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Why Take Private Law Seriously in Africa?

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WHY TAKE PRIVATE LAW SERIOUSLY IN AFRICA?

SYLVIA WAIRIMU KANG'ARA*

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INTRODUCTION

A century and a half of economic and political fragility has undermined Africa's ability to engage with or counteract the assaults of global economic and political powers. Situational and contractual asymmetries, both past and present, have guaranteed economic indignity and political powerlessness for almost all African nations and their citizens.¹ Africa's human capital, natural wealth, and

* Assistant Professor, University of Washington School of Law. I wish to thank Professor Fernanda Nicola for inviting me to chair the *Panel on Private Law and Social Justice in Africa* at the XVIIIth Annual Congress of the International Association of Comparative Law held in Washington, D.C., on July 26, 2010. I also wish to thank the panelists, Raymond Atuguba, Romuald Haule, and Rugemeleza Inshala, for their wonderful participation and timely contributions.

1. Cf. JAMES THUO GATHII, *WAR, COMMERCE, AND INTERNATIONAL LAW 185-90* (2010) (arguing that rules of international economic governance have perpetuated the exploitative nature of colonial economic relations, such as how the restrictive theory of immunity supports the right of private actors "to sue and recover against third-world States in the courts of the developed world and in arbitral forums"); Antony Anghie, *Civilization and Commerce: The Concept of Governance in Historical Perspective*, 45 *VILL. L. REV.* 887, 904-05 (2000) (categorizing European defense of the "right to trade" as legal dressing for

strategic advantages have failed to produce tangible economic or political benefits for its inhabitants.² For a long time, this situation was blamed on Africa's dearth of private law and the individualist ethos that accompanies such law.³ Consequently, for over a century, resources went to private law generating efforts such as reception, codification, harmonization, and judicial development.⁴ This article argues that, in place of the traditional commitment to the formal development of private law in Africa, international and comparative law should instead make situated critiques of private law's performance on the continent. Making the needs and circumstances of communities and individuals in Africa the focus of private law is not an abandonment of the ideal of formal development. Reorienting private law in this way is consistent with democratic governance, because private law should operate to the benefit of the governed, as well as in the interest of global economic fairness. For private law to strengthen Africa's economic chances and dignitary interests, it must move beyond formal development to situational consciousness.

economic exploitation).

2. See, e.g., Emeka Duruigbo, *The World Bank, Multinational Oil Corporations, and the Resource Curse in Africa*, 26 U. PA. J. INT'L ECON. L. 1, 2, 21-25 (2005) (providing evidence of Africa's "resource curse," a term describing the paradox whereby countries with an abundance of natural resources, particularly oil rich countries, often experience low levels of economic growth).

3. See, e.g., G.B.A. COKER, FAMILY PROPERTY AMONG THE YORUBAS 3-19 (1958) (observing that "modern stress" and "a gradual dissolution of family dependency" necessitates a transition from "native" to "modern" law, while maintaining that Yoruba systems of land tenure are so entrenched they will never be fully replaced by foreign law). *But see* Kwamena Bentsi-Enchill, *Do African Systems of Land Tenure Require a Special Terminology?*, 9 J. AFR. L. 114, 114-16 (1965) (rejecting this position by resisting the call for radical reforms of traditional African landholding systems and advocating for a comparative study of land tenure systems to identify limited instances where reform or legal integration is necessary).

4. European studies of African legal systems began in mid-nineteenth century. See, e.g., Notes and News, *African Customary Law, 1858-1958*, 2 J. AFR. L. 139, 139-45 (1958) (noting the paucity of research on African customary law and describing reform efforts in Ghana and then Northern Rhodesia and Basutoland); Jill Cottrell, *The Tort of Negligence in Nigeria*, 17 J. AFR. L. 30, 30, 37 (1973) (discussing advancements in Nigerian contributory negligence law following the adoption of apportionment legislation in the late 1950s and early 1960s); C. M. McDowell, *Trespass and Title to Land in the Northern States of Nigeria*, 17 J. AFR. L. 94, 94 (1973) (analyzing developments in Nigerian law of trespass and land entitlement, including judicial understanding of the definitions of "native" and "non-native" with respect to the alienation of land).

Despite the many achievements of comparative law in the last century, the problem of private law in Africa remains, namely that it has failed to secure economic dignity and political clout for Africa in global affairs. Heartfelt thanks are therefore due to the organizing committee of the 2010 Annual Congress of the International Association of Comparative Law for inviting and supporting the participation of up-and-coming African scholars. The panel provided an opportunity to discuss with influential scholars and practitioners the distressful failure of private law in Africa even after more than a century of codification and harmonization programs. Thanks are especially due to Professors Fernanda Nicola, David Snyder, and James Feinerman, and the deans of Washington College of Law, Georgetown Law Center, and George Washington School of Law for supporting and encouraging the work of the panelists.

I. LIVING BY THE SEA BUT BATHING IN SPITTLE

In the past, scholars routinely claimed that Africa lacked law and private consciousness.⁵ As a result of these critiques, in the last century and a half, significant attention has been paid to the development of private law in Africa.⁶ Far from yielding economic independence and political clout, the various outcomes from these efforts include the implementation of a positive law scheme which maintains a public/private divide and values individualism over

5. See generally WERNER MENSKI, *COMPARATIVE LAW IN A GLOBAL CONTEXT* 380-492 (2d ed. 2006) (arguing that the existence of African law has been systematically denied throughout history while noting, ironically, that African law is often blamed for hindering development); James Thuo Gathii, *Retelling Good Governance Narratives on Africa's Economic and Political Predicaments: Continuities and Discontinuities in Legal Outcomes Between Markets and States*, 45 *VILL. L. REV.* 971, 975, 1035 (2000) (analyzing how modernist discourse cast Africa as "trapped in conditions of nature as opposed to consciousness" and tracing the persistence of this discourse in current economic development initiatives); Sylvia Kang'ara, *Analytical, Prescriptive, and Resistant Characterizations of "African" Conceptions of Property: A Critique of Mainstream Assumptions about African-Western Incompatibility* 3 (2003) (unpublished SJD Dissertation, Harvard Law School) (on file with author) (questioning the "African-EuroAmerican legal incompatibility" theory).

6. See Richard Frimpong Opong, *Private International Law Scholarship in Africa (1884-2009)--A Selected Bibliography*, 58 *AM. J. COMP. L.* 319, 321-22 (2010) (describing the growth of African private law through the rise of private international law study in African universities and efforts to harmonize laws in African nations).

communitarianism, a near monopoly by African states over formal lawmaking and enforcement within this scheme,⁷ and the development of local private law institutional capacities by African governments with the assistance of renowned international scholars.⁸

Thus, the initiatives to develop private law appear increasingly disconnected from real needs. Indeed, the development of private law in Africa has occurred within a conceptual framework that can be analogized to a train on rails, with the rails signifying liberal classical legal thought.⁹ Like trains on a rail, governments, scholars, and international institutions following this framework have historically moved in one direction and sought one outcome, namely, an individualistic unitary private law regime.¹⁰ This single-track approach has deceptively lent private law an appearance of

7. See MENSKI, *supra* note 5, at 485-86 (noting that African leaders have “learnt to copy the bad and dangerous elements of positivist circularity,” and to manipulate the state for their own benefit).

8. See, e.g., Jan L. Neels, *The Revocation of Wills in South African Private International Law*, 56 INT'L & COMP. L.Q. 613 (2007) (highlighting the influence of the Hague Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions and other state practice on domestic private law in South Africa, particularly the South African Wills Act 7 of 1953); Sylvia Kang'ara, *Globalization of Law: Anglo-American Legal Thought in African Family Law and the Limits of a Jurisprudence of Pre-Commitments* 4-7 (unpublished manuscript) (on file with the author) (arguing that the reliance of African courts and legislatures on Anglo-American legal thought has led to “systemic incoherence” and injustice in African family law); see also Oppong, *supra* note 6, at 319-20 (acknowledging that while private international law scholarship in Africa has not received broad international recognition, it has nevertheless had a marked impact on the development of African private law).

9. See, e.g., Paul Brietzke, *Private Law in Ethiopia*, 18 J. AFR. L. 149, 160 (1974) (“The outstanding characteristics of Ethiopian private law are its orientation towards nineteenth century capitalism and the lack of meliorating provisions associated with the welfare state in the West and with broadly-based development in the Third World.”).

10. For useful critiques of neoclassical legal and economic thought, see generally Thomas C. Grey, *The Disintegration of Property*, in 2 LIBERTY, PROPERTY, AND THE LAW: MODERN UNDERSTANDINGS OF LIBERTY AND PROPERTY 291 (Richard A. Epstein ed., 2000); Duncan Kennedy, *Neither the Market Nor the State: Housing Privatization Issues*, in A FOURTH WAY? PRIVATIZATION, PROPERTY, AND THE EMERGENCE OF NEW MARKET ECONOMIES 253 (Gregory S. Alexander & Grażyna Skapska eds., 1994); Duncan Kennedy & Frank Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711 (1980); and Kenneth J. Vandavelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325 (1980).

coherence and, worse, turned its development into an isolated goal. A century's worth of private law writings on Africa gives the impression that governments, scholars, and the international community neither understand Africa's true priorities nor require that private law benefit the continent's inhabitants.¹¹ In fleeting moments, scholars, governments, and international institutions claim that private law reform will spur economic development and therefore improve the circumstances of all.¹² Still, private law scholarship leaves one with the feeling that reform is being pursued for its own sake; the activities of codifying law, requiring seals, and creating document registries or courts, do not seem awfully relevant to prevalent food insecurity, environmental devastation, social dislocation, low wages, or the grotesque labor conditions prevailing in most African countries.¹³ This disconnect between private law and the lived experience of the majority has led to an undesirable dependence on family, the African state, and charity—a dependence that amounts to an unacknowledged subsidy of private enterprise in Africa.

To reduce this cycle of dependence, this article proposes a shift from the traditional focus on the formal development of private law

11. See Brietzke, *supra* note 9, at 153 (suggesting that private law codes in Ethiopia are not responsive to “Ethiopian needs and demands” and therefore will not promote development); see also Frank I. Michelman, *Ethics, Economics, and the Law of Property*, in ETHICS, ECONOMICS AND THE LAW 3, 32 (J. Roland Pennock & John W. Chapman eds., 1982) (critiquing the “sweeping claims” of private law scholars and challenging the presumed efficiency of private property).

12. See, e.g., Joel M. Ngugi, *Policing Neo-Liberal Reforms: The Rule of Law as an Enabling and Restrictive Discourse*, 26 U. PA. J. INT'L ECON. L. 513, 514-15 (2005) (describing the proliferation of Rule of Law projects in developing countries in connection with “the second wave of the Law and Development movement,” the purported goal of which is to spur economic growth and democracy).

13. Paul Brietzke's observations about Ethiopian private law ring true today for much of Africa:

Whose interests do the Civil and Commercial Codes serve? They do not meet the needs and demands of the "ordinary" Ethiopian since the Codes are neither for the most part orientated towards traditional laws nor do they promote development. The Codes have, rather, followed a middle path which served the interests of those who would preserve the *status quo* -- the westernized, landed and urbanized elite, and the practical effect of the Codes has been the appearance rather than the reality of reform. They are elegant status symbols: learned, concise, doctrinal and, perhaps, intellectually satisfying. All they lack is an essential link with contemporary Ethiopian realities.

Brietzke, *supra* note 9, at 167.

to a much-needed situational critique of private law's performance in Africa. A situational critique is one that first and foremost looks at law's promise vis-à-vis its practice—such a critique is therefore relentless in its opposition to legal abstraction.¹⁴ Situational critiques have the potential to reveal that the conceptual rails guiding private law programs in Africa are not only unconvincing and incoherent on their own terms,¹⁵ but are also incapable of meeting basic expectations of fairness and justice. Relying on such problematic conceptual rails, governments, scholars, and international institutions remain incapable of harnessing private law to secure economic dignity and political power for Africa in a world where these two elements are indispensable to survival.

These conceptual rails have led the development of private law in Africa astray, resulting in a system that routinely fails to promote fair dealing or leave the costs of private activity with their source.¹⁶ First, the private law regime feeds on the African family system, while castigating it for being neither private nor efficient.¹⁷ Second, the human rights framework—with which African states are obligated to comply under public international law, and more recently under new, pro-democracy constitutions passed in some African nations¹⁸—requires the state to mop-up the social costs of private law sanctioned

14. See Robert W. Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 FLA. ST. U. L. REV. 195, 200-01 (1987) (highlighting the benefits of critical legal studies and recognizing that the inability of broad legal prescriptions to account for variety and nuance render them ineffective in practice).

15. See, e.g., Michelman, *supra* note 11, at 30-31 (exposing the incoherence in economic rationales for private property by illuminating additional premises underlying the regime).

16. For a theoretical framework on the role of private law, see generally Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976) (discussing the tension between individualism and altruism underlying private law systems); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1090-91 (1972) (explaining the “problem of entitlement,” which invariably requires a legal system to choose between conflicting interests); Michelman, *supra* note 11, at 21-32 (examining the moral premises and arguments underlying private property).

17. See *infra* Part VII.

18. See, e.g., CONSTITUTION, art. 40 (2010) (Kenya) (providing right to the protection of property); S. AFR. CONST., 1996, art. 25 (noting that “[n]o one may be [arbitrarily] deprived of property”).

activity.¹⁹ Finally, international donor aid and private charities, both secular and religious, also routinely subsidize such sanctioned activity.²⁰

This situation raises important normative questions. For example, why should African families, the African state, and local and international charities subsidize private activity that leads to serious social dislocation, capital flight, and political upheaval?²¹ The subsidization of private activity by families, states, and charities is a blow to the dignitary interests of Africans. This system of subsidies retards the development of private law in Africa and undermines the economic and political power of Africans. Further, it creates an unacknowledged dependency of private actors on non-private institutions, while casting Africans as helpless recipients of charity and perpetuating irreparable economic indignities and political powerlessness.²²

This article does not claim that family, the state, and charity have no role to play in Africa's pursuit of economic dignity and political

19. See David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 HARV. HUM. RTS. J. 101, 109 (2002) (recognizing that in focusing on "public remedies" for private harms, the human rights movement ultimately "leaves unattended or enhanced the powers and felt entitlements of private actors").

20. See A. N. Allott, *Credit and the Law in Africa: A Special Study of Some Legal Aspects of Economic Development*, 19 J. AFR. L. 73, 73-74 (1975) (noting that African countries lack quick access to large amounts of capital and outlining various types of international and domestic credit suppliers on the continent).

21. See generally GATHII, *supra* note 1 (exploring the relationship between economics and war, noting that "dependency theorists" believed international aid favored industrial development at the expense of the poor agricultural sectors in Africa).

22. See Betty Plewes & Rieky Stuart, *The Pornography of Poverty: A Cautionary Fundraising Tale*, in ETHICS IN ACTION: THE ETHICAL CHALLENGES OF INTERNATIONAL HUMAN RIGHTS NONGOVERNMENTAL ORGANIZATIONS 23, 30-31 (Daniel A. Bell & Jean-Marc Coicaud eds., 2007) (noting the image of the poor African family is often used to raise money for development aid, leading to an "extractive" relationship between African families and international organizations).

[I]nternational governance errs when it imagines itself capable of governing, 'intervening' if you will, without taking responsibility for the messy business of allocating stakes in society—when it intervenes only economically and not politically, only in public and not in private life, only 'consensually' without acknowledging the politics of influence, only to freeze the situation and not to improve it, 'neutrally' as between the parties, politically/economically but not culturally, and so forth. Kennedy, *supra* note 19, at 122.

power, or that private enterprise can exist without the support of public institutions. Rather, the claim here is that the subsidies that these institutions grant to private enterprise continue to go unacknowledged, and this is inconsistent with private law's perpetuation of individualism as an important conceptual rail upon which these programs run. Private law perpetuates injustice when it mistakenly assumes that private enterprise relies exclusively on individual capital. This in effect creates the social conditions that make it possible for private enterprise to exploit without acknowledgment its dependence on community capital. Thus, in order to take private law seriously in Africa, representatives of the people and the legal profession must make elementary demands of private law regimes in Africa to assure fair dealing, fair returns, compensation for harm of individuals and communities occasioned by private enterprise, and responsible resource sharing between private owners and local communities. As the adage goes, those who live by the sea should not bath in spittle. Taking private law seriously means figuring out why resource-rich communities remain economically destitute, the frequent and unenviable recipients of charity, even after installing investor-friendly legal institutions.

Context-specific reform of private law in Africa is difficult so long as current perceptions of Western private law persist. Private law in Africa is founded on the claim that in order to make African society "as good as" Western society, governments must introduce copious amounts of Western private law.²³ The assumption is that economic development is an essential plank of an advanced society,²⁴ and that economic development in Africa cannot succeed without implanting Western private law.²⁵ Although capitalism, socialism, communism,

23. See, e.g., Brietzke, *supra* note 9, at 150-51 (suggesting that French scholars adopted this perspective in drafting the Ethiopian Civil and Commercial Codes).

24. See J. C. Smith, *The Unique Nature of the Concepts of Western Law*, 46 CANADIAN B. REV. 191, 199-208 (1968) (discussing the modern Western concepts of property and contract, finding that, "[t]he increasing complexity of modern society, requiring a high degree of stability of expectations in regard to individual behavior, could be possible only through such highly technical jural constructs").

25. See, e.g., S. K. Date-Bah, *Aspects of the Role of Contract in the Economic Development of Ghana*, 17 J. AFR. L. 254, 260 (1973) (noting that while customary contract law in Ghana regulates "smaller-scale contracts at the grass roots level," English law played a greater role in facilitating economic development because it regulated "larger-scale business contracts of the modern sector"); cf. David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the*

and feudalism are all Western legal-economic systems,²⁶ in Africa “Western” means capitalism.²⁷ Possessive individualism and positive statehood are the most critical attributes of “Western” private law in the African context.²⁸ Comparative studies which portray these attributes as superior to “traditional” African legal and economic concepts not only make it difficult to challenge Western-derived private law in Africa, they are elements of the conceptual railing project that discourage creative solutions to weaknesses in African private law.²⁹

Crisis in Law and Development Studies in the United States, 1974 WIS. L. REV. 1062, 1080-93 (explaining how doubts about the liberal legalism paradigm led to a crisis in the law and development movement).

26. For a closer examination of these legal-economic systems, see generally BARRINGTON MOORE, JR., *SOCIAL ORIGINS OF DICTATORSHIP AND DEMOCRACY: LORD AND PEASANT IN THE MAKING OF THE MODERN WORLD* (1966); I. FREDERICK POLLOCK & FREDERICK WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW: BEFORE THE TIME OF EDWARD I* (2d ed. 1968) (1898); Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998); Michael Heller & Christopher Serkin, *Revaluating Restitution: From the Talmud to Postsocialism*, 97 MICH. L. REV. 1385 (1999) (reviewing HANOCH DAGAN, *UNJUST ENRICHMENT: A STUDY OF PRIVATE LAW AND PUBLIC VALUES* (1998)).

27. See, e.g., David M. Trubek, *Max Weber on Law and the Rise of Capitalism*, 1972 WIS. L. REV. 720, 739-45 (finding Weber’s concept of legalism to be “intimately related” with capitalism). See generally KARL POLANYI, *THE GREAT TRANSFORMATION* (Beacon Press 1957) (1944) (examining the rise of the modern capitalist economy).

28. See, e.g., Christopher Roederer, *The Transformation of South African Private Law After Ten Years of Democracy: The Role of Torts (Delict) in the Consolidation of Democracy*, 37 COLUM. HUM. RTS. L. REV. 447, 450-52 (2006) (highlighting the developments in private law in post-apartheid South Africa as evidence of the importance of “democratic transformation” in creating a body of private law that can remedy injustice); see also Allott, *supra* note 20, at 76-77 (explaining that the impetus behind reforms of traditional land tenure systems in Africa is “the desire to give the African farmer a holding which will be a chargeable asset if he wishes to obtain credit for development of his land”).

29. See Sylvia Kang’ara, *supra* note 5, at 185 (“If African-Western conceptual incompatibility is a mere theoretical derivation, a part of an economic or legal orthodoxy, one should be able to challenge it and question its assumptions. The more it is identified with folkness (Africanness or Westernness), the less open to challenge.”).

II. LIMITS TO PRAGMATIC REGARD FOR AFRICAN CUSTOMARY LAW

Although proponents of private law in Africa seek to re-create the socio-economic experience of the West in Africa, many scholars advocate an approach that gives due regard to African customary law.³⁰ Regard for such law has been demonstrated in various ways: studying, recognizing, codifying, reforming, and supplementing it.³¹

This commitment to customary law has taken at least two forms. Some take customary law on its own terms.³² Others seek to establish its content, normative substance, and conceptual character for a variety of purposes: in order to make judicial ascertainment by modern courts and administration by state bureaucracies possible;³³ to advance pluralist modernization by integrating and harmonizing national laws;³⁴ or to make legal cartographical comparisons with

30. See, e.g., Stephen Cretney, *The Application of Equitable Doctrines by the Courts in East Africa*, 12 J. AFR. L. 119, 128 (1968) (suggesting equitable doctrines facilitate the adaptation of private law to local circumstances); Kenneth Roberts-Wray, *The Need for Study of Native Law*, 1 J. AFR. L. 82, 85-86 (1957) (calling for a "reconciliation" between English and "native" law in Africa, and predicting that "native law" will continue to operate mainly at the local level).

31. See, e.g., A. J. Kerr, *The Reception and Codification of Systems of Law in Southern Africa*, 2 J. AFR. L. 82, 92-95, 100 (1958); see also Gordon Woodman, *The Ghana Conveyancing Decree, 1973, and the Customary Law*, 17 J. AFR. L. 300, 300 (1973) (discussing Ghana's recording statute which extended English recording principles and implied terms to customary conveyances).

32. See, e.g., Sanele Sibanda, *When Is the Past Not the Past? Reflections on Customary Law Under South Africa's Constitutional Dispensation*, 17 HUM. RTS. BRIEF, No. 3, 2010, at 31, 33 (urging that reforms of South African customary law take place in a democratic fashion to avoid "reproducing the bifurcated state form and decentralized despotism characteristic of [the apartheid] era").

33. See, e.g., A. N. Allott, *Towards a Definition of "Absolute Ownership"*, 5 J. AFR. L. 98, 100 (1961) (attempting to define "absolute ownership" in "the most convenient and least misleading language in which to present the facts of African land law" for the practical purpose of title registration).

34. Harmonization programs have sought integration of domestic laws for political, nation-building purposes. See Antony Allott, *The Unification of Laws in Africa*, 16 AM. J. COMP. L. 51, 61-62 (1968) ("There is scarcely an African country . . . which is not plagued by tribal and regional tensions and conflicts So it is not just the political manifestations of separatism which are outlawed, but the cultural and legal ones too."). This type of harmonization is different from the regional and sub-regional economic harmonization advocated by some scholars. See, e.g., A. M. Akiwumi, *A Plea for the Harmonization of African Investment Laws*, 19 J. AFR. L. 134, 139 (1975) (noting that the lack of harmony in African investment law is "a fertile field for exploitation by investors to the detriment of

other private law regimes of the world.³⁵ The first approach strongly affirms African customary private law and places an enormous burden on the researcher-observer to avoid looking at preexisting law through the lens of his own legal system.³⁶ The first approach also lacks the positive prescriptive transformative agenda that is the *raison d'être* of the second.

Despite their different approaches, proponents on both sides consider customary law for pragmatic reasons, namely the fact that it is commonly understood and widely utilized by many Africans.³⁷ It is also highly adaptable to changing conditions. In certain cases, modern courts have used its rules and principles to fill gaps in formal private law. Furthermore, formal private law is not accessible by the vast majority of low and mid-level entrepreneurs because of barriers such as language, distance, and expense. Writing is a predominant feature of formal private law transactions and litigation. In most countries, foreign languages are the language of law, which excludes all but formally trained lawyers from its practice. In spite of these pragmatic calculations, proponents of the formal development of African law tend to limit customary private law to certain

inter-African co-operation and the rational economic development of host countries”).

35. See, e.g., MAX GLUCKMAN, *THE IDEAS IN BAROTSE JURISPRUDENCE* xv (1965) (comparing the judicial reasoning of the Barotse legal system with Western concepts). See generally MENSKI, *supra* note 5, at 4 (exploring the relationship between globalization and law by examining the legal systems of Africa and Asia).

36. See PAUL BOHANNAN, *JUSTICE AND JUDGMENT AMONG THE TIV* 4-6 (1957) (discussing the challenge of a legal anthropologist to “report accurately the ideas and institutions of the people he has studied, in a language . . . in which most of the words and concepts of social control have been pre-empted by jurists and given precise and technical meanings”).

37. See MENSKI, *supra* note 5, at 492 (affirming the continued relevance of African customary law “mainly because people themselves are taking recourse to such rules while state institutions are not able to lend them much support in sorting out problems in their daily lives”).

One occasionally meets people, even among those who have lived or served in Africa, who speak light-heartedly about the study of native law and native courts and seem to imply that it is an esoteric exercise of little more practical importance than, say, archaeology Native customary law . . . affects and, to some extent, governs the conduct of millions of human beings. Moreover, there is no reason for thinking that the state of health of parts of native law is more delicate than that of the common law of England in the Middle ages, and it seems to follow that those parts must continue in force, or at least have profound influence, indefinitely.

Roberts-Wray, *supra* note 30, at 82.

circumstances. Specifically, they argue that due regard for customary law is not necessary if: (1) parties to a dispute are non-Africans;³⁸ (2) a state is pursuing certain social and economic policies crucial to achieve economic development, for instance, by introducing individual land titling systems;³⁹ (3) an African as an individual affirmatively chooses to sever links with the customary system bringing all his affairs whether commercial or familial under non-customary law;⁴⁰ (4) African private law is inconsistent with universal human rights and moral individualism;⁴¹ (5) a state has usurped a particular field, such as criminal law, that had been previously governed by customary law, in order to strengthen the state's sovereign powers and to eliminate problems precluding the consistent and just administration of law;⁴² (6) it is essential to achieve uniform laws and streamline judicial systems;⁴³ and (7) it is

38. See, e.g., T. OLAWALE ELIAS, *BRITISH COLONIAL LAW: A COMPARATIVE STUDY OF THE INTERACTION BETWEEN ENGLISH LOCAL LAWS IN BRITISH DEPENDENCIES* 82 (1962) (discussing legal dualism in former British colonies, whereby native courts operated alongside British courts, which applied English law in cases involving a non-native or non-customary disputes).

39. See Janine M. Ubink, *Tenure Security: Wishful Policy Thinking or Reality? A Case from Peri-Urban Ghana*, 51 J. AFR. L. 215, 246-48 (2007) (concluding that customary land tenure in Ghana has produced insecurity, largely due to the erosion of traditional checks and balances on local chiefs, and cautioning that a positive stance toward customary tenure systems "should [not] be based on idealized notions of customary law, often brought forth by traditional authorities themselves"); see also Shana Hofstetter, Note, *The Interaction of Customary Law and Microfinance: Women's Entry into the World Economy*, 14 WM. & MARY J. WOMEN & L. 337, 337 (2007) (examining how customary law in Morocco and the Dominican Republic hinders microfinance programs for women).

40. For a discussion of methods for solving conflicts of personal law in Africa, see generally T.W. BENNETT, *CUSTOMARY LAW IN SOUTH AFRICA* 49-70 (2004) (defining personal conflicts as those "arising from the litigants' attachment to different cultures or religions").

41. *But cf.* Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L L.J. 201, 204-05 (2001) (cautioning that the "universal" human rights corpus is largely Eurocentric and fails to incorporate non-Western norms).

42. See, e.g., Lynn Berat, *The Future of Customary Law in Namibia: A Call for an Integration Model*, 15 HASTINGS INT'L & COMP. L. REV. 1, 15, 17 (1991) (contending that forum shopping in criminal matters is particularly dangerous and proposing a rule whereby Swazi customary courts would be required to apply national criminal law).

43. See Roberts-Wray, *supra* note 30, at 83 ("It cannot be seriously denied that the ideal for any country is one law and one judicial system for everybody. There must therefore be a process of reconciliation between the English law and the

necessary to fill gaps where customary law has not evolved whole areas of law considered in Western jurisprudence critical to economic development and social modernization, for instance contract and commercial law.⁴⁴

These recommendations seek to reorient private law in Africa to the benefit of individual Africans, the state, and foreign investors in new ways. Given the theory that Western private law attracts foreign investment and that foreign investment in turn drives economic development, it is shocking that Africa's economic prospects remain so grim particularly because the wellbeing of foreign investors has always been a principal concern of private law in Africa.⁴⁵ In reality, Africa has always been an attractive destination for foreign investors because private law in Africa promotes extractive devaluation, not progressive valuation of existing conditions. Indeed, foreign investment is driven by attraction to resources, not to the creation of a thriving and cohesive legal universe of reciprocal rights and duties and intra-class interdependence.⁴⁶ Thus, contract law has not

native law.”).

44. *Id.* at 84 (“One cannot hope to find commercial customs, such as those from which Lord Mansfield moulded a segment of the common law, in a community in whose philosophy the transactions to which they relate are undreamed of.”). For a critique of this view, see Brietzke, *supra* note 9, at 150 (“These views mistake the nature of pre-existing Ethiopian law by finding its essence in form rather than function and by uncritically transferring French assumptions in areas where the Ethiopian legal environment is not understood. Contract is obviously equated with modern French contract, since even subsistence trade is contractually regulated, and notions of reciprocity, duty and the bargained-for regulation of social and economic relations—elements of a more relevant contract definition—have existed in Ethiopia for many years. Likewise historically significant commercial customs and practices have existed in Ethiopia for thousands of years, and modernizing codes could have been drafted that take these practices into account.”).

45. *See, e.g.*, Brietzke, *supra* note 9, at 162 (explaining that Ethiopian private law was written with the utilitarian end of promoting foreign investment at the acknowledged expense of rural enterprises).

46. *Cf.* Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 19, 20 (David Trubek & Alvaro Santos eds., 2006) (noting that economic actors in the capitalist West influenced the pursuit of “laissez-faire” policies so the law would not “constrain their pursuit of power and profit”); Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 *WIS. L. REV.* 975, 1026, 1031 (discussing the doctrine of *damnum absque injuria* or “damage without legal wrong” in the context of economic competition).

operated to balance the interests of foreign investors to make profit against those of host states to achieve economic development in Africa.⁴⁷

III. CRITIQUES OF CUSTOMARY PRIVATE LAW

Indeed, the pursuit of the private law system since colonization to the present has led to outcomes that undermine the core assumptions and promises of private law in Africa.⁴⁸ Thus, disregard for African customary law is only justified if customary law hinders economic development, and Western private law actually fulfills its promise. In such a case, it would not be necessary to distinguish between customary and Western law because the latter would be cognizant of and responsive to local needs. Disregard for African customary law based on the argument that it impedes economic development has turned out to be an official blind spot because customary law remains very influential in actual economic relations of Africans.⁴⁹ Customary law persists for many reasons: it is familiar; it is less costly to access because it operates without a formal bureaucracy;

47. See Date-Bah, *supra* note 25, at 265 (explaining the necessity for host states and private investors to utilize institutions of coordination, such as “concession agreements,” to establish a complimentary system that alleviates the conflict of interests between the host state and the private investor).

48. See Kang’ara, *supra* note 8. See generally WILLIAM LUCY, PHILOSOPHY OF PRIVATE LAW (2007) (focusing on the principles of Anglo-American private law).

49. See Brietzke, *supra* note 9, at 155 (“The theoretical repeal of traditional laws epitomizes [the characterization of] Ethiopian private law as ‘fantasy law.’ Many centuries of legal history are not transformed into a *tabula rasa* so easily. In rural, and, to a large extent, urban Ethiopia, effective everyday social control is maintained under the traditional laws which are misunderstood and mistrusted by professional and academic lawyers alike. Recourse to ‘government law’ only occurs in extraordinary cases—penal problems, tax disputes, and cases in which traditional dispute settlement has failed. Even in these cases, the judge is often unaware of the existence of relevant state-sanctioned law, misunderstands it, or refuses to apply it. . . . Traditional law places a relatively greater emphasis on the past relationships and relative status of the parties to a dispute, rendering the disengagement of the economy from traditional social structures more difficult.”); see also Mauro Bussani, *Tort Law and Development: Insights into the Case of Ethiopia and Eritrea*, 40 J. AFR. L. 43, 48 (1996) (detailing how customary tort law in African states, particularly Ethiopia and Eritrea, plays an important function in solving interpersonal conflicts to the benefit of African economies); Janet L. Roitman, *The Politics of Informal Markets in Sub-Saharan Africa*, 28 J. MOD. AFR. STUD. 671, 672 (1990) (encouraging the inclusion of analysis of informal and societal-based economics in the study of African economic markets).

and it affords individuals immediate benefits formal law fails to compute or value.⁵⁰ For instance, information, a critical component of economic activity,⁵¹ comes to an economic player through many customary channels unknown to or unauthorized by formal law. The customary system also assures access to certain markets for individuals locked out of formally constituted industries,⁵² and it provides low-cost credit facilities to a majority lacking access to formal banking services.⁵³

Presumably, there are social and economic costs to transacting under customary law if the state considers it an impediment to economic activity, but the continued use of customary economic channels by various communities within Africa suggests either that the benefits outweigh the costs or that no viable alternative exists. This phenomenon highlights in turn the existence of a complex family-state-market relationship and a stratified formal/informal economic system.⁵⁴ One immediate effect of this arrangement is the

50. See, e.g., Brietzke, *supra* note 9, at 158 (noting how merchants in Ethiopia prefer traditional arbitration by local elders to governmental courts unless the dispute involves large sums of money, complex issues, foreign parties, or criminal matters); cf. L. Amede Obiora, *Reconsidering African Customary Law*, 17 LEGAL STUD. F. 219, 224 (1993) (emphasizing the malleable nature of customary law that allows for adaptation of traditional norms and standards to contemporary circumstances).

51. See generally ERIC RICHARD A. POSNER, *ECONOMICS OF JUSTICE* 8 (1981) (discussing the economics of uncertainty, the relationship between information and economic risk).

52. See Date-Bah, *supra* note 25, at 258 (“The chief contribution of the customary law of contract has been in the rural areas. It has been an important instrumentality through which the rural population have [sic] been able to participate in the cash economy. In other words, the customary law of contract has played a role in the switch from subsistence production to production for exchange (or commercial agriculture) in the rural agricultural areas of Ghana.”).

53. William F. Steel et al., *Informal Financial Markets Under Liberalization in Four African Countries*, 25 WORLD DEV. 817, 817-18 (1997) (maintaining that informal financial institutions promote economic growth by increasing household savings and small-scale business opportunities). But see Irfan Aleem, *Imperfect Information, Screening, and the Costs of Informal Lending: A Study of a Rural Credit Market in Pakistan*, 4 WORLD BANK ECON. REV. 329, 347 (commenting that though informal credit mechanisms oftentimes allow for greater access to credit for farmers, in many cases, imperfections and a lack of information in the informal system cause farmers who are receiving loans to agree to contract terms without full awareness of possibly widely varying, high interest rates).

54. See, e.g., Steel et al., *supra* note 54, at 818 (categorizing African financial systems, from a study of these systems in Ghana, Malawi, Nigeria, and Tanzania,

association of the formal economic system with “proper” private investment and the informal economic system with underclass activity.⁵⁵ The former is accessible by only a small but wealthy minority.⁵⁶ At the same time, the formal private investment system is also heavily subsidized by the state, which poses a significant challenge to the democratic foundations of the African state.⁵⁷

Still, academics have long argued that customary law systems of ownership hinder economic development.⁵⁸ These arguments are derived from Western private law theories such as the tragedy of the commons—the notion that a commonly held resource is bound to be overused, producing a net loss to society.⁵⁹ Customary law is also criticized on the theory that economic advancement depends on freedom of alienation, which common property systems generally prohibit.⁶⁰ By allowing the simultaneous recognition of multiple

as fragmented due to the simultaneous operation of formal and informal economies that serve different clientele with no apparent connections); *see also* Roitman, *supra* note 50, at 677 (contending that proper analysis of African economic markets within an African context must recognize the influence local societies and informal markets have on the efficiency of the state’s markets).

55. *See* Steel et al., *supra* note 54, at 818 (concluding that the mostly elite focus of formal economic institutions often do not “match the characteristics and demands of the . . . low-income, small-scale and rural population in most African countries”).

56. *See id.* at 818, 822 (describing reluctance on the part of formal financial institutions to finance small borrowers due to these institutions’ inability to access reliable information about small clients because of their geographical remoteness, illiteracy, and unreliable incomes).

57. *See id.* at 818 (referring to the financial repression hypothesis that directs blame for inefficient and underdeveloped financial institutions to states’ repressive financial policies that arise from the subsidization of priority activities).

58. *See, e.g.,* Heller, *supra* note 26, at 639-40 (concluding that the recognition of multiple owners’ rights of exclusion over a single property in Russia often led to a significant amount of unused properties that thus limited economic opportunities and caused diminished job opportunities). *But see* Robert W. Gordon, *Hayek and Cooter on Custom and Reason*, 23 SW. U. L. REV. 453, 459 (1994) (arguing that common customary rights, through binding multiple owners or users of property, could result in efficient regimes based upon mutual insurance against risks and instability).

59. *See, e.g.,* Heller, *supra* note 26, at 677; Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968) (illustrating how rational individuals weigh the costs and benefits of the use of the “commons” from an individual point of view rather than from a communal point of view to the detriment of the finite resources available to all people).

60. *See e.g.,* COKER, *supra* note 3, at 35, 57 (noting that “immovable property,”

interest holders over one parcel of property, common ownership prevents access to credit and therefore prevents investment in land since banks want to lend only to individuals and against registered title.⁶¹ Where title is held by a group, individual members of the group will not invest in the property because without exclusive ownership, they will not reap exclusive benefits from investment.⁶² Moreover, determining ownership absent title registration is costly and difficult.

Under the freedom of alienation theory, customary land tenure also limits upward mobility.⁶³ Individuals moving to urban centers as laborers, contractors, students, or professionals who have made the choice to sever links with their ancestral lands and customary regimes suffer huge losses because they are not allowed to sell off their interests. The customary system, which on one hand requires them to maintain ancestral links, tends to offend the Western concept of individual liberty at two levels—at the level of personal choice, the choice to sever links, and at the level of freedom to alienate commonly held property. In other words, the choice to detach from the customary system is “taxed” through the involuntary and uncompensated surrender of wealth held in customary strongholds.⁶⁴

such as land and houses, are considered “family property” and therefore inalienable by an individual under Yoruba customary law).

61. See, e.g., Allott, *supra* note 20, at 76 (1975) (describing the land consolidation program in Kenya to demonstrate how one of the main motivations for land tenure reform with Africa is to supply individuals with a “chargeable asset” to be able to obtain credit); see also U.N. Econ. Comm’n for Afr., *Land Tenure Systems and Sustainable Development in Southern Africa*, at 2, U.N. Doc. ECA/SA/EGM.Land/2003/2 (Dec. 2003) [hereinafter *ECA Report*] (noting that customary systems hold property in “communal trust” such that it cannot be used as collateral).

62. See Lee Godden & Maureen Tehan, *Introduction: A Sustainable Future for Communal Lands, Resources, and Communities*, in *COMPARATIVE PERSPECTIVES ON COMMUNAL LANDS AND INDIVIDUAL OWNERSHIP: SUSTAINABLE FUTURES 1, 1* (Lee Godden & Maureen Tehan eds., 2010) (arguing that strong pressures from globalization have resulted in an increased push for individualization of land tenure systems as individual ownership of land is seen as the key in providing property protections); *ECA Report*, *supra* note 62, at 7 (noting additional arguments against customary land tenure, including that communal systems fail to promote efficient use of land).

63. Cf. *ECA Report*, *supra* note 62, at 8-11 (suggesting that rural farmers operating under a customary land tenure system are often vulnerable to exploitation).

64. Cf. COKER, *supra* note 3, at 118-19 (explaining that alienation of family

All the above factors make for tragic outcomes. Since those who are moving from rural to urban areas are prevented from liquidating their customary interests, they move to the urban areas without any capital. This dynamic has contributed to urban poverty in Africa, represented largely by the image of rural laborers working and living in Africa's legendary slums, and surviving at the mercy of international charity and government handouts.⁶⁵ The rural communities they leave behind do not benefit either, even though one could claim that such communities have been unjustly enriched by this involuntary surrender of property interests initiated by urban migration. Instead, the rural customary system loses human capital to urban migration and rural economies remain dormant because those who leave for urban areas do not liquidate land.⁶⁶ Further, urban dwellers become a tax on rural areas by using their relatively easy access to political platforms to influence government policies. For instance, they advocate for the suppression of prices of produce grown in the countryside.⁶⁷ Urban voters also influence the channeling of government revenues away from rural exports to urban infrastructural development such as the building of superhighways, international airports, etc.⁶⁸ These projects are big budget items on government budgets even though in many instances they are either mere symbols of modernity or important to only heavy capital investors. Thus, this system perpetuates rural-urban migration

properties in Nigerian customary law systems is improper and voidable without the consent of all other "principle representatives" of the family holding interest in the property).

65. See generally U.N. HUMAN SETTLEMENTS PROGRAMME, THE CHALLENGE OF SLUMS: GLOBAL REPORT ON HUMAN SETTLEMENTS 2003 25-27 (2003), available at <http://www.unhabitat.org/downloads/docs/GRHS.2003.0.pdf> (detailing how rural laborers and dependents of farmers of communal lands are increasingly displaced into urban areas to live in slums, which are densely populated environments with low standards of living and housing).

66. Cf. COKER, *supra* note 3, at 119.

67. See David Stasavage, *Democracy and Education Spending in Africa*, 49 AM. J. POL. SCI. 343, 345 (2005) (discussing the possible greater influence urban groups have over rural groups in influencing a state's political and economic sphere as a result of the urban population's geographical advantage that allows for greater collective action). But see U.N. HUMAN SETTLEMENTS PROGRAMME, *supra* note 66, at 26-27 (questioning the validity of the "urban bias" taxation theory).

68. See Steel et al., *supra* note 54, at 818 (emphasizing that government directives often focus on funneling monetary funds into public sector projects focused in urban development).

particularly negatively, and ultimately affects both the rural and urban poor.

In addition to the problems associated with rural-urban migration, the above factors also add to the tragic exploitation of rural communities and individuals by politicians, foreign and local investors, banks, and other institutional players. These players have the ability to persuade or force governments to pass *laissez faire* legislation, despite the fact that customary law continues to be indispensable to economic activity.⁶⁹ As the layers of private law pile on, the more the above-enumerated problems persist, the more customary law becomes relevant, and the more customary law is blamed for the mass of problems.

IV. THE TRAP INHERENT IN EFFICIENCY ARGUMENTS

To end the cycle of tragic outcomes, proponents of reform introduce more foreign law into Africa's private law system.⁷⁰ The recommendations outlined above in Part II are tailored to limit the scope of customary law and allow formal private law to take hold. They are expected to alleviate the negative effects resulting from the current interplay between customary and formal law in Africa. By now, customary law has been acknowledged and cannot be eliminated. However, social and economic dependency cannot be lessened without limitations on the scope of customary law. On one hand, proponents of private law development tend to blame the failure of the current private law regime on customary legal regimes.

69. Cf. Joel M. Ngugi, *Forgetting Lochner in the Journey from Plan to Market: The Framing Effect of the Market Rhetoric in Market-Oriented Reforms*, 56 BUFF. L. REV. 1, 79 (2008) (discussing how private economic actors constantly redefine and morph economic systems through both formal and informal methods to influence government norms and to modify economic rule of law).

70. This argument may seem counterintuitive in light of some scholars' critiques of international economic governance as inherently imbalanced in favor of capital-exporting states. See, e.g., GATHII, *supra* note 1, at 186-90 (arguing that "these rules continue to perpetuate the subordinate position of these formerly colonial countries in a manner that uncannily reflects the imbalances that characterized colonial rule"). As Part VI will show, however, this article locates the problem in the *interplay* between Western and African law. Thus, the solution to aggressively introduce more foreign law makes sense because the state, African families, and international donors will continue to mop up the costs of the current private law system unless a more effective system is introduced.

On the other hand, customary law has become a tool in the hands of politicians seeking to assure Africans of their unique historical cultural heritage. Politicians blame the Western system for their lack of economic development, even as they derive benefits from it. As a result, handouts from politicians, foreign aid workers, and donor institutions supplant the formal private law system and promote dependency on customary social systems.

While each side seeks to blame the other, both positions fail to acknowledge that this undesirable situation is created by the interaction of formal and informal legal regimes. More specifically, both politicians and private foreign and local investors are able to exploit the situation to their own ends at the expense of ordinary Africans. In other words, it is not possible to delineate a “safe” sphere for private investors governed by Western-derived private law that is above and outside this chaotic scene. Western laws have created layered social and economic dependency, rather than freedom and economic dignity for Africans.

Some argue that this resulting interplay between customary law and western private law is the state of chaos likely to exist in the absence of law and order.⁷¹ It is no surprise, they argue, that this state of chaos will not be magically remedied by implementation of Western-derived colonial or postcolonial law because, in both instances, the laws were influenced by the toxic and unshakeable politics of unjust acquisition and exploitation. And further, rather than dispelling colonial law-induced systemic chaos, customary law perpetuates it. To them, the way out of this morass is a combination of political, economic, social, and cultural reforms. This includes the aggressive pursuit of an individualist unitary private law system. These steps would bring order by installing a clear sphere of individual property rights and a defined private/public distinction.

Under this theorization of the problem, the first legal fields ripe for reform are contract and property law because they unquestionably

71. Compare Mutua, *supra* note 42, at 205-10, 243 (alleging that the contemporary human rights movement focuses on eliminating the “savage cultures” of non-Western states through the introduction of Eurocentric views of rule of law and the development of human rights), with ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991) (contending that order can exist within states and societies without Western ideals of the rule of law).

value efficiency. Contract and property reform is a natural outcome of the declaration that customary law is an impediment to economic advancement.⁷² The stark contrast reform proponents believe exists between formal contract and property law on the one hand and custom on the other hand leads them to depart from custom in the pursuit of social and economic policy.⁷³ And by citing social and economic justifications, they remain well within the exception embedded in their logically rational private law argument scheme. But a trap beckons. They must pursue Western contract and property law reform with a vigor that demonstrates the inefficiency of custom; otherwise, it becomes difficult to justify the abandonment of customary laws that have been in place for centuries. In other words, because installation of Western law would intrude on embedded local norms, it must be supported by strong justification and logical rationalization.

The characteristics necessary to delineate a stark contrast between customary law on the one hand and contract and property on the other are well-established under Western private law theory—moral individualism and an exclusive system whose outcomes are always “fair” even if widespread pain and suffering results from their prescription as law or policy. Disregarding the argument that the customary system was originally abandoned because it produces barbaric and intolerable pain and chaos, the theoretical debate now focuses on determining which system—the African customary system or the Western legal system—causes less pain and maximizes administrative efficiency. Unlike the past scholarly approaches to African private law, this debate asks whether assumptions about

72. Cf. Richard A. Posner, *Social Norms and the Law: An Economic Approach*, 87 AM. ECON. REV. 365, 368 (1997) (concluding that contract furthers and completes customary law and norms by providing a legal framework for the regulation of highly specific activities that would otherwise be outside the scope of customary law). *But see* Godden & Tehan, *supra* note 63, at 20 (questioning the assumption of policy prescriptions based on western notions of economic development, and advocating solutions based on existing systems of communal property).

73. *See supra* Part III; cf. Bentsi-Enchill, *supra* note 3, at 121-29 (suggesting the development of private law in the realm of individual property ownership, such as laws regarding succession and administration, is necessary in order to address the inadequacies of traditional remedies, while still recognizing that the current property system is the result of the circumstances and “accidents” of history).

system efficiency and coherence are accurate.⁷⁴ Reform then is not about questioning the premises of the system, but working to improve the system on the assumption that it produces less pain and greater administrative efficiency overall.

Such private law reform, however, does not come without a shift in the “pain” it causes. In recent decades, three institutions have been active sites for minimizing the painful outcomes of private law reform in Africa: the family, the state, and human rights organizations. Burdens are unevenly distributed across the three, depending on the nature of the issue and the institution’s role in society. For instance, care of the elderly is traditionally the responsibility of the family, while urban housing has increasingly fallen under the auspices of the state. An important assumption in choosing and prioritizing these projects is that people of poorer nations—who tolerate a private law regime that produces higher levels of pain—should have states, charity, and family ready to mop up the costs. Currently, international institutions and western development partners have stepped in to fill this role, perpetuating the cycle by standing ready to save the private sector from legal liability and moral accountability.⁷⁵

V. DISTRIBUTIVE ISSUES OF LEGAL PLURALISM

Ironically, even though reformers have sought the abandonment of the customary law regime, it subsidizes the formal regime of private law. For example, in the current system, the family mops up a lot of the pain generated by private law sanctioned activity. Women and children, often identified as needing liberation from the customary law system, subsidize the private sector by supplying cheap or free labor to ailing workers rather than requiring companies to pay workers sufficient wages to pay for health care. They, therefore, alleviate the pain caused by the private law system by providing a service that has little to no value in the private law sanctioned

74. See generally Kennedy & Michelman, *supra* note 10, at 714 (refuting arguments that reward presumptive efficiency to either private property or free contract based solely on theoretical rational maximization behavior).

75. Cf. Mutua, *supra* note 42, at 233-43 (describing the efforts of international institutions and western powerbrokers in the developing world, particularly Africa, as attempts at becoming a savior through the dissemination of western policies and reforms and through financial support and management of national organizations).

marketplace. Similarly, rather than having companies pay workers hefty damages for tortious injury, this too is subsidized by families. These contributions of African families obviate the need to develop a tort law regime that adequately redresses harm or a contracts regime cognizant of the plight of low wage workers and their vulnerable dependents. The reliance interests of workers are discounted and the expectations of dependents are dashed.⁷⁶ Thus, while some reliance on families to soak up the pain created by private law may be required, a reformed contract law regime should partially shift the burden to other legal regimes, such as torts, limiting the burden on families.

The customary system has its own much-derided economy. Yet this economy exists in part because the formal economy generates demand for exploitative relationships. For instance, in areas of Africa which rely on subsistence farming or low-wage work, very few people can afford to access modern hospitals. As a result, the majority seek the services of traditional doctors and herbalists. While affordable, these traditional doctors and herbalists are also spectacularly unsuited to meet the needs of a national public health system.⁷⁷ The same dynamic plagues sector after sector—security, education, transport, housing, sanitation, agriculture, to name but a few.

State welfare programs are another way of subsidizing the private law regime in Africa. For example, state involvement in slum housing upgrade schemes often serve to entrench private sector profiteering and save the private sector from paying fair wages or negotiating fair employment contracts.⁷⁸ Slum dwellers typically

76. See generally Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988) (describing the reliance interest of workers as well as their dependents in private companies' property and the legal precedent to protect such an interest in the context of the closing of private companies and industries).

77. See, e.g., World Health Org. Reg'l Office for Africa, *Achieving Sustainable Health Development in the African Region: Strategic Directions for WHO, 2010-2015* 8-9 (2010) (claiming that inadequate health resources and limited health infrastructure in Africa, among other factors, continue to plague the African population with insufficient access to health resulting in such health epidemics as high maternal mortality ratios (550 to 1000 deaths per 100,000 live births in thirty-one African nations) and high rates of death in children (4.2 million in 2008) from preventable or treatable diseases).

78. Cf. U.N. HUMAN SETTLEMENTS PROGRAMME, *supra* note 66, at 134 (acknowledging that market-oriented approaches have tended to increase social

supply labor to affluent urban suburbs, factories, industries, and other private institutions. The state becomes involved by providing health services programs to take care of people adversely affected by corporate industrial waste or environmental disasters, for instance, or by resettling communities displaced by real estate developers.

Yet a third way of removing the pain caused by private law is through the human rights regime. Like the welfare regime, human rights programs are funded by the state, as well as by charities, foreign aid, and development aid. Currently, without a working tort law regime, people harmed in the private sector marshal human rights arguments such as the right to health, housing, and education. In such circumstances, the human rights regime in significant measure amounts to a subsidy for the private sector. For instance, when people are displaced from their land by a private developer, human rights arguments are used to force the state to resettle them.⁷⁹ Or when private industrialists who pollute water sources are never forced under private law principles to clean up, state funds are used to clean up the pollution and provide treatment to victims. These state funds are used under a theory of the human right to clean water. More recently, the human rights regime has also warmed up to enforcing economic rights.⁸⁰ The challenge of enforcing economic rights is that they require enforcement by an individual against the state as justiciable rights.⁸¹ International aid, by contrast, depends on

inequality).

79. See, e.g., *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶¶ 11, 214 (Nov. 28, 2007) (holding that Suriname violated Article 21 (right to property) of the American Convention on Human Rights when the state displaced the Saramaka people following the flooding of their traditional territory in the 1960s, and ordering Suriname to “delimit, demarcate, and grant collective title” over the Saramaka’s land). See generally U.N. Econ. & Soc. Council, Comm’n on Human Rights, Rep. of the Secretary-General, Mr. Francis M. Deng, *Addendum: Guiding Principles on Internal Displacement: Compilation and Analysis of Legal Norms*, submitted pursuant to Comm’n Res. 1997/39, U.N. Doc. E/CN.4/1998/53/Add.2 (Feb. 11, 1998) (introducing a set of principles to guide state actors, intergovernmental, and nongovernmental organizations on the necessary protections and available rights to internally displaced persons, including their right not to be displaced due to development projects).

80. See generally Frank I. Michelman, *The Constitution, Social Rights, and Liberal Political Justification*, 1 INT’L J. CONST. L. 13 (2003) (providing an overview of the debate regarding constitutionalization of socio-economic rights).

81. See, e.g., Protocol No. 11 to the Convention for the Protection of Human

the funding priorities of the donor.

A final means of reducing private law pain is through private, institutional, and governmental aid. Institutional aid has taken an interesting character, particularly with the rise of Chinese investment in Africa.⁸² Western donors have long used aid packages to force African governments to adopt free market systems.⁸³ Aid is also a staple of Western foreign policy that is usually a mix of carrot and sticks aimed to ensure the pursuit and protection of western interests in recipient nations.⁸⁴ Although China's official policy in Africa has been "noninterference in domestic affairs,"⁸⁵ recently China has included aid packages in investment agreements. This begs the question: instead of aid, why not implement a private law system that requires investors to observe basic private law principles, such as fair dealing and adequate recompense for harm? In theory, this would reduce economic dependency by placing the social costs of private law sanctioned activity at their source, breaking the cycle of exploitation.

Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby art. 34, May 11, 1994, E.T.S. 155, 2061 A-2889 U.N.T.S 7 (empowering the European Court of Human Rights to receive applications from individuals claiming a violation of the articles of the Convention for the Protection of Human Rights and Fundamental Freedoms against any signatory state to the Convention).

82. See Ngaire Woods, *Whose Aid? Whose Influence? China, Emerging Donors and the Silent Revolution in Development Assistance*, 84 INT'L AFF. 1205, 1215 (2008) (linking Chinese aid to Africa with Chinese investments and trade, which grew by seven hundred percent in the 1990s eventually reaching \$55.5 billion in 2006); see also Stephanie Hanson, *China, Africa, and Oil*, COUNCIL ON FOREIGN REL. (June 6, 2008), www.cfr.org/china/china-africa-oil/p9557 (noting that China ranks as Africa's second-highest trading partner behind the United States).

83. See Steven Radelet, *A Primer on Foreign Aid* 13 (Cr. for Global Dev., Working Paper No. 92, 2006) (discussing typical conditionalities that donors, particularly the International Monetary Fund and the World Bank, place upon aid programs to require recipients to adhere to donors' interests and economic policies).

84. Cf. *id.* at 6 (summarizing how the United States and the Soviet Union donated aid to developing nations during the Cold War to acquire support and influence and noting that many Western states still supply aid to former colonies to maintain political influence).

85. Hanson, *supra* note 83.

VI. INTERDEPENDENCE OF FORMAL AND INFORMAL LAW

A more robust private law regime could achieve many of the aims of the government, family, and donor programs. But to do this, such a private law regime must get out of the trap that “Western derived law must always be clearly distinguished from customary law,” or that there ought to be a distinction of the private and public, and instead focus on the development of a legal regime that integrates the concerns of both customary and private law. A less rigid system is not a system of handouts, but a system focused on fairness. Fairness is at the root of Western private law philosophy and practice as can be demonstrated by various principles:⁸⁶ property should be lawfully acquired, not grabbed; contracts should promote equal bargaining, not institutionalize inequality; and in torts, one who harms another should restore the injured party to wholeness. Handouts and subsidies should not be mixed with these principles because they are not an adequate substitute for fairness.

If Africa’s economic prospects depend on private law, private law must be taken seriously. To start with, this means both recognizing and challenging the basic assumptions underlying Western private law, such as the link between custom and economic backwardness. Scholars have recognized that the causal link between Western private law and Western economic advancement is tenuous.⁸⁷ Second, custom is a well-recognized attribute of Western law,⁸⁸

86. See generally LUCY, *supra* note 49 (analyzing the foundations and normative components of legal liability-responsibility in private law along with the various theories of compensation and corrective or distributive justice associated with private law).

87. See, e.g., Brietzke, *supra* note 9, at 151 (noting that while Professor Rene David’s theory of codification “presupposes that the French legal model and its related assumptions are the appropriate ones from the standpoint of Ethiopian development . . . [, the] French private laws were not instrumental in securing a broadly-based development in their country of origin . . . and it is unlikely that they will be so in Ethiopia”).

88. See generally David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375 (1996) (discussing the various ways by which customary easements of public access to beaches are recognized, including by common law doctrine, statute, recognition by judicial activists, and customary rights of indigenous groups); Alan Watson, *An Approach to Customary Law*, 1984 U. ILL. L. R. 561 (discussing the transformation of Roman customary norms into law).

further attenuating the link between custom and economic backwardness in Africa; this link is based on inaccurate assumptions about Western private law. Taking private law seriously in Africa would require taking Western private law seriously. The comparative contrast, assumed to exist between Western private law and “traditional” African legal concepts and which subsequently informs law reform programs, mischaracterizes both African and Western ideas of law. Mischaracterization leads to false dichotomization of the two systems, false characterization of the nexus between Western private law and economic development,⁸⁹ ineffective law reform programs, and eventually leads to intractable instability and conflict. Systems of law may be different, but abstracting legal difference into capsule prescriptions is a meaningless expenditure of effort with inescapable chilling effects.⁹⁰

CONCLUSION

Private law has not served Africa well. There has been an excessive focus on installation of institutions of positive law, and little attention paid to basic questions such as: what is the function and purpose of private law in Africa? There has not existed a system of post-installation periodic performance review of private law institutions. At this point in history, the function and purpose of private law in Africa should be to achieve for Africa economic dignity and political say over global matters. If these are the twin goals, it is pointless to continue trying to force Africa to follow the same path of legal development as the West; legal reforms in Africa driven by the prospect of reconciling tensions within the law will not succeed because no system in the world has ever achieved that goal. A performance review of private law in Africa will reveal that the private sector enjoys unacknowledged subsidies from the state, family, and charity. This not only points to an important conceptual

89. Cf. Brietzke, *supra* note 9, at 151-52 (listing the similarities in the development and substance of the Civil and Commercial Codes of France and Ethiopia, while detailing how the French codes arose out of the French “social field” and highlighting the necessity for the Ethiopian codes to develop from the radically different Ethiopian needs and demands).

90. See generally Günter Frankenberg, *Critical Comparisons: Rethinking Comparative Law*, 26 HARV. INT’L. L.J. 411 (1985) (highlighting the problems of bias and perspective in comparative legal studies).

problem in how we think about private law in Africa, but also to the fact that under such a scheme, private law has been retarded rather than developed.