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HAS THE INDIGENOUS CUSTOMARY LAW GHANA OUTLIVED ITS USEFULNESS AS A SOURCE OF LAW: AN INTROSPECTION

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Abstract

Eurocentric philosophical approach towards legal education and practice downplays Africa's customary law system, suggesting that it is outmoded and irrelevant in a democratic legal system. Hence, African customary law practices, norms, and values of indigenous communities are no longer significant as they are now primarily measured on the standards of national laws and international human rights principles and conventions. The paper highlights the decline of customary law due to imperial colonial mindset, arguing that it is flexible, adaptable to state laws and international human rights principles, and serves as a tool for dispute resolution in indigenous communities, preserving cultural values and heritage. The paper suggests interventions to maintain customary law in Ghana's legal pluralism, including codification, documentation, harmonisation, unification, and balanced judicial interpretation. Policy interventions include capacity building, modernizing traditional tribunals, establishing specialized customary law court divisions, broader legislative consultation, and decolonizing legal education.

Keywords - Customary Law, Decolonisation, Legal Education, Ghana.

I. INTRODUCTION

The paper discusses the relevance of customary law with respect to its challenges and conflict of laws due to Africa's legal pluralism and how these can be managed and harnessed to sustain its existence. The discussion considers legal and policy interventions that could be adopted in harmonising and integrating customary laws with state and international human rights principles and conventions towards ensuring the sustenance of relevant customs, norms, values and usages with a particular community within a jurisdiction.

According to the Black's Law Dictionary[115] customary law is defined as 'law consisting of customs that are accepted as legal requirement or obligatory rules of conduct; practices and beliefs that are so vital and intrinsic, a part of social and economic system that they are treated as if they were law'. African courts have also provided various definitions of customary law. The Nigerians

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[115] 677th Edn. (St Paul Minn: West Pub. Co.1999): 391.

Supreme Court in *Owoniyi v. Omotosho*[116] referred to customary law as *"a minor of accepted usage'.* Whereas in *Aku v. Aneku*[117] the Court of Appeal defined custom or usage as "The unrecorded tradition and history of the people which has 'grown' with the 'growth' of the people to stability, and eventually become an intrinsic part of their culture. It is a usage or practice of the people which by common adoption and acquiescence and by long and unvarying habit has become compulsory and has acquired the force of law with respect to the place or subject matter to which it relates."

Asante's work reveals three phases in judicial attitudes towards the impact of economic and social changes on customary law. In the first phase, courts emphasized new social phenomena and challenged traditional categories. In the second phase, superior courts reverted to "pure native law," restating old conceptions of usufruct and communal ownership without considering social realities. In the third phase, courts reaffirmed traditional terminology, but the legal consequences attached to the conceptual scheme represented a radical departure from the old order. This period saw courts pay lip service to the traditional scheme while addressing changing conditions.[118] Asante presents a historical trajectory of the trend of customary law and how the courts have dealt with it.

Ama[119] posits that the main source of customary law in pre-colonial Ghana was custom, which was derived from the usages of the community. In many respects, the nature of native custom could be likened to the English common law, though unlike in the lawmaking process in the common law system, the traditional courts were not solely responsible for making law. Reference is made to the fact that before colonialism, customary law governed the lives of natives in African including Gold Coast. As early as 1665, an organized society with kings, rulers, institutions, and customary laws existed in the region as Sarbah notes. This period predates unofficial colonization and was unique to the Gold Coast asserted by Joseph Casely-Hayford.

She argues that although the traditional courts made and applied law, they were for all intents and purposes simply offering a platform for the application of well-established community norms. These traditional courts were not specialised organs for recording, systemising and shaping the growth of the law." The judicial process was open to the whole community and most men and women participated in it. The elders of the various communities were regarded as the "natural repositories of the law," which they handed down orally. It would seem that the absence of written records of custom did not affect the operations of the traditional courts. Customary law may have been unwritten, but this undoubtedly did not affect the administration of justice as understood by the natives. What actually affected the administration of justice, as defined by the imported legal system, was the nature of some traditional practices and the beliefs that engendered them. These practices and beliefs contravened the English notions of justice and morality, not only because they were brutal, but also because they were sometimes misunderstood.[120] It can therefore be seen that from inception due to this misunderstanding, the conflict of laws situation was created. Where

[116] (1961)1 All NLR 304.
[117] (1991)8 NxWLR (Pt. 209): 280.
[118] KB Asante Samuel, 'Interests in Land in the Customary Law of Ghana: A New Appraisal.' Yale LJ 74 (1964): 864-865.
[119] Hammond Ama Fowa, 'Towards an inclusive vision of law reform and legal pluralism in Ghana. Diss. University of British Columbia (2016):8-9.
[120] Ibid

indigenous which did not align with English laws were deemed repugnant, unconscionable and barbaric.

Ogwurike is of the opinion that customary law is a kind of "law that reflects the common consciousness of the African people. It is sourced from local customs which are not repugnant to natural 'justice, equity and good conscience."[121] However, needs to be carefully considered is the determinant of what can be termed "repugnant to natural 'justice, equity and good conscience", is the African natives or the English or West? This by itself is another conflict. Ogwurike further notes that "rules of traditional customs which are discoverable by judicial inquiry and which are enforced because they are acceptable as conforming to what ought to be current values in society". Laws of Anglophonic Africa are mainly derived from sources such as legislation, precedence and traditional customs. He indicates that the general notion among writers of the African law such as the Savignian School, sees customary law as law par excellence, being best of its kind, stands unique, better or more than all others of the same kind. This is derived from local customs and usages of traditional Africa communities. Customary Law has its root in the people way of life and therefore cannot but reflect their common consciousness and culture. Customary law now includes Islamic law, and only those local customs which are not repugnant to natural justice, equity and good conscience Ogwurike asserts.

With respect to the source and authority of African customary law', Ogwurike observed that: *"(a) A rule of customary law may not be known to exist until discovered through inquiry; (b) An existing rule of customary law is valid law if accepted and pronounced upon by the courts. (c) A rule of customary law is invalid and unenforceable if rejected by the courts; (d) A rule of customary law ceases to be law if it is incompatible with any law enacted by statute."* He concludes that the term customary law includes these rules of traditional customs which are discoverable by judicial inquiry which are enforceable because they are acceptable as conforming to what ought to be the current values in society and not what is it.

Customary law must meet the *Repugnancy Test*, the standards to be met to pass as customary law include: not in breach natural justice, equity and good conscience; must not be incompatible either directly or by implication with any law for the time being in force and thirdly it should not be contrary to public policy.

In the case of Ghana, customary law has been provided in the Constitution and the Interpretation Act 1960 as a source of law. It is not a stand-alone but part of the state law. Article 11(e) of the 1992 Constitution makes the common law part of Ghana's laws. Common law under clause (2) of articles 11 comprises of the rules of law generally known as the common law, these rules are generally known as the doctrines of equity and the rules of customary law including those determined by the Superior Court of Judicature (case law). Clause (3) places emphasis on the purposes of this article "customary law", indicating that they are rules of law, which by custom are applicable to particular communities in Ghana.

Similarly, section 17 of Interpretation Act, 1960 defines common law as forming part of *"the laws of Ghana in addition to the rules of law generally known as the common law, of the rules generally known as the doctrines of equity and rules of customary law included in the common law under any enactment providing for the assimilation of such rules of customary law as are suitable for general application."* Furthermore, section 18 deals with Customary Law as *"Comprising rules*

[121]Ogwurike Charles, 'The source and authority of African customary law' U. Ghana LJ 3 (1966): 11.

of law which by custom are applicable to particular communities in Ghana, not being rules included in the common law under any enactment providing for the assimilation of such rules of customary law as are suitable for general application."

Josiah-Aryeh[122] also observes that customary law properly so called operated at a sub-state level, within the context of distinctive communities, and was only recognised by the courts if it conformed to specified criteria. He indicates in his articles that: *"Article 11 of the constitution of Ghana defines the laws of Ghana to include English common law, the doctrines of equity, the Constitution and the "customary law of Ghana". The "customary law of Ghana "is defined to include rules of prevailing within the various communities of Ghana. In origin these were ethnic-based rules which had over time developed to constitute an essential part of the corpus of Ghanaian law. They were an essential part of the colonial system of adjudication for section 87 of the Supreme Court Ordinance 1876 provided that in the adjudication of cases in the erstwhile Gold Coast (the former name of Ghana) European judges were to take account, in appropriate cases, of "native laws and customs" particularly in the areas of marriage, succession and property"*

The Customary law of Ghana is par excellent in the sense that it is the manifestation of the various customs, norms and usages of the various societies making up the state called Ghana. They form the foundation of customary law tradition and growth. These customs norms and usages are manifest within the body of communities, family, traditional councils, arbitration committees, and pronouncements of chiefs and heads of families, informal judicial bodies. To this Harvey notes that these are the grounds where customary law lives and grows.[123] Whereas Obeng indicates that customary law is a living law that is continually interpreted, applied, amended, and developed by the community or courts, considering existing customs, traditions, and the supremacy of the Constitution.[124]

Similarly, Ndulo asserts that courts play a crucial role in reforming customary law to align with human rights norms and promote gender equality, emphasizing its dynamic nature and interpretation based on lived experiences.[125] Customary law is therefore flexible and amenable to the evolution of society, either by modification made be the community, by the court or legal reforms.

From the above discussion it can be seen that customary law forms part of the laws of African countries, in the case of Ghana, which are particular with indigenous communities and rural dweller. The 1992 Constitution and various statutes consider customary law as a source of law in Ghana. However, their application is subject to aligning with the supremacy of the constitution in according with Article 1(2) and 2(1)[126] to avoid been declared void.

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[122] N A Josiah-Aryeh, 'Customary Law in the Twenty-First Century: A Survey of Ghanaian Customary Law' (2006).

[123] Harvey William Burnett, 'A Value Analysis of Ghanaian Legal Development Since Independence.' U. Ghana LJ 1 (1964): 4.

[124]Obeng Mireku, 'Customary Law and the Promotion of Gender Equality: An Appraisal of the Shilubana Decision' (2010) 10 Afr Hum Rts LJ 520.

[125] Ndulo Muna, 'African customary law, customs, and women's rights' Indiana Journal of Global Legal Studies (2011): 87-120.1.

[126] 1992 Constitution, Article 1 (2) The Constitution shall be the supreme law of Ghana and any other law found to be inconsistent with any provision of this Constitution should, to the extent of the inconsistency, be void.

2. (1) A person who alleges that (a) an enactment or anything contained in or done under the authority of that or any other enactment; or (b) any act or omission of any person; is inconsistent with, or is in contravention of a provision of this Constitution, may bring an action in the Supreme Court for a declaration to that effect.

II. LEGAL PLURALISM AND CONFLICT OF LAWS

Many African countries just as Ghana, have pluralistic legal systems. Ghana's legal pluralism is demonstrated under Article 11 of the Constitution as discussed above. Jenny Goldschmidt underscores the need to accept the fact that there are two kinds of constitutional systems in Ghana, namely, the national and the traditional systems. She maintains that in spite of their differences and similarities, they complement each other and cautions against damaging the integrity of either. She admits that the traditional structures are the best way for ensuring the involvement of the people in the public life of the country.[127]

Similarly, Ama indicates that Ghana's legal system is based on English common law and customary law, which were incorporated into the Gold Coast's laws in 1876. The 1992 Fourth Republican Constitution outlines the country's laws, including the Constitution, enactments, orders, rules, and regulations, existing law, and common law, including equity doctrines and customary law rules determined by Superior Courts. Islamic law is applied by courts as customary law. Ghana's legal system is legally pluralistic, encompassing state law, judicial customary law, living customary law of various ethnic groups, and Islamic customary law. This pluralism is argued to be due to the existence of various normative orders or social fields in most societies, and that state law is not the only regulatory system in a state. This pluralism allows for a more comprehensive understanding of the country's legal system.[128] Furthermore she contends that this conflict results from the native people's seeming disengagement from their traditional society as a result of economic development, creolization, education, and Christianity. Pimental on the other hand argues that legal pluralism is a challenge in post-colonial African states, where they must preserve their cultural heritage while attempting to function as modern constitutional regimes. Few have found structural solutions for linking multiple legal regimes within the same state. Policy should focus on preserving a legally pluralistic regime, distinguishing between colonists and political opportunists who exploited it for self-interest. Recognizing the virtues of customary systems, historically undervalued, is also crucial. [129]

It is observed that these presents a conflict of laws situations between the State law and that of the native customary laws. And how the courts have addressed these disputes, whether these resolutions have in anyway changed these customary practices and are being complied with needs to be considered. Onyango provides that conflict of laws refers to the diverse legal systems in private international law and African customary law, highlighting the diversities that characterize these systems. Where judges often consider various laws to resolve disputes, especially in civil procedures.

In African customary law, the question of internal conflict of laws is evident, as it can be challenging to determine the appropriate rule for impartial decision-making in controversial matters. Internal conflict of laws is used to specify the proper choice of law in legal dilemmas, especially when parties have different customary law backgrounds. The court must decide on the

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[127] Jenny Goldschmidt, 'Ghana between the Second and the Third Republican Era: Recent Constitutional Developments and their Relation to Traditional Laws and Institutions' (1980) 18 African Law Studies 43 at 57.

[128] Ibid (n 5) 21.

[129] Pimentel David, 'Legal pluralism in post-colonial Africa: linking statutory and customary adjudication in Mozambique.' Yale Hum. Rts. & Dev. LJ 14 (2011): 59.

appropriate law with the consent of the parties. More importantly is a dispute between State law and customary laws would require a balanced approached in resolving the dispute.[130]

III. CASE LAW ON LEGAL PLURALISM AND CONFLICT OF LAWS

Below includes some cases on how African Courts have handle conflict of law disputes with respect to state law and customary law practices.

The South Africa case of in *Shilubana and Others v Nwamitwa,*[131] the Constitutional Court of ruled in favor of allowing a female to inherit traditional leadership in the Vatsonga community. The case involved the Vatsonga community, where traditional leadership is passed down through inheritance. In 1968, Hosi Fofoza Nwamitwa died without a male heir, and his daughter, Ms. Sidwell Shilubana, was overlooked as his successor. In the 1990s, the royal family and Vatsonga community decided to restore the chieftainship to Shilubana, in line with gender equality norms. Shilubana was officially appointed as chief in 2001. Richard Nwamitwa challenged Shilubana's appointment, arguing it was unlawful. The High Court and Constitutional Court upon appeal held in her favour, stating that the royal family and Vatsonga community had the authority to change customary law and that such a change was consistent with the Constitution, particularly regarding gender equality.

Also in the following consolidated cases, namely, *Bhe v. Magistrate, Khayelitsha, Shibi v. Sithole, and South African Human Rights Commission v. President of the Republic of South Africa,* to address the constitutional validity of the principle of primogeniture in the context of the customary law of succession. The principle of male primogeniture is central to the customary law of succession in South Africa.

In *Bhe v. Magistrate,* two minor daughters were ineligible to inherit from their father's intestate estate, as minor children are not entitled to inherit intestate from their father's estate. Also, this the case of *Shibi v. Sithole,* Ms. Shibi was ineligible to become heir of the deceased's intestate estate, despite the deceased's childlessness, childlessness, and lack of surviving parents or grandparents. Similarly, in *South African Human Rights Commission v. President of the Republic of South Africa*, the court declared section 23 of the Act inconsistent with the Constitution of South Africa, stating it was discriminatory on the grounds of race, sex, gender, and the right to dignity. The Court held that, the rule of primogeniture was said to be discriminatory insofar as it hindered all female children, and male extramarital children, from inheriting.

On the other hand, in *Alexkor Ltd and Another v Richtersveld Community*,[132] the Constitutional Court ruled in favour of the Richtersveld Community, recognizing their indigenous land rights and ownership of the land and mineral resources. The community's dispossession was deemed due to racially discriminatory practices, making them eligible for restitution under the Restitution of Land Rights Act. The case affirmed the recognition of customary laws and indigenous land rights under South African law, even before colonial rule. It highlighted the importance of interpreting indigenous law within the Constitution and addressing historical injustices through land restitution.

[130] Onyango Peter, 'African customary law: an introduction. African Books Collective.' (2013).
[131] CCT 03/07 [2008] ZACC 9.
[132] CCT 19/03 [2003] ZACC 18.

From above it can be seen that the South African Constitutional Court makes an effort to balance state law as against the native law in their attempt to resolve conflicts.

Similarly, the *Nigerian Courts* have also been confronted with such cases. In *Mojekwu and Others v Ejikeme and Others,*[133] the Nigerian Court of Appeal held that the Nrachi custom of Nnewi, which allowed a man to keep his daughter unmarried perpetually, was discriminatory, inapplicable, against equity and good conscience, and violated CEDAW. The court also found it inconsistent with public policy and repugnant to natural justice. Justice Olagunju emphasized that the burden of addressing such practices lies with the legislature, and the best course of action is to stop the practice as repugnant to natural justice, equity, and good conscience, hoping that authorities will eventually interment it. The court emphasized that the abrogation of such practice's rests with the legislature and the apex court.

Also, in *Edet v. Essien*,[134] a Nigerian court considered a customary rule in which, if a woman's dowry was not refunded to her former husband, children born by a subsequent marriage belonged to the husband of the first marriage. The court held that the custom was contrary to natural justice, equity, and good conscience. The court held that a custom that denies the natural or biological father of his child is certainly repugnant to natural justice.

With the *Kenyan* jurisdiction, the case of *In Re the Estate of Andrew Manunzyu Musyoka,*[135] is under consideration. The deceased's daughter applied to inherit from his father's estate, claiming she was entitled to it. It was argued that African customary law excluded her from inheriting, as a female married under Kamba law is ineligible. However, the court found no customary marriage had been concluded, and the daughter could regain eligibility if her goats were returned to her husband after divorce. The court deemed Kamba customary law discriminatory. The court held that Kamba customary law was discriminatory in so far as it sought to deny the applicant her inheritance rights on grounds of sex. The law was repugnant to justice and good morals and therefore inapplicable to the case. Similarly, the High Court in *Katet Nhoe and Nalangu Sekut v R*[136] held that the Maasai custom of circumcising females was repugnant to justice and morality. The court disregarded the Maasai's customs, stating that female genital mutilation caused physical pain and was harmful to a citizen's physical and social wellbeing.

For *Tanzania,* the case of *Ephraim v. Pastory*,[137] also points similar to the above-mentioned jurisdictions. The High Court of Tanzania considered a law where, although daughters were entitled to inherit family land, unlike men, they could not dispose of the land. The court held this rule to be discriminatory and inconsistent with the Tanzanian Bill of Rights, which prohibits discrimination against any person. The court further noted that the constitution's incorporation of the Universal Declaration of Human Rights, as well as Tanzania's ratification of CEDAW, the African Charter on Human and Peoples' Rights, and the International Covenant on Civil and Political Rights all required Tanzania to prohibit discrimination based on sex. Therefore, the said customary was unlawful.

[133] (2000) 5 NWLR 402.
[134] (1932) 11 NLR 47.
[135] (2005) eKLR.
[136] Criminal Appeal No. 115 of 2010 consolidated with Criminal Appeal No. 117 of 2010.
[137] (2001) AHRLR 236.

When it comes to *Ghana,* its courts have also been faced with similarly disputes. For example, the case of *Biei v. Akomea*[138] was a case involving a disagreement over land ownership in Ghana. Biei claimed he had inherited the land, while Akomea claimed he also inherited it. The West African Court of Appeal overturned the lower court's decision, ruling in Biei's favour. The court found Biei had a stronger claim to the land under customary law, based on inheritance evidence and the land's history. The case highlighted the complexities of customary land law in West Africa, particularly in disputes involving inheritance and land ownership.

On the other hand, *In re Kofi Antubam (Decd.)*[139] the case centered on the distribution of Kofi Antubam's estate under matrilineal customary law, which traditionally favored matrilineal relatives. The dispute arose between family members over the distribution of the estate, with conflicting claims. The High Court held that Akan customary law would govern the estate distribution, emphasizing that property should pass through the matrilineal line, consistent with the Akan people's established customs. The court held that the deceased's will could not override these customary inheritance rules, as customary law took precedence in matters of succession within the community.

In another breath, in *Akrofi v. Akrofi,*[140] the plaintiff, the deceased's only child, sought to be declared the sole successor to her father's estate. The court held that in Buem, succession is patrilineal, with male children taking preference. However, female children are not excluded from inheriting if no male children exist. The court found that no custom should exclude women and noted that such customs had outlived their usefulness and were no longer in line with public policy.

Additionally, in *Amissah-Abadoo v. Abadoo*[141] it involved a matrimonial dispute between Mr. Amissah-Abadoo and Mrs. Abadoo, who filed for divorce after their marriage broke down. The main issue was the division of matrimonial property, particularly a house registered in her husband's name. The customary laws were in favour of the husband and discriminatory towards the wife's interest and rights. However, she argued the she contributed financially to the property's acquisition and improvement, seeking a share upon divorce. The High Court held in her favour, recognizing that a spouse's contribution to matrimonial property could extend beyond formal ownership, based on principles of equity and fairness.

Furthermore, the High Court in *In re Appiah (Decd.)*,[142] addressed a customary law that excluded children and vested inheritance in a successor to the deceased. The court emphasized the impact of social and economic changes on this aspect of customary law, recognizing the right of widows and children to personal chattels enjoyed in common with the deceased in the matrimonial home.

Consequently, above is an attempt to looking at the recent history of how the courts in Africa and especially Ghana has handled disputes of customary law and state law, well even before the promulgation of the 1992 Constitution. However, as discussed above, there appear to be a settlement on this conflict of law issue in Ghana due to the supremacy of the Constitution and particularly the hierarchy of laws under Article 11. Therefore, even though customary laws are part of the laws of Ghana, in terms of superiority the Constitution is placed first whereas customary law comes fifth, therefore where conflict arises between customary law practices in

[138] [1956]1 W.A.L.R. 73 (West Africa Law Reports).
[139] [1965] G.L.R. 138.
[140] [1965] G.L.R. 13, 14 (Ghana).
[141] [1974] G.L.R. 110.
[142] In re Appiah (Decd.), [1975] G.L.R. 465, 473.

contravention of any Constitution provision is void. It is therefore submitted that any customary law which does not conform with the Constitution or contravenes any provision is unlawful in Ghana, simplicita. Similarly, other African Courts as can be seen have handled in this approach in dealing with the conflict between customary laws and state laws.

Having looked at the trajectory of how these cases have been handled in Africa looking at that above cases, they appear to present the trend of customary laws been subsumed by state laws. These State laws present legal standards for customary law and where they fall short are determined as void. This seems to be threatening the contemporary relevance of its survival but most importance the cultural preservation and identity of the community as a unique entity of the state which needs to the protected. On the other hand, it is observed that customary law is actually inseparable from the state law or national law, this suggest that it remains very much significant. Hence, the need for a more balanced approach managing the conflict between state law and customary law within Africa's (Ghana's) legal pluralism.

IV. IMPORTANCE OF AFRICAN CUSTOMARY LAW AS A SOURCE OF LAW

At this stage of the discussion, whether or not customary laws is still relevance, does the relevance of customary laws as a source of law in the midst of this conflict in this contemporary time require saving. And as to whether it needs to be sustained in the scheme of socio-economic affairs and the fourth industrial revolution and the rapid global changes. The response, is in the affirmative. The following are the importance of customary law in African and especially Ghana as a source of law.

Firstly, *customary law is a flexible and adaptable legal system that can align to the changing needs of its people.* It is considered a living law in law courts, as it is adaptable[143] to the changing conditions of modern Africa.[144] The West African native custom, for example, is known for its flexibility, adapting to altered circumstances without losing its individual characteristics. In the Ghanaian case of *Loko V. Konklofi,* the stool in application of customary in resolving a dispute, acknowledged the common law pledge and directed Konklofi to pay the judgment, making his interest alienable subject to a formal requirement of prior stool consent.

Similarly, in the South African case of *Shilubana and Others v Nwamitwa,* the court affirmed the flexibility of customary law in adapting to modern constitutional principles, particularly gender equality, setting a precedent for communities to modify customary law in line with Constitution. To this Diala asserts that customary law is source of law.[145] Also, Sanders argues that African autonomic customary law is self-generated and self-regulating, adapting to external influences. It is fluid and adaptable, allowing for changes in the people's life-world. This law, particularly in Africa, has demonstrated remarkable capacity for adaptation to external influences, making it an effective tool for governing and managing customary practices.[146]

Secondly, *customary Law as Accessible tool*[147]within the native communities and rural dwellers**.** Customary law is often the most accessible kind of law for people who live in rural areas. Its

[143] A. J. Kerr, 'The Nature and Future of Customary Law' (2009) 126 S African LJ 677.
[144] Ibid (n 5) 8-9.
[145] C Anthony Diala, 'The Concept of Living Customary Law: A Critique' (2017) 49 J Legal Pluralism & Unofficial L 143
[146] A. J. G. M. Sanders, 'How Customary is African Customary Law' (1987) 20 Comp & Int'l LJ S Afr 405.
[147] E S Chukwuemeka, 'Customary Law: 4 Characteristics of Customary Law.' Features of Customary Law (2021).

proceedings are usually conducted in local languages, and the principals involved are often easy for members of the community to understand. There are limited costs to cases in community courts. It is usually not necessary to involve legal complexities. It is an essential part of the legal landscape in many African countries, operating alongside state law. African Customary Law, as an accessible tool, plays a vital role in providing justice to communities by reflecting their values, being adaptable, and prioritizing reconciliation. Its recognition within formal legal systems enhances its accessibility and ensures that it remains relevant in contemporary African societies.

Furthermore, *customary law provides amicable forms of dispute settlement (ADR), which serves as the communities first point of call.* Many communities especially indigenous African communities submit their disputes peace settlement mechanisms which are now termed ADR approaches. These mechanisms have become a very central part of our justice delivery system, which have their root from customary law. This makes customary relevant not only yesterday and in recent times. These ADR approaches have been adopted as addition to the adversarial litigation as complementing within the court system. Therefore, it can be seen that these customary law approaches to dispute resolution are not only application with communities but also in formal administrative sectors.

These approaches are not well known by members of the community and the sanctions. Bush argues that customary law dispute resolution procedures are straightforward and accessible, depending on the role of the parties in the court. This traditional court assists disputants in resolving disputes, examines and cross-examines, and may involve additional witnesses. The conflict is revealed for consideration, and the parties contributes to the customary procedure. This forum allows individuals to formalize disputes while ensuring fair resolution, facilitating their relations.[148] Mostly these are brought before chiefs and elders for resolution.[149]

Fiadjoe[150] argues that before colonialism, Africa, particularly Ghana, had a customary law system with dispute resolution mechanisms, demonstrating the historical existence of ADR processes. These mechanisms promote peace settlement and restoration of broken relationships, promoting restorative justice.

Last but not the least, *customary law serves as a medium where cultural heritage is preserved as well as enhance socialization*. Customary law plays a vital role in preserving cultural heritage by maintaining traditional practices, rituals, and values that are passed down through generations such as marriage, land ownership and rights, inheritance, funeral, festival, etc. These unwritten norms and rules are deeply embedded in communities and are crucial for safeguarding intangible cultural heritage, such as language, folklore, and customs.[151]

By enforcing community norms, customary law helps preserve the identity of a group and its connection to its ancestral roots. Following preservation, it facilitates socialization by providing a framework for instilling social norms and values within individuals, particularly in communal settings. It guides behavior, promotes social cohesion, and ensures the continuity of cultural practices. Through rituals, ceremonies, and everyday interactions, individuals learn the

[148] A Bush Robert, 'Modern roles for customary justice: Integration of civil procedure in African courts.' Stan. L. Rev. 26 (1973):1128-1129.
[149] Apuko-Awuni Peter, 'Mediation as an option under alternative dispute resolution: The case of Ghana.' UCC Law Journal 2.1 (2022): 161.
[150] Fiadjoe Albert, 'Alternative dispute resolution: a developing world perspective. Routledge-Cavendish' (2013) 5.
[151] UNESCO, 'Convention for the Safeguarding of the Intangible Cultural Heritage.' (2020).

expectations of their community, reinforcing a shared sense of belonging and collective responsibility. Through customary law communities do not loss their identity and dignity, this is as a result of the essential role it plays.

It can therefore be seen that the life's of people in native communities are predominantly still glued to their customs and traditions notwithstanding it diluted nature and flexibility. Most human affairs are still undertaking with respect to these customs, hence the need sustaining it even though some parts may be in conflict with state laws as well as international human rights treaties. It however, be seen that customary law plays a complementary role to the state laws, thereby still relevant as a legal tool for social regulation and development.

It is therefore very significant to consider strategies that would ensure that customary laws which are likely to be in conflict with state laws such as infringing perpetrating human rights violations are reformed in a manner acceptable and understandable to the indigenous communities towards ensuring compliance. In addition is the establishment of appropriate mechanisms for sustaining its co-existence with state law to avoid it real likelihood of being swiped off.

V. LEGAL INTERVENTIONS FOR SUSTAINING CUSTOMARY LAW IN GHANA AND AFRICA

Law reforms play a critical role in preserving African customary law by adapting traditional practices to modern legal frameworks while ensuring their relevance and protection. These reforms help integrate customary law into formal legal systems, ensuring it coexists with national laws. By codifying and recognizing customary practices, law reforms prevent the erosion of these traditions due to external influences. Additionally, they promote consistency and fairness in the application of customary law, especially in areas like inheritance, marriage, and land rights, while ensuring that fundamental human rights are upheld. The conflict between state laws and customary laws if not well managed may lead to the customary law losing its valuable place and significance, which would not only suffer but that would also impact negatively on the state law since it plays a complementary role to it. Therefore, the following legal remedies are recommended:

The first intervention which could be considered is *codification some customary laws.* In looking at how best to reconcile equality for women and children with African customary law concerning some discriminatory customary practices such as inheritance. The principal difficulty is that indigenous inheritance law is widely thought to feature a rule of male primogeniture particularly in patrilineal communities, and the opposite is the matrilineal communities.

In matrilineal communities, spouses are not allowed to inherit from each other's estate, as they do not belong to the same family. Property can only be inherited from a blood relation, with consanguineal ties being superior to affinal ties. Spouses hold property individually during their marriage, not as joint property. Children born to a matrilineal man are not considered part of their father's family and have no legal right to any portion of his estate. They also have a responsibility to assist their father in his trade or business, but this does not entitle them to any beneficial interest in the property. However, customary law imposes a father's obligation to house, support, and advance his children, and they must be financially supported by their customary successor.[152] It can be seen quite clear that these persons are discriminated of their rights and entitlements. These

[152] Ibid (n 5).

have followed attempts to harness some customs, norms and usages of various traditional societies in Ghana when it comes to some of these critical issues. The State has enacted laws which regulates these aspects of social life.

For example, legislations such as Intestate Succession Law, the Customary Marriage and Divorce (Registration) Law, Head of Family Accountability Law as well as the Land Act, 2020. Particularly, the Land Act, 2020 criminalizes customary law discrimination in land acquisition, specifically in section 11. It prohibits discriminatory practices based on place of origin, ethnic origin, political opinions, color, gender, occupation, religion, disability, or social or economic status. The legislation aims to address discrimination in women and land ownership and usage by certain communities, ensuring that decisions and practices respect the customs, traditions, and practices of the community. These legislations are very instrumental and played a critical role towards changing some substantial parts of the customary laws which deemed discriminatory, repugnant to natural justice, equity and good conscience.

For example, customary practices such as human sacrifice, banishment of citizens of communities, burying human beings alive with a dead chief, using human sacrifice as part of installation processes of some chiefs, trokosi, female genital mutilation among others are have been outlawed and criminalized through legislation as a way of curbing the negative effectives of these practices. However, customary law being one of a living law thus suggest that it not all of it which codification would be appropriate, since codification may well mean holding a customary system static and rigid to the rapidly changing society.

The second intervention that can be taken is the *ascertainment and documentation.* The ascertainment and documentation of African Customary Law are crucial for several ways, it makes room for tacking stock of customary laws. Ascertainment and documenting customary law ensure that it is recognized within legal systems, this helps to integrate traditional practices with modern legal frameworks. Additionally, it aids in the preservation of customs and cultural traditions that do not contravene state law, such as the violation of human rights.

Additionally, it makes customary practices and procedures, such dispute resolution methods, more understandable to community members. They lessen ambiguity, which facilitates the effective understanding and application of customary laws by both external entities and local groups. Chuma argues that the approach which is sometimes used by state in managing the disputes from customary laws through courts and codification may also lead to creates misconceptions and distortions that affect women's rights and interests.[153]

Ascertainment and documentation are popular reformatory tool that has been employed by reformers to make customary law more certain and accessible. Ascertainment refers to a “precise and juristically worded” record of the existing customary law rules and has been described as “less intrusive” than codification in that it states the law as it is without attempting much modification. Ascertaining customary law has merits. It has been hailed for ensuring greater certainty in the law even though it is not clear the extent to which writing customary law would make it more certain. Also, it provides the courts with a set of principles to aid them in the formulation of decisions. With regard to the customary laws on intestate succession, Kludze

[153] Chuma Himonga, 'Taking the Gap - Living Law Land Grabbing in the Context of Customary Succession Laws in Southern Africa' (2011) 2011 Acta Juridica 138.

asserts that "the customary law on the devolution of intestate estates is certain and ascertainable in the several communities."[154]

According to Ama Ghana has taken some steps in this direction towards bridging the gap between customary law and state law under the auspices of the Ascertainment and Codification of Customary Law Project (ACLP), which was started in 2007 by the National House of Chiefs (NHC) in collaboration with the Law Reform Commission (LRC) to ascertain and document the customary law on land and family. This is in line with the constitutional mandate of the NHC to "undertake the progressive study, interpretation and codification of customary law" and to evaluate "traditional customs and usages with a view to eliminating those customs and usages that are outmoded and socially harmful." It seems that the aim of the ACLP is to codify the ascertained law eventually, also in fulfillment of Article 272(b) of the Constitution. She recommends of the Commission to be equipped with competent personnel who have the capacity to engage in meaningful research and produce in-depth reports that reflect the reality of Ghanaian circumstances, especially when the law under review includes aspects of customary law.[155]

It is therefore, submitted that another strategy of preserving customary laws to be in harmony with state laws is the appropriate ascertainment and documentation of these customs and practices. This must be done in a regular form as well as reviews. This method appears suitable to customary law as living law since it allows quick reviews and amendments without any legal tussle as it applies to codified legislation.

Harmonisation and unification of customary laws with state laws and international conventions is another strategy which can be considered. The harmonization and unification of African customary laws with state laws and international human rights conventions are important for creating a cohesive legal system that respects both traditional practices and modern legal standards, thus the national legal framework. The harmonization of the two helps ensures that customary laws, which vary widely across African societies as well as different from one community to another, are consistent with state laws. This creates a unified legal framework that applies equally to all citizens as contained in many African Constitutions, in the case of Ghana, this is provided for under Article 17.[156] Furthermore, if fosters the protection of fundamental human rights. It enables that customary laws align with state laws especially the Constitution and that of international human rights conventions[157] ensures that customary practices do not violate fundamental human rights, particularly those related to gender equality, children's rights, and freedom from discrimination. Also, facilitates the smooth transformations and evolution of customary law as a living law which is as flexible and adaptable meeting modern societal trends without much difficult. This process allows for the preservation of these customary law practices

[154] KP Kludze Anselmus, 'Problems of intestate succession in Ghana.' U. Ghana LJ 9 (1972): 89.
[155] Ibid (n 5) 161.
[156] Equality and freedom from discrimination.
[157] Such as Universal Declaration of Human Rights (UDHR) (1948); International Covenant on Civil and Political Rights (ICCPR) (1966); International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966); International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (1965); Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (1979); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (1984); Convention on the Rights of the Child (CRC) (1989); Convention on the Rights of Persons with Disabilities (CRPD) (2006); International Labour Organization (ILO) Conventions; African Charter on Human and Peoples' Rights.

as well as harmonising and unifying them to fit within contemporary legal and human rights frameworks. The benefit of this is the access to justice. This is so because customary legal systems become well recognised and a of formal state legal structures, ensuring that individuals who rely on customary law are not left out of state protection and human rights guarantees. Disputes settled under the customary laws system are recognised and enforced by the court.

With Ghana for example, the Chieftaincy Act, 2008, the Land Act, 2020, the Alternative Dispute Resolution Act, 2010 for example, empowers traditional leaders and elders in various to handle some category of disputes as adjudicators. Settlements arising to these sessions are enforceable as if they were judgment of the court. However, the customary standards in resolving these disputes must not breach the rules of natural justice.

Allots argues that unification is different from integration, which imposes uniform laws. Integration aims to standardize the effects of different laws, such as marriage and succession laws in Kenya and Tanzania. However, he argues that the relationship between the International Law of Human Rights and African customary law is complex. Many young African states have become de jure members of the international community, making it difficult for them to develop their own legal systems without interfering with international conventions. Pacta sunt servanda and jus cogens bind all state members to respect treaties, and if domestic law contravenes these, international law prevails. This narrows the chance for African customary law to prosper and reach its desired status.[158] Similarly, Bessie observes that the continual elevation of statutory marriages over customary ones continues to be problematic largest segment of the population continue to marry way. And suggests implementing a unifying law of marriage and divorce to unify multiple marital systems in the country. A uniform age of majority should be used as the minimum requirement for marriage, ensuring equality of status for both monogamous and polygamous marriages. The issue of marriage should be scrutinized to prevent women from being pressured into divorce, and uniformity should be granted until proven irretrievable breakdown.[159]

Furthermore, another factor which cannot be overlooked is *judge-made-law through judicial interpretation.* The court plays a crucial role in maintaining the regulation of customary laws, as it serves as a liaison between the state law and the customary when it comes to dealing disputes. And so, as law evolves over time, judges are obligated to interpret in a way would reflect a fine balance of the two, in the light of changing times. It is argued that courts must be proactive in creating and modifying customary law that upholds human rights principles and advances gender equality, especially in cases involving children.

Looking at the cases discussed above, judicial decisions appear to have taken the stands that customary laws are part of the laws of the state and therefore should be interpreted in the conformity with the Constitution and not treated as sui generis. It is therefore, argued that apart for enactments, judge-made-law is also another strategy for sustaining and preserving relevance customary laws.

Therefore, as to whether it is harmonizing, unifying or integration, what stands paramount is the fact that when this is done, African customary laws with state laws and international human rights

[158] A. N. Allott, 'What Is to Be Done with African Customary Law - The Experience of Problems and Reforms in Anglophone Africa from 1950' (1984) 28 J Afr L 65.

[159] House-Midamba, Bessie. "Legal pluralism and attendant internal conflicts in marital and inheritance laws in Kenya." Africa (1994): 375-392.

conventions avoid a much bigger conflicts of laws, it balances customary laws with modern legal standards, ensuring justice, equality, and human rights protection across diverse societies where members of indigenous communities comply voluntary with the legal law.

VI. POLICY INTERVENTIONS FOR SUSTAINING CUSTOMARY LAW IN GHANA AND AFRICA

Legal remedies alone cannot produce positive outcomes when it comes to sustaining customary laws. Policy intervention is more even significant in this instance since customary laws is predominantly community specific, blanket application of a legal intervention made well not reach the said indigenous community for which it was enacted to cure, hence polices are very critical. Below include policy interventions to be considered.

The first strategy is the *revitalising and establishing modernized African Traditional Customary Courts and Tribunals.* Traditional leaders are custodian of custom and traditions, hence practitioners of customary law. they therefore the need the they are well equipped to know their legal mandate within the state legal systems. This would enable them engage with the practice and handling of disputes in line with state law and continue with customary practice which have been criminalized. This is notwithstanding the fact that ignorance of the law is not excuse. That which arises why know that fact that traditional leaders are engaged in such customary practices which are unlawful and not give them the appropriate capacity building and wait for them to breach the law. It is based on this premise that it is recommended.

According to Onyango the British government aimed to tame Africans and bring them under European legal imperialism, closed down native courts. Post-British African governments focused on decolonization and nation building, ignoring the need to promote African customary law. He argues that well empowered and equipped native courts are better placed to handled customary law disputes line with the law.[160]

Similarly, Ayittey makes the point that notwithstanding these challenges indigenous laws and institutions have stood the test of time and are resilient.[161] Asante argues with Ghana, the court's involvement in family property administration is rooted in traditional jurisprudence. The chief's court had jurisdiction over matters affecting public peace and disputes between large community segments. The chief's court had original jurisdiction in these matters, while disputes related to succession, interspousal relations, and family property were classified as "Efisem" and fell under family conferences and tribunals.[162] Ghana's customary law enhances its role as a national dialogue, with the Houses of Chiefs playing a central role. Traditional tribunals are accessible, quick, and easy to understand, avoiding bureaucracy in formal court systems. They promote community ownership and social cohesion, encourage mediation, and rebuild relations. Customary tribunals' laws are flexible, considering local values and mores, promoting community relations.

And therefore, customary law can be more widely applied with more comprehensive knowledge given to these traditional leaders such as chiefs. Establishing and equipping traditional courts to

[160] Onyango Peter, 'African customary law: an introduction. African Books Collective (2013):82-83.
[161] Ayittey George, 'Indigenous African Institutions.' Brill, (2006):19-20.
[162] KB Asante Samuel, 'Fiduciary Principles in Anglo-American Law and the Customary Law of Ghana: A Comparative Study.' International & Comparative Law Quarterly 14.4 (1965):1152.

build precedent for customary cases and formalize teaching for judges, lawyers, and future law students. These would address challenges in the unwritten and diverse nature of customary law which would help expose it to public attention and strengthen legal system.

Secondly, very close to this policy intervention is the need to for the Judicial Service to *establish special court for Customary Division* just as it has been provided for other sectors of disputes. The judicial services of Ghanan have established specialized courts to deal with specific disputes, these include Criminal Division, Land Division, Divorce and Matrimonial Division, Probate and Administration Division, Labour Division, Human Rights Division, Commercial Division, Financial Division, General Jurisdiction, Electoral disputes courts, among others. It is pertinent to note that the establishment of such as division would be very helpful since just like these specialized divisions who are manned by experts similar would be given to this proposed Customary Division. This is significant because customary laws of the many communities within the state are predominantly unwritten, this makes the work of the judge quite difficult. Most courts therefore lack adequate knowledge and usually depend on the opinion of experts and the use of assessors. In *Wambui Otieno v. Joash Ochieng Ougo and Ornolo Siranga,* the court noted that most Kenyans are of indigenous Kenyan origin and thus subject to the customs of their tribe. And that no African could divorce himself from the tribe of his roots and thus he will always be under his tribe's law', and that there is no way an African citizen of Kenya can divest himself of the association with the tribe of his father.[163] This is not any different from any African country such as Ghana. However, what appears quite a surprise is that seeming reluctance in developing customary law even though all African are captives, bound in chains to it, which colonialism and statehood. It is therefore suggested that establishing a customary division would go alone way to appropriately customary disputes speedily and in harmony with state laws and international human right principles.

The *Legislature has a critical role to play in policy reforms,* Ama asserts that Post-colonial Ghana has undergone significant law reforms, primarily through the judicial and statutory processes. Courts apply liberal tests to redesign customary laws to align with rule of law, democracy, equality, and modernity. This is known as judicial customary law. Parliamentary reforms have also altered customary law, including procedures for application, ascertainment, recognition, assimilation, and declaration. Land tenure laws have been altered through Acts of Parliament, and customary practices like widowhood rites, ritual servitude, and female genital mutilation have been criminalized. The Intestate Succession Act (PNDC Law 111) was passed in 1985 to address changing family and intestate property distribution, particularly for women and children denied property due to the matrilineal inheritance system.[164]

The Law Reform Commission of Ghana,[165] established in 1968, has been instrumental in reforming the country's laws. It receives, considers, and makes proposals for law reform, advises the Minister of State on policies, examines specific areas, formulates reform proposals, and obtains information from other countries. The Commission seeks input from stakeholders and publicizes relevant issues. However, customary law reforms have not very much successful in Ghana. The reformer, Sarbah, believes that it should be done by judicial officers with highly

[163] Wambui Otieno v. Joash Ochieng Ougo and Ornolo Siranga (1982-88)1 KAR.
[164] Ibid (n5).
[165] https://mojagd.gov.gh/?department=the-law-reform

trained faculties, intelligence, open-mindedness, and the capacity to look at law in its widest aspects.[166] The impact of judicial and legislative changes on Ghana's rural population is crucial. Professor Antony Allott states that they continue as if the new law had not been passed. Legal scholar Samuel Asante believes the legislature is more effective for reforms, but Gani Aldashev et al suggest allowing customary law to evolve and modernize through court decisions.

Next, *there is also the role for the State* as a whole in looking at the future of customary and the role it plays in cultural heritage, peace and development. It must take an active role and not seat at the fence. Institutions of state must have a constructive attitude toward customary laws. It is imperative that the state implements legal reforms with an inclusive stance. Socioeconomic integration is the goal of an inclusive strategy. Its main goals are to raise the standard of living for its citizens and actively involve traditional political authorities in the reform of customary law. Since these connections are essential to implementing successful reforms, developing strategic partnerships is another essential component of the inclusive approach. Nica contends that there is a need for significant innovation in our understanding of the proper restraints on state administration, acknowledging the neoliberal solution, which equates all forms of governance with a totalitarian inclination, as inadequate and detrimental.[167]

Ama argues that state must not see itself as better than the other systems and thus attempt to forcefully assimilate them; it must see and treat customary law like partners in nation building and thus forge meaningful mutualistic relationships towards enhancing reforms. Legal pluralism as a theory and social fact lies at the heart of a clear understanding of the relationship between law and society. A lack of understanding of the operation of legal pluralism by the state has many negative ramifications, which hampers negatively on socio-economic development and obstruct human rights protection efforts.

Furthermore, she is of the opinion that public sensitization by state institutions can enhance the effectiveness of a customary law. She refers to a parliamentary proceeding where Hon. Cletus Avoka, a legislator, calls for extensive education through Houses of Chiefs and District Assemblies to sensitize people to the changes and prevent chaotic developments in communities due to the radical departure from the traditional inheritance system. He believed that the introduction of Intestate Succession Law[168] will limit the responsibility of one's family to the core, leading to neglect of some members, which would be in conflict with the exiting customary practice. Avoka advocates for moderation and intervention to balance traditional values with equity in the inheritance system. He believes in the virtues of customary law values, which account for solidarity within families and among the people of Ghana.[169] It is therefore essential in looking at how to preserving customary law, state institutions must approach its regulation from a broader perspective by engaging the necessary state holders.

On the other hand, is the *role of the community*, since they form the major stakeholders. This makes the community an essential stakeholder in the affairs of customary law which should not be ignored. This is due to the fact the such laws are actually mean to regulate them with the rural communities and not actually for urban dwellers, even though it does not exclude them. And as

[166] Ibid (n5) 99.
[167] Nica Siegel, 'Thinking the Boundaries of Customary Law in South Africa' (2015) 31 S Afr J on Hum Rts 376.
[168] PNDC Law 111.
[169] Ibid (n5) 376.

Friedrich Karl von Savigny posits, the law of the modern nation state must reflect the *Volksgeist*[170] *or the people's spirit.*[171]

In *Katet Nhoe and Nalangu Sekut v R,*[172] the critical positioning of the community was central them to judgment of the court. The High Court held that the Maasai custom of circumcising females was repugnant to justice and morality, and that the practice causes physical pain and is harmful to a citizen's physical and social wellbeing. However, what is observed from this is the fact the courts can not compel Maasai men to marry their uncircumcised women. So, women who by virtue of the law would not undertake the circumcise may well not get married and would be deemed as social outcast within cultural sect.

Allot discusses internal conflict of laws in plural legal systems, where courts must decide which legal system to apply to a case. In England, external conflict problems arise when applying foreign laws but not internal conflict cases as African nations. The legacy of colonialism in the anglophone area included internal conflicts of law. The colonial legal solutions were inadequacy, as they failed to address the complex relationships and legal problems between different communities.[173] It is therefore imperative to approach customary law from inclusive perspective in dealing with these conflicts.

In light of conflicts, legal regulations of customary practices must be approached in a much broader perspective, where the state would involve all stakeholders including the sensitisation of the communities which are likely to be affected by those laws. These would afford them the opportunity to appreciate the reason for need for changes, the benefits and the sanctions which would be followed in violated. In the sense, in the case of Ghana the role of the NCCE would be very instrumental.

Another strategy to be considered is *the role of Law Schools in decolonising legal education in align with customary law.* African customary law is gaining popularity and pressure for law reforms, despite the widespread influence of English Common Law in the form of the seeming pluralistic state laws. Studying customary law not only forms a solid legal culture but also enhances legal professionalism and realism. African lawyers, scholars, and jurists view it as a crucial aspect of social growth, requiring a deep understanding of the role of law in society, hence the call for decolonising legal education. Decolonizing legal education aims to challenge and dismantle the dominance of Western legal frameworks and knowledge systems in African legal education. By incorporating African customary law into legal curricula, this approach seeks to preserve and legitimize indigenous legal traditions that have often been marginalized or disregarded under colonial and post-colonial legal systems. Incorporating African customary law into legal education not only ensures the recognition and application of these laws in modern legal systems but also fosters a more culturally relevant and inclusive legal framework, symbiosis and its sustenance. This exposes law students, lawyers, judges, and policymakers to its relevance and endangers respect for application, which can be more attuned to the social, cultural, and economic realities of African communities.

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[170] Volksgeist Theory: The term "Volksgeist" combines two German words: "Volks," meaning people and "Geist," meaning spirit or will. In essence, Volksgeist represents the collective will or spirit of a nation.

[171] A. J. G. M. Sanders, 'How Customary is African Customary Law' (1987) 20 Comp & Int'lLJ S Afr 405.

[172] Criminal Appeal No. 115 of 2010 consolidated with Criminal Appeal No. 117 of 2010.

[173] Ibid (n 44).

Mawere suggests that Africa's legal education system, based on European theories, is difficult for students to relate to. He recommends introducing a new curriculum reflecting African laws, principles, and customs, especially in South African legal education, and encouraging institutions to decolonize and end eurocentrism.[174] Diala argues that South African universities have pushed for the decolonisation of the law curriculum, despite its marginalization and distortion by policymakers. African customary law, shaped by colonial rule, has been criticized for being unfriendly to women and younger male children. Universities are called upon to handle the pedagogy of African customary law by acknowledging the self-sustaining legacy of colonialism and re-conceptualizing it to offer a framework for legal integration. This approach challenges the mainstream conceptualization of customary law and promotes a more inclusive legal system.[175]
From above, lawyers and judges are indispensable in fostering the sustenance of customary law. This is based on the fact that many African countries have undergone a significant transformation due to westernization, leading to a shift in lifestyle and court system. The transition from indigenous African courts to formal court systems marked the beginning of the adoption of formal legal systems creating the current conflict of laws, putting in this current and future crisis of being lost.
As in the *South African case of Alexkor Ltd v Richtersveld Community,* the South African Constitutional Court provides that:

> *"while in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the Constitution, the Constitution acknowledges the originality and distinctiveness of indigenous law as an independent source of norms within the legal system. In the result, indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law."*

This present a clear picture of what is expected of legal practitioners and judges is customary must be saved. It must be handled as a living law, since it embodies the soul and body of the community. It must therefore be approached in a manner which feeds, nourishes, fuses with the state in a welled harmonised form which enable is growth and development rather than suffocating it to death.
It is therefore pertinent to note that the kind of legal education provided plays a central role, since all the major stakeholders such as lawyers, judges and other policy makers such as legislators and technocrats are trained by these institutions. They would therefore be well positioned if the legal education that they are provided with equips them in the light of positive direction on the relevance of customary law as part of the state law which must co-exist within the legal framework and not be merely misunderstood as outmoded barbaric practices.

VII. CONCLUSION

[174] Mawere Joshua, 'Decolonising legal education in South Africa: A review of African indigenous law in the curriculum.' Pretoria Student L. Rev. 14 (2020): 31.
[175] C Diala Anthony, 'Curriculum decolonisation and revisionist pedagogy of African customary law.' Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad 22.1 (2019).

Legal pluralism in African countries shapes the legal regimes, highlighting the relationship between state and customary legal systems. To embrace legal and policy reforms in indigenous communities especially for rural dwellers, the state must adopt an inclusive vision, modify the machinery of law and policy reforms to meet the needs of its people within these communities, and accompany it with social, political, economic, educational, and psychological changes to the customary legal system. African countries must resolve internal conflicts of genuine diversity by equipping legal institutions and mechanisms, formal and traditional courts, and other forms empowered by the Constitution. These institutions should mediate and pursue justice without resorting to hegemonic interference or hatred of sovereign institutions that sustain unregulated neoliberal capitalist approaches to customary law as outmoded and barbaric arising from misunderstanding. There is the need for customary law to be carefully considered, extract its essential components and benefits, and dovetailing to align with state laws, international human right principles and conventions.

The papers submits that customary law remains important in contemporary times as it was days of old before colonialism notwithstanding the internal and external conflict of laws it faces. It is important based on the following grounds, it is flexible and adaptable to state laws and international human rights principles and conventions, an accessible tool for dispute resolution in indigenous communities, where state law enforcers may never reach due to inadequate human and capital resources challenges and enhance amicable resolutions which are in tandem with international conflict resolution principles. Most of these communities have no formal court systems established there, hence having to rely on the traditional tribunal.

Other relevance of customary law is the fact that they serve as a medium for the cultural values and heritage including enhancing socialization and cultural heritage. Therefore, African countries have more to gain than loss when it comes to sustaining customary law when it comes to law compliance and enforcement, stability, dispute resolution and peaceful co-existence for economic development.

Therefore, legal strategies such as codification, ascertainment and documentation, harmonisation and unification of customary laws with state laws and international convention, as well as judicial interpretation are possible approaches in sustaining the endured customary law system which has become part and parcel of Africa's legal pluralism. Similarly, in support of the legal remedies are the policy interventions. There is the need for the building of the capacities of African Tradition leaders and establishing modernized traditional tribunals which operates in tandem with state laws and international human right conventions, this would prevent these traditional leaders from engaging in unlawful practices.

It is also recommended the judicial services should also prioritise the establishment of specialised Customary Law Courts (divisions) as provided for other sectors to be handled by seasoned judges with specialisation and experience in customary law.

Also, the legislature needs to broaden their scope of consultation in law making with the community and the relevant stakeholders. Law schools have a significant role to play when it comes to decolonising legal education to mediate the conflict of laws between state laws and customary law by equipping law students, lawyers, judges and technocrats in this regard. And as provided above the state must be proactive towards this initiative with the necessary political will

in driving the agenda towards comprehensive handling of harmonisation of state law and customary law for the harmonious co-existence of the two within a democratic dispensation.