³³⁵ the South African legislature recently promulgated a new bill known as the Traditional Courts Bill. Controversy has surrounded the Bill as it is awaiting signature by the President. The Traditional Courts Bill, which has been previously legislated and rejected twice,³³⁶ has been denoted as a critical attack towards traditional South African communities.³³⁷ Critiques can be sorted into three camps: lack of an opt-out clause, non-recognition of gender issues, and absence of a hierarchal court structure.

Particularly, the Bill excludes a critical “opt-out clause” for most cases before a customary court.³³⁸ The clause would allow a party before a customary court to withdraw from the customary court’s jurisdiction and opt for a different court to hear their case.³³⁹ In essence, this restricts parties in most cases to the customary court systems and requires them to try their case in all levels of the customary courts before they may appeal to a higher state court.³⁴⁰ By restricting the parties right to opt-out of the customary court’s jurisdiction, customary courts are proclaimed to be “courts of law” which require them to be strictly regulated by the state instead of the traditional customary chiefs.³⁴¹ Those who support the Traditional Courts Bill note that allowing an opt-out clause would “undermine the traditional court [system].”³⁴² However, those who have argued that the Bill must include an opt-out provision note the dangerous impact that the lack of the provision could have on women in a deeply patriarchal traditional society.³⁴³

³³³ See U.N. Comm. Rts. Child, *supra* note 37, ¶ 98 (imposing a positive obligation on state parties to implement procedures to effectively regulate cases involving children); Maputo Protocol, *supra* note 22, art. 2(d) (placing a positive obligation on state parties to combat forms of discrimination against women).

³³⁴ See generally Williams, *supra* note 97; Osman, *supra* note 20, at 6.

³³⁵ See *supra* Part IV for introductory comments.

³³⁶ *Parliament Passes Problematic Traditional Courts Bill*, MAIL & GUARDIAN (Sept. 13, 2022), <https://mg.co.za/thoughtleader/opinion/2022-09-13-parliament-passes-problematic-traditional-courts-bill/>.

³³⁷ *Id.* (“Its exclusion is an affront to rural people who have consistently demanded that their constitutional and customary rights be protected.”).

³³⁸ *Id.*

³³⁹ *Id.*

³⁴⁰ *Id.*

³⁴¹ *Id.* (“This was done despite advice from state legal advisors that traditional courts should be regarded as special dispute resolution tribunals.”).

³⁴² *Traditional Courts Bill Sidelines Women*, MAIL & GUARDIAN (Sept. 15, 2022), <https://mg.co.za/editorial/2022-09-15-traditional-courts-bill-sidelines-women/>.

³⁴³ See *id.*

Concurrently, the Traditional Courts Bill does not adequately address discrimination against women in some of the traditional communities. References to women's rights are minimally addressed by the guiding principles of the Traditional Courts Bill such as the broadly stated principle found in Section 3(2) which generally notes the "existence of systematic unfair discrimination and inequalities . . . particularly in respect of gender."³⁴⁴ The Traditional Courts Bill also grants women "full and equal participation in the proceedings, as men are."³⁴⁵ In practice, some contend that "women can only be witnesses or silent listeners whilst in other courts they can represent themselves."³⁴⁶ Given this inconsistency in customary courts, the Traditional Courts Bill is critiqued for not imposing positive obligations on customary courts to combat and remedy discriminatory practices.³⁴⁷ A proposed solution to lessen the presence of discriminatory and inconsistent treatment between men and women's representation in court is to require customary officials to participate in mandatory training "so that their activities are not marred by the issues of gender imbalance."³⁴⁸ The combination of the lack of the opt-out provision, with the lack of concern towards remedying women's rights concerns, further exemplifies the discriminatory practices and leads to a system that harbors violations of human rights.

Traditionally, customary courts have always had a hierarchal structure.³⁴⁹ African custom defined this hierarchal structure first at a family court, then at the court of the headman, followed by a process of appeals to the chief.³⁵⁰ Despite the prevalence and history of the hierarchal structure, the Traditional Courts Bill fails to effectively implement a hierarchal structure or classify the customary courts as a part of the state court system.³⁵¹ The Traditional Courts Bill recognizes the courts of headmen but does not further

³⁴⁴ Traditional Courts Bill of 2017 § 3(2)(b) (S. Afr.); *see also* Soyapi, *supra* note 240, at 1455.

³⁴⁵ Traditional Courts Bill of 2017 § 7(3)(a)(i) (S. Afr.); *see also* Soyapi, *supra* note 240, at 1455.

³⁴⁶ Soyapi, *supra* note 240, at 1455.

³⁴⁷ *Id.* ("It would have been judicious to have a provision to the effect that the Minister can make regulations on representation. However, this has not been done.")

³⁴⁸ *Id.* at 1456. Training is mentioned in the 2017 Traditional Courts Bill as a reprimand for those judges who are found to have breached the code of conduct under Section 16 of the bill or upon order of the Minister. Traditional Courts Bill of 2017 § 16(6)(f) (S. Afr.). This does not make training mandatory as suggested and the future use of this provision would be important to monitor. *Id.*

³⁴⁹ Soyapi, *supra* note 240, at 1456.

³⁵⁰ *Id.* at 1456–57.

³⁵¹ *Id.* at 1456.

define the hierarchal nature of the customary court system.³⁵² In Section 7 of the Traditional Courts Bill, “the procedure at any proceedings of a traditional court . . . must be in accordance with customary law and custom.”³⁵³ As a result, the lack of a prescribed hierarchy, while arguably allowing flexibility within customary courts, has further adverse effects on formalizing the courts.³⁵⁴

Despite the problems and controversies surrounding the Traditional Courts Bill, one section of the Bill could improve conditions and equality for women in divorce and custody cases. If enacted and regulated properly, Schedule 2 of the Traditional Courts Bill does not grant customary courts the jurisdiction to hear divorce and custody cases.³⁵⁵ As a result, if a divorcing couple wants their marriage to be dissolved and custody of their children to be regulated by a court, they will have to have their case heard in a competent state court. This may have an adverse effect on the access to the legal system, especially in rural parts of the African countries, by further exasperating previously discussed issues within the customary court systems. However, if this provision of the Traditional Courts Bill can be enforced in concurrence with additional measures to improve access to the legal system, it could create a consistent dispute resolution process, one that both South Africa and Nigeria could benefit from.

The development of the exclusion of divorce and custody cases from the jurisdiction of the customary courts began in the 2008 draft of the Traditional Courts Bill (2008 Bill).³⁵⁶ Under Section 5 of the 2008 Bill, customary courts were excluded from hearing “any matter relating to the custody and guardianship of minority children,”³⁵⁷ and “any question of nullity, divorce or separation arising out of a marriage.”³⁵⁸ The 2008 draft was subsequently rejected by the South African legislature, which began the extensive redrafting period.³⁵⁹ The Bill was subsequently reintroduced in 2012 and was largely unchanged since its

³⁵² Traditional Courts Bill of 2017 § 6(3) (S. Afr.). This is in comparison to countries like Zimbabwe that clearly define the three levels of customary courts: the family court, the headmen’s courts, and the chief’s courts. See Soyapi, *supra* note 240, at 1457.

³⁵³ Traditional Courts Bill of 2017 § 7(2) (S. Afr.).

³⁵⁴ Soyapi, *supra* note 240, at 1457.

³⁵⁵ Traditional Courts Bill of 2017 sched. 2 (S. Afr.).

³⁵⁶ Traditional Courts Bill of 2008 (draft) (S. Afr.).

³⁵⁷ *Id.* § 5(2)(c).

³⁵⁸ *Id.* § 5(2)(b).

³⁵⁹ Diala, *supra* note 225.

last introduction.³⁶⁰ The 2012 draft was also rejected by the South African legislature.³⁶¹

In 2017, the current draft of the Traditional Courts Bill was introduced to the South African parliament and passed.³⁶² As of 2023, it awaits signature by the South African President.³⁶³ The 2017 version saw significant changes from the two previous drafts. Schedule 2 lists the cases in “which traditional courts are competent to deal with.”³⁶⁴ Customary marriages and custody cases are listed under the category granting advisory opinions, but not granting the customary courts the jurisdiction to hear the cases.³⁶⁵ The use of Schedule 2 marks a significant change from the original 2008 Bill, which did not grant the customary courts the advisory authority custody cases.³⁶⁶ Drafting of the 2008 Bill created a clear route for customary custody cases to be heard: through state courts. The use of Schedule 2 and the advisory role of customary courts in custody cases, while allowing the customary practices and law to remain prevalent even in state courts, is unclear drafting that could leave the possibility of discriminatory practices to be carried into state courts.

Nonetheless, the enactment of Schedule 2 and the prohibition of custody and divorce disputes from the jurisdiction of customary courts creates an opportunity for consistency throughout family law matters in the South African legal system, and one that Nigeria could benefit from implementing. Particularly, Schedule 2 clarifies the confusion around whether customary courts are authorized to hear child custody cases by clearly stating that they cannot hear cases arising out of child custody disputes.³⁶⁷ This Comment does not aim to resolve all disputes and potential controversies of the Traditional Courts Bill, but instead to focus on one positive aspect of the Bill that, if properly implemented, could have a positive effect on equality in divorce and custody cases.

Although the Traditional Courts Bill has been heavily criticized, little attention is being devoted to the provision excluding custody and divorce cases

³⁶⁰ See Traditional Courts Bill of 2012 § 5(2) (S. Afr.) (which uses the same exclusionary language and the 2008 draft).

³⁶¹ Diala, *supra* note 225.

³⁶² *Id.*

³⁶³ *Id.*

³⁶⁴ Traditional Courts Bill of 2017 sched. 2 (S. Afr.).

³⁶⁵ *Id.* (“Advice relating to customary law practices in respect of . . . customary law marriages; custody and guardianship of minor or dependent children.”).

³⁶⁶ Traditional Courts Bill of 2008 § 5(2)(c).

³⁶⁷ Compare Children’s Act 38 of 2005 § 21(b)(i) (S. Afr.), with Recognition of Customary Marriages Act 120 of 1998 § 8(5) (S. Afr.).

from the jurisdiction of customary courts. The South African Traditional Courts Bill could have a positive impact on combatting some of the inconsistent results by denying customary courts the jurisdiction to hear cases involving custody and divorce.³⁶⁸ For example, the current law in Nigeria grants customary courts' jurisdiction to hear custody cases.³⁶⁹ The result of this law is custody outcomes that favor granting the father sole custody of his children.³⁷⁰ By giving one method of resolution for divorce and custody cases, South Africa and Nigeria would be able to closely regulate cases to ensure that the best interests of the child are being considered under the prescribed statutory factors which will lead to the countries aligning themselves with their pledged international obligations while combating discriminatory practices. This would create consistency throughout court cases and better regulation of sensitive cases.

A recent case, abbreviated as *S v. S*, illustrates the application of the Best Interests of the Child Doctrine being applied in the High Court of South Africa in the Kwazulu-Natal, and can serve as a basis for application of the Best Interests of the Child Doctrine by a state court.³⁷¹ This case applies state law under the premise that the marriage was performed pursuant to the Islamic religion.³⁷² The child in question resided with the mother primarily and the father was noted as being frequently absent.³⁷³ The High Court applied the Best Interests of the Child Doctrine in awarding custody to the mother with visitation rights to the father.³⁷⁴ The court cited various sources supporting their decision such as the opinion of a professor who noted the importance of the child's psychological bond with the parent as a primary factor in the Best Interests of the Child Doctrine.³⁷⁵ The court then examined the child's disposition and well-being, noting that "he is doing well in his current environment," and should stay with his mother.³⁷⁶ This case serves as a model of a typical custody case involving the Best Interests of the Child Doctrine if it were heard by a state court in South Africa.

³⁶⁸ Traditional Courts Bill of 2017 sched. 2 (S. Afr.).

³⁶⁹ See Hon. Justice S.H. Mkeri, *supra* note 116, at 10 (citations omitted).

³⁷⁰ See *supra* Part I(F) for statistical evidence of this occurrence.

³⁷¹ *S v. S*, No. D7960/2019, Decision, High Court of South Africa Kwazulu-Nata ¶ 31 (Feb. 18, 2022), <https://www.saflii.org/za/cases/ZAKZDHC/2022/7.html>.

³⁷² *Id.* ¶ 6.

³⁷³ *Id.* ¶ 5(b).

³⁷⁴ *Id.* ¶¶ 21, 31.

³⁷⁵ *Id.* ¶ 33.

³⁷⁶ *Id.* ¶ 30.

CONCLUSION

Nigeria and South Africa harbor discriminatory practices throughout their customary court systems, particularly in the areas of divorce and child custody. Where custom dictates, women find themselves secondary to their spouses. While the Traditional Courts Bill set forth by South Africa is heavily criticized, attention should be devoted to the provision that removes jurisdiction from the customary courts for cases of divorce and child custody. The exclusion of jurisdiction could have a positive impact on discriminatory practices that are still prevalent throughout South Africa. Nigeria could benefit by enacting a provision similar to Schedule 2 in the Traditional Courts Bill in order to remove custody and divorce jurisdiction from their customary courts. The exclusion of jurisdiction could have a positive impact on sex-based discriminatory practices that are still prevalent throughout Nigeria and South Africa.

MADELYN CAMERON