CONFLICT ON THE CHOICE OF MARRIAGE AND THE EFFECTS ON THE DISTRIBUTION OF A DECEASED ESTATE IN NIGERIA AND SOUTH AFRICA

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Abstract

The delusion of the superiority of the English law over the Nigerian customary laws, with the belief that indigenous legal systems are uncivilized, primitive and inferior, are false. A nation's legal system cannot be divorced from its social realities, norms, values and religions. Thus, it is unethical by way of legislation to force the values and faith of a nation on another. The problem of conflict of choice of marriage stems from the mindset that the English marriage system is superior to customary mode of marriage and succession in Nigeria. The need for legal reforms of indigenous legal system should not be borne out of a feeling of inferiority but a need to balance competing social interest on the scale of equity, non-discrimination and fairness. This paper adopts a doctrinal approach in analyzing rising conflicts in Nigerian legal pluralism in the choice of marriage and its effect on the distribution of a deceased estate who died intestate and the approach of the court in resolving such conflict by first determining the status of parties under a marriage system and the actual legal regime that should regulate their affairs, including intestate succession. This study compares the South African Marriage regime with that of Nigeria and seeks to draw lesson points which can aid Nigerian Courts in resolving rising conflicts.

Keywords: Customary Law, English Law, Intestate, Marriage, Pluralism, Succession.

1.0 INTRODUCTION

The Nigerian legal pluralism is birthed out of its multiple ethno-religious practices, and the integration of English laws with multiple Nigerian legislations. This intermix which is recognized and validly upheld has made the legal system somewhat complex.[1] The marriage institution like every other sector, is regulated by this pluralistic system which results in conflict. This occurs because demand is placed on an individual by different legal bodies with competing claims of

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[1] S.A. St. Emmanuel. 'Legal Pluralism: An Examination of Conflicting Standards in Statutory, Customary and Islamic Law Marriage in Nigeria' (2021) (4) (1) *Ajayi Crowther Law Journal*, 1.

authority, placing such individual in a state of uncertainty about which law should regulate his marital affairs.[2]

The consequent value and significance of the marriage institution in Nigeria and many African societies have resulted in a multi-faceted conflict that arises from parental consideration, cultural diversity and preferences, pressure from society, religious differences, economic status, social status, preference on the type of marriage, etc. These differing perspectives and preferences influence marriage choices. When and after parties decide to get married despite conflicting expectations, they are faced with the choice of a system of marriage formalities. Some party's choice of a marriage system ceremony is based on the glamour and excitement of its ceremony not considering the legal implications of their action. While some are aware of the legal implications, they damn the consequences and choose to live the way they deem fit. The pluralistic legal frameworks regulating marriage aid conflicts in the choice of marriage in Nigeria, conflict in family customary practices and religious expectations.

This paper is divided into nine parts, the first part being the introductory part sets the tone for the various arguments that are canvassed in the paper. Part two critically examines the concept of marriage while part three discusses the conflict of laws as it relates to choice of marriage in Nigeria. Part four analyses the available succession laws and principles in Nigeria. The case of ***Mohammed v Mohammed***[3] which is a departure from the decision made in the locus classicus case of ***Cole v. Cole***[4] was analyzed in this section of the paper. Parts five and six looked at choice of marriage and intestate distribution under South African Laws respectively. The choice of South Africa was borne out of the fact that it shares the same commonwealth origin with Nigeria. Part seven considers the legal regime on marriage and intestacy both in Nigeria and South Africa, attention was drawn to the fact that the regimes differ significantly from each other. The learning points from South Africa

[2] D. Odunniake, 'Marriage in Nigeria: The Dilemma of Legal Pluralism' (2014).
[3] (2024) LPELR-62831(CA).
[4] (1898) 1 N.L.R 15.

were drawn in this part of the work. While part eight concludes the work, part nine articulates general recommendations to resolve conflicts that usually arises as a result of marital choices.

2.0 THE CONCEPT OF MARRIAGE

Marriage as an institution is of ancient origin, it is said to be one of the oldest institutions in the world.[5] There is hardly any country of the world where marriage is not conducted. Its incidences may differ or vary from one community, society, religion or culture to another nonetheless it is recognized as an institution which grounds the society/family. Marriage is considered as the voluntary union for life of one man and one woman to the exclusion of all others.[6] This form of marriage, known as monogamous marriage, is regulated by the provisions of the Marriage Act.[7] Monogamous marriage is the form received from the English conception of marriage, and recognized under the Marriage Act. The voluntariness of the union presupposes an agreement or contract between consenting adults, lack of which will render the marriage a nullity. The union intended to be a lifelong commitment, sometimes ends up in separation. That the marriage is to the exclusion of all others is key, as a violation of this element can lead to the crime of bigamy, allegations of adultery and a likelihood of dissolution of the marriage. The general purpose of the monogamous marriage is that once a person is married, such individual is ineligible to contract another marriage in his or her lifetime while the monogamous marriage subsists and the other partner lives.[8]

The union between one man and more than one wife is also a recognized form of marriage in Nigeria under the Customary and Islamic legal systems. While they seem similar, the customary law marriage is marriage according to traditions and customs where the man has the right to an

[5] See *Marriage: A Foundational Institution of Society* https://www.cliffsnotes.com/study-notes/23399541 and B. Herre and 3 others, *Marriages and Divorces* https://ourworldindata.org/marriages-and-divorces (accessed 16 April 2025).

[6] Per Lord Penzance in *Hyde v Hyde* (1886) LR 1 P & D, 130, at 133. See also section 18, Interpretation Act Cap I 23 LFN 2004.

[7] Cap.M6, Laws of the Federation of Nigeria (LFN) 2004.

[8] M.A. Lateef, and N.K. Adegbite. 'Bigamy and Dearth of Prosecution in Nigeria.' (2017) (1)(1) *Obafemi Awolowo University Journal of Public Law*, 91-117.

unlimited number of wives. Under Islamic law, a man can take on as many as four wives as long as he can take care of them and love them equally.[9] It is a tradition in Africa to place great importance on the family unit. Individuals wishing to get married usually fulfil the customary law marriage requirements, irrespective of their religious inclinations or educational status.[10]

The system of marriage in Nigeria possesses certain qualifications, akin to all types of marriages, meant to validate the marriage such as the presence of consent (of both parties and parents), capacity as to age, capacity as to economic status, payment of bride price, formal solemnization in public with witnesses etc. These qualifications are recognized under the Marriage Act as lawful in attaining a valid marriage.[11] However, everyone has a right of choice, to choose the type of marriage they want to be bound by. A party's choice of marriage determines the rules of engagement they will be bound with, not only in the formal ceremonial celebration but also in the conduct of their marital affairs.

3.0 CONFLICT ON THE CHOICE OF MARRIAGE IN NIGERIA

In Nigeria, it is common for couples to simultaneously conduct both statutory and customary law marriage often resulting in confusion over which legal framework should govern their marital status. They go through traditional marriage ceremony in one day, proceed to the Marriage Registry the next day to obtain the Marriage Certificate or they obtain the Marriage Certificate in the morning and in the afternoon go through the customary law marriage ceremony.

The traditional African society primarily recognizes the customary law marriage as the authentic ceremony. It gives credence to the union of both families of the bride and groom, rather than that of the couple. Statutory marriage is seen as a mere formality for providing evidence of marriage by issuance of a Marriage Certificate, which will become needful for documentation in other

[9] See Quran 4:3.
[10] P.A. Akhihiero, 'An Abridgment of Nigerian Matrimonial Laws and the Church' Paper presented at the seminar organized for the members of the Marriage Committee of the Deeper Life Bible Church"3. https://edojudiciary.gov.ng/wp-content/uploads/2016/10/An-Abridgement-Of-Nigeria-Matrimonial-Laws-And-The-Church.pdf, (accessed on 18 February, 2025).
[11] Section 35 of the Marriage Act.

formal engagements such as education, employment, visa application etc. This duality raises questions about how the choice of marriage type influences a person's entire life's dealings- his family structure, succession, and home management within the context of the traditional African beliefs, values and norms.

The court in ***Cole v Cole***[12] highlighted the significant legal implication of one's choice of marriage type. The court emphasized that "*Christian marriage imposes obligations that may not be recognized by native law… In fact a Christian marriage clothes the parties to such marriage and their offspring with a status unknown to native law."* Despite this decision, tension continues to arise from the interplay between statutory marriages and customary law marital relations. The lives and decisions of the average Nigerian man or woman is still influenced by custom, with the extended families playing important roles in the nuclear families. Extended families are crucial in various situations such as acceptance of a person into a family, legitimization of a child, indirect contribution of uncles and aunties to the child's well-being; supporting spouse to maintain marital harmony etc.

Conflict arises in cases of 'double-deck' marriage where individuals marry under both statutory and customary law marriage system.[13] The problem with a double decked marriage is that it becomes difficult to determine the legal status of the parties as the legal framework does not straightforwardly resolve the rising conflicts. Section 35 of the Nigerian Marriage Act specifies that those married under the Act cannot contract a valid marriage under customary law. The Act does not invalidate a previous customary law marriage but acknowledges it as valid. If a statutory marriage occurs after a customary law marriage, the statutory marriage is viewed as overriding the customary marriage, changing it from a polygamous to monogamous one. The situation may differ if a customary marriage occurs after a statutory marriage, raising questions about which legal system applies to the couple's responsibilities. This determination would ultimately be made by the court on the basis of the way of life of the couple in question.

[12] [1898] 1 N.L.R. 15.
[13] M. C. Onokah. *Family Law* (Spectrum Books Limited, 2007) 143.

No doubt, it is popular practice in Nigeria for parties who desire a statutory marriage to marry first under customary law before the solemnization of the statutory marriage.[14] This practice is based on the fact that western civilization have permeated Nigerian society, though most people are still understandably bound by the customary law of their place of origin. The Nigerian Marriage Act validates this practice by enabling persons who are married under customary law to marry each other under the statute with the implication that the statutory marriage gains preeminence over the customary law marriage.[15]

In the eyes of the law, a customary law marriage is a complete and a perfect marriage. The matrimonial union is legitimate and need no further contract under the Act. Most people further proceed to contract statutory marriage as a safety measure to prevent polygamy because they know that customary law marriage is potentially polygamous.[16] The practice of double deck marriage has been judicially noticed by courts in Nigeria. In the case of ***Jadesimi v Okotie-Eboh & 2 ors*,**[17] the court opined that it is never intended by the practice that the marriage under the Marriage Act should nullify the customary marriage, rather it would supplement the practice or custom. The parties are however aware that by contracting under the Marriage Act their marriage would become monogamous.[18]

Questions with regards to the value placed on customary law arises at all times as it is constantly viewed as subordinate to the English Law. Sometimes, the court's reaction to questions of which system of law is applicable to parties' marital affairs is usually determined by the status of the parties and the facts of the case.[19] While a statutory marriage following a customary marriage can undermine the latter's polygamous status, the reverse situation lacks a clear legal resolution.

[14] E.I. Nwogugu, *Family Law in Nigeria* (Revised Edition) (Heinemann Educational Books (Nigeria) Plc, 2014), 66-67.
[15] E.I. Nwogugu, *op cit* 66.
[16] P. A. Akhihiero, *op cit,* 3.
[17] (1996) 2 NWLR (pt. 429) 128.
[18] *Per Uwais, C.J.N,* (1996) 2 NWLR (pt. 429) 128
[19] E.A Oji, and N. Iguh, 'Conflict of Laws in Nigeria' in G.C Nwakoby, K.C Nwogu, and M.N Umenweke (eds), *Fundamentals of the Nigerian Legal System* (Nnamdi Azikiwe University, 2010) 91-110.

Under the Act, if a person has a previous customary marriage with another party before entering a statutory marriage, the latter is void. [20] However, if same parties got married under the two systems of marriage, the statutory marriage remains valid and converts the customary polygamous arrangement into a monogamous one. The section also reflects the common practice in Nigeria where men marry under statutory law but maintain multiple wives through customary practices. This often leads to frustration for women who believed they were marrying monogamously.[21] Marriage under the Act explicitly prohibits a person already married under its guidelines from marrying another person under customary law, labeling such actions as bigamy punishable upon conviction with imprisonment for five years.[22]

The courts have consistently upheld the illegality of marrying a third party while a statutory marriage is still in effect. In the cases of ***Towoeni v. Towoeni***[23] and ***Taiga v. Taiga***,[24] it was emphasized that under Section 35 of the Marriage Act, a person with a subsisting statutory marriage cannot validly enter into another marriage under native law and custom while the first marriage is still active.

It is noteworthy that Section 47 of the Marriage Act has never been enforced in Nigeria because of societal outlook to bigamy in marriage. Despite its criminalization,[25] the offence of bigamy is rarely reported or enforced.[26] The rationale for this is that traditional African society recognizes

[20] See Section 33 Marriage Act which provides that: 'No marriage in Nigeria shall be valid where either of the parties thereto at the time of the celebration of such marriage is married under customary law to any person other than the person with whom such marriage is had.'

[21] M. C. Onokah, *op cit,* 145.

[22] See Sections 35, 46 & 47 of the Marriage Act. See the case of *Lawal-Osula v Lawal-Osula* (1993) 2 NWLR (Pt 274) 158.

[23] (2001) LLER- 246195 (CA).

[24] (2012) LLER-67608 (SC).

[25] Upon conviction for the offence of bigamy, the offender is liable to imprisonment for seven years. See section 370 of the Criminal Code.

[26] The only two reported cases of Bigamy in Nigeria are *Rex v. Inyang and Rex v. Princewill. Rex v. Inyang* (1931) NLR 10, P. 33; the facts are that Mr Inyang married one Evelyn Eliza Darvell on 15th March, 1923 in the registry office at Hammersmith, London. While this marriage subsisted, he went through another marriage under the Act on 25th October, 1928 at the United Free Church, Duke Town, Calabar, with one Nya Eniang Esien. Years after the

and condones the polygamist nature of the male folk. Many married women are compelled to condone such offensive actions, because they do not want to referred to as a divorcees, losing their self-respect in the society, and more importantly to protect the interest of their children where they are not economically sufficient.[27] The long run effect of this permissiveness surfaces at the point of inheritance and succession, with a battle for who should or should not be entitled to a deceased estate, where he dies intestate.

4.0 DISTRIBUTION OF A DECEASED ESTATE INTESTATE

Succession involves rules regarding the distribution and management of a deceased person's estate, encompassing not just transmission of property but also of ownership rights and responsibilities transferred to heirs, typically including children, spouses, and other dependents.[28] In cases where a Will exists, distribution follows the directives of that Will, this is also known as testate succession.[29] The Testate succession is regulated by various legal framework especially when the marriage of the deceased and his/her spouse was contracted under statutory law.[30] However, when a person dies intestate, the distribution is governed by local laws, varying based on the deceased's marital status and applicable statutory or customary laws; though in Nigeria intestacy is largely regulated by native law and custom.[31] When a person who is subject to customary law dies intestate, native law applies.[32]

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case of R v. Princewell was decided, another bigamous case came up, though unreported. (Extracted from M. A Lateef and K. Adegbite, 'Bigamy and the Dearth of Prosecution in Nigeria' (2017) *OAU Journal of Public Law,*9.

[27] M. A. Lateef and K. Adegbite, 'Bigamy and the Dearth of Prosecution in Nigeria' (2017) *OAU Journal of Public Law,* 1-25.

[28] A.C Diala, Reform of the Customary Law of Inheritance in Nigeria: Lessons from South Africa (2014) 14 AHRLJ 633-654

[29] M.T Otu, and M. Nabiebu, 'Succession to, and Inheritance of Property under Nigerian Laws: A Comparative Analysis' (2021) (62) (2) European *Journal of Social Sciences,* 50-63.

[30] Generally, principal laws governing testate inheritance include the Marriage Act, the Administration of Estates Law of 1959, the Succession Law Edict of 1987 (as amended by South-East States), the English Wills Act of 1837, and the Wills Amendment Act of 1852 (generally applicable except in the south-west). Others are the Wills Law of 1959 (south-west), the Wills (Soldiers and Sailors) Act of 1918, and the Wills Law of old Bendel State. etc.

[31] M. T Otu, *ibid*, 63.

[32] A. C Diala, *op cit*, 640.

In Nigeria, intestate succession lacks uniformity, but some general rules apply:[33]

a) Immovable property is governed by *lex situs*, the law of the place where the property is located. If the property is based in states created out of the former Western Region or the defunct Bendel state, the Administration of Estates Law of 1959 applies when customary law does not apply. If the property is based in any of the northern or eastern states, English common law applies, as laid down in ***Cole v Cole.***[34]

b) Movable property is governed by the law of domicile of the intestate at the time of death.[35] If the intestate died domiciled in states created out of the former Western Region, the Administration of Estates Law applies. If he dies in any of the northern or eastern states, the law of the state in which he died applies with respect to movable property.[36]

c) Where the property is subject to customary law, or the deceased was married under customary law, customary law applies.

Generally, persons married under statutory law are expected to follow the Marriage Act, which defines their rights and obligations. The same goes for another who is married under customary law, while Islamic law regulates succession only amongst Muslims in the country.[37] However, conflicts can arise when a man married under statutory law takes additional wives under customary or Islamic law. In cases where he dies without a will, questions emerge about how to distribute his estate—whether to favor the legally recognized wife or to include customs that acknowledge other wives and their children.

In ***Salubi v. Nwariaku*****,**[38] the supreme court set aside judgment of the appellate court and held that the applicable law to the distribution of the estate of an intestate who died leaving a spouse and children is the Administration of Estate Law. The reasoning of the court was hinged on the principle that where there is conflict between the English common law and provisions of a regional

[33] P.O Itua 'Legitimacy, Legitimation and Succession in Nigeria: An Appraisal of Section 42(2) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) on the Rights of Inheritance' (2012) (4) *Journal of Law and Conflict Resolution* 36.

[34] *Cole v Cole* (1898) 1 NLR 15 is authority that when a person who contracted a Christian marriage outside Nigeria dies intestate while domiciled in Nigeria, the English common law governs the distribution of his estate. Extracted from Anthony C Diala, *op cit*, 16.

[35] *Tapa v Kuka* (1945) 18 NLR 5; *Zaidan v Zaidan* (1974) 4 UILR 283.

[36] A.C Diala, *op cit*. 640.

[37] T. Oladipo, 'Intestate Succession in Nigeria' (2009) (5) *Business Law Digest, 1-8.*

[38] (2003) 7 NWLR (pt. 819) 426.

law on distribution of intestate estate, the latter must prevail. In determining the distribution of estate of a deceased who married under the Marriage Act and died intestate, the court in **Obusez *v* *Obusez***,[39] followed the principle laid down in *Salubi's case* and held that the Administration of Estate Law is applicable. In the instant case, the Agbor native law and custom to which the deceased was subject was held non-applicable. The court also held that intestate succession is not determined by place of burial. The fact that deceased was buried in his twin brother's (1st Appellant) personal residence and a life policy made by deceased named 1st appellant as beneficiary did not give him priority in the grant of Letters of Administration over the deceased wife and children.[40] It should be noted that subjecting distribution according to Administration of Estate Law overrides any conflicting customary law.[41]

The general principle of marriage under the Act establishes a legal bond that applies English law to intestate succession.[42] However, courts have the discretion to deviate from this rule to avoid injustice to descendants of customary marriages. In the case of ***Adegbola v. Folaranmi***,[43] Johnson, a Nigerian who married according to customary law, later married Mary in a Roman Catholic church after being sold into slavery in Trinidad. Upon his return to Nigeria, both his first wife and his daughter (plaintiff) were alive. After Johnson and Mary's death, Johnson's daughter (the plaintiff) claimed his immovable property, asserting her rights under customary law as his only child. Johnson died intestate but Mary died leaving a will in which she declared the first defendant as her executor. The divisional court and the Nigerian Supreme Court ruled that English common law governed the succession, affirming that the first defendant was entitled to the property under Mary's will who was entitled under English Law to inherit Johnson's property. Critics argue that the court erred by not properly assessing the plaintiff's status under customary law or evaluating

[39] (2007) 10 NWLR (Pt 1043) 430.
[40] Per Mohammed JSC at 455-456.
[41] By virtue of section 49(5) of the Administration of Estates Law Cap. 3, Laws of Lagos State where any person who is subject to customary law contracts a marriage in accordance with the provisions of the Marriage Act and such person dies intestate leaving a widow or husband or any issue of such marriage, any property of which the person might have disposed of by Will shall be distributed in accordance with the provisions of the Administration of Estates Law notwithstanding any customary law to the contrary.
[42] E. K. Bankas, 'Problems of Intestate Succession and the Conflict of Laws in Ghana' (1992) (26) (2) *International Lawyer*, 433.
[43] [1921] 3 N.L.R. 89.

the validity of Johnson's first marriage, suggesting that justice was not served in the decision.[44] We also hold the view that by not recognizing the plaintiff as the legitimate daughter of the deceased, she was bastardized. This definitely contradicts the principles of natural justice, equity and good conscience.

The complexity of intestate succession places courts in challenging positions of determining which law to apply, especially when the choice of marriage could be a major index on the lifestyle of the deceased. Reality has shown that the choice of marriage cannot be the major and only determinant for the distribution of the deceased estate. The determination of heir-ship should consider various factors, including the status of the parties and the peculiar facts of the case; the personality and conduct of the deceased at the time of death; balancing the interests of all parties in the dispute; the appropriate law that will not cause hardship on any party if applied and/or which law would be most impaired if not applied.[45]

It is noteworthy also that parties to the marriage are pure Africans not Englishmen and the tenets of a valid marriage in their hometown cannot be ignored. On the one hand, many Africans enter into the English form of marriage because of their faith in the Christian religion. They may not intend all aspect of their marital lives to be governed exclusively by the English law, and some invariably may have entered into a civil or Christian marriage without realizing that the English law will be applied to all aspects of their relationship.[46] The court's approach should consider the reasonable expectations based on how the parties lived, advocating for a more flexible application of the law. It was for this reason the court in ***Smith v. Smith***[47] commented that "it would be quite incorrect to say that all the persons who embrace the Christian faith or who are married in accordance with its tenets, have in other respects attained that stage of culture and development as to make it just or reasonable to 'suppose that their whole lives should be regulated in accordance with English laws and procedures." Besides, the courts therefore should consider that a marital

[44] E. K. Bankas *op cit.*442.
[45] See E. K. Bankas *op cit;* N. Iguh, *Conflict of Law in Nigeria. Ibid.*
[46] *Ibid.*
[47] *Smith v. Smith* (1924) 5 N.L.R. cited by T. W. Bennett, African Marriages Under the Marriage Act African Law or Common Law? (1977) *The Rhodesian Law Journal*, 3-28.

union under the Act in fact terminates at the death of a spouse. As a result, the court's focus should shift from enforcing rigid legal regulations to resolving conflicts and ensuring fair distribution of the deceased's estate based on equity and good conscience.[48]

In the case of ***Mohammed v. Mohammed***,[49] the deceased, who was survived by his aged parents, the appellants and other heirs, left inheritable estates. While the deceased married the 1st and 2nd Appellants under Islamic Law, the 2nd Respondent was married to the deceased under the Marriage Act first before the Islamic marriages. On his demise, the Nigerian Army paid to the 1st Respondent, the deceased's first daughter, being his next of kin in the record of the Nigerian Army, a sum of ₦23,588,000.00 (Twenty-Three Million Five Hundred and Eighty-Eight Thousand Naira) as the deceased's emoluments. It was when it became clear that the 1st Respondent was not willing to share the said money and properties of the deceased that an action was initiated in court. The trial court held that the applicable law to the administration of estate of the deceased is the Administration of Estates Law of Kwara State and not Islamic Personal Law. This decision was upturned by the Court of Appeal on the grounds that the personal way of life of the deceased (being a Muslim subject to Islamic law) should govern the succession of his estate and not the Marriage Act.

The court's decision in ***Mohammed v Mohammed***[50] is a departure from the decision made in the *locus classicus* of ***Cole v. Cole.***[51] There seems to be shift in consideration from the rule that 'the form of marriage determines which law governs intestate succession.' The decision of *Cole v. Cole,* though laid a ground rule that 'the form of marriage determines which law governs intestate succession' which has been the basis for determining succession when issues of conflict arises, yet the effect of the court's decision had been faulted on the grounds that the validity of first customary marriage of the deceased was not put into consideration, hence the causing injustice to the child

[48] Argument ours.
[49] (2024) LPELR-62831(CA)
[50] *Ibid*
[51] (1898) 1 N.L.R 15

born from the customary marriage, as the court favoured the second statutory marriage over the first customary marriage.

The court of Appeal in ***Mohammed v Mohammed***[52] departed from this *status quo* and refused to determine intestate succession on the basis that the deceased (first) statutory marriage regulations would govern his entire marital affairs. Rather, the court reasoned that the status of the deceased and how he conducted the affairs of his life while alive would be a justiciable yardstick. In this instance, the deceased married other wives after his statutory marriage, lived and died as a muslim. This was far from the consequence of the court's decision in *Cole's case* which excluded the legitimate child of deceased from inheritance because she was not a product of a statutory marriage. The decision in Mohammed has come under heavy criticism for 'not being based on law but possible miscarriage of justice against the respondents.'[53]It is hoped that an appeal to the supreme court will set the records straight.

It may be argued that this decision cannot create a general rule in intestate succession. This is because various customs have varying standing rules on how property is shared. However, customs and practices that do not align with existing laws in the country or are repugnant to natural justice, equity and good conscience and generally fail the validity tests are unenforceable[54] and only 'fit for the garbage consigned to history.'[55] In ***Mojekwu v Mojekwu,***[56] the custom of Nwewi people of Nigeria which gives a brother the right to inherit the estate of his late brother to the exclusion of the deceased's widow and female children was held to be discriminatory and repugnant to natural justice, equity and good conscience and was therefore set aside. Similarly, in ***Ukeje v Ukeje***[57] the right of a female child to inherit properties was upheld while the *Ikwerre* native law and custom

[52] (2024) LPELR-62831(CA)

[53] H. Ajibola, 'The Court of Appeal Decision in Mohammed & 5 Ords v. Mohammed & Another on Succession under Islamic Personal Law: My Legal Opinion' *Law Pavilion Blog* 13 September 2024 https://lawpavilion.com/blog/the-court-of-appeal-of-nigeria-decision-in-mohammed-5-ords-v-mohammed-another-on-succession-under-islamic-personal-law-my-legal-opinion/ (accessed 18 April 2025).

[54] See *Ukeje v Ukeje* (2014) 11 NWLR (pt.1418) 384.

[55] See *Alajemba Uke and Anor v. Albert Iro* (2001) 1 NWLR (pt 723) 196 Per Pats-Acholonu, JCA at 202. See also Ananaba, A., and Taiwo, A., 'The Judicial System and Female Inheritance in South East Nigeria.' (2024) (3) *International Journal of Law and Policy,* 125.

[56] (1997) 7 NWLR (pt. 512) 283.

[57] (2014) 11 NWLR (pt.1418) 384.

that stated otherwise was held to be discriminatory and unconstitutional. It has been severally argued that customary law on succession should not be discriminatory but should rather reflect equality.[58] However it will take legislative and judicial intervention as well as public consciousness to bring about an adjustment in this mode of succession. [59]

In Nigeria, the conflicts between statutory marriage and customary law marriage regarding intestate succession are obvious; whereas the customs for property distribution vary significantly. While some customs promote equity, others are marked by inequality. The Yoruba culture aims to ensure fairness among all heirs using sharing formulas that consider both legitimate and illegitimate children, through its *ori-ojori*[60] or the *Idi-igi*[61] sharing formula, whichever is suitable at the time of distribution. Conversely, the Ibo culture follows a male progenitor system which does not reflect equity. This situation highlights the need for a review of certain customary practices in Nigeria to better balance interests.

5.0 CHOICE OF MARRIAGE UNDER SOUTH AFRICAN LAWS

The South African (SA) marriage system is pluralistic, regulated by various laws stemming from colonial and apartheid legacies, as well as post-1994 reforms aimed at addressing historical injustices.[62] Key pieces of legislation include the Marriage Act 25 of 1961, the Recognition of Customary Marriages Act 120 of 1998 (RCMA) and the Civil Union Act 17 of 2006.[63] The existing marriage systems include- Marriage under the Act, the Customary Marriage, Islamic Marriage,

[58] P.A. Anyebe, 'The Rule of Primogeniture Under Igbo Customary Law: A Violation of Women's International Human Rights Norms' (2023) (3) (1) *Achievers University Law Journal*, 139-152

[59] A major legal reform followed the Ukeje's case. Following the judgment, Rivers State promulgated a law that entitled women to share in family property. See Rivers State Prohibition of the Curtailment of Women's Right to Share in Family Property Law No 2 of 2022.

[60] Distribution of a deceased estate according to the number of children, thus every child is entitled to their father's property. Division may not be equal, but every child is not deprived of inheritance.

[61] Distribution of a deceased estate according to the number of wives. The Wives are regarded as branches of the deceased, whether they have children or not, are entitled to their deceased husband's property.

[62] Home Affairs Department of South Africa, *White Paper on Marriages in South Africa*, March 2022; www.dha.gov.za/ (accessed on 20 February, 2025).

[63] *Ibid*

Hindu Marriage and Non-Customary Marriage.[64] The Marriage Act of 1961 regulates the English/ Christian/ Monogamous form of marriage; the Recognition of Customary Marriage Act (RCMA) regulates the both monogamous and polygamous form of Marriage and the Civil Union Act 17 of 2006 regulates and formalizes monogamous partnerships for both same and opposite sex couples.

Prior to 1961, only marriages under the Marriage Act were recognized, while customary marriage never gained formal recognition until 1998 when the RCMA was enacted giving formal validity to the customary marriage.[65] Conflict was prevalent because customary marriages were viewed as inferior to civil marriages.[66] However, this has changed with the constitutional acknowledgement of customary law under section 211 of the South African's 1996 constitution. The customary institution, status and role of traditional leadership, are recognized and subject to the constitution hence the rules of customary law must, however, not conflict with section 211 of the Constitution.[67] The courts have ruled that South Africa is an open and democratic society that guarantees freedom of worship and acknowledges the multi-faith nature of the country where orthodox thoughts are neither imposed nor is anyone required to conform to any particular world-view. [68] The Constitution recognizes and accommodates the existing different belief systems within the framework of equality and non-discrimination.[69]

The South African 1994 constitutional reforms accords equal recognition and protection to both culture and religion. [70] It moves away from traditional common law view of one man and one

[64] M.J Mafela, 'Marriage Practices and Intercultural Communication: The Case of African Communities' (2016) (24) (1) *Southern African Journal of Folklore Studies*, 1-8.

[65] The other systems of marriage (marriage according Hindu, Muslim or other religious rites) have however not received any formal recognition but they exist among the socially recognized mode of marriage in South Africa.

[66] D. Budlende, N. Chobokoane, and S. Simelane, 'Marriage Patterns in South Africa: Methodological and Substantive Issues' (2004) (9) *Southern African Journal of Demography;* 1-9.

[67] M.C Schoeman-Malan, 'Recent Developments Regarding South African Common and Customary Law of Succession' (2007) (10) (1) *Potchefstroom Electronic Law Journal*, 2.

[68] See *S v Lawrence* CCT38/96 (1997) ZACC 11; *S v Negal* CCT 39/96 1997 (10) BCLR 1348 (CC); and *S v Solberg* 1997 4 SA 1176 (CC) 151.

[69] See J. A Robinson, *The Evolution of The Concept of Marriage in South Africa: The Influence of the Bill of Rights In 1994.* Paper presented at the 12th World Conference of the International Society of Family Law, Salt Lake City, United States of America, July 2005, Pg 488.

[70] Section 9(3) of the Constitution prohibits the State from unfairly discriminating against anyone on one or more grounds, including, among others, 'religion, conscience, belief, [and] culture.' Under section 15(1) everyone has

woman with the Recognition of Customary Marriages Act (RCMA).[71] Customary Marriage registered under the RCMA now has the same status and protection as marriages under the Marriage Act.[72] It also promotes equality in proprietary rights between spouses.[73] While both monogamous and polygamous customary marriages are recognized legally, it is a requirement that customary marriages are registered to obtain a marriage certificate.[74] Though non-registration of the customary marriage does not invalidate the marriage, benefits of registration includes certification and documentation that facilitates legal claims and recognition especially for women and widows.[75]

The effect of recognizing customary marriage as a formal and valid form of marriage has drastically reduced conflict in choice of marriage as the rules of engagement are so clear that it is either one chooses a legal system that promotes monogamy or polygamy. Similar to the Nigerian Marriage Act, anyone whose marriage is subsisting under the Act cannot legally enter into another civil or customary marriage while the civil marriage still exists.[76] A spouse in a customary marriage, cannot enter into a civil marriage with any other person (except his customary spouse) while the customary marriage still exists, and only if their marriage is monogamous.[77] However, where a spouse of a customary marriage enters into a civil marriage with another woman while the customary marriage subsist the civil law marriage with the other woman is not valid.[78] Where the husband entered into the civil law marriage before the customary law marriage, and the civil law marriage was not terminated (through divorce) by a court, then the civil law marriage is said to be subsisting and valid while the customary law marriage is invalid.

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the right to 'freedom of conscience, religion, thought, belief and opinion.' Section 31 entitles persons belonging to a cultural, religious or linguistic community – (a) to enjoy their culture, practice their religion and use their language; and – (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.' See also sections 181(1)(c), 211 and 212 of the Constitution.

[71] See J.A Robinson, *op cit.*

[72] *The Recognition of Customary Marriages in South Africa: Law, Policy and Practice.* (December 2012) https://open.uct.ac.za (accessed on 18 February, 2025).

[73] Section 6 of the RCMA.

[74] See Sections 4(1) and 4(4)(b) of the RCMA.

[75] Section 4(8) of the RCMA.

[76] Section 10 of the RCMA.

[77] *The Recognition of Customary Marriages in South Africa: Law, Policy and Practice, supra.*

[78] *Netshituka v Netshituka* 2011 (5) SA 453.

Where a man marries under monogamous customary marriage and later intends to marry another wife or wives under customary law, he is expected to inform his wife before marrying other wives. However, he cannot enter into another customary marriage until the magistrate or high court judge approves a written contract that shows how the property will be divided between him and all the wives in the future.[79] The property rights of the husband and wives will be determined according to the terms of the contract and a judge can say whether the division is fair or not. All his existing wives must also give their consent to the new marriage.[80] Some have argued that where the subsequent customary marriage does not go through the procedure it will be invalid, and the new wife may not be able to claim property or benefits if the husband dies. However, in practice, very few polygamous customary marriages are registered because people find it difficult to meet these requirements. The cost implication of going to court, hiring a lawyer and drafting a contract are expensive hence most new polygamous marriages are not registered. If the court also decides that these marriages are invalid, then new polygamous wives will be left in a very vulnerable position.[81]

6.0 DISTRIBUTION OF INTESTATE UNDER SOUTH AFRICAN LAWS

In South Africa, the distribution of a deceased estate is primarily governed by the Wills Act of 1953 and the Intestate Succession Act of 1987. Historically, customary law for black Africans was initially un-codified until the Black Administration Act of 1927, which established specific inheritance rules, often favoring male heirs and limiting women's rights to property, and succession was based squarely on the deceased lifestyle.

The Constitutional court in the case of ***Bhe v The Magistrate, Khayelitsha***[82] observed that the application of the customary law rules of succession caused much hardship, where widows could be left to raise children on their own without support from the deceased husband's family. In

[79] Section 7(6) of RCMA.
[80] *The Recognition of Customary Marriages in South Africa: Law, Policy and Practice, supra.*
[81] *Ibid*.
[82] 2004 (2) SA 544 (C); 2004 (1) BCLR 27 (C) (Commission for Gender Equality as amicus curiae). See also Shibi v Sithole & Others; South African Human Rights Commission & Another v President of the Republic of South Africa & Another 2005 (1) SA 580).

response to these concerns, the South African Law Reform Commission (SALRC)[83] initiated reforms through the Law of Succession Amendment Act of 1992, aiming to modernize the Intestate Succession Act and the Wills Act.[84] The reforms sought to align customary law with constitutional principles, ensuring that widows and children are adequately protected in matters of inheritance and property rights. The text discusses an amendment to the Maintenance of Surviving Spouses Act of 1990, allowing wives in customary marriages to claim maintenance and related support.

In ***Zondi v President of the Republic of South Africa*[85]** the deceased who was married and had two illegitimate children, died intestate in 1995. The marriage was not one in community of property[86] in terms of section 22(6) of Black Administration Act. No child was born from the marriage but the deceased wife pre-deceased him in October 1992. At the time of his death, the deceased was not married by custom but he had fathered two illegitimate children. His estate was to be administered in accordance with customary law according to Regulation-2,[87] where the deceased's brother would become the heir, and the illegitimate children would not inherit. The applicant sought an order declaring Regulation-2 unconstitutional. The court held that the constitutional prohibition on unfair discrimination in section 9 (of the SA 1996 Constitution) lies at the heart of the Constitution. That Regulation-2 offends against the equality provisions of the Constitution as children, both legitimate and illegitimate, of a deceased African person married by ante-nuptial contract or in community of property would qualify to inherit the estate, while the illegitimate children of persons in the same position as the deceased would not. The court found that it was grossly discriminatory and should be struck down, thus conferring on all illegitimate children the same succession rights.

[83] Established under the South African Law Reform Commission Act 19 of 1973.
[84] A.C Diala, 'Reform of the Customary Law of Inheritance in Nigeria: Lessons from South Africa' (2014) (14) *AHRLJ* 633-654.
[85] Unreported decision of Levinsohn J of the Natal Provincial Division (NPD),:33 De Jure 155 (2000)
[86] Marriage in community of property was marriage where the husband and wife have equal proprietary rights.
[87] Regulations 2 of the Regulation for the Administration and Distribution of the Estates of Deceased Blacks Reg GN R200 of 1987. Case extracted from MC Schoeman-Malan, *opcit,* 15.

In ***Bhe v Magistrate, Khayelitsha,***[88] the 3rd applicant and the deceased lived together as partners. Two minor female children (1st and 2nd applicants) were born out of the relationship. The applicants challenged the appointment of the deceased father as the intestate heir and representative of the estate of the deceased. The rule of primogeniture as sanctioned by regulation 2(e) of the Administration and Distribution of the Estates of Deceased Blacks was found to be unconstitutional by the court. In addition, the court also declared section 23 (10) (a), (c) and (e) of Black Administration Act invalid because they violated the constitutional principles of equality.[89] With the landmark decision in *Bhe's case* widows and children now have equal rights to inheritance regardless of their gender or legitimacy.[90]

7.0 MARRIAGE AND INTESTACY IN NIGERIA AND SOUTH AFRICA

The marriage systems in Nigeria and South Africa differ significantly, particularly regarding marriage choices and estate distribution for individuals who die intestate. South Africa's 1996 constitutional reforms recognized and harmonized customary and English common law on marriage, promoting inclusivity and cultural appreciation while reducing discrimination. This recognition elevated customary law to an equal status alongside English law, supported by the codification of the Recognition of Customary Marriage Act. Conversely, Nigeria's constitution offers only passive recognition of customary and Islamic law. Even though their application is allowed in specific areas, they are not codified across all aspects of the legal system. Their importance and relevance are further limited by subjecting them to English legal standards. The common practice of decking a customary law marriage with a statutory marriage in Nigeria seems to be fueled by the belief that one is inferior to the other.[91] This duality complicates legal recognition and creates challenges for the courts in determining marital status and rising issues in succession.[92]

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[88] CCT 49/03 (2004) ZACC 17.
[89] See section 9 (1) and (3) of South Africa Constitution.
[90] See section 1(1)(a) Intestate Succession Act 81 of 1987.
[91] This practice is validated by the Marriage Act which gives allowance for parties married under customary law to marry each other under the Act.
[92] R.A Onuoha, 'Discriminatory Property Inheritance under Customary Law in Nigeria: NGOs to the Rescue' (2010) (10) (2) *The International Journal of Not-for-Profit Law*.

The 1996 South African constitution's anti-discrimination stance led to significant legal reforms, including the codification of uniform customary laws that apply to various ethnic groups. This codification aimed to clarify the legal requirements for marriage and allowed for the registration of customary marriages, protecting the validity of such marriages and defining the status of the spouses involved. Furthermore, these reforms addressed issues of male primogeniture, promoting gender property rights and protecting women and children considered illegitimate. No doubt, the South African legal regime has simplified the determination of an individual's marriage system and the applicable succession laws.

The enactment of the Recognition of Customary Marriage Act (RCMA) represents a significant move towards harmonizing the customs of diverse ethnic groups within the constitutional framework. It acknowledges polygamous marriage as a legitimate form of African marriage, contrasting with English marriage norms. The RCMA provides clear legal requirements for both monogamous and polygamous marriages, promoting transparency among spouses and minimizing disputes related to succession, while allowing individuals the freedom to choose their preferred marital regime. Parties can change their legal regime through a simple agreement; without such an agreement, one party may face criminal or civil liability. Despite these advances, Nigerian laws and courts struggle with inconsistencies in decisions regarding marriage validity and estate distribution under intestate succession, leading to ongoing conflicts.

8.0 CONCLUSION

The choices regarding marriage and property distribution after death are largely influenced by peculiar cultural practices, No one culture can be said to be superior to the other, rather appreciation of the diversities in the heterogeneous clan is what makes a state stronger. Legal reforms are advocated not to undermine customary laws but to promote fairness and balance among various

cultural groups and the English legal frameworks, aiding in the resolution of legal conflicts. The courts are encouraged to recognize both statutory and customary law marriages as equally valid, facilitating a harmonious legal framework.

9.0 RECOMMENDATION

Judicial and legislative reforms are urgently needed for Nigeria's matrimonial legal system. A unified legal system as available in most developed countries can be adopted to reduce conflicts. We recognize the fact that a complete unification may not be feasible due to Nigeria's diverse cultural and religious legal systems. However, a partial unification through harmonization is recommended, where different legal systems coexist and are treated equally. We believe where marriages under the Act and customary law marriages are recognized as being equal in status and validity, the issues that comes with succession will reduce.

In addition, the codification of common customary laws on marriage and succession in Nigeria would enhance legal certainty for parties involved- certainty as to the binding laws and status of parties' marriage, certainty for heirs and successors in succession, certainty for the courts. Codification would also promote better registration and certification of marriage, customary or statutory. It will aid easy investigation and identification of any person violating matrimonial rules and give proper recognition of those married under custom thus foreclosing the commonly practiced double decker system.

An overhaul of the Nigerian legal system as regards marriage is necessary. Section 258 of the Nigerian Evidence Act places legally recognized marriages in Nigeria on the same pedestal and with the same value.[93] Unfortunately, this is not the position under the Marriage Act. Conflicts

[93] Under the Evidence Act, the status and obligations of spouses are not varied by choice of marriage systems. According to section 258 Evidence Act: ' "wife" and "husband" mean respectively the wife and husband of a marriage validly contracted under the Marriage Act, or under Islamic law or a Customary law applicable in Nigeria, and includes any marriage recognised as valid under the Marriage Act.'