Customary Law Revivalism: Seven Phases in the Evolution of Customary Law in Sub-Saharan Africa

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I. Introduction

If Africa is the cradle of humanity, then the "Customary Law of Africa" is perhaps the oldest existing law of humanity. Customary Law is made up mostly of unwritten rules and customs, practices, usages, conventions and systems of the African people, designed by the African People to govern themselves and their relations.[1] It existed before the advent of colonialism, and its principles have been passed on from generation to generation. There are thousands of communities in Africa, and each of these has their own system of Customary Law, even if similarities abound. Over the millennia, it is possible to identify seven different stages of the evolution of Customary Law on the continent.[2] The first would be "Pristine Customary Law." This is what Customary Law was before it encountered Islamic and then Euro-Christian influences. The second signpost would be "Judicial Customary Law," resulting from the European policy of testing Customary Law against what was called the repugnancy clause, which ensured that only rules of Customary Law which were consistent with European notions of "natural justice, equity and good conscience" were recognised and enforced. The third is

[1] See generally Max Gluckman, ed, *Ideas and Procedures in African Customary Law: Studies Presented and Discussed at the Eighth International African Seminar at the Haile Sellassie I University, Addis Ababa*, *January 1966* (London, UK: Routledge, 1969).
[2] See Raymond A Atuguba, "Legal pluralism in Africa: Three levels and seven types of law" in Muna Ndulo & Cosmas Emeziem, eds, *The Routledge Handbook of African Law* (New York: Routledge, 2022) 17 at 25 (summary of the seven phases in the evolution of Customary Law).

"Codified Customary Law," consisting of existing rules of Customary Law that are written into statutes or distilled by authorities on Customary Law. The fourth is a related but different concept of "Statutorily Instituted Customary Law," where new rules of Customary Law are instituted by the legislature or in the writings of publicists. The fifth is "Complementary Customary Law," where basic rules of statute and the common law are supplemented by rules of Customary Law. The sixth signpost is "Insular Customary Law," representing instances where other forms of law operate in tandem and parallel to rules of Customary Law in particular domains of social life, especially in the areas of family law and land law, leaving the rules of Customary Law intact and allowing them to evolve on their own, untouched by other systems of law. The last signpost consists of "Declared Customary Law," where new rules of Customary Law are instituted and declared as such by persons and institutions that have the authority to do so, even if that authority is additionally endorsed by statutory or other authorities in the "modern" law. Although these phases in the evolution of Customary Law somewhat overlap, they evolved rather lineally. Elaborating on each of these phases in the evolution of Customary Law is essential to change the narrative of African Customary Law as a monolith and is necessary to illuminate its struggles in the past, its status in the present, and its roles and implications for the future.[3]

There is significant revivalism of Customary Law in many African countries today. Customary Law is engraved in the Constitutions of many African States and is the lived reality of the majority of urban and rural folk in Africa.[4] Yet there are many forces that seek to countervail Customary Law. The general impression that Customary Law is dying slowly as it is

[3] See generally James Bernard Murphy, *The Philosophy of Customary Law* (Oxford: Oxford University Press, 2014). See also Paul du Plessis & Willemien du Plessis, "Engaging with African Customary Law: Legal History in Contemporary South Africa" (2017) 20:1 Potchefstroom Electronic LJ 2.

[4] See e.g. *Constitution of the Republic of Ghana*, *1992*, art 11; *Constitution of Kenya*, *2010*, art 2; *Constitution of the Republic of Malawi*, *1994*, art 10; *Constitution of the Republic of South Africa*, *1996*, no. 108 of 1996, art 211(3).

weakened by Received law, domestic statutory law, and the forces of globalisation appearing in the guise of international, commercial, trade, human rights and criminal law is well-founded.[5] These are potent projects aimed (consciously or unconsciously) at a desecration and subsequent complete dismissal of Customary Law. The arsenals of these projects cover everything from genuine misconceptions to deliberate misrepresentations of Customary Law to disrupt, control, or extinguish it and are contained in otherwise respectable scholarship and strategies.

However these countervailing forces contain the seeds of their own destruction. To the extent that these forces seek to instil subsidiarity, participatory governance, and even ideas from anti-globalisation movements as measures for good governance in the global sphere, they unwittingly allow Customary Law to blossom. As already noted, chief constituents of the complex mixture that will produce a New Customary Law are subsidiarity, the "participation mania" in policy discourses in Africa today and the anti-globalisation movements in the last few decades. The moral forces behind the paradigm shifts that created these three concepts will prevail and allow Customary Law to flourish. Thus, it is possible to discover within and without the countervailing forces, the alchemy for a New Customary Law. Before we delve into these arenas of controversy, let us first trace the seven evolutions of Customary Law over the millennia.

II. Pristine Customary Law

[5] See Nelson Tebbe, "Inheritance and Disinheritance: African Customary Law and Constitutional Rights" (2008) 88:4 The Journal of Religion 466 at 466. See also A J Kerr, "Inheritance in Customary Law under the Interim Constitution and under the Present Constitution" (1998) 115 SALJ at 262–70.

For many centuries and prior to major contacts and interactions with outside forces, Africans developed for themselves and lived by elaborate rules, customs and practices that have come to be called Customary Law.[6] Thus,

> [i]f you are free to admit it, you will see that you find here [in the Gold Coast] already a system of self-government as perfect and efficient as the most forward nations of the earth today can possibly conceive. A people who could, indigenously, and without a literature, evolve the orderly representative government which obtained in Ashanti and the Gold Coast before the advent of the foreign interloper, are a people to be respected and shown consideration when they proceed to discuss questions of self-government.[7]

Although this describes communities in the south of the Gold Coast, now Ghana, the situation was not different in the Northern parts and in other parts of Africa. As early as the fifteenth century, the chieftaincy system was the mode of governance for the Dagomba, Gonja and Mamprusi kingdoms. Other ethnic groups which had chiefs acting as central figures in Africa were the Yoruba of Nigeria, the Mossi of Burkina Faso, and the Swazi and Zulu of South Africa.[8] Africa has always been replete with great kingdoms. These kingdoms were, in some cases, villages, towns and communities under a principal ruler. Notable among these kingdoms were the Ife (Nigeria), Ashanti (Ghana), Kongo (spanning from parts of the present-day Republic of Congo, DR Congo and Gabon), Swazi (Swaziland), Zulu (South Africa) and the Basoga

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[6] See generally Ama Fowa Hammond, *Towards an inclusive vision of law reform and legal pluralism in Ghana* (PhD Dissertation, University of British Columbia, 2016), [unpublished]. See also TW Bennett, "Comparative Law and African Customary Law" in Mathias Reimann & Reinhard Zimmermann, eds, *The Oxford Handbook of Comparative Law*, 2nd ed (Oxford: Oxford University Press, 2019) 653.

[7] See Casely Hayford, *Gold Coast Native Institutions with Thoughts upon a Healthy Imperial Policy for the Gold Coast and Ashanti* (London: Sweet and Maxwell, 1903) at 128–129.

[8] See George BN Ayittey, *Indigenous African Institutions*, 2nd ed (New York: Transnational Publishers, 2006) at 191–201.

Kingdom of Uganda.[9] Some communities had an acephalous political system where there were no chiefs but councils of elders or spiritual leaders in whom all authority was reposed.[10] The Bulasa, Moba, Tallensi and Konkomba in the northern part of the Gold Coast had no chiefs but rather earth priests, known in some parts as "Tindanas," who wielded politico-spiritual authority.[11] The Igbo of Nigeria, the Kru of Liberia, the Fulani of Nigeria, the Somali, the Jie of Uganda and the Mbeere of Kenya also had no centralised authority.[12]

These kingdoms were governed by Customary Law which was largely in unwritten form.[13] The absence of writing, however, did not affect the legal potency and legitimacy of Customary Law, since the governed lived their lives within its remits and applied it in all their endeavours. To say that pristine customary law was unwritten meant only that it was not put on paper and in ink. It was, however, effectively documented, for purposes of clarity, certainty and preservation. Documentation took a variety of forms. The physical design and structure of a household and the protocols for occupancy of the rooms and homestead could constitute documentation on succession and inheritance, more effective, more secure, and better communicated than a written will.[14] There were whole institutions dedicated to the documentation, preservation and evolution of pristine customary law.

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[9] *Ibid* at 196–199.

[10] See CE Ngwakwe & N Ikeocha, "Impact of Western Legal System on Indigenous African Culture" in *Culture and Society in Post-Colonial Nigeria: Essays in Honour of Ulli Beier* (Ibadan: Institute of African Studies, 2012) 55 at 56.

[11] See Hurna L Abdallah, "State and Non-State Actors in Land Appropriation: Colonial Land Policy and the Role of the Tindana in Northern Ghana" (2015) 4:5 Research on Humanities & Soc Sciences 126 at 126.

[12] See Ehiedu EG Iweriebor, "State Systems in Pre-Colonial, Colonial and Post-Colonial Nigeria: An Overview" (1982) 37:4 Africa: Rivista Trimestrale Di Studi e Documentazione Dell'Instiuto Italiano per l'Africa et l'Oriente 507 at 508. See also Chika Ezenya-Esiobu, "Africa's Indigenous Knowledge: From Education to Practice" in *Indigenous Knowledge and Education in Africa* (Singapore: Springer, 2019), 55.

[13] See Muna Ndulo, "African Customary Law, Customs, and Women's Rights" (2011) 18:1 Ind J Global Leg Stud 87 at 88. See also Casper Njuguna, *African Customary Law: Assessing Its Status and Effects Today* (Lanham, Maryland: Lexington Books, 2020).

[14] See Jomo Kenyatta, *Facing Mount Kenya* (London: Harvill Secker and Warburg, 1938) at 22–26. For example, in some communities, the hut of the successor to the head of the household is located in a particular geographic relationship to the hut of the extant head of household.

In West Africa for example, the Griot was a member of the community who was seen by the locals as a library whose duties included the preservation and transmission of their customs and traditions. Indeed the griots were a repository of oral tradition and customary law.[15] The position of the Griot was one of the most enviable, yet hard to come by, and took years of extensive training under a teacher. To paraphrase a popular turn of phrase from International Law, these were the "the most highly qualified publicists" and jurists of the Pristine Customary Law of Africa.[16] Francis Bebey speaks of the Griot in African Music thus:

> The West African griot is a troubadour, the counterpart of the medieval European minstrel…The griot knows everything that is going on…He is a living archive of the people's traditions…The virtuoso talents of the griots command universal admiration. This virtuosity is the culmination of long years of study and hard work under the tuition of a teacher who is often a father or uncle. The profession is by no means a male prerogative. There are many women griots whose talents as singers and musicians are equally remarkable.[17]

Whatever the documentary status of pristine customary law, its legal potency was never in doubt.[18] The Chiefs were assisted by others who were learned in the law, such as the linguists, in interpreting Customary Law for the resolution of disputes and in shaping the law to deal with

[15] See Simon Adewale Ebine, "The Roles of Griots in African Oral Tradition among the Manding" (2019) 11:1 Approaches in Intl J Research Development 1 at 4. See also Bennett, *supra* note 6.
[16] See e.g. *Statute of the International Court of Justice*, 26 June 1945, art 38(1)(d).
[17] Francis Bebey, *African Music: A People's Art*, translated by Josephine Bennett (New York: Lawrence Hill Books, 1999) at 24.
[18] See Peter Onyango, *African Customary Law: An Introduction* (Nairobi: LawAfrica Publishing, 2013) at xii.

novel situations. In his much celebrated ethnographic rendition of the Kikuyu society, "Facing Mount Kenya," writer Jomo Kenyatta chronicles this pristine customary legal system.[19]

From birth, through adolescence, marriage and work-life, to death, indigenous African folk had an elaborate system of laws regulating their lives.[20] These rules are what I call Pristine Customary Law. This is what Customary Law was before it was depleted mainly by Islamic influences from North Africa in the context of the proselytizing jihadist crusades,[21] and then Euro-Christian influences from the south, beginning with the European explorers, missionaries, and colonialists.[22] Customary law, in its pristine form, conformed to the community's notions of justice and fairness. Thus, it was generally accepted to be the law.[23] The elderly and persons learned in the law helped in the transmission of customary law from one generation to another.

As already noted, Pristine Customary Law subsequently thoroughly adapted, and was sometimes erased, by the invading forces of Islam, the Christian missions and then by colonialism. Commenting on the posture of missionaries towards Pristine Customary Law, Onyango notes that: "Whatever missionaries found within the African law and customs were paganism and it was their duty to wipe it out in order to gear up the civilization process."[24]

The customary law rules which existed in the precolonial era are now very difficult to reconstruct and many of them have been lost.[25] Apart from errors committed in recording and

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[19] See Kenyatta, *supra* note 14.
[20] See Ndulo, *supra* note 13 at 88.
[21] See Margari Hill, "The Spread of Islam in West Afrca: Containment, Mixing, and Reform from the Eighth to the Twentieth Century" (2009) Spice Digest: Freeman Spogli Institute for International Studies at para 1. See also Sebastian Poulter, "An Essay on African Customary Law Research Techniques: Some Experiences from Lesotho" (1975) 2:1 Journal of Southern African Studies 181.
[22] See generally Etim E Okon, "Christian Missions and Colonial Rule in Africa: Objective and Contemporary Analysis" (2014) 10:17 European Scientific Journal 192.
[23] See Ndulo, *supra* note 13 at 87. See also P P Howell, *A Manual of Neur Law: Being an Account of Customary Law, its Evolution and Development in the Courts Established by the Sudan Government* (London, UK: Routledge, 2018).
[24] See Onyango, *supra* note 18 at 19.
[25] See Martin Chanock, *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia* (Portsmouth, NH: Heinemann Educational Book, 1998) at 9.

difficulties with translation, the versions of customary law captured by the early writers of the invading forces still remain very distorted and self-serving accounts in aid of the colonial enterprise.[26] Indigenous customary practices and laws were deliberately described in degrading language by the early European writers in a calculated attempt to make them unpopular in the eyes of the people, locally and in the metropoles.[27] Their prayers were *juju* and their miracles *black magic*. Their churches were *shrines* and their priests and pastors were jujumen, *fetish priests* or *soothsayers*.[28] For "the surest way to colonize a people's minds is to demonize their culture and then their traditions."[29]

The inaccuracies in Pristine Customary Law as recorded by the early European writers also emanate from their blindness as strangers in a foreign land. Thus, the value of these writings as correct representations of the customary law in existence at the time is correspondingly diminished. As the African proverb taken from the hometown of John Mensah Sarbah goes: "A stranger does not skin a sheep that is paid as a fine at a chief's court," which is to say, African people never tell or convey the complete picture of their Customary Law to any stranger. In African cosmology, a stranger was never allowed to see, hear, say, or do anything beyond what was necessary for her temporary stay. A deep impenetrable institution of community – of everyone being a sister's keeper – ensured a virtual circle of trust within the community, which did not extend to outsiders. Against this background, it is implausible to suggest that what Africans allowed the scribes of the invading forces to see and hear was anything more than miniscule. Indeed, as current authorities on the subject suggest, African presentations of rules of

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[26] *Ibid* at 8.
[27] *Ibid* at 7.
[28] "*Juju"* is a reference to African fetish and charms associated with religious practices and almost always connotes spiritual harm.
[29] See Mzilikazi wa Afrika, "'To colonize a people's mind you must first demonize their culture then their traditions.' ~ Words Of Wisdom" (30 April 2018 at 2:00), online: *Twitter* <https://twitter.com/IamMzilikazi/status/990833275538157568?s=20&t=DKapcBFiF08BKmbN1yP_wg> [https://perma.cc/WNU5-GM2H].

Customary Law to these scribes were one of the ways they tried to control the disrupting effects of the changes which they experienced as a consequence of colonial impositions.[30] It is a tragedy that the distorted and incomplete views of Customary Law that the scribes recorded and published became an "authentic" record utilised by other writers and the courts of law as a true representation of Customary Law in many African countries.

To take one example, in many African countries, cultural relationships and authority, the system of inheritance and many other socio-cultural variables were represented by the spatial design of the family compound or homestead.[31] Thus, it was possible to determine the next head of family or the inheritance of any member of the family by interpreting the spatial outlay of the family compound. It goes without saying that such a mechanism for encrypting rules of Customary Law will not be readily comprehensible to a stranger. Similarly, the seemingly huge bride prices that prospective husbands are called upon to pay in certain parts of Ghana are not really what they are. According to custom, the bride price is never to be paid in its entirety. It has been noted that: "Paying the entire bride price is a very wrong signal to the family of the bride. Only a portion of it is paid and the family of the groom is at custom forever indebted to the family of the bride. This acts as a check on the groom and the family of the groom in the way in which they treat the bride."[32]

The erasure of Pristine Customary Law has been so devastating that some experts blame Africa's problems on it and have suggested a portrayal of relatively pristine customary law, not much affected by colonial contaminations, as a foundation for a new African law going

[30] See generally T O Beidelman, Book Review of *Law, Custom and Social Order, the Colonial Experience in Malawi and Zambia* by Martin Chanock (1987) 31:1 Am J Leg Hist 71.
[31] See generally Hamman Tukur Saad, "Folk Culture and Architecture in North-Eastern Nigeria" (1991) 37 Paideuma Mitteilungen zur Kulturkunde 253; Kenyatta, *supra* note 14.
[32] See Raymond A Atuguba, "Customary Law: Some Critical Perspectives in Aid of the Constitution making Process in Zimbabwe" in Norbert Kersting, ed, *Constitution in Transition: Academic Inputs for a New Constitution in Zimbabwe* (Harare: Friedrich Ebert Stiftung, 2009) 291 at 296.

forward.[33] Pristine Customary Law there was, but finding it today is hardly possible. It is therefore worth mentioning that "…the mutilation of pristine Customary Law by the forces of Islam, Christianity, colonialism, neo-colonialism, and now globalisation (including the role of the courts as agents of colonialism, neo-colonialism and globalization) has meant that different narratives of Customary Law exist in the field and within the same community regarding the same customary law issue."[34] Researchers studying Africa are very familiar with this phenomenon.

III. Judicial Customary Law

Another reason why it is virtually impossible to discover Pristine Customary Law is that it has been supplanted by old and new Judicial Customary Law. Using what is called the *repugnancy clause*, and measuring all rules of Customary Law that came to the fore against European notions of "natural justice, equity and good conscience," a new Customary Law slowly evolved and crystallised in the judgments of the courts, the writings of publicists and ultimately enforced in the lives of the people.[35] This second evolution of Customary Law is what is generally called "Judicial Customary Law," resulting from the European policy of testing Customary Law against the repugnancy clause to ensure that only rules of Customary Law which are consistent with it are recognised and enforceable.

This historical formation of Customary Law during the colonial period was part of the economic transformation of African societies under colonial rule. Slowly, African ideas,

[33] See generally Chanock, *supra* note 25. See also Psoper S Maguchu, Victor Nkiwane, & Lovemore Chiduza, "Courts in Africa and the Right to a Fair Trial under International Human Rights Law" (2017) 4 State Practice & Intl LJ 3 at 3.

[34] See Raymond A Atuguba, Akua Britwum et al, *Child Maintenance in Plural Legal Systems in Ghana: Institution and Legal Research*, 4th ed, (2004) Access to Justice Series, Ministry of Justice.

[35] See Onyango, *supra* note 18 at 43; Fenrich, *supra* note 19.

perceptions, and aspirations of the law, including as expressed in customary law, and the resultant legal institutions and practices, were shaped through encounters with those of the British colonisers.[36] The colonisers instituted the repugnancy test in several pieces of legislation applicable to the former British and French African territories. In East Africa, an 1897 Order in Council was promulgated as the governing law of the East African protectorate (covering present-day Kenya, the Great Rift Valley and Uganda). Pursuant to article 52 of the Order in Council, African customary law applied, provided it was not repugnant to justice and morality.[37] Section 10 of the Nigerian Native Courts Ordinance of 1933 also contained the repugnancy standard as "repugnant to natural justice or morality."[38] The enactment of the Native Courts (Amendment) Law in 1960 in Nigeria reinforced the applicability of the repugnancy test, allowing the applicability of "the native Law and custom prevailing in the area of the jurisdiction of the court or binding between the parties, so far as it is not repugnant to natural justice, equity and good conscience nor incompatible either directly or by necessary implication with any written law for the time being in force."[39] Variants of the repugnancy clause were also legislated in the former Northern Rhodesia and Southern Rhodesia, now Zambia and Zimbabwe respectively.[40] Section 19 of the 1876 Supreme Court Ordinance which governed the Gold Coast decreed that "...the Supreme Court shall enforce the observance of any law or custom existing in the colony not being repugnant to natural justice, equity and good conscience and not incompatible directly or indirectly with any local enactment then existing." In conferring

[36] See generally Chanock, *supra* note 25.
[37] F Karuiki, "Customary Law Jurisprudence from Kenyan Courts: Implications for Traditional Justice Systems" (2015) 8:1 U Nairobi LJ at 2.
[38] See JND Anderson, "Conflict of Laws in Northern Nigeria" (1957) 2:1 J Afr L 87 at 88; Antony N Allott, *New Essays in African law*, Butterworths African Law Series, No 13 (London: Butterworths, 1970) at 158.
[39] See Derek Asiedu-Akrofi, "Judicial Recognition and Adoption of Customary Law in Nigeria" (1989) 37:3 Am J Comp L 571 at 572. See also EA Taiwo, "Repugnancy clause and its impact on customary law: comparing the South African and Nigerian positions - some lessons for Nigeria" (2009) 34:1 Journal for Juridical Science 89–115 at 95.
[40] See e.g. *Ordinances, Proclamations and Orders-in-Council of Northern Rhodesia*, 1924.

jurisdiction on specially appointed traditional rulers in the Transvaal, Law 4 of 1885 indicated the applicability of customary law, provided that it was consistent with the "general principles of civilization recognized throughout the civilised world."[41]

The French also had their version of the repugnancy clause littered across many Decrees in many African colonies. The early Decrees authorised the application of indigenous law provided that they were not "contrary to the principles of French civilization." When the courts were reorganised in the 1920s, the new Decrees did not contain this prohibition, but the courts continued to abrogate indigenous rules and customs which were contrary to public policy (*ordre public*) during the remainder of the colonial era. The application of the repugnancy clause by the French appears to have been more aggressive than the English equivalent. In Togo, a Decree of 1922 provided that the received French law was to be applied where the customary law was silent. In the absence of explicit statutory provision in the other French colonies, this principle was applied there. Thus, where the indigenous law of Cameroon did not recognize a particular liability, the courts applied the principles of the French Civil Code to ground liability.[42]

The concepts of "natural justice," "morality," "equity," and "good conscience" as used in the colonial laws were undefined and construed subjectively to suit what the colonial authorities considered to be equitable, without paying regard to the sense of fairness of the communities governed by the specific Customary Law rule. The subordination of African Customary Law to European ideals of justice and morality was a clear indication of how inferior the colonial rulers regarded Customary Law. The instances where the repugnancy clause was applied are abundant and some examples are worth citing. In *R v Ugochima*, the custom of killing or throwing twins

[41] See *The Harmonisation of the Common Law and the Indigenous Law*, Report on Conflicts of Law Project 90 (South African Law Commission, 1999) at 8 [*The Harmonisation*].
[42] See MW Prinsloo, "Recognition and Application of Indigenous Law in Francophone Africa" 1993:2 JS Afr L 189 at 191.

away with their mother among the people of Igboland was outlawed on the basis of the repugnancy standard. This custom was significant to the people because of the popular belief that "twins were a sign of bad omen to the communities in which they were born," and by permitting their existence, "the society could be destroyed by both internal and external forces."[43] The influence of Christianity also caused the colonial rulers to construe African customary practices, termed "*juju*," as unreasonable, as in the case of *R v Nwaoke*.[44] Ngwakwe and Ikeocha recount that "the Ibini Ukpabi cult system of Arochukwu (Long Juju) was struck down in 1901 purportedly in the interest of the public."[45]

One area of Customary Law which was greatly impacted by the repugnancy clause was the law on marriage. Allot writes that "aspects of the customary laws of marriage which are particularly vulnerable under the repugnancy clause are: infant betrothal and all forms of marriage in which one or the other of the spouses has not given his or her full and free consent…; sexual prerogatives of the husband, exercisable over the wife whatever her state of health; the absolute claim of the husband to legal paternity of any children born to his wife during the continuation of their marriage, whether or not the husband is their natural father (genitor); the obligation on a widow to marry, or allow connexion, with the male relative of her deceased husband."[46] It is therefore not surprising that in the case of *Ocharo Oigo v Ombego Mogoi*,[47] the court ruled that the custom which prevented a woman forcefully "inherited" by the brother of her deceased husband from seeking divorce as repugnant to natural justice.[48]

Whilst it may seem from the sampling of cases above that the repugnancy clause was a good thing, eroding from African Customary Law horrible practices that ravage the human

[43] See Asiedu-Akrofi, *supra* note 39 at 582.
[44] See Ngwakwe & Ikeocha, *supra* note 10 at 56.
[45] *Ibid*.
[46] See Allott, *supra* note 38 at 166.
[47] See Onyango, *supra* note 18 at 45.
[48] *Ibid*.

consciousness, we must be careful not to arrive too easily at such an assessment. A deeper study will reveal that in many instances, the repugnancy clause was used to erode principles of African Customary Law developed many centuries ago, but which are in accord with twenty-first century science. Thus, it is not in all cases that the repugnancy clause abated what appeared to be unconscionable rules of Customary Law. In some cases, the repugnancy clause was used to disrupt intelligent, scientific, progressive, and sustainable rules of Customary Law. In a case decided in the year 1899,[49] the Colonial Secretary of Agriculture ordered the Chief of Winnebah in present day Ghana to withdraw a set of by-laws prohibiting the use of three types of nets. The Chief of Winnebah claimed that these nets were the cause of overfishing and scarcity in the local fish supply. In a communication to the Provincial Commissioner at Winnebah, the Secretary stated that he could not agree that the Chief's objections to the nets were "sound" because "the best fishing net is the net which catches the most fish."[50] It was also earlier decided in 1898 by Judge Griffith in the *Akwufio and Others v. Mensah and Others* case that the colony would not support a law prohibiting nets, citing Section 19 of the Supreme Court Ordinance 1876; a decision which clearly went against the Customary Law principles of sustainable fishing and sustainable development. In plain language, these cases held that sustainable fishing, an aspect of sustainable development, was repugnant to "natural justice, equity, and good conscience." It is therefore not true, as opined by many experts, including one of the most revered judges of England, Lord Atkin, that the essence of the repugnancy clause was to eradicate "barbarous

[49] RA Atuguba & R Atta-Kesson, "Of Fish, Fishing, Fisherfolk, the Law and Fishing Institution" (Research Report submitted to Corporate Social Responsibility Movement, 2007) at 4. See also C Finegold et al, "Western Region Fisheries Sector Review" (Ghana: USAID Integrated Coastal and Fisheries Governance Initiative for the Western Region, 2010) at 29.

[50] See Barbara Louise Endemaño Walker, "Engendering Ghana's Seascape: Fanti Fishtraders and Marine Property in Colonial History" 14:2 Society & Natural Resources 289 at 396.

customs"which ought to be "rejected as repugnant to natural justice, equity and good conscience."[51]

The repugnancy clause is not merely a colonial phenomenon. Many African countries began their post-colonial eras with a mass of colonial laws which had replicas of the repugnancy clause. For example, Kenya's Judicature Act of 1967 reinforced the repugnancy clause in the statement of sources of law in Kenya, with section 3 providing "that the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more parties is subjected to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law."[52] Similarly, the South African Law Commission observed that the repugnancy clause was replicated in the Law of Evidence Amendment Act which required that judicial notice be taken of customary law on the condition that it accords with public policy or natural justice.[53] In its recommendations, the Commission opined that this reproduction of the repugnancy clause be repealed as it is "an unwelcome reminder of the superior role enjoyed by the common law in South Africa's legal system."[54] Prinsloo observes that Benin, Cote d'Ivoire and the Congo also recognized indigenous law by implication in their modern constitutions, adding that the national assembly may enact laws with regard to "the procedure according to which custom shall be ascertained and placed in harmony with the fundamental principles of the Constitution," principles which are chiefly borrowed from the metropoles.[55]

The wholesale acceptance of the repugnancy clause in post-colonial legal systems of African countries is made evident by decisions of courts when faced with an issue in Customary

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[51] See *Eshugbayi Eleko v Officer Administering Government of Southern Nigeria*, [1931] AC 662 at 673.
[52] See Kenya Legislative Assembly, "Judicature Act," CAP 8 (1967) at 3(2).
[53] See *The Harmonisation*, *supra* note 41 at 43.
[54] *Ibid.*
[55] See Prinsloo, *supra* note 42 at 192.

Law. As recently as 1997, and in the Nigerian case of *Mojekwu v Mojekwu*,[56] the court held that a local custom by which a daughter was disentitled from inheriting her father's property was repugnant to natural justice, equity and good conscience. In *Koykoy Jatta v Menna Camara*,[57] the Supreme Court of Gambia held that "under Gambian statutes, it was repugnant to natural justice, equity and good conscience to import the custom of female circumcision into a tribe that did not practice it, even though this was the custom of the place where the act of circumcision occurred."[58]

In *Donkor v Danso*,[59] an ancestor of the plaintiff, a subject of the Kwahu Stool,[60] had cultivated a portion of the Kwahu Stool land at Awenade, and that portion was in the possession of the plaintiff's family. In the course of time, the land became outskirt land and without the consent of the plaintiff and his family, the Stool granted the land in question to another subject of the Stool. At the trial, evidence was given by the Secretary of the Kwahu State Council as to Kwahu custom, by which the Stool had the right to repossess previously alienated land if and when the land became outskirt land. The Stool is entitled to grant or otherwise alienate that land to any person without reference to the subject who occupied it. The subject who has cultivated and been in occupation of the land is not entitled to compensation. Nevertheless, the subject is at all times compellable to perform the customary services due to the Stool. The Kwahu Local Court found the facts as set out above and accepted the evidence of the State Secretary as per custom and accordingly dismissed the plaintiff's claim. On appeal to the Land Court, the judge, after considering the merits of the case, stated that, "it is revolting to say that the subject, who is compellable at all times to render customary services to the Stool, can be deprived (while he is

[56] See *Mojekwu v Mojekwu*, [1997] 7 NWLR 283 (Nigeria) [*Mojekwu*].
[57] See *Koykoy Jatta v Menna Camara*, [1961] Civil Suit, S. 64/60 (Gambia) [*Koykoy Jatta*].
[58] See Bonny Ibhawoh, *Imperial justice: Africans in Empire's court* (Oxford: Oxford University Press, 2014) at 61.
[59] See *Donkor v Danso*, [1959] GLR 147 (Ghana) [*Donkor*].
[60] "Stool," in Ghana, refers to the source of authority and the jurisdiction of chiefs in the southern parts of the country, where chiefs, literally, sit on such stools as a symbol of their authority.

still willing to serve the Stool loyally) of the whole of his right, title and interest in the Stool land over which he has acquired a usufructuary title. Such a custom, in my opinion, is repugnant to 'natural justice, equity and good conscience'…."[61] Also, in the case of *Ashiemoa v Bani and another*,[62] the repugnancy clause was applied where the Chief of Kpando asserted authority through native custom over the land of the plaintiff. The Chief claimed that the land was vested in the stool as it had become an outskirt land to the nearest town. The Court of Appeal held that such a custom would be contrary to natural justice, equity and good conscience.

Once again, it is tempting to conclude that the modern repugnancy clause serves an indispensable utility, modernising African Customary Law to rid it of barbarism and unreasonableness. This is not entirely the case. As previously noted, the application of the repugnancy clause is not always progressive phenomenon. Indeed, its application has been as retrogressive as it has been progressive. In *Maria Gisege Angoi v. Macella Nyomenda*, the Kenyan High court disallowed a custom among the Kisii people, which required a woman whose husband had died to "marry" another woman and "choose a male figure from her husband's clan to sire children for the dead husband."[63] The court ruled that the Customary Law on woman-to-woman marriage was repugnant to natural justice, equity and good conscience, since it infringed on the rights of the widow to freely elect who to get married to.[64] We see in this case a judicial disruption of the seeds for LGBTQ rights in Africa, way before the clarion call for those rights were made in many "civilised" nations. If we consider that one of the key arguments against LGBTQ rights in Africa is that it is "unAfrican" and unknown to African cosmology, we

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[61] See Donkor, *supra* note 59 at 149.
[62] See *Ashiemoa v Bani*, [1959] GLR 130 (Ghana) [*Ashiemoa*].
[63] See Karuiki, *supra* note 37 at 7; *Maria Gisege Angoi v Macella Nyomenda*, [1981] Civil Appeal No 1 (Kenya) [*Maria Gisege Angoi*].
[64] See Karuiki, *supra* note 37 at 7–8.

will understand how disastrous the application of the repugnancy clause in this case has been to freedom of sexual identity for many Africans.

From a review of these cases, it is apparent that relics of the repugnancy clause have been accepted by African courts in the post-colonial era such that the validity and continuous prevalence of Customary Law is subject to conformity with received law from their colonial masters and current statutes and constitutions. Thus, the attainment of independence from colonial rule did not by itself restore the previous glory of Customary Law. That notwithstanding, there have been few occasions in which the courts have boldly upheld customary law. The seminal case of *Virginia Edith Wambui v Joash Ochieng Ougo and Omolo Siranga* ("the S.M. Otieno case") is a classic example. Upon the death of prominent Kenyan lawyer, S.M. Otieno, the burial of his body precipitated the suit. In his lifetime, Otieno adopted a modern lifestyle and did not associate himself with the customs of his clansmen, that is, the Luo customs. His wife prayed to the court for the body to be buried in his home near Nairobi as opposed to the contention of Otieno's eldest surviving brother who argued that the place of burial of a member of the Umira Kager clan ought to be at his ancestral home in Western Kenya. Under the Succession Act, the next of kin of the deceased, in this case the surviving spouse, had the right to be appointed administrator of the deceased's property, and on this basis, the wife argued that she had the right to make burial arrangements. The elder brother contended that the Succession Act was not applicable. He argued that a determination ought to be made in accordance with Luo customs which mandate the surviving elder brother of a deceased person to make burial arrangements, any differing views of the wife being of no consequence. The court

ruled in favour of the elder brother, holding that the Succession Act was not applicable to burial.[65]

Judicial Customary Law, as a phase in the evolution of Customary Law, has significantly impacted the content of customary law. It is significant to ponder over the following words of Allott:

> There thus developed in Ghana and Nigeria especially what I have termed 'judicial customary law', the law recognised by the superior courts, and which might differ substantially from the customary law actually followed by the people whose law it was, and who in theory in a customary-law system can alone give legal recognition to a customary rule. The gap between judicial and popular customary law is a serious one, and one which poses fundamental questions, both now and for the future, as to the sources of that law. Who is to say what the customary law is – the people or the court?[66]

Other writers are more forthright and call out the midwives of Judicial Customary Law as self-interested conspirators, deliberately moulding the content of Customary Law to predetermined ends, which ends were constructed by the colonisers and their collaborating African elites.[67] This concept of "invention of customary law" has been elaborated upon as follows:

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[65] See John W Van Doren, "Death African Style: The Case of S. M. Otieno" (1988) 36:2 The Am J Comp Law 329 at 341.

[66] See Anthony N Allott, "What Is to Be Done with African Customary Law? The Experience of Problems and Reforms in Anglophone Africa from 1950" (1984) 28:1–2 J African L 56 at 60.

[67] See Ibhawoh, *supra* note 58 at 71; Asiedu-Akrofi, *supra* note 39 at 572; Lloyd Fallers, "Customary Law in the New African States" (1962) 27 Law & Contemporary Problems 605 at 614.

Several historical and anthropological studies have shown that the so-called customary law of the colonial period was forged in particular historical struggles between the colonial power and the colonized groups. The customary law implemented in native tribunals was not a relic of the distant pre-colonial past, but instead an historical construct of the colonial period. Both traditional and modernizing African elites took a central role in defining customary law in the native tribunals. The unfamiliarity of British officials with local property, gender, and power relations sometimes created opportunities for litigants in colonial courts to present local customs as they wanted them to be. African assessors who were seen as 'experts' in native customs were well positioned to do this, particularly in the early colonial period when European officials tended to readily accept their opinions on African customs. The process therefore was characterized as the 'invention of tradition', rather than the ascertaining of tradition. Customary law was made, not found, and was forged in the struggles over land, labour, and property in the colonial era combining British law and a range of chiefly and tribal forms of law.[68]

As the struggle between Pristine Customary Law and Judicial Customary Law played out in the courts and in people's lives, various African codification experts took steps to end it by attempting to codify Customary Law.

IV. Codified Customary Law

A third phase in the evolution of Customary Law is "Codified Customary Law," consisting of existing rules of Customary Law that are written into statutes or distilled by

[68] See Ibhawoh, *supra* note 58 at 71.

authorities on Customary Law or by Customary Law publicists. There are many exercises of codification of Customary Law on the continent.[69] There are now many instances where rules of Customary Law are written into statute.[70] In other instances, the rules of Customary Law are written by publicists and these are then used as authoritative statements of what the rule of Customary Law on a particular issue is, in very much the same way codes are applied. The writings of eminent jurists such as Whitfield on *South African Native Law*,[71] Schapera's *Handbook of Tswana Law and Custom*[72] and the anthropologist, Roscoe, on *The Banyakole,*[73] codify Customary Law relative to several parts of Africa. It has also been found that the compilation of the customary law of the Haya of Tanganyika by Cory and Hartnoll[74] has been constantly relied on in the courts of Tanganyika (now Tanzania).[75] Rattray,[76] John Mensah Sarbah,[77] J.B. Danquah,[78] M. Fortes,[79] S.K.B. Asante,[80] Allott,[81] Gordon Woodman,[82] and A.K.P. Kludze[83] have all written important treatises on Customary Law in Ghana which are used much

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[69] Michael K Musgrave, Book Review of African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives, by C Himonga & T Nhlapo, T, eds, (2016) 10:2 Intl J Commons at 1205.
[70] See generally Manfred O Hinz, *Customary Law Ascertained Volume 2: The Customary Law of the Bakgalagari, Batswana and Damara Communities of Namibia* (Oxford: University of Namibia Press, 2014).
[71] GMB Whitfield, 2nd ed (Cape Town: Juta and Co Ltd, 1948).
[72] Isaac Schapera, revised ed (London: Oxford University Press, 1955)
[73] John Roscoe, (Cambridge University Press, 1923).
[74] See Cory Hans & MM Hartnoll, *Customary Law of the Haya Tribe*, 1st ed (London: Routledge, 1971).
[75] See Allot, *supra* note 38 at 286–287.
[76] See Robert S Rattray, *Ashanti Law and Constitution* (Oxford: Oxford University Clarendon Press, 1929).
[77] See John M Sarbah, *Fanti Customary Laws* (London: William Clowes Ltd, 1897).
[78] See JB Danquah, *Gold Coast: Akan Laws and Customs and the Akim Abuakwa Constitution* (London: Routledge, 1928).
[79] See Meyers Fortes, "Kinship and Marriage among the Ashanti" in AR Radcliffe-Browne & Daryll Forde, eds, *African Systems of Kinship and Marriage* (London: Oxford University Press, 1950).
[80] See SKB Asante, Property Law and Social Goals in Ghana, 1844–1966 (Accra: Ghana Universities Press, 1975); SKB Asante, "Fiduciary Principles in Anglo-American Law and the Customary Law of Ghana" (1965) 14:1 ICLQ 1144.
[81] See Allott, *supra* note 38; Antony N Allott, "The Judicial Ascertainment of Customary Law in British Africa" (1957) 20:3 Mod L Rev 244.
[82] See Gordon Woodman, "Legal Pluralism in Africa: The Implications of State Recognition of Customary Laws Illustrated from the Field of Land Law" 2011 Acta Juridica 35; Gordon Woodman, "Some Realism about Customary Law: The West African experience" (1969) 1969:1 Wis L Rev 128; Gordon Woodman, "Customary Law in Common Law Legal Systems" (2009) 32:1 IDS Bulletin 28.
[83] See AKP Kludze, *Ewe law of property* (London: Sweet & Maxwell, 1973).

like codes. Nigeria's T. O. Elias has also contributed painstakingly to the codification of Customary Law in Nigeria.[84]

In the more recent past, an attempt at codification of Customary Law in Kenya was instigated by President Jomo Kenyatta when he set up two commissions to inquire into the Customary Law of marriage, divorce, and succession to aid in the development of a uniform law or code on the subjects. This project did not achieve its targets.[85] In Ghana, the National House of Chiefs and the Law Reform Commission have collaborated on the "Ascertainment and Codification of Customary Law Project" since 2006. Focusing on land law and family law, the project seeks to ascertain and codify rules of Customary Law that are applicable to various communities in Ghana. The main steps of this project involve background work on the concept, the development of methodologies for gathering and managing information on Customary Law, research to determine rules of Customary Law on various issues, and then verification, validation, codification, and harmonisation of the rules. The second phase of the project involved collection of additional variations of customary laws in thirty traditional areas in Ghana's regions before the third phase of validation, codification, and harmonisation.[86] The project seeks to fulfil the constitutional and statutory mandate of the National House of Chiefs to "undertake the progressive study, interpretation and codification of Customary Law with a view to evolving, in appropriate cases, a unified system of rules of Customary Law, and compiling the customary laws and lines of succession applicable to each stool or skin."[87] The project is of exceptional

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[84] See TO Elias, *Nigerian Land Law and Custom*, 3rd ed (London: Routledge & Kegan Paul, 1962); T O Elias, *The Nature of African Customary Law*, 2nd ed (Manchester: Manchester University Press, 1956); T O Elias, *The Impact of English Law on Nigerian Customary Law* (Lagos: CMS Nigeria Press, 1958).
[85] See Winifred Kamau, "Customary Law and Women's Rights in Kenya" (2011), online: *The Equality Effect* <http://theequalityeffect.org/wp-content/uploads/2014/12/CustomaryLawAndWomensRightsInKenya.pdf> at 4–5.
[86] See "National House of Chiefs to Unify Rules on Customary Laws" (19 October 2010), online: *GhanaWeb* <ghanaweb.com/GhanaHomePage/NewsArchive/National-House-of-Chiefs-to-unify-rules-on-Customary-Law-195532>.
[87] See Constitution of the Republic of Ghana, *supra* note 4, art 272(b).

relevance, given that under the laws of Ghana, a question as to the existence or content of a rule of Customary Law is a question of law for the Court and not a question of fact.[88] The Court may request a House of Chiefs, Divisional or Traditional Council or any other body with knowledge of the Customary Law in question to state its opinion in written form and this will be subjected to inquiry.[89]

The Nigerian Institute of Advanced Legal Studies (NIALS) has also taken steps towards a restatement of Nigerian Customary Law, particularly in the areas of marriage, inheritance, land tenure, and chieftaincy in the South-south, South-east, South-west and North-central geo-political zones of Nigeria.[90] The project co-ordinator, Professor Animi Awah, explained the essence of this attempt at restatement of Customary Law as follows:

> In this project NIALS has sought to identify and document with precision, the position of custom across Nigeria. Preparatory to the field-work embarked upon by researchers of NIALS, was a period of intensive desk review of available literature on the customary law of the various ethnic nationalities in Nigeria. The field-work was, therefore, targeted at confirming the change if any between customary law as documented and the extant law as accepted and practiced by those affected…At all times throughout the course of the preparatory work, the clear objective of the project was identified to be the documentation of the custom of the communities to be visited on the four themes of the project, as distinguished from reinvention of custom.[91]

[88] See *Courts Act,* Acts of Ghana 459 1993, s 55.
[89] *Ibid.*
[90] See "Institute to Restate Customary Law" (16 October 2012), online: *The Nation* <https://thenationonlineng.net/institute-to-restate-customary-law/>.
[91] *Ibid.*

Bennett and Vermeulen have identified two approaches to the codification of Customary Law.[92] The first is exemplified by the Ethiopian codification of Customary Law project, whereas the second is typified by the posture taken by the Malagassy Customary Law codification process. The Ethiopian codification project "proposed radical reform of the whole legal system, including the almost total abolition of customary law."[93] The effect of this approach was to relegate the varied rules of Customary Law of different communities in Ethiopia to the periphery in a bid to provide a harmonised system of law applicable to all. In order to assuage the harsh effects of this stance and approach, the drafters of the code were guided to avoid the introduction of rules "so foreign as to outrage Ethiopian sensibilities."[94] The Malagassy approach, on the other hand, set off on the basis of an acceptance of the rules of Customary Law, as they then existed, and modified them to meet present needs.[95]

Although codification of Customary Law has the primary advantage of preserving the law from unauthorised dilutions, some authorities are against it. Pimentel observed that, "first, oral law is flexible and highly adaptable; this is one of its greatest strengths. It responds to shifting priorities and exigencies in its society in ways that written law never can. Written law is frozen in time, reflecting the issues and concerns that were present at the time the law was adopted… Oral traditions, in contrast, evolve naturally and almost effortlessly to accommodate societal changes."[96] Again, just as the midwives of Judicial Customary Law have been accused of moulding that law to serve selfish interests, there is a danger that the new midwives of Codified Customary Law could do the same for neo-colonial and post-modern colonialism ends.

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[92] See TW Bennett & T Vermeulen, "Codification of Customary Law" (1980) 24 African LJ 206 (HeinOnline) at 206.
[93] *Ibid* at 207–208.
[94] *Ibid* at 90.
[95] *Ibid*.
[96] See David Pimentel, "Legal Pluralism in Post-Colonial Africa: Linking statutory and customary adjudication in Mozambique" (2011) 14:1 Yale Human Rts & Dev LJ 59 at 77–78 (HeinOnline).

Whatever the merits and demerits of codification may be, it is clear that a veritable signpost of Customary Law is the reduction of those rules into writing, and sometimes, into more or less codified form. This should be contradistinguished from the related concepts of adapting existing rules of Customary Law and creating new ones by Statute, the subject of the next sections.

V. Statutorily Instituted Customary Law

The attempts to infiltrate the purity of the Customary Law, changing it to fit with modern democratic standards and practices, is evident in the institution of new rules of Customary Law by Statute, created to fill gaps or make the rules more modern. To draw from an example used in the previous section, the policymakers and managers of the Ascertainment and Codification of Customary Law Project in Ghana suggest that codification would "go along with modernization to bring some of those customary laws in tune with current trends."[97] Thus, aside from seeking to codify existing rules of Customary Law, this project seeks to adapt, change and thereby institute new rules of Customary Law in the Codes that are being developed. The fourth phase in the evolution of Customary Law is therefore the concept of "Statutorily Instituted Customary Law," where new rules of Customary Law are instituted by African legislatures and policymakers.[98] These new rules are often contrary to existing custom and so there is a definitive attempt to legislatively change Customary Law. The reason why these rules are still considered Customary Law is that they change only a minute aspect of a particular part of the Customary Law

[97] See Ghana News Agency, "Codification of Customary Laws to Forge Stronger Relativities with Statutes - Justice Gbadegbe" (12 March 2011), online: *BusinessGhana* <businessghana.com/site/news/general/129763/Codification-of-customary-laws-to-forge-stronger-relativities-with-statutes>.

[98] See Manfred O Hinz & Alexander Gairiseb, *Customary Law Ascertained: The Customary Law of Nama, Ovaherero, Ovambanderu, and San communities of Namibia,* vol 3 (Windhoek: University of Namibia Press, 2016) at 15.

ecosystem, whilst allowing the rest of the system to subsist. The Head of Family Accountability Law in Ghana is a good example of this.[99] With this law, the Ghanaian government sought to make a head of family accountable for the use and disposition of family property. However, all the related rules on what family property is, how it comes to be family property, as well as the rules on its usage by members and non-members of the family are still governed by Customary Law.

A leading example of statutorily-instituted customary law is the Recognition of Customary Marriages Act in South Africa, which introduced changes to the customary law rules of marriage.[100] Commenting on this Act, scholars Bekker and Koyana note that: "In enacting the Recognition Act, the legislature failed to abolish customary marriages but it has projected common law features into it with regard to its requirements, patrimonial consequences and dissolution."[101] A key reform made by this Act was the treatment of women as equals with their male counterparts in requiring consent to a marriage as well as conferring on women (as well as men) the right to seek divorce on the basis of an "irretrievable breakdown of the marriage" – developments which the legislator thought were previously unknown to Customary Law.[102] This was in order to eradicate gender discrimination in conformity with the Bill of Rights in the South African Constitution. When statutory intervention leads to a substantial adaptation of rules of Customary Law or to the institution of new rules of Customary Law, our fourth signpost, "Statutorily Instituted Customary Law" is implicated.

Along similar lines, the Commission set up by the Government of Kenya to provide a uniform law on succession recommended the abolition of the "house" system for the devolution

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[99] See *Head of Family (Accountability) Act* (Ghana), 1985 PNDCL 114.
[100] See *Marriages Act* (Ghana), CAP 127 of 1884–1985.
[101] See JC Bekker & DS Koyana, "The Legislative Reconstruction of the Customary Law of Marriage" (2014) 77:1 J Contemporary Roman-Dutch L 23 at 28 (HeinOnline).
[102] *Ibid.*

of property which prevailed under Customary Law.[103] The import of this system was to divide properties of a deceased husband in a polygamous union according to the "houses" of each wife and her children, without taking into account the number of children of each wife.[104] The Commission recommended a new law on intestacy which guarantees to the wife (or wives) life interest in the deceased husband's property.[105]

In Ghana, the Customary Marriages (Registration) Law is an example of how new rules of Customary Law are created by Statute.[106] The Act sought the mandatory registration of customary marriages and divorce. Registration of customary marriages and divorce was made a precondition for the application of the Intestate Succession Act – applicable to intestate property of a deceased person who contracted a customary marriage.[107] These were new rules of Customary Law which were instituted by statute and which departed in large measure from the pre-existing rules of Customary Law. The Law was very largely ignored and was very soon amended to make registration of customary marriages optional.[108] One may cite as another example in Ghana, the changes made to customary pledges by the Mortgages Act.[109] Under customary law, land was kept by the pledgee until debt was paid, but the statute changed this Customary Law position by postulating that a pledge only creates a charge over the land.[110] The effect of the Act is therefore to deprive the pledge of rights to enjoy the pledgor's land by mandating that English mortgage rules apply to customary transactions. By this, the long developed Customary Law was supplanted by English rules. Add to the list the Head of Family

[103] See Eugene Cotran, "Marriage, Divorce and Succession Laws in Kenya: Is Integration or Unification Possible" (1996) 40:2 J Afr L 194 at 202.
[104] *Ibid.*
[105] *Ibid.*
[106] See *Customary Marriages (Registration)* (Ghana), 1985 PNDCL 112.
[107] See *Interstate Succession Act* (Ghana), 1985 PNDCL 111.
[108] See *Customary Marriages (Registration)* Ghana, 1985 PNDCL 112, as amended by PNDCL 1991.
[109] See *Mortgages Act* (Ghana), 1972 NRCD 96.
[110] *Ibid* at s 2.

(Accountability) Law, which mandates a head of family to register all family property and empowers members of the family to go to court to compel the head of family to account.[111] The law goes over the head of the Customary Law structure to bestow upon members of a family the ability to go to court, thus circumventing the customary processes.

Another law which came to destabilise the traditional family system under Customary Law is the above-mentioned law on intestate succession. The Law was enacted to modify the customary law rules of succession on the presumption that the "average Ghanaian" no longer subscribed to customary rules and practices. The effect of the law is to redefine the focus of one's family from the extended family, as it was defined under Customary Law, to the nuclear family. In so doing, the law seeks to separate and distance the Ghanaian from the communal family system which has existed in Ghana and has pervaded the African continent for centuries. The true effect of these statutory modifications was to institute new rules in various spheres of African life which, hitherto, were wholly governed by Customary Law.

Whatever the motivations and justifications are for Statutorily Instituted Customary Law, they proceed from the problematic assumption that Customary Law lacks the potential to self-correct as it evolves. As one observer has noted, customary laws, if allowed to evolve unruffled, can potentially self-correct to take care of the changing trends, demands and needs of the people.[112] Attempts to forcefully effect change in Customary Law through statutory interventions could be premature, ill-timed, counterproductive, and above-all rob it of spirit and true essence.[113] And "since customary law consists of the customs and usages of the people it is the people themselves who can change or modify it…Since customary law is elastic and

[111] See Head of Family (Accountability) Act, *supra* note 99.
[112] See Eshun v John Fia, [1983] GLR 441 (Ghana) [*Eshun*].
[113] See generally Fatima Osman, "The Consequences of the Statutory Regulations of Customary Law: An Examination of the South African Customary Law of Succession and Marriage" (2019) 22:1 Potchefstroom Electronic LJ.

progressive… our people who live in the modern world should be credited with the capability to adapt their customs and usages to modern situations without coercion from an external authority."[114]

VI. Complementary Customary Law

The fifth type of Customary Law is "Complementary Customary Law," where statutes and basic rules of the Common Law are supplemented by Customary Law. The supplementary character of the Customary Law is useful for filling the gaps where the constitution, statute, common law or the civil law are inadequate.[115] The Ghanaian Courts Act, for example, contains provisions that seek to apply the rules of Customary Law to torts, contracts, inheritance, land law and several other spheres of life as a secondary measure and in the absence of a positive and contrary choice of rules by the parties to a transaction.[116] It provides that a court, when determining the law applicable to an issue arising out of any such transaction or situation, shall be guided by the personal law of a person, which invariably is a reference to the system of Customary Law to which a person is subject, unless there is clearly an intention to the contrary.[117]

Under this phase in the evolution of Customary Law, the basic rules of the game are provided for by other systems of law in broad outline, but the rules say nothing about the finer details, which are critical for daily political, economic and social interactions. In such situations,

[114] See Eshun, *supra* note 112 at 452.
[115] See generally Laurent Mayali & Pierre Mousseron, *Customary Law Today (*Springer International Publishing AG, 2018).
[116] See *Courts Act* (Ghana), 1993 Act 459, s 54.
[117] *Ibid*. See also Fatima Osman, "The Ascertainment of Living Customary Law: An Analysis of the South African Constitutional Courts" (2019) 51:1 J Leg Pluralism & Unofficial L 98.

Customary Law comes in handy to fill the void.[118] In Africa, there are many areas of life which are insufficiently governed by the Constitution, other statutory law and the received law. A good example is the Law of Succession Act in Kenya which provides that the law applicable to the distribution of intestate properties such as agricultural land and livestock in certain districts of Kenya shall be the law or custom applicable to the deceased's community or tribe.[119] Although the Law of Succession Act has elaborate rules on intestate succession, its rules are inadequate to determine matters of intestate succession to such properties. Recourse is therefore made to Customary Law. Similarly, in defining "descendant." South Africa's Intestate Succession Act provides that the descendants of a person includes anyone who has been accepted by the person as his or her own child in accordance with Customary Law.[120] The effect of this provision is that a complete determination of who a person's descendants are must necessarily take into account the customary law on the matter. In Ghana, various provisions of the Intestate Succession Act provide that a certain percentage of the estate of a person who dies intestate should devolve according to the rules of Customary Law applicable to him or her.[121] In contractual and tort law, the Courts Act of Ghana provides for the application of one's personal law to "any transaction or situation."[122] As defined by that Act, personal law is predominantly the system of Customary Law to which the person is subject.[123]

In adjudication involving family law cases, family tribunals use customary rules for the settlement of family disputes to supplement those that are provided by statutes.[124] In the area of

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[118] See generally Muna Ndulo, "African Customary Law, Customs and Women's Rights" (2011) 18:1 Ind J Global Leg Studies.
[119] See *Law of Succession Act* (Kenya), 2012 c 160. See also Ama Hammond, "Reforming the law of interstate succession in a legally plural Ghana" (2019) 51:1 J Leg Pluralism & Unofficial L 114.
[120] See *Interstate Succession Act*, South Africa 1987, (Vol 268, No 10973) s 1(4); see also *Reform of Customary Law of Succession and Regulation of Related Matters Act,* South Africa 2009 (No 11).
[121] See Interstate Succession Act, *supra* note 107.
[122] See Courts Act, *supra* note 116.
[123] *Ibid.*
[124] See *Matrimonial Causes Act,* Ghana 1971 (Act 367), s 41(2)(b).

dispute resolution, Alternative Dispute Resolution (ADR) involves in large measure the application of customary rules for the amicable resolution of interpersonal disputes to complement formal and statutory ADR rules. It was on this premise that in the case of *Suka v Glavee*,[125] the Ghanaian court upheld customary arbitration conducted in line with Customary Law as valid, and the defendant was bound by the arbitral award. This draws on a long tradition of amicable dispute resolution in Africa.[126] As Ayittey notes, within the customary system, "great emphasis was placed on peaceful resolution of disputes and the promotion of social harmony while upholding the principles of fairness, custom and tradition."[127] This was in order to prevent the escalation of feuds through attachment of groups to lineages and latent groups. In contrast, the colonialist system of dispute settlement was concerned with punishment, and imprisonment was introduced as a sanction for certain crimes and misdemeanours.[128] It is clear that there are many instances today where Customary Law is used to complement rules of Statutory Law and in situations where the operationalization of Statutory Law would be very limited or suboptimal without the complementary rules and practices of Customary Law.

VII. Insular Customary Law

The sixth phase in the evolution of Customary Law is "Insular Customary Law." This represents instances where other forms of law operate in tandem and parallel to rules of Customary Law in particular domains of social life, leaving the rules of Customary Law intact

[125] [1991] 1 GLR 194.
[126] See generally Andrew Chukwuemerie, "The Internationalisation of African Customary Law Arbitration" (2006) 14:2 Afr J Int'l & Comp L 143.
[127] See George B N Ayittey, *Indigenous African Institutions* 2nd ed (Ardsley, NY: Transnational Publishers Inc, 2006) at 71.
[128] See Werner Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* 2nd ed (Cambridge, UK: Cambridge University Press, 2006) at 463.

and allowing them to evolve on their own. Here, Customary Law attempts to stay apart from "modern law," almost as a form of resistance to the latter.[129] For example, in many African countries there is a distinct law on Customary Marriages, which is legal, subsists, and may occur outside of any "modern" rules of law on marriage. A Customary Law marriage is a valid marriage in almost all African states. It needs no other system of law to complement it and it exists in tandem and parallel to Islamic marriages, Christian marriages, and other forms of marriages.[130] The essence of Insular Customary Law is captured by the following observations of a Ghanaian judge:[131]

> The duty of a court is to endeavour always to ascertain and apply the customary rules and usages in force at any particular time in the community... Once external coercion, judicial or legislative, is brought to bear on the customs and usages of the people, there is bound to be the polarization of what is actually practiced by the people in their day to day lives on the one hand and the judicial decisions or legislative enactments on the other. There should always be a judicious parallelism between the law-making process and the advancement of the practices, customs and usages of the people to avoid frustration.[132]

Insular Customary Law is brought into focus where rules of Customary Law constitute the basic rules of the game, whilst other systems of law are merely complementary.[133] In this

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[129] See E Kofi Abotsi, "Customary Law and the Rule of Law: Evolving Tensions and Re-Engineering" (2020) 37:2 Arizona J of Inter'l & Comp L 159.
[130] See *Davis v Randell*, (1963), GLR 382, (Ghana).
[131] See Eshun, *supra* note 112. See also TW Bennett, "Re-introducing African Customary Law to the South African Legal System" (2009) 57:1 Am J Comp L 1.
[132] See Eshun, *supra* note 112 at 452. See also Liz Lewis, "Exploring the 'Ecology' of Laws at the Interface between International Rights Law and Subnational Customary Law" (2016) 24:1 Afr J Intl & Comparative L 105.
[133] See generally Weiland Lehnart, "The Role of the Courts in the Conflict Between African Customary Law and Human Rights" (2005) 21:2 South Afr J Human Rights 241.

phase, the rules of Customary Law are not merely complementary to other systems of law. This is the opposite of Complementary Customary Law, where the principal rules are dictated by statutes or received law, whilst the rules of Customary Law are merely supplementary. The key areas where the tables are turned in this way are land management, family life, and chieftaincy.

The 1967 Magistrate Courts Act in Kenya established the magistrate courts which had jurisdiction to apply Customary Law for the resolution of specific claims involving land, intestacy, family, adultery and the status of women and children.[134] As regards these claims, Customary Law was the guiding law instead of the other systems of law. In South Africa, the Recognition of Customary Marriages Act was passed "to make provisions for the recognition of customary marriages; to specify the requirements for a valid customary marriage; to regulate the registration of customary marriages; to provide for the equal status and capacity of spouses in customary marriages; to regulate the proprietary consequences of customary marriages and the capacity of spouses of such marriages; to regulate the dissolution of customary marriages; to provide for the making of regulations…and to provide for matters connected therewith."[135] Similarly, the Zimbabwe Customary Marriages Act was passed to regulate the solemnization of customary marriages and other incidents in connection with such marriages.[136] The Malawian Constitution also recognises marriages contracted under customary law.[137] This implies that with regards to such marriages, which are treated as equal to civil marriages under the Marriage, Divorce and Family Relations Act, the system of customary law has a dominant effect.[138]

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[134] See *Magistrate' s Court Act* (Kenya), No 17 of 1967, s 2.
[135] See *Recognition of Customary Marriages Act* (S Afr), Vol 402 No 19539 of 1998 at 1.
[136] See *Customary Marriages Act* (Zimbabwe), Ch 5:07 of 2004.
[137] See *Constitution of the Republic of Malawi* (Malawi), 1994, s 22(5). See also Lea Mwabene, "Marriage under African customary law in the face of the Bill of Rights and international human rights standards in Malawi" (2010) 10:1 African Human Rights LJ 92 at 78.
[138] See *Marriage, Divorce and Family Relations Act* (Malawi), 4 of 2005, s 12(1)(b). See also Hanibal Goitom, "Malawi: Parliament Passes Comprehensive Marriage, Divorce and Family Relations Legislation," *Malawi Voice* (24 February 2015), online:

In Ghana, nearly all marriages are either wholly or partially performed according to the rules of Customary Law, and they are considered valid marriages.[139] Also, the performance of a customary ceremony by the father of a child is enough evidence of parentage.[140] Under both the Wills Act and the Intestate Succession Act, the law recognizes as the child of a person to whom the respective Acts relate, any person who is either adopted under customary law or recognized by customary law to be the child of the deceased.[141] Under the provisions of the Matrimonial Causes Act, the court is to take into consideration any facts recognised by the personal law of the parties as sufficient to justify a divorce, including in the case of a customary law marriage, factors which traditionally constitute grounds for divorce under custom.[142] Also, apart from the fact that statutory law in Ghana has provisions on issues of child maintenance, it is the case that many traditional rulers still wield immense powers especially in places where the impact of formal state structures and statutory law is not very significant. What holds sway in most places is the Customary Law of child maintenance as enforced by traditional and, in some cases, religious leaders.[143]

With respect to chieftaincy, Ghana's Constitution boldly and clearly proclaims that the "institution of Chieftaincy**,** *together with its traditional councils as established by customary law and usage*, is hereby guaranteed" and that a Chief is "a person, who, hailing from the appropriate family and lineage, has been validly nominated, elected or selected and enstooled, enskinned or installed as a chief or queen mother *in accordance with the relevant customary law and usage*"

<www.loc.gov/item/global-legal-monitor/2015-02-24/malawi-parliament-passes-comprehensive-marriage-divorce-and-family-relations-legislation/> [perma.cc/N2KS-AMRM].

[139] See Enock D. Kom, "Customary Arbitration" (1987-1988) 16: Rev Ghana L 148.

[140] See *Children's Act* (Ghana), Act 560 of 1998, s 41(b).

[141] See *Wills Act* (Ghana), Act 360 of 1971, s 14(1); see also *Intestate Succession Act* (Ghana), PNDCL 111 of 1985, s 18.

[142] See *Matrimonial Causes Act* (Ghana), Act 367 of 1971, s. 41(3).

[143] See Raymond A. Atuguba et al, "Child Maintenance in Plural Legal Systems in Ghana: Institutional and Legal Research" (2005) 4 Access to Justice Series, Ghana Ministry of Justice.

(my emphasis in both cases).[144] The Supreme Court of Ghana has endorsed this position and has consistently protected the institution of chieftaincy and its detailed rules from the ravages of formal laws and institutions.[145] In all of these areas, there is at best a veneer of other systems of law under which rules of Customary Law reign supreme.

VIII. Declared Customary Law

The seventh and last phase in the evolution of Customary Law is "Declared Customary Law," where new rules of Customary Law are instituted and declared as such by persons and institutions that have statutory or other authority to do so. In Ghana, the National House of Chiefs may on its own, or at the request of the Minister in charge of Chieftaincy Affairs or a Regional House of Chiefs, consider whether a rule of Customary Law should be assimilated by the common law.[146] Where the National House is of the opinion that the rule should be assimilated by the Common Law, it drafts a Declaration describing the rule with the modifications it considers necessary, after considering the evidence and representations that have been submitted to it, and after carrying out appropriate investigations.[147] The draft is submitted to the Minister who may by Legislative Instrument give effect to the recommendations of the National House of Chiefs and declare the rule to be assimilated in the form specified in the instrument, after consultation with the Attorney-General.[148] Where a rule is declared to be assimilated in this way, it may be referred to as a common law rule of customary origin.[149]

[144] See *Constitution of Ghana 1992* (Ghana), c 22, arts 270, 277.
[145] See Republic v Domeabra Traditional Council; ex Parte Oppong (1992) 1 GLR 88-96 (Ghana Law Reports) [*Republic*].
[146] See *Chieftaincy Act* (Ghana), Act 759 of 2008, ss 54(1)-(3), 55(1).
[147] *Ibid*.
[148] *Ibid*.
[149] *Ibid*.

Declared Customary Law also comes into play as a collateral effect of the process of codification of Customary Law. Tanzania's Unification of Customary Law Project was commenced in 1961 to help unify and codify the diverse customary law systems in Tanzania. The project led to the Local Customary Law Declaration Orders of 1963.[150] Commenting on the success of this Declaration, a former Chief Justice of the Tanzanian Supreme Court, Francis Nyalali, stated that the project had created an "indigenous common law" as a substitute for the diverse customary law systems.[151]

In other cases, Declared Customary Law is at a more micro level. In many communities in Africa, modern Chieftains make declarations of Customary Law which are now often reduced into writing. It appears that Declared Customary Law is the modern mechanism for the renewal of Customary Law. Customary law is not static; it is dynamic and its rules change from time to time to reflect changing social and economic conditions. As noted in one judicial decision, "one of the most striking features of native custom is its flexibility; it appears to have been always subject to motives of expediency, and it shows unquestionable adaptability to altered circumstances without entirely losing its character."[152] Like any system of unwritten law, customary law has a capacity to adapt itself to new, altered facts and circumstances as well as to changes in the economic, political and social environment.[153] Thus, it has adjusted to influences such as the introduction of European and other foreign legal systems in Africa, urbanisation and the growth of a modern economy.[154]

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[150] See Leila Chirayath, Caroline Sage & Michael Woolcock, "Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems" (2005) World Bank Working Paper, online <openknowledge.worldbank.org/handle/10986/9075> [perma.cc/KXX2-ASP5].

[151] *Ibid.*

[152] See *Lewis v Bankole* (1908), 1 NLR 81 (Supreme Court, Nigeria) *[Lewis]* at 10.

[153] See generally L Bernstein & F Parisi, *Customary Law and Economics* (Edward Elgar Publishing, 2014).

[154] See Paul Kuruk, "African Customary Law and the Protection of Folklore" (2002) 36:2 Copyright Bulletin 3 at 6-7. See also John Andrew Faris, "African Customary Law and Common Law in South Africa: Reconciling Contending Legal Systems" (2015) 10:2 Intl J African Renaissance Studies 171 at 176; Charles Mwalimu, "A

So far, I have presented seven phases in the evolution of Customary Law in Africa. They portray seven concrete and different types of Customary Law over a long period extending from pre-colonial times to the modern day. In the last part of this article, I illustrate the reasons for the resurgence of Customary Law in Africa today.

IX. Customary Law Revivalism

Despite the many and strong countervailing forces in the evolution of Customary Law, it remains a significant and growing source of law in Africa.[155] The resilience of Customary Law has been remarkable given the intensity of the forces set against it. Africa's colonial masters sought to change its laws immediately when they stepped on its shores. They perceived those laws to be backward and barbaric and thus sought to beat them into conformity with the laws of mainly England and France.[156] Various Agreements, Pacts and Bonds entered into with African peoples were partly aimed at achieving this.[157] Some of these agreements named African customary laws and practices as "abominations" and "barbarous."[158] It is significant to note that the attempted erasure of African Customary Law is not only attributable to the European colonialists. Islamic Law and customs have affected Customary Law in North Africa, Northern Nigeria, Northern Ghana, Sierra Leone and sections of several other African countries.[159]

Bibliographic Essay of Selected Secondary Sources on the Common Law and Customary Law of English-Speaking Sub-Saharan Africa" (1988) 80:2 L Library J 241.

[155] See Ndulo, *supra* note 118 at 88.

[156] See generally Sandra Fullerton Joireman, "Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy" (2001) 39:4 J Modern African Studies 571.

[157] See "March 6, 1844: Bond of 1844 Signed by Fanti Chiefs and Britain" (6 March 2018), online (blog): *Edward A. Ulzen Memorial Foundation* <www.eaumf.org/ejm-blog/2018/3/6/march-6-1844-bond-of-1844-signed-by-fanti-chiefs-and-britain> [perma.cc/A2A3-CLB8].

[158] *Ibid*.

[159] See generally EG Parrinder, "Islam and West African Indigenous Religion" (1959) 6:2 Numen 130. See also Abdulmajeed Hassan Bello, "Islam and Cultural Changes in Africa" (2018) 2:1 Arts & Humanities Open Access J 25.

After independence, many African countries reinstituted various versions of the repugnancy clause in their new constitutions, further attempting to drive customary laws and practices aground. Today, neoliberalism, a globalising force, uses political, economic, social, psychological, and technological measures to erode all previous forms of law in Africa, especially Customary Law, seeking to institute in its stead Euro-American forms of political, economic, and social order. A silent subscript of these efforts is the belief that Customary Law is backward, primitive and inimical to the tenets of democracy and serves no purpose in the twenty-first century. This movement marshals any allies it can get to achieve its purpose. These forces of globalisation and of neoliberalism are represented under various terms, popular amongst which are democracy, good governance, rule of law, development assistance, free market, free trade, economic cooperation, human rights.[160] The chief agencies that instil these dogmas on African societies include international financial institutions, development agencies, human rights organisations and even feminist movements.

There has been severe onslaughts by human rights and feminist movements on many aspects of African Customary Law, often attempting to sweep everything away, baby with bathwater.[161] Once an aspect of a customary rule of law is found to be incompatible with an accepted principle of international human rights norms or with national bills of rights inspired by international norms, the customary rule together with its moderating elements is deprecated into extinction. Thus, the example of ending Female Genital Mutilation (FGM) in many African

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[160] See generally Raymond A. Atuguba, "An African Redefinition of Popular Democracy and Development Nomenclature" (2016) 5:10 Intl J Innovative Research & Development 58.

[161] See Ndulo, *supra* note 118; see also Lea Mwambene, *The Impact of the Bill of Rights on African Customary Family Laws: A Study of the Rights of Women in Malawi with some Reference to Developments in South Africa* (Legum Doctor Thesis, University of the Western Cape, 2008) [unpublished]; Vrinda Vinayak "Female Genital Mutilation: The Cultural Relativism Argument Just Doesn't Fly" Huffington Post (18 June 2017) online: <www.huffpost.com> [perma.cc/2TUS-3AV8]; Anne Hellum, "Women's Human Rights and African Customary Laws: Between Universalism and Relativism - Individualism and Communitarianism" (1998) 10:2 European J Development Research 88 at 90.

countries means that the rites of passage, the weeks of education of young women on community ideals, and more are swept away with the ending of FGM.[162] This is at the core of the debate between universalism and cultural relativism.[163] In many places in Africa, efforts to reform Customary Law to accord with international human rights norms are now easily interpreted as efforts to impose Western values on African societies by obliterating their Customary Law based on the belief that Customary Law is backwards and inimical to the very tenets of democracy and human rights, and serves no purpose in the modern world. Thus, many Africans and Africanists are beginning to question human rights norms and the unilateral changes they impose on African societies, especially when the parties concerned consent to practices such as FGM.[164]

Despite the deprecation of Customary Law during the various phases of its evolution, it remains a significant source of law in Africa and is growing. The neoliberal movement is therefore failing in its attempt to erode or debilitate Customary Law. There is a long list of immediate reasons for this: fear of change by African peoples; habit; Customary Law's accordance with lived reality; and the institutionalisation of Customary Law in the new constitutions of African states, sometimes carving out entire domains of national life for regulation primarily by Customary Law. There are some other reasons for the resilience and flourishing of Customary Law in Africa today, and it is to them we now turn.

Customary Law retains an unenviable position in the hierarchy of norms in the constitutions of many African countries, yet it is still the dominant law in three of the most

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[162] See Olga Khazan, "Why Some Women Choose to Get Circumcised" (8 April 2015), online: *The Atlantic*<https://www.theatlantic.com/international/archive/2015/04/female-genital-mutilation-cutting-anthropologist/389640/>.

[163] See Makau Matua, *Human rights: A Political and Cultural Critique* (Philadelphia: University of Pennsylvania Press, 2002) at 43 (De Gruyter); Evadné Grant, "Human Rights, Cultural Diversity and Customary Law in South Africa" (2006) 50:1 J Afr L 2 at 2–3 (Cambridge Core); see also Simisola C. Obatusin, "Customary Law Principles as a Tool for Human Rights Advocacy: Innovating Nigerian Customary Practices Using Lessons from Ugandan and South African Courts" (2018) 56:3 Colum J Transnat'l L 636 at 644 (HeinOnline).

[164] See Ashley Sahel Castro, "The Rite to Womanhood: An Interdisciplinary Study of Female Circumcision Among the Gikuyu of Kenya" (Middletown: Wesleyan University, 2010) 1 at 15.

critical domains of life, in both quantitative and qualitative terms: family life (births, membership, marriages, matrimonial causes, children, deaths); land ownership, utilisation and management; and dispute resolution.[165]

The fact that marriages under customary law are widespread in countries such as Ghana has been justified by small-scale surveys conducted throughout the country.[166] Almost all marriages celebrated in Africa are performed according to Customary Law, even though some of them are then followed or preceded by other religious or secular marriage processes.[167] Most Customary Law marriages have superimposed on them Islamic or Christian marriages—a phenomenon referred to as double-decker marriages.[168] African judges insist that when a subsequent Islamic or Christian marriage is dissolved there is a subsisting Customary Marriage until it is dissolved.[169]

In West Africa generally, the land belonging to a community represents both a physical and spiritual relationship with the dead, living and unborn. With the advent of colonialism and European acculturation, strains appeared in the hitherto stable traditional land holding regime.[170] Transition from traditional land ownership structures to bring them in line with modern economic and social conditions has not been smooth. In Ghana, the Aborigines Rights Protection Society ensured, at the very beginning of this struggle, that Ghana's lands were not mass-expropriated by the colonial government and with it all of the Customary Law that

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[165] See Telesphore Ngarambe, *Practical Challenges in Customary Law Translation* (Addis Ababa: Organisation for Social Science Research in Eastern and Southern Africa, 2015) at xvi.
[166] See "Ghana - Marital Processes And Types Of Marriage" online: JRank Articles <https://family.jrank.org/pages/706/Ghana-Marital-Processes-Types-Marriage.html>.
[167] See Enoch D Kom, "Customary Arbitration" (1987-1988) 16 Rev Ghana L 148.
[168] See Fallers, *supra* note 67 at 614.
[169] See Fatima Osman, "The Million Rand Question: Does a Civil Marriage Automatically Dissolve the Parties' Customary Marriage?" (Cape Town: University of Cape Town, 2018) 1 at 2.
[170] See Tony Burns et al, "Land administration reform: indicators of success and future challenges" (ResearchGate 2007) 1 at 40, 164.

regulates them.[171] Other colonies were not so lucky, and today Zimbabwe and South Africa, for example, are struggling to repossess for their peoples the lands that were taken by the colonialists. Mozambique also has a strong system of customary tenure which accounts for about ninety percent of land in the country.[172] The majority of Namibia's two million population live in the north under customary tenure. The rest of the land in the country is mostly registered in full ownership (freehold) in a deeds registry system that is too expensive for the poor to access.[173] In Uganda, there is a predominance of customary tenure at an estimated sixty-two percent of the land and involving an estimated sixty-eight percent of the population. This accounts for approximately eight million customary landholders throughout Uganda.[174] Some commentators believe seventy-five percent of land in Uganda is governed by the customary land tenure system.[175] Thus, the majority of lands in many African countries are held according to Customary Law. This includes land for agriculture, industry, housing, mining and oil and gas exploratory activities.

Customary justice systems in post-independence Africa have contributed immensely to the dispensation of justice. Without this system, most parts of Sierra Leone and Uganda would not have had any justice system at all during their periods of civil war and its aftermath. In other countries like Kenya and Tanzania, no separate customary tribunal systems were created, hence the formal judiciary adjudicated on matters of Customary Law. In these countries, however,

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[171] See "May 24, 1898: The Aborigines Rights Protection Society Delegation Leaves for London to Protest Lands Bill" (25 May 2018), online (blog): Edward A. Ulzen Memorial Foundation <https://www.eaumf.org/ejm-blog/2018/5/25/may-24-1898-the-aborigines-rights-protection-society-delegation-leaves-for-london-to-protest-lands-bill>.
[172] See Burns et al, *supra* note 170.
[173] *Ibid*.
[174] *Ibid*.
[175] See Gender and Land Rights Database, "Uganda: Prevailing Systems of Land Tenure," Food and Agriculture Organisation of the United Nations (2010), online:<https://www.fao.org/gender-landrights-database/country-profiles/countries-list/land-tenure-and-related-institutions/prevailing-systems-of-land-tenure/en/?country_iso3=UGA>.

informal customary law tribunals exist and operate at the level of villages and communities in several forms, including councils of elders, clan or family tribunals, and village associations.[176] In practice, poorer people are more likely to use customary tribunals as they are unable to afford to take their matters to the formal judiciary. A clear strength of customary law systems is that they represent law that originates from the people in the most direct sense.

Customary law processes compliment formal justice systems. They have a reach, accessibility and familiarity that are unparalleled. They are also incredibly cheaper than the formal courts. In particular, the use of local languages and not complicated legalese, encourage members of many African communities to resort to these processes. Overall, the processes implicate greater community ownership and instil firmer social cohesion.[177] Using Ghana as an example, Davies and Dagbanja note that:

> The corporate and group nature of the Ghanaian descent system, the communal aspect of Ghanaian culture, the role of the family, and the role of customary law in maintaining the structure of society are fully intact in Ghana and not likely to change soon. Customary law is still more inclusive than the common law in its vision of what constitutes a "wrong" and more generous with respect to remedies. To the extent that the Chieftaincy institution and other traditional institutions perform their duties properly, these cases will not need to be brought to courts.[178]

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[176] See Kane et al, "Reassessing Customary Law Systems as a Vehicle for Providing Equitable Access to Justice for the Poor" (Paper delivered at the Arusha Conference, Arusha, Tanzania, 12-15 December 2005) [unpublished]; Jacques Frémont, "Legal Pluralism, Customary Law and Human Rights in francophone African countries" (2009) 40 VUWLR 149 at 154.

[177] See International Development Law Organization (IDLO), "Practitioner Brief: Navigating Complex Pathways to Justice: Engagement with Customary and Informal Justice Systems" (2019) Working Paper Series at 10.

[178] See Julie A. Davies & Dominic Dagbanja, "The Role and Future of Customary Tort Law in Ghana: A Cross-Cultural Perspective" (2009) 26:2 Ariz J Int'l & Comp L 303 at 327.

Customary Law is considered "as a legacy handed down from generation to generation… enjoy[ing] wide acceptance among many [Africans]."[179] It does not just represent a phase in the legal and political development of Africa; rather, it is an established and structured way of life which is grounded on certain core social beliefs and values. In the case of *Oyewunmi v. Ogunsan*, a Justice of the Supreme Court summarised the essence of customary law in the lives of Nigerians as:

> …the organic and living law of the indigenous people of Nigeria regulating their lives and transactions. It is organic in that it is not static, is regulatory in that it controls the lives and transactions of the community subject to it. It is said that custom is the mirror of the culture of the people. I would say that customary law goes further to import justice to the lives of those subject to it.[180]

African Customary Law has not fallen into abeyance despite the onslaught of modern state laws which are made out to be more authoritative.[181] This is primarily because people in Africa need their local laws to survive.[182] This is evidenced by the fact that the constitutions of many African countries assure Customary Law a significant role in people's lives.[183] A leading example of this bounce-back effect of Customary Law is the Customary Marriages (Registration) Law in Ghana that we have already referred to.[184] This law was introduced in 1985 and required registration of customary marriages. Ghanaians simply ignored the law. So resounding was the silent resistance that met the law, it was subsequently amended to make registration of customary

[179] See Hammond, *supra* note 6 at 130.
[180] See Oyewunmi & Anor. v. Ogunesan (1990) JELR 42987 (SC) at 207.
[181] See Effa Okupa, International Bibliography of African Customary Law (Hamburg: LIT VERLAG,1998) at ix.
[182] *Ibid*.
[183] See e.g. Davies & Dagbanja, *supra* note 178 at 321.
[184] See *Customary Marriages (Registration)* Ghana, *supra* note 106 at s 1.

marriages optional.[185] It is obvious that Customary Law retains a resilience that modern legislators are not conversant with, and which has been shown to be capable of overriding attempts to overcome it.

X. Customary Law as the Law of the Future

There is a last set of less obvious reasons why the forces of neoliberalism have not yet consumed Customary Law. Those forces contain within themselves certain qualities which ensure the survival of Customary Law – subsidiarity, participation and tolerance. Counter-intuitively, it is neoliberalism's formal insistence on the qualities of subsidiarity, its love for participation that characterises participatory democracy, and its tolerance of anti-globalisation movements that would sustain the revival of Customary Law in Africa going forward. This is because all of these three qualities of good governance have one thing in common – localism.

Subsidiarity insists that issues and solutions are best raised, discussed, implemented, assessed, and corrective action taken at the lowest possible level, which happens to be the domain of Customary Law. Participatory democracy opines that "the people" at the lowest level of organisation—families, clans, tribes, ethnic groups, cantons, communes, villages—must decide the governance, economic, and social issues that affect their lives and those of their children, especially as they would have to live with the consequences of their decisions. The predominant law at these lowest levels of social organisation in Africa is Customary Law. The anti-globalisation movements argue that the desire to modify in order to conform everything to Euro-American notions of modernity and globalisation is bound to fail, as these are antithetical to the lived reality of Africans. This will eventually result in a rejection of the imposed norms

[185] *Ibid*.

and ways of life. The neglect of local representation in the formulation of new policies and the estrangement of the majority of Africans who live their daily lives within the remits of Customary Law as they have known it, they argue, will fail. At the level they are concerned about, Customary Law is paramount. In many neoliberal policy documents, there is a thrust for the resolution of issues at the lowest possible level for efficiency reasons.[186] As long as subsidiarity remains a part of the neoliberal movement, its capacity to dismiss Customary Law will be correspondingly diminished.

The same argumentation holds good for the neo-liberal love for participation in governance.[187] Chastened neoliberalism insists that intense participation of all stakeholders is essential for the sustainability of development initiatives.[188] From the development of policy and laws, through macro-economic management and development programming, to local level initiatives, chastened neo-liberalism insists that stakeholders, especially at the local level, and as a function of subsidiarity, be thoroughly consulted.[189] The process of consultation, deployed and managed at the local level, ensures that Customary Law and its practice seep into all the matters that preoccupy the developmental state. This is a clear avenue for the revival, growth, and durability of Customary Law.

Even attempts at codification and declaration of new rules of Customary Law or attempts at passing laws that reform or recast Customary Law are frowned upon without prior arrangements to hear the views of the communities affected by such customary rules.[190] Without this, such changes eventually result in a rejection of the imposed law and a return to the original

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[186] See United Kingdom, *House of Lords, Select Committee on European Union Eleventh Report* (2003).
[187] See David M Trubek & Alvaro Santos, *The New Law and Economic Development: A Critical Appraisal*, (Cambridge, UK: Cambridge University Press, 2006) at 7.
[188] *Ibid.*
[189] *Ibid.*
[190] See Shirin Jaafari, "Why do these women in Kenya support female genital mutilation?" *The World* (2 July 2014), online: <https://theworld.org/stories/2014-07-02/why-do-these-women-kenya-support-female-genital-mutilation>.

Customary Law doctrines which the people are largely familiar with. Neoliberalism will face a backlash if it neglects to give due regard to the participation of local representatives in the formulation of new policies and laws, including matters relating to macro-economic policies. This creates a great avenue for Customary Law to seep into these policies and laws. As Trubek and Santos note,

> Critics charged neoliberal policy makers for not having paid attention to existing local institutions…They noted that transplanted laws, thought to reflect best practices, often did not take hold, or produced results diametrically opposite from what was intended. They emphasized that success of economic policies could not be disentangled from local context...[191]

Finally, and flowing from the above, chastened neoliberalism is structured to acknowledge, have regard for and try to contain the forces of anti-globalisation.[192] These forces work to disrupt the uniformization of policies, laws, development thinking, economies and societies. They insist that each locale is unique and that uniqueness, above all else, must inform any development plans regarding any locale.[193] Again, this is a great opportunity for the thriving of Customary Law, which is the law of the locales in many African communities. It is clear that as long as chastened neoliberalism – currently the most dominant developmental force on the face of the earth – harbours within its interstices the elements of subsidiarity, participation, and anti-globalisation, Customary Law will continue to thrive.

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[191] See Trubek & Santors, *supra* note 187 at 6.
[192] *Ibid*.
[193] *Ibid*.

XI. CONCLUSION

It is important to consciously reject the scholarship which seeks to equate Customary Law to a few negative cultural practices in African countries. As I have endeavoured to show, Customary Law, like all systems of law, contains both retrogressive and progressive elements. Rid of its negatives, Customary Law is a beautiful set of principles constituting the lived reality of African peoples, and which alone can see the continent into sustainable and equitable development. A distinction would have to be drawn between abolishing negative customary practices and Customary Law in general. The fight against inimical widowhood rites[194] and *trokosi,*[195] for example, has not been highly successful even though there is a general understanding that aspects of these practices are inimical to the wellbeing of the victims involved. This is because neoliberalism and the forces of globalisation are not able to disaggregate the inimical aspects of these practices and work against them in a targeted way. The current approach of trying to erase all aspects of these practices, including very progressive aspects of them, is sure to have limited positive results.

Customary Law is still evolving.[196] It has undergone many phases in its development. It is still the law most Africans are accustomed to. It controls the daily activities of most of her peoples. It is the law they were born and raised with. Such a law cannot be easily wiped out. The proliferation of modern state and international laws has not done much to scrap Customary Law.

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[194] See Ebenezer Durojaye, "Woman, But Not Human: Widowhood Practices and Human Rights Violations in Nigeria" (2013) 27: 2 Intl JL Pol'y & Fam 176 at 176.

[195] "The word *trokosi* comes from the Ewe words "tro," meaning deity or fetish, and "kosi," meaning female slave. The Étro" deity is not, according to African traditional religion, the Creator or what might be called the "High" or Ultimate God. "Tro" refers to what African Traditional Religion calls the "small gods" or "lesser deities"—spirits of nature, etc. which are venerated in traditional religion. Trokosi is a ritual form of servitude through which women are enslaved in specific contexts. The term *trokosi* is commonly used in English in Ghana, as a loanword." See Dennis Yao Dzansi, "'Trokosi' - Slave of a Fetish: An Empirical Study" (2014) 12:1 Studies Tribes & Tribals 1 at 1.

[196] See Julia Sloth-Nielsen & Lea Mwambene, "Talking the Talk and Walking the Walk: How Can the Development of Africa Customary Law Be Understood" (2010) 28:2 Law Context: A Socio-Legal J 27 at 27.

Although it has undergone many changes as depicted in its evolution, its relevance is ongoing. Customary Law has been, is, and will continue to be the law in Africa. The mutations in its growth and development have left us with many signposts and a firm sense of its resilience. It will continue to evolve to meet the changing needs of its people and cannot be obliterated completely. The most destructive forces that come against Customary Law contain within them elements that ensure the survival and growth of Customary Law, as we have seen with neoliberalism. It is safe to conclude that Customary Law will survive and blossom going forward. It will always live with the people.