LEGAL SYNCRETISM:

A THEORETICAL FRAMEWORK FOR UNDERSTANDING AFRICAN CONSTITUTIONALISM

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This dissertation contains no material accepted by any other institution for any other degree and no material previously written and/or published by another person without appropriate acknowledgement.

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s/Berihun Adugna Gebeye

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This dissertation is dedicated to my mother Weyzero Fkrie Kassie Tefalet and my father Ato Adugna Gebeye Gelie. I also dedicate this dissertation to my sisters and brothers.

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ABSTRACT

This dissertation provides a theoretical framework to better understand and explain African constitutionalism in its normative configurations and empirical manifestations. Prior studies mainly approach African constitutionalism through either legal centralism or legal pluralism. While the former understands and explains African constitutionalism from the perspective of the state, the latter sees it from the lens of the state and society. On the one side of the spectrum, the legal centralist approach fails to account to the empirical realities of the state and ignores the role and function of indigenous laws in the *constitution* and operation of the African state. On the other side of the spectrum, the legal pluralist approach misinterprets the nature of the African state and its configuration with the society. By situating the phenomenology of African constitutionalism in the experiences, interactions, and contestations of power and governance in precolonial, colonial, and postcolonial times, and by building on religious studies and anthropology, this dissertation introduces legal syncretism as a theoretical framework for a better understanding of African constitutionalism.

Legal syncretism captures and explains the transformation of African constitutionalism from precolonial times to the present, and the consequent constitutional designs and practices in theoretically defensible and practically sound ways. On the one hand, legal syncretism explains how precolonial constitutionalism in Africa came to an end with the entry of international law and colonial laws in the late nineteenth century, how colonial constitutionalism reconfigured and transformed precolonial constitutional rules and practices, and how postcolonial constitutionalism grapples with the continuous affirmation and, at the same time, negation of liberal constitutionalism. On the other hand, legal syncretism offers a novel theoretical framework to look at the nature of the African state, its

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vertical and horizontal government organizations, and its conception of constitutional rights. Along with these constitutional developments and practices, legal syncretism presents the nature, travails, pathologies, and incremental successes of African constitutionalism in time and space more clearly. By taking federalism, the executive, and women's rights as themes of analysis and Nigeria, Ethiopia, and South Africa as comparative case studies, this dissertation tests and demonstrates how legal syncretism animates and permeates African constitutional designs and practices. By doing so, it shows the convergences and divergences between African constitutionalism and liberal constitutionalism. By transcending the impasse between legal centralism and legal pluralism, legal syncretism not only offers a better theoretical framework to understand the nature, identity, and manifestations of African constitutionalism, but it also provides some useful theoretical and practical insights for its assessment and improvement.

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INTRODUCTION

One of the major discussions on constitutions and constitutionalism in Africa revolves around two main approaches: legal centralism and legal pluralism. Legal centralists explain the idea and practice of constitutions and constitutionalism through the prism of liberal constitutionalism focusing on written constitutions. Their temporal starting point is the 1950s and 1960s where many African states got independence from colonial rule. Based on the legal centralists' account, the practice of limited government, protection of individual rights, and the rule of law, the performance of constitutionalism in Africa has been a tragic failure, at worst, and very disappointing, at best.[1]

In contrast, legal pluralists understand and explain constitutions and constitutionalism from two vantage points. The first is through the lens of the state and the second is through the lens of society. Inherent in this view is the bifurcation of the public sphere into the *civic public* that operates - or claims to operate- under the civil structures of the state created during colonialism, and the *primordial public*, which functions in accordance with indigenous custom since precolonial times.[2] Legal pluralists hold that these two publics operate under a different morality, rationality, and sense of justice. As a result, they posit that there are dual and parallel constitutional systems. For legal pluralists, this state of affairs not only distinguishes the

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[1] HWO Okoth-Ogendo, 'Constitutions without Constitutionalism: Reflections on an African Political Paradox' in Douglass Greenberg and others (eds), *Constitutionalism and Democracy: Transitions in the Contemporary World* (Oxford University Press 1993) 65–80. Okoth-Ogendo's 'Constitutions without Constitutionalism' is the classic legal centralist account of constitutions and constitutionalism in Africa.

[2] Peter P Ekeh, 'Colonialism and the Two Publics in Africa: A Theoretical Statement' (1975) 17 Comparative Studies in Society and History 91, 92–93. Ekeh's 'Two Publics' epitomize the legal pluralist approach of constitutions and constitutionalism in Africa.

practice of constitutionalism in Africa from the liberal constitutional systems of Western states, but it also makes the liberal constitutional project in Africa simply a chimera. While legal centralists turn to the universe of liberal constitutionalism to find a cure to the perennial ills of constitutionalism in Africa, legal pluralists see the solution in the historical and cultural milieu of Africans.

However, there is a paralysis of perspective in the legal centralist and legal pluralist approaches to constitutions and constitutionalism in Africa. As these approaches stand on different epistemological, historical, and legal accounts, it is difficult to understand constitutions and constitutionalism in their normative and empirical manifestations without choosing one over the other. As such, the legal centralist and legal pluralist impasse hinder the range of theoretically cogent and practically sound constitutional solutions to the problems of constitutional government in Africa. The solution for this paralysis in perspective, between legal centralism and legal pluralism, is to be found not in the emphatic support of one against the other, but rather in subjecting them to proper critical exposition and analysis. As both legal centralists and legal pluralists grapple with similar constitutional problems in similar constitutional spaces, problematizing them to attend to the constitutional realities helps to transcend the paralysis of perspective in constitutional thinking in Africa.

To do so, the main research question that guides my inquiry in this dissertation is how to better understand and explain African constitutionalism. In light of this, I ask and seek to answer: Why is a theoretical framework for understanding African constitutionalism necessary? How can this theoretical framework be developed? And how can this theoretical framework offer a better alternative to understand and explain African constitutionalism and how can it be useful to foster African constitutionalism? In this dissertation, African

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constitutionalism refers to a set of concepts, principles, and practices that are used to organize, limit, and enable government power in African states.[3] By locating the *phenomenology of African constitutionalism* in the experiences, interactions, and contestations of power and governance in precolonial, colonial, and postcolonial times, I present the transformation of African constitutionalism in time and space and the attendant constitutional designs and practices. By building on and simultaneously departing from the theoretical and practical insights of legal centralism and legal pluralism, I aim to rectify their pitfalls in a way that is attentive to the normative configurations and empirical manifestations of African constitutionalism.

Building on religious studies and anthropology, the central argument of this dissertation is that legal syncretism better captures and explains the transformation of African constitutionalism- from precolonial times to the present- and the attendant constitutional designs and practices- the nature and operation of the state along with its vertical and horizontal government structures and Bill of Rights. This dissertation advances the hypothesis that legal syncretism not only offers a theoretical framework to understand the nature, travails, pathologies, and incremental successes of African constitutionalism, but also provides useful insights for its health, improvement, and assessment. Legal syncretism for the purpose of this dissertation refers to *the process and the result of adoption, rejection, acceptance, invention, reconfiguration, and transformation of diverse and seemingly opposite legal rules, principles, and practices into a constitutional state as a result of imperial or colonial encounters.* The constitutional matrix that sets legal syncretism in motion is composed of international law, colonial laws, African indigenous laws, and liberal constitutional norms and practices.

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[3] See also Mark Tushnet, 'Varieties of Constitutionalism' (2016) 14 International Journal of Constitutional Law 1, 1-5. African constitutionalism can be one genre of regional constitutionalism like Latin American constitutionalism or East Asian constitutionalism.

To demonstrate how legal syncretism captures and explains the African constitutional designs and practices, this dissertation takes federalism, the Executive, and women's rights as test beds or themes of analysis. The choice of these themes is based on several considerations. The first reason is these themes represent the three major aspects of constitutional design and practice. Federalism is one form of vertical organization of government, while the Executive is the representative of government in the horizontal division of power, whereas women's rights are one element in the Bill of Rights. Hence, a study of these themes gives a comprehensive idea about constitutions and constitutionalism in Africa. The second reason is the relevance and capacity of these themes to highlight the nature, identity, and challenges of African constitutionalism. Although African countries are either less interested or have a general distaste for federalism, there is an increasing trend of or demand for decentralization which a focus on federalism illuminates.[4] The Executive is chosen as it is the most powerful government branch that has influenced the trajectory of African constitutionalism and making it part of this study offers some useful insights for the design and practice of limited government.[5] Women's rights are chosen as one theme of analysis as they are good intersection points in the design and practice of liberal constitutionalism and multiculturalism.[6] Furthermore, a focus on women's rights not only extends the discussion to human rights broadly conceived, but it also helps to look at the organization and philosophy of the judiciary.

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[4] See Charles M Fombad, 'Constitutional Entrenchment of Decentralization in Africa: An Overview of Trends and Tendencies' (2018) 62 Journal of African law 2, 175-199; Yonatan Fessha and Coel Kirkby, 'A Critical Survey of Subnational Autonomy in African States' (2008) 38 Publius: The Journal of Federalism 248, 248-271.
[5] See Oda van Cranenburgh, '"Big Men" Rule: Presidential Power, Regime Type and Democracy in 30 African Countries' (2008) 15 Democratization 952, 952-973.
[6] See for instance, Fareda Banda, *Women, Law and Human Rights: An African Perspective* (Hart Publishing 2005) 41–57.

This dissertation focuses on Nigeria, Ethiopia, and South Africa as comparative case studies to show how legal syncretism captures and explains federalism, the Executive, and women's rights. The choice of these case studies is because not only they represent the strikingly different African historical experiences, but they also share some similarities. While Nigeria had a colonial experience, Ethiopia did not, whereas South Africa had the unique experience of apartheid. Nonetheless, the Western imperial and colonial encounters played a critical role in the emergence of these countries in their present forms and textures. In this regard, as Western colonialism brought Nigeria and South Africa, it helped in the development of Ethiopia in its current territorial form.[7] Furthermore, these states are representative of the nature of ethnic, racial, religious, and regional diversities prevalent in sub-Saharan Africa that influence the design and practice of constitutionalism. In addition, while South Africa is a better example for the practice of constitutionalism in Africa, Nigeria and Ethiopia grapple with constitutionalism like most African countries.

Moreover, these states are suitable case studies to test the specific themes this dissertation examines. With respect to federalism, Nigeria, Ethiopia, and South Africa are the only established African federal countries. Regarding the Executive, Nigeria adopts the predominant type of presidential system in Africa, while Ethiopia follows the less preferred parliamentary system, whereas South Africa has a hybrid system. Related to women's rights, these case studies represent the constitutional treatments and practices of women's rights in many African countries. Hence, the striking differences and similarities in their constitutional histories, challenges, designs, and practices in addition to being representative of the African experiments of constitutionalism not only make Nigeria, Ethiopia, and South Africa good

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[7] Bahru Zewde, *A History of Modern Ethiopia, 1855-1991* (2nd ed, James Currey 2001) 111-147.

comparative case studies, but also demonstrate the theoretical fitness of legal syncretism to clearly account and explain African constitutionalism with its diversities and subtleties. In addition to these reasons and due to the author's linguistic limitations and the availability of literature, Francophone and Lusophone African countries are not included as case studies, although they are an integral part of the theoretical discussion of this dissertation.

As the study of constitutionalism cuts across disciplinary boundaries, this dissertation approaches constitutions and constitutionalism in Africa from multidisciplinary perspectives. The objective of deploying multidisciplinary perspectives and materials is to construct the idea of constitutions and constitutionalism in Africa in different time and space. This is particularly useful for the thesis of this dissertation as it situates *the phenomenology of African constitutionalism* within the dynamics of power and governance from precolonial times to the present. Although this dissertation is mainly a legal study and consequently uses methods and materials in the field of constitutional law, international law, and legal theory, it heavily draws from the field of political science, anthropology, sociology, religious studies, international relations, and history to understand the normative configurations and empirical manifestations of constitutions and constitutionalism. In particular, this dissertation develops legal syncretism- as a theoretical framework- from the notion of *syncretism* in religious studies and anthropology.

Furthermore, this dissertation is both comparative and theoretical. It is comparative, not only in the sense of using Nigeria, Ethiopia, and South Africa as case studies to test and demonstrate the theoretical framework of this dissertation, but also in its quest to include and interrogate the constitutional experiences of many African countries and Western liberal democracies to develop the theoretical framework itself. In this respect, it extensively uses the

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constitutional experiences of numerous African societies and countries and features the experiences of liberal constitutional democracies. The aim to develop a theoretical framework for understanding African constitutionalism is behind this broader comparative approach within and beyond Africa.[8] To this end, this dissertation relies on the analysis of primary sources such as relevant constitutions, international and national laws, and judicial and quasi-judicial decisions. The study is further supported by secondary sources such as published academic and research works in the above multidisciplinary fields related to the idea of constitutions and constitutionalism.

This dissertation has three main objectives. The first objective is to develop a theoretical framework for understanding African constitutionalism that transcends the impasse between legal centralism and legal pluralism. The second objective is to offer some useful practical insights and perspectives for the ongoing constitution-building processes-constitution-making, revisions, and amendments- in Africa. The third and final objective is to *present* African constitutionalism to the universe of comparative constitutional law and consequently set a comparative constitutional law research agenda, in general, and in the Global South, in particular. Following from these objectives, the significance of this dissertation lies in its contribution to the scholarship on (comparative) constitutional theory, constitutional sociology, constitutional identity, and constitution-building, in general, and in Africa, in particular.

In furtherance of these objectives and answering the research questions set out above, this dissertation is organized in six chapters. The first three chapters are theoretical, and their

[8] See also Masamichi Sasaki, 'Comparative Research' in Michael S Lewis-Beck, Alan Bryman and Tim Futing Liao (eds), *The SAGE Encyclopedia of Social Science Research Methods* (Sage Publications 2004) 152-153.

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main purpose is the development of a theoretical framework for understanding African constitutionalism. In this regard, Chapter One sets the basis for the development of the theoretical framework of this dissertation by showing why we should look beyond legal centralism and legal pluralism to understand and appreciate the complexities of African constitutionalism. Chapter Two introduces legal syncretism as a theoretical framework and assesses how *legal syncretism as a process* explains the transformation of African constitutionalism from precolonial times to the present. Chapter Three goes on to examine how *legal syncretism as a result* explains and captures the designs and practices of African constitutionalism with respect to the nature of the state, its vertical and horizontal organization of government, and the Bill of Rights.

The following three chapters are comparative case studies, which, on the one hand, aim to demonstrate the theoretical fitness of legal syncretism to capture and explain the selected themes, and, on the other hand, make a normative case on what the constitutional designs and practices should look like on these themes. Along these lines, Chapter Four, Chapter Five, and Chapter Six take respectively federalism, the Executive, and women's rights as themes of analysis and Nigeria, Ethiopia, and South Africa as comparative case studies. Before delving into the experiences of the case studies, these chapters first develop a conceptual framework of these themes to build a robust theoretical framework against which the case studies are evaluated. The conceptual frameworks on federalism, the Executive, and women's rights are important not only to show how legal syncretism animates their design and practice, but also to make a normative case on how they should figure in constitutional design in Africa. This dissertation concludes with how legal syncretism, more clearly, accounts to and explains the complexities of African constitutionalism, and how it offers

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novel theoretical and practical tools for the understanding, assessment, and improvement of African constitutionalism.

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CHAPTER ONE
IN SEARCH OF A THEORETICAL FRAMEWORK FOR UNDERSTANDING AFRICAN CONSTITUTIONALISM

1.1 Introduction

Constitutions assume a dual role of constraining and enabling political power for socio-economic and political transformation in Africa.[9] In this regard, a high premium is given to constitutions and constitutionalism to ensure, among other things, the practice of multi-party democracy, rule of law, human rights, and development.[10] Even if many agree on the importance and transformative potential of constitutions and constitutionalism for Africa's multi-faceted challenges, there is no similar or uniform account of constitutions and constitutionalism in Africa. This has to do mainly with the "African triple heritage" (that is informed by African indigeneity, the spread of Islam, and European colonialism)[11] and the hegemonic and universalization of liberal constitutionalism.[12] The attendant historical, epistemological, methodological, and ideological accounts give rise to plural and sometimes competing understandings of constitutions and constitutionalism in Africa.[13]

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[9] NW Barber, *The Principles of Constitutionalism* (Oxford University Press 2018) 9–10; Upendra Baxi, 'Preliminary Notes on Transformative Constitutionalism' in Oscar Vilhena Vieira, Upendra Baxi and Frans Viljoen (eds), *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (Pretoria University Law Press 2013) 19–47.
[10] H Kwasi Prempeh, 'Africa's "Constitutionalism Revival": False Start or New Dawn?' (2007) 5 International Journal of Constitutional Law 469, 485.
[11] See Ali A Mazrui, *The Africans: A Triple Heritage* (Little, Brown and Company 1986).
[12] Francis M. Deng, *Identity, Diversity, and Constitutionalism in Africa* (United States Institute of Peace Press 2008) 12–13.
[13] See also Abdullahi Ahmed An-Na'im, *African Constitutionalism and the Role of Islam* (University of Pennsylvania Press 2006) 20; Mahmood Mamdani, 'The Social Basis of Constitutionalism in Africa' (1990) 28 The Journal of Modern African Studies 359, 363–366.

For many, constitutions and constitutionalism in Africa are a post-colonial phenomenon. The independence constitutions of the 1950s and 1960s are the starting point for Africa's constitutional analysis.[14] The essential features of these constitutions are the incorporation of liberal constitutional ideals such as limited government and the Bill of Rights in a written constitution. Despite passing through numerous waves of constitution-making since independence, the proclaimed aims of constitutions in Africa are to entrench and practice liberal constitutionalism.[15] Even if there are several challenges for the practical enforcement of constitutions, ranging from their alleged fitness to the African context to the commitment of African governments to live by their rules, they are presented as the supreme source of political power and authority in African states.[16]

For others, however, as constitutions and constitutionalism are traced back to the pre-colonial times, there are two constitutional systems in post-colonial Africa. While the first is a constitutional system based on a written constitution, the second is a constitutional system based on an indigenous custom. This is because, the argument goes, there are "two publics" in Africa.[17] The first public is a "civic public" created by Europeans in their colonization of Africa, which operates- or claims to operate- under a Western type constitutional system. Whereas the second is a "primordial public" that survives colonialism and operates under the logic and morality of indigenous custom. Hence, unlike the West, it is posited that there are

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[14] Charles M Fombad, 'The Evolution of Modern African Constitutions: A Retrospective Perspective' in Charles M Fombad (eds), *Separation of Powers in African Constitutionalism* (Oxford University Press 2016) 14.
[15] See Charles Manga Fombad, 'Constitution-Building in Africa: The Never-Ending Story of the Making, Unmaking and Remaking of Constitutions' (2014) 13 African and Asian Studies 429, 429-451.
[16] See Okoth-Ogendo (n 1) 65-80; Charles Manga Fombad, 'Constitutional Reforms and Constitutionalism in Africa: Reflections on Some Current Challenges and Future Prospects' (2011) 59 Buff L Rev 1007, 1020–1035.
[17] See Ekeh (n 2) 92-93; Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton University Press 1996) 16-18; Wale Adebanwi, 'Africa's "Two Publics": Colonialism and Governmentality' (2017) 34 Theory, Culture & Society 65, 74-77.

two parallel constitutional systems in Africa with a different morality, rationality, and sense of justice.

In order to foster constitutionalism and consolidate its dividends, it is necessary to appreciate the nature, identity, and contours of constitutionalism in Africa. To this end, one should address the singularity or the duality of the constitutional order, the relationship between the written constitutional system and the indigenous customary order, and their overall interaction and impact on the system of constitutional government. These require a theoretical framework that captures and explains the idea of constitution and constitutionalism in Africa in different time and space. The objective of this chapter, therefore, is to justify the necessity of having a theoretical framework for constitutionalism in Africa and to examine the two accounts of constitutionalism outlined above. After providing reasons for a theoretical framework of constitutionalism in Africa, this chapter proceeds to explore theoretical frameworks of law and their relevance to constitutional law. Legal centralism and legal pluralism are identified as theoretical frameworks of law that have a potential relevance for constitutionalism in Africa. After a concise presentation of legal centralism and legal pluralism, this chapter examines their potential and limits as a theoretical framework of constitutionalism in Africa.

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1.2 Why We Need a Theoretical Framework for Understanding African Constitutionalism

With few exceptions, the Westphalian state was imported to the African continent at the end of the 19th century with European colonialism. While the colonial state in Africa had brought Western law as a technology of governance, it neither faced a law-less society nor did it totally

erase the laws of the pre-existing societies.[18] Before the importation of Western laws, customary or indigenous laws had been performing constitutionalist functions ranging from the exercise of political authority to the protection of individual rights in pre-colonial societies in Africa.[19] Officially, with the advent of colonialism, these customary laws were subordinated to the imported laws. Similarly, after independence, customary laws have been applicable within the limits of the constitutional framework. Nonetheless, the interaction between laws that emanate from the state – both colonial and post-colonial - and from the society is not clear as its official proclamation.[20]

Even if the post-colonial written constitutions are declared as supreme legal codes within states, they have been unable to broadcast their institutions and laws throughout the entire territory, as a matter of fact.[21] In much of sub-Saharan Africa, constitutional rules and institutions are mainly applicable, when they are applicable, at the center or in cities and towns. At the same time, although the application of customary laws is limited in constitutions, as a matter of fact, they regulate the socio-economic and political life of much of the population in rural and pastoral areas.[22] Due to this different application of constitutions and customary laws, some argue that the post-colonial states are bifurcated states operating under the realm of both the modern constitutional systems and the customary

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[18] See T Olawale Elias, *The Nature of African Customary Law* (Manchester University Press 1956).
[19] M Fortes and EE Evans-Pritchard, 'Introduction' in M Fortes and EE Evans-Pritchard (eds), *African Political Systems* (Oxford University Press 1940) 12–14.
[20] Olaf Zenker and Markus Virgil Hoehne, 'Processing the Paradox: When the State has to deal with customary law' in Olaf Zenker and Markus Virgil Hoehne (eds), *The State and the Paradox of Customary Law in Africa* (Routledge 2018) 1-30.
[21] See also Jeffrey Herbst, *States and Power in Africa: Comparative Lessons in Authority and Control* (Princeton University Press 2000) 11–13.
[22] Jeanmarie Fenrich, Paolo Galizzi and Tracy E Higgins, 'Introduction' in Jeanmarie Fenrich, Paolo Galizzi and Tracy E Higgins (eds), *The Future of African Customary Law* (Cambridge University Press 2011) 1–2.

or indigenous constitutional systems.[23] Consequently, as noted in the Introduction, it is contended that two parallel constitutional systems co-exist in regulating the "two publics" in post-colonial Africa.[24]

The relationship between the "written based constitutional systems" and the "custom based constitutional systems" is often characterized in binaries as official/unofficial, formal/informal, state/society, and modern/traditional respectively.[25] Indeed, the relationship between the modern constitutional systems and the customary or indigenous constitutional systems in post-colonial Africa is much more complex and transcends the above binaries.[26] The discrepancy between the proclamation of constitutional monopoly and actual practice,[27] on the one hand, and the vitality of customary or indigenous systems as sources of political power and rights protection,[28] on the other, necessitate a clearer account of constitutions and constitutionalism in post-colonial Africa.

This is because the constitutional experience of post-colonial Africa begs more questions that cast more doubts to what constitutions and constitutionalism mean. For instance, how do we understand and conceive constitutions and constitutionalism in Africa

[23] See Mamdani (n 17) 16-18; Lungisile Ntsebeza, *Democracy Compromised: Chiefs and the Politics of the Land in South Africa* (Brill 2005) 295–299.
[24] See also Bruce Baker, 'Justice and Security Architecture in Africa: The Plans, The Bricks, The Purse and The Builder' (2011) 43 The Journal of Legal Pluralism and Unofficial Law 25, 27. Baker further states that the customary justice systems are the most efficient and more widely used than the constitutional based justice systems.
[25] Carolyn Logan, 'Traditional Leaders in Modern Africa: Can Democracy and the Chief Co-Exist?' Afrobarometer Working Papers 35 Working Paper No 93 <http://afrobarometerorg/sites/default/files/publications/Working%20paper/AfropaperNo93pdf> accessed 23 August 2018.
[26] See Kate Baldwin, *The Paradox of Traditional Chiefs in Democratic Africa* (Cambridge University Press 2015) 6-13; Christian Lund, 'Twilight Institutions: Public Authority and Local Politics in Africa' (2006) 37 Development & Change 685.
[27] Herbst (n 21) 21–23.
[28] Pierre Englebert, 'Patterns and Theories of Traditional Resurgence in Tropical Africa' (2002) 118 Mondes en développement 51.

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in different time and space? Are there single or plural constitutional systems in post-colonial Africa? How are customary or indigenous systems related to constitutional government? And what role do they play in post-colonial Africa? For this purpose, a theoretical framework that addresses these questions and that contributes towards the consolidation of constitutional government in Africa becomes necessary. It goes without saying that a clearer account of constitutions and constitutionalism is helpful to identify the pathologies of constitutional government and to offer some useful diagnostic prescriptions for its health and improvement.

Furthermore, this dissertation builds on reasons for a theoretical study of constitutions and constitutionalism. In this respect, Richard Fallon notes that both descriptive and prescriptive constitutional theory should or claim to advance rule of law, democracy, and substantive justice that protects individual rights.[29] Despite the variations in the meanings they attach or in the ways they claim to advance, rule of law, democracy, and respect for individual rights are the main justifications for constitutional studies. The quest for a theoretical framework of constitutionalism in Africa is ultimately related to advancing the rule of law, promoting democracy, and protecting basic individual rights, for these depend on a clearer account of constitutions and their surrounding operating systems.

1.3 Theoretical Frameworks of Law and their Relevance to Constitutional Law

Law has been understood in diverse ways by many great thinkers.[30] One fundamental element in the description of law is its relationship with the state. Legal theorists in the legal positivism school hold that law is fundamentally tied to the state. For instance, John Austin defines law

[29] Richard H Fallon, 'How to Choose a Constitutional Theory' (1999) 87 California Law Review 535, 539.
[30] HLA Hart, *The Concept of Law* (2nd ed, Oxford University Press 1994) 1–2.

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as "a general command of a sovereign addressed to his subjects."[31] H.L.A. Hart, in contrast with Austin, considers law as "a union of primary and secondary rules."[32] Neil MacCormick, departing from Hart's system of rules, defines law as an "institutional normative order."[33] Scott Shapiro, by considering laws as plans, asserts that law is "a self- certifying compulsory planning organization whose aim is to solve those moral problems that cannot be solved, or solved as well, through alternative forms of social ordering."[34] Even if these legal theorists approach law differently, they consider law's existence, normativity, and force from the perspective of the state. This understanding of law is dubbed as legal centralism as it situates law within the centralized, singular, and supreme legal order of the state.[35]

However, others, - legal pluralists, legal anthropologists, and law and society scholars- conceive law independently of or unlimited by the state. They consider the state as one among many sources of law.[36] For example, John Griffiths, in his influential article - "What is legal pluralism? - defines law as "the self-regulation of the semi-autonomous social field."[37] Boaventura de Sousa Santos, seeing law from a post-modern perspective, defines law as "a body of regularized procedures and normative standards, considered justiciable in any group, which contributes to the creation and prevention of disputes, and to their settlement through an argumentative discourse, coupled with the threat of force."[38] Situating law from a global

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[31] Wilfrid E Rumble (eds), *John Austin: The Province of Jurisprudence Determined* (Cambridge University Press 1995) XV & 18; Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System* (2nd ed, Oxford University Press 1980) 4.
[32] Hart (n 30) 79.
[33] Neil MacCormick, *Institutions of Law: An Essay in Legal Theory* (Oxford University Press 2007) 1.
[34] Scott J Shapiro, *Legality* (Harvard University Press 2013) 225.
[35] John Griffiths, 'What Is Legal Pluralism?' (1986) 24 Journal of Legal Pluralism and Unofficial Law 1, 3.
[36] For instance, see DJ Galligan, *Law in Modern Society* (Oxford University Press 2007) 162.
[37] Griffiths (n 35) 38.
[38] Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* (Cambridge University Press 2002) 428–429.

perspective, William Twining conceives law "[…] as a species of institutionalised social practice that is oriented to ordering relations between subjects at one or more levels of relations and of ordering."[39] Unhappy with these essentialist definitions or conceptions of law,[40] Brian Z. Tamanaha contends that law is "[…] whatever social groups conventionally attach the label "law" to."[41] Despite their differences in their definition or conceptualization of law, these jurists unite on the plural sources of law. They posit that law is neither the exclusive domain of the state nor is non-state law inferior to state law. This description of law is usually called legal pluralism as it ascribes plural sources for law.

Even if legal centralism and legal pluralism are broad descriptive frameworks directed to understand and explicate the identity, nature, source, and application of law generally, they have a constitutional relevance. This is due to the fact that they deal with how a legal order is constituted and structured and how it functions. For legal centralists, there is either a supreme written constitution or a master rule in any legal system that ultimately determines the legality and validity of laws in that legal system. For instance, consider Hans Kelsen and Hart. Kelsen in his *General Theory of Law and State* puts the constitution at the top of the legal order.[42] As the highest law, Kelsen posits, every other law should conform to the constitution or else it will be deemed null and void.[43] To this end, Kelsen introduced the idea of a special constitutional court that is in charge of constitutional review in a centralized manner.[44] Hart

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[39] William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge University Press 2009) 117.
[40] See Brian Z Tamanha, 'A Non-Essentialist Version of Legal Pluralism' (2000) 27 Journal of Law and Society 296.
[41] Brian Z Tamanaha, *A Realistic Theory of Law* (Cambridge University Press 2017) 194.
[42] Hans Kelsen, *General Theory of Law and State* (Anders Wedberg tr, Harvard University Press 1945) 124.
[43] ibid 125–128.
[44] See Georg Schmitz, 'The Constitutional Court of the Republic of Austria 1918–1920' (2003) 16 Ratio Juris 240.

in his *The Concept of Law* introduces the idea of the rule of recognition as an ultimate and master meta rule in any legal system.[45] Hart's rule of recognition has a constitutional relevance, as it is the rule that provides the supreme and ultimate criterion for validity and legality of rules in a legal system.[46] To give an example, an act of parliament in the United Kingdom and the amendment clause in the United States Constitution[47] are considered as a rule of recognition.[48] In contrast, legal pluralists contend that multiple legal orders can co-exist in a society or a territory independently.[49] Consequently, they advance that there is no superior law that settles conflicts between or among legal orders in society as each legal order has a different source of legality and validity.[50]

As the idea of constitutions and constitutionalism in Africa is discussed within the prism of the written constitutional systems and the custom based constitutional systems, as noted in the previous section, applying legal centralism and legal pluralism to the constitutional phenomenon of Africa is helpful to problematize and clarify the idea of constitutions and constitutionalism. In order to deploy them as theoretical frameworks for the constitutional experience in Africa, the following sections present a concise account of legal centralism and legal pluralism.

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[45] Hart (n 30) 100–103.
[46] ibid 103.
[47] United States Constitution 1789, Article V.
[48] Hart (n 30) 106; Kent Greenawalt, 'The Rule of Recognition and the Constitution' in Matthew Adler and Kenneth Einar Himma (eds), *The Rule of Recognition and the US Constitution* (Oxford University Press 2009) 11–16.
[49] Griffiths (n 35) 5–7; Galligan (n 36) 162–163.
[50] NW Barber, *The Constitutional State* (Oxford University Press 2012) 147–148.

1.4 Legal Centralism

Legal centralism is related to and associated with the development of the modern state. The state as a historically contingent entity claims primacy over any other entity within it. Regardless of differences in the development of the state across the world, ones they came into being, states project a legal order that is supreme and universal within their jurisdiction. Consequently, state institutions and their officials advance the supreme and universal power of the state. And scholars and philosophers theorize this phenomenon in a systematic manner. Legal centralism is the result of the projection of *state law* as a singular legal order by the state as a manifestation and practice of sovereignty, on the one hand, and the consideration of *law* as the sole business and domain of the state by legal scholars and philosophers in their scientific study of law. In order to understand the fundamentals of legal centralism, this section explores the notion of the state, how it projects its legal order as supreme and universal within its domain, and how scholars and philosophers, in particular, legal scientists, posit and advance the idea that the state is the only source of law and legality.

The state externally immune -from interference- and internally autonomous -in its course of action- emerges after the 1648 Treaty of Westphalia. Even if the Westphalian state is particular to Europe, it has become the universal template for a state.[51] From a legal perspective, the idea of the state can be seen from international law and constitutional law. For the purpose of international law,[52] the state should possess a permanent population, a defined territory, a government, and a capacity to enter into relations with other states to

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[51] Martin van Creveld, *The Rise and Decline of the State* (Cambridge University Press 1999) 263–335; explaining how the idea of the state spread from few Western European states to Eastern Europe, Latin America, Asia, and Africa.
[52] James R Crawford, *The Creation of States in International Law* (2nd ed, Oxford University Press 2007) 45.

assume rights and duties as such.[53] The rich body of international law scholarship takes these criteria's of statehood into account in identifying entities as states for the purpose of the subject. For instance, Antonio Cassese,[54] Malcolm Shaw,[55] and Ian Brownlie[56] write their treaties in international law by taking these essential requirements of statehood into consideration. For Cassese, states need to have (1) "a central structure capable of exercising effective control over a human community living in a given territory;" (2) "a territory which does not belong, or no longer belongs, to any other sovereign state;" and (3) "effective possession of, and control over, a territory."[57] By the same token, Shaw discusses the notion of the state within this legal criteria's and interrogates it with the international law practice.[58] Similarly, Brownlie considers the existence of "population, defined territory, government and independence" as the legal criteria's for statehood.[59] In spite of new developments in international law that challenge the Westphalian idea of the state, international law still accords states external protection through the recognition of sovereignty and internal autonomy through the recognition of the right to self-determination.[60]

Constitutional law gives substance to the international law conception of statehood. That it defines the state's population, territorial limit, and form of government, and it proclaims the sovereign power of the state.[61] By providing the institutional architecture, the systems of operation and interaction, the constitution gives the state not only its own form

[53] Montevideo Convention on the Rights and Duties of States 1933, article 1.
[54] Antonio Cassese, *International Law* (2nd ed, Oxford University Press 2005) 71–80.
[55] Malcolm N Shaw, *International Law* (8th ed, Cambridge University Press 2017) 155–163.
[56] Ian Brownlie, *Principles of Public International Law* (7th ed, Oxford University Press 2008) 69–83.
[57] Cassese (n 54) 73.
[58] Shaw (n 55) 155–163.
[59] Brownlie (n 56) 70–71.
[60] See for instance, Jean L Cohen, *Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism* (Cambridge University Press 2012) 1–8; 76-79.
[61] Barber (n 50) 17–25.

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and texture, but also confers the unity of authority and power in the state.[62] Fundamentally, in its classic European context, the constitution constitutes or establishes the state.[63] By its act of *constitution* of the state, the constitution – both written and unwritten – enables the state to exercise its sovereign power and disables it from exercising the same by introducing some limitations.[64] Indeed, this constitutional state is a later development or progression of the Westphalian state in the late eighteenth and nineteenth centuries associated with the French and American revolutions.[65] At the present century, despite variations in form, substance and practice, states either operate or claim to operate under their own supreme constitutional systems. Under these systems, constitutional law proclaims and claims the supreme authority and power of the state in its internal actions and external relations.

In addition to these self-projections and claims of the state, scholars and philosophers of social,[66] political,[67] and legal theory[68] advance the grander claims of the state. Max Weber offered the most influential account of the state in this respect. Weber posited that "[a] compulsory political association with continuous organization […] will be called a 'state' if and in so far as its administrative staff successfully upholds a claim to the monopoly of the legitimate use of physical force in the enforcement of its order."[69] While the international law

[62] Gianfranco Poggi, *The Development of the Modern State: A Sociological Introduction* (Stanford University Press 1978) 92–93; Andrew Vincent, *Theories of the State* (Wiley-Blackwell 1991) 118–119.
[63] Olivier Beaud, 'Conceptions of the State' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 273–274.
[64] See for instance András Sajó and Renáta Uitz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (Oxford University Press 2017) 22–23.
[65] Vincent (n 62) 96–98; Ernst-Wolfgang Böckenförde, *Constitutional and Political Theory: Selected Writings* (Mirjam Künkler and Tine Stein (eds), Oxford University Press 2017) 141-142.
[66] Poggi (n 62) 1.
[67] See Alessandro Passerin d'Entrèves, *The Notion of the State: An Introduction to Political Theory* (Oxford University Press 1967) 1; Christopher Pierson, *The Modern State* (3rd ed, Routledge 2011) 8–34.
[68] Kelsen (n 42) 207-243.
[69] Max Weber, *Theory of Social and Economic Organization* (Talcott Parsons and AM Henderson tr, Oxford University Press 1947) 154.

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and constitutional law account of the state is normative, the Weberian state is empirical and descriptive. As such, according to Weber, states have the *monopoly and legitimate use of violence* over their populations and within their territories. Building on Weber, social and political theorists assert that the state is not only a supreme entity but also the source of law and legality.[70] Peter Steinberger even goes to the extent that state is a "structure of judgment about what is true and what is not" more than a geographically defined piece of the earth or a collection of people or a pattern of social interactions.[71] In a similar vein, Alexander d'Entrèves observes that the state is an "omnipresent entity" that uses law in the exercise of its indefinite and irresistible power.[72] Common to the notion of the state in social and political theory is the supremacy of the state as an entity and the use of law as a legitimate use of force.

The supremacy of the state and *state law* get an unmatched expression in legal theory. Among the 20th century legal philosophers, Kelsen gave the most legalistic account of the state and positioned *state law* as the supreme arbiter in the operation and functioning of the state and others within it. Kelsen considers the state as "the personification of the legal order" or a "juristic expression of law."[73] While he agrees with the conventional elements of the state such as territory, population, and sovereignty to consider a certain entity as a state, he offers a legalistic account of these elements. For Kelsen, the territory of the state is "the territorial sphere of validity of the national legal order."[74] This means that the reach of the legal order determines the territory of the state. In a similar suit, he considers people of the state nothing but "the personal sphere of validity of the national legal order"[75] and sovereignty of the state

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[70] Vincent (n 62) 19–21.
[71] Peter J Steinberger, *The Idea of the State* (Cambridge University Press 2005) 13.
[72] d'Entrèves (n 67) 1.
[73] Kelsen (n 42) 181.
[74] ibid 207.
[75] ibid 233.

as "the validity and efficacy of the national legal order."[76] Thus, for Kelsen, the legal order identifies the people of a state and imposes its sovereign power over them. By doing so, the legal order constitutes or establishes a state with "one people, one territory, and one power."[77] As the Kelsenian legal order is a hierarchical structure of laws that place the Constitution at the top, he unifies the theory of law with the theory of the state.[78]

Unlike Kelsen, Hart takes the state for granted and offers a general concept of *state law.*[79] In order to understand the concept of law, Hart introduces the notion of "primary and secondary rules" which he considers are the "key to the science of jurisprudence."[80] He posits that law is "the union of primary and secondary rules," and thereby the legality of a rule rests on its fitness in these systems of rules.[81] Even if Hart stated from the outset that his theory of law is a theory of municipal law, he tried to apply his system of rules to primitive or pre-state societies.[82] He contends that while there are primary rules (duty imposing rules) in primitive societies, secondary rules (power conferring rules) are absent, and consequently, the concept of law is non-existent in these societies.[83] According to Hart's concept of law, law is the sole domain of the state and non-state or pre-state societies lack law so understood.

Even if Joseph Raz admits the parochial nature of legal theory and insists that legal theory should take into consideration the experiences of non-western societies if it has to be

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[76] ibid 255.
[77] ibid.
[78] See also Hans Kelsen, *Introduction to the Problems of Legal Theory: A Translation of the First Edition of the Reine Rechtslehre Or Pure Theory of Law* (Bonnie Litschewski Paulson and Stanley L Paulson tr, Clarendon Press 1996) 63–64.
[79] Hart (n 30) 3, 239–240.
[80] ibid 81.
[81] ibid 79.
[82] ibid 91–99.
[83] ibid 99.

universal,[84] his conception of law and legality is along the traditions of analytical legal theory like Kelsen and Hart. Although Raz approaches law differently than his predecessors and his theory of legal system has a much more currency to non-western contexts,[85] law and legality, in his conception, emanates from a hierarchical structure of legal systems of states and their institutions.[86] Raz holds that "[a] theory of law must be based, at least partly, on a theory of state, and … A theory of state, however, is partly based on a theory of law--the two are intimately interrelated."[87] According to Raz, without a theory of state, a theory of law is inconceivable. Hence, like Kelsen and Hart, the Razian account of law and legality is that of the state.[88]

Legal centralism, therefore, is a term introduced to describe the projection of *state law* as a supreme and singular legal order by the state and the consideration of *law* as the sole business and sphere of the state by legal philosophers. Indeed, as is evident from this discussion, there is neither consensus on what law is nor is there a uniform method to the study of law in legal centralism. The essential feature of legal centralism as discussed above and eloquently put by John Griffiths is the following:

> [l]aw is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions. To the extent that the other lesser normative orderings, such as the church, the family, the voluntary association and the economic organizations exist, they ought to be and in fact are hierarchically subordinate to the law and institutions of the state.[89]

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[84] Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford University Press 2010) 31–32, 41–46.
[85] Raz (n 31) 1-4.
[86] See also Keith Culver and Michael Giudice, *Legality's Borders: An Essay in General Jurisprudence* (Oxford University Press 2010) 62–64.
[87] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press 1979) 99.
[88] See also Roger Cotterrell, 'Transnational Communities and the Concept of Law' (2008) 21 Ratio Juris 1, 6–7.
[89] Griffiths (n 35) 3.

And it is in this sense that legal centralism has been used in this dissertation.

1.5 Legal Pluralism

Originally related to the phenomenon of law in colonial societies,[90] legal pluralism has been used to describe the nature of law and legality globally.[91] Posited in sharp contrast with legal centralism, legal pluralism claims that law is neither the exclusive domain of the state nor is *state law* superior to non-state law. It holds that law is essentially plural in its source and, consequently, multiple legal orders co-exist in any social field. Accordingly, it claims that the state is one among many sources of law. Legal pluralism has been primarily presented and advanced by sociologists, anthropologists, and lawyers working at the intersection of law, society, and state at the local and international levels. It should be clear from the outset that there is neither an agreement about *what law is* nor is there a consensus on *legal pluralism itself* in the legal pluralism scholarship. The aim of this section is not to settle the controversy of the 'legal' in legal pluralism or about legal pluralism itself. It is rather, as the previous section, to briefly present the idea of legal pluralism with the aim to test its descriptive potential for the purpose of this dissertation.

Legal pluralism is usually defined as "a situation in which two or more legal systems coexist in the same social field"[92] or "that state of affairs, for any social field, in which behavior pursuant to more than one legal order occurs."[93] This conception of legal pluralism

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[90] See MB Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (Clarendon Press 1975). Explaining how British, French, and Dutch laws interact with customary and religious laws in colonial and post-colonial Africa, Asia, and the Middle East.
[91] See Sally Engle Merry, 'Legal Pluralism' (1988) 22 Law & Society Review 869, 869; Brian Z Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2008) 30 Sydney L Rev 375.
[92] Merry (n 91) 870.
[93] Griffiths (n 35) 2.

rests in the intellectual works of the early sociology of law and legal anthropology scholarship. In the 1930s and 1940s, Georges Gurvitch argued that the positivist sources of law - statutes and judicial decisions - are not only secondary sources but also depend on other primary or material sources for their authority and effectiveness.[94] He contended that the monist claim of the state as a source of law is not only dogmatic but also socially unscientific.[95] As far as there are multiple of sources of law, Gurvitch observed, the state cannot claim the monopoly of legality.[96] Like Gurvitch, Eugen Ehrlich gave further impetus to the plural ethos and qualities of law through his idea of "living law" which he describes as "the law which dominates life itself though it has not been posited in legal propositions."[97]

In the 1970s, legal anthropologists produced a more advanced scholarship related to legal pluralism that informs its development. In this respect, most influential works include Leopold Pospisil's theory of legal levels,[98] Michael Garfield Smith's theory of corporations,[99] and Sally Falk Moore's theory of the semi-autonomous social field.[100] Building on the works of Adamson Hoebel, that primitive societies have laws which are distinct from but arise out of culture, rituals, magic and customary ordering,[101] Pospisil argues that "no society has a single consistent legal system."[102] He posits that every society has multiple legal levels which

[94] Georges Gurvitch, *L'Expérience juridique et la philosophie pluraliste du droit* (Éditions A Pedone, Librairie de la Cour d'Appel et de l'Ordre des Avocats 1935) 145 as cited by Gordon R Woodman, 'Ideological Combat and Social Observation: Recent Debate about Legal Pluralism' (1998) 30 The Journal of Legal Pluralism and Unofficial Law 21, 28–29.
[95] ibid.
[96] See for instance Georges Gurvitch, *Sociology of Law* (Kegan Paul, Trench, Trubner & Co Ltd 1947) 166–180.
[97] Eugen Ehrlich, *Fundamental Principles of the Sociology of Law [1936]* (Transaction Publishers 2009) 493.
[98] See Leopold J Pospisil, *Anthropology of Law: A Comparative Theory* (Harper & Row 1971).
[99] See MG Smith, *Corporations and Society: The Social Anthropology of Collective Action* (Transaction Publishers 1974).
[100] See Sally Falk Moore, 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (1973) 7 Law & Society Review 719, 719-746.
[101] See E Adamson Hoebel, *The Law of Primitive Man: A Study in Comparative Legal Dynamics* (Harvard University Press 1954) 28.
[102] Pospisil (n 98) 98.

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arise out of the existence of subgroups, such as family, lineage, community, and political confederacy that have their own laws.[103] Society as a mosaic of specifically patterned subgroups, notes Pospisil, has a multiplicity of legal systems ordered hierarchically based on their inclusiveness.[104]

By identifying how power is organized in society and how individuals are subject to different social organizations, Smith proposes the theory of corporations as a framework to understand law in society. Unlike Pospisil, Smith advances the universality of corporations and corporate life and states that "law provides the medium of expression and adjustment of the corporate relations."[105]And as there are many corporations, argues Smith, that are established based on religion, occupation, sex, ethnicity, age or similar attributes, beyond a mere collection of people that run "the politics of public affairs", there are and will be multiple laws in society.[106] Moore, on the other hand, develops her theory of the semi-autonomous social field, neither by taking social organizations as corporations nor by recognizing them as hierarchical fields, but by considering the capacity of social fields "to generate rules and coerce compliance."[107] As far as there are multiple social fields with the capacity to generate and execute rules, there will be plural laws in society. Hence, the gist of their theories is that legal pluralism is the feature of law in society and legal centralism is not only unreflective of the socio-legal phenomena but also deceptive of the societal structure and interaction.[108]

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[103] ibid 107 & 125.
[104] ibid 107.
[105] Smith (n 99) 128.
[106] ibid 84–85; Griffiths (n 35) 18.
[107] Moore (n 100) 722.
[108] See also Marc Galanter, 'Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law' (1981) 13 The Journal of Legal Pluralism and Unofficial Law 1, 17-27.

By building on and reacting to such scholarship, John Griffiths offers a descriptive conception of legal pluralism by classifying legal pluralism as strong and weak. While strong legal pluralism refers to a situation where multiple legal orders co-exist in parallel in the same social field independently of each other, weak legal pluralism refers to a situation where non-state law and state law are applicable in the same social field as the former is recognized by the latter as a "technique of governance on pragmatic reasons."[109] As the application of customary and religious laws in colonial societies was conditioned upon their recognition by the respective Western laws, notes Griffiths, legal pluralism in colonial societies was an archetype of weak legal pluralism.[110] And weak legal pluralism is not legal pluralism in the full sense of the term, for Griffiths, as it is permeated by legal centralism that the state authorizes the application of non-state laws. Griffiths holds that as law is "neither systematic nor uniform" but "the self-regulation of the semi-autonomous social field", the true version of legal pluralism is strong legal pluralism.[111] Hence, legal pluralism for him is an empirical situation in every society in which multiple legal orders are applicable in the same social field without the authorization of the state. By doing so, Griffiths liberates law from its sole association to the state.[112]

Boaventura de Sousa Santos and Gunther Teubner place the notion of legal pluralism in a post-modern context and consequently add some new layers and spaces in the legal pluralism scholarship. After defining law in normative and institutional terms as noted in section 1.2, Sousa Santos identifies six types or clusters of laws; such as domestic law (the law

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[109] Griffiths (n 35) 5.
[110] ibid; see also Jacques Vanderlinden, 'Return to Legal Pluralism: Twenty Years Later' (1989) 21 The Journal of Legal Pluralism and Unofficial Law 149, 153–156.
[111] Griffiths (n 35) 5 & 38.
[112] See also Franz von Benda-Beckmann, 'Who's Afraid of Legal Pluralism?' (2002) 34 The Journal of Legal Pluralism and Unofficial Law 37, 74.

of the household), production law (the laws of the factory and corporation), exchange law (the laws of the market), community law (the laws of groups hegemonic or oppressed), territorial or state law (the law of the citizen place), and systemic law (the law of the world place) that are applicable in the same social field.[113] Teubner theorizes the complexities of these cluster of laws through his idea of "constitutional fragments." He argues that constitutionalism is neither the sole arena of the nation-state nor the only domain of global constitutionalism. Constitutional problems can arise in transnational political processes, and "at the same time outside the institutionalized political sector, in the 'private sectors' of global society."[114] Teubner holds that transnational political process and private sectors of global society can have transnational and sectorial constitutionalism respectively that constitutes their power and limit it under their own rule of law.[115] He suggests that conflict among these constitutional systems should be solved not by appeal to the state constitutionalism or global constitutionalism[116]but a "multilevel constitutionalism."[117] Strong legal pluralism animates Teubner's conception of constitutional fragments.[118]

Without engaging in a definitional exercise of *what is law* and *what is legal pluralism*,[119] Tamanaha considers legal pluralism as a "common historical condition" evident in every society at a different time and space.[120] Multiple legal orders with competing claims of

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[113] ibid 429-38; see also Sousa Santos (n 38).
[114] Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Gareth Norbury tr, Oxford University Press 2014) 1–2.
[115] ibid 17, for sectorial constitutionalism see Chapter 2 and for transnational constitutionalism see Chapter 3.
[116] Global constitutionalism refers to "the gradual emergence and deliberate creation of constitutionalist elements in the international legal order". See Anne Peters, 'The Merits of Global Constitutionalism' (2009) 16 Indiana Journal of Global Legal Studies 397, 397-39.
[117] ibid 35–36, 155-173.
[118] See also Gunther Teubner, 'The Two Faces of Janus: Rethinking Legal Pluralism' (1991) 13 Cardozo Law Review 1443, 1444–1452.
[119] See Tamanaha, 'A Non-Essentialist Version of Legal Pluralism' (n 40).
[120] Tamanaha, 'Understanding Legal Pluralism' (n 91) 376.

authority, conflicting, sometimes complementing, normative demands, and diverse style and orientation have existed in society ranging from the medieval period to the present century.[121] While the emergence of the nation-state in Europe reduced the medieval type of legal pluralism, it brought legal pluralism to colonial societies and to the international legal system.[122] Colonialism, globalization, and privatization have made the uniform and monopolistic claim of *state law* obsolete.[123] Tamanaha identifies six types of normative orderings that give rise to legal pluralism.[124] The first is the *official/positive legal system* that includes those of the state, regional systems (such as the European Union or the African Union), and international systems (such as the United Nations or World Trade Organization).[125] The second is *customary normative systems* including indigenous/traditional laws and other forms of dispute resolution mechanisms. The third is *religious normative systems* such as Islamic law. The fourth is *economic/capitalist normative systems* that regulate capitalist production and market transactions. The fifth is *functionalist normative systems* that are organized and established to pursue particular purposes or functions like Universities, hospitals, and sports leagues. And the final one is *community normative systems* that are organized mainly around identity. Despite their differences in power, influence, and organizational structure, these normative systems apply in the same social arena.

In a nutshell, legal pluralism refers to the existence and application of multiple legal orders in the same social field with or without the recognition of the state. As discussed above,

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[121] ibid 377–386.
[122] See William W Burke-White, 'International Legal Pluralism' (2004) 25 Michigan Journal of International Law 963.
[123] Tamanaha, 'Understanding Legal Pluralism' (n 91) 409.
[124] ibid 397–399.
[125] See also Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Cambridge University Press 2012) 23–57, mapping out the details of legal pluralism at the global level.

there is neither consensus on *what is law* nor on *legal pluralism* in the legal pluralism scholarship. Nonetheless, there is unanimity in this scholarship that law is neither the sole domain of the state nor is state law superior to non-state law. Building on this general idea of legal pluralism, for the purpose of this dissertation, however, legal pluralism refers to the existence and application of customary, religious, and state laws within a state with or without its recognition. I choose a narrower conception of legal pluralism simply because this dissertation deals with the legal and constitutional systems of post-colonial states in Africa where such type of legal pluralism is its classic expression and is predominant.

1.6 The Potential and Limits of Legal Centralism and Legal Pluralism as a Theoretical Framework for Understanding African Constitutionalism

In order to test the potential and limits of legal centralism and legal pluralism as theoretical frameworks for constitutionalism in Africa, it is important to discuss the concept of constitutionalism, in general, and its application in the African context, in particular. After a working concept of constitutionalism (in Africa) is adopted, this section applies legal centralism and legal pluralism to this constitutionalism phenomenon in Africa. The objective of this section is to show how legal centralism and legal pluralism can be helpful but inadequate to understand and explain constitutionalism in Africa. By showing the inadequacies of legal centralism and legal pluralism as theoretical frameworks for understanding constitutionalism in Africa, this section not only paves the way for unearthing a new theoretical framework that captures the essence and nature of constitutionalism in Africa, but also the methods and approaches of doing so.

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Constitutionalism is a generic term that does not have a single shape or form both in the past and present.[126] In its conventional understanding, however, constitutionalism is often described as the idea of limited government and the protection of fundamental rights under the rule of law.[127] This idea of constitutionalism is set in motion through the instrumentality of a written document (not always), called the constitution, that provides the institutional and functional features of government and its operation with some fundamental rights.[128] The constitution, in turn, is usually referred to as a social contract, collective promise, expressions of values, manifestations of power, pre-commitment and coordination devices of a state.[129] As such, the constitution is authored by a people using their liberty through their constituent power.[130]

In order to effectuate an 'order of liberty,' the constitution allocates separate powers and responsibilities to the legislative, executive, and judicial organs of government, and, at the same time, instills systems of checks and balances among them.[131] By doing so, the constitution not only establishes *limited* government, but also self-sustains itself by limiting powers of constitutional amendment.[132] Further, as the supreme law of the land, all other laws and normative orderings are required to conform to the constitution and derive their

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[126] See Charles Howard McIlwain, *Constitutionalism: Ancient and Modern* (Revised edition, Cornell University Press 1947) 23-24; Tushnet (n 3).
[127] Dieter Grimm, *Constitutionalism: Past, Present, and Future* (Oxford University Press 2016) 363–364.
[128] The famous exception to this is the United Kingdom with its unwritten constitution.
[129] Keith E Whittington, 'Constitutionalism' in Gregory A Caldeira, R Daniel Kelemen and Keith E Whittington (eds), *The Oxford Handbook of Law and Politics* (Oxford University Press 2008) 289–291; Denis J Galligan and Mila Versteeg, 'Theoretical Perspectives on the Social and Political Foundations of Constitutions' in Denis J Galligan and Mila Versteeg (eds), *Social and Political Foundations of Constitutions* (Cambridge University Press 2013) 8–39.
[130] Alexander Somek, *The Cosmopolitan Constitution* (Oxford University Press 2014) 1–2.
[131] Sajó and Uitz (n 64) 14.
[132] Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press 2017) 228–233.

authority from it or else they will be null and void.[133] Hence, in its classic form, constitutionalism "stands for a set of interrelated concepts, principles, and practices of organizing and thereby limiting government power in order to prevent despotism."[134]

This idea of constitutionalism, to be precise *liberal* constitutionalism, is a late eighteenth century phenomenon associated with the development of the modern state in North America and France.[135] Despite numerous innovations and novelties, the American and French systems of constitutional government are informed by and built on the enlightenment thinking.[136] The idea of a written constitution, judicial review, separation of powers, and Bill of Rights, among other constitutional principles and concepts, have traveled from their homelands and have been adopted by many nations worldwide.[137] Indeed, the migration of constitutional ideas is not limited to the spread of liberal constitutionalism to the other parts of the world, but also includes the mutual learning and cross-fertilization among the liberal constitutional systems on both sides of the Atlantic.[138] In the African case, in particular, liberal constitutionalism arrived late in the 1950s and 1960s when former colonies gained independence from colonial rule and recognized as equal members in the community of nations.[139] And it came to Africa in the image of the constitutional systems of the former colonizers, predominantly British and French.

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[133] See also Jutta Limbach, 'The Concept of the Supremacy of the Constitution' (2001) 64 The Modern Law Review 1, 1-10.
[134] Sajó and Uitz (n 64) 13.
[135] Grimm (n 127) 6.
[136] Stephen Holmes, 'Constitution and Constitutionalism' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 195–198.
[137] Vlad Perju, 'Constitutional Transplants, Borrowing, and Migrations' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 1305.
[138] Sujit Choudhry, 'Migration as a new metaphor in comparative constitutional law' in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press 2006) 1–16.
[139] See Robert B Seidman, 'Constitutions in Independent, Anglophonic, Sub-Saharan Africa: Form and Legitimacy' (1969) 1969 Wisconsin Law Review 83, 94; Victor T Le Vine, 'The Fall and Rise of

Nonetheless, liberal constitutionalism was not transplanted to Africa on the eve of independence onto a tabula rasa. Rather, it is situated in and configured within the complex historical trajectories of state formation, resistance and conquest, colonial rule, and decolonization struggle.[140] These, in turn, are located within the background of the socio-economic and political organizations of African societies before and during the birth of the colonial state, its operation, and end, on the one hand, and the inauguration of the liberal world order with the end of the Second World War, on the other.[141] Consequently, the *phenomenology of constitutional studies* in Africa is not (or should not be) limited to the arrival of liberal constitutionalism at independence but lies in the experiences, interactions, and contestations of power and governance in the pre-colonial, colonial, and post-colonial times.

The liberal constitutional system of the post-colonial period is a superstructure built on the pre-colonial and colonial structures, laws, rules, discursive practices, and behaviors.[142] This is due to the fact that, as history has it, the independence constitutions, which ushered in liberal constitutionalism, were transition devices from colony to sovereign statehood and mechanisms of transfer of government power from the hands of colonial powers to the

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Constitutionalism in West Africa' (1997) 35 The Journal of Modern African Studies 181, 183–186; YP Ghai, 'Constitutions and the Political Order in East Africa' (1972) 21 The International and Comparative Law Quarterly 403, 410–412.

[140] An-Na'im, *African Constitutionalism and the Role of Islam* (n 13) 27.

[141] See Tukumbi Lumumba-Kasongo, 'The Origin of African Constitutions, Elusive Constitutionalism, and the Crisis of Liberal Democracy' in Said Adejumobi (ed), *Democratic Renewal in Africa: Trends and Discourses* (Palgrave Macmillan 2015) 66–67; André Mbata B Mangu, 'Africa's Long and Hard Road to Constitutionalism and Democracy: Two Decades On' in Said Adejumobi (ed), *Democratic Renewal in Africa: Trends and Discourses* (Palgrave Macmillan 2015) 104-109.

[142] See also Issa G Shivji, *Where Is Uhuru?: Reflections on the Struggle for Democracy in Africa* (Fahamu/Pambazuka 2009) 51.

indigenous Africans.[143] The body politic of the post-colonial state is formed during the colonial period.[144]

As a result, in order to understand and appreciate the nature and practice of constitutionalism in post-colonial Africa fully, investigating the pre-colonial and colonial systems of governance and the international system within which Africa is situated becomes necessary. This is due to the fact that the *state* in Africa is *constituted* out of the interactions of pre-colonial and colonial dynamics within and in light of the broader international system.

The plethora of scholarship attests that pre-colonial societies in Africa had their own way of organizing, constituting, and limiting political power.[145] By the original meaning of a 'constitution,' that is to *set up* and *organize* a people for common defense, prosperity, and territorial aggrandizement,[146] pre-colonial societies in Africa had varied forms of constitutions.[147] To the extent that they relied on these constitutions to organize and operate their overall socio-economic and political life, they practiced constitutionalism of some sort. Furthermore, these practices of constitutionalism included the respect and protection of some basic rights and freedoms.[148] Nonetheless, many of these pre-colonial societies neither had the attributes of modern statehood nor a similar political organization. In spite of this, pre-

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[143] Crawford Young, *The Postcolonial State in Africa: Fifty Years of Independence, 1960–2010* (University of Wisconsin Press 2012) 11–12.
[144] See for instance Crawford Young, *The African Colonial State in Comparative Perspective* (Yale University Press 1994) 180–181.
[145] See for instance An-Na'im (n 13) 35–42; John Hatchard, Muna Ndulo and Peter Slinn, *Comparative Constitutionalism and Good Governance in the Commonwealth: An Eastern and Southern African Perspective* (Cambridge University Press 2004) 13; Mangu (n 141) 104–110.
[146] See Holmes (n 136) 195; McIlwain (n 126) 23–24.
[147] See RS Rattray, *Ashanti Law and Constitution* (Clarendon Press 1929).
[148] See Makau Mutua, *Human Rights: A Political and Cultural Critique* (University of Pennsylvania Press 2009) 74–81.

colonial societies in Africa had different forms of non-state constitutional practices and organizations.

The advent of colonialism superimposed a 'new constitutional system' over the pre-colonial constitutions. Indeed, there is nothing constitutional about the colonial constitutional systems if we relate constitutionalism with sovereignty, limited government, and the protection of fundamental rights.[149] It is constitutional in the empirical sense of *constituting the state* in Africa.[150] In this regard, the Berlin Africa Conference of 1884-1885 provided the basic rules of the colonial constitutional dispensation. On the one hand, it provided the rules of engagement among Europeans in the partitioning of Africa, legitimated the prior colonial possessions, and exported the doctrine of European sovereignty to the African universe to avoid conflict among colonial powers. Consequently, the territories of pre-colonial societies were redrawn along with the possessions and wishes of colonial powers. On the other hand, it gave colonial powers absolute power in their territories in Africa and absented Africans claim to and exercise of power based on their own terms in this colonial enterprise.[151]

In light of these fundamental pillars of the colonial dispensation, the colonial state was formed in Africa. The colonial state possessed a people, territory, government, and sovereignty. Even if the colonial state in Africa had these attributes, it is strikingly different from the kind of state we see in Europe as noted in the previous sections. This is due to the fact that the peoples that inhabited the colonial states neither consented to live under the new territorial states nor shared a common history, culture, language or tradition among

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[149] Hatchard, Ndulo and Slinn (n 145) 14–15.
[150] An-Na'im, *African Constitutionalism and the Role of Islam* (n 13) 42–43.
[151] See Jörg Fisch, 'Africa as terra nullius: the Berlin Conference and international law' in Stig Förster, Wolfgang Justin Mommsen, and Ronald Edward Robinson (eds), *Bismarck, Europe and Africa: The Berlin Africa Conference 1884-1885 and the Onset of Partition* (Oxford University Press 1988) 347–375.

themselves. They were lumped together for reasons of colonial and imperial expediency. In addition, the government and sovereign power in the colonial state resided in the imperial capitals outside its territorial reach. Furthermore, within the colonial state, the colonial government neither had the monopoly of violence all over the territory nor the interest to establish a rational-legal authority in the Weberian sense.[152]

The post-colonial state maintained this *founding constitutive identity* of the colonial state through the aid of international law externally and constitutional law internally. The Charter of the Organization of African Unity (OAU) (now African Union) affirmed the colonial borders and made the defense of "sovereignty, territorial integrity and independence" its purpose.[153] Further, the Charter recognized the principle of "[r]espect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence."[154] Such recognition by the OAU legitimated the artificial borders of post-colonial states in Africa and consequently provided them the necessary shield from external aggression and interference from each other.[155] Internally, without much alteration of colonial laws, structures, rules and practices, independence constitutions introduced a new theory of government.[156] Unlike the colonial constitutional arrangements which made the colonial government unlimited, the independence constitutions introduced limited government under the system of constitutional democracy. Further, these constitutions proclaimed supremacy

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[152] Herbst (n 21) 67–70 & 78–79.
[153] The Charter of the Organization of African Unity 1963, article II.
[154] ibid article III.
[155] See also Saadia Touval, 'The Organization of African Unity and African Borders' (1967) 21 International Organization 102, 127.
[156] Prempeh (n 10) 502; Sabelo J Ndlovu-Gatsheni, *Coloniality of Power in Postcolonial Africa* (Council for the Development of Social Science Research in Africa 2013) 6–7.

over any other law and positioned the states as the ultimate and supreme power within their bounds.

While post-independence constitution-making in Africa involves the negation and affirmation of the liberal theory of government,[157] such as the constitution of one party systems, 'Big men rule,'[158] and multi-party democratic systems,[159] the paradoxical nature of the post-colonial African states continues unabated. On the one hand, the post-colonial African states are weak internationally for either they depend on handouts from Western governments and donor agencies, and international organizations or civil society groups perform some of their essential functions.[160] In addition, they are either unable and/or unwilling to perform basic state functions, such as the provision of welfare, law and order, security, throughout their territories.[161] As such, they lack empirical sovereignty in the Weberian sense internally even though they enjoy juridical sovereignty internationally.[162] Due to this lack of empirical sovereignty, post-colonial African constitutions expressly declare and assert the supremacy of constitutions which otherwise is self-evident in many Western constitutions.[163] On the other hand, the post-colonial African states are strong internally as they are equipped with powerful financial, human, bureaucratic, security, and armed infrastructures than other groups to deploy coercion and violence anywhere in their

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[157] Michel Rosenfeld, 'Constitutional Identity' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 766.
[158] For details of 'Big men rule' see Robert H Jackson and Carl G Rosberg, *Personal Rule in Black Africa: Prince, Autocrat, Prophet, Tyrant* (University of California Press 1982).
[159] Young, *The Postcolonial State in Africa* (n 143) 8–31.
[160] Yash Ghai, 'Chimera of Constitutionalism: State, Economy, and Society in Africa' in Swati Deva (eds), *Law and (In) Equalities: Contemporary Perspectives* (Eastern Book Company 2010) 319-323.
[161] Jonathan Hill, 'Beyond the Other? A Postcolonial Critique of the Failed State Thesis' (2005) 3 African Identities 139, 145–146; Herbst (n 21) 254–257.
[162] See Robert H Jackson and Carl G Rosberg, 'Why Africa's Weak States Persist: The Empirical and the Juridical in Statehood' (1982) 35 World Politics 1.
[163] An-Na'im (n 13) 53; Okoth-Ogendo (n 1) 67.

territory.[164] Due to the lack of empirical sovereignty, post-colonial governments in Africa usually rely not on the democratic will of the population at large to stay in office, but mainly on extra-constitutional mechanisms such as through the control of the government apparatus and patronage systems, and the incorporation and support of key ethnic actors or leaders.[165] Like empirical sovereignty, popular sovereignty lacks in many post-colonial states in Africa.

In light of these constitutional trajectories, legal centralism and legal pluralism have a conceptual appeal and a practical relevance in understanding the multiple and complex constitutional systems, experiences, practices and aspirations in Africa. Legal centralism is relevant, as the state and its projection of *state law* as a universal and supreme legal order exist in Africa. As discussed above, pre-colonial systems of political organization were changed into territorial colonial states and these, in turn, were further transformed into 'constitutional states' with independence.[166] Along with these transitions and transformations, *state law* has been positioned to be the ultimate and universal legal order. Consider, for example, Nigeria; section 1(1) of the 1999 Constitution proclaims that "[t]his Constitution is Supreme and its provisions shall have binding force on the authorities and persons throughout the Federal Republic of Nigeria." Following this constitutional proclamation, the legal centralist legal theory can be utilized to understand and explain the idea and practice of constitutionalism in Nigeria. By the same token, legal pluralism is relevant because multiple laws co-exist in Africa. Using the same example, in addition to Islamic law, there are more than two hundred fifty ethnic groups in Nigeria with their own customary laws.[167] This means that Islamic and

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[164] Ghai, 'Chimera of Constitutionalism' (n 160) 321-322.
[165] An-Na'im, *African Constitutionalism and the Role of Islam* (n 13) 51–53.
[166] Okoth-Ogendo (n 1) 70–71.
[167] Abdulmumini A Oba, 'Religious and Customary Laws in Nigeria' (2011) 25 Emory Int'l L Rev 881, 881–884.

numerous customary laws co-exist in Nigeria along with *state law*. Furthermore, these laws apply with or without recognition by the Constitution.[168] Accordingly, legal pluralism can be deployed to capture the essence and practice of constitutionalism in Nigeria.

In spite of their potential to be a theoretical framework for understanding constitutionalism in Africa, legal centralism and legal pluralism have inherent limitations. Both misunderstand or misconstrue the nature of the state, government organization, and notion of rights in Africa. As discussed above, the state neither has the empirical sovereignty to enforce its laws throughout its territory, save the specific actions of coercion and violence, nor is the application and existence of customary and/or Islamic laws contingent upon state recognition and confirmation with liberal constitutional standards. At the same time, customary and/or religious laws neither claim supremacy and universality like the constitutions nor do their enforcers challenge the authority of the state and its institutions as such. Thus, the legal centralist approach fails to account to the specific empirical realities of the state, on the one hand, and misses the role, position, and function of customary and/or religious laws in the operation of the state, on the other. Similarly, the legal pluralist approach misinterprets the nature of the state, its organization, and configuration with the society.

Thus, a theoretical framework for understanding constitutionalism in Africa should rectify the limitations of legal centralism and legal pluralism. The search for this theoretical framework should consider the constitutional development in Africa from pre-colonial times to the present seriously without falling in the trap of either legal centralism or legal pluralism.

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[168] See Rotimi Suberu, 'The Sharia Challenge: Revisiting the Travails of the Secular State' in Wale Adebanwi and Ebenezer Obadare (eds), *Encountering the Nigerian State* (Palgrave Macmillan 2010) 217-238; Vincent O Nmehielle, 'Sharia Law in the Northern States of Nigeria: To Implement or Not to Implement, the Constitutionality Is the Question' (2004) 26 Human Rights Quarterly 730, 741-757.

This includes the investigation and critical assessment of constitutional design and constitutional practice in light of the socio-economic and political factors that influence constitutional government in Africa, on the one hand, and the general idea of constitutionalism and the migration of constitutional ideas, on the other. In the search for a theoretical framework of constitutionalism in Africa, the nature and organization of the state, its government structure, and the notion of constitutional rights should be the units of analysis at a different time and space. Such endeavor obviously requires the use of multi-disciplinary approaches and materials to transcend the impasse between legal centralism and legal pluralism.

1.7 Conclusion

In order to foster the practice of constitutionalism in Africa, this chapter demonstrates the need for a theoretical framework that captures the nature, practice, and manifestations of constitutionalism in Africa in different time and space. While legal centralism and legal pluralism can offer a useful theoretical and practical insight towards the understanding of the phenomenon of constitutionalism in Africa, they are inadequate to capture the complex, multifaceted, and interwoven constitutional ideas, practices, and aspirations. This is because legal centralism ignores the empirical realities of the state and fails to account the role and function of customary and/or religious laws in the operation of the state. And legal pluralism misinterprets the nature of the African state and its configuration with the society. Hence, a theoretical framework that rectifies these pitfalls and accounts to the complexities of the constitutional ideas, practices, and manifestations in Africa is necessary. Building on religious studies and anthropology, this dissertation introduces legal syncretism as a theoretical

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framework for understanding African constitutionalism to clearly account the constitutional transformations and developments from precolonial times to the present, and the concomitant constitutional designs and practices, to which I now turn in the next chapters.

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CHAPTER TWO
LEGAL SYNCRETISM IN THE TRANSFORMATION OF AFRICAN CONSTITUTIONALISM

2.1 Introduction

The previous chapter has shown that African constitutionalism cannot be captured and explained by legal centralism and legal pluralism as it is a blend of constitutional ideas, principles, and practices. Building on religious studies and anthropology, this chapter introduces legal syncretism as a theoretical framework for understanding African constitutionalism. Legal syncretism explains and clearly takes into account the African constitutional transformations and developments and the consequent constitutional designs and practices both in their normative and empirical manifestations. This chapter investigates how *legal syncretism as a process* explains the constitutional transformations and developments from precolonial times to the present, while the next chapter discusses how *legal syncretism as a result* captures and explains the attendant constitutional design and practices. After introducing the concept of legal syncretism and demonstrate its fitness as a theoretical framework with a normative appeal to African constitutionalism, the following sections employ legal syncretism as a theoretical tool to understand and explain the constitutional transformations and developments from precolonial times to the present. The objective of this chapter is to (i) explore and examine the idea and practice of constitutionalism in pre-colonial Africa, (ii) trace the transformation of pre-colonial constitutionalism with the introduction of colonial constitutionalism, and (iii) show how post-colonial constitutionalism builds on and departs from the previous constitutional systems. Within this dynamic constitutional matrix,

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the investigation in this chapter takes the general idea of constitution and constitutionalism, custom, customary law, traditional authority and traditional conceptions of power as the units of analysis, and explains the interactions, changes, transformations, resistances, and reconfigurations among each other in time and space.

2.2 Introducing Legal Syncretism as a Theoretical Framework for Understanding African Constitutionalism

Legal syncretism, unlike legal centralism and legal pluralism, is not a widely discussed subject in the field of law, socio-legal studies, or legal anthropology. Even if some scholars use the term legal syncretism, they neither define the term nor give it content.[169] For instance, M.A Jaspan employed legal syncretism as an appealing normative legal theory for Indonesia in the 1960s. Nonetheless, the existence of a complex legal system composed of Dutch law, Adat or customary law, and Islamic law, argues Jaspan, make it difficult to adopt "a syncretic philosophy of law based on diverse Indonesian tradition and a modified socialist ideology."[170] The main challenge for the development of a syncretic philosophy of law, according to Jaspan, is the impasse between unification and plurality. However, he neither explains what legal syncretism means nor elaborates on what he calls as a syncretic philosophy of law. Neil J. Diamant uses legal syncretism, without offering a definition or explanation, in lieu of legal transplants to assess the changes in the family law of China.[171] In the context of Africa, Xavier

[169] See Paschalis M Kitromilides, 'The Making of a Lawyer: Humanism and Legal Syncretism in Venetian Crete' (1993) 17 Byzantine and Modern Greek Studies 57, 57–81. In this article, the term legal syncretism is mentioned only in the title.
[170] MA Jaspan, 'In Quest of New Law: The Perplexity of Legal Syncretism in Indonesia' (1965) 7 Comparative Studies in Society and History 252, 252 & 265.
[171] Neil J Diamant, 'Legal Syncretism and Family Change in Urban and Rural China' in Dennis Galvan and Rudra Sil (eds), *Reconfiguring Institutions Across Time and Space: Syncretic Responses to Challenges of Political and Economic Transformation* (Palgrave Macmillan 2007) 164–188.

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Blanc-Jouvan proposed the idea of *mixitè* as a trend and a normative argument for law and legal reform.[172] He contends that the only way to have a uniform and coherent legal regulation in Africa is through the mixture of traditional African law with modern law. In this process, Blanc-Jouvan notes, traditional African law should not be relegated or placed in an inferior position in its relation with modern law. While *mixitè* can be an aspect of legal syncretism, the latter has a much broader notion and can give a nuance to the legal universe in Africa.[173] Hence, to develop the concept of legal syncretism, I turn to religious studies and anthropology where syncretism has been studied extensively.

Syncretism has multiple meanings. The Oxford English Dictionary defines syncretism as an "(1) attempted union or reconciliation of diverse or opposite tenets or practices, (2) the merging of two or more inflectional categories and (3) the process of fusing diverse ideas or sensations into a general (inexact) impression."[174] The word syncretism comes from the Greek "prefix *syn*, 'with,' and *krasis*, 'mixture'… *synkrasis*, which means 'a mixing together.'[175] It was first used by Plutarch (AD 45-125) in the *Moralia,* in the chapter entitled *On Brotherly Love,* to describe the coming together of the quarreling inhabitants of Crete against a common enemy.[176] While Cretans warred and quarreled among each other, they had a culture of setting aside their differences and to stand united against an outside enemy or aggressor, which is

[172] Xavier Blanc-Jouvan, 'Du Pluralisme a la mixite dans les nouveaux droits africains' in Dalloz-Sirey (ed), *Liber amicorum : Mélanges en l'honneur de Camille Jauffret-Spinosi* (Dalloz 2013) 123–150.
[173] See also Charles Stewart, 'Syncretism and Its Synonyms: Reflections on Cultural Mixture' (1999) 29 Diacritics 40, 41–48.
[174] The Oxford English Dictionary, 'Syncretism, N' <http://wwwoedcom/view/Entry/196428> accessed 28 November 2018.
[175] Rosalind Shaw and Charles Stewart, 'Introduction: Problematizing Syncretism' in Rosalind Shaw and Charles Stewart (eds), *Syncretism/Anti-Syncretism: The Politics of Religious Synthesis* (Routledge 2003) 3.
[176] Anita Maria Leopold and Jeppe Sinding Jensen, 'Introduction to Part II' in Anita Maria Leopold and Jeppe Sinding Jensen (eds), *Syncretism in Religion: A Reader* (Routledge 2016) 14; Andre Droogers and Sidney M Greenfield, 'Recovering and Reconstructing Syncretism,' in Andre Droogers and Sidney M Greenfield (eds), *Reinventing Religions: Syncretism and Transformation in Africa and the Americas* (Rowman & Littlefield Publishers 2001) 27.

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called syncretism.[177] The original use of the word syncretism was associated, with belonging and self-defense in a community, to a political field of human affairs.[178]

Syncretism in religious studies is usually defined as "a blending of religious ideas and practices, by means of which either one set adopts more or less thoroughly the principles of another or both are amalgamated in a more cosmopolitan and less polytheistic shape."[179] This state of religious mixture is of momentary nature that can lead to either a further accretive mixture or an unravelling of past syntheses.[180] Erasmus of Rotterdam (1469-1536) first introduced it to the domain of religion in the Renaissance era. Following the ethos of Plutarch's syncretism, Erasmus used syncretism to reconcile the theological differences in Christianity and to show how Christianity absorbed classical ideas, such as those of Plato and Aristotle, and how this, in turn, enriched and strengthen Christianity.[181] Erasmus's syncretism, in addition to uniting different followers of Christian doctrine against barbarians, like Cretans, infused a human idea (non-Christian) onto the eternal Christian thought. In the sixteenth and seventeenth centuries, however, syncretism acquired a pejorative connotation as the quest to reconcile the various Protestant denominations and the mutual access to each other's rituals of communion and baptism were considered as unprincipled jumbling and mixing of religions.[182] In the nineteenth century, the negative connotation of syncretism resurfaced as scholars of comparative religion present the state of Christianity and religious

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[177] Leopold and Jensen (n 176) 14.
[178] ibid 14–15.
[179] James Moffatt, 'Syncretism,' in James Hastings (eds), *Encyclopedia of Religion and Ethics* (Charles Scribner's Sons 1922) 157.
[180] Charles Stewart, 'Relocating Syncretism in Social Science Discourse' in Anita Maria Leopold and Jeppe Sinding Jensen (eds), *Syncretism in Religion: A Reader* (Routledge 2014) 278.
[181] ibid 15; Shaw and Stewart (n 175) 3–4; Irina A Levinskaya, 'Syncretism-The Term and Phenomenon' (1993) 44 Tyndale Bulletin 117, 119.
[182] Shaw and Stewart (n 175) 4.

life, in the New World, Africa, and Asia, as one of disorder, confusion, and a pathway to full Christianity.[183] In these respects, syncretism was used as an assimilation tool to bring historically and geographically distant societies to a Christian empire, and at the same time, an 'othering' tool of these societies for their syncretic religion was considered as inferior and impure.[184]

Unlike some negative connotations in religious studies, syncretism has been associated with neutrality and conferred with a positive significance in anthropology.[185] It was introduced as a reinterpretation of acculturation, a phenomenon which results in the blending of cultures out of cultural contact in the context of imperialism and colonialism.[186] As acculturation studies emerge as an alternative method to evolutionism in anthropology, a further refinement and reinterpretation of acculturation was necessary to overcome "the problems and methods of the discipline" and to account to the specific manners and ways in which the blending of cultures happen.[187] To this end, syncretism has been deployed at the center of anthropological studies to refer to both the incorporation, reformulation, invention, and transformation of cultural traits, forms, meanings, and practices as the result of the cultural contacts and encounters, and the processes of such syncretic cultural makeups.[188] Through such processes, syncretism reconnects the past with the present.[189] The increasingly globalized and interconnected world order has made syncretism a basic predicament to

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[183] ibid 4-5.
[184] ibid.
[185] ibid 1.
[186] Droogers and Greenfield (n 176) 26.
[187] ibid 24–27; Melville J Herskovits, 'The Significance of the Study of Acculturation for Anthropology' (1937) 39 American Anthropologist 259, 261–262.
[188] Droogers and Greenfield (n 176) 26.
[189] Shaw and Stewart (n 175) 5.

culture as in religion.[190] Consequently, cultural purity and authenticity are relegated to the periphery, and substituted by multiculturalism and cultural pluralism, as a matter of fact, and heavily criticized as an unappealing normative claims in the social sciences. Hence, it is held that as anthropology is a "discourse about syncretism", syncretism is considered as anthropology.[191]

Both in its original Plutarch version or later religious and cultural usages, syncretism happens in a dynamic cultural matrix. It requires the existence of multiple and diverse cultural, political, or religious ideas and practices in a social field at a given time.[192] The encounter and contact of these diverse and multiple ideas and practices set syncretism in motion. This encounter leads both to conflict and tension, and to exchange and interaction.[193] Given the power balance between these diverse cultural, political, and religious ideas, the encounter can lead to their (1) symbiotic relationship, (2) fusion, adaptation, and assimilation, (3) metamorphosis or transformation, and/or (4) isolation and dissolution.[194] Acceptance and resistance, integration and accommodation, unity and diversity are inherent elements in these syncretic processes.[195] In the Plutarch sense of syncretism, conflict and disagreement within a community are transformed into unity and brotherhood. In the religious sense of syncretism, either different religions opt for a symbiotic relationship as Confucianism, Taoism, and Buddhism in China, or to the incorporation and adaptation of classic ideas in Christian

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[190] ibid 1 & 12–20.
[191] ibid 20–21.
[192] Hans G Kippenberg, 'In Praise of Syncretism: The Beginning of Christianity Conceived in the Light of a Diagnosis of Modern Culture' in Anita Maria Leopold and Jeppe Sinding Jensen (eds), *Syncretism in Religion: A Reader* (Routledge 2016) 34.
[193] ibid.
[194] Kurt Rudolph, 'Syncretism: From Theological Invective to a Concept in the Study of Religion' in Anita Maria Leopold and Jeppe Sinding Jensen (eds), *Syncretism in Religion: A Reader* (Routledge 2016) 81–82.
[195] Michael Pye, 'Syncretism and Ambiguity' (1971) 18 Numen 83, 89–93.

doctrine in Europe, or to a fusion and transformation of Christianity and Islam[196] in Africa, or to the development of new popular religion or superstition.[197] In the cultural context, syncretism creates a dynamic which is mutually intelligible and practically acceptable to subjects and participants in the cultural matrix.[198] In all these, syncretism can be a result of a conscious and reflective action and undertaking, and/or an unconscious, naïve, and spontaneous engagement with the cultural matrix.[199] In a similar vein, it can be driven from above and below, consequently setting complex processes of syncretism, in the spectrum of the hierarchy of power in the social field.[200]

As *a process* and *a result* in this dynamic cultural matrix, syncretism offers a practical tool to solve existential problems.[201] This is because syncretism has a reconciliatory power in a context where diverse and opposing ideas and practices exist in a social field. Although it involves varied forms of acceptance and rejection, or synthesis and erasure, depending upon the power balance between or among the different cultural, religious or political ideas and practices at a given time and space, syncretism brings different norms, ideas, symbols, and discursive practices together to solve and transcend a challenge or a problem posed by the encounter in the cultural matrix. By appealing to phenomenological similarities, complementarities, or comparable similar experiences and practices, syncretism transforms the dynamic in the cultural matrix from one of wild animosity and perpetual opposition or conflict into one of integration, accommodation, respect, tolerance, and new modes of

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[196] An-Na'im (n 13) 107–113.
[197] Rudolph (n 194) 81-82.
[198] Shaw and Stewart (n 175) 18–19.
[199] Leopold and Jensen (n 176) 52–53.
[200] Shaw and Stewart (n 175) 19–20; Birgit Meyer, '"If You Are a Devil, You Are a Witch and, If You Are a Witch, You Are a Devil" the Integration of "Pagan" Ideas Into the Conceptual Universe of Ewe Christians in Southeastern Ghana1' (1992) 22 Journal of Religion in Africa 98, 119–123.
[201] Andre Droogers, 'Syncretism and Fundamentalism: A Comparison' (2005) 52 Social Compass 463, 465.

resistance and change.[202] While syncretism is helpful to solve these problems, it cannot satisfy everyone in the social field. For instance, for the advocates of religious and cultural purity and authenticity, syncretism is a process to be arrested and a problem to be solved.[203] However, for others, it is a process to be supported and a result to be celebrated as it offers a space and opportunity for the negotiation of identities and hegemonies in situations such as imperial and colonial conquest, migration, and religious dissemination.[204] The syncretic process of absorption, rejection, affirmation, transformation, and reconstruction opens avenues for participation and negotiation in the cultural matrix.[205]

Due to its normative appeal and descriptive potential, syncretism has been also used in the field of political science. Dennis Galvan and Rudra Sil in their edited book, *Reconfiguring Institutions across Time and Space: Syncretic Responses to Challenges of Political and Economic Transformation*, demonstrate the analytical potential and the theoretical fitness of syncretism to explain institutional transformations and changes in the political and economic fields.[206] Drawing from diverse regional experiences and multiple perspectives in institutions, they give special emphasis to what they call "institutional syncretism" which they define it as "a set of interpretive processes through which actors in local settings selectively transform newly imposed or transplanted institutional features (norms, rules—formal and informal—organizational principles, and operational procedures) while adapting portable elements of

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[202] ibid.
[203] See Siv Ellen Kraft, '"To Mix or Not to Mix": Syncretism/Anti-Syncretism in the History of Theosophy' (2002) 49 Numen 142, 142–170.
[204] Shaw and Stewart (n 175) 18.
[205] ibid 18-19; Peter van der Veer, 'Syncretism, multiculturalism and the Discourse of tolerance' in Rosalind Shaw and Charles Stewart (eds), *Syncretism/Anti-Syncretism: The Politics of Religious Synthesis* (Routledge 2003) 185–186.
[206] See Dennis Galvan and Rudra Sil (eds), *Reconfiguring Institutions Across Time and Space: Syncretic Responses to Challenges of Political and Economic Transformation* (Palgrave Macmillan 2007).

preexisting social institutions to produce innovative institutional configurations."[207] Within the theoretical framework of institutional syncretism, the contributors have analyzed and discussed how the syncretism of numerous practices, norms, and institutions explain the institutional frameworks or the normative practices in different time and space across societies.

To give a particular example, Thomas Bickford chooses the military as a space for syncretic inquiry and China as a case study.[208] Bickford considers the military as an institution the "most universally prone to convergence in terms of their organizational structures, routines, and practices."[209] What he finds in his study of the People's Liberation Army (PLA), however, is "a radical departure from the ideal-typical model of Modern military organization" as in the West.[210] The reason for this departure is the syncretism of Chinese, European, and Soviet modes of military and economic organization.[211] Bickford argues that this is "a result of a deliberate attempt by communist party elites to selectively combine and reinterpret traditional organizational frameworks with the formally modern organizational characteristics of the military that justifies the political authority of the elites and serves as an ideological and organizational vehicle for social transformation."[212] The consequence is the establishment of a military with extensive military and economic roles.

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[207] Dennis Galvan and Rudra Sil, 'The Dilemma of Institutional Adaptation and the Role of Syncretism' in Dennis Galvan and Rudra Sil (eds), *Reconfiguring Institutions Across Time and Space: Syncretic Responses to Challenges of Political and Economic Transformation* (Palgrave Macmillan 2007) 7.
[208] Thomas J Bickford, 'Institutional Syncretism and the Chinese Armed Forces' in Dennis Galvan and Rudra Sil (eds), *Reconfiguring Institutions Across Time and Space: Syncretic Responses to Challenges of Political and Economic Transformation* (Palgrave Macmillan 2007) 61–80.
[209] ibid 63.
[210] ibid 62.
[211] Ibid.
[212] ibid 62.

Thus, as syncretism has been applied as an analytical tool or a theoretical framework in religious studies, anthropology, and political science, the application of syncretism in the legal field, what I call "legal syncretism", offers a better theoretical framework for understanding African constitutionalism. As the discussion in this chapter attests, the dynamic cultural matrix which sets it in motion exists in the African constitutional experiences. Legal syncretism for the purpose of this dissertation refers to *the process and the result of adoption, rejection, acceptance, invention, reconfiguration, and transformation of diverse and seemingly opposite legal rules, principles, and practices into a constitutional state as a result of imperial or colonial encounters.* Legal syncretism as *a process* explains the transformation and development of African constitutionalism from precolonial times to the present as discussed in this chapter. And legal syncretism as *a result*, explains and decrypts the design and practice of African constitutionalism as the next chapter shows.

2.3 Constitutionalism in Pre-Colonial Africa

As the dynamic constitutional matrix that sets legal syncretism in motion arises as a result of imperial or colonial encounters, it is important to explore and ascertain the African constitutional contexts and identities before such encounters to trace the subsequent syncretic constitutional transformations and developments. The inquiry of constitutionalism in pre-colonial Africa in this section, therefore, is neither to demonstrate the existence of a constitutional system best fitted to Africa and consequently to feed into the romanticism of constitutional autochthony nor to discover new insights and materials that boost African historical memory. Such an inquiry is primarily important, on the one hand, to understand the present state of African constitutional government and its persistent challenges. On the

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other hand, it also helps to identify the pathologies of constitutional practices and discourses and to take remedial actions for their diagnosis, as there are some continuities in as much as discontinuities in the practice of constitutionalism from the pre-colonial times to the present.[213]

In the study of constitutionalism in pre-colonial Africa, there are a number of caveats that should be mentioned from the outset. The first is the availability, nature, and sources of data in the study of pre-colonial societies in Africa. It is widely assumed that there are few written sources on pre-colonial Africa and even these written sources are those of travelers and missionaries who wrote based on their observation about the state of affairs as they see it.[214] The second is the issue of time within both the range and end of the pre-colonial period. On the one hand, due to the vastness of time, it is difficult, to say the least, to comprehend constitutionalism in this period. On the other hand, due to variations in the start of imperial and colonial relations in Africa, it is difficult to clearly and generally state a pre-colonial period for the whole of Africa within which constitutionalism has to be discussed. The third caveat is the notion of change, which is universal in all human societies, that further complicates the investigation of constitutionalism in this period. And the final one is the attempt to employ a modern concept to understand a different time period.

In light of these caveats, this section takes the Berlin Africa Conference as the end of the long pre-colonial period due to its radical change of socio-economic and political life of Africans and its enduring legacy for constitutional government in Africa. In order to

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[213] Sabelo J Ndlovu-Gatsheni, 'Genealogies of Coloniality and Implications for Africa's Development' (2015) 40 Africa Development / Afrique et Développement 13, 14–15; Alex Thomson, *An Introduction to African Politics* (3rd ed, Routledge 2010) 9.
[214] AN Allott, AL Epstein, and M Gluckman, 'Introduction' in Max Gluckman (ed), *Ideas and Procedures in African Customary Law* (Oxford University Press 1969) 19–21.

understand the idea and practice of constitutionalism in pre-colonial Africa, this section first explores and examines the political organizations through the prism of traditional government and traditional conceptions of power, and their legal orders through the lens of custom in the political universe of pre-colonial African societies at a higher level of abstraction and generality.

A. Traditional Government and Traditional Conceptions of Power

Pre-colonial Africa hosted a mosaic of societies with different types of political organizations across its vast geography. Based on the nature of their political organizations, three types of political systems existed in pre-colonial Africa.[215] The first type of political systems operated based on a centralized administrative system such as empires, states, kingdoms, and chiefdoms (usually referred to as *states*).[216] The second type of political systems functioned based on a lineage structure such as clans or tribes (usually referred to as *stateless societies*), while the third type of political systems was based on kinship and consisted of small communities tied to each other by kinship. For the purpose of this section, I focus on the first two types of political systems due to their relevance for current discourses and practices of constitutionalism. I use the terminology of traditional government and traditional conceptions of power here to refer to these different types of political organizations and political conceptions in pre-colonial Africa following common usages in African constitutional scholarship and in order to distinguish them from *the modern government and the modern conceptions of power* in Africa. The objective of this section is to briefly present the origin,

[215] Fortes and Evans-Pritchard (n 19) 6–7. Needless to say, there were diverse and complex ways of interactions that transcends these classifications within and among these political systems.
[216] See also Mueni wa Muiu and Guy Martin, *A New Paradigm of the African State : Fundi Wa Afrika* (Palgrave Macmillan 2009) 23–46.

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nature, and power of traditional government in these political organizations and traditional political conceptions and to identify the identities, projections, and manifestations of traditional political power and authority in pre-colonial Africa. It also aims to draw some common and salient features in the conception, organization, and exercise of traditional political power and authority in pre-colonial Africa.

The origins and sources of political power in centralized political systems, despite some exceptions and variations in form and degree, were hereditary and related to lineage, kinship, and real or imagined common ancestry, and/or consent of the people. This is backed by a myth that confers political power a special royalty and divinity.[217] Hereditary succession to the throne was the rule in many of the centralized political systems. For instance, succession to the throne was hereditary along the maternal line in the empire of Ghana and Mali,[218] along with the paternal line in the empires of Songhai, Asante, and Benin,[219] and simply hereditary in the Ethiopian empire.[220] Nonetheless, it was neither always the case that the rule of hereditary succession to the throne is guaranteed nor was it always practically possible that such rule yields the right person for the throne. For example, in the empire of Mossi succession to the throne was hereditary but it was subject to confirmation by four dignitaries who themselves were governors of provinces along with their specialized functions in the empire.[221] Even more, the kingdom of Cayor imported kings from outside but

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[217] George BN Ayittey, *Indigenous African Institutions* (2nd ed, Transnational Publishers 2006) 181; Naomi Chazan, 'Myths and Politics in Precolonial Africa' in Shmuel Noah Eisenstadt, Michael Abitbol and Naomi Chazan (eds), *The Early State in African Perspective: Culture, Power, and Division of Labor* (Brill 1988) 28–29 .
[218] Cheikh Anta Diop, *Precolonial Black Africa* (Harold Salemson tr, Seventh Printing edition, Chicago Review Press 1988) 48–53.
[219] Ayittey (n 217) 233–253.
[220] See Hanna Rubinkowska, *Ethiopia on the Verge of Modernity: The Transfer of Power During Zewditu's Reign 1916-1930* (Agade Publishing 2010).
[221] Diop (n 218) 43–44.

maintained other political positions for hereditary succession due to the equal right of its seven dynasties for the throne and their perpetual disagreement to choose their king among themselves.[222] Moreover, the Oromo have had an egalitarian political system where political office is open to all members of the group, categorized under five generations or sets that rotate every eight years.[223]

The king, the chief or the ruler in these centralized political systems was both the reservoir and custodian of political power bestowed with the supreme power of legislation, execution, and adjudication. In addition, in empires, kingdoms or chiefdoms that practiced traditional African religions, the king was endowed with temporal and spiritual powers.[224] The king was a symbol that links the living with the dead, a supernatural power that protects and comforts the living and ensures the continuity of their posterities.[225] For instance, the Zulu king was a supreme legislator, administrator, chief justice, spiritual head and healer of his kingdom.[226] Nonetheless, with the introduction of Islam (Songhai) and Christianity (Ethiopia) into certain African empires and kingdoms, the power of the king was limited to the temporal element of the empire while the Muslim clergy and Christian priests were in charge of the eternal.[227] The power of the king, chief or ruler, whether temporal and/or eternal, was expressed in singular, unified, personal, and absolute terms in the domain of his empire or kingdom.[228] Hence, in theory, the traditional conception of political power is

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[222] ibid 56.
[223] See Asmarom Legesse, *Oromo Democracy: An Indigenous African Political System* (Red Sea Press 2001).
[224] Diop (n 218) 65–66.
[225] Ayittey (n 217) 39–40, 131–132.
[226] Max Gluckman, 'The Kingdom of the Zulu' in M Fortes and E E Evans-Pritchard (eds), *African Political Systems* (Oxford University Press 1940) 29–30.
[227] Diop (n 218) 66–69.
[228] Chancellor Williams, *Destruction of Black Civilization: Great Issues of a Race from 4500 BC to 2000 AD* (Third World Press 1974) 179–181.

centralized, indivisible, and resided in the person of the king, the chief or the ruler.[229] As the king, chief or ruler was considered as "the manifestation of the god," he was painted as "physically dangerous to touch and politically absolute."[230]

However, this seemingly centralized and personalized political power was dispersed horizontally and vertically in practice. Horizontally, the king, the chief or the ruler had to share political power, among others, with the King's or Chief's Council, the Council of Elders, his Cabinet, Queen-mother, women of the royal house, village heads, and ritual functionaries.[231] Accordingly, the king or chief was not an absolute monarch who commanded and executed his policies and laws as he wished.[232] Even though the king or the chief was not generally obliged to follow the advice or decisions of these councils and officials, ignorance of such advises and contradiction of council or cabinet decisions were at his peril as it could invite chaos at the palace and rebellion in the empire or kingdom.[233] Furthermore, the king or chief was neither beyond the reach of law nor, even in some empires and kingdoms such as Mossi, could he remove his ministers at will.[234]

Vertically, as the empire or kingdom was divided into provinces and villages, political power was devolved from the king to the provincial governors or chiefs and to other

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[229] Basil Davidson, *The African Genius: An Introduction to African Social and Cultural History* (Little, Brown and Company/ An Atlantic Monthly Press Book 1969) 190–196.
[230] SE Finer, *The History of Government from the Earliest Times: Ancient Monarchies and Empires; The Intermediate Ages; Empires, Monarchies and the Modern State* (Oxford University Press 1999) 144.
[231] Muiu and Martin (n 216) 47; Ayittey (n 217) 111; Fortes and Evans-Pritchard (n 19) 11–12; Robert William July, *Precolonial Africa: An Economic and Social History* (Scribner 1975) 112–113; Davidson (n 229) 198–199; Robert S Smith, *Kingdoms Of The Yoruba* (2nd ed, University of Wisconsin Press 1988) 92–93; KA Busia, *Africa in Search of Democracy* (Routledge & Kegan Paul PLC 1967) 23–24.
[232] Peter G Lloyd, 'The Political Structure of African Kingdoms: An Exploratory Model' in Michael Banton (ed), *Political Systems and the Distribution of Power* (Routledge 2011) 73–82.
[233] Williams (n 228) 174.
[234] Diop (n 218) 44–45.

subordinate chiefs and village heads.[235] Hence, both as the representatives of their own people in the empire or kingdom and as the representative of the king among their people, these provincial and village administrators had some autonomy of action within their jurisdiction.[236] Thus, as the actual practice and exercise of political power was configured with webs of checks and balances, there were multiple sites of power and, consequently, decision by consensus was rather the norm than the exception.[237]

In uncentralized political systems, however, in addition to the lack of centralized political authority and power, there existed a general distaste for organized power.[238] In these political systems, there was no single person or institution vested with the ultimate and supreme political power and authority. Unlike the centralized political systems where social status and class defined and determined one's access to and participation in the political systems, social status, wealth, and rank, *albeit* significant, were less important in uncentralized political systems.[239] Furthermore, in sharp contrast to centralized political systems, in uncentralized political systems such as the Tiv, Igbo, and Dagaaba, "[k]ings or chiefs are often portrayed as unimaginative, unintelligent, lacking common sense, and likely to use brute force" in their mystic conception of power to discourage the centralization of power either by an individual or institution.[240]

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[235] Ayittey (n 217) 280–283; Diop (n 218) 111–112.
[236] Elias (n 18) 19-20; Fortes and Evans-Pritchard (n 19) 12.
[237] Ayittey (n 217) 137–140, 266-267; Fortes and Evans-Pritchard (n 19) 11–12; Finer (n 230) 145–161; Basil Davidson, *The Black Man's Burden: Africa and the Curse of the Nation-State* (James Currey 1992) 74–98.
[238] Kenneth Carlston, *Social Theory and African Tribal Organization: The Development of Socio-Legal Theory* (University of Illinois Press 1968) 211; Paul Bohannan, *Africa and Africans* (The Natural History Press 1964) 195.
[239] Fortes and Evans-Pritchard (n 19) 6.
[240] Kojo Yelpaala, 'Circular Arguments and Self-Fulfilling Definitions: "Statelessness" and the Dagaaba' (1983) 10 History in Africa 349, 357.

The basic unit of the political system in stateless societies was a joint or extended family based on some number of generation lineage.[241] Every such unit had a single head who acts both as a domestic authority concerning its internal affairs and a representative of the unit in its relationship with other units.[242] In these systems, political power was exercised through an equilibrium between a number of segments who were "spatially juxtaposed and structurally equivalent."[243] For instance, a "[c]onflict between local segments necessarily mean conflicts between lineage segments…and the stabilizing factor is not a superordinate judicial or military organization, but is simply the sum total of inter-segment relations."[244] As a result, the political systems were organized in unilineal descent groups and political power was balanced through the dialectic of cooperation and competition among or between the lineages.[245]

The lack of a centralized authority and administrative system in uncentralized political systems did not mean that they lack a systematically organized political organization that maintains internal peace and order and that guarantees and ensures external defense and protection. Indeed, many of them had systematic organizations informed by a number of factors including their size, geography, livelihood, and way of life.[246] They had rulers named as chiefs, elders, sultans, or headman, village or elder assemblies as deliberative bodies, age grades as functional organizations, and adjudicatory bodies.[247] Through such forms of political organization and with the aid of commonly accepted customary and religious

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[241] John Middleton and David Tait, 'Introduction' in John Middleton and David Tait (eds), *Tribes Without Rulers: Studies in African Segmentary Systems* (Routledge & Kegan Paul PLC 1970) 8.
[242] ibid 8–9.
[243] Fortes and Evans-Pritchard (n 19) 13.
[244] ibid 13–14.
[245] Middleton and Tait (n 241) 6-7; Elias (n 18) 20.
[246] See Carlston (n 238).
[247] Middleton and Tait (n 241).

traditions, uncentralized political systems maintained internal cohesion and order.[248] Whenever there is external attack or aggression, they channeled their organized violence through self-help, feud, and warfare in the dialectic of cooperation and competition and balance of powers between and among the lineage systems.[249]

Hence, what was missing in these societies was a personalized, indivisible, permanent, and supreme political power vested in either a single individual or an institution. For instance, in Somali society, families and extended families form a corporate group such as *qabiil, qolo, jilib, and reer,* often under the leadership of *sultan* or *ugaz,* for common defense and protection of property.[250] Nonetheless, either they are entitled to leave these groups to join another group or to form a new one to protect their best interest at any time and no one can stop them.[251] Furthermore, even in times of external defense or war, the centralized systematic organization of violence was of not a permanent nature but is demand driven and contingent upon need in a particular time and space.[252] Thus, in uncentralized political systems there was a fundamental fear of centralized political power and the whole framework of political organizations was to avoid the emergence and development of such power and to significantly limit ambitions of centralization.[253]

Both centralized and uncentralized political systems, despite their striking differences, had some common conceptions and articulations about political power and political

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[248] Ayittey (n 217) 113–127.
[249] Middleton and Tait (n 241) 19–22.
[250] IM Lewis, *A Pastoral Democracy: A Study of Pastoralism and Politics Among the Northern Somali of the Horn of Africa* (James Currey 1999) 132–134.
[251] Ibid 133; Ayittey (n 217) 121; see also Michael van Notten, *The Law of the Somalis: A Stable Foundation for Economic Development in the Horn of Africa* (Spencer Heath MacCallum ed, The Red Sea Press 2005).
[252] Ayittey (n 217) 113.
[253] Yelpaala (n 240).

authority. In both systems, genealogical ties and connections played a crucial role in both the foundation and development of political power and authority. Moreover, genealogical ties and connections broadcasted political power and authority from the center to the peripheries in the case of centralized political systems and to distant lineages in the case of uncentralized political systems. Obviously, political power and authority were projected in a geographically limited territory in both political systems.[254] Nonetheless, for reasons of political geography such as low population densities, inhospitable environments, and the availability of large open land, territory did not hold a central place in the imagination and conception of power in pre-colonial Africa unlike in Europe.[255]

As a result, a territorial-based explanation of political power of the state like that of Weber not only misses the pre-colonial African political conception and imagination, but also disconfigures it. More than territory, genealogical ties, connections, and alliances and its dynamics across societies account for the conception and practice of political power and authority in pre-colonial Africa.[256] In addition, in both political systems, as multiple sites of political power existed, sovereignty was divided, shared, and diffused among different actors. This is very clear in uncentralized political systems where the balance of powers and the dialectic of cooperation and competition of the lineage groups guided political behavior and political action. In centralized political systems too, the paradox of political theory- that is the projection of a centralized, indivisible, supreme, and absolute power vested in the person of

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[254] AI Asiwaju, 'The Concept of Frontier in the Setting of States in Pre-Colonial Africa' (1983) Présence Africaine 43.
[255] Herbst (n 21) 35–57; Mazrui (n 11) 41-61.
[256] See Jan M Vansina, *Paths in the Rainforests: Toward a History of Political Tradition in Equatorial Africa* (University of Wisconsin Press 1990) 142–165; Igor Kopytoff, 'The Internal African Frontier: The Making of African Political Culture' in Igor Kopytoff (ed), *The African Frontier: The Reproduction of Traditional African Societies* (Indiana University Press 1987) 29; Max Gluckman, *Politics, Law and Ritual in Tribal Society* (Transaction Publishers 1965) 163–164.

the king in principle and the existence of a horizontal and vertical division of powers in practice- ultimately channeled a shared and diffused sovereignty. The traditional government in both systems operated neither in a willy-nilly nor in a random fashion. Rather it was constituted and acted upon pursuant to established custom.

B. Custom as an Indigenous Constitution

Custom was the constitution of pre-colonial societies in Africa. This is due to the fact that, first, it provided the fundamental rules governing the society in general, including the relationship between the governor and the governed in the case of centralized political systems, and the relationship between individuals and lineages in uncentralized political systems.[257] Second, custom outlined the powers and responsibilities of government along with its organization, operation, and change.[258] Third, and finally, it recognized the protections available for individuals and groups within their respective political communities.[259] Building on the previous discussion, this section demonstrates how custom was the constitutional basis for the existence and operation of traditional government in pre-colonial Africa. The discussion begins by clarifying the concept of custom and its multiple functions and manifestations and then proceeds to explore its constitutional function and relevance.

Custom had multiple meanings and functions in pre-colonial Africa. As the Oxford English Dictionary defines it, custom was "a mode of behavior or procedure which is widely

[257] These are some of the fundamental elements for a constitution. See for instance, David Dyzenhaus, 'The Idea of a Constitution: A Plea for Staatsrechtslehre' in David Dyzenhaus and Malcolm Thorburn, *Philosophical Foundations of Constitutional Law* (Oxford University Press 2016) 9–12; Hanna Fenichel Pitkin, 'The Idea of a Constitution' (1987) 37 Journal of Legal Education 167; McIlwain (n 126) 146.
[258] See Ayittey (n 217); Fortes and Evans-Pritchard (n 19); Middleton and Tait (n 241).
[259] See Mutua (n 148) 74–83; Vincent Obisienunwo Orlu Nmehielle, *The African Human Rights System: Its Laws, Practice, and Institutions* (Martinus Nijhoff Publishers 2001) 11–17; Josiah AM Cobbah, 'African Values and the Human Rights Debate: An African Perspective' (1987) 9 Human Rights Quarterly 309, 320–325.

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practiced and accepted in a particular community" and "an established usage which by long continuance has acquired the force of a law or right" in pre-colonial Africa.[260] Furthermore, it was a normative order that manages and regulates the way of life of societies.[261] As a normative order, custom was formed by a regular social behavior accompanied by a general public observance and a sense of obligation.[262] The Nigerian Supreme Court in *Oyewumi v. Ogunesan* defines custom as "the organic and living law of the indigenous people of Nigeria regulating their lives and transactions."[263] Similarly, the South African Constitutional Court in *Alexkor Limited v. the Richtersveld Community,* defines custom as;

> […] a system of law that was known to the community, practiced and passed on from generation to generation. It is a system of law that has its own values and norms. Throughout its history it has evolved and developed to meet the changing needs of the community.[264]

From these conceptions and definitions, at least three different functions and manifestations of custom emerge; these are custom as a way of life, as a law, and as a constitution.

Even if custom was unwritten, it is possible to distinguish the different functions and manifestations of custom and their socio-legal and political consequences. Indeed, the multifarious nature of custom in the pre-colonial African socio-political imagination, on the one hand, and the lack of theoretical and conceptual tools to understand these African

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[260] Oxford English Dictionary, 'Custom, ' <http://wwwoedcom/view/Entry/46306> accessed 29 October 2018.
[261] Henry Louis Gates and Kwame Anthony Appiah, *Encyclopedia of Africa* (Oxford University Press 2010) 35.
[262] Gordan Woodman, 'A survey of Customary Law in Africa: In Search of Lessons for the Future, 'in Jeanmarie Fenrich, Paolo Galizzi and Tracy E Higgins (eds), *The Future of African Customary Law* (Cambridge University Press 2011) 10; TW Bennett, *Customary Law in South Africa* (Juta 2004) 1; Ian Hamnett, *Chieftainship and Legitimacy: An Anthropological Study of Executive Law in Lesotho* (Routledge & Kegan Paul, Limited 1975) 14.
[263] *Oyewumi v Ogunesan* [1990] 3 NWLR PT 137 P182, 207.
[264] *Alexkor Ltd and Another v Richtersveld Community and Others* (CCT19/03) [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (14 October 2003) 53.

realities, on the other, had led some to conclude that pre-colonial Africa was pre-law.[265] It is argued that the absence of clear distinctions between rules of social conduct into law and custom in the African imagination, and the difficulty of identifying social practices and usages as either an ordinary social conduct or a law made custom a non-legal subject matter.[266] Nonetheless, the different functions of custom were clearly known to the respective communities. For instance, traditional dances and drumming at marriage ceremonies in many African societies are customary. It is also customary to pay a dowry for the conclusion of marriage. However, marriage can be concluded without dances and drumming, but it cannot be valid without the payment of a dowry despite the weeklong performance of dances and drumming.[267]

The overriding values of *cieng* of the Dinka, *personhood* of the Akan, and *Ubuntu* of the Southern Africa are customary values which guide human behavior and relations towards humanness, compassion, community, and unity.[268] However, the inability and/or unwillingness of one to live up to these values will not bring legal consequences but social ones such as lack of respect, honor, and dignity in the community. In contrast, if one fails to pay his debt, takes someone's property or kills another human being, this person faces legal sanctions of civil and criminal nature according to the respective custom.[269] Furthermore, if

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[265] Makau W Mutua, 'Africa and the Rule of Law' (2016) 13 Sur - International Journal on Human Rights 159, 163. Indeed, the recognition of the so called "customary law" by colonial powers was a later development due to what Mahmood Mamdani called "a crisis of mission and a crisis of justification" that changed colonial policy from "civilization to conservation and from progress to order". See Mahmood Mamdani, *Define and Rule: Native as Political Identity* (Harvard University Press 2012) 8–25.
[266] Elias (n 18) 29.
[267] ibid.
[268] Deng (n 12) 85–100; Y Makgoro, 'Ubuntu and the Law in South Africa' (1998) 1 Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad, 1-4; Kwame Gyekye, *Tradition and Modernity: Philosophical Reflections on the African Experience* (Oxford University Press 1997) 48–52 .
[269] See Elias (n 18) chapter VII, VIII & IX.

the king, chief, or headman acts without the consultation and participation of his counsels, other subordinate administrators, elders, or the community at large, or if someone attempts to be a king, chief or headman by force, the politico-legal core of custom will be triggered.[270]

Custom as a constitution in pre-colonial African societies provided the fundamental rules of organization of the society, the government structures, and the rights and duties of individuals and groups.[271] In centralized political systems, custom divided the society horizontally and vertically.[272] Horizontally, some due to their birth were entitled to rule,[273] some were entitled to elect the rulers, while some others were entitled only to say how the king or the chief rules.[274] In addition, others due to their special functions, trainings, and skills, such as priests, craftsmen, fishermen, singers, had either a special privilege or (dis)advantage in the social strata.[275] In some centralized political systems, there were also some categories of people who did not have any say but had to obey the rules.[276] Vertically, as centralized political systems were heterogeneous each with its own custom, there was a division which separates one clan from another clan, one village from another village, and the descendants of one ancestor from the descendants of another ancestor.[277] Status, wealth, age, sex, ability, disability, and beauty among others were intersecting themes that affect the place and position of the individual in the customs of many of the centralized political systems.[278] As the customs

[270] Ayittey (n 217) 216–231; Elias (n 18) 18–19.
[271] See also Fenrich, Galizzi and Higgins (n 22) 2.
[272] Basil Davidson, *A History of West Africa, 1000-1800* (Revised edition, Addison-Wesley Longman Ltd 1978) 178.
[273] See also EG Parrinder, 'Divine Kingship in West Africa' (1956) 3 Numen 111, 111–121.
[274] Davidson, *A History of West Africa* (n 272) 178; Cheikh Anta Diop, *Civilization or Barbarism: An Authentic Anthropology* (Yaa-Lengi Meema Ngemi tr, 3rd edition, Lawrence Hill Books 1991) 117–118.
[275] Davidson, *A History of West Africa* (n 272) 179; Diop, *Civilization or Barbarism* (n 273) 117–118.
[276] Davidson, *A History of West Africa* (n 272) 180–182; Robert William July, *Precolonial Africa: An Economic and Social History* (Scribner 1975) 225.
[277] Davidson, *A History of West Africa* (n 272) 178–179; Szymon Chodak, 'Social Stratification in Sub-Saharan Africa' (1973) 7 Canadian Journal of African Studies / Revue Canadienne des Études Africaines 401, 402–408.
[278] Elias (n 18) 98–108; July (n 276) 111–114.

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of uncentralized political systems were egalitarian and as lineages were their corporate political units, these societies were vertically more homogenous and horizontally less stratified. Surely, there were customary functional and other divisions, for instance, along with sex, secret society affiliation, age grades or age sets, that defines the place and position of the individual in these societies.[279]

In addition to constituting the social makeup of pre-colonial societies, by taking into consideration their size and population number, the customs of the centralized political systems established and organized government power horizontally and vertically. Horizontally, as noted in the previous discussion, the government of the empire or kingdom was organized around the king or the chief who held legislative, executive, and judicial powers but shares these powers with his Counsel, Cabinet, Queen-mother, women of the royal house, and ritual functionaries. Similarly, vertically, the government power of the empire or kingdom was devolved to provinces and villages under the custodian of the provincial chiefs or princes and village leaders. In the case of uncentralized political systems, custom conferred and authorized the headman, in collaboration with his lineage, governmental authority. In both political systems, custom provided sanctions and punishments for abuse or misuse of powers and recognized a set of rights and freedoms to individuals and groups within the political community.

In what follows, I present a template of custom as an indigenous constitution in pre-colonial Africa building on the above discussion and drawing from Chancellor Williams'

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[279] Ayittey (n 217) 112–131; Middleton and Tait (n 241); Susan Keech McIntosh, 'Pathways to complexity: An African perspective' in Susan Keech McIntosh (eds), *Beyond Chiefdoms: Pathways to Complexity in Africa* (Cambridge University Press 2005) 9–19.

version of the "African Constitution" before the advent of colonialism.[280] Chancellor Williams develops an archetype of the "African Constitution" in pre-colonial Africa by examining the customs of 105 language groups in 26 African countries after sixteen years of research and two years of field studies.[281] Building on the discussions here and the previous section together with Williams' version of the "African Constitution" and George Ayittey's "Indigenous African Constitution",[282] I briefly restate and summarize the theory of government and the idea of rights produced by the customs of pre-colonial societies in Africa below.

Indigenous theory of government and ideas of rights in pre-colonial Africa[283]

I General Principles

1. *He who founded the empire, kingdom or chiefdom by uniting many as one is the leader.*
2. *The people will elect rulers from the founder's family in honor of him if the heirs demonstrate the founder's character, bravery, and intelligence.*
3. *The will of the people is the supreme law.*
4. *The king or the chief is the custodian of the will of the people and its supreme and ultimate executor.*

II Fundamental Rights

Every member of the community had-

1. *The right to work and economic livelihood.*
2. *The right to the use of land.*
3. *The right to defend the family against intruders, even against harassment by the chief.*
4. *The right to aid in time of trouble including the right to family or community care in case of sickness and accidents.*
5. *The right to a fair trial.*
6. *The right to participate in government and the decision-making process.*
7. *Freedom of expression and worship.*
8. *Freedom of movement and association.*

III Government

1. *The chief or king has the following powers and functions:*

a. *Provide a vital link between the living and the ancestors.*
b. *Maintain order, balance and harmony among the cosmological elements: the sky, the earth*

[280] Williams (n 228) 171–186.
[281] ibid 20–21.
[282] Ayittey (n 217) 295–297.
[283] Adopted with modifications from Williams (n 228) 181–186 and Ayittey (n 217) 295–297.

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and the world.

c. *Promote peace, justice, social harmony and prosperity among the people.*
d. *Respect the laws of the ancestors and abide by the will of the people.*
e. *Collect money, taxes, gifts, and other donations and dispose them for the welfare of the society*
f. *Present the prayers of the people to his and their ancestors in Heaven.*

2. *The king or chief shall govern with a Council.*

a. *The chief or king must remain silent as Council deliberates on an issue.*
b. *Important decisions must be debated until unanimity is reached. If not, the issue shall be placed before a Village Assembly of commoners and debated until a consensus is reached.*
c. *The king or chief together with the Council, shall ensure that the will of the people, arrived at by consensus, is carried out. The king or chief shall not unilaterally abrogate the expressed will of the community.*
d. *The king or chief shall not entertain or enter into any contract with a foreigner or a stranger without the full approval of the Council.*
e. *All decisions initiated by the king should be approved by the Council.*

3. *The Council is composed of the elders of the extended family or clan either based on hereditary or meritocratic considerations. The king or chief may nominate other persons of high regard to the Council upon concurrence of the Council.*
4. *The family is the primary social, economic, judicial, and political unit in society that entertains all internal matters first hand.*
5. *The primary duties of the government are to defend the community against external aggression, maintain law and order, and ensure the survival of the ethnic group by promoting peace, justice, harmony and economic prosperity. It is not the function of the tribal government to operate commercial enterprises to the total exclusion of the subjects. The chief may operate a farm or business if he so wishes. But he cannot prohibit others from engaging in the same economic activity.*
6. *Grounds of removal and/or regicide of a king or chief.*

a. *Failure to perform the duties listed in III (1).*
b. *Drunkenness*
c. *Cowardice in war*
d. *Failure to listen to advice*
e. *Physical disfigurement*
f. *Oppression of the people*
g. *Looting the tribal treasury*

Thus, evidently, custom animated the normative universe of traditional government and traditional conceptions of power and was the ultimate compass in the practical exercise of political power. Accordingly, custom was the indigenous constitution that regulated the politico-legal life of pre-colonial societies in Africa.

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C. Indigenous Constitutionalism

The indigenous constitution, as described in the previous section, was enforceable in practice. Indeed, there should not be an illusion that the constitutional theory envisioned in the constitutional arrangements was exactly implemented in practice. Nonetheless, there was a general compliance with and commitment to the practical enforcement of the indigenous constitution. If rule by consent, rule of law, limited government, and the protection of rights constitute the fundamental elements of constitutionalism, then precolonial societies in Africa had an ingenious constitutionalism.[284] This section explores the practical enforcement of the indigenous constitution in light of these fundamental elements of constitutionalism. The objective of this discussion is to demonstrate that custom as an indigenous constitution *did matter* in the operation and functioning of traditional government in precolonial Africa.

The general will of the people had the paramount importance in bestowing the king or chief with the authority and legitimacy necessary for voluntary compliance to his political power. As discussed in the previous sections, indigenous constitutions provided different rules of access to political office and allocated different powers and functions to these offices. As a result, illegal seizure of a political office, abuse and/or misuse of political powers, and non-performance of political functions were sanctioned either through the institutional political process or through popular rebellion including secession or a combination of both. For instance, the kings of Buganda, Lubu, Zulu, Ankole, Mende, Fanti, Yoruba, and Asante were in check through these processes.[285] To give a particular example, the Asante had destooled

[284] See Bruce P Frohnen, 'Is Constitutionalism Liberal?' (2011) 33 Campbell Law Review 31, 529-558.
[285] Ayittey (n 217) 185–200; Elias (n 18) 18 & 99; Gluckman, 'The Kingdom of the Zulu of South Africa' (n 226) 30-36; K Oberg, 'The Kingdom of Ankole in Uganda' in M Fortes and EE Evans-Pritchard (eds), *African Political Systems* (Oxford University Press 1940) 157-161.

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or impeached three kings: Osei Kwame in 1799 for absenting and failing to perform his religious duties during *Adae* festivals, Karikari in 1874 for extravagance, and Mensa Bonsu in 1883 for excessive taxation.[286] While indigenous constitutions could not prevent the ruler from being a tyrant or dictator all the time, the recourse to rebellion, secession, and regicide tamed the temptations of dictatorship. In this regard, the demise and death of Shaka of the Zulu kingdom were instructive as it shows how lack of popular consent ended the king's rule and ultimately cost him his life.[287] Hence, rule by consent was one of the cornerstones of political legitimacy and authority in precolonial Africa.[288]

Indigenous constitutions applied to rulers and subjects alike. In addition, both the rulers and their subjects were fully aware of their rights and duties to each other and agreed to live accordingly.[289] One of the fundamental rules of indigenous constitutions echoes the familiar French maxim *noblesse oblige*.[290] As the kings, chiefs or rulers held power and influence unmatched by any member of their societies, they assumed corresponding obligations and responsibilities to their societies.[291] In as much as kings, chiefs or rulers collected taxes, tributes, and labor services, among others, from their subjects, they had to disperse welfare and justice to them, and protect their lives and properties, and perform ritual acts and observances.[292] Failure to perform these duties will result in impeachment, removal or even regicide as noted above. Hence, the idea of constitutionalism manifested in precolonial Africa was not only concerned with limiting government for individual or

[286] ibid 174.
[287] Gluckman, 'The Kingdom of the Zulu of South Africa' (n 226) 26.
[288] Williams (n 228) 179–185; Elias (n 18) 19–20; Fortes and Evans-Pritchard (n 19) 12–13; Middleton and Tait (n 241).
[289] Fortes and Evans-Pritchard (n 19) 12.
[290] Elias (n 18) 20.
[291] Fortes and Evans-Pritchard (n 19) 12.
[292] ibid 12.

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communal liberty, but also tasked with enabling government for the same purpose.[293] As N.W. Barber argued in *The Principles of Constitutionalism,* indigenous constitutionalism both *limited* and *enabled* government to effectuate political power for the betterment and common wealth of the society in accordance with the principles and rules of the indigenous constitutions.[294]

In a similar vein, the rights and freedoms recognized in the indigenous constitutions were enforceable. The right to use land, the right to fair trial, the right to participation in decision-making, freedom of expression and movement, among others, were enforceable rights in precolonial Africa. There is a dearth of scholarship that shows how Africans used their right to land, settled their disputes, participated in the government of their society, expressed their ideas and views, and freely moved from one place to another within and beyond their political community.[295] These rights and freedoms were inherent in the indigenous constitutional dispensation and remained so in the constitutional practices. Nonetheless, I am not alluding that precolonial Africa practiced human rights as we know them today nor am I suggesting that there was equality in the practice and enforcement of these rights and freedoms. Indeed, not everyone in the political community was equal and discrimination, for instance, based on sex, status, and ethnicity were prevalent. However, precolonial societies in Africa maintained and practiced the rights they recognized in their respective constitutions. Therefore, seen in light of the general ideas and principles of

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[293] See also Graham Walker, 'The Idea of Nonliberal Constitutionalism' (1997) 39 Nomos 154, 154-184.
[294] Barber (n 9) 9–10.
[295] See Mutua (n 148) 74–81; Elias (n 18) chapter IX (for land rights), XI (for participation in decision making), and XII (for the judicial processes); Lewis (n 250) (for the democratic decision making among the Somalis); Kwasi Wiredu, 'An Akan Perspective on Human Rights' in Abdullahi Ahmed An-naim and Francis M Deng (eds), *Human Rights in Africa: Cross-Cultural Perspectives* (Brookings Institution Press 1990) 243–260; Francis M Deng, 'A Cultural Approach to Human Rights Among the Dinka' in Abdullahi Ahmed An-naim and Francis M Deng (eds), *Human Rights in Africa: Cross-Cultural Perspectives* (Brookings Institution Press 1990) 261-289.

constitutionalism, precolonial societies in Africa practiced an indigenous constitutionalism which can be considered as one variety of constitutionalism.[296]

2.4 Constitutionalism in Colonial Africa

As in constitutionalism in precolonial Africa, the nature and identity of colonial constitutionalism in colonial Africa that encountered indigenous constitutionalism should be investigated and ascertained on its own first to locate it in the dynamic constitutional matrix that sets legal syncretism in play. Even if it is a contradiction in terms, indeed, to talk about colonial constitutionalism in Africa, it is difficult to understand and explain the dynamic constitutional matrix that changed and transformed the indigenous constitutionalism and consequently set a syncretic postcolonial constitutional deign and practice without accounting for the colonial constitutional set-up. As highlighted in the previous chapter, colonialism superimposed a 'new constitutional system' over precolonial Africa under a new theory of government and conceptions of power. This section examines and explores the nature of colonial constitutional theory and practice and their interactions with the indigenous constitutional systems. The first part deals with the nature of colonial constitutions and their theory of government and conceptions of power. This is followed by a discussion of how colonial constitutions dissolved the indigenous constitutional systems by transforming and reconfiguring the traditional governments and customs into the colonial constitutional systems through acts of rejection, accommodation, and invention. Needless to say, there were different types of colonial constitutions in Africa in as much as there were different colonial

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[296] See Tushnet (n 3); Frohnen (n 284); Walker (n 293).

powers and different circumstances and exigencies within the respective colonial states. Hence, the reference to colonial constitutions here is to the fundamental common elements.

A. Colonial Constitutions

The Colonial constitutions in Africa were framed and structured through the aid of international law and domestic imperial and colonial laws. Indeed, imperial and colonial laws were the main tools, structural prerequisites, and cutting edges of the colonial project elsewhere.[297] Nonetheless, the emergence of new states with colonial ambitions in Africa made international law at the forefront of late colonialism.[298] In this regard, the Berlin Conference building on nineteenth-century international law provided the frame of reference for the colonization of Africa and acted as the fundamental Basic Law for colonial Africa.[299] Within the frameworks of the Berlin Conference, the respective imperial and colonial laws crafted, administered, and managed colonial states. Through the help of international law and imperial and colonial laws, new territories, peoples, governments, and sovereignties were established and superimposed over indigenous constitutional arrangements of precolonial Africa. In the paragraphs that follow the constitutional design and theory built in the colonial constitutions in Africa will be discussed.

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[297] Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900* (Cambridge University Press 2002) 18–19; Sally Engle Merry, 'Law and Colonialism' (1991) 25 Law & Society Review 889, 890; Res Schuerch, *The International Criminal Court at the Mercy of Powerful States: An Assessment of the Neo-Colonialism Claim Made by African Stakeholders* (Springer 2017) 44–47; Martin Chanock, *Law, Custom, and Social Order: The Colonial Experience in Malawi and Zambia* (Cambridge University Press 1985) 4.

[298] Wolfgang Justin Mommsen, 'Bismarck, the Concept of Europe, and the Future of West Africa, 1883-1885' in Stig Förster, Wolfgang Justin Mommsen and Ronald Edward Robinson (eds), *Bismarck, Europe and Africa: The Berlin Africa Conference 1884-1885 and the Onset of Partition* (Oxford University Press [for] German Historical Institute 1988) 151–170.

[299] Matthew Craven, 'Between Law and History: The Berlin Conference of 1884-1885 and the Logic of Free Trade' (2015) 3 London Review of International Law 31, 49–54; Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2007) 90–91.

The Berlin Conference provided the Basic Law or constitution *ex nihilo*[300] for colonial Africa without the participation of Africans. At the Berlin Conference, indigenous constitutions were considered non-existent. So were the numerous precolonial societies with their centralized and uncentralized political systems. International law neither recognized the personality of precolonial African states and societies nor did it provide a theory of international relations that includes them.[301] As a result, Africa was a place without rights and duties under international law. The exclusion of Africa at the Berlin Conference and the invitation and participation of other states such as the United States, Austria-Hungary, Denmark, Sweden-Norway, which did not have a colonial interest in Africa, on African affairs is an evidence of international law's treatment of Africa as a legal object.[302] Consequently, Africa was considered as a *terra nullius* and, hence, a legitimate *object* of occupation and conquest by European states. As the power of Europeans to occupy and colonize Africa was a truism, the Berlin Conference concerns itself with how this can be done. Consider, for example, the opening paragraphs of the General Act of the Berlin Conference:

> WISHING, in a spirit of good and mutual accord, to regulate the conditions most favourable to the development of trade and civilization in certain regions of Africa, and to assure to all nations the advantages of free navigation on the two chief rivers of Africa flowing into the Atlantic Ocean;
>
> BEING DESIROUS, on the other hand, to obviate the misunderstanding and disputes which might in future arise from new acts of occupation (prises de possession) on the coast of Africa; and concerned, at the same time, as to the means of furthering the moral and material well-being of the native populations;

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[300] Thomas C Grey, 'The Constitution as Scripture' (1984) 37 Stanford Law Review 1, 16.
[301] Ibrahim J Gassama, 'International Law, Colonialism, and the African' in Martin S Shanguhyia and Toyin Falola (eds), *The Palgrave Handbook of African Colonial and Postcolonial History* (Palgrave Macmillan 2018) 554–559; Makau wa Mutua, 'Why Redraw the Map of Africa: A Moral and Legal Inquiry' (1995) 16 Michigan Journal of International Law 1113, 1120–1122.
[302] Fisch (n 151) 347.

The Berlin Conference incorporated what Achille Mbembe called the *founding violence* into the colonial constitutions.[303] On the one hand, it created the right of colonization and the space within which it was exercised. On the other hand, it excluded the indigenous constitutions and made the colonial constitutions supreme. Chapter 6 of the General Act of the Berlin Conference speaks about the founding violence;

> Any Power which henceforth takes possession of a tract of land on the coasts of the African continent outside of its present possessions, or which, being hitherto without such possessions, shall acquire them, as well as the Power which assumes a Protectorate there, shall accompany the respective act with a notification thereof, addressed to the other Signatory Powers of the present Act, in order to enable them, if need be, to make good any claims of their own.[304]

> The Signatory Powers of the present Act recognize the obligation to insure the establishment of authority in the regions occupied by them on the coasts of the African continent sufficient to protect existing rights, and, as the case may be, freedom of trade and of transit under the conditions agreed upon.[305]

The chief aim of these provisions was the legitimation of the partitions of Africa among the European colonial powers and the management of conflicts that might have arisen in this respect. Through this act of legitimation, colonial sovereignty was born in the graveyards of the sovereignty of Africans as discussed in the previous section.

Building on the founding violence and frame of reference engineered at the Berlin Conference, the imperial and colonial powers added a further *legitimation* and *maintenance* violence to the colonial constitutional architectures.[306] The *legitimation violence* was brought to Africa with the importation of imperial and colonial laws to justify, order, and structure colonial government. To ensure the maintenance, spread, and permanence of the colonial

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[303] Achille Mbembe, *On the Postcolony* (University of California Press 2001) 25.
[304] General Act of the Berlin Conference on West Africa 1885, article 34.
[305] ibid article 35.
[306] ibid; Mamdani, *Define and Rule* (n 265) 43–44.

government, colonial powers further enacted new laws and rules required by the exigencies of the situation in every colony. As a result, precolonial states and societies were forced to come together and/or separated from each other to form new territorial colonial states, and a colonial government animated by violence and a colonial sovereignty alien to the Africans were implanted in these states.

Even though the structures and rules of colonial constitutions varied among Anglophone, Francophone, or Lusophone colonies, and within these colonies themselves, their effect in terminating the indigenous constitutional systems were the same.[307] For instance, in Anglophone Africa, the colonial constitutional structures were composed of (1) Order in Council which put the general framework of colonial governance attaching the application of the laws of England, (2) Acts of the Westminster parliament, (3) and local legislation of the colonies either by their Governors and/or Legislative Councils.[308] In Sierra Leone and the Gambia, there were a Governor and a Legislative Council, comprising a Chief Justice, a colonial secretary, and some merchants, with both legislative and judicial powers.[309] In the colony of the Gold Coast, however, there was only a Lieutenant-Governor while the Governor and Legislative Council of Sierra Leone held legislative and judicial functions over it.[310] In addition, the Order in Council provided the application of the codified laws of India in Eastern Anglophone Africa.[311] In a similar vein, in Francophone Africa, the

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[307] See Hooker (n 90) chapter II-IV.
[308] See the constitutional structure of Tanganika as a sample; The Tanganyika Order in Council 1920.
[309] Arthur Mills, *Colonial Constitutions: An Outline of the Constitutional History and Existing Government of the British Dependencies: With Schedules of the Orders in Council, Statutes, and Parliamentary Documents Relating to Each Dependency* (J Murray 1856) 163–164, 168.
[310] ibid 170.
[311] JND Anderson, 'Colonial Law in Tropical Africa: The Conflict between English, Islamic and Customary Law' (1960) 35 Ind LJ 433, 434–435.

colonial constitutional structures and rules were provided in the *senatus-consult* of 3 May 1854 which authorized the administration of the colonies by the decree of the Emperor- which the President inherited in the Third Republic, legislation of the Ministers of the Navy and the Colony, and local legislation by the governors and administers or councils.[312] Despite their variations, these colonial constitutions changed the rules, institutions, procedures, and meanings of the indigenous constitutional systems in the new territorial states.[313]

B. The Transformation of Traditional Government

With the superimposition of colonial constitutions in Africa, the traditional governments ceased to be the ultimate decision-making bodies as they used to be. Their power and final decision-making authority about their people within their precolonial territorial or genealogical ties were stripped and rejected by the new colonial governments. Their fundamental sources and conceptions of power were subordinated, transformed, and incorporated into the systems of colonial governments. In this discussion, I demonstrate how the colonial constitutions rejected, incorporated, invented, and accommodated traditional governments through complex legal syncretic processes into the colonial states and governments.

As the importation of Europeans laws and institutions were part of the alleged civilizing mission of the colonial project in Africa, the powers of traditional government were

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[312] Ruth Ginio, *French Colonialism Unmasked: The Vichy Years in French West Africa* (University of Nebraska Press 2008) 3–4; Jean Suret-Canale, *French Colonialism in Tropical Africa: 1900-1945* (Pica Press 1971) 71–72; Hooker (n 90) 196–203.
[313] Richard Roberts and Kristin Mann, *'Law in Colonial Africa' in* Kristin Mann and Richard Roberts (eds), *Law in Colonial Africa* (Heinemann Educational Books & James Currey 1991) 3–5.

not formally recognized at the beginning.[314] Indeed, the importation of these laws and institutions were neither to simply use them as dispute settlement mechanisms nor as an apparatus of control.[315] They were meant to show Western civilization with universal normative appeal and institutional sophistication which can and should be applied in the colonies as the core part of the legitimation violence.[316] In fact, as noted elsewhere, colonial states had neither the interest nor the capacity to apply European laws to all Africans within their territory. However, the maintenance of the colonial state and the colonial rule of law required some formal recognition of traditional government.[317] The exigencies of the colonial administration such as the need to contain threats to the continuity of colonial rule, protect the authority and dignity of local colonial governors and European citizens, and collect taxes from the African mass, among others, made recognition of certain limited powers of the traditional government necessary.[318]

The recognition of traditional government by the colonial states introduced new changes to the precolonial structures and normative basis of traditional government and traditional conception of power. The change brought new terminologies or political vocabularies such as native authority or native administration in colonial Africa. In this native authority or native administration, the native leader or the chief was appointed or confirmed

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[314] See also Alice L Conklin, *A Mission to Civilize : The Republican Idea of Empire in France and West Africa, 1895-1930* (Stanford University Press 1997).
[315] Mamdani, *Citizen and Subject* (n 17) 109.
[316] ibid; Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (University of Michigan Press 2003) 35–68 .
[317] Mamdani, *Define and Rule* (n 265) 8; Karen E Fields, *Revival and Rebellion in Colonial Central Africa* (Princeton University Press 1985) chapter 1 & 2.
[318] Henri Labouret, 'France's Colonial Policy in Africa' (1940) 39 African Affairs 22, 25–29; David Killingray, 'The Maintenance of Law and Order in British Colonial Africa' (1986) 85 African Affairs 411, 412–419; Emmanuelle Saada, 'The Empire of Law: Dignity, Prestige, and Domination in the "Colonial Situation"' (2002) 20 French Politics, Culture & Society 98, 103–106.

by the colonial authorities.[319] The basis of appointment and confirmation of the chief was not custom, but his agreement with the colonial authorities and commitment to their colonial mission.[320] Precisely because of this, colonial authorities recognized chiefs who submitted to their policy and dismissed those who stand against them and appointed persons who otherwise could not have been chiefs or traditional leaders according to custom.[321] Further, they created the institution of native authority in communities who did not have prior centralized political systems.[322] By doing so, colonial states incorporated new sources of power and authority to the institution of native authority by displacing customary rules and practices.

Along with the sources of power, the colonial state changed the functions and powers of traditional governments. Depending upon the circumstances and contexts of the colonial administrations, colonial states either gave more powers and functions to traditional authorities or severely limited their powers and functions.[323] Generally, in British colonial Africa, the powers of traditional authorities increased more often than not with the oversight of colonial authorities,[324] unlike French colonial Africa where the powers of traditional authorities were severely limited.[325] For instance, in British colonial Africa, as the sole native

[319] Lord Hailey, *Native Administration and Political Development in British Tropical Africa: Report, 1940-42* (London: HMSO 1944) 85–87.
[320] Colin Newbury, *Patrons, Clients, and Empire: Chieftaincy and over-Rule in Asia, Africa, and the Pacific* (Oxford University Press 2003) 121–122.
[321] Suret-Canale (n 313) 82–83.
[322] Suret-Canale (n 313) 79–80; Adiele Eberechukwu Afigbo, *The Warrant Chiefs: Indirect Rule in Southeastern Nigeria, 1891-1929* (Longman 1972) 37–45; Robert L Tignor, 'Colonial Chiefs in Chiefless Societies' (1971) 9 The Journal of Modern African Studies 339, 339-359.
[323] Martin Chanok, 'Making Customary Law: Men, Women, and Courts in Colonial Northern Rhodesia' in Margaret Jean Hay and Marcia Wright (eds), *African Women & the Law : Historical Perspectives* (Boston University, African Studies Center 1982) 59-60; Suret-Canale (n 313) 79–82.
[324] Peter K Tibenderana, 'The Irony of Indirect Rule in Sokoto Emirate, Nigeria, 1903-1944' (1988) 31 African Studies Review 67, 67–92.
[325] Michael Crowder, 'Indirect Rule: French and British Style' (1964) 34 Africa: Journal of the International African Institute 197, 197-205.

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authority was vested in the chiefs under the authority of colonial administrators, they become stronger as holders of political power.[326] In French colonial Africa, however, the main tasks of native authorities included the collection of taxes, the recruitment of men for labor and the execution and management of the infamous *indigènes.*[327] As part of the corpus of colonial administrations, salaries and bonuses were paid to chiefs in colonial Africa.[328]

Furthermore, the institution of native authority was not a pure native institution run by natives and applied native laws, but it heavily incorporated Europeans and Europeans laws in its structure and operation. In this respect, the British native rule consisted of a native authority an indigenous chief appointed and backed by the British, a native treasury which included British tax assessors and African tax collectors, and a native court run by Africans and supervised by British colonial officials.[329] When we explore further about the native court systems in many parts of British colonial Africa, we find that the native judges were the British and the natives were simply advisors, translators or aids in the disposition of colonial justice.[330] Chiefs and headmen acted mainly as assessors and interpreters of customary laws in native courts.[331] Even when natives run native courts, their decisions were subject to review

[326] For details see Michael Crowder and Obaro Ikime (eds), *West African Chiefs: Their Changing Status under Colonial Rule and Independence* (Africana Publishing Corporation and the University of Ife Press 1970).
[327] Crowder (n 326) 200; Gregory Mann, 'What Was the "Indigénat"? The "Empire of Law" in French West Africa' (2009) 50 The Journal of African History 331, 333–337; Suret-Canale (n 313) 80–83.
[328] Newbury (n 321) 114; Elise Huillery, 'The Black Man's Burden: The Cost of Colonization of French West Africa' (2014) 74 The Journal of Economic History 1, 14; Tignor (n 323).
[329] T Walter Wallbank, 'The Principles and Organization of British Native Rule in Tropical Africa' (1934) 3 Pacific Historical Review 142, 147–149.
[330] Julius Lewin, 'Native Courts and British Justice in Africa' (1944) 14 Africa: Journal of the International African Institute 448, 448.
[331] Bonny Ibhawoh, 'Historical Globalization and Colonial Legal Culture: African Assessors, Customary Law, and Criminal Justice in British Africa' (2009) 4 Journal of Global History 429, 434–435; AN Allott, 'The Judicial Ascertainment of Customary Law in British Africa' (1957) 20 The Modern Law Review 244, 249–251; see also Sally Falk Moore, 'Treating Law as Knowledge: Telling Colonial Officers What to Say to Africans about Running "Their Own" Native Courts' (1992) 26 Law & Society Review 11.

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and appeal in higher courts staffed by the British.[332] Hence, the native authority and administration was an arrangement of mixed persons, laws, and institutions where syncretism took place as a matter of colonial governmentality.

These changes significantly transformed the relationship between traditional governments and their respective African societies. On the one hand, traditional authorities represented the colonial states as part of the colonial administration or bureaucracy in their societies, and on the other hand, they were divorced from the indigenous constitutional systems of checks and balances. The precolonial supreme custodians of sovereignty were reduced to subordinate administrators. In lieu of their new source of power and legitimacy, they were neither accountable to their precolonial councils and peers nor to their people.[333] So long as they had the backing and support of the colonial states, they exercised their power without or with little limitations towards their people.[334] Despite the differences in the degree of despotism within native authorities in British or French colonies, or within every colony, the colonial states channeled and configured violence to the body of native authorities as a means of exploitation, domination, and tribalization that fundamentally altered the nature of traditional government and traditional conception of power in Africa.

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[332] Roger Gocking, 'British Justice and the Native Tribunals of the Southern Gold Coast Colony' (1993) 34 The Journal of African History 93, 95; David N Smith, 'Native Courts of Northern Nigeria: Techniques for Institutional Development' (1968) 48 Boston University Law Review 49, 56; AN Allott, 'Native Tribunals in the Gold Coast 1844-1927 Prolegomena to a Study of Native Courts in Ghana' (1957) 1 Journal of African Law 163, 168–169; Julius Lewin, 'The Recognition of Native Law and Custom in British Africa' (1938) 20 Journal of Comparative Legislation and International Law 16, 20–21.
[333] Mamdani, *Define and Rule* (n 265) 43–45.
[334] ibid 52–61.

C. The Transformation of Custom

Like traditional authorities, customs were transformed by the intrusion of colonial constitutions through a complex process of legal syncretism. In fact, in pursuing the alleged civilizing mission as noted above, colonial powers attempted to apply their own imported laws to their colonies.[335] Nonetheless, due to changes in colonial policy from direct rule to indirect rule, in the case of the British, and from assimilation to association, in the case of French, the colonial mission transformed from one of "civilization to conservation" and "from progress to order."[336] While this change in colonial policy was a new technology of governmentality of *define and rule,* for Mamdani, it was one of accommodation and adaption, for Lord Lugard the then governor of Nigeria and the engineer of indirect rule in Anglophone Africa. Lugard rationalized his policy as follows;

> The task of the administrative officer is to cloth his principles in the grab of evolution, not of revolution; to make it apparent alike to the educated native, the conservative Moslem, and the primitive pagan [*sic*], each in his own degree, that the policy of the government is not antagonistic but progressive–sympathetic to his aspirations and the safeguard of his natural rights.[337]

Regardless of the complexities of the deriving logic or reasons for changes in colonial policy, as a matter of fact, such changes transformed the domain of custom.

As a matter of colonial laws, the application of custom in the colonial states and its recognition as *native law*, *indigenous law*, or *customary law* was conditional upon the fulfillment of some uncustomary requirements. The first necessary requirement was that custom should

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[335] Hooker (n 90) 220; Robert B Seidman, 'The Reception of English Law' in Yash P Ghai, Robin Luckham and Francis G Snyder (eds), *The Political Economy of Law: A Third World Reader* (Oxford University Press 1987) 107-116.
[336] Mamdani, *Define and Rule* (n 265) 8.
[337] Frederick John Dealtry Lugard, *The Dual Mandate in British Tropical Africa* (William Blackwood and Sons 1922) 194.

not contravene against any written law or legislation. These included imperial and colonial laws of the metropoles and all local laws enacted by colonial administrators, councils or officials.[338] In French colonial Africa, in particular, the application of custom was even limited to the private law while the public law was under the French civil law. Moreover, in matters of private law, the application of customary and religious laws (in the case of Muslims) was limited to civil status, marriage, succession, gifts, and wills.[339] Within such confinement, custom either by its very terms or by implication should not contradict imperial and colonial laws.[340] As a result, the domain of the customary was fractured and fragmented by the imposition of legislative non-contradiction as an essential element of application and recognition.

The second requirement was that custom should not be repugnant to the principles of European sense of natural justice, equity, morality, public order, good conscience, and civilization.[341] This is the so-called repugnancy test employed to further transform and align the application of custom to conform to the European and Christian normative systems. In this regard, woman-to-woman marriages and liability for the faults of family members, among others, were considered repugnant.[342] Even if there were no written laws to contravene with, the practical application of custom was contingent upon its conformity with the general moral

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[338] Muna Ndulo, 'African Customary Law, Customs, and Women's Rights' (2011) 18 Indiana Journal of Global Legal Studies 87, 95.
[339] Hooker (n 90) 221–222.
[340] Ndulo (n 338) 95.
[341] Mamdani, *Citizen and Subject* (n 17) 115–119; Moore, 'Treating Law as Knowledge' (n 331) 18–19; Antony N Allott, *New Essays in African Law* (Butterworths 1970) 158–181.
[342] Ndulo (n 338) 95–96; see also Jackton B Ojwang and Emily Nyiva Kinama, 'Woman-to-Woman Marriage: A Cultural Paradox in Contemporary Africa's Constitutional Profile' (2014) 47 Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America 412; CO Akpamgbo, 'A "Woman to Woman" Marriage and the Repugnancy Clause: A Case of Putting New Wine into Old Bottles' (1977) 9 The Journal of Legal Pluralism and Unofficial Law 87, 87-92.

and legal considerations of the colonial states. Consequently, as it was difficult to determine *ex ante* the conformity of the numerous customs with the repugnancy test, it was neither evident whether a custom which did not contravene to written laws was applicable nor whether the outcomes of actions and behaviors pursuant to custom were predictable as in precolonial times. The twin requirements of legislative conformity and the repugnancy test not only subordinated the constitutional status of custom as in precolonial times, but also introduced changes into the substantive and procedural aspects of custom from the outside by colonial states.

In addition, as in the invention of chiefs in chiefless societies, new customary laws were invented in colonial Africa.[343] The invention of new customary laws took two forms. The first was the creation of customary law by colonial states. For example, the French colonial administration created the central feature of Banjal customary land law which radically separated land use "between the master of the land and the users."[344] In solving a dispute between the natives, the colonial court decided that the 'rain priest,' who had been institutionalized by the colonial administration, owns the land against an established Banjal custom.[345] In spite of this colonial invention, such land law had been treated as customary law.[346] The second invention of custom came from the struggles, contestations, and resistance between Africans and the colonial authorities and among Africans themselves.[347] In this

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[343] Simon Roberts, 'Introduction: Some Notes on "African Customary Law"' (1984) 28 Journal of African Law 1, 1–5; Franz von Benda-Beckmann, 'Law out of Context: A Comment on the Creation of Traditional Law Discussion' (1984) 28 Journal of African Law 28, 28-33.
[344] Francis G Snyder, 'Colonialism and Legal Form: The Creation of "Customary Law" in Senegal' (1981) 13 The Journal of Legal Pluralism and Unofficial Law 49, 51.
[345] ibid 64–69.
[346] ibid 74; see also Francis Snyder, 'Customary Law and the Economy' (1984) 28 Journal of African Law 34, 34-43.
[347] Thomas Spear, 'Neo-Traditionalism and The Limits of Invention in British Colonial Africa' (2003) 44 The Journal of African History 3, 3–27; Peter Fitzpatrick, 'Traditionalism and Traditional Law' (1984) 28 Journal

respect, the colonial authorities and the African elites created many of the customary laws in Malawi and Zambia.[348] While the British were protective of women at first, they created and ossified patriarchal rules in cooperation with the African elderly men for the sake of order and stability.[349] The Chagga of Tanzania also constructed new customary laws from their precolonial customary practices and colonial rules to adjust with new realities.[350]

Furthermore, in some instances and places, Islamic law was considered as a variant of customary law and while in others it was treated as a distinct category of law, like customary law or imported law, in colonial Africa. Islamic law was treated as a form of native law and custom in, for instance, Northern Nigeria, Ghana, Sierra Leone, Uganda, and Nyasaland.[351] In French West Africa too, Islamic law was lumped together with custom under the disposition of native courts.[352] Citing Article 75 of the 1903 Code that recognized the application of customary and Islamic laws in the native courts, the then Governor-General of French West Africa noted to his local administrators that "[n]ative courts will judge applying either Malikite rites, which are accepted in a large portion of our territories and are more or less modifications of Quranic law by local practice, or by applying local traditions in regions where Muslim influence is not yet strong."[353] As a result, in the operation of native courts,

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of African Law 20, 20–27; Terence Ranger, 'The Invention of Tradition in Colonial Africa' in Eric Hobsbawm and Terence Ranger (eds), *The Invention of Tradition* (Cambridge University Press 1983) 247–262.

[348] Chanock (n 297) 4–10.

[349] ibid 145–150; Martin Chanok, 'Making Customary Law: Men, Women, and Courts in Colonial Northern Rhodesia' in Margaret Jean Hay and Marcia Wright (eds), *African Women & the Law: Historical Perspectives* (Boston University, African Studies Center 1982) 53-67.

[350] See Sally Falk Moore, *Social Facts and Fabrications 'Customary' Law on Kilimanjaro, 1880-1980* (Cambridge University Press 1986).

[351] Anderson (n 311) 437.

[352] Richard Roberts, 'Custom and Muslim Family Law in the Native Courts of the French Soudan, 1905 -1912' in Shamil Jeppie, Ebrahim Moosa and Richard L Roberts (eds), *Muslim Family Law in Sub-Saharan Africa: Colonial Legacies and Post-Colonial Challenges* (Amsterdam University Press 2010) 89–90.

[353] ibid 90.

Islamic law was fused and forged with custom in these colonies.[354] Unlike in Kenya, the Sudan, Somaliland, and Zanzibar, among others, where Islamic law was recognized as a distinct category of law,[355] Islamic law and custom were mixed or (con)fused not only in the colonial vocabulary of native law and custom, but also in the adjudication of the customary in native courts.[356]

Thus, the requirement of legislative conformity with imported laws, the repugnancy test, the creation of new customary laws, and the mix of Islamic laws with custom ended the constitutional status of custom as discussed above in this chapter. Custom was subordinated and made part of colonial laws. Unlike in precolonial times, the change in the domain of the customary happened through the agency of Africans in their interaction with the colonial states or among each other in light of new circumstances and through the agency of colonial powers in legitimating and maintaining their colonies.[357] Accordingly, what (de)legitimates customs were the colonial states and the new realities not their conformity with their respective precolonial constitutional systems. This heralded the disruption and end of indigenous constitutional systems.[358]

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[354] Barbara M Cooper, 'Injudicious Intrusions: Chiefly Authority and Islamic Judicial Practice in Maradi, Niger' in Shamil Jeppie, Ebrahim Moosa and Richard L Roberts (eds), *Muslim Family Law in Sub-Saharan Africa: Colonial Legacies and Post-Colonial Challenges* (Amsterdam University Press 2010) 187–188.
[355] Anderson (n 311) 437–438; Shamil Jeppie, 'The Making and Unmaking of Colonial Sharia in the Sudan' in Shamil Jeppie, Ebrahim Moosa and Richard L Roberts (eds), *Muslim Family Law in Sub-Saharan Africa: Colonial Legacies and Post-Colonial Challenges* (Amsterdam University Press 2010) 165.
[356] JND Anderson, *Islamic Law in Africa Vol II* (Reprinted edition, Routledge 2008) 1–10.
[357] See also Benton (n 297) 3–5; Peter Fitzpatrick, 'Terminal Legality: Imperialism and the (De)Composition of Law' in Diane Elizabeth Kirkby and Catharine Coleborne, *Law, History, Colonialism: The Reach of Empire* (Manchester University Press 2001) 9-21.
[358] See also Yash Ghai and Jill Cottrell, 'The state and constitutionalism in postcolonial societies in Africa' in Upendra Baxi, Christopher McCrudden and Abdul Paliwala (eds), *Law's Ethical, Global and Theoretical Contexts: Essays in Honour of William Twining* (Cambridge University Press 2015) 172–173.

2.5 Constitutionalism in Post-Colonial Africa

Constitutionalism in postcolonial Africa has aimed to redeem the legitimacy deficit of the alien origin of the state through the legal syncretic processes of rejection or negation of the colonial state and its theory of government, and at the same time, through affirmation or acceptance of the colonial state structures to broadcast and channel the fruits of independence and self-determination. While anti-colonial resistance, decolonization, and the materialization of independence signify the rejection or negation of the colonial state and its *modus operandi,* the continuity of the colonial state makeup – territorial borders, peoples, and sovereignties – show the affirmation or acceptance of the colonial legacy. Constitutionally speaking, the independence of African states marked the transfer of *government power* from the hands of Europeans to Africans in former colonies. It is no wonder then that the chief purpose and function of constitutions and constitutionalism since independence have been devising a theory of government that legitimizes government power and authority and consequently enables it to deliver the promises of liberation and self-determination in the postcolonial states. In this section, I will explore and examine the continuous legal syncretic processes of negation and affirmation of the theory of limited government of the liberal constitutional tradition and the attendant constitutional treatments and the broader constitutional discourses on customary laws and traditional authorities in postcolonial constitutionalism in Africa. The objective in this discussion is to demonstrate the fact that constitutionalism in postcolonial Africa is neither singular as legal centralists posit nor plural as legal pluralists comfortably claim, but legally syncretic. Past constitutional experiences and present constitutional realities make constitutionalism in postcolonial Africa a blend of constitutional ideas, textures, and meanings that transcend legal centralist and legal pluralist accounts.

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A. The Continuous Negation and Affirmation of Liberal Constitutionalism

As the Berlin Conference provided the constitutional basis for the establishment of colonial states in Africa, independence constitutions heralded the end of colonial states and the birth of new independent and sovereign African states onto the community of nations. Unlike the Berlin Conference, many of the colonies - with few exceptions- [359] got their independence in a bargain, *albeit* an unequal one, between the former colonizers and the African political elites. Independence constitutions were the results of these bargains. In sharp contrast to the colonial theory of unlimited government, independence constitutions incorporated and/or imposed a limited government for the newly independent states. Largely mirrored after the constitutional systems of the former colonizers, independence constitutions established either a Westminster style parliamentary system or a presidential system with horizontal, and in some cases vertical, separation of powers with checks and balances and recognized fundamental human rights.[360] Further, they made electoral democracy the only basis to access government power and provided the rules of election as well. Hence, Africa was set to begin its self-government under a system of liberal constitutional democracy.

Aside from the legitimacy deficit of the independence constitutions,[361] in general, and the continuity of the Queen of England as a titular head of state for the former British colonies,

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[359] For instance, in some colonies such as Algeria and in Portuguese colonies, independence was achieved through wars of national liberation; see JNC Hill, *Identity in Algerian Politics: The Legacy of Colonial Rule* (Lynne Rienner Publishers 2009) 55–67; Patrick Chabal, 'The Post-Colonial State in Portuguese-Speaking Africa' (1992) 8 Portuguese Studies 189, 192–195.
[360] Le Vine (n 139) 184–187; Ghai, 'Constitutions and the Political Order in East Africa' (n 139) 410–413; Seidman, 'Constitutions in Independent, Anglophonic, Sub-Saharan Africa: Form and Legitimacy' (n 139) 99–110.
[361] BO Nwabueze, *Constitutionalism in the Emergent States* (Fairleigh Dickinson University Press 1973) 24–28.

in particular, the theory of government engineered by these constitutions were defensible in retrospect.[362] This is due to the fact that the quest to have a limited government under a system of multi-party democracy and protection of human rights permeate the constitutional and political struggles of postcolonial Africa to date.[363] As a result, the idea of limited government in independence constitutions had a moral legitimacy if not a sociological legitimacy at the time.[364] Nonetheless, the desire to manufacture the legitimacy of the new states and governments, and the urge and need to change from a monarchy to a republic in the case of former British colonies were understandable.[365] By their condition, the newly independent states were compelled to overcome the inherent contradictions in their being born from a colony and expected to reimagine independence and operate in a decisive break from the colonial past.[366] In these attempts, independence constitutions were changed or altered and the idea of limited government and multi-party democracy were rejected as alien and colonial impositions.[367]

Soon after independence, one party systems replaced multiparty democracy, and personal rule displaced separation of powers and checks and balances by claiming to fulfill the fruits of independence – nation-building, development, and overall social transformation – and to ground and institute a government based on African autochthonous conceptions and

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[362] See Robert Mattes and Michael Bratton, 'Do Africans Still Want Democracy?' (Afrobarometer 2016) Afrobarometer Policy Paper No 36, 1-27.
[363] See Eunice N Sahle, 'Introduction' in Eunice N Sahle (ed), *Democracy, Constitutionalism, and Politics in Africa: Historical Contexts, Developments, and Dilemmas* (Springer 2017) 1–4; Peter Anayang Nyong'o, *Popular Struggles for Democracy in Africa* (Zed Books 1987).
[364] A constitution can be morally justifiable if it has an inherent trustworthiness in its substantive standards of justice although it may be imposed. For details see Richard H Fallon, 'Legitimacy and the Constitution' (2005) 118 Harvard Law Review 1787, 1794–1796.
[365] Nwabueze (n 361) 23.
[366] Leela Gandhi, *Postcolonial Theory: A Critical Introduction* (Allen & Unwin 1998) 6.
[367] Nwabueze (n 361) 28–30.

new realities.[368] The new African leaders argued that the limited government instituted by the independence constitutions is a hurdle for development, social transformation, and nation building in addition to its alien origin and nature to the African experience. It was contended that an African theory of government should accelerate development, enable government, and bestow on the state the power and resources it needs to defeat "African real enemies - ignorance, poverty and diseases."[369] In light of these, it was claimed that multiparty democracy is a brake and a recipe for tribalism.

Accordingly, one party systems were constitutionalized, and the powers of presidents were enlarged in the republican constitutions. Such constitutional undertakings were rationalized based on the alleged existence of an African system of government that favors consensus and cooperation over competition, the unity of power than its division, and the centrality of a unifying personality like a king or chief in precolonial times.[370] As discussed elsewhere, such a claim is not true not only because there were numerous governance systems in precolonial Africa, but also they had inbuilt systems of separation of powers and checks and balances and consequently they had a limited theory of government. Nevertheless, the new leaders centralized and personalized both the powers of the government and their political parties and made themselves the main sources of power and wealth in the newly independent states.[371]

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[368] Young, *The Postcolonial State in Africa* (n 143) 16–19; Pal Ahluwalia, *Politics and Post-Colonial Theory: African Inflections* (Routledge 2002) 56–59.
[369] Prempeh (n 10) 475.
[370] H Kwasi Prempeh, 'Presidential Power in Comparative Perspective: The Puzzling Persistence of Imperial Presidency in Post-Authoritarian Africa' (2007) 35 Hastings Const LQ 761, 764–765.
[371] See also Jackson and Rosberg (n 158).

However, the practice of one party systems and personal rules neither brought economic development and built a unified nation, nor did it confer the much-needed legitimacy to the state and government.[372] The primacy of personal patronage, loyalty, and dependence around the presidency over constitutional rules and laws for opportunities in politics and in business drained the new independent states' hope for development and progress.[373] The tendency and propensity toward corruption among those in government (public sector) and their affiliates in business (private sector) and the similar drive to exit among those marginal to these systems further weakened the legitimacy of the states and governments.[374] The newly independent states became captives to their new presidents and their cronies and ready for capture by their opponents when circumstances permitted. The alleged claim of nation building and development turned out to be justifications for the personal rule of presidents and, at the same time, organizing principles for state capture by their opponents.[375] Further, the ethnic, religious, and regional diversities in these newly independent states made one party systems and personal rules unpalatable and unappealing to many, especially to minorities.[376]

As their political elites held these states hostage, the military was invited by the prevailing circumstances or invited itself into the realm of politics by transforming its role

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[372] See also Peter Anyang' Nyong'o, 'Africa: The Failure of One-Party Rule' (1992) 3 Journal of Democracy 90, 90–96.
[373] Michael Bratton and Nicholas van de Walle, 'Neopatrimonial Rule Regimes and Political Transitions in Africa' (1994) 46 World Politics 453, 458.
[374] Mamdani, *Citizen and Subject* (n 17) 11.
[375] See Davidson, *The Black Man's Burden* (n 237) 290-294; Liisa Laakso and Adebayo O Olukoshi, 'The Crises of the Post-Colonial Nation-State Project in Africa' in Adebayo O Olukoshi and Liisa Laakso (eds), *Challenges to the Nation-State in Africa* (Nordic Africa Institute 1996) 11-16; Claude Ake, 'The Unique Case of African Democracy' (1993) 69 International Affairs 239, 239.
[376] See also Philip Roessler, *Ethnic Politics and State Power in Africa: The Logic of the Coup-Civil War Trap* (Cambridge University Press 2016) 60–81.

from protecting the territorial integrity of these states to cleanse them from "incorrigible politicians."[377] With the exception of few states where one party autocracies survived, from the late 1960s up to the end of 1980s, the military took over power from the civilian regimes in many of the African states.[378] While the military justified its intervention on claims of the failure of constitutional governments, the prevalence of corruption, and bad governance on the part of the civilian leaders, it subscribed to the theory of government and used the playbooks of the civilian leaders it deposed.[379]

The military leaders aimed to civilize or demilitarize their powers either by adopting a new constitution or by altering only few parts of the one party state constitutions. They neither had the commitment to practice constitutionalism nor the interest to transfer power to a civilian regime[380] or the will to deliver good government and prevent corruption while in office.[381] It is no wonder that there were 80 successful coups, 108 failed attempts, and 139 reported plots in 48 African states between 1956-2001.[382] The ultimate objective of the military leaders was to institutionalize their personal powers under a theory of unlimited government like their civilian predecessors.[383]

[377] See Paul Nugent, *Africa Since Independence: A Comparative History* (2nd ed, Palgrave Macmillan 2012) chapter 6; George Klay Kieh, Jr, 'Military Engagement in Politics in Africa' in George Klay Kieh, Jr and Pita Ogaba Agbese (eds), *The Military and Politics in Africa: From Engagement to Democratic and Constitutional Control* (Ashgate 2004) 37–54; Samuel Decalo, 'Military Coups and Military Regimes in Africa' (1973) 11 The Journal of Modern African Studies 105, 105–127.
[378] Young, *The Postcolonial State in Africa* (n 143) 16–19.
[379] See also Samuel Decalo, *Coups and Army Rule in Africa: Studies in Military Style* (Yale University Press 1976).
[380] Even if the military handed over power to the civilian regimes after the military coup in Ghana and Nigeria, they recaptured power from the civilian regimes again; Nugent (n 377) chapter 6.
[381] Okoth-Ogendo (n 1) 78.
[382] Patrick J McGowan, 'African Military Coups d'état, 1956–2001: Frequency, Trends and Distribution' (2003) 41 The Journal of Modern African Studies 339, 339; See also GS Mmaduabuchi Okeke, 'Theories of Military in African Politics, 'in Samuel Ojo Oloruntoba and Toyin Falola, *The Palgrave Handbook of African Politics, Governance and Development* (Palgrave Macmillan 2018) 219–236.
[383] Okoth-Ogendo (n 1) 78.

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Nonetheless, the general distaste, protest and struggle against unlimited government at home, and the triumph of liberal democracy abroad with the end of the Cold War,[384] coerced African states to reaffirm and accept liberal constitutionalism with multi-party democracy in the 1990s. Starting in Algeria with the opening up of multi-party elections in 1988 and followed by the organization of a national conference for democratic transition in Benin in 1990, the "tsunami of democratization swept over Africa" throughout the 1990s.[385] For better or worse, multiparty democracy with the protection of some fundamental human rights under a constitutionally limited government have been put forward to address the troubles of post-independence such as political instability, dictatorship, bad governance, grave violation of human rights, corruption, and pervasive poverty. With few exceptions,[386] the majority of African states revised or adopted brand new constitutions that incorporated and affirmed the principles of democratic politics, established independent constitutional review systems along with independent constitutional institutions, and recognized fundamental human rights and freedoms.

Even though the post-Cold War African constitutions have had a better vitality and influence in shaping and taming the actions and behaviors of African governments than the previous constitutions, they have carried over the authoritarian textures of their predecessors to negate the liberal constitutional promises and commitments. In addition to affirming the idea of limited government in a constitutional democracy as a matter of constitutional law and politics, these constitutions indeed helped the peaceful transfer of power through elections

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[384] See Francis Fukuyama, *The End of History and the Last Man* (The Free Press 1992).
[385] Young, *The Postcolonial State in Africa* (n 143) 26–27; see also Samuel P Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (University of Oklahoma Press 1993).
[386] For instance, Botswana only revised its 1966 Constitution in 2005.

to end the tenure of presidents for life, to enable courts to annul unconstitutional legislative and executive actions and decisions,[387] to contribute to the emergence of the nascent free media and civil society, and to create the space for the practice of human rights.[388] Despite these positive developments, the multiple decades of these constitutional experiments have led to the development of dominant and single party systems,[389] maintained authoritarian rules and practices,[390] and faced the resurgence of personal rules[391] and sometimes military coups.[392] Thus, as Michel Rosenfeld noted, the postcolonial constitutional experiment in Africa is a dialectic process that involves a continuous affirmation and absorption of liberal constitutionalism as implanted on the eve of independence, and a negation and rejection of the same as these states operate in a system of constitutional government.[393] In this dialectic

[387] Recently, the Supreme Court of Kenya annuls the presidential election result for election irregularities ordering reelection. See *Raila Amolo Odinga and other v independent Electoral and Boundaries Commission and others* [2017] Supreme Court of Kenya, Presidential Petition No 1 of 2017. See also Rachel Ellett, *Pathways to Judicial Power in Transitional States: Perspectives from African Courts* (Routledge 2013) 6–7.

[388] Prempeh, 'Africa's "Constitutionalism Revival"' (n 10) 471–472.

[389] Gero Erdmann and Matthias Basedau, 'An Overview of African Party Systems' in Renske Doorenspleet and Lia Nijzink (eds), *One-Party Dominance in African Democracies* (Lynne Rienner Publishers 2010) 25-46; Matthijs Bogaards, 'Counting Parties and Identifying Dominant Party Systems in Africa' (2004) 43 European Journal of Political Research 173, 173–197.

[390] See Gabrielle Lynch and Gordon Crawford, 'Democratization in Africa 1990–2010: An Assessment' (2011) 18 Democratization 275; 275-310.

[391] See Cranenburgh (n 5) 952-973; Larry Diamond, 'The Rule of Law versus the Big Man' (2008) 19 Journal of Democracy 138, 138–149.

[392] For instance Niger (2010), Mali (2012), Guinea Bissau (2012), Lesotho (2014), and Burkina Faso (2017) had military coups; see Virginie Baudais and Grégory Chauzal, 'The 2010 Coup d'état in Niger: A Praetorian Regulation of Politics?' (2011) 110 African Affairs 295, 295-304; Adam Nossiter, 'Soldiers Overthrow Mali Government' *The New York Times* (22 March 2012) <https://wwwnytimescom/2012/03/23/world/africa/mali-coup-france-calls-for-electionshtml> accessed 16 November 2018; Adam Nossiter, 'Guinea-Bissau Coup Removes Presidential Front-Runner' *The New York Times* (13 April 2012) <https://wwwnytimescom/2012/04/14/world/africa/guinea-bissau-coup-removes-presidential-front-runnerhtml> accessed 16 November 2018; Everisto Benyera, 'Towards an Explanation of the Recurrence of Military Coups in Lesotho' (2017) 3 ASPJ Africa & Francophonie 56, 56-73; Hervé Taoko, 'African Leaders Call for Reinstatement of President of Burkina Faso' *The New York Times* (21 December 2017) <https://wwwnytimescom/2015/09/23/world/africa/military-coup-burkina-fasohtml> accessed 16 November 2018.

[393] Rosenfeld (n 157) 766; Michel Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (Routledge 2010) 179–180.

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process of negation and affirmation, as discussed in the next chapter, the theory of government focuses more on changing the office holder than reforming the office itself.

B. Customary Law and Traditional Authority in Post-Colonial Constitutions

In the dialectic continuum of the negation and affirmation of liberal constitutionalism in postcolonial Africa, the constitutional treatment of customary laws and traditional authorities present a paradox to the theory of government advanced by African civilian and military leaders. The paradox arises, first, in the claims of African leaders to institute a government based on the African autochthonous political traditions while rejecting and/or undermining customary laws and traditional authorities. While post-independence leaders retrieved an alleged African theory of government that bestows a unified political power in the chief executive of the state,[394] they rejected, at worst, and undermined, at best, the relevance of customary laws and traditional authorities for the postcolonial states on claims of their incompatibility with modernity and the theory of the nation-state.[395] Second, the affirmation of liberal constitutionalism and multiparty democracy in the post-1990 constitutions have brought customary laws and traditional authorities in the constitutional space as the alleged African theory of government was negated and the idea of the nation-state withered away. In this section I discuss and present the constitutional treatment of customary laws and traditional authorities in postcolonial constitutions, and in the next section, I examine and explore the general constitutional debates about customary laws and traditional authorities in the postcolonial states.

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[394] BO Nwabueze, *Presidentialism in Commonwealth Africa* (St Martin's Press 1974) 106.
[395] Davidson, *The Black Man's Burden* (n 237) 99-107.

The independence constitutions adopted three major approaches with respect to customary laws and traditional authorities.[396] The first approach, which was followed mainly by Anglophone Africa,[397] was to maintain the colonial legal systems which recognized the application of customary laws and the powers of traditional authorities. The second approach, which was mainly followed by Francophone and Lusophone Africa, was to abolish the colonial customary or native courts and to establish a general court system which applied customary laws. The third and final one was to adopt an integrated court system where customary courts handled the first instance customary law claims while higher courts reviewed their decisions through appeal. Given that traditional authorities were considered as the custodians of customary laws, the recognition of customary laws implied the concomitant recognition of the powers of traditional authorities at least in those states which followed the first and the third approach. In many of these countries, in addition to the judicial powers of traditional authorities related to the adjudication of customary laws, traditional authorities were incorporated into the state administration through regionalism (Ghana and Kenya), federalism (Nigeria and Uganda), Constitutional Monarchy (Swaziland and Lesotho), and Chieftaincy (Zambia and Zimbabwe).[398] Independence constitutions recognized customary laws and traditional authorities subject to their constitutional conformity. Needless to say, the constitutional role and influence of traditional authorities varied not only across states but also within states at the central and regional levels.[399] Traditional authorities had much more power and influence at regional levels and in

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[396] Banda (n 6) 20.
[397] See also Lloyd Fallers, 'Customary Law in the New African States' (1962) 27 Law and Contemporary Problems 605, 606–616.
[398] Okoth-Ogendo (n 1) 71; Seidman, 'Constitutions in Independent, Anglophonic, Sub-Saharan Africa' (n 139) 95–96.
[399] Seidman, 'Constitutions in Independent, Anglophonic, Sub-Saharan Africa' (n 139) 95.

particular on matters of land, family, and personal issues. In a nutshell, the independence constitutions were open to accommodate customary laws and traditional authorities in the constitutional government of the newly independent states.

The constitutions of one party systems and military rules, however, either rejected or seriously undermined the role and status of customary laws and traditional authorities. As the objective was building a nation-state, the ethnic diversity of these states and their respective customary laws and traditional authorities were suppressed or repressed in the nation-building projects of African leaders. To this end, the Constitution, and for that matter all laws, policies, and development interventions, were tools of creating a homogeneous political entity rather than accommodation mechanisms of the actual diversity of these states.[400] Moreover, colonial languages were adopted as national languages and their usage was aggressively promoted while the teaching of local languages was abolished.[401] Social, political, and legal pluralism were abandoned in the unitary projects of nation-building. New unifying ideologies under the new leaders, such as *Ujamma* (*Julius Nyerere*), *Authenticité* (*Mobutu Sese Seko*), variants of *African socialism* (*Sékou Touré* and Kwame *Nkrumah*), *African humanism* (Kenneth *Kaunda*), and *Harambee* (*Jomo Kenyatta*), substituted and took over the role and function of customary laws and traditional authorities.[402] As a result, the application of customary laws and traditional authorities were abolished in some states, such as Burkina Faso, Tanzania, and Mozambique, while seriously limited in others, such as Ghana, Nigeria, and Zimbabwe.[403]

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[400] See also Benyamin Neurberger, 'State and Nation in African Thought' in John Hutchinson and Anthony D Smith (eds), *Nationalism* (Oxford University Press 1994) 231–235.
[401] Solomon A Dersso, *Taking Ethno-Cultural Diversity Seriously in Constitutional Design: A Theory of Minority Rights for Addressing Africa's Multi-Ethnic Challenge* (Martinus Nijhoff Publishers 2012) 68.
[402] Laakso and Olukoshi (n 375) 14–15.
[403] See Lars Buur and Helene Maria Kyed, 'Contested Sources of Authority: Re-Claiming State Sovereignty by Formalizing Traditional Authority in Mozambique' (2006) 37 Development & Change 847, 850–851; Banda (n

Customary laws and traditional authorities showed some resurgence after the end of one party systems and military rules and figure prominently in the post-1990 constitutions.[404] In these constitutions, for instance, in Ethiopia, Ghana, Malawi, Mozambique, Namibia, Niger, Nigeria, South Africa, and Uganda just to mention a few, specific constitutional provisions are allotted to customary laws and traditional authorities.[405] In addition, the recognition of the right to culture in many of the African constitutions opens the opportunity for the application of customary laws and the exercise of traditional powers by traditional authorities.[406] Furthermore, along with customary laws, Islamic law was also recognized in many African states where there is a significant Muslim population.[407] The trend of recognition and accommodation of customary laws, Islamic law, and traditional authorities continues in the recent waves of constitution-making in Africa.[408] The new constitutions of Angola, Kenya, Zambia, Zimbabwe, and South Sudan recognize customary and/or Islamic laws and traditional authorities.[409] While the specific subject matters and procedures of application differ in every state, customary and Islamic laws are generally applicable in the personal and family matters.[410] Similarly, despite differences in their role and influence, the

6) 21; Englebert (n 28) 51; Richard Rathbone, *Nkrumah & the Chiefs: The Politics of Chieftaincy in Ghana, 1951-60* (Ohio State University Press 2000); EI Nwogugu, 'Abolition of Customary Courts--The Nigerian Experiment' (1976) 20 Journal of African Law 1, 1-19.

[404] Katrina Cuskelly, 'Customs and Constitutions: State Recognition of Customary Law around the World' (International Union for Conservation of Nature and Natural Resources 2011) 6–11 <https://portalsiucnorg/library/efiles/documents/2011-101pdf> accessed 8 March 2017.

[405] Ndulo (n 338) 98–101; Akua Kuenyehia, 'Women, Marriage, and Intestate Succession in the Context of Legal Pluralism in Africa' (2006) 40 UC Davis L Rev 385, 399–401.

[406] Barbara Oomen, *Chiefs in South Africa: Law, Power & Culture in the Post-Apartheid Era* (James Currey 2005) 50-58; Harri Englund, 'Introduction: Recognizing Identities, Imagining Alternatives' In Harri Englund and Francis B Nyamnjoh, *Rights and the Politics of Recognition in Africa* (Zed Books 2004) 1–29; Bennett (n 262) 1-24.

[407] An-Na'im, (n 13) 8-16.

[408] See also Gedion T Hessebon, 'The Fourth Constitution-Making Wave of Africa: Constitutions 40?' (2014) 28 Temple International & Comparative Law Journal 185, 189–190.

[409] M Christian Green, 'Religious and Legal Pluralism in Recent African Constitutional Reform' (2013) 28 Journal of Law and Religion 401, 432-439.

[410] Banda (n 6) 34–36.

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powers of traditional authorities are usually confined to the domain of the customary. Their power waxes in the rural areas and wanes in the urban areas.

Thus, in terms of approach, the postcolonial constitutional treatment of customary laws and traditional authorities shares many commonalities with the colonial constitutional treatment. This is due to the fact that the colonial state originally wanted to replace customary laws with imported laws, at least by denying official recognition, during direct rule, which the post-independence leaders attempted to do in their nation-state projects. In addition, the recognition of customary laws and traditional authorities, during the system of indirect rule and association, in the colonial state was conditional upon their conformity with the written colonial laws and their attributes to pass the repugnancy test; in a similar vein, in the postcolonial state, in the system of constitutional democracy, they have to conform to constitutional standards. The recognition of traditional authorities both in the colonial and postcolonial state in itself is an act of subordination to their precolonial position. Even though constitutional design fails to attend to constitutional practice, the subordination of customary law and traditional authority is a constitutional reality as a matter of fact in Africa today. In the next part, I will explain why this is so by engaging with the general constitutional discourse in Africa with a particular emphasis on customary law and traditional authority.

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C. Customary Law and Traditional Authority in the Post-Colonial Constitutional Discourse

The postcolonial discourse on customary laws and traditional authorities has two strands involving the legal syncretic processes of rejection, acceptance, incorporation, and accommodation. The first strand of the debate on customary laws and traditional authorities

is related to a larger postcolonial discourse that deals with how and what course should the postcolonial state and its people take to achieve liberation and self-determination in the full sense of these terms. This, in turn, has four major themes. The first theme calls for the redrawing of maps in Africa either to go back to the precolonial times or to form a new political geography based on African terms and African values. The second proposes an African theory of government within the existing borders to redeem the illegitimate origin and logic of the state and to enable it to serve the needs, rights, and interests of its people. The third theme posits liberal constitutionalism as the future of the postcolonial state and its people, whereas the fourth theme needs the contextualization of liberal constitutionalism with African values, realities, and needs.

The second strand of the debate on customary laws and traditional authorities is related to the constitutional (non)recognition and their empirical applications and manifestations with or without official state recognition. In the paragraphs that follow, I explore how customary laws and traditional authorities figure in these debates and themes and examine their role, status, and function in the postcolonial state.

A strong case for customary laws and traditional authorities exist in the theme that calls for the rejection of the postcolonial state and the redrawing of its borders.[411] It is argued that the postcolonial state is incapable of salvation or redemption in its current form as it was established and maintained as an apparatus of violence to serve the colonial and imperial

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[411] Laurence Caromba, 'Redrawing the Map of Southern Africa? A Critical Analysis of the Arguments for the Unification of South Africa and Lesotho' (2017) 44 Politikon: South African Journal of Political Studies 93, 93-109; Muiu and Martin (n 216) 193–205; Pita Ogaba Agbese and George Klay Kieh Jr, 'State Renewal in Africa: The Lessons' in Pita Ogaba Agbese and George Klay Kieh Jr (eds), *Reconstituting the State in Africa* (Palgrave Macmillan 2007) 279–293; Kelechi A Kalu, 'The Political Economy of State Reconstitution in Africa' in Obioma M Iheduru, *Contending Issues in African Development: Advances, Challenges, and the Future* (Greenwood Press 2001) 34–39; Mutua, 'Why Redraw the Map of Africa' (n 301) 1113–1176.

powers during and after colonialism.[412] It is contended that the very logic and mode of operation of the postcolonial state is alien to Africans, did not serve Africans in the past, and will not serve them in the future.[413] The importation of democracy, human rights, and constitutionalism at independence have not rectified the violence inherent in the makeup of the postcolonial state nor tamed the row violence of its government. Moreover, these liberal ideas as developed in a particular socio-economic, cultural, and political condition have inherent limitations both to legitimate the fundamentally illegitimate postcolonial state and to respond to its pressing challenges and to the problems facing the peoples of Africa.[414] The postcolonial state, undemocratic, illegitimate, and alien at its core by its very nature, form, and substance, is impossible to democratize without unscrambling, disassembling, or dismantling it.[415]

The democratization of Africa, therefore, starts with the dismantling of the physical barriers and confinements of the colonial borders that constitute postcolonial states and the subsequent reconfiguration of precolonial African ideas and principles of government onto these new geographical spaces. Going back to the African roots and thinking through the African epistemology, it is claimed, heralds the African renaissance and true liberation. In this process of renewal and reformation of the postcolonial state and its theory of government, a high premium is given to the idea of custom and traditional authority as practiced in precolonial times.

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[412] Mutua, 'Why Redraw the Map of Africa' (n 301) 1160–1162.
[413] Muiu and Martin (n 216) 193–194.
[414] Makau Mutua, *Human Rights Standards: Hegemony, Law, and Politics* (State University of New York Press 2016) 165–183; Mutua, 'Africa and the Rule of Law' (n 265); Mutua, *Human Rights* (n 148) 126–153.
[415] Mutua, 'Why Redraw the Map of Africa' (n 301) 1162; Makau wa Mutua, 'Putting Humpty Dumpty Back Together Again: The Dilemmas of the Post-Colonial African State' (1995) 21 Brooklyn Journal of International Law 505, 534–536.

Customary laws and traditional authorities also figure in prominently, *albeit* less radically compared to the first theme, in the second theme that aims to institute an African theory of government within the postcolonial state. The main argument that runs through this theme is that a theory of government based on African ideas, values, principles, and practices is necessary to legitimize the postcolonial state, to hold its government accountable, to deliver development, and to arrest the pressing socio-economic, political, and cultural challenges of Africans.[416] It is held that a theory of government based on African values has a cultural appeal, a practical utility, and a diagnostic capacity to the ills and misfortunes of liberal democracy.[417]

To this end, a consensual democracy in a "non-party polity" is proposed while liberal democracy with its multi-party system is rejected.[418] The case for a consensual democracy is made building on the African tradition of consensus in decision-making, the culture of inclusive participation, the general responsiveness of participants to strike a balance between individual and communal interests, and the resultant compromise and harmony in the outcomes of the decisions.[419] It is surmised that multiparty democracy with its spirit of competition, in the process, and production of winners and losers, in the outcome, is fundamentally unfit for the postcolonial state with diverse religious, linguistic, and ethnic compositions.[420]

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[416] Ake (n 375) 239–244; Claude Ake, 'Rethinking African Democracy' (1991) 2 Journal of Democracy 32, 32–44.
[417] See Claude Ake, *Democracy and Development in Africa* (Brookings Institution Press 2001), 132-139.
[418] Kwasi Wiredu, 'Democracy and Consensus in African Traditional Politics: A Plea for a Non-Party Polity' (1995) 39 The Centennial Review 53, 53–64.
[419] Kwasi Wiredu, 'Democracy by Consensus: Some Conceptual Considerations' (2001) 30 Philosophical Papers 227, 227-244; Gyekye (n 268) 259–260.
[420] See Tukumbi Lumumba-Kasongo, 'The Problematics of Liberal Democracy and Democratic Process: Lessons for Deconstructing and Building African Democracies' in Tukumbi Lumumba-Kasongo (ed), *Liberal Democracy and Its Critics in Africa: Political Dysfunction and the Struggle for Progress* (Zed Books 2005) 1–22.

Further, it is claimed that multi-party democracy, with its majoritarian primacy, by design and effect configures a deep sense of exclusion, alienation, and hostility among the diverse ethno-linguistic groups, given the numerical composition of these groups that inhabit the postcolonial state.[421] The African theory of government, in contrast to liberal democracy, channels economic and social democracy that brings socio-economic improvement to the African people, on the one hand, and focuses on *people-centered* participation and engagement with the state, on the other.[422] The idea of customary laws and traditional authorities are at the heart of this quest for an African theory of government as it endeavors to offer a governance system for the postcolonial state and aspires to (re)connect it with the African cultural universe.[423]

In contrast to the first and second themes, customary laws and traditional authorities have a limited role and function in the third theme which posits liberal constitutionalism and democracy as a panacea for the challenges and problems of the postcolonial state. Even though the state has a foreign and colonial origin in Africa, it is argued, we need a system of limited government that ensures accountability and responsibility, and protects fundamental human rights and civil liberties as far as the state exists.[424] Without the system of liberal constitutionalism and multi-party democracy, an ordered life and liberty, good governance, rule of law, and development, among other aspirations of Africans, are difficult to achieve in

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[421] Kwasi Wiredu, *Cultural Universals and Particulars: An African Perspective* (Indiana University Press 1996) 177 & 182-190; See also Claude Ake, *The Feasibility of Democracy in Africa* (Council for the Development of Social Science Research in Africa 2000).
[422] Shivji (n 142) 60–63.
[423] Gyekye (n 268) 234–237.
[424] Ghai, 'Chimera of Constitutionalism' (n 160) 313–331; Yash Pal Ghai, 'Creating a New Constitutional Order: Kenya's Predicament' in W Gachenga, G Franceschi and Migai Akech (eds), *Governance, Institutions and the Human Condition* (LawAfrica Publishing 2009) 18–30.

the postcolonial state.[425] As deriving a car requires the use of seatbelts and an understanding of traffic rules to avoid accidents, the operation of a modern state needs a liberal constitutional system and the observance of the will of the people manifested in regular elections, the lack of which have bedeviled postcolonial states since independence.[426]

As the state has a commitment to having a written constitution as a basis for its sovereign existence, if not for its operation, what is required is the practice of the written constitution.[427] In addition, in light of its tortuous constitutional past, a constitutional system that effectively limits the power of the executive through the reduction of presidential powers, term limits, judicial review, and decentralization; empowers the legislature through the control of the legislative agendas and various oversight mechanisms; ensures the independence of the judiciary; fosters the practice of human rights, free media, and civil society; and advances democracy, accountability and transparency through the establishment of independent constitutional institutions should be engineered.[428] The common thread that runs through this theme is the prescriptions of liberal constitutionalism and multi-party democracy for the constitutional challenges and problems of the postcolonial state.[429] In this

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[425] HWO Okoth-Ogendo, 'The Quest for Constitutional Government' in Göran Hydén, Dele Olowu and HWO Okoth-Ogendo (eds), *African Perspectives on Governance* (Africa World Press 2000) 43–58; Okoth-Ogendo (n 1) 65–84.
[426] See also Wiktor Osiatyński, *Human Rights and Their Limits* (Cambridge University Press 2009) 161.
[427] Prempeh, 'Africa's "Constitutionalism Revival"' (n 10) 486–494; H Kwasi Prempeh, 'Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa' (2007) 80 Tulane Law Review 42–84; Okoth-Ogendo (n 1) 65–84; HWO Okoth-Ogendo, 'The Politics of Constitutional Change in Kenya since Independence, 1963-69' (1972) 71 African Affairs 9, 33–34; Nwabueze, *Constitutionalism in the Emergent States* (n 361) 300–307.
[428] Fombad (n 16) 1035-1089; Prempeh, 'Africa's "Constitutionalism Revival"' (n 10) 494–505; H Kwasi Prempeh, 'African Judges, in Their Own Cause: Reconstituting Independent Courts in Contemporary Africa' (2006) 4 International Journal of Constitutional Law 592, 598–604.
[429] Prempeh, 'Africa's "Constitutionalism Revival"' (n 10) 485.

theme, customary laws and traditional authorities have a role and function only if they are compatible with these liberal constitutional ideals, or else they are relegated or put aside.

However, customary laws and traditional authorities in their many facets are reconfigured and retrieved in the fourth theme which calls for the contextualization of constitutionalism in Africa. The central claim in this theme is that constitutionalism will not take root in Africa unless it takes into account African values and realities in its normative articulation and institutional design. It is held that the lack of cultural content and context, along with other things, have contributed to the tragic failure of constitutionalism and democracy in the two decades following independence and their continuous fragility with the return of multiparty democracy since the 1990s.[430] The postcolonial state, being a foreign creation itself and struggling to gain legitimacy, cannot simply wished away the African systems of government, laws, and practices and substituted them with some liberal constitutional templates developed in western historicity.[431] At the same time, the postcolonial state cannot reject liberal constitutional ideas simply because they emerged in a foreign land as far as these ideas are open to contestation and reconceptualization in light of the given socio-cultural, economic, and political contexts.[432]

The theoretically defensible and practically sensible way to advance and foster constitutional government is to incorporate the historical, social, and political experiences of every postcolonial state not only in the normative and institutional conception of constitutionalism, but also in its practical assessment.[433] As a result, the African worldview

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[430] See Deng (n 12) 195.
[431] See also Gedion Timothewos Hessebon, *Contextualizing Constitutionalism: Multiparty Democracy in the African Political Matrix* (Eleven International Publishing 2017) 185-191.
[432] An-Na'im (n 13) 16–20.
[433] ibid 27–30.

and culture should inform and permeate the entire spectrum of constitutional government such as the notion and practice of human rights, democracy, development, environment, and gender relations, without which a sustainable constitutional government will be a wishful thinking.[434] Hence, customary laws and traditional authorities with their numerous manifestations are given due consideration in this quest for the contextualization of constitutionalism in Africa.

The variants of these general normative arguments, with the exception of the first theme, on the role and function of customary laws and traditional authorities in postcolonial Africa, have been used as justifications for the (non)recognition of customary laws and traditional authorities in constitutions. As noted in the previous section, the quest for an African theory of government by the post-independence leaders led to the rejection of customary laws and traditional authorities, as they existed in colonial Africa, and the incorporation of some customary and traditional principles of government into the normative conceptions and institutional architectures of constitutions. Similarly, the implantation of liberal constitutionalism at independence and its return in the 1990s have led to the resurgence of customary laws and traditional authorities in the constitutions of many African states. Liberal constitutional arguments, such as the recognition of cultural pluralism and democratization, on the one hand, and the quest for the contextualization of constitutionalism, the Africanization of constitutionalism, on the other, have contributed to the recognition of customary laws and traditional authorities in the post-1990 constitutions.[435]

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[434] Deng (n 12) chapter 8 & 9; Ali Mazrui, 'Constitutional Change and Cultural Engineering: Africa's Search for New Directions' in Joseph Oloka-Onyango (ed), *Constitutionalism in Africa: Creating Opportunities, Facing Challenges* (Fountain Publishers 2001) 18-36.

[435] David Pimentel, 'Legal Pluralism in Post-Colonial Africa: Linking Statutory and Customary Adjudication in Mozambique' (2011) 14 Yale Hum Rts & Dev LJ 59, 61–69; Helene Maria Kyed and Lars Buur, 'Introduction:

Beyond these general normative arguments on the role and function of customary laws and traditional authorities and their constitutional (non)recognition in postcolonial Africa, there is an empirical state of affairs in which customary laws and traditional authorities exist and operate. Despite differences in breadth and width, they have had a stronghold both in the so-called collapsed or failed states, weak states, and relatively stable and democratic states since independence.[436] The empirical applications and manifestations of customary laws and traditional authorities transcend the normative arguments advanced to their support or opposition, and the constitutional texts that define their scope and extent or deny their very application. In the postcolonial condition customary laws and traditional authorities find themselves, their actors and machinery are neither equal partners to the state or have the ambition to be so nor consider themselves as distinctively different and separate from the state or its constitutional order. In here lies one of the puzzles of the postcolonial state which the next chapter decrypts.

2.6 Conclusion

This chapter reveals that the African constitutional matrix in a different time and space sets legal syncretism, which channels various syncretic processes capable of transforming and developing the constitutional matrix in African constitutionalism. In unearthing the African constitutional matrix, this chapter explores and examines the transformations and

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Traditional Authority and Democratization in Africa' in Lars Buur and Helene Maria (eds) Kyed, *State Recognition and Democratization in Sub-Saharan Africa: A New Dawn for Traditional Authorities* (Palgrave Macmillan 2007) 1–24; Englebert (n 28) 51–52; Peter Skalník, 'Authority Versus Power: Democracy in Africa Must Include Original African Institutions' (1996) 28 The Journal of Legal Pluralism and Unofficial Law 109, 109–119.

[436] Godsglory O Ifezue, 'Understanding Chieftainship in Botswana: The Status and Powers of Chiefs in Present Day Botswana' (2015) 59 Journal of African Law 271, 271–293; J Michael Williams, *Chieftaincy, the State, and Democracy: Political Legitimacy in Post-Apartheid South Africa* (Indiana University Press 2010) 217-218; Kyed and Buur (n 435) 4–5.

developments of African constitutionalism from precolonial times to the present. It demonstrates that precolonial Africa had experienced and hosted numerous indigenous constitutional systems, which considered custom as their normative order and traditional government as their institutional setup. With the aid of international law, however, these indigenous constitutional systems were aborted, rejected, and subordinated formally with the conclusion of the Berlin Conference. By considering the Berlin Conference as a Basic Law, European colonial powers introduced their own colonial constitutional systems to Africa. In addition to dissolving the operation of indigenous constitutional systems, the colonial constitutional systems significantly transformed the nature of custom and traditional authority through acts of rejection, accommodation, and invention. Accepting the colonially constituted states, the postcolonial constitutional systems have been grappling with devising a theory of government that legitimates the newly independent states and addresses their pressing challenges and needs. In these attempts, the postcolonial constitutional systems have been engaging with the continuous legal syncretic processes of negation and affirmation of liberal constitutionalism, on the one hand, and the rejection, accommodation, and tolerance of customary laws and traditional authorities, on the other. These constitutional transformations and developments have been informed by the interactions, changes, and reconfigurations of constitutional ideas, principles, and practices from the indigenous, colonial, and liberal constitutional systems and experiences. These legal syncretic processes, in turn, configure and bring a blend of mixed constitutional ideas, principles, and practices into the constitutional designs and practices, which the next chapter examines.

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CHAPTER THREE
LEGAL SYNCRETISM IN THE DESIGN AND PRACTICE OF AFRICAN CONSTITUTIONALISM

3.1 Introduction

The previous chapter has shown how legal syncretism animates the African constitutional transformations and developments in time and space. This chapter continues to explore and examine how *legal syncretism as a result* permeates the design and practice of African constitutionalism. By taking the constitutional structures and rights seriously along with their practical applications, this chapter decrypts the identity, nature, and texture of African constitutionalism through legal syncretism. The first section explicates the nature of the African state and its modalities of organization, while the second section examines the African government architecture, and the final one investigates the constitutional rights regime. Through a closer look at the texts and contexts of constitutions and constitutionalism in Africa, and building on social, political, and international relations theory, this chapter aims to show how African constitutionalism is legally syncretic and why appreciating this is necessary to understand, improve, and foster constitutionalism in the continent.

3.2 The African State and its Organization

The African state is both a syncretic polity and is a space for legal syncretism. It is a European creation and African affirmation which grapples to establish a workable theory of government. In this section, I explore and evaluate the nature, identity, and texture of the African state and its modalities of organization. This section shows how African constitutionalism uses international law and some tenets of indigenous constitutional systems

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to *constitute* the African state. And how these elements, in turn, bring a state with a different power configuration and expression than the Weberian state. In addition, this section demonstrates how the syncretic nature of the African state blends and fuses federal and unitary systems of organization into its vertical division of powers in its constitutional design and practice.

A. The *Constitution* of the African State

Without understanding the anatomy of the African state, it is difficult to comprehend and explain its constitutional system. In order to understand the nature or anatomy of the African state and its way of *constitution* and operation, I first examine how the African state is explained and described in social, political, and international relations theory. By doing so, my objective is to show the limitations of these theories to explain the nature of the African state and consequently to construct a constitutional framework based on legal syncretism that accounts to its complexities of *constitution* and operation. For this purpose, I identify three major themes within which the nature of the African state has been discussed. These are the "two publics" thesis, the weak state thesis, and the state survival thesis. As the aim of the discussion here is on the structural anatomy of the state, the particular ways in which the state acts is excluded and will be considered in the later sections related to its system of government.

The "two publics" thesis proposed by Peter P. Ekeh has been an influential account about the nature of the African state.[437] Ekeh posits that the African state hosts two publics with different relationships with the private realm. The first public is based on "primordial groupings, ties, and sentiments [that] influence and determine the individual's public

[437] Ekeh (n 2).

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behavior."[438] This primordial public "is moral and operates on the same moral imperatives as the private realm."[439] The individual in the primordial public considers her duties as a moral obligation to benefit and sustain her own primordial public.[440] This primordial public is mainly based on ethnic affiliation. The second public is the civic public implanted by the colonial state and is based on the civil structures of the colonial state such as the military, the civil service, and the police.[441] The civic public is amoral to the private realm unlike the primordial public. Accordingly, the individual emphasizes her rights in her engagement with the civic public by de-emphasizing her attendant duties.[442] As there is no moral urge to give back to the civic public on the part of the individual, the civic public is up for grab or capture for the enrichment of the primordial public. Ekeh contends that while the two publics share similar actors, they are essentially rivals as they operate on a fundamentally different and opposite sense of morality, justice, and rationality.[443]

Building on Ekeh's two publics thesis and drawing from Michel Foucault's theory of governmentality, Wale Adebanwi argues that the African state is "neither real nor illusory," but a "transactional reality".[444] As such, "the public" is always up for capture, adjustment, and adaptation. In these processes, "while the civic public *notionally* addresses itself to the question of how to save and improve *the state*, the primordial public practically focuses on the question of how to save and improve the *community*, or '*our' people*."[445] Consequently, this has led to the "bifurcation of public reason, apparatus of rule, mentalities of rule and

[438] ibid 92.
[439] ibid.
[440] ibid 106.
[441] ibid 92.
[442] ibid 107.
[443] ibid 93.
[444] Adebanwi (n 17) 76.
[445] ibid.

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rationality."[446] Furthermore, the dualization of the public makes the actors of these publics "ethical and unethical at the same time" and "provides them with the material and ideological tools to live with, live well within, as well as defend the existence of this dual public."[447] Similarly, Mamdani uses the concept of a bifurcated state to describe and explain the African state related to the rural and urban divide, and the domain of *state law* and *state authority* and the domain of the customary and traditional authority.[448]

Indeed, the two publics thesis offers a unique analytical tool to explain and decrypt the *constitution* of the African state. However, it only explains partly. True, there are a seemingly separate two publics or bifurcation within the African state. It is also true that there is a parasitic relationship between the two publics. Nevertheless, the two publics are neither purely separate in their sense of morality, justice, and rationality nor always parasitic in their relationship. As discussed in the previous chapter, the civic public builds on some tenets of the primordial public and the primordial public accepts and depends on some tenets of the civic public. Acceptance and cooperation as much as rejection and competition symbolize the relationship between these publics. Precisely because of this, what we get is not a "bifurcation of public reason, apparatus of rule, and rationality", but a syncretic public reason, apparatus of rule, and rationality that develops in a particular way according to the balance between the two publics in a given time and place. Moreover, it is not the dualization of the public that makes the actors of these publics "ethical and unethical at the same time" and "provides them with the material and ideological tools to live with, live well within, as well as defend the existence of this dual public," but the Janus-faced syncretic configuration of the civic public

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[446] ibid 72.
[447] ibid 76.
[448] Mamdani, *Citizen and Subject* (n 17) 16–22.

with the primordial public during the colonial encounter and its affirmation at independence. As a result, there is a syncretic public rather than two publics in the African state, in which its makeup will be explained later in this section.

The weak state thesis focuses on Ekeh's civic public, by ignoring its progeny- the primordial public, to explain the nature of the African state. It is held that the African state is not a state in the Weberian sense[449] as it neither has the capacity and the authority to broadcast its power over its territory and population, nor has sufficient resources to finance its operation.[450] The African state is an empirical illusion without empirical sovereignty.[451] Due to its colonial origin, the African state is considered as alien to the people and consequently lacks moral and cultural legitimacy. The people who live within the African state neither had a common history and cultural experience nor have a national identity or cohesion.[452] It is held that the African state is a state due to the courtesy of international law.[453] Unlike the nineteenth-century international law that denied the sovereignty of Africans, the post Second World War international law under the auspices of the United Nations extended juridical sovereignty to former colonies without the need for them to have empirical sovereignty.[454] International law's replacement of empirical statehood by juridical statehood has enabled African states to join the community of nations without acquiring the necessary capacity and infrastructure for their empirical existence. As such, as sovereignty is the foundation and basis of the African state, unlike the Weberian state where sovereignty is an empirical reality and

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[449] See Weber (n 69) 154.
[450] Herbst (n 21) 15–17; Robert H Jackson and Carl G Rosberg, 'Sovereignty and Underdevelopment: Juridical Statehood in the African Crisis' (1986) 24 The Journal of Modern African Studies 1, 1–3.
[451] Robert H Jackson, 'Juridical Statehood in Sub-Saharan Africa' (1992) 46 Journal of International Affairs 1, 1.
[452] Young, *The Postcolonial State in Africa* (n 143) 299; Deng (n 12) 31.
[453] Jackson (n 451) 1–16.
[454] ibid 2.

manifestation of the state, it is fundamentally weak to perform standard state functions and responsibilities.

The weak state thesis, as the two publics thesis, explains some aspects of the nature of the African state. It is true that the African state is not like the Weberian state which asserts sovereignty as a matter of fact and deploys it through its monopoly of violence. Equally true is the constitutive role of international law for sovereignty in Africa. International law has played a significant role in the *constitution* of the colonial and postcolonial states. This is due to the fact that, as discussed in the previous chapter, international law provided the basic rules of the organization and operation of both the colonial and postcolonial states. The Berlin Conference, and its guiding principles of international law, conferred juridical sovereignty to the colonial state without it acquired the necessary capacity and infrastructure to assert empirical sovereignty. In a similar vein, the principles of territorial integrity and sovereignty of the United Nations and the OAU affirmed the sovereignty of the colonial state which the postcolonial state inherits.

However, there are a number of outstanding questions the weak thesis fails to answer. For instance, how an alien political entity operates and still exists in a population which neither shared a common history and culture nor has a common sense of national identity or cohesion? Why its inhabitants still commit to live under it while they can easily break and form a state of their own?[455] In spite of the prevalent ethno-linguistic and religious tensions and conflicts, secessionist movements are rare.[456] In the more than the fifty states Africa consists of, secessionist movements have been raised in limited numbers by specific groups in

[455] Young, *The Postcolonial State in Africa* (n 143) 299.
[456] ibid.

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specific states. For instance, the Katanga in Congo, the Biafra in Nigeria, the Cabinda in Angola, the Casamance in Senegal, the South Sudan in the Sudan, and Eritrea in Ethiopia are the notable instances of secessionist movements, in which only the South Sudanese and Eritrean secession materialized.[457] Moreover, behind these secessionist movements are the real or imagined lack of cultural recognition and political participation and representation in the national state.[458] Hence, despite the acute lack of empirical sovereignty of the African state, its inhabitants are attached to it willfully.

The state survival thesis comes to the rescue of the weak state thesis in explaining why the African state still exists despite the odds. Robert Jackson and Carl Rosenberg offer four reasons why African states persist despite their apparent weakness and legitimacy deficit.[459] The first reason for the survival of the African state is the ideology of Pan-Africanism or African nationalism that cemented the consensus that the freedom of Africans will be achieved within the contours of the colonial states which has led to the legal and political commitment to respect the sovereignty and territorial integrity of each new independent state.[460] This legal and political commitment to respect colonial border avoids a possible external threat from the outside. The second explanation is a rational choice theory that it is in the interest of each African state to respect the territorial integrity and sovereignty of the other state amidst lack of empirical sovereignty internally.[461] The internal insecurity of both states and their leaders command the observance of the sovereignty of other states. While the third reason is associated with the conservativeness of the United Nations led international

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[457] Dersso (n 401) 51–52.
[458] ibid 60.
[459] Robert H Jackson and Carl G Rosberg, 'Why Africa's Weak States Persist: The Empirical and the Juridical in Statehood' (1982) 35 World Politics 1, 17.
[460] ibid 18.
[461] ibid 19.

order for state fragmentation, the final one is the absence of interference by non-Africans in African affairs.[462] Like Jackson and Rosenberg, Christopher Clapham holds that 'negative sovereignty' that is the principle of respect for existing colonial borders and the principle of non-interference in international affairs helps African states to secure their viability.[463]

While Pierre Englebert and Crawford Young agree with some of the above explanations, they offer a more specific reason internal to the African state. Even if they agree that Pan-Africanism and its concomitant impact in the norms of OAU are significant in maintaining the African state intact in legal and political terms, it is not a sufficient reason given 'the norm violating behavior of African states.' For instance, by violating the principles of sovereignty and territorial integrity, Tanzania, Cote d'Ivoire, Gabon, and Zambia gave recognition to Biafra in the 1960s; Libya supported separatist groups in Chad; Chad, Ethiopia and Uganda supported South Sudanese; Sudan supported separatists in Ethiopia; and Tanzania even invaded Uganda in the end of 1970s.[464] Recently, the African Union readmits Morocco as a member state while its annexation of Western Sahara is ongoing which reinforces Englebert's and Young's argument.[465] Furthermore, they also agree to the rational choice theory and the conservativeness of the international system for state fragmentation. In particular, the secessionist movements were discouraged, and Eritrean and South Sudanese

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[462] ibid 20-21.
[463] Christopher Clapham, *Africa and the International System: The Politics of State Survival* (Cambridge University Press 1996) 34–38, 44–50.
[464] Pierre Englebert, *Africa: Unity Sovereignty and Sorrow* (Lynne Rienner Publishers 2009) 33; Young, *The Postcolonial State in Africa* (n 143) 301-302.
[465] Ben Quinn and agencies, 'Morocco Rejoins African Union after More than 30 Years' *The Guardian* (31 January 2017) <https://wwwtheguardiancom/global-development/2017/jan/31/morocco-rejoins-african-union-after-more-than-30-years> accessed 16 February 2017.

secessions were accepted after many decades of civil war and prior recognition by Ethiopia and the Sudan respectively.[466]

However, the most compelling reason for the survival of many of the African states for Englebert is the diffusion of sovereignty in the form of legal command to many state institutions, agents, and officials.[467] He claims that the legal power that enables different state institutions, agents, and officials such as custom officials, courts, municipal workers, civil servants, soldiers, police and the like emanates from the juridical and diffused sovereignty of the state.[468] As a result, according to him, what endures the state is the contextualization of sovereignty in the form of legal command by different state actors. Engleberg's argument explains part of the story. This is due to the fact that his conception of contextualized sovereignty and its manifestation in the form of legal command is valid in urban areas or in areas where formal state institutions or officials exist. However, in many rural areas in which the majority of the inhabitants live, there is an acute lack of state agents and officials. Hence, in the absence of a state institution, agent or official that uses the legal command, how the majority of the population leads socio-economic and political life under the umbrella of the state remains a puzzle.

Young, instead, contends that the weak African states survive simply because their citizens or populations want them to endure.[469] He observes that the catastrophic failure of states to provide basic security, freedoms, and opportunities neither erases the attachment of citizens to their states nor the hope that their states can be reformed.[470] Young gives the

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[466] Young, *The Postcolonial State in Africa* (n 143) 301.
[467] Englebert (n 464) 62.
[468] ibid 62–64.
[469] Young, *The Postcolonial State in Africa* (n 143) 314.
[470] ibid.

example of Congo-Kinshasa, South Sudan, and Somalia to demonstrate the attachment of citizens to their states. Despite the ongoing civil war and its horrendous impact in their lives, many Congolese and opposition rebel groups have a high attachment to their state.[471] In a similar vein, many South Sudanese had an ambition to live in a single Sudan.[472] Without a central government for more than two decades, Somalia still exists in the social imagination of Somalis.[473] Hence, for Young, territorial nationalism is the reason behind the survival of the African state. Once failed or collapsed states, Ghana, Uganda, Mozambique, Sierra Leone, and Liberia, just to mention a few, recovered from their failure or collapse.[474] Moreover, Ghana is one of the states in Africa where electoral democracy brings peaceful political transition. Somalia is also recovering from its tragic failure and marches to rebuild institutions under a constitutional system.[475] For the continuous viability of the African state and its recovery, Young's thesis of territorial nationalism is a convincing one. However, territorial nationalism alone neither explains how the socio-economic and political biosphere of the populace operates nor does it indicate how these are (dis)connected to the state.

The *constitution* of the African state, therefore, lies in the Janus-faced configuration of international law and customary laws and traditional authorities, which the above three theses fail to take into account. While the two publics thesis emphasizes on the incompatibility and perpetual rivalry of the customary and traditional conceptions of power, primordial public, and the modern rational-legal authority, civic public, without considering international law; the weak state and state survival theses focus on international law by ignoring the role and

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[471] ibid 305–306.
[472] ibid.
[473] ibid 299.
[474] See I William Zartman (ed), *Collapsed States: The Disintegration and Restoration of Legitimate Authority* (Lynne Rienner Publishers 1995).
[475] The Constitution of Somalia 2012.

function of customary and traditional conceptions of power and authority in the African state. As noted elsewhere, international law created and maintained the sovereignty of the African state, as we know it, both in colonial and postcolonial times. It reimagined and reconfigured precolonial Africa in its current geographical or territorial form. Accordingly, it implanted the territorial state with its attendant attributes such as defined population, territory, government, and sovereignty. Along with these, it has bestowed on the territorial state internal autonomy and external protection. By doing so, international law incorporated Africa into the community of nations on its terms and has played a *constitutive role* in the formation of the African states from above.

At the same time, within the contours of the territorial state, customary laws and traditional authorities in their various manifestations have been reconfigured in the government of the African state. The encounter of the rational-legal authority of the state, which is created from above through the aid of international law, with the customary and traditional conception of power and authority have transformed both conceptions of power and authority in Africa. As discussed in the previous chapter, the rational-legal authority has incorporated some elements from the customary and traditional conceptions of power and by doing so have changed its nature or identity. In a similar vein, the customary and traditional conceptions of power and authority have accepted the existence of the rational-legal authority and accordingly transformed, reconfigured, and channeled their principles and practices in the operation of the territorial state. As international law gives the state internal autonomy and external protection from above, customary and traditional conceptions of power and authority provide the state the necessary infrastructure and resources for internal operation from below.

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If we consider the powers and resources available in the domain of the customary and traditional authority as one aspect of the state configuration, I believe we should, the African state is strong in its bureaucratic arrangement and disposition and maintenance of internal law and order as these exist everywhere in the entire territory. Obviously, the customary and traditional conceptions of power here, go beyond the simple constitutional recognitions, and include their empirical applications and manifestations. As noted in the previous chapter, customary laws and traditional authorities perform state functions both in the so-called weak or collapsed states and in stable and democratic states. For instance, customary laws and traditional authorities play a significant state function in Mozambique,[476] Angola,[477] Sierra Leone,[478] Somalia,[479] Tanzania,[480] Ethiopia,[481] South Africa,[482] Namibia,[483] and Botswana,[484] all of which have a different level of state existence, capacity, and legitimacy from a Weberian conception of state point of view.

Thus, the colonial encounter set the development of a syncretic state that repudiates the African indigenous constitutional configurations, as discussed in the previous chapter, yet incorporates, reforms, and reconfigures some of the underlying rules, principles, and practices into its constitutional system to extend its institutional reach in its territory and ensure internal

[476] Buur and Kyed (n 403).
[477] Aslak Orre, 'Integration of Traditional Authorities in Local Governance in Mozambique and Angola: The Context of Decentralization and Democratisation' in Armando Marques Guedes and Maria José Lopes (eds), *State and Traditional Law in Angola and Mozambique* (Almedina 2007) 139-199.
[478] Richard Fanthorpe, 'On the Limits of Liberal Peace: Chiefs and Democratic Decentralization in Post-War Sierra Leone' (2006) 105 African Affairs 27.
[479] van Notten (n 251).
[480] Mamdani, *Define and Rule* (n 265) 107.
[481] See Bahru Zewde and Siegfried Pausewang (eds), *Ethiopia: The Challenge of Democracy from Below* (Nordic Africa Institute 2002).
[482] See Oomen (n 406).
[483] Oliver C Ruppel and Katharina Ruppel-Schlichting, 'Legal and Judicial Pluralism in Namibia and Beyond: A Modern Approach to African Legal Architecture?' (2011) 43 The Journal of Legal Pluralism and Unofficial Law 33, 33-57.
[484] Ifezue (n 436).

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law and order. By doing so, the state, in turn, transformed its rational-legal authority as it fused it with a traditional political authority that operates in a different sense of morality, justice, and rationality. As a result, the African state is neither bifurcated nor hosted two publics, nor is it solely dependent on international law for its survival. Rather, the African state is constituted with a Janus-faced configuration of international law from above and customary laws and traditional authorities from below. As a result, the African state and its constitutional system is both a product and a space of legal syncretism.

B. The Organization of the African State: Between Federalism and Unitarism

Configured within the twin pillars of international law from above and customary laws and traditional authorities from below, African constitutionalism grapples with a theory of government to organize the state between federalism and unitarism. The ethno-linguistic and regional diversity, and the lack of a prior shared history and culture beyond the colonial experience, have made the nation-state project difficult yet made the unitary system of government the preferred system of state organization in Africa. Nonetheless, this has been achieved by the reinterpretation of both the logic and principles of unitary systems of government. In transposing a unitary system of government, the syncretic African state redeploys it as both a device of holding the diverse ethno-linguistic groups together and as a means of enlarging the power of the central government. By doing so, it incorporated federalist ideas and principles of state organization into its unitary system. By the same token, those states which adopted a federal form of government not only transformed the nature and function of federalism, but also fused it with some unitary principles and ideas. As a result, the theory of state organization in Africa, both federal and unitary, shares an underlying purpose or function and aims to address a common problem posed by the syncretic nature of

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the African state. Consequently, the African federal and unitary theory diverges from the classic federal and unitary states even though they share some common structural norms, principles, and discursive practices. This section explores the federalist ambition in unitary states and the unitary impulse in federal states, on the one hand, and the divergences and convergences of African federalism and unitarism with classic states, on the other, to show how the theory of state organization in Africa builds on legal syncretism. The discussion begins with the restatement of classic unitary and federal theory to trace their transformation and reconceptualization in the African state.

A unitary system of government traces its origin in the Westphalian state system which conceived the state "ideally as a unitary, centralized, homogeneous, self-sufficient, and politically sovereign polity encompassing a single nation, a territory, and a unitary government."[485] Accordingly, in a classic unitary system of government, the state expresses and is expressed by the homogeneous national identity of its citizens who share common socio-cultural, linguistic and other identities.[486] As diversity is a fact of the human or social experience, the unitary theory of government employs a political theory to achieve unity or homogeneity. In this respect, for instance, John Stuart Mill, suggested a common language if free institutions have to work in a nation state,[487] Jean-Jacques Rousseau, emphasized the necessity of having a common religion for a nation as an ultimate moral reservoir,[488] and Ernest Barker, proposed social cohesion as a necessary condition for the exercise and

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[485] Daniel J Elazar, 'Contrasting Unitary and Federal Systems' (1997) 18 International Political Science Review / Revue internationale de science politique 237, 237.
[486] Sergio Bartole, 'Internal Ordering in a Unitary State' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 610-611.
[487] John Stuart Mill, *Utilitarianism, Liberty & Representative Government* (London & Toronto JM DENT & SONS 1910) 365.
[488] Jean-Jacques Rousseau, *The Social Contract* (Maurice Cranston tr, Penguin Classics 1968) 181.

operation of sovereignty.[489] All these require, and indeed required, the imposition of a dominant culture and its animating attributes to all within a given state as a unification tool with the use or the threat of use of force (France), and in some exceptional circumstances with a "center-periphery political dynamics" (the United Kingdom).[490] Hence, the unitary system of government has a huge cultural current of homogeneity and cohesion and the consequent indivisibility of the state and its inseparability with the identity of its people.

As a product and manifestation of the homogeneous and unified cultural current of a state and a mechanism of extending, consolidating, and ensuring the application of uniform laws, policies, and practices throughout its territory, the unitary state creates one loci of power. Government in a unitary state is organized either hierarchically, as in France, where the one at the top in the power pyramid controls and dispenses the ultimate power to the regions or departments, or centrally, as in the United Kingdom, where the center holds the supreme and final power in its relationship with the peripheries.[491] The key consideration in the unitary system of government is the organization of state power efficiently. State efficiency in this respect is associated with the maximization of control of the top of the power pyramid over the lower levels or the control of the center over the peripheries.[492] Depending upon the particular needs and how democratic or republican the government is, the one at the top or at the center decides what and how to decentralize power, in the form of deconcentration, delegation, and devolution, to lower administrative bodies.[493] At the same time, the national

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[489] Ernest Barker, *Principles of Social & Political Theory* (Clarendon Press 1951) 42.
[490] Elazar (n 485) 244–246.
[491] ibid 247–248.
[492] ibid 243–244.
[493] Fessha and Kirkby (n 4) 249; Aaron Schneider, 'Decentralization: Conceptualization and Measurement' (2003) 38 Studies in Comparative International Development 32, 34–35.

or central government can recentralize the powers of lower administrative bodies or undo the decentralization and abolish the existing lower administrative bodies or create new ones.

In light of the above, the unitary system of government in Africa, since independence to the 1990s massive decentralization, neither has the cultural currents of a nation-state or come into being through a political dynamic internal to it. The unitary system of government is adopted at independence in Africa, first, mainly as a French colonial inheritance and, later, as part of the nation-state building project on the European prototype.[494] The waves of decentralization since the 1990s have been informed more by federalist ideas and principles than by unitary logics of decentralization.[495]While state efficiency is an outstanding issue for the African state, regardless of its system of government, the main drives for decentralization have been the accommodation of ethno-linguistic and regional diversities and interests in the unitary states.[496] Even if there is a development and democratic imperative for these decentralizations, their institutional and normative configurations make the loci of power plural. Even though these states maintain some of the structures, principles, and discursive practices of a unitary system of government, the realities and conditions of legal syncretism transform the nature and operating principles of a unitary system of government. As these decentralizations are the results of a constitutional settlement, the reconceptualization of unitary systems of government aims to strike some level of balance between the national and subnational actors, and by extension among the ethno-linguistic and regional groups. Kenya,

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[494] Dersso (n 401) 62–70.
[495] See also Rotimi T Suberu, 'Federalism and Decentralization' in David Anderson, Nicholas Cheeseman and Andrea Scheibler (eds), *Routledge Handbook of African Politics* (Routledge 2013) 24.
[496] Fessha and Kirkby 251–252.

Uganda, and Cameroon are fine examples to demonstrate the transformation of a unitary system, as we know it, and its fusion with federalist ideas and principles.

The Kenyan Constitution entrenches the powers of County governments as part of its devolved government.[497] 47 Counties are established by the Constitution in which a Senator represents them in the Senate, the upper house of parliament. Moreover, they are given political, administrative, and fiscal autonomy in their own domain.[498] County governments have their own directly elected Governor, a Country Executive formed by the Governor, and Country Assembly, which they draw heavily from the United States model of state government.[499] The County governors are not removed by the President of the republic but on constitutionally stipulated grounds and on further grounds enacted by parliament.[500] Even in times of emergency and exceptional circumstances, the President of the Republic only suspends a County government with the investigation of an Independent Commission of Inquiry and with the Act of Parliament.[501] Furthermore, the Senate can terminate such suspension anytime.[502] As the Senate is constituted of County senators, the bi-cameral parliamentary system has the objective and effect of protecting and ensuring the interests of Counties in the legislative processes, including in the impeachment of the President and Deputy President of the republic, as in federal states.[503]

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[497] The Constitution of Kenya 2010, Chapter 11.
[498] ibid ss 183, 185, 186, & 187.
[499] Nic Cheeseman, Gabrielle Lynch and Justin Willis, 'Decentralisation in Kenya: The Governance of Governors' (2016) 54 The Journal of Modern African Studies 1, 13.
[500] The Constitution of Kenya, s 181.
[501] ibid s 192.
[502] ibid s 192(4).
[503] See also Cheeseman, Lynch and Willis (n 499) 13-16.

Uganda, like Kenya, constitutionally decentralizes power by establishing Districts as local political units. Districts have their own District Chairperson as a political head, District Council as a deliberative body and District Executive Committee as an executive body. Districts have political,[504] administrative,[505] and fiscal autonomy[506] to perform local government functions. Like Kenya, the President of the republic cannot dissolve the local government nor can remove the District Chairperson. Either it is in a state of emergency or when it is difficult for the district government to function or at the invitation of the district council that the president of the republic exercises the powers of the district government only if two-thirds of all members of parliament approve it.[507] Furthermore, the Constitution requires a two-third approval from the districts to *amend* the part of the Constitution which deals with local government.[508] The principle of constitutional unamendability by either level of government unilaterally is one of the essential criteria's of federal systems.[509] Unlike Kenya, Uganda's parliament is unicameral.[510] Interestingly enough, Uganda tries to accommodate the interests of districts by giving them a special quota in the parliament and making the quota available only to women.[511] By doing so, women district parliamentarians can advance the interests of their own districts and of themselves as a vulnerable group in society.

Similarly, Cameroon constitutionally recognizes regional and local authorities as "public law corporate bodies" in its decentralized unitary state.[512] Regions and local

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[504] See the Constitution of Uganda 1995, article 180.
[505] ibid article 186 & 189.
[506] ibid article 190-195.
[507] ibid article 202.
[508] ibid article 260.
[509] Ronald Watts, *Comparing Federal Systems* (3rd ed, McGill-Queen's University Press 2008) 9.
[510] The Constitution of Uganda, article 77 & 78.
[511] ibid article 78(1) (b).
[512] The Constitution of Cameroon 1972, article 55.

authorities have exclusive and concurrent powers with a fiscal autonomy although the National government is entitled to make supervisions.[513] In line with this, ten regions headed by Presidents with Regional Councils as deliberative bodies are identified by the Constitution, in which, unlike Kenya and Uganda, the President of the Republic is given power to remove Presidents of Regions and dissolve Regional Councils.[514] However, as corporate bodies, regions and local authorities are constitutionally protected and immune from dissolution. Moreover, as the Senate, the upper house of parliament, like Kenya, is constituted of regional and local authorities, they can influence the legislative process as the case in federal states.[515]

Thus, the unitary system of government in Kenya, Uganda, and Cameroon is a legal syncretic result of federalist ideas and principles and unitary forms, principles and discursive practices. Unlike their unsuccessful past federal constitutional experiences, the transformation and reconceptualization of the unitary system of government in these ways seems to be palatable to both national actors in their extension and consolidation of power and sub-national actors in the practice of self-government at the local level and shared rule at the national level.

Like unitary states, African federal states also reconfigured federalism with a new purpose or function and fused it with unitarist principles and practices. Classic federal theory as typified by United States, Canada, Switzerland, and Australia have had the aim to bring pre-existing sovereign political units together for the sake of collective security, democracy,

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[513] ibid article 55.
[514] ibid article 56-60.
[515] For the practice see Ndiva Kofele-Kale, 'Local Governance under Cameroon's Decentralisation Regime: Is It All Sound and Fury Signifying Nothing?' (2011) 37 Commonwealth Law Bulletin 513, 513-530.

and/or economic prosperity.[516] The institutional design of federalism in these states aims to combat majority tyranny, protect individual rights, safeguard democracy, and ensure government accountability.[517] Furthermore, building state efficiency by availing the benefits of unity and maintaining diversity by avoiding the costs of uniformity guide the federal design.[518] Nonetheless, the federal theory envisaged and have been experimented in Africa has a different logic and purpose. As the next chapter demonstrates, federalism in Africa is dictated by the quest to hold the post-colonial state together. Precisely because of this, the federal design mainly aims to achieve peace and territorial integrity by accommodating ethnic and regional diversity. Furthermore, whereas unitary states have a federalist ambition, federal states have a unitarist impulse that either led to the abolition of federalism as in Cameroon and Uganda or extensive centralization as in Nigeria, Ethiopia, and South Africa.[519]

The syncretic states in Africa design their systems of vertical organization of power by reforming and reconfiguring unitary and federal systems of government and, at the same time, by blending them with each other to address their peculiar needs and circumstances. Behind such experiments are the existence of a general commitment to the viability of the African state, the presence of ethno-linguistic and regional diversity, and the outstanding quest to legitimate the African state and consequently extend and consolidate its operation. These contexts, in turn, lead to the development of a syncretic system of government organization that mixes legal and political ideas, practices, and norms as manifested in the primordial

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[516] Sujit Choudhry and Nathan Hume, 'Federalism, Devolution and Secession: From Classical to Post Conflict Federalism' in Tom Ginsburg and Rosalind Dixon, *Comparative Constitutional Law* (Edward Elgar Publishing 2011) 359.
[517] ibid 356.
[518] ibid.
[519] See also Rotimi Suberu, 'Federalism in Africa: The Nigerian Experience in Comparative Perspective' (2009) 8 Ethnopolitics 67, 68–69.

public, civic public, and comparative liberal constitutional experiences. It is due to this syncretic condition that the system of vertical division of power hangs between federalism and unitarism in both federal and unitary states despite the differences in name, form, and scope.

3.3 The African Government Architecture

As with the vertical division of power, the horizontal division of power in Africa is animated by legal syncretism. The legislative branch of government draws from both the modern principle of democratic representation, one-person one-vote, and the traditional form of representation, as symbolized in traditional leaders or chiefs, and blends them in its constitutional design. By doing so, the legislative branch becomes a dual house of representation for the people based on the democratic and African principles of representation. In a similar vein, the executive branch of government is designed mainly by the adoption of presidential forms of government with a blend of alleged African principles of government and the *modus operandi* of the Colonial Governor. As a result, the executive power in Africa has an imperial and personal attribute that goes counter to the principle of separation of powers. Similarly, the judicial branch fuses laws and persons from customary and/or religious laws and statutory laws. Consequently, the legislative, executive, and judicial branches of government in Africa are not only a result of legal syncretism but also a space for the same. This section begins with how legal syncretism animates the legislative and proceeds to examine and explore the same with regard to the executive and the judiciary in this order.

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A. The Legislative: The Dual House of Representation

Until the third wave of democratization in the 1990s, the role and function of legislatures have been legitimating and supporting the Executive in Africa. However, the adoption of democratic constitutions in the 1990s has begun to change the role of legislatures from being another arm of the executives to an institution with significant constitutional importance in taming the executives and consolidating constitutionalism.[520] While their constitutional roles and actual influence vary across states, the legislatives as an institution begin to matter in the practice of constitutionalism in Africa.[521]

Legislatures, in liberal constitutional systems, as an institution symbolize representative government and are results of popular sovereignty expressed in regular and periodic elections.[522] As people have diverse needs and interests, it forms and supports political parties for these purposes. Ultimately, while legislatures are composed of political parties with varied interests, the legislature as an institution is the reservoir of popular will or popular sovereignty. This popular sovereignty resides in the people undivided.

However, a closer look at the legislatures of many African states reveals that legislatures are not only representative bodies to the people as an expression of popular sovereignty, they are also representative bodies to the people as an expression of traditional form of sovereignty. While the direct election of members of the legislature through regular elections embody the notion of popular sovereignty, the incorporation and reconfiguration of

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[520] MA Mohamed Salih, 'Introduction' in MA Mohamed Salih (ed), *African Parliaments: Between Governance and Government* (Springer 2005) 12–20.
[521] Joel D Barkan, 'African Legislatures and ''the third wave'' of Democratization' in Joel D Barkan (ed), *Legislative Power in Emerging African Democracies* (Lynne Rienner Publishers 2009) 1-3.
[522] Sajó and Uitz (n 64) 227–228.

traditional authorities in the legislature in different degrees and forms[523] show the traditional conception of sovereignty. Such institutional configuration produces a syncretic legislative body. In this section, I explore how traditional authorities figure in the legislative bodies and how this consequently transforms the nature of these legislative bodies.

Traditional authorities are incorporated into the legislative branches of government in Africa in four major ways. The first is direct incorporation into the legislature, the second is the institution of separate houses, the third is inclusion as part of local government, and the fourth and final one is incorporation through an innovative institutional recreation. Burkina Faso, Lesotho, Swaziland, and Sierra Leone are good examples for the first way, namely that of directly incorporating chiefs to the legislative branch. While Lesotho and Swaziland are constitutional monarchies where traditional authorities or traditional conceptions of power animate the whole constitutional structure, Burkina Faso and Sierra Leone establish constitutional democracy but choose to represent traditional authorities in the legislature. In Lesotho, twenty-two out of thirty-three seats in the Senate, upper house of parliament, are allocated to chiefs,[524] while the national assembly is composed of peoples representatives.[525] Although there is no clear nomenclature as Senate and National Assembly, as in Lesotho, Swaziland establishes constitutional systems for traditional representation through chiefs and representation of peoples in the parliament.[526] In Sierra Leone, the unicameral parliament is constituted of Paramount Chiefs from each District and elected representatives.[527]

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[523] Englebert (n 464) 52–55.
[524] The Constitution of Lesotho 1993, article 55.
[525] ibid article 56 & 57.
[526] The Constitution of Swaziland 2005, articles 80, 81 & 84.
[527] The Constitution of Sierra Leone 1991, article 74.

In Burkina Faso, the National Assembly is the house of popular representation while the Senate is composed of different sections of the population, one of which is traditional authorities. Its constitution reads "[t]he Senate is composed of representatives of the territorial collectivities, of the customary and religious authorities, of the employers, of the workers, of the Burkinabe living abroad and of persons of distinction appointed by the President of Faso."[528] Unlike Lesotho where the large number of chiefs makes the Senate almost a house of chiefs, the chiefs in Burkina Faso are one among other groups represented in the Senate. As the Senate in Burkina Faso is composed of diverse groups, the mode of election of the members of the Senate is also different. While the representatives of local collectivities are subject to universal indirect suffrage, chiefs are elected according to customary law.[529]

The preferred approach for the incorporation of traditional authorities is the second way: the institution or establishment of separate houses, house of chiefs, as a traditional conception of representation. In this respect, Ghana, Botswana, and Zambia are fine examples to show how house of chiefs are established and to explicate their relationships with the legislature. In Ghana, customary law and usage guide both the organization and tenure of the house of chiefs at the national and regional levels.[530] To this end, the Parliament neither has the power to confer or withdraw the power of chieftaincy to anyone or authority nor to "detract or derogate from the honour and dignity of the institution of chieftaincy."[531] In addition, the election or removal of chiefs is entirely within the ambit of customary law and

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[528] The Constitution of Burkina Faso 1991, article 80.
[529] ibid article 80; Sten Hagberg, 'Traditional Chieftaincy, Party Politics, and Political Violence in Burkina Faso' in Lars Buur and Helene Maria Kyed (eds), *State Recognition and Democratization in Sub-Saharan Africa: A New Dawn for Traditional Authorities?* (Palgrave Macmillan US 2007) 131–150.
[530] The Constitution of Ghana 1992, article 270.
[531] ibid article 270(2); see Nicole Bonoff, 'Traditional Authority in the State: Chiefs, Elections and Taxation in Ghana' (PhD thesis, University of California, San Diego 2016). Bonoff discusses the influence and role of chiefs beyond their constitutionally recognized power.

usage, the Parliaments role being limited to making laws to this effect.[532] In Botswana, however, even if customary norms and practices are the normative basis for the institution of Ntlo ya Dikgosi (house of chiefs), there is a Regional Electoral College responsible for the election of chiefs, and anyone who is a Botswanan national who attains 21 years of age can run for the position.[533] In addition to being open to anyone, the tenure of Ntlo ya Dikgosi is limited to five years.[534] By the same token, in Zambia, customary norms are not the only sources of chieftainship as the government can designate or select anyone as a chief and can member her to the house of chiefs.[535] Unlike Botswana, chiefs themselves in the provinces elect the members of the house of chiefs in Zambia.[536] However, their term of office is limited to three years with the possibility of re-election for another term.[537]

The house of chiefs participates at different degrees and levels, mostly as advisory organs, in the business of the legislature. In Ghana, the house of chiefs plays a strong role in legislation with respect to the institution of chieftaincy, customary law, and usage. This ranges from taking away the legislative power of the Parliament in making laws concerning the institution of chieftaincy to a collaborative role in determining some specific rules or procedures concerning chiefs and customary law.[538] Further, the house of chiefs plays an advisory role to the legislature. Their advisory authority is not limited to matters of chieftaincy

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[532] The Constitution of Ghana, article 270(3) (a); for a details account of traditional authorities in Ghana's constitutional democracy see Irene K Odotei and AK Awedoba (eds), *Chieftaincy in Ghana: Culture, Governance and Development* (Sub-Saharan Publishers 2006).
[533] The Constitution of Botswana 1966, ss 78 (4) & 79 (1); see Wazha G Morapedi, 'Demise or Resilience? Customary Law and Chieftaincy in Twenty-First Century Botswana' (2010) 28 Journal of Contemporary African Studies 215 (discussing how chiefs manage to secure their power and influences despite government interventions).
[534] The Constitution of Botswana, s 80 (1) (a); see also Ifezue (n 436).
[535] The Constitution of Zambia 1991, article 128(c).
[536] ibid article 132.
[537] ibid article 133(1).
[538] The Constitution of Ghana, article 270.

and customary law, but extends to any constitutional matter or law.[539] They, in particular, have the mandate and the power to undertake progressive studies and evaluations in filtering harmful customary practices and usages, and in codifying customary laws.[540]

In Botswana and Zambia, however, house of chiefs has an advisory role and the Parliaments have no constitutional limitation in legislating on matters of chiefs or customary laws. Unlike Ghana where the constitution authorizes the house of chiefs to be advisory organs for any person or authority, in Botswana and Zambia, the functions of house of chiefs are an advisory body to the legislature. For instance, the Botswanan Constitution provides that "[t]he Ntlo ya Dikgosi shall consider the copy of any Bill which has been referred to it under the provisions of section 88(2) of this Constitution and the Ntlo ya Dikgosi shall be entitled to submit resolutions thereon to the National Assembly."[541] Furthermore, it states that

> The Ntlo ya Dikgosi shall be entitled to discuss any matter within the executive or legislative authority of Botswana of which it considers it is desirable to take cognizance in the interests of the tribes and tribal organizations it represents and to make representations thereon to the President, or to send messages thereon to the National Assembly.[542]

By the same token, the Zambian Constitution stipulates that the house of chiefs is an advisory body to the government on traditional, customary or any other matter referred to it by the president.[543] In addition to this general advisory role, the house of chiefs has the power to consider and discuss any Bill concerning custom or tradition introduced by the National

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[539] ibid article 272 (a) & (d), 274(3).
[540] ibid article 272(b) & (c), 274 (3).
[541] The Constitution of Botswana, s 85(1).
[542] ibid s 85(5).
[543] The Constitution of Zambia, article 130.

Assembly, or any other matter referred to it by the president and submit resolutions to this effect to the National Assembly.[544]

The third way of incorporating traditional authorities in the legislative activities is by making them part of the local government. Local governments are corporate bodies in the devolved government system in much of sub-Saharan Africa where they have their own legislative assemblies and executive organs subject to constitutional and legal limitations.[545] In Chad, Democratic Republic of Congo, the Gambia, and South Africa, for instance, traditional authorities are either part of or play a supportive role in the functioning of the local government. In the Gambia, the Constitution combines the local government and traditional rulers and does not even make any distinction.[546] Traditional rulers called *Seyfolu* are represented in the local government and accordingly responsible for local legislation and execution.[547] In Chad, unlike the Gambia, the Constitution generally recognizes the institution of traditional and customary authority and makes them collaborators and supporters of the local government.[548] In the Democratic Republic of Congo, traditional authorities are recognized under the provinces, i.e. regional or local government. While a future law determines the specific powers of traditional authorities in Congo as in Chad,[549]

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[544] ibid article 131.
[545] For instance, see the Constitution of the Democratic Republic of Congo 2005, article 195.
[546] The Constitution of Gambia 1996, chapter XV; the chapter on local government is titled as "local government and traditional rulers.
[547] ibid s 194(b).
[548] ibid s 213-214.
[549] The Constitution of Chad 1996, article 216.

they assume the duty to promote national unity and cohesion.[550] In South Africa, traditional authorities assume a role in the local government on issues affecting local communities.[551]

The fourth and final approach of inclusion of traditional authorities in the business of the legislature is through an innovative institutional recreation with a traditional logic and conception but with a modern actor and participant. Rwanda is a good example for this. Rwanda does not follow the similar African trend of recognizing traditional authorities as noted above. It reinvents traditional authorities in the form of National Umushyikirano Council and Abunzi Committee. The National Umushyikirano Council is composed of the President of the Republic and citizen representatives, whereas the Abunzi Committee is a conciliatory organ composed of persons of high integrity with skills of conciliation and dispute resolution.[552] For our present purposes, the National Umushyikirano Council is relevant due to the fact that discussions of the Council leads to the adoption of resolutions and their submission to relevant institutions including the legislature.[553] Both the organization, deliberations, and resolutions of the Council resonate a traditional system of deliberation and governance, the exception being the President of the republic acting as a traditional leader, king or chief with supreme power. In pre-colonial Africa, in which Rwanda is not an exception, people gather around a traditional leader, king, or elder to discuss, deliberate, and solve issues of communal interest. In this Umushyikirano Council, the President leads the discussion and deliberation with citizen representatives, whom she invites. The Council can debate and adopt resolutions about any "issues relating to the state of the nation and national

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[550] The Constitution of Democratic Republic of Congo, article 207.
[551] The Constitution of South Africa 1996 , s 212(1); For the political dynamics of traditional authorities see J Michael Williams, *Chieftaincy, the State, and Democracy: Political Legitimacy in Post-Apartheid South Africa* (Indiana University Press 2010).
[552] The Constitution of Rwanda 2003, article 140 & 141.
[553] ibid article 140.

unity."[554]The President through this Council seems to exercise the powers of traditional authorities to influence the legislature by submitting resolutions of the Council. The National Umushyikirano Council epitomizes the syncretic engineering of traditional conception of power and authority with modern constitutional principles and institutions that makes the leader of the republic both a traditional leader or a chief and a modern president. This ultimately strengthens the executive power of the president and her leverages and influences on the legislature.

Therefore, there is incorporation and reconfiguration of traditional authorities and traditional conceptions of powers in the business of legislation and legislature in Africa.[555] While the national assemblies are usually houses of modern forms of representation as they are composed of people who are popularly and democratically elected, membership of traditional authorities or chiefs in the Senate, the institution of separate house of chiefs, the incorporation traditional authorities in local government, and the reinvention of traditional authorities shows the reconstitution and inclusion of traditional forms of representations. In spite of the differences in the degrees and levels of incorporation and reconfiguration, the constitutions of many African states set the development of a syncretic legislative organ that appeals to the modern and traditional political elite rather than a bifurcated one between the urban and the rural polity.[556] Even those countries which do not incorporate traditional authorities in the legislative branch, they either recognize them as part of the state apparatus

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[554] ibid article 140.
[555] See also Michaela Collord, 'The Legislature: Institutional Strengthening in Dominant-Party States,' in Nicholas Cheeseman (ed), *Institutions and Democracy in Africa: How the Rules of the Game Shape Political Developments* (Cambridge University Press 2017) 298–299.
[556] See also Charles Mwalimu, *Seeking Viable Grassroots Representation Mechanisms in African Constitutions: Integration of Indigenous and Modern Systems of Government in Sub-Saharan Africa* (Peter Lang 2009); Carolyn Logan, 'Selected Chiefs, Elected Councillors and Hybrid Democrats: Popular Perspectives on the Co-Existence of Democracy and Traditional Authority' (2009) 47 The Journal of Modern African Studies 101, 101-128.

with clearly stipulated roles and functions, such as judicial roles,[557] or accepted their role and function as a matter of constitutional practice within their own domain as the case in Ethiopia.[558] As custodians of customary laws, traditional authorities engage in the making and unmaking of customary laws with their constituencies, as customary laws evolve or change with time due to circumstances internal or external to it. These empirical realities show the legislative role of traditional authorities even when they are not formally incorporated into the legislative branch.

B. The Executive: Imperial and Personalized

In common parlance, the Executive is a branch of government that gives effect to laws made by the legislature and performs other constitutionally allotted powers and functions such as matters of foreign relations, national defense, and general welfare.[559] In a constitutional democracy, the executive is either headed by a president or a prime minster. The president or the prime minster along with her cabinet runs the executive branch of government. Informed by the principles of separation of powers, in spite of its wider prerogatives and powers compared with the legislature and the judiciary in the administration of the state, the executive figurehead be it a president or a prime minster is supposed to function and operate within the ambit of constitutional limitations and rules. Indeed, this is one of the main hallmarks of modern constitutionalism that distinguishes present day presidents or prime

[557] The Constitution of Federal Democratic Republic of Ethiopia 1995, article 34(5) & 78(5).
[558] See Girmachew Alemu Aneme, 'Ethiopia: Legal and Judicial Plurality and the Incorporation of Traditional Dispute Resolution Mechanisms within the State Justice System' in Matthias Kötter and others (eds), *Non-State Justice Institutions and the Law: Decision-Making at the Interface of Tradition, Religion and the State* (Palgrave Macmillan 2015) 80–99; Dolores A Donovan and Getachew Assefa, 'Homicide in Ethiopia: Human Rights, Federalism, and Legal Pluralism' (2003) 51 The American Journal of Comparative Law 505, 505–552; Bahru Zewde, 'Introduction' in Bahru Zewde and Siegfried Pausewang (eds), *Ethiopia: The Challenge of Democracy from Below* (Nordic Africa Institute and Forum for Social Studies 2002) 7–14.
[559] Sajó and Uitz (n 64) 267–268.

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ministers from the ancient or medieval monarchs or kings. The functional division of government powers along with the tenets of separation of powers has been considered as "a grand secret of liberty and good government" in Western constitutional thought.[560] The inbuilt system of checks and balances in the principle of separation of powers is supposed to keep the executive within its constitutional limits. The actual practice of the principle of separation of powers by the three branches of government, in general, and the executive, in particular, epitomize the success of constitutional government.

However, this constitutional principle of separation of powers has been reinterpreted by African executives in a way that favors the executive and creates executive supremacy in the constitutional order. As discussed in the previous chapter, in the continuous negation and affirmation of liberal constitutionalism, the alleged African system of government under a strong king or chief has been used as a discursive practice both to legitimate the new leaders along with their styles of rule and to relegate the principles of separation of powers as a foreign and alien cultural imposition. By magnifying and universalizing a particular conception of African system of government that concentrates political power in the person of the king or the chief and deemphasizing the traditional systems of separation of powers and checks and balances, African executives have accumulated much political power and consequently personalized the executive power of government. Although the founding presidents of African states fancy the executive persona of foreign leaders of their time, such as Charles de Gaulle, as a matter of fact, they draw heavily from and impliedly accepted the theory of the colonial government that knows no principle of separation of powers but a politics of convenience.[561]

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[560] MJC Vile, *Constitutionalism and the Separation of Powers* (Liberty Fund 2012) 3.
[561] See also Prempeh, 'Presidential Power in Comparative Perspective' (n 370) 802–804.

As discussed in the previous chapter, the colonial constitutions bestowed supreme legislative, executive, and judicial powers in the person of the Colonial Governor within his colonial hold. While there were a colonial administration and bureaucracy, the colonial governor trumps all these colonial state institutions and practices at his pleasure. Both to advance their alleged project of nation-building and development or to centralize and personalize executive power, the Colonial Governor offered them an attractive theory of government which they tried to incorporate into their constitutions. The African constitutions have established an imperial executive and personalized executive power drawing from a selective incorporation and rejection of the traditional theory of government, an implied acceptance of the colonial theory of government, and the principle of separation of powers.

By doing so, even if they maintain the government structures that channel the separation of powers, they have significantly transformed the power allocations among these government structures and altered the relationships among them. As a result, in contrast to the principle of separation of powers, the African executive wields a wide range of powers.[562] The executive is usually symbolized and institutionalized around a president whose power is so strong so much so that the other branches of government pay allegiance to it. The 'office of the president' becomes 'a parallel government' with strong executive powers than the powers of Cabinet ministers and with much political influence than the legislative and judicial organs.[563] Even though executive hegemony and imperial presidency were common vernaculars to describe the nature of African presidents, they still recur in different forms and

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[562] Charles M Fombad, 'An Overview of the Separation of Powers under Modern African Constitutions' in Charles M Fombad (ed) *Separation of Powers in African Constitutionalism* (Oxford University Press 2016) 70.
[563] Nicolas van de Walle, 'Presidentialism and Clientelism in Africa's Emerging Party Systems' (2003) 41 The Journal of Modern African Studies 297, 310.

degrees to date.[564] As chapter five discusses the constitutional design and practice of executive power with a particular focus on Nigeria, Ethiopia, and South Africa, for present purposes, I explain the general nature of African executives and how this legal syncretism, i.e. a selective incorporation and rejection of the traditional theory of government, an implied acceptance of the colonial theory of government, and the principle of separation of powers, brings an imperial executive and a personalized power into a constitutional framework.

Indeed, the independence constitutions were able to put numerous constitutional limitations on the executive. In Anglophone Africa, the executive was divided into the head of the state (run by a Governor General representing the Queen of England) and head of government (run by a prime minister) mirroring the Westminster parliamentary system.[565] Accordingly, the prime minister and his cabinet were both answerable to and depend on the support of the parliament to continue in office. Furthermore, the constitutionalization of independent civil service, police, and judiciary, on the one hand, and the recognition of a Bill of Rights with judicial review, on the other, made the executives of Anglophone African states weak by design.[566] Under these constitutional arrangements, the executive had to get the support of the legislature and the judiciary in running the business of governance. In addition, the bifurcation of power into the head of the state and head of government reduced the accumulation of power in a single individual. The incorporation of American constitutional ideas such as Bill of Rights and judicial review with Westminster parliamentary model in Anglophone Africa was animated by the desire to prevent despotism, as political power was

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[564] Prempeh, 'Africa's "constitutionalism Revival"' (n 10) 498.
[565] Seidman, 'Constitutions in Independent, Anglophonic, Sub-Saharan Africa' (n 139).
[566] Ghai, 'Constitutions and the Political Order in East Africa' (n 139) 412.

considered as an evil prone to corruption.[567] In retrospect, the practice or effective implementation of Anglophone independence constitutions would have avoided the phenomenon of imperial presidency and personal rule.[568]In Francophone Africa, however, independence constitutions followed the French constitutional model by institutionalizing a strong executive president.[569] In particular, the section dealing with presidential power was a verbatim copy of the 1958 French Constitution.[570] Despite installing a strong executive president, Francophone African independence constitutions provided a national legislature, judicial, and legal systems to ensure a French type constitutionalism.[571]

Nonetheless, these constitutional limitations were either eroded or replaced by other constitutional rules from the late 1960s to the end of 1980s as discussed in the previous chapter.[572] The pacesetter in this spectacle of imperial presidency and personal rule was Ghana, the first country to gain independence in sub-Saharan Africa, and its chief architect was Kwame Nkrumah.[573] Under Nkrumah's political engineering, the 1960 republican Constitution of Ghana abolished the independence Constitution and established a single party unitary state concentrating centralized government power under the unitary president – combining both the titular head of state and executive head of government.[574] Furthermore, the republican Constitution granted the president strong powers which undermines legislative

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[567] ibid 413; See Francois Venter, 'Parliamentary Sovereignty or Presidential Imperialism? The Difficulties in Identifying the Sources of Constitutional Power from the Interaction Between Legislatures and Executives in Anglophone Africa' in Charles M Fombad (ed), *Separation of Powers in African Constitutionalism* (Oxford University Press 2016) 95–115.
[568] Okoth-Ogendo (n 1) 74.
[569] Le Vine (n 139) 184.
[570] ibid.
[571] Le Vine (n 139).
[572] Young, *The Postcolonial State in Africa* (n 143) 16; Donald L Gordon, 'African Politics' in April A Gordon and Donald L Gordon (eds), *Understanding Contemporary Africa* (Lynne Rienner Publishers 2007) 76–80.
[573] Young, *The Postcolonial State in Africa* (n 143) 16.
[574] Prempeh, 'Presidential Power in Comparative Perspective' (n 370) 790.

and judicial branches of government.[575] For instance, the president was empowered to veto a bill without the possibility of a legislative override, terminate or extend the session of the Parliament at any time, withdraw public funds outside the approved budget, and unilaterally appoints or dismiss any number of his cabinets from the Parliament.[576] The President was also entitled to appoint or dismiss the chief justice and judges of superior courts, the auditor general, the attorney general, and members of the civil service, which were independent from the executive branch under the independence Constitution.[577] In addition to allowing the president to run for re-election without limit and the power to rule by decree, it confers *sui generis* powers to Nkrumah, as the first president, 'to give directions by legislation whenever he considers it to be in the national interest to do so.'[578] The personal control of the political party, which constituted the Parliament, the abolishing of regional assemblies and traditional chieftaincy powers along with the above absolutist constitutional presidential powers, turned Nkrumah a "Presidential Monarch."[579]

The rest of Africa, in general, and Anglophone Africa, in particular, followed Nkrumah's model of imperial presidency. For instance, the counterparts of Nkrumah in Cote d' Ivoire, Guinea, Kenya, Malawi, Mali, Tanzania, Uganda and Zambia, to mention just a few, installed imperial presidency and entrench personal rule in their respective constitutions.[580] Common to the imperial presidency phenomenon in post-colonial Africa was

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[575] See also H Kwasi Prempeh, 'Progress and Retreat in Africa: Presidents Untamed' (2008) 19 Journal of Democracy 2, 109-125; H Kwasi Prempeh, 'Constitutional Autochthony and the Invention and Survival of "absolute Presidentialism" in Postcolonial Africa' in Gunter Frankenberk, *Order from Transfer Comparative Constitutional Design and Legal Culture Comparative Constitutional Design and Legal Culture* (Elgar 2013) 209–233.
[576] Prempeh, 'Presidential Power in Comparative Perspective' (n 370) 791–793.
[577] ibid 792.
[578] ibid.
[579] ibid 793.
[580] ibid 784, 794–795.

the rejection of separation of powers and the devolution of power and/or the (quasi) federal arrangement, and the recentralization of power, the installation of single party systems, the subordination of the political party and the state to the personal rule of the president, and, of course, the suppression of political dissent and human rights.[581] These have resulted in the substitution of the rule of law and constitutionalism by the personal rule of the president, and the replacement of constitutional and legal rules by informal rules of neo-patrimonialism and its variants.[582] In this government power configuration, the legislature and the judiciary turned to be rubber stamps for the executive rather than independent constitutional actors who counteract ambition with ambition in Madison's terms.[583]

Although the return of multi-party systems and the introduction of term limits with the third wave of democratization open a space for plural political contestation and limit the tenure of presidents respectively, the substantive powers of presidents are unaltered or not limited effectively.[584] Not only are these constitutions committed to the presidential form of government, they also maintain the strong powers to the president, by only opening the office to multi-party competition and limiting its tenure.[585] The imperial nature of the presidency seems to be less of a problem for constitutional makers of the third wave. As in the *ancien*

[581] ibid 794–795; Prempeh, 'Constitutional Autochthony and the Invention and Survival of "absolute Presidentialism" in Postcolonial Africa' (n 575) 210; Thomson (n 213) 109 & 132; Goran Hyden, *African Politics in Comparative Perspective* (Cambridge University Press 2005) Chapter 5 on Big Men.
[582] See Okoth-Ogendo (n 1) 74; Bratton and de Walle (n 373) 453; Paul Nugent, *Africa Since Independence: A Comparative History* (Palgrave Macmillan 2004) 204; Anne Pitcher, Mary H Moran and Michael Johnston, 'Rethinking Patrimonialism and Neopatrimonialism in Africa' (2009) 52 African Studies Review 125, 129–130; Jean-François Bayart, *The State in Africa: The Politics of the Belly* (Longman 1993) 228–234; Pierre Englebert and Kevin C Dunn, *Inside African Politics* (Lynne Rienner Publishers 2013) 129–156.
[583] Salih (n 520) 11; Prempeh, 'Marbury in Africa' (n 427); Prempeh, 'African Judges' (n 428); Robert B Seidman, 'Judicial Review and Fundamental Freedoms in Anglophonic Independent Africa' (1974) 35 Ohio St LJ 820, 820-850.
[584] Prempeh, 'Africa's "Constitutionalism Revival"' (n 10) 497.
[585] See Prempeh, 'Progress and Retreat in Africa' (n 575); Prempeh, 'Presidential Power in Comparative Perspective' (n 370).

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régime, the president enjoys more powers than the legislature and the judiciary.[586] This ranges from, among others, the expression of the supremacy of the president over any other person or organ,[587] to wider appointment and emergency powers which can diminish the principle of separation of powers and checks and balances,[588] to presidential immunity.[589]

In a similar vein, in many of the constitutions, legislative and policy initiation including on national budget is the prerogatives of the executive, while the parliament's role is limited to either to pass or not to pass the bill.[590] Even in this role, given the phenomena of dominant or one party systems and the wider presidential leverages, the parliament is receptive of executive bills and proposals.[591] The operating systems of these dominant or one party systems is not significantly different from the one party systems of the *ancien régime.*[592] In addition, through subsidiary legislation, i.e. executive rule making through delegation, the executive enjoys wider discretion escaping both parliamentary and judicial oversight.[593]

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[586] Muna Ndulo, 'Presidentialism in the Southern African States and Constitutional Restraint on Presidential Power' (2001) 26 Vt L Rev 769, 771.
[587] Article 98(2) of the Ugandan Constitution reads "The President shall take precedence over all persons in Uganda, and in descending order, the Vice-President, the Speaker and the Chief Justice, shall take precedence over all other persons in Uganda".
[588] Ndulo, 'Presidentialism in the Southern African States and Constitutional Restraint on Presidential Power'.
[589] Charles Manga Fombad and Enyinna Nwauche, 'Africa's Imperial Presidents: Immunity, Impunity and Accountability' (2012) 5 African Journal of Legal Studies 91, 91-118.
[590] Prempeh, 'Africa's "Constitutionalism Revival"' (n 10) 498.
[591] Salih (n 520) 13–18; R Doorenspleet and L Nijzink (eds*), One-Party Dominance in African Democracies,* Lynne Rienner (2013) (detailing the experiences of Namibia, South Africa, Tanzania, Zambia, Senegal and Mali in particular); M Chege, *Political Parties in East Africa: Diversity in Political party Systems*, International IDEA (2007) (exploring the one party dominant system in Ethiopia, Uganda and Tanzania); G Erdmann and M Basedau, 'Party systems in Africa: Problems of Categorizing and Explaining Party Systems' (2008) 26 Journal of Contemporary African Studies 3, 241-258; Matthijs Bogaards, 'Counting Parties and Identifying Dominant Party Systems in Africa' (2004) 43 European Journal of Political Research 173, 173-197.
[592] See de Walle (n 563); V Adefemi Isumonah, 'Imperial Presidency and Democratic Consolidation in Nigeria' (2012) 59 Africa Today 43, 43-68; Sarah Brierley, 'Party Unity and Presidential Dominance: Parliamentary Development in the Fourth Republic of Ghana' (2012) 30 Journal of Contemporary African Studies 419, 419-439; Andrew M Mwenda, 'Personalizing Power in Uganda' (2007) 18 Journal of Democracy 23, 23-37; Adem Kassie Abebe, 'From the "TPLF Constitution" to the "Constitution of the People of Ethiopia": Constitutionalism and Proposals for Constitutional Reform' in Morris Kiwinda Mbondenyi and Tom Ojienda (eds), *Constitutionalism and Democratic Governance in Africa: Contemporary Perspectives from Sub-Saharan Africa* (Pretoria University Law Press 2013) 71-74.
[593] Prempeh, 'Africa's "Constitutionalism Revival"' (n 10) 498.

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Furthermore, the regressive constitutional designs maintain the executive hegemony.[594] While terms limits have ended the tenure of some presidents, many presidents managed to get a constitutional amendment that extends their tenure or safely ignore term limits.[595]

Imperial presidency still persists at different degrees and forms in states that adopt brand new constitutions recently. Kenya and South Sudan are good examples in showing how imperial presidency persists and figures in constitutional practice. While the 2010 Kenyan Constitution in its design limits executive hegemony and the recurring phenomenon of imperial presidency,[596] the president still enjoys more powers from extra-constitutional sources.[597] From a constitutional design perspective,[598] the president only nominates persons to different constitutional offices and their appointment and dismissal rests on the legislature.[599] The legislature not only controls the determination of the national revenue,[600] but also must approve a declaration of state of emergency and war.[601] Moreover, the legislature not only calls and asks cabinet ministers[602] but also can impeach the president for

[594] ibid 498; Fombad, 'Constitutional Reforms and Constitutionalism in Africa' (n 16) 1024; Gedion T Hessebon, 'Some Major Themes in the Study of Constitutionalism and Democracy in Africa' (2013) 7 Vienna Journal on International Constitutional Law 28, 35–38.
[595] Cheryl Hendricks and Gabriel Ngah Kiven, 'Presidential Term Limits: Slippery Slope Back to Authoritarianism in Africa' [2018] The Conversation <http://theconversationcom/presidential-term-limits-slippery-slope-back-to-authoritarianism-in-africa-96796> accessed 12 December 2018; Denis M Tull and Claudia Simons, 'The Institutionalisation of Power Revisited: Presidential Term Limits in Africa' (2017) 52 Africa Spectrum 79, 83–89 For instance, while Frederick Chiluba (2001) and Edgar Lungu (2015) of Zambia, Olusegun Obesanjo of Nigeria (2005), Mamadou Tandja of Niger(2010) and Blaise Compaore of Burkino Faso (2014) leave office as a result of term limits, the presidents of Burundi, Rwanda, Togo, Gabon, Uganda, Chad, Cameroon, Djibouti, Republic of Congo, Sudan, Senegal, Eritrea, and the Democratic Republic of the Congo amended or ignored terms limits to stay in office.
[596] See Conrad M Bosire, 'Kenya's Budding Bicameralism and Legislative-Executive Relations' in Charles M Fombad (ed), *Separation of Powers in African Constitutionalism* (Oxford University Press 2016) 116–133.
[597] See Mai Hassan, 'Continuity despite Change: Kenya's New Constitution and Executive Power' (2015) 22 Democratization 587, 587-609.
[598] See also Hessebon, 'The Fourth Constitution-Making Wave of Africa' (n 408), 212-213.
[599] See for instance, the Constitution of Kenya, articles 132(2), 142(2), 152(2), 156(2), 166(1) (a), 233 (2).
[600] ibid articles 95(4) & 96(3).
[601] ibid article 95(6).
[602] ibid article 153(3).

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violations of the constitution, national law or international law.[603] Furthermore, the Constitution establishes an independent electoral commission,[604] and positions the judiciary as the guardian of the Constitution and the 'peoples will' by ensuring its institutional and functional independence.[605] Despite these constitutional designs, extra-constitutional sources somehow maintain the imperial presidential impulses. Elite interests in the bureaucracy, real or alleged security threats, and the continuity of persons and their mode of engagement from the *ancien régime* confer presidents' extra-constitutional power.[606] In South Sudan, however, the imperial impulses of the president are more explicit in the constitutional design. For instance, the president is constitutionally empowered to unilaterally remove a state governor, dissolve a state legislative assembly, and appoint a care-taker governor in the event of crises.[607] The presidential use of these powers has led South Sudan to a political turmoil including civil war.[608]

Thus, such phenomenon of imperial presidency and personal rule in Africa is neither a postcolonial governance big bang nor an attribute of the African traditional system of government. It is a result of a blend of diverse legal, political, and social norms and experiences, both within and outside Africa, into a constitutional order. Imperial presidency and personal rule is a result of legal syncretism conditioned to serve the real or alleged interests of the African states and concomitantly entrench the power, role, and agency of its leaders.

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[603] ibid article 145.
[604] ibid article 88.
[605] ibid article 159.
[606] Hassan (n 597) 598–604; Solomon Ayele Dersso, 'More Than Enacting a Just Constitution: Lessons from Kenya on the Challenges of Establishing a Rule-Based Democratic Politics' in Jaap de Visser, Nico Steytler, Derek Powell and Ebenezer Durojaye (eds), *Constitution Building in Africa* (Nomos, Baden-Baden 2015) 271–292.
[607] South Sudan Constitutions, article 101(r) & (s).
[608] See Mark AW Deng, 'Defining the Nature and Limits of Presidential Powers in the Transitional Constitution of South Sudan: A Politically Contentious Matter for the New Nation' (2017) Journal of African Law 1, 23-39.

To this end, the African constitutional designs and practices incorporate and magnify the *power enabling* aspects of the executive power from the diverse legal and political rules and experiences while relegating and deemphasizing the *power limiting* aspects of the executive power from these diverse rules and experiences. The outcome of these processes is the institution of a hyperactive and an imperial executive and personalized executive power in which the executive controls the political party apparatus, the government institutions, and ultimately the state.

C. The Judiciary: The Fusion of Laws and Persons

As the case with the legislature, the judiciary in Africa had limited role in the practice of constitutionalism.[609] Not only was "Africa's first encounter with independent courts short lived," the role of courts was ignored in discussions of African politics.[610] The predominance of imperial presidencies, one party systems, military rules, and neopatrimonial politics from the 1960s to the 1980s placed courts and their role at the periphery in the experiment of constitutionalism.[611] Although the democratic constitutions of the 1990s grant courts the power of judicial review with institutional and functional independence, at least in principle, with few exceptions such as South Africa, other courts do not yet establish substantial jurisprudence.[612] In spite of this, the role of courts as legal and constitutional arbiters is

[609] See for instance Seidman, 'Judicial Review and Fundamental Freedoms in Anglophonic Independent Africa' (n 583); Steven B Pfeiffer, 'The Role of the Judiciary in the Constitutional Systems of East Africa' (1978) 16 The Journal of Modern African Studies 33, 33-66; Le Vine (n 139).
[610] Prempeh, 'African Judges' (n 428) 593–594; See Jennifer A Widner, *Building the Rule of Law: Francis Nyalali and the Road to Judicial Independence in Africa* (WW Norton and Company 2001), this being one of the works which examines the role of judges for constitutionalism in Africa .
[611] For why judiciaries are neglected in the scholarship, see Karen A Mingst, 'Judicial Systems of Sub-Saharan Africa: An Analysis of Neglect' (1988) 31 African Studies Review 135, 135-147.
[612] Prempeh, 'Marbury in Africa' (n 427); Fombad, 'Constitutional Reforms and Constitutionalism in Africa' (n 16).

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emerging.[613] Even though there are differences with respect to the role of courts and their jurisprudence in the specific countries,[614] there is a common theme in both judicial organization and interpretation which unites judiciaries in Africa. This theme is the fusion of laws and persons from customary and/or sharia laws and constitutional and statutory laws. In this part, I show how customary and/or Islamic laws are fused with constitutional and statutory laws in the works of the judiciary, and how adjudicators of these laws compose the institution of the judiciary. The aim of the discussion here is to show how, like the legislative and executive, the judiciary is the product of legal syncretism and a space for the same.

As discussed elsewhere in this dissertation, many African constitutions recognize customary laws in limited matters subject to constitutional and legal conformity. While the scope of application of customary laws varies across constitutions,[615] they are predominantly applicable in personal and family matters such as marriage, inheritance, and land.[616] In addition, they are also applicable in natural resource management and dispute resolution.[617] While the preferred approach is an express recognition of customary laws, some constitutions recognize them as part of the right to culture and/or minority rights or a combination of both. Consider, for instance, South Africa and Cameroon. The South African Constitution expressly recognizes customary law and the right to culture. Section 39 of the Constitution

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[613] Prempeh, 'Africa's "constitutionalism Revival"' (n 10); Yuhniwo Ngenge, 'Traditional and historical antecedents of constitutional justice in West Africa' in Markus Böckenförde and others (eds), *Judicial Review Systems in West Africa: A Comparative Analysis* (International IDEA 2016) 39–40; Josephine Dawuni, 'Gender and the Judiciary in Africa: An Introduction' in Gretchen Bauer and Josephine Dawuni (eds), *Gender and the Judiciary in Africa: From Obscurity to Parity?* (Routledge 2015) 5–6.
[614] See Ellett (n 387) Discussing the various ways of judicial empowerment in Malawi, Uganda, and Tanzania .
[615] Cuskelly (n 404) 6–11.
[616] See Anne Helium, 'Human Rights and Gender Relations in Postcolonial Africa: Options and Limits for the Subjects of Legal Pluralism' (2000) 25 Law & Social Inquiry 635, 635-655; Kuenyehia (n 405); Ndulo, 'African Customary Law, Customs, and Women's Rights' (n 338) 88–89; Jeanmarie Fenrich, Paolo Galizzi and Tracy E Higgins (eds), *The Future of African Customary Law* (Cambridge University Press 2011).
[617] Cuskelly (n 404) 6–11.

provides that "[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights." Moreover, section 211 stipulates that "[t]he institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution." Furthermore, the Constitution recognizes both the right to culture[618] and the right to culture of cultural, religious, and linguistic communities.[619] Although customary law is expressly recognized, the right to culture, in general, and of cultural communities, in particular, can consolidate a robust protection of customary law under the Constitution.[620]

Unlike South Africa, one cannot find an express recognition or even mention of customary law in Cameroon. The constitutional basis for customary law in Cameroon is found in the preamble and article 1(2). The preamble states that "the State shall ensure the protection of minorities and shall preserve the rights of indigenous populations in accordance with the law." Article 1(2) among other principles provides that "[i]t [state] shall recognize and protect traditional values that conform to democratic principles, human rights and the law," and "[i]t shall ensure the equality of all citizens before the law." Hence, the protection of minorities and indigenous peoples, on the one hand, and the recognition and protection of traditional values, on the other, give a constitutional basis for the application of customary law in Cameroon. As any other African country, customary laws subject to constitutional and

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[618] The Constitution of South Africa, s 30.
[619] ibid s 31.
[620] See Bennett (n 262). The current debate on the recognition of Muslim law in South Africa is along these lines. This is due to the fact that the claim for recognition of Muslim law rests on the right to religion and the possibility of legislative recognition of cultural and religious laws on personal matters according to ss 15(1) & 15 (3) (a) of the Constitution. For details see Christa Rautenbach, 'Deep Legal Pluralism in South Africa: Judicial Accommodation of Non-State Law' (2010) 42 The Journal of Legal Pluralism and Unofficial Law 143, 143-177 .

legal limitations continue to apply in Cameroon.[621]

In addition to customary laws, Islamic or sharia law is also recognized in many African countries.[622] Ranging from predominantly Muslim countries such as the Gambia, Djibouti, and the Sudan, to countries where Muslims constitute almost half of the population such as Ethiopia, Nigeria, and Ghana to countries where Muslims constitute a minority such as Kenya and Tanzania, Sharia law is recognized *albeit* at different degrees.[623] Even in majority Muslim countries, the constitutional status of sharia law is different. For example, Islam is the religion of the state in Djibouti[624] and it is a source of legislation in the Sudan,[625] and it is only applicable in "matters of marriage, divorce and inheritance among members of the communities to which it applies" in the Gambia.[626] The Gambian approach is a typical recognition of sharia law in Africa.[627] More precisely, a typical recognition of sharia law in an African constitution goes as follows: "The jurisdiction of a Kadhis' court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's courts."[628] Thus, the application of sharia law is limited in

[621] See Mikano Emmanuel Kiye, 'Conflict between Customary Law and Human Rights in Cameroon: The Role of the Courts in Fostering an Equitably Gendered Society' (2015) 36 African Study Monographs 75, 75-100; Lotsmart N Fonjong (ed), *Issues in Women's Land Rights in Cameroon* (African Books Collective 2012) (discussing how the land rights regime, including customary law, negatively affect women).
[622] See An-Na'im (n 13); Abdullahi Ahmed An-Na'im, *Islamic Family Law in A Changing World: A Global Resource Book* (Zed Books 2002) 37-62 (on East Africa), 187-198 (on Southern Africa), 281-306 (on West Africa).
[623] See Shamil Jeppie, Ebrahim Moosa and Richard L Roberts, *Muslim Family Law in Sub-Saharan Africa: Colonial Legacies and Post-Colonial Challenges* (Amsterdam University Press 2010).
[624] The Constitution of Djibouti 1992, article 1.
[625] The Constitution of Sudan 2005, article 5(1).
[626] The Constitution of Gambia, s 7 (f).
[627] Nonetheless, there are differences in the practice of sharia law. For instance, despite the differences in the details the Ethiopian and Nigerian constitutions give to sharia law, they have similar substance that it is applicable in personal matters with the consent of parties. However, the actual application of sharia law in Nigeria extends to criminal law unlike Ethiopia. See Mamman Lawan, 'Islamic Law and Legal Hybridity in Nigeria' (2014) 58 Journal of African Law 303; Mohammed Abdo, 'Legal Pluralism, Sharia Courts and Constitutional Issues in Ethiopia' (2011) 5 Mizan Law Review 72, 72-106.
[628] The Constitution of Kenya, article 170 (5).

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scope and conditional upon the consent of the parties.

The constitutional recognition of customary and sharia laws fuses persons and laws from indigenous and religious sources and constitutional and statutory sources. The recognition of customary and sharia laws brings traditional, Islamic, and modern judges together in the business of adjudication. Unlike sharia law where Khadi or Islamic judges are primarily responsible for its adjudication in first instance and appellate levels, there is no uniform body responsible for the adjudication of customary laws in Africa. However, there are three major institutional arrangements for the adjudication of customary laws. The first is adjudication of customary laws through traditional authorities or rulers. Traditional authorities can be duly constituted and established in the constitution as the case in Ghana,[629] or they may not have such constitutional institutionalization but continue to judge on customary laws as traditional authorities so understood as in Kenya.[630] The second is adjudication through legal practitioners who have the necessary legal training and experience with the necessary knowledge in customary law as the case in Nigeria.[631] The third is adjudication through a combination of regular courts and traditional authorities or rulers as in South Africa.[632] The mixture of persons brings varied personal and professional experience and concomitantly produces diverse judicial reasoning and philosophy. Being placed within the hierarchy of courts, as will be further discussed in Chapter Six, constitutional and/or apex courts are given the responsibility to ensure a syncretic judicial practice and philosophy in a seemingly plural legal and institutional configuration.

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[629] See the Constitution of Ghana, article 273 & 274; where the National House of Chiefs and Regional House of chiefs are responsible for the judicial settlement of customary law.
[630] See the Constitution of Kenya, article 159(2) (c).
[631] See the Constitution of Nigeria, ss 266 (1) & 277 (1).
[632] See the Constitution of South Africa, s 211.

Like the fusion of persons, the recognition of customary and sharia laws blends these laws with constitutional and statutory laws and consequently transform both in the business of adjudication. This is due to the fact that constitutional and statutory principles and values are used to filter which customary and sharia laws have to be recognized. In this process, the substantive and procedural aspects of these laws have to confirm to the constitutional and legal standards. The output of these processes is not simply customary and sharia laws in their pure forms, but a transformed customary and sharia laws embedded with constitutional and legal principles and values.

In addition to the transformation of customary and sharia laws at the level of normative recognition, they are subject to further transformation in their application. Such transformation happens at least at two levels. The first is the first instance/appellate application of customary and sharia laws by customary and sharia specific adjudicatory bodies. The second is the application of these laws in higher and apex courts through appeal. While the transformation of customary and sharia laws in customary and sharia specific adjudicatory bodies is less than in higher and apex courts, as will be discussed more in detail in Chapter Six, the possibility of applying other non-customary or non-sharia laws or principles in cases involving customary and sharia laws will definitely transform these laws. At the same time, some constitutional and legal standards have to give some way for the application of customary and sharia laws. Therefore, what we see in the constitutional recognition of customary and sharia laws is the syncretism of customary and sharia laws and constitutional and statutory laws and their transformation through judicial practice. The constitutional recognition and application of customary and sharia laws brings the syncretism of laws and persons in the judiciary that transform the institutional manifestation of the

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judiciary and its guiding laws, practices, and philosophies.

3.4 The African Constitutional Rights Regime

Constitutional rights are one of the basic pillars of liberal constitutionalism. Along with separation of powers, constitutional rights set a limit to government power and action. In their classic form, constitutional rights are shields against the government.[633]As such, they are constitutional entitlements of individuals against their states and consequently limit the actions of the legislative, executive, judicial or other state organs in their relationship with individuals. Equal treatment and equal concern for all individuals is the central edifice of constitutional rights.

The African constitutional rights regime, however, configured this liberal constitutional rights system with the African conception of rights. The incorporation of rights rooted in the African traditions and cultural milieus with liberal constitutional rights transform the nature and identity of constitutional rights in Africa. Constitutional rights in Africa are not only entitlements that limit the power of the state, but they are also duties that impose obligations on the part of the individual towards the state. In a similar vein, constitutional rights rest in a diverse normative universe that has plural senses of equal treatment and equal concern. As with the *constitution* and organization of the state and its government architecture, as discussed above, legal syncretism animates the African constitutional rights regime. In this section, I explore and examine how legal syncretism

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[633] Sajó and Uitz (n 64) 377; Robert Alexy, *A Theory of Constitutional Rights* (Julian Rivers tr, Oxford University Press 2002) 365–396; Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1978) 365.

brings constitutional duties along with constitutional rights and produces a unique regime of women's rights to demonstrate the nature of constitutional rights in Africa.

A. The Duty-Rights Conception

The incorporation of duties with rights is a fine example of the syncretism of the liberal account of rights with the African conception of rights. While the idea of individual duties is not unique to the African legal, cultural, and political experiences,[634] duties permeate all forms of social organizations and practices of rights in pre-colonial Africa. In this respect, the African Charter on Human and Peoples Rights (the African Charter) is the pioneer legal instrument in introducing the notion of duties with rights in the continent. In his appeal for the recognition of duties in the African Charter, Leopold Senghor, the then president of Senegal, noted that:

> Room should be made for [the] African tradition in our Charter on Human and Peoples' Rights, while bathing in our philosophy, which consists in not alienating the subordination of the individual to the community, in co-existence, in giving everyone a certain number of rights and duties. In Europe, Human Rights are considered as a body of principles and rules placed in the hands of the individual, as a weapon, thus enabling him to defend himself against the group or entity representing it. In Africa, the individual and his rights are wrapped in the protection of the family and other communities ensure everyone… If we want to build the *Homo africanus* of tomorrow, we should once again, assimilate without being assimilated. We should borrow from modernism only that which does not misrepresent our civilization and deep nature.[635]

Along similar lines, experts entrusted in the drafting of the African Charter presented that "[t]he conception of an individual who is utterly free and utterly irresponsible and opposed to

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[634] See the Universal Declaration of Human Rights 1948, article 29; the American Declaration of the Rights and Duties of Man 1948; Fatsah Ouguergouz, *The African Charter of Human and People's Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (Martinus Nijhoff Publishers 2003) 381-400 (detailing the ethical, religious, and legal sources of the notion of duty beyond Africa).
[635] Ouguergouz (n 634) 377–378.

society is not consonant with African philosophy."[636] The idea that the individual as an autonomous moral being is endowed with rights but at the same time bound by duties is held to be the quintessence of human rights formulation in pre-colonial Africa.[637] Hence, the clear articulation of duties in the African Charter is the incorporation of the African conception of rights into the liberal notion of rights.[638]

Building on the African Charter, more than forty African constitutions incorporate the notion of individual duties along with rights.[639] However, the extent of the duty and the place where duties are stipulated vary. In many of the constitutions, the section on the Bill of Rights is entitled as fundamental rights and duties, while in others either a section on duties is provided or duties are attached with rights.[640] For instance, both Burundi and Angola entitled their Bill of Rights as fundamental rights and duties. However, they differ in the nature of the duty and its details. After declaring that citizens have rights and duties,[641] the Constitution of Burundi separately lists individual duties. These duties include the responsibility to respect once compatriot and to show them consideration without discrimination, responsibilities to the family, society, state and other public collectivities, maintain national unity, respect the laws and institutions of the state, defend the country among others.[642] The Angolan Constitution, however, assimilates duties with rights. In its principle of universality, it

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[636] ibid.
[637] Mutua, *Human Rights* (n 148) 84.
[638] Nmehielle (n 259) 161–165; *Kofi Quashigah,* 'Scope of Individual Duties in the African Charter' in Manisuli Ssenyonjo (ed), *The African Regional Human Rights System: 30 Years After the African Charter on Human and Peoples' Rights* (Martinus Nijhoff Publishers 2011) 119-134.
[639] See also Christof Heyns and Waruguru Kaguongo, 'Constitutional Human Rights Law in Africa' (2006) 22 S Afr J on Hum Rts 673, 712.
[640] ibid 712-713.
[641] The Constitution of Burundi 2005, article 20.
[642] ibid articles 62-74.

recognizes rights and freedoms and imposes duties on the individual with regard to the family, society, the state and other legally recognized institution, with a particular duty;

a) To respect the rights, freedoms, and property of others, morals, acceptable behavior and the common good;
b) To respect and be considerate of others without discrimination of any kind and to maintain relations that promote, safeguard and reinforce mutual respect and tolerance.[643]

It further imposes duties on the individual in the enjoyment of rights. While the right to live in a heathy environment, the right to vote and the right to work are recognized, defending and preserving the environment, voting, and work are also individual duties.[644]

Other than Bill of Rights, individual duties are found in the section dealing with Directive Principles of State Policy and preambles. For instance, section 24 of the Nigerian Constitution imposes duties on individuals to respect the Constitution, institutions, and legitimate authorities, defend the nation, respect the dignity and rights of other citizens, to pay taxes and contribute to the wellbeing of the community.[645] By the same token, section 63 of the Swaziland Constitution clearly stipulates that "the exercise and enjoyment of rights is inseparable from the performance of duties and obligations" and as a result it imposes duties on individuals to respect the Constitution, to defend the nation, to further the national interest and ensure national unity, to promote democracy and rule of law, to work and protect and safeguard the environment.[646] The constitutions of Cameroon and Comoros, on the other hand, contain individual duties in their preambles. The Constitution of Cameroon, for example, imposes duties on individuals to protect the environment, to work, to pay taxes, and

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[643] The Constitution of Angola 2010, article 22 (1) & (3).
[644] ibid article 39 (1), 54(3) & 76(1).
[645] See also the Constitution of Sierra Leone, s 13 which imposes similar duties on the individual.
[646] See also the Constitution of Zambia, article 113 and the Constitution of Uganda, article xxix which impose similar duties on individuals.

defend the nation.[647] The Comoros Constitution emphasis the corollary nature of rights and duties and makes the protection of the environment the duty of individuals.[648] Furthermore, the notion of duty is one of the basic principles of the constitution in Ethiopia.[649] Along with the sovereignty of the people, human and democratic rights, separation of state and religion, and accountability of government, the "duty to ensure the constitution and to obey it" constitutes the fundamental principle of the Ethiopian Constitution.[650]

Although these constitutional duties are not being a subject of judicial or quasi-judicial litigation unlike women's rights,[651] the idea that individuals have duties to other individuals, family, society, and state, in general, is deeply entrenched in the African social and cultural imagination.[652] By the same token, the notion that duties are express corollaries to rights fits with the conception of rights in pre-colonial Africa.[653] As with this syncretic normative articulation of the duty-rights conception, its constitutional practice surely will bring a syncretic notion of constitutional rights regime, as Chapter Six demonstrates with respect to women's rights. Regardless of the judicial or quasi-judicial practice, the normative design of the duty-rights conception in African constitutions is a manifestation of the syncretism of the liberal notion of rights with the African conception of rights.

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[647] See the Constitution of Cameroon, preamble para 21-24.
[648] Preamble of the Constitution of Comoros.
[649] The Constitution of the Federal Democratic Republic of Ethiopia, article 9(2).
[650] ibid article 8-12.
[651] Viljoen (n 314) 239–241.
[652] See Makau Wa Mutua, 'The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties' (1995) 35 Virginia Journal of International Law, 339-380; Issa G Shivji, *The Concept of Human Rights in Africa* (African Books Collective 1989).
[653] Deng (n 12) 77-102; Cobbah (n 259).

B. Women's Constitutional Rights

Women's rights are another example for the syncretism of a liberal notion of rights with a communitarian vision of rights embedded in the African cultural conceptions in constitutional design. On the one hand, the right to equality of women and men are guaranteed in every African constitution. On the other hand, however, women's rights are tempered by the recognition of group rights in the form of the right to culture, customary and sharia laws, and the powers of traditional authorities. Thus, women's rights are confluent points for the protection of individual rights mainly rooted in the liberal tradition and the quest for recognition of group rights in the African communitarian conception. What we see in this experimentation is the fusion and configuration of the liberal and communitarian account of rights in constitutional rights.

The right to equality and non-discrimination is recognized in every constitution in Africa.[654] Despite differences in formulation, the right to equality and non-discrimination form the core of the Bill of Rights. For instance, the Ethiopian Constitution contains a non-discrimination clause in the right to equality. It provides that,

> [a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall guarantee to all persons equal and effective protection without discrimination on grounds of race, nation, nationality, or other social origin, colour, sex, language, religion, political or other opinion, property, birth or other status.[655]

The Ugandan Constitution, on the other, recognizes the right to equality and non-discrimination as follows.[656] It says that,

[654] Heyns and Kaguongo 683.
[655] The Constitution of the Federal Democratic Republic of Ethiopia, article 25.
[656] The Constitution of Uganda, article 21.

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1. All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.
2. Without prejudice to clause (1) of this article, a person shall not be discriminated against on the ground of sex, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion or disability.

Such constitutional right to equality and non-discrimination guarantees and ensures, at least in principle, the rights of women as individuals and citizens.[657] Women can enjoy the rights protected in their respective constitutions, access the socio-economic and political opportunities available and demand protection and safeguard in the event of discrimination based on sex. In addition to this general right to equality and non-discrimination, many constitutions contain specific rights under the title 'women's rights' or in the section dealing with 'family and marriage'[658] and sometimes in the provision of affirmative action.[659]

Without ignoring the factual reality within which many African women lead their lives, the constitutional right to equality and non-discrimination in all facets of life seems to lay a gender sensitive rights framework.[660] However, the group rights conception of constitutions brings back indigenous legal and political practices which are not always compatible with the rights of women. In this respect, the right to culture is one of the rights which poses a red light to the enjoyment of women's rights. More than forty constitutions in Africa recognize the right to culture.[661] For instance, section 26 of the Ghanaian Constitution recognize the right to culture as follows: "Every person is entitled to enjoy, practice, profess,

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[657] See Manisuli Ssenyonjo, 'Culture and the Human Rights of Women in Africa: Between Light and Shadow' (2007) 51 Journal of African Law 39.
[658] The Constitution of Angola, article 35(3).
[659] The Constitution of the Federal Democratic Republic of Ethiopia, article 35(3).
[660] Ssenyonjo (n 318); Banda (n 6).
[661] Heyns and Kaguongo (n 639) 715.

maintain and promote any culture, language, tradition or religion subject to the provisions of this Constitution." Similarly, section 44 of the Kenyan Constitution states that,

> 1. Every person has the right to use the language, and to participate in the cultural life, of the person's choice.
> 2. A person belonging to a cultural or linguistic community has the right, with other members of that community-
>   a. to enjoy the person's culture and use the person's language; or
>   b. to form, join and maintain cultural and linguistic associations and other organs of civil society.

These constitutional stipulations represent how the right to culture is constitutionalized in Africa. While the individualistic formulation of the right to culture is the dominant one, the addition of a group component as in Kenya shows the emphasis and attention given to groups.[662] Nonetheless, in spite of its individualistic formulation, the right to culture is also a collective right. As culture is "a comprehensive way of life," an individual neither forms this way of life alone nor can enjoy by herself.[663] As such, the recognition of the right to culture presupposes the existence of a group and its peculiar way of life. As a result, the choice available to the individual in practice is minimal as the group corporately controls the practice of a culture. Although women like men are cultural beings who identify and want to be identified with their own specific cultures,[664] there are numerous cultural practices in Africa which place women in an inferior position than men and continue to violate their rights and dignity.[665] While the right to culture should be practiced within the contours of an open and

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[662] See Hessebon, 'The Fourth Constitution-Making Wave of Africa' (n 408).
[663] Avishai Margalit and Moshe Halbertal, 'Liberalism and the Right to Culture' (2004) 71 Social Research 529, 535.
[664] Florence Butegwa, 'Mediating Culture and Human Rights in Favour of Land Rights for Women in Africa: A Framework for Community-level Action' in Abdullahi A An-Na'im (ed), *Cultural Transformation and Human Rights in Africa* (Zed Books 2002) 109.
[665] Ndulo, 'African Customary Law, Customs, and Women's Rights' (n 338).

democratic society and in line with the basic tenets of constitutions, the possibility of conflict with women's rights is not a stretch of imagination as Chapter Six shows.

More specifically, the recognition of customary and sharia laws in constitutions channels the indigenous and religious laws and practices in the design and practice of individual rights, in particular, the rights of women. As noted elsewhere in this dissertation, customary and sharia laws are usually applicable in personal and family matters. Although there are customary laws which protects the rights and interests of women, there are also customary laws which discriminate against women on matters related to marriage, divorce, inheritance, land and property, among others.[666] By the same token, sharia law on matters of marriage, divorce, and inheritance discriminates women in favor of men.[667] Although the equality of women with men is guaranteed in constitutions, the constitutional recognition of these laws gives the normative basis for the abdication of gender equality, although their application is conditioned upon the consent of parties and practiced within the general framework of constitutional supremacy.[668]

Furthermore, the recognition of traditional authorities is almost akin to the constitutionalization of patriarchal institutions which are usually not suitable for women's rights. As patriarchy permeates both the organization, rules, and operation of traditional authorities, the recognition of these institutions poses a sever danger in the provision of gender

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[666] Manisuli Ssenyonjo, 'Culture and the Human Rights of Women in Africa: Between Light and Shadow' (2007) 51 Journal of African Law 39, 55; Dejene N Debsu, 'Gender and Culture in Southern Ethiopia: An Ethnographic Analysis of Guji-Oromo Women's Customary Rights' (2009) 30 African Study Monographs 15, 15-36; Fareda Banda, 'Women, Law and Human Rights in Southern Africa' (2006) 32 Journal of Southern African Studies 13, 13-27; Kuenyehia (n 405); Ndulo, 'African Customary Law, Customs, and Women's Rights' (n 338).
[667] See also Mashood A Baderin, *International Human Rights and Islamic Law* (Oxford University Press 2005).
[668] See the Constitution of the Federal Democratic Republic of Ethiopia, article 9 & 34(5).

justice.[669] Not only are traditional authorities unaccountable to democratic processes, illiberal values and rules are their operating systems. As a result, as Chapter Six demonstrates, the collision of these illiberal values and rules with the liberal constitutional rights of women is real and constitutionally tolerated. This means that women who find themselves within the powers of traditional authorities, in particular rural women who constitute the majority, are not in a position to enjoy and exercise their constitutional rights based on liberal equality with men.[670]

Nonetheless, as discussed in Chapter Six, the incorporation of the communitarian vision of rights can advance and protect the rights of women, and the liberal notion of rights may limit the rights and interests of women. As it is well known, customary and religious laws are neither static social phenomenon nor are homogeneous and uncontested. They are subject to change due to internal dynamics as in external cultural encounter. With respect to human rights, women have been claiming and asserting rights within their customary and religious domains and consequently set more egalitarian customary and religious laws along with the tenets of democratic principles and human rights.[671] Accordingly, the recognition of customary and Islamic laws in constitutions is not something to be contained or rejected in its entirety but to be transformed in a more egalitarian way to the benefit of all the subjects, including women. Along these lines, the Kwena women of Botswana have used the syncretic

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[669] Carolyn Logan, 'Selected Chiefs, Elected Councillors and Hybrid Democrats: Popular Perspectives on the Co-Existence of Democracy and Traditional Authority' (2009) 47 The Journal of Modern African Studies 101, 105.

[670] For instance see Haripriya Rangan and Mary Gilmartin, 'Gender, Traditional Authority, and the Politics of Rural Reform in South Africa' (2002) 33 Development & Change 633, 633-658; Millicent Odeny, 'Improving Access to Land and Strengthening Women's Land Rights in Africa'', *Annual World Bank conference on land and poverty', The World Bank, Washington, DC* (2013) <http://weblawcolumbiaedu/sites/default/files/microsites/gendersexuality/odeny_improving_access_to_land_in_africapdf> accessed 7 June 2017.

[671] Madhavi Sunder, 'Piercing the Veil' (2002) 112 Yale LJ 1399, 1403.

configuration of their rights from customary laws and liberal constitutional laws creatively to advance their best interests and rights.[672] Similarly, the Swahili Muslims of Kenya use the Khadi courts to protect and assert their rights in accordance with Islamic law.[673] Although the status of women and their position in society are huge factors in the dispensation of gender justice, the consciousness and awareness of women and women's rights activists about the syncretic configuration of constitutional rights help to assert women's rights within customary and Islamic laws and modify the discriminatory ones.[674] The liberal notion of rights, on the other hand, can limit the substantive equality of women through its formal recognition of the right to equality and non-discrimination without accounting for the socio-economic and political circumstances of women.

Thus, the African constitutional rights regime incorporates a liberal and communitarian notion of rights into women's constitutional rights. While the normative syncretism in women's rights provides the framework and the operating orbit within which women exercise their constitutional rights, the exact content and contour of these rights are determined by constitutional practices, in particular- judicial practices. In this respect, as discussed in Chapter Six, constitutional or apex courts determine the content and substance of women's rights in a judicial philosophy that maintains their syncretic ethos.

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[672] Anne Griffiths, *In the Shadow of Marriage: Gender and Justice in An African Community* (The University of Chicago Press 1997) 232–234.
[673] Susan F Hirsch, *Pronouncing and Persevering: Gender and the Discourses of Disputing in an African Islamic Court* (The University of Chicago Press 1998) 1–10.
[674] Sunder (n 671) 1430–1432; Helium (n 616) 638-646.

3.5 Conclusion

This chapter shows how *legal syncretism as a result* configures and brings a blend of mixed constitutional ideas, principles, and practices into the African constitutional designs and practices. Legal syncretism animates the very *constitution* of the African state and its modalities of organization, government architecture, and constitutional rights regime. Consequently, the legal syncretic constitutional designs and practices set a unique constitutional experiment, which is different from the pre-colonial and colonial constitutional systems, and liberal constitutionalism, yet draws from these constitutional traditions in different degrees and forms. In all these, the quest to establish an African theory of government that best works for the African state dictates the direction and dynamic of legal syncretism in the constitutional designs and practices. As will be further explored in the subsequent Chapters with a particular focus on federalism, the executive power, and women's constitutional rights, legal syncretism has a contingent role to advance and foster constitutional government in Africa. Accordingly, legal syncretism has a normative appeal with a prescriptive function.

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CHAPTER FOUR
LEGAL SYNCRETISM AND FEDERALISM IN AFRICA: CASE STUDIES

4.1 Introduction

Based on the conceptual framework developed in the previous chapters, this chapter presents federalism as a test bed for its detailed assessment. By taking federalism as one aspect of constitutional design and practice related to the vertical division of power, and Nigeria, Ethiopia, and South Africa as comparative case studies, this chapter shows how legal syncretism figures in and permeates the federal systems of these countries. Classic federal theory offers an explanation of the origin, formation, fundamental elements, and success and failure of federalism. Drawing from the experiences of Nigeria, Ethiopia, and South Africa, this chapter aims to demonstrate how federalism in Africa, on the one hand, shares the forms, structures, and discursive practices with classic federal theory, and, on the other, differs from classic federal theory in its normative articulations and institutional frameworks due to the syncretic configurations.

Due to legal syncretism, federalism transforms its purpose, fundamental elements, and operations in Nigeria, Ethiopia, and South Africa. As federalism follows new pathways in these countries, this chapter shows how its system of operation and standards of assessment take a similar course. Against the central ethos of classic federal theory, federalism in these countries manages to operate and, to the extent possible, able to deliver its purpose mainly in the absence of liberal constitutionalism. By showing how legal syncretism structures the design and operation of federalism in these countries, this chapter demonstrates how

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federalism is re-conceptualized and deployed to serve a different purpose than the one it has in classic federal states.

To identify and illuminate the syncretic features of federalism in Nigeria, Ethiopia, and South Africa, the first section presents the original logic, formation, and fundamental elements of federalism and its reasons for success and failure as developed in classic federal theory. The second section proceeds to explore how federalism takes new pathways in Nigeria, Ethiopia, and South Africa in its both original purpose and formation. The third section examines how the fundamental elements of federalism in these countries are a blend of syncretic convergences, adaptations, and innovations. Building on this, the final section argues why rethinking the classic standards for federalism's success and failure is necessary and discusses how this helps to improve the performance of federalism in fostering constitutional democracy in these countries. This chapter suggests that if federalism has to ensure the practice of constitutional democracy in Africa, democratic values, human rights, and constitutionalism considerations should animate its normative and institutional underpinnings of self-rule and shared rule as in classic federal theory.

4.2 Federalism: A Conceptual Framework

To appreciate how legal syncretism features in the federal systems of Nigeria, Ethiopia, and South Africa, it is necessary to adopt a conceptual framework of federalism within which these three systems are assessed. As a result, this section focuses only on some aspects of federalism that are relevant for discussions of legal syncretism. Drawing from the experiences of established federal systems such as the United States, Canada, Australia, and Switzerland, classic federal theory concerns itself mainly with (1) what are the fundamental elements of

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federalism, (2) why states adopt federalism, (3) how federalism is formed, and (4) why federalism succeed or fail. Through the investigation of federal theories and the literature on comparative federalism on these questions, this section develops a conceptual framework of federalism as a benchmark for the following sections.

The fundamental elements of federalism emanate from its very conceptions or meaning. In fact, although we are living in the age of federalism,[675] i.e. as more than half of the world populations live in systems that are considered federal,[676] there is no unanimity on its meaning.[677] The etymology of the word "federal" is derived from the Latin word *foedus,* which means covenant or pact among individuals and groups for mutual recognition of each other and the promotion of unity among them.[678] While federalism was equated with confederation or other forms of loose alliance between or among states,[679] since the introduction of federalism in the United States, it has been distinguished from similar arrangements and given a class of its own.[680] In spite of this, federalism has no single universally accepted definition.

Offering the definitions of the three towering figures in federalism suffices for our present purposes. In this respect, William Riker defined federalism as an arrangement where

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[675] William H Riker, *Federalism: Origin, Operation, Significance* (Little, Brown and Company 1964) 1.
[676] Jenna Bednar, *The Robust Federation: Principles of Design* (Cambridge University Press 2008) 2.
[677] Malcolm Feeley and Edward Rubin, *Federalism: Political Identity and Tragic Compromise* (University of Michigan Press 2009) 1–3.
[678] Daniel J Elazar, *Exploring Federalism* (University of Alabama Press 1987) 5.
[679] Montesquieu, 'Combining the Advantages of Small and Large States' in Dimitrios Karmis and Wayne Norman (eds), *Theories of Federalism: A Reader* (Palgrave Macmillan 2005) 55-57; Jean-Jacques Rousseau, 'A Lasting Peace Through the Federation of Europe: Exposition and Critique of St Pierre's Project' in Dimitrios Karmis and Wayne Norman (eds), *Theories of Federalism: A Reader* (Palgrave Macmillan 2005) 59-85; Immanuel Kant, 'Toward Perpetual Peace' in Dimitrios Karmis and Wayne Norman (eds), *Theories of Federalism: A Reader* (Palgrave Macmillan 2005) 87-99.
[680] Dimitrios Karmis and Wayne Norman, 'Editors' Introduction' in Dimitrios Karmis and Wayne Norman (eds), *Theories of Federalism: A Reader* (Palgrave Macmillan 2005) 103-104.

the "(1) two levels of government rule the same land and people, (2) each level has at least one area of action in which it is autonomous, and (3) there is some guarantee … of the autonomy of each government in its own sphere."[681] Daniel Elazar defined federalism simply as "self-rule plus shared rule" in a polity.[682] Ronald Watts, like Elazar, defined federalism as "the advocacy of multi-tiered government combining elements of shared-rule and regional self-rule."[683] From these definitions and the scholarship on federalism,[684] we can draw the following fundamental elements: federalism at a minimum requires (a) at least two tiers of government endowed with a sovereign power on some matters, (b) a non-unilateral amendable supreme written constitution with horizontal and vertical division of power, (c) representation mechanisms of self-rule and shared rule, and (d) an umpire.[685] Hence, these fundamental elements explain the meaning and essentials of federalism.

With respect to the original logic why states adopt federalism, scholars offer multiple explanations. In this regard, there are, at least, four major explanations. The first is the explanation provided by "Publius", the pseudo names of the three authors of the *Federalist Papers* (Alexander Hamilton, John Jay, and James Madison) in their effort for the ratification of the 1789 United States Constitution. According to the *Federalist Papers*, the Union should adopt federalism as it responds to military necessity and ensure security (the Federalist No. 2 & 15), provide individual liberty, prosperity, and freedom, and guarantee a democratic form

[681] Riker (n 675) 11.
[682] Elazar (n 678) 12.
[683] Watts (n 509) 8.
[684] See Kenneth Wheare, *Federal Government* (4th ed, Oxford University Press 1964); Thomas O Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Inquiry* (2nded, University of Toronto Press 2015) 31–36; See also Michael Burgess, *In Search of the Federal Spirit: New Theoretical and Empirical Perspectives in Comparative Federalism* (Oxford University Press 2012); Burgess discusses the contributions of Kenneth Wheare, William S Livingston, William Riker, Carl J Friedrich, and Daniel Elazar with the view to discern the federal idea or spirit that animate the scholarship of these theorists of federalism.
[685] Watts (n 509) 9.

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of government (the Federalist No. 9, 10, & 17).[686] The *Federalists'* account is a widely accepted explanation on why states should adopt a federal system. In this respect, Elazar further developed the democratic, liberty, equality, and freedom justifications of federalism. He argues that federalism maximizes individual liberty, equality, freedom, and ensures and enhances democratic self-government in a polity.[687] He contends that federalism aims to institute a workable political arrangement based on a just moral order.[688] Hence, according to this view, the superiority of federalism, as a system of state organization, to bring a workable polity with a just moral order is the reason why states adopt or should adopt federalism.

The second theory focuses on the existence of external military or diplomatic threats for the origin of federalism. The chief architect of this theory is Riker. He rejects the assertion that states adopt federalism to protect liberty and ensure democracy. He posits that federalism is a result of a bargain between politicians who offer the bargain and those who accept it.[689] According to him, a federal bargain is possible when those "…who offer the bargain desire to expand their territorial control, usually either to meet an external military or diplomatic threat or to prepare for military or diplomatic aggression or aggrandizement," on the one hand, and those "who accept the bargain, giving up some independence for the sake of union, are willing to do so because of some external military-diplomatic threat or opportunity," on the other.[690] Thus, for Riker, the cumulative existence of these conditions, that is "the expansion" and "the military condition," creates federalism.[691]

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[686] Alexander Hamilton, John Jay, and James Madison, 'Federal Theory in Dimitrios Karmis and Wayne Norman (eds), *Theories of Federalism: A Reader (Palgrave Macmillan 2005)* 105–133.
[687] Elazar (n 678) 83–91.
[688] ibid 104.
[689] Riker (n 675) 12.
[690] ibid.
[691] ibid 13.

While the third theory recognizes the relevance of Riker's theory of federal bargain, unlike Riker's theory, it finds the origin of federalism in the disjuncture between political identity and the geography of a polity. Malcolm Feeley and Edward Rubin advance this theory. According to them, states adopt federalism because of a "tragic compromise" to mediate the disjuncture between political identity and geographic governance. Unlike the first theory, which considers federalism as a means to minimize human vice in a political community, Feeley and Rubin consider "federalism as a tragic aspect of life" as it comes into being due to the misfortunes of "conflicts in political identity."[692] For them, the fundamental reason for the creation of federalism is "to resolve conflicts among citizens that arise from the disjuncture between their geography based sense of political identity and the actual or potential geographic organization of their polity."[693] In the absence of these conditions, either federalism cannot arise in the first place or, if arisen, it "will become vestigial."[694]

Unlike the third theory, the fourth theory attributes the origin of federalism to the level of institutionalization and infrastructural capacity of subunits for governance. Daniel Ziblatt argues that the origin of federalism is not so much related to the military power of those who offer the federal bargain as Riker argued; instead, it is related to the state-society dynamics the subunits find themselves in. For Ziblatt, "federalism is possible only if state building is carried out in a context in which the preexisting units of a potential federation are highly institutionalized and are deeply embedded in their societies- and hence are capable of governance."[695] This is due to the fact that "[o]nly subunits with high level of infrastructural

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[692] Feeley and Rubin (n 677) 39.
[693] ibid 38.
[694] ibid 38–39.
[695] Daniel Ziblatt, 'Rethinking the Origins of Federalism: Puzzle, Theory, and Evidence from Nineteenth-Century Europe' (2004) 57 World Politics 70, 71.

capacity can deliver both to the core and the subunits the gains that were sought from state formation in the first place."[696] Absent this, he argues, the political core will absorb all the subunits to form a unitary state.[697]

Except for the theory advanced in the *Federalist Papers*, all of them are empirically grounded in comparative federalism. The authors of the *Federalist Papers* had no comparator for the system they were advocating for and the only comparison was a confederation or other loose alliances. Apart from Ziblatt, the rest of them draw inspiration from the federal experience of the United States, Canada, Switzerland, Germany, and Australia while they, in particular, Elazar, also occasionally refer to the federal systems in Latin America, Asia, and Africa. Unlike others who rely on comparative federalism, Ziblatt posits his theory by interrogating the state formation experience of Germany and Italy, i.e. through a comparison of the state formation in a federal and unitary state. While each of them is not adequate to explain the origin of every federal system, all of them are relevant justifications and when taken together build a robust theory for why states adopt federalism.[698] Further, given the socio-economic, cultural, historical, and political diversity and complexity within which federal systems arise and operate, formulating a unitary theory for federalism is a difficult task.[699]

Regardless of the different rationales for the origin of federalism, it is formed through three major ways. As Watts observes, the first is through the aggregation of former separate

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[696] ibid.
[697] See Daniel Ziblatt, *Structuring the State: The Formation of Italy and Germany and the Puzzle of Federalism* (Princeton University Press 2006); See also Wilfried Swenden, *Federalism and Regionalism in Western Europe: A Comparative and Thematic Analysis* (Palgrave Macmillan UK 2006) Chapter 2. Swenden explains the origins of federalism and regionalism in Europe.
[698] See also Watts (n 509) 63–64.
[699] See also Hueglin and Fenna (n 684) 113–118.

subunits, the second is through devolution from a former unitary state, and the third is through a combination of aggregation and devolution.[700] Alfred Stepan reduces these processes of federal formation into two; i.e. Coming-together and Holding-together federalism.[701] While Coming-together federalism refers to the formation of a federal state from prior sovereign states, Holding-together federalism refers to the formation of a federal state from the preexisting subunits in a former unitary state.[702] The classic examples for Coming-together federalism (or for those formed through aggregation) include the United States, Switzerland, and Australia, while many post-Second World War federal states such as Nigeria and Belgium are Holding-together (or formed through devolution), whereas Canada and India combine the features of both Coming-together and Holding-together federalism.[703]

The other important theme in federalism studies is why federalism succeeds in some states while failing in others. Although approaching federalism in terms of success and failure is contested, the durability or longevity of the federal system in itself and the achievement of the original objectives or its *raison d'etre* for the creation of the federal system stand out as major parameters against which success and failure are measured.[704] While durability can be relatively easy to measure as its essential question is whether the federal system is still in operation, measuring the achievement of the original purpose is extremely complex and difficult. This is because not only may every federal system have different purposes to achieve, such purposes and the mechanism of achieving them are embedded in the socio-economic,

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[700] Watts (n 509) 65.
[701] Alfred C Stepan, 'Federalism and Democracy: Beyond the US Model' (1999) 10 Journal of Democracy 19, 22.
[702] ibid.
[703] Watts (n 509) 65.
[704] Michael Burgess, 'Success and Failure in Federation: Comparative Perspectives' in Thomas J Courchene and others, *The Federal Idea: Essays in Honour of Ronald L Watts* (The McGill-Queen's University Press 2011) 194–204.

cultural and political context of each federal system.[705] Furthermore, these contexts are dynamic and the assessment of success and failure along these lines will be relative and contingent in time and place.[706] Bearing this in mind, scholars offer some reasons for the success and failure of federalism.[707] After a careful review of the comparative federalism scholarship, Michael Burgess lists the following as the main reasons why federalism succeeds in some states while failing in others.[708] These include,[709]

A. a desire for the federal polity which is manifested by the dual loyalty of the political class and the citizenry to the federal union and constitute units at the same time
B. the practice of constitutionalism along the federal spirit
C. the existence of liberal democracy
D. the commitment and capacity of political elites to work together
E. the structure and vitality of the political party system to operate and function in a way to maintain federal unity while accommodating diversity
F. the existence of fair and equitable resource allocation and redistribution
G. the existence of a commitment to keep "the federal spirit" as an end in itself

While the existence of these conditions contributes to the success of federalism, their absence may lead to its failure.[710] To give some examples in this respect, the United States, Canada, Switzerland, and Australia, among others, are examples of successful federal states not only because their federal system endures, but also their federal system are able to deliver the original purposes for which they were adopted. However, the Federation of West Indies, Uganda, and Cameroon, among others, are examples of failed federal experiments, as their federal system no longer exists. The Malaysian federal experiment, on the other hand, shows

[705] See Thomas M Franck, *Why Federations Fail: An Inquiry into the Requisites for Successful Federalism* (New York University Press 1968).
[706] Burgess, 'Success and Failure in Federation' (n 704) 194.
[707] See Riker (n 675) Chapter 3 & 4.
[708] Michael Burgess, 'Asking the Same Question But Getting Different Answers: The Conditions of Success and Failure in Federal States' (2008) 16–17 <https://wwwkentacuk/politics/cfs/research/Conditions%20of%20Successpdf> accessed 23 August 2017.
[709] ibid 16.
[710] See also Richard Simeon, 'Preconditions and Prerequisites: Can Anyone Make Federalism Work?' Thomas J Courchene and others, *The Federal Idea: Essays in Honour of Ronald L Watts* (The McGill-Queen's University Press 2011) 207-223 .

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how success and failure are complex variables. While the Malaysian federalism did not prevent Singapore from seceding the federation in 1965, it holds the rest of its multi-ethnic and multi-cultural communities together. Indeed, as Burgess observes, it is also possible that federal states can succeed in some aspects and fail in others.[711]

Against this conceptual framework of federalism, the following sections examine and explore how legal syncretism animates and structures the original logic, fundamental elements, formation, and operation of federalism in Nigeria, Ethiopia, and South Africa. The aim of the discussion is to identify and illuminate how legal syncretism explains and captures the reasons and ways of convergence and divergence between classic federal theory and federalism in Africa and the consequences thereof.

4.3 The Purpose and Formation of Federalism in Nigeria, Ethiopia, and South Africa

The original logic and ways of federal formation in Nigeria, Ethiopia, and South Africa significantly differ from those offered in classic federal theory. Why these countries adopt federalism in the first place and why they are committed to its continuous operation could not be explained and captured fully through classic federal theory. Unlike the *Federalist Papers,* even if these countries aspire to have a democratic system that ensures individual liberty, freedom, and prosperity, as is evident from their constitutional histories, they do not consider federalism as a superior government arrangement to achieve these purposes. By the same token, there were no external military threats or opportunities that set Riker's federal bargain

[711] Burgess, 'Success and Failure in Federation' (n 704) 204.

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in motion in these countries. Furthermore, although the theory of federalism as a tragic compromise due to the disjuncture between political identity and the geographical aspect of a polity has some relevance for these countries, it cannot explain why these countries adopt federalism as this feature of disjuncture is common to the rest of Africa, as territories were arbitrarily drawn by colonial powers.

Similarly, the institutional infrastructure theory cannot be a helpful explanatory tool for the formation of federalism in these countries as the different ethnic groups that find themselves in territorial states have had their own way of political organization before the advent of colonialism, in which the subunits in these countries do not have a special institutional infrastructural capacity than any other country in the continent. The primary purpose for the adoption of federalism in these countries is to accommodate the competing demands of ethnonational groups within a single state. The accommodation of diversity and the maintenance of territorial integrity are the twin justifications for federal formation, while the political strength of ethnonational groups during the constitutional moment is the determining factor.

With its new task of accommodation and integration of diverse ethnonational groups within a single state, federalism holds new purposes and follows new pathways in Nigeria, Ethiopia, and South Africa. It is introduced and formed in these states to regulate and manage their *internal political dynamics*. Hence, federalism is formed through the devolution of power to the center and to the constituent units from a former unitary state with the goal to hold the states together and concomitantly enable subnational units to broadcast their own respective ethnonational interests and ambitions within the channels of shared rule and self-rule. As a holding together device, as the following section reveals, federalism in these countries

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enshrine unique normative and institutional configurations. Now I explain the original logic and ways of federal formation in detail with respect to Nigeria, Ethiopia, and South Africa, in this order, and show how legal syncretism transforms its purposes and follows new pathways.

A. Nigeria

Why Nigeria adopted federalism at independence and continues to commit to it can be understood from the way Nigeria is came into being and in the way it exists since independence. At the center of the original logic and ways of federal formation in Nigeria is legal syncretism. To ascertain the reasons why Nigeria adopts federalism and how legal syncretism informs this choice, one has to briefly look at the formation of the Nigerian state and its operation from a historical perspective. Such examination reveals that the choice for federalism in the final years of colonial rule and the commitment to the federal idea since then is a result of a conscious effort to reconfigure, transform, and reinterpret the pre-colonial and colonial systems of political and legal rules of organization into the post-colonial state. As a result, the federal idea has been a space for the experimentation of these institutional and legal reconfigurations and transformations.

Nigeria as a unified state came into being in 1914 as a result of British colonial conquest in the Scramble for Africa.[712] Although the British had already established colonies in West Africa before the Berlin Conference, it is thereafter that their colonial conquest got the strength and speed in the region today called Nigeria.[713] In 1861, the British established

[712] Toyin Falola and Matthew M Heaton, *A History of Nigeria* (Cambridge University Press 2008) 117.
[713] Adegboyega Somide, 'Federalism, State Creation and Ethnic Management in Nigeria' in Bamidele A Ojo, *Problems and Prospects of Sustaining Democracy in Nigeria* (Nova Publishers 2001) 26.

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the colony of Lagos in what is now Southern Nigeria.[714] After almost four decades, they penetrated further South and established the Protectorate of Southern Nigeria. In 1906, the Colony of Lagos and the Protectorate of Southern Nigeria were amalgamated and named as the Colony and Protectorate of Southern Nigeria.[715] At the beginning of the twentieth century, the Protectorate of Northern Nigeria was created.[716] On 1 January 1914, under the leadership of Lord Lugard, the Colony and Protectorate of Southern Nigeria and the Protectorate of Northern Nigeria united to form present-day Nigeria.[717]

The amalgamation of the different parts of Nigeria to a unified state was mainly motivated by economic considerations.[718] This is due to the fact that the North, despite its huge landmass and population, was not able to cover its cost of administration.[719] The South, on the other hand, had a surplus of resources that could finance the administration of the North.[720] Thus, in order to efficiently use colonial resources to administer colonies and not to subvert imperial resources, the amalgamation of the Northern and Southern Protectorates became necessary for the colonial governors.[721] Aside from this economic and administration rationale of the British, the Protectorates of Northern and Southern Nigeria neither had a prior co-existence as members of a single political community nor shared similar cultural, ethnic, and political systems.[722] Moreover, what brought them together was not their interest

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[714] Toyin Falola, *The History of Nigeria* (Greenwood Press 1999) 55.
[715] ibid 56–58.
[716] ibid 59–60.
[717] Richard Bourne, *Nigeria: A New History of a Turbulent Century* (Zed Books 2015) 3.
[718] Falola and Heaton (n 712) 68.
[719] Tekena Tamuno, 'Nigerian Federalism in Historical Perspective' in Kunle Amuwo and others, *Federalism and Political Restructuring in Nigeria* (Spectrum Books 1998) 15.
[720] ibid; Adiele E Afigbo, 'Background to Nigerian Federalism: Federal Features in the Colonial State' (1991) 21 Publius 13, 22.
[721] Falola (n 714) 68.
[722] Ignatius Akaayar Ayua and Dakas Dakas, 'Federal Republic of Nigeria' in John Kincaid and George Alan Tarr (eds), *Constitutional Origins, Structure, and Change in Federal Countries* (McGill-Queen's Press 2005) 242.

or will to build a nation called Nigeria.[723] The principal rationale for uniting Nigeria was to enable its administration by herself and consequently enlarge the British colonial hold in West Africa.

Precisely because the aim of the amalgamation was economic, the British colonial rule neither developed common institutions of governance nor it allowed for the integration of the people across Nigeria.[724] Separate governance regimes were in place, and their peoples were kept apart. Instrumental in this was the philosophy of indirect rule, which gave birth to the system of Native Authority. The practice of Native Authority, as discussed in Chapter Two, required the acknowledgment of prior ethnic, cultural and religious affiliations of people and their systems of traditional governance in a way suiting the colonial state, and the creation of one in the event of absence. In Northern Nigeria where the Islamic emirates had hierarchical systems of governance, the colonial administrators did not find it difficult to implant the system of indirect rule under the institution of Native Authority.[725] In a similar vein, the introduction of indirect rule to the Southwest positioned the Yoruba kings on equal footing with the Northern emirs.[726] In the Southeast, the absence of a hierarchical traditional political institution among the Igbo made the invention of the so-called "warrant chiefs" necessary.[727] This colonial administration not only kept the people within the confines of the respective

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[723] ibid.
[724] Falola (n 714) 69.
[725] Jonathan Reynolds, 'Good and Bad Muslims: Islam and Indirect Rule in Northern Nigeria' (2001) 34 The International Journal of African Historical Studies 601, 605–608.
[726] Falola (n 714) 70; See also Joseph Adebowale Atanda, 'Indirect Rule in Yorubaland' (1970) 3 Tarikh 3, 16-28.
[727] See Afigbo (n 322) .

Native Authorities,[728] but also made formal communication among the native chiefs impossible as each native chief was directly responsible to a colonial governor or officer.[729]

Beyond this structural barrier, the differential approaches and treatments of the colonial state along ethnic, religious, regional, and educational lines have made the quest for national integration and unity difficult in the post-independence period. In the South where the British started their colonial conquest, they were interested to put in place their own systems of administration and laws. In the colony of Lagos, in addition to the office of the colonial administrator, institutions such as legislative council, judicial systems, and civil service mirroring the British tradition were established.[730] Similarly, in the Southern Protectorate, British institutions and laws substituted the indigenous systems and laws. This is one of the reasons why education flourished in the South, as it was key to hold lucrative positions in the colonial administration.[731] Because of this, the indigenous political institutions and laws were undermined.

Due to the changes in colonial policy from direct rule to indirect rule, the British maintained the indigenous political institutions and laws in the Northern Protectorate. As the ally in the North for the British was the traditional elite, western education found a little place. After 1914, the system of indirect rule was extended to the South and this created rivalry between the "traditional elite," who derived authority and power from custom and/or

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[728] Elizabeth Allo Isichei, *A History of Nigeria* (Longman 1983) 391–392; Toyin Falola, 'Neighbours at War: Conflicts over Boundaries in Colonial Nigeria' (2010) 19 Journal of the Historical Society of Nigeria 1, 1.
[729] Peter K Tibenderana, 'The Irony of Indirect Rule in Sokoto Emirate, Nigeria, 1903-1944' (1988) 31 African Studies Review 67, 74–79; See also Anthony Hamilton Millard Kirk-Greene, *The Principles of Native Administration in Nigeria: Selected Documents, 1900-1947* (Oxford University Press 1965).
[730] Afigbo (n 720) 18; FO Ogunlade, 'Education and Politics in Colonial Nigeria: The Case of King's College, Lagos (1906-1911)' (1974) 7 Journal of the Historical Society of Nigeria 325, 345.
[731] Larry Diamond, *Class, Ethnicity, and Democracy in Nigeria: The Failure of the First Republic* (Syracuse University Press 1988) 26-27.

religion, and "the modern elite," who were schooled in western education. As conservation of indigenous practices and laws, and governability of the mass were at the heart of indirect rule, the system pitted the traditional elite against the modern elite. As a result, the South, which is largely constituted of the Yoruba in the West and Igbo in the East, was more affected by the British colonial conquest than the North, which hosts the Hausa-Fulani.

While the South follows Christianity, the North adheres to Islam. As the case with regional, ethnic, and educational variables, the religion factor entered into Nigerian politics as the British maintained and recognized Islam and its rules of socio-economic and political organization as far as it did not go against the interests of the colonial state, unlike the case in the South.[732]

The intersection of regionalism, ethnicity, religion, and economics shaped by the colonial experiences of direct and indirect rule influenced the negotiation terms for the independence of Nigeria. The Hausa-Fulani, the Yoruba, and the Igbo representing the main ethnic, regional, religious, and economic groups feared each other's domination when independence approached.[733] The Yoruba and Igbo advanced Nigerian nationalism and pushed for the independence of Nigeria, while the Hausa-Fulani were not ready for independence for fear of Southern domination.[734] As a result, the Hausa-Fulani rejected the motion for the independence of Nigeria in 1956 in the House of Representatives.[735]

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[732] Somide (n 713) 26–27; Olufemi Vaughan, 'Religion and State Formation' in Emmanuel Ike Udogu, Nigeria *in the Twenty-First Century: Strategies for Political Stability and Peaceful Coexistence* (Africa World Press 2005) 115.
[733] Olawale Albert, 'Federalism, Inter-ethnic Conflicts and the Northernisation Policy of the 1950s and 1960s' in Kunle Amuwo and others, *Federalism and Political Restructuring in Nigeria* (Spectrum Books 1998) 51.
[734] Larry R Jackson, 'Nigeria: The Politics of the First Republic' (1972) 2 Journal of Black Studies 277, 278; See also James Samuel Coleman and James Smoot Coleman, *Nigeria: Background to Nationalism* (University of California Press 1971).
[735] Diamond (n 731) 48–49.

When the Southern representatives were prepared to travel to the North to campaign for independence, the Northern politicians not only mobilized their people against the campaign, but also revealed a plan for secession.[736] Although the Southern politicians were advocates of Nigerian nationalism, they competed with each other for national dominance. The advance of the Igbo's in education, business, and civil service was of concern for the Yoruba and vice versa.[737] These multi-layered dynamics brought three regional political parties, which aimed to secure the interests of their own regions in the independence bargain and its aftermath. The Northern People's Congress with a political base in the Hausa-Fulani, the Action Group with a political base in the Yoruba, and the National Council of Nigeria and Cameroon with a base in the Igbo negotiated the terms of independence.[738]

Within these atmospheres of mistrust, fear, and competition, the future of a unitary Nigerian state withered away and the adoption of a federal system, which holds the three regions together, seemed the only option to get independence and experience self-government.[739] Nonetheless, the asymmetry among the regions and the concomitant effect on the structure and operation of the federal system posed further problems. The Hausa-Fulani accounting more than half of the population demanded proportional representation in the federal government commensurate to their population, which put the Yoruba and the Igbo in a disadvantageous position.[740] Further, other minority ethnic groups demanded the creation of their own states within the federation to escape the domination of the three large ethnic

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[736] ibid 49.
[737] Albert (n 733) 51.
[738] See Richard L Sklar, *Nigerian Political Parties: Power in an Emergent African Nation* (Africa World Press 2004) 87-140.
[739] Sebastine Tar Hon, *Constitutional Law and Jurisprudence in Nigeria* (Pearl Publishers 2004) 7.
[740] Somide (n 713) 28-29.

groups.[741] In the hope that issues would be resolved after independence, the South agreed to the terms of the North, and the minority claims for the creation of other states were rejected as it was thought it will delay independence.[742] On 1 October 1960, Nigeria got its independence with a federal constitution under the premiership of Abubakar Tafawa Balewa, from the Northern People's Congress.

Although the cumulative effect of British colonial legacy, pre-and post-independence indigenous politics, and resource and opportunity allocation and distribution has not given federalism an easy ride, Nigeria is committed to the federal idea to date.[743] Since 1960, Nigeria has adopted four republican federal constitutions; i.e. the First Republic (1960-1966), the Second Republic (1979-1983), the Third Republic (1993-aborted), and the Fourth Republic (1999- present). In this time, Nigeria experienced military rule after the First Republic (from 1966-1979) and the Second Republic (from 1984-1999). From 1967-1970, Nigeria engaged in a civil war to stop the secession movements of Biafra. Despite changing constitutions, experiencing a bloody civil war, and military coups one after another,[744] federalism has still relevance and appeal for many Nigerians if their country is to stay united.[745] Although other systems of loose alliance such as confederation may be on the table in the constitutional debates and discourses of Nigeria,[746] the idea of a unitary solution seems to be a dead option

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[741] ibid, 28-29.
[742] Somide (n 713) 29.
[743] Rotimi T Suberu, *Federalism and Ethnic Conflict in Nigeria* (United States Institute of Peace Press 2001) 45.
[744] See Richard A Joseph, *Democracy and Prebendal Politics in Nigeria* (Cambridge University Press 2014).
[745] Ladipo Adamolekun, 'The Nigerian Federation at the Crossroads: The Way Forward' (2005) 35 Publius: The Journal of Federalism 383, 398.
[746] Richard L Sklar, 'Unity or Regionalism: The Nationalities Question" in Robert I Rotberg (ed), *Crafting the New Nigeria: Confronting the Challenges* (Lynne Rienner Publishers 2004) 46.

with Decree No. 34 of 1966, which turned the country into a unitary state for a very brief period.[747]

Seen in this context, the choice of federalism and the allegiance to it in Nigeria is neither because it is considered as a superior system of state organization for a workable and just polity, as a matter of principle, nor is it because it brought good government, economic prosperity, and a culture of human rights, as a matter of fact. Rather, it is primarily because federalism has offered a normative appeal and institutional framework for ethnonational and religious groups to channel and advocate their interests regardless of the theory of government, be it civil/military or democratic/undemocratic. To this end, the idea of federalism, as we know it in classic federal theory, has been re-conceptualized and deployed to serve new purposes in new realities.

B. Ethiopia

Although the history of Ethiopia and the processes by which the state was built are different from Nigeria, the original logic and ways of federal formation are like Nigeria. To appreciate the specific factors and historical processes which give birth to the federal idea and continue to destine Ethiopia with federalism, this section briefly explores and presents the history of the Ethiopian state-building project. The aim of this investigation is to demonstrate, like Nigeria, how federalism follows new pathways in Ethiopia in its both purpose and formation

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[747] Tar Hon (n 69) 13; Dele Olowu, 'The Literature on Nigerian Federalism: A Critical Appraisal' (1991) 21 Publius: The Journal of Federalism 155; Suberu, *Federalism and Ethnic Conflict in Nigeria* (n 743).

than the one it has in classic federal states and how legal syncretism explains the transformation of the original logic and formation of federalism in Ethiopia.

Ethiopia is a country with ancient roots that date back millennia.[748] Despite the waxing and waning of its boundaries on the strength of its leaders, Ethiopia's statehood is uninterrupted. Ethiopia successfully resisted waves of Italian aggression and is the only African country that was never colonized by a European power.[749] Its history can be classified into five for purposes of its constitutional history; these are (a) pre-Christian times to the 18th century, (b) *Zamana Mesafent* (the Era of Princes), (c) modern monarchial period, (d) the military period usually known as *Derg*, and (e) the present federal period.[750] For our present purposes, a brief investigation of Ethiopia's modern history suffices.

Ethiopia's modern history started with the restoration of monarchial rule by Emperor Tewodros II in 1855.[751] Tewodros defeated the regional *ras's* and recentralized power under his rule. After his coronation as king, Tewodros set the modernization ambition of the Ethiopian empire in which his successors advanced vigorously and skillfully. Among Ethiopia's modern monarchial kings, Emperor Menelik II was the one that gave the country its current form and texture. After maintaining Ethiopian sovereignty against European colonization at the battle of Adwa in 1896, Menelik both negotiated and delimited the territorial frontiers of the empire and expanded and consolidated his power within the empire. As the regions that border Ethiopia were under British, French, and Italian colonial rule, the boundary delimitations were with European powers. Menelik concluded boundary

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[748] Harold G Marcus, *A History of Ethiopia* (University of California Press 1994) 1; Sergew Hable Selassie, *Ancient and Medieval Ethiopian History to 1270* (Addis Ababa University Press 1972).
[749] See Raymond Jonas, *The Battle of Adwa: African Victory in the Age of Empire* (Harvard University Press 2011).
[750] See also Fasil Nahum, *Constitution for a Nation of Nations: The Ethiopian Prospect* (Red Sea Press 1997) 3.
[751] Zewde (n 7) 27; See also Teshale Tibebu, *The Making of Modern Ethiopia: 1896-1974* (The Red Sea Press 1995).

agreements with French Somaliland (now Djibouti) in 1897, with British Somaliland in 1899, with Italy for the severance of Eritrea in 1900, with the British for the territory with Sudan and Kenya in 1902 and 1907 respectively, and with Italian Somaliland in 1908.[752] In about a decade after Adwa, Ethiopia took its present form territorially.[753] While Eritrea joined with Ethiopia through a federal arrangement in 1952 and united in 1962, its secession in 1991 made Menelik's Ethiopia the enduring territorial limits of present-day Ethiopia.[754]

As the case with its territorial boundaries, the internal expansion and consolidation of Menelik's power gave Ethiopia its present ethnic and linguistic diversity and concomitantly gave birth to center-periphery or north-south political, social, economic, and ethnic relations and contestations since the 1960s.[755] The north and its cultural and religious traditions were the core of the Ethiopian empire.[756] It consists of the provinces or *kiflehager*, as they were then called, Tigray, Gonder, Gojjam, Wello, and Shewa. These provinces share common cultural, religious, and linguistic traditions, although *Tigregna* is spoken in the province of Tigray. Orthodox Christianity and the Amharic language have been the epicenter of the empire. When Menelik made Addis Ababa the capital of his empire in 1886, not only did the political base of the empire moved to the south, but it also heralded a further southern expansion.

Menelik's expansion took two forms.[757] The first is the recognition of existing traditional power structures upon a peaceful submission to the empire. Once a chief or king submitted to the empire, he will become *ras* for the province and will be part of the government

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[752] Bahru (n 7) 113.
[753] ibid.
[754] Tibebu (n 751) 180.
[755] See John Markakis, *Ethiopia: The Last Two Frontiers* (James Currey 2011).
[756] Tibebu (n 751).
[757] ibid 42.

machinery. The second is the use of force when provinces resisted the imperial request. After the conquest, a new administration constituted of people including from the north were in charge.[758] The south has been the mosaic of people with different ethnicities, languages, religions, and cultural identities. The triumph of Menelik's expansion in the south was also compounded by the hegemony of the Christian religion and the Amharic language. Menelik repeated his external success against Italy with an internal consolidation of power and territory. This makes Ethiopia exceptional to its African peers.[759]

Menelik's expansion into the south is the most contested in Ethiopian history and has dominated much of the scholarly and political debate to date. There are three theses on this historicity.[760] The first considers Menelik's expansion as part of nation-building.[761] The nation-building thesis argues that the south was part of the Ethiopian empire and what Menelik did was reconfiguring part of historic Ethiopia. The second views Menelik's expansion as colonial conquest.[762] The colonial thesis contends that what Menelik did in his southern expansion was akin to European colonialism and the only difference is the colonizing empire is black. Further, it is claimed that the south's distinct ethnic, linguistic, and religious makeup had been subordinated, humiliated, and violated by the northern Amhara-Tigre culture and identity. The third and final one holds that there was national oppression by the Ethiopian state and the different ethnic and linguistic groups were not treated with equality.[763] The national oppression thesis holds that not only were Ethiopia's

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[758] ibid 43–47.
[759] ibid 49.
[760] Merera Gudina 'Contradictory Interpretations of Ethiopian History: The Need for a New Consensus' in David Turton (ed), *Ethnic Federalism: The Ethiopian Experience in Comparative Perspective* (James Currey 2006) 120.
[761] ibid 120–122.
[762] ibid 124–126; see also Asafa Jalata, *Fighting Against the Injustice of the State and Globalization: Comparing the African American and Oromo Movements* (Springer 2002).
[763] Gudina (n 760) 122–123.

multi-ethnic groups discriminated, but also the Amhara-Tigre culture was considered as the Ethiopian culture and the rest were forced to assimilate. These competing and contradictory readings of Ethiopian history were critical in giving birth to many liberation movements and are still relevant in the political contestations in the country today.

Although the Solomonic monarchs, including Menelik, asserted absolute political power, they had to negotiate with the *ras's* or governors of different provinces in both the north and south for the smooth operation of the country. Regionalism relatively tempered the centralizing impulses of Ethiopian monarchs across time and place. This balance was fundamentally altered with the inauguration of Teferi Mekonnon as Emperor Haile Selassie I, the last monarch of the Solomonic dynasty, in 1930. Haile Selassie reconstructed feudalism in a way that enhances the political power of the monarchy and guarantees the economic privileges of the nobility.[764] For this effect, Haile Selassie cemented his absolute rule with the adoption of the first written constitution of Ethiopia in 1931. The Constitution was both an expression of the emperor's absoluteness and his modernist ambitions. This is because the Constitution unifies political power in the person of the emperor, as he was the supreme lawmaker, executor, and adjudicator (as he appoints members of the parliament, the executive, and judicial branches), while showing to the international community that he rules with a modern written constitution.[765] Not only did Haile Selassie dismantle the pre-existing regional powers of the *ras's* and governors of the provinces, but he also centralized their powers and, in some places, appointed persons equipped with western education.[766] Although

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[764] Zewde (n 7) 140.
[765] ibid 201; Gebru Tareke, *The Ethiopian Revolution: War in the Horn of Africa* (Yale University Press 2014) 17; the Constitution of Ethiopia 1931, Chapter II.
[766] Tareke (n 765) 16.

the 1931 Constitution was revised in 1955 to include Eritrea with Ethiopia in a federation, in 1962 the federation was abolished to form a unitary Ethiopia.[767]

While Haile Selassie was the only absolute monarch Ethiopia ever had in its history, the opposition from the progressive intelligentsia, the peasant rebellions, and the student movement coupled with the widespread social discontent and distress ended his reign. The first critique came from his own circles, the western educated elite and members of his government, who held progressive ideas.[768] The attempted coup d'etat of 1960, the attempt to crown Asfawasan the emperor's lawful heir while the emperor was on a foreign visit, marked the violent expression of opposition from the progressive intelligentsia.[769] Aggrieved by land alienation, administrative inefficiency, and excessive taxes, peasants in Tigray, Bale, and Gojjam rebelled against the central government.[770] The spread of modern education and the enrollment of students from different corners of the country turned these students to critical opposition machines to Haile Selassie's rule. The pervasive backwardness, underdevelopment, and exploitation of the mass, on the one hand, and the additional inequality and marginalization along ethnic, religious, and linguistic lines in national life, made the students the sworn enemies of Haile Selassie. A combination of all these brought a revolution that led to the demise of the Solomonic monarchy and the inauguration of military socialism in 1974.[771]

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[767] Zewde (n 7) 219.
[768] See also Bahru Zewde, *Pioneers of Change in Ethiopia: The Reformist Intellectuals of the Early Twentieth Century* (James Currey 2002).
[769] Zewde (n 7) 213.
[770] See Tareke (n 765).
[771] See Andargachew Tiruneh, *The Ethiopian Revolution 1974-1987: A Transformation from an Aristocratic to a Totalitarian Autocracy* (Cambridge University Press 1993).

The intellectual articulations and the political actions in the final years of imperial rule, on the one hand, and the hijacking of the revolution by the military junta and its subsequent institutionalization of military socialism and the *Ethiopia first* motto, on the other, were crucial for the birth of the federal idea in 1991. Although the military adopted the prevailing political ideology of the time in Ethiopia,[772] Marxism-Leninism, it was neither able to deliver the dividends of Marxism-Leninism nor was it able to respond to the outstanding questions of ethnic groups framed as "the nationality question". Even if there were a multitude of factors responsible for the outbreak of the revolution, such as questions of modernity, transformation, class, and ethnic relations, the last stands out as the epicenter of Ethiopian politics and responsible to the birth of the federal idea.

There is no other person than Wallelign Mekonnen, a student of the Haile Selassie I University (now Addis Ababa University), who articulated the nationality question in Ethiopia and consequently shape the terms of political discourse since then. He argues that

> Ethiopia is made up of a dozen nationalities with their own languages, ways of dressing, history, social organization and territorial entity. [...] in Ethiopia there is the Oromo Nation, the Tigrai Nation, the Amhara Nation, the Gurage Nation, the Sidama Nation… Ask anybody what Ethiopian culture is? Ask anybody what Ethiopian language is? Ask anybody what Ethiopian music is? Ask anybody what the "national dress" is? It is either Amhara or Amhara-Tigre!! To be a "genuine Ethiopian" one has to speak Amharic, to listen to Amharic music, to accept the Amhara-Tigre religion, Orthodox Christianity and to wear the Amhara-Tigre Shamma in international conferences. In some cases to be an "Ethiopian", you will even have to change your name. In short to be an Ethiopian, you will have to wear an Amhara mask…[773]

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[772] See Donald L Donham, *Marxist Modern: An Ethnographic History of the Ethiopian Revolution* (University of California Press 1999).
[773] Wallelign Mekonnen, 'On the Question of Nationalities in Ethiopia' (Nov 17, 1969) <http://wwwethiopianforeignpolicycom/wallelign-mekonnen-and-his-article-on-the-question-of-nationalities-in-ethiopia/> accessed 13 November 2017.

Precisely because of this, the radical student movement considered Ethiopia as "a prison house of nationalities" like Tsarist Russia.[774] Accordingly, the Stalinist account of self-determination including secession of the nationalities was considered as the primary means to transform and reconfigure the Ethiopian empire.[775]

Armed with the ideological weapons of Marxism-Leninism, the ethnonational groups of Eritrea, Tigray, Oromo, and later the Somali started liberation movements for independence. Viewing the relationship of their ethnicities to the Ethiopian state through the prism of colonialism, the right to self-determination including secession became the overarching goal of their struggle. Although the Eritrean secession movements started even before the abolition of the federal arrangement, the unified struggle for liberation started in 1972 with the establishment of the Eritrean People's Liberation Front (EPLF).[776] EPLF was also the inspiration for and active supporters of the establishment of the Tigray People's Liberation Front (TPLF). The EPLF and TPLF were the main armed forces that led to the removal of the military dictatorship of Mengistu Haile Mariam in 1991. Unlike the EPLF, the TPLF revised its political ideology from secession to internal self-determination before the final military victory.[777] As its political base is in Tigray, TPLF needed a coalition of other ethnic groups representing the rest of the country to form the Ethiopian government after the defeat of the military. As a result, it established the Ethiopian People's Revolutionary Democratic Front (EPRDF) with the Amhara National Democratic Movement (ANDM), the Oromo People's Democratic Organization (OPDO), and the Southern Ethiopia People's

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[774] Semahagn Gashu Abebe, *The Last Post-Cold War Socialist Federation: Ethnicity, Ideology and Democracy in Ethiopia* (Ashgate 2014) 2.
[775] ibid.
[776] Zewde (n 7) 220.
[777] Aregawi Berhe, *A Political History of the Tigray People's Liberation Front (1975-1991): Revolt, Ideology and Mobilisation in Ethiopia* (Tsehai Publishers 2009) 191.

Democratic Movement (SEPDM).[778]

The triumph of ethnonational groups through military victory in 1991 not only brought federalism as the only viable option to hold the country together, but it also helped to institutionalize the socialist account of the right to self-determination including secession as the fundamental principles of the federal system that permeate its origin and operation.[779] As Ethiopia was considered "the prison house of nationalities" any solution short of recognizing and assuring ethnic groups the right to self-determination including secession would not be taken as a solution at all. The chief architect of the transition period, Meles Zenawi, unequivocally stated that "[t]he key cause of the war all over the country was the issue of nationalities…Any solution that did not address them did not address the issue of peace and war."[780] Committed to their ideologies, the ethnonational groups that won a military victory over the *Derg* tabled the right to self-determination including unconditional secession in the National Democratic Conference that adopted the Transitional Charter and inaugurated the transitional government of Ethiopia. In this process, while Eritrea chose independence from Ethiopia, the rest had to find an institutional mechanism that accommodates their right to self-determination including secession within the Ethiopian state, which federalism presents itself as the best choice.

Since then, like Nigeria, the appropriateness of federalism for the Ethiopian state is agreed across the political divide although the type of federalism has been a point of

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[778] John Young, *Peasant Revolution in Ethiopia: The Tigray People's Liberation Front, 1975-1991* (Cambridge University Press 2006) 62. In 2018, ANDM changed its name to Amhara Democratic Party (ANP) and OPDO changed its name to Oromo Democratic Party following the recent waves of political transition in Ethiopia.
[779] See Abebe (n 774).
[780] Meles Zenawil as quoted in Lovise Aalen, 'Ethnic Federalism in a Dominant Party State: The Ethiopian Experience 1991-2000' (2002) R 2002:2 CMI Report 40.

contestation.[781] As federalism transforms its original logic, ethnonational groups find it appealing as it enables them to broadcast their own respective ethnonational interests and ambitions within the channels of shared rule and self-rule regardless of the theory of government, be it authoritarian or democratic as discussed in section 4.4.

C. South Africa

Even if the history of South Africa and the socio-economic and political processes by which it came into being are different both from Nigeria and Ethiopia, the underlying rationale and aim for the origin of federalism in South Africa shares a lot of commonalities with these countries. Like Nigeria and Ethiopia, legal syncretism explains the institutional choice for federalism in South Africa. This section shows how legal syncretism contributes to the origin of federalism and how this, in turn, is situated within the socio-economic, political, and historical past of South Africa.

The South Africa Act of 1909 brought together the settler colonies of Cape, Free State, Transvaal, and Natal to form the Union of South Africa in 1910.[782] The creation of South Africa, unlike Nigeria and Ethiopia, has two peculiar features. The first is the relationship between the settler populations that is between the British and Afrikaners and the question whether a federal or unitary form of government should be adopted for the newly established Union of South Africa. The second is the relationship between the settler and indigenous

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[781] See for instance Yonatan Tesfaye Fessha, 'The Original Sin of Ethiopian Federalism' (2017) 16 Ethnopolitics 232, 232-245; Jon Abbink, 'Ethnic-Based Federalism and Ethnicity in Ethiopia: Reassessing the Experiment after 20 Years' (2011) 5 Journal of Eastern African Studies 4, 596-618; Assefa Fiseha, 'Ethiopia's Experiment in Accommodating Diversity: 20 Years' Balance Sheet' (2012) 22 Regional & Federal Studies 4, 435-473.
[782] Heinz Klug, *The Constitution of South Africa: A Contextual Analysis* (Hart 2010) 8.

African populations, that is the "Native question", in the Union.[783] As the British came out as victorious in the Boer War and the establishment of a single political community became real, the Afrikaners demanded federalism where they can maintain autonomy within their own territorial hold.[784] Unlike other settler colonies such as Canada and Australia, the British institutionalized a unitary state.[785] In order to achieve unity and accommodate provincial interests, however, the South Africa Act of 1909 established an upper house of parliament, called Senate, constituted of an equal number of senators from each province.[786] Further, legislative and executive organs at the provincial level were established although the national organs overrode their activities or actions.[787] Through such relatively inclusive institutional design, the Union of South Africa set the experiment of parliamentary democracy for white minorities in South Africa.

The South Africa Act of 1909, however, excluded the black majority from participating in the newly inaugurated parliamentary democracy. Instead, a different governance regime was institutionalized for the black mass where the Governor-General in Council was the ultimate decision maker. Unlike the practice in Nigeria and Ethiopia, the Union of South Africa and from 1961, the Republic of South Africa, through the Republic of South Africa Act of 1961, had operated under two different constitutional systems governing the white minority and the black majority. Building on the race based differentiated constitutional system pioneered in the Union of South Africa Act of 1909, a series of statutes were enacted

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[783] Hassen Ebrahim, *The Soul of a Nation: Constitution-Making in South Africa* (Oxford University Press 1998) 6–7.
[784] ibid 7.
[785] Nico Steytler, 'South Africa' in John Kincaid and George Alan Tarr (eds), *Constitutional Origins, Structure, and Change in Federal Countries* (McGill-Queen's Press 2005) 313.
[786] ibid.
[787] ibid; Richard Simeon and Christina Murray, 'Multi-Sphere Governance in South Africa: An Interim Assessment' (2001) 31 Publius: The Journal of Federalism 65, 68.

to further disenfranchise the black majority. The first series of legislative measures aimed to segregate and discriminate against the black majority. These include, among others, the enactment of Mines and Works Act in 1911 which imposed colour bar, Native Land Act in 1913 which dispossessed and disfranchised blacks, Native Affairs Act in 1920 which set up tribal councils and advisory councils for blacks in reserves and towns respectively, Native Urban Act in 1923 which established the segregation of blacks in towns, Industrial Conciliation Act in 1924 which excluded migrant black workers from employee protection, and the Native Administration Act in 1927 which retribalized the African natives. The ultimate goal of these legislative measures was to ensure white supremacy.

The rise of the National Party (NP) through electoral victory in 1948 inaugurated a special type of racial discrimination and segregation in South Africa known as apartheid. The quintessential feature of apartheid is the classification of South Africa along racial lines. According to the apartheid policy, South Africa was divided into four racial categories; white, colored, Asiatic (Indian) and Native (African).[788] In order to keep these four categories of people apart, the parliament promulgated laws such as the Marriage (1949) and Immorality Acts (1950) which banned inter-racial marriage and sexual intercourse, Group Areas Act (1950) for the separate residence of the races, the Separate Amenities Act (1953) which enforced the separate provision of public services such as transport, cinema, and restaurants, and the Native Resettlement Act (1954) for the eviction of blacks to separate townships, and separate educational systems.[789] Furthermore, the apartheid engineers created homelands for black South Africans with the objective to strip them of their South African citizenship. For

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[788] Nigel Worden, *The Making of Modern South Africa: Conquest, Apartheid, Democracy* (John Wiley & Sons 2012) 104–105.
[789] ibid.

this purpose, nominal independent homelands such as Transkei (1976), Bophuthatswana (1977), Venda (1979), and Ciskei (1981) were created.[790] To this end, millions of black South Africans were forcefully relocated to these homelands.

The notorious policy of apartheid brought internal resistance and external exclusion to South Africa. As a result, the South African government adopted a Constitution in 1983 with a tricameral parliament consisting of the White House of Assembly, the Coloured House of Representatives, and the Indian House of Delegates.[791] Although the coloured and Indians were given some form of representation to control their own affairs such as education, health, and community administration, they were not equal partners with the whites in the constitutional dispensation.[792] Nonetheless, the black majority were not included and represented in this constitutional dispensation. Therefore, unlike Nigeria and Ethiopia, the South African democratic constitutional dispensation came into being after more than nine decades of struggle by the black majority, the coloured, and Indian peoples against white minority rule in the quest for equality, freedom, and dignity for all.

The main umbrella organization in the struggle against racial discrimination and apartheid is the African National Congress (ANC) established on 12 January 1912 soon after the inauguration of the Union of South Africa.[793] Unlike the ethnic based regional parties that negotiated Nigerian independence or the ethnonational forces that restructured the Ethiopian state, the ANC provided the genesis for the unity of black South Africans and African

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[790] ibid 119.
[791] Ebrahim (n 783) 18.
[792] Klug (n 782) 13; Worden (n 788) 134.
[793] Leonard Monteath Thompson, *A History of South Africa* (Yale University Press 2001) 174; Ebrahim (n 783) 11.

nationalism that cuts across tribal and linguistic differences.[794] Although there were other black organizations, as is evident during the constitutional negotiations for democratic South Africa at the beginning of the 1990s, the ANC managed to mobilize and appeal to the black majority irrespective of tribal and linguistic affiliations in the struggle against racial discrimination and apartheid.

In addition to employing non-violent civil resistance such as boycotts, strikes, and civil disobedience, and using the courtroom as a space of resistance against apartheid,[795] and later including armed struggle with its ban, the ANC posited an inclusive political ideology not only for black South Africans but also for whites, coloureds, and Indians. The 1955 Freedom Charter is the expression of ANC's inclusive political ideology to all South Africans irrespective of race and a manifestation of its commitment to the ideals of human rights unmatched by any political organization in the African continent at the time. The Freedom Charter in its opening clause stated that

> […] South Africa belongs to all who live in it, black and white, and that no government can justly claim authority unless it is based on the will of all the people; that our people have been robbed of their birthright to land, liberty and peace by a form of government founded on injustice and inequality; that our country will never be prosperous or free until all our people live in brotherhood, enjoying equal rights and opportunities; that only a democratic state, based on the will of all the people, can secure to all their birthright without distinction of colour, race, sex or belief.[796]

In pursuing this egalitarian and inclusive ideal, the Charter aims to secure the right to equality before the law for men and women and for all national groups, the right to share the country's

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[794] Richard Rive and Tim Couzens, *Seme: The Founder of the ANC* (Africa World Press 1993) 9–10; Peter Walshe, *The Rise of African Nationalism in South Africa: The African National Congress, 1912-1952* (C Hurst & Co Publishers 1970) 33.
[795] See Awol Allo (ed), *The Courtroom as a Space of Resistance: Reflections on the Legacy of the Rivonia Trial* (Ashgate Publishing 2015).
[796] The Freedom Charter, adopted at the Congress of the People at Kliptown, Johannesburg (25-26 June, 1955) available at <http://wwwhistoricalpaperswitsacza/inventories/inv_pdfo/AD1137/AD1137-Ea6-1-001-jpegpdf> accessed on 14 September 2018.

wealth and land, the right to work, security, culture, education, and human rights, and appeals to peace and friendship.[797]

When the apartheid system could no longer withstand the internal resistance and international exclusion, a negotiated transition became a sensible option. Before the official start of the negotiation in the formation of a Convention for a Democratic South Africa (CODESA) in 1991, bilateral negotiations between the Botha's government and the ANC started in 1985 through the initiation of Nelsen Mandela.[798] Beginning from the informal talks to the formal negotiations, the position of the ANC was to constitute a unitary state. Nonetheless, the NP was in favor of devolution of power to the regional government through the prism of federalism. Indeed, the ANC and the NP reached consensus on the decentralization of power to the regional governments although whether such decentralization should be made in a federal or unitary form was not agreed. In the multi-party negotiations, however, the issue of federalism provoked a heated debate and political parties held strong views. The NP, the Inkatha Freedom Party (IFP), the Conservative Party (CP), Afrikaner Volsfront (AVF), the Freedom Front, and the Democratic Party advocated federalism, while the ANC and the Pan-Africanist Congress of Azania advanced for a unitary state.[799]

Among the federalists, the IFP with an ethnic base in KwaZulu-Natal advocated federalism in their territorial base and the conservative Afrikaners proposed self-government

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[797] ibid; Worden (n 788) 115; Mary Benson, *The African Patriots: The Story of the African National Congress of South Africa* (Faber & Faber 1963) 214; Iris Berger, *South Africa in World History* (Oxford University Press 2009) 119.
[798] Ebrahim (n 783) 30.
[799] Nicholas Haysom, 'The Federal Features of the Final Constitution' in Penelope Andrews and Stephen Ellmann (eds), *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law* (Witwatersrand University Press 2001) 506.

in their own *volkstaat*. Except for the IFP, other federalist parties did not have a geographically concentrated base but wanted federalism as a counter-majoritarian mechanism against the ANC's majority rule. ANC saw the claim of federalists as an institutional configuration that can cripple majority rule, sustain the apartheid homeland systems, contributes to the creation of *volkstaat*, and an obstacle for South African transformation from a racial based to a non-racial and inclusive society.[800]

Nonetheless, the secessionist moves of the IFP and the huge insecurity and anxiety of other federalist parties, on the one hand, and the quest for inclusive and peaceful democratic transition necessary for the legitimacy of ANC's majority rule, on the other, made concessions possible from both sides. The IFP, the CP, and the AVF formed a Freedom Alliance, amongst other demands, for the constitution of federal democracy, and absent this, the IFP opted for secession and the AVF for a civil war.[801] The open warfare in the KwaZulu-Natal between the ANC and IFP supporters and the loyalty and support of the AVF by retired military generals and serving armed forces in the prevailing violence and disorder since the start of the transition could not be ignored by the actors of the transition, in particular, by the ANC.[802] Like Nigeria and Ethiopia, the quest to accommodate ethnic and racial diversity and the urgency to secure peace brought federalism to South Africa.

However, unlike Nigeria and Ethiopia, federalism is configured in South Africa in form and substance, not in name. One cannot find the word federalism in the final Constitution. Indeed, the word federalism was avoided before the adoption of the final

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[800] Steytler (n 785) 316; Karthy Govender, 'Federalism and Legal Unification in South Africa' in Daniel Halberstam and Mathias Reimann (eds), *Federalism and Legal Unification* (Springer 2014) 391–392.
[801] Nico Steytler and Johann Mettler, 'Federal Arrangements as a Peacemaking Device during South Africa's Transition to Democracy' (2001) 31 Publius: The Journal of Federalism 93, 95.
[802] ibid 95–96.

Constitution as it created an impasse between federalists and unitarists.[803] Given South Africa's historical experience of racial segregation and apartheid, federalism gained a pejorative name, in particular, in the eyes of the ANC and was considered as an obstacle for the overall transformation of South Africa.[804] In order to facilitate meaningful debate, the constitutional negotiators dropped the term federalism and ultimately institutionalize "Co-operative Government".[805]

Unlike the ethnic, regional, and religious factors in the formative periods of the Nigerian political party system and the nationality question that condition political party organization in Ethiopia which consequently brought federalism as the first choice, the ANC's mobilization of the majority of black South Africans and others including coloureds, Indians, and white liberals, and its commitment to liberal ideology as stated in the Freedom Charter made unitary form of government its first choice during the negotiations. Precisely because ANC has inculcated African nationalism to the minds and hearts of black South Africans since 1912, and it mainstreamed the ideals of freedom, human rights, equality, and dignity with the struggle against racial discrimination and apartheid, it managed to table the unitary state for a democratic South Africa. Unlike the major political parties in Nigeria and Ethiopia, which presented and advocated federalism, the federalist idea in South Africa is a minority demand.[806] Not only did ANC's unitary state proposal got acceptance by the majority because it syncretized the liberal ideology of human rights and inclusive politics with

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[803] Haysom (n 799) 505.
[804] Simeon and Murray (n 787) 68; Christina Murray, 'South Africa: Provincial Implementation of National Policies' in Raoul Blindenbacher and Abigail Ostien, *Dialogues on Legislative and Executive Governance in Federal Countries* (McGill-Queen's Press 2006) 29–30.
[805] Haysom (n 799) 504.
[806] See also Danie Brand and others, *South African Constitutional Law in Context* (Pierre De Vos and Warren Freedman eds, Oxford University Press 2015) 269–276.

the democratic demands of the majority of South Africans, this syncretism, in turn, led to the recognition of the minority demands for autonomy and self-government.

Accordingly, the way legal syncretism configures federalism in South Africa is significantly different from Nigeria and Ethiopia. In South Africa, liberal constitutional ideas and principles were part of the struggle against apartheid and racial discrimination. Even though liberalism is a western export, ANC *accepted* it as a mode of resistance and struggle against the South African state. Concomitantly, the ideals of equality, liberty, and dignity find their phenomenological similarity in the black South African's quest for equal rights and concern in their country as fellow citizens. As a result, while federalism's original purpose was the accommodation of ethnic and racial demands as in Nigeria and Ethiopia, the general liberal constitutional vision of South Africa maintains the classic purposes of federalism, as discussed in the following section. In contrast, in Nigeria and Ethiopia the ethnonational groups *use the forms and discursive practices* of federalism to channel their own corporate group interests.

4.4 The Fundamental Elements of Federalism in Nigeria, Ethiopia, and South Africa

As federalism follows new pathways in Nigeria, Ethiopia, and South Africa, some of the fundamental elements of federalism known to classic federal theory have been transformed and adapted with non-federal principles and practices. As former unitary states, they heavily draw from the unitary theory of state organization and this is evident in the design and operation of their federal systems.[807] Furthermore, each state blends federalism with its unique

[807] See also J Tyler Dickovick, 'Federalism in Africa: Origins, Operation and (In)Significance' (2014) 24 Regional & Federal Studies 5, 553-570.

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experiences. In this regard, while federalism has been fused with the military principles of administration in Nigeria, it has been blended with ethnicity and socialist ideologies in Ethiopia, whereas it is configured with liberalism and *Ubuntu* in South Africa. Accordingly, the fundamental elements of federalism in these countries manifest convergences with classic federal theory with respect to forms, structures, and discursive practices, on the one hand, and show divergences related to the syncretic normative and institutional adaptations and innovations, on the other.

While Nigeria and South Africa have a three-tiered government arrangement, Ethiopia has a two-tiered system; each tier with some degree of sovereign power on some matters.[808] In all these states, the constitutions are unilaterally unamendable. In Nigeria, even if the National Assembly is empowered to amend the Constitution, it cannot do so without the approval of the House of Assembly with no less than two-thirds of all the states.[809] By the same token, in South Africa, the Constitution can be amended by the National Assembly mainly with the participation of the National Council of Provinces (NCOP) and approval by six of them.[810] In Ethiopia, constitutional amendment without the approval of a two-thirds majority vote of the states is impossible.[811]

Further, there are representation mechanisms of self-rule and shared rule in the multi-tiered government systems in these states. While States and Local Government Areas (LGAs) in Nigeria, Provinces and Local Government in South Africa, and States in Ethiopia are avenues for the experiment of self-rule, the federal legislative, executive, and judicial organs

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[808] The Constitution of Nigeria, ss 2(2) & 3(6); The Constitution of South African, s 40(1); The Constitution of the Federal Democratic Republic of Ethiopia, article 46 (1).
[809] The Constitution of Nigeria, s 9(1) (2) & (3).
[810] The Constitution of South Africa, s 44(1)(a) (b) & 74.
[811] The Constitution of the Federal Democratic Republic of Ethiopia, article 105.

are spaces for the practice of shared rule. Furthermore, the Supreme Court in Nigeria,[812] the Constitutional Court in South Africa,[813] and the House of Federation (HoF), the upper house of parliament, in Ethiopia[814] are federal umpires.

Moreover, the federalists in these states often invoke the benefits and the rhetoric of federalism building on the experiences of established federal states to advance and safeguard their interests. To these extents, there is a convergence between federal theory and federalism in these states. Despite these formal convergences, several syncretic normative and institutional adaptations and innovations make the federal experiments in these states unique, which I now explain.

A. Nigeria: Centralized Federalism

Nigeria began experimenting federalism with three constituent units called regions at independence. In the Fourth Republic, Nigeria has 36 constituent units called states and 768 LGAs.[815] In addition to having many states and LGAs, the Fourth Republic operates centralized federalism, unlike the First Republic. Not only are these states and LGAs the creation of the federal government, but the powers of the states are also taken away with the proliferation of states and LGAs. This is compounded by a distribution of resources and opportunities from the center to the states. In this part, I explain why and how the military logic of centralization transformed the Nigerian federalism from decentralized or peripheral federalism to centralized federalism, and how legal syncretism explains this transformation.

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[812] The Constitution of Nigeria, s 232(1).
[813] The Constitution of South Africa, s 167.
[814] The Constitution of the Federal Democratic Republic of Ethiopia, article 62.
[815] The Constitution of Nigeria, s 3(1) & (6).

The fragmentation of the states in the Nigerian federation did not have a single explanation. In spite of this, the military and civilian rulers present the original logic of federalism, i.e. to hold the country together, as a dominant rationale for the creation of new states.[816] In this regard, the demands of ethnic minorities, the need to correct population and territorial imbalances among the three dominant regions, economic development and its concomitant consequence of distribution, and the quest to bring governance near to the people are the official explanations.[817] Among other state creation waves, the creation of the Mid-Western region in 1963 out of the Western region is the most associated with minority ethnic demands for self-government.[818] Indeed, minority ethnic groups in the Western region wanted their own state.[819]

Nonetheless, such demands for statehood were present both in the Northern and Eastern regions.[820] Out of the three regional political parties, the Action Group that was in charge of the Western region was even in favor of creating new states for ethnic minorities.[821] Due to the inter-political party competition and rivalry for dominance in the federation, the Northern People's Congress and National Council of Nigeria and Cameroon formed a coalition to diminish the political base of their rival by creating a fourth region out of it.[822]

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[816] Somide (n 713) 33.
[817] Rotimi T Suberu, 'The Struggle for New States in Nigeria, 1976-1990' (1991) 90 African Affairs 499, 499–503; Henry E Alapiki, 'State Creation in Nigeria: Failed Approaches to National Integration and Local Autonomy' (2005) 48 African Studies Review 49, 57–59.
[818] See RT Akinyele, 'States Creation in Nigeria: The Willink Report in Retrospect' (1996) 39 African Studies Review 2, 71-94.
[819] Suberu, *Federalism and Ethnic Conflict in Nigeria* (n 743) 82.
[820] ibid.
[821] Sklar (n 738).
[822] Diamond (n 731) 97.

Thus, the real reason for the creation of the Mid-Western region was more to destroy the Action Group than to recognize the right to self-government of ethnic minorities.[823]

The restructuring of Nigeria into 12 states was justified on grounds of avoiding any state domination by any other state either due to its population number or due to territorial size.[824] By trying to address the asymmetry that was implanted in Nigerian independence federal structure, the creation of new states was not only aimed to attract support for the federation against the secessionist demands of the Igbo, but also aimed to reduce the southern fear of Northern domination.[825] This restructuring was, in particular, fundamental in gaining the support of non-Igbo ethnic groups in the eastern region. The further fragmentation of the states was rationalized on grounds of economic development, social justice, interethnic balance and bringing in governance near to the people.[826] While these are the official explanations, the dual objective of broadcasting the federal government into the state and LGAs and the ambition of the governing regime of the time to boost its political base throughout the federation are the real drivers of state creation in Nigeria. Put differently, the unitary impulse of the Nigerian state and the domination syndrome of military and civilian elites are equally responsible for such fragmentation with the growing demand for new states by ethnic groups.[827]

Against one of the fundamental elements of federalism, the federal government created states and LGAs single-handedly. One of the defining features of federalism is the absence of

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[823] Suberu, *Federalism and Ethnic Conflict in Nigeria* (n 743) 83.
[824] ibid 86.
[825] ibid 88–89.
[826] ibid 90–103.
[827] Rotimi T Suberu, "States' Creation and the Political Economy of Nigerian Federalism" in Kunle Amuwo and others, *Federalism and Political Restructuring in Nigeria* (Spectrum Books 1998) 285.

a unilateral amendment of the constitution or alteration of the structures and powers provided in the constitution. In contrast with this, the federal military and civilian governments created states and LGAs.[828] For instance, as noted above the federal government created the Mid-Western region as a fourth region in 1963. After the end of the First Republic, the regions were further divided into 12 by Lieutenant-Colonel Gowon's military administration.[829] Brigadier Murtala Mohammed increased the number of states to 19.[830] During the Ibrahim Babangida administration, the number of states reached 30.[831] General Sani Abacha's regime added six new states and the number of states in the federation increased into the current 36.[832] Like states, LGAs are created by the federal government starting with 301 in 1976 and reached 768 in 1999.[833] The manner of creation of states and LGAs in Nigeria resembles an act of decentralization of a unitary state.

Beyond a centralized process of state and LGAs creation, the federal government centralized many of the powers of states. A comparison of the powers of states in the First Republic and in the Fourth Republic shows how Nigerian federalism changed from decentralized federalism to centralized federalism. In the first republic, the powers of the federal government were limited to national defense, foreign relations, currency, mines and minerals, and main transportation and communication services.[834] Higher education, industry and power development, the judiciary, the police, and regulation of labor, among

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[828] See Alapiki (n 817).
[829] Suberu, *Federalism and Ethnic Conflict in Nigeria* (n 743) 85.
[830] ibid 90.
[831] ibid 98.
[832] ibid 101.
[833] ibid 106.
[834] Kalu Ezera, *Constitutional Developments in Nigeria* (2nd ed, Cambridge University Press 1964) 266–269; John P Mackintosh, 'Federalism in Nigeria' (1962) 10 Political Studies 3, 223-247.

others, form the concurrent powers of the federal government and the regions.[835] Not only the regions had a residual power, but also they can pursue their own socio-economic development policies.[836] Related to this, a 50 percent revenue-allocation formula was adopted which enables regions to use half of the resources they mobilized and collected, and sharing the remaining half with others in the federation.[837] Moreover, they had their own regional constitutions and regional police force.[838] Further, the regional base of the political party system made crucial political power to be in the regions than in the center.[839] Because of this constitutional and political configuration, the regions were stronger than the center in operating Nigerian federalism in the First Republic.[840]

In the Fourth Republic, the nucleus of power changed from the regions to the center. The 1999 Constitution confers on the National Assembly to have legislative powers on 68 broad items known as the Exclusive Legislative List (ELL).[841] Moreover, the Constitution empowers the federal government to legislate on matters that are not included in the ELL but which are incidental and supplementary to any of the matters listed.[842] Among the ELL, the creation of states,[843] regulation of police,[844]and political parties[845] are included. Most importantly, oil exploration and natural gas, the main engines of the Nigerian economy, are

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[835] Suberu, 'Federalism and Decentralization' (n 72) 26; Brian Smith, 'Federal-State Relations in Nigeria' (1981) 80 African Affairs 355, 362.
[836] Adamolekun (n 745) 386.
[837] ibid.
[838] Eghosa E Osaghae, 'The Status of State Governments in Nigeria's Federalism: A Study of the Changing Phases' (1991) 52 The Indian Journal of Political Science 242, 244.
[839] ibid 186.
[840] Adamolekun (n 745) 387.
[841] The Constitution of Nigeria, s 4(2) (3) & (4).
[842] ibid Schedule II Part I Item 68.
[843] ibid Schedule II Part I Item 14.
[844] ibid Schedule II Part I Item 45.
[845] ibid Schedule II Part I Item 56.

the exclusive domain of the federal government.[846] Moreover, not only States operate under a single Constitution, they did not have Supreme Courts. States only have High Courts[847] in which their appeals go to the Court of Appeal,[848] which is second to the Supreme Court of Nigeria.

Furthermore, the establishment of presidentially controlled federal institutions or commissions strengthens the powers of the federal government over states.[849] For instance, the Independent National Electoral Commission has one Resident Electoral Commissioner in each state appointed by the president to organize, undertake, and supervise elections and monitor the operation of political parties in the states.[850] The National Judicial Council recommends the Governors of states on the appointment, removal, and disciplinary measures against state judges, in addition to collecting, controlling, and disbursing money for the judiciary throughout the federation.[851] In a similar vein, the Revenue Mobilization Allocation and Fiscal Commission whose members are appointed by the president determine the remuneration for political office holders at the state level and advise states on fiscal matters.[852]

In addition, the constitutionalization of LGAs and the allocation of federal funds for their operation and function further diminish the autonomy of states. LGAs have the power to "the making of recommendations to a State commission on economic planning or any similar body on the economic development of a State , collection of rates, radio and television

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[846] ibid Schedule II Part I Item 39.
[847] ibid s 270 (1).
[848] ibid s 240.
[849] Rotimi Suberu, 'Managing Constitutional Change in the Nigerian Federation' (2015) 45 Publius: The Journal of Federalism 552, 558.
[850] The Constitution of Nigeria, Schedule III Part I 14.
[851] ibid Schedule III Part I 21(c) & (d).
[852] ibid Schedule III Part I 31 & 32.

licenses, establishment and maintenance of slaughterhouses, construction and maintenance of public facilities such as roads, control and regulation of outdoor advertising, sale of liquors, shops and kiosks, restaurants and bakeries, provision and maintenance of public swage and refuse disposal," among others, and participate in the governance of the State on matters related to education, agriculture, natural resources, and health services.[853] For this purpose, the Constitution allocates them a federal budget which is payable through the states from the State Joint Local Government Account.[854] The introduction of the three-tiered government structure reduced the power and autonomy of states from above and from below although, in practice, LGAs struggle to maintain their constitutional standing from the states and the federal government.[855]

This centralized federalism is also accompanied by distributive federalism. The central logic of distributive federalism is to ensure "equitable" sharing of resources and opportunities to the ethnonational and religious units of the federation. This is what is usually known as "the cake sharing" syndrome in Nigerian politics.[856] Oil revenue sharing is the central orbit of distributive federalism. 90% of public revenues and foreign exchange earnings of Nigeria is derived from the Niger Delta oil wealth.[857] This revenue is distributed vertically among the three tiers of government and horizontally among states and LGAs from the Federation

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[853] ibid Schedule IV 1 & 2.
[854] ibid s 162 (5), (6) & (7).
[855] Ozy B Orluwene, 'Constitutional Provisions and Challenges to Local Government Administration in Nigeria' (2008) 14 The Nigerian Academic Forum: A Multi-Disciplinary Journal 3, 67-69; Okey Marcellus Ikeanyibe, 'Uniformity in Local Government System and the Governance Model in Nigeria' (2016) Journal of Asian and African Studies, 1-15 (discussing how the centralization of the functions and forms of Local Government Areas affect their local performance).
[856] Felix Asogwa and FO Fagbohum, 'Revenue Determination and Political Conflict in a Federal State: The Nigerian Experience' in A Sat Obiyan and Kunle Amuwo, *Nigeria's Democratic Experience in the Fourth Republic Since 1999: Policies and Politics* (Rowman & Littlefield 2013) 210.
[857] Rotimi Suberu, 'The Nigerian Federal System: Performance, Problems and Prospects' (2010) 28 Journal of Contemporary African Studies 459, 467.

Account.[858] Only 13% of the revenue from oil or other natural resources will go to the states of derivation and is exempt from such distribution.[859]

Moreover, the Federal Character Principle is another means of distributive federalism in Nigeria. As one core of the Directive Principles of State Policy, this principle prescribes the following:

> The composition of the Government of the Federation or any of its agencies and the conduct of its affairs shall be carried out in such a manner as to reflect the federal character of Nigeria and the need to promote national unity, and also to command national loyalty, thereby ensuring that there shall be no predominance of persons from a few State or from a few ethnic or other sectional groups in that Government or in any of its agencies.[860]

To this effect, a National Character Commission is established to look after the compliance of this principle.[861] The gist of the Federal Character Principle is to ensure that all Nigerians are equitably and proportionally represented in all posts and positions in government such as public service, army, police, and bureaucracy. Beyond government posts and offices, the Federal Character Principle makes an obligation for political parties to reflect the federal character of Nigeria in their executive committee or governing bodies.[862] Not only does the Constitution ban ethnic-based political organizations, but it also enshrines the federal character principle in party organizations so that the government political parties' form will reflect the federal character of Nigeria. Thus, in addition to the government, the political party system, in turn, is a distribution mechanism in the Nigerian federalism.[863]

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[858] The Constitution of Nigeria, s 162(3).
[859] ibid s 162(2).
[860] ibid s 14 (3).
[861] ibid Third Schedule, Part I(c).
[862] ibid s 223 (1) (b).
[863] JAA Ayoade, 'The Federal Character Principle and the Search for National Integration' in Kunle Amuwo and others, *Federalism and Political Restructuring in Nigeria* (Spectrum Books 1998) 101–117; Suberu, *Federalism and Ethnic Conflict in Nigeria* (n 743) 111–138.

Hence, the change from decentralized federalism into a centralized one with a distributive feature is a result of legal syncretism. This is because the federal idea is considered essential if the Nigerian state is to exist in its current form. However, the practice of federalism as designed in the First Republic or along the general practices of classic federalism like the United States or Canada did not work for or interest the Nigerian political and military elites. At the same time, the abrogation of the federal idea and the installation of a unitary state proved to be a failure. As a result, what the military and civilian leaders did were to reinterpret the federal idea and reconfigure it to broadcast the ethnonational and religious interests in the systems of shared rule and self-rule. To this end, Nigerian federalism blends unitary principles and practices along with the military logic of centralization with the federal spirit at its core in its design and operation. Without accounting for these, one should be hard pressed to understand and, at one's own peril, explain Nigerian federalism.

B. Ethiopia: Ethnic Federalism

Ethiopia, like Nigeria, *albeit* in a different context and form, along with the unitary impulse configures federalism with ethnicity and socialist ideology. The uniqueness of the Ethiopian federal system lies in how legal syncretism animates and structures its design and operation. On the one hand, there is a need to maintain the unity of the Ethiopian state, and on the other, there is an ambition to channel ethnonational ambitions and interests in the state. Unlike classic federal states, this context situates ethnicity at the center of the federal spirit in Ethiopia.

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As noted in the previous discussion, the introduction of ethnic federalism in Ethiopia is a metamorphosis of Marxist-Leninist political ideology to address the equal rights and concerns of Ethiopia's multi-ethnic and multi-lingual communities on its face, on the one hand, and is a mechanism of broadcasting the political ambitions of the ethnonational forces that defeated the military regime in a seemingly liberal constitutional order, on the other. As the discussion here demonstrates, ethnic federalism is the syncretic result of socialist and Ethiopian indigenous norms of political organization in a constitutional framework. Although the adoption of ethnic federalism based on the recognition of the right to self-determination including an unconditional right of secession of ethnic groups, known as Nations, Nationalities and People's (NNPs), is radical and has no comparator in Africa, its design reinforces centralized federalism. Even more, the practice resembles a unitary decentralization with an ethnic flavor.

The normative innovations and institutional configurations of the 1995 Ethiopian Constitution are shaped by the quest to address the issue of ethnicity.[864] Ethnicity animates the very foundation of the constitutional order.[865] Ranging from the preamble to the basic principles of the Constitution including the Bill of Rights to the structural parts of the Constitution speaks about the primacy of ethnicity. The preamble of the Constitution begins with "[w]e, the Nations, Nationalities and Peoples of Ethiopia" unlike the Nigerian Constitution, and for that matter unlike many other constitutions in the world, which begins with "[w]e the people." Not only does this articulation of the Constitution presuppose the

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[864] See also Kidane Mengisteab, 'New Approaches to State Building in Africa: The Case of Ethiopia's Ethnic-Based Federalism' (1997) 40 African Studies Review 3, 111-132.
[865] See Jon Abbink, 'Ethnicity and Constitutionalism in Contemporary Ethiopia' (1997) 41 Journal of African Law 2, 159-174.

existence of multiple *demos,* but it also essentially requires every Ethiopian to be a member of one of the ethnic groups. [866] By using their right to self-determination, NNPs agreed to form one political and economic community known as the Federal Democratic Republic of Ethiopia based on the ideals of rule of law, peace, and democracy.[867] The preamble further provides that *the achievement of these ideals by the NNPs require "the full respect for individual and people's fundamental freedoms and rights."* Unlike Nigeria, the preamble of the Ethiopian Constitution envisions ethnic rather than territorial federalism and multiple *demos* than a *demo*.[868] This is because, as Nahum observes, ethnic groups are the founding units of the federation.[869]

NNPs are not only authors of the Constitution, they are also custodians of the sovereign power. Article 8 provides that sovereignty reside in NNPs and the "Constitution is an expression of their sovereignty." Even if NNPs are authors of and sovereigns in the constitutional order, article 39(5) defines them in the following way;

> A "Nation, Nationality or People" for the purpose of this Constitution, is a group of people who have or share a large measure of a common culture or similar customs, mutual intelligibility of language, belief in a common or related identities, a common psychological make-up, and who inhabit an identifiable, predominantly contiguous territory.

Although there is neither a difference in meaning, nor a hierarchy among the NNPs, they are corporate indivisible entities bestowed with equal sovereign power.[870] Moreover, they are

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[866] Nahum (n 750) 51–52; See Berihun Adugna Gebeye, 'Toward Making a Proper Space for the Individual in the Ethiopian Constitution' (2017) 18 Human Rights Review 4, 439-458.
[867] The Constitution of the Federal Democratic Republic of Ethiopia, article 1.
[868] See also Jan Erk, '"Nations, Nationalities, and Peoples": The Ethnopolitics of Ethnofederalism in Ethiopia' (2017) 16 Ethnopolitics 3, 219-231.
[869] Nahum (n 750) 52.
[870] Abbink, 'Ethnicity and Constitutionalism in Contemporary Ethiopia' (n 865) 166.

endowed with a right of exit from the Ethiopian state whenever they wish so.[871] Article 39(1) states that "[e]very Nation, Nationality and People in Ethiopia has an unconditional right to self- determination, including the right to secession." Although the procedure of secession is not easy,[872] any justification or rationale for it is not required if any of the NNPs so required. Unlike Nigeria which builds its federal system on the indivisibility of the state, Ethiopia establishes its federalism on the recognition of its disintegration if it is needed.[873] Even though the recognition of the right to secession is at odds with the very idea of the constitution as a pre-commitment device, Ethiopia opts to install its federal system based on this normative commitment.[874]

Precisely because of this normative commitment, ethnicity is the primary means of delimiting the units of the federation. Article 46(1) stipulates that "[s]tates shall be delimited on the basis of settlement patterns, language, identity and consent of the people concerned." Based on this formula, article 47 lists down the State of Tigray, Afar, Amhara, Oromia, Somalia, Benshangul/Gumuz, Southern Nations, Nationalities and Peoples, Gambela, and Harari as member states of the Federal Democratic Republic of Ethiopia. Except for the Southern Nations, Nationalities and Peoples state, the rest of the states are named by the major ethnic group they host. Accordingly, ethnic groups are supposed to exercise self-government within their own respective states and shared government at the federal level.

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[871] For details see Alem Habtu, 'Multiethnic Federalism in Ethiopia: A Study of the Secession Clause in the Constitution' (2005) 35 Publius: The Journal of Federalism 2, 313-335.
[872] The Constitution of the Federal Democratic Republic of Ethiopia, article 39(4).
[873] See John M Cohen, '"Ethnic Federalism" in Ethiopia' (1995) 2 Northeast African Studies 157, 158. Because of the constitutional recognition of "self-destruction", Cohen considers the Ethiopian system as one of confederation than a federation.
[874] Alemante G Selassie, 'Ethnic Identity and Constitutional Design for Africa' (1992) 29 Stan J Int'l L 1, 47–49; Cass R Sunstein, 'Constitutionalism and Secession' (1991) 58 The University of Chicago Law Review 633; Whittington (n 129) 281–298. The idea of constitution as a pre-commitment device is the main pillar of the conceptual constitutionalism literature.

Although Ethiopia is composed of more than 80 ethnic and linguistic groups, they live within nine states. This means that not every ethnic group gets its own state. Indeed, many of the ethnic groups are lumped together under the Southern Nations, Nationalities and Peoples state and other states also host many minority ethnic groups.[875] Article 46(2), in recognition of this fact, entitles every NNPs living in the nine states for the establishment of their own states at any time if there is a demand. Although unlike Nigeria a new state has not yet created, some ethnic groups such as *Silte* managed to establish their own zonal, district (*woreda*), and local (*kebele*) administrations within the existing states.[876]

Further, NNPs are also umpires of the federal system. Unlike Nigeria, which bestows upon the Supreme Court with the power of judicial review, or South Africa, which establishes a Constitutional Court, Ethiopia confers the power of constitutional interpretation to HoF with the assistance of a legal expert body called the Council of Constitutional Inquiry (CCI).[877] Although there were proposals for judicial review and for the establishment of a constitutional court, the EPRDF rejected these proposals.[878] As the main objective of the Constitution was to address the ethnicity issue, it was argued, giving ultimate power to judges to decide on the fate of ethnic groups was not appropriate.[879] Accordingly, the HoF, which is composed of the representatives of all ethnic groups and extra one additional representative

[875] The notable exception is the state of Harari that is named after the Harari ethnic group which constitutes 1/7 of the population of the Harari state.
[876] Asnake Kefale, *Federalism and Ethnic Conflict in Ethiopia: A Comparative Regional Study* (Routledge 2013) 52.
[877] The Constitution of the Federal Democratic Republic of Ethiopia, article 62 & 82.
[878] Gedion Hessebon and Abduletif Idris, 'The Supreme Court of Ethiopia: Federalism's Bystander' in Nicholas Theodore Aroney and John Kincaid, *Courts in Federal Countries: Federalists or Unitarists?* (University of Toronto Press 2017) 181.
[879] See Getachew Assefa, 'All about Words: Discovering the Intention of the Makers of the Ethiopian Constitution on the Scope and Meaning of Constitutional Interpretation' (2010) 24 Journal of Ethiopian Law 139-169; Yonatan Tesfaye Fessha, 'Judicial Review and Democracy: A Normative Discourse on the (Novel) Ethiopian Approach to Constitutional Review' (2006) 14 African Journal of International and Comparative Law 53.

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for each one million population, was considered best suited to do the constitutional interpretation.[880] Members of the HoF are chosen by the State Councils- the legislative bodies of the regional states – or directly by the ethnic group concerned.[881] By establishing the CCI as an expert body that can give legal assistance to the HoF, Ethiopia chooses an ethnic political body to umpire the operation of its federal system. As a result, the ethnic groups via the HoF are the ones who have the final say on what the Constitution ultimately means.

The configuration of ethnic federalism with the above normative and institutional setups, indeed, gives the impression and façade that Ethiopia is transformed from "a prison house of nationalities" to "a freedom house of nationalities." Despite the laudable autonomy and freedom that can be heard from afar, ethnic federalism institutionalizes the centralizing impulses of the Ethiopian state in the design and operation of the federation. Although unlike Nigeria, states have their own constitution, Supreme Court, and regional police force in Ethiopia,[882] important government functions and prerogatives are the mandates of the federal government. In addition to the list of 21 broad items such as national defense, foreign affairs, financial and monetary matters, transportation, health, education, science and technology, and land and natural resources as the exclusive legislative list of the federal government,[883] the Constitution empowers the federal government to formulate and implement the country's overall socio-economic and development policies, plans, and strategies.[884] This gives the federal government a wider power in implementing uniform socio-economic and development policies in the country and consequently shrinks the autonomy of regional states

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[880] The Constitution of the Federal Democratic Republic of Ethiopia, article 61 (1) & (2).
[881] ibid article 61(3).
[882] ibid articles 50(7), 52 (2(b &g) & 78 (3).
[883] ibid article 51.
[884] ibid article 51(1).

in pursuing their own development policy. Even if states have residual powers and the Constitution specifically mentions the power of states to formulate and execute their own socio-economic and development policies, these should not be against the policy framework of the federal government.[885] Further, states are only empowered to administer land, the key livelihood for more than 80% of the population in Ethiopia, and other natural resources in accordance with federal laws.[886] Thus, the division of power between the two tiers of government is not consistent with the laudable affirmation and recognition of the right to self-determination including secession.

The power and autonomy of states are further diminished by the adoption of a unicameral legislative organ. The House of Peoples' Representatives (HPR), the lower house of parliament, is the sole legislative body of the federal government.[887] Unlike the case with a federal legislature elsewhere[888] which adopts a bicameral legislative body composed of the Senate, representing the interests of the states, and House of Representatives, representing the interests of the general public, in the legislative process, Ethiopia does not confer a legislative mandate to the HoF. As noted above, the main function of the HoF is constitutional interpretation. As the people in direct and universal suffrage elect members of HPR, they are responsible to their constituency.[889] Although 20 seats out of 550 are allocated for minority nationalities, states as such do not have a representative in the legislative process.[890] Because of this, article 8 of the Constitution that bestows sovereignty on NNPs did not get a

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[885] ibid article 52(1) & (2(c)).
[886] ibid article 52 (2(d)).
[887] ibid article 55(1).
[888] See Meg Russell, 'The Territorial Role of Second Chambers' (2001) 7 The Journal of Legislative Studies 105-118.
[889] The Constitution of the Federal Democratic Republic of Ethiopia, article 54(1) & (2).
[890] ibid article 54(3).

meaningful expression in the architecture of the legislative process. Moreover, the fact that the HPR, and not the HoF, is the highest authority of the federal government means that the *Ethiopian People* in the singular are holders of the highest power.[891] Although the Constitution assures the equality of states, the Amhara and Oromia states, given their population number, form a democratic majority in the HPR, put others in a perpetual minority in the legislative process.[892] This, in turn, channels majority rule and assimilationist legislative process in the operation of the federation.

In addition, the control of the major revenue sources by the federal government limits the autonomy of states in executing the constitutionally allocated powers and responsibilities.[893] The major source of revenue for the states comes from low taxes bases such as from state and private employees, individual farmers, and cooperatives.[894] The fiscal centralization makes states dependent on the federal government for their financial expenditures in operating their government and administration.[895]

When the constitutional design is seen in light of the prevailing constitutional practice, the intermingling of socialist ideologies with the centralizing impulses and practices of the Ethiopian state become more apparent.[896] The political ideologies and practices of the EPRDF cripple the autonomy of states even more in practice.[897] The ideology of

[891] ibid article 50(3).
[892] ibid article 47(4).
[893] ibid article 96; Fessha and Kirkby (n 4) 262; See also Edmond Keller, 'Ethnic Federalism, Fiscal Reform, Development and Democracy in Ethiopia' (2002) 7 African Journal of Political Science / Revue Africaine de Science Politique 1, 21-50.
[894] The Constitution of the Federal Democratic Republic of Ethiopia, article 97; See also Eshetu Chole, 'Opening Pandora's Box: Preliminary Notes on Fiscal Decentralization in Contemporary Ethiopia' (1994) 1 Northeast African Studies 1, 7-30.
[895] See Solomon Negussie, *Fiscal Federalism in the Ethiopian Ethnic-Based Federal System* (Wolf Legal Publishers 2006).
[896] See Abebe (n 774).
[897] See Abbink (n 781); Fiseha (781).

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revolutionary democracy,[898] the principle of democratic centralism, the party rules on criticism and self-criticism (*gimgema*), and the ushering in of the developmental state[899] have changed the federal state structure to a *de facto* unitary state. The EPRDF has been the primary producer of the country's socio-economic and political development policies, which states have to implement them as centrally planned.[900] In this respect, the inauguration of a Growth and Transformation Plan every five years is a fine example of how the autonomy of states is limited in following and implementing their own development plan. The lack of appetite of the EPRDF for different policy implementation or even contextualization, on the one hand, and the political cost of states (and their leaders) in pursuing their own policy, on the other, make the constitutional right to self-determination including secession a mockery.[901]

Thus, the fundamental elements of federalism in Ethiopia are blended with diverse normative sources. On the one hand, the concept of nationalities and their fundamental right of self-determination up to secession is the result of the migration of Marxist-Leninist ideologies to the Ethiopian political scene. On the other hand, building on the concept of nationalities, the Ethiopian Constitution adds the concept of "nation and people" to *describe and transform* the country's multi-ethnic and multi-lingual communities to corporate democratic actors and homages of political identities.[902] Further, inspired by the country's

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[898] See Tobias Hagmann and Jon Abbink, 'Twenty Years of Revolutionary Democratic Ethiopia, 1991 to 2011' (2011) 5 Journal of Eastern African Studies 4, 579-595; Jean-Nicolas Bach, 'Abyotawi Democracy: Neither Revolutionary nor Democratic, a Critical Review of EPRDF's Conception of Revolutionary Democracy in Post-1991 Ethiopia' (2011) 5 Journal of Eastern African Studies 4, 641-663.
[899] See Christopher Clapham, 'The Ethiopian Developmental State' (2018) 39 Third World Quarterly 6, 1151-1165.
[900] Aaron Tesfaye, *State and Economic Development in Africa: The Case of Ethiopia* (Palgrave Macmillan 2017) 54–59.
[901] See Theodore M Vestal, *Ethiopia: A Post-Cold War African State* (Praeger 1999); Bach (n 898).
[902] Jon Abbink, 'The Ethiopian Second Republic and the Fragile "Social Contract"' (2009) 44 Africa Spectrum 3, 10.

regional and provincial administrative setups, the Constitution grants "a freedom house" to the ethnic groups in places they live.[903]

Although the current delimitation of states and other lower administrative units are not similar to the previous regional or provincial administrative organizations, with the exception of the ethnic nomenclature, its restructuring is not entirely novel or devoid of the influence of the past.[904] For the same reason, the reconfiguration of centralized federalism in design and more importantly in practice is also shaped by the Ethiopian tradition of centralization and the influence of the Marxist-Leninist party organization of the EPRDF. Like former socialist federations of the USSR, Czechoslovakia, and Yugoslavia which recognized the right to self-determination up to secession of nationalities, and seemingly recognize the autonomy of subnational units in their constitutions, but denied such autonomy in practice through the vanguard party rules and ideologies, the EPRDF partly constitutionalizes centralized federalism and in practice turns it to somehow unitary decentralization.[905] Like Nigeria, it is extremely difficult to understand and appreciate the Ethiopian federalism without accounting legal syncretism.

C. South Africa: Cooperative Government

South Africa establishes cooperative government drawing from the German experience of integrated federalism and building on the value systems of Ubuntu within the general unitary impulse as in Nigeria and Ethiopia. The South African choice of cooperative government is

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[903] See also Alem Habtu, 'Ethnic Pluralism as an Organizing Principle of the Ethiopian Federation' (2004) 28 Dialectical Anthropology 2, 91-123.
[904] Assefa Fiseha, *Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study* (Wolf Legal 2006) 11; Tareke (n 226) 36.
[905] Abebe (n 774) 52–54.

a result of a compromise for a peaceful negotiated transition that aimed at accommodating ethnic and racial demands in the new democratic dispensation. Nonetheless, once the institutional relevance of federalism is agreed by the negotiating parties, unlike Nigeria and Ethiopia, federalism is tasked with the purpose of ensuring democracy, development, and government efficiency. Inherent in the transformation of federalism as a peacemaking and accommodative device to a transformative and developmental tool in the final Constitution is a piece of evidence to the *acceptance* of democratic and human rights ideals by South African constitutional actors, in particular, by the ANC, unlike Nigeria and Ethiopia. As discussed above, in Nigeria and Ethiopia federalism is *accepted* as an accommodative device and *maintained* for the same purpose. Precisely because of the change in federalism's purpose in the final Constitution, the debate in South Africa is whether federalism helped to advance the cause of democracy, development, and government efficiency. Nonetheless, like Nigeria and Ethiopia, federalism in South Africa is a blend of diverse normative values accompanied by a unitary impulse.

As the transformation of South Africa from a racial to a non-racial and inclusive society was the main driving force during the constitutional negotiations, the constitutional actors investigated institutional mechanisms that can be deployed for this purpose. As their Ethiopian counterparts looked into former socialist federations to draw a lesson for the nationality question, the South Africans borrowed from the federal experience of Germany on how to use institutional mechanisms in a transformative way. The federal design in Germany institutionalizes consensus building and cooperative behavior within the tiers of

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government.[906] For this purpose, it confers limited exclusive domains while leaving much of governmental responsibilities to the shared and joint prerogatives of the federal government and the Länder.[907] Further, federal laws prevail over Länder laws to protect the interest of other Länder and to maintain the legal and economic unity of the federation.[908] This cooperative federalism interests the constitutional negotiators, especially the ANC, to build a multilevel-government system that works based on consensus and cooperation, and in times of conflict assure the primacy of the national government.

Drawing from the German experience of integrated federalism and building on the value systems of Ubuntu,[909] South Africa established a three-tiered sphere of cooperative government. Section 40(1) of the Constitution provides that "[i]n the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated." Unlike Nigeria, in the First Republic, and Ethiopia, South Africa constituted nine provinces based on non-ethnic, non-racial or non-linguistic grounds.[910] It founded the republic based on the ideas of democratic values, social justice, and fundamental human rights "to all who live in it" as stated in the preamble of the Constitution. Section 41 outlines the principles of cooperative government among which include, 'to preserve peace, national unity, security, effective, transparent and coherent government as a whole' within their own sphere, on the one hand, and 'fostering friendly relations, assisting and supporting one another, cooperation on matters of common interest, and avoiding legal

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[906] Richard Simeon, 'Considerations on the Design of Federations: The South African Constitution in Comparative Context' (1998) 13 South Africa Public Law 42, 56.
[907] ibid 56–58.
[908] ibid 56, see also the Basic Law of Germany 1949, article 31.
[909] Simeon (n 906) 60.
[910] South African Constitution, sec 103 (1); Christina Murray and Richard Simeon, 'Promises Unmet: Multilevel Government in South Africa' in Rekha Saxena (ed), *Varieties of Federal Governance: Major Contemporary Debates* (Cambridge University Press 2011) 238.

proceedings' in intergovernmental relations, on the other. There is a phenomenological similarity between Ubuntu and these principles of cooperative government, as consensus and cooperation are the central ethos of Ubuntu.[911] Moreover, following the ethos of Ubuntu, sec 76(1)(d) of the Constitution requires the establishment of a Mediation Committee to solve intergovernmental disagreements.

The unitary impulse, as in Nigeria and Ethiopia, is evident in Schedule 4 and 5 of the Constitution that lists areas of concurrent and exclusive jurisdiction among the spheres of government respectively. The functional areas of concurrent jurisdiction are numerous while the exclusive domain for the provinces and local government are limited. For instance, provinces are given exclusive jurisdiction only on 'abattoirs, ambulance services, archives, museums, libraries other than the national ones, liquor services, provincial planning, provincial road, traffic, cultural, sport, recreation and amenities, and veterinary services excluding the regulation of the profession.'[912] South Africa, like Nigeria, centralizes judicial power and the police force. The limited legislative and administrative space for the provinces in South Africa makes its federal system very centralized even more than Nigeria and Ethiopia.

While the Constitution establishes the NCOP as a guardian for provincial interests, its power and influence in the national legislative process are contingent upon the subject matter under consideration. Concerning Bills that amend the Constitution and affect the interest of the provinces, the NCOP is given an important power to defend provincial interests as the

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[911] For the place and role of Ubuntu in the Constitution, see JY Makgoro, 'Ubuntu and the Law in South Africa' (1998) 1 Potchefstroom Electronic Law Journal 1, 1-11.
[912] The Constitution of South Africa, Schedule 5 Part A.

support of two-thirds of the provinces is required.[913] While for a bill affecting provincial interests to pass the NCOP must agree.[914] Other than these, including money bills, the National Assembly can pass a bill on its own.[915] Also, the national legislature overrides provincial legislatures even on matters exclusively assigned to the provinces.[916] Thus, unlike the Senate in Nigeria, the NCOP in South Africa has a differentiated role and influence in the national legislative process. As a result, the national legislature has an overriding power within the multi-sphere government system.

The limited legislative and administrative mandates for the provinces in South Africa are further reduced by the centralized fiscal federalism. Not only do provinces have limited tax base to finance their operation, but also these tax bases are not immune from national regulation. For instance, provinces can impose "taxes, levies and duties other than income tax, value-added tax, general sales tax, rates on property or customs duties" and "flat-rate surcharges on any tax, levy or duty that is imposed by national legislation, other than on corporate income tax, value-added tax, rates on property or customs duties."[917] However, the national parliament is given the mandate to ensure that provinces legislate in a manner not materially and unreasonably affecting national economic policies and activities.[918] The combination of limited legislative and administrative mandates coupled with financial dependability on the national government has reduced the capability of provinces to execute their prerogatives and hindered the experimentation of provincial policy choices in the

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[913] ibid s 74(1)(b).
[914] ibid *s* 76(1)(a).
[915] ibid ss 75 (2) & 75(1) (c) (i).
[916] ibid ss 146-148; see also Murray and Simeon (n 910) 237; Ziyad Motala and Cyril Ramaphosa, *Constitutional Law: Analysis and Cases* (Oxford University Press 2002) 153–158.
[917] The Constitution of South Africa, s 228(1).
[918] ibid s 228(2).

scheme of multi-sphere government.[919] Indeed, this fact has ignited a debate on the role and utility of provinces in South African federalism, including by the ANC.[920]

The Constitution both enables local government to share power with the national and provincial governments as stated in part B of Schedule 4 and 5, and it also defines their purpose. Local governments are constitutionalized with the objective to provide democratic and accountable government, promote socio-economic development, protect the safety of the environment, and ensure service delivery.[921] In addition to the national financial support, the Constitution gives local government taxing power "on property and surcharges on fees for services provided by or on behalf of the municipality" and "other taxes, levies and duties appropriate to local government or to the category of local government" when authorized by national legislation.[922] Although local government is subject to supervision by both the national and provincial governments, the Constitution considers it as a transformative and developmental institutional setup.[923] However, as the case with the provinces, the national government has the overriding power even on matters exclusively given to the local

[919] Nico Steytler, 'Co-operative and Coercive Models of Intergovernmental Relations: A South African Case Study' in Thomas J Courchene and others, *The Federal Idea: Essays in Honour of Ronald L Watts* (The McGill-Queen's University Press 2011) 420–425.
[920] See Tom Lodge, 'Provincial Government and State Authority in South Africa' (2005) 31 Journal of Southern African Studies 4, 737-753 (noting that despite their shortcomings, provinces proved to be helpful in exercising political authority at subnational level); Simeon and Murray (n 787) (discussing the ANC's assessment on provinces and showing its preference to strengthening local government while questioning the relevance of provinces); Klug (n 782) 282.
[921] The Constitution of South Africa, ss 152 & 153.
[922] ibid s 229 (1).
[923] See Rudolf Mastenbroek and Nico Steytler, 'Local Government and Development: The New Constitutional Enterprise' (1997) 1 Law, Democracy and Development 233-250; Christopher Pycroft, 'Democracy and Delivery: The Rationalization of Local Government in South Africa' (2000) 66 International Review of Administrative Sciences 1, 143-159.

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government.[924] Thus, local government can also be another arm of the national government as in Nigeria.[925]

Hence, the blend of federalism with diverse normative sources transformed the identity of federalism in South Africa. Like Nigeria and Ethiopia, some of the fundamental elements of federalism are transformed in the configuration of cooperative government. Although there are differences in the deployment of federalism at different stages of the constitution-making process in South Africa, on the one hand, and in Nigeria and Ethiopia, on the other, legal syncretism is the central feature of all of them. The syncretic configurations, as in Nigeria and Ethiopia, have brought a unique institutional setup to the experimentation of federalism in South Africa. Without a proper understanding and appreciation of these unique features, it is difficult to understand and explain the South African federal experiment through classic federal theory.

4.5 The Performance of Federalism in Nigeria, Ethiopia, and South Africa

Without a doubt, the standards of assessment are equally important as the assessment of federalism itself. As there are syncretic configurations between federal theory and federalism in Africa, the standards of assessment in federal theory are neither adequate nor totally irrelevant for Africa. To the extent that convergence exists in forms, structures, and discursive practices, the tools of assessment in these respects can be deployed. Accordingly, the standards of longevity or durability of the federal system and the desire of the citizenry and

[924] Nico Steyler, 'Local Government in South Africa: Entrenching Decentralized Government' Nico Steytler (ed), *The Place and Role of Local Government in Federal Systems* (Konrad-Adenauer-Stiftung 2005) 183–212.
[925] See Murray and Simeon (n 910).

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the political class to the federal system can be standards of assessment. On these counts, federalism in Nigeria, Ethiopia, and South Africa is a success. This is because the federal system in Nigeria exists since independence and there is a general desire for its continuity from citizens and politicians alike. Similarly, the federal system in Ethiopia exists since its first installation and will likely continue for the foreseeable future given the commitment of citizens and politicians to the federal spirit. By the same token, the South African federalism is a success not only because it exists, but also there is a support for its continuity.[926]

With respect to the achievements of the original objectives of federalism, however, the standards of assessment in classic federal theory will be of little help. As the syncretic incorporations give federalism a different purpose and function, these elements should be accounted in its assessment. Consequently, the principal objective against which federalism is assessed in Africa is not the achievement of democratic government, individual liberty or economic prosperity, but the maintenance of territorial integrity and the accommodation of ethnonational and religious diversity. Democratic government, respect for human rights, and economic development are dividends rather than the original objectives of federalism in Africa. Precisely because of this, federalism's continuous viability is neither contingent upon the existence of a democratic system that respects human rights and delivers economic development nor is the impracticality of liberal democracy evidence of its failure. In these respects, the African experiment of federalism presents a paradox that cannot be explained by classic federal theory for it holds that the existence of liberal democracy and constitutionalism are essential requirements for its success.

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[926] ibid 245–246.

Nigeria is a fine example to demonstrate this paradox. Federalism has operated in Nigeria both in civil and military regimes. Indeed, much of Nigeria's post-independence period was under military rule and the military was the main architect of the present Constitution. By definition, military rule is in contradiction with constitutional government and liberal democracy as it installs itself with the displacement of constitutional rules and liberal democratic norms. Yet, Nigerian military rulers respected and protected the federal logic like their civilian counterparts, the difference is one of style and structure of administration.[927] Even after the transition to democracy, the performance of Nigeria with respect to democracy, human rights, and constitutionalism is poor.[928]

By the same token, Ethiopia's federalism, as a matter of fact, has operated in a single party system run by the Ethiopian People's Revolutionary Democratic Front (EPRDF) with a blatant disregard of the Constitution and rejection of liberal democracy. While the Constitution has been often cited as a justification for the authoritarian and undemocratic actions of the EPRDF, its leading ideology of revolutionary democracy and the party practice of democratic centralism have played the real constitutional function in practice. Since the introduction of ethnic federalism, multi-party democracy, respect for human rights, and constitutionalism have been put aside and given way to the emergence of the EPRDF as the only viable political party in the country. Unsurprisingly, Ethiopia scores very low on democracy, human rights, and constitutionalism even compared with other African countries.[929] While years of protest movements against such authoritarian regime have

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[927] J Isawa Elaigwu, 'Nigerian Federalism under Civilian and Military Regimes' (1988) 18:1 Publius: The Journal of Federalism 173, 173.
[928] The Economist Intelligence Unit's Democracy Index, 'EIU Democracy Index 2017' <https://infographicseconomistcom/2018/DemocracyIndex/> accessed 28 December 2018.
[929] ibid.

brought change in persons of the government and the party recently, the practice of constitutionalism and liberal democracy are yet to be seen. Regardless, federalism is to stay if the country is to remain united.

The genius of federalism in Nigeria and Ethiopia is its ability to operate in the absence of liberal constitutionalism. In so far as the governance system accommodates ethnonational and religious interests at the national and subnational levels, the theory of government, be it civil/military or democratic/undemocratic, becomes either a secondary consideration or a matter of style or form informed by the dynamics of internal and international politics. Despite the existence of ethnonational and religious tensions and agitations, the governing elites in Nigeria and Ethiopia are aware of the benefits and costs of accommodation and integration and they try to be inclusive to the extent possible, *albeit* to different degrees, to make governmentality possible. Consequently, federalism exists and performs its accommodative and integrative function without constitutionalism and liberal democracy in Nigeria and Ethiopia.

Although South Africa introduced federalism as an accommodative and peacemaking device, it is part of a broader constitutional dispensation toward a post-apartheid and post-racial society. As such, like any other feature of the Constitution, federalism is fundamentally tied to the ideals of democratic values, social justice, and human rights. In particular, section 152 and 153 of the Constitution specify the purposes of local government expressly as the provision of democratic and accountable government, the promotion of socio-economic development, the protection of the safety of the environment, and the performance of service delivery. By doing so, South Africa, unlike Nigeria and Ethiopia, adds a democratic, human rights, and economic development task to federalism. As an accommodative and

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peacemaking device, federalism has enabled South Africa to transit from apartheid to democracy. In its classic tasks, federalism has been able to bring government closer to the people and ensure public participation in government, while unable to improve the economic well-being of the poor majority.[930] For its good democratic and governance performance, the practice of constitutionalism and liberal democracy have a great contribution, without which self-government and participation in local government would have been wishful thinking like Nigeria and Ethiopia.

Thus, the inability of federalism to deliver constitutional democracy in Nigeria and Ethiopia does not make it a failure. Indeed, federalism succeeds in maintaining the unity and territorial integrity of these states. It has provided the normative appeal and the institutional architecture to channel, accommodate, and integrate diverse interests and ambitions within a single state. Nonetheless, if federalism has to bring constitutional democracy, it should be given such tasks along with its holding-together function as in South Africa and other classic federal states. To this end, in addition to the corporate ethnonational and elite interests, democratic values, human rights, and constitutionalism considerations should animate the normative and institutional frameworks of both self-rule and shared rule. As federalism is incorporated with syncretic elements, it is not primarily responsible for the constitutional and democratic deficits in Nigeria and Ethiopia, nor does associating such deficits with federalism help the diagnostic prescriptions to these states. The fundamental problem in this regard is the theory of government that accompanies federalism and it is this which requires serious consideration.

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[930] Murray and Simeon (n 910) 240.

4.6 Conclusion

While federalism in Africa shares the forms, structures, and discursive practices from classic federal theory, its normative articulations and institutional frameworks are animated by syncretic configurations. These, in turn, transform the purpose, fundamental elements, and operation of federalism in Africa. As federalism follows new pathways in Africa, so does its systems of operation and standards of assessment. Against the central tenets of classic federal theory, federalism manages to operate and, to the extent possible, is able to deliver its purpose without the existence of constitutionalism and liberal democracy, as evident from the experiences of Nigeria and Ethiopia.

As the primary purpose of federalism in Africa is the accommodation of ethnonational diversity and territorial integrity, rather than the institution of constitutionalism and liberal democracy, it is not incompatible with undemocratic, including military, government as far as the government holds this federal logic. It is precisely because of this that federalism manages to operate and survive without liberal constitutionalism in Nigeria and Ethiopia. Hence, federalism is neither a failure nor prime suspect for the constitutional and democratic deficits in Nigeria and Ethiopia for these are not its primary purposes. Indeed, it is a success as it holds these states together against the competing ethnonational interests.

If federalism has to ensure the practice of constitutional democracy in Nigeria and Ethiopia, it should be given such tasks as in South Africa and other established federal states. In addition to the corporate ethnonational and elite interests, democratic values, human rights, and constitutionalism considerations should animate the normative and institutional frameworks of both self-rule and shared rule.

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CHAPTER FIVE
LEGAL SYNCRETISM AND THE EXECUTIVE IN AFRICA: CASE STUDIES

5.1 Introduction

By taking federalism as one form of vertical division of power, the previous chapter demonstrates how legal syncretism animates its origin and institutional framework and transforms its purpose and operation in Africa. With a similar approach, this chapter focuses on the executive, one branch in the horizontal division of power, to explain how legal syncretism influences the design and practice of executive power in Africa by taking Nigeria, Ethiopia, and South Africa as case studies. Like federalism, legal syncretism in the institution of the executive varies within these states. While Nigeria has a popularly elected president, South Africa has an indirectly elected president, whereas, Ethiopia chose to have a prime minister. As will be discussed below, these differences are crucial elements that make legal syncretism a useful analytical tool to understand the nature of the different executives in Africa.

As noted in Chapter Three, the African constitutional designs and practices incorporate and magnify the *power enabling* aspects of the executive power from the diverse legal and political rules and experiences while relegating and deemphasizing the *power limiting* aspects of the executive power from these diverse rules and experiences. The outcome of these processes is the institution of a hyperactive and imperial executive and personalized executive power in which the executive controls the political party apparatus, the government

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institutions, and ultimately the state. Precisely because of this, the African executive has defied conventional vocabularies and required an additional descriptor.[931]

To understand and appreciate the African executive, and how legal syncretism constitutes it, it is necessary to present the standard executive in constitutional theory. To this end, this chapter first develops a conceptual framework of the design of the executive and the practice of executive power drawing from liberal constitutional theory. Then it explores and examines the design of the executive and the practice of executive power in Nigeria, Ethiopia, and South Africa in this order. The aim of this chapter is to demonstrate how legal syncretism shapes the executives in these countries, in general, and how a different configuration of legal syncretism produces imperial executives in Nigeria and Ethiopia unlike in South Africa, in particular. By disentangling the discursive practices that bring and sustain the imperial executives, on the one hand, and by showing the pathologies of constitutional designs and practices related to the executive, on the other hand, this chapter defends the idea of a *limited executive* if constitutionalism has to prosper in Africa.

5.2 The Executive: A Conceptual Framework

Liberal constitutional theory concerns itself with defending individual liberty in a political community. On how to defend liberty, however, prescriptions differ. Thomas Hobbes thought the unity of sovereign power on a single man or assembly of men would secure and protect individual liberty. To this end, he proposed a social contract for the institution of a Common-wealth where individuals give up part of their rights and surrender their will to the

[931] Prempeh, 'Constitutional Autochthony and the Invention and Survival of "Absolute Presidentialism" in Postcolonial Africa' (n 575) 209.

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sovereign.[932] Then individuals owe obedience and submission to the sovereign, as a custodian of public will, like a Leviathan or a *Mortal God*.[933] Nevertheless, as history has it, the Leviathan has become the enemy of individual liberty, at worse, or an untrusted friend of liberty, at best. Hence, much of liberal constitutional theory grapples with taming Hobbes' Leviathan. And it is in this quest of taming the Leviathan that the executive is born in liberal constitutional theory.

The doctrine of separation of powers is one of the main inventions in limiting the powers of the sovereign. As developed in Montesquieu's *The Spirit of Laws*, for the sake of political liberty and exclusion of tyranny or arbitrary power, government power should not be concentrated in one man or assembly of men.[934] Montesquieu argued a government has three functions and consequently, it should have three separate bodies. As government has the power to make and repeal laws, the power to implement these laws, and the power to adjudicate and solve disputes based on laws, accordingly, a government should be structured into legislative, executive, and judicial organs performing these functions respectively. In addition to the functional separation of powers among the branches of government, these branches of government should not be manned by the same persons. In this way, as each branch of government is checked by the other, or in Madison's terms, as ambition will counteract ambition, the government will not encroach on individual liberty.[935]

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[932] Thomas Hobbes, *Hobbes: Leviathan* (Cambridge University Press 1996) 120.
[933] ibid 120–122.
[934] Charles de Secondat baron de Montesquieu, *The Spirit of Laws* (Batoche Books 2001) 173-174.
[935] Alexander Hamilton or James Madison, 'Federalist No 51' <https://wwwcongressgov/resources/display/content/The+Federalist+Papers#TheFederalistPapers-51> accessed 16 January 2018.

Within the prism of separation of powers, liberal constitutions further specify the nature and powers of the executive. While some closely following the tenets of separation of powers establish a unitary executive, as in the United States,[936] others institute a bifurcated executive one as head of the state and the other as head of the government, as in the United Kingdom. Even if there are hybrid regimes between presidential and parliamentary systems, the existence of a single figurehead of the executive and her cabinet represent the executive branch of government. To prevent arbitrary power, the executive has enumerated and implied powers and it is within these strictures that the executive has to function.[937] The idea of enumerated powers is another device of *limiting* the power of the executive as it cannot claim to have powers beyond what is expressly given to it by a constitution. However, prudence also requires that the executive needs to have some powers that are essential or necessary for the execution of the enumerated powers.

Although there is a difference in the breadth and scope of executive power across liberal constitutional systems, there is a limit to the duration and term of office of the executive figurehead. The temporal limitation of executive power is as important as the limitation of substantive executive power to tame the Leviathan and consequently defend political liberty. Term limits to the executive head are particularly the norm in presidential systems, as in the United States and France, whereas the tenure of the prime minister rests on the confidence of the parliament in parliamentary systems, as in the United Kingdom. Even so, the powers of the executive are limited substantively and temporally in constitutions, as a successor of the absolute monarch, the executive still dwarfs the legislative and the judicial organs of

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[936] See Steven G Calabresi and Christopher S Yoo, *The Unitary Executive: Presidential Power from Washington to Bush* (Yale University Press 2008).
[937] Louis Fisher, *The Law of the Executive Branch: Presidential Power* (Oxford University Press 2014) 1–2.

government due to its gigantic complex bureaucracy and administrative apparatus.[938] Nonetheless, the executive disposes its strong physical and financial resources and its monopoly of coercion within the framework of the rule of law.[939]

While the executive in liberal democracies looks less formidable in the constitutional designs, the rise of the modern regulatory and welfare state and the national security regime, among other things, expanded the powers of the executives in practice.[940] The expansion of executive power beyond what the constitution allows has been often termed as "imperial power".[941] The imperial executive in liberal democracies is usually associated with the exercise of presidential power in the United States. Even Webster's' unabridged dictionary defined imperial presidency as "a U.S. presidency that is characterized by greater power than the Constitution allows."[942] In addition, imperial presidency is said to exist in the French Constitution of the Fifth Republic.[943] Outside of Western democracies, the phenomenon of imperial presidency can be found in China and Russia among others.[944] For present purposes, the focus is on the United States because the notion of imperial presidency emerged there; and France because many post-colonial African presidents draw inspiration from the

[938] Eric Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (Oxford University Press 2011) 5–6.
[939] Sajó and Uitz (n 64) 268.
[940] Renata Uitz, 'Courts and the Expansion of Executive Power: Making the Constitution Matter' in David Bilchitz and David Landau (eds), *The Evolution of the Separation of Powers Between the Global North and the Global South* (Edward Elgar 2018) 85–86.
[941] Posner and Vermeule (n 938) 12.
[942]Webster's' unabridged dictionary, <http://wwwdictionarycom/browse/imperial-presidency> accessed 23 December 2018.
[943] Ezra N Suleiman, 'Presidential Government in France' in Richard Rose and Ezra N Suleiman (eds), *Presidents and Prime Ministers* (American Enterprise Institute 1980) 103–104 Suleiman observes that the imperial presidency is more fitting to France than the United States.
[944] Elizabeth C Economy, 'China's Imperial President: Xi Jinping Tightens His Grip' (2014) 93 Foreign Aff 80; Luke Coffey, 'Putin Has Imperial (Not Soviet) Aspirations' The Daily Signal (13 June 2016) <https://wwwdailysignalcom/2016/06/13/putin-has-imperial-not-soviet-aspirations/> accessed 10 November 2018.

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presidential power of the Constitution of the Fifth Republic. A brief discussion of the practice of executive power in these liberal democracies sheds some light on the nature of the executive in the practice of constitutional government.

In this regard, Arthur Schlesinger, in his seminal book the *Imperial Presidency,* offers a language and vocabulary to explain the practice and rise of presidential power in the United States under the pretext of an emergency.[945] As developed by Schlesinger, imperial presidency is an extra-constitutional phenomenon mainly concerning foreign affairs, in general, and declaration of war, in particular. His central argument is that although the Constitution divides war power between Congress and the President, the former defers to the decisions and wisdom of the latter. Due to these developments since the founding of the Republic, the American president has become an absolute monarch on issues of war and peace, as he is unilaterally in charge against the constitutional balance.[946] While Schlesinger associates this imperial phenomenon rather to congressional abdication than presidential usurpation, he also notes that Congress's deference to the President is a result of an operational compulsion to the belief that the Executive has superior information and direct responsibility on these issues.[947]

Although imperial presidency in the United States is related to the dominance of the President in foreign policy and unilateral decision in a declaration of war, its impact and influence on domestic policy are growing since the 9/11 terrorist attack.[948] The transformation of the "National Security State" to the "National Surveillance State" has

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[945] Arthur Meier Schlesinger, *The Imperial Presidency* (Houghton Mifflin Harcourt 1973) ix.
[946] ibid.
[947] ibid 14.
[948] Mark Tushnet, 'The Presidential Empire' (2015) 62 Dissent 101, 102.

extended the imperial presidency to domestic affairs.[949] As protecting and guarding the United States against "sudden attack," such as the likes of 9/11, forms part of the inherent power of the President, it is argued that the imperial power on the national security thesis on foreign affairs is not less relevant on domestic affairs.[950] Based on this argument, President George Bush pursued a global war on terror which cuts across foreign and domestic issues,[951] which President Obama[952] pursued carefully and less openly, in particular on surveillance.[953] Furthermore, in this spectacle of imperial presidency, in addition to Congress, the lower courts generally defer to check the Executive through the doctrines of standing and political questions, while the Supreme Court ordered *some* judicial supervision of the surveillance state.[954]

Imperial presidency in the United States, therefore, is not a general executive phenomenon unlike in Africa. As noted above, it only focuses on a specific executive power on foreign affairs and/or national security. In addition, not only is the President constitutionally empowered to wage war as commander in chief of the army,[955] but also performs this function after the consultation of his cabinet, Congress, the judiciary, the media, and public opinion at home and abroad.[956] The chief explanation for imperial presidency is more one of an emergency than a normalcy. Presidents become imperial when the country

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[949] ibid.
[950] See Charlie Savage, *Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy* (Little, Brown and Company 2007).
[951] Franz-Josef Meiers, 'The Return of the Imperial Presidency? The President, Congress, and US Foreign Policy after 11 September 2001' (2010) 55 Amerikastudien / American Studies 249, 255; See also Andrew Rudalevige, *The New Imperial Presidency: Renewing Presidential Power After Watergate* (University of Michigan Press 2005).
[952] For details see Ryan C Hendrickson, *Obama at War: Congress and the Imperial Presidency* (University Press of Kentucky 2015).
[953] Tushnet (n 948) 103.
[954] ibid 105.
[955] The Constitution of the United States of America 1789, article II s 2.
[956] Schlesinger (n 945) ix.

faces some sort of emergency either in foreign affairs and international relations or the fight against terrorism demands it both abroad and at home.

Unlike the imperial presidency in Africa that bestows imperial executive power in the person of the president, the imperial presidency in the United States is constrained by both written and unwritten constitutional rules. Moreover, the separation of powers that animated the founding of the United States and permeates its operation has made its Presidents more limited and constrained more than any leader in the Western world.[957] Furthermore, the United States is the pioneer and good example of limited government in the modern world. Considering this context in which imperial presidency originates and manifests itself, using imperial presidency in the African context to describe executive dominance is a misnomer without contextualization and redefinition.

By combining the features of presidency in presidential and parliamentary systems, the French presidency too is a "republican monarch" less constrained in his power unlike the presidency in the United States.[958] Beyond the charisma of presidents which confers them extra-constitutional power and influence, the Constitution of the Fifth Republic bestows presidents with strong executive powers probably more than any other chief executive in the Western world.[959] For instance, article 5 of the Constitution expresses the place and function of the president in the following way;

> The President of the Republic shall ensure due respect for the Constitution. He shall ensure, by his *arbitration*, the proper functioning of the public authorities and the continuity of the State. He shall be the *guarantor* of national independence, territorial integrity and due respect for Treaties. [emphasis added].

[957] Louis W Koenig, 'Reassessing the "Imperial Presidency"' (1981) 34 Proceedings of the Academy of Political Science 31, 35.
[958] Sajó and Uitz (n 64) 269.
[959] Suleiman (n 943) 103.

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Further, unlike the United States Constitution, the French Constitution enumerates the legislative powers of the parliament, in article 34, and bestows all other residual legislative matters to the executive as stated in article 37. Moreover, the President appoints and dismisses the Prime Minister,[960] presides over the Council of Ministers,[961] bypasses Parliament and submits important issues for a referendum,[962] dissolves Parliament,[963] and assumes emergency powers.[964] In addition to dividing law-making powers between Parliament and the Executive, the Constitution establishes a Constitutional Council which checks Parliament in its legislative business.[965] The constitutional architecture engineered in the Fifth Republic ensures executive primacy under the leadership of a strong president.[966]

Because of this constitutional design of presidential power, many commentators consider the French presidency as an imperial one.[967] If we consider the French presidency imperial- given the strong executive powers conferred upon it by the Constitution- its nature, scope, rationale and manifestations are different from the American imperial presidency and the prevalent practice in Africa. Unlike the United States, the imperial presidency in France is found in the text of the Constitution and its main rationale is not emergency but a response to a prior constitutional experiment. The Constitution of the Fifth Republic created a strong executive president to redeem the failures in the Fourth Republic where Parliament was strong and the President was a figurehead and this constitutional arrangement led to

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[960] The Constitution of France 1958, article 8.
[961] ibid article 9.
[962] ibid article 11.
[963] ibid article 12.
[964] ibid article 16.
[965] John Bell, *French Constitutional Law* (Clarendon Press 1994) 16–19.
[966] Sophie Boyron, *The Constitution of France: A Contextual Analysis* (Bloomsbury Publishing 2012) Chapter 3.
[967] See ibid 57-74; Suleiman (n 943).

government instability and weakness.[968] As such, the imperial presidency is supposed to be a practice not only in an emergency but also in normalcy. Consequently, the nature and manifestation of imperial presidency in France and the United States are different.

Nonetheless, like the United States, despite the variations in degree, the French presidency is constrained by constitutional and political rules and practices. Not only does the President seek the backing of a political party to run for election, but he also needs to work with Parliament to support his legislative proposals.[969] As a result, the President needs to take into consideration the interests of party and parliamentary politics in his presidency. Similarly, although the President can appoint and dismiss the Prime Minister, the Constitution institutionalizes built-in difficulties by composing the Executive government from the teams of the President and the Prime Minister. This is particularly the case in a time of cohabitation where a different party than that of the President controls Parliament.[970] In this scenario, the Powers of the President is restricted while the powers of the Prime Minister are expanded.[971] In times of cohabitation, the President is required and/or forced to co-operate with the Prime Minister.[972]

As a result, while loyalty to the President is expected from the Prime Minister, this is not always the case. In addition, the functioning of real politics tames the President's influence and action of dismissal of his Prime Minister.[973] Furthermore, as presidents are popularly

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[968] Bell (n 965) 14.
[969] Suleiman (n 943) 98–103.
[970] Jean V Poulard, 'The French Double Executive and the Experience of Cohabitation' (1990) 105 Political Science Quarterly 243, 255–256.
[971] For the particular cases of cohabitation, see Martin A Rogoff, *French Constitutional Law: Cases and Materials* (Carolina Academic Press 2011) 70–78.
[972] Robert Elgie, '"Cohabitation": Divided Government French-Style' in Robert Elgie (ed), *Divided Government in Comparative Perspective* (Oxford University Press 2001) 118–119.
[973] Suleiman (n 943) 107–120.

elected, the rejection of their referenda proposals ends their tenure. For instance, despite his charisma, de Gaulle stepped down from his presidency when he lost the 1969 referendum. Unlike the imperial phenomenon in Africa, French presidents work with the constitutional limits and submit to the will of the people.[974]

Like the United States president, the Prime Minister in the UK also enjoys a wide range of powers, in particular, with respect to foreign affairs and declaration of war.[975] It is argued that Parliament's difference to or acceptance of the Prime Minister's policy of foreign military interventions and policies, like the United States, transformed the Prime Minister into an imperial Executive.[976] Nonetheless, the political authority of the Prime Minister emanates from her position as a party leader and Parliament's confidence in her. The loss of support from the party can oust a Prime Minister even as strong as Margaret Thatcher.[977]

Although the United States, French, and UK Executives have imperial characters and impulses, a commitment to the idea of limited government lies at the edifice of the operation of the executives. The Executives with their cabinet submit to the rule of law and they are neither above the state nor the political party to which they are a member. Further, they are neither President or Prime Minister for life nor aspire to be so. The imperial executive phenomenon in these countries rests within their constitutional contours and choices.

Even though the United States or French type executive President is the choice of many African states, the institution of the presidency and the practice of presidential power

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[974] David S Bell and John Gaffney, 'Introduction' in David S Bell and John Gaffney (eds), *Presidential Power in Fifth Republic France* (Palgrave Macmillan 2013) 1–5.
[975] Peter Leyland, *The Constitution of the United Kingdom: A Contextual Analysis* (Bloomsbury Publishing 2016) 158–160.
[976] See Sam Goodman, *The Imperial Premiership: The Role of the Modern Prime Minister in Foreign Policy Making, 1964-2015* (Manchester University Press 2016).
[977] Leyland (n 975) 162–163.

are different from both. As discussed in Chapter Three and will be developed further here, the reading of presidential government by many African presidents undermines the notion of separation power and institutionalizes personal rule. While the origin of the executive and the allocation of executive power is related to the quest to *limit* government for the sake of liberty, the African Executive has been preoccupied with *limiting the limitations* with the alleged quest to enlarge freedom in developmental terms. In this respect, on the one hand, there is a nearly universal adoption of presidential system of government in Africa and consequently there is an *acceptance* of a regime type from Western democracies, to be precise from the United States and France. On the other hand, there is a general distaste for or even *rejection* of the doctrine of separation of powers and judicial review that comes with the acceptance of such systems.

The following sections, building on the discussion on the executive in Chapter Three, explore and examine how legal syncretism structure and institute the executive in Nigeria, Ethiopia, and South Africa, and how a different configuration of legal syncretism in these countries contributes to the development of imperial presidency and premiership in Nigeria and Ethiopia respectively that are different from South Africa.

5.3 The Executive in Nigeria: "Imperial Presidency"

Unlike in liberal constitutional systems where the origin of the executive is associated with the quest for a limited government, the executive in Africa is the result of an imposed or imported constitutional design. As noted elsewhere, the departing colonial powers imposed liberal constitutional systems that include the doctrine of separation of powers. As a result, the African executives mirror the executives of their former colonizers, while former British

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colonies later adopt American type presidential system.[978] As discussed in the previous Chapters, the independence constitutions were accepted by the African political elites not because they believed in the values of these liberal constitutional systems or in the separation of powers they enshrined in, instead, acceptance of these constitutions was a condition precedent for independence. As discussed in Chapter Three, while the structural forms of the doctrine of separation of powers have been accepted in the post-1990 constitutions, many of the constitutions have been preoccupied with *limiting the limitations* to the executive. The concentration of power in the Executive has been the preoccupation of constitutions and constitutional practice in Africa. This section explores how legal syncretism has been used to limit the limitations to the executive in Nigeria.

Following the British colonial legacy, Nigeria adopted a parliamentary system at independence. Unlike much of Anglophone Africa, Nigeria did not have a national charismatic and mobilizing figure at independence.[979] As discussed in the previous Chapter, Nigeria was deeply divided across ethnic, regional, and religious lines. Furthermore, a three political party system fashioned in light of these diversities were already in operation. As a result, Nigeria even maintained the parliamentary system in the first republican Constitution. In this regard, Nigeria was among the few Anglophone African countries, i.e. along with Sierra Leone, Uganda, Lesotho, and Swaziland, that replaced the British Queen as the Head of the State by an indigenous Head of State while it kept the parliamentary system.[980] The bifurcation of executive power into a titular head of state and executive head of government

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[978] Charles M Fombad, 'An Overview of Separation of Powers under Modern African Constitutions' in Charles M Fombad (ed), *Separation of Powers in African Constitutionalism* (Oxford University Press 2016) 69–88.
[979] Larry R Jackson, 'Nigeria: The Politics of the First Republic' (1972) 2 Journal of Black Studies 277, 278.
[980] Nwabueze, *Presidentialism in Commonwealth Africa* (n 394) 70. Note that Lesotho and Swaziland have been kingdoms.

was not considered as un-African by then.[981] However, the real or alleged problems associated with the parliamentary system in the First Republic, the civil war experience, the quest for autochthony, and the prolonged military rule conspired for an American type presidential system.[982]

Accordingly, the 1979 Nigerian Constitution established an executive president for the federation, which the 1999 Constitution maintains.[983] The shift from a parliamentary to a presidential system is explained and rationalized on cultural and institutional grounds.[984] On the cultural aspect, it was held that the bifurcation of power into the head of government and head of the state is unknown to the African conception and organization of power.[985] Accordingly, the friction, competition, and confusion between the office holders of the head of government and head of the state in exercising their constitutional powers were attributed to the lack of context and autochthony in constitutional design.[986] Despite the clear constitutional allocation of power between the Prime Minister and the President, there was competition between the office holders.[987] A good example for this is the advice of the President to postpone the 1964 national election which the Prime Minister opposed and executed as planned, despite the boycott in the East, West, and Midwest regions.[988] This led

[981] Ezera (n 834) 282–284.
[982] Benjamin Obi Nwabueze, *Military Rule and Constitutionalism in Nigeria* (Spectrum Law Pub 1992) 229.
[983] See also BO Nwabueze, *Nigeria's Presidential Constitution: The Second Experiment in Constitutional Democracy* (Longman 1984) 23–26.
[984] Nwabueze, *Presidentialism in Commonwealth Africa* (n 394) 59–92; see also E Michael Joye and Kingsley Igweike, *Introduction to the 1979 Nigerian Constitution* (Macmillan Nigeria 1982) 119–131.
[985] JD Ojo, *The Development of the Executive Under the Nigerian Constitutions, 1960-81* (Ibadan, University Press 1989) 7–8.
[986] Rotimi T Suberu and Larry Diamond, 'Institutional Design, Ethnic Conflict Management, and Democracy in Nigeria' in Andrew Reynolds (ed), *The Architecture of Democracy: Constitutional Design, Conflict Management, and Democracy* (Oxford University Press 2002) 411; Nwabueze, *Presidentialism in Commonwealth Africa* (n 394) 59–69.
[987] Nwabueze, *Presidentialism in Commonwealth Africa* (n 394) 73–83.
[988] JD Ojo, 'The Executive under the Nigerian Constitutions, 1960-1995' in Kunle Amuwo and others, Federalism and Political Restructuring in Nigeria (Spectrum Books 1998) 300.

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to an election crisis that fermented the setting for prolonged military rule.[989] The argument goes, unifying the power of the head of government and the head of the state in one person not only avoids the competition and confusion of power between the president and the prime minister, but also relates such constitutional design to the African cultural milieu, as such power resides in unitary kings, chiefs or traditional leaders.[990]

The institutional explanations are attributed to the advantages of the presidential system over the parliamentary system in the Nigerian setting.[991] In addition to the 1964 election crisis,[992] the theoretical challenge was that such parliamentary system made clear that Nigeria could have a Prime Minister who has supported only in her region if her party controls the majority seat in parliament.[993] Obviously, this will go counter to the accommodative and Holding-together nature of Nigerian federalism. It was held that the presidential system provides the president an opportunity to be a unifying figure in the federation given his direct election. By fostering inter-ethnic and regional unity, it was argued, the president will be able to overcome the pressing national challenges by providing effective leadership.[994] To this end, it is proposed, a clear separation of powers among the three branches of government is necessary.[995]

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[989] Diamond (n 731) 190.
[990] See also Oyeleye Oyediran, *Nigerian Government and Politics under Military Rule, 1966-79* (Macmillan 1979) 247; Nwabueze, *Presidentialism in Commonwealth Africa* (n 394) 59–69.
[991] Nwabueze, *Military Rule and Constitutionalism in Nigeria* (n 982) 229–245 Nwabueze argues that presidential system ensures separation of legislative and executive powers, unity and stability of the political order, and effective leadership for economic development.
[992] Diamond (n 731) 190-247.
[993] Ojo (n 985) 300.
[994] See Suberu and Diamond (n 986) 411.
[995] W Alade Fawole, 'Executive-Legislative Relationship' in A Sat Obiyan and Kunle Amuwo (eds), *Nigeria's Democratic Experience in the Fourth Republic since 1999: Policies and Politics* (University Press of America 2012) 15-31.

Although the military tradition of centralized rule has its own contributions in the shift from the parliamentary to the presidential system,[996] the choice for such a system is a result of a conscious effort by political and military elites of Nigeria to organize executive power.[997] In choosing presidentialism, the constitutional authors of the 1979 and 1999 Constitutions selectively incorporated alleged indigenous norms of political organization with a modern institutional setup of presidential power. By doing so, they absorbed a presidential regime based on real or alleged traits of commonality with the African notion of organization of power while rejecting a parliamentary regime based on claims of lack of complementarity. Evident in this constitutional act of absorption and rejection is the configuration of an American type presidentialism. While the practical challenges of the parliamentary system in the first republic informed the choice for presidentialism, the quest for autochthony and Africanism were used as a discursive practice to institute a strong executive president. In this regard, Nwabueze observes that "[p]residentialism may be regarded as the culmination in the constitutional field of the national struggle for emancipation from colonialism."[998] Accordingly, the presidential system should be further Africanized.[999] In this Africanization process, the authors of the Nigerian presidential constitutions selectively incorporated and reconfigured those *power enabling* aspects of indigenous notion of power while relegated the *power limiting* ones.

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[996] Nwabueze, *Military Rule and Constitutionalism in Nigeria* (n 982) 229.
[997] Suberu and Diamond (n 986) 415 (noting that despite its problems, the presidential system is preffered by the majority of Nigerians).
[998] Nwabueze, *Presidentialism in Commonwealth Africa* (n 394) 59.
[999] ibid 60, Nwabueze argues that autochthony has two aspects; the first is the source from which the constitution dervies its authority as law, and the second is the contents of the constitution. While the first has to do with the legitimacy of the constitution that who should make the constitution, the second has to do with the substantive contents of the constitution that it has to reflect the reality of the society and fit with its context.

As noted elsewhere, the concept of a unitary king or chief or a centralized political organization is not a universal African experience. Even in the Nigerian context, the idea of a unitary king or chief is unknown to the Igbo, unlike in the Yoruba and Hausa-Fulani. Like any other uncentralized political system, as discussed in Chapter Two, there was a general distaste for and resistance to political centralization among the Igbos. The claim for autochthony in the institution of the executive is simply used as a discursive practice to centralize and personalize executive power. As a matter of fact, the colonial governor is a fine example for accumulating legislative, executive, and judicial powers in his person and this can be a huge inspiration for the institution of a strong president. Unlike the concept of a unitary king or chief, the practice of the colonial governor and its *modus operandi* was a universal African experience. As discussed in the previous Chapters, even the alleged unitary king or chief in centralized political systems was limited by numerous institutional and customary practices and consequently may not provide the cultural ground for the institution of personal rule, unlike the practice of the colonial governor.

The constitutional design of presidential power in Nigeria shows how the doctrine of separation of powers has been used to separate the executive from the other branches of government and how it is modified to ensure executive primacy in contradiction with the central tenets of separation of powers. A closer look at the presidential powers, on the one hand, and the assessment of the relationship of the executive with the legislative and judicial organs, on the other hand, reveals that the President is bestowed with enormous powers that challenge the doctrine of separation of powers.

Exclusive executive power vests in the President and he is the chief executive officer of the federation in charge of the implementation of the Constitution and all laws enacted by

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the National Assembly.[1000] All other executive organs of the federation do not have a constitutionally defined power or responsibility.[1001] The Vice President and the Ministers of the federation will perform and execute such powers and responsibilities given to them by the President at his discretion.[1002] In this respect, in *A.G Federation v. Atiku Abubakar*, the Supreme Court also notes that although the Constitution created the office of the President and the Vice President, all executive power vests in the President alone.[1003]

In addition, the President has a very wide appointment, security, and emergency powers. Not only does he appoints the Chief of the Defense Staff, the Chief of the Army Staff, Chief of Naval Staff, Chief of Air Staff, and other heads of the armed forces of the federation,[1004] he can also remove them at his discretion.[1005] The President appoints and removes the Inspector General of the Nigerian Police Force with consultation with the Nigeria Police Council.[1006] He also appoints and removes his own special advisors at his pleasure.[1007] Subject to confirmation by the Senate, he appoints Ministers of the Government,[1008] Attorney-General,[1009] and other government officials.[1010] Although the President cannot declare war without the resolution of the National Assembly, he can deploy the armed forces outside of Nigeria with the consultation of the National Defense Council for

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[1000] The Constitution of Nigeria, s 5(1).
[1001] Oyelowo Oyewo, 'Nigeria' in Baron André Alen and David Haljan (eds), *International Encyclopaedia for Constitutional Law* (Wolters Kluwer Law & Business 2012) 52–54.
[1002] Nigerian Constitution sec 148(1).
[1003] *AG Federation v Atiku Abubakar* [2007] 4 S C 3 NWLR (PT II) 62.
[1004] The Constitution of Nigeria s 218.
[1005] Oyewo (n 1001) 55.
[1006] The Constitution of Nigeria s 216(1).
[1007] ibid s 151.
[1008] ibid s 147.
[1009] ibid s 150.
[1010] ibid ss 154(1) & 171.

seven days if he thinks that the national security of the country is in danger.[1011] He can also declare a state of emergency in any part of the federation.[1012]

The Executive also participates in law-making by initiating bills and in the appointment of judicial functionaries.[1013] Further, the President through the veto power controls the law-making process.[1014] Even though there is an override veto procedure,[1015] the President is bestowed with enormous power to influence the legislative process. Along these lines, although the control of the public revenue resides primarily within the ambits of the National Assembly,[1016] it is the President who decides on the way the revenue is distributed or disbursed. This is due to the fact that it is the power of the President to table proposals of revenue allocation or utilization within which the National Assembly has to decide.[1017] Moreover, the President's proposal is a condition precedent for the National Assembly to exercise its power in this respect.[1018] With the confirmation by the Senate, the President also appoints justices of the Supreme Court.[1019] Hence, the executive holds enormous powers that can dwarf the legislative and judicial branches even further.[1020]

[1011] ibid s 5(5).
[1012] ibid s 305(1); AA Idowu, 'Emergency Powers, Political Instability, and the Nigerian Constitution: The Plateau State Experience of Year 2004 Revisited' in A Sat Obiyan and Kunle Amuwo, *Nigeria's Democratic Experience in the Fourth Republic Since 1999: Policies and Politics* (Rowman & Littlefield 2013) 82, the president by using his emergency powers suspend and disband the Governor and State House of Assembly respectively.
[1013] See also Sylvester Shikyil, 'Legislative-Executive Relations in Presidential Democracies: The Case of Nigeria' in Charles M Fombad (ed), *Separation of Powers in African Constitutionalism* (Oxford University Press 2016) 142-143.
[1014] The Constitution of Nigeria, s 58(4).
[1015] ibid s 58 (5).
[1016] ibid ss 162-168.
[1017] ibid s 162 (2).
[1018] Oyewo (n 1001) 64.
[1019] The Constitution of Nigeria s 231 (1) & (2).
[1020] Eugene N Nweke, 'The Principle and Practice of Separation of Power in Nigeria: A Study of Olusengun Obasanjo's Civilian Regime (1999-2007)' in Obiyan and Amuwo, *Nigeria's Democratic Experience in the Fourth Republic Since 1999* 63–67.

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The practice of presidential powers in the Fourth Republic shows that not only an executive president can be a source of ethno-regional anxiety and suspicion, but also it can lead to the emergence of personal rule and imperial executive power.[1021] Since the transition to civilian democratic rule in 1999, the office of the presidency became a preeminent office which other branches of the government pay difference.[1022] Abuse of incumbency becomes a feature in Nigerian political life which makes accessing the office of the presidency a difficult task for the opposition.[1023] In this respect, Olusengun Obasanjo's presidency was a fine example for the practice of imperial presidency in the fourth republic.[1024] Like the other imperial presidents in Africa discussed in Chapter Three, Obasanjo started institutionalizing his personal rule by controlling the party, i.e. People's Democratic Party (PDP), and the state apparatus.[1025] This, in turn, helped him to secure his two-term presidency. Although he was not able to secure a constitutional amendment to run for a third term, he was successful in making a person of his choice, Goodluck Jonathan, to become his successor in 2007.[1026]

During his tenure, Obasanjo subordinated the legislature and the judicial organs to his realm. For instance, with respect to the legislature, even if the Constitution requires Parliamentary approval for expenditure by the Executive, Obasanjo spent the budget on numerous occasions without such approval.[1027] The presidential dominance in the legislative process continues in the Fourth Republic as a legacy of colonial and postcolonial military

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[1021] Suberu and Diamond (n 986) 412.
[1022] V Adefemi Isumonah, 'Imperial Presidency and Democratic Consolidation in Nigeria' (2012) 59 Africa Today 43.
[1023] Hessebon, *Contextualizing Constitutionalism* (n 431) 57–62.
[1024] A Sat Obiyan, "The Federal State in Obasanjo's Nigeria: Coordinate Relationship or Imperial Order?" in Obiyan and Amuwo, *Nigeria's Democratic Experience in the Fourth Republic Since 1999* 97–103.
[1025] Isumonah 53–65.
[1026] Christian Purefoy, 'Goodluck Jonathan: By Name and Nature?' (2011) <http://wwwcnncom/2010/WORLD/africa/05/06/nigeriajonathan/indexhtml> accessed 1 October 2017.
[1027] Nweke (n 1020) 66.

traditions.[1028] In a similar vein, Obasanjo either disregards or alters the decisions of the Supreme Court. Even more, only three weeks away from the sixth presidential election since 1999, President Muhammadu Buhari recently suspended the Chief Justice of the Supreme Court, Justice Walter Nkanu Samuel Onnoghen, on allegations of corruption.[1029] Under the Nigerian Constitution, the President cannot suspend or remove a justice of the Supreme Court without two-thirds support from the Senate.[1030] The suspension of the justice is said to be linked with the possible contestation of the February 2019 presidential election in the Supreme Court.[1031] In addition to the abuse of incumbency and imperial presidency which secured Obasanjo's presidency and his personal clientelistic networks in the party and state apparatus,[1032] the federal government under his leadership were actively involving in the impeachment processes of state governors, in which the federal government has no constitutional mandate.[1033]

Thus, unlike liberal constitutional democracies, the establishment of the unitary executive under a presidential system in Nigeria is to unify and concentrate executive power. As Mazrui observed to much of Africa, at the core of presidential power and practice in Nigeria is the *personalization* and *sacralization* of authority.[1034] While the claim for such *personalization and sacralization* of authority is advanced on cultural grounds, the colonial

[1028] Shikyil (n 1013) 150–152.
[1029] Paul Wallace, 'Nigeria Leader Sparks Pre-Vote Crisis by Replacing Top Judge' (25 January 2019), Bloomberg, <https://wwwbloombergcom/news/articles/2019-01-25/buhari-suspends-nigeria-s-top-judge-ahead-of-election-aide-says-jrcau3pn> accessed 28 January 2019.
[1030] Nigerian Constitution sec 291(1)(a) (i).
[1031] ibid.
[1032] See Andrew C Okolie, 'The 2007 General Elections in Nigeria: An Account of the Politics of Personal Rule in an African Country by a Former Presidential Aide' (2010) 37 The Review of Black Political Economy 2, 153-172.
[1033] Mamman Lawan, 'Abuse of Powers of Impeachment in Nigeria' (2010) 48 The Journal of Modern African Studies 311, 323–327.
[1034] Ali A Mazrui, 'The Monarchical Tendency in African Political Culture' (1967) 18 The British Journal of Sociology 231, 231.

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theory of government and the postcolonial military tradition are the prime suspects in this regard. When we locate the executive in the broader Nigerian constitutional history, design and practice, its phenomenon of imperial presidency is in sharp contrast with the United States and France. This is primarily because the executive in Nigeria is created through the syncretism of the *power enabling* aspects of the diverse legal and political traditions, on the one hand, and the relegation or displacement of the *power limiting* ones, on the other.

5.4 The Executive in Ethiopia: "Imperial Premiership"

The Executive in Ethiopia, unlike Nigeria, is a successor of an absolute monarch. For much of its history, Ethiopia had been under the monarchial rule where the monarch was the custodian of all government power. Under its unwritten constitution, the monarch was the sovereign and acted as it wished mainly within the intricate power relationship involving the Ethiopian Orthodox Church and the nobility.[1035] With the adoption of the first written Constitution in 1931, however, the monarchy even emerged as a "super power" by subordinating the nobility and the Church.[1036] On claims of modernization, Emperor Haile Selassie established an absolute monarch in a written constitutional framework. In this respect, by disregarding century's old unwritten constitutional rule, article 4 of the 1931 Constitution limited the throne and the crown of the empire only to the decedents of Emperor Haile Selassie. Such constitutional arrangement excluded the right of other nobilities who had an equal opportunity to access the throne if they manage to have what it requires. In a similar vein, by displacing an old tradition of bringing in an *Abun*, head of the Ethiopian Orthodox

[1035] Nahum (n 750) 17; Messay Kebede, *Survival and Modernization, Ethiopia's Enigmatic Present: A Philosophical Discourse* (Red Sea Press 1999) Chapter Two.
[1036] ibid 21.

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Church, from the Coptic Church of Alexandria, as a mean of maintaining the neutrality of the Church in throne politics, Haile Selassie became the final authority who approves an Ethiopian *Abun* to head the Church. Further, while the 1931 Constitution establishes a parliament, ministerial positions, and judiciary, all legislative, executive, and judicial power rests in the person of the emperor. Hence, the modernization rationale and the adoption of a written constitution was not meant to limit the power of the government for the sake of individual liberties, but was used as opportunities to further centralize and enlarge the power of the emperor.

The military, which came after the collapse of the monarchy even, did not pretend to rule the country with a constitution. Colonel Mengistu Haile Mariam, president of the military regime, ruled the country with a mighty brutal force without a constitution for thirteen years. It is only in 1987 that the military adopted a constitution to legitimate its rule and to appease opposition forces in the country. Even in the 1987 Constitution, the military centralized ultimate government power in the National *Shengo* and its standing organ, the Council of State, where the President controls all governmental functions.[1037] By establishing the Workers Party of Ethiopia as the only political party in the country, the military regime fused the political party and the government in the same political group and consequently in the same person, i.e. the leader of the party and the government, Colonel Mengistu Haile Mariam. Thus, the adoption of a written constitution by the military regime was yet another occasion for the centralization of power. As the 1931 Constitution established monarchical

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[1037] See the Constitution of Ethiopia 1987, Chapter, 9-11.

absolutism, the 1987 Constitution tried to replicate and consolidate absolutism in a socialist military system.[1038]

In sharp contrast to Ethiopia's tradition of centralized rule under one person, and the prevailing practice in Africa, the TPLF/EPRDF established a parliamentary system to effectuate a strong executive. Given Ethiopia's political tradition, a presidential system should have been the first choice of the TPLF/EPRDF. Nonetheless, the move towards a parliamentary system is dictated by the need to centralization. The power configuration within the EPRDF and the politics of ethnic federalism make a presidential system unappealing at the time. Put differently, a presidential system could not offer a strong executive under the leadership of the TPLF. Precisely because of this, TPLF has to turn to a parliamentary system to effectively centralize and control executive power. Unlike many African countries, Ethiopia seems to be successful in keeping the President as head of the state with ceremonial powers and the Prime Minister as head of government with executive powers. There has been neither competition nor conflict between the two office holders, nor have they shown the interest to unify the titular head of state and head of government in one person so far.

Indeed, the Constitutional Commission, which was in charge of the drafting of the Constitution, did not give a special preference to either a semi-presidential or a parliamentary system of government as long as the design fits with the Ethiopian context when the first draft proposal on the form of government was discussed.[1039] The first draft proposal was to establish a semi-presidential system where the President is elected from the majority party controlling

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[1038] Nahum (n 750) 30.
[1039] See Minutes of the Ethiopian Constitutional Commission, 78th regular session, *Megabit* 5, 1986 (in *Ethiopian Colander*).

Parliament; and the President, in turn, chooses the Prime Minister, but both would have a constitutionally defined allocation of power. While there was no opposition from members of the Commission, Dawit Yohannes, the Secretary of the Commission and the presiding chairperson of this meeting opined and proposed that unifying the head of the state and the head of government in the President and replacing the Prime Minister with a Vice President would be relevant for Ethiopia as it ensures political stability.[1040] The second proposal was to establish a parliamentary system where the President would have ceremonial powers as head of state and would be indirectly elected, while the Prime Minister would have executive powers and would head the government.[1041] Without much contestation and debate on this matter, the Commission adopted a parliamentary system in its draft,[1042] which the final Constitution maintained.

Given the tightly controlled constitution-making process,[1043] the choice for a parliamentary system is that of the TPLF/EPRDF.[1044] The TPLF comes from a minority ethnic group consisting of around 6% of the population which makes the choice for a parliamentary system rational. Conditioned with a minority democratic base where ethnic federalism is the primary means and ultimate end of channeling and advancing the right to self-determination of each ethnic group, the installation of a presidential system for the TPLF is a suicidal constitutional act. Under ethnic federalism the ethnonational forces established, it is reasonable to expect that many ethnic groups want to see persons from their own ethnic

[1040] ibid.
[1041] See Minutes of the Ethiopian Constitutional Commission, 82nd regular session, *Megabit* 14, 1986 (in *Ethiopian Colander*).
[1042] See ibid 88th regular session, *Megabit* 29, 1986.
[1043] Tsegaye Regassa, 'The Making and Legitimacy of the Ethiopian Constitution: Towards Bridging the Gap between Constitutional Design and Constitutional Practice' (2010) 23 Afrika focus 1, 85-118.
[1044] See Theodore M Vestal, 'An Analysis of the New Constitution of Ethiopia and the Process of Its Adoption' (1996) 3 Northeast African Studies 2, 21-38; Abebe (n 592) 51-87.

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groups run for the presidency and control presidential power. In this respect, persons from the major ethnic groups such as the Amhara and the Oromo will have an electoral advantage in winning the office of the presidency as they account for more than 60% of the population. It is no wonder that the Oromo Federalist Democratic Movement (OFDM), an opposition party, supports constitutional reform in favor of a presidential system,[1045] although the presidents of Ethiopia since 1995 have been from an Oromo ethnic group.[1046] Hence, the adoption of a parliamentary system to operate Ethiopia's ethnic federalism is a conscious choice of the TPLF, as it is the type of government best suited to broadcast and channel their interest in the federation.

After the choice for a parliamentary system was made, the Constitution almost crowns the Prime Minister by granting a wide range of powers. Like the President in Nigeria, the Prime Minister in Ethiopia is the chief executive, chairperson of the council of ministers, and commander-in-chief of the national armed forces.[1047] He selects and appoints ministers, commissioners, federal officers, and Presidents and Vice President of the Federal Supreme Court,[1048] the auditor general,[1049] the national election board,[1050] and the population census commission[1051] with the approval of the HPR. Like the Vice President in Nigeria, the Vice Prime Minister in Ethiopia does not have a constitutionally defined power but carry out such responsibilities entrusted to him by the Prime Minister and responsible for him.[1052] The Prime

[1045] Abebe (n 592) 80.
[1046] Dr Negasso Gidada from 1995-2001, Ato Girma Wolde-Giorgis from 2001-2013, and Dr Mulatu Tesheme from 2013-2018. Sahle-Work Zewde who is appointed as President of Ethiopia in October 2018 is a non-Oromo.
[1047] The Constitution of the Federal Democratic Republic of Ethiopia, article 74(1).
[1048] ibid article 74(2 & 7).
[1049] ibid article 101 (1).
[1050] ibid article 102(2).
[1051] ibid article 103(2).
[1052] ibid article 75.

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Minister not only oversees the implementation of the Constitution and all laws, policies and directives adopted by the HPR,[1053] he can also declare a state of emergency with the support of the Council of Ministers he composes and heads.[1054] In performing this wide range of powers, the Constitution does not consider that the Prime Minister can make errors and should be impeached. Nor does it limit the term limits of the Prime Minister. While it can be argued that in a parliamentary system, the Prime Minister's stay in office depends upon the confidence of Parliament and his party, the failure to provide term limits and grounds of impeachment in the Constitution, in a country that is rich with the tradition of one-man rule, is ill-advised, at best, and institutionalizing personal rule, at worse.[1055]

The design of prime ministerial power and its practice is not different from the prevailing practice of presidentialism in other African countries including Nigeria. While presidentialism has led to the emergence of imperial presidency, the Ethiopian experiment of parliamentarianism has produced an imperial premiership. The parliamentary experiment since 1995 confirms the existence of the prevailing phenomena of imperial presidency in Africa in the form of imperial premiership in Ethiopia. As elsewhere in Africa, for instance like Nkrumah of Ghana or Obasanjo of Nigeria, Meles Zenawi, the transitional period President from 1991-1994 and Prime Minister from 1995- 2012, started his imperial premiership by establishing and consolidating his power within his party, TPLF, and his coalition party, EPRDF, and these ultimately conferred him the "imperial power" in Ethiopia until his death.

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[1053] ibid article 74 (3, 4, 5, 6 & 8).
[1054] ibid article 93.
[1055] See also Gedion Timothewos, 'Tackling the Imperial Premiership and Abuse of Incumbency: Ideas for Constitutional Reform in Ethiopia' in Gedion Timothewos and Helen Fikre (eds), The FDRE Constitution: Some Perspectives on the Institutional Dimension (Addis Ababa University Press 2014).

In fact, Zenawi started consolidating his power within the TPLF by establishing the Marxist-Leninist League of Tigray (MLLT) in 1985 with the alleged objective to guide the TPLF in the right direction by being the party's intellectual and political hub.[1056] Not only did Zenawi assume the leadership position within the MLLT, but also managed to exclude some of the prominent members of the TPLF.[1057] He continued to consolidate his power within the TPLF after being the Prime Minister of Ethiopia. When he faced strong opposition from his party, TPLF, in 2001, he managed to dismiss his comrades and high-ranking ministers both from their party and government posts.[1058] After 2001, Zenawi was the chief socio-economic and political architect of the EPRDF and of Ethiopia.[1059] Zenawi, the person, became the institutional embodiment of the federal system. Not only did the federal legislature[1060] and judiciary[1061] follow his directions, State Presidents and institutions were also subservient to Zenawi.[1062] Due to his immense power and influence, he accumulated in the party and state apparatus, it was customary for individuals and groups alike to petition and appeal their grievances directly to the Prime Minister bypassing other institutions such as courts and administrative organs.[1063] A combination of wide constitutional powers and party domination

[1056] Berhe (n 777) 209.
[1057] ibid.
[1058] Medhane Tadesse, 'The Tigray People's Liberation Front (TPLF)' in Gérard Prunier and Éloi Ficquet (eds), *Understanding Contemporary Ethiopia: Monarchy, Revolution and the Legacy of Meles Zenawi* (Hurst & Company 2015) 279–280.
[1059] Gérard Prunier, 'The Meles Zenawi Era: From Revolutionary Marxism to State Developemntalism' in Gérard Prunier and Éloi Ficquet (eds), *Understanding Contemporary Ethiopia: Monarchy, Revolution and the Legacy of Meles Zenawi* (Hurst & Company 2015) 426.
[1060] Kassahun Berhanu, 'Parliament and Dominant Party System in Ethiopia' in MA Mohamed Salih (ed), *African Parliaments: Between Governance and Government* (Palgrave Macmillan 2005) 162–181.
[1061] See Assefa Fiseha, 'Separation of Powers and Its Implications for the Judiciary in Ethiopia' (2011) 5 Journal of Eastern African Studies 4, 702-715; Siye Abraha, *Nestanet ena dagninet be Ethiopia* (ZA Printing 2002) (in Amharic).
[1062] See also Prunier (n 1059) 415–436.
[1063] Timothewos, 'Tackling the Imperial Premiership and Abuse of Incumbency' (n 1055).

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enabled Zenawi to be the first Ethiopian imperial Prime Minister unconstrained by the federal arrangement.

However, Prime Minister Haile Mariam Desalegn, the successor of Zenawi, was not able to maintain the imperial premiership and his tenure was ended abruptly. Prime Minister Deselagn, handpicked by Zenawi, even struggled to be a Prime Minister let alone an imperial one. As even admitted by the EPRDF, Desalegn was a puppet without executive power. This is not because the powers of the Prime Minister under the Constitution or the power of the leader of the party in the EPRDF had changed. Rather, it was because Desalegn lacked the extra-constitutional and extra-party influence, unlike Zenawi. Desalegn belongs to a party, SEPDM, which is marginal in the EPRDF power architecture, and comes from the south that lacks influence in the political dynamics of the country.[1064] As a result, Desalegn acted as the TPLF/EPRDF wanted him to act. As he was not able to control the EPRDF, the coalition began to have multiple sites of power. This led to the development of assertive State Presidents, in particular, in Amhara, Oromia, Tigray, and Somali regional states, who influence politics at the federal level which would have been unthinkable under Zenawi. Finally, the waves of protest movements that shaken the EPRDF since 2015 abruptly ended the tenure of Deselagn in April 2018.

Even though it is early to tell what kind of Prime Minister Abiy Ahmed, who assumed office in April 2018, will become, all the factors that make him imperial are on his hands. In contrast to Zenawi, who is an ardent ethno-nationalist, Ahmed emerged as a pan-Ethiopianist or even Pan-Africanist. His idea of *medemer*, unity, appeals to many people regardless of

[1064] BBC News, 'Ethiopia Profile Leaders - Prime Minister: Hailemariam Desalegn' *BBC News* (30 July 2015) <http://wwwbbccom/news/world-africa-13349400> accessed 23 November 2017.

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ethnic, religious or other differences. Like *Ujamma* of *Julius Nyerere* or *Harambee* of *Jomo Kenyatta,* Ahmed's *medemer* posits the necessity of unity and cohesion among Ethiopians, and even sheds light on the vitality of cooperation and integration of the horn of African region. In addition to his unifying ideology, Ahmed's ethnic affiliation with the Oromo, one of the largest ethnic groups in Ethiopia, gives him a strong democratic base, unlike Zenawi and Desalegn. Since his ascent to power, unlike Desalegn, Ahmed seems to be in charge of the EPRDF and the executive arm of government. Even more, he seems to be hyperactive in "transforming and democratizing Ethiopia" by reforming the judiciary and parliamentary rules and practices. While these are much-needed and welcome reforms as it stands now, how his premiership unfolds determines his commitment to democracy.

Hence, although Ethiopia chose parliamentarism over presidentialism, unlike Nigeria, their underlying rationale for their choice converges. The establishment of a strong executive is the main justification for the rejection of presidentialism and the absorption of parliamentarism. As discussed above, a strong Executive under a directly elected President for the Ethiopian constitutional authors was untenable for the simple fact that the TPLF does not have a democratic base to support this system. As a result, rather than unifying the head of the state and the head of government, bifurcating the same would ensure a strong Executive. By controlling the party and state apparatus, it is possible for the TPLF to maintain the premiership either within its own members or within the coalition.[1065] A direct presidential election, in addition to bringing multiple competitors to the presidency,[1066] further makes the

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[1065] See also Abebe (n 774).
[1066] As a matter of fact, the Prime Minister is simply elected with nominal competitor who has to resign from the outset.

presidential outcome costly even if the TPLF/EPRDF nominee may win. The adoption of parliamentarism with strong premiership powers does the job of presidentialism.

The Ethiopian parliamentary experiment shows how legal syncretism informs its design and even more so shapes its practice. In contrast to liberal constitutional theory, the adoption of a written constitution is aimed to centralize and enlarge the executive power than limiting it for the sake of individual liberty. Even if there is a striking difference in the constitutional and political theory that brought Ethiopia's monarchial, military, and federal constitutions, they essentially share a similar ambition of centralizing executive power. When we pierce the veil of executive power in modern Ethiopian constitutions, we find an imperial executive both in the military and civilian regimes as in the monarchy. In this respect, the constitutions have been used as a centralizing rather than a limiting device for the executive. Like Nigeria, the introduction of written constitutions in Ethiopia has been used as a means of enabling rather than limiting the executive.

5.5 The Executive in South Africa: "Constrained Presidency"

South Africa, unlike Nigeria and Ethiopia, has had an experience of parliamentary democracy for the white minority since its establishment.[1067] Deviating from the British tradition, South Africa provided the powers and functions of government in a written constitution. From the Union of South Africa to the Republic of South Africa, a limited government was instituted for the white minority.[1068] The powers and functions of the executives were expressly stated in the constitutions and the democratic election was the only means to assume government

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[1067] Lauren Segal and Sharon Cort, *One Law, One Nation: The Making of the South African Constitution* (Jacana Media 2011) 14–21.
[1068] Leonard Thompson and Andrew Prior, *South African Politics* (Yale University Press 1982) 71-83.

power. With respect to the white minority, the Executive had limited power and could not act as it wished.[1069] It had to follow constitutional rules and conventions in its operation and engagement with the white minority. As such, unlike Nigeria and Ethiopia, the introduction of a written constitution in South Africa was not to centralize and enlarge the executive power of government contrary to political liberty to all. Instead, it aimed to establish a democratic republic for the white minority and this, in turn, required a limited government.

As noted in the previous chapter, the struggle of the black majority was to extend the range of this limited government to all who live in South Africa. The quest for democracy, human rights, and equal citizenship were at the root of the nine-decade struggle by those disfranchised by the white minority rule.[1070] Put differently, the idea of constitutionalism, i.e. limited government, individual rights, and the rule of law, was at the heart of the South African struggle against racial segregation and apartheid.[1071] As a result, the plan of the ANC during the constitutional negotiations was the establishment of a democratic South Africa that respects the equal rights of everyone regardless of race or other status.[1072] Accordingly, unlike Nigeria and Ethiopia, the adoption of the new constitution was not considered as an occasion to further centralize and enlarge the power of the executive. Rather, all actors in the constitution-making process agreed upon the establishment of a limited executive. Moreover, instead of limiting the limitation to executive power, as discussed below, the Constitution introduces novel institutional mechanisms to ensure and safeguard the practice of limited

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[1069] LM Thompson, 'Constitutionalism in the South African Republics' (1954) 1954 Butterworths South African Law Review 49, 49-72.
[1070] Ebrahim (n 783) 31-32 & 429-436.
[1071] Stu Woolman, *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law* (Juta 2013) 505–508.
[1072] See David Chidester, Cassius Lubisi and Kader Asmal, *Legacy of Freedom: The ANC's Human Rights Tradition* (Jonathan Ball Publishers 2005).

government. The *acceptance* of the idea of limited government by South African constitutional actors, mainly by the ANC, brings a limited or constrained Executive.

Due to such *acceptance* of limited government, the rationale and substance of executive power in South Africa are different from Nigeria and Ethiopia. As noted above, this has to do with the constitution-making processes and the nature of the constitutional actors.[1073] Unlike Nigeria and Ethiopia, the constitution-making process in South Africa was inclusive of the competing interests and the final Constitution is the result of a negotiated settlement. At the beginning of the negotiation, the ANC proposed a French type presidency strong enough to execute the transformative ambition of post-apartheid South Africa and limited enough not to trump minority rights and interests.[1074] The NP, on its part, proposed a collective presidency where each member holds a veto power to ensure government by consensus.[1075] As a matter of fact, in order to advance and protect their own interests, the ANC had to defend the liberal notion of majority rule, while the NP had to inculcate the African notion of decision by consensus. The common ground for both was to structure a limited Executive where majority rule prevails while minority rights are respected. In addition to cooperative government, Bill of Rights, and judicial review, the organization of the Executive were deemed to channel these interests in a proper equilibrium. Hence, unlike Nigeria, which sees strong executive power in presidentialism, or Ethiopia, which adopts

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[1073] See Steven Friedman and Doreen Atkinson, *The Small Miracle: South Africa's Negotiated Settlement* (Ravan Press 1994).
[1074] Roger Southall, 'The South African Presidency in Comparative African Context' in Catherine Jenkins and Max du Plessis (eds), *Law, Nation-Building & Transformation: The South African Experience in Perspective* (Intersentia 2014) 263.
[1075] ibid 262.

parliamentarism to constitute a strong Executive, South Africa, engineered a unique type of limited executive government.

In fact, the Executive of post-apartheid South Africa shares some common features with the Executive of the 1983 Constitution in form but differs in substance. The 1983 Constitution unified the head of the state and the head of the government in one person without altering the parliamentary system. When the tricameral Parliament was inaugurated to include Indian and Colored communities, the centralization and consolidation of executive power were deemed important to maintain white supremacy.[1076] By unifying the bifurcation of power in a state president, South Africa departed from its Westminster parliamentary tradition. The state president of the 1983 Constitution assumed extensive powers in the legislative and executive fields.[1077] For instance, during PW Botha's presidency, the state was militarized, other institutions were subordinated to the Executive, and some form of imperial presidency was in reign.[1078] The unification of the head of state and the head of government in a state president in the 1983 Constitution, like Nigeria or Ethiopia's choice for parliamentrasim, was motivated by the quest to centralize and consolidate executive power to suppress government opposition and dissent.[1079] The post-apartheid Constitution like the 1983 Constitution eliminates the office of the Prime Minister and makes the President both the head of the state and the head of the executive.

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[1076] I Currie and J De Waal (eds), *The New Constitutional and Administrative Law: Constitutional Law Vol 1* (5th Edition edition, Juta Legal and Academic Publishers 2005) 56.
[1077] ibid.
[1078] Southall (n 1074) 262.
[1079] See D Basson and H Viljoen (eds), *South African Constitutional Law* (Juta Legal and Academic Publishers 1988) 46–61.

Nonetheless, the substance of Executive power and its way of organization under the new Constitution is different from the 1983 Constitution. As a result of a negotiated settlement,[1080] it is fair to assume that the prime purpose of unifying the head of the state and the head of government in the president is not to centralize and consolidate executive power.[1081] Further, as stated in Constitutional Principle VI, within the broader ambit of separation of powers, the structuring of the Executive is meant to ensure government "accountability, responsiveness and openness."[1082] In the South African quest for democratic transition, the executive power is structured differently both from an American or French type presidency or Westminster parliamentary system.[1083] Further, the South African Constitution by going beyond the traditional notions of separation of powers among the three branches of government, introduces a new institutional architecture so as to disperse executive power and to insulate some decisions from ordinary politics.[1084] The objective of this institutional architecture is to protect human rights and advance good governance in post-apartheid South Africa.[1085]

In terms of substantive structure, the South African Executive is shaped by the hybridization of presidential and parliamentary systems.[1086] Like Nigeria, the President in South Africa is the head of the state and government but elected by the National Assembly

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[1080] See Patti Waldmeir, *Anatomy of a Miracle: The End of Apartheid and the Birth of the New South Africa* (Rutgers University Press 1998).
[1081] See also Albert Venter, 'The Executive: A Critical Evaluation' in Bertus De Villiers (ed), *Birth of a Constitution* (1st edition, Juta Legal and Academic Publishers 1994) 172-188.
[1082] Annex to the Interim Constitution of South Africa1993.
[1083] Christina Murray and Richard Stacey, 'The President and the National Executive' in Stu Woolman and Michael Bishop (eds), *Constitutional Law of South Africa Vol 1* (Juta & Company Ltd 2013) 18-2-18–3; DA Basson, *South Africa's Interim Constitution: Text and Notes* (Juta & Co 1994) 112–113.
[1084] Klug (n 782) 188.
[1085] ibid.
[1086] Romano Orru, 'South African 'Quasi-Parliementariansim' in Hugh Corder and Veronica Federico, *The Quest for Constitutionalism: South Africa since 1994* (Routledge 2014) 28.

among its members and dependent on the support of the parliament for his office.[1087] In addition, unlike Nigeria, with the exception of two cabinet ministers, the President in South Africa appoints his cabinet ministers from members of the National Assembly.[1088] While the President is elected from members of the National Assembly, he has to vacate his seat unlike in Ethiopia. Most importantly, the President has a differentiated authority or power when he acts as head of state and head of government. As head of the state, the President is responsible, among others, to assent and sign Bills, to refer back Bills to the National Assembly for reconsideration or to the Constitutional Court for confirmation of constitutionality, to appoint ambassadors and diplomatic representatives.[1089] In exercising these head of state powers stated in sec 84(2), the President is autonomous and acts solely as it is considered that other institutions make these decisions and the president's decision is merely one of formalization.[1090] However, it does not mean that the President cannot consult his advisors or cabinet in exercising these powers nor does it mean the head of state and head of government powers are clearly separated.[1091] It means that the President is the final decision maker and he is more autonomous when acting on behalf of the state.

As the head of the executive, the President has the power of [1092]

a) *implementing national legislation except where the Constitution or an Act of Parliament provides otherwise;*
b) *developing and implementing national policy;*
c) *co-ordinating the functions of state departments and administrations;*
d) *preparing and initiating legislation; and*
e) *performing any other executive function provided for in the Constitution or in national legislation.*

[1087] The Constitution of South Africa, ss 83(a), 86(1) & 102 (2) See also Brand and others (n 806) 173–176.
[1088] ibid s 91(3).
[1089] ibid s 84(2).
[1090] Murray and Stacey (n 1083) 18–5.
[1091] See Brand and others (n 806) 177; Murray and Stacey (n 1083) 18–6.
[1092] The Constitution of South Africa, s 85(2).

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In performing these executive functions, the President has to act with his cabinet which includes the Deputy President and Ministers.[1093] Although the Constitution vests executive power in the President, its exercise is the joint domain of the cabinet.[1094] In order to ensure joint executive action, the Constitution requires a decision made by the President to be written and "countersigned by another cabinet member if that decision concerns a function assigned to that cabinet member."[1095] While the President appoints his deputy and ministers by himself,[1096] he appoints judges with the consultation of the Judicial Service Commission and/or the leader of parties represented in the National Assembly[1097] and independent constitutional institutions such as the Public Protector, the Auditor General and members of the South African Human Rights Commission, the Commission for Gender Equality, and the Electoral Commission with the recommendation of the National Assembly.[1098] He also appoints the members of the Financial and Fiscal Commission.[1099] Although the President can dismiss his deputy or ministers,[1100] he has no power of removing judges or appointed persons of the independent constitutional institutions.[1101]

Moreover, unlike Nigeria and Ethiopia, the South African President and his cabinet have no power of declaration of emergency. Declaration of state of emergency is within the domain of Parliament in South Africa.[1102] Although the South African President has the

[1093] ibid ss 85(2) & 91(1).
[1094] ibid s 85(1).
[1095] ibid s 101(2).
[1096] ibid s 91(2).
[1097] ibid s 174(3), (4), & (6).
[1098] ibid s 194(4).
[1099] ibid s 221(1).
[1100] See also Brand and others (n 806) 194–195; Stating that the president has to consult the leadership of the majority party to remove the deputy or one of his ministers.
[1101] The Constitution of South Africa, ss 91(2), 177, & 194.
[1102] ibid s 37.

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power to declare national defense as Commander-in-chief of the army, this declaration will lapse after seven days if not approved by Parliament.[1103] The emergency power of the President is considered a key power in many African countries including Nigeria and Ethiopia in maintaining incumbency.

Furthermore, unlike Nigeria and Ethiopia, the establishment of institutions that support constitutional democracy such as the Public Protector, the South African Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Minorities, the Commission for Gender Equality, the Auditor General, and the Electoral commission insulate some decisions from the discretions of the executive.[1104] These institutions enjoy a constitutionally guaranteed independence in advancing constitutional democracy by executing specifically assigned tasks by the Constitution and legislation.[1105] Through their oversight, supervision, and enforcement of their specific tasks, these constitutional institutions keep the Executive within its constitutional limit.[1106] In addition, the legislative oversight and judicial review of the exercise of presidential power in South Africa has limited and constrained the power of the presidency, unlike Nigeria and Ethiopia.[1107]

In contrast with Nigeria and Ethiopia, the post-apartheid practice of presidential power is more one of constraint than imperial. This is not only related to substantive Executive power but also the resources available for the presidency. Nelson Mandela, South

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[1103] ibid ss 202 & 203.
[1104] ibid s 181.
[1105] For the mandates of these institutions and organizational structure, see South African Constitution Chapter 9.
[1106] See Fombad, 'Constitutional Reforms and Constitutionalism in Africa' (n 16) 1019.
[1107] See Motala and Ramaphosa (n 916) 177–191; Brand and others (n 806) 174–196; Murray and Stacey (n 1083) 18-12 &18–22 .

Africa's first democratically elected President, not only had fewer administrative resources than his predecessor FW de Klerk, but had to share his office with his two deputies, Klerk and Thabo Mbeki, and had to consult with them on all issues.[1108] Although the administrative and financial resources of the office of the presidency expanded through time, the presidential power remains within the contours of the Constitution.[1109] Mandela in sharp contrast with Obasanjo and Zenawi, and other post-colonial African leaders, not only stepped down from his presidency after one term, but also submitted to the decision of the judiciary when it invalidated his executive actions and even acted as a court witness.[1110]

Although Mbeki enlarged the capacity of the presidency more than Mandela, he did not control the state and the party apparatus, unlike Obasanjo and Zenawi.[1111] When he lost the internal party election, he resigned from his presidency before the expiry of his second term although he could have challenged it in the National Assembly following the Constitutional procedures.[1112] Following his predecessor Mbeki, Jacob Zuma resigned before the end of his second term as the ANC wanted him to step down.[1113] Although corruption was alleged to be rampant in the Zuma presidency, almost every legislation and executive action of the government were challenged in the Constitutional Court, another indicator for

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[1108] Klug (n 782) 201.
[1109] Brand and others (n 806) 180–181.
[1110] Klug (n 782) 192; Diana Kapiszewski, Gordon Silverstein and Robert A Kagan, 'Introduction' in Diana Kapiszewski, Gordon Silverstein and Robert A Kagan *Consequential Courts: Judicial Roles in Global Perspective* (Cambridge University Press 2013) 26–27; Nelson Mandela and Mandla Langa, *Dare Not Linger: The Presidential Years* (Pan Macmillan 2017).
[1111] See also Shane Mac Giollabhuí, 'The Fall of an African President: How and Why Did the ANC Unseat Thabo Mbeki?' (2017) 116 African Affairs 464, 395-404; Sean Jacobs and Richard Calland, *Thabo Mbeki's World: The Politics and Ideology of the South African President* (University of Natal 2002).
[1112] Klug (n 752) 192.
[1113] See Richard Calland, *The Zuma Years: South Africa's Changing Face of Power* (Random House Struik 2014); 'South Africa's President Zuma Resigns' *BBC News* (14 February 2018) <http://wwwbbccom/news/world-africa-43066443> accessed 14 February 2018.

the practice of checks and balances.[1114] So far, the Presidents in South Africa neither personally control their political party nor the state. Unlike Obasanjo of Nigeria, South African Presidents have respected the constitutional rule of terms limits and they did not reign over their political parties. They are constrained by both political party and constitutional rules. Beyond respecting term limits, they have been constrained by and operated within the strictures of executive government as provided in the Constitution.[1115]

The chief explanation for the constrained presidency is to be found in the syncretism of the idea of limited government in the main constitutional actors, in particular in the ANC as the main actor in the transition and post-apartheid South Africa.[1116] The creation of a limited Executive in South Africa was not only a necessary condition for the transition from apartheid, but it was also essential in transforming South Africa to a non-racial state hospitable to all people who live in it. Unlike Nigeria and Ethiopia, the power limiting aspects of indigenous and liberal constitutional ideas were deployed. Although the ANC had the majority support, it agreed to form a Government of National Unity in the Interim Constitution to ensure inclusivity, cooperation, and consensus among a wide range of political parties. While this is part of a deal in a two-step constitution-making process, as a matter of fact, consensus in decision making which animate African traditional notions of power was at the service of South Africa's transition from apartheid to democracy. As discussed above, the construction of executive power in a personally and institutionally

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[1114] Heinz Klug, 'Challenging Constitutionalism in Post-Apartheid South Africa' (2016) 1 Constitutional Studies 41, 50.
[1115] Southall (n 1074) 263–272; Motala and Ramaphosa (n 916) 179–200; Brand and others (n 806) 182–194.
[1116] See also Chidester, Lubisi and Asmal (n 1072); Jens Meierhenrich, *The Legacies of Law: Long-Run Consequences of Legal Development in South Africa, 1652-2000* (Cambridge University Press 2008).

dispersed and diffused way attest to the syncretism of more power limiting aspects of liberal and indigenous notions of power in South Africa.

5.6 Conclusion

Legal syncretism animates both the power and structure of the executive in Nigeria, Ethiopia, and South Africa *albeit* differently. While presidentialism in Nigeria and parliamentarinsm in Ethiopia are adopted with the objective to centralize and consolidate power in the person of the Chief Executive, South Africa's unique regime is motivated by placing effective constraints in the power of the Chief Executive. Nigeria and Ethiopia have consciously configured the *power enabling* aspects of presidential and parliamentary systems and traditional notions of political power. The result is the establishment of a strong Chief Executive with imperial tendencies that trumps other constitutional organs. Nonetheless, the nature, rationale, scope, and manifestations of imperial presidency and premiership in Nigeria and Ethiopia respectively are different from the American or French imperial presidency as the former rests in the conscious act of absorption and rejection of liberal and indigenous constitutional ideas. South Africa, in contrast, constructed its Executive mainly from the *power limiting* aspects of the liberal and indigenous notions of political power. Consequently, its Chief Executive is more limited or constrained and operates within the strictures provided by the Constitution. Because of this syncretic logic, presidential power in South Africa is different from the United States or France. Thus, despite the differences in the powers of the Chief Executive in Nigeria, Ethiopia, and South Africa, legal syncretism captures and explains the nature, organization, and practice of executive power.

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CHAPTER SIX
LEGAL SYNCRETISM AND WOMEN'S CONSTITUTIONAL RIGHTS IN AFRICA: CASE STUDIES

6.1 Introduction

The previous chapters demonstrated how legal syncretism features in the vertical and horizontal division of power with a focus on federalism and the Executive. Following a similar suit, this chapter explains how legal syncretism influences and manifests itself in the design and practice of the Bills of Rights with a focus on women's rights in the constitutional systems of Nigeria, South Africa, and Ethiopia. By taking women's rights as an aspect of the Bills of Rights, this chapter aims to demonstrate how the interaction between the liberal notion of rights and the indigenous conception of rights in a constitutional space produce a unique regime of women's rights in these countries.

Women's rights are one of the main intersection points in the universalism and cultural relativism debates of human rights. On the one hand, universalists claim that culture poses a serious challenge to the enjoyment of women's rights as such cultures are produced by and operated in patriarchal systems. Hence, to protect and ensure the rights and interest of women, human rights should have primacy over cultural systems.[1117] On the other hand, cultural relativists contend that human rights are part of the cultural experience of every society and consequently culture should inform the substantive content and enforcement of

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[1117] Susan Moller Okin, 'Is Multiculturalism Bad for Women?' in Joshua Cohen, Mattew Howard and Martha C Nussbaum (eds), *Is Multiculturalism Bad for Women?: Susan Moller Okin with Respondents* (Princeton University Press 1999) 22–24.

human rights.[1118] As a result, the theory and practice of human rights should not be judged simply by the cultural understanding of Western societies that brought the so-called "universal human rights".[1119]

As a matter of fact, however, the universal account of human rights is not without problems for women, and the cultural relativist view is not without advantages. Feminist scholars reveal how the human rights discourse and structure position women in a disadvantaged position.[1120] In a similar vein, some scholars also demonstrate how cultural systems protect the rights and interests of women[1121] and how women are changing their cultures *within* to more egalitarian value systems.[1122] Despite the universalism and cultural relativism debate, therefore, culture influences the structure, perception, adjudication, and enforcement of human rights, and human rights, in turn, influence and shape the development of culture.[1123]

In the African context, the idea of women's rights broadcasts and channels its universality in the sense that women are entitled to the same rights available to men on the basis of equality and to those specific rights available to women internationally as the special circumstances of women warrant it. At the same time, as these women's rights are exercised within a cultural and religious setting, their universality is set in motion along with cultural relativism. In this regard, constitutions are spaces within which the universality and cultural

[1118] Mutua (n 148) 74-81.
[1119] Abdullahi Ahmed An-Na'im, 'Toward a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman, or Degrading Treatment or Punishment' in Abdullahi Ahmed An-Na'im (ed), *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (University of Pennsylvania Press 1999) 25–29 .
[1120] See Gayle Binion, 'Human Rights: A Feminist Perspective' (1995) 17 Human Rights Quarterly 509, 509–526.
[1121] Helium (n 616).
[1122] Sunder (n 671) 1402–1404.
[1123] Federico Lenzerini, *The Culturalization of Human Rights Law* (Oxford University Press 2014) 213–217.

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relativity of women's rights happen. This constitutional design both offers women unique opportunities to claim their rights and advance their interests within their cultural universe and carries over old problems that challenge their rights. Further, in such constitutional design and practice, women's rights are neither a Western export nor an indigenous product. They are the results of legal syncretism, i.e. a conscious constitutional craft, which aims to channel the seemingly opposite and diverse notions of rights in a constitutional plane.

In order to show how women's rights in these countries are the results of legal syncretism, this chapter first presents a brief theory of women's rights as a standard of comparison and evaluation. This will be done through an investigation of women's rights in international law. This is followed by a discussion of women's constitutional rights in Nigeria, South Africa, and Ethiopia. Such discussion explores the substantive content and the way in which women's rights are constitutionalized along with their practical and judicial applications. The syncretic nature of women's rights in these countries sheds some light on the importance of looking beyond the universalism and cultural relativism debate to enforce human rights.

6.2 Women's Rights as Human Rights

It is conventional wisdom that human rights are the rights one has by the simple fact of being a human. However, it is neither self-evident that human rights were available to women nor can women enjoy human rights on the basis of equality with men.[1124] Both the French Declaration on the Rights of Man and Citizen and the American Declaration of

[1124] Catharine A MacKinnon, *Are Women Human?: And Other International Dialogues* (Harvard University Press 2006) 1–7.

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Independence, the precursors to international human rights law, did not extend what they declared self-evident truths about rights to women.[1125] The extension of human rights to women in the Universal Declaration of Human Rights (UDHR) and the subsequent conventions is both the results of women's struggle and the recognition of women as an equal part of humanity in the liberal thought.[1126] Although international human rights law plays a significant role in protecting and advancing the rights and interests of women, the deeply embedded socio-economic, cultural, and political barriers set a huge obstacle for women to enjoy their rights on an equal basis with men.

Within this background, this section briefly introduces the concept of women's rights as a frame of reference to evaluate and examine women's rights in South Africa, Nigeria, and Ethiopia. Fundamental in the discussion of women's rights are women's rights to equality and non-discrimination in the enjoyment of all human rights available to men, the protection of women from structural power imbalance and violence, enabling women to enjoy their rights in a meaningful and substantive way, and understanding and incorporating women's world view in the theory and practice of human rights. This section discusses these issues in light of international human rights law with feminist and African insights. As there are international and regional standards on women's rights, unlike federalism or imperial presidency, a discussion of women's rights in non-African national jurisdictions will not be made here. Moreover, as the UDHR inspired constitutional rights in Africa including the case

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[1125] Eileen Hunt Botting, *Wollstonecraft, Mill, and Women's Human Rights* (Yale University Press 2016) 6; Sally McMillen, *Seneca Falls and the Origins of the Women's Rights Movement* (Oxford University Press 2009).
[1126] Johannes Morsink, 'Women's Rights in the Universal Declaration' (1991) 13 Human Rights Quarterly 229, 231–232.

studies here, it is appropriate to evaluate constitutional women's rights with international standards.[1127]

The International Bill of Human Rights recognizes the equal rights of women and men and prohibits discrimination on the ground of sex in an unequivocal manner. The pioneer in this regard is the UDHR which declares that "[a]ll human beings are born free and equal in dignity and rights."[1128] It continues, "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as…sex..."[1129] Even though the UDHR did not avoid sexist languages and understandings,[1130] it introduces gender-neutral terms such as 'everyone, no one, all, and human beings' in its framing of the subject of human rights. By doing so, the UDHR makes both women and men subjects of civil, political, economic, and social rights it recognizes. Further, by taking the traditional position and role of women into account, it recognizes the equality of women and men in marriage[1131] and provides for special care and assistance to motherhood.[1132]

Building on the UDHR, the International Covenant on Civil and Political Rights (ICCPR) reaffirms the equality of women and men in the enjoyment of civil and political rights[1133] and prohibits discrimination on the grounds of sex.[1134] In a similar vein, the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognizes the equal rights of women and men in the enjoyment of economic, social and cultural rights[1135]

[1127] See Hurst Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law' (1995) 25 Ga J Int'l & Comp L 287, 289–312.
[1128] The Universal Declaration of Human Rights, article 1.
[1129] ibid article 2.
[1130] See ibid article 13 (2) & 25(1).
[1131] ibid article 16(1).
[1132] ibid article 25(2).
[1133] The International Covenant on Civil and Political Rights 1966, articles 23(2) & 26.
[1134] ibid article 2(1).
[1135] The International Covenant on Economic, Social and Cultural Rights 1966, article 3.

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and prohibits any discrimination based on sex.[1136] These international human rights instruments legally equalize women and men in the enjoyment of and access to human rights.

Although the recognition of women's rights in these instruments have played a significant practical and symbolic role in the improvement of the situations of women, these instruments neither bring women on equal basis with men in the enjoyment of human rights nor eliminate discrimination based on sex. This generally has to do with the participation of women in the making and monitoring of human rights, the way in which human rights are legalized, and the special circumstance of women in society and the understanding and translation of this phenomenon by human rights norms.

Along these lines, feminists bring four major critiques of why human rights as recognized in the International Bill of Human Rights are not able to improve the situation of women and ensure their equality with men.[1137] The first critique is the absence of women and their voices in international human rights norm making.[1138] As men make these standards predominantly, it is argued, the perspectives of men and how men see women 's rights shape the kind of equality and non-discrimination they envision.[1139] As a result, some argue that the language of human rights even become a structural barrier like other socio-economic and political structures.[1140] The second critique is international human rights are shaped by the realities of men and consequently marginalizes women's concerns and experiences. Despite

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[1136] ibid article 2(2).
[1137] Alice Edwards, *Violence against Women under International Human Rights Law* (Cambridge University Press 2010) 36.
[1138] ibid 43.
[1139] See also Hilary Charlesworth, 'Alienating Oscar - Feminist Analysis of International Law' (1993) 25 Studies in Transnational Legal Policy 1, 1-18.
[1140] Hilary Charlesworth, 'What are "Women's International Human Rights"? in Rebecca J Cook (ed), *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press 1994) 60–61.

the recognition of formal equality, feminists contented that "human rights are men's rights."[1141] The privilege of patriarchy, the standardization of men, and the primacy of civil and political rights over economic and social rights are considered as the manifestation of human rights as men's rights.[1142]

The third critique is the distinction between the public and private sphere in international human rights law.[1143] While the public sphere is considered as the space for reason, culture, and intellectual endeavor, the private sphere is considered as the site for 'nature, nurture and non-rationality.'[1144] By intervening only in the public sphere, international human rights law protects men, as they are the main actors while alienating women.[1145] Hence, feminists argue that international human rights law marginalized women's interests and subordinates their worlds in its conceptualization.

The fourth and final critique is even though international human rights law recognizes women's rights, it considers women as homogeneous groups who essentially share the same feminine identity.[1146] Although women share some similar structural and social problems in every society, they have different experiences and problems across the world due to ethnicity, race, religion, culture, class, and similar attributes. Feminists contend that by essentializing women, international human rights law failed to consider their particular needs and circumstances.

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[1141] Edwards (n 1137) 51.
[1142] ibid 51–64.
[1143] ibid 64.
[1144] Margaret Thornton, 'The cartography of Public and Private' in Margaret Thornton (ed), *Public and Private: Feminist Legal Debates* (Oxford University Press 1995) 11–12.
[1145] Celina Romany, 'State Responsibility Goes Private: A Feminist Critique of Public/private Distinction in International Human Rights Law' in Rebecca J Cook (ed), *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press 1994) 87.
[1146] Edwards (n 1137) 71.

In order to tackle "the extensive discrimination against women,"[1147] despite numerous human rights instruments recognize their equality and prohibit discrimination on the grounds of sex, and partly to respond to some of the feminist critiques of international human rights law, the Convention on the Elimination of All forms of Discrimination against Women (CEDAW) was adopted. CEDAW by going beyond the International Bill of Human Rights prohibits any discrimination against women "in the political, economic, social, cultural, civil or any other field."[1148] Not only does it require states to take all appropriate measures "to eliminate discrimination against women by any person, organization or enterprise,"[1149] it obligates states to take "temporary special measures" to ensure the *de facto* equality of women and men.[1150] CEDAW directly deals with the social and cultural context women lead their lives and prohibits discrimination in these fields. It specifically stipulates that states should

> […] modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.[1151]

In addition to reaffirming the equal rights of women in all aspects of life such as in socio-economic and political fields to the domain of personal and family matters,[1152] CEDAW pays particular attention to trafficking in women, prostitution, and rural women.[1153] Furthermore, the CEDAW Committee, the body overviewing the implementation of this convention, has explained via its general recommendations on the various provision of CEDAW by relating

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[1147] See Convention on the Elimination of All Forms of Discrimination against Women 1979, preamble.
[1148] ibid article 1.
[1149] ibid article 2(e).
[1150] ibid article 4.
[1151] ibid article 5(1).
[1152] ibid articles 3,7-13, 15 & 16.
[1153] ibid articles 6 & 14.

them to the different circumstances of women around the world, for instance, on violence against women,[1154] the practice of female circumcision,[1155] AIDS,[1156] unpaid women workers in family enterprises,[1157] disabled women,[1158] older women,[1159] women in conflict and post-conflict situations,[1160] and refuge and asylum seeker women.[1161] Although CEDAW has many reservations,[1162] in particular from predominantly Muslim states, it is the most transformative and progressive women's rights convention at the international level.[1163] It provides the case for formal and substantive equality for women in all aspects of life unconstrained by cultural, religious, customary or any other explanations, and consequently make women's rights universal human rights.[1164]

Even if CEDAW recognizes the equal rights of women and men in all fields at the international level and the African Charter affirms the equal rights of women and men at the regional level,[1165] African women face discrimination, marginalization, and violence in a wide range of spheres.[1166] In order to address the specific needs of women in Africa, the AU

[1154] United Nations Committee on the Elimination of Discrimination Against Women, 'General Recommendation No 19' <https://wwwohchrorg/en/hrbodies/cedaw/pages/recommendationsaspx> accessed 17 January 2019; See also United Nations Committee on the Elimination of Discrimination Against Women, 'General Recommendation No. 35' <https://wwwohchrorg/en/hrbodies/cedaw/pages/recommendationsaspx> accessed 17 January 2019.
[1155] ibid General Recommendation No 14.
[1156] ibid General Recommendation No 15.
[1157] ibid General Recommendation No 16.
[1158] ibid General Recommendation No 18.
[1159] ibid General Recommendation No 27.
[1160] ibid General Recommendation No 30.
[1161] ibid General Recommendation No 32.
[1162] See Rebecca J Cook, 'Reservations to the Convention on the Elimination of All Forms of Discrimination against Women' (1989) 30 Virginia Journal of International Law 643, 643-716.
[1163] Frances Raday, 'Gender and Democratic Citizenship: The Impact of CEDAW' (2012) 10 International Journal of Constitutional Law 512, 529.
[1164] See Marsha A Freeman, Christine Chinkin, Beate Rudolf, 'Introduction' in Marsha A Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary* (Oxford University Press 2012) 2.
[1165] African Charter, Article 2, 3, & 18(3).
[1166] Claude E Welch, 'Human Rights and African Women: A Comparison of Protection under Two Major Treaties' (1993) 15 Human Rights Quarterly 549, 550-553; Fareda Banda, 'Blazing a Trail: The African Protocol

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adopts a Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa (African Women's Rights Protocol) in 2003.[1167] In addition to reaffirming women's rights recognized by other human rights instruments, the African Women's Rights Protocol defines and prohibits harmful cultural practices,[1168] violence against women,[1169] recognizes women's sexual and reproductive rights including the right to abortion on some grounds,[1170] and prohibits female genital mutilation.[1171] Furthermore, it recognizes women's right to a positive cultural context. This right is defined as women's "[…] right to live in a positive cultural context and to participate at all levels in the determination of cultural policies."[1172] By recognizing culture as a site for women's rights and by appreciating the agency of women in culture and its development and transformation, the African Women's Rights Protocol extends the reach of human rights in the province of culture.[1173]

In a nutshell, the nature and substance of women's rights in Africa emanates from these international and regional human rights instruments. Equality, non-discrimination, and temporary special measures or affirmative action, on the one hand, and the prohibition and elimination of all legal, social, cultural, religious, customary or other harmful practices against

on Women's Rights Comes into Force' (2006) 50 Journal of African Law 72, 72–74; See also African Women's protocol, Preamble.

[1167] For the protocol's comparison with other human rights instruments see Frans Viljoen, 'An Introduction to the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa' (2009) 16 Washington and Lee Journal of Civil Rights and Social Justice 11.

[1168] The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2003, article 1(g) & 5.

[1169] ibid article 1(j).

[1170] ibid article 14, 14(2(c)).

[1171] ibid article 5(b); See also Banda (n 6) 80–82; Rose Gawaya and Rosemary Semafumu Mukasa, 'The African Women's Protocol: A New Dimension for Women's Rights in Africa' (2005) 13 Gender and Development 42, 48.

[1172] The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, article 17(1).

[1173] See also Sylvia Tamale, 'The Right to Culture and the Culture of Rights: A Critical Perspective on Women's Sexual Rights in Africa' (2008) 16 Feminist Legal Studies 47, 57–58.

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women, on the other hand, characterize the nature of women's rights. In terms of substance, women's rights include (1) those civil, political, economic, social, environmental, and developmental rights recognized to every human being and (2) those specific women's rights recognized by CEDAW and the African Women's Rights Protocol.

While it is a truism that the ideals of human rights are embedded in the different cultural, social, and religious contexts across the world in one or other form,[1174] the advancement of human rights in their current form and shape are the results of the triumph of liberalism since the end of the Second World War.[1175] Women's rights as part of the human rights regime and movement are not an exception. Against this backdrop, the following sections, explore and examine the constitutional design and practice of women's rights in Nigeria, South Africa, and Ethiopia. Like federalism and executive power, the aim of these sections is to show how women's constitutional rights in Africa are the result of legal syncretism and how this concomitantly shape women's right to equality and non-discrimination.

6.3 Women's Constitutional Rights in Nigeria

A cursory reading of the Bill of Rights under the Nigerian Constitution shows that women and men are equal in enjoying and accessing rights. However, a closer look at the constitutional normative and institutional configurations reveals that the province of women's rights in Nigeria is not as clear as it seems. On the one hand, the Constitution reaffirms the liberal account of rights by extending it to everyone including women without any

[1174] See Mutua (n 148).
[1175] See Jack Donnelly, *Universal Human Rights in Theory and Practice* (3 edition, Cornell University Press 2013).

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discrimination based on sex. On the other hand, it brings the notion of rights as found in religious and customary practices by recognizing sharia and customary laws. By transcending the universalism and cultural relativism dichotomy in the human rights debate, the Constitution considers sharia and customary laws as both manifestations of freedom of religion and the right to culture and avenues for the enforcement of human rights including women's rights. As a result, the exact contents of women's rights will be determined by the normative, institutional, and practical interactions set out by the Constitution. In this respect, courts play a crucial role in defining women's rights and shaping their contours. This section outlines the substance of women's rights under the Nigerian Constitution and, in particular, investigates women's right to equality and non-discrimination under sharia and customary laws. The focus on these laws is to show how women's constitutional rights are animated by legal syncretism, that they are rooted in the liberal notion of rights, and that the notion of rights is embedded in religious and customary laws.

A. Constitutional Design

Unlike South Africa and Ethiopia, as will be discussed below, Nigeria recognized socio-economic rights in Chapter II which deals with Directive Principles of State Policy (DPSP) and civil and political rights in Chapter IV that covers fundamental rights. While DPSP are general guidelines in the implementation of the Constitution and other laws, they may not be justiciable before a court of law.[1176] Whereas, fundamental rights are justiciable and accordingly can be enforced by the judiciary. Like the International Bill of Human Rights, a

[1176] The Constitution of Nigeria, s 13; see also Atudiwe P Atupare, 'Reconciling Socioeconomic Rights and Directive Principles with a Fundamental Law of Reason in Ghana and Nigeria' (2014) 27 Harv Hum Rts J 71, 90–91.

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feminist critique can be made by the different levels of recognition and protection towards socio-economic rights and civil and political rights under the Nigerian Constitution. Nonetheless, the discussion here is limited to ascertaining women's rights, in general, and their right to equality and non-discrimination, in particular, at the formal level.

The DPSP Chapter makes it clear that the fundamental objectives and directives of state policy in the socio-economic, cultural, and political fields should include and take into account every Nigerian. Moreover, it emphasizes on the equality of women and men and prohibits discrimination based on sex within the DPSP framework. For instance, section 17(2(a)) states that "every citizen shall have equality of rights, obligations and opportunities before the law." Women as Nigerian citizens[1177] are entitled to equal rights and responsibilities with men. Conscious of the prevalence of discrimination including based on sex, section 17 (3(a)) commands the state to direct its policies to ensure that "all citizens, without discrimination on any group whatsoever, have the opportunity for securing adequate means of livelihood as well as adequate opportunity to secure suitable employment." In particular, section 17(3(e)) recognizes equal pay for equal work without discrimination on account of sex.

Following similar trends in international human rights standards, the DPSP Chapter encourages the state to direct its policies to the "evolution and promotion of family life"[1178] and the development and promotion of positive cultural practices. In this regard, section 21(a) provides that the state shall "protect, preserve and promote the Nigerian cultures which enhance human dignity and are consistent with the fundamental objectives as provided in this

[1177] See the Constitution of Nigeria, s 25(1).
[1178] ibid s 17 (3(h)).

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Chapter." This cultural right formulation is important when seen in light of women's rights. First, women like men are cultural beings and want to participate in the cultural life of their community. Second, in as much as there are cultural practices that channel and reinforce discrimination against women, there are cultural practices that protect and advance women's rights.[1179] Moreover, even those discriminatory cultural practices are subject to change due to internal and/or external reasons.[1180] Hence, the recognition and rejection of cultural practices opens multiple possibilities and contestations for women's rights.[1181]

Within the general background of equality and non-discrimination, women are entitled to the right to human dignity,[1182] the right to adequate standard of living,[1183] the right to health,[1184] the right to work,[1185] the right to rest and leisure,[1186] the right to education,[1187] and the right to culture,[1188] among other things, in the DPSP Chapter. Beyond rights, DPSP enshrines principles that advance the causes of social justice, development, national integration, and constitutionalism and it positions women and men on an equal plane.

The fundamental rights Chapter contains the classic civil and political rights and makes them available to women. Among the civil and political rights, freedom of religion and

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[1179] See Sunder (n 671).
[1180] See also Susanne Zwingel, 'How Do Norms Travel? Theorizing International Women's Rights in Transnational Perspective' (2012) 56 International Studies Quarterly 1, 115-129.
[1181] See also Bonny Ibhawoh, 'Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State' (2000) 22 Human Rights Quarterly 838, 842; Manisuli Ssenyonjo, 'Culture and the Human Rights of Women in Africa: Between Light and Shadow' (2007) 51 Journal of African Law 39, 66.
[1182] The Constitution of Nigeria, section 17(2(b)).
[1183] ibid s 17(3).
[1184] ibid s 17(3(d).
[1185] ibid s 17(3(a, b & c)).
[1186] ibid s 17(3) (b).
[1187] ibid s 18(3).
[1188] ibid s 21(a).

equality before the law require a special mention given their impact on women's rights in the domain of sharia law. Section 38(1) of the Constitution states that

> Every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief, and freedom (either alone or in community with others, and in public or in private) to manifest and propagate his religion or belief in worship, teaching, practice and observance.

This article is almost a verbatim copy of article 18 (1) of the ICCPR and does not pose danger to women's rights in itself.[1189] Further, section 42 guarantees equality and prohibits any discrimination based on sex, among others. Thus, while the Nigerian Constitution did not recognize special rights for women, as in CEDAW or the African Women's Rights Protocol, it recognizes the equal rights of women and men in enjoying and accessing rights and performing duties and responsibilities.

This description of women's rights under the Nigerian Constitution is the tip of the iceberg. The complex terrain of women's rights in Nigeria is unraveled through the investigation of the judicial structure, the applicable laws, and the judicial practice. As a federal state, Nigeria has a decentralized judicial system. There are three major types of courts in Nigeria. For lack of a better description, the first kind of courts are those that predominantly apply statutory and the common law which includes the Supreme Court, the Court of Appeal, the Federal High Court, the Federal High Court of the Federal Capital Territory, High Courts of States, and other lower courts of a similar type. The second kind of courts are those that predominantly apply sharia law and include the Sharia Court of Appeal of the Federal Capital

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[1189] See also Human Rights Committee, General Comment No 22 <https://tbinternetohchrorg/_layouts/treatybodyexternal/Downloadaspx?symbolno=CCPR%2fC%2f21%2fRev1%2fAdd4&Lang=en> accessed 17 January 2019 When we see General Comment No 22 on freedom of thought, conscience and religion, it is clear that freedom of religion does not enlarge religious freedom to the public sphere (i.e. criminal law).

Territory, the Sharia Court of Appeal of States, and other lower sharia courts. The third type of courts is those that predominantly apply customary laws and include the Customary Court of Appeal of the Federal Capital Territory, the Customary Court of Appeal of States, and other lower customary courts. While there is a three-tiered court system at the Federal Capital Territory and state levels, there is a unified court system at the federal level having appellate jurisdiction on sharia and customary laws.

Like the nature of the judiciary in Africa, as discussed in Section 3.3 (C), the judiciary in Nigeria is syncretic as there is a fusion of laws and persons. For instance, sharia and customary court judges need to have a legal training in addition to having a proven expertise in Islamic law and customary laws.[1190] The jurisdiction of sharia and customary courts are not limited to Islamic or customary laws.[1191] Further, the appointment of sharia and customary court judges and their rule of procedure is regulated by statutory laws.[1192] Moreover, the higher federal courts have appellate jurisdiction to review the decision of sharia and customary courts.[1193] Seen in this syncretic judicial framework, the court system in Nigeria is set out in a unified and harmonious manner despite the seemingly diverse and perhaps competing judicial design.[1194]

In addition to the formal recognition of women's right to equality and non-discrimination in the Constitution, this syncretic judicial design with its plural laws determines the substance of women's rights and the level of protection in practice. In this

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[1190] See the Constitution of Nigeria, ss 260(3) & 266(3).
[1191] See ibid ss 262(1) & 267.
[1192] See ibid ss 261(1 &2) & 266 (1 & 2).
[1193] See ibid s 247.
[1194] See also Abdulmumini A Oba, 'Judicial Practice in Islamic Family Law and Its Relation to 'Urf (Custom) in Northern Nigeria' (2013) 20 Islamic Law and Society 272, 279.

respect, it will be of particular importance to see women's rights, in general, and their right to equality and non-discrimination, in particular, in light of Islamic and customary laws. The Constitution simply mentions that sharia and customary courts have jurisdiction on issues involving Islamic personal law and customary laws. As a result, it is necessary to consult on extra constitutional sources to ascertain the content of these laws to assess their compatibility or otherwise to the constitutional recognition of women's rights. As Islamic and customary laws are applicable in personal matters, I will focus on what these laws say on marriage and inheritance and examine women's rights in these laws to show the range of these rights in the constitutional design.

B. Islamic and Customary Laws on Marriage and Inheritance

It should be noted from the outset that Islamic law was considered as customary law for Northern Nigeria during the colonial period.[1195] Moreover, while the Constitution simply says Islamic personal law, the Malik school has been the official school of Islamic law applicable in Nigeria.[1196] One of the features of the Malik school is the strong consideration of "custom" as a source of Islamic law.[1197] As long as custom is not contrary to the law and spirit of Islamic law, it will be applicable in Islamic courts.[1198] This means that what is considered as Islamic law for the purpose of judicial application may include a complex set of Islamic laws and local customs. This as it may, the canonical Islamic law on marriage and inheritance are well-

[1195] See AA Oba, 'Islamic Law as Customary Law: The Changing Perspective in Nigeria' (2002) 51 The International and Comparative Law Quarterly 4, 817-850.
[1196] Oba (n 1194) 275–276 See the Supreme Court in *Abdulsalam v Salawu* [2002] 6 SCNJ, 388-403 holding that the official Islamic law is the Malik school.
[1197] Oba (n 1194) 277.
[1198] Ibid; Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (3rd revised edition, The Islamic Texts Society 2003) 283; see also Khaleel Mohammed, 'The Islamic Law Maxims' (2005) 44 Islamic Studies 2, 191-207.

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known. What will be done here is a brief restatement of the main contents of these laws as they relate to women's rights to equality and non-discrimination.

Marriage under Islamic law, as practiced in Nigeria, requires the consent of the future spouses in principle, while the consent of the guardian (often the father) suffices if the woman or girl is a virgin.[1199] Although she is entitled to revoke the consent of her guardian after attaining majority, the guardian has a legal right to marry her even against her will. To have a valid marriage, the future husband must pay a dowry to the future wife. Once the marriage is concluded, the husband has an obligation to maintain his wife and family. The wife has an obligation to neither pay dowry nor assume a duty of maintaining the family during marriage as a matter of law. After the first marriage, the man is entitled to marry up to three to four wives, while the wife cannot. A validly concluded marriage can be dissolved through *talaq* (a unitary declaration of divorce by the husband after repeating three times that he divorced her), *khul* (a divorce by the wife after paying compensation-returning the dowry- to the husband and with the intervention of the qadi/judge), and mutual consent through court.[1200]

With respect to inheritance under Islamic law, both women and men are entitled to inheritance. On the share of women and men, however, the Quran says "Allah commands you as regards your children's [inheritance]: to the male, a portion equal to that of two females; if only daughters, two or more, their share is two thirds of the inheritance; if only one, her share is half (4:11)."[1201] Thus, the women's or girl's share in inheritance under

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[1199] Jamila M Nasir, 'Sharia Implementation and Female Muslims in Nigeria's Sharia States' in Philip Ostien (ed), *Sharia Implementation in Northern Nigeria 1999-2006: The Sharia Penal and Criminal Procedure Codes* (Spectrum Books 2007) 76–118.
[1200] Judith E Tucker, *Women, Family, and Gender in Islamic Law* (Cambridge University Press 2008) 84–100.
[1201] See also Jamal J Ahmad Nasir, *The Status of Women under Islamic Law and Modern Islamic Legislation* (3rd revised edition, Brill 2009) 19; Tucker (n 1200) 26.

Islamic law is half of a man or a boy.

Unlike Islamic law, there are numerous customary laws in Nigeria, and it is difficult, and not necessary for the present purposes, to state every customary laws of marriage and inheritance here. While there are differences among these customary laws, there are some common features across customary laws in Nigeria. A recent study by the Nigerian Institute of Advanced Legal Studies documents some of the common features of these laws.[1202] For the conclusion of a customary marriage, the consent of the families of the future spouses is required.[1203] This consent is gained through intermediary persons well known to both families. While the consent of the man to the marriage is assumed as it is often initiated by him or consultation with him, the same could not be hold for the woman. Consent to marriage is the right of her families.[1204] Like Islamic law, the man is required to pay the bride price to the family of the women, and this has to be effected in the presence of witnesses.[1205] Unlike Islamic law, the bride price is not paid to the women. However, as in Islamic law, the woman has no such obligation.

After the conclusion of a customary marriage, the husband and the wife assume rights and duties to each other and to their families. The rights of the husband include, "the right to be respected and obeyed by his wife, the right to claim ownership of property belonging to his wife, the right not to be denied conjugal relations by his wife, and the right to the status of headship of the home" among others.[1206] While his main duties are "to love and cherish his

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[1202] Epiphany Azinge (eds), *Restatement of Customary Law of Nigeria* (Nigerian Institute of Advanced Legal Studies 2013).
[1203] ibid 254.
[1204] ibid 265.
[1205] ibid 268-270.
[1206] ibid 289.

wife and to provide for her needs, to consummate the marriage, to avoid maltreating his wife (but this does not preclude him from disciplining her occasionally for her misbehaviors[*sic*]), and to support his children and the family."[1207] Although the wife has the right to be loved and cherished by her husband, she neither has an equal decision-making power with her husband nor can discipline him in the event of his misbehavior.[1208] Even if the wife has similar duties like the husband, her main duty is confined to domestic matters affecting the home.[1209] During a divorce, the family of the wife is obliged to return the dowry to the husband, without which in some communities children from subsequent marriages belong to the former husband.[1210] Once the marriage is dissolved, the wife loses custody of her children to the husband, with the exception of the very little ones, and will lose her property rights in marriage.[1211]

Customary laws of inheritance, too, treat women and men differently. The predominant principle in customary inheritance is the rule of male primogeniture where succession goes along the male line entitling the eldest son to be the successor of his deceased father or male relative.[1212] In this rule of inheritance, women are absent in the equation.[1213] Even in some communities that allow female inheritance, a distinction is made between those

[1207] ibid 290.
[1208] ibid 295.
[1209] ibid 296.
[1210] ibid 332.
[1211] ibid 348; MOA Ashiru, 'Gender Discrimination in the Division of Property on Divorce in Nigeria' (2007) 51 Journal of African Law 316, 321; Ebenezer Durojaye, '"Woman, But Not Human": Widowhood Practices and Human Rights Violations in Nigeria' (2013) 27 International Journal of Law, Policy and the Family 2, 176-196.
[1212] ibid 113.
[1213] See also Mary Adebola Ajayi and Abiodun Olukayode Olotuah, 'Violation of Women's Property Rights within the Family' (2005) 1 Agenda: Empowering Women for Gender Equity 1, 58-63; Ikechukwu Olueze, 'Women's Right to Inheritance under Customary Laws in Nigeria' (2004) 29 International Legal Practitioner 135-138; Christopher E Ukhun and Nathaniel A Inegbedion, 'Cultural Authoritarianism, Women and Human Rights Issues among the Esan People of Nigeria' (2005) 5 African Human Rights Law Journal 129, 135.

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"who remain in the house and procreate to further the family lineage" who are entitled to inherit landed property and others whose entitlement is limited to movable property if their deceased fathers give them as gifts.[1214]

From a formal legalistic perspective, therefore, some parts of these Islamic and customary laws on marriage and inheritance are apparently discriminatory against women. Women do not have equal rights in the conclusion, duration, and dissolution of marriage. Similarly, they do not enjoy equal rights with men in inheritance. Either they do not have inheritance rights or if they have, their shares are significantly lower than men. A plethora of scholarship is available on how these laws violate women's rights in Nigeria.[1215] However, much of the focus is on how Islamic and customary laws as such contradict with women's constitutional rights. Nonetheless, while such critique is appropriate on its own, the more interesting point of analysis in this respect is not Islamic and customary laws as such, but constitutional law. This is due to the fact that these laws are applicable not because religion or custom commands it, but the Constitution authorizes their application on its own terms. As discussed above, it established its own sharia and customary courts at different levels to adjudicate matters concerning Islamic and customary laws. While the religious and customary basis of these laws is very clear, the Constitution transforms them into positive law, and consequently, they are no longer Islamic and customary laws only. The transformation and configuration of Islamic and customary laws into positive law changes the reference frames of analyzing women's rights under these laws. In this context, the Constitution, not the body of Islamic and customary laws, is the principal unit of analysis for

[1214] Azinge (n 1202) 114.
[1215] Ajayi and Olotuah (n 1213).

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women's rights. As a result, the notion of women's rights under these transformed Islamic and customary laws and women's rights under the DPSP and Fundamental Rights chapters compose the women's rights regime under the Nigerian Constitution. This constitutional design makes women's constitutional rights syncretic as it incorporates both the liberal account of rights and an account of rights rooted in religion and custom.

The judicial practice and adjudication on issues of women's rights in light of Islamic and customarily laws further sheds light on this syncretic feature: a feature of recognition, interpenetration, and resistance between the liberal account of rights and Islamic and customary conceptions of rights.

C. Judicial Practice

In order to show the judicial practice on women's rights in the field of Islamic and customary laws, I will focus on Islamic marriage and customary laws of inheritance. As the following cases demonstrate, women's rights in Nigeria is the syncretic result of liberal, Islamic and customary notions of rights and their specific content is determined by their interactions in a given time and place. For instance, in *Karimatu Yakubu and Alhaji Mahmoud Ndatsu v. Alhaji Yakubu Tafida Paiko and Alhaji Umaru Gwagwada* the issue was who is entitled to give consent for the conclusion of marriage.[1216] Under liberal constitutional standards, it is obvious that marriage is concluded by the free and full consent of the spouses. However, under Islamic marriage, in which the parties to this case concluded the marriage, the father as a guardian of his daughter can marry her against her will. This itself is a violation of the constitutional right

[1216] Yushau Sodiq, *A History of the Application of Islamic Law in Nigeria* (Springer International Publishing 2017) 79.

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to equality and consequently should herald this law unconstitutional. Indeed, the Area Court that first received the case found no difficulty in making the marriage invalid as it was concluded between Karimatu's father and her husband without her consent.[1217] However, the Sharia Court of Appeal in Sokoto reversed the decision of the Area Court by arguing that Karimatu's father has a right to compel his daughter to marriage under Islamic law.[1218] Although the Federal Court of Appeal in Kaduna reversed the decision of the Sharia Court of Appeal, it did so on different grounds[1219] and reaffirmed the father's right to compulsion (*ijbar*) in marriage.[1220]

In *Hasana Gbaguda v. Muhammadu Gbaguda*, Hasana filed an application to divorce her husband, Muhammadu, in the Area Court alleging that he beat her while he got drunk.[1221] Although Muhammadu admits the allegations, the Court denied Hasana's claim for divorce and further notes that if she wants a divorce she has to pay compensation (*khul*).[1222] Unhappy with the decision of the Area Court, she appealed to the Sharia Court of Appeal for divorce. The Sharia Court of Appeal decided in her favor by reasoning that her husband beats and abuses her and accordingly he does not deserve any compensation.[1223] The fact that men can divorce through *talaq* (without compensation) and women should divorce through *khul* (with compensation) was neither considered as discriminatory against women nor even contested in this case. Even more, in *Habiba Sarkin Fulani v. and Alhaji Dahiru Dayi*, the appellant's right to divorce through *khul* was denied as she could not find evidence that shows that she is

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[1217] ibid 80.
[1218] ibid 81.
[1219] Once the father gave his daughter a choice to marry in the first place, he cannot revoke his promise.
[1220] Sodiq (n 1216) 81–82.
[1221] ibid 88.
[1222] ibid.
[1223] ibid 89.

mistreated by her husband.[1224]

In addition to the application of Islamic law in personal matters as seen in the above cases, its application in the field of criminal law is extended in the 12 Northern states. The extension of Islamic law to all aspects of life in these states is a highly contested issue in Nigeria. Despite this, the Supreme Court has neither given a decision about the constitutionality of the application of sharia in criminal law nor has an application for its constitutionality been made to it yet. The famous Amina Lawal case, *Amina Lawal v. the State*,[1225] is a classic example to demonstrate the (in)compatibilities of Islamic mode of punishment with human rights standards. For the crime of adultery, which Lawal was charged with, death by stoning is the punishment under Islamic law. The man with whom Lawal alleged the relationship of adultery was not prosecuted for lack of evidence, even without considering DNA tests, while "her pregnancy" was the single concrete evidence for the crime. The lower Sharia Court sentenced Lawal to death by stoning, but the Sharia Court of Appeal set her free on procedural grounds.[1226] Like Islamic personal laws, Islamic criminal law also has a gender discriminatory dimension and brings an additional element to women's rights regime in Nigeria, and consequently broadens the syncretic range of women's rights.

Although the Constitution does not expressly authorize the application of Islamic criminal law, it is made applicable in a constitutional system that maintains the supremacy of the Constitution. The 12 sharia implementing states justify the re-introduction of sharia into their states based on different sections of the Constitution, not by rejecting its existence or

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[1224] ibid 90–91.
[1225] *Amina Lawal v The State* [2002] USC FT/CRA/1/02.
[1226] Sodiq (n 1216) 97. Indeed, there are some persons (both men and women) who are sentenced to death by stoning for adultery; see Harvard Law Review, 'Saving Amina Lawal: Human Rights Symbolism and the Dangers of Colonialism' (2004) 117 Harvard Law Review 2365, 2366.

supremacy.[1227] They defend the application of sharia in criminal law, for instance, relying on section 2(2) which proclaims that Nigeria shall be a federation, section 4(7) (the legislative powers of the House of Assembly of states), section 6(2&4) (the power of the House of Assembly of States to establish courts), section 38 (freedom of religion), and section 277 (the jurisdiction of the Sharia Court of Appeal). Although its constitutionality is a contentious matter in Nigerian political and public life, its advancement is claimed to have a constitutional basis.[1228] Further, all these states affirm the supremacy of the Constitution with the sharia reforms.[1229]

While it is problematic to say the least that the full implementation of sharia is compatible with the Constitution, it is not advanced on the premise that sharia is a supreme law and not subject to the standards of positive law. Moreover, the sharia proponents are not radical Muslims, like Boko Haram, who reject the constitutional system and wanted to create an Islamic state of Nigeria,[1230] but politicians who rely on the democratic votes of the people for their access to and time in the government office.[1231] As a result, the application of Islamic criminal law, like Islamic personal law, further makes women's rights in Nigeria syncretic as it is advanced and practiced within the constitutional space.

With respect to customary laws, courts are generally progressive to ensure the formal

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[1227] Vincent O Nmehielle, 'Sharia Law in the Northern States of Nigeria: To Implement or Not to Implement, the Constitutionality Is the Question' (2004) 26 Human Rights Quarterly 3, 730-759.
[1228] ibid; Lawan (n 627); Andrew Ubaka Iwobi, 'Tiptoeing through a Constitutional Minefield: The Great Sharia Controversy in Nigeria' (2004) 48 Journal of African Law 2, 111-164; Rotimi T Suberu, 'Religion and Institutions: Federalism and the Management of Conflicts over Sharia in Nigeria' (2009) 21 Journal of International Development 4, 547-560; Mohammed HA Bolaji, 'Between Democracy and Federalism: Shari'ah in Northern Nigeria and the Paradox of Institutional Impetuses' (2013) 59 Africa Today 4, 92-117.
[1229] Lawan (n 627) 310.
[1230] Roman Loimeier, 'Boko Haram: The Development of a Militant Religious Movement in Nigeria' (2012) 47 Africa Spectrum 2/3, 137-155.
[1231] John N Paden, *Muslim Civic Cultures and Conflict Resolution: The Challenge of Democratic Federalism in Nigeria* (Brookings Institution Press 2005) 160; Suberu, 'Religion and Institutions' (n 1228) 553.

equality of women and men in accessing rights, while the Supreme Court takes a tempered approach and counsels lower courts on their far-reaching decisions. In *Mojekwu v. Mojekwu*,[1232] the rights of women's inheritance under customary law was at issue. Under the *oli-Ekpe* custom of South Eastern Nigeria (Ibo), women do not have a right to inheritance as it is the exclusive right of men. The appellate, Mr. Augustine Mojekwu, based on this customary law instituted a claim against Mrs. Caroline Mojekwu to inherit her deceased husband's property. The appellate argued that as the deceased had no son and brother, the deceased's property will go to him as the deceased is his paternal uncle and he is the only closest male relative. The Court of Appeal based on the facts and evidence produced decided that another customary law called *Kola Tenancy* is the applicable law in this case and under this law women are entitled to inherit the deceased's property as men. The court further observes that the *oli-Ekpe* custom that excludes women from inheritance is contrary to not only public policy or repugnant to natural justice, equity and good conscience, but it is also against the Constitution and international human rights standards Nigeria ratified. This decision was welcomed by the human rights and legal community of Nigeria as a landmark case in fine-tuning discriminatory customary laws with human rights standards.[1233]

However, the pronouncement of the Court of Appeal is water down by the Supreme Court in its appellate judgment of *Mojekwu v. Iwuchukwu*.[1234] While the Supreme Court upheld the decision and holding of the Court of Appeal, it reversed the opinion on the *oli-Ekpe* custom of inheritance. Justice S.O. Uwaifo on behalf of the Supreme Court stated that:

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[1232] *Mojekwu v Mojekwu* [1997] 7 NWLR 283.
[1233] IN Eme Worugji and RO Ugbe, 'Judicial Protection of Women's Rights in Nigeria: The Regrettable Decision in Mojekwu v Iwuchukwu Note' (2013) 16 University of Botswana Law Journal 59, 59-72.
[1234] *Mojekwu v Iwuchukwu* [2004] 4 SC (Pt II) Mrs Iwuchukwu, the daughter of Mrs Caroline Mojekwu substituted as a party to the case as her mother died.

> I cannot see any justification for the court below to pronounce that the Nnewi native custom of '[o]li-ekpe' was repugnant to natural justice, equity and good conscience…the learned justice of appeal was no doubt concerned about the perceived discrimination directed against women by the said Nnewi 'oli-ekpe' custom and that is quite understandable. But the language used made the pronouncement so general and far[-]reaching that it seems to cavil at, and is capable of causing strong feelings against, all customs which fail to recognise a role for women. For instance, the custom and traditions of some communities which do not permit women to be natural rulers or family heads. The import is that those communities stand to be condemned without a hearing for such fundamental custom and tradition they practice by the system by which they run their native communities.[1235]

As seen from this comment of the Supreme Court, the fact that customary law discriminates against women does not *ipso facto* lead to the conclusion of unconstitutionality of such laws. Further, it also alludes that the exact substance and contours of women's rights in relation to customary laws will be determined and delimited on a case-by-case basis after consideration of all competing interests.

Following this approach, the Supreme Court reaffirmed women's rights of inheritance by declaring Igbo customary law discriminatory and unconstitutional in *Ukeje v Ukeje*.[1236] In its decision the Court notes that

> No matter the circumstances of the birth of a female child, such a child is entitled to an inheritance from her late father's estate. Consequently, the Igbo customary law which disentitles a female child from partaking, in the sharing of her deceased father's estate is in breach of section 42(1) and (2) of the Constitution, a fundamental rights provision guaranteed to every Nigerian. The said discriminatory customary law is void as it conflicts with section 42(1) and (2) of the Constitution.[1237]

In a similar case of *Anekwe v Nweke*,[1238] the Supreme Court declared a customary law that denies a widow and her female child from inheriting her husband's property repugnant to national justice, equity, and conscience, and accordingly void. Unlike the previous case that

[1235] *Mojekwu v Iwuchukwu* [2004] 4 SC (Pt II) as cited by Azinge (n 1202) 125.
[1236] *Mrs Lois Chituru Ukeje & Anor v Mrs Gladys Ada Ukeje* [2001] 27 WRN 127.
[1237] *Mrs Lois Chituru Ukeje & Anor v Mrs Gladys Ada Ukeje* [2001] 27 WRN 127, Para 32-33.
[1238] *Anekwe v Nweke* [2014] 234 LRCN 34.

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relies on the Constitutional provisions of equality, the Court applies a public policy test in outlawing a customary law of widow and women disinheritance.[1239] Although both cases ensure the equal rights of women and men in inheriting property, the account of women's rights in customary laws have to be judicially litigated to ascertain their substance and delimit their contour's in the constitutional framework.[1240]

Thus, in light of such constitutional design and judicial practice, the women's rights regime in Nigeria is different from the women's rights regime discussed in the first section. The primary difference emanates from the recognition of Islamic and customary laws as applicable laws in the Nigerian judiciary, in general, and the establishment of sharia and customary courts as avenues for rights enforcement, in particular.[1241] There is a dialectic between the rights rooted in Islamic and customary laws and the rights rooted in the liberal human rights tradition.[1242] As a result, women's rights are the syncretic result of this dialectic at the levels of constitutional design of rights and judicial practice.

Indeed, the syncretism of women's rights unfolds differently, in practice, with respect to Islamic law and customary laws. Regarding Islamic laws, there is mainly a symbiotic relationship with respect to the liberal tenet of the Constitution. This is because the rights rooted in Islamic law seem to co-exist with the rights found in liberalism in the same constitutional space. This constitutional state of affairs is comparable with the idea of religious syncretism in China which enables Confucianism, Taoism, and Buddhism to co-exist in the

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[1239] ibid Para 64-65.
[1240] See also Oba (n 167) 894.
[1241] See also Phil E Okeke, 'Reconfiguring Tradition: Women's Rights and Social Status in Contemporary Nigeria' (2000) 47 Africa Today 49, 55.
[1242] See also Abdullahi Ahmed An-Na'im, 'The Compatibility Dialectic: Mediating the Legitimate Coexistence of Islamic Law and State Law' (2010) 73 The Modern Law Review 1, 1-29.

same space. In such symbiotic relationship, mutual recognition and tolerance are the predominant courses of action in the constitutional matrix. In the case of customary law, however, there is a relationship of adaption, fusion, and transformation with the liberal tenet of the Constitution. As a result, the relationship is characterized by change within the customary and the outcome is one of assimilation to the liberal notion of rights. Like federalism and executive power, the syncretic constitutional design and practice of women's rights is a conscious choice of constitutional actors *from above*.

6.4 Women's Constitutional Rights in South Africa

Beyond the formal recognition of women's rights of equality, the South African Constitution provides a framework for the advancement of the substantive equality of women with men. Unlike the Nigerian Constitution, it does not differentiate the level of protection between civil and political rights and socio-economic and cultural rights nor limits the application of the Bill of Rights to the state. Further, not only does it founded the state based on "human dignity, the achievement of equality and the advancement of human rights and freedoms," but also on "non-racialism and non-sexism."[1243] What is more, it established a constitutional institution that works solely on gender equality. The normative and institutional architectures for women's rights in South Africa is more robust than in Nigeria. Nonetheless, like Nigeria, the South African Constitution recognizes the right to culture and the application of customary laws that often challenge the equal rights of women. In addition, it recognizes the power of traditional authorities whose basic pillar is patriarchy. The women's rights regime in South Africa, as in Nigeria, is to be found through the investigation of the liberal account

[1243] The Constitution of South Africa, s 1(a) & (b).

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of rights and the notion of rights rooted in African cultures. In this process, the judiciary plays a significant role in defining the contours of women's rights within the constitutional framework. The aim of this section, therefore, is to explore the women's rights regime in South Africa, in general, and to examine women's right to equality and non-discrimination under customary laws, in particular, to show how legal syncretism animates women's rights and permeates their application. For this purpose, I first look at the constitutional design for women's rights, explore the official customary laws on marriage and inheritance, and examine the judicial practice on women's rights under customary laws.

A. Constitutional Design

Post-apartheid South Africa is informed by the prevalence of discrimination based on sex and gender as it is on discrimination on account of race. The issue of women permeates the founding values of the new democratic republic, the Bill of Rights, and constitutional institutions. To reiterate, while 'human dignity, equality, human rights and freedoms' are inclusive enough to herald the foundation of an inclusive society, the Constitution specifically mentions that 'non-sexism' should also be one of the foundational values of the new constitutional order. Although there is no specific constitutional right for women as in CEDAW or the African Women's Rights Protocol, the way the Bill of Rights is designed favors women's rights.

By positioning the Bill of Rights as the cornerstone of democracy in South Africa,[1244] the Constitution enlarges the reach of the Bill of Rights beyond the state to include natural or

[1244] ibid s 7(1).

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juristic persons to the extent that they are applicable.[1245] Unlike the International Bill of Human Rights, the South African Bill of Rights transcends the public-private dichotomy in the application of human rights.[1246] By extending the Bill of Rights to the private sphere,[1247] it protects and safeguards the interests and activities of women in this sphere. In this regard, the South African Bill of Rights adopts the philosophy behind CEDAW and the African Women's Rights Protocol in mainstreaming human rights in both the public and private spheres. Similarly, the South African Bill of Rights recognizes the indivisibility and interdependence of civil and political rights and socio-economic and cultural rights. As much of women's interests and activities rest in the field of socio-economic rights, their constitutional recognition has the potential to advance women's interests and rights. For instance, the right to heath includes the right to access to reproductive health care which many women have an outstanding need.[1248]

The Constitution not only makes the Bill of Rights available to every person, but also gives particular attention to equality irrespective of sex and gender.[1249] Equality, in addition of being a value in the foundation and operation of the republic, is a fundamental value that should be considered in the interpretation and application of the Bill of Rights. Section 39(1) of the Constitution makes it mandatory for a court, tribunal or a forum that interprets the Bill of Rights to "promote the values that underlie an open and democratic society based on

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[1245] ibid s 8(1) & (2).
[1246] See Deeksha Bhana, 'The Horizontal Application of the Bill of Rights: A Reconciliation of Sections 8 and 39 of the Constitution' (2013) 29 South African Journal on Human Rights 2, 351-375.
[1247] See Delisa Futch, 'Du Plessis v De Klerk: South Africa's Bill of Rights and the Issue of Horizontal Application' (1996) 22 NC J Int'l L & Com Reg 1009-1033.
[1248] South African Constitution, s 27(1) (a).
[1249] Joan Small and Evadne Grant, 'Equality and Non-Discrimination in the South African Constitution' (2000) 4 International Journal of Discrimination and the Law 47.

human dignity, *equality* and freedom."[1250] In addition, equality is one of the values in limiting constitutional rights. Section 36(1) provides that "the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, *equality* and freedom…"[1251] Moreover, freedom of expression is limited if it includes advocacy of hatred on grounds of gender.[1252]

On the content of equality, unlike the Nigerian Constitution, the South African Constitution recognizes formal and substantive equality. Section 9(1) provides for formal equality and reads "[e]veryone is equal before the law and has the right to equal protection and benefit of the law." Formal equality operates in a circumstance or context-free situations and may not capture the specific needs or demands of individuals in different circumstances and contexts. While the recognition of this formal equality is a big deal in a situation where this apparently lacks, as in apartheid, it has a limited capacity to enable everyone to have and access rights. This is particularly true for women who have faced ages of discrimination and marginalization in all wakes of life.[1253] In recognition of this fact, the Constitution recognizes substantive equality in section 9(2) as follows:

> [e]quality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

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[1250] Emphasis added.
[1251] Emphasis added.
[1252] The constitution of South Africa, s 16 (2) (c).
[1253] Catherine Albertyn and Beth Goldblatt, 'Equality' in Stu Woolman and Michael Bishop (eds), *Constitutional Law of South Africa Vol 3* (Juta & Company Ltd 2012) 35-3-35–4.

The constitution recognizes affirmative action as a mechanism of equalizing those who suffer past discrimination and marginalization. Obviously, the provision of affirmative action can be a helpful constitutional tool for the advancement of women's rights and interests as disadvantaged groups. Furthermore, the Constitution prohibits direct or indirect unfair discrimination by either the state or any person, among others, on the grounds of 'sex, gender, pregnancy, and marital status.'[1254] On top of this, any discrimination based on these grounds is presumed to be unfair and the bourdon of proof will be on the one that do the discrimination to prove that it is fair.[1255] The Constitution does not simply take sex and/or gender as a ground of discrimination, it also takes into account the circumstances of different women such as those who are pregnant, married, unmarried, and widowed. The recognition of the diverse needs and contexts of women is of great importance in designing women's rights regime.

In addition to equality, the South African Constitution recognizes human dignity as both a foundational value and right that have a huge impact in transforming the world of women from one of discrimination and marginalization to that of equal concern, respect, and rights. Within the biosphere of equality and human dignity both as foundational values and substantive rights, women are entitled to enjoy the civil, political, economic, social and cultural rights recognized in the Constitution: ranging from the right to life, reproductive health care, education, and to clean and healthy environment.

Beyond the Bill of Rights, the Constitution mainstreams the issue of gender in the composition of constitutional institutions. Primarily, it establishes a constitutional commission on gender, i.e. the Commission for Gender Equality (CGE).[1256] The CGE works

[1254] The Constitution of South Africa, s 9 (3) & (4).
[1255] ibid s 9(5).
[1256] ibid s 181 (1) (d).

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for the attainment of gender equality through monitoring, investigating, researching, educating and lobbying on matters concerning gender equality.[1257] Moreover, all chapter nine institutions that are established to support constitutional democracy are required to consider gender in the appointment of their members.[1258] Similarly, gender is one prominent consideration in the appointment of judicial officers.[1259]

Although the normative commitment in the Bill of Rights and the mainstreaming of gender in different constitutional institutions herald a robust protection of women's rights in South Africa, the recognition of the right to culture and religion pose some tensions to the liberal notions of women's rights discussed above. For instance, as part of freedom of religion, the Constitution permits for the recognition of personal and family laws under different religions and traditions subject to the Constitution.[1260] Similarly, the Constitution recognizes the right of everyone to culture and to participate in the cultural life of one's community.[1261] By the same token, not only are customary laws and rights emanated from these laws are recognized,[1262] but also the institution of traditional authority in accordance with customary laws are constitutionalized.[1263] In addition to traditional authorities, courts are obligated to apply customary laws when applicable.[1264] Even if the Constitution allows the application of customary laws subject to constitutional conformity, its practical application is much more complex than this.

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[1257] ibid s 187.
[1258] ibid s 193(2).
[1259] ibid s 174(2).
[1260] ibid s 15 (3).
[1261] ibid ss 30 & 31.
[1262] ibid s 39(2) & (3).
[1263] ibid s 211 (1).
[1264] ibid s 211 (3).

The complexity arises not only due to the nature of customary laws as such, but also due to the approach South Africa takes on it. Unlike Nigeria, South Africa codifies customary laws usually known as "official customary law." Nonetheless, the customary law in the legislation is not always similar to the one that applies in practice usually known as "living customary law." In order to investigate women's right to equality and non-discrimination under customary laws,[1265] I will briefly discuss the official customary laws on marriage and inheritance and proceed to examine how courts adjudicate customary laws in light of the Constitution and legislative frameworks.

B. Official Customary Laws on Marriage and Inheritance

Unlike Nigeria, South Africa codifies customary laws on marriage and inheritance. As such, customary laws on marriage and inheritance are found in statutes. Nonetheless, the fact that customary laws are codified does not mean that the content of these laws is uncontested or settled. As the judicial practice shows, as will be discussed below, there is a contestation between the nature and substance of customary laws as in statutes and as practiced in society.[1266] Bearing this in mind, I will explore official customary laws on marriage and inheritance with the objective to examine women's right to equality and non-discrimination under these laws.

The Recognition of Customary Marriages Act (RCMA), following the constitutional commitment to ensure equality, aims to ensure the equal status of women and men before,

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[1265] I focus on customary laws here as it is a dominant law with a broad application in South Africa unlike sharia law.
[1266] See also TW Bennett, 'Re-Introducing African Customary Law to the South African Legal System' (2009) 57 The American Journal of Comparative Law 1, 10–12.

during and after the conclusion of marriage and on its dissolution.[1267] While it recognizes customary marriages concluded before the commencement of RCMA, it provides essential validity requirements for the conclusion of marriage under customary laws after its commencement. Section 3(1) provides that

> For a customary marriage entered into after the commencement of this act to be valid The prospective spouses –
> a) Must be above the ages of 18 years; and
> b) Must be both consent to be married to each other under customary law; and
> c) The marriage must be negotiated and entered into or celebrated in accordance with customary law.

These requirements somehow modified the customary laws of marriage in South Africa as the payment of *lobolo, a bride price,* is deemed the essential requirement for the commencement of marriage.[1268] The age restrictions and the requirement of spousal consent is also an addition to the customary requirements of marriage.[1269] Nonetheless, the third requirement that "the marriage must be negotiated and entered into or celebrated in accordance with customary law" opens avenues for the application of numerous customary practices with respect to marriage.[1270] The diversity of these practices makes their ascertainment still a difficult task. In this regard, the RCMA defines customary marriage as "a marriage concluded in accordance with customary law."[1271] And it defines customary law as "the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those people."[1272] This legislative design brings what customary practices

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[1267] IP Maithufi and others (eds), *African Customary Law in South Africa* (Oxford University Press 2015) 91–92.
[1268] Bennett (n 262) 234.
[1269] Ann Skelton and others, *Family Law in South Africa* (Oxford University Press Southern Africa 2010) 180–184.
[1270] Maithufi and others (n 1267) 103–104.
[1271] The Recognition of Customary Marriages Act of South Africa 1998, s 1.
[1272] ibid.

consider a necessary requirement for the conclusion of marriage in contestation with the RCMA requirements provided in section 3(1).

Although the RCMA requires the registration of customary marriages, it also states that failure to register will not affect its legal validity.[1273] Unlike the position of the wife under customary law which considers her as a perpetual minor under the power of her husband, the RCMA equalizes the wife with her husband with respect to status, property acquisition and disposal or any other matter under customary law.[1274] The RCMA, however, maintains the practice of polygamy while it tries to protect the interests and rights of women within it.[1275] Finally, it introduces judicial divorce as the only mechanism of dissolving marriage under customary law on the condition of its irretrievable breakdown.[1276]

The overall objective of RCMA is to tame patriarchy that animates customary marriages by uplifting the low status and positions of women. While it does proclaim the equality of women and men in marriage, it also maintains customary practices that affect women's equality such as polygamy and other customary practices necessary for the conclusion of the marriage. Setting aside the issue of whether RCMA is really "customary law" given its modification of the substance of customary law and its mode of production, as it is an Act of Parliament, it maintains the constitutional ethos of equality and accommodation of cultural practices.[1277] In this pursuit, women's rights are the main subjects of contestation.

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[1273] ibid s 4.
[1274] ibid s 6.
[1275] ibid s 7.
[1276] ibid s 8(1).
[1277] Maithufi and others (n 1267) 100.

Like RCMA, the Reform of Customary Law of Succession and Regulation of Related Matters Act (RCLSA) regulates the customary laws on succession and inheritance.[1278] Similar to the customary laws of inheritance in Nigeria, the rule of male primogeniture has been the dominant customary law in South Africa.[1279] The eldest son with the exclusion of the female family members and younger males will succeed the status of the deceased and inherit his property as the new family head. Even if women are allowed to inherit the deceased's property, they only inherit the domestic utensils and other goods used by females while men inherit all the cattle and other property used by males.[1280] With the objective to protect widows and children born out of customary marriage in case of intestate succession, on the one hand, and to modify the rule of male primogeniture with the constitutional notions of equality and human dignity,[1281] the RCLSA considers widows of customary marriages and children of the deceased regardless of sex, age, gender, and status to be heirs. [1282] Thus, RCLSA fundamentally transformed the African customary laws of inheritance in South Africa. The big question is whether the customary laws on marriage and inheritance as codified in RCMA and RCLSA are the customary laws applicable in the everyday life of society in South Africa. For further insight and nuances on this, I will turn to the judicial practice.

C. Judicial Practice

The Constitution already sets a syncretic theory of women's rights in South Africa. On the one hand, it recognizes the liberal notion of rights based on the values of equality, human

[1278] ibid 176.
[1279] Bennett (n 262) 334–345.
[1280] Maithufi and others (n 1267) 165.
[1281] The Reform of Customary Law of Succession and Regulation of Related Matters Act of South Africa 2009, preamble.
[1282] ibid ss 2, 3 & 4.

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dignity, and freedom, but on the other hand, it incorporates the indigenous notion of rights rooted in the cultural milieu of Africans in South Africa in the same constitutional space. While the official customary law is mainly equality friendly, it still accommodates some cultural practices that are incompatible with the liberal notion of equality such as polygamy which only entitles men to have more than one wife. The judicial practice on customary law offers not only an additional insight to its nature, substance, and application, but also on its relation to women's rights in line with the ethos of the Constitution. Despite the contestations between official and living customary laws, the judicial practice further entrenches the syncretic theory of women's rights in South Africa.[1283]

The South African Constitutional Court (CC) authoritatively describes the status, nature and application of customary law in *Alexkor Ltd and Another v Richtersveld Community and Others*.[1284] In this case, the CC recognizes customary law on its own terms in light of the Constitution. The CC captures the essence of customary law in democratic South Africa as follows;

> […] the Constitution acknowledges the originality and distinctiveness of indigenous law [customary law] as an independent source of norms within the legal system. At the same time the Constitution, while giving force to indigenous law, makes it clear that such law is subject to the Constitution and has to be interpreted in the light of its values. Furthermore, like the common law, indigenous law is subject to any legislation, consistent with the Constitution, that specifically deals with it. In the result, indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law.[1285]
>
> …
>
> In applying indigenous law, it is important to bear in mind that, unlike common law, indigenous law is not written. It is a system of law that was known to the community, practised and passed on from generation to generation. It is a system of law that has

[1283] See also Lee Stone, 'Two Decades of Jurisprudence on Substantive Gender Equality: What the Constitutional Court Got Right and Wrong' (2016) 30 Agenda: Empowering Women for Gender Equity 10, 12–13.
[1284] *Alexkor Ltd and Another v Richtersveld Community and Others*.
[1285] ibid Para 51.

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> its own values and norms. Throughout its history it has evolved and developed to meet the changing needs of the community. And it will continue to evolve within the context of its values and norms consistently with the Constitution.[1286]

This judicial pronouncement reinforces the constitutional vision of integrating, fusing, and reconfiguring customary laws to constitutional law and vice versa for a transformative South Africa.

Accordingly, women's rights are in a continuum of contestation and fusion between the liberal vision of rights and the cultural account of rights whose exact content is determined by courts.[1287] As will be discussed below, the constitutionality test for the application of customary law is not a silver bullet that solves the incongruences between the liberal notion of rights and the cultural ones. There is a normative constitutional commitment to keep these incongruences that courts maintain in their adjudication.[1288] As a result, the decision to have a statutory law on customary law, i.e. official customary law, or to rely on the practical experiences of people in different time and place, living customary law, will be a matter of technicality and efficacy. This is because both official and living customary laws are permeated by the legal syncretism vision of the Constitution. In recognition of this fact, courts apply both official and living customary laws concerning women's rights. In the following paragraphs, I will discuss the landmark cases of the CC on women's rights to inheritance, succession to chieftainship, and polygamy.

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[1286] ibid Para 53.
[1287] See also the Traditional Courts Bill of South Africa 2016 and the Traditional Leadership Bill of South Africa 2015 For instance, for the impact of the traditional Courts Bill see Jennifer Williams and Judith Klusener, 'The Traditional Courts Bill: A Woman's Perspective' (2013) 29 South African Journal on Human Rights 2, 276-293.
[1288] Thandabantu Nhlapo, 'Customary Law in Post-Apartheid South Africa: Constitutional Confrontations in Culture, Gender and "Living Law"' (2017) 33 South African Journal on Human Rights 1, 1-24.

In the *Bhe and Others v The Magistrate, Khayelitsha and Others,*[1289] considered with *Shibi v Sithole and Others* and *South African Human Rights Commission and Another v President of the Republic of South Africa and Another,* the constitutionality of the customary law of male primogeniture[1290] and section 23 of the Black Administration Act 38 of 1927[1291] was at issue. The high courts that saw the cases of *Bhe* and *Shibi* declared these laws as unconstitutional and sent it to the CC for conferral. The *South African Human Rights Commission and Another* joined these cases at the CC in the public interest of all women and children who are denied their right of inheritance under these laws. In the *Bhe* case, the two daughters of the deceased were prevented from inheriting their father's estate, and in the *Shibi* case, the sister was prevented from inheriting her deceased brother's estate. The reason was both the Black Administration Act of 1927 and the customary law of male primogeniture did not recognize women's right of inheritance. While section 23 of the former provides succession according to "black law and custom" in the majority of instances, including in these cases, the later only allows men to inherit the status and property of the deceased. The official and living customary laws on the issue were found incompatible with the constitutional vision of human dignity and equality.[1292] Consequently, the CC found both unconstitutional and ordered the application of the Intestate Succession Act until the legislature takes an action.[1293]

Both the development of customary law and the recognition of living customary law were not found necessary in this case as the CC considered that the rule of male primogeniture is the essential element of the customary law of inheritance and it has not sufficient

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[1289] *Bhe and Others v Khayelitsha Magistrate and Others* (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC).
[1290] This was the living customary law.
[1291] This was official customary law. .
[1292] *Bhe and Others v Khayelitsha Magistrate and Others,* Para 100.
[1293] ibid Para 117.

information and evidence to ascertain the content of living customary law on this issue.[1294] The solution was the substitution of the common law rule of inheritance, the Intestate Succession Act, in lieu of customary law to ensure human dignity and equality.[1295] Following the CC's vision, the legislature later enacted the RCLSA, as discussed above, to regulate customary laws of succession by enshrining the values of liberal equality in to it.

Nonetheless, the dynamism and flexibility of customary laws bring challenges to the official version of customary law. *Shilubana and Others v. Nwamitwa*[1296] is an excellent example that shows how statutory customary law, official customary law, and living customary law diverge and pose challenges for the ascertainment of customary law at a given time and place. In this case, Ms Shilubana was not allowed to succeed her father as *Hosi*, chief, despite being the eldest child, as women were not allowed to be *Hosi* under the customary law of the time. Accordingly, her father's brother, Richard Nwamitwa becomes *Hosi*. Following the democratic transition in South Africa, the traditional authorities in the community adopted a resolution based on the equality of women and men to the succession of *Hosi*, and consequently install Ms Shilubana as *Hosi* succeeding Richard Nwamitwa. However, Nwamitwa's eldest son claimed that he is the rightful successor of his father and the traditional authorities acted illegally to install Ms Shilubana as *Hosi*. Both the High Court and the Supreme Court of Appeal decided in his favor by noting that the traditional authorities acted illegally in changing the customary laws of succession. The CC, however, reversed the decision. In reversing the decision of the lower courts, the CC notes that

> […] where there is a dispute over the legal position under customary law, a court must

[1294] ibid Para 109.
[1295] Rita Ozoemena, 'Living Customary Law: A Truly Transformative Tool?' (2016) 6 Constitutioanal Court Review 147, 149.
[1296] *Shilubana and Others v Nwamitwa* [2009] (2) SA 66 (CC).

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> consider both the traditions and the present practice of the community. If development happens within the community, the court must strive to recognise and give effect to that development, to the extent consistent with adequately upholding the protection of rights. In addition, the imperative of section 39(2) must be acted on when necessary, and deference should be paid to the development by a customary community of its own laws and customs where this is possible, consistent with the continuing effective operation of the law.[1297]
>
> …
>
> Customary law must be permitted to develop, and the enquiry must be rooted in the contemporary practice of the community in question. Section 211(2) of the Constitution requires this. The legal status of customary law norms cannot depend simply on their having been consistently applied in the past, because that is a test which any new development must necessarily fail. Development implies some departure from past practice. A rule that requires absolute consistency with past practice before a court will recognise the existence of a customary norm would therefore prevent the recognition of new developments as customary law. This would result in the courts applying laws which communities themselves no longer follow, and would stifle the recognition of the new rules adopted by the communities in response to the changing face of South African society. This result would be contrary to the Constitution and cannot be accepted.[1298]

Shilubana sheds light on the treatment of official and living customary law by courts and the essential factor in considering either official or living customary law is the existence of syncretism that advances the constitutional vision. In this case, living customary law on succession to chieftainship prevails over official customary law because the former converges with the constitutional ethos of equality.

In *Mayelane v Ngwenyama and Another*,[1299] however, as neither the official customary law nor the living customary law was helpful, the CC had to develop the customary law to adjudicate on the issues before it. The issue in *Mayelane* was whether the consent of the first wife was necessary for the conclusion of a second marriage under customary law. As the RCMA is silent on this issue, it only deals with the consent of the contracting spouses, the

[1297] ibid Para 49.
[1298] ibid Para 55.
[1299] *Mayelane v Ngwenyama and Another* (CCT 57/12) [2013] ZACC 14; 2013 (4) SA 415 (CC); 2013 (8) BCLR 918 (CC).

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CC resorted to investigating living customary law. Unable to find a uniform practice about the consent of the first wife for the conclusion of a second marriage, the CC developed the rule of consent of the first wife for the conclusion of subsequent customary marriages.[1300] The CC argues that a subsequent marriage without the consent of the first wife is against equality and human dignity envisioned in the Constitution.[1301] It particularly states that,

> […] where subsequent customary marriages are entered into without the knowledge or consent of the first wife, she is unable to consider or protect her own position. She cannot take an informed decision on her personal life, her sexual or reproductive health, or on the possibly adverse proprietary consequences of a subsequent customary marriage. Any notion of the first wife's equality with her husband would be completely undermined if he were able to introduce a new marriage partner to their domestic life without her consent…[1302] Given that marriage is a highly personal and private contract, it would be a blatant intrusion on the dignity of one partner to introduce a new member to that union without obtaining that partner's consent.[1303]

Even if the CC conditions polygamy under customary laws on the consent of the first wife with the objective to protect her equality and human dignity, it does not substantively deal with the compatibility of polygamy with women's right to equality and human dignity. It prefers to work within the ambit of polygamy.[1304] Surely, the arguments made for the introduction of consent of the first wife to conclude another customary marriage can be deployed to challenge polygamy itself or to extend it to women so that they can have more than one husband. Nonetheless, as the Constitution enshrines a syncretic theory of women's rights, the practice of polygamy is tolerated by the CC.

Thus, the constitutional design for women's rights and the subsequent judicial practice in South Africa, like Nigeria, shows that women's rights are enshrined within the spectrum

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[1300] ibid Para 75.
[1301] ibid Para 71.
[1302] ibid Para 72.
[1303] ibid Para 74.
[1304] ibid Para 70.

of the liberal notion of rights and the rights rooted in the African cultural milieu. In this spectrum, courts give content and substance to women's rights. Following the syncretic design of rights in the Constitution, courts give it life through recognition and interpretation of customary laws in light of the Constitution. In this judicial process - unlike Nigeria which opts for a symbiotic relationship between the rights rooted in Islamic law and those found in liberalism - fusion, integration, rejection, convergence, and innovation between the liberal and African account of rights inform women's rights in South Africa. While much of the syncretism happens *from above*, i.e. constitutional design and judicial practice from apex courts, like Nigeria, there is also a syncretism *from below* in South Africa. In this respect, *Shilubana* is a fine example of syncretism *from below*. In syncretism *from below*, the local community is the main drivers of change and transformation of the customary towards the liberal equality of women and men.

6.5 Women's Constitutional Rights in Ethiopia

Women's rights under the Ethiopian Constitution are syncretic by design and practice. The Ethiopian Constitution recognizes women's rights as human and democratic rights in themselves. Within the framework of equality and non-discrimination, the Constitution recognizes all generation of human rights without any distinction. In addition to the Bill of Rights, the Constitution incorporates the idea of women's equality in its preamble and the DPSP. At the same time, it recognizes the right to culture and religion and the application of customary and religious laws on family and personal matters based on the consent of the parties. Even if the constitutional review system in Ethiopia is different from Nigeria and South Africa, the HoF determines the syncretic outcomes of women's rights. An examination

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of the constitutional design of women's rights and the constitutional review practice shows that women's rights are configured with a syncretic feature that combines the liberal notion of rights and the notion of rights as they manifest in cultural and religious practices. The result is the transformation of the liberal and cultural account of rights of women's constitutional rights. Following a similar suit as in Nigeria and South Africa, this section explores and examines the constitutional design for women's rights, sharia and customary laws on marriage and inheritance, and the judicial practice on women's rights related to these laws. The objective is to demonstrate how legal syncretism informs the design and practice of women's rights.

A. Constitutional Design

The Ethiopian Constitution is generous in its recognition of women's rights. It incorporates both the conception of women's rights under the International Bill of Human Rights and CEDAW. Nonetheless, the Ethiopian Constitution sees the recognition and enforcement of human rights including women's rights as a means for the fulfillment of a 'larger objective': the realization of the right to self-determination for NNPs in one economic and political community.[1305] As discussed in Chapter Four, the primary goal of the Ethiopian Constitution is to ensure the right to self-determination of ethnic groups not the individual rights and liberties of their members.[1306] With a backdrop of socialist frame, the Constitution recognizes the rights of women in numerous ways. Ranging from making equality and non-discrimination based on sex a constitutional aspiration to the substantive formulation of women's rights as 'democratic rights,' and to the recognition of women's participation in the

[1305] The Constitution of the Federal Democratic Republic of Ethiopia, preamble.
[1306] Habtu (n 903) 92.

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economic and social development endeavors of the state, the Constitution presents women in the forefront as equal human beings and citizens.

Not only does the Ethiopian Constitution recognize the indivisibility and interdependence of rights by according a similar treatment to civil, political, economic, social, and developmental rights, it also makes a case for the horizontal application of human rights. As noted elsewhere, the recognition of the indivisibility and interdependence of human rights is of great importance to women as it brings their worlds and spaces to the attention of the state. Furthermore, their horizontal application can shield women from oppression and discrimination in the private sphere. Indeed, the Bill of Rights Chapter imposes a human rights duty to state organs at the federal and state levels and thereby set the vertical application of human rights.[1307] However, the chapter on the Fundamental Principles of the Constitution makes it compulsory for any physical and juristic person to obey and enforce the Constitution. Article 9(2) provides that "[a]ll citizens, organs of state, political organizations, other associations as well as their officials have the duty to ensure observance of the Constitution and to obey it." Hence, this provision imposes both a vertical and horizontal duty for everyone to ensure the enforcement of the Bill of Rights.[1308] As a result, women can claim their constitutional rights both in the public and private spheres.

In addition, the Ethiopian Constitution makes the interpretation of the Bill of Rights, including women's rights, in light of the international human rights instruments.[1309] Article

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[1307] The Constitution of the Federal Democratic Republic of Ethiopia, article 13(1).
[1308] Adem Kassie Abebe, 'Human Rights under the Ethiopian Constitution: A Descriptive Overview' (2011) 5 Mizan Law Review1, 45–46.
[1309] See Theresa Rouger, 'The Impact of International Human Rights Law on the National Laws of Ethiopia from a Gender Rights and Disability Rights Perspective' in Malcolm Maclachlan and Leslie Swartz, *Disability & International Development* (Springer 2009) 31-49.

13(2) states that "[t]he fundamental rights and freedoms specified in this Chapter shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and international instruments adopted by Ethiopia." A combined reading of article 13(2) and article 9(4), which makes ratified international agreements an integral part of Ethiopian law, gives human rights a special protective status under the Constitution.[1310] Accordingly, the interpretation of women's rights in Ethiopia should be in line with international human rights standards such as CEDAW. This enables the channeling and mainstreaming of women's human rights, as discussed in the first section, in the application and interpretation of women's constitutional rights.

Within these enabling normative designs, in addition to recognizing the right to equality and non-discrimination on grounds of sex,[1311] the Ethiopian Constitution recognizes the special rights of women.[1312] Under the article on the rights of women, the Constitution reiterates the formal equality of women and men in the enjoyment of rights and available protections, the equality of women and men in marriage, the right to maternity leave with full pay, and the right to access to family planning services.[1313] Furthermore, it recognizes the rights of women for full consultation concerning national development programs, the right to property and the right to employment on the basis of equality of with men.[1314] These rights of women can be found in the provisions dealing with the right to property,[1315] the right to

[1310] Ibrahim Idris, 'The place of International Human Rights Conventions in the 1994 Federal Democratic Republic of Ethiopia Constitution' (2000) 20 Journal of Ethiopian Law 113. Although the status of international instruments under the Ethiopian Constitution is a subject of debate, in *Miss Tsedale Demissie v Mr Kifle Demissie* [2007] Federal Supreme Court Cassation Division, File 23632, Judgment 6 November 2007, the Federal Supreme Court applied the Convention on the Rights of the Child to protect the child's best interest.
[1311] The Constitution of the Federal Democratic Republic of Ethiopia, article 25.
[1312] ibid article 35.
[1313] ibid article 35(1, 2, 5 & 9); see also article 34(1).
[1314] ibid article 35(6, 7 & 8).
[1315] ibid article 40(1).

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labor[1316] and the right to development.[1317] Their restatement under the article on the rights of women seems to emphasis their relevance for women and shows an appreciation of the outstanding quests of women in these fields. In its bid to enforce women's rights, the Constitution prohibits customs and practices that oppress or harm women.[1318]

Furthermore, in order to create an enabling condition for women to enjoy their rights, the Constitution provides for women's right to affirmative action. In this respect, article 35(3) stipulates that

> The historical legacy of inequality and discrimination suffered by women in Ethiopia taken into account, women, in order to remedy this legacy, are entitled to affirmative measures. The purpose of such measures shall be to provide special attention to women so as to enable them compete and participate on the basis of equality with men in political, social and economic life as well as in *public* and *private* institutions.[1319]

With a particular emphasis to equality and non-discrimination, special women's rights including affirmative action, the Constitution disperses the idea of women's rights to the entire Bill of Rights and the economic objectives of the DPSP. By doing so, the Constitution incorporates the liberal notion of women's rights, as discussed in the first section, in Ethiopia.

However, like Nigeria and South Africa, the liberal notion of rights is configured with the notion of rights rooted in religion and custom. In addition to the recognition of freedom of religion[1320] and the right to culture,[1321] the Constitution specifically allows for the application of religious and customary laws on personal and family matters and for the

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[1316] ibid article 42(1)(d).
[1317] ibid article 43(2).
[1318] ibid article 35(4).
[1319] Emphasis added.
[1320] The Constitution of the Federal Democratic Republic of Ethiopia, article 27.
[1321] ibid articles 41(9) & 39(2.

establishment of religious and customary courts.[1322] As noted elsewhere, while religious and customary laws offer potential spaces and forums for the implementation of women's rights, there are well-known practices that are incompatible with the liberal notion of rights.[1323] In order to ascertain the notion of rights rooted in Islamic and customary laws, I will discuss briefly these laws on marriage and inheritance related to women.

B. Islamic and Customary Laws on Marriage and Inheritance

Following the constitutional recognition for the application of religious law on personal and family matters, Parliament enacted a proclamation that consolidates the jurisdictions of federal sharia courts.[1324] In addition to regulating the appointment and operation of sharia courts by the state, this proclamation further introduced a syncretic applicable law in these courts. On the one hand, the proclamation authorizes the application of Islamic law on matters related to marriage, family relationships, and inheritance among other personal and family matters.[1325] On the other hand, it obliges sharia courts to apply the general civil procedure law.[1326] Although the application of Islamic law is subject to constitutional conformity, Ethiopia does not adopt a specific Islamic school unlike Nigeria and sharia judges are at liberty to apply an Islamic school they are familiar with or choose. In this regard, while the *Shaffii* school is predominant, the followers of the *Hanafi* and the *Malik* schools are also

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[1322] ibid articles 34 (4) & (5) & 78(5).
[1323] See also Gemma Lucy Burgess, 'When the Personal Becomes Political: Using Legal Reform to Combat Violence against Women in Ethiopia' (2012) 19 Gender, Place & Culture 153, 163–164.
[1324] There are sharia courts at the federal and regional levels consisting of first instance, high, and supreme sharia courts.
[1325] Federal Courts of Sharia Consolidation Proclamation of Ethiopia 1999, article 4.
[1326] ibid article 6.

found in Ethiopia.[1327] As a result, identifying the applicable substantive Islamic laws at a given time and case is extremely difficult.

Although the different Islamic schools in Ethiopia have variations in their applications and interpretations of Islamic law, there are some common approaches towards marriage and inheritance. For a valid conclusion of Islamic marriage in Ethiopia, there are some essential requirements. For instance, while the consent of the woman is required, her guardian can marry her while the consent of the man is a mandatory requirement.[1328] Although there is no consensus on the marriageable age, puberty is considered as a manifestation of capacity for a woman to marry.[1329] The payment of dowry (*mahr*) by the man to the woman is the other valid requirement for the conclusion of Islamic marriage.[1330] Once the marriage is concluded, the husband assumes the obligation to maintain the wife and children, while the wife has no such obligation even if she is rich.[1331] After the first marriage, the husband can marry two, three or four wives while the wife cannot.[1332] If the husband wants to end the marriage, he can use *talaq* but the wife has to use *khul*, however, they can also terminate the marriage through *mubarh* (mutual consent).[1333] On inheritance, Islamic law provides for the right to inheritance for women and men *albeit* with a different share. While a wife can inherit a fourth of her deceased husband's estate, a husband can inherit half of his deceased wife's estate. Similarly, the share of women's or girl's inheritance is half of the men's or boy's share.[1334]

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[1327] See J Spencer Trimingham, *Islam in Ethiopia* (Oxford University Press 1952) 232–233.
[1328] Abdulmalik Abubaker, Islamic Law (Ethiopian Justice and Legal Systems Institute 2009) 25.
[1329] ibid 30-32.
[1330] ibid 30.
[1331] ibid 37.
[1332] ibid 34-35.
[1333] ibid 41-49.
[1334] ibid 85-88.

Unlike the case with sharia courts, Parliament did not enact a law for the operation and establishment of customary courts that apply customary laws. As the Constitution conditions the application of religious and customary laws on the enactment of a law, the absence of an enabling law in this regard means that there is no practical official recognition to customary laws. In spite of this, customary laws continue to apply in Ethiopia even beyond what is constitutionally permissible as a matter of fact.[1335] Although there are numerous customary laws on marriage and inheritance in Ethiopia, patriarchy is a common theme that runs across these laws.[1336] Women are not considered as equal partners in marriage and often discriminated against in inheritance.[1337] Despite the improvements in recent years, early and forced marriage are routine practices in rural Ethiopia. Polygamy and widow inheritance are still the prevailing customary practices among the Afar, Oromo, Somali and other ethnic groups.[1338]

Under a typical customary law in Ethiopia, marriage is a family affair and concluded with the consent and agreement of the two families. Nonetheless, the consent of the man is given due consideration unlike that of the woman. While the consent of the woman is requested, it is not always essential for the conclusion of the marriage. Marriage against the will of the girl and through abduction is practiced in some places.[1339] Once the marriage is concluded, there are a set of gendered roles the spouses have to perform. The husband is the

[1335] Donovan and Assefa (n 558); Exploring how different customary laws are applicable in the domain of criminal law.
[1336] Seyoum Worku Telila, '"Irra Dhaaba": A Customary Marriage among the Gelan Oromo of Caaffee Tumaa in Ada'a Disrict, East Shewa, Ethiopia' (Master Thesis, Addis Ababa University 2016).
[1337] Meaza Ashenafi and Zenebeworke Tadesse, 'Women, HIV/AIDS, Property and Inheritance Rights: The Case of Ethiopia' (UNDP 2005) 23–24.
[1338] For instance see Tilahun Seyoum, 'Widow Inheritance and Women's Rights: The Case of the Boro-Shinasha in Bullen Woreda, Benishangule Gumuz Regional State' (Master Thesis, Addis Ababa University 2015).
[1339] Gemechu Beyene, 'Marriage Practices Among The Gidda Oromo, Northern Wollega, Ethiopia' (2006) 15 Nordic Journal of African Studies 240, 250–251.

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head of the family and assumes a huge decision making power.[1340] By the same token, given the social structure and role and position of women,[1341] the customary inheritance practices perpetuate the discriminatory practices against women.[1342] For example, as women move out of their families and join the family of their husbands, unlike men who stay with their families, women are seen with suspicion with respect to property allocation in inheritance.[1343] Due to their physical proximity and role in society, men are considered to be genuine family members with much access to family property including land while women are seen with suspicion by both their families and the families of their husbands and consequently are left with limited access to property including in inheritance.[1344]

Hence, the recognition of the liberal notion of women's rights and the recognition of Islamic and customary laws in the same constitutional space heralds the establishment of a syncretic women's rights regime. Even if Islamic and customary laws are applicable subject to the Constitution, determining the constitutionality of Islamic and customary laws related to marriage and inheritance is not an easy task. Further, when the Constitution recognizes these laws, it is opening accommodative spaces in the constitutional order. The question is what type of accommodation is constitutionally permissible and what type is not. The above description of women's rights as rooted in the liberal tradition and Islamic and customary

[1340] Nasser B Ebrahim and Madhu S Atteraya, 'Women's Decision-Making Autonomy and Their Attitude towards Wife-Beating: Findings from the 2011 Ethiopia's Demographic and Health Survey' (2018) 20 Journal of Immigrant and Minority Health 3, 603-611; Eshetu Gurmu and Senait Endale, 'Wife Beating Refusal among Women of Reproductive Age in Urban and Rural Ethiopia' (2017) 17 BMC International Health and Human Rights 6, 1-12.
[1341] Jeylan W Hussein, 'A Cultural Representation of Women in the Oromo Society' (2004) 25 African Study Monographs 3, 103-147.
[1342] Burgess (n 1323) 158.
[1343] Kuma Beyene Fita, 'The Inheritance Rights of Women: The Case of Yaa"aa Yaaboo" Customary Court in Ambo' (Master Thesis, Addis Ababa University 2017).
[1344] See also Åsa Torkelsson and Bekele Tassew, 'Quantifying Women's and Men's Rural Resource Portfolios – Empirical Evidence from Western Shoa in Ethiopia' (2008) 20 The European Journal of Development Research 3, 462-481.

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laws only gives the normative framework. Its actual application is determined through the investigation of the judicial practice on these issues.

C. Judicial Practice

The HoF decided some cases on issues related to the syncretic regime of women's rights. As these cases demonstrate, the HoF gives effect to the syncretic nature of women's rights. In the case of *Kedija Bashir*,[1345] the HoF reversed the decisions of the Sharia courts including the Federal Supreme Court based on preliminary objections than on substantive merits to protect the rights of women. In this case, the inheritance of a house that belongs to an alleged common grandfather was at issue.[1346] When the applicants instituted a claim against the defendants in a sharia court, the defendants submitted a preliminary objection that they did not consent to the jurisdiction of the sharia court. While article 34(5) of the Constitution clearly provides for consent as an essential requirement for setting the sharia courts in motion, the proclamation for the consolidation of sharia courts was not in force at the time of application and based on this reasoning the court dismissed the preliminary objection and went on to rule on the merits. The reason the defendants did not want to consent is litigation based on sharia law would have put them in a disadvantageous and unequal position. As the defendants feared, the sharia court decided based on sharia law and they were unhappy about the decision and appealed to the Federal Supreme Court. The Federal Supreme Court also confirmed the decisions of the sharia courts. The Ethiopian Women Lawyers Association filed an application to the HoF challenging the constitutionality of the decision. The HoF

[1345] Kedija Bashir case [2004] the House of Federation of FDRE (May 2008), 1 Journal of Constitutional Decisions 35-41.
[1346] Aneme (n 558) 95.

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reversed the decision arguing that sharia courts do not have jurisdiction without the consent of the parties.[1347] As the defendants did not want to litigate in sharia courts, the courts should have simply followed article 34(5) of the Constitution even if the sharia courts' proclamation was not in force at the time of application. However, the HoF did not examine the compatibility of the merits of the decision with the constitutional standards. Its failure to engage with the merits of the case may be either due to strategy or presumption of compatibility with the constitutional framework had it been based on consent. In both ways, the decision reinforces the syncretic philosophy of rights.

In contrast, in the case of *Halima Mehamed v Adem Abdi*,[1348] the HoF focused on the substance of the case to defend the rights of women. As noted above, although the Constitution provides for the application of customary law, it did not enact legislation that enables its application yet. In this case, Adem Abdi inherited Halima Mehamed and her property through the customary practice of widow inheritance. Accordingly, Adem Abdi possessed the land Halima Mehamed and her three children inherited from her deceased husband as common property while he possessed solely the land he had through his other marriage. Halima Mehamed on behalf of herself and her children instituted a suit against Adem Abdi. While the lower and higher courts of the regional state of Oromia decided in her favor by arguing that the land belongs to them as it is individual property gained through inheritance before the second marriage, the Oromia Supreme Court reversed the decision of the lower courts on the ground that rural land cannot be considered as individual property gained before marriage. Consequently, the Oromia Supreme Court decided that the husband

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[1347] See also *Raniya Ahmed Ibrahim v Dr Ibrahim Mohamed Hasen* [2008] House of Federation /2/160 (2008) where the HoF found that the decision of the sharia courts unconstitutional for lack of adequate consent.
[1348] *Halima Mehamed v Adem Abdi* [2007] House of Federation /5/163/ (2007).

had a right to share half of the land in addition to possessing the other land he has with the other marriage. The HoF reversed this decision by noting that women have the right to equality with men in marriage in accordance with article 35 (2) and have the right to acquire, control, and administer property including land in accordance with article 35(7). As the contested land is acquired before marriage through inheritance, it is a personal possession and the husband has no right to share this personal property.[1349] Although the HoF's decision secures the women's right to property, it also alludes to the constitutionality of widow inheritance and bigamy within which the case was situated. As a result, it mainstreams the liberal notion of rights while maintaining some notions of rights rooted in customary laws.

Like Nigeria and South Africa, women's constitutional rights in Ethiopia are syncretic. The constitutional practice in this respect unfolds towards the fusion and transformation of the religious and customary based rights with the rights rooted in liberalism and consequently the former are assimilated with the liberal tenet of the Constitution. Such syncretism predominantly comes *from above* and the HoF plays a crucial role in this respect. As in Nigeria and South Africa, the Ethiopian Constitution sets a syncretic constitutional adjudication system that further problematizes the practice of constitutional rights rather than a simple declaration of (un)constitutionality simply because Islamic and customary laws are incompatible with the liberal half of the Constitution.

6.6 Conclusion

As is evident from the discussion, women's constitutional rights in Nigeria, South Africa, and Ethiopia are the result of legal syncretism. However, the syncretic nature of women's rights

[1349] ibid 3.

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does not come in a single form or shape. For instance, while there is a general blend and transformation of women's rights rooted in both the liberal and customary systems in all the three countries, there is a symbiotic relationship between women's rights rooted in the liberal tradition and Islamic law in Nigeria. Furthermore, beyond the constitutional design, the syncretism between women's rights rooted in the liberal tradition and customary laws mainly comes *from above*, that is from apex judicial or quasi-judicial organs. However, such syncretism also arises *from below* as the South African experience shows. Despite these different forms of syncretism, the women's rights regime in these countries shares the liberal notion of women's rights as incorporated in international human (and/or women's) rights instruments but also diverges from them as it includes the notion of rights rooted in customary and religious laws. Precisely because the women's rights regime is syncretic, the universalist ambition and supremacy of the constitution do not override a certain conception of women's rights simply because it is incompatible with the liberal notion of rights. It sets a jurisgenerative approach in the design and practice of women's rights.[1350] The result is the creation of spaces and interactions for the enforcement of women's rights in multiple, overlapping, and contestable avenues through creative procedural innovation and normative commitment to syncretism.[1351] However, it does not mean that the syncretic constitutional approach to women's rights and the concomitant jurisgenerative approach to women's rights adjudication offer the best protection to women. It means that the women's rights regime is the result of a conscious act of acceptance, rejection, and reinterpretation of the liberal and the indigenous notion of rights in a constitutional space. Surely, this syncretic constitutional

[1350] See Robert M Cover, 'The Supreme Court, 1982 Term - Foreword: Nomos and Narrative' (1983) 97 Harvard Law Review 4, 4-68.
[1351] See also Paul Schiff Berman, 'Jurisgenerative Constitutionalism: Procedural Principles for Managing Global Legal Pluralism' (2013) 20 Indiana Journal of Global Legal Studies 665, 668–669.

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design and practice offer better options to women than what the universalists and cultural relativists prescribe. However, as the case studies here demonstrate, the optimal service of legal syncretism for women is contingent upon several considerations at a given time and place.

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CONCLUSION

This dissertation asks the question of how to better understand and explain African constitutionalism and has aimed to develop a theoretical framework to this effect. As the discussion in this dissertation shows, legal syncretism offers a better theoretical framework than legal centralism and legal pluralism to decode the African constitutional matrix and consequently to capture and explain the concomitant constitutional designs and practices.

The first step in understanding African constitutionalism is to unearth its roots and trace the constitutive elements of this matrix. As colonial and postcolonial African states and their corresponding constitutional systems did not come into being *ex nihilo*, the ascertainment of the constitutional systems in precolonial Africa becomes necessary to understand how constitutionalism unfolds in time and space. In this respect, the genealogical orientation of legal syncretism provides the analytical tools and resources to retrieve and register the African experience of constitutionalism in precolonial times as the first element in the constitutional matrix. This, in turn, rectifies one of the epistemological problems associated with legal centralism- that Africa was pre-constitution before European colonialism. In addition, legal syncretism creates the opportunity to ascertain the identity and nature of precolonial constitutionalism in Africa. Moreover, as the idea and practice of precolonial constitutionalism in its many variants feature in the design, practice, and discourse of postcolonial constitutionalism, a critical study and construction of the former opens a window of opportunity to test the validity of some of the widely held assumptions or myths about "the African political culture".

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The second element of the African constitutional matrix legal syncretism identifies is international law. One can at one's own peril explain and understand African constitutionalism without appreciating the broader international system Africa is situated in different time and space. International law played the role of a *Basic Law* in both the establishment of African colonial states in the late nineteenth century and their independence in the mid-twentieth century. In the establishment of colonial states, international law - in which the Berlin Conference is its classic expression - not only denied recognition to the constitutional systems and sovereignty of precolonial Africa, but it also considered Africa a *terra nullius* and, hence, a legitimate *object* of European colonialism. At the end of colonialism, however, post-World War II international law- the right to self-determination and the principle of sovereignty- created possibilities for the inauguration and incorporation of colonial African states into the community of nations as independent states. In both ways, international law created the external conditions for the existence and operation of colonial and postcolonial states, which an African constitutional analysis should not miss. By presenting international law into the African constitutional matrix, legal syncretism captures theoretical and practical insights that escaped the attention of legal pluralism – for it focuses on the dynamics of customary, religious, and imported European laws within colonial and postcolonial states.

The third element of the constitutional matrix is imported colonial laws. Within the general spirit of international law, colonial laws gave African states their own forms and textures. During colonialism, the primary occupation of these laws was the *legitimation* and *maintenance* of colonial states and consequently, they were devoid of the constitutional morality, justice, and rationality inherent in the laws of the colonizers at home. More often

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than not, the Colonial Governor was the chief legislator, executive, and justice of the colony. At independence, however, the colonial powers imposed a liberal constitutional system imagined based on their historical experience as a condition for exercising the right to self-determination. Accordingly, the newly independent African states have to operate with a system of liberal constitutional democracy.

Furthermore, along with the triumph of liberal democracy in the 1990s, liberal constitutional norms and practices feature as the fourth element of the African constitutional matrix. In this regard, the influence of the American constitutional system and comparative constitutional law looms large in the African constitutional experiment. The migration of liberal constitutional norms and practices such as judicial review, Bill of Rights, presidentialism, and federalism are a case in point.

The encounter and contact of international law, colonial laws, and liberal constitutional norms and practices with the African indigenous constitutional systems and practices in the late nineteenth and mid-twentieth centuries led to conflict, resistance, acceptance, and exchange at different levels and in different ways. These syncretic processes changed and transformed the nature and identity of the four constitutive elements of the constitutional matrix. Accordingly, the indigenous constitutional system of precolonial Africa was dissolved, but its various elements were accepted, modified, and even invented by the colonial laws. Similarly, international law altered one of its fundamental principles -empirical sovereignty to juridical sovereignty- as it enters into the African constitutional matrix. By the same token, colonial laws adapted with and incorporated customary and/or religious laws and practices. In a similar vein, the identity, nature, and purpose of liberal constitutional norms and practices have been transformed. The quest to solve some existential problems

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posed by the constitutional matrix dictated by the power balance in the social field at different time and space has made these syncretic changes possible.

Most importantly, these syncretic processes in the constitutional matrix have brought syncretic constitutional designs and practices. Legal syncretism animates the very conception of the African state along with its vertical and horizontal divisions of power and its notion of constitutional rights. The African state, unlike the Euro-American conception of the state, is a Janus-faced constitutional configuration. The first face of Janus is international law that reimagined and reconfigured Africa from above in its current geographical or territorial form to the community of nations with the attendant defined population, territory, government, and sovereignty. Along with these, it has bestowed on the territorial state (both colonial and postcolonial) internal autonomy and external protection. The other face of Janus is the African indigenous laws and institutions configured from below to maintain internal law and order within the contours of the territorial states. Consequently, indigenous laws and institutions provide the African state the necessary infrastructure and resources for internal operation. At the center of this Janus-faced configuration lies the written constitutional system, which provides primarily legitimacy and, to the extent possible, the institutional and normative context for the practice of constitutionalism. This syncretic constitutional configuration challenges the conventional wisdom about the nature of the African state, its relationship with society, and the international community by transcending the artificial binary of formal and informal, state and non-state, legitimate and illegitimate, weak state and strong state in the conception and practice of constitutionalism.

This syncretic nature of the African state necessitates the reinterpretation and redeployment of the classic theories of state organization. In furtherance of this, the classic

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federal and unity theories are not only modified and transformed in the African state, but the federal spirit and the unitary logic are also blended together. As a result, while the unitary states in Africa incorporate federalist principles and practices and have a general federalist ambition, the federal states heavily draw from the unitary theory and have a general unitary impulse.

In a similar vein, even though the horizontal division of power accepts the formal structure of separations of powers from liberal constitutional theory, its internal organization and power allocation are animated by legal syncretism. The legislature in many African states is the dual house of representation based on the liberal notion of *popular sovereignty* and the *traditional form of sovereignty*. While the direct election of members of the legislature through regular elections embodies the notion of popular sovereignty, the incorporation and reconfiguration of traditional authorities in the legislature, *albeit* at different degrees and forms, show the traditional conception of sovereignty. Through such legislative design, citizens have dual representations.

By the same token, while the executive takes the form or shape of a presidential or parliamentary system of government, its substantive powers are inspired by the *modus operandi* of the Colonial Governor. As a result, against the core of the doctrine of separation of powers, more often than not executive power in Africa is personalized and the executives are imperial. Likewise, the judiciary fuses persons and laws from customary and/or religious laws with statutory laws and this concomitantly channels a syncretic judicial structure and philosophy. Similarly, the Bill of Rights of the liberal constitutional tradition is animated by the duty-rights conception and they are applicable within the dialectic of liberalism and

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communitarianism. Hence, legal syncretism permeates the entire constitutional structure and constitutional rights regime of the African state.

Precisely because legal syncretism animates and permeates the constitutional designs and practices, these constitutional designs and practices, in turn, have their own unique features and purposes. A closer inspection of federalism, the Executive, and women's rights, as representatives of the various aspects of constitutional design and practice, in the selected case studies of Nigeria, Ethiopia, and South Africa, shows how African constitutionalism is a result of the syncretism of the various constitutive elements of the constitutional matrix. Although federalism in Africa shares the forms, structures, and discursive practices from liberal constitutional theory, its normative articulations and institutional frameworks are animated by syncretic configurations, and these, concomitantly transformed its purpose, fundamental elements, and operation, *albeit* differently. In addition to the unitary theory, which is inherent in the federal experiments, federalism is blended with the military principle of organization in Nigeria, ethnicity and socialism in Ethiopia, and liberalism and Ubuntu in South Africa. As a result, the normative and institutional frameworks of federalism are animated by these syncretic elements.

Furthermore, as federalism's primary purpose is the accommodation of ethnonational diversity and territorial integrity, it neither needs the practice of liberal constitutionalism or democracy to survive nor is it incompatible with unlimited government to operate, as far as the government is committed to the syncretic federal logic. It is due to this reason that federalism manages to operate and survive in Nigeria and Ethiopia largely in the absence of liberal constitutionalism. In contrast, even though the original logic for federalism in South Africa is the accommodation of ethnic and racial diversity, the *acceptance* of liberal

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constitutionalism by the key constitutional actors maintained the classic purposes of federalism in the final Constitution. Hence, the operation of federalism in South Africa requires the practice of liberal constitutionalism.

Similarly, the Executive is the syncretic result of the constitutive elements in the constitutional matrix. While the African executive adopts the forms and structures of a presidential or parliamentary system from liberal constitutional theory- as the offspring of the doctrine of separation of powers, it draws the substantive executive powers from the *power enabling* aspects of the different elements of the constitutional matrix. To this end, it uses the African traditional system of government as a *discursive practice* to establish an imperial and strong executive, while, in fact, it seems to constitutionalize the theory of colonial government. The truth of the matter is, in addition to the absence of a unitary African traditional theory of government, the centralized political systems in precolonial Africa had an inbuilt system of separation of powers and checks and balances. However, the colonial theory of government ushered in one-man governance under the leadership of the Colonial Governor. Hence, there is an implicit *acceptance* of the colonial theory of government in postcolonial constitutionalism and the constitution has been usually used not to limit the substantive powers of the executive, but to enlarge and/or safeguard it. The result is the transformation of executive power into personalized power and the President or the Prime Minister into an imperial President or Premier.

In this respect, presidentialism in Nigeria and parliamentarianism in Ethiopia are adopted with the objective to centralize and consolidate executive power in the person of the Chief Executive in a way that upsets the doctrine of separation of powers and even the federal structure. However, the African executive also establishes its power and structure drawing

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from the *power limiting* aspects of the different elements in the constitutional matrix. Consequently, the power of the executive is limited, its power is dispersed, and ultimately the imperial ambition is constrained. South Africa is a fine example for the institution of a limited executive. The *acceptance* of the limited theory of government in South Africa has led to the construction of executive power in a personally and institutionally dispersed and diffused way building on the *power limiting* aspects of liberal and indigenous notions of power.

By the same token, women's constitutional rights are the results of the syncretic relations between the rights rooted in the liberal tradition and those in customary and religious systems.[1352] Due to this, the women's constitutional rights regime converges with the liberal notion of women's rights as incorporated in international human rights instruments, but, at the same time, diverges from these as it includes the notion of rights in customary and religious laws and practices. However, such syncretism comes in different forms and shapes. While there is a general blend and transformation of women's rights rooted in both the liberal and customary systems in Nigeria, Ethiopia, and South Africa, there is a symbiotic relationship between women's rights in the liberal tradition and in Islamic law in Nigeria. The syncretism between women's rights in the liberal tradition and in customary laws mainly comes *from above* - that is from the apex judicial or quasi-judicial organs, while such syncretism also arises *from below*- that is from the changes in the customary laws of the community based on its own initiative- as in South Africa. This syncretic configuration creates spaces and interactions for the enforcement of women's rights in multiple, overlapping and sometimes

[1352] Indeed, women have to struggle for their liberal or customary/religious rights for their materialization. See for instance Aili Mari Tripp, 'Conflicting Agendas? Women's Rights and Customary Law in African Constitutional Reform' in Susan H. Williams (ed), *Constituting Equality: Gender Equality and Comparative Constitutional Law* (Cambridge University Press 2009) 173-194; Mary Hames, 'Rights and Realities: Limits to Women's Rights and Citizenship after 10 Years of Democracy in South Africa' (2006) 27 Third World Quarterly 7, 1313-1327.

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competing avenues through creative procedural innovation and normative commitment to syncretism rather than choosing one over the other. Although the service of legal syncretism for women's rights is contingent upon several factors in time and place, it offers better options to women than what the universalists and cultural relativists prescribe in the human rights debate.

Three observations follow from the findings of this dissertation. First, legal syncretism as a theoretical framework clearly explains the nature, identity, and manifestations of African constitutionalism in epistemologically conscious and methodologically sound ways. By taking the idea of constitutions and constitutionalism across time and space seriously, legal syncretism gives due emphasis to the African constitutional designs and practices in their own terms without falling in the trap of legal centralism and legal pluralism. By doing so, it offers a unique theoretical perspective to unearth the socio-economic, cultural, and political contexts that give rise to and influence the different constitutional designs and consequently transform and shape the constitutional practices.

Furthermore, it clearly accounts for the internal working of the African state through a holistic investigation of its biosphere and by zooming into its vertical and horizontal divisions of power and notion of constitutional rights. As it deploys multi-disciplinary approaches and materials to explain, analyze, and capture the various aspects of constitutional design and practice, it offers a better account of what constitutions and constitutionalism are in their normative articulations and empirical realities. Following from this, legal syncretism helps to identify more clearly the achievements, challenges, and pathologies in constitutional government in Africa. Thus, legal syncretism provides a better

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theoretical framework to understand and capture the complex terrain of African constitutionalism.

Second, legal syncretism offers key theoretical tools and practical insights to assess and evaluate the performance of African constitutionalism. As legal syncretism situates the phenomenology of constitutional studies in Africa in broader temporal and spatial perspectives along with the resultant complex socio-economic and political contexts, it sheds more light on the origin, development, and transformation of a constitutional system, in general, and its unique designs and practices, in particular. On the one hand, these help to understand why a constitutional system comes into being in the first place and how it aims to address its *raison d'être*. On the other hand, these help to understand the nature and purpose of the specific constitutional designs put in place- to achieve the general aim of the constitutional systems- and their consequent practices. The constitutional tools of assessment that are drawn in such ways can provide a better account of the performance of constitutionalism and the state of constitutional government in Africa than the Western liberal constitutional tools of assessment that usually record and register constitutional failure.

In this respect, the discussion on federalism in Chapter Four casts some light on how legal syncretism provides useful tools in evaluating the performance of constitutionalism. Based on the standards of success and failure in classic federal theory, the viability of federalism in Nigeria and Ethiopia is an anomaly and its performance is largely a failure. Nonetheless, this assessment ignores the nature of federalism and its dynamics in these countries. However, if we consider the transformation of its purpose, fundamental elements, and operation in these states, the viability of federalism is not an anomaly and its performance is not largely a failure.

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Third, legal syncretism provides important theoretical and practical perspectives to constitution-builders in Africa in the writing and amendment of constitutions. The use of legal syncretism as a theoretical framework in this dissertation helps to both identify the recurring challenges and pathologies of constitutional government and trace their underlying causes. One of the main problems in this regard, for instance, is the theory of government advanced in African constitutionalism. Based on claims of nation-building, development, and autochthony, there has been a general distaste for the theory of *limited government* and a preference to *enabled government*. Nonetheless, this *enabled government* has neither brought a unified nation and development nor has a basis in the cultural universe of every African state or society. Rather, it transformed executive power into personalized executive power and the chief executives into imperial executives. Such transformation ultimately has extended the temporal and substantive powers of African executives beyond what is permissible in liberal constitutional theory. While term limits are introduced to prevent presidents for life, the substantive powers largely remain intact and this has led to the continuous amendment of term limits by presidents. Beyond the Executive, the *enabled government* manifests itself in the federal structure. For example, the chief purpose of federalism in Nigeria and Ethiopia is the accommodation of the corporate ethnonational and elite interests and as such, the institutional frameworks of self-rule and shared rule are less concerned about limiting government in defense of human rights and democratic values. Related to constitutional rights, while the syncretic women's rights regime provides women with multiple spaces and avenues to defend and protect their rights and interests, its actual service to women is contingent upon their status, position, and circumstances in time and place.

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Thus, legal syncretism helps constitution-builders to direct their attention and efforts in finding solutions to these problems in a durable manner. As the saying goes, a problem well defined is half solved. Moreover, as legal syncretism registers and highlights the achievements and positive features of African constitutionalism, constitution-builders can keep and maintain these aspects in their constitutional writing, revision, or amendment.

In this regard, future research can be directed toward examining and understanding the various aspects of constitutional design and practice through legal syncretism in different African states. Like federalism, the Executive, and women's rights as examined in this dissertation, a closer inspection of the unitary system, the legislature, the judiciary, and various aspects of the Bill of Rights will give a rich account of their nature, identity, and manifestations with the related problems and challenges. This can be done (i) by investigating the unitary system, the legislature, the judiciary, and different constitutional rights in liberal constitutional theory and practice, (ii) by examining how and why they figure in the African constitutional designs, and (iii) by looking at how they play out in practice. Similarly, the investigation of these aspects of constitutional design and practice in many African states will give a robust understanding of African constitutionalism. This will be particularly important to not only understand and appreciate the general features and trends of African constitutionalism, but also to account to and register the variations among Francophone, Lusophone, and Anglophone states and within themselves. Beyond Africa, it will be also interesting to see the theoretical fitness and practical relevance of legal syncretism to explain and understand the constitutional systems of the Global South that had colonial experiences.

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