CHAPTER 7

The Pretense of Modernity and Justice in Africa

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Introduction

A country is as modern as its laws, yet law is not the sole determiner of modernity. To investigate the connection between modernity and law in Africa is to try to understand how the imposition of foreign standards of justice and morality dislocated Indigenous African values, and how this dislocation created a legacy of elite power grab that has "othered" and continues to exclude several demographics of Africans from equitable justice. The process of modernizing is, in part, the process of improving laws—forming new judicial cultures—to meet changing social realities. But then, modernity, as a condition, is an unending process that can only be subjectively determined. It becomes a problem when imagined as a "standard" or relegated to a few individuals' ideals. Unfortunately, the quest for modernity in Africa has evolved into a pursuit of (often foreign) standards and an imposition of the political elite's ideals. Africa's political leaders have turned to law as an integral instrument in facilitating this pursuit of modernity by manipulating bodies of law (constitutions, criminal codes, etc.). In this context, the purpose of law shifts away from Ronald Dworkin's proposal that law's eventual aim is integrity, i.e., guaranteeing justice and fairness before a defined set of principles.[1] Rather, it begins to conform with Duncan Kennedy's view that orientation about law tends to reproduce hierarchies of exclusion and oppression.[2] Therefore, the reality of law as a "modernizing" tool in Africa is that it has produced exclusionary and oppressive calamities for Africans and less equitable justice. But how did we get here?

From the arrival of Islamic scholars in the eleventh century until the arrival of Europeans in the fifteenth century, travelers and anthropologists writing about Sub-Saharan Africa generally imagined that Indigenous laws and customs in that region were not complex and stable enough to warrant calling them civilized. From Al-Muqaddasī in the tenth century to Ibn Battuta in the fourteenth century, Arab clerics and observers often exhibit a paternalistic gaze by treating African norms as primitive in the eyes of the Sharia. Muslim African chiefs from the Kingdom of Mali in West Africa to the Sultanate of Kilwa along the coast of East Africa employed some of these clerics as *qāḍī* (judges) and subsumed preexisting African laws under Sharia. Equally, when Europeans began to form colonies in Africa in the fifteenth century, African laws were subsumed under European laws.

Europeans outright declared African laws invalid in some places, often to fatal ends. For example, thousands of Africans were murdered between the mid-nineteenth and

1 Dworkin, *Law's Empire*.
2 Kennedy, "Legal Education and the Reproduction of Hierarchy."

early twentieth centuries in punitive wars waged by European officials to subdue so-called witchcraft practices that they believed formed the basis of justice in African communities they desired to colonize. Some anthropologists writing as late as the nineteenth century did not even believe that this region of Africa had structures worthy of being described as legal systems. However, scholars engaged in Africa's *longue-durée* history have demonstrated that the evolution of laws in Africa before Islam's growth in the fifteenth century was complex and evolved to meet the new needs of the ruling class and the public. In other words, African judicial traditions were not static but changed according to a community's priorities. If Jürgen Habermas's conclusion is that modernity is both an unfinished project and a process, then the changing nature of judicial transitions in Africa before the arrival of Islam and European colonization indicates an ongoing African modernity.

The Hypocrisy of Modernity

Problems start to arise in our understanding of modernity, as Aníbal Quijano notes, when the idea of modernity becomes "inseparable from coloniality."[3] That is, the domination of one tradition's idea of the modern upon another so that the latter loses its sense of self-worth, which in Africa's case draws from entanglements with both Islamic and European traditions. Ergo, when scholars of politics like Anthony Giddens inferred that "modernity refers to modes of social life or organization which emerged in Europe from about the seventeenth century onwards and which subsequently became more or less worldwide in their influence," the idea of modernity then becomes a completely hegemonic condition.[4] It projects a patrimonial gaze in disregard of African self-worth. Meanwhile, Gidden's submission hints at a centuries-long attempt by outsiders to define modernity for Africa. Instead, assessing modernity in Africa, or anywhere else, needs to be subjective because different societies appropriate and reconfigure the institutions and normative frameworks of modernity in ways that reflect their distinct historical trajectories, cultural logics, and socio-political contexts; Shmuel Eisenstadt puts it rightly, submitting that "there are multiple modernities."[5]

It is nonetheless pertinent to recognize that such cultural specificity does not mean divorcing Africa from the cultural values it has since adopted from both Islam and Europe. Homi Bhabha reminds us that modernity is a hybrid process.[6] Africa's modernity then is intrinsically hybrid, shaped by the interplay of cultural traditions, epistemologies, and practices in contact. It manifests not as a uniform trajectory but as localized articulations where global currents are refracted through Indigenous African norms, histories, and power relations, revealing multiple modernities born of cross-cultural and transnational encounters.

To colonize Africans was to first modernize those Africans. Both the Islamic and European drives to modernize Africans by modernizing legal systems were part of their respective agenda to facilitate the subjectivity of Africans. Francis Synder posits that the reality of colonial legal systems is that they upheld a dual structure—formal equality for colonizers; customary or discriminatory law for the colonized.[7] Meanwhile, well before Africans started encountering both Islam and Europeans, the thousands of distinct language communities that comprise the continent had equally distinct legal

3 Quijano, "Coloniality and Modernity/Rationality."
4 Giddens, *The Consequences of Modernity*.
5 Eisenstadt, "Multiple Modernities."
6 Bhabha, *The Location of Culture*.
7 Snyder, "Colonialism and Legal Form."

cultures. Neither Islam nor European colonization is responsible for the institution of legal modernities in Africa. If qualities akin to the rule of law, checks and balances, constitutionalism, and independence of the judiciary all equated modernity, then African legal systems were modern before the propagation of the Sharia and European colonialism. Indeed, until the nineteenth century, several communities in West Africa practiced ordeal trials, human sacrifice as punishment, and other acts that might qualify as immoral in today's consciousness. But so did Europeans who executed so-called witches until the eighteenth century and persons accused of blasphemy and heresy in the nineteenth century. In Saudi Arabia, the spiritual home of Islam, executions are still performed in public to conform with the Sharia. Not long ago, in 2011, Saudi authorities beheaded a woman on a witchcraft accusation and another man in 2012.[8] Between January 2024 and June 2025 alone, that country executed about 520 people, several of whom were convicted of apostasy and blasphemy against Islam.

The point here is that if European societies exhibited questionable legal practices around the same time that they forced their idea of legal modernity down the throats of Africans, and Arabian societies still exhibit similar questionable practices today, then their attempt at modernizing laws in Africa is hypocritical. That is, in the context of Africa's experience, the rhetoric of "modernization" served to justify exploitation, exposing morality as a calculated mechanism of domination rather than a neutral ethical ideal. The transplantation of Islamic and European legal regimes into Africa under colonial domination fractured Indigenous African jurisprudence, undermined local authority, and corroded cultural continuity. The Sharia rendered African laws uncivilized and unholy. Likewise, colonial courts, armed with devices like the repugnancy clause, subordinated living customary systems to alien norms, stripping them of their fluid, adaptive essence. Responsive traditions—rooted in communal ethics and environmental balance—were recast into rigid, state-controlled codes, alien to the very societies they purported to serve.

Modernity and Law as Exclusionary

For most countries on the continent, independence from colonial rule in the mid-twentieth century came with the expectation that Indigenous rule would herald a resuscitation of those African legal values discarded by Europeans. Most of the political elites who took over from Europeans upon independence had little to no appetite to pursue such reforms. The colonial legal system left in its wake systems that put educated elites at the forefront of power. Local, provincial, and supreme courts were in the hands of these elites on the eve of independence, and they have since held on to them at the exclusion of other actors. Pierre Bourdieu cautioned about such choices among political elites amid their drive to reproduce dominance through the accumulation and transmission of cultural and social capital, which only complements economic capital in sustaining inequality.[9] This Bourdieuan reflection has turned out to be calamitous for Africans.

Among the calamities that bewilder Africans today is the retention of those alien, foreign legal frameworks as the bedrock of jurisprudence. This problem is most prevalent in Sub-Saharan Africa, where current legal systems are carbon copies of Western models. Looking elsewhere for what has worked is not the problem, but the need for context-specific innovations over wholesale replication is what proves to be elusive. For

8 "Saudi Arabia: Beheading for 'Sorcery' Shocking"; "Saudi Man Executed for 'Witchcraft and Sorcery.'"

9 Bourdieu, *The State Nobility: Elite Schools in the Field of Power*; Bourdieu, *Distinction: A Social Critique of the Judgement of Taste*.

example, African politicians and legislators treat the United States' judicial system as the gold standard while giving less consideration to the fact that the latter's system is a framework carved out of several wars, unique social upheavals, and distinct cultural evolution. Therefore, it is not ideal for an African country to, for example, model its supreme court system after the US model without contextualizing the different conditions that engendered that court's evolution in terms of purpose and outlook since its emergence in 1789. The same consideration applies to the formation of other law-oriented institutions, like the senate and police. To put it differently, transplanting a foreign judicial model without thinking about adaptation is counterproductive because legal systems should reflect distinct histories, cultures, and political economies. It is not to Africa's benefit to operate under legal systems that mirror foreign and colonial logics of control, which only cloaks exclusion and injustice in the language of progress. Having legal structures that do not reflect local realities and values only distorts the purpose of law and weakens public faith in that structure's legitimacy. The consequence is a vicious cycle where citizens disengage from the system, which almost always further empowers those who are strong enough to manipulate the system, i.e., political elites.

The legal systems presently obtainable across Africa are not designed to promote justice and equity. Instead, they are designed to protect and advance the powers of the elite class in such a way that it renders the interests of the masses irrelevant before the law. Paul Zeleza recently noted that "the formalistic interpretation of the rule of law in many African countries often prioritizes legality and order at the expense of justice and equity" and that the consequence of this wrong prioritization is that it has "exacerbated ethnic tensions, leading to prolonged instability and undermining the legitimacy of the legal system."[10] Zeleza is right because with the enforcement of laws that only emphasize procedural compliance over substantive justice, state institutions frequently entrench historical grievances and deepen divisions. This misalignment has fueled violent ethnic conflicts such as the Rwandan genocide of 1994, the Darfur crisis in Sudan, the ongoing Tigray conflict in Ethiopia, the 2007–2008 post-election violence in Kenya, and recurring clashes between Fulani herders and farming communities in Nigeria. In each case, the legal system's failure to equitably address the root causes of marginalization has not only intensified communal hostilities but also eroded public trust in state legitimacy, perpetuating cycles of violence and instability.

In this milieu, several Africans are left behind in more ways than Kennedy's reinforced hierarchies. Women and queer persons are two demographics of Africans at the bottom of that hierarchy. In many places on the continent, there are laws preventing women from inheriting real estate. For example, Uganda's customary inheritance laws dispossess widows and daughters of land, particularly in the Acholi region. Sudan and Mauritania restrict women's legal testimony and mobility, curtailing access to justice. Even in South Africa, constitutional protections are undermined by persistent gender-based violence. Across these cases, formal rights are consistently compromised by entrenched norms, exposing the persistent gap between legal guarantees and women's lived realities. It is not more than a decade ago when the World Economic Forum revealed that women in Cameroon, Chad, the Democratic Republic of the Congo, Gabon, Guinea, Mauritania, Niger, and Sudan needed their husbands' permission to get a job.[11] Equally in Cameroon, Chad, Equatorial Guinea, Guinea-Bissau, Niger, and several oth-

10 Zeleza, "The Rule of Law in Africa: A Reappraisal."

11 Thomson, "18 Countries Where Women Need their Husband's Permission to Work."

ers, laws prevent women from opening bank accounts without their husbands' approval.[12] Even in non-material contexts like access to legal divorce, women's interests are still secondary. What then is the pursuit of modernity if the rights and interests of half of the continent are relegated to the peripheries of governing bodies of law? Indeed, "law sees and treats women the way men see and treat women."[13] However, to assume that the condition African women find themselves in before the law is gender-driven is to miss the point. The same paternalistic and elite-oriented legal structures that fail to see these problems and how they affect the lives of women are the same systems that do not seem to care about the rights of queer persons.

There is hardly a more contested issue relating to the conversation about modernity in today's Africa than the toleration of homosexuality. Historians demonstrate that Africans had elaborate sexual identities and relations before colonial rule, which dismisses as a farce the suggestions of a strictly heterosexual precolonial Africa. With colonial rule came the punitive culture that criminalized so-called "unnatural offenses," facilitating the othering of Africans whose sexuality did not conform to European parameters of "natural." Enforcing this policy was tantamount to instituting colonial modernity in Africa. Whatever colonialism did not understand, it moved to regulate and often dismantled through regimes of oppression. African political elites who took over after independence preserved these rules and added greater expansions.

One could argue that the decision to retain these colonial-era laws effectively preserved colonialism's skewed idea of modernity. African leaders who have championed this cause today, including Évariste Ndayishimiye (Burundi) and Yoweri Museveni (Uganda), have instead argued that they are in fact demonstrating and preserving the boundaries of their conception of "African modernity," which is different from what is obtainable in the West. The victims of the conundrum over sexuality's modernity are innocent queer (and often non-queer) Africans, who find themselves at the mercy of an elite class that seems poised to demonstrate power by victimizing the marginalized and weak. Gerald O. West and others put it aptly in their observation that "sexuality has become a new site of struggle and the 'old' theology does not fit, for it is founded on heteropatriarchy."[14] Persecuting queer persons violates fundamental human rights, contravening equality and dignity principles in the Universal Declaration of Human Rights (1948). In fact, the African Commission on Human and Peoples' Rights—Resolution 275 (2014) affirms that violence and discrimination based on sexual orientation violate the African Charter. By subordinating autonomy to politicized moralism, these measures perpetuate exclusion, incite violence, and erode the universality of justice.

There are reasons to be hopeful nonetheless. Since the late 2000s, the number of civil society organizations on the continent fighting for the needs of women has steadily increased. The 2010s brought with it similar interests in advocating for public policy reforms to protect the rights of queer persons. Although the majority of these organizations rely on the benevolence of foreign (mostly Western) donors, without whom they cannot function, their work has brought women and queer persons towards a freer existence more than any time since the mid-twentieth century.

12 "Women, Business, and the Law 2022."
13 Mackinnon, *Toward a Feminist Theory of the State*.
14 West et al., "When Faith Does Violence."

Conclusion

The modernity of a legal system significantly hinges on the expectation that everyone is equal before the law. Elite usurping of power in Africa is a process of many calamities for the masses—so much so that Roberto Unger's 1983 reflection that law is indeterminate and reflects the interests of the powerful seems to evoke the true nature of law's applicability on the continent.[15] When one class assumes greater benefits from the constitution to the detriment of another class, the notion of equality before the law becomes alien. In postcolonial Africa, the rule of law—ostensibly anchored in equality—often serves as a refined instrument of elite domination. By retaining colonial legal frameworks, states entrench structural hierarchies, legitimize authority, and suppress dissent, thereby masking deep inequities in justice, resources, and political participation. Or, as Makau Mutua reminds us, the principle of the rule of law in Africa—purporting to guarantee equality—has frequently functioned as a veil for systems of domination.[16] The results of this elite domination are coups, ethnic violence, civil unrest, criminalization of sexuality, and disregard for women's rights.

The enduring nature of these systemic inequities highlights the imperative for legal reforms that are attuned to Africa's specific sociohistorical and cultural contexts, privileging substantive justice over formalistic adherence. African states must transcend the uncritical adoption of exogenous legal frameworks, instead fostering institutions that are responsive to indigenous histories, normative traditions, and social realities. By institutionalizing principles of equity, inclusivity, and accountability within the legal architecture, African societies can disrupt patterns of elite domination, safeguard marginalized populations, and actualize the emancipatory potential of a genuinely modern and contextually grounded legal order.

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