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The Coloniality and Evolution of African Customary Law

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Abstract

African customary law (ACL) is an important legal system that regulates the lives of many people. The colonial origins of this body of law meant that it hasn't always served the justice needs of Africans. Coloniality and Upendra Baxi's postcolonial legalities are useful to make sense of ACL, particularly *settler colonialism*. This paper is focused on the gendered implications of ACL, particularly male primogeniture. The paper examines the application of repugnancy clauses, and the treatment of male primogeniture in *seven* former British settler colonialisms in Southern, Eastern and West Africa – namely Zimbabwe, South Africa, Kenya, Uganda, Tanzania, Ghana and Nigeria. The various cases discussed show the historical gendered implications of ACL, the contradictory or absurd applications of repugnancy clauses, and its evolution under new constitutional orders and judicial reforms in the last two decades.

Key words

African Customary Law; coloniality; postcolonial legalities; repugnancy clauses; male primogeniture; constitutional reforms; judicial reforms

Resumen

El derecho consuetudinario africano es un importante sistema jurídico que regula la vida de muchas personas. Los orígenes coloniales de este cuerpo jurídico hicieron que no siempre haya servido a las necesidades de justicia de los africanos. La colonialidad y las legalidades poscoloniales de Upendra Baxi son útiles para dar sentido al Derecho consuetudinario africano, en particular al colonialismo de colonos. Este artículo se centra en las implicaciones de género del Derecho consuetudinario africano, en particular la primogenitura masculina. Examina la aplicación de las cláusulas de repugnancia y el tratamiento de la primogenitura masculina en siete antiguos colonialismos de colonos

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británicos en África meridional, oriental y occidental: Zimbabue, Sudáfrica, Kenia, Uganda, Tanzania, Ghana y Nigeria. Los diversos casos analizados muestran las implicaciones históricas de género del derecho consuetudinario africano y las aplicaciones contradictorias o absurdas de las cláusulas de repugnancia, así como su evolución bajo nuevos ordenamientos constitucionales y reformas judiciales en las últimas dos décadas para revertir su discriminación de género.

Palabras clave

Derecho consuetudinario africano; colonialidad; legalidades poscoloniales; cláusulas de repugnancia; primogenitura masculina; reformas constitucionales; reformas judiciales

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1. Central arguments

The place of ACL is of immense importance. It regulates the lives of many people. The paper contributes to the study of legal pluralism in African legal systems. The plurality of legal regimes has had tremendous (and devastating) effects on gender relations. The treatment of male primogeniture and the contradictory and sometimes absurd effects of repugnancy clauses for African women in several African jurisdictions in East, Southern and West Africa provide the basis for the case law discussed in the paper.

Coloniality is a central focus elaborated in section two, specifically on how it continues to permeate postcolonial legal norms and processes. Upendra Baxi's theorisation of postcolonial legalities is instructive – which took three forms. The first was a total transplantation of laws into colonies. The second was a *tolerance* of indigenous legal systems alongside *imported* colonial (English) laws, creating a dual legal system of English and customary law – the latter depending on the extent of the *tolerance*. The third form of postcolonial legality was *settler colonialism* – this was applied in many parts of Africa. *Settler colonialism* was characterised by different models of governance to manage vast colony countries, chief among them indirect rule through chieftaincy (Chanock 1989). Chieftaincies involved a "patriarchal coalition" between traditional male elders (chiefs) who ruled in collaboration with colonial authorities (who were also all male) and extended into ever increasingly wider spheres of authority than was previously envisaged in traditional authority, such as in marriage, divorce, property inheritance, and custody of children (Parpart 1988, Chanock 1989, Oyewumi 1997). These were all governed in *native courts* from the perspective of colonial officials (such as a common law lens that was based on British morality and norms of justice through the (in)famous *repugnancy clauses*) (Chanock 1989, Owino 2016) and that preserved African traditional elders' *male interests* (Parpart 1988). One such way in which this was manifested was the rule of *male primogeniture.*

Section three is focused on examining literature on the historical gendered effects of ACL, such as Oyewumi (1997) for West Africa (Nigeria), Chanock (1982, 1985, 1989, 1989) and Parpart (1988) for Southern Africa, Mbilinyi (1988, 1989), Oboler (1985), and Lonsdale and Berman (1987) for East Africa.

In section four, I examine the colonial and post-independence application of ACL, and its evolution in new constitutional orders in the last two decades. I systematically analyse case law on the application of repugnancy clauses and the treatment of male primogeniture in former settler colonialisms in East Africa (Kenya, Uganda and Tanzania), West Africa (Ghana and Nigeria), and Southern Africa (Zimbabwe and South Africa). These countries are former British settler colonies whose gendered colonial relations through African Customary Law are well theorized and considered further in this paper. Older cases showcase the gendered effects of ACL, such as *Venia Magaya* in Zimbabwe in 1987. Contemporary case law shows a consistent trend of revamping ACL towards democratising it and suiting it to Africans' contemporary needs.

The gendered effects of ACL continued long after independence todate – I use Upendra Baxi's lens of postcolonial legalities to make sense of these enduring colonial legacies of ACL. The first is the preservation of *repugnancy clauses* in the laws of postcolonial states, such as through the retained statutes of general application, like Judicature Acts. What this has meant is that ACL continued to be interpreted and applied from the lens of

British morality and norms of justice (common law) long after independence. The second form of postcolonial legality is the retention of *exemption clauses* in equality and non-discrimination provisions of independence constitutions. Postcolonial courts were *unable* to peer into personal moral codes (such as ACL, Hindu Codes, and Mohammedan Codes) to strike down discriminatory customs or practices.

The sum consequence of these postcolonial legalities is that ACL was stripped of its capability of reform and development.

Recent constitutional and judicial reforms in various African countries have tried to cure this postcolonial malaise is concerned in several ways. The countries under study in the paper are those who have gone through these reforms in the last two decades or so with the aim of revamping the legal and justice system to align them more with African peoples' interests. Good examples are Zimbabwe in 2013, Uganda in 1995, Tanzania in 1996, South Africa in 1995, and Kenya in 2010.

The first is to install ACL as a source of law in its own right. The second is to remove *exemption clauses* in equality and non-discrimination clauses in the new constitutional orders. This means that courts can strike down African customs that are discriminatory, while at the same time providing for the right to a positive enjoyment of one's culture. The third constitutional reform is to provide courts with authority and mechanisms to develop customary law so that it affords the highest purposes of the Constitution, including the justice needs of the African people, and protecting fundamental rights and freedoms. Finally, new African constitutional orders have included traditional justice systems as part and parcel of the judicial system, so that courts are required to encourage the use of traditional justice systems as alternative dispute resolution mechanisms – the word *alternative* not necessarily to mean less important.

There have also been studies to revitalise and re-democratise traditional dispute resolution mechanisms disrupted by apartheid in South Africa (Khunou 2009). Some African countries such as Kenya include traditional dispute resolution mechanisms as part of the justice system and have mechanisms to ensure participation by women.Judicial reforms are geared to reinstating and decolonising systems to *indigenise* them, which is not a simple exercise after decades of erosion. Kenya's alternative justice policy of 2020 is an exemplary example. This has great implications for gender justice.

To demonstrate all these judicial mechanisms of *revamping* ACL in new constitutional orders, I systematically examine constitutional and statutory frameworks and case law from former British *settler colonialisms* in Southern Africa (Zimbabwe and South Africa), East Africa (Kenya, Uganda and Tanzania), and West Africa (Ghana and Nigeria). More recent case law showcase a trend in which courts are increasingly more willing to peer into ACL discriminatory personal codes. This is a sharp departure from the hands-off approach in previous historical cases.

Transforming ACL promises an avenue for redressing discrimination against women.

There are inherent dangers that must be heeded in seeking to transform ACL, however. The first is the indeterminate nature of customary law - how do the courts know what the content of a customary practice is at any given time? The South African Constitutional Court grappled with this question in *Bhe.* The second threat is the reading of customary law from a common law lens. This was the case with British colonial courts

particularly, in cases such as *Rex v Amkeyo* (1917) - African customary marriage and the practice of bride price was compared against the standards of a "civilised society", where the practice of bride price could only be construed as wife purchase. The third threat is the development of customary law through the legislative function, rather than organically through modern social contemporary norms and usage. The Constitutional Court of South Africa was alive to this in *Mthembu v Letsela (*1997, 1998, 2000), *Shilubana v Nwamitwa* (2008) ZACC 9, *Pilane & Another v Pilane & Others* [2013] ZACC3, and *Mayelane v Ngwenyama [2013] ZACC 14.*

These threats suggest that the need for ACL to develop organically whilst also ensuring that it conforms to liberal constitutional values of democracy, equality, and non-discrimination. Liberal values are also in and of themselves arguably not part of indigenous African culture but rather imposed as part of colonial and neo-colonial projects. I acknowledge the complexity of this oxymoron in postcolonial contexts. I also acknowledge the oxymoron of discussing ACL as if its imposition was devoid neither of colonial influence nor indigenous precolonial origins. We could never talk purely of African customs, or of an independent process of a colonial imposition of a distinctly new legal system of ACL without acknowledging the role of indigenous power relations. I have instead focused on carefully making a case for a colonial creation of ACL that has been a site of African women's oppression.

But perhaps a further question is whether customary law can regulate the public sphere – in other words, why was it relegated to the private sphere? Cases on the customary practice of compensation for homicide give us one such glimpse into how customary law was used to solve a homicide. To what extent could customary law regulate land disputes for instance, not just in family property disputes but also intercommunity disputes, and those between communities and the state? One may wonder whether the colonial project maintaining a very neat divide between the public sphere for colonial policy on land and the political economy endures to date, kept alive by international neoliberal institutions that permeate state structures and everyday personal life to sustain a global political economy in which land and labour are precious commodities.

I try to address these threats and questions in the rest of the paper, but overall they suggest a need for a wholesale *indigenisation* or *decolonising* justice systems in Africa, beyond ACL (Buur and Kyed 2007; Khunou 2009). In other words, *revamping* ACL should be viewed as part and parcel of a wider judicial discourse and project of *decolonising* justice systems so that they serve the needs of Africans, not just consolidating a colonially imposed justice system. This is the subject of a different paper beyond the scope of this paper.

2. Coloniality, African Customary Law and Postcolonial Legalities

Coloniality has been defined and theorised as the enduring aftermaths of that process of colonialism (Tamale 2020) - a concept related to colonialism but goes beyond the mere acquisition and political control of another country, as an ideological system, it explains the long-standing patterns of power that resulted from European colonialism, including knowledge production and the establishment of social orders" (Tamale 2020, xiii). Sabelo Ndlovu-Gatsheni defines coloniality similarly as the "invisible power structure that

sustains colonial relations of exploitation and domination long after the end of direct colonialism" (Ndlovu-Gatsheni 2012).

The coloniality of law in Africa involved three dimensions, well theorised by Upendra Baxi as postcolonial legalities (Baxi 2000, 540-555).

The first form of postcolonial legality is the extreme form of the direct transplantation of laws into African countries. A good example is the shipment of laws to Mozambique from Portugal - like wine or wool as colonial territories were regarded as *ne loi, ne roi, ne foi* – without law, without order and without faith (Sachs and Welch 1990, 3). Traditional leaders were seen as part and parcel of indirect rule to reach the people through these "shipped laws" (Buur and Kyed 2007).

The second form of postcolonial legality involved the toleration and begrudging indifference to indigenous legal traditions – a form of colonial law reform where civil and criminal law were codified from common law in Britain.

The third form of postcolonial legality involved *settler colonialism* in many parts of Africa. The British presence in these vast African colonies was small, and therefore no capacity to administer them all. Colonial regimes invented various devices of governance, including indirect rule with the continuation of African custom. How much of African custom that was allowed to exist depended on the English Law Extent of Application Act, which was applied to all British colonies. The Act imported English law – common law, statutes of general application, and doctrines of equity. This resulted in two legal systems – English law, and ACL, with the caveat that any custom (law) that conflicted with English law is invalid. It is on this basis that many African customs were struck down in the courts based on repugnancy clauses. English common law remained the preserve of the white minority settlers.

Chieftaincy as a device of indirect rule was the result of complex and contradictory negotiations of interests between colonial authorities and indigenous male elites (Mamdani 1996). The pacts between indigenous male elites and colonial authorities have been termed as a "patriarchal coalition" that created a colonial and postcolonial political economy along gender, race and class lines that has had an enduring impact to date (Parpart 1988, Chanock 1989). Not only is ACL a colonial invention but has also had to be interpreted in the native courts from colonial authorities' point of view in the colonial native courts (Chanock 1989).

The invention of ACL had a particularly devastating effect on women: "[A]t a time when the state was extending its tentacles to an increasing number of aspects of life (…) with much more power than was vested in them traditionally (…) as the British created their own brands of 'traditional chiefs' (…) who lost their sovereignty while increasing their powers over the people (…) thus male chiefs were invested with more power over the people while female chiefs were stripped of power" (Oyewumi 1997, 125-126). Martin Chanock writes that

> British officials… where they came across a chief, intended to invest in him retroactively not only with a greater range of authority than he had before but also with authority of a different type. There seemed to be no way of thinking about chiefly authority… which did not include judicial power. (Chanock 1982, 53-67)

Colonial native tribunals were set up to administer disputes on increasingly personal matters (marriage, divorce, inheritance, custody of children), overseen by colonial administrative officers who were not qualified judicial officers. Martin Chanock (1985) details how the existence of custom was a question of fact – colonial administrators worked hand in hand with indigenous elders for their ascertainment. Women were often *peripheral* – willing or unwilling participants in a quasi-judicial system in which they had little say. In *Lolkilite ole Ndinoni v Netwala ole Nebele* (1952), Sir Edward CJ (Uganda) held in the East African Court of Appeal that native tribunals were not proper courts. Native tribunals were replaced in 1951 by African Courts (and later magistrates courts) to deal with personal or civil matters – although rules of fair hearing applied, ACL was still treated as a matter of fact that had to be evidenced by whomever claims the customary practice, sometimes aided by expert witnesses – usually male elders (Owino 2016, 154). This meant that ACL was treated by colonial authorities as inferior, rather than a body of law in its own right.

In this way, ACL was "created" as a rigid personal code for indigenous Africans, supposedly incapable of evolution (Ozoemena 2014). ACL was deprived of its processes of development. It lost its "natural" mechanisms of reform. The problem of ACL was its rigid ascertainment, and its reliance on men and colonial officials (who were also men) to interpret it, giving rise to a version of ACL that favoured men.

3. African customary law and African women

Oyèrónkẹ́ Oyěwùmí's seminal paper on the colonial "invention of woman" is one of the foremost labelling of the gendered implications of law and colonialism in Africa. (Oyěwùmí 1997). Oyěwùmí starts with the assertion that the process of colonisation was gendered, in that it "impacted men and women in similar and dissimilar ways" (Oyěwùmí 1997, 121) as colonial authorities determined policy based on male and female differentiation (Oyěwùmí 1997, 122). Oyěwùmí argues that this male and female differentiation was also racial in that

> in the colonial situation, there was a hierarchy of four, not two categories. Beginning at the top, these were: men (European), women (European), native (African men), and Other (African women). Native women occupied the residual and unspecified category of the Other. (Oyewumi 1997, 122)

African women faced multiple oppressions in a two-fold process of racial inferiorisation and gender subordination that excluded them from the newly created colonial public sphere (Oyěwùmí 1997, 122-124), as they were simply "bypassed by the colonial state in the arena of politics" (Oyěwùmí 1997, 124), that "the basis for this exclusion was their biology, a process that was a new development in Yoruba society" (Oyěwùmí 1997,124), in which "females were simply categorised as 'women' and rendered ineligible for leadership" (Oyěwùmí 1997, 124).

Oyěwùmí argues that "the creation of 'women' as a category was the very first accomplishment of the colonial state" (Oyěwùmí 1997, 123), followed by a complete "transformation of state power to male-gendered power (…) accomplished at one level by the exclusion of women from state structures...the colonial state was patriarchal in many ways (…) colonial personnel was male (…) the administrative branches, which embodied power and authority, excluded women by law" (Oyěwùmí 1997, 124-125).

Oyěwùmí refers to Helen Callaway who writes that even for British women settlers, the Colonial Service was

> a male institution in all its aspects: its 'masculine' ideology, its military organisation and processes, its rituals of power and hierarchy, its strong boundaries between the sexes. It would have been 'unthinkable' in the belief system of the time even to consider the part women might play, other than as nursing sisters. (Callaway 1986)

Colonial English authorities were not concerned with the human rights of women, but on English morality. At the time of colonization in the 1800s, common law was after all dominated by patriarchy. The most poignant patriarchal common law norm at the time was the doctrine of *coverture,* in which the existence of a woman was subsumed in marriage, or at least incorporated and consolidated into that of her husband, through which she could perform everything under his wing, protection and cover. English women could not own property until the early 1920s. A "patriarchal coalition" (Parpart 1988) between colonial masters and these "traditional" chiefs was forged to create ACL as a tool for social control of women (Chanock 1982, 1985, 1991, O'Rourke 1995). Women were excluded from colonial dispute adjudication systems that dealt with increasingly personal matters of marriage, divorce, adultery, and pregnancy, but in a way that was disadvantageous to women (Oyěwùmí 1997, 126).

From a political economy viewpoint, ACL was not only a creation of the colonial masters not only to facilitate the capitalist interests of the colonial masters (Snyder 1981a, Fitzpatrick 1980, 1983; Snyder 1981b), but also to preserve the interests of traditional male African elders of ownership and control of land (Chanock 1991, O'Rourke 1995), and the social control of women's labour and sexuality (Chanock 1982, 1985, 1991, Parpart 1988, Lovett 1989, Mbilinyi 1988, 1989). Customary law was therefore a manifestation of the way in which capitalist legal relations permeated traditional legal orders (Snyder 1981a), and the symbiosis of capitalist and traditional modes of production (Fitzpatrick 1980, 1983). This symbiosis of traditional legal orders and western capitalist relations had particularly adverse effects on African women as they were displaced from the traditional land usage system through this synthesis (Lovett 1989, 25, Stewart 1993, 232). In this way, women were controlled through restriction of their movement from rural to urban areas, restriction of their urban economic activities, and marriage (Parpart 1988, 32-37, Mbilinyi 1988, 7-11, 1989, 125).

ACL cannot be divorced from the wider coercive colonial tools of social control where women's reproductive labour was crucial to the colonial capitalist economy particularly in urban centres. Ambreena Manji's "Imagining Women's Legal World" is key for making sense of women and law in the African context from a legal pluralist paradigm (Manji 1991). ACLHistorians, legal anthropologists and lawyers have taken pains to describe the paradoxes and complexities of African women in a colonial and postcolonial political economy of legal pluralism.

There was a strong colonial need to ensure that women and children do not abandon their native tribal home by relying on the traditional authority of kinship (Chanock 1985) to restrict women's movement, backed by state law (Oboler 1985, Lonsdale and Berman 1987, Parpart 1988). Whilst indigenous elders were concerned with maintaining pre-colonial social offerings, colonial authorities were concerned with controlling migration to urban areas, where migrant male workers served the colonial capitalist economy and

were subject to more and more state control, and less and less traditional authority (Manji 1999 444). Lovett (1989), Parpart (1988), Oboler (1985), and Mbilinyi (1989) detail the coercive techniques employed by the colonial state and chiefs to restrict women's movement and to exert social control over them. For instance, women required the written permission of the chief and to travel only if they had a marriage certificate (Parpart 1988). Customary laws of marriage were created to curb marital breakdown and sexual waywardness (Chanock 1985, Mbilinyi 1989).

British colonial officials were mostly concerned with standards of British morality embodied in common law and struck African customs that they deemed repugnant to justice and morality. Good examples are *Rex v Amkeyo* (1917) in Uganda, and *Lolkite ole Ndinoni v Netwala ole Nebele* (1952) in Kenya. The East African Court of Appeal (as it then was) declared the customary practices of polygamy and bride price in *Amkeyo* repugnant to justice and morality and could not be considered a marriage but merely "*wife purchase*." In *Lolkite*, the EACA struck down the Maasai customary practice of payment of compensation for homicide.

Postcolonial or post-independence courts continued to either apply repugnancy clauses or to leave discriminatory African customs and other personal codes intact due to exemption clauses within the equality and non-discrimination constitutional provisions.

4. African Customary Law in new constitutional orders

A key achievement on the African continent as far as women's rights and welfare are concenrned has been the Maputo Protocol to the African Charter on the Rights of Women in Africa, which has provided African courts with context-specific application of women's rights on the African continent, over and above those of the Convention on the Elimination of Discrimination Against Women (CEDAW) (Banda 2006, Nyamu-Musembi 2013). International human rights norms have been transplanted into constitution reform projects over time, described by Katrin Seidel as "rule of law translation projects" involving technologies of normative knowledge transfer (Seidel 2017). International and local human and women's rights activists take up these international women's rights norms and agitate for their inclusion and protection as part of constitutional reform agendas (Mutua 2006).

These widescale constitutional reforms involve tightening rule of law and integration of international human rights in new constitutional orders, combined with institutional and judicial reforms. These reforms have seen to it that courts are having to pay attention to discrimination that has been sanctioned for a long time under the colonial legacy of ACL and constitutional exemption clauses. These new constitutional frameworks contain clauses that specifically remove colonially codified exemption clauses. Kenya, Uganda, Malawi, Ghana and Zimbabwe are some of the countries that have undergone wide-scale constitutional reforms and have removed these exemption clauses, while the constitutions of Botswana, Zambia, and Lesotho still contain these exemption clauses (Nyamu-Musembi 2013, 199-200).

Although colonial residual repugnancy clauses are still present in some retained colonial statutes of general application, they have been amended to suit the contemporary justice needs and interests of Africans. A good example is Kenya's Judicature Act, enacted in 1967 but recently amended in 2018. In the new Act, "common law, doctrines of equity

and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit abs subject to such qualifications as those circumstances may render necessary."

In the rest of this section, I describe the cumulative effect that these new constitutional orders and judicial reforms have had on the evolution of ACL to transform its historical gendered discrimination, and absurd applications of repugnancy clauses.

4.1. Southern Africa

4.1.1. Zimbabwe

Zimbabwe's independence constitution 1980 at clause 23 contained this exemption clause:

> Nothing contained in any law shall be held to be in contravention of subsection 1(a) to the extent that the law in question relates to any of the following matters – (a) adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law; (b) the application of African customary law in any case involving Africans or more persons who are not Africans where such persons have consented to the application of African customary law in that case.

Based on this clause,Venia Magaya's discrimination claim in the Supreme Court could not be addressed**.** In *Magaya v Magaya* (1980), Venia Magaya was disinherited from her father's estate according to Shona customary rule of male primogeniture and lived the rest of her life in destitution. Justice Muchechetere relied on Shona and Ndebele customary law (Goldin and Gelfand 1975) to hold that inheritance is based on a patrilineal system where the estate is passed on to a male heir, often the eldest son. As Venia's father was Shona, the judge relied on past decisions in which it was held that the customary law of the Shona preferred male heirs to female heirs. Some of these past decisions were *Matambo v Matambo* (1969); *Vareta v Vareta* (S-126-90); and *Mwazozo v Mwazozo* (S-121-94).

Magaya v Magaya was significant because in the same judgment, the Supreme Court overruled past judgments relating to the Legal Age of Majority Act 1982 to remedy the situation in customary law where women in Zimbabwe were treated as perpetual minors. The 1982 law reform meant that women could own and inherit property and sue in their own person, and was confirmed in the decisions of *Chihowa v Mangwende* (1987), and *Katekwe v Muchabayiwa* (1984). *Chihowa* concerned an inheritance dispute and Shona customary law where the community court appointed the eldest daughter as heiress, whilst *Katekwe* was a seduction case in which it was held that a woman who had been seduced could sue for damages under common law for loss of *roora/lobola.* The Supreme Court in *Magaya* held that *Chihowa* and *Katekewe* were wrongly decided, that inequities are justified by the patriarchal nature and patrilineal tradition of the society, and that these inequities are not remedied by the Legal Age of Majority Act but are in fact sanctioned by the Constitution.

Human rights activists decried *Magaya* and similar cases from the Supreme Court as a backlash against so many gains for the improvement of women's legal status in Zimbabwe since the 1982 Legal Age of Majority Act (Matetakufa 1999, IWRAW 1999, Knobelsdorf 2006).

Zimbabwe's exemption clause has now been removed in recent constitutional reforms culminating in the 2013 Constitution of Zimbabwe. Thus, the courts have been upholding widows' inheritance rights to inheritance from their husbands' estates, such as in *Chiminya v Estate* (2015), where the widow (only surviving spouse) had been left out of her husband's will, and the court declared the will invalid.

4.1.2. South Africa

Karl Klare's and Dennis Davis' essay titled *Transformative Constitutionalism and the Common and Customary Law* (Davis and Klare 2010) placed great emphasis on the transformation of legal methodologies for social transformation. The courts are charged with the responsibility of transforming common law and customary law (Davis and Klare 2010, Claassens and Budlender 2013, Ozoemena 2014).

In the cases of *Alexkor* and *Bhe,* the Constitututional Court of South Africa laid down five principles to be applied in developing customary law. First, customary law must be interpreted purposively to align with the goals, purposes and provisions of the Constitution, such as democracy, fundamental rights and freedoms, and rule of law. Secondly, common law and customary law are two distinct forms of law – the validity of customary law must not be determined by reference to common law. Thirdly, customary law evolves and adapts to the changing needs of the society, hence it is living law. Fourth, caution must be exercised in relying on textbooks and old authorities on customary law as they often distorted the true customary law. This distortion goes beyond the tendency to view indigenous law through the eyes of legal conceptions that were foreign to it. The distortion also arose from political assumptions and purposes which were dominant under colonialism and apartheid - from a failure to understand the true nature of the phenomenon which was being observed, to a failure to appreciate the changing nature of customary law (Claassens and Budlender 2013, 77-78). Fifth is a contextual approach to the realisation of rights, which considers poverty and inequality, and its real-life effect (Davis and Klare 2010, 494-496). Subsequent cases have applied these five principles, such as *Mayelane and Shilubana.*

The Constitutional Court of South Africa has worked to develop customary law to align it with liberal constitutional values, and to contemporary development of society. The Constitutional Court abolished the customary practice of *male primogeniture* in *Bhe & Others v Magistrate*, and *Khayelisha & Others* (2004) ZACC 17, and *Shilubana v Nwamitwa* (2008) ZACC 9. *Bhe* was an amalgamation of three cases, including *Charlotte Shibi v Mantabeni Freddy Sithole and Others* (2005 (1) SA 580 (CC), and *The South African Human Rights Commission and Another v President of the Republic of South Africa and Another* (2005 (1) BCLR 1 (CC) (15 October 2004).

In *Bhe*, Ms Bhe was a domestic worker who was in a relationship with a deceased man with whom he had two minor daughters, Nonkululeko Bhe, and Analisa Bhe. The deceased was a carpenter, and they all lived in temporary informal shelter in Khayelitsha, Cape Town. The deceased obtained state housing subsidies and purchased property and building materials to build a house. He died before he could build the house. At the time of his death, Analisa (the youngest) was living with him and Ms Bhe, and Nonkululeko were living with the deceased's father. The deceased's father lived in Eastern Cape but was nonetheless appointed representative and sole heir of the

deceased's estate by the Magistrate in Kayelitsha. The deceased's father wanted to sell the estate.

In *Shibi,* Charlotte Shibi's brother Daniel Solomon Sithole died without a will in 1995 in Pretoria. Daniel was not married, had no partner under customary law, no children, and no parent or grandparent. Their nearest male relatives were two male cousins Mantabeni Sithole and Jerry Sithole. The magistrate appointed Mantabeni Sithole as representative of Daniel's estate. Sithole's relatives complained that he was misappropriating estate funds. The magistrate then appointed an attorney, Mr. Nkuna, to administer the estate. Mr. Nkuna awarded the remainder of the estate all to Daniel's second cousin Jerry Sithole. Mr. Nkuna then wound up the estate.

In *South African High Commission and Another v President of the Republic of South Africa and Another,* the South African Human Rights Commission and the Women's Legal Centre Trust asked the Constitutional Court to declare section 23 of the Black Administration Act (Act 38 of 1927) unconstitutional. This Act deals exclusively with the intestate estates of deceased Africans and excludes intestate estates of deceased Africans from application of the (public) Intestate Succession Act (Act 81 of 1987). Section 23 of the Black Administration Act provides that intestate estates of deceased Africans are to be governed in accordance with Black law and custom, which is essentially that of male primogeniture – that property and heirship is devolved to the closest male relative. What this has essentially meant is that intestate estates of deceased Africans are excluded from public policy and principles of equality and non-discrimination under the Intestate Act. Section 23 of the Black Administration Act sets out the rule of primogeniture thus:

> (1) 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.
> (2) All land in a tribal settlement held in individual tenure upon quitrent conditions by a Black shall devolve upon his death upon one male person, to be determined in accordance with tables of succession to be prescribed under subsection (10).

The removal of these tribal customary laws outside the realms of public policy can best be appreciated in cases in which South African courts declined to investigate the unfairness of African customary practices such as the rule of male primogeniture. In *Mthembu v Letsela (*2000), the Supreme Court of Appeal of South Africa declined a request to investigate this customary practice of male primogeniture to align it with public policy and the rules of natural justice.

The Constitutional Court agreed to declare section 23 of the Black Administration Act (Act 38 of 2017) unconstitutional and incompatible with constitutional values and principles of democracy, equality and nondiscrimination, including specific rights of women and children. In both *Bhe* and *Shibi,* the Constitutional Court ruled that "it would be just and equitable that the estates of the deceased devolve according to the Intestate Succession Act."

Shilubana concerned traditional authority. Ms Shilubana was appointed *Hosi* (chief) of the Valoyi traditional community in Limpompo on December 22, 1996. In 1968 when her father Hosi Fofoza Nwamitwa died, she was not appointed as Hosi as her father's eldest daughter, as succession to the chieftaincy was then governed by the rule of male

primogeniture where *hosi* could only be passed to eldest male heirs. As her father Hosi Fofoza died without a male heir in 1968, the chieftaincy was bestowed on her father's younger brother Hosi Richard. During the reign and with the consent and participation of Hosi Richard, the Royal family of the Valoyi community met on December 22 1996 and resolved to bestow chieftaincy on Ms Shilubana, on the understanding that "though in the past it was not permissible by the Valoyis that a female child be heir, in terms of democracy and the new Republic of South African Constitution it is now permissible that a female child be heir since she is also equal to a male child."

Hosi Richard died on October 1, 2001, and on 4th and 25th November 2001, the Royal Council of the Valoyi met and confirmed Ms Shilubana as Hosi. On September 16, 2002, Hosi Richard's eldest son Mr. Namwita challenged Ms Shilubana's chieftaincy in the Pretoria High Court where it was ruled in his favour, as he was Hosi Richard's eldest child. This decision was confirmed by the Supreme Court of Appeal. Ms. Shilubana appealed in the Constitutional Court.

The Constitutional Court upheld the decision of the Royal Council of the Valoyi to institute Ms Shilubana as Hosi, stating further:

> It is true that Ms Shilubana's installation leaves unanswered some questions relating to how the Valoyi succession will operate in the future. However, customary law is living law and will in future inevitably be interpreted, applied and, when necessary, amended or developed by the community itself or by the courts. This will be done in view of existing customs and traditions, previous circumstances and practical needs, and of course the demands of the Constitution as the supreme law.

Through these cases and others, the Constitutional Court signalled its intention to supportthe organic development of ACL to develop in line with contemporary times and constitutional liberal values of democracy, equality and non-discrimination. The Constitutional Court was very alive to the threat of using British standards of morality and justice in common law in adjudicating ACL, such as in *Bhe:*

> When dealing with indigenous law every attempt should be made to avoid the tendency of construing indigenous law concepts in the light of common law concepts or concepts foreign to indigenous law. There are obvious dangers in such an approach. These two systems of law developed in two different situations, under different cultures and in response to different conditions (…). However, because of our legal background and, in particular, the fact that indigenous law was previously not allowed to develop in the same way as other systems of law, the tendency may at times be unavoidable. But even then, common law concepts should be used with great caution in indigenous law. (Paragraphs 156-157)

Of particular concern to the South African Constitutional Court is the interchangeable usage of the concepts of "succession" and "inheritance" in common law, which have very distinct meanings in the context of ACL.

4.2. East Africa

4.2.1. Kenya

Kenya's 1963 independence constitution contained an exemption clause under its equality and antidiscrimination clause 26(4): "Subsection (1) of this section shall not apply to any law so far as that law makes provision- (b) with respect to adoption,

marriage, divorce, burial, devolution, of property on death or other matters of personal law; or (c) for the application in the case of members of a particular race ---, or tribe of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons."

Wives and daughters had been prevented from inheriting from their fathers' or husbands' estate, such as in *Mary Gichuru v Esther Gachuhi* (1998). A customary wife married alongside a wife married under the Christian marriage statute was not considered a wife for purposes of succession when she was left out of a will in *Re Ogola's Estate* (1978). The customary practice of woman-to-woman marriage among the Kisii of Kenya was struck down as repugnant to justice and morality in *Maria Gisege Anglo v Marcella Nyomenda* (1981).

The 2010 Constitution removed the exemption clause in its post-independence constitution and replaced it with a clause similar to sections 9 and 31 of the South African 1996 Constitution where the courts are charged with the duty to develop all laws to align with its liberal constitutional values, and contemporary times and practice. Courts are now required by the post-transition 2010 Constitution to develop (all) law to align with liberal constitutional values.

Kenyan courts have been re-evaluating customary practices with a view to uphold them but align them with human rights, and the contemporary circumstances of the people. Hence, the courts declared the practice of female circumcision among the Maasai as repugnant to justice and morality in *Katet Nhoe and Nalangu Sekut v R* (2010). The court upheld the younger woman's right to inheritance in a woman-to-woman marriage in *Monica Jesang Katam* in Mombasa (2010)ACL, even though the High Court had declared the practice repugnant to justice and morality in 1981 in *Maria Gisege Angoi v Macella Nyomenda.*

Cases on the customary practice of compensation for homicide are particularly interesting. In *Republic v Musili Ivia & Another* (2016), Musili Ivia and Mutinda Muli were accused of the murder of Dominic Mukungu Mutemia on January 23, 2016. Clan members of the accused and deceased persons approached prosecution counsel requesting to resolve the matter amicably outside the court, and later produced minutes of an agreement signed by both clans to the effect that the deceased's family will be paid blood money in the form of cows and bulls. The court endorsed the agreement of the two clans, endorsing the application of traditional dispute resolution mechanisms The judge stated: "I am also not aware of any written law or International Convention that prohibits the amicable settlement proposed. The victim is already dead, and close relatives agree to the settlement. I have not been told that there is any objection from the community or the public. I will therefore accord the clan settlement consideration in this matter."

These cases and others signal the Kenyan courts' willingness to develop ACL to align it with contemporary needs of Kenyans, and constitutional liberal values of democracy, justice, equality and non-discrimination.

4.2.2. Uganda

Uganda does not have a specific constitutional provision that empowers courts to adjudicate matters of personal law to scrutinise them against non-discrimination. Clause

33 (Constitution of Uganda 1995) provides specifically for women's rights, however. Women are regarded as equal to men and afforded affirmative action to redress past discrimination in history, tradition or custom. On this basis, Ugandan courts have been scrutinising customary law and practices to ensure adherence to clause 33 of the Constitution. A good example is the *Mifumi Case* (2014). *Mifumi* is a non-governmental organisation on women's rights in Uganda.

Mifumi filed a public interest petition in the Constitutional Court of Uganda concerning the customary practice of bride price. Bride price is widely practised custom by many African ethnic groups in Uganda. *Mifumi* asked the Constitutional Court to find the practice of bride price altogether unconstitutional. Mifumi took issue with two separate elements of bride price - the customary practice of demanding bride price from the groom's family as a precondition for marriage, and secondly demanding the refund of the bride price from the bride's family upon the breakdown of the marriage. *Mifumi* was of the view that the customary practice of bride price offends the Constitutional requirement that parties to a marriage shall enter it with free consent. *Mifumi* was of the further view that payment of bride price causes men to treat their wives as mere possessions and lowers women's dignity, since they are paraded like articles for sale in a market. The Constitutional Court of Uganda did not share *Mifumi's v*iews and dismissed the appeal.

Mifumi appealed

The Supreme Court expressed its discomfort with the term "bride price" and took issue with the historical treatment of the term and customary marriage in general by the colonial courts in *Rex v Amkeyo*. Chief Justice Sir Robert Hamilton had previously stated during the colonial period: "I know no word that correctly describes it [customary marriage]; 'wife purchase' is not altogether satisfactory, but it comes much nearer to the idea than that of 'marriage' as generally understood among civilized people." The Supreme Court was of the view that British colonial courts did not fully recognise customary marriage, and this was the position for a long time during colonial rule.

The Supreme Court in 2019 preferred other terms such as "dowry" or "marriage gifts" that convey the true meaning of the customary practice, rather than wife purchase. Such an alternative construction meant that the Supreme Court did not agree with *Mifumi's* view that the custom amounts to bride purchase in a market, or that the practice contributed to inequality and mistreatment of women in marriage. The Supreme Court also declined to hold and could not find evidence that the customary practice undermines the free consent of parties to a marriage.

The Supreme Court however agreed with Mifumi that the practice of returning dowry

> devalues the worth, dignity and respect of a woman (…) ignores the contribution of the woman to the marriage up to the time of its breakdown (…) she is not property that should be valued (…) refund of bride price is unfair to the parents and relatives of the woman when they are asked to refund the bride price after years of marriage. It is not likely that they will still be keeping the property ready for refund (…) the effect of the woman's parents not having the property to refund may be to keep the woman in an abusive marital relationship for fear that her parents may be put into trouble owing to their inability to refund bride price, or that her parents may not welcome her back home as her coming back may have deleterious economic implications for them.

One could only hope that the Supreme Court's consideration of the customary practice of bride price (or dowry) is the beginning of a willingness on the part of African judiciaries to align customs that demean women's dignity.

4.2.3. Tanzania

The Laws of Inheritance of the The Declaration of Customary Law 1963 that concerns intestate inheritance among patrilineal communities in Tanzania makes a distinction between self-acquired land, and family and clan land. Widows are excluded from inheriting self-acquired land, and daughters can inherit but not dispose of family land.

In *Bernados Ephraim v Holaria d/o Pastory and Gervazi Keizilege,* Holaria Pastory inherited some clan land from her father by way of a will. As she was getting old, she sold the clan land on 24th August 1988 to Gervazi Kaizilege. On 25th August 1988, Holaria's nephew Bernados Ephraim challenged the sale in the local primary court, claiming that under *Haya* customary law, women have no power to sell clan land. The Primary/District Court dismissed Holaria's nephew's challenge and held that Holaria had rights under the Constitution to sell her land, and that her nephew could always redeem the land by way of repurchasing it. Holaria's nephew appealed to the High Court. The High Court agreed with the Primary /District Court and upheld Holaria's sale of the land as valid, dismissed her nephew's appeal and further directed her nephew to redeem the clan land by way of repurchasing within six months if he so wished. The High court found the position under *Haya* customary law correct and in line with the Laws of Inheritance of the Declaration of Customary Law: "Women can inherit, except for clan land, which they may receive in usufruct but may not sell. However, if there is no male of that clan, women may inherit such land in full ownership". The High Court found discriminatory the rule of male primogeniture. The Court of Appeal found the Declaration discriminatory and inconsistent with the Constitution's prohibition of discrimination based on sex.

4.3. West Africa

4.3.1. Ghana

Ghana's 1957 Independence Constitution and 1960 Republican Constitution did not contain a Bill of Rights. Customary law was stated to be part of the laws of Ghana. Ghana transitioned to a one-party state through the 1964 Constitution, which underwent several changes in periods of unstable political environments and military dictatorships between 1966 and 1981. The 1979 Constitution clause 31 exempted personal matters from the non-discrimination protection of the Constitution. Constitutional reforms in the 1990s towards a democratic state yielded the 1992 Constitution. The 1992 Constitution does not exempt personal matters and personal laws in its equality and non-discrimination provision in clause 17, and and empowers Parliament to enact laws "for matters relating to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law."

Two court cases reversed the customary rule of male primogeniture: *Akrofi v Akrofi*, and *Re Kofi Antubam (Deceased)*, both in 1965.

In *Akrofi*, Ms Akrofi instituted legal proceedings at the Jasikan Local Court seeking legal heirship to her father's estate. Upon the death of her father Mr Paul Kwasi Akrofi, his younger brother Bonifacious Kwaku (Ms Akrofi's uncle) was appointed supervisor of her father's estate. Ms Akrofi was an only child, while Bonifacious was the only male relative of the immediate family. He took over the estate but was not supporting Ms Akrofi and her mother, did not pay off the estate's liabilities, and was not accounting for the estate. The chief of Jasikan settled the matter out of court and determined that a woman cannot be successor to her father's estate.

The High Court held that Ms Akrofi was "within the range of persons (…)" entitled to succeed to her father's estate. The court could not find a custom that excluded women from inheritance, and stated: "… if there be such a custom and I do not so find, whereby a person is discriminated against solely upon the ground of sex that custom has outlived its usefulness and is at present not in conformity with public policy. Our customs if they are to survive the test of time must change with the times."

Re Kofi Antubam (Deceased) concerned the rule of male primogeniture in Akan customary law. The question was whether the widows and children could inherit the estate of the deceased. The court held that the widows and children not only had an interest in the properties of the estate, but also a right to be maintained from the estate. The court made observations regarding the development of customary law in contemporary society and that the customary rule of male primogeniture was out of sync with these contemporary realities:

> In the last quarter of the last century, customary law in Ghana has progressed and developed in accordance with the tempo of social, commercial, and industrial progress. So far as land tenure is concerned, farming rights have been converted into building and residential rights, customs which appear to be repugnant to natural justice, equity and good conscience have been gradually extinguished by judicial decisions. The then legislature played a less effective role in these spontaneous developments engineered by public opinion. The courts have embraced these developments without adhering strictly to the original customary rigid rules.

In this way, Ghana's judiciary signalled their commitment to develop ACL to redress gender discrimination occasioned by the customary practice of male primogeniture.

4.3.2. Nigeria

As a former British colony, Nigeria's colonial courts interpreted African customary practices on the basis of repugnancy clauses. Lord Atkin stated in *Eshugbayi Eleko v. Government of Nigeria* (1931):

> Their Lordships entertain no doubt that the more barbarous customs of earlier days may under the influences of civilization become milder without losing their essential character as custom. It would, however, appear to be necessary to show that in their milder form they are still recognized in the native community as custom, so as in the form to regulate the relations of the native community.

Earlier Supreme Court decisions during colonial rule established and solidified the rule of male primogeniture in property disputes revolving around deaths of husbands without a will, such as *Ugboma v Ibeneme & Another* under Igbo customary law, and

Suberu v Sunmonu, (1957) concerning Yoruba customary law applicable in six states of Western Nigeria, and *Nzekwe v. Nzekwe* (1989).

Recent court decisions in Nigeria have sought to reverse the male primogeniture rule to conform with international principles of equality and non-discrimination, such as in *Mojekwu v. Mojekwu*, *Ukeje v Ukeje*, and *Anekwe v Nweke*. In *Anwekwe* concerning Awka customary law, Mrs Maria Nweke was asked to vacate her house by her father-in-law after her husband's death, as she had no male child. In *Ukeje,* the Supreme Court granted inheritance rights to a Mr. Lazarus Ogbonnaga Ukeje, much to the annoyance and agitation of the Igbo community. These new emerging cases reversing male primogeniture are not necessarily a direct result of constitution reforms, but more to do with judicial efforts to align customary practices with international human rights principles.

5. Final thoughts: Coloniality, evolution and future of African Customary Law

ACL regulates the lives of many people but has had contradictory applications and gendered implications. Coloniality is a useful concept to make sense of the enduring colonial creation and consequences of ACL, particularly Upendra Baxi's postcolonial legality of settler colonialism (Baxi 2000). The focus here has been on former British settler colonialisms, which were too vast for British colonial authorities to administer. Various forms of colonial governance structures were introduced to manage these vast colonies, including indirect rule and chieftaincies (Mamdani 1996). These colonial devices outstretched the breadth of indigenous authority and permeated deeper into ever increasingly personal matters such as marriage, divorce, inheritance, and custody of children (Oyewumi 1997).

ACL has been theorised as a "patriarchal coalition" between traditional elders and colonial authorities, as their interests coalesced to preserve traditional elders' male interests and British capitalist interests (Parpart 1988). At the time in the late 1800s, colonial authorities were not concerned with gender equality, as was the case back home in Britain. They were mostly concerned with morality, manifest through repugnancy clauses to strike down customs that were deemed repugnant to justice and morality. These were however British standards of justice and morality embodied in common law. Nowhere has this gendered colonial effect been felt more acutely than in the customary rule of male primogeniture, consolidated and solidified by British administrative authorities and traditional elders in colonial native courts, and later postindependence African courts administered by District Commissioners.

Postindependence, exemption clauses in equality and non-discrimination provisions of independence constitutions prevented judicial officers from peering into personal codes to strike any customs and practices for discrimination (Tripp 2010, Nyamu-Musembi 2013).

Recent trends of constitution and judicial reforms of the last two decades have seen to it that ACL (and traditional justice systems) are part and parcel of the judicial systems, but are subject to constitutional principles of equality and no discrimination. Celestine Nyamu-Musembi (2013) and Aili Mari Tripp (2016) meticulously studied the countries that have undergone constitution reforms and removed exemption clauses so that courts can scrutinise customary practices and personal codes to ensure equality and non-

discrimination. Virtually all African states have undergone constitutional or major reforms since 1990s, except Liberia, Botswana, Guinea Bissau, Mauritius and São Tomé Principe (Tripp 2016, 77). The only countries that have not removed exemption clauses from their constitutions are Zambia, Botswana, and Lesotho – all in Southern Africa (Nyamu-Musembi 2013, 200).

In many cases, these countries have also moved from being dualist states to monolithic states - what this means is that international human rights are part of the constitutional and legal system and do not need to be domesticated (legislated) for courts to apply them. Prior to that there had been piecemeal application of human rights principles that was not always consistent, which is still the case for countries that have not undergone wholesale constitutional and judicial reforms.

Repugnancy clauses are still present in residual colonial statutes such as Judicature Acts, albeit reformulated to move away from British standards of morality.

I have discussed examples of court cases in all the seven countries under study where courts are striving to develop customary law as a dynamic body of law capable of "moving along" with the times to suit the justice needs and interests of Africans, and to democratise it to align it with international human rights norms.

Most important however are the cross-country African conversations around judicial reforms to revamp traditional justice systems to serve the needs of Africans, such as the constitutional and judicial reform projects of South Africa (Buur and Kyed 2007; Khunou 2009) and Kenya. The reality is that only a small percentage of Africans use the formal justice system (11% in Kenya according to a needs and justice survey conducted in 2017). The rest solve their disputes through traditional or alternative justice mechanisms. This prompted the judiciary in Kenya to put in place an Alternative Justice Framework policy in 2020 to revamp and democratise traditional justice systems. Lesotho is beginning its process of conducting a justice needs survey, the first Southern African country to do so. There is greater potential in revamping and traditional justice systems where majority of Africans prefer to solve their disputes, rather than focusing on ACL with its colonial undertones. In short, ACL and African indigenous justice systems do not mean the same thing –it's about *decolonising* entire justice systems in Africa to suit Africans' contemporary needs and interests around traditional ways of punishing crime and solving personal disputes. I explore this ambitious project in a different paper, which is beyond the scope of what I am trying to do here.

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