

Africa and the reimagination of modernisation: Beyond the colonial legal paradigm

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Abstract: *In 1984, Professor AN Allot published an article titled ‘What is to be done with African customary law’, in which he examined an urgent fundamental problem that confronted post-independent African states at the end of colonial rule. The question, as it was then, and now, was never really answered, and African countries still grapple with it today. The purpose of this chapter is to examine this question through a different prism – the concept of modernity. This chapter argues that post-colonial African leaders conflate modernity with Westernisation, thereby foreclosing the possibility of an African alternative. Second, the efforts put into legal pluralism as a response to the above question has been less successful than expected and largely perpetuates a systemic legal identity crisis occasionally manifested in conflict between traditional justice systems and formal legal system.*

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Third, I argue that any answer to the above question should be geared towards a reimagined African legal modernity. This paradigm shift is an imperative for Africa's social and economic development, and it is an urgent one.

1 Introduction

In 1984, Professor AN Allot examined one of the major problems that confronted post-colonial African countries at independence – the question of the future of indigenous legal systems in the post-colonial African state.¹ This question was never really answered. At the time, there were two choices: Abolish the Western legal system arbitrarily transplanted into Africa through colonisation and, in its place, re-establish the indigenous legal system, or completely abolish the indigenous legal system and retain the super-imposed Western legal system.² Most African states opted for a middle ground – a dual legal system or legal pluralism – a compromise, by institutionalising the parallel coexistence of indigenous laws and inherited Western legal system within one domestic legal order – with a view to the ultimate integration of both systems at some point.³ This ambition of integration has remained more of an aspiration than a tangible project in many African countries. But why did post-independent African leaders not reinstate the disrupted indigenous legal system after independence? After all, indigenous legal systems had regulated African societies for centuries and had even survived the onslaught of colonial legal subjugation.

One major argument against the indigenous legal system was that it has limited capacity to foster modern economic development. It is often pointed out that the essential characteristics of African law were also its major limitations – it is unwritten, flexible, uncertain and its doctrines susceptible to manipulation, subjugates women and it had the tendencies to infringe human rights; its sources are diffused and

1 AN Allot 'What is to be done with African customary law? The experience of problems and reforms in Anglophone Africa from 1950' (1984) 28 *Journal of African Law* 56.

2 Allot (n 1) 63.

3 Allot (n 1) 64. See also L Fallers 'Customary law in the new African states' (1962) 27 *Law & Contemporary Problems* 605-616.

can be easily distorted.⁴ Thus, it was argued that indigenous laws could not support political, social and economic development in a modern society.⁵ For these and other reasons, African states needed to retain the inherited Western legal systems and, where possible, allow them to co-exist with indigenous legal systems in an almost superior-inferior arrangement.⁶ By re-examining some of these arguments and their premises, I challenge the assumption that the Western legal system was indispensable for Africa's socio-economic development. If historical evidence confirms that African societies evolved at different times just like other societies in Asia, the Americas and Europe, then it is more than likely that Africa's legal system would have adapted to changing needs. The choice to retain the inherited Western legal system was to a large extent influenced by a number of factors, including the conflation of Westernisation with modernity.⁷ By equating Westernisation with modernity, post-independent African states felt compelled to replace or, at the very least, subordinate indigenous legal system to the formal legal system even though the indigenous legal systems ostensibly resonated more with the local population and therefore had legitimacy.⁸ This produced an outcome in which African states have a socio-legal vacuum that the enactment of legislation or judicial activism continue to struggle to fill. There is today a situation of chaotic legal ordering where African urban elites are regulated by formal laws while the vast majority in far-flung peripheries, where formal laws and institutions are largely absent, and where they are governed by indigenous laws. Consequently, Africa struggles with economic development and stifled organic legal innovation. Post-colonial African states have tried different legal modernisation through law reform projects that could resonate with

4 BZ Tamanaha 'Legal pluralism across the Global South: Colonial origins and contemporary consequences' (2021) 53 *The Journal of Legal Pluralism and Unofficial Law* 168-205, 188.

5 CM Fombad 'Sub-Saharan Africa' in M Siems & PJ Yap (eds) *The Cambridge handbook of comparative law* (2024) 367-384, 370-371.

6 K Tuori 'Legal pluralism and modernisation: American law professors in Ethiopia and the downfall of the restatements of African customary law' (2013) 42 *The Journal of Legal Pluralism and Unofficial Law* 43-70.

7 Tuori (n 6) 44.

8 Bennett and others claim that the thinking among African leaders at the time viewed African customary law as best suited to the 18th and 19th centuries. See TW Bennett & T Vermeulen 'Codification of customary law' (1980) 24 *Journal of African Law* 206-219, 206.

the cultures of their constituencies while fostering social and economic development aspirations. Unfortunately, these efforts are largely based on the same assumptions that the indigenous legal system is incapable of adequately adapting to modern socio-economic changes to provide a legal framework for development. My aim in this chapter is to critically re-examine the justifications and the grounds on which they were based. I adopt a historicisation approach to understand the process and its continuing impact on African countries.

This chapter is divided into five parts, including this introduction. In part 2, I examine how post-colonial African legal systems implicitly conflate 'modernity' with 'Westernisation', thereby foreclosing the possibility of a regeneration of an African alternative. In part 3 I examine some of the problems with which post-colonial African state institutions are now grappling as an indirect outcome of the choices they made at independence – a systemic legal identity crisis that we sometimes see in conflicts between traditional justice systems and the formal legal systems. In part 4 I consider how the effort at legal modernity connects with some of the challenges in the judiciary today and the need to change our approach. This is followed by part 5, where I offer concluding remarks.

2 Conflation of modernity and Westernisation in post-colonial Africa: Law, politics and social justice

The challenge of legal modernity in post-colonial African state persists because of the erroneous beliefs that equates 'modernity' with 'Westernisation', which shuts out the possibility of re-imagining African legal system even if not necessarily in a Western sense. Writers have long tried to distinguish Westernisation from an African legal modernity that reflects Africa's social and cultural contexts. Hence, it is important to begin by considering a few definitional issues. It is difficult to define modernity since there is a difference between the phenomenon of modernity and the process of modernity.⁹ Some scholars firmly locate modernity within its European epistemological origins. According to Gyekye, we can define modernity as

9 K Gyekye *Tradition and modernity: Philosophical reflections on the African experience* (1997) 264.

the ideas, principles, and ideals covering a whole range of human activities that have underpinned Western life and thought since the seventeenth century. The constitution of modernity makes it a philosophical doctrine and, as such, it is essentially linked to Western cultures; it was, and is, culture dependent, even though this fact does not in any way confine the appreciation of the notion, and the exploitation of its practical implications and consequences, to the West.¹⁰

To Gyekye, the defining characteristics of modernity emanated from European civilisation, although it is possible that certain developments and practices in non-European cultures may have been incorporated in the process by Europeans.¹¹ Nevertheless, modernity was 'uniquely developed by [Europe]'.¹² However, other iterations of modernity render the concept as characterised by 'a number of stable recurring coordinates such as knowledge, technology, individual rights, politics, social stratification and rationalisation of social and economic life and state institutions'.¹³ As a result, human populations generally manifest a tendency towards modernity and actively engage in the process of modernisation.¹⁴ These definitions reflect two notions of modernity: First, those who argue that 'modernity' as a concept cannot be confined to European origin and should be understood outside its Eurocentric articulations. In other words, a distinction should be drawn between Euromodernity and the uniquely natural human capability for modernisation.¹⁵ This distinction is important for our understanding of the African post-independent nationalist's conflation of Westernisation with modernity. In contrast, Westernisation is regarded as 'the process of adopting the ideas or way of life that are typical of Western Europe and North America'.¹⁶ It is the 'adoption of the practices and culture of Western Europe by societies and countries in other parts of the

10 Gyekye (n 9) 264.

11 As above.

12 As above.

13 RA Kumars 'Tradition and modernity in Africa: A reflection on influence of European ideology' (2006) 1 *Boleswa Occasional Papers in Theology and Religion* 37.

14 Kumars (n 13).

15 Ndlovu-Gatsheni offers a critique of Euromodernity and those who seek to replicate it in Africa as the ultimate goal of a complete decolonisation process. See S Ndlovu-Gatsheni *Decolonisation, development and knowledge in Africa: Turning over a new leaf* (2020) 2-6.

16 See Britannica 'Westernisation: Cultural and social influence', <https://www.britannica.com/topic/Westernisation> (accessed 12 December 2025).

world, whether through compulsion or influence.¹⁷ Colonisation was instrumental in the spread of Westernisation throughout most parts of the world, and globalisation has further advanced this trend. For a long time (especially in post-independent African political and economic development circles), modernity was often equated with Westernisation and to be modernised meant, at the very least, to be Westernised.¹⁸ The assumption that the road to modernisation passes through Westernisation was the progenitor of the convergence theory.¹⁹ Whereas Westernisation was initially exported to Africa through colonisation, it is the combined forces of globalisation, neo-colonialism and imperialism that have sustained it ever since and nowhere has this been felt more than the field of law.²⁰

Post-independence African nationalists, many of whom were educated in the metropolises of the colonial empire, did not escape the trappings of cultural Westernisation.²¹ There are many examples that manifested this tendency, but take language, for example. During the struggle for decolonisation, African nationalists often underscored their 'Africanness' and the importance of cultural identity in the struggle, not only in distinguishing themselves from the colonial masters but also as a vehicle of political mobilisation for mass action.²² Language was essential in this process, not just as a medium of communication in negotiating with the colonial masters, but also in connecting with their domestic constituencies in the struggle. Thus, while English, French, German, Portuguese or Spanish simultaneously served as a medium of communication with the colonial master and also among the nationalists themselves, the local language was often deployed to distance nationalist liberators from the colonial masters and to connect with the local community.²³ However, as Huntington points out, soon after independence, 'the elites of these societies needed to distinguish

17 Britannica (n 16).

18 See SP Huntington *The clash of civilisations and the remaking of world order* (1996) 69.

19 SC Nwinyia 'The conflate of modernisation and Westernisation and Africa's quest for authentic civilisation and development' (2019) 24 *Journal of Humanities and Social Science* 59.

20 Nwinyia (n 19).

21 A Mazrui 'Is development sustainable without modernisation?' (2006) 32 *Ufahamu: A Journal of African Studies* 13-37.

22 Huntington (n 18) 63.

23 As above.

themselves from the common people of their societies.²⁴ Fluency in English, French or another Western language did this. As a result, we find that in post-colonial Africa, elites of non-Western societies are often better able to communicate with Westerners and one another than with ‘the people of their own society.’²⁵ To this end, Westernisation was viewed as a phenomenon of modernity.

Arguably, post-independent African leaders accepted Westernisation as a requirement for modernisation, which led them to adopt policies that de-emphasised cultural influence and its role in different aspects of national development – language, education, law, economics, politics, culture, civic responsibility, nation building, ethics, social-cohesion, and so forth. The result is a crisis of identity in which Africa has not been able to inspire nor sustain meaningful development. It is also largely responsible for why many development programmes, aid, policy after independence failed since they were not rooted in ‘indigenous values’ which hindered successful implementation.²⁶ Many African countries are now juridically ‘torn countries’ gripped by a relentless legal order identity crisis in which elites try unsuccessfully to redefine the identity of their country’s legal orders.²⁷

The basic idea underpinning the ‘Westernisation’ view through which Western culture have been propagated in Africa is the Eurocentric claim that since European values of liberty, individualism and private property rights were superior values, they would inevitably be embraced by the rest of the world as their own societies advanced.²⁸ For example, during colonisation, colonial laws introduced tax systems and land title registrations that began the commercialisation processes and created a narrow class of native elites whose cooperation and proximity to colonial

24 Huntington (n 18).

25 As above.

26 REE Nwobodo ‘Africa and the challenges of modernity’ (2021) 5 *Nnadiabube Journal of Philosophy* 1-17.

27 Huntington elaborates this phenomenon in relation to Mustafa Kemal Atatürk’s attempt to redefine Turkey as a modernised and westernised country in the early 20th century. ‘In embarking on this course, and rejecting the Islamic past, Atatürk made Turkey a “torn country”, a society which was Muslim in its religion, heritage, customs, and institutions but with a ruling elite determined to make it modern, Western, and at one with the West.’ See SP Huntington (n 18) 74.

28 F Fukuyama *The end of history and the last man* (1992); FA Hayek *Law, legislation and liberty: A new statement of the liberal principles of justice and political economy* (1998).

power positioned them to not only step into the shoes of the departing colonial masters at independence, but also to retain its legal system as a heritage indispensable to modernisation regardless of how disconnected from the social realities of the local population such laws were.²⁹ We find evidence of such disconnect in Western-inspired laws and practices of many African states even to this day held up not as colonial legacies but as proof of legal modernity. For example, until recently, bigamy was a crime on the statute books in many states in Nigeria, such as Lagos state, even though it obviously was at odds with the prevalent social norm of polygamy. According to this law, '[a]ny person who having a husband or a wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife is guilty of a felony and is liable to imprisonment for seven years.'³⁰

In over six decades after independence, this law remained on the statute books of most states in Southern Nigeria and the criminal code. Yet, to the best of the knowledge of the current author, there is only one instance where someone was prosecuted for bigamy, which and this was in 1962, right after independence, and since the British left, no one pays attention to that law, not because there has been no infringements

29 Eg, hut tax, head tax, etc were introduced and land registration and titles were introduced. See BG Fortman & P Mihyo 'A false start: Law and development in the context of a colonial legacy' (1993) 26 *Law and Politics in Africa, Asia and Latin America* 136, 140. Today, this process has intensified across countries facilitated by forces of globalisation and foreign-funded NGOs. However, citing the example of the Asante of Ghana, scholars such as Kwame Gyekye argue that private ownership of land in Africa predates colonisation. According to him, 'the idea of private property is not alien to traditional African societies'. 'The denial of the existence of the concept of private property in pre-colonial Africa cannot be firmly grounded. The evidence instead affirms the existence of both the concept and the practice of private property. Also, if we can appropriately talk of 'the wealthy man', then we can correctly talk also of private property. If there were no private property, there would be no wealthy *individual*. In other words, the wealthy person must be assumed as possessing private property. If the wealth or property belongs to a family or clan, then it would be the family or clan, not an individual, which can appropriately be said to be wealthy. Thus, if there were wealthy individuals in African communities in pre-colonial times, then it can be concluded that there were private properties.' See O Taiwo *How colonialism pre-empted modernity in Africa* (2010) 154.

30 See sec 370 of the old Criminal Code Law of Lagos State Cap C17, Laws of Lagos State 2004, reproducing the Criminal Code Ordinance and the Marriage Ordinance of 1914. See also BG Fortman & P Mihyo 'A false start: Law and development in the context of a colonial legacy' (1993) 26 *Law and Politics in Africa, Asia and Latin America* 136-161.

but because nobody believes in it.³¹ Thus, it was one piece of irrelevant legislation since it created an offence that was culturally at odds with the community it was intended to regulate and has therefore been unenforceable. Of course, law as a product of a social process means that there are aspects in which some practices have changed over the years, but those changes have been driven by the interaction of local custom and gradual percolation of Western values rather than any piece of legislation. Across many legal domains, there is an observable gap between the proliferation of laws and the everyday realities of the people in many African countries. This contradiction between what has been described as 'legal fetishism and legal irrelevance' is part of the reason why many laws in Africa lack the necessary compliance pull because they ignore the social context in which laws are supposed to function.³²

Similar assumptions underpinned the Western approach to law and development in Africa in the 1980s and 1990s and the convergence of the narrow interests of African elites that drove its implementation. It was the premise of the package of free market economy, democracy and human rights that institutions such as the International Monetary Fund (IMF) and the World Bank impressed upon African states as the antidote for their economic malaise.³³ The current democratic 'roll-back' across Africa is emblematic of this quagmire.³⁴ Whereas Western democracy is often seen as one of the colonial exports to Africa, it has struggled to consolidate into a firm democratic culture on the continent, so much so that some observers are now asking whether there is something fundamentally antidemocratic about Africa.³⁵ As a colonial legacy,

31 See *Queen v Bartholomew Princewell* (Jos Charge JD/19C/1962. Judgment delivered on 16 June 1962), reported in [1963] Northern Regional of Nigeria Law Report 54.

32 Fortman & Mihyo (n 29) 136.

33 JE Stiglitz *Globalisation and its discontents* (2002) 10, 12; D Lal 'Does modernisation require Westernisation?' (2000) 1 *The Independent Review* 5-24. A recent report by the World Bank now suggests a policy reversal that confirms what many critics in and outside Africa have since stated. See International Bank for Reconstruction and Development (2026) *The World Bank*: Washington.

34 L Diamond 'The democratic rollback: The resurgence of the predatory state' (2008) 87 *Foreign Affairs* 36-48.

35 PM Lewis 'Aspirations and realities in Africa: Five reflections' (2019) 30 *Journal of Democracy* 76-85. Recent studies have found that three key variables (poor performance, violations of the rule of law and corruption) by the President explain popular support for military coups in Africa. See W Hatungimana 'Democracy on the line? Political legitimacy and support for military rule in Africa' (2025)

democracy in Africa has often carried an instrumental value for Africans because of its supposed 'promise' of prosperity.³⁶ This instrumental view of democratisation also forms part of the modernisation endeavour that post-independent African states were supposed to embrace, but, when it fails to deliver this promise, as we have sometimes seen, proponents question the process rather than the assumptions. Some commentators are beginning to consider the possibility of an African model of democracy.

The point being made here is that, for centuries, indigenous legal systems in Africa were underpinned by values of collective progress, communalism, inter-dependence and group solidarity which were subjugated by colonial laws and have been systematically undermined by the post-colonial state ever since. This is not to romanticise pre-colonial African indigenous legal systems, but to emphasise the view that while inextricably linked, the conflation of Westernisation and modernisation by post-independent African elites is partly responsible for the quagmire in the legal systems of most post-independent African states. Thus, while modernisation involves a modification in ideas of how the material world functions, Westernisation involves a 'change in cosmological beliefs about the way that one should live' and by maintaining colonial legal practices that sees Westernisation as a condition for modernity, many post-independent African laws actually estrange large segments of their populations and the policies and legislation designed in such contexts would hardly ever yield the desired outcomes.³⁷

3 Legal modernity and the afterlife of decolonisation in the African imagination

We have seen from the preceding analysis how post-independent African elites conflated Westernisation with modernity and, consequently, chose

32 *Democratisation* 1904-192, 1914. However, some commentators challenge the 'democratic backsliding' thesis arguing that democratic experiences vary among African countries. See RA Leonardo and others *Democratic backsliding in Africa? Autocratisation, resilience, and contention* (2023) 18.

36 C Ake *Democracy and development in Africa* (1996).

37 S Parashar & M Schulz 'Colonial legacies, post-colonial "selfhood" and the (un) doing of Africa' (2021) 42 *Third World Quarterly* 867-881, 870; Nwinya (n 19) 59-65.

to retain the Western legal system after decolonisation even though this was clearly at odds with the pre-existing indigenous legal system and a large section of the population in the newly independent state. In this part, I briefly consider some of the implications of that choice and evaluate the attempts to resolve it.

Critics have long argued that in most post-colonial states, the formal decolonisation process only saw the successful handover of political power by colonial powers to Western-trained African elites without significant normative change.³⁸ Across most of the decolonising Third World, where 'elite consciousness was privileged over subaltern consciousness', the belief was that modernity would entail supplanting whatever was traditional.³⁹ In Africa, this was so much so that even among some African intellectuals and elites, there was a tendency to distance themselves from what was perceived traditional.⁴⁰ First and foremost, the primary concern of post-independent African elites arguably was the consolidation of political power.⁴¹ Thus, the so-called modernisation and the numerous post-independent law reforms implemented under the new constitutional architecture actually enabled post-independent political elites to centralise power, entrench clientelism, repress dissent and prop up authoritarianism, which became the defining characteristics of many African countries.⁴² The task of managing the shift from colonial rule to self-rule proved more difficult for post-independent African states than was initially envisaged, and the art of crafting a state with capable and sustainable institutions – the civil service and bureaucracy, the justice sector, security, and so forth – proved daunting and in many cases 'undermined by the lack of internal cohesion, ethnic rivalries, cultural dissonance, and external interventions.'⁴³ In my view, because the whole post-colonial state edifice was underpinned by a misaligned cultural

38 Parashar & Schulz (n 37) 870.

39 S Parashar 'Colonial legacies, armed revolts and state violence: The Maoist movement in India' (2021) 42 *Third World Quarterly* 337-354, 339.

40 See J Abidogun 'Pan-African theory's impact on the development of Afrocentric education in Jamaica' in T Falola & K Essien (eds) *Pan-Africanism and the politics of African citizenship and identity* (1998) 13-27.

41 M Mutua 'Africa and the rule of law' (2016) 13 *International Journal of Human Rights* 159-173.

42 Fombad (n 5) 372; MM Mulinge & GN Lesetedi 'Interrogating our past: Colonialism and corruption in sub-Saharan Africa' (1998) 3 *African Journal of Political Science* 15-28.

43 Mutua (n 41) 160.

superstructure, the state failed in one of its most fundamental functions almost from the very beginning – the administration of justice. So, it was only a matter of time before those wobbling state institutions collapsed. Mutua largely blamed the executive arm of government for this state of affairs and the new African judiciaries for failing to ‘transform the justice sector from a colonially racist, antipeople, and oppressive instrumentality.’⁴⁴

While Mutua is not necessarily wrong, I think the collapse has more to do with the contradictions between the inherited legal system and the multiplicity of social, economic and political relationships it was supposed to regulate or resolve. In the absence of acculturation, how was a judge trained in colonial legal education, practised inherited colonial laws, in a colonially-designed court operated within a colonial administration of justice system, and so forth, supposed to suddenly transform the system when the entire edifice of legal culture from top to bottom was underpinned by colonial logic? The end result is a dysfunctional legal order in many African states which persists today but euphemistically described as legal pluralism – where competing legal regimes co-exist in a state of legal disorder. The implications for Africa’s socio-economic development (not to mention corruption, crime and violence, and so forth) have been huge, to say the least. The point being made here is not to suggest that the pre-colonial legal order in Africa was a perfect system, because even that system has been the subject of critique. However, to the extent that societies develop within a given social and cultural context, to the extent that countries do not modernise in a cultural vacuum, it is more than likely that modernity in Africa would and could have evolved in a uniquely African way providing the cultural security for societal mobilisation to build industrial, scientific, technological and industrial capacity, without which efforts at development will not only be vacuous but a mirage.⁴⁵ For this modernity, borrowing from other legal cultures, including those of former colonial masters, may be useful but should not be equated to Westernisation, which is what has led to the current identity crisis. The canons of legal modernity embraced at independence at least in a liberal market economy framework – constitution, democracy, the rule of law, private property rights, human rights – have so far not been able to secure the state nor insulate African polities from the perils of inter-ethnic rivalries (which post-independent leaders feared would fracture nascent post-independent countries’ unity), nor has it been able to

⁴⁴ Mutua (n 41) 161.

⁴⁵ E Crew & R Axelby *Anthropology and development: Culture, morality and politics in a globalised world* (2013) 137; Mazrui (n 21).

consolidate institutions of the state.⁴⁶ In fact, the nation-building projects, transitional justice projects, post-conflict state reconstruction projects of the United Nations (UN) and other multilateral organisations operating in Africa often yield very few results over several decades and at the cost of hundreds of billions of dollars partly for this reason.

It is imperative to consider that the choice to replace indigenous legal systems with Western legal systems after independence may also have been driven by economic considerations. For example, by retaining the Western legal system, post-independent African elites were able to appropriate land and other natural resources under state control by enacting legislation that effectively transferred those resources from communities to the state and subsequently to private individuals and enterprises for exploitation.⁴⁷ Through judicial and legislative apparatus and the colonial instruments of political violence inherited at independence, post-independent elites successfully retained for themselves the privilege of office while stripping communities of their resources and driving them into social economic marginalisation.⁴⁸ A good example is the Land Use Act of Nigeria supposedly representing legal modernisation of land law in Nigeria, but which has become the instrument of elite misappropriation and dispossession, extraction of natural resources, and violence against indigenous communities.⁴⁹ This legislation vests all lands in a state in the state governor of the state in trust for all Nigerians.⁵⁰ Similarly, through the constitution and similar

46 RP Burns 'Modernity and the law: A late twentieth century view' (2020) 10 *Notre Dame Journal of International and Comparative Law* 307.

47 Parashar & Schulz (n 37) 872; RB Persaud & N Kumarakulasingam 'Violence and ordering of the Third World: An introduction' (2019) 40 *Third World Quarterly* 199-206, 200; A Kyomuhendo 'The modern state, imperial law, and decolonial possibilities: Assessing the effectiveness of law in protecting cultural heritage in Africa during and after colonialism' (2024) 31 *International Journal of Cultural Property* 477-495; Fombad (n 5) 371; Parashar (n 38) 340; Crew & Axelby (n 45) 137.

48 Parashar makes this case in the context of India, but the same can be said of Africa. See S Parashar 'Colonial legacies, armed revolts and state violence: The Maoist movement in India' (2019) 40 *Third World Quarterly* 337-354, 339.

49 Sec 315 of Constitution of the Federal Republic of Nigeria, 1999 preserves the Land Use Act under the constitutional framework in the democratic dispensation. See KH Babalola and SA Hull 'Examining the Land Use Act of 1978 and its effects on tenure security in Nigeria: A case study of Ekiti State, Nigeria' (2019) 22 *PER/PELJ* 134.

50 See sec 1 of the Land Use Act, 1978 which provides that '[s]ubject to the provisions of this Act, all land comprised in the territory of each State in the Federation is hereby vested in the Governor of that State, and such land shall be held in trust

legislation, communities were stripped of control over their natural resources, especially oil, natural gas, rare timbers, and so forth, which the state has appropriated and now hands over to a small class of economic and political elites through the award of licences that the original indigenous communities are usually too poor to obtain. Yes, there might be a handful of individuals from the indigenous communities who have been coopted to legitimise the use of legislation to rob indigenous communities. Nevertheless, this does not diminish the effect of these laws and how they have impoverished communities. Writing in the case of India, Parashar notes that

[t]he usurpation of forest areas not only dispossessed the traditional owners from their own land but also unleashed a new class of oppressors in the form of landlords, merchants, and moneylenders and government agents. Given this proclivity, there was a tension between the sub-national groups or subaltern groups and the nationalist elites in what was described as the conflict between the people-who-comprise-the-nation and the state-which-represents-the-nation.⁵¹

The activities of resistant movements especially in the Niger Delta of Nigeria is another prime example.

Since Africa is composed of different communities each with its own law, it is argued that it would be difficult to impose a uniform traditional justice system. At the same time, the post-colonial state has struggled to impose the formal legal system upon indigenous communities whose lives continue to be largely regulated by indigenous laws of the communities. The ‘messy compromise’ of legal pluralism, as Griffiths calls it, ‘which the ideology of legal centralism was forced to make with recalcitrant social reality’ did produce legal pluralism but has been unable to lead to the promised legal unification.⁵² The result is an endless cycle of legal gymnastics in which the formal courts struggle to resolve the tensions created by these competing legal dilemmas and in the process end up creating even more serious cultural and social apprehension capable of igniting an avalanche of social crisis. The most recent example of this

and administered for the use and common benefit of all Nigerians in accordance with the provisions of this Act’. The Land Use Act 6, enacted on 29 March 1978, The Complete 2004 Laws of Nigeria, <https://faolex.fao.org/docs/pdf/nig67625.pdf> (accessed 13 April 2026).

51 Parashar (n 39) 341-342.

52 J Griffiths ‘What is legal pluralism?’ (1986) 7 *Journal of Legal Pluralism and Unofficial Law* 1-55, 4-5, 7.

conundrum is the recent judgment of the South African Constitutional Court in *Jordaan & Others v Minister of Home Affairs* in which the Court decided that a husband could take the surname of his wife.⁵³ This sort of judicially-induced social engineering underscores the current African identity crisis, which is beyond the scope of this chapter. Nevertheless, to the extent that this has implications for individuals, families and communities in terms of property rights, inheritance, nationality/citizenship, and so forth, not only highlights the dangers of the long-standing but unresolved crisis of African legal systems unleashed by the choice of Western legal system over indigenous system, itself a result of the erroneous conflation of Westernisation with modernity, it also demonstrates the urgency for action. African leaders usually made three main arguments then and now. First, that modern economy requires the adoption of Western-style legislation because, as pointed out above, Africa is made up of small tribal groups each with its own laws. But it is obvious that if indigenous tribes could retain their cultural identity within the postcolonial nation state, they could as well retain their legal systems including the control over their natural resources, and whoever intends to do business with them should consider those laws. Second, it was argued that the adoption of Western legal system and legislation was necessary for national integration. Yet, more than 65 years later, the number of conflicts on the African continent actually suggests otherwise. Third, it was argued that treating different groups according to different legal systems within one nation state would have amounted to discrimination. However, indigenous legal systems should be tested against indigenous nomos rather than a Western construct of justice and fairness.⁵⁴ In any event, it is now widely accepted that there is a disconnect between the law 'desired by the African leaders, and particularly the statute law, and the law lived by a large segment of the population.'⁵⁵ To resolve this, advocates recommend adaptation – retention of the law

53 *Jordaan & Others v Minister of Home Affairs & Another* [2025] ZACC 19, in which the applicants challenged the constitutionality of secs 26(1)(a)-(c) of the Births and Deaths Registration Act 51 of 1992 under which females may take the names of their husband but without a corresponding reference to the male gender.

54 F Reyntjens 'The future of customary law in Africa' in J Church (ed) *The future of indigenous law in Southern Africa* (1993) 3-22, 4.

55 Reyntjens (n 54) 3, 22.

means it continues to exist but in line with necessary adaptation for socio-economic development.⁵⁶

4 Legal modernity and crisis in the African imagination

Whatever view one takes of modernity, it is clear that modernisation encompasses a variety of elements ranging from industrialisation, diversification, expansion of professional organisations and commercial ventures, and so on.⁵⁷ We have seen that Westernisation and modernisation are two different concepts, and the evidence of Japan's modernisation without Westernisation and China are practical illustrations of this point. These two countries remind us that for practical purposes, Africa should understand modernity in its own context by approaching its own 'technological innovation, governance, and socio-economics' with such acute awareness.⁵⁸ In other words, Africa's participation in modernity would mean African societies actively engaging in both organisation and production of advanced knowledge that far exceeds those of our forebears. Africa should abandon many of its unprofitable colonial legal practices, for example, the use of legal robes and other regalia that add no value to the dispensation of justice. In fairness to the post-colonial state, it is pertinent to consider the environment and time in which the leaders had to operate. The departing colonial administration viewed Westernisation – embrace of Western culture and values – as inevitable for the newly independent African states to continue the match towards 'civilisation' for which a variety of legal paraphernalia would be crucial, including a written constitution, democracy, rule of law, human rights, all of which were to be delivered by a capable post-colonial state. Of course, the basic colonial logic underpinning this

56 AC Diala 'Normative intersectionality in married women's property rights in Southern Nigeria' (2024) 24 *Law, Democracy and Development* 86-108, 89; Fombad (n 5) 372.

57 According to Nwinya, modernisation entails 'industrialisation, urbanisation, complex and diverse occupational structures; economic enterprises based on rationality and efficiency; technically rational modes of thought; mass education, mass communication, a centralised nation, state and institutions that participate in global systems while Western values and institutions include: individualism, liberty, equality, constitutionalism, human rights, free markets, secularisation and democracy'. See Nwinya (n 19) 62.

58 Britannica 'Modernity', <https://www.britannica.com/topic/modernity> (accessed 4 December 2025).

assumption was that pre-colonial Africa had no history, no law, no institutions, because since the native was seen as an uncivilised savage, how could they have all of the elements that were the essential markers of European Enlightenment?⁵⁹ According to Mutua,

Western thought viewed pre-colonial Africa as pre-law, and thus argued that emergent states needed formal Western legal regimes to enter modernity. No credit was given to pre-existing African legal systems, which were often referred to as 'customary law', 'traditional', 'savage', or 'uncivilised'.⁶⁰

Continuing in the steps of the colonial state, what the post-independent state sought to do was the bureaucratisation of the system, including the judiciary in the name of modernity, but in the mistaken belief that this would translate to socio-economic development, which unfortunately has not happened.⁶¹ Consequently, to ensure that Africa's legal modernity responds to Africa's unique needs, Mutua suggests a devolution of powers as part of institutional reforms necessary to strengthen the rule of law in order to bring the source of authority closer to the people, ensure greater participation in economic and political processes and, thus, facilitate transparency and accountability.⁶² This will also ensure legitimacy of any cultural modifications which will be beneficial not just to the law and justice reforms programmes long hobbled by colonial legal cultures, but progressive efforts in transitional justice and other broader modernisation efforts. This will require a paradigm shift from a top-down approach often pursued by the state and development partners (who are more familiar and comfortable with such system) to a bottom-up approach of local ownership driven by communities whom those systems are intended to serve. State agents in the justice sector should be willing to concede that local communities exercise autonomy in ways that are contextually sensitive even though the outcomes may not necessarily correspond to what the Western-trained law and justice development partners and practitioners would conceive as 'justice'. Again, to quote Mutua,

59 M Mutua 'Savages, victims and saviour: The metaphor of human rights' (2001) 42 *Harvard International Law Journal* 201; Mutua (n 41) 163.

60 Mutua (n 41) 164.

61 As above.

62 Mutua (n 41) 167.

[i]t can enhance national cohesion and give pre-colonial loyalties a reason to embrace the post-colonial state to create a national consciousness. In Africa, where virtually every state is hodge-podge of distinct pre-colonial ethno-political societies forced together by the colonial cartographer devolution serves the purpose of forging a common national identity.⁶³

Some commentators also highlight the corrupt nature of many African judiciaries where justice is often for sale with judges serving as vendors, lawyers as bartenders and vested private businesses (local and international) as clients in an urbanised system that has limited or no rural presence characterised by interminable delays in court processes.⁶⁴ Thus, it has been suggested to redesign the current institutions in the justice sector and reorient the personnel that operate them.⁶⁵ However, this proposal is hardly different from what has been tried previously under the law and justice reforms programme.⁶⁶ The re-imagination of the judiciary called for by Mutua only reinforces the current approach to legal modernity by at best not neglecting 'to integrate and treat with dignity so-called alternative justice systems'.⁶⁷ In my view, the impact of the conflation of modernisation with Westernisation remains a key question and would have to be addressed to make progress and this has become more urgent in the last few decades when similar initiatives such as the African Renaissance imitative failed to make a radical break from this past, but was instead ostensibly anchored in the same 'false start'. The current crisis of legal identity facing Africa stems from the fact that the formal legal system – the positivism bequeathed to independent African states – has not been able to effectively regulate the affairs of the people and there is a disconnect between the law and the everyday realities of the people. As Bennett pointed out long ago, what makes legal pluralism sit uneasily with legal positivism in Africa is that legal positivism is not realised in reality and the question of the extent to which people accept the formal legal system as the 'primary sources of law regulating their lives'⁶⁸ has to be answered. Fortunately, there seems to be a growing awareness, albeit rather slow, of the need to reconceive Africa's modernity, particularly

63 Mutua (n 41) 167.

64 Mutua (n 41) 168.

65 As above.

66 As above.

67 As above.

68 T Bennett 'Human rights and customary law under the new Constitution' (2011) 75 *Transformation* 73, 78.

in the aspect of legal development, as a necessary condition for socio-economic and scientific, technological advancement and, increasingly, scholars are beginning to re-engage with the problem.⁶⁹

5 Conclusion

In this chapter I have attempted to tackle the crisis of the identity crisis that characterises many African legal systems. I argue that post-colonial African leaders conflated modernity with Westernisation when they opted to privilege the inherited Western legal system over indigenous legal systems and rather than serve as an effective legal framework for socio-economic development, this has actually created an identity crisis in the legal order while enabling elite malfeasance. Since law is supposed to regulate a society in a given cultural context, the disconnect between the formal legal systems adopted at independence and the everyday life of most people in Africa represent one challenge that requires a paradigm shift to find a solution. The current top-down approach often promoted by Africa's development partners and African elites perpetuates a colonial practice that ignores the disconnect between the formal laws of the colonial and post-colonial state and the community such laws are supposed to serve. Thinking about legal modernisation in post-colonial Africa should move away from elite-driven processes and be geared towards a reimagined African legal modernity that seeks to ground Africa's legal system in Africa's history, the experience and current everyday realities of African peoples.

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⁶⁹ See the Workshop organised by Eghosa Ekhator at University of Derby, and Prof Okafor Obiora's ongoing project. Unfortunately, as is often the case, these efforts are largely pursued in the Global North, sometimes by African diasporas. It has not yet gained traction in the African academy.

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