A Common Contractual Conception of Custom?

How the Judiciaries of Post-Colonial Ghana and Papua New Guinea Fetter Indeterminacy through *Stare Decisis* in Customary Disputes

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Abstract

Customary law persists as a legal paradigm in many parts of the former British Empire alongside 'received' English law. Due to the essentialist and communitarian connotations that anthropological and legal thought have bestowed upon the former, legal pluralism is often invoked to analyse customary law. Unfortunately, pluralist frameworks often give the mistaken impression that each group's customs somehow constitute separate subnational legal systems. While socio-legal pluralist perspectives have their place, within Ghana and Papua New Guinea at least, legal pluralism fails to articulate how customary law doctrines have been translated into common law terminology and integrated within a positivist framework by the hierarchical, ultimately English-style judiciary that administers it. Furthermore, the tendency for legal pluralists to consider custom as law proper is ill-equipped to recognise how Ghana and Papua New Guinea's judiciaries have developed generalised *legal* principles ('customary law') for the recognition of custom as a question of *fact* (custom).

As these principles and related teleological concerns vary from issue-to-issue, this thesis looks at the doctrines governing the specific issue of the recognition of customary marriage, and analyses relevant constitutional provisions, legislation and precedent through a positivist framework. This analysis reveals that far from being a separate essentialist law with a communitarian character, the judicial doctrines of customary marriage are almost identical to the underlying principles of contract law, and are based on the same individualist principles, although accounting for communitarian standards. However, while precedents regarding the recognition of customary marriage consistently relies on these principles, it usually fails to articulate them explicitly, instead varying the degree of communitarian essentialism (i.e. formalism) to reach the result a contractual conception would have otherwise reached. This caution about expressing these contractual principles ultimately means that the judiciary fails to live up to its constitutional function of providing legal certainty, leaving the door open for excessive discretion and leaving the legislature and the public in the dark.

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Part 1

Introduction

1.1 The Judiciary's Constitutional Role to Self-Regulate for Legal Certainty

Many laypersons believe the judiciary's constitutional role in upholding the rule of law is predicated upon their power to use entrenched constitutional provisions to overturn legislation. This belief's underlying logic is that only substantive, uncompromising, and ever-increasing protection of entrenched individual rights against state power is sufficient to ensure the latter upholds the rule of law. This view is at-best a half-truth; many liberal constitutional systems have functioned without such protections. Even within societies with such protection, most of the judiciary's work to protect individuals lies not in undermining legislative output but rather in providing a consistent and coherent articulation and application of the *corpus juris*. It is through this that individuals have legal certainty, and it is legal certainty which affords individuals broad latitude to freely plan their affairs in a legally-compliant and responsible manner. When courts interpret and apply the law inconsistently, there is no legal certainty, rendering the law unreliable and the law-abiding citizen unprotected.

Entire areas of the law of England and Wales ('English law') are uncodified, but codified or otherwise, the inevitable degree of indeterminacy laws possess is not *carte blanche* for judicial arbitrariness. *Stare decisis* is English law's primary mechanism for judicial self-regulation to ensure legal certainty, with that doctrine serving as the basis for a continuous process of rationalisation and restatement of the interaction and interrelation of all the *corpus juris*' moving parts. *Stare decisis* was exported throughout the world through Empire, though now in most places operates subject to the provisions of national constitutions. The primary focus of this thesis is how the English-style[1] judiciaries of Papua New Guinea ('PNG') and Ghana fulfil their constitutional function of self-limitation and ensure legal certainty through

[1] I use the term 'English-style' throughout this thesis due to the ambiguity of the term 'common law'. Common law means (at least) three different things in English Law alone and has a fourth meaning in the Constitution of Ghana, which I will get to later. Common law (1) when contrasted with Civil law systems refers to English-style legal systems generally, (2) when contrasted with statute refers to judge-made law, and (3) when contrasted with equity (in the sense used within English law) refers to judge-made law other than equity. Thus, I utilise terms like 'English-style' and 'judge-made' law for disambiguation.

stare decisis when adjudicating an especially indeterminate colonial species of (generally) ethnically-delineated, uncodified, and, most problematically, ***living*** law, referred to variously as 'native custom,' 'customary law,' or simply 'custom.'

1.2 Methodology, Justifications of Comparators, and Outline

Methodologically, this thesis is little concerned with Ghana or PNG's formal constitutional law, but instead with the institutional self-limitation of judicial discretion through the doctrine of *stare decisis*, specifically as this applies to the inherently indeterminate and ever-changing substance of custom. This further relates to the judicial role in upholding one of the least contentious elements of the rule of law, legal certainty, which is essential for both informed individual autonomy (what the Americans call 'ordered liberty') and for informed legislative output. This focus on individual autonomy also leads to tangential considerations regarding whether being subjected to custom is contingent upon communitarian standards or individual intent. English law serves as the yardstick throughout, as Ghana and PNG's judiciaries' incorporation of customary law into an English-style legal framework relies heavily upon analogies with English-style legal concepts. Thus, the comparison's purpose is what Hirschl calls "concept formation through multiple descriptions of the same constitutional phenomena across countries,"[2] i.e. if and how custom interacts with the English-style judicial self-limitation mechanism of *stare decisis*, using Ghana and PNG to exemplify this interaction. The main reason for choosing the comparators of PNG and Ghana is that they adjudicate all legal disputes, customary or otherwise, within unified English-style judicial administrations.

Part 2 provides a brief overview of the various connotations colonial custom carries in anthropology, the essentialist conceptions of custom in pre-positivist English legal thought, the original intent of the colonial mandate to recognise custom, and how these have coloured interpretation of the modern post-colonial paradigm and academic analyses of it. It considers several prevalent understandings of how the colonial mandate to give custom legal effect should be construed in light of the aforementioned concerns about judicial self-limitation. It

[2] Ran Hirschl, "Comparative Methodologies," in *The Cambridge Companion to Comparative Constitutional Law*, ed. Robert Schütze and Roger Masterman, Cambridge Companions to Law (Cambridge University Press, 2019), 11–39 p. 18

ultimately rejects pluralism in favour of an Austinian positivist framework[3] as the most coherent path English-style judiciaries can take. Parts 3 and 4 outline the recognition of customary marital status to illustrate the integration of custom into an English-style legal framework, as well as how custom's role can be expressed through the language of English law. Part 3 theorises that the mandate to recognise customary marriages is best construed as generalised *legal* principles governing the recognition of *fact*, and that it is these *facts* that in turn give rise to *legal* obligations. These principles are closely analogous with the common law of contract, though nonetheless incorporate custom's communitarian connotations. Part 4 critiques PNG's judiciaries' tendency to instrumentalise custom's indeterminacy for tangential purposes in individual cases, which I critique as over-broad discretion which undermines the judiciary's constitutional function to ensure legal certainty.

[3] i.e. A framework which understands customary law as part-and-parcel of the closed, logical, and formal system that constitutes the national *corpus juris.*

Part 2

Construing the Colonial Mandate

2.1 Custom and Stare Decisis

The recognition of colonial custom reflects a notion which stretches back to antiquity; that knowing the law of the conquered is a prerequisite to ruling them effectively.[4] The citizens of Ghana and PNG, however, are subject to generally applicable laws resembling England's, with their courts figuratively and (usually) literally speaking the same language.[5] Although both common law countries, aside from this colonial heritage they have few historical or cultural connections, and their colonial administrations were not directly intertwined during the age of Imperialism, so legal similarities between the two generally arise from direct reception of English law.[6]

Customary law was introduced through colonial ordinances utilising a legislative boilerplate that was near-ubiquitously applied to multi-ethnic British colonies, that mandated courts to give effect to custom, usually with the caveat custom would not apply when contrary to law, public policy, or otherwise 'repugnant to the general principles of humanity.'[7] The first step when interpreting statutory language is to ascertain the words' ordinary meaning.[8] Custom

[4] R H Charles (transl.), 'The Letter of Aristeas', *The Apocrypha and Pseudepigrapha of the Old Testament in English*, vol 2 vols. (Oxford University Press)

[5] Regarding PNG specifically, "the court structure is essentially unchanged since colonial times; it is an adjudicatory and hierarchical institution, just like the Anglo-Australian courts from which it was copied. The core values and beliefs of the judges, at least as regard the roles that law and custom should play in a nation-state, are inculcated in law school and in their early professional experience" - Jean G Zorn, 'Custom and/or Law in Papua New Guinea' (1996) 19 Political and Legal Anthropology Review 15 pp. 19-20

[6] As opposed to, for example, colonial Gold Coast (now Ghana), Nigeria, Gambia, and Sierra Leone, which were all subject to the jurisdiction of the West African Court of Appeal ('WACA'), whose rulings were not automatically applicable in other parts of the Empire. Some of WACA's rulings have continued applicability, so some 'Ghanaian' precedents referenced here actually arose from Nigeria. See a selection of that courts case law at 'West African Court of Appeal' (1957) 1 Journal of African Law 51.

[7] e.g. Supreme Court Ordinance of 1876 (No. 4 of 1846) (Gold Coast and Lagos). and s 57(2) New Guinea Native Administration Regulations 1924 (PNG).

[8] i.e. This is the literal rule, exemplified by *R v Harris* [1836] 7 C&P 446 (UK).

ordinarily means something like established community habits.[9] This is too vague for legal use, as it could refer to matters as narrow as using trade customs to aid contractual interpretation,[10] or as broad and philosophical as the 'habitual' acquiescence of a community to their legitimate ruler. In the 21st Century, the now post-colonial system of customary law may be defined as when the state gives legal effect to uncodified, partially uncertain, and multiple normative social orders.[11] These social orders are (theoretically) the living customs of communities, generally delineated by ethnicity and locale, and this chapter elucidates how this came to be. This research began by asking: *how does judicial doctrine delineate the boundary between custom and state law?* This question was motivated by the theoretical incompatibility of ever-changing, living customary law, and *stare decisis*. However, for reasons this chapter will explain, my research has led me to reject the premises of this question so-formulated.

While English law shares the widespread constitutional ideal that the legislator makes law while the judiciary applies it, this over-simplistic paradigm is particularly misleading in the common law tradition, where judge-made law governs many areas. Judicial discretion in these areas is limited by *stare decisis*. *Stare decisis* signifies not only that like cases be decided alike, but that principles underpinning decisions (*ratio decidendi*) by reasonably senior courts bind inferior courts, so decisions serve simultaneously as applications and authoritative formulations of the law. This provides consistency and prevents excessive judicial discretion where the law is scantily codified and where statutory terminology is ambiguous or "open textured."[12] *Stare decisis* may increase judicial power vis-à-vis the legislator if the country

[9] 'Definition of Custom (Noun)' (Oxford Advanced Learner's Dictionary) <https://www.oxfordlearnersdictionaries.com/definition/english/custom_1> accessed 6 June 2021. See also the discussion regarding the legal prerequisite of communal acquiescence for a custom's validity in Neil Duxbury, 'Custom as Law in English Law' (2017) 76 The Cambridge Law Journal 337, p. 342

[10] Ashburn Anstalt v WJ Arnold & Co [1989] Ch. 1, 27 (UK)

[11] Equivalent to 'customary/cultural normative systems' as defined in Brian Z Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' (Social Science Research Network 2007) SSRN Scholarly Paper ID 1010105, see also the paraphrase of Woodman's definition in Olaf Zenker and Markus Virgil Hoehne, 'Processing the Paradox: When the State Has to Deal with Customary Law' in Olaf Zenker and Markus Virgil Hoehne (eds), The State and the Paradox of Customary Law in Africa (Routledge 2018), p. 1

[12] i.e. Language which could reasonably be applied to a given set of facts in multiple ways, for more detailed discussion, see HLA Hart, The Concept of Law (Clarendon Press 1961), pp. 121-114

adheres to constitutional sovereignty, as do Ghana and PNG, as judges may use constitutional provisions to overturn legislation. However, in all other cases, the legislative process and *stare decisis* function co-operatively, with the judiciary clarifying the law's content subject to potential legislative modification.

For example, the UK's Theft Act 1968 provides anybody who "dishonestly appropriates property belonging to another with intention to permanently deprive the other of it is guilty of theft,"[13] with appropriation defined as "any assumption by a person of the rights of an owner."[14] When a defendant switched price labels to get cheaper products was arrested at a checkout and charged with theft, he argued he had not assumed *all* the owner's rights as he had not removed the goods.[15] The court instead construed 'the rights' as "<u>any</u> [as opposed to all] of the rights."[16] *Stare decisis*' operation clarified such label-switching amounts to "appropriation" for Theft Act purposes. With the exception of constitutional matters under constitutional sovereignty, *stare decisis* in this area serves to augment, not contradict the legislature's general intent. The Theft Act expressed no specific intent as to label-switching, but adjudication clarified its meaning. If 'appropriation,' defined in the statute, requires clarification through precedent, surely an open-ended mandate for judicial recognition of 'custom' invites *stare decisis* to establish robust doctrines for customary law. But how can *stare decisis* pin down a living and ever-changing custom?

2.2 Essentialist Theories of Custom as Law

A major divergence in theoretical approaches to customary and common law's interaction is viewing custom as (1) part of national law, and (2) external to it, positions I label 'Austinian' and 'legal pluralist' (or simply 'pluralist') respectively.[17] Pluralism conceives of multiple customary systems within one jurisdiction as multiple systems of <u>*law;*</u>[18] a national *corpus*

[13] s 1(1), Theft Act 1968 (UK)

[14] s 3(1), id.

[15] *R v Morris; Anderton v Burnside* [1984] AC 320 (UK).

[16] ibid.

[17] Gordon Woodman, 'Legal Pluralism in Africa: The Implications of State Recognition of Customary Laws Illustrated from the Field of Land Law' (2011) 2011 Acta Juridica 35. pp. 42-43

[18] Zenker and Hoehne (n 11), p. 14

juris alongside customary *corpora juris*. Austinianism is a positivist theory defining law proper as the Sovereign's command backed by power to sanction (i.e. official state law).[19] Thus, an Austinian need not deny custom's regulatory character, but it is not considered law proper lest the (Sovereign's) general laws consider it so.[20]

The Pluralist-Austinian dichotomy centres upon different philosophical intuitions[21] regarding law's definition, which Tamanaha categorises into three archetypes; (1) *tradition/custom as law*, (2) *law as the Sovereign's command*, and (3) *law as what is just*.[22] The third category is roughly equivalent to natural law philosophy. Positivism and realism fall into the second category. While positivists usually regard law proper as the formal articulation of the rules *posited* by the Sovereign, realists emphasise empirical observation of all factors influencing outcomes, formal or otherwise, i.e. what the Sovereign does. *Stare decisis'* operation holds these two philosophical approaches in dialectical tension; when the applicable law is unclear, decisions turn upon a jumble of analogies, 'relevant factors', and recourse to general principles. English-style judgements seldom differentiate between the *ratio decendendi* and *obiter dicta* (tangential comments), resulting in ambiguous precedents. However, after similar facts are adjudicated a sufficient number of times, fact patterns are distinguished and principles clarified until a formal articulation of the law is established.

Pluralist approaches are too diverse for any one of Tamanaha's categories to apply to all of them. Early 20th Century pluralist discussions in colonial environments drew inspiration from anthropological ideas about 'primitive' societies. Observing that stateless 'primitive' societies recognised 'legal' obligations without legal institutions, anthropologists theorised that law

[19] While many positivists have criticised the idea of law as the Sovereign's 'command' as misleading, Austin defined the term to mean specifically the formal substance of a legal norm as opposed to personal obligations derived therefrom ('duty') and the consequences for not following such a rule ('sanction'), see John Austin, *The Province of Jurisprudence Determined* (John Murray Publishers 1832), p. 11-12

[20] Woodman (n 17). p. 42

[21] Brian Z Tamanaha (ed), 'What Is Law?', *A Realistic Theory of Law* (Cambridge University Press 2017), p. 42-43

[22] Although I derived these three categories from id. p. 39, Tamanaha notes they are identical to the taxonomy implicit in the (possibly pseudo-) Platonic dialogue *Minos*

pre-existed the state. [23] Interpreted through the then-widespread Social-Darwinist worldview, positive law was understood as a 'more evolved' version of this social 'primitive law', leading to the conception that European-style colonial law's mingling with native custom as legal pluralism (the *colonial* view). Decolonisation ushered in a period of re-evaluating anthropological attitudes, particularly its negative representations of primitive society,[24] which in turn influenced pluralist scholarship which differentiated between the "official customary law" of the courts from "true custom" (the *post-colonial* view). Removed from their original anthropological contexts, these *colonial* and *post-colonial* perspectives have been oversimplified to imply that native customary groups possess a 'true customary law' regardless of institutional and historical context. This almost *Völkisch* essentialism naturally falls within Tamanaha's *law as custom* category.

An even more essentialist variation of the *law as custom* category can be found in Medieval English legal thought, where precedent was considered evidence of a transcendent common law, which judges found and declared rather than laid-down and developed. This declaratory theory of common law purported to derive from *ancient* customs; Blackstone differentiated between 'local custom', 'general custom' i.e. the common law, and 'peculiar laws' i.e. codified laws un-enacted but applicable *by custom*.[25] The Sovereign's command could derogate from, but not replace, custom. Most analogous to the colonial paradigm was local custom, non-general law applicable to "particular place[s], persons… and[/or] things."[26] The persistence of a *custom as law* was considered proof of its wisdom, as an unwise custom would have either been derogated from by positive law or would have fallen into desuetude.[27] Thus, the declaratory theory also had connotations of Tamanaha's *law as the just* category. But can state law really judicialise the *essence* of uncodified community customs in an

[23] Bronislaw Malinowski, *Crime and Custom in Savage Society* (Routledge and Kegan Paul 1926). 59 and 14., as quoted in Tamanaha, 'What Is Law?' (n 21), p. 41

[24] This trend is well exemplified by the general argument in Marshall Sahlins, *Stone Age Economics* (Aldine-Atherton 1972).

[25] e.g. Canon Law, see Duxbury (n 9). p. 342-343

[26] Anthony Fitzherbert, *La Graunde Abridgement* (1st edn, Printed by John Rastell and Wynkyn de Worde 1516). p. 277, referenced in Duxbury (n 9) p. 342

[27] Duxbury (n 9), pp. 349-350

authentic manner?

This question frequently comes up regarding the colonial concept of custom,[28] but in regards to local custom under England's declaratory theory, the answer is certainly no. English law prior to the 1800s was highly focused on forms of action (standardised complaint forms associated with distinct, complex procedures) rather than causes of action (the claim's substance).[29] As "each procedural pigeon-hole contain[ed]… its own rules of substantive law,"[30] formulating an overarching theory of the substantive principles of English law was nigh-impossible. The practical inadequacy of the limited range of forms led to systemic use of bizarre legal fictions, disingenuous characterisations of fact, and irrationally convoluted logic to shoehorn common disputes into available forms.[31] And the ascertainment of custom similarly involved legal fictitiousness; pleading that a parochial custom derogated from the common law (the 'general custom') required proof of the custom's persistence since time-immemorial (i.e. A.D. 1189[32]). So, a plaintiff (as they were then called[33]) could argue they had a right over land if that right had persisted since time-immemorial.

In theory, the time-immemorial requirement would lead to a progressive reduction in local anomalies, as items on the list of parochial customs would one-by-one fall into desuetude. However, the burdensome evidentiary requirement of proving a custom's persistence since 1189 *de facto* required lack of contrary evidence rather than actual proof.[34] This led to the legal fiction of (implied) prescription, whereby a lack of contrary evidence was construed as

[28] Ubink Janine, 'The Quest for Customary Law' in Jeanmarie Fenrich, Paolo Galizzi and Tracy E Higgins (eds), *The Future of African Customary Law* (Cambridge University Press 2011), p. 86

[29] See John Baker, 'The Forms of Action', *Introduction to English Legal History* (2nd edn, Oxford University Press 2010) p. 60-77

[30] Frederic Maitland, *Equity, Also, The Forms of Action: Two Courses of Lectures* (1st edn, Cambridge University Press 1910), p. 298

[31] Famously, in *Rattlesdene v Grunestone* [1317] YB 10 Edw II (54 SS) 140 (England)., an action to claim damages for a wine shipment contaminated with sea-water was fictitiously characterised as involving a wrong by force of arms to shoehorn it into the *trespass vi et armis* (trespass by force of arms) form of action

[32] Time Immemorial refers was 1189 AD for legal purposes, for rather obscure reasons succinctly explained in Duxbury (n 9), p. 346-348

[33] A 'claimant' since the Civil Procedure Rules 1998 (UK)

[34] Duxbury (n 9), p. 348-349

proof of legitimate grant of that right over land before 1189 in our hypothetical case. This process elevated certain *living* customary rights (mainly land rights) to the status of a legal right, but only according to these rather artificial procedures that were ***determined by judicial doctrine***. Even then, custom's application was contingent upon formal legal rules and the institutional context, so from a modern perspective could anachronistically be analysed through positivism and realism respectively. But by grounding law in ancient custom, judges could declare almost anything to be law, providing they could formally declare it to have persisted since 1189, even if such arguments were entirely fictitious, and this served as a spring-board for quite unfettered judicial activism.[35]

Appeal to a transcendent common law also served as the rhetorical basis for Parliamentary arguments against Royal Absolutism during the era of the Civil War and Glorious Revolution.[36] But shortly thereafter, positivists critiqued the artificiality resulting from uncodified law's equation with tried-and-tested customs. They found allies in Parliament, who were already experiencing problems with a conservative judiciary who construed legislation simplifying property law[37] extremely narrowly as mere derogations from the transcendent common law, limiting the implementation of Parliament's will.[38] While positivists such as Bentham and their radical ambitions of comprehensive codification failed, rationalistic positivism engendered a paradigm shift in legal understanding,[39] leading to a piecemeal, dialectical rationalisation process led by Parliament but supported by the judiciary. While reluctant to abandon the declaratory theory, judicial adaptation to novel disputes led to

[35] id. pp. 355

[36] In the Bill of Rights 1689 (England) , one of the founding documents of Parliamentary Supremacy, the condemnation of the 'pretended powers' of Charles I is said to contradict unnamed ancient laws

[37] For an example of Parliament's extensive economic and property law reforms in the early days of Parliamentary Sovereignty, see Dan Bogart and Gary Richardson, 'Property Rights and Parliament in Industrializing Britain' (2011) 54 The Journal of Law and Economics 241

[38] Anthony D'Amato, 'Human Rights as Part of Customary International Law: A Plea for Change of Paradigms' Georgia Journal of International & Comparative Law 47, p. 65

[39] "But while his codes were not adopted, it is quite certain that his ideas, or a great many of them, were assimilated, if we may use a word which seems most fit", Charles Noble Gregory, 'Bentham and the Codifiers' (1900) 13 Harvard Law Review 344, p. 348

old forms of actions being repurposed[40] and others falling into desuetude, leading to a gradual emergence of a substantive *corpus juris* formulated in positivist terms.

This led to the modern mechanisms of rationalised judicial self-limitation under Parliamentary supervision outlined previously, though initially hidden behind traditionalist pretences. Even the decision confirming the doctrine of *stare decisis*, an explicit assertion of the judiciary's *de facto* law-making power, restated the declaratory theory.[41] *Stare Decisis* is the bedrock of common law's *legal* constitutionalism, providing an exponential growth in consistency and certainty where the legislator is silent or unclear, though nonetheless deferring to legislative intent. While not inflexible, the positivist tendencies of recent centuries have replaced the traditionalist and essentialist custom-based views of old, allowing the judiciary to be increasingly honest about their institutional role in the law-making process. Nonetheless, English political rhetoric's continued invocation of long-established tradition leads to mischaracterisations of *modern* common law as judicialized ancient custom. The modern foundations of the three least-codified areas of English Law most closely associated with judge-made common law's flexibility (contract, tort, and trust) were developed by lines of cases formulating general legal principles based on liberal philosophy, not from any ancient customs. The superficial linguistic resemblances to time-immemorial and implied prescription in English land law are not living fossils of the pre-positivist law but rather statutory rationalisations of these old procedures.[42]

2.3 The Imperial Parliament's General Intent

2.3.1 The Imperial Sovereign's Command to Consider Native Custom as Law

While *custom as law* in the declaratory sense is long-dead in law, it survives rhetorically. In the early-to-mid 18th Century, when this path to judicial positivism had still not been fully traversed, the Tories made natural law arguments that there was a duty to preserve the *laws* of

[40] e.g. the novel repurposing of *Assumpit*, outlined in Frederic Maitland and Sir Frederick Pollock, *The History of English Law Volume 2: Before the Time of Edward I*, vol 2 (Cambridge University Press 1898), pp. 184-239

[41] Duxbury (n 9), p. 352

[42] Prescription Act 1832 (UK)

the Empire's conquered peoples,[43] prevailing against Whig arguments in favour of legal equality and assimilation.[44] This began the policy habit of passing the aforementioned boilerplate ordinances mandating recognition of custom. While the source of this mandate was the Sovereign at Westminster's command rather than a declaratory theory of ancient custom's inherent legal character, custom then retained connotations of long-established communitarian habits as law. These ambiguities were then inconsequential, as British imperial administration was spread thinly,[45] functioning through intermediary 'traditional authorities' generally responsible for adjudicating customary disputes. Thus, these ordinances left custom at traditional authorities' discretion, subject to potential legislative modification; neither wholesale implementation of English law, nor comprehensive codification of the Empire's customs were within the budget. Withholding the relative legal equality and commercial efficacy of English law may have also been part of a divide and rule strategy to foster economic dependence on the metropole and exploitation of native populations.[46] Regardless of motivation, custom's subordination to legislation suggests an analogy with the common law; i.e. native custom applies to natives when Parliament is silent, just as England's common law does to the English. This position is reflected in custom's definition in the modern constitutions of PNG and Ghana.[47]

But this still connotes the essentialism of the old declaratory theory of the common law, as well as the *colonial* and *post-colonial* anthropological literature, in that it assumes 'natives' exist in definable groups possessing coherent *corpora juris*, and that these *corpora* can be found outside adjudicatory institutions. Likewise, it is also a legal fiction, because finding sufficient legal certainty in unwritten community norms which lack institutional enforcement is looking for something that isn't there. This became problematic when the judiciary

[43] Angela R Riley, 'Good (Native) Governance' (2007) 107 Columbia Law Review 1049, p. 1050

[44] Christian R Burset, 'Why Didn't the Common Law Follow the Flag?' (2019) 105 Virginia Law Review 483, p. 507

[45] Richard J Ross and Phillip J Stern, 'Reconstructing Early Modern Notions of Legal Pluralism' in Richard J Ross and Lauren Benton, *Legal Pluralism and Empires, 1500-1850* (NYU Press 2013), pp. 112-113

[46] See Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (Cambridge University Press 2001), pp. 147-149

[47] See Articles 11(1)(e) and 11(2), Constitution of Ghana, 1992 (rev. 1996) , and s 9, 10, and Schedules 1.1 and 1.2 of the Constitution of the Independent State of Papua New Guinea, 1975 (rev. 2016)

increasingly gained jurisdiction over customary matters. The indeterminacy of 'custom' may have given the colonial judiciary broad latitude to 'do justice' according to their conscience (*ex aequo et bono*), but practical problems forced a significant alteration in custom's legal meaning. Initial attempts to apply the old English standard of time-immemorial[48] were abandoned[49] as unworkable due to the non-verifiability of the antiquity of the uncodified customs, significant changes to custom brought about by the colonializing process, and scant legal records.[50] Therefore by the early 20th Century, custom was near-ubiquitously understood to refer to *living* custom, that which "receives the assent of the native community" when the dispute arises.[51] Both PNG and Ghana have codified this doctrine.[52]

Neither bound by the fetters of antiquity, nor *stare decisis*, it is little wonder that pluralism is an attractive framework for such an anomalous legal concept. However, modern pluralism is tending back towards a stricter definition of law, again influenced by anthropology, which was in turn influenced by post-colonial critical theory in their abandonment of the old primitive-civilised paradigm. As anthropologists applied their methods to developed Western societies, so too were pluralist theories applied to Western societies. This firstly led to finding pluralism everywhere,[53] but pluralist theory later rediscovered the distinction between social normative systems from law proper,[54] though drew it in different ways depending on the

[48] In *Welbeck v Brown* [1882] Sarbah FCL 185 (Gold Coast) , it was rather foolishly held that a given custom's validity was contingent upon its persistence since A.D. 1189, a date with no notable historical significance whatsoever in the Gold Coast.

[49] *Mensah v Wiaboe* [1925] D. Ct. 1921-1925, 172 (Gold Coast), as related in AN Allott, 'The Judicial Ascertainment of Customary Law in British Africa' (1957) 20 The Modern Law Review 244, p. 246

[50] Gordan Woodman, 'A Survey of Customary Laws in Africa' in Jeanmarie Fenrich, Paolo Galizzi and Tracy E Higgins (eds), *The Future of African Customary Law* (Cambridge University Press 2011), p. 15-17

[51] *Lewis v Bankole* [1908] 1 NLR 81, 83 (Nigeria)

[52] Sch. 1.2, Constitution of the Independent State of Papua New Guinea, 1975 (rev. 2016) provides that "'"custom" means the customs and usages of indigenous inhabitants of the country existing in relation to the matter in question at the time when and the place in relation to which the matter arises, regardless of whether or not the custom or usage has existed from time immemorial." In Article 11(3), Constitution of Ghana, 1992 (rev. 1996) , custom is defined as "rules of law which by custom are applicable to particular communities in Ghana", but the Nigerian precedent of *Lewis v Bankole* (n 51) clarifies this is to be construed as living custom.

[53] Exemplified by John Griffiths, 'What Is Legal Pluralism?' (1986) 1 Journal of Legal Pluralism and Unofficial Law 38

[54] See the critique of Griffiths' view in Sally Engle Merry, 'Legal Pluralism' [1988] Law & Society Review 869, p. 878

purpose of the analysis (the *non-essentialist* approach).[55] This research is by-and-large interdisciplinary and socio-legal, focusing on empirical dynamics between *social* custom and the state.[56] This type of pluralism is well-exemplified by Tamanaha's philosophising[57] and Hoehne and Zenker's recent volume.[58]

So having considered various connotations custom carries, what is the most appropriate approach in the present day? We must look to its modern statutory definition and the forum of its application. Ghana's Constitution recognises customary law as part of the common law along with English common law and equity.[59] 'Common law' thus refers to all uncodified 'law' including custom, and not just to received English law, echoing the previous suggestion that those drafting the colonial boilerplate conceived of native custom as a kind of native common law. PNG's Constitution's definition of 'common law' is more restricted, referring only to English judge-made law (including equity), but it also echoes the idea of native custom as a native common law, using the term "underlying law"[60] to refer to PNG's indigenous jurisprudence built on a synthesis of common law[61] and native custom.[62] During the period of post-colonial nation-building, nationalist rhetoric in both countries reinforced custom's ambiguous connotations by emphasising an essentialised concept of pre-colonial (i.e. ancient) native custom and its equality (or superiority) vis-à-vis the imposed, foreign English law,[63] while simultaneously encouraging a transformation of customary practice to facilitate the socio-economic transformations necessary to achieve developmental objectives.

[55] Exemplified by Brian Z Tamanaha, 'A Non-Essentialist Version of Legal Pluralism' (2000) 27 Journal of Law and Society 296

[56] Zenker and Hoehne (n 11). p. 3-5

[57] See generally the approach in Tamanaha, 'Understanding Legal Pluralism' (n 11)

[58] Olaf Zenker and Markus Virgil Hoehne (eds), *The State and the Paradox of Customary Law in Africa* (Routledge 2018)

[59] Articles 11(1)(e) and 11(2), Constitution of Ghana, 1992 (rev. 1996).

[60] s 9(f) Constitution of the Independent State of Papua New Guinea, 1975 (rev. 2016).

[61] Schedule 2.2, id.

[62] Schedule 2.1(1), id.

[63] The idea that native custom is a superior source of law to English law is explicated in Sch.2.2.(1)(c), id., and the classification of custom as law proper appears in Articles 11(1)(e) and 11(2), Constitution of Ghana, 1992 (rev. 1996).

Their constitutions both codified these contradictory directive principles of preserving 'authentic' community custom[64] while purging that which stands in the way of modernisation.[65]

We know that the unrealistic essentialist conceptions, be they *colonial*, *post-colonial*, or declaratory, have proved unworkable and custom is no longer thought of as static, with its antiquity no longer a prerequisite for its judicial application. While neither modern non-essentialist pluralism nor Austinian positivist perspectives on custom are essentialist, they focus on different objects of analysis. The former's socio-legal focus is ill-suited for elucidating the formal judicial doctrines governing customary law. For an Austinian, "The existence of law is one thing; its merit or demerit is another."[66] The judiciary cannot fulfil its constitutional function of authoritatively formulating the law consistently if it cannot incorporate custom into the general legal framework of substantive law, as customary disputes usually overlap with laws of general applicability. Thinking of 'authentic social custom' as sub-national *corpora juris* leads to theoretical problems, such as *the paradox of jurispathic recognition*,[67] where 'living customary law' is inevitably altered by formal adjudication in the courts. If this 'living customary law' in its social sense is our object of analysis, not only does its official counterpart fail to provide legal certainty through *stare decisis*, it fails to protect the individual's customary rights as they and their communities perceive them. Alternatively, if custom is subjected to *stare decisis* in the absence of evidence of customary change, then 'official' customary law is likely to lag behind customary change, which occurs rapidly in the modern world.[68] There is also a pervasive tension between the state's role in the protection of communitarian standards and the state's protection of

[64] Article 39(2), Constitution of Ghana, 1992 (rev. 1996) declares the state's objective "to encourage the integration of appropriate customary values into the fabric of national life," and s 5(d) of the Preamble of the Constitution of the Independent State of Papua New Guinea, 1975 (rev. 2016)., provides that "traditional villages and communities [are] to remain as viable units of Papua New Guinean society".

[65] See the repugnancy test appears in Schedule 2.1.(2), Constitution of the Independent State of Papua New Guinea, 1975 (rev. 2016), and the prohibition of harmful customs in Article 26(2), Constitution of Ghana, 1992 (rev. 1996).

[66] Austin (n 19), p. 278

[67] Summarised by Zenker and Hoehne (n 11), p. 19-21

[68] Woodman (n 50), pp. 15-17

individual autonomy that is particularly acute for customary law.[69]

Taking the *jurispathic paradox* and communitarian-individualist tension together, 'official' customary law may therefore enforce misrepresented communitarian standards. But from a positivist perspective, these are concerns about the law in society, not formulations of the law proper. While doing the latter coherently does not alleviate concerns about the former, formal articulation of the law provides the requisite mechanism for the judiciary to bind itself and thereby increase legal certainty; while social critiques are important, in its narrowest sense, the "rule of law is *about* form."[70] If the rules in this area are not carefully ***form***ulated, then this form cannot be improved upon. So while recent non-essentialist pluralist literature contributes empirical, case-specific accounts of dynamics between the state and customary norms, interdisciplinary and socio-legal research which remains focused on the gap between the official and popular conceptions of living custom by their nature side-step this formal articulation of custom's integration into a common law legal framework.

2.3.2 A Note on Positivism and Administrative Judicial Pluralism

As mentioned in the introduction, both PNG and Ghana now have a hierarchical court model which deals with all legal matters,[71] customary or otherwise.[72] PNG maintains some institutional anomalies which *de facto* derogate from general law, as the village courts (which also exist in urban areas) deal almost exclusively[73] with custom, take no notice of general legislation, and are restricted substantively only by the constitution.[74] Village court magistrates usually lack legal training - lawyers are banned from proceedings[75]- and court

[69] This phenomena is dubbed *the paradox of liberal statecraft* in Zenker and Hoehne (n 11), p. 19-21, though I think this is a misnomer; it is a tension, not a paradox.

[70] Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law - New Edition* (Princeton University Press 2018), p. 25

[71] SA Brobbey, 'Explaining Legal Pluralism in African Countries: Ghana as a Case Study'

[72] Ghana's Chiefs were stripped of their judicial authority through the House of Chiefs Act 1958 and the Chief Act 1961 (Ghana).

[73] ss 29, Village Courts Act 1989 (No. 37 of 1989) (PNG).

[74] ss 57(2) and 58, id.

[75] ss 32(2), 80, and 89(6)(b), id.

personnel are supposed to be representative of their customary community.[76] However, village court decisions are appealable to the district court, which reviews their rulings against general laws and the constitution, and may also review their formulation of local custom. Theoretically, PNG's higher courts shall not reconsider questions of substantive custom,[77] but as rulings may be over-ruled on other grounds, including non-conformity to natural justice in the ascertainment process,[78] the subject-matter jurisdictional distinction is *de facto* weak.[79] Ghana has considered custom as part of their common law since around the time of their independence,[80] so administers it in the ordinary court system (as this is where the common law is generally administered). This comparative lack of administrative pluralism that was common during imperialism and persists in other post-colonial states makes a positivist articulation of judicial doctrine easier, but it should not be taken to suggest that a unified, hierarchical judicial administration is a pre-requisite to articulation of a substantive *corpus juris*.

Nor do conflicts between the doctrines expressed by one judicial administration and another within a single jurisdiction necessarily lead to practical incoherence (although they may do[81]). For example, when the UK was an EU member state, the CJEU overturned British legislation due to EU law's Supremacy, while the UK courts disapplied non-EU-compliant law on the basis of Parliamentary legislation.[82] These distinctions in doctrinal formulation of where Sovereignty is situated are practically reconcilable. While commenting on rule of law concerns regarding administrative pluralism in customary contexts, Tamanaha comments that

[76] s 17(2) id.

[77] This is due to the principle that appellate courts review questions of law, not question of fact, see s 2(1) Chapter 19 of the Revised Laws, previously Native Custom (Recognition) Act 1963 (PNG)

[78] s 59(2) Village Courts Act 1989 (No. 37 of 1989) (PNG)

[79] See *Application of Thesia Maip; in the Matter of the Constitution s 42 (5)* (1991) [1991] PGNC 35; [1991] PNGLR 80; N958 (PNG)

[80] Joseph B Akamba and Isidore Kwadwo Tufour, 'The Future of Customary Law in Ghana' in Jeanmarie Fenrich, Paolo Galizzi and Tracy E Higgins (eds), *The Future of African Customary Law* (Cambridge University Press 2011), p. 209

[81] For an example of the potential for chaos when plural adjudicatory administrations implement distinct substantive law with no conflict resolution rules, see Silja Vöneky and Peter-Tobias Stoll, 'The Swordfish Case: Law of the Sea v. Trade' [2002] ZaöRV 21

[82] European Communities Act 1972 (UK)

"in some locations [non-state law systems'] interrelations with state law may become better articulated with the passage of time,"[83] indicating that even conflicting logics can be networked. Parallel judiciaries for separate *corpora juris* present no genuine obstacle to positivist articulations, providing their inter-relationship is *articulated in practice*. This is why 'common law' often refers to all uncodified law in England *including equity*, as common law and equity's inter-relation is so well-articulated, as to constitute a single closed, logical system, albeit with idiosyncratic historical complexities, and this was the case even before their administration was merged. An analogous but ill-articulated pluralist administration[84] could likewise be analysed as a singular but deficient positivist legal order (unless mutual recognition is non-existent), as positivism does not necessarily require that formal rules are articulated well.[85]

Thus, the few remaining forums where customary law persists outside of ordinary courts in PNG and Ghana do not justify departing from a positivist analysis, and can be easily articulated using well-known common law principles. Ghanaian Chiefs have a constitutional right to provide arbitration.[86] If the decisions are published,[87] they are final and binding upon parties consenting thereto, providing the hearing was fair.[88] This is no anomaly as the principles of such customary arbitration are subject to similar contractual and statutory principles governing arbitration generally.[89] Under statute, Chiefs may be called to the courts to give accounts of customary practices, but courts can call *any* relevant party, and evidence is evaluated at their discretion.[90] Chiefs' authority over *stool* or *skin* lands[91] can be analysed as a

[83] Brian Z Tamanaha, 'The Rule of Law and Legal Pluralism in Development' (2011) 3 Hague Journal on the Rule of Law 1, p. 14

[84] Such an ill-articulated interrelation would arguably include EU law's relations with Member State law generally. See; NW Barber, 'Legal Pluralism and the European Union' [2006] European Law Journal 306

[85] For a fuller discussion of this matter, see Leslie Green, 'Positivism, Realism, and Sources of Law' (2019) Oxford Legal Research Paper No. 53/2019, p. 5-7

[86] s 30, Chieftaincy Act 2008 (Act 759) (Ghana).

[87] *Budu II v Caesar & Ors* [1959] GLR 410 (Ghana), at 413

[88] id. at 417-418, and see Akamba and Kwadwo Tufour (n 80), pp. 207-208

[89] See generally the Alternative Dispute Resolution Act 2010 (Ghana)

[90] s 55(5) and (4), Courts Act 1993 (Act 459) (Ghana)

trust of land with a corporation sole as trustee for the benefit of the community living thereupon.[92] The informal substantive and procedural standards in PNG's village courts are subject to legality review upon appeal. A positivist account of the law underpinning less well-articulated administrative pluralism is not unfeasible; it is merely beyond this thesis' scope, hence my choice of Ghana and PNG, which both utilise essentially English-style unitary and hierarchical judicial administrations.

2.4 Abandoning a flawed question

These abstract academic discussions of the legal history and philosophy have somewhat obscured custom's doctrinal role in judicial practice, though this discussion has proved necessary to reveal the incoherence of my initial research question. When one looks at *specific* customary issues, the ambiguous mandate is transformed into concise legal questions formulated in ordinary common law terms. The necessity to avoid generality in favour of specificity arises because custom is neither a separate *corpora juris* nor a substantive area of law; traditional authorities during indirect rule dealt with legal disputes overlapping with multiple substantive areas of law, such as contract, tort, land, family, and criminal law. As the state expanded and the courts came to deal with customary matters more often, the concepts used to adjudicate customary law were translated into terminology known to the common law, but many of these areas are now governed by statute and English-style uncodified law, overriding custom. Like the role of local custom under the old declaratory theory, customary considerations factor into specific legal issues only to the extent that legislation and judicial doctrine dictates. These matters are almost exclusively civil,[93] scattered among the different substantive areas of Ghana and PNG's modern legal systems.

[91] These terms refer to the *ex sede* legal authority of Ghanaian Chiefs, analogous but not identical to 'the Crown' in English law.

[92] Explicated in Article 267(1), Constitution of Ghana, 1992 (rev. 1996).

[93] For custom's limited relevance in PNG's criminal law, see; s 4, Chapter 19 of the Revised Laws, previously Native Custom (Recognition) Act 1963. While Ghana permits customary offences, the precedent *Debrah v The Republic* [1991] 2 GLR 517 dictates they must be codified due to the prohibition of vague offences under Article 19(11) Constitution of Ghana, 1992 (rev. 1996), so customary offences do not fall into the uncodified category of custom this thesis is concerned with. For the permitted statutory scope of customary civil matters, see s 5, Chapter 19 of the Revised Laws, previously Native Custom (Recognition) Act 1963 (PNG).

My initial research question (*how does judicial doctrine delineate the boundary between custom and state law?*), contains contradictory philosophical presuppositions which mix up Austinian positivism and essentialist pluralist conceptions of custom. Demanding a doctrinal delineation between custom and state law assumes that this delineation can be formally expressed for use in a judicial context, but doctrinal coherence is a product of legislation and adjudication, i.e. the Sovereign's command, be that Sovereign the British Empire or the independent states of PNG and Ghana. Thus, the distinction it draws between custom and state law is fallacious, as state law (i.e. the command of the Sovereign) defines the applicability of custom, so it follows custom is part-and-parcel of the closed, logical and formal system that constitutes the will of the Sovereign.

While doctrinal consistency is usually an aim in judge-made law, custom's overlap with multiple substantive areas of law gives reason for the formal articulation of customary rules to vary from area to area; i.e. there is no reason to assume that the doctrinal relationship between customary land law and the general principles of English-style land law will be the same as the relationship between customary tortious principles and their common law equivalents. Just like equity and common law as they relate to certain substantive matters, the labels of 'non-customary' and 'customary' have become increasingly irrelevant as their relationship becomes increasingly well-articulated,[94] and the coherence with which they can be articulated within a unitary positivist framework increases. Additionally, legislation sometimes provides for the extent of custom's application and resulting legal implications within a given substantive area. For these reasons, my analysis of custom in Ghana and PNG will be limited to a single issue in parts 3 and 4, the recognition of legally valid marriages ('customary marriage').

[94] See generally; Andrew Burrows, 'We Do This at Common Law but That in Equity' (2002) 22 Oxford Journal of Legal Studies 1, pp. 1-16

Part 3

A Mandate to Recognise Fact

3.1 Marital Status, the Fact-Law Distinction, and Stare Decisis' Operation

The choice of the specific issue of customary marriage begs further elucidation. PNG and Ghanaian legislation provides that marital status can be either customary or statutory. However, whether a customary marriage exists is frequently the topic of legal disputes of a similar nature in both countries. Focus on this specific issue also allows a more practical analysis of custom's legal character, unimpeded by customary law's complex interaction with non-customary issues that arise in other frequent disputes, e.g. those involving customary land rights. Disputes on the existence of a customary marriage bear a superficial resemblance to old English cases where a valid 'common law' marriage was disputed. 'Common law' marriage is a type of marriage without formal requirements, abolished centuries ago in England,[95] but recognised in Scotland up until 2006.[96] It historically arose not from the declaratory theory of *custom as law*, but from the Catholic Canon Law,[97] which was historically applicable in English courts (and throughout much of Europe) by custom. Canon Law made a strong presumption that a marriage existed when conjugal co-habitation occurred, as extra-marital conjugal cohabitation was understood to have severe spiritual consequences.[98] While the recognition of modern customary marital status is contingent upon parochial and ethnicity-specific customs, the rules recognising old Canon Law marriages were of general applicability. In anachronistically modern terminology, the *legal* question of whether a Canon Law marriage existed was answered with reference to the *factual* question; *was there cohabitation and consummation?*

In PNG and Ghana, statutory marriage involves formalities analogous to many Western

[95] Marriage Act 1753 (UK)

[96] Family Law (Scotland) Act 2006 (UK)

[97] Peter Lucas, 'Common Law Marriage' (1990) 49 The Cambridge Law Journal 117, p. 117

[98] id. p. 119

marriage laws, while customary marriage is recognised on the basis of custom.[99] The legal question of whether a statutory marriage exists is answered with reference to the factual issue of whether the prerequisite statutory formalities have been carried out in a given case. The legal question of whether a customary marriage exists is answered with reference to the factual issue of whether the relevant practices which customarily constitute marriage have been performed. However, while the formalities of statutory marriage are unquestionably legal requirements, the formalities of customary marriage are not so straightforward. Colonial courts took the position that while the mandate to enforce custom was the law, the question of substantive native custom was a question of fact.[100] Ghana deviated from this formula in 1960, with both the Constitution and relevant legislation asserting customary law is law proper.[101] This was done to reduce the evidentiary burdens[102] for pleading the existence of 'infamous'[103] customs,[104] and perhaps to rhetorically assert that native custom was just as legitimate as English judge-made law. PNG's constitutional definition of custom does not directly address this matter, but relevant legislation directs courts to consider substantive customary matters "as though they were matters of fact".[105] This constructive ambiguity, rhetorically speaking, does not deny custom's equality with foreign law, but leaves the colonial position unaltered. It is important to emphasise that the fact-law distinction does not affect customs' regulatory character; the substantive content of a contract is also a question of fact, but one which gives rise to networks of legal obligations governing much modern commercial activity.

The distinction has concrete implications in the application of *stare decisis*. On which side of

[99] See generally, Marriage Act (Cap 127) (Ghana), and Chapter 280 of the Revised Laws, previously Marriage Act 1963 (PNG).

[100] *Hughes v Davis* [1909] Renner 550 (Gold Coast), at 551

[101] Article 11(3), Constitution of Ghana, 1992 (rev. 1996) and s 55(1) of the Courts Act 1993 (Act 459) (Ghana).

[102] *Bonsi v Adjena* [1940] 6 WACA 241, had ruled that relevant customs must be specifically pleaded on a case-by-case basis. Allott (n 49), p. 247 argues this remedied a tendency for the colonial judiciary to assume that the customs of ethnic group A applied to neighbouring ethnic group B.

[103] As in well-known, not notorious.

[104] Akamba and Kwadwo Tufour (n 80), pp. 210-211

[105] s 2(1) Chapter 19 of the Revised Laws, previously Native Custom (Recognition) Act 1963 (PNG)

the fact-law distinction certain questions fall is contestable,[106] and was traditionally considered a procedural question of whether the matter is for the judge or for the jury to decide,[107] a distinction inapplicable in Ghana and PNG.[108] If an area of law has not been legislated upon, or legislation gives the courts broad discretionary latitude, consistency is realised through *stare decisis*. But as previously mentioned, custom's validity is contingent upon the native community's assent thereto, so *stare decisis* cannot really work if custom is conceptualised as law proper. This is because even superior courts are not in a position to clarify ambiguities in the substance of customary norms with any degree of certainty or finality, as it is always possible that a custom declared valid in precedent is later rejected by a community. Also, the boundaries between community groups may be ill-defined, especially in PNG, so construing to whom the custom applies may be contentious. However, if customary law is conceived of not as the customary norms' substance, but as generalised principles providing recognition thereto, then *stare decisis* may be used to clarify and develop those general principles.

This approach to considering custom's role within a positivist common law framework is not just logically appealing; it can be found in the methods of pleading custom based on evidence of social fact rather than formal legal sources, not only in PNG but also in Ghana.[109] Despite their formal classification of custom as law, Ghana's evidence rules suggest otherwise. Ghana's courts have the power to summon chiefs or other appropriate witnesses of customary practices,[110] and restrictions on third-party hearsay evidence are relaxed for customary disputes,[111] showing that the ascertainment of custom is flexible and fact-sensitive. In PNG, where the customary groups are far more diverse, the appropriate living custom is determined by the 'common sense' of the lay village magistrate, again implying custom lacks the relatively fixed characteristics of law proper, and is more akin to a question of fact. Ghana can

[106] See Nathan Isaacs, 'The Law and the Facts' (1922) 22 Columbia Law Review 1, p. 5

[107] See *Isaack v Clark* [1613-1614] 1 Rolle (England). *per* Lord Coke at p. 132

[108] Ghana only uses juries for certain criminal trials. PNG never uses juries.

[109] s 55 Courts Act 1993 (Act 459) (Ghana)

[110] s 55(2)-(5), id.

[111] ss 128-129 Evidence Act 1975 NRCD 323 (Ghana)

call it law if they like, but custom there is ascertained much like facts are.

Logically, custom, defined as uncodified *living* communal habits,[112] must be understood either as a question of fact, or as an isolated island of the old declaratory theory in a sea of positivism, exempted from the operation of *stare decisis*. The former is preferable for several reasons. Firstly, a relative degree of legal certainty was ensured under the old declaratory theory through the prerequisite that customs' legal validity was contingent upon its long-established existence, and this prerequisite does not apply in PNG and Ghana. Secondly, conceiving of custom as fact is a straightforward solution which solves the problem of its interaction with *stare decisis* and allows its coherent integration with other areas of English-style law. Conversely, the old declaratory conception leads to a discredited, fictitious, essentialist and superficial understanding of both the nature of law and the nature of custom that belongs in a legal system obsessed with tradition and procedure and inarticulate in its elucidation of its own substantive content.

3.2 General Principles for the Recognition of Fact

Thus, if the substance of custom is a *de facto* question of fact rather than law in both jurisdictions, then national legal doctrines associated with custom, providing they are sufficiently general to give legal effect to all customs within the jurisdiction, may be coherently subjected to *stare decisis*. We can make an analogy here with the customs and usages of English contract law, completely distinct from the custom under the declaratory theory. Where there is an industry in which certain ways of doing things (custom) are ubiquitous, certain terms may be implied into contracts,[113] or ambiguous provisions may be upheld, defined according to dominant industry usage,[114] providing no contrary intent is evidenced. This 'custom' applies in extremely limited circumstances where customs are so pervasive throughout the relevant industry that reading them into a contract "goes without saying."[115] While lacking colonial custom's scope of applicability, both these senses of the

[112] *Lewis v Bankole* (n 51)

[113] *Ashburn Anstalt v WJ Arnold & Co* (n 10)

[114] *WN Hillas & Co Ltd v Arcos Ltd* [1932] 40 Lloyd's Rep (CA), (UK)

[115] E.g. See *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* [1977] 180 CLR 266 (UK), at 282-283

word custom point to 'common sense' judicial practices that ensure that obvious social obligations are recognised by the law, regardless of whether any formalities have been observed.

So the colonial mandate, now codified in PNG and Ghana's constitutions and legislation, is a mandate to derive *legal* obligations from social *fact*. No national law codifies the customs of every group nor the obligations contained in every contract; they instead provide general principles giving (or refusing to give) *legal* effect to obligations arising from *fact*. I mean the latter in both the social and legal sense. Thus, under the Austinian conception, there is no independent body of 'customary law', but rather, much like 'contract law' there is an area of national law which provides principles and precedent which facilitates a flexible recognition and enforcement of custom. Thus, the internal logics of a particular custom merely form part of a cases' fact pattern, which the (national) customary law (what is often called 'official' or 'judicial customary law' in pluralist approaches[116]) is equipped to recognise. Thus this thesis defines 'customary law' as the legal principles used to recognise and enforce 'custom', while 'custom' refers to the norms which, as a question of fact, "receive… the assent of the native community."[117]

3.3 The Fictitiousness of 'True' Communitarian Standards

Contract law and customary law's similarities may be reduced to the truism that both give legal effect to diverse systems of social regulation through generalised overarching principles. This is not saying much. Contract law is based on the classical liberal individualist principles that promises should be kept; individuals are bound by the bargains that they make.[118] Custom, at least as it was probably meant by the British Parliament when promulgating its imperial ordinances, referred to an essentialist communitarian conception of *custom as native law*, reflecting the then continued salience of the declaratory theory. One would therefore expect customary law doctrine to be designed to recognise the factual matter of community

[116] Woodman (n 50), pp. 24-25

[117] *Lewis v Bankole* (n 51)

[118] Thomas Gutmann, 'Some Preliminary Remarks on a Liberal Theory of Contract' (2013) 76 Law and Contemporary Problems 39, pp. 39-42

habit, rather than individual intent. Therefore, it would not be surprising if this led to *living* custom being articulated in an artificially rigid and formalistic manner.

Some precedent *prima facie* does this. For example, *Yaotey v Quaye* defined customary marriage in Ghana as a union between two families,[119] going on to list its "four essentials."[120] Due to Ghana's formal classification of custom as law, these essentials have occasionally been applied rigidly as prerequisites to customary marriage, e.g. by refusing to recognise promises to marry made without family approval,[121] or refusing to recognise marriages with only a 'notional' presence of these essentials.[122] These requirements, unlike the old Canon Law marriages, limit individual autonomy to marry one's own choice of spouse under customary law, and are seemingly Akan[123]-centric (apparently a pervasive problem in Ghanaian customary law precedents[124]). Similarly, in *Thesia Maip*, PNG's National Court refused to recognise the marriage of an estranged couple due to the absence of "any public ceremony involving bride price in the village," overturning the village court's decision due to their failure to consider the divergence of the customs applicable to Ms. Maip and Mr. Sioni, who were from different areas. The National Court believed this failure constituted non-conformity to natural justice, a statutory limitation on the village courts.[125] This is despite the fact that customs leading to community perception of marital status in PNG do not necessarily reflect Western legal concepts of marriage, where a ceremony or bureaucratic process immediately transform an individual from single to married, and despite the fact that both Mr. Sioni and Ms. Maip's local village court both considered her validly married under custom.[126]

[119] *Yaotey v Quaye* [1961] GLR 573-584 (Ghana), at 576

[120] These 'essentials' were further restated in *Re Caveat By Clara Sackitey: Re Marriage Ordinance, Cap 127* [1962] 1 GLR 180-183 (Ghana)

[121] *Djarbeng v Tagoe* [1989-1990] 1 GLR 155-161 (Ghana), at 156

[122] *Badu v Boakye* [1975] 1 GLR 283-291 (Ghana)

[123] The largest ethnic group in Ghana

[124] As discussed in HJAN Mensa-Bonsu, 'Avuugi v Aburgri: Some Customary Law Issues' (1993) 19 Rev Ghana L 252, p. 252 and p. 262

[125] *Application of Thesia Maip; in the Matter of the Constitution s 42 (5)* (n 79)

[126] Zorn (n 5), pp. 21-23

Differences between living custom ascertained as a question of fact in formal judicial settings, and custom as a social phenomenon, map on to the 'official customary law'-'living customary law' distinction made in pluralist literature. But the fictitiousness of legal concepts, or at least their distinction from their ordinary meanings, is near-ubiquitous. Over one hundred years ago, Holmes commented upon the fictitiousness of *Consensus ad Idem*, the 'meeting of the minds', a teleological concept that judicial construction of contracts should reflect the intentions of the parties. He used the hypothetical case of a contract for the delivery of a lecture, but with no specified date of delivery. The buyer intended the lecture be given within a week, while the lecturer intended "when he was ready." Contract law is keen to uphold agreements, so despite the uncertainty, the hypothetical court held there was a *Consensus ad Idem* to hold a lecture within a 'reasonable time', then determined that reasonable period as a remedy. The contractual principle of objective intention (i.e. how a reasonable bystander would understand the parties' intention as understood from their behaviour) here overrides the subjective (i.e. actual) intention of both parties, who did not agree on any 'reasonable' period in which the obligation was to be discharged.[127] Such legal fictions are inevitable, as courts cannot read minds but must provide solutions. Regarding a communitarian standard of ascertaining custom, courts cannot read the minds of an entire community, nor is a community ever of one mind. But this again is straying from positivist doctrinal analyses into 'law in society'; Holmes does not claim the parties' actual intention was law, nor do I claim that social understandings of custom are precisely reflected in adjudication under customary *law*. Both are constructs for use in proceedings.

However, more subtly, Holmes' hypothetical demonstrates that the fictitiousness of objective standards is necessary for the law to fulfil its practical purposes. And the same is true of custom. With the exception of PNG cases where custom interacts with matters of national importance,[128] in Ghana and PNG a given body of custom will be applied based on affiliation with an (ethnic) community. While this further reinforces the need for custom to be considered a question of fact (consider PNG, where the national judiciary could not possibly

[127] Oliver Wendell Holmes, 'The Path of the Law' (1997) 110 Harvard Law Review 991, pp. 996-997

[128] See the discussion of the lines of cases in Owen Jessop, 'The Elusive Role of Custom in the Underlying Law of Papua New Guinea' (1998) (1 January 1998) Melanesian Law Journal 1, s C.2.

have a working knowledge of the customs of the thousand-plus customary groups inhabiting the country), the notion that an entire ethnic group's norms can be articulated precisely is even more fictitious (and thus impractical) than its contractual equivalents, which are (at least theoretically) based on consciously articulated terms and conditions. Subnational groups are unlikely to possess customs sufficiently clear, uncontested, or certain for use in a legal context, especially in the absence of corollary subnational institutions. I would like to focus specifically on the problem of contestation; how is consensus reached on the substantive content of custom? And if consensus is impracticable, who makes the final determination?

From an Austinian perspective, it is whom the Sovereign Constitution has empowered to ascertain custom's content that makes the final determination i.e. the courts. But how do the courts ascertain communitarian standards with certainty? Rigid application of ultimately artificial communitarian standards tends to entrench social inequalities at the expense of individual autonomy, for example, traditional customs often disadvantage women.[129] While if these disadvantaged women were to collectively contest this custom, that should in theory be recognised as signs of customary change (as the courts ascertain *living* custom), the essentialist and traditionalist connotations that custom carries will likely have the traditionalists win the argument on what the true communitarian standard is, unless the newer view has already become dominant among the group. As community custom varies from one ethnicity to another, this results in the state engaging in 'meta-discrimination'; ethnic discrimination in the application of communitarian standards which effect gender discrimination, for example. Thus, customary law *prima facie* advantages traditionalist and communitarian rights at the expense of liberal individualist equality before the law, forming a sort of 'legal apartheid.'[130]

Thus, switching from a pluralist to a positivist perspective does not alleviate the individualist-communitarian tension discussed in part 2. Customary marriage illustrates this tension well,

[129] Woodman (n 50), pp. 12-13

[130] This rather sensationalist language is not entirely inappropriate; the colonial logic of customary law was part-and-parcel of South Africa's 'Bantustan' system underpinning the system of so-called *grande apartheid*, see e.g. Bantu Authorities Act, 1951 (Act No. 68 of 1951) (South Africa)

as while marriage is a legal status under national law, evidencing it by community-defined customary procedures reduces individual autonomy, especially if precedents like *Yaotey* in Ghana suggest that parental permissions are an essential prerequisite. So how do national law doctrines protect communitarian customs while ensuring equality before the law? One route is invalidating certain customs. Ghana's Constitution prohibits harmful and dehumanising customs,[131] with precedents ruling certain customs unenforceable due to unconscionability[132] or modernisation,[133] resembling the repugnancy test, long-abolished in Ghana, but surviving essentially unmodified in PNG's Constitution.[134] But before becoming too distracted with the tangential issue of over-riding oppressive communitarian standards, at least in regards to customary marriage, this *prima facie* communitarian conception of ascertaining custom as fact ('communitarian conception') is *de facto* mitigated with what I call the contractual conception of ascertaining custom as fact ('contractual conception'), i.e. where custom is applied based on the intent of parties to do things according to custom.

3.4 A 'Common-Sense' Contractual Conception

Regarding marriage specifically, statutory marriage in both countries provides a clear get-out for those who do not wish to have a customary marriage. More generally, in Ghana, consideration of the intention of the parties pervades the choice of law rules. Although the rules direct the court to consider a range of factors, such as the "personal law" (i.e. custom) applicable to the individuals involved[135] and where the dispute arose,[136] the initial consideration is the intent of the parties to a dispute as to which law they intended to govern it.[137] These rules, while referencing "personal law", frequently give precedence to intention; even the rule dealing with applying customary inheritance rules (which are particularly

[131] Article 26(2), Constitution of Ghana, 1992 (rev. 1996)

[132] *Foli and 7 others v the Republic* [1968] GLR 768 (Ghana)

[133] *Sarkodie I v Baoteng II* [1983] GLRD 73 (Ghana)

[134] Sch.2.1(2), Constitution of the Independent State of Papua New Guinea, 1975 (rev. 2016)

[135] s 54(1), Rules 2,3 and 5, Courts Act 1993 (Act 459) (Ghana)

[136] s 54(1), Rule 4, id.

[137] s 54(1), Rule 1, id.; "An issue arising out of a transaction shall be determined according to the system of law intended by the parties to the transaction to govern the issue or the system of law which the parties may, from the nature or form of the transaction, be taken to have intended to govern the issue."

important customary norms, as inheritance rights reflect and shape cultural conceptions of family relations) says "personal law" is only applicable "in the absence of an intention to the contrary."[138] Like contract law, these rules centre upon the ascertainment of the *objective intention to enter into legal relations*, evaluating whether there was *consensus ad idem* to govern the matter under custom. These agreements are then enforced by the courts. In cases where parties are subject to different "personal law" and the rules of the general law are inappropriate, courts are quite free to mix-and-match norms from different customs or depart therefrom, providing that they "conform… with natural justice, equity and good conscience."[139]

PNG legislation, probably due to their extreme ethnic and customary diversity, does not approach the issue with the conceptual presumption that different customary groups can be clearly differentiated based upon 'personal law'. The choice of law, in rural areas at least, will be largely a matter of 'common sense' from the point of view of the village court magistrates; after all, they may apply custom even in contravention of PNG's general laws.[140] Therefore, appropriate living customs are generally chosen on the basis of locale as defined by the territorial jurisdiction of the local Village Court. On appeal, if the parties hail from different customary backgrounds, then a purposive and teleological approach to solving the dispute is taken. This generally involves first considering whether there is an appropriate common custom between the two cultures, and if not, any analogies which can be drawn which facilitate the resolution of dispute.[141] Finally, if the customs of the two parties are completely incompatible, appeals may be made to 'general principles of humanity.' All of these practices are generally geared towards providing a just outcome to the dispute at hand, which often is simply a matter of identifying the broken agreements, express or implied (i.e. *consensus ad idem*), and holding the parties to their bargains.[142] The contractual conception is actually rather pervasive for custom generally.

[138] s 54(1), Rule 2, id.

[139] s 54(1), Rule 5, id.

[140] s 57(2), Village Courts Act 1989 (No. 37 of 1989) (PNG).

[141] *Allman v Arua* [2020] PGDC 7; DC4041, (PNG).

[142] id., paragraph 18.

However, the contractual conception has limitations. Unlike commercial contracts, agreements under custom seldom provide an authoritative written record of what was objectively intended, and the meaning of customary formalities evidencing intent may be contested. While businessmen making commercial agreements are incentivised to iron out terms and conditions to avoid litigation and liability, custom is fluid by definition, and there is no equivalent to a written customary agreement for marriage, for example. Additionally, of all areas that could be chosen to illustrate an analogy between contract and custom, marriage is 'an easy case'; many cultures in PNG, Ghana, and indeed across the world view marriage contractually, be that a contract between individuals, between families, or something betwixt. The position is likely at least *somewhat* different for customary inheritance, for example. Thus, although this may be considered an easy case chosen to circumvent the problem of facts ruining a good theory (or indeed, ruining a tenuous analogy), the argument is not that this analogy is water-tight in all substantive areas touched by custom. It does, however, transcend the doctrinal ambiguities that custom carries in the specific area of evidencing a customary marriage, and consistently applying contractual principles would reduce overbroad judicial discretion *in regards to this specific issue*.

Because of unwritten custom's constant ebb-and-flow of contestation and change, the analogy is with contract law's underlying principles. There is no need to invoke these principles where the objective intent is clearly defined in writing, so they are mainly invoked explicitly in harder cases where the contract is unwritten, ambiguous, or uses "open textured" terms. These underlying principles are the *objective intention to be legally bound*, which in these harder cases is based upon implied terms derived from the 'factual matrix' (*terms implied in fact*),[143] which evidences *consensus ad idem*. While still based on the classical liberal principle of holding folk to their word, as the intended bargain is uncodified, the factual inquiry must be more context-sensitive in these harder cases. There is always an element of cultural 'common sense' where hard lines cannot be drawn; e.g. rebutting the ordinary presumption against enforcing domestic agreements as contracts when there was an agreement between a

[143] *Reardon Smith Line Ltd v Yngvar Hansen-Tangen and Sanko SS & Co Ltd* [1976] 1 WLR 989 (UK)

household to pool money for a competition and split any cash-prizes,[144] or rebutting the presumption in favour of enforcing commercial agreements when businessmen made an agreement drunk in a pub because "no reasonable person present… would have thought that the offer… was serious and was intended to create a contract... [t]hey all thought it was a joke."[145] It is this common-sense approach to objective intent that can be extended to giving legal effect to custom.

It is nigh impossible to prove what someone's subjective intentions are, or what the community's conception of custom is, so courts must look to the existence of objective intent. So in PNG, Ms. Maip had actually been imprisoned for failing to pay a fine for adultery. It was not only the lack of communally-defined customary rituals which undermined her purported husband's claim. Mr. Sioni had told Ms. Maip if she "behaved herself he was considering getting married [to her] in a church", which the court took to mean that while they cohabited, it was not a marriage.[146] Like the aforementioned species of harder contract cases, the sorts of evidence from the factual matrix, demonstrating whether there was sufficient *consensus ad idem* to give rise to legal relations, must be evaluated based on general substantive legal principles that cannot be reduced to a formula for mechanical application. Due to the malleable and ever-transforming content of custom, a 'common-sense' analysis of what the performance of certain 'formalities' under custom reveals about the intent of the parties is required. If within a certain group, custom dictates that certain rituals (i.e. formalities) are necessary for a marriage to exist, then without these formalities, it is unlikely that the couple intended to form a marriage. This part is common sense. But what about in the scenario where the customs which precede marriage are becoming increasingly variable, and certain formalities are being dropped? Or what about cultures where customarily, couples don't 'get married,' but become recognised as such after lengthy cohabitation? [147] Would the lack of recognisable formalities render such unions invalid?

[144] *Simpkins v Pays* [1955] 1 WLR 975, (UK)

[145] *Blue v Ashley* [2017] EWHC 1298 (Comm) (UK) at paragraph 142

[146] *Application of Thesia Maip; in the Matter of the Constitution s 42 (5)* (n 79)

[147] Zorn (n 5), pp. 22-23

In both Ghana and PNG, the simple answer is no, but it depends. Despite *Yaotey*, in Ghana it seems the 'four essentials' were never meant inflexibly,[148] with Lutterodt J pointing out that Ollenu J "himself never followed this principle either In *re Sackity* or *Yaotey v Quaye*," and elsewhere recognised customary marital status where "there has been no formal exchanges of drinks or presents between the couples' families."[149] Mawuse Hor Vormawor in his article defending *Yaotey* and its restatement in *Re Caveat*,[150] points out that in the latter the 'essentials of customary marriage' were (mis)reported as 'essential prerequisites',[151] suggesting this alleged *ratio decendendi* may have misrepresented a nuanced mnemonic guideline as inflexible doctrine, a semantic hazard that the process of building law through *stare decisis* is no stranger to. Vormawor also notes another case where Ollenu J disregards rigid application of the essentials.[152] Josiah-Aryeh suggests that the main factual determiner of Ghanaian customary marriage is "the social fact of the parties living together as man and wife",[153] and while the decision in *Esselfie* elsewhere suggests that parents' approval of the marriage is important,[154] elsewhere, Ludderodt J asserts that individual intent to live "together in the sight of the world as man and wife" was sufficient for customary marriage, regardless of parental consent.[155]

Similarly, in the PNG case *Tom v Kayiak*, the father of a purportedly married woman demanded the purported husband pay him K10,000 as part of ongoing bride price payments. In modern PNG, it is customary for bride price payments to be made on an ongoing basis rather than in one instalment, but as Mr. Kayiak had already made several cash-and-kind

[148] *Yaotey v Quaye* (n 119), *per* Ollenu J at 576; "by custom there is more than one form of valid marriage"

[149] *Esselfie v Quarcoo* [1992] 2 GLR 180-194 (Ghana), at 185

[150] *Re Caveat By Clara Sackitey: Re Marriage Ordinance, Cap 127* (n 120)

[151] Mawuse Barker-Vormawor, 'In Defence of Yaotey v. Quaye: Redeeming a Confounded Approach to the Essentials of a Valid Customary Law Marriage in Ghana' (Social Science Research Network 2015) SSRN Scholarly Paper ID 2608209, p. 99

[152] *Asumah v Khair* [1959] GLR 353-358 (Ghana), at 356

[153] Nii Armah Josiah-Aryeh, 'Family, Property, and the State in Ghana: Changing Customary Law in an Urban Setting' (School of Oriental and African Studies 1995), p. 231

[154] *Esselfie v Quarcoo* (n 149), at 187-188

[155] *Quaye v Kuevi* [1992] 2 GLR 180-194 (Ghana), at 185

payments to the father,[156] the judge viewed this as extortion (in the moral sense); the demand had been made as a threat to pay up lest Ms. Tom be Mr. Kayiak's wife no longer. Despite the fact that Tom and Kayiak's church wedding was not registered and thus was not a statutory marriage, the judge happily took the ceremony as evidence towards the couples' intention to marry under custom. This case's refusal to impose formal prerequisites for customary marriage was justified on the grounds that "the quality and quantity of bride price will vary where the parties have different customs and where they live in urban areas away from their traditional societies," showing that a traditionalist, essentialist conception was the default in the judge's mind. However, more recent cases establish a doctrinal dichotomy between a formal customary marriage, and *de facto* marriage, which can arise either from the female partner giving birth, family recognition of the couple, or simple *consensus ad idem*; i.e. social facts demonstrating intent to live as married.[157]

Through our analysis of customary marriage, the romantic and exotic essentialism of preserving the Empire's natives' ancient law has given way to a statutory mandate to recognise social fact on principles- for marriage at least- essentially identical to the common law of contract, though especially sensitive to evidence of this intent which is derived from traditionalist communitarian standards. By formulating the doctrines of recognition sufficiently generally, the practices constituting the formation of customary marriages are free to develop largely independently of the state. However, as marriage is a legal status, the legal obligations resultant therefrom are the same whether one marries under custom A, custom B, or by statutory formalities. This is not to discount that *social* customary obligations may vary from community to community, but from an Austinian perspective, this is not a legal matter. However, in part 4, we shall see that the judiciary of PNG has a tendency to deviate from these contractual principles for tangential teleological reasons, undermining their constitutional function of ensuring legal certainty.

[156] "In January 1985 he paid bride price made of K300 in cash, a second hand Toyota Corona and a large pig valued at K500. Also at various times he gave different amounts to the father. All these were admitted except for a comment that the vehicle broke down" - *Tom v Kayiak* [1992] PNGLR 171 (PNG)

[157] This doctrine is explained in in *Allman v Arua* (n 144) at paragraph 18, and originates from *Oa v Korua* [1999] PGNC 69; N1871 (PNG) 's interpretation of the term 'spouse' for the purposes of ss. 1, 2, and 9(1)(c) of the Adultery and Enticement Act 1988 (as amended) (PNG), though is now of general applicability.

Part 4

Abuse of Custom's Indeterminacy

4.1 Distinguishing Teleology from ex Aequo et Bono

In both Ghana and PNG, the contractual principles that underlie customary marriages' recognition take some account of communitarian standards as evidence of objective intention. As custom is a question of fact (or, even if one does not except this analysis, the substantive content of custom is nonetheless exempt from *stare decisis*), *stare decisis* provides only general principles for customary marital status' recognition or rejection. No mechanical application of any doctrinal test could cover custom's diversity, so all factual matters must be weighed up. This clearly requires doctrinal flexibility.

Doctrinal flexibility affords the courts latitude to integrate teleological considerations; indeed, principles such as objective intent and *consensus ad idem* are inherently teleological. However, the legislator's job, already fraught with dangers of unintended consequences, is made more difficult if adjudicators instrumentalise the inherent indeterminacy of custom to introduce public policy considerations irrelevant to the doctrinal issue at hand. In the realm of custom, this often takes the form of intentionally haphazard differentiation between denying a purported custom recognition, and circumventing its application for other reasons.[158] This excessive instrumentalism[159] leads to unnecessary legal uncertainty, affording overbroad discretion in adjudication, and creating uncertainty for legislators and individuals regarding custom's application.

This is observable in the aforementioned PNG decisions. *Thesia* had arisen due to the expat judge's outrage at Ms. Maip's imprisonment for a failure to pay a fine for adultery, and he sought to have her released and declared single. While not declaring the village courts' statutory power to imprison people for non-payment of fines unconstitutional *per se*, he ruled

[158] Mensa-Bonsu (n 124), p. 252

[159] "All legal systems suffer from uncertainty and excessive instrumentalism. In situations of legal pluralism, however, these problems are magnified" - Tamanaha, 'The Rule of Law and Legal Pluralism in Development' (n 83), p. 16

imprisonment was unconstitutional as *de facto* punishment for family breakdown.[160] While he could have declared her single on the basis of contractual principles, which the decision alluded to but did not explicate, instead, against the opinion of both Mr. Sioni and the village court, he imposed a formalistic and traditionalist standard of substantive custom.[161]

Conversely, *Tom* involved child custody, so considerations regarding the welfare of the child were naturally paramount. Mr. Kayiak had a healthier lifestyle and was in a comparatively stable economic position, and the decision to grant him primary custody could have been made on this basis alone. However, again the judges were moved by the totality of his situation, with Mr. Kayiak *de facto* extorted by his father in law and abandoned by his alcoholic partner who immediately took up with a new man. Thus they took the unofficial church wedding as custom, even though religious ceremony and customary marriage procedures are explicitly differentiated in the Marriage Act.[162] Ms. Tom's adultery served to vindicate Mr. Kayiak morally, and further strengthened his clear claim to custody. Again, explicit articulation of a contractual standard would have led to the same result, with their church wedding demonstrating objective intent to live as married.

While both cases would have reached the same outcome if a contractual standard was invoked, instead, the prerequisite formalism for customary marriage fluttered about with the cases' equities. Assuming the decisions accurately represent the facts, I do not dispute these outcomes' justness. I assert the articulation of the doctrinal flexibility was not justified by the contractual principles *de facto* governing customary marriage's recognition, and that conflating this recognition with tangentially related issues serves to undermine legal certainty. This is not to say flexible doctrines cannot serve the law's underlying principles. A good example of this is the English Court of Appeal's mid-20th Century use of flexible standards of

[160] "Jails are for criminals, not as a means of revenge on the breakdown of a living together arrangement which discriminates against the female partner" - *Application of Thesia Maip; in the Matter of the Constitution s 42 (5)* (n 79).

[161] "The thwarted man here had ample opportunity to consider a proper marriage, either by a public ceremony in the village concerned or in the church or registry office under the Marriage Act. He elected not to take any of those procedures." - ibid.

[162] See s 3 and 4, Chapter 280 of the Revised Laws, previously Marriage Act 1963 (PNG)

notice, one of the methods through which terms can be incorporated into a contract, to protect consumers and small businesses from imposed standard terms which unreasonably protected certain parties (usually larger businesses) from liability for breach of contract or negligence.[163] This gave litigants remedies which under previous precedents would have been unavailable due to small-print they were unaware of[164] prior to the later passage of legislation banning unreasonable terms.[165]

This differs from the doctrinal flexibility in *Thesia* and *Tom*. The flexible doctrine of notice was justified by the underlying principles of contract law, namely objective intent and *consensus ad idem*. If person A makes a contract for purpose Y on the standard terms of person B, and later person A discovers they have no remedy for breach of contract when purpose Y is not achieved due to unreasonable term Z in the small-print of person B's standard terms, this results in outcomes failing to reflect the objective intent of person A and B to make a contract for purpose Y and fails to hold person B liable for breach.[166] In such a case, there is no true *consensus ad idem* in regards to unreasonable term Z by the standards of a reasonable third party; objective intent is missing. The PNG judiciary's bending of customary marriage's contractual principles in their justifications of the outcome do not accord with the contractual principles underlying customary marriages' recognition. In *Tom*, where the deciding factor was the best interests of the child, the prerequisite customary formalities were construed flexibly.[167] In *Thesia*, they were construed formalistically to reach the judge's desired outcome.[168]

So how should we interpret this precedent? Does it mean that if recognising a purported

[163] *J Spurling Ltd v Bradshaw* [1956] 1 WLR 461 (UK)

[164] *L'Estrange v F Graucob Ltd* [1934] 2 KB 394 (UK)

[165] Unfair Contract Terms Act 1977 (UK)

[166] *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 AC 803 (UK)

[167] "[W]hen people live in an urban society for a long period of time or for generations… custom grows and changes to accommodate new developments" - *Tom v Kayiak* (n 156)

[168] "[O]ne must be very careful in accepting that… developments in custom are clearly recognised by everyone and that they do not leave the way open for far reaching consequences" - *Application of Thesia Maip; in the Matter of the Constitution s 42 (5)* (n 79)

marriage will support the best interests of a child it is recognised, but if denying the existence of another will avoid a complex aftermath to enforcing the constitutional prohibition on unfair detentions, it will be denied? I think it shows that like the declaratory theory of ancient custom, the inherent indeterminacy of custom is still being abused to justify unfettered judicial activism, which is unfettered discretion. This is despite the continued salience of the repugnancy doctrine in PNG, increasingly invoked since independence,[169] which gives judges a clear route through which such concerns can be channelled. By not separating consideration of customary marriage's contractual principles from tangential matters, there is a danger such precedents will be taken as *carte blanche* to allow subjective and ill-articulated moral considerations to seep into customary adjudication, transforming customary law into adjudication *ex aequo et bono*.

4.2 Instrumentalism and the Judiciary's Constitutional Role

Teleological flexibility in common law doctrines should be bound to the *telos* that the doctrine concerns. While customary law's overlaps with diverse substantive areas of law likely justify the variance of teleological considerations depending on the substantive area in question (customary land disputes, customary inheritance and customary marriage naturally give rise to different considerations), there is little justification for bending doctrine merely because the substantive issue of determining customary marital status happens to be interacting with legislation, unless that legislation mandates this. The fact that in both these cases the *contractual conception* of custom would have done the trick, shows that flexibility to do justice when adjudicating wrongful imprisonment and child custody cases does not require increasing the indeterminacy of doctrines determining customary marital status. Doctrines regarding the recognition of customary marriage need only be as indeterminate as required to ensure that the specific danger of unjustly imposing marital status is avoided, and indeed this can be (and is) done on the basis of contractual principles. Custom's inherent ambiguity should not render it an empty vessel for the court's conception of *law as the just*.

The brief opinions in *Thesia* and *Tom* both invoke notions of objective intent without

[169] Melissa Demian, 'On the Repugnance of Customary Law' (2014) 56 Comparative Studies in Society and History 508, p. 509

explicitly identifying them as such. While this requires a degree of sensitivity to the relevant factual matrix, naturally requiring consideration of traditional marital rituals, that is not the same thing as making overbroad statements that "[w]hilst custom is developing, it does not yet recognise a casual non-customary (de facto) relationship as a formal marriage,"[170] just because this leads to the same outcome the *contractual conception* would. Luckily such statements are not followed as precedent; recent cases do explicitly articulate *consensus ad idem* as the relevant standard.[171]

As the social fact of communitarian custom is indeterminate, judges are always afforded a choice of interpretations on whether a particular custom applies in a given scenario. But this interpretative discretion should be used to ensure custom applies consistently, not just with the letter, but also the spirit of the legal system as a whole, and here, the main factors influencing the varying formality is not a philosophical difficulty determining precisely which social arrangements should be recognised as customary marriage. Bending the doctrines that determine customary marital status only complicates the job of lawyers, who will be unable to predict the outcome of legislation's interaction with customary doctrines when advising clients, and further complicates the legislator's job of communicating their general intent without inviting unintended consequences. Like the declaratory theory's idea of legislation as mere derogation, bending the doctrines of customary recognition is equivalent to non-implementation of legislation. If judicial doctrine consists not just of flexible principles, but principles which are modified teleologically whenever they interact with legislation, then the legislator's role is usurped. This uncertainty thus not only undermines the judiciaries' constitutional role of ensuring legal certainty, but also the constitutional role of the legislator.

Well-intentioned judicial paternalism is thus a short-term strategy. If the doctrines determining customary marital status vary every time a dispute interacts with legislation in a novel way, then there is no true doctrine of customary marriage (as disputes over marital status are practically always predicated on a claim involving statutory rights), and thus, there

[170] *Application of Thesia Maip; in the Matter of the Constitution s 42 (5)* (n 79)

[171] *Allman v Arua* (n 141)

is no rule of law, but a rule of subjective judicial preferences. Legal uncertainty, even if for benign purposes, prevents the autonomy of the individual to plan their affairs and informed discussions on how the law could be improved. While beyond the scope of this discussion, the inherent indeterminacy of custom may give reason to subject it to comprehensive codification or piecemeal legislative reduction of its applicability so as to guide customary law into desuetude. But for now, the paradigm persists with no signs of fading, applicable in many legal disputes throughout PNG and Ghana amongst others. For legislative activity and substantive development in judge-made customary law to maintain coherence, the judge-made doctrines governing native custom's legal effect should be precisely articulated. And that is in fact a prerequisite to legislative modification anyway, as legislators must know what they are working with before they can change it, unless they are to abolish it altogether.

Part 5

Concluding Observations

Although custom's current formulation as a living and ever-changing phenomena is *prima facie* at odds with the notion of legal certainty, this thesis has demonstrated that if one focuses on specific customary issues, such as determining customary marital status, then clear and consistent doctrines emerge through *stare decisis*. While *non-essentialist* pluralism remains useful for interdisciplinary studies, insofar as the courts and their constitutional function of self-limitation to ensure legal certainty is concerned, a positivist Austinian approach is necessary to articulate customary doctrine in language the common law is familiar with, which in turn allows this doctrine to be tamed through *stare decisis*. I have shown that the judicial doctrines governing the determination of customary marital status can be analysed through ordinary contractual principles. One of the fundamental implications of this research is that customary *law* need not be conceived of as a communitarian exception from the ordinary legal system (pluralism), but can be understood as part-and-parcel of it (positivism), and that custom, like contract, at least in some areas, can operate upon principles of individual autonomy and consent.

However, every now-and-then, a court will construe custom artificially formalistically, as *Thesia* demonstrates. While this seems to show that essentialist conceptions of *custom as law* retain vitality in the courtroom, the fact these formal standards are only applied when they conveniently support a desirable outcome shows that it is a case of judges abusing custom's inherent indeterminacy to replace *custom as law* with their conception of *law as the just*. While a paternalistic judiciary's unprincipled selective impositions of formalistic standards may prevent unfair outcomes in a given case, such practices obscure what doctrines in that area of law actually are, undermining the prerequisite legal certainty necessary for the individual to plan their affairs within the confines of the law. This failure of the judiciary to fulfil their constitutional role of articulating and further clarifying the *corpus juris* also retards legal development generally, as it leaves the legislator in the dark when it comes to their intervention in customary matters. It may be the case that customary law doctrines, like any other law, may not always be just, but if no-one knows what they are, how can the legislator make them better?

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6.2 Constitutions

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6.3 Legislation

6.3.1 Papua New Guinea

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Chapter 19 of the Revised Laws, previously Native Custom (Recognition) Act 1963

Chapter 280 of the Revised Laws, previously Marriage Act 1963
New Guinea Native Administration Regulations 1924
Village Courts Act 1989 (No. 37 of 1989)

6.3.2 Ghana/Gold Coast

Alternative Dispute Resolution Act 2010
Chief Act 1961
Chieftaincy Act 2008 (Act 759)
Courts Act 1993 (Act 459)
Evidence Act 1975 NRCD 323
House of Chiefs Act 1958
Marriage Act (Cap 127)
Supreme Court Ordinance of 1876 (No. 4 of 1846) (Gold Coast and Lagos)

6.3.3 UK/England

(NB: If labelled 'UK' in footnotes, this does not necessarily mean that the legislation applies in Scotland and Northern Island, simply that it was passed after the Act of Union 1707)
Bill of Rights 1689
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Prescription Act 1832
Theft Act 1968
Unfair Contract Terms Act 1977

6.3.4 South Africa

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6.4 Cases

6.4.1 Papua New Guinea

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6.4.2 Ghana/Gold Coast

(NB: includes applicable Nigerian and WACA precedent)

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6.4.3 UK/England

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Blue v Ashley [2017] EWHC 1298 (Comm)

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Isaack v Clark [1613-1614] 1 Rolle

J Spurling Ltd v Bradshaw [1956] 1 WLR 461

L'Estrange v F Graucob Ltd [1934] 2 KB 394

R v Harris [1836] 7 C&P 446

R v Morris; Anderton v Burnside [1984] AC 320

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