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Eunice N. Sahle
Editor

Democracy, Constitutionalism, and Politics in Africa

Historical Contexts, Developments, and Dilemmas

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CHAPTER 1

Introduction

Eunice N. Sahle

In the last three decades, significant political changes have occurred in various parts of Africa. These changes didn't emerge in a local or global vacuum. At the continent and national levels, African intellectuals and institutions of knowledge production generated ideas that circulated widely and contributed to the re-imaging of historically situated political landscapes. In the late 1980s, for example, the Council for the Development of Social Science Research in Africa (CODESRIA) provided an important intellectual space for debates focusing on African perspectives on democracy.[1] Further, Peter A. Nyong'o's 1987 text, *Popular Struggles for Democracy in Africa* offered important insights on questions of democracy and democratization.[2] Social scientists were not the only intellectuals raising questions that challenged the political and economic status quo. The work of literary scholars such as Micere G. Mugo, Ousmane Sembène, and Jack Mapanje denaturalized historical and existing processes and mechanisms of dispossession and marginalization of the majority of citizens in their respective countries.[3] Their intellectual labor made significant contributions to the shifting of political

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consciousness in the 1980s and 1990s. In the case of Mapanje, the Malawian state deemed his book *Of Chameleons and Gods* as a critique of its practices. As such, like other Malawians that the state considered its enemies,[4] he ended up in prison and was held without trial from 1987 to 1991, and the state banned the circulation of his book in the country.[5]

At various national levels, political mobilization by human rights organizations, women's movements, and pro-democracy organizations, and their allies, played a major role in processes that led to transitions to democracy in various countries in Africa in the 1990s. Between 1991 and 1994 for example, such organizations contributed greatly to the processes that led to the dismantling of a one-party system and the fall of Malawi's postcolonial regime led by Dr. Hastings Kamuzu Banda. Such developments were also evident in Zambia, whereby a multi-party election was held in 1991. In the case of South Africa, 1994 saw the holding of the first multiracial election after a protracted struggle for human dignity and democratic freedom. During the period under review, women's organizations, the labor movement, and other civil society organizations played an important role in South Africa's democratization process.

In addition to political mobilization by civil society organizations, other local developments generated favorable conditions for political change in various parts of the African continent. By the early 1990s, the legitimacy crises, generated by the onset of a global economic downturn in the 1970s, the failure of 1980s neoliberal inspired economic restructuring policies, and the deepening of state terror in countries such as Malawi and Kenya, led citizens to question the political and social arrangements that had underpinned the postcolonial social contract.[6] In addition, division among the postcolonial ruling "historical bloc"[7] played an important role in the political developments that led to democratization in various countries in Africa in the 1990s.

The foregoing brief highlights signal that by the time states in the global North and institutions of global governance reframed their approach to political development[8] in the late 1980s, questions about political change and struggles aimed at democratizing practices and constitutional foundations of local state forms were not new in Africa. As such, these states and other international actors didn't enter a continent devoid of agency and democratic imagination. In any event, by the late 1980s, these states and institutions of global governance shifted their approach to political development in Africa and elsewhere. During the

geopolitics of the Cold War, their approach to such development was to support the emergence and consolidation of strong authoritarian regimes, which from their perspective offered stability and political order in regions that in the post-1945 period were referred to as the "Third World." To ensure that their new policy turn had structural power at the level of practice, these states and institutions of global governance, such as the World Bank, added the implementation of political reforms geared toward transitions to multi-party democracy or what some scholars have referred to as "polyarchy"[9] to their foreign aid conditionality architecture.

Like their other projects in different conjunctures in the post-World War II period, the democracy promotion agenda by states in the global North and institutions of global governance did not emerge in an intellectual vacuum. Rather it was influenced by the emergence and wide dissemination of ideas pertaining to the question of democratization in the "Third World" by dominant scholars linked to key sites of public policy formation in the global North. Among other things, ideas by these scholars questioned the assumptions underpinning modernization theorists' approach to political development in the "Third World," which emphasized preconditions for democracy. Some of the key texts that influenced such rethinking and the nature of the democracy that dominant states in the global North and institutions of global governance envisioned in the "Third World" were: Michel Crozier, Samuel P. Huntington, and Joji Watanuki, *The Crisis of Democracy: Report on the Governability of Democracies to the Trilateral Commission*, New York: New York University Press, 1975; William A. Douglas, *Developing Democracy*, Washington, DC: Heldref, 1972; and Ralph M. Goldman and William A. Douglas, *Promoting Democracy: Opportunities and Issues*, New York: Praeger, 1988. Overall, by the early 1990s, the interplay of local and global developments opened political opportunity structures for the emergence of multi-party political systems in various parts of Africa. In addition, these developments contributed to the adoption of new constitutions with provisions focusing on human rights and equality.

The preceding developments mark important political dynamics on the African continent in the last two decades. However, in addition to them, and the emergence of normative instruments aimed at promoting human rights and democratic governance at the continental and regional levels, other developments have emerged in the post-Cold War era that are central to a deeper understanding of contemporary political and economic dynamics in Africa.

Leading among them is the rise and expansion of terrorist organizations and responses to this development by African and other states in the contemporary world political and economic order. Consequently, even though these developments are not explored systematically in this edited volume due to space limitations, this chapter provides brief preliminary notes on them from a human rights perspective. The chapter's final section offers highlights on the structure of the book.

Human Rights in the Age of Terrorism and the War on Terror: Brief Notes

In recent years, African countries such as Kenya, Somalia, Nigeria, and Mali have experienced intense acts of terrorism. For example, in addition to the 1998 terrorist attacks in Nairobi, in which over 200 Kenyans lost their lives, in April 2015, the terrorist organization al-Shabab killed 147 people, mainly young students, when it targeted Garissa University College. In the context of Nigeria, 276 schoolgirls were kidnapped from their school by the Boko Haram terrorist organization in 2014. Since its emergence, Boko Haram has targeted markets, institutions, rural farming communities, and, in general, public spaces for its terrorist attacks. The rise and expansion of terrorist organizations has generated geographies of fear and a sense of insecurity on the African continent and elsewhere. In light of these developments and particularly since the horrific 9/11 terrorist attacks in the USA, states have either individually or in coalitions established policies and practices in response to what they consider as existential threats to their security and that of their citizens, and to regional and global stability.

The developments that the previous paragraph highlights have serious implications for a range of human rights articulated in various international human rights instruments that have emerged since the launching of the Universal Declaration of Human Rights on December 10, 1948. In these brief notes, the analysis will offer highlights of some implications of these developments to the following human rights: *the right to liberty and security of person; and the right to freedom of expression*. While our focus is on these rights, the analysis nonetheless shows how their violation by non-state or state actors puts other rights at risk, thus demonstrating the interdependent nature of human rights.

The 1966 Covenant on Civil and Political Rights (CCPR) offers provisions for the right to liberty and security of person. Its Article 9(1) declares that "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."[10] In the current juncture, the right to liberty and security of person of citizens is vulnerable to practices of non-state and state actors. The kidnapping of 276 schoolgirls by Boko Haram in Nigeria is an example of such vulnerability. For these girls, it is not only their right to liberty and security of person that has been violated by their captivity. Given Boko Haram's oppositional stand on education, their right to education has been violated as have their rights as "young persons" who should be "protected from economic and social exploitation."[11] In addition, their kidnapping has made them vulnerable to gender-based violence and as such put their right to bodily integrity at risk.

Non-state actors are not the only social agents whose practices are putting the human right to liberty and security of person at risk. In the age of a post-9/11 geopolitical order, states have engaged in practices that have contributed to such risks. Their practice of extraordinary rendition is but one example of such practices. Extraordinary rendition, "entails individuals being 'arrested in an airport, abducted in a foreign country, detained at a border crossing and then bundled off to jail cells in foreign countries [wh]ere torture is the norm and where the rule of law quite simply does not apply.'"[12] The case of Maher Arar, a Canadian citizen, who was arrested by "USA security agents at John F. Kennedy"[13] in 2002, is an example of states' practice of extraordinary rendition.

Following his arrest, Arar "was then detained in the US, Jordan and lastly in Syria."[14] As per the Commission of Inquiry (CI) established to investigate the "actions of Canadian officials in Relation to Maher Arar,"[15] his arrest was a collaborative effort between Canada's and the USA's security forces. According to the CI, "the RMCP (Royal Canadian Mounted Police) requested that American authorities place lookouts for Mr. Arar and his wife, Monia Mazigh, in the US Customs Treasury Enforcement Communications System (TECS)."[16] Further, "in the request, to which no caveats were attached, the RCMP described Mr Arar and Dr Mazingh as Islamic Extremist individuals suspected of being linked to the Al Qaeda terrorist movement."[17] After the completion of the investigation, "the CI's

Commissioner, Dennis O'Connor, declared 'I am able to say categorically that there is no evidence to indicate that Mr. Arar has committed any offence or that his activities constitute a threat to the security of Canada,'"[18] and Mr. Arar received an apology from the Canadian state in 2007.[19] Commendable as the apology by the Canadian state is, it is important to remember that "for more than a year, his basic rights were not secured by the state, and the actions of the latter contributed directly to his experiences of human insecurity especially through torture."[20] Yet, in its efforts to construct itself as a normative actor, the Canadian state has historically and in the contemporary era represented itself as a state form whose foreign and domestic policies and practices are informed by human rights ideas, and other normative frameworks such as human security.

In the age of terrorism and the attendant war on terror project, the right to freedom of expression is also under threat. Provisions for such a right are articulated in Article 19(1–2) of the CCPR. According to that article, "Everyone shall have the right to hold opinions without interference." Further, "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."[21] In the post-9/11 era, states are using the sense of insecurity and fear generated by terrorist attacks to create laws that have serious implications for the right to freedom of expression. Article 6 of the 2009 Ethiopian state's Anti-Terrorism Proclamation (the Proclamation) provides an example of such developments.[22] The Article states: "Whosoever publishes or causes the publication of a statement that is likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission or preparation or instigation of an act of terrorism stipulated under Article 3 of this Proclamation is punishable with rigorous imprisonment from 10 to 20 years."[23]

Overall, Article 6 and others in the Proclamation give the Ethiopian state extensive powers in the age of its war on terror. Its emergence and contents fit well with other post-9/11 processes of securitization. Stating that "an issue has become securitized means that it has not only been represented as an existential threat to a referent object such as national or international security by a securitizing agent, which could be a state or a non-state actor, but also that it has been accepted as such in the public

domain."[24] In the main, insights from the Copenhagen School in the field of security studies suggest that "Securitizing agents tend to portray their 'action' as being 'on behalf of, and with reference to, a collectivity' and thus 'the referent object is that to which one can point and say: It has to survive, therefore it is necessary to…' or else."[25]

The Copenhagen School also contends that a "distinguishing feature of securitization" is the existence of "a specific rhetorical structure … [regarding] survival [and] priority of action because if the problem is not handled now it will be too late, and we will not exist to remedy our failure."[26] Such rhetorical structure peppers the Proclamation. In terms of the right to freedom of expression, since its emergence the Proclamation has had negating effects on this right. For example, the Ethiopian state jailed "24 journalists and opposition politicians" in 2012 and in the same year "three Ethiopian journalists, an opposition leader, and a fifth person" were "convicted" of what the Proclamation terms as "terrorist acts."[27] While it is beyond the scope of this introductory chapter to explore all the Articles of the Proclamation, it is nonetheless important to note that the right of freedom of expression is not the only human right that is at risk in contemporary Ethiopia. In addition, in the contemporary era, the Ethiopian state is not the only one in contemporary Africa or elsewhere that has established anti-terrorist strategies that have significant implications for human rights.[28]

The preceding discussion has highlighted some of the implications of the rise of terrorism and responses to it by state actors for human rights. The examples provided in these brief notes are but a few of the numerous human rights that are affected by these developments. Elsewhere, I have indicated how the realization of the right to development as articulated in the 1986 UN Declaration on the Right to Development faces significant challenges in the current conjuncture because of, among other factors, the securitization of development and the rise of acts of terrorism by non-state actors.[29] To sum up, the rise of acts of terrorism by non-state actors and the war on terror spearheaded by states is a salient feature of political and economic developments in Africa and the rest of the world in the contemporary era. Consequently, while not explored extensively here, these developments are a part of what this volume considers as dilemmas in any discussion of contemporary political economy developments in Africa. The discussion now turns to brief highlights of each of the contributors' focus in the volume's various chapters.

Structure of the Book

The volume is composed of nine chapters, which includes this introductory one, and focuses on key developments in various parts of Africa. One of its main themes is an exploration of the dynamics leading to the emergence of new constitutional frameworks in various parts of Africa from the early 1990s onwards. In examining these frameworks, some of its chapters highlight the contradictions underpinning them. The volume also explores questions pertaining to judicial changes, and the emergence of normative instruments at the continental and regional levels. In addition, it offers a discussion focusing on the theme of democratic governance in contemporary Africa. Further, it explores the politics of electoral democracies in some former settler colonies. In addition, the volume offers a discussion on civil society's responses to political crisis and violence in the wake of the 2007 contested election in Kenya. From the volume's perspective, the foregoing themes, in addition to issues of terrorism and the war on terror, are crucial to an understanding of local and global dynamics that have influenced Africa's political trajectories in recent decades.

In Chapter 2, H. Kwasi Prempeh offers a deep understanding of the evolution of constitutions and constitutionalism in Africa. Further, he teases out the rise of 1990s democratic reforms and the contradictions underpinning the new constitutional orders in various parts of Africa. The chapter's historical breadth and its focus on the 1990s transitions to democracy in Africa provide an excellent foundation for the issues that are central to this volume. In Chapter 3, one of Charles M. Fombad's arguments is that a core source of pre-1990s human rights violations and other forms of socio-political and economic dispossessions in Africa was the lack of mechanisms restraining ruling elites from changing constitutional frameworks in any given moment to suit their political projects. With that claim as a starting point, his chapter focuses on a range of "control devices" that have emerged in the era of democracy that are aimed at containing the ability of elites to change constitutions without the participation and consent of citizens. According to him, "controlling the process of constitutional change" is central to the embedding of "constitutionalism." Fombad also provides an excellent methodological lens through which to examine constitutional change. Further, he highlights "patterns" of constitutional change drawing on examples from various African countries. This chapter not only complements the second one and others in the volume, but also deepens our understanding of processes of constitutional change in contemporary Africa and elsewhere.

The promotion of gender equality and women's rights has emerged as a major theme in the constitutional frameworks, and in other normative instruments that have been adopted in the era of democracy in Africa. Thus, Chapter 4, by Eunice N. Sahle, discusses the Southern African Development Community's (SADC) gender equality promotion project with a focus on its 2008 Protocol on Gender and Development. Through the "three-legged equality stool"[30] analytical framework, the chapter explores the equality strategies underpinning SADC's gender equality project as framed in its 2008 Protocol on Gender and Development. While making a case for the importance of SADC's gender equality project, the chapter also highlights dilemmas that limit the realization of some of its goals. In Chapter 5, Willy Mutunga, the former Chief Justice and President of Kenya's Supreme Court, provides a comparative and rich historical examination of the politics of judicial attire. Further, in his exploration of these issues in the context of Kenya, he interrogates the nexus of judicial attire and the question of access to justice. In addition, his chapter demonstrates the role of cultural producers in the recent transformation of Kenya's judicial attire. Overall, the Kenyan case study explored here demonstrates efforts to decolonize the country's judicial attire and judicial systems in general. In Chapter 6, Jason Warner examines Article 4(h) of the 2000 Constitutive Act of the African Union. In addition, he provides an overview of the evolution of norms of sovereignty and intervention in Africa. The chapter's deployment of a multi-causal and integrated levels-of-analysis perspective enriches our understanding of these developments.

In Chapter 7, Peter Anyang' Nyong'o explores the politics of electoral democracy and election coalitions in three former settler colonies in Africa: Kenya, Cote D'Ivoire, and Zimbabwe. According to Nyong'o, authoritarian regimes in these countries, which were originally colonized as plantation economies, have recently shown resistance to democratization through competitive electoral politics in very similar ways. In all three cases, violent conflicts followed disputed elections and external actors have sought to "stabilize" their politics through military and/or diplomatic interventions. Given the preceding developments, Nyong'o enriches our understanding of what he terms as "stunted transition" in the three countries and the possibility for democratic governance.

In Chapter 8, Georges Nzongola-Ntalaja departs from dominant approaches in contemporary governance studies by situating the question of governance in Africa in a historical context. The author contends that the broader vision of Africa's anti-colonial struggles was self-rule and the emergence of state forms underpinned by democratic practices, the rule

of law, freedom, and a commitment to instituting economic projects that would lead to human security for all citizens. According to him, these objectives have not been met in the decades following independence. Nonetheless, the author suggests reforms that could contribute to the realization of the aims of the anti-colonial movements. Chapter 9, authored by Anders Sjögren, Onyango Oloo, and Shailja Patel, critically explores the responses of the Kenyans for Peace with Truth and Justice (KPTJ)—a civil society group—to the political violence that emerged following the contested results of the December 2007 election and the inauguration of President Mwai Kibaki. Based on interviews with key members of KPTJ and insights from scholarly debates focusing on state and civil society relations, the authors provide a rich analysis of Kenya's 2007–2008 political crisis and civil society responses to it. In addition, they offer a brief postscript of Kenya's March 2013 presidential election.

Notes

1. See Mamdani et al. 1988.
2. See Nyong'o ed. 1987.
3. See, for example, the following works: Ngũgĩ wa Thiong'o and Micere Mugo, *The Trial of Dedan Kimathi* (1977) and Jack Mapanje, *Of Chameleons and Gods* (1981). In terms of Ousmane Sembené, see the following films: *Mandabi* (1968); and *Xala* (1974).
4. See the following 1994 report by Makau Mutua on extensive human rights violations by the state during President Kamuzu Banda's rule: *Confronting the Past: Accountability for Human Rights Violations in Malawi.*
5. Jack Mapanje captures elements of his experiences in prison in his book *The Chattering Wagtails of Mikuyu Prison* (1993) and also in his memoir *And Crocodiles Are Hungry at Night: A Memoir* (2011).
6. See Bangura 1992.
7. See Gramsci 1971, 377; Rueschemeyer, Stephens and Stephens 1992.
8. Of course these states had been heavily involved in economic restructuring processes in Africa in the 1980s. During that decade and beyond, they called on African states to implement neoliberal inspired Structural Adjustments Programs (SAPs), for from their perspective, it was only such market reforms that could pave the way for economic development on the African continent (see Mkandawire 2014). These programs required countries to demonstrate their adoption of SAPs as a condition for receiving development loans from states in the global North and institutions of global governance such as the World Bank and the International Monetary Fund.
9. William I. Robinson's 1996 book *Promoting Polyarchy: Globalization, US Intervention, and Hegemony* provides a detailed discussion of these developments.

10. See International Covenant on Civil and Political Rights at: http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.
11. See Articles 10(3) and 13 respectively of the International Covenant on Economic, Social and Cultural Rights at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx.
12. See Neve 2007, 121–122, quoted in Sahle 2010, 147.
13. See Sahle 2010, 147.
14. See ibid.
15. See http://epc.lac-bac.gc.ca, quoted in Sahle 2010, 147.
16. See ibid.
17. See ibid.
18. See ibid.
19. See ibid.
20. See Sahle 2010, 147.
21. See International Covenant on Civil and Political Rights at: http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.
22. See Proclamation No. 652/2009, Anti-Terrorism Proclamation, 7 July 2009 at: http://www.refworld.org/docid/4ba799d32.html.
23. See ibid.
24. See Buzan et al. 1998, 25, referenced in Sahle 2010, 160.
25. See Sahle 2010, 160.
26. See Buzan et al. 1998, 26, quoted in Sahle 2010, 160.
27. See Sekyere and Asare 2016, 363.
28. See Lumina 2007, and Cachalia 2010.
29. See Sahle 2017, forthcoming.
30. See Booth and Bennett 2002.

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CHAPTER 2

Africa's "Constitutionalism Revival": False Start or New Dawn?

H. Kwasi Prempeh

In February 1990, protracted strikes and popular protests finally forced Mathieu Kérékou, the long-serving dictator of the small West African country of Benin, to convene a "national conference." A broadly representative, albeit extra parliamentary, assemblage of influential political, civic, and occupational groups and elites, the National Conference, drawing inspiration from the *états-généraux* of eighteenth-century revolutionary France,[1] declared itself sovereign and proceeded to enact far-reaching changes to the country's constitutional order. It stripped Kérékou of all executive power, abolished the one-party system, installed an interim prime minister and legislature, and authorized the drafting of a new constitution that won popular approval as the basis for a democratic reconstitution of civil authority.

Compared to the cataclysmic events that swept eastern and central Europe at the end of the 1980s, Africa's recent "constitutional moments"[2] have attracted little notice or interest from comparative constitutionalists.

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Indeed, as one influential American constitutional scholar has observed, "Amidst the blossoming of comparative scholarship, most of the continent of Africa is usually overlooked, as if it were a legal 'Heart of Darkness,' as if it were a lawless world."[3] Only South Africa's transition from apartheid to multiracial constitutionalism, and, with it, the emerging jurisprudence of its famous Constitutional Court,[4] has captured the interest of comparative constitutional scholars.

With images of gloom and doom—the perennial focus of reporting and news about Africa in the Western media—sustaining preconceived notions of "African exceptionalism,"[5] the exclusion of African cases (outside of South Africa) from the flourishing discourse in comparative constitutionalism is not altogether surprising. Yet democracy's "third wave,"[6] which was indeed global in its geographic sweep, left important imprints across the rest of Africa that are worthy of study as an integral part of the story of the "rise of world constitutionalism."[7]

In the years since Benin's precedent-setting transition, the unique mode of which quickly spawned imitators across francophone Africa,[8] regime change and constitutional reform have been forced upon reluctant but beleaguered autocrats across east, west, central, and southern Africa. Single-party parliaments, military juntas, and presidents-for-life no longer dominate the political map of the continent, as they did at the end of the 1980s. By 1999, most African states permitted multiparty competition for legislative and presidential offices. The number of multiparty elections held in Africa in the last decade of the twentieth century alone was twice as many as in the entire three decades up to 1990. While many of Africa's recent elections have been flawed or unexceptional in their outcomes, a notable number have produced unprecedented regime turnover.[9]

The recent democratic openings in Africa have been backstopped by constitutional changes. Among other things, Africa's contemporary constitutions legalize opposition parties, impose term limits on presidential tenure, grant independent courts constitutional review authority, and guarantee important civil and political liberties. In the history of postcolonial Africa, these liberal concessions are unprecedented, and even though only a decade or so old, they have already outlasted previous attempts at political liberalization. Importantly, presidential term limits introduced in recent reforms have successfully ended the tenure of a growing number of Africa's presidents, thus helping to establish a new tradition of orderly political succession. A flourishing private press and independent electronic media, together with an emboldened civil society, are braving the odds to keep governments honest and accountable. On their part, newly independent

courts with judicial review power are beginning to cause Africa's political class to take constitutions seriously.

Optimistic Africa watchers see in these developments a "rebirth of African liberalism."[10] There is even talk of Africa experiencing a "second liberation"—the momentous first liberation from colonialism having failed, on account of postcolonial Africa's "false start," to deliver on its democratic promise and transformative aspirations.[11] Others, however, are not so sanguine in their assessment. Some see Africa's recent reforms as externally oriented, for the most part; addressed more to the international community for purposes of "presentability" than to Africa's domestic polities.[12] Recalling postcolonial Africa's history of "constitutions without constitutionalism," skeptics and "Afro-pessimists" note enduring patterns of authoritarianism and illiberality in contemporary Africa and warn of the possibility of "transition without change."[13]

Against the backdrop of the foregoing debate, this chapter examines the political and constitutional reforms that have taken place in Africa since the end of the 1980s and their implications for the revival of constitutionalism in contemporary Africa. The chapter is in four main parts. The discussion in first section provides a historical context and perspective for the political trajectories and constitutional developments in contemporary Africa. Recounting postcolonial Africa's brief first encounter with democracy and constitutionalism, first section traces the early fall and recent rise of constitutionalism in Africa. As the narrative demonstrates, the initial choice of authoritarianism over constitutionalism in postcolonial Africa was, in part, a case of "constrained" agency: an African agency, certainly, but an agency constrained by the colonial experience and legacy and further rationalized by the ideological orthodoxy of the day. Postcolonial constitutionalism faced dim prospects from the start, because, given the exigencies and expectations of the times, Africa's postcolonial rulers had little difficulty resting their legitimacy on a *supra* constitutional development project. In time, the disappointing record of postcolonial development would precipitate a crisis of legitimacy for Africa's ruling elites and pave the way for the current democratic revival of constitutionalism in Africa. In second section, I suggest, in answer to the skeptics, that there are enough transformative currents in the recent developments in Africa, as well as in the overall climate of change, to warrant a measure of optimism that there is, indeed, something new and durable taking place in the constitutional politics of Africa. I show in third section, however, that despite the important changes that have taken place, certain features of the ancien régime, including, notably, the

postcolonial tradition of an imperial president, have survived the initial round of democratic and constitutional reforms in Africa. I suggest in fourth section that the fault for this perversity might lie, in part at least, in the narrow motivations and limited vision of Africa's reformers.

The Fall and Rise of Postcolonial Constitutionalism in Africa

Neither democracy nor constitutionalism is a new item on the agenda of postcolonial Africa. Not only did the idea of democracy supply a powerful mobilizing rhetoric for Africa's post-World War II anticolonial movement,[14] but, as the colonial enterprise drew to a close, the departing colonizers sought a "dignified retreat from empire" by installing in their former colonies constitutions modeled after metropolitan parliamentary systems.[15] Complete with protections for opposition parties, individual rights, independent courts, and some measure of regional or local autonomy, Africa's founding constitutions, which were crafted as pacts between the retreating colonial power and nationalist elites, were supposed to lay the foundation for postcolonial constitutionalism.[16] However, soon after the attainment of sovereign statehood, Africa's new managers discarded their so-called independence constitutions.

Kwame Nkrumah, who had led the Gold Coast (Ghana) to become sub-Saharan Africa's first sovereign state, famously disparaged Africa's independence constitutions as neocolonial devices designed to ensure "the preservation of imperial interests in the newly emergent state."[17] Specifically, Nkrumah identified "constitutional rigidity" (the "obnoxious entrenched clauses"), "political separatism" (Nkrumaism for the limited constitutional role reserved for regional assemblies), and "a civil service apparatus insulated from the new political power" as key features of Africa's independence constitutions that had been designed (as "schisms") to impede "speedy development."[18] Rejection of the independence constitution was, therefore, to be regarded as "the starting point in the process of consolidation [of the people's power]."[19] In line with this political diagnosis, the gist of which was shared by Nkrumah's peers in other newly sovereign African states,[20] postcolonial Africa's first constitutions were soon replaced by constitutions designed to suit the instrumental needs of particular regimes. Between 1960 and 1962, 13 newly independent African states, beginning with Ghana, amended or replaced their independence constitutions.[21]

At independence, Africa's new elites assumed control over "juridical states"[22]—states by courtesy of international law, but states whose "ruler-straight borders"[25] had little organic or historical logic behind them.[23] "Europe did not bring to Africa a tropical version of the late-nineteenth-century European nation-state."[24] Nor did Europe's imperial powers attempt to preserve or consolidate what precolonial nation-state projects they encountered in Africa.[25] Rather, the colonial project in Africa often consisted in forcibly collecting within artificially drawn borders disparate ethno-linguistic communities and nationalities, some with long precolonial histories of mutual antagonism.[26] As Africa's postcolonial leaders saw it, their foremost challenge, given the political demography of the new states, was to forge a new nationalism—and nationality—that would both preserve this loose colonial formation and mold it into a viable nation-state.

The challenge on the social and economic front was no less daunting. Although theories of trusteeship and talk of benevolent paternalism (the supposed *mission civilisatrice*) suffused the imperial defense of the colonial project, the impetus behind colonial policy "was not primarily a concern for the welfare of the peoples of Africa as for trade and the possession of materials known or believed to exist in Africa."[27] "Things," "not human beings and their welfare," came first.[28] In consequence, colonialism in Africa left behind vast unmet needs in education, health, and other social infrastructure, as well as a domestic economy whose production and consumption halves were, by colonial design, externally orientated and controlled.

In the field of education, for example, as the 1950s drew to a close and independence neared, the colonies in the entire sub-Saharan region, with a combined population of approximately 200 million people, could boast only some 8000 secondary school graduates.[29] When Congo (now the Democratic Republic of the Congo) gained independence from Belgium in 1960, it had only 16 postsecondary school graduates, for a country slightly less than one-fourth the size of the USA and a population (then) of 13 million.[30]

For Africa's postcolonial rulers, the scale and gravity of the developmental challenge qualified it as a national emergency. The metaphor of war was one that Africa's leaders frequently invoked to underscore the extraordinary character and urgency of the task ahead. Without concerted action to conquer "those very real enemies—ignorance, poverty and disease," African independence would be little more than a "paper independence."[31]

The crucial question that needed to be answered, and one that would have profound implications for the viability of constitutionalism and democracy in postcolonial Africa, was what model of state and economic organization Africa's postcolonial governments would employ to address the twin challenges of nation building and socioeconomic development. A confluence of factors inclined Africa's postcolonial elites toward the authoritarian model.

Among the first casualties of the postcolonial development project was multiparty democracy. Africa's postcolonial elites objected to multiparty politics on multiple grounds. As a form of politics, it was said to be Western in origin and alien to Africa's indigenous political traditions, which were said to privilege nonpartisan consensus building over partisan division. Multiparty politics, it was further argued, made sense only in the class-stratified societies of the industrialized economies. Since African societies and economies were preindustrial and, therefore, supposedly "classless," parties were said to perform no constructive interest-aggregation function in postcolonial politics.[32] Rather, given the African state's multiethnic demography, party politics—its objectors claimed—would simply encourage partisan mobilization of those subnational identities and loyalties that colonialism had manipulated and, in some cases, exaggerated, and which the anticolonial movement had obscured but never quite extinguished. On this view, multiparty politics would undermine national unity and thus hinder successful implementation of the postcolonial development project. Instead of multiparty politics, the single-party regime was said to represent the best hope for uniting the African polity and concentrating scarce political and human resources behind the assault on the scourge of underdevelopment. After all, the argument continued, popular representation and participation in government—democracy, that is—could be realized through the vehicle of a one-party state.

Similar arguments were put forth in defense of a centralized unitary state in which power and resources would be controlled by a single national sovereign. Thus, demands for federalism, or "a reasonable degree of provincial devolution" to preserve some degree of local self-governance for the postcolonial state's territorially based subnational communities, or to check totalitarian tendencies on the part of national elites, were disparaged as tribalism-inspired.[33] Similarly dismissed, of course, were proposals to carve a constructive role for indigenous kingship in postcolonial local government. Under the conception of nationhood and national unity pressed by Africa's postcolonial elites, not only

did national interests and national identity, even if inchoate, trump all local or subnational sentiments and identities, but, more importantly, only claims on behalf of the national were considered valid.[34]

Regarding the economics of postcolonial development, Africa's new managers argued that, because the inherited economy lacked an industrial sector as well as an indigenous capitalist class with the capacity to spearhead economic development, the state was to be the engine of development. As with Western democracy, so too was capitalism—and its free market—discredited as part and parcel of the ideology of imperialism, one that continued to disadvantage Africa even after colonialism, since its operating logic continued to underwrite the international economic system. African inheritors of the postcolonial state asserted the supremacy of the collective over the individual. Thus "African socialism"—or else some other nominally collectivist ideology—was promoted as the development paradigm that best harmonized with the communalistic and supposedly egalitarian ethos of traditional African society.[35]

The big leaps in economic growth that were, at the time, associated with the Soviet Union and China, and, in particular, the transformation of these peasant societies into industrial giants within a single generation, were proffered as evidence of the empirical superiority of the command-and-control model of economic organization for underdeveloped societies.[36] And from the West, where Keynesian economics urged an interventionist role for the state in economic life, the impressive postwar reconstruction of Europe under the Marshall Plan, and the success of New Deal interventionism in rescuing the USA from the Great Depression, all went to reinforce advocacy of central planning and an activist state for postcolonial societies.

In making their case for emergency powers, Africa's political elites indeed drew parallels with the New Deal, however inapt the comparison. Thus, Tanzania's *Presidential Commission on the Establishment of a Democratic One Party State* used President Franklin Roosevelt's attempted court-packing episode to justify its decision to omit a Bill of Rights in its proposed interim constitution:

> [Tanzania] has dynamic plans for economic development. These cannot be implemented without revolutionary changes in the social structure. In considering a Bill of Rights in this context we have in mind the bitter conflict which arose in the United States between the President and the Supreme Court as a result of the radical measures enacted by the Roosevelt

> Administration to deal with the economic depression in the 1930's. Decisions containing the extent to which individual rights must give way to the wider considerations of social progress are not properly judicial decisions. They are political decisions best taken by political leaders responsible to the electorate.[37]

From an instrumental standpoint, the authoritarian state model also came handily to Africa's postcolonial elites because its form and contours had been well delineated under colonialism. With a unitary and internally unaccountable executive (the colonial governor), possessed of extraordinary powers,[38] a centralized administration, subordinate courts, compliant chiefs, and with no organized opposition party, the colonial state exemplified the sort of institutional framework that fit the designs of Africa's postcolonial managers. In the economic sphere, too, the colonial state was unquestionably an activist and interventionist state. Its bureaucracy administered the colonial economy; "it developed markets; it codified the uses of labor; it introduced new crops; [and] it controlled production, internal trade and export."[39] Importantly, the new African state also received, as part of its colonial bequest, a command-based legal order—the full panoply of coercive legislation, orders, ordinances, by-laws, and judicial precedents—upon which colonial authority had been based. The inherited legal apparatus thus "offered African elites real power and the bureaucratic machinery with which to exercise it effectively."[40] By choosing the authoritarian model, then, Africa's new managers would not have to reinvent the wheel; the structures, laws, and usages of the colonial state were readily at hand.

The problem with retaining the extant colonial order, however, was that it had been conceived and constructed under colonialism primarily for purposes of domination and exploitation, to be managed according to the dictates of imperial policy. For African nationalists who had, until only recently, denounced the colonial machinery as unjust and illegitimate to turn around and use it in the postcolonial era would seem to present some political difficulty. In the end, the imperatives of postcolonial development would supply the justificatory and legitimating rhetoric for retaining and enforcing the most authoritarian aspects of the colonial legal order. Thus, what would change about the colonial state was not its structure or machinery of control, but its assigned mission and ideological underpinnings. Africa's postcolonial rulers believed that by changing its orientation and purpose and Africanizing its personnel, in short by relegitimizing it,

that it was possible to use the selfsame colonial state to accomplish the purposes of the postcolonial project. The postcolonial project would thus be executed by a "colonial state in African guise."[41]

"Development first" thus became the rallying cry of Africa's postcolonial governments. As Tanzania's Julius Nyerere stated in 1964, while defending his introduction of a new preventive-detention law: "Development must be considered first … Our question with regard to any matter—even the issue of fundamental freedom—must be, 'How does this affect the progress of the Development Plan?'"[42] For Africa's postcolonial managers, the development plan trumped the Constitution as the most important economic and political document of the state.

The paramountcy of development on the agenda of postcolonial Africa was affirmed by the world community when the period from 1960 to 1970, coinciding with the emergence of sovereign states in Africa, was declared the first UN Development Decade. Prevailing academic and expert opinion, notably Seymour Lipset's famous socioeconomic preconditions of democracy, also "readily acknowledged that economic development came first with democratization expected to follow later."[43] Opinions refuting claims of an "authoritarian advantage" were unpopular and, in any case, went unheeded.[44]

In the beginning, Africa's ruling elites conceded that "development first" would place freedom in jeopardy. The trade-off, nevertheless, was said to be justified by necessity. In time, however, development and freedom would be conflated, but freedom—for Africa's postcolonial elites—was not the negative freedom associated with liberal constitutionalism. What counted as freedom, indeed as development, was "freedom from poverty, freedom from illiteracy and ignorance, freedom from ill-health, and freedom from the hardship and cruelty which exist when a society lacks a minimum of social security and social services."[45]

The case for development, as articulated by Africa's nationalist elites, had become, in effect, a case against constitutionalism. Furthermore, insofar as it entailed imposing procedural and substantive restraints on the government's freedom of action, constitutionalism was, according to its detractors, a needless retardant of Africa's development ambitions. Law in Africa, it was argued, needed to be an accelerator, not a brake, to national development goals.[46] Accordingly, Africa's regime-inspired constitutions were envisioned as constitutions of power, not of liberty or limitation. Indeed, the notion that the African managers of the newly sovereign, specifically African state could or should be restrained constitutionally in their

exercise of power, whereas previous European colonialists had not been, was deemed a contemptuous insult. As Ghana's first postcolonial attorney general asked rhetorically, rebutting President Nkrumah's foreign critics: "If denial of access to the courts was justified in 1948 [during British colonial rule] why was it wrong in 1957 [when Africans were now at the helm]?"[47]

Importantly, the assault on constitutionalism was spearheaded by Africa's larger-than-life founding fathers, leaders like *Osagyefo* (Victorious Warrior) Kwame Nkrumah (Ghana), *Mwalimu* (The Teacher) Julius Nyerere (Tanzania), *le Grand Silly* (Elephant) Sékou Touré (Guinea), *Ngwazi* (Great Lion) Kamuzu Banda (Malawi), and *Mzee* (Esteemed Elder) Jomo Kenyatta (Kenya). Nationalist mythology and historiography had invested these leaders with messianic attributes for their role in wrestling sovereign statehood from the jaws of European colonialism. As a result, this generation of African leaders, as well as the freedom-fighter comrades of later years who led liberation movements to independence in Mozambique, Angola, Guinea-Bissau, Zimbabwe, and Namibia, came to possess, in their own right, a large reservoir of unrivalled legitimacy with which to underwrite their postcolonial projects. Regarded as a "father of the nation," each enjoyed exclusive "founder rights,"[55] a status that gave them de facto—and de jure—immunity from personal blame for their errors and omissions.[48]

In a nutshell, constitutionalism in Africa in the early decades following the end of colonialism faced a massive deficit of legitimacy. Africa's postcolonial rulers chose to create sources of legitimacy not in constitutions or democratic elections, but in supraconstitutional (and supradmocratic) welfarist projects tied to the pressing material concerns of the people.[49] Significantly, the process of reconfiguring legitimacy within the postcolonial state and society had but one beneficiary, the president. All other institutions and constituencies with potential countervailing power within postcolonial society and the state, including, notably, parliament, the ruling party, the courts, trade unions, chiefs, and universities, were to defer—and, indeed, became subordinated—to the superior will of the putative philosopher-king.[50] The way was thus paved for the rise of Africa's imperial president.

In the early years, the postcolonial project recorded some important gains in social welfare, notably in the areas of public education and health, and particularly in countries like Tanzania and Ghana. In the course of time, however, as elite commitment to development waned and gave way to "ostentatious corruption," or as the planned development proved

elusive or unsustainable, development's capacity to underwrite the exercise of public power wore thin, prompting Africa's leaders to resort to a combination of repression and patronage in order to maintain their rule.[51] Where this provoked or provided an excuse for coups d'état, as happened in numerous African countries, the self-appointed so-called saviors, redeemers, and liberators also sought to establish their own bona fides by proclaiming, and making fitful demonstrations of, an exceptional devotion to social improvement.[52]

As the 1980s drew to a close, the verdict on 30-something years of authoritarian rule, the outlines of which were already evident by the mid-1970s, was finally out, and it was an unmitigated indictment of the postcolonial state, its managers and their projects. On the economic side of the balance sheet, the record was one of inescapable crisis: "nil or negative rates of increase in Gross Domestic Product per capita; decline in the export of primary products and in agricultural productivity; underutilization of a modest industrial plant; severe balance of payments deficits; worsening income inequality; and more extensive absolute poverty."[53] As the African sovereign state descended into bankruptcy, economic capacity shrank, public services and infrastructure broke down, black markets flourished in open defiance of state controls, and a brain drain worsened the perennial shortage of skilled professionals. The political dimension of the crisis was also manifest in institutional decay, widespread abuses of civil liberties, escalating crime and lawlessness, inefficient and unresponsive bureaucracies, runaway corruption and rent seeking, growing communal rifts, and political instability.

For all but a tiny section of its citizenry, the postcolonial state had become a predatory state, exacting obedience and obligation but giving back little in return. On their part, ordinary Africans came to "see the state and its development agents as enemies to be evaded, cheated and defeated, if possible, but never as partners."[54] As Africa historian Basil Davidson summed it up, "the postcolonial nation-state had become a shackle on progress. … The state was not liberating and protective of its citizens, no matter what its propaganda claimed: on the contrary, its gross effect was constricting and exploitative, or else it simply failed to operate in any social sense at all."[55] The postcolonial state and its elites had lost the basis for their claim to legitimacy.

As no constitutional or democratic avenue existed to replace these regimes in an orderly political succession, "the crisis of legitimacy became a crisis of governance."[56] In countries such as Mobutu's Zaire, Liberia,

and Sierra Leone, where a severely weakened central authority proved incapable of projecting its power into territory under its juridical control, armed bandits and insurgents emerged to challenge the state for control over important, often resource-rich, regions. The ensuing civil wars eventually led to state collapse, giving rise in the 1980s and 1990s to the phenomenon of failed or warlord states in parts of Africa. In the rest of Africa, where state capacity, however diminished, continued to hold, beleaguered incumbents came under external and internal pressure to change course. Notably, the World Bank and the International Monetary Fund, Africa's lenders and creditors of first and last resort, began to impose "structural adjustment programs" on their bankrupt clients, forcing them, as a condition for providing interim relief, to deregulate their economies and restructure their public administrations; basically, this meant privatizing loss-making state enterprises, removing price controls and subsidies for social services, and trimming bloated public payrolls. Despite the absence of a domestic African constituency for these reforms, "African governments had very little choice but to go along with this structural adjustment, as there were no alternative sources of loans available."[57]

The austerity measures introduced in the name of structural adjustment reforms resulted, predictably, in massive layoffs and unemployment, sharp cuts in public services, and increases in the market prices of consumer goods and services. Urban riots and street protests by influential constituencies ensued. Politically, then, structural adjustment, somewhat paradoxically, compounded the crisis of legitimacy, especially as it overtly transferred control of domestic economic policy and management to external actors. Regime opponents and a newly emboldened civil society seized the moment by mobilizing the growing domestic discontent into popular demand for regime change or else for a restoration of legitimacy through the introduction of democratic and constitutional reforms.

Adding to the mounting domestic political pressure, the Bretton Woods institutions, in a reversal of long-standing policy against applying political criteria, pushed Africa's besieged governments to embrace and implement an agenda of "good governance," entailing decentralization and transparency, accountability, and public participation in national decision making. Contemporaneous events in the wider international environment also signaled to Africa's rulers that the postcolonial authoritarian project was in a stage of arguably terminal crisis. African state and civil society actors alike did not fail to notice the revolutionary and

dramatic endings of totalitarian regimes in Eastern and Central Europe, as well as the capitulation of the apartheid oligarchy in South Africa evidenced by the release of Nelson Mandela in 1990. These events, including the widely publicized execution of Romanian strongman Nicolae Ceauşescu, demonstrated that even seemingly invincible and entrenched dictators remained vulnerable to sustained pressure from below. Africa's authoritarian elites paid heed.

By the mid-1990s, the political landscape of Africa had undergone remarkable change. Whereas "in 1989, 29 African countries were governed under some kind of single-party constitution, and one-party rule seemed entrenched as the modal form of governance," by 1994 "not a single de jure one-party state remained."[58] Constitutional reforms restored freedom of association and other civil liberties, legalized opposition parties, and provided for independent judicial review. A timetable for a return to multiparty politics was agreed upon between ruling governments and oppositionists. "By 1995, most countries on the continent had met the initial demand of multi-party democracy: the holding of reasonably free and fair competitive elections."[59] Postcolonial Africa had entered a new constitutional moment—or so it seemed. At the minimum, competitive democracy—and presumably constitutionalism, too—had finally earned credible billing on the agenda of the postcolonial state.

Africa's Constitutionalism Revival: Signs of a New Dawn

The African chapter of the third wave of democratization is in its second decade. Overall, progress toward democracy and constitutionalism has been mixed and, in many respects, falls far short of impressive. While states like Ghana, Benin, Mali, and Senegal have continued to build incrementally on the initial democratic openings, others have stagnated, and still others have regressed toward authoritarian rule or remained holdouts resisting reform. This uneven record, as well as postcolonial Africa's long-standing tradition of constitutions without constitutionalism, has prompted skeptics to query whether talk of a constitutionalism revival is warranted. Postcolonial Africa's early false start and its past failure to nurture a culture of constitutionalism indeed cast a pessimistic shadow on contemporary efforts. Still, there are grounds to distinguish the current climate and developments from those of the past.

A New Intellectual Consensus

Unlike the three decades before 1990, the global political and intellectual discourse has shifted perceptibly against authoritarian and statist models of political and economic governance. While economic development remains Africa's most formidable challenge, an intellectual, and increasingly a popular, consensus has coalesced behind the view that, "for better or worse, Africa is doomed to democracy as the only viable framework within which it must seek to promote political reforms and economic development."[60] The intellectual and policy ascendancy and mainstreaming of the new "institutional economics," with its insights about the primacy of institutions as determinants of economic performance over time, has transformed discourse about development.[61] In the African context, specifically, the influence of the new institutional economics has moved problems of governance, the rule of law, peace and security, bureaucratic corruption, and judicial performance to the forefront of current economic development discourses.[62] Significantly, Africa's best postcolonial economic performers—Botswana and Mauritius—are also her only two cases of stable, uninterrupted postcolonial constitutional democracy. The denouement of the postcolonial authoritarian project in Africa has finally helped to lift from relative obscurity these two Africa counterexamples to the illiberal and messianic ideologies that held sway in the region from the 1960s to the end of the 1980s. In the current environment, then, it is not democracy or constitutionalism that stands in need of justification in Africa. In the light of the postcolonial record, it is authoritarianism and illiberalism that must carry the burden of persuasion as to their continued relevance and legitimacy.

The Evolution of Democratic Constitutionalism as a Supranational Regional Norm

The regional dimension of this normative shift is equally noteworthy. In July 1999, the Organization of African Unity (OAU), postcolonial Africa's primary forum for promoting inter-African cooperation and solidarity, adopted a policy against "unconstitutional change of government." For an organization that had become notorious for its "see no evil, speak no evil" policy toward political conditions and developments within its member states, the OAU's public disavowal of coups

d'état represented important, if belated, course correction.[63] In 2002, in a move regarded by many as signaling the arrival of a cadre of leaders committed to a new political and economic vision for Africa, the OAU was reconfigured as the African Union (AU). Article 30 of the Constitutive Act of the AU declares that "governments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union."

Contemporaneous with the establishment of the AU, a New Partnership for Africa's Development (NEPAD) was launched at the initiative of certain influential African leaders. Conceived as a "vision and strategic framework for Africa's renewal," NEPAD includes a *Declaration on Democracy, Political, Economic and Corporate Governance* that commits African governments, among other things, "to promote and protect democracy and human rights in their respective countries and regions, by developing clear standards of accountability, transparency and participative governance at the national and subnational levels." A key innovation of NEPAD is its African Peer Review Mechanism (APRM), which is designed as a voluntary, self-monitoring mechanism for assessing, through a technocratic review process, a participating government's progress in meeting the commitments, goals, and standards contained in the *Declaration on Democracy, Political, Economic and Corporate Governance*. Already, over 20 African governments have voluntarily agreed to submit to APRM, and participating states are expected to receive remedial support to address identified governance deficiencies.

Although the AU lacks the power to specify and enforce uniform standards of constitutional and democratic practice as a precondition for membership as the EU does,[64] its stated commitment to democracy and constitutionalism as new norms for the African region is a significant, if modest, step forward. As the world community has begun to look increasingly to the AU for initiative and leadership in promoting "African solutions for Africa's problems," the AU stance on specific political developments in its member states is likely to be accorded substantial deference and support by influential international actors. In fact, the AU, acting in conjunction with the sub-regional Economic Community of West African States (ECOWAS), was influential in reversing a de facto coup in Togo in 2005,[65] and also played an important role, again with and through its sub-regional partners, in the recent restoration of civil authority to the failed states of Liberia and Sierra Leone.

The Passing of Africa's Founding Fathers

The passing from the African political scene of modern Africa's founding fathers represents another important milestone in the political evolution of African states, in light of the pioneering role that these historical figures played in the legitimation and implantation of authoritarianism in postcolonial Africa. Importantly, the passing of Africa's founding fathers means that Africa's current generation of leaders cannot lay claim to "founder rights"[74] of the kind that supplied supraconstitutional legitimacy for the postcolonial authoritarian project.[66] Today's generation of African leaders must find its legitimacy, by and large, in an election under a democratic constitutional order. Of the current generation of African leaders, perhaps only Uganda's Yoweri Museveni, who may be credited with rescuing post-Idi Amin Uganda from the brink of state collapse and restoring to the country a measure of steady progress, can draw on supraconstitutional political resources of the kind that the Nyereres and Nkrumahs once commanded. Yet even Museveni has not been able to resist or disregard sustained domestic pressure for constitutional and democratic reform. Notably, persistent domestic opposition, including some adverse judicial decisions, recently forced Museveni to relent in his insistence that Uganda's politics and elections be conducted on the basis of a no-party "Movement" system.

New Era of Presidential Term Limits

The disappearance of supraconstitutional sources of legitimacy for Africa's contemporary leaders is evident in the emergence of presidential term limits as "a new political norm in the region."[67] Writing in the early 1980s, Jackson and Rosberg observed that "the institutional method of arranging a succession of rulers through a written constitution is unusual and has been little tried in Africa."[68] And at the dawn of Africa's current political transition, Kenyan legal scholar Okoth-Ogendo held firm to the belief that, "Provisions limiting the tenure of office of the President have never been, nor are they likely, to be successful [in Africa]."[69] Since the 1990s, however, presidential term limits have not only become a standard provision in the constitutions of African states, they have actually worked to end the presidential tenure of long-reigning rulers like Ghana's Jerry Rawlings and Kenya's Daniel arap Moi and of newcomers like Zambia's Frederick Chiluba and Malawi's Bakili Muluzi. In the case of the latter

two, as well as most recently in Nigeria, domestic opposition successfully resisted attempts to amend the Constitution to allow for an additional term for the retiring president. While some presidents, notably Uganda's Museveni and former Namibian president Sam Nujoma, have been able to secure constitutional amendments extending their term of office, and others, like Burkina Faso's Blaise Compaoré, have benefited from a pro-incumbent judicial interpretation of term limit provisions, the notion of a de jure or de facto president-for-life is no longer a tenable proposition in Africa.

The successful institution of presidential term limits in Africa is an immensely positive development for African constitutionalism. The prospect of a president returning to private life after the expiration of the maximum constitutional term, with its attendant loss of presidential immunity, should help discipline the use of power during a president's term in office, especially where alternation of power between rival political parties and, for that matter, postregime accountability, is a strong possibility.

Resurgent Civil Society

Yet another significant development on the African scene is the emergence of strong domestic constituencies for constitutionalism, notably the newly ascendant private media and civil society. The democratic openings of the late 1980s and early 1990s, in fact, owed much to the courageous leadership and civic-mindedness of religious bodies, professional associations, university students, and trade unions. In countries like Malawi and Zambia, for example, the leadership of such civil society organizations was often the first to break the "culture of silence" by demanding political liberalization in the face of declining regime legitimacy. These influential civil society organizations were instrumental, before opposition parties were legalized, in organizing and sustaining popular protests for regime change. In the post-transition period, too, African civil society has remained actively engaged as monitors and critics of state practice and behavior, recognizing, perhaps, that politics and governance are matters too important to be left in the exclusive care of the political class. African countries have witnessed remarkable growth in the number and caliber of NGOs, many of which are chartered to protect and promote respect for the rule of law, human rights, gender equality, environmental justice, and economic liberty. These "governance NGOs" are shining the light of critical scrutiny on progress and failings

in constitutional governance. Africa's civil society actors also "are banding together to defend their interests and their rights; they are networking nationally, regionally, and even globally; they are becoming more sophisticated in general."[70] As a result, "social restraints upon the executive," which an early student of postcolonial Africa found to be lacking in the Africa of the 1960s and 1970s, are an important phenomenon in the Africa of today.[71]

The vigilant efforts of Africa's home-based civil society are complemented by the growing civic engagement of the population of African émigrés who have settled in countries outside the continent since Africa's brain drain gathered steam in the 1970s. Made up largely of students, scholars, professionals, and self-employed individuals, Africa's growing overseas middle class has begun to constitute itself into national communities of "virtual citizens" who are claiming and asserting, individually and collectively, a voice in national affairs that their departure might be thought to have denied them. With their growing importance and influence as sources of remittances and emergency funds for their home-based kin and of direct investment for their home economies,[72] African nationals and communities abroad are beginning to integrate themselves into the public discourse and decision making in their home countries. Common avenues for such civic engagement by Africa's diasporan communities include overseas NGOs and political party branches as well as Internet blogs and websites that are dedicated to daily news and commentary about developments at home. Many of these Internet forums, which are regularly accessed by home-based journalists, politicians, and sections of the general public, have become virtual parliaments of sorts, producing opinion leaders and other critics whose views, broadcast through cyberspace, are routinely fed back into public debates back home.[73] A notable few have even launched political careers and campaigns from their locations abroad and gone on to contest parliamentary and presidential elections back home. Through collective action and active lobbying of their home governments, some communities of Africans abroad have even managed to secure legislative and constitutional changes that allow non-resident citizens to vote in national elections at home.[74] By all accounts, Africa's overseas nationals have become an important new constituency for constitutionalism and democratic progress in Africa and are to be considered an integral and influential part of the newly emboldened African civil society.

The Rise of an Independent and Fearless Media

The recent rise of a diverse, independent, and aggressive media is a development of particular moment for the future of constitutionalism in Africa. Themselves a product and beneficiary of recent constitutional reforms,[75] Africa's fledgling private media have been among the most fearless defenders of the rights and liberties guaranteed by Africa's new or modified constitutions. On the eve of the contemporary democratic transition, media pluralism and diversity did not exist in most African countries. Importantly, broadcast media were a state monopoly serving a regime's propaganda needs. The growth of private mass media free of content control by state elites and censors has been one of the most important outcomes of constitutional reforms in many African countries. In Ghana, for example, before constitutional government was restored in 1993, a regime-controlled radio and television station held a three-decade-old monopoly on all broadcasting. Today, thanks to robust constitutional guarantees of free media and free speech, including an independent national media commission established to preempt political censorship of programming content, Ghanaians enjoy unimpeded access to news, editorial opinion, and political commentary from an expansive array of independent media sources, including the Internet. Besides widely diverse print media, several private radio stations, numbering over 50 nationwide and covering all corners of the country, plus two private commercial TV stations (and others accessible by cable), now operate freely in the country. In the largest urban markets, individual media operators boast significantly larger shares of the audience than the state broadcaster.

Ghana's private media have played a major role in exposing scandal and malfeasance in public office and in subjecting politicians to daily scrutiny. And in recent elections, instant polling-site reporting of vote tallies by multiple freelance and private media correspondents have served as a critical, independent check on the integrity of national election administration, thereby lending greater legitimacy to officially declared results.

Growing Popularity of Negative Liberty

More widely diffused support for constitutionalism is also reflected in growing popular "appreciation for the values of negative liberty, those that protect the person from injury by the state."[76] As the authors of a recent *Afrobarometer* survey note: "For people all too familiar with repressive and kleptocratic military and civilian dictators or

racial oligarchies, the human dignity provided by basic civil liberties may also be a fundamental need in Africa."[77] Indeed, in reaction to the postcolonial state's failure to deliver on promises of positive rights, Africa's citizens have long readjusted their expectations, "diversifying their survival strategies by loosening their dependence on the state and seeking satisfaction of needs through nonpolitical channels."[78] For such self-reliant citizens, the guarantees of negative liberty and the rule of law are substantial and important concessions to wrestle from the state, because with them citizens can at least pursue their daily livelihoods free from predation and other arbitrary interference by state officials. Constitutionalism then, far from being a luxury the poor cannot afford, is arguably more beneficial to the poor than it is to those with privileged access in the African political system.

The results of recent elections in Africa underscore the growing value that African publics attach to guarantees of negative liberty. In Ghana's 2000 general election, for example, the leading opposition party at the time, the New Patriotic Party (NPP), campaigned on a promise of greater respect for personal liberties and freedom, while the more populist ruling National Democratic Congress (NDC), which had refused to repudiate its authoritarian and militaristic antecedents, continued to run primarily on its putative "development record." The NPP pledged that, if elected, it would repeal a criminal libel law that the NDC administration had used against the private press. The NDC lost the ensuing election, and voters cited a desire for greater freedom as their primary reason for preferring the rival party. In the next December 2004 election, Ghanaians voted to retain the NPP, rewarding the incumbent government more for making good on its promises in the area of personal liberties and freedom than for any significant material accomplishment during its first four-year term.[79]

Emboldened Judiciaries

Africa's judiciaries, long considered marginal to the course of national events and politics, have also emerged from the current democratic and constitutional reforms with far greater prestige, authority, and confidence than they have ever enjoyed in Africa's postcolonial history. Africa's newly revised constitutions grant designated national courts the authority to enforce constitutional guarantees, including, notably, rights provisions.

While authoritarian-era courts served primarily as passive instruments of legitimation for the regime in power,[80] Africa's newly empowered courts are beginning to make constitutions and constitutional law matter. A few examples from various national courts illustrate the point.

In 1994, the Constitutional Court of Benin[81] declared as an unconstitutional violation of freedom of association a decision of the Ministry of Interior that placed the ministry in charge of approving local development associations (NGOs), and also restricted to one the number of such NGOs that could legally operate in each district of the country.[82] In Malawi—whose long-reigning autocrat was forced to submit to, and defeated in, democratic election in 1994—the courts enjoined as unconstitutional certain actions of the country's successor president, including an order banning public protest over a proposed constitutional amendment to extend a two-term limit on presidential tenure.[83]

In 1993, the Ghana supreme court, rejecting "political question" objections, enjoined the public-funded celebration of the anniversary of the coup d'état that abolished the country's last republican constitution, holding that to allow the celebration would be inconsistent with the democratic ethos of the new Constitution.[84] In 1997, Mali's Constitutional Court upheld a petition by opposition parties challenging the results of the first round of parliamentary election and issued an order for new balloting.[85] A Zambian high court blocked the country's first post-authoritarian president and his allies in the ruling party from expelling from the party certain members who had opposed a plan to push through a constitutional amendment to allow a third presidential term.[86] And in Uganda, decisions of the courts were instrumental in precipitating the recent restoration of multiparty politics.[87]

This new judicial assertiveness stands in sharp contrast to the heyday of the postcolonial authoritarian project, when judicial pronouncements in cases like *Re Akoto*[88] and *Ex parte Matovu*[89] voided all possibility of meaningful judicial restraint on presidential power. It would be a mistake, however, to explain these contrasting histories of African judicial attitude toward executive power in terms of an older generation of "timorous souls" giving way to a new breed of "bold spirits."[90] What has changed with the African judiciary is not the rise of a new breed of judge; what has changed (or, at least, is changing), since 1990, is largely extrinsic to the judiciary. It is a change in the politics of constitutionalism and, for that matter, in the politics and legitimacy of judicial review in Africa.[91]

Pitfalls and Omissions of the Contemporary Constitutionalism Project

Judged by their content, legitimacy, and impact, the constitutional reforms that have accompanied Africa's democratic transitions represent significant progress from the pre-1990 era. On the whole, progress toward constitutionalism has been relatively steady in those African states like Ghana, Benin, and Senegal, where legislative and presidential elections have produced regime turnover, an indication that incremental progress in electoral democracy enhances the prospects for constitutionalism. Yet even in the case of Africa's better reformers, as in the rest of Africa generally, post-authoritarian constitutions have left in place some of the central planks of the ancien régime. In particular, contemporary constitutional reforms in Africa have done little to change either the territorial (vertical) distribution of power within the postcolonial state or the functional (horizontal) allocation of sovereign power between the different institutions of the national government. In this last section, we shall examine a few salient features of the old order that have survived the democratic transition of the late 1980s and 1990s.

The Persistence of Unitary Centralism

One defining characteristic of Africa's postcolonial project that has survived recent democratic and constitutional reforms is the consolidation or centralization of sovereign power in a unitary government. Despite the persistence of subnational loyalties and identities—what Africa scholar Dennis Austin[92] calls "local patriotism"—and the failure of unitary centralism to achieve either equitable development or social cohesion, the original decision of Africa's postcolonial elites to structure and organize state power on this model has evaded scrutiny from Africa's current constitutional reformers. Even in countries such as Ghana and Uganda, where the federalism-versus-unitarism debate once drew a deep fault line within the founding generation, the federal idea has not been revived or revisited lately.

Nor have recent democratic and constitutional reforms in Africa done much to empower or transform local government. While there is an emerging consensus among Africa's policymaking elites that good governance must include meaningful devolution or decentralization of public power and initiative, Africa's new constitutions break no new ground in that regard. While elected local councils are a widespread phenomenon

in contemporary Africa, provincial and local authorities still exist, both legally and functionally, as administrative subdivisions of a unitary central government. Local *administration*, not local *government*, best describes the role played by local councils and officials within the African constitutional constellation.[93]

Moreover, with the notable exception of new democracies in southern Africa, where legislation has assigned (sometimes ambiguous) parallel roles and recognition to traditional kingship in local governance, constitutional change in much of contemporary Africa has failed generally to redress or reconsider, in any meaningful sense, the postcolonial exclusion of Africa's homegrown customary institutions from the formal structures of local representation and governance. Elite mistrust and suspicion of local chieftains' power, which has its origins in the politics of colonialism (when the colonialists favored chiefs over the elites), continues to inform constitutional design in contemporary Africa. As before, Africa's newly emergent democracies have failed to emulate the successful example of Botswana, one of only two African countries with an unbroken record of postcolonial democracy, and one that has had a postcolonial policy of making selective use of traditional customary institutions at the basic or community level of its system of local administration. Given the African state's limited capacity to penetrate or reach deep down into rural society and the indispensability (yet relative scarcity) of legitimacy as a political resource in Africa, it seems short-sighted and counterproductive to continue to exclude from the formal structures of local government a homegrown institution that commands the habitual allegiance and obeisance of a significant population of Africans.[94]

A persistent modern objection against traditional kingship is that it is an undemocratic institution and thus incompatible with contemporary democratic trends. But merely because an institution might suffer from a democratic deficit does not make it ineligible for a functional role in a constitutional democracy. Constitutional democracies everywhere routinely assign limited specialized functions to appropriately designed counter-majoritarian institutions, chief among them constitutional courts and central banks. At any rate, since kingship institutions in Africa have long ceased to exercise any essential elements of sovereign power, notably, the power to tax, to legislate policy, or to enforce criminal sanctions, the democratic objection to their functional participation in local government is grossly overstated. Despite earlier attempts by postcolonial governments to marginalize traditional kingship or legislate it out of existence, the

institution has proven exceptionally resilient and continues to command substantial organic and cultural legitimacy as well as mobilize power within society. Africa's chiefs are thus thrust into the important role of interpleaders and lobbyists for their typically rural communities, bringing the needs and concerns of these communities before governments that have historically been "captured" by politically more influential urban constituencies. In a sense, then, chiefs help to redress the deficit of "effective representation" that Africa's rural communities face in national politics.

Contemporary constitutional policy in Africa, in glossing over the political and social realities of Africa's largely rural populations and retaining the same monolithic system of government based mainly on norms and models nominally familiar to the urban political class, thus reflects the same discredited urban bias that has characterized elite policy making in the postcolonial state.[95] The resulting vision of constitutionalism resembles a kind of *capital-city* constitutionalism, a constitutionalism whose forms, priorities, and rhetoric, centered around the interests of competing elites in the national capital city, do not speak—except abstractly—to the realities of Africa's largely rural citizenry.[96]

The Imperial President Survives

The failure to rethink the unitary model or to redistribute power away from the central state means that the task of transforming African constitutionalism must be effected through a horizontal distribution of power among the constituent institutions of the central government. But here, too, the contemporary record is one of continuity rather than change. The recent flurry of constitution writing and rewriting in Africa is notable for its failure to alter the presidentialist character of Africa's constitutional politics.

The presidential form of government remains the unrivaled favorite of Africa's constitutional designers. In the current transition from authoritarian to democratic politics in Africa "not a single democratizing state chose to move to a parliamentary form of government."[97] Moreover, the presidentialism that is characteristic of Africa's constitutional politics is unlike its textbook peer. While the latter comes with a system of checks and balances that includes a legislature with significant countervailing power, African presidentialism has historically dispensed with meaningful horizontal restraints on executive power. The recent introduction of multiparty elections and presidential term limits has helped to democratize

access to presidential office in Africa's reforming states. But the African president has emerged from the current round of constitutional revisions with its substantive powers relatively undiminished.[98] Once installed in office and for the duration of his term, the contemporary African president generally retains within the constitutional and political orbit the essential attributes of *imperium* long associated with presidential power in postcolonial Africa.[99] The imperial presidency in Africa has been term-limited but not tamed.

Despite the restoration of multiparty competition, Africa's post-authoritarian parliaments have yet to emerge from the shadows of executive hegemony[100] to which decades of military or presidentialist one-party rule have consigned them. The long absence in postcolonial Africa of a tradition of parliamentary autonomy has severely handicapped Africa's legislatures in defining or protecting their institutional interests and prerogatives. Despite new openings and opportunities to assert a meaningful role for parliaments in Africa's post authoritarian constitutional politics, contemporary legislative-executive relationships continue to be defined by conventions established under the executive-dominated ancien régime.

The problem has been further compounded by regressive constitutional design. Consistent with constitutional practice in democracies generally, Africa's parliaments possess formal legislative power, but oftentimes this is merely a power to pass (or not pass) bills initiated by the executive, not a power to make or originate legislation. Legislative and, for that matter, policy initiatives, including the determination of the national budget, are generally the prerogative solely of the executive, with the legislature's role usually limited to casting an up-or-down vote on the executive's finished package of proposals. Persistent presidential monopoly of policy initiative continues to impoverish policymaking in Africa, because its practical import is to confine to a single perspective—the president's—the range of possible solutions to any given societal problem. Even worse, it implies that presidential inertia or failure to act legislatively to address a public problem will leave open a policy vacuum and thus cause the problem to fester.

Executive dominance in lawmaking is even more complete in the area of "subsidiary legislation." Statutory grants of rule-making authority to the executive branch in Africa often leave individual ministers—and, for that matter, the president—considerable latitude in applying legislation to individual cases. For example, a dual-citizenship law enacted by the Ghanaian parliament in 2000 contains several provisions vesting in the minister subjective discretion ("as he thinks fit" and "as he may prescribe")

in the case-by-case application of the law.[101] Following long-established practice, most African constitutions do not require transparency or public consultation in the making of executive regulations,[102] while judicial review of statute-based executive action, at least in common law Africa, has not advanced significantly past the traditional ultra vires doctrine. In a legal regime where most laws come in the form of delegated legislation or executive rule making, the continued absence of meaningful parliamentary, popular, or judicial oversight of sub legislative rule making effectively enthrones the African executive as the real source of the laws governing society's routine social and economic activity.

Of the numerous resources that underwrite presidentialism in Africa none is as empowering, in a concretely personal sense, as the president's vast power of patronage. The ability to reward friend and foe alike with state largesse, including appointments to important and not-so-important (but still lucrative) public offices is a presidential prerogative in postcolonial Africa that has been left largely untouched by recent reforms. In many of Africa's new democracies, nearly all open constitutional and statutory offices, including directorships and management posts in state-owned corporations, are filled by presidential appointment. While the approval of parliament is usually required in the case of constitutional offices, the president has ample patronage resources with which to secure legislative support for most of his nominations as well as legislative proposals. In particular, the African executive's monopoly control over the allocation, timing, and location of development projects ("pork," in American parlance) represents a source of immense leverage over legislators. In those countries, such as Ghana, where legislators are themselves constitutionally eligible for appointment to ministerial and other executive branch offices, presidents have been able to use such appointments, or the prospect, to co-opt or bend the will of influential legislators.

The fact that recent transitions from authoritarianism have tended to give rise to strong presidencies (and relatively weaker legislatures) remains one of the least theorized paradoxes of the third wave of democratization. Far from being a case of African exceptionalism, the imperial presidency—a term native to American political discourse and first used to describe the American presidency in the second half of the twentieth century[103]—is, in fact, a phenomenon common to contemporary democracies everywhere.[104] Still, the reemergence of "big man" presidentialism in post-transition Africa is both puzzling and disconcerting. As a fact of African political life, it was widely blamed for the institutional decay, neopatrimonialism, and

clientelism that came to define the postcolonial state. Presidential personal rule was a central grievance of the protest movement, contributing to the crisis of legitimacy that ultimately precipitated the transition to democratic politics in the early 1990s. It is thus troubling that presidentialism, in only slightly altered forms, should still persist.

Unchecked Bureaucratic Power

A related failure of contemporary African constitutionalism is its relative lack of concern with bureaucratic or administrative, as opposed to political, power.[105] Among professional lawyers, the latter is often regarded as properly the subject of constitutional law, while the former—the regulation of bureaucratic power and discretion—is considered a matter for administrative law. Yet constitutionalism, concerned as it is with limits on governmental action, must be concerned with regulating all forms of public power, not just with power entrusted to politicians. In theory, the provisions of Africa's democratic constitutions extend to all forms of governmental action; in some cases, even "private action" (that is, customary practice) has been brought within the purview of the constitution. In practice, however, constitutions, constitutional litigation, and constitutional law in Africa are concerned, at best, with regulating the exercise of power by holders of high office, notably presidents and other ruling politicians. Yet, for the average African, the most pervasive and perennial abuses of discretionary power are encountered at the middle and lower tiers of the public administration.

The faces of "abuse of public power" most intimately familiar to the African are not necessarily those of the president or a minister of state; they are often those of the police sergeant manning the checkpoint or roadblock; the mid-level tax assessor at the district tax office; the customs official at the port of entry or border post; the clerk at the land-title office; the municipal clerk in charge of allocating market stalls; the official at the local vehicle registration or drivers' licensing office; and the principal determining admission to the local high school. The public's recurring encounters with these public officers are characterized by spur-of-the-moment "rule making," unjustified discrimination, opportunistic delays, and plain extortion. Typically absent from these dealings is any notion of the rule of law. The rule of men (literally) best describes the nature of the encounters with public power that matter most to the greatest number of Africans. A constitutionalism that presumably is concerned with righting

abuses of power by the holders of high office, but not with the ubiquitous and routine abuse of power by ordinary public servants, is unlikely to sow deep roots within society. To the average African, then, the constitutionalism that would seem to matter the most is not always or necessarily the *high* constitutionalism of the political elites (or what we might call "wholesale" constitutionalism), but a *low* constitutionalism (or "retail" constitutionalism) that would address the rampant impunity and abuse of power by officials at the most basic level of the public administration.

The Limited Vision Behind Contemporary African Constitutionalism

Why have these troubling features of the ancien régime survived the first round of constitutional reforms accompanying Africa's democratic transitions? The search for explanations must begin with the process of political transition in contemporary Africa.

In the main, the recent rule changes in the politics of Africa have been primarily about installing (or restoring) democratic politics, not about constitutionalism (or reforming government) per se.[106] Recent constitutional reform activities in Africa have tended to be spur-of-the-moment projects driven by the exigencies of a short-term transition timetable and agenda. Thus, the transition agenda in Africa has been dominated by issues like guaranteeing the right of opposition parties and candidates to contest elections; assuring the free, fair, and independent conduct of elections; checking the abuse of incumbency for unfair electoral advantage; ending government monopoly and censorship of the media; and imposing new term limits on presidential tenure. The common theme that connects these issues is a concern with opening up a previously closed political process to ensure pluralistic representation and participation in national government. Usually all that is required to accomplish these ends are a few selective amendments to an existing constitution, primarily to remove clauses that prevented open contestation for political office. A comprehensive overhaul of the constitutional order, beyond the installation of democracy, has generally been off the table.

The limited purview of Africa's constitutional reform also reflects the narrow, self-interested agendas of rival elites at the moment of transition. As in times past, constitution making and constitutional reform in contemporary Africa have not been conducted behind a Rawlsian "veil of

ignorance."[107] Elite agitation for political change in Africa has been driven by a desire not so much to *reform* or transform government as to be a part *of* government. Access to the "political kingdom,"[108] but not reform of the kingdom itself, has dominated transition politics in contemporary Africa; hence the preoccupation with elections and with fairness in the conduct of elections. Except, for example, in Kenya, where sustained civil society and opposition pressure has kept constitutionalism, and, in particular, the reform of presidential power, at the top of the transition agenda (even after a successful regime change), regime opponents across Africa generally have not pushed for a redrawing of the "power map"[109] of the postcolonial state.

In thus failing to build credible checks and balances into the political half of the state, Africa's postauthoritarian constitutions have allowed the burden of promoting and sustaining constitutionalism to fall, disproportionately, on the third branch of government: the judiciary. Thus, rather than structural reform of state and government, contemporary constitutional policy in Africa has tended to rely on judicially enforceable rights as the mechanism for checking authoritarian uses of power. However, it is doubtful that bills of rights and judicial review alone—absent *structural* constitutionalism[110]—can secure or sustain constitutionalism in contemporary Africa.[111]

As we saw in the second section of this chapter, Africa's newly emboldened courts have already produced a corpus of important rulings protecting civil and political liberties and limiting governmental power. Despite this encouraging record, there is reason to be skeptical of the possibilities of *juridical* constitutionalism in Africa. This skepticism is partly a general one, pertaining to the political vulnerability of the institution of judicial review. But it is also, more specifically, about judicial review within the context of contemporary Africa.

Notwithstanding recent constitutional reforms, a large inventory of repressive legislation remains on the statute books of most of Africa's reforming states. During moments of constitutional reform, the common practice, first used in the transition from colonialism to sovereign statehood, is to hold over or grandfather all preexisting legislation and sub-legislative laws into the new era. Legislation can then be repealed on a case-by-case basis by the legislature or otherwise overturned as unconstitutional if challenged in the courts. Until one of these happens, however, the repressive laws from the ancien régime remain good law and may continue to be enforced.

This situation, which describes a state of affairs common throughout contemporary Africa, threatens personal liberty because, while public officials are likely to continue to apply preexisting laws in the post-transition period, extremely low levels of constitutional literacy and rights-awareness among the population would likely result in relatively few constitutional challenges being brought against these laws. To help overcome this problem, many contemporary African constitutions have enacted new rules of standing that permit suits to be filed without a showing of personal injury or injury-in-fact. The liberalization of constitutional standing, however, has not resulted in the emergence of private attorneys general, so-called, ready and willing to sue the government in defense of the rights of others or the public as a whole. While the organized bar in Africa has a history of fighting off authoritarian attacks on its associational or professional prerogatives, an organized public interest or human rights bar or a tradition of "cause lawyering" is still lacking. Thus African legal communities have not seized on the liberalization of constitutional standing to champion and press judicial enforcement of the constitution on behalf of others.[112] The result is a gross under-enforcement of constitutional norms in contemporary Africa.

Given the gross under-enforcement of the constitution, arising from relatively few legal challenges, the most effective and efficient solution to the problem of obnoxious laws held over from the past might be for such laws to be repealed ex ante. This could be done by express provision in the constitutional text or else for post authoritarian legislatures to repeal them. However, neither Africa's post-transition constitutions nor its newly elected governments have purged the statute books of such repressive legislation, creating a situation parallel to that in the immediate aftermath of colonialism when colonial era laws, many of them designed for repression, remained in force after independence.

In countries with a long postcolonial experience of military rule, such as Nigeria, Benin, and Ghana, this problem has created a situation where decrees from past military regimes constitute a disproportionately large portion of all currently valid laws. Importantly, authoritarian-era laws criminalizing an "insult" or defamation of presidents and other public figures remain on the penal codes of most African states. As might be expected, Africa's new democratically elected governments have not shied away from selectively enforcing these relics of the ancien régime.[113] In Malawi, for example, a *Protected Emblems and Names Act*, in force since 1967,[114] has been used over 15 times, since the restoration of democratic

government in 1995, to arrest or prosecute journalists and other persons for insulting the president.

The retention in post-authoritarian Africa of a large stock of repressive legislation confronts judicial review with a paradox: on the one hand, there is potentially a large number of cases deserving of judicial review; on the other hand, there remains a severe shortfall of actual litigated cases. For judicial review to have the capacity to advance constitutionalism, there must be, first and foremost, citizens who are educated about their rights and are willing and able to sue to protect them from infringement by the state. Alternatively, an active public interest bar must be available to take on such litigation on behalf of persons whose rights may have been violated. Neither condition currently exists in most African states.

Putting aside the problems with constitutional litigation, Africa's judiciaries themselves face a legion of difficulties that could undermine their effectiveness as guardians of the new constitutions. Although we tend to think of judicial review as performing a checking or restraining function, Alexander Bickel reminds us that judicial review "performs not only a checking function but also a legitimating function."[115] This is because judicial review "means not only that the Court may strike down a legislative action as unconstitutional but also that it may validate it as within constitutionally granted powers and as not violating constitutional limitations."[116] Thus, the mere grant of judicial review power, even under conditions of judicial independence, offers no assurance that it will be employed in the cause of constitutionalism. In the end, the fate of constitutionalism, where it must depend primarily on judicial review, will depend crucially on the set of values, norms, and assumptions that informs judicial reasoning and decision making, especially when it comes to interpreting and applying open-textured constitutional provisions.

On the whole, the bills of rights found in Africa's current constitutions provide a strong textual foundation for the development of a rights-friendly jurisprudence. Concerns and uncertainties remain, however, in the area of judicial attitudes and interpretive methodologies. For example, among the judges (and lawyers) of common law Africa, the persistent influence of common law thinking and approaches to interpretation as well as a residual cultural relativism in judicial attitude toward rights are tendencies that could obstruct the emergence of a robust jurisprudence of rights.[117]

Despite recent judicial rulings restraining executive power in Africa, a general shift or reorientation in constitutional jurisprudence—from what

I have called a "jurisprudence of executive supremacy" to a "jurisprudence of constitutionalism"[118]—is not yet evident.[119] The cases decided during the incipient stages of democratic transition, in which the courts showed a willingness to rule against incumbent governments, may well represent a sort of transitional jurisprudence, the durability and progressive development of which cannot be assured beyond the period of transition, unless the political momentum for change is sustained and the existing power map reconfigured in ways that structurally constrain executive power. Without sustained progress or structural reform in the political half of constitutionalism, Africa's judiciaries may, in time, settle back into their familiar jurisprudential patterns, reading new or revised constitutions with old executive-colored lenses.

Conclusion

Important changes have taken place in the constitutional politics and landscape of Africa since the end of the 1980s, when mounting pressure for democratic reform began to register successes from one country to the other. Thus far, the balance sheet shows a very variegated picture, of incremental progress in certain countries but of stagnation, even retrogression, in many others. Overall, elite commitment to constitutionalism remains weak or lukewarm at best. As before, "contemporary elites in Africa are preoccupied with the perfection of ways, means, and techniques of their own survival and the expansion of opportunities for private accumulation."[120] Political entrepreneurs have been able to take advantage of new democratic openings to ride to power on a wave of popular discontent.[121] Indeed, Africa's recent democratic transitions have become an occasion for recycling old elites, not for the emergence of a new generation of leadership.[122] Illiberal and authoritarian tendencies continue to linger, and disturbing features of the old order persist.

Given decades of socialization in the ways of the ancien régime, a fair degree of path dependency is bound to infect contemporary reform efforts. Even so, the balance of legitimacy has shifted away from authoritarianism and in favor of democracy and constitutionalism. Where authoritarianism persists, it is not quietly or passively tolerated. Rather, resistance to authoritarianism and pressure for reform also persist. As Ghanaian political scientist Gyimah-Boadi[123] has observed, "Authoritarianism is alive in Africa today, but it is not well. It is under siege."

Rather than give cause for pessimism about the prospects for democratic constitutionalism in Africa, the imperfections and authoritarian reflexes that have characterized current democratic reform in Africa should merely remind us that, in Africa as much as anywhere else, talk of the "end of history" is fanciful.[124] Contemporary Africa's democracy and constitutionalism projects are still works-in-progress, and relatively young ones at that. As "time is an important determinant of institutionalization," it is yet too soon to become disenchanted or pessimistic about the prospects for constitutionalism or democratic consolidation in Africa.[125] For the foreseeable future, the democratic and liberal openings in Africa will continue to require consistent and persistent nurturing, correction and progressive reform. Indeed, the constitutional changes made in the early 1990s must be regarded, appropriately, as transitional and thus necessarily incomplete. The inevitable need for additional reform, once the transition has "settled," should, in fact, counsel against the writing of rigid constitutions during fluid moments of democratic transition. Interim constitutions, such as were used by South Africa between 1993 and 1996, or constitutional rules institutionalizing a process of formal periodic review of the constitution seem a more sensible way to proceed.

In the near term, what is needed to reenergize and advance the constitutionalism project in Africa is a second generation of constitutional reforms, one that will shift the emphasis from merely installing electoral democracies to building firmer structural and institutional foundations for constitutionalism. And in this next stage of Africa's constitutional evolution, the power map of the entire postcolonial state (and its founding assumptions)—not just disaggregated and disembodied parts of it—must be placed on the reform agenda. Fifty years after the end of colonialism, the time is ripe, and the times auspicious, for the postcolonial state in Africa to receive its first-ever comprehensive review and reform.

Notes

1. See Hyden 2006, 107–108 (noting parallels between the Benin National Conference and French Third Estate of 1789).
2. The term "constitutional moment" is Bruce Ackerman's famous coinage for those dramatic episodes in a country's constitutional development when previously settled understandings as to the nature and meaning of the extant constitutional order are repudiated and replaced by new understandings that are widely accepted as legitimate, even though the discontinuity

might have occurred without recourse to the formal processes of constitutional change. See, generally, Ackerman 1998.

3. See Dudziak 2003, 1630.
4. See, for example, State v. Grootboom 2000 (11) BCLR 1169 (CC) (state has judicially enforceable constitutional duty to enact and implement reasonable legislative measures to meet the housing needs of populations living in destitute conditions); August v. Electoral Commission 1999 (4) BCLR 363 (CC) (constitutional right to vote extends to convicted and remand prisoners, and electoral authority is obligated to make appropriate arrangements to enable such citizens to register and to vote).
5. As social scientists C.R.D. Halisi and Scott Bowman have observed, African exceptionalism—the "idea that the problems that plague Africa are uniquely African" and thus must be analyzed without reference to or reliance on "universal categories of explanation"—"has become the golden rule of analysis" for many students and observers of Africa. See Halisi and Bowman 2002, lxi.
6. See Huntington 1991.
7. See Ackerman 1998.
8. See Fomunyoh 2001, 37–50 (reviewing the various national conferences held in francophone Africa following the Benin example).
9. "[S]ince the early 1990s … being voted out of power is an increasing possibility. Eighteen heads of state have lost elections and been replaced by someone else." See Hyden 2006, 20.
10. See Gyimah-Boadi 1999.
11. See Diamond 1999; Dumont 1966.
12. See Mbembe 1990; Joseph 1999. "African regimes were eventually prepared to reconfigure their political institutions to make continued flows of aid and loans from Western financed bilateral and multilateral agencies possible." See Joseph 1999, 61.
13. See Okoth-Ogendo 1993; Olukoshi 1999. Nigerian professor Adebayo Olukoshi has defined "Afro-pessimism" as "that state of mind whereby nothing good is seen as presently or potentially coming out of Africa in the near term." See Olukoshi 1999, 451.
14. "Nationalist leaders in debating the righteousness of their cause customarily employed the vocabulary of liberal democracy." See Pye 1966, 71.
15. See Young 1999, 64.
16. See, for example, Elias 1960 (examining the important political and civil liberties provisions of Nigeria's Independence Constitution).
17. See The editors of the Spark 1965. See, generally, Nkrumah 1963.
18. See Nkrumah 1963, 39.
19. See Nkrumah 1963, 38.

20. See, for example, "[T]he Independence Constitution of Tanganyika was neither particularly suited to the needs of development nor was it entirely ours." See Nyerere 1973, 174.
21. See Selassie 1974, 39.
22. See Jackson and Rosberg 1986.
23. See Thomson 2004, 256. "At independence, every new African country is a state in the limited sense only of having acceded to international sovereignty, i.e., general recognition by the community of international states and membership in the United Nations. Beyond this nominal quality of statehood, the new African countries came to independence with the shell rather than the substance of statehood." See, for example, Rivkin 1968, 8.
24. See Mamdani 1996, 287.
25. See, generally, Eisenstadt, Abitol, and Chazan 1988.
26. Abubakar Tafawa Balewa, who would later become Nigeria's first federal prime minister, noted in 1948 that, "Since 1914 the British Government has been trying to make Nigeria into one country, but the Nigerian people themselves are historically different in their backgrounds, in their religious beliefs and custom and do not show themselves any signs of willingness to unite … Nigerian unity is only a British invention." Quoted in Meredith 2005, 8.
27. See Busia 1967, 37–38.
28. See Busia 1967, 38.
29. See Meredith 2005, 151.
30. It was the policy of the Belgian colonial authorities not to educate Congolese to assume roles much higher than clerks. Thus, at independence, clerks were among the best-educated classes in the Congo. See Young 1965.
31. See Mboya 1963, 159; Nyerere 1973, 54.
32. See Mboya 1963, 85. See, for example, Republic of Kenya 1965: "The sharp class divisions that once existed in Europe have no … parallel in African society. No class problem arose in the traditional African society and none exists today among Africans."
33. See Lewis 1965, 55. See Rothchild 1966, 275.
34. Malawi's postcolonial president, Hastings Banda, spoke for his peers in the newly emergent states of Africa when he stated that: "So far as I am concerned, there is no Yao in this country; no Lomwe; no Sena; no Chewa; no Ngoni; no Nyakyusa; no Tonga; there are only 'Malawians.' That is all." Quoted in Vail and White 1989, 151. See also Austin 1960, 20, 21 (quoting Nkrumah as saying, "… In Ghana in the higher reaches of our national life there should be no reference to Fantis, Ashantis, Ewes, Gas, Dagombas, 'strangers' and so forth … we should call ourselves

Ghanaians"). In practice, of course, political mobilization, manipulation, and construction of ethnicity became and remain important components of the modus operandus of Africa's postcolonial leaders.

35. See Nyerere 1968, 12.
36. See, for example, Nkrumah 1963, 166. "[T]he Soviet Union, in a little over thirty years, has built up an industrial machine so strong and advanced as to be able to launch the Sputnik and follow it up by being the first to send a man into space. There must be something to be said for a system of continental organization allied to clearly defined socialized objectives that made this remarkable achievement [possible]…"
37. Quoted in Seidman 1969, 83, 105. The Ghanaian authorities under Nkrumah similarly leaned on Roosevelt's in fact unsuccessful court-packing plan for precedent when they decided in 1964 to push through an amendment to the Ghana constitution to allow the president to remove judges at pleasure: "In the United States of America, the President has power to 'pack' the Federal Supreme Court, that is, to appoint new Judges of his liking. He also has the power to retire Judges before the stipulated retiring age. These were powers which President Franklin Delano Roosevelt used very effectively in the mid-nineteen-thirties when he was fighting for his New Deal Programme. This is what the proposed amendment seeks to do." Quoted in Bretton 1996, 91–92.
38. For example, "The Governor had certain 'reserved powers' by which he could invalidate legislation; and he could, in time of extreme emergency, suspend the [colonial] constitution and rule by decree." See Nkrumah 1963, 165.
39. See Chabal 1992, 75.
40. See Okoth-Ogendo 1993, 71.
41. See Austin 1984, 32. See also Mayanja 1968, 14–15. "[F]ar from wanting to change the outmoded colonial laws, the Government of Uganda seems to be quite happy in retaining them and utilizing them, especially those laws designed by the Colonial regime to suppress freedom of association and expression."
42. See Austin 1984, 69.
43. See Lipset 1959, 69; Young 1965, 54. See also Lipset 1960. See, for example, Huntington 1968.
44. See, for example, Lewis 1965, 38; Busia 1967, 30; Pye 1966, 16.
45. See Cowen 1962, 545; 562.
46. See, for example, Alexander 1963, 293.
47. See Bing 1968, 222.
48. See Nwabueze 1973, 302–303. The "cult of personality" built around Africa's "founding fathers" runs deep and has often survived their death or loss of power. For example, in 1966, soon after Kwame Nkrumah—"the

Black Star of Africa"—was overthrown in Ghana's first coup d'état, African scholar Ali Mazrui drew a storm of protest from certain other African scholars when he published an essay on Nkrumah in which he opined that, while Nkrumah had been a great African, he had fallen short of becoming a great Ghanaian. See Mazrui 1966, 8. Mazrui's essay was condemned by his critics as irreverent and an attempt to diminish Nkrumah's place in history. See, for example, Karioki 1974, 55; Mazrui 1967, 48.

49. See, for example, Mkandawire 1999, 124. "The quest for legitimacy was an important feature of postindependence politics, and authoritarian rule did not diminish the centrality of this quest, as power was justified on the ability and willingness of political authorities to promote public welfare."
50. See Hyden 1967, 14. "Plato's idea of the philosopher-king has hardly anywhere been more deliberately put into practice than in Africa. As the philosopher-kings, the intellectuals in power have often been considered the 'national conscience.'"
51. See Mazrui 1966.
52. For example, between 1960 and the end of the 1980s, Nigeria experienced five coups d'état, as did Ghana; Uganda experienced four; Togo three; and Benin six.
53. See Sandbrook 1985, 2.
54. See Ake 1991.
55. See Davidson 1992, 290.
56. See Thomson 2004, 206.
57. See Thomson 2004, 183.
58. See Bratton and Walle 1997.
59. See Thomson 2004, 233.
60. See Olukoshi 1999, 457.
61. See, generally, North 1990.
62. See Alence 2004, 163.
63. Under the OAU Charter, member states committed themselves to the "principle of non-interference in the internal affairs of States." See Organization of African Unity, *OAU Charter*, art. 3, para. 2, May 25, 1963.
64. At its summit in Copenhagen in 1993, the EU agreed on a series of criteria that all countries would have to fulfill as a condition of admission to membership: "Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union." See Conclusions of the Presidency 1993. European Council, http://www.consilium.europa.eu/en/european-council/conclusions/1993-2003/.

65. See Ebeku 2005.
66. See Nwabueze 1973, 302–303.
67. See Walle 2002, 78. See also Mulikita 2003. "Of the 37 African constitutions that were in force by 1994, all but four contained provisions for term limits."
68. See Jackson and Rosberg 1982, 71.
69. See Okoth-Ogendo 1993, 75.
70. See Gyimah-Boadi 1999, 40.
71. See Seidman 1966, 1022.
72. See, for example, United Nations Office of the Special Adviser on Africa. *Resource Flows to Africa: An Update on Statistical Trends*, 2005 (remittances from Africans working abroad in the period 2000–2003 averaged about $17 billion per annum, overtaking foreign direct investment flows which averaged about $15 billion per annum during the same period). For example, Ghanaian government officials estimate from official records that remittances from their nationals abroad in 2005 amounted to $1.5 billion, up from $680 million in 2002. See Owusu-Ankomah 2006.
73. See, for example, http://www.ghanaweb.com; http://www. nigeria-world.com; http://www.nigeriansinamerica.com; and http://www.ethioforum.org.
74. For example, in 2006, a Diaspora Voting Committee formed by Ghanaians abroad and coordinated largely through the Internet successfully campaigned for legislation in Ghana that grants voting rights to overseas Ghanaian nationals in Ghanaian parliamentary and presidential elections.
75. For example, Article 162 of the Ghana Constitution contains, among others, the following two provisions: "(3) There shall be no impediments to the establishment of private press or media; and in particular, there shall be no law requiring any person to obtain a license as a prerequisite to the establishment or operation of a newspaper, journal or other media for mass communication or information"; and "(4) Editors and publishers of newspapers and other institutions of the mass media shall not be subject to control or interference by Government, nor shall they be penalized or harassed for their editorial opinions and views, or the content of their publications."
76. See Hutchful 1993, 218.
77. See Bratton and Mattes 2003.
78. See Hutchful 1993, 218.
79. See Fayemi 2004.
80. See Prempeh 2006, 1239, 1250–1256, discussing judicial behavior in early postcolonial Africa.

81. For an account of the history and evolving jurisprudence of the Benin Constitutional Court, see Rotman 2004, 281.
82. See Magnusson 1999, 226–227.
83. See State v. President of Malawi 2002.
84. See New Patriotic Party c. Attorney General 1993–1995.
85. See Fomunyoh 2001, 45.
86. See International Commission Of Jurists (ICJ) 2002.
87. See, for example, Ssemogerere & 5 others v. Attorney General, Const. Pet. No. 5 of 2002 (Const. Ct., Uganda) (unreported) (declared unconstitutional a section of a new political parties law that would have allowed limited political party organization and activity at the national, but not local, level), discussed in Barya v. Attorney-Gen., Const. Pet. No. 5 of 2002 (Const. Cit., Uganda). See also Kibandama 2006.
88. [1961] G.L.R. (pt. II) 523 (holding that the Ghana Constitution of 1960 imposed no substantive judicially enforceable restraint on presidential or legislative power: thus upholding as constitutional a "preventive-detention act" that empowered the president to order the detention of persons for up to five years at a time without charge or trial).
89. [1966] E.A.L.R. 514 (validating, on Kelsenite grounds, the extra constitutional abolition of Uganda's 1962 constitution by then prime minister Milton Obote and his subsequent installation of a new 1966 Constitution).
90. Lord Denning's famous statement in *Candler v. Crane, Christmas & Co.*, [1951] 1 All ER 426, that the progressive development of the common law requires judges to be "bold spirits," not "timorous souls," appears to have influenced immensely the thinking of Africa's common law lawyers (for whom Denning the jurist is a sort of folk hero), especially their views regarding judicial responsibility for the demise of constitutionalism in postcolonial Africa. See, for example, Odinkalu 1996, 124, 136–137. "[The first generation of the Constitutions and Bills of Rights in Common Law Africa was destroyed not so much by the intolerance of the executive as by the enthusiastic abdication of judicial responsibilities by the persons and institutions mandated under those Constitutions to perform them …]." See also Omari 1970, 13. "Three things must be held responsible for … the Ghanaian's loss of liberty under [the 1960] Constitution—President Nkrumah, the Justices of the Supreme Court and Parliament. Of these three, the judiciary must take most of the blame".
91. See Prempeh 2006, 1256–1274, attributing cases such as *Akoto* and *Ex parte Matovu* to the absence of legitimacy for constitutionalism and judicial review in the early postcolonial period.
92. See Austin 1984, 51.
93. See Thomson 2004, 114.

94. Nigerian social scientist Peter Ekeh has described postcolonial African society as consisting of "two publics," with ethical practices and a high sense of moral duty confined to the "traditional" or ethno communal realm, while amoralism and self-dealing characterizes the African's dealings with the modern state. See, generally, Ekeh 1975, 91.
95. See, generally, Bates 1981, showing how public policy in postcolonial Africa caused Africa's agricultural decline by squeezing the productive rural sector to subsidize urban consumption.
96. See Mazrui 2001, 21.
97. See Walle 2001.
98. See, for example, Gloppen 2004, 119: "multiparty elections and constitutional changes had failed to diminish the dominance of the executive president."
99. See Okoth-Ogendo 1993, 74.
100. See, for example, Burnell 2003, 47.
101. See Citizenship Act 591 of 2000.
102. See, for example, Stanton 2003, 13–17.
103. See, generally, Schlesinger 1973.
104. See, for example, Lord 2003: "the general trend in democracies today seems to be in the direction, if anything, of a further strengthening of the executive element, especially at the expense of legislatures." See also Rosen 2006, 6–21: "Around the world, the imperial presidency appears to be alive and well."
105. See, for example, Mensah 2006, 47, noting the persistence of the preconstitutional-era problem of "unregulated discretion of public officials."
106. As a descriptive category, democracy is concerned simply with the process and method of selecting governments (and with such safeguards or rights as are deemed necessary to lend electoral legitimacy and credibility to such selection). See, for example, Dahl 1989, 163–170, which addresses a different concern. It is concerned not with deciding *who* gets to exercise public power, but with the control and regulation of public power. Constitutionalism thus insists on limits and constraints on the exercise of public power, regardless of who holds such power. The most influential recent reminder of the importance of keeping the distinction separate has come in the form of Fareed Zakaria's coinage of the epithet "illiberal democracy" to describe, in essence, a democracy without constitutionalism. See Zakaria 1997, 22.
107. See, generally, Rawls 1971.
108. During the struggle to end colonialism, Ghana's Nkrumah implored his peers and followers to focus their energies on capturing political power above everything else with his famous statement "Seek ye first the political kingdom and all other else shall be added unto you."
109. See, generally, Duchacek 1973.

110. I define structural constitutionalism as involving constitutional limitation and restraint of governmental and executive power primarily through vertical and horizontal dispersion of state power.
111. See, generally, Prempeh 2006.
112. See, for example, Welch 1995, 336: "Lawyers in Africa are few in number, overwhelmingly concentrated in national capitals … and not affected by extensive *pro bono* obligations."
113. See Chanda 1998, 123.
114. The act provides as follows: "Any person who does any act or utters any words or publishes any writing calculated to or liable to insult, ridicule or to show disrespect to the President, the National Flag, the Armorial Ensigns, the Public Seal, or any protected emblem or protected likeness, shall be liable to a fine of 1000 pounds and to imprisonment for two years." See Walden 2000.
115. See Bickel 1986, 29.
116. See Bickel 1986, 29.
117. See, generally, Prempeh 2001, 260.
118. Ibid., 139–143, describing characteristics of a jurisprudence of executive supremacy, and drawing contrasts with a jurisprudence of constitutionalism.
119. Ibid. See also Gloppen 2004, 118: "Despite notable recent developments, the overall assessment must be that the Tanzanian courts have not been able to significantly limit executive dominance or the 'hyper-presidential' nature of Tanzanian politics."
120. See Okoth-Ogendo 1993, 80.
121. See Joseph 2003, 159, 163. "Whatever the rhetoric, the reality is that those who win governmental office concentrate on serving themselves and their narrow circles of supporters."
122. Ibid., 165: "In Nigeria, the roster of presidential candidates in the April 2003 elections included many who have held executive, parliamentary, and other political positions over the decades of predatory military and civilian governments."
123. See Gyimah-Boadi 1999, 46.
124. See Fukuyama 1992.
125. See Gyimah-Boadi 1999, 43.

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CHAPTER 3

Some Perspectives on Durability and Change Under Modern African Constitutions

Charles Manga Fombad

Introduction

Constitutions are usually designed to endure in order to ensure political stability. However, they are not immutable documents frozen in time or cast in stone such that they must endure regardless of the changes in the polity's circumstances and citizens' values. Because constitutions inevitably obsolesce with time, there must be an effective and efficient process to ensure that they can be regularly updated to avoid the twin dangers of extra-legal or revolutionary methods of change on one hand and arbitrary, hasty, and opportunistic changes on the other. One of the major causes of political and constitutional instability during Africa's first three turbulent

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decades of independence was the ease with which post-independence leaders subverted constitutionalism by regularly amending constitutions to suit their selfish political agendas. The very limited constitutional constraints that appeared in post-independence constitutions were recklessly ignored and the catastrophic consequence of the resulting symbolic constitutionalism was the economic, social, and political crisis from which the continent is still struggling to recover.

Modern constitutionalism entails as one of its core elements,[1] restrictions on the ability to amend the constitution. It is therefore no surprise that most of the post-1990 substantially revised or new African constitutions attempt, in diverse ways, to place some limits and restrictions on the powers of governments to amend the constitution. These limits and restrictions are found in provisions that contain numerous legal devices that are either designed to make the amendment process difficult or prohibit the amendment of certain provisions. The overall objective is to ensure that the general will of the people, as reflected in the constitution, is not casually and capriciously frustrated by self-seeking political leaders or transient majorities in order to perpetuate themselves in power.

In the absence of any limits or restrictions on the amendment of a constitution, it is extremely difficult for such a constitution to promote constitutionalism, respect for the rule of law, democracy, and good governance. Besides, new empirical studies appear to suggest that the effectiveness of the amendment procedures does not only affect the stability and durability of political regimes but also has a significant effect on the welfare and prosperity of the country.[2] Because of the importance of controlling the process of constitutional change, this chapter intends to critically examine and analyze some of the different control devices that have been introduced in modern African constitutions to prevent the frequent and arbitrary changes to constitutions that had been a hallmark of the pre-1990 era.

The first part of the chapter will explain why it is important for constitutional designers to include special procedures to regulate and control the constitutional amendment process. The second part will consider the different amendment patterns in a number of selected African countries. The selected countries reflect the different Western constitutional models and traditions that have been received in Africa and the emphasis is on the content and normative quality of the current constitutional provisions controlling constitutional amendments rather than actual implementation and practice in any given country. It is contended that although an

examination of actual practice will probably be more rewarding, the formal constitutional entrenchment of the control measures is an absolutely essential and possibly necessary precondition to functional and substantive control of the constitutional amendment process. The third part of the chapter considers the practical implications of the various control devices in terms of their actual and potential impact on the nurturing and growth of constitutionalism on the continent. It highlights some of the challenges that lead to the conclusion in the final part of the chapter that there are some fundamental elements that constitutional designers need to take account of and include in any constitutional provision designed to limit and prevent impulsive changes to constitutions dictated by the selfish interests of political opportunists.

The Rationale for Special Procedures to Regulate Changes to the Constitution

Before considering whether or not special procedures to regulate the process of constitutional amendments can be justified, it is necessary to preface this with a brief consideration of the concept of constitutional amendment itself. There are two points worth noting about this. First, modern African constitutions use diverse terminologies such as "revision,"[3] "amendment,"[4] and "alteration."[5] Some of the literature on constitutional amendments appears to suggest that there is a distinction between some of these terms. It has also been suggested that revision is used in the literature on constitutions to mean several different things. Some writers distinguish between major and minor constitutional changes by calling the former "revisions" and the latter "amendments."[6] Donald Lutz uses "amendment" as a description of the formal process developed by the Americans and "alteration" to describe the processes that use the legislature or judiciary.[7] Other authors reserve "amendments" for when a constitutional change is carried out in accordance with the amending procedure specified in the constitution and "replacement" when the change is undertaken without the actors claiming to follow such a procedure.[8] Albert Sturm is right when he points out that some of these distinctions in practice are conceptually slippery and impossible to operationalize, and therefore useless.[9] For all practical purposes, the different terms that appear in the different African constitutions are clearly used indiscriminately to refer to the changes that can be made to these constitutions, regardless of the nature and scope of the changes, and we shall therefore use the terms interchangeably.

Second, in spite of the general practice of including provisions specifying the procedure to be followed in changing modern constitutions, some scholars have argued that such provisions are "irrelevant."[10] Some of the arguments made against the idea of amending constitutions are that it is bad to "tamper" with the constitution. It is also said that the constitution should not be "cluttered up" with amendments that will "trivialize" its majesty; that constitutional amendments are "divisive" or "polarizing"; that constitutional amendments may have bad unanticipated consequences; and that constitutional amendments diminish the coherence of the constitutional text or judicially developed constitutional doctrine. It is beyond the scope of this chapter to go into the merits and demerits of these arguments, many of which have been persuasively rebutted by Adrian Vermeule.[11] What is perhaps of more interest to us here is the justification for the constitutional entrenchment of provisions controlling the amendment of the constitution.

It can be said that the need to amend a constitution inheres in the very nature of a constitution itself. Far from being a "lifeless museum piece," or a document that contains "time-worn adages or hollow shibboleths," a constitution must be regarded as a living document which is designed to serve present and future generations, as well as embody and reflect their fears, hopes, aspirations, and desires.[12] Hardly any political system, whether dictatorial or democratic, will survive for long without striving to reflect the political realities of the day in its constitution. As Donald Lutz rightly points out, every political system needs to be modified over time as a result of some combination of any of the following: changes in the environment within which the political system operates (including economics, technology, foreign relations, demographics, etc.); changes in the value system distributed across the population; unwanted or unexpected institutional effects; and the cumulative effect of decisions made by the legislative, executive, and judiciary.[13] In fact, Thomas Jefferson, in arguing that constitutions should be rewritten every generation, declared that the "dead should not govern the living."[14] He probably went too far in suggesting that constitutions should have an expiration date of 19 years, but he was certainly right in deriding those who "look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched."[15]

Constitutional designers, in spite of their expertise, scholarship, and best efforts, are ordinary human beings who are neither perfect nor omniscient.[16] Hence, no constitution, however elaborate and

comprehensive it may purport to be, can ever be perfect. Human fallibility therefore dictates that a good constitution should provide a mechanism for revising it to, at least, either clarify or correct a lacuna in the constitution or to extend the constitution to cover new ideas, new information, or new circumstances that had not been anticipated at the time it was drafted.

In almost all countries, the constitution is explicitly or implicitly declared to be the supreme law of the land. As the supreme law, all other laws derive their validity from it and any such law that is inconsistent with it will usually be declared invalid. Because of its special status, a constitution will lose its value as the supreme law of the land based on the sovereign will of the people if it could be altered easily, casually, carelessly, by subterfuge or by implication through the acts of a few people holding leadership positions, as was the case in most African countries prior to the constitutional rights revolution brought about by the so-called "third wave"[17] of democratization in the 1990s. Popular sovereignty therefore implies that all constitutional matters should be based upon some form of popular consent, which in turn implies some special method for amending the constitution which will ensure that it is based on and reflects this popular will. As Amissah P. said in the Botswana case of *Attorney-General v. Dow*:

> A written Constitution is the legislation or compact which establishes the State itself.... It is a document of immense dimensions, portraying, as it does, the vision of the peoples' future. The makers of a Constitution do not intend that it is amended as often as other legislation; indeed, it is not unusual for provisions of the Constitution to be made amendable only by special procedures imposing more difficult forms and heavier majorities of the members of the legislature.[18]

Specially entrenched constitutional procedures to limit or control the power to amend constitutions was not part of the repertoire of the twentieth-century British draftsmen in Whitehall who prepared the independence constitutions of most Anglophone African countries. But even the Francophone African constitutions where attempts were made to introduce such provisions did not fare better. Although constitutional provisions controlling the powers to amend the constitution on their own do not guarantee constitutional durability or a culture of constitutionalism, they remain a critical element in any genuine attempt to attain these goals. This will however depend on the method provided for changing the constitution, which we will now consider.

Patterns of Constitutional Change Under Modern African Constitutions

Three important issues will be considered here. First, there will be a brief overview of the different methods for changing a constitution. Second, the analytical framework that is used to examine the different amendment procedures provided for under African constitutions will be explained. The third part will indicate the different patterns for amending constitutions that emerge from the examination of selected constitutions.

Methods of Constitutional Change

Two major distinctions can be made when classifying the main methods through which a constitution can be amended.[19] The first is the distinction between formal change and informal change. The former involves a change in the constitutional text but the latter does not. The second distinction is between lawful change and unlawful change. The purpose of this is to distinguish between those situations where the changes have been carried out in accordance with the amendment procedure specified in the constitution and where the procedure was not followed. Bearing these two distinctions in mind, Table 3.1 below shows that there are at least five possible ways in which a constitution can be changed.

From the perspective of formal change, a constitutional amendment can be made in accordance with the procedures laid down in the constitution. In such a case, any resulting amendment will be considered lawful. There could also be a formal constitutional change that can be deemed an unlawful change, if it was not carried out in accordance with the correct procedures for amending the constitution or this procedure was abused. Such extra-constitutional means may be adopted in those circumstances where the constitutional amendment procedure is too rigid and difficult to comply with.[20]

Table 3.1 Types of constitutional change

	Lawful change	*Unlawful change*
Formal change	Formal amendment procedures	Irregular procedures or abuse of formal procedures
Informal change	Judicial interpretation Unwritten understandings and conventions	Inaction and neglect

As regards informal constitutional changes, there are at least three different ways in which this may occur. The most frequent, at least in common law jurisdictions, are subtle and sometimes substantial changes brought about through judicial interpretation of the constitutional text. Although this is one of the most important ways of constitutional change, it often does not immediately result in a change in the constitutional text. This usually occurs in the process of judicial review, or in what Adrian Vermeule refers to as "common law constitutionalism," and enables judges not only to clarify any ambiguities in the text but also to adapt the constitution to modern realities, especially in those constitutional systems where the process for formal change is rigid, complex, and protracted.[21] While any resulting changes are lawful, informal changes that result from inaction and neglect, whether legislative or executive, are unlawful. A glaring example of constitutional change resulting from executive and legislative inaction has occurred under the Cameroon Constitution of 1996. This new constitution, which replaced the 1972 constitution provided, *inter alia*, for a Senate as a second chamber of parliament, a Constitutional Council with exclusive powers to deal with constitutional adjudication, and regional and local authorities. None of these institutions have ever been established and in fact, it is sometimes unclear whether Cameroon is operating under the 1972 or 1996 constitution.[22] But, it is not only in Cameroon that the constitution is surreptitiously changed by the executive and legislature ignoring provisions that they do not like.[23] The former South African President, F.W. de Klerk, has drawn attention to a number of ways in which the South African Constitution is progressively being changed through legislative erosion and executive neglect.[24] A common form of constitutional change in many Francophone and Lusophone African countries occurs through the introduction in ordinary legislation of provisions which effectively alter the constitution. Because of the defective system of constitutional adjudication these abuses cannot be checked by the courts.[25] Closely resembling informal constitutional change through inaction and neglect are informal changes that are the product of unwritten understandings, conventions, and informal practices of government institutions. These are usually lawful because they are the result of common understanding, usage, and practice accepted by all as the best way to respond to new pressures, and are usually devised to offset rigid formal procedures for constitutional change. This chapter, however, deals exclusively with the formal procedures for change that are expressly or implicitly stated in the constitution, since this in many respects presents

the most important and significant way in which African constitutions can be regularly updated in a manner that will enhance constitutional stability, durability, and constitutionalism.

The Analytical Framework

An overview of the amendment patterns suggests that these, by and large, reflect, with slight modifications in some cases, the main Western constitutional models that have been received in Africa via the Westminster model, which in this particular respect has been modified by the US presidential model and is found in most Anglophone African constitutions, and the Gaullist model widely adopted in Francophone African constitutions with variations of this found in the constitutions of Lusophone African countries.

The 30 countries whose constitutional patterns are examined below have been selected to reflect the diverse models of received legal and constitutional cultures on the continent. This accounts for the inclusion of several Anglophone African countries (e.g., Ghana, Nigeria, Lesotho, and Malawi), several Francophone countries (such as Cameroon, Central African Republic, Gabon, Senegal, and Mali), two Lusophone countries (Angola and Mozambique), one Hispanophone country (Equatorial Guinea), and others, such as Morocco[26] and Ethiopia. Other secondary factors that influenced the choice of the countries in the study are the age of the constitution. Thus, account has been taken of some old constitutions that have survived the 1990 virus of constitutional renewals and stood the test of time with no fundamental substantive changes, such as the Botswana and Mauritius independence constitutions. It is also worth noting that these two countries have the best record on the continent for constitutional and political stability. Account has also been taken of the most recent constitutions, such as the 2010 constitutions of Angola and Kenya. The choice of constitutions also took account of the vanguard constitutions of the 1990s, such as those of Benin, Burkina Faso, Gabon, Ghana, and Namibia, as well as the real flag bearer of the 1990s constitutional rights revolution, the South African Constitution of 1996. The study includes an examination of the constitution of Africa's last absolute monarchy, the 2005 Constitution of Swaziland.

Five main points provide the basic framework within which to appreciate the different patterns that emerge viz:

1. Those who can initiate amendments. It is important here to see to what extent the ordinary citizen or groups of them can initiate an

amendment of the constitution. The critical question is whether there are restrictions which may make it difficult for constitutional amendments that have a broad public support to be initiated.

2. The nature and scope of legislative majority required to approve amendments and the complexity of the process. What is likely going to make the procedure special is the fact that a supermajority of sorts, quite different from the normal majority required to approve an ordinary Bill, is required. In the case of a bicameral legislation of a referendum. In federal or quasi-federal systems, it is often provided that the two bodies must sit in a special joint session called "congress." In some cases, as an addition, and in others, as an alternative to approval by a supermajority in the legislature, it is required that the people should be consulted by way of a referendum. In federal or quasi-federal systems, it is often provided that in addition to approval by the central legislature, a certain percentage of the different component units through their legislatures must approve the change.
3. The nature and circumstances of a referendum. As indicated above, a referendum may either be provided in addition to approval of a Bill by the legislature, or as alternative, or, in some situations, in addition to approval by the legislature.
4. The existence of specified timelines. In some constitutions, to ensure that constitutional amendments are not hastily carried out without adequate time and opportunity being given for the population to be consulted, timelines are specified which indicate a minimum period between which such amendments could be introduced and the time when they can be approved and take effect.
5. The scope of matters that is not subject to amendment. In many constitutions, especially those of Francophone countries, there are a number of matters, which are expressly stated, not to be subject to amendment either generally or during a certain period. This raises quite interesting theoretical questions that will be examined later.

A potentially useful element of analysis indicated in Table 3.2 deals with the actual number of constitutional amendments that have taken place since the introduction of the constitution. Accurate information on this is usually very difficult to get; nevertheless the available information provides some indication of what is happening.

The pattern that emerges from an examination of the constitutions of these 30 countries is summarized in Table 3.2 below.

Table 3.2 Patterns of constitutional amendments in selected African countries

	Country and year of constitution	*Initiator of amendments*	*Nature and scope of amendment process*	*Referendum (nature and circumstances)*	*Timelines for periodic amendment and/or amendment process*	*Unamendable provisions*	*No. of amend-ments*
1	Angola (2010)	Art. 233 President or 1/3 members of National Assembly Art. 235 National Assembly may assume extraordinary revision powers if 2/3 members so decide	Art. 234 Approval by 2/3 majority in National Assembly	None	Art. 235 Review 5 years after entering into force or after last review	Art. 236 Material limits Art. 237 Circumstantial limits	N/A
2	Benin (1990)	Art. 154 President of Republic after decision of Council of Ministers Members of National Assembly	Art. 154 Approval of 3/4 in National Assembly	Art. 155 Referendum required only if proposal not approved by 4/5 of National Assembly	None	Art. 156 Those that will undermine national integrity, republican form of government or secularity of state	N/A
3	Botswana (1966)	Sec. 89 Ordinary lawmaking procedure	Sec. 89 Three different procedures for three different sets of provisions Normal majority for approval of amendment of ordinary provisions 2/3 majority in National Assembly required for entrenched and specially entrenched provisions	Sec. 89 Referendum applies only for revision of specially entrenched provisions	Sec. 89 Process must take at least 5 months	None	22 (2010)

4	Burkina Faso (1991)	Art. 161 President Majority of members of the National Assembly At least 30,000 people	Art. 64 3/4 majority in the National Assembly	Art. 64 Referendum only if it did not get 3/4 majority	None	Art. 165 Republican nature and form of state Multiparty system Integrity of national territory	N/A
5	Cameroon (1996)	Art. 63 President 1/3 of members of Parliament	Art. 63 Absolute majority in Parliament but 2/3 required at second reading requested by President	Art. 63 Referendum alternative to parliamentary approval	None	Art. 64 Republican form, unity and territorial integrity of the state	2 (2010)
6	Central African Republic (2004)	Art. 106 President 2/3 majority of National Assembly	Art. 107 Approval by 3/4 majority of National Assembly or referendum	Art. 107 Referendum as alternative method of approving revision	None	Art. 108 Republican form Number and length of presidential term Eligibility requirements Restrictions on presidential functions Fundamental rights	N/A
7	Democratic Republic of the Congo (2006)	Art. 218 President Council of ministers 1/2 majority of either Chamber of Parliament Petition of 100,000 citizens to either of the two Chambers of Parliament	Art. 218 3/5 approval by both Chambers meeting in Senate	Referendum only if majority approval in Parliament not up to 3/5	None	Art. 219 War, state of urgency, state of siege, interim presidency Art. 220 Republican form, universal suffrage, number and duration of presidential mandate, and judicial independence	N/A

(*continued*)

Table 3.2 (continued)

	Country and year of constitution	*Initiator of amendments*	*Nature and scope of amendment process*	*Referendum (nature and circumstances)*	*Timelines for periodic amendment and/or amendment process*	*Unamendable provisions*	*No. of amend-ments*
8	Djibouti (1992)	Art. 87 President 1/3 majority of members of National Assembly	Art. 87 Majority in National Assembly or 2/3 majority if President wants to dispense with referendum	Art. 87 Referendum only if 2/3 majority not obtained in National Assembly	None	Art. 88 Questions existence of state Jeopardizes integrity of territory Republican form Pluralist character	N/A
9	Equatorial Guinea (1996)	Art. 103 President on his own initiative President on proposition of absolute majority of the members of Parliament	None	Art. 103 Referendum as an alternative to Parliament adopting amendment	None	Art. 104 Republican and democratic character National unity and territorial integrity	23
10	Eritrea (1997)	Art. 59 President 50% majority of National Assembly	Art. 59 Initial approval 3/4 majority in National Assembly, a year later, 4/5 majority approval	None	Art. 59 At least one year	None	N/A

11	Ethiopia (1995)	Art. 105 Silent	Art. 105 Entrenched provisions: approval by 2/3 House of Peoples' Representatives and House of Federation in joint session Specially entrenched provisions: approval by majority of all State Councils, 2/3 approval by House of Peoples' Representatives and House of Federation in joint session and approval by 2/3 House of Federation	None	None	None	N/A
12	Gabon (1991)	Art. 116 President Council of ministers 1/3 majority of National Assembly 1/3 majority of Senate	Art. 116 National Assembly and Senate, after referendum vote separately and later jointly and 2/3 majority required	Art. 116 Proposal must be approved by referendum before going to Parliament	Art. 116 None but likely to be protracted	Art. 116 Not allowed during emergency, interim presidency and during elections Infringement of territorial integrity	79

(*continued*)

Table 3.2 (continued)

	Country and year of constitution	*Initiator of amendments*	*Nature and scope of amendment process*	*Referendum (nature and circumstances)*	*Timelines for periodic amendment and/or amendment process*	*Unamendable provisions*	*No. of amend-ments*
13	Ghana (1992)	Art. 289 Ordinary lawmaking procedure	Art. 290 Entrenched provisions Advice of Council of State Art. 291 Non-entrenched provisions After first reading referred to Council of State and subsequently approved by 2/3 majority in Parliament during second and third reading	Art. 290 Entrenched provisions Referendum, after first reading, 40% turn out and 75% approval required	Arts. 290 and 291 At least 8 months for both entrenched and non-entrenched provisions	None	N/A
14	Guinea-Bissau (1984)	Art. 127 National Popular Assembly	Art. 127 Silence means procedure of ordinary legislation applicable	None	None	None	N/A

15	Kenya (2010)	Art. 256 Parliamentary initiative Art. 257 Popular initiative of at least 1 million people	Art. 256 Unentrenched provisions 2/3 approval of each House of Parliament for first and second readings Art. 257 Popular initiative must be approved by majority of county assemblies, and majority of each House of Parliament, referendum if no majority in either House	Art. 255 Referendum only if it relates to certain entrenched provisions 20% registered voters in at least 50% counties	Arts. 256 and 257 At least 8 months for any amendment	None	N/A
16	Lesotho (1993)	Sec. 85 Ordinary lawmaking procedure	Sec. 85 Ordinary provisions: majority of both National Assembly and Senate Entrenched provisions: 2/3 majority in both National Assembly and Senate Specially entrenched provisions: after parliamentary approval, referendum	Sec. 85 Referendum reserved for specially entrenched provisions	Sec. 85 At least 6 months for any amendments	None	N/A

(*continued*)

Table 3.2 (continued)

	Country and year of constitution	*Initiator of amendments*	*Nature and scope of amendment process*	*Referendum (nature and circumstances)*	*Timelines for periodic amendment and/or amendment process*	*Unamendable provisions*	*No. of amend-ments*
17	Madagascar (1992)	Art. 138 President 1/3 members of National Assembly	Art. 139 3/4 approval by National Assembly and Senate	Arts. 140 and 141 President may submit to referendum but amendment of certain specified titles must be approved by referendum	None	Art. 142 Republican form of state	N/A
18	Malawi (1994)	Sec. 196 Ordinary lawmaking procedure	Secs. 196 and 197 3 categories of provision First category: simple majority in Parliament and referendum Second category: 2/3 majority in Parliament and no referendum if amendment does not affect substance or effect of the constitution Third category: approval of 2/3 majority in Parliament	Sec. 196 Referendum required for amendment of certain provisions	None	None	N/A

19	Mali (1992)	Art. 118 President Members of Parliament	Art. 118 Approval by 2/3 in Parliament	Art. 118 Referendum mandatory	None	Art. 118 Territorial integrity Republican form Secularity of state Multipartyism	N/A
20	Mauritius (1968)	Sec. 47 Ordinary lawmaking procedure	Sec. 47 3 categories of provisions First category: 3/4 majority of National Assembly required Second category: after referendum, it is supported by all members of National Assembly Third category: approval by 2/3 of members of National Assembly	Sec. 47 Some amendments require 3/4 approval at referendum before it goes to National Assembly	Could be protracted	None	N/A
21	Morocco (1996)	Art. 103 King House of Representatives House of Councillors	Art. 104 2/3 majority of both Houses	Art. 104 All must be submitted to referendum	None	Art. 106 State system of monarchy Provisions relating to Islam	N/A

(*continued*)

Table 3.2 (continued)

	Country and year of constitution	*Initiator of amendments*	*Nature and scope of amendment process*	*Referendum (nature and circumstances)*	*Timelines for periodic amendment and/or amendment process*	*Unamendable provisions*	*No. of amend-ments*
22	Mozambique (1990)	Art. 198 President 1/3 members of Assembly	Art. 199 2 categories First category: approval by Assembly, goes to referendum Second category: approval by 2/3 of Assembly sufficient	Art. 199 Referendum for amendment of certain provisions	Art. 198 At least 4 months	None	N/A
23	Namibia (1990)	Art. 132 Ordinary lawmaking procedure	Art. 132 2/3 approval of National Assembly and 2/3 approval of National Council	Art. 132 President may resort to referendum if it did not get 2/3 approval of National Council Must get 2/3 approval at referendum	None	Art. 131 No repeal of any provisions in Chapter 3	
24	Nigeria (1999)	Sec. 9 Ordinary lawmaking procedure	Sec. 9 2/3 approval of National Assembly and Senate and approved by resolution of 2/3 of the Houses of Assembly of the States	None	None	None	1

25	Senegal (2001)	Art. 103 President National Assembly Prime Minister can propose to President	Art. 103 2 approaches Approved by National Assembly and at referendum In lieu of referendum President can refer to both Houses meeting as congress, 3/5 approval needed	Art. 103 Referendum is an option for approval	None	Art. 103 Republican form	N/A
26	Seychelles (1993)	Art. 91 Ordinary lawmaking procedure	Art. 91 Refers only to certain specific provisions Requires 2/3 majority in National Assembly apparently after referendum	Art. 91 60% approval at referendum before National Assembly vote	None	None	N/A
27	South Africa (1996)	Sec. 74 Ordinary lawmaking procedure	Sec. 74 3 approaches for 3 different categories of provisions First category: 75% majority in National Assembly and 6 of 9 majority in National Council of Provinces Second category: 2/3 majority in National Assembly and 6 of 9 majority in National Council of Provinces Third category: 2/3 majority in National Assembly and 6 of 9 majority in National Council of Provinces	None	Sec. 74(5) At least 2 months	None	16

(*continued*)

Table 3.2 (continued)

	Country and year of constitution	*Initiator of amendments*	*Nature and scope of amendment process*	*Referendum (nature and circumstances)*	*Timelines for periodic amendment and/or amendment process*	*Unamendable provisions*	*No. of amend-ments*
28	Swaziland (2005)	Sec. 245 Ordinary lawmaking procedure	Sec. 246 Specially entrenched provisions 3/4 majority in two Chambers of Parliament Sec. 247 Entrenched provisions 2/3 majority in two Chambers of Parliament Assumed that other provisions amended like ordinary bills	None	Sec. 245 At least 2 months	None	N/A
29	Tanzania (1977)	Art. 98 Ordinary lawmaking procedure	Art. 98 2 different procedures for 2 categories of provisions First category: 2/3 majority in Parliament Second category: 2/3 majority in Parliament and 2/3 members of Parliament from Zanzibar	None	None	None	100

30	Uganda (1995)	Art. 259 Ordinary lawmaking procedure	Arts. 260–262 3 different procedures for 3 categories of provisions First category: 2/3 majority in Parliament and a referendum Second category: 2/3 majority in Parliament and ratification by 2/3 members of district Councils in at least 2/3 of all districts in Uganda Third category: apart from those stated in arts. 260 and 261, all others require 2/3 majority in Parliament	None	More than a month	None	N/A

Possible Implications of Constitutional Changes on Constitutional Stability and Constitutionalism

If the common assumption that a constitution is based on the general will of the people is correct, then any changes that can be easily carried out to the constitution without the effective involvement of the people or in any manner that cannot reasonably be considered to reflect their general will are not only contrary to one of the core elements of constitutionalism but are also illegal. It is therefore contended that any constitution that stands any chance of promoting constitutionalism should not be vulnerable to arbitrary revision. The question therefore is whether the mechanisms for changing modern African constitutions, examples of which have been discussed above, are consistent with the promotion of constitutional stability and constitutionalism. In considering this, it is important to note that in spite of the common origins, in terms of models, of many African constitutions, there are significant variations in the actual patterns adopted in the different countries to make any attempt at generalizations difficult. Nevertheless, there are important trends that emerge.

In analyzing the provisions controlling and restricting the processes of amending a constitution, the general assumption is that the aim of constitutional designers is not to block amendments completely, but rather to ensure that the process is reasonably difficult to check against arbitrary and whimsical changes to the constitution. How easy or difficult this process is depends on the number of legal and practical obstacles that have been built into the process. In many respects, each of the five factors discussed above may potentially make the amendment process easy or difficult. The extent to which they can effectively control and check arbitrary changes to the constitution certainly impacts on the ability of the constitution to promote constitutionalism. A number of issues do arise in actually considering what impact each of these factors, either on its own or with the other factors, can have on constitutional change, stability, and constitutionalism.

For a start, attention must be drawn to the fact that although many African constitutional designers have gone to considerable lengths to incorporate provisions that try to control the process of constitutional amendment, there are still some constitutional designs that have not given the issue the attention it deserves.[27] Examples of constitutions where very little or only symbolic attempts have been made to address the dangers of arbitrary constitutional amendments include the constitutions of Libya,[28] Equatorial Guinea,[29] and Guinea-Bissau.[30]

In looking at the issue of who should initiate constitutional amendments, the assumption where there is silence is that the normal procedure for amending legislation applies. It becomes a potentially problematic matter where the constitution uses language that appears to restrict the initiative in such matters to certain persons.

There are interesting novel approaches in some constitutions, which state that at least a certain number of citizens who qualify to vote—30,000 in the case of Burkina Faso,[31] 100,000 in the case of DR Congo,[32] and one million in the case of Kenya[33]—can present before the National Assembly a petition containing the proposals for an amendment of the constitution. This is significant because in almost all countries, legislation or amendments to legislation including the constitution are usually initiated by the government. If the government is not interested in pursuing a constitutional amendment, it is unlikely that the issue of constitutional change can come before parliament. The Burkina Faso, Kenya, and DR Congo constitutional provisions provide an important way of dealing with one of the major obstacles to constitutional change: a refusal by the government to bring a request for change before the legislature, which in constitutional theory represents the sovereign will. Allowing petitions by a specified number of citizens is certainly good for ensuring that governments do not have the absolute discretion to determine whether or not a proposed constitutional amendment should go before the legislature. However, the minimum number of citizens required to petition in both the Burkina Faso[34] and DR Congo[35] constitutions is rather too low and could easily be abused by a vocal minority for their own ends. It is therefore desirable to fix the minimum number and geographical spread of citizens at a level that will ensure that any proposals for change enjoy popular support and such support is broadly spread throughout the country. The Kenyan requirement for a petition supported by one million citizens, which is about 2.5 percent of the population,[36] is a reasonable minimum provided measures are taken to ensure that this is evenly spread throughout the country and not merely the plans of a minority concentrated in one region trying to impose their will on the rest of the country.

Getting a proposal for changing the constitution into Parliament is not a guarantee that it will succeed. Almost all the constitutions analyzed above now require that all constitutional amendments must be approved by a supermajority vote of 2/3, 3/5, or 4/5[37] of a Parliament consisting of a single or two houses sitting separately or in joint session. In the case of some federal or quasi-federal states, such as Ethiopia, Nigeria, or South Africa,[38]

there is an additional requirement that there should also be an affirmative vote from a qualified majority of 2/3 or 3/5 of all the component parts of the state. These special requirements for qualified majorities in the different legislatures would under normal circumstances have ensured that only amendments that have a broad support of the people's representative could be approved. However, the ghost of the discredited rubber stamp one-party parliaments still looms very large over the African legislative horizon today. In spite of the "third wave" of democratization that swept over the continent from the 1990s, and supposedly brought with it multipartyism, the reality is that the *de jure* multiparty systems have steadily and progressively degenerated into *de facto* one-party rule under the different dominant parties. This has been aggravated by the ease with which opposition parties, with the complicity of the dominant parties, have been reduced to divided, fragmented, self-serving groups which are more of a threat to each other than to the ruling dominant parties. Table 3.3 provides an overall view of the extent of ruling party dominance in African parliaments.

It should be noted that in countries with a bicameral legislature the seats in the two bodies have been added to arrive at the total number of seats.

For purposes of this analysis, the dominant party simply refers to a party with more than 2/3 of the seats in parliament.[39] Table 3.3 shows that 80 percent of the countries are controlled by dominant parties, meaning that in 16 of the 20 countries, the ruling parties enjoy a 2/3 majority in parliament. This therefore means that the 2/3 majority requirement on its own is not a major obstacle to amending the constitution in many African countries. But even if the level of difficulty was raised by requiring a 3/4 majority, the table shows that 9 out of 20, that is, 45 percent of the countries will still have no difficulty in reaching this threshold.

However, some constitutions make this slightly more difficult by providing for a referendum in addition to[40] or as an alternative to parliamentary approval,[41] or even as the sole method[42] of approving an amendment to the constitution or certain provisions of it considered as of especial importance. This is potentially a very useful way of ensuring that citizens are actively involved in such an important process which affects the foundational document on which the state rests. However, African referenda cannot and have not been different from African elections, even in this era of democratic revival. African leaders have reduced elections to theatrical exercises in self-reproduction and self-perpetuation by regularly using carefully crafted perpetual incumbency machines that ensure they are always declared winners.

Table 3.3 Dominant-party systems in Africa[a]

Country	*Total number of seats in parliament and year of election*	*Total number of seats occupied by the ruling party*	*Percentage of seats occupied by the ruling party*
Angola	220 (2008)	129 (Popular Movement for the Liberation of Angola, MPLA-PT)	86.8%
Botswana	57 (2009)	45 (Botswana Democratic Party, BDP)	78.9%
Burundi	141 (2010)	112 (National Council for the Defence of Democracy—Front for the Defence of Democracy, CNDD-FDD)	79.4%
Cameroon	180 (2007)	153 (Cameroon Peoples' Democratic Movement)	85%
Cape Verde	72 (2011)	38 (African Party for the Independence of Cape Verde, PAICA)	52.7%
Central African Republic	35 (2011)	26 (National Convergence "Kwa Na Kwa," KNK)	74.2%
Equatorial Guinea	100 (2008)	98 (Democratic Party of Equatorial Guinea)	89%
Gabon	220 (2006)	157 (Gabonese Democratic Party)	71.3%
The Gambia	48 (2007)	42 (Alliance for Patriotic Reorientation and Construction)	87.5%
Ghana	230 (2008)	115 (National Democratic Congress)	50%
Guinea-Bissau	100 (2008)	67 (African Party for the Independence of Guinea and Cape Verde)	67%
Lesotho	120 (2007)	61 (Lesotho Congress for Democracy)	50.8%
Mozambique	250 (2009)	191 (FRELIMO)	76.4%
Namibia	98 (2009/2010)	78 (SWAPO)	79.5%
Seychelles	34 (2007)	23 (Seychelles Peoples' Progressive Front)	67.6%
South Africa	454 (2009)	299 (African National Congress)	65.8%
Sudan	450 (2010)	323 (National Congress Party)	71.7%
Tanzania	239 (2005)	186 (Chama Cha Mapinduzi)	77.8%
Togo	81 (2007)	50 (Rally of the Togolese People)	61.7%
Uganda	375 (2011)	250 (National Resistance Movement)	66.6%

[a]This table is based on information obtained from the "PARLINE database on national parliaments" (website of the Inter-Parliamentary Union, which publishes the latest information on parliamentary elections), available at http://www.ipu.org/parline-e/parlinesearch.asp. See also Dominant-party system, Wikipedia, the Free Encyclopedia, available at http://en.wikipedia.org/wiki/Dominant-party_system.

Hence, with the diminishing prospects for free and fair elections, it is most unlikely that the present leaders will organize referenda to obtain approval of constitutional amendment proposals without taking the usual extreme measures they take to win elections, to ensure that they obtain the outcome they desire. Two examples of how a referendum exercise can be called into question are worth noting. On May 26, 2006, the Chadian Parliament, dominated by the ruling Patriotic Salvation Movement (MPS) easily approved an amendment to the 1996 constitution, which replaced the two terms presidential tenure limits in the constitution with an open term, thus allowing the incumbent, Idriss Deby, to stand as presidential candidate for an unlimited number of five-year terms. This was despite the fact that during his 2001 presidential campaign, Deby had promised to step down at the end of his second term. The embattled opposition, with only 45 of the 188 seats in Parliament, protested by walking out of parliament during the vote and called for a strike as well as a "no" vote during the referendum that had to approve this change. The results of the referendum were, however, a foregone conclusion. In the two presidential elections that Deby had declared himself winner, both the national and international observers had stated that there had been such massive vote rigging, fraud, and other electoral irregularities that it cast doubts on the legitimacy of the elections. Besides this, the legitimacy of referenda as an effective means to involve the people and obtain their consent in the constitution-amendment process can be called into question by voter apathy. An example of this was the referendum that took place in Botswana on November 3, 2001 seeking approval of certain constitutional amendments dealing with the judiciary. Out of 460,525 eligible voters, only 22,577 bothered to vote; that is a voter turnout of 4.9 percent. Although an overwhelming majority voted in favor of the amendments, it is debatable whether results obtained after such a massive boycott accurately reflect the will of the people. Some constitutional framers have tried to overcome this potentially absurd situation in diverse ways. For example, Article 79 of the Zambian Constitution (1991) provides that the constitutional amendment bill must have been approved in a referendum in which at least 50 percent of the registered voters have participated. Under the Mauritian and Namibian constitutions, certain constitutional amendments require the approval of at least 3/4[43] and 2/3[44] of the electorate in a referendum respectively. Under the Ghanaian Constitution, Article 290(4) provides with respect to the amendment of the specially entrenched provisions that, after the bill has been read for the first time in Parliament, it must be submitted to a referendum in which at least 40 percent of those entitled to

vote actually vote and at least 75 percent of those who actually vote cast their votes in favor of passing the bill. While all these precautions cannot entirely eradicate the frequent abuses that have become a common practice in African polls, they may nevertheless make such irregularities more difficult to accomplish and to this extent improve the chances that the outcome of such consultations will genuinely reflect the wishes of the people. The use of referenda may be also problematic because it is said that people tend to vote "no" if they do not understand or are uncertain about the potential impact of a constitutional proposal.[45]

The inclusion in some constitutions of strict timelines reflects a desire by constitutional designers that constitutional amendments should not be hastily and perhaps stealthily carried out without the full knowledge and active involvement of the public. This check against hasty constitutional changes is reflected in a number of ways in certain constitutions. Under Article 198(2) of the Mozambican Constitution, the draft amendment must be submitted to the Assembly of the Republic 90 days before the opening of the debate, thus giving members of parliament enough time not only to acquaint themselves with the proposed changes but also to consult their constituents. Under some constitutions, the full text of the bill must be published in the official *Gazette* at least 30 days before it is introduced to parliament.[46] There are two elaborate and commendable examples of the use of strict timelines to possibly ensure broad consultation as well as check against hasty changes to the constitution. The first of this is the Botswana Constitution under which the effect of these timelines ensures that a constitutional amendment may take at least five months from when it is introduced in Parliament before it becomes law. The second example is under the Ghanaian Constitution where Article 290(3) states that a bill amending an entrenched provision shall not be introduced into Parliament until after the expiry of six months after its publication in the *Gazette*. For the amendment of non-entrenched provisions, this period is reduced to three months and ten days. By contrast, under the Cameroonian Constitution, where no time limits are provided, the bill amending the 1972 Constitution was only made available to parliamentarians on the eve of the day that they had to vote on it. It is no surprise that it is one of the few African constitutions that merely reinforces the pre-1990 system of personal rule and explains why even many of the token changes purportedly introduced to make the system open and participatory have never been implemented.

There is the category of matters which are expressly stated in some constitutions as not being subject to amendment or some other language to

that effect.[47] This is found in almost all the constitutions of Francophone[48] and Lusophone[49] African countries, with Namibia[50] being a notable exception amongst Anglophone countries.[51] It can also be argued that section 47 of the Mauritian Constitution, which states that the amendment of certain provisions requires a 3/4 majority approval at a referendum followed by a 100 percent approval in the National Assembly, almost renders such provisions unamendable.[52] Be that as it may, the concept of unamendable provisions must be distinguished from those situations where constitutional provisions prohibit the amendment of the constitution in certain specified circumstances, for example, during the period when there is an emergency such as a state of emergency or state of siege, or when the president is temporarily or permanently incapacitated and a person is acting for a specified period.[53] It is understandable why there is need to ensure that no leader or acting leader exploits a crisis to change a constitution in a way that would often serve to perpetuate their stay in power. Unamendable provisions, on the other hand, usually reflect a desire to protect and perpetuate certain values, principles, or concepts that the constitutional drafters feel should never be infringed, threatened, or changed. Typical examples of values that some constitutions declare are not subject to amendment are: national integrity, republican form of government, secularity of the state, national unity and territorial integrity, multipartyism, and fundamental rights.[54]

Although the concept of unamendable provisions is borrowed from advanced constitutional models, such as the Constitution of the Fifth French Republic[55] as well as the German Constitution,[56] there are a number of conceptual and theoretical difficulties with the whole idea of certain constitutional provisions being declared unamendable—the so-called eternity or perpetuity clauses. First, in many constitutions the exact nature and scope of the concepts or values being protected in perpetuity are never clear. Examples of these obscure concepts are: "territorial integrity," "national unity," and "national integrity." Second, nothing is utterly immune from change. The purpose of a controlled amendatory procedure is not to prevent changes but rather to prevent the process being abused by dictators to serve their own selfish ends. The concept of unamendable provisions is not only an illusion but also potentially dangerous. A constitution or provisions in it could with time become antiquated, and if there is no procedure for amending them or if this is too cumbersome, it may provoke violent changes through revolutionary means. Change is therefore an inevitable aspect of life and no constitution can be frozen

in time and still be relevant. Citizens will only identify themselves with, obey, and venerate a constitution that is relevant to their lives and makes sense to them. Third, each generation has and should have its cherished values and political principles that reflect its current predicaments and preoccupations. In a sense, constitutions are time- and place-specific.[57] No generation has the right to impose its own values and political principles on a later generation. Colvin R. de Silva captured this concern very aptly when he said:

> Constitutions are made in terms of the stage of development at which any given society or country has arrived. In terms of that stage of development it looks upon things, and for any generation of people to imagine that it can so completely project itself into the infinity of the future so as to be able to decide its own generation that it will constrain a future generation or generations forever within the confines of its own postulates is to make the mistake of thinking that any human collectivity is the equivalent of the divinity.[58]

Perhaps more fundamentally, it can be argued that one constituent body cannot make constitutional provisions that prevent a future constituent body from repealing the constitution, even where it introduces an express provision that purports to do this. This, it can be argued, is based on the principle that a constituent body is omnipotent in all save the power to destroy or limit its own omnipotence. Finally, eternity or perpetuity provisions are inherently undemocratic since they seek to deny the sovereign right of the people to determine how they want to be governed. As a practical matter, these provisions turn to be symbolic in nature, and whilst they underscore the fundamental importance of certain matters, they do not prevent a constitutional change that commands the overwhelming support of the people or a replacement of the whole constitution.[59]

There are, however, a number of constitutions which provide excellent examples of a legitimate and more realistic way of protecting specially cherished constitutional values and principles against capricious or arbitrary revision. The best example of this is the Ghanaian Constitution which distinguishes between specially entrenched provisions and entrenched provisions. An examination of these specially entrenched provisions shows that most of the values and principles protected are the same or similar to what is contained in the unamendable provisions in Francophone and Lusophone constitutions. The Ghanaian Constitution makes the process

of amending the specially entrenched provisions quite protracted and difficult. Similar distinctions, with more protracted requirements being made for amending constitutional provisions considered as particularly important or fundamental, are found in the constitutions of Botswana, Ethiopia, Lesotho, Mauritius, Nigeria, and Tanzania, although the degree of effectiveness varies from one constitution to the other.[60] A better approach to the concept of unamendable provisions is to strictly regulate and control the manner in which amendments can be done to make them more stringent, rather than attempt to do the impossible: to immortalize what simply cannot be immortalized.

The last row in Table 3.2 provides an indication of the number of times that some constitutions have been amended. If the goal of modifying provisions dealing with constitutional amendments in the 1990s was to reduce the frequency of amendments and hopefully enhance the prospects for constitutional stability and durability, then the evidence from some countries suggests that this is not yet happening. To put this evidence in perspective, we should look at the revision record of two of the oldest constitutions in the world. The US Constitution of 1789, which is generally regarded as the oldest in the world, has been amended only 27 times. On the other hand, the Norwegian Constitution of 1814, which is the second oldest, has undergone about 200 amendments.[61] This can be contrasted with the revision record of a number of African constitutions. Between 1991 and 2003, 79 articles of the 120 articles of the Gabonese Constitution were amended.[62] Some articles were amended as many as three[63] or four[64] times during this period. In the case of Burkina Faso, between 1991 and 2009, the Constitution was amended four times by law and five times by presidential decrees. Equatorial Guinea amended 23 of the 104 articles in its Constitution between 1982 and 1998. Perhaps the most interesting case is that of Tanzania where 100 articles of the 152 articles of its Constitution have been amended. With such frequent and radical piecemeal amendments, one wonders whether there can be either constitutional stability or coherence in the text. There are too many factors that come into play and prevent any hard-and-fast conclusions that the frequency or otherwise of constitutional amendments may or may not be an accurate reflection of general satisfaction with the constitution and an indication of constitutional stability. For example, as noted above, there may be many countries, besides Cameroon, which may have "radically changed" their constitutions simply by the government ignoring provisions that it does not like. This by no means makes such a constitution

stable. The example of Nigeria further underscores this point. The country is presently operating under a 1999 constitution that was handed over by the military and which the citizens can hardly identify with. In spite of general dissatisfaction with it and persistent demands for its revision, there have only been three successful amendments in 12 years.

Despite its reasonable durability, if the average lifespan of 19 years[65] for constitutions is to be believed, it can hardly be described as a constitution that guarantees stability. Serious disagreements, mainly within the ruling party have made necessary constitutional changes problematic. South Africa, by contrast, until 2010 was considered to have one of the most modern state-of-the-art constitutions not only in Africa but in the world. In spite of this, within a relatively short period of 15 years, it has been revised 16 times, an average of once every year. There would probably have been more because of the dominance in Parliament of the African National Congress, but the vigilance and incessant pressure of civil society groups in South Africa have considerably helped to limit the number of formal amendments. Besides this, as pointed out earlier, there are numerous ways in which the South African Constitution has been informally changed.[66] It is therefore clear that the link between constitutional change, constitutional durability, and constitutionalism is not an easy one to make.

Conclusion

African independence constitutions were pretty fragile and technically defective documents which inevitably contributed to the political turmoil and resulting economic crisis that made it impossible to build stable constitutional and democratic polities on the continent. These technical defects made it easy for unscrupulous dictators to easily and quickly rewrite the constitutions to suit their selfish designs to monopolize political power. The post-1990 constitutional designs have in many respects and in diverse ways tried to correct some of these defects, particularly with respect to controlling and limiting the freedom to amend the constitution. However, as the preceding analysis has shown, whilst there have been tremendous improvements, there remain a number of weaknesses. It is no surprise, therefore, that in spite of the presence of provisions in these new constitutions attempting to limit and control the ability of governments to alter constitutional provisions, many African leaders still continue to exploit the fragility of the democratic transition as well as some of the flaws in the new or revised constitutions to make changes that seek to perpetuate their hold on power.[67]

Although there is a need for a more comprehensive study to determine the actual relationship that exists between the difficulties of amending a constitution and the frequency of constitutional amendments on the continent, a number of studies suggest that the more difficult the process of constitutional amendment, the fewer the number or frequency of amendments. Put differently, the easier the amendment process, the higher the rate of amendments.[68] These studies also suggest that making the amendment process too difficult is an inefficient way to limit the frequency of amendments. The challenge therefore is to design a process which neither makes it too easy nor too cumbersome as to block unavoidable constitutional reforms that are needed to adjust to changing social, economic, and political realities. In considering some of the ways in which present constitutional amendment processes need to be improved to enhance their effectiveness, it is necessary to also take into account the present realities on the continent. This means that the constitutional amendment process must try to preempt the ominous threats of dictatorship that have been revived through the regular rigging of elections, and the exploitation of incumbency using the emerging dominant political parties within the polity. Bearing this in mind, it can be suggested that the success or failure of any particular form of constitutional amendment formula or procedure may well not depend on how frequently or infrequently it enables amendments to be adopted, but rather on how these amendments actually reflect the will of the people. In other words, constitutional amendment provisions that aim to promote constitutionalism must strike a fine balance between constitutional growth, durability, and stability on one hand and popular sovereignty on the other. Rigid and inflexible constitutions which provide no avenue for changing social, economic, and political conditions or adjusting the constitution to take account of recent innovations in constitutional design are just as bad as completely flexible constitutions that can be easily changed to suit the political convenience of transient majorities. In finding a balance between rigidity and flexibility, the following points need to be noted.

First, that the initiative for amending the constitution should be open to all, especially members of parliament. Proposals which secure 1/3 support from the members of parliament should be considered admissible for full consideration and debate.

Second, before parliament begins to consider any proposal for amending the constitution, it should be published in the official *Gazette* for at least four months to give most citizens an opportunity to acquaint themselves with the proposals and to contribute meaningfully to the discussion.

Third, to ensure that there is sufficient time for debate in parliament, it may be necessary to provide a minimum time frame of a month or more for the different stages of the debate in parliament. It is unlikely that a constitutional amendment will be of such a nature that it needs to be rushed through parliament.

Fourth, because of the threat posed by the emerging phenomena of dominant parties, the level of majority required needs to be reconsidered. It is not unrealistic to provide for a 2/3 affirmative vote followed by a referendum with specification that at least 2/3 of those qualified to vote approve of the change. In the case of the very important principles or values, or what is referred to as "specially entrenched provisions" in some constitutions and "unamendable" provisions in others, the referenda stakes could be raised by requiring an affirmative vote of 3/4 of all those qualified to vote. The aim should be to neutralize the impact of dominant parties and ensure that any changes to the constitution have a cross-party consensus and wide community support.

It is contended that an amendment process designed along these lines is likely to be a more effective check against the frequent arbitrary changes to constitutions by opportunistic leaders masquerading under multiparty democratic elections to prolong their stay or the stay of their party in power by, for example, changing the provisions imposing term limits, or manipulating electoral rules and management of elections. In this regard, well-designed constitutional amendment processes are crucial to enhancing the prospects for constitutionalism, constitutional stability, and durability in Africa. Ultimately, a vigilant civil society that is prepared to fight for its rights is not only necessary to counter the machinations of transient self-seeking majorities but also necessary to ensure that the constitution is not ignored or abused.

Notes

1. For a detailed discussion of the concept of constitutionalism and its core elements, see Fombad 2007, 1, and the literature cited there.
2. See, for example, Rasch and Congleton 2006, 319–341.
3. This is the case in the constitutions of almost all Francophone African countries. For example, art. 99 of the Mauritanian Constitution of July 12, 1991; arts. 218–220 of the Constitution of the Democratic Republic of the Congo of Feb. 18, 2006; arts. 116–118 of the Gabonese Constitution; and arts. 223–226 of the Chad Constitution of March 31, 1996.

4. See, for example, art. 59 of the Constitution of Eritrea of May 23, 1997; art. 105 of the Constitution of Ethiopia of Dec. 8, 1994; §§ 195–197 of the Constitution of Malawi of 1994; arts. 198–199 of the Constitution of Mozambique of Nov. 30, 1990; arts. 131–132 of the Constitution of Namibia of Feb. 9, 1990; and § 74 of the Constitution of South Africa of 1996.
5. See, for example, § 89 of the Botswana Constitution of 1966; § 47 of the Constitution of Mauritius of Mar. 12, 1968; §§ 98–99 of the Constitution of Tanzania of 1977; and § 52 of the Constitution of Zimbabwe of 1980.
6. For a discussion of this, see Lutz 1994, 355, 356.
7. See Lutz 1994.
8. See Elkins, Ginsburg, and Melton 2009, 55.
9. See Sturm 1970.
10. See Strauss 2001, 1457.
11. See Vermeule 2004
12. See Aguda 1992, 166; Warren 1958, 103. Some argue that the constitution is for the living and the present generation should no longer be ruled by the dead hand of their ancestors. See McConnell 1998, 1127–1128.
13. See McConnell 1998, 357.
14. Part of a series of exchanges with James Madison and is quoted in ibid., 1.
15. Letter to Samuel Kercheval, July 12, 1816, quoted by Elkins et al. 2009, 1.
16. As Lutz 1994, 356 rightly points out, "the entire idea of a constitution rests on an assumption of human fallibility, since, if humans were angels, there would be no need to erect, direct, and limit government through a constitution."
17. Samuel Huntington coined the expression in *The Third Wave: Democratization in the Late Twentieth Century* (1991), 15–16. He defines a "wave of democratization" simply as "a group of transitions from non-democratic to democratic regimes that occur within a specified period of time and that significantly out-number transitions in the opposite direction during that period." He identifies two previous waves of democratization: a long, slow wave from 1828 to 1926, and a second wave from 1943 to 1962. Most consider the "third wave" to have started in the 1970s, although it only reached African shores in the late 1980s and early 1990s, in what Larry Diamond and others, such as Julius Ihonvbere and Terisa Turner, call "second liberation" or "second revolution." See Diamond 2001. See also Diamond 1996, 20–21; Diamond et al. 1997; and Ihonvbere and Turner 1993, 350. For the meaning of the rather complex concept of "constitutionalism," see Fombad 2008 and Henkin 1998, 11.
18. See *Attorney-General v. Dow*. [1992] B.L.R. 119 (Botswana), at 129.
19. See Twomey 2011; Rasch and Congleton 2006; Colantuono 1987, 1473–1485; Elkins et al. 2009, 74–76 and 108–109.
20. Some examples in America are discussed by Williams 1999, 1074–1078.

21. See Vermeule 2004, 1. See also Strauss 1996, 877.
22. See also the 1996 Constitution of Central African Republic, which provided for a Senate that has never been established.
23. For example, during the debates leading to the first amendment of the 1999 Nigerian Constitution, it was widely argued that the urgent problem that needed to be addressed was not the amendment of certain provisions of the constitution but rather the full implementation of the constitution as it is. See *Daily Champion* 2011.
24. See De Klerk 2010.
25. Some of these countries still follow the inherited constitutional council method of constitutional adjudication which limits jurisdiction to pre-promulgation review of constitutionality of laws before a quasi-administrative body composed of people who need not be jurists. These bodies usually have no jurisdiction to deal with concrete violations of the constitutions.
26. At the time of writing this chapter, the so-called Arab spring which started with uprisings that ended in the removal of Zine El Albidine Ben Ali of Tunisia and Hosni Mubarak of Egypt had spread to other Arab countries in Northern Africa. The situation in the whole region was unsettled, and even Morocco that was relatively peaceful was in the process of revising its constitution.
27. Rasch and Congleton point out that less than four percent of the world's constitutions lack provisions on formal amendment procedures (2006, 536).
28. See Constitution of Dec. 11, 1969.
29. See arts. 103–4 of the Constitution of 1982.
30. See art. 127 of the Constitution of 1984.
31. See art. 161 of the Constitution of 1991.
32. See art. 218 of the Constitution of 2006.
33. See art. 257 of the Constitution of 2010.
34. 30,000 out of a population of 16,241,811 (Jan. 2011 estimates) or 0.18 percent of the population. See Burkina Faso 2016.
35. 100,000 out of a population of 71,712,867 (July 2011 estimates) or 0.13 % of the population. See CIA World Fact Book on DR Congo 2016.
36. From a population of 40,145,899 (Apr. 2011 estimates). See http://www.trueknowledge.com/q/ what_is_the_population_of_kenya_2011.
37. The exception to this is § 47(3)(b) of the Mauritian Constitution of 12 March 1968, which with respect to the amendment of certain specially entrenched provisions of the Constitution, require for approval the affirmative vote of all the members of the Assembly.
38. See art. 105 of the Constitution of Ethiopia of Dec. 8, 1994; § 9 of the Nigerian Constitution of 1999; and § 74 of the South African Constitution of 1996.

39. It is, however, worth noting Suttner's definition, in which he states that a dominant-party system or one-party dominant system is a system where there is a category of parties/political organizations that have successively won election victories and whose future defeat cannot be envisaged or is unlikely for the foreseeable future. In Suttner 2006, 277.
40. See art. 177 of the Constitution of Algeria of Nov. 19, 1976; art. 224 of the Constitution of Chad of Mar. 31, 1996; and § 196 of the Constitution of Malawi of 1994.
41. See, e.g., art. 124 of the Constitution of Chad of Mar. 31, 1996; art. 116 of the Constitution of Gabon of Mar. 26, 1991; and art. 103 of the Senegalese Constitution of Jan. 7, 2001. Also note art. 135 of the Constitution of Niger of July 18, 1999, which allows for a referendum only if the amendment is not approved by a 4/5 majority of the members of the National Assembly. See to a similar effect, art. 132(3) (a) of the Namibian Constitution of 1990.
42. See art. 103 of the Constitution of Equatorial Guinea of Jan. 17, 1996; art. 141 of the Constitution of Madagascar of August 19, 1992; and art. 103 of the Constitution of Morocco of 1996.
43. See § 47(3)(a) of the Constitution of 1968.
44. See art. 132(3)(c) of the Constitution of 1990.
45. See Twomey 2011, 10.
46. See § 89(2) of the Botswana Constitution of 1966; art. 79(1) of the Constitution of Zambia of Aug. 24, 1991; and § 52(2) of the Zimbabwe Constitution of 1980.
47. See, for example, art. 236 of the Angolan Constitution of 2010, which lists 11 aspects of the constitution which any revision of the constitution "must respect."
48. See, for example, art. 165 of the Constitution of Burkina Faso of 1991; art. 225 of the Constitution of Chad of Mar. 31, 1996; art. 117 of the Constitution of Gabon of 1991; art. 118 of the Constitution of Mali of 1992; and art. 106 of the Constitution of Morocco of Sept. 13, 1996.
49. See art. 104 of the Constitution of Equatorial Guinea of 1982; and art. 142 of the Constitution of Mozambique of 1990.
50. See art. 131 of the Namibian Constitution of 1990 which states:
    No repeal or amendment of any provisions of Chapter 3 hereof, insofar as such repeal or amendment diminishes or detracts from the fundamental rights and freedoms contained and defined in that Chapter, shall be permissible under this Constitution, and no such purported repeal or amendment shall be valid or have any force or effect.
51. It is, however, worth noting that, although the Indian Constitution permits the amendment of all provisions, the Indian Supreme Court has in a series of decisions imposed a limit on this power. For example, in His Holiness

Kesavananda Bharati Sripadagalvaru v. State of Kerala, AIR 1973 SC 1461 (India), the Supreme Court held that although any provision of the Indian Constitution could be amended, this could not be done in such a manner as to alter the "basic structure and framework" of the constitution. An attempt by the Indian Parliament to remove the court's jurisdiction and restore its full powers to amend the constitution through the enactment of the 42nd amendment to the Indian Constitution was rejected by the Supreme Court in Minerva Mills Ltd v. Union of India, AIR 1980 SC 1789 (India). The court declared the amendment as invalid on the grounds that Parliament could not use its limited power of amendment to confer on itself absolute powers of amendment.

52. See, also art. 91(1) of the Seychelles Constitution of 1993, which states that the amendment of certain provisions must be approved by a majority of 60 percent at a referendum before being submitted to Parliament where it must be approved by at least a majority of 2/3. Although definitely less exacting than the Mauritian provision, it also renders the amendments of such provisions difficult.
53. See, for example, art. 226 of the Constitution of Chad of 1996; art. 219 of the Constitution of DR Congo of 2006; and art. 116 of the Constitution of Gabon of 1991.
54. See, for example, arts. 236 and 237 of the Angolan Constitution of 2010; art. 156 of the Benin Constitution of 1990; art. 165 of the Burkina Faso Constitution of 1991; art. 64 of the Cameroonian Constitution of 1996; art. 108 of the Central African Constitution of 2004; arts. 219 and 220 of the DR Congo Constitution of 2006; art. 88 of the Djibouti Constitution of 1992; art. 104 of the Equatorial Guinea Constitution of 1982; art. 116 of the Gabonese Constitution of 1991; and art. 106 of the Moroccan Constitution of 1996, which also specifically mentions the state system of monarchy.
55. This is an irony in the French Constitution because art. 28 of the Declaration of the Rights of Men and the Citizens of 1793, which is incorporated by reference into the French Constitution states: "A people have always the right of revising, amending and changing their constitution. *One generation cannot subject to its laws future generations*" (emphasis added).
56. See art. 89 of the French Constitution of 1958; and art. 79(3) of the German Constitution (the Basic Law) of May 23, 1949. See generally Finer, Bogdanor, and Rudden 1995.
57. An example of this is provided by Elkins, Ginsburg, and Melton (2009, 86), who point out that the German Constitution of 1871 spends 11 of its 78 articles detailing aspects of the railroad and telegraph systems. The Swedish Constitution of the same era mentions reindeer herding. All these are matters which are hardly pressing concerns in the twenty-first century to deserve being mentioned in the constitution.

58. See Jayawickrama 1992, 45.
59. The German Constitutional Court has, however, not hesitated to invalidate any piece of legislature which went contrary to the eternity provisions in the German Constitution. See generally Kommers 1997.
60. See § 89 of the Botswana Constitution; art. 105 of the Constitution of Ethiopia; § 85 of the Lesotho Constitution; § 9 of the Constitution of Nigeria; § 74 of the South African Constitution; and § 98 of the Tanzanian Constitution.
61. It must be pointed out here that during this period, Sweden, which was previously part of Norway, broke off in 1905.
62. These were carried out in 1994, 1995, 1997, 2000, and 2003.
63. See arts. 9, 11, 78, 116, and 118.
64. See arts. 84 and 110.
65. The authors, Elkins et al. 2009, discuss the exchanges between James Madison and Thomas Jefferson on constitutional life span in which the latter in arguing that constitutions should be rewritten every generation proposed an expiration date of 19 years for each constitution. They then point out that "the life expectancy of a national constitution in our data is 19 years, precisely the period Jefferson thought optimal" (ibid., 2). They explain that this is calculated from a baseline survival model as the age before which 50 percent of constitutions will have died (ibid., 55 nn. 4 and 22).
66. See De Klerk 2010, 25.
67. Perhaps the most controversial example of this has been the recent attempts in many countries to over-ride the presidential term limits that now limit leaders to two terms in office. For a full discussion of this, see Fombad and Inegbedion 2010, 1.
68. See, for example, Ackerman 1999, 415; Lutz 1994, 6; and Anckar and Karvonen 2002.

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CHAPTER 4

Promoting Gender Equality in the Era of Democracy and Constitutionalism in Southern Africa

Eunice N. Sahle

Since the 1990s, various countries on the African continent have instituted important political and institutional changes. These developments have contributed to the expansion of the political space in ways that were difficult to imagine in countries such as Malawi, Kenya, Nigeria, South Africa, and Ghana in previous decades. Such expansion of political space has opened opportunities for the emergence of active practices of citizenship, as evidenced by the rise of numerous social movements in various parts of the African continent that continue to challenge socio-cultural, political, and economic inequalities.[1]

Further, political changes have resulted in new constitutional frameworks. A common feature of these constitutions is their incorporation of norms aimed at addressing gender inequality on the African continent. The robust Bill of Rights in the 1996 Constitution of the Republic of South Africa embodies such a development. For example, in Article 9(1), the constitution states "everyone is equal before the law and has the right to equal protection and benefit of the law."[2] Further, the constitution declares that "the state may not unfairly discriminate directly or

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indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."[3] The right to equality is one of the non-derogable rights in the constitution.[4] As such, it demonstrates the embeddedness of the norm of equality in the era of democracy and constitutionalism in South Africa.

Given the centuries of political, structural, and socio-cultural forms of inequality based on race, gender, and other social categories, which were sanctioned by the state in South Africa, the centering of the normative principle of equality is an important development. In terms of gender inequality, the constitution protects the reproductive rights of all under its Article 12(2)(a) in focusing on "the right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction."[5] Further, the 1996 Choice on Termination of Pregnancy Act (CTPA)[6] strengthened these rights. By dismantling the 1975 Abortion and Sterilization Act, the CTPA promotes women's rights by extending "freedom of choice by affording every woman the right to choose whether to have an early, safe and legal termination of pregnancy according to her individual beliefs."[7] In addition, it articulates an expanded view of women's reproductive rights. For the CTPA, these rights include: "universal access to reproductive health care services, including family planning and contraception, termination of pregnancy, as well as sexuality education and counselling programmes and services."[8]

Equality is one of the principal norms underpinning the Malawian Constitution, which entered into force in 1995 following the country's transition to multi-party democracy in 1994. Articulating its vision of "gender equality for women and men," the constitution calls on the state to "actively promote" national policies that "address social issues such as domestic violence, security of the person, lack of maternity benefits, economic exploitation and rights to property."[9] In its Article 24(1) and (2), the Malawian Constitution pays specific attention to the interdependent nature of the human rights of women and reiterates their equality with men under the law.[10] Mozambique's 1990 Constitution not only calls on the state to "promote, and support and value" women's involvement in all spheres, but also states that it "hold[s] in high esteem the participation of women in the national liberation struggle."[11] The constitution's inclusion of women's role in that struggle departs from the long tendency of erasing women's contributions to historical developments.

The emergence of the first democratic constitution in 2010 in Kenya signaled a new era in struggles for political, economic, and gender equality, and for socio-cultural mutual recognition in the country. In its Article 27(3), the constitution declares that women should have equal rights with men.[12] The constitution further states that the state "shall not discriminate directly" on bases such as sex, ethnicity, religion, color, disability, and other foundations of political, economic and social inequalities.[13] In efforts to promote women's civil and political rights, the constitution stipulates that "not more than two-thirds of the members of elective or appointive bodies shall be of the same gender."[14] Zambia's 2016 amended constitution shows the continuing emergence of normative frameworks underpinned by principles of equality in contemporary Africa. Its Article 8(d) includes the norms of equity, human dignity, and non-discrimination as part of the country's "national values and principles,"[15] while its Article 231(1) calls for the creation of a commission on "Gender Equity and Equality."[16]

During the period under review, national constitutions have not been the only normative instruments that have emerged in Africa calling on states to promote gender equality. On the continental level for example, the 2000 African Union's (AU) Constitutive Act[17] has gender equality as one of its core norms. Its 2003 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa provides the normative framework of AU's current position on gender equality. In its Article 2(1) for instance, it assigns duties to member states to institute policy instruments and other processes aimed at eliminating "all forms of discrimination against women."[18] Further, in its Article 4(b), it directs member states to create legal frameworks that "prohibit all forms of violence against women," regardless of whether it occurs in "private or public."[19] The article's approach to sources of gender-based violence in a non-binary manner breaks the historical private versus public dichotomy when it comes to addressing structures generating and reproducing violence against women in the private sphere. As such, the AU's 2003 Protocol's approach to gender-based violence marks an important turn in debates concerning this phenomenon, which generates multiple harms for women and girls all over the world.

Beyond the African continent, developments at the global level have also been important in generating normative ideas concerning gender inequality and in the diffusion of such norms. Leading among such developments is the 1995 United Nations (UN) Beijing conference on women, titled

Action for Equality, Development and Peace.[20] That conference resulted in the emergence of the Beijing Declaration and Platform for Action (BDPA), and since then, the promotion of gender equity has emerged as a global policy frame.[21] As far as gender inequalities are concerned, the BDPA called on states, non-governmental organizations and other social agents to pay attention to the following areas, which from its perspective were of critical concern: women and the environment; women in power and decision-making; the girl child; women and the economy; women and poverty; violence against women; human rights of women; education and training of women; institutional mechanisms for the advancement of women; health; women and the media; women and armed conflict.[22] Since its emergence, the evolution of the BDPA has been characterized by a dynamic review and appraisal process[23] involving a range of actors, leading among them: local women's movements and organizations; representatives of national gender machineries; regional organizations; and the UN.[24]

It is in the preceding context that this chapter examines the Southern African Development Community's (SADC) project of promoting gender equality. The latter is embedded in SADC's 2008 normative instrument, titled *Protocol on Gender and Development* (PGD). As a regional bloc, SADC emerged in 1992 with the signing of its founding Treaty by 15 member states, which include: Angola; Botswana; Democratic Republic of the Congo; Lesotho; Madagascar; Malawi; Mauritius; Mozambique; Namibia; Seychelles; South Africa; Swaziland; Tanzania; Zambia; and Zimbabwe. From its founding Treaty, addressing gender inequalities has been a theme in SADC's framework for regional integration. Article 5(1k) of its founding Treaty, for example, lists "gender" mainstreaming as one of its goals. Further, SADC's 1997 *Declaration on Gender and Development* (DGD) includes the "disparities between women and men"[25] as one of its issues of deep "concern."[26] Further, in the PGD, SADC categorizes gender as one of its "cross-cutting issues."[27]

While the promotion of gender equality is not a new area of focus for SADC, its 2008 PGD offers a more substantive policy frame. Overall, it frames broader areas of concern as far as SADC's strategies for gender equality are concerned. These include but are not limited to: constitutional and legal rights; governance; economic empowerment; the girl and boy child; and gender-based violence. PGD's framing of broader areas of focus and its status as a legally binding instrument makes it a more substantive policy frame when compared to SADC's 1997 DGD. As such,

even though it is underpinned by dilemmas, some of which the chapter highlights, the analysis suggests that it offers a more substantive normative instrument for mapping out public policy responses to address gender inequalities. Further, it provides opportunities for contestations about these inequalities by civil society groups and institutions involved in promoting gender equality. The chapter has three sections. It begins by exploring the underlying strategies of SADC's gender equality project by examining substantive articles of the PGD through the lens of the "three-legged equality stool."[28] In its second section, it highlights some dilemmas underpinning SADC's gender equality project with a focus on its economic empowerment objective. The last section provides a brief conclusion.

SADC's 2008 Protocol on Gender and Development: Strategies for Gender Equality

In its discussion of PGD's gender equality strategies, the chapter draws on Christine Booth's and Cinnamon Bennett's concept of the "three-legged equality stool" (equality stool).[29] Their equality stool has three approaches: equality perspective; women's perspective; and gender perspective. As will be highlighted shortly, underlying these perspectives are distinct feminist political theory traditions. What the chapter finds analytically productive in Booth's and Bennett's equality stool lens is its articulation of the three perspectives as interdependent,[30] and not as silo strategies for gender equality. As the authors state, the three perspectives "work together to achieve gender equality in all social arrangements, which is the necessary underpinning of a more egalitarian society."[31] How the synergy of the equality stool translates in practice in a given national setting will of course be informed by local conditions and global dynamics in a given juncture. As Booth and Bennett posit, "the dynamic nature of historical development means that it is likely that one or more of the perspectives will be less developed than the others, at different times and in different spatial locations."[32] Such an approach suggests that, while regional normative instruments and global developments such as the BDPA provide foundations for the transformation of pre-existing gender arrangements, such processes are also "path-dependent," as the work of Sylvia Walby[33] on the emergence of multiple gender regimes in the context of the European Union indicates. The analysis turns to a further elaboration of the equality stool articulated by Booth and Bennett.[34]

Three-Legged Equality Stool

The equality treatment perspective's foundational ideas are rooted in the evolution of liberal feminist theoretical debates, which emphasize individual autonomy, equality, and neutrality.[35] As a strategy for gender equality, its objectives are to support policies that promote "equal opportunities" and "rights" for both men and women.[36] The underlying principle for the equality treatment perspective is that women and men are not different. From such a perspective, forms of historical and contemporary marginalization of women in all societies don't emerge out of an innate difference between them and men. Rather, their roots are to be found in oppressive social norms, such as patriarchy, that legitimize "inequality between the sexes."[37]

While taking different forms, in light of different socio-cultural and political histories, over time such norms become normalized and accepted as natural. Their normalization emerges as one core source of gender-based oppression. For example, they play a major role as mechanisms of social and ideological control in the everyday experiences of most women. In addition, they enable the emergence of social, political, and economic conditions that limit opportunities and equality of outcomes for the majority of women when it comes to their participation in their societies and the realization of their rights. On its own, the equality perspective is quite limited. In light of its philosophical roots, its focus is the promotion of "equal opportunity" for women and men and not "equality of outcome."[38] Thus, its approach to gender equality is not aimed at significant restructuring of structures that generate inequalities, but at promoting policies that provide opportunities for women to achieve their goals. As such, while providing a space for women to participate in historically situated social orders, it enables the reproduction of sources of gender inequalities.[39] Overall, its hallmark is integrating women into current social, political, and economic architectures without major changes.

The women's perspective approach to gender equality is underpinned by concerns of diverse thinking in radical and cultural feminist theorizing.[40] The perspective contends that women and men are different. However, such "difference" is not an indication of women's "inferiority."[41] What is important from a women's perspective lens is the recognition and valuing of such difference.[42] As such, challenging "male normative identities and cultures"[43] is central to the women's

perspective. As a gender equality strategy, the women's perspective advocates for the creation of special programs and policies geared toward addressing women's "past historical and structural oppression."[44] One of the major limitations of the women's perspective is its essentialist approach to social categories. Its simplistic representation of women ignores their different histories, social class positioning, sexual orientation, religion, race, ethnicity, and other social markers. Consequently, a gender equality policy frame that is solely underpinned by the women's perspective is a limited approach in the ongoing struggles against gender-based forms of oppression. Overall, critics of women's perspective argue that its focus on differences enables the reproduction of patriarchal practices and conceptualizations of the social world.[45] In the main, an incorporation of an intersectionality[46] lens, which takes into consideration the complexity of social identities would greatly strengthen the women's perspective's conceptualization of gender-based oppression and its framing of gender equality policies.

While emphasizing different issues, the gender perspective articulated in Booth's and Bennet's work shares some similarities with the concept of "displacement" articulated by Judith Squires[47] in her classification[48] of approaches to gender equality in the field of political theory. As such, its assumptions are influenced by debates marking the poststructuralist turn in social theory.[49] Overall, the gender perspective calls into question the gendering of the social world.[50] As such, it contests social categories such as women or men for, from its perspective, the social construction of such identities has contributed to the emergence of a "gendered world"[51] characterized by inequalities. In efforts to address the gendered nature of economic and political policies, the gender perspective calls for "gender-sensitivity"[52] in policy formation and "analysis."[53] The underlying goal for the gender perspective is to push for policies that contribute to the emergence of societal orders characterized by "a fairer distribution of human responsibilities."[54]

Like the gender analytical lens in the field of international development studies,[55] in debates concerning gender equality, the gender perspective challenges approaches to the latter that are underpinned by essentialist assumptions. The women's perspective is an example of such an approach for it fails to problematize social categories such as women and men. However, a gender perspective that fails to take cognizance of the complexity of women's social identities that result from class and other social, historical, and structural factors sheds limited light on the

multiple sources of gender inequality.[56] Thus, a critical examination of how normative instruments such as the PGD frame their gender equality projects is crucial.

The foregoing discussion has highlighted central aspects of the equality stool conceptualized by Booth and Bennett.[57] Further, it has signaled the tensions underlying each of the stool's perspectives. As such, the chapter's analysis suggests that, while each of the approaches has its merit, none of them can offer a substantive framing of strategies for gender equality on their own. However, under favorable structural and other conditions, they can offer a promising framing foundation for public policies aimed at addressing gender inequality if implemented in concert. Drawing on these insights, the analysis turns to an exploration of the PGD's gender equality strategy through the lens of the equality stool.

PGD's Strategies for Gender Equality

The equality stool approach provides a generative heuristic lens through which to explore the gender equality strategies underpinning the PGD.[58] While the PGD has over 30 articles, the aim of this discussion is not to explore all of them. Rather, it is to highlight a representative sample of the substantive articles in the PGD. The discussion highlights constitutive elements of SADC's gender equality project embedded in the following PGD Articles: 4—constitutional rights; 5—affirmative action; 6—domestic legislation; 7—equality in accessing justice; 13—participation; and 17—economic empowerment.

Constitutional and legal orders are political social arrangements that can contribute to the emergence and reproduction of gender inequalities. However, they can also be sites of societal transformation. Such a critical and de-naturalized approach to constitutional and legal orders in the SADC region is evident in the framing of Article 4 of the PGD. In its Article 4(1), it calls on member states to "enshrine gender equality and equity in their Constitutions."[59] Anticipating clawback clauses and other measures that tend to constrain and for the most part make constitutionally guaranteed rights meaningless, it further stipulates that states should guarantee that rights aimed at gender equality "are not compromised by any provisions, laws or practices."[60]

The PGD's Article 4(2) mandates states to "implement legislative and other measures to eliminate all practices which negatively affect the fundamental rights of women, men, girls and boys, such as their right to

life, health, dignity, education and physical integrity."[61] Further, its Article 6(1) calls on states to "review, amend and or repeal" domestic legislation frameworks and other policies that enable discriminatory practices on the basis of "sex or gender."[62] Further, Article 6(2c) calls on member states to "enact and enforce legislative and other measures to ensure equal access to justice and protection before the law."[63] In addition, it advocates for special measures focusing solely on women, such as the eradication of legislative measures that place women under the "minority status" category, and "practices" that limit them from realizing their rights.[64]

While not the only articles indicating PGD's concerns with economic sources of gender inequality, Articles 15, 17, 18, and 19 highlight these issues in more detail. Signaling an understanding of the gendered characteristic of economic and social reproduction processes, PGD calls for an examining of the "multiple roles" that women play in society.[65] As it declares in its Article 16, the objective of such an exercise would be to map out public policies aimed at addressing the "burden[s]" that mark women's lives given their various "roles" in their societies.[66] In terms of macroeconomic policy formation and practice, its Article 15(1) and (2) respectively focus on issues of "equal participation" in such processes and on being "gender sensitive" in the area of allocation of budgets at all "levels, including tracking, monitoring and evaluation."[67] PGD's Article 17(1) focuses on economic empowerment. In that regard, it calls on local states to provide equal opportunities in the economic arena and to recognize women's contributions in "formal and informal sectors."[68] Indicating an attention to specific needs for women in light of their historical and contemporary forms of marginalization, Article 17(3) calls for the introduction of "affirmative" action "measures to ensure that women benefit equally from economic opportunities, including those created through public procurement processes."[69]

Like in other parts of the world, gender-based violence is a common feature of societies in the SADC region. In the case of South Africa, sexual violence and other forms of gender-based violence remain a major issue, a reality that some scholars refer to as the "dark side" of the post-apartheid ideology of a "rainbow" nation.[70] As the 2015 SADC's Gender Protocol Barometer, South Africa indicates, "more than three quarters (77%) of women in Limpopo; 51% of women in Gauteng; 39% of women in the Western Cape and 37% of women in KwaZulu-Natal report[ed] experiencing some form of gender-based violence."[71] Such violence takes multiple forms. Further, experiences of gender-based violence constrain the ability

of women to develop "the capabilities" that would enable them to "choose a life" they have "reason to value."[72] Arguing along these lines, Martha Nussbaum posits that "violence and the threat of violence greatly influence a woman's ability to participate in politics, to seek employment and to enjoy a rewarding work life, and to control both land and movable property."[73]

In light of the multiple harms that gender-based violence generates in various parts of the world, SADC's policy measures aimed at addressing such violence as part of its gender equality stool are an important development in the struggles for the emergence of just and equitable social, political, and economic orders in the region. SADC frames its position on gender-based violence briefly in Article 5(2d) of the PGD.[74] However, it provides a more expansive framing in the PGD's Article 20.[75] In its Article 20(1 a–b), the PGD calls on states to institute and "enforce legislation prohibiting all forms of gender based violence" and to make sure that "perpetrators" of such violence face the law.[76] The health dimensions of gender-based violence are also of concern in the PGD. For example, it calls on states to provide psychological and medical support for victims of gender-based violence.[77] Additionally, the establishment of institutional and policy mechanisms that are "gender sensitive"[78] and that attend to the multiple effects of practices of gender-based violence is embedded in the PGD.

The preceding discussion indicates the interdependent nature of the equality stool in PGD's framing of its strategies for gender equality. Take for instance PGD's Article 4, which focuses on equal realization of constitutional and legal rights. The article's directives on that front echo the equality perspective approach to social, political, and economic inequalities. In light of the logic of the equality perspective, constitutional reforms and legislative measures provide equal opportunities for women, men, girls, and boys to realize their constitutional rights. Yet, for the objectives of Article 4(1) and (2) to materialize in practice, strategies that pay attention to the realities of the historical and contemporary marginalization of the majority of women in the region in the public sphere have to be considered. Such realities include, but are not limited to, economic inequalities and patriarchal norms that construct women in general as apolitical and weak. As such, in its Article 5, PGD directs states to institute "affirmative action measures with particular reference to women in order to eliminate all barriers which prevent them from participating meaningfully in all spheres of life and create a conducive environment for such participation."[79] In addition, while calling on states to "adopt specific legislative measures" to create equitable "opportunities" for participation

in the public sphere, Article 13(2, b–c) directs them to institute specific measures focusing on women, such as "providing support structures for women in decision-making positions."[80] The interdependent nature of the equality stool in the context of PGD strategies for gender equality is also evident in its Article 6, the central concern of which is the elimination of oppressive legislative policies. As indicated earlier, while invoking visions of the equality perspective on gender equality, it also pays attention to what it considers as women's specific needs.

SADC's Gender Equality Project: Trends and Dilemmas

In addition to international normative instruments such as the UN's Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the BDPA, geared to promoting gender equality, since 2008, SADC has had its own instrument: the PGD. The latter frames SADC's strategies for the achievement of gender equality in the region. While underpinned by significant dilemmas, some of which we will highlight in this section, SADC's gender equality project is important in the struggles against gender inequalities. For example, as the preceding highlights from the PGD indicate, the three interdependent elements of the equality stool underpin its framing of strategies aimed at institutional and other sources of gender inequalities. If the latter were implemented in a systematic manner in conjunction with SADC's gender mainstreaming approach, which Article 1(2) of the PGD defines as "the process of identifying gender gaps and making women's, men's, girls' and boys' concerns and experiences integral to the design, implementation, monitoring and evaluation of policies and programs in all spheres so that they benefit equality,"[81] some progress could be made in the struggle for gender equality in the region.

Further, since its emergence, the PGD has become a focal point for national and regional networks involved in struggles against gender inequality. These networks have become important agents in the promotion of the PGD's goals and in broadening its agenda. The Southern Africa Gender Protocol Alliance (the Alliance)[82] represents such a network and it has emerged as an important agent in the evolution of the PGD. For example, between 2010 and 2013, the Alliance petitioned SADC member states to include the theme of "gender and climate change" as part of its focus on gender equality. The Alliance's petition

campaign resulted in the emergence in 2013 of SADC's Protocol on Environment Management for Sustainable Development, which includes a provision for gender equality.[83] The Alliance's work is an example of processes of "frame extension"[84] by civil society actors in various contexts. Such processes refer to "the ways in which social movements either modify" or "extend the dominant frame so as to include their own projects."[85] Overall, with the launching of the PGD, SADC has cemented its position as an institutional norm setter on the issue of gender equality. Nonetheless, like other gender equality projects in other parts of the world, the SADC's own blueprint is characterized by dilemmas. The analysis turns to a discussion of some of these dilemmas and their implications for SADC's gender equality project.

SADC's Economic Empowerment Project: Underlying Dilemmas

Gender Equality in Decision-Making

As highlighted earlier, Articles 15, 17, and 18 of the PGD focus more exclusively on mainstreaming gender in the economic arena. Its Article 15(1) calls on states to "ensure equal participation, of women and men, in policy formulation and implementation of economic policies."[86] In terms of developments in that area, the last few years have seen a positive trend in most countries in the SADC region. For example, the region has seen the emergence of the first woman head of state: her Excellency Joyce Banda, the former President of Malawi. In addition, as Table 4.1 indicates, other women have gained top leadership positions. Further, as Table 4.2 highlights, women have made inroads in parliamentary spaces in various parts of the region. Further, as Table 4.3 indicates, in 2013, two of the countries in the region stood at number 5 and 8, respectively, on the global ranking of the number of women in national parliaments.

In light of the gender imbalance that tends to characterize dominant decision-making sites such as ministries of economic and financial planning, the judiciary, and the presidency, PGD's policies geared to addressing this matter mark an important development. However, the underlying assumptions of the equality treatment perspective that informs Article 15(1)'s

Table 4.1 Women in high-ranking leadership positions

Country	*President*	*Deputy President*	*Prime Minister*	*Deputy Prime Minister*
Malawi	Joyce Banda (2012–2013)	Joyce Banda (2009–2012)		
Mauritius	Ameenah Gurib (2015–Current)	Monique Ohsan Bellepeau (2010–2015)		
Mozambique			Luísa Diogo (2004–2010)	
Namibia			Saara Kuugongelwa (2015–Current)	Netumbo Nandi-Ndaitwah (2015–Current)
South Africa		Phumzile Mlambo-Ngcuka (2005–2008) Baleka Mbete (2008–2009)		
Zambia		Inonge Wina (2015–Current)		
Zimbabwe		Joyce Mujuru (2004–2014)		Thokozani Khuphe (2009–2013)

Sources: Gender Links: For Equality and Justice, on page 92, at: http://genderlinks.org.za/wp-content/uploads/imported/articles/attachments/21171_chap2_baro_2015_govfin2.pdf

policy framing render it more a strategy of including women in the SADC's regional development economic framework, without addressing the power dynamics that govern decision-making spaces. Further, the assumption that all that is needed in the struggle against gender inequalities is to have more women at high levels of decision-making ignores their diverse ideologies, class positioning, and other differences. Women appointed to such decision-making ranks cannot be assumed to represent the concerns of all women simply on the basis of the socially constructed gender identities.

The foregoing discussion is not meant to downplay the urgent imperative of instituting measures that expand opportunities for women in high-ranking decision-making spaces both in the public and private sectors. Such developments have the potential of contributing to changes that augur well for gender equality. For example, in the case of Malawi, the ascendancy of President Banda in 2012 saw the centering of maternal

Table 4.2 Women in parliament in SADC member states

Country	*Women MPs 1997 (%)*	*Women MPs 2000 (%)*	*Women MPs 2006 (%)*	*Women MPs 2009 (%)*	*Women MPs 2012 (%)*	*Women MPs 2012*
Angola	9.7	15.4	12.3	38.2	34.1	75
Botswana	9	18.2	11.3	7.9	9.5	6
DRC	—	—	12	8.4 (L)	10.4	52
				4.6 (U)	4.6	5
Lesotho	12	10.3	14	25	25.8 (L)	31
					27.3 (U)	9
Madagascar	—	—	24	7.87	—	—
Malawi	5.2	8.3	15	26	22.3	43
Mauritius	7.6	7.6	17.1	17.1	18.6	13
Mozambique	28.4	28.6	32.8	39.2	39.2	98
Namibia	19.4	19.2	31	24.4	24.4 (L)	19
					26.9 (U)	7
Seychelles	27.3	24	29.4	23.5	43.8	14
South Africa	27.8	29.8	32.8	42.3	42.3 (L)	169
					32.1 (U)	17
Swaziland	19	7.3	19	13.6	13.63 (L)	9
					40.0 (U)	12
Tanzania	16.3	21.2	30.4	30.4	36.0	126
Zambia	18.1	10	12	14	14	23
Zimbabwe	14	10.7	16	15.2	15.2 (L)	32
					24.7 (U)	23

Sources: National Progress Reports on the Implementation of the SADC Protocol on Gender and Development; National Parliaments; DRC National Gender Report 2011; WIP reports April 2012; SADC Gender Monitor 2001, 2006, 2009. See SADC Gender Monitor 2013, on page 25, at: http://www.sadc.int/files/1413/7701/1684/SADC_Gender_Monitor_english_FINAL.pdf

L—Lower House; U—Upper House

health issues in the public policy agenda and in the national conversation. Once in office, she instituted Malawi's Presidential Initiative for Maternal Health and Safe Motherhood (the Safe Motherhood initiative). During an interview that I conducted with her in Nkhata Bay, Malawi on June 15, 2014, President Banda stressed that her own challenges during one of her pregnancies were a key motivating factor in her creating the Safe Motherhood initiative.[87] Further, in a strategic move aimed at giving it a national and global profile, she placed the initiative in the Presidential office.

Table 4.3 Women in national parliaments—global rankings for SADC member states, July 2013

Regional rank	*Global rank*	*Country*	*Lower or Single house*				*Upper House/Senate/National Council*			
			Election year	*Total seats*	*Women*	*% Women*	*Election year*	*Total seats*	*Women*	*% Women*
1	5	Seychelles[a]	09.2011	32	14	43.8	–	–	–	–
2	8	South Africa[b]	04.2009	400	169	42.3	04.2009	53	17	32.1
3	12	Mozambique	10.2009	250	98	39.2	–	–	–	–
4	20	Tanzania[c]	10.2010	350	126	36.0	–	–	–	–
5	22	Angola	08.2012	220	75	34.1	–	–	–	–
6	38	Lesotho	05.2012	120	32	26.7	06.2012	33	9	27.3
7	47	Namibia	11.2009	78	19	24.4	11.2010	26	7	26.9
8	57	Malawi[d]	05.2009	193	43	22.3	–	–	–	–
9	72	Mauritius	05.2010	69	13	18.8	–	–	–	–
10	89	Zimbabwe	03.2008	210	32	15.0	03.2008	99	24	24.2
11	97	Swaziland[e]	09.2008	66	9	13.6	10.2008	30	12	40.0
12	107	Zambia	09.2011	157	18	11.5	–	–	–	–
13	117	DRC	11.2011	492	44	8.9	01.2007	108	6	5.6
14	124	Botswana	10.2009	63	5	7.9	–	–	–	–

Sources: Inter-Parliamentary Union (IPU) based on information provided by National Parliaments by July 1, 2013. Figures correspond to the number of seats currently filled in Parliament; SADC Gender Monitor 2013, on page 25, at: http://sadc.int/files/1214/0558/8114/SADC_GENDER_MONITOR_2013_-ENGLISH.pdf

[a]The National Assembly is composed of 34 members—25 directly elected and 9 proportionately elected

[b]The figure on the distribution of seats for the Upper House in South Africa does not include the 36 special rotating delegates appointed on an ad hoc basis, and all percentages given here are calculated on the basis of the 54 permanent seats

[c]Same global ranking as Spain

[d]Same global ranking as the United Kingdom

[e]Same global ranking as the Russian Federation. Madagascar is suspended from SADC since 2009, and SADC is engaged in a mediation process

Such positive trends are also evident in Rwanda, where the high number of women in parliament has had a significant symbolic impact.[88] For example, historically, patriarchal norms have expected women to "be silent in public and men to speak on behalf of the entire community," a norm embedded in the following "Kinyarwanda proverb: *Nta nkokokazi ibika hari isake*—Hens do not crow where there is a rooster."[89] With the opening of the public sphere through state feminist projects such as the "implementation of quotas," women's participation in public debates and spaces has expanded,[90] even in rural areas. As Jennie Burnet concludes: "the large number of women in local government, coupled with the clear endorsement of women as political authorities by President Kagame, the RFP [the Rwanda Patriotic Front], and the central government, sent a clear message to rural citizens that women must be accepted as legitimate political agents or local government authorities."[91] The foregoing developments are important for they indicate the potential that high numbers of women in formal political spaces can have in the descriptive, substantive, and symbolic dimensions of political representation. Nonetheless, women in such spaces cannot be assumed to represent the generic interests of all women. In the case of Rwanda, for example, in 2008, "the majority female parliament approved a new labor code that reduced paid maternity leave from eight to two weeks."[92] As these preceding examples indicate, what the analysis is calling attention to is the need for a nuanced approach in the policy framing of gender equality instruments such as the PGD, in light of the diversity of women's experiences, ideologies, and interests. In addition, it is important to remember that when it comes to decision-making spaces, achieving parity in gender political representation doesn't mean the realization of gender equality.

SADC'S Gender Equality Project: Political Economy Context

Beyond its neglect of the complex nature of women's identities, another limitation of SADC's gender equality project, as mapped in PGD's articles focusing on gender equality in the economic arena, is its neglect of the political economy context in which this project is embedded. In what follows, the analysis highlights two political economy trends in the region that it suggests have implications for SADC's gender equality project in the current juncture: social and structural inequalities; and the regional bloc's neoliberal development framework.

Attention to economic development trends in Southern Africa indicates that, by standard economic measures, in recent years, countries in the region have experienced steady economic growth. According to a report by the United Economic Commission for Africa (UNECA), in 2013, Malawi's economic growth stood at 5 percent and that of Namibia was at 5.1 percent.[93] In the case of Mozambique, its economic growth in 2014 was 7.2 percent, while that of Zambia was 6.4 percent.[94] These economic trends were also evident in other parts of the African continent. According to the African Development Bank, "between 2000 and 2010, six of the world's ten fastest growing economies were in sub-Saharan Africa. A number of states consistently managed growth rates above 7%."[95] As such, by standard measures of economic development, these were impressive numbers in light of the recent global economic crisis. However, as most observers of economic development history in the region and Africa in general would have expected, primary commodity-driven economic growth is highly vulnerable to shifts in the world economy. Such was the case in 2015, when the primary commodity boom took a downward turn. The impact of that development is evident in the declining levels of economic growth in 2015 in various countries in the region. For example, South Africa's economic growth declined to 1.4 percent, while that of both Malawi and Namibia dropped to 4.2 percent from the 2013 growth levels of "5 percent and 5.1 percent respectively."[96]

In any event, while standard measures of annual economic growth are important, a focus on them alone offers a limited understanding of economic inequalities and their gendered effects in the SADC region and elsewhere. Commenting on inequalities in the context of recent economic growth trends, the renowned political economist Thandika Mkandiwire contends that in terms of "the sub-Saharan region, inequality was … higher than in all other regions of the world except for Latin America and the Caribbean."[97] Thus, studies that neglect to ask questions, such as economic growth for whom and the extent to which economic trends in a given juncture contribute to the transformation of the weak economic bases of the states in the region, do not enrich our understanding of economic processes and developments in SADC and other parts of the African continent. An exploration of such questions would provide a better understanding of the possibilities and limits of projects aimed at promoting gender equality and the emergence of just social, political, and the economic orders such as SADC's PGD.

The reality is that, while taking different forms given each member state's institutional, political, racial, ethnic, and gender dynamics, economic and social inequalities remain major obstacles to the realization of SADC's gender equality project. For example, the region is marked by "high gender inequalities in income as measured by gross national income (GNI) per capita."[98] In 2013, such figures in the case of Mauritius were: for "females [an income] of US$10 980" while "for males [an income] of US$ 22 726." In the case of the Democratic Republic of the Congo these figures stood at: for "females [an income] of US$390" and "for males [an income] of US$ 499."[99] Further, significant economic inequalities continue to be markers of South Africa's socio-political and economic order. As the UNECA report states

> South Africa presents striking examples of racial and spatial inequalities in the sub-region. In 2012, for example, about 78 percent of the Africans/Blacks were in the low income category, whilst only about 6 percent were in the high income category … On the contrary, for the Whites, about 15 percent were in the low income category, whilst about 56 percent were in the high income category. The pattern for Coloureds is similar to that of Blacks, whilst that of Indians/Asians is similar to that for Whites, but with lower proportions. Income inequality in South Africa remained high and increasing from an income Gini coefficient of around 64 percent in 1999 rising to 0.72 in 2012.[100]

While policies aimed at empowering women, men, boys, and girls in the economic sphere, such as those framing the PGD, are important in the struggle for economic equality, examining their implementation context matters. Thus, highlighting existing local structural, social, political, and economic, as well as global political economy dynamics in a given historical juncture would offer a better understanding of the potential for and challenges of such policies. Yet, in its over 30 articles, for example, the PGD neglects to call into question the ways in which the SADC's contemporary regional development vision and global dynamics set the parameters within which its envisioned gender economic empowerment project will occur. The chapter briefly highlights elements of the PGD's implementation context before offering concluding remarks.

In the last three decades, member states of the SADC, like others in the African continent, have adopted locally mediated forms of neoliberal development ideas.[101] Further, states in the SADC region have supported

the African Union's indigenous version of the neoliberal development paradigm articulated in its New Partnership for Africa Development framework.[102] As such, as its 2001 *Regional Indicative Strategic Development Plan* (RISDP) indicates, the ideational foundations of SADC's regional development strategy "focuses on promoting trade, economic liberalization and development as a means of facilitating trade and financial liberalization, competition, and investment through the establishment of a SADC Common Market."[103] To achieve these goals, RISDP calls on SADC "to accelerate and complete the formation of a free trade area; begin negotiations for the establishment of a customs union, which will be followed by a common market; enhance competitiveness through industrial development and increased productivity in all sectors; harmonize policies, legal and regulatory frameworks for the free movement of factors of production; and implement policies to attain macroeconomic stability and build policy credibility."[104]

The preceding highlights indicate that, while locally generated and implemented, SADC's development vision shares the basic ideas underpinning the neoliberal development paradigm. Further, as a regional development bloc, its development strategies dovetail with political and economic processes that Stephen Gill has conceptualized as "new constitutionalism."[105] According to Gill, it is in processes of such constitutionalism whereby "disciplinary neo-liberalism is institutionalized at the macro-level of power in the quasi-legal restructuring of state and international political forms."[106] The underlying development logic of new constitutionalism processes is very similar to those mapped out in the RISDP. As Gill posits:

> New constitutionalist proposals…emphasize market efficiency, discipline and confidence; economic policy creditability and consistency; and limitation on democratic decision-making processes. Proposals imply or mandate the insulation of key aspects of the economy from the influence of politicians or the mass of citizens by imposing, internally and externally, "binding constraints" on the conduct of fiscal, monetary and trade and investment policies. Ideology and market power is not enough to ensure the adequacy of neo-liberal restructuring.[107]

In the Southern Africa context, such economic development strategies fail to address major structural constraints underpinning economic processes in the region and other formally colonized parts of the African continent. These strategies call on African countries to focus on their

comparative advantage, which is mainly primary commodities, thus they contribute to the reproduction of weak mono-crop or mono-mineral economic structures that emerged in the era of formal imperialism. Such an approach to development has contributed to "deindustrialization" and the neglect of strategies that could lead to the expansion of the economic foundations of states on the African continent in general.[108] Overall, it is important to note that "the litany of externally driven development strategies, including the neoliberal informed structural adjustment programs and Poverty Reduction Strategy Papers, and their 'trickle down' assumptions and the 'willing-buyer, willing-seller' in land redistribution, did not deliver as expected."[109] Further, they have had gendered effects on the African continent. Additionally, in the context of the Southern African region, given neoliberal politico-economic conditions, the "structural transformation development agenda meant to correct the historical injustices has been derailed."[110]

The preceding discussion has highlighted the economic context in which SADC's gender equality project has emerged. These conditions have implications for that project in the economic sphere and others. For example, in Article 18, the PGD calls on states to "review all policies and laws that determine access to, control of, and benefit from, productive resources by women in order to…end all discrimination against women and girls with regard to water rights and property such as land and tenure thereof."[111] The right to water and land is crucial to human flourishing in the SADC region and elsewhere in Africa. However, the ability of women and girls, who are poor or face other forms of social and structural marginalization, to realize these rights in the era of regional development strategies inspired by the neoliberal model of development is severely constrained. As we have argued elsewhere, in the case of water rights, the commodification logic that has characterized neoliberal reforms in the water sector in countries such as Tanzania and South Africa places significant limitations for women at the socio-political and economic margins to realize such rights.[112]

In terms of the land sector, various states in the SADC region and in other parts of the African continent have in recent decades instituted reforms that have implications for gender equality projects. One of the trends in these reforms has been the promotion of formalization of land title deeds in the customary land sector. The work of Hernando de Soto, who is the President of the Institute for Liberty and Democracy in Peru, informs that policy turn. De Soto's work advocates for property rights

reforms in the global South and the former Soviet bloc, for he deems them as the pathway to capitalist development along the lines of countries in the Western world.[113] According to him, the lack of formalized property rights systems in what he calls the non-Western regions limits their capitalist potential.[114] As such, in Africa and elsewhere, land that doesn't have individual title deeds, or any other property lacking formal documents stipulating ownership, remains "dead capital."[115] Proponents of such views also consider the formalization of land ownership in the customary land sector—in countries where it exists in Africa—as crucial, for in their view, such a process could contribute to the emergence of rural land markets.[116] De Soto's ideas have been welcomed not only by institutions such as the World Bank but also by African states. For example, in 2003, de Soto shared his ideas at a forum led by the then Tanzanian President, His Excellency Benjamin William Mkapa.[117] The aim of the forum was "to create awareness to the Tanzanian leadership on the link between formal property rights and wealth creation, within the context of inclusive and equitable socio-economic development."[118] The result of that meeting was the formation of the Property and Business Formalization Program (PBFP), whose mandate was to translate de Soto's ideas into practices governing the land sector and others.

Like other economic, social, and political projects, the PBFP is not neutral. For example, its implementation in Tanzania or elsewhere in Africa deepens the disembedding[119] of the land sector that emerged during colonial land alienation processes. Further, the PBFP ignores its policies' effects on gender power dynamics. Overall, de Soto's approach to the land sector is akin to dominant development thinking that tends to naturalize and depoliticize processes of social, political, and economic change, and overall presents them in gender-neutral terms.[120] For instance, the return of "the language of the customary" in recent land reform processes in Tanzania and elsewhere in the SADC region "masks modernization and marketization" trends in the land sector and their attendant gender effects.[121] Of course these effects are mediated by class and other differences, and the dynamics of the customary land tenure systems in a given geography. However, in light of the evolution of economic processes in the SADC region, which in the main have tended to have negative effects on the economic rights of the majority of women, especially those in rural areas, the marketization of the customary land sector doesn't represent a gender-neutral process of unleashing "dead capital" in rural areas as de Soto's property rights framework and his followers suggest.

Even if the anticipated land markets in rural areas emerge rapidly across the SADC region or elsewhere in Africa, the majority of women will not benefit, for in general they will be moving into such markets "with no property, little cash income, minimal political power, and a family to maintain."[122] Thus, while mediated by class, ethnicity, religion, and other markers of social difference, the marketization of the land sector is not only a gendered process, but as we have argued elsewhere, it also has gendered effects.[123] Overall, as various scholars have contended, neoliberal development projects, such as those in the land sector and others, have contributed to diverse forms of dispossession including gendered ones,[124] which are the focus of PGD. Consequently, as SADC framed its 2008 normative instrument focusing on the promotion of gender equality projects, its neglect of the political economy context underpinning the implementation of its goals is striking. Such neglect is one of the significant dilemmas underlying its goal of promoting gender equality in the region in the current juncture.

Conclusion

This chapter has offered brief highlights of the national, regional, and global contexts in which the SADC's gender equality project—embedded in its 2008 PGD—emerged. In addition, based on an exploration of some of the constitutive articles of the PGD, it has suggested that the emergence of the latter marks an important turn in the evolution of SADC's gender equality project. Overall, the PGD's framing of gender equality incorporates the three strategies of the equality stool articulated by Booth and Bennett.[125] The chapter has also highlighted some dilemmas underpinning the PGD. Lastly, it has suggested that the framing extension strategies of regional civil society networks such as the Alliance hold potential for SADC's project of promoting gender equality.

Notes

1. For example, see Ballard, Habib, and Valodia, eds. 2006.
2. See Article 9(1) of the South African Constitution, which is available at http://www.gov.za/sites/www.gov.za/files/images/a108-96.pdf.
3. Ibid.
4. For a list of non-derogable rights, from Article 37(5)(c), see ibid.
5. Ibid.

6. See CTPA 1996, 2. The act is available at http://www.gov.za/sites/www.gov.za/files/Act92of1996.pdf.
7. See CTPA 1996, 2.
8. See ibid., 3.
9. Article 13(a)(iii), Constitution of the Republic of Malawi, available at: https://www.icrc.org/ihl-nat.nsf/0/4953f2286ef1f7c2c1257129003696f4/$FILE/Constitution%20Malawi%20-%20EN.pdf.
10. Ibid.
11. Mozambique's 1990 constitution is available at: http://www.refworld.org/docid/4a1e597b2.html.
12. For the full text of the 2010 Kenyan Constitution, see http://kenyalaw.org/kl/index.php?id=398.
13. See Article 27(4), at ibid.
14. See ibid., at 27(8).
15. The text of the Constitution is available at: http://www.parliament.gov.zm/sites/default/files/documents/amendment_act/Constitution%20of%20Zambia%20%20%28Amendment%29%202016-Act%20No.%202_0.pdf.
16. Ibid.
17. Article 4(1) and the full text of the 2000 AU's Constitutive Act are available at: http://www1.uneca.org/Portals/ngm/Documents/Conventions%20and%20Resolutions/constitution.pdf.
18. The 2000 AU's Constitutive Act.
19. Ibid.
20. This was the fourth conference focusing on issues pertaining to women since the one held in Mexico City. The other conferences were held in Copenhagen (1980) and Nairobi (1985). Details of all of these conferences are available at: http://www.un.org/womenwatch/daw/beijing/nairobi.html.
21. This notion draws on the work of Marlijn van Hulst and Dvora Yanow (2016), which provides an excellent discussion of policy framing and frames.
22. An extended elaboration of these critical areas of concern is available at The Beijing Platform for Action, UN Women at: http://beijing20.unwomen.org/en/about.
23. Three such review and appraisal processes occurred in 2000, 2005, and in 2010. These processes generated numerous documents, which are available at: http://www.un.org/womenwatch/daw/beijing/.
24. For example, during various interviews in June and July 2014 in Lilongwe Malawi, senior government officials and Ms. Emma Kaliya, Chairwoman, the NGO Gender Co-Ordination Network, emphasized the importance of these processes in ensuring that the objectives of the Beijing conference remained at the forefront of public policy and civil society concerns.

25. See SADC 1997.
26. Preamble (C)(i) is available at: http://www.sadc.int/documents-publications/show/Declaration_on_Gender__Development_1997.pdf.
27. The other issues are science and technology; information and communication; environment and sustainable development; private sector; statistics; and HIV/AIDS. For more details, see: http://www.sadc.int/issues/.
28. See Booth and Bennett 2002.
29. See ibid., 434.
30. See ibid., 432.
31. See ibid.
32. See ibid.
33. See Walby 2004, 23.
34. See Booth and Bennett 2002.
35. See Tong 1998; Squires 1999.
36. See Booth and Bennett 2002, 434.
37. See Squires 1999, 117.
38. See ibid., 120.
39. See Squires 1999; Walby 2005.
40. See Tong 1998.
41. See Squires 1999, 118.
42. See ibid.
43. See Verloo and Lombardo 2007, 23.
44. See Booth and Bennett 2002, 437.
45. See Squires 1999.
46. See Cremshaw 1991.
47. See Squires 1999, 3.
48. The other concepts in Squires' classification are inclusion and reversal (1999, 3). According to Squires, none of the following three categories, equality, difference (women's perspective in Booth's and Bennett's work), and gender, transcend the long debate in feminist thought concerning the equality/difference divide. As such, she proposes what she terms as the displacement perspective as a way of moving beyond that divide. In her view, the analytical strength of the displacement perspective is that it "argues against remaining within the terms of existing political discussion and seeks to show why neither an equality nor a difference approach will ever be a satisfactory one given that both work within parameters of debate constructed according to patriarchal norms"(ibid).
49. See ibid.
50. See Verloo and Lombardo 2007.
51. See ibid., 23.
52. See Booth and Bennett 2002, 434.
53. See ibid., 434.
54. See ibid., 435.
55. See, for example, Everett and Charlton 2014.

56. See Sahle 2014.
57. See Booth and Bennett 2002.
58. The SADC 2008 Protocol on Gender and Development (SADC 2008) is not numbered. Its complete text is available on SADC's website at: http://www.sadc.int/documents-publications/show/803.
59. See SADC 2008.
60. Ibid.
61. See ibid.
62. See ibid.
63. See ibid.
64. For more details, see ibid., Article 6(b) and (c).
65. See PGD 2008.
66. See ibid.
67. See ibid.
68. See ibid.
69. See ibid.
70. See Combrinck 2005, 1.
71. See SADC 2015, 89.
72. See Sen 1999, 74.
73. See Nussbaum 2005, 173. Nussbaum (2005) discusses several capabilities that are affected by such violence: life; health; bodily integrity; senses, imagination, and thought; emotions; practical reason; and others.
74. See PGD 2008.
75. See ibid.
76. See ibid.
77. In its Article 20(2), the PGD stipulates that "State Parties shall, by 2015, ensure that laws on gender based violence provide for the comprehensive testing, treatment and care of survivors of sexual offences which shall include: (a) emergency contraception, (b) ready access to post exposure prophylaxis at all health facilities to reduce the risk of contracting HIV, and (c) preventing the onset of sexually transmitted infections" (SADC 2008). Further, Article 20(4) directs the following: "State Parties shall put in place mechanisms for the social and psychological rehabilitation of perpetrators of gender based violence" (ibid).
78. See ibid's Article 20(2) and (6).
79. See ibid.
80. See ibid.
81. See ibid.
82. This Alliance has links in all the SADC member countries. Its thematic areas of focus in the promotion and interrogation of the evolution of the PGD are: governance and constitutional and legal rights; sexual and reproductive health; economic justice and education; climate change and sustainable development; and media, information and communications. For more details on the Alliance and its campaigns for gender equality, see

Gender Links at: http://genderlinks.org.za/what-we-do/sadc-gender-protocol/.

83. The Alliance's work on this issue is available at: Gender and Climate Change, Gender Links, http://genderlinks.org.za/what-we-do/sadc-gender-protocol/the-sadc-gender-protocol/gender-and-climate-change/.
84. See Walby 2004.
85. See ibid., 324.
86. See SADC 2008.
87. See Banda 2014.
88. See Burnet 2011.
89. See ibid., 317.
90. See ibid., 318.
91. Ibid.
92. See ibid., 314.
93. See UNECA 2015, 4. The report provides economic and social development data for the SADC region, and it is available at: http://www.uneca.org/sites/default/files/uploaded-documents/SROs/SA/ICE-21/economic_and_social_conditions_in_southern_africa_in_2014.pdf.
94. See ibid.
95. See African Development Bank 2012, 11.
96. See ibid.
97. See Mkandiwire 2014, 176.
98. See UNECA 2015, 13.
99. See ibid.
100. See ibid., 14.
101. For extended discussions of these ideas, see Bond 2005; Harvey 2005; Mkandiwire 2014; Sahle 2010.
102. See Bond 2005; Sahle 2008.
103. These aims are outlined in the executive summary of SADC's 2001 regional development plan (Regional Indicative Strategic Development Plan). The document has no page numbers and it is available at: http://www.sadc.int/documentspublications/show/Regional_Indicative_Strategic_Development_Plan.pdf.
104. For more details, see ibid.
105. See Gill 2003, 131. In his elaboration of this concept, Gill argues that "the discourse of global economic governance" under neoliberal conditions "is reflected in the policies of the Bretton Woods organizations (e.g. IMF and World Bank conditionality that mandates changes in the form of state and economic policy) and quasi-constitutional regional arrangements such as NAFTA or Maastricht, and the multilateral regulatory framework of the new World Trade Organization" (2003, 131).
106. See ibid.

107. See ibid.
108. See Mkandawire 2014, 175–176.
109. See UNECA 2015, 16.
110. See ibid.
111. See SADC 2008.
112. For an extended discussion of these issues, see Sahle et al. 2017.
113. See de Soto 2000.
114. See ibid., 5–6.
115. See ibid., 40.
116. See Sahle 2008.
117. Details of the forum are available on the Property and Business Formalisation Programme website, at: http://www.mkurabita.go.tz/mkurabita/foreword.php.
118. Ibid.
119. See Polanyi 2001, for details on earlier processes of commodification of land.
120. See Sahle 2008.
121. See Whitehead and Tsikata 2003, 101.
122. See Lastarria-Cornhiel 1997, 1326; Sahle 2008.
123. See Sahle 2008.
124. See Brodie 1994; Sahle 2008; Turshen 1994.
125. See Booth and Bennett 2002.

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CHAPTER 5

Dressing and Addressing the Kenyan Judiciary: Reflecting on the History and Politics of Judicial Attire and Address

Willy Mutunga

Theoretical Framework and Introduction

A historical, socio-economic, environmental, security, cultural, and political analysis of judicial attire and formally addressing the judiciary should assist the Kenyan judiciary in reaching a consensus on the raging debate on judicial dress and address. Such analysis will lay bare the ideas of the ruling classes over time—political struggles in society; the dictates of the market as reflected in fashion; the impact of religion, climate, and class; dominant masculinities over time and gender inequality; and the subsequent imposition of European and English ideas on judicial attire and address in the various dominated and exploited regions of the world. The majority of the people in many countries, who are the main consumers of justice, have historically never participated in the dress and address of the judiciaries.

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Judicial attire and address impact access to justice, although this aspect is rarely historicized and problematized. There has been a good deal of writing on the issue and how other jurisdictions have dealt with this issue and arrived at solutions. These jurisdictions include Britain—the mother of imposition of the judicial attire and address.

In the Kenyan case, judicial attire and address has been a colonial and neo-colonial imposition.[1] The Kenyan judiciary has not had any occasion before the promulgation of the new constitution in 2010 to see the issues as critical to the administration of justice. The Kenyan people had the occasion to address this issue when they were consulted in crafting of the Bomas draft of the Constitution of Kenya Review Commission. Kenyans called for the change of judicial attire and address.[2] The idea to change judicial attire and address is one whose time has come. We cannot, under the new Kenya Constitution, impose a dress code and new formal title on the judiciary. In the word and spirit of the constitution, we as Kenyans must debate this issue, engage the public, and reach a consensus on it.

On June 20, 2011 the Chief Justice and the Deputy Chief Justice, who are also the President and Vice-President of the Supreme Court of Kenya respectively, were sworn in by the President Mwai Kibaki.[3] Both wore business suits, were neither robed nor wigged.[4] Immediately after this ceremony a national debate emerged on the dress code for the Kenyan judiciary. The debate still continues.[5] Both judicial officers were of the view that the newly established Supreme Court did not have a dress code and there was need to discuss the issue with the Supreme Court judges. Both felt very strongly that the promulgation of the new constitution on August 27, 2010, overthrew the colonial and neo-colonial constitutions that had been crafted without broad participation of the Kenyan people. Both felt that there was need to rethink the relevance of the colonial relics, reflected in the judicial attire and address, under the new constitution.

On May 31, 2012, the Chief Justice launched the *Judiciary Transformation Framework, 2012–2016*.[6] This framework lays the foundations for the transformation of the Kenyan Judiciary. The first of the four pillars undertakes a people-focused delivery of justice. The framework states its mission pertaining to this pillar thusly:

> The philosophical and cultural orientation of the judiciary has reflected its founding history of dominance, power, prestige and remoteness, as opposed to service and equality. Further, its architecture, rules, dress code and other rituals have uprooted it from social reality. As a result the public perceive the judiciary to be alien and insensitive.

> In seeking to change this image, the framework will provide a clear philosophical compass for the judiciary founded on the constitution and informed by the country's social context. The judiciary must be eternally conscious of its "near-sacred" role as the temple of justice and, in dealing with the public, must realize that the people are not only the source of its authority but also the target of its service. The framework seeks to create a judiciary that is sensitive and responsive to the needs, feelings, and aspirations of the people. Further, it seeks to create an institution that is friendly and fair to people, both in the hardware of its outlook and in the software of its decisions and processes.[7]

Judicial attire has changed throughout history, adapting to newly empowered governments, populist movements, and popular fashions.[8] Robes, wigs, hats, gloves, and medals have been added to and subtracted from judges' wardrobes after the English Civil War, the American and French Revolutions, and Napoleon's conquests.[9] New leaders often seek to set the tone for their reign by introducing new customs or reviving them from more prosperous times.[10] Because courts are the point of immediate contact between society and a government's laws, leaders have often changed their judges' attire to portray an image of dignity, strength, authority, wealth, or populism that they choose to project to their citizens.[11] However, modern judges often contemplate the effect their garb has on citizens who appear before them.[12] Formal changes in recent years often have occurred as a result of thorough research and citizen interaction, as opposed to the unilateral whims of leaders.[13]

Literature explicating the rationale for judicial attire focuses on trends in Europe and the USA, and this chapter will follow suit, while focusing less on chronology and more on the reasons that particular changes are made. Part II of this chapter chronicles European movements through the eighteenth century, while addressing English changes through the present day. Even though English attire has remained largely the same for the last 600 years,[14] slight deviations have been met with well-documented criticism that can provide readers context with which to view modern attire. Part III addresses American traditions and highlights the lack of uniformity and formal requirements in most courts. Part IV analyzes whether a relationship exists between judicial attire and access to justice. Part V analyzes judicial address and salutations and changes that are taking place in some countries under common law systems. Part VI addresses the project being undertaken by Kenyan artists, lawyers, cultural activists, and designers to dress the Supreme Court of Kenya. Part VII narrates responses of the judges during their colloquium held in Mombasa on August 14–19, 2011

and the consequent emerging consensus on the attire and salutations of the judiciary. Part VIII reproduces the responses of the Kenyan public on the new green robes worn by the judges of the Supreme Court of Kenya. Finally, Part IX concludes that overly formal attire has an inverse relationship with citizens' access to justice. There is need for change in the judicial dress and address to reflect the patriotic efforts in the country aimed at implementing our social democratic constitution. This part, further, concludes that more in-depth research must be undertaken on the entire Kenyan judicial culture if judicial dress and address is to be understood and demystified within that broad context.

European History

European courts in the thirteenth century began to derive their authority from monarchies or feudal lords—a new development, as religious institutions wielded much of the power previously.[15] These new leaders sought to obtain uncontested power and galvanize the support of their citizens.[16] To achieve this end, leaders aimed to create laws emanating from the crown, rather than the church.[17] Although new leaders sought to distinguish their reigns from churches, they kept an article of clothing traditionally worn by clergymen to project dignity for their laws: a robe, which provided detached dignity that a military uniform could not.[18]

European judges have worn robes since the thirteenth century.[19] Italian and German judges dressed to emulate the noble classes of their time, and in the monarchial countries of Austria, Spain, Portugal, France, and England, ruling monarchs controlled judicial attire at their whims.[20] Austria, France, North Germany, and the Scandinavian countries abandoned robe-wearing during periods of enlightenment or revolution, but eventually resumed wearing them.[21] Countries often copied their neighbors' societal norms and fashions, and, therefore, judicial dress was often similar across Europe.[22]

Italy and France Through the Eighteenth Century

Prior to the Renaissance, Italian law was administered by feudal leaders in nation-states, and by religious leaders in church-states. During this period, judges dressed like nobles.[23] In the fourteenth century, judges distinguished themselves by wearing a small skull-cap, which was circular and covered the top of the head.[24] This black skull-cap sat atop a white linen coif, which also covered the top of the head, but had flaps hanging over the

ears, and strings that tied below the chin to hold it in place.[25] Otherwise, their attire resembled other nobles like doctors, knights, and senators: a robe, worn under an *armelausa*—a cape-like garment that opened on the right side, with an attached hood draping behind.[26] Interestingly, judges wore scarlet robes in the monarchial and more stylish regions, but not in rural areas where democratic principles were held.[27]

In the fifteenth century, a scarlet *pileus*—a hat, which at this time was flat-topped and round—replaced the skull-cap, and robes' sleeves were turned back to reveal stylish fur.[28] Judges added white gloves, a gold chain, and an ebony baton, which were thought of as symbols of authority.[29] For ceremonies, sixteenth- and seventeenth-century Venetian high judges wore scarlet robes, which were pink silk-lined in the summer and fur-lined in the winter, a standing collar, and a small round black *pileus*.[30] The high judges wore black robes on ordinary occasions, while lower judges wore violet.[31]

Italian judges resembled English judges in the eighteenth century, and wore white wigs, black robes, and white bands—hanging neck wear that resembles a modern-day tie.[32] After Napoleon's invasion in 1797 though, judges were given a new military-style costume: a green coat, white pants, black boots, a white-feathered and black cocked hat, and a sash with red, white, and green horizontal lining.[33]

In fourteenth-century France, trials were conducted in various levels of Parliament. Its members were called presidents and functioned like judges.[34] They wore a cylindrical hat known as a *mortier*, and over their robes of varying colors, a scarlet fur-lined *manteau*,[35] which was closed on the left (sword) side but open on the right.[36] The *manteau's* open right side has military origins, and provided its wearer greater arm mobility and easier access to his sword.[37] By the fifteenth century, the two high parliamentary presidents—those who administered justice—distinguished themselves by having three stripes of gold rows and three stripes of furrows on either shoulder of their *manteau*. In addition, if their black velvet *mortier* was worn, a gold band circumscribed the upper part.[38] The Chancellor was a high officer who oversaw the presidents and the keeping of public order. He wore scarlet robes in the fifteenth century and violet by the middle of the sixteenth century.[39]

In a picture depicting a 1458 trial, the two high presidents wear scarlet fur-lined robes, scarlet *manteaus* with horizontal gold bars on the left shoulder, fur hoods, and black skull-caps.[40] The lower presidents wear robes of pink, green, violet, and blue. Scarlet robes were thought to be

ceremonial, as a 1589 picture of a Parisian parade shows the presidents in scarlet robes.[41] Below the presidents, lower ranked magistrates' colors varied depending on who their feudal lords were.[42]

In seventeenth-century France, presidents wore fur-lined scarlet robes during winter, and black robes during summer; however, scarlet was also worn for special occasions, such as the end of a trial.[43] Bands also appeared in seventeenth-century France among all nobles—legal, religious, academic, businessmen—but legal bands tended to hang lower than those worn by the clergy.[44]

Wigs became fashionable in the seventeenth century, and the legal profession subsequently adopted them.[45] Initially, wigs were naturally colored, but powdered wigs were adopted when they became fashionable. However, the French legal profession discontinued their use when wigs fell out of popular fashion in the late eighteenth century.[46]

During the eighteenth century, the rigid, pyramid-shaped, black velvet *mortier* was worn not only by the presidents, but was also worn by all important officials and lawyers. The hats were "associated with the dignity of legal office in its widest sense."[47] For distinguishing purposes though, the first president's hat contained two gold lace rings, and the other presidents' had only one ring.[48] When in the presence of royalty, judges attached a feather or medal to the front of their *mortiers*.[49]

In 1790, near the beginning of the French Revolution, trials were conducted by tribunal judges who wore a black robe, a black round hat raised in front and surmounted by black feathers, and a *tricouleur* (red, white, and blue-striped like the French flag) ribbon around their necks, from which hung a medal with the inscription *La Loi*—the law.[50]

Courts were reorganized after the French Revolution. Judges sitting on the High Court of Justice—which adjudicated disputes between the new bodies of government—wore a long white robe with *tricouleur* edging, a white *manteau* with *tricouleur* edging, a white bonnet, and a white sash with *tricouleur* tassels.[51] Judges of the *Tribunal de Cassation*—the highest appellate court—wore a light blue robe with red edging, a round light blue bonnet, a red sash, and a white *manteau* with *tricouleur* edging.[52] Trial judges wore black robes and a black hat with black feathers.[53]

Under Napoleon's rule in the early nineteenth century, the courts were again reorganized.[54] He sought to ensure that the judiciary did not remind the public of the recently removed monarchy, and ordered all judges to wear black robes and a black hat without feathers.[55] Higher judges wore cloaks laced with purple silk, and gold braids lined the edges of their three-cornered hats, which were also circumscribed by a gold line.[56]

England

Before discussing English judicial attire, it is important to understand the ranks of the English barristers and judges. From the fourteenth century to the late nineteenth century, sergeants-at-law were the premier rank of barristers. For a time, judges were only selected from the ranks of the sergeants-at-law, who were known for their long robes, hood, and white linen coifs that sat atop their head; they were known as the Order of the Coif.[57] Upon promotion to judge, a fifteenth-century sergeant-at-law's robe lining was changed from white lamb to miniver, a luxurious fur, his hood was removed, and a cloak was hung from his right shoulder.[58] The coif remained, but a black skull-cap was added on top.[59]

Some accounts highlight the relationship between English judicial headwear and the death sentence. In 1867, the coif-cap was usually worn when a judge handed down a death sentence,[60] but some judges would don a larger black cap.[61] This would allow the judge to pull it down over his eyes and conceal his face and emotion for the grim sentence he was handing down.[62] As of 1945, judges wear a cornered-cap when passing the death sentence.[63]

The *armelausa* became associated with English judges in the fourteenth century.[64] Although the loose-fitting garments were traditionally worn by French nobles and other religious heads, Kings bestowed these upon their judges, who were to be allies of the King.[65] The *armelausa* denoted high standing.[66]

In the fifteenth century, judicial robes assumed the shape that remains today.[67] High judges wore violet robes in the winter and green in the summer,[68] and scarlet for formal occasions.[69] They wore a fur-lined hood, an *armelausa*, and a coif-cap.[70] In the sixteenth century, the hood grew to an enlarged size, and a *pileus*—a small conical hat—was added atop the coif-cap.[71] Toward the end of the sixteenth century, the Collar of SS was added to the Lord Chief Justice's and Chief Baron's costume.[72] The Collar of SS was a medal that hung around the neck, and is thought to have originated in either a military or religious context; it was generally known, though, to signify being in the King's favor.[73]

At the beginning of the seventeenth century, robes were sometimes black, violet, or scarlet, and their cuffs were turned back to display fur lining in winter or silk in summer.[74] Some judges wore the *pileus quadrates* (cornered-cap) over their coif-cap, instead of the conical *pileus*.[75] Like the Italian and French, English judges wore bands, a symbol of the wealthy in the seventeenth century.[76]

In 1635, a judicial dress code was adopted to promote uniformity and emphasize that courts were offices of the Crown.[77] This was especially important during the period of social unrest leading up to the English Civil War (1642–1651), and the monarchy sought to distinguish the English courts from European courts; distinguishing judges' attire hopefully would reinforce the judges' allegiance to the Crown.[78] The dress code provided that high court judges were to have a scarlet robe.[79] This robe was worn on red-letter days, criminal trials, in Sunday church, in the presence of royalty, and when dining with the sheriff.[80] For day-to-day matters, judges wore violet or black robes, with a scarlet hood that hung over the right shoulder.[81] It is said that wearing the hood over the right shoulder signified temporal dignity, for if worn to the left, it would be priestly.[82] The robes were to be lined with fur during winter, and silk during summer.[83] The day-to-day attire included a stole that hung around the neck and was said to signify the power of a judge to try religious causes.[84] Above the familiar coif-cap sat a black cornered-cap,[85] and for the Lord Chancellor, a conical *pileus*.[86]

Judge Bradshaw tried King Charles for treason in 1649, and he wore a beaver hat lined with plated steel for this unusual trial, which resulted in the execution of the King.[87] While some accounts allege that the hat was worn to ward off blows from potential assailants, others argue that the judge sought to dignify his position, or that the hat was to highlight the exceptional character of the proceeding, or possibly to signify that he was acting with the authority of parliament.[88] The reaction was decidedly negative; some saw the wearing of this hat as cowardly, an act to curry favor with parliament, or as signifying a willingness to defy all laws.[89]

The 1635 code was short lived though. Charles II—exiled in France after his father's execution[90]—ignored the code in 1660 after assuming the throne.[91] Charles II sought to restore grand traditional customs and pomp in society.[92] Full-bottomed wigs and falling bands of dainty lace became fashionable in French and English society, and popular among judges.[93] Wigs were introduced to English courts in 1663, and most fashionable and high-ranking members of society wore them by 1673.[94] Generally speaking, the larger a person's wig, the higher his or her societal rank.[95]

Upon wearing the initially naturally colored wig, many judges gave up wearing the skull-cap and cornered-cap,[96] and coifs shrank for stylistic and logistical reasons until they became a tiny piece of black silk on the crown of the wig.[97] Almost all judges wore wigs by 1700, and by 1705, the powdered wig came into fashion.[98] However, because the rest of fashionable

society wore full wigs during this period, they were not representative of the legal profession until 1720, when full-bottomed wigs fell out of style.[99] When short wigs came into style, judges kept the full wigs to signify their dignity.[100]

After 1720, the full-bottomed wig was emblematic of judges and sergeants-at-law: powdered white or grey, with lappets—rows of curls—falling over each shoulder.[101] This wig was the badge of office, and King George III regarded it as a status symbol and distinction for judges.[102] The formal full-bottomed wig has not changed since this era, but smaller versions were sometimes worn.[103] In 1770, for example, many judges took to a smaller wig for ordinary occasions, with a single vertical curl running down the back.[104]

In the middle of the eighteenth century, full-bottomed wigs were mocked by the satirists of the day for being out of style and out of touch with contemporary society.[105] But the movement to abolish wigs did not begin in earnest until the twentieth century.

In recent years, the English have attempted to reform judicial attire.[106] In 1990, Lord Chief Justice Taylor opined that the English judiciary "could disarm a good deal of public misunderstanding of the legal profession if [judges] stopped wearing wigs and gowns in court,"[107] and he argued that wigs made judges "look antique and slightly ridiculous."[108] In 1992, the commercial bar requested that the English Commercial Court abandon wearing wigs, and pointed out that wigs had already been abandoned in family courts.[109] However, the Commercial Court did not decide the issue, and instead, the British House of Lords commissioned a paper to study the arguments for and against retaining distinctive judicial attire.[110] The 1992 consultation paper summarized the main arguments:

- Judicial attire preserves "respect for authority" and the "status of the court."[111]
- "[T]raditional judicial garb imbued in laypersons a sense of the solemnity and dignity of the law," especially important to instill in criminal defendants, because they "tend, as a group, to be under appreciative of the law's dignity and solemnity."[112]
- The garb has a theatrical aspect, and seeks to impress on laymen that the law is a serious, impartial, and magisterial process.[113]
- Court dress gives judges a useful anonymity and conformity; indeed, the robes obscured "differences of gender, race, and age, creating an edifying sameness among all the participants."[114]

- Wigs disguise judges to protect them from revenge-seeking defendants.[115]
- Distinctive judicial garb is a brand symbol for English courts, perpetuating a competitive advantage in an era when entities can move from country to country to choose which legal system to be governed by.[116]
- Robes make the clothing underneath irrelevant and equalize judges.[117]

In 1992, 85 percent of the English public felt that robes lent dignity to court proceedings, 71 percent felt the robes emphasized the importance for witnesses to tell the truth, and, ultimately, 79 percent were in favor of retaining the robes.[118] Alas, the English did not abolish their formal attire.[119]

Lord Chancellor Lairg revisited the topic in 2003. He recognized that the role of the courts was to deliver justice, and that it was important that those unfamiliar with the courts feel comfortable there.[120] Therefore, another study was commissioned to measure how court dress impacts public confidence.[121] This consultation paper stressed the negative effects that formal attire might have: intimidate victims and witnesses, encourage self-importance, and provoke mockery of the legal system as outdated or backward.[122] Again though, no changes were made in 2003.

The English finally changed their judicial attire in civil and family courts in 2008 for simplification purposes.[123] Wigs and traditional bands are no longer worn in these courts.[124] These judges simply wear a dark navy gabardine robe, with small, square bands.[125] Middle appellate judges wear gold bands, while the High Court wears red bands.[126] Most judges were in favor of the abolition, and the judges who were not generally did not want to make another change, as they believed another swift change could be damaging to the judiciary's image.[127]

American History

When the USA became independent from England, Thomas Jefferson and other founders opposed official garments for the judiciary because they saw the wig and robe as symbols of a rejected system.[128] Thus the "aristocracy of the robe was eliminated."[129] While there are no rules requiring federal and most state judges to wear robes, status clothing has always been part of American society, and judges have often worn them.[130]

US Supreme Court justices have always worn robes, starting with Chief Justice John Jay in 1789, who wore a fur-lined scarlet and black robe with silver trim.[131] When John Marshall became Chief Justice in 1801, he controversially donned a plain black silk robe—a seemingly radical departure at the time, as the other justices continued to wear fur-lined scarlet robes like the English.[132] Chief Justice Marshall preferred the black robe's simplicity over the extravagant and pompous scarlet robe.[133] Supreme Court justices have worn black ever since, and they are even known as "Supreme Court-style" robes.[134]

In the highest courts of Massachusetts and Maryland, robes were worn from the colonial era until shortly after the American Revolution ended.[135] New York Court of Appeals judges also shed their robes after the Revolution to distance themselves from the "pomp and ceremony" of English traditions.[136] Most judges followed this trend, and through the era of Jacksonian democracy of 1828–1850, most judges wore business suits because formal garb was disfavored.[137]

In 1884 though, New York's Bar Association passed a resolution—at the insistence of elite conservative lawyers—that Court of Appeals judges were to wear "the black silk robe when in session in accordance with the historical traditions of our judicial institutions and agreeable to a cultured taste."[138] After a similar petition from the Massachusetts bar in 1900, future Supreme Court Justice Holmes, sitting then as the Chief Judge of the Massachusetts Supreme Judicial Court, adopted the practice of wearing black robes in 1901.[139] Many states followed suit, and by the middle of the 1960s, high court justices in every state wore robes.[140]

Judge Frank, a former federal appellate judge, argued that the 1884 mandate in New York, like the English judicial attire mandate in 1635, was rooted in the desire to thwart democracy.[141] He argued that conservative elites sought to use the "courts as a bulwark against the rising Populist movement," and that the black robes falsely dignified the judiciary.[142] In a book chapter titled "The Cult of the Robe,"[143] Judge Frank highlighted the robes' negative consequences and arguments against wearing them:

- Robes hide their wearer, and can affect a false dignity and nourish pomposity, while shielding judges from rational inquiry.[144]
- Robes convey uniformity in the law in a way that he does not believe exists; if laws were uniform, he argues, judges would not write dissenting opinions.[145]

- Robes have adverse effects on justice, by intimidating unaccustomed citizens and inexperienced lawyers.[146]

He concluded that the robe was an outdated remnant of ceremonial government and should be discarded, thereby humanizing judges.[147]

A number of Judge Frank's critics and proponents of robes in the USA take the opposite position. One commentator argued that all trial judges should wear robes to promote uniformity, as it would "enhance the prestige of judicial office, foster cooperation between the bench and the bar, and reassert the dedication of the judiciary to the goal of justice."[148] In addition, since the public views the legal system in trial courts, robed judges would show the public that the American legal system is a dignified one.[149] Other critics of Judge Frank opine that:

- Robes serve to differentiate the role of the wearer, and emit an aura of dignity.[150]
- The robe "announces the judge," and makes clear that a court of justice is in session.[151]
- When appearing before a robed judge, we expect justice and not favoritism.[152]
- Robes "serve as a constant admonition to the conscience of the judge himself in the discharge of his solemn duty as a minister of justice."[153]

A recent article highlighted the freedom American trial judges possess to choose their robes.[154] Robes are not required to be worn by New York trial judges, and one criminal judge has changed her wardrobe frequently; she has been seen without a robe in a lime-green suit on the bench, or accenting a partly-buttoned robe with a scarf or necklace. She likes to bring her personality to her courtroom, and other judges agree that their dress freedom is a humanizing factor.[155] Another trial judge wears her robe open like a bathrobe to stay comfortable.[156]

Deviating from tradition is not limited to state trial judges. In 1994, Supreme Court Chief Justice Rehnquist added four gold bars to the upper part of his robes' sleeves after attending a comic opera in which the Lord Chancellor wore similar sleeves.[157] He adopted the gold bars simply because he liked the way it looked. Some female judges, like Supreme Court Justice Ginsburg and former New York Court of Appeals Chief Justice Kaye, have worn a lacy jabot around their necks.[158] Chief Justice Kaye felt that the

V-cut robes were designed for the male figure, and that the hanging garment made for a less awkward look.[159]

Although Supreme Court justices wear the standard black silk robes, some state courts have taken to different colored robes. In preparation for the 1976 bicentennial celebration of American independence, the Maryland Court of Appeals wanted to return to the scarlet robes worn during the revolutionary era.[160] The Maryland Court of Appeals began wearing the scarlet robes in 1972, and have worn them ever since.[161] Judge Clarkson, a Michigan state trial judge, researched the history behind judicial garb upon his election to judge; after discovering that red was the color most widely worn in England—where much American common law derives from—he took to wearing red.[162] In 1993, after the Idaho Supreme Court discussed permissible judicial robe colors, they decided that any color would suffice; thereafter, Justice Johnson of Idaho wore a blue robe, and even quipped that he sat on the "black and blue court."[163]

Relationship Between Judicial Attire and Access to Justice

To analyze whether there is a relationship between judicial attire and access to justice, this section will synthesize the intentions of those who impose formal attire and examine the effects on citizens.

Intentions of Those Who Require, Proscribe, or Maintain Judicial Attire

After examining the history of judicial attire, it appears that those who impose changes generally intend to distinguish their judges, have their judges mimic others, or project an image to their citizens.[164] They may choose one, or even all reasons, but most of the reasons detailed fit into one of the aforementioned categories.

The most common and powerful historical theme of judicial attire changes is the desire to distinguish a new reign from a prior one.[165] New governments often make drastic changes to attempt to show they are unlike the predecessors they replaced. When Charles II assumed the English throne following their Civil War and his exile, he sought to distinguish his new monarchy by discarding reforms made during the populist movement.[166] Judges no longer

adhered to the formal 1635 dress code,[167] and instead were encouraged to wear pompous falling lace bands and newly fashionable French wigs to display the new government's grandeur.[168] After the French Revolution, judges' scarlet robes and gold lace-decorated hats were discarded. Trial courts took to simple black attire, while the high appellate court wore the nationalistic *tricouleur*, trimmed light blue, and the intergovernmental dispute court wore pure white with *tricouleur* trim.[169] Napoleon, though, sought to break any potential monarchial resemblance of the judiciary: gone were the reforms of the Revolution, and all judges were to adorn simple black.[170] After achieving independence from England, American judges eschewed the wigs and fur-lined scarlet robes they wore under English control, and instead wore simpler black robes or shed them altogether.[171]

Attire can also distinguish judges from other judges, professions, and countries.[172] In the fifteenth-century French judicial ranks, the high presidents wore gold bars and fur stripes on their shoulders and gold rings around their *mortiers* to show their superiority to the rank-and-file presidents.[173] Napoleon distinguished his high judges by adding purple cloaks.[174] The English Lord Chancellor and Chief Baron wore the Collar of SS to indicate their place atop their court system's hierarchy. English judges draped their hoods over their right shoulders to distinguish themselves from clergymen, who hung them over their left. Newly elevated fifteenth-century English judges distinguished themselves from sergeants-at-law by adding a black skull-cap.[175] Some argue that English judges have kept their formal and distinctive attire to distinguish their legal system from other countries, in hopes of attracting forum-shopping entities.[176]

Judicial attire can also distinguish court proceedings. Judge Bradshaw donned the unusual steel-plated beaver hat during the unusual trial of an English king for treason.[177] Skull-caps and cornered-caps have been worn at times in England when passing death sentences. And, even in the modern era, English criminal trial judges adorn the scarlet robes instead of the dark navy worn in civil trials.[178]

Kings often clothed their judges in regal garments so they would resemble nobles or royalty.[179] Scarlet robes were thought of as monarchial in Italy and ceremonial in France, and both countries' judges adorned them. Italian judges were fitted with garments suitable for senators, doctors, and knights, and the English kings bestowed the *armelausa* upon their judges like French nobles or clergymen. English kings also bestowed upon the highest judges the Collar of SS—worn by military leaders and royalty—to signify the alliance between the crown and the judiciary.[180]

Another common theme with judicial attire is the desire to project dignity.[181] From the very inception of secular courts, the robes, a holdover from church-rule, were kept for this purpose.[182] To gain support of citizens previously ruled by the church, it was important that new authorities be dignified. Robes are thought to project a respectful image to court users, in hopes that lay people like criminal defendants view the proceedings seriously, or that witnesses feel compelled to tell the truth. But, robes also have been used by powerful groups like robber barons to project oppressive control over restless citizens, like in 1884 New York. In these cases, the dignified look which robes provide can be viewed by lay users as elitist or intimidating—an effect which some leaders might desire.

For those abandoning robes, the gesture can be interpreted as attempting to project less pageantry, and to make judges look more human.[183] Courts in the democratic rural regions of Italy did not adopt the monarchial scarlet robe.[184] The newly independent American courts shed their wigs and fur-lined scarlet robes because they saw the formalities as a symbol of aristocracy; the black-robed jurists hence appeared more democratic.[185] In recent years, English reforms sought to project modernization and simplicity, to ensure that their own citizens maintained respect for their legal system.[186]

It is also important to not overlook simple logistical reasons for changing attire. The smaller wig was cooler and more comfortable than the full-bottomed wig.[187] Robes were not designed for the female figure, so as they have risen to the bench, female judges have sometimes adopted hanging neckwear to make the robe look less awkward.[188]

Consequences of Requiring, Proscribing, or Maintaining Judicial Attire

While those in power may have specific reasons for why they want distinctive judicial attire, there are consequences—sometimes unintended—that should be considered.

On the positive side, a robed judge might appear prestigious, cultured, or dignified.[189] Since no other profession wears them, judicial robes truly do announce that court is in session, and that its wearer will seek justice.[190] Perhaps most importantly, the distinctive black robes can serve as a reminder to judges of the importance of their responsibility to administer justice and not perpetuate bias.[191] On the other hand, judges who

become less formal by removing robes or simplifying them might appear less pompous and more human.

The negative consequences of wearing formal attire seem to weigh heavier today. It is important to remember that when judges initially wore formal attire like robes and wigs, other professions wore them as well.[192] However, those fashions faded centuries ago. Today, when those who have never before walked into court make their first appearance, it is likely that the formally outfitted judge—perhaps wearing a wig and robe—is the only robed person they have ever seen. As the English documented when studying this issue recently people can, indeed, be intimidated by such formal attire. Instilling fear in a court participant—whether in criminal defendants, witnesses, or younger or inexperienced lawyers—undermines the very purpose of judicial systems: to administer justice.

Lord Chief Justice Taylor of England opined that their judges' formal attire made them look "antique and slightly ridiculous"—in 1990. Judge Frank felt the American black robe—much simpler than the English costume—nourished pomposity and was outdated and out of touch in 1950.[193] That was over 60 years ago, and societies and laws have advanced rapidly since then. Leaving legal systems vulnerable to mockery for appearing antiquated seems unnecessary, as the world around the courts has advanced so much.

Judicial Address

In Elizabethan England,[194] citizens carefully chose titles and terms of address when speaking with other members of society.[195] "Your Honor" indicated that the addressee was a nobleman or of equivalent dignity, and the lesser title of nobility, "Your Worship," indicated that the addressee was a knight or gentleman.[196] English judges adopted these titles as well, and their use has been very similar throughout history. Since 1897, magistrate judges were addressed as "Your Worship," trial judges as "Your Honor," and High Court justices as "Your Lordship."[197] The titles distinguish members of the judiciary, and modern English judges are addressed today as follows:

- The Lord Chief Justice is addressed as "Dear Lord Chief Justice [Name]" in written correspondence and as "My Lord" or "My Lady" inside the courtroom.

- Judges in the Court of Appeal, known as Lords Justices of Appeal, are addressed as "Dear Lord Justice [Name]" in written correspondence and as "My Lord" or "My Lady" inside the courtroom.
- Circuit Judges are addressed as "Dear Judge [Name]" in written correspondence and as "Your Honour" inside the courtroom.
- District Judges are addressed as "Dear Judge [Name]" in written correspondence and as "Sir" or "Madam" inside the courtroom.
- Magistrates are addressed as "Dear [Name]" in written correspondence and as "Your Worship," or "Sir" or "Madam" inside the courtroom (What Do I Call a Judge?).[198]

In the USA, all judges are addressed as "Your Honor" inside the courtroom, and should only be addressed with the less formal title "Judge" outside the courtroom.[199] When outside the courtroom and in written form, Supreme Court justices are addressed as "Justice [Name]," and their leader is addressed as "Chief Justice [Name]."[200] Court of Appeals, district, and magistrate judges are addressed simply as "Judge [Name]."[201] When outside the courtroom and in the presence of a client, a lawyer who has a personal relationship with the judge should not call the judge by his or her first name, as it can be seen as demeaning the judge's position of authority, and disrespectful.[202]

American proponents of the salutation "Your Honor," particularly federal judges, argue that the address "is a constant reminder, not alone of the prestige of the office, but more importantly of the tremendous power and heavy responsibility and absolute independence of the federal judge."[203] Because they are appointed and not popularly elected, federal judges' consciences are their only supervisor and censor, and "'Your Honor' is the trigger which commands [their] conscience to proper personal conduct and to the faithful performance of [their] duties," and the salutation "encourages judicial patience, inspires industry, nurtures prudence and counsels [them] with the great virtue of common sense."[204] Another argument is that names and titles shape choices, opinions, and views, and the nomenclature is "a matter of showing respect for the office or title."[205] If the public identifies the position properly, they "will get the best picture of the office and its role in adjudicating the fate of their cases."[206]

Some have argued that the institutional power of legal systems relies upon outward displays of dominance like robes, wigs, and the imposed terms of address described above.[207] However, the titles, as well as others

used in the courtroom, such as "learned friends" for lawyers and "public servants" for police officers, are thought by some to "perpetuate the hierarchical relationships between the agents of the state and ordinary citizens who bring grievances to court."[208]

Indian Bar Associations in Punjab and Haryana abolished the practice of addressing High Court judges as "My Lord," or "Your Lordship" in April 2011.[209] The Bar Association deemed the titles "'relics of the colonial past,'" and, instead, the judges are now to be addressed as "Sir" or "Your Honour."[210] This change followed the acceptance of the more nationalist political ideology prevalent in modern Indian society, which has dedicated itself to "ending the hierarchies that the legal system reflects and reinforces."[211] Similarly, justices of the Canadian province of Ontario's Superior Court of Justice are no longer addressed as "My Lord," or "My Lady," but are now addressed as "Your Honour" (Ontario Justice Education Network).[212]

Dressing the Supreme Court of Kenya

The GoDown Arts Centre was initially a site for artists, but has since then become a site for artist movements and other civil society movements in Kenya. Though mainly accommodating middle class concerns in those movements, the GoDown is a bridge to other movements in rural and urban areas of other social classes. The GoDown Arts Centre offered to convene designers and other stakeholders to propose a dress code for the Supreme Court. This was a continuation of efforts from cultural actors to engage with the new constitution in concrete ways. Prior to the referendum on the constitution, representatives from the culture sector debated and agreed on submissions to be put forward for inclusion in the constitution on behalf of the sector, and after the promulgation of the constitution, cultural actors continued to discuss the opportunities opening up in a new constitutional dispensation for their direct engagement in national matters, for example, in areas of identity and cultural/national expressions.

Dressing the Supreme Court, therefore, presented an opportunity to both interrogate the traditions of the judicial system, its practices and access to justice in Kenya, and to propose new ideas that portray the spirit of reform that the constitution embodies. The GoDown set about doing this by convening three participatory focus groups. The sessions were attended by participants in such varied sectors as representing the cultural

sector, designers, academia, the legal fraternity, and other structures of law and order, such as the penal system. The fourth meeting was with the Chief Justice and Deputy Chief Justice where aspects of the discussion and emerging design considerations were shared.

The first meeting brought out the following perspectives and issues: on the signification of legal robe/dress, representatives of the legal fraternity explained that they denote status, rank, achievement, and identification. The dress code also elicits responses from the public that clearly signal who the legal professionals are and help distinguish learned representation from individual or citizen representation.

On the matter of utility and functionality of the gown, and perceptions of the robe and wig, observations made included that the robe can be cumbersome, hot and impeding; it has a distancing effect—distancing the public from justice; and its connotations are negative, from a bygone colonial era, a non-African heritage.

There was substantial debate about what aspects of the legal tradition should be retained and in what ways, what new interpretation? How radical could the new designs be? How far should they disengage with legal tradition? Should the design allow for the reflection of the unique and individual personality of the Supreme Court judges or should it present the idea of objective and neutral justice? Can justice really be objective and neutral?

A cautionary note was also made that there should not be an attempt to fit the whole of Kenya, and that a sense of perspective should be maintained even as the country sought to chart a new direction. It was agreed that the dress should be simple and ceremonial, dignified but not overworked, and not a politicization of art.

It was also noted that the concept of a robe is widely used in judicial systems across the globe. The designers looked at dress ranging from Western countries to Asian countries to confirm this fact. The question posed was could the fact of the wide use of the robe across the globe be taken as a universal marker? Therefore, should the task at hand for the designers be to localize/Africanize/Kenyanize this universal code, that is, the robe?

It was very clearly recognized that a reform of the judicial dress goes beyond the notion of attire and has deeper and wider implications, for example, on the environment/spaces where justice is meted out, and on the whole notion of the performance of justice—power play, hierarchy, and accessibility.

Reference was made to fundamental concepts of the constitution that the Supreme Court dress could represent. Some of the concepts mentioned included values and principles specifically provided for and implied in the constitution, including equality, participation, access to justice, transparency, sovereignty of the people, and universality.

The designers, based on the discussions, debate, and their understanding of these conversations, left with the following considerations for design: take on board the seriousness and importance that the legal fraternity attaches to their judicial traditions and heritage; recognize the need to denote the reality and importance of rank in the judicial system; include African symbolism in the design; color symbolism; somehow embody, in design, the "new order" which the constitution has ushered in; how to give attention to gender and justice; whether the dress should be unisex; the functionality and practicality of the garment; and how to encompass utility, ceremony and beauty.

In a separate meeting, a former head of the Magistrates and Judges Association made several points. The debate on legal dress code had been brought up before but was met with a very conservative and rigid attitude from High Court judges in particular. Other countries have tried to contemporize legal traditions—in the UK, for example, the robe is used only in ceremony, the language used in the courts is simplified in order to be better understood by the lay people, and efforts have been made toward having a court environment that exudes the idea of equality before the law. Dress code reforms were not the only reform overdue as the robe/gown change presented an opportunity for wider redesign of the justice and Prisons systems. There was a need to make sure that the physical space of the court is not alienating to the public, and clean public toilets, benches, plants, trees, and areas in which children attending the court could play should be provided. It was important to show the levels and ranks of justice, however, the philosophy of the dress should demonstrate accessibility and fairness. A day-to-day dress and a ceremonial dress should be adopted. There could be other symbols to accompany the dress code, for example, a Supreme Court flag or emblem.

In this second meeting representatives for the Prisons system were invited, including a youthful ex-law offender, a retired justice, and a former magistrate. The idea was to provide, especially for the benefit of the designers, more understanding of the legal structure and its workings.

Perspectives coming from the legal/law and order representatives were as follows: the Supreme Court attire should represent the "authority and reverence" of the law, the law as a "majestic entity" and reflect the "seriousness" of the execution and delivery of justice; the former justice

(Retired Justice Kuloba) felt that it was "far from the truth" that the current judicial dress "intimidates and makes people fearful," rather the symbolism is that "wigs and gowns are for serious people"; it seemed to be agreed (among those representing the legal system) that differentiation to reflect the positions and differences between the courts and their officers was desirable. For example, the High Court, Court of Appeal, and Supreme Court colors should be different from one another. There was a proposal that the magistracy also have identification as judicial officers. Representatives from the Kenya Prisons system agreed that the image of justice needed to be clearly shown through a dress or uniform ("image is everything"); their view was that the officialdom or authority expressed must be one that gives assurance and does not intimidate. The youthful ex-offender stated that although the dress and what it represents could be understood, it was the actual integrity of the system and its accessibility that was important. A question posed at the meeting was whether a uniform can help one make better decisions. Other questions included: whether or not it was the values that the courts and robes represent that needed to be built upon; whether the critical issues were how the courts needed to come closer to the people and how the setting of justice—the physical space itself—needed reforming; what the dress should communicate, how to communicate this and the most appropriate way to communicate this.

When the designers shared sketches of their first interpretations, based on the debates of the first meeting, reactions from those present included: care should be taken to ensure that, in adopting symbols (spears, shields, for example), justice is not portrayed as being masculine and violent; that real mock-ups of the sketches be presented as a next stage; that the design be sensitive to being misread as "expensive" and "costly," that is, the idea of being locally made, locally sourced, and therefore of putting money back into the pockets of Kenyans should be considered.

The third session was primarily for the designers to present their mock-ups and to rehearse their presentation and justification of their designs so far. The designers presented a mock-up, as well as several samples of fabric and elements to Africanize the dress—animal print, beads, embroidery, and so on. They explained their design choices which were robustly interrogated by the academics present—why the selected inferences, why the attributions to the past, what interpretations and meaning can be made for today's global context, how do we "own" our history which includes the colonial history that has given us our justice system?

The Chief Justice and the former Deputy Chief Justice attended the fourth meeting. Both justices provided key additional perspectives for the designers to draw upon. These additional perspectives stood out as follows: the Supreme Court should portray the de-linking with the past and this difference needs to be evident; and there is a lot of resistance coming from lawyers toward different attire but the opportunity and point to be taken is that the Supreme Court is new and this can be the beginning of thinking differently. With so much revolution going on (due to the new constitution), the wig and gown surely cannot be an area of such vigorous preservation concern; authority can be shown in a lot of ways and therefore one need not be wedded to the robe—the robe is not necessarily essential; capturing the idea of a de-linking with the past is important so that people do not see the Supreme Court as just a continuation of what has come before; in the tour around the country (by the Constitution of Kenya Review Commission) Kenyans expressed the view that the present image of justice was a barrier, was alienating, was one which "frightens," and it was even difficult to tell the gender of judges (some thought underneath the long wig of the Chief Justice was a woman!). The constitution is the spirit of the people of Kenya and the design of the Supreme Court dress should embody this; there is an opportunity to bring in freshness, to show direction and to start a conversation through this process; and sometimes even if we do not succeed, we will have started an important discussion.

Those at the meeting came away with the following understanding and questions, but also a way forward: it is important to take into account everybody's views, but to not shy away from making some radical proposals as long as the principles behind the choices can be explained. In other words, the dress code for the Supreme Court is not predicated on prior or existing traditions, which begs the question: if the robe is to be discarded, what is the rigorously considered reason for this? The way forward based on the understanding and the information as gathered by the designers from various stakeholders was:

- Two kinds of designs should be developed: (a) a functional dress to be worn when hearing cases—this dress should be light and green in color (representing the "Yes" vote for the constitution in the referendum); additional consideration would be given to the fact that blue as the majority color of Kenyans might be incorporated, and a sprinkling of red to depict the ruling class whose rights in the courts must be protected, and (b) a ceremonial piece for occasions.

- There would be no wigs or headgear of any type.
- Advocates appearing before the Supreme Court would be expected to wear suits of the somber colors decreed by the Law Society of Kenya. No robes or wigs would be allowed.
- The team would visit the proposed courtroom for the Supreme Court and help in a design that would reflect equality, access to justice, proximity, fairness, and all values enshrined in the constitution.
- The two kinds of designs would be discussed by all Supreme Court judges.
- The views of the Kenyan public would be sought by the team.
- There still remained the possibility of subjecting the issue of dressing the Supreme Court to national competition.
- The final product would be glorified and publicized in song, dance, and art as one of the strategies of creating a different public image of the judiciary; and
- The team would thereafter turn its attention to the other courts and the legal profession if there was enthusiasm for dialogue.

The Judges' Colloquium and Its Responses

On August 14–19, 2011 judges convened in Mombasa for their annual colloquium. I read the paper in this workshop and it generated great and robust discussion. Most of the responses reflected the historical arguments for and against the retention of judicial attire and address that have been canvassed in the paper. I will confine myself to what turned out to be the emerging consensus.

The judges decided to discard the wigs because in their words they were "torturous," "colonial relics," "cumbersome," "uncomfortable," and "antique," and "lacked uniformity." The judges decided to retain robes although they could not agree on the colors. It was suggested that each of the superior courts could decide on the colors of their respective robes. As for the Kadhis and the magistracy, it was suggested that they too should be robed. The various courts would henceforth continue the conversations on the color of the robes and come to a conclusion.

Public participation in dressing and addressing the judiciary was anticipated and encouraged. The initiative already seized with the project would be continued by asking how this public participation could be expanded upon. It was suggested that a national competition could be undertaken under the auspices of the initiative being led by Joy Mboya of the GoDown.

The judges did not find it their place to impose a dress code on the Law Society of Kenya and its members. It was decided that the society would participate in the debate as a critical stakeholder and give its views. It is important to bear in mind that some of its members participated on the Joy Mboya team.

As to the issue of judicial address, a consensus emerged that we all be addressed as "Your Honor," that is, all of us from the Kadhis and Magistrates to the Judges of the Supreme Court.[213]

Public Responses to the New Robes of the Supreme Court Judges

The Joy Mboya team came up with a functional robe for the judges of the Supreme Court with the understanding that the discussion around dressing the Supreme Court would continue. The robe was green in color with some minor gold embroidery. It was a simple cotton robe, light and inelegant. The Supreme Court judges picked the green color because it represented those who voted "Yes" in the referendum in 2010. The 67 percent "Yes" vote in the referendum paved the way for the promulgation of our progressive constitution on August 27, 2011. More importantly, the judges chose the colors that the South African Constitutional Court has chosen. At the time the South African court seemed the obvious model court in its attire, its building, and its jurisprudence.[214] Green also symbolizes a healthy environment, beauty, plenty, freshness, and the colors of the peasantry, common folk, the wealthy and the mighty—it is a color that promotes the constitutional value of inclusiveness. The Supreme Court Judges wore their new robes in their first hearing on November 15, 2011. However, the responses from the public as published by the press were not at all flattering! The public comments reflected the tensions revealed in the historical discussion above and similarly verbalized by the judges in their colloquium.

The Star in its gossip column, appropriately called "Corridors of Power," wrote of the robes: "The new robes of the Supreme Court Judges, which sat officially for the first time on Tuesday, have been the cause of debate in the court corridors. A senior lawyer who watched the proceedings from a vantage point said the robes – green and gold with a black binding and cowl – made judges look like the Prison's Choir and did not reflect the dignity and somberness of the Supreme Court."[215]

The *Sunday Nation*, quoting a reader in its popular column, "The Cutting Edge" wrote, "They [Supreme Court Judges] wear a robe that is mainly green and resembles that donned by Catholic Priests during Mass. Who designed this robe and what do the colors signify? Is the cult of colonial wigs being replaced by one of robes? Why can't judges wear plain suits? Over to you, CJ Mutunga."[216] The *Daily Nation* in the same column quoted yet another reader saying: "The green attire would have been okay for members of a choir from the Forest Department singing about trees, or officials of a school or college environmental club. I prefer the red attire which displays authority and sanctity of the court. CJ Mutunga, let's change with a touch of style if we must change."[217]

A blogger repeated similar negative comments on the robes appearing in various media and concluded: "There you have it: Kenyans are not impressed with this activism."[218]

The Supreme Court has continued to wear the green robes and nobody seems bothered by that these days. The judges have added a green sash with golden embroidery, but they are not particularly happy with the robes. Some of the judges are happy that the public criticism likened them to ordinary, humble, people with a calling. Others feel it is time to choose robes that will restore the dignity of the Supreme Court. The Chief Justice is of the view that the Court should settle for elegant suits as suggested by one of the individuals quoted in the press. He is also happy with the Supreme Court being likened to common folk. In his view it would have been worse for the new judiciary if the Supreme Court judges were considered pompous, arrogant, snooty, and insensitive individuals. The public participation on the topic of dressing the Supreme Court and the Judiciary in general has started in earnest and it will continue.

Meanwhile the Court of Appeal has settled for black robes, while the High Court and the Magistracy have yet to make up their minds. The Kadhis have compromised on brown robes.

Conclusion

While I have not found materials that squarely address whether there is, in fact, a relationship between judicial attire and access to justice, my research leads me to believe that overly formal attire has an inverse relationship with access to justice. From the early days of secular courts, authorities were concerned not with providing access to justice for the benefit of their

citizens, but with reinforcing support for their own power. Robes and other formalwear were borrowed from clergymen to create the perception of a dignified reign, or from nobles to display their reign's wealth and power.

The intentions of states that enhance judicial formality have often appeared manipulative rather than benevolent, and the consequences for citizens are more often negative. Simply put, formal attire that lingers from different countries, centuries, and global structures does not symbolize access to justice for the public. A humanizing and contemporary approach seems more appropriate. Indeed, the consensus reached by the judges reflects such an approach. As for judicial address, the judges have followed the Indian, Canadian, and American experiences of addressing all judicial officers as "Your Honor." In Kiswahili they will be addressed as "Mheshimiwa." Languages of all Kenyan nationalities have their Kiswahili equivalents that can be popularized, a reflection in part of the access to justice.

Speaking for myself, I love it when Kenyans address me as "Ndugu Jaji Mkuu" [My brother the Chief Justice] because this expresses and denotes the Nyererean, and our constitutional values of humility, modesty, patriotism, inclusiveness, and humanity. For those who feel I am old enough to be their grandfather they are welcome to address me as "Babu Jaji Mkuu" [My granddad the Chief Justice] as, indeed, my grandchildren do!

The security of the judicial officers will trump the debate on judicial attire and address. In implementing the new constitution, it may soon dawn on us to discard our robes and wigs and spend money on bulletproof vests, as well as Kevlar jackets, as we interpret and rule on the implementation of our progressive social democratic constitution.

Finally, this debate on dress for and address of judicial officers hardly scrapes the surface of the conservative judicial culture of the Kenyan Judiciary that is slowly being transformed. This culture has its hallmarks in its insularity, impunity, judicial and intellectual laziness, self-centeredness, arrogance, insensitivity, and failure to recognize its pro-people calling. Transforming this culture is fundamental to the transformation of the judiciary. The Judiciary Transformation Secretariat in the Office of the Chief Justice has recognized this fundamental fact and transformation workshops focus on this issue. It is this culture that can stifle the nurturing of a robust, indigenous and patriotic, progressive jurisprudence that is decreed by the Constitution and the Supreme Court Act,[219] and that can build on the strengths of comparative jurisprudence the world over while rescuing the limitations of such jurisprudence. Undertaking historical, socio-economic, political, and cultural research into this culture cannot be delayed any longer if the transformation of the judiciary is to have a permanent, indestructible, irreversible, and irrevocable foundation.

Notes

1. See Standard Digital News 2011.
2. Former Deputy Chief Justice, Lady Justice Nancy Baraza was one of the Commissioners and confirms this fact.
3. See Chepkemei 2011.
4. See Gaitho 2011.
5. See Mwamu 2011.
6. See Republic of Kenya Judiciary 2012.
7. See ibid., 15. In interrogating the architecture of the Court buildings, the Judiciary commissioned a "Judiciary Court Prototype Competition" that would give the Judiciary courthouses a design that would reflect the values of the new constitution.
8. See, generally, Ashdown 1910.
9. See, generally, Jeaffreson 1867, 172.
10. See ibid.
11. See Whitehead 2009.
12. See *BBC News* 2008, 2011.
13. See New South Wales Law Reform Commission 1982. For an evaluation of courtroom dress based on student moot court presentations, see Chase and Thong 2012.
14. See Baker 1978.
15. See Jeaffreson 1867, 267.
16. Ibid.
17. See Hargreaves-Mawdsley 1963, 2.
18. See ibid., 3.
19. See ibid.
20. The attire, however, still closely resembled that worn by nobles. See ibid., 2–3.
21. See ibid., 3.
22. See ibid.
23. See ibid., 5.
24. See ibid.
25. See ibid.
26. Hargreaves-Mawdsley refers to the robe as a tunica, but there is no meaningful distinction between the two. See ibid., 4–5.
27. See ibid., 6.
28. See ibid.
29. See ibid., 6.
30. See ibid., 9.
31. See ibid., 10.
32. See ibid., 11.
33. See ibid., 14.
34. See ibid., 19–20.

35. *Manteau* is the French version of the *armelausa*, the cape-like garment slung over one shoulder, with one side open.
36. See Hargreaves-Mawdsley 1963, 24.
37. See ibid.
38. See ibid., 29.
39. See ibid.
40. Nobles also wore these gold bars; fittingly, these presidents were referred to as "noblemen of the law." See ibid., 22.
41. See ibid., 24–26.
42. See ibid., 33.
43. See ibid., 26–27.
44. See ibid., 40.
45. See ibid., 41.
46. See ibid.
47. See ibid., 27.
48. See ibid., 27.
49. See ibid.
50. See ibid., 42.
51. See ibid., 43.
52. See ibid.
53. See ibid., 43.
54. See ibid., 44.
55. See ibid., 45.
56. See ibid.
57. See Jeaffreson 1867, 283; see ibid., 285–286 (the coif often had flaps that covered the ears, with strings that tied below the chin to hold it in place); see also Hargreaves-Mawdsley 1963, 59; see Jeaffreson 1867, 286, stating that there are rumors that the coif was used to conceal the tonsure—a religious haircut, where the top of the skull is shaved—so that clergymen could practice in secular courts. However, the author Jeaffreson thought this suggestion ridiculous.
58. See Jeaffreson 1867, 283.
59. See Hargreaves-Mawdsley 1963, 70.
60. See Jeaffreson 1867, 286.
61. See ibid.
62. See ibid.
63. See Newark 1946.
64. See Hargreaves-Mawdsley 1963, 49.
65. See ibid.
66. See ibid., 50.
67. See ibid., 51; see also Baker 1978, 27.
68. See Hargreaves-Mawdsley 1963, 48.

69. See ibid., 51.
70. See ibid., 52–54.
71. See ibid., 54.
72. See ibid., 57.
73. See ibid., 56.
74. See Hargreaves-Mawdsley 1963, 59–60; gloves were also worn. See ibid., 60.
75. See ibid., 59.
76. See Jeaffreson 1867, 294–296.
77. See ibid., 283. See also Newark 1946, 206; McQueen 1998, 31, 33.
78. See McQueen 1998, 32–33.
79. See Newark 1946, 207.
80. See ibid.
81. See Hargreaves-Mawdsley 1963, 62–64.
82. See ibid.
83. See Newark 1946, 207–208.
84. See ibid., 208.
85. See Hargreaves-Mawdsley 1963, 64–65.
86. See Jeaffreson 1867, 287.
87. See ibid.
88. See ibid.; Sachse 1973, 72–73. See Jeaffreson 1867, 288.
89. See Jeaffreson 1867, 313 (stating that a similar reaction was had when the Irish Chief Justice Lord Norbury issued a death sentence to a nationalist leader without wearing his robes—the public found this dress inappropriate for the occasion).
90. See, generally, Scott 1905, 22–37.
91. See ibid.
92. See ibid.
93. See Hargreaves-Mawdsley 1963, 66–67.
94. See ibid., 66.
95. See Yablon 1995, 1129, 1134.
96. See Hargreaves-Mawdsley 1963, 67.
97. See Jeaffreson 1867, 287; see also McQueen 1998, 35.
98. See Hargreaves-Mawdsley 1963, 67; see also Jeaffreson 1867, 289.
99. See Jeaffreson 1867, 292; see Hargreaves-Mawdsley 1963, 67.
100. See Hargreaves-Mawdsley 1963, 67.
101. See ibid.
102. See ibid.; see Jeaffreson 1867, 293.
103. See Hargreaves-Mawdsley 1963, 68.
104. Ibid.
105. See McQueen 1998, 36.
106. See Yablon 1995, 1135.

107. See ibid.
108. See ibid., 1137.
109. See ibid., 1135.
110. See ibid., 1138.
111. See ibid., 1140.
112. See ibid., 1139.
113. See ibid., 1140.
114. See ibid., 1141.
115. This is no longer applicable because short wigs are now worn during all but ceremonial occasions, and the short wigs do not conceal one's face. See ibid.
116. See ibid., 1139–1142; this echoes an argument dating back to the sixteenth century, where the legal dress code ensured dignity, "but also … conveyed the special character of the common law as compared with other European systems of law." See McQueen 1998, 31.
117. See McQueen 1998, 37.
118. See Yablon 1995, 1138.
119. See ibid., 1139.
120. See Department for Constitutional Affairs 2003.
121. The paper revisited the rational for judicial dress: to signify authority, to instill respect for the law, to remind the legal profession that their role is solemn, to emphasize the impersonal and disinterested nature of the judge, to identify the parties, and to preserve anonymity in criminal cases. See Department for Constitutional Affairs 2003.
122. See Department for Constitutional Affairs 2003.
123. See Telegraph 2008.
124. See ibid.
125. See Telegraph 2009.
126. See Telegraph 2008.
127. See Telegraph 2009.
128. See Ferguson 1956, 166.
129. See ibid.
130. See ibid., 168.
131. See Eligon 2008.
132. See ibid.
133. See Smith and Marshall 1996, 286.
134. See Eligon 2008.
135. See Grinnell 1946, 786; Lamy 2006, 2.
136. See Eligon 2008.
137. See Lamy 2006.
138. See Blue 2004, 43.

139. See Grinnell 1946, 787. One author remarks that a 1900 photograph of the Massachusetts Supreme Judicial Court showing its judges in business suits makes them seem more approachable and human than a robed jurist. See Blue 2004, 42.
140. See Blue 2004, 43.
141. See Frank 1950, 255.
142. See ibid. Professors Green and Roiphe echoed this sentiment, pointing out that some saw courts as "tools of the new robber barons, facilitating the concentration of wealth and power at the expense of the less privileged" (2009, 497, 517).
143. See Frank 1950, 254.
144. Frank also alludes to the fact that the USA has separate branches of government which are supposed to be equal; however, he points out, there are no token garments of the executive or legislative branch that command dignified respect, while judges can choose to adorn themselves in the dignity-inspiring robes. See ibid., 256.
145. See Frank 1950, 256–257.
146. See ibid., 257.
147. See ibid., 260. Other judges opposed to wearing robes argue that the additional formality can provoke political criticism, that there is precedent for wearing suits, and that the personal modesty of the judge precludes the wearing of the religious-looking garment. See G.W. Ferguson 1956, 170.
148. See G.W. Ferguson 1956, 171.
149. See ibid., 168.
150. Ibid.
151. See ibid.
152. See ibid.
153. See G.W. Ferguson 1956, 169.
154. See Eligon 2008, 132.
155. Another judge comments that showing personality on the bench is important because it allows criminal defendants "to see her 'as another human being, not just a rubber-stamp automation.'" Ibid.
156. See ibid.
157. See Greenhouse 2005.
158. See Eligon 2008.
159. See ibid.
160. See Lamy 2006, 1.
161. Ibid.
162. See Clarkson 1980, 148.
163. See McLaren 1998, 12–13.
164. The literature is voluminous—for a canonical list, see Tsang 1999.

165. See Hargreaves-Mawdsley 1963, 2.
166. See Jeaffreson 1867, 171.
167. The 1635 dress code prescribed that Judges at Westminster would wear either black or violet gowns and a hood to cover their heads. For further details, see Windeyer 1974, 394, 398.
168. See Hargreaves-Mawdsley 1963, 79.
169. See ibid., 43.
170. See ibid., 45.
171. See Baker 1978, 15–21.
172. See Hargreaves-Mawdsley 1963, 94. See also Fuller 1894, 493–497; Yablon 1995, 1134.
173. See Hargreaves-Mawdsley 1963, 24.
174. See ibid., 35.
175. See ibid., 77; see also Baker 1978, 27–39.
176. See Hargreaves-Mawdsley 1963, 77.
177. See Sachse 1973, 69–85.
178. See Hargreaves-Mawdsley 1963, 35.
179. See English Judge's Dress 1904, 321, 332.
180. See Hargreaves-Mawdsley 1963, 66; see also W.J. Ferguson 1900.
181. See Hargreaves-Mawdsley 1963; see also Yablon 1995, 1129–1131.
182. See W.J. Ferguson 1900, 614–616.
183. See, generally, Frank 1950, 254.
184. See Hargreaves-Mawdsley 1963, 11–14.
185. See G.W. Ferguson 1956, 166–217; see also Harvey 1908.
186. This is also the case in other commonwealth countries such as New Zealand. For instance, The New Zealand Royal Commission on Courts considered the question of whether or not to retain their court dress under the following headings:

    1. formality, solemnity and tradition;
    2. neatness, uniformity and fairness;
    3. expense, inconvenience and discomfort;
    4. the position of solicitor advocates.

    For further details, see New South Wales Law Reform Commission 1982.
187. See W.J. Ferguson 1900, 616.
188. See Hargreaves-Mawdsley 1963, 66; see, generally, Brunet 1988.
189. See Chase and Thong 2012, 221–246.
190. Ibid., 222.
191. See W.J. Ferguson 1900, 168.
192. See Yablon 1995, 1133.
193. A history of legal dress from Saxon period. See Frank 1950.
194. This era was the time of Queen Elizabeth I's reign, between 1558 and 1603; see, for example, Guy 1990.

195. See Ringler 1961, 159–160.
196. Ibid.
197. Harley 1914, 339, 358; "Lord" derives from the High Court Justices' former seats in the House of Lords, England's upper Parliamentary house; other members of the House of Lords, such as archbishops and life peers, are also titled "Lords" (see House of Lords 2009). A clear timeline of the evolution of the House of Lords appears on page six, detailing the progressive elimination of hereditary membership and the increasing separation of powers between the judiciary and legislature. Though High Court Justices no longer sit in the House of Lords, they retain the title "Lord."
198. What Do I Call a Judge?
199. See Clarke 1991, 994–995.
200. See Battaglia 2007, 48, 51. This author is a federal magistrate judge for the United States District Court for the Southern District of California.
201. Ibid.
202. See Clarke 1991, 995.
203. See Devitt 1971, 144.
204. Ibid.
205. See Battaglia 2007, 50–51.
206. Ibid.
207. See Scott 1989, 145, 150.
208. See Lazarus-Black 1997, 628, 637.
209. See Sura 2011.
210. Ibid.
211. See Liebman 1985, 1679.
212. See Ontario Justice Education Network. n.d.
213. A newly appointed judge was understandably upset by this consensus. As a Magistrate, he had been addressed as "Your Honor" for many years. As soon as he was elevated to the status of a Judge, he hoped he would be addressed as "Your Lordship" for many years to come! The consensus received support from a not unexpected quarter, the Christian clergy. The view of the clergy was that it was high time judges stopped playing God!
214. While this remains by and large true in terms of jurisprudence the Indian Supreme Court and Colombian Constitutional Court have joined the ranks of admired jurisdictions.
215. See *The Star* 2011.
216. See *Daily Nation* 2011.
217. See The Watchman 2011.
218. See Hard Talk Kenya 2011.
219. See The Supreme Court Act 2011, No. 7 (Kenya).

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CHAPTER 6

The African Union and Article 4(h): Understanding Changing Norms of Sovereignty and Intervention in Africa Through an Integrated Levels-of-Analysis Approach

Jason Warner

When the former Organization of African Unity (OAU), founded in 1963, officially completed its reincarnation into the African Union (AU) in 2002, observers were quick to analyze various facets of the "newness" of the AU as compared to its predecessor. Among other phenomena, analysts questioned the cause for its rapid creation, the reason for the lack of public knowledge about its genesis, its new stance on the prohibition of non-democratic transitions as enshrined in Article 4(p), and its elevation of Swahili to an official organizational language.[1] Yet undoubtedly, the aspect that garnered the most attention in the transmutation from the

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OAU to the AU was the inclusion of Article 4(h) in the African Union's founding document, the AU Constitutive Act, which entered into force on May 26, 2001. In its entirety, Article 4(h) affirms:

> The right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect to grave circumstances, namely: war crimes, genocide, and crimes against humanity.[2]

Put simply, by signing onto the AU Constitutive Act, African Union members gave other constituent states the right to intervene in the affairs of other member states if the latter's domestic politics looked to pose an imminent threat to collective African security, or, if governments elected to harm, rather than protect, their citizens. Possible scenarios for AU intervention then included state collapse and the spillover effects of refugees, crime, and transnational violence and arms, or, the perpetration of mass human rights abuses by individual state governments, which the new African Union pledged not to tolerate.

Not only was the inclusion of such new language progressive in its own right, Article 4(h) was doubly surprising given African states' historically deep-seated protection of their sovereignty, which was entrenched and enforced as a continental norm, by the OAU itself. As is detailed further in this chapter, the OAU had been notable precisely for its inflexible stance on sovereignty: it was created, above all, to *protect* state sovereignty, and to enshrine the notion of non-interference into the very fabric of African international relations. That its successor organization would explicitly legally *permit and even sanction* intervention was a stark departure from the days of old.

As might be intuited, the inclusion of such progressive language in sovereignty was nothing less than unexpected. Given African leaders' rejections of a similar mechanism only years earlier[3] the subsequent adoption of such a liberal framework for peace promotion was highly surprising, and was a hallmark of a deeply progressive[4] stance on the notion of sovereignty not only in the case of Africa, but globally.[5] To that end, the inclusion of Article 4(h) has been described in its uniqueness as: "striking," "unprecedented," "remarkable," "a major shift," "a normative revolution," and quite simply "without parallel internationally."[6] Yet, while observers have rightly noted the *extent* of change that the African Union's Constitutive Act brought, particularly as regards Article 4(h), just *why* the adoption of

such new understandings of sovereignty and intervention were included remains a debated topic. What then were the forces by which this notable shift in continental security norms may have been engendered?

As is detailed in subsequent sections, many of the most outstanding scholars of African international relations have offered sundry explanations as to how and why the deeply progressive Article 4(h) language was included in the AU Constitutive Act.[7] Such hypotheses place the origins of the adoption of Article 4(h) with: shifts in global systemic polarity; pressure from bilateral partners; the prevalence of the responsibility to protect (R2P) ideology globally; the psychological impact of specific conflicts and events on the pan-African consciousness; the AU's mimicking of organizational structures from above (the UN), laterally (the EU), and from below (African regional organizations like the Economic Community of West African States [ECOWAS]); and efforts attributed to individual African states and their leaders.

Yet, despite the various works that have sought to account for the emergence of this highly surprising new norm, this chapter suggests that extant analyses of Article 4(h) typically suffer from at least one of two problems. First, it is often the case that authors offer monocausal explanations for the emergence of Article 4(h): that is, authors will cite a *singular, specific cause* as having been the driving force for its emergence. Such a tendency is typical (and indeed understandable) in pieces making brief mention of Article 4(h) in passing. The second type of problem relates to instances in which authors proffer *multi-causal* explanations for the emergence of the new progressive security regime. The issue at hand here is that such multi-causal explanations are rarely, if ever, explicit about the fact that the explanations that they offer are, in fact, *multi-causal and span various levels of analysis:* they are multi-causal without being self-admittedly so. To recall, then, extant analyses are either a) shortsighted in singling out only *one factor* at play, or b) *inexplicit* that their understandings that the processes behind the adoption of Article 4(h) are indeed multi-causal and span various levels of analysis and various periods of pan-African and international history.

In departing from these tendencies, this piece instead suggests that the appropriate way to understand the shift in African continental security norms that emerged in the new African Union is through an *explicit, multi-causal, and integrated levels-of-analysis approach.* That

is, only by looking at both the African and non-African inputs at play at *various* levels of analysis—the systemic (global), pan-African, regional, statist, and individual leadership levels—can one gain a complete picture of the sundry forces that *simultaneously and inter-subjectively* contributed to engender what is ostensibly one of the most progressive international relations sovereignty schematics in the world today. Thus, it seeks not to disprove existing hypotheses, but rather, to affirm their validity as components of a fuller, more complex, and ultimately wider-ranging story that has, so far, remained untold in its entirety.

This chapter proceeds in three parts. The first part offers an overview of the utility of using a levels-of-analysis approach in the study of normative shifts in international relations: particularly, it situates itself in the orientation of scholars working in the international relations (IR) sub-field of the foreign policy analysis (FPA) framework. The second and third parts focus on the African Union as a case study for this approach. It therefore attempts to spell out the various factors that contributed to the adoption of the AU's new progressive outlook on sovereignty and intervention. In the second section, the chapter recounts the evolution of sovereignty in Africa from the post-independence period until the end of the era of the Organization of African Unity in 2002. In the third section, which forms the brunt of the chapter, it investigates the sundry forces at various levels of analysis that collectively, and inter-subjectively, led to the African Union's adoption of radically new norms of sovereignty and intervention. A final section concludes.

The Utility of a Levels-of-Analysis Approach to Studying Changing Norms

The Integration of Levels of Analysis

In the study of IR, "levels of analysis" refer to specific types of agents or phenomena (independent variables) whose actions are deemed to be the causes of other phenomena (dependent variables). Levels of analysis range from the most macroscopic social forces—like the entire international system—to the most microscopic—like the cognitive processes of individual leaders—such that, in theory, there are an infinite number of levels of analysis, according to the level of aggregation or disaggregation of social

phenomena. Most typically, however, IR scholars have selected one of three levels of analysis—the individual, the state, or the international system of states—as the three primary units of interrogation when attempting to understand the causes of international events.

However, while the vast majority of IR scholars tend to focus on one level of analysis depending on their intellectual predispositions, a smaller sub-set has ardently advocated for the utility of the integration of various levels of analysis, since electing just one level of analysis has its inherent shortcomings, and as indeed, "only a limited set of real world problems in international relations lend themselves to this sort of analysis."[8] The tendency to integrate various levels of analysis into understandings of international relations finds its genesis most broadly in the field of foreign policy analysis (FPA). One of the founders of the study of FPA, particularly the school of comparative foreign policy analysis, James Rosenau advocated approaching any policy choice from various levels of analysis. Smith et al. have detailed Rosenau's call for the need to "provide a robust integrated analysis 'at several levels of analysis—from individual leaders to the international system—in understanding foreign policy'"[9] and his belief that "the best explanations would be multilevel and multi-causal, integrating information from a variety of social science knowledge systems."[10] During the same era as Rosenau, David Singer's noted 1961 work further emphasized how, as Steven Smith puts it, "focusing on a certain level of analysis imposes a bias on the data and in this way evidence is theory dependent."[11]

Since the early years of the establishment of the comparative foreign policy research agenda, various other authors have used integrated levels of analysis artfully in their work. Most notable was Graham Allison's[12] study of the Cuban Missile Crisis through the lenses of three levels of analysis, while Robert Putnam,[13] Andrew Moravsick, and others have written on the utility of the "two-level game" of integrating domestic and international politics into explanations of international outcomes. Moravsick argues that: "empirical studies formulated on a single level of analysis, international or domestic, are increasingly being supplanted by efforts to integrate the two."[14] Rooted in their historical antecedents, contemporary scholars of FPA continue to synthesize actions at various levels of international society and thus it is perhaps unsurprising that FPA in the post-Cold War period retains, as Valerie Hudson puts it, "a commitment to pursue multi-causal explanations spanning multiple levels of analysis."[15]

Norms and Understanding Normative Change

Within international relations, "norms" may be thought of as "standards of appropriate behavior for actors with a given identity"[16] or "standards of right and wrong, which proscribe certain activities and legitimate others."[17] Put otherwise, norms are informally understood patterns of what constitutes acceptable behavior among two or more political actors, which, even if lacking a formalized legal basis, are nevertheless thought to carry more or less formal weight. In this piece, the "norm" under consideration is postcolonial African states' norm of non-intervention in member states' affairs and how it was replaced by a new ostensibly "pro-interventionist" normative stance.

While those who study normative changes in international relations proffer various suggestions for why norms change, understandings of normative adoption in the Global South remain generally limited. However, three broad frameworks are generally employed in understanding normative adoption in non-hegemonic states and institutions. The most mainstream framework by which normative change has been said to occur is via the process of socialization. Introduced in Finnemore and Sikkinks's 1998 *Life Cycle of Norms*, the socialization thesis argues that norms emerge when a series of norm entrepreneurs convince a critical mass of states to adopt or support these norms.[18] These norms are then spread (via praise or censure) via socialization, or the process by which member states change their understandings about the importance of a norm due to continued interaction with one another. Resultantly, new relationships and identities emerge between actors regarding their expectations of likely adherence to those norms.[19] Moreover, norms can then get spread from originating organizations to other organizations through the process of mimetic behavior, social learning, and cost–behavior calculations.[20]

The second (and most blunt) process by which normative change might be said to occur, especially in the Global South, rests in the "hegemonic normative" thesis. In this vein, the notion is that a powerful state within any given system or sub-system decides that it is in its interest that a norm change for the entire system over which it presides, and thus, all others in its orbit must adopt the new normative shift as well.[21] Recipient states can either adopt new norms because they are actively induced (or forced) to do so, or they may adopt them simply because powerful states or institutions

are looked to as "attractive sources of imitation" for subordinates.[22] This latter process has historically been particularly pronounced as related to normative frameworks constructed within the United Nations or in the European Union and disseminated elsewhere. As Lotze writes:

> For one, norms held by states widely viewed as successful and desirable models within states, it is argued, are more likely to become prominent and diffuse than norms held by less successful states. On this basis, so-called Western norms are argued to be more likely to diffuse throughout international society than non-Western norms.[23]

For her part, Martha Finnemore has combined the two discussions within the "hegemonic normative thesis," in showing how international organizations have "taught" states what their new interests are, in a wide range of issue areas.

Yet some have rejected the simplified notion that the adoption of norms in the Global South to a mere mimetic process as ascribed by the hegemonic thesis, though they also recognize that forces "from above" nevertheless inform how states "at the bottom" of the international hierarchy adopt norms. Thus, a third means by which norms change can occur, especially throughout the Global South, is via what Amitav Acharya refers to as "constitutive norm localization."[24] Norm localization is the process by which actors take norms that have become accepted at a *global* level and collectively modify them so as to fit *local* realities and exigencies.[25] Particularly germane for the current investigation about the AU's adoption of Article 4(h) is Jürgen Rüland's suggestion that as a corrective to the hegemonic normative thesis, "the theory of 'constitutive localization' attaches agency not only to external norm entrepreneurs but also to local norm recipients."[26]

Normative Change and the Integration of Levels of Analysis

While each of these three explanations seems superficially cogent in its own right, a singular reliance on only one of these paradigms falls short when one considers the adoption of normative frameworks by states that exist at the bottom of the international political hierarchy. How is one to pinpoint when norms were "forced upon" subordinate states ("hegemonic thesis"), "trickled down" from the global level and reconfigured by subordinate

states ("constitutive localization"), or when local actors simply constructed their own ideas locally independent of pressure from the international community ("socialization")? Moreover, these interpretations give actors "at the bottom" relatively little agency to create or reinterpret norms and then pass the norms "back up" to the global level, in essence, *informing the nature of global norm creation from the bottom up.*

Thus, the utility of a multi-causal approach is particularly pronounced in the course of the study of normative shifts in the case of sub-Saharan Africa. On one hand, given the inter-subjective nature of the construction and adoption of norms generally, the suggestion that normative change originates from only one level of analysis and is transferred and accepted by actors in a second level of analysis is inherently counterintuitive. But, second, given that the lower in the international hierarchy that states find themselves, the more varied the inputs for normative change, the more imperative the need for self-consciously multi-causal, multi-level analyses. Therefore, this piece suggests that rather than the traditional assumption of relying on a distinct analytic by which to understand why and when norms change, the observer is better advised to take into account *all levels of analysis* and to appreciate that the process of normative change occurs instead via *a multi-causal, multi-directional* process. Rather than focusing on just one level to explain why norms emerged, understanding the existence of overlapping modes of normative origination, diffusion, acceptance, rejection, reformation, and implementation is instead imperative.

What Changed? The Meanings and Practice of Sovereignty Prior to the African Union

Before forwarding an overview of the inputs at play in explaining *why* Africa's security norms changed in the OAU's transformation to the African Union, it is first imperative to explain exactly *what* changed. Thus, the following section briefly recounts the evolution of the postcolonial African international sovereignty regime. In so doing, it offers an account of what sovereignty looked like before the shift to the AU and the inclusion of Article 4(h), subsequently highlighting the causal factors in the third section that may have been at play in facilitating such a shift.

With Ghana's independence in 1957, the weight of the Westphalian system bore down on Africa. Former colonial subjects could not revert to existence in the non-formally stated societies in which many had lived

prior to their collision with Europeans; the Yorùbá or Zulu empires that had once served as the organizing unit of politics were not acceptable actors on the international stage. Rather, African leaders were obliged to adhere to the "extraordinarily powerful template" of sovereignty created by the United Nations that "molded international society" to agree that the only legitimate international participant was that of the state. In Africa then, to be free of European occupation was necessarily to inherit the state. Having accepted the state form in theory, leaders were then left to decide just what new African sovereignties would look like: by and large African leaders were in broad agreement that they would retain the boundaries established by the colonial powers. Though not all pre-sovereignties accepted colonially demarcated borders—the Somali Republic being the prime example—in general, these borders were inherited with minimal resistance, as they afforded new leaders the much coveted windfall of internationally recognized juridical sovereignty.[27]

But the new territories over which these leaders now claimed dominion were in almost all cases larger than the central government could realistically control. As such, Robert Jackson has described (somewhat contentiously) that what ultimately arose in Africa during the postcolonial period were "quasi-states": entities which were recognized as legally sovereign by the *external* international community, but which lacked effective *internal* control.[28] Put otherwise, the Janus-faced nature of international sovereignty meant that the intra-Africa regime was one of "negative" sovereignty: African states were allowed to endure not because of their internal capabilities to protect and govern populations, but because external actors—both neighboring African states and the international community—each had its own reasons to maintain the international status quo.[29] With the recognition that they all found themselves in the same tenuous position, leaders were made acutely aware that to ensure that the intra-African sovereignty regime did not collapse (by aggressive acts of state takeover by neighbors) they would be obliged to work together to ensure a continental peace.

But how was such sovereignty-respecting friendship to be ensured among postcolonial African states? Rapidly, the question of an African political union came to the fore. Beginning in 1958, Ghana and Guinea formed a political alliance, and were joined by Mali in 1960 to form the Ghana–Guinea–Mali Union (also known as the Union of African States). Though the union ultimately collapsed, it nevertheless served

as the ideological basis for more attempts at supranational organizations responsible for transnational African governance.[30]

Thus, on May 25, 1963, African leaders cemented the friendship they needed for the endurance of their states by creating the Organization of African Unity. Outwardly decrying their mutual experiences of colonialism and promoting an ethos of pan-African unity, the OAU's more important purpose was to protect borders via the assurance of interstate peace. To this end, the OAU's (1963) Charter melded the dictates of non-intervention, non-interference, and a respect for state sovereignty with an emancipatory pro-African, anti-colonial rhetoric. A reference to the OAU's Charter highlights the expedient marriage of the two concepts, in calling for:

1. The promotion of the unity and solidarity of African states;
2. The coordination and intensification of their cooperation and efforts to achieve a better life for the peoples of Africa;
3. The defense of the sovereignty, territorial integrity, and independence of African countries;
4. The eradication of all forms of colonialism from Africa.

Yet several dilemmas with the OAU's scheme of sovereignty protection arose in the decades following its creation. The first dilemma created by the OAU was that African states did not actually view the organization as an entity to which they would cede substantial degrees of sovereignty. At the beginning of the project, Ghana's president Kwame Nkrumah advocated that the newly independent states cede substantial sovereignty related to numerous functions of statecraft to a would-be pan-African federal government akin to the USA, that would coordinate economic, and foreign and defense policies, and oversee a singular African citizenry.[31] Far from adopting such wide-ranging measures, leaders instead made the tacit agreement among themselves that the OAU was to be employed instrumentally to ensure that the intra-African order did not collapse. Rather than becoming an organization that could constrain states' domestic or international actions, the OAU came to stand for the principles of sovereignty protection.[32]

A second dilemma of the postcolonial African sovereignty regime was that it allowed leaders' assured protections of non-intervention if they elected to perpetrate crimes against citizens of their states. In short, African sovereignty came to be manipulated as a tool that afforded

leaders the legal and practical ability to extract resources, capital, and power from their societies, typically in the service of entrenching their own political positions.[33] Both because of its language on non-intervention and collusion in similar acts by its constituents, the OAU was precluded from intervening, even in the case of extreme human rights violations. All too aware of this fact, postcolonial leaders took this system to imply a blank check for poor behavior. Most infamous of these unsavory leaders were Fernando Nguema in Equatorial Guinea, Idi Amin in Uganda, and Jean-Bédel Bokassa in the Central African Republic. To this end, Ernest Wamba dia Wamba has argued that since Africa has inherited the norms of international sovereignty, African society has been "forced to service the state, which is controlled by an authoritarian gang of people."[34] Bayart, Ellis, and Hibou in this regard have described the "criminalization of the state"[35] in Africa while Mahmood Mamdani refers to the phenomenon as "decentralized despotism."[36] Christopher Clapham writes:

> Monopoly statehood, as the mechanism favored by the great majority of independent African rulers, had as its external corollary the insistence on a juridical sovereignty which, while ostensibly protecting the state and nation against illegitimate external interference, actually provided privileged access for rulers of the state to the external resources which they could use to impose their power at home...The result was that sovereignty became the pretext for assuring external support for an increasingly disreputable and often brutal collection of domestic autocracies.[37]

Thus, the OAU's norms around sovereignty were in clear need of alteration.

Why Did Norms on Sovereignty Change? A Levels-of-Analysis Examination Underlying the Emergence of Article 4(h) of the African Union's Constitutive Act

While the last section highlighted the reasons of the need for a rethinking of sovereignty, what were the forces at play that led the new African Union to adopt the language of Article 4(h), which shifted the intra-African notion of sovereignty as "non-interference" to sovereignty as "non-indifference"[38]? As noted, numerous scholars, whose work is presented

subsequently, have weighed in on the question. Yet, explanations of sources in general remain diverse, scattered across various levels of analysis and spanning various periods and events in international and African social, political, and economic history. Moreover, they are generally non-explicit about the inter-subjective and multi-causal nature of the explanations that they proffer. Though this chapter takes their suggestions—and thus does not seek to disprove any extant work—it argues instead that the breadth of existing explanations *all* likely play some role as inputs to the decision. While no existing explanations are necessarily "wrong," the only "right" way to understand the emergence of Article 4(h), and the attendant new sovereignty regime, lies in synthesis of inputs across all levels of analysis in the formation of a consciously multi-causal, and multi-level explanation.

Before concluding: three caveats. First, while the vast majority of African international relations literature has suggested that the norm of non-intervention was a paramount force in early postcolonial African interstate relations—and indeed, it often was—states' reverence of non-intervention was never as deep as has historically been suggested. Numerous instances of aggressive behavior between states can be seen, even interstate military interventions.[39] The second caveat that must be forwarded here relates to the extent to which the African Union's *legal* shifts actually led to *practical* shifts in the organization's behavior. In short, simply because organizations include formal language demanding or forbidding particular actions, member states need not necessarily follow them or invoke them in practice. To this end, and despite the fact that those like Fagbayibo call Article 4(h) the AU's "strongest element of a normative supranationalism,"[40] most observers of the African Union are in agreement that, despite the juridico–normative changes that ostensibly accompanied Article 4(h), truly significant changes in actual African state foreign policy behavior have not really been forthcoming.[41] That, as of mid-2015, the AU had never invoked Article 4(h) to justify peace operations, this assessment seems reasonable.[42] Nevertheless, the underlying assumption argument is that normative change *is* present, despite the fact that 4(h) has never been invoked: the fact that the AU now has multiple peacekeeping operations deployed throughout the continent, despite not having invoked 4(h) as such, emphasizes the imperatives of collective security provision, as what is now "good and appropriate behavior" and a stark divergence from the past. A third caveat to note is that due to space limitations, this chapter does not claim to be a fully exhaustive overview of the

various phenomena or hypotheses that have been forwarded to explain the emergence of Article 4(h). Rather, it simply presents a variety of discussions and rationales to emphasize that focusing on even one factor or set of factors at a single level of analysis inherently obscures the explanatory power of important other independent variables.

Following, this chapter traces how various observers of African international relations have understood the rationales underlying the inclusion of Article 4(h). In so doing, it first presents the ways in which observers have understood the *external,* extra-African environment to have informed the adoption of the new norms, particularly in presenting discussions from three predominant strains of international relations theory. Finding an explanation from solely external inputs insufficient, the second section then details the various *internal* African actors—at the pan-African, regional, statist, and leader levels—that informed, along with global forces, the adoption of Article 4(h).

Non-African Inputs

The following section presents system-level hypotheses from three schools of IR scholarship—realist, liberal, and constructivist—explaining the shifts in continental norms for international intervention from the predominant non-African inputs. One of the primary explanations for the inclusion of Article 4(h) is (neo)-realist in nature, and suggests that its inclusion was underwritten or at least facilitated—though not necessarily caused—by changes in the systemic (global) distribution of power. A neo-realist explanation of the story runs as follows. During the Cold War, the USA and the USSR each had their "clients" in Africa, whom they supported with various political, military, and economic incentives. Upon the collapse of the Soviet Union in 1991, both powers retrenched from Africa: the USSR as a result of domestic turmoil, and the USA due to reduced exigency to maintain a presence in the former ideological battleground. With their departure, a "security vacuum" emerged, destabilized the continent, and led to the proliferation of crises by cutting off former sources of income drawn from forms of "extraversion" from international, non-African patrons.[43] The subsequent uptick in conflicts and inability to rely on the superpowers thus signaled to African states that they needed to "get serious" about collective security, and led to the opening of the ideological landscape about long-held ideas about sovereignty.[44]

A similar—though distinct—explanation as to how the end of the Cold War informed norms of African sovereignty comes from constructivists. Predictably, this explanation has more to do with shifts in identities, and not, in the realist vein, the distribution of military and material resources. In this view, African states' identities changed in relation to each other and to non-African actors at the end of the Cold War. The suggestion is that the abandonment of the continent by both superpowers led to a sense of jilting, which changed the ways that African states understood themselves and their relationships with other African states:

> [P]ost-Cold War developments initiated a discernible change in the continental self-conception. In what Uganda's President Museveni had called a "decade of awakening" in the face of an increasingly felt impact of globalization on Africa's desolate economies, waning superpower interest and the proliferation of horrific humanitarian catastrophes on the continent, Africa began to experience a new wave of cooperative Pan-Africanism. Driven by a growing sense of urgency and a feeling of disappointment and distrust in the international community and its motives, capabilities and willingness to get involved in African affairs, the continent's leaders realized … they had to cooperate with each other and together take charge of Africa's destiny.[45]

Yet, the attribution of the end of the Cold War as having drastically altered everything about the nature of African international relations, especially understandings of sovereignty, is in and of itself unsatisfying. For one, reliance on systemic-level explanations over-determines the importance of external actors on the continent *during* the Cold War—which, except in a handful of key states such as Ethiopia, Somalia, and Angola, was rarely ever truly deeply profound enough to have left a devastating security vacuum upon their exit. Second, explanations that the Cold War led to a proliferation of conflicts after its conclusion overlooks the existence of the roots of numerous post-Cold War conflicts during the Cold War era.[46]

Some authors have added nuance to the "end of the Cold War" explanation for the emergence of Africa's new sovereignty interpretation, making it at least partly more palatable. For his part, Wright has suggested the departure of the USA and the USSR did not directly cause the adoption of new norms, but instead, *facilitated* the domestic African conditions necessary for the reformation of such changes to begin. For instance, rather

than imperiling the continent, the retrenchment of superpowers reduced African states' perceptions of external security threats, thus allowing them to focus more on the internal dimensions of the continental security regime.[47] For his part, Eboe Hutchful thinks that the end of the Cold War simply highlighted to African states the starkness of insufficiencies:

> A stress on the geopolitical dimensions as a key component to comprehending recent changes in Africa's security landscape would be misplaced. … This external element serves merely to expose the fundamental causes of Africa's security crisis, located in the breakdown of internal governance and security structures within African states.

And finally, the constructivist explanation also fails to convince. The notion that African identities changed so substantially upon the departure of the superpowers suffers primarily from a lack of specification of causal mechanisms linking such a change in identities to the shift in norms as such. Yet it more troublingly makes the very odd assumption that African political self-perceptions were so firmly constructed in relation to the superpowers that they suffered crises of identity upon the departure of the latter.

The third genre of international relations theory that proffers a systemic explanation for changes in African collective security norms is the neoliberal institutionalist school. In this understanding, it has been suggested that norms about sovereignty and human rights that had been established at the global, systemic level from international organizations—particularly the UN—in essence "trickled down" into Africa, where they were then enshrined within the new AU's Constitutive Act. As might be expected, the "global norms" here in question are related to the responsibility to protect, or R2P, norm.[48] First introduced by discussions by Médecins Sans Frontières founder Bernard Kouchner and professor Mario Betatti, the framework was developed further academically in the 1990s by Francis Deng, supported by middle-power states like Canada, Sweden, and Norway; notably referenced by Kofi Annan's agenda for UN reform *In Larger Freedom*; and forwarded globally most prominently in a 2001 International Commission on Intervention and State Sovereignty report.[49] In sum, the R2P doctrine is at the core of all global norms about the international community's right to intervention in a state when that state is not fulfilling its expected duties of serving as a protector of, and not a threat to, its citizens. The notion of "sovereignty as responsibility"

thus emerged, and articulated that states that could not or would not protect their populaces from harm did not have the right to historical protection of non-intervention as conceived of by the Westphalian notion of sovereignty.[50]

Given the ascendancy for the R2P framework globally, within neoliberal institutionalist predictions of normative change, three specific lines of thought are offered for the inclusion of Article 4(h). The predominant neoliberal, systemic explanation suggests that international leaders *applied pressure* on African states to adopt the new norms. In a broad sense, various authors have noted the tendency for Western powers in the post-Cold War era to demand a host of neoliberal reforms to African states seeking the receipt of foreign aid[51]—not only in relation to the protection of human rights, but also in relation to improved governance, transparency, and democratization—in exchange for development assistance and private capital investment.[52] Thus, the first of three neoliberal explanations for the norm shift suggests that the inclusion of Article 4(h) in the AU was precipitated by the need for preeminent African states, in the protection of their international image for donors, to agree to new forms of good governance.[53] Nsongurua Udombana for instance has suggested that the norms embodied in the AU might be considered something of a public relations ploy aimed at bolstering individual states' international images for wealthy, liberal donor states.[54] Or, as Haggis writes:

> According to this account, the key motive behind Article 4(h) was not a genuine commitment to alleviate human suffering but the more self-interested goal of enhancing African states' international reputation in order to reap the economic benefits associated with good international standing. Article 4(h) was thus a means to an end (development assistance and foreign direct investment) and the decision to adopt a right of intervention for the AU was made according to the logic of consequences, rather than the logic of appropriateness.[55]

A second liberal explanation suggests that rather than being compelled to change as a result of international *pressure*, the emergence of the new norms was more coincidental, and suggests that African states were in a dialectical process of norm construction at the global level. Rather than being *forced* to include new language, the imbuing of such norms was simply the result of the AU coming to existence at a time when radical new takes on post-Westphalian sovereignty were simply *de rigeur* globally. Thus, the rationales in this vein suggest that the AU, in effect, learned and adopted the norms from the UN: they weren't necessarily

forced upon African states, though African states did not create the norms wholly on their own. In this explanation, then, the radical shift in the conceptualization of sovereignty can be thought to be driven more as a byproduct of the genesis of a new organization which was able, *tabula rasa*, and as the newest major regional organization, to instill within itself the progressive legal norms contemporarily available. Africa, while exerting agency in the adoption of norms, was in some sense a bystander in the wake of normative shifts at the global level more generally.

Yet, what most liberal, systematic explanations overlook is that African states, rather than being (a) pressured or (b) equal members of a dialectical process of transnational norm construction, were instead (c) *at the forefront of creating global changes themselves.* Consistently under-discussed is that the African Union was the first major international organization to incorporate language on the responsibility to protect into its constitutive act: thus, its *de jure* commitment predates even that of the UN.[56] To wit: while the African Union Constitutive Act was being ratified in 2002, most non-African members of the United Nations General Assembly and Security Council were only themselves beginning to sign on to UN legislation even *mentioning* the responsibility to protect. The first major instances of UN member state commitment to the *idea* of R2P came at the 2005 World Summit at the UN headquarters in New York, in which states committed, in UN Security Council Resolution 1674, to the "unambiguous acceptance of collective international responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity."[57] Yet, it was only the next year, in April 2006, that the UN Security Council passed its first (legally binding)[58] resolution in relation to the responsibility to protect, when members passed UNSC Resolution 1706, invoking the language of the "responsibility to protect"[59] in relation to the crisis in Darfur, Sudan.

Such a chronology should lay to rest the notion that the R2P ideology imbued within Article 4(h) was externally imposed upon the nascent African Union by the UN. Admissions from senior UN officials speak for themselves. In no uncertain terms, UN Secretary-General Ban Ki-moon, in describing the relationship of the UN and regional and sub-regional organizations on the responsibility to protect, wrote:

> Regional and sub-regional bodies, such as the Economic Community of West African States (ECOWAS), the African Union, and the Organization for Security and Cooperation in Europe (OSCE), were in the vanguard of international efforts to develop both the principles of protection and the practical tools for achieving them. The United Nations followed their lead.[60]

Or as Edward Luck, Special Advisor to the United Nations Secretary-General, declared: "the responsibility to protect really came from Africa, and the African experience" and "emerged, quite literally, from the soil and soul of Africa."[61] And in a statement to the UN Security Council in 2004, the then-UK ambassador and permanent representative to the UN, Sir Emyr Jones Parry, stressed the magnitude of Article 4(h):

> The African Union has made rapid strides in a very short period of time … It even recognizes the principle—*which no one outside Africa has done*—that an intervention in a territory may be permissible if a Government is not protecting its own citizens … and that intervention, if necessary, can be made against the wishes of the country concerned. That is immensely far reaching.[62]

What then are we to make of the arguments for systemic sources of shifts in African collective security policy regarding sovereignty and non-intervention? In short, both realist and constructivist explanations add to our understanding only insofar as they suggest that global forces might have *facilitated* the conditions for new outlooks on sovereignty—though did not *cause* them—while predominant liberal explanations, in emphasizing the new circulation of norms regarding R2P at the global level, nevertheless get the direction of causality about the origin of the norms wrong. Or at the very least, liberal systemic explanations typically overemphasize Africa's *receipt* of normative frameworks while downplaying its agency as a *generator* of norms. While it does seem clear that shifts in the international environment did have some bearing on the generation of Article 4(h), the language itself must be understood with reference, not least of all, to a host of African actors themselves.

African Inputs

While illuminating to a degree, relying exclusively on the aforementioned non-African inputs as having primarily informed the continental adoption of Article 4(h) is insufficient primarily in that such a strategy gives virtually no agency to African policymakers, states, and institutions themselves. Thus, this section delves into four African levels of analysis—pan-African

phenomena; regional organizations; states; and leaders—to elucidate the various ways that actors at each informed the adoption of new African norms of sovereignty.

Pan-African Factors

Certain scholars have cited institutional factors at the level of the Organization of African Unity to have been at the heart of the change regarding the inclusion of Article 4(h). Sundry rationales as to just how the OAU served as a predecessor in the creation of the norms that would become imbued within the AU are detailed below.

The first rationale relates simply to the notion of the "appropriateness" of the inclusion of such language: the inclusion of new norms was a byproduct of the OAU's collective historical inaction in the face of mass violence. This inaction led to an indelible recognition of the need for African states to abandon their non-interventionist outlook and adopt more bio-centric, or human-centered, approaches to security. Various instances of mass violence—this explanation runs—eventually engendered the recognition of the need for norm reformation. The chronology of examples is diverse: beginning with violence in Rwanda (1963–1964); the attempted Katanga secession in Zaire (1967); followed by the failed Biafran war of independence in Nigeria (1967–1970); violence in Burundi (1972); Idi Amin's reign of terror in Uganda (1970–1980); the Marxist "Red Terror" in Ethiopia (1977–1978); the First Liberian civil war (1989–1996); the collapse of Somalia (1993–1994); the Rwandan genocide (1994); and the conflict in Burundi (1997).[63] In each of these instances, it could be argued, the African international community was "ingloriously quiet" using, Carolyn Haggis's[64] words, leveraging the OAU's norms of sovereignty as non-intervention in what Donald Puchala[65] has referred to as "moats around national elites" and leaders. This reasoning, in other words, suggests a gradual, historic–functionalist explanation of the change in the nature of norms embedded in the AU Constitution. African states, having witnessed instances of mass violence since the 1960s and beyond, and thereby impacted psychologically, created a set of statutes to prevent mass violence in ways previously seen.

Many astute observers of African international relations have broadly forwarded this "intuition of adoption" or as Finnemore[66] calls it, the "logics of appropriateness" argument, based in the notion of historical inadequacy of the OAU's stance on sovereignty specifically, or on the broader recognition that by the early 1990s, "the contemporary challenges faced by the continent were no longer the same as those of [OAU's founding in] 1963."[67] For instance, Ben Kioko writes that: "The decision by the Assembly of Heads of State and Government of the OAU who adopted the Constitutive Act of the African Union to incorporate the right of intervention in that Act stemmed from concern about the OAU's failure to intervene in order to stop the gross and massive human rights violations witnessed in Africa in the past."[68] Maluwa relays that:

> In an era in which post-independence Africa has witnessed the horrors of genocide and ethnic cleansing perpetrated on its own soil and against her own kind, it would have been absolutely amiss for the Constitutive Act to remain silent on the question of the right to intervene in respect of such grave circumstances as war crimes, genocide and crimes against humanity.[69]

Within these explanations, a great number of scholars cite in particular the psychological impacts of inaction during the Rwandan genocide as having played an integral role in the adoption of Article 4(h). For her part, Hélène Gandois[70] insinuates that leaders have since been dealing with how to avoid another genocide since Rwanda, where Paul Williams forwards more definitively that "the introspection that followed the 1994 Rwanda genocide was a major catalyst in prompting the subsequent shift in the normative climate of African society."[71] Many others have forwarded broadly similar suggestions, also noting the psychological effect that inaction during Rwanda had on members of the United Nations as well.[72]

Authors' explanations of just how these instances of inaction causally translated into the adoption of new norms have also been varied. Williams has suggested that these glaring failures were impactful in their ability to generate discussion about the importance of norm reformation within the OAU secretariat, all of which led to acceptance, in 1995, of the OAU's endorsement of the necessity of "ready contingents" within national armies to be able to respond to conflicts.[73] In another explanation, Haggis has

argued that the shift in norms was less the product of the Rwandan genocide *per se*, but rather, a question of timing: she has suggested that the timing of the OAU's July 2000 release of its internal report (*Panel on the Rwandan Genocide*), which offered scathing critiques of OAU inaction, coincided with discussions on the creation of the AU in ways that led to a more innovative agenda for intervention than might have otherwise been expected.[74]

The second explanation at the pan-African level for the inclusion of Article 4(h) is that the process of the change in norms was one that had been in development for decades anyway: rather than being a radical departure as some have suggested, the inclusion of Article 4(h) was simply the next logical step in a piecemeal evolution on the OAU's understanding of sovereignty. In short, though the OAU was initially clear that non-intervention was to remain the norm, as time progressed even it broke its own rules. Beginning in 1981, the OAU itself launched its first attempt at intervention in Chad. Following, the first instance of the continent's movement toward allowing intervention in member states' conflict occurred in 1993 in Cairo with the establishment of the OAU Mechanism on Conflict Prevention, Management, and Resolution.[75] Thus, the AU Constitutive Act simply reinforced the Cairo Declaration.[76]

A third AU institutional explanation has also been proffered at the pan-African level, and suggests that the personalities within the AU Secretariat sought the inclusion of Article 4(h) to ensure that sub-regional organizations (especially ECOWAS), which were becoming more prominent players in the African security arena, remained subordinate to the pan-African Union. The inclusion of Article 4(h) might be thought of as the fight to "keep the continental organization relevant" in the face of expanding mandates of Africa's regional economic communities (RECs).[77] Thus, in this explanation, it was members operating within the OAU Secretariat—not member states themselves—who sought to ensure that the AU retained top hand in the continental security agenda. It was then the OAU as such that was serving as a "norm entrepreneur."[78] As Franke puts it, by 1993, the OAU was "still lagging far behind the proactive stances towards conflict management of regional organizations such as ECOWAS," thus the OAU remained "a peripheral actor compared to the UN and regional organizations like ECOWAS."[79] The move for the AU to include new liberal norms

on intervention, then, could theoretically be attributed to, as Haggis writes, "the OAU's purported search for relevance in an institutionally-dense security environment."[80]

Other pan-African inputs have also been noted. Haggis, in her exhaustive overview of the emergence of Article 4(h), has compiled a list of various other suggestions at a broadly pan-African level, including the suggestion by S. Neil MacFarlane and Yeun Foon Kong about the desire for more African ownership over collective security; Alex Bellamy's insinuation about Article 4(h)'s utility to deter Western intervention; and Jean Allain's suggestion that the inclusion of 4(h) related to consternation from African actors about the UN's inaction in intervening in conflicts.[81] Apart from those that she has compiled, other inputs that authors have noted include the insufficiency of extant OAU mechanisms in dealing with conflict due to their tendency to be hamstrung by members to the conflict[82] and the inclusion of Article 4(h) as broadly reflective of desires of African civil society,[83] especially the role of women's rights activists.[84]

Yet problems arise from claiming that the OAU or other pan-African forces were exclusively at the heart of engendering a new AU security framework. Explanations of this genre are functionally tautological. To suggest that the AU imbued itself with new norms of pro-intervention simply because it wanted to gives no explanation as to the source of the presences *within the institution itself*: where did such preferences for these norms come from at all? Thus, although as an interrogation of pan-African factors, these explanations give us some insight into the factors and conditions at play, they are unsatisfactory in painting a clear and wide-ranging picture.

African Regional and Subregional Factors

While regional explanations for the shifts in African continental security norms tend not to be common, they should not be overlooked, as they are far more compelling than typically assumed. Dembinski and Schott have offered a cogent explanation relaying the importance of regional international institutions as concerns the adoption and dissemination of norms, writing that regional organizations are unique in that they:

> Exert their influence … by shaping the reception of emerging global norms regionally. [They] can either transport global norms to the national level, thus enabling a process of outside–in transmission, or block the adoption of global norms and articulate their rejection through their member states, thus performing an inside–out process of dismissal.[85]

Two regional explanations for the nature of norm change can be forwarded. The first regional explanation that Africa's subregional organizations were at the heart of the AU's normative change regarding sovereignty is the common recognition that several of Africa's international organizations, most notably ECOWAS, have *always* been at the forefront of pushing forward ever-more liberal interpretations of sovereignty, especially as it relates to the possibility of collective intervention during times of conflict. To that end, the broad suggestion is that the essence of the language of Article 4(h), in fact, came from the AU's adoption of some of the most progressive ideas from smaller subregional organizations, whose mandates of the promotion of peace and security, among other goals, largely mimicked its own, and which had, in any case, developed more expertise in the area of peacekeeping than the O(AU) itself.[86]

In a more specified linkage, many authors have argued that the AU's progressive interpretation of sovereignty and intervention in member conflicts was most heavily borrowed from ECOWAS, in West Africa. To be sure, ECOWAS has always been the leading African international organization as concerns collective security efforts. It broke new ground in 1990 with the deployment of the ECOWAS Monitoring Group (ECOMOG) intervention mission into its member state of Liberia to oust President Samuel Doe in 1990, serving as the first time an African subregional international organization had ever launched a peace enforcement operation. ECOWAS's subsequent interventions into Sierra Leone (1993) and Liberia (1997) reinforced the fact that, at least in Africa's western regions, norms of non-intervention were more a relic of the 1960s post-independence paranoia than a contemporary understanding of effective African statecraft in the less uncertain 1990s. Thus some like Katharina Coleman suggest that when it comes to establishing norms of intervention in Africa, ECOWAS has served as a "model for African organizations considering regional peace enforcement operations."[87]

More acutely still, a compelling case for understanding the African regional inputs into the AU's adoption can be seen in that, beyond just their interventionist *actions*, ECOWAS and other African RECs were also at the forefront of creating *legal* frameworks to codify and thus justify these interventions, which the AU borrowed from substantially when it emerged in 2002. Indeed, throughout the 1990s, RECs in Africa set about on the process of revising their *own* founding treaties,

analogues to the AU's Constitutive Act, to reflect their own dismantling of the historical African norms of non-intervention. To that end, in 1993, ECOWAS revised its treaty to allow itself to better respond to collective security threats within the region, and in December 1999, it created the ECOWAS Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, which, particularly in Article 25, allowed for collective responses to insecurity in member states.[88] For their part, members of the Southern African Development Community (SADC) created a similar instrument, the Organ on Politics, Defense and Security (adopted in 1996, entering into force in 2001), as did members of the Economic Community of Central African State (ECCAS), which created the Protocol Relating to the Establishment of a Mutual Security Pact in Central Africa (adopted in 2000, entering into force in 2004). As with ECOWAS, the adoption of these mechanisms "opened up the internal affairs of SADC and ECCAS members to collective scrutiny and allowed for some type of military response."[89] Thus, it has been argued frequently that the RECs have been the most progressive leaders on the continent when it comes to changing norms about continental security.[90]

While an appreciation of the African regional forces moves us closer toward a more complete understanding of the origins of Article 4(h), some lingering concerns remain. One's struggle for greater clarity comes when the location of the source of such changes within the regions is to be pinpointed: although regional organizations created new norms themselves that the AU may have broadly mimicked, from where did *those* norms derive? Was it somehow the security culture of West Africa as such? Or, did progressive norms of intervention arise in West Africa during the 1990s behind the power of statist norm entrepreneurs, pulling the organization in a particular direction? To understand how and why organizations create specific outlooks, the observer must dig deeper into the preferences of its constituent member states.

African Statist Factors

Moving down from the level of the region to the level of the state, it has also been argued that the change in African collective security norms was brought not by the horrors caused by the collapse of *weak* African states,

but rather as a result of forceful leadership from *powerful* individual African states. Particularly, observers have underlined the roles of South Africa, Nigeria, and Libya in engendering a shift in norms.[91] Concerning South Africa, Baimu and Sturman relay that South Africa had a "strong hand"[92] in the drafting of the Constitutive Act. Christopher Landsberg understands South African leadership to be "instrumental in articulating a right to intervene in the internal affairs of member state and Peter Kagwanja argues that the African Union's new stance on sovereignty has a 'strong South African imprimatur.'"[93] Others have since argued that the responsibility to protect doctrine has become a "major pillar" in South Africa's foreign policy.[94] Others, however, disagree.[95] Further hypotheses sit at the nexus of regional and statist explanations, suggesting that South Africa and Nigeria used their regional dominance to *de facto* pressure their neighbors into acceptance of Article 4(h), a proposition that is discussed subsequently.[96] Or, as Haggis articulates, "regional power dynamics, in other words, might be the silent reason why the AU was given this particular set of prerogatives."[97]

Others have looked at country-level forces from less powerful African states. Walter Lotze has outlined that certain African countries have been outspoken for the benefits of R2P within the context of the United Nations, particularly noting that "during a UN Security Council Debate on the responsibility to protect in 2005, it was three African states (Benin, Rwanda, and Tanzania) that provided strong support for the norm."[98] Others have also looked back in African history and have cited Tanzania's 1978–1970 invasion into Uganda as a turning point for the reformation of the norms of non-intervention. Tiyanjana Maluwa writes that the Tanzanian intervention "facilitated the emerging debate within the OAU on the need to rethink … [the] principles of sovereignty and non-interference,"[99] while Baimu and Sturman relay that it got the OAU to "question its rigid interpretation of the notion of sovereignty."[100]

However, while superficially cogent, attributing the emergence of Article 4(h) norms to strong African states alone intuitively has its drawbacks. First, such explanations tend to suggest only that specific states were advocates of such language: relatively little attention is given to how and why coalitions for and against such norms emerged.[101] Second, it overlooks the fact that assumptions of statist responsibility for new normative inclusions simply "blackbox" the state, with little reference to where statist

preferences themselves emerge. Indeed, in the history of African foreign policymaking, these have frequently been derived from individual leaders, the final level of analysis that will be investigated.

African Leadership Factors

A final and no less compelling explanation of the shift in ushering in such norms has been attributed to the efforts of specific African leaders. In undergirding the shift from the OAU to the AU, it has also been suggested that certain African leaders have served as so-called "norm entrepreneurs,"[102] to borrow the phrase from Finnemore and Sikkink[103] encouraging the deepening of norms within the organization. At least three prominent scholars have landed on the role of leaders as the prime determinants of the inclusion of 4(h).

First, Thomas Teiku[104] has offered a fascinating analysis of the political bargaining processes that undergirded the shift of the OAU to the AU, concluding that the efforts of three leaders—Moammar Qaddafi (Libya), Olusegun Obasanjo (Nigeria), and Thabo Mbeki (South Africa)—made them the fundamental players that put the right of intervention into the AU Constitutive Act. Particularly, he argues that the 1999 elections of Obasanjo and Thabo Mbeki in Nigeria and South Africa respectively were imperative sources of the inclusion of the new norms. For his part, Obasanjo wanted other countries to help shoulder the responsibility of policing the West Africa region after the expensive Nigerian-led ECOMOG interventions in the 1990s, especially in light of Nigerian civil society backlashes against their costs.[105] For his part, Thabo Mbeki was motivated, it is argued, by a desire to deepen his liberal credentials and ingratiate himself with the international community, and by the imperatives of leadership that his African National Congress (ANC) party needed to evince.[106] These efforts coincided with the Libyan leader Moammar Qaddafi's renewed push to use the OAU as a platform to counter his own international isolation.[107] After meetings were convened to ostensibly improve the efficacy of the OAU in July and September 1999, which ultimately led to the Sirte Declaration[108]—including Qaddafi's radical suggestion for the United States of Africa—most observers agree that the ultimate outcome version of the AU Constitutive Act was a conciliatory agreement by other states toward Qaddafi, or a process that Baimu and Sturman[109] have

referred to as carrying on OAU business while still keeping an overly radical Libya "inside the AU tent."[110]

Second, for her part Carolyn Haggis,[111] in what is unquestionably the most thorough and well-articulated analysis to date of the genesis of Article 4(h), has also landed on leaders as being the primary determinants of the inclusion of Article 4(h). While she has investigated many of the above hypotheses as well, her analysis comes down to the roles of leaders, particularly within powerful states. In short, she suggests that Qaddafi's dogged insistence on the adoption of a new stance of sovereignty—which notably, had nothing at all to do with a notion of humanitarian protection—made him the most important of the individual entrepreneurs, but that the efforts of other leaders in diluting his suggestions to be more palatable cannot be overlooked. In adding nuance to existing explanations, she has emphasized the role of Senegalese President Abdoulaye Wade in trying to salvage discussions when other members found the Libyan proposal overly radical. Others have emphasized the role of African leaders such as Nigeria's Ibrahim Babangida and Yoweri Museveni in encouraging the opening up of conversations about the role of the OAU's potential avenues for domestic conflict resolution mechanisms and the broader legitimizing role of South Africa's Nelson Mandela.[112]

Beyond simply the norm entrepreneurship of statist leaders, others have cited that leadership from bureaucrats within the OAU itself might have been an important input in reforming continental security norms. Most cited in this regard is Tanzanian diplomat Salim Ahmed Salim, who served as the Secretary-General of the OAU between 1989 and 2001.[113] Notable for the release of the 1992 report *Resolving Conflicts in Africa: Proposals for Action*, Salim is widely noted as a key catalyst in encouraging the OAU to become more open to inserting itself in member states' domestic politics in instances of gross human rights violations. Thus, Gandois, citing Liberian president Ellen Johnson Sirleaf, notes that during the Liberian crisis of 1990, Salim asserted that "nowhere in the OAU Charter does it refer to the term 'noninterference' as meaning indifference to the plight of our people,"[114] a notion that he put into action in 1999 in warning successive leaders in the Côte d'Ivoire—against the status quo of non-interference—about the potentially dangerous consequences of their actions.[115]

Of all existing interpretations, the role of African leaders in serving as the most fundamental inputs leading to inclusion of new outlooks on sovereignty is most cogent. Indeed, given the extensive nature of the OAU bureaucracy and its attendant potential veto points, it is hard to imagine the inclusion of such radical language without the backing of specific norm entrepreneurs like Obasanjo, Mbeki, Qaddafi, and Salim. Yet relying strictly on the interpretation of leaders as having ushered in the new norms overlooks both the changing international backdrop—particularly globally new thinking on the responsibility to protect—as well as the statist contexts—including legislatures, bureaucracies, and civil societies—that inevitably informed the context in which leaders could even forward suggestions. Apart from these critiques, the simple suggestion that leaders were at the forefront of precipitating such changes does not allow for a full interrogation into the micro-processes of cognition, rationality, and decision-making, which inevitably have at least some bearing on the resultant outcomes. Most importantly though, to distill explanations for the inclusion of Article 4(h)—arguably the largest about-face in the history of African postcolonial international relations—to a handful of state leaders is a gross simplification of a far wider-ranging series of phenomena that have, over the course of a half-century, all collectively contributed to the emergence of what has been hailed as a new dawn in African security relations.

Conclusion

Given the breadth of explanations that have been forwarded in the preceding pages, to suggest that there is a single, isolatable "cause" of the shift in African collective security norms that resulted in the inclusion of Article 4(h) has been shown here to be misguided. Instead of pinpointing one independent variable, a more accurate understanding of just why this shift has occurred should take into account various inputs at all levels of analysis in an attempt to construct a logical explanatory story. Especially when dealing with phenomena that are as intangible, fungible, and contested as norms—not least those that are purportedly stretching across the second largest continent in the world—some degree of opacity in our understanding seems to be inherent. Indeed, as has been shown, selecting any one level of analysis when attempting to understand normative shifts inherently overlooks both the more macroscopic and microscopic forces at play.

Notes

1. See Packer and Rukare 2002, 365; Udombana 2002, 1181; Williams 2007; Tieku 2004.
2. See African Union 2002.
3. See Mwanaswali 2008, 47.
4. Indeed, as Haggis (2009, 10) notes, many legal scholars at the time were highly doubtful about the ability of any *legal* enshrinement of the right of intervention—much less in an African context—to the extent that "the likelihood that a right of humanitarian intervention would be codified in a treaty outside of the forum of the UN was almost entirely overlooked in the literature."
5. See Haggis 2009, 85; Kinidiki 2003; Mwanaswali 2008, 47.
6. See Cilliers and Sturman 2002, 29; Haggis 2009, 2, 85; Mwanaswali 2006, 90; Mwanaswali 2008, 41; Packer and Rukare 2002, 372.
7. See Haggis 2009; Williams 2007; Franke 2008; Kioko 2003; Baimu and Sturman 2003; Tieku 2004.
8. See Moravscik 1993, 6. See Ray 2001, 356.
9. See Smith, Dunne, and Hadfield 2012, 8.
10. See Smith, Dunne, and Hadfield 2012, 16.
11. See Singer 1961; Smith 1986.
12. See Allison 1969.
13. See Putnam 1988.
14. See Moravsick 1993, 6.
15. See Hudson 2012, 31. See Smith, Dunne, and Hadfield 2012; Hudson 2014; Neack 2014.
16. See Finnemore and Sikkink 1998, 891.
17. See Williams 2007, 258.
18. See Sikkinks 1998.
19. See Finnemore and Sikkink 1998.
20. See Rüland 2014.
21. See Kindleberger 1986.
22. See Volberding 2015.
23. See Lotze 2010, 35.
24. See Acharya 2004.
25. See Acharya 2004; Rüland 2014; Williams 2007.
26. See Rüland 2014, 183.
27. See Jackson and Rosberg 1982; Jackson 1993; Herbst 2000.
28. See Jackson 1993, 27.
29. See Jackson and Rosberg 1982; Clapham 1996.
30. See Mezu 1965, 40.
31. See Mezu 1965, 65.

32. See Foltz 1983.
33. See Clapham 1996.
34. See Wamba dia Wamba 1994, 252.
35. See Bayart, Ellis, and Hibou 1999.
36. See Mamdani 1996.
37. See Clapham, Herbst, and Mills 2006, 247.
38. See Mwanaswali 2008, 41.
39. As Haggis (2009, 60) writes: "During the Cold War, there were numerous cases in which African states used subversive tactics against other African states. For example, Congo–Brazzaville and the Malagasy Republic supported Kataganese secessionists, and Arab countries in North Africa supported Eritrean secessionists. Similarly, Sudan worked to subvert Eritrea and Chad, Somalia labored to destabilize Ethiopia, Algeria strove to undermine Western Sahara, and Libya toiled to weaken Sudan, Western Sahara, and Chad. There were also instances in which African states intervened militarily in their neighbors. To name just a few, Tanzania launched a military incursion into Uganda in 1979, Libya intervened in Chad and Tunisia in the early 1980s, and Somalia intervened in Ethiopia in 1982."
40. See Fagbayibo 2013, 415.
41. See Zähringer 2013, 199–200; Haggis 2009, 44; Dembinski and Schott 2013, 290; Williams 2007, 258
42. See Dembinski and Schott 2013, 286.
43. See Bates 2010; Franke 2008, 318; Dersso 2014, 52.
44. See Packer and Rukare 2002, 367; Warner 2015.
45. See Franke 2008, 318–319.
46. See Kasaija 2013.
47. Though not stated explicitly in his work, this notion is broadly derived from Wright 1999, 9.
48. Yet, what the new tendency to allow intervention means is inherently contested. As Adam Branch (2014, 187) has written of the R2P concept: "Among its proponents, it has been called variously a norm, a doctrine, a concept, an idea, a principle, a framework, or a lens, while among its critics, it has been less charitably identified as an excuse, an ideology, a fad, a buzzword, or an empty slogan."
49. See Dembinski and Schott 2014, 366; Kioko 2003, 808; Lotze 2010, 63; Zähringer 2013, 187.
50. Yet not all are convinced that the R2P norm is as "liberal" as its pro nets would suggest. Adam Branch (2014, 189) forwards that from some African perspectives, the notion of R2P "represents just the latest excuse for Western intervention and aggression" and is "not even new … considering

that 'protection' was the justification frequently given for intervention during the colonial period."

51. These of course, have been most notable in relation to the neoliberal reforms demanded in the service of the international financial institutions' structural adjustment policies (SAPs), but, in a bilateral sense, in relation to the USA's so-called "Washington Consensus."
52. See Wright 1999; Tieku 2007, 253; Haggis 2009, 88.
53. See Haggis 2009, 88–90.
54. See Udombana 2002.
55. See Haggis 2009, 89. However, despite articulating the hypothesis, Haggis (2009, 193) finds little evidence that an economic explanation was actually at play.
56. See Zähringer 2013, 190.
57. See United Nations 2005.
58. The distinction of the UN Security Council passage of resolutions is important, given that they are the only legally binding decision (apart from budgetary matters in the General Assembly) that are made in the United Nations.
59. The UN Security Council has subsequently invoked its responsibility to protect civilians in conflicts several times since then, including in Libya in 2011 (UNSC Resolutions 1970 and 1973); Cote d'Ivoire in 2011 (UNSC Resolution 1975); Yemen in 2011 (UNSC Resolution 2014); Mali in 2012 (UNSC Resolution 2085); Sudan and South Sudan in 2011 and 2013, respectively (UNSC Resolutions 1996 and 2121); and Central African Republic in 2013 (UNSC Resolutions 2121 and 2127) and 2014 (UNSC Resolution 2134).
60. See United Nations 2011.
61. Quoted in Branch 2014, 187.
62. Quoted in Haggis 2009, 3.
63. See Paul Williams 2011, 150; Baimu and Sturman 2003.
64. See Haggis 2009, 58.
65. See Puchala 1998.
66. See Finnemore 1996.
67. See Packer and Rukare 2002, 366.
68. See Kioko 2003, 812.
69. See Maluwa 2001, 28–29.
70. See Gandois 2009, 16.
71. See Williams 2014, 148–149.
72. See Zähringer 2013, 190; Dembinski and Schott 2014, 372; Franke 2008, 92; Gandois 2009, 16; Williams 2014, 148–149; Dersso 2014, 52; Kioko 2003, 812; Williams 2011, 150; Mwanswali 2006, 89–90.

73. See Williams 2011, 151.
74. See Haggis 2009.
75. See Franke 2008, Chap. 5; Hailu 2011, 60. Franke (2008, 89) notes that even though the 1993 creation of the OAU Mechanism for Conflict Prevention, Management, and Resolution signaled the beginning of the second wave of the African peace and security landscape, enthusiasm among member states remained low: particularly, they preferred that the OAU focus on the prevention of conflicts, rather than on managing coordination efforts in the aftermath of the outbreak of violence.
76. I attribute this observation to an anonymous reviewer.
77. See Haggis 2009, 97–100.
78. See Murithi 2012; Dembinski and Schott 2014.
79. See Franke 2008, 88, 91.
80. See Haggis 2009, 98.
81. See Haggis 2009, 16.
82. See Kioko 2003, 814; Udombana, 2002 182.
83. See Maluwa 2003.
84. See Tieku 2004, 263–264.
85. See Dembinski and Schott 2014, 362–363.
86. See Franke 2008, 88.
87. See Coleman 2007, 73.
88. See ECOWAS 1999; Williams 2011, 152; Haggis 2009, 143–153.
89. See Williams 2011, 152; Haggis 2009, 146–148.
90. See Franke 2008, 88; Williams 2011, 152; Zähringer 2013, 190.
91. For more on the quality of African state leadership and legitimacy within various regions, see Gebrewold 2014.
92. See Baimu and Sturman 2003, 38.
93. Quoted in Haggis 2009, 92.
94. See Verhoeven et al. 2014.
95. See Haggis 2009, 196.
96. See Dembinski and Schott, 374–375; Haggis, 2009, 91–95; Tieku, 2004.
97. See Haggis 2009, 94.
98. See Lotze 2010.
99. See Maluwa 2004, 217.
100. See Baimu and Sturman 2003, 39.
101. A notable exception in this regard is the work done by Haggis 2009.
102. See Williams 2007, 276.
103. See Finnemore and Sikkink 1998.
104. See Teiku 2007.
105. See Teiku 2007, 259.

106. The South African support for the transition to the AU was part and parcel of the ANC (African National Congress) party's platform. Recognizing that the populist–socialist platform that brought it to power was increasingly unattractive in the neo-liberal 1990s and 2000s, it sought to adhere to new neo-liberal values in order to create a new image and to attract foreign investment for the purposes of South African nation-building (Tieku 2004, 253).
107. For more on Qadaffi's relationship with Africa, see Kioko 2003; Tieku 2004; Haggis 2009, 160–163.
108. For more on the 1999 Sirte Summit and its internal politics, see Franke 2008, 95; Tieku 2004; Haggis 2009, 163–166; Packer and Rukare 2002, 371.
109. See Baimu and Sturman 2003, 38.
110. See Baimu and Sturman 2003; Tieku 2007.
111. See Haggis 2009.
112. See Packer and Rukare 2002, 368; Tieku 2007.
113. See Gandois 2009; Tieku 2007; Mwanswali 2008; Haggis 2009, 137–141.
114. See Gandois 2009, 125.
115. See Mwanswali 2008, 50.

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CHAPTER 7

Electoral Democracy and Election Coalitions in Former Settler Colonies in Africa: Is Democracy on Trial or in Reverse Gear in Kenya, Côte d'Ivoire and Zimbabwe?

Peter Anyang' Nyong'o

Introduction

African scholars, civil society, social movements and international organizations (including what we here choose to call "the democracy industry")[1] have in the last two decades put a lot of faith in competitive electoral politics as a means of achieving and consolidating democratic governance in Africa. Yet elections, however frequently held, have rarely been a sure means of achieving, let alone consolidating, democracy in Africa. It might not be by accident that Kenya, Côte d'Ivoire and Zimbabwe—three countries which could have been regarded as "good candidates" for successful elections—have gone through tumultuous times following controversial

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elections—held or avoided—since the fall of the Berlin Wall in 1989. Their attempts to "transit" to democracy remain tenuous, with strikingly similar experiences and elite political compromises when competitive electoral politics fail to produce acceptable results or incumbents simply fail to quit power when they lose. It is assumed that free and fair elections are important for democracy and democratization. But can free and fair elections be held in societies where incumbent regimes see such elections as a threat to their political rule and economic interests?

After many years of authoritarian rule, with presidents who employed very similar methods of using the armed might of the state to exercise power in ethnically diverse societies, attempts at transitions to democracy through competitive electoral politics have been substantially protracted, if not destructively violent, in the three countries in varying degrees. Both Kenya and Côte d'Ivoire lost their authoritarian presidents: Côte d'Ivoire through death in 1993 (and then a military coup against the successor under the same regime in 1999) and Kenya through a surprisingly free and fair election in 2002. Zimbabwe, however, has been stuck with the old octogenarian president Robert Mugabe, apparently "winning" competitive elections in political terrains largely of his own choice, but in reality refusing to quit power when he lost, as in March 2008. With far-reaching constitutional reforms in 2010 supposed to provide the framework for democratic electoral politics and a legitimately elected democratic government, Kenya would have been expected to climb out of the authoritarian political lacuna that her two sister countries still seem to be locked into, but she did not quite do that. Accepting electoral results as legitimate remains a problem in Kenya and the search for a more representative democracy is still in the works. One would have expected these three former settler colonies, regarded as the most economically prosperous and politically stable in postcolonial Africa, to have been at the forefront as successful cases of "transitions" to democracy. But the concept of "transition to democracy" has itself become problematic: what form does it take, what type of politicians are capable of deliberately engineering the transition, how long does it take, what stages does it go through, is it irreversible or can it get into reverse gear at times? If it does get into reverse gear, how soon would it begin to accelerate forwards and what does it take for it to do so?

Substantial literature exists on problems that authoritarian societies face in their attempts to democratize. Since 1980, most of this literature has focused on Latin America and states previously under the Soviet Union.[2] For Guillermo O'Donnell and Philippe Schmitter, *the transition* is the

interval between one political regime and another.[3] Transitions, they point out, are delimited, on the one side, by the launching of the process of dissolution of an authoritarian regime and, on the other, by the installation of *some form of democracy,* the return to some form of authoritarian rule, or the emergence of a revolutionary alternative. Thus regimes can "transit" from authoritarianism to democracy, back to authoritarianism and then to democracy "or something else" including sheer military dictatorship or a "failed state" for that matter. What matters is whether or not a government formed after "the departure" from authoritarianism is formed through electoral democratic politics or not. And that once formed, it is accepted as legitimate by the citizens and can exercise authority using the armed instruments of the state without any challenge. In most of the literature on transitions to democracy from authoritarian or some other non-democratic governments, the following definition of the *democratic method of forming a government* seems to prevail.

"The democratic method," Joseph Schumpeter observed more than half a century ago, "is that institutional arrangement for arriving at political decisions in which individuals acquire power to decide by means of a competitive struggle for the people's vote."[4] But the competitive struggle itself is not enough: it needs to be a free and fair struggle among individuals who play by rules known to all and fairly and justly adjudicated. The voters, in return, need to exercise their freedom of choice as individual citizens, and/or groups of citizens, exercising "rights to vote" under rules which neither discriminate nor limit choices arbitrarily. Hence competitive democratic elections have had, added to the paraphernalia of rules and regulations that are contained in constitutions and acts of parliament, an array of institutions that manage such elections from what is normally regarded as "neutral" or "autonomous" grounds from wielders of state power. As many students of democratic elections have observed, the contestation for democratic elections is quite often first and foremost a struggle over these rules/regulations and electoral management before it is a struggle over the elections and their results. The history of African nationalism, and the struggle for independence, attests to this.

Without going much further into this literature, let us limit ourselves to this perception on transitions purely for the purpose of discussing the phenomenon in Africa, particularly the three former plantation colonies we intend to study. Have they been transiting to democracy? How has this transition been undertaken? What institutions and processes have been involved? What explains the protracted nature of the processes of

dismantling the authoritarian regimes and the coming into being of "the replacements?" If these "replacements" are not democratic, what are they? Why, in particular, has it been problematic to nurture democratic transition through competitive elections in the three countries?

This chapter looks at the prospects for electoral democracy in the three countries since 1990 and seeks to find out why holding competitive democratic elections has been problematic and prone to violence. Similar patterns have emerged in the three countries with varying degrees of success: constitutional reforms to establish acceptable rules for competitive electoral politics; coalitions of political parties to win acceptable majorities in elections; governments of national unity when no clear-cut majorities win elections or when incumbents simply refuse to leave power, employing the security apparatuses of the state to secure their rebellion against the popular vote. Using varying degrees of state terror, quite often accompanied by breakdowns in the rule of law, has led to intervention by international or regional groups to help create domestic political order. What is it in these former plantation colonies which has predisposed them to more or less similar experiences during this period of "transition to democracy" through competitive electoral politics?

Plantation Economies and Authoritarian Regimes

In the CODESRIA debates on democracy and democratization processes in the 1980s,[5] Thandika Mkandawire identified plantation colonies in Africa as having *produced* their own genre of authoritarian regimes in Africa. These regimes, though led by strong leaders that could be described as *presidential authoritarian*,[6] tended to have strong agrarian capitalist roots derived from the *Africanization* of white settler agriculture. In the case of Jomo Kenyatta and Félix Houphouët-Boigny this happened at the dawn of their power[7]; in the case of Robert Mugabe this became the process of legitimizing his regime domestically after 20 years of being in power and faced with challenges from his political opponents.[8] The three regimes, however, have strong ethno-class basis in the specific agrarian capitalists that formed their bedrock of political power. In Côte d'Ivoire the Baule *planteurs* from the central part of the country and their Agni cousins from the South and South East formed the central core of Houphouët-Boigny's support in the Parti Democratique de Côte d'Ivoire (PDCI).[9] Jomo Kenyatta relied largely on his own Kikuyu "former loyalists" during the Mau Mau rebellion, who acquired large-scale

settler farms, sparking off an intense debate in the early part of his rule between those who wanted a fairer land deal involving catering to the interest of the poor, and the bourgeoisie around Kenyatta who wanted a laissez-faire approach to the land problem. No doubt Kenyatta settled the matter using an iron fist; hence the disintegration of the nationalist coalition by 1966, hardly three years after independence.[10] From then on, Africanization of the economy became a tool for solidifying the class basis of the authoritarian regime, heavily biased toward expanding economic opportunities within the president's ethnic community, and thereby limiting upward social mobility in other communities.[11] A tight control of the state was key to the political and economic survival of this elite, hence their attempts to change the constitution to allow one of them to directly inherit Kenyatta's presidency as the old man's health started to fail in the late 1970s.[12] Thenceforth, open political competition in elections to control state power would always prove a threat to the economic interests of this elite: hence, the authoritarian option for settling subsequent political conflicts, including assassinations.

Côte d'Ivoire

The role of large-scale coffee and cocoa farmers, buttressed by state support in terms of marketing and subsidy of agricultural inputs, became very important in the politics of Côte d'Ivoire. The state went further to organize the flow of labor from the Muslim North and Upper Volta (later Burkina Faso) for the farmers. The planters of all sizes valued these workers and appreciated the very favorable terms under which the labor was paid. The solidarity between labor and capital within the PDCI derived essentially from this arrangement. Houphouët-Boigny went further to ensure that workers "from the North," regarded as non-Ivorians, gained citizenship after some time. This generosity with Ivorian citizenship included other people from Mali, Ghana, Senegal and even Lebanon who stayed and worked in the country for a long period of time. It was not unusual to find some of them within the civil service and even in Houphouët-Boigny's cabinet. The earnings from the agricultural export economy fueled economic growth in all sectors of the economy, including the commercial, service, financial and manufacturing sectors nurturing a state elite which joined hands with the planters to give the PDCI substantial hegemony in society.

The years from 1960 to the 1990s were more or less the golden years for the Ivorian economy. Côte d'Ivoire remained a "valuable estate" to France

as a former colony and a showcase for the West as a stable, market-oriented and pro-Western state; a distinction she shared with Kenya, a former British colony, on the East Coast of Africa. These years also coincided with the one-party rule under Houphouët-Boigny, giving the impression that the East Asian "miracle" could be repeated in Africa where authoritarianism equaled capitalist development. Samir Amin, however, doubted this possibility, emphasizing that the Ivorian "miracle" was not sustainable since value addition was minimal and the stability of prices of raw material exports could not be guaranteed in the coming future; hence the precarious nature of foreign earnings from these exports. To the local farmers, however, the state ensured stability of farm gate prices through the *Caisse de Stabilisation des Produits Agricoles*.[13] The GDP per capita grew 82 percent in the 1960s, reaching a peak of 360 percent in the 1970s. But this proved unsustainable and it shrank by 28 percent in the 1980s and a further 22 percent in the 1990s. This coupled with high population growth resulted in a steady fall in living standards just before Houphouët-Boigny died in 1993.[14] The improvements that followed in the economy after the devaluation of the CFA Franc did not, however, help deal with the uncertainties already created by the departure of the old leader.

In 1990, following the politics of "national conferences" that swept across Francophone West Africa like prairie fire, Houphouët-Boigny gave in to the popular demands for multi-party politics in his country.[15] Among the several parties that were registered to contest the election that year was Laurent Gbagbo's *Front Popular Ivoirien (FPI),* the Ivorian Popular Front party. The FPI was a party of "outsiders" as far as the PDCI elite were concerned: the challengers to their established political and economic order inherited from Houphouët-Boigny. They were definitely not part of *les militants des militants:* the independence nationalists and hence the true inheritors of *l'état ivoirien*. The core of the FPI was professionals, peasants mainly from the South and South West part of the country, students, teachers and the urban *déclassé*.

Although the PDCI "won" the 1990 election against the FPI, it was definitely not by fair means. The ruling party had to use more brutal methods of keeping itself in power as discontent increased and open defiance to the politics of repression became a pronounced feature of opposition politics. After the death of Houphouët-Boigny in 1993, several opposition political parties emerged, taking advantage of the apparent "relaxed political atmosphere" that was heralded by the departure of the dominant octogenarian. Henri Konan Bedie,[16] who took over as the president, was,

however, not as respected as Houphouët-Boigny, and a good number of the elite sympathetic to the more business-like Alassane Ouattara, former Prime Minister, did not easily adjust to Bedie's leadership; they immediately defected from the PDCI and grouped themselves into a new outfit called the Rally of the Republicans (RDR), ostensibly led by Ouattara. The fact that Bedie, a Baoule, was succeeding Houphouët-Boigny—another Baoule—was not taken kindly by other Ivorian political elites, hence the formation of the RDR. Matters were not made any better for Bedie following the economic uncertainties of the late 1990s and accusations of corruption, political repression and xenophobia ("ivoirite") leveled against him. Moreover, in an attempt to get support and loyalty from the army, Bedie brought major changes in the leadership by replacing career soldiers with his self-appointed Baoule officers. No wonder the army, whose ranks were largely from the north, rebelled against him in the Robert Guei led coup of 1999. When election was held in 2000 following the coup, RDR did not contest since its leader, Ouattara, had been disqualified on the trumped-up issue of citizenship. The FPI won, not because the majority of Ivorians voted for it, but because it got more seats than any other party. Out of 225 National Assembly seats, the FPI got 96 seats; PDCI, 94; RDR, though boycotting, got 5; Parti Independent de Traveilleurs (PIT), the party of workers, got 4; the Union of Democrats of Côte d'Ivoire got 1 seat; the Movement of Future Forces (MFA) received 1; and independents secured 22 seats.[17] In other words, under what is superficially regarded as a democratic election "because political parties compete for the votes," FPI formed the government, although it was, for all intents and purposes, only representing a minority of Ivorians. No doubt a large majority regarded the government so formed as illegitimate. And years would follow when Gbagbo could only rule by force, and through the intimidation of such militias as the Young Patriots of Abidjan, who were fiercely loyal to his wife, Simone.

Looking into the future, Samir Amin had predicted as early as 1973 that sooner rather than later, given the vagaries that such raw material export economies face in the changing fortunes in the global market, the "Ivorian miracle" was likely to face a crisis. When that happened the PDCI was also likely to implode.[18] Between 1994 and 2000 this crisis intensified, leading to a coup d'état against Bedie on December 23, 1999, whereby a retired army commander, Robert Guei, was called out of retirement to head a National Public Salvation Committee in the new government. As usual he soon engaged in the rituals of coup leaders: he addressed the nation on

television promising all was well, democracy would be respected, foreign treaties and obligations would be adhered to, and attempts would be made to improve the well-being of Ivorians. While doing this, he dissolved all the organs of the government including the Supreme Court, parliament and the cabinet, leaving himself as a one-man rule, with his National Public Salvation Committee. Momentarily, Ivorians welcomed the coup, hoping that it would address the economic and political uncertainties that had followed Houphouët-Boigny's demise. But as soldiers started to commit human rights abuses, the euphoria started to wane. Army mutinies with soldiers demanding higher salaries followed, and sporadic arrests of politicians perceived by the military to be plotting against the new regime did little to reduce growing uncertainty with the military order. In an attempt to gain some popular support among the masses, the military resurrected the policy of Ivoirite, and soon started to expel Alassane Ouattara's supporters from the government. When the presidential election was held on October 22, 2000, the army disqualified all opposition candidates except Laurent Gbagbo's Ivorian Popular Front (FPI) party. To make matters worse, Guei was defeated by Gbagbo but he refused to accept the results, giving Ouattara an opportunity to call for a fresh election amidst growing protests that escalated into street fights and large-scale demonstrations. Overwhelmed by the crisis he had ignited, Guei fled the country as Gbagbo took over the reins of power as president, compelling Guei to come back to Abidjan and officially recognize the change as a fait accompli. The Parliamentary election that followed soon after, though won by Gbagbo's party, was only legitimate in the southern part of the country where it was held successfully. In the north, due to the political unrest following the disqualification of Ouattara, no elections were held until January 2001. To gain and keep political power, either at the national level or within enclaves controlled by this or that group of armed men, what was becoming increasingly necessary was not the vote but the barrel of a gun. As Ruth First had observed a few decades earlier, when politicians begin to rule by command, who can command better but the soldiers?[19]

Gbagbo presided over a nation for over a decade as president without actually being accepted as legitimate by the whole country. He enjoyed no historical legitimacy like Houphouët-Boigny to keep the country together successfully using the iron fist. He was not the head of a robust coalition of diverse social classes joined together by their dependence on largesse from the state as those who formed the bedrock of the PDCI under Houphouët-Boigny. Unlike General Guei, he was temporarily more

successful in manipulating the Ivoirite xenophobia, playing one group against another as he received the support of the French government to remain in power, marking time, as it were, waiting for democratic elections to be held to settle the crisis. Gbagbo became adept at postponing the prospects for these elections, with every day that passed simply prolonging his stay in power. In the meantime, the international community became engaged in perpetual attempts to keep peace in Côte d'Ivoire, intervening every now and again between and among the parties to the conflict. Resolutions by the UN Security Council, interventions by African heads of state, peace accords negotiated by France among the warring parties: all were features in Ivorian politics between 2000 and 2010 during the chaotic rule of Gbagbo. The international community and regional powers put primacy on something called "peace" and cessation of hostilities as pre-requisites for elections. Elections were now about restoring peace and "good governance" (read law and order) not democracy. Maybe under such circumstances creating political order is perhaps more important than "chasing democracy through elections." But as Aristide Zolberg would have put it, nobody succeeded during this time to "create political order" in this once-prosperous former French plantation colony.[20] The question is: why not?

By 1993 when Houphouët-Boigny died, the economic basis for keeping the PDCI alliance had shifted; it had more or less been eroded, the center could no longer hold. The plantation economy as the colonialists had created and as Houphouët-Boigny had nurtured was fading away. Bedie's attempt to keep it together through xenophobia backfired against him, inviting a more forceful agent called the military to take over this political weapon from him and use it in its own interest. But Houphouët-Boigny's generosity and confidence had led him to build a more integrated military in which northern elements formed a big part, making Guei's Ivoirite a weapon he could not use successfully in his own army. As fate would have it, Guei's attempts to take over power through the ballot backfired since he had built little skills at political mobilization; nor was his own "home base"—the military—that excited about his candidature. He lost to Gbagbo who, in the meantime, lost half of the country he did not consider as part of Côte d'Ivoire. The *Forces Nouvelles (FN)*, which controlled half of the country to the north, was loyal neither to General Guie nor to any other opponents of Gbagbo: they were loyal to themselves. As their name suggested, they were really a "new force" in substance, style and attitude to politics. The conflicts that ensued, superficially regarded as between the north and the south, the Moslem north and the

Christian South, the backward Mossi and the more advanced Akan community of the South and South East (Baoule and Agni), were actually conflicts over the politics of exclusion from state power seen historically as a central determinant in the fortunes of people. The state, as it were, should have been a *Caisse de Stabilisation* for everybody. During the good economic times, Houphouët-Boigny had actually made it appear so. But times had changed. And with the economic misfortunes that accompanied the old man's demise, the state as a Caisse for all was gone. Entry could not be for all, hence the emergence of such politics of exclusion as Ivoirite. From then on the politics of exclusion spelt the doom of Côte d'Ivoire as a national project: only the force of arms could attempt to keep the nation together; not through state largesse but state terror. Ironically the force of arms kept on splitting it into pieces, since no election held on purely partisan terrains could work the magic of keeping the nation together. The prosperous agricultural economy had itself been an enclave: it produced a wealthy elite with strong allegiance to the state—its benefactor—and limited organic connection, except ethnic identity, with other social classes. Herein lies the irrationality of this elite; one would have thought that at times of economic crisis and political uncertainty following Houphouët-Boigny's death it would have rallied together as a class in pursuit of a stable state. On the contrary, the various fractions fled into their ethnic cocoons, each seeking direct access and control of the state for its interests, and temporarily getting solace under a general summoned from retirement to equally temporarily perform a political drama of incompetence. Under such circumstances, do so-called democratic elections make sense as means of creating political order, let alone democracy?

Laurent Gbagbo did not himself think so following the election of October 2010. This election was expected to end the conflicts after being delayed for many years. But the vote ushered in more unrest when Gbagbo refused to accept the results and to accept defeat as his opponent, Alassane Ouattara claimed victory. Remember, Adam Przeworski has defined "democracy as a system in which parties lose elections."[21] This was never to be for the Ivorian Popular Front Party in 2010. Can the mere loss of an election compel a president to surrender the power of the state to someone else, with all its connotation of access to wealth and other economic advantages? The political culture of accepting democracy as "a system in which parties lose elections" only exists when occupation of state power is not so intricately intertwined with the personal economic and material fortunes of the incumbents. Several months followed of armed

conflicts, looting, political mayhem and continued fragmentation of the country because Gbagbo did not accept he lost the election. Mwai Kibaki had done the same in Kenya two years earlier. When Gbagbo was finally apprehended and taken to The Hague in November 2011, he left behind a nation more divided and more deeply wounded than it was a decade earlier when he assumed the presidency. The Ivorian miracle was now a dream deferred and the question still arose: was Gbagbo's extradition to The Hague a solution to the Ivorian crisis?

It could not possibly be notwithstanding the fact that Gbagbo needed to answer for the crimes against humanity that were committed under his watch, and maybe with his knowledge and approval so as to keep political power. But as *The Economist* reported on July 13, 2013, "although Ouattara was *freely and fairly elected in the eyes of the outside world*, he entered office on the back of a rebellion led by warlords who ran the country's north until the elections." To his credit, Ouattara recognized the political relevance of these warlords, and included them in his government rewarding them with plum posts. But along with this came the excess baggage of criminality that the warlords had enjoyed while fighting Gbagbo's government. Commented the *Economist:* "As well as getting plum jobs in the security apparatus, they have held to the vast smuggling networks and parallel taxation systems they established as rebel leaders. A recent UN report found that smuggling costs the state hundreds of millions of dollars a year."[22] It was not through "respect for the will of the people in a competitive democratic election" that Ouattara brought the warlords into the government; it was because they were representatives of some significant constituencies/people/communities that were necessary in creating an acceptable and stable government or legitimate political order. Rather than leave this effort at *inclusivity* to the subjective will of Ouattara, using it perhaps to reward cronies in an attempt to appear to be bringing diverse social forces into his government, it would be better were it to follow from a constitutional principle which establishes it as an aspect of institutionalizing democratic governance. We shall return to this issue later.

But Ouattara is not alone in being held hostage by warlords for political survival. Elsewhere under circumstances where one would expect civilian politicians to behave differently, regimes put together by *political pacts of domination* constituted by ethnic leaders that, as it were, command "ethnic voting blocks," the payback in kind is in essence no different. It comes in the form of land deals, kickbacks from contracts, transacting business without taxation, and so on. In other words, elites may indeed compete

for power through electoral processes regarded *by eyes from the outside world as free and fair*, but the results of any such electoral victory do not usually relate to the people *being governed and yet controlling their governors* as George Bernard Shaw once described the essence of democratic governance.[23] The lamentations about impunity, corruption and lack of accountability continue notwithstanding electoral processes meant to put in power people who claim legitimacy on the basis of governing democratically. The Ouattara elites saw themselves as having stayed in the cold for too long. Having arrived at the helm of the state, it was now "their time to eat,"[24] and with the backing of the political constituencies they presumed themselves to be representing. And this backing might not have been demonstrated actively: all that they required was acquiescence.

There is perhaps a general assumption in Côte d'Ivoire—and perhaps within the "democracy industry"—that the regime of Alassane Ouattara has finally been accepted; that improving economic times may be producing more sustainable political stability than before; and therefore that this could very well be attributed to the outcome of the *competitive democratic elections that Ouattara won*. This, however, would make the observer fall prey to the mistake of collapsing the appearances in Côte d'Ivoire with the reality that we are in search of. In other words, we could easily confuse the rhetoric of democracy with the real story of democracy. Revisiting the issue of acquiescence would no doubt remind us of Albert Hirschman's thesis in his book *Exit, Voice and Loyalty*.[25] In this book Hirschman argues that members of an organization—be it a firm or a nation—when confronted by the decrease in the quality of benefits they are gaining, have three choices. They can seek to change the organization to perform better through speaking up (voice) or they can quit the organization by withdrawing their membership or migrating with regard to a nation (exit). Exit need not be physical: it can be mental. It could therefore be very close to loyalty where people benignly tolerate their status quo while immensely dissatisfied with it. Nonetheless, people may simply decide to stay put by being "loyal" to the nation or the organization, making the calculation that, in the final analysis, however bad things are, it would still be more problematic or difficult exercising any of the other two options. In Luo culture, the phenomenon is called "choosing to walk with it" like a disease that does not go away since it cannot be treated but the affected person continues to tolerate and "walk with it" given no other alternative. Such a situation is unlikely to produce citizens actively engaged in the affairs of their nation. More often than not those who have "exited" or are

"benignly loyal" may do "their own things," things which could at times be counterproductive to democratization as part and parcel of the project of constructing the nation.

After so many years of violence, deaths, political instability and coming to the precipice of a failed state, the "political order" that Ouattara appears to have created may very well generate political support across otherwise diverse and conflict-prone interests. Most, if not all, may choose "to walk with it," not because Ouattara's regime is legitimate or even democratic from these diverse interests, but because under it all can feel at home. This could very well be the basis on which "ground rules" can then be established for free and fair elections: but this must remain speculative and not conclusive until experience proves so or otherwise.

Kenya

Kenya shared the limelight with Côte d'Ivoire as the most stable and prosperous former colonies in Africa during the years 1960–2000. Like Côte d'Ivoire it was a valuable colony for her former colonial master, Great Britain. But unlike Côte d'Ivoire, the death of Jomo Kenyatta ended this "positive view" at the end of the 1970s, and most of the years of Daniel arap Moi's presidency (1978–2002) were marked by political repression, crass authoritarianism and economic stagnation. Kenya became a one-party state *de jure* in 1982 when no political party other than the ruling Kenya African National Union (KANU) was allowed to operate. Opposition politicians, radical academics, civil society activists and even dissenting voices from the religious sector were ruthlessly dealt with by the state. A good number were detained without trial, some imprisoned on trumped up charges, others escaped into exile and a few were assassinated or disappeared mysteriously. The radical cleric, Timothy Njoya, even coined a new term to describe "organized road accidents" to eliminate regime opponents as happened to his colleague the late Alexander Kipsang Muge. This word was "to be road *accidented*."[26]

By the fall of the Berlin Wall in 1989, Moi's regime had very little popular support in diverse sections of society, even within his own ruling party KANU. Semi-competitive elections were held, periodically as the Constitution required, but more as rituals to legitimize the authoritarian rule rather than to subject it to the democratic choice by the people. Things became worse when, in February 1990, the popular foreign minister, Robert John Ouko, was mysteriously murdered after a controversial

trip with Moi to the USA where issues of good governance were raised by the US government. Ouko's murder was part of a series of using assassination and murder to silence opponents dating back to the Kenyatta regime with the assassinations of Pio da Gama Pinto in 1965, Tom Joseph Mboya in 1969 and J.M. Kariuki in 1975. The aftermath of Ouko's elimination saw a series of eliminations of those who were involved in the investigation of the murder, like former Police Commissioner Phillip Kilonzo, or those who "were in the know" like former permanent secretary for internal security Hezekiah Oyugi or even witnesses to the murder scene in Got Alila like the shepherd boy Shikuku. All this fuelled more dissent against Moi and more demand for a much more open society. Bishop John Henry Okullu's Easter Sermon in Kisumu in April 1990 opened the floodgates as he explicitly called for democracy and ruthlessly denounced the iron fist with which Moi ruled and ruined the country.[27] Sensing this, and aware of the growing demand for legalizing multi-party politics that politicians and civil society activists were now more openly clamoring for,[28] Moi appointed a KANU Review Committee to gather views from Kenyans, as to whether or not Kenya should adopt a multi-party system of government.[29] The George Saitoti Review Committee, appointed on June 21, 1990, finally reported in the subsequent year that Kenya was still not ready for multi-party politics.

The year 1991, however, was full of intense pressure against Moi by both domestic and international social forces. The US Ambassador, Smith Hempstone, was quick to announce the withdrawal of American civilian and military aid if the human rights situation in Kenya did not improve. The European Union countries, though shy at the beginning, silently put pressure on Moi, making it clear that Kenya's foreign relations would continue to be strained without improvement on human rights records. The Opposition, led by Jaramogi Oginga Odinga, announced the formation of a broad-based opposition movement called the Forum for the Restoration of Democracy (FORD) in August 1991: Moi refused to register this one as well, to the chagrin of his western backers who were growing increasingly disenchanted by his continued *political illiberalism*. In essence, any move by Moi to *liberalize domestic politics* would satisfy the demands of western powers.

Fareed Zakaria has pointed out the dilemma of democratic elections producing *illiberal governments* and, conversely, *liberalization* being implemented by non-democratic regimes that organize semi-competitive elections as means of producing what they regard as democratic governments. Although Zakaria was examining mainly western and Arab

states after the collapse of the Soviet Union, the same phenomenon is to be witnessed in Africa, explaining the rather protracted or "stunted" transition to democracy in the former plantation colonies under study here.[30] It is relevant to summarize the arguments of Zakaria that may shed some light in the African context.

It is interesting to note that democratically elected regimes are quite often those which proceed *to routinely ignore constitutional limits on their power and to deprive citizens of basic rights and freedoms.* Democracy may flourish in terms of holding free and fair elections and establishing governments regarded as legitimate after such elections, but constitutional governance—or constitutional liberalism—may not follow under such governments.[31] Political elites may demand and get democratic elections as a means of getting into power. But once in power it may very well be against their interests to institutionalize competitive democratic elections as a way of determining the formation of future democratic governments. They may equally hold such elections but not under free and fair conditions. They may likewise hold them successfully but refuse to count, let alone announce, the results. They are the captains of an illiberal political culture: they can hardly be expected to guide the ship of competitive electoral politics toward its democratic coast after they assume state power. As we shall see subsequently, this is what happened in Kenya after the only two free and fair elections held in Kenya: in 1963 and 2002.

In 1992 the first multi-party election was held under the Moi regime. In the Kenyan case, several conditions for holding "free and fair elections" were lacking: a neutral referee in the form of an independent electoral commission, free access to voters by those seeking to be elected (through campaigns and publicity for example) and an independent state apparatus treating all candidates equally. This situation favored Moi and the ruling party; hence the election could not possibly be regarded as free and fair: it was, in the Kenyan tradition since independence, essentially a *semi-competitive election*.[32] The Opposition immediately contested the results. What was even worse was that Moi's party, KANU, actually received a minority vote at the poll, but since it had more members of parliament than any other party and held the presidency, it formed the government under the *illiberal* constitutional and electoral rules prevalent at the time. Of the 5,398,037 votes that were cast for the presidency, the results were as follows: Daniel arap Moi (KANU) 1,962,866 votes (36.4 percent); Kenneth Matiba (Ford-Asili) 1,404,266 votes (26 percent); Mwai Kibaki (Democratic Party) 1,050,617 (19.5 percent); Jaramogi

Oginga Odinga (Ford-Kenya) 944,197 (17.5 percent); three other minor candidates shared the 0.7 percent of the remaining votes. In the National Assembly, Moi's KANU got 100 seats in the 188 seat chamber, obviously gaining a majority of 12 although it received only 24.5 percent of the popular votes. This demonstrated the effects of gerrymandering in favor of KANU with regard to constituency sizes and constituency boundaries.[33] The old dictum: "the struggle for democracy should be first and foremost a struggle over the rules of the democratic game before it is a struggle for the vote" should have been heeded by the opposition political parties before they went for a contest against KANU, the ruling party and mastermind of the rules of the game. But this was to follow in the 1997 election, where the opposition parties were again trounced by KANU, which went ahead to form yet another minority government notwithstanding the *no reform no elections* demand by the opposition just before the election was held.

Adept at the politics of co-optation, Moi had persuaded some opposition leaders to agree to some limited reforms that would allow the election to be held under improved rules of the game. This was done through the rapprochement arrived at in the context of the Inter-Party Parliamentary Group (IPPG). These reforms included the following: immediate registration of all political parties whose applications were pending; the incorporation of ten opposition-appointed commissioners to the Electoral Commission; the repeal of sedition laws and amendment of the unpopular Public Order Act then used by the government to impede free opposition movement in the country; and the opening up of the air waves at the government-controlled Kenya Broadcasting Corporation to air opposition views as well. The repeal and reform of the Local Governments Act never saw daylight as Moi dissolved Parliament before the bill was debated by the House. Nor did the reforms touch the immense presidential powers that could still be used to influence the electoral commission, the security apparatuses of the state, public appointments, access to state largesse and intimidation using bribery and other illegal measures.

The 1997 election results almost mirrored those of 1992, with a slightly higher margin for KANU forming yet another minority government. The results were as follows: Daniel arap Moi (KANU) 2,500,956 votes (40.6 percent); Mwai Kibaki (Democratic Party) 1,911,742 votes (31 percent); Raila Odinga (National Development Party) 667,886 (10.8 percent); Kijana Wamalwa 505,704 votes (8.2 percent); Charity Ngilu

(Social Democratic Party) 488,600 votes (7.9 percent). The ten remaining minor candidates shared, among them, about 1.5 percent of the total votes cast.[34] Again it can clearly be seen that KANU formed a minority government, and although the constitution allowed a coalition government, Moi only moved in much later to bring the National Development Party into a government with KANU in an arrangement that eventually saw the NDP dissolved into KANU.

If there had been a proportional representation (PR) system in Kenya which stipulated that a government is formed by political parties in proportion to the votes received at an election, then all the above parties could have been in government and then negotiated leadership on the basis of which party, or group of parties, constitutes the 50+1 majority. This would similarly have been the case in Côte d'Ivoire when Gbagbo refused to accept the result of the 2010–2011 election and plunged his country into yet more bloodshed. As we shall see below, this has been repeated by Mugabe in Zimbabwe. The method of determining who governs makes it easier for incumbent presidents to perpetuate authoritarian rule through semi-competitive "democratic" elections. This can be avoided by deliberately adopting the method of regime formation as happened in South Africa in 1994.

Though South Africa calls its leader a president, this position is essentially a prime ministerial one. South Africa goes further to ensure that Members of Parliament are elected by political parties on the basis of party lists. And parties get members in proportion to the number of votes received at an election. The Africa National Congress (ANC) has used the proportional representation (PR) system internally to ensure that the lists are representative of marginal and minority groups in the country. The ANC claims that it attempts to transform society; hence, the party's guidelines for its internal list processes that are used to elect MPs reflect key objectives of creating a united, non-sexist, non-racial and democratic society. The guidelines normally include factors such as geographical, racial, ethnic, linguistic, skills, interest groups and gender representation.[35] The 1997 election results in Kenya did not produce any representative government or legislature bearing any resemblance to the South African one. By the very nature by which both government and legislature were produced *they were exclusivist,* hence the continued discontent by the people and the further quest for a democratic transition by different ethnic communities which felt unrepresented in government.

In the meantime, the Kenyan economy continued to get worse after the 1997 election. Although economic growth had been declining since the early 1980s, the downward spiral continued during the 1990s as a result of poor fiscal and monetary policies, external and internal shocks as well as the political uncertainties created by elections that produced doubtful results. The average real GDP fell to a low 2.2 percent from 1990 to 2002, compared to 6.6 percent during the first decade of independence. Attempts to "fix" this economic impasse through bureaucratic changes in government like the "dream team" arrangement did not achieve much; nor did the World Bank/IMF structural adjustment programs (SAPs) bear any useful fruits.[36]

In the CODESRIA debates of the 1980s, I had argued that democracy is good for development, and hence necessary in Africa. Thandika Mkandawire retorted that development can actually be undertaken by authoritarian regimes even much more successfully than democratic ones. In any case, countries which I then pointed out as "better off on the democratic scale in the African context then" (Kenya and Côte d'Ivoire) were a political disaster as far as Mkandawire was concerned. In effect Mkandawire was right in dismissing Kenya and Côte d'Ivoire as examples of democratic political systems in Africa then: they were not. But on the controversy of whether democracy was good or not good for development, the debate had to continue.

Archie Mafeje, joining this debate, made the following observations.[37] One, although it is doubtful whether there is an acceptable universal concept of democracy, the common notion shared in all thoughts of democracy is that of *self-rule, and freedom to choose and fire rulers by the ruled*. Democratic governance is therefore antithetical to the idea of "presidents for life" or single party dictatorships. Therefore, two, the *popular movements for democracy* that African scholars focused on during the latter half of the 1980s, even before the fall of the Berlin Wall, were primarily concerned with the dismantling of one-party regimes and the ushering in of multi-party politics and *regimes of choice* and not *imposed regimes*. Three, social movements for democracy went further than this: they demanded liberalism in society as a necessary political culture for democratic governance. As Mafeje pointed out, *objections to one-party autocracy got interpreted as "multi-party democracy"; democratic pluralism got construed as "liberal democracy," and local autonomy as "participatory democracy," which got associated with "development" without saying what type of development*.[38]

Zakaria makes a distinction between "democracy" and "liberal democracy" when he says: "for almost a century in the West, democracy has meant *liberal democracy*—a political system marked *not only by free and fair elections* [and this is what democracy is as far as Zakaria is concerned) but also by *the rule of law, a separation of powers, and the protection of basic liberties of speech, assembly, religion, and property.* In fact, this latter bundle of freedoms—what might be termed *constitutional liberalism*—is theoretically different and historically distinct from democracy."[39] Zakaria's conception of democracy is in keeping with Adam Przeworski's, which defines democracy as *a system in which parties lose elections.* Conflicts are never resolved, only temporarily satisfied. Outcomes are not known ex ante: each party does its best and then rolls the dice to see who will win. *Democratization is an act of subjecting all interests to competition, of institutionalizing uncertainty.* But why would the losers choose to comply with the results? Because *democratic institutions* help give political actors "a long time horizon … They allow them to think about the future rather than being concerned exclusively with the present outcomes … Political forces comply with present defeats because they believe that *the institutional framework* that organizes the democratic competition will permit them to advance their interests in the future."[40] It is this long time horizon that authoritarian incumbents rarely have in Africa, nor do they have any faith that an institution—independent of their own personal control—would guarantee them some future following competitive elections.

The reason why competitive or semi-competitive elections in many African countries hardly lead to transitions to democracy is that the institutional pre-requisites for sustaining democratic elections, let alone "transiting" to democracy, are lacking. Where such institutions have actually existed to some degree, like in Zimbabwe, Kenya and Côte d'Ivoire, social forces interested in their dysfunction are so strong that such institutions are more likely to be dismantled, undermined, left to atrophy or eliminated altogether to give political space to these social forces to realize their interests. After passing the 2010 Constitution in Kenya, the Jubilee government formed after the March 2013 election started to frustrate the process of implementing laws to establish institutions that could safeguard constitutional liberalism in Kenya. Daron Acemoglu and James Robinson have in a recent study shown that it is *man-made political and economic institutions that underlie economic success (or lack of it)*.[41] The same can be said of political success. It is man-made democratic institutions or democratic political culture that make competitive electoral poli-

tics possible as a means of creating democratic governance. The example of North and South Korea that Acemoglu and Robinson use is both illuminating as well as challenging. Korea is a remarkably homogeneous nation, yet the people of North Korea are among the poorest on earth while their brothers and sisters in South Korea are among the richest. The South forged a society that created incentives, rewarded innovation, and allowed everyone to participate in economic opportunities. The economic success thus spurred was sustained because the government became accountable and responsive to citizens and the great mass of the people. There was, as it were, respect for *the rule of law* in South Korea even though it took some time to institutionalize democracy. The people of the North, to the contrary, have endured decades of famine, political repression, and very different economic institutions with no end in sight. *The difference between the two Koreas is due to the politics that created these completely different institutional trajectories.*[42] Nothing explains this much better than what happened in Kenya before and after the 2002 election, regarded as having been one of Kenya's freest and fairest elections since independence.

Following its second failure to wrest power from Moi in 1997, the Kenyan opposition political parties learnt that none of them could win an election against KANU under the prevailing electoral rules. In any case the past had shown that their votes put together provided a wide margin against KANU, yet KANU still won the elections. In 2002, therefore, all opposition political parties, plus the breakaway wing from KANU which had formed the National Rainbow Alliance, finally came together into a broad national democratic front called *The National Rainbow Coalition* (NARC). Its manifesto for winning the election was simple: *Democracy and Popular Empowerment,* a complete antithesis to the politics of control and repression that Moi had employed for over two decades, disempowering the people and engendering economic stagnation, unemployment, increasing poverty and institutional decay in many sectors like higher education. A memorandum of understanding (MOU) was signed between the two major partners in the coalition: The National Alliance Party of Kenya (NAK), led by Mwai Kibaki, and the Liberal Democratic Party (LDP), led by Raila Amolo Odinga. The MOU stipulated how the government would be formed when NARC won the elections and the policies the coalition would pursue. Unfortunately, this man-made institution called the MOU was not honored by Mwai Kibaki when he formed the government, and NARC started governing on the basis of mistrust, suspicions and bad blood among the coalition partners. Although its reformist

policies[43] were well received by the public and sparked off encouraging economic growth,[44] the bad politics undermined the stability of the new regime, leading eventually to its breakup in 2005 over disagreements on constitutional reforms.

Both Michela Wrong[45] and John Githongo have carefully documented how a small clique around Kibaki, referred to as the "Mount Kenya Mafia," subverted the reform agenda of the NARC government and derailed the coalition in pursuit of their interest to use the state for accumulating personal and individual wealth. They were first and foremost responsible for undermining the institution of the MOU, hence jeopardizing the success of the coalition. This was in their interest, as a strong coalition government in which there were diverse centers of power would not have permitted their unfettered access to state power to abet personal accumulation, rent seeking and corruption. Their view of wielding state power was in keeping with the character of the authoritarian presidential regime the coalition had just defeated in the election. Now they were determined to restore it and wind the clock back as it were. For the Mount Kenya Mafia, NARC was a means to get into power and not to let NARC wield this power since they were not really the major social forces controlling NARC. More powerful political forces were to be found in the LDP and other sister parties within the National Alliance Party of Kenya and all leaders of these parties were members of the NARC Summit, another body they undermined and brought to a standstill because they could not control it. In other words, before the first year of the coalition government was over, all its political organs had been made irrelevant by the Mount Kenya Mafia, and all that now mattered was the state as an organ of both political power and personal accumulation: back to the days of both Kenyatta and Moi. *Plus ça change plus ça reste le même!*

NARC therefore broke down into two parts: The Mount Kenya Mafia, in search for a new political outfit fashioned by the state, and the LDP, waiting to fight the next election, battling for control of state power having lost this one. But the LDP could not hope to do so under the old rules; hence the LDP re-initiation of the battle for a new constitution, which had been in the works all the time the opposition had battled with the ancien régime since 1992. The Mafia had scuttled the people's convention at the Bomas of Kenya that was drafting a new constitution. Realizing that it did not have this process under its control, it refused to accept its output and instead masterminded a draft constitution authored by agents of the state led by the Attorney General Amos Wako. The Bomas Draft,

produced by popular participation, and the Wako (then Attorney General) Draft, engineered by the state, became the two contending proposals for constitutional reform in Kenya. Since the Mount Kenya Mafia was more in control of the state-engineered Wako Draft, it sanctioned this to be validated at a national referendum. Led by the opposition now organized as the Orange Democratic Movement (ODM)—from the sign "orange" on the referendum ballot paper for those who opposed the Wako Draft—the people overwhelmingly rejected the Wako Draft, and opted to await another turn to vote for a "people-driven" alternative like the Bomas Draft. The election held in 2007 created a perfect confrontation between the ODM and Party of National Unity (PNU), the party into which the Mount Kenya Mafia now found itself.

It was not surprising, therefore, that when the election was held and controversy arose over the results, it was the Electoral Commission—appointed by the president himself—that proved incompetent to run a viable election.[46] The government's interference with the electoral process, coupled with the heavy state security control of the process, showed quite clearly that the incumbent regime was unwilling to submit itself to a free and fair election as a means of achieving legitimacy and authority to govern. If democracy meant the PNU was to lose power which it already had, then free and fair elections would as well wait. In protest, the disappointed voters and the opposition took to the streets to demand their rights through mass action. In essence, the violence that rocked Kenya after the 2007 botched election was no different from the ones which rocked Côte d'Ivoire after contested elections were held following the demise of Houphouët-Boigny. Mugabe in Zimbabwe had behaved no differently at every election held since 2000. When there is minimal or no acceptance of the possibility of losing an election by an incumbent regime, there is very little likelihood that such elections can be the basis of producing legitimate democratic governments through free and fair elections. Holding such elections without establishing the institutional pre-requisites for accepting the results as legitimate is a recipe for frequent conflicts and periodic circulation of political discontent and grievances among the competing social forces depending on who gets state power following the elections.[47] The crisis in the case of Kenya was finally settled after a National Accord and Reconciliation Agreement was negotiated between the PNU and ODM, establishing a coalition government in which the PNU provided the presidency and the ODM a Prime Minister. But the relationship between the two parties in the accord arrangement

remained contentious throughout their five years in power. It nonetheless provided a stable political environment of contestation and compromise that enabled a new constitution to be passed followed by enabling legislations that translated the constitution into institutions of democratic governance. No doubt this coalition government was a testimony to the fact that in such highly ethnically heterogeneous societies such arrangements facilitate the politics of inclusion and enhance more stable governance than the winner-take-all principle inherited from Westminster and implemented by blind faith in such societies.

After evaluating the electoral debacle of 2007, the Justice Kriegler Commission came up with the following findings and verdict. First, the Kenyan constitutional and legal framework since independence, particularly following the 26 or so amendments that had been made on the original independence constitution, did not at that point in time *expressly provide the citizen with the right to vote and to stand for elections.* Both rights were largely left to the discretion of the government. Second, notwithstanding all that, the pieces of law that relate to elections were found to be excessive without any clear and effective process of enforcing such laws. Third, it was improbable that free and fair elections could be held under a political culture and practice where vote-buying and selling was the order of the day; public resources were used unapologetically by elites in government; public servants participated in campaigns in support of certain candidates; ballot papers could be stuffed into ballot boxes easily and by anybody who had the right connections; marauding gangs and bully-boys could cordon areas as political "zones" for certain parties or individuals; sexist tactics could be used wantonly to keep women out of competition for votes; and votes could be miscounted and invalid results announced as valid results. The Commission therefore made far-reaching recommendations for improving the electoral process through constitutional, legal and institutional reforms.

The new constitution approved by Kenyans through a national referendum in August 2010 incorporated the Kriegler Report recommendations and provided the constitutional framework for establishing the Electoral Commission of Kenya as an independent body that could manage elections fairly, freely and competently. But the management of the 2013 election produced as many, if not more, controversies as that of its 2007 counterpart.[48] Only this time the discontent was not expressed in violent terms. It has been argued that the cases at the International Criminal Court acted as a deterrent to possible violence as

leaders of the various political formations feared the likely consequence of being taken to The Hague should post-election discontent morph into the kind of violence that followed the discontent of 2007.[49] The uncertainties and irregularities were demonstrated in terms of the 180 petition cases brought to the courts with reference to irregularities at various levels of the electoral process. The most remarkable petition was that presented to the Supreme Court by the Coalition for Reform and Democracy (CORD) presidential candidate Raila Odinga. The Court handled the case in a high-handed manner, leading to dangerous accusations of bias by the court, or giving in to undue pressure from external forces. Subsequently substantial evidence of rigging the election in favor of Jubilee emerged at the trial of British businessmen charged with corrupting Kenyan officials in the Kenyan Electoral Commission and the Examination Council.

The new constitution has, however, brought into play new principles of democratic governance and representation which have gone a long way to expanding the political space and *including* more individuals, interest groups and *peoples* in the political process. Thus by introducing *devolved governance* at the county level and the representation of the counties in the Senate, the new constitution has institutionalized representation of people/nationalities and regions as an aspect of the Bill of Rights in the same manner in which the South African Constitution provides for representation of people/nationalities/regions in the National Council of Provinces. The reserved seats for women, the youth and people with disability through party lists at all levels of government extend inclusivity to groups previously unrepresented directly in the legislative process. But by preserving the presidential system of government at the national level, and the winner-take-all principle in forming government both at national and county levels, Kenya's representative government is still short of completing the transition to democratic governance.

Zimbabwe

Soon after Zimbabwe's independence in 1980, the Zimbabwe Institute of Development Studies (ZIDS) invited Professor Mike Chege and I to a conference in Harare to discuss Zimbabwe's land policy after independence. We were both aware that Zimbabwe had received a very raw deal from the British Government on the land issue in its independence dispensation. Compared to what Britain had done in Kenya in 1962–1963,

the Zimbabwe land deal we considered a disaster waiting to happen. Our paper was focused on that, but we never presented it as we were stopped at the Jomo Kenyatta International Airport, our passports withdrawn, and a whole new chapter was opened in the Moi regime where any public servant leaving Kenya had to get elaborate clearance from the Office of the President before leaving the country. This was politics of control at its best.

At independence in 1980, over 40 percent of Zimbabwe's farming land was contained within 5000 white farms. It was claimed that these farms provided 40 percent of the country's GDP and up to 60 percent of its foreign earnings. The mineral sector, largely controlled by multinationals, contributed to the remaining GDP and the foreign earnings. African peasant agriculture, confined to marginal lands, was largely for subsistence. It was the cheap labor provided by Africans in both agriculture and the mines that was significant in creating the country's wealth.

The liberation struggle had been fought over the issue of African access to the productive land owned by the whites. Yet the independence land deal did not tackle this issue frontally as was done in Kenya almost two decades earlier by the same British Government. The Zimbabwe Lancaster House Agreement allocated 75 million British pounds for payment of landowners, though only 44 million was finally spent. In Kenya, 500 million pounds had been made available to purchase land for settling landless Africans in a process that was more robust and more successful than in Zimbabwe. In Kenya, the land transfer and settlement project, initiated even before independence, was more systematically and effectively followed by both the British and the incoming independence government than was the case in Zimbabwe, where transfer and settlement were not as well coordinated.[50]

Why the British government behaved so unfairly to the Zimbabweans regarding the land issue as compared to the Kenyan case has been a subject of controversy. Some have argued that the British government considered Rhodesian white settlers as different in character from other white settlers in British colonies like Kenya. Settlers in Kenya were perceived to come from the "officer class" and from the British landowning class with titles and even lineage connecting them to the royal family.[51] Settlers after the Second World War in Rhodesia were perceived to come from lower social strata and were treated accordingly by the British authorities.[52] No wonder that the redeeming of the Rhodesian settlers was left to market forces, "willing buyer, willing seller," while the Kenyan settlers were "bought off" by funds provided by Britain to the new African government to settle the landless and appease the new landed bourgeoisie with large-scale farms

they paid little for.[53] But it was inconceivable that the new Zimbabwe government could resist the pressure from the African landless and the war veterans for long, especially after the "grace period" of honoring the Lancaster House land agreement ran out in 1990. As Mahmood Mamdani puts it, "transfers during the first decade of independence were so minimal that they increased rather than appeased land hunger. The new regime in Harare, installed in 1980 and led by Mugabe and his party, ZANU, called for the purchase of eight million hectares to resettle 162,000 land-poor farming households from communal areas. But the ban on compulsory purchase drove up land prices and encouraged white farmers to sell only the worst land. As the decade drew to a close, only 58,000 families had been resettled on mere three million hectares of land. No more than 19 percent of the land acquired between 1980 and 1992 was of prime agricultural value."[54]

One can therefore understand Mugabe's frustration. On the one hand was his political base at home: the landless peasants and war veterans in need of good farming land, but with no money to buy. On the other hand, were the former Rhodesian white settlers with land, but who were only ready to sell at prices neither the government nor Mugabe's political base could afford. Yet Britain was not prepared to play ball, to even grant the money promised at independence. Britain, however, considered this issue as closed, and as an internal affair of a nation long granted independence to run her own affairs.

It has been argued that Mugabe's anger with Britain was justified, but the methods he used to "transfer land from the whites and settle the Africans" were crude and wrong. The Land Acquisition Act of 1992 gave the state powers of compulsory purchase, though landowners retained the right to challenge the price set and to receive prompt compensation. But this did not last long, as the government did not have the resources to compensate at the rates demanded on acquisition. By 1999 Mugabe was ready to dispense with Lancaster altogether and to propose a constitutional change that gave him powers to seize land without compensation while ensuring he could stay in power for two more terms. Unfortunately for Mugabe, his proposals were defeated at the referendum of February 2000. For those who needed this land, the idea that Mugabe could seize it and give it to them was obviously very popular, and Mugabe knew it. That the referendum did not succeed did not mean that the idea was to be abandoned overnight: it persisted and Mugabe remained its champion. A lot has been written on the forced acquisition of land from the whites, the

disruption of commercial agriculture, the loss of livelihood of the African farm workers, the opportunism with which some acquired this land, the violence, and the torture and so on. The end result was, of course, that the whole issue boiled down to a game of survival for Mugabe, and the economic survival of those who had acquired the land. The two interests, though not necessarily complimentary, at least coincided.

Mugabe's move to change the constitution and give him more power was ill timed and poorly executed. The newly formed Movement for Democratic Change (MDC), an off-shoot from the Zimbabwe Congress of Trade Unions (ZCTU), realizing that this move could not in any way help improve the difficult economic situation, mobilized against the proposal. In its support came an array of civil society organizations and members and supporters of the National Constitutional Assembly (NCA). The voter turn-out for the referendum was low: only 20 percent of the electorate voted. But the verdict went against Mugabe and bolstered the political fortunes of MDC as a new challenge to ZANU-PF, ready to go for power at the next elections.

Like in Côte d'Ivoire, Mugabe and ZANU-PF employed the politics of repression and bribery—through the forceful acquisition of land, and distributing it to veterans, loyalists and party supporters—much to the disapproval of the opposition. To Mugabe, the opposition was no doubt unpatriotic, sympathetic to the enemy and unqualified to rule "because they never fought for independence." Thus ZANU-PF felt an entitlement to power due to its historical past and not through popular support by winning the vote. History, land and political power became the basis of justifying Mugabe's hold on power, hence losing elections became strange to his political vocabulary: all this mounted to tensions and stand offs between Mugabe and his main opponents, led by Tsvangirai of the MDC. The SADC member states, except Botswana, were obviously sympathetic to Mugabe. Hence, well ahead of the 2008 election, it chose Thabo Mbeki, president of the Republic of South Africa, to mediate between the two parties contending for power in Zimbabwe. As was to be expected when the presidential election was held in March 2008 and Tsvangirai won the first round, Mugabe made it impossible for the run off to be held by escalating violence and disorder, making it very difficult for his opponent to campaign, access voters and even believe that the votes would be counted fairly once the election was held. It was futile to get power through the ballot box under Mugabe.

SADC and the international community came in to mediate between the two. Like in Kenya, a power-sharing deal was worked out where the

two parties shared government with Mugabe as President and Tsvangirai as Prime Minister. The MDC was to control the police and ZANU-PF was to control the army. The MDC also got the Finance portfolio while ZANU-PF controlled the Central Bank. But all these meticulous attempts at portfolio balance, undertaken more successfully than in the Kenyan case, did not deter Mugabe from exploiting his vast executive powers to systematically undermine the Global Political Agenda (GPA) on which the power-sharing formula was based, and to eventually resume the same authoritarian powers he had enjoyed since independence. Once more, *plus ça change plus c'est la même chose!*

Comparative Lessons

The state, in former plantation colonies, is highly priced by the new political elite. Those who capture it first have tended to seek to retain their stranglehold on it through authoritarian measures and not democratic ones. It is unlikely that they can give in to pressures for democratization easily. Even when they concede—as they did when they allowed multiparty politics in all the three countries—the concession does not last long. Sooner rather than later the status quo is resumed. This can be done in various ways: through co-optation of challenging elites, power-sharing arrangements, outright repression, subversion of elections, rigging elections, and even falsifying results of elections. Where the regime faces a very strong electoral challenge that threatens to remove it through the vote, it may resort to extra-constitutional methods of retaining power, leading to a contest for state power that can precipitate several years of civil strife, quite often leading to great loss of life. Under such circumstances, external forces may avail themselves to "create political order" through military (Côte d'Ivoire) or diplomatic (Kenya and Zimbabwe) interventions. Solutions that lead to establishing governments of national unity bringing together the conflicting parties (Kenya and Zimbabwe) on the basis of "power sharing" formulae have tended to favor the incumbent government, thereby stunting or even reversing the democratization process.

Since the institutional pre-requisites for "transiting" to democracy, themselves man-made, cannot be initiated by persons whose material interest lies in maintaining an authoritarian state, it may be necessary to conceptualize *an intermediate regime* between authoritarianism and democracy. The emergence of a Grand Coalition Government in Kenya and a Global Political Agreement (GPA) government in Zimbabwe could easily provide a prototype of the kind of transition regime we are looking for.

The essence of this transition regime is that it deals with problems of exclusivity in a context where political stability and peace, not democracy, is the aim. Yet, by bringing everybody into government, it creates conditions where "voice" and direct representation become the basis of regime legitimacy, not acquiescence as the ground for passive acceptance.

There is therefore the need for new social forces which are committed in theory and practice to building democracy to consciously construct institutions of democratic governance which are inclusive and which are not threatening either to the incumbents (that losing elections will throw them into the cold) or to the challengers (that if they win the incumbents may never be willing to hand power to them).

The goal of democratic elections is to establish a democratic government based on the self-rule by the people. We propose that proportional representation of all the people in government provides for proper democratic governance. In this regard, the fratricidal war over control of the state through majoritarian principles of forming government is itself counterproductive in forming democratic government. It is proposed that first-past-the-goalpost and presidential governments are ill suited for self-rule in ethnically diverse societies.[55] Proportional representation and devolved governance would work better. In this regard, Senegal and South Africa have led the way. It is no wonder that Abdoulaye Wade, in as much as he tried, could not completely subvert the democratic process in Senegal in 2012. In many other African countries, however organized the opposition may be, taking power from an incumbent like Wade would not have been possible. Something in Senegal's political culture, history and greater political inclusiveness works in favor of competitive electoral politics as a means of forming democratic government.

Notes

1. The "Democracy Industry" comprises election observers, election monitors, exit poll specialists, opinion polls, those who compile data on elections and make judgment or assessment on which countries have had elections and how frequently such elections are held. The industry also includes organizers and trainers for "capacity building" for democracy and democratization. Foundations and donor agencies have mushroomed in Africa, all working with "civil society organizations," in aid of measuring, assessing, implementing and studying democracy.
2. See, for example, Baloyra 1987; O'Donnell et al. 1986; Mainwaring 1989.
3. See O'Donnell and Schmitter 1986.
4. Schumpeter 1950.

5. See, for example Anyang' Nyong'o 1988, 1989a, 1991; Chole and Ibrahim 1995; Ibrahim 1993a, b; Mafeje 1993, 1998; Mkandawire 1989, 1991; Shivji 1989.
6. See Anyang' Nyong'o 1989b.
7. For Côte d'Ivoire, see Amin 1967; for Kenya, see Leys 1973.
8. See Moyo and Chambati 2013.
9. See Zolberg 1964; Anyang' Nyong'o 1987.
10. See Anyang' Nyong'o 1989b.
11. See Githinji and Holmquist 2008.
12. See Ochieng and Karimi 1980.
13. See Anyang' Nyong'o 1987.
14. https://en.wikipedia.org/wiki/Economy_of_Ivory_Coast.
15. See Robinson 1994.
16. Henri Konan Bédié had been groomed by Houphouët-Boigny since the 1970s as "a crown prince" when he held the portfolio of Finance and the Economy from 1966 to 1977 after which he served in Washington as Special Advisor to the World Bank and the IMF from 1978 to 1980. As a member of parliament he was elected President of the National Assembly in 1980, a position he held for 10 years being the constitutional successor of the President, hence the acknowledged heir apparent. It was no wonder therefore that he had a head start over Ouattara within the PDCI to succeed Houphouët-Boigny when the latter died in 1993.
17. http://www.nationsencyclopedia.com/Africa/C-te-D-ivoire.html.
18. See Amin 1973.
19. See First 1970.
20. See Zolberg 1966.
21. See Przeworski 1991.
22. See The Economist 2013.
23. See Shaw 1928.
24. See Wrong 2009.
25. See Hirschman 1970.
26. For an account of these various forms of repression under both the Kenyatta and Moi regimes, see the two novels by Ngũgĩ wa Thiong'o, *Petals of Blood* (1977) and *Devil on the Cross* (1987). See also Odinga 2013.
27. "The best system of government is one that is based on the principle of the constant exchange of ideas between the rulers and the ruled: a system which provides everyone with an opportunity to make his or her political contribution to the best of his ability and knowledge," J.H. Okullu 1974, 75.
28. On 7th July 1990, Kenneth Matiba, Charles Rubia and Raila Amolo Odinga held "an illegal" political rally and led a demonstration in Nairobi calling for multi-party politics. This became known as the Saba Saba Day rally, subsequently observed every year by pro-democracy movements. In the meantime, work had been going on since 1987 for the formation and

registration of what was finally announced in February 1991 as *The National Democratic Party* (NDP) led by Jaramogi Oginga Odinga with Ramogi Achieng' Oneko, Munyua Waiyaki, Luke Obok, Joe Ager, Paul Muite, and Anyang' Nyong'o in the background.

29. At a KANU Delegates Conference held at the Kasarani International Sports Ground in November 1991, Moi suddenly surprised everyone when he accepted that time had come for Kenya to accept multi-party politics and for Section 2A of the Constitution, promulgated in 1982 to outlaw multi-parties, to be expunged from the Constitution.
30. See Zakaria 1997.
31. See Zakaria 1997, 23.
32. For the meaning and use of this concept in the Kenyan political landscape, see, for example, Okumu 1969; Okumu and Barkan 1979.
33. See Throup and Hornsby 1998.
34. See "Elections in Kenya," *Kenya Elections Database*, www.kenyaelectiondatabase.co.ke.
35. See, for example, Masiko-Kambala 2008.
36. As part of the SAPs, the government eliminated price controls and import licensing, removed foreign exchange controls, privatized a range of publicly owned enterprises, reduced the number of civil servants, and introduced conservative fiscal and monetary policies. From 1994 to 1996, real GDP growth rate averaged 4 percent per year but this declined drastically after 1997 to a miserly 1.2 percent by 2002. "The Dream Team" of permanent secretaries recruited from international organizations and the private sector, led by Richard Leakey, to clean up the corrupt civil service, accelerate privatization and superintend sound macro-economic policies, was appointed in mid 2001.
37. See Mafeje 1998.
38. See Mafeje 1998, 4.
39. See Zakaria 1997.
40. See Przeworski 1991, 19. See also *Prszeworski: Democracy and the market.*
41. See Acemoglu and Robinson 2012.
42. http://www.whynationsfail.com/summary/.
43. These policies were contained in the NARC government's blueprint for economic development during its five-year tenure as contained in Ministry of Planning and National Development's 2003 plan, *Economic Recovery Strategy for Wealth and Employment Creation (ERS): 2003–2007.* (Government of Kenya: Government Printers). Key objectives of this Five Year Plan were to promote good democratic governance, equity, social welfare and national development.
44. Between 2003 and 2005, the GDP growth rate went from 1.2 percent per annum to 5 percent.
45. See Wrong 2009.

46. For analyses of the 2007 Presidential and General Elections and the violence that followed, see Lafargue 2007; Mueller 2011; Mutua 2008.
47. In order to avoid such electoral debacles in the future, the Justice Kriegler Commission on the Post-Election Violence, that is, *The Independent Review Committee Report (IREC)*, looked at the constitutional and legal framework for elections in Kenya with a view to identifying weaknesses and inconsistencies; examined the structure and composition of the Electoral Commission assessing its independence, capacity and functions; evaluated the electoral environment and the role of political parties, civil society, the media and election observers; the organization and conduct of the 2007 election; vote-tallying, counting and safety and integrity of the electoral process; and finally recommended reforms to improve future electoral processes.
48. See, for example, Long et al. 2014.
49. See, for example, Mueller 2014.
50. See Hazlewood 1985.
51. See, for example, Fox 1998.
52. See Godwin 2007. "If only Ian Smith had shown some imagination, then many more of his people might live in peace" *The Guardian* (Saturday November 19). Godwin writes: "Foreign Office mandarins dismissed white Rhodesians as lower middle class, no more than provincial clerks and artisans, the lowly NCOs of empire." So when these NCOs rebelled against the Empire in 1965 by declaring UDI under the leadership of an equally nondescript Ian Smith, the Foreign Office was not amused. They could as well be finally abandoned to their fate among the African guerilla fighters led by Robert Mugabe. See also *The Fear: The Last Days of Robert Mugabe* (2010) by the same author. This attitude has persisted even up to very recent times within the British government. "When New Labor took over government in 1997, Clare Short, the minister for international development, claimed that since she nor her colleagues came from the landed class in Britain … they could not be held responsible for what Britain had done in colonial Rhodesia," writes Mamdani 2008.
53. See Leys 1973.
54. See Mamdani 2008.
55. See also Githinji and Holmquist 2008; Lijphart 1977, 1999.

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CHAPTER 8

Major Challenges of Governance in Africa Today

Georges Nzongola-Ntalaja

Introduction

In 1988, in response to a request by the African Academy of Sciences, I delivered a keynote address at the Fourth Symposium of its Special Commission on Africa in Harare, Zimbabwe, on "nation-building and state building in Africa."[1] Looking back at this essay 29 years later, I see the need to analyze nation building more comprehensively from the standpoint of the people rather than the state as a process of consolidating democratic rights through the rule of law, full citizenship, and access to a higher standard of living for all. These are the major challenges of democratic and developmental governance in Africa today.

There is no better description of what these challenges are than what Professor Jacob Ade Ajayi, a world-renowned Nigerian historian, has shown to be the major expectations of independence by ordinary Africans. In a short but brilliant article in the Spring 1982 issue of *Daedalus,* the journal of the American Academy of Arts and Sciences, Professor Ajayi sums up the meaning of independence for the African masses as follows:

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> Insofar as they fully appreciated what was involved in the independence movement, their basic expectation was to see an end to the unpredictability and irrationality of the white man's world. Without the dubious advantages of Western education, they rejected the white man's culture, and for as long as possible, stuck to what they knew. This did not mean that they wanted to recreate the past in its entirety. Their notion of freedom was not an abstract ideal, but a catalogue of specific wants: freedom from unjust and incomprehensible laws and directives; return of their land; and freedom to be left alone to live their lives and seek their own goals, especially in regard to land tenure and local government groupings that affected historical relationships. These wants developed and became more specific with each new hope and each disastrous frustration. Soon, expectations came to include improved standards of living in housing and clothing, greater returns for their labor, better transportation for exporting and marketing their surpluses, education as a means to the social mobility that would ensure a better life for their children, and an adequate water supply, electricity, health-care facilities, and other such amenities of life.[2]

From this excellent summary of the people's expectations of independence, it is evident that their vision of decolonization and self-rule meant democracy and social progress, or freedom and material prosperity. This includes freedom from arbitrary rule and the establishment of the rule of law, self-determination with respect to land use and local governance, and material prosperity through higher return on the labor of workers and peasants plus increased access to basic social services. But in order to meet these expectations in an effective way, the state needs to acquire increased capacity for the performance of those essential functions of safety and security, service delivery and revenue collection necessary for *establishing the rule of law, expanding citizenship rights, and improving the standard of living for all*. In this chapter, a brief survey of these three challenges of governance that are most critical for ordinary people will be followed by a discussion of the state capacity building needed to meet these challenges in an effective manner.

The Challenge of Establishing the Rule of Law

As stated by Ajayi, European colonialism in Africa was a system of arbitrary rule that, from the standpoint of African subjects, was often characterized by unjust, unpredictable and incomprehensible laws and directives. In some cases, the behavior of white colonial officials was perceived as being

totally irrational. A good example was when people were forced to move their villages from their ancestral lands, with sacred burial grounds, closer to major roads so that the colonial administration could control them better and compel them to help maintain these roads. In addition to being seemingly irrational, this process was extremely brutal.

During his years as agent of King Leopold II in the drive to claim the Congo Basin for the Belgian monarch, Henry Morton Stanley used dynamite to blow up rocky mountains for purposes of building a road between Matadi and Kinshasa. He thus earned the nickname of "*Bula Matari*" or the "crusher of rocks." More than 100 years later, *bula matari* is still the term used by the Congolese in their different languages to designate the state. Given Stanley's brutal and sadistic methods of control, the term "bula matari" was an apt designation of the colonial state as organized violence, as Frantz Fanon has so well described it in the brilliant diagnosis of colonialism in his book *The Wretched of the Earth*.[3] That the term should continue to be used today is a testimony to the fact that little has changed in the nature of the state since the passage from colonialism to independence. It is still identified with violence, not in the Weberian sense of the state's monopoly over the legitimate use of force, but with reference to its repressive functions, which continue to outweigh its welfare and developmental functions.

Rupert Emerson, one of the pioneers of African studies in the USA after World War II, depicted colonialism as a school for democracy because of the access by educated African elites to Western classics on democracy and their apprenticeship in liberal democracy by France and Britain.[4] Contrary to this view, there is a radical incompatibility between colonialism and democracy. Colonized peoples were subjects with obligations to their distant rulers in Europe and immediate masters in the colony, and not citizens with fundamental human rights. According to Ruth First, the colonial state was a pure bureaucratic entity, based on force and authoritarianism.[5] For Jean Suret-Canale, total despotism was the organizational model of the colonial state at each territorial level of administration: the center, the region or province, the district and the local administrative unit.[6] At each of these levels, the colonial administrator exercised total control, and used intimidation and repression by the military and the police as methods of rule to keep the subjects down. From the district down, he was the author and executor of regulations, investigative officer, tax collector, and even judge. Whenever he wished, he could preside over the district or a lower court.

Have the nature of the state and state-society relations changed much during the postcolonial period? With respect to the rule of law, the change

is not as profound as expected. For decolonization involves both *rupture* and *continuity;* rupture in state power or change in the nature of rulers from Europeans to Africans, and continuity in the functions of the state, whose major economic role is to extract raw materials and export them to the world market.[7] The social control required for this function means that despite the evident gains made in democratic rights, the balance still weighs more on the side of despotism rather than the rule of law.

This is so because the social character of the postcolonial state is determined by its colonial heritage, its role in the economy and the international context in which it operates. Like its colonial predecessor, the postcolonial state has as its priority goals: order maintenance, resource extraction and social control. Relying on a narrow class basis as a representative of the nationalist petty bourgeoisie rather than the majority of the population, it is more *predatory* than *developmental*, as it continues to prioritize social control for purposes of extracting resources from society to improve and consolidate the economic basis of the new ruling class. In the absence or weakness of a national bourgeoisie, the parastatal sector is expanded as a major avenue of wealth accumulation for African rulers, whose longevity in office is used as a means of keeping and protecting their acquired wealth.

With respect to the international context in which the state operates, the Guyanese political economist Clive Thomas has argued that the postcolonial state is not a purely national phenomenon, for it cannot retain its viability without the alliance between national ruling classes and those of the advanced capitalist countries.[8] Support mechanisms by the latter include military, economic, financial and ideological means, which tend to reinforce despotism rather than the rule of law. Consequently, the most prized methods of rule include (1) heavy reliance on nepotism, clientelism and corruption, (2) Machiavellian precepts, particularly those depicting the prince as both lion and fox, (3) destruction or systematic undermining of the political opposition and independent mass organizations through administrative restraints and other means, (4) electoral fraud, even when supposedly independent electoral commissions are in charge of the electoral process, and (5) in some cases, a highly developed system of repression and terror.

Fortunately, during the last 25 years, the democracy and human rights movements have made a great deal of progress in freeing the continent from arbitrary rule and establishing the rule of law. But even before the current wave of democratization, the political situation all over the continent was not as bad as under colonial rule. Even in the midst of a general tendency toward despotism, there were instances of states such as

Botswana, Cape Verde, Mauritius, Senegal and Tanzania, where the rule of law was by and large respected.

With the hope being generated by current efforts to consolidate the rule of law in Africa, I would like to relate an instance of a state agency acting in full respect of the rule of law in a most unlikely place: Nigeria under military rule in 1978.

I first went to Nigeria 40 years ago in August 1977 as a lecturer at the University of Maiduguri in Borno State. As a member of the expatriate teaching staff, I was instructed to register with the Aliens Bureau, which kept a vigilant but non-threatening watch over foreigners working in Nigeria. Having completed all the necessary forms at the Bureau's office in downtown Maiduguri, I was asked to return in a week or so to collect my aliens' card. When I returned to the Bureau, an agent informed me that the boss wanted to see me. A bit apprehensive as to why the Bureau's regional or state chief (I can't remember his exact title) wanted to see me after two or three weeks spent in Nigeria, I went into his office expecting an unpleasant encounter. To my pleasant surprise, the chief told me that he had decided against giving me an aliens' card, something he said should be for "real foreigners" like white folks. As an African and someone who came from the country of Patrice Lumumba, he added, I was right at home in Nigeria.

As a student of public administration, I was certainly puzzled by this man's position. Since Zaire (as the DRC was then known) was not a member of either ECOWAS or the Commonwealth, I assumed that this was a case of a civil servant rejecting those rules and regulations that he considered contrary to his pan-African convictions.

What happened next was even more astonishing, but always in a positive way. Seven months later, there was some disturbance on the campus of the University of Maiduguri, part of a general rebellious mode on university campuses all over the country. The Aliens' Bureau decided to find out whether there were foreign professors and lecturers who were teaching students Marxist or other subversive ideas. Agents of the Bureau came to the campus and searched the house of a Polish colleague and friend of mine.[9] After two hours of going through her personal effects, they could not find any subversive material. The agent in charge thanked her for putting up with the search and apologized for inconveniencing her. After all, he said, she was not the target of the investigation. Their real target, he told her, was me, since I was known to be her partner and an academic adviser to the students' Marxist club. Unfortunately for them, they had no authority to search my house, since I was not registered with the Aliens' Bureau.

This was mindboggling! Who would believe that the rule of law could exist in Nigeria under military rule in 1978? But here was a clear example of the respect for the rule of law by a state agency. This, of course, did not extend to the country as a whole, as Marxist scholars such as Ola Oni and Bade Onimode were expelled from the University of Ibadan for their trade union activities during the same year by General Olusegun Obasanjo, the military head of state. Moreover, as the 2002 Report of the Human Rights Violations Investigation Commission under Retired Chief Justice Chukwudifu Oputa clearly shows, whatever respect there existed for the rule of law during the 1970s was eventually eroded under the military regimes of the 1980s and 1990s.

Today, the drive for consolidating the rule of law in Africa is being led domestically by democracy and human rights activists and at the regional and pan-African levels by regional economic communities (RECs) and the African Union, respectively. The rejection of unconstitutional changes of government by the AU and the RECs is a very important arsenal in this drive, together with electoral observation and the defense of the pan-African right of intervention in any country in which the state is committing crimes against humanity, war crimes or the crime of genocide against a portion of its own citizens. As intergovernmental organizations, the AU and the RECs can succeed only with the political will and active support of member states, which must provide the resources necessary for upholding peace, security and fundamental human rights.[10]

Africa continues to adopt progressive positions on human rights, but does little or nothing to enforce them. An excellent example in this regard is the continent's indifference to the Report of the UN High Commissioner for Human Rights "documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003," released on October 1, 2010. Our leaders continue to tolerate impunity, particularly when high-ranking officials and state agencies are accused of the most heinous crimes against innocent civilians. How can Africa remain silent when over 6 million people have died in the DRC since 1998 as a result of aggression by neighboring countries and their looting of natural resources in alliance with Congolese and non-African collaborators? Impunity and the rule of law cannot coexist.

The Challenge of Expanding Citizenship Rights

I have regrouped all the variables relating to land and self-determination in Ajayi's analysis under the more general theme of *citizenship* to include urban residents who may no longer be preoccupied with land rights and local government groupings, but for whom the full exercise of citizenship rights is equally as relevant as for people with claims to land and local self-government. Expanding citizenship rights in the face of attempts to exclude some individuals and groups as non-citizens is a major development challenge in Africa today. For conflicts over citizenship often result in violence, loss of life and the destruction of property, which are all detrimental to national cohesion and economic development.[11]

The denial of full citizenship rights to selected individuals and groups in Africa has taken several forms, all of which are a negation of national and pan-African solidarity. During the wave of democratization that began 29 years ago with the Algerian revolt against one-party rule, incumbents bent on prolonging their stay in power have used exclusionary notions of citizenship to bar their most challenging rivals from the electoral process. The best-known examples of this practice are the disqualification of former President Kenneth Kaunda of Zambia and former Prime Minister Alassane Dramane Ouattara of Côte d'Ivoire from presidential elections in 1996 and 2000, respectively. Because one was a founding father and the other had served as head of government under the venerable Félix Houphouët-Boigny, the incumbent regimes felt compelled to resort to constitutional gymnastics to justify their political exclusion on the basis of dubious definitions of citizenship.

In the Zambian case, the fact that Kaunda's parents had migrated from Malawi when both countries were British colonies was held against him. Because his parents were not indigenous to Zambia, he was prohibited from running for a presidential seat that he had occupied for 27 years (1964–1991). Interestingly, opponents of the then incumbent president, Frederick Chiluba, argued that he too should be disqualified, since his father was allegedly Congolese.

The Ivorians were more sophisticated in their legal arguments. Conscious of the legal complexities of indigeneity in a territorial entity whose political boundaries had shifted during the colonial era and that was home to millions of immigrants, they excluded Ouattara from the presidential race not because he was not a citizen or had dual nationality,

but on the grounds that he had in the past "availed himself of another nationality" by carrying a diplomatic passport from Burkina Faso.

The violent repercussions of these politically motivated acts of exclusion are well known. State repression of Kaunda's supporters and the general climate of violence resulted in numerous deaths, including that of a son of the former president. In Côte d'Ivoire, Ouattara's exclusion led to the boycott of presidential elections by his political party and to acts of ethnic cleansing on both sides of the political/religious divide between southerners and northerners and between Christians and Muslims. The crisis eventually escalated to full-scale civil war, whose repercussions are still being felt today.

More detrimental to democracy and development than the reluctance of incumbents to leave office is the political manipulation of exclusionary notions of citizenship, reinforced by competition over scarce resources and socioeconomic opportunities in crisis situations. Two of the most compelling cases in this regard are the Rwandan genocide of 1994 and ethnic cleansing in Mobutu's Zaïre in 1992–1994. In the case of Rwanda, the Hutu Power regime originally established on the basis of the anti-Tutsi pogrom of 1959 had consistently discriminated against the minority Tutsi since independence in 1962. The Tutsi remaining in Rwanda were denied their full citizenship rights, and those in exile in Uganda, Congo, Burundi, Tanzania and elsewhere were denied their right of return to Rwanda. Under the leadership of Tutsi exiles in Uganda, some of whom were prominent members of Yoweri Museveni's National Resistance Movement (NRM) and the Ugandan People's Defense Force (UPDF), the Rwandan Patriotic Front (RPF) launched a military campaign against Kigali in October 1990. Regional and pan-African efforts to end the resulting civil war culminated in the Arusha Accords of 1993, which provided for power sharing between the incumbent Hutu regime, the Tutsi-dominated RPF, and moderate Hutu.

Radically opposed to this accord, Hutu Power extremists in the government did their best to undermine it. Their hate propaganda in favor of keeping Rwanda as a Hutu republic in which the Tutsi had no full citizenship rights, combined with a situation of worsening economic conditions, triggered the genocide. David Newbury has identified two major and interrelated variables that contributed to violence. The first was the drastic fall in the world market price of coffee—the country's main export—which deepened the economic crisis and increased the number of the jobless. The second was the increasingly large number of unemployed young men in both the modern and traditional economic sectors. In the

modern sector, educational opportunities and jobs were very limited. In the traditional sector, land scarcity and the lack of money made it difficult, if not impossible, for young men to establish themselves as landowning farmers and thus meet the customary requirements for marriage.[12] With nothing to do and no hope for the future, Tutsi youths joined the Rwandese Patriotic Army (RPA) in Uganda, whereas the more numerous Hutu youths were vulnerable to the anti-Tutsi propaganda and many joined the Hutu extremist militia known as Interahamwe, a paramilitary group that took an active part in the genocide.

In the Democratic Republic of the Congo (DRC)—known as "Zaire" between October 1971 and May 1997—the denial of Congolese citizenship to peoples of Rwandan origin was closely linked to both the steady influx of Hutu and Tutsi as a result of the Hutu–Tutsi conflict in Rwanda and Burundi and to the competition between these migrants and the original inhabitants over land and other economic opportunities. With great social mobility and strong solidarity among them, Rwandan immigrants succeeded in acquiring wealth and power, to the detriment of the indigenous peoples, particularly around Masisi in North Kivu. National resentment led to the 1981 nationality law, which repealed Mobutu's presidential decree of 1972 granting Congolese citizenship to all immigrants from Rwanda and Burundi who had lived in what is now the DRC since 1950. Mobutu and his cronies then manipulated the anti-Rwandan feelings in eastern Congo to inspire ethnic cleansing in North Kivu in 1993 and the attempted expulsion from South Kivu of Congolese Tutsi known as Banyamulenge in 1996.

Rwanda exploited the latter episode as an opportunity to wage war in the DRC in 1996 and 1998, on the grounds of "preventing another genocide." In fact, the 1996 war was aimed at destroying the Hutu refugee camps in North and South Kivu, which served as bases for the army of the ancien régime and the Interahamwe. The 1998 war, on the other hand, was a war of partition and plunder for which the security of Rwanda and Uganda served only as a pretext for the invaders.[13]

Similarly, ethnic cleansing in Katanga also had its roots in the greater social mobility and prosperity of migrants from the Kasaï region in comparison to native Katangans. Although no one disputed that both groups were Congolese, advocates of the "authentic Katangans" had since 1958 maintained that the riches of the province ought to first and foremost be enjoyed by the sons and daughters of the soil of Katanga, thus privileging them over other Congolese. The first wave of ethnic cleansing in Katanga

took place in 1960–1962, under the supervision of Godefroid Munongo, the interior minister of the secessionist province.[14]

In 1992–1994, the Mobutu regime sought to exploit anti-Kasaïan feelings to divide and weaken the democracy movement. The result was massive ethnic cleansing spearheaded by Gabriel Kyungu wa Kumwanza, the provincial governor, who established a genocidal youth militia whose commanders included John Numbi, who later on served as head of the air force under President Laurent Kabila and as the inspector general of the DRC national police under Joseph Kabila.[15] Approximately a million Kasaïans were expelled from cities and towns where their families had lived since the early twentieth century.

More numerous than ethnic wars are cases of intercommunal violence that involve the denial of full citizenship rights to minorities. Much of the violence stems from identity-based conflicts between different groups (national, religious, regional, ethnic) or ethnic fractions (such as lineages or clans) over the control of economic, political or social space. The bone of contention is access to land or other resources, and so these confrontations are exacerbated by the growing poverty of ordinary Africans and the state's declining capacities. Territorial disputes keep multiplying, particularly between pastoralists and agriculturalists and in areas where communal boundaries are either too difficult to establish or are contested.

Like violent conflicts at the provincial and national levels, intercommunal violence has an adverse impact on both democracy and development. The development of genuinely democratic forms of local governance and the nurturing of a democratic culture of participation, tolerance, respect for diversity, and equity are impeded drastically without full citizenship rights for all residents who are entitled to citizenship. Denying citizens of a country political, economic and social rights simply on the basis of the fact that they are "strangers" and not "indigenes," even if they have resided in the area for over a century simply makes no sense. How can we talk about pan-Africanism and a single African identity when we refuse to grant full citizenship rights to our own fellow citizens?

Most cases of intercommunal violence in Africa involve nationals of the same country, but there are also clashes between nationals and foreign workers or refugees who are deemed to enjoy fewer rights than citizens. The xenophobic attacks on foreign Africans in South Africa in 2008 are the most dramatic and tragic instance of violence directed against immigrants. In this particular case, the South Africans seem to forget the sacrifices made by Africans north of the Limpopo in support of the anti-apartheid

struggle. I personally witnessed how ordinary Nigerians contributed whatever money they could to the annual fundraising campaign of the anti-apartheid movement in the city of Maiduguri during the 1970s.

Another important issue with respect to citizenship rights concerns the land leases to foreign enterprises for mineral or agricultural exploitation, which are fast becoming a major bone of contention between the state and the people across the African continent. Deforestation by lumber and other companies and the transformation of peasant lands into vast plantations for biofuels are rapidly transforming the landscape and denying ordinary Africans not only the exercise of their land rights, but also the opportunity to use their land as they see fit for purposes of their own development. This situation is reminiscent of the alienation of African land by the colonial state, concession companies and white settlers. It ought to be reversed before it results in violent confrontations that can only impede development in Africa.

The Challenge of Improving the Standard of Living for All

The land issue is an important aspect of a much larger issue, identified by Ajayi as people's expectations of material prosperity through greater return on their labor and increased access to basic social services in postcolonial Africa. The development challenge facing Africa in this regard is *to improve the standard of living for all or make the economy work for all the people,* namely, citizens, permanent residents and legal migrants, including legitimate refugees. The postcolonial state cannot improve the standard of living of the majority through better housing, better salaries and prices for agricultural products, better transportation and marketing of rural produce, education as a means of social mobility and a better future for children, and an adequate supply of clean water, electricity and health-care facilities, within the existing structures of the economy inherited from colonialism. For these structures were not designed to serve the interests of African workers and peasants.

This is a question that Amilcar Cabral raised 50 years ago with respect to the revolutionary mission of the nationalist petty bourgeoisie to "*destroy the economy of the enemy and build our own economy.*"[16] In fact, the fundamental question for Cabral was to determine whether an independent state based on the same system of economic exploitation as the colonial state could satisfy the basic needs of African workers and peasants. His

basically negative answer to this question is consistent with the practical guidance he provides on what is to be done, and his thoughts on this matter are often misunderstood. In underlining the incompatibility between the inherited colonial economy and state machinery with the needs and aspirations of the African masses, Cabral shows that there is a choice to be made by African governments, between the people and their aspirations on the one hand, and the world system and its constraints, on the other. For him, as for those of us who claim to be pan-Africanists, the economic policy of the African state ought to respond to the deepest aspirations of the people, and not to the interests of the dominant classes of the world system along with the anti-social policies of the financial institutions under their control.

By conducting business as usual and managing in a rather routine fashion our raw materials-based and export-oriented economies, African rulers will remain the objective allies of the dominant interests of the developed and newly industrialized countries, which are the main beneficiaries of raw materials exports and capital flight to their markets. By refusing to "follow the path of revolution," as Fanon wrote half a century ago, they are pleased to play the role of intermediary between the dominant centers of the world economy and their people.[17] The major consequences of this option are the development of an oligarchy bent on using state power as a means of self-enrichment, the deeper underdevelopment of African countries, and the further impoverishment of the popular masses.

The current controversy in the DRC over mineral contracts through which a tiny minority of Congolese political elites has virtually sold the national wealth to foreign interests for a pittance is one of the best manifestations today of the irresponsibility and lack of patriotism of the new African oligarchy, which Fanon had decried in 1960–1961. The development challenge of making the economy work for all the people is also the biggest governance challenge facing Africa today, namely, the need to pursue autonomous policies of national and sub-regional development favorable to the interests of ordinary Africans, with the aim of eradicating poverty, unemployment, inequality and social exclusion. For these are, without doubt, the major root causes of armed conflict in Africa today.

In this regard, there is need to renew with the progressive tradition of the founding fathers of African independence, who sought to bring economic development through autonomous policy, reliance on our own human and natural resources, and pan-African solidarity. Pan-Africanists in the state sector, the private sector and civil society must assume the

leadership of this renewal, by pressuring African governments and regional economic organizations to implement the major policy instruments of this African strategy of development, *The Lagos Plan of Action* and the *Abuja Treaty Establishing the African Economic Community.*

State Capacity Building for Effective Governance

In order to address the three challenges outlined above, Africa faces a fourth challenge, that of transforming state institutions from the apparatuses of economic exploitation, political repression and cultural oppression that they were under colonialism, into development agencies designed to assist citizens in eradicating poverty and creating an environment in which they can achieve material prosperity. This transformation has less to do with institutional capacity building and the imparting of new skills to civil servants per se, than with the reason why these new capacities are needed. They are necessary because the relationship between the state and the people ought to change after decolonization. Instead of being subjects who were called upon to serve state institutions as the embodiment of the colonial overlord, the peoples of independent Africa are *stakeholders,* or citizens with rights and privileges for whom the state exists not as a master but as a servant. As *civil servants,* state agents, including political authorities, are employed to *serve* the people and to show them respect as the collective sovereign, rather than to brutalize and humiliate them.

The point of departure for the transformation of state structures in postcolonial Africa ought to be Amilcar Cabral's vision of a democratic developmental state, which is a total negation of the neocolonial state. In an informal talk with African Americans on October 20, 1972 in New York, Cabral had this to say on the state in Africa:

> We are not interested in the preservation of any of the structures of the colonial state. It is our opinion that it is necessary to totally destroy, to break, to reduce to ash all aspects of the colonial state in our country in order to make everything possible for our people. … Some independent African states preserved the structures of the colonial state. In some countries they only replaced a white man with a black man, but for the people it is the same. … The nature of the state we have to create in our country is a very good question for it is a fundamental one. … *It is the most important problem in the liberation movement. The problem of the nature of the state created after independence is perhaps the secret of the failure of African independence.*[18]

Democratizing the State

Whether the colonial state is destroyed and reduced to ashes, or survives in a neocolonial garb under African rulers, is the fundamental issue for postcolonial Africa with respect to democratic governance. Thus, for democratic governance to take hold and have an impact on the implementation of development objectives and programs, the state itself must be democratized with legitimate and representative institutions at all levels of the system in a constitutionally decentralized framework. Democratizing the state means transforming it from a despotic or authoritarian form to a democratic state working under the rule of law and a constitutionally established government. In addition to strengthening constitutional government, checks and balances and the transparent management of public affairs, democratizing the state requires the practice of free, fair and transparent elections.

Democratizing the state also requires decentralization or the devolution of power to regional or provincial and local authorities. Decentralization implies the restructuring of the state to empower these authorities and the citizens who elect them to have a say in how the country's wealth is to be used to meet the needs of the population. This means that in addition to constitutional and legal texts on devolution and autonomy, financial resources must be provided to these lower levels of the state to permit them to carry out their duties effectively. Participatory processes involving civil society, the private sector, women and the youth are necessary for involving all segments of the population in public policy making, and consequently in strengthening democratic governance at the local level.

One practice that may deepen both democracy and decentralization is *participatory budgeting,* a practice invented in Porto Alegre, Brazil, to allow residents to determine how to allocate municipal resources to their economic, social and cultural needs. This is what democratic and participatory governance is all about, as both a good in itself and a means toward other goods. In itself, it is a fundamental right of all human beings to participate in the management of public affairs, since these do affect their lives. And it is a means toward other goods such as comprehensive and sustainable development.

In addition to democratization and decentralization, restructuring the state requires the modernization of the public sector, which consists of the civil service, revenue collection agencies, law enforcement agencies, and economic and social development agencies including state enterprises. While its tasks include the enforcement of state regulations, law

enforcement and revenue collection, the public sector constitutes the service delivery apparatus of the modern state. For it to succeed in dealing effectively with the challenges of establishing the rule of law, expanding citizenship rights, and improving the standard of living for all, it must first of all be restructured to get rid of the deadwood, the corrupt and the incompetent within its ranks. This is best done by placing emphasis on talent in recruitment and promotion, as well as the development of professionalism in a well-trained and well-remunerated service, with equal opportunity for women and minorities, an enforceable code of ethics, and a reward system based on merit. Secondly, the public sector must be modernized by developing through training the specific skills required for development tasks and effective service delivery, including mastery of new information technologies and methods of fighting corruption. Finally, there is need for greater accountability in financial management through the emergence of a more transparent revenue collection system, a more credible audit system, and a more effective oversight by civil society and the public at large through the democratization of the state.

Civil Service Reform

As the administrative arm of the state, the civil service needs to improve its functioning and its image, which are interrelated. Both of them have suffered tremendously due in part to the declining capacity of the state to perform its traditional functions in an effective way. Although state decline or failure is a function of factors other than the behavior of civil servants, they are the most visible representatives of the public sector and hence easy targets for popular frustration, anger and blame. Some of this blame or anger has been earned by civil servants for the arrogant, selfish and inconsiderate manner in which they deal with the public. Being poorly and in some cases irregularly paid, civil servants have invented a multitude of ways in which they can rip off the public in order to maximize their income for purposes of making ends meet.

Civil service reform must give priority to reducing the excessive number of employees in the civil service and the state enterprises. The hiring of many of these employees did not follow exacting standards of institutional need and meritocracy. There is also need to restore the culture of state responsibility in regularly paying civil servants' salaries and social benefits, in addition to respecting the principle of a living wage for middle and lower level civil servants, whose pay is ridiculously low. As for their

relations with the public, a major part of the training of civil servants ought to deal with inculcating democratic values, particularly the respect due to citizens as stakeholders with rights and privileges, and not people to be subjected to humiliation, harassment, extortion, and any other kind of brutal treatment. For it is only when such values become part of their daily working equipment that civil servants can play a significant role in the development process.

Revenue Collection Agencies

Some African states have been described as failed or failing states. The test of state failure is the ability of the state to perform its fundamental functions, the most important of which are the maintenance of order and security, the delivery of basic social services to the population, and the mobilization of sufficient revenues to cover all of the state's activities. The collection of revenue—whose sources include personal income and business taxes, customs duties, fees for various state services and licenses, royalties, and the profits of state enterprises—is an activity that involves not only tax and customs agents, but a full range of state employees in the civil service and state enterprises. In Africa, it is an activity that has suffered from many of the problems facing the postcolonial state, including poor morale, incompetence, and corruption.

All of these factors are interrelated. State employees have low morale because of relatively low salaries and deteriorating working conditions. Once a prestigious employment, whose khaki or white uniforms were the envy of young people dreaming of a future career in the public sector, the civil service is no longer a top career goal for today's youth, who may find better opportunities in the private sector. With state buildings dilapidated, full of old furniture and mostly useless equipment like old typewriters that should now be museum pieces, the work environment is so crowded and unsanitary in a number of countries that it is not conducive to raising the morale of those condemned to spend five consecutive days in it each week. But even those state employees who must go out in the field to carry out duties such as revenue collection find it difficult to move about without adequate means of transportation.

The lower the morale, the more civil servants become complacent and incompetent in the performance of their tasks. This is especially true of revenue collection agents, who must be alert at detecting and neutralizing tax avoidance and tax evasion schemes by individuals and businesses bent

on paying as little as possible or nothing at all. Unfortunately, corrupt practices among the agents themselves, many of whom have learned to use their career as a way to make ends meet or even to enrich themselves, constitute the major factor of low performance in revenue mobilization. In many African countries, the amount of revenues collected represents less than a quarter of what could be collected if the job was well done.

One example of petty corruption by revenue collection agents is instructive in this regard. During my dissertation research in Mobutu's Zaire, I found that the amount of revenue collected for beer licenses did not correspond to the number of and types of licenses sold. When I asked the tax collectors to explain this discrepancy, they explained that the only way to collect any money for the treasury was to allow license holders to pay whatever amount they could, with the promise of paying the difference later.[19] Thus, instead of carrying out their tasks in an orthodox manner, agents often engage in bargaining and other informal arrangements with taxpayers, as a way of both raising some revenues for the state and channeling some of the receipts into their own pockets. At the same time, it must be pointed out that although petty corruption is a violation of the law and an infringement on the rights of ordinary citizens, it is the grand corruption at the top by agency heads, ministers and heads of state that deprives the treasury in countries like the DRC of billions of dollars each year and is therefore a major factor of state failure.

Good governance requires that such practices be extirpated from the state and the civil service. The reform of revenue collection agencies ought to be a top priority for African states. A major precondition for ending corrupt practices is the strengthening of record-keeping capacities in the agencies, so that computerized data of individuals and organizations from which revenues are expected can be checked and updated on a regular basis. Another precondition is the establishment of a small corps of financial inspectors who are well trained, well paid, and highly motivated to keep a keen eye on the work of the revenue collectors at all levels of the hierarchy.

Law Enforcement Agencies

There are at least five separate law enforcement agencies in a modern state: the armed forces, the police, the intelligence services, the judiciary and the penitentiary services. All of these organizations participate in one way or another in the maintenance of order and security through national defense, internal security, and the enforcement of law and order. Riot and crowd

control duties are usually performed by a constabulary force known as the *gendarmerie* in Francophone countries; by the riot police or another specialized branch of the police in Anglophone countries; or by a military unit designed to back up the police such as the National Guard in the USA.

In Africa, the army continues to be used for repressive purposes, given its colonial heritage as a constabulary and a repressive force against Africans. Massacres of students and other citizens by army units have taken place in a number of countries. Likewise, intelligence services are more likely to be used for intimidation and repression than for intelligence gathering and national readiness vis-à-vis external threats. A major priority in the restructuring of the African state for democratic and participatory governance is to remove intelligence services from repressive functions and have them concentrate their work on the more strategic issues of national survival and development. Reforms are also needed to restrict the military to its professional role of defending the country's borders and protecting civilians from harm by armed militias and Mafia-type criminal networks involved in drug, arms and human trafficking, as well as to train the police in human rights and the need to treat their fellow citizens with respect and honor.

Like the civil service, the judicial system is extremely weak with respect to the challenges of providing equal access to justice for all citizens, regardless of gender, social status and ethnicity, and of rendering justice independently of the executive. Deterioration in buildings and lack of appropriate equipment and supplies for speeding up the caseload in the face of rising crime have made the work of judges and other judicial officials very difficult, indeed. Major reforms are needed in this area, inasmuch as the judiciary is expected to play an important role not only in strengthening the rule of law to create an enabling environment for private business investments, but also in the fight against corruption. Given the limited capacity in the judiciary and the slowness of the judicial process, many countries have opted to create anti-corruption commissions or other specialized bodies to deal with the issue of wiping out systemic corruption from the state system in Africa.

Finally, with respect to the penitentiary services, the restructuring tasks go beyond changing officials, as in the case of corrupt or incompetent civil servants, judges and police officers, to the more cumbersome issues of prison facilities and operations. There is need for a more humane treatment of prisoners in all aspects of prison life, from expediting the trial process to ensuring fair justice, to the lodging and hygienic conditions, to the rehabilitation process. With so many people being detained for a long

time without trial in extremely crowded conditions, states should respect their own laws on detention and release petty criminals in order to use the available resources to deal with the more serious offenders.

Economic and Social Development Agencies

With respect to the fight against poverty, the state agencies for which best governance practices are needed are those dealing with economic and social development. For they are the ones called upon to develop the infrastructure and provide basic social services within a self-reliant and inward-looking strategy of development for the eradication of poverty for Africans and by Africans. Developing the physical infrastructure of urban and rural development and making basic social services available to poor people is the best way of restoring trust in the government, particularly in post-conflict areas, as people may once again have access to electricity, running water, schools, health centers, and modern means of transportation such as paved roads and bridges. Building roads and bridges and thus allowing peasants to bring their produce to urban markets is an important aspect of the development process, as it helps to improve the welfare of rural producers and to decrease dependence on external food aid. The infrastructure of urban transportation is also indispensable, given its importance for the informal economy.

Another aspect of the fight against poverty is the dialectical relationship between poverty and the environment. For example, lacking money for electricity, gas or petroleum products, poor people will fell trees for their fuel needs, as they also do for the wood needed for building purposes. This practice, together with the building of dwellings on erosion- or other disaster-prone areas for lack of better sites, may have negative consequences for both the environment and the poor themselves. Consequently, best governance practices on poverty eradication must involve efforts not only to educate the poor on environmental protection and disaster prevention, but also to make sure that economic and social development agencies assist them in finding better sites for housing and in meeting their needs with respect to affordable fuel and construction materials. They should be encouraged to maintain a constructive dialogue with environmental and disaster management agencies. Civil society organizations can play a major role in facilitating this dialogue.

Conclusion

After 50 years of self-rule, the countries of Africa have not succeeded in meeting the people's expectations of independence. Despotism continues to rear its ugly head from time to time, and some countries are mired in endless violence for which no clear end is in view. In addition to developed Western countries, the new economic powers of China, Brazil, India and Saudi Arabia are now negotiating contracts that endanger the rights of African peasants, as their lands are being leased to foreign companies for mineral, forest and agricultural exploitation with little concern for consequences for the people and the environment. Poverty remains rampant, with more than half of the African population living on less than 2 US dollars a day. While the nation-state as presently constituted remains an indispensable framework for dealing with Africa's development challenges, their satisfactory resolution can occur only through pan-African solidarity by the way of regional and continental integration.

In arguing for pan-African solidarity as the best answer to Africa's development challenges, I would like to conclude with an anecdote from my work experience with Nigeria's anti-corruption commission, the Independent Corrupt Practices and Other Related Offences Commission (ICPC), in 2001–2002.[20]

One of the services I provided for the ICPC was to organize training workshops for the commissioners and their staff, which included prosecutors and investigators and the support staff (particularly those dealing with electronic data and records). For the commissioners, I thought that they might learn more from best practices by some of the African countries with successful experience in the fight against corruption than from Europe, Asia and America, from which the consultants were very costly. When I suggested the heads of the anti-corruption bureaus from Tanzania and Botswana, the commissioners were very skeptical, particularly with respect to Botswana, which was viewed as a "little" country with nothing to teach the mighty and big Nigeria. The Chair of the Commission, the Hon. Justice Mustapha Adebayo Akanbi, convinced his colleagues to accept my proposal on both countries.

Between March 4 and 8, 2002, Mr. T.M. Katlholo, Director of the Botwana Directorate on Corruption and Economic Crime, conducted 9 training sessions for the Commission and its staff. His training was so outstanding that it was greatly appreciated by all concerned. Other than traveling with a business class ticket and accepting his per diem for lodging

and meals in Abuja, he did not accept consultancy fees. He told me and the Commission Chair that his Minister had decided that given Nigeria's great contribution to the liberation struggle in Southern Africa, he was to offer his services free of charge as a Botswanan civil servant on official mission to a sister African nation. A fine example of pan-African solidarity, this was in sharp contrast to the $1000 a day fee paid to Bertrand de Speville, a Franco-British aristocrat and former Chair of the Hong Kong anti-corruption commission. I must point out that his contribution to ICPC training was excellent but too costly.

As my tenure in Nigeria drew to its end, the ICPC held a going-away reception in my honor on April 29, 2002 at the Chelsea Hotel in Abuja. In his remarks, Justice Akanbi explained why he had so warmly embraced me as an advisor to the Commission and appreciated the way I conducted myself in dealing with both the commissioners and the staff. He told the gathering that during my very first meeting with him, he ascertained that we were on the same wavelength, because he understood that we were both "Nkrumahists." As pan-Africanists, we were both supportive of promoting African thinking on the major challenges facing the African continent. This, I think, is the way forward for Africa's development in the twenty-first century.

Notes

1. See Nzongola-Ntalaja 1993.
2. See Ajayi 1982, 5.
3. See Fanon 1963.
4. See Emerson 1962.
5. See First 1970.
6. See Suret-Canale 1971.
7. See M'Bokolo 1983, 197–213.
8. See Thomas 1984, 93.
9. The lecturer in question was Dr. Cecylia Barbara Bartoszewics.
10. See Nzongola-Ntalaja 2010, 15–27.
11. This section of the chapter is heavily borrowed from three previous publications of mine on citizenship in Africa: Nzongola-Ntalaja (2004, 2007, 2008).
12. See Newbury 1998, 73–97.
13. For the background to both wars, see Nzongola-Ntalaja 2002, 215–240.
14. Ironically, as a descendant of King Msiri, the Nyamwezi trader from Tanzania who founded the State of Garenganze in southeastern Katanga in

mid-nineteenth century, Munongo could not be more of an "authentic Katangan" than the Luba of Kasai, whose original homeland is in the area around Lake Upemba in Katanga.

15. For brief biographical sketches of both Kyungu and Numbi, see Jean Omasombo and Eric Kennes 2006, 115–116 and 206.
16. See Cabral 1979, 239–241; emphasis mine.
17. See Fanon 1963, 151.
18. See Cabral 1973, 83–84; italics in original.
19. For more details, see Nzongola-Ntalaja 1975.
20. For two years, from 2000 to 2002, I served as the senior UNDP governance advisor to the Federal Government of Nigeria in Abuja. My major assignment was to work with the National Planning Commission (NPC) in developing and refining a comprehensive national governance program for Nigeria based on a Nigerian rather than a foreign vision of democratic governance for poverty eradication and sustainable development. In addition to the NPC, my work included setting up a think tank for President Olusegun Obasanjo, the Independent Policy Group (IPG), and providing capacity development support to four other major institutions: the Independent Corrupt Practices and Other Related Offences Commission (ICPC), the Institute for Peace and Conflict Resolution (IPCR), the National Human Rights Commission (NHRC) and the Independent National Electoral Commission (INEC).

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CHAPTER 9

State, Civil Society and Democracy in Kenya: Kenyans for Peace with Truth and Justice (KPTJ) and the Political Crisis of 2007–2008

Anders Sjögren, Onyango Oloo, and Shailja Patel

In the evening of 30 December 2007, after three days of tense waiting, controversy and accusations of rigging, Samuel Kivuitu, Chairperson of the Electoral Commission of Kenya (ECK) declared Mwai Kibaki the elected President of Kenya. Less than an hour later, Kibaki was sworn in by the Chief Justice on the lawns of State House in the company of only a handful of loyalists. By then, violence had already erupted in many parts of the country. People had taken to the streets in large numbers to protest against what was seen as a blatant theft of state power. As the opposition party, the Orange Democratic Movement (ODM), was holding a press conference that evening, calling for a mass demonstration in Nairobi's Uhuru Park the following day, the Minister for Internal Security issued a decree, which indefinitely banned live media broadcasts and political rallies. The

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day after, Uhuru Park was closed off, guarded by hundreds of members of a special police force, the General Service Unit (GSU). Kenya had been thrown into a *de facto* state of emergency.

Only five years earlier, the new National Rainbow Coalition (NARC) government had been euphorically voted into power after four decades of Kenya African National Union (KANU) rule. The electoral transition of 2002 followed upon decade-long struggles against political repression. The fact that democratic space had been opened up was in no small measure thanks to continuous pressure from sections of civil society. Conventional wisdom has it, however, that the transition from KANU to NARC brought with it complacency. Civil society actors are said to have been compromised by co-optation. While there is some truth to this claim, it does not tell the whole story. The political terrain had become less clear-cut than under KANU rule. The modes of engagement were different. It is however accurate to say that just like society at large, civil society underwent a change in the direction of political and ethnicized polarization, not least after the 2005 referendum on the constitution.

In the face of the magnitude and complexity of the crisis; the restrictions imposed by the state; and the relative fragmentation of civil society, what was the scope for and capacity of social and political forces to respond to the challenges in a meaningful way? What resources could they draw upon? Because of Kenya's regionally dominant position, the crisis carried regional implications from the start, and it soon became internationalized beyond the region. The "international community" intervened in the process in all manner of ways. Also, the Kenyan diaspora came to play a significant role. What were the connections between internationalization and local initiatives? This chapter seeks to answer these questions through an analysis of the Kenyans for Peace with Truth and Justice (KPTJ) coalition in the context of the relationship between the Kenyan state and civil society in the era of democracy.[1] The study mainly draws on interviews with key members of KPTJ, alongside official, media and KPTJ in-house documentation and secondary literature on state–civil society relations in Kenya. After a theoretical section, the chapter offers a brief overview of the history of repression and resistance in Kenya and examines the activities of KPTJ from the onset of the crisis to the signing of the National Accord on 28 February 2008, followed by a summary of the period culminating in the promulgation of the new constitution in August 2010—at which time this chapter was written. Since Kenya in March 2013 witnessed yet

another controversial election with post-election intervention by KPTJ, we have found it justified to add a brief post-script on the latter.

Things have since moved fast. While space does not permit a thorough examination of the post-agreement period, we summarize the main developments and identify some future challenges in the conclusion.

State, Civil Society and Democracy: Some Theoretical Preliminaries

The Kenyan post-independence experience resonates with those of many other African countries. Political pluralism at independence was soon replaced by one-party or military rule. Following economic decline, pressure was put on most African governments to comply with Structural Adjustment Programmes. From the late 1980s, economic liberalization was in some cases accompanied by political reforms. Domestic pressures for reforming and opening up political institutions were incorporated into the "good governance" agenda and codified into political conditionalities as demands for multi-party elections. The expectations that first met these changes, as being part of the so-called Third Wave of democracy, eventually evaporated. Some countries fell back into military or one-party rule. In other cases, where liberal democracy has been established, observers have pointed to its shallow character and limited reach.[2] These setbacks suggest that patterns of political authoritarianism are deeply rooted and further enforced by structural characteristics of many African political orders. Significant features that impede the consolidation of democracy in Africa are said to include weak economies on the periphery of global capitalism; deep social and political inequalities; fragile and incapacitated state institutions controlled by elite coalitions; factional political parties without a solid social base; and weak civil societies, often characterized by ethno-regional fragmentation and disrupted links between the urban and rural population.[3] This has also been discussed by Huber et al. in terms of the "contradictions of contemporary democracy,"[4] by which they mean that while decisive structural features, including the nature of class relations, state structures and international relations which frame the current conjuncture are conducive for promoting formal democracy, these features at the same time tend to obstruct social and participatory dimensions of democracy.

The nature of civil society in Africa has long been the topic of a vast literature, with proponents[5] as well as critics[6] of the idea that civil society holds the

key to democratic transitions in Africa.[7] In contrast to certain contemporary conceptualizations of civil society that tend to view it as a pluralizing social phenomenon with relatively homogeneous core properties and liberal-democratic political implications,[8] it is argued here that civil society is better understood as an analytical as opposed to a prescriptive shorthand term for a wide range of more or less formal social groups without specific pre-determined political properties; civil society cannot, for instance, be assumed a priori to be autonomous from or opposing the state, as witnessed by the wide-ranging political orientation of civil society groups in contemporary Kenya.[9] Following from this, the formation of civil society in any specific setting is here viewed as rooted in and transformed by the political economy and its different kinds of social stratification, including class, gender, ethnic, and other relations, and in response to the forms of ideology and representation such stratification sets off.[10] This process does not, of course, occur in any deterministic manner. The composition and political orientation of civil societies cannot be derived straight off from the social structure or from state or ruling class imposed attempts at domination.

In theoretical terms, the different orientation of civil society groups may be discussed in terms of forms of civil society that pluralize social life, those that expand popular participation and those that strengthen the interests of subordinate groups.[11] The argument advanced by Rueschemeyer et al. is that in order for democracy to be promoted and consolidated, the state must be relatively autonomous from dominant classes and, correspondingly, sufficiently embedded among subordinate ones.[12] In spite of difficult conditions, there is still scope for certain sections of civil society to play key roles in demanding or defending democracy. It is those sections of Kenyan civil society that we examine in this chapter.

Repression and Resistance in Colonial and Postcolonial Kenya

Violence in different forms has been a consistent political theme throughout Kenya's history. Subsequent governments have orchestrated repression of oppositional groups and individuals by way of police harassment and assassinations since the 1960s. Mobilization of ethnic militias has been a political weapon since the early 1990s. Protests against political marginalization, land conflicts, violent and criminal manifestations of poverty and unemployment: these have been the undercurrents beneath the surface of apparent stability.[13]

As elsewhere in Africa, colonial rule in Kenya imposed a repressive state apparatus characterized by exploitation and coercion. The difficulties for the colonial state in balancing contradictions posed by imperatives of accumulation and control in the context of limited administrative resources was the background to indirect rule as a particular state form. "The customary" was reified, compartmentalized and made absolute by intertwined processes: authoritarian aspects of tradition were selectively derived and deemed fit for rule; each "tribe" was declared a homogeneous cultural (and by implication administrative) unit; and customary law was invested in the singular authority of the chief.[14] In Kenya, the presence of white settlers intensified the process of land grabbing by the state and landlessness among Africans. Settlers were concentrated in the "White Highlands," the agriculturally productive areas of the Rift Valley. Land alienation led to anti-colonial protests, of which the Mau Mau was the most prominent. Colonial brutally suppressed Mau Mau and other expressions of nationalism—whose proponents were again subordinated around independence, now by the emerging African elites.

The combined legacy of indirect rule and socio-economic underdevelopment along ethno-regional lines was reproduced after independence by the institutional and geographical centralization of power to the Presidency and Nairobi, and deep inequalities in terms of access to the state. Fragmentation, polarization and discrimination generated structural patterns of ethno-regional inequalities and set off the kind of pronounced politicized ethnicity, including the politics of "settlers" versus "natives," which has characterized post-independence Kenya.

After 68 years of colonialism, the British negotiated a decolonization transition in December 1963 which saw pro-Western protégés like Jomo Kenyatta and Tom Mboya seize control of the newly "independent" but thoroughly neo-colonial state apparatus—a contraption which had the superficial trappings of a modicum of bastardized Westminster style "democracy" masking an iron-fisted imperial presidency, which over the next four decades emasculated the legislature, reduced the judiciary largely to a rubber stamp of the executive and systematically clamped down on fundamental freedoms like the right to assembly, expression, association and organization. By the end of the 1960s, the popular progressive nationalist camp led by Jaramogi Oginga Odinga and Bildad Kaggia had been outlawed and its leadership either detained without trial or locked out from mainstream politics. The murder of the populist parliamentarian J.M. Kariuki, by forces acting at the instigation of the increasingly

repressive Kenyatta dictatorship, spurred a rise in militant oppositional organizing which was driven underground and later into exile.[15]

The ascendancy of Daniel arap Moi as president in October 1978 following the death of Kenyatta initiated a 24-year nightmare of near fascist control of all aspects of Kenyan society, from the media and the trade unions, to the student movement and national politics. In 1982, the constitution was to declare the country a *de jure* one-party state. Between 1979 and 1982 there was a small but militant informal opposition within parliament consisting of the so-called Seven Bearded Sisters. However, one by one their voices were silenced. The abortive coup attempt in 1982 by junior elements of the air force only served to justify the imposition of a quasi-military regime with Daniel arap Moi ruling almost openly by decree, and a parliament stacked with cronies who parroted and applauded his every pronouncement, no matter how trite.[16]

These repressive conditions planted the seedlings of what would later mushroom into a plethora of political parties in the early 1990s and beyond. The Moi–KANU one-party dictatorship drove the opposition even deeper underground and into exile. A number of left leaning formations[17] built a very high profile international campaign for social justice and democracy. By the late 1980s, the religious leaders within the country took on the mantle of the nation's conscience with bold denunciations of excessive presidential powers and other repressive acts by the state. In the media, the human rights lawyer (and future Imenti Central MP) Gitobu Imanyara used his *Nairobi Law Monthly* to agitate for human rights and democratic reforms; Bedan Mbugua used his editorship of the Christian magazine *Beyond* to achieve the same goals, while an ostensible coffee table magazine called *Society* together with *Finance* soon metamorphosed into radical champions for civil and political rights. The Moi-led regime reacted in knee-jerk fashion—arresting the editors, seizing the printing press and confiscating issues. Street protests, prayer vigils, sit-ins, strikes and other acts of civil disobedience were broken up by heavily armed riot and para-military police wielding tear gas and bayonets and even firing live ammunition at peaceful, unarmed pro-democracy campaigners. Student leaders, activists and journalists were arrested, detained, and sentenced to prison, charged with sedition.[18]

Finally something had to give in. The popular protests, which had migrated from underground and exile to the pulpits, the streets and magazine columns, now started seeping back into the political mainstream. The ageing doyen of the Kenyan opposition, Jaramogi Oginga Odinga

made a dramatic comeback to the headlines with his periodic media releases. He even announced the formation of a new political party when it was still illegal to form a competitor to KANU. And then in a stunning development, two KANU politicians not previously associated with the opposition—Kenneth Matiba and Charles Rubia—called a press conference to denounce the KANU dictatorship and demand political pluralism. For their pains, they were immediately pounced on and detained without trial. There were other stirrings of a national uprising with Jaramogi Oginga Odinga joining hands with five other respected nationalist figures like Masinde Muliro and Martin Shikuku to launch the Forum for the Restoration of Democracy in Kenya. By December 1991, Daniel arap Moi had acquiesced to the popular outcry and decreed another amendment to the constitution, this time paving the way for Kenya to revert back to the original status quo of formal multi-party democracy.[19]

State–Civil Society Relations in Multi-Party Kenya

The reintroduction of legal political pluralism did not entrench democracy in Kenya. True, the democratic space was widened and hitherto silenced voices spoke loudly for social justice, against corruption and for a new Kenya, yet there were no fundamental institutional reforms which would have anchored the new chapter of relatively relaxed conditions of political engagement. The more enlightened members of the democratic forces called for the enactment of a new democratic constitution. This proved to be an elusive quest.

The first multi-party election in 1992 was therefore held in conditions where Moi and his cronies still controlled the executive and the judiciary, and could manipulate the legislature almost at will. Kenyans were bitter that despite a three-to-one trouncing of KANU by the combined opposition in the popular vote, Moi and KANU still squeaked through to continue dominating Kenya because of the divided opposition, but most principally because the elections were held under the old draconian constitution. This scenario was to be repeated in 1997 when there was a widespread belief that Moi had cheated Kibaki to the presidency by rigging the polls.[20]

In the 1992 and 1997 elections, KANU instigated politically motivated "ethnic clashes" to intimidate, scatter and expel populations considered "enemies" of the powers that be. The state looted the public coffers to recruit unemployed youth to become part of its sponsored private armies

which wreaked terror and havoc on members of ethnic groups associated with opposition politicians. This was a calculated exercise to change the ethnic composition of voting populations in Rift Valley and Coast provinces and resulted in a great number of internally displaced people.[21] Some of the roots of the 2008 Kenyan post-election violence can be dug up here. The origins of the dreaded *Mungiki* militia can also be traced to this period as Agikuyu youth displaced by the state in the sprawling Rift Valley Province formed self-defense vigilante groups.[22]

2002 was supposed to be a watershed moment in Kenyan politics. For the first time, all the major opposition figures came together under one umbrella, the National Rainbow Coalition (NARC), to confront the 39-year reign of KANU and Moi's handpicked successor, Uhuru Kenyatta. NARC's flag bearer, Mwai Kibaki, was elected president with a landslide hovering near the 70 percent mark and NARC formed a formidable majority in parliament. With this decisive mandate, Kenyans expected Kibaki and the new NARC administration to promulgate and enact a new constitution within six months of coming to power.[23]

This was not to be. Within months NARC had split down the middle, with supporters of Mwai Kibaki reneging on a pre-election power-sharing agreement with the Liberal Democratic Party (LDP) faction led by Kibaki's most enthusiastic campaigner, Raila Odinga. The factional cleavages soon assumed ethno-regional connotations with the growing perception that Kibaki was entrenching Gikuyu tribal supremacy at the expense of other Kenyan communities. This perception gave birth to a new term, "the Mount Kenya Mafia." A much vaunted national constitutional conference was convened in late 2003 at the Bomas of Kenya. It collapsed in March 2004 when the Kibaki faction engineered a walkout by a section of the delegates. The LDP faction insisted that the Bomas Draft had paved the way for a new constitution based on the parliamentary system with an executive prime minister and a largely ceremonial president. The Kibaki faction countered by reaching out to the highly despised KANU official opposition and to the smaller FORD-People party, led by former KANU minister Simeon Nyachae, to form a "Government of National Unity" which tilted power to the more conservative wing of the Kenyan political class. Undeterred, Raila Odinga and his LDP faction cobbled together a loose alliance including sections of civil society to agitate for the Bomas Draft and against the controversial Wako Draft which was seen as watering down the former.[24]

It was under these conditions that the November 2005 Referendum was held, with the country already polarized not just along the parliamentary/

presidential schisms, but also the devolution/centralized cleavages, which were permeated through and through with barely disguised tribal animosity pitting the combined Agikuyu/Embu/Meru/Mbeere Mount Kenya communities against the rest of the Kenyan nationalities. The result of the referendum displayed these stark divisions: in seven out of the eight Kenyan provinces, the Wako Draft was roundly rejected while being embraced by a landslide in the strongholds of Mwai Kibaki.

The 2007 electoral campaigns really began in earnest with the 2005 Referendum. The current largest party, ODM, was born as the Orange Democratic Movement at a massive rally in the western Kenyan town of Kisumu, a stronghold of Raila Odinga. The Party of National Unity (PNU) was the regrouping of the Banana camp which had voted for the Wako Draft. The tensions which would later explode in the wake of the controversial announcement of the 2007 Presidential results had been simmering for a long time, beyond 2005, harking back to even 1992 (especially given the fact that a section of the old KANU base from the Rift Valley was by 2007 firmly part of the ODM bedrock). Kenyans went to the 2007 polls with the same old constitution, and also with many of the old private armies run and maintained by warlords in and out of cabinet still very much intact. Political parties largely remained myopic electoral vehicles designed to catapult the various political chieftains to power where they could continue accumulating private wealth through control of the levers of state. Yet, political polarization was strong. At the same time, popular expectations for genuine change had grown in strength. This was the charged context in which the elections were held.

Crisis and Response: The Emergence of KPTJ

The ECK announcement of the official election results, and subsequent state repression and the waves of violence, shocked most Kenyans, including seasoned activists. Kenya Human Rights Commission (KHRC) had election observers placed around the country, and so did the Kenya National Commission on Human Rights (KNCHR), its statutory counterpart.

> We had expressed concerns about hate speech, bribery, and misuse of public resources. But none of us anticipated what we saw in the end.[25]

Likewise, David Ndii, economist with the Kenya Leadership Institute and KPTJ member, says that while he came across "ethnic jingoists" in Central Kenya prior to the elections, he assumed that this group constituted "the lunatic fringe." One reason for dismissing the possibility of

what eventually transpired was, according to Ndii, that most observers probably thought that the people who could be contemplating it would be deterred by the likely consequences. Therefore, he along with others in "civil society [were] caught flatfooted" by the rigging, and only woke up to the realities when the results were announced and Kibaki was sworn in on 30 December. "My immediate reaction was 'this is a coup!'"[26]

A lot of people felt the same way. It became apparent during the interviews that everybody (as well as the authors of this chapter) reacted instantly and activated their respective networks by phone, SMS and meetings. On 31 December 2007, the day after the swearing in, 23 members of Kenyan civil society convened an emergency meeting in Nairobi. All long-time activists, they represented a spectrum of legal, human rights, and governance organizations, as well as individual Kenyans. Within hours, they had released a statement which *denounced the credibility of the electoral process; demanded the ban on live media coverage be lifted; urged full disclosure of presidential tally results; offered hotlines for electoral commission whistleblowers;* and *appealed to the international community not to recognize Kibaki as president*. This was the group that would become KPTJ. According to David Ndii, two main strands came together: one consisted of organized activists and human rights organizations and the other of individual intellectuals. On 5 January 2008 KPTJ organized a press conference at the Grand Regency Hotel, which seemed to provide both unity and energy and a sense of purpose to many people: "There were Kenyans from all walks of life, uniting around a common cause. People stood up and introduced themselves. This was a very powerful moment."[27]

A number of other organizations soon came on board; people started meeting at KNCHR. Hassan Omar Hassan explains that KNCHR did provide some degree of protection thanks to its standing. Many of its resources, from a place to meet to its Government of Kenya car number plates, proved useful. KNCHR also had a more developed institutional framework than many of the other organizations involved.[28]

> It was very important that KNCHR could provide us with a place to gather. The first meetings there were a clearing house […] if you could identify with the core issues—the rigging and the violence—you stayed.[29]

It was the insistence on the two connected core issues of violence and flawed elections that distinguished KPTJ from all the other initiatives that emerged at the time. The media preached peace; on 3 January 2008, all papers in the country carried the same headline on the front pages: "Save our beloved country," the message being that the violence (and then not

necessarily referring to the violence meted out by state agencies) must stop at any cost. Vacuous moralism was the order of the day. Another initiative with a similar perspective was *Concerned Citizens for Peace*, spearheaded by high profile mainstream personalities like Ambassador Bethuel Kiplagat and retired senior military figures Brigadier Daniel Opande and General Lazaro Sumbweiywo. According to David Ndii, Bethuel Kiplagat came to KPTJ to give a presentation on the road to peace at whatever cost but he was shocked at the premium that KPTJ placed on unraveling the truth about the political situation as a basis for resolving the crisis.[30] KPTJ was the only group that emphasized the interconnection between peace, truth, and justice. Since the problem was that violence was related to fraud and lies, the solution must be to connect peace to truth and justice. As Maina Kiai, former Chairperson of the Kenya National Commission on Human Rights and KPTJ member, put it in an interview:

> Even at the first meetings, it was clear we were all for peace but we were also not naïve to think that calm is the same as peace. Calm without truth and justice would only lead to redoubling of the issues that caused the fighting in the first place. Yes, we got a lot of flak from people saying, 'Why aren't you focusing on peace?' We focused on peace but we understood that if we wanted to have real peace, then we could only have it through truth and justice […] we were clearly leading the only group that seemed to address every facet of the crisis. Some groups were trying to meet for peace or calm—that was driven, in my view, by a desire for money from the donors. Even the donor community was so interested in calm that they forgot that you cannot have calm without peace. Unless we address these things, our agenda is not finished.[31]

From the outset, KPTJ insisted that any resolution of the crisis must address the injustices at all levels, historic and current, which precipitated the catastrophe. There was no "business as usual" to go back to; indeed, it was the usual business which was at the root of the crisis. One aspect of coming to terms with the crisis was the analysis of the post-election violence that traced each strand of violence to its source and held the initiators of each form of violence accountable. KPTJ distinguished between four types of violence: spontaneous protests against the announced election results; state-organized violence against those protesting, particularly by way of police crackdown and extra-judicial killings in opposition strongholds; organized militia activities with ethnic connotations; and finally reactions, including intra-communal violence, to the three former

types. Different layers of Kenya's structural problems were activated by failed hopes for change, charged with intense political energy, and setting off different but soon interconnected violent manifestations.

To insist, as KPTJ did, on not only peace as something more than ceasefire, but also on truth and justice as necessary conditions for such peace, and, moreover, on truth and justice with regard to both the violence and the elections, was highly controversial at the time. To quote David Ndii: "While moral outrage was the common driving force, 'civil liberties' was the unifying principle."[32] And civil liberties had been suspended. It is no surprise that the PNU-side regarded KPTJ with hostility, as an ODM outfit.

> We met with ODM, which proposed a joint social movement, but we declined. This was for a lot of reasons. The major concern was with keeping our autonomy and credibility. KPTJ was already being branded as an ODM mouthpiece just by virtue of criticizing the elections. Another concern was with the violence in the Rift Valley, and our limited knowledge of the responsibility for it. So we told them that we would probably be of greater use if we remained autonomous, and provided independent moral and intellectual leadership. We could not exclude that ODM politicians were culpable. Moreover, we also thought that ODM was paralyzed in its thinking, and never went beyond its fixation with holding mass meetings in Uhuru Park. Those were really empty threats.[33]

During the first week, activities centered on keeping up with and reacting to events as the crisis rapidly deepened and became more complex. KPTJ representatives were involved in a lot of local and international media work such as interviews. International media had picked up on its statements. One should recall that local media was under pressure at the time and limited in its coverage by (self-) censorship, for instance by the ban on live broadcasts.

The early informal meetings gradually faded out and focus shifted to working groups. During the intense 48 hours after that first meeting, KPTJ created three working groups—legal, violence-monitoring, and direct action. In subsequent weeks, the legal and violence groups would generate information, backed by verified data and professional analysis, to underpin reasoned positions and messaging for diplomatic efforts. The direct action team would meet daily, defying the government ban on public assembly, providing a public forum for Kenyans across all sectors and ethnicities to channel their outrage into activism. An early response to the

elections was to document as much as possible. The compilation of the information would later turn into reports, including the KPTJ report on the elections, *Countdown To Deception*.

KPTJ was able to get assistance from the organization "No Peace Without Justice," based in Brussels and with an office in Rome. By the end of January, they had sent a team to Kenya to train KPTJ on how to handle issues of documentation and establishing factual details, such as gathering evidence and testimonies. This made it possible to get things moving in the field.

Strategies and Impact—Reaching Out Through Networks

It was evident from the start that KPTJ encompassed impressive collective competence in terms of analytical capacity. Working groups soon began to collect and systematize evidence and compile reports. The more difficult challenge was to reach out and create an impact. One obstacle was the self-censorship that was practiced under pressure by the Kenyan media, which restricted the effectiveness of that channel of communication. Another challenge can be regarded as a testimony to the influence of KPTJ: a series of death threats addressed to its leading members during January. The threats were mainly directed at members of kikuyu ethnicity, described as "traitors" of the Mwai Kibaki/PNU (and, supposedly, the kikuyu community) cause. Hostile sentiments were furthermore whipped up by state-orchestrated propaganda. The Office of the Government Spokesperson organized a campaign in which a number of groups and individuals, among whom was Maina Kiai, were attacked in full-page adverts in the leading Kenyan dailies and in the electronic media.[34] When KPTJ presented its election analysis at a press conference at the Panafric Hotel, Nairobi, in January, a number of its members had to be taken out through the back door to avoid the mob waiting outside. In order to secure protection and reach out, more resources were needed.

> In the beginning, everyone was drawing on their own resources—money, office space, time, contacts, capacity, and so on—and doing so on a voluntary basis. But planning required more resources.[35]

Behind the scenes of KPTJ was a civil society powerhouse, the George Soros-funded Open Society Institute for East Africa (OSIEA). Led by Binaifer Nowrojee and Mugambi Kiai, both human rights activists for

decades, OSIEA from the outset took a position as "donor-cum-activist." The particular OSIEA combination of generous and flexibly and rapidly provided resources proved most useful in planning activities rather than just responding to events. Drawing on its global network of OSI foundations, OSIEA facilitated and funded international advocacy efforts for KPTJ in key policy-making centers—London, Brussels (headquarters of the European Union), New York (headquarters of the UN), Washington, DC, and Addis Ababa (headquarters of the African Union [AU]). The support was not only about money. The networks, access, and logistics offered were just as important. For instance, when a group of KPTJ members went to Addis Ababa for the AU meeting, OSIEA had a team on the ground, which facilitated logistics, translations, and other services. OSIEA also supported Maina Kiai's trip to Washington, DC, to deliver an address before the American Congress.

The extreme nature of the crisis also required flexibility and innovation with regard to means of reaching out. Demonstrations were banned and press conferences were not efficient. The thematic and open structures meant that:

> KPTJ avoided bureaucratic set-ups. Organisations had been tasked to convene certain thematic areas […] and then you were able to feed back to the larger group […] There was that high level of engagement from individual organisations. People were able to make decisions—there [was] a huge cut in the bureaucratic process.[36]

One needs to underscore that the work of KPTJ was part of wider efforts by concerned Kenyans and friends of Kenya, inside and outside the country. Kenyans abroad played a very important part in the activities of KPTJ. According to Firoze Manji, who runs the Oxford-based Fahamu which produces the influential *Pambazuka* social justice online newsletter with a global readership of 500,000:

> The role of Fahamu in KPTJ was one of solidarity. As a Kenyan organization, we had a responsibility to push forward an acceptable solution. The responsibility of Pambazuka was to be an independent voice. At the time, mainstream media was largely shut down. Also, it wasn't just Pambazuka News—we also worked through radio stations. Pambazuka was at the disposal of Kenyan civil society, and especially KPTJ. It disseminated information widely, and offered a platform for deeply concerned voices that were not otherwise being heard. These voices provided an analysis of the situation

> and pointed to a way forward. We published six consecutive special issues on the Kenyan crisis. An interesting observation is the impact it seemed to have had within Kenya. The contributions were widely circulated and the feedback was excellent! We had never until then realized the impact of Pambazuka.[37]

The Kenyan diaspora played an important role, but in shifting ways.

> The response from the UK diaspora was mixed. We tried to get together, but it was ethnically polarized—much more so than in Kenya, as it did not need to be concerned with either concrete problems or the dilemmas these posed.[38]

The case of the US diaspora was different. The day after the announcement of Kibaki as president, the Kenyan and East African diaspora communities in Minnesota, home to over 100,000 migrants from the East Africa region, began to mobilize. All had a vital stake in the political stability of Kenya, the economic gateway and entry port for the East and Central African region, and the Horn of Africa.

Diaspora Kenyan organizers, Dr. Siyad Abdullahi and Dr. Sam Oyugi, made formal advocacy visits to Washington, DC, to lobby the Senate Foreign Relations Committee. They found that the State Department's support of Kibaki was rooted in a simplistic and factually flawed formula: Kibaki was a known quantity, seen as Christian and pro-market. His willingness to allow extraordinary renditions of minority Kenyans to Somalia marked him as an ally in the US so-called War on Terror. Odinga was believed to be Pro-Islam (perhaps even Muslim!), socialist, and therefore inimical to the interests of the Bush administration.

While calling for Senate hearings on the Kenya crisis, Abdullahi and Oyugi worked to dispel these myths. They coordinated an effective media outreach campaign, via radio and print, to correct the inaccurate coverage of the violence in Kenya. Most importantly, they harnessed the support of Minnesota's Senator, Norm Coleman, to sponsor the Kenya Resolution in the US Senate. Drawing directly on KPTJ's language and analysis, the Kenya Resolution called for:

1. all politicians and political parties to desist from reactivation, support and use of militia organizations
2. leaders of both parties to engage in internationally brokered mediation and dialogue

3. a "thorough and credible independent audit of the election results" with the possibility of a recount, retallying, or rerun of the presidential election within a specified time period
4. Kenyan security forces to refrain from excessive force and respect the human rights of Kenyans
5. those found guilty of human rights violations to be held accountable
6. an immediate end to the restrictions on media and rights of peaceful assembly and association
7. an end to threats to civil society leaders and human rights activists
8. all political actors in Kenya to be responsible for the safety of civil society leaders and human rights activists
9. the international community, UN Aid organizations, and neighboring countries to assist Kenyan refugees
10. the President of the USA to:

    – support diplomatic efforts toward dialogue between ODM and PNU leaders
    – impose an asset ban and travel freeze on PNU and ODM leaders
    – restrict all non-essential aid to Kenya until a peaceful resolution was reached.

The Kenya Resolution had been universally passed by the Senate, and was before Congress, when KPTJ's representatives arrived in DC for meetings on Capitol Hill. The work of the diaspora, coupled with the effective presentation of the civil society position by Maina Kiai and Muthoni Wanyeki prompted a shift in the previously unhelpful unilateral approach of the US State Department. As violence escalated in Kenya, Maina Kiai returned to address the House of Representatives on 7 February. He called for higher level intervention from the USA. On 14 February, President Bush announced the dispatch of Condoleezza Rice to Kenya. On arrival in Kenya, Rice requested a meeting with KPTJ, who again sent a team of three women and three men, a cross section of Kenya's finest civil society minds, to brief her. Immediately following her meeting with KPTJ, Rice spoke to the press, finally aligning the USA with the AU and EU in requiring Kibaki and his hardliners to negotiate a power-sharing agreement. "The diaspora effort provided the external fire," says OSIEA's Mugambi Kiai. "KPTJ was the internal energy. Together, they brought the water to boil."

Lobbying took place in Europe, too. On 16 January, KPTJ's Gladwell Otieno spoke at the Royal Africa Society in London, and to the Africa All-Party Parliamentary Group (APPG) of the British government. The following day, the chair of the Africa APPG drew on her statement of KPTJ's position in his recommendations to the UK parliament. In Brussels, Otieno found that EU members were nervous of coming across as "colonial masters." KPTJ's analysis spurred the EU to offer more robust support to the AU for intervention.

The turning point came at the AU summit in Addis Ababa at the end of January 2008. Kenya was not an agenda item for the summit. But by this time, KPTJ had drawn on decades of progressive pan-African organizing to mobilize civil society allies across the continent. While OSIEA was unable to get KPTJ accredited to attend and speak at the AU summit, it lined up a plethora of meetings with embassies and policymakers. Senegal was particularly supportive in putting the Kenya crisis on the agenda. When the PNU delegation arrived at the AU, they found the heat on them in a way they had not anticipated.

The Mediation Process

From the very start of the crisis, efforts were made toward a mediated solution. In early January, the PNU-side rejected a proposal for Desmond Tutu-led negotiations. A few days later, then Ghanaian President and Africa Union (AU) Chairperson, John Kufuor, came to Nairobi but left empty-handed. Likewise, a visit by the former heads of state of Botswana, Tanzania, Zambia and Mozambique came to naught. Finally, though, and after the ground had been prepared by, among other things, KPTJ lobbying, the AU-appointed Panel of Eminent African Personalities, headed by Kofi Annan, managed to initiate a mediation process between ODM and the PNU-side late January.

Already at the onset of the process, the negotiating parties agreed to four agenda items: (1) stopping the violence and restoring rights and liberties, (2) addressing the humanitarian crisis, (3) overcoming the political crisis and negotiating a settlement, and (4) resolving long-term fundamental issues. Agenda item number 4 encompassed a number of weighty issues, such as initiating constitutional, institutional and legal reform; addressing poverty and inequality; promoting national cohesion; ending impunity; and undertaking land reform.[39] The inclusion of the latter agenda item testified to the recognition that the roots of the crisis were deep and that

genuine solutions would have to be radical. This insight was very much thanks to the efforts of KPTJ, whose representatives met with the Annan team a number of times. According to Muthoni Wanyeki, working toward making the negotiations a reality had been difficult. PNU had tried to resist and obstruct. When the talks finally began, KPTJ was extensively involved, together with academics and business people. The main work was centered on agenda item number 4. All involved KPTJ members had done extensive work on long-term issues before; the intellectual work was not the most difficult part. The main challenges came with lobbying, getting access, applying pressure, and so on. The contacts with the mediation team were good—particularly so with Annan himself and Graca Machel, who were accessible throughout.[40]

KPTJ had three exclusive meetings with Annan, and two more as part of a bigger group. During the first meeting, he was informed what the problem was, in KPTJ's view, and told that he needed to address all issues in the broadest way possible. He was quite receptive to that. One important contribution to the discussion of violence was the addition of distinctions and stressing the need to apply a gender perspective.[41]

There was general consensus among the negotiators around items one, two and four, in spite of the reform challenges the latter would pose—perhaps because of a belief that such reform challenges could conveniently be bypassed at a later stage, as there were binding principles. Instead, the negotiations got stuck at item number three: whether to share political power and if so what, exactly, this would mean. In the process of political bargaining, other issues were left out. KPTJ and others argued for a transitional government and new elections after 18–24 months. This did not come to be. When the National Accord was signed on 28 February, the mandate of the Coalition Government was not time bound.

> When Annan came in, the momentum shifted, and so did the mode of engagement, from mobilisation to lobbying. This was not entirely a good thing. For one thing, negotiations necessarily mean compromises. It also had internal implications, as it took momentum away from the broader movement. On the other hand, the situation had escalated and called for rapid engagement. We also tried to reach out to other actors—political parties, religious leaders and the business community. Our aim was a transitional government. Of course, it didn't turn out that way. What we ended up with was no timeline and no good definition of "transition".[42]

But as Mugambi Kiai suggests, challenges were complex and there was no easy solution:

> If we made it transitory, we would shoot ourselves in the foot. One needs to recognise that certain compromises were necessary in order to get PNU onboard at all, and that an interim solution would have had its disadvantages too. It would have been even more difficult than it is now to address long-term issues; we would have been thrown into election mode immediately.[43]

This captures the dilemmas KPTJ (and indeed all actors involved) faced in dealing with multiple imperatives at the same time and under a great deal of pressure. KPTJ and like-minded actors may not have succeeded in pushing for a limited lifespan of the coalition. Nevertheless, the influence of the KPTJ perspective on the negotiations with regard to the broader context of the crisis and the necessary solutions to it, codified in agenda 1, 2 and 4, is a genuine achievement which must not be belittled.

The Politics of International Interventions

We have already discussed the ways in which the crisis and responses to it were internationalized and how KPTJ made effective use of its international networks. At the level of international politics, the united strong pressure for a mediated solution expressed a rare case of convergence of different interests. It was furthermore an even rarer case of such converging interests being helpful to a just cause; historically, the role of external forces with regard to support for democracy in Kenya has been uneven at best.[44] The most influential actors probably had their own reasons. The USA is likely to have placed prime importance on keeping Kenya stable, in order to ensure its role as regional ally in "the war on terror." Great Britain represented significant commercial interests. The United Nations may have considered moving its Nairobi-based headquarters. Kenya's neighbors faced economic strangulation. For all of these reasons, a consensus emerged that Kenya would not be allowed to slide down into civil war.

This consensus was at times far from certain. While most diplomats and election observers—including those representing the EU and the Commonwealth—made critical statements even before the results were announced, and the various observers eventually published damning reports, the USA delivered inconsistent messages. The day after Kibaki was sworn in, the USA congratulated him and suggested that all parties accept the results, but it was quickly forced to backtrack on this pronouncement. According to Muthoni Wanyeki, even though the USA later changed its position, this was not done in any consistent or convincing manner. The shift in attitude was an adjustment to the fact that all other

actors, including the UN-system, pushed for AU-led negotiations and had a critical view of what had happened. Also, the USA started to realize that the Kibaki regime, which it had first regarded as a guarantee of stability, would, as a matter of fact, undercut stability.[45] The suspicion that the US Embassy was hostile to electoral truth arose once more when accusations were made about the Embassy having been complicit in suppressing the findings of an exit poll which indicated a Raila Odinga victory.[46] KPTJ consistently pushed for its release, which finally came in August.

A number of international interventions appear to have been crucial in establishing and ensuring the success of the mediation process, which culminated in the signing of the National Accord on 28 February. One was the support of the AU chair, President Kikwete of Tanzania, for KPTJ's progressive position at the AU summit. Another was Senegal's advocacy to put the Kenya Crisis on the agenda for the AU summit. There was also the European Union's willingness to take its lead from the AU, and offer consistent, concerted support to Kenyan civil society. When the process started, momentum was kept by the deep patience and extraordinary skill of Kofi Annan and the Panel of Eminent Persons in the face of the intransigence and belligerence of the Kibaki/PNU camp at the negotiation table. A final crucial factor was the logistical and financial support offered by the UN for the mediation process. The international push was essential for creating a mediated political solution and safeguarding short-term stability. It is however an open question whether the same international actors will be equally interested in promoting the radical reforms for political and socio-economic justice that are necessary for ensuring long-term stability.

Achievements and Limitations: A Summary

A common observation among interviewees was that a major achievement was the way in which KPTJ strongly contributed in setting the agenda nationally and internationally. At the broadest level, the challenge was to bring out a perspective on the crisis contrary to those communicated by either the Kenya government or by media reporting and mainstream civil society engagement. At the same time, this was to be translated into lobbying for suggestions on specific issues. For this to be effective, the analysis would have to be solid, again with regard to both the bigger picture and the details.

> We were able to formulate a position against simple "peace" messages, emphasising the necessity of truth and justice. We were able to set the

> agenda in Kenya. Lobbying was very successful, and in that respect, the AU meeting in Addis was a turning point. Sure, ODM sent a representative, but with more limited impact. The messages and positions were widespread, even if awareness of "KPTJ" wasn't. We had influence beyond our numbers by enunciating a principled position.[47]

This perspective was supported by an outside observer:

> To and through the international media, yes, they were successful. To and through the local media, to some extent. Their strength was perhaps mainly with lobbying the international community behind the scenes. These efforts had huge impact. For example, the Waki commission took KPTJ onboard and borrowed some of its perspectives. Kriegler however only called KPTJ after some pressure—with known consequences.[48]

One lesson from this, as stressed by Muthoni Wanyeki, is that contacts matter immensely. Leading people in KPTJ had very good local, pan-African and international networks, which made it possible to get immediate access at the highest levels and achieve the desired effects. Most diplomatic missions in Nairobi took KPTJ seriously and were willing to be briefed. OSI had both the resources and the mandate to make things happen. All of this meant that KPTJ managed to influence both the process and the substance of the mediation talks. The successful lobbying and advocacy efforts depended to a large degree on the effective local–international links. One needs to careful, however, about replicating the OSI approach elsewhere. It requires very good local knowledge and contacts in order to identify the most suitable actors. Much as it succeeded in Kenya, it's very easy for things to go wrong.[49] The fact that things worked so well is ascribed to the combined networks and competence of the organizations under the KPTJ umbrella, and to the fact that these resources were very effectively utilized. These assets did not, of course, emerge out of nothing. They rested on decades of shared struggles and experiences among those involved, and this common history created respect and trust.

> The participating groups had been doing work like this under KANU; people knew and trusted one another, recognised other people's comparative strengths and knew who could do what. Much of this came naturally, and friction could therefore to a great extent be avoided. Of course, there were inevitable trade-offs between for instance organising, inclusiveness, flexibility and confidentiality, but most things worked very well.[50]

Mugambi Kiai emphasizes that drawing on experiences made KPTJ able to immediately analyze the situation. For example, they were able to see through claims of "genocide" in the debate on the violence in Rift Valley. This experience also alerted KPTJ to the re-emergence of the police state.[51]

There were various reasons as to why things worked well from the start:

> Necessity was one reason […] People were very, very, very energised with getting out the story that there is something wrong with what happened in the election.[52]

Finally, above and beyond its response to the crisis, KPTJ can be accredited with another achievement, according to Maina Kiai:

> KPTJ re-energised civil society in the country. It had been struggling to find its feet but now, civil society is reawakening in a way that most of us are happy with. The comments about civil society being dead or collapsing are not heard any more. From the taxation of members of parliament to fuel prices, all the activities that have happened since have more ordinary people speaking up and coming out. It rejuvenated the sense of empowerment in the country. One of the things this country needs is for Kenyans to stand up, speak to power, and not be intimidated by it. I think KPTJ showed that very well and it is an important contribution. You cannot measure it in milestones and indicators, but its impact has been apparent over the course of the year.[53]

A view shared by Gladwell Otieno:

> Our strengths were that we broke down barriers between different civil society groups and brought together groups that hadn't worked together to a great extent. There was crossbreeding.[54]

Turning to the limitations, a painful acknowledgment is that neither KPTJ nor anyone else was able to do enough to stop the killings and the human rights violations early enough. This generalized level of violence also took its toll on leading KPTJ representatives by way of the death threats and the preoccupation with security these threats necessitated. Much of this was obviously beyond the control of KPTJ, but the threats suggest a lesson about heightened security awareness for the future. Intimidation and repression of dissent are certainly not things of the past in Kenya.

Another limitation concerns the complex relation between lobbying and mass mobilization.

> We failed to build a structure. It was sometimes difficult to bridge between the small group and the broader network. There were so many considerations, and so little time. And even when you are engaged in high level lobbying, you need a set of principles. Also, we ran out of steam trying to keep up. There were so many things going on […] But we never went to the slums, and we never connected with the potential mass base. Sure, there were reports from groups working there, but never any sustained and strong links.[55]

> We had wanted very much to amass KPTJ communications into grassroots [activities] […] We were not able to do that, because we just haven't had the funding to move.[56]

However, in this context it should be recalled that: "the work of people from the human rights movement at [the local] level was extraordinary, because they were at great risk."[57]

Another limitation, discussed above, was that KPTJ was not able to sustain the pressure on the political players and the Annan team during the negotiations. Mwalimu Mati suggested that although the situation was indeed very difficult, KPTJ may not have been sufficiently consistent when it shifted from demands for "fresh elections" to an "interim government" to "grand coalition."[58]

> This would have been the best moment for Kenyans to secure certain fundamental constitutional principles […] that was one of the biggest deficits that the mediation agreement had […] The mediation agreement has no constitutional framework, no legal framework, so it is another kind of political agreement which depends on the goodwill of politicians. The implementation will depend on political pressure.[59]

Our assessment of what KPTJ achieved will obviously have to be restricted to the immediate interventions; the long-standing implications of the crisis and responses to it will be with us for a long time. To place the assessment in perspective, it must first of all be recalled that the conditions for civil society groups to exercise any kind of influence at all during the crisis were extremely challenging. Things were moving very fast; many complex issues multiplied and were more interconnected by the day. The government was hostile to dissenting views. Peaceful demonstrations were met with police brutality. The rights of assembly and free speech were curtailed. Threats were issued to human rights activists. Some parts of the country were outright dangerous to work in. External constraints aside,

KPTJ, being a broad network of many organizations, also had to respond to internal demands and make difficult choices about how to balance flexibility and accountability, openness and confidentiality.

Particularly in view of all these obstacles, the conclusion must be that KPTJ was remarkably successful. Its main achievements were made at the level of high politics lobbying, in Kenya and internationally. Much of this was thanks to the work of its key members, who were able to draw upon individual and collective experiences of past struggles. By making use of its ensemble of impressive networks, KPTJ strongly contributed to changing the international perceptions of what had really happened in Kenya. The downside of this mode and level of operation was that there was only limited anchoring of its work among broader sections of society. KPTJ primarily succeeded as a lobby group, not as a social movement. The latter was evidently difficult to achieve during the height of the crisis, which generated constant pressing demands for immediate input and response at the highest level of decision making. Nevertheless, it points to a few more general and long-standing problems for Kenyan civil society: how to develop effective strategies for linking high politics lobbying to broad-based mobilization; the defense of civil and political rights to the advance of social and economic rights; and linking civil society activism to party politics. KPTJ itself emerged during an acute crisis as a focal point for individuals and organizations with different experiences but similar perspectives. In the context of the crisis, all of this gelled with remarkable success. But the same individuals and organizations have different strategies and expectations for the future. In order to ensure that the pluralism of progressive civil society groups is galvanized into alliances and not split into fragmentation, hard organizational work remains. The challenge will be to anchor networking within—and have it be reinforced by—a broad-based social movement for sustained content, direction, and energy.

The Post-Agreement Period: The Grand Coalition Government and Struggles for Reforms

Our account in this chapter ended with the signing of the National Accord. Evidently, much has since happened with regard to the processes that were initiated by the Accord. Even though a careful analysis of these developments lies outside the scope of this chapter, we find it justified to add some brief comments on them. The National Accord had set off two

commissions: the Independent Review Commission on the general elections in Kenya 2007 (IREC) and the Commission of Inquiry into Post-Election Violence (CIPEV). IREC and CIPEV submitted their reports in September and October 2008, respectively. The creation of both commissions had been promoted by KPTJ among others. They were officially intended as the institutionalized expression of the search for truth and justice with regard to the elections and the violence, respectively. Once in place, however, they differed notably in the way they chose to relate to KPTJ and civil society in general. IREC's attitude toward KPTJ oscillated between neglect and outright antagonism. When KPTJ was finally, after many attempts from its side, given the opportunity to present its findings, to everybody's astonishment IREC's Chairperson, Justice Johann Kriegler, launched an attack on the KPTJ representative and even accused KPTJ of having fuelled the violence by authoring an "inflammatory document."[60]

On its part, CIPEV welcomed the input of KPTJ and civil society organizations. KPTJ was given the status of intervener and was allowed to have a representative calling and cross-examining witnesses. It was no surprise, then, that KPTJ managed to add issues and perspectives to CIPEV's work. It would evidently be hyperbolic to ascribe the difference in outcome and impact between the reports to KPTJ and civil society alone. The fact remains, however, that the CIPEV report was almost unanimously judged frank and honest by the public—and correspondingly given a much more hostile reception by potentially implicated politicians than was the IREC report. While this difference suggests the important contributions made to the CIPEV report by democratic forces in Kenya in promoting accountability, it also serves as a reminder that the most challenging part—the implementation of the reports—still lies ahead.

One landmark achievement has nevertheless been made. On 4 August 2010, Kenyans voted in favor of the proposed new constitution. The landslide victory in the referendum put an end to a struggle for a democratic constitution stretching over a generation. At the same time, it marks the start of new struggles to realize the potentials of popular influence and greater accountability that the new constitution offers through the checks on presidential powers by way of the Bill of Rights, devolution, and greater autonomy for state institutions such as the judiciary. Needless to say, long and difficult struggles remain. Powerful vested interests are regrouping to subvert the democratic gains. They will seek to keep their ill-gotten wealth (not least grabbed land) through battles in arenas such as parliament, the judiciary, and the public service.

The political terrain is uncertain. At one level, powerful groupings are busy seeking to dilute or subvert moves toward reform and transformation. At another level, popular anger with corruption and impunity is widespread. Ideally, the fury could be mobilized against impunity. However, in any society, and especially in one characterized by weak institutions and political polarization and fluidity, there is always the risk that generalized frustration may be channeled into projects for reactionary populism by political entrepreneurs—unless there is an organized alternative. It is essential to realize that there are significant divisions within the Grand Coalition which go beyond narrow struggles for spoils. The presence of progressive forces in government, fighting their conservative colleagues, has been amply illustrated over the last two years by contrasting positions of leading politicians on fundamental issues, including accountability for the post-election violence; media freedom; protecting key natural resources (the Mau forest); and the constitution. The challenge for KPTJ or any other social movement is to defend and advance its achievements for sustained peace, truth, and justice by crafting strategic alliances with other actors—not only in civil society, but also in political parties and the state.

Post-Script: The 2013 Elections and KPTJ

On 4 March 2013, Kenyans once more lined up in huge numbers to elect their political representatives. Just like in 2007, the exercise came to be widely regarded as a failure, again with responsibility pinned on the electoral management body, this time going by the name of the Independent Electoral and Boundaries Commission (IEBC). Space does not permit us to examine the elections in detail. Suffice it to say that after the IEBC had announced Uhuru Kenyatta as winner of the presidential election, both Kenyatta's main contender, Raila Odinga, as well as Africog (a member of KPTJ) through Gladwell Otieno and Zahid Rajan, petitioned the Supreme Court to reject the result as declared by the IEBC. Africog's petition centered on the election process, the overall argument being that the IEBC failed to exercise its mandate during counting and tallying to the extent that the entire election process and its outcome suffered fundamentally from lack of transparency, integrity and accuracy. The Supreme Court unanimously rejected both petitions, and thus upheld the IEBC's results.

The Supreme Court ruling has been roundly criticized for being shallow.[61] The ruling was a major disappointment, not only to KPTJ. One reason for this is the fact that the Court was headed by Chief Justice Willy

Mutunga, in the past an ally of KPTJ members, and closely associated with attempts to reform the judiciary. Just like the election, the ruling left Kenya deeply divided. Many had put their faith in the judiciary, and, to a lesser extent, in the IEBC, to be front-running institutions for a reformed political order. It is probably safe to say that among the opposition and its supporters hope is now largely vanquished.

Notes

1. For a more general overview of the role of civil society during the crisis, see Kanyinga 2011.
2. Sandbrook 2000, 23–26.
3. Sandbrook 2000, Chap. 2.
4. Huber et al. 1997.
5. See Bratton 1989, Chazan 1992, Diamond 1994, and Harbeson 1994.
6. See the collections edited by Mamdani and Wamba-dia-Wamba 1995, Kasfir 1998, and Comaroff and Comaroff 1999.
7. For an overview, see Sjögren 2001.
8. Diamond 1994.
9. For an early contribution along these lines, see Kanyinga 1995.
10. Gibbon 1996 and Sjögren 2001.
11. Huber et al. 1997, 328.
12. Rueschemeyer et al. 1992, 64–66.
13. Kenya Human Rights Commission 1997, 1998 and Mueller 2008.
14. Berman and Lonsdale 1992 and Mamdani 1996.
15. Ajulu 2002 and Nyong'o 1989.
16. Murung'a 2004, 188–191 and Throup and Hornsby 1998, 26–32.
17. Such as the December Twelve Movement, Mwakenya, Kenya Anti-Imperialist Front (based in Harare, Zimbabwe), the Me Katilili Revolutionary Movement (based in Dar es Salaam, Tanzania), the Kenya Patriotic Front (based in Oslo, Norway), Organization for Democracy in Kenya (based in Stockholm, Sweden), Movement for Democracy in Kenya (based in New York, USA), and Harakati ya Kupigania Demokrasia HDK (based in Copenhagen, Denmark).
18. Chege 1994, 56–61.
19. Throup and Hornsby 1998, Chap. 4.
20. For an analysis of the 1992 election, see Throup and Hornsby 1998; for the 1997 election, see Rutten et al. 2001.
21. Kenya Human Rights Commission 1997, 1998.
22. Anderson 2002, Kagwanja 2003, and Ruteere 2008.

23. For analyses of the 2002 election, see the contributions to Maupeu et al. 2005 and Oyugi et al. 2003.
24. Murung'a and Nasong'o 2006, 17–19.
25. Interview, Muthoni Wanyeki, Executive Director, Kenya Human Rights Commission and KPTJ member, 8 September 2008.
26. Interview, David Ndii, 14 September 2008.
27. Interview, Gladwell Otieno, Executive Director, African Centre for Open Governance and KPTJ member, 16 September 2008.
28. Interview, Hassan Omar Hassan, Kenya National Commission on Human Rights and KPTJ member, 24 September 2008.
29. Interview Gladwell Otieno, 16 September 2008.
30. David Ndii, interview 14 September 2008.
31. Kiai and Makokha 2009.
32. Interview, 14 September 2008.
33. Interview, Gladwell Otieno, 16 September 2008.
34. See for instance *The Daily Nation*, 15 January 2008, p. 32 and *The Standard*, 17 January 2008, p. 17.
35. Interview, David Ndii, 14 September 2008.
36. Interview, Ndung'u Wainaina, Executive Director, International Centre for Policy and Conflict and KPTJ member, 30 September 2008.
37. Interview, Firoze Manji, 18 September 2008.
38. Ibid.
39. See Kenyan National Dialogue and Reconciliation Annotated Agenda at: http://www.dialoguekenya.org/docs/Signed_Annotated_Agenda_Feb1st.pdf.
40. Interview, Muthoni Wanyeki, 8 September 2008.
41. Interview, Mugambi Kiai, Open Society Institute for East Africa and KPTJ member, 19 November 2008.
42. Interview, Gladwell Otieno 19 September 2008.
43. Interview, Mugambi Kiai 19 November 2008.
44. Brown 2006.
45. Interview, Muthoni Wanyeki, 8 September 2008.
46. For a summary, see McIntire and Gettleman 2009.
47. Interview, Gladwell Otieno, 19 September 2008.
48. Interview, Kenyan journalist, 22 September 2008.
49. Interview, Muthoni Wanyeki, 8 September 2008.
50. Interview, Gladwell Otieno, 16 September 2008.
51. Interview, Mugambi Kiai, 19 November 2008.
52. Interview, Mwalimu Mati, Mars Group Kenya and KPTJ member, 30 September 2008.
53. Kiai and Makokha 2009.
54. Interview, Gladwell Otieno, 19 September 2008.

55. Interview, Gladwell Otieno, 16 September 2008.
56. Interview, Kwamchetsi Makokha, writer, journalist and media analyst and KPTJ member, 18 November 2008.
57. Interview, Muthoni Wanyeki, 8 September 2008.
58. Interview, Mwalimu Mati, 30 September 2008.
59. Interview, Ndung'u Wainaina, 30 September 2008.
60. "Election was not a fraud, Kriegler tells witness," *The Standard*, 30 August 2008.
61. See most notably Maina 2013.

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