NEOLIBERAL INFLUENCES ON LEGAL PLURALIST MARRIAGE REFORMS IN AFRICA

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Abstract: Since attaining political independence, states in sub-Saharan Africa have undertaken wide-ranging reforms of family laws. Using legislative reforms and judicial decisions, this article examines the influence of neoliberal legality on the reforms of indigenous marriage laws. It assesses the trends, commonalities and drivers of these reforms, arguing that they illustrate the unequal interaction of state and non-state legal orders in Africa. It finds that non-profit organisations funded mainly by foreign actors play influential roles in the transformation of indigenous laws. Inspired by Western acculturation and the feminist lobby, judges and legislators use the argument of modernity to mould communalistic family laws into individualistic images of equality, human dignity and non-discrimination. Paradoxically, this promotion of universalist values diminishes communal property rights and exposes traditional societies to market capitalism. The article points out the perils and opportunities presented by family law reforms, especially their propensity to construct new legal identities in Africa.

Keywords: *family law reforms; neoliberalism; legal pluralism; non-governmental organisations; market capitalism*

I. Introduction

When most countries were celebrating Valentine Day on 14 February 2017, a significant event for legal pluralism occurred in Malawi, a landlocked country in southern Africa. That day, its parliament repealed s.22(7), which provided that "persons between the age of fifteen and eighteen years" may marry "with the consent of their parents or guardians", and s.22(8) of the Malawi Constitution of 1994, which enjoined the State to "discourage marriage between persons where either of them is under the age of fifteen years". Significantly, the repealed provisions recognised that the age of marriage in many traditional communities is not fixed. Accordingly, they permitted child marriages with parental consent. However, two years earlier in 2015, Malawi's Parliament had enacted the Marriage, Divorce and Family Relations Act, which pegged the minimum age of marriage at 18 years.

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Section 14 of this Act states: "Subject to section 22 of the Constitution, two persons of the opposite sex who are both not below the age of eighteen years, and are of sound mind, may enter into marriage with each other". In the context of s.14, Parliament's constitutional amendment aligned Malawi's supreme law with the Marriage Act, in what essentially amounts to a legislative catch-up. This situation is quite remarkable, given that Malawi's marriage law reforms were driven by pressure from non-governmental organisations (NGOs), international agencies, state donors and transnational agents, who champion the universalist human rights movement.[1] I argue that the *modus operandi* of these reforms symbolises the influence of neoliberal legality on coexisting legal orders in sub-Saharan Africa. What does neoliberal legality mean, and why is it important?

Neoliberal legality denotes the link between law and neoliberalism. Simply described, neoliberalism seeks to shift the control of economic wealth from the public sector to the private sector. The word itself is a play on two words: "neo", meaning revive or reinvent, and "liberal", meaning the philosophy of unbounded capitalism, which had emerged at the onset of the second industrial revolution in the nineteenth century.[2] The history of neoliberalism is quite intriguing.

For reasons that need not detain us here, the popularity of classical liberal ideas had waned after Adam Smith's influential book the *Wealth of Nations*. Following the Great Depression of the 1930s and the attempts by states to control markets, neoliberalism emerged to reinvent liberal economic ideas and, more importantly, explain their failures.[3] Although it is beset with competing definitions, neoliberalism is commonly associated with the deregulation of markets; the privatisation of public assets and the promotion of free trade, reduced tariffs and product subsidies. In Africa, it is associated with a reduction in government spending as part of financial austerity measures. It is also associated with rule of law programmes and their accompanying law reforms. These programmes inform the term neoliberal legality.

Neoliberal legality is not an established concept. The notable work on it is an edited collection, which observed that "the role of law and its interrelations with the politics and economics of neoliberalism has remained almost entirely ignored

1 These are notably complaints by Malawian civil society groups to the African Committee of Experts on the Rights and Welfare of the Child, which were tabled at the 2016 African Union Summit in The Gambia. For discussion, see D Nowack, "Cultural Values, Attitudes, and Democracy Promotion in Malawi: How Values Mediate the Effectiveness of Donor Support for the Reform of Presidential Term Limits and Family Law" (Discussion Paper No. 27, Deutsches Institut für Entwicklungspolitik (DIE), 2018), 1–60 at 24–25, available at https://www.die-gdi.de/discussion-paper/article/cultural-values-attitudes-and-democracy-promotion-in-malawi-how-values-mediate-the-effectiveness-of-donor-support-for-the-reform-of-presidential-term-limits-and-family-law/ (visited 1 August 2022).

2 Peter Bloom, *The Ethics of Neoliberalism: The Business of Making Capitalism Moral* (New York: Routledge, 2017), 3.

3 David S Grewal and Jedediah Purdy, "Introduction: Law and Neoliberalism" (2014) 77:4 *Law and Contemporary Problems – Special issue on Law and Neoliberalism* 1, 23; Philip Mirowski and Dieter Plehwe, *The Road from Mont Pèlerin: The Making of the Neoliberal Thought Collective* (Cambridge, MA: Harvard University Press, 2015; 1st ed., 2009).

as a subject of research and debate".[4] The authors of this collection used empirical evidence to probe "the role law plays in the neoliberal project" and to explain the interface of law and neoliberalism "as dynamic and complex social phenomena" that affect human development.[5]

Generally, the intricate interface of law, politics and economics dominate the small body of work on neoliberal legality.[6] For example, Glinavos describes the push for law reform by international financial institutions as the outcome of neoliberal economic theory.[7] He found that "the use of law reform to impose what neoliberalism considers 'rational' solutions undermines the legitimacy of democratic institutions in developing and transitional countries".[8] Grewal and Purdy describe neoliberal legality as "a set of recurring claims made by policy-makers, advocates, and scholars in the ongoing contest between the imperatives of market economies and non-market values [that are] grounded in the requirements of democratic legitimacy".[9] These recurring claims focus on the promotion of laws that protect private property interests and enable investors to maximise profits. Thus, neoliberal laws support financial austerity measures that curb government spending on social welfare, and correspondingly, promote the aggressive privatisation of public assets.[10] These public assets are usually sold to the highest bidder, sometimes with negative effects on human security and the access to justice of people who observe indigenous norms.[11]

Just like neoliberalism, neoliberal legality has an intriguing history. When European societies moved from agrarian to industrialised economies in the eighteenth century, their laws became less oriented to communal welfare and more tailored to serve the individual. In effect, industrialisation promoted capitalist property rights, which were couched in the attractive language of human rights.[12] However, the promotion of human rights masked ulterior economic motives. Marks noted that "the history of human rights cannot be told in isolation from developments in the

4 Honor Brabazon (ed), "Introduction" in *Neoliberal Legality: Understanding the Role of Law in the Neoliberal Project* (New York: Routledge, 2017), 1.

5 *Ibid*., at 2.

6 See, for example, Ben Golder and Daniel McLoughlin (eds), *The Politics of Legality in a Neoliberal Age* (Abingdon and New York: Routledge, 2018); Boaventura de Sousa Santos, "Beyond Neoliberal Governance: The World Social Forum as Subaltern Cosmopolitan Politics and Legality" in Boaventura de Sousa Santos and César A Rodríguez-Garavito (eds), *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge University Press, 2005), 31–44. See also a special issue edited by David S Grewal and Jedediah Purdy, "Introduction: Law and Neoliberalism" (n. 3), 1–24.

7 I Glinavos, "Neoliberal Law: Unintended Consequences of Market-friendly Law Reforms" (2008) 29:6 *Third World Quarterly* 1087–1099.

8 *Ibid*., at 1087.

9 David S Grewal and Jedediah Purdy, "Introduction: Law and Neoliberalism" (n. 3), 1–23, at 2–3.

10 *Ibid.,* at 14 and 19.

11 Jess Mant, "Neoliberalism, Family Law and the Cost of Access to Justice" (2017) 39:2 *Journal of Social Welfare and Family Law* 246–258.

12 Samuel Moyn, "A Powerless Companion: Human Rights in the Age of Neoliberalism" (2014) 77:4 *Law and Contemporary Problems* 147–170 at 148 (noting the thin line "between economic liberalization and the promotion of international human rights").

history of capitalism".[13] Arguably, the quest to privatise public assets and to protect the right to private property accounts for the impressive manner neoliberalism rode to prominence on the back of the human rights movement.[14] As Whyte wryly commented on the rejection of proposals to turn empty properties into shelters for victims of the Grenfell Tower fire of 2017, "[H]uman rights were necessary to protect a weak minority, Kensington's absent property-owners, from the passions of the masses".[15] In this context of privatisation and promotion of individual rights, neoliberal legality is useful for understanding the murky motives of the change agents who are championing law reforms in sub-Saharan Africa.

In the socio-economic environment of the Global South, neoliberal legality explains the influence exerted on family law reforms by market-oriented policies such as trade deregulation, low tariffs and non-state control of prices. As modernists would point out, most of the reforms of family laws by African judges and legislators are aimed at liberating women and girls from the shackles of patriarchy that are imposed on them by customary laws. However, in the words of Mignolo, modernity is "the Trojan horse of Western cosmology [that] carries in it the seed of the Western pretense to universality".[16] There are two main problems with modernist reforms.

First, family law reforms neglect the dissonance between the communal origins of indigenous laws and the individualistic nature of constitutional bills of rights. This neglect has negative effects on social harmony because indigenous laws operated very well in the agrarian settings in which they emerged. In these settings, economic needs were basic; rights were non-binary, and social roles promoted the best interest of the clan.[17] Several feminist scholars have used ethnographic examples to demonstrate a non-hierarchical relationship between women and men in the precolonial era.[18] These examples include costumes, religious rituals, multiple social roles, neutral patterns of comportment, interchangeable use of first names by females and males and insignificant gender differentials in the pronouns of African languages. From the literature, it is European colonialism that changed gender relations from complementary to binary by radically altering the religious,

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13 Susan Marks, "Four Human Rights Myths" in David Kinley, Wojciech Sadurski and Kevin Walton (eds), *Human Rights – Old Problems, New Possibilities* (Cheltenham, UK and Northampton, MA: Edward Elgar Publishing, 2013), 226.

14 Jessica Whyte, *The Morals of the Market: Human Rights and the Rise of Neoliberalism* (London: Verso Books, 2019) [arguing that neoliberalism was originally a moral project, which made it easy for it to ride on the back of human rights].

15 *Ibid*., 2.

16 Walter Mignolo, "Foreword. On Pluriversality and Multipolarity" in Bernd Reiter (ed), *Constructing the Pluriverse: The Geopolitics of Knowledge* (Durham and London: Duke University Press, 2018), x.

17 Niara Sudarkasa, "'The Status of Women' in Indigenous African Societies" (1986) 12:1 *Feminist Studies* 91–103, at 92–94.

18 See, for example, Nkiru Nzegwu, *Family Matters: Feminist Concepts in African Philosophy of Culture* (Albany: State University of New York, 2006); Ifi Amadiume, *Male Daughters, Female Husbands: Gender and Sex in an African Society* (London: Zed Books, 1989), 119–123; Sylvia Leith-Ross *African Women: A Study of the Ibo of Nigeria* (London: Faber & Faber, 1938), 19–21.

economic and political systems of African societies. Colonialism invented patriarchy in some communities and reinforced it in others. As Chanock observed, the colonial policy of indirect rule appealed to the natives placed in charge of indigenous laws. "Their assertion of control over women, and over family property, was supported by colonial administrations as it accorded with the administrators' own prescriptions for African societies".[19] Thus, when customary laws are accused of patriarchy, their historical trajectory needs to be considered.

Second, the quest to liberate African women from restrictive customs is arguably a fallout of "state directed neo-liberal reforms designed to craft a more market friendly 'customary tenure' that is as secure as it is efficient and democratic".[20] Indeed, market-oriented policies often feature in debates over the communal management of natural resources. Thus, these policies shed light on why indigenous property systems were transformed and are still being transformed into state property, privatised assets and eventually open-access commodities.[21] The transformation of these property systems limits people's access to their own natural resources. While debates over natural resources management reveal the layered ways in which unbridled profit harms the livelihoods of traditional communities, a vital aspect of the debates escapes academic and policy attention. This aspect is how neoliberalism influences legal pluralist regulation of indigenous family laws in the south of the Sahara.

Given Africa's staggering cultural diversity and plurality of normative systems, neoliberal influence on law reforms illuminates the complex interface of law and development programming. To secure access to resources such as land and minerals, law reforms are likelier to promote individual rights than communal rights. The rationale resembles the biblical tenet of a house divided against itself.[22] Thus, by speaking the language of (individualistic) human rights, neoliberalism erodes communal rights and values, which underpinned natural resources management in the precolonial era. For example, a review of neoliberal reforms in 12 Latin American countries at the turn of the millennium found that new laws favour gender equality and undermine collective land rights.[23] Although literature acknowledges this paradox of rights promotion and erosion, its multiplier effects on the reform of indigenous family laws in Africa escape critical attention.

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19 Martin Chanock, "Neither Customary nor Legal: African Customary Law in an Era of Family Law Reform" (1989) 3 *International Journal of Law and Family* 72–88, at 76.

20 Admos Chimhowu, "The 'New' African Customary Land Tenure. Characteristic, Features and Policy Implications of a New Paradigm" (2019) 81 *Land Use Policy* 897–903, at 897.

21 Tobias Haller, "The Different Meanings of Land in the Age of Neoliberalism: Theoretical Reflections on Commons and Resilience Grabbing from a Social Anthropological Perspective" (2019) 8:7 *Land* 104.

22 Matthew 12:22–28 (New King James Version): "Every kingdom divided against itself is brought to desolation; and every city or house divided against itself shall not stand".

23 Carmen D Deere and Magdalena León, "Institutional Reform of Agriculture under Neoliberalism: The Impact of the Women's and Indigenous Movements" (2001) 36:2 *Latin American Research Review* 31–63.

This article therefore probes how the interplay of neoliberalism, colonially transplanted laws and indigenous African laws influences marriage law reforms. It is motivated by the impact of law reforms on the dignity, identity and livelihoods of Africans who live by indigenous laws.[24] Using thematic examples from eight representative African states, it shows how family law reforms are reconstructing the cultural identities of Africans.[25] It interrogates three related questions: (1) Who spearheads the reforms of indigenous marriage laws? (2) How does neoliberalism influence these reforms? (3) What is the pattern displayed by recent reforms of indigenous family laws in the south of the Sahara?[26]

The article is divided into four sections. Following this introduction, Section II contextualises law reforms in Africa by explaining the nature of its coexisting legal orders. It examines the philosophical foundation of these legal orders and the influence of the Civil Law and Anglo-American systems on their evolution. It also examines the effect of this influence on contemporary treatment of indigenous laws. Section III analyses what I term the neoliberal pressure, using examples from countries that engaged in marriage law reforms in the past decade. It identifies the influence of modernity in the role of non-profit organisations and universalist human rights values in law reforms. Section IV presents trends and commonalities in family law reforms. These include the neoliberal pressure, the top–down nature of legislative amendments and the seeming obsession with binary notions of gender equality by judges, donors, human rights treaty bodies and non-profit organisations. It concludes by pointing out the promises and pitfalls of using law reforms to construct new legal identities in Africa.

II. Contextualisation of Legal Pluralism in Africa

The interaction of two or more normative orders in the same population or social field, which is known in the scholarly world as legal pluralism, is an undisputed reality in Africa.[27] Africa's plural situation arose from its colonisation by Western Europeans between the eighteenth and twentieth centuries. Other than territorial dominion, European colonisation revolved on the economic exploitation of natural

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24 Christa Rautenbach, "A Family Home, Five Sisters and the Rule of Ultimogeniture: Comparing Notes on Judicial Approaches to Customary Law in South Africa and Botswana" (2016) 16:1 *African Human Rights Law Journal* 145–174 and "Legal Reform of Traditional Courts in South Africa: Exploring Links between Ubuntu, Restorative Justice and Therapeutic Jurisprudence" (2015) 2:2 *Journal of International and Comparative Law* 275–304.

25 The eight states are Botswana, Eswatini, Kenya, Malawi, Mozambique, Nigeria, South Africa and Tanzania.

26 By recent, I mean law reforms that were undertaken in the past decade.

27 For a good summary of notable definitions of legal pluralism, see Shaun Larcom, "Problematic Legal Pluralism: Causes and Some Potential 'Cures'" (2014) 46:2 *Journal of Legal Pluralism and Unofficial Law* 193–217.

resources.[28] Importantly, for our present purpose, it also involved the imposition—or to use the politically correct term—the transplantation of relatively industrial European legal systems onto Africa's largely agrarian political economies.[29] As is commonly known, European officials used Africans to govern Africans. Since much has been written about this administrative system of (in)direct rule, it need not be revisited here.[30] The noteworthy aspect of colonial administration is how Europeans allowed indigenous laws and religious norms to apply alongside their transplanted laws. It is striking because the recognition of indigenous laws was neither altruistic nor unproblematic.

For a start, the Europeans lacked the knowledge, personnel and power to completely replace indigenous laws with their own legal systems. So, much as they would have loved to abolish these laws, they were compelled by circumstances to tolerate them. They used their own rules and procedures to regulate their affairs and set up courts in their administrative centres to mediate disputes between themselves. These courts also mediated disputes between Europeans and Africans in issues of public law, and among Africans who opted to use European procedures to regulate their private affairs. Although the Europeans recognised and/or allowed indigenous courts to continue, they exercised oversight over them by reserving for themselves the right of ultimate appeal from their decisions.[31] More importantly, the recognition of indigenous laws in all the colonial courts was undertaken with European moral and legal standards, using criteria that became known as the repugnancy clause. This clause usually stipulated that "customary law must not be 'repugnant to natural justice, equity and good conscience, or incompatible . . . with any written law.'"[32]

When African states attained political independence, their new leaders, who literarily stepped into the shoes of the departing European administrators, continued regulating their indigenous laws with transplanted foreign standards. Sometimes, this regulation takes the original form of the repugnancy clause, while at other

28 Walter Rodney, *How Europe Underdeveloped Africa* (London: Bogle-L'Ouverture Publications and Tanzanian Publishing House, 1972).

29 Mathias Siems, "Malicious Legal Transplants" (2018) 38:1 *Legal Studies* 103–119.

30 See, for example Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (New Jersey: Princeton University Press, 1996), V Turner (ed), *Colonialism in Africa 1870–1960 Vol. III: Profiles of Change: African Society and Colonial Rule* (Cambridge, MA: Cambridge University Press, 1971); L H Gann and P Duignan (eds), *Colonialism in Africa, 1870–1960, Vol. I: The History and Politics of Colonialism, 1870–1914* (Cambridge, MA: Cambridge University Press, 1969); Obaro Ikime, "Reconsidering Indirect Rule: The Nigerian Example" (1968) 4:3 *Journal of the Historical Society of Nigeria* 421–438; A E Afigbo, *The Warrant Chiefs: Indirect Rule in South-eastern Nigeria: 1891–1929* (London: Longman, 1972); Anthony C Diala "A Butterfly That Thinks Itself a Bird: The Identity of Customary Courts in Nigeria" (2019) 51:3 *The Journal of Legal Pluralism and Unofficial Law* 381–405.

31 Martin Chanock, *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia* (Cambridge, MA: Cambridge University Press, 1985).

32 Anthony C Diala, "The Concept of Living Customary Law: A Critique" (2017) 49:2 *The Journal of Legal Pluralism and Unofficial Law* 143–165, at 146.

times, it occurs in the guise of constitutional bills of rights.[33] However, irrespective of the way it occurs, its philosophy remains the same: Europe's transplanted legal systems are superior to indigenous African laws.[34] We shall shortly see the consequences of this mindset for the reforms of marriage laws.

A. *Legal pluralism and law reforms*

African normative orders comprise four main types. In descending order of dominance, these are statutory laws, customary laws, oral indigenous laws and religious laws. Statutory laws are variants and remnants of European laws that were colonially transplanted to Africa. As the most dominant legal order, statutory laws dictate the pace of legal pluralism. Indigenous laws are ancient norms that Africans still observe in their precolonial forms, while customary laws are variants of indigenous norms that have been adapted to socio-economic changes. These variants often manifest as codifications, restatements and judicial records of indigenous norms.[35] On its part, religious laws include ritual norms, animist practices and Sharia codes. Some religious laws are written, but most of the norms observed in rural areas are oral in nature.

The interaction of African normative orders is highly problematic for reasons ranging from their divergent natures to the top–down manner in which they are managed by elites. The quest to understand this interaction informs the relatively recent interest in informal or non-state laws by funding agencies in the North. Their interest is partly attributable to the realisation by policymakers that a top–down approach to social regulation and development programming is unhelpful.[36] "Understanding legal pluralism", says Swenson, "is important for any legal or policy intervention, including but by no means limited to state building".[37]

Legal pluralism results in fierce conflict of laws in the courts. Generally, judicial interpretation is challenging because law is embedded in its accompanying narrative.[38] For example, Cover's seminal work on judges in the United States argued that "[t]he normative universe is held together by the force of interpretive commitments".[39] Thus, normative meaning is harmed whenever law is interpreted without

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33 Elijah A 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.

34 Anthony C Diala, "Our Laws Are Better than Yours: The Future of Legal Pluralism in South Africa" (2019) 26 *Revista General de Derecho Público Comparado* 1–23.

35 Anthony C Diala, "Legal Pluralism and the Future of Indigenous Family Laws in Africa" (2021) 35:1 *International Journal of Law, Policy and the Family* 1–17, at 1 and 3.

36 Leila Chirayath, Caroline Sage and Michael Woolcock, *Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems* (Washington, DC: World Bank Legal Department, 2005).

37 Geoffrey Swenson, "Legal Pluralism in Theory and Practice" (2018) 20:3 *International Studies Review* 438–462, at 458.

38 See, for example, Ming-Sung Kuo, "Whither Judicial Dialogue after Convergence? Finding Transnational Public Law in Nomos-building" (2021) 19:5 *International Journal of Constitutional Law* 1536–1558, at 1552.

39 Robert M Cover, "The Supreme Court, 1982 Term—Foreword: Nomos and Narrative" (1983) 97 *Harvard Law Review* 4–68, at 7.

sensitivity to its underlying narratives. In this context, recent reforms of family laws in Africa paint a jurispathic portrait of social regulation.

Here, the word "jurispathic" denotes the destructive manner in which judicial and legislative policymakers handle non-Western meanings of law.[40] It is an inevitable consequence of inequality between coexisting normative orders, given that dominant orders are known to "kill off competing interpretations by authoritatively saying that this is the law and that is not".[41] Jurispathic judicial interpretation is remarkable in Africa because of its widespread neglect of indigenous values. Additionally, it is notable for its entrenched attachment to a neoliberal mindset, which is seemingly aimed at "opening up the domestic space for transnational capital and ideas" to flourish.[42]

In a development context, therefore, jurispathic law reform may be defined as the arbitrary replacement of indigenous laws with colonially transplanted laws and values. As discussed in Section III, African case law jurisprudence is quite clear on how judges strike down indigenous laws that they deem offensive to Western ideas of equality, human dignity and non-discrimination.[43] In what follows, I show how jurispathic normative regulation occurs under foreign influences, especially the socio-economic forces of globalisation and the universalist human rights embedded in constitutional bills of rights.

B. *Jurispathic legal pluralism*

As successors of European colonial powers, African states regulate competition between their statutory laws and non-state normative orders. However, this regulation is destroying indigenous laws by forcing them into the philosophical images of Western laws. To understand this assertion, one needs to appreciate the close link between law, empire and development.[44] This link arises from the fact that states are constructed through internal and external political, economic, religious and cultural forces.[45] In the process of state formation, the role of law depends on the level of government's social control. It follows that the territorial, economic and cultural

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40 Olaf Zenker and Markus V Höhne (eds), *The State and the Paradox of Customary Law in Africa* (Abingdon and New York: Routledge, 2018), 4.

41 Paul S Berman, "Jurisgenerative Constitutionalism: Procedural Principles for Managing Global Legal Pluralism" (2013) 20:2 *Indiana Journal of Global Legal Studies* 665–695, at 673.

42 Nana Poku and Jim Whitman (eds), *Africa under Neoliberalism* (London: Routledge, 2018), Preface.

43 See, for example the Nigerian case of *Mojekwu v Iwuchukwu* (2004) 11 NWLR (Pt. 883) 196 and the Ugandan cases of *Otikor v Anya* (Civil Appeal No. 38 of 2012) [2016] Uganda High Court Civil Division 10 (Decided on 5 May 2016) and *Lwamasaka Nkonge Prosper (Kinyenyambali) v James Magala Muteweta (Kyana)* (Miscellaneous Cause 65 of 2015) [2019] Uganda High Court Civil Division (Decided on 12 July 2019) 356.

44 For a detailed analysis, see Jennifer Pitts, *Boundaries of the International: Law and Empire* (Cambridge, MA: Harvard University Press, 2018).

45 Ian Duncanson, "Close Your Eyes and Think of England: Stories about Law and Constitutional Change in Australia" (1996) 3 *Canberra Law Review* 123–138.

aspirations of the state affect the nature of law, especially in (post)colonial contexts. So, what is the nature of law in Africa?

In both historical and empirical senses, European colonialism is the progenitor of modern law in Africa. Significantly, the colonisation of Africa was spurred by the first industrial revolution in Europe, which occurred between 1780 and 1849.[46] This period brought unprecedented technological growth, commercial innovation, mechanisation of agriculture and displacement of agrarian livelihoods with large industries. To protect the emergent private property interests, European legal systems turned from promoting group welfare to promoting individual rights. Their laws became coercive, individualistic and capitalist-oriented.

Between the eighteenth and twentieth centuries, Western Europeans concertedly constructed African states to fit their imperial assertions of authority over economic resources. A key aspect of this construction is the imposition of relatively industrial legal systems onto Africa's largely agrarian political economies.[47] These impositions are intrinsically jurispathic because of the cultural superiority that underpinned them. Colonial legal transplants were unmindful of indigenous normative orders and their unique cultural contexts. For example, European judges refused to recognise the custom of woman-to-woman marriage, which enables a childless widow to perpetuate her husband's lineage by "marrying" another woman, who would then engage in extramarital relations with men to produce a male child for the deceased.[48] European administrators also ignored the strong spiritual connotations that Africans attached to land, which had informed its non-alienable nature in the precolonial era. They used economic development and the flexibility of indigenous laws to justify their commodification of land.[49]

As outlined earlier, statutory laws are the products of European legal transplants. In southern Africa, where more than one European power controlled the same territory at varying times, statutory laws are hybrid in nature.[50] Significantly, their development occurred alongside tremendous changes in the political, economic, religious and cultural lives of Africans. These changes are revolutionary in nature. Indeed, many post-independence states spent their early years either fighting civil wars or attempting to build a unifying national identity for their disparate ethnic groups. Given that African states continued the legal systems imposed by colonial powers, the spirit of cultural superiority of Western laws over indigenous

46 Peter N Stearns, *The Industrial Revolution in World History* (New York: Routledge, 5th ed., 2020).

47 Andrew M Kamarck, *The Economics of African Development* (New York: Praeger, 1967), 16–17.

48 Clement O Akpamgbo, "A 'Woman to Woman' Marriage and the Repugnancy Clause: A Case of Putting New Wine into Old Bottles" (1977) 9:14 *The Journal of Legal Pluralism and Unofficial Law* 87–95.

49 Johan Pottier, "Customary Land Tenure in Sub-Saharan Africa Today: Meanings and Contexts" in Chris Huggins and Jenny Cloreal (eds), *From the Ground Up: Land Rights, Conflict and Peace in Sub-Saharan Africa* (Pretoria: Institute for Security Studies, 2005), 55–75 at 57. See also *Wokoko v Molyko* (1938) 14 All *Nigeria Law Reports* 41, 44 (Pearson AJ).

50 For example, South Africa operates a Roman-Dutch law system, which is a mixture of the English common law and Dutch civil law.

laws did not end with the start of self-rule. Imbibed with this spirit, African law reformers systematically infuse(d) Western ideas into indigenous practices, aided by self-sustaining, European-styled institutions such as schools, courts, religious houses, civil service regimes and commercial systems.[51] As Chanock remarked, colonial law was "a way of creating powers, [and] of endowing officials with regulated ways of acting".[52] These "regulated ways of acting", also known as coloniality, thrive from the liberal pressure. They make the regulation of indigenous laws jurispathic, mainly because state court judges are products of Western-style legal education. Moreover, they reside outside traditional communities, live a Western lifestyle and interact in social fields that are heavily buffeted by the socio-economic forces of globalisation. Unsurprisingly, most judges are ignorant of indigenous laws. As aptly noted by Ugandan high court judge, Ssekaana Musa, "[t]he courts are too westernized to handle cultural and customary issues".[53] Next, I use recent reforms of equality laws, matrimonial property and the minimum age of marriage to show how the neoliberal pressure influences the treatment of indigenous African values.

III. Neoliberalist Influences in Family Law Reforms

African countries have undertaken wide-ranging reforms of their indigenous family laws since they attained political independence in the past seven decades. Generally, these reforms cover land, inheritance, marriage, property, circumcision, traditional leadership and cultural practices such as burial and initiation rites. They seek to conform indigenous laws to universalist standards of equality, human dignity and right to non-discrimination. Though they operate under the guise of the human rights movement, these standards are arguably part of the neoliberal pressure. As shown in the following, this assertion is traceable to the historical context of the neoliberal pressure in Africa.

A. The roots of development assistance

Many African nations experienced violent conflicts soon after they attained political independence. This is unsurprising, since these nations were largely disparate tribal groups that lacked national identity before and after they were colonially lumped into nationhood. Some Western nations watched these conflicts with

51 On how law reform in sub-Saharan Africa is an integral part of revolutionary social change, see Robert A Sedler, "Law Reform in the Emerging Nations of Sub-Saharan Africa: Social Change and the Development of the Modern Legal System" (1968) 13 *Louis University Law Journal* 195–257 at 195.

52 Martin Chanock, *The Making of South African Legal Culture 1902–1936: Fear, Favour and Prejudice* (Cambridge, UK: Cambridge University Press, 2001), 22.

53 *Lwamasaka Nkonge Prosper (Kinyenyambali) v James Magala Muteweta (Kyana)* (Miscellaneous Cause 65 of 2015) [2019] Uganda High Court Civil Division (Decided on 12 July 2019) 356.

interest and, whenever possible, intervened with ostensibly benevolent development assistance.[54]

Following the global economic upheaval caused by the energy crisis of the 1970s, African states explored ways of recovery for their export-oriented economies. In the 1980s, many of them sought loans from Western financial institutions. The World Bank and the International Monetary Fund obliged, but only with insistence on the liberalisation of trade and public assets.[55] The hapless African states agreed and began neoliberal reforms.[56] To strengthen the emergent law reforms, numerous non-profit organisations and the so-called development agencies invaded several African countries. The prominent ones include the US Agency for International Development, the British Department for International Development (now Foreign, Commonwealth and Development Office) and the Swedish International Development Cooperation Agency. Their activities and rule of law programmes bred the Law and Development Studies movement, which focuses on how legal reform promotes development by removing barriers to trade.[57] As shown later, the influence of these development activities constitute an important part of the neoliberal pressure.

Economic reforms led to harsh financial austerity measures, better known as structural adjustment programmes.[58] Politicians took the blame for the removal of state subsidies on vital services such as energy, health and education. Government economic advisers took the blame for the massive sell-offs of public assets that swept across the continent. Legislators and judges took the blame for the law reforms that accompanied all these liberal economic programmes. But in all these, NGOs have relatively escaped condemnation for their role in the liberal pressure.

Yet, quite ironically, one of the strongest influences on law reforms in Africa is the activities of NGOs and community-based organisations. NGOs are widely regarded as voluntary, not-for-profit organisations that are independent

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54 Everett E Hagen, "What We Do Not Know about the Economics of Development in Low Income Societies" in Kurt Martin and John Knapp (eds), *Development Economics: Its Position in the Present State of Knowledge* (Abingdon and New York: Routledge, 2017; 1st ed., 1967), 53–56.

55 This is unsurprising, given that "the organizations that make up the World Bank Group are owned by the governments of member nations, which have the ultimate decision-making power within the organizations on all matters, including policy, financial or membership issues", available at https://www.worldbank.org/en/about/leadership/members (visited 2 July 2022). The boards of the World Bank Group are controlled by their member states, who in turn answer to the wealthy industrialists and multinational corporations that pull their financial strings. For in-depth explanation of the control of the World Bank and how neoliberalism drives international financial institutions, see Michael Hodd, "Africa, the IMF and the World Bank" (1987) 86:344 *African Affairs* 331–342 and Richard Peet, *Unholy Trinity: The IMF, World Bank and WTO* (London and New York: Zed Books, 2003).

56 Lisa Mueller, *Political Protest in Contemporary Africa* (Cambridge, UK: Cambridge University Press, 2018).

57 David M Trubek, "The 'Rule of Law' in Development Assistance: Past, Present, and Future" in David M Trubek and Alvaro Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (Cambridge, MA: Cambridge University Press, 2006), 74–94.

58 David Seddon and Leo Zeilig, "Class and Protest in Africa: New Waves" (2005) 32:103 *Review of African Political Economy* 9–27, at 17.

of government and private business.[59] Literature, however, shows that their independence and non-governmental nature are questionable.[60] The following thematic examples illustrate the influence of NGOs in family law reforms in Africa.

(i) Minimum age of marriage

In *Gyumi v Attorney General*,[61] the core issue was whether ss.13 and 17 of the Law of Marriage Act of 1971 (Marriage Act) contravene the rights to equality, freedom of expression and receipt of information provided by arts.12, 13, 18 and 21 of the Constitution of Tanzania. Section 13(1) of the Marriage Act states as follows: "No person shall marry who, being male, has not attained the apparent age of eighteen years or, being female, has not attained the apparent age of fifteen years". Section 13(2) gives the court discretion to permit deviations from these minimum ages, so long as each party has attained the age of 14 years, and the court is satisfied that there are special circumstances which make the proposed marriage desirable.

The applicant, Rebeca Gyumi, who is the founder of Msichana Initiative, a Tanzanian NGO, challenged the Marriage Act for permitting girls of the age of 15 years to marry, while males could get married only after they have reached the age of 18. She also argued that s.13(2), which permitted a person to get married at the age of 14 with the consent of the court "where the court is satisfied that there are special circumstances which make the proposed marriage desirable", was vague and arbitrary. Ms Gyumi claimed that ss.13 and 17 of the Act particularly contravene arts.12(1) and 13(1) and 13(2) of the Constitution of Tanzania, which prohibit gender discrimination and guarantee equality before the law. In pleading for the abolition of the impugned sections, she urged the court to adopt a "liberal interpretation".[62]

Representing the government, the Attorney General denied that ss.13 and 17 of the Marriage Act are discriminatory. She argued that s.13(2)(3) contains a gender-neutral safety mechanism by requiring a court's approval for any marriage involving a minor. Significantly for this article's arguments, she submitted that the Act aimed to accommodate "disparities in customary, traditional and religious values from divergent communities pertaining to marriage and related issues".[63] The Attorney General relied on s.11 of the Judicature and Application of Laws Act 358 of 2002, which provides that customary law shall be applicable to matters of a civil nature, and the Local Customary Law (Declaration) (No 4)

59 Sarah Michael, *Undermining Development: The Absence of Power among Local NGOs in Africa* (Bloomington, IN: Indiana University Press, 2004).

60 Julie Hearn, "African NGOs: The New Compradors?" (2007) 38:6 *Development and Change* 1095–1110, at 1095.

61 *Rebeca Z Gyumi v Attorney General* (Tanzania Civil Cause No 5 of 2016, Decided 8 July 2016).

62 Page 14 of the judgment.

63 Pages 9–10 and 14 of the judgment. Section 10 of the Marriage Act recognises both monogamous and polygamous marriages, with a presumption that Islamic law and customary law marriages are polygamous or potentially polygamous.

Order of 1963, whose three Schedules set out provisions relating to guardianship, inheritance and wills. Relying on the Marriage Act's legal pluralist tone, she argued that "the law allows each ethnic group to follow and make decisions based on its customary norms, traditions and religious values".[64] The Attorney General also cited art.8(2)(a) of the Southern Africa Development Community Protocol on Gender and Development, which allows exceptions to 18 years as the minimum age of marriage where legislation ensures the best interest and welfare of the child.

The High Court of Tanzania rejected the Attorney General's contention that the impugned provisions should be spared on account of values embedded in customary law and Islamic law. The court, however, did not examine any of these values nor try to determine why customary laws have a different age of maturity than statutory laws. Had it done so, it might have traced the age of marriage under customary laws to initiation rites into adulthood.[65] It might have also traced the basis of parental involvement in adolescent marriages to the agrarian nature of precolonial societies, in which formidable ecological barriers between communities gave potential spouses little opportunity for courtship. Rather than considering the culturally relativist nature of Tanzania's indigenous legal system, the judges sought inspiration from some of the international and regional instruments which Tanzania has ratified, particularly (article 21 of) the African Charter on the Welfare of the Child. Citing with approval a Zimbabwean Constitutional Court decision,[66] the High Court held that the differential treatment of girls and boys in the Marriage Act infringed the right to equality. It declared the impugned provisions unconstitutional and ordered the government to amend them in accordance with Tanzania's treaty obligations by setting the age of marriage at 18 years without any exception.[67] These treaties are notably art.6 of the Maputo Protocol, which guarantees men and women equal rights in marriage, and art.21(2) of the African Charter on the Rights and Welfare of the Child, which prohibits child marriage.

64 Page 10 of the judgment. However, s.11(4) of the Judicature and Application of Laws Act cited by the Attorney General excludes its provisions, "the rules of customary law and the rules of Islamic law" from applying to "any matter provided for in the Law of Marriage Act".

65 Elizabeth Schroeder, Renata Tallarico and Maria Bakaroudis, "The Impact of Adolescent Initiation Rites in East and Southern Africa: Implications for Policies and Practices" (2022) 27:1 *International Journal of Adolescence and Youth* 181–192.

66 *Mudzuru v Ministry of Justice, Legal and Parliamentary Affairs N O* (Constitutional Application 79 of 2014, CC 12 of 2015) Zimbabwe Constitutional Court Judgements (Decided on 20 January 2016) 12.

67 On pages 26 and 27, the judgment reads as follows: ". . . we have no option but to find that the two provisions i.e. sections 13 and 17 of the Law of Marriage Act, Cap 29 RE 2002, are unconstitutional to the extent explained herein above. . . . we direct the Government through the Attorney General within a period of one (1) year from the date of this order to correct the complained anomalies within the provisions of section 13 and 17 of the Law of Marriage Act and in lieu thereof put 18 years as the eligible age for marriage in respect of both boys and girls".

In October 2019, Tanzania's Court of Appeal upheld the High Court's decision.[68] The order in *Gyumi v Attorney General* is illustrative of the situation in many African states.

For example, in May 2022, Zimbabwe's Constitutional Court raised the age of sexual consent from 16 to 18 years, thereby invalidating sections of the Criminal Law (Reform and Codification) Act.[69] In so doing, the Constitutional Court neither examined indigenous laws of Zimbabwe regarding the age of majority nor relied on survey data. It was only concerned with the constitutionality of the Criminal Law Act.[70] Significantly, it castigated the High Court for refusing to raise the age of sexual consent. It stated: "The [high] court thus shied away from its primary role of declaring itself [sic] on the constitutionality or otherwise of the impugned law. This was the sole issue that was squarely before it, and by deliberately avoiding it, the court a quo fell into a grave error. It ended up on a frolic of its own, deciding on whether or not laws alone can stop adolescents from engaging in sexual activities".[71] The Constitutional Court approvingly cited its decision in *Mudzuru*.[72] In *Mudzuru*, it had reiterated that "section 78(1) of the Constitution permits of no exception for religious, customary or cultural practices that permit child marriage", and that "international human rights standards" require Zimbabwe "to modify or abolish existing laws, regulations, customs and practices inconsistent with the fundamental rights of the child".[73]

Pressure from the international human rights movement is also evident in how Mozambique's parliament adopted legislation titled "Law for the Prevention and Fight against Premature Unions" on 24 July 2019. It criminalises marriage involving anyone younger than 18 years and threatens anyone who officiates or authorises an underage marriage with imprisonment of at least two years. Any adult who enters a marital union or sexual relationship with another person under the age of 18 faces imprisonment of 8 to 12 years. Just as in other African states, indigenous beliefs, practices and norms regarding the age of marriage were neglected during the enactment of this law. Arguably, this neglect arose from the liberal pressure. As the United Nations Children's Fund noted, the Law for the Prevention and Fight against Premature Unions emerged from "years of efforts by the government, civil society and rights-based organizations".[74]

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68 The Court of Appeal observed that the Marriage Act was enacted to protect the rights of young children in compliance with international, regional and sub-regional instruments that uphold the rights of the child.

69 *Diana Eunice Kawenda v Minister of Justice, Legal and Parliamentary Affairs and Two Others,* Zimbabwe Constitutional Court Judgements (24 May 2022) 3.

70 Section 8(1)(e) of the Zimbabwe Constitution of 2013 fixes the age of protection of children from sexual exploitation at 18 years.

71 *Diana Eunice Kawenda v Minister of Justice, Legal and Parliamentary Affairs and Two Others,* Zimbabwe Constitutional Court Judgements (24 May 2022) 18.

72 *Mudzuru v Ministry of Justice, Legal and Parliamentary Affairs N O* (n. 66).

73 *Ibid*., [13].

74 "Community Activists Are on a Mission to End Child Marriage in Mozambique", available at https://www.unicef.org/mozambique/en/stories/community-activists-are-mission-end-child-marriage-mozambique (visited 7 April 2022).

(ii) Equal gender and matrimonial rights

There is a plethora of cases in which NGOs and civil society groups championed the judicial reform of gender and matrimonial property laws in Africa. One of the most notorious is the case of *Bhe v Magistrate Khayelitsha*, a consolidated hearing of three cases involving the indigenous rule of male primogeniture. This rule requires that only the eldest male child of a deceased person can inherit his estate. Where the deceased has no male child, inheritance devolves on his eldest male relative. The male primogeniture rule was codified in section 23 of the Black Administration Act, a colonial/apartheid era legislation that regulated the intestate estates of black South Africans.[75] Section 23, however, failed to include an heir's duty of care to the deceased person's dependants, which was foundational to the male primogeniture rule in the precolonial era. In its agrarian settings, this rule aimed to promote the best interest of the family. Here is an apt explanation of its context:

> Succession was not primarily concerned with the distribution of the estate of the deceased, but with the preservation and perpetuation of the family unit. Property was collectively owned and the family head, who was the nominal owner of the property, administered it for the benefit of the family unit as a whole. The heir stepped into the shoes of the family head and acquired all the rights and became subject to all the obligations of the family head. The members of the family under the guardianship of the deceased fell under the guardianship of his heir. The latter, in turn, acquired the duty to maintain and support all the members of the family who were assured of his protection and enjoyed the benefit of the heir's maintenance and support.[76]

In the first consolidated suit in the *Bhe* decision, the mother of two female applicants aged nine and two sought an order to secure her deceased husband's house for her daughters. The house had devolved on their grandfather, as the eldest male relative of the deceased. The claimant mother was assisted by the South African Human Rights Commission and the Women's Legal Centre Trust, who instituted a class action on behalf of all women and children similarly affected by the male primogeniture rule. In the other two suits, the rule also denied women and girls the right to inherit from the estates of their parents or husbands who had died intestate. The cases attracted widespread publicity because of their potential impact on communities that observe indigenous laws in South Africa.

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75 *Bhe v Khayelitsha Magistrate* 2005 (1) Butterworths Constitutional Law Reports 1 (Constitutional Court Judgments) (Decided on 15 October 2004). Section 23 (1) of the Black Administration Act states: "All movable property belonging to a Black and allotted by him or accruing under Black law or custom to any woman with whom he lived in a customary union, or to any house, shall upon his death devolve and be administered under Black law and custom".

76 *Ibid*., [76].

The Constitutional Court, the apex court in South Africa, stressed that s.39(2) of the Constitution demands that when interpreting customary law, a court "must promote the spirit, purpose and objects of the Bill of Rights". It found that by enabling male primogeniture, s.23 of the Black Administration Act and its accompanying regulations contravened the right to equality in s.9(3) of the Constitution.[77] To remedy this situation, the Constitutional Court was faced with two broad choices.

The first was to abolish the indigenous law of intestate succession and import the Intestate Succession Act 81 of 1987 (ISA) to regulate indigenous laws of succession. Notably, the ISA is modelled on colonially imposed Dutch laws of intestate succession. The second choice was to develop the rule of male primogeniture by removing its restriction to eldest male children or by demanding that it must be accompanied by an heir's duty of care to the deceased person's dependants. In weighing these choices, all 11 judges agreed that the circumstances in which indigenous laws of succession apply today have changed:

> The rule of male primogeniture . . . prevented the partitioning of the family property and kept it intact for the support of the widow, unmarried daughters and younger sons. However, the circumstances in which the rule applies today are very different. The cattle-based economy has largely been replaced by a cash-based economy. Impoverishment, urbanization and the migrant labour system [introduced by European administration] have fundamentally affected the traditional family structures. The role and status of women in modern urban, and even rural, areas extend far beyond that imposed on them by their status in traditional society. Many women are de facto heads of their families. They support themselves and their children by their own efforts. Many contribute to the acquisition of family assets. The official traditional version of indigenous law does not therefore reflect nor accommodate this changed role and function.[78]

Ten of the judges ruled in favour of invalidating the male primogeniture rule and its supporting legislation. Furthermore, they ordered that the ISA should regulate the estates of persons who die intestate until Parliament adopts legislation to govern succession under customary law.[79] Justice Ngcobo agreed that the rule of male primogeniture is not compatible with section 9(3) of the Constitution to the extent that it excludes women from succeeding to the family head. He, however, disagreed with the majority's decision to abolish male primogeniture and impose the ISA on the customary law of succession:

77 The regulations that accompany ss.1(4)(b) and 23 of the ISA also infringed the right to equality.

78 *Bhe v Khayelitsha Magistrate* (n. 75), [221].

79 In 2009, South Africa's Parliament enacted the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009, which copied extensively from the Intestate Succession Act of 1987.

> Once a rule of indigenous law is struck down, that is the end of that particular rule. Yet there may be many people who observe that rule, and who will continue to observe the rule. And what is more, the rule may already have been adapted to the ever-changing circumstances in which it operates. Furthermore, the Constitution guarantees the survival of the indigenous law. These considerations require that, where possible, courts should develop rather than strike down a rule of indigenous law. . . . The defect in the rule of male primogeniture is that it excludes women from being considered for succession. . . . It needs to be developed so as to bring it in line with our Bill of Rights . . . by removing the reference to a male so as to allow an eldest daughter to succeed to the deceased estate.[80]

The decision of the majority to impose the ISA rather than extend primogeniture to eldest female children demonstrates the subordinate status of indigenous laws in South Africa's legal pluralism. Notably, the ISA envisages a nuclear family system, whereas indigenous laws are founded on the extended family system. Thus, the ISA is ill-suited for the preservation and perpetuation of the family unit, succession to the status and position of the family head, and support to the minor children and other dependants of a deceased person. As Justice Ngcobo noted, applying the ISA to indigenous laws "may well lead to the disintegration of the family unit that indigenous law seeks to preserve and perpetrate".[81] This statement affirms the jurispathic nature of law reforms in Africa. Indeed, the minority judgment admitted that the development of indigenous law to reflect changed socio-economic circumstances requires judges to consider people's current practices—that is the so-called living customary law.[82] Yet it went on to state: ". . . we are concerned with the development of the rule of male primogeniture so as to bring it in line with the right to equality. We are not concerned with the law actually lived by the people".[83] This astonishing admission demonstrates the influence of neoliberal legality on cultural relativism in Africa. This influence is glaring in *Mayelane v Ngwenyama*.[84]

In *Mayelane v Ngwenyama*, Ms Mayelane, the applicant, married her deceased husband, Mr Moyana, in 1984, according to Tsonga customary law. Their marriage was not registered. In 2008, Ms Ngwenyama, the first respondent, purportedly married Mr Moyana according to Xitsonga customary law. The following year, Mr Moyana died.

His first wife, Ms Mayelane, brought a claim in the North Gauteng High Court in Pretoria. She sought to invalidate her husband's second marriage to Ms Ngenyama

80 *Bhe v Khayelitsha Magistrate* (n. 75), [215] and [222].
81 *Ibid*., [229].
82 *Ibid*., [219].
83 *Ibid*. Paradoxically, Justice Ngcobo admitted in para.228 that "a majority of Africans have not forsaken their traditional cultures. These have been adapted to meet the changing circumstances. The law must recognise this".
84 *Mayelane v Ngwenyama* (CCT 57/12) South Africa Constitutional Court Decisions (4) SA 415 (Decided on 30 May 2013) 14.

on the ground, among others, that she had not consented to the second marriage and that under the Recognition of Customary Marriages Act 120 of 1998 (the RCMA), the 1996 Constitution of South Africa and Xitsonga customary law, the consent of the first wife is required for a second marriage. Countering, Ms Ngwenyama argued that the first wife's consent was not required under the RCMA. She also claimed an absence of sufficient information for the court to make definitive findings on whether consent is a requirement under customary law for the validity of subsequent marriages and the consequences of lack of consent. Ms Mayelane succeeded in the High Court.

On appeal to the Constitutional Court, the affidavit evidence of some witnesses showed that the first wife's consent is a requirement to a second marriage under Xitsonga custom and practice, while other witnesses testified that the first wife merely needs to be informed.[85] The Court acknowledged that the RCMA regulates indigenous marriages in South Africa and imposes certain requirements for their validity such as minimum ages, consent of both parties and equality between men and women. It also acknowledged that s.211(3) of the Constitution requires that "courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law". Also, ss.9 and 10 guarantee the rights to equality and human dignity. It noted that the development of indigenous laws to conform with the Constitution must be undertaken in a participatory manner by those who observe these laws, and that the values of the Constitution may be recognised differently by ethnic groups. It found that the RCMA does not demand the first wife's consent to a second marriage. It then considered whether the rights to equality and human dignity require the consent of the first wife before a man could undertake a valid second marriage. It found that when a woman is unable to control the entry of a second wife into her family, she cannot make an informed decision on her personal life, sexual or reproductive health and the proprietary consequences of the new marriage. This inability undermines her statutory equality with her husband. According to the lead judgment:

> Autonomy and control over one's personal circumstances is a fundamental aspect of human dignity. However, a wife has no effective autonomy over her family life if her husband is entitled to take a second wife without her consent. Respect for human dignity requires that her husband be obliged to seek her consent and that she be entitled to engage in the cultural and family processes regarding the undertaking of a second marriage. . . . Given that marriage is a highly personal and private contract, it would be a blatant intrusion on the dignity of one partner to introduce a new member to that union without obtaining that partner's consent.[86]

85 *Ibid.*, [123] and [124].
86 *Ibid.*, [73] and [74].

Six of the judges—Froneman J, Khampepe J and Skweyiya J, (Moseneke DCJ, Cameron J and Yacoob J concurring)—held that, at the time of the purported marriage between Ms Ngwenyama and the deceased, Tsonga customary law required the first wife to be informed. Since Ms Mayelane had not been informed, they held that "Xitsonga customary law must be developed, to the extent that it does not yet do so, to include a requirement that the consent of the first wife is necessary for the validity of a subsequent customary marriage".[87] However, they did not distinguish between consent and mere information.

Justice Jafta (Mogoeng CJ and Nkabinde J concurring) and to an extent Justice Zondo disagreed with the majority's decision to require consent for a second marriage even in communities where consent was not required.[88] Based on the evidence, they argued, the proper approach "is that the customary law applicable to the Vatsonga either requires the first wife's consent or requires that the first wife be informed of her husband's intention to enter into a further customary marriage with another woman".[89] The tone of the dissent is significant for understanding how law reforms impose universalist human rights values on culturally relativist African communities. Obviously, judges should not develop indigenous laws because these laws are best developed by the people who practise them. Courts should only recognise and uphold indigenous laws in their current forms—if they are constitutional. As Justice Zondo noted, the court's duty is "to establish the customs and usages traditionally observed by the Vatsonga, which form part of their culture. Customs and usages 'traditionally observed' by any group of people is a question of fact and not of law".[90]

Notably, *Mayelane* was championed by NGOs such as the Women's Legal Centre Trust and the Rural Women's Movement, as well as South Africa's Commission for Gender Equality. If the activities of these organisations are influential, their impact on Malawi's reform of the age of marriage is even more so. As stated in the introduction of this article, the reform of Malawi's family laws from 2015 resulted in the extraordinary act of amending its constitution to align with the Marriage, Divorce and Family Relations Act. The forces behind the adoption of this Act are noteworthy.

A group of female parliamentarians formed a Women's Caucus in 1996 and identified the harmonisation of laws pertaining to women's rights as a key goal.[91] They partnered with the United Nations Development Programme (UNDP) and Malawi's government to establish the Gender Coordination Network. This network is mostly made up of NGOs. The Malawian government then set up a Special Law Commission on Gender in September 2001. Together with the UNDP

87 *Ibid*., [75].
88 *Ibid*., [90]–[157].
89 *Ibid*., [127] (Zondo J).
90 *Ibid*., [126].
91 Asiyati Chiweza, Vibeke Wang and Ann Maganga, *Acting Jointly on Behalf of Women? The Cross-party Women's Caucus in Malawi:* CMI Brief 15:8 (Bergen, Norway: Chr. Michelsen Institute, 2016).

and the Gender Coordination Network, they identified gender equality, succession and inheritance and marriage and divorce, as major 10-year programmatic areas. The subsequent law reform debates were contentious, especially over issues of polygamy and child marriage. In fact, when the Bill was introduced in parliament in 2010, it was sent back to the Gender Commission for revision.[92] Eventually, pressure from NGOs and UN Women led to its passage in 2015. As an observer noted, “The presence of civil society representatives on Parliament’s grandstand who ‘kept their eyes’ on the MPs voting below suggests that some measure of social control was exerted”.[93]

The neoliberal pressure is also evident in legislative reforms in Eswatini (officially, Kingdom of Eswatini, formerly Kingdom of Swaziland). For example, the Sexual Offences and Domestic Violence Act of 2018 was promoted by numerous NGOs and foreign donors. These include the Eswatini Action Group against Abuse (SWAGAA), the European Union, the Foundation for Socio-Economic Justice in Swaziland, the Southern African Litigation Centre, and the Cooperazione per lo Sviluppo dei Paesi Emergenti (COSPE Onlus). COSPE Onlus is an Italian non-profit whose activities include coordinating “civil society actors, capacity strengthening, definition and implementation of advocacy activities and widespread promotion of UN mechanisms for the protection of human rights”.[94] The liberal pressure in legislative reforms is remarkable because Eswatini is an absolute monarchy. Indeed, the process to adopt the Sexual Offences and Domestic Violence Act only succeeded almost 10 years after it commenced in 2009. The Bill was passed in October 2011 but did not receive Royal Assent from the King. It was reintroduced in Parliament in 2015.

As shown next, the liberal pressure appears less in countries that do not attract meaningful foreign direct investment. An example is Botswana, where the only notable recent law reform occurred in *Ramantele v Mmusi*.[95] Here, both the High Court and Court of Appeal struck down the Ngwaketse customary law of male ultimogeniture, which prioritised inheritance by the youngest male child. Delivering the judgment of the High Court, Dingake held that “the Ngwaketse Customary law is an unacceptable part of the system of male domination . . . . [T]he exclusion of women from heirship is consistent with the logic of patriarchy which reserves for women positions of subservience and subordination. Such exclusion does not only amount to degrading treatment but constitute an offence against human dignity”.[96]

92 Centre for Human Rights and Rehabilitation, *Alternative Report for the Review of Republic of Malawi by the Human Rights Committee* (UN Human Right Committee, 2011).

93 D Nowack, “Cultural Values, Attitudes, and Democracy Promotion in Malawi” (n. 1), 1–60 at 24.

94 See Southern Africa Litigation Centre, COSPE Onlus, and Foundation for Socio-Economic Justice “A Summary of Eswatini’s Sexual Offences and Domestic Violence Act” (2019), which was funded by the European Union.

95 *Mmusi v Ramantele* [2012] Botswana High Court 125 (12 October 2012) and *Ramantele v Mmusi* [2013] Botswana Court of Appeal 1.

96 *Mmusi vs Ramantele* [2012] Botswana High Court 125 para.205. For analysis, see Christa Rautenbach, “A Family Home, Five Sisters and the Rule of Ultimogeniture” (n. 24).

The judges relied on s.3(a) of the Constitution of Botswana and the Convention on the Elimination of all Forms of Discrimination against Women. They also considered international instruments such as the International Covenant on Civil and Political Rights, the African Charter on Human and Peoples' Rights and decisions of the Human Rights Committee and the African Commission on Human and Peoples' Rights.[97]

Prior to the *Mmusi* decision, customary laws were exempt from constitutional scrutiny in certain circumstances.[98] Although the Southern African Litigation Centre assisted the local firm of Rantao Kewagamang Attorneys and South African Advocate, Geoff Budlender, to represent the applicant, they did not spearhead the case like NGOs did in the other cases discussed here. However, on 18 June 2013, the Women's Link Worldwide gave a "Bronze Gender Justice Uncovered Award" to the High Court of Botswana for its decision in *Mmusi*.[99] This award was "in recognition of its significant contribution to promoting gender equality". Women's Link Worldwide is an international non-profit organisation with regional offices in Colombia, Spain and East Africa. It was established in 2001 to advocate and litigate for new standards in the human rights of women and girls.[100]

Obviously, not all law reforms emerge from the neoliberal pressure. An example from Nigeria is the 2014 case of *Onyibor Anekwe v Maria Nweke*.[101] Here, the Supreme Court invalidated the custom of male primogeniture in southern Nigeria, which discriminated against women by insisting on inheritance through the eldest male child or male relative of a deceased person. Curiously, the court relied on the colonial era repugnancy clause, instead of the constitutional right to equality or the human rights treaties that Nigeria had ratified.[102]

IV. Significance of Family Law Reforms

The reforms of family laws in Africa are widely welcomed by international and domestic human rights organisations. However, their perceived lack of cultural legitimacy by the people who practice indigenous laws causes considerable negative

97 Jonas Obonye, "Gender Equality in Botswana: The Case of *Mmusi and Others v Ramantele and Others*" (2013) 13:1 *African Human Rights Law Journal* 229–244, at 236.

98 See s.15(4)(c) and 15(4)(d) of the Botswana Constitution. Section 88(2) demands that any legislative regulation of customary law must be undertaken in consultation with the House of Chiefs. See generally Bonolo R Dinokopila and Bonno Kgoboge, "Customary Law and Limitations to Constitutional Rights in Botswana" (2021) 39:3 *Nordic Journal of Human Rights* 339–357.

99 Christa Rautenbach, "A Family Home, Five Sisters and the Rule of Ultimogeniture" (n. 24), 161.

100 Information about this organisation's aims and funding is available at https://www.womenslinkworldwide.org/en (visited 16 April 2022).

101 *Onyibor Anekwe v Maria Nweke* (2014) All Federal Weekly Law Reports (Pt 739) 1154.

102 For critical analysis of this judgment, see Anthony C Diala, "A Critique of the Judicial Attitude towards Matrimonial Property Rights under Customary Law in Nigeria's Southern States" (2018) 18:1 *African Human Rights Law Journal* 100–122.

reactions in traditional communities.[103] In any case, the findings here indicate that law reforms are inexorably altering the cultural (and legal) identities of Africans. This assertion finds support in a survey by the African Union in 2018.[104] According to this survey, 43 of the African Union's 55 member states (78 per cent) have legal frameworks that peg the minimum age of marriage at 18 years or above for both girls and boys. Of these, 27 (63 per cent) contain exceptions to child marriage either with parental/guardian consent, a judge's approval or court/State's approval.[105] These figures also reflect a trend towards the Westernisation of marriage laws. For example, in 2022, Zimbabwe enacted a comprehensive law, the Marriage Act, which among others, consolidates marriage laws and provides for the recognition and registration of customary law unions and civil partnerships.[106] Its innovations include a single-marriage register, monogamous option for customary law marriages and couple-centric provisions that jettison the traditional involvement of the extended family in marriage agreement and dissolution. South Africa is currently soliciting public opinion on a similar single-marriage statute.

The remainder of this article shows how recent reforms of family laws are imposing binary notions of gender equality and liberal values of individualistic property rights.

A. *What drives African law reforms?*

As pointed out, family law reforms centre on the enforcement of equality in indigenous laws of inheritance, marital property and minimum age of marriage.[107] Ironically, there is little evidence that these reforms are beneficial to women. Rather, they appear to breed a culture of individualism (individual rights), which tends to divorce property from communal ownership and usage. The chief beneficiaries of this situation are the State, which champions law reforms; male elders who exploit the legal spaces created by reforms and large corporations that ultimately grab communal resources. In this regard, Lastarria-Cornhie observed:

> It is under the increasing transformation of customary tenure systems to market-based, individualized tenure systems that women's limited but

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103 Pumza Fihlani "Outcry over South Africa's Multiple Husbands Proposal" *BBC News* (27 June 2021), available at https://www.bbc.com/news/world-africa-57548646 (visited 28 March 2022).

104 African Union Commission, UN Women and Plan International, *Marriage Laws in Africa – a Compendium from 55 African Union Member States* (Addis Ababa: UN Women Office Publishing, 2019).

105 Eleven states (20 per cent) lack legal frameworks that impose 18 years as the minimum age for both boys and girls, and 10 of the 11 (91 per cent) have further exceptions reducing the age of marriage for girls. Ten states (18 per cent) have unequal minimum age of marriage ranging from as low as 14 years for girls to 15 years for boys.

106 The Marriages Act [Ch.5:15] 1 of 2022 amended the Child Abduction Act, Children's Act, Guardianship of Minors Act, Maintenance Act, Matrimonial Causes Act, General Law Amendment Act and Criminal Law (Codification and Reform) Act. It also repealed the Customary Marriages Act and the Marriage Act. Just like South Africa's RCMA, the Act made bridewealth (*lobola*) optional.

107 Jonas Obonye, "Gender Equality in Botswana" (n. 97).

> recognized land rights may be ignored and consequently lost. During the transition (be it through land reform, market forces, or a land titling project), men and particularly male heads of household acquire total, legal ownership of household land. Individualized and private ownership transfers the few rights, such as cultivation rights, that women had to land under customary law to some men who are able to claim all rights to land.[108]

The pertinent question for understanding what drives law reforms is this: To what end are law reforms transforming indigenous African laws? Arguably, the reforms of indigenous family laws are spin-offs of the neoliberal pressure applied by some Western nations on African governments. Along with international financial institutions, these nations have exerted considerable influence on African political economies since the late 1970s. This period marked the dawn of a "new era of indebtedness, poverty, aid dependency and policy conditionality, [which aim at] fundamentally transforming the balance of power between the North and Africa".[109] Thus, economic assistance initiatives compelled African states to frame their development strategies in free enterprise terms. However, free enterprise is hampered by communal notions of property, since it seeks, among others, to enable large corporations to exploit natural resources. For example, many multinational corporations listed on the London Stock Exchange conduct mining operations in eastern and southern Africa, which are worth over US$1 trillion.[110] For free enterprise to thrive, land laws need to be amended; group notions of rights need to give way to individual rights, and women need to be empowered to assert property rights through acquaintance with binary understandings of equality. Communalism and social cohesion, which ensured complementary property relations in the precolonial and early colonial eras, are falling apart under binary ideas of gender equality.[111] This cultural upheaval, evident in the meteoric rise in divorce cases after European contact,[112] is symptomatic of how neoliberal legality influences the State's regulation of indigenous family laws. By literarily compelling African states to adopt free market policies, neoliberalism transforms "the authority and capacity of the state

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108 Susana Lastarria-Cornhiel, "Impact of Privatization on Gender and Property Rights in Africa" (1997) 25:8 *World Development* 1317–1333, at 1329.

109 Julie Hearn, "African NGOs" (n. 60), 1098. See also David N Plank, "Aid, Debt and the End of Sovereignty: Mozambique and Its Donors" (1993) 31:3 *Journal of Modern African Studies* 407–430; Osei Kwadwo Prempeh, *Against Global Capitalism: African Social Movements Confront Neoliberal Globalization* (London: Routledge, 2006).

110 Mark Curtis, *The New Colonialism: Britain's Scramble for Africa's Energy and Mineral Resources* (London: War on Want, 2016).

111 As Chinua Achebe demonstrated in his classic novel, *Things Fall Apart*, the cultural upheaval created by colonialism destroyed many indigenous socio-legal orders.

112 John C Caldwell, Pat Caldwell and Israel O Orubuloye, "The Family and Sexual Networking in Sub-Saharan Africa: Historical Regional Differences and Present-day Implications" (1992) 46:3 *Population Studies* 385–410, at 353–404.

to effect social, political and economic change".[113] Thus, law reforms became more controlling of indigenous laws and more tailored to economic modernisation and market capitalism.[114]

Significantly, the liberal pressure thrives on development aid. As evident in Uganda's publicised gay rights furore, international donors often predicate their loans on extensive reforms, which are ostensibly aimed at promoting individual liberties.[115] In this context, the neoliberal pressure has induced a staggering array of human rights activism and rule of law programmes in Africa. These programmes are usually championed by NGOs, churches, intergovernmental agencies and subsets of globalist bodies such as the United Nations and the African Union. Although reliable figures are hard to find, about 200,000 NGOs were estimated to be operating in South Africa alone by March 2020.[116] In the same year, there were over 11,262 registered NGOs in Kenya, of which 8,893 are classified as activist.[117] Along with other change agents, NGOs tremendously influence the reforms of private laws. As Sakue-Collins observed, "[t]he practice of foreign aid, backed by neoliberalism, is primarily characterised by symbolic power relations between donors and recipients, in which NGOs, as recipients, are obligated (or 'forced') to implement policies they don't originate and which also do not necessarily serve the interest of their societies".[118]

The funding of NGOs that promote law reforms reveals an impressive labyrinth of donors that ultimately trace back to Western governments, institutions and businesses. For example, in Kenya, a report commissioned by the UNDP, the Government of Kenya and the NGO Coordination Board of Kenya found that 88 per cent of funds for Kenyan NGOs is externally sourced.[119] The report was itself supported by UNDP and the Embassy of the Netherlands. It covered the 2019 reporting period, in which 3,028 organisations submitted reports. Of the total sum

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113 Nana Poku and Jim Whitman (eds), *Africa under Neoliberalism* (London and New York: Routledge, 2017), Preface.

114 Sylvia Kang'ara, "Beyond Bed and Bread: Making the African State through Marriage Law Reform – Constitutive and Transformative Influences of Anglo-American Legal Thought" (2012) 9:2 *Hastings Race and Poverty Law Journal* 353–396 at 353–355.

115 Martin Plaut, "Uganda Donors Cut Aid after President Passes Anti-gay Law" *The Guardian* (February 2014), available at https://www.theguardian.com/global-development/2014/feb/25/uganda-donors-cut-aid-anti-gay-law (visited 5 April 2022).

116 Kentse Radebe and Ncedisa Nkonyeni, "NGOs Today: Competing for Resources, Power and Agency" (5 March 2020), available at https://mg.co.za/analysis/2020-03-05-ngos-today-competing-for-resources-power-and-agency/ (visited April 2022); Isaac G Shivji, *Silences in NGO Discourse: The Role and Future of NGOs in Africa* (Oxford: Fahamu/Pambazuka, 2007).

117 Yimovie Sakue-Collins, "(Un) Doing Development: A Postcolonial Enquiry of the Agenda and Agency of NGOs in Africa" (2021) 42:5 *Third World Quarterly* 976–995, at 984.

118 *Ibid*., 977; Sarah Michael, *Undermining Development* (n. 59); Agbola S Babatunde and Olusegun J Falola, "Planning Law Reforms in Africa: Case Studies from Uganda, South Africa and Nigeria" in *Governing Urban Africa* (London: Palgrave Macmillan, 2016), 125–147; and Julie Hearn, "African NGOs" (n. 60).

119 UNDP Kenya, "Close to 90% of Funds for NGOs is Externally Sourced – UNDP Supported Report Reveals" (January 2020), available at https://www.ke.undp.org/content/kenya/en/home/presscenter/articles/2020/AnnualNGOSectorReportLaunch201819.html (visited 15 April 2022).

of Ksh 166 billion (US$1.42 billion) received by NGOs in 2018/2019, 11 per cent came from local private sources and 1 per cent came from an undisclosed foreign source. When the 88 per cent is broken down, it indicates that 49 per cent came from North America, 35 per cent from Europe, 2 per cent from within Africa and 1 per cent from Asia. The 2021 Annual Report of Msichana Initiative, which championed *Gyumi v Attorney General*, reveals that it is funded by organisations such as the Segal Family Foundation, Planet Wheeler Foundation, UN-Women, the French Embassy in Tanzania, Karimjee Jivanjee Foundation, Foundation for Civil Society and the Open Society Initiative for Eastern Africa.

V. Conclusion

Are reforms that seek to conform agrarian norms with modernity necessarily a bad thing? Obviously, the answer cannot be affirmative. However, as far as Africa is concerned, the word "post-colonial" does not mean a decisive break with the past. The reality of coloniality—that is the persistent patterns of power and philosophy created by colonialism—underlies the liberal pressure in the continent. Coloniality influences the normative behaviour of Africans in conscious and unconscious ways. Here, NGOs play an influential role. In 1994, *Africa World Review* published a special issue on "NGOs and the recolonisation process". Its editorial revealed a "new strategy of global control, which now places less emphasis on the state and prioritises direct influence and control over communities through funding NGOs".[120] In fact, development assistance from the Global North has become so institutionalised that Africans have assumed ownership of neoliberal policies. Harrison observed that "rather than conceptualizing donor power as a strong external force on the state, it would be more useful to conceive of donors as part of the state itself".[121] Through their liberalist legislative and judicial reforms of private laws, African states create new values and norms that steadily displace the foundational values of their indigenous laws.

The neoliberal pressure in Africa is intriguing because of its ability to affect both authoritarian and democratic regimes, as well as its failure to induce meaningful economic development. This is evident in the absolute monarchy of Eswatini and the economic success story of Botswana. Arguably, Botswana has fared better than other African states in a developmental sense because its landlocked, territorially small nature exempted it from much liberal pressure.[122] In fact, Botswana has been accused of being a "gate-keeping state" because it operates a regulatory

120 *Africa World Review*, "NGOs and the Recolonisation Process" Special theme issue (London: Africa Research and Information Bureau, 1994), 5.

121 Graham Harrison, "Post-conditionality Politics and Administrative Reform: Reflections on the Cases of Uganda and Tanzania" (2001) 32:4 *Development and Change* 657–679.

122 Ian Taylor, "Botswana as a 'Development-oriented Gate-keeping State': A Response" (2012) 111:442 *African Affairs* 466–476, at 474.

economy that does not emphasise "the development of private property rights and an open market".[123] At independence, it had comparatively very few European settlers, with only 3 per cent of agricultural land under European control. Thus, scholars argue, this relative lack of European influence allowed Botswana's political and economic structures to enjoy stability and growth in both the colonial and postcolonial eras.[124]

Ultimately, one must be concerned about the endgame of family law reforms in Africa. Drawing from the global history of conquests, imposition of laws and eventual integration of imposed and indigenous laws, the interventions of African states in the private realm portend both perils and opportunities. On the one hand, law reforms present danger because of the tendency of indigenous laws to disappear after a long period of subjection to colonially imposed laws.[125] For example, as far back as 1986, the Australian Law Reform Commission noted that "true 'tribal law' is probably dead everywhere".[126] Several factors aid the disappearance of indigenous laws. The most notable are their oral nature, their subordination to state laws and their perception by state policymakers as "formless . . . and unfitted to the needs of the modern nation state".[127]

On the other hand, state interventions in the private sphere present opportunities for constructing new African legal identities. These identities should be founded on the communal values of indigenous laws rather than the individualistic values of Western laws.[128] For these legal identities to be formed, law reforms must be preceded by field investigations, accompanied by sound theoretical frameworks and produced from meaningful consultations with affected communities. Research shows that some reforms have little practical effect in rural communities because of a lack of awareness and poor resonance with local realities.[129] This dissonance between reforms and cultural realities implies that reformers run the

123 Ellen Hillbom, "Botswana: A Development-oriented Gate-keeping State" (2012) 111:442 *African Affairs* 67–89 at 69. For a rebuttal, see Taylor, "Botswana" (n. 122).

124 Daron Acemoglu, Simon Johnson and James Robinson, "An African Success Story: Botswana" in Dani Rodrik (ed), *In Search of Prosperity: Analytic Narratives on Economic Growth* (Princeton, NJ and Oxford: Princeton University Press, 2003), 80–119; and Christopher Colclough and Stephen McCarthy, *The Political Economy of Botswana: A Study of Growth and Distribution* (New York: Oxford University Press, 1980).

125 Kenneth Brown, "Customary Law in the Pacific: An Endangered Species" (1999) 3:2 *Journal of South Pacific Law* 1–9.

126 Australian Law Reform Commission, Report on the Recognition of Aboriginal Customary Laws, Report 31, June 1986, Submission 33, Strethlow TJH, available at https://www.alrc.gov.au/publication/recognition-of-aboriginal-customary-laws-alrc-report-31/ (visited 15 April 2022).

127 *Ibid*., 2.

128 An example of an indigenous value that is gaining widespread global acceptance is Ubuntu. See, for example, Thaddeus Metz, "Ubuntu as a Moral Theory and Human Rights in South Africa" (2011) 11:2 *African Human Rights Law Journal* 532–559.

129 Abby M Richardson, "Women's Inheritance Rights in Africa: The Need to Integrate Cultural Understanding and Legal Reform" (2004) 11:2 *Human Rights Brief* 19–22. See also Franz von Benda-Beckmann, "Scapegoat and Magic Charm: Law in Development Theory and Practice" in Mark Hobart (ed), *An Anthropological Critique of Development* (London and New York: Routledge, 2002; 1st ed., 1993), 128–146.

risk of producing zombie laws.[130] However, law reforms that adequately incorporated local inputs and were implemented with sensitivity to the realities of their target communities appear to spawn positive attitudinal changes.[131] The latter is the way forward for handling the problematic nature of legal pluralism in sub-Saharan Africa.

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130 A good example of blatant disconnection between law and practice is the financial limit placed by legislation on bride wealth payment in some regions of Nigeria.

131 Christo Botha and Bernard Bekink, "Law Reform in South Africa: 21 Years since the Establishment of a Supreme Constitutional Dispensation" (2018) 6:2 *Theory and Practice of Legislation* 263–289.