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When do women win in legally plural systems? Evidence from Ghana and Senegal*

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ABSTRACT

Africa's plural legal systems are often doubly bad for women: reinforcing patriarchal threads in indigenous practices while layering male-dominated Anglo-European laws atop. While these systems generally work to their detriment, women are sometimes able to take advantage of them. Under what conditions are women able to 'win' in Africa's plural legal systems? I examine women's interactions with the plural colonial court systems in the Gold Coast and Senegal. Based on an analysis of original court records in each country, I argue that women are more likely to win in plural legal systems in areas of operational ambiguity where applicable legal principles are contradictory. Leveraging this ambiguity enabled women in the Gold Coast and Senegal to win rights around inheritance and divorce, respectively. These victories were codified post-independence, though women face social pressures against exercising them.

INTRODUCTION

By virtue of colonialism and a complex array of pre-existing legal structures, many African countries are legally plural, pairing some form of national legal system alongside a patchwork of 'customary' legal practices. These legal systems are often doubly bad for women: reinforcing patriarchal threads in indigenous practices while layering male-dominated Anglo-European laws

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atop. While these plural legal systems generally work to their detriment, women are sometimes able to take advantage of them. Under what conditions are women able to win in Africa's plural legal systems?

To answer this question, I examine sets of colonial court records from the Gold Coast and Senegal to identify the legal areas in which women disproportionately won. In the Gold Coast, women used the courts to secure property through inheritance and succession cases. In Senegal, they used the courts to win divorce cases. These victories were made possible by the confused and ambiguous context of colonial courts, where women could leverage an array of legal (and moral) principles that were unavailable in other venues. Based on this evidence, I argue that women facing plural legal systems are more successful in areas of operational ambiguity: where various legal systems rest on contradictory logics. I then trace these legal areas to the present to determine whether early victories resulted in lasting legal changes. Women's victories were codified in both countries, though they face social pressures that limit exercise of these rights.

This case selection offers several analytical advantages. First, pre-existing legal principles varied greatly between the two colonies, and the British and French imported different legal systems. This diversity generates an opportunity to determine whether there are any commonalities in women's legal strategies across different contexts. Second, focus on how women navigated legal pluralism during colonialism allows analysis of how women's interactions with the courts changed legal practice over time. Finally, examining civil law illuminates how women carved out autonomy under quotidian circumstances. Most accounts of women's resistance during this time focus on highly visible forms of civil disobedience and contentious politics (e.g. van Allen 1972; Allman 1996; Tripp 2015). These forms of resistance are important elements of women's repertoire of political action. However, women's ability to claim victories *within* an institutional environment hostile to their interests has attracted less scholarship. Further, accounts of women's strategies in legally plural contexts are often limited to a particular location and period. This study, based on analysis of two different systems over time, advances a unifying framework to better understand when women are likely to be successful in navigating these plural systems.

This paper proceeds as follows: Section 2 reviews the literature on women and legal pluralism in Africa. Section 3 presents my argument regarding when women's strategies are more likely to be successful. Section 4 details my methods. Section 5 presents an empirical analysis of colonial court records from the Gold Coast and Senegal, highlighting the areas in which women disproportionately won their cases. Section 6 traces the codification of these laws post-independence. A final section concludes by considering how this theory applies to existing work on legally plural African countries, and other arenas in which it may be applicable.

LEGAL PLURALISM AND WOMEN'S STRATEGIES

Legal pluralism refers to the coexistence of two or more parallel or overlapping legal systems within a country. Nearly all African countries are legally plural: the introduction of Islam in some regions generated legal pluralism through the complex ways in which Islamic law interacted with local customs. Colonialism added another layer of complexity by establishing 'dual' legal systems with courts catering to Europeans and Africans thought to be sufficiently 'Europeanised'[1] alongside 'customary courts' that were supposed to administer justice based on precolonial norms (Roberts & Mann 1991; Gebeye 2017: 228). These dual systems were plural in practice, as most colonies included numerous ethnic groups with varied practices. Because colonisers lacked the resources and manpower to extend a legal system that could encompass all of the territory they claimed, customary courts became important workhorses for colonial administrations (Gebeye 2017: 230).

Colonial officials relied on reports from local elites and intermediaries to interpret customary law.[2] These elites often presented versions of 'custom' meant to highlight their own power, often to the detriment of lower-status community members (e.g. Chanock 1985; Diala 2019). Customary law was not a continuation of pre-colonial practice, but a translation of those practices reflecting the interests of intermediaries. Following Diala (2019: 383), I use *indigenous law* as 'precolonial norms observed in their original forms', and *customary law* as an (often distorted) adaptation of indigenous law. While the extent and the nature of this distortion are highly variable, customary law often represented changes to indigenous law that disadvantaged women, youth, migrants and ethnic minorities (Chanock 1985).

The relationship between customary and colonial courts varied across different colonies, but legal pluralism across colonial Africa shared some unifying factors. First, colonial officials tended to leave the customary courts to their own devices unless they upheld practices that failed the 'repugnancy test' – in other words, allowing behaviour that Europeans found questionable (Roberts & Mann 1991: 14; Bakibinga-Gaswaga 2018: 294; Diala 2019: 394). Second, while customary and colonial courts were supposed to be separate entities operating in parallel, the boundaries of these courts were much more porous in practice. Africans could often appeal the rulings of customary courts to the colonial court system, where their cases would be heard outside their local communities by colonial rather than indigenous judges. Third, there were often contradictions between different versions of the law. Most colonies recognised numerous versions of custom, creating problems of which law to apply in cases of inter-marriage and migration. There were also numerous contradictions between customary and colonial law, giving judges great latitude in determining which legal principles applied.

Legal pluralism persisted after independence in most African countries. Customary courts were maintained and formalised, sometimes enshrined in new constitutions. Colonial courts became state courts, with state law often

modelled on colonial law. In many countries, the result is 'a multitude of incoherent systems working side by side, weakly enforced and often operating in contradiction to one another' (Bakibinga-Gaswaga 2018: 278). Independent African states have maintained some version of the repugnancy test, generally stating that customary law cannot contradict state law. However, even where state laws may prohibit certain behaviours, there may be intense social or cultural pressure to adhere to them (Diala 2020). Legal pluralism and its attendant contradictions remain characteristic for many African countries.

Analyses of legal pluralism in Africa often highlight how detrimental it is for women. Male elites' reinterpretations of indigenous law into customary law reinforced patriarchal strands within those practices, while the concomitant social and economic changes associated with colonialism eroded women's social power (Chanock 1985; Tashjian & Allman 2002; Mbah 2019). For example, in Nigeria, customary courts reinforced the custom of male primogeniture (inheritance through the male bloodline) while abandoning the indigenous expectation that the man inheriting the property also inherits the responsibility of caring for the deceased's dependents (Diala 2019: 387). At the same time, the legal structures imported by colonial officials generally reflected the patriarchal practices of their own systems, usually based around the assumption of the nuclear family with a male breadwinner (Beoku-Betts 1976; Hern 2021). For example, such legal systems recognised principles such as land ownership, but did not recognise either women's ability to enter into independent contracts while married or women's claims to land through kin (Dowuona-Hammond *et al.* 2020: 8). In many places, women find themselves caught between customary law 'used to disempower women and bolster patriarchal interests', and state law 'used to entrench the position of those with formal rights (mostly men)' (Mnisi & Claassens 2009: 491–2). Legal pluralism in African countries often leaves women doubly bound.

Yet, despite the theoretical and empirical work examining the ways in which these legal systems disadvantage women, another strand of literature highlights women's ability to claim legal victories, particularly in civil courts. For example, in colonial French Soudan, women seeking divorce engaged in venue shopping: when customary courts insisted that they should be reconciled to their husbands, they took their cases to the colonial provincial courts, where French judges were inclined to grant them (Roberts 2005: 16–22). In Southern Rhodesia, Basotho women turned to colonial courts to bolster their claims for inheritance and property rights in the face of contradictory customary laws (Mujere 2014: 711–15). In Nigeria's Igboland, women were able to take advantage of the colonial repugnancy test to extricate themselves from marriages to which they had not consented (Ojo 2016: 74). One account of colonial courts in Kenya notes that they became 'sites of resistance', where women were able to challenge gender norms and often won their cases (Roberts 2005: 24). Post-independence, women in Botswana have used the contradictory legal logics of state and customary courts to claim inheritance and land ownership, increasing their access to land tenure over time (Griffiths 2011). Similarly,

in post-apartheid South Africa, women adopt different discourses and legal justifications to claim land rights in different legal venues (Mnisi & Claassens 2009).

Women across varied contexts have been able to leverage legal pluralism to their advantage, despite facing disadvantageous institutional configurations. These case studies offer important examples, and beg the question: under what circumstances are women able to achieve such victories? The following section presents a theoretical framework to unite these cases and address this question.

ARGUMENT

This argument draws on institutional logic to theorise when women are more likely to be successful in Africa's plural legal systems. My baseline assumption is that elites and other powerful actors generally benefit from the rules and procedures of non-plural institutions. These elites have incentives to reproduce those rules, and there may be little opportunity for less powerful actors to achieve victories. For that reason, non-plural institutions may be stable for long periods of time. However, a plural institution may be less stable because it entails 'the coexistence of alternative, legitimate, and potentially competing strategies' (Jarzabkowski *et al.* 2009: 284–5). Even if the various legal logics within a plural system each reflect patriarchal standards, the instability inherent in these systems can create opportunity. In the examples of women's victory cited above, the plurality of the legal system was precisely what enabled their success because it allowed either venue shopping (selecting courts that apply their preferred version of the law) or norm shopping (activating specific legal arguments in courts that allow pluralism). Women's ability to activate different strategies in different types of courts was particularly effective when the different legal systems contradicted each other and drew on different legitimating logics.

I argue that women were more likely to be successful in legal areas characterised by a high degree of operational ambiguity: those in which rules are unclear and subject to a greater degree of subjective interpretation. In this context, operational ambiguity refers specifically to areas within a legally plural system where the different legal traditions contradict each other and the rules as to which version of the law to apply are flexible or unclear. Operational ambiguity creates a permissive environment where individuals have more agency: judges have more flexibility and lower-status people may be able to make claims that were previously unthinkable. Some have noted that ambiguity in plural or customary legal systems can entrench inequality, as more powerful actors are better able to manipulate ambiguity in their favour (von Benda-Beckmann *et al.* 2009) or take unilateral action (Ubink 2007). However, in the cases presented here, the operational ambiguity between colonial and customary systems had the effect of disrupting local leaders' monopoly on adjudicating civil disputes, thus creating more options through which women could pursue their interests.

Shadle (1999) has argued that, despite assumptions to the contrary, colonial officials and local intermediaries alike preferred to maintain the fluidity of customary law because making it unintelligible to outsiders bolstered their own power. That combined with the contradictions between different forms of custom and colonial or state law provided opportunities for 'women, juniors, and the poor [to] argue against the dominant interpretation of customary law' (Shadle 1999: 430–1). The fluidity and porosity of the plural legal system enabled women to engage in both venue and norm shopping. In areas of operational ambiguity, when the 'right' ruling was unclear, women had the opportunity to 'resolve institutional ambiguities in their favour' (Mahoney & Thelen 2009: 9).

EMPIRICAL METHODS

This argument is the result of inductive reasoning based on a sample of colonial court cases from the Gold Coast and Senegal. Based on the existing literature, I restricted my focus to civil law, and approached each set of records with two questions: in what areas do women disproportionately win cases, and what legal strategies do they employ? I employed a strategy of diverse case selection in order to find commonalities across different circumstances (Gerring 2008).

For the Gold Coast, primary source documents include all the cases from the West African Court of Appeals (WACA) originating from the Gold Coast from 1930–1955.[3] While WACA heard civil and criminal appeals from all British colonies in West Africa, I examined civil cases originating from the Gold Coast. These cases generally originated in a Native Authority and were appealed through a Provincial Court and the Gold Coast Court of Appeals before arriving at WACA. These are contentious cases with better-resourced and more tenacious plaintiff-appellants, and therefore are not representative of all civil cases in the Gold Coast during this time. The advantages of this dataset are that it covers 25 years and summarises lower court decisions.

For Senegal, primary documents include a complete set of civil court records for the years 1928–1929 from provincial courts in 10 provinces selected for geographic diversity.[4] This court heard civil cases that had been escalated from the lowest courts, the village tribunals (at which no written records were kept). For these records, I focused on a shorter period as a practical matter: this lower court heard far more cases, so focusing on a shorter period was necessary to manage qualitative analysis of the data. These two sets of data are not directly comparable. Rather, each makes possible a different type of inquiry into women's experiences with colonial legal systems across time and space.

For each set of court records, I created a dataset of all cases that involved women as a plaintiff/appellant or defendant/respondent, yielding 62 cases from the Gold Coast and 68 cases from Senegal.[5] I hand-coded these cases according to topic and outcome, alongside as much personal detail as was available for the parties involved. The initial round of coding revealed that most cases involving women in the Gold Coast concerned inheritance and property

rights, while most in Senegal involved issues of marriage and divorce. Restricting my focus to this set of cases, I engaged in a second round of open-ended coding to examine the legal strategies women employed in these areas (the results of which are detailed below). I then traced the subsequent legislative developments in each area post-independence, examining both the legislative documents as primary source material and secondary analysis detailing the implementation and effect of these legal changes.

WOMEN AND LEGAL PLURALISM IN THE GOLD COAST AND SENEGAL

The British (in the Gold Coast) and the French (in Senegal) imposed far-reaching plural legal systems. Prior to colonial intervention, local authorities adjudicated civil disputes, including issues around marriage, inheritance and succession, and property rights. In the Gold Coast, chiefs ruled on such issues according to indigenous law, which varied between (and within) ethnic groups. In Senegal, where the population was overwhelmingly Muslim, precolonial laws were 'a thorough confusion of Islamic and pre-existing legal systems', and disputes were handled by Muslim judges (*cadis*), village chiefs, or senior family members (Callaway & Creevey 1989: 89; see also Roberts & Mann 1991: 12). During the 1800s, these indigenous methods of handling civil disputes were left intact. However, both colonial powers undertook an expansion of their respective colonial projects around the turn of the century, including efforts to create comprehensive legal systems. This effort generated a new institutional landscape in the early 1920s marked by complex legal pluralism (Mbaye 1991; Gocking 1993). Customary courts, known as the Indigenous Tribunals in Senegal and the Native Authorities in the Gold Coast, were supposed to play the dual role of interpreting and enforcing customary law.

In the Gold Coast, local chiefs were largely left to administer customary law as they saw fit (Gocking 1990). However, denizens who were dissatisfied with the rulings of the Native Authorities could appeal their cases through the colonial legal system (Gocking 1993: 95). Theoretically, the British judges in colonial courts were supposed to apply customary law to cases that originated from Native Authorities. However, once a case was appealed into the colonial court system, there was uncertainty regarding which custom judges would choose to apply, as custom itself was contested (Gocking 1990; Rathbone 2000). Furthermore, African residents could opt into the British system in certain legal arenas, like inheritance, which were then subject to competing legal claims (Woodman 1985: 119).

In Senegal, the local chief presided over the village tribunal (the lowest court). No written records were kept at these courts, and local chiefs had latitude to rule as they wished, though their rulings were non-binding (Conklin 1997: 91). The French encouraged chiefs to prioritise reconciliation in civil cases, but Africans regularly bypassed the village tribunals to bring their cases to the provincial courts in an attempt to circumvent the biases of local elites and gain a definitive ruling (Roberts 2005: 4). Provincial chiefs (who were

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colonial appointees) presided over the provincial courts, assisted by two *notables* purported to be experts in Muslim law as well as the indigenous laws associated with the various ethnic groups in each province (Conklin 1997: 91; Roberts 2005: 3). Legal reform in 1912 expanded French supervision over these courts, including requirements to record rulings in French for administrators to review (Conklin 1997: 123). Because indigenous laws were not codified, court rulings depended on the subjective understandings of the justices and assessors, and varied from court to court (even when they were meant to be applying the same 'custom') (Wilder 2005: 107).

Operational ambiguity in the Gold Coast and Senegal

In both colonies, the ad hoc plural system created operational ambiguity: areas of the law with overlapping and contradictory legal principles. Sometimes, there was no conflict between indigenous and customary laws, and customary law was either reinforced by or clearly separate from colonial statues. In other areas, discrepancies between indigenous and customary law, competing interpretations of customary law, or overlapping jurisdiction between customary and colonial courts created operational ambiguity. It was in these areas that women could engage in venue or norm shopping to circumvent the patriarchal standards embedded in each legal system. Inheritance in the Gold Coast and marriage in Senegal were each marked by such ambiguity.

In the Gold Coast, indigenous principles of inheritance were complex and varied, though they tended to be disadvantageous to women (Kuenyehia 2006: 387–8). Many groups in the region practiced matrilineal inheritance, wherein property follows the female line within the family. 'Matrilineal' does not mean 'female-controlled' – family property was typically managed by the senior male relative within that matriline (Manuh 1997: 79–82). In a highly communal setting, most property was considered family property, to which all family members within the matriline have a right.[6] All of a woman's children and her uterine siblings would be part of her matriline, but her son's wife and children would not be – the line cannot pass through any male family members (his children would belong to his wife's matriline). These inheritance rules are problematic for widows: when a man dies, all his property that can be considered family property (including a house, land and belongings) devolves back to his matriline to be managed by the head of family, typically an uncle.[7] Because his widow and children are not part of his matriline, they can be left destitute (Akoto 2013). Groups practicing matrilineal inheritance varied in their rules of succession to the head of family, which were often convoluted (Bentsi-Enchill 1964: 126; Gocking 1990: 601).

Legal pluralism under colonialism complicated the matter further. Residents of the Gold Coast could marry under the 1884 Marriage Ordinance, which was part of a strategy to promote Christianity and monogamy. Marital property for those with ordinance marriages would be managed under British inheritance laws, which did allow wives and children to inherit from their husbands/

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fathers (Mann 1982). Additionally, the introduction of wills led to battles over the limits of what could be considered family property. The interaction between the complexity of matrilineal customs, the rules of succession of family head, and the designation of family versus personal property generated significant legal complexity and operational ambiguity in the courts. Particularly regarding inheritance, 'there was tremendous room for manoeuvre within the area of customary law' (Gocking 1990: 616). Within the colonial court system, therefore, women could engage in norm shopping to activate legal principles most likely to result in their victory.

In Senegal, the operational ambiguity around divorce came from the structure of the colonial court system. Islam heavily influenced precolonial marriage practices. Marriage was seen as a bond between two families, and often parents agreed to marriage on their daughter's behalf without her consent (Yade 2007: 625). While men could initiate divorce with relative ease by denouncing their wives, it was much harder for women to leave a marriage (Lydon 1997). Additionally, men were disinclined to divorce – even if they disliked the wife their family chose for them, polygyny was common and they could take another wife (Yade 2007: 627). While women could initiate divorce by leaving their husband's house to return to their family home, women's families had economic and social interests in making the marriage work, and would often pressure them to return (Ames 1953: 58). As such, divorce was rare. These practices conflicted directly with new mores in France's Third Republic, including the idea that marriage should be freely entered into by consenting adults (Roberts 2005: 134). Colonial law promulgated in 1903 reflected these values, recognising (among other things) the rights of marital consent and divorce (Yade 2007: 627). Women who wanted to leave their marriages suddenly had the ability to venue shop.

First, they had to take their case to the village tribunals. The local chiefs who presided were instructed by colonial officials to emphasise reconciliation, and extended family also pressured women to accept reconciliation (Roberts 2005: 3). However, women could then appeal their cases to the provincial court. In theory, these courts were supposed to apply relevant indigenous laws to litigants. The justices who presided over these courts were Senegalese, but had been appointed (and could be removed) by the French, and were therefore sensitive to their preferences; many French colonialists were 'convinced of the superiority of their civilisation' and disdainful of Islamic familial principles (Sarr & Roberts 1991: 134). Emphasis on marital consent therefore put forced marriage under the 'repugnancy' clause. Due in part to racially charged notions of women as 'beasts of burden' or 'exploited workers' who must be saved from 'barbaric' African husbands, French officials across West Africa initially pressured judges to grant divorces (Lydon 1999; Roberts 2005: 131).[8] At the same time, French officials worried that intervening in customary matters would threaten their alliances with the local elites on whom they relied to maintain their empire (Rodet 2007). Operational ambiguity therefore arose as these

judges contended with the countervailing pressures to preserve custom and counter 'repugnancy' in the arena of divorce.

As the case descriptions below demonstrate, women in both the Gold Coast and Senegal were able to leverage this ambiguity to their advantage.

Women and inheritance claims in the Gold Coast

Of the 62 Gold Coast cases involving women WACA from 1930–1955, a plurality of 22 involved inheritance disputes. Of these cases, women won rights to property (real or personal) in 14. Women lost their claims in five, and the remaining three were remanded back to a lower court. While the volume of claims is not representative of all legal activity in the colonies, in the British system these rulings are important for the development of case law. The content of these cases illustrates the operational ambiguity around inheritance and how women norm shopped to win property.

Inheritance cases fell into two categories: those in which the deceased had left a disputed will and those in which the deceased was intestate. English law applied in the case of couples who had been married under the 1884 Marriage Ordinance or those who had wills drawn up under the English code (Woodman 1985). Customary law applied when the deceased was intestate and had not been married under the Ordinance, and the court had to determine which custom applied. Despite consequential differences in inheritance and succession between different ethnic groups, the colonial courts had only a vague sense of these nuances and tended to apply the Fanti rules of matrilineal inheritance, as this version had been codified by John Sarbah in his volume *Fanti Customary Law*.[9] Women pursued different tactics according to which body of law was more likely to generate a ruling in their favour. Women were disproportionately successful in litigating these claims, particularly in contesting intestate settlements (winning 78%), but also at disputing wills (winning 60%).

English law provided a framework for women to claim access to rights it would have been difficult to otherwise assert; in nearly all cases discussed here, women used it as a shield against the claims of extended family. For example, in the case of Kwabena Mensah v. Ernestina Takyiampong,[10] Ernestina was granted a plot of land in a will. Kwabena sued her for it, claiming his status as the head of the family of the deceased's matriline. The court upheld her rights under English law, dismissing the matrilineal rights of inheritance that Kwabena claimed. In another case, Margaret Agbeshie was able to use the court's interpretation of English law to stay in her house with her two infant daughters after her husband died.[11] The couple had built a new house and put it in their daughters' names. After his death, his matriline claimed that the house was part of the residual estate to be distributed among the extended family and ordered that Margaret and her infants vacate the premises. The court upheld the rights of property of the infants over the matriline and affirmed Margaret's right to continue living there. In several other cases,[12] the court affirmed widows' rights to inherit property because they had been married through the 1884 Ordinance,

despite the claims of indignant family members that the property should have devolved to them. Of the six cases in this sample in which women invoked English law, only one woman lost her case.[13]

Whereas the protections of English law for women seeking to inherit were relatively straightforward, invocation of matrilineal custom could be more complex. Matrilineal custom did not necessarily protect women, but it provided a framework for women to make claims, particularly when they felt that senior male relatives were unfairly managing or taking ownership over family property. In the case Araba Tsetsewa v. Joseph Dobson Acquah and Samuel Gabriel Acquah, Joseph had left his cousin Samuel several properties in his will, which Samuel claimed was his personal property. However, Araba – as head of Joseph's matriline – disputed Joseph's right to will the property as though it were personal, claiming that was in fact family property that she should be able to administer. Using Sarbah's codification of Fanti law, the court affirmed that the properties belonged to the family and affirmed Araba's standing as head of family (granting her both standing in court and the right to manage said properties).[14] In another case, an unnamed male family member had been appointed as a caretaker of a family property and had been keeping the rents for himself. Augustina Mamuna Ruttern took him to court on behalf of herself and her two sisters, claiming their rights to share in the proceeds of family property (she won).[15]

Women also used the courts to affirm their matrilineal succession rights, as in the case of Vakoh Chapman, who gained ownership of property after her son's death. Another male family member had leased out the land, without her consent, to the Compagnie Française de l'Afrique Occidentale. Vakoh successfully sued for back rents on the land, and the court affirmed that she, as her son's heir and successor, was entitled to do what she pleased with the land she owned.[16] In a similar case, the courts affirmed Ayichoe Tagoe, as a family's senior aunt, was heir to her deceased nephew Alexander Sackeyfio. Alexander's son sued her for a share of the estate, but the court affirmed that according to Ga custom, she was the rightful heir as well as head of family.[17]

While most of these cases involved women claiming property from male relatives, the ambiguity between English and matrilineal inheritance could also create conflicting interests between widows and female relatives in the matriline. A typical case in this regard is that of Effuah Kwakuwah (widow) v. Effuah Nayenna (deceased's mother). While Effuah Nayenna was the rightful heir to her son according to matrilineal custom, Effuah Kwakuwah sued to reclaim the money she had contributed to building her family's home. In this case, the court determined that Effuah Kwakuwah's contribution was a gift, and non-recoverable, but suggested that she be able to continue living in the house until she re-married (though such a situation must have been awkward, to say the least, after suing her mother-in-law).

The women in these cases adopted different tactics according to the version of the law that was most likely to favour them. The legally plural situation created by the coexistence of English and customary courts, the complication

of personal wills that might contradict customary practice, and the tendency of the colonial courts to favour the Fanti version of matrilineal inheritance created a nuanced patchwork of laws that women could use to gain property rights. Over time, the courts' decisions generated case law and resolved these ambiguities, most often in favour of widows. Though the colonial court's interpretation of indigenous law was often inaccurate, 'the trend of judicial decisions reveals a gradual inclination toward the recognition and protection of the rights and interests of spouses and children of the deceased' (Kuenyehia 2006: 394). The women represented in these cases are particularly well-resourced; it would not be rational to pursue such claims all the way to WACA unless the inheritances they claimed were sizeable. However, the cases they pursued were precedent-setting in the English court system (la Porta *et al.* 2008: 288).

Women and divorce in Senegal

In Senegal, 42 of the 68 cases in the provincial courts involving women in 1928–29 concerned marital disputes. Escalation to the provincial court indicates that at least one of the parties rejected reconciliation at the village tribunal; indeed, court notes on many of these cases indicate that they follow a failed reconciliation.[18] In all but two of these cases women were attempting to leave their marriages. 30 cases involved women filing for divorce; nine involved men requesting that the court order their wives to return to them. In only two cases did men request divorce; the final case involved a complex dispute in which the claims of each party were unclear. The operational ambiguity in the provincial tribunals manifested in two ways: first, in standing to bring marital cases; second, in the vast latitude granted to the judges and their need to balance competing moral principles around marriage.

Concerning standing, operational ambiguity arose from the tension between custom and French repugnancy concerns. As described above, in precolonial custom, divorce could more easily be initiated by a husband (Yade 2007: 627). While Islamic law recognises several ways that women can request divorce, the way it was practiced in Senegal fused with local customs to restrict women's options (Lydon 2010). Women therefore had little ability to initiate a divorce without the agreement of her husband and support of her family, and families put a great deal of pressure on women to remain in their marriages (Ames 1953: 132–3; Yade 2007: 626). This practice was reinforced by the village tribunals, which were charged with reconciliation in marital disputes. In the provincial courts, however, women had standing to request divorce on their own, despite the court's ostensible commitment to apply customary law, because of French attitudes about consent in marriage.

Women initiated the request for divorce in 30 of these 42 cases. Most often, their requests were justified under local Islamic principles. The most common justification women gave was abandonment (19 cases). According to Islamic principles, men's marital duties included providing material maintenance of their wives, and so abandonment 'without maintenance' proved

uncontroversial grounds upon which to request divorce (Lydon 2010: 144). In many cases, the women's husbands had been gone for years, as in the case of Kani, whose husband left her three years prior 'without any maintenance'.[19] In the Tambacounda court, when the absent husband failed to attend the hearing, the court insisted on a three-month waiting period in order to try to find him, though these searches were often unsuccessful and therefore the divorces were uncontested.[20] In other cases, the men or their relatives would argue on their behalf. In the Rufisque court, a woman named Aminata sought a divorce from her husband, who had abandoned her three years earlier, so she could re-marry. While her husband did not come to advocate for his marriage, a friend reported that 'he had left to find work and send back money and cloth'. As he had never sent any such materials, the court granted Aminata her divorce.[21] In the Louga court, a woman named Panel requested a divorce after being abandoned without maintenance for five years. Her prodigal husband did not attend the hearing, but her father-in-law did, stating that he 'disagreed with the separation' but had been unable to compel his son to come. That the court granted Panel her divorce over the objection of her father-in-law is a particularly notable outcome.[22] Similarly, women were granted divorce in two cases based on their husbands' impotence, which is valid in Islam if they were unaware of it prior to the marriage.[23] Women's grounds for divorce in these cases were not controversial. What is notable about these cases is that women pursued them even after pressure to reconcile from the local tribunal, as their appearance in court meant that their husbands and families had not agreed to the divorce. Without the plural legal system, they would have lacked standing to bring these cases at all.

The other area of operational ambiguity was the vast latitude that the judges had. While the judges were Senegalese, they were not necessarily from the region in which they worked. Moreover, they were appointed because of their education in colonial institutions and perceived sympathy to the colonial administration (Roberts & Mann 1991). These judges had to balance their interpretation of custom, on the one hand, with French cultural mores on the other (Sarr & Roberts 1991: 135). The result was seepage of French ideas into the indigenous justice system, including ideas of marriage as an at-will union between consenting adults (Roberts 2005: 18). Women were able to lean on the latitude of judges to gain divorce for reasons that would likely not have been accepted customarily.

At the court in Matam, a woman named Fati asked the court to annul her marriage because her husband was verbally abusive, renouncing her and stating that 'he likened her to his mother if he slept with her now'. He denied her allegations, which (according to custom) would have amounted to a withdrawal of the renunciation and led to attempts at reconciliation (Lagoutte & Fall 2014: 66). The provincial court granted her the annulment anyway.[24] In Kolda's court, a woman named Coumba demanded that the court rule on the state of her relationship, insisting that she was never married at all as she never gave consent. Her husband had accused her of adultery, complaining that she was

'sleeping around and never satisfied', while she insisted that they were never married in the first place. However, she had accepted the *dot* (bride price), suggesting that their families and broader community would have considered them married. The court granted her separation pending her repayment of the *dot*. In four cases heard in Baol and Thies, women were granted divorces for no stated reason at all, providing they repaid their *dot*. These cases are unusual in the sense that the women provided no justification for their cases that would have found resonance in Islamic law, and their recourse to the courts indicates that their families had not accepted their requests for divorce. Some of these cases were successful, underscoring the discretion that judges exercised: courts in Kedougou and Bakel denied women their requests because 'a divorce must have a legal justification'.[25]

Women were not guaranteed a divorce, particularly when they could not provide a justification that would satisfy indigenous or French norms. However, considering that the village tribunals and extended families prioritised reconciliation, the provincial courts represented an important avenue through which women could win freedom. That women's claims were granted in such a large percentage of cases – even those without justification – indicates that these colonial courts provided a real escape hatch. While my focus is on women's strategic choice of venue, it is notable that these courts even ruled disproportionately for women when their husbands were the plaintiffs, generally to insist their wives return to their conjugal home after having fled. The provincial court ordered reconciliation in only one of these cases, in Kolda, because the prodigal wife accepted her husband's conciliatory gifts.[26]

PERSISTENCE AND LIMITS OF WOMEN'S LEGAL VICTORIES

In both Ghana and Senegal, the rights women claimed through the ambiguous operation of colonial courts were ultimately codified after independence. Today in Ghana, all women have the right to inherit from their intestate spouses; in Senegal, women can petition the court for divorce with the same rights as men. However, in both countries, social pressures limit the impact of these legal rights.

Widows' rights in Ghana

In the Gold Coast, women's actions in courts influenced the development of case law, resulting in new rules that were ultimately extended and solidified after independence. Post-independence, wills remained uncommon and the government recognised that disputes over intestate succession continued to pose legal challenges, particularly concerning the rights of widows in matrilineal ethnic groups. While the family of a deceased man was expected to help care for a widow until she remarried, in practice widows were often left homeless and destitute after the deceased's matrilineal relatives reclaimed his property (Dowuona-Hammond *et al.* 2020: 8). In 1985 government passed the

Intestate Succession Law (PNDCL 111) along with a suite of other legislation that granted widows the same inheritance rights as those who had been married under the 1884 Marriage Ordinance (Woodman 1985; Kuenyehia 2006: 396; Britwum *et al.* 2014: 30).

PNDCL 111 was the culmination of numerous incremental steps toward codifying widows' rights. Through the late colonial period, case law like that described above tended to expand the rights of widows and children in inheritance cases (Woodman 1985: 120). This expansion through the courts reflected the changing social attitudes of the legal intelligentsia and urban professional classes who disliked matrilineal inheritance, preferring to maintain wealth within their nuclear families (Gocking 1990). Summarising the debates over inheritance law during the 20th century, Woodman (1985: 120–1) indicates that economic and familial changes in urban areas meant that 'a man's loyalty had become increasingly directed towards his wife and children', and urbanites increasingly preferred an inheritance model that would keep resources within the nuclear household. Defenders of customary law focused on its importance in maintaining cohesion in the matriline, but these arguments fell out of favour with the urban Gold Coast elites who benefitted from being able to pass wealth to their children (Bentsi-Enchill 1964: 138). Soon after independence, these elites initiated the process of legal reform, issuing a series of reports in the early 1960s and proposed reforms in the 1970s. The changes to intestate law were introduced in a new constitution in 1979, and then preserved by the subsequently PNDC government and enacted in 1985 (Woodman 1985: 121).

Securing intestate inheritance for widows increased financial security for women, but it is still not universally observed – largely because insisting on its application could generate animosity within the extended family (Kuenyehia 2006: 398; Dowuona-Hammond *et al.* 2020). A woman who relies upon this extended family for material support would have a great disincentive to claim these rights (Akoto 2013). Additionally, because families tend to contribute so much support to their members – material, monetary or time – some Ghanaians continue to baulk at the idea that a widow and children should inherit the fruits of the family labour (as they should be beneficiaries of their own matriline) (Hammond 2019). Nevertheless, there is evidence that wives and children in Ghana are increasingly able to inherit property in this manner (Manuh 1997: 85–6; Britwum *et al.* 2014: 40). At a minimum, widows who have been treated poorly by the deceased's family now have clear legal recourse.

Divorce in Senegal

In Senegal, debates about family law have been vitriolic and contentious since women began pursuing divorce in courts. Women's ability to access divorce alarmed both indigenous elites as well as colonial administrators and their intermediaries, triggering a backlash (Rodet 2007). In her tour of French West

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Africa, colonialist Denise Savineau lamented that Senegalese women knew the French were sympathetic to their claims of being 'oppressed', and therefore 'they risk exaggerating, and provoking a kind of anarchy' in their quest to rebel against men's dominance.[27] Both French colonial officials and the Muslim clerics who acted as important intermediaries were distressed by women's recourse to colonial courts to leave their marriages.[28] Across West Africa, French officials' concern with women shifted from liberating them to 'curbing their loose morals' (Roberts & Mann 1991: 41).

After Senegal's independence, there was pressure from both progressive- and conservative-minded groups to codify family law. The resultant compromise was the 1972 Family Code. The code included provisions to protect women, such as laws around marital consent, legal age of marriage and avenues for divorce if women are mistreated (Scales-Trent 2010: 131–2). Women (like men) are able to petition the court for divorce for numerous legal reasons, including 'incompatibility', which functionally broadens women's rights. While feminists have criticised the law for not going far enough (Camara 2007; Sow *et al.* 1989: 34), influential Muslim clerics were so incensed that they ordered their followers to engage in 'passive noncompliance' (London 2010: 242). In practice, women's ability to access these rights is limited by social and family pressures (Lagoutte & Fall 2014: 67). In some cases, judges themselves ignore the law in favour of reconciling errant wives to their husbands (London 2010). However, more recent evidence indicates that marriage law in practice is moving toward a 'pragmatic pluralism', with divorce through the courts gaining greater acceptance (even in the face of social and family pressures) (Bouland 2020).

In Senegal, as in Ghana, the legal victories that women eked out in the ambiguous arena of colonial courts ultimately became codified, though women face ongoing social pressure that limits their ability to claim these rights. However, there is evidence that women in both cases increasingly use the courts to assert these rights, especially in urban areas (Britwum *et al.* 2014; Lagoutte & Fall 2014).

CONCLUSION

Most African countries have plural legal systems, and often each of those plural legal strands reflects men's social dominance. Women might be doubly – or triply – bound between various legal systems that disadvantage them in different ways. And yet, research has shown that women are sometimes able to win in these plural legal systems. Through an analysis of women's interactions with the plural colonial legal systems in the Gold Coast and Senegal, this study has advanced an argument regarding when women are likely to be successful. These cases suggest that when plural legal systems generate operational ambiguity, women can leverage that ambiguity to their advantage through venue or norm shopping. In the Gold Coast and Senegal, women disproportionately won cases in these ambiguous areas of the law.

An alternative interpretation is that the plural legal system simply allowed women to opt out of local custom. However, available evidence does not support this interpretation. In Senegal, women engaged in venue shopping, taking their cases to the provincial court to escape the judgement of the lower court and family pressure. Once there, however, many women invoked customary principles to justify their divorces. The ambiguity between French and customary law therefore provided a space for women to escape the normal social hierarchy and make claims that were still within the normative framework of indigenous law. In the Gold Coast, women norm shopped rather than venue shopped, activating the legal principle – customary or British – that would be most beneficial to them. These were not simply cases of women being able to opt out of custom. Rather, the ambiguity around these specific topics within the plural system gave them room to manoeuvre.

The contributions of this study are twofold: first, it contributes to understanding of the quotidian ways in which women fought and advocated for themselves during the colonial period. While much literature highlights women's highly visible demonstrations of civil disobedience or participation in nationalist liberation movements, it is also essential to understand the quiet ways women worked for themselves within hostile institutions. Second, it demonstrates that these quotidian actions had a lasting impact, as women's rights in these areas were ultimately codified in both countries. While the social context limits the extent to which women can exercise these rights, recent analyses indicate that women are increasingly pursuing their legal rights in court in both Ghana and Senegal.

While this study has focused on women and legal pluralism, the insights are applicable to other marginalised groups and other plural institutions. As noted above, youth and migrants also generally have a lower social status in African countries. These groups may also be able to leverage ambiguity to eke out legal victories. Further, the legal system is not the only plural institution in African countries. Ambiguity in other plural institutions may similarly provide opportunities for lower-status groups to up-end the status quo. This study, therefore, is a call for improved understanding of how institutional ambiguities may provide opportunities for the disadvantaged to improve their conditions – and possibly generate lasting change.

NOTES

1. Typically those who had been educated in colonial schools, had converted to Christianity, were fluent in the colonial language, and/or worked for the colonial administration.

2. Some elites were local leaders prior to colonialism while others were appointed by colonial administrators.

3. These cases were compiled as law reports, Volumes 1–14, and included cases from all of Britain's West African holdings. WACA was established in 1928 and became defunct as the party colonies gained independence. Case reports are not available for the first two or last year of Gold Coast's membership.

4. *Tribunal du Prèmier Degré, Matière Civile et Commerciale.* In the north, Djioloff, Podor, and Matam; in the centre, Thies, Cayor, Diourbel and Kaolack; in the Casamance south, Kedougou, Kolda and Sedhou. I selected a period shortly after the 1924 legal reforms because one effect of that reform was to increase

French supervision over the lower courts (Rodet 2019: 6), increasing the pressure on local judges, but before the period of Popular Front Rule in France began in 1936, which was an aberration in a number of ways (Lydon 1999).

5. This comprised 11.7% of all cases heard before the appeals court in the Gold Coast, and approximately 10% of the cases heard by the selected tribunals in Senegal.

6. Exceptions are made for 'personal' property that was unequivocally acquired by an individual with no family help or investment.

7. Matrilineal practices vary across groups and regions – those described here differ from those practiced by groups elsewhere, such as Malawi (Robinson & Gottlieb 2021) or south-eastern Nigeria (Mbah 2019), and are complicated by whether the group practices matrilocal or patrilocal residence.

8. Historians offer varied dates regarding French officials' attitudes toward saving women. Roberts (2005) references the early 1900s, while Lydon writes of the mid-1930s. From Roberts' account, French officials informally held these attitudes earlier than they were officially espoused by the administration.

9. The litigants included in this sample are Fanti, Ga, Akan, Anlo Ewe and Kroo (from Liberia). The courts applied matrilineal principles to all these groups. The judges ultimately decided matrilineal principles should apply to the Kroo litigants because they resided in a matrilineal area. Pre-colonial practices of the Ga are often described as patrilineal, but the court system increasingly applied matrilineal principles to their cases over time. The Anlo-Ewe practice patrilineal kinship but some groups follow matrilineal inheritance. As Gocking (1990) notes, the court defaulted to matrilineal principles largely because the most prominent lawyers arguing these cases were from matrilineal groups.

10. WACA Volume 6, Kwabena Mensah v. Ernestina Takyiampong (1940).

11. WACA Volume 14, DN Nartey, ST Aryeh, and RJ Amartey v. Doreen Nartey by her next friend Margaret Agbesie (1952).

12. WACA Volume 8, Joseph Samuel Anie and Adnan Askhar v. Joseph Abdilamsi and Mercy Ofebea Anie (1942); WACA Volume 2, Victoria Gorleku v. George D. Gorleku and Victoria Gorleku (1934); WACA Volume 9, Mercy Adoley Akwei v. Lucy Kate Akwei (1943).

13. WACA Volume 5, Abiba Ali v Alhaji Ali (1939), in which the dispute concerned ambiguous wording in the will.

14. WACA 7, Araba Tsetsewa v. Joseph Dobson Acquah and Samuel Gabriel Acquah (1941).

15. WACA 2, Augustina Mamuna Rutterm, Lovel Manann Ruttmernm, and Theidira Manun Ruttmern, v. [Unnamed-record cut off] (1929).

16. WACA 9, Vakoh Chapman c. Messieurs Compagnie Française de l'Afrique Occidentale (1943).

17. WACA 11, AV Sackeyfio v. V. Ayichoe Tagoe (1945).

18. Noted as '*Tentative de conciliation infructueuse*'.

19. Archives Nationales du Senegal (hereafter AN) 618 218-220; Case 27.

20. AN 618 218-220; Cases 24 and 25.

21. AN 618 218-220; Case 37.

22. AN 618 218-220; Case 41.

23. AN 618 218-220; Cases 18 and 50.

24. AN 618 218-220; Case 33.

25. AN 618 218-220; Cases 9 and 72.

26. AN 618 218-220; Case 36.

27. 'Any indigenous society, evolving freely, tends to reinforce the power of men over women, of fathers over their children. These dominators expect us to help them maintain or reinforce their supremacy. But we are not disposed to follow them blindly, we would like to preserve individual liberty, sometimes increase it. The oppressed know this, in calling on us, and sure of our support they rise up. They risk exaggerating, and provoking a kind of anarchy. We have indicated it would be advisable to better specify our doctrine, in order to avoid this double failure.'

28. Colonial officials in French Soudan began to worry about divorce contributing to social instability, and shifted their focus from marriage as a contract between consenting individuals to a preference for 'the unquestioned authority of the male household head' (Roberts 2005: 131–4).

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