

CHECKS AND BALANCES:

African constitutions and democracy
in the 21st century



Edited by Grant Masterson
and Melanie Meirotti

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AFRICAN CONSTITUTIONS AND DEMOCRACY
IN THE 21ST CENTURY

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Grant Masterson and Melanie Meirotti

Foreword by

Justice Johann Kriegler

Former South African Constitutional Court Judge

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14 Park Road, Richmond
Johannesburg
South Africa

P.O Box 740
Auckland Park
2006
South Africa

Tel: +27 11 381 6000
Fax: +27 11 482 6163
Email: publications@eisa.org.za
www.eisa.org.za

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ABBREVIATIONS AND ACRONYMS

ACDEG	African Charter on Democracy, Elections and Governance
ACHPR	African Charter of Human and Peoples' Rights
ACJHR	African Court of Justice and Human Rights
AFDL	Alliance of Democratic Forces for the Liberation of Congo-Zaire
AGA	African Governance Architecture
AMU	Arab Maghreb Union
ANC	African National Congress
APRM	African Peer Review Mechanism
APSA	African Peace and Security Architecture
AU	African Union
AUCPCC	African Union Convention on Preventing and Combating Corruption
CA	Constituent Assembly
CAR	Central African Republic
CEN-SAD	Community of Sahel Sub-Saharan States
CODESA	Convention for a Democratic South Africa
COMESA	Common Market for Eastern and Southern Africa
COs	Civic organisations
CR	Council of Representatives
CRC	Constitutional Review Commission
DRC	Democratic Republic of Congo
EAC	East African Community
EAS	East Asia Summit
EBCs	Electoral Boundaries Commissions
ECCAS	Economic Community of Central African States
ECOSOC	Economic, Social and Cultural Council
ECOWAS	Economic Community of Western African States
EISA	Electoral Institute for Sustainable Democracy in Africa
ELF	Eritrean Liberation Front
EMBs	electoral management boards
EPRDF	Ethiopian Peoples' Revolutionary Defence Forces
GNU	government of national unity
IGAD	Intergovernmental Authority on Government
MB	Muslim Brotherhood
MMD	Movement for Multiparty Democracy
NCC	National Constitutional Commission
Nepad	New Partnership for Africa's Development
NGOs	non-governmental organisations
NLM	National Liberation Movement
NP	National Party
OAU	Organization of African Unity
OPDS	Organ on Politics, Defence and Security
PAP	Pan African Parliament

PEC	Presidential Election Committee
PSC	Peace and Security Council
PSC	Peace and Security Council
RECs	regional economic communities
SADC	Southern African Development Community
SCAF	Supreme Council of the Armed Forces
SCC	Supreme Constitutional Court
SIPO	SADC Indicative Strategic Plan for the Organ
TCDZC	Technical Committee for the Drafting of the Zambia Constitution
TGE	Transitional Government of Ethiopia
UN	United Nations
UNIP	United National Independence Party

FOREWORD

In the two decades since EISA was founded representative democracy has become the accepted norm across Africa. Genuine, free, fair and periodic elections are recognised as the essential foundation of free societies. We have developed the capacity to conduct such elections and learnt – administratively and politically – that elections are not occasional convulsive hurdles but are part of an ongoing cyclical process. In this EISA has played a vital role.

Credible elections were held in places where before they had been unthinkable. Elections became the prescribed rite of passage for communities emerging from conflict and tyranny. Progress beckoned and peoples hoped to build their futures free under the law. But disillusionment followed. Although the shackles of colonialism could be cast off, hostilities put to rest and transitional elections held, historical divisions and ancient resentments lingered while strongman-rule prevailed. Sadly, the sunny uplands remained a dream.

Picking up these concerns and drilling down to the next level EISA focused its 10th annual symposium on the constitutional framework within which limping democracies have to function. This publication represents the distilled essence of those deliberations. It should not only be compulsory reading for every electoral administrator on our continent but should be a well-thumbed resource on the desk of every political leader. It explores why imposed constitutions chafe, why constitutional amendments seem to beget ever more amendments and why – notwithstanding constitutional updates designed to address specific socio-political ills – those very ills persist frustratingly or, worse, are succeeded at times by even more troublesome features.

The threefold lesson is clear. First, just as good elections are not the cause but the product of democracy, so a constitution does not cause a democracy to function properly. Even a model constitution does not of itself produce a democratic society. Even a constitution painstakingly constructed by wise founders does not vouchsafe success. The society concerned has to make its constitution work.

Secondly, just as elections are not isolated happenings but form part of an integrated process, so making a constitution work is an ongoing, unending process. Democratic societies make their constitutions work, warts and all. Reviewing, reforming, adapting, amending, tweaking, tampering – call it what you like – changing a constitution to make it fit the needs of the moment is at best dangerous and usually ill-conceived. If you can't get the old familiar

machine to work satisfactorily what makes you think that you can satisfactorily operate a newfangled device? Constitutional amendments are all too often no more than window-dressing and a cop-out.

Thirdly, closely linked to the first two but more fundamental, we have come to relearn and make our own the time-honoured truism that the price of freedom is eternal vigilance. We've seen some 40 examples of rewritten constitutions in Africa over the last generation: save for an insignificant handful they have done little more than rearrange the hegemony of the elites. The people, the acknowledged source of all state power to whom all wielders of authority solemnly pledge their fealty, remain powerless and mute.

There lies the challenge for the next generation of toilers in EISA's fields: to make the ringing promise of the Universal Declaration and the African Charter a living reality for the weak, the humble, the marginalised and forgotten little people of our vast continent.

*Johann Kriegler
Johannesburg
January 2017*

INTRODUCTION

Positioning Constitutions within the Field of Democratic Theory and Problematising their role in the Promotion of Democracy in African states

Grant Masterson

During the 2015 EISA Symposium on 'Recent Trends in Constitutional Reforms in Africa: How do Constitutions help or hinder Democracy?' H E Kgalema Motlanthe (former President of South Africa) lamented the state of South Africa's constitutional 'guardians', without speaking to the elephant in the room, the impending decision by the South African Constitutional Court on whether South Africa's President Jacob Zuma had broken his presidential oath of office by ignoring constitutional principles.

In March 2016 the Constitutional Court would declare unequivocally that President Zuma had failed to uphold the Constitution, essentially violating his presidential oath in the process. Further north, Burundian President Pierre Nkurunziza was settling into his third term in office courtesy of a technical (and broadly rejected) interpretation by Burundi's own courts of how many terms Nkurunziza had already served as president. The African Union (AU) and other international groups boycotted the elections in protest, stating that the necessary conditions had not been met for the organisation of free, fair, transparent and credible elections.

The escalation of violence in Burundi after the court ruling legitimising Nkurunziza's third term aspirations prompted many to call the Burundi situation a constitutional crisis. The previous year Burkinabe President Blaise Compaoré had unsuccessfully attempted to extend his own stay in power, but was ousted and forced to flee the country after a national uprising in October 2014 by citizens rejecting his efforts to amend the Constitution of Burkina Faso.

It wasn't all negative news in 2015, however, as Nigeria's Goodluck Jonathan made an emphatic statement in support of constitutionalism by conceding defeat when his rival, Muhammadu Buhari, was declared the winner of Nigeria's national poll.

In recent years this interplay among democracy, politics and constitutionalism has become common in African states. In 2011 Zambians

shrugged cynically as their president reneged on his promise to deliver a new Constitution for the country within 100 days of his election (having heard such promises in all of the previous three elections in Zambia). Mozambicans pondered the merits and risks of federalism in the aftermath of the 2014 elections, which escalated tensions in that country to such an extent that a Maputo lawyer who had publicly supported federalism was shot dead on the street by unknown gunmen.

In Egypt in the aftermath of the 'Arab Spring' the Constitution itself was put on trial by a leader who had no claim to constitutional legitimacy, having replaced elected leader Mohammed Morsi in a military show of force. All these examples raise the question: are African constitutions supporting or destroying democracy on the continent? As with all simple questions, the answer is complex.

One of the first observations made during the EISA Symposium was how volatile African constitutions have been since the end of the bipolar world order. In fact, a simple assessment of constitutional reforms in Africa highlighted that as many as 38 African constitutions had been rewritten since the end of the Cold War, in 1990. While this fact could, perhaps, be partially explained by the necessary changes some constitutions required to adopt or revert to competitive multiparty elections from one-party state systems, the number of reviewed constitutions is too high for this to be the only cause.

An equally plausible but ultimately inadequate explanation for the high turnover of African constitutions after 1990 views the phenomenon as a deferred correction of the colonially imposed constitutions passed down to African states at independence. Several authors in this volume explore this notion further and, while the argument clearly merits further examination, the timing of these constitutional changes defies this narrative as a broad description. In fact, there appears to have been a direct benefit in political elites which have inherited colonial structures preserving these systems well beyond any direct interference from colonial powers. This suggests that there were other motivations in at least some of these cases.

The theme of political elites recurred throughout EISA's deliberations and, in the pages that follow, the authors are rarely complimentary about these interest groups and their role in promoting healthier and more robust democracies on the African continent. However, there are few solutions to the problem of what to do about this elite influence over African politics in the short to medium term.

More problematic is the possibility that without the curatorship of these elites the likelihood that national constitutions can be reformed is remote. This notion is more fully explored in chapters by Tom Lodge, Winluck Wahiu and in my own chapter on Zambia's travails in constitutional reform. The

conclusion is that without the backing of political elites constitutional reform appears far less likely to reach any resolution than in situations where these personalities support the process.

It is also apparent that African political elites inherited colonial systems designed to entrench their status at the expense of the citizenry and have cynically maintained this status quo well beyond the colonial era, primarily to their own benefit. The implications for inclusive and participatory democratic engagement for citizens in the governance of their countries are dire, yet global examples of so-called 'people's constitutions' offer little hope for more organically reformed legal frameworks in the future.

The role of citizens in shaping and defending their constitutions was also examined during the symposium and although the examples of Burkina Faso, Senegal and even Cameroon offer some hope for the future of citizen participation in African democracies, they serve only to reinforce the limits of the extent to which civil society, however organised, can push for meaningful reforms and constitutional amendments. Political elites remain the critical actors in determining the success of such efforts.

What became abundantly clear during the symposium is the growing levels of frustration among African citizens in 2015 with the narrow interests served by constitutional frameworks in many countries and that this discontent, when focused, can galvanise change, but when left unfocused tends to degenerate into aimless protest action. In the post-Arab-Spring era such examples of civic discontent have often been treated with suspicion by central governments, which have often responded to such demonstrations by increasing security and legislative restraints on the right of citizens to protest.

UNDERSTANDING AFRICAN CONSTITUTIONS IN THEIR HISTORICAL CONTEXT

In the first chapter of this volume Tom Lodge examines the genesis of African constitutions and how these foundational frameworks were constructed. Key to his analysis is the interplay between colonial governments and local political leaders and how the exchanges between the two groups played a central role in shaping the constitutions that newly independent African states inherited.

Lodge observes that although each state took its own unique path to political independence and that the negotiations between colonial governments and local leaders produced a wide variety of constitutions, there were broadly observable commonalities between anglophone countries on the one hand and francophone states on the other. Lodge notes that in French colonies local leaders played a more central role in the fashioning of constitutions than was the case in colonies under British rule at the time of independence. Unsurprisingly, in both francophone and anglophone states

the newly drafted constitutions reflected many of the prevailing constitutional arrangements found in France or the United Kingdom.

It is particularly illustrative of one of the recurring themes in this volume that although local leaders played a much greater role in fashioning independence constitutions in French African states the degree of popular engagement in French Africa 'was significantly curtailed'. Put another way, these constitutions were inherited by populations who had had very little input in their final drafts. In former British colonies, by comparison, Lodge argues, although British negotiators played a disproportionate role in fashioning constitutions at independence, these constitutions typically provided for greater pluralism within newly formed nation states. Lodge references examples (Nigeria, Ghana) where federalism and regional disaggregation of national power were dominant discourses during and after independence. In this regard his chapter dissects the way these differing approaches to the creation of national constitutions lead to diverging experiences within the newly formed states.

Lodge concludes by noting that constitutional reforms have progressed rapidly in former British colonies, in many instances effectively obliterating any lingering colonial legacy enshrined in national constitutions, while francophone states have evidenced far less evolution and adaptation as a result of the supremacy of the executive, which was enshrined at the start. It is interesting to note, however, that although both groups of African states diverged at the start, executive supremacy within the African state quickly became the preferred constitutional paradigm, largely irrespective of the original departure point.

Winluck Wahiu examines in more detail the period after 1990, during which, he writes, the majority of African states, either out of choice or necessity, undertook major constitutional reforms of some sort. It was during this post-Cold-War period that democratic governance enjoyed increasingly popular support globally, propagated by the United States and Western Europe in the absence of the countervailing opposition of the Soviet Union.

In order to maintain or develop better relations with these Western democracies, the old order of the one-party state had to be altered in some states, while, in others, greater compliance with emerging democratic theory and principles necessitated reforms. Wahiu dispels the sometimes fashionable notion that these reforms took place in African states as part of a global re-orientation of values and 'triumph of constitutionalism'. Rather, he argues compellingly for the self-interest and narrow motivations of political elites in acquiescing to prevailing global sentiments without adopting the underlying principles of constitutional democracy.

There is an interesting incoherency in the broader picture that is emerging if one accepts Wahiu's narrative rather than the analysis in the subsequent chapter by Charles Fombad. Fombad examines the process whereby political elites have attempted to dismantle presidential term limits and how these limits entered constitutions in the early 1990s. Wahiu's analysis tells us that the 1990s wave of reforms and revisions was cynically motivated and delivered shallow forms of appearance over democratic substance. Fombad's critique, however, suggests that during this period sufficient restraints on the powers of the political elite were introduced into the constitutional frameworks of African states to provoke a later push back by presidents seeking a third term. Although the two chapters co-exist rationally, the contrasts call starkly into question the long-term institutional commitment to democracy and democratic ideals.

Wahiu's chapter concludes with echoes of Lodge's historical context, demonstrating through the examination of various constitutional drafting processes how few, if any, constitution-making processes take place in a political or social vacuum. In this he references not only how the content of constitution-making processes is carefully curated but also the way in which limits are often prescribed on how a constitution can and should be constructed. In view of the importance and centrality of constitutions to the underlying principles of a democratic state, the conditions in which these critical documents are constructed can have a significant impact on the overall quality of the final drafts.

Fombad's chapter focuses primarily on the recent upswing in efforts to change the term limits placed on presidents. He places this analysis in the historical context of presidents-for-life and limitless presidencies. We are fortunate to have his contribution to this volume as he has published widely and extensively on presidential term limits and the constitutional limits placed on the executive. Fombad is unambiguous on the issue, asserting that presidents who cling to power for as long as possible constitute the single most significant challenge facing African democracies. He points out that the African continent is currently served by more than half of the world's longest-serving heads of state, a fact which, he notes, is indicative of the problem of extracting African leaders from power once they are installed in the executive branch of government.

Fombad's chapter, therefore, focuses on the constitutional bulwarks introduced during the 1990s wave of reforms aimed at addressing the long-standing challenge of intransigent heads of state resisting the call to step down. His observations and findings re-emphasise Wahiu's central narrative of the thin and insincere reforms at the heart of constitutional changes which

took place in the 1990s, although Fombad's analysis demonstrates the climb-downs which took place later that demonstrate this insincerity most clearly.

When constitutional safeguards against prolonged presidencies were introduced there was a generalised optimism that the era of African strongmen would become a thing of the past. Fombad's analysis suggests, however, that the historical anomaly is more likely to be the period during which presidential term limits were imposed on heads of state.

Where Fombad examines the third-term presidency debate from the political/constitutional perspective, David Zounmenou and Segun Adeyemo reflect on the stance of external actors to African heads of state pursuing constitutional or extra-constitutional approaches to extending their time in power. Arguably, the internal affairs of African states experience more frequent and intrusive external interventions in what are ordinarily considered sovereign matters than those on any other continent. However, in the context of Africa's post-colonial history of leaders unwilling to step down through democratic processes, external actors have, at times, played both positive and destructive roles in mediating such situations.

Zounmenou and Adeyemo show that the role of external actors in the internal democratic affairs of African states is rarely clear cut and must always be positioned within the context of a specific state and historical paradigm. In general, they are sympathetic in their analysis of external interventions, by implication concurring with Fombad on the issue of extended presidential terms. They show how, even in weakly governed and smaller states, external actors are limited in the extent to which they can promote democratic principles and behaviour. They also point out that these interventions are often far less direct than assumed, falling, as they often do, within the broader ambit of democracy-strengthening and support programmes.

Their examination of the influence of external parties in the context of third-term constitutional amendments demonstrates that, in most instances, external actors tend to try to dissuade leaders from seeking a third term. It is therefore more understandable that they are positive about external influence, while noting that, at a certain point, domestic forces are necessary to sustain any momentum generated.

This is an interesting approach. When we developed this brief during the EISA Symposium we were unsure how the author would view the role of external actors in the internal democratic affairs of sovereign states. As a simple thought experiment it is often worth asking how the United States of America would react to external influence from African states with respect to amending (or not) its Constitution or legal framework? It is therefore illustrative of how destructive long-term presidencies have been in African

states that those seeking to prevent third-term amendments see external actors as key allies in this contest.

The first section of this volume examines the historical and recent political context within which constitutional reforms have taken place. It is interesting to note the consistent scepticism reflected in all four chapters that the current constitutions of many African states represent either consensus-driven or ideologically-grounded versions of the aspirations and processes of the people governed by them. This is evident in descriptions of the complex inheritance passed on to newly independent former colonies; the transference of power from a colonial elite to a newly-minted African elite which had little concern for the interests of the citizenry; the superficial reforms intended, in many instances, to placate the global impetus for greater democracy which manifested in the early 1990s or the return to the 'politics of the belly' seen in Zounmenou and Adeyemo's and Fombad's chapters by third-term seeking Africa leaders. As a theoretical framework within which the later chapters are positioned, this section shows the inadequacy of constitutional reforms and the problems with weak processes and governance institutions in safeguarding these constitutions from further manipulation.

In the second section the authors examine the issue of constitutional reform from the perspective of various actors and interests both inside and outside the state. André Mbata Mangu opens with an analysis of the African Union's efforts to restrain leaders from 'unconstitutional changes' in government, going much further than the AU's predecessor, the Organization of African Unity (OAU), ever did in explicitly rejecting the idea of such changes as legitimate. In this context it might be assumed that this firming of stance has resulted in at least some abatement in changes that the AU, since its inception, would define as 'unconstitutional'. Mangu's analysis suggests, however, that this has not been the case and that rather than simplify matters the AU's more categorical stance on such changes has, in most instances, only weakened and/or complicated its position in relation to member states which fall foul of its principles.

The challenge of defining when changes of government are unconstitutional is problematised through the contrasting approaches of the AU and the OAU. The OAU prioritised non-interference in the internal affairs of states as a guiding principle and this principle has been carried over into the AU guiding documents (in particular the AU Constitutive Act). However, the AU added the condemnation and rejection of unconstitutional changes of government. Taken together with the principle that every citizen has the right to participate either directly or indirectly in his or her country's government, the AU position on constitutionalism is a considerable departure from that of its predecessor. However, the AU's imperative to condemn unconstitutional processes has

been more complicated than the OAU's tidy approach of 'see no evil, hear no evil', as Mangu shows.

The condemnation of the AU itself is at best a relatively muted rebuke, given little in the way of punitive or binding member treaties. Further, only one of the regional economic communities (RECs) – the Economic Community of West African States (ECOWAS) even has a subsidiary convention with sanctions in line with the Lomé Convention. When testing tangible condemnation in action Mangu breaks this down by region, highlighting the ineffective nature of the AU's rebukes in states such as Eritrea, Madagascar and Egypt. He concludes that the definitions of constitutionalism in the Lomé Convention have not been carried into the broader architecture of the AU's guiding policy frameworks, ultimately ensuring that despite the firmer stance on unconstitutional changes of government the AU's success in preventing and resolving such disputes remains mixed.

Nokukhanya Ntuli opts for an alternative perspective of the role of the AU and RECs with respect to their promotion of democratic governance and constitutionalism. Ntuli's analysis gives greater weight to the normative changes between the OAU and the AU, demonstrating how significant these changes were within an organisation of states where democratic values and norms are not universally acknowledged.

Primarily, constitutionalism is the responsibility of the citizens and government of a country. In this regard, the role of regional and sub-regional institutions in promoting and defending constitutional values and principles is limited, a fact that Ntuli argues is often under-appreciated in critiques of the role of these institutions in crisis management.

Another aspect of the work of the AU and RECs that Ntuli believes does not receive sufficient attention is the improvement over time in the performance of these bodies in restraining and mediating against constitutional abuses of power. Here Ntuli references quantitative analytics that show a gradual decline over time in attempted military coups in African states since 1960. Further evidence of the growing number of democratic states in Africa supports Ntuli's view that although there are still shortcomings and weaknesses in the AU's normative framework for dealing with unconstitutional changes of government, the continental structure has made progress in supporting and buttressing Africa's constitutional states.

While both Mangu and Ntuli focus quite specifically on the issue of when constitutional rules are broken during changes to or extensions of governments, the broader question of the way in which these institutions promote constitutionalism as opposed to censuring and condemning unconstitutional actions is also addressed. In both chapters the authors recognise the importance of the Lomé Convention and the African Charter

on Democracy, Elections and Governance (ACDEG) as key documents that promote deeper and more meaningful entrenchment of democratic norms in the laws and statutes of African states. Although there has been much analysis of these frameworks and their underlying goals and objectives, there is presently scant evidence of or even research into the impact they have had on deepening and widening the democratic space.

This is an issue that I look at in my longitudinal analysis of Zambia's constitutional reform since the 1970s and Ebrahim Deen examines in the context of Egypt's recent constitutional turbulence in the wake of the Arab Spring. In the Zambia analysis it quickly becomes evident that the inherited models described by Tom Lodge persist in the forms of government and constitution-making processes adopted in the former British colony, but that the principles underlying the inherited constitution have, over time, been completely overwritten, most often due to short- or medium-term political expediency. The ongoing and almost cyclical debates about constitutional reform in Zambia illustrate beautifully Fombad's analysis of the role of political elites as gatekeepers of constitutional reforms and Wahiu's narrative about the superficial nature of constitutional reforms in many African states.

The key question I seek to answer in the chapter is whether or not meaningful constitutional reforms can and do take place in the absence of a critical impetus for reform (such as a disputed election, change in global paradigm or violent conflict). Given Zambia's largely peaceful nature and its ongoing efforts to reform its Constitution, this makes the Southern African state an ideal case study to answer this question. Zambia provides an opportunity to examine an alternative method of constitutional reform to the imperative-driven changes that were wrought in so many African constitutions in the early 1990s.

Constitutional reform has been a regular campaign issue in Zambia, with promises of regulatory reforms and curbs and limits placed on the extensive powers of the executive a common feature during campaigning. Zambia has also attempted through successive processes to include broader stakeholder participation in the drafting of a revised constitution, with limited success.

An analysis of Zambia's efforts to institute organic and normative constitutional reforms through ordinary political process demonstrates the importance of a critical mass of political will to see such reforms through to their conclusion. Zambia's experiences show that constitutional reform has become a partisan issue, with political opponents using it to score political points, usually in the lead-up to national elections. The successful implementation of constitutional reforms has often been achieved by removing

politically controversial aspects of the drafts (very often the specific provisions that Zambian citizens and civil society are most eager to see implemented).

Zambia's ongoing constitutional reform narrative has further undermined and weakened the country's governance institutions through long-term policy uncertainty, reshuffling areas of responsibility and blurring lines of accountability. Zambia as a case study clearly demonstrates a state attempting to deepen its democracy through constitutional reform but becoming mired in a form of political limbo in the process. The study challenges the idea that constitutional reform is possible through organic processes of negotiation rather than moments of political or national crisis. While it would be rational to assume that the most enduring and inclusive constitutions would emerge from broad-based consultations with a wide variety of stakeholders, in fact, even Zambia's own instances of completed reform tend to occur at moments of elevated urgency.

If a study of Zambia enables us to understand the challenges in reforming constitutions in the absence of national crisis, Ebrahim Deen, in his examination of Egypt in the post-Mubarak era, analyses the utility of constitutionalism to defuse and resolve an ongoing national crisis. Deen's analysis brings the debate about constitutional processes full circle, suggesting, as he does, that rather than using constitution-making processes as devices through which to resolve transitional processes these documents should be the end result of such transitional processes.

In the case of Egypt, the Constitution has been collateral damage in the often chaotic post-Mubarak transition, with attendant consequences for the credibility and trust it enjoys. Deen also highlights the impact of perceptions of the enduring nature of the final Constitution on the hardening of stances among various actors in the negotiated transition, to the detriment of the final Constitution's coherence and broad-based appeal. The constitution-making process was also intermittently interrupted by legal challenges, based on the logic that, once enshrined, the Constitution would effectively be eternal.

This appears to be quite a widespread and commonly held perception among stakeholders involved in constitution-making processes and unduly discounts the utility of small 'course corrective' reforms once the constitution is enacted. Many of the contributors to this volume recognise the value of and place for constitutional reforms in an evolving democratic state. In fact, small reforms form the larger part of ordinary legislative business, ensuring that older legislation is refreshed and brought in line with current legislation and constitutional principles.

By implication, it is therefore apparent that much of the political emphasis placed on major constitutional overhaul as the sum of all engagements misses the opportunity that a well-developed constitutional framework facilitates to

continually update and refresh itself. A greater appreciation of this fact would likely enable more cooperative constitution-making negotiations if actors were assured that at a later date, according to mutually agreed conditions, disagreeable or contentious clauses in the constitutional framework could be reviewed.

Deen's analysis of the Egyptian transitional process hints at one of the reasons behind South Africa's constitution-making success in 1996. During negotiations between the South African government and the African National Congress (ANC) during the transition to normalised elections in 1994, the constitution was not a central negotiating point for either side. While some assurances and commitments with respect to the constitution were given all parties agreed to enter into the 1994 elections with an interim framework in place, on the understanding that once the electorate had voiced its opinion the political actors would undertake the longer and more involved task of developing a permanent constitution for the country. By de-linking constitutional negotiations from the political contestation during the 1994 elections, negotiators from all parties created the necessary room for a constitutional draft to take shape in a less politically-contested space.

As Deen highlights in his chapter, the consequences of including the constitution in the transitional negotiations have been largely negative for Egypt. Increased polarisation of positions, emboldened and assertive opposition demands and consistent refusal to negotiate led, paradoxically, to a re-emergence of Mubarak-era survivors who were able to exploit this fractious space to roll back some of the gains all sides had hoped might come of the transitional process in the context of the Arab Spring. Zambia, too, illustrates the dangers inherent in the polarisation of partisan positions in respect to a document which, in ideal circumstances, should be created to enhance and unify consensus where possible. As Wahiu observes, constitutions are always more effective when they include a broader spectrum of citizens than they exclude.

From the colonial frameworks inherited by newly independent African democracies to the manipulation of constitutions by political elites, the involvement of external actors and the challenge of constitution-making in the context of transitional processes, African democracies today continue to be shaped in powerful ways by these vital documents. This volume augments the existing discussions on constitutionalism in Africa by attempting to bridge the disciplinary divide between legal and political forms of constitutional analysis.

Increasingly apparent throughout the volume is the sobering reality that while it was previously hoped that constitutions would and could act as a catalyst for deeper democratic institutionalisation in African states, present realities cast serious doubts on the utility of current frameworks to defend

even the modest democratic gains made in the past 20 years. Recent indicators and rankings point to further challenges relating to constitutionalism and the rule of law for the continent in the coming years and should act as a wake-up call for our political leaders, citizens and external actors alike that the recent democratic gains cannot and should not be taken for granted. The authors featured in this volume have done an excellent job in illustrating from a number of perspectives why this is so important.

SECTION ONE

THE HISTORICAL AND POLITICAL
CONTEXT OF CURRENT AFRICAN
CONSTITUTIONS

FIRST-GENERATION CONSTITUTIONS IN AFRICA

Tom Lodge

ABSTRACT

This chapter, which focuses on the first post-colonial constitutions created at the time of African independence, addresses four questions. How were these constitutions made? Did they build a social contract between states and citizens? Is there a clear typology of constitutions in Africa corresponding to the political differences between the colonial powers? What was the long-term effect of these first post-colonial constitutions?

HOW WERE THE CONSTITUTIONS MADE?

Generally speaking, the constitutions adopted when African countries became independent were the results of negotiations between colonial governments and local political leaders.

In the cases of French colonies, in 1956 reforms introduced universal suffrage for territorial advisory councils as well as representation in the French National Assembly in Paris: at this point the French republican Constitution prevailed in African colonies (Rothermund 2006, p 12). Limited degrees of suffrage had existed from 1946, with qualified African voters sending representatives to the National Assembly (Wilson 1994, pp 146-148). Thereafter these elected local leaders drafted the constitutions enacted at independence.

The case of Côte d'Ivoire is illustrative. After a nearly unanimous referendum in 1958 calling for the territory to become a republic within a francophone African community a Constitution was drafted by Ivorian officials, amended by a committee within the Ivorian National Assembly, approved by the leader of the main political party, then a parliamentarian in Paris, and subsequently adopted by the Ivorian Assembly.

A subsequent revised Constitution was passed without debate by the Assembly immediately after independence in 1960. It installed a presidential system in which the separately-elected president could circumvent the Assembly by calling referenda over legislative reforms. The 1960 Constitution also provided for elections conducted through national lists 'elected by a single majority on a single ballot', in effect ensuring a politically monolithic Parliament (Zolberg 1969, pp 263-265). Within this Parliament legislating

was a very confined function: the president could curtail any law-making proposal by any of its members on the advice of a constitutional chamber whose members he appointed. In practice, most legislation would be proposed by the president (Alexander 1963).

In French territories, elected African politicians played a decisive role in constitutional drafting (Le Vine 1997, p 184). However, notwithstanding the role played by elected bodies and referenda in approving constitutional proposals, any public debate about their content was abruptly curtailed. This was the case even in those instances, as in Tunisia, where constituent assemblies were elected for this purpose.

In British colonial Africa nationalist politicians generally acceded to constitutional drafts which were 'fashioned in the main by British craftsmen ... cut to Westminster's pattern' (Seidman 1969, p 83). There is much less evidence than in francophone Africa of national politicians exercising any choice over constitutional content (Hatchard 1998, p 381). Where there were disagreements between local leaders the main issue in contention was the extent to which the government should be organised through a federal system.

Only in Nigeria did the federal dimension of constitution-making in the British African decolonisation era survive to the present, but this was because it was favoured by the electorally predominant northern political elite. Nigeria's regional governments had several key competencies including control over local land tenure as well as direct access to marketing board revenues. Elsewhere in British Africa the efforts to devolve power downwards from national law-making bodies did not have long-lasting effects.

For example, in the then Gold Coast (now Ghana), a National Liberation Movement (NLM) emerged in opposition to Kwame Nkrumah's Convention People's Party (CPP), then governing in partnership with the colonial administration. The NLM, based in the Ashanti Kingdom, called for an indissoluble federation, elected regional parliaments and division of revenues between the regions and the centre, as well as basic guarantees of human rights (Austin 1970, pp 278-279). A British constitutional advisor recommended instead regional assemblies with delegated powers, well short of what the NLM was asking for. The NLM boycotted the Constitutional Assembly, which endorsed these proposals.

In an electoral contest in which 'the issue was really independence under CPP rule or delay and federation' (Wilson 1994, p 146) the CPP emerged victorious. Subsequently a demoralised NLM leadership accepted a Constitution which provided for regional assemblies with powers decided by the Ghanaian Parliament, the retention of the British Queen as head of state, a prime minister and a Cabinet responsible to Parliament. Constitutional changes would require a two-thirds majority and, in the case of key clauses,

consent from the regional assemblies. This safeguard was ineffectual. When the assemblies were elected in 1958 their powers were so circumscribed that the Ashanti opposition boycotted the elections. The ruling party-dominated assemblies then voted for their own abolition.

Elsewhere in British Africa dissolution of federal arrangements required force. Uganda's first Constitution, in 1962, conferred federal status on the Kingdom of Buganda, which sent its own representatives to the National Assembly. These could be elected indirectly by the Lukiiko, a body in which the king exercised strong influence. In 1963 the Bugandan king or Kabaka was elected as the ceremonial head of state to replace the governor-general. At this stage the non-Buganda Uganda People's Congress was functioning in an alliance with the Kabaka against Buganda modernisers in the Democratic Party (Mugaju 1988, p 94).

After winning the pre-independence elections in 1962 the Uganda People's Congress was able to exploit rural resentments about the landlord-dominated Kabaka Yekka to amass support. In 1966 a new 'interim' constitution removed the residual legislative powers of the Bugandan government. In 1967, after soldiers occupied the Kabaka's palace, a third constitution ended all sub-national legislatures and withdrew recognition from any traditional rulers (Jorgensen 1981, p 231).

In the case of the Belgian Congo, a constitutional 'round table' met briefly in Brussels in January 1960, attended by 44 Congolese politicians. The Belgians hoped that a European-staffed bureaucracy would retain influence over a nominally independent African-elected government. Congolese political parties had contested the first local government elections, in 1957, so that by 1960 there was an established political elite, mainly supported by the ethnic groups predominating in each of the five biggest towns. The Congolese participants, though from a range of parties, announced that a *front commune* would prevail among them during the negotiations.

On the whole, though, the main Congolese concern was to establish a swift timetable for independence rather than to finesse constitutional detail. A *Loi Fondamentale* in 1960 constituted an independent Congo on the basis of arrangements 'copied with very few alterations from the Belgian blueprint' (Young 1965, p 176). As in Belgium, a largely ceremonial head of state was intended to formally appoint a prime minister who would act as a head of government responsible to Parliament (Juergensmeyer 1964, pp 164-165). At the time this was decided many of the politicians, Belgian and Congolese, present at the round table assumed this head of state would continue to be the king of Belgium, whose behaviour would be shaped by the conventions of constitutional monarchy. Hence the precise division of powers between the head of government and head of state was left undefined.

In brief, decolonisation constitution-making, though sometimes contested, as in Ghana, was hardly the consequence of extended deliberation. Particularly in British Africa it was often conducted through a drafting process undertaken by colonial or even metropolitan civil servants and with debates normally focusing on the few issues considered most salient by members of the national political elite. Understandably, they tended to focus on those aspects of the constitution that had most bearing on their ability to gain access to executive power and to retain it. For example, in settings in which political parties were constituted around ethnic groups, leaders of ethnic minorities tended to favour federal dispensations. Leaders of dominant groups or successful ethnic coalitions supported unitary constitutional arrangements.

A SOCIAL CONTRACT BETWEEN STATES AND CITIZENS?

On the whole, these first-generation African constitutions omitted extensive contractual obligations between governments and their citizens. In general, their treatment of civil rights was perfunctory, though francophone African constitutions, which took their starting points from French republican precedents, were more likely to elaborate commitments to citizen's rights.

For example, 12 of the 78 clauses of the 1959 Tunisian Constitution concerned basic freedoms and rights, though most of these were qualified with reference to such concerns as 'the respect for public order'. Rights clauses were accorded 'organic' status, with demanding requirements for their change, but even so, amendment of the Constitution, a presidential prerogative, could be undertaken by a simple parliamentary majority after a majority vote in a referendum. A Constitutional Council could review all 'organic laws' but presidential nominees prevailed in the council.

By contrast, the Ghanaian Constitution of 1957 contained much less language about rights; specifically, guarantees of rights were limited to voting, freedom from discrimination and protection of linguistic minorities (Frempong 2007, p 6). This particular Constitution was replaced by the republican Constitution of 1960, which, among other changes, accorded to the first president of Ghana the right to issue legislation by decree, bypassing Parliament (Juergensmeyer 1964, p 162). The earlier rights-based provisions were replaced with 'fundamental principles' that the president swore an oath to protect (Apter 1972, p 353).

Replacement of Ghana's Constitution was not difficult in a setting in which the ruling party predominated. British drafters engaged in decolonisation constitution-making were disinclined to introduce major procedural barriers to block constitutional change (Fombad 2013, p 387). In Botswana, which has one of the few first constitutions to have survive to the present mainly intact, entrenched provisions required a referendum for any change, but no turnout

requirements were stipulated and changes have been approved, as in 2001, on a turnout of less than 5%. Mauritius is rather exceptional in this respect: the key clauses in its 1968 Constitution can only be changed by a referendum and a unanimous vote in the National Assembly (Fombad 2013, pp 406-408).

The rights emphasised in different constitutions sometimes reflected the recent history of the countries concerned. Compare, for instance, the brevity of Chapter Two of the 1963 Kenyan Constitution's treatment of rights of assembly and expression with the extensive detail of the provisions that restrict the government's ability to expropriate land without compensation or the equally conscientious definitions of rights of citizenship, both a reflection of a colonial setting in which immigrant settlers were able to take ownership of large tracts of fertile farmland. Ironically, the efforts by the drafters of Kenya's 'Lancaster House' Constitution to promote indigenous African land access today supply the constitutional foundation for the political use of land as a patronage resource.

As noted above, in most African countries it was not difficult for the new ruler to change the constitution or even replace it entirely. Victor Le Vine counted 50 post-independence constitutions up to 1989, including five constitutions each in Nigeria and Ghana. The most common alteration was to reinforce executive powers, with legislatures reduced to agreeing to legislation introduced by the president. In certain military regimes parliaments sometimes disappeared altogether (Le Vine 1997, p 189). Changes would also formalise single-party regimes and subordinate the judiciary to executive will.

Not all constitutions changed significantly. The Senegalese and Ivorian constitutions remained more or less in their original shape, though, as noted, in the Ivorian case the Constitution itself ensured that only one party would win representation in elections.

Various changes in Senegalese electoral provisions imposed by the ruling political leadership also ensured that between 1962 and 1975 Senegal functioned as a *de facto* one-party state (Beck 1997). Botswana and Mauritius are still governed by almost the same constitutional provisions that were in place at the time of their independence (Fombad 2013, p 389).

Constitutional changes were more marked in the English-speaking former colonies, beginning with the replacement of the British Crown with locally chosen presidents. The Nigerian republic of 1963 divided powers between a president and a prime minister; the president had the capacity to remove a prime minister who failed to retain majority support within the legislature. More commonly, the head of state functions of the presidency were combined with the executive role of a prime minister, as happened in Ghana and Tanzania when they become republics.

In certain anglophone African republics, for instance Nigeria, Kenya, Uganda and Sierra Leone, civil service commissions retained their constitutionally prescribed independence but in Ghana and Tanzania these were abolished (Seidman 1969, p 108). Judicial independence was also an early casualty of anglophone republicanism; in Nigeria in 1963 the prime minister assumed the function of appointing judges, taking this role over from the Judicial Service Commission (Seidman, p 109). Despite this development, Nigerian judges were vigorous champions of the Bill of Rights in 1970 (Paul 1974, p 861).

The extent to which constitutions underwent change and the speed at which it happened, particularly in the case of Anglophone Africa, the absence of any real engagement of local political elites, let alone the wider public in the detailed drafting of first constitutions might suggest that their political impact was ephemeral. At least one critic has suggested that the underlying logic informing the way that these constitutions were written was at odds with the political realities of their settings.

Writing at the end of the 1960s Seidman (1969, pp 122-123) observed that ‘the control devices developed in Western nations appropriate to a regime based on contract’ were absent from Africa. Looking back over a much longer period of post-colonial history, this view seems too pessimistic. There is plenty of evidence that members of colonial African political elites had a ready familiarity with the Western canon of constitutional thought: in 1947 Tom Mbotela translated Tom Paine’s *Rights of Man* into KiSwahili (Atieno Odhiambo 1988, p 118). However, in the 1960s, whether there was a wider understanding of the rights associated with citizens is questionable, so in that sense these constitutions lacked the status of social contracts.

One very obvious legacy still evident today of the way these decolonisation constitutions were written is the divide in modern African politics between regimes which broadly conform to British parliamentary tradition in which the head of government or head of state is the leader of the majority party in Parliament and the more president-dominant system which prevails in French-speaking Africa, and in which Parliament is often constituted by a multitude of small parties.

Of the five purely parliamentary regimes – Botswana, Ethiopia, Lesotho, Mauritius and South Africa – four are former British colonies. Several others draw their Cabinets from the majority in Parliament, with ministers remaining accountable to Parliament, in this way retaining a key feature of the early parliamentary systems of the first post-colonial democracies.

**IS THERE A CLEAR TYPOLOGY OF CONSTITUTIONS IN AFRICA
CORRESPONDING TO THE POLITICAL DIFFERENCES BETWEEN THE
COLONIAL POWERS?**

There was initially a clear distinction between 'neo-presidentialist' systems in which Parliament chooses the president and the 'reinforced presidencies' elected separately and which can legislate independently (Juergensmeyer 1964, pp 174-175). These two groups corresponded to the early difference between anglophone Westminster regimes that emphasised parliamentary sovereignty and the francophone Gaullist systems. Especially in the British West African territories, Westminster principles were reproduced quite faithfully.

Heads of governments and their Cabinets were drawn from the predominant group in Parliament and they remained subject to votes of no confidence. The Cabinet assumed collective responsibility for its decisions. Initially, the British queen remained as head of state, represented by 'governors-general'. Various measures restricted government interference in the appointment of civil servants and judges (Ghai 1972, p 411; Le Vine 1997, p 185).

However, conformity between regimes and colonial lineage soon collapsed as English-speaking heads of government decided to repudiate inherited models of restrained executives in favour of what they insisted were 'autochthonous' or native traditions of presidential absolutism (Prempeh 2013, pp 209-235). Meanwhile, several former French colonies maintained French constitutional provisions on the presidency 'word for word' (Le Vine 1997, p 184). Ironically, the expansion of African absolutism was facilitated by the constitutional flexibility and silences and consequent discretionary powers accorded to the executive that are features of a British tradition of assuming that assertive parliaments check power more effectively than more elaborate institutional restraints (Seidman 1969, pp 110-112).

It is also the case that formal parliamentary sovereignty in anglophone Africa was an insufficient condition for parliaments to exercise any real assertiveness. Though presidents were subject to votes of no confidence these were unlikely given the frequent predominance of a single party. By the end of the 1960s '[o]n only one occasion [had] a government bill been defeated by Parliament in any country in independent Anglophonic tropical Africa' (Seidman 1969, p 101). The occasion was when the Tanzanian government tried to introduce end-of-service gratuities for ministers in 1968. In 1969 in Nigeria the average length of time between the introduction of a government Bill in the Federal Parliament and its adoption was two hours (Seidman 1969, p 101).

Much academic assessment of these independence constitutions suggests that they were 'dysfunctional duplications of the former colonial master' (Go 2002, p 559). As observed immediately above they mostly tried to reproduce metropolitan institutions, but they also addressed local concerns. This was especially the case if constitution-making was accompanied by ethnic or racial conflict. Bills, or at least Chapters of Rights, featured in African settings where such provisions might help to defuse tensions, as in Kenya and Uganda; their absence from the Tanzanian Constitution was a reflection both of haste and of a nationalist mobilisation that did not feature sharp communal divisions (Ghai 1972, p 411): the British believed that Nyerere's administration would continue to rely on the services of senior British officials for a decade after independence (Pratt 1982, p 280).

For British drafters of such constitutions, Rights Bills could not be based on their own experience, given the absence of a written constitution in Britain. In Nigeria, where local political leaders were worried about the likelihood of oppression by ethnic rivals, drafters drew their references to rights from the 1950 European Convention on Human Rights and the Nigerian language was mimicked in other subsequent anglophone constitutions adopted at independence (Go 2002, p 579). In former French colonies certain constitutions incorporated phraseology from the 1789 Declaration of the Rights of Man and the Citizen; this was the case in Upper Volta and Dahomey, though others drew their provisions from the Universal Declaration of Human Rights (1948), a deliberate distancing from the metropole (Go 2002, p 580).

Respecting rights, racial or ethnic minorities in the run-up to independence had leverage because in British African colonies independence was conditional on consensus about constitutional issues, especially if the minority were immigrant British settlers. Hence, in certain settler colonies very particular concerns could find expression in minute constitutional prescription. For example, in Kenya, as Ghai (1972, p 411) notes, 'it was considered essential to establish through the Constitution' which government body should be charged with managing public toilets. In fact, the Kenyan Constitution addressed more fundamental preoccupations of the settler minority, including issues of land ownership and property – key concerns also in other ex-settler colonies such as Zambia. Of all the anglophone constitutions Kenya's was the most complicated until the Zimbabwe settlement of 1980 (Paul 1974, p 855). In Kenya key concerns were protected by requirements of a 75% vote in the lower house and 90% in the Senate before any change could be made.

On the whole, francophone African independence constitutions were less likely to depart from metropolitan precedent to provide for local circumstances, partly because of the rather longer gestation period before colonial Africans began to be incorporated as full citizens rather than subordinate territorial

subjects. After all, the Four Communes – the main coastal towns – of Senegal had sent representatives to French parliaments through the 19th century and, from 1914, these deputies were indigenous Africans.

The Senegalese deputy would be joined in Paris by other elected African representatives after the extension of the Fourth Republic to embrace all French colonies. Leopold Senghor, first president of Senegal in 1958, served as a deputy in Paris from 1951. North African French colonies departed from French secularism in giving Islam special constitutional status and insisting that the president should be a Muslim (Le Vine 1997, p 184).

So, are there clear distinctions between constitutions that reflect the metropolitan political traditions of the main colonial powers?

At first, forms of government differed significantly between English-speaking and French-speaking Africa, but as anglophone countries reinforced their executives with the help of deferential parliaments these distinctions lessened. The British were more likely to construct arrangements to devolve power to sub-national units as well as to introduce rights to address minority concerns: on the whole, these were given short shrift by post-colonial rulers.

There are other differences between the anglophone and francophone groups that have endured. Anglophone constitutions did not usually prescribe the details of the electoral system, or provide for the number of constituencies or the extent of the franchise. But silence or omission encouraged the following of British precedent and most parliamentary elections in anglophone Africa are still conducted in single-member constituencies through the first-past-the-post system. Francophone constitutions tended to be more prescriptive and most francophone African elections still use a two-round system adapted from French practice.

A key consideration in encouraging the retention of colonially instituted constitutional traditions was the normal requirement that to stand for Parliament candidates must speak either English or French: Ghana and Tanzania removed this requirement early but elsewhere it was retained for much longer. The language issue points to wider aspects of high politics: so often it was shaped by educational traditions that drew upon metropolitan norms. As Le Vine noted in 1997:

The documentation on the *Conférences nationales* that were held in Benin and Mali [in 1990] reveal traces, albeit more implicit than explicit, of the French constitutional mythology still taught in their schools that has become part of the elite political culture.

National constitutional conferences were a key feature of the democratisation of francophone Africa after 1990, a reflection of the French revolutionary legacy

(Robinson 1994): of the 11 that were held between 1990 and 1994 nine were in French-speaking countries (Bratton & Van de Walle 1997, p 111).

WHAT WAS THE LONG-TERM EFFECT OF THESE FIRST POST-COLONIAL CONSTITUTIONS?

In the reconstruction of liberal democracy in the 1990s the older constitutional forms of early independence were partially revived in certain Anglophone settings. For example, Ghana's 1992 Constitution, while borrowing from the American system an elected executive president subject to a two-term limit, also stipulated that most ministers would be chosen from Parliament and be responsible individually. It also returned to Parliament a degree of legislative authority.

In Ghana the president can nominate a portion of his Cabinet, but these appointments require parliamentary assent. However, cutting across Westminster conventions, only the president can introduce Bills concerning finance (Prempeh 2008, p 20). Meanwhile, ministers can still legislate without parliamentary assent (Prempeh 2007, p 498). And in 2010 Nigerian parliamentarians failed in their litigation against the principle of constitutional amendments requiring presidential assent in a key challenge to executive authority.

Several francophone African countries did modify their traditions of presidential autonomy with the institution of prime ministers who were expected to command a majority in the National Assembly as well as with the enhancement of judicial constitutional review (Fomunyoh 2001). Even in settings in which national assemblies have remained deferential rubber-stamp-type institutions, the prime ministers have sometimes exercised significant power as was the case in Mali's first government after the 1992 Constitution, in which Prime Minister Boubacar Keita was 'seen as a near rival in power to the presidency' (Smith 2001, p 76).

Mali, in its first term of democratic government after 1990, is a benign example of efforts to check presidents through prime ministers who were accountable to Parliament. It worked in a setting in which the president could command a sizeable and stable majority in the Assembly. In three other African countries in which prime ministerships were established, the shifting dynamics of coalition politics led to the president having to share power with a prime minister voted into office by a parliamentary opposition. This happened in Niger in 1996 and in Congo in 1997. Political deadlock when 'co-habitation' became acrimonious prompted military takeovers (Kirschke 2007; Moestrup 1999).

In Benin, where a prime ministership was established before the new Constitution was drafted, the first incumbent, Nicephore Soglo, who later

became president, enjoyed considerable executive authority conferred on him by a transitional *Haut Conseil*. The office retained importance even under a regime that remained strongly presidential in a setting in which, in a very fragmented party system, the clientelist maintenance of parliamentary coalitions requires attentive management (Allen 1992). Francophone maintenance of executive presidencies was not just a consequence of elite predispositions. In Benin in 2002 the draft constitution was put to a freely contested public referendum and was opposed by a group advocating a parliamentary system: the 'no' vote amounted to only 7% of the total.

Judicial review has also been a feature of several post-1990 constitutions. Prempeh's assessment of the performance of supreme courts and constitutional courts in undertaking this function is that too often they have upheld the older tradition of a 'jurisprudence of executive supremacy' (1999, p 139). He is especially critical of Ghanaian and Kenyan judges. Unusually, the deferential predisposition of Botswana's judges was sharply criticised in a South African High Court judgement (Tolsi 2011).

Prempeh notes, however, the way that Benin's Constitutional Court has defended rights of assembly against government attempts at restriction. Benin's court is rather exceptional, partly because of the scope of human rights issues the Constitution itself addresses and also because of the liberal rules that govern citizen access to the court (Rotman 2004). In Benin, the National Assembly nominates a proportion of the court's members and this, too, has helped to strengthen its autonomy from the executive.

In reality, though, only one of the new democracies, Ethiopia, restored or established full parliamentary sovereignty, or two, if one counts South Africa, where the racially exclusive Parliament's sovereignty was curtailed by the 1984 constitution. Three – Lesotho, Botswana and Mauritius – have retained this feature of their original dispensations. More common was the partial return to Parliament of powers to introduce legislation and ministerial accountability. But even with these competencies one difficulty has been that with the proliferation of parties very fragmented parliaments struggle to exercise any effective oversight. Generally, parliaments that remained substantially constituted by members of the old single-ruling parties or by larger groups that replaced them, as in Zambia, have found it easier to accumulate leverage in their relationship with the executive (Bratton & Van de Walle 1997, p 247).

Parliaments may have been strengthened by the term limits that were a distinctive and new feature of African constitution-making in the 1990s: 33 of the 37 new constitutions adopted by 1994 included presidential term limits (Bratton & Van de Walle 1997, p 113). In the past ten years these provisions have been substantially eroded, though, as Charles Fombad and David Zounmenou explain in their chapters in this volume.

It is likely that common law inherited by former British colonies maintained judicial assertiveness and protect civil liberties measurably better than the republican civil law doctrines that shaped legal and constitutional practice in francophone Africa (Joireman 2001). In any case, over time, inherited constitutional traditions have become more publically influential. In 2011, in Senegal, one of the few African countries in which the constitutional order has remained more or less unaltered since independence, the opponents of President Abdoulaye Wade, who was seeking a third term in office, campaigned against him with the slogan ‘*Touche pas a ma constitution* [Do not touch *my* constitution]’ (my italics) (Kelly 2012, p 127).

CONCLUSION

We can now provide answers to the four questions posed at the beginning of this chapter.

How were these constitutions made? They were more likely to reflect local elite preferences in French-speaking Africa, where, in some instances, politicians had been the beneficiaries of a metropolitan strategy of political and cultural assimilation. In British Africa African nationalist leaders assented to constitutions drafted by colonial officials who often included in their drafts special measures to protect minority concerns. Wider kinds of civic engagement were generally absent from constitution-making.

To what degree did these constitutions represent social contracts between states and citizenry? The language of rights and obligations was more universally conspicuous in francophone African post-colonial constitution-making than was the case in former British colonies, where rights served more particularistic functions. Partly for this reason, in today’s francophone Africa popular political protest is more likely to be rights-based.

To what degree did these constitutions replicate metropolitan models? Anglophone African constitutions established parliamentary systems, but these were swiftly replaced. Francophone constitutions followed French Fourth Republican precedent and institutionalised executive supremacy from the start. Post-1990 reforms have attempted to modify presidential prerogatives by assigning powers to both parliaments and courts; several of the more successful instances of such transfers have been in francophone African countries.

Have these first constitutions had long-term effects? This is the case more obviously in francophone countries, but if we consider wider aspects of political life in French- and English-speaking Africa – in their electoral and party systems, for example – it is still possible to discern differences that correspond to colonial lineage and the different metropolitan styles of state-making.

AFRICA'S CONSTITUTIONAL DEVELOPMENTS AFTER 1990

Constitution-building for democracies?

Winluck Wahiu

ABSTRACT

African states revised or enacted new constitutions after 1990, which, then and now, have been rhetorically identified with democracy and constitutionalism. Yet these efforts to design democracies have produced uncertain democratic outcomes and their gains remain contingent on the continued commitment of regime insiders rather than on the normalisation of constitutionalism. This chapter argues that constitutional developments have locked in strategies of uncertainty with many functions of new constitutional restraints on public officials largely explained by prudential deals that circumscribe reforms and because constitutional development continues to be the initiative of the same regime insiders who drove reforms in the first place in order to gain control of future political dynamics. Though it is in their interests to restrain the abuse of power, these regime insiders may not be controlled by normative appeals. Until regime outsiders can assimilate their own conceptions of democracy into the basic rules of the political game they have limited ways of sharpening the incidence of constitutional legal obligations on duty-holders and injecting greater publicity into government acts in the interest of political pluralism.

INTRODUCTION

Nearly all African states revised or re-enacted constitutions after 1990. This historically striking scale of constitutional change converged on the idea that constitutions should be built for democracy and marked the crest of a wave of political and economic liberalisation in Africa, as in other regions of the world, after the fall of international communism (Huntington 1991). African constitutional reformers, comprising leaders, bureaucrats and experts, took the opportunity to anchor guarantees for institutions and procedures so that not only the central state administration but also the private sector, communal cooperatives, an array of political parties, youth, women and other civic organisations, devolved regional governments and a mix of international

actors could all think about and act upon the challenges and opportunities of economic development from their self-interested vantage points.

Constitutional reformers aimed at democratic government as a primary goal. But have post-1990 constitutional developments in Africa produced democracy by design? Contemporary assessments of democracy and governance give a mixed answer. Yes, there have been notable gains in more even political playing fields, but they are beset by reversal. This, essentially, is the result of uncertainty.

This chapter argues that against a sustainable consensus of expert opinion on constitutional designs for democratic government in Africa's diverse states, coupled with the durable appeal of democratic norms and principles, instead of being a triumph of constitutionalism, constitutional development has been disproportionately motivated by partisan interests in the context of political trade-offs. As the baseline of states below shows, constitutional changes have remained the initiative of self-sustaining leaders rather than of 'we the people', notwithstanding the rhetoric of inclusive democracy. The alarming consequence is that formal constitutional guarantees function as interest multipliers for the benefit of regime insiders and are disposable in the long term.

Many of the present beneficiaries of post-1990 reforms are the same people who drove or established constitutional reform in the first place. The silver lining in this outcome is that Africa's constitutions remain open spaces for new actors on the political scene to assimilate their own concepts of democracy into the fundamental rules of the political game. But as long as uncertainty-prone constitutional reform rewards insiders, the prospects for regime outsiders to evolve democratic outcomes may lie in manoeuvring the legal rules of the political game to pinpoint what exact obligations apply to which particular constitutional duty-holder and to inject greater publicity into government so that avoidance of those obligations is not easily hidden.

MAPPING CONSTITUTIONAL DEVELOPMENT IN AFRICA

Constitutional reforms have been nourished by the idea that the democracy architecture of ethnically diverse African states can be built around majoritarian political decision-making and a civic consciousness shared by all citizens. Reformers have aimed to anchor such an architecture in supreme laws without ignoring the political function of a constitution to restrain governments from arbitrary rule and to animate the sense of belonging in an inclusive state. Constitutionalism and democracy have not been the starting point of constitutional development, they are the hoped for downstream outcomes (Prempeh 2007).

Constitutions must be worthy of respect and fit for normative purpose in order to nudge such outcomes, requiring, in turn, that the rules and processes of constitutional change should similarly be norm-respecting (Hart 2003; Bockenforde, Hedlin & Wahi 2011). In fact, African constitutional reformers obtained their formal orders from interim constitutions, statutes, decrees and expert commission terms of reference, obliging them to respect general or specified principles, typically including national ownership, organic law, equitable representation, stakeholder consultation and public participation.¹

What counts as a democratic constitution is widely discussed and there is, at least, widespread expert consensus about constitutional designs that will create a fairer, more level political playing field in multi-ethnic African states (Okoth-Ogendo 1988; Nwabueze 2003). Emerging African inter-governmental consensus about principles of a democratic constitution is evident in documents like the Protocol on Democracy and Good Governance, 2001 of the Economic Community of West African States (ECOWAS) with its 'constitutional convergence principles' provisions.

Flowing from the above, constitutional developments in Africa after 1990 could be analysed from two angles: firstly, what the prior agreement on rules for changing or amending the rules of the game reveal about their orientation and secondly, how, or whether reform outcomes relate to the democracy deficit they were engineered to resolve.

Table 1
Constitutional developments and their drivers in selected states

Country	Date	Drivers	Contentious
Mali	1992 Constitution	<ul style="list-style-type: none"> ☐ Pressure for party/electoral law reform ☐ economic restructuring ☐ national constitutional dialogue convened by president 	<ul style="list-style-type: none"> ☐ Prohibition on religious parties ☐ Cohabitation/separation between president and prime minister

1 An interesting example is found in Egypt's supra-constitutional principles, issued in 2011. See www.constitutionnet.org/country/constitutional-history-egypt

Country	Date	Drivers	Contentious
Democratic Republic of Congo	1990-1994 Constitution amended 2006 Constitution	<input type="checkbox"/> Anti-Mobutu insurgency/military rebellion <input type="checkbox"/> Peace accords partners <input type="checkbox"/> International and non-international armed conflict	<input type="checkbox"/> Executive power <input type="checkbox"/> Regional government <input type="checkbox"/> Provincial reorganisation and administration <input type="checkbox"/> Power-sharing formulae
Ethiopia	1994 Constitution	<input type="checkbox"/> Separatist Eritrean forces and ethnic militia under the EPRDF.	<input type="checkbox"/> Status of Eritrea <input type="checkbox"/> National identity <input type="checkbox"/> Federalism <input type="checkbox"/> Reconstruction after Marxist stagnation (property rights, etc.)
Kenya	2008 Constitution amended (GNU) 2010 Constitution	<input type="checkbox"/> Multiple draft constitutions 2008 electoral violence <input type="checkbox"/> GNU and AU mediation	<input type="checkbox"/> Limits on presidency <input type="checkbox"/> Number and character of devolved governments <input type="checkbox"/> Presidential or parliamentary system <input type="checkbox"/> Skewed land ownership and protection of communal lands
Egypt	2012 Constitution 2014 Constitution	<input type="checkbox"/> Muslim Brotherhood <input type="checkbox"/> Military SCAF <input type="checkbox"/> Deconstructing the Mubarak 'deep security state'	<input type="checkbox"/> Democratic elections to executive and legislature <input type="checkbox"/> Status of religious laws and religious parties <input type="checkbox"/> Role and status of military in state and economy
Tunisia	2015 Constitution	<input type="checkbox"/> 'Arab Spring' transition <input type="checkbox"/> Military, constitutional council, Islamists and civil society <input type="checkbox"/> economic stagnation	<input type="checkbox"/> Executive power <input type="checkbox"/> Economic stagnation <input type="checkbox"/> Role of religion in government

Country	Date	Drivers	Contentious
South Africa	1994 Interim Constitution	<input type="checkbox"/> ANC, IFP, PAC and re-legalised parties	<input type="checkbox"/> African majority rule based on universal suffrage
	1996 Constitution	<input type="checkbox"/> Majority rule demand <input type="checkbox"/> NP and security forces	<input type="checkbox"/> Provincial/regional/group autonomy <input type="checkbox"/> Equality rights and policies <input type="checkbox"/> Land ownership and repatriation

The countries named in Table 1, like many others in Africa, undertook reforms after 1990 in which they also promulgated new constitutions, each according to its own circumstances and political resolve to frame alternative rules for the political game (Ndulo 2006). Those reforms have improved the administration of these complex states; their citizens today are on average less likely to live under a brutally repressive regime than was the case in 1989.² But if administration of these states has improved, their political governance remains chequered, as is reflected in Afrobarometer³ surveys, among others. A recent important study of the future of democracy in Africa suggested that African democracy remains constrained by lack of governance capacity, thin electoral democracy and neopatrimonialism (Cilliers 2016). The important detail here is that surveying the current problems as opposed to issues of democracy, the present is linked to the past by a cycle of constitutional development in which reformers who instigated reforms in the first place continue to define the scope of possibilities for constitutional democracy, while the prevailing sentiment in opposition and civil society ranks in many of these states is one of dismayed re-occupation of their traditional arenas of political activism.

2 The Mo Ibrahim Index of African Governance, for instance, shows improvements in conflict management and democratic competition, but stagnation and reversal in human rights protections in the period between 1999 and 2010 (<http://mo.ibrahim.foundation/iia/>)

3 For instance, the number of South Africans who perceive that their president ignores laws rose to 59% in 2015 compared to 21% in 2002. A survey in 2014 showed majority support in Kenya for constitutional changes to revenue-sharing between national and devolved governments but there was a problem of elected county assembly members never listening to citizens. In 2013, 81% of Ethiopians considered the country to be a democracy with minor problems even though there was only one elected opposition MP out of 547 members of the House of Representatives, a result Afrobarometer ascribed either to fear or to Ethiopian idiosyncrasy (<http://afrobarometer.org/countries>)

The Democratic Republic of the Congo (DRC), Ethiopia and, more recently, Egypt, showcase a familiar paradox of African constitutional development where armies play determinist roles during relatively short transitions from which new democratic constitutions emerge in countries with little previous experience of democratic opposition. Nobody in the DRC believed a Constitution that implausibly governed Mobutu's plunder could be saved after the Rwanda- and Uganda-backed rebels of the Alliance of Democratic Forces for the Liberation of Congo-Zaire (AFDL) became victorious in their bush path to power in 1994. Once installed, the new forces accepted a transitional conference and its charter, but the constitutional development process between 2000 and 2006 became intertwined with peace-building (Boshoff 2010). An inter-Congolese dialogue adopted a second transitional constitution in 2003 to implement the Pretoria peace accords,⁴ which directed the finalisation of the 2006 Constitution. In reality, President Joseph Kabila was at liberty to challenge any unacceptable changes in a general context in which people conflated the Constitution with peace (Gathii 2008).

Further east, the Ethiopian Peoples' Revolutionary Defence Forces (EPRDF), which ousted the autocratic Derg and its Marxist Constitution in 1991, drew up a transitional charter in 1993 providing for a Transitional Government (TGE), a Council of Representatives (CR) comprising ethno-regional organisations and an unprecedented rule permitting secession that was soon invoked by the Eritrean Liberation Front (ELF).⁵ The CR set up a commission to prepare a draft constitution, followed by nationwide public consultations and, ultimately, ratification by an elected Constituent Assembly (CA). The elected CA, in which EPRDF and its affiliates won 460 of 515 seats, was directed to 'enshrine the notion of a voluntary union between ethnically-defined regions' (Berhanu 1995), on which basis it avoided making substantial changes to a draft constitution once unity about its purpose and content had been achieved in the CR.

A decade after constitutional changes were initiated in the DRC and Ethiopia revolutionary sentiments blew across northern Africa. Although Egypt's recent constitutional change is popularly labelled a democratic revolution, the military, the *éminence grise* behind constitutional change, was later compelled to emerge from the shadows and directly assume power. After deposing Hosni Mubarak, the Supreme Council of the Armed

4 The agreement is available at http://peacemaker.un.org/sites/peacemaker.un.org/files/CD_030402_SunCityAgreement.pdf

5 Eritrea, which claimed historical independence from Ethiopia, had been administered independently until 1964, when it became a nominally autonomous part of a federal Ethiopia. Following Haile Selassie's unilateral abrogation of the federal system Eritrea was absorbed into Ethiopia, triggering a long-lasting separatist movement (see Henze 2000).

Forces (SCAF) decreed a legal framework for democratisation, anticipating a new constitution. Mohamed Morsi of the Muslim Brotherhood (MB), who was elected president in 2011, an historic first, did not supplant the SCAF framework. However, his attempts to steer constitutional development were effectively scuttled by the courts and conflicts quickly hardened around alternative visions of the constitution among the MB, the opposition and the military (ICJ 2012). The MB was accused of imposing an Islamised self-entrenching set of rules and was pushed out of power by the army, which also suspended the Constitution promulgated in 2012. This time, the military took direct charge of the procedures leading to the promulgation of the 2014 Constitution, allowing no formal possibility for the MB and its affiliates to influence the outcome (www.al-monitor.com/pulse/originals/2013/08/egypt-draft-constitution-guide.html#).

The involvement of the army in Tunisia's transition to its 2014 Constitution was somewhat less openly deterministic than that in Egypt. Tunisia was emerging from a police state rather than a military authoritarian state.⁶ The election of a Constituent Assembly and a new power-sharing government mandated by the Constitutional Council brought in primarily religious stakeholders as key actors in constitutional change. And political stalemates were resolved through deals struck between the ruling party, Ennahda, and its political opponents, with the acquiescence of civil groups, notably the Tunisian National Dialogue Quartet. The deals struck were such that the 2014 Constitution gained more than two-thirds majority support in the Constituent Assembly, allowing it to be enacted without recourse to a popular referendum and providing the 'Arab Spring' with a 'much needed boost' (Sadiki 2014).

Kenya and South Africa are in a set of countries that pursued constitutional developments after 1990 through inter-party negotiations about the new democratic constitutional order. In Kenya the process spanned the period between 1997, when constitutional review legislation was enacted, and 2010, when a new Constitution was promulgated. In South Africa the process took five years – from the inauguration of the Convention for a Democratic South Africa (Codesa 1 & 2) in 1991 to the adoption of the final Constitution in 1996.

The process in Kenya received a bloody jolt of momentum after the closely contested and violent presidential election in 2007. The two contenders, Mwai Kibaki and Raila Odinga, signed a power-sharing agreement in February 2008, mediated by former UN Secretary General Kofi Annan, which set up a government of national unity (GNU) enshrined in statute and embedded in the Constitution to safeguard it from judicial annulment. The National Accord

6 Tunisian views on the 'jasmine revolution' available at www.jasmine-foundation.org/; see also Stepan 2012.

and Reconciliation Act of 2008 was provided for by an amendment to section 3 of the Constitution of 1964.

Constitutional reform was one the four main agenda items for the power-sharing government. A small statutory committee of experts was appointed to harmonise previous draft constitutional proposals dating back to the defunct national constitutional conference of 2002-2004, subject to the principles for a democratic system provided for in the enabling legislation. The legal framework left it to a parliamentary committee comprising the parties in the GNU to adopt the experts' recommendations, which it did after negotiating last minute substantive changes. Numerous amendments were pushed in Parliament to modify the harmonised draft, but apprehension about reopening negotiations weighed in when Parliament adopted the text without debating any amendments. President Mwai Kibaki promulgated the 2010 Constitution, the second in Kenya's history, following its ratification by popular referendum (Kramon & Posner 2011).

In 2010 South Africans were recovering from Thabo Mbeki's 'recall' resignation from the presidency a year before (Gevisser 2009). South Africa's constitutional democracy had largely been engineered by two parties, the African National Congress (ANC) and the National Party (NP) in yet another example of a consociational government of national unity elected in 1994, that momentous year in Africa, under the presidency of the revered late Nelson Mandela. In practice, the obligations binding reformers had been spelt out during consensus-building meetings under the auspices of a Multi-Party Negotiation Process building on Codesa 1 & 2, with key principles formulated for a new Constitution for a democratic state (<http://www.sahistory.org.za/>). These principles, initially 33 in all, framed binding commitments for which constitutional reformers were obliged to aim.⁷

From that point, constitutional development was a question of ushering in majority rule and a liberal economic order. The talks had resulted in the introduction of a proportional representation system, but significant disagreement remained about whether government should be broad based, with co-opted minorities, or based only on popular mandate. Strong voices supported the view that the responsibility for economic policy should lie in broad-based consultation, effectively a consociational view. These disagreements between the dominant players, the ANC and the NP, underline the distrust of majority rule that permeated constitutional negotiations, with the draft constitution certified by a court instead of a plebiscite. The fact that many solutions to emerging problems in constitutional reform were

7 The full list is available at: www.nelsonmandela.org/omalley/index.php/site/q/03lv02039/04lv02046/05lv02047/06lv02065/07lv02084/08lv02088.htm

decided only between the two is demonstrated by the appearance of some 84 parties, including non-governmental organisations, religious groups, labour organisations and business associations, who filed objections to the first constitutional proposal certification adjudication, many of them alleging a lack of transparency and participation (Certification of the Constitution 1996).

ORIENTING CONSTITUTIONAL DEVELOPMENTS TOWARDS DEMOCRACY?

The cases above underline the peculiarities of constitutional development in each setting. They also shine a light on the mystery of prior agreements about rules for changing the rules of the game and whether it is really democratic outcomes that are at stake here.

Constitutional reforms were deliberate acts, with much evidence of key actors committed to defining rules intended specifically to mandate reformers to engage in constitution-building for democracy. The 34 negotiated principles in South Africa, or Egypt's decreed legal framework principles, are well analysed examples. Even the procedure of the 'almost-sovereign national conference',⁸ used in DRC, Mali or Kenya, generally gave directives to constitutional reformers, reinforced by provisions in peace accords or statutes.

In similar fashion, Ethiopia's EPRDF directed reformers pursuant to a transitional charter to flesh out the machinery of their preconceived federal democratic system. Nowhere were reformers acting on a clean slate with a free hand as benevolent sovereigns dishing out constitutional charters. They were agents offered historical opportunities to produce constitutional designs for democratic government suited to the genius of their people.

An early impression of this use of procedural rules to bind reform of the rules of the political game is technocratic processes of crafting social contracts with emphasis on the design aspect. Technocratic rules narrow down who should become involved. Their use gives pause for reflection. What is suggested is that de-politicisation, or, at any rate, an agency external to the reform process, can and should be able to control constitutional development and the validity of its outcomes. If so, such rules would be expected to provide an adequate account for the role of 'we the people' as ultimate bearers of constituent power. However, the evidence suggests 'we the people' play whatever role the procedural rules assign them.

Typically, the people voted by a majority determined by procedural rules to ratify, or not, the constitutional proposals negotiated by principal actors.

8 Originated in Benin in 1990, the national conference was typically not elected as a constituent assembly or fully accountable to a sitting Parliament, yet it attempted to claim a role as a constitution-making organ.

This is a reactive role rather than a constitutive one. The choices offered to referenda are fixed. Kenyans heatedly debated whether constitutional reform should be a technical-expert or people-driven procedure; its initial statutory framework was only amended to add validation by referendum pursuant to a judicial order (*Njoya & Others vs Attorney-General & Others* 2004).

South Africa could dispense with validation by referendum without apparently affecting the popular legitimacy of the 1996 Constitution, though here it could be argued that the role of ‘we the people’ was to elect and pre-validate a constitutional assembly with an exclusive mandate to enact a new constitution. On the other hand, Niger evidenced high popular votes at referenda for two constitutions in two years.⁹ If popular majorities can be mobilised to support substantively different constitutional proposals within a few years, perhaps popular validation of constitutional developments, particularly in deeply divided societies, does not prove much about the actual legitimacy of constitutional authority? The considered praxis suggests that rules about how to change the political game are equivocal or even incongruous with the demand for greater democratisation of such changes *ab initio*. In fact, the praxis opens the question whether ‘we the people’ can play anything but a formulaic role?

Suggested too in the cases above is the significance of express provisions for the role of ‘we the people’ in the procedural rules of constitutional change. Those provisions may be necessary to grant and vindicate legal and political rights to the people as a collective to determine the new rules of the political game. In practice, elected representatives and interest groups claim a right to participate in constitutional developments as proxies of ‘we the people’. On the other hand, Table 1 suggests that many of the drivers of constitutional developments were those who already enjoyed some formal or informal authority – military, incumbency, economic, intellectual, traditional or religious – which they tunnelled into constitutional preferences. It is authoritative actors who time and again seized the initiative for constitutional development, while their political opponents and civil society tried to marshal their resources and supporters to influence constitutional options before it was too late.

Because constitutional restraints have to find some expression, explicit or implicit, in the formal constitutional law, formalisation is the key to successful constitutional reform outcomes. It is argued that formalisation should be the product of the broadest democratic consensus possible (Hart 2003). Yet what is observed are fixed rules of constitutional change giving way to pragmatic

⁹ 2009 Constitution approved by 92.5% referendum vote with 68% turnout; 2010 Constitution approved by 90% of voters with 52% turnout (<http://www.gouv-niger.ne/>)

settlements during constitution-making and formalisation stages. In Egypt, Ethiopia, Kenya and South Africa constitutional reform processes were not fully grasped as opportunities to expand democratic inclusion when a draft charter was to be finalised. In fact, the finalisation aspect in those particular processes became a new terrain of division, polarisation and exclusion. In many instances the now familiar complaint was that constitutional change was broadly inclusive only when the provisions at stake did not matter for process heavyweights. It is not that exclusion was an indiscriminate and deliberate policy but that those groups who controlled constitutional reform did not seem willing to accept that there could be constructive alternatives to their formalisation suggestions.

Consociational governments, when formed in Kenya, South Africa and the DRC, do appear to have delivered reforms that went furthest to democratise the political rules of the game relative to governments founded on simple majority popular bases. Yet consociational democracy has not been favoured as a method of government post-reforms, including in South Africa, where Mandela's government is still discussed in superlative terms. If leaders are not learning democracy from pursuing and participating in constitutional reforms could it be because they have controlled outcomes *ab initio* and learnt to use participation as a balm or administrative ritual, denuded of much of its transformative capacity? Is the democracy lesson being learnt one that places a premium on rule-defined competence of participation rather than on its scope of inclusion?

With formalisation as a political process is there any point in having principles or rules to specify what should be included in or excluded from the negotiated constitutional charter? The outcomes in formalisation seem as likely to be expedient products of pragmatic politics as the result of careful design. The praxis in the comparative baseline above is replete with examples of deal-making on substantive constitutional options, in addition to deals over the form and procedure of constitutional changes. An arresting example was the Kenyan parliamentary committee bargain, made literally overnight, to replace a semi-presidential system with a US-style executive and increase the number of devolved governments fourfold.¹⁰ Nowhere have the rules of constitutional reform made deal-making inadmissible. Instead, deal-making is seen by political actors as the supreme craft during constitutional change, superior even to expert opinion and closed to the reason of latecomers. One looks for deal-making being made subject to ethics and obligations regarding

10 The author discussed the background to the changes with a member of the parliamentary committee who participated in the Naivasha review meeting in January 2010 that revised the proposals of the Committee of Experts. The official statement of the parliamentary select committee on the changes is on file with the author.

democratic outcomes and is greeted by prudential compromises to keep overall consensus on formalisation within reach. Deal-making, moreover, attests merely to what given players considered important at the time and what could feasibly be provided for in constitutional provisions. Deal-making paradigms reduced reforms to bilateral deals in Kenya, South Africa and Egypt, or multilateral deals in the DRC and Ethiopia, with all the players armed and identified in advance. This almost certainly permitted constitutional provisions to be framed by the imposing context of political trade-offs among competitors for access to power. Egyptian media reported on the perception that reformers from the Muslim Brotherhood (MB) reduced democratic government to an equation of access to formal power (www.al-monitor.com/pulse/politics/2014/04/egypt-muslim-brotherhood-challenges-future.html). If so, the MB, perhaps naively, saw constitutional change as an opportunity to marshal its own popular base against the so called 'deep state' regime insiders. It is more likely that the MB underestimated the value of making deals with its opponents, much to its subsequent detriment.

Ultimately, the prior agreements about the rules to be used to change the rules of the political game fail to vindicate the central idea of constitutional change by 'we the people' – that the final decisions about constitutional change should remain out of the control of those who already are or will shortly become active players in the political game.

Constitutional reformers directed to frame constitutional changes in accordance with the wishes of the people could always conflate those wishes with the interests of insiders, for instance to secure majorities for the control of legislatures and executives and to use constitutional rights to reinforce their political majorities only.¹¹ And insiders calling for referenda on the validity of final charters in Egypt, the DRC and Kenya (2010) correctly calculated that a polarised popular majority would not punish their disdain for esoteric veils of ignorance. Prior agreement on the rules of constitutional change determined how far closeted principal actors privileged their own conceptions of democratic government and constitutionalism and efforts to reclaim these tenets will have to come from outsiders.

From the above it is possible to identify some constraints that outsiders must overcome if the processes of changing the rules of the political game are themselves to be oriented toward democratic government and constitutionalism. Firstly, the prior agreement that constitutional changes should produce democratic outcomes requires constraints that prevent certainty of popular validation being built into the process. That means

11 Elster (1995) has addressed this constitution-making dilemma through the lens of 'institutional interests'.

increasing the uncertainty that the public will not reject reform proposals if allowed a meaningful say. Secondly, the requirement that rules for changing the political game actually establish a democratic process will also need to overcome constraints that minimise publicity of the process. Building in a mix of popular and interest-based validation at the tail end of reforms at least ensures the process outcomes will move toward publicity. Thirdly, constraints that limit who can claim the proxy for 'we the people' will only be overcome if legal rights for political opposition parties and interest groups are hardwired into the organs of reform. Finally, the absence of a rule-obeying culture among principal actors and citizens alike is always a constraint in changing government systems to rule-obeying democracies. Admittedly, this constraint cannot be overcome solely through the narrow formalism approaches preferred in this chapter.

Unless competing interests stand a real chance of being included in the formalisation process the practice of generating the fundamental law may easily be captured to ensure the resultant supreme law does not negate the core interests of those who should be below it. At the same time, perhaps the prevalence of deal-making to secure successful constitutional changes requires that such changes be gauged in utilitarian terms, that is, to the extent that they succeed in sustaining prudential politics and stabilising constitutional government post-reforms?

NEW RULES OF THE POLITICAL GAME AND DEMOCRATIC GOVERNMENT

Have constitutional developments designed democracy for African states? It matters what is written in the constitution. Some of the recognisable substantive elements of democracy in Table 1 included reduced presidential power, separation of the roles of president and Parliament, greater decentralised government, civilian control over the military, citizen and minority rights, secularism, protection of political parties, electoral reform and the introduction of executive term limits. These issues raised contentious problems in many states, often resolved in prudential deals behind the closed doors of constitutional negotiations.

The ensuing practice should be understood as animated both by substantive constitutional provisions that were agreed upon and by the nature of deal-making that accompanied constitutional formalisation. The result in the DRC, Ethiopia and Egypt, for instance, are democratic outcomes centred on the executive branch. Hence, in 2011 the DRC's President Kabila successfully drove a constitutional amendment that replaced the requirement for a run-off election if no presidential candidate attained a majority greater than 50%, with that of a simpler plurality majority (<http://greatlakesvoice>.

com/amendments-of-dr-congo-constitution-called-%E2%80%9Cundemocratic%E2%80%9D/). The amendments were backed by 485 of 608 senators. Despite the Constitution barring amendments of provisions on the republican form of government, the two-term limit rule for presidential tenure, the independence of the judiciary and the principle of political pluralism (Article 220), political manoeuvring suggests an amendment may be entertained to extend the incumbent president's term beyond his second five-year term after 2016 (see, eg, <http://afkinsider.com/60989/congo-kabila-may-change-constitution-hang-onto-power/>).

If democracy in the DRC is an assimilation of the practices pursued by the same leadership that enacted the constitutional order in the first place, the same is true of Ethiopia, whose 1994 Constitution mirrors the federated structures organised by EPRDF around the nationalities provisions of their 1993 transitional charter. EPRDF dominates the executive and the House of Representatives, where, together with its affiliates, it won 100% of the seats in the elections of 2015. The presidential elections due in November 2016 were postponed by the electoral commission until 2018.

Federal territories whose powers are constitutionally anchored have seen their functions accrete on security grounds to the central government ministry of federal affairs established in 2000 (Yibeltal 2015). The prevailing balance of power has so far delivered impressive economic growth; its political risk is that a constitutional settlement so closely associated with one group may not survive that group's eventual political decline. Egypt's governance post-2014 also seems to mirror the powerful presidency of the Constitution of 1971, supposedly deposed by a democratic revolution.¹²

Have constitutional changes produced democracy in Kenya and South Africa? Some eyebrows should be raised by the failure of integrity provisions of the still new 2010 Constitution in Kenya to render inadmissible the 2012 candidacy and election as president and deputy president of political insiders who were facing separate prosecutions at the International Criminal Court. Devolution is the real gem in the system and even here old-school politicians have created such a chaos of overlapping offices and jurisdictions between the national and county governments that what is observed is less a system of devolved government than a collection of astoundingly wasteful petty offices (*Daily Nation* November 2015).

Disillusionment with democratic outcomes in Kenya is expected to crystallise into a new constitutional change campaign. Already, a transitional constitutional commission created to support constitutional implementation

¹² Carnegie Endowment has compared provisions in the constitutions of 1971, 2012 and 2014: <http://carnegieendowment.org/files/Comparing-Egypt-s-Constitutions.pdf>

had recommended substantive modifications to the constitutional system to reduce the number of devolved governments to ten and members of Parliament to 150, citing per capita over-administration (www.nation.co.ke/news/Reduce-elected-MPs-from-290-to-150/1056-3014422-13apgooz/index.html). In response, Parliament declined to renew the commission's mandate after December 2015.

South Africans, on the other hand, had to reckon with the implications of a 20th anniversary as a constitutional democracy in 2016. Many of the celebrated actors who engineered the constitutional order rotated themselves from office. The voluntary folding of the National Party effectively ended one contest for power, but, because constitutional development was also, unavoidably, about dismantling all the building blocks of the morally repugnant apartheid state, democratic outcome expectations strode a wide field. A consequence of South Africa's democratic politics is that constitutional problems seem to be contained within the contestation inside the ANC itself. Hence, an internal vote to recall or remove the executive chair of the ANC in 2009 essentially translated into the sacking of the national president, who was elected by Parliament. If the ANC cannot tell the difference between its internal environment and the constitutional democratic landscape concerns will grow about the political resources that an ANC out of touch with the grain of public interest will increasingly need to marshal to supplement its diminishing popular mandate.

Several of the developments above give pause for thought regarding what is at stake with constitutional developments in Africa. The prudential deals that circumscribed the key periods of constitutional change and dictated how level the political playing field should be have resulted in uncertainty. Yet familiar provisions such as presidential term limits, decentralisation of government and fundamental freedoms offer evidence that normative considerations still weighed on reformers, otherwise how is their similarity and presence to be explained in nearly all the constitutions emerging in this period? If, in spite of their origins, governments are forced to abide by the normativity of such provisions, democracy through law can nevertheless be fostered for African states. Here is the window of hope. The present problem is to reclaim the normativity of constitutional developments.

In order to see constitutions such as those of the DRC, Egypt, Ethiopia, Kenya, South Africa and Tunisia as charters of possibility, one has to excavate beyond their prudential deal-making and seek the ascendance of the constitution as a supreme law that can be used to outlaw egregiously anti-democratic practices. Constitutional rules that require government to be understood through law presuppose the emergence of legally rationalised states. That includes countries like DRC, which had hitherto never functioned as fully effective states and where the gulf to be crossed to develop a

constitutional state is phenomenal. That gap need not mean that the relevant constitutional provisions are to be relegated to aspiration. In legal spaces constitutional reformers have helped by signposting democratic outcomes in a number of important ways.

Firstly, it is acknowledged that where the African Charter on Human and Peoples' Rights, 1981, which, together with the Constitutive Act of the AU is the only instrument ratified by all member states, recognised 23 human rights of individuals and peoples, constitutions in Kenya and South Africa, among others, guarantee an even larger number. Rights theoretically curtail governmental action so as to permit a sphere of civil society where individuals can nurture a democratic consciousness, but bearers of rights also reveal who in society is protected by governmental power.

By requiring constitutional actors to inhibit beliefs, for instance by proscribing religious political parties or communal activities because they negate an individual's enjoyment of his or her constitutionally protected human rights, custom, culture and religion by implication become purely private choice matters. The government has no role punishing religious heresies and compelling fidelity to customary or communal traditions any more than it should coerce individuals to join some common economic programme. Since only allegiance to the constitution matters, this development means that those who belong in the state are those demonstrating an allegiance to its law rather than to some community or tribe. The status of 'nationality' becomes merely a status of fidelity to national laws (Mamdani 1996).¹³

If reformers aim to reconfigure African identities to the extent that equal enjoyment of constitutional rights will be enforced then constitutional developments should move more along the South African 'liberal state' path rather than the Ethiopian 'state nationalities' path. But the practical problem remains whether the constitution can successfully manage the long-term inclusion of difference using liberal rights-based approaches while also organising the state democratically as a cooperative understanding among, primarily, communal groups?

Secondly, constitutional developments have settled the principle of political pluralism. South Africa, Kenya, the DRC and Tunisia now safeguard the principle of political pluralism and both Tunisia and the DRC bar constitutional amendments that risk diluting this protection. However, political pluralism is a protean term; in Tunisia and Kenya it even accommodates the prohibition of religious political parties. Political pluralism is probably an illusion in states without a practice of disciplined political parties or free media. Reformers

13 Mamdani distinguished between those bound by tribal law (subjects) and those by civil law (citizens).

seem to be saying that these provisions are immediately achievable by keeping the democratic space open as a marketplace of ideas.

Thirdly, reformers have signalled the future importance of judges as democracy champions and watchdogs. Parliamentarians may object in advance to executive appointments, budgets and policies, but the *ex post facto* supervision of executive decisions and parliamentary enactments will increasingly become the territory of judges. In Kenya the role of judges in overturning impeachment decisions of the popular assemblies is questioned, but their role, and that of their counterparts in the DRC, Egypt, Mali, and Tunisia, as final tribunes on who is properly elected is now unquestioned. In Egypt, Ethiopia, Kenya, the DRC, Nigeria and Tunisia no Parliament acting unilaterally and alone may amend the constitution, let alone enact one. In practice, even the people acting alone may not easily amend the constitution. Kenya's popular initiative to amend its Constitution is made deliberately very difficult to achieve by Article 257 of the 2010 Constitution and a recent initiative could not even take off past basic preliminary steps (see www.constitutionnet.org/news/constitutional-amendment-through-popular-initiative-tentative-lessons-okoa-kenya-campaign). In fact, in the DRC, Egypt, Kenya, Nigeria, South Africa and Tunisia, both 'we the people' and parliaments may now have their popularly voted constitutional amendments struck down in decisions handed down by judges.

What reformers have done on the normative side is to leave room for democratic outcomes provided two problems or constraints are continuously fixed. Undoubtedly, judicial oversight and constitutional review of governmental authority turns on the precision of constitutional tools either in drawing boundaries between institutional competences, so that judges have the role of pointing out when actors exceed their boundaries, or in translating political action into rigid procedural hurdles that judges can monitor impartially.

Precision of obligations is a technocratic construction, a task for judicial experts. Precision serves to minimise the room for adverse or self-serving presidential interpretation, for instance, of what it means to consult the opposition when appointing a chief justice, which is what ambiguous drafting invites.¹⁴ The other problem relates to access to information. A one-party state is not only repressive, it is also secretive, and secrecy nurtures impunity. The developments above are tactics by norm-protecting reformists to ensure publicity of government. Where precision is the grease for juridical oversight over government, publicity is the gruel for political pluralism. For legal

14 See Art 174 of the Constitution of South Africa and the flourishing debate about the meaning of consultation (<http://constitutionallyspeaking.co.za/on-the-appointment-of-a-chief-justice/>)

restraints, the developments which foresee that any ordinary individual can move the courts to prevent public officials acting beyond their boundaries must also require publicity of the actions of officials precisely so that they come to the attention of the ordinary citizens.

Institutional safeguards also benefit from publicity. A requirement that if the decisions of an executive are to have legal effect they must be in writing is aimed at enhancing the publicity of executive actions so that other institutional arms become cognisant of them, reinforced by powers to summon officials and subpoena documents. Hence, besides amplifying the multiple forms that constitutional restraints take, developments are pointing to the importance of precision of obligations and publicity of actions. It is the publicity of government set in motion by these constitutional developments that, in my view, raises public expectation of stronger democratic practice.

CONCLUSION

Africa has formalised many new rules of the political game since 1990, some of which are not objectionable in principle. Even those of doubtful democratic pedigree may yet foster democracy, while some that were elaborately designed are creating worrying disillusionment. Strategies of democracy by design are inherently limited. They reveal the importance of a political community's uncodified political conventions. It is probably true that the crises that accompany constitutional reform hamper the reasoning and far-sighted insight the tasks should demand. It is also true that African constitutional developments have risked locking in promises of inherent failure with the narrow interests of insiders who, wittingly or unwittingly, are unable to forecast or accept the changing dynamics of the future.

According to legend, only one candidate, Mobutu Sese Seko, stood in the 1970 presidential election in then Zaire and the ballot consisted of two cards, a green one 'for hope' and a red one 'for chaos' (Harding 1995). As Nigerian author Chinua Achebe advised pro-democracy constitutional activists: to understand why you fell, you must first look for where you began to slip.

PRESIDENTIAL TERM LIMITS THROUGH CONSTITUTIONAL AMENDMENTS IN AFRICA

Deconstructing Legitimacy

Charles Manga Fombad

ABSTRACT

The constitutional entrenchment of presidential term limits was one of the major innovations introduced during the post-1990 constitutional reforms. It was hoped that this would provide a solid basis for eradicating personal and authoritarian rule in favour of open pluralistic governance in which citizens would have the opportunity to change their leaders. The steady and progressive amendment of African constitutions from which these term-limit provisions are being removed and the increasing number of leaders ready to ignore or remove the limits pose a major threat to the fragile transition to democracy and constitutional rule. Why are these presidential term limitation provisions being removed? How can we limit the chances of these changes being made and in this way reduce the risk that doing so pose to democratic consolidation? This chapter considers the provenance of and the rationale for presidential term limitation provisions and reviews the way they have operated in Africa in the past two decades. After examining why the provisions have been unsuccessful in facilitating alternation of power and preventing prolonged stays in power, it suggests some corrective measures that need to be taken to arrest this dangerous slide towards the repressive authoritarian practices of the past. Strictly enforceable and enforced term limits provide the best chance for Africa to have politicians who are democrats and not despots.

INTRODUCTION

One-person rule by presidents and potentates who cling to power for years and even decades has been one of the most enduring obstacles to the advance of democratic governance in Africa. The continent has the unenviable record of being home to more than half of the world's longest-serving leaders.¹

1 The top ten longest-serving leaders on the continent are: Theodoro Obiang Nguema of Equatorial Guinea (36 years); José Eduardo dos Santos of Angola (36 years); Robert Mugabe of Zimbabwe (35 years), Paul Biya of Cameroon (33 years); Yoweri Museveni of Uganda (29 years); Omar El Bashir of Sudan (26 years); Idris Deby of Chad (25 years); Isaias Afwerki of Eritrea (24 years); Yahyah Jammeh of The Gambia (21 years) and Dennis Sassou Nguesso of the Republic of Congo (18 years). Jammeh was defeated in an election in December 2016 but is challenging the results

One of the innovations introduced during the post-1990 constitutional reform period was the entrenchment of presidential term limits designed to curb African leaders from spending prolonged periods in power. It was hoped that this would form a solid basis for eradicating personal and authoritarian rule in favour of open pluralistic governance in which citizens would have the opportunity to change their leaders regularly.

The steady and progressive removal of presidential term limits from African constitutions is spreading like a viral disease. In October 2014 a *coup d'état* thwarted the attempts by President Blaise Compaoré to repeal the term limits in the Constitution of Burkina Faso in order to extend his 27-year rule and he was forced to go into exile. In May 2001 a failed *coup d'état* was not enough to stop Burundi's President Pierre Nkurunziza from creatively misinterpreting the country's Constitution and, with the complicity of the Constitutional Court and sham elections, securing himself a third term in office. The progressive dismantling of one of the constitutional bulwarks against life presidencies in Africa has slowly been gathering momentum. It is now clear that each time an incumbent succeeds in prolonging his stay in power in this way many other leaders on the continent are emboldened.

Recent events in Burundi have encouraged President Denis Sassou Nguesso, who staged a sham referendum on 27 October 2015 which approved the removal of the age limit and presidential term limits, in spite of these limitations appearing in unamendable provisions of the Constitution (articles 57, 58 and 185). In Rwanda on 5 November 2015 the Upper House of Parliament approved the resolution of the Lower House, which, with the complicity of the Supreme Court, paved the way for President Paul Kagame not only to run for a third term but to stay in office until 2034 (AFP 2015). Meanwhile, in the DR Congo, President Joseph Kabila has already made clear his intention to remove the presidential term limits (although in terms of Article 220 they are not amendable) by expelling the leaders of seven political parties from the ruling coalition after they called on him to respect the term limits set in the Constitution (Wilson 2015). Recent progressive moves in the opposite direction in Liberia and Senegal, are unfortunately, insignificant forces against the strong movement towards elected monarchs in Africa.²

Why are these presidential term limit provisions being removed? How can African citizens reduce the chances of these changes being made and minimise the risks the changes pose to democratic consolidation? These are some of the issues this chapter tries to address. The second section of the

2 In Liberia, a constitution review commission is considering reducing the current six-year presidential term to four years, and in Senegal, President Macky Sall, is pushing for an amendment to reduce the term from seven to five years, with the two-term limit still being maintained in both countries.

chapter provides a brief overview of the circumstances in which term limit provisions have been removed from the constitutions of African countries. The third examines why the term limit provisions have not been successful in facilitating alternation of power and preventing prolonged stays in power by African leaders and the fourth section considers some corrective measures that need to be taken to arrest this dangerous slide towards the repressive authoritarian systems of the past. In concluding, it is contended that more radical reforms beyond merely entrenching presidential term limits need to be undertaken to arrest the creeping descent towards dictatorship backed by bogus elections.

A BALANCE SHEET OF THE OPERATION OF TERM LIMITS

Why have so many countries rushed to repeal the term limits in their constitutions? Is this a reflection of the genuine will of the citizens or a contrived strategy by African leaders to return to the days of life presidencies? There is no better way to assess this than to look at the different instances where term limits were either successfully repealed or where attempts to repeal them failed and at where there have been attempts to repeal them. In each of these instances we will examine who initiated the change, under what circumstances the change or attempted change took place and what could have made the change possible. The analysis, therefore, is split into four categories: countries where the term limits were successfully removed from the Constitution, those where the attempts were unsuccessful, those where technical arguments were used to ignore the term limits and finally those countries that are seriously contemplating removing or ignoring term limits.

Table 1

Countries where presidential term limit provisions have been repealed

Country	Date of change	Change initiated by	Mechanism used	Reason
Guinea	2001	President Lansana Conte	Removal approved by 98% in national referendum	None
Tunisia	May 2002	President Ben Ali	Removal approved by 99% in national referendum	To enable Ben Ali to run for office again

Togo	December 2002	President Gnassingbe Eyadema	Constitutional amendment	To enable President Gnassingbe Eyadema to stand for re-election in 2003
Gabon	July 2003	President Omar Bongo	Constitutional amendment	None given
Chad	22 June 2005	Change was initiated by President Idris Deby	Amendment approved by Parliament and a referendum	Deby argued that the change was not meant to benefit him personally.
Uganda	June 2005	President Yoweri Museveni	Widespread intimidation, blackmail, violence and bribery of members of Parliament to approve the change*	Museveni argued that he was indispensable to Uganda's stability
Cameroon	2008	President Paul Biya	Parliament dominated by his party easily approved the amendment	Biya argued that the restriction was undemocratic
Algeria	2014	President Abdelaziz Bouteflika	Change approved by Parliament dominated by his party	Bouteflika argued that the change would deepen democracy
Djibouti	14 April 2010	President Ismail Oumar Guelleh	Amendment approved by Parliament	Supposedly to foster national unity

* According to Izama and Wilkerson (2011, p 75), in 2005 eliminating term limits cost 5 million Ugandan shillings in bribes paid to parliamentarians.

Table 2
Countries where attempts to remove presidential term limits failed

Country	Date of attempted change	Attempted change initiated by	Mechanism used	Reason for failure
Zambia	2001	President Frederick Chiluba	Widespread intimidation, blackmail, violence and bribery	Dogged resistance from Cabinet members, senior members of his party and parliamentarians including members of his party.
Malawi	2007	President Bakili Muluzi	Widespread intimidation, blackmail, violence and bribery	Opposition from civil society, opposition parties and within the ruling party
Nigeria	2005/2006	President Olusegan Obasanjo	A constitutional review conference and Parliament. Huge bribes paid to Parliamentarians*	Strongly opposed by civil society and members of his Cabinet. Parliament, dominated by his party, rejected it
Niger	2009	President Mamadou Tanja	Referendum	He dissolved Parliament and the Constitutional Court (which declared the referendum illegal) but was removed by military coup
Burkina Faso	2014	President Blaise Compaoré	Tried to use Parliament	Protesters stormed Parliament and nationwide protest led to a coup

* President Obasanjo is alleged to have given Nigerian parliamentarians as much as 50 million Naira (approximately US\$6.5 million at the time) as a bribe (*Economist*, 26 April 2007).

Table 3
Countries where presidential term limits were ignored

Country	Date	Circumstances	Method	Reason
Namibia	1998	Term limits in the Constitution were ignored	The ruling party amended the provision to give President Sam Nujoma a special third term	'Namibia had no alternative to Nujoma' (Fombad & Inegbedion 2011, p 16)
Senegal	2012	President Abdoulaye Wade ran for a third term despite the two-term limit set down in the Constitution	He argued that the term limit did not apply to him because it had come into effect when he was already in office	The Constitutional Council ruled in favour of the president's interpretation.
Burundi	2015	President Pierre Nkurunziza ignored a two-term limit and stood for re-election	He argued that the two-term limit did not apply to him	The Constitutional Court agreed with him
Eritrea	The 1997 independence Constitution was never implemented	President Isias Afwerki has never implemented the 1997 independence Constitution	No explanation	A total dictatorship in which the president is in control

With regard to the last category, there have been and are still many countries where there are serious debates about dispensing with presidential term limits. The issue was raised in Ghana in 1997 when the National Democratic Congress (NDC) was in power and suggested the need to remove the presidential term limits. It abandoned the move when there were strong protests by civil society groups and opposition parties. In Benin, opposition parties have accused President Yayi Boni of campaigning for a constitutional amendment that would end up with the scrapping of the term limits. Although the president

has denied these claims, rumours continue to circulate. However, the presence of a strong culture of constitutionalism and a very assertive Constitutional Court in Benin might just be enough to discourage any such tampering with the Constitution.

Since presidential term limit were introduced in post-1990 African constitutions they have been repealed in nine countries (possibly 11, if we add Congo Republic and Rwanda, where repeal is just a question of time); there were unsuccessful attempts to repeal them in six countries and in four the provisions were simply ignored (unsuccessfully, though, in the case of Senegal). There are presently three countries where the incumbents are preparing to repeal term limits and the trend is gathering momentum, particularly since the Burundian president, defying world public opinion and relentless pressure from the international community, especially the African Union, recently circumvented the term limits in that country's Constitution. How can we explain this negative trend?

EXPLAINING THE DISMANTLING OR IMPOTENCE OF PRESIDENTIAL TERM LIMIT PROVISIONS

Africa has more than 10 of the longest-serving leaders in the world yet the continent is also home to many of the poorest and worst-managed states in the world.³ What is the relationship between these two facts? From the evidence provided in tables 1 to 3 it can be argued that we are making the same or very similar mistakes to those that were made in the immediate post-independence period. As a result, the old demons of authoritarian rule, which we thought had been exorcised by limitations on presidential tenure and the introduction of multiparty democracy still haunt the continent today.

Africa is not inherently cursed with poor leaders prepared to do anything to stay in power. Politicians are ordinary mortals, not saints: 'If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary'. (Diamond, Plattner & Andreas 1999, p 3).

In most cases Africans do not elect inherently bad leaders. Bennett (2004, p 105) is right in suggesting that tyranny is an African disease of the modern

3 According to *Global Finance* magazine, 19 of the 23 poorest countries in the world are located in Africa. Topping the list are the DRC, Zimbabwe, Burundi, Eritrea and the Central African Republic, all of which are ruled by persons who have almost become monarchs. See www.businessinsider.com/the-23-poorest-countries-in-the-world-2015-7#ixzz3klrlo8o2. According to Transparency International's Corruption Perception Index for 2014, available at: www.transparency.org/cpi2014/results, five of the 10 most corrupt countries in the world are in Africa.

era. As he puts it, 'A certain degree of political insecurity explains why an African ruler's power could not, in the past, have been absolute. Anyone who attempted tyrannical rule would soon face revolt or secession ... A common saying has it that *Kgosi ke Kgosi ka batho* (a chief is a chief through his people).' Although he was referring to the situation in Southern Africa, the same is true in many other parts of Africa, especially West Africa.

We elect potential Nelson Mandelas but quickly transform these ordinary mortals into infallible, indispensable and irreplaceable saviours whose departure from power must be viewed with trepidation. In fact, many of the founding fathers either invested themselves or were invested with messianic epithets such as *Osagyefo* (the Victorious Warrior), for Kwame Nkrumah of Ghana; *Mwalimu* (the Teacher), for Julius Nyerere of Tanzania; *Mzee* (the Elder), for Jomo Kenyatta of Kenya, *Le Grand Silly* (the Elephant), for Léopold Sédar Senghor of Senegal, *Nkuku Ngbendu wa Za Banga* (All powerful warrior who goes from conquest to conquest), for Mobutu Sésé Seko of Zaire (now the DRC), *Le Vieux* (the Old Man,) for Félix Houphouët-Boigny of Côte d'Ivoire, *Le père de la nation* (father of the nation) for Ahmadou Ahidjo of Cameroon and, more recently, *Ngwazi* (the Great Lion), which has been adopted by the late president of Malawi, Bingu wa Mutharika.

Nobody displays the intoxicating effects of absolute power on African leaders more than Uganda's President Yoweri Museveni. In 1986, shortly after he came to power, he declared that 'no African head of state should be in power for more than 10 years'. He followed this up in his book, *What is Africa's Problem?* by pointing out that the longer a president stays in office the harder it is to remove him democratically (Museveni 2000).

This is the same Museveni who had no compunction about retorting to Obama's appeal when addressing African Union (AU) leaders in Addis Ababa in July 2015 that 'nobody should be president for life', by saying: 'For us in Uganda, we rejected this business of term limits. If I am in power because I am voted by the people, then I am there by the will of the people' (Vanguard 2015). What had transformed this leader who did not believe in a prolonged stay in power into a person who now feels that the ballot box and not term limits is the answer? The answer is simple, it is a combination of the indolence of the people and the dangerously addictive opium of absolute power.

The numerous reasons why the apparent constraints that came with presidential term limits are no longer containing the resurgence of the prolongation of presidential terms can be summed up under four main points: the excessive concentration of powers in African presidents, the sloppy drafting of the term limit provisions, the weak constitutional foundation of multiparty democracy and a number of external factors.

First, African leaders are not only deified but often given or allowed

to arrogate to themselves imperial powers that they regularly abuse with impunity. The excessive concentration of powers in the president with few effective checks against abuse transforms him into an untouchable 'Big Man', whose party often controls Parliament and, therefore, puts it under his control. The non-political public service is, in most countries, a thing of the past; presidential authority typically includes the power to appoint and dismiss public servants almost at will as well as the power to create and abolish new offices if and when needed to reward supporters or sanction opponents.

Such excessive concentration of powers under modern African constitutions has merely transformed the hard-core hegemonic authoritarianism of the past into a soft-core authoritarianism with the veneer of legitimacy provided by routine sham elections with forgone conclusions. State employees now feel beholden to the incumbent rather than to the state and its institutions and therefore have no hesitation in adopting or supporting measures which will perpetuate the *status quo* in whose survival they have a stake. It is probably wishful thinking to expect politicians exposed to such powers and splendour to relinquish power voluntarily.

A second factor that has contributed to the disregard of presidential term limit provisions has been the sloppy way in which some African constitutions were drafted. President Nkurunziza's third term bid was made possible because of two potentially contradictory provisions in the 2005 Burundi Constitution: articles 96 and 302. This made it easy for him to intimidate and blackmail the Constitutional Court to adopt a clearly absurd interpretation of the Constitution that favoured his position (see *The Guardian* 5 May 2015).⁴ A similar clumsy formulation of the Senegalese Constitution of 2001 made it easy for President Abdoulaye Wade, with the complicity of the Constitutional Council, to attempt a third term bid which was thwarted by the voters at the polls.

One solution proffered to protect term limit provisions is to declare them unamendable. Neither specially weighted parliamentary majorities nor referenda have been enough to protect the removal of term limits by determined presidents. Unamendable provisions, or perpetuity or eternity clauses, as they are referred to in the literature, are an illusion and potentially dangerous (Fombad 2013). A constitution or provisions in it could, with time, become antiquated and if there is no procedure for amending it or if the procedure is too cumbersome, it may provoke violent change through revolutionary means. Change is, therefore, an inevitable aspect of life

4 It was widely reported that Judge Sylvere Nimpagaritse, the Vice-President of the Burundi Constitutional Court, who refused to sign the judgement, which he declared to be illegal, fled the country. He declared that the court's judges had come under 'enormous pressure and even death threats'.

and no constitution can be frozen in time and still be relevant. Besides, constitutions are time and place specific. No generation has the right to impose its own values and political principles on a later generation. Perhaps more fundamentally, 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 will be shown below there are better ways of protecting cherished constitutional values such as these term limit provisions than pretending to eternalise them.

Third, the fragility of presidential term limit provisions speaks eloquently to the weak multiparty foundation of modern African constitutions. Post-1990 constitution drafters were rather naïve to assume that multiparty democracy, of which presidential term limitation provisions are an important component, will grow and flourish just through the recognition of multipartyism. The rapid removal of term limits is a predictable result of the shallow foundation on which most African multiparty democracies are built.

Beyond the recognition of the right to form parties and participate in elections, certain fundamental political rights, which are critical in a modern multiparty democracy, are hardly recognised. The failure to constitutionally entrench the rights of all political parties in a manner that will ensure a level playing field, protect them from intimidation and blackmail and confer on them an enforceable right to free and fair elections has had numerous consequences (Fombad 2015).

The progressive repeal of term limits has come hand in hand with the increasing neutralisation of opposition parties and the undermining of the rise of any potential credible leaders. Any serious political parties or leaders are either co-opted into the ruling parties to form coalitions and share the spoils of power or are neutralised. This is so not only in countries that are still firmly in the grip of old-fashioned dictators masquerading as democrats but also in countries with fairly impressive democratic credentials.

Finally, presidential term limits may well be a matter of purely domestic constitutional policy and concern. But they have wider international peace and security implications. Nothing demonstrates the relationships among prolonged stays in power, term extensions and the potential conflicts which these may provoke and the resulting threats to international peace and security than the calamitous refugee situation in Syria⁵ and, perhaps more relevantly, that in Burundi. The crisis provoked by Nkurunziza's decision to ignore the

5 See, Amanda Taub, 'Europe's Refugee Crisis Explained,' www.vox.com/2015/9/5/9265501/refugee-crisis-europe-syria. As a result of the brutal attempts by President Bashar al-Assad's regime to stay in power, the civil war has created one of the worst refugee crises Europe has faced since the end of the Second World War, with more than 4 million Syrian refugees (about a fifth of the country's population) having fled since 2011, with millions of these seeking to resettle in Europe.

term limits in the Burundian Constitution has resulted in more than 200 000 refugees fleeing to neighbouring countries and on 12 November 2015 the United Nations Security Council declared that the country was on the brink of genocide (New Vision 2015).

It is therefore no surprise that since the AU came into existence it has introduced several instruments designed to promote constitutionalism, good governance and respect for the rule of law (Fombad 2012). The most important of these instruments, which prohibits unconstitutional changes of government, the African Charter on Democracy, Elections and Governance (ACDEG), which came into force in 2007, defines this concept in article 23(5) to include 'any amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government'. Breaches of this provision should lead to sanctions.

The AU did bring enormous pressure to bear on Nkurunziza and ultimately both the AU and UN refused to send observers to the parliamentary and presidential elections that took place. Burundi, like many other African countries, has not ratified the ACDEG. Even if it did, the reality is that the AU is still largely led by ageing autocrats or reluctant 'democrats' who either do not have or have removed term limits from their own constitutions. It is therefore no surprise that the organisation's record in compelling states to respect their commitments under its various constitutionalism-building instruments has been largely inconsistent, erratic and unpredictable.

The lack of a firm commitment to democratic principles within the AU is reflected in a vote at the 23rd Ordinary Summit of the Assembly of the AU, held on 26-27 June 2014 in Malabo, Equatorial Guinea. There African leaders formalised the expansion of the jurisdiction of the African Court of Justice and Human Rights to include international crimes and, among other things, voted to grant blanket immunity from prosecution to 'serving heads of state' and 'senior government officials' while they are in office for crimes against humanity and genocide (New Vision 2015; see also <http://theglobalobservatory.org/2014/07/leaders-agree-immunity-expansion-african-court/>). The potential implications of this decision are frightening. It means the AU will protect all African presidents who commit these international crimes not only from its own courts but also from the International Criminal Court, provided they stay in power and regardless of how they do so. In the final analysis, the AU has neither the means nor the will and credibility to restrain African leaders from seeking to prolong their stay in power.

Besides the relatively timid response by the AU and its regional economic communities it can be argued that the West has been actively complicit in the prolonged stay in power of several leaders. For example, in spite of the ruthless methods used by leaders such as Kagame of Rwanda and Museveni

of Uganda, they have, at most, only been subject to mild criticism and have otherwise received the financial support they need from the West.

The global post-1990 democracy momentum that saw Western governments and international institutions and donor agencies supporting democracy-building initiatives on the continent has waned. First, Western post-9-11 security imperatives have led to increasing support for certain autocratic repressive regimes such as Museveni's in Uganda, Paul Biya's in Cameroon and Idriss Deby's in Chad, all countries that are threatened by elements of global terrorism. The so-called war on Islamic fundamentalist groups has often been used as a pretext for reducing the space for free speech and introducing harsh measures that are then used to suppress all internal opposition. Second, the emergence of China and other non-traditional trading partners such as India, Brazil and Russia, as alternative sources of foreign direct investment threatens to further undermine Africa's fragile transition to democracy. Unlike the West and Western donors and institutions, Africa's new trading partners, with China taking the lead by a considerable distance, ask no questions and have no qualms about supporting the continent's growing list of sit-tight presidents as long as their economic interests are protected. As a result of the increasing threat from China many Western countries are beginning to take a more tolerant attitude to the threats of an authoritarian revival in Africa.

MAKING PRESIDENTIAL TERM LIMIT PROVISIONS STICK

There is overwhelming evidence that there is an inextricable causal link between a prolonged stay in power, state fragility, weak institutions, bad governance and feeble democratic consolidation. More often than not, powerful and repressive autocratic leaders have used repressive means to maintain their tenure and are, as a result, often reluctant to leave power for fear of political reprisals later.

The constitutional foundation on which term limit provisions are presently entrenched in African constitutions is generally weak. Considering Africa's post-independence realities it was wishful thinking to bestow such enormous powers on the continent's presidents or to allow them to arrogate such powers to themselves and expect them not to abuse them. A number of reforms must be undertaken to enhance the political stability of African regimes while ensuring regular alternation of powers. How do we deconstruct the legitimacy paradox between those who argue that term limits are undemocratic and illegitimate and those who argue that they are the only way to ensure proper democracy?

First, five decades of independence have shown that without term limits

African leaders will not voluntarily relinquish power. It is, however, important to ensure that there is no ambiguity in the wording of these provisions.

Second, the best way to protect term-limit provisions is not to declare them unamendable but rather to make it extremely difficult to amend them. A better approach to the concept of unamendable provisions is therefore to regulate and control strictly the manner in which amendments can be made in such a way that the procedure is complex and protracted, not only to ensure that there is elaborate and adequate consultation but also that the changes reflect the free and fully expressed will of the people through a referendum (Fombad 2013, pp 382-413).

Third, because of the critical role of elections, not only in electing presidents but also in determining whether or not presidential term limit provisions should be amended, there is a need to constitutionalise the rights of political parties and confer on all citizens a right to free and fair elections (Fombad 2015). An important element in the entrenchment of political rights is the recognition of the principle of fair competition and equality of treatment of all the parties. Without constitutional provisions that enshrine these principles, the right to vote will be nothing but an illusion.

Fourth, an essential element of free and fair elections is the existence of independent and competent electoral management boards (EMB)s and electoral boundaries commissions (EBCs). While the primary function of the former is to ensure that elections are organised in such a manner that the competition among parties is fair and the outcome decided in a free and fair manner, the functions of the latter are basically to demarcate the electoral constituencies fairly.

If flawed electoral laws make EMBs and EBCs vulnerable to partisan control and manipulation this can be prevented by reasonably comprehensive constitutional provisions based on the principles suggested above. It is likely that the incentive for leaders to use their positions to change constitutional term limit provisions to prolong their stay in power will be reduced. More generally, ensuring a level playing political field will considerably reduce the prospects of one person using the process to assume enormous powers of patronage and influence over the body politic.

CONCLUSION

What Africa does not need are strong men who want to rule for life, regardless of their competence; what it needs are strong institutions that entrench a culture of democracy that gives everybody a fair and equal opportunity to serve the country. That is what constitution designers thought they had created when presidential term limits were introduced in the 1990s. At the

heart of the debate is whether such provisions are legitimate and are not, in themselves, undemocratic.

A fundamental aspect of genuine democracy is free and fair competitive elections in which all the contestants have an equal opportunity to win. What has happened in Africa, particularly in the past decade, is the very antithesis of this: sit-tight presidents, very much like the autocratic presidents of the pre-1990 era. Most of these leaders tolerated the presidential term limits until they expired. Having yielded to these constitutional restrictions under pressure from pro-democracy activists and the international community in the early 1990s, most of these leaders did no more than make a strategic retreat. They have now sufficiently regained their poise to reinstate their autocratic life presidencies. As the high hopes for the slow but steady deepening of democracy through free and fair elections, which was supposed to provide an avenue for alternation of power, diminishes, the prospects of life presidencies and the enormous damage they cause increases.

Are term limitation provisions illegitimate and undemocratic, as many African leaders have asserted? President Museveni, in his age of leadership innocence, was right when he declared that the longer a leader stays in power the harder it is to remove him democratically. Recent empirical research also proves that open-seat elections in which incumbents do not participate usually turn out to be more transparent and fair and provide better opportunities for opposition parties and their leaders (Cheeseman 2010).

What democratic legitimacy can justify the removal of terms limits by presidents who have ruled for more than two decades and have poor records for organising free and fair elections but claim that the removal reflects the will of the people. The failed *coup d'état* in Burundi is a warning to African leaders; those who make peaceful changes and alternation of power in free and fair elections impossible make changes and alternation of power by violent means not only possible but imperative.

As this chapter has shown, the introduction of weak term limit provisions is not enough. Such provisions must be reinforced by clear and enforceable stipulations recognising and protecting the right to free and fair elections as well as the rights and duties of political parties. Strict and legally enforceable presidential term limits are not a fool proof solution but they do offer the best prospects for electing democrats who have the interests of the people at heart and will considerably reduce the incidence of personalised power and the propensity for perpetual rule.

PURSUING THE STATUS QUO OR REGIME CHANGE?

A Critical Analysis of External Influence on Presidential Term Limits in Africa

Dossou David Zounmenou and Segun Rotimi Adeyemo

ABSTRACT

Like the process of democratisation in the early 1990s, which benefited from both the engagement of domestic forces and the influence of external actors, the current debate about constitutional amendments enabling presidents to hang onto power is of interest and concern to external partners. Political experience on the continent, particularly since the end of the Cold War, has shown that external actors can act both as a catalyst for political transformation and a factor in maintaining the status quo. What are the conditions under which external actors prevent or fail to prevent the fraudulent amendment of constitutions? What mechanisms do they use and to what effect? What lessons are to be drawn from the interference? This chapter argues that the influence of external actors on the outcomes of constitutional amendments extending incumbents' terms in office is not clear cut and must be located in the complexities of their overall support for democratisation. Moreover, it appears that there is a limit beyond which external actors cannot go and therefore domestic forces and institutions must challenge leaders' attempts to hang on to power indefinitely. Above all, attention must be paid to the effectiveness of the checks and balances necessary for a genuine democratisation process.

INTRODUCTION

In October 2014 citizens in Burkina Faso went to the streets in an attempt to prevent a controversial amendment to the country's Constitution that would allow President Blaise Compaoré to remain in power after 27 years. Led by Le Balai Citoyen, a youth organisation, the riots forced President Compaoré out of power and sent him into exile. It was the fourth time in West Africa that attempts to change a constitution to extend the term of office of an incumbent president had failed. The other attempts were in Nigeria in 2006, Niger in 2010 and Senegal in 2012. Elsewhere on the continent the debate about a third presidential term rages on and has become a contentious issue both for pro-democratic domestic forces and for development partners.

In fact, the debate over the third term in Africa is far from being a domestic concern only. Christopher Clapham (1997, p 187) pointed out that from the early years of independence the heads of African states were remarkably successful in extending and ensuring control over their domestic political systems in the face of external pressure for change. He also indicated that leaders successfully manipulated the instruments of international cooperation, maintaining a 'privileged relationship' with external partners to survive and to maintain the internal status quo, which was mostly characterised by dictatorship and misery (Clapham 1997, p 187).

However, with the end of the Cold War African leaders became more vulnerable to outside influences on their domestic political life because the rivalry between communism and capitalism disappeared, forcing them to undertake political reforms and move towards democratisation. As Phillip Schmitter (1996) argues:

[A]lthough the establishment and consolidation of democratic regimes requires strong commitment from a broad range of internal forces, we must not overlook the distinctly restrictive international contexts under which the great majority of existing democracies became established, or were re-established.

Political experience on the continent over recent decades, particularly since the end of the Cold War, has shown that the influence of external actors can act as both a catalyst for political transformation and a factor in maintaining the status quo. What are the conditions under which external actors prevent or fail to prevent fraudulent amendment of a constitution to allow for a third term? What mechanisms do they use and to what effect? What lessons can be drawn from the interference?

The influence of external actors on constitutional amendments extending incumbents' terms in office must be located in the complexities of the overall external support for democratisation. Moreover, it appears that there is a limit beyond which external actors cannot go and, therefore, it is up to domestic forces and institutions to challenge leaders' attempts to hang onto power indefinitely. This debate brings to the fore the much deeper and larger structural challenges facing the democratisation process on the continent.

ORIGINS AND STATE OF THE DEBATE ON THE THIRD TERM: SOVEREIGNTY VERSUS POLITICAL EXCLUSION

The debate about term limits can be traced back to ancient Greece, where the principle of rotation of leaders played an important role in the political debate. Some of the functions that the assemblies (Parliament) could not perform were

given to young men for a year and could only be renewed once. This was also the case in the cities of Rome and Venice during the Renaissance. Between the 16th and 18th centuries the concept of term limits appeared in American political thought. It is important to stress, however, that its evolution has not been linear. In the US the debate moved from no limitation to a customary principle before being turned into law with the 26th constitutional amendment in 1951 under President Harry Truman.

In Africa, where the trend has been towards an imperial presidency, the issue has been no less controversial. Supporters of term limits argue that they are legitimate and respond to the imperative of elite rotation at the helm of power (power alternation) and to a large extent promote good governance. Opponents contend that they restrict the democratic rights of individuals.

According to a study published by Afrobarometer in May 2015 there has been notable constitutional development in Africa, mainly with regard to the limitation of the number of years presidents remain in power. While between 1960 and 1990 there were ten countries (five Anglophone, four Francophone)¹ with constitutional term limits, in the following decade close to 49 constitutions of the 64 adopted or amended contained provisions limiting the presidential mandate (Afrobarometer 2015, p 3). Afrobarometer went further to reveal that the overwhelming majority of citizens supported the limitation. Three-quarters of citizens in the 34 countries surveyed supported a two-term limit.

While this shows that there have been efforts to root out life presidencies and the confiscation of political power by a small political elite, such progress is far from an indication of the good health of democracy or consolidated constitutionalism in Africa. There is still a notable gap between what citizens want in terms of respect for the fundamental laws and institutions of their countries and the behaviour of their leaders when it comes to honouring their constitutions. There has been and continues to be resistance, if not reversal of the gains achieved, in many countries.

CONSTITUTIONAL AMENDMENTS IN AFRICAN DEMOCRACIES

The current debate about constitutional amendment enabling presidents to extend their stay in power revolves around two main arguments. On the one hand, sovereignty is used as a justification for such an initiative. African leaders have always justified their actions in attempting to extend their terms

1 South Africa 1961, Comoros 1978, Tanzania 1984, Liberia 1986, Tunisia 1988, Comoros 1989, Togo 1963, Senegal 1963, Mali 1974, Burkina Faso (Haute Volta) 1970, 1977. The constitutions of these countries formally established term limits. Some maintained it, others, like Comoros, removed it and later re-established it.

in office regardless of the constitutional prohibitions by invoking the claim of sovereignty or the will of the people.

Indeed, it is the sovereign attribute of the state and its people to define the contours and content of its political institutions, build consensus and develop a normative framework to guide national political processes and actions. In a context where efforts have been made to create solid checks and balances and in which citizens are full and free participants it is hard to argue against the right of a democratically elected Parliament to exercise its constitutional mandate of legislating, including changing the number of terms a president can serve. Moreover, there have been instances in Africa where term limits have been respected but there has been no real democratic development and consolidation as the same party has remained in power. Indeed, in most cases, term limits might only allow for rotation among the elites within the same power structure and may actually lead to consolidation of the 'predominant party' status because there is an appearance of change.

To be sure, if a country's democratic institutions and normative arrangements are strong enough and the electorate can vote an undesirable leader out of power at any time, legal term limits might be irrelevant or unnecessary. But power holders have unrestricted access to the vast state resources that enable them to develop an extensive patronage network to gain favour, obtain undue advantages and ultimately secure unlimited terms in office, even if the voting is free and fair (Posner & Young 2008).

On the other hand, amending a constitution to create additional terms in office amounts to political exclusion, one of the main causes, mainly in the 1990s, of coups d'état² and civil wars. One of the consequences of life and imperial presidencies in Africa has been what some forces perceived as political exclusion, an argument they used to stage the many armed rebellions that decimated the continent from the early 1990s. Conflicts and the ensuing instability in the Democratic Republic of Congo and Côte d'Ivoire (Zounmenou & Matlosa 2012), among others, could be traced back to bad governance, failure to plan an orderly and peaceful transition and power alternation in both countries. More importantly, they resulted from the exclusive rule of one leader for decades without any attempt to build credible institutions.

Many other countries could be cited as victims of life presidencies. The collapse of the state cannot be dissociated from the tendencies among African heads of state to become presidents for life. In fact, the need for term limits in Africa cannot be dissociated from the security threats and risks of violence, if not state collapse, emanating from power transfers on the continent.

2 Between 1960 and 2015 there were 89 successful coups d'état in Africa (Zounmenou & Matlosa 2012).

Arguably, this is one of the reasons why the African Union in its transformation from the Organization of African Unity (OAU) proposed not only a new peace and security architecture to tackle the sources of conflicts but also a democratic and governance architecture to deal specifically with the political and governance dimensions of armed violence and political instability on the continent. Therefore, the purpose of the presidential term limits, as limited and controversial as it might appear, is fundamentally to provide a vehicle for a peaceful political transition from one regime to another (Armstrong 2015). Term limits foster a conducive environment for democratic development, thereby paving the way for democratic consolidation.

EXTERNAL ACTORS AND REGIME CHANGE OR STATUS QUO: AN HISTORICAL PERSPECTIVE

The role of external actors in influencing national political trajectories on the continent is not new, though it has taken various forms and evolved over time. The Cold War period provided enough evidence of such interference in support of regimes considered friendly regardless of their democratic credentials and of plotting the destruction of those perceived as antagonistic (Zounmenou 2008, p 203). The rivalry between the so-called Western and Eastern blocks shielded many governments from accountability, democratic rule and pressure from citizens to take part in the political life of their countries.

The vulnerability of Africa to external forces is a perennial problem that did not come to an end with the end of East-West rivalry. Three major consequences could be identified from this development. First was the subjugation of the continent to the forces and actors with whom Africa could have had unequivocal relations. Second is the low priority of Africa on the agenda of the major powers. Third and most important is the position of most African states in negotiating the conditions and terms of the 1990s democratic process. Poor social, economic and political conditions have served as indicators that defined and continue to shape the bargaining power status of the continent in international relations as well as its place in the post-Cold War dispensation. For this reason, the continent's place in the global system has remained relatively marginal.

Yet leaders have also learnt to adjust to the demands of external forces by making cosmetic changes while reinventing or re-establishing mechanisms, including fraudulent elections, cosmetic 'democratic' changes and manipulation of existing institutions, to consolidate their grip on power or survive pressure both domestic and external.

Some observers have argued that the vulnerability of Africa to the influence of external partners has been less evident in recent times. Three factors have played a role in this change: economic growth makes African countries less

dependent and also more attractive as investment destinations and markets for Western economies, making economic relations more important than the promotion of democracy and good governance; the discovery of key mineral resources in many African countries makes them less dependent on foreign aid from the West, and the 'China' factor, which is not limited to China but extends to other Southern countries like India and Brazil, who play a greater investment and foreign aid role on the continent, reducing dependence on the West. These changes, however, appear to be more nominal than real. The structure of relationships between the European Union and some African countries has not changed significantly, to the extent that the EU remains a key role player in the politics of a number of countries.

Regardless of the changes in the international system, diplomatic, political and financial tools continue to be used to influence domestic political processes, albeit with differing results. With the assistance of external partners some countries (Benin, Senegal and Mauritius, among others) have established democratic systems that are functioning relatively well, while others have seen reversals or recycling of political actors who remain in power in spite of pressure for change.

EXTERNAL INFLUENCES: THE LAWS OF CARROT AND STICK

The African Union is undeniably one of the major external actors spearheading and shaping the political transformation of the continent. Political crises and instability arising from bad governance and unconstitutional changes of government were the origins of the AU's normative framework, transcending the long-held notion of non-interference in the domestic affairs of a member state. Inspired by the defunct OAU provisions on unconstitutional changes of government, which were never respected, in 2000 the AU adopted, along with its Constitutive Act, the Lomé Declaration, which outlawed unconstitutional changes of government. The declaration went further, providing instances where the continental organisation can sanction the affected country. Sanctions range from exclusion from AU organs to banning individuals from participating in any restorative elections.

The declaration listed four instances of unconstitutional change:

- A military coup d'état against a democratically elected government;
- Intervention by mercenaries to replace a democratically elected government;
- Replacement of a democratically elected government by armed dissident groups and rebel movements; and
- The refusal by an incumbent government to relinquish power to the winning party after free, fair and regular elections.

With the adoption of the African Charter on Democracy, Elections and Governance, 'any amendment or revision of the constitution or legal instruments which is an infringement on the principles of democratic change of government' also constitutes an unconstitutional change of government. The AU has also been actively engaged with the issue of the third term, albeit with limited success so far.

In addition to the AU, some of the regional economic communities (RECS) such as the Economic Community of West African States (ECOWAS), have taken action against the third term in their regions. On many occasions the EU and the international financial institutions have added their voices to those of the continental organisations in their efforts to encourage peaceful power alternations.

The interest in recent political developments and the influence of external actors on constitutional term limits cannot be dissociated from the overall external support to democracy. Due to a confounding mixture of domestic, continental and external pressures, direct links between a particular action and the final outcome of term limits debates will always be blurred (Armstrong 2011). What must be taken into account because of the considerable powers wielded by political leaders in Africa is that it is often very difficult to determine whether, where third-term projects have been truncated, the decision was voluntary or the result of pressure. The delicate nature of international politics, diplomatic relations, transnational trade and other interests and trade-offs has contributed increasingly to the complexities in the way external actors intervene in the domestic affairs of other nations (Armstrong 2011).

External pressures or sanctions can be applied directly on the holders of political power. According to Hauser (1999, p 14) there are three important categories of international pressure. Firstly, the international community can openly and directly support a specific reform aimed at achieving the desired result. Secondly, the provision of foreign aid, technical assistance or foreign direct investment can be made conditional on specific reforms and thirdly, external pressure can be exerted privately to persuade a domestic government to reform in a certain way. For example, John Negroponte, head of the US intelligence services, warned in February 2006 that if a third term was implemented for Olusegun Obasanjo in Nigeria it might unleash 'major turmoil and conflict' and 'secessionist moves by regional and ethnic nationalities and major refugee flows could create regional instability in west Africa' and elsewhere (Negroponte 2006).

Another important form of international pressure is an appeal to the citizens or residents of a country to put pressure on the political power holders to reform in specific directions. International actors can also exert

direct pressure on political leaders by supporting and funding domestic non-governmental and civic organisations (NGOs and COs). One example would be the funding in the late 1990s by Danish donor agency Danida of NGOs, churches and civic organisations in Malawi.

The most common vehicle for external pressure is threats or incentives. External powers, through their agencies or financial institutions (the International Monetary Fund, World Bank and other development agencies) might promise or threaten to reduce, withhold or revoke aid or certain assistance unless and until certain political conditions are fulfilled or political reforms undertaken.

Power holders or governments may also respond to the fact that external powers have a history or policy of responding in a particular way to a specific violation or action, whether or not a threat has been made (Armstrong 2011). Approaches that have commonly been used include the suspension of aid, constructive engagement with the government in question, the establishment of international contact groups, sanctions regimes and the concept of a government of national unity.

The history of external influence or pressure on third-term projects is complex. As Table 1 reflects, in the past two decades there have been 20 attempted constitutional amendments to favour a presidential third term, 13 of them successful. Countries that have changed their constitutions to keep the incumbents in power have not all had sanctions imposed, although some have been criticised for doing so.

Table 1
Constitutional amendments to allow a third term

Country	President	Year	Outcome
Algeria	Abdelaziz Bouteflika	2008	Successful
Cameroon	Paul Biya	2008	Successful
Chad	Idriss Deby	2005	Successful
Djibouti	Ismail Omar Guelleh	2010	Successful
Gabon	Omar Bongo	2005	Successful
Guinea	Lansana Conte	2003	Successful
Malawi	Bakili Muluzi	2002	Failed
Namibia	Samuel Nujoma	1998	Successful
Nigeria	Olusegun Obasanjo	2006	Failed
Togo	Gnassingbe Eyadema	2005	Successful
Tunisia	Zeni el-Abidine Ben	2002	Successful

Uganda	Yoweri Museveni	2005	Successful
Zambia	Frederick Chiluba	2001	Failed
Burundi	Pierre Nkurunziza	2015	Successful
Senegal	Abdoulaye Wade	2011	Failed
Benin	Mathieu Kerekou	2006	Failed
Niger	Mamadou Tandja	2010	Failed
Burkina Faso	Blaise Compaoré	2014	Failed
Rwanda	Paul Kagame	2015	Successful
Congo-Brazzaville	Denis Sassou-Nguesso	2015	Successful

Source: Various. Updated by the authors

There are a number of concerns about the ability of the normative framework to pre-empt attempts to change the Constitution to permit a third term. In 2010, for instance, AU and ECOWAS injunctions did not prevent President Mamadou Tandja from holding his controversial referendum to extend his term in office (Zounmenou & Matlosa 2012). In fact, Tandja dissolved all state institutions that challenged his bid to hang onto power, including the Parliament, the Supreme Court and the State Council.

A study of this and similar cases reveals that the influence of external actors failed to prevent countries from successfully removing the term limits from their constitutions. The failure was, to a large extent, due to one or a combination of the following factors:

- Sovereignty and the fear of political interference;
- Intransigence or resistance of leaders;
- Lack of coherence and consistency in the positions of the external actors;
- The strategic, economic and political significance of the country; and
- Weak or non-existent organised domestic opposition and civil society organisations.

In cases where the attempts have failed the following factors have been identified as plausible explanatory variables:

- External pressure that has reinforced organised domestic opposition;
- Synergy and coherence among external partners and continental institutions; and
- The commitment and strength of the domestic forces' engagement.

In addition to those broad trends, it is essential to point out some reasons that are specific to particular countries. In Nigeria, Malawi and Zambia it was Parliament that rejected the outgoing presidents' attempts to hang onto power. In Niger, a military coup put an end to President Mamadou Tandja's rule, while in Senegal it was the integrity of the electoral system that sent Aboudoulaye Wade into a disgraceful political retirement. In the cases of Benin and Burkina Faso social activists opposed Mathieu Kerekou's (2006) and Blaise Compaoré's (2015) attempts.

It could also be argued that no significant sanctions followed beyond expressions of concern and condemnation. Moreover, the responses to many cases of unconstitutional changes of government have not always been consistent with the norms and principles set out by external actors. In some cases (Zimbabwe and Kenya) power-sharing arrangements as well as the 'rehabilitation and self-legitimation' of coup makers (Mauritania and Egypt) sent contradictory messages to the citizens. The key question is whether external influence matters at all.

BURKINA FASO: FROM PALACE TO EXILE FOR COMPAORÉ

President Blaise Compaoré came to power in 1987 following a military coup that claimed the life of the revolutionary leader Thomas Sankara. Like many other leaders who stood up against neo-colonialists, Sankara was violently removed from power with the assistance of external actors annoyed by his calls for self-reliance. This was the fourth coup d'état in the history of Burkina in the two decades since independence. The others were in 1980, 1982 and 1983. Since then, Compaoré has consolidated his control over the country through repressive machinery sustained by the presidential guard and a solid local and external patronage network.

The Burkinabe Constitution, adopted in June 1991, has been amended five times (in 1997, 2000, 2002, 2009 and 2012) to remove and return the term limits. Specifically, the 1997 amendment removed the provision limiting the number of presidential terms. This limitation was reintroduced in 2000, when two consecutive five-year terms were permitted once again. Each time this allowed the incumbent to begin a new mandate indefinitely, on the basis that the newly adopted Constitution could not be retroactive. It has become evident to several socio-political actors in Burkina Faso that the main objective of the numerous amendments has been to maintain Compaoré's hold on power.

The debate on the constitutional change that would allow Compaoré to remain in power beyond his last term in 2015 started two years earlier, dividing the political elite of the ruling Congress for Democracy and Progress (Congres pour la démocratie et le progrès – CDP). Ultimately, this led to the resignation

of some key founding figures of the party in January 2014, including Rock Christian Kabore, Salif Diallo and Simon Compaoré, and the creation of the People's Movement for Progress (Mouvement du peuple pour le progress), led by Kabore, one of Compaoré's long-time allies.

COMPLACENCY

Early in the crisis in Burkina Faso Guillaume Soro and Ahmed Bakayoko, respectively Speaker of the National Assembly and Interior Minister of Côte d'Ivoire, were sent there to try to help the various protagonists reach consensus. However, Compaoré's controversial role in the armed rebellion in Côte d'Ivoire between 2002 and 2012 made Burkinabe political actors sceptical about mediation led by politicians from that country.

Many citizens believed that, given Compaoré's extensive network and his destabilising abilities, regional or external forces would have no significant dissuasive influence on his decision to hang onto power. In fact, one of the peculiarities of the socio-political situation in Burkina Faso is the extreme hesitation of major external actors to become involved. So, although the prevailing situation was tense, no significant official and unequivocal position was expressed by any external players. This was quite different from the firm opposition displayed, particularly by the United States, to attempts at constitutional amendments that would allow the current leaders of the Democratic Republic of the Congo and Burundi to remain in power beyond their constitutional mandates. President Compaoré's role in regional (in) stability and the strategic ties he built and consolidated over time – including in the fight against terrorism in the Sahel-Sahara region – make him a privileged partner, particularly of Western countries. These considerations explained, to a large extent, the ambivalent response of the international community to his actions.

FAILED INTERNAL MEDIATION EFFORTS

In order to avoid escalation and an outbreak of violence internal mediation efforts were undertaken under the auspices of Burkina Faso's former president, Jean-Baptiste Ouedraogo, supported by religious and traditional leaders. Three contentious issues were at the heart of the disagreement among political and social actors, including the amendment of Article 37 of the Constitution, which limited the presidential term; the creation of a senate and a proposed referendum to adopt the 'new constitution'. While the mediators proposed the establishment of a 'restructured Senate' and a two-year transition at the end of President Compaoré's term in 2015, opposition leaders rejected the proposals, which, in their view, had no constitutional basis. With the failure of the internal mediation attempts the debate became further polarised and the risk of violence increased.

THE POWER OF SOCIAL MOVEMENTS

In his book entitled *Social Movements and Contentious Politics*, Sydney Tarrow (1998) defined social movements as instruments of contentious politics. He posited that 'contentious politics' or contentious collective actions are initiatives embarked upon by people who lack regular access to institutions, who act in the name of new/or unacceptable claims and who behave in ways that fundamentally challenge the authorities. In other words, contentious collective actions are attempts to redress allegations and perceptions of discrimination, exclusion, oppression, injustice, domination and exploitation, all of which arise from the denial and violation of human rights. The bottom line of contentious politics is the demand for social justice.

The rise of social or youth movements that challenge leaders' bids to hang onto power or, more broadly, against what is perceived as an injustice, has a long history, from colonisation to apartheid and, more recently, authoritarianism. Galvanised by the impact of the so-called Arab Spring and inspired by the iconic leadership of Thomas Sankara, the youth in Burkina Faso decided to take action to defend their Constitution when national and regional mediation efforts failed. Using a concept borrowed from Senegal (*Y'en a marre*, we have had enough), they set up *Le Balai Citoyen* (Citizen Broom), a euphemism for their determination to bar Compaoré from achieving his life presidency ambition.

Le Balai Citoyen has been the channel through which the aspirations of citizens of Burkina Faso for peaceful and orderly power alternation and the preservation of the fragile gains of democracy since 1990 conveyed to political actors. It has filled the vacuum left by traditional political parties, some of which have lost touch with the people.

The session of the National Assembly held in late October 2014 to adopt the amended Constitution ignited a series of popular revolts that overpowered leaders and some units of the army and forced President Compaoré to flee the presidential palace. Parliament came under attack and the angry crowd targeted politicians who supported the fraudulent amendment. The success of the movement brought to the fore the determination of the youth to preserve freedom and accountability in the country.

The first phase of the movement that resulted in the defeat of Compaoré began with the waves of protest sparked by the assassination in 1997 of Norbert Zongo, an investigative journalist, by elements close to the president. The protests served as an opportunity to weaken the repressive machinery that had sustained the regime since 1987 and compelled the government to make concessions in the areas of freedom of speech and association and other democratic principles. The second phase came about in 2011 when elements of the Presidential Guard (Regiment de Sécurité Présidentielle-RSP) mutinied

and forced Compaoré into a short exile in his hometown before advisors convinced him to return to the palace. For the first time the regime found itself attacked from inside and displayed major weaknesses. The soldiers who revolted complained about corruption and ostracism.

The government responded by expelling 700 from the army, many soldiers were killed and others were sent to jail (Zounmenou & Yewadan 2012). Interestingly, the mutiny amplified social anger against the high price of basic commodities, the deterioration in the living standards of the people, corruption, political assassinations and the absence of justice. The third phase emanated from the other two and culminated in the birth of a powerful youth and social movement with its key objective to end Compaoré's rule and rescue the democratisation process.

LESSONS FROM BURKINA FASO

As Hanna Arendt (1990, p 25) wrote,

what makes totalitarianism is the fear that annihilates the people in their being ... what makes democracy is the recognition of the people's rights and values. Citizen, this flexible human being, complying with social structures and rules is also able to become aware of his/her own nature and value when these are recognized and protected or loose them all if the regime does not allow their free expression.

Burkina Faso was the fourth country in West Africa, after Nigeria, Niger and Senegal, to experience a failed attempt by an incumbent to hang on to power. It was assumed that the downfall of Compaoré would dissuade politicians elsewhere from pursuing similar ambitions but this does not seem to have been the case, at least in the DRC, Congo-Brazzaville, Rwanda or Burundi.

Elsewhere on the continent the victorious collective action of the people of Burkina Faso has encouraged those who have been fighting for credible democratisation and believe that alternation in power enshrined in the constitution is essential. As has happened in other African countries where foreign injunctions were ignored, domestic mechanisms have served as a safeguard. In Nigeria in 2006 and in Senegal in 2012 Parliament and the integrity of the electoral process prevented presidents Olusegun Obasanjo and Abdoulaye Wade from extending their terms of office. In Niger it was the army that prevented President Mamadou Tandja from plunging his country into instability.

Young urban African populations may not yet be able to formulate their political, economic and social claims coherently and efficiently but they no longer buy the argument of stability preserved by never-ending presidential

rule and accept the blatant inconsistency between formal democratic systems and political practices (Yabi 2015, p 12).

The key weakness in the external influence on the third-term debate is the absence of coherent sanctions in situations where leaders, regardless of the prohibitive normative framework and threats from external partners, amend their constitutions to consolidate their grip on power.

CONCLUSION

Claude Ake (1996) wrote in the mid-1990s that democracy, like development, is something you do for yourself or it does not happen. He was calling for the genuine commitment of African countries to making the democratisation process work and was insisting on the need for domestic forces to own and promote democratic political transformation in the interest of their citizens. In that sense, domestic forces have the primary responsibility.

There is no doubt that external partners have played a notable role in the process of democratisation in Africa through financial and technical support. In some instances, and combined with receptive domestic forces, such assistance bears fruit. In others, external forces failed to contribute to the transformation of the political process in the name of stability.

In the specific case of the third-term debate it appears that external influence remains largely marginal. It is limited to condemnation, expressions of concern, warnings or threats, but none of these has been dissuasive enough for countries to refrain from amending their constitutions to extend the rule of the incumbent president. It is true that external injunctions and warnings, at times, of suspension of aid, could galvanise the efforts of local forces if they are well organised and committed to the cause of stopping an opportunistic constitutional change. However, the fact that presidents can decide to change the constitution in order to remain in power and succeed in doing so is a sign of the failed institutionalisation of democracy and the overwhelming power of patrimony.

In Burkina Faso the Constitution was amended four times without any major pressure being placed on Blaise Compaoré. His relations with both the US (counter-terrorism) and France (a key ally in the region) shielded him until citizens took the matter into their own hands.

The transition that followed Compaoré's downfall has faced strong challenges in terms of dismantling the regime and its ramifications. The Presidential Guard, which was established in 1987 and has been the backbone of the repressive system, was an impediment to accountability and justice if not to the completion of the transition. The coup d'état staged by elements of that unit in September 2015 against the interim president and the transitional

government is the manifestation of the guard's opposition to any moves that might shed some light on crimes committed under Compaoré's rule.

While one would not dismiss external pressure as irrelevant, this chapter argues that its effectiveness is context-bound and depends, to a large extent, on receptive domestic forces that stand against the confiscation of power by selfish political elites.

Finally, there is a need to highlight the difference between the West African approach to third terms and that of other parts of the continent. West African citizens have, to a large extent, successfully repelled third-term bids in recent times by means of robust institutional action, condemnation by the regional body, ECOWAS, and citizen initiatives. In East Africa, however, there seems to be an understanding among heads of states seeking third terms that the regional body will remain weak and ineffective and will not condemn their bids to remain in power by subverting the constitution. As a result, Uganda, Rwanda and now Burundi are all successfully managing to do so. As a result, in West Africa even a leader as powerful as Obasanjo was unsuccessful, while in East Africa even a leader as weak as Burundi's Pierre Nkurunziza has, despite formidable internal opposition, been able to maintain power.

SECTION TWO

FROM THEORY TO IMPLEMENTATION:
CONSTITUTIONAL REFORM IN PRACTICE

‘UNCONSTITUTIONAL CHANGES OF GOVERNMENTS’ AND LIMITATIONS TO AFRICAN UNION / REGIONAL ECONOMIC COMMUNITIES’ RESPONSES

André Mbata Mangu

ABSTRACT

The term ‘unconstitutional changes of governments’ is not defined clearly enough to encompass all the situations that fall into the category of regimes which exist and function in violation of the principles of constitutionalism and democracy that feature prominently among the objectives of the African Union (AU). The AU’s Constitutive Act and several other of its instruments firmly condemn and reject ‘unconstitutional changes of governments’. However, despite their firm condemnation and total rejection, such changes continue unabated, at least partly because the African Union and its regional economic communities (RECs) have not been efficient and consistent in their responses to this criminal enterprise, which hinders constitutionalism and democracy on the African continent. This chapter considers the African Union’s definition of ‘unconstitutional changes of governments’ and assesses critically the AU and REC’s responses to this phenomenon.

INTRODUCTION

The Constitutive Act of the AU and several other AU instruments firmly condemn and reject ‘unconstitutional changes of governments’. This is also the official position of the eight AU regional economic communities (RECs), the Economic Community of Western African States (ECOWAS), the Economic Community of Central African States (ECCAS), the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC), the Arab Maghreb Union (AMU), the Intergovernmental Authority on Government (IGAD), the Southern African Development Community (SADC) and the Community of Sahel Sub-Saharan States (CEN-SAD). However, despite the firm condemnation and total rejection, ‘unconstitutional changes of governments’ continue and their definition needs to be revisited. The AU and its RECs have not been efficient and consistent in their responses to this

criminal enterprise, which hinders constitutionalism and democracy on our continent.

Against this background, this chapter examines the AU's definition of 'unconstitutional changes of governments' and assesses critically both its responses and those of the RECs to such changes in line with the Declaration on the Framework for an OAU Response Unconstitutional Changes of Governments (Lomé Declaration), the AU Constitutive Act, the African Charter on Democracy, Elections and Governance (ACDEG), the Protocol establishing the Peace and Security Council (PSC), and the Protocol on amendments to the Statute of the African Court of Justice and Human Rights (Malabo Protocol).

DEFINITIONS

At its inception in 1963 the Organization of African Unity (OAU), which preceded the AU, was concerned with the promotion of unity and solidarity among African states and with cooperation, defence of sovereignty, territorial integrity and independence as well as the eradication of colonialism (Article 2 of the OAU Charter).

'Non-interference in the internal affairs of States' (Article 3(2)) was a sacrosanct principle that partly accounted for the proliferation of unconstitutional changes of governments under the OAU. This began to change in the 1980s with the adoption of the African Charter of Human and Peoples' Rights (ACHPR), which enshrines every citizen's 'right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law' (Article 13 (1)).

Although it remains an important AU principle, 'non-interference in internal affairs of States' (Article 4(g) of the AU Constitutive Act) now cohabits with the principle of 'condemnation and rejection of unconstitutional changes of governments' (Article 4 (p)). This is in line with AU objectives and principles such as the 'promotion of democratic principles and institutions, and the promotion and protection of human and peoples' rights' (Article 3 (g) & (h)), 'respect for democratic principles, human rights, the rule of law and good governance' (Article 4 (m)) and 'the right of the Union to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity' (Article 4 (h)).

The AU Constitutive Act was the first of its binding instruments to outlaw unconstitutional changes of governments (Sturman 2011, p 1; Odinkalu 2008, p 1). Odinkalu (2008, p 1) writes that this is 'the only commitment in the Constitutive Act for whose breach a sanction is prescribed, suggesting that

the treaty recognizes it as a limitation to the general principle of domestic jurisdiction and non-interference’.

According to Issaka Souaré (2009, p 2), the Lomé Declaration, the AU Constitutive Act and the ACDEG are the three main instruments that guide the AU’s position on unconstitutional changes of governments.

AU instruments such as the New Partnership for Africa’s Development (Nepad) Declaration on Democracy, Political, Economic and Corporate Governance (Nepad Declaration), the Protocol on the PSC (Heyns & Killander 2006, pp 16-20, pp 293-298), the Protocol on the Statute of the African Court of Justice and Human Rights (ACJHR) and the Malabo Protocol also relate to unconstitutional changes of governments without defining them. However, neither the Malabo Protocol, which establishes a Criminal Law Section in the ACJHR to prosecute and judge, *inter alia*, the perpetrators of unconstitutional changes of governments, nor the Protocol on the Statute of the ACJHR that it purported to amend has yet come into force.

ECOWAS is the only REC with a comprehensive legal framework on the subject. The Protocol on Democracy and Good Governance Supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security of 21 December 2001 (ECOWAS Protocol) provides for ‘constitutional convergence principles’ (Section 1) to be shared by all ECOWAS member states. One of these principles is ‘Zero tolerance for power obtained or maintained by unconstitutional means’.

DECLARATIONS ON THE FRAMEWORK FOR AN AU RESPONSE TO UNCONSTITUTIONAL CHANGES OF GOVERNMENTS

The Lomé Declaration

The Lomé Declaration is not a treaty. Accordingly, it is not, itself, legally binding, but can be considered binding as part of African (regional) customary law. It was adopted against the background of ‘the resurgence of coups d’état in Africa’, its aim being ‘to put an end to this unacceptable development’, which constitutes ‘a very disturbing trend and a serious set back to the on-going process of democratisation in the continent’, ‘coming at a time when our people have committed themselves to respect the rule of law based on peoples’ will expressed through the ballot and not the bullet’ (Heyns & Killander 2006, p 86; Lomé Declaration)

The Lomé Declaration was the first regional instrument to define a response to unconstitutional changes of governments. This framework consisted of the following elements:

- A set of common values and principles for democratic governance;

- A definition of what constitutes an unconstitutional change of government;
- Measures and actions to respond to an unconstitutional change of government; and
- An implementing mechanism.

Heyns & Killander 2006, pp 86-87; Lomé Declaration

According to the Lomé Declaration, four situations constitute ‘unconstitutional changes of governments’. These are:

- Military *coup d’état* against a democratically elected government;
- Intervention by mercenaries to replace a democratically elected government;
- Replacement of democratically elected governments by armed dissident groups and rebel movements; and
- The refusal by an incumbent government to relinquish power to the winning party after free, fair and regular elections.

Heyns & Killander 2006, p 86; Lomé Declaration

The African Charter on Democracy, Elections and Governance

Unlike the Lomé Declaration, the ACDEG is a treaty binding on all states parties. It endorsed previous AU instruments dealing with unconstitutional changes of governments, including the 1999 Algiers Declaration, the Lomé Declaration, and the Protocol relating to the PSC (Preamble to the ACDEG). Its objectives include the promotion of universal values and principles of democracy and the rule of law, human rights and fundamental freedoms, regular, free and fair elections, independence of the judiciary and the prohibition, rejection and condemnation of unconstitutional change of governments (Article 2 (1) - (5)).

Article 23 of the ACDEG defines ‘unconstitutional change of government’ as ‘illegal means of accessing or maintaining power’. These illegal means are:

- Any putsch or *coup d’état* against a democratically elected government;
- Any intervention by mercenaries to replace a democratically elected government;
- Any replacement of a democratically elected government by armed dissidents or rebels;
- Any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections; and
- Any amendment or revision of the constitution or legal instruments,

which is an infringement on the principles of democratic change of government.

The ACDEG definition is much broader than that contained in the Lomé Declaration, which did not include the last category.

PROCEDURE AND SANCTIONS

Between the adoption of the AU Constitutive Act in July 2000 and the Lomé Declaration in September 2015 about 37 unconstitutional changes of governments had taken place in 27 of the 54 member states of the AU.

According to the Lomé Declaration, whenever an unconstitutional change of government takes place the chairman of the OAU and the secretary-general must immediately and publicly condemn such a change and urge a speedy return to constitutional order. The central organ of the OAU should thereafter convene to discuss the situation and to condemn it. The perpetrators should be given up to six months to restore constitutional order and during that period they should be suspended from participating in meetings of the regional body. If after six months they refuse to adhere to the order they may face additional sanctions such as the restriction of government-to-government contacts (Heyns & Killander 2006, pp 87-88).

The Central Organ established in the Lomé Declaration was replaced with the PSC under the ACDEG. The PSC is empowered to impose and to lift sanctions against the perpetrators of unconstitutional changes of governments (Article 7 (1) (g) of the Protocol; Article 24 & 26 of the ACDEG). These sanctions include the immediate suspension of the participation of a state in the activities of the AU (Article 30 of the Constitutive Act; Article 31 of the Protocol on the PSC) and the interdiction of the perpetrators of such changes from participating in subsequent elections or holding any position of responsibility in national politics.

Despite its suspension, a member state is compelled to fulfil its obligations and the AU must maintain diplomatic contacts and take initiatives to restore democracy in the affected country. Moreover, with participation in unconstitutional change of governments considered to be a crime which does not prescribe, perpetrators may be prosecuted and tried by the competent court of the union (Article 25 of the ACDEG) and subjected to additional penalties such as punitive economic measures, bans on travel and the seizure of funds in foreign banks. The AU Assembly may impose sanctions on any member state that is proved to have instigated or supported an unconstitutional change of government in another state (Article 23 of the Constitutive Act), or harbours or gives sanctuary to its perpetrators.

ECOWAS was the only REC to prescribe additional sanctions in line with the Lomé Declaration and its own protocol. In terms of Article 45 of the ECOWAS Protocol such sanctions may include refusal to support candidates presented by the member state concerned for elective posts in international organisations, prevention from hosting ECOWAS meetings and suspension from all ECOWAS decision-making bodies.

ASSESSING THE AU AND RECS' RESPONSES

The responses to unconstitutional changes of governments in Africa have followed a similar path: condemnation, suspension, sanctions, deployment of envoys and the constitution of international consultative groups to redress the problem (Omotola 2011, pp 32 -33). However, they have varied from one case to another depending on particular issues or interests. They have also been inconsistent and ambiguous (Omotola 2011, pp 32 -33; Engel 2010, pp 12-13; Tsegaye 2013; Yihdego 2013).

ECCAS

Neither the AU nor ECCAS has condemned or imposed sanctions in cases of unconstitutional changes of governments in Burundi, Cameroon, Central African Republic (CAR), Chad, Congo, Gabon, Rwanda or the Democratic Republic of Congo (DRC). Pierre Nkurunziza of Burundi, Paul Kagame of Rwanda and Denis Sassou Nguesso of Congo relied on their countries' Constitutional Court or organised controversial referenda to change the Constitution so they could rule indefinitely. The AU and ECCAS also did not condemn presidents Paul Biya of Cameroon, Idriss Derby of Chad, Teodoro Obiang Nguema of Equatorial Guinea or Omar Bongo of Gabon, who used their parliaments to amend their constitutions so they could remain in power.

Unlike ECOWAS, which condemned the fact that President Ngnassingbe Eyadema was succeeded by his son, Faure Eyadema, in violation of the Constitution of Togo, the AU and ECCAS tacitly approved the monarchist succession of assassinated President Laurent-Désiré Kabila by his son Joseph Kabila in the DRC in 2001. They also took note of François Bozize's coup d'état against President Ange Patasse in CAR in March 2003 and recognised his government after he participated in and, not surprisingly, won the presidential election held by his unconstitutional government.

However, when Michel Djotodia led the Seleka rebellion that overthrew President Bozize's government in March 2013, both bodies condemned the move as a coup d'état and CAR was suspended from the AU. Sanctions were imposed on Seleka leaders and AU member states were urged not to cooperate with their unconstitutional government. Due to the influential role of Chad's President Idriss Deby, who was allegedly behind the coup, ECCAS did not

enforce any sanctions against CAR, which continued to participate in ECCAS meetings. ECCAS also approved Michel Djotodia's appointment as the interim president for a period of 18 months.

The AU and RECs' responses to the unconstitutional change of government in Burundi, where President Nkurunziza manipulated the Constitutional Court, which allowed him to run for a third term, were also inconsistent and contradictory. Neither ECCAS nor its member states condemned Nkurunziza, indeed, they welcomed his contested re-election. This explains why, after his successful coup, Nkurunziza sent one of his close advisors to thank President Kabila for his support and that of his colleagues in ECCAS. The AU and EAS, which had earlier opposed Nkurunziza's third term as a violation of the Arusha Agreement that founded the Burundian Constitution, ended up accepting his standing for a third term as a *fait accompli* and EAS sent an electoral observation mission to Burundi.

Despite the finding that the July 2015 elections were not free and fair EAS did not apply any sanction but rather welcomed Nkurunziza's election. It did so after President Yoweri Museveni of Uganda had taken over from Jakaya Kikwete of Tanzania as the chair of EAS. President Museveni, who had criticised President Daniel arap Moi of Kenya for clinging to power and who had earlier vowed to respect the presidential term limit set by the Ugandan Constitution, was, ironically, on 30 September 2005, the first leader in the region to manipulate Parliament and have the presidential term limit removed by constitutional amendment.

IGAD

Like the AU and EAS, IGAD appears to be unconcerned about the persistence of authoritarian rule in Eastern African countries such as Eritrea and Sudan, where leaders seem to be born to rule forever and where the prospects for constitutionalism and democracy remain bleak.

In another case, despite its official name of 'the People's Democratic Republic', Ethiopia has not as yet totally broken with its history of a highly centralised government, but neither the AU, which is headquartered in Addis Ababa, nor IGAD has ever demanded that the government of this EAS country take constitutionalism and democracy more seriously. The People's Democratic Republic of Ethiopia remains a *de facto* authoritarian regime with the concentration of power in the hands of the Ethiopian Peoples' Revolutionary Democratic Front.

THE ARAB MAGHREB UNION (UMA) AND CEN-SAD

The response of the UMA and CEN-SAD to unconstitutional changes of governments during the 'Arab Spring' in North Africa, was also disappointing.

Unlike the AU, which approved the Arab revolutions by formally recognising their leaders and welcoming them to its meetings, the UMA and CEN-SAD continued to demonstrate solidarity with the authoritarian governments of presidents Bouteflika of Algeria, Mubarak of Egypt, Gaddafi of Libya and Ben Ali of Tunisia through a lack of collective response or sanctions.

The organisations also did not condemn the coups d'état perpetrated by General Mohamed Ould Abdel Aziz in Mauritania in 2005 and 2009. On the contrary, they supported Abdel Aziz, who contested and won the election of 2014, in violation of the Lomé Declaration and the ACDEG. Thus Abdel Aziz was able to escape sanctions for his unconstitutional seizure of power by legitimising his hold on it through elections (Omotola 2011, p 22). Less than two months after his second coup the AU appointed Abdel Aziz to head a panel consisting of presidents Jacob Zuma (South Africa), Idriss Deby (Chad), Blaise Compaoré (Burkina Faso) and Jakaya Kikwete (Tanzania) to mediate in the Ivorian crisis between Laurent Gbagbo and Alassane Ouattara.

The UMA and CEN-SAD also kept quiet after the military, led by General Abdel Fattah el-Sisi, took advantage of popular unrest to seize power and oust democratically elected President Mohamed Morsi in Egypt. It should be stressed that a coup remains a coup. Whether one likes the Muslim Brotherhood or not, President Morsi's ousting was not merely the outcome of the Arab revolution, which ended President Hosni Mubarak's authoritarian rule (Mengistu 2013), but a military coup (Yihdego 2013).

The PSC rightly condemned the ousting of Morsi and Egypt was suspended. Like General Abdel Aziz, el-Sisi converted himself into a civilian who ran for and was elected president in June 2014. Despite the fact that this was a violation of the Lomé Declaration the ACDEG and the PSC Protocol, the PSC recommended the lifting of sanctions and the AU recognised el-Sisi's government.

SADC

SADC's practice has tended to be to promote peace through power-sharing agreements instead of sanctioning the perpetrators of unconstitutional changes of governments, as required by the AU Constitutive Act and the ACDEG. South Africa, a constitutional and democratic country which suffered decades of apartheid rule and was expected to promote constitutionalism and democracy, was unfortunately behind this strategy, which was applied in AU member states such as Kenya, Zimbabwe and Madagascar.

In Kenya and Zimbabwe this practice allowed incumbents Mwai Kibaki and Robert Mugabe to retain the presidency while opposition leaders Raila Odinga (Kenya) and Morgan Tsvangirai (Zimbabwe) were obliged to accept the position of prime minister. These cases set bad precedents that threatened to reverse the gains electoral democracy had made in Africa.

Incumbents can now assume that if they lose elections, violence and a refusal to step down will facilitate the formation of power-sharing agreements through which they will retain most of their powers (Tendi 2010, p 1; Omotola 2011, p 34).

According to Omotola, the failure of the AU to apply its rules decisively in the Kenyan and Zimbabwean cases indirectly constitutes an open invitation to other incumbents who lose competitive elections not to concede victory to the winners, as was the case in Côte d'Ivoire (Omotola 2011, p 32).

In Madagascar the AU and SADC engaged in some sort of dialogue with President Andry Rajoelina, who came to power by unconstitutional means, instead of taking punitive measures against him and refusing to recognise his government. The two bodies have also done little to promote constitutionalism and democracy in member states like Swaziland and Angola.

Swaziland is, arguably, the only remaining absolute monarchy in Africa, with all the powers vested in the king, and in Angola President José Eduardo dos Santos, who has been in power since 10 September 1979, seems to have turned into a *de facto* president for life like his counterparts in Algeria, Cameroon, Congo, Chad, Equatorial Guinea, Uganda, Rwanda and Zimbabwe.

Attempted unconstitutional changes of governments in SADC countries such as Zambia and Malawi failed, not because of the intervention of SADC and the AU but thanks to the important role played by the opposition parties and mostly by the people who took to the streets to manifest their opposition.

ECOWAS

Of all the RECs, ECOWAS seems to be the most effective in responding to unconstitutional changes of government. Not only did it adopt the most comprehensive legal framework in relation to the problem, it also succeeded in compelling the perpetrators of such unconstitutional changes to restore the constitutional and democratic order. Examples of the use of this tactic are Mali, Niger, Guinea and Burkina Faso, where military rulers who seized power were forced by combined internal and international pressure, including that of ECOWAS, to re-establish civilian political order.

In the case of Côte d'Ivoire, where a crisis unfolded after the 2008 elections, a lack of decisiveness and poor coordination resulted in the AU and ECOWAS being overtaken by UN-backed French peacekeepers who forcibly intervened to remove Laurent Gbagbo, who refused to concede defeat to opposition leader Alassane Ouattara. On the other hand, both the AU and ECOWAS have been indifferent to the persistent violation of the principles of constitutionalism and democracy in the Gambia, which hosts the African Commission on Human and Peoples' Rights and has been under authoritarian rule since President Yaya Jammeh seized power more than two decades ago.

THE AU DEFINITION OF UNCONSTITUTIONAL CHANGES OF GOVERNMENTS

The AU definition entrenched in the ACDEG, which complemented the Lomé Declaration, raises a number of problems and contains several shortcomings:

- It puts more emphasis on elections than on any other element of democracy. Four of the five cases of unconstitutional changes of government cited in the ACDEG refer to changes of ‘democratically elected governments’ and only one case to the violation of the rules of the game. It is therefore more about ‘undemocratic change’ than ‘unconstitutional change’.
- It is based on a narrow, minimalistic, formal or procedural definition of constitutionalism or democracy and does not comply fully with the ACDEG.
- It should have included cases of continuation of the exercise of power in contexts in which there is no independent judiciary to uphold the constitution and the rule of law, where the people are deprived of their rights and the opposition cannot operate freely. Preservation of power based on a biased ruling of a Constitutional Court or a rigged referendum, as was recently the case in Burundi, Congo and Rwanda, would also qualify as an unconstitutional change of government.
- It should exclude changes of government through popular revolution against authoritarian rule such as the Arab uprisings in Tunisia, Libya, Egypt or ‘The Citizen’s Broom (*Le Balai citoyen*)’ in Burkina Faso. This calls for recognition of the citizens’ right to oppose any individual or group of individuals who seize power by unconstitutional means such as force, vote-rigging or constitutional manipulation and/or exercises it in violation of a legitimate constitution. Examples are Article 66 of the 1990 Constitution of the Republic of Benin, which provides, *inter alia*, that it is the most sacred right and duty of every citizen of Benin to disobey and organise to defeat any illegitimate authority and Article 64 of the DRC’s 1996 Constitution, which states that every Congolese citizen has the duty to oppose anyone or any group of individuals who seize power and exercise it in violation of the Constitution.
- It could have included a provision on presidential term limits, as already provided for in a number of African constitutions, and a total ban on constitutional changes by incumbent leaders during their last term of office.

CONCLUSION

The number of unconstitutional changes of government in Africa has declined since the AU replaced the OAU in 2000. However, the coup d’état perpetrated

in Burkina Faso in September 2015 was a clear reminder that the time has not yet come to celebrate. On the other hand, 'civilian' and 'constitutional coups d'état', like those recently perpetrated in Burundi, Congo and Rwanda, where the people voted 'without choosing' (Ake 1996, p 137) demonstrate that Africa still has a long way to go in combating the problem. These changes have serious and negative implications not only for democratic consolidation (Omotola 2011, pp 35-39) but also for economic development, peace, national reconciliation, the rule of law and human rights.

However, in Africa, as elsewhere, there is no alternative to constitutionalism and democracy and the continent must move away from the current prevailing situation of 'constitutions without constitutionalism' (Grey 1979, p 189; Harbeson 1986, pp 7-15; Mojekwu 1979, p 164; Okoth-Ogendo 1991, pp 3-25; Olukoshi 1999, pp 453 -456; Rosenfeld 1994, pp 3, 14; Schochet 1979, p 11; Shivji 1991, p 254) and 'elections without democracy' (Ake 1996, pp 130, 137; Bratton & Posner 1999, pp 378-389; Mkandawire 1999, pp 119 – 135; Nzongola-Ntalaja 1997, p 19) and unconstitutional changes of governments which should be condemned unreservedly and eradicated.

Examining the AU definition of 'unconstitutional changes of governments' and assessing the AU and its RECs' responses to this 'African political cancer', this chapter has argued that both leave much to be desired as they do not correspond to the broad approach to constitutionalism adopted in the Lomé Declaration and the ACDEG.

It has also suggested ways in which they could be improved. The ACDEG, as the most important regional instrument to promote constitutionalism and democracy, should be ratified, enforced and popularised across the continent. It is disappointing that fewer than half of the 54 AU member states have so far ratified the ACEDG. This sends the message that despite the numerous statements or declarations generally made for public and foreign consumption, many African leaders are not serious about constitutionalism and democracy.

Also disappointing is the fact that the African Peer Review Mechanism (APRM), which was established as a voluntary mechanism to ensure that policies and practices of participating states conform to the agreed political, economic and governance values, codes and standards contained in the NEPAD Declaration (Hyens & Killander, 2006, pp 338-354), has lost momentum. Little has been achieved through this mechanism, which was presented as an important and even revolutionary home-grown African governance and accountability tool and raised so many expectations about the future of constitutionalism and democracy on the continent.

Through their competent organs the AU and its RECs can buttress their responses to unconstitutional changes of government and further contribute to promoting constitutionalism and democracy in Africa by improving the

existing legal and institutional framework, by developing the benchmarks for implementation of states parties' commitments and by regularly monitoring their compliance.

They should work in a coordinated and harmonious manner and put in place an early warning mechanism instead of waiting until the evil has occurred. Unfortunately, the 2006 Framework for the Operationalization of the Continental Early Warning System provided by the Protocol on the PSC (Article 12) does not appear to be working and should therefore be re-examined to make it more effective.

A 'zero-tolerance' approach to unconstitutional changes of government should be enforced and be respected by the AU, the RECs and the international community, which continues to intervene in African affairs (very often adopting a hypocritical attitude by supporting some unconstitutional changes and their perpetrators while officially denouncing them).

The AU, the RECs and international frameworks are important, but ultimately it is through the commitment of the African people that constitutionalism can be upheld. As experience has shown in some consolidated democracies in Asia, America, Europe and even in Africa, the quality of the political leadership and its own commitment to the democratic rule of law cannot be overlooked.

THE IMPACT OF REGIONAL AND SUB-REGIONAL NORMS AND STANDARDS ON DEMOCRATIC GOVERNANCE IN PROMOTING CONSTITUTIONALISM IN AFRICA

Nokukhanya Ntuli

ABSTRACT

The effectiveness of regional and sub-regional organisations in promoting constitutionalism in Africa is often called into question. Yet, when the history of the formation of the Organization of African Unity (OAU) and its evolution into the African Union is explained the significant role played by these organisations becomes clear. Although there have been challenges, normative and institutional frameworks have been implemented to address the deficiencies in constitutionalism, including serious human rights violations. Thus, Africa in 2016 was far more conscious of, and compliant with, the principles of constitutionalism than it was in the 1960s after independence. There is no doubt that democratic governance has improved over the years and regional and sub-regional organisations have contributed to these improvements. Nonetheless, there is still considerable work to be done if the continent is, as Agenda 2063 states, to 'create the Africa we want'. The fact that the destination has not yet been reached does not mean that the journey has been a failure.

INTRODUCTION

Constitutionalism is not just about putting in place well-written constitutions but about living the values enshrined in those constitutions. The constitution provides a road map for governance by creating an enabling environment in which democracy, human rights and the rule of law can thrive. It outlines how a country should be governed and how the citizens elect those who will govern them. It gives clear powers to the government, to enable it to govern effectively, while, at the same time, limiting its powers in order to guard against arbitrary rule. It also creates institutions that hold government accountable and safeguards constitutional values, while conferring rights and obligations on both the citizens and the government (Fombad 2011).

Promoting constitutionalism is primarily the responsibility of governments and their citizens. However, regional and sub-regional organisations

(the Organization of African Unity/African Union and regional economic communities – RECs) have played a significant role in articulating and promoting norms and standard for democratic governance which promote constitutionalism in member states. Although the results have not always reflected the aspirations, the contribution of regional and sub-regional organisations in promoting constitutionalism has been invaluable.

This chapter examines the role of the OAU in promoting constitutionalism. It looks at the challenges the organisation experienced, which gave rise to the formation of the AU. It then goes on to outline the AU's normative frameworks on democratic governance, which promotes constitutionalism, and looks at the impact of these normative frameworks on member states' willingness to promote constitutionalism on the continent. Finally, it highlights some of the challenges facing the AU in promoting constitutionalism.

THE OAU

After enduring years of colonial rule and apartheid, which, by their very nature, were undemocratic and failed to adhere to the values of constitutionalism, independent African countries formed the Organization of African Unity in 1963 and began the journey of promoting democratic governance in Africa by proclaiming their commitment to democracy, good governance and respect for human rights (Mbodenyi & Ojienda 2013). It was at this point that the values of constitutionalism and democracy began to emerge on the continent. The main objective of the OAU was decolonisation and liberation from apartheid, which was achieved when apartheid ended in Namibia in 1990 and in South Africa in 1994.

Yet, in the process of achieving decolonisation and despite the desire for democratic governance, the OAU failed to address adequately violations of constitutionalism in its member states. While the organisation complained about human rights violations in apartheid South Africa it failed to condemn and address violations of human rights and undemocratic practices in other African states (Warburton 2005). Some of the most brutal human rights violations, such as mass murders, genocide and extrajudicial killings took place on the continent under the leadership of Francisco Macias Nguema of Equatorial Guinea, Jean-Bedel Bokassa of the Central African Republic and Idi Dada Amin of Uganda (Fombad 2006).

Between 1957 and 2001, 65% of the countries in sub-Saharan Africa experienced at least one military coup d'état and the intervention of mercenaries and 37% suffered multiple coups (Eghweree 2014). In some countries emerging opposition parties were eradicated, there was an increased in military rule, constitutions were amended to give presidents more power, there was a disregard for the principle of separation of powers (Lodge 2015)

and dictatorial and oppressive systems inherited from colonial times were perpetuated (Fombad 2006, p 10).

Meanwhile, the OAU's stance on state sovereignty and non-interference in the internal affairs of another state left the organisation with no mandate to intervene when member states violated the principles of democracy and constitutionalism. This resulted in the organisation being perceived as an old boys' club, with leaders who were more interested in amassing and retaining power and protecting each other, regardless of the circumstances, under the guise of state sovereignty and the doctrine of non-interference (Hodge 2002).

The state of affairs on the continent forced the OAU to review its strategy (Hodge 2002, p 220). As early as 1977 it adopted a Convention on the Elimination of Mercenaries in Africa, to condemn and criminalise the numerous coups that were taking place. Countries affected were Ghana, Seychelles, Comoros and Equatorial Guinea (Anyangwe 2011). In 1979 a 'Committee for Review of the OAU Charter' was formed to address the lack of constitutionalism and democracy on the continent.

It was recognised that the charter had to be amended to create structures that met the needs of the changing world and addressed the serious human rights violations taking place on the continent. In July 1979 the OAU Assembly called for a draft of the African Charter on Human and Peoples' Rights, for the protection and promotion of rights. This resulted in the creation of several organs tasked with promoting human rights, including the African Commission on Human and Peoples' Rights, the African Court on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child.

The work of the OAU was reviewed throughout the 1990s to determine whether the organisation was meeting its aspirations and it began taking a stronger position on military coups. In July 1996 the coup in Burundi was condemned and a regional summit resolved to exert maximum pressure, including economic sanctions, against illegal governments. Similarly, in 1997, the coup in Sierra Leone was condemned and at the Harare Summit in 1997 the OAU requested the international community not to recognise the military regime (Vandeginste 2011). At the 35th Algiers Summit, in 1999, the OAU took a decision to bar from attending future summits African leaders who came to power unconstitutionally. The Algiers Declaration rejected unconstitutional changes of government and when, in December 1999, there was a coup in Côte d'Ivoire and Robert Guei overthrew President Henri Konan Bédié, the OAU barred Guei from attending the summit.

The result of these initiatives was that member states begin to take corrective action. Between the late 1980s and the 1990s there was a wave of democratisation on the continent, termed the 'third wave', (Fombad & Murray

2010, p 9). This marked a transition from non-democratic to democratic regimes and with it came amendments to constitutions entrenching the culture of constitutionalism. There was also a realisation that the OAU needed internal transformation to reflect the challenges of a changing world, accelerate integration and address the multifaceted social, economic and political problems facing the continent. For these reasons the OAU itself experienced a 'third wave', with the adoption of the Constitutive Act of the African Union in Lomé, Togo, in 2000, which saw the OAU transform into the African Union (AU).

AU NORMATIVE FRAMEWORKS

The AU Constitutive Act of 2002 focused on democratic governance and the advancement of constitutionalism through the protection and promotion of human and peoples' rights; the need to consolidate democratic institutions and culture and ensure popular participation and good governance (Article 3(g) & (h)). The Act (Art 4 (m), (n) & (o)) also rejected and condemned unconstitutional changes of government and called for the suspension of governments that come into power by unconstitutional means. There was a paradigm shift from the principle of non-interference (Art 4(g)) to non-indifference, which enabled the AU to intervene in the affairs of member states in certain circumstances, namely, war crimes, genocide and crimes against humanity (Art 4(h)).

Unconstitutional changes of government were further defined in the Lomé Declaration (AHG/Decl 5 (XXXVI) of 2000), which called for immediate public condemnation of military coups and a speedy return to constitutional order where coups had taken place. In 2002 the Protocol Relating to the Establishment of the Peace and Security Council was adopted, giving the council powers to institute sanctions where there are unconstitutional changes of government (Art 7). The protocol expressed the frustration of heads of states with unconstitutional changes of government and identified the lack of strong institutions of democracy and the failure to adhere to human rights and the rule of law as a barrier to reducing conflict on the continent.

The adoption of these frameworks did not automatically result in improved constitutionalism in member states. Military coups continued despite the efforts of the AU to condemn them, and coups, human rights violations and disregard for the rule of law also continued. However, the AU was now better placed to condemn and sanction acts of unconstitutional changes of government through internal mechanisms.

In 2001 Marc Ravalomanana of Madagascar declared himself president after refusing to participate in a run-off poll. The AU condemned this and the country was suspended and barred from attending the Durban summit in 2002. In 2003 François Bozize of the Central African Republic overthrew the

government of President Ange-Felix Patassé. The AU condemned the coup, imposed sanctions and demanded a return to constitutional order. Elections were held in 2005 and were won by Bozize, after which the sanctions were lifted.

In 2003 Major Álvaro Pereira seized power in São Tomé and Príncipe. This move, too, was condemned by the AU and a mediation process commenced. Mediation was successful and constitutional order was restored. Other examples of unconstitutional changes of government which were condemned by the AU include those in Guinea Bissau (2003), Togo and Mauritania (2005), Egypt (2011), Burkina Faso (2015) and the Central Africa Republic (2013).

The focus was not only on unconstitutional changes of government. Between 2000 and 2014 myriad institutional and normative frameworks on democratic governance were adopted. The Constitutive Act created organs to promote democratic governance and the rule of law, including the:

- Pan African Parliament (PAP), whose mandates includes the promotion of good governance and rule of law; and
- The Economic, Social and Cultural Council (ECOSOC), an advisory body to the AU composed of civil society organisations.

In 2002 the New Partnership for Africa's Development (Nepad) was adopted to promote and protect democracy and human rights and to develop clear standards of accountability, transparency and participative governance at national and subnational levels (the Declaration on Democracy, Political, Economic and Corporate Governance). This resulted in the establishment in 2003 of the African Peer Review Mechanism (APRM), a voluntary, self-monitoring mechanism enabling participating states to monitor governance compliance.

The APRM, which monitors four thematic areas: democracy and political governance, economic governance and management, corporate governance and socio-economic development, represents a unique commitment by the African continent to constitutional law, international law and human rights law, where countries that observe the principles of state sovereignty willingly submit their governance processes to scrutiny by their peers (Mangu 2007).

In 2003 the AU adopted the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), which requires member states to combat all forms of discrimination and harmful cultural and traditional practices against women. This charter together with the African Youth Charter, adopted in 2006, seeks greater inclusion for marginalised groups such as women and youth in promoting constitutionalism.

The AU also adopted the Convention on Preventing and Combating Corruption (AUCPCC) in 2003, which led to the establishment of AU Advisory Board on Corruption in 2006. The board encourages member states to adopt measures that prevent, detect, punish and eradicate corruption and related offences in the public and private sectors.

The Justice Architecture was consolidated to promote the rule of law by providing in the Constitutive Act for the establishment of an African Court of Justice whose mandate was to hear cases relating to interpretation and/or application of the Constitutive Act as well as any treaties adopted within the AU framework. In 2003 the African Court of Justice was established. However, to avoid a proliferation of justice institutions, the AU adopted a protocol in 2008 which merged the African Court of Justice with the African Court on Human and Peoples' Rights, creating the African Court of Justice and Human Rights. The court is yet to start its work.

Perhaps the most comprehensive AU framework on constitutionalism and democratic governance thus far is the African Charter for Democracy, Elections and Governance (ACDEG), which was adopted in 2007. It covers issues of free and fair elections, promotion of democracy, human rights, good governance, rule of law, independence of the judiciary and unconstitutional changes of government. The objectives of the charter are contained in Article 2, which sets out the values of constitutionalism, emphasising respect for and the supremacy of the constitution and constitutional order in the political arrangements of the states parties.

With the above frameworks in place, in 2011 the AU decided that, to avoid duplication of efforts and ensure effectiveness, a Pan African Architecture for Governance should be established to harmonise and coordinate the roles of the various institutional frameworks. The African Governance Architecture (AGA) was created as the overall political and institutional framework, aimed at connecting, empowering and building capacity and appropriate responses to the challenges of governance in Africa.

Central to the institutional framework of the AGA is a platform of AU organs and institutions with its formal mandate to promote and sustain democracy, governance and human rights on the continent. The AGA is divided into five clusters: democracy; governance, human rights and transitional justice; constitutionalism and the rule of law and humanitarian affairs, which work to strengthen governance and human rights and consolidate democracy through initiatives such as election monitoring and building the capacity of institutions of democracy. The AGA is constantly engaged in ensuring that the member states implement the normative frameworks and take steps to entrench the values of constitutionalism in their national laws and practices.

The AGA also complements the African Peace and Security Architecture (APSA), whose mandate is to address the peace and security agenda in Africa. Together they acknowledge that ‘democratic governance and peace and security, are related and that without democracy, there cannot be sustainable peace. Without peace, democracy is rooted on a weak foundation’ (Mangu 2007).

What impact have these bodies had on the willingness of member states to promote democratic governance and constitutionalism? Research suggests that the AU’s efforts are slowly starting to yield results. Although military coups continue to take place the numbers have declined significantly. Table 1 illustrates the number of coups (successful and attempted) per sub-region, between the 1960s and 2010.

Table 1

Region	1960-1969	1970 -1989	1990 -2010
West Africa	19	49	36
Central Africa	8	14	13
Southern Africa	10	26	12
East Africa	0	10	6
Total	31	99	67

Source: Ben Barka & Ncube 2012

The AU’s efforts have not only resulted in a decline in the number of military coups but also in an improvement in democratic governance on the continent. According to data from the Polity IV index, which has been in existence and collecting data about constitutional democracy since the 1960s, in 1991 there were approximately seven democracies in Africa. This number rose to 16 in 2012 (Burchard 2014). The Polity IV index measures the presence of specific procedures for electoral contestation, the competitiveness of political participation, constraints on executive power and the openness of executive recruitment (Burchard 2014). The index shows that there has been a steady improvement in democracy and constitutionalism on the continent and that the most significant improvements took place between 2000 and 2014 (Burchard 2014).

The Ibrahim Index of African Governance measures democratic gains and assesses the state of governance on the continent. The index uses 100 different measures, organised in terms of four indicators of governance: safety and the rule of law, human development, sustainable economic opportunity and

participation and human rights (Burchard 2014). In 2000 the average score for the continent was 46.6/100. This rose to 51.5/100 in 2013.

Although the progress may seem slow it indicates an improvement in democratic governance. Various member states of the AU have made constitutional amendments to strengthen the provision of human rights and bolster judicial independence and the principle of separation of powers and, in some instances, to limit or reduce presidential terms.

However, the progress is by no means uniform. Some countries perform better than others. The indexes show that Southern Africa performed the best, while Central Africa performed the worst (Burchard 2014, p 10). Mauritius, Botswana and South Africa achieved high scores while Madagascar, Libya and the Central African Republic, all of which experienced at least one coup in the period covered by the survey, had the worst governance record (Burchard 2014, p 10). Perhaps this emphasises the importance of the AGA / APSA collaboration and shows that democratic governance and peace and security are related and the one is not sustainable without the other.

THE REGIONAL ECONOMIC COMMUNITIES

The regional economic communities (RECs) also play a significant role in promoting peace and security as well as democracy and the rule of law on the continent. RECs are the building blocks of the African Union and, with the exception of the Arab Maghreb Union (UMA), have been established and active since the days of the OAU, to promote economic integration on the continent.¹ It soon became apparent, however, that economic integration would not be possible without political stability and governance. As a result, the RECs have been involved not only in issues of integration but also with peace and security and promoting constitutional rule and development.

The Economic Community of West African States (ECOWAS) put in place a Protocol on Democracy and Good Governance in December 2001, which is in line with the Constitutive Act of the African Union, strongly condemns unconstitutional changes of government and promotes the use of free and fair elections for accession to power (Omotola 2011).

The Southern African Development Community (SADC) established the Organ on Politics, Defence and Security (OPDS) in 1996, its objective being to:

¹ The seven RECs are the: Common Market for Eastern and Southern Africa (COMESA), Community of Sahel-Saharan States (CEN-SAD), East African Community (EAC), Economic Community of Central African States (ECCAS), Economic Community of West African States (ECOWAS), Intergovernmental Authority on Development (IGAD) and Southern African Development Community (SADC).

promote the development of democratic institutions and practices within the territories of State Parties and encourage the observance of universal human rights as provided for in the Charters and Conventions of the Organisations of the African Union and United Nations respectively.

Matlosa 2004

OPDS developed the SADC Indicative Strategic Plan for the Organ (SIPO), whose focus is building democratic institutions and promoting human rights in the region, with a strong emphasis on elections and electoral systems.

The Inter-Governmental Authority on Development (IGAD) and the East Africa Community (EAC) have also contributed significantly to peace and security and democratic governance in the Horn of Africa and East Africa respectively. The EAC established the Forum of National Electoral Commissions, which set out common standards and principles to determine the credibility of any electoral process and the legitimacy of an electoral outcome. These principles are important in enhancing democratic values, the rule of law and good governance.

The AU often has to rely on the RECs to handle issues of peace and security in the regions because of their proximity to the conflict. As a result, the peace and security architectures of the RECs are well developed and are aligned with and complement that of the AU. These architectures have, in recent times, evolved to deal with peace and security issues as well as human rights, democracy and the rule of law.

SHORTCOMINGS OF THE AU

There is abundant evidence of the AU's success, but the organisation is not without its shortcomings. It has been criticised as being an 'ineffective talk shop of tyrants, an ineffectual lumbering bureaucracy that worries more about per diem than it does about Africa's most pressing political problems' (Allison 2014). A critical look at some of the challenges it faces indicates that a considerable amount of work is still required if it is to achieve its aspirations.

Financial resources

The lack of sufficient contributions from member states to fund the AU's programmes and operational activities poses a serious challenge to the organisation's ability to deliver. For this reason there is heavy reliance on donor funding, which comes with its own challenges of influence and advancing conflicting interests. However, the AU is aware of this challenge and at the 27th AU Summit held in Kigali, Rwanda, on 18 July 2016, it decided to introduce, starting in 2017, a 0.2% levy on all goods imported into the continent apart from those that are intended for development programmes or are a national

priority, with the proceeds to be paid by member states to the AU (www.au.int/en/pressreleases/31218/summary-27th-au-summit-decisions-tax-imports-finance-au-establish-protocol-issue; www.au.int/en/pressreleases/31387/ministers-finance-agree-roadmap-implementing-02-import-levy-fund-au).

This will assist in funding programmes and the operations budget. At the summit President Paul Kagame of Rwanda was chosen to lead the institutional reform of the union and focus on the effective and efficient use of resources and business-oriented delivery.

Domestication of normative frameworks

While some member states have adopted various normative frameworks for democratic governance, many have failed to ratify them or have ratified them and failed to domesticate and implement them within their own countries. In 2007 the ACDEG was adopted, but it only came into force five years later, in 2012, after the requisite 15 member states ratified it. To date, only 24 of the 54 member states have ratified the charter, bringing into question their commitment to promoting constitutionalism.

It has been argued that ratification is not synonymous with implementation and therefore the focus should rather be on whether member states live up to the values of the charter by implementing them. This is true in the case of Southern African, where only four of 15 member states (Lesotho, South Africa, Malawi and Zambia) have ratified the charter. However, this region has achieved the highest scores in the abovementioned democracy indexes. Of the three countries achieving the highest score – Mauritius (81.7), Botswana (76.2) and South Africa (73.3) – only South Africa has ratified the charter.

Although the viewpoint above may be correct, the aim of formulating and adopting normative frameworks for democratic governance is to create common guidelines and standards for member states to implement. Ratification also indicates a member state's intention to be bound by the charter. Therefore, ratification is the starting point for demonstrating commitment to the values of the normative frameworks.

Changing political climate

The AU faces a continuously changing political climate, which poses challenges, particularly in cases of unconstitutional changes of government. Situations that are not addressed in the ACDEG, such as popular uprisings, show up a possible loophole in the definition of unconstitutional changes. Events in Egypt and Burkina Faso highlighted these gaps, which forced the Peace and Security Council at its 432nd meeting in April 2014 to interrogate whether popular uprisings are compatible with the AU norms on unconstitutional changes of government (<http://www.peaceau.org/en/>

article/press-statement-of-the-432nd-meeting-on-unconstitutional-changes-of-governments-and-popular-uprisings-in-africa#sthash.oz133DUx.dpuf; PSC-COMM-442-Egypt-17-07-2014 (v)).

The PSC agreed that a sub-committee should be established to conduct a review of and consolidate existing normative frameworks on how to respond to unconstitutional changes of government and popular uprisings. It further sought to refine the definition of unconstitutional changes of government, notably that relating to popular uprisings against oppressive systems, taking into account all relevant parameters. Clarity is required on this issue because popular uprisings are becoming a favoured way for citizens to express their dissatisfaction with governments.

Inconsistency

The AU is often criticised for its lack of consistency in applying its own normative frameworks, with complaints abounding that the member states are not treated equally (Omotola 2011). The PSC acknowledged this at its meeting in April 2014 when it noted that the AU's credibility has been called into question because of the flexible and inconsistent interpretation and application of some of its instruments. The statement related to the different treatment of the 'Arab Spring' countries. For example, while the PSC applauded the uprisings in Tunisia and Egypt for their commitment to democratic governance and human rights, the situation in Libya caused internal divisions among member states because some were opposed to airstrikes by the North Atlantic Treaty Organisation to protect civilians.

Another issue is whether coalition governments are in line with the provisions of the ACDEG, particularly where there are suggestions that one party, during an election process, has manipulated the results in its favour. The question that arises is whether a party that has manipulated election results should form part of the coalition government when a conflict arises as a result of the electoral outcome. Art 23(4) of the ACDEG classifies manipulation to stay in power as an unconstitutional change of government and Art 25(4) prohibits a party involved in an electoral dispute from holding any position of responsibility.

However, during negotiations to resolve a conflict, the offending party is sometimes urged to participate in a coalition government. Recent examples include Zimbabwe and Kenya, where election results were disputed and the two main parties claiming victory were forced into coalition/national 'unity' governments (Souaré 2009).

Reversal of gains

At times it appears that the gains made at regional, sub-regional and national level are being eroded. Recently the mandate of the SADC tribunal was

amended to prevent individuals from bringing matters, including government abuses of human rights, before the tribunal. Civil society in the region views this as reversing the gains that have been made in promoting the rule of law and constitutionalism. Rwanda also recently announced that it would no longer allow individuals and civil society organisation to file cases against it in the African Court on Human and Peoples' Rights (www.minijust.gov.rw/fileadmin/Documents/Photo_News_2016/Clarification2.pdf).

CONTROVERSIAL DECISIONS

The AU Assembly has taken decisions that seem to go against the grain of constitutionalism. The Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human and Rights, adopted in Malabo, Equatorial Guinea, on 27 June 2014 (Malabo Protocol), has caused controversy because of the immunity clause for sitting heads of state and governments. The protocol, which seemed progressive on the one hand, in giving international criminal jurisdiction to the new merged African Court of Justice and Human Rights, also seems regressive in that it states in Article 46 that

No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.

Although heads of state argue that removing a sitting head of state may cause further instability in a country, as was the case in Libya and Somalia, this provision does not address the challenges of unconstitutional governance by a sitting head of state which may result in instability.

CONCLUSION

Africa has come a long way since the formation of the OAU, which gave rise to democratic governance and constitutionalism, which was absent during colonial times. Although the OAU's aspirations were not fully realised, the transition to the AU was a step in the right direction to address some of the challenges the OAU had faced. The AU's creation of institutional and normative frameworks strengthened the continent's commitment to democratic governance and, over the years, there has been a steady, if uneven, increase in democratic governance. Some member states are still plagued by poor security and governance and the AU itself still struggles with internal issues, which, at times, threaten its credibility. However, the AU is constantly reviewing the challenges and taking the necessary steps to address them.

In 2013, at the 50th Jubilee celebration of the founding of the OAU, governance, democracy, respect for human rights, justice and the rule of law were highlighted as priorities for the continent. Agenda 2063 recognised that ‘a prosperous, integrated and united Africa, based on good governance, democracy, social inclusion and respect for human rights, justice and the rule of law are the necessary pre-conditions for a peaceful and conflict free continent’.

Notwithstanding the shortcomings and challenges still faced by the continent the leadership of the AU and the RECs has shifted Africa from a continent once described as ‘hopeless’ (Kaplan 1994) to one that was recently considered the fastest-growing (*The Economist* 2013). The fact that not all the aspirations of the AU have been fully achieved does not mean that they will not be achieved in the future.

CAN NEW CONSTITUTIONS BE PRODUCED WITHOUT POLITICAL CRISIS?

The Problematic Case of Zambia's History of Constitutional Reform

Grant Masterson

ABSTRACT

This chapter examines attempts to secure popular consensus on large-scale amendments to existing constitutional frameworks in Zambia between 2005 and 2015. It seeks to address the issue of constitution-making in African states in the absence of a key political crisis as a catalyst for the necessary political and societal support for constitutional amendments. It examines the particularly problematic case of Zambia, which has attempted to amend its Constitution on five separate occasions in the absence of such a crisis. The chapter concludes that although constitution-making and large-scale amendments are possible in the absence of political crisis, the bargaining process required to secure popular support for such amendments is complicated by a multiplicity of competing interests, whereas in the context of a crisis it is often possible to leverage the immediacy of the event to secure popular support for reforms with less bargaining required. Zambia's peaceful, process-driven constitutional amendments have been characterised by lengthy (and costly) delays. By comparison, countries like Kenya and Zimbabwe have been able to amend their constitutions substantively in response to political crises without these challenges, suggesting that political crises in particular have some utility in expediting and facilitating constitutional change.

BACKGROUND AND THEORETICAL ASSUMPTIONS

Contemporary African constitutions are often the product of colonially-influenced (and sometimes prescribed) constitutions, one-party-state systems and multiparty democratic models. They are viewed by citizens as having varying degrees of legitimacy as written documents reflecting the aspirations of those who live in a particular state. As the foundation of a constitutional democracy, a country's constitution defines the framework within which almost all other legislation is promulgated, as well as the nature of most interactions between a government and its citizens.

Africa's post-independence history can, from one perspective, be seen as a search for an African constitutional system that enjoys legitimacy in the

eyes of citizens while reforming the systemic colonial influence of inherited legal systems and governance structures at independence.

During the Cold War era the importance of consolidating hard won independence and the call for self-determination in all African states often came at the expense of popular, participatory engagement in political life by African citizens. This was, in part, a response to the deliberate destabilisation of regimes by both the United States and the Soviet Union to advance their own ideological agendas. It can equally be argued, however, that the entrenchment of liberation movements and one-party states represented elite capture of newly independent African states by a predatory African elite with little interest in the processes of popular participation by citizens in governance.

In the post-Cold War period, however, there has been a proliferation of major and ongoing efforts to reform inherited and existing constitutional frameworks in many African states. During this period African societies have had to grapple with the twin legacies of their colonial and Cold-War-influenced histories: flawed or weak constitutional frameworks and a weak culture of public participation in political processes.

DIFFERENTIATING CONSTITUTIONAL AMENDMENTS FROM REGULAR LEGISLATIVE FUNCTION

Donald Lutz (2014, p 355), reflecting on the importance of popular ownership of the Constitution in American constitutional thought, notes that popular sovereignty was not ‘an experimental idea, but rather one that stood at the very heart of [America’s] shared political consensus’. Lutz, drawing on John Locke’s seminal works on the subject in America, highlights the importance of providing for mechanisms which enable constitutional amendments over time due to popular recognition that aspects of the existing constitution no longer serve the interests of the citizen. Lutz distils four elements of the rationale for constitutional amendment.

- The value of popular sovereignty in constitution-making;
- The imperfect but educable nature of human society;
- The efficacy of deliberative processes; and
- A clear difference between constitutional legal reform and other legislative matters.

Lutz’s second element is essential to understanding the rationale of why constitutional amendments and revisions are a critical aspect of democratic constitutional frameworks, as it recognises that, in trying to meet the aspirations of popular sovereignty in constitution-making, societies can create rules and processes which, over time, may become tyrannical and/or

unpopular if there is no facility for their amendment. This principle recognises that societies are not infallible and may make mistakes that require undoing, even in the creation and adoption of a constitutional framework. Critically, this aspect of the rationale also assumes that societies are learning organisms and that, over time, they may require more enlightened and progressive constitutions to accommodate the society's own growth and learning.

The third element of this rationale, in referencing the importance of collective and shared negotiations over amendments and reforms, is important as a constraint on reckless and/or mischievous tampering with the constitutional framework. Many African states, Zambia and Tanzania among them, are able to reference significant amendments at multiple points in their post-colonial history, yet many of these reforms and amendments were essentially driven by a small, politically powerful elite.

These top-down processes fail to take advantage of what Lutz (2014, p 356) describes as the 'best possible process in the *pursuit of the common good*'. There is a recognition here that harnessing this legitimacy slows down significantly the process of drafting constitutional amendments, but Lutz does not see this as a challenge, but rather a virtue, in particular in cases where amendments are either highly complex or where the potential consequences of the alterations are exceptionally significant.

The final element of Lutz's rationale is more technical, but is particularly relevant to the case study cited in this chapter because it distinguishes between the emphasis on the processes for constitutional amendments as opposed to the daily business of parliaments promulgating and amending legislation. This emphasis recognises the foundational nature of the constitution as the purest and broadest expression of the aspirations of a society, based on the notion that it is founded on principles of popular sovereignty.

Because the constitution forms the basis for almost all other legislation and is the benchmark against which contested laws are evaluated, it is therefore not only ideal but essential to subject constitutional amendments to more stringent tests of the principles of popular sovereignty than other legislation. This principle is implicitly recognised by many parliaments that set the benchmarks for constitutional amendments higher than those for other legislation, in some cases, prescribing a national referendum for specific amendments, while in other cases, setting the required percentage of legislators supporting amendments higher than that required for ordinary promulgation processes.

CONSTITUTION-MAKING: AFRICAN REALITIES

Nqosa Mahao (2008) points out that a dominant narrative in the African discussion of democracy and democratisation incorrectly conflates *democracy*

with *Western liberal capitalism*. According to this argument, there is still considerable difficulty in overcoming the preconceptions of *democracy* (both nostalgic and suspicious) when debating 'African democracy'. On the one hand, constitutions that depart too severely from these Western-style liberal democratic frameworks are denigrated as sub-standard, on the other, for those innately predisposed to less accommodating views of Western democracies, constitutions that too closely resemble Western models are described as 'un-African'.

Despite this, Mahao's formulation of the two underlying principles supporting constitutionalism in Africa bears a strong resemblance to that of Western constitutionalists, suggesting that this debate may be more political than technical in nature.

Mahao (2009, p 3) cites two concepts underpinning constitutionalism in Africa in a globalised world: the idea of control over governmental power, in the form of normative and institutional limitations (in short, limited government) and a broad, national consensus that underpins respect for and adherence to the limitations prescribed in the constitution. At independence the majority of newly sovereign African states inherited systems of governance designed specifically to exploit the natural and human resources of the former colonies (Dia 1993), in essence, systems which were not particularly adaptable to the types of constitutional aspirations described by Mahao.

African citizens have also suffered from a deficit of democratic experience, which was, for large parts of the 20th century, denied to most through both colonial and post-colonial administrations. Amadu Sesay (2014) illustrates how more African citizens have lived under one-party and military regimes since independence than have lived in countries where their governments were elected in competitive elections (competitive here describing the minimum benchmark of multiple choices presented to the voter on the ballot paper).

Sesay goes further to describe how many post-independence governments in newly sovereign African states drew upon both the flawed models inherited during colonial rule and the tribal systems of chieftainship rule pre-dating the scramble for Africa in constructing post-independence state systems. In many African states large kingdoms and chieftainships were incorporated into the colonial system of governance through 'indirect rule' and post-independence governance systems perpetuated this structural anomaly for any number of reasons, including self-interest.

Other colonies encountered less concentrated societies, described as stateless or acephalous peoples, and incorporated them into the colonial structures regardless of this lack of cohesive and unifying bonds. These types of colonial systems of rule created two enduring challenges for post-colonial governments: they imposed structured systems of rule on peoples who were

naturally resistant to the formality of colonial governance and they created societies with little or no common heritage, languages or shared norms.

For governments inheriting either of these types of administration at independence, falling back on historical models of societal formations and authority did not typically offer viable solutions for modern African states. It is thus evident that for both cultural and historical reasons the majority of African citizens were not afforded the opportunities to develop African standards for democratic rule (with a few obvious states standing out as exceptions) via Lutz's concept of popular ownership. Rather, the nominal democracies many African citizens experienced in the latter part of the 20th century could be more accurately described as governance systems fashioned to suit the narrow interests of an elite political class (Iheduru 1999; Baba 2014). Thus, even some of the 'open democracies' measured by Sesay (2014) provided a type of democratic governance structure which limited popular participation by citizens to periodic elections and minimal interaction in the interim periods (Iheduru 1999; Baba 2014).

The constitutions of many African states reflect these inherent contradictions due to the legacy of colonially inherited legal systems, confusing traditional and cultural norms and modern elite capture of the democratic processes for the advancement of narrow agendas as opposed to the enhancement of popular ownership of the constitution. Both case studies demonstrate the increasing pressure that has built up over time within these societies against the persistence of constitutional foundations that have entrenched elite rule at the expense of broader participation in the determinations of policy and governance, have preserved a system of resource extraction and transfer and have generally delivered little in terms of popular experiences of democracy (Bratton & Houessou 2014).

While some have used the disenchantment narrative to suggest that popular demand for democracy is therefore declining in Africa, there is growing evidence to suggest that, in fact, the reverse is true and that claims of historical demand for democracy in African states may have been somewhat overstated. In 2014 AfroBarometer found that 70% of its survey respondents across Africa preferred democracy to any other form of government and that this percentage had increased steadily in the previous decade (Bratton & Houessou 2014).

There is strong anecdotal evidence to support the view that citizens in Zambia are increasingly demanding a constitution that is far more reflective of their aspirations and values than the elite constructs that exist at present and that this, perhaps more than any other single factor, has led to both countries' governments acceding to these demands and embarking on constitutional review processes.

ZAMBIA'S CONSTITUTIONAL HISTORY

The origins of the modern state of Zambia lie in 1953, when Northern Rhodesia and Nyasaland were joined in a federation for ten years. Northern Rhodesia was recognised by Britain as an independent state in 1961. The first Constitution for the newly independent state of Zambia was established in 1962, but the draft was written entirely by the British colonial administration and accommodated both whites and 'natives' in the legislature (Constitutionnet.org 2015). The federation was dissolved in 1963 and a Westminster-type Constitution was negotiated with the aim of incorporating the interests of white settlers, indigenous peoples and the colonial administration. This Constitution came into force in 1964, with Kenneth Kaunda's United National Independence Party (UNIP) holding the majority of parliamentary seats (unelected).

From 1964 to 1968 Kaunda and UNIP faced mounting opposition, prompting Kaunda to push towards a one-party state. In 1968 Zambia held its first post-independence elections, ostensibly competitive multiparty polls, but in reality the playing field was skewed heavily in UNIP's favour in light of the banning of the United Party from competing in the elections. Despite this and the massive advantage of incumbency UNIP enjoyed, the Zambian African National Congress, the only other party permitted to compete in the 1968 polls, defeated four incumbent ministers and won 18.2% of the total vote.

Kaunda's response was to push for amendments to the 1964 Constitution by means of a referendum in 1969, which granted permission to the legislature to change the Constitution without requiring a national referendum (which was overwhelmingly approved); the establishment of a Constitutional Review Commission (CRC), which introduced the necessary constitutional amendments to legalise a one-party state system and the passing by the legislature (with almost no popular participation) of the 1973 Constitution, which outlawed all political parties but UNIP. Kaunda and UNIP ruled under this one-party state system from 1973 until 1991.

The sequencing and detail of these events remain relevant as they established a template for constitutional review which has been used on multiple occasions, with varying degrees of success. One of the challenges created by the 1973 Constitution was that it established the legislature as the only legitimate body to approve amendments to the Constitution. This would have lasting implications for later efforts to amend clauses in the Constitution, including the one that requires a national referendum. The other key challenge for Zambia in 2015 was the fact that the Constitution entrenches the primacy of the president as the key political decision-maker within the government. Further minor amendments made under UNIP's one-party rule reinforced presidential powers and privileges.

In the late 1980s Zambia introduced a new CRC, this time under the leadership of Professor Patrick Mphanza Mvunga (Motsamai, 2014) to examine the measures necessary for the re-introduction of multiparty democracy. Mvunga's appointment was at the sole discretion of President Kaunda, who faced dissent from some within his own party at the move to re-open the country to multipartyism. However, using the extensive privileges and powers given to him by the 1973 Constitution, Kaunda was able to push the necessary amendments through Parliament and they were entrenched in the Constitution in 1991. The move backfired spectacularly when, in the elections held in that year, Frederik Chiluba's Movement for Multiparty Democracy (MMD) crushed Kaunda and UNIP at the polls, winning more than 75% of the vote, a decisive rejection of UNIP's economic and political performance since the introduction of the 1973 Constitution.

Given the later revisions pushed through Parliament by the MMD, the 1991 alterations can be seen as major constitutional amendments rather than a distinctly new draft of the Constitution, despite the profound effect they had on the political governance of Zambia.

It is also critical to note that the 1991 amendments, despite facing backbench opposition within UNIP itself, were pushed through by a powerful executive with the support of his party's core in the legislature. They failed to meet even the minimum requirements for popular participation.

The result of the 1991 elections showed definitively the extent of dissatisfaction of the voters with UNIP and Kaunda's government, but, in spite of this, Kaunda undertook a constitutional review using the narrowest possible terms of reference; turning the amendments into an elite-driven project of the legislature rather than a potential reflection of Zambia's citizens' aspirations.

The amended Constitution did not survive to the 1996 election because Chiluba and the MMD used identical elite-driven, top-down processes to pass a new Constitution. Once again, a sitting president appointed an elite-sanctioned CRC to make recommendations about the necessary amendments to the existing legal framework. The CRC, chaired by academic and politician John Mwanakatwe, began its work in 1993.

On this occasion there was evidence of minimal efforts to engage the Zambian citizenry in legitimising the work of the CRC, but despite Chiluba's strong showing at the polls in 1991 this did not translate into the necessary popular support for the CRC. The majority of the recommendations were rejected and a minimally amended Constitution was adopted in 1996 with little popular support and was roundly criticised by both Zambian citizens and the international community for lacking popular legitimacy (Human Rights Watch 1996).

Where the 1996 CRC did break from the previous iterations of such commissions was the extent to which it reached out to Zambian citizens to solicit inputs into the draft. Kaunda and UNIP's defeat in the 1991 poll had been on the back of increasingly active civic action as well as worsening economic performance and Chiluba recognised the increasingly prominent role non-state actors were beginning to play in political governance processes in the country. However, once the CRC presented its recommendations, including greater limitations on the powers of the executive, Chiluba used his party's dominance to enact a Constitution approved by the country's political elite but not particularly by popular consent, removing many of the provisions recommended by the CRC which did not suit the elite.

Chiluba served his mandatory two-term limit under the 1991 Constitution (amended in 1996) and was replaced as head of state by his successor in the MMD, Levy Mwanawasa, in 2001. In 2003 Mwanawasa re-opened the constitutional debate, with Zambia's fourth CRC since independence, under the chairmanship of lawyer Wila Mung'omba. Following the well-established method of a commission appointed by government, as opposed to civil society's preference for the establishment of a constituent assembly of all stakeholders, the Mung'omba Commission presented a draft constitution to Mwanawasa in 2005.

Mwanawasa initially promised to implement the draft constitution once it had undergone a review in a constituent assembly, but this process stalled for more than a year. In 2006 Mwanawasa presented a 14-point 'roadmap' towards a new Zambian constitution, which was given a timeline of five years. Mwanawasa and supporters of the roadmap argued that this timeframe would be necessary to amend provisions of the existing Constitution, going back to 1973, which limited the power to amend the Constitution to the Zambian legislature. In order to amend these provisions to allow a constituent assembly to approve the constitutional draft of the Mung'omba Commission, Mwanawasa pointed to the need for constitutional amendments. In an ironically circular yet compelling argument, it had become necessary to amend the existing Constitution before constitutional amendments could be made. Mwanawasa proposed a validation processes which required the following steps:

- A national census;
- The establishment of a constituent assembly;
- A national referendum on the draft constitution; and
- The adoption of a new constitution.

Civil society, which, since the reintroduction of multipartyism in Zambia, had become increasingly vocal in its demands for a new constitution, rejected Mwanawasa's plan and a coalition of organisations presented a civil society 'alternative' roadmap which suggested that it would be possible to have a new constitution within two years. The critical departure from the government's plan was that civil society rejected the need to operate within the existing legal framework in order to draft the constitution.

After considerable dispute, a compromise was reached which appointed a National Constitutional Commission (NCC) of 400 members drawn from across the spectrum of Zambian society, which would draft the constitutional document but would not be granted legislative powers (in order to make the process legal according to existing laws). This draft would be adopted by Parliament and presented to the Zambian people for confirmation in a referendum.

This process stalled in 2010, partially disrupted by the death of Mwanawasa in 2008 and the election of Rupiah Banda to replace him, and partially because of a lack of political will within the MMD to implement the draft proposed by the NCC. In the 2011 national elections, Michael Sata's Patriotic Front displaced Banda's MMD as ruling party in a surge of popular support for his campaign promises, which, among other populist claims, included the commitment to 'deliver a new Constitution within 90 days in office' (*Africa Review* 2011). Sata, in the tried and (un)trusted manner of all previous presidents before him, established a Technical Committee for the Drafting of the Zambia Constitution (TCDZC), which was asked, among other things, to consider:

- The Mvunga Constitution Review Report;
- And review the 1991 Constitution of Zambia;
- The 1993 Mwanakatwe Constitution Review Commission Report and Draft Constitution;
- The 2005 Mung'omba Constitution Review Report and Draft Constitution; and
- The 2010 National Constitution Conference Report and Draft Constitution.

(TCDZC, 2012)

Although President Sata's rhetoric appeared to recognise the impatience about the delays in delivering a new constitution, the TCDZC fared no better than its predecessors in resolving the apparent impasse between Zambia's citizenry and its political elite over adopting a constitution that is recognised by all Zambians as legitimate. In 2014 the Ministry of Justice, after repeatedly being

questioned by journalists and civil society, made the astonishing claim that the draft document had 'been lost' (*Zambia Daily News*, May 2014).

After months of speculation Minister of Justice Wynter Kabimba declared the constitutional draft 'found' and in the same breath, declared that a new constitution would not be enacted before 2016. Kabimba, showing little cognisance of his Patriotic Front party's election claims ahead of the 2011 polls, declared boldly that a new constitution had never been 'one of the party's top five priorities' in its 2011 manifesto.

Priority or not, Kabimba's promise was kept in the most literal sense of the term, as, on 3 January 2016 (some seven months prior to national polls), President Edgar Lungu, who succeeded Sata, who died in office, announced that Parliament had approved a major amendment to the 1996 Constitution. The newly amended constitution was presented with much fanfare and self-congratulatory rhetoric as Lungu and the PF proudly proclaimed the late Sata's 2011 promise fulfilled.

The 2016 amendment made significant changes to the existing legal framework, including the introduction of a vice-presidential candidacy on the presidential ballot, the creation of a Constitutional Court, new powers for the Electoral Commission of Zambia (including decentralising control over electoral administration) and new provisions to allow for petitions to the courts regarding presidential election results.

Simultaneously, President Lungu declared that a national referendum to secure a mandate for an alteration to the Zambian Bill of Rights (to include social and economic rights) and to reduce the threshold for such amendments in future would be held concurrently with the elections.

The implications of the 2016 constitutional process have been significant. Almost immediately after approving the amendment in Parliament, a non-partisan group of members of Parliament took their own legislation to the newly created Constitutional Court, challenging a provision that they had approved mere months before. This bizarre spectacle related to a clause that raised the eligibility requirements for candidates for the legislature, requiring them to hold a Grade 12 certificate. Civil society observers estimated that such a provision would have rendered approximately half of the existing MPs ineligible to contest future elections. The matter also raised quite legitimate questions about the degree to which MPs had studied and applied their minds to the draft amendment prior to approving it. Through this process, the extent to which the draft amendments were kept confidential, even from MPs, until the final moments of ratifying the document in Parliament have emerged, highlighting once more the ongoing elite prioritisation of such amendments in Zambia.

The current state of the Constitution continues to revolve on its own axis, caught in limbo between the demands for one reflecting the human rights agenda (in particular social and economic rights) that Zambians have been demanding since 1996 and a political elite that appears both unwilling and unable to provide its citizens with a constitution they can own.

The 2016 amendment delivered on some of the substance demanded by civil society, but through the same narrowly controlled, elite-driven process by which previous amendments were secured. In spite of the constitutional overhaul, one jarring reality persists: despite nearly 25 years and five CRCs, the 1991 Constitution remains in force in a country that has, for the greater part of its independence history, attempted to rewrite that very document. Such efforts are increasingly met with both cynicism and *déjà vu*.

CONCLUSION

The ongoing constitutional reform processes in Zambia cannot be understood out of the context of the constitutional history of the country. Zambia inherited its original Constitution from the British administration and has spent the better part of the past 60 years refashioning and amending this document by largely non-violent means.

However, despite the multiple reforms that have been enacted during this time, the major amendments continue to struggle to achieve either of Mahao's ideals of limitations on power or a broad national consensus. The latest amendment, in January 2016, fails in particular on the second point, highlighting the ongoing dominance of political elites (arguably the persisting legacy of the original British-endowed constitutional framework).

Anecdotal evidence suggests that under external pressures political elites are sometimes willing to initiate enquiries into reforms, but that external pressures alone are rarely sufficient to see these enquiries materialise into tangible outcomes. In Zambia, this trend has persisted across multiple regimes and ruling parties.

In the post-2016 election period the Zambian Minister of Justice has again mooted the idea of future constitutional reforms, suggesting that this cycle of elite-driven processes is set to continue. Zambia as a test case could potentially be a crucial example of an African state recognising the need for reforms, but, at present, it seems to be stuck in a cyclical limbo with no sign of a resolution. Until such time as African states demonstrate the capacity for wholesale reforms without a crisis tipping point to focus their collective energies, it appears that the problematic thesis proposed in this chapter cannot be disproved. It therefore appears that it remains significantly easier to reform a constitution after rather than prior to some political or social crisis.

TRANSITIONAL CONSTITUTIONALISM CONSTRAINS CONSTITUENT POWER

The Case of Egypt

Ebrahim Deen

ABSTRACT

This chapter assesses how constitutional uncertainty affects the behaviour of a country's main political actors. It argues that constitutions should be the end result of a transition not the foundational document that shapes it, that international actors use them to constrain the aims and goals of the revolution by adding clauses protecting certain rights and that this focus enables an unelected judiciary to gain pre-eminence. Using the example of Egypt, it illustrates the impact of these issues. Believing that the constitution was eternal, the major parties sought to dominate the constitutional process and, when they failed, appealed to the judiciary. This led to the electoral process being circumvented and to the empowerment of the judiciary, which had its own views of the way the state should be organised. It was one of the key institutions that enabled Hosni Mubarak's regime to remain in power for so long. As a result, polarisation increased, the opposition refused negotiations and conciliation and Mubarak era remnants emerged in the political vacuum. Mohammed Mursi was overthrown and the country is now in a worse position than it was at the end of Mubarak's rule. Rights are trampled, the space for political contestation has been curbed and the military has further entrenched its domination of political life.

INTRODUCTION

The past five years in Egypt's history have been tumultuous. Frustrated by the lack of opportunity and government accountability, citizens, inspired by the overthrow of the Ben Ali regime in neighbouring Tunisia, rebelled against the administration of President Hosni Mubarak. After an 18-day standoff Mubarak relinquished power to the military in the form of the Supreme Council of the Armed Forces (SCAF), which ruled until a presidential election saw the Muslim Brotherhood's Mohamed Mursi ascend to the helm in June 2012.

During its year in charge SCAF attempted to protect its privileges, first through the enactment of a 64-article constitutional declaration in March 2011,

then through the promulgation of the El-Selmi document, which supported the increased role and political influence of the Egyptian army (Lunde 2015; Turner 2015; El-Sayed 2014). When this was relatively unsuccessful, prior to the release of election results in June 2012 SCAF released a decree giving it legislative powers until a lower house was elected. This was also largely unsuccessful and the Mursi administration, during the initial stages at least, was able to wield considerable influence.

However, increasing popular disillusionment and judicial intransigence led to many supporting Mursi's overthrow by a coup in July 2013 (Powell 2013). Resistance to the state and perceptions of Islamisation played a large role in the disillusionment (Nafi 2013). Mursi's overthrow led to a successful counter revolution, which has resulted in freedoms won during the 2011 revolution, such as the right to protest, being severely curtailed and individuals from Mubarak's National Democratic Party now hold top positions in government (Deen 2014). A state of emergency has been in place in the restive Sinai region for the past two years, with hundreds being arbitrarily killed and arrested and a former military head, Abdel Fattah El-Sisi, was declared the country's president in May 2014.

Two constitutions have been passed, one in 2012 and another in 2014, with turnout in both constitutional referenda being under 40%. In both cases, but particularly in 2014, the process was rushed and the 2014 version was largely unrepresentative. In addition, numerous constitutional amendments, Supreme Constitutional Court (SCC) decisions and presidential decrees have been issued in the past five years, raising many questions about the way constitutions, or the lack thereof, influence the behaviour of political actors during periods of transition.

This chapter aims to shed light on this issue by assessing critically the motivations and behaviour of the major actors and how they responded and attempted to influence Egypt's transition. The first part seeks to problematise the notion that constitutions allow for orderly transition. It argues that the focus on constitutions actually results in a circumvention of electoral processes, alluding to the political nature of constitution-drafting. Further, it contends that the focus on constitutions as normative transitional documents allows international actors to shape the transition and empowers both *ancien régime* officials and the unelected judiciary.

The second part endeavours to illustrate how this transpired in the Egyptian context. It argues that the notion that constitutions are eternal led to the major players attempting to control the process, causing much conflict and inhibiting the chances of compromise. This focus on legality, it contends, led to a strengthening of the power of the already influential and compromised Egyptian judiciary. This resulted in the circumvention of the electoral and

constitution-drafting processes as opposition actors utilised the courts to compensate for their lack of grassroots support. This was a major contributing factor to increasing polarisation and enabling the deep state to consolidate and re-emerge, resulting in the July 2013 military ouster of the Mursi regime and subsequent crackdowns.

Running through the chapter is the notion that transitional constitutionalism actually hampers constituent power and undermines processes of democratisation. Revolutions and transitions, by their very nature, are extra-legal and unconstitutional events and insisting that they should be guided by legal principles such as those contained in a constitution is not only oxymoronic but detracts from the nature of the transition and shows disregard for the demands of the populace. Constitutions are necessary to guide the actions of states and citizens, but they should be the end result of the transition and not be viewed as immutable.

‘TRANSITIONAL CONSTITUTIONALISM’

Following the collapse of the Soviet Union and the move to a more liberal free market international system with a single hegemon, it has been theorised and insisted that written laws, embodied in constitutions, act as a constraint on state power and result in the promotion of individual rights, while at the same time protecting the dominant neoliberal paradigm. This theory has seeped into the literature about and perspectives on transitions, arguing that success is dependent on constitutions (Haimerl, 2014; Brown, 2013; Lang, 2013).¹

This focus on constitutions as a prerequisite is insisted upon both by international institutions such as the United Nations and by academics focusing on transitional processes. ‘Transitional constitutionalism’ is believed to allow for the emergence of a stable order, while simultaneously concretising the gains of the populous (Lang 2013; Liolos 2013). In other words, it is assumed that only through a written legal document can the people’s aspirations be vocalised and the institutions permitting their realisation be formed. It is argued that this process allows for consensus formation and democratic consolidation.

1 The ‘constitutional’ moment in Africa in the 1990s, which saw many African states drafting and/or updating their constitutions, was a reflection of this. This was a ‘critical juncture’, as historical institutionalists would argue. However, this juncture, for the most part, was not the result of internal mechanisms and consciousness but a response to the dictates and influence of the then new international system, governed by only one preeminent hegemon (the US). Thus we observed rights being codified and prominence being afforded to individual rights and market freedoms. It is also noteworthy that at the time many of these constitutional processes formed part of ‘conflict resolution’, a process that was most definitely influenced by the collapse of the Soviet Union.

International organisations have thus been active in promoting the need for constitutionalism in post-soviet and other conflict states undergoing transition (Bali 2012).

This overemphasis on constitutions and codified laws has, in recent years, actually hampered transitional processes (Turner 2015; Lang 2013).

First, the notion of transitional constitutionalism is problematic as it assumes that constitutions are legal documents that are and should be immunised and isolated from political contestation (Turner 2015; Brown 2013). The political nature of the documents' drafting and interpretation is only minimally considered. This has seen experts and drafters use the language of 'neutrality' in constitutional negotiations and drafting processes without accounting for the fact that this itself represents the privileging of certain power configurations. Consequently, the *ancien régime* can protect its privileges through an appeal to neutrality and impartiality and constitutions become an avenue for suppressing the constituent power of the majority instead of allowing new aspirations to be conceived (Lang 2013; Turner 2015; Liolos 2013).

Moreover, instead of constitutions being the end result of contestation, transitional constitutionalists have increasingly viewed them as normative documents which will guide the behaviour of the state and other political actors during the transition process. Constitutions are viewed as creating the rules for political participation and presaging the extent of tolerable change. Thus, instead of a constitution representing the aftermath of contestation and compromise in transitional situations it has become a document which seeks to chart the means, methods and scope of this contestation. It has thus privileged the *ancien régime* at the expense of popular forces with rules such as respect for private property and state institutions being set prior to electoral contestation.

Legalism and 'neutrality' have been utilised to narrow the scope of contestation instead of creating rules to ensure that the contestation occurs more smoothly. This leads to a situation where the aspirational aims of the constitution are in conflict with its functional aspects. The end result is a constitution devoid of real substance; a document which actually decreases the support for the rule of law as people realise that it means very little and allows for only minimal redress.

This is exacerbated by a focus on international norms and best practices in the drafting and outcomes of constitutions (Lang 2013; Turner 2015; Liolos 2013). Standards such as the type of government, rights that need to be protected and people's aspirations have, in recent times, been a dictate from the international community rather than an accurate representation of the citizenry's aspirations and the domestic balance of forces.

This overemphasis on norms and the compulsion that they be adhered to is, in most instances, an attempt to constrain constitutive power and usually forms part of the counter-revolutionary impulse to ensure stability and protect existing norms and alliances (Bisley 2004). This not only protects the interests of the *ancien régime* but results in the final constitution having very little support; not only is it now unable to mitigate conflict, it actually causes it. This can best be seen in the exaggerated focus on the incorporation of Sharia law in the Egyptian and Libyan constitutions and, to some extent, in the Tunisian Constitution, despite the fact that most of the citizenry supported it and that parts of it had already been a part of civil and personal laws for over a half a century.² This led to a situation where conflict was increasingly prevalent, especially as those opposed to Sharia were able to appeal successfully for international assistance, despite having relatively small constituencies. This caused much political gridlock, enabling *ancien régime* remnants to re-emerge. It should be noted that this example is not as applicable to Tunisia because Tunisians are, comparatively, more secular than Egyptians and Libyans.³

Finally, the belief that constitutions are eternal, unalterable rules guiding the country's polity and politics has led to increased contestation over their formulation. Instead of compromise and consensus, major actors have sought to dominate the process. This is extremely problematic as it has meant, especially in the case of negotiated transitions, that groups with disproportionate influence have used the constitution to protect and entrench their privileges. These groups have mainly been members of the *ancien régime*, who have used constitutional protections and international constitutional norms and best practices for this purpose.

It should be noted that a smaller group of elites usually exercise a disproportionate influence on processes relating to matters of governance, however, the notion that constitutions are eternal has made this a zero-sum game (Kotze 2013). The emphasis on constitutions has also led to the emergence, in many instances, of an unelected and unaccountable body of judges to interpret and review them (Brown 2013).⁴ This is significant as these judges and judicial bodies maintain their own preferences, do not always

2 Though most people in Egypt and Libya support a role for religion in the state's functioning, the international community, specifically Western states such as the US, feared that this would empower parties referencing Islam. These Islamist parties would not be as amenable to Western interests as the *anciens régimes*, thus, in appealing to international norms, Sharia was problematised.

3 This secularism is a legacy of French colonialism and has even resulted in the spawning of a group of ultra-secularists who are opposed to any form of religion being incorporated into the state.

4 In contemporary times the work of judges is seen as being beyond politics and thus, in many instances, they are given the task of supervising elections.

represent the wider population and, in many instances, are members of the *ancien régime*. Judicial independence, though lauded, has been used to constrain constituent power (Lang 2013).

EGYPT UNDER MUBARAK

For a long time Egypt had a vibrant and well developed constitutional culture. Aside from the 2012 and 2014 versions, the past century has seen the country enact five different constitutions, in 1923, 1956, 1958, 1964, and 1971 (Lunde 2015; El-Sayed 2014). This has resulted in a situation in which constitutionalism, at least the drafting and document completion stages, has become the norm. Moreover, although power was largely vested in the hands of the leader and although provisions such as those for individual freedoms were regularly trampled upon when they conflicted with the aspirations of the regime, a large judicial body of laws and culture was spawned as a consequence and judges and judicial institutions became politicised.

In 1952, after the overthrow of King Farouk I, the State Council, comprised of ten judges, was asked to rule on whether Parliament should be recalled (Ashour 2014). The reason was that the coup staged by Gamal Abdel Nasser had overthrown not only the monarch but the elected Parliament. A minority within the Revolutionary Command Council sought to have the body reconvened (Ashour 2014). The judges allowed party prejudice to inform their decisions and, in a nine to one decision on 31 July 1952, it ruled that Parliament should be dissolved (Ashour 2014). The council's first and second in command (Abd Al Razzaq Al-Sanhouri and Suleiman Hafiz), sought to block the 'liberal' Wafd party, which was, at the time, the largest political party, from controlling Parliament (Ashour, 2014). The body also later ruled that a military leader could head a civilian government (Ashour 2014).

This judicial authority and culture was further strengthened with the formation of the SCC in 1979 (Haimerl 2014; Brown 2013; Enayat 2014). The court was initially established by the Anwar Sadat regime to promote investment in the country by creating the impression that the SCC would secure property rights and protect individual freedoms. Justices of the court were nominated by the SCC together with the chief justice, and although the chief justice was to be appointed by the president, under Sadat, he was usually the most senior member of the court (Enayat 2014; Haimerl 2014). Thus, soon after it was founded the SCC exercised more power in recruitment and sustainability than most comparable supreme courts.

In the 1990s, the so called 'golden Era', the court acted to constrain the government on issues including media protections, human rights and the rights of opposition parties (Enayat 2014; Brown 2013). It even sought to enforce

laws on privatisation despite the fact that, in some instances, these conflicted with the country's Constitution (Enayat 2014). The court distinguished, however, between political and sovereignty crimes, which threatened the regime's core interests, thus sanctioning military trials of civilians (Haimerl 2014).

Enayat (2014) contends that in its early years it sought to realise a revolutionary economic programme while still preserving the regime.⁵

However, when the court sought judicial supervision of elections in the early 2000s, a move that in some ways threatened the regime's interests, Mubarak stepped in and curbed its influence. By enforcing the president's right to appoint the chief justice and by stacking the court with loyalists, Mubarak was able to assert his influence over the court (Haimerl 2014). Further, through the appointment of an electoral commission staffed by loyalists from the SCC Mubarak was even able to circumnavigate the need for judicial oversight of the much disputed 2005 presidential election when the Presidential Election Committee (PEC) ratified it as being judicially supervised (Haimerl 2014). The fact that there was relatively little opposition from the justices to these manoeuvres by the regime points to the court's compromised nature. Following Mubarak's ouster this has come to the fore. The court played a critical role during the transition, from being involved in the March 2011 constitutional amendments to its role after Mursi was removed. It must thus be assessed, especially with regard to the way in which it influenced the behaviour of the more 'political' actors.

In order for this to be done properly the judicial culture needs to be assessed and problematised. As observed above, Egypt has a strong judicial culture, which is a consequence of the role law has played in the recent history of the country, especially during the 'golden era'. This has led to a situation where judges have created and been afforded their own relatively insular culture and autonomy. They often socialise, attend the same legal schools and intermarry (El Chazli 2014)⁶ and have thus formed a unique and concretised ideological view of how society should be organised (Brown 2013; Enayat 2014). They are fearful of the populace and contend that state interference is necessary to ensure that the country does not descend into chaos (Enayat, 2014).

Like judges and the constitutional court in Turkey, they see themselves as enlightened liberals who are required to protect the state's liberal character (Enayat 2014). They believe that theirs is the only body conscious enough to understand and protect the public interest and that the best way to do that is through a positivist liberal method (Brown 2013). Thus, in the 1990s they ruled

5 During the Sadat era the country was moving away from the socialism of the Nasser regime.

6 In 2013 about 25% of newly-appointed judges were the children of sitting judges.

against the state in matters of press freedom and electoral composition, while turning a blind eye to military courts and accusations of torture (Brown 2013; Haimerl 2014). This ‘insulated liberalism’ informed many of their actions during the post-Mubarak era; rulings supporting secularists and the military have as much to do with the way the judiciary perceives the role of the state as with the fact that most of the judges were appointed by Mubarak (Haimerl 2014).

THE ROLE OF THE JUDICIARY DURING THE TRANSITION AND MURSI’S OUSTER

As can be inferred from the foregoing, the judiciary would necessarily play a large role in the transitional process, especially since three of the SCC’s members were involved in the committee that proposed amendments to the 1971 Constitution in March 2011. Seeking to protect its privileged position, the institution has been at the forefront of shaping events since 2011. In April 2012 it ruled that the constitutional drafting committee appointed by the legislature was unlawful as it contained members who were, themselves, parliamentarians; while in June that same year it ruled to dissolve the legislature (lower house) because parties had put up candidates to fill one-third of the seats set aside for independents (Haimerl 2014; Brown 2013; Al-Ali 2012).

These decisions were highly political – the April decision even undermined and encroached on that of the elected legislature – and were based on logic and assumption as opposed to pure technical-legal interpretation (Haimerl 2014). Further, in June 2013 the SCC ruled that the upper house of Parliament should be dissolved and overturned the law on the appointment of the second constitution-drafting committee, suspending the 2012 Constitution (El-Sayed 2014; Brown 2013; Al-Ali 2012). These rulings, as will be elaborated upon below, greatly influenced the behaviour of the major political actors and their willingness to accept electoral processes.

Nathan Brown and Maria Haimerl detail brilliantly the rulings and the nuances and legal justifications provided for these judgements, however, for the purposes of this chapter the major reasons informing these decisions will suffice. At the heart of the decisions were two major factors: self-preservation and the character of the state post-transition. It is argued that immediately following transitions judiciaries, in order to enhance their reputation and authority, are more responsive to popular demands. Italy and Germany are the most-cited examples (Haimerl 2014). However, in the Egyptian case the court’s aim was self-preservation; it already had ample authority and thus did not see the need to create and maintain an image of responsiveness.

Feeling threatened by the popular constituency, in light of the institution’s role in legitimising the Mubarak regime, the judiciary, specifically

the administrative courts and the SCC, sought to use the language of independence to preserve its sphere of influence and promote its autonomy. Following Mubarak's fall it thus sought to legalise its appointment and selection procedures by arguing for the codification of the unwritten rule that prevailed in the 1980s and 1990s that the president should endorse the chief justice after the individual's nomination by the three most-senior members of the SCC (Haimerl 2014; Brown 2013). This was secured and, in November 2011, SCAF issued a decree endorsing it. However, in May 2012, at the legislature's first sitting, it was decided that the judiciary should be reformed and its power of oversight curbed, mainly because most judges were Mubarak appointees (Brown 2013). The judicial commission labelled these proposed measures a 'massacre of the judiciary' and less than a month later the legislature was dissolved (Haimerl 2014).

Although this measure was not without precedent, the timing of the ruling raised many questions. In 1987 and 1990 when it was ruled that the lower house be dissolved the process took years, in this instance it took less than two months (Brown 2013). Furthermore, prior to SCAF's handing over power to the Mursi administration it issued a decree protecting the judiciary's position and giving it a supervisory role over the form of the impending constitution (Brown 2013). This decree was subsequently rescinded by Mursi in August 2012 (Brown 2013; Al-Ali 2012). Moreover, the 2012 Constitution omitted most of the SCC's demands concerning institutional autonomy and member selection, in fact, Mursi even sought to lower the retirement age to 60 to promote institutional reform (Brown 2013; Al-Ali 2012). The judiciary thus saw in SCAF a means of protecting these aforementioned privileges, especially in regard to institutional autonomy and transitional supervision. This has been relatively successful following the ouster of the Mursi regime. Adli Mansour (head of the SCC) was named transitional/interim president and the judiciary's rights of selection and appointment were codified in Article 193 of the 2014 Constitution (El Chazli 2014).⁷

Secondly, as mentioned above, the judiciary sees itself as protecting a form of positive liberalism. The conservative nature of the populace and the fact that most support a role for religion in state affairs had made the judges wary. The institution thus dissolved the first constitution-drafting panel in April 2012 and the second in June 2013, notwithstanding the fact that to do so undermined the legislature and, in the case of the second panel, was clearly a legislative matter that fell outside its jurisdiction (Brown 2013). It did so despite (or perhaps because of) the fact that in early October 2012 the majority

⁷ Article 193 allows the judiciary sole preserve over appointing the general prosecutor, with no mention made of accountability mechanisms and/or the issuing of reports.

of the members comprising the second panel had signed a private document agreeing to most of the Constitution, including the contentious Articles 4 and 219 concerning the position of Sharia in the new state and the role of the Al Azhar (the most recognised Islamic institution in Egypt) in formulating laws (Lunde 2015). These have since been removed from the 2014 Constitution.⁸

It is noteworthy that the 50-member committee that drafted the 2014 Constitution was more inclusive than the committee that drafted the 2012 version, especially in terms of the backgrounds of its members. However, Islamists only had two seats and many of the farmer and worker representatives were Mubarak-era holdovers. The panel's work was not strictly controlled by the judiciary and military apparatus, however, the unanimity over the protections granted to the military, judiciary and even the interior ministry show the compromised nature of the members.⁹

Notwithstanding these factors, the 2014 Constitution is more progressive than the 2012 version in some respects: citizens are defined equally, freedom of religion is protected unconditionally, the provision of social services such as housing and health care are guaranteed and minimum and maximum wages have been stipulated. However, in practice, in the past two years these provisions have been ignored and the all-encompassing nature of the aspirational elements of the Constitution will be difficult to achieve. Poverty and unemployment are high and many people have no access to health care and proper education. The crackdown on the Brotherhood, which had previously provided some of the social services the state was unable to provide (Deen 2012) has removed that option and since the state was unable in the past to provide those services, it is equally unlikely to be able to do so in the future.

IMPACT ON ELECTORAL PROCESSES AND POLITICAL ACTORS

The Muslim Brotherhood

The judicialisation of politics and the belief that constitutions are normative transformational processes have, in the Egyptian case, led to the major actors attempting, in a variety of ways, to control the process and to influence the judiciary. This has inhibited the chances of consensus and has increased polarisation. Election results were undermined as the different actors jockeyed for position. At the centre of this process stood the Muslim Brotherhood's Freedom and Justice Party, which was victorious in the 2011/12 lower and

8 The document goes as far as banning parties referencing religion from participating in the political process.

9 Articles 206 and 207 create a supreme police council which must be consulted on matters relating to the police force and which will be able to stall the interior ministry reforms demanded during the 2011 protests.

upper house elections, winning about 46% of the vote (Nafi 2013; Deen 2012, 2014).

Despite this, the party was unable to exercise any real legislative power as, prior to the presidential election, SCAF still remained in control of the country (Haimerl 2014; Lunde 2015; Brown 2013). It thus sought to realise its influence by putting up a candidate, Mohamed Mursi, in the 2012 election in contravention of its promise that it would desist from seeking control of the executive as well as the legislature (Deen 2012).

It is significant that prior to the presidential election the judiciary disbanded the first constitutional committee and was expected to annul the results of the 2011 lower house election (Haimerl 2014). This indeed happened prior to the June 2012 presidential run-off between Mursi and the military's Ahmed Shafiq. Following Mursi's victory the Brotherhood sought to overturn the decision and dissolve the lower house, however, the move was struck down by the SCC (Brown 2013). The failure to revive the legislature shifted the party's focus towards the constitution-drafting panel.

When it became clear that the six months SCAF had been given to draw up a constitution, failing which it would appoint a drafting panel and oversee the process, would elapse on 22 November 2012 Mursi unilaterally issued a decree immunising himself and the panel from judicial oversight (Brown 2013). It is significant that, at the time, the SCC was to rule on the constitutionality of the second panel a decision it later (June 2013) ruled unconstitutional.

The Constitution was then rushed through and confirmed by a referendum, although the turnout figures illustrated a deep disillusionment with Mursi (Brown 2013; El-Sayed 2014).

In an attempt to circumvent future dissolutions of Parliament the 2012 Constitution mandated judicial review of electoral law prior to its promulgation, failing which it could not be overturned after the election. However, ambiguities in this constitutionally mandated judicial supervision of electoral law meant that the SCC would first have to declare electoral legislation constitutional before it could be promulgated, a process the court used to stall the proposed April 2013 lower house electoral rerun (Brown 2013). When Mursi was ousted the court was still studying a second draft of electoral legislation sent to it by the upper house (Brown 2013).

In summary, the uncertainty caused by the judiciary's undermining of electoral results led the party to shift its focus towards the constitution-drafting process and it acted unilaterally (the 22 November decree) to immunise and preserve the process, while at the same time attempting to ensure that the judiciary's electoral oversight power was curbed by the addition of constitutional clauses. This backfired gravely, increasing polarisation among the citizenry and causing gridlock in the political process as the judiciary increased its scrutiny of electoral legislation.

It is noteworthy that the conflict over the legalistic nature of the transition was informed by two other key factors. Firstly, Mubarak's rule was underpinned by the judiciary's sanctioning most measures protecting the regime's core interests (Haimerl 2014; Brown 2013; Enayat 2014). The legalistic nature of this rule and the politicisation of the judiciary naturally led to the revolutionaries seeking judicial control and endorsement (Enayat 2014).

Secondly, contestation over the legalistic nature of the state was the result of the Brotherhood's aspirations in relation to the nature of the state and the role Islam should play in it (Enayat 2014). The group believed that the state should have an Islamic character and has thus, according to Enayat, sought to reverse some of the rulings that have undermined this. It therefore viewed the constitutional process as a means of organising society, rather than in purely instrumental terms (Enayat 2014). It should be noted that the group does not seek the creation of a theocracy and/or a state that is governed by literal interpretations of religious texts, but of a civil state which incorporates the body of Islamic jurisprudence (Sharia) in its decision-making processes (Al-Ali 2012).

OPPOSITION PARTIES

The responses of opposition parties to this constitutional uncertainty and judicial politicisation can be divided into two groups: those of fellow Islamists and those of leftists and secularists. Islamist parties such as the Nour party coalesced with the Brotherhood, largely participating in the electoral process and both constitution-drafting processes (Lunde 2015; Brown 2013). The motivations of these parties were similar to those of the Brotherhood. Only in June 2013 did Nour express a position counter to that of the Mursi administration and, like the other opposition parties, sanctioned the ouster of Mursi for electoral purposes. Nour believed it would be able to win the votes that would have gone to the Brotherhood. With parliamentary elections only taking place two years after the coup, it is evident that Nour's belief was a severe strategic blunder.

The party, which had won about 25% of the vote in the 2011/12 lower house election, won none of the 60 party seats contested in the first round of the elections held on 20 October 2015. Nour-affiliated candidates also failed to win any of the 220 seats contested and only managed to force run-offs in about 30 contests. This was despite the fact that the Brotherhood did not participate in the election and Nour was the sole Islamist representative.

In other words, because Nour's position was similar to that of the Brotherhood, the party respected the electoral and constitution-drafting processes. However, when it realised that it could gain electorally from undermining the democratic process, it shifted position. Its shift was slight

compared to that of the secularists and liberals, as the party realised its views on society would not appeal to many within the deep state and judiciary. It thus refrained from advocating Mursi's ouster as late as June 2013, preferring instead to call for early elections, and hedging its bets.

From early on other opposition parties, including the leftists and secular liberals, appealed to the judiciary in an attempt to circumvent the political process (El-Sayed 2014; Lunde 2015). Winning less than 30% of the vote in both parliamentary elections and possessing little grassroots support, these parties criticised the legislature and constitution-drafting committees (Lunde 2015). Procedural matters and technicalities were successfully appealed to in an attempt to disband both constitution-drafting committees and impose the parties' views on the constitutional character. The parties feared that their lack of political and electoral influence in the legislature and the constitution-drafting panel would result in Islamists being able to shape the nature of the Egyptian state, especially in terms of the influence of Sharia, notwithstanding the fact that most articles of the Constitution allowed for large interpretive leeway (Brown 2013; Al-Ali 2012).

As noted above, the belief that constitutions are eternal increased these fears. Secular parties wanted to ensure that future electoral gains and legislative and executive jurisdiction would not be constrained by the state's constitutional character. This intention was aided by the judiciary, which ruled in favour of the secular parties in the decision in April 2012 to disband the first constitutional committee and the June 2012 decision to dissolve the lower house of Parliament (Brown 2013).

When these efforts failed to halt the process and a draft constitution was about to be put to a referendum, the parties pulled out of the drafting committee, citing an Islamist monopoly and lack of intellect, almost crippling the committee's work and drastically increasing secular/Islamist polarisation. The parties also sought to circumvent the electoral process by appealing to protest politics (democracy of the street vs democracy of the ballot) and supporting the grassroots Tamarod movement, which collected signatures to a petition calling for Mursi to be removed. The parties refused to meet with the Mursi regime after the 22 November Decree, declined to participate in Mursi's Cabinet and used their influence to obtain international support for Mursi's removal.

It is significant that Tahani ElJibali, a senior SCC member critical of the Mursi regime and supportive of SCAF, worked closely with the Tamarod campaign to ensure that power was transferred to the SCC following Mursi's ouster. As a result, Mursi's regime was ousted in July 2013 and military control was re-asserted over Egyptian politics.

The attempt to circumvent the electoral process and influence the nature of the state by appealing to the judiciary and the military has led to a full-scale reversal of the gains won in 2011, something that would have not been possible had it not been for the support of secularists and youth organisations. It is noteworthy that in the 25 cases where a similar pushback was successfully instituted, including in Chili in 1972 and Thailand in 2014, only nine countries returned to the democratic path within five years and most at the latter end of the five years (Sides 2013; Svobik 2008).

CONCLUSION

This chapter has problematised the increased focus on constitutions as a means of enabling orderly transition. It has assessed and critically analysed the methods of restraining constitutive power and demonstrated how the perception that a constitution is an eternal document inhibits consensus formation. It has also illustrated how this perception empowers a coterie of unelected judicial officials, who are usually members of the *ancien régime*, to make decisions about the state's future character; decisions which usually serve to protect the benefits of the former regime.

It further problematised the notion that constitution-drafting is a domestic affair, representing the local political balance of forces, by illustrating how 'best practices' and assistance from international organisations during the drafting process are used by international powers to influence the nature of transitions and protect their interests.

Using the example of Egypt, it demonstrated how these views informed the actions of the main political actors. Justifiable fears about judicial independence and the belief that the Constitution was unchangeable led the Muslim Brotherhood to attempt to dominate increasingly and to immunise the constitution-drafting process from interference. This reinforced the perception that the group was seeking to Islamise Egyptian society and resulted in increased secular-Islamist polarisation.

Opposition parties, particularly secular ones, fearing this and not possessing a large constituency, sought to influence the judiciary to circumvent the electoral process and reverse the losses they had suffered in the previous two referenda and three elections prior to the enactment of the 2012 Constitution. Possessing its own view of the way society should be organised, which was similar to that of the opposition, and being comprised largely of Mubarak-era remnants who were fearful of losing their privileges under the new regime, the judiciary obliged, dissolving the first constitution-drafting committee in April 2012 and the lower house of Parliament in June of the same year. Moreover, the second committee was dissolved in June 2013 and the upper house of Parliament was found to be unconstitutional. This

culminated in the 2013 military ouster of the Mursi regime, which, at the time, was supported by most opposition parties, and which has resulted in a full reversal of the gains of the 2011 uprising.

Similar processes were unsuccessfully attempted in Turkey in 2008 and in Indonesia and Spain, all states in which the military have disproportionate influence (Bali 2012). For this to be inhibited and compromise fostered it is first necessary to acknowledge that constitutions represent a certain power configuration at the time of their drafting and are not eternal, infallible documents that are unalterable. Such recognition would lead us to place less emphasis on constitutions in times of transition and focus more on electoral processes and respect for their outcomes.

The notion that constitutions can begin the process of transition should be disparaged and the idea that an 'independent' judiciary should be allowed the political powers of interpretation during the transition discouraged. This may pose problems in terms of negotiating rules of engagement for the different actors following the transitional process, however, these can be negotiated in an interim constitution, provided all actors are involved in its drafting and a time limit set for its expiry (El-Sayed 2014). Judicial independence, especially in matters concerning political oversight and constitutional interpretation, must be suspended during this process in order to ensure judicial reform.

CONCLUSION

Five thematic lessons and conclusions drawn from 70 years of constitutional experimentation in Africa

Grant Masterson

Democracy is an experiment whose only purpose is to keep the experiment going

Professor John Stremlau

This concluding chapter examines five broad themes addressed in the preceding chapters, summarising each. Although other themes emerged during the EISA Symposium that inspired this volume, and individual authors touch on other matters, these themes reflect broadly the synthesis of those discussions and debates.

The themes are:

- the legacy of colonialism and its continuing influence on modern constitutional reforms in Africa;
- distinctions and similarities between anglophone and francophone states, both at independence and currently;
- differences in constitutional reforms carried out in the 1990s, during which time the majority of African states introduced at least some constitutional amendments;
- the rise of the African Union and its framework of norms and standards to entrench constitutional changes of government as the only legitimate means of regime change; and
- the issue of constitutions as limits on the powers of political elites.

LEGACY OF COLONIALISM

From one perspective, the tenacity of colonial legacies in remaining embedded in African constitutions today is, arguably, not surprising. There is compelling evidence to suggest that the colonial structures inherited by newly independent African leaders suited the style of executive-dominant governance that has characterised much of Africa's post-colonial history in many states and were thus reinforced by those leaders by whom democracy and universal human rights were not highly valued. At the time constitutional forms of government were well established in Europe and America, so it is

also understandable that African constitution-makers would have referenced these forms of constitutional governance in their own designs.

African governments have now had more than 60 years to remove from their constitutions, arguably the most important documents in modern nation states, the skewed allocation of privileges built into colonial governance. When one considers (as detailed extensively in the preceding chapters) how individual African states have, in many cases, completely redrafted, or at least undertaken wholesale revisions of their constitutions, one might expect this to lead, *inter alia*, to the removal of colonial architecture and statutes.

Structures such as the Organization of African Unity (OAU) were established with the explicit intention of overturning and rolling back colonial dominance on the African continent and, in 2013, its successor, the African Union (AU), during the celebration of the 50th anniversary of the establishment of the OAU, even claimed victory over colonialism.

Yet in spite of these considerations a number of the chapters in this volume repeatedly refer to the legacy, practices and structures modern African states inherited from colonial powers and which seem to persist in today's constitutions. Clearly, the authors featured in this volume aren't persuaded by the AU's rhetoric or the notion that colonialism is no longer relevant to present-day African constitutional debates. This cannot be a mere quirk of history.

The fact that evidence of colonial structures persists in the constitutions of modern African states underscores two issues simultaneously: the exploitation of colonial centralism by African 'strongmen' and the collective failure of African legislatures to overturn their colonial structures through legal and constitutional reform. This point is worth emphasising: although it is challenging to redress the injustices of colonial legacies in African states, the task of reformulating legislation to remove colonial biases and structures is a mere technicality by comparison.

In a volume which has as its central focus the issue of constitutional reform in African states, this finding should raise serious concerns about the past and present performance of African legislatures. It is therefore essential that this issue is explicitly articulated in volumes such as this, which seek to encapsulate the current status of constitutionalism in Africa. Constitutions which continue to reflect colonial era structures, procedures and standards are fatally flawed in their advancement of inclusive governance for Africa's citizens.

Tom Lodge frames this issue well in his chapter, which examines the way in which constitutions were inherited or negotiated into existence during the transition from colonies to independent states. Lodge's analysis highlights the differences in approach to transitional negotiations of Africa's two dominant

colonial powers, France and Britain. The fact that both anglophone and francophone colonies adopted fairly faithfully replicas of Britain and France respectively demonstrates the influence of these systems as departure points for the governance of modern African states. Although Lodge does not say so explicitly in his chapter, the genesis of the modern African state, built according to colonial architecture and constitutionally constructed to mimic it, demonstrates how independence was initially far more about *who* was in power than *how* they were in power. Lodge's analysis indicates clearly how deeply the systems of colonial governance were entrenched, to the point that some of them have survived in modern African states.

ANGLOPHONE VS FRANCOPHONE DYNAMICS AND CONSTITUTIONAL EVOLUTION

Lodge, Winluck Wahiu and Charles Fombad all touch on the differences between anglophone and francophone processes of negotiation and the types of constitution the two groups of former colonies inherited. It is entirely expected that, at independence, most African states would reference the constitutional and governance structures of the colonial powers they were separating from, even if only during some transitional arrangement.

Lodge makes it clear that, further to this observation, the approaches of the British and French governors negotiating the transitional processes differed significantly as well, affecting the later trajectory of the former colonies. While the French followed a hands-off approach to the independence process, Lodge argues that British governors were far more involved in the constructs left behind after independence.

In his chapter Fombad observes the way in which these processes created the pre-conditions for almost total power to be appropriated by the executive, leading to later efforts to curb executive excesses through the imposition of term limits. Interestingly, all three authors acknowledge that although British and French colonies attained their independence along different trajectories, across the continent in the 1970s and 1980s there was a convergence in most African states (both Anglophone and Francophone) towards one-party rule, with a dominant executive branch wielding broad and sweeping powers. Thus, while their points of departure may have varied, by the late 1980s many African states had reformed their constitutions to reflect fairly similar centralised forms of governance.

This finding challenges the notion that historical analysis of state and constitutional reforms in African states requires at all times a dialectical approach that distinguishes between former British, French and even Portuguese and Spanish colonies. In fact, given the convergence demonstrated by Fombad and Wahiu, African leaders were clearly learning from one another

and adopting similar systems of rule virtually from the outset. Given the embedded notions passed on from colonial structures, this implies that while African leaders were using peer experiences in reforms during this period they were also entrenching colonial structures in their systems through a type of hybrid cross-pollination effect. This may further explain why and how legacies of colonial era legislation persist in some modern African constitutions.

CONSTITUTIONAL REFORM FROM THE EARLY 1990S

One of the issues revisited repeatedly during EISA's Symposium in 2015 and in this volume is the wave of constitutional reforms undertaken by African states in the 1990s and early 2000s. It is common cause that the end of the Cold War precipitated a necessary realignment of geo-political alliances, and the 'third wave' narrative, which described the onset of rapid democratisation in Africa at the end of the Cold War, is well understood (if often criticised). What interested authors like Fombad, Wahiu, David Zounmenou and André Mangu was less that these reforms took place than what those who initiated them were seeking to achieve.

Wahiu is scathing about the calibre of the reforms, questioning the underlying commitment of African leaders to the democratic project they were ostensibly committing to. His scepticism is clearly articulated and repeated references to the later rolling back of some of the most progressive democratic reforms in African constitutions (including specific term limits for heads of state) appear to support his critique. It should be noted, though, that even if the intentions behind reforms during this period were less than altruistic, the reforms nevertheless took place and created, perhaps inadvertently, the conditions for later democratic consolidation and strengthening.

Fombad agrees with this analysis, examining more specifically third-term limits within constitutions. His analysis makes it quite clear that constitutional bulwarks to third-term presidencies were not only weak to begin with, but, as a general rule, are fairly ineffective in deflecting powerful executive arms of government from seeking to undo these safeguards in their respective constitutions.

Zounmenou examines the influence of external actors in promoting or compromising adherence to national constitutions during periods when constitutional limits are, in principle, prescribed. His findings are particularly problematic for two very different reasons. Firstly, the very existence of the intrusion of external actors into the sovereign affairs of African states undermines the reliance on a country's constitution as the basis for governance and due process. It is precisely because Africa's leaders and arms of government seek to weaken their own constitutions and legal processes

that the space (and occasionally the desire) is created for external actors to seek to intervene in what are essentially sovereign affairs of state.

By allowing the state to undermine its own constitution a country opens itself up to greater influence from external actors, primarily in the absence of mechanisms to resolve constitutional disputes. It would be far better for African states to resolve their issues according to national consensus and agreed legal jurisprudence than to rely continually on external actors to intervene. However, this argument has often been advanced by African strongmen and despots to shield their actions and motivations from closer scrutiny and has even resulted in the African Union breaking from its tradition of non-interference (more on this below).

Secondly, when a country's leaders fail to commit to the democratic principles they profess to espouse it is often the citizens who cry out most for external intervention, thus depriving themselves of some degree of the agency they claim as citizens of a democratic state. Once again the symptom of weak institutions and processes, constitutional protection and an overarching social compact render citizen activism and engagement with the state increasingly impotent, frustrating the citizenry and insulating national governments from the consequences of their actions. In both instances the biggest casualty of external influence is the legitimacy of a state's democratic processes themselves.

In the context of Africa's ongoing dissatisfaction with the International Criminal Court (ICC) it is worth remembering that the majority of cases before the ICC involving African leaders were brought by citizens of the countries involved. This clearly demonstrates a breakdown in the trust placed in state institutions and processes guided by the constitution. Zounmenou, however, sees the influence of external actors to correct the domestic shortcomings of African constitutions as a positive force, for reasons described in detail in his chapter.

THE AFRICAN UNION AND THE BIRTH OF NON-INDIFFERENCE

Mangu and Nokhukanya Ntuli's chapters take a closer look at one of the key external actors in African constitutionalism, examining the performance of the AU in the context of its predecessor, the OAU, and in light of its relative successes and failures in the relatively brief time it has been in existence. Ntuli's chapter offers a procedural and historical context within which she defends the performance of the AU in advancing constitutionalism and democratic governance since its creation in 2003.

There is legitimate and valid criticism of the AU and its role in promoting governance and the rule of law in Africa, but that should not detract from the important and necessary function the body serves in the African context.

Africa's post-colonial democratisation efforts have historically suffered from two key impediments: the ongoing influence of former colonial and other external powers (neo-colonialism and the proxy wars during the Cold War) and the impunity of African strongmen in suppressing and repressing domestic dissent.

While the AU's existence may not address these impediments completely, the pan-African institution and its sub-regional structures clearly ameliorate some of the worst excesses of both challenges. The AU's presence in the region ameliorates the effects of external actors imposing their presence in Africa without the consent of either the AU as a body or a regional economic community and the AU's stance on the primacy of constitutionalism and constitutional changes of government has tightened the space within which African leaders are able to act with impunity at home.

Sceptics may rightly point out that the AU is heavy on rhetoric and light on action and, more particularly, results, but the extent to which this criticism is valuable is less in its stinging rebuke of the AU than as an exhortation for its structures to improve their performance. The AU as a structure is the only institution with both the legitimacy and authority to support constitutionalism on a continent whose national constitutions are often still too weak to defend against both foreign and domestic influence. An African continent without an African Union and all the ideals it purports to uphold would be a far poorer place, not only democratically but developmentally, than it is at present.

Mangu's analysis of the AU's performance challenges this assertion, highlighting the complex problems the body has begun to encounter in the simple act of trying to secure adherence to its own principles and frameworks. The AU broke with the tradition of non-interference advocated by the OAU, arguing that those matters which affect the citizens of one African state affect all other Africans as well. The underlying rationale for this line of reasoning can be seen most graphically in the refugee camps in countries such as Kenya, Uganda, Ethiopia and the largescale movements of people from neighbouring states into countries such as South Africa, Ethiopia, Kenya and Tanzania. When governance fails in one African state the burden of that failure is often regionalised.

It was largely in response to this appreciation of the knock-on effects of crises in African states that the AU developed the African Charter on Democracy, Elections and Governance (ACDEG) in 2006, codifying a growing body of institutional frameworks which condemned categorically unconstitutional changes of government. Mangu is particularly interested in this aspect of the AU's mandate, arguing that the imprecise language used to define unconstitutional changes of government has not served the AU well

when it has had to navigate some of the continent's most taxing constitutional crises.

Mangu notes that the debate about this issue is far from theoretical, as highlighted by the AU's challenges in resolving the issue of the transitional arrangement between the democratically elected Mohammed Morsi and former military leader Abdel Fatah al-Sisi in Egypt in 2014, NATO's intervention in Libya in 2011 and, more recently, the constitutional crisis in Burundi precipitated by President Pierre Nkurunziza's determination to stand for a third term.

In each of these circumstances definitions have been central to the challenge facing the AU's response. In Mangu's view, as the AU has become more strident in advancing its stance on constitutional changes of government matters have become more complicated. In some quarters the AU's boycott of Burundi's elections in 2015 was seen as a bold move, yet, at the same time, it undermined the body's ability to understand the context in the post-election period when the challenge shifted to instituting institutional and legal reforms to resolve the country's political crisis.

CONSTITUTIONAL REFORM AND POLITICAL ELITES

Perhaps more than any other theme the role of political elites in the creation, revision and dismantling/deconstruction of constitutional frameworks was the most cross-cutting across the chapters in this volume. Masterson's review of Zambia's ongoing challenges in defining a stable and broadly acceptable constitution, Deen's chapter on constitutional issues in Egypt and Wahiu's chapter clearly highlight the central role played by political elites in these processes. Problematically, political elites are, in fact, the central actors and role players during meaningful constitutional reform. A cursory search for evidence of successful citizen-driven constitutional processes throws up a couple of outliers in principalities such as Liechtenstein and Nordic states, but on the African continent not even the Arab Spring led to constitutional reform without the intervention of political elites.

Fombad, Wahiu, Masterson and others all describe a lack of trust in the motivations of political elites during the process of constructing or revising constitutional frameworks. This raises a number of questions. Based on Lodge's analysis, modern African constitutions remain (at least in part) products of their colonial past, which logically suggests the need for further constitutional reforms. Yet Wahiu, Fombad *et al* have clearly demonstrated that Africa's post-colonial history has been littered with examples of political elites advancing parochial and narrow interests in the reform and revision of national constitutions.

If such elites are, as several authors suggest, necessary to effect constitutional change, they do so with a significant trust deficit which undermines the much needed social contract with their countries' citizens. This places constitutional reform in jeopardy or, perhaps even worse, creates the preconditions for further efforts at a later stage to review these reforms and revisit them once more, as demonstrated in Masterson's review of Zambia's experience.

This is, perhaps, a partial explanation of why so many of the contributors to this volume return repeatedly to the centrality and importance of political elites. Wahiu's observation that constitutions are always stronger when the citizenry is included in providing input during reforms is true, but perhaps the clearest lesson to be learnt from the book is the necessary and controversial role that political elites can and are often required to play in delivering constitutional reforms that either include or exclude the interests of the citizens on whose behalf they should be negotiating. It is, perhaps, not an absolute truth that political elites will always play a role in constitution-making, but, all else being equal, it is true more often than not.

THE FUTURE OF CONSTITUTIONALISM IN AFRICA?

Throughout the chapters in the book there is a palpable sense of scepticism about and frustration and *ennui* in relation to the state of constitutionalism in Africa, with many valid and well-reasoned justifications provided. Yet to conclude by emphasising this fatigue without offering some counter argument or perspective risks devaluing the importance of constitutionalism, democracy and institutions. Constitutions matter not just because of the way they are created or what they contain, but because of the aspirations they represent in the context of a country's vision and its social compact.

South Africa's Constitution boldly proclaims that 'South Africa belongs to all who live in it', even while African visitors experience xenophobic slurs and attacks. The fact that these visitors fail to experience the 'belonging' the Constitution reflects does not undermine the value of the statement as an aspiration but rather highlights the failure of South Africa's institutions and citizens to embody the spirit of that statement.

Article 4 of the African Union's Constitutive Act (2002) spells out clearly the 16 principles which underpin the union's existence and will guide its conduct during interactions with its member states. There is legitimate criticism of the AU's performance against its own principles and statutes, but this critique should avoid minimising the importance of setting those principles in writing within the formational act of the union. It is both useful and important that even if these principles are not *de facto* enjoyed by Africa's

people they should remain the goal and vision of the AU and act as a measure of progress (or lack thereof).

One of the most interesting contributions made during the discussions that took place at EISA's 2015 Symposium was that for a particular generation of Africans what is written down is often viewed as less important than a spoken commitment. In this narrative the primary contract between a leader and his/her people is entered into through the spoken word, while those words written down have less meaning and impact. Colonial legal practice imposed the primacy of contract law in the transactions between parties, a practice which amused and perplexed many African parties to such negotiations. If true, this viewpoint challenges the prevailing notions of constitutional supremacy as the written contract between a country's citizens and their government. However, even if true, and there was some disagreement on this point, the modern African state has entered fully into the global system where rules and institutions are created through documentary procedures.

In this context there is no more important document set down in written form than a country's constitution. It is not only the document against which all other legal frameworks should be tested for consistency, it should, ideally, encapsulate the ambitions, aspirations and commonly held principles of a country's people. It shapes the legal system, institutions and processes through which those who live in a country interact economically, socially, religiously, ethnically/racially and challenge one another's ideas. It provides the mechanisms whereby those who fail to adhere to this social contract are treated and how to resolve conflict if it should arise.

When political leaders, elites and other interest groups undermine and weaken the constitution they weaken the very fabric of the society they claim to serve. When they weaken and abuse state institutions they weaken the very mechanisms created to give life to a constitution's ambitions. In both cases citizens should be constantly on guard against such abuses and their long-term consequences.

Constitutions impose on nation-states obligations that, until the middle of the 20th century, were almost unheard of, but are increasingly accepted by many states as part of the fabric of governance and as a responsibility of the state to its people. In this era of state obligations the conduct of states such as North Korea and Swaziland are increasingly viewed as anachronistic and out of sync with the modern nation-state. Even in the African context, where the constitutional experiment is still relatively young (50+ years), the idea of states having obligations to their people is changing and shaping the way the continent's citizens regard their leaders.

If the scepticism reflected in this volume indicates anything it is, perhaps,

just how much further African states still have to go to entrench and manifest the principles of constitutional democracy. The importance of that project is arguably greater than any other single task currently facing Africa's leaders, citizens and institutions. For without a social compact around which to rally, the continent's development goals will continue to be enjoyed by the few at the expense of the many, and that situation is about as untenable as they come.

THE AUTHORS

Segun Adeyemo

Segun Adeyemo studied International Relations at the University of South Africa. Since his graduation he has become a social entrepreneur and good governance advocate focusing on Nigeria's domestic and foreign policies. Mr Adeyemo speaks and writes regularly on social, security and governance issues in Africa.

Ebrahim Shabbir Deen

Ebrahim Shabbir Deen is a researcher at the Afro-Middle East Centre, a research institute based in Johannesburg, South Africa. His interests include political Islam, Middle Eastern politics, development issues and climate change. He is a frequent media commentator on political events in the Middle East-North Africa region. He is author of the book *Hezbollah vs. the Egyptian Muslim Brotherhood: A social democratic perspective* (2012). He holds a master's degree in International Relations from the University of the Witwatersrand and is an Abbot Wigan Athletics supporter.

Charles Manga Fombad

Charles Manga Fombad is Professor of Law and heads the African Constitutional Law Unit at the Institute for International and Comparative Law at the University of Pretoria. He is the author/editor of nine books and has published more than 75 articles in local and international peer reviewed journals. He has also written more than two dozen book chapters as well as numerous other publications and conference papers and has received several awards for his publications. Professor Fombad is a fellow of the Stellenbosch Institute for Advanced Study (STIAS) and an NRF B-rated scholar. He is a member of the editorial boards of several international journals and a member of many professional associations, among them the African Network of Constitutional Lawyers of which he is a member of the steering committee and convenor of its working group on the Teaching of Constitutional Law. He is a vice-president of the International Association of Constitutional Law and a convenor of the research group on the constitutional dimensions of political parties and political rights. His research interests are in Comparative African Constitutional Law, Media Law, the African Union and Legal History, especially issues of legal harmonisation.

Tom Lodge

Tom Lodge is Professor of Peace and Conflict Studies and a faculty dean at the University of Limerick. Until his present appointment he was Professor

of Political Studies at the University of the Witwatersrand in Johannesburg. He has worked with EISA in various ways since 1999 and is at present a member of its board. He is the author of several books about South African politics, most recently, *Sharpeville: An Apartheid Massacre and its consequences* (Oxford 2011). His most recent research has focused on the efforts of African governments to address the HIV/AIDS pandemic.

André Mbata Mangu

Professor André Mbata Mangu completed his undergraduate studies in the Faculty of Law of the University of Kinshasa, Democratic Republic of Congo and his postgraduate studies in the College of Law at the University of South Africa, where he was awarded a master's degree in 1999 and a doctoral degree in 2002. His doctoral thesis, entitled 'The Road to Constitutionalism and Democracy in Post-colonial Africa: The Case of the Democratic Republic of Congo', received an award from the Association of African Universities. Prof Mangu lectured at the then University of the North (currently University of Limpopo) in South Africa and has also taught at the University of Kinshasa (DRC) and the University of Paris 13 (France). He serves on the editorial boards of several academic journals and has published books, chapters in books and numerous articles in accredited African and international journals. He is currently a research professor in the College of Law.

Grant Masterson

Grant Masterson (MA [International Relations], University of the Witwatersrand) is programme manager of EISA's programme supporting the African Peer Review Mechanism (APRM). The APRM programme supports the work of the official APRM institutions and promotes the value of the mechanism as a means for civil society to engage with government on governance issues. Currently the EISA APRM Support Programme supports civil society engagement in seven APRM member states. Mr Masterson has published several volumes, among them *Peering the peers: Civil Society and the African Peer Review Mechanism*. Since 2004 he has participated in 17 election observation exercises for EISA, the African Union and regional economic community bodies.

Nokukhanya Ntuli

Nokukhanya (Nox) Ntuli, a lawyer, mediator, trainer and process facilitator, is a Constitutionalism and Rule of Law Expert in the Department of Political Affairs at the African Union Commission in Addis Ababa. Prior to joining the AU she worked as a Conflict Resolution Specialist. She holds a post-graduate fellowship on Peace and Security (from Kings College and the

African Leadership Centre), a master's degree in Corporate Law (from Nottingham Trent University), an LLB Honours degree (from the University of Wolverhampton), a certificate in Commercial and Civil Mediation (from the ADR Group) and a certificate in Transitional Justice and Peace-building (from the United Nations Institute for Training and Research). She has worked in the legal field for about 15 years and has been a mediator for 10 years. She has served on the boards of several non-governmental organisations and is currently a member of the board of the Centre for the Study of Violence and Reconciliation.

Winluck Wahiu

Winluck Wahiu, who studied law at the London School of Economics and the University of Nairobi, is president of the Ratio Foundation, a Washington, DC-based think tank specialising in constitutional law and international economic law research. He is an advisor to the AUC on constitutionalism and is currently drafting a report on the state of constitutionalism in Africa for the constitutionalism cluster under the Department of Political Affairs. He has advised national organs in Kenya, Ecuador, Nepal, Zambia, Liberia and South Sudan on constitutional reform and constitution-building processes and written on related issues, in particular the design of participatory and inclusive processes of constitutional reform. He is a former head of the International IDEA global Constitution Building Programme based in Stockholm, Sweden. In 2004 he received a certificate from the Law Society of Kenya for his contribution to the country's constitutional reform.

David Zounmenou

Dr David Zounmenou is a Senior Research Fellow of the Conflict Prevention and Risk Analysis Programme at the Tshwane (Pretoria) office of the Institute for Security Studies, where he focuses on West Africa Security Complexes. Graduating from the Ecole Nationale d'Administration (ENA-BENIN) in Law and Diplomacy, he joined the University of the Witwatersrand (Wits), Johannesburg, where he completed his postgraduate studies (BA Hons, MA Cum Laude and PhD) in International Relations. His areas of interest include Foreign Policy Analysis, Contemporary Development Issues, Democracy and Good Governance, Armed Conflicts and Human Security. Dr Zounmenou also tutored at Wits and lectured at the Walter Sisulu University (Eastern Cape). He has recently become involved in a project that looks into political violence and issues related to elections and violence in Africa. In 2014 Dr Zounmenou was appointed by the UN Secretary General to serve as a Regional Expert with the UN Group of Experts on Côte d'Ivoire.

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Constitutions are the bedrock of multiparty democracies. Tension between the principles of democracy – rule by the people – and constitutionalism, as a predominantly elite driven process, have increased across the African continent as constitutional reforms have become regular occurrences in many states since the early 1990s. Some of these reforms have strengthened democratic ideals, while others have opened states up to greater abuses of power. As many African states continue to grapple with the consolidation of democratic norms and institutions into their legal frameworks, they have simultaneously been constrained by the remnants of colonial era constitutions. Colonial era states were deliberately constructed to propagate elites in the governance of the colony, a system which has in many modern African states been reinforced by African political elites in furthering narrow interests. When political leaders, elites and other interest groups undermine and weaken the constitution they weaken the very fabric of the society they claim to serve. When they weaken and abuse state institutions they weaken the very mechanisms created to give life to a constitution's ambitions. In this edited volume, some of Africa's leading academics seek to answer questions such as: "If constitutional changes continue to be elite driven processes – excluding citizens – can constitutions ever truly be 'living documents' providing the foundations to build and consolidate democratic norms and institutions in Africa?"



14 Park Road Richmond
Johannesburg 2092, South Africa
P.O. Box 740 Auckland Park 2006
Johannesburg South Africa
Tel: +27 11 381 6000 - 7
Fax: +27 11 482 6163
Email: eisa@eisa.org.za
www.eisa.org.za

