


# Legal Pluralism and the Future of Personal Family Laws in Africa

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## ABSTRACT

A notable aspect of Africa's struggle with its colonial legacies is the co-existence of indigenous laws that emerged in agrarian settings with state laws that emerged in industrial settings. Given the dissonance in their origins, clashes frequently occur between traditionalists and change agents, especially over the property and succession rights of women, girls, and younger male children. Spurred by the judicial handling of these clashes, scholars categorise African customary laws into 'official' and 'living' versions. However, this categorisation does not account properly for the influence of globalisation on the normative behaviour of Africans. Based on multi-country field research, this article introduces adaptive legal pluralism as the framework for managing the co-existence of indigenous laws and state laws in sub-Saharan Africa. By explaining the influence of globalisation on the behaviour of people subject to indigenous laws, the article draws attention to the imitative character of normative interaction in this region. It presents adaptive legal pluralism as not only a crystal bowl for charting the future of indigenous family laws, but also the theoretical pathway to integrated state and indigenous laws.

## I. INTRODUCTION

Decades after gaining political independence, African states are still struggling with their colonial legacies. In the legal sphere, a notable aspect of this struggle is the co-existence of indigenous laws and state laws. While the former are pre-colonial norms that emerged in agrarian settings, the latter are remnants and adaptations of European laws that emerged in relatively industrial settings. Given the dissonance in their origins, clashes frequently occur between traditionalists and change agents, especially over the property rights of women, girls, and younger male children.<sup>1</sup> These clashes occur in the context of socioeconomic transplants, during which western Europeans imposed their religion, economy, culture, and legal systems on their

1 C. Himonga and C. Bosch, 'The Application of African Customary Law under the Constitution of South Africa: Problems Solved or Just Beginning' (2000) 117 *South African Law Journal* 306–341.

colonies.<sup>2</sup> Significantly, the transplanted legal systems are characterised by a rule-based approach to law, which is known as legal positivism. Summarily described, legal positivism perceives law as a product of habitual practice, a command issued by a sovereign authority, and an obligation that is enforceable with the threat of sanctions.<sup>3</sup> Correspondingly, it underemphasises the moral values that prompt, inform, and sustain the law. Imbibed with legal positivist mindsets, colonial judges and their successors sacrificed indigenous values on the altar of rules, thereby creating dissonance between customs and the official perceptions of customs.<sup>4</sup> Consequently, scholars categorised customary laws into ‘official’ and ‘living’ versions. This article uses the concept of adaptive legal pluralism to challenge this categorisation, specifically the implicit way it neglects the influence of globalisation on normative behaviour in modern social fields, as well as the potential of this influence to engender integrated state and indigenous laws in Africa.

Adaptive legal pluralism regards the interaction of legal orders in sub-Saharan Africa as essentially imitative. A striking feature of this interaction is how law reforms mould indigenous norms into universalist images of the rights to dignity, equality, and non-discrimination. The jurisprudence of cultural contestations indicates that whenever an indigenous norm is constitutionally challenged as offensive to human rights values, judges invalidate it and legislators support the invalidation with law reform. Significantly, these human rights values are successors of colonial judicial standards of equity, fairness, and natural justice, which are known as the ‘repugnancy test’.<sup>5</sup> Oftentimes, neither the judges who protect human rights nor the legislators who undertake law reforms address the incongruence between the welfarist origins of indigenous norms and the individualistic modern settings in which these norms are applied.<sup>6</sup> In this context, adaptive legal pluralism responds to normative challenges raised by the colonial transplantation of industrial socioeconomic systems onto Africa’s agrarian political economies. Here, it asks how the interplay of norms and globalisation shapes the behaviour of Africans who observe indigenous laws. This question is significant on pedagogical, practical, and policy levels.

For pedagogical purposes, it questions the current categorisation of African customary laws. For development programming, it offers a crystal bowl for the future of indigenous laws in Africa. For law reforms, it provides a postmodernist understanding of normativity. Although postmodernism started manifesting in law about three decades ago through critiques of gender and racial inequalities,<sup>7</sup> it is yet to be theoretically applied to the interaction of laws in Africa. This is surprising, given the revolutionary impact of globalisation on indigenous African laws.<sup>8</sup> For example, land has

2 M. Siems, ‘Malicious Legal Transplants’ (2018) 38 (1) *Legal Studies* 103–119, 105; J.M. Owen IV, ‘The Foreign Imposition of Domestic Institutions’ (2002) 56 (2) *International Organization* 375–409.

3 J. Gardner, ‘Legal Positivism: 5½ Myths’ (2001) 46 *American Journal of Jurisprudence* 199–228.

4 A.K. Armstrong and W. Ncube, *Women and Law in Southern Africa* (University of Zimbabwe Press, 1987) preface.

5 N.M. Ollennu, ‘The Influence of English Law on West Africa’ (1961) 5 (1) *Journal of African Law* 21–35.

6 U. Ewelukwa, ‘Post-Colonialism, Gender, Customary Injustice: Widows in African Societies’ (2002) 24 (2) *Human Rights Quarterly* 427–428.

7 See, for example, Boaventura de Sousa Santos, ‘Law: A Map of Misreading. Toward a Postmodern Conception of Law’ (1987) 14 (3) *Journal of Law and Society* 279–302.

8 S.J. Ndlovu-Gatsheni, *Empire, Global Coloniality and African Subjectivity* (Berghahn Books, 2013) vii.

become permanently alienable, contrary to its pre-colonial status; group production of family wealth is giving way to individual income; women are acquiring equal matrimonial property rights, and the male primogeniture rule has been abolished in many countries.<sup>9</sup> Significantly, these changes in the normative lives of Africans were mostly caused by the influence of state officials, the inherited colonial systems within which these officials operate, and the numerous socioeconomic changes that follow(ed) these legal systems. Despite the intersectional nature of these socioeconomic changes, and despite the fluid nature of modern African social fields, the mainstream conceptualisation of African customary law persists with an insular line between people's practices and official perceptions of their practices.<sup>10</sup> This article argues that this categorisation is experientially flimsy, theoretically confusing, and developmentally unhelpful. Its argument is informed by 5 years of field observations, interviews, and case studies involving over 400 research subjects in Somaliland, South Africa, and Nigeria. The informants range from customary court judges to widows, divorcees, traditional authorities, market union leaders, and non-governmental organisations.

Following this introduction, Part II of the article critiques the literature against the background of legal philosophies. It uses two arguments that are elaborated in part three. First, the European colonisation of Africa constitutes, in a historical sense, a normative marker for the evolution of customary laws. Secondly, the radical effect of colonialism on behaviour signifies three types of African laws. The first is state laws – that is transplanted European statutes and their adapted variants. The second is indigenous laws, which denote pre-colonial norms that developed in agrarian, communal settings with the primary aim of clan welfare. The third is African customary laws. These are hybrid products of colonial contact, notably adaptations of indigenous norms to economic, religious, cultural, philosophical, and technological changes. Part III elaborates these arguments with the aid of empirical scenarios. Part IV uses adaptive legal pluralism to explain how the interaction of legal orders in intersectional social fields construct customary laws. It concludes with the trajectory of these legal orders.

## II. FALLACIOUS CATEGORISATION

There was an era when scholars debated the existence of law in preindustrial societies.<sup>11</sup> This ludicrous debate highlights the chief problem with customary law's categorisation. Why would anyone dispute that preindustrial societies lacked law when it is obvious that cooperative social relations can only be founded on law? To extrapolate, why is customary law categorised as 'living' and 'official' when this derisive division is absent in colonially transplanted laws like delict and criminal law? The answer owes much to the legal philosophies that shaped understandings of customary law. I will therefore analyse their historical evolution.

9 A.C. Diala, 'Reform of the Customary Law of Inheritance in Nigeria: Lessons from South Africa' (2014) 14 (2) *African Human Rights Law Journal* 633–654.

10 For discussion of intersectionality, see A.-M. Hancock, 'Intersectionality as a Normative and Empirical Paradigm' (2007) 3 (2) *Politics and Gender* 248–254.

11 H.S. Maine, *Ancient Law, Its Connection with the Early History of Society, and Its Relation to Modern Ideas* (John Murray, 1861).

### III. PHILOSOPHICAL FOUNDATIONS OF LAW

As Hart observed, '[f]ew questions concerning human society have been asked with such persistence and answered by serious thinkers in so many diverse, strange, and even paradoxical ways as the question "What is Law? . . ."'<sup>12</sup> In this age of globalisation and liberalism, his observation reminds us that legal ideas are shaped by the state of societal civilisation.

Early debates about the meaning of law centred on the role of disputes, sanctions, and judges.<sup>13</sup> John Austin, Thomas Hobbes, Jeremy Bentham, Hans Kelsen, and Max Weber stand out for championing sanctions or organised coercion as the determinant of law.<sup>14</sup> For example, Weber argued that law exists if a phenomenon 'is externally guaranteed by the probability that physical or psychological coercion will be applied . . . to bring about compliance or avenge violation.'<sup>15</sup> Similarly, Hoebel declared that '[t]he really fundamental *sine qua non* of law in any society—primitive or civilized—is the legitimate use of physical coercion by a socially authorized agent.'<sup>16</sup> Kelsen offered 'a pyramid of norms regulated by a 'sovereign centre'.<sup>17</sup> Later, Bohannon stressed the importance of institutionalised enforcement.<sup>18</sup>

On the contrary, legal realism scholars – admittedly a loose label – prefer empirical evidence or law in action. Here, social behaviour and how judges interpret it is prominent. Pound's three-part series in the *Harvard Law Review* (1911–1912) on 'The scope and purpose of sociological jurisprudence' influenced early thoughts on the nature of law. Conscious of fierce contestations, Llewellyn confined law to the activities of judges, lawyers, and law enforcement officers regarding disputes.<sup>19</sup> Malinowski's pioneering work on pre-state law emphasised the primacy of claims and obligations.<sup>20</sup> Ehrlich used 'folk law' to show how patterns of social conduct shape law and its underlying values.<sup>21</sup> Their writings set the tone for sociology and legal anthropology, as evident in the works of Donald Black, Jacques Vanderlinden, Sally Merry, Sally Moore, Bonaventura Santos, Brian Tamanaha, Michael Hooker, John and Jean Comaroff, William Twining, and many others.

Naturally, some scholars seek a balance in the definitional debate. For example, Tamanaha insists that 'to distinguish law from non-state law we must rely on the collective identification of law, that is, on folk law', which he defines as 'what people collectively recognise as law'.<sup>22</sup> Kantorowicz and Patterson rejected the use of coercion to differentiate laws from customs, arguing that 'customs can always be enforced,

12 H.L.A. Hart, *The Concept of Law* (Oxford University Press, 1961) 1.

13 H. Kantorowicz, *The definition of law* (AH Campbell ed.) (New York: Cambridge University Press, 2014).

14 For analysis, see Gardner (n 3) 199–228.

15 M. Weber, *On Law in Economy and Society* (Max Rheinstein ed.) (Simon and Schuster, 1954).

16 A. Hoebel, *The Law of Primitive Man* (Harvard University Press, 1954) 26.

17 H. Kelsen, *Introduction to the Problems of Legal Theory* (BL Paulson and SL Paulson trans. of first edn. 1934) (Clarendon Press, 1992) 55.

18 P. Bohannon, 'The Differing Realms of the Law' (1965) 67 (6) *American Anthropologist* 33–42.

19 K.N. Llewellyn, 'A Realistic Jurisprudence – The Next Step' (1930) 30 *Columbia Law Review* 431–465.

20 B. Malinowski, *Crime and Custom in Savage Society* (Harcourt, Brace & Company, 1926) 55.

21 E. Ehrlich, *Fundamental Principles of the Sociology of Law* (Harvard University Press, 1936) 493.

22 B.Z. Tamanaha, *Legal Pluralism Explained: History, Theory, Consequences* (Oxford University Press, 2021) 200–204.

and law sometimes cannot,' and the 'command of the state' is unhelpful 'because it would exclude phenomena like canon law, international law, and customary law'.<sup>23</sup> They, therefore, define law as 'the totality of those rules of external conduct, to whose application a judge is appropriate.'<sup>24</sup> Among these middle-ground theorists, Hart is important for his contributions to postmodern law.

#### IV. HART AND LEGAL EVOLUTION

Legal theory is increasingly bottom-up – that is informed by law's operation in the street. This is in marked contrast with the top-down, Westphalian idea of authority that used to dominate in the Medieval Period, when law was the command of a sovereign. Following revolutions in Europe and contact with other societies, sanction lost its primacy as the criterion for the validity of law. Notably, anthropologists showed the complex ways in which law is shaped by behavioural interactions in semi-autonomous social fields.<sup>25</sup> They demonstrated that law is not always precise, prescriptive, and punitive. Later, conflicts between imposed foreign laws and indigenous laws forced theorists to compare legal systems and locate the meaning of law within intersectional settings, especially dynamics of power and wealth. Importantly for adaptive legal pluralism, comparative law paved the way for bottom-up insights into customary law.<sup>26</sup>

In the above context, Hart's rule of recognition is useful for bridging the gap between the source of norms and the motivations for observing norms. While his primary rules maintain the importance of obligation, his secondary rules point to other sources of legal validity by explaining the normative power of social habits.<sup>27</sup> Accordingly, I perceive law as widely accepted standards of conduct to which members of a community attach a sense of obligation. My definition speaks to the adaptive nature of law, especially indigenous laws.

For emphasis, indigenous African laws emerged in close-knit, agrarian social settings in which people operated with a communal sense of rights and obligations. In these settings, norms were sensitive to shared obligations, supple in dispute resolutions, and shorn of individualism. Indeed, the processual character of indigenous norms enabled them to embrace the socioeconomic changes of globalisation to the point of near extinction. Accordingly, I describe indigenous African laws as pre-colonial norms that developed in agrarian settings with the primary aims of kin welfare. My description, elaborated in Part III, is in marked contrast with the legal ideas brought by European colonisers to Africa. As I will show, these ideas are responsible for the mainstream categorisation of customary law.

23 H.U. Kantorowicz and E.W. Patterson, 'Legal Science – A Summary of Its Methodology' (1928) 28 *Columbia Law Review* 679–707.

24 *Ibid* 687.

25 S.F. Moore, *Law as Process: An Anthropological Approach* (Routledge and Kegan Paul, 2000); 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (1973) 7 (4) *Law and Society Review* 719–746.

26 J. Hund, "'Customary Law Is What the People Say It Is"— HLA Hart's Contribution to Legal Anthropology' (1998) 84 (3) *Archives for Philosophy of Law and Social Philosophy* 420–433.

27 Hart (n 12) 97–120.

## V. LEGAL CENTRALISM AND POSITIVISM

Legal centralism distinguishes between rules and morality, perceives law as the command of a sovereign, and insists on an apex source of norms in a legal system. Per Griffiths, it regards law as 'an exclusive, systematic and unified hierarchical ordering of normative propositions'.<sup>28</sup> Obviously, the doctrine traces its roots to political despotism. Inevitably, its state-centric perception of law faltered in the face of challenges to sovereignty, which coincided with advancements in legal thought such as the social contract theory.<sup>29</sup> These challenges bred principles like the supremacy of the law and fundamental human rights, which induced revolutions in America and France in the latter half of the 18th century.<sup>30</sup> Thus, legal centralism was informed by the state of European civilisation, in which imperialists imbibed law with a coercive character.<sup>31</sup> European states exported this coercive character in their colonisation of the rest of the world.<sup>32</sup> This is the origins of legal positivism, on which the governance architecture of Europe's colonies was founded.<sup>33</sup>

Simply described, legal positivism perceives law in terms of habits (certainty), commands (rules), and obedience (obligations). Correspondingly, it neglects the values that prompt, inform, and sustain the law. In Africa, it is evident in judicial procedures, which distrust oral narratives containing the bulk of indigenous laws. As Eekelaar noted, 'exclusive positivism had difficulty in attributing the character of law to the norms of religious and customary legal orders.'<sup>34</sup> Under the influence of legal positivism, many colonial jurists dismissed indigenous customs.<sup>35</sup> For example, Lord Sumner declared that '[s]ome tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society.'<sup>36</sup> Drunk with legal positivism, colonial administrators established European-styled tribunals, assumed control of indigenous courts, and codified indigenous norms narrated to them by native authorities and anthropologists. They established administrative structures with persistent impacts on property and homeownership.<sup>37</sup> Their attitude to indigenous laws contributed to the emergence of the misnomer called official customary law.

- 28 J. Griffiths, 'What Is Legal Pluralism?' (1986) 18 (24) *Journal of Legal Pluralism and Unofficial Law* 1–55, 3.
- 29 P. Abrams, 'Notes on the Difficulty of Studying the State (1977)' (1988) 1 (1) *Journal of historical sociology* 58–89.
- 30 T. Skocpol, *States and Social Revolutions: A Comparative Analysis of France, Russia and China* (Cambridge University Press, 1979) 47.
- 31 J.M. Kelly, *A Short History of Western Legal Theory* (Oxford University Press, 1992) 203; L. Benton and B. Straumann, 'Acquiring Empire by Law: From Roman Doctrine to Early Modern European Practice' (2010) 28 *Law and History Review* 1–38.
- 32 D.M. Klerman, P.G. Mahoney, H. Spamann and M.I. Weinstein, 'Legal Origin or Colonial History?' (2011) 3 (2) *Journal of Legal Analysis* 379–409, 380.
- 33 M.B. Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (Clarendon Press, 1975).
- 34 J. Eekelaar, 'Positivism and Plural Legal Systems' (2012) 25 (4) *Ratio Juris* 513–526, 525.
- 35 C.K. Allen, *Law in the Making* (Clarendon Press, 1927) 32.
- 36 Re Southern Rhodesia [1919] AC 211.
- 37 M. Bolt, 'Homeownership, Legal Administration, and the Uncertainties of Inheritance in South Africa's Townships: Apartheid's Legal Shadows' (2021) 120 (478) *African Affairs* 1–23.

## VI. OFFICIAL CUSTOMARY LAW

Mainstream scholars distinguish between community practices and judicial interpretation of these practices. In southern Africa, judicial interpretations are thought to embody the colonial distortion of indigenous laws.<sup>38</sup> Accordingly, scholars define official customary law as the version captured in state codes, court judgements, academic writings, and legislation. In one of the early essays on the subject, Sanders argued that official customary law emerged from the ways European judges and administrators subordinated indigenous laws to foreign principles.<sup>39</sup> Bennett defined it as ‘the body of rules created by the state and legal profession’.<sup>40</sup> Their views reflect opinions about the ‘creation of customary law’ by colonial authorities.<sup>41</sup> However, scholarly definitions are hesitant.

For example, Himonga and Bosch admitted that official customary law is ‘a contradiction in terms, but is used for the version of customary law as described by observers outside the communities in which the customary law in question is practised’.<sup>42</sup> Bekker and van Niekerk conceded that it could be ‘in harmony with constitutional principles’.<sup>43</sup> Bennett added that ‘we should not make a clear-cut distinction between official and living law’ because ‘whenever community practices are recorded for public consumption, whether as a result of fieldwork or judicial inquiry, they begin a process of transformation into the official code’.<sup>44</sup> So, why has the terminology of official customary law persisted when it is so nebulous?

The answer lies in the scholarly tendency to follow the crowd, as well as the hegemonic realities of colonialism. Commenting on descriptions of customary law in England, Brown observed that they are ‘written, less often to represent actualities, than to promote an ulterior purpose’.<sup>45</sup> As I noted, most scholars regard official customary law as the version recognised by state authorities, especially the courts. However, the courts do not apply customary law; they merely interpret it. The

38 Himonga and Bosch (n 1).

39 A.J.G.M. Sanders, ‘How Customary Is African Customary Law’ (1987) 20 *Comparative and International Law Journal of South Africa* 406–409.

40 T.W. Bennett, ‘Official vs “Living” Customary Law: Dilemmas of Description and Recognition’ in A. Claassens and B. Cousins (eds.), *Land, Power and Custom: Controversies Generated by South Africa’s Communal Land Rights Act* (JUTA, 2008) 138–153, 138.

41 P. Fitzpatrick, ‘Traditionalism and Traditional Law’ (1984) 28 (1–2) *Journal of African Law* 20–27; S.F. Moore, *Social Facts and Fabrications: “Customary” Law on Kilimanjaro, 1880–1980* (Cambridge University Press, 1986); F. von Benda-Beckmann, ‘Law Out of Context: A Comment on the Creation of Traditional Law Discussion’ (1984) 28 (1–2) *Journal of African Law* 28–33; E. Hobsbaum and T. Ranger (eds.), *The Invention of Tradition* (Cambridge University Press, 1983); R. Roberts and K. Mann (eds.), *Law in Colonial Africa* (Vol. 199, Heinemann, 1991); F.G. Snyder, ‘Colonialism and Legal Form: The Creation of “Customary Law” in Senegal’ (1981) 13 (19) *The Journal of Legal Pluralism and Unofficial Law* 49–90; M. Chanock, *The Making of South African Legal Culture, 1902–1936: Fear, Favour and Prejudice* (Cambridge University Press, 2001) 243–272; J. Fenrich, P. Galizzi, and T.E. Higgins, *The Future of African Customary Law* (Cambridge University Press, 2011).

42 Himonga and Bosch (n 1) 328.

43 J. Bekker and G. van Niekerk, ‘Broadening the Divide Between Official and Living Customary Law: *Mayelane v Ngwenyama* 2010 4 SA 286 (GNP); [2010] JOL 25422 (GNP)’ (2010) 73 (4) *Journal of Contemporary Roman-Dutch Law* 679–698.

44 T.W. Bennett, ‘Re-Introducing African Customary Law to the South African Legal System’ (2009) 57 (1) *American Journal of Comparative Law* 1–32, 21.

45 J.W. Brown, ‘Customary Law in Modern England’ (1905) 5 (8) *Columbia Law Review* 561–583, 562.

adversarial nature of judicial proceedings shows that courts ultimately adopt a version of customary law pleaded by litigants. Indeed, it is unheard of for a court to give judgement to itself. Thus, even where colonial judges distorted indigenous norms by misinterpreting their values, they acted at the behest of Africans. Importantly, the Africans who misrepresented their norms to European judges were reacting to the radical changes caused in their lives by colonial rule. These range from loss of (agrarian) livelihoods to individualism, taxation, urbanisation, commercialisation, new religion (Christianity), Western education, and suspicion of the colonisers' motives. So, why should the distortion of customary law be confined to the courts, thereby ignoring the role of African communities? This question raises a further contradiction in the categorisation of customary law.

South African judges claim that the 1996 Constitution recognises only 'living' law, thereby implying that their judgements are founded on living customary law.<sup>46</sup> Indeed, judicial precedents are embodiments of people's practices. It is immaterial if these practices reflect minority views. In fact, minority views have been recognised as living customary law. For example, in *Mabena v Letsoalo*, the applicant queried the validity of a marriage in which the father of an adult groom had not consented to the union and was not involved in the bridewealth (lobolo) negotiations.<sup>47</sup> The High Court ruled that women's acceptance of lobolo (contrary to indigenous law) reflects living customary law and the objects, spirit, and purpose of the Bill of Rights. Mwambene argues that courts accept this precedent as living law.<sup>48</sup> Similarly, courts have 'accepted the requirement that, under Tsonga customary law, a husband who wants to marry a subsequent wife must inform his first wife.'<sup>49</sup> These examples reflect the role of judges in the evolution of indigenous laws. As Judge Dlodlo remarked, courts 'participate in the development of the customary law . . . in accordance with the "spirit, purport and object" of our Constitution'.<sup>50</sup> Thus, the classification of judgements as official customary law mocks the definition of living customary law as 'the actual practices of people'.<sup>51</sup>

Since judgements reflect the so-called living customary law, what distinguishes it from official customary law? In my first critique of this conceptualisation, I asked a similar question: 'is it not plausible that a judgment can reflect living customary law, especially when the judge(s) belong(s) to the same normative community as litigants?'<sup>52</sup> As I show below, the answer reveals the incongruity of the term 'living customary law', especially in an era of exponential globalisation.

46 *Alexkor v Richtersveld Community* 52; *Shilubana v Nwamitwa* 2009 2 SA 66 (CC) para 46.

47 *Mabena v Letsoalo* 1998 (2) SA 1068 (T).

48 L. Mwambene, 'The Essence Vindicated? Courts and Customary Marriages in South Africa' (2017) 17 (1) *African Human Rights Law Journal* 35–54, 36.

49 *Mayelane v Ngwenyama and another* 2013 (4) SA 415 (CC).

50 *Fanti v Boto and Others* 2008 (5) SA 405 (C).

51 F. Osman, 'The Ascertainment of Living Customary Law: An Analysis of the South African Constitutional Court's Jurisprudence' (2019) 51 (1) *Journal of Legal Pluralism and Unofficial Law* 98–113, 100.

52 A.C. Diala, 'The Concept of Living Customary Law: A Critique' (2017) 49 (2) *The Journal of Legal Pluralism and Unofficial Law* 143–165, 147.



## VII. LIVING CUSTOMARY LAW

Known also as 'practiced customary law', this category is defined as the current practices of Africans.<sup>53</sup> Although the first academic usage of 'living law' is credited to Eugen Ehrlich,<sup>54</sup> Roscoe Pound hinted at it when he wrote about differences between law in the books and in action.<sup>55</sup> In southern Africa, Schapera's influential *Handbook of Tswana law* quoted the concern of the Resident Commissioner of Bechuanaland in the early 20th century that codification of Tswana law could force it to fall out of tune with the 'living law'.<sup>56</sup> Although we may rightly dispute the origin of 'living law,' we cannot dispute its root in community practices. As Hinz noted, living customary law emerged from the realisation by social scientists that the 'customary law recorded in textbooks, codes, or court cases, was not necessarily the customary law practiced by the people.'<sup>57</sup>

In sum, scholars regard living customary law as the norms that regulate people in their daily lives, in contra-distinction with what outsiders, especially legal experts, consider as their norms.<sup>58</sup> In my critique, I defined it as norms that emerge from 'people's adaptation of customs to socioeconomic changes'.<sup>59</sup> While I maintain my arguments, I no longer accept the terminology of living customary law. In what follows, I rely on field evidence, case law, and deductive reasoning to demonstrate why this terminology needs to be abandoned.

## VIII. IMPACT OF GLOBALISATION ON AFRICAN LAWS

For historicisation purposes, the influence of globalisation in sub-Saharan Africa dates to the transatlantic slave trade and colonial rule.<sup>60</sup> Currently, it manifests in technology, integrated markets, international organisations, and intellectual movements such as feminism and the rule of law.<sup>61</sup> Of these influences, I will discuss only colonialism because of its enduring impact. Since profit and power are acknowledged as its primary motives,<sup>62</sup> they need not detain us here. Rather, I focus on its impact on the behaviour of Africans, using two themes and empirical scenarios that demonstrate contradictions in the mainstream categorisation of customary law.

53 G.R. Woodman, 'Customary Law in Common Law Systems' (2001) 32 (1) *Institute of Development Studies Bulletin* 28–34, 33.

54 Ehrlich (n 21).

55 R. Pound, 'Law in Books and Law in Action' (1910) 44 *American Law Review* 12–36.

56 I. Schapera, *A Handbook of Tswana Law and Custom* (LIT Verlag, 1994).

57 M. Hinz and H. Patemann (eds.), *The Shade of New Leaves: Governance in Traditional Authority: A Southern African Perspective* (Vol. 29, LIT Verlag, 2006) 274.

58 Bennett (n 40) 138; Himonga and Bosch (n 1) 328; I. Hamnett, *Chieftainship and Legitimacy: An Anthropological Study of Executive Law in Lesotho* (Routledge and Kegan Paul, 1975) 10.

59 Diala (n 52) 143.

60 W. Rodney, 'African Slavery and Other Forms of Social Oppression on the Upper Guinea Coast in the Context of the Atlantic Slave-Trade' (1966) 7 (3) *Journal of African History* 431–443.

61 O. Taiwo, *How Colonialism Preempted Modernity in Africa* (Indiana University Press, 2010) 241.

62 W. Rodney, *How Europe Underdeveloped Africa* (Bogle-L'Ouverture Publications and Tanzanian Publishing House, 1973); I. Chinweizu, *The West and the Rest of Us: White Predators, Black Slavers, and the African Elite* (Random House, 1975).

## IX. COLONIAL IMPACT ON AFRICAN THOUGHT

Undoubtedly, colonialism reconfigured the worldview of Africans and the trajectory of their political economies.<sup>63</sup> Colonial authorities created new systems using alien judicial, economic, and administrative structures that revolutionised the agrarian basis of African societies.<sup>64</sup> Driven by new religion, courts, schools, civil service, and commerce, Africans acquired a remarkable taste for foreign culture, evident in their food, fashion, architecture, and regulatory behaviour. In these profound transformations, Christianity and Western education stand out.

Notably, both disregarded, denied, or denigrated African science.<sup>65</sup> As a tool of empire, Christianity was patriarchal and genocidally intolerant of indigenous religions.<sup>66</sup> The European approach to Christianity and education is significant for its effect on the African psyche. For many Africans, the cosmos comprises physical and spiritual components interlinking the living and the dead.<sup>67</sup> In pre-colonial communities, the family head represented the physical world. This role involved offering sacrifices to appease dead ancestors, obtain their approval for important decisions, and secure divine favour for bountiful harvests. Given the intertwined nature of spirituality, economic activities, and social life, pre-colonial communities functioned with remarkably welfarist and conservationist philosophies.<sup>68</sup> As Sudarkasa noted, 'communalism, cooperation, and sharing' mark(ed) social life, unlike the Western nuclear family, which promotes 'individualism, competition, and accumulation'.<sup>69</sup> Christianity, Western education, and other social changes emphasised individualism and maximum profit. How could such radical changes not affect the regulatory behaviour of Africans?

In sum, colonialism introduced many Africans to a self-centric philosophy. Today, its triumph over communalism is evident in rules of inheritance and judicial deification of constitutional bills of rights.<sup>70</sup> In this context of colonial impact on African thought, the below scenario from a South African judgement illustrates the irrelevancy of the 'official' and 'living' customary law categorisation.<sup>71</sup>

### 1. Scenario 1

In 2013, a dispute arose between X and Y over the legal status of their relationship. They had met in 2005, and went on to have a child in 2007. Such behaviour would

63 A. Mbembe, *On the Postcolony* (University of California Press, 2001); J. Comaroff and J. Comaroff, *Of Revelation and Revolution, Volume 1: Christianity, Colonialism, and Consciousness in South Africa* (University of Chicago Press, 1991).

64 S. Berry, *No Condition Is Permanent: The Social Dynamics of Agrarian Change in Sub-Saharan Africa* (University of Wisconsin Press, 1993).

65 D. Chidester, *Savage Systems: Colonialism and Comparative Religion in Southern Africa* (University of Virginia Press, 1996) 19.

66 O. p'Bitek, *Song of Lawino and Song of Ocol* (Heinemann, 1984).

67 A. Shorter, *The Church in the African City* (Orbis Books, 1991).

68 Seth A. Opoku, 'Indigenous Economic Institutions and Ecological Knowledge: A Ghanaian Case Study' (1999) 19 (3) *Environmentalist* 217–227.

69 N. Sudarkasa, *The Strength of Our Mothers: African and African-American Women and Families - Essays and Speeches* (Africa World Press, 1996) 186.

70 *Bhe and Others v Khayelitsha Magistrate and Others* 2005 (1) SA 580 (CC).

71 *DRM v DMK Case No: 2017/2016* Judgement of the High Court (Limpopo Division) 07 November 2018.

have been unacceptable in the pre-colonial era. In 2010, they initiated ceremonies for marriage. Although X paid bridewealth (lobolo) for Y, she was not formally handed over to him (*go gorosa ngwetsi*) as his wife. In 2013, Y filed for divorce. The primary issue for the court's determination was whether a customary law marriage exists where bridewealth was paid but the bride was not formally handed over to the groom. X argued that a formal handing over distinguishes mere cohabitation from marriage. Y argued that X's payment of lobola signified a handing over that legally established a marriage. The court faced two options.

In option 1 (the eventual decision), the court could declare that indigenous law requires that the bride must be formally handed over to the groom's family before marriage is established. In terms of this requirement, the bride cannot hand herself over, as she must be accompanied by her relatives. According to mainstream scholars, a judgement based on this option is 'official' customary law.

In option 2, the court could declare that customary law has developed to the extent that the physical handing over of the bride may be waived or performed symbolically. In other words, the social settings in which the contested custom arose have changed to accommodate relaxations in the hand-over of the bride. The court could recognise these relaxations as 'living customary law', which scholars define as the law that 'emerges from what people do, or—more accurately—from what people believe they ought to do'.<sup>72</sup> Yet, going by the mainstream categorisation of customary law, such a recognition of 'living' custom falls under 'official' customary law because it emanates from the courts.

In both scenarios, the (non)handing over of the bride is 'living law' or 'what people do'.<sup>73</sup> Thus, neither the terminology of 'official' nor 'living' customary law suffices to describe the issue in this dispute. Realistically, the test is whether a change has occurred in the custom of handing over the bride. If there is no change, the custom is indigenous law; if a change has occurred, it is customary law – without the appellation of 'living' or 'official'.

## X. COLONIAL IMPACT ON AFRICAN ECONOMIES

My second theme for assessing the impact of colonialism on indigenous laws is land, the fulcrum of pre-colonial economies.<sup>74</sup> Land was targeted by the Europeans, who had traded with African merchants for several centuries.<sup>75</sup> Initially, the Europeans justified land acquisitions with the ridiculous theory of *terra nullius*, which literally means nobody's land.<sup>76</sup> Later, they dismantled communal ownership and assumed legislative control of all lands.<sup>77</sup> In many places like the Congo, they encouraged the

72 Hamnett (n 58) 10.

73 In *Tsambo v Sengadi* (2020), a high court invalidated the custom of handing over the bride on the ground that it contravenes the Recognition of Customary Marriages Act 120 of 1998.

74 V.C. Uchendu, 'State, Land, and Society in Nigeria: A Critical Assessment of Land Use Decree (1978)' (1979) 6 (2) *Journal of African Studies* 62–74, 62.

75 A.F.C. Ryder, *Benin and the Europeans: 1485–1897* (Humanities Press, 1969).

76 C. Geisler, 'New Terra Nullius Narratives and the Gentrification of Africa's Empty Lands' (2012) 18 (1) *Journal of World-Systems Research* 15–29, 15.

77 Uchendu (n 74).

export of raw commodities to their home countries.<sup>78</sup> Their aggressive mining and large-scale agriculture placed land at the heart of fierce contestations.<sup>79</sup>

Ultimately, colonial laws and policies revolutionised indigenous land tenure systems.<sup>80</sup> Whereas land ownership under indigenous laws is communal, colonial property laws were largely individualistic.<sup>81</sup> Many Africans struggled to adjust to the individualistic commercialisation of land, which contradicted their communal ethos. These struggles are evident in Holleman's research in the late 60s on the property rights of women in Zululand.<sup>82</sup>

Normative struggles highlight flaws in the categorisation of customary law into 'official' and 'living' versions. Using land alienation as context, the below scenario demonstrates these flaws.

### 1. Scenario 2

According to the indigenous laws of Community X, a town in Enugu State of Nigeria, women could not engage in land transactions – either as sellers or purchasers in the 1990s. This was despite rapid urbanisation, individual income, and other socioeconomic changes. In 1997, a widow sold a plot of land near her husband's ancestral homestead to a man from a notable family in their community. This sale was not an isolated practice, as the individual sale of land had begun as far back as the early eighties. However, this was the first sale of family land by a woman.

The widow's aggrieved brother-in-law, a traditional worshipper and sole surviving male sibling of the deceased, asked a customary court to overturn the sale for violating the customs of Community X. He raised two issues for the court's determination. The first was whether family land could be sold without the consent of the family head. The second was whether a woman could sell family land. Significantly, he did not use the term 'living customary law,' which, being an academic invention, is unknown to him. He merely wanted to 'preserve the traditions of our ancestors, so as not to incur their wrath'.<sup>83</sup>

The court, comprising a State-appointed, Western-trained judge, and two assessors from Community X, faced two options. One is a declaration that it is unknown to indigenous law for a woman to sell land, or for family land to be sold without the consent of the family head, or both. If chosen, the judgment would be official customary law according to mainstream scholars. However, the custom governing the sale of family land is living customary law according to its definition as 'the law actually observed by the people who created it'.<sup>84</sup>

Option 2 is for the court to find that a change has occurred in the land laws of Community X. The court could recognise this change as 'living' customary law by

78 Rodney (n 62) 238.

79 M. Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton University Press, 1996) 50–91.

80 R. Ross, *A Concise History of South Africa* (Cambridge University Press, 2008) 12.

81 C.K. Meek, *Law and Authority in a Nigerian Tribe: A Study in Indirect Rule* (Barnes and Noble, 1970) 30.

82 J.F. Holleman, 'Trouble-Cases and Trouble-Less Cases in the Study of Customary Law and Legal Reform' (1973) 7(4) *Law and Society Review* 585–609.

83 Redacted interview held in January 2015.

84 Bennett (n 44) 3.

combining oral evidence with legislation and constitutional principles of equality. But this judgement would be ‘official customary law’, according to its mainstream conceptualisation.<sup>85</sup>

Let us assume that this dispute arose in the colonial era when there were no constitutional bills of rights and the judges of so-called native courts combined executive and judicial powers. It would be immaterial if the court were influenced by pressure from colonial administrators executing export-oriented land policies. It would also be immaterial if the court cited the flexibility of indigenous customs. The judgment would still be categorised as ‘official’ customary law. In the post-colonial era, in which courts promote bills of rights and other statutes that are arguably influenced by globalisation, it would be immaterial if the court visited Community X to determine the currency of their land laws. It would also be immaterial if it combined expert testimony with community witnesses. The judgement would still be categorised as ‘official’ customary law. If you are confused at this point, it is because neither the terminology of ‘official’ nor ‘living’ customary law describes the outcome of this dispute in past and present times. The explanation must therefore be sought elsewhere.

## XI. CHANGE AND CUSTOMARY LAW

The common denominator in the scenario above is a change in the land custom of Community X. Only a conceptualisation of customary law founded on this change can resolve the dispute. Arguably, this conceptualisation demands a distinction between unaltered and altered pre-colonial norms. All unaltered pre-colonial norms are indigenous laws, while all new norms or adaptations of pre-colonial norms to socio-economic changes are customary laws – without the labels of ‘official’ and ‘living’.<sup>86</sup>

In the foregoing context, colonialism constitutes a historical marker for the evolution of African laws, since its ‘persistent patterns of power and philosophy’ construct the resistance and receptivity of Africans to social changes.<sup>87</sup> Scholars refer to these patterns of power as coloniality.<sup>88</sup> As argued below, coloniality underpins adaptive legal pluralism in postmodern Africa, as well as the future of its indigenous family laws.

## XII. LEGAL PLURALISM AND THE FUTURE OF AFRICAN LAWS

Conceptually, legal pluralism acknowledges that ‘legal systems derive [their validity] from sources other than the state and exist as independent fields of law.’<sup>89</sup> Since its emergence in the twentieth century, it has gone on to become ‘one of the dominant concepts in the field of legal anthropology.’<sup>90</sup> Scholars divide it into ‘deep’ and

85 In the end, the dispute was resolved out of court. The brother-in-law ratified the contract and got a share of the proceeds, an outcome that reveals the intersectional nature of law, profit, and power.

86 Admittedly, indigenous laws are fast disappearing, just as elsewhere. See, for example, Australian Law Reform Commission, Report on the Recognition of Aboriginal Customary Laws, Report 31, 1986, Submission 33, Stretlow TJH.

87 A.C. Diala and B. Kangwa, ‘Rethinking the Interface Between Customary Law and Constitutionalism in Sub-Saharan Africa’ (2019) 52 (1) *De Jure Law Journal* 189–206, 191.

88 A. Quijano, ‘Coloniality of Power and Eurocentrism in Latin America’ (2000) 15 (2) *International Sociology* 215–232.

89 D. Galligan, *Law in Modern Society* (Oxford University Press, 2006) 162.

90 B.Z. Tamanaha, ‘The Folly of the ‘Social Scientific’ Concept of Legal Pluralism’ (1993) 20 (2) *Journal of Law and Society* 192–217, 192.

'weak' versions, and describe the latter as a watered-down version of legal positivism.<sup>91</sup>

In Africa, legal pluralism traditionally denotes the interaction of religious and indigenous laws with the (state) laws bequeathed by colonial rule. From my cross-country observations, this interaction is imitative and reflective of coloniality.

### XIII. THE NATURE OF LAWS IN POSTMODERN AFRICA

Law is an instrument of power, and customary law is people's current practices.<sup>92</sup> Due to the radical nature of colonialism, it is the biggest actor in the transformation of regulatory practices in Africa. Importantly, its legacy thrives in forces of globalisation such as technology, feminism, interlinked markets, educational systems, and rule of law movements.<sup>93</sup> Along with mass media, these forces erode boundaries in African social fields. Given the intersectionality of the global and the local (glocalisation), one cannot overstress the influence of socioeconomic changes on African laws.

Initially, legal pluralism in Africa tended to 'provide different, incompatible answers' known as conflict of laws.<sup>94</sup> However, these answers are giving way to hybrid norms emerging from people's response to socioeconomic changes.<sup>95</sup> These adaptations range from permanent alienation of land to acceptance of gender equality in succession and symbolic performance of ceremonies such as handing over of the bride to the groom's family. In considering these adaptations, one must bear in mind the roots of the common and civil law systems operating in the continent. Since these systems are 'manifestations of the cultural imperialism of powerful colonial nations',<sup>96</sup> they give African legal pluralism an adaptive character. If law is accepted as the practices to which people attach a sense of obligation, it becomes apparent that African customary laws are a potpourri of indigenous and foreign values, ideas, and standards. Thus, normative imitation creates customary law because colonial laws were accompanied by new religious beliefs, education, technology, fashion, foods, and economic systems. The profound changes caused by these socio-cultural transplants are significant for the future of indigenous family laws in Africa.

### XIV. THE FUTURE OF AFRICAN LEGAL ORDERS

Despite its title, *The Future of African Customary Law*, a collection of twenty-one essays, did not provide practical steps for the future of indigenous family laws in Africa.<sup>97</sup> However, the history of law in the global North predicts this future.

91 C. Rautenbach, 'Deep Legal Pluralism in South Africa: Judicial Accommodation of Non-State Law' (2010) 42 (60) *Journal of Legal Pluralism and Unofficial Law* 143–177, 146.

92 J. Starr and J. Collier (eds.), *History and Power in the Study of Law: New Directions in Legal Anthropology* (Cornell University Press, 1989).

93 U. Mattei and L. Nader, *Plunder: When the Rule of Law Is Illegal* (Blackwell, 2008) 2–4, 26–7.

94 G. Woodman, 'Legal Pluralism in Africa: The Implications of State Recognition of Customary Laws Illustrated from the Field of Land Law' (2011) *Acta Juridica* 35–58, 52.

95 For an account of hybridity elsewhere, see P.S. Berman, 'Towards a Jurisprudence of Hybridity' (2010) *Utah Law Review* 11–30.

96 J. Schmidhauser, 'Legal Imperialism: Its Enduring Impact on Colonial and Post-Colonial Judicial Systems' (1992) 13 (3) *International Political Science Review* 321–334, 321.

97 Even the intriguing title, 'From contemporary African customary laws to indigenous African law' by Fatou Camara lacks a meaningful explanation for the transformation of indigenous laws.

Scholars have shown the coercive impact of imperial laws on the indigenous laws of conquered territories. For example, Schmidhauser conducted a 'comprehensive examination of the enduring influence of legal systems introduced by powerful nations'.<sup>98</sup> Earlier, Zweigert and Kotz identified eight categories of legal families produced from imperial influence.<sup>99</sup> Of these eight, the Roman family is the most influential. As Nicholas noted, Roman colonialism 'gave to almost the whole of Europe a common stock of legal ideas.'<sup>100</sup> Roman influence on the legal systems of Scandinavia and Britain is notable because it shaped the systems Britain later imposed on Africa and Asia.

By the time William the Duke of Normandy conquered England at the Battle of Hastings in 1066, Rome's influence (circa 43 to 410 AD) had ingrained a customary Anglo-Saxon legal system. Between 1066 and 1154, the Normans undertook law reforms, many of which resonate with British changes to indigenous African laws. For example, a convicted person began paying fines to the crown instead of the wronged family.<sup>101</sup> To ensure better control of property, the Normans amplified the male primogeniture rule in ways similar to British reinforcement of patriarchy in Africa.<sup>102</sup> The Normans also transferred titles in all land to a monarch, evicted villagers from arable lands, and developed feudal taxes.<sup>103</sup> Ultimately, the English common law emerged from the melding of English customs with the legal systems imposed by the Romans and Normans.<sup>104</sup> The British proceeded to colonise most of the world, using legal transplants to run the largest colonial empire in recent history.

This brief historical context of colonial legal transplants paints a vivid picture of how indigenous laws adapt towards transplanted laws. Currently, the product of this adaptation is customary laws. Following a long period of co-existence, customary laws will merge with state laws into national common laws. The question is how this will occur. I will therefore end with a trajectory of integrated state and indigenous laws.

## XV. TRAJECTORY OF LEGAL INTEGRATION

There are five stages in the integration of state and indigenous African laws. For convenience, I represent them with conquest, control, conflict, confusion, and convergence:

1. Conquest of African territories by European colonisers.
2. Control of Africans, including indirect rule and legal transplants.
3. Conflict of laws caused by legal pluralism and altered political economies.

98 Schmidhauser (n 96) 321.

99 These are (i) Romanistic, (ii) Germanic, (iii) Nordic, (iv) Anglo-American, (v) Socialist, (vi) Far Eastern, (vii) Islamic, and (viii) Hindu legal families. See K. Zweigert and H. Koetz (Tony Weir trans.) *Introduction to Comparative Law* (Vol. 3, Clarendon Press, 1998).

100 B. Nicholas and E. Metzger, *Introduction to Roman Law* (Oxford University Press, 1962) 2.

101 F. Wieacker, 'The Importance of Roman Law for Western Civilization and Western Legal Thought' (1981) 4 *Boston College International and Comparative Law Review* 257–282.

102 T. Ranger, 'The Invention of Tradition Revisited: The Case of Colonial Africa' in T. Ranger and O. Vaughan (eds.), *Legitimacy and the State in Twentieth-Century Africa* (Palgrave Macmillan, 1993) pp. 66–67.

103 J.C. Holt, *Colonial England, 1066-1215* (A&C Black, 1997).

104 Brown (n 45) 565–566.

4. Confused legal identity due to globalisation and decolonisation movements.
5. Convergence of legal orders after a lengthy period of adaptive legal pluralism.

Obviously, this trajectory is neither time-bound nor isolated. Since the first two stages are over and I have been discussing the third, I will explain only the last two stages.

## XVI. CONFUSED LEGAL IDENTITY

The legal identity of many Africans may be grouped into three.

The first is Africans who have been thoroughly westernised in their education, religion, work, language, food, philosophy, and dressing. They dismiss indigenous laws as backward. The second group, obviously very traditional and/or nationalistic, clings to some indigenous laws, many of which are out of tune with modern conditions.<sup>105</sup> The third (moderate) group is Africans who recognise the irrevocable effects of globalisation. Conscious of their altered identity, they promote law reforms to reconcile indigenous laws with modern ideas of equality and human dignity.

The confused legal identity of Africans has historical parallels with Asia, where people struggled to reconcile imposed Spanish and English cultures with indigenous and Islamic laws.<sup>106</sup> Arguably, the categorisation of customary law into living and official versions demonstrates similar identity crisis. Following self-awareness, this crisis would eventually lead to normative convergence.

## XVII. CONVERGENCE OF LEGAL ORDERS

As a complex system, law does not operate in isolation.<sup>107</sup> Pressure from globalisation inevitably compels the adherents of indigenous norms to adapt their behaviour to state laws. In this stage, judges play a crucial role, since the litigation process offers a contextualised, bottom-up advantage that legislation lacks. Generally, there are five overlapping phases in this stage.

In phase 1, customary laws are understood as products of people's adaptations to socioeconomic changes. In two, governments ascertain the foundational values of indigenous laws and respect cultural pluralism by avoiding substantive laws. These values, such as bridewealth and succession principles, are generally stable and similar across Africa.<sup>108</sup> In phase three, judges use indigenous values as primary judicial standards. In four, law reforms incorporate these values into statutes. For example, sections 20–21 and Schedule 2 of the 1975 Constitution of Papua New Guinea enshrine customary law as the 'underlying law'. In phase five, indigenous laws transform

105 A.N. Allott, 'What Is to Be Done with African Customary Law – The Experience of Problems and Reforms in Anglophone Africa from 1950' (1984) 28 *Journal of African Law* 56–71.

106 M.B. Hooker, *A Concise Legal History of South-East Asia* (Clarendon Press, 1978).

107 S. Lierman, 'Law as a Complex Adaptive System: The Importance of Convergence in a Multi-Layered Legal Order' (2014) 21 (4) *Maastricht Journal of European and Comparative Law* 611–629, 612.

108 A.N. Allott, *Essays in African Law: With Special Reference to the Law of Ghana* (Butterworths, 1960) 63; J.B. Ojwang, 'The Meaning, Content and Significance of Tribal Law in an Emergent Nation: The Kenya Case' (1989) 4 *Law and Anthropology* 125–140.



into customary laws. Thereafter, state laws become indistinguishable from customary laws, and both merge into national common laws.

### XVIII. CONCLUSION

The nature of modern African customary laws is poorly presented and even more poorly understood. The colonial imposition of industrial legal systems on Africa's agrarian systems created conflict of law problems that spurred scholars and practitioners to propagate a dichotomy in customary laws. However, this dichotomy neglects the imitative dialogue occurring between indigenous laws and state laws. In rejecting this dichotomy, I have used the concept of adaptive legal pluralism to explain the significance of normative dialogue for the future of indigenous family laws in Africa.

As a postcolonial concept, adaptive legal pluralism illuminates the normative struggles of Africans, who are compelled to adapt their indigenous practices to modern realities of western human rights, economic systems, and globalisation generally. Conscious of legal history, it foresees the emergence of integrated state and indigenous laws after a long period of coexistence. To guide and facilitate this emergence, policy attention should focus on how indigenous values spur people's normative adaptations to socioeconomic changes.