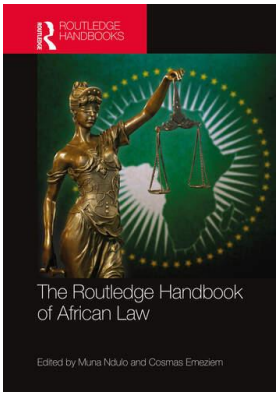

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Legal pluralism in Africa

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LEGAL PLURALISM IN AFRICA

Three levels and seven types of law

Raymond A. Atuguba

Introduction

In this chapter, I illustrate the distinctiveness of legal pluralism in Africa and derive from this some three levels and seven types of law in Africa. While there are many excellent and nuanced scholarly works on the subject, none of them is sufficiently teleological. Thus, this chapter moves beyond the causes and history of legal pluralism to the practical effects of the phenomenon. To this end, the chapter is a novel and useful introduction to African law, stripping it of its unenviable ethos of obscurity, density, and multiplex complexities, and laying bare its fundamental constituent elements, an enterprise that is useful for anyone interested in or working on Africa. By illustrating the coexistence and interaction of the levels and types of laws on the continent, the chapter not only elucidates the multiple levels of legal pluralism that exist in Africa, but points out the ways in which Africans mediate and manage their pluralistic legal systems through the entrenchment of a reliable, even if contested, hierarchy of norms. Enforcing hierarchy involves processes for discovering the existence, content, evolution, applicability, and relative weight of various norms, including international norms, and leverages the age-old critique of how newer and foreign norms ultimately subordinate preexisting norms, which are the lived reality of African peoples.

The distinctiveness of African legal pluralism

Legal pluralism is familiar phenomenon the world over (see, for example, Griffiths [1986]; Merry [1988]; de Sousa Santos [2006]; Tamanaha [2008]; Berman [2012]; Lawan [2014]). In the United States, for example, city laws, state laws, federal laws, and applicable international laws exist alongside each other on literally all aspects of life.[1] The distinctiveness of legal pluralism in Africa, and in other postcolonial contexts, is sustained by at least three factors. First, the density of legal pluralism is far higher in Africa than anywhere in the world. This is because African countries absorbed into their legal systems, during colonial rule, the legal systems of mainly the United Kingdom (UK) and France, which were in themselves legally pluralistic. Further, this absorption or uptake was into preexisting legal systems in African countries, which were also pluralistic. The extreme high density of legal pluralism is, therefore, the outcome of the intermeshing of two legal systems, each of which is already pluralistic of and by itself. In

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some African States, this density is further compounded by adherence of huge segments of the population to Islam, which is operationalized as a way of life, complete with a system of law, rather like African customary law, and a way of life relatively distinct from British, French, or African culture.

Second, and flowing from the previous discussion, while legal pluralism in the UK or France arises from differences in systems of law that pertain to the same genre of law—mainly, because they constitute efforts to resolve social problems arising from similar racial, demographic, and cultural milieux—that is untrue for legal pluralism in postcolonial settings such as Africa. In these settings, there is at least one other whole and complete legal system, arising from different racial, demographic, and cultural contexts, from which rules of law, called customary law, are derived. In the case of African countries that have significant Islamic communities, there are at least two other such systems of law.

The third and final distinctive feature of legal pluralism in the African context is that various African countries belong to four layers of international law. While countries on other continents are subject to bilateral international law (as in the case of bilateral treaties), regional international law (as in the case of European Union or Organization of American States law), and Global International Law (as in the case of customary international law of global application and United Nations law), many African states additionally have one or more subregional international body of law applicable to them. These include the Economic Community of West African States (ECOWAS); the Economic Community of Central African States (ECCAS); the East African Community (EAC); the Intergovernmental Authority on Development (IGAD), headquartered in Djibouti and including governments from the Horn of Africa, the Nile Valley, and the African Great Lakes Region; the Southern African Development Community (SADC); the Common Market for Eastern and Southern Africa (COMESA); the Community of Sahel–Saharan States (CEN–SAD); and the Arab Magreb Union.

All of the distinctive characteristics of African legal pluralism have produced three levels of law and seven types of law, which are continuously in interaction on the continent. If the African legal terrain is difficult to crack, it is partly because of this phenomenon. In this chapter, I detail these ten aspects of African law in a very pragmatic way.

The three levels of law in Africa

In a typical African country, there are three levels of law: high-level policy contained in the constitution or developed by the executive branch; statutes passed by the legislative branch, called acts of parliament in many African countries; and detailed regulations or administrative instructions developed by the executive branch, the better to implement high-level policies or statutes. There are various subdivisions within these three broad categories of law that I will attempt to unpack next.

Policy

At the level of broad policy, some five distinct kinds are decipherable. Many African constitutions contain broad, high-level policy statements on many aspects of national life. The Ghanaian Constitution, for example, contains a chapter titled, "Directive Principles of State Policy,"[2] which outlines the country's broad policy prescriptions on literally every aspect of law: political, economic, social, educational, cultural, and international relations. The policy prescription on education, for example, guarantees education as a right, providing for equal access to educational opportunities and facilities with a view to achieving the full realization

of that right, and makes primary education free and compulsory.[3] The Constitution of the Republic of Ghana provides that these Directive Principles of State Policy "shall guide all citizens, Parliament, the President, the Judiciary, the Council of State, the Cabinet, political parties and other bodies and persons in applying or interpreting [the] Constitution or any other law and in taking and implementing any policy decisions, for the establishment of a just and free society."[4]

The 1991 Constitution of Sierra Leone also contains "Fundamental Principles of State Policy," that is, political, economic, social, educational, and foreign policy "fundamental in the governance of the State, and it shall be the duty of Parliament to apply these principles in making laws."[5] Another example of broad policy prescriptions contained in a country's "Fundamental Objectives and Directive Principles of State Policy," is the provision to "protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria" contained in Nigeria's 1999 Constitution.[6] In Kenya, the Constitution provides for high-level policies, titled "National Values and Principles of Governance," which bind all public institutions and officials and are meant to guide them in the discharge of their duties.[7] The values and principles are binding not only on public institutions and officials, but also on all persons who apply or interpret the Constitution and other laws, or make or implement public policy decisions.[8] There are other broad policies spelled out in the Kenyan Constitution on land, for example: providing in part for land to be held, used, and managed in an equitable, efficient, productive, and sustainable manner, and for equitable access to land; security of land rights; sustainable and productive management of land resources; transparent and cost-effective administration of land; sound conservation and protection of ecologically sensitive areas; elimination of gender discrimination in law, customs, and practices related to land and property on land; and encouragement of communities to settle land disputes through recognized local community initiatives consistent with the Constitution.[9]

Rather than provide direct policy stipulations, some African constitutions require the executive branch, and sometimes, the legislative branch, to generate policies on specific aspects of national life. The Constitution of Tanzania provides, "[t]he state authority shall make appropriate provisions for the realization of a person's right to work, to self-education, and social welfare at times of old age, sickness or disability and in other cases of incapacity."[10] The same Constitution provides, "[t]he Government shall endeavour to ensure that there are equal and adequate opportunities to all persons to enable them to acquire education and vocational training at all levels of schools and other institutions of learning."[11] From this policy directive came aspects of the Tanzania Development Vision 2025 and the Education and Training Policy of 2014 for that country (Republic of Tanzania n.d.; Tanzania Education Network 2018). The Constitution of Kenya directs the Parliament to provide, by legislation, the phased transfer over a period of not more than three years from the date of the first election of county assemblies, from the national government to county governments, the devolution of governmental functions.[12] The same Constitution provides that the principles of land policy shall be implemented through a national land policy developed and reviewed regularly by the national government and through legislation.[13] To this end, the Ministry of Land Use and Physical Planning developed the National Land Use Policy of 2017, which seeks to balance different, yet related, concerns, such as food security, human settlements, environmental protection, and climate change, on the one hand, and economic pursuits on the other (Republic of Kenya 2017). The Constitution of Kenya, in art. 215(1), also mandates the Commission on Revenue Allocation of Kenya to make recommendations concerning the basis for the equitable sharing of revenue raised by the national government and, in art.216, to determine, publish, and regularly review a policy in which it sets out the criteria by which to identify marginalized areas.

The South African Constitution, unsurprisingly, provides that "[n]ational legislation must be enacted to prevent or prohibit unfair discrimination."[14]

Sometimes, national constitutions require that broad policies are contained in short-term, medium-term, and long-term development plans to direct the course of governance and of development. This is often aimed at ensuring developmental focus and to exert some sense of obligation on successive governments to adhere to clearly defined and articulated development pathways. The Constitution of Ghana provides for a National Development Planning Commission (NDPC), tasked with generating "proposals for the development of multi-year rolling plans taking into consideration the resource potential and comparative advantage of the different districts of Ghana" to guide the course of national development.[15] Over the years, the NDPC in Ghana has generated a number of development plans and policies in fulfilment of this constitutional mandate. These include the Ghana Poverty Reduction Strategy (GPRS I and II), generated in line with the Millennium Development Goals[16]; and the Coordinated Programme of Economic and Social Development Policies (2017–2024), generated in line with the Sustainable Development Goals (Akufo-Addo 2017). The Tanzanian Constitution provides that the "National Assembly may deliberate upon and authorize any long or short term plan which is intended to be implemented in the United Republic and enact a law to regulate the implementation of that plan."[17] In line with this, the Tanzanian 2025 Development Plan, also known as Vision 2025, was developed, setting out the national development agenda for the United Republic of Tanzania (Republic of Tanzania. n.d.).

Again, as a function of its general governance mandate, the executive branches in many African countries generate high-level policy in various domains of national life in the ordinary course of governance. Thus, the executive may develop and implement policies as part of their general mandate to govern, and although these policies are not directly mandated by the national constitution, they may not infringe upon it. In Ghana, for example, although the constitution clearly states that free secondary education is to be achieved progressively and subject to the availability of resources, the current government has developed and is implementing a policy on free secondary education for every student at the same time.[18] The current Ghana government has also developed and is implementing the "Ghana Beyond Aid Policy" (Republic of Ghana 2019). The Ghana Beyond Aid Policy is a vision that is aimed at transitioning Ghana from its current socio-economic status to a prosperous and buoyant economy that is in charge of its own destiny. It is about how to leverage and deploy the country's resources for the transformation of Ghana and its people. Another example is the "Agriculture First" policy of the Government of Tanzania, developed and implemented during the presidency of Jakarta Kikwete and aimed at transforming the agriculture sector into a model and commercial sector (Ngaiza 2012). Other examples are the 2008 National Employment Policy to address unemployment and limited employment opportunities in Tanzania (United Republic of Tanzania 2008) and the "Big Results Now" initiative, a policy designed by the Tanzanian Government to accelerate the process of achieving middle-income status by 2025 and transition out of aid dependency within that same time frame (World Bank 2014). In Kenya, the Presidential Digital Talent Programme was created with the aim of transforming the manner in which information and communications technology (ICT) is utilized for efficient and effective service delivery. The program is targeted at fresh university graduates from both private and public institutions, offering them an opportunity for a full year of on-the-job training in the private sector and public service (ICT Authority 2017). In South Africa, a Public–Private Growth Initiative (PPGI) was adopted by Dr. Nkosazana Dlamini Zuma, former Minister in the Presidency responsible for Planning, Monitoring and Evaluation, and for several months engaged on building a closer relationship between

government and the private sector in which the alignment of plans and objectives of the two sectors could be enhanced.

Although the legal authority of the high-level broad policies, described here, are attenuated by their general character, they are nevertheless a part of the laws of African states in several ways. These broad policies often provide the rationale, background, and expected outcomes of prospective governmental action and serve as triggers to the administration and the bureaucracy to swing into action, further developing the broad policy outlines into programs, projects, and budgets for implementation. As one observer noted, policymaking is "the process by which governments translate their political vision into programmes and actions to deliver 'outcomes'—desired changes in the real world" (Hallsworth, Parker, and Rutter 2011, 22, quoting Cabinet Office [1999]). In Ghana, and at the beginning of this century, Presidential Special Initiatives (PSI) were implemented as part of efforts to address the broad policy prescriptions contained in the Directive Principles of State Policy of the Constitution.[19] The Corporate Village Enterprise (COVE) Model was intended to mainstream socioeconomic activities for rural farmers in the country, while the Integrated Action Programme for Cassava Starch Production and the Export Action Programme for Garments and Textiles were meant to improve nontraditional exports for the country and get money into the pockets of rural farmers and the urban poor and unemployed (Heintz 2004). The Ghana School Feeding Programme (GSFP), initiated in 2005, is another example of a program that is derived directly from broad policy prescriptions and without positive statutory backing. It was only in 2015 that an attempt was made to reduce the macro-level policy that animated the School Feeding Programme into a meso-level policy articulation (Ministry of Gender, Children and Social Protection. 2015). Soon after, a further attempt was made to translate the meso-level policy into positive law (USAID 2018; Dunaev and Corona 2019).

It is clear that broad policies may serve as a useful background for legislative action. Indeed, in many instances, policy formulation is a precursor to the legislative process in Africa, by providing the broad strokes of intended legislation. Thus, the standard law-making process in African countries involves, first, the development of a policy document that is then translated into legislative language. In South Africa:

> The process of making a law may start with a discussion document called a Green Paper that is drafted in the Ministry or department dealing with a particular issue. This discussion document gives an idea of the general thinking that informs a particular policy. It is then published for comment, suggestions or ideas. This leads to the development of a more refined discussion document, a White Paper, which is a broad statement of government policy. It is drafted by the relevant department or task team and the relevant parliamentary committees may propose amendments or other proposals. After this, it is sent back to the Ministry for further discussion, input and final decisions.
>
> Most Bills are drawn up by a government department under direction of the relevant minister or deputy minister. This kind of Bill must be approved by the Cabinet before being submitted to Parliament.[20]

Thus, a broad policy often serves as a set of principles that may be used as a basis for gathering public and expert opinions on the prospective law. Kenya's Privacy and Data Protection Policy of 2018, for example, envisages the development of a legal framework to govern the protection of personal data and the establishment of an independent oversight authority, which will ensure compliance with the policy and sound management practices, to safeguard the rights of

the data of Kenyans (Ministry of Information, Communication and Technology 2018). The Data Protection Bill of 2018 was developed from this policy, translating broad policy directives on data protection into hardcore legislative provisions.[21] In Ghana, the National Information Technology Agency Act, 2008, and the Electronic Communications Act, 2008, were drawn from the Information and Communication Technology for Accelerated Development Policy of 2003.[22] Ghana's Public Private Partnership Bill was drafted and submitted to Parliament to effect Ghana's Public Private Partnership Policy, which seeks to attract more foreign investment while enhancing local participation in pipeline projects (Ashun 2018). In Tanzania, the National Environmental Policy (NEP) led to the enactment of the Environment Management Act, 2004. Additionally, the 1995 National Land Policy (NLP) of Tanzania led to the enactment of the Land Act, 1999. Further, the Tanzania Health Policy of 2003 led to the passage of the Public Health Act, 2009. Statutes are, therefore, one of the main vehicles by which broad policies are entrenched in the legal system.

Where broad policies are not translated into hard law, they nevertheless retain some utility. The bureaucracy and the courts are unlikely to sanction action that is clearly contrary to the terms of a policy. Where broad policy is translated into law, it retains additional utility. In instances where a law is not very clear, bureaucrats and judges refer to the terms of the policy for clarification and direction. Indeed, laws that govern the way in which laws may be interpreted by judges in many African countries require this to be done. In Ghana, the Interpretation Act of 2009 allows the court to resort to policy documents in the interpretation of an Act of Parliament. Apart from the Memorandum to the Bill, which articulates government policy, it permits the use of "pre-parliamentary materials relating to the enactment" of the law, which clearly includes prior policies on the subject.[23]

A final utility for broad policies that are not translated into hard law is that they normally contain clear statements relating to the international obligations of the particular state in relation to the subject matter of the policy. They also invariably articulate a series of steps to bring national laws and practices in line with international commitments. Broad policies are, therefore, not only a set of political objectives, but a demonstration of a state's obligations with respect to international law. Tanzania's National Health Policy of 2017 is aligned with many international standards set by the World Health Organization (WHO). Also, the National Employment Policy (NEP) for that country is aligned with the International Labour Standards Convention of 1976 (ILO 2013), while the National Employment Policy for Uganda was adopted in line with the International Labour Organization's (ILO) Employment Policy Convention of 1964.[24]

Statutes

A second level of law in Africa is comprised of statutes. Easier to grasp than the other two concepts, this level includes all the laws that have been passed by the legislative branch. As previously noted, many broad policies are ultimately translated into statutes, although many statutes are passed without the articulation of a preceding broad formal policy. So, while Kenya's Computer Misuse and Cyber Crimes Act of 2018 was birthed from the Information and Communications Technology (ICT) Policy of 2016 for that country, the country's Official Secrets Act was passed without a prior policy.[25] In situations such as the latter, what may pass for a broad policy statement is contained in the Memorandum to the Cabinet, justifying the Bill, and in the Memorandum to the Bill that is sent to the Legislature.

We have previously noted that some broad policy statements constitute directives to the bureaucracy to develop programs, projects, and budgets and to proceed to implementation,

effectively skipping the intermediate stage of translating the broad policy into a statute. The evidence is that this jump often incubates enervating and concerning challenges, some fatal to development projects and institutional renewal. There are instances in Africa in which policies have been directly implemented without legislation and these have generally fared badly. Subsequent evaluations and audits have invariably recommended positive legislation that translates the policy intentions of government into fundamental legislative provisions, the better to ensure clarity, good governance, authority, responsibility, accountability, and sustainability.

In Nigeria, the Cassava Flour Initiative was rolled out without legislative authority, leading to the stalling of this policy initiative (Apata 2015). There are now moves to get a law passed in support of the initiative. The Ghana Youth Employment and Entrepreneurial Development Agency (GYEEDA) program was rolled out without any legislative backing in 2006.[26] The investigative report into allegations of corruption and misappropriation of public funds in the agency recommended the immediate passage of an Act of Parliament to govern GYEEDA. The Youth Employment Agency Act was then passed under a certificate of urgency to give the agency the necessary legal authority and governance structure to ensure accountability and good governance (Kwawukume 2015).[27]

Some statutes are influenced partly or wholly by the international commitments of African states. The commitments may be bilateral, subregional, regional, or multilateral. The African Continental Free Trade Agreement is an example of a commitment at the regional level by African states. Among others, the Agreement will "create a single continental market for goods and services, with free movement of business persons and investments, and thus pave the way for accelerating the establishment of the Continental Customs Union and the African customs union" (African Union 2020). State parties are obligated to change their domestic legal frameworks to promote trade liberalization and the movement of persons and goods across national boundaries. This will impact their national laws on foreign trade and investment as well as on immigration. The Kenyan Public Participation Bill, which is currently before parliament,[28] is partly mandated by Kenya's commitments under the International Covenant on Civil and Political Rights to assure that every citizen has the right and the opportunity to take part in the conduct of public affairs.[29] Again, Kenya recently adopted a national legal framework governing refugee matters and assumed partial responsibility for the refugee status determination (RSD) process. It did so when it took a step to implement its obligations under international law by enacting the Refugees Act in 2006[30] and its subsidiary legislation, the Refugees (Reception, Registration and Adjudication) Regulations of 2009. In South Africa, the Diplomatic Immunities and Privileges Act[31] was passed, in keeping with South Africa's obligations under the Vienna Convention on Diplomatic Relations,[32] the Vienna Convention on Consular Relations,[33] the Convention on the Privileges and Immunities of the United Nations,[34] and the Convention on the Privileges and Immunities of the Specialized Agencies.[35] Following Ghana's accession to the Convention on Cybercrime (Budapest Convention)[36] and the African Union Convention on Cyber Security and Personal Data Protection (Malabo Convention),[37] legislation is imminent to comply with these international commitments and reduce the incidence of cybercrimes (Lartey 2019).[38] Similarly, Nigeria's Discrimination Against Persons with Disabilities (Prohibition) Act[39] is, in part, a fulfillment of the country's treaty obligations under the Convention on the Rights of Persons with Disabilities,[40] (Ewang, 2019) while Nigeria's International Centre for Settlement of Investment Disputes (Enforcement of Awards) Act was enacted in total satisfaction of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States.[41] Tanzania passed the Territorial Sea Exclusive Economic Zone Act in 1989, so as to wholly accommodate the United Nations Convention on the Law of the Sea.[42] Again,

the International Convention on Civil Liability for Oil Pollution Damage (CLC Convention)[43] was wholly domesticated by Nigeria by the passage of the International Convention on Civil Liability for Oil Pollution Damage (Ratification and Enforcement) Act.[44]

While legislation in the form of statute has immense utility, it is not enough for realizing policy prescriptions in many contexts, including in Africa. "The Devil, [indeed], is in the details" (Makhandia 2018). Thus, the statute is often operationalized in the form of more detailed laws. It is to this third and final level of law we now turn.

The third and final level of Law in Africa is "policy". This last rung contains four main components: delegated legislation (including local authority laws); administrative instructions and rules for the regulation of discretionary powers; customary laws and practices that are legal; and customary laws and practices that are strictly illegal, yet prevalent and effective. We now proceed to consider these in this section and the next. For an executive policy emanating from "the highest authority to be duly implemented," it must be accompanied by an administrative policy to guide government departments and municipalities on the practical steps to be followed in effectively and correctly implementing that executive policy (Fuo 2013, 11). And so, "administrative policy" may be perceived as a third genre of policy (Fuo 2013, 11). These include internal policy documents or administrative guidelines, which may have the force of law and give directions on how subordinate staff members should approach certain tasks (Fuo 2013, 11). "Administrative action takes diverse forms and serves a multitude of purposes. Individual administrative determinations are made for the purposes of exercising statutory power in specific situations—perhaps to grant a license, impose restrictions on the development of a piece of land, or dismiss a public employee" (Baxter 1993, 176). Finally, "although administrative policies [may] not be enforceable per se, their implementation constitutes administrative action which can be subjected to judicial review" (Fuo 2013, 11).

Together, the elements of this third level of law constitute the bulk of the law, which Africans and persons who deal with Africa navigate and confront on a day-to-day basis. While it is considered to be the last rung of the three-part typology of the levels of law in Africa, it is the most ubiquitous and, perhaps, the most important. In the final analysis, broad policies and statutes on all aspects of law are interpreted, implemented, or not implemented, by bureaucrats, local authorities, and chieftains who make decisions on a day-to-day basis, determining who may obtain a work permit or social security benefit; who may access health care; who may have free secondary education; who may draw agricultural subsidies from the state; who may farm on what land; who is entitled to spousal or child maintenance; and so forth.

The ubiquitousness of this level of law lies partly in the range of norms that come under its umbrella. In Kenya, for example, the following are included under this level of law: delegated legislation[45], standing orders of the National Assembly[46], executive orders[47], bylaws[48], County Assembly Speaker's orders[49], African customary law[50], Islamic law[51], and Hindu law.[52] In Ghana, the following long list belongs to this level of law: constitutional instruments[53], legislative instruments[54], executive instruments[55], statutory instruments of a judicial character, standing orders[56], bylaws[57], statutes (mainly passed for the internal regulation of public universities), notices, administrative instructions[58], directives, orders[59], proclamations[60], statutory documents, warrants, assimilated rules of customary law[61], customary law[62], judge-made law[63], and writings of jurists and publicists.[64] Other reasons for the ubiquity of this level of law is that some parts of it are unwritten and other parts of it depend heavily on the discretion of persons in authority, who are required to act pursuant to an enacted policy or statute. Each of the distinct variants of this level of law in Africa will be discussed in detail in the next part of this chapter.

The seven types of law in Africa

Within the three broad levels of law articulated in the previous section, it is possible to locate at least seven types of law that operate in Africa. These types of law are also mostly categories that contain a range of laws. In this chapter, I have tried to group similar laws together in the same category. In order to provide the level of detail that is required for a thorough comprehension of these various laws, in this section, I will provide a preponderance of examples from Ghana, where the laws are those with which I am most familiar, although I will draw many examples from other African countries as well. As anyone conversant with law on the African continent knows, the Ghanaian examples will approximate the laws in literally any African country. Indeed, they will approximate the laws of any country in the global south with a history of colonial rule.

Constitutions

At the very top of the legislative architecture in most African countries is a national constitution. A marker for the end of colonial rule for these countries was the promulgation of a constitution to govern each of the newly independent nations. So, the 1957 Constitution of Ghana came into force on March 6, 1957, the official date on which Ghana formally gained political independence. Over the course of the last 60 plus years, these original constitutions have been abrogated, mainly by military regimes, which took over the governance of many African nations within the first decade of independence and continued to govern, in some nations, for decades. In many cases, the military, who ruled by decree and often dispensed with the rights of the people that are accommodated by regular democracies and constitutions, would return the country to constitutional rule with the promulgation of a new constitution. In many cases, the return to constitutional rule did not last, and another military regime would overthrow the newer constitutional government. In many instances, this occurred more than twice in a nation's history.

In the case of Ghana, its 1957 Constitution, which instituted a parliamentary system of government modeled after the United Kingdom, was translated into a new constitution in 1960. Actioned by the illustrious son of Africa, Dr. Kwame Nkrumah, the new Constitution instituted a presidential system of government similar to the United States.[65] Unfortunately, this new Constitution contained less constitutional protections for institutions of state, such as the judiciary, and less human rights protections (Omari 1970). These would later constitute some of the reasons provided by the military junta, which overthrew the government of Nkrumah and his new Constitution with him. Although there is now clear evidence that part of the reason for Nkrumah's overthrow was the disquiet of the United States government and the broader Western world with Nkrumah's communist tendencies and his inclinations to the East during the rabid cold war (he was overthrown while on a trip away from Ghana to Hanoi) (Nkrumah 1972), the key point for our purposes is that the second post-independence Constitution, which was also the First Republican Constitution of Ghana, was abrogated in early 1966 by the military in that country.

By 1969, after a process of assessing the operation of the previous constitution, the military inaugurated a new Constitution, and a new government with it. This Constitution returned Ghana to Westminster-style parliamentary governance, but, alas, for just 27 months. Another military government abrogated this Constitution in early 1972, and, calling themselves by three different names over time, governed the country for more than seven years. On June 4, 1979, and for the first time, there was an outright overthrow of a military government by another military government and the return of the country to constitutional rule in just over three

months, with yet another constitution, the 1979 Constitution, modeled for the second time on a presidential system of government, with a strict separation of the executive and the legislature. After another 27 months (on December 31, 1981), the leader of the military junta of June 4, 1979, overthrew the government he had instituted in September of that year, christening the new effort, rather than a coup d'état, "a revolution," and instituted a new military-cum-civilian government that ruled for over 11 years. As early as 1984, this government passed a comprehensive law for the governance of the country, which was in substance, tenure, and size like a regular constitution, except that the military regime retained absolute power, including the power to change that law.[66]

After some attempts to structurally change the economy of the country through a series of IMF and World Bank stabilization and economic recovery programs, the thirst for liberty and constitutionalism began to increase in Ghana, coincidentally with third wave democracy on the entire continent (Schraeder 1995; see, also, Ismi 2004). After an elaborate process of consultations with the people around the entire country, the National Commission for Democracy submitted a report to the government recommending a return to constitutional democracy. A committee of experts then drafted proposals for a new Constitution, which were subjected to thorough debate by a representative Constituent Assembly, a referendum of the people, and presidential and parliamentary elections, before the Fourth Republican Constitution of Ghana was inaugurated with a new government on the January 7, 1993.

Ghana still retains its Fourth Republican Constitution from over 25 years ago, although very minor amendments were made to it some six years later, and a few more are planned. There has been no wholesale implementation of the report of the Presidential Constitution Review Commission, which engaged in comprehensive and deep consultative processes on the operation of the Constitution and made proposals in 2011, contained in some thousand pages, complete with draft Constitutional amendment bills, for refreshing the Constitution in many respects. Like Ghana, many African countries retain some type of constitutions, some older, some newer. And like Ghana, many African countries are finding that their current constitutions may be enough for their needs, but unable to meet their wants, and are yearning, and in some cases taking concrete actions, to revamp them. The 2010 Kenyan Constitution is an outcome of very comprehensive consultations with the people, dating from December 2008 when the Committee of Experts commenced holding extensive public consultations and received submissions from the public, after the coming into force of the Constitution of Kenya Review Act of 2008 (Laibuta 2014).

Today, in each African country, there is a document that is referred to as the constitution of that country. It contains the basic laws of the country, and as previously noted, contains many policy prescriptions and policy directives. These constitutions have a number of important characteristics. First, they claim to be the basic law of the land, against which every other law and every action of anyone, including the arms of government, are measured for consistency. Where there is inconsistency, the terms of the constitution prevail, and there are often severe consequences for anyone engaging in conduct that defies constitutional stipulates. In Ghana, violating the Constitution constitutes grounds for the removal of the president from office.[67] Again, when a person does not remediate a violation of the Constitution, as determined by the Supreme Court, they shall be guilty of high crime under the Constitution.[68] A person convicted of high crime is liable to imprisonment for a period not exceeding 10 years, without the option of a fine, and is not eligible for election, or for appointment to any public office for 10 years, beginning from the date of the expiration of the term of imprisonment.[69]

The second characteristic of African constitutions is that they contain fairly elaborate listings of what the sources of law are for the countries. Ghana's list, contained in art. 11 of its

Constitution includes the following: the 1992 Constitution; enactments made by or under the authority of the Parliament established by the Constitution; any orders, rules, and regulations made by any person or authority under a power conferred by this Constitution; the existing law; and the common law.[70] It is important to note that these provisions constitutionally institute legal pluralism by directly recognizing different systems of law within the same jurisdiction. To further cement legal pluralism, these provisions sometimes allocate segments or aspects of national life for regulation entirely or almost entirely, or at least primarily, by customary law, which is often a more subordinate type of law in the new constitutional typologies of hierarchies of norms. The Ghanaian Constitution stipulates that chieftaincy shall be governed by custom and usage, and that chieftaincy disputes shall be determined by the judicial committees of the Traditional Councils and the Houses of Chiefs, to the exclusion of the regular courts. Only the Supreme Court may hear a chieftaincy matter, and only on last appeal, after it has traveled through various levels of Chieftaincy Tribunals, including the National House of Chiefs, and even then, it may only hear the appeal on questions of law.[71] Thus, these constitutions potentiate this other system of law against the formal and inherited systems that are considered to be formally superior to customary law. Given that customary law is the lived reality of many people, the living law that most people obey even when the customary law is sometimes contrary to the inherited systems of law, then the constitutional anointing of customary law in this way complicates legal pluralism in ways that are not present in many other parts of the world. We will discuss this in more detail later in this chapter.

A third feature of these constitutions is that they aim to provide a mechanism for resolving conflicts between the various systems and types of laws. The Ghana Constitution provides that it is the supreme law of the land and that any other law found to be inconsistent with any provision of the Constitution is void to the extent of the inconsistency.[72] Furthermore, an Act of Parliament is deemed higher than a piece of subsidiary legislation that is made to regulate the operationalization of an Act of Parliament or other policy.[73]

The fourth feature is that African constitutions that were created by military governors contain various indemnity provisions which protect the military regimes when they leave office. Often negotiated as a condition for the departure of the military and the return to constitutional democracy, these provisions are often seen as scars on the beautiful rights provisions adorning these new constitutions. In Ghana, §34(1) of the transitional provisions of the 1992 Constitution indemnifies past military juntas. The section states that no member of these regimes may be held liable, either jointly or severally, for any act or omission during their administrations (Kumado 1995).

The fourth and final feature of these African constitutions is that they contain all of the basic rules for national governance. The Ghanaian Constitution contains chapters on the primacy of the constitution and the constitutional order, the territories of Ghana, human rights, the electoral process, the executive, the legislature, the judiciary, local governance, independent constitutional bodies for the protection of human rights, the media, monetary policy, and for civic education, security agencies, chieftaincy, the ownership and management of lands and natural resources, code of conduct for public officers, and the processes for amending the constitution.

Acts of Parliament

Acts of Parliament, sometimes called statutes, play a significant role in the African legal architecture. African constitutions contain, to varying degrees, broad principles of governance. The meso-level of detail is left to their parliaments to construct. In art. 11 of the Ghanaian Constitution, enactments made by or under the authority of Parliament are ranked just below

the Constitution. The enactments are of greater legal weight than any other laws, including laws that existed before the coming into force of the Constitution, some of which remain in force, as long as they do not offend the Constitution. In South Africa, the national Parliament is bound only by the Constitution when exercising its legislative authority. This reveals the extent of authority accorded to the products of Parliament's legislative effort in the legal framework (South African Parliament, 2020). Also, in art. 95 of the Rwandan Constitution, organic laws are the second in authority after the Constitution.[74] Organic laws are laws passed by a three-fifths majority vote of the Deputies or Senators present and entitled to vote. Deputies and Senators are the persons who exercise legislative authority of the state under the Rwandan Constitution.

Although of high legal valence, acts of African parliaments are limited within the framework of constitutions. Additionally, there are some procedural limitations that reflect heavily on the substantive content of acts of parliament. The constitution of a typical African state would contain provisions on the limits of parliament's legislative authority and the manner in which that authority may be exercised. The Ghanaian Constitution forbids Parliament to pass certain types of laws: laws that are contrary to the Constitution[75]; laws that seek to turn Ghana into a one-party state[76]; laws to establish or authorize the establishment of a body or movement with the right or power to impose on the people of Ghana a common program or a set of objectives of a religious or political nature[77]; laws that seek to abolish the office of a Justice of the Superior Court while there is a substantive holder of the office[78]; and a law that confers on any person or authority the right to accord or withdraw recognition to or from a chief for any purpose whatsoever, or in any way detracts or derogates from the honor and dignity of the institution of chieftaincy.[79]

As already mentioned, some procedural mechanisms relating to African parliaments translate into huge, substantive effects. An example of these is the procedure, prevalent in many African parliaments, whereby the laws passed by parliament are wholly or predominantly formulated and drafted by the executive branch. In many cases, these laws are hardly changed by the parliament, which merely rubber stamps them into law (see Gyampo 2015). A complement of this first procedural limitation is the power of the executive to assent to bills passed by parliament. This power of the executive to initiate legislation, together with the complementary role of giving assent to legislation in order to give them legal effect, is significant for anyone interested in how acts of parliament may be procured to effect policy change. In Ghana, a bill, which has financial implications in the nature of imposing taxes, charges, payments, or withdrawals from the National Treasury or Consolidated Fund and the remission of debts due to the government, may only be initiated by a person acting on behalf of the president. Without presidential mandate, Parliament does not have the right to consider a bill that will occasion such consequences. The concept of "financial implication" has been interpreted by one Speaker of Ghana's Parliament to include the cost of the paper on which the Bill has been printed, thus eroding any chance for any person or agency other than the executive to initiate any legislation in Ghana's Parliament.[80] The situation is not this dire in some other countries. In Rwanda, a law may be initiated by a member of the Chamber of Deputies or the Government acting through the Cabinet, thus providing an opportunity for individual members of parliament to initiate legislation, although the number of such pieces of legislation is always lower than those proposed by the executive branch.[81]

The regular procedures for the passage of laws by African parliaments also serve as a check on them. Bills are regularly published before they are transmitted to the parliament.[82] Some parliaments inform the public through various media when a bill is sent to parliament and actively solicit the views of the public on the bill.[83] Thus, many interest groups and civil society

organizations regularly submit memoranda and make interventions to influence such bills. In some instances, bills have been significantly changed, delayed, or rejected by parliaments due to such interventions.[84] The procedures for debate over the provisions of bills in parliament also serve as basis for particular members or caucuses of parliament to mobilize public or interest group input, interventions, or even agitations against a bill or parts of it.[85]

Acts of parliament are a significant type of law in Africa. In a legislative typology, which sets out basic and bare policy guidelines in national constitutions, acts of parliament are the mechanism for elaborating the meaning and meso-level details of national policies and for establishing and imbuing with authority, the institutional mechanisms for delivering on broad policies. Acts of parliament also provide many mechanisms for democratic guidance through various mechanisms: they create governing boards for institutions, some including civil society representation; provide limits on the powers of institutions and their governing boards; criminalize actions that undermine or seek to obviate the policies and institutions established by the act; provide opportunities for ministries, departments, and agencies to make detailed operational rules for implementing policies; and provide mechanisms for guiding the discretionary and other powers of policy implementers. To these latter rules of democratic guidance, it is now necessary to turn.

Subordinate legislation

Subordinate legislation in African countries comprises three main forms of delegated legislation. The first are regulations, rules, and orders made by a ministry, department, or agency, pursuant to a power granted them by the parliament, and providing micro details on how a policy should be implemented. Thus, these types of laws are made by the executive branch pursuant to a power granted to it by the legislative branch. Just like statutes, regulations are passed formally, right through to their printing and publishing in an official gazette; they are just not passed by parliament and in the elaborate way that statutes are ordinarily passed. Sometimes, they are required to be formally approved by parliament before they come into force. This requirement is to ensure that they do not transgress the purpose and terms of the mother statute from which they derive.[86]

In Kenya, delegated legislation, in the form of statutory instruments, is governed by the Statutory Instruments Act,[87] which spells out the means of making, scrutinizing, publishing, and operationalizing statutory instruments. A Committee on Delegated Legislation, established under the Standing Orders of the National Assembly, or the Senate, or any other committee that may be established by Parliament, is clothed with the responsibility of reviewing and scrutinizing statutory instruments. In Nigeria, the terms and conditions to obtain loans from the National Housing Fund were made by the Minister responsible for Housing under §25 of the National Housing Fund Act.[88] In Zimbabwe, the Rural District Councils Act empowers the Minister of Local Government, Rural and Urban Development or any other minister designated by the president to make regulations prescribing anything for carrying out or giving effect to the provisions of the Act.[89] In many African countries, most legislation contains clauses that allow for secondary and subsidiary legislation to be drafted or issued in certain, vaguely specified areas at a later stage (Mboya 2014). Regulations are indeed common in Africa, and chiefly represent detailed rules made by a minister of state or other authority, setting out how an act of parliament is to be implemented.

Rules are also a form of subordinate legislation that are common and tend to prescribe procedural matters, such as the rules governing court proceedings. The Fundamental Rights (Enforcement Procedure) Rules of 2009, for example, were made pursuant to the powers conferred on the Chief Justice of Nigeria in their 1999 Constitution.[90]

Another familiar type of subordinate legislation in Africa is orders. Under the Exchange Control Act of Zimbabwe, for example, the president or Minister for Finance and certain other authorities legally mandated in Zimbabwe may make orders, including imposing restrictions in relation to gold, currency, securities, exchange transactions, payments and debts, and the import, export, transfer and settlement of property.[91]

A second distinct form of delegated legislation is local authority laws, passed by local authorities, pursuant to a power granted to them by the constitution or the parliament, and operational only within that local authority. Thus, local government authorities in many African countries have the mandate to pass subordinate legislation, which applies in their domains. Known as bylaws in Ghana, they include laws governing local property rates, sanitation, and public order.[92] Each African state has a peculiar governance structure, and this translates into the type of local government system that they operate. Whereas some states are unitary republics, others are federal republics. In unitary states, governmental authority is concentrated in the central government, which may create lower governance structures in order to diffuse its authority. These lower governance structures are under the supervision of the executive branch, but they may make laws to regulate conduct covering specified subject matter areas and are operational only within their areas of jurisdiction. These are generally referred to as local authority laws.

The Kenyan Constitution underscores the distinctiveness and interdependence of the national and county governments in a unitary state by stipulating that the devolution of authority is aimed at fostering national unity and promoting diversity, in light of Kenya's history of ethnic conflicts.[93] The County Governments Act empowers some 47 counties to pass legislation on local taxes, appropriations and revenues, and a host of other matters. The Nairobi City County, for example, has passed bylaws targeted at nuisance, solid waste management, hawking, and the control of city transportation and parking spaces.[94] In Uganda, also a unitary state, local government authorities have powers to pass ordinances and bylaws.[95] The aim is to vest authority, similar to that exercised by the central government, in district councils to ensure effective governance of areas far away from the reach of the central government. Some observers note that the radical decentralization of power in Uganda in the early 1990s enabled "attention [to be] shifted to strengthening administrative systems to enable them to respond to local service delivery needs and poverty reduction imperatives" (Kiyaga-Nsubuga 2009).

Ghana's local government structure has some similarities to that of Uganda. One of Ghana's economic objectives is the attainment of an even and balanced development of all its regions. Decentralization is executed through the establishment of Metropolitan, Municipal, and District Assemblies (MMDAs). The primary objective of MMDAs is to ensure the overall development of the districts they oversee. In furtherance of this objective, they are imbued with the powers to legislate, through the passage of bylaws, on the construction of buildings, streets, erection of sign boards, removal of obstructions and nuisances, as well the improvement of sanitation.[96] The Assemblies may enforce these laws by employing task forces and the local police to sanction persons who violate the laws. For example, the Accra Metropolitan Assembly (AMA) passed a bylaw in 2017, which obligates all persons carrying on business within the metropolis to obtain business operating permits from the Assembly before commencing business.[97] Entities in the hospitality industry are also mandated to obtain health certificates, which are issued by the metropolitan public health department.[98] Other bylaws require the payment of property rates and other rates.[99] Noncompliance with these bylaws disables persons and entities from carrying on business or otherwise engaging in enterprise or social or other activities, even if they have satisfied all national-level laws with respect to those businesses.

In African countries that operate a more or less federal type of government, local authority laws will include state-level or province-level laws. The states have their own executive and

legislative branches, and are subject to federal regulation of national security, monetary policy, citizenship, diplomatic relations, and other overarching and important domains of national life. These state-level organs of government have sufficient breadth of authority to pass laws for the governance of their states. Such laws have legal effect only within the territory of the state. A classic example of a federation in Africa is the Federal Republic of Nigeria, governed by a federal constitution and bifurcated lawmaking between the Senate and the House of Representatives, but with significant powers delegated to 36 state legislatures. These state legislatures may make laws on a range of matters for the peace, order, and good government of the state.[100] The subordinate character of state laws is preserved by the stipulation that in the event of conflicts, federal laws will prevail.[101]

Although the Constitution of South Africa does not expressly describe the country as a federal republic, the structure of governance is sufficiently federated. The government is constituted at the national, provincial, and local spheres, and the provinces operate like states in a federation.[102] Although the legislative authority of the national sphere is vested in the national Parliament,[103] each province has its own legislature, with authority to promulgate a constitution for their respective provinces,[104] as well as other legislation on matters over which the national legislature has concurrent legislative authority.[105] These matters include disaster management, cultural matters, Indigenous law and customs, matters having to do with airports other than international and national airports, health services, industrial promotion, public transport, tourism, trade, and urban and rural development.[106] The South African Constitution also provides for matters with respect to which provincial legislatures have exclusive legislative authority—over slaughterhouses, ambulance services, provincial planning, provincial recreation and amenities, provincial sports, and provincial roads and traffic.[107]

The last form of subordinate legislation is administrative instructions. These constitute the most detailed written laws within an African state. Administrative instructions do not go through a lengthy formal process before they become effective. They are often issued directly from a government ministry, department, or agency to their staff or to the public that benefits from their services. Administrative instructions often relate to the nitty-gritty of implementation and must conform to any statutes and delegated legislation from which they derive. Essentially, they exist as written directives to administrators and bureaucrats on how they may exercise discretionary powers contained in acts of parliament, subordinate legislation, or in local authority laws, and to the public on what they may expect from them, so that they may keep these administrators and bureaucrats within the confines of legal and legitimate exercise of their discretionary powers.

The Government of Ghana, through its Chief of Staff in June 2018, issued a directive temporarily banning foreign travel by government officials (Graphic Online 2018). Also, the Ghana Health Service (GHS) recently directed all government-accredited hospitals and clinics to desist from turning patients away on the excuse that they had no beds (Duho 2018). In Nigeria, the Nigeria Custom Service (NCS) issued an Administrative Notice for the information of exporters, agencies, and institutions that are involved in the business of export promotion in Nigeria, spelling out prescribed procedures and documentation requirements for any export business in Nigeria (NCS n.d.). Similarly, in June 2016, the President of Uganda issued the Strategic Guidelines and Directives for the Term: 2016–2021, detailing a series of directives and initiatives meant to overcome bottlenecks for Uganda to become a middle-income country in the next few years and a first world country by 2021 (Republic of Uganda 2016). Furthermore, the President of Sierra Leone, in April 2018, issued a directive ordering the suspension of timber exports as part of the government's strategy of combating the scourge of deforestation in the country (Tarawallie 2018).

Case law

The matters relating to the exercise of discretionary powers in the last section constitute a good entry point for the discussion of the fourth type of law in Africa, which is case law. Case law results from the principle of judicial precedent, which postulates that like cases must be treated alike, as a measure for real justice, and that the principles enunciated by judges in the application of laws to particular fact situations in the past are useful for the decision of new cases. Although lawmakers make efforts to provide elaborate rules in legislation, the rules are not and cannot be exhaustive and ought to be supplemented by various practices, and therein lies the opportunity for case law.

In no area of public law are these principles of judicial precedent more palpable than in the area of the regulation of discretionary powers. It will be recalled that discretionary powers are mainly exercised in this regard by bureaucrats and administrators, as they operationalize laws passed by the legislature or contained in regulations. As implementational situations are many and varied, it is impossible, beforehand, to provide all the possible future instances for application of the law, and so much is left to the operators of the policy or law to decide. Where a person feels aggrieved by a particular exercise of such discretion, they mostly have a right to question it in a tribunal or court of law. The decisions of the tribunals or courts on these matters, and especially the principles they enunciate to guide the exercise of such discretion, form a body of laws called case law, which are then utilized by lawyers to advise and to argue future cases, and by judges to decide such cases. This is the essence of case law. In sum, at the core of the regulation of discretionary power is an attempt by the courts to provide administrative and bureaucratic guidance. This is both palpable and significant in the body of administrative law in various African states.

There are a host of cases in Africa on a range of discretionary rules and how they may be formulated and implemented. Over time, some countries have elevated the core principles in these cases to the level of constitutional guidance. One of the clearest expositions of the rules that must guide the exercise of discretionary powers is contained in Ghana's Constitution. It provides as follows: "Where in the Constitution or in any other law discretionary power is vested in any person or authority, that discretionary power shall be deemed to imply a duty to be fair and candid; the exercise of the discretionary power shall not be arbitrary, capricious or biased either by resentment, prejudice or personal dislike and shall be in accordance with due process of law; and where the person or authority is not a Justice or other judicial officer, there shall be published by constitutional instrument or statutory instrument, Regulations that are not inconsistent with the provisions of this Constitution or that other law to govern the exercise of the discretionary power."[108]

It suffices to add that case law goes beyond public law and into all other parts of law. Case law is regularly implemented in African countries in the areas of civil claims and in criminal law. Many principles of contract and tort law applicable in Africa are derived from case law and in the usual way that judicial precedent applies. Aside from judicial precedent, generated locally by African courts, and because African constitutions allow for the application of case law from various ex-colonial metropoles such as the United Kingdom and France, principles of law enunciated in these countries are still applicable in Africa today. Even the latter-day neocolonial power, the United States, is not left out. The case of *Marbury v. Madison*[109] is constantly cited as a *locus classicus* on judicial review in the legal systems of African states, including Ghana.[110] In some instances, some acts of parliament of the former colonizers are still applicable in African countries today, although they are given the status accorded to case law, not statute. The Second Schedule to the Courts Act of Ghana lists the following United Kingdom laws as

still applicable in Ghana: Partitions Act, §§1 and 2; Cestui Que Vie Act, §4; Prescription Act, §§1–8; Real Property Act, s§§6–§8; Libel Act, §§1 and 2; Trustee Act, §§1–5 and §§7–34; and Charitable Trusts Act, §12.

Case law is also very significant in the area of constitutional law in African countries. The new constitutions of Africa were implemented quite swiftly, leading to many efforts, including from civil society, seeking to strengthen the new constitutional democratic dispensations by testing governance practices against the stipulations of the new constitutions. Still fresh in many minds is the case in which the 2017 Kenyan elections were successfully challenged and annulled by their Supreme Court for failing to meet constitutional standards.[111] In Ghana, the Supreme Court has recently held that regulations requiring content authorization from the National Media Commission before broadcast[112] offend the press freedom provisions of the constitution of the country.[113]

Case law is a most extensive body of law in Africa, second only to customary law. Given that the customary law of colonial metropoles was absorbed into African countries in the form of mountains of law reports of cases, and was augmented by cases decided in those African countries after independence and supplemented by cases decided in the metropoles after independence and in any other country with a similar legal tradition, the breadth and depth of case law is surpassed only by customary law.

International law

Before we leave the arena of formally written laws and examine the domain of customary law, it is important to discuss the applicability of international law in African states.

As noted earlier, there is an extra layer of international law that applies to most African states (OAU Resolution, 1964). In addition to bilateral treaties, which are common and are effective between an African state and any other state in the world, regional treaties (relating to the African Union, for example), global treaties (such as United Nations' treaties), and a host of subregional treaties applicable to the majority of African states exist. It is to these that we now turn.

In the early 1960s, the new post-independent African states sought to organize themselves along the lines of the United States, the better to garner greater political, economic, and military strength.[114] Thus, the debates that surrounded the formation of the predecessor organization to the African Union, the Organisation of African Unity (OAU), coalesced around two strategies. The Kwame Nkrumah strategy called for an immediate surrender of the sovereignty of African states in favor of the formation of an African Union Government (Nkrumah 1963). President Nkrumah was so convinced about the possibility and utility of this strategy that he made sure to provide in the Ghanaian 1960 Constitution the following: "In the confident expectation of an early surrender of sovereignty to a union of African states and territories, the people now confer on Parliament the power to provide for the surrender of the whole or any part of the sovereignty of Ghana."[115] To Nkrumah, only an immediate move to full African unity, while progressively addressing the various issues that would arise with such a move, would prevent external forces from completely and permanently disrupting the effort. The other strategy, Ujamaa,[116] championed by Julius Nyerere (Nyerere 1967), called for a more incremental approach, beginning with various subregional unions, which would eventually fold into a broader African union (Agyeman 1992, 79–89). It is this strategy that prevailed with the overthrow of Nkrumah in 1966, the destabilization of many African states in the context of Cold War politics for several decades after that, and an ensuing economic stagnation on the continent, even as Africa's massive natural market and financial resources were pillaged mainly by Europe and the United States (Rodney 2018).

The politics of African unity, therefore, was partly responsible for the rise of subregional bodies on the continent, more committed to subregional unity and a number of subregional issues than they were to broader African unity. As previously noted, we have had: the Economic Community of West African States (ECOWAS); the Economic Community of Central African States (ECCAS); the East African Community (EAC); the Intergovernmental Authority on Development (IGAD), headquartered in Djibouti and including governments from the Horn of Africa, the Nile Valley, and the African Great Lakes Region; the Southern African Development Community (SADC); the Common Market for Eastern and Southern Africa (COMESA); the Community of Sahel–Saharan States (CEN–SAD); and the Arab Maghreb Union.

Each of these subregional bodies is bound together by a foundational treaty, from which many other treaties have been spawned, creating a whole body of subregional international law covering the entire continent in a manner that is not common on any other continent. These subregional treaties are very often incorporated into the domestic laws of the states involved, producing a systematic unification of the laws of many states in Africa on a subregional basis. Established in 1975, the ECOWAS, for example, is made up of 15 countries in West Africa. The Treaty of Lagos of 1975, revised in 1993, established an economic community in the subregion to foster integration for the realization of the objectives of the Africa Economic Community (ECOWAS 2016). It also aimed at creating a common market among member states, with the adoption of trade liberalization policies through the abolition of customs duties and non-tariff barriers.[117] Further, it aimed to adopt a common external tariff and a common trade policy vis-à-vis third countries.[118] The obligations of member states include taking all necessary measures to facilitate the attainment of the objectives of the community.

Headed by the Authority of Heads of State and Governments of Member States, which are responsible for the general direction of the community and meet at least once a year in ordinary session,[119] the Community now has a Parliament[120] and a Court of Justice, the decisions of which are binding on the member states.[121] The powers of the heads of state and government are in law and practice often delegated to various conferences of ministers of state for various sectors.[122] Thus, there is cooperation on literally every subject matter: finance, monetary policy, economic planning and trade; agriculture; natural resources; transport and communications; justice; environment; and tourism. These cooperative agreements produce a dose of sub-regional international law. A good example is the ECOWAS Protocol on the Free Movement of Persons, Residence and Establishment.[123] This treaty, which has been incorporated into the domestic laws of all ECOWAS states, ensures that no member of an ECOWAS country requires a prior visa to enter another ECOWAS country. An almost automatic visa for about 90 days is ordinarily granted at the port of entry to nationals of member states.[124]

The colonial histories of various African states have meant that subregional international laws are further complicated. Colonized mainly by the French and the English, ECOWAS countries are unofficially further divisible into French ECOWAS and English ECOWAS, depending on who their former colonizer was—or some will say, who their subsisting colonizer is. Nowhere is this more palpable than in the efforts of ECOWAS to institute a common subregional currency. For this purpose, the Community is made up of two subregional blocks—the West African Economic and Monetary Union, made up of eight French-speaking countries, all of which use the CFA Franc as a national currency, and the West African Monetary Zone made up of six English-speaking countries, which use different national currencies. While some progress has been made at the subregional levels, there are severe challenges to connecting the two into a single ECOWAS monetary zone, not the least the way in which the CFA Franc used by the former colonies of France is tied to the French Franc (Harvey and Cushing 2015).

International law at the regional level is more familiar. Like the European Union, the African Union (AU) seeks, with less success, to unite all 54 African countries, and, in addition to its Assembly of Heads of State and Government, now sports a Pan-African Parliament[125] and an African Court on Human and Peoples' Rights.[126] Accession to the Charter of the AU does not automatically activate an almost full complement of regional laws that a state party must obey, as in the case of the EU. Instead, the Charter takes a minimalist approach, retaining only the barest minimum of obligations, while reserving a host of substantive matters to be addressed in the context of future treaty negotiations.

Fifty-four countries in Africa are parties to the United Nations (UN) Charter and, therefore, are bound by the principles of the UN, including a range of principles that are called customary international law[127] and *jus cogens*.[128] Generally, the UN Charter underscores the principles of sovereign equality of states, the abolition of the use of force in the settlement of disputes and compliance in good faith with the obligations of member states under the Charter. All Member States are required to provide the organization with every assistance needed to further the objectives of the Charter. The obligations arising from the Charter are enforced against member states through sanctions imposed by the Security Council or the General Assembly. The resolutions of the General Assembly are not, generally speaking, binding on Member States of the United Nations or binding at the international level (Schwebel 1979). Notwithstanding that, the General Assembly regularly passes resolutions, and many states respect them. For example, a resolution was passed in response to the apartheid policies of the then South African Government (UN General Assembly 1966). The resolution called for Member States to voluntarily break off diplomatic relations with South Africa, to cease trading with the apartheid establishment, particularly, with regard to arms trade, and to deny passage to South African aircraft and ships. Some countries honored this resolution (Barnes 2008; Skinner 2017).[129] On the other hand, United Nations Security Council resolutions are binding on Member States. Thus, the United Nations Security Council adopted a resolution (UN Security Council 2009) imposing an arms embargo on Eritrea, together with travel bans on its state officials, and further froze the assets of some of the country's political and military officers after the Eritrean Government was accused of tacitly backing the terrorist group, Al-Shabaab, in Somalia and reportedly refusing to withdraw troops from its disputed border with Djibouti, following a conflict in 2008 (UN 2009). Additionally, African countries are bound by a host of treaties facilitated by the UN system, to the extent that they have incorporated those treaties into domestic law. Given the huge global power imbalance against the global south, including African states, the rate of domestication of key international instruments is higher, as this is often a silent conditionality for aid and loans or a trigger for the release of aid or loan funds that have been previously committed (Zormelo 1996).

A host of former British colonies in Africa are strewn across the north, south, east, west, and center of Africa. These countries, numbering 17, are members of the Commonwealth of Nations. Mozambique and Rwanda are also members of the Commonwealth, although they did not have any colonial ties with the British. The Commonwealth Charter enjoins its member states to practice democracy; abide by international instruments on the protection of human rights; support efforts for international peace and security; and promote the rule of law, separation of powers, good governance and sustainable development. The Charter's provisions represent the convictions of member states and express common goals that all member states must effectuate.[130] The Commonwealth has facilitated a number of treaties, including the Treaty on Cooperation among the Members States of the Commonwealth of Independent States in Combating Terrorism.[131] These treaties constitute another domain of international law, applicable to a broad range of African countries.

Customary law

The sixth type of law prevalent in Africa may be loosely captured under the rubric of customary law. Customary law has existed in African communities since time immemorial. Customary law comprises the traditions, customs, and usages peculiar to communities in African polities, which have been handed down from one generation to another. It regulates every aspect of communal and individual life: state governance, law-making, dispute resolution, economic enterprise, trade, business, births, education, marriages, death, and succession. There are four significant features of customary law to note.

First, customary law comprises both the norms that are considered legal, even if they are subordinated to other normative forms in the "modern" African state, and those that are strictly illegal but are still practiced and lived out in many African countries. It should be acknowledged that the outlawing of these customary practices is a product of the effect of globalization on the African continent. As a result of emerging orthodox scientific experimentation and derived conclusions, what Africans once perceived as right and binding has been overridden or slightly modified by modern social theories. For example, while female genital mutilation (FGM) is illegal in many African countries due to its presumed "negative impacts" on the physical and mental health of girls and women, it is still practiced in many countries, even if "underground." The fact that FGM is just one small aspect of a conglomeration of customary education on reproductive health and family life, rites of passage, and many other practices, makes FGM difficult to isolate for effective abrogation, unless such a reform is contextual and considers the subsisting parts of the cultural conglomeration and their utility. Again, in many African contexts, fetish and royal declarations, made under customary law, are obeyed by many, even when these are strictly contrary to other rules of law of the "modern" state. Thus, the Asantehene (king)[132] of the Ashante people in Ghana imposed a curfew over Kumasi to allow for the performance of a customary ritual in the royal ancestral home, following the death of the queen mother, an edict that is contrary to the "modern" laws of Ghana (Boadu 2017). The Constitution of Ghana mandates only the president (usually acting through the Minister for the Interior) may impose any such curfew in accordance with established law.[133] In another instance, the Overlord of the Mamprugu Traditional Area in Ghana caused a holiday to be declared in the traditional area for the local school district, to allow for school-going pupils to participate in the Fire Festival, an action that is contrary to Ghana's Public Holidays Law.[134] Both of these edicts, clearly illegal in Ghanaian "modern" law, were obeyed to the letter.

A second significant point to note about customary law is that it has evolved over the last several centuries, mainly as a result of its interactions with different normative forms that African states accepted. These interactions have produced about seven different genres of customary law.[135] The first is "pristine customary law." This is what customary law was before it was polluted, mainly by Islamic influences from North Africa in the context of the proselytizing jihadist crusades (Poulter 1975), and then Euro-Christian influences from the south, beginning with the European explorers, missionaries, and colonialists (Okun 2014).

The second genre of customary law is "judicial customary law," resulting from the European policy of testing customary law against what was called the repugnancy clause, to ensure that only rules of customary law, which are consistent with European notions of "natural justice, equity and good conscience," are recognized and enforceable by the courts of law.

The third genre is "codified customary law," consisting of existing rules of customary law that are written into statutes or distilled by authorities on customary law or by customary law publicists. There are many exercises of the codification of customary law on the African continent (Bennett and Vermeulen 1980). The subsisting utility of customary law to this genre of

law is that the detailed rules for the operationalization of these trans-mutated rules of customary law can be found only at customary law. In other words, when these rules are not clear or need to be elaborated upon, recourse would need to be made to customary law itself.

The fourth genre is a related but different concept of "statutorily instituted customary law," whereby new rules of customary law are instituted by African legislatures. These new rules are often contrary to existing custom and so there is a definitive attempt to legislatively change customary law. The reason why these rules are still considered customary law is that they transform only a minute aspect of a particular part of the customary law ecosystem, while allowing the rest of the system to subsist. The Head of Family Accountability Law is an excellent example.[136] The Ghanaian Government, by this law, sought to make a head of family accountable for the use and disposition of family property, while leaving untouched (and still governed by customary law) all the related rules on what family property is, how it comes to be family property, the rules for use of family property by members of the family, nonmembers of the family, and so forth.

The fifth genre of customary law is "complementary customary law," whereby basic rules of statute and common law are supplemented by rules of customary law. The Ghanaian Courts Act, for example, contains provisions that seek to apply the rules of customary law to torts, contracts, inheritance, land law, and several laws.[137] It provides that a court, when determining the law applicable to an issue arising out of any such transaction or situation, shall be guided by the personal law of a person, which invariably is a reference to the system of customary law to which a person is subject, unless there is clearly an intention to the contrary.

The sixth genre is "insular customary law," representing instances in which other forms of law operate in tandem and parallel to rules of customary law in particular domains of social life, leaving the rules of customary law intact and allowing them to evolve on their own. In many African countries, there is a distinct law on customary marriages, which are legal, subsist, and may occur outside of any "modern" rules of law on marriage. A customary law marriage is a valid marriage in almost all African states, needing no other system of law to complement it, and exists in tandem and parallel to Islamic marriages and Christian marriages.[138]

The last genre is "declared customary law," for which new rules of customary law are instituted and declared as such by persons and institutions that have statutory or other authority to do so. In Ghana, the National House of Chiefs may, on its own or at the request of the Minister in charge of Chieftaincy Affairs or the Regional Houses of Chiefs, consider whether a rule of customary law should be assimilated by the common law.[139] If the National House is of the opinion that the rule should be assimilated by the common law, it shall draft a declaration describing the rule, with the modifications that it considers necessary, after considering the evidence and representations that have been submitted to it, and after carrying out the appropriate investigations.[140] The draft is submitted to the Minister, who may, by legislative instrument, give effect to the recommendations of the National House and declare the rule to be assimilated in the form specified in the instrument, after consultation with the Attorney General.[141] Where a rule is declared to be assimilated in this way, it may be referred to as a common law rule of customary origin.[142] Although these evolutions of the genres of customary law overlap somewhat, they evolved quite lineally.

Post-independent legal systems in African states have given some level of recognition to customary law. However, customary law has lost its primacy. This is because it has been made subject to other types of law. This is the third of the five key characteristics of African customary law that I seek to illustrate in this chapter. For example, §16 of the 2013 Constitution of Zimbabwe obligates the state and agencies of government to "promote and preserve cultural values and practices which enhance the dignity, well-being and equality of Zimbabweans."

That Constitution also provides that the dignity of traditional institutions must be respected.[143] That notwithstanding, customary practices must not be inconsistent with the Constitution due to the supremacy of the Constitution.[144] In Ghana, customary law is considered a part of the common law of Ghana.[145] This set of laws is at the lowest rung in the hierarchy of laws in the Constitution and must not be inconsistent with the Constitution and legislation, main and subordinate alike.[146] The 1999 Constitution of the Federal Republic of Nigeria enjoins the State to protect, preserve, and promote Nigerian cultures, insofar as they enhance human dignity and are consistent with the fundamental objectives and directive principles of state policy.[147] The essence of these provisions is to uphold cultural values only when they accord with higher norms—a subtle form of replicating the repugnancy clause. Similarly, the 1995 Ugandan Constitution guarantees "cultural and customary values which are consistent with fundamental rights and freedoms, human dignity, democracy and with the Constitution."[148] The Kenyan Constitution expressly subjects customary law to the Constitution in order to avoid equivocation regarding the status of customary law in the framework of governance.[149]

Based on the preceding discussion, customary law generally has a lower place in the hierarchy of norms in African states. However, there have been instances where the dictates of customary law have been the order of the day, noticeably where there is no relevant or applicable statutory provision nor any common law principles. Customary law would, therefore, be applicable to decide the matter, provided the law is not repugnant to justice and morality. A key example is the popular *S. M. Otieno* case,[150] decided by the Kenyan High Court. This case involved a prominent Nairobi criminal lawyer, Silvano Melea Otieno, who died in December 1986. Soon after his death, a dispute arose, between his only widow and his relatives, concerning who had the legal right to bury the remains of the deceased and to decide his place of burial. The widow wished to bury the deceased in the city, while the others wanted to bury the body at Nyamira Village, Nyalgunga Sub-location, Central Alego Location, Siaya District (under Nyalugunga), in accordance with traditional Luo burial customs. Under Kenyan law at that time, a deceased person's will or the wishes of their spouse were not satisfactory to decide a dispute between any opposed parties. The case revolved on whether the relevant Kenyan law on burial was statute law or customary law, and who was the next of kin responsible for the funeral rites.

The court recognized the fact that Kenya had not enacted any statutory law regulating burial of deceased persons. It also observed that there was no statute of general application in English law, which could, by virtue of a judicature act of Kenya, be applied. The court held that there being no statutory law or common law principles with respect to burial, customary law was the law of last resort. The court further held that there being no law, which the Luo custom conflicted with, the content of the customary law was not repugnant to morality or justice, and therefore, should be applied. The court was satisfied that the deceased did previously express his wish to his cousin, Albert, that he be buried next to his father's grave at Nyamila Village. However, the court took the stance that the question with regard to the place of burial was a matter for the family to decide at custom and that the first defendant and plaintiff had the right to decide where the burial was to take place, but because of the disagreement, the court had to intervene to give directions. In the court's opinion, justice demanded that the court ordered where the deceased should be buried. Guided by Luo custom, which was applicable, and the deceased having expressed his wish of where he should be buried, the court directed that the body be handed over to the plaintiff and the first defendant for the deceased to be buried at Nyamila Village.

There are two other strengths of customary law that assure its subsistence and continuing growth. First, customary law is the "living law" of most Africans.[151] It is the law by which the

majority of urban and rural folks conduct their lives. The intensity of movements between the cities and the rural areas of many African states, for festivals and naming, marriage, chieftaincy, and funeral ceremonies, is representative of the persistent prevalence, relevance, and pull of customary law in the lives of ordinary Africans. The reality of the "living law" means that many Africans order their lives according to and obey some customary laws in the face of clear statutory or other "superior" legal prohibitions to the contrary. Thus, in reality, the law, which prevails in a significant sphere of African livelihoods and for a significant number of Africans, does not accord with the dictates of the hierarchy of norms (Ndulo 2011). There is another reason for the resilience of customary law in Africa. While most African constitutions provide for customary law in the hierarchy of norms and seek to subordinate it in the hierarchy, the situation is far more complicated. For example, some African constitutions provide that in certain domains of life, notably chieftaincy and aspects of family law and land law, customary law reigns supreme over statutory and other forms of law that are ordinarily higher in the hierarchy. The Ghanaian Constitution, for example, provides that customary law is the master in Chieftaincy Affairs.[152] The same Constitution allows for some 80 percent of lands in Ghana to be held by families and chieftains under customary tenure.[153]

The fourth and last element of customary law for our purposes is that, in some African states, Islamic law is treated directly or indirectly as part of customary law. In the Ghanaian case of *Kwakye v. Tuba*,[154] it was held that: "In the eyes of our law, a marriage by a Mohammedan according to Mohammedan law is at its very best marriage by customary law and does not affect succession to his estate, unless the said marriage is registered under the Ordinance. Therefore if a Mohammedan died not having married, and if married, not having had his said marriage registered under the [Islamic Marriage] Ordinance …, the only law which can regulate succession to his estate, is his personal law, i.e., the customary law of the tribe to which he belonged." This holding was applied in the subsequent case of *Brimah and Cobsold v. Asana*.[155] In Nigeria, Islamic law has more overtly and more consistently been regarded as a variant of customary law for a very long time, although this may be changing, as Islamic law comes of its own, especially in Northern Nigeria (Abun-Nasr 1990; Oba 2002; Yakubu 2005).

Royal and fetish declarations

Long before the emergence of colonialism, African communities were primarily governed by chiefs and other central figures, including spiritual leaders, selected from among members of the community. There were generally accepted rules or traditions on the manner of nomination and selection of these key actors. These rules specified the clan or lineage of persons qualified to serve in such positions. The prescription of particular clans or lineages, as eligible to provide individuals to take on leadership roles, was a recognition of the fact that the function of leadership ought to be the preserve of a select group. It was also a manifestation of the political-cum-spiritual authority conferred on them, when they eventually assumed the reins of power.

In Africa, "chiefs," "kings," "priests," "councils of elders," or any other figures of authority by whatsoever name called, are empowered to make laws for their areas of jurisdiction. For the most part, the laws are in the nature of oral declarations and are made as and when the need arises. For example, in the kingdom of Swaziland, "announcements by the king become Swazi law when they are made known to the nation, usually at the cattle barn where all national meetings are held. The king is referred to as *umlomo longa cali manga* ('the mouth that never lies)" (Dube and Nhlabatsi 2016, 269).

Royal declarations by chiefs had legal effects and were incorporated into the customary law applicable to each community. Royal declarations were the means by which kingdoms forged

alliances, waged wars, conducted diplomatic expeditions, annexed lands pursuant to conquest, and established traditions. Fetish declarations were also made by chiefs and spiritual leaders in their capacities as links between the physical world, the community's forebears, and oracles or deities. According to Ayittey (2012), chiefs have a semidivine nature that connects them to the community's ancestors and its deities, who are considered a part of the community. The sanctity of the chief's office, as embodying not only physical functions but also involving spiritual authority, can be exemplified by Eliade's description of a king as:

> … an absolute powerhouse of forces simply because he is a king, and one must take certain precautions before approaching him; he must not be directly looked at or touched; nor must he be directly spoken to, and so on. In some areas the ruler must not touch the ground, for he has enough power in him to destroy it completely; he has to be carried, or to walk on carpets all the time."
>
> *Eliade 1958, 16–17*[156]

The selection of a chief requires the authorization of ancestors and deities in charge of the area. Thus, chiefs were said to rule by divine right. Among the Yoruba, the first King or Ooni of Ife was alleged to have been a deity before becoming a chief. By the chief's role as an intermediary between the living and the ancestors, the chief makes orders and issues declarations on matters bordering on the spiritual welfare of the citizenry (Adepegba 1986). This is to ensure that the conduct of inhabitants accords with the dictates of the ancestors to avert epidemics and bad omens. For example, with regard to the use of communal lands, portions of land are not to be appropriated by members of the community, because they are dedicated as sacred groves in honor of ancestors and spiritual beings. It is reported that the King of Akyem Abuakwa, Nana Sir Ofori Atta I, described land as belonging to "a vast family of whom many are dead, a few are living and countless host are still unborn" (Ollennu 1962, 4). It is clear that this warping of spirituality was used as a subterfuge for the institution of principles of sustainable development in African communities.

Recognition of the existence and potency of the spiritual world was rife in African kingdoms before the advent of colonialism. Declarations made by chiefs, as spiritual heads of their communities, received obeisance by the generality of the people, in light of the fear that persons who flouted such sacred decrees would incur the wrath of the gods. Bailey notes that: "… ancestors can be relentless in ensuring that their descendants adhere to the letter of the law, causing anything from minor disruptions to catastrophic events if familial and community customs such as burial rites are not appropriately carried out" (Bailey 2016, 12). Among some communities in Ghana, there were taboos that prohibited farming and fishing on specific days. In Austinian terms, the threat of sanctions gave fetish declarations the force of law. Reading deeper, we again see key principles of public health, rest from labor, and space for the renewal of the fields for greater productivity in these taboos.

While royal and fetish declarations were the main sources of law before the advent of colonialism, their effect was subsequently whittled down pursuant to the introduction of Islamic and Christian beliefs. Popular conceptions of the power of ancestors and deities began to change, as Christianity emphasized the existence of only one supreme being, who was professed to be more powerful than the gods of African peoples. This paved the way for the chiefs' power to make laws that regulated human conduct to be thoroughly undermined by colonial rulers who made new laws to govern the colonies. Through the British strategy of indirect rule and the policy of assimilation by the French, chiefs became involved in the colonial architecture and were used as channels for enforcing the new colonial legislation. Thus,

the role of chiefs as lawmakers, through the issuance of royal and fetish declarations, became at best secondary.

In many African legal systems, therefore, royal and fetish declarations are not considered as a distinct type or source of law. Due to the fact that they arise from the traditional system of governance in local communities, they may nevertheless be treated as a part of customary law, as long as they do not contradict any other source of law. This is justifiably so, given the fact that customary law embodies the traditions, practices, and unwritten rules applicable to specific communities in Africa. It is safe, therefore, to conclude that royal and fetish declarations are regarded as components of customary law in their character as pristine customary law, flowing directly from the lived reality of African peoples. Hence, a reference to customary law in national constitutions and statutes, in effect, includes royal and fetish declarations. Thus, the place of royal and fetish declarations in modern African legal systems is directly correlated to the extent of recognition given to customary law and the status of chiefs in modern societies.

In Kenya, customary law is valid to the extent that it is not inconsistent with its Constitution.[157] Under the Chiefs Act, Kenyan chiefs are administrative officials who represent the central government in their areas of jurisdiction. They are appointed by the government and must meet some eligibility criteria.[158] It is significant to note that chiefs are empowered to make orders under the Chiefs Act relating to civil and criminal activities. For example, a chief can make orders to prohibit or restrict the holding of drinking bouts, the carrying of arms, and any conduct that breaches the peace.[159] Orders requiring the proper burial of deceased persons can also be made by chiefs. Although these declarations are similar in substance to royal declarations made in the past, they lack a cloak of royalty, because of the subjugation of chiefs to the national government. Even more, the orders are made pursuant to statutorily conferred power, rather than the inherent power previously exercised by chiefs. In the North-West province of Cameroon, by virtue of a decree,[160] chiefs have been made lower-rank administrative officers, answerable to the senior divisional officers in their area of jurisdiction (Konings 1996). Fisiy (1995) explained that, although the decree provides a framework for the recognition of genuine sources of "traditional rule,"[161] the law has tended to demystify the sacred nature of royalty by turning *fons* (traditional kings or chiefs in Cameroon) into mere auxiliaries of the administration. *Fons* have now been rendered fully accountable to the administration at the divisional level, and a *fon's* installation now has to be ratified by an express note of administrative recognition before he can officially exercise any active role as an auxiliary of the administration. It is clear from this decree that the chiefs in Cameroon have had their roles severely bureaucratized and they have been reduced to the lower ranks of the administrative ladder.

Statutory incursions into chiefs' authority and status impact the weight accorded to royal and fetish declarations. In places where the authority of chiefs is recognized and promoted, chiefs reserve the right to make declarations that are considered enforceable, to the extent that they do not contravene human rights or provisions of statutes and the constitution. For example, in Ghana, a person who refuses to undertake communal labor ordered by a chief, without reasonable cause, commits an offense and is liable to a fine or a term of imprisonment.[162] On the other hand, refusal to honor a call from a chief does not amount to a criminal offense because of the right of every individual to freely move about. In so holding, the Supreme Court of Ghana stated that, although "the social value of the institution of chieftaincy is … given widespread recognition by the Ghanaian public … [n]evertheless the rights of even chiefs are subject to the 1992 Constitution."[163]

Although the courts in Africa have made reforms to many customary practices that do not accord with human rights laws, public policy, and their constitutions, there are hardly any cases

that expressly outlaw a royal or fetish declaration made by a chief. This may be because statutes in Africa do not generally recognize the spiritual authority of chiefs, therefore debarring, *a priori*, any space for their making such declarations that derive from spiritual significance. Again, royal and fetish declarations are very localized, affecting only members of the local community, who are motivated to keep quiet about them and obey them religiously from a sense of spiritual or citizen–subject obligation.

So, daily in Africa, many obey royal and fetish declarations. As already noted, in 2017, the King of Asanteland imposed a curfew over Kumasi to give way for the conduct of burial rites of the deceased Queen Mother of the Asante. A similar royal declaration that declared a school holiday for the purpose of celebrating the Fire Festival in a community in Ghana has also been presented here. Although the chiefs had no "modern" authority to do what they did, and their actions were contrary to statutes then and still in force in Ghana, the declarations were obeyed strictly. What is even more intriguing is the fact that state officials in Ghana acquiesced and actively facilitated the enforcement of these declarations. Neglecting the efficacy of royal and fetish declarations in Africa will, therefore, leave us with a less than complete picture of law in Africa.

Conclusion

When an existing legal system is made to absorb another system, many developments, including legal pluralism, occur or become exacerbated. In this chapter, I have examined the distinctiveness of legal pluralism in Africa and also drawn out three levels and the accompanying seven types of laws that exist in Africa, as a consequence of legal pluralism. In the course of this exercise, I have attempted to indicate the legal valence of each level and type of law, noting that the formal operation of the hierarchy of norms in Africa is very often disrupted by the reality of the living law. Overall, I have sought to exemplify, in a very sublime manner, these 10 different, intertwining types and levels of law, which are often disregarded or considered mundane, in the hope that Africans and Africanists would go about their lives and business with a full and complete picture of "Policy, Law, and pOLICY" in Africa.

Notes

1 Constitution of the United States, art. 6; see Hart, Jr. (1954).
2 Contained in Ch. 6 of the 1992 Constitution of the Republic of Ghana. The Supreme Court of Ghana in *New Patriotic Party v. Attorney-General* ruled that these principles are justiciable.
3 1992 Constitution of the Republic of Ghana, art. 25(1)(a). See http://africanchildforum.org/clr/Legislation%20Per%20Country/ghana/ghana_constitution_1992_en.pdf.
4 1992 Constitution of the Republic of Ghana, art. 34.
5 1991 Constitution of the Republic of Sierra Leone, §14. However, they are not justiciable, according to the Constitution itself. See www.constituteproject.org/constitution/Sierra_Leone_2013.pdf?lang=en
6 1999 Constitution of the Federal Republic of Nigeria, §20. See www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm#Chapter_2. In the opening provision of Chapter 2 (Fundamental Objectives and Directive Principles of State Policy) of the 1999 Constitution of Nigeria, §13 provides: "It shall be the duty and responsibility of all organs of government, and of all authorities and persons, exercising legislative, executive or judicial powers, to conform to, observe and apply the provisions of this Chapter of this Constitution."
7 2010 Constitution of Kenya, art. 10.
8 2010 Constitution of Kenya, art. 10(1).
9 2010 Constitution of Kenya, art. 60(1). On other principles scattered in the Kenyan Constitution, see art. 20(5); 27(8); 54(2); 60; 73(2); 80(d); 81; 91(d),(g); 129(2); 159(2); 175; 201; 230(5); 232; 238.
10 1977 Constitution of the Republic Tanzania (Revised edn of 2005), art. 11(1).
11 1977 Constitution of the Republic of Tanzania (Revised edn of 2005), art. 11(3).

12 2010 Constitution of Kenya, Sixth Schedule, Pt 4, §15(1).
13 2010 Constitution of Kenya, art. (60)(2).
14 1996 Constitution of the Republic of South Africa, art. 9(3). www.justice.gov.za/legislation/constitution/SAConstitution-web-eng.pdf.
15 1992 Constitution of the Republic of Ghana, art. 87(2)(b).
16 The Millennium Development Goals (MDGs) were eight goals with measurable targets and clear deadlines for improving the lives of the world's poorest people. The Millennium Declaration at the United Nations Millennium Summit in 2000, signed by 189 countries, sought to achieve these goals by 2015 (www.un.org/millenniumgoals/). See Republic of Ghana (2015).
17 1977 Constitution of the Republic Tanzania (Revised edn of 2005), art. 63(3)(c).
18 1992 Constitution of the Republic of Ghana, art. 25(1)(b).
19 Launched under the auspices of the President and Government of Ghana in 2001, and monitored by an Inter-Ministerial Facilitation Team. See: Asante (2012, Abstract). The 1992 Constitution of Ghana, art. 36(2)(b) states: "The State shall, in particular, take all necessary steps to establish a sound and healthy economy whose underlying principles shall include affording ample opportunity for individual initiative and creativity in economic activities and fostering an enabling environment for a pronounced role of the private sector in the economy."
20 Parliament of the Republic of South Africa. n.d. "How a Law is Made." www.parliament.gov.za/how-law-made.
21 At the time of publication of this book, the Bill is still before Parliament, with petitions and comments being invited.
22 National Information Technology Agency Act of Ghana, 2008 (Act 771); Electronic Communications Act of Ghana, 2008 (Act 775).
23 The Interpretation Act of Ghana, 2009 (Act 792).
24 Employment Policy Convention, 1964 (No. 122); see, also, Republic of Uganda (2011).
25 Official Secrets Act of Kenya, 1968 (Act 4).
26 GYEEDA was formerly called the National Youth Employment Programme (NYEP), which was set up in 2006. NYEP was rebranded GYEEDA in 2012. See Darko and Löwe (2016, 13).
27 Youth Development Agency Act, 2015 (Act 887).
28 The Senate of the Republic of Kenya, "Petition to Parliament," Public Participation Bill, 2018, http://parliament.go.ke/contact/senate_petition?bill=The%20Public%20Participation%20Bill,%202018.
29 Article 25(a) of International Covenant on Civil and Political Rights (ICCPR) reads: "Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions to take part in the conduct of public affairs, directly or through freely chosen representatives."
30 Refugees Act of Kenya (No. 13 of 2006) (rev. edn 2017).
31 Diplomatic Immunities and Privileges Act 37 of 2001 (South Africa), amended by Diplomatic Immunities and Privileges Amendment Act 35 of 2008 from October 2009: §§2 and 9.
32 Vienna Convention on Diplomatic Relations, April 18, 1961. (United Nations, Treaty Series, vol. 500, 95).
33 Vienna Convention on Consular Relations, April 24, 1963. (United Nations, Treaty Series, vol. 596, 261).
34 Convention on the Privileges and Immunities of the United Nations, February 13, 1946 (United Nations, Treaty Series, vol. 1, 15 and vol. 90, 327 (corrigendum to vol. 1).
35 Convention on Privileges and Immunities of the Specialized Agencies, November 21, 1947 (United Nations, Treaty Series, vol. 33, 261).
36 Council of Europe, Convention on Cybercrime (Budapest Convention), November 23, 2001 (European Treaty Series No. 185).
37 The African Union Convention on Cyber Security and Personal Data Protection (Malabo Convention).
38 Ghana's Communications Minister Ursula Owusu-Ekuful disclosed that the government is working on a law to improve the country's cybersecurity environment. See Ibrahim (2018).
39 Discrimination Against Persons with Disabilities (Prohibition) Act, 2018. See Ewang (2009).
40 UN General Assembly, Convention on the Rights of Persons with Disabilities (CRPD): Resolution adopted by the General Assembly, January 24, 2007, A/RES/61/106.
41 The Long Title to the International Centre for Settlement of Investment Disputes (Enforcement of Awards) Act of 1967 reads "An Act to provide for the enforcement in Nigeria of an award by the International Centre for Settlement of Investment Disputes."

42 The United Nations Law of the Sea Convention is attached as a schedule to the Act. See art. 2 of the Act.
43 As amended by the 1992 Protocol, which widened the scope of the Convention to cover pollution damages in exclusive economic zones (EEZ).
44 The Long Title to the International Convention on Civil Liability for Oil Pollution Damage (Ratification and Enforcement) Act, CAP. 129 reads: "An Act to enable effect to be given in the Federal Republic of Nigeria to the International Convention on Civil Liability for Oil Pollution Damage 1969 as amended; and for related matters."
45 Article 1(3)(a) of the 2010 Kenyan Constitution delegates sovereign power to the parliaments and the legislative assemblies in the county governments. See, also, the Statutory Instruments Act, 2013 of Kenya.
46 2010 Constitution of Kenya, art. 124(1).
47 2010 Constitution of Kenya, art. 132. See, for example: Executive Order No. 3 of 20019 www.theelephant.info/documents/executive-order-no-3-of-2019-presidential-action-reorganization-of-the-government-of-kenya/.
48 §201 of the Local Government Act of Kenya (Ch. 265). Revised edition 2010 (1998).
49 See §38 of County Assemblies Powers and Privileges Act (No. 6 of 2017) (Kenya).
50 It is recognized by §3(2) of the Judicature Act (Cap 8 Laws of Kenya).
51 2010 Constitution of Kenya, art. 24(4), 45(4a, b), and 170; Kadhis Court Act of 1967.
52 2010 Constitution of Kenya, art. 45(4a, b); Hindu Marriage and Divorce Act (Cap 157 Laws of Kenya); and the Law of Succession Act (Cap 160 Laws of Kenya).
53 1992 Constitution of Ghana, arts 11(7); 58(5); 63(2); 64(3); 65; 69(4&8); 112(1); 124(5); 157(2); 158(2); 159; 161(c); 167(d); 187(10); 189(3b); 197; 203(2); 208(2); 214(2); 230; 278; 281(2); and 295.
54 A legislative instrument is also known as a statutory instrument. See 1992 Constitution of Ghana, art. 58(5) and 11(7).
55 See 1992 Constitution of Ghana, art. 58(5) and §1 of Interpretation Act of Ghana 2009 (Act 792).
56 See 1992 Constitution of Ghana, art. 110.
57 Section 183 of the 2016 Local Governance Act of Ghana (Act 936).
58 See §§48, 66, 91, and 93 of the Civil Service Act of 1993 of Ghana (PNDCL 327).
59 See 1992 Constitution of Ghana, art. 11(7).
60 1992 Constitution of Ghana, §36(2) of the Transitional Provisions.
61 See §§54 and 55 of the 2008 Chieftaincy Act of Ghana (Act 759).
62 See 1992 Constitution of Ghana, art. 11(3) and §§54 and 55 of Court Act of 1993 of Ghana (Act 459).
63 Judge-made law is otherwise known as case law. See 1992 Constitution of Ghana, art. 11(2) and 126(2).
64 §10(2)(a) of the 2009 Interpretation Act of Ghana (Act 792). Also see, generally, §§1 and 10 of Ghana's Interpretation Act of 2009 (Act 792).
65 In the year 2000, BBC listeners in Africa voted Kwame Nkrumah the "Man of the Millennium." See BBC (2000).
66 See: Provisional National Defence Council (Establishment) Proclamation, 1981, and the Provisional National Defence Council (Establishment) Proclamation (Supplementary and Consequential Provisions) Law, 1982 (*P.N.D.C.L. 42*). By §36(1) of the Transitional Provision to the 1992 Constitution of Ghana, these laws have no effect presently.
67 1992 Constitution of Ghana, art. 2(4).
68 1992 Constitution of Ghana, art. 2(4).
69 1992 Constitution of Ghana, art. 2(5).
70 1992 Constitution of Ghana, art. 11.
71 1992 Constitution of Ghana, art. 131(4) and art. 273(6).
72 1992 Constitution of Ghana, art. 1(2).
73 This can be gleaned from art. 11(1)(b) and (c) of the 1992 Constitution of Ghana, where in order of hierarchy, enactments of Parliament take precedence over orders, rules, and regulations made by any person or authority under a power conferred by the Constitution.
74 The 2003 Constitution of the Republic of Rwanda (Rev. 2015).
75 Article 1(2) of the 1992 Constitution of Ghana states that "the Constitution shall be the supreme law of Ghana and any other law found to be inconsistent with any provision of this Constitution shall, to the extent of the inconsistency, be void."
76 1992 Constitution of Ghana, art. 3.

77 1992 Constitution of Ghana, art. 56.
78 1992 Constitution of Ghana, art. 144(7).
79 1992 Constitution of Ghana, art. 270(2).
80 This ruling was made by Peter Ala Adjetey when he was speaker. See Owusu-Aboagye (2015). See, also, FES (2011, 18), which stated: "While most bills are expected to come from the executive level, Members of Parliament can initiate legislation through "Private Members' bills." Although parliamentary rules of procedure allow for Members of Parliament (MPs) to initiate bills, MPs have "not exercised this right because of the lack of resources or expertise needed to draft legislation." However, art. 108 of the 1992 Constitution of Ghana prevents "Private Member's Bills, which in the opinion of the 'person presiding,' has financial obligations," and this prohibition was interpreted by former Speaker Peter Ala Adjetey to include all bills.
81 See Constitution of Rwanda, 2003, art. 88, with Amendments through 2015, which reads: "Initiation and amendment of laws is the right of every Deputy or the Government acting through the Cabinet. However, the Senate initiates the draft organic law determining the functioning of the Senate. The initiator of a draft law transmits it to the Speaker of the Chamber of Deputies." See also Power (2009).
82 See 1992 Constitution of Ghana, art. 106(2)(b).
83 Ghana's Parliamentary Select Committee on Constitutional, Legal and Parliamentary Affairs called for the input of Ghanaians in the anti-vigilantism offense bill, which was laid before parliament for consideration. See GhanaWeb (2019); see, also, Czapanskiy and Manjoo (2008).
84 Following pressure by a section of civil society and members of the public, Ghana's Speaker of Parliament directed the suspension of discussions on the controversial Plant Breeders' Bill for public consultation on the bill. See Mensah (2015).
85 The Parliament of Ghana postponed a stakeholder engagement to allow the public enough time to study the Vigilante Bill in order to get enough memoranda as possible from the public. The Chairman of Ghana's Parliament's Constitutional, Legal and Parliamentary Affairs Committee, Ben Abdallah, was quoted as saying: "We want to give the public enough time to study the Bill in order that we can get enough memoranda as possible, the Committee had to postpone the holding of the stakeholder engagement to a date which is yet to be fixed " Myjoyonline.com (2019).
86 This can be gleaned from art. 218(d)(iv) of the 1992 Constitution of Ghana, which provides that the functions of Ghana's Commission on Human Rights and Administrative Justice shall be "defined and prescribed by an Act of Parliament" and shall include the duty to take fitting action to call for the remedying, correction, and reversal of instances of human rights violations and breaches, by taking actions to restrain the enforcement of such legislation or regulation, or by challenging its legitimacy if the offending action or conduct is "sought to be justified by subordinate legislation or regulation," which is unreasonable or otherwise, *ultra vires.*
87 Statutory Instruments Act, 2013 (No. 23 of 2013).
88 National Housing Fund Act, Cap N 45, Laws of the Federation of Nigeria 2004.
89 The Rural District Councils Act of Zimbabwe [*Chapter 29:13*]; see §159.
90 Pursuant to §46(3) of the 1999 Federal Constitution of Nigeria.
91 The Exchange Control Act of Zimbabwe [Chapter 22:05].
92 See: §181 of the Local Governance Act of Ghana, 2016 (Act 936).
93 See: Article 174 (Objects of devolution) of the 2010 Kenyan Constitution.
94 See Nairobi City County Solid Waste Management Act, 2015 (No. 5 of 2015); Nairobi City County Regularization of Development Act, 2015, (No. 3 of 2015); Nairobi County Public Road Transport and Traffic Management Bill 2018; The Nairobi City County Outdoor Advertising & Signage Control & Regulation Bill, 2017; the Nairobi City County Public Open Spaces Use and Maintenance Bill, 2017.
95 See arts 178(d) and 180 of the 1995 Constitution of Uganda, as amended; §39 of the Local Government Act of Uganda, 1997 (Cap. 243).
96 See: §104 of Local Governance Act of Ghana, 2016, Act 936.
97 See Accra Metropolitan Assembly (AMA) (Business Operating Permit) ByLaws, 2017.
98 Accra Metropolitan Assembly 9AMA) (Business Operating Permit) ByLaws, 2017.
99 See AMA Profession, Business and Trade (Self-Employed) ByLaws, 2017].
100 1999 Constitution of the Federal Republic of Nigeria, §4(2).
101 1999 Constitution of the Federal Republic of Nigeria, §4(5).
102 See §§6(4); 40; 43; 44; 45; 60; 104; 156 of the 1996 Constitution of South Africa as amended.
103 See §§43(a) and 44 of the 1996 Constitution of South Africa as amended.

104 See §§43(b) and 104 of the 1996 Constitution of South Africa as amended.
105 See §104 and Sch. 4 to the 1996 Constitution of South Africa as amended.
106 See Sch. 4 to the 1996 Constitution of South Africa as amended.
107 See Sch. 5 to the 1996 Constitution of South Africa as amended.
108 See1992 Constitution of Ghana, art. 296.
109 5 U.S. (1 Cranch) 137 (1803).
110 *Marbury v. Madison* has been applied in the following Ghanaian cases: (1) *Amidu v. President Kufuor* [2001–2002] SCGLR 86, at 154–155; (2) *Brown v. A. G.* (Audit Service case) [2010] SCGLR 183, at 237; (3) *Appiah-Ofori v. A. G.* [2010] SCGLR 484, at 549; and a host of others.
111 See: *Raila Amolo Odinga and Stephen Kalonzo Musyoka v. The Independent Electoral and Boundaries Commission and Chairperson, Independent Electoral and Boundaries Commission, and H. E. Uhuru Muigai Kenyatta*; *and Dr. Ekuru Aukot and Prof. Michael Wainaina, interested parties; and the Attorney General, 1st Amicus Curiae and the Law Society of Kenya, 2nd Amicus Curiae* (Presidential Petition No.1 of 2017).
112 National Media Commission (Content Standards) Regulations, 2015 (LI 2224).
113 *Ghana Independent Broadcasters Association v. Attorney General and The National Media Commission* (J1/4/2016) [2017] GHASC 45 (November 3, 2017). Article 173 of the 1992 Constitution of Ghana reads: "Subject to article 167 of this Constitution, the National Media Commission shall not exercise any control or direction over the professional functions of a person engaged in the production of newspapers or other means of communication."
114 See art. II (enumerates the purposes of the Organization of African Unity, now African Union, which includes defense and security); and art. XX(3) of the Organisation of Africa Union(OAU) Charter, which establishes the Defence Commission.
115 1960 Constitution of Ghana, Pt 1, art. 2. The constitutions of Guinea, Tunisia, Mali, and the United Arab Republic. (a political union of Egypt and Syria founded in 1958, and sovereign state 1958 to 1971) in the 1950's also contained similar provisions. See Nkrumah (1963, 86).
116 Ujamaa is a Swahili word which means "extended family." Ujamaa was a concept that formed the basis of social and economic policies developed by Julius Nyerere in Tanzania, after it gained independence from Britain in 1961.
117 Article 3 (2)(d)(i); and art. 35 of the ECOWAS Revised Treaty.
118 Article 37 of the ECOWAS Revised Treaty.
119 Articles 7(2) and 8(1) of the ECOWAS Revised Treaty.
120 Established by art. 13 of the Revised Treaty; Protocol A/P.2/8/94 Relating to the Community Parliament.
121 Article 15(4) of the ECOWAS Revised Treaty. Also note that the Court gained "jurisdiction to determine cases of violation of human rights that occur in any Member State" in 2005, with the implementation of Supplementary Protocol A/SP.1/01/05 Relating to the Community Court of Justice. The member states include: Nigeria, Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Senegal, Sierra Leone, and Togo.
122 See: art. 10 of the ECOWAS Revised Treaty.
123 Protocol A/P.1/5/79
124 See: arts 3 and 5(1) of the Protocol A/P.1/5/79 Relating to Free Movement of Persons, Residence and Establishment.
125 The Pan-African Parliament was established by art. 17(1) of the Constitutive Act of the African Union. See also: Protocol to the Constitutive Act of the African Union Relating to the Pan-African-Parliament.
126 The Court was established by virtue of art. 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, (the Protocol), which was adopted by member states of the then Organization of African Unity (OAU) in Ouagadougou, Burkina Faso, in June 1998. The Protocol came into force on January 25, 2004.
127 The concept of customary international law entails two elements, namely state practice and *opinion juris*. State practice is how states behave in practice, which forms the basis of customary law. Evidence of what a state does can be obtained from numerous sources. Examples include a government's administrative acts, legislation[s], decisions of courts, and activities on the international stage. For example, in treaty-making: *opinio juris* is a belief that a state activity is legally obligatory, and this forms the factor that turns the usage into a custom and renders it part of the rules of international law.
128 *Jus cogens*, also known as peremptory norms, refers to certain fundamental principles of international law of which no international legal personality or state is permitted to set aside, violate, or derogate

from. *Jus cogens* has been captured under art. 53 of the Vienna Convention on the Law of Treaties (VCLT), concluded at Vienna on May 23, 1969, as follows: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Article 53 is captioned: *Treaties conflicting with a peremptory norm of general international law ("jus cogens.")*. Examples of *jus cogens* norms include prohibitions against genocide, human trafficking, and crimes against humanity.

129 The then Organization of African Unity (OAU) passed a resolution calling on member states, and the international community, to boycott South African goods and cease any relations with it. See OAU (1964).

130 Charter of the Commonwealth, (signed by Her Majesty Queen Elizabeth II, Head of the Commonwealth, Commonwealth Day, 2013). https://thecommonwealth.org/history-of-the-commonwealth/commonwealth-charter-signed-her-majesty-queen-elizabeth-ii-head.

131 Treaty on Cooperation among the State Members of the Commonwealth of Independent States in Combating Terrorism, 1999. Done at Minsk on June 4, 1999. Entry into force in accordance with art. 22. Depositary: Executive Committee of the Commonwealth of Independent States. https://treaties.un.org/doc/db/Terrorism/csi-english.pdf.

See, generally: Lester (1963).

132 Otumfuo Osei Tutu II

133 1992 Constitution of Ghana, art. 31.

134 The circular communicating the declaration of holiday was issued by the Municipal Director of Education of the Mamprugu Municipality at the request of the Overload of the Mamprugu traditional area. The circular was dated September 17, 2018 (on file with author).

135 The material for this subsection is mainly taken from Raymond A. Atuguba, *Customary Law Revivalism: Seven Phases in the Evolution of Customary Law in Africa*, forthcoming.

136 See Ghana's Head of Family (Accountability) Act, 1985 (PNDCL 114).

137 See Courts Act of Ghana, 1993 (Act 459).

138 In Ghana, in the case of *Davis v. Randell* [1963] 1 GLR 382, the marriage of a Sierra Leonean under Fanti customary law was recognized by the Ghanaian courts as valid. In South Africa, customary marriages are recognized as valid marriages, according to the Recognition of Customary Marriages of 1998 Act No 120 of 1988.

139 See §54(1) of the Chieftaincy Act of Ghana, 2008 (Act 759).

140 See §54(2) of the Chieftaincy Act of Ghana, 2008 (Act 759).

141 See §54(3) of the Chieftaincy Act of Ghana, 2008 (Act 759).

142 See §55(1) of the Chieftaincy Act of Ghana, 2008 (Act 759).

143 See §16(3) of the 2013 Constitution of Zimbabwe.

144 See §2(1) of the 2013 Constitution of Zimbabwe.

145 See Constitution of Ghana, art. 11(2).

146 By virtue of the 1992 Constitution of Ghana, art. 1(2).

147 1999 Constitution of the Federal Republic of Nigeria, §21.

148 1995 Ugandan Constitution (As amended in 2005), Objective 24

149 2010 Kenyan Constitution, art. 2(4).

150 See the case of *Virginia Edith Wamboi Otieno v. Joash Ochieng Ougo & Another* (1987) (High Court at Nairobi—Civil Case No. 4873 of 1986).

151 See Ndulo (2011). In the abstract of the publication, the author states, "*The guiding principle should be that customary law is living law and cannot therefore be static. It must be interpreted to take account of the lived experiences of the people it serves.*"

152 1992 Constitution of Ghana, art. 270(1).

153 1992 Constitution of Ghana, art. 270(1).

154 *Kwakye v, Tuba and Others* [1961] GLR (Pt. II) 720–725.

155 *Brimah and Cosbold v. Asana* [1962] 1 GLR 118–120.

156 See, also, Eliade (1959), *The Sacred and the Profane: The Nature Of Religion*.

157 2010 Constitution of Kenya, art. 2(4).

158 See §2 of Chiefs' Act of Kenya, CAP 128 [Rev. 2012]. See, also, Opera News Kenya (2020): "Qualifications of Chiefs And Assistant Chiefs in Kenya and Their Benefits."

159 See §10 of Chiefs' Act of Kenya, CAP 128 [Rev. 2012].
160 See Cameroon Chieftaincy Law contained in Decree No. 77/245 of July 15, 1977.
161 Cameroon Chieftaincy Law contained in Decree No 77/245 of July 15, 1977.
162 §63(e) of the Chieftaincy Act of 2008 of Ghana (Act 759).
163 §63(d) of the Chieftaincy Act was struck down by Ghana's Supreme Court as unconstitutional in the case of *Nana Adjei Ampofo v. Attorney-General* (J1/8/2008) [2011] GHASC 54 (July 20, 2011).

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