

**Constitutionalism and
Democratic Governance in Africa:
Contemporary Perspectives from Sub-Saharan Africa**

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Pretoria University Law Press
PULP

2013

***Constitutionalism and democratic governance in Africa:
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Published by:

Pretoria University Law Press (PULP)

The Pretoria University Law Press (PULP) is a publisher at the Faculty of Law, University of Pretoria, South Africa. PULP endeavours to publish and make available innovative, high-quality scholarly texts on law in Africa. PULP also publishes a series of collections of legal documents related to public law in Africa, as well as text books from African countries other than South Africa. This book was peer reviewed prior to publication.

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Printed and bound by:

ABC Press
Cape Town

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Cover:

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ISBN: 978-1-920538-14-9

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From military rule to constitutional government: The case of Nigeria

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FOREWORD AND DEDICATION

Adieu, Steve: Tribute to a scholar of African constitutionalism

This volume of essays on constitutionalism in Africa is devoted to the memory of Steve Odero Ouma, who spent most of his professional life working on these issues. He was a colleague and friend to many of the contributors to this volume, and no doubt to many of its actual and potential readers. Steve passed away on 23 February 2012.

Steve's professional life

Steve Odero Ouma was born in Kenya and lived most of his life there. Steve completed a Bachelor of Laws degree at the University of Nairobi in Kenya, before enrolling for the LLM (Human Rights and Democratisation in Africa), presented at the Centre for Human Rights at the University of Pretoria, in 2005. His Master's dissertation titled 'Federalism as a peace-making device in Sudan's Interim National Constitution'. Steve graduated from the programme in December 2005. As part of that year's programme, students undertook a field trip to Sierra Leone. I was fortunate enough to accompany this group. On this trip, I got to know Steve as someone who could be playful and mischievous but he was also extremely serious about issues affecting our continent, and was an inquisitive, determined and dedicated student. In 2011, the Centre for Human Rights invited Steve back to Pretoria, to teach part of the 'democratisation' element of the LLM programme. The very favourable student assessment (a score of 98% from the class) is evidence of his knowledge of the field and his outstanding qualities as a teacher.

After completing his LLM at the Centre, Steve was awarded a bursary to undertake doctoral studies (in Political Theory) at the Luiss University of Rome, in Italy. By focusing on the challenges to constitution-making in Africa in his thesis ('Constitutional mechanisms for the management and settlement of identity conflict: The cases of Sudan, Kenya and Somalia', see website <http://eprints.luiss.it/997/1/20110621-odero-ouma-tesi.pdf>), Steve was one of the alumni who took the 'democratisation' part of the LLM programme to heart. Having completed his studies, Steve obtained his LLD in 2011.

Steve also worked on several projects as a researcher, and taught at the School of Law, Jomo Kenyatta University in Nairobi, Kenya; the Africa Nazarene University, Kenya; and the University of Pretoria, South Africa. At the Institute for Diplomacy and International Studies, University of Nairobi, Dr Odero served as a PhD research associate where he worked on the prospects of autonomy as an antidote for clanism in Somalia. At the Amnesty International United Nations Office in New York, he conducted research on the responsibility of United Nations peacekeepers for allegations of violence and sexual exploitation of women and children. His research interests included criminal law, post-colonial political philosophy, international law and relations, conflict resolution, good governance and democratisation in Africa, constitutional law and anthropology. Steve was admitted as an advocate in Kenya in 2007.

Steve's publications

One way of paying tribute to Steve, and to remember him, is by listening to his own words, as expressed in some of his publications. Steve's voice has a very distinct ring, because he was both a lawyer and political scientist. Having been schooled in both international law and political science, Steve was able to provide a distinct academic vantage point. Positioned on the cusp of two separate disciplines, he was able to bring particular and very valuable insights. In one of Steve's contributions (a chapter on the politics of international criminal justice and the International Criminal Court's arrest warrant for President Al Bashir, contained in a collection of essays by alumni on criminal justice in Africa ('Politics of international criminal justice: The ICC's arrest warrant for Al Bashir and the African Union's neo-colonial conspirator thesis' in C Murungu and J Biegon (eds) *Prosecuting international crimes in Africa* 145 (Pretoria: PULP, 2011) he identified his own particular contribution to the debate exactly as a hybrid of law and politics (at 146):

The analysis is hybrid in nature, drawing from the disciplines of law and political science, and is therefore a challenge to lawyers, calling on them to unpack controversial factual issues and in so doing, add to their understanding of the complex non-legal factors that are at play in international criminal justice. Likewise, it is a challenge to political scientists to pay more attention to legal phenomena that are often at play and likely to influence political processes. It is only through a meeting of minds by scholars, practitioners and policy makers from these two fields that sound judgments grounded in law and political reality may be reached and successfully implemented.

Steve's emphasis on the potential synergy and the added advantage of the one discipline (law) to the other (politics), and the other way round, made him a very strong proponent of a multi-disciplinary approach to the study of conflicts in Africa, and their effects, including criminal prosecution and their underlying causes.

Steve's deep concern for the underlying causes of conflict in Africa appears from his analysis in the article 'Reflections on the causes of conflict in Africa: ethnicity or failure of leadership' ((2005) 13 *International Law Students Association Quarterly* 25). As the title of his article suggests, he investigated ethnicity and the failure of leadership as major root causes of conflict. On the issue of ethnicity, he presented a nuanced view, underlining the following: 'Ethnicity on its own is not a negative concept. Indeed the peculiar ways of dress, types of food and dance of a given group of people are in themselves not destructive.' However, he added the following: 'What is destructive is isolationist ethnicity carried out by those in authority and has been the cause of civil strife that characterizes Africa today.' Underlining the importance of leadership, he continued in the following way:

A leader is instrumental in creating the mood, ideals and general character that prevails in his or her country at any given time. Where a leader not only speaks of reconciliation and unity, but also practices the same, then such practice spills over to the local populous and a mood of peace and sense of unity take centre stage. Where a leader engages in ethnic politics either by publicly denouncing an ethnic group or remaining silent upon such denunciation or condoning the practice of the same in institutions, he only creates an atmosphere of animosity between ethnic groups in his country and suspicion.

His analysis in the article deals in more detail with the scourge of failed leadership:

African leaders have used use ethnicity to safeguard their own interests. This is evident from the account of the Rwandan genocide where a government supported and owned radio station was used to urge members of the Hutu to rise up against the Tutsi stating that it was only through their elimination that peace would prevail. Similarly in the Liberian conflict, the government of Charles Taylor succeeded in splitting the LURD rebel group along ethnic lines so as to minimize opposition to his rule. It is imperative that the cause of conflict in Africa be understood. Conflict occurs when there is a lack of effective leadership. Misapprehension of this reality has led to the employment of ineffectual policies and approaches to reconciliation hence the failure of many peace efforts. In this regard, whereas ethnicity or tribalism is a prominent feature in African conflicts, the cause of conflicts in the continent is multifaceted composing more than one factor. The principal factor behind these conflicts is simply and squarely a failure of leadership.

In his chapter in *Prosecuting international crimes in Africa*, mentioned earlier, Steve dealt with the negative reaction from some African states, and the African Union, as a collective, to the indictment of Sudanese President Al Bashir to appear before the International Criminal Court. He deplored the deteriorating relationship between the Court and the AU in the following terms (at 159-160):

Even if extreme action, such as a withdrawal of ratifications or referrals of one or more African states parties, has not so far been taken, the damaged relationship between the Court and the AU may encourage countries on the continent to drag their feet in domesticating the Rome Statute. This is important because, out of 30 states parties from the continent, only Burkina Faso, Kenya, Senegal, South Africa and Uganda have so far passed implementing legislation. Furthermore, other African state parties may withhold their planned referrals and their planned ratifications. Improved relations, which can be achieved through an appreciation of the issues raised here, will in the long run embolden some countries (for instance Rwanda and Angola) which have vowed never to become part of the ICC. At the same time, the Court as a legal institution, whose very essence is to help build an international rule of law, must jealously guard its mission to ensure that it is not subverted, or perceived to have been subverted, as an instrument for great powers to target weaker states or defeat adversaries in less influential regions of the world.

Steve's other publications include the chapter 'The African renaissance and discourse ownership – challenging debilitating discourses on Africa' in NM Creary (ed) (2012) *African Intellectuals and decolonization*.

This publication

This publication is a collection of essays written mainly by graduates of the Master's Programme in Human Rights and Democratisation in Africa. (One of the authors, Mwiza Jo Nkatha was one of Steve's class mates in 2005.) The only exception, Professor Kofi Quashigah, is the Dean of the Faculty of Law, University of Ghana, at Legon, Accra. My sincere thanks and congratulations go to each of these contributors for their pointed and important contributions to this volume. I should mention here that the University of Ghana is one of the twelve partner universities in the programme. The other partner faculties are: the University of the Western Cape (South Africa); the University of Venda (South Africa); Makerere University, Uganda; the University of Ghana, Ghana; the University of

Lagos, Nigeria; Université Gaston Berger, Senegal; the University of Abomey Calavi, Benin; Catholic University of Central Africa, Cameroon; Universidade Eduardo Mondlane, Mozambique; Addis Ababa University, Ethiopia; University of Mauritius, Mauritius; and American University, Cairo, Egypt.

The editors are two prominent Kenyan academics, Dr Morris Kiwinda Mbondenyei, Senior Lecturer in Law, Africa Nazarene University and Professor Tom Ojienda, Associate Professor of Law, Moi University. I would like to thank them, in particular, for their hard work and dedication in bringing this work into being. They oversaw the peer-review process, and worked with individual authors.

It should certainly also be mentioned that Steve Odero conceived of and initiated the idea of this book, together with the two editors, and walked some distance on the road towards this publication. Sadly, it was a road not completed, due to Steve's sudden death. I am sure Steve would have wanted these pages to take us all along a journey he embarked on, but could not complete: the unfinished journey to secure genuine constitutionalism in states across Africa.

Frans Viljoen
Director, Centre for Human Rights



In loving memory of our beloved departed friend

Dr Steve Odera Ouma

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Dejo Olowu is a research Professor of Law at the Faculty of Law, North-West University (Mafikeng Campus), SA. He was admitted to the Nigerian Bar in 1992 and was an active litigation attorney until 1997 when he moved into the academic world. He started his professional career as an academic at the Obafemi Awolowo University, Ile-Ife, Nigeria, as an Assistant Lecturer in 1997 and assumed his present position as Research Professor of Law (Public Law & Legal Philosophy) at the North-West University (NWU), Mafikeng, from 1 January 2010. Prior to joining the NWU, he was Professor of Law and Acting Director of the Walter Sisulu University School of Law, SA, and had served as a Ministerial Adviser to

the South African Law Reform Commission (Project 25: Minerals & Energy Affairs). An inquisitive scholar, Professor Olowu has participated in various learned conferences connected with his teaching and research interests around the world. He has also authored some 100 learned publications through reputable legal and interdisciplinary outlets in Africa, the Americas, Asia, Europe, and Oceania. The South African National Research Foundation (NRF) currently rates Professor Olowu an 'Established Researcher' for his interdisciplinary work (2009-2014). In recognition of his keen research acumen, Professor Olowu serves on the Academy of Science South Africa (ASSAf)'s Peer Review Panel for Scholarly Journals in the Law and Related Fields.

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**PART I: GENERAL THEORETICAL
PERSPECTIVES**

INTRODUCTION TO AND OVERVIEW OF CONSTITUTIONALISM AND DEMOCRATIC GOVERNANCE IN AFRICA

Morris Kiwinda Mbondenye and Tom Ojienda

1 Introduction

In modern constitutional systems, the term ‘constitutionalism’ has come to suggest limited government. In fact, constitutions have become a blueprint for a system of government where authority is shared among a set of different branches and limitations are implied in these divisions.¹ In such cases, constitutions lay the foundation for external checks designed to safeguard the people’s liberties,² which is an essential feature of any democratic system.³ The concept of constitutionalism, therefore, is the doctrine that governments must act within the constraints of a known constitution whether it is written or not.⁴ Rather than merely being a static exercise in historical retrieval, constitutionalism is an on-going process in which each new generation engages and which necessarily alters in the process of such engagement.⁵ This easily explains why, although all governments have constitutions, they are not necessarily constitutional governments. This further explains why it has been so easy for many post-colonial African governments to use Constitutions to legitimise authoritarian rule.

Africa’s constitutional history is an excellent case study of the myriad difficulties that most post-colonial African states have faced and continue to face in the process of self-discovery. Arguably, the unending conflicts and civil wars in most of the countries on the continent have been orchestrated by the quest to establish constitutional regimes that can guarantee everyone equal participation in the economic, social and

¹ L Henkin *Foreign affairs and the Constitution* (1972) 3.

² As above.

³ M Foley *The silence of the constitutions* (1989) 2-3.

⁴ See DB Mosota ‘Constitutionalism and the rule of law under the new constitutional order’ in PLO Lumumba, MK Mbondenye & SO Odero *The Constitution of Kenya: Contemporary readings* (2010) 78.

⁵ As above.

political activities of their respective nations. Indeed, the emerging independent African states of the 1960s proclaimed their commitment to democracy, good governance and respect for human rights.⁶ This postulated deal would have been easily tenable, given that the independence constitutions of most of these countries came with a flowery package of guarantees to the citizens.⁷ This, however, turned out not to be the case. Instead, shortly after independence, the constitutions of most, if not all, of the emerging states were soon subjected to numerous amendments, effected in a manner that watered down the essence of constitutionalism and democratic governance.

Sadly, the end of the 1960s was characterised by the negation of the pledged democracy and gross violations of human rights with impunity across the continent. The pledged multiparty democracy became a by-word as opposition parties were regarded as 'clogs in the wheels of progress'.⁸ Ruling parties which had become intolerant to opposition politics stifled democracy and sacrificed constitutionalism on the altar of political greed.⁹ Consequently, a wave of *coup d'états* swept across the continent, where the military overthrew governments, purportedly to clean the socio-economic and political messes these governments had left.¹⁰ Although military regimes were usually enthusiastically received, little did people know what they had in store for them. With time, these celebrated military regimes fell into the same errors as the civilian administration.¹¹

Clearly, although African governments were expected to embrace and promote constitutionalism and democracy at independence, they neglected the same with impunity. As Babu sarcastically noted, liberation in Africa was duly climaxed by the following tendencies:¹²

Arbitrary arrest of citizens; disrespect for the right of habeas corpus; imprisonment without trial; denial of freedom of movement; ... organised and systematic police brutality; domination of government by secret police; mass arrests and detentions; concentration camps; physical and mental torture of prisoners; public executions; and the whole apparatus of violent repression.

This situation prevailed in Africa for decades. One would therefore agree with Odinkalu that the effective protection of human rights in post-colonial Africa necessitated a re-orientation of states away from the

⁶ MK Mbondenyi *International human rights and their enforcement in Africa* (2010) 89-90.

⁷ As above.

⁸ U Umozurike *The African Charter on Human and Peoples' Rights* (1997) 23.

⁹ For example, in 1982 Kenya became a *de jure* one party state following the enactment 2A in its Constitution.

¹⁰ Umozurike (n 8 above) 22. Umozurike explains that there were mutinies in Burundi and Rwanda in the 1970s and 1990s and in Nigeria, as early as 1966. In the same period, Ghana witnessed ten-minute trials and executions of former heads of government, following a successful military coup.

¹¹ As above.

¹² A Babu *African socialism or socialist Africa?* (1981) 171.

institutional infrastructure and attitudinal orientation inherited from the colonial period.¹³ Unfortunately, this process was never undertaken, let alone achieved. In fact, most of the laws, institutions and attitudes that underwrote the violations of human rights during colonialism did not just survive independence, they prospered thereafter.¹⁴ Oloka-Onyango went ahead to note:¹⁵

Nearly half a century after most countries on the continent attained independence, so many of them continue to utilise colonial laws governing political association, public health, education and free expression. The consequence is that their very claim to have made a difference in the human rights reality of the people they govern is effectively negated.

Not only did most post-independence African states retain some archaic colonial laws after independence; they also cherished the irresponsible practice of frequent constitutional amendments, aimed at accommodate the whims of the ruling class. Thus, they went full throttle to endorse the chronic culture of poor governance. Consequently, innocent citizens were unabatedly denied the enjoyment of many of their fundamental rights and freedoms.

A cursory glance at the events in twenty-first century Africa clearly indicates that the continent is still wallowing in a miasma of poor governance, while trying to remain afloat in the sea of constitutional turmoil. The on-going situation in Africa is a clear indication of how the undermining of constitutionalism can produce consequences which, when carefully considered, are the antithesis of democracy and good governance. The situation also explains why at the dawn of the twenty-first century the continent has witnessed, more than ever, agitation for comprehensive constitutional reforms and good governance.

Good governance is influenced by the existence of a well-crafted, democratic Constitution that enables the government to manage the affairs of the state effectively, while at the same time empowering the citizenry to participate in government.¹⁶ Citizens must participate in the drafting and implementation of such a Constitution. Good governance, strictly so called, has therefore not been tenable in Africa, much due to 'authoritarian constitutions' that disregard the doctrine of constitutionalism and vest enormous powers on one arm of government to the disadvantage of the

¹³ CA Odinkalu 'Back to the future: The imperative of prioritising for the protection of human rights in Africa' (2003) *Journal of African Law* 1 2.

¹⁴ As above.

¹⁵ J Oloka-Onyango 'Human rights and sustainable development in contemporary Africa: A new dawn or retreating horizons?' (2000) *Human Development Report 2000 Background Paper 4* available at <http://www.undp.org/hdro/Oloka-Onyango2000.html> (accessed 12 June 2012).

¹⁶ African Peer Review Mechanism 'Country Review Report of the Republic of Kenya' May 2006 available at http://www.polity.org.za/article.php?a_id=99422 and <http://www.nepad.org/aprm> (accessed 4 January 2011).

other arms. Disquiet with such constitutions, coupled with detest for the abuse of executive powers by incumbents, has led to the agitation for constitutional reforms in Africa, which is now the central talking point in many countries on the continent. There is a strong belief among the inhabitants of the continent that only comprehensive constitutional reforms can ensure sustainable constitutionalism, any separation of powers and bring to an end the abuse of executive powers.

2 Overview of the book

Since Africa is renowned globally for its rich source of case studies in constitution-making, constitutional reform, constitutionalism and democracy, this book is tailored to equip the reader with an incisive and in-depth treatise on the continent's experiences in these thematic areas. It is only through an even-handed appreciation of such rich experience that plausible analyses can be undertaken to inform other similar disconcerting situations elsewhere in the world.

The book contains thirteen chapters. The chapters are divided into three thematic areas, namely, general theoretical perspectives; perspectives on constitutionalism, constitution-making and constitutional reforms; and perspectives on democratic governance.

2.1 General theoretical perspectives

This part explores some themes and concepts of constitutionalism, constitution-making, constitutional reform and democracy in Africa. In chapter 1, Morris Kiwinda Mbondenyi and Tom Ojienda briefly underscore the theory and concept of constitutionalism and democracy in Africa. The authors contend that constitutions are important as they lay the foundation for external checks designed to safeguard people's rights and liberties. They further point out that the concept of constitutionalism enables governments to act within the constraints of a known constitution. Thus, rather than merely being a static exercise in historical retrieval, constitutionalism is an on-going process in which each new generation engages and which necessarily alters in the process of such engagement.¹⁷ It is the authors' view that the unending conflicts and civil wars in most of the countries in Africa have been orchestrated by the quest to establish constitutional regimes that can guarantee everyone equal participation in the economic, social and political activities of their respective nations.

¹⁷ As above.

2.2 Perspectives on constitutionalism, constitution-making and constitutional reforms in Africa

This part of the book contains case studies on constitutionalism, constitution-making and constitutional reforms in Africa. In chapter 2, Benedict Maige Nchalla discusses Tanzania's experience with constitutionalism, constitution-making and constitutional reforms. The author observes that Tanzania's path of constitution-making has been characterised by non-participation of its people, throughout the 50 years of its independence (1961-2011). The author further observes that the existing Constitution of the United Republic of Tanzania is devoid of constitutionalism. The good news is, Tanzania is currently involved in a constitutional reform process, which suggests a possible cause for Tanzanians to celebrate the writing of their new rule book if actively and meaningfully consulted. To the author, true democracy is the answer to successful constitutional review and reform processes.

In chapter 3, Adem Kassie Abebe explores constitutionalism and proposals for constitutional reform in Ethiopia. The Ethiopian Constitution was adopted in 1994 by an elected Constituent Assembly after the downfall of the Dergue communist regime. The Constitution establishes a federal form of government largely along ethnic lines. So far it has not been amended mainly due to the fact that the political coalition that adopted the Constitution has enjoyed uninterrupted political power. Abebe's chapter looks at the process through which the Ethiopian Constitution was adopted, its inclusiveness and the impact on the legitimacy of the final outcome. The chapter argues that despite some efforts to engage a wide spectrum of stakeholders during the constitution-making process, the withdrawal of major political factions from the process not only undermined the legitimacy of the Constitution but also led to the relapse of some of the factions into a rebellious group that has damaged the unity of the nation as well as the security of its people.

Furthermore, Abebe identifies the main values and principles that the 1994 Ethiopian Constitution enshrines. The author contends that, in stark departure from its predecessors, the country's current Constitution incorporates ideals of pluralism, the rule of law, democracy and fundamental rights and freedoms. However, the increasingly authoritarian tendency of the ruling elite – legalised by a spate of illiberal laws, especially after the 2005 elections – goes against the grain of constitutionalism and has undermined constitutional developments. The chapter also observes that the Constitution is not infallible, and therefore stands in constant need of completion, reassessment and revision. It concludes by raising some issues that should form part of a constitutional reform agenda through broad participation of ordinary people. A wide and popular reconsideration of the values the Constitution represents and the

institutions it establishes can ensure that the 'TPLF Constitution' becomes the 'Constitution of the people of Ethiopia'.

Eritrea offers an interesting case study of constitution-making in Africa. In chapter 4 of the book, Simon M Weldehaimanot discusses how the United Nations wrote the first modern constitution for Eritrea that contained certain core un-amendable provisions. This constitution, however, was not spared from abrogation. A second constitution of the country was adopted in 1997 through a process some consider unnecessary and simply illegitimate. The 1997 Constitution is completely ignored by the government that was instrumental in its creation. Similarly, the country's political opposition, by and large excluded from the process that produced the Constitution, has never been willing to address its grievances with the help of this constitution. Instead, they are vowing to write a new constitution in due course. This notwithstanding, there are several areas in which the opposition's commitment to constitutionalism would be tested. These include understanding the difference between the majorities needed to adopt and amend a constitution and respecting the independence of the judiciary.

In chapter 5, Kofi Quashigah examines how, through various constitutional reforms, the essential elements of constitutionalism came to be imbibed into the constitutional psyche of Ghana. Structured along three periods, the chapter vindicates the argument that the constitutional history of Ghana represents to a large extent the continuous struggles of a people to actualise, through constitutional reforms, the basic elements that are the foundation for the realisation of constitutionalism. Quashigah builds his analysis on the premise that constitutional reform in post-colonial Ghana has been essentially focused on the design of structures that would reduce the inherent dominance of the executive. This is because in Ghana the executive has been fingered as the organ that must be controlled if constitutionalism will become the hallmark of the political system.

Thus the search for constitutional structures and systems of government has understandably been a preoccupation for Ghana. This follows from the perception that in structures and institutions the country can avoid or reduce to the minimum the tendency of arbitrariness. What the people of Ghana have endeavoured to do over the years has been the creation of systems of government that have as their basis the principle of constitutionalism and democracy.

Diala Anthony Chima explores, in chapter 6 of the book, how constitutionalism in Nigeria has been crisis-ridden since independence in 1960. These crises flow from issues such as fiscal federalism, corruption, credible elections, tribal politics, ethno-religious conflicts, and disdain for the rule of law. At the heart of these crises are weak democratic institutions, which are sustained by bad leadership and a culture of impunity. After nearly three decades of cumulative military rule, the

country returned to civilian governance in 1999 under a presidential system of government. Regrettably, this system is founded on a militarily-conceived Constitution lacking a fully enforceable bill of rights and clear governmental functions. Since a strong bond links the process through which constitutions are produced and their degree of acceptance and effectiveness, questions over the Constitution's legitimacy prompted parliament to amend it in 2010.

In examining post-independence constitution-making in Nigeria, Chima finds that military rule blighted Nigeria's capacity to respond appropriately to the challenges of federalism. He argues that, although deficient in popular sovereignty, the Constitution's legitimacy is moot since it is the operative law that governs the country. He submits that the problem with constitutionalism in Nigeria is poor leadership and poor implementation of the Constitution. Chima therefore advocates good governance and a participatory approach to constitutional review as the foundations for strong constitutionalism in Nigeria.

In chapter 7, entitled 'Constitution without constitutionalism: The case of Cameroon', Chofor Che Christian Aimé moots the idea that many of Africa's problems have been caused not because of the absence of constitutions *per se*, but rather by the ease with which the provisions in these constitutions were manipulated. It is on this premise that his chapter examines constitutionalism in Cameroon from independence till 2012. The central question is whether, although Cameroon has had constitutions since 1961, there has been constitutionalism.

Aimé's central argument is that since 1960, Cameroon has had constitutions without constitutionalism as evidenced by the lack of supremacy of the constitution, the absence of an independent judiciary, the absence of a bill of rights, as well as lack of democracy. To him, establishing constitutionalism in Cameroon would mean that the constitution is not easily amendable, the constitution is supreme, there is independence of the judiciary, there is an entrenchment of a bill of rights in the constitution as well as a visible and generally accepted presence of democracy. His chapter therefore first examines the colonial history of Cameroon, which consisted of German, French and British rule. The period leading to the independence and reunification of Cameroon in 1960 is also examined. The chapter then assesses the 1961, 1972 and 1996 constitutions with respect to various elements of constitutionalism. Establishing that Cameroon has indeed had constitutions without constitutionalism, the chapter finally recommends elements of constitutionalism necessary for a democratic Cameroon.

In the eighth chapter of the book, Bonolo Ramadi Dinokopila adds his voice to the debate on constitutionalism, constitution-making and constitutional reform in Africa. Entitled 'Pre-independence constitutions, participatory constitution-making and constitutionalism in Africa: The

case of Botswana', the chapter takes a look at the history of Botswana constitution-making process. Dinokopila argues that, even though little attention has been paid to pre-independence constitutions, they somehow played a significant role, positive or negative, in the entrenchment of constitutionalism in Africa. The chapter catalogues the constitution-making process of Botswana's pre-independence constitutions and their eventual impact on the 1966 Republican Constitution. The latter has been dismissed by some commentators as a fraudulent or imported document that, among other things, concentrates too much power on a president who does not enjoy election to office through popular vote.

The chapter attempts to ascertain whether the inadequacies of Botswana's present constitutional framework could be traced back to Botswana's pre-independence constitutions. Already there are calls to have such a review in order to balance powers between the executive, the legislature, and the judiciary or to make clearer the separation of powers in the Constitution. Without making an analysis of the appropriateness of such calls or the necessity of a constitutional review in Botswana, the chapter underscores the fact that it is when constitutions are proving to be inadequate that the people challenge their legitimacy and require that they be amended. It is in that context that an argument is made for a serious interrogation of the processes that lead to the adoption of pre-independence constitutions, the effect of such processes on post-independence constitutions and by necessary extension their impact on constitutionalism in post-colonial Africa.

In the final chapter under this part (chapter 9), Mwiza Jo Nkhata analyses the struggle towards constitutionalism in Malawi. The author contends that the roots of modern constitution-making in Malawi can be traced to the processes surrounding the adoption of the Independence Constitution in 1964. Two years after the adoption of the Independence Constitution, the nation engaged in further constitution-making when it adopted a new Constitution and transformed itself into a Republic. After the adoption of the 1966 Constitution the nation was not taken down the path of constitution-making again until 1994, during what has often been referred to as the 'Third Wave of Democratisation'. Admittedly, diverse factors and players influenced the processes leading up to the adoption of the three constitutions that Malawi has had so far. While constitution-making processes in the different African countries are obviously distinct, a case can be made for lessons that cross-cut the various African countries. Centrally, Nkhata uses the Malawian experience in constitution-making to distil some important lessons for constitution-making generally. Specifically, he examines the role and nature of popular participation in constitution-making in Malawi and the implications this has had in the struggle for constitutionalism.

2.3 Perspectives on democratic governance in Africa

The third and final part of this book embodies four chapters that focus on democratic governance in Africa. The four chapters define the crucial nexus between democratic governance and constitutionalism in Africa.

In chapter 10, Horace Adjolohoun focuses on the period after 1990 in Benin, and analyses the main constitutional challenges faced by the country in that period. Against the background of a trend towards presidentialism, he examines the ongoing debate about constitutional amendment. The chapter discusses the main advantages and disadvantages of a constitutional amendment and looks at the role of civil society in the process.

In chapter 11, Christopher Mbazira investigates the challenges hampering the effective implementation of multi-party democracy in Uganda. These challenges are investigated from a historical perspective by briefly exploring the history of multi-party politics in the country, while highlighting the hurdles which the system has historically faced. Mbazira argues that, since independence, the culture of freely and fairly competing for political power has eluded the country. This has occurred at a number of levels, extending from inter-party competition to individual internal party organisation and competition. Indeed, Uganda's political history is largely characterised by dictatorship and one-party leadership only punctuated by short periods of pseudo multi-party politics. In Mbazira's chapter, the days of the movement system and its impact on multi-party democracy on the country is discussed, as well as the hurdles parties are facing after the 2005 reversion to the multi-party system.

In chapter 12, Dejo Olowu gives an excursion of 'constitutional governance, democratisation and military legacies in post-independence Nigeria'. The author proceeds from the premise that Nigeria provides a fertile terrain for exploring the relationship between constitutional design and actual constitutionalism in Africa. To him, the issues that have predominantly been significant, at least in the Nigerian context, include the effect of intermittent attempts at establishing a constitutional state; the capacity or otherwise of federalism in stemming the tide of divisive politics and in offering space for ethno-religious pluralism and social fragmentation; the marked successes and failures of experimented forms of government to promote national harmony; and, more importantly, the indelible footprints of incessant military incursions on the overall national experience at democratisation.

Olowu traces the interwoven relationship among these core issues and how they have affected, and will most probably influence the future of, constitutional governance and democratisation in Africa's most populous country. Apart from the general appraisal of constitutional theory, his chapter raises critical questions about the place of democratisation,

constitutional culture, nationhood, national identity, and (de-) militarisation – and the extent to which these concepts have been rendered particularly relevant and pronounced in Nigeria's march towards true constitutionalism, in the aftermath of alternating military interventions.

The overarching outcome of the analysis in Olowu's chapter lends credence to the assertion that the footprints of erstwhile military regimes will continue to impact on the connotations of constitutionalism, governance and democratisation in Nigeria, as presently constituted. Underpinning the thrust of the discussions in the chapter is the consciousness that an understanding of the problems presented in the Nigerian narrative of protracted struggle towards constitutionalism through the adoption of written constitutions since the country attained independence in 1960, offers insights into interpreting latent factors mirrored in several African post-colonial states, focusing on balancing civil-military relations, and transitions from authoritarian rule to democracy.

In a way that strengthens Olowu's chapter, Ademola Oluborode Jegede adds his voice to the journey Nigeria travelled from military rule to constitutional government. Chapter 13 of the book lays emphasis on the fact that, from a past punctuated by thirty years of military rule since independence in 1960, Nigeria resumed constitutional government when it returned to democracy on 29 May 1999. The transition was preceded by the drawing of the 1999 Constitution which was designed to usher in a new democratic era. According to Jegede, the formal break from military rule notwithstanding, constitutional government remains problematic in Nigeria; three 'stigmas' in the areas of rule of law, human rights, devolution of power which typified military rule persist still under the new constitutional dispensation. While urging evidences to demonstrate these 'stigmas', Jegede's chapter argues that only a consistent culture of compliance with constitutional roles and responsibilities by stakeholders can bring about genuine transformation into constitutional government in Nigeria.

**PART II: PERSPECTIVES ON
CONSTITUTIONALISM,
CONSTITUTION-MAKING AND
CONSTITUTIONAL REFORMS
IN AFRICA**

CHAPTER 2

TANZANIA'S EXPERIENCE WITH CONSTITUTIONALISM, CONSTITUTION-MAKING AND CONSTITUTIONAL REFORMS

Benedict Maige Nchalla

1 Introduction

Issa Shivji once eloquently stated as follows: ¹

[T]hough there is no constitution in the world which is perfect, Tanzania's document is time barred, which can't be perfected through dozens of amendments ... The legitimacy of the constitution does not emanate from its good clauses. Its legitimacy is drawn from the full participation of its people in all the processes - that is from the social and political debates at all levels to adoption process.

Once upon a time it was unnecessary to look beyond constitutions. Each constitution represented the highest expression of the individual will of a political community, sovereign to the extent it could defend (and project) that sovereignty among the community of nations. A state was 'conceived of as itself the sole source of legality, the *fons et origo* of all those laws which condition its own actions and determine the legal relations of those subject to its authority'.² The principal focus was on lawfulness – the adherence of functionaries to the rules and processes through which state power was organised and expressed. A constitution on the one hand allots the proper share of work to each and every part of the organism of the state, and thus

¹ Issa Shivji is a professor of constitutional law and currently a *Mwalimu* Nyerere Professorial Chair in Pan-African Studies and Emeritus Professor at the University of Dar es Salaam. He was speaking, as one of the key speakers during a one-day convocation, discussing whether there is a need for a new constitution in Tanzania, organised by the University of Dar es Salaam Academic Staff Assembly (UDASA), held at the University of Dar es Salaam on 15 January 2011. The convocation, the first of its kind, drew the conclusion that the current Constitution of the United Republic of Tanzania, 1977 (as amended) lacks political legitimacy since its drafting process and adoption never involved *wananchi* (the citizens). See also 'Why new Constitution' *The Guardian* 16 January 2011 1.

² LC Backer 'From constitution to constitutionalism: A global framework for legitimate public power systems' (2008-2009) 113 *Penn State Law Review* 671 673 quoting WW Willoughby *The fundamental concepts of public law* (1924) 30.

maintains a proper connection between the different parts; while, on the other hand, 'the Sovereign exercises his proper functions in accordance with the provisions of the constitution'.³ Lawfulness required government to be taken strictly in accordance with law – but did not limit the range of lawful assertions of government power. Lawfulness – rule of law – was tied to avoidance of the tyranny of the individuals invoking state power, but not to the regulation of the substantive ends for which that power might be invoked. Besides, no one was particularly fussy about the content of those constitutions. 'Democracy, for example, so important in the modern understanding of constitutionalism, was viewed as a choice that might be rejected in whole or in part'.⁴

It was the memorialisation and institutionalisation of political power that marked constitutions. It was the territorial borders of a state that marked its limits. Constitutions could be declared the product of a fiduciary obligation to ancestors for the protection of the subjects.⁵ Accordingly, the law of the constitution, then, could be understood essentially as a theoretic of higher law grounded in the power of uniquely constituted and inward-looking political communities.⁶

In the aftermath of the World War II and in the context of the construction of an institutional framework for discourse (and action) among the community of nations, values have become important in constitutions, and the ability of states to insulate themselves from the influence of others has been substantially reduced. Emerging from that war were the beginnings of a consensus that values matter in the establishment of constitutions that such values were superior in authority to any peculiarities of national sentiment, and that they could be enforced. 'A constitution without legitimacy is no constitution at all. It is outside the law in the sense that it ought not to be respected by the community against which it is applied.' Legitimacy is a function of values, which in turn serve as the foundation of constitutionalism.⁷ Backer has suggested that constitutional legitimacy is grounded in the development of a single system designed to give authoritative expression to the customary values of the community of nations that together make up the value systems of

³ Backer (n 2 above) 673.

⁴ Backer (n 2 above) 674.

⁵ The preamble to the Japanese Imperial Constitution of 1947 (as amended) exorbitantly stated:

Having, by virtue of the glories of Our Ancestors, ascended the throne of a lineal succession unbroken for ages eternal; desiring to promote the welfare of, and to give development to the moral and intellectual faculties of Our beloved subjects, the very same that have been favoured with the benevolent care and affectionate vigilance of Our Ancestors; and hoping to maintain the prosperity of the State, in concert with Our people and with their support, We hereby promulgate ... a fundamental law of the State, to exhibit the principles, by which We are guided in Our conduct, and to point out to what Our descendants and Our subjects and their descendants are forever to conform. See also Backer (n 2 above).

⁶ As above.

⁷ Backer (n 2 above) 676.

constitutionalism and constitutional legitimacy,⁸ a view that inexorably excludes in total a society's own values or ethos, thus making a point of departure with this work.

Unfortunately, the transformation of how constitutions had to be moulded in the aftermath of the war, did not trickle down and affect the African states the same way as it did in the Northern and Western hemispheres. On the contrary, since the African continent was still under colonialism, apartheid, or at the wake of independence struggles, pathetically, our struggles to 'rule ourselves' independent from the colonisers were upset by the fact that we were granted independence and 'given written constitutions'. For instance, the first Tanganyika (now Tanzania after its union with Zanzibar in 1964) Constitution was the Independence Constitution of 1961. Tanganyika achieved its independence in 1961. Britain, the colonial power, passed the Tanganyika (Constitution) Order in Council of 1961 which granted Tanganyika independence and gave her a written constitution. The constitution created a sovereign state of Tanganyika. The form of government under the first constitution was very much based on the Westminster model with a sovereign parliament, multiparty democracy, a prime minister and the governor general as head of state representing Her Majesty the Queen of England and exclusive of a bill of rights. So Tanganyika's first constitution was made by the parliament of the colonial power.⁹ This fact inevitably excluded our shared values or national ethos, in the then Tanganyika community a condition *sine qua non* for a legitimate constitution. From independence till now, Tanzania has had five constitutions, which among others, include the existing Constitution of the United Republic of Tanzania of 1977, as it will be shown in the subsequent sections. However, the question of the legitimacy in the making of each constitution to meet the tests of constitutionalism is debatable, the result of which has currently culminated into a process of constitution reform.

2 Tanzania: An overview of the political system

Tanzania is a union of two formerly sovereign African states, namely, the Republic of Tanganyika and the People's Republic of Zanzibar. Tanganyika became a sovereign state on 9 December 1961 and became a republic the following year. Zanzibar became independent on 10 December 1963, and the People's Republic of Zanzibar was established after the revolution of 12 January 1964.¹⁰ The two sovereign states concluded a treaty called articles of the Union on 22 April 1964 and became one sovereign republic known as the United Republic of Tanzania

⁸ LC Backer 'God(s) over constitutions: International and religious transnational constitutionalism in the 21st Century' (2007-2008) 27 *Mississippi College Law Review* 11.

⁹ IG Shivji *et al* *Constitutional and legal systems of Tanzania: A civics source book* (2004) 47-48.

¹⁰ CM Peter & H Othman *Zanzibar and the Union question* (2006) 2.

from 26 April 1964.¹¹ This Union consists of two organs vested with executive powers, two organs vested with judicial powers and two organs vested with legislative and supervisory powers over the conduct of public affairs, as provided for by the 1964 Articles of the Union,¹² and the Constitution of the United Republic of Tanzania of 1977 (the Constitution of Tanzania, 1977).¹³ The Union Government, the judiciary of the United Republic and the Parliament of the United Republic, exercise powers over the whole territory in all Union matters in and for Tanganyika (Tanzania-Mainland) and an autonomous government known as the Revolutionary Government of Zanzibar (Tanzania-Zanzibar), the judiciary of the Revolutionary Government of Zanzibar, and the House of Representatives, whose powers are confined to non-Union matters in and for Zanzibar. It also entrenches a Bill of Rights.¹⁴ Union matters according to the Union Constitution¹⁵ include the Constitution of Tanzania and the Government of the United Republic, citizenship, higher education, research, foreign affairs, statistics and the Court of Appeal of the United Republic.¹⁶ In the case of *Khatib Haji v Juma Sleiman Nungu*,¹⁷ the Court of

¹¹ Article I of Articles of the Union between the Republic of Tanganyika and the People's Republic of Zanzibar of 1964. See also, S Mvungi 'Legal problems of the Union between Tanganyika and Zanzibar' (2003) *Eastern Africa Law Review* 31. In this context, unless otherwise clearly stated, the word 'Tanzania' as is used in this chapter, refers to the Mainland part of the Union, formerly the Republic of Tanganyika.

¹² 1964 Articles of the Union (n 11 above) article III(a).

¹³ Constitution of Tanzania 1977 (n 1 above) article 4(1) & (2). See also, BM Nchalla 'Tanzania-Mainland's human rights obligations and situation *vis-à-vis* the African Union's human rights documents' Paper presented at a residential seminar on advanced human rights and leadership training, organised by Amnesty International Mauritius Section, from 19-21 September 2008 2.

¹⁴ Constitution of Tanzania 1977 (n 1 above) article 4(3) provides for the distinction of public affairs into Union matters and non-Union matters. It has distinguished them for the purpose of efficient conduct of public affairs and for the allocation of powers among the branches of the government as specified in the Constitution. See n 1 above, article 4(1) & (2). See SA Abdallah 'The legislative powers of Tanzania Parliament over non-Union matters for Zanzibar' unpublished LLM dissertation, University of Dar es Salaam, 2006 30. See also, Mvungi (n 11 above) 31. See also Part III of the Constitution of Tanzania 1977 providing for the Basic Rights and Duties.

¹⁵ Constitution of Tanzania 1977 (n 1 above). It is important to point out here that Zanzibar has its own constitution apart from the Union Constitution called the Constitution of the Revolutionary Government of Zanzibar of 1984 (as amended).

¹⁶ Constitution of Tanzania 1977 (n 1 above) first schedule. It is also equally vital to note that, there have been the 10th constitutional amendments of the Constitution of Zanzibar of 1984 (as amended) effected in August 2010, which have raised a number of issues, *inter alia*: the status of the Union, as the amendments now recognises Zanzibar as a sovereign state within the Union such changes contradict the Union Constitution which recognises Zanzibar as part of the Union; the status of the Court of Appeal of Tanzania, a Union matter, as article 24(3) of the amendments by implication ousts its jurisdiction to determine appeals emanating from cases related to human rights, such appeals would be determined by the Zanzibar High Court. On the issue of whether Zanzibar is a sovereign state or not, the Court of Appeal of Tanzania in the Revision from the ruling of the High Court of Zanzibar of *SMZ v Machano Khamis Ali & Others* [2000] TZCA 1 held *inter alia* '... treason can only be committed against a sovereign. However, as treason is a breach of security, which in the United Republic is a Union Matter, therefore, the sovereign is the United Republic and not the Revolutionary Government of Zanzibar or the Head of the Executive of Tanzania Zanzibar who is also called the President of Zanzibar.' (*emphasis added*). See Peter & Othman (n 10 above) 188-213. See generally, CM Peter & I Sikand (eds) *The judiciary in Zanzibar* (2006). See also 'Lawyers

Appeal of Tanzania, acknowledged the classification of public affairs into Union matters and non-Union matters. The then Chief Justice, the late Francis L Nyalali, classified matters of public affairs in Tanzania as composed of three divisions, matters for Tanzania-Mainland, matters for Tanzania-Zanzibar, and matters of common concern for both Tanzania-Mainland and Tanzania-Zanzibar, meaning, Union matters. This articulation has established something new that has not been expressed within the Constitution of Tanzania, 1977. It has to be noted that the Union Parliament is composed of representatives from the Mainland and Zanzibar.¹⁸ Yet, any law made by the Union Parliament cannot apply to Zanzibar unless such law expressly states that it shall apply to Tanzania-Mainland as well as to Tanzania-Zanzibar,¹⁹ or unless that law relates to Union affairs only and has complied with the provisions of the Union Constitution.²⁰ Thus, not all acts of the Parliament of Tanzania apply to Zanzibar. To this end, Zanzibar is constitutionally justified in having its own laws.

3 Conceptualisation

3.1 Constitution

A constitution is the supreme national law and has, among its essential functions, the distribution of power between the state and society, as well as among the various branches of government. The manner of distributing that power is conditioned by several factors including the political history and future aspirations of the nation in question.²¹ A constitution is what unites people irrespective of, among others, their social status, religious beliefs or political affiliations. For them (the people), the constitution is colour-blind and it does not discriminate against any of them, they can thus seek refuge in this noble instrument. The constitution is the heart of the country – the centre which keeps everything going.²² Okoth-Ogendo metaphorically encapsulates a constitution as a 'power map' upon which

differ on Isles amendments' *The Guardian* 8 September 2010 1, available at <http://www.ippmedia.com/fronted/?l=20724> (accessed 11 May 2011). See also, J Tarimo 'We'll challenge Z'bar constitution – Chadema' *The Guardian* 29 November 2010 1, available at <http://www.ippmedia.com/fronted/index.php?l=23545> (accessed 12 May 2011).

¹⁷ [1986] L.R.C. (Const.) 224. See also a detailed discussion on the issue in LN Shuma 'The federal principle in the Constitution of Tanzania: A comparative analysis of the legislative competence of the Union Parliament and the Federal Congress of America' unpublished LLM dissertation, Mzumbe University, 2011 5.

¹⁸ Constitution of Tanzania 1977 (n 1 above) article 66(1)(c).

¹⁹ Constitution of Tanzania 1977 (n 1 above) article 64(4)(a)-(c) & (5).

²⁰ Constitution of Zanzibar of 1984 (n 15 above) art 132(1) & (2).

²¹ FE Kanyongolo 'The constitution and the democratisation process in Malawi' in O Sichone (ed) *The state & constitutionalism* (1998) 1.

²² CM Peter 'Why there are people resisting new constitution?' <http://www.mzalendo.net/makala/why-there-are-people-resisting-new-constitution> (accessed 13 June 2011).

the framers may delineate a whole set of concerns which may range from an application of the Hobbesian concept of 'the covenant', as in the American constitution; to a basic constitutive process, as in the Malawi constitution; a code of conduct to which public behaviour should conform, as in the Liberian or French constitutions; a programme of social, economic and political transformations, as in the Ethiopian or Soviet constitutions; to an authoritative affirmation of the basis of social, moral, political or cultural existence including the ideals towards which the policy is expected to strive, as in the Libyan Constitution.

The process of constitution-making, which involves, *inter alia*, making choices as to which one of those concerns should appear on that map cannot, therefore, be regarded as a simple reproduction of some basic principles which particular societies may have found operational.²³ Despite the fact that most of the countries referred to above, such as Ethiopia and Liberia have since reviewed their constitutions or are in a political quandary due to a despotic leadership such as the Great Socialist People's Libyan Arab Jamahiriya, or ceased to exist as a Union, namely, the Union of Soviet Socialist Republics; conversely, the definition epitomises the fact that constitutions for all practical purposes must reflect the *sui generis* aspects of a society. It has been well said that the constitution should and must reflect a country's historical experiences, history, cultures, traditions, and hopes for the future. It must be sufficiently dynamic to reflect the past and the present, and to anticipate the future. This is the only way to really understand constitutions not just as political documents but also as instruments for development.²⁴ This point is well articulated by Sinjela that widespread corruption and abuse of power had eroded possibilities for good governance because the 'lack of accountability weakened political institutions' resulting in economic stagnation in the continent. To avoid a repetition of this situation, 'the emergent new constitutional order includes elaborate human rights provisions and attempts to curb the autocratic power of the executive branch of the government'.²⁵

The existence of a constitution which articulates democratic values and principles is not sufficient for the establishment of the political system which is democratic in practice. However, it is equally true that a democratic constitution is a condition precedent for the development of a democratic constitutionalism. Constitutions therefore require to be

²³ HWO Okoth-Ogendo 'Constitutions without constitutionalism: Reflections on an African political paradox' in IG Shivji (ed) *State and constitutionalism: An African debate on democracy* (1991) 5. See generally AV Dicey *Introduction to the study of the law of the constitution* (1959) 1-205.

²⁴ JO Ihonvbere 'Towards a new constitutionalism in Africa' (2000) Centre for Democracy & Development Occasional Paper Series No 4 (Unnumbered). See J Alder *Constitutional and administrative law* (2005) 3-8.

²⁵ Ihonvbere (n 24 above). See also M Sinjela 'Constitutionalism in Africa: Emerging trends' (1998) 60 *The Review* 24-25.

constantly reviewed with a view to strengthening their ability to entrench the various aspects of democracy such as popular participation in the political process, accountability of the state to the society it governs, open government and the rule of law.²⁶

3.2 Constitutionalism

A critical examination of the main currents of writings about constitutionalism has depicted 'that scholarship is protean, at best, and empty at worst'. Like liberty or democracy, constitutionalism is also a nebulous concept, and various scholars have diverse ideas about what constitutionalism really means. On the other hand, an inference from the literatures has been to the effect that many authors have accepted that, in a wider sense, the concept of constitutionalism is a prerequisite for the existence of a legitimate constitution. According to Henkin, 'constitutionalism is nowhere defined. We speak of it as if its meaning is self-evident, or that we know it when we see it.' Schochet writes that 'the "veneration" of constitutionalism is among the enduring and probably justified vanities of liberal democratic theory'.²⁷ Mahao is of the view that, located at the heart of the concept of contemporary constitutionalism – the concept that underwrites the constitutional state – is democracy. While conditions that define both constitutionalism and democracy are intractably controversial, few would deny that both strive towards assumed ideal conditions of political, institutional and civic arrangements suited for human self-actualisation. Because of this convergence democracy has come to be accepted as one of the critical pillars integral to the definition of constitutionalism.²⁸ However, it has been argued that perspectives on constitutionalism are contradictory, competing and confusing, as constitutionalism is understood as an idea, a principle, and also as a process. Hitherto, the definition of constitutionalism is quite controversial.²⁹ It can be inferred thus that there appears to be no accepted definition of constitutionalism, as authors either reconceptualise as a context-dependent concept, or sway in the western usage, that is, in its orthodox definition. To this point, Robin West's literature is found to be useful, though what he does is sketch out the parameters within which much constitutionalist discourse is situated:³⁰

²⁶ As above. See also Kanyongolo (n 21 above) 2.

²⁷ AMB Mangu 'Federalism, constitutionalism and democracy in Africa' Paper for the VIIIth World Congress of the International Association of Constitutional Law (IACL) Mexico, 6-10 December 2010 12. See J Blondel 'Democracy and constitutionalism' T Inoguchi *et al* (eds) *The changing nature of democracy* (1998) 71-74.

²⁸ NL Mahao 'The constitutional state in the developing world in the age of globalisation: from limited government to minimum democracy' (2008) 12 *Law, Democracy & Development Journal* 1. See also Backer (n 2 above) 678, stating that defining constitutionalism has been a subject of rich controversial discourse especially by African scholars, many of whom have challenged the concept that has exercised sway in the western liberal democracies.

²⁹ Mangu (n 27 above) 12.

³⁰ Backer (n 2 above) 681.

We might, in fact, think of various theories of constitutionalism along a continuum, defined by this ‘particularistic-to-universalist’ axis. At one end are views of constitutionalism that see the role of the constitution as delineating a national identity, by in effect highlighting and sharpening distinctive events, features, and moments of the nation’s shared history. At the other end are views of constitutionalism that see the role of the constitution as imposing constraints, in the name of universalist conceptions of humanity, on just that sort of national distinctiveness: the purpose of the constitution, in other words, as understood at this end of the spectrum, is to require of the state obligations derived not from the country’s history, but from the human status of the state’s citizens.

For this reason, constitution as a concept is distinct from the concept of constitutionalism, the latter serving as a means of evaluating the form, substance, and legitimacy of the former.³¹ Notwithstanding the above, whether constitutionalism is perceived as delineating a national identity of the nation’s shared history, a legal principle, a set of rules aimed at achieving a specific end or a body of values underlying the government of a society, two main approaches to constitutionalism may be distinguished; the traditional and the modern approaches. ‘Legal scholars generally favour the first, which is based on rules and institutions, while political scientists, sociologists, historians, and economists tend to adopt the latter’.³²

3.2.1 *Traditional approach to constitutionalism*

Ihonybere³³ and Shivji,³⁴ construe constitutionalism as a liberal concept which rests on two pillars, namely, limited government and individual rights. In McIlwain’s view: ‘the most ancient, the most persistent, and the most lasting of the essentials of true constitutionalism still remains what it has been almost from the beginning, the limitation of government by law’.³⁵ Henkin’s thinking rests upon the American sense of constitutionalism by stating that ‘American constitutionalism – which is not novel – implies a government subject to the constitution; it implies limited government, government with agreed powers for agreed purposes, subject to the rule of law; it implies fractionalised authority to prevent concentration of power and the danger of tyranny. Constitutionalism implies also the reservation of a large private domain and retained rights for every individual’.³⁶ Primarily, it is needless to say that the concept of constitutionalism in the traditional approach has often been anchored on the aspect of political power which is inevitably immense. Hence, it should

³¹ AHY Chen ‘A tale of two islands: Comparative reflections on constitutionalism in Hong Kong and Taiwan’ (2007) 37 *Hong Kong Law Journal* 647.

³² Mangu (n 27 above) 13.

³³ Ihonybere (n 24 above) 13.

³⁴ Shivji *et al* (n 9 above) 28. See also Mangu (n 27 above) 13.

³⁵ Mangu (n 27 above) 14.

³⁶ As above.

be devoid of arbitrariness whenever exercised, so as to protect individuals and society generally.

3.2.2 Modern approach to constitutionalism

Proponents of modern constitutionalism are of the considered view that the concept is more concerned with values.³⁷ On the other side of the coin, 'constitutionalism is a legal and political idea, principle or doctrine; it is based on both rules and values'.³⁸ Rosenfeld thinks of the concept of constitutionalism as a 'three-faceted concept', consisting of three general features, namely, limited government, adherence to the rule of law and protection of human rights.³⁹ Thus, traditional and modern approaches as well as rules and values are not mutually exclusive, but reinforcing. The 1996 Constitution of South Africa, for instance, provides that the Republic is based on a number of core 'values' and these democratic values 'must' be promoted in the interpretation of the Constitution in general and of the Bill of Rights in particular.⁴⁰ In this context, unless otherwise clearly indicated, constitutionalism refers to a system of government based on the primacy of the constitution, which incorporates the modern constitutional basic structure and values,⁴¹ and which is a result of the people's will.

3.3 Constitutional reform versus constitution-making

It is pertinent to say here that a careful reading of scholarship on the discourse of constitution reform shows a reluctance to investigate the appropriate term as to whether we talk of constitutional reform or review. Reform in common parlance denotes, among other things, an official change of something or to form a new thing, but also includes amending in the discipline of legislating. Review denotes assessing something with the possibility or intention of instituting change 'if necessary' or an appraisal of something, which includes and is limited to effecting an

³⁷ G Carpenter 'Public law: Constitutional law' in WJ Hosten *et al* (eds) *Introduction to South African law and legal theory* (1997) 949.

³⁸ Mangu (n 27 above) 18.

³⁹ As above.

⁴⁰ Mangu (n 27 above) 17. The Constitution of the Republic of South Africa (as amended), section 1 provides; 'The Republic of South Africa is one, sovereign, democratic state founded on the following values:

(a) Human dignity, the achievement of equality and the advancement of human rights and the freedoms.

(b) Non-racialism and non-sexism.

(c) Supremacy of the Constitution and the rule of law.

(d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.'

⁴¹ The author refers to a constitution which has separation of powers between the executive, legislature and the judiciary; the rule of law; democracy and good governance principles; judicial independence and protection of individual rights through a bill of rights in a constitution. Besides these, such a constitution should embrace peculiar society's values, political history and future aspirations.

amendment in the context of legislating. Therefore, contemporary constitutional review has been referred to as the process whereby a constitution is revised with the possibility or intention of changing it if considered desirable or necessary, often developed through consultation that requires participation by stakeholders and individuals in society, in order to bestow legitimacy on the process and thus on the actual Constitution.⁴² It is a process that may culminate in a completely revised constitution or one that is amended to make its original form unrecognisable. However, a more appropriate term for this form of constitutional review is constitutional reform. The term constitutional reform has become commonplace when referring to the process of constitutional review, analysis, revision, amendment, and adoption of a new constitution. Hence, review, as an appraisal or evaluation, is an inherent part of the constitutional review process but is only one component in constitutional reform.⁴³ Hence, in constitutional reform there is often an inevitable process of constitution-making.

4 Constitution-making *vis à vis* constitutionalism in Tanzania: How far has it come?

According to Shivji constitution-making includes both amending an existing constitution as well as making new constitutions, but he concedes that the term is often used to refer to making of new constitutions only.⁴⁴ The process of constitution-making is central in a democratic political system because it is from the constitution that the rulers claim to derive their authority and legitimacy. This claim cannot hold if the process of making a constitution did not involve the people.⁴⁵ It is significant that any constitution should be legitimate. Balkin puts it that legitimacy means something more than mere legal validity in a positivist sense, and something less than complete justice. Contemporary constitution-making or constitutional reform demands that the process is given as much importance as the substance or content of the constitution.⁴⁶ Popular, inclusive, participatory and democratic are all key aspects of a successful process that bestows both legitimacy and credibility on the supreme law of the country. This kind of process contributes to making the constitution a living document by taking it to the people so that they are in a position not

⁴² L. Oliver *Constitutional review and reform and the adherence to democratic principles in constitutions in Southern African countries* (2007) 3. See also BM Nchalla 'Constitutional review and reform: A Tanzanian perspective' Paper presented at a public awareness seminar on the Constitution of the United Republic of Tanzania of 1977, organised by the Makumira University College Law Society, at Tumaini University, Makumira University College, Arusha, Tanzania, on 20 May 2011 1-2.

⁴³ Oliver (n 42 above) 5.

⁴⁴ Shivji *et al* (n 9 above) 47.

⁴⁵ As above.

⁴⁶ JM Balkin 'Respect-worthy: Frank Michelman and the legitimate constitution' (2003-2004) 39 *Tulsa Law Review* 485 486.

just to have access to it, but also to understand it, claim ownership of it, and respect and obey it.⁴⁷ Needless to say that, the constitution becomes devoid of constitutionalism if it lacks legitimacy.

Since World War II, many new states of sub-Saharan Africa have been afflicted, so to speak, by an epidemic of constitution-making. This epidemic was initiated and has been maintained by the forces unleashed by decolonisation.⁴⁸ Consequently, a person taking stock of the constitution-making in virtually every African state which experienced the colonial yoke of domination, Tanzania not forming any exception, must inevitably lay a hand on the constitutionalism of the resultant document(s). This is due to the unavoidable fact that most African states' independence constitutions were not home-grown and popular documents (especially their successors which often lacked people's participation) but were either an imposition from the predecessor colonial state, as it was the case with the then Tanganyika,⁴⁹ or as pointed out by Munene that the making of the Kenya Independence Constitution of 1963 in the Lancaster House Conference had participants who were not popularly elected by universal suffrage.⁵⁰ It was not subjected to a referendum to gauge its acceptability by ordinary Kenyans.⁵¹

Shivji has also noted that there was a rush in post-independence constitution-making, from the liberal independence constitutions to various forms of authoritarian constitutions, a process which was accomplished by a variety of constitution-making methods. In a number of countries, the pre-existing national assemblies, usually constituted under the independence constitutions and therefore by the imperial legislature, transformed themselves into constituent assemblies to enact new Constitutions. This was done in Ghana and Tanganyika when they underwent their transition from monarchical to republican constitutions. This method was again used by Obote to enact Uganda's 1967 Constitution after his 'palace coup' overthrowing the independence constitutional order.⁵² It is worthwhile to note that, disciples of constitutionalism in Tanzania, such as Chris Maina have argued that historically, constitutional development in Tanzania has been a process of 'constitution-making without constitutionalism'. This is particularly true

⁴⁷ As above.

⁴⁸ S Adelman 'Constitutionalism, pluralism and democracy in Africa' (1998) 42 *Journal of Legal Pluralism* 73.

⁴⁹ Shivji (n 9 above) 47–48.

⁵⁰ GM Munene 'Constitutional development in Kenya: A historical perspective' in Y Vyas *et al* (eds) *Law and development in the Third World* (1994) 51. See also K M'noti 'Constitutional experience in Kenya from independence to the present: Success and failures' Paper presented at the conference on constitutionalism, organised by the East African Law Society and Konrad Adenauer Foundation at White Sands Hotel, Dar Es Salaam-Tanzania, from 15 to 16 August 1996 2.

⁵¹ M'noti (n 50 above) 2.

⁵² IG Shivji 'Three generations of constitutions and constitution-making in Africa: An overview and assessment in social and economic context' in MS Rosen (ed) *Constitutionalism in transition: Africa and Eastern Europe* (2003) 79.

in the period of 1960 to 1992, when statist or commandist politics were the *modus operandi* of doing politics in Tanzania.⁵³

5 Constitution-making in Tanzania: A glimpse of the historical backdrop

Tanzania, known as Tanganyika before its union with Zanzibar in 1964, was formerly under the British as a mandate under the League of Nations and later as a Trustee Territory under the United Nations. Its independence Constitution was negotiated with the former rulers. In these negotiations the departing British had an upper hand. The nationalists and the people did not have a clear say in the process of framing the incoming independence Constitution.⁵⁴ Since independence, Tanzania (and the then Tanganyika) has had five constitutions.

5.1 Independence Constitution of 1961

Tanzania's independence was a negotiated process. As its first independence constitution was a symbolic representation of the end of colonialism and the installation of state sovereignty. The Constitution constituted state sovereignty in the international arena as opposed to constructing a 'national' consensus domestically. It was more of a compromise between the colonial rulers and nationalist leaders than an embodiment of a compact between the new rulers and the people.⁵⁵ The latter consensus, which found expression in nationalist struggles and national-building ideologies, was crystallised on a terrain other than that of liberal ideologies of constitutionalism. Yet most independence constitutions hatched in colonial offices were constructed on the basis of the liberal principles of the Westminster model.⁵⁶ The 1961 Constitution was the first constitution adopted by Tanganyika after its independence from the British in 1961. The Constitution nevertheless retained the tradition of the former rulers based on the Westminster tradition with clear separation of powers, independence of the judiciary and generally an existence of checks and balances.⁵⁷ It was a classic example with one glaring omission, a bill of rights, in fact, the 1961 Constitution was closer to the Westminster model as it operates in the United Kingdom which does not have a written bill of rights than similar constitutions elsewhere

⁵³ B Tumasirwe *Constitutionalism in East Africa: Progress, challenges and prospects in 2003* (2005) 12.

⁵⁴ CM Peter 'Constitution-making in Tanzania: The role of the people in the process' Faculty of Law, University of Dar es Salaam, (August 2000) (unnumbered).

⁵⁵ IG Shivji 'Problems of constitution-making as consensus-building: The Tanzanian experience' in Sichone (n 21 above) 24. See also generally, AK Vedasto *The basics of the laws and constitutions of Tanzania: From 1920 to the present* (2008).

⁵⁶ Shivji (n 55 above).

⁵⁷ Peter (n 54 above).

in East Africa.⁵⁸ One writer has ended up naming such basic principles of the Independence Constitution as alien.⁵⁹ As mentioned above, the colonial power, Britain, passed the Tanganyika (Constitution) Order in Council of 1961 which granted Tanganyika independence and gave it a written constitution. The Constitution created the sovereign state of Tanganyika.⁶⁰ It can be inferred that the process that led to the adoption of the independence constitution, in essence involved only the colonial rulers and the nationalist leaders. The general public was not involved.

5.2 Republican Constitution of 1962

This was the second Constitution of Tanganyika. The Tanganyika National African Union (TANU), the then ruling party, had expressed its wish to have a republican form of government with an executive president. The most important feature of the republican constitution was that it concentrated powers in the executive president, who was the head of state and head of government, commander-in-chief of the army and part of the Parliament but not a member of the National Assembly. No law could be passed without the assent of the President.⁶¹ Defending executive presidency with vast powers that the 1962 republican constitution provided, Nyerere wrote as follows in the *London Observer*.⁶²

Our constitution differs from the American system in that it ... enables the executive to function without being checked at every turn ... Our need is not for brakes to social change ... our lack of trained manpower and capital resources, and even our climate, act too effectively already. We need accelerators powerful enough to overcome the inertia bred of poverty, and the resistances which are inherent in all societies.

Indeed the Republican Constitution provided such accelerators by removing virtually all constraints on the exercise of power by the executive and its head, the President. The Republican Constitution set in motion what has graphically been termed by Okoth-Ogendo as 'imperial presidency'.⁶³ Ndumbaro has stated that the Republican Constitution of 1962 was a product of discussion among nationalist leaders and it reflected more the wishes and aspirations of the nationalist leaders than the general public. The National Assembly consisting of members from TANU, converted itself into a Constitutional Assembly and adopted the

⁵⁸ Shivji (n 55 above) 24. See CM Peter *Human rights in Tanzania: Selected cases and materials* (1997) 3, who argues that the government, right after independence, rejected the guarantee of fundamental rights and freedoms in the form of a bill of rights. The nationalists argued that a bill of rights would hamper the new government in its endeavour to develop the country, it would be abused to frustrate the government by declaring most of its actions unconstitutional, and it would also invite conflict.

⁵⁹ M'noti (n 50 above) 3.

⁶⁰ Shivji *et al* (n 9 above) 47.

⁶¹ Shivji *et al* (n 9 above) 48.

⁶² Shivji (n 55 above) 25.

⁶³ As above.

Republican Constitution of 1962.⁶⁴ Thus, the way the Republican Constitution was adopted and the unrepresentative nature of the Constituent Assembly signified a continuation of the exclusionary process of constitution-making in the country. In other words, while during the colonial era, law-making was the exclusive right of the colonial leadership, in the post-independence era, it was the exclusive right of the ruling party leadership.⁶⁵ It is worth mentioning that the *modus operandi* which was followed in adopting the Republican Constitution as a new constitution altogether and not an amendment of the 1961 Independence Constitution was eccentric. The Republican Constitution set the precedent for the concentration of power in the presidency, which was later to become the hallmark of the subsequent constitutions.⁶⁶

5.3 Union between Tanganyika and Zanzibar of 1964

It is momentous to note that the signing of the Articles of Union between the then People's Republic of Zanzibar and the Republic of Tanganyika on 22 April 1964 is a historic and a corner-stone episode in the constitution-making process in Tanzania, as it gave birth to the United Republic of Tanzania on 26 April 1964. The Union's legality has been a subject of discussion in recent years.⁶⁷ A liberal style constitution gave the people of Zanzibar independence in 1963 under a government controlled by an Arab minority. However, the constitutional government thus established was

⁶⁴ L Ndumbaro 'The state of constitutionalism in Tanzania, 2003' in Tusasirwe (n 53 above) 13. See also Shivji (n 9 above) 48 – 49 where he has *inter alia* stated that the Republican Constitution of Tanganyika was in theory made by a Constituent Assembly but in reality it was made by the National Assembly since the Constituent Assembly was the same body as the National Assembly.

⁶⁵ Ndumbaro (n 64 above) 13.

⁶⁶ Shivji *et al* (n 9 above) 49. Under the existing Constitution of Tanzania of 1977, the president has a wide range of powers; he may appoint any person, in any position, from a Minister of a certain Ministry, to a Chairperson of a Board of Directors. Such powers have formed part of the on-going debate in the forums about the constitution reform.

⁶⁷ Shivji *et al* (n 9 above), 49-50. Some Members of Parliament (MPs) debating the 2011/2012 Budget estimates of the Vice President's Office appealed to the Union and Zanzibar governments to make public all documents related to the formation of the 26 April 1964 Union between then Tanganyika and the Isles for their perusal and digestion. The MPs said the time had come for the two governments to unveil the said documents in a move to end controversy over the circumstances under which the Union came into being. See J Tarimo 'Open Articles of Union to public, demand MPs' *The Guardian* 8 July 2011 1. Yet, it is worthwhile to note that, since the 20th Century, to date, there have been divergent views by the government officials, scholars and citizens on the Union question; first, its legality as will be depicted in the subsequent headings (a glimpse of the Union began is given hereinafter), and second as to whether Tanzania is a federation. Shivji states that, ideally, Nyerere would have preferred that the Zanzibar 'headache' be resolved within the larger federation of East Africa. When this failed, Nyerere, the pragmatic politician that he was, turned to the union of 300 000 islanders with 10 million mainlanders. It has been a puzzle as to when exactly the decision to form the Union was made since the whole process was shrouded in great secrecy. A year after the formation of the Union, (ie in 1965) at the Tanganyika African National Union-Afro Shiraz Party (TANU-ASP) electoral conference where Nyerere was nominated by Karume to stand for the presidency of the Union, Nyerere told the story of how the Union came about and since then he often repeated it. Nyerere and

overthrown within a month in a bloody revolution which brought to power the Afro-Shiraz Party (ASP) under Abeid Karume in alliance with the *Umma* Party under Abdulrahman Mohamed Babu.⁶⁸ Only three months later, Nyerere and Karume, each on behalf of their countries, signed the Articles of the Union to form the United Republic of Tanganyika and Zanzibar, eventually renamed Tanzania.⁶⁹ The Articles of the Union was a masterly piece of legal draftsmanship guided by immediate requirements of distribution of power rather than grand principles of constitutionalism.⁷⁰ The Articles of the Union, being a treaty, was ratified by the respective legislatures and thus translated into municipal law. In the case of Tanganyika the legislature was the erstwhile independence National Assembly (an exclusive TANU body) and in the case of Zanzibar it was the self-appointed Revolutionary Council.⁷¹ The Articles thus ratified became the Union of Tanganyika and Zanzibar Act, 1964⁷² in Tanganyika and the Union of Zanzibar and Tanganyika Law, 1964 in Zanzibar and together they are cited as the Acts of Union.⁷³ The Acts of Union constituted fundamental basic law, or the Constitution of the Union. All the later constitutional changes pertaining to the Union derive their legal validity from the Acts of the Union which are still in force and appended to the

Karume were alone in the State House at Dar es Salaam. This was sometime in March 1964. Nyerere told Karume that he had mentioned to his Kenyan and Ugandan colleagues that Tanganyika was ready to unite whenever Kenya and Uganda would be ready. Nyerere said that the Union would have come in March 1964, not April. But there was still a possibility of forming the union of 'three countries'. Nyerere seemed to imply that the possibility of Kenya, Tanganyika and Zanzibar uniting was being explored at the time. That did not come to pass. The final meeting on the issue took place on 10 April 1964 when there was a meeting in Nairobi. The Nairobi meeting apparently failed to bring in Kenya and that is when the decision on the union of two countries was made. See IG Shivji *Pan-Africanism or pragmatism?: Lessons of Tanganyika – Zanzibar union* (2008) 76–78. Professor Yash Ghai, a constitutional law guru in his foreword to one of Shivji's recent literatures on the Union had this to say with respect to the second question, 'Shivji's book examines Tanzania's experience of the Union of two African states as they merge their policies and institutions in a federation. Explicitly or implicitly he adverts to the difficulties that federal Tanzania has faced. Although the scope of his study is restricted to the proper and lawful status of Zanzibar, as an equal partner in the federation, including its distinctive share in state sovereignty, there are undoubtedly lessons that can be drawn from it. Shivji disposes of briskly the question whether Tanzania is a federation. Few lists of federal countries prepared by scholars (such as the eminent authority, Ronald Watts) or the international Forum of Federations include Tanzania, nor does Tanzanian constitution use the term. But Shivji says emphatically (and in my view correctly) that Tanzania is federal, stating that federations come in many guises. A federation is in part a matter of constitution and laws, and in part political approaches and attitudes. Tanzania satisfies most of the formal criteria of a federation ...'. See foreword by Yash Ghai in IG Shivji *Tanzania: The legal foundations of the Union* (2009) xi. See also generally Shuma (n 17 above).

⁶⁸ Shivji (n 55 above) 26.

⁶⁹ As above.

⁷⁰ As above.

⁷¹ Shivji (n 55 above) 27.

⁷² Act 22 of 1964.

⁷³ Shivji (n 55 above) 27. See also Shivji *et al* (n 9 above) 50, where he argues that there is a controversy over whether the Revolutionary Council formally ratified and passed this law. Research shows that such a law was not published in the Government Gazette of Zanzibar, as it ought to have been done. But it was published in the Government

1977 Constitution.⁷⁴ However it should be noted that, the signing of the Articles of the Union by presidents Nyerere and Karume in 1964 was without public consent.⁷⁵ Besides that, neither the Tanganyika National Assembly nor the Zanzibar Revolutionary Council was allowed to debate the essence of the Union. They were only required to grant legal status to the Articles of the Union. In other words, the Articles of the Union embodied the aspirations and wishes of the two Presidents rather than those of the general public. As such the principle of constitutionalism was paid lip service.⁷⁶

Gazette of Tanganyika (Government Notice No 243 of 1/5/64) under the signature of Tanganyika's Acting Solicitor-General. Aboud Jumbe, who was then a member of the Revolutionary Council, cannot recall that the Revolutionary Council actually sat and ratified the Articles. See A Jumbe *The partnership: Tanganyika-Zanzibar Union: 30 turbulent years* (1994). It is doubtful therefore if the Revolutionary Council together with the Cabinet of Zanzibar actually made this law as is claimed in this Government Notice. In law, it can be argued that even if the Articles were not ratified by the Revolutionary Council, they are binding because the relevant Zanzabari [*sic*] authorities have acquiesced (agreed and accepted) in them. But the fact remains that the Articles of Union were never ratified by the Revolutionary Council of Zanzibar, which, legally, is a serious flaw. Conversely, Bakary after engaging into a discourse establishing that the Articles of Union is a treaty, attempts to answer the question as to whether this international agreement signed by the two executives had a force of law or not. He cites the case of *R v H.M. Treasury and the Bank of England exp. Centro. Com.* Times Law Reports, October 7, 1993, where it was established that, 'international agreements may be entered into by the executives, but such agreement [*sic*] do not ipso facto have the force of law unless and until they have been expressly adopted and incorporated in local legislation.' This means that the Articles of the Union (the Treaty) had to be ratified by the Government of Tanganyika and the Government of Zanzibar before coming into force (ie by respective legislative bodies). The Articles of Union themselves provided for ratification under article VIII of the Treaty. The article implies that there should have been an enactment by the Parliament of Tanganyika to ratify the Articles and in the same spirit the Revolutionary Council should also enact a Decree to ratify the Articles. The requirement of this provision was not followed. Mere discussions on the subject matter by the Revolutionary Council and the fact that the Revolutionary Council approved the discussion does not in any way legalise the wrong procedure. Thus it was only in Tanganyika, as per Tanganyika Legal Notice no 243 of 1964 that ratification was legally made. The law was not passed by the Revolutionary Council which was at that time a legislature *cum* a cabinet. We cannot in law substantiate our arguments with what the Revolutionary Council Members had said during their deliberations. As once Lord Denning had said, 'one could not look at what the responsible Minister has said in the Parliament or what the Hansard has reported, rather we must look to the meaning of the legislation (Act).' There has to be a law enacted by the Parliament of Tanganyika separately and by the Revolutionary Council separately to ratify the Articles as required under article VIII of the Articles of Union. See AK Bakary 'The union and the Zanzibar constitutions' in Peter & Othman (n 10 above) 4-6.

⁷⁴ Shivji (n 55 above) 27. See also Constitution of Tanzania of 1977 (n 1 above) first schedule. It is worth noting that, 'every first year law student has been taught that the Constitution of the United Republic of Tanzania is found in the document called the Constitution of the United Republic of Tanzania of 1977'. But every law student, I am afraid, has been mistaught. The Constitution of Tanzania is to be found in, not one, but two documents: the Acts of Union, chapter 557 of the Laws of Tanzania and the Constitution of the united republic of Tanzania, Constituent Act 1 of 1977. By the same token, the Constitution of Zanzibar is to be found in (1) the Acts of Union and (2) the Constitution of Zanzibar of 1984. See also Shivji (n 67 above) 66.

⁷⁵ W Dourado 'The consolidation of the Union: A basic re-appraisal' in Peter & Othman (n 10 above) 73-108. See also Ndumbaro (n 64 above) 13.

⁷⁶ Ndumbaro (n 64 above) 13.

5.4 Constitution of the United Republic of Tanganyika and Zanzibar of 1964

It was under the authority of the Acts of Union (Articles of Union) that then President Nyerere passed the Interim Constitutional Decree of 1964, modifying the Republican Constitution to accommodate the Union. As a matter of fact, the Decree, among other things, renamed the constitution as the 'Interim Constitution of the United Republic of Tanganyika and Zanzibar of 1964' (article 24 of the Decree repealing and replacing section 69 of the Constitution of Tanganyika).⁷⁷ Effectively what was done was that the Parliament first gave powers under the Acts of the Union to one of its components, the President, to amend the Constitution, that is, the very instrument from which the parliament derived its authority. In short, the Parliament divested itself of its constituent capacity in favour of one of its components. To a lawyer's mind this is outrageous and in breach of all known constitutional principles. Tanzania has thus gone through rule by presidential decree albeit for a short period.⁷⁸ This was the third Constitution of Tanzania and was made by the President, a product of conspicuous want of constitutionalism in constitution-making.

5.5 Interim Constitution of Tanzania of 1965

This is considered the fourth Constitution of Tanzania. It was never passed by a constituent assembly but rather adopted like an ordinary Act of Parliament in its constituent capacity as if adoption of a new constitution were an amendment of a pre-existing constitution. Whatever the legal significance of this, the political significance was clear. Nyerere wanted to instil a One Party System.⁷⁹ It once again by-passed the people and a public debate was not conducted in the process of adopting a new constitution.

The Interim Constitution re-enacted all the changes brought about by the union. It went on to declare in section 3 that 'there shall be one political party in Tanzania' and 'until the union of the Tanganyika African National Union with the Afro-Shiraz Party (which United Party shall constitute the one political party), the Party shall, in and for Tanganyika, be the Tanganyika African National Union and, in and for Zanzibar, be the Afro-Shiraz Party'. All political activity except that of the organs of the state was to be conducted under the auspices of the party.⁸⁰ Finally, the Constitution of the Tanganyika African National Union (only one of the two parties recognised in the Constitution, the other being Afro-Shiraz Party) was made a schedule to the Constitution thus legally endorsing the

⁷⁷ Shivji (n 55 above) 27.

⁷⁸ As above. See also Shivji *et al* (n 9 above) 52.

⁷⁹ Shivji (n 55 above) 29. See PA Oluyede *Administrative law in East Africa* (1973) 4-7.

⁸⁰ As above. See also Peter (n 58 above) 4-9. See also Shivji *et al* (n 9 above) 52-53.

emergence of a party-state.⁸¹ The establishment of a single party regime in 1965 and later on the adoption of the *Ujamaa* ideology in 1967 enhanced the trend of excluding citizens from participating in constitutional debates. The logic of single-party politics and the nature of the socialist system have tendencies of centralising power and excluding not only those who are against the dominant ideology but also the 'no-vanguard elite'. Experiences of communist and socialist countries worldwide, which have widely been documented, attest to the claim.⁸²

Dourado, venturing in a discourse on party supremacy, had this to say:⁸³

I will now deal with the fiction of single party supremacy. But first let us define what we mean by a federation. Federation can be defined as constitutional system in which there is a division of legislative and executive powers between a central government and two or more state governments and each government being supreme in matters left to them. The governments are co-ordinate with one another and not subordinate. The essence of a federation is the supremacy of each government in its own sphere. From this very definition it can be seen that party supremacy can have no relevance in a federation.

The 1965 Constitution had to be amended to restore the original provision which excluded the organs of government from the political activity of the Party. Otherwise it would have been tantamount to creating a unitary state through the back door. By granting the party supremacy over the organs of government one of the fundamental provisions of the Articles of Union of 1964 was breached.⁸⁴ Jain who is quoted by the former Chief Justice of Tanzania, is critical about how the single party system altered

⁸¹ Shivji (n 79 above) 29.

⁸² Ndumbaro (n 64 above) 13. Between 1965 and 1977 when the permanent constitution was adopted, the Interim Constitution was often amended. The conspicuous changes were: one of the amendments increased the jurisdiction of the union government in terms of the number of union matters, thus constricting the autonomy of Zanzibar. This was arguably contrary to the provisions of the Articles of Union yet did not then become a constitutional issue between Zanzibar and the Mainland. The second amendment was the consolidation of the party-state and undermining of the National Assembly in favour of the National Executive Committee of the party. Thus, for example, the 1975 amendment declared the supremacy of the party by providing that the functions of all state organs shall be performed under the auspices of the party as per section 3(4). It changed the composition of the National Assembly such that only 40 per cent were directly elected constituency members, 30 per cent indirectly elected by the National Assembly or the Revolutionary Council and 30 per cent appointed by the Executive (president of the Union and the president of Zanzibar). See Shivji (n 55 above) 30.

⁸³ Dourado (n 10 above) 92-93.

⁸⁴ Dourado (n 10 above) 95. Article III(a) of the Articles of Union of 1964 states: During the interim period the Constitution of the united republic shall be the Constitution of Tanganyika so modified as to provide for:
A separate legislature and executive in and for Zanzibar as from time to time constituted in accordance with the existing law Zanzibar and having exclusive authority within Zanzibar for matters other than those reserved to the parliament and executive of the United Republic.

constitutions to serve its own interests in stating that: a constitution is national heritage and not the property of one single party howsoever mighty it may be and no single party has thus a right to institute amendments in the party interest rather than in the national interest.⁸⁵

5.6 Constitution of the United Republic of Tanzania of 1977

A merger of the two parties (TANU and ASP) was necessitated after the Union of 1964. A joint meeting of the two National Executive Committees of the respective parties appointed a twenty-person committee with equal representation to propose a constitution of the new party. Eventually, the parties merged and the new party *Chama Cha Mapinduzi* (CCM) was formed and launched on 5 February 1977. The same party committee was appointed as the Constitutional Commission as required by the Acts of Union on 25 March 1977.⁸⁶ On the same date, the President also appointed a constituent assembly whose membership was the same as the pre-existing union National Assembly. The Commission had started working on the Constitution even before it was formally appointed as the constitutional commission. It submitted its proposals to the National Executive Committee which adopted them in *camera* in a one-day meeting. These proposals were then published in the form of a bill and within seven days submitted to the Constituent Assembly.⁸⁷ So, what went to the Constituent Assembly were not proposals from the Commission but a draft of the Constitution which had been drafted on instructions from the party.⁸⁸ The Constituent Assembly passed the Constitution within three hours.

The Constituent Assembly had 201 representatives of which 45, or just one-fifth, was from Zanzibar. When one goes through the list of representatives, one finds that all of them were members of the existing National Assembly. So, in reality the Constituent Assembly was the same body in its composition as the National Assembly although in law it was different.⁸⁹ Needless to say the fifth Constitution of Tanzania was as a

⁸⁵ BA Samatta 'Judicial protection of democratic values: The judgment of the Court of Appeal on independent candidates' a public lecture delivered at Ruaha University College, Iringa, 25 November 2010 15. See generally BA Samatta 'Judicial protection of democratic values' (2011) Issue No 17 June *The East African Lawyer* 10-17 & 17-23.

⁸⁶ Shivji *et al* (n 9 above) 30-31. See also Shivji *et al* (n 9 above) 53-54.

⁸⁷ As above. The then Prime Minister, HE Edward M Sokoine, introducing the bill had candidly pointed out the limitations of the Constituent Assembly. He said: '... in exercising our authority we ought to be conscious of its limitations. The proposals we are about to debate are the outcome of the Party directives. *We Tanzanians* (emphasis mine), in our wisdom, have determined without hesitation that the Party shall be the ultimate authority in the country. Therefore this Constituent Assembly has full powers to reject or amend these Government proposals if it feels that they are contrary to, or in conflict with, the Party directives. On the other hand, if these proposals correctly implement the Party's wishes, I beg the Assembly to accept them without a moment's hesitation.'

⁸⁸ As above.

⁸⁹ Shivji (n 9 above) 54.

consequence born as the permanent constitution of Tanzania, the current Constitution of the United Republic of Tanzania of 1977. In this respect, constitution-making became the exclusive right of the party leaders. In other words, like previous constitutional developments, the adoption of the 1977 Constitution was more of private party matter than a public issue.⁹⁰ Since its passing in 1977, the Constitution has until 2005 been amended fourteen times. No constitution can survive as it was first framed without amendments.⁹¹ Hence, article 98 of the Constitution permits Parliament to amend the Constitution.

There are two types of amendments. Amendments to matters involving the list of union matters, the existence of the United Republic, the authority of the government of the United Republic, the authority of the government of Zanzibar, the High Court of Zanzibar, *et cetera*, which require two-thirds majority of the members from Tanzania Mainland and two-thirds majority of members from Zanzibar. Amendments to any other provision of the Constitution require a two-thirds majority of all members of the National Assembly. Four are worth mentioning as major amendments.⁹²

The Fifth Amendment was Act 15 of 1984, which for the first time introduced a bill of rights in the constitution.⁹³ The second amendment is the Eighth Amendment, Act 4 of 1992, which introduced the multi-party system in the country. The third major amendment is the Eleventh Amendment, Act 34 of 1994. This amendment introduced the system of 'running mate' of the President to be the Vice-President. It has to be pointed out that, since the inception of the Union, the President of Zanzibar automatically became the Vice-President of the Union. This worked reasonably well during the one-party system. But the introduction

⁹⁰ Ndumbaro (n 64 above) 14.

⁹¹ Shivji *et al* (n 9 above) 56.

⁹² See generally Shivji (n 9 above) 56-58. For the debates on the question of multi-party in Tanzania, see IG Shivji 'Pre-condition for a popular debate on democracy in Tanzania' (1991) *University of Dar es Salaam Law Journal* 6-19.

⁹³ In January 1982 the National Executive Committee of the Party (CCM) issued proposals for amending the Constitution. For the first time these proposals were submitted to the public for a one-year public debate. What ensued was a novel experience in the constitutional history of the country – a country-wide vigorous debate. The original proposals were not particularly 'revolutionary'. They proposed to modify somewhat the powers of the president, enhance the stature of the parliament and consolidate the Union. The debate was not confined to the proposals. In particular two trends emerged – a demand for the democratisation of the state including a bill of rights and a federal structure of the union. In Zanzibar the demand for greater autonomy and a revisiting of the Articles of Union became very persistent and vitriolic. It was widely believed that the Zanzibar leadership itself was behind encouraging this mood. In the event the debate was cut short in eight months. The Party National Executive Committee meeting in Dodoma declared the 'pollution of atmosphere' and made accusations against president Jumbe and his chief minister as being responsible ... Eventually the proposals and the feed-back from the debate were translated into a bill for the Fifth Constitution Amendment of 1984 which then included a bill of rights. It has been variously argued that the bill was a response to public demand. See Shivji (n 55 above) 30-31. See also Shivji (n 9 above) 33.

of multi-parties created a possibility that the President of Zanzibar and the President of the Union could come from different political parties. It was this which made the ruling party, through its government, introduce the system of 'running mate'. This requires that a presidential candidate should select his or her running mate as a vice-presidential candidate. The election of the President means that his or her running mate automatically becomes the Vice-President. This ensures that the President and Vice-President of the Union come from the same political party. But this created another problem. It left the President of Zanzibar totally out of the Union structure. For this reason, this amendment also provided that the President of Zanzibar shall be a member of the Union Cabinet. He was simply made redundant in the Union governance structure at odds with the stipulations of the Acts of Union. The fourth major amendment is the Thirteenth Amendment, Act 3 of 2000. This amendment introduced four important changes in the Constitution. The first change relates to the election of the President. The second dealt with the proportion of seats in the National Assembly reserved for women. The third change was to declare that the judiciary has the final say on matters of determining rights and duties according to law and dispensation of justice. The fourth change was to establish the Human Rights and Good Governance Commission.

6 Administration of justice as regards constitutionalism in Tanzania: A glance

In any democratic society, the judiciary has often been vested with a duty of being the organ responsible for the dispensation of justice, and the custodian of constitutional values.⁹⁴ It also engages itself in the checks and balances of powers amid the other two organs of the government, namely, the executive and the legislature. A ready image coming into one's faculties of thinking when a question of enacting or amending statutes is at issue is that of a Parliament. This is so because enactment or amendment of statutes is a legislative function. Since legislating is the exclusive province of the Parliament, it follows then that amendment is again the province of the Parliament. But amending statutes in cases of this type is to some extent a process with certain peculiarities.⁹⁵

The first peculiarity is that Parliament once had an occasion to provide for a matter in question but it fumbled causing a decision of invalidation of the law in court. Undoubtedly, it is startling that a system should depend

⁹⁴ Constitution of Tanzania of 1977 (n 1 above) article 107A(1) states that: 'The Judiciary shall be the authority with final decision in dispensation of justice in the United Republic of Tanzania.' The Basic Rights and Duties Enforcement Act 33 of 1994, under section 8, vests to the High Court of Tanzania original jurisdiction to hear and determine any application made pursuant to Part III of the Constitution which provides for the Basic Rights and Duties.

⁹⁵ AK Vedasto *The life of an unconstitutional and so a void statute* (2010) 91-92.

on the same wrongdoer to correct the unwanted wrong. Theoretically, this person in making the unconstitutional statute applied the best of his or her efforts and understanding of the constitutional limitations and ended there. To require the same person to remedy the wrongs resulting from his or her opinion is to require him or her to repeat the same or, if to avoid them, to do so not as a free interpreter of the constitutional limitations but just as a puppet of someone else's sense of limitations.⁹⁶

The second peculiarity, which demands attention, and the one to be discussed herein under, is the judicial involvement, in fact, judicial centrality, in the process. In this type, amendments of the statute in question are initiated by judicial process. Things start in court where the court knocks down the statute.⁹⁷ On the contrary, it is noteworthy to point out that the judiciary, first, as a matter of fact, has never amended, and secondly, as a matter of principle, cannot amend, and that Parliament is indispensable in effecting amendment in any statute.⁹⁸ Against that background, in Tanzania, it is evident that the government, to be precise the executive, on some occasions has sought Parliament's assistance to pass or amend a law subsequent to the High Court's or Court of Appeal's decision which preserves the Bill of Rights. In *Chumchua s/o Marwa v Officer In Charge of Musoma Prison and Another*,⁹⁹ Mwalusanya J (as he then was) held that deportation of Tanzanians under the Deportation Ordinance, from one place to another, within the United Republic of Tanzania, was

⁹⁶ Vedasto (n 95 above) 92. In this respect, the author engage in the discussion of article 30(5) of the Constitution of the United Republic of Tanzania of 1977 which is confined to the laws that conflict with the Constitution's 'Basic Rights and Duties' stipulated in articles 12 to 29 of that Constitution. The provision reads as follows:

'Where in any proceedings it is alleged that any law enacted or any action taken by the government or any other authority abrogates or abridges any of the basic rights, freedoms and duties set out in articles 12 to 29 of this Constitution, and the High Court is satisfied that the law or action concerned, to the extent that it conflicts with this Constitution, is void, or is inconsistent with this Constitution, then the High Court, if it deems fit, or if the circumstances or public interest so requires, instead of declaring that such law or action is void, shall have power to decide to afford the government or other authority concerned an opportunity to rectify the defect found in the law or action concerned within such a period and in such manner as the High Court shall determine, and such law or action shall be deemed to be valid until such time the defect is rectified or the period determined by the High Court lapses, whichever is the earlier.'

This provision is incorporated *mutatis mutandis* in the Basic Rights and Duties Enforcement Act 33 of 1994 as sect 13(2). The logical construction of the said provisions should be to the effect that; the court in finding a law to be unconstitutional, in appropriate circumstances, it should give the authority an opportunity to rectify the defect found in the law or action, by proposing the manner of such a rectification or reform and a time limit for the same to be made. This has as well been the court's view on sect 13(2) of Act 33 of 1994 above, in the case of *Judge i/c High Court, Arusha, & AG v NIN Muruo Ng'uni*, Court of Appeal of Tanzania at Arusha, Civil Appeal No 45 of 1998 (Unreported), which held that that subsection gives the Court 'power and discretion in appropriate case to allow' the relevant organ to correct the defect impugned. The provision does not oblige the Court to refer the matter to the relevant organ in all cases but leaves it with 'discretion' and then only in 'appropriate cases'.

⁹⁷ Vedasto (n 95 above) 92.

⁹⁸ As above.

⁹⁹ High Court of Tanzania at Mwanza, Miscellaneous Criminal Cause No 2 of 1988 (Unreported).

unconstitutional, void and of no effect, because it directly interfered with the right to freedom of movement of a person guaranteed under article 17 of the Constitution of Tanzania. However, the Attorney-General (AG) instead of lodging an appeal to the Court of Appeal pursued a bill before the National Assembly to amend the nullified Deportation Ordinance.¹⁰⁰ Mwalusanya J, once ardently stated, 'the law which is void, is as if was not there, that is, not passed by parliament ... you cannot amend a statute that has been declared void ... It is just common sense that you cannot amend a legislation which is non-existent.'¹⁰¹ The proposition that a law which is declared void by the court is as if it were never passed by Parliament is superfluous and bears no reality. As mentioned above, and as the concept of constitutionalism demands, it is Parliament which enjoys the exclusive powers to enact or amend laws. Hence, the fact is that the Act (Deportation Ordinance) became law, effectively, and ... it is still a law in the series of the laws of Tanzania passed in 1991, known as Act Number 3. As a matter of fact, statutory laws declared unconstitutional and void, however such declarations have been formulated, have, as all other statutory laws, been effectively amended by the Parliament, and Parliament alone.¹⁰² No temple of justice can masquerade itself to perform what has always been considered as essential powers of Parliament.

The saga continues in the noteworthy case of *Rev Christopher Mtikila v AG*,¹⁰³ which is given more full attention below. The petitioner, one Rev Christopher Mtikila, filed a petition before the High Court of Tanzania praying for, *inter alia*, a declaration that the amendments to articles 39 and 67 of the Constitution of the United Republic of Tanzania were unconstitutional. The prayer was based upon the contention that, contrary to the provisions of article 21 of the Constitution, the said amendments were invalid because they purported to destroy a citizen's fundamental right to take part in presidential, parliamentary or local council election as an independent candidate. The petition was heard by the late Justice Lugakingira. About a week before the learned judge delivered his landmark judgment – on 16 October 1994, to be more precise – the government tabled a bill before the National Assembly seeking to deny the existence in law of the fundamental right which Rev Mtikila had asked the High Court to recognise and give effect to. On 24 October 1994, the Court delivered the much-awaited judgment which *inter alia* held that the amendments made to articles 39, 67 and 77 of the Constitution, restricting the right to contest in elections to political party candidates only, are

¹⁰⁰ LX Mbunda 'The support structure theory and its implication in securing basic rights in Tanzania' in SE Mchome (ed) *Taking stock of human rights situation in Africa* (2002) 101.

¹⁰¹ *AA Sisya & 35 Others v The Principal Secretary, Ministry of Finance and Another*, High Court of Tanzania at Dodoma, Civil Case No 5 of 1994 (unreported). See also a full discussion on 'the non-existent principle' and 'reform of an unconstitutional statute' in Vedasto (n 95 above) 55-90 & 91-130.

¹⁰² Vedasto (95 above) 93.

¹⁰³ [1995] TLR 31. See BD Chipeta *Administrative law in Tanzania: A digest of cases* (2009) 23-30. See also Samatta (n 75 above) 1-3.

capable of being abused to confine the right of governing to a few and to render illusory the emergence of a truly democratic society. Notwithstanding those restrictions, it shall be lawful for private candidates to contest elections along with political party candidates. The High Court was of the opinion that the constitutional amendments were invalid. The AG was aggrieved by this decision. He lodged a notice of appeal,¹⁰⁴ but later abandoned the intended appeal. Instead, the government vigorously pursued the aforementioned bill before the National Assembly. On 2 December 1994, the Assembly passed that bill, and subsequently enacted a law which curtailed among others, the right to contest in General Elections as an independent candidate.¹⁰⁵ Rev Mtikila challenged the amendments' constitutionality before the High Court, which agreed with him.¹⁰⁶ The High Court sitting as a Full Bench *inter alia* held as follows:

The impugned amendments were violative of the democratic values and principles enshrined in the constitution and also violative of the doctrine of basic features. We wish to make it very plain that in our view Act 34 of 1994 which amended article 21(1) so as to cross refer it to article 5, 39 and 67 which introduced into the constitution restrictions on participation of public affairs and the running of the government to party members only was an infringement on the fundamental rights and that the restriction was unnecessary and unreasonable, and did not meet the test of proportionality.

¹⁰⁴ *AG v Rev Christopher Mtikila*, Court of Appeal of Tanzania at Arusha, Civil Appeal No 3 of 1993 (Unreported).

¹⁰⁵ The Eleventh Constitutional Amendment Act of 1994, then assented by the president on 17 January 1995. The Act had the effect of amending article 21(1) of the Constitution, see Act 34 of 1994. The AG applied to withdraw the appeal. When granting the AG's application, Kisanga, JA (as he then was) noted that: We are constrained to have to point out some aspects in the handling of this matter by the appellant (AG) which causes great concern. While the ruling was being awaited, the Government on 16 October 1994 presented a Bill in Parliament seeking to amend the Constitution so as to deny the existence of that right (that is, the right of independent candidates to contest elective posts), thus pre-empting the Court Ruling should it go against the Government. This is where things started to go wrong. The Government was now adopting parallel causes of action towards the same end by asking Parliament to deal with the matter simultaneously with the High Court. That was totally wrong for reasons which will be apparent presently. Thus the government consciously and deliberately drew the judiciary into a direct clash with Parliament by asking the two organs to deal with the same matter simultaneously. Such a state of affairs was both regrettable and most undesirable. It was wholly incompatible with the smooth administration of justice in the country and every effort ought to be made to discourage it. In the instant case had the amendment been initiated and passed after the Court process had come to a finality, that in law would have been alright procedurally, the soundness of the amendment itself, of course, being entirely a different matter. Then the clash would have been avoided. Indeed that would be in keeping with good governance which today constitutes one of the attributes of a democratic society. See *AG v Rev Christopher Mtikila*, Court of Appeal of Tanzania at Arusha, Civil Appeal No 3 of 1993 3 (Unreported). See also A Mughwai 'Forty years of struggles for human rights in Tanzania: How far have we travelled?' in Mchome (n 100 above) 57-60.

¹⁰⁶ *Rev Christopher Mtikila v AG*, High Court of Tanzania at Dar es Salaam, Miscellaneous Civil Cause No 10 of 2005 (Unreported). See also Samatta (n 85 above) 3. A notable statement from Justice S Massati is worth recapitulating, he reiterated a Court of Appeal's passage already stated while adding his to the effect that: As a matter of procedure, we must, at once condemn this act of the respondent (the AG) *as being contrary to the dictates of good governance* (emphasis added), and for which we can do no more than quote the above cited passage from the judgment of the Court of Appeal.

We thus proceed to declare that the said amendments to article 21(1), 39(1)(c) and 67(1)(b) are unconstitutional.

The judges quoted with approval *Mwalimu Julius K Nyerere's* observations in his book, *Our leadership and the destiny of Tanzania*, published in 1995:

This is very dangerous. Where can we stop? If one section of the Bill of Rights can be amended, what is to stop the whole Bill of Rights being made meaningless by qualifications of, and amendments to, all its provisions?

Besides that, they also cited with approval the observations by Prof Issa Shivji, made in his article, 'Constitutional limits of parliamentary powers', which was published in 2003 in a special edition of the journal *Tanzania Lawyer*:

The power to amend the constitution is also limited. While it is true that parliament acting in constituent capacity ... can amend any provision of the constitution, it cannot do so in a manner that would alter the basic structure or essential features of the constitution.

The AG was aggrieved by the Court's decision. He appealed against it to the Court of Appeal. Although that Court did not formally allow the appeal, in effect it did so, as Samatta puts it.¹⁰⁷ The Court of Appeal concluded its judgment with the following unforgettable words:

The issue of independent candidates has to be settled by parliament which has the jurisdiction to amend the Constitution and not the courts which, as we have found, do not have that jurisdiction. The decision on whether or not to introduce independent candidates depends on the social needs of each state based on its historical reality. Thus the issue of independent candidates is political and not legal.¹⁰⁸ However, it should be noted that, what Rev Mtikila prayed for in court was to perform one of its own chief functions, namely, interpreting the constitution and, thereafter, declaring that parliament lacked legal competence to enact the constitutional amendments which purported to abrogate a citizen's right to take part in a public election as an independent candidate. Plainly, that is not a function of parliament. In one sense or another, *a constitutional interpretation is a political matter* (emphasis mine).¹⁰⁹

In reaching their judgment the Justices of Appeal do not appear to have given due weight to the fact that the Constitution of the United Republic of Tanzania has accorded the High Court a dignified and crucial status as a chief guardian and trustee of the Constitution. The High Court is enjoined by law to keep all state organs, including Parliament, within bounds. It is a function which must be performed innovatively, responsibly, efficiently and boldly. Constitutional interpretation is a democratic function. Judges must give effect to the ideals and fundamental

¹⁰⁷ Samatta (n 85 above) 4.

¹⁰⁸ As above.

¹⁰⁹ Samatta (n 85 above) 14 & 16.

concepts engraved in the constitution.¹¹⁰ Subordination of courts to other state pillars, including parliament, is totally unacceptable. That will usher in dictatorship in the country.¹¹¹ Separation of powers is a doctrine of great importance in the governance of a country, but in this country that doctrine has been placed in serious jeopardy by the Court of Appeal's judgment. It is not possible to guess how long it will take to have that serious damage rectified.¹¹² In a nutshell, the administration of justice in Tanzania is not as smooth as it was thought to have been, as it is devoid of constitutionalism though not *in toto*. The courts of record, the High Court of Tanzania and the Court of Appeal of Tanzania, do have powers to declare legislation unconstitutional when it curtails basic rights of the citizens. To be more precise, in this respect it is the High Court, and whenever there is an appeal, the Court of Appeal which should be bold enough to make bold decisions in appropriate cases, to sanction the decisions by the High Court. Mr Justice Kayode's adage becomes of great importance to be employed here. He earlier said; 'even if floodgate it entails, let there be one, once it is a matter of fundamental rights'.¹¹³ Nyerere, once eloquently stated as follows:¹¹⁴

Change has, throughout history, been a constant part of human experience. But today change is more rapid than ever before ... For any society, and for every individual, adapting to change at the present speed is very difficult; yet avoiding change is impossible.

In a courteous way, it can be encapsulated that the Justices of the Court of Appeal of Tanzania did in fact abdicate their noble and omnipotent powers to guard one of the fundamental rights and freedoms, the right to participate in public affairs without being a cadre of a political party.¹¹⁵ Yet, currently, Rev Mtikila 'a determined man' as described by the High Court has lodged an application against the United Republic of Tanzania with the African Court on Human and Peoples' Rights, a judicial organ

¹¹⁰ Samatta (n 85 above) 14.

¹¹¹ Samatta (n 85 above) 20-21.

¹¹² Samatta (n 85 above) 21.

¹¹³ Samatta (n 85 above) 10.

¹¹⁴ Speech on Leadership and the Management of Change by *Mwalimu* Julius K Nyerere, Former first president of Tanzania and Chairman of the South Centre, at the Quinquennial General Conference of the Association of Commonwealth Universities, Ottawa, Canada, delivered on 17 August 1998 (unnumbered).

¹¹⁵ H Kijo-Bisimba & CMI Peter *Justice and rule of law in Tanzania: Selected judgments and writings of Justice James L Mwalusanya and commentaries* (2005) 31 had this to say: 'For those who have had the opportunity to observe the Court of Appeal – the highest judicial organ in the United Republic at work must have noticed three things. Firstly, a very artificial unanimity with their Lordships almost agreeing on each and everything. There are hardly any dissenting judgments from this court – which is curious. At best, once in awhile we see separate judgments but largely supporting the judgment of the Court. Secondly, love for legal technicalities. This provides the opportunity not to say much about the law and its development, a case will be dealt with summarily if there is a slight mistake in procedure. Therefore, for this court the form is more important than substance. Thirdly, harshness to both Counsels appearing before it and Judges whose decisions are being considered in appeal. One advocate noted that Counsels are forced to think twice before proceeding to the Court of Appeal'.

within the African Union.¹¹⁶ Tanzania has ratified the African Charter on Human and Peoples' Rights of 1981, ratified the Protocol to the African Charter on Human and Peoples' Rights on the establishment of the African Court on Human and Peoples' Rights of 1998, and most importantly, it has entered a declaration accepting the Court's jurisdiction to receive petitions under article 5(3) submitted to it by individuals and Non-Governmental Organisations as per article 34(6) of the Court's Protocol. It is the Tanzanians legitimate expectation that justice will be done, *a fortiori*, at this forum!

7 Constitution reform: Is there a choice not to change the 1977 *Grundnorm*?

Benjamin W Mkapa¹¹⁷ has on one occasion stated that the constitution is the heart of the nation. The heart of the human body enables the organs of the body to function, and the organs to work to it. And so it should be with the body politic. Therefore, the way forward starts with an overhaul of the constitution and its organs of state. We cling to the independence constitutions at our deferred peril.

A constitution provides a society with a vision of the future. It is a guiding document containing principles that limit the state's power and protect people's liberties and rights. It is a supreme law that provides for an open and free society based on government accountability, the rule of law, and transparency. As a corollary to that, constitutionalism proclaims the desirability of the rule of law as opposed to rule by the arbitrary judgment or mere fiat of public officials.¹¹⁸ In liberal political discourse, constitutionalism includes a process for 'developing, presenting, adopting and utilising a political compact that defines not only the power relations between political communities and constituencies, but also the rights, duties and obligations of citizens in any society'.¹¹⁹ If that is the case, the crux of the matter is how all these structures arrive in a constitution, that is, the question as to who it is that makes the constitution has to be carefully addressed. That being said and done, besides the aforementioned

¹¹⁶ The application filed by Rev Mtikila against the United Republic of Tanzania, *inter alia*, submits that, the current Tanzanian law violates his right to freedom of association and to participate in public or government affairs by prohibiting independent candidates to contest presidential, parliamentary and local council elections. Such prohibition, it is submitted, creates unnecessary discrimination among Tanzanians and therefore violates the principle of non-discrimination. Finally Rev Mtikila contends that the Tanzanian government violated the rule of law by initiating a constitutional review and subsequent amendment to settle an issue pending before the courts of Tanzania. See http://www.etudesvihode.com/files/20110610_Mtikila_Application-FINAL.pdf (accessed 30 June 2011).

¹¹⁷ Speech by Benjamin W Mkapa, the former president of the United Republic of Tanzania to the Annual General Meeting of the East African Law Society held in Bujumbura, Burundi, from 19 – 20 November 2010. See also Peter (n 22 above).

¹¹⁸ Oliver (n 42 above) 6.

¹¹⁹ As above.

basic question, fundamental questions thus remain; who decides to write a new constitution, how do we decide to write it, who decides what goes into it and what goes into it?

8 Features of an effectual and inclusive constitutional reform process

Constitutional reform by and large triggers a constitution-making process. Since a constitution affects all citizens, any government embarking on a constitution-making or constitutional reform process, where there is real political will to develop the best constitution for its people, should ensure that the process is legitimate, credible, lawful, and reflective of the will of the people.¹²⁰ During the constitution-making process, various aspects should be in place before the substance or content is negotiated and drafted. Gone are the days when the traditional method of making a constitution was acceptable and resulted in a supreme law that satisfied its citizenry.¹²¹ Contemporary constitution-making or constitutional reform demands that the process is given as much importance as the substance or content of the constitution. Popular, inclusive, participatory and democratic are all key aspects of a successful process that bestows both legitimacy and credibility on the supreme law of the country. This kind of process contributes to making the constitution a living document by taking it to the people so that they are in a position not just to have access to it, but also to understand it, claim ownership and use it in the defence of the democratic enterprise.¹²² Recent constitution-making processes practices have required that the public be involved in the pre-, during and post-phases of the drafting of a constitution.¹²³ These practices include prior agreement on broad principles as part of the first phase of constitution-

¹²⁰ As above.

¹²¹ As above.

¹²² As above. See also Nchalla (n 42 above) 3.

¹²³ South Africa's constitutional review and reform process serves as the best practice which culminated in participatory process with concordant legitimacy. When it established its first democratic Constitution, post its first democratic elections in 1994, it undertook an inclusive approach both in its drafting and in its adoption. With the ushering in of a new democratic government came the establishment of a constituent assembly tasked with the drafting of South Africa's first representative constitution. The process that South Africa constitutional review and reform in Southern Africa embarked upon is largely regarded as the leading example of maximum citizen participation in a constitution-making process. It took seven years, from 1989 to 1996, to complete the process, with sufficient funding allocated to ensure extensive participatory constitution-making. In the mid 1990s an all-reaching educational and information-sharing campaign took place. All forms of media were accessed; billboards and the sides of buses became information summaries on the process, an assembly newspaper with a direct circulation of 160 000 people was produced, cartoons, websites and public meetings ensured that an estimated 73 percent of the population was reached. From 1994 to 1996 the assembly received over two million submissions from the public, including individuals, advocacy groups, professional associations, and civil society. Groups including those marginalised such as women, traditional authorities, and rural communities were specially targeted. This process demanded a considerable commitment of time and resources, both human and financial, but the investment paid

making; an interim constitution to provide the space for further, on-going, and more detailed negotiations for the final constitution; civic education and media campaigns using both the print and electronic media; the creation and guarantee of channels of communication among the structure undertaking the process, the public, and government; elections for constitution-making assemblies; open and transparent drafting committees; and approval and adoption by various combinations of representative legislatures, courts, and referendums.¹²⁴ In a nutshell, the constitution reform process should have at least the following elements or bodies: political will, a constitution reform commission, participation by the people, time frames, civic education and information sharing, a constituent assembly, and a referendum.¹²⁵

9 A new (legitimate) constitution in Tanzania: A people's appeal

Although historians and lawyers differ on many issues, they share many characteristics. In making their arguments, both professions engage in case-making by citing scenarios which can justify a *status quo*. They use research as a tool to build a particular line of argument. In support of this, it is hereby argued that the cry for a new constitution has a historical basis; hence, it is not a new one as it can be evidenced. Important and respected personalities in the legal field and beyond have added voice to the demand for a new constitution. Some political leaders have made promises that if they were to come to power, they would initiate the move towards a new constitution in the country. The demands are made from time to time, whenever the opportunity arose, but the authorities have always found

substantial dividends, with a large majority of South Africans from all political persuasions owning the constitution and thus ensuring its legitimacy. Even political parties and groupings opposed to South Africa's democracy and black-led government have shown respect for its constitution. This is evidenced by statutory challenges presented before the Constitutional Court and a media that is often highly critical of government yet refers to the Constitution and the rule of law as being two of the greatest successes of the African National Congress (ANC) government. South Africa followed a constitution-making process with four key pillars, *viz*: public education, public consultation, drafting of the Constitution, and legitimising the draft Constitution. All of these stages required commitment from the government, adequate resources, and time. Civic education is essential to inform the citizenry of the process and of contentious issues that the constitution may contain. Consultation provides for the sharing of information on the content and soliciting people's views and needs. The drafting process only begins once public consultations have ensured maximum participation and the drafters consider and include the public's submissions. The model constitution is then presented for further public debate. See Oliver (n 42 above) 22-23.

¹²⁴ Oliver (n 42 above) 7.

¹²⁵ See a full discussion of the bodies and elements necessary for a constitution reform process in Oliver (n 42 above) 6-31.

ways of justifying their refusal to embark on constitutional renewal.¹²⁶ For instance, during the famous Nyalali Commission of 1991, which went around the country to seek people's opinion about whether Tanzania should continue with single-party rule or adopt a multi-party system, people also raised their concern and gave opinions about the prospect of a new constitution. The same concern appeared during the Kisanga Committee on the White Paper of 1998. This Committee was tasked with obtaining people's views on issues which the government thought were of constitutional importance. The White Paper posed questions and provided answers to the issues, the people were asked only to comment if they had additional comments on the answers given by the government.¹²⁷ Yet, the government ignored their recommendations, charging that the commissioners had over-stepped the terms of reference they had been given.¹²⁸ Moreover, in the 2010 general elections, the demand for a new constitution emerged vehemently because some of the political parties had taken this issue and placed it on the top of their election manifestos. They had promised the electorate that, if elected, they would provide the country with a new constitution. It would seem that as this issue continues to be postponed, it will not go away and will keep on emerging whenever the occasion appears.¹²⁹

When one is in a sober mind and tries to trace the path of constitutional development in Africa from 1963 to date, one cannot dispute the fact that such a path is strewn with skeletons of constitutions that miserably failed to hold together states emerging from colonialism barely five decades ago. While some in the short run attracted the intervention of military politics (for example, in Uganda, Nigeria), others collapsed under arbitrariness and autocracy (Somalia).¹³⁰ The Constitution of Tanzania of 1977 has suffered no such extreme fate. It may therefore be tempting to assume that it has been exceptionally resilient and successful, in terms of continuity and acceptance of its basic philosophy. However, the fact is, the Constitution of Tanzania of 1977 does not meet the tests of constitutionalism – even if one cannot easily question its legality, the history of its adoption casts a long shadow over its legitimacy. Today, as perhaps never before in the history of Tanzania, the need for constitutional reform evokes a near unanimity of opinion, not only between the government and the opposition, but also between other sections of the community. Thus, constitutional reform in Tanzania is currently considered a fundamental prerequisite. It is hypocritical to argue

¹²⁶ Peter (n 22 above). See also ZN Lukumay 'The legitimacy of the Constitution of the United Republic of Tanzania, 1977' A paper presented at a public awareness seminar on the Constitution of the United Republic of Tanzania of 1977, organised by the Makumira University College Law Society, at Tumaini University, Makumira University College, Arusha, Tanzania, on 20 May 2010 12.

¹²⁷ Peter (n 22 above). See also Lukumay (n 126 above) 12-13.

¹²⁸ 'Leaders fault proposed constitution commission' *The Guardian* 2 January 2011 1.

¹²⁹ Peter (n 22 above).

¹³⁰ M'inoti (n 50 above) 1.

against or just say that, 'let the people speak',¹³¹ after such a long discourse in this chapter on the subject. The claim that the constitution was made by the people is often included in the Preamble to a constitution. For instance, the Constitution of the United Republic of Tanzania of 1977 (as amended), after initial narration of some fundamental principles, concludes that part by stating:¹³²

Now, therefore, this constitution is enacted by the constituent assembly of the United Republic of Tanzania, on behalf of the People, for the purpose of building such a society and ensuring that Tanzania is governed by a Government that adheres to the principles of democracy and socialism and shall be a secular state.

As constitutions go, this is an exclusively modest claim. But it is accurate. We have already narrated the antecedents, what we can call the legal facts, which formed the basis of the adoption of the 1977 Constitution. The evidence is clear. At no point did the people – in this case two peoples, Zanzibarians and Tanganyikans – participate in the debate on, let alone the enactment of, the constitution. Even at the level of the Party, the organ, that is, the National Executive Committee, which endorsed the proposals, was not the most representative organ in the Party hierarchy.¹³³ It must also be remembered that the Constituent Assembly which adopted the 1977 Constitution, could not even claim greater political legitimacy since, in practice, it was the pre-existing National Assembly with heavily skewed representation as already scrutinised.¹³⁴ It is gratifying to note that a thorough evaluation of the *status quo* depicts the following candid reasons as to why Tanzania needs a new constitution.

In the first place, the current Constitution of Tanzania of 1977 is obsolete. The present constitution has not passed the tests of constitutionalism in its constitution-making. Tanzania deserves a modern constitution, a constitution born out of people's genuine participation and consensus.

Second is the Union issue, an architect of two people (Presidents Nyerere and Jumbe), despite the fact that President Jumbe might have been hauled into it. Thus, its existence was a private matter, for reasons known to the maker. The government should afford the people of Tanzania Mainland and Zanzibar an opportunity to decide whether to embrace it or to drop it.

¹³¹ I have borrowed the wording of IG Shivji *Let the people speak: Tanzania down the road to neo liberalism* (2006).

¹³² Constitution of Tanzania of 1977 (n 1 above) 17. The page bears the heading 'Preamble, foundations of the Constitution'. See Shivji (n 9 above) 47. See also Shivji (n 67 above) 64-65.

¹³³ Shivji (n 67 above) 64.

¹³⁴ Shivji (n 67 above) 65.

Third, the current Constitution is not exactly ‘human rights friendly’. Since independence, Tanzania has ratified or acceded to a plethora of international and regional human rights instruments which have increased the range of human rights standards designed to benefit the people. For example, it has ratified the International Covenant on Economic, Social and Cultural Rights of 1966 in 1976 (CESCR of 1966); ratified the African Charter on Human and Peoples’ Rights of 1981 in 1986; and in 2007 it ratified the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa of 2003. However, the rights enshrined therein are not captured in the 1977 Constitution, or are not justiciable.¹³⁵ In theory, at least, Tanzania has a Bill of Rights just like many other countries with a written constitution. In practice, the Bill is far from reflecting the interests of ordinary Tanzanians. The Bill of Rights was rather a compromise with the new emerging Zanzibar leadership under president Mwinyi. The Bill draws heavily from the international bill of rights but leans towards political and civil rights. Social and economic rights are made part of directive principles which are not justiciable, while civil and political rights are circumscribed by claw-back and derogation clauses.¹³⁶

Fourth, the demands of good governance,¹³⁷ proper management of natural resources, and not just democracy, require that Tanzania adopts a

¹³⁵ The 1984 amendment made to the Constitution of Tanzania of 1977 (n 1 above), which entrenched a Bill of Rights, did not incorporate all of human rights, particularly socio-economic rights, in the enforceable part of the Constitution, i.e., Part III on the basic rights and duties. Only the right to work, article 22(1) and earn commensurate remuneration, article 23, and the right to own property, article 24, were included in the bill of rights, ie, the justiciable of the Constitution. The rest of the socio-economic as provided for in the International Covenant on Economic, Social and Cultural Rights (CESCR, 1966) were relegated to the unjusticiable part of the Constitution, ie, in Part II of the Constitution that contains Fundamental Objectives and Directive Principles of State Policy. The main socio-economic rights that are contained in Part II of the Constitution include the right to education; the right to social welfare or security at times of old age, sickness and in other cases of incapacity; the right to health and the right to livelihood, all under article 11. The rights to adequate food and housing were left out of the Constitution *in toto*.

The problem of having a plethora of ratified treaties but which do not affect people’s lives is caused by the fact that, Tanzania is a dualist state; hence, for international treaties to become legally enforceable in a court of law, mere ratification of a treaty is not enough. Once a treaty has been signed, two legislative processes must follow in order to give the said treaty the force of law. First, it has to be adopted through a resolution by the National Assembly for it to be duly ratified. Second, there has to be in place an enabling legislation to give the treaty legal force or put simply, to give such a treaty equal weight and binding nature as other applicable laws. See Constitution of Tanzania of 1977 (n 1 above) article 63(3)(e). See also ‘Should Tanzania opt to embrace monism?’ *The Citizen* 17 May 2011 7. See generally BM Nchalla ‘The impact of foreign direct investment on socio-economic rights of indigenous peoples: A case study of the Barabaig of Tanzania and the Basarwa of Botswana’ unpublished LLM dissertation, University of Pretoria, 2008.

¹³⁶ Shivji (n 55 above) 32-33.

¹³⁷ The Commission for Human Rights and Good Governance established under the Constitution of Tanzania of 1977 (n 1 above) article 129. It is hereby argued that it is far from accomplishing that task without a proper constitutional framework which is devoid of centralisation of omnipotent powers to the president.

constitution tailored to meet them. Issues of the fight against corruption and the enhancement of the rule of law, for instance, will be better achieved under a new constitution. Ultimately, there is a need to have a new constitution in Tanzania in order to deal with the problem of impunity. The present constitution protects impunity, which is not good for the contemporary time and future of the country.¹³⁸

10 The constitutional review Act 2011: A knock at the door

The demands for a new constitution are not accidental. That being the case, the much awaited moment in Tanzania arrived on 11 March 2011 when the Constitutional Review Act 2011, a Bill, was introduced and presented for first reading before the National Assembly on 6 April 2011, before it was open for public hearing from 7 April 2011.¹³⁹ It was a cause for celebration in many Tanzanians, yet, the Bill no sooner survived a week than it became a celebration of a cause for redrafting it. The Bill was supposed to be enacted a law and come into operation on the first day of June 2011 but with no success due to a number of its inherent legal impediments limiting genuine, open and popular debate and people's participation in the constitution-making process (conditions *sine qua non* for constitutionalism in the constitution-making process), hence, showing no political will on the part of the incumbent government to have a new constitution. Tanzanians were vigilant about it, from politicians, civil societies, activists, academia, and lawyers, to people from all walks of life. It is thus important to cite some of its provisions which in one way or the other prompted the public to raise its general concern over it, which led the government to withdraw it, with a view to redrafting it.¹⁴⁰ The Long Title of the Bill reads as follows:

A Bill for an Act to provide for the co-ordination and collection of public opinions on the Constitution; to establish an institutional framework for the co-ordination and collection of public opinions; to provide for national *fora*

¹³⁸ M Hansungule 'Kenya's unsteady march towards the lane of constitutionalism' (2003) 1 *The University of Nairobi Law Journal* 43, *mutatis mutandis*. See Constitution of Tanzania of 1977 (n 1 above) article 46, which provides for immunity from criminal and civil proceedings to the president.

¹³⁹ The Constitution Review Act 2011, Special Bill Supplement 1 of 2011, is on the Bill stage as it suggests. Sect 1 of the Bill states: This 'Act' may be cited as the Constitutional Review Act 2011. It is quite astonishing why it bears such a title even before it is passed by the National Assembly and then assented to by the president of the United Republic to be enacted into a law and called an Act of the parliament. Therefore, in this section the appropriate word, namely, the Bill is used instead of the Act wherever it appears in the 'Act'. Another point to be noted is that, as many other Bills and enacted laws, this one too is written in English language.

¹⁴⁰ E Mhegera 'Tanzania: Government decides to withdraw Bill for the Constitutional Review' *Shout Africa* 21 April 2011 <http://www.shout-africa.com/politics/tanzania-government-decides-to-withdraw-bill-for-the-constitutional-review/> (accessed 25 May 2011).

for constitutional review for validation of legislative proposals for a constitution; to provide for preparation and submission of the report on the public opinions to the relevant constitutional organs, the procedure to constitute the Constituent Assembly, the conduct of referendum and to provide for related matters.

The interpretation section, section 3 of the Bill, it provides:

In this Bill, unless the context otherwise requires: 'constitution' means the fundamental law, written or unwritten, that establishes the character of a state by defining the basic principles to which a society shall conform, distribution of powers and functions among pillars of the state, by describing the organisation of the executive, legislature, judiciary and their regulation, distribution, and the limitation of different state organs, and by prescribing the extent and manner of the exercise of its sovereign powers, and, *for the purposes of this Bill it includes amendments to an existing constitution* (emphasis mine); 'the Constitution' means the Constitution of the United Republic of Tanzania, 1977.

Section 9(1) of the Bill is all about the functions of the Commission to be established for purposes of coordination and collection of public opinions in the constitutional review process. Yet, subsection (2) is worth mentioning. It provides:

In the implementation of subsection (1), the Commission shall adhere to national values and ethos and shall, in that respect, observe inviolability and sanctity of the following matters:

- (a) the union of Tanganyika and Zanzibar;
- (b) the existence of the Executive, Legislature and the Judicature;
- (c) the Presidency;
- (d) the existence of the Revolutionary Government of Zanzibar;
- (e) national unity, cohesion and peace;
- (f) periodic democratic election based on universal suffrage;
- (g) the promotion and protection of human rights;
- (h) human dignity, equality before the law and due process of law;
- (i) the secular nature of the United Republic; and
- (j) the independence of the Judiciary.

A keen reading of these provisions suggests that the Bill's sole intention is ambiguous. The ambiguity projects itself in relation to what has been a legitimate expectation of Tanzanians for a good number of years, in anticipation of a golden opportunity to cure the defects of the past appearing in the constitution-making, producing a constitution which lacks legitimacy or in a broader sense, is devoid of constitutionalism. The title of the Bill, 'Constitutional Review Bill, 2011' does not suggest the making of a new constitution but rather, amending the existing Constitution of Tanzania of 1977. In other words, it does not portray the intention that the Long Title expresses. This is reinforced by the fact that the meaning ascribed to a 'constitution', for the purpose of the Bill, as including *amendments to an existing constitution*, namely the Constitution of the United Republic of Tanzania of 1977, as defined in section 3. The

interpretation of the language used is not exhaustive, as it could mean: first, that the current constitution can continue to exist, as it can just be amended, hence, needless to say that, Tanzanians will be effecting the fifteenth amendments to the Constitution of Tanzania of 1977. Secondly, the constitutional review process could lead to overhauling the current constitution to obtain a new one. This second meaning is rendered superfluous by the dogmatic nature of section 9(2) of the Bill. The words 'inviolability' and 'sanctity', means; 'that must not be changed' and 'sacred or solemn', respectively.¹⁴¹ By necessary implication, the subsection commences the constitutional review and reform process from its inception.

This pre-empts a popular and democratic debate on how the people would like to make their new rule book. Nevertheless, this is in no way suggesting that the people can do away with the incontestably basic democratic values or ideals and principles which ought to be enshrined in any fundamental law. Yet, the argument is, the subsection prohibits the possibility of curing the defects found in those matters, which have been pivotal to the nation's want of good governance, ubiquitous poverty, ignorance and corruption, to mention a few. Be that as it may, another presupposition has been that inviolable matters in the context of the Bill are matters which cannot be done away with; they can only be discussed with the view to improving them.¹⁴² I would beg to differ with that view, as it does not hold water, since, the presupposition just interpolates the provision. As a general rule, the canons of statutory interpretation require Acts to be construed as a whole. Thus, guidance as to the meaning of a particular word or phrase may be found in other words and phrases in the same provision or in other provisions. On the issue of how best Tanzania can achieve its developmental strategies, the late father of the nation, *Mwalimu* Julius K Nyerere, once said:¹⁴³

Tanzania had been independent for a very short time before we began to see such a growing gap between the Haves and Have-nots of our country. We were as we still are – a very poor country. We did not have a well-developed money making private sector. Our privileged group was emerging from the political leaders and the bureaucrats, who had all been poor under colonial rule but were beginning to use their new positions in the Party and the Government to enrich themselves. This kind of development would alienate our leadership from the People; yet our overriding need was for the whole

¹⁴¹ AS Hornby *Oxford advanced learner's dictionary: Of current English* (1998) 630, 1034 & 1040.

¹⁴² The Citizen (n 135 above) 7.

¹⁴³ The Chief Justice (Rtd) Mr Barnabas Samatta is of the view that there is a need to have a constitution that will strongly encourage responsibility at the highest level to those vested with leadership, if Tanzania is to attain meaningful and sustainable development, harmony and peace. A constitution that will clearly take to task those involved in corrupt activities, laziness and unlawful acts is needed. Also, the desired constitution should guard and give more provisions in supporting citizens who are seen as belonging to a lower class in the country. See 'Constitution debates need framework' *Daily News* 8 June 2011 9.

nation to work together to fight against what we had named as our three Enemies: POVERTY, IGNORANCE, and DISEASES.

I am afraid to say that, regardless of all government efforts to fight the named enemies, the progress in that fight can be equated to a chameleon's character of seeing it changing its colour but remaining the same chameleon. Besides that, the cleavage between the Have and Have-nots is ever increasing. The right not to be poor, a recent developing right in the discipline of human rights law, and a cognate right to the right to development, proposes the indispensable need to entrench socio-economic rights in our Bill of Rights, and make them justiciable in Tanzania. Since a closer look at the holistic nature of socio-economic rights as stipulated in the CESC of 1966, the Nyerere-named enemies, poverty, ignorance and diseases, stand nowhere. Indeed, human rights, apart from being inherent and inalienable, are indivisible and interdependent. Thus, civil and political rights cannot stand alone to make a person live a dignified life. It is therefore recommended that the continuous exclusion of socio-economic rights in the Bill of Rights in Tanzania deprives the people of their right not to be poor, as well as to live a dignified life. Above and beyond that, human rights based approach to developmental strategies and challenges facing Tanzania provides a better platform for Nyerere's accepted wisdom when Tanzania have already celebrated, in the year 2011, 50 years of its independence.

11 Conclusion

The trajectory of constitution-making and constitutionalism in Tanzania portrays a failure by the authorities to involve people in the process of making fundamental law in the 50 years since the country's independence. This failure has bred constitutions which have lacked legitimacy in people's eyes and constitutionalism. The want for constitutionalism has even percolated through the administration of justice. A court of law, in particular, a court of record such as the High Court, although it enjoys incidental powers to make case laws, is limited. A presiding judge cannot assume the essential powers of the legislature. The continuing 2011 constitutional review and reform process in Tanzania deserves a genuine political will from the incumbent government, so that its people can participate in a meaningful way towards the making of a new constitution. A constitution ought to be people-driven for it to become a product of the people. There is a close relationship between a people-driven constitution, good governance and quality of life. A new constitution will be of no use if it will not result in the improvement of people's lives. The change that is needed by Tanzanians is true democracy to afford them a constitution which every Tanzanian can defend and die for.

FROM THE 'TPLF CONSTITUTION' TO THE 'CONSTITUTION OF THE PEOPLE OF ETHIOPIA': CONSTITUTIONALISM AND PROPOSALS FOR CONSTITUTIONAL REFORM

Adem Kassie Abebe

1 Introduction: The genesis of constitutionalisation in Ethiopia

The current geographic map of Ethiopia was carved through expansion and occupation under the leadership of Emperor Menelik II at the end of the 19th century. Menelik II heralded modern public administration by establishing government ministries, opening up schools, and introducing new communications systems.¹ The political struggle to replace the ageing Menelik during the first decade of the 20th century ushered in the emergence of Ras Teferi Mekonnen as a powerful figure. The support of the Allied Powers of the First World War, who had established themselves by opening embassies in Ethiopia, helped Teferi to be established as a prominent political actor. Ras Teferi Mekonnen was eventually enthroned as Emperor Haile Sellasie I of Ethiopia in 1930.

Ethiopia has had four written Constitutions throughout its history. Prior to 1974, the monarchy represented the Ethiopian constitutional and institutional foundation. The monarchy's fusion with religion and myths of Solomonic line of descent provided legitimacy and, therefore, strength and continuity to the system. The genesis of constitutionalisation in Ethiopia started with the adoption of the first written Constitution in 1931 after the official crowning of Haile Sellasie I.² This Constitution 'gave institutional expression to some of the new ideas carried into Ethiopia

¹ One of the first and biggest infrastructural projects in Ethiopia, the building of the first railway, Addis Ababa – Djibouti Railway, was started during his regime, although he did not live long enough to see its completion in 1916 as he died in 1913.

² Constitution of Ethiopia, adopted in July 1931. However, the absence of written constitutions before 1931 does not imply that there were no, (unwritten), constitutions. There were some unwritten monarchical rules, (constitutions), though they hardly limited the power of the leaders. For a discussion of the factors that led to the adoption of this Constitution and the purpose behind it, see HB Selassie 'Constitutional development in Ethiopia' (1966) 10 *Journal of African Law* 74 76.

mostly through the agency of a small but influential educated group'.³ However, the main purpose of the Constitution was not to limit government power but to centralise governance, including particularly in areas of taxation and administration of justice, and weaken feudal lords who enjoyed strong powers at local levels. Nevertheless, the Constitution established two parliamentary houses, the Upper House (Senate) consisting of the nobility (*Mekuanint*) 'who have for a long time served His⁴ Empire as Princes or Ministers, judges or high military officers', and the Lower House (House of Deputies) whose members were to be elected by the nobility and local chiefs, until such time the people were said to be ready to elect the deputies themselves. The legislative powers of these Houses were limited as the Emperor enjoyed the monopoly of initiating, or authorising ministers or the deputies to initiate legislation and as he also had veto power over any legislation. The Emperor further had the right to establish the procedures of the two Houses and to dissolve them. The Constitution nonetheless served as the principal legal instrument until its replacement by the 1955 (Revised) Constitution, despite the interruption of the monarchical power due to the short lived 1936-1941 Italian occupation.

The 1955 Constitution represented an ideological shift from personalised power to institutionalised power and from concentration of power to decentralisation of power.⁵ The Constitution was adopted partly to accommodate and redress the constitutional anomaly generated by the federation of Eritrea with Ethiopia in 1952 following the recommendations of the United Nations General Assembly.⁶ The Revised Constitution required that members of the House of Deputies should be elected directly by the people to conform to the then elected House of Deputies of Eritrea. The Constitution moreover provided for detailed provisions on the rights of citizens such as the right to due process of law and established duties of public officials. It also introduced, at least theoretically, functional separation of powers between the various state organs, although the predominance of the Executive was doubtless as the Emperor maintained his veto powers over legislation. The Constitution explicitly declared the sovereignty of the Emperor, and the Emperor's Chilot (Bench) served as the ultimate umpire of disputes, and hence, the Emperor was also at the helm of the adjudication system thereby blurring the separation of powers between the various organs.

³ Selassie (n 2 above) 75.

⁴ Art 31 of Constitution, Selassie (n 2 above) 77.

⁵ Selassie (n 2 above) 81.

⁶ 'UN General Assembly, Eritrea: Report of the United Nations Commission for Eritrea; Report of the Interim Committee of the General Assembly on the Report of the United Nations Commission for Eritrea' 2 December 1950 A/Res/390. The Federation was unilaterally dissolved by the Emperor, and Eritrea was fully incorporated into Ethiopia in November 1962.

The Constitution and the era of the Emperor were brought to an abrupt end in 1974 after one of the biggest revolutions in Ethiopian history mainly orchestrated by the intelligentsia, the military and aggrieved peasants. The failure to effectively address the issue of equality of ethnic groups and to guarantee land tenure to poor peasants coupled with the prevalence and prominence of socialist ideas provided the main reasons for the uprisings that led to the Emperor's ultimate toppling. The military regime under the leadership of Colonel Mengistu Haile Mariam took advantage of the vacuum that was created following the overthrow of the Emperor to assume leadership as the Dergue Military Council. The Dergue regime officially endorsed communism as its political and social ideology and aligned itself with the USSR. The Dergue answered one of the most critical issues in Ethiopian history by granting land to the tiller. However, failure to address the other explosive issue, the rights and relationship of the diverse ethnic groups entailed the continuing, emergence and growth of armed opposition to the regime. In reaction to the armed liberation struggles around the country and the onslaught orchestrated by rebels targeting and killing higher government officials through the 'White Terror', the Dergue unleashed one of the worst atrocities in Ethiopian history, the 'Red Terror' where thousands of suspected opposition members were either murdered and exhibited publicly or forced to flee their home and country.

For most of its duration, the Dergue ruled without any official constitution. It was only in 1987, after a 13 year constitutional lacuna, that the regime adopted the Constitution of the People's Republic of Ethiopia. This Constitution was mainly intended to appease the growing power of armed opposition forces. However, it was too little, too late for the Dergue. As the Cold War subsided and support from the USSR declined, the Dergue was overthrown by the US supported liberation movements in 1991.

A coalition of liberation forces formed the Ethiopian People's Democratic Liberation Front (EPRDF) under the tutorship of the Tigrayan People's Liberation Front (TPLF) with a view to establish a new government. This led to the creation of the Transitional Government Council under the strong leadership of the TPLF. The Council was charged with a mammoth task of constituting and adopting a constitutional democracy and of punishing those responsible for the Red Terror killings. The prosecution of the crimes committed by the Dergue officials was finalised in 2008 after more than 15 years, resulting in the conviction of many officials including the Chairman of the Dergue, Mengistu Hailemariam.⁷ Mengistu was convicted of genocide and sentenced to death in absentia. He lives in exile in Zimbabwe.

⁷ The death sentences imposed on 23 people convicted of genocide, excluding Mengistu, were commuted to life in prison by the President of the Republic in 2011, mainly due to brokering by religious leaders, organisations and public figures seeking for pardon and reconciliation – see 'Ethiopia commutes death sentences for former officials accused of

2 The making of the Federal Democratic Republic of Ethiopia (FDRE) Constitution: Its inclusiveness and some implications

The current Ethiopian Constitution has its beginnings in the Transitional Charter which served as the 'supreme law of the land' – hence, an Interim, fifth, Constitution – during the transitional period, 1991 - 1995.⁸ The Charter was agreed upon by several warring factions that together overthrew the Dergue military junta. Thus, it was 'primarily a peace document, an accord'.⁹ Articles 1 and 2 of the Charter recognised the human rights enshrined in the Universal Declaration of Human Rights, and in particular the right to self-determination of ethnic groups to 'independence' when the nation/nationality or people, essentially, ethnic group, concerned was convinced that its 'rights [were] denied, abridged, or abrogated'. Most importantly, the Charter provided for the establishment of a Constitutional Commission with the mandate to draft the final constitution. Once the draft was finalised, the Commission had to submit it to the Transitional Council of Representatives (TCR), composed of representatives of liberation forces and professional organisations. The TCR was then to present the draft for popular discussion before finally adopting the draft. Once the draft was adopted by the TCR, the Constitution was to be approved by a Constituent Assembly, which was to be elected in accordance with the provisions of the final draft of the Constitution adopted by the TCR.

The Constitutional Commission was constituted in 1992. According to the enabling proclamation, the Commission was comprised of a 29-member General Assembly (GA), an Executive Committee, and various other expert committees. The GA was composed of seven members from the TCR, seven members representing various political parties, three members representing trade unions, two members representing teachers' associations, two members representing lawyers' associations, two representatives representing health professionals' associations, three representatives from the Ethiopian Chamber of Commerce, and three members representing women. The Constitution was adopted largely in the manner prescribed by the Transitional Charter.

genocide' <http://nazret.com/blog/index.php/2011/06/02/ethiopia-com-mutes-death-sentences-for-former-officials-accused-of-genocide> (accessed 10 November 2012). For a discussion of the genocide trials in Ethiopia, see FK Tiba 'The Mengistu genocide trial in Ethiopia (2007) 5 *Journal of International Criminal Justice* 513.

⁸ Transitional Period Charter of Ethiopia, No 1 (July 1991). For a detailed consideration of the making of the FDRE Constitution, see T Regassa 'The making and legitimacy of the Ethiopian Constitution: Towards bridging the gap between constitutional design and constitutional practice' (2010) 23 *Afrika Focus* 85-98. It should be noted that Eritrea was allowed to secede from Ethiopia during the transitional period in 1993 after the results of a referendum in Eritrea overwhelmingly supported secession.

⁹ Regassa (n 8 above) 98.

Although certain autochthonous procedural and institutional structures were invented, foreign constitutions were also consulted for comparative purposes with the support of local and foreign experts. One of the major flaws of the constitution-making process was that it was dominated by the EPRDF and was not fully participatory. Paul concludes that:

none of the political and ethnic forces which make the opposition to [the EPRDF] had participated in the Constitutional making. All opposition parties, most importantly, those representing the Amhara and Oromo groups (38 and 35% respectively) withdrew from the electoral competition. The new constitution is therefore supported politically and ethnically only by the Tigrayan minority which counts less than 10% of the population.¹⁰

Markakis also observes that the process was rushed.¹¹

It is fair to say that not many Ethiopians who live in the countryside have a clear notion of what federalism means, or had the opportunity to express an opinion on its merits. There was simply no time to form a national consensus on the legitimacy of the new political system.

Ashenafi similarly notes the dominance of the EPRDF:¹²

The chairperson of the Commission encouraged decisions by consensus, though it was not always possible to reach a unanimous decision. The diversity of the Commission members meant that a great number of interests were represented. Informal lobbying and negotiations were part of the process. Nonetheless, the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF), the ruling party, always dominated when an issue came to a vote, as it had the largest delegation.

The Constitutional Commission submitted the draft Constitution to the TCR in 1994, which discussed each provision for about a month. Most of the discussions were televised nationally, however, at that time very few privileged Ethiopians had access to electricity and television. After adoption by the TCR, the Commission presented the draft to the people for popular discussion which consisted in meetings at various levels throughout the country. However, Regassa notes that the 'turnout was low'.¹³ As a consequence of the absence of active and wide engagement of

¹⁰ JCN Paul 'Ethnicity and the new constitutional orders of Ethiopia and Eritrea' in Y Ghai (ed) *Autonomy and ethnicity: Negotiating competing claims in multi-ethnic States* (2000) 173 189.

¹¹ J Markakis 'Federalism and constitutionalism in the Horn of Africa' in *Conference on constitutionalism and human security in the Horn of Africa* (2007) 49.

¹² M Ashenafi 'Ethiopia: Process of democratisation and development' in AA AnNa'im (ed) *Human rights under African Constitutions: Realizing the promise for ourselves* (2003) 32.

¹³ Regassa (n 8 above) 104.

the people in the drafting process, the Constitution suffers from a 'lack of original legitimacy'.¹⁴

Members of the Constituent Assembly were elected according to the provisions of the draft Constitution adopted by the TCR. The Assembly discussed the draft again and ratified it on 8 December 1994. The Constitution entered into force on 21 August 1995.¹⁵

However, the withdrawal or exclusion of some of the main opposition political parties, such as the Oromo Liberation Front (OLF), the second biggest political grouping constituting the Transitional Government after the EPRDF, the Ogaden National Liberation Front (ONLF) and later the All-Amhara People's Organization (AAPO), from the TCR and the Constitutional Commission due to alleged dominance of the TPLF undermined the legitimacy of the Constitution. Henze observes that opposition parties did not have any role in the transition to the FDRE.¹⁶ The withdrawal or exclusion was often accompanied by continuous harassment of the leaders and members of these political parties. For instance, the founder of AAPO, Professor Asrat Woldeyes, was arrested and imprisoned by the EPRDF government for five years until he was released in 1998 for health reasons which ultimately claimed his life in 1999. He was dubbed 'a prisoner of conscience' by Amnesty International.

While some parties continued their peaceful opposition, the reaction of the OLF and ONLF has been more violent. The OLF relapsed into a military front and still continues to pose a serious threat to the safety and security of the nation through its guerrilla warfare strategies and alleged terrorist tendencies. Currently, the OLF is listed as a terrorist organisation in Ethiopia and most of its leaders live scattered around the world. The ONLF has also been listed as a terrorist organisation. The confrontation between the ONLF, with its secessionist tendencies, and the Ethiopian government has been more lethal and has resulted in the continuous displacement of people in the Somalia Region of Ethiopia. The situation in the Ogaden region is very precarious and, despite serious allegations of

¹⁴ Regassa (n 8 above) 108. Regassa recommends that the EPRDF, which adopted the Constitution and which has enjoyed uninterrupted power since then, has the responsibility to ensure that the Constitution enjoys 'earned legitimacy' through 'aggressive acts of implementation' to redeem the weak original legitimacy at 113.

¹⁵ Federal Democratic Republic of Ethiopia (FDRE) Constitution proclamation no 1/1995. Abbink observes that '[t]he Constitution was published on 12 December 1996, with the imprint "21 August 1995" (the date of the inauguration of the Federal Republic of Ethiopia' although 'the reason for the delay is not known' – J Abbink 'Ethnicity and constitutionalism in contemporary Ethiopia' (1997) 41 *Journal of African Law* 159 166.

¹⁶ PB Henze 'A political success story' (1998) 9 *Journal of Democracy* 40 47. More critically, as a result of the boycotting of the elections by opposition groups, which was partly induced by the exclusionary tendency of the EPRDF regime, Harbeson describes the first nationwide elections in 1994 that constituted the Constituent Assembly and the 1995 elections for members of the first House of Peoples' Representatives as 'a plebiscite on EPRDF single-party rule' – JW Harbeson 'A bureaucratic authoritarian regime' (1998) 9 *Journal of Democracy* 62 67.

arbitrary killings, torture, and other human rights violations both by the government and rebels and calls for an independent investigation, the government tightly monitors the Ogaden Region and forbids access of independent media, human rights defenders and humanitarian organisations, including the International Committee of the Red Cross, to the Region.¹⁷

It can clearly be seen that the exclusion or withdrawal of the major opposition political parties not only undermined the legitimacy of the constitution drafting process and therefore the final Constitution, it also created security nightmares to the people and government of Ethiopia. The fact that the level of participation of the general population was not ideal combined with the marginalisation and withdrawal of the main opposition political parties has created a Constitution that essentially replicates the political philosophies of the most dominant political group, the EPRDF, composed of ethnic-based 'independent' political parties under the hegemonic leadership of the TPLF. Consequently, current opposition political parties oppose not only the policies of the new government but also the foundations of the Constitution itself. The government often expressed the view that opposition political parties should endorse the sanctity of the Constitution and mobilise support only based on alternative policies, that is, the basis of political organisation should be varying policies and not opposing the Constitution. Criticism of the Constitution is considered sensitive and can attract charges of overthrowing the Constitution through illegal means, especially if the criticism is accompanied by popular support and riots as was the case after the 2005 elections.¹⁸

3 Constitutionalism: Constitutional principles and compliance

The Ethiopian Constitution asserts its supremacy and denies effect to any law, customary practice or a decision of any organ of the state or a public official.¹⁹ As an expression of its supremacy, all citizens, organs of state, political organisations, and other associations, as well as their officials, are required to ensure the observance of the Constitution and to obey it. Most importantly, the Constitution serves as the only source of government

¹⁷ International Federation for Human Rights (FIDH) & World Organisation Against Torture (OMCT) *Steadfast in protest: The Observatory for the Protection of Human Rights Defenders: Annual Report* (2010) 52.

¹⁸ After the subsiding of the 2005 elections, violence erupted and claimed more than 200 lives. Almost all the senior leaders of the major opposition political parties together with critical voices in the media and civil society organisations were successfully prosecuted. Following negotiations led by religious leaders and elders, the convicts were later released upon presidential pardon.

¹⁹ FDRE Constitution, art 9(1).

power. It is therefore prohibited to assume power through any means other than, or contradictory to, the manner prescribed in the Constitution itself.

The Constitution endorses several principles that converge to reflect the values and aspirations it represents. To the extent it recognises and promotes the hitherto suppressed diversity and equality of the mosaic of ethnic groups, the Constitution can be described as transformational. It above all vests sovereign power in the ethnic groups of Ethiopia.²⁰ It moreover establishes a federal form of government drawn along ethnic lines. The Constitution also contains several other basic principles each espousing essential values as discussed below.

3.1 Decentralisation

Perhaps the most novel introduction of the new Constitution is the establishment of the ethnic-based federal form of government. This sets the Constitution apart from its predecessors which provided for an unduly centralised government system. The current Ethiopian Constitution establishes a federal form of government with regional states drawn primarily along ethnic lines.²¹ The formal practice of ethnic-based federalism was officially introduced into the Ethiopian legal system through the Transitional Charter which established regional self-governments, each with its own legislative, executive, and judicial powers within its territorial boundary.²² Although the Charter did not use the term federalism, the country was divided along ethnic lines and clearly provided the foundation for the vertical division of power in the FDRE Constitution. There are currently nine regional states and two cities, Addis Ababa and Dire Dawa, under federal administration.²³ The Constitution guarantees ethnic groups an unconditional right to self-determination, including secession.²⁴ Ethnic groups that have been subsumed by other larger ethnic groups may therefore choose to exercise their right to self-determination to establish their own *Woreda* (district), or Zone – precinct, sub-region – or regional state, or even secede from the federation.²⁵

The Constitution vertically separates legislative, administrative and judicial powers. The regional states enjoy the residual powers. Hence, the

²⁰ FDRE Constitution, art 8(1).

²¹ FDRE Constitution, art 46(2) provides the criteria for delimiting the regional borders: [Regional] states shall be delimited on the basis of the settlement patterns, language, identity, and the consent of the people concerned.

²² Note, however, the *de jure* short-lived federal arrangement between Ethiopia and Eritrea from 1952-1962.

²³ FDRE Constitution, art 47.

²⁴ It should be stressed that the substantive condition in the Transitional Charter that the right to secession is guaranteed only if an ethnic group believed its rights were denied, abridged, or abrogated, has not been retained in the FDRE Constitution. The current Constitution only establishes procedural requirements for secession without any substantive limits – FDRE Constitution, art 39.

²⁵ FDRE Constitution, art 39.

powers that have not been explicitly guaranteed to the federal government are reserved to the regional states.²⁶ However, this residual power rule does not apply in relation to the division of taxation powers.²⁷ The Constitution stipulates separate powers of taxation for the federal government, another separate list for the states, and concurrent powers of taxation for both government levels. The Constitution leaves undesignated powers of taxation to be decided by a two-thirds majority vote in a joint session of the two Federal Houses – the House of People's Representatives (HPR) and the House of Federation (HoF).²⁸ Therefore, neither level of government has residual taxation power.

Despite the constitutional commitment to divide power between the two levels of government, in reality the federal government continues to be the focal point of administration with very weak regional states.²⁹ This dependence emanates from the fact that none of the regions raises enough revenue and hence all regions depend on federal government subsidies, which tilts the power balance towards the federal government. Moreover, currently the ruling political party, the EPRDF, is composed of several 'independent' ethnic based political parties that control the regional states preventing any possibility of serious conflict of interest between the two levels of government. The combination of various factors has created rather submissive regional states. Mainly due to the existence of a strong ruling political party at the federal level, in reality, the Ethiopian state is characterised by centralism that has undermined the promised regional autonomy.³⁰ In fact, there has been no instance where any of the regional governments has opposed or challenged any decision, law or policy of the federal government either politically or through the constitutional adjudication system. This indicates that, despite the letter of the Constitution which actually creates strong regional states, the Ethiopian state is still characterised by a strong and centralised government with immense powers and control over the regional states.³¹

²⁶ FDRE Constitution, arts 50-52.

²⁷ FDRE Constitution, arts 96-99.

²⁸ The HPR is composed of representatives of the peoples elected every five years. The HoF is composed of representatives of ethnic groups. Although the Constitution establishes a bi-cameral legislature, the HoF barely has any legislative powers. It is rather constituted to regulate the relationship between the federal and regional state governments and also between the regional states. It also controls the HPR through its power to pass final judgment on the constitutionality of laws – arts 62 and 82-84.

²⁹ T Regassa 'Sub-national constitutions in Ethiopia: Towards entrenching constitutionalism at state level' (2009) 3 *Mizan Law Review* 33 65, noting the strong dependence of regional states on the federal government.

³⁰ See generally L Aalen 'Ethnic federalism in a dominant party state: The Ethiopian experience 1991-2000' (2002) Chr Michelsen Institute, Development Studies and Human Rights; L Aalen 'Ethiopia's paradox: Constitutional devolution and centralised party rule' (2000), a paper presented at the 14th International Conference of Ethiopian Studies.

³¹ Haile criticises the Constitution for creating a weak central/federal government. He observes that '[t]he tribal homelands, or the "states"..., have been given such a disproportionately large measure of competence that it can reasonably be questioned

Another major challenge to the ethnic based federal system has been the ethnic diversity of the regions and the fact that most, if not all, regions contain settler minorities. Some of the regional states are ethnically very diverse. The Southern Nations, Nationalities and Peoples State, for instance, is home to more than 55 ethnic groups. All of the regional states contain a significant number of minorities, some of them settler minorities. This diversity of ethnic groups living in the regional states has created some difficulties, especially for settler minorities, as the Constitution does not anticipate and specifically address the rights of settler minorities.³² For instance, issues of education in the official language of regional states seriously hamper the attendance level of members of settler minorities who might not necessarily understand the official language of the regional state concerned. Most importantly, the Constitution authorises the regions to select their own official language and some of the regions, such as Oromia and Tigray, have adopted their official languages.³³ Other ethnic groups living in these regions should therefore learn to use the regional languages to communicate with the administrative, legislative and judicial branches of the regional state concerned. Many of the ethnic groups, however, similarly find it hard to interact with the federal government as it has adopted only one language, Amharic, as its official language.³⁴

There have also been incidences of conflict between different ethnic groups claiming membership to different regional states mainly due to loosely drawn boundaries. This has particularly been the case between the Oromia and Somali regional states. The HoF has organised referendums to resolve some of these conflicts.

3.2 Sovereignty of the nations, nationalities and peoples (ethnic groups)

The Ethiopian Constitution is unique compared to most other constitutions, in general, and to those in Africa, in particular, in one basic respect: the Preamble commences with the expression '[w]e the nations,

whether the "federal government" the constitution purports to establish in fact exists at all' – M Haile 'The new Ethiopian Constitution: Its impact upon unity, human rights and development' (1996-1997) 20 *Suffolk Transnational Law Review* 1, 24.

³² Unfortunately, the constitutions of the regional states do not similarly address the rights of settler minorities – Regassa (n 28 above) 58-59. See also YT Fessha 'A tale of two federations: Comparing language rights in South Africa and Ethiopia' (2009) 9 *African Human Rights Law Journal* 501.

³³ Compare with the South African Constitution which similarly allows the provinces to adopt their own official languages but requires them to select at least two official languages. Constitution of the Republic of South Africa, 1996, section 6(3)(a).

³⁴ Although members of the House of People's Representatives are allowed to use their own mother tongue during the discussions in the sessions of the House, all official documents and communications including legislation are available only in Amharic, usually with English translations. It should be noted that some political parties advocate for bilingual arrangements at the federal level particularly recommending the addition of *Oromiffa*, which is spoken by the largest ethnic group, as an official language along with Amharic.

nationalities and peoples of Ethiopia'. It is therefore clear from the outset that the Constitution is not a social contract between individuals as such, but amongst ethnic groups. Ethnic groups are the building blocks of the federal form of government. The Constitution affirms this in bold terms by declaring that '[a]ll sovereign power resides in the nations, nationalities and peoples of Ethiopia'.³⁵ The sovereignty of ethnic groups is expressed in the Constitution as well as through the representatives elected in accordance with the Constitution and through their direct democratic participation.³⁶ The ethnic-based federal structure of government is but a reflection of the colossal importance attached to ethnicity. Moreover, although the Constitution selects one language, Amharic, as the working language for the federal government, it equally recognises all Ethiopian languages.³⁷ It furthermore allows each regional state to determine its own working language.³⁸

The rights of ethnic groups have generally been given effect as each regional state governs itself and as education is provided in local languages in several areas.³⁹ Culturally and linguistically, ethnic groups express themselves in a variety of forums. In accordance with the constitutional requirement to benefit historically disadvantaged ethnic groups, members of these groups benefit from affirmative measures in government employment.⁴⁰ Moreover, historical disadvantage is one of the factors that is considered in the formula used to determine the amount of federal subsidy to the regional states.

Despite the benefits of recognising the ethnic diversity, the over-emphasis on ethnicity has had a down side. The animosity mainly between the major ethnic groups, the Oromos, Amharas, and Tigres, has intensified. Essentially, the government has done its job of accentuating the diversity but has not done enough to ensure that unity and nationalism are also enriched. Ethnic identity politics is visible in the organisation of political, social and even private financial institutions as well as the frequent attacks settler minorities endure throughout the country. It should be noted that even the EPRDF is a coalition of ethnic based political parties. The main opposition political party, Forum for Democratic Dialogue in Ethiopia (known mainly as *Medrek*, Amharic for *Forum*), also represents the coming together of parties established largely along ethnic lines. The emphasis on ethnicity and the ethnicisation of politics have generally undermined the unity amongst ethnic groups and have particularly led to some conflicts between locals and settler minorities. The

³⁵ FDRE Constitution, art 8(1).

³⁶ FDRE Constitution, art 8(3).

³⁷ FDRE Constitution, art 39(2).

³⁸ FDRE Constitution, art 5(3).

³⁹ Consider, however, the discussion above where the Oromo Liberation Front and Ogaden National Liberation Front have been waging guerrilla war mainly alleging continued marginalisation and exclusion of the respective ethnic groups.

⁴⁰ FDRE Constitution, art 89(4).

ethnisation of politics has also had a chilling effect on inter-regional movement of people and trade and investment. Indeed, the ethnic based system of government 'has converted many Ethiopians living outside their areas of ethnic origin into foreigners within their own country'.⁴¹ The Committee on the Elimination of Racial Discrimination (CERD) noted that the organisation of political parties on ethnic lines can potentially increase ethnic tension and recommended Ethiopia to 'encourage the development of integrationist multi-racial organisations, including political parties'.⁴² In short, there is a need to find the appropriate equilibrium between ethnicism and nationalism, between unity and diversity.

3.3 Human and democratic rights

According to the Ethiopian Constitution, human rights emanate from humanity and do not owe allegiance to any other source.⁴³ The Constitution reaffirms that it is merely reiterating, and not creating, the rights it guarantees. As clearly indicated in the Preamble, full respect for individual and people's fundamental freedoms is considered as an essential precondition for the achievement of the goals set out in the Constitution.⁴⁴ Hence, human rights and freedoms are inviolable and inalienable. The human and democratic rights of citizens and peoples must be respected.⁴⁵

The Ethiopian Constitution incorporates several human rights in its chapter 3. This recognition ranges from traditional civil and political rights, to socio-economic rights, and to group or solidarity rights. The Constitution moreover requires that the interpretation of the human rights provisions should be in line with the principles recognised in international human rights instruments adopted by Ethiopia.⁴⁶ The emphasis on human rights is further reflected in the separate and more stringent amendment procedure for the constitutional human rights provisions as compared to the other provisions of the Constitution. Amendments to the human rights provisions of the Constitution may only be approved when all the regional state legislative councils endorse the proposed amendment; and when the HPR and the HoF, in separate sessions, approve the proposed amendment

⁴¹ C Clapham 'The challenge of democratisation in Ethiopia' in R Cobbold and G Mills *Global challenges and Africa: Bridging divides, dealing with perceptions, rebuilding societies* (2004) 79 (The Royal United Services Institute for Defence and Security Studies, White Paper 62).

⁴² CERD, Concluding Observations: Ethiopia, CERD/C/ETH/CO/7-16 (7 September 2009) para 13.

⁴³ FDRE Constitution, art 10(1).

⁴⁴ FDRE Constitution, Preamble, para 2.

⁴⁵ FDRE Constitution, art 10(2).

⁴⁶ FDRE Constitution, art 13(2).

by a two-third majority vote.⁴⁷ Other provisions of the Constitution may be amended if the HPR and the HoF in a joint session approve the amendment by a two-thirds majority vote, and when two-third of the regional state legislative councils approve the proposed amendment by majority vote.⁴⁸

However, despite the constitutional guarantees and despite the regular elections that have been conducted four times since the Constitution came into effect in 1995, the human rights record of Ethiopia has been characterised by serious and systematic violations. The repression has intensified particularly following the 2005 elections, which was accompanied by post-election violence that claimed more than 200 lives.⁴⁹ Most leaders of opposition political parties together with human rights advocates and journalists were arrested following the deadly violence.⁵⁰ There have been reports that political freedom in Ethiopia is shrinking and that the gains since the inception of the transition to democracy in 1991 are being reversed.⁵¹ Membership of the ruling party has become a duty, failure to be a member entailing systematic exclusion and discrimination in access to public resources, including government employment. Given that the government is the principal employer, almost all new graduates and civil servants have joined the EPRDF. As a result, the membership of

⁴⁷ FDRE Constitution, art 105(1). In practice, however, the ruling party enjoys more than enough majority to effect any constitutional amendment including amendments to the human rights provisions. The ruling party won more than 99.6 per cent of the seats in HPR in the May 2010 elections. The members and affiliates of the EPRDF each control the regional states.

⁴⁸ FDRE Constitution, art 105(2), governing amendment of the rest of the Constitution.

⁴⁹ Ironically, the 2005 elections were the most free and strongly contested elections in Ethiopian history. See K Tronvoll 'Ambiguous elections: The influence of non-electoral politics in Ethiopian democratisation' (2009) 47 *Journal of Modern African Studies* 449, 469 observing that 'since the "founding", "formative" and "genuine" 2005 election, Ethiopia has undergone a markedly negative political development, severely undermining liberal values and the politics of plurality in the country'.

⁵⁰ The convicts were later released on a presidential pardon. However, one of the most prolific and popular opposition political leaders, Birtukan Mideksa, was re-arrested for allegedly violating the terms of her pardon. She was released on a second pardon in September 2010, after the May 2010 elections. She has since been politically inactive and largely invisible.

⁵¹ This is especially so after the 2005 elections. See the 'Final Report: House of People's Representatives and State Council Elections, May 2010' (European Union Election Observation Mission) http://eueom.eu/files/pressreleases/english/final-report-eueom-ethiopia-08112010_en.pdf (accessed 8 November 2012) noting that '[t]he changes in the legal framework together with the fragmentation of the main opposition forces in the aftermath of the 2005 elections, as well as the imprisonment of leading opposition figures and the departure in exile of one opposition leader, resulted in a cumulative narrowing of the political space within the country'; Human Rights Watch 'One hundred ways of putting pressure: Violations of freedom of expression and association in Ethiopia' (2010) <http://www.hrw.org/en/reports/2010/03/24/one-hundred-ways-putting-pressure> (accessed 05 January 2011); Human Rights Watch 'Development without freedom: How aid underwrites repression in Ethiopia' (8 November 2012) <http://www.unhcr.org/refworld/docid/4cbd2fce2.html> (accessed 5 January 2011); Freedom House 'Freedom in the World: Country Reports: Ethiopia (2010)' <http://www.freedomhouse.org/template.cfm?page=22&year=2010&country=7821> (accessed 8 November 2012) noting that government has 'bolstered restrictions on political activity'; 'Ethiopia: Political space narrowing – fear for violent clashes' *African Press*

the party has more than quadrupled since the 2005 elections, a clear case of neo-patrimonialism, politics based on favours and grants.⁵² The 'carrot and stick' policy of benefiting members and excluding and even harassing opposition party members and neutrals has apparently paid off.

The May 2010 election outcomes resulted in a sycophantic 99.6 per cent win for the ruling government.⁵³ Systematic intimidation and weakening of opposition parties and their supporters reportedly preceded the elections. The elections were criticised notably regarding the 'transparency of the process and the lack of a level playing field for all contesting parties'.⁵⁴ The 2010 elections ensured that the ruling EPRDF's uninterrupted and unchallenged power reached its pinnacle.

The executive branch of the government exercises enormous and untrammelled powers with inconsequential civil society participation and influence, and with the legislature serving as 'a façade of legitimacy for party [EPDRF] and executive decisions'.⁵⁵ The parliamentary form of government that the Constitution establishes further strengthens the power of the executive and blurs the distinction between the executive and the legislature.⁵⁶ Prime Minister Meles Zenawi was at the helm of political power from 1991 to 2012 as there are no term limits on the position of the Prime Minister, who is the head of government and commander-in-chief of the armed forces, in the Constitution.⁵⁷ Following his sudden death in

International (14 January 2009) noting frustrations that 'gaining power through the ballot box is impossible' <http://africanpress.wordpress.com/2009/01/14/ethiopia-political-space-narrowing/> (accessed 8 November 2012); Michael Chebsi 'Ethiopia: Political space narrowing' *International Press Service* 12 January 2009 <http://www.ipsnews.net/africa/nota.asp?idnews=45382> (accessed 8 November 2012) noting that 'the fear is that a growing number may instead consider following the route of armed struggle'.

⁵² Membership jumped from just 760,000 in 2005 to more than 4.5 million in 2008 – Tronvoll (n 48 above) 469.

⁵³ The EPRDF and its affiliates control 544 of the 547 seats in the House of Peoples Representatives. However, this does not mean that the EPRDF has won 99 per cent of the votes, since Ethiopia follows the first-past-the-post plurality electoral system.

⁵⁴ European Union Election Observation Mission Report (n 50 above). Note that foreign embassies were expressly prohibited from observing the elections. Moreover, the National Electoral Board of Ethiopia (NEBE) had the exclusive mandate in voter education programmes. See also Human Rights Watch 'One hundred ways of putting pressure' (n 50 above); and Human Rights Watch 'Development without freedom' (n 50 above).

⁵⁵ M Wolde 'A critical assessment of institutions, roles and leverage in public policy-making: Ethiopia, 1974-2004' (2005) pg iii, PHD Thesis, University of Stellenbosch, Stellenbosch, South Africa.

⁵⁶ A parliamentary form of government is a system where the head of the executive/government is elected by members of parliament rather than independently and directly by the people. Moreover, members of parliament may be appointed Ministers (cabinet members). In addition, in parliamentary systems, the parliament has the power to remove the cabinet, including the prime minister. Parliamentary systems of government provide lesser formal checks and balances between the political organs than presidential systems.

⁵⁷ However, he had indicated that the 2010-2015 term would be his last term and that he would not run for election in 2015. Watch his question and answer session at Columbia University <http://www.worldleaders.columbia.edu/events/prime-minister-ethiopia-meles-zenawi> (accessed 8 November 2012).

August 2012, Deputy Prime Minister Hailemariam Desalegn was sworn in as Prime Minister in September 2012.

In the Freedom House report on freedom in the world, Ethiopia regressed from 'partly free' in 2010⁵⁸ to 'not free' in 2011.⁵⁹ The period following the 2005 elections has witnessed the enactment and active use of several illiberal laws to suppress political freedoms. The adoption of two recent laws, the Anti-terrorism and CSO Proclamations has had serious consequences to independent voices primarily the media, which often resorts to self-censorship for fear of persecution, and CSOs, whose engagement in activities including advocacy and related work on human rights and good governance issues is considered by the government as 'political' and therefore illegal.⁶⁰ The most restrictive aspects of the CSO Law relate to the prohibition of CSOs receiving more than 10 per cent of their funding from foreign sources from engaging in human rights and good governance issues and the absence of the right to appeal to ordinary courts to challenge decisions of the CSO Agency, which is composed of members appointed by the executive without even legislative approval, in relation to the registration, licensing and banning of the activities of CSOs.⁶¹

⁵⁸ Freedom House 'Freedom in the World in 2010: Erosion of freedom intensifies – Table of Independent Countries' http://www.freedomhouse.org/uploads/fiw10/FIW_2010_Tables_and_Graphs.pdf (accessed 8 November 2012).

⁵⁹ For the latest Freedom in the World survey, see <http://www.freedomhouse.org/report/freedom-world/freedom-world-2012> (accessed 8 November 2012). Freedom House uses three broad categories to classify states and territories: *Free*, *partly free* and *not free*. 'Free' represents an average score of 1 - 3 and signifies broad scope for open political competition (including whether voters have the right to change their rulers through regular, fair and free elections), a climate of respect for civil liberties, significant independent civic life, and independent media. 'Partly free' represents an average score of 3 - 5.5 and signifies limited respect for political rights and civil liberties. Partly free states frequently suffer from an environment of corruption, weak rule of law, ethnic and religious strife, and often a setting in which a single political party enjoys dominance despite the façade of limited pluralism. 'Not free' represents an average score of 5.5 - 7 and signifies a situation where basic political rights are absent, and basic civil liberties are widely and systematically denied. The higher a country scores, the lower level of freedom; the lower it scores, the better (hence 1 represents most free and 7 least free countries). Freedom House has released the *Freedom in the World* survey annually for more than 40 years. The survey is one of the most widely accepted and reliable yardsticks to assess progress towards constitutionalism and full-fledged democracy.

⁶⁰ Anti-terrorism Proclamation no 652/2009, and Charities and Societies Proclamation no 621/2009. For commentaries on and criticisms of the CSO Law see 'Sounding the horn: Ethiopia's civil society law threatens human rights defenders' (2009) Centre for International Human Rights, Northwestern University School of Law; D Hailegebriel 'Sub-Saharan Africa Country Reports: Ethiopia' (2010) 12 *International Journal of Not-for-Profit Law* 9; and D Hailegebriel 'Restrictions on foreign funding of civil society: Ethiopia' (2010) 12 *International Journal of Not-for-Profit Law* 18.

⁶¹ For a discussion of the most controversial aspects of civil society organisations which range from mandatory registration to intrusive oversight power of the executive, see Hailegebriel 'Ethiopia' (n 59 above). The policy of the government towards CSOs is outrageous. According to the policy: NGOs are not organisations established by citizens to protect their rights. These organisations are rather established by individuals mainly for personal benefit, accountable to, and advancing the interests of foreign agencies. Their leaders are not accountable to the staff of the organisations and the beneficiaries. As result, they cannot have a democratic nature and role, therefore,

The impact of the CSO Law has already been felt as the monies of two of the most prominent human rights CSOs in Ethiopia, the Ethiopian Women Lawyers' Association (EWLA) and the Ethiopian Human Rights Council (EHRC) have been frozen for allegedly receiving funds from foreign sources which is prohibited under the Law. The Law coupled with the intimidation and harassment by higher government officials has been most successful especially in managing to ignite a climate of fear inducing self-censorship and uncritical compliance on the part of CSOs.⁶² The government continues to defy international pressure from the Universal Periodic Review Process (UPR),⁶³ UN Committee on the Elimination of Racial Discrimination (CERD),⁶⁴ UN Committee against Torture (CAT),⁶⁵ and African Commission on Human and Peoples' Rights⁶⁶ to amend the Law, particularly the funding restriction on CSOs working on activities related to human rights and good governance issues.

The Anti-terrorism Law has also taken its toll particularly on freedom of expression and association and is being used to muzzle critical voices. The Law criminalises publications that are '*likely* to be understood by some or all of the members of the public to whom it is published as a direct or indirect *encouragement* or other *inducement* to them to the commission or preparation or instigation' of terrorism (emphasis added).⁶⁷ The UN Committee against Torture has expressed particular concern over the broad definition of incitement to terrorism and the broad powers of the police to arrest suspects without a court warrant.⁶⁸ The final outcome of the UPR report also recommended that Ethiopia should ensure that the Law will not be abused to silence critical voices.⁶⁹ The overstretched definitional provisions have induced serious self-censorship amongst journalists who are forced to avoid taking the risk of legal persecution by an increasingly intolerant government. One journalist, for instance, indicated to the Committee to Protect Journalists (CPJ) that '[i]f a reporter

the government has to confront the rent-seeking nature of NGOs, for example, by considering those organisations receiving 15 per cent of their income from foreign sources as foreign organisations and denying them recognition as a means of expression of freedom of association as well as democratic forums. EPRDF *Revolutionary democracy and struggle for the development of democratic rule* (2006) cited in Hailegebriel (n 59 above) 20.

⁶² International Federation for Human Rights (FIDH) & World Organisation Against Torture (OMCT) *Steadfast in protest* (n 16 above) 53.

⁶³ UN Human Rights Council Universal Periodic Review, Report of the Working Group on the Universal Periodic Review: Ethiopia, A/HRC/13/17 (4 January 2010), paras 99 (23-26).

⁶⁴ CERD, Concluding Observations: Ethiopia (n 42 above) para 14.

⁶⁵ CAT, Concluding Observations: Ethiopia, CAT/C/ETH/CO/1 (November 2010) para 54.

⁶⁶ African Commission on Human and People's Rights, Concluding Observations and Recommendations on the 1st, 2nd, 3rd, & 4th periodic report of the FDRE, 47th Ordinary Session (12-26 May 2010), paras 45 & 72.

⁶⁷ Ethiopian Anti-terrorism Proclamation no 652/2009, art 6.

⁶⁸ CAT, Concluding Observations: Ethiopia (n 65 above) para 14.

⁶⁹ Universal Periodic Review (n 63 above), paras 35&44. The recommendations to review some provisions of the Anti-terrorism law were rejected by the Ethiopian delegation – para 51.

writes anything, except clear denunciation about these [listed] organisations, she or he is taking the risk of any interpretation'.⁷⁰ The CPJ also reported that the Anti-terrorism Law has had a chilling effect on reporting particularly on security issues.⁷¹ Reporters Without Borders similarly condemned the 'long-running pattern of attacks against the private press' based on the anti-terrorism and other legislation.⁷² Between June and November 2011, more than 30 individuals including journalists and members of opposition political parties, who are known for being critical of government, were arrested after being accused of organising terrorist networks.⁷³ The arrests and convictions of journalists, opposition members, and peaceful protesters have continued unabated in 2012. In October 2012, 29 Muslims, including the wife of a sitting Minister, were arrested on terrorism charges following the continued Muslim protests in reaction to alleged government interference in religious affairs.⁷⁴ Two Muslim organisations were similarly charged for allegedly rendering support to terrorism.

In sum, the explicit constitutional recognition of most of the internationally recognised rights has not had any tangible impact in practice in relation to individual political rights. In addition to the subtle and illegal violations, most of the suppression is based on a series of restrictive laws that are loyally enforced by courts. Particularly following the 2005 elections, Ethiopia has become one of the most repressive states in Africa.

3.4 Transparent and accountable government

Accountability and transparency are essential tenets sanctioned by the Constitution to guide the conduct of government and government

⁷⁰ See 'In Ethiopia anti-terrorism law chills reporting on security' <http://www.cpj.org/blog/2011/06/in-ethiopia-anti-terrorism-law-chills-reporting-on.php> (accessed 8 November 2012).

⁷¹ As above.

⁷² 'Reporters without Borders condemns latest arrests of journalists in Ethiopia' *Sudan Tribune* <http://www.sudantribune.com/Reporters-without-Borders-condemns,39372> (accessed 8 November 2012).

⁷³ For a detailed discussion of the use of the Anti-Terrorism Law to suppress dissent, see Amnesty International 'Dismantling dissent: Intensified crackdown on free speech in Ethiopia' (2011) http://www.ethiomeia.com/broad/dismantling_dissent_in_ethio pia.pdf (accessed 8 November 2012). Also visit the Committee to Protect Journalists website <http://www.cpj.org/africa/ethiopia/> (accessed 8 November 2012).

⁷⁴ 'Ethiopian charges 29 Muslims under anti-terror law' *AFP* 29 October 2012 <http://www.google.com/hostednews/afp/article/ALeqM5gttaOJfdpqSDCEsYPXmryYfgxAUg?docId=CNG.8bd914fc534d9bdeff429c1088f472e.551> (accessed 6 November 2012). See also Amnesty International 'Ethiopia: Government continues to target peaceful Muslim protest movement' <http://www.amnesty.org/en/library/asset/AFR25/016/2012/en/f77e6342-5d69-4ed9-b595-c23fd2e3cb3d/af250162012en.html> (accessed 6 November 2012) noting the use of the Anti-terrorism Law against leaders of the peaceful protests.

officials.⁷⁵ All government affairs must be conducted transparently. Public officials and elected representatives are accountable for any failure in their official duties. In cases where elected representatives do not deliver on their promises, resulting in the loss of confidence of voters, the people have the right to recall them.

In terms of corruption, although the government has established the Anti-Corruption and Ethics Commission in 2001, there are serious questions about its ability to tackle high level corruption. The only two major instances where a high level government official was successfully prosecuted were when the ex-Vice Prime Minister, Tamirat Layne, and the ex-Defence Minister Siye Abraha were convicted of corruption. However, the prosecution of Tamirat Layne was allegedly initiated not out of the desire to uproot large scale corruption but out of political motivations.⁷⁶ Similarly, Siye Abraha was arrested after being expelled from the Central Committee of the EPRDF as a result of frictions during the aftermath of the Ethio-Eritrean War concerning the handling of the war and border issues.⁷⁷ There may well be some truth in these suspicions, especially as no other member of the major political elite has so far been convicted of corruption despite serious indicators of corruption.⁷⁸ In May 2011, for instance, the UNDP announced that Ethiopia is ranked eighth among least developed countries (LDCs) with respect to the level of illegal capital transfers into foreign financial institutions, with over US\$8.3 billion illegally transferred out of the country between 1990 and 2008.⁷⁹

Although the Constitution established the Ethiopian Human Rights Commission and the institution of the Ombudsman,⁸⁰ they have so far been largely invisible. Both institutions are empowered to receive and

⁷⁵ FDRE Constitution, art 12.

⁷⁶ This is not a statement that Tamirat Layne was not corrupt. He was after all convicted by a court of law. It is only indicating that corrupt officials do not always face prosecution unless and until they are found to be dissidents or otherwise undesirable.

⁷⁷ When the federal court ordered Siye's release on bail, he was immediately re-arrested after leaving the court building. In less than two days, a new law which denied bail to persons accused of corruption offences was enacted. Siye remained in prison until 2007 when the Supreme Court convicted and sentenced him on one of the charges. He was released immediately as he had already served an amount of time equivalent to the sentences.

⁷⁸ See the Bertelsmann Stiftung *BTI 2010 – Ethiopia Country Report* Gütersloh: (Bertelsmann Stiftung, 2009) 14 observing that '[t]he top leadership uses the tolerance of corruption as a political tool to uphold loyalty and discipline within the party and the government'. The BTI is a global ranking of transition processes in which the state of democracy and market economic systems as well as the quality of political management in 125 transforming and developing countries are evaluated.

⁷⁹ UNDP 'Illicit financial flows from the least developed countries: 1990-2008' May 2011 12 <http://www.financialtaskforce.org/2011/05/12/undp-commissioned-report-from-global-financial-integrity-%E2%80%99Cillicit-financial-flows-from-the-least-developed-countries-1990-2008%E2%80%9D-now-available/> (accessed 8 November 2012).

⁸⁰ FDRE Constitution, art 55(14&15). The establishment Proclamations for the Commission and Ombudsman were adopted in 2000 although they were established and started operating in 2004. See Ethiopian Human Rights Commission Establishment Proclamation no 210/2000 and Institution of the Ombudsman Establishment Proclamation no 211/2000.

investigate complaints from alleged victims, conduct research, launch educational campaigns on human rights and the rule of law, and also support legislative reform initiatives. However, their impact in constraining legislative and executive lawlessness has yet to be seen. The Commission has already shown signs of deference especially in relation to politically sensitive issues. Despite its mandate to independently assess proposed and existing laws, it has continued to refrain from commenting on the Anti-terrorism and CSO Laws – which are politically strategic laws. This avoidance of politically controversial legal and policy issues suggests the complicity of the Commission in legally sanctioned human rights violations. Some of its activities in fact pose serious doubts as to its independence and may imply that it is being used as political camouflage to legitimise unacceptable government behaviour. The Human Rights Commission recently criticised Human Rights Watch for its report alleging the use of donor funds to suppress political dissent and requested it to reconsider the ‘relentless campaign, direct or indirect, to obstruct the flow of development aid to Ethiopia by development partners’.⁸¹

3.5 Separation of state and religion

Prior to 1974, during the time of the Emperors, religion (more specifically, the Ethiopian Orthodox Church) played a significant role in social and political governance and other affairs of the state. Support from the church was in fact a precondition for power. During the Dergue regime, however, the socialist tendencies of the regime meant that religion was discouraged and undermined. The current Constitution takes a middle approach in that it claims to have completely separated state and religion. Thus, the state may not interfere in religious matters, and the other way round.⁸² Logically, the Constitution overrules any possibility of adopting a state religion. However, the Constitution allows the establishment of institutions for religious education and administration, and also the setting up of religious courts, which may adjudicate family and personal matters based on the consent of all parties. Accordingly, Shari’a Courts have been established throughout the country.

⁸¹ Ethiopian Human Rights Commission, Press Release ‘The Ethiopian Human Rights Commission requests HRW to reassess its communications, calls on stakeholders to critically look into it’ <http://ehrc.org.et/NewsEvents/tabid/59/Default.aspx> (accessed 10 May 2011); and ‘The Chief Commissioner of the Ethiopian Human Rights Commission defended its views on Human Rights Watch reports in a recent interview with the Voice of America’ <http://ehrc.org.et/LinkClick.aspx?fileticket=qSKu2jdlko0%3d&tabid=36> (accessed 8 November 2012). The full letter of the Commission to Human Rights Watch is available at <http://ehrc.org.et/LinkClick.aspx?fileticket=Ji%2fBbt57Hzo%3d&tabid=36> (accessed 8 November 2012). The Letter indicates that the Commission had to intervene because HRW called upon donors to interrupt support for democratic institutions which includes the Commission.

⁸² FDRE Constitution, art 11.

However, despite the constitutional separation of state and religion, the continued protests staged by the Muslim community in Ethiopia since the beginning of 2012 are testimony to the fragile state-religion relationship. The Muslim community alleges that the government is attempting to 'interfere' with their religious freedom by supporting particular sects that allegedly promote a 'liberal' or 'moderate' version of Islam. The government claims that it is attempting to root out signs of religious extremism through a controversial nationwide training programme for religious leaders. There is fear that the 'interference' and violent crackdown of protests might actually trigger religious extremism. As noted above, the government has officially started using the Anti-terrorism Law to prosecute leaders of these protests. However, the protests have shown no sign of subsiding. The state-religion distinction is obviously more complicated than the simple yet strong expression of separation in the Constitution. The way the government handles the on-going protests will certainly set the tone for the long-term relationship between the state and religion in Ethiopia.

The Constitution also incorporates several national policy principles and objectives designed to direct social, political, economic, and every other aspect of life and governance. These principles should guide the implementation of the Constitution and other laws and policies by all organs of the federal and state governments including the judiciary. Social, economic, cultural, political and environmental objectives as well as policies on national defence and external relations are outlined.⁸³

4 Major factors that have hampered constitutionalism and constitutional development

The Constitution promised pluralism, free competition for state power and of course socio-economic development. Recent reports of the government supported by the International Monetary Fund (IMF) and the World Bank indicate that the Ethiopian economy has expanded impressively in the last five years. The 2011 - 2015 Growth and Transformation Plan promises even better economic growth despite lower growth projections by the IMF and the World Bank.⁸⁴ In terms of freedom and pluralism, as well, one can say political space and competition for power were taking root, although certainly not ideal, until the process was abruptly aborted following the 2005 elections. The last years of economic expansion have unfortunately

⁸³ See FDRE Constitution, arts 85-92.

⁸⁴ 'Ethiopian Prime Minister rebuffs IMF, World Bank for doubting country's economic progress' *Ezega* 13 July 2011 <http://www.ezega.com/News/NewsDetails.aspx?Page=heads&NewsID=2974> (accessed 13 July 2011)

been accompanied by a worrying decline in terms of human rights and democratisation.⁸⁵

4.1 Increasing authoritarianism and the party-state conflation

The *de jure* one-party system during the Dergue has worryingly degenerated into a *de-facto* single-party state under the current regime. The one-party dominance is particularly visible after the intensely contested 2005 elections which prickled the foundations of the ruling party beyond their expectations. The period preceding the 2005 elections were vibrant and the government generously granted opposition political parties access to public media. According to Abbink, the 'openness and dynamism' preceding the 2005 elections was 'unprecedented'.⁸⁶ The government had a clear intention to demonstrate to all observers, including particularly the international community, its evasive commitment to democracy and competitive elections. It can be said that during the campaign period there was indeed a relatively levelled playing field for the contestants. The ruling party assumed that it will enjoy a landslide victory in a free contest.

However, after the election day the ruling party was visibly worried. The results indicated that the opposition had won all the parliamentary seats for the capital Addis Ababa as well as in the City's Council. Then things started to get slightly murky. Despite the opposition victory in the capital, the ruling party declared victory before the official announcement of the results by the National Election Board of Ethiopia, which hinted at its unwillingness to step down even if it were not to prevail in the elections. Most importantly, in reaction to the opposition victory in Addis Ababa, the outgoing Parliament introduced several legislative reforms which took away the powers of the Addis Ababa City Administration including reforms shifting the accountability of the city's police from the City Administration to the federal government. Some of the reforms also had financial implications for the newly elected opposition party, apparently to sabotage the City Council and to subordinate it to the federal government even in relation to its day to day activities. In addition, the law that regulated parliamentary processes was amended by the outgoing Parliament to require support of more than 50 per cent of parliamentarians before an issue can be included in the agenda of Parliament (previously

⁸⁵ The 2008 Bertelsmann Transformation Index (BTI) captures the dual face of the Ethiopian political system showing some flexibility in relation to market reforms while refraining from implementing democratic reform – Bertelsmann Stiftung, *BTI 2008 – Ethiopia Country Report*. Gütersloh: Bertelsmann Stiftung, 2007. The Bertelsmann Stiftung, *BTI 2010* (n 78 above) records a reverse in the democratic gain – authoritarian backlash. See also Human Rights Watch 'Development without freedom' (n 50 above).

⁸⁶ J Abbink 'Discomfiture of democracy? The 2005 election crisis in Ethiopia and its aftermath' (2006) 105 *Africa Affairs* 173 181. See also Tronvoll (n 48 above) 454 noting that '[d]uring the electoral process, the electorate witnessed an unprecedented context of openness and plurality of political opinions through campaigning and broadcast through public media'.

only 20 per cent was required to the inclusion of an issue in the agenda).⁸⁷ This effectively excluded the opposition from actively participating in Parliament, even if they had taken all their seats.

When the Electoral Board declared that the ruling party had won the elections, the opposition complained of vote rigging. Although opposition parties had won an unprecedented number of more than 170 seats in the HPR, the main opposition party, the Coalition of Unity and Democracy (CUD), refused to join Parliament in protest. The opposition called on their supporters to take measures and the calls resulted in several protests. The government called for calm but clashes between protesters and security forces were inevitable. The Prime Minister then declared an emergency, banning all forms of assembly and demonstration in and around Addis Ababa. However, the protests continued and the government unleashed military forces into the streets rendering them a battleground which in the end claimed more than 200 lives. The opposition insisted and called for a coalition government but the ruling party rejected the proposal.

Later, almost all the top leaders of the opposition, media personnel and even CSOs were arrested and charged for allegedly attempting to illegally overthrow the Constitution through violent means. The Federal High Court convicted them and some were sentenced to life in prison. Fortunately, under pressure from the international community, the President pardoned most of the convicts. Since their release, some of them have fled the country and some are still active in the opposition. The vacant seats in the HPR were later filled through by-elections. All the seats went to the ruling party as the opposition parties boycotted the elections.

The result of the 2005 elections was apparently a wake-up call for the ruling party which soon started to aggressively consult the people on their problems and grievances. There were also huge membership recruitment campaigns particularly targeting tertiary education students and graduates. This was further complemented by an unwritten policy of preference to members in access to government jobs and other resource benefits. In the eyes of many observers, including the author, the historically ethnic-based discrimination has been overtaken by political membership-based discrimination. The ruling party has learnt lessons and was determined to avoid a repeat of the 2005 elections. In less than five years, membership quadrupled and the May 2010 elections bore fruit by rewarding the ruling party with more than 99.6 per cent of the seats in the House of People's Representatives. Although the day of the elections was peaceful, the

⁸⁷ Rules of Procedures and Member's Code of Conduct Regulation no 2/2005. This law has now been repealed by The House of Peoples' Representatives Regulation no 3/2006. According to the new law, an agenda will be approved only if one-third of the members approve it. This makes it impossible for opposition party members to even initiate agenda.

prelude to the elections was allegedly marred by reports of intimidation and harassment of opposition political parties and members. The measures taken after the 2005 elections have created a sense of surveillance, fear and distrust among the population, a feeling that everyone is constantly being watched, and being spied upon.⁸⁸ Abbink concludes that after the previous two authoritarian regimes, the Emperor's and the Dergue's, 'centralist authoritarianism is not gone but perhaps is being reinvented in a new form'.⁸⁹

Voters were also frustrated with the opposition who were themselves unable to maintain their unity and control institutional fragmentation – many people believe that the internal friction within the opposition is a result of a government plot.⁹⁰ Who wants to vote for a party which is ravaged by internal divisions and conflict? In the prelude to the 2010 elections, there was clearly a lack of confidence in the opposition. All these factors obviously tilted the chances towards the ruling party although not even the government itself expected such a flattering victory in the May 2010 elections. The fact that the economy is growing also helped the ruling party in garnering support and perhaps made opposition political parties seem irrelevant. In fact, according to the government, the economic growth provided the main if not the only explanation for the landslide victory. Prime Minister Meles Zenawi posed the question in several forums: who will vote against a government that is delivering.

Currently, the rhetoric of a developmental state propagated by the ruling party, which intends to replicate the fast economic growth recorded by East Asian tiger economies notably South Korea and Taiwan, has become a major talking point. The developmental state theory essentially prioritises more power for the government and the state, and, despite claims to the contrary, emphasises economic development even at the expense of political pluralism. Democratic values will only be a priority once there is economic transformation. The rhetoric of the developmental state has therefore provided a theoretical camouflage for the increasingly authoritarian tendencies of the regime and the state-party conflation. The economic growth that has accompanied the increasing authoritarianism has provided the basis for claims of legitimacy and success the regime desperately needs. With an increasingly powerful state less tolerant to serious criticism, elections are held simply to consecrate the ruling party with absolutely no chance for an emasculated and largely unreliable opposition.

⁸⁸ Abbink (n 86 above) 192-193, observing that the post-election events that unfolded following the 2005 elections created 'malaise, fear, and cynicism among the public, perceiving politics again as dangerous business and as a closed elite affair' and that '[t]rust in the political process and system of governance thus reached its lowest ebb'.

⁸⁹ Abbink (n 86 above) 174.

⁹⁰ See the Bertelsmann Stiftung, *BTI 2008* (n 84 above) 13&14 accusing the ruling party of establishing 'moles' within opposition parties to foment internal dissent.

In summary, the increasing authoritarianism and the *de facto* one-party state clearly deviate from the pluralism and democratic tone of the Constitution and therefore undermine constitutionalism and the Constitution itself. The dominance of a single party has led to the conflation of the ruling party with the state.⁹¹ Given the collusion of the legislative and executive organs due to the parliamentary form of government which the Constitution establishes, and resulting from the party-state conflation, the Constitution essentially means whatever the ruling party wants it to mean. Under current Ethiopian realities, supremacy lies in the government of the day and not in the Constitution. As discussed in the following section, the fact that the Constitution does not establish an effective and independent constitutional adjudication system has strengthened the one-party dictatorship and further blunted the possibilities of instilling the ideals of constitutionalism and limited government.

4.2 Lack of independent and reliable constitutional adjudication system

As indicated earlier, the Ethiopian Constitution establishes a parliamentary form of government.⁹² As such, the executive is constituted by and from Parliament. The Prime Minister, who is the Head of Government and commander-in-chief of the armed forces, is elected by and from among the members of the HPR.⁹³ The separation of powers between the two organs is therefore clumsy. They are essentially one organ. The hope of ensuring constitutional behaviour by the legislative and executive organs therefore lies in constitutional adjudication and in the prospect of losing elections due to dissatisfaction among the populace as a result of failure to act constitutionally.⁹⁴

The role of elections in ensuring constitutionalism can be potent only if the electorate is aware of the values the Constitution represents and only if they are willing to vote a government out of power if it fails to comply with the Constitution. Unfortunately, not many people are aware of the contents of the Constitution and it is debatable if all the values that the Constitution upholds actually reflect what the electorate desire, given the

⁹¹ In an article published on 4 August 2012, *The Economist* observes that since 2005 'the ruling party [EPRDF] has expanded its membership from 300,000 to more than 4 million out of a population of about 85 million. With 85 per cent of Ethiopians living in the countryside, everything from jobs and food aid to seeds and school places is in the party's gift. State and party have been conflated' – 'Ethiopia: If Meles goes too ...' *The Economist* 4 August 2012 <http://www.economist.com/node/21559971> (accessed 4 August 2012).

⁹² FDRE Constitution, art 73.

⁹³ FDRE Constitution, art 73(1).

⁹⁴ These are of course the peaceful mechanisms. *Coup d'états* or popular revolutions, such as those that happened in Tunisia and Egypt in 2010/2011, provide violent means of overthrowing undesired governments which blatantly violate the Constitution and even an undesired Constitution itself.

elitist nature of the Ethiopian Constitution which was drafted with little input from the population. A Constitution that is adopted without the full and effective participation of the people represents values that the elite drafters aspire to, and not the values to which the people themselves aspire for. Moreover, election outcomes do not depend on a carefully studied record of compliance with the Constitution, a document alien to the great majority of the people.⁹⁵ Indeed, elections are often won and lost based on the stance on the issues of the day and not based on the abstract values a constitution represents, especially in Africa where, despite clear evidence of corruption, individuals are still elected and re-elected and rewarded with even higher positions. More often than not, elections are rigged. Despite their importance, therefore, periodic elections are not sufficient to ensure compliance with constitutional principles.

Therefore, at least theoretically, the constitutional adjudication system is the most potent mechanism to ensure that unconstitutional measures are purged and to contribute to the entrenchment of a culture of constitutionalism. Unfortunately, the constitutional adjudication system in Ethiopia is designed to avoid mishaps to any government of the day and does not guarantee effective mechanisms to quash illiberal laws and other unconstitutional measures. In Ethiopia, the power to interpret the Constitution and assess the constitutionality of legislation, regulations and directives issued by the federal and state government institutions and international agreements lies with the HoF with the advisory support of the Council of Constitutional Inquiry (Council).⁹⁶ Independent courts do

⁹⁵ Even if we assume that the electorate will actually vote depending on record of compliance with the Constitution, it will need a vibrant, independent and influential media, CSOs and strong opposition groups committed to constitutionalism to bring to light an assessment of the compliance record (both positive and negative) for the voters to decide. Unfortunately, these institutional preconditions are utterly absent in the Ethiopian context.

⁹⁶ The constitutional adjudication process in Ethiopia is as follows: The Ethiopian Constitution only explicitly anticipates constitutional cases arising from judicial proceedings – FDRE Constitution, arts 62(1), 82, 83 and 84. The Proclamation enacted for the consolidation of the Council in addition recognises constitutional complaint procedures where cases may be directly referred to the Council by individuals – arts 21 23, the Council of Constitutional Inquiry Proclamation no 250/2001). If a constitutional issue arises during court proceedings, the court, if it is convinced that there is need for constitutional interpretation in deciding the case, must submit the case to the Council. The court can refer the constitutional issue either by itself or upon the request of the parties. Constitutional cases arising outside courts may only be submitted to the Council if they relate to fundamental rights and freedoms. Hence, any person aggrieved by the final decision of any government institution or official may approach the Council for constitutional interpretation. However, the person must have exhausted all the possible remedies within the government institution having the power with due hierarchy to consider it. The Council then considers whether there is need for constitutional interpretation, and if there is a need to interpret the Constitution, it will provide recommendations to the HoF for final decision. The HoF has to decide the case in 30 days. If for various reasons the Council is convinced that there is no need to interpret the Constitution, the Council rejects the case. In cases where the Council rejects a case, the parties may appeal to the HoF. If the HoF accepts the appeal, it may refer the case back to the Council for recommendation or proceed with the case by itself.

not have the power to declare unconstitutional laws and executive action or inaction.⁹⁷ The alleged undemocratic nature of judicial review and the desire to keep the final say about what the Constitution says to ethnic groups in whom the Constitution vests sovereignty coupled with the historical distrust towards the judiciary provided the underlying reasons behind the decision of the drafters of the Constitution to keep the judiciary at arm's length with the Constitution.⁹⁸

The HoF is the second legislative chamber (although it does not really have any legislative powers) and is composed of representatives of ethnic groups who are nominated by the legislative councils of the regional states.⁹⁹ Each ethnic group has at least one representative and an additional one for each one million individuals belonging to the ethnic group. The HoF is therefore essentially a majoritarian political entity. In fact, there is an astonishing similarity in the composition of the HoF and the HPR. The Council is designed to provide a legalistic touch to the highly political composition of the HoF. The Council is composed of 11 members: the President and Vice President of the Federal Supreme Court, six other legal experts with proven competence and high moral standing appointed by the President of the Republic upon recommendation of the HPR, and three others nominated by the HoF from among its members.¹⁰⁰

Except the President and Vice-President of the Federal Supreme Court, all the other members of the Council are nominated after every election by a newly composed HoF and HPR following the outcomes of elections. Although the Council is less politicised than the HoF, it only has recommendatory powers. The final say on constitutional issues lies with the HoF. Besides, there is no constitutional or legislative provision that requires members of the Council to be independent. In fact, the fact that nine of the 11 members are nominated by the winning party following every election empowers governments to constitute their own constitutional adjudicators. Moreover, there is no constitutional or legal provision that requires the involvement of the Federal Judicial

⁹⁷ However, this does not mean that the courts do not have any power to interpret and mould the understanding of the Constitution. For instance, the decision on whether to refer a constitutional issue to the Council cannot be done without interpreting the Constitution. On judicial referral of constitutional issues in Ethiopia and the opportunities it represents for judicial interpretation of the Constitution, see TS Bulto 'Judicial referral of constitutional disputes in Ethiopia: From practice to theory' (2011) 19 *African Journal of International and Comparative Law* 99.

⁹⁸ For a discussion of the reasons behind the decision to establish a politicised constitutional adjudication system, see A Fiseha 'Federalism and the adjudication of constitutional issues: The Ethiopian experience' 2005 52 *Netherlands International Law Review* 1.

⁹⁹ FDRE Constitution, art 61. The Legislative Councils may appoint the members of the HoF either by organising elections or by simply nominating representatives.

¹⁰⁰ FDRE Constitution, art 82(2).

Administration Council in the nomination of the members of the Council, which makes the process of nomination entirely political.¹⁰¹

In short, the institutional and procedural framework for constitutional adjudication were forged to faithfully serve, sentinel, reinforce and legitimise government behaviour. The constitutional adjudication system in Ethiopia has not and will not, under the current framework, ensure constitutionalism by providing the necessary break on legislative and executive excess. The lack of trust in the constitutional adjudication system explains why, for instance, some of the most controversial laws such as the CSO Law and the Anti-Terrorism Law have not been challenged as unconstitutional. The absence of an independent adjudicator discourages litigants from actively submitting constitutional complaints. In short, the Ethiopian system of constitutional review does not guarantee protection against harassment based on illiberal laws or what can be characterised as rule *by law*.¹⁰²

The constitutional adjudication procedure is crafted to favour the leaders of the time. It is highly unlikely that a complainant challenging the constitutionality of politically sensitive laws and other acts or omissions will succeed. This explains the fact that the number of constitutional challenges so far have been insignificant with the great majority of the cases rejected on procedural grounds.¹⁰³ In one of the rarest instances, opposition parties challenged the ban on assemblies and demonstration by an emergency declaration after the 2005 elections.¹⁰⁴ The challenge was first launched in the Federal First Instance Court. The fact that the opposition political parties literally begged the Court not to refer the case to the Council speaks volumes about the utter distrust of political parties of the constitutional adjudication system. The politicised nature of the constitutional adjudication system may also explain why CSOs have not challenged the constitutionality of the Law that has literally paralysed their work despite the guarantees of the right to association and the right to freedom of expression in the Constitution.¹⁰⁵

¹⁰¹ FDRE Constitution, art 81(2). The FJAC is established to strengthen the independence of the judiciary – Amended Federal Judicial Administration Council Establishment Proclamation 684/2010, preamble para 2.

¹⁰² For a discussion of rule *by law* in Ethiopia, see A Abebe 'Rule *by law* in Ethiopia: Rendering constitutional limits on government power nonsensical' (April 2012) *CGHR Working Paper 1*, Cambridge: University of Cambridge Centre of Governance and Human Rights.

¹⁰³ For a summary discussion on selected cases referred by the Council to the HoF, see G Kassa 'Mechanisms of constitutional control: A preliminary observation of the Ethiopian system' (2007) 20 *Afrika Focus* 75 88. The Council has not referred any case to the HoF since 2007.

¹⁰⁴ See Emergency declaration case, Council of Constitutional Inquiry (14 June 2004) (on file with author).

¹⁰⁵ FDRE Constitution, art 31. It provides: '[E]very person has the right to freedom of association for any cause or purpose. Organisations formed, in violation of appropriate laws, or to illegally subvert the constitutional order, or which promote such activities are prohibited'.

Government distrust towards the judiciary is also visible in the growing exclusion of courts through jurisdictional ouster clauses in relation to issues that are considered politically or economically sensitive. In addition to the emasculating exclusion of the judiciary from constitutional adjudication, there is a trend to strip the judiciary of its judicial powers in favour of special bodies. The exclusion of judicial review in the following instances arguably violates the right to access to justice enshrined in article 37 of the Ethiopian Constitution.¹⁰⁶

The decisions of the Electoral Board of Ethiopia to allow or refuse CSOs to observe elections or engage in voter education are not subject to judicial review. The jurisdictional ouster clause was apparently introduced to reverse, and also to avoid similar judgments in the future, the decision of the High Court and the Federal Supreme Court prior to the 2005 elections which overturned the decision of the National Election Board to prevent several CSOs from observing the 2005 elections.¹⁰⁷ In 2007, an amendment to the Electoral Law authorised the Board to do what it pleases in relation to granting or refusing license for CSOs to observe elections or educate voters without the possibility of appeal to ordinary courts.¹⁰⁸

The most recent intrusion into the realm of the judicial role relates to the CSO Proclamation.¹⁰⁹ The Proclamation does not guarantee the right to appeal against the decisions of the Charities and Societies Agency to CSOs considered non-Ethiopian or 'foreign'. Ethiopian CSOs that earn more than 10 per cent of their funds from non-Ethiopian sources, or organisations that have foreign members, or CSOs established based on the laws of a foreign state are considered 'foreign' CSOs.¹¹⁰ The Charities and Societies Agency functions under and is accountable to the Ministry of Justice. Ethiopian courts have therefore been deprived of one of their

¹⁰⁶ These exclusions also possibly contradict the prohibition on the establishment of special or ad hoc courts which take judicial powers away from the regular courts or institutions legally empowered to exercise judicial functions and which do not follow legally prescribed procedures – FDRE Constitution art 78(4).

¹⁰⁷ See *Organisation for Social Justice in Ethiopia & Others v Ethiopian Election Board*, case no 38472 Federal High Court, Decision of 11 May 2005; and *Organization for Social Justice in Ethiopia & Others v Ethiopian Election Board*, File No 19699, Federal Supreme Court, (May 2005). This reversal is in line with the observations of Ginsburg and Moustafa that '[t]he more compliant the regular courts are, the more that authoritarian rulers allow political cases to remain in their jurisdiction ... The more the regular courts attempt to challenge regime interests, on the other hand, the more the jurisdiction of the auxiliary courts [judicial bodies that exist side by side with regular courts] is expanded' – T Ginsburg and T Moustafa 'Introduction' in T Ginsburg & T Moustafa (eds) *Rule by law: The politics of courts in authoritarian regimes* (2008) 17-18. In the Ethiopian context, the judicial power of organs under executive control has expanded with a view to preclude judicial challenges to government policies and preferences.

¹⁰⁸ Electoral Law of Ethiopia Amendment Proclamation 532/2007, art 79(1).

¹⁰⁹ Charities and Societies Proclamation 621/2009.

¹¹⁰ Charities and Societies Proclamation 621/2009, arts 104(2) & (3). The Law only grants the right to appeal to the Federal High Court to Ethiopia Charities or Societies that exclusively have Ethiopian members and earn more than 90 per cent of their funds from domestic sources.

essential roles, ensuring that the executive operates within the parameters set by the law. Under the CSO Proclamation, the Executive has the first and final say over what the law and the Constitution say.¹¹¹

Due to lack of effective procedural and institutional controls on the potentially unconstitutional behaviour of the executive and the legislature, constitutionalism in Ethiopia has essentially become the choice of the government. The dilemma is particularly acute when it comes to politically sensitive issues which represent the hallmark of a constitutional democratic government. Although the Constitution embodies acceptable values represented and supported by the ruling party, it does not create mechanisms to ensure that those voluntarily endorsed values actually shape government behaviour. Ethiopia's is therefore a constitution without proper institutional guarantees to ensure constitutionalism.

5 Proposals for a possible constitutional reform agenda

The Ethiopian Constitution was adopted in 1994 and entered into force in 1995. Although the Constitution anticipates and has established procedures for constitutional amendment, it has not been amended so far. This does not mean that the Constitution is impeccable and that some of the constitutional values and provisions do not need further honing or even reform. For instance, the Ethiopian Constitution does not have a clear provision on the replacement of the Prime Minister in cases of sickness, disability, death and even resignation and impeachment of the incumbent. Most importantly, there is no provision on whether and under what conditions a Prime Minister may be impeached. These gaps, particularly the gap in relation to impeachment, can create a constitutional crisis and succession problems to the detriment of the interests of the people and the state.¹¹² No constitution is infallible, and every constitution stands in constant need of completion, reassessment and revision.

¹¹¹ It should, however, be noted that there is nothing in the law that prevents CSOs from challenging decisions of the Agency as unconstitutional in the Council of Constitutional Inquiry.

¹¹² The concern on smooth succession is topical because of the death of the Prime Minister. The occasion brought to the fore a constitutional lacuna in relation to succession to the Prime Minister's Office. See A Mariam 'Is Ethiopia in a constitutional crisis?' <http://nazret.com/blog/index.php/2012/07/30/ethiopia-in-constitutional-crisis?blog=15> (accessed 1 August 2012). However, in case of death or long-term sickness of the Prime Minister, the House of People's Representatives has the power to elect a new Prime Minister, as it has the original jurisdiction to elect the Prime Minister – see article 73(1). In parliamentary systems, the replacement of a Prime Minister who has left power for whatever reasons is the inherent task of parliament, even if the constitution does not specifically empower parliament to that effect – see A Fiseha 'Time to contemplate the next Prime Minister in Ethiopia?' <http://www.ancl-radc.org.za/sites/default/files/images/Ethiopian%20article.pdf> (accessed 1 August 2012).

The fact that the political party under whose aegis the Constitution was drafted and adopted has enjoyed an uninterrupted supermajority can partly explain the lack of interest in amending or reforming any part of the Constitution. There are, however, several controversial aspects of the Constitution that have attracted academic and political discussion. This section identifies and discusses these issues. With a view to consecrate the Constitution with the original legitimacy it lacks, due to the lack of wide public participation during the drafting process,¹¹³ the government and academic professionals may ignite discussions on these decisive issues for ultimate decision by the people. A wide and popular reconsideration of the values the Constitution represents and the institutions it establishes can ensure that the 'TPLF Constitution'¹¹⁴ becomes the Constitution of the people of Ethiopia.

5.1 Parliamentary versus presidential form of government

As indicated earlier, the Ethiopian Constitution establishes a parliamentary form of government. This essentially means that the executive is constituted by and from the Parliament. Some political parties, notably the Oromo Federalist Democratic Movement (OFDM), support reforms in favour of a presidential form of government. The principle of separation of powers is theoretically more rigorous and there is a better system of checks and balances between the legislative and executive organs in a presidential rather than parliamentary form of government.¹¹⁵ The fear associated with adopting a presidential system of government is that candidates from the biggest ethnic groups might unduly benefit from the prevalence of identity politics at the expense of minority ethnic groups. Under the current circumstances, it is unlikely that the country will adopt a presidential system of government as the TPLF, which represents a minority group, dominates the EPRDF. Any change will therefore be costly to the interests of the TPLF and is therefore highly unlikely. Nevertheless, this is an interesting and relevant issue upon which the people should have a say. There should therefore be an informed discussion on whether the *status quo* should be maintained, or whether a presidential or semi-presidential system of government should be adopted.

¹¹³ Regassa (n 8 above) 85 indicates that forceful implementation can redeem the original legitimacy deficit. However, this conclusion assumes that the values enshrined in the Constitution have wide acceptance which is not entirely true. In the absence of wide consensus on some of the provisions of the Constitution, aggressive implementation will only exacerbate, rather than redeem, the legitimacy deficit. It is argued that even if such values may be acceptable, the Constitution will still suffer from legitimacy deficit so long as the people have not endorsed them through a participatory process. The process of adopting constitutions is as important as the outcome itself. The outcome (the end) cannot justify the process (the means).

¹¹⁴ See M Haile 'Comparing human rights in two Ethiopian constitutions: The Emperor's and the "Republic's" – *cucullus non facit monachum*' (2005) 13 *Cardozo Journal of International and Comparative Law* 1 19.

¹¹⁵ See generally R Albert 'Presidential values in parliamentary democracies' (2010) 8 *International Journal of Constitutional Law* 207.

5.2 The first-past-the-post electoral system

The adoption of the first-past-the-post electoral system endorsed by the Constitution and the Electoral Law has also attracted some controversy.¹¹⁶ Although one of the essential democratic choices is the kind of the electoral system, there is no clear explanation as to why, for instance, another form of plurality/majority electoral system or even the proportional electoral system or a mixed electoral system was not adopted by the Constitution. Prominent scholars on constitutional design in fractured or divided societies have advised against pluralist and in favour of proportional electoral systems. According to Lewis, 'the surest way to kill the idea of democracy in a plural society is to adopt the Anglo-American electoral system of first-past-the-post'.¹¹⁷ Reynolds similarly observes that 'for ethnically divided states, the prevailing academic wind clearly blows in favour of proportional representation and against plurality'.¹¹⁸

Despite the fact that Ethiopia is a society divided on religious and ethnic cleavages, the drafters of the Constitution opted for the most extreme form of the plurality electoral system, the first-past-the-post. The appeal to change the electoral system to a proportional system by opposition parties prior to the 2005 elections was rejected by the ruling party.¹¹⁹ All the conditions in Ethiopia militate against the first-past-the-post system. In practice, as well, the electoral system has resulted in the creation of a *de facto* one-party state. If the proportional representation system was adopted, the ruling party would not have won 99.6 per cent of the parliamentary seats in the May 2010 elections. There has never been a wide discussion on which electoral system best suits the political, social and cultural realities of Ethiopia. There is need to consciously study and debate the advantages and disadvantages of choosing one electoral system over the others considering the informed choice of the people. The electoral system is not something that may simply be transplanted. There is therefore need for a robust political, academic and popular discussion on whether to maintain the current electoral system, or to replace or somehow modify it.

5.3 Term limits on the position of the Prime Minister

Another controversial aspect of the Constitution is the fact that the position of the Prime Minister, who serves as the head of government, is

¹¹⁶ FDRE Constitution, art 54 (1&2).

¹¹⁷ WA Lewis *Politics in West Africa* (1965) 71.

¹¹⁸ A Reynolds *Electoral systems and democratisation in Southern Africa* (1999) 93.

¹¹⁹ T Lyons 'Ethiopia in 2005: The beginning of a transition?' (2006) 25 *Africa Notes* 1-2.

not subject to term limits,¹²⁰ unlike the ceremonial President, who is only eligible to serve for a maximum of two six year terms.¹²¹ The main justification behind the absence of term limits for the position of the Prime Minister is the assumption that it is in line with the tradition of parliamentary forms of governments. However, the fact that there are term limits for the position of the President and not the Prime Minister raises serious doubts.¹²² The imposition of term limits for a position that merely enjoys ceremonial powers while leaving the most powerful office to be occupied indefinitely cannot be justified. The absence of term limits was perhaps a deliberate omission intended to serve the then young Meles Zenawi, who was the Chairperson of the EPRDF. Although most parliamentary systems do not impose term limits on the office of the head of government, there is no inherent anomaly associated with imposing term limits even in parliamentary systems. In South Africa, for instance, the President is elected by a majority in the National Assembly. Nevertheless, the Constitution imposes two five year term limits on the office of the President. Indeed, the lack of term limits has seen Meles Zenawi govern the country for more than 21 years.¹²³ Although he promised to step down before the 2010 elections, he later indicated that his entourage ‘convinced’ him to stay another term in power.¹²⁴ The absence of term limits reduces states into personal inheritances.¹²⁵ Term limits ‘reduce barriers to entry to politics, facilitate the process of developing a culture of political competition and enhance the prospects for political development and the consolidation of democracy’.¹²⁶

Following the death of Meles Zenawi in August 2012 and the enthroning of the new Prime Minister Hailemariam Desalegn, the EPRDF announced that it has agreed to impose, as part of its succession policy, two five year term limits on all ministerial positions, including the position of Prime Minister.¹²⁷ The Party has also imposed an age limit on the same positions. Henceforth, a Minister cannot be more than 65 years of age.

¹²⁰ FDRE Constitution, art 72(2).

¹²¹ FDRE Constitution, art 70(4).

¹²² Most parliamentary forms of government, particularly in Europe, have constitutional monarchies and are headed by ceremonial monarchs who are not subject to term limits – see, for instance, the systems in England, Belgium, and The Netherlands.

¹²³ Indeed, one of the virtues of term limits, which is seen as an essential element of democracy, is that it ensures ‘rotation in office to prevent the development of an untouchable bureaucratic elite’ – see RD Heffner (ed) *Alexis de Tocqueville: Democracy in America* (2001) 10. In the Ethiopian context, the absence of term limits has created just that – before his death, a nearly untouchable Prime Minister.

¹²⁴ n 56 above.

¹²⁵ BO Nwabueze *The presidential Constitution of Nigeria* (1982) 201.

¹²⁶ C Fombad & N Inegbedion ‘Presidential term limits and their impact on constitutionalism in Africa’ in C Fombad & C Murray (eds) *Fostering constitutionalism in Africa* (2010) 1 17.

¹²⁷ For a discussion of the newly introduced term and age limits, see A Abebe ‘A true glimmer of hope or a mere mirage? Term and age limits in the “new” Ethiopia’ *AfricLaw* 15 October 2012 <http://africlaw.com/2012/10/15/a-true-glimmer-of-hope-or-a-mere-mirage-term-and-age-limits-in-the-new-ethiopia/#more-333> (accessed 6 November 2012).

Ethiopia is perhaps the only country in Africa that now imposes maximum age limits on the highest political position. Most African countries impose only minimum age limits. The term and age limits are in line with and strengthen the Constitution and constitutionalism. However, there has not been any concrete discussion on whether these internal party rules will be elevated to constitutional provisions. Only when the limits are constitutionally entrenched can one talk of properly established term or age limits. The EPRDF has more parliamentary seats than it needs both at the federal and regional level to enact a constitutional amendment. If the EPRDF is seriously committed to the idea of term and age limits it should transform the party rules into constitutional rules.

5.4 Changing the constitutional adjudication system

Of course, a proposal for reform agenda cannot be completed without considering whether the current constitutional adjudication system should be maintained. As indicated earlier, there is no independent and trustful constitutional adjudication system in Ethiopia that can restrain at least the most blatant legislative and executive excesses.¹²⁸ There is therefore need to consider whether Ethiopia should either empower the judiciary or another independent and competent constitutional court to control legislative and executive excesses. Given the parliamentary form of government, keeping constitutional adjudication within the legislative and political circle unduly empowers political actors to the detriment of constitutionalism. There is therefore a need to consider empowering the judiciary or a new constitutional court as an institutional bulwark against legislative and executive tyranny to at least create the semblance of an independent constitutional adjudication system.

5.5 Public ownership of land

The public ownership of land has also been one of the most controversial aspects of the Constitution that has attracted serious political and academic debate.¹²⁹ Currently, land is owned exclusively by the state and is not subject to sale.¹³⁰ The main explanation behind the public ownership of land is the intention to prevent a situation where peasants sell their mode of production to gluttonous and rent-seeking individuals and flock to the cities leading to uncontrolled urbanisation. In contrast, some observers indicate that public ownership of land is a means of controlling

¹²⁸ See for instance C Mgbako *et al* 'Silencing the Ethiopian courts: Non-judicial constitutional review and its impact on human rights' (2008-2009) 32 *Fordham International Law Journal* 259 recommending that ordinary courts should be empowered to adjudicate constitutional issues.

¹²⁹ It should be noted that the land ownership issue need not necessarily be made a constitutional issue. It may preferably be addressed through policy and legislative measures which are more flexible than a constitutional provision.

¹³⁰ FDRE Constitution, art 40(3).

the public as the decision to grant or take land lies with the government with very little independent control.¹³¹ This concern is particularly worrying as decisions on expropriation are not subject to judicial scrutiny.¹³² The discussions over the issue of ownership of land have not, however, gone beyond very narrow political and academic circles. There is therefore a need for an open and wide discussion over the issue including through collating the views of the peasants, the real stakeholders.

5.6 Abolishing or empowering the Office of the President?

Another interesting issue is whether Ethiopia should abolish the Office of the President, or perhaps strengthen the powers of the Office of the President. Ethiopia may perhaps consider devising mechanisms to divide executive power between the Prime Minister and the President, as was done in the 2010 Constitution of Kenya, to ensure that power is not concentrated in the hands of a single individual. Currently, the President only has ceremonial powers and is intended to serve as a non-partisan figurehead. However, unlike the kings and queens in Europe, the Ethiopian President is elected from among the members of the HPR and may only serve two six year terms. It is questionable if a President originally elected to represent a particular electoral district can really command the respect required to serve as a uniting figurehead. It is rather doubtful if the current President, for instance, possesses the unifying charisma and calibre. Alternatively, therefore, discussions on whether Ethiopia needs to maintain the Office of the President with the insignificant powers it enjoys currently may be considered taking into account the cost implications for an already poor country. To the minimum, there should be attempts to devise mechanism to select an individual that can truly serve as a uniting figurehead.

In summary, this section has presented some of the most controversial aspects of the Constitution that merit public reconsideration given the unbalanced representation of ideas and values during the drafting of the Constitution mainly due to the relative elitist and non-inclusive nature of the drafting process. There are of course several other issues over which further discussion and reform may be necessary, such as reducing the powers of the Prime Minister, and the depoliticisation of the appointment process of the highest members of the judiciary to ensure more competitiveness and transparency. This section only supports the ushering

¹³¹ Abbink (n 86 above) 179, for instance, observes that the state ownership of land has provided an excuse to 'uproot possible interest groups or entrepreneurs and keep the peasantry dependent'.

¹³² The Expropriation of Land for Public Purposes Proclamation no 455-2005 allows individuals whose land has been expropriated to appeal to courts only in relation to the amount of compensation. However, decisions of government bodies as to the public purpose involved and generally whether expropriation is justified are not subject to judicial scrutiny. Moreover, the amount of compensation is calculated to cover the value of improvements on the land and not the value of the land itself.

in of a constitutional reform agenda and does not claim to exhaustively identify all the controversial aspects of the Constitution. It is merely designed to show that the Constitution is not an untouchable 'Holy Grail' as conveniently presented by the EPRDF and that it is necessary, from time to time, to consider popular discussions of the contents of the Constitution.

6 Concluding remarks

This chapter has outlined the constitutional history of Ethiopia. A cursory look at the four Ethiopian Constitutions reveals that the current Constitution is better than its predecessors in laying the foundations for democracy, pluralism and the protection of human rights. However, the general non-inclusiveness of the drafting process together with the absolute dominance of certain groups and ideas has created perceptions that the Constitution is merely an embodiment of the political manifesto and interests of the dominant political party, the EPRDF. Most importantly, the increasingly authoritarian tendency of the government, legitimised by illiberal laws and their application, especially after the 2005 elections, has undermined the Constitution and constitutionalism. The 2005 elections were a turning point in Ethiopian constitutional history. The slow yet encouraging progress towards democracy and constitutionalism witnessed prior to the elections was brought to an abrupt end after the elections. The absolute dominance of a single party has led to conflation of the state with the ruling party thereby undermining the supremacy of the Constitution. Ethiopia continues to be a *de facto* one-party state. The absence of strong, coordinated and reliable opposition groups capable of absorbing and resisting legal and at times illegal government pressure has contributed to the creation in reality of a one-party state against the pluralist hopes and promises of the Constitution. The absence of any independent structure and procedure whereby unconstitutional government behaviour may be effectively challenged has created a supreme government beyond the Constitution.

This chapter also identifies and discusses some, certainly not all or even the most important, controversial aspects of the Ethiopian Constitution and recommends further popular, academic and political reconsideration of the issues. Almost twenty years is a long time for a Constitution to stand unchanged. There is therefore need to take an inclusive and pragmatic second look at the Constitution, the values it represents and the institutions it establishes to maintain and strengthen what is objectively defensible and to reform undesirable aspects. The academic community should spearhead discussions on possible constitutional development and a possible agenda for reform. Let there be no doubt that the chapter does not espouse the adoption of any particular

view in relation to the reform agenda.¹³³ Such outright recommendations need in-depth analysis of each of the issues and the possible solutions based on our experiences and the experiences of other countries and, most importantly, based on a systematic and intensive investigation of the interests and desires of the people, which is beyond the scope of this chapter.

In conclusion, given the absolute dominance of the ruling party, constitutionalism in Ethiopia can only be achieved if the ruling party is committed and willing to tolerate or even encourage opposition parties, civil society organisations, and vibrant and critical media. Unfortunately, in practice the EPRDF desires to have absolute control of the socio-political arena and actively works to undermine the existence and strength of opposition parties, independent civil society organisations, the media and other critical organisations that are not associated with or are otherwise sympathetic towards its ideologies. The ruling party often works to supplant political parties, the media, CSOs and other influential public actors with entities accountable to or sympathetic towards the government. Currently, opposition parties are nearly invisible; civil society organisations working on critical issues such as human rights and democratisation have almost disappeared; and the private media continues to face serious legal and extra-legal harassment. Almost all the critical newspapers have been shut down in the last five years. The public owned printing press, *Birhanena Selam*, continues to refuse to print newspapers that are critical of government, particularly since April 2012 when it drew up a new agreement granting itself the right to refuse the publication of anything that could be perceived as 'illegal', which is understood to include critical publications. As Markakis rightly observes, the 'EPRDF's contempt for its political opponents' has translated 'into denying them the space needed to function properly'.¹³⁴

Despite the initial euphoria and optimism that accompanied the toppling of the Dergue and, most importantly, the adoption of the FDRE Constitution, the establishment of an Ethiopian state based on constitutionalism has become a mirage. The hope for constitutionalism has not been accompanied by relentless and fearless pressure from below. The government rules with an iron fist and the space for dissent and for demanding constitutionalism remains narrow. The political situation in Ethiopia remains far from reassuring. It is always hard to speculate but from the way things stand now, there is very little promise. Constitutionalism appears to be a hopeless venture. Any hope for a change

¹³³ However, the recommendations on the restructuring of the constitutional adjudication system and the adoption of term limits on the position of the Prime Minister may be considered as recommendations, although the author does not delve into the required specificities, for instance, as to whether the ordinary judiciary or a constitutional court should have the final say, or whether Ethiopia should have, say, two or three term limits of four, five or six years each.

¹³⁴ J Markakis *Ethiopia: The last two frontiers* (2011) 250.

in course towards constitutional democracy rests in an unlikely but possible change of heart and approach within the ruling elite, or fractures within the ruling party for any reason,¹³⁵ or in an even more unlikely popular revolution, the outcome of which is hard to predict.

¹³⁵ Fractures within the ruling party can hopefully lead to the birth of competitive groups leading to competitive elections and ultimately the long awaited progress towards constitutional democracy.

CHAPTER 4

CONSTITUTION-MAKING IN ERITREA

Simon M Weldehaimanot

1 Introduction: Higher law and fine-tuning

Of all laws, a constitution is probably the most closely linked to the notion of the rule of law. A constitution is a type of law but three important factors differentiate it from all other laws: (1) its content, (2) its supremacy, and (3) the more rigorous procedure for its amendment. Not much needs to be said about the first issue, except that the content of a constitution may be quite contentious. As for the second, a constitution is supreme to other laws in the sense that a constitution overrides conflicting legislation. Closely linked to the second differentiating factor is the third. If a constitution is supreme, it necessarily follows that it should be protected from changes that can be effected through the normal law-making process.

Supremacy and more rigorous procedures of amendment aim to serve two conflicting interests. ‘One of the first requisites of any constitutional system’, according to Willoughby, one of the few authorities Eritreans consulted in drafting their 1952 Constitution, ‘is that it shall have a high degree of stability’.¹ However, there is another consideration directly opposed to the imperative of stability that is no less important. Willoughby explained that conditions to be met by a government are not unchangeable; political ideas and aspirations of a people are not always the same and framers of constitutions are not all-skillful in foreseeing the future. There is thus a need to leave some room for subsequent alteration.²

¹ WF Willoughby *An introduction to the study of the government of modern states* (1919) 108. For the reference to Willoughby, see AA Schiller ‘Eritrea: Constitution and federation with Ethiopia’ (1953) 2 *American Journal of Comparative Law* 375 382 noting that searching for answers to some questions such as ‘the allocation of the powers of government to the proper authority, Eritrean or federal ... entailed study of the few texts available, Willoughby for one advisor and Rousseau or Duverger for the other’.

² Willoughby (n 1 above) 109.

There is consensus on the fact that a constitution can be altered, either by way of judicial interpretation, or through formal amendment and revision. Only some 4 per cent of all national constitutions lack a provision for a formal amending process.³ Hence, constitutional amendment is the most frequently used *formal* way of modifying a constitution. Abrogation and writing a new constitution are more far-reaching means of changing the constitutional order.

The distinction between amendment and revision merits a brief discussion as it features in subsequent parts of this chapter. To some scholars, there is no limit to the extent of alteration permitted through amendment.⁴ However, scholarly literature and judicial opinion make 'a distinction between major and minor constitutional alterations by calling the former "revisions" and the latter "amendments"'.⁵ While some authorities hold that this distinction is of 'relative importance',⁶ others point out that 'the distinction turned out in practice to be conceptually slippery, impossible to operationalise, and therefore generally useless'.⁷

Within a constitution, 'no legal rules in the Constitution enjoy a higher status than the rules for its own amendment', the reason being that '*these* rules specify the conditions under which all other constitutional rules may be changed'.⁸ Indeed, in many respects, a constitution is a political formula that is largely dependent on the provision on amendment in that very constitution.

Amendment procedures range from procedurally relatively simple procedures, such as amendment by a two-thirds majority in the legislature, to those which provide for more rigorous procedures such as a four-fifth majority or a referendum. Based on the nature of the amendment procedure, constitutions are often classified as either rigid or flexible.⁹ Some Constitutions entrench the entire content, others target the most valued parts such as human rights and the basic structure of government, a few others put certain parts of the Constitution beyond any possible amendments.

On balancing the two conflicting considerations, there is considerable consensus that the acceptable equilibrium is to place a constitution beyond the passion of the law-making majority but not to make it untouchable to future generations. In other words, the amendment procedure should be

³ As above.

⁴ H. Finer *The theory and practice of modern government* (1949) 127.

⁵ D. S. Lutz 'Toward a theory of constitutional amendment' (1994) 88 *American Political Science Review* 355-356. See also Willoughby (n 1 above) 128.

⁶ Willoughby (n 1 above) 128.

⁷ Lutz (n 5 above) 356.

⁸ A. Amar 'Philadelphia revisited: Amending the constitution outside article V' (1988) 55 *The University of Chicago Law Review* 1043-1102.

⁹ A. P. Chatterjee 'Constitutional changes: problems and prospects' (1976) 5 *Social Scientist* 58-63-64.

neither too easy nor too difficult.¹⁰ From this perspective, highly entrenched or entirely un-amendable Constitutions are widely and strongly condemned as placing immoral restrictions on the will of the public and are practically, an illusion.¹¹ In fact, to some scholars, 'constitutions rest on logical antecedent presuppositions that give them their constitutional status. As a result, constitutions can and do change not only when they are amended ... but whenever there is a change in these underlying presuppositions – political and social, but decidedly not constitutional or legal'.¹² The view is widely held that even un-amendable constitutions 'can be overthrown by revolution'.¹³ Dicey, for example, argued that the fact that a constitution was un-amendable might actually encourage revolution.¹⁴ Others support un-amendable provisions, maintaining that there are things that are always 'just and good' independent of the number of people who subscribe to them.¹⁵ Thus, these eternally 'just and good' things can be protected absolutely.

2 Contestation in Eritrea: Amendment against new constitution-making

Before introducing the discussion on a constitution in Eritrea, it is important to give a concise history of Eritrea over the last 120 years so as to familiarise the uninitiated.¹⁶ Present day Eritrea was declared an Italian colony by Italy on 1 January 1890 and remained so until 1941 when, during the WWII, British forces advancing from Sudan evicted Italy from Eritrea. Later, on 10 February 1947, Italy was made to renounce its title over Eritrea, in what is called the Treaty of Peace with Italy.¹⁷ The parties to the Treaty agreed that the occupying force would continue administering Eritrea, thus giving rise to the British Military Administration of Eritrea that lasted from 1941 to 1952.¹⁸

¹⁰ DS Lutz 'Toward a theory of constitutional amendment' in S Levinson (ed) *Responding to imperfection: The theory and practice of constitutional amendment* (1995) 237-240.

¹¹ CM Fombad 'Post-1990 constitutional reforms in Africa: A preliminary assessment of the prospects for constitutional governance and constitutionalism' in AG Nhema & PT Zeleza (eds) *The resolution of African conflicts: The management of conflict resolution and post conflict reconstruction* (2008) 193; Amar (n 8 above) 1104.

¹² F Schauer 'Amending the presupposition of a constitution' in Levinson (n 10 above) 148.

¹³ J Webber 'Institutional dialogue between courts and legislatures in the definition of fundamental rights: Lessons from Canada (and elsewhere)' in W Sadurski (ed) *Constitutional justice, east and west: Democratic legitimacy and constitutional courts in post-communist Europe in comparative perspective* (2002) 61-75.

¹⁴ AV Dicey *Introduction to the study of the law of the constitution* (1959) 128-131.

¹⁵ DR Dow 'The plain meaning of article V' in Levinson (n 10 above) 121.

¹⁶ For a short history of Eritrea SH Longrigg *A short history of Eritrea* (1945).

¹⁷ Extract of the Treaty of Peace with Italy, 10 Feb 1947, art 23(1), reprinted in H Gebre-Ab *Ethiopia and Eritrea: a documentary study* (1993) 39-40.

¹⁸ Treaty of Peace with Italy (n 17 above) art 23(2).

The final determination of the country's status was left to be decided jointly by the governments of the Soviet Union, United Kingdom, the United States of America and France within one year from the coming into force of the Treaty.¹⁹ In a joint declaration annexed to the Treaty, the four states agreed that the final disposal of Eritrea and the appropriate adjustment of its borders would be made by them in light of the wishes and welfare of the inhabitants and the interests of peace and security, taking into consideration the views of other governments.²⁰ The four states also agreed that if they failed to agree in one year from the entry into force of the Treaty they would refer the question of Eritrea's status to the United Nations General Assembly for its recommendation.²¹ When in fact they failed to agree, they submitted the matter to the General Assembly and they respected the latter's recommendation and worked to put it into effect.

While trying to agree on how to deal with Eritrea, the four states sent a commission of inquiry to ascertain the wishes of Eritreans. The General Assembly also sent a commission of inquiry with the same mandate as the four states. The two commissions and the UN's constitution-drafting Commissioner (discussed below) visited Eritrea to ascertain what the will of the people was. The inquiring visitors and the British Military Administration's encouragement of democracy allowed Eritreans for the first time to talk about their political future. After two years the UN General Assembly passed a resolution, famously called Resolution 390(V)A, by which it determined that Eritrea would be 'an autonomous unit federated with Ethiopia under the sovereignty of the Ethiopian Crown'.²² Resolution 390(V)A, roughly two pages long, consisted of 15 paragraphs: 'the first seven paragraphs of the Resolution embodied what was termed the Federal Act. This Federal Act might rather be designated a fragmentary federal constitution'.²³ The rest of the Resolution dealt with procedures for the establishment of the federation.

As one of the main authorities of this time observed, the 'terms of the resolution were commendably brief and simple, but, in being so, left much that should have been said unsaid'.²⁴ Among the few things it did say, it provided that the 'Eritrean Government shall have legislative, executive and judicial powers in the field of domestic affairs', 'not vested in the Federal Government' which had enumerated powers.²⁵ Resolution 390(V)A also provided for developing a constitution for Eritrea and to this end the General Assembly appointed a Commissioner with legal advisors

¹⁹ Treaty of Peace with Italy (n 17 above) art 23(3).

²⁰ Annex XI, Joint Declaration, reprinted in Gebre-Ab (n 17 above) 41-42, para 2.

²¹ Joint Declaration (n 20 above) para 3.

²² Eritrea: Report of the United Nations Commission for Eritrea; Report of the Interim Committee of the General Assembly on the Report of the United Nations Commission for Eritrea, UN Doc., A/RES/390(V)A, 02 Dec. 1950, para 1. In many publications the resolution is wrongly referred as '390A(V)'.

²³ Schiller (n 1 above) 377.

²⁴ GKN Trevaskis *Eritrea: A colony in Transition: 1941-52* (1960) 114.

²⁵ Resolution 390(V)A (n 22 above) para 2 & 3.

and support staff. A constitution was duly finalised in 1952 (the 1952 Constitution). Under the 1952 Constitution, the legislative body was called the Assembly, the executive head was named the Chief Executive and the judiciary was headed by the Supreme Court of Eritrea.

To the delight of the UN and its agents in Eritrea and those who hoped that the new international body would achieve what was expected of it, the establishment of the federation took place on time on 15 September 1952.²⁶ Soon thereafter, however, the federation faced unconstitutional encroachments and, in less than ten years, the federation was completely dismantled. This development marked the abrogation of the 1952 Constitution – despite its un-amendable provisions. As a result, Eritrea became a province of Ethiopia. This development made the first event the subject of much debate. What happened in this period of about 20 years (1941-61) is highly contested as various sides were interested in and subsequently continued narrating events in their own particular way. More than fifty years later, the contestation about the events taking place in this period has still not abated.

Roughly, the narratives can be categorised into three: (1) Eritrea's narrative; (2) the UN and the British narrative and; (3) Ethiopia's narrative. Generally, the Eritrean narrative holds that Eritrea, which had been fully developed into an Italian colony from the 1890s to 1941, deserved to be asked to freely determine its future political status. However, Eritrea was federated with Ethiopia despite its inhabitants' desire for an independent state. The federation, so the argument goes, 'failed to meet the demands of the majority of the Eritrean people; who wanted independence.'²⁷ The UN's and the British narrative takes a middle position by holding that everybody's interest was duly considered and the federation 'was essentially a middle-of-the-road formula' which at that time 'appeared to be the best possible "compromise"'.²⁸ One version of the Ethiopian narrative emphasises the historical links between parts of today's Eritrea and today's Ethiopia and argue that a majority of Eritreans and Ethiopians were in favour of an unconditional union.²⁹

There are conflicting positions on who caused the abrogation. The UN and British narrative agree with the Eritrean one in holding that Ethiopia abrogated the federation.³⁰ Even some Ethiopians hold the position that, to begin with, Ethiopia never took Eritrea's autonomy under the federation

²⁶ H Erlich 'The Eritrean autonomy 1952-1962: Its failure and its contribution to further escalation' in Y Dinstein (ed) *Models of autonomy* (1981) 171 175. See also United Nations Department of Public Information *Shaping a people's destiny: The story of Eritrea and the United Nations* (1953).

²⁷ BH Selassie *Eritrea and the United Nations: And other essays* (1989) 75.

²⁸ DC Cumming 'The disposal of Eritrea' (1953) 77 *Middle East Journal* 18, 19 & 24.

²⁹ T Negash *Eritrea and Ethiopia: The federal experience* (1997) 144.

³⁰ United Nations *The United Nations and independence of Eritrea* (1996) 13 42.

seriously, and quickly dismantled the federal order.³¹ Another Ethiopian account holds the majority of Eritreans responsible for the abrogation of the federation, arguing that the 'first incursions against the Eritrean constitution were not from Ethiopia or the federal authorities but from the Eritrean Assembly and government'.³² 'Although the Ethiopian government might have been equally interested in abolishing' the federation, this line of argument asserts that 'it is inconceivable that this would have succeeded without the full support of the 'unionist Eritreans and the Eritrean government'.³³

The latter position is the most important premise for the first case this chapter discusses. However, it must be clear that reaching this conclusion is not an endorsement of the truthfulness of the premise. To the contrary, this position is criticised as being biased, unsatisfactory and as 'not supported by any serious evidence.'³⁴ Yet, despite the fact that Ethiopia was fully supporting Eritreans in favour of a union, Eritreans were not entirely blameless. Some of them aided and abetted Ethiopia in its unconstitutional actions.

The second case is the fate of the 1997 Constitution of Eritrea, which since its birth has merely collected dust. People who asked about its fate have often encountered indefinite detention. The third is the current constitution-making initiative sponsored by Eritrea's political opposition in exile.

3 Abrogation of the 1952 Constitution and the notion of a higher law

3.1 The 1952 Constitution on amendments

Article 2 of the 1952 Constitution states that any 'amendment to the Constitution must be submitted in writing either by the Chief Executive or by a number of members of the Assembly equal to one quarter of the actual number of members'. Afterwards, 'twenty days must elapse between the submission of an amendment and the opening of the Assembly's discussion thereon'. According to the UN Commissioner who may be regarded as the 'father' of the 1952 Constitution, the purpose of the twenty

³¹ DW Giorgis *Red tears: war, famine and revolution in Ethiopia* (1989) 81.

³² Negash (n 29 above) 144.

³³ Negash (n 29 above) 147.

³⁴ R Reid 'Eritrea: an Ethiopian view' (2000) 41 *The Journal of African History* page article starts on 166-7. See also J Markakis, 'Ethiopia and Eritrea: The Federal experience' (1998) 25 *Review of African Political Economy* 153.

days delay was 'to obviate the adoption of amendment under pressure of extraneous circumstances'.³⁵

Article 93 provides two ways of amending the Constitution. A majority of three-quarters of the members of the Assembly in office can automatically amend the Constitution. In addition, a majority of two-thirds of the members present and voting or a majority of the members in office can amend the Constitution if the proposed amendment is approved by two successive legislatures. In regard to the latter, 'the second debate can only take place after the next legislature has been elected. Thus the amendment is indirectly put to the electorate'.³⁶ The next stage is entry into effect which, as stipulated in article 93(3), required ratification by the Emperor, the Sovereign of the Federation.

The above provisions pertain to procedure. Even if the amendment procedure is complied with perfectly, article 91 of the Constitution which provides for substantive restrictions, also has to be met before an amendment would be constitutional. First, the 'Assembly may not, by means of an amendment, introduce into the Constitution any provision which would not be in conformity with the Federal Act'. Second, article 16 bases the Constitution 'on the principles of democratic government' and provides that this basis 'shall not be amended'.

The Federal Act defines the powers of the Eritrean government and the federal government. In legislative writing it is often assumed that 'shall not' is different from 'may not', but distinction may not be historically well founded.³⁷ However, in current common usage, 'shall not' is a command or order; 'may not' is used to indicate a measure of possibility. In Courts legal documents have often stated that there are certain aspects set in stone article allowing for some discretion. In this context, 'shall not' is conclusively prohibitive while 'may not,' although injunctive on the party it restrains, allows for some leeway, but only with the permission of someone which has the legal power to lift the injunction. In as far as that permission is not obtained the term 'may not' is as absolutely prohibitive as 'shall not'.

The Commissioner, the founder of the Constitution, gave indications about how seriously the term 'may not' in article 91 should be taken. In his final response, he first mentioned the fact that the Constitution of Eritrea is supposed to be based on the principles of a democratic government and include the guarantees contained in paragraph 7 of the Federal Act, which were fixed by the UN General Assembly.³⁸ Indeed, 'it may be said that the

³⁵ Final Report of United Nations Commissioner in Eritrea, A/2188, 17 October 1952, reprinted in United Nations (n 30 above) 128, para 618.

³⁶ United Nations Commissioner in Eritrea (n 35 above) 129, para 622.

³⁷ NR Tillman & SB Tillman 'A fragment on shall and may' (2008-2010) 50 *American Journal of Legal History* 453.

³⁸ UN Commissioner's Final Report (n 35 above) 115, para 20.

United Nations General Assembly, in its resolution A(V), not only drafted the Federal Act, but laid down the principles on which the Constitution of Eritrea was to be based'.³⁹ Provisions of the Federal Act reproduced in the Constitution of Eritrea, thus the UN Commissioner continued, 'can in no way be modified by their incorporation in the Constitution of Eritrea'.⁴⁰ Similarly, 'the federation [Eritrea and Ethiopia combined] certainly does not possess a unilateral power of decision as regards the application of these provisions'.⁴¹ The provisions of the Federal Act were 'therefore binding on Eritrea, Ethiopia and the Federation simultaneously'.⁴²

Here it is important to bear in mind that the 1952 Constitution and the Federal Act were written with partners who had conflicting aims in mind: one advocated for a union with Ethiopia, and the other for independence. Given this fact, there was one context in which 'may not' could not have meant 'shall not'. Ethiopia wanted Eritrea and it is hard to imagine that Ethiopia would have intended 'may not' to mean a prohibition of any change of heart by Eritreans to re-join Ethiopia. As a matter of fact, it did not.

Had Ethiopia been supportive of an independent Eritrea, it is difficult to imagine that Eritreans would have taken 'may not' to indicate some form of restraint on Ethiopia. It is indeed difficult to imagine that Eritreans would have begged or constitutionally forced an unwilling Ethiopia to be their federal partner. So it can be concluded that unanimous Eritreans agreeing with Ethiopia could have legally changed the un-amendable parts of the 1952 Constitution and the Federal Act.

3.2 Amendments sought and their legality

On 30 September 1952, just two weeks after the birth of the federation, and without consulting the new Eritrean government, the Ethiopian government created a Federal Supreme Court with the power to interpret the Federal Act, and with appellate jurisdiction from the Supreme Court of Eritrea. By then Cumming, the British administrator of Eritrea, not only doubted the legal validity of the Federal Supreme Court's appellate jurisdiction over the Supreme Court of Eritrea, but also rightly thought that 'the autonomy of Eritrea intended by the United Nations resolution, would appear to be at the mercy of this court'.⁴³ This move though brought about as an amendment by Eritreans, had the effect of amending the 1952 Constitution, under which judicial power must be exercised by the Eritrean Supreme Court.

³⁹ UN Commissioner's Final Report (n 35 above) 116, para 24.

⁴⁰ UN Commissioner's Final Report (n 35 above) 120, para 514.

⁴¹ UN Commissioner's Final Report (n 35 above) 120, para 515.

⁴² UN Commissioner's Final Report (n 35 above) 120, para 518.

⁴³ Cumming (n 28 above) 31.

In 1955, a group of deputies in the Eritrean Assembly proposed amendments to the Constitution. The first proposed amendment was the adoption of Amharic (the majority Ethiopic language) as the official language of Eritrea in place of the Eritrean languages the 1952 Constitution recognised as official languages. The other amendments were the abolition of the flag and the official seal under the Constitution and the nomination of the Chief Executive of Eritrea by the Emperor of Ethiopia instead of election by the Eritrean Assembly.⁴⁴ The then President of the Eritrean Assembly deemed these proposals so serious that he consulted the Attorney-General who 'in a written statement pointed out that while the first three of the proposed changes could be made by two thirds majority vote, the proposed amendment concerning the appointment of the Chief Executive could not be amended at all since it was contrary to article 16 of the Constitution and would thus undermine democracy'.⁴⁵ On 15 November 1962, the Eritrean Assembly 'voted unanimously to dissolve the federation and unite Eritrea with the Ethiopian empire' – a move which British embassy officials considered as 'of doubtful legality'.⁴⁶ It is not important to discuss the procedural correctness of the amendments as they were substantively prohibited.

Before asking if these amendments were legal, it should be considered whether it was legally possible for the Eritrean Assembly to pass an amendment to scrap the Federal Act's provision that 'Eritrea shall constitute an autonomous unit federated with Ethiopia under the sovereignty of the Ethiopian Crown' and declare Eritrea an independent state. The answer, according to the UN Commissioner, is clearly in the negative: provisions of the Federal Act reproduced in the Constitution of Eritrea 'can in no way be modified by their incorporation in the Constitution of Eritrea'.⁴⁷ Similarly, the Federation (Eritrea and Ethiopia combined) certainly did 'not possess a unilateral power of decision as regards the application of these provisions'.⁴⁸ The provisions of the Federal Act were therefore 'binding on Eritrea, Ethiopia and the Federation simultaneously'.⁴⁹

Even on the premise that a non-amendable constitution is amendable by the unanimous agreement of its subjects or on the premise that change in the underlying presuppositions warrants amendment of a non-amendable constitution,⁵⁰ a positive answer can only be imagined on the condition that the other partner of the Federation, (Ethiopia) was happy to let Eritrea be a sovereign state and that Eritreans also unanimously agreed to the amendment. However, states do not willingly give away their

⁴⁴ Negash (n 29 above) 113.

⁴⁵ Negash (n 29 above) 112-3.

⁴⁶ Negash (n 29 above) 138.

⁴⁷ UN Commissioner's Final Report (n 35 above) 120, para 514.

⁴⁸ UN Commissioner's Final Report (n 35 above) 120, para 515.

⁴⁹ UN Commissioner's Final Report (n 35 above) 120, para 518.

⁵⁰ Schauer (n 12 above) 148.

territory in return for nothing. Against this background, the claim that Ethiopia was willing to be land-locked appears farfetched. Thus under the hypothetical circumstances postulated, what would Ethiopia's reaction have been to the amendment passed by the Eritrean Assembly declaring Eritrea a sovereign state?

Ethiopia would in all likelihood have invoked article 91(1). For amendments passed following the requirements to be effective, article 93(3) required 'ratification by the Emperor' of Ethiopia. According to the UN Commissioner, giving the Emperor power of ratification of amendments is justified by the fact that paragraph 13 of the UN General Assembly's Resolution provides that the Constitution of Eritrea enters into effect following ratification by the Emperor of Ethiopia of the Federal Act and the Constitution. The Commissioner concluded that amendments to the Constitution also needed to be ratified by the Emperor.⁵¹ In addition, the Commissioner found justification in paragraph 7 of the Federal Act which requires the Federal Government to ensure respect for human rights and fundamental liberties in Eritrea. 'The Federal Government must therefore,' the UN Commissioner reasoned, 'be in a position to prevent suppression or restriction of these rights and freedoms by [amendments to] the Eritrean Constitution'.⁵² The UN Commissioner explained that for 'amendments at variance with the provisions of the Federal Act ... ratification must be refused'.⁵³ Thus, Ethiopia, as a partner of the Federation, had protection at article 9(3) where it could have invoked article 91(1) and (2).

In the same context, it is helpful to ask if it was legally possible for the Eritrean Assembly to pass an amendment to make Eritrea a province of a unitary Ethiopia. Assuming that Ethiopia favoured the idea, which it did, and further assuming that Eritreans were unanimous (or close to unanimous, in their desire to re-unite with Ethiopia, the answer could be positive. In fact, 'Ethiopia had argued the General Assembly resolution predicted the entry into force of the federal Act upon the consent of both parties, therefore that Act could be disengaged from in the same manner'.⁵⁴ However, the UN Commissioner took the view that whatever is contained in the Resolution cannot be amended even by agreement between Eritrea and Ethiopia. Two international lawyers also hold these arguments to be unpersuasive.⁵⁵

Questions of encroachment upon Eritrea's autonomy would appear, under the circumstances, to have been outside the domestic domain. Even assuming that Eritrea and Ethiopia had the option to reject the federation scheme – a

⁵¹ UN Commissioner's Final Report (n 35 above) 122, para 547.

⁵² UN Commissioner's Final Report (n 35 above) 123, para 550.

⁵³ UN Commissioner's Final Report (n 35 above) 123, para 551.

⁵⁴ T Meron & AM Pappas 'The Eritrean autonomy: a case study of a failure' in Dinstein (n 26 above) 211.

⁵⁵ As above.

debatable proposition – the federation plan did not purport to become legally operative solely through the consent of its participants. The approval of the United Nations General Assembly was a *sine qua non* to its genesis. Furthermore, since the Federal Act did not contain a revision clause, it would be argued that the federation plan could not be altered in any way short of action by the General Assembly.

Ethiopia always wanted Eritrea back. However, in the face of objections by some Eritreans, as discussed below, Ethiopia was obligated by the Federal Act and empowered by article 93(3) of the Eritrean Constitution to refuse giving effect to amendments purporting to unite Eritrea with Ethiopia.

However, this chapter does not aim to accuse Ethiopia of historical failures but to identify a lesson for Eritrean politicians. Thus, without considering the Ethiopian factor and on the assumption that the procedural aspect of the amendment was followed, it suffices to ask if it was legally possible for the Eritrean Assembly to pass an amendment to turn Eritrea into a province of a unitary Ethiopia. The answer is in the negative, because the Assembly is expressly restrained from amending the Federal Act. Turning Eritrea into a province of Ethiopia was therefore against the Federal Act. It therefore was an unconstitutional constitutional amendment, regardless of the compliance with procedure. Even if it is an accepted premise that a hundred per cent unanimity on the part of the public can indeed overthrow even an un-amendable constitution, Eritreans were not even close to reaching unanimity on the issue of re-joining Ethiopia. There were considerable objections. One can also not say that the ‘logical antecedent presuppositions’ of the Constitution – striking a balance between the desire for union and for separation – changed by the 1950s. Quite to the contrary, writing in 1953, one of the legal advisers involved in drafting the 1952 Constitution noted that despite the Ethiopian Emperor’s generosity aimed at luring Eritreans towards a union, ‘all sections of the people are beginning to take a pride in their nationhood and would not at present welcome a complete merger with Ethiopia’.⁵⁶

The Eritrean Assembly had no powers to amend ‘the principles of democratic government’ on which the 1952 Constitution was based. The important question is whether forfeiting the autonomous status of Eritrea amounts to a violation of the democratic principles on which the Constitution is based. From purely administrative considerations, it may not have been. In the way it was implemented – prohibiting Eritreans the right to their languages, banning of political parties, muzzling private press and various civil and political rights – the gradual abrogation of the Federal order certainly violated the un-amendable democratic principles of the Constitution.⁵⁷

⁵⁶ ERJ Hussey ‘Eritrea self-governing’ (1954) 53 *African Affairs* 320 322.

⁵⁷ Erlich (n 26 above) 176.

The UN Commissioner observed that paragraph 7 of the Federal Act, reflected in article 34 of the 1952 Constitution, provide that no limitation may be applied to these rights unless they are justified in light of respect for the rights and freedoms of others or by the requirements of public order and the general welfare. The Constitution, added the Commissioner, 'affirms that liberty is the rule; any restrictive provision of the law must be justified, must come within the scope of the exceptions expressly prescribed and may not suppress the rights guaranteed'.⁵⁸ He observed that the 'fundamental rights and freedoms directly guaranteed by the Constitution may be amplified and defined by ordinary laws'. The Constitution grants the Supreme Court the means to exercise control over legislation if other organs of State, such as the Assembly and the Executive, should fail in their duties.⁵⁹

3.3 The federation: A delicate balance

In many respects, an entrenched constitution is needed to protect a delicate balance of relations. In the Eritrean case, the extremes were the unconditional union with Ethiopia and the creation of the unconditionally sovereign state of Eritrea. To the UN Commissioner, the federation 'was essentially a middle-of-the-road formula' and 'the best possible "compromise"'.⁶⁰ The British Administrator was also of the view that even though '[n]one of the Eritrean political parties had previously proposed federation with Ethiopia, and the federal conception was so foreign to them ..., all the parties, and other bodies consulted, accepted the plan and promised their co-operation in giving effect to it'.⁶¹ He also observed that 'the wishes and welfare of the inhabitants, the interests of peace and security, and the views of other interested governments' were given full consideration.⁶² These claims, if true, tend to argue in favour of protecting the federal order.

During the constitution-drafting process subsequent conferences with the Ethiopian Government indicated that 'on some fundamental questions the Resolution was susceptible to two contrasting interpretations'.⁶³ The Commissioner spoke for the UN's interpretation while the Minister of Foreign Affairs represented Ethiopia.⁶⁴ Indeed, political interests were paramount during the course of the discussions.⁶⁵ In specifying the institutions and their powers in the constitution, there was strong apprehension on Ethiopia's part that autonomous and democratic Eritrea

⁵⁸ UN Commissioner's Final Report (n 35 above) 123, para 556.

⁵⁹ UN Commissioner's Final Report (n 35 above) 123, para 556.

⁶⁰ UN Commissioner's Final Report (n 35 above) 115, para 16.

⁶¹ Cumming (n 28 above) 27.

⁶² Cumming (n 28 above) 19 & 24.

⁶³ Schiller (n 1 above) 378.

⁶⁴ As above.

⁶⁵ Schiller (n 1 above) 379.

might militate against the stability of the Federation and indeed of Ethiopia. For the most part, the Commissioner refused to depart from the conception of the democratic government desirable for Eritrea which had grown out of the pooled thinking of the group'.⁶⁶ 'It was the concern of the Commissioner to illustrate that a constitution proclaiming to be democratic must have as its primary aim the well-being of the whole of Eritrea'.⁶⁷ Specifically on the amendment procedure, the Commissioner expressed a very clear position:⁶⁸

In view of the fact that a single Assembly has power to carry out revision, the conditions laid down in the Eritrean Constitution are not excessive. The Eritrean Assembly did not by any means consider the revision procedure laid down in the Commissioner's Draft to be inflexible, *but would have preferred to see amendment of the Constitution made more difficult.*

This articulation of his position indicates that the UN Commissioner was suspicious of one side's plan of abrogation. For this reason, in concluding his final report, he urged as follows: 'The Federation and Eritrea will have to learn to live side by side, each respecting the proper sphere of activity and jurisdiction of the other'.⁶⁹ He added that 'the United Kingdom share[d] the belief of the United Nations Commissioner that federation has been entered into the best faith on both sides'.⁷⁰ The British administrator of Eritrea also observed at that time that the 'success of the United Nations resolution, from the constitutional aspect of the federation of Ethiopia and Eritrea, will depend largely on the attitude of Ethiopia'.⁷¹

Another indication of the deliberate nature of the entrenchment is provided by the UN Commissioner. He reported that the Constitution of Eritrea shall be based on the principles of democratic government and include the guarantees contained in paragraph 7 of the Federal Act were fixed by the UN General Assembly.⁷² Indeed, 'it may be said that the United Nations General Assembly, in its resolution A(V), not only drafted the Federal Act, but laid down the principles on which the Constitution of Eritrea was to be based'.⁷³ For this reason, the Commissioner seems to imply that provisions of the Federal Act reproduced in the Constitution of Eritrea 'can in no way be modified by their incorporation in the Constitution of Eritrea'.⁷⁴ Similarly, 'the federation certainly does not possess a unilateral power of decision as regards the application of these

⁶⁶ Schiller (n 1 above) 381. See also Erlich (n 26 above) 179 noting that 'Haile Selassie's Government concluded that it could not afford even a fictitious autonomy in Eritrea'.

⁶⁷ Schiller (n 1 above) 379.

⁶⁸ UN Commissioner's Final Report (n 35 above) 129, para 625 (emphasis added).

⁶⁹ UN Commissioner's Final Report (n 35 above) 133, para 775.

⁷⁰ Report of the Government of the United Kingdom Concerning the Administration of Eritrea for the Period from December 1950 to September 1952, A2233, 27 October 1952, reprinted in United Nations (n 84 above) 152, para 288.

⁷¹ Cumming (n 28 above) 31.

⁷² UN Commissioner's Final Report (n 35 above) 115, para 20.

⁷³ UN Commissioner's Final Report (n 35 above) 116, para 24.

⁷⁴ UN Commissioner's Final Report (n 35 above) 120, para 514.

provisions'.⁷⁵ The provisions of the Federal Act were 'therefore binding on Eritrea, Ethiopia and the Federation simultaneously'.⁷⁶

3.4 Lack of arbiter in the constitutional design

One writer has documented a number of scholars of political constitutionalism who have expressed 'the view that the basic stumbling block of the federal accord rested on its impracticability' owing to different reasons, one of which is 'structural incongruity [which] had to do with the legal-constitutional system'.⁷⁷ Even though federalism could be asymmetrical, it needs a dispassionate arbiter of disputes between the asymmetrical federal units. To Selassie, a constitutional lawyer, '[t]he 'federal' arrangement lacked an essential element of the federal principle, that is, equality between the competent entities with an impartial arbiter to settle any conflicts or disputes that might arise between (or among) the entities'.⁷⁸ Indeed, there was no provision for the establishment of a separate Federal Government; the Federal Government is similar to the Ethiopian Government, except insofar as an Imperial Federal Council composed of equal numbers of Ethiopian and Eritrean representatives was provided for to advise upon the common affairs of the Federation. However, the Imperial Federal Council was never established.⁷⁹ For this reason, the UN General Assembly's resolution federating Eritrea with Ethiopia 'was far removed from federalism, both in principle and practice'.⁸⁰ According to Haile, 'the Commissioner agreed to recognise the Ethiopian Government as the Federal Government'.⁸¹

Resolution 390(V)A and the subsequent Federal Act 'were full of ambiguity and vagueness, creating one of the most explosive problems in the region'.⁸² The UN Commissioner himself seems to have been confused. In reporting that the provisions of the Federal Act were 'binding on Eritrea, Ethiopia and the Federation simultaneously' he indicated that there were three entities – 'Eritrea, Ethiopia and the Federation'.⁸³ Using an analogy, Eritrea and Ethiopia may be regarded as similar to the states of the United States and the Federation as similar to the United States.⁸⁴ However, the Federation lacked a body of laws and institution comparable

⁷⁵ UN Commissioner's Final Report (n 35 above) 120, para 515.

⁷⁶ UN Commissioner's Final Report (n 35 above) 120, para 518.

⁷⁷ R Bereketeab *Eritrea: the making of a nation 1890-1991* (2000) 171.

⁷⁸ Selassie (n 27 above) 79.

⁷⁹ As above.

⁸⁰ M Araya 'The Eritrean question: an alternative explanation (1990) 28 *Journal of Modern African Studies* 79 81.

⁸¹ S Haile 'The origins and demise of the Ethiopia-Eritrea federation' (1987) 15 *Journal of Opinion* 9 13.

⁸² Haile (n 81 above) 11.

⁸³ UN Commissioner's Final Report (n 35 above) 120, para 518.

⁸⁴ The then Attorney-General of Eritrea indeed said that 'Eritrea today resembles an American state, with jurisdiction over its local laws, including customary law'. See FF Russell 'Eritrean customary law' (1959) 3 *Journal of African Law* 99.

to the United States' federal government. In fact, the only federal institutions were the Ethiopian Crown and the Imperial Federal Council, which however never materialised in reality. As a consequence, the Ethiopian government simply became the federal Government.⁸⁵

The UN Commissioner was apprehensive of the deficiency in the constitutional design for which he has to be blamed. In his final report, he thus tried to remedy this defect by indicating that '[a]ny difficulties which may arise in this connexion [federal v state power] will have to be settled by a federal tribunal appointed for the purpose by the Federal Government and consisting of both Ethiopian and Eritrean judges'.⁸⁶ Even though the Imperial Federal Council is said to 'allow representatives of Eritrea to express their opinion on the federal laws which they might regard as encroaching on the Eritrean jurisdiction',⁸⁷ he added that '[t]he existence of this procedure does not, however, remove the need to establish appeal procedure with the necessary safeguards' which 'can only be provided by the setting of an impartial Supreme Court with powers to settle conflicts of jurisdictions between the Federation and Eritrea in the final instance'.⁸⁸ The tribunal's impartiality must be, he continued, 'manifest in its proceedings and composition. For this purpose, a joint act by the two legislatures ... [was] required'.⁸⁹

The UN Commissioner's Final Report, in which he made the recommendations above is dated 17 October 1952. However, it must have been drafted earlier than 30 September 1952 when the Ethiopian government, without even bothering to consult the Eritrean government, created a Federal Supreme Court with the power to interpret the Federal Act, and provided appellate jurisdiction to the Supreme Court of Eritrea. By then the British Administrator of Eritrea not only doubted the legal validity of the Federal Supreme Court's appellate jurisdiction over the Supreme Court of Eritrea, but also thought that 'the autonomy of Eritrea intended by the United Nations resolution, would appear to be at the mercy of this court'.⁹⁰ He hoped that the Ethiopian Government regarded this only 'as a stop-gap legislation and that it will seek the agreement of the Eritrean Government at an early date'.⁹¹ It did not happen. Pending the establishment of this court, the British administrator was of the opinion that the Imperial Federal Council was the institution where claims of abrogation of the Federal Act were to be contested.⁹²

⁸⁵ Araya (n 80 above) 81.

⁸⁶ UN Commissioner's Final Report (n 35 above) 120, para 515.

⁸⁷ UN Commissioner's Final Report (n 35 above) 122, para 543.

⁸⁸ UN Commissioner's Final Report (n 35 above) 122, para 543 & 544.

⁸⁹ UN Commissioner's Final Report (n 35 above) 133, para 778.

⁹⁰ Cumming (n 28 above) 31.

⁹¹ As above.

⁹² As above.

According to Selassie, '[i]t was obviously in recognition of this glaring gap that ... the UN Commissioner on Eritrea who oversaw the transition, observed in his final report that Resolution 390 A(V) would remain an international instrument and that the UN General Assembly would be seized of the matter, in the event of any violation of its provisions'.⁹³ For the same reason, the British administrator noted that 'although the United Nations have no direct residual interest in the matter, having incorporated Eritrea under the sovereignty of a member-state of the United Nations, the Eritreans will no doubt expect the larger organisation to take an interest in their future, as their choice of a flag suggests'.⁹⁴

Indeed, when the Federal Act and the 1952 Constitution started to fall apart, those Eritreans opposed to union petitioned the Attorney-General, FF Russell, who as an expatriate was perceived as having no fear of intimidation. In a written statement, the Attorney-General pointed out that some of the proposed amendments were 'contrary to article 16 of the constitution and would thus undermine democracy'.⁹⁵ The representative of the Emperor, the Chief Executive and Supreme Court of Eritrea, were also petitioned.⁹⁶ Encouraged by the Attorney-General's opinion, one anti-union political party petitioned the representative of the Emperor strongly reminding him of the terms of the constitution and warning that if the proposed motion was put forward, the party would take the next step - appeal to the United Nations.⁹⁷ Eventually, in October 1957, two leaders presented a petition to the United Nations in New York complaining extensively on how the Federal Act and the Eritrean Constitution were undermined by the combined efforts of the Ethiopian authorities and the Eritrean government.⁹⁸

4 The trashing of the 1997 Constitution

The Federal Act and the 1952 Constitution which had a non-amendable provision were discarded. In reaction to that, by 1961 some Eritreans revolted. Over time, the armed struggle gathered momentum, and in the end lasted for some 30 years. Armed movements were taking place in Ethiopia too particularly during the last ten years of Eritrea's resistance. Eventually, the Ethiopian regime insistent on keeping Eritrea as part of Ethiopia was defeated in 1991 and two military organisations took power in Eritrea and Ethiopia.

On Eritrean soil, the armed struggle was started by the Eritrean Liberation Front (ELF), which in the 1970s gave rise to a splinter fronts

⁹³ Selassie (n 27 above) 79.

⁹⁴ Cumming (n 28 above) 32.

⁹⁵ Negash (n 29 above) 112-3.

⁹⁶ Negash (n 29 above) 113-4.

⁹⁷ Negash (n 29 above) 113.

⁹⁸ Negash (n 29 above), 126.

that eventually formed the rival Eritrea Peoples' Liberation Front (EPLF). The two groups fought against each other leading to the liquidation and dismissal of ELF into exile in 1981. It was thus the EPLF alone that liberated Eritrea in May 1991, gave Eritreans a chance to exercise their right of self-determination which they did in favour of an independent state and established a transitional government forthwith whose lifetime was expanded in May 1993 to an additional four years. In these four years, the EPLF's government supportively supervised the drafting of a new constitution which was eventually adopted in May 1997.

The nature of the constitution-making process in Eritrea is amply covered by writers of different viewpoints.⁹⁹ Many present it as a new, mass-driven participatory process while others question the substance of the publicity and mass participation. Some hold the view that the 1997 Constitution is legitimate while others deny its legitimacy. However, this debate is not important for this article. The Constitution does not have an entry-into-force clause. However, the transitional statutes intended, and public expectation was, that it would come into force in its entirety a year after its ratification while the operative parts were considered to be in effect immediately upon its ratification. No significant steps were taken towards launching the Constitution in the year proceeding May 1998 when Eritrea and Ethiopia started engaging in a full scale war. A truce was brokered only in 2000. Thus, the war contributed to derailing the implementation of the Constitution. After the war, a movement demanding political reforms, including the implementation of the 1997 Constitution, emerged. The movement included significant academics, university students and – importantly – almost half of the leadership present in the Cabinet of Ministers of the transitional legislature and in higher positions of the EPLF. The clamour for reform was so intense that the Front agreed on a timetable for implementation.¹⁰⁰

However, the government had a change of heart. In September 2001, eleven of the reformers were detained and simply disappeared within the prison systems. More than a dozen journalists of the budding private press, which was instrumental in the reform movement, were at the same time detained and also simply disappeared. For some time, the government

⁹⁹ From those who hold that the Constitution is legitimate see BH Selassie *The making of the Eritrean constitution: The dialectic of process and substance* (2003) 37-98; BH Selassie *Wounded nation: How a once promising Eritrea was betrayed and its future compromised* (2011) 105-133; BH Selassie 'Constitution-making in Eritrea: A process-driven approach' in LE Miller & L Aucoin (ed) *Framing the state in times of transition: Case studies in constitution-making* (2010) 80; RA Rosen & BH Selassie 'The Eritrean Constitutional process: An interview with Dr Bereket Habte Selassie' (1999) 3 *Eritrean Studies Review* 139; and RA Rosen 'Constitutional process, constitutionalism, and the Eritrean experience' (1998-1999) 24 *North Carolina Journal of International Law and Commercial Regulation* 263. For a contrarian view, see T Medhanie, 'Constitution-making, legitimacy and regional integration: An approach to Eritrea's predicament and relations with Ethiopia' (2008) 9 *DIIPER Research Series: Working Paper* 1.

¹⁰⁰ See generally D Connell *Conversations with Eritrean political prisoners* (2005).

argued that the immediate post-war time was not conducive to the implementation of the Constitution. In recent years, the transitional government has made it very clear that it does not subscribe to democracy and the rule of law.¹⁰¹ At least in the past ten years, the 1997 Constitution has been a document which Eritreans would refer to at their peril. The transitional government, which exceeded its legitimate term in 1997 still rules Eritrea without constitutional legitimacy and without the slightest regard to any law. As a result, massive human right violations take place on a daily basis.¹⁰²

The 1997 Constitution has been collecting dust for more than 15 years now, because the transitional government wanted to rule without any legal impediment or constraint. Specifically, it knows that the Constitution has term limits that everyone notices. Had the Constitution been implemented in 1997 as it should have been, the current President, even on the assumption that he would have been elected for two terms, should have left the presidency for good in 2007.

A surprising point is the opposition's position. The opposition – based in exile due to the lack of democratic space in Eritrea – emerged from dormancy in 1999. Now it is made up of more than three dozen political parties and civil society organisations. To a large extent, these groups are a continuation of the vanquished ELF and hold extreme resentment and bitterness towards the government in Eritrea. They tend not to appreciate even the few positive things the incumbent government has done, such as the adoption of the 1997 Constitution. Forcing the government to be true to its words – to implement the Constitution – is the easiest and most pragmatic political platform on which the opposition could base itself. Important organisations such as Human Rights Watch,¹⁰³ Amnesty International,¹⁰⁴ the International Crisis Group¹⁰⁵ and even governments such as the European Union and many other countries demanded for the implementation of the Constitution during the 2009 Universal Periodic Review of Eritrea before the United Nations Human Rights Council.¹⁰⁶ Instead of pushing for implementation of the 1997 Constitution, the opposition insists on the need for a new constitution. However, its understanding of the distinction between amending, revising and adopting

¹⁰¹ See generally SM Weldehaimanot 'The status and fate of the Eritrean constitution' (2008) 8 *African Human Rights Law Journal* 108 112-114.

¹⁰² See generally Human Rights Watch *Service for life: State repression and indefinite conscription in Eritrea* (2009).

¹⁰³ Human Rights Watch *Service for life* (n 102 above) 9.

¹⁰⁴ See Eritrea: Amnesty International Report 2007. In this report Amnesty International states: 'Donors continued emergency humanitarian assistance but most had long suspended development aid because of the government's failure to implement both the constitutional process of democratisation and international human rights treaties it had ratified'.

¹⁰⁵ International Crisis Group 'Eritrea: The siege state' (2010) 163 *Africa Report* ii & 26.

¹⁰⁶ UN Human Rights Council 'Report of the working group on the Universal Periodic Review [of Eritrea]' 4 January 2010, A/HRC/13/2.

a constitution seems unconvincing. These points are addressed below in the context of the on-going urge for constitution-making process in exile.

4.1 The eagerness to write yet a new constitution

In the constitution-making process that produced the 1997 Constitution, the ELF was not allowed to participate as a political organisation. This and other factors were raised by critics, mainly the opposition block in exile, as vitiating the legitimacy of the 1997 Constitution. Both camps have persisted with their respective positions. Meanwhile, a constitution is needed to guide even the opposition in exile to fill a possible power vacuum that may result from the collapse of the current government.

In this context, some Eritreans in 2010 forwarded a document called 'The Eritrean Accord: Harmonised Constitution'. This document alludes to the actors behind the document and the reasons that have driven them, the risks and uncertainties looming over Eritrea's near future, analysis of the way forward and the mitigation of risk. The Eritrean Accord is driven by several fears for the future. One of these fears is that a power vacuum and a 'state of anarchy and mayhem' may result. To address this prospect, they proposed a transitional strategy.¹⁰⁷ The authors noted that one of the thorniest issues that has not helped the democracy-seeking forces move forward is the impasse on the question of which constitution Eritrea should follow after the removal of the current government.¹⁰⁸ Thus, '[i]n the spirit of compromise and to break this deadlock' they came up with a 'Harmonised Constitution' which was created by adding some provisions to the 1997 Constitution of the 1952 Constitution.¹⁰⁹

This Harmonised Constitution is just a proposal. In fact, it is a proposal from anonymous individuals. They have called upon the opposition to accept it by issuing a declaration of acceptance. This has not yet happened. In this regard, one can rightly ask questions about the authoritative nature of the proposal. Still, it is a real proposal. In addition, a significant part of the opposition camp convened in Addis Ababa from 31 July to 9 August 2010 in what is called the National Conference for Democratic Change (NCDC). The NCDC established a 53-member commission, called the Eritrean National Commission for Democratic Change (ENCDC) with a mandate to prepare a draft roadmap to guide the transition period following the demise of the current government. That

¹⁰⁷ I Mukhtar 'The Eritrean Accord: Harmonised Constitution' 2010 http://gereger.com/media/pdf/Eritrean%20Accord_Harmonized_constitution.pdf 4 & 6 (accessed 12 January 2011).

¹⁰⁸ Mukhtar (n 107 above) 8.

¹⁰⁹ As above.

roadmap is understood to mean a constitution which the ENCDC prepared should draw on past Eritrea constitutions.¹¹⁰

The Commission assumed the task of drafting a transitional constitution and, in the end, it presented an unprofessional draft to the second National Conference – the Eritrean National Congress for Democratic Change – which was held from 21 to 30 November 2011 in Hawassa, Ethiopia. It is very unfortunate that the draft is so unprofessional. To begin with, the whole idea of writing a constitution while in exile has been opposable and the drafting commission has not been comfortable with it, at times denying that it is drafting a constitution. In this context, the second congress did not take on the task of writing a constitution. The second congress formed a national assembly in exile and the draft constitution was entrusted to the assembly to be used as a reference in the making of a constitution in Eritrea after the downfall of the current Eritrean regime.

Though the ENCDC has not accepted the Harmonised Constitution, the document is an important case for investigating the understanding of constitutional matters of Eritrea's opposition politicians who have been preaching rule of law and constitutionalism for a decade.

4.2 Transition and the permanent constitution under the Accord

The Accord is driven by several fears for the future, including the prospect of a power vacuum and a state of anarchy and mayhem. However, Mukhtar is of the view that these fears may be mitigated 'by having a workable, agreed upon and sound transitional strategy'.¹¹¹ Among several reasons laws are needed, for one, is to avoid disputes in the future. To serve this end, the clearer and more exact laws are the better. Yet, laws can never deal sufficiently clearly with all aspects. Unsurprisingly, the Eritrean Accord also contains vague parts. Generally, giving meaning to constitutional terms is the task of the judiciary and the main point of this section is to show the extent of changes the judiciary can make and to investigate the question whether Eritrean politicians are indeed committed to function alongside an independent judiciary.

The idea of the authors of the Eritrean Accord was that 'all Eritrean political parties and organisations must pledge their full commitment to abide by [the Accord] and [recognise] it as the only legally acceptable paths towards restoring democracy and rule of law in Eritrea'. Signatories of the

¹¹⁰ National Conference for Democratic Change Final Communiqué, 9 August 2010, <http://encdc.com/national-conference-for-democratic-change-final-communique/> (accessed 30 August 2010).

¹¹¹ Mukhtar (n 107 above) 4 & 6.

Accord were called upon 'not to recognise, and keep on resistance and opposing, any group whether a signatory or not, that comes to power and does not abide by this Accord'. In order to envisage what the aftermath of the current political situation would look like, they outlined a roadmap. Unfortunately, this roadmap remained unclear.

On the issue of handling the transition, it is not clear how a permanent constitution is envisaged to eventually come about. The Accord, in its explanatory note, talks about three stages and two constitutions: the 'Transitional Constitution' and 'Permanent Constitution'. The 'Transitional Constitution' is the one the authors of the Accord created by 'harmonising' the 1997 and 1952 constitution and which they added as Annex III. This draft would need declarations of acceptance from the political parties/organisations, civic organisations and from significant personalities before it would gain general legitimacy as a viable alternative text.

Before becoming the Permanent Constitution, this 'Transitional Constitution,' also called the 'Provisional Harmonised Constitution', may be amended by the First Eritrean National Assembly and would need ratification. This is clear from the Accord's part which stated: '[p]ending the ratification of a permanent constitution, the Interim and Transitional Governments shall operate under the Provisional Harmonised Constitution'.¹¹² Importantly, the Accord also stated that the 'First Eritrean National Assembly shall have the authority to ... *amend the Provisional Harmonised Constitution, which shall be ratified to become a Permanent Constitution*'.¹¹³

4.3 Distinction between adopting and amending a constitution

The first part of this chapter discussed the extent of changes permitted by way of amendment. Under the Eritrean Accord, there is no obligation placed on the First Eritrean National Assembly to convene and consider amendments. Although it was possible and logical for the Accord to obligate the Assembly to re-consider certain parts of the Provisional Harmonised Constitution, there are no highlighted provisions for amendment. Article 63 of the Harmonised Constitution or article 59 of the 1997 Constitution will govern the amendment process. According to these provisions, a proposal for the amendment of any provision of the Provisional Harmonised Constitution can be initiated and tabled by the President or 50 per cent of all members of the National Assembly. Any provision of the Constitution can be amended where the National Assembly by a three-quarters majority vote of all its members proposes an amendment with reference to a specific article of the Constitution tabled to

¹¹² Mukhtar (n 107 above) 11.

¹¹³ As above (emphasis added).

be amended and where, one year after it has proposed such an amendment, the National Assembly approves this amendment by a four-fifths majority vote of all its members.

When it comes to the debate on the legitimacy of the 1997 Constitution, arguments go along two lines: discontent with the (1) process and (2) substance of the Constitution. For those who did not accept the 1997 Constitution on the basis of some of its content, article 59 is the most important argument they should have raised. Surprisingly, none of those who took issue with the 1997 Constitution based on its contents raised article 59. Even the authors of the Harmonised Constitution have not touched upon article 59.

As already noted, the issue with article 59 of the 1997 Constitution – now, article 63 of the Harmonised Constitution – is the fact that ‘no legal rules in the Constitution enjoy a higher status than the rules for its own amendment’, the reason being that ‘these rules specify the conditions under which all other constitutional rules may be changed’.¹¹⁴ Indeed, a constitution is a legal formula which can be equated as the whole content being equal to the provision on amendment. The 1997 Constitution is highly entrenched. As a result, those who did not participate in its making and oppose the substance of the Constitution should have been arguing that they would be in a weaker position to effect changes by way of amendments than they would have been in writing a new constitution. Thus, those excluded from the process may want to take their chances with a new process.

In general, minorities favour a highly entrenched constitution. The assumption is that in the process they have been successful in cementing their interests to the constitution and by applying to them, or to the entire constitution, a very difficult amendment procedure. To effect any amendment of the 1997 Constitution and the Harmonised Constitution, an 80 per cent supportive vote of all members of the national legislature is needed. In a genuine and pluralist society, getting 80 per cent majority in the National Assembly may indeed be quite difficult. Thus, of those who claim to be dissatisfied with the 1997 Constitution, the main argument should have been the entrenched nature of that Constitution.

Having pointed out the entrenchment of the 1997 and the Harmonised Constitution, it is important to consider the other side of the argument. If it is difficult to obtain 80 per cent of the Parliament, the required majority for an amendment, what guarantee do minorities have that they would succeed in addressing their interests through a new constitution-making process? International human rights law could guide the content of constitutions in the sense that new constitution-making processes can be

¹¹⁴ Amar (n 8 above) 1102.

held to be in conformity with international law, particularly human rights treaties the state concerned has accepted. Yet, those matters which international human rights law does not regulate are left to the political process. The implication of this is that, in the absence of consensus, states could rely on a relative majority decision to adopt any position they want.

Therefore, it is almost inevitable that adopting or ratifying a constitution needs the support of the majority. A referendum gives an opportunity equally to all rational and irrational individuals, while a smaller body – a constituent assembly – could be better informed and more rational. In any case, unless resort is made to consensus, a majority formula is needed. Consensus is a distant ideal that has been eluding many communities, including Eritreans.

The changes that can be introduced by way of amendment have already been mentioned in the first part of this chapter. With regard to the Eritrean Accord, the 'First Eritrean National Assembly shall have the authority to ... amend the Provisional Harmonised Constitution, which shall be ratified to become a Permanent Constitution'.¹¹⁵ Authority is not the same as obligation; power is not the same as duty. To amend or not to amend the Provisional Harmonised Constitution hinges on the authority of the First Eritrean National Assembly, on the basis of an 80 per cent majority vote.

One apparent question is what can happen if the Assembly fails to obtain the required 80 per cent. This is a pertinent question, as it would most probably fail to get it. For the Provisional Harmonised Constitution to become the Permanent one, with or without amendment, it needs ratification and it seems reasonable to argue that since the term of the First Eritrean National Assembly is for one year, by the end of its term, it must submit the Provisional Harmonised Constitution, with or without amendment, to the ratifying body. In case the First Eritrean National Assembly fails to effect amendment due to the 80 per cent majority requirement or because it concludes the Provisional Harmonised Constitution does not need any amendment, there will not be any problem.

On the other hand, the question may be posed whether there would be any problem if the Assembly, by way of amendment, introduces a totally new constitution or change the Provisional Harmonised Constitution substantially. Even though it is difficult to provide a definitive answer without considering the specific context, based on the discussions in the first part of this chapter, the answer could be 'no' because there is a limit to the extent of change the amendment allows. However, issues of this nature are better left to a court of reason. In this regard, the important question is: Would Eritrean politicians abide by the decisions of a court?

¹¹⁵ Mukhtar (n 107 above) 11.

According to the Eritrean Accord, it is the act of ratification by an unknown body that would bring a permanent constitution to Eritrea. It is clear that it is the Harmonised Constitution, with or without amendment, that would be presented to the ratifying body. Courts have held that the extent of changes permissible under an amendment is limited but there is no guideline on the extent of changes the ratifying body could affect. There is not much writing on the meaning of 'ratification'. According to one online legal dictionary 'ratification', which is a noun, is a 'confirmation of an action which was not pre-approved and may not have been authorised, usually by a principal (employer) who adopts the acts of his/her agent (employee).' To ratify is 'to confirm and adopt the act of another even though it was not approved beforehand.' The word 'adopt' is sometimes used in place of the word 'ratify'. The same dictionary defines the term adopt as a verb which means 'to accept or make use of, such as to adopt another party's argument in a lawsuit'.¹¹⁶ Even though the definitions talk about acceptance, they do not bar acceptance with changes.

In the context of the constitution-making process, the usual practice is to employ a small body, often called a constitutional commission, which does the drafting. At a time the people are considered to be sovereign, ratification or adoption of constitution either by a way of a referendum or by a representative body of the people is a common practice. Changes are made during the ratification process but no systematic study has been done to give us the extent of change that is considered acceptable. However, there are some indications that it should be very minimal.

4.4 Opposition politicians and living with an independent judiciary

A positive aspect of the transitional provisions provided in the Eritrean Accord was that there would be an independent judiciary headed by the Chief Justice of the Supreme Court who would be appointed by the President and approved by the Interim National Assembly. However, the Court was not expressly given transitional powers, based on the Provisional Harmonised Constitution, to settle any dispute related to the transition. A dispute-resolving judicial branch has been missing almost in every political party or organisation including in the Charter of the Eritrean Democratic Alliance – an umbrella organisation of more than one dozen political parties. Indeed, it is surprising that an initiative primarily intended to avoid conflicts in a power vacuum-type of situation misses this point.

The South African experience of transition creatively brought into existence a Constitutional Court with binding authority. This Court was

¹¹⁶ See <http://dictionary.law.com/>.

empowered to ensure that the final Draft Constitution incorporated the 34 Constitutional Principles which political forces had agreed on in advance. Some may say that an adjudicative body is not fit for such a role in a political process. However, 'the constitutional principles were essentially political agreements among parties bringing an end to conflict ... To make matters worse, a fair number of the thirty-four principles could be interpreted in various ways'.¹¹⁷ The omission of a similar procedure in the case of the Eritrean Accord is indicative of an opposition that seems to pay only lip service to fundamental principles of democracy.

Despite the constant posturing, modern day Eritrean politicians have diminished the profound principle of rule of law that appears deeply rooted in the many pre-colonial customary laws of Eritrea. The fact that many of the civil society organisations and the political parties rarely follow their foundational documents reinforces the pessimism. The ignorance of providing a role to the judiciary by the Accord is additional evidence. However, the Accord states that '[p]ending the ratification of a permanent constitution, the Interim and Transitional Governments shall operate under the Provisional Harmonised Constitution'.¹¹⁸ Also, in the Provisional Harmonised Constitution, there is a Supreme Court with powers of judicial review. Thus, one can be optimistic that if a dispute arises and if resolution through dialogue fails, the politicians would resort to the Supreme Court.

Now, suppose the transition envisaged by the Accord has just taken place and the National Assembly has established a constitution-drafting commission and has set the stage for a fresh constitution-making process. Then, suppose one party petitioned the Supreme Court seeking an injunction of the Assembly which, according to the party's argument, has transgressed its transitional mandate of amending the Provisional Harmonised Constitution. Relying on various scholars discussed in the first part of this chapter, the party may argue that amending a constitution is not writing a new one. Suppose the Supreme Courts agreed with the argument and gives the injunction. To take another assumption, suppose the Supreme Court was unimpressed by the definitions of amendment. Rather, the Court may opt to give more weight to the intention of the authors of the Accord and the various organisations which ratified the Provisional Harmonised Constitution. The intent of the legislature is difficult to find but suppose the Court did rule that a new constitution-making process is what was intended. It is likely that many Eritreans have little faith that the opposition politicians now advocating for rule of law and independence of the judiciary will respect the projected judgments.

¹¹⁷ H Ebrahim & LE Miller 'Creating the birth certificate of a new South Africa: constitution-making after apartheid' in Miller & Aucoin (n 99 above) 140.

¹¹⁸ Mukhtar (n 107 above) 11.

5 Conclusion

The UN wrote the first Constitution for Eritrea, making certain provisions non-amendable. The Ethiopian factor and the fact that a considerable number of Eritreans paid lip service to the modern constitutional democracy are the main factors responsible for the abrogation of the 1952 Constitution despite its non-amendable provisions. The fate of the 1997 Constitution is a typical case of freedom fighters turned into deniers of freedom, of which Africa has regrettably seen many. The Eritrean case is slightly different in the sense that the transitional government has not tried to establish even a sham constitutional government. Instead, the government opted to completely disregard the fact that a Constitution was ever made.

Opposition politicians are often not in the best position to accord blame and shame. They are advocates for the rule of law and constitutionalism, but the records on these areas inside their organisations are far from positive. Their first act of lip service to the rule of law was their rejection of the 1997 Constitution, as well as the 1952 Constitution, on the basis that the process of adoption was not to their liking. Under the present circumstances, my view is that the most strategic option open to the opposition is to hold the incumbent government to its constitutional commitments. In this regard they could count on the support of the international community. Instead, opposition politicians, in exile are insisting on writing a new constitution. The Eritrean Accord came as a sensible suggestion even though it missed a great diplomatic advantage in not taking the 1997 Constitution as it is for the transitional period. There are several areas in which the opposition's commitment to constitutionalism would be tested. These include understanding the difference between the majorities needed to adopt and amend a constitution, on the one hand and respecting the independence of the judiciary, on the other.

CHAPTER 5

CONSTITUTIONALISM AND CONSTITUTIONAL REFORMS IN GHANA

Kofi Quashigah

1 Introduction

To a large extent, the constitutional history of Ghana represents the continuous struggles of a people to actualise, through constitutional reforms, the basic elements that are the foundation for the realisation of constitutionalism. Constitutionalism, according to Friedrich,¹ implies limited government and the division of power as basic elements.

This chapter will examine how, through various constitutional reforms, the essential elements of constitutionalism came to be imbibed into the constitutional psyche of Ghana. The chapter will be structured along three periods: the immediate post-independence period to the eve of the 1992 Constitution; the 1992 Constitution; and the efforts being made towards the reform of the 1992 Constitution through the Constitution Review Commission.²

2 The period between independence and the eve of the 1992 Constitution

2.1 The search for an acceptable executive system

The executives in Africa hold a significant position in the schemes of governance in the various countries. The nature of African economies

¹ CJ Friedrich *Limited government: A comparison* (1974) 13-14 in MB Thompson & M Allen *Cases and Materials on constitutional and Administrative law* (1990) 13.

² In 2010, the Government by Constitutional Instrument appointed a Constitution Review Commission which was charged with the duty of gathering information from the generality of Ghanaians and accordingly proposing changes to the 1992 Constitution. The said Commission completed its work and submitted a report the Government on 20 December 2011. On June 2012 the Government issued a White Paper expressing its position on the recommendations made.

makes the state a dominant player in the economic life of the people and therefore a significant force to contend with. Control of the executive branch necessarily entails control of the economic wealth of the nation. This fact hampers constitutionalism because the executive is able to manipulate and may easily render the limiting powers of the other organs of government and constitutional institutions ineffective.

In Ghana the executive has been identified as the organ that must be controlled for constitutionalism to become the hallmark of the political system. Constitutional reform in post-colonial Ghana has therefore been focused essentially on the design of structures that would reduce the inherent dominance of the executive and therefore guarantee constitutionalism.

The evolution of the governmental system in Ghana has been essentially a story of the various metamorphoses of the executive branch of government. Ghana is a former British colony. The colonial period was one of subordination: the government was not responsible to the people but to the Colonial Administration acting on behalf of the Queen – the Monarch. Constitutionalism had no relevance because the Queen ruled at her own pleasure. As a former British possession, Ghana was ushered into independence under the Westminster parliamentary model. As a consequence, some basic structures and principles that underlay the British constitutional system and which were consequences of British history were infused into the parliamentary system under the 1957 Constitution.

At independence the government of Ghana became what could be described as a *responsible* and *representative* government. The government became responsible because the executive was now answerable to the people through their representatives in Parliament and Parliament came to have the power to question the executive on all matters. It was representative because Parliament came to be composed only of elected members representing the interests of the people.

The 1957 Independence Constitution was parliamentary in nature. Even though Ghana had become independent on 6 March 1957, the Queen of England remained the Head of State. The executive power of Ghana was vested in the Queen, to be exercised by her or by the Governor-General as her representative.³ There was a Cabinet of Ministers headed by a Prime Minister and the Cabinet was to be collectively responsible to Parliament.⁴ The Prime Minister was the head of government. In line with the parliamentary system the executive was responsible to Parliament.

As Prime Minister under the 1957 Constitution, Dr Nkrumah could best be described as restive. Almost immediately dramatic reforms that

³ The Ghana (Constitution) Order in Council 1957 art 6.

⁴ The Ghana (Constitution) Order in Council 1957 art 7(1).

were designed to give more powers to the executive were initiated. At first was the Constitution (Repeal of Restrictions) Act 1958, which repealed paragraph 6 of the first schedule of the Independence Constitution. In terms of section 32 of the Independence Constitution a two-thirds majority of the Regional Assemblies must consent to any proposed amendment. With its majority in Parliament the government had no difficulty in securing the required two-thirds majority.⁵ It was alleged that in the course of the debate on the Bill to amend the Constitution, the opposition in Parliament cautioned that 'the repeals would mean that the Constitution could thereafter be amended by an ordinary Act of Parliament rushed through in one day ...'.⁶ Ironically, this power of Regional Assemblies to influence amendments was instead manipulated to abolish the Regional Assemblies themselves.

In 1960 steps were taken to change the status of the nation from a constitutional monarchy to a republic. The 1960 Constitution therefore changed the country into a republic; Ghana ceased to be headed by a monarch in whom resided sovereign authority and instead the people became sovereign. At the same time the 1960 Constitution changed the parliamentary system of government to a presidential system.

The rationale for the reform and establishment of the Republic was stated as the vesting of sovereign authority in the people.⁷ It was, however, also clear that the reform was intended to further loosen the hands of Parliament and hence the opposition from their control of the executive. During the debate on the proposal for the introduction of the presidential system, Mr Karbo⁸ expressed the following prophetic view:⁹

It was because of this power of veto that this country fought for independence. In fact, we rejected the idea of giving one man the right of veto over the will of Parliament. People are saying because we are Ghanaians we should have nothing to fear. But Ghanaians are human beings in the same way as whites; and what is more, human nature is the same. A dictator is a dictator whether he is black or white. Dictatorship results from misdirection of power or entrusting too much power in the hands of one man. It is the very dictatorship against which we fought that we are creating by these proposals.

The ostensible reasons for the reform of the 1957 Constitution were blatantly displayed in some of its own provisions. For example, article 8(4) of the 1960 Constitution read as follows:

⁵ FAR Bennion *The Constitutional law of Ghana* (1962) 69.

⁶ Bennion (n 5 above) 70.

⁷ The Constitution of the Republic of Ghana 1960, article 1.

⁸ Member of Parliament for Lawra Nandom.

⁹ Proceedings of the Constituent Assembly, Official Report 14 March -29 June 1960 30.

Except as may be otherwise provided by law, in the exercise of his functions the President shall act in his own discretion and shall not be obliged to follow advice tendered by any other person.

Obviously, by his policies and actions President Nkrumah was a person in a rush to transform Ghana and Africa and the presidential system was regarded as a better tool to serve this purpose. However, reform in this case that was intended to strengthen the hands of the President for the speedy development of the country became an easy route to dictatorship.

In 1964 the government pushed through a constitutional amendment, the Constitution (Amendment) Act, 1964, Act 224, which provides in part as follows:

IA. (1) ... there shall be one national party which shall be the vanguard of the People in their struggle to build a socialist society and which shall be the leading core of all organisations of the People.

(2) The national party shall be the Convention People's Party.

Section 6 of the same Act provides further that

... the President may at any time for reasons which to him appear sufficient remove from office a Judge of the Supreme Court or a Judge of the High Court.

The amendment changed Ghana into a single-party state, as one could belong to only one political party, the Convention People's Party (CPP) led by President Nkrumah. In addition, the President was given power to appoint and remove judges as he desired. Nkrumah also became President for life. All these extensive changes removed the limitations that were prerequisites for the existence of constitutionalism.

The analysis of these changes makes it clear that the reforms of the Nkrumah period were directed at loosening the control of the Constitution over the executive. It was these changes that strengthened the hands of President Nkrumah, thus making it possible for him to impose absolute rule. Nkrumah had been most often described as a dictator but the truth of the matter was that the various changes that increasingly conferred the extensive powers on him were constitutionally acquired. The 1960 and 1964 period provides a clear example of a system with a Constitution but without constitutionalism.

2.2 Protection of fundamental human rights and freedoms

One very important element of constitutionalism is the need for the guarantee of fundamental human rights and freedoms. The 1957 Constitution and also the 1960 Constitution contained no elaborate provisions on fundamental human rights. The closest provision was article

13(1) in the 1960 Constitution that required the President, upon assumption of office, to declare his adherence to certain fundamental principles.

Article 13(1) described in its side note as 'Declaration of Fundamental Principles', reads as follows:

Immediately after his assumption of office the President shall make the following solemn declaration before the people

On accepting the call of the people to the high office of President of Ghana, I solemnly declare my adherence to the following fundamental principles

That the powers of Government spring from the will of the people and should be exercised in accordance therewith.

That freedom and justice should be honoured and maintained.

That the union of Africa should be striven for by every lawful means and, when attained, should be faithfully preserved.

.....

That subject to such restrictions as may be necessary for preserving public order, morality or health, no person should be deprived of freedom of religion or speech, of the right to move and assemble without hindrance of the right to access to courts of law.

That no person should be deprived of his property save where the public interest so requires and the law so provides.

Article 13 was complemented by the Preventive Detention Act of 1958 (PDA).

In 1958, a Bill that sought to permit the executive to arrest and detain any individual without trial was introduced into Parliament. It was heavily challenged in Parliament but in response to this concern, a leading member of government was alleged to have retorted that 'the same position obtained in Britain'.¹⁰ Thus, despite the arguments and fears expressed against it by the opposition in Parliament, the Bill nevertheless secured the requisite majority for approval. The PDA was therefore passed but it became an exceedingly dangerous weapon in the hands of the government for oppressing both real and perceived enemies of the regime. Many opposition political figures and ordinary individuals were arrested and thrown into jail and many remained there until the military *coup d'état* of 1966, which removed the Nkrumah government from power.

¹⁰ As above.

The extent of article 13 and the PDA were tested in the case of *Re Akoto*.¹¹ The facts of that case illustrate the importance of separation of powers and respect for the rule of law, which are two essential elements for constitutionalism. In that case the appellants were arrested and detained under the Preventive Detention Act. The Act permitted the executive to arrest and detain without trial for up to a period of five years. The applicants were arrested and detained without trial under the PDA. Counsel for the applicants contended that Parliament acted in excess of its powers to confer the powers of detention without trial on the executive; and that the Act was contrary to the solemn declaration of fundamental principles made by the President on assumption of office. In other words, the contention for the applicants was that it was against the basic principles inherent in the written Constitution of 1960 for Parliament to legislate conferring judicial authority on the executive arm of government. The applicant's counsel further argued that the rights mentioned in article 13(1) would be derogated from in the exercise of the powers of arrest and detention without trial. In its judgment, the Supreme Court rejected those contentions as:¹²

based on a misconception of the intent, purpose and effect of article 13(1) the provisions of which are, in our view, similar to the Coronation Oath taken by the Queen of England during the Coronation Service ... Neither the oath nor the declaration can be said to have a statutory effect of an enactment of Parliament. The suggestion that the declarations made by the President on assumption of office constitute a 'Bill of Rights' in the sense in which the expression is understood under the Constitution of the United States of America is therefore untenable.

The consequence of that decision was that the Supreme Court completely denied the existence of any fundamental rights in the 1960 Constitution. In the *Re Akoto* case the Supreme Court – possibly inadvertently – supported the growth of despotism and the death of constitutionalism in Ghana. The fact that the Supreme Court held that there was no fundamental human rights provisions in the Constitution to be enforced lent constitutional support to the PDA and therefore derogated from the principle of constitutionalism.

With the PDA in place, the stage was set for a *de facto* single-party system. All opposition party leaders were either thrown into prison or hounded out of the country into exile. Open political dissent was stifled and therefore went underground, resulting into a number of bomb attacks directed at Nkrumah.

It is also worth mentioning that the 1964 constitutional amendments that invested the President with the power to appoint and remove judges

¹¹ [1961] 2 GLR 523 (2D).

¹² 2 G & G 579 593 (2(d)).

was in reality a sequel to and intended to reverse the decision of the Supreme Court in the case of *State v Otchere and Others*.¹³ The facts of the case were that a bomb attempt was made on President Nkrumah's life at Kulungugu in the northern part of the country, for which the accused persons were allegedly responsible. Based on the evidence before it the Court found the first and second accused guilty and convicted them, but held the third, fourth and fifth accused persons not guilty for lack of convincing and credible evidence connecting them to the crime. Nkrumah was outraged at the acquittal of the three and accordingly the Convention People's Party (CPP) government in 1964 engineered the amendments to the Constitution to remove some constitutional limitations that should hold the government in check. Nkrumah therefore proceeded under the 1964 amendments to remove the judges, which included the then Chief Justice who sat on the *Otchere* case, from office. Another court was subsequently reconstituted, which re-tried the three accused and found them guilty.

Even if President Nkrumah is considered a great leader on the basis of some of his accomplishments, the period of the first republic cannot qualify as a period of constitutionalism. The amendments of the Constitution in 1964 confirmed the *de facto* situation. The Nkrumah government was removed in a *coup d'état* on February 1966 and was replaced with the military government of the National Liberation Council (NLC).

2.3 The 1969 constitutional period

The NLC committed itself to a return to civilian administration but under a reformed constitutional arrangement that would avoid the experiences of the immediate post-independence period. The experiences under the Nkrumah regime therefore informed the structures put in place under the 1969 Constitution. The 1969 Constitution was fashioned to prevent a repeat of the exercise of unbridled political power that had characterised the Nkrumah regime.

The Constitutional Commission established by the National Liberation Council to produce a proposal for a new Constitution was tasked specifically to achieve the following:¹⁴

- (a) ensure the inclusion in the Constitution for Ghana of a provision which will guarantee that so far as is consistent with good government, the Executive, Legislative and Judicial powers of the State shall be exercised by three separate and independent organs;
- (b) ensure that the said Constitution contains a provision guaranteeing the enjoyment by every individual in Ghana of the maximum freedom within the

¹³ [1963] 2 GLR 463 (2D).

¹⁴ Bennion (n 5 above) 2.

law consistent with the rights of others also with the security of the State and with the requirement of public order and morality and with the welfare of the people of Ghana as a whole and that the said Constitution provides an effective machinery for the protection of such freedom from violation by the State or by any other body or person; and

(c) ensure in particular, under and subject to the provisions of sub-paragraph (b) of this paragraph, that the said Constitution guarantees the enjoyment of every individual in Ghana of the following freedoms,

- (i) freedom of opinion and expression,
- (ii) freedom of assembly and association,
- (iii) freedom from arbitrary arrest and detention, and
- (iv) freedom of thought, conscience and religion.

Obviously the objective was to eventually prepare the ground for a constitution that would guarantee constitutionalism. The resulting 1969 Constitution was indeed far superior in its endeavour to limit the powers of governance than its predecessors.

Without necessarily putting it in express words, the evolution of the arbitrary system of government under President Nkrumah was to a large extent blamed on the presidential system that was introduced in 1960. In formulating the draft of the 1969 Constitution the draftsmen proceeded on the belief that 'with the experience of tyranny and oppression so fresh in the minds of the people of Ghana, Ghanaians were determined to ensure that never again would the political sovereignty of our country be allowed to reside so precariously in one man'.¹⁵ The motivating philosophy of the 1969 Constitution was, as stated, to 'establish the sovereignty of the people and the rule of law as the foundation of our society and which shall guarantee freedom of thought, expression and religion, justice – social, economic and political, respect for the dignity of the individual and equality of opportunity for all citizens'.¹⁶ The 1969 Constitution was therefore undoubtedly crafted to avoid a recurrence of the unlimited system of governance as was experienced under the Nkrumah administration.

With the prime objective of creating a constitutional system that would end arbitrary rule the Constituent Assembly set as its goal the infusion of certain basic principles into the Constitution. Among these principles were the need to reconcile the supremacy of the Constitution with the sovereignty of the people and implying therefore that the welfare of the people should be the supreme law and that 'the individuals who form the body politic of Ghana should be elevated above the state'.¹⁷

¹⁵ Akufu-Addo Report 2-3.

¹⁶ The Proposals of the Constitutional Commission for the Establishment of a Transitional (Interim) National Government for Ghana (1978) 10-11.

¹⁷ Akufu-Addo Report 21.

Article 1 of the 1969 Constitution vested the sovereign authority of the state in the people and in terms of article 2(1) the Supreme Court was open to any person who alleged that an enactment or anything contained in or done under the authority of the enactment was in contravention of any provision of the Constitution. The Supreme Court could make a declaration of unconstitutionality and in addition could make such orders and give such directions as it deemed appropriate.

The Constitution in very clear terms prohibited Parliament from passing a law to establish a one-party state and further declared that any activity of persons or groups of persons that sought to suppress lawful political activity of any other person or class of persons would be an unlawful act.¹⁸ These provisions were obviously aimed at ameliorating the consequences of the 1964 Constitutional Amendment provisions discussed above.

Chapter 4 of the Constitution constituted an elaborate provision of fundamental human rights, from articles 12 to 27, protecting individual rights including life, liberty, freedom of conscience, freedom of expression, protection of the privacy of home, correspondence and property. These provisions were entrenched under article 169 of the Constitution and were therefore made subject to a very rigorous amendment procedure. Article 28 further conferred jurisdiction on the High Court to hear and grant redress to anyone who proved that his or her rights contained in articles 12 to 27 have been infringed upon. This was obviously in reaction to the experience of the PDA and the decision in the *Re Akoto* case.

Other features of the 1969 Constitution that were directed at establishing a system of constitutionalism included an independent Electoral Commission. Also to avoid an overly powerful executive, a parliamentary system was introduced with a President, but a Cabinet headed by a Prime Minister was also created and charged with the responsibility to 'determine the general policy of the Government and [to] collectively be responsible to the National Assembly'.¹⁹

The 1969 Constitution was, without doubt, intended to redirect the country's governance system along democratic lines. Unfortunately, however, barely a few years into its life – in 1972 – it was abrogated in another military *coup d'état*.

2.4 The incidence of military *coups d'état*

In 1966, 1972, 1979 and 1981 successful military *coups d'état* were staged to abrogate the existing constitutions. Military regimes were an aberration of

¹⁸ Art 3(1)(2).

¹⁹ Art 61(2).

the idea of constitutionalism. The military came to power outside the constitutionally mandated process of succession to office. They were therefore not constrained by any law. Even the judiciary became shackled and laws were made and applied based on the whims of those who held office under the military regime. These were people who often considered themselves above the law.

It is an inherent feature of the concept of constitutionalism that changes in the leadership of the country must be in conformity with the constitutionally prescribed methods. A military *coup d'état* is definitely not one such method. A military insurgency against a constitutionally installed government is treason. It is for this reason, and to avoid possible prosecution in the future, that the transitional provisions have become regular features in the Constitutions of Ghana since 1969.

A prominent feature of the transitional provisions has been ousting the jurisdiction of the courts to question the constitutionality of the military regimes. The incidence of military *coup d'état* can be viewed as derogatory from the precepts of constitutionalism from two perspectives: First, is the very fact of the destruction of the Constitution which is the bedrock of constitutionalism, and second, military administrations are by their nature of ascension into office and mode of operation not susceptible to control or limitation.

Some limited attempts were made by some courts to compel the military regimes to stick to their own prescribed procedures. In the case of *Ex parte Bannerman*,²⁰ for example, the Court held that the NLC was limited in the exercise of its powers to conform to the requirements of the NLC Proclamation. In *Ex parte Salifu*,²¹ the Court held the military administration to be bound by the prescribed method of legislation that it had set for itself. In the case of *Ex parte Braimah*,²² however, the Court frowned upon the discretionary powers given to the Attorney-General to extend the period of detention of a person in custody pending trial. The Court could only frown upon the magnitude of that discretion but had no choice but to uphold the exercise of the power.

These few instances notwithstanding, military regimes can never be perceived as limitable. Military governments have virtually nothing that limits their operations so as to qualify them for consideration under any discussion on constitutionalism. Military regimes have the following

²⁰ 2G & G 293.

²¹ 2 G & G 374 & 378.

²² [1967] GLR 192.

consequences for constitutionalism:

- The Constitution is abrogated. The benefits of limitations imposed by the constitution are therefore lost.
- The concept of separation of powers has no place in military administrations
- The rule of law gives way to arbitrary rule
- The independence of the Judiciary is compromised; judges could be removed from office without following accepted standards. Judges could be removed even by radio announcement
- Fundamental human rights are no longer guaranteed
- The media becomes subjected to undemocratic controls
- The rights of citizens to freely elect their representatives is lost under military regimes

Military regimes are indeed anathema to constitutionalism. In the subsequent 1979 and 1992 Constitutions, therefore, courageous insertions were made to criminalise unconstitutional abrogation of the Constitution.²³

2.5 The 1979 Constitution

After years of military rule, a Constitutional Commission was put in place in 1978 to draft a new constitution to replace the 1969 Constitution. In a reversal of the Akufo-Addo Commission's position, the 1978 Commission cast doubts on the usefulness of the parliamentary system. The latter Commission based its new perception on the perceived workings of the parliamentary system during the 1969 constitutional period. The 1978 Commission therefore came to the conclusion that 'the parliamentary system of government – with its necessary fusion of legislative and executive power in the Cabinet and their near-complete subordination of the legislature to the control and direction of the executive – is unsuitable for Ghana'.²⁴ The presidential system was therefore recommended and eventually accepted for inclusion in the 1979 Constitution.

The 1979 Constitution retained the essentials for constitutionalism such as an entrenched chapter on fundamental human rights and an independent judiciary. The 1979 Constitution was also short-lived since it was abrogated in 1981 through a military *coup d'état* led by Flight Lt Rawlings. Ghanaians came to perceive military *coups d'état* as perhaps the gravest danger to constitutionalism.

²³ Discussed below.

²⁴ n 16 above, 18.

3 The 1992 Constitution

3.1 Supremacy of the Constitution

Flight Lt Rawlings and his Provisional National Defence Council (PNDC) government stayed in power and ruled by Decrees promulgated at its discretion from 1981 until pressure was brought to bear on the government to consider a return of the country to constitutional rule. In the consideration of the 1992 Constitution the significant role that civil society organisations played in its birth cannot therefore be forgotten. When the demands of civil society for a constitutional system of government could no longer be ignored the then government set in motion the process for the return of the country to civilian rule.

The 1992 Constitution was the product of the experience of several years of constitutional and military rule in Ghana. It has the expressed intention of institutionalising constitutional rule and therefore constitutionalism. It starts with the Preamble, in which it is stated that 'We the people ... in exercise of our natural and inalienable right to establish a framework of government which shall secure for ourselves and posterity the blessing of liberty, equality of opportunity and prosperity ...'. The people are sovereign, a principle further concretised in article 1(1) of the Constitution. Article 1(2) declares the Constitution as the supreme law of Ghana and provides that the Supreme Court has the power to 'make such orders and give such directions as it may consider appropriate for giving effect or enabling effect to be given, to the declaration so made'.²⁵ Failure to obey such order or direction constitutes a high crime under the 1992 Constitution and if it relates to the President or the Vice-President the consequence shall be removal from office.²⁶

The 1992 Constitution therefore came in as a constitution that was intended to operationalise the concept of constitutionalism. Article 1 proclaims the supremacy of the Constitution: All actions of government and laws must be carried out in conformity with the provisions of the Constitution. This new Constitution was based on the basic principles of the rule of law, separation of powers, republicanism and also presidentialism. An elaborate provision is also made for the protection of human rights.

Also, in order to remove the incessant threat of military *coup d'état*, the 1992 Constitution reinforced the earlier effort made in the 1979 Constitution to constitutionally protect the life of the new constitution

²⁵ 1992 Constitution art 2(2).

²⁶ 1992 Constitution art 2(4).

against military adventurism. In the 1979 Constitution, a limited attempt at the proscription of *coup d'etat* is provided for in article 1(3):

All citizens of Ghana shall have the right to resist any person or persons seeking to abolish the constitutional order as established by this Constitution should no other remedy be possible.

This provision was extensively strengthened in the 1992 Constitution; the relevant parts of article 3 provide in detail as follows:

- (3) Any person who –
 - (a) by himself or in concert with others by any violent or other unlawful means, suspends or overthrows or abrogates this Constitution or any part of it, or attempts to do any such act; or
 - (b) aids and abets in any manner any person referred to in paragraph (a) of this clause, commits the offence of high treason and shall, upon conviction, be sentenced to suffer death.
- (4) All citizens of Ghana shall have the right and duty at all times –
 - (a) to defend this Constitution, and in particular, to resist any person or group of persons seeking to commit any of the acts referred to in clause (3) of this article; and
 - (b) to do all in their power to restore this Constitution after it has been suspended, overthrown, or abrogated as referred to in clause (3) of this article.
- (5) Any person or group of persons who suppresses or resists the suspension, overthrow or abrogation of this Constitution as referred to in clause (3) of this article, commits no offence.
- (6) Where a person referred to in clause (5) of this article is punished for any act done under that clause, the punishment shall, on the restoration of this Constitution, be taken to be void from the time it was imposed and he shall, from that time, be taken to be absolved from all liabilities arising out of the punishment.
- (7) The Supreme Court shall, on application by or on behalf of a person who has suffered any punishment or loss to which clause (6) of this article relates, award him adequate compensation, which shall be charged on the Consolidated Fund, in respect of any suffering or loss incurred as a result of the punishment.

The implications of these provisions are very profound for constitutionalism: Simply put, Ghanaians have made it clear that no matter what the threats might be, military take-overs are totally prohibited. Any unconstitutional assumption of political office would forever remain a treasonable act and punishable, no matter how long it takes, upon the return or the reinstatement of the Constitution. As can be deciphered from article 3(4), all citizens have both a right and a duty to at all times endeavour to resist any one who attempts to or succeeds in interfering with the Constitution.

This provision came up for consideration in the case of *Rosemary Ekwam v Kwame Pianim*.²⁷ The 1992 Constitution disqualifies an individual who has been convicted of treason from campaigning for: election to Parliament; or the position as President of the Republic. During the period of the PNDC military rule, Mr Pianim was convicted of treason in relation to an attempt to overthrow that government. He was imprisoned but pardoned after serving some years in prison. In 1996 Mr Pianim's bid to present himself for selection as presidential candidate for his political party and to campaign for the position of President in the forthcoming elections was challenged in the Supreme Court and he was disqualified from putting himself forward for consideration as a presidential candidate. In his defence Pianim invoked article 1(3) of the 1979 Constitution. However, the Supreme Court held that at the time of his action the 1979 Constitution was not in force and the PNDC military administration was fully in control. What is of interest is that at least one of the justices expressed the opinion, though *obiter*, that the position could have been different if he were proceeding under the 1992 constitutional provisions. It is worth quoting Justice Adjabeng's opinion in detail which is as follows:²⁸

The fact is that both at the time of the alleged commission of the offence and at the time of the conviction of the defendant, the 1979 Constitution had been suspended by those who had overthrown the said Constitution and the government formed thereunder. So the reality was that even though article 1(3) of the 1979 Constitution gave the right to every Ghanaian citizen 'to resist any person or persons seeking to abolish the constitutional order as established under this constitution,' this right could not be exercised simply because the Constitution which gave that right had been suspended. Whether it was legally right or not to suspend it is not for us to say here. I think that is now history. It is clear, therefore, that it could not have been rightly argued at the time that preparing to overthrow the PNDC Government was an act punishable under the 1979 Constitution. It would even have been suicidal to so argue having regard to the atmosphere at the time. *I do not, however, think that the position will be the same now. With the re-enactment and expansion, in article 3(4), (5), (6) and (7) of the present Constitution, the right given in article 1(3) of the 1979 Constitution, I think that the position would be different if the defendant were to be tried now of the same offence.*

Thus in view of the 1992 constitutional provision any abrogation of the Constitution will forever remain a punishable offence and citizens have both a duty and a right at all times to endeavour to restore the Constitution in case it is abrogated.

²⁷ [1996-97] SCGLR 120.

²⁸ [1996-97] SCGLR (n 27 above) 145-6 (emphasis added).

3.2 The guarantee of public elections

One other feature of the Constitution worth noticing is that ascension to political office is through the electoral process. The government and members of the legislature are elected by the electorate at regular intervals. The President's term is limited to two terms of four years each and he or she must secure more than fifty percent of the total number of votes cast. The need to seek re-election through regularly conducted free and fair elections is a necessary element of constitutionalism. From the experience of the reality of a 'president for life' under President Nkrumah, that notion has become anathema in Ghanaian politics.

3.3 Human rights and fundamental freedoms

Chapter 5 of the Constitution guarantees fundamental human rights and freedoms. Significant among them are the right to personal liberty and freedom of expression and assembly. The experience of the people under various kinds of governments, particularly during the period of the Preventive Detention Act and also under the military regimes, led to the formulation of article 14 which provided specifically the various reasons for which an individual could be arrested and detained. Any arrest and detention not covered by the provisions of article 14 is unconstitutional.

The Supreme Court gave meaning to the freedom of assembly and demonstration in the case of *New Patriotic Party (NPP) v Inspector-General of Police (Public Order Case) v IGP*²⁹ to the effect that the requirement of a police permit before embarking on a public procession was unconstitutional. That decision triggered the passage of the Public Order Act, 1994, Act 491, which replaced the requirement of a permit with the requirement to just inform the police.

3.4 The judiciary under the 1992 Constitution

The judiciary is an important element in the continuous institutionalisation of constitutionalism. The 1992 Constitution guarantees the independence of the judiciary; it is expected to protect conformance with the letter and spirit of the Constitution. Under the 1992 Constitution the Supreme Court handed out some judgments that could deepen constitutional rule and therefore constitutionalism. Examples include the following cases: *New Patriotic Party (NPP) v Inspector General of Police (Public Order Case)*,³⁰ *NPP v GBC*,³¹ *NPP v Attorney-General* (31st

²⁹ (2001) AHRLR 138 (GhSC 1993) 459.

³⁰ As above.

³¹ n 29 above, 354.

December Case)³² and *New Patriotic Party v Attorney-General (CIBA Case)*.³³ The *31st December* case in particular calls for deeper reflection. The facts of that case are that on 4 June 1979, Flight Lt Rawlings staged a military *coup d'état* and took power from the then ruling military government. He handed over power to President Hilla Liman who was elected into office under the 1979 Constitution. Barely two years after that, on 31 December 1981, he staged another *coup d'état* and abrogated the 1979 Constitution. He stayed in power until January 1992 when he won the first election conducted under the new 1992 Constitution. Subsequently, he sought to celebrate 31 December as a national public holiday. The main opposition political party, the New Patriotic Party (now known as the National Patriotic Party), filed an action in the Supreme Court contending that applying public funds to celebrate an event that derailed the democratic system under the 1979 Constitution was unconstitutional. The Supreme Court held that the celebration of 31 December as a public holiday would derogate from the spirit of the 1992 Constitution which upholds constitutional sanctity, democracy and the rule of law.

It is believed that a robust interpretation of the Constitution by the Supreme Court is a necessary means of guaranteeing constitutionalism and making possible a silent and consistent reform of the Constitution in line with the ever changing conditions of life. Under the 1992 Constitution the Supreme Court has adopted a purposive approach to the interpretation of the Constitution to assist the Constitution to grow and keep pace with on-going socio-economic changes in the country. According to the purposive approach the judge takes into account the context and values of the constitution in reaching its decision.³⁴

3.5 The legislature

The legislature under the 1992 Constitution is intended to serve as a check on the executive and therefore prevent the inherent potential of the President to be excessively overbearing. The legislature for instance has the authority under article 103(3) to investigate or inquire into the activities and administration of ministries and departments of government. An effective exercise of this power could contain the potential for executive dominance. Parliament could serve as a formidable control institution on the executive but the Constitutional mandate of article 78(1), which states that the President must appoint the majority of Ministers from Parliament, has generated some constraints on its potency.

The requirement that a majority of Ministers should be chosen from Parliament was intended to create a system in which Ministers and

³² [1993-94] 2 GLR 35.

³³ [1996-97] SCGLR 729.

³⁴ *Agwei Twum v Attorney-General & Akwetey* 2 G & G 2573 (2d).

Members of Parliament would sit together and reach decisions that they could all buy into. This system however makes every Member of Parliament from the ruling political party a potential candidate for appointment to a ministerial position. The provision might have been well intentioned but the practice has not borne out that intention.

The consequence is that the degree to which Members of Parliament, particularly those from the majority party, are prepared to perform their oversight function with detachment is affected. It has been argued that Parliament has ceded its powers of control of the executive. Akwetey expressed the following view:³⁵

The Parliament of the fourth republic has shown deep party cleavage in its functioning, with the two major parliamentary parties in particular striving to protect and defend the record, policies and programmes of their respective governments, as well as the integrity of the parent or extra parliamentary party. The majority parliamentary party openly defends the president's policies and programmes as well as the record of government. It operates on the belief that it is the majority party that controls the executive organ of the state. The president's programme is therefore the programme of the parliamentary majority.

Against this background of an apparently divided Parliament, the degree of control that is in principle expected by it on the executive is lacking. Hence the call by some that the Constitution be amended to require the President to pick all Ministers from outside Parliament. The political reform process initiated in 2010 was essential due to the failure to control the executive.

4 Proposed reform of the 1992 Constitution

The qualities of the 1992 Constitution notwithstanding, it became the subject for proposed reforms barely 16 years into its life, on the basis of arguments such as the following:³⁶

Flaws in Constitutional design and practice have led to too much power concentrated in the Presidency, thus undermining systems of checks and balances. Executive dominance has impeded the effectiveness of oversight institutions such as Parliament and Independent Constitutional and Statutory Bodies. These transparency and accountability deficits are caused by structural defects and exacerbated by consistent under-resourcing of institutions that should act as counter points to the Executive. This has translated into a failure of formal democratic institutions to give a voice to the people. There is also a lack of effective devolution of authority to democratic

³⁵ E Akwetey 'Preface and Acknowledgement' in KA Ninsin *Executive-Parliamentary interface in the legislative process (1993-2006): A synergy of powers?* (2008) v.

³⁶ Constitution Review Commission, National Constitution Conference, General Conference Brief, 1– 5 March 2011.

local government bodies. Finally, a weak culture of the rule of law, respect for human rights and constitutionalism has meant that Ghana is still awaiting great strides in these areas.

It is with the intention of correcting these alleged structural deficiencies that the Constitution Review Commission has been established to seek the views of the people of Ghana on reforms of the Constitution. The Constitution Review Commission has its mandate spelt out as follows:

- (i) Ascertain from the people of Ghana, their views on the operation of the 1992 Fourth Republican Constitution and, in particular, the strengths and weaknesses of the Constitution;
- (ii) Articulate the concerns of the people of Ghana as regards the amendments that may be required for comprehensive review of the 1992 Constitution;
- (iii) Make recommendations to the Government for consideration and provide a draft Bill for possible amendments to the 1992 Constitution.

In the Government's concept paper on the proposal for a review of the Constitution, nearly 40 possible areas of amendment were listed, prominent among them were the following:

- (i) A review of the provisions of chapter Eight of the Constitution to determine whether there should be a curtailment of the excessive powers of the Executive President.
- (ii) A review of the Constitution to determine whether it should be amended to allow more easily for the tabling and passage of Private Member Bills in Parliament.
- (iii) Flowing from the above, a review of article 108 barring anyone other than the President or someone designated by him to propose a bill that has financial implications.
- (iv) The decoupling of the position of Attorney-General from that of Minister for Justice (article 88).
- (v) A review of the constitutional injunction in article 78(1) that a majority of Ministers of State should come from Parliament.
- (vi) A review of article 78(2) which does not place a ceiling on the number of ministers a President may appoint.
- (vii) Absence of a ceiling on the number of judges that may be appointed to the Supreme Court and the Appeal Court under article 128(1) and 136(1)(b) of the Constitution.
- (viii) A change of the timing for the holding of Presidential and Parliamentary elections (articles 63(2) and 112(4)).
- (ix) A proposal for increasing the tenure of office of a President from four to five years under article 66(1).
- (x) The inclusion of provisions to regulate a scenario where a sitting President leaves the party on whose ticket he was voted into power.

- (xi) The inclusion of provisions to regulate a scenario where a Vice President resigns from office.
- (xii) The provision of more effective provisions in the Constitution in order to effectuate real decentralisation of governmental powers and functions to the District Assemblies (chapter 20).
- (xiii) The reconsideration of the attempt to impose a partisan government on a non-partisan local government system (article 248(1)).
- (xiv) A review of the Constitution to allow for the election of District Chief Executives (article 243).
- (xv) A review of article 71(1) to remove the power granted to the President to determine the salaries, allowances and facilities of Members of Parliament and the Speaker.
- (xvi) A review of article 82(5) to establish whether it should be amended to make it mandatory, rather than discretionary, for the President to revoke the appointment of a Minister once Parliament has passed a vote of no confidence in that Minister.
- (xvii) A reconsideration of the article 146(6) to determine whether it should be amended to include Parliamentary oversight and public proceedings in the process for removing the Chief Justice from office.

The number and importance of the proposed amendments involved leaves room for some concern about the reform process being adopted which is by the amendment processes set out in chapter 25 of the Constitution. The question may be asked whether it should not be a more comprehensive political exercise whereby a new Constituent Assembly is established to undertake a completely new constitution-making exercise rather than following the 'patch work' approach.

The Constitution Review Commission (CRC) completed its work in December 2011 and the government issued a White Paper on the Report in June 2012. Of relevance to the issue of constitutionalism is, for example, the reiteration in the Report of the two terms of four years each for the office of President by any individual. The Report recommends that the Constitution should be amended to make it abundantly clear that 'a person who has been President for two terms of four years shall not qualify to stand for re-election as President'.³⁷

A critical reading of the CRC Report provides the desire of the people of Ghana to strengthen the institutions and processes of governance so as to avoid arbitrary exercise of political power.³⁸

³⁷ Republic of Ghana *White Paper on the Report of the Constitution Review Commission of Inquiry* June 2012 10.

³⁸ The recommendations of the CRC are yet to be placed before Cabinet for possible implementation.

5 Conclusion

The search for constitutional structures and systems of government has understandably been a preoccupation for Ghana, following from the perception that structures and institutions can avoid or reduce to the minimum tendencies towards arbitrariness.

Structures of government may to some extent control the tendency of the human being for arbitrariness, informing an incessant search for supposedly more appropriate principles and institutions of government. What the people of Ghana have endeavoured to do over the years, and even now, has been the creation of systems of government that have as their basis the principle of constitutionalism and democracy.

The search for structures that would guarantee constitutionalism still continues in the Ghanaian polity but one view that has recurred from time to time is that the greater problem is in the failure of the average Ghanaian to develop the requisite attitude that is required to support the basic constitutional structures necessary for constitutionalism.

CHAPTER 6

THE DAWN OF CONSTITUTIONALISM IN NIGERIA

Diala Anthony Chima

1 Introduction

Beginning from the first post-independence effort in 1960, Nigeria has had a chequered history of constitution-making. After nearly three decades of cumulative military rule, it returned to civilian governance in 1999 under a presidential system of governance. Regrettably, this system is founded on the 1999 Constitution,¹ which was conceived by a military regime and is fairly unrepresentative of popular participation. Since a strong bond links the process through which constitutions are produced and the degree of their acceptance and effectiveness, constitutionalism in Nigeria has, unsurprisingly, been problematic.² Crises besetting Nigeria's constitutional history include intermittent military rule, a civil war, flawed elections, a presidential power vacuum in 2010, recurrent ethno-religious clashes, and widespread disdain for the rule of law. Driving these crises is weak democratic institutions, which are sustained by poor leadership, ethnic politics, and a general culture of impunity inherited from past military regimes.

Being deficient in democratic values, fully justiciable human rights provisions, and clear governmental structures, amendments were made to the 1999 Constitution in mid-2010. These amendments dealt with ambiguous provisions on power vacuum, weak electoral provisions, lack of autonomy of key democratic institutions, and procedure for amending the Constitution. In sum, 35 sections of the 1999 Constitution were

¹ Constitution of the Federal Republic of Nigeria 1999.

² JO Ihonybere 'How to make an undemocratic constitution: The Nigerian example' (2000) 21 *Third World Quarterly* 343-366, arguing that civil society participation in constitution-making is critical to the relevance, effectiveness, and legitimacy of any constitution.

altered,³ three sections were deleted,⁴ while two sections were substituted.⁵ Importantly, extensive electoral amendments were made, while provisions for regulating internal democracy in political parties were introduced. However, to many observers the amendment process remains unsatisfactory.⁶ The criticisms centre on structural imbalances in the composition of Nigeria's 36 federating states, lack of inclusiveness and accountability in governance, devolution of powers in the federation, and most importantly, the legitimacy of the reviewers of the Constitution. This chapter examines post-independence constitution-making in Nigeria with regard to military rule and constitutionalism in Nigeria. In the light of a culture of impunity bequeathed by long years of military rule, it advocates good governance and a participatory approach to constitutional review as the foundations for strong constitutionalism in Nigeria.

2 Constitution-making and review in Nigeria: 1960 - 1999

The history of constitution-making and amendment in Nigeria commenced from efforts to mould Nigeria into a united country for the administrative convenience of the British Empire. These include the amalgamation proclamations of 1914,⁷ the Clifford Constitution of 1922, the Richards Constitution of 1946, the Macpherson Constitution of 1951, the Lyttleton Constitution of 1954 and the Independence Constitution of 1960. Although the scope of this work does not allow an in-depth examination of the pre-independence Constitutions, it is pertinent to note that a common thread runs through them. That thread is the absence of a participatory approach to constitution-making. While the Clifford Constitution is noted for introducing the elective principle and a Legislative Council, it was a product of British political interest, and largely lacking in local content.⁸ It provided for a Legislative Council of 46 members comprising of 27 officials and 19 unofficial members. Three members were to be elected by all adult males in Lagos and one member from voters in Calabar. To qualify as a voter, an individual had to reside in a location for at least 12 months and had to have a gross income of 100

³ Sec 65-66, 68-69, 75-76, 81, 84, 106-107, 109-110, 116, 121, 131, 132, 135, 137, 156, 160, 177-178, 180, 182, 190, 200, 229, 233, 239, 246, 251, 272, 285 & 318.

⁴ Sec 221 – 227.

⁵ Sec 145 & 228.

⁶ O Igbuzor 'A critique of the 1999 constitution-making and review process in Nigeria' (2002) *Citizens' Forum for Constitutional Reform* Monograph Series No 1.

⁷ These Proclamations from the colonial office in London purported to unite the southern and northern protectorates of Nigeria into a single unit for administrative convenience. At that time, the north was unable to generate enough funds to maintain a separate administration. See JF Ajayi 'National history in the context of decolonisation: the Nigerian example' in E Lonnroth *et al* *Conceptions of national history* (1994) 64-78.

⁸ For detailed accounts of the amalgamation of Nigeria, and the making of the pre-independence Constitutions, see OI Odumosu *The Nigerian Constitution: History and development* (1963) 10-17.

pounds per annum. Accordingly, the Clifford Constitution disenfranchised a substantial proportion of Nigerians.

The Richards Constitution sought unity in Nigeria's diversity. It included the northern part of the country in the central legislature and created regional councils in eastern and western Nigeria. Although it expanded the legislative council to 44 members, the majority of them were unelected. The Richards Constitution was seen by many as very arbitrary, lacking in real legislative powers, and 'regionalising' Nigerian politics.⁹ Although the Macpherson Constitution of 1952 encouraged nation-wide discussions over its form, the final product was not much different from its predecessors in terms of inclusiveness. It introduced divisive regionalism, encouraged ethnic politics, and was disturbingly vague on critical issues such as direct representation and legislative powers. Not surprisingly, it was marked by bitter party feuds, leading to two constitutional conferences in London in 1953 and 1954 to resolve the problem. The result of these constitutional conferences was the Lyttleton Constitution, which attempted to lay down the basic design of Nigeria's independent government. Eventually, two additional constitutional conferences were held in London (1957) and Lagos (1958) in preparation for independence. The resolutions of these conferences formed the bedrock of the 1960 Independence Constitution.

2.1 The 1960 Independence Constitution

Section 1 of the 1960 Constitution states:

This constitution shall have the force of law throughout Nigeria and, subject to the provisions of section 4 ... if any other law (including the constitution of a Region) is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.

Section 5 of the Constitution gave to the three regional¹⁰ constitutions powers similar to section 1. These were contained in schedules 3, 4 and 5. The northern and eastern region constitutions contained seven chapters and 77 sections respectively, while the western region contained seven chapters and 76 sections. All three constitutions were similar. The differences were twofold: the first difference related to the provision for a legislative house adviser on Muslim law, as well as the use of English and Hausa as legislative languages in the northern region constitution; and the second difference was varying requirements for a provincial administrator in the three regions.

⁹ Odumosu (n 8 above) 10.

¹⁰ These were the northern, western and eastern regions.

The 1960 Constitution contained basic or 'fundamental' human rights provisions. Chapter 3 dealt exclusively with civil and political rights such as the right to dignity,¹¹ the prohibition of slavery and forced labour,¹² the recognition of individual liberty,¹³ fair hearing,¹⁴ respect for privacy and family life,¹⁵ freedom of conscience and religion,¹⁶ freedom of expression,¹⁷ the right to peaceful association and movement,¹⁸ and the right to freedom from discrimination.¹⁹

It is noteworthy that all the pre-independence Constitutions were named after the incumbent British governor-generals of their era. This contributed to criticisms of the Constitutions' alienation of the people whom they were meant to govern. The Independence Constitution of 1960 did little to change this perception of alienation. For a start, it was dominated by the provisions of the Lyttleton Constitution, which had laid porous foundations for Nigeria's federalism. In making each region of the country semi-autonomous, it did not appreciate the diverse ethnic composition of the country and the negative effect of powerful regions on the central government.²⁰ To worsen this problem, the northern region was the size of the other two regions combined. Comprising of about 60 per cent of Nigeria's population, this imbalance in the size of the regions was described as 'an astonishing peculiarity' of Nigeria's early federalism.²¹ As shown later, the dominance of the regions, fuelled by intra-party feuds, especially in the western region, inevitably led to a constitutional crisis. Moreover, the 1960 Constitution significantly kept Nigeria under British constitutional control. The Queen of England remained Nigeria's constitutional monarch and the final court of appeal was the Judicial Committee of the British Privy Council (Privy Council). This situation gave rise to two constitutional conferences on 25 and 26 July 1963. These conferences, aimed at severing Nigeria's colonial attachment to England, culminated in the Constitution of the Federation Act, which was passed by Parliament in September 1963.

¹¹ Independence Constitution, sec 18.

¹² Independence Constitution, sec 19.

¹³ Independence Constitution, sec 20.

¹⁴ Independence Constitution, sec 21.

¹⁵ Independence Constitution, sec 22.

¹⁶ Independence Constitution, sec 23.

¹⁷ Independence Constitution, sec 24.

¹⁸ Independence Constitution, sec 37(1) & (2) respectively.

¹⁹ Independence Constitution, sec 38.

²⁰ It is noteworthy that a federal system of government with powerful regions was adopted in response to the ethnic diversity of Nigeria. The idea was that each ethnic group would have considerable areas of autonomy not subject to interference by others. See generally G Eluwa *et al A history of Nigeria* (1988) 255-261.

²¹ BO Nwabueze *A constitutional history of Nigeria* (1982) 153. In fact, following agitations about the inequality of the regions, a referendum, courtesy of the Constitutional Referendum Act of 1962, was held. As a result, the mid-western region was carved out from the western region in August 1963.

2.2 The 1963 Republican Constitution

On 1 October 1963, the Constitution of the Federation Act resulted in the entry into force of the Republican Constitution. Other than the need to sever the last vestiges of Nigeria's colonial attachments to the United Kingdom, the Republican Constitution was primarily aimed at instituting a federal system of government in Nigeria. Significantly, it removed the Queen of England as Nigeria's head of state and made the Supreme Court of Nigeria the final court of appeal. Unlike the 1960 Constitution, it proclaimed 'the people' as the source of its authority. The Preamble states that,

Having firmly resolved to establish the Federal Republic of Nigeria ... We, the people of Nigeria, by our representatives here in Parliament assembled, do hereby declare, enact, and give to ourselves the following Constitution ...

The 1963 Constitution also aimed at unity and faith in the Republic, as well as 'liberty, equality and justice' within and outside Nigeria. Notwithstanding that it satisfied nationalist aspirations for independence, the 1963 Constitution retained the Westminster parliamentary system of government. It left untouched the existing system of revenue allocation, as well as the public service. There was a bicameral legislature at both state and federal levels, a Bill of Rights, a unified police force,²² and regional governments. Notably, it retained separate constitutions for the four regions, which it annexed as schedules. Accordingly, the key structural weaknesses of improper division of powers and ethnic-based politics remained. Parties were formed and ran along tribal lines, while the regions engaged the federal government in a vicious power tussle.²³ Although the President was the commander-in-chief, his powers were largely ceremonial, as the Council of Ministers, made up of representatives from the four regions, wielded *de facto* executive power.²⁴ Not surprisingly, the Republican Constitution only lasted for three years.

A major reason for the demise of the Constitution was the fused nature of executive and legislative power which proved troublesome in a system with political parties formed along tribal lines. For example, in 1962, disagreements arose between Chief Obafemi Awolowo, the leader of the opposition Action Group (AG) in the House of Representatives and Chief Ladoke Akintola, the Premier of the western region and deputy leader of the AG. Both Awolowo and Akintola were from the Yoruba ethnic group,

²² Although the police structure was left intact, sec 105, schedule 2 of Decree no 1 banned the creation of local police forces.

²³ A. Aguda, *The challenge of the Nigerian nation: An examination of its legal development, 1960-1985* (1985) 9.

²⁴ Chapter IV of the Republican Constitution, outlining the relationship between the powers of the president, the prime minister and the council of ministers.

though from different tribes.²⁵ Awolowo's supporters, who were more numerous, petitioned the Governor of the region, requesting him to remove Akintola from office because he no longer enjoyed the confidence of the majority of the House of Assembly members. In his place, they proposed Alhaji S Adegbenro. The governor, Sir Adesola Aderemi, obliged and dismissed Akintola from office. Citing section 33(10) of the Western Region Constitution of 1960, Akintola refused to accept his dismissal on the ground that no legislative proceedings to facilitate his removal occurred in the House of Assembly. Section 33(10) provided as follows:

Subject to the provisions of subsections (8) and (9) of this section, the Minister of the Government of the Region shall hold office during the Governor's pleasure: Provided that (a) the Governor shall not remove the Premier from office unless it appears to him that the Premier no longer commands the support of a majority of the members of the House of Assembly.

The dispute was taken to court; the Federal Supreme Court ruled that the Governor's purported removal of the Premier was invalid as there was no resolution to that effect from the House of Assembly. According to the Court, the evidence upon which the Governor may remove the premier must have emanated from proceedings in the House of Assembly.²⁶ On appeal to the Privy Council, the Federal Supreme Court's decision was reversed.²⁷ These two conflicting decisions contributed to the crisis in the western region. To forestall a total breakdown of law and order, a state of emergency was declared and the federal government took over the governance of the region.²⁸

Following its reversal of the Federal Supreme Court's decision regarding Akintola's removal, the role of the Privy Council in Nigeria's constitutionalism was questioned. The criticisms of the reversal in fact hastened the abolition of the Privy Council as the highest court of appeal in Nigeria. However, the declaration of emergency did not solve the crisis in the western region. The general elections of 1964 and 1965, characterised by massive rigging and violence, were boycotted by the minority opposition parties and bitterly contested in the courts. The declaration of Chief Akintola as the winner of the 1965 western regional elections tipped the political tension over the edge. Shortly afterwards, the army, citing political corruption and the crisis in the western region as key reasons, overthrew the federal government in a bloody *coup d'état*.²⁹

²⁵ While Akintola was from the notoriously troublesome Ogbomosho in Oyo State, Awolowo was from Ikene-Remo in Ogun State, the state from where former president Olusegun Obasanjo also hails from.

²⁶ *Akintola v Aderemi* [1962] 2 All NLR 440.

²⁷ *Adegbenro v Akintola* [1962] 1 All NLR 462 pt II.

²⁸ Emergency Powers (General) Regulation LN 54 of 1962.

²⁹ A Ademoyega *Why we struck: The story of the first Nigerian coup* (1981), the crisis in the western region, ethnic politics, and corruption are the chief reasons why the first military coup occurred.

2.3 Military rule: 1966 - 1999

On 15 January 1966, the military, led by Major CK Nzeogwu, took over the government.³⁰ The Prime Minister, Sir Tafawa Balewa, the Premier of the northern region and also Sarduana of Sokoto, Sir Ahmadu Bello, the premier of the western region, Chief S L Akintola, the federal minister of finance, Chief Festus Okotie-Eboh, and other top politicians were killed. Eventually, the army chief, Major General JTU Aguiyi-Ironsi, an easterner, persuaded the *coup* plotters to surrender. He took charge of government and proceeded to enact several decrees that undermined the Republican Constitution. The most prominent were Decree 1,³¹ Decree 3,³² and Decree 34 of 1966.³³

Decree No 1 suspended and modified portions of the 1963 Constitution and the four regional Constitutions in a manner that subordinated them to military laws. It abolished Parliament and the four regional legislatures. Section 3 empowered the Federal Military Government to make laws for the good governance of the country. Military governors were appointed for the four regions and authorised to make laws on matters in the concurrent legislative list with the prior approval of the Federal Military Government. Laws made by parliament were re-designated as 'Decrees,' while regional laws became 'Edicts.'³⁴ Section 6 provided that 'no question as to the validity of this or any other Decree or Edict shall be entertained by any court of law in Nigeria'. Section 7 vested the executive powers of the republic on the head of the Federal Military Government, who may delegate his powers to the military governors of the regions. Section 8 established a Supreme Military Council to replace Parliament as the apex law-making body. However, it did not outline the functions of the council. It also established a federal executive council and vested it with decision-making functions. Curiously, it made no provision for division of executive and legislative powers at the regional level. Rather, it provided that 'any reference to the government of the Region shall be construed as a reference to the Military Governor of the Region'.³⁵

Decree 34 of 1966, which came into force on 24 May 1966, abolished and banned all political parties and political activities. On the same day, the federal structure of government was abolished and replaced with a unitary system.³⁶ As shown later, this action significantly contributed to

³⁰ The plot was hatched and executed by middle-level officers of largely eastern and western ethnic extraction.

³¹ The Constitution (Suspension and Modification) Decree 1 of 1966.

³² The State Security (Detention of Persons) Decree 3 of 1966.

³³ The Public Order and Security Decree 34 of 1966.

³⁴ The Constitution (Suspension and Modification) Decree 1 of 1966, sec 4.

³⁵ Decree 1 of 1966, sec 1, sch 4.

³⁶ It is noteworthy that these three decrees subsisted in varying forms throughout subsequent military interventions in Nigerian politics.

the downfall of the first military regime. For now, it is worthwhile to examine the effect the first and second military *coups* had on the judiciary in Nigeria.

The initial judicial attitude to the military's role in politics was disappointing. Judges were unusually deferential to the clauses in decrees that purportedly ousted their jurisdiction to entertain certain cases brought before them. In one case,³⁷ two decrees were challenged as invalid. The Lagos High Court ruled that by virtue of their ouster clauses, decrees override the Constitution. This judicial timidity on the supremacy of decrees over the Constitution continued.³⁸ Eventually, the judiciary found its voice in the celebrated case of Lakanmi³⁹ and declared a decree as invalid. The military response was swift and decisive. General Yakubu Gowon's regime quickly promulgated the Federal Military Government (Supremacy and Enforcement of Powers) Decree 28 of 1970. This decree asserted that the first and second military *coups* were revolutions that altered the legal orders preceding them. Accordingly, decrees were supreme and superseded the constitution in the new legal order. This trend of the supremacy of decrees continued with subsequent military regimes in Nigeria. For example, in considering the hierarchy of norms under a military regime, the Supreme Court stated:⁴⁰

Under the present condition, Decrees are the Supreme Laws in Nigeria, and all other laws, including the current Constitution, are inferior to the Decree as provided for by the Federal Military Government (Supremacy and Enforcement of Powers) Decree 1984.

General Ironsi's effort to unify the country through a unitary system of government was perceived as a threat to the entrenched oligarchic system of the government in the northern region. Accordingly, it was greeted with riots in the numerically superior north throughout May 1966. Furthermore, the north viewed the January *coup* as an ethnic *coup* by Igbo officers from eastern Nigeria.⁴¹ Coupled with a perceived domination of the military top echelons by Igbo officers, the powder kegs for a counter *coup* were laid. The kegs were lit on 29 July 1966 by young northern army officers in an extraordinarily bloody *coup d'état*.

The counter *coup* claimed the lives of the head of state, General Ironsi, along with his host, the governor of the western region, Lieutenant Colonel Fajuyi. It also claimed the lives of hundreds of Igbo military officers. The violence unleashed in the *coup* spread and led to the death of

³⁷ *Ogunlesi & Others v Attorney-General of the Federation* (1970) LD/28/69 (Unreported).

³⁸ For eg, *Adamolekun v The Council of the University of Ibadan* (1967) SC 378/1966.

³⁹ *Lakanmi & Kikelomo Ola v Attorney-General (Western State) & Others* SC 58/69 FN 80, reported as (1971) UILR 201.

⁴⁰ *Attorney-General of Anambra State v Attorney-General of the Federation* (1993) 7 SCNJ 245.

⁴¹ CS Phillips 'Nigeria and Biafra' in F Shiels (ed) *Ethnic separatism and world politics* (1984) 166 205-206.

thousands of Igbo civilians resident in the north. The rest of the Igbo in the north and even some in the west fled to their homeland. In the meantime, a northern colonel, Yakubu Gowon, became head of state. Despite several peace meetings between the regions,⁴² the eastern region seceded from the rest of the country on 6 July 1967 and proclaimed the Republic of Biafra.⁴³ The North did not accept the East's secession, and backed by the West, it launched an armed effort to quell the secession. The civil war that followed lasted till 15 January 1970 and claimed millions of lives. On that date, the Republic of Biafra was formally renounced and rejoined the rest of Nigeria as part of a 12-state federation.⁴⁴

Soon after he became the head of state, Gowon abolished Ironsi's Decree No 34 and replaced it with Decree No 59.⁴⁵ This decree returned Nigeria to the federal structure of 17 January 1966. On 12 September 1966, Gowon convened a constitutional conference, which adjourned to 24 October 1966. Delegates appointed by military governors from the four regions attended the conferences, which were beset with the political crisis that arose from the July counter *coup*. After the civil war, Gowon instituted programmes ostensibly aimed at returning the country to civilian governance. Following his inability to keep to his timetable to return Nigeria to civilian governance, he was overthrown in a bloodless *coup d'état* on 29 July 1975, while attending an Organisation of African Unity meeting in Uganda. He fled to London, and General Murtala Mohammed replaced him on 30 July 1975.

General Mohammed's regime accorded itself legal recognition by enacting the Constitution (Basic Provisions) Decree 32 of 1975. This Decree suspended parts of the Constitution and subordinated the rest to military decrees. Three notable constitutional developments occurred between 1975 and 1979, when civilian governance was restored. The first is the creation of seven states to increase the number of states to 19.⁴⁶ The second is the establishment of Abuja to replace Lagos as the federal capital territory. The third is arrangements for a new constitution and a programme for a credible transition to civilian governance. These arrangements were part of populist reforms introduced by General Mohammed before he was assassinated in an aborted *coup d'état* on 13

⁴² The most notable is the Aburi Meetings of 4/5 January 1967 convened by Gen. Ankrah, the then Ghanaian head of state in Aburi, Ghana.

⁴³ CO Ojukwu *The Ahiaara Declaration: The principles of the Biafran revolution* (1969) giving reasons for, and justifying the Biafran struggle, its philosophy, scope and overall aims.

⁴⁴ RC Njoku 'An endless cycle of secessionism: intellectuals and separatist movements in Nigeria' in B Coppieters & M Huyseune (eds) *Secession, history and the social sciences* (2002) 249-269.

⁴⁵ The Constitution (Suspension and Modification) Decree 9 of 1966.

⁴⁶ The States (Creation & Transitional Provisions) Decree of 1976.

February 1976.⁴⁷ Thereafter, his deputy, General Olusegun Obasanjo, became the head of state.

Obasanjo stuck to his predecessor's transition programme and returned Nigeria to civilian governance on 1 October 1979. To achieve this, he introduced the 1979 Constitution. This Constitution lasted until January 1984 when the military seized back political power. In 1989, General Babangida's regime introduced a Constitution widely believed to pave way for a civilian President. However, this Constitution was discarded following Obasanjo's forced resignation in 1993. Attempts to introduce another constitution were made under General Abacha's administration and led to the 1995 draft Constitution. This Constitution was yet again abandoned after Abacha's death in 1998. General Abubakar, who succeeded Abacha, eventually set up the Justice Niki Tobi Constitution Amendment Debate Coordinating Committee on 11 November 1998. The Tobi Committee was mandated to draw insights from the 1995 draft Constitution and the 1979 Constitution. The report of the Committee and its subsequent tinkering by the military culminated in the 1999 Constitution, which became operational on 29 May 1999.

2.4 The 1979 Constitution

Prior to his assassination, General Mohammed had established a Constitution Drafting Committee (CDC) headed by a legal icon, Chief Rotimi Williams. The CDC was composed of 50 members, comprising of two representatives from each of the 12 states, and experts in law, history, economics, political science, and other social sciences. The CDC's mandate was as follows:⁴⁸

- (i) creation of viable institutions which ensure maximum participation and consensus and orderly succession to political power;
- (ii) elimination of cut-throat political competition based on a system or rule of winner-takes-all; discouragement of institutionalised opposition to the government in power;
- (iii) development of consensus politics and government based on a community of all interests rather than the interests of sections of the country;
- (iv) establishment of the principle of public accountability for all holders of public office;
- (v) elimination of over-centralisation of power in a few hands and the decentralisation of power as a means of diffusing tension;
- (vi) a careful definition of the powers and duties of the leading functionaries of government; and

⁴⁷ Such is the impact and popularity of General Murtala Mohammed's reforms in the Nigerian polity that he is the only military head of state to have his image emblazoned on a national currency.

⁴⁸ O Oyediran *The Nigerian 1979 elections* (1981) 22.

(vii) evolution of a free and fair electoral system which ensures adequate representation of the cross-section of the nation at the Centre.

The CDC produced a draft constitution and submitted its two-volume report on 14 September 1976. Mohammed's successor, General Obasanjo, set up a Constituent Assembly (CA) in 1978 to deliberate on this draft constitution.⁴⁹ Headed by Sir Udo Udoma, a Supreme Court Justice, the CA was a deliberative body devoid of executive powers. It had a one year mandate and worked steadily from October 1977 to June 1978. As public debate continued on the draft constitution, the first nationwide local government elections took place in December 1976. Serving as electoral colleges, these new local governments selected 203 of the 230 members of the Constitutional Assembly in August 1977. The remaining 20 members were nominated by the Supreme Military Council. The nominated members included members of the CDC that produced the draft constitution and were generally respected persons.⁵⁰ After the CA submitted the draft constitution that it produced, Obasanjo's government amended and promulgated it in late 1979.⁵¹

The processes that led to the 1979 Constitution were the most participatory that Nigeria has witnessed.⁵² The CA held numerous sittings and received hundreds of memoranda from groups and members of the public. After its sittings, it published the results of its deliberations in two volumes, which also contained the draft constitution itself.⁵³ The report was widely distributed and subjected to intense public scrutiny. The draft constitution was, however, not subjected to a referendum. It is necessary to review the 1979 Constitution in detail because it enjoys a unique relationship with the 1999 Constitution. As will be seen later, the 1999 Constitution is, in fact, an amended version of the 1979 Constitution.⁵⁴

The 1979 Constitution adopted the American presidential model of government. It retained certain features from the 1960 and 1960 Constitutions and modified others. Of these modifications, three stand out. These are the supremacy of the constitution,⁵⁵ 'fundamental objectives and directive principles of state policy' (Objectives),⁵⁶ and human rights provisions.⁵⁷

⁴⁹ Decree 50 of 1977.

⁵⁰ BO Nwabueze *The presidential Constitution of Nigeria* (1982) 2 4.

⁵¹ The amendments made by the military to the Constituent Assembly's report include the National Youth Corps Decree 24 of 1973, the Public Complaints Commission Decree 31 of 1975, the National Security Organisation Decree 36 of 1979, and the Lands Use Decree 6 of 1978.

⁵² Oyediran (n 48 above) 10.

⁵³ Report of the Constitution Drafting Committee, complete volumes (1976).

⁵⁴ See discussions in 7.3.5.

⁵⁵ 1979 Constitution, chaps 1-2.

⁵⁶ Chapter 2 of the constitution provided that social and economic rights such as the right to health, food, shelter, and education were not justiciable. These rights were rather classified as 'directive principles' that the government aspires to achieve.

⁵⁷ 1979 Constitution, chap 3.

While the Preamble of the 1979 Constitution proclaimed the people as the source of the constitution's authority, section 1 emphasised the primacy of the Constitution. It provided that the Constitution is supreme and its provisions shall have binding force on all authorities and persons in Nigeria. Accordingly, it is the *grundnorm*, or the law from which other laws derive their validity in Nigeria.⁵⁸ This constitutional supremacy was founded on federalism, which is both a political and constitutional concept. Nigerian federalism has certain key elements that are nearly identical in both the 1979 and 1999 Constitutions. Accordingly, the relevant sections of these two Constitutions under which elements of federalism appear are discussed together.

The most notable element of federalism in Nigeria is the division of legislative powers between the central government and the federating states. Sections 4, 5, and 6 of the Constitution vests legislative, executive and judicial powers with Parliament, the President, and the courts. Under a 'legislative list,' the federal government has exclusive legislative powers in many areas; the states have concurrent powers with the federal government in some areas, while the local councils share residual powers with states in certain matters.⁵⁹ Using the principle of 'covering the field,' the federal government may legislate on any matter under the concurrent legislative list in which it has parallel powers with states. Any state law that is inconsistent with a federal legislation on the same subject shall, to the extent of its inconsistency, be void and inoperative. According to section 130(2) of the 1999 Constitution, the President is the 'head of state, the Chief Executive of the Federation and Commander-in-Chief of the Armed Forces of the Federation'. By this provision, the Constitution uses the President to symbolise the artificial entity of the state – which in Nigeria's case includes the executive, the legislature and the judiciary. This perhaps explains why the Constitution grants the President absolute immunity from all court processes.⁶⁰ The rationale behind this immunity is that to drag an incumbent President to court and subject him to the rigours of questioning degrades his office and the entire nation that he symbolises.⁶¹

In the light of the above, Nigerian federalism consists of a union of several geo-political entities called states. Section 2(1) of the 1979 Constitution provides that Nigeria is an 'indivisible and indissoluble sovereign state'. Section 2(2) further provided that 'Nigeria shall be a Federation consisting of States and a Federal Capital Territory'. Section

⁵⁸ A Aguda *The judicial process and the third republic* (1992) 94 & 95, arguing that, being directly bequeathed by the British colonial masters, the 1960 Constitution became the *grundnorm* or the apex law on which all other laws are based or derive their validity. Subsequent constitutions, in turn, derive their validity from the 1960 Constitution.

⁵⁹ 1999 Constitution, parts 1-3, 2nd sch.

⁶⁰ 1999 Constitution, sec 308.

⁶¹ Presidential immunity in Nigeria has, of course, been criticised. See eg, GO Arishe 'Reconsidering executive immunity under the Nigerian constitution' (2010) *Nigerian Current Law Review* 2007-2010 274 275 -311.

3(6) stated that 'there shall be 768 Local Government Areas in Nigeria' and six area councils in the Federal Capital Territory. Section seven provided for local government councils. However, its provisions fail to satisfy the federalism professed in the constitution.⁶² According to section 7(1):

The system of local government by democratically elected local government councils is under this Constitution guaranteed; and accordingly, the Government of every State shall, subject to section 8 of this Constitution, ensure their existence under a Law which provides for the establishment, structure, composition, finance and functions of such councils.

The above provision led to controversy.⁶³ In reviewing this controversy and the criticisms of the regulatory power given to states over local governments by the constitution, a commentator has observed as follows:⁶⁴

[T]he basis for the division of powers under federalism is that, within the framework of a general government charged with responsibility for matters of national concern, those of local concern should be managed by the state government ... Local government is an example *par excellence* of a matter of local concern ...

As noted above, the Constitution enumerated the local government councils in Nigeria. Coupled with the powers given to states by section 7 and 8 of the Constitution, the issue of local government creation led to bitter conflicts between the federal government and the states. Some states created local government councils, which the federal government refused to recognise. In fact, the federal government, under Obasanjo's leadership, swiftly responded to the newly-created councils by withholding the statutory revenue allocation of the states concerned. Its action was in clear breach of section 162(5)(6) and (8) of the Constitution,⁶⁵ as the subject of local governments is a matter under the residual legislative list to which states have exclusive competence to legislate upon. This view is lent support by the Supreme Court, which ruled that local government matters

⁶² RT Suberu 'The travail of federalism in Nigeria', in L Diamond & MF Plattner (eds) *Nationalism, ethnic conflict and democracy* (1994) 56-70.

⁶³ See eg 'New LGs: Lagos warns of imminent crisis' *This Day* 22 April 2004.

⁶⁴ BO Nwabueze *Constitutional democracy in Africa: Structures, powers and organising principles of government* (2003) Volume 1, chap 6.

⁶⁵ Sec 162(5)(6) and (8) of the Constitution provide respectively:
(5) The amount standing to the credit of Local Government Councils in the Federation Account shall also be allocated to the State for the benefit of their Local Government Councils on such terms and in such manner as may be prescribed by the National Assembly. (6) Each State shall maintain a special account to be called 'State Joint Local Government Account' into which shall be paid all allocations to the Local Government Councils of the State from the Federation Account and from the Government of the State. (8) The amount standing to the credit of Local Government Councils of a State shall be distributed among the Local Government Councils of that State on such terms and in such manner as may be prescribed by the House of Assembly of the State.

are within the exclusive preserve of state governments and that the federal government has no jurisdiction over such matters.⁶⁶

Under Nigeria's federalism, the Constitution is written, supreme, and requires stringent procedures for its amendment. Section 9(2) of the 1999 Constitution provides that a law by the National Assembly for the alteration of the Constitution

[s]hall not be passed in either House of the National Assembly unless the proposal is supported by the votes of not less than two-thirds majority of all the members of that House and approved by resolution of the Houses of Assembly of not less than two-thirds of all the States.

Section 9(3) went on to provide even more stringent requirements for the amendment of section nine, in order to safeguard its provisions on the procedure for amending the Constitution.⁶⁷

The courts are the interpreters of the Constitution, as well as the regulators of executive and legislative conduct in order to ensure compliance with the rule of law. On their part, the Executive and the Legislature regulate the judiciary by nominating and approving the appointment of judicial officers, as well as determining and controlling judicial bodies. There is a direct legislative representation of the people rather than delegation of powers. Parliamentary bills pass through three major phases before they become laws and the legislative process is open to the public. Contributions to parliamentary bills are welcomed from all segments of society and individuals can also sponsor bills to Parliament. The Constitution took pains to stipulate the maximum period a parliamentary bill requires to obtain the assent of the president and the procedure in which bills may become law without the president's assent.⁶⁸

Chapter 2 of the 1979 Constitution introduced fundamental objectives and directive principles of state policy (Objectives). The *travaux préparatoires* of the draft constitution reveal that the Objectives were aimed not only at inspiring and guiding government actions, but also as a source of legitimacy for democratic values.⁶⁹ Chapter 2 also contains the values on which the federation is based. These include democratic principles of popular sovereignty, participation in governance and social justice, as well as security and welfare of the people as the primary purpose of governance.

⁶⁶ *Government of Abia State & 35 Others v Federal Government* (2002) 6 NWLR.

⁶⁷ Sec 9(3) demands that a proposal to amend sec 9 must be approved by the votes of not less than four-fifths majority of all the members of each House, and also approved by resolution of the House of Assembly of not less than two-third of all States.

⁶⁸ Sec 58 and 59 provide for situations where the president fails to give assent to a parliamentary bill. Sec 58(5) provides that 'where the President withholds his assent and the (concerned) bill is again passed by each House (of [p]arliament) by two-thirds majority, the bill shall become law and the assent of the President shall not be required'.

⁶⁹ W Ofonagoro *et al* *The great debate: Nigerians' viewpoints on the draft constitution 1976/77* (1977) 50.

Furthermore, it provided for a federal character principle.⁷⁰ This principle flows from the heterogeneous nature of Nigeria, with diverse tribes that possess differing origins, language, 'cultural patterns, political institutions, social standards, and customary usages'.⁷¹ Accordingly, the federal character principle is important. Right from the British amalgamation of the southern and northern protectorates into the entity known as Nigeria in 1914, the country has been dogged by real and perceived inequality, domination and agitations for political inclusiveness by different ethnic groups.⁷² In fact, a perception of domination by one ethnic group was partly responsible for the July 1966 counter-coup and the subsequent civil war. Thus, the federal character principle was an innovation aimed at political stability and peaceful co-existence of disparate peoples.⁷³

Chapter 2 of the 1979 Constitution adopted a mixed economy for Nigeria. This comprised of a free market subject to some government limitations. Its social objectives were based on freedom, equality and justice, while its foreign policy was hinged on international co-operation, the promotion of African unity, and the total liberation of Africa from socio-political bondage.⁷⁴ Regarding socio-economic and cultural rights, it provided for an adequate standard of living, health facilities, educational opportunities, and social welfare.⁷⁵ However, section 6(6)(c) of the 1979 Constitution provided that the powers of judicial review vested on the judiciary:

shall not except as otherwise provided by this Constitution, extend to any issue or question as to whether an act, omission, law or judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in chapter II of this Constitution.

The provisions in section 6(6)(c) was a barrier to judicial enforcement of the socio-economic rights in chapter 2 of the Constitution. Section 14, which recognised the people as the true custodians of sovereignty, was made part of the 'Objectives'. Considering that section 13 of the Constitution stated that it is the duty of all authorities and persons exercising government power to observe and apply the constitution, a key question arose. This question, which persists with the 1999 Constitution, is whether the provisions of section 13 must be observed, thereby creating

⁷⁰ Sec 14(3) of the 1979 Constitution provides that 'the composition of the Government of the Federation or any of its agencies and the conduct of its affairs shall be carried out in such a manner as to reflect the federal character of Nigeria and the need to promote national unity, and also to command national loyalty, thereby ensuring that there shall be no predominance of persons from a few State or from a few ethnic or other sectional groups in that Government or in any of its agencies'.

⁷¹ O Awolowo *Thoughts on the Nigerian Constitution* (1966) 162.

⁷² C Achebe *The trouble with Nigeria* (1983) 1-22, the problem with Nigeria is failed leadership, which is a product of internal factors of social injustice brought about by the domination of one group or part of the country by another.

⁷³ Awolowo (n 71 above) 162 & 163.

⁷⁴ 1979 Constitution, secs 17 & 19.

⁷⁵ 1979 Constitution, sec 17, chap 2.

grounds for an aggrieved person or body to seek judicial review. As argued elsewhere,⁷⁶ Nigerian courts can successfully navigate around the non-enforceability of chapter 2 of the Constitution. They can achieve this by issuing rulings on the reasonableness of government policies on socio-economic rights. It is very unlikely that such rulings would violate the non-enforceability obstacle in section 6(6)(c). The phrase 'shall not ... extend to any issue or question as to whether' an act, omission, law or judicial decision is in conformity with the Objectives does not preclude the courts from assessing the reasonableness of government efforts to realise the Objectives. Conformity is different from reasonableness of actions taken to realise objectives. The provision of electricity by government may, while non-judicially enforceable, still be subject to judicial review of the seriousness of the policy on which it is founded. This is because if the legislature frames certain rights in broad terms, then courts, through their interpretive role, can legitimately give meaning to such rights by prescribing minimum standards of compliance. Prescribing and monitoring these standards is 'a sign of good faith, and an indication of seriousness in implementation'.⁷⁷ After all, there seems little point in enacting laws without commensurate intentions of applying them.

The above position was lent judicial weight by the Supreme Court in 2002.⁷⁸ Here, the issue was the efficacy of the law that established the Corrupt Practices and Other Related Offences Act of 2000 (Anti-Corruption Act) with regard to the fact that section 15(5) of the 1999 Constitution is placed under chapter 2 of the Constitution. Section 15(5) deals with the power of the state to 'abolish all corrupt practices and abuse of power'. The Supreme Court ruled that the Anti-Corruption Act is valid as the National Assembly is empowered by section 4(2) of the Constitution to 'make laws for the peace, order and good government of the Federation or any part thereof with respect to any matter included in the Exclusive Legislative List'. Accordingly, notwithstanding that corruption properly falls under the non-justiciable Objectives, it is enforceable under a competent piece of legislation by Parliament. In this respect, it is noteworthy that Nigeria has domesticated⁷⁹ the Banjul Charter,⁸⁰ which contains most of the socio-economic rights in the Objectives. The Banjul Charter may thus be regarded as a competent piece of legislation by

⁷⁶ AC Diala 'Lessons from South Africa in judicial power and minority protection' (2010/11) 1 *Madonna University Law Journal* 164 175.

⁷⁷ As above.

⁷⁸ *Attorney-General of Ondo State v Attorney-General of the Federation & Others* (2002) 27 WRN.

⁷⁹ African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 2 of 1983, now chap A9, Laws of the Federation of Nigeria, volume 1 2004.

⁸⁰ African Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc CAB/LEG/67/3 rev 5, 21 ILM 58 (1982) in force 21 October 1986.

Parliament on which Nigerian courts may rely to enforce the Objectives in chapter two of the 1999 Constitution.⁸¹

Notwithstanding the non-enforceability of certain rights, the 1979 Constitution improved on previous constitutions by adopting a proactive stance regarding human rights. Section 42(1) provided that any person who alleges that any of the provisions on civil and political rights 'has been, is being, or is likely to be contravened in any State in relation to him, may apply to a High Court in that State for redress'. Accordingly, citizens needed not wait until their rights were actually violated before they could apply to the courts for redress.

The 1979 Constitution provided that the Court of Appeal and the Supreme Court would be the highest courts in Nigeria.⁸² It departed from previous Constitutions by dropping the power given to the regions to establish their own court of appeal.⁸³ It however allowed each state of the federation to set up its own high court⁸⁴ and introduced a federal high court with wide-ranging jurisdiction.⁸⁵

The existence of two parallel high courts with more or less equal powers created jurisdictional problems. These problems led to several contradictory judgments on the powers of the federal and state high courts, as well as their spheres of influence.⁸⁶ Besides the above provisions, the 1979 Constitution also provided for separation of powers, the rule of law, and an independent judiciary. Section 33(1) provides as follows:

In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality.

In furtherance of the rule of law, section 33(8) provided the following:

No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence heavier than the penalty in force at the time the offence was committed.

⁸¹ Sec 12(1) of the 1999 Constitution provides: 'No treaty between the Federation and any other country shall have the force of law to the extent to which any such treaty has been enacted into law by the National Assembly'.

⁸² Sec 210 & 217 of the 1979 Constitution respectively.

⁸³ Sec 126 & 127 of the 1963 Constitution.

⁸⁴ Sec 234 of the 1979 Constitution.

⁸⁵ 1979 Constitution, sec 230.

⁸⁶ Examples include *Shugaba v Federal Ministry of Internal Affairs* (1981) 2 NCLR 459; *Federal Republic of Nigeria v Eze* (1982) 3 NCLR 259; *Momoh v Senate* (1981, 1 NCLR 21, and *Westminster Dredging Ltd v Ikuosohan* (1985) FCA/L/221/83.

The 1979 Constitution took pains to guide against retroactive laws.⁸⁷ Section 33(12) seemed determined to cement the due process of the law by providing that:

Subject as otherwise provided by this Constitution, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty ... is prescribed in a written law, and in this subsection, a written law refers to an Act of the National Assembly or a Law of a State, any subsidiary legislation or instrument under the provisions of a law.

Similarly, the 1979 Constitution was conscious of the autocratic culture bestowed on Nigeria's democracy by military interventions in the nation's politics. Accordingly, it stressed the importance of separation of powers by attempting to delineate the scope of powers between the executive, legislature and the judiciary. In this respect, it has been observed that the Constitution's delineation of executive and legislative functions revolves around an artificial friction.⁸⁸ This artificial tension is not so much a separation of powers as a separation of procedures for the exercise of government functions. This procedural separation of functions is perhaps influenced by the fact that Nigeria once practiced the Westminster model of governance where executive and legislative powers are fused. The importance of separation of procedures by the constitution has not only been lent judicial weight, it has also been expanded. In this respect, the Court has stated regarding the division of powers between the executive, legislature and judiciary:⁸⁹

The doctrine of separation of powers has three implications:

- (a) That the same person should not be part of more than one of these three arms or divisions of government.
- (b) That one branch should not dominate or control another arm. This is particularly important in the relationship between the executive and the courts.
- (c) That one branch should not attempt to exercise the functions of the other, for example a president, however powerful, ought not to make laws, [or] indeed act except in execution of laws made by the legislature. If it is in doubt, it should head for the court to seek interpretation.

In addition to the elements of federalism discussed above, the 1979 Constitution changed the existing land tenure system and vested ownership of all land in the government.⁹⁰ Regarding resource control, it,

⁸⁷ The importance of this provision is shown by the criticism that trailed the execution of three alleged drug couriers by General Buhari's regime. The three were executed based on Decree 20 of 1984. At the time one of them – Bernard Ogedengbe – allegedly committed the offence, it did not merit a capital punishment.

⁸⁸ Nwabueze (n 50 above) 9.

⁸⁹ Per Salami JCA, in *Hon Alhaji Abdullahi Maccido Ahmad v Sokoto State House of Assembly & Another* (2002) 44 WRN 52 69.

⁹⁰ Sec 274(5) of the 1979 Constitution incorporated the Lands Use Decree 6 of 1978, now chap L5, vol II, Laws of the Federation of Nigeria 2004.

introduced a 'derivation formula' for oil producing states of the federation. This provision enabled the concerned states to enjoy up to 13 per cent of oil revenue accruing from natural resources under their control.

Notwithstanding the noble provisions of the 1979 Constitution, constitutionalism remained under sufferance because of the abuse of due process by politicians. In many states, opposition parties were excluded from policy-making and marginalised in appointments to the public service. States implemented federal government programmes in shockingly partisan manners, erected barriers to admissions into government schools, and used their media to attack the federal government.⁹¹ Coupled with grossly incompetent leadership and corruption at both state and federal levels, the political stage was set for military intervention. On 31 December 1983, the military, led by General Mohammadu Buhari, terminated the civilian government and suspended the 1979 Constitution.⁹²

2.5 The 1999 Constitution

While the 1979 Constitution had in-depth input from civil society in its drafting processes, the same cannot be said for the 1999 Constitution. A brief background detail is necessary in order to understand this non-participatory approach. For eight years, General Ibrahim Babangida, who ousted General Buhari's regime from power in December 1985, claimed to guide Nigeria towards the path of genuine democracy. Without a commensurate intention of implementation, he initiated and discarded several transitions to civilian governance programmes. In late 1989, he partially promulgated the 1989 Constitution for the regulation of elections into state and local government offices in 1991. Curiously, then, a semblance of democracy operated at the state and local government levels from 1992, while a military government remained at the federal level. On 12 June 1993, following intense local and international pressure, Babangida conducted general elections widely regarded as free and fair. Chief M K O Abiola, a southerner, led in the exit polls. From partial results announced by the National Electoral Commission (NEC), Abiola seemed set to be declared the elected President.⁹³

However, Babangida was unwilling to relinquish power. His government mounted pressure on the NEC to suspend the announcement of the presidential election results. When this pressure failed, a group believed to be sponsored by the military – the Association for Better Nigeria – went to court in a bid to stop the NEC from completing the

⁹¹ JA Yakubu *Trends in constitution-making in Nigeria* (2003) 56-59.

⁹² Sec 1(1) of the Constitution (Suspension and Modification) Decree 1 of 1983.

⁹³ PM Lewis 'Endgame in Nigeria? The politics of a failed democratic transition' (1994) 93 *African Affairs* 323.

announcement of the election results. Such was the desperation of the military to prevent the emergence of a civilian government that the court injunction that halted the announcement of the results was allegedly issued around midnight. When the NEC chairman, Professor Humphrey Nwosu, refused to recognise the purported court order, he was arrested and detained. Babangida proceeded to annul the presidential elections, citing the court injunction and national security as the primary reasons for his action. A grave political crisis ensued.⁹⁴

Chief Abiola's ethnic group, the Yoruba people, felt robbed and encouraged their kinsman to press for the restoration of his electoral mandate. Civil demonstrations were held across the country calling for the release of the presidential election results. With Lagos virtually paralysed, there were even whispers of secession and the breakup of the country into the three major tribes, the Hausa, Igbo and Yoruba.⁹⁵ The international community also chipped in on the pressure on the military junta. Economic sanctions were imposed against Nigeria by the Commonwealth and the European Union. Unable to withstand the pressure, but unwilling to reverse the annulment of the election results, Babangida resigned on 27 August 1993. He handed over power to an unelected Interim Government of National Unity (ING), which was tasked with stabilising the polity and conducting fresh presidential elections. To pacify Abiola's tribe, he appointed Chief Ernest Shonekan, a Yoruba, as the head of the ING.

Abiola refused to recognise the ING and continued to press for the restoration of his electoral mandate. Shonekan's government was eventually declared illegal by a Lagos High Court on 10 November 1993. A few days later, General Sani Abacha, the Secretary for Defence in the ING, announced that Shonekan had resigned and seized power in a bloodless *coup*. On 11 June 1994, Abiola carried his protests too far by declaring himself the elected President of Nigeria. He was arrested and charged with treason. Yoruba political pressure groups, notably the National Democratic Coalition, were persecuted and their leaders went into exile.

General Abacha formulated a draft constitution and formed five political parties funded and controlled by his government. He prepared for a presidential election in which he was to be declared the consensus candidate of the five parties. On 10 June 1998 he died suddenly and the Chief of Defence Staff, General Abdusalami Abubakar, took over the reins of political power.

On 11 November 1998, General Abubakar established the Justice Niki Tobi-led Constitution Amendment Debate Coordinating Committee

⁹⁴ M Sakah 'The failed transition to civilian rule in Nigeria: its implications for democracy and human rights' (1993) 40 *Africa Today* 87.

⁹⁵ As above.

(CADC). There were 24 members, including the chairperson. The CADC was tasked with organising nation-wide consultations on a new constitution and to make recommendations based on these consultations. In his inaugural address, General Abubakar charged the CADC to 'collate views and recommendations canvassed by individuals and groups and submit a report not later than December 31 1998'.⁹⁶ One of the CADC's options was to base the new constitution on General Abacha's Draft Constitution of 1995. The CADC reported that Nigerians seriously opposed this option since they considered the 1995 Draft Constitution 'a product of disputed legitimacy', as well as a victim of a 'crisis of authenticity in the public consciousness'.⁹⁷ The CADC also reported similar disapproval for Babangida's 1989 Constitution. Nigerians were rather near-unanimous in agreeing that 'the 1979 Constitution had been tried and tested and therefore provides a better point of departure in the quest for constitutionalism in Nigeria'.⁹⁸ Accordingly, the CADC recommended the adoption of the 1979 Constitution, subject to certain amendments. General Abubakar's government accepted the CADC's recommendations, and after minor alterations, promulgated the 1999 Constitution in May 1999.⁹⁹ Conscious of Nigerians' disenchantment with military regimes, he quickly planned and implemented a political transition programme based on the Constitution. This programme eventually ushered in the Fourth Republic, with Chief Olusegun Obasanjo as the President.¹⁰⁰

It is apparent now why the 1999 Constitution is regarded as a reproduction of the 1979 Constitution. This is evident from the Preamble to Decree No 24 of 1999, which states:¹⁰¹

AND WHEREAS the constitutional Debate Coordinating Committee benefitted from the receipt of large volumes of memoranda from Nigerians ... and oral presentations at the public hearings at the debate centres throughout the country and the conclusions arrived thereat, and also at various seminars, workshops and conferences organised, and *was convinced that the general consensus of opinion of Nigerians is the desire to retain the provisions of the 1979 Constitution of the Federal Republic of Nigeria with some amendments.*

⁹⁶ Para 3 of the Inaugural Address contained in the Main Report of the Constitution Debate Coordinating Committee Annexure 1, 44-50.

⁹⁷ *Report of the Constitution Debate Coordinating Committee*, volume 1, main report (December 1999) 56.

⁹⁸ As above.

⁹⁹ The military established a new National Judicial Council (sec 153 and 3rd Sch, Pt 1) with a mandate that covers both state and federal judges. This contravened the CADC's recommendations, which had argued that a unified Judicial Council would violate Nigeria's federalism.

¹⁰⁰ As stated earlier, the late Alhaji Umaru Yar'Adua succeeded Obasanjo in 2007, and was in turn, succeeded by Dr Jonathan, who ushered in the sixth republic in May 2011.

¹⁰¹ Sec 3 of the Constitution of the Federal Republic of Nigeria (Promulgation) Decree No 24 of 1999 (emphasis added).

The sixth Preamble of the 1999 Constitution states in this regard:¹⁰²

AND WHEREAS it is necessary in accordance with the programme on transition to civil rule for the Constitution of the Federal Republic of Nigeria 1979, after necessary amendments and approval by the Provisional Ruling Council, to be promulgated into a new constitution for the Federal Republic of Nigeria in order to give the same force of law with effect from 29 May 1999.

It is safe, therefore, to conclude that the document containing eight chapters, 320 sections, and seven schedules, known as the 1999 Constitution, is an amendment of the 1979 Constitution. However, there are some differences in the provisions of the two Constitutions.

The 1999 Constitution added two new sections to chapter two of the 1979 Constitution. These are environmental objectives and duties of citizens to the government. Section 20 of the 1999 Constitution provides that 'the State shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria'. Section 24 outlines the duties of citizens to include patriotism, respect for the dignity of other citizens, maintenance of law and order and payment of taxes. Unlike the 1979 Constitution, and perhaps mindful of increasing economic hardship that had forced many Nigerians to go abroad, the 1999 Constitution dealt with renunciation of citizenship. Section 29 provides that 'any citizen of Nigeria of full age who wishes to renounce his Nigerian citizenship shall make a declaration in the prescribed manner for the renunciation'.

The 1999 Constitution also provided for the declaration of assets by public officers.¹⁰³ This was part of its conscious effort to promote the due process of law. In line with this recognition, and quite ironically, in view of the Constitution's history, it emphasised the importance of sovereignty belonging to the people by providing for the power of recall. Accordingly, the electorate are empowered to withdraw their mandate from an elected official whenever they so desire.¹⁰⁴ In furtherance of its provisions on the rule of law and separation of powers, the Constitution specially provided for the remuneration of both federal and state legislators. It gave a new constitutional body – the Revenue Mobilisation, Allocation and Fiscal Commission – the power to recommend and regulate the remuneration of certain elected and appointed officials.

Furthermore, the 1999 Constitution contains more comprehensive provisions than the 1979 Constitution with regard to the grounds for the disqualification of presidential and governorship candidates.¹⁰⁵ Similarly, it introduced the subject of 'acting president' and 'acting governor', and the

¹⁰² The 1999 Constitution, Preamble, sec 6.

¹⁰³ Sec 52, 94, 140, 149, 185, 194 & 290.

¹⁰⁴ The 1999 Constitution, sec 69 & 110.

¹⁰⁵ The 1999 Constitution, sec 137 & 182.

circumstances in which a person may hold the office of president or governor of a state in an acting capacity.¹⁰⁶ However, the ambiguous nature of this provision led to a constitutional crisis during the long ill-health of former president Musa Yar'Adua. The late President had failed to hand over to his deputy in an acting capacity before he proceeded for medical treatment in Saudi Arabia. Section 145 of the Constitution provides that for the Vice President to become acting President in the circumstances above, the President must transmit to the President of the Senate and the Speaker of the House of Representatives a written declaration that he is proceeding on vacation or that he is otherwise unable to discharge the functions of his office. During the troubling period of the president's prolonged ill-health, Parliament had to intervene under a 'doctrine of necessity' in order to give Dr Jonathan powers to act for the late president.

Finally, the 1999 Constitution provided for the determination of certain questions relating to elections. Sections 139 and 184 provide for the determination of election petitions with reference to the president and the Vice-President. Furthermore, it added a new schedule to the existing six in the 1979 Constitution. This addition was to accommodate election tribunals at both state and national levels. Being an amended version of the 1979 Constitution, the exploration of Nigeria's transition from military rule to constitutional government would be incomplete without examining the question of the 1999 Constitution's legitimacy.

3 The legitimacy of the 1999 Constitution

The 1999 Constitution has been subjected to criticism from its inception, most of which revolves around its legitimacy.¹⁰⁷ The concept of legitimacy is contested. In their most common usages, the term 'legitimate' is employed as a synonym for what is 'lawful,' and 'illegitimate' for what is 'unlawful'.¹⁰⁸ On the other hand, in a legal setting, these usages become unhelpful. For example, one may regard a judicial decision as legally legitimate even though one strongly disagrees with it. Used in a strict sense, however, there is no 'illegitimate' judgment because, in one way or another, such judgment finds a basis in written law. As seen below, this argument applies for the legitimacy of the 1999 Constitution.

The 1999 Constitution clearly departs from the constitution-making trends observed in previous constitutions in Nigeria. It is not without

¹⁰⁶ The 1999 Constitution, secs 145 and 190. Note that sec 37 restricts certain citizens from holding elective or appointive offices within ten years of being registered or naturalised as Nigeria citizens.

¹⁰⁷ Report of the Presidential Committee on the Review of the 1999 Constitution, vol 1, main report (February 2001) 3-4.

¹⁰⁸ Webster's New Twentieth Century Dictionary of English Language (2nd ed 1979) 1035.

interest to note that the 1979 Constitution was founded on a new legal order created by the military. Accordingly, it was not promulgated in line with any guidelines for constitutional change written into the 1963 Republican Constitution. Again, and unlike the 1963 Constitution, it made no reference to an existing Constitution with regard to the source of its authority.¹⁰⁹ Instead, it traces its validity to a largely elected Constituent Assembly that represented the generality of Nigerians. The 1999 Constitution is different. Though the brainchild of the military, it was not based on the militarily-conceived 1989 Constitution nor the 1995 draft Constitution. It was also not the product of a people's assembly. Based instead on the recommendations of a committee, it is an adoption of an amended constitution from a previous legal order – one that the military had put to sleep.¹¹⁰ In order to pass judgment on its legitimacy, a brief enquiry into the legality of military regimes is therefore required.

From age to age, people have changed their rulers to suit their purposes. Rulers have also sometimes imposed themselves on the people. These changes of rulers may be peaceful or violent. Regarding forceful changes of government, Hobbes and Rousseau postulated in varying degrees that where the force employed is successful, the sovereign ceases to govern and the subjects are free to choose a new ruler.¹¹¹ According to Rousseau:¹¹²

[t]he popular insurrection that ends in the death or deposition of a Sultan is as lawful an act as those by which he disposed, the day before, of the lives and fortunes of his subjects. As he was maintained by force alone, it is force alone that overthrows him.

Military regimes are products of force or coercion. In considering the legality of Nigerian military regimes, Hans Kelsen's view on legal orders is persuasive. Kelsen contended that a revolution occurs whenever the legal order of a community is nullified and replaced by a new legal order in an illegitimate manner – that is in a manner not prescribed or recognised by the first or pre-existing legal order itself. According to him:¹¹³

[e]very jurist will presume that the older order – to which no political reality any longer corresponds – has ceased to be valid, and that all norms, which are valid within the new order, received their validity exclusively from the new constitution. It follows that from the juristic point of view, the norms of the older order can no longer be recognised as valid norms.

¹⁰⁹ The 1989 and 1995 Constitutions, which were never fully promulgated, were military self-perpetuation gimmicks, and do not merit serious consideration.

¹¹⁰ Sec 1(1) of the Constitution (Suspension and Modification) Decree 1 of 1983.

¹¹¹ T Hobbes *Leviathan* (1651).

¹¹² J Rousseau *On the origin of inequality* (1752), cited in CH Heyns 'A "struggle approach" to human rights' in A Soeteman (ed) *Law and pluralism* (2001) 171-172.

¹¹³ H Kelsen 'The pure theory of law' (1934) 50 & (1935) 51 *Law Quarterly Review*.

Kelsen further asserted that legal systems consist of a hierarchy of norms, the apex of which is the *grundnorm*. Based on the principle of effectiveness, legal systems survive violations of their norms. Thus, a legal system remains valid and functional if it maintains a minimum of effectiveness capable of sustaining social cohesion. Accordingly, even if some norms are destroyed, the legal order subsists until the *grundnorm* itself is destroyed.¹¹⁴ This Kelsenian principle of minimum effectiveness is founded on the validity of law lying in the psychological reaction of the people to the actions of their rulers. If, for example, a revolution occurs and the populace is coerced or compelled to give it recognition through appropriate compliance, then the revolution has binding force. In this respect, it has been claimed by an eminent jurist that Nigerians deserve whatever form of government they have as long as they acquiesce to it.¹¹⁵ It has to be concluded that military interventions in Nigerian politics were successful revolutions that displaced the pre-existing legal order and replaced them with the ones chosen by the military. Being tainted by military regimes, to what then can the legitimacy of Nigeria's constitutionalism be attributed.

At a casual glance, it does not appear as if the legitimacy of the 1999 Constitution can be founded on the 1979 Constitution. A number of reasons can be offered for this view.

First, it should be recalled that the military used decrees to alter the existing legal order on which the 1979 Constitution was founded.¹¹⁶ Specifically, these decrees were enacted without regard to the mechanisms for altering the constitution provided for in section 9 of the 1979 Constitution. Similarly, the contents of these decrees on issues such as division of legislative and executive powers, number of states, and more importantly, ouster of courts' jurisdiction, show that the legal order established by the 1979 Constitution was completely abolished.

Second, the wording and effect of intervening military decrees since the first *coup d'état* in 1966 leave no doubt as to the legal order they inaugurated. For example, the Supremacy and Enforcement of Powers Decree 12 of 1994 provided as follows:

WHEREAS the military revolution which took place on 17 November 1993 effectively abrogated the whole pre-existing legal order in Nigeria except what has been preserved under the Constitution (Suspension and Modification) Decree No 107 of 1993;

¹¹⁴ Kelsen (n 113 above) 37-40.

¹¹⁵ N. Tobi *The rule of law under the military government in Nigeria* (1982) 10, arguing that in line with Hugo Grotius's postulation, once a people transfer their rights of government to a ruler however so chosen and for whatever reason, they forfeit the right to control or punish the ruler, no matter how autocratic the ruler becomes.

¹¹⁶ The Constitution (Suspension and Modification) Decree No 1 1984, and the Constitution (Suspension and Modification) Decree No 1 1993, as amended by the Constitution (Suspension and Modification) Decree No 13 1994.

AND WHEREAS the military revolution aforesaid involved an abrupt political change which was not within the contemplation of the Constitution of the Federal Republic of Nigeria 1979;

AND WHEREAS BY the Constitution (Suspension and Modification) Decree No 107 aforesaid, there was established a new government known as the Federal Military Government with absolute powers to make laws for the peace, order and good governance of Nigeria or any part thereof Nigeria ...

In light of the above, intervening military regimes in Nigeria justified their legitimacy as the outcome of successful revolutions. In other words, the supremacy decree may be regarded as having created a 'tabula rasa' on which a new legal system was built and which, at the same time, became the foundation of a new legal order. Though described as an 'evil piece of legislation',¹¹⁷ a supremacy decree such as Decree 13 of 1994 effectively became the *grundnorm* that replaced the Constitution. When the 1999 Constitution was eventually promulgated, no provision was made for the resuscitation of the 1979 Constitution. This is a fatal omission. It is difficult, therefore, to see how the Constitution's legitimacy can be traced to a destroyed constitution. The better argument is that, based on the principle of successful revolution, the 1999 Constitution's legitimacy is attributable to its acquiescence or acceptance by the Nigerian people. So long as it is accepted and operative in Nigeria, the issue of its legitimacy is moot.

4 Conclusion

With the exception of the 1979 Constitution,¹¹⁸ Nigeria's constitution-making experience has, thus far, largely followed the general trend in most African countries. This trend involves government stage-managing a constituent assembly to write a constitution. Under this trend, there is little or no debate, nor is there any referendum on the draft constitution before it is decreed or passed into law.¹¹⁹ In this regard, it is unfortunate that the practice of subjecting constitution-making and review to a referendum is omitted from Nigerian constitutions. This is not surprising as all the Constitutions Nigeria has had were either tainted with colonialism or military autocracy. Colonialism and authoritarianism, by their very nature, obviously discourage debate and dissent. This exclusion of the people in the constitution-making process offends the principle of constitutionalism. Fortunately, the results of the 2011 general elections show that the Nigerian electorate are increasingly aware of the power they wield, or are supposed to wield, over the political affairs of their country.

¹¹⁷ JV Achimu 'The legitimacy of constitutional change: The enactment of the 1999 Constitution in Nigeria' in IA Ayua *et al* *Nigeria: Issues in the 1999 Constitution* (2000) 9.

¹¹⁸ Arguably, the pre-independence 1954 Constitution was widely debated.

¹¹⁹ JO Ihonvbere 'Towards a new constitutionalism in Africa' (2000) *London Centre for Democracy and Development Occasional Paper Series* No 4.

The key lessons from constitution-making in Nigeria may therefore be classified into two.

The first is that military interventions have blighted Nigeria's capacity to respond adequately to the challenges of federalism on which its constitutionalism is founded. Being based on coercion, military rule is invariably and necessarily centrist. This centralism, which contradicts true federalism, did not take appropriate cognisance of the heterogeneous nature of the country. More ominously, it stifled vibrant debate and curtailed the judiciary's ability to develop the rule of law in Nigeria.¹²⁰ As acknowledged by the CADC, military dictatorships resulted in the 'curtailment of opportunities for political institutionalisation and democratic consolidation'.¹²¹ Nigerian presidential elections have been dominated by retired military officers since 1999, a fact identified as one of the challenges facing constitutionalism in Nigeria.¹²²

Second, it is fair to accept that although the 1999 Constitution is the operative basis of Nigerian law, its validity is questionable because it lacks the will or consent of the Nigerian people.¹²³ As if to underline this, the Fourth Republic, under former president Olusegun Obasanjo, had barely been sworn into office when it began moves to amend the 1999 Constitution in 2000. This dissatisfaction with the Constitution did not, however, diminish the efforts to review it.¹²⁴ This is because the general election that ushered in the reviewers of the Constitution was itself questionable.¹²⁵ Accordingly, considerable efforts have been made by civil society to inject into the constitutional review process the participatory principles of dialogue, debate, diversity, consultation, transparency and accountability. These efforts are championed by the Citizens Forum for Constitutional Reform, a conglomerate of over 100 non-governmental and community-based organisations.¹²⁶

The key issues involved in the present efforts to review the Constitution include federalism (especially its fiscal aspects), gender neutral language in the Constitution, security in the light of terrorism, and

¹²⁰ In *Wang Ching Yao v Chief of Staff Supreme Headquarters* (1985) unreported Appeal No CA/L/25/85, the Court of Appeal stated *inter alia* that 'on questions of civil liberties, the law courts of Nigeria must ... now blow muted trumpets'.

¹²¹ Report of the Presidential Committee on the Review of the 1999 Constitution, vol 1, Main Report (2001) 2.

¹²² IA Ayua & CJ Dakas 'Federal Republic of Nigeria' in J Kincaid & GA Tarr (eds) *Constitutional origins, structure, and change in federal countries: A global dialogue on federalism* (2005) note 59.

¹²³ Ihonvbere (n 119 above) 343-366.

¹²⁴ Despite the efforts of the fifth parliament to amend the 1999 Constitution, the sixth parliament has commenced further review of the Constitution.

¹²⁵ Although individual and civil society input is allowed in the constitution review process, sec 9 of the Constitution provides that the ultimate amendments are carried out by parliament.

¹²⁶ Citizens Forum for Constitutional Reform 'The Position of Citizens Forum for Constitutional Reform on the 1999 Constitution of the Federal Republic of Nigeria' (2001).

independence of both the electoral commission and political parties. Other key issues are freedom of association, enforceability of social and economic rights, creation of state police, protection of vulnerable minorities such as persons with disabilities, children, and women, as well as whether the Constitution should be reviewed via a national conference or a 'sovereign national conference'.¹²⁷ The idea of a sovereign national conference is an intriguing one borne from the awareness that the Preamble of the 1999 Constitution, which proclaims 'we the people' as the source of the Constitution's validity, is a lie against the Nigerian people.¹²⁸ By using the word 'sovereign' in advocating for a national conference, its proponents clearly imply that the present constitution is bereft of the peoples' mandate. This, and other issues involved in the review of the 1999 Constitution, indicate that Nigeria has grasped the importance of a participatory approach to constitution-making. The ongoing active involvement of civil society in the review of the 1999 Constitution is, accordingly, a positive sign that constitutionalism is coming of age in Nigeria.

Active participation in constitutional review processes is, however, insufficient to entrench constitutionalism in Nigeria. Constitutionalism encompasses all the political rules and obligations that bind both rulers and the electorate. As governmental powers are defined and limited by law, the actions of government organs must be in strict accordance with the law. Accordingly, constitutionalism cannot survive without compliance with the rule of law. Put differently, it is not enough to have a perfect constitution – if such a thing exists. The vital issue is the extent to which the constitution is respected and implemented. This is where the question of good governance gains prominence. A leading scholar has observed that 'the trouble with Nigeria is simply and squarely a failure of leadership'.¹²⁹ As evident in studies on leadership in Nigeria, it is on this failure from which pervasive corruption, political wrangling, civil strife, and economic mismanagement, so prevalent in Nigeria today, flow.¹³⁰ The 1999 Constitution, even before it was amended, contained numerous provisions capable of entrenching genuine constitutionalism in Nigeria. The key challenge to the success of these provisions is their effective implementation.

¹²⁷ On the question of sovereign national conference, see O Igbuzor & B Ololade (eds) 'Report of the National Conference on the Constitution Reform Process in Nigeria' (Nov 2002) *Citizens' Forum for Constitutional Reform*, Executive Summary.

¹²⁸ The 1999 Constitution's shortcomings in popular participation prompted Chief Rotimi Williams, chairman of the CDC for the 1979 Constitution, to describe the 1999 model as a 'fraudulent document.' See 'Towards an autochthonous constitution for Nigeria,' *Vanguard* 3 September 2004.

¹²⁹ Achebe (n 72 above) 1.

¹³⁰ BA Odunsi 'The impact of leadership instability on democratic process in Nigeria' (1996) 31 *Journal of Asian and African Studies* 66, describing the result of a study on the impact of leadership instability and democratic process in Nigeria from 1960 to 1995.

CHAPTER 7

A FEDERAL CONSTITUTION DEVOID OF CONSTITUTIONALISM: THE CASE OF CAMEROON

Chofor Che Christian Aimé

1 Introduction

The history of constitutionalism in Africa, and Cameroon in particular, is contentious. Many of the continent's problems have been caused not by the absence of *constitutions* as such but rather by the ease by which the provisions in these constitutions were manipulated: Thus, an absence of *constitutionalism*.

This chapter examines constitutionalism in Cameroon. The central question is: Although Cameroon has had numerous Constitutions since 1960, has it ever experienced constitutionalism? In seeking to answer this question, an assessment is first made of the colonial history of Cameroon. An assessment is also made of the period leading up to the independence and reunification of Cameroon in 1960. This is followed by an assessment of constitutionalism under the 1961, 1972 and 1996 Constitutions. The central argument is that since 1960, Cameroon has had Constitutions without constitutionalism as evidenced by the lack of supremacy of the Constitution, the absence of an independent judiciary, the absence of a Bill of Rights, and the lack of democracy through free and fair elections. The chapter finally recommends elements necessary for constitutionalism to prevail in Cameroon.

2 The colonial history of Cameroon from 1884 to 1960

2.1 Introduction

In June 1884, German agents present in Cameroon were instructed to notify the traditional coastal rulers that Germany was interested in

annexing their territory.¹ The Germans arrived in Douala in July 1884 and signed treaties with the traditional rulers. When the British heard of the arrival of the Germans, they immediately began their journey to the coast of Cameroon, but arrived very late, after the Germans had already signed treaties of annexation with the coastal traditional rulers of Cameroon, Kings Akwa and Bell.²

2.2 Cameroon under German colonial rule

German rule commenced in Cameroon in 1884. Authors such as Le Vine contend that 'Germany badly administered its colonies and brutally repressed the revolts of the colonised peoples'.³

From 1884 to 1894, discussions between Britain and France, on the one hand, and Germany, on the other hand, led to the formation of German Cameroon, 'Kamerun' as it was then called. A treaty was signed in March 1894 between the French and the Germans, which gave 'Kamerun' its shape until 1911.⁴

The German Colonial Constitution of 1886 ushered in the German administration in 'Kamerun'. German rule in Cameroon relied on a law which was passed in the Reichstag in 1886, which gave considerable power to the Kaiser, as Governor, to govern by decree in the German protectorate of Cameroon.⁵

The Kaiser also had power over the courts in 'Kamerun' and acted as judge of the court of highest appeal in the country.⁶ During their colonial tenure, the Germans ensured that there was a justice system in Cameroon by creating a number of courts. Two types of courts were created in the Cameroon, in which German criminal and civil procedure operated: a court for the 'natives' and a court for the 'whites'.⁷ Two laws, the Colonial Law of 10 September 1900 and the Consular Jurisdiction Law of 7 April 1900, opened up an avenue for German law to be applied in Cameroon.⁸

¹ TE Mbuagbaw *et al* *A history of the Cameroon* (1987) 48.

² VT Levine *The Cameroons: From mandate to independence* (1964) 21.

³ Levine (n 2 above) 37.

⁴ HR Rudin *Germans in the Cameroons 1884-1914: A case study in modern imperialism* (1968) 102. Before the signing of the 1894 treaty, 'the only officially defined boundary between French and German territory was the Cameroons Southern one, running up the Campo River and ending at 15 degrees east longitude'. In 1911, the total area of the German Cameroons was increased to 292,000 square miles, having an estimated total population of around 2,650,000 people.

⁵ N Rubin *Cameroon: An African federation* (1971) 33. The Governor was the head of the colonial administration, and had the right to control the military forces, as well as the right to collect and levy taxes.

⁶ CM Fombad 'Cameroon: Introductory notes' (2011) <http://web.up.ac.za/sitefiles/file/47/15338/CAMEROON%20CONSTITUTION%20-%20FINAL.pdf> (accessed 12 June 2012).

⁷ Rubin (n 5 above) 35.

⁸ Fombad (n 6 above) 2.

2.3 Cameroon under British and French colonial rule

In August 1914, the Germans in Cameroon were jointly attacked by the French and the British. After the departure of the Germans, Britain and France decided to partition Cameroon between themselves. Britain received one fifth, comprising two separate areas bordering Nigeria, while France received four fifths of the captured territory.⁹

This arrangement did not mean that the German possessions were to be annexed immediately by the states that conquered Germany. The distribution and mandate of the newly conquered German territories was to be supervised by the League of Nations. An annual report had to be given to the League of Nations by the 'mandatory' powers. The system of mandates was officialised by article 22 of the Covenant of the League of Nations.¹⁰ After the First World War, acquired colonies were classified into Class A, B and C mandates. Territories capable of governing themselves without external assistance, such as the provinces of the former Ottoman Empire, were designated as Class A mandate countries. Class B mandates were mainly reserved for German colonies in Africa that were to be governed by mandatory powers with complete powers of administration and legislation. Cameroon was classified as a Class B mandate. Class C mandates were made up of German colonies in the Pacific and Southwest Africa.¹¹

2.3.1 *British rule in Cameroon: Indirect rule from 1922 to 1939*

Lord Lugard was one of the many British colonial administrators who implemented the principles of indirect rule in Africa.¹² Therefore, with the exception of domains such as military force and taxation, the role of the British in colonial Africa, was advisory in nature. One would have thought that the aim of the British colonial masters would have been to improve the native administration they met while at the same time guaranteeing continuity from the past. However, Collins argues that the British used indirect rule because it was cheap and practical.¹³

⁹ Le Vine (n 2 above) 32-35. Systems of government were established by Britain and France in Cameroon, reflective of the systems of government established in other British and French colonies in Africa. A new system of mandate to cater for newly acquired colonies was established by the Peace Conference of Versailles in 1919. By 1922, the French and British accepted to administer their various portions of Cameroon as mandated territories of the League of Nations.

¹⁰ Zorgbibe (2006) in FE Anye 'Issues of minority in the context of political liberalisation: The case of Anglophone Cameroon' unpublished PhD thesis, University of the Witwatersrand (2008) 69.

¹¹ As above.

¹² DT Osabu-Kle *Compatible cultural democracy: The key to development in Africa* (2000) 44.

¹³ OR Collins 'Indirect rule in theory and practice' in OR Collins (eds) *Problems in the history of colonial Africa, 1860-1960* (1970) 87.

The British administered the two small territories received from the Germans, Northern and South Cameroon, for administrative convenience. The Clifford Constitution, which became operational in Nigeria in 1923, applied in Cameroon and put in place an Executive Council, which served as an advisory body to the Governor of Nigeria.¹⁴ Southern Cameroon was ruled as part of the territory of the Southern Province of Nigeria, while the Northern Cameroons was shared administratively among the three Northern Nigerian provinces of Adamawa, Bornu and Benue.¹⁵

2.3.2 French rule in Cameroon: 1922 to 1939

The system of governance carried out in French Cameroon was that of direct rule, similar to the system of governance carried out in other French colonies in Africa, in particular through assimilation.¹⁶ Such a policy intended integrating subjects of French colonies to the extent where they would actually become French individuals, legally, linguistically, politically and culturally speaking.¹⁷ The foundation of policies such as assimilation was that French civilisation was considered superior to African civilisation and French colonies were considered as part of France.¹⁸

The policy of assimilation faced many obstacles. A main barrier in fully carrying out the policy of assimilation especially in Cameroon was that, for several years, colonies like Cameroon had not had any connection or interaction with the French.¹⁹ Because of such impediments, France in each colony established an African elite that would assist in spreading French culture and language in colonised territories and would eventually be in a position to take part in the future administration of these colonies.²⁰

The legal system all over French Africa differentiated between Africans. Africans assimilated into the civilisation and culture of the French were called 'citizens', while Africans subjected to customs and native laws were called 'subjects'.²¹ Subjects only possessed their traditional rights, while citizens or assimilated Africans acquired the

¹⁴ Fombad (n 6 above) 3.

¹⁵ Mbuagbaw *et al* (n 1 above) 86.

¹⁶ Collins (n 13 above) 162.

¹⁷ As above.

¹⁸ RJ Willard *The Cameroon Federation: Political integration in a fragmentary society* (1970) 74.

¹⁹ DE Gardinier *Cameroon: United Nations challenge to French policy* (1963) 13. Additionally, France was not financially able to effectively implement an educational system based on the policy of assimilation in African territories.

²⁰ Gardinier (n 19 above) 13.

²¹ M Mamdani 'African states, citizenship and war: A case-study' (2002) 78 *International Affairs* 493 495. From the perspective of 19th Century colonialism, what is termed by historians as 'direct colonialism', the colonial powers created and enforced separate legal system in different sections of the population: customary laws for ethnic groups, and civil law for groups classified as 'races'.

judicial, political and civil rights of persons of French origin. Subjects could therefore only become citizens by proving that they had indeed become European citizens via employment and education of a European type.²² This implied that as subjects and citizens were subjected to two different legal systems, there was indeed a system of dual status which eventually found expression in the legal system and the courts.²³

2.3.3 Trusteeship rule of Cameroon after Second World War in 1939

The start of the Second World War in 1939 led to the end of the mandate system under which British and French Cameroon was governed. All the same, the mandate and League of Nations did not officially come to an end until the end of the Second World War and the creation of the United Nations (UN) in 1945, with its system of trusteeship.²⁴ The Trusteeship Agreements and the UN Charter both put in place fundamental rules and procedures for the post-war political and socio-economic development in trust territories. Article 76 of the UN Charter provides for 'the progressive development of the inhabitants of the trust territory towards self-government or independence'.²⁵ The UN was bent on ending colonisation.

2.3.3.1 French rule over Cameroon during the Trusteeship era: 1946 to 1959

As enshrined in the 1946 Constitution of France, French Cameroon was made an 'associate state' of France. This constitutional entrenchment allowed some Francophone Cameroonians, responsible for the management of government affairs in Cameroon, to be represented in the French National Assembly.²⁶

The creation of political parties in French colonies was encouraged by the 1946 French Constitution. The *Union des populations du Cameroun* (UPC), which was created in Douala in April 1948, was the first political party in French Cameroon. The UPC advocated for 'the unification of the

²² Levine (n 2 above) 90-91.

²³ Levine (n 2 above) 103. A tribunal existed for the subjects, which adhered to procedures governed by local custom and 'applied customary laws as long as they were not in conflict with the principle of French civilisation'.

²⁴ VG Fanzo *Cameroon History for secondary schools and colleges: The colonial and post-colonial periods Vol. 2* (1989) 102.

²⁵ JN Murray *The United Nations Trusteeship System* (1957) 249.

²⁶ Gardinier (n 19 above) 21.

two Cameroons and complete independence under the terms of the UN Charter'.²⁷

2.3.3.2 British rule over Cameroon during the trusteeship era: 1946 to 1961

The policy of indirect rule was continued by Britain under the greater part of the British Trusteeship era in Cameroon. As such, all administrative and political decisions implemented in Nigeria, were also indirectly or directly implemented in Anglophone Cameroon. During this trusteeship era, Anglophone Cameroon underwent major administrative and political changes, especially in the evolution from being part of the Eastern region of Nigeria to becoming a separate unit within Nigeria.²⁸

During the trusteeship era, the Clifford Constitution was in 1946 replaced by the Richards Constitution.²⁹ The Richards Constitution did not grant budgetary and regional autonomy to Anglophone Cameroon. The Richards Constitution was heavily criticised and therefore amended. The amended Constitution provided for thirteen elected members of the Eastern Regional House, ensuring that two of these elected members came from Anglophone Cameroon.³⁰

Some hope was given to Anglophone Cameroonian nationalists' aspirations when the representation in the Eastern Regional House was increased by the MacPherson Constitution, which replaced the Richards Constitution in 1951.³¹ The MacPherson Constitution of June 1951 ensured that there were thirteen members from Anglophone Cameroon. Despite the fact that the MacPherson Constitution gave additional seats to Anglophone Cameroon, traditional rulers remained very powerful and indirect rule was still operational. Since Anglophone Cameroon was still considered to be part of Nigeria, it did not benefit from budgetary or regional autonomy.³²

Anglophone Cameroon underwent significant political activity including the creation of political parties during the trusteeship era.

²⁷ VJ Ngoh *Cameroon: From a federal to a unitary state 1961 - 1972* (2004) 8. The UPC soon became critical of French rule and was perceived by the French administration as a threat to peace in Francophone Cameroon. The UPC was banned in 1955, after a bloody rebellion in Yaoundé and Douala. In a bid to solve some of the concerns pointed out by the UPC, a law was passed by the French National Assembly which furnished 'institutional reforms by decrees, the acceptance of political developments in French Cameroon and single Electoral College election to all assemblies in French Cameroon'.

²⁸ VG Fanzo *Cameroon history for secondary schools and colleges: The colonial and post-colonial periods vol 2* (1989) 125.

²⁹ Fombad (n 6 above) 4.

³⁰ VJ Ngoh *Constitutional development in Southern Cameroons, 1946 - 1961: From trusteeship to independence* (1990) 86.

³¹ Fombad (n 6 above) 4.

³² Anye (n 10 above) 81.

Pressure groups like the Cameroons National Federation (CNF) and the Cameroons Welfare Union (CWU) existed and spearheaded the political agenda in Anglophone Cameroon, before political parties came into existence. The first political party to be created in Anglophone Cameroon, the Kamerun National Congress (KNC), came into being only in June 1953. Anglophone Cameroon was accorded some degree of autonomy in October 1945, with its own House of Assembly and Executive Council with Endeley as the governor in charge of government affairs.³³

2.3.4 An assessment of British and French rule in colonial Cameroon

The most important distinction between French and British colonial rule was the manner in which the 'native' population was treated, especially the traditional rulers. This was clearly demonstrated in the manner in which the British stressed respecting the institutions and powers of the traditional rulers.³⁴ In British Anglophone Cameroon, the British met powerful local traditional rulers and institutions, and established traditional rulers where they found none. These traditional rulers assisted the British in their colonial administration.³⁵ The French considered the traditional rulers as subordinate officials, retained for convenience in the colonial administration, rather than out of any consideration for their institutions of governing or traditional institutions.³⁶

The indirect system and the policy of assimilation were similar in that these systems conserved authority over their colonies by ruling via the traditional rulers. Although the French policy of assimilation considered the traditional rulers as subordinates, cooperation was allowed among themselves, while ensuring that these traditional rulers and their people respected French values. The British on the other hand allowed traditional rulers to some extent, to govern themselves as well as respect their own traditional values and culture.

2.4 The independence and reunification of Cameroon

2.4.1 The presence and manifestation of nationalist sentiments

Before reunification, nationalist sentiments were noticeable both in Anglophone and Francophone Cameroon. Francophone Cameroon first demonstrated some signs of nationalist sentiments through the emergence

³³ Fanson (n 28 above) 133.

³⁴ BN Jua 'Indirect Rule in the Post-Colonial State' 6 December 2005 <http://lucy.ukc.ac.uk/Chilver/Paideuma/paideuma-Conclus-2.html> (accessed 29 May 2012).

³⁵ As above.

³⁶ M Crowder 'Indirect rule French and British style' in IL Markovitz (eds) (1970) *African politics and society: Basic issues and problems of government and development* 109.

of political activism, which gradually trickled into Anglophone Cameroon.³⁷

In Anglophone Cameroon, tendencies began to emerge only around 1939, owing to the fact that the development of the territory was seriously neglected by the British. As a result of these nationalistic tendencies, several national movements were created, which eventually led to the formation of political parties. A political conference jointly attended by Anglophone and Francophone Cameroonians took place in May 1949 in the historical town of Mamfe in Anglophone Cameroon.³⁸

It would appear that nationalist sentiments for a reunification of Anglophone and Francophone Cameroon were encouraged at the political conference that was attended by elites of both territories. Consequently, the issue of secession from Nigeria, and reunification with Francophone Cameroon dominated politics in Anglophone Cameroon from the 1950s onwards. However, the Anglophone Cameroonian community did not have one voice with regards to the issue of secession from Nigeria. Some Cameroonians preferred Anglophone Cameroon to be a region of the Nigerian Federation, while others preferred Anglophone Cameroon to secede and reunite with Francophone Cameroon.³⁹

The group of Anglophone Cameroonians who favoured joining Francophone Cameroon led by Foncha started campaigning seriously, criticised Nigerian politics, and highlighted the fear of Ibo domination on the ground that this Nigerian group was an economic threat to Anglophone Cameroonians.⁴⁰ The other group of Anglophone Cameroonians who favoured remaining with Nigeria tried to convince Anglophone Cameroonians of the disadvantages of joining French Cameroon. A plebiscite that was held to decide the future of Anglophone Cameroonians saw victory to those in favour of the reunification of Anglophone Cameroon with Francophone Cameroon.⁴¹ There was therefore a need for a meeting to decide governance arrangements, including issues of constitutionalism, for a unified Cameroon. Foumban in Francophone Cameroon was chosen for this meeting.

³⁷ NP Toh *The anglophone problem in Cameroon: The prospects for non-violent transformation: proposals for peaceful transformation of the Anglophone problem in Cameroon* (2001) 19.

³⁸ Gardinier (n 19 above) 62. The Anglophone Cameroonians appreciated the growth in educational standards in French Cameroon, due to French rule. Requests were then made by Anglophone Cameroonians for French trusteeship to take over the British territory.

³⁹ L. Atanga 'The political economy of West Cameroon: A study in the alienation of a linguistic minority' unpublished MA thesis, Amadou Bello University, Zaria, 1994 71.

⁴⁰ Atanga (n 39 above) 67.

⁴¹ J Ebune *The growth of political parties in southern Cameroons 1916 - 1960* (1990) 187.

2.4.2 The Constitutional Conference in Foumban

The Constitutional Conference in Foumban was scheduled to take place from 17 to 21 July 1961. In preparation of the Constitutional Conference in Foumban, traditional rulers, members of the Native Authority Councils, as well as political leaders from Southern Cameroons, jointly held a convention in June 1961 at the headquarters of Bamenda – now the headquarters of the North West Region of Cameroon.⁴²

During the Constitutional Conference in Foumban, 12 delegates were present from Francophone Cameroon and 25 from Anglophone Cameroon. The 12 delegates from Francophone Cameroon tabled before the Anglophone Cameroonian delegation for deliberation, a constitution very similar to the Constitution of the Fifth French Republic of 1958. The delegates from Anglophone Cameroon stressed on their part, 'constitutional conceptions derived from the United States, Canada and Britain'.⁴³

Anglophone Cameroonians suggested that justice in their part of the territory should be carried out in accordance with English law and customs. There would be need for the entrenchment in the Constitution of a list of constitutional clauses guaranteeing the autonomy of Anglophone Cameroon, and the sole possibility for the amendment of these clauses would be via a national referendum.⁴⁴

By the time of reunification, the Francophone sector of the country was not only independent but also had a fully functioning Constitution, the 1960 Constitution, in place.⁴⁵ President Ahidjo was instead trying to grasp more power in the newly independent country and proposals from the Anglophone Cameroonians were going to weaken his position. All the same after much reflection, Francophone Cameroonians were ready to make some concessions to proposals from their Anglophone counterparts.⁴⁶

⁴² J Ebune 'Making of the federal system' in VJ Ngoh (ed) *Cameroon: From a federal to unitary state 1961-1972* (2004) 67. During their final discussions a mutual position was arrived at for further discussions with Francophone Cameroon. They accepted a 'loose federation and a clear distinction to be made between the rights of the state and that of the federation in order to preserve the local autonomy of the state and its power'.

⁴³ H Enonchong *Cameroon constitutional law* (1976) 84.

⁴⁴ NF Awasom 'The reunification question in Cameroon history: Was the bride an enthusiastic or a reluctant one?' (2000) 47 *Africa Today* 439.

⁴⁵ CM Fombad 'Cameroon's constitutional conundrum: Reconciling unity with diversity' in the Kenyan section of the International Commission of Jurists *Ethnicity, human rights and constitutionalism in Africa* (2008) 126.

⁴⁶ Awasom (n 44 above) 441.

3 An analysis of constitutionalism under the 1961, 1972 and 1996 Constitutions of Cameroon

3.1 The 1961 Federal Constitution

The 1961 Federal Constitution which gave birth to the Federal State of Cameroon was a written constitution, ushered in by the February 1961 plebiscites.⁴⁷ These plebiscites were planned under the auspices of the UN.⁴⁸ There were two options for Anglophone Cameroon to achieve independence: either by joining Nigeria or by joining the independent Republic of Cameroon – Francophone Cameroon or Eastern Cameroon.⁴⁹ The majority of the voters chose the second option.⁵⁰

Remarkably, the 1961 Federal Constitution made no main changes to the formal government arrangements that had existed separately in Anglophone and Francophone Cameroon before reunification. Anglophone Cameroon retained its ministerial system, complete with a Prime Minister and cabinet. Its House of Assembly – renamed the West Cameroon Legislative Assembly – and its House of Chiefs were also retained. Francophone Cameroon retained its ministerial system of Prime Minister and Secretaries of State – Ministers. It also retained its own legislature, unaltered save in name, from ‘National Assembly’ to ‘East Cameroon Legislative Assembly’.⁵¹

3.1.1 Amendment of the 1961 Federal Constitution

The Federal Constitution of 1961⁵² was an indicator of the nature of the federation. Against the comprehensive list of the federal prerogatives was placed that of the federated states – regional governments. Article 38(1) of the Federal Constitution stipulates as follows:

Any subject not listed in article 5 and 6, and whose regulation is not specifically entrusted by the Constitution to a federal law shall be the

⁴⁷ E Ardener ‘The political history of Cameroon’ (1962) 18 *The World Today* 341 342.

⁴⁸ As above.

⁴⁹ NF Awasom ‘Negotiating federalism: How ready were Cameroonian leaders before the February 1961 United Nations plebiscites?’ (2002) 36 *Canadian Journal of African Studies* 450 456.

⁵⁰ Awasom (n 49 above) 450 458. Also see P Konings ‘The anglophone Cameroon-Nigeria boundary: Opportunities and conflicts’ (2005) 104 *African Affairs* 275 282-283. Although the Anglophone Cameroonians voted by a majority of seven to three in favour of union with the former French Cameroons during the 1961 plebiscite organised by the UN, there is overwhelming evidence to suggest that if a third option of either independence or continued trusteeship had been put forward, it would have been considered in a favourable light.

⁵¹ P Konings & FB Nyamnjoh ‘The Anglophone problem in Cameroon’ (1997) 35 *The Journal of Modern African Studies* 207.

⁵² The Federal Constitution, arts 5 & 6.

exclusive jurisdiction of the federated states, which within these limits may adopt their own constitution.

According to article 5 of the 1961 Federal Constitution, the central government has competence over the following:

- (1) Nationality;
- (2) Status of Aliens;
- (3) Rules governing the conflict of Laws;
- (4) National Defence;
- (5) Foreign Affairs;
- (6) Internal and External Security of the Federal State, and Immigration and Emigration;
- (7) Planning, Guidance of the Economy, Statistical Services, Supervision and Regulation of Credit, Foreign Economic Relations, in particular Trade Agreements;
- (8) Currency, the Federal Budget, Taxation and other Revenue to meet federal expenditure;
- (9) Higher Education and Scientific Research;
- (10) Press and Broadcasting;
- (11) Foreign Technical and Financial Assistance;
- (12) Postal Services and Telecommunications;
- (13) Aviation, and Meteorology, Mines and Geological Research, Geographical Survey;
- (14) Conditions of Service of Federal Civil Servants, Members of the Bench and Legal Officers;
- (15) Regulation as to procedure and otherwise of the Federal Court of Justice;
- (16) Border disputes between the Federated States; and
- (17) Regulation of Services dealing with the above subjects.

Article 6(1) of the 1961 Federal Constitution also accords central government competence over the following:

- (a) Human Rights;
- (b) Law of Persons and of Property;
- (c) Law of Civil and Commercial Obligations and Contracts;
- (d) Administration of Justice, including rules of Procedure in and Jurisdiction of all Courts (but not the Customary Courts of West Cameroon except for appeals from their decisions);
- (e) Criminal Law;
- (f) Means of Transport of federal concern (roads, railways, inland waterways, sea and air) and Ports;
- (g) Prison Administration;

- (h) Law of Public Property;
- (i) Labour Law;
- (j) Public Health;
- (k) Secondary and Technical Education;
- (l) Regulation of Territorial Administration; and
- (m) Weights and Measures.

Article 6(2) of the 1961 Federal Constitution stipulates as follows:

The Federated States may continue to legislate on the subjects listed in this article, and to run the corresponding administrative services until the Federal National Assembly or the President of the Federal Republic in its or his field shall have determined to exercise the jurisdiction by this article conferred.

Article 6(3) of the Federal Constitution further stipulates as follows:

The executive or legislative authorities as the case may be of the Federated States shall cease to have jurisdiction over any such subject of which the Federal authorities shall have taken charge.

The cumulative effect of these provisions is that the federal or central government had competence on all the major issues in the running of the affairs of the state. The regional government could only carry out any functions if the central government so allowed.

In October 1969, President Ahidjo urged certain constitutional changes to be made by the National Assembly. He requested that a law be passed to enable Parliament to extend its term of office on the initiative of the President. He also wanted the power to appoint the Prime Ministers of the states, and finally requested that the Assembly delegate the power to legislate to him.⁵³ President Ahidjo announced in the National Assembly that he intended to transform the federal Republic into a unitary state provided the electorate supported the idea in a referendum that would be held on 20 May 1972. This proposed course of action constituted an abrogation of article 47(1) of the 1961 Federal Constitution, which read: 'Any proposal for the revision of the present constitution, which impairs the unity and integration of the federation, shall be inadmissible'.

This important clause had been inserted into the 1961 Federal Constitution specifically to assure Anglophone Cameroonians that the Federation could not be dissolved easily through a constitutional amendment. Even if the 1961 Federal Constitution were to be amended, it could not be done by referendum because article 47(3) stipulated that 'proposals for revision shall be adopted by simple majority vote of the

⁵³ FM Stark 'Federalism in Cameroon: The shadow and the reality' (1976) 10 *Canadian Journal of African Studies* 3 438.

members of the federal Assembly, provided that such majority includes a majority of the representatives of each of the Federated States'.⁵⁴ Le Vine argues that President Ahidjo probably chose the use of a referendum.⁵⁵ In the end, because through an amendment, these results could easily be manipulated. The intentions of article 47(1) and 47(3) did not succeed, especially as President Ahidjo succeeded in revising the 1961 Federal Constitution.

The 1961 Federal Constitution could be easily amended. The President did not have to rely on a supermajority procedure before a Bill concerning an amendment of the Federal Constitution was passed.

3.1.2 Supreme law

The concept of the supremacy of a constitution assigns the highest authority in a legal system to the constitution.⁵⁶ Therefore, the supremacy of the constitution means the *lower ranking* of statutes in relation to the constitution.⁵⁷

The regional government of Anglophone Cameroon, in particular, felt seriously threatened by the Federal Inspectors. Functions to be carried out by civil servants of Anglophone Cameroon were in most cases taken over by Federal Inspectors.⁵⁸ This led to some protests from the civil servants of the Anglophone Cameroon regional government. A secret memorandum was even addressed to President Ahidjo, requesting that the Prime Minister of Anglophone Cameroon should be the only representative of the President in the state of West Cameroon.⁵⁹

By 1965, the central government had taken over most of the functions assumed to fall under the competence of the regional governments, including local government, agriculture, internal trade, social affairs and primary education.⁶⁰

This meant that the 1961 Federal Constitution was not supreme, because provisions therein were not adhered to by the central government. The central government took over nearly all the functions of the regional governments in 1965. If the 1961 Federal Constitution has been supreme, the regional governments could have challenged this move, by tabling the

⁵⁴ See also P Konnings & FB Nyamnjoh *Negotiating an anglophone identity: A study of the politics of recognition and representation in Cameroon* (2003) 64.

⁵⁵ VT Levine 'Political integration and the United Republic of Cameroon' in DR Smock & K Bentsi-Enchill (eds) *The search for national integration in Africa* (1976) 276.

⁵⁶ J Limbach 'The concept of the supremacy of the Constitution' (2001) 64 *The Modern Law Review* 1.

⁵⁷ As above.

⁵⁸ T Ngomba 'The federal system in west and east Cameroon' in VJ Ngoh (ed) *Cameroon from a federal to a unitary state 1961 - 1972* (2004) 89.

⁵⁹ J Benjamin *West Cameroonians: The minority in a bi-cultural state* (1987) 55.

⁶⁰ M Atanga *The Anglophone Cameroon predicament* (2011) 61.

issue before a court of finality, which happened to be the federal Court of Justice. However, only the President of the Republic had the complete discretion to refer cases affecting the 1961 Federal Constitution to the federal Court of Justice. With these constitutional provisions and a series of other texts regulating the functioning of the federal Court of Justice, this court was not considered objective in determining the constitutionality of laws in Cameroon.⁶¹

3.1.3 *The independence of the judiciary*

In a bid to merge the legal systems of Anglophone and Francophone Cameroon, 'federal laws were passed that covered procedures for the Supreme Court of the Federation'.⁶² The central government's move to integrate both legal systems was a daunting task. Significant differences between the court systems of Anglophone and Francophone Cameroon existed.⁶³

The court system in both regional governments remained unaltered, and the courts continued to function on the basis of the legal systems based on French principles and procedures in Francophone Cameroon and on the British version thereof in Anglophone Cameroon. The French and English languages were utilised in the respective jurisdictions. A major difference in the legal system was the recruitment of court staff. Judges in Anglophone Cameroon were trained following the British legal system, and judges in Francophone Cameroon were trained following the French legal system.⁶⁴

At the top of the legal structure under the 1961 Federal Constitution was the Federal Court of Justice. The Federal Court of Justice was vested with the following power:⁶⁵

- (a) to decide conflicts of jurisdiction between the highest courts of the two federated states;
- (b) to give final judgments in such appeals as may be granted by federal law from the judgment of the superior courts of the federated states wherever the application of federal law was in issue;
- (c) to decide complaints against administrative acts on grounds of 'ultra vires';
- (d) to decide disputes between the federated states or between either of them and the Federal Republic.

⁶¹ CM Fombad 'The new Cameroonian Constitutional Council in a comparative perspective: Progress or retrogression?' (1998) 42 *Journal of African Law* 172 174.

⁶² RJ Willard *The Cameroon Federation: Political integration in a fragmentary society* (1963) 304.

⁶³ Rubin (n 5 above) 162.

⁶⁴ Willard (n 18 above) 306.

⁶⁵ The Federal Constitution, art 33.

In exercising this jurisdiction, the court's membership was made up of individuals appointed by the President of the Republic as 'ad hoc' judges for a period of one year by reason of their expertise. These constitutional provisions and a series of other texts regulating the functioning of the federal Court of Justice dictate the conclusion that this court could not be considered independent in determining the constitutionality of laws in Cameroon.⁶⁶

3.1.4 Bill of Rights

The scope of application of rights categorises rights into so-called three generations of rights: namely, 'civil and political' rights, first generation rights; 'social and economic' rights, second generation rights; and the 'solidarity' or 'collective' rights, third generation rights.⁶⁷

Under the 1961 Constitution, there was no Bill of Rights to guarantee the promotion and protection of the rights of the people of Cameroon. All the same, article 1 of the 1961 Constitution provided for adherence to the Universal Declaration of Human Rights and the UN Charter.⁶⁸ It was therefore difficult to enforce human rights in Cameroon under the 1961 Federal Constitution, because there were no national human rights institutions in place, and no civil society groups to see to it that human rights prevailed.

The enforcement of human rights depended on the goodwill of the regime in power. Human rights remained an expression of political will that was yet to become exploitable by the citizens of Cameroon.⁶⁹

3.1.5 Democracy

Democracy was not adequately guaranteed. There was no freedom of the press. The government was not accountable to the people. Political parties were dissolved by President Ahidjo. President Ahidjo was able to dominate the Federation during the first years, playing off Anglophone political parties against each other and eventually persuading them to support the idea of a single national party. Only one month after reunification, in November 1961, President Ahidjo first appealed for the formation of a single national party, which he rightly perceived as a major step to the realisation of his main objective of having a unitary state.⁷⁰ On

⁶⁶ Fombad (n 61 above) 174.

⁶⁷ J Mishra *Scope and categories of human rights* (2006) 214.

⁶⁸ The Federal Constitution, art 1.

⁶⁹ JL Fongoh 'The influence of constitutional justice on society and on global human rights jurisprudence: The case of the Republic of Cameroon' (2009) Paper at the World Conference on Constitutional Justice, Cape Town South Africa http://www.venice.coe.int/WCCJ/Papers/CMN_Jani_e.pdf (accessed 20 March 2012).

⁷⁰ JM Mbaku *Institutions and reform in Africa: The public choice perspective* (1997) 80.

30 December 1961, elections to a new enlarged West Cameroon Legislative Assembly gave the ruling party, Kamerun National Democratic Party (KNDP), a clear majority of 24 seats out of 37, to the detriment of the Anglophone political parties.⁷¹

Although there were elections, they were not free and fair, in part due to the absence of an elections management body to facilitate this process. The Ministry of Territorial Administration and appointed administrative authorities, accountable to the President, organised these elections.⁷² Elements of democracy were therefore definitely lacking with respect to the 1961 Federal Constitution. A lack of freedom of speech and the existence of only one political party meant that it was difficult for the citizens to hold the President accountable for any irregularities.

3.1.6 Assessment

The Federal Constitution of 1961 could be easily amended. The Federal Constitution was also not considered the supreme law of the land because the power attributed to regional governments, especially the Anglophone regional government, was usurped by agents of the central government. There was no judicial review power accorded to the highest court to challenge executive orders found to go against provisions of the 1961 Federal Constitution. The 1961 Federal Constitution provided for an independent judiciary, but this judiciary was not independent in its decision making. The 1961 Federal Constitution also did not contain a Bill of Rights and so the protection and promotion of human rights was lacking. Associational concepts such as democracy, which are always linked with constitutionalism, were consequently also not respected.

3.2 The 1972 Constitution

President Ahidjo explained the change from a federal to the unitary state as a means to promote peace and the development of the nation. He considered that the cumbersome and costly federal structures of the country were clearly hampering the nation's developmental efforts. The President's move was a success.⁷³ Following a referendum held on 20 May 1972, the state on 2 June 1972 became the United Republic of Cameroon (URC).⁷⁴

⁷¹ Ardener (n 47 above) 349.

⁷² Stark (n 53 above) 437-439.

⁷³ CL Bongfen 'The road to the unitary state of Cameroon 1959 - 1972' (1995) 41 *Paideuma Bd* 23-24.

⁷⁴ Bongfen (n 73 above) 18-19.

3.2.1 Amendment of the 1972 Constitution

According to article 36, only the President of the newly formed unitary state and the President of the National Assembly could initiate Bills amending the 1972 Constitution. Bills to amend the 1972 Constitution introduced in the National Assembly had to bear the signatures of at least one-third of its membership.⁷⁵ Article 37 added that no procedure to amend the 1972 Constitution was to be accepted if it tended to impair the republican character, unity or territorial integrity of the State.⁷⁶

In 1984, when President Paul Biya took over power from President Ahidjo, articles 1, 5, 7, 8, 26 and 34, all considered as core articles of the 1972 Constitution, were amended.⁷⁷ According to El Hadj Hayatou, the amendments gave *de jure* and *de facto* recognition to Cameroon's fundamental option of national unity. The appellation 'United Republic of Cameroon' was replaced with 'Republic of Cameroon'.⁷⁸ More importantly, the amendments also involved streamlining the exercise of executive power by vesting such power solely in the President of the Republic, and re-instituting a system of vacancy of the Presidency that was from a legal viewpoint, more in accordance, with the democratic and republican spirit of article 2 of the 1972 Constitution. Hayatou adds that the amendments sought to make the Cameroonian people sovereign masters of their destiny and of the choice of their Head of State in the event of a vacancy.⁷⁹ Hayatou's assessment that the amendments sought to make the Cameroonian people sovereign masters of their destiny, is not a true assertion especially as some of these amendments instead invested absolute powers in the President, making him very powerful.

The 1972 Constitution could be amended easily. This element of constitutionalism was therefore lacking under the 1972 Constitution.

3.2.2 Supreme law

A strong centralised government and presidential system was established under the 1972 Constitution.⁸⁰ At the helm of the judicial ladder was the Supreme Court. Although this Court was considered as the court of finality over judicial matters, it could not challenge executive acts. The Supreme Court had no power of judicial review. In principle, the 1972 Constitution was considered paramount law, but technically it did not bind the

⁷⁵ The 1972 Constitution of Cameroon, art 36.

⁷⁶ As above.

⁷⁷ EH Hayatou 'The Constitution of Cameroon' (1985) 143 3rd Quarter *Constitutional and parliamentary information* The Association of Secretaries General of Parliaments 99 <http://www.asgp.info/Resources/Data/Documents/HPMOEWVPHSZPHGXVHYOUSSTWPSYJWI.pdf> (accessed 19 August 2012).

⁷⁸ As above.

⁷⁹ Hayatou (n 77 above) 99.

⁸⁰ Ngoh (n 27 above) 176.

legislature because the 1972 Constitution did not allow challenges against the acts of the executive.

3.2.3 *Independence of the judiciary*

The Cameroonian legal system and its sources of law were significantly shaped by the dual English-French colonial legal heritage that gave rise to the dual legal system in the country. The legal system of Francophone Cameroon was modelled on French tradition and practice while the legal system of Anglophone Cameroon operated in accordance with British common law and Nigerian statutes.⁸¹

According to article 31, justice was to be administered in the name of the people of Cameroon. The judiciary was supervised by the Ministry of Justice, part of the Executive, and did not operate as an independent branch of government.⁸² The President appointed the members of the Bench and of the legal service, assisted by the Higher Judicial Council which was mainly composed of those loyal to his regime. The Council was to provide him with opinions on all proposed appointments to the Bench and regards disciplinary sanctions concerning them. There was no elaboration on the independence of the judiciary, especially with respect to adjudication and enforcement of the law.

Political influence had a major impact on the impartiality and independence of the judiciary: Judges could be appointed and dismissed by the President and the Executive branch influenced judicial decisions. The principle of impartiality and independence of the judiciary was therefore lacking in the 1972 Constitution.⁸³

3.2.4 *Bill of Rights*

There was also no Bill of Rights in the 1972 Constitution. As a result, the promotion and protection of human rights suffered from a lack of procedural as well as substantive measures, and the abuse of civil and political rights especially was left without appropriate remedies.⁸⁴ The promotion and protection of the human rights of citizens was definitely wanting.

⁸¹ E Ngwafor 'The law across the bridge: Twenty years (1972-1992) of confusion' (1995) 26 *Revue Générale de Droit* [General Law Review] 70.

⁸² Cameroon – Judicial system *Encyclopaedia of the Nations* <http://www.nationsencyclopedia.com/Africa/Cameroon-JUDICIAL-SYSTEM.html> (accessed 15 May 2012).

⁸³ AS Ngwana 'Cameroon Democratic Party' 1987 *Peuples Noirs Peuples Africains* [Black People, African People] 55/56/57/58, 174-190 http://mongobeti.arts.uwa.edu.au/issues/pnpa55_58/pnpa55_58_17.html (accessed 12 September 2012).

⁸⁴ S Dicklitch 'Failed democratic transition in Cameroon: A human rights explanation' (2002) 24 *Human Rights Quarterly* 152 153.

3.2.5 Democracy

Freedom of speech was heavily regulated under the 1972 Constitution. The country still had one political party, the CNU, until 1988, when Cameroon held its first elections since the multi-party system was dissolved earlier in 1966. However, to qualify to participate in these elections, each candidate had to be approved by the leadership of the country's only legal political party, the Cameroon People's Democratic Party (CPDM), which succeeded the CNU in 1988. Due to severe criticism during these elections, supported by changes in the global landscape, there was a brief return to multiparty campaigning in 1990, which was an intended shift towards democracy. Despite this move, the CPDM still monopolised the political environment of the country.⁸⁵ In 1991, the opposition called for the dissolution of the CPDM-controlled National Assembly, as well as for freedom of the press.⁸⁶

In 1992 Cameroon held its first multiparty elections in 25 years. Out of 60 political parties, 31 were able to participate, although it was alleged that they did not respect the registration requirements. The major opposition party, the Social Democratic Front (SDF), decided to boycott the elections, as it claimed that there were irregularities in the preparations for the elections. The elections were organised by the Ministry of Territorial Administration through appointed administrative authorities loyal to the regime.⁸⁷ The CPDM won the elections, and none of the anticipated democratic changes materialised. Discontent and frustration among Cameroonians led to strikes and riots, accompanied by vehement calls for constitutional reform.⁸⁸

3.2.6 Assessment

The 1972 Constitution could be easily amended, and was also not considered supreme law because there was no judicial review power accorded to the highest court to challenge executive orders found to go against provisions of this Constitution. The 1972 Constitution provided for an independent judiciary, but this judiciary was not independent in its decision-making. The 1972 Constitution also did not contain a Bill of Rights leaving the protection and promotion of human rights lacking. It follows that democracy was also very weak under this constitutional dispensation.

⁸⁵ JM Mbaku 'Decolonisation, reunification and the federation in Cameroon' in J Takougang & JM Mbaku (eds) *The leadership challenge in Africa: Cameroon under Paul Biya* (2004) 32.

⁸⁶ Mbaku (n 85 above) 33.

⁸⁷ Mbaku (n 85 above) 33.

⁸⁸ Fombad (n 45 above) 132.

3.3 The 1996 Constitution

In reaction to the request of a sovereign national conference by Cameroonians, President Biya finally gave in and organised on his conditions what was termed a 'Tripartite Conference' in October-November 1991. However, the participants were constituted principally of his appointees and operated within a limited agenda. After significant pressure, the Conference decided to create a Technical Committee on Constitutional Matters (TCCM) composed of 7 Francophone and 4 Anglophone Cameroonians, with a mandate of coming up with the outlines of a 'new' constitution. This process eventually led to the oddly labelled 1996 'amendment to the 1972' constitution.⁸⁹

Before delving into an examination of elements of constitutionalism under the 1996 Constitution, it is important to outline the structure of government therein. This would ease our understanding of the constitutional *status quo* under which elements of constitutionalism are examined, under the 1996 Constitution.

Article 4 of the 1996 Constitution defines central government authority as residing in the President of the Republic and the Parliament. The 1996 Constitution vests the executive authority of the Republic in the President, who is head of state,⁹⁰ head of the armed forces,⁹¹ and represents the State in all aspects of public life.⁹² Although the 1996 Constitution stipulates that the Prime Minister shall be the Head of Government,⁹³ he or she can be dismissed by the President of the Republic, like any member of Cabinet. The President therefore exercises executive authority together with the other members of the Cabinet. Members of the Cabinet are accountable collectively and individually to the National Assembly.⁹⁴

The legislative authority of the national government is vested in Parliament, which is supposed to be composed of the National Assembly and the Senate.⁹⁵ However, the Senate has not yet become operational.⁹⁶ The National Assembly is a directly elected body, to be comprised of 180 members elected by direct and secret universal suffrage for a five year term of office.⁹⁷

⁸⁹ Fombad (n 45 above) 133.

⁹⁰ The 1996 Constitution, art 5.

⁹¹ The 1996 Constitution, art 8(2).

⁹² The 1996 Constitution, art 8(1).

⁹³ The 1996 Constitution, art 12(1).

⁹⁴ The 1996 Constitution, art 11.

⁹⁵ The 1996 Constitution, art 14(1).

⁹⁶ The 1996 Cameroon, arts 20 - 24 focus on the Senate, but the institution has not yet been created.

⁹⁷ The 1996 Constitution, art 15.

The judicial authority of the national government is exercised by the Supreme Court, Courts of Appeal and Tribunals. Judicial power is supposed to be independent of executive and legislative powers. Magistrates of the bench are to carry out their duties, governed only by law and their conscience. The President of the Republic is supposed to guarantee the independence of the judiciary. He appoints members of the bench and the legal department. He is assisted in this task by the higher Judicial Council which advises him on all nominations for the bench and on disciplinary action against judicial and legal officers.⁹⁸ The Supreme Court is the highest court in the state in legal and administrative matters.⁹⁹

The 1996 introduced a new structure, the Constitutional Council, which is supposed to have jurisdiction over matters pertaining to the constitutionality of law.¹⁰⁰ It is also supposed to be the organ which regulates conflict of powers between state institutions; between the state and the Regions, and between the Regions.¹⁰¹ Also this structure is yet to become fully operational. In the interim, the Supreme Court therefore sits in for the Constitutional Council.¹⁰²

3.3.1 Amendment of the 1996 Constitution

The 1996 Constitution provides for two ways through which a constitutional amendment can be initiated. Article 63(1) stipulates that amendments to the Constitution may be proposed either by the President or by Parliament. Any amendment proposed by a Member of Parliament shall be signed by at least one-third of the members of the House of Assembly.¹⁰³ Article 63(3) states as follows:¹⁰⁴

Parliament shall meet in congress when called upon to examine a draft or proposed amendment. The amendment shall be adopted by an absolute majority of the members of Parliament. The President of the Republic may request a second reading; in which case the amendment shall be adopted by a two-third Majority of the members of Parliament.

Article 63(4) goes further to state that the President may decide to submit any Bill to amend the 1996 Constitution to a referendum. An amendment may only be adopted if a simple majority of the votes cast in the referendum favours the amendment.

In April 2008, the Cameroon National Assembly accepted a revision of article 6(2) which, while maintaining the seven-year tenure of the

⁹⁸ The 1996 Constitution, art 37.

⁹⁹ The 1996 Constitution, art 38.

¹⁰⁰ The 1996 Constitution, art 46.

¹⁰¹ The 1996 Constitution, art 47(1).

¹⁰² The 1996 Constitution, art 67(4).

¹⁰³ The 1996 Constitution, art 63(2).

¹⁰⁴ The 1996 Constitution, art 63(3).

President of the Republic, removed the two-term limit.¹⁰⁵ Although the opposition parties protested against this constitutional amendment, the ruling party, with its overwhelming parliamentary majority of 116 seats out of 180, readily approved the amendment. In the months following the vote, there was widespread protest in the country against the constitutional amendments, but these protests were violently suppressed, with heavy loss of life.¹⁰⁶

Under the 1996 Constitution, amendments are easily approved by Parliament which is solely composed of the National Assembly. In the National Assembly, there are no adequate mechanisms in place for other political parties such as the SDF to veto unconstitutional amendments. Although the 1996 Constitution provides that Parliament is also to be composed of a Senate, this institution is still to be created.¹⁰⁷ Unlike in the case of South Africa, where one sphere of government cannot unilaterally amend the 1996 Constitution of South Africa to its advantage,¹⁰⁸ the 1996 Constitution in the case of Cameroon, allows for unilateral constitutional amendments by the executive. This is a weakness with respect to the principles of constitutionalism.

3.3.2 Supremacy of the 1996 Constitution

Under the 1996 Constitution, courts have limited powers to intervene by way of judicial review under the 1996 Constitution. In reality, there are major obstacles to the effective operation of the process of judicial review with respect to upholding constitutionalism.

¹⁰⁵ Law No 2008/001 of 14 April 2008 to amend and supplement some provisions of law No 96/6 of 18 January 1996 to amend the Constitution of 2 June 1972, art 6(2) new.

¹⁰⁶ Fombad (n 6 above) 14-15.

¹⁰⁷ Articles 20 to 24 of the 1996 Constitution focus on the Senate, but the institution has not yet been created. See Fombad (n 15 above) 15-16. Although according to article 14(2) both the National Assembly and the Senate, acting as Parliament, 'shall legislate and control government action', this is not on an equal basis. Both Houses do not have the same powers. The National Assembly has greater powers and influence than the Senate. This is comprehensible, considering the fact that all the members of the National Assembly are elected by direct and secret universal suffrage and represent the whole nation, whereas the senators represent only the local and regional authorities and are either elected by indirect universal suffrage or appointed by the President of the Republic. Bills have to go via both the National Assembly and the Senate before they are tabled before the President for enactment into law. Nevertheless, the role of the Senate, whilst quite important, is less than that of the National Assembly. Therefore, the Senate can amend a Bill tabled before it by the National Assembly but the National Assembly is not bound to accept or adopt any amendments proposed by the Senate, as per article 30(3)(b) of the 1996 Constitution. However, according to article 30(3)(c)(1), where the Senate rejects all or part of a Bill, this may only be disregarded if the Bill, as rejected in part or as a whole, is passed by an absolute majority of members of the National Assembly. In regards to article 30(3)(c)(2) where an absolute majority cannot be achieved, the President of the Republic may convene a meeting of a joint commission of representatives from both Houses to find a compromise.

¹⁰⁸ N Steytler 'Republic of South Africa' in J Kincaid & GA Tarr (eds) *Constitutional origins, structure and change in federal countries: A global dialogue on federalism vol 1* (2005) 340.

The process of judicial review cannot be used to challenge any legislative or administrative enactment that violates any provision of the 1996 Constitution. The control over the constitutionality of laws is reserved to a quasi-political body, the Constitutional Council.¹⁰⁹

Those who can bring matters before the Constitutional Council are a restricted group of persons such as the President of the Republic and the President of the National Assembly.¹¹⁰ These are the very people who must have made the disputed law and thus have no interest in questioning it. This structure is yet to become fully operational.¹¹¹ The purpose of the Constitutional Council is to guarantee the supremacy of the 1996 Constitution through judicial review, as well as questions surrounding legislation of constitutional importance. Since this body cannot invalidate legislation in violation of the 1996 Constitution, especially executive acts, it results in the 1996 Constitution not being the supreme law of the land *per se*.

3.3.3 The independence of the judiciary

An independent judiciary is made mention of in articles 37 to 42. The concept of judicial independence is apparently stated in article 37(2) of the 1996 Constitution, which provides that 'the judicial power shall be independent of the executive and legislative powers'.

In *The People v Nya Henry*,¹¹² the magistrate could not conceal the fact that he was under pressure from the Executive. He could see that at the very least his career could be adversely affected if he decided the case in a way that went against the wishes of the Executive. Within months of the decision in *Nya Henry*, which went against the wishes of the Executive, the magistrate was removed from his post.¹¹³

In reality the enormous powers given to the President under the 1996 Constitution to appoint, dismiss, promote, transfer and discipline judicial officers, especially judges and prosecutors, limit in a fairly significant way not only the independence of the judiciary but also the effectiveness of the separation of powers.

¹⁰⁹ The 1996 Constitution, art 46. The Constitutional Council shall have jurisdiction in matters pertaining to the Constitution. It shall rule on the constitutionality of laws. It shall be the organ regulating the functioning of the institutions. See also the 1996 Constitution, art 47(1).

¹¹⁰ CM Fombad 'Cameroon's emergency powers: A recipe for (un)constitutional dictatorship?' (2004) 48 *Journal of African Law* 62.

¹¹¹ The 1996 Constitution, art 67(4). The Supreme Court shall perform the duties of the Constitutional Council until the latter is set up.

¹¹² *The People v Nya Henry & Others* (2005) AHRLR 101 (CaFI 2001).

¹¹³ N Enonchong 'The African Charter on Human and Peoples' Rights: Effective remedies in domestic law?' (2002) 46 *Journal of African Law* 197 215.

3.3.4 Bill of Rights

Unlike most post-1990 constitutions, the 1996 Constitution focuses almost exclusively on 'civil and political' rights, although it makes mention of some social and economic rights. Almost all the fundamental rights mentioned in the 1996 Constitution are only found in the Preamble.¹¹⁴

Cameroon has signed and ratified six of the nine UN core human rights treaties.¹¹⁵ Cameroon has also signed and ratified the African Charter on Human and Peoples' Rights (ACHPR).¹¹⁶ Cameroon has opted for a monistic system with respect to international law: all international treaties Cameroon has approved, ratified and published are supposed to become part of domestic law.¹¹⁷ International law does not therefore need to be translated into national law by another act of the legislature since the act of ratifying immediately incorporates the treaty into national law. Article 45 of the 1996 Constitution even goes further to confer a higher normative status to such treaties or agreements so that they could trump any domestic legislative that contravenes them, including the 1996 Constitution.

The enforceability of the fundamental rights enshrined in a constitution is important to their effectiveness. Constitutionally protecting human rights under the 1996 Constitution remains a dilemma, especially by the lack of adequate enforcement measures for protecting and promoting these rights.¹¹⁸ Even if a constitution exhaustively mentions

¹¹⁴ These rights include the right to equality and non-discrimination, this includes the rights of the aged, the rights of persons with disabilities, and the rights of women; freedom of opinion and expression, including freedom of the press; freedom of movement, including freedom of choice of residence; the right to privacy; rights relating to property; the right to a fair trial, including the right of access to justice; rights related to liberty and security of the person; freedom of association, including the right to form unions; freedom of thought, conscience, and religion; freedom from torture and cruel, inhuman and degrading treatment or punishment; freedom of assembly; the right to work, including the right to strike; the right to education; the right to participation in government and to vote, in Arts 2 and 3; the right to protection of the family, including the rights of children; rights to the environment; and rights of minorities.

¹¹⁵ See Office of the High Commissioner for Human rights (OHCHR) <http://www2.ohchr.org/english/law/index.htm#core> (accessed 11 November 2012).

¹¹⁶ C Diwouta 'The impact of the African Charter and Women's Protocol in Cameroon' in The Centre for Human Rights, University of Pretoria *The impact of the African Charter and Women's Protocol in selected African states* (2012) 21. Cameroon signed the African Charter on Human and Peoples' Rights of 1981 (ACHPR) on 23 July 1987 and ratified it on 20 June 1989. Also see OC Okafor *The African human rights system, activist forces and international institutions* (2007) 248.

¹¹⁷ The 1996 Constitution, art 45.

¹¹⁸ NN Nkumbe 'The effectiveness of domestic complaint mechanisms in the protection of human rights in Cameroon' (2011) 5 *Cameroon Journal of Democracy and Human Rights* 21 30-50 <http://cjdhr.org/2011-12/Ndode-Ngube-Nkumbe.pdf> (accessed 8 June 2013). An assessment of enforcement mechanisms in the promotion and protection of human rights in Cameroon shows that the human rights institutions charged with promoting and protecting human rights are ineffective. For instance, though the ordinary courts and the Administrative Court are charged with ensuring that rights of individuals are promoted and protected, individuals still do not benefit from adequate protection and

fundamental rights therein, there is need for institutions to effectively ensure that these constitutionally enshrined rights are adequately promoted and protected. There is also a need to ensure that any violations of these rights are punctually sanctioned. Lack of effective enforceable bodies would therefore render a constitution a valueless instrument.

The scope of application and enforceability of human rights under the 1996 Constitution is therefore limited. Instead of having these rights in a well-structured Bill of Rights, these rights are outlined in the Preamble of the 1996 Constitution. The promotion and protection of human rights under the 1996 Constitution is definitely inadequate.

3.3.5 Democracy

With regard to democracy, Cameroon has witnessed some progress, but there is still much to be done. The advent of multipartism in 1990 ushered in several political parties, pressure groups and private newspapers. There was general agreement that the creation of SDF, the major opposition party in the country, was a decisive factor in changing the political landscape in Cameroon. Under considerable internal and external pressure, President Biya's government introduced a larger measure of political liberalisation.¹¹⁹

Prior to the creation of an elections monitoring body, Elections Cameroon (ELECAM),¹²⁰ elections were organised by the Ministry of Territorial Administration – today the Ministry of Territorial Administration and Decentralisation. This opened the door to criticism about election rigging. Subsequently the importance of creating an Independent Elections Observatory was recognised but this body was criticised and considered a 'toothless bulldog', for it was deemed to observe elections rather than be actively involved in actual managerial and organisational, as well as co-ordination, of the electoral process in the country.¹²¹

Since the creation of ELECAM in 2006, there have been criticisms, especially from opposition political parties, of the credibility of this structure organising free and fair elections. There is even a problem as to the manner in which the staff of this structure is recruited, since positions within the structure are not advertised appropriately. Some of these

promotion of their rights. This equally applies to the National Commission on Human Rights and Freedoms, which remains inadequate in protecting and promoting fundamental rights of citizens in the state.

¹¹⁹ Konings & Nyamnjoh (n 54 above) 48.

¹²⁰ ELECAM was created by virtue of Law No 2006/11 of the 29 of December 2006.

¹²¹ K Yuh 'The shortcomings and loopholes of Elections Cameroon (ELECAM) within the electoral dispensation of Cameroon' (2010) 4 *Cameroon Journal on Democracy and Human Rights* 74 <http://cjdhr.org/2010-06/Joseph-Yuh.pdf> (accessed 29 January 2012).

criticisms have led to the amendment of certain provisions of the law creating the structure.¹²² Discontent has been expressed by Cameroonians, at home and abroad, with respect to the manner in which ELECAM conducted the October 2011 Presidential elections.¹²³

4 Towards effecting constitutionalism in Cameroon

It has been shown in this contribution that the 1996 Constitution is devoid of constitutionalism. Establishing constitutionalism in Cameroon would mean that the 1996 Constitution is not easily amendable, that the 1996 Constitution is supreme, that there is independence of the judiciary, that there is an entrenched Bill of Rights in the 1996 Constitution, and that there is a visible and generally accepted presence of democracy.

The need for the amendment process to reflect the principles of constitutionalism is of utmost importance. This does not mean that the 1996 Constitution should not be amendable at all. Although it is unrealistic to expect constitutional drafters to devise a satisfactory formula to cover all eventualities, there is a need to ensure that no political party has the sole right, in practice, to amend the 1996 Constitution for its own partisan purposes. This therefore means there is need for the Senate to go operational in Cameroon, so that amendments should be carried out in the presence of both Houses of Parliament, rather than in the presence of the National Assembly, which simply accepts amendments from the executive.

The supremacy of the 1996 Constitution is definitely weak. There should be a clear distinction between the 1996 Constitution and other laws. There must be a constitutionally enshrined institution with the authority in the event of conflict to check the constitutionality of governmental legal acts. The Constitutional Council, which according to the 1996 Constitution is the institution of finality with respect to the constitutionality of laws, has to go operational. The Supreme Court cannot continue playing the role of the Constitutional Council, especially as this court is overwhelmed with its own cases. The Constitutional Council should not only exist but must be able to operate free from coercion from the executive arm of government. Litigants should be furnished with a remedy not only when the authorities violate or threaten to violate the 1996 Constitution but also where the alleged violation consists of a failure to fulfil a constitutional obligation. This may result in an assertion of unconstitutionality because of the omission to carry out a constitutional

¹²² Law 2010/005 of 13 April 2010, to amend and supplement certain provisions of Law 2006/11 of 29 December 2006 to set up and lay down the organisation and functioning of Elections Cameroon (ELECAM).

¹²³ TI Tanku 'Cameroonian president wins vote, extending 29-year-rule' 22 October 2011 CNN <http://edition.cnn.com/2011/10/22/world/africa/Cameroon-election-outcome> (accessed 22 December 2011).

obligation and is essential in Cameroon where the Executive and Judiciary regularly ignore the implementation of constitutional provisions.

There is a need to entrench what are now considered to be the core principles of judicial independence in the 1996 Constitution rather than in ordinary legislation. It is equally necessary that bodies, such as the Judicial Service Commission or the Higher Council of Magistracy, that decide on significant issues, such as appointments, promotions and dismissal of judges are made less vulnerable to partisan manipulation. Even then, the effectiveness of the judiciary will depend on the scope of its powers to review constitutional violations, which powers also need to be expanded.

It is important that human rights be given some constitutional importance. This can be done via a Bill of Rights. Though the 1996 Constitution refers to political and socio-economic rights and the right to development and peace, these rights are all buried in the Preamble rather than contained in a well organised Bill of Rights. A Bill of Rights would therefore compel the Executive to provide civil, political, as well as socio-economic rights to the Cameroonian populace at large, especially deprived communities.

The government of Cameroon still lacks elements of accountability rendering it at odds with the principles of democracy. Concerning elections, there is a need to entrench the provision of an elections monitoring body in the 1996 Constitution, and to supplement this with electoral legislation. The basic components of this framework, which should be clearly spelt out in the 1996 Constitution, should comprise of indispensable characteristics, such as its status, the number and manner of appointment of members, the term of office of appointees, as well as its financial independence and its powers. Where a simple statutory instrument to create such a body exists, it could easily be changed by the executive when it suits its convenience.

PRE-INDEPENDENCE CONSTITUTIONS, PARTICIPATORY CONSTITUTION-MAKING AND CONSTITUTIONALISM IN AFRICA: THE CASE OF BOTSWANA

Bonolo Ramadi Dinokopila

1 Introduction

The colonial experience was almost uniform but its variant forms contributed to differences in democratic performance and democratisation prospects in Africa.¹ The decolonisation of Africa saw the various protectorate territories and colonies moving towards statehood. Such a move inevitably led to the adoption of constitutions across Africa, prior to and post independence. It was during these processes that some states resorted to authoritarianism to disguise their fragility and inadequacies.² These constitutions were adopted at various times, in different places and under different circumstances. The constitution making experience of Botswana is for example markedly different from that of Nigeria and Kenya. This difference is due to a host of factors that prevailed in a particular territory at the time that the constitution-making process was initiated. These constitutional experiences have significantly contributed to differences in democratic performance and prospects of democratisation in Africa.

This chapter takes a look at the history of the Botswana constitution-making process. It is by no means exhaustive. It only seeks to highlight that even though little attention has been paid to pre-independence constitutions, they do play a significant role, both positive and negative, in the entrenchment of constitutionalism in Africa. The chapter achieves this by cataloguing the constitution-making process of Botswana's pre-independence Constitutions and their eventual impact on the 1966 Republican Constitution. The latter has been dismissed by some commentators as a fraudulent or imported document that concentrates too much power on a president who does not enjoy election to office through

¹ LJ Diamond *et al* (eds) *Democracy in developing countries* (1989) 20.

² A Mazrui 'Francophone nations and English speaking states: Imperial ethnicity and African political formations' in D Rothchild & VA Olorunsola (eds) *State versus ethnic claims: African policy dilemmas* (1983), quoted in Diamond (n 1 above) 6.

popular vote. The chapter then attempts to ascertain whether the inadequacies of Botswana's present constitutional framework could be traced back to Botswana's pre-independence Constitutions. Already there are calls to have such a review in order to balance powers between the Executive, the Legislature, and the Judiciary or to make clearer the separation of powers in the Constitution. Without making an analysis of the appropriateness of such calls or the necessity of a constitutional review in Botswana, the chapter underscores the fact that it is when constitutions prove to be inadequate that the people challenge their legitimacy and require that they be amended. It is in that context that an argument is made for a serious interrogation of the processes that lead to the adoption of pre-independence constitutions, the effect of such processes on independence constitutions and by necessary extension their impact on constitutionalism in post-colonial Africa.

2 The history and making of the Constitution of Botswana

Since Independence in 1966, Botswana has been hailed as a shining example of democracy in Africa where rights and freedoms of individuals relating to race, colour or creed, tribe, place of origin, national or ethnic identity, social origin, political opinion, sex, language, and religion are guaranteed under the Constitution. Botswana has thus managed to maintain a 'good' record of human rights protection standards, or at least a semblance thereof, when compared with most African countries. Botswana is generally known for its relative peace and stability, and its emergence as one of the fastest growing economies on the continent. Given its record of good democratic practices Botswana has been described in some quarters as the beacon of hope in Africa, as a shining democracy, and as gaining the status of a promoter of peace and democracy around the world.³

Botswana, then called Bechuanaland, became a British Protectorate in 1895. The British Protectorates, Protected States and Protected Persons Order 1949/140 identified Bechuanaland as one of the British protectorates.⁴ Protectorates were then, in essence, British protected territories that had no properly organised internal government with the British controlling both the external matters, such as the protectorate's defence and foreign relations and internal matters through an established British administration within the Protectorate.⁵ Substantively, the

³ A Cook & J Sarkin 'Is Botswana the miracle of Africa? Democracy, the rule of law, and human rights versus economic development' (2010-2011) 19 *Transnational Law & Contemporary Problems* 453 458.

⁴ *Protectorates and Protected States: Meaning of the expression* (undated) <http://www.ukba.homeoffice.gov.uk> (accessed 27 July 2011).

⁵ As above.

involvement of the British in the affairs of Bechuanaland was thus similar to their involvement in other colonies.⁶ The difference is that Bechuanaland as a protectorate was not formally brought within the Crown's dominions.⁷ The Bechuanaland Protectorate fully ceased to be a protectorate in September 1966, even though it had attained self-rule in 1965.

When Botswana gained independence on 30 September 1966, it was not, as was the case with its neighbours, through liberation wars and struggles for liberation either from colonialism or apartheid governance.⁸ Botswana's road to independence was a peaceful one. Often-cited reasons for such a peaceful transition are that, at the time, Botswana was not seen as an economically viable territory to hold onto by the British. The assertion is fortified by the fact that the diamonds in Botswana were discovered shortly after Botswana gained independence therefore affording the British no opportunity to change their minds about granting the then Bechuanaland independence. According to some commentators, Botswana's peaceful road to independence was as a result of the fact that

the country did not attract a European settler group politically powerful enough to challenge the development of Black Nationalism; in addition, the fact that Britain negotiated the transition to independence with a group of politicians who were supported in the process by the majority of the population made the process legitimate and peaceful.⁹

As was the case with other protectorates who gained independence, Botswana's independence was preceded by rounds of constitutional negotiations.¹⁰ The constitutional negotiations started as far back as 1960 when various stakeholders were engaged in discussions leading to the adoption of the Constitution. These various 'stakeholders' have been rightly described by Sebudubudu as 'two elites with contrasting value systems', being 'the new elite and the traditional elite'. The new elite being Christian-liberal tending towards a democratic system of government, while the 'traditional elite', mainly composed of chiefs or traditional leaders, were traditionally authoritarian.¹¹ The two camps, as it eventually transpired, influenced the nature and content of the constitution that was eventually adopted and promulgated in Botswana.

⁶ As above.

⁷ As above.

⁸ K Good 'Democratisation in Southern Africa: Barriers and potentialities' Occasional paper, Centre of African Studies, University of Copenhagen (2005) 2.

⁹ G Somolekae 'Botswana' in T Lodge *et al* (eds) *Compendium of elections in Southern Africa* (2002) 37-39.

¹⁰ As above.

¹¹ D Sebudubudu & P Molutsi 'Leaders, elites and coalitions in the development of Botswana' Research Paper 2, Policy and Practice for Developmental Leaders, Elites and Coalitions (DLP), Developmental Leadership Program (2009) 8.

At the heart of the constitutional development was the Joint Advisory Council – the Council. Established in the 1950s, the Council was ‘encouraged to play an important part in the administration and drafting of legislation’.¹² The setting up of the Joint Advisory Council brought to three the number of organs through which the British Government consulted the people of the Protectorate.¹³ These were the African Advisory Council, the European Advisory Council and the then newly established Joint Advisory Council.¹⁴ Following years of agitation by the likes of ML Kgasa of the Bangwaketse, Kgosi Tshekedi, Kgosi Bathoen, Dr SM Molema and in 1958 Mr – later Sir – Seretse Khama to have the power to promulgate laws conferred upon citizens of the Protectorate,¹⁵ the Legislative Council was established. This was preceded by a decision of the Joint Advisory Council in 1958 that a constitutional committee should be set up to consider the constitution of the proposed Legislative Council.¹⁶ It was then that the protectorates were given the power to make laws for the running of the territory.¹⁷ As it has been noted,

the vital inter-relationship of constitutional evolution and political development was effectively demonstrated in Bechuanaland on December 6, 1960, a date memorable both for the government’s announcement that a Legislative Council would be established and for the birth of the Bechuanaland Peoples’ Party, the Territory’s first political party.¹⁸

As aforementioned, the constitutional talks of the then Bechuanaland Protectorate began as far back as 1960 and it has come to be accepted that the formation of the Legislative Council somehow ‘effectively put Botswana on the road to independence’.¹⁹ The United Kingdom government had then published as a white paper the details of the proposed new constitution for the Bechuanaland Protectorate, which it intended to promulgate by Order in Council.²⁰ The proposals for the 1961 constitution followed closely those of the Constitutional Committee of the Joint Advisory Council subject to certain modifications. Such modifications were recommended by both the High Commissioner as well as the Resident Commissioner and agreed upon by the Constitutional Committee.²¹ Bechuanaland’s first constitution provided for, the Advisory Executive Council, a Representative Legislative Council and an African

¹² OK Dingake *Key aspects of the constitutional law of Botswana* (2000) 10.

¹³ KR Manungo ‘The role of the Native Advisory Council in the Bechuanaland Protectorate, 1919 – 1960’ (1999) 13 *Pula: Botswana Journal of African Studies* 24–36.

¹⁴ As above.

¹⁵ As above.

¹⁶ As above.

¹⁷ As above.

¹⁸ RP Stevens & HG Henry *Lesotho Botswana & Swaziland: The former High Commission territories in Southern Africa* (1967) 141.

¹⁹ M Mogalakwe ‘Botswana: An African miracle or a case of mistaken identity’ (2003) 17 *Pula: Botswana Journal of African Studies* 85–91.

²⁰ 6 (1960) 21 *Commonwealth Survey, a record of the United Kingdom and Commonwealth Affairs*.

²¹ As above.

Council as governance structures.²² This 1961 constitution received serious criticism from politicians. The Bechuanaland People's Party (BPP), through a memorandum read to his honour the Resident Commissioner in Mahalapye on 6 February 1961²³ took issue, with representation of the people to the proposed Legislative Council. The proposed constitution was to the effect that the Legislative Council would be made up of twenty-one elected members, of whom ten would be European, ten African and one Asian. Dismissing the proposed representation of ten elected whites and ten elected blacks, the BPP highlighted that the model was

unfair as it is deceptive, considering the respective sections of the population; but as a matter of fact it is misleading for it is really 11 Non-Africans to 10 Africans because the Asian member will naturally align himself with the Europeans from the fact of the community of interests with them as a trader.²⁴

Citing further reasons for their assertions, the BPP pointed out that the proposed model of representation in the Legislative Assembly was either not there at all or was 'distressingly negligible' and that the 'trend of the legislation from a body so constituted is a fore-gone conclusion'.²⁵ It was also contended by the BPP that the end result of such an anomaly was the 'entrenchment and perpetuation of the economic and financial domination by the Europeans with the corollary of the exploitation of the African'.²⁶ Most importantly, the BPP warned of the racial tensions that were likely to ensue as a result of such a composition of the Legislative Council.²⁷

Another objection from the BPP was that the composition of the Constitutional Committee that drafted the proposals left 'much to be desired'.²⁸ Their main concern was that a ratio of 8:4 – Europeans to Africans – was unfair as it was a clear advantage for the privileged whites.²⁹ Further that the four Africans who were part of the Committee were practically chiefs or African authorities who were also privileged in that context. They concluded, with respect to the composition of the Constitutional Committee, that the ordinary African was not represented at all as:³⁰

²² Dingake (n 12 above) 11.

²³ On file with the author and available at the National Archives, Republic of Botswana (accessed June 2011).

²⁴ As above.

²⁵ Bechuanaland People's Party *Critical appraisal of Constitutional Proposals for a legislature for the Bechuanaland Protectorate contained in Cmnd 1159: HM Stationery Office London, Memorandum read to his honour the Resident Commissioner* (Mahalapye, 6 February 1961) 3.

²⁶ As above.

²⁷ As above.

²⁸ Bechuanaland People's Party (n 25 above) 6.

²⁹ As above.

³⁰ As above

constitutional proposals drawn up solely by a privileged class of white and black, who see things more through their own glasses as it were, and are definitely out of touch with the current thinking of the common person, his needs, wants and aspirations, must be of necessity evince the defects they have.

Stevens records that agitation and mass demonstrations for constitutional change continued following the Bechuanaland 1961 Constitution. The BPP was at the helm of the denunciation of racialism and British colonial policy which eventually led to the then Resident Commissioner, Peter Fawcus, announcing that instead of the original plan for a constitutional review in 1968, such a review will take place in 1963.³¹ Following the announcement, the BPP allegedly called for mass demonstrations to urge the immediate scrapping of the existing 'racially-based' constitution.³² The call for mass demonstrations led to clashes of a sizeable number of the people and the police in places like Lobatse and Francistown during which tear gas was used to disperse the crowds.³³ A temporary ban of all gatherings of twelve or more people was imposed in places such as Francistown.³⁴

The entry into politics of Seretse Khama through the Bechuanaland Democratic Party (BDP) and his eventual election to the Legislative Council in 1961 cannot go unmentioned. As it will become apparent in the following discussion, Seretse Khama and the BDP were the major players in the constitution-making processes that took place in the territory.

2.1 Constitutional review: The Lobatse conference

Following the Resident Commissioner's announcement that the constitutional review talks will take place in 1963, the talks 'designed to give the Territory internal self-rule' were indeed held in Lobatse on 1 July 1963.³⁵ Those present at the constitutional talks included the chiefs, 'the educated Batswana of different ethnic groups',³⁶ the nationalist leaders from the BPP, the BDP, leaders of the white populace and some religious leaders.³⁷ Each concerned group was permitted to nominate three representatives to the Constitutional talks.³⁸ This was mainly because

³¹ Stevens & Henry (n 18 above) 143.

³² As above.

³³ As above.

³⁴ As above.

³⁵ As above; Subudubudu & Molutsi (n 11 above) 9; Dingake (n 12 above) 11; DDN Nsereko *Constitutional law in Botswana* (2002) 30. It must be noted that the earlier literature on the history of the making of the Botswana constitution refer to 'Lobatsi' as the place where the constitutional talks were held. The Town has since been renamed as 'Lobatse' a name which has been adopted for the purposes of this paper.

³⁶ As above.

³⁷ Subudubudu & Molutsi (n 11 above) 9; Dingake (n 12 above) 11; Nsereko (n 35 above) 30.

³⁸ Stevens (n 18 above) 146; Bechuanaland Protectorate: Constitutional Discussions (1963) Annexures B & C.

prior to the talks, it was agreed that the constitutional review would be by way of a joint consultation between the Resident Commissioner and the representatives of the various stakeholders.³⁹ There were no women present at either of the talks. The full and formal 'consultations' took six days, commencing on 21 August and ending on 18 November 1963.⁴⁰ The joint consultations were held on 21 and 22 August, then 2 and 3 October and 13 and 14 November.⁴¹ The constitutional talks proved to be intense and they would rather be referred to as negotiations as 'to call them talks implies that the discussions were smooth when they were not'.⁴²

There is no indication that there ever was a constitutional referendum or public consultation(s) on the model or the representatives that were to craft the terms of the new constitution. Literature surrounding the constitutional talks indicates that there was a timeline that parties sought to adhere to.⁴³ Perhaps the fact that there were no extensive country wide public consultations through the *Kgotla*⁴⁴ system is attributable to the underlying urgency to the constitutional talks. In that context, consultations with the people of the then sparsely populated Bechuanaland would have 'unnecessarily' prolonged the attainment of self-rule.

A number of issues relating to the Constitution were tabled and considered during the Lobatse talks. The delegates confined themselves to the general principles and issues suggested to them by the British officials for consideration.⁴⁵ It was during these talks that the issue of Bechuanaland's incorporation into the Union of South Africa was discussed. It was decided by those present that Bechuanaland would become, for all intents and purposes, an independent nation state and would not form part of South Africa.⁴⁶ Despite that the likes of Cecil

³⁹ As above. The list of those who attended the preliminary meeting of the constitutional review and the joint consultations was as follows: Her Majesty's Commissioner Mr RP Fawcus, for the Bechuanaland Democratic Party; Mr SM Khama, Mr QKJ Masire & Mr PK Nwako, for the BPP (Motsete's Party); Mr KT Motsete, Mr TW Motlagodi and Mr JG Kgaboesele, for the BPP (Mr Mpho's Party); Mr PM Tshane, Mr BD Macheng and Mr MM Tlale. The Chiefs were represented by Kgosi Bathoen II, Kgosi Mokgosi III and Kgosi Linchwe. Present were also the European members of the Legislative Council being Mr Russel England, Mr DJC Morgan and Mr JG Haskins. Mr AC Chad was the Asian member of the Legislative Council present during the joint consultations. Also present was Mr AJA Douglas who was the Chief Secretary and Mr AG Tilbury who was the Attorney-General. All were present at both the preliminary meeting held on 2 July 1963 and the joint consultation meetings to the exception of Mr JG Kgaboesele of the BPP – Motsete's Party – who was replaced with Mr Matante and Mr Russel of England who was replaced by Mr CJ Mynhardt.

⁴⁰ As above; JH Proctor 'The House of Chiefs and the political development of Botswana', (1968) 6 *Journal of Modern African Studies* 59–61.

⁴¹ Bechuanaland Protectorate: Constitutional Discussions (1963) para 1.

⁴² Subudubudu & Molutsi (n 11 above) 9.

⁴³ Stevens (n 18 above) 146.

⁴⁴ This means the traditional meeting place for the people or the tribe. This meeting place is where the people are consulted and decisions taken by the people and their traditional leaders. It is also a meeting place for court cases, and meetings of village leaders.

⁴⁵ Proctor (n 40 above) 61.

⁴⁶ Subudubudu & Molutsi (n 11 above) 9.

Rhodes wanted Bechuanaland to be made part of South Africa, the Tswana chiefs and politicians had persistently objected to such a move since the 1920s.⁴⁷ Reasons for such refusal came to light in some of the earlier discussions in the territory on the issue. For example, members of the Bechuanaland's Legislative Council in 1963, rejecting further proposals for Bechuanaland to be made part of South Africa, highlighted that 'Bechuanaland's future was destined on multi-racialism'.⁴⁸ The possibility of Bechuanaland becoming part of South Africa failed because of the then policy of apartheid in South Africa which members of the Legislative Council viewed as a threat to Bechuanaland's future of multi-racialism.⁴⁹ While acknowledging that Bechuanaland could not become an independent state in isolation, the leaders asserted that all they sought from South Africa was 'economic co-operation',⁵⁰ and a policy of 'good neighbourliness',⁵¹ and highlighted that Bechuanaland's intentions did not amount to approval of South Africa's apartheid policy.⁵²

Another contentious issue during the constitutional talks was the place of the chiefs in the new dispensation. This was not at all peculiar to Bechuanaland for the same presented itself during similar negotiations for self-rule in other territories. The Chiefs maintained that since they were the rightful leaders, it should follow that they would be the leaders of the new state.⁵³ At one point the chiefs suggested that they should be placed above the national parliament with a house similar to the British House of Lords.⁵⁴ Several options, with respect to the eventual position of the chiefs in the new dispensation, were explored.⁵⁵ The other parties, mostly representatives of the political parties, were not amenable to any position where the chiefs would reign supreme to the government and fiercely opposed any arrangement which suggested such supremacy.⁵⁶ Even though the chiefs preferred the House of Lords solution they eventually settled for an 'advisory council' a name which was eventually changed to 'House of Chiefs'.⁵⁷ Thus, the chiefs settled for the establishment of the House of Chiefs which would serve as an advisory body to the legislature on matters relating to tribal law(s) and custom.⁵⁸ The House of Chiefs was not to become part of the legislature.⁵⁹

⁴⁷ P Fawcus & A Tilbury *Botswana: The road to independence* (2000) 23.

⁴⁸ Fawcus & Tilbury (n 47 above) 154.

⁴⁹ As above.

⁵⁰ As above. See also QKJ Masire *Very brave or very foolish: Memoirs of an African democrat* (2006) 249.

⁵¹ Fawcus & Tilbury (n 47 above) 156.

⁵² As above.

⁵³ As above.

⁵⁴ As above.

⁵⁵ Proctor (n 40 above) 61.

⁵⁶ As above. See also Subudubudu & Molutsi (n 11 above) 9.

⁵⁷ Proctor (n 40 above) 63.

⁵⁸ Nsereko (n 35 above) 152-154.

⁵⁹ As above.

The talks covered most issues found under Botswana's Republican 1966 constitution such as the Bill of Rights and the government structures. Stevens had this to say about the constitution which was poised to usher Bechuanaland into independence:⁶⁰

In place of the existing racially-based constitution, unanimous agreement was reached in a constitution which, in terms of representative procedure, was probably one of the most advanced proposals yet submitted in British Africa. With official blessing, Bechuanaland thus achieved something, at least in the preliminary stages, rare in the history of African decolonisation-constitutional reform by *general consent of blacks and whites*.

2.2 Second round of constitutional talks: The London conference

Following the Lobatse constitutional talks it was decided that the terms of the new constitution be urgently implemented. It was suggested that the new government be set up as early as before the end of 1964 and no later than 1965.⁶¹ This was immediately followed by election preparations even before the proposed constitution could be submitted to the British government for consideration and approval.⁶² The proposals for internal self-government were tabled and formally accepted by the British on 2 June 1964⁶³ following the announcement of the agreed constitutional proposals to the Legislative Council on 18 November 1963.⁶⁴ The British accepted the 'slightly-revised constitutional proposals'⁶⁵ and announced that the first general elections under the new pre-independence constitution would be held in March 1965.⁶⁶ It is alleged that according to the Legislative Council Paper 9 of 1963/4 the constitutional recommendations were reached unanimously.⁶⁷

The terms of the proposed constitution were that the new legislature will comprise of thirty-two members elected for a term of five years.⁶⁸ It also provided for specially elected members of parliament who were supposed to be chosen without regard to race by the elected members.⁶⁹ This was to allow the Prime Minister to elect to the house specially qualified people or cater for such interests such as the business community.⁷⁰ It further provided that the elections would be by way of

⁶⁰ As above (emphasis added).

⁶¹ Stevens & Henry (n 18 above) 149.

⁶² As above.

⁶³ Dingake (n 12 above) 11.

⁶⁴ Stevens & Henry (n 18 above) 146.

⁶⁵ As above.

⁶⁶ As above.

⁶⁷ ES Munger *Bechuanaland: Pan-African outpost or Bantu Homeland?* (1965) 33.

⁶⁸ As above.

⁶⁹ As above.

⁷⁰ As above.

universal adult suffrage.⁷¹ It also made provision for the qualification of persons suitable to stand for elections to the Legislature. A Bill of Rights similar to the Kenyan and Ugandan constitutions was also included in the proposed constitution.⁷²

A provision was also made for the House of Chiefs to be made up of eight chiefs being the tribal leaders of the eight 'principal' tribes in the territory and four additional members elected by them. These were the Chiefs of the Bakgatla, Bakwena, Bamalete, Bangwato, Barolong, Batawana, Batlokwa and the Bangwaketse tribes.⁷³ As mentioned, the House of Chiefs was to play an advisory role with respect to matters of traditional authority.⁷⁴

With respect to the Government, the pre-independence Constitution provided for a Cabinet to be made up of her Majesty's Commissioner, a Prime Minister, a Deputy Prime Minister, five ministers elected from the Legislative Assembly and the Financial Secretary with the Attorney-General also being allowed to attend cabinet meetings in an advisory capacity until replaced by a minister from the Legislature.⁷⁵ Her Majesty's Commissioner was granted the control of external affairs and defence, the appointment and discipline of Public Service Officers, power to dissolve the legislature upon request of the Prime Minister or if a motion of no confidence was passed or where the office of Prime Minister became vacant.⁷⁶

Writing around the same time that the pre-independence constitution was promulgated, Munger, emphasising that Bechuanaland was about to take a long constitutional step forward, expressed the following view:⁷⁷

Although not without calculated risks, the new constitution is a brilliant example of a particular adaptation to a particular time and situation. Furthermore, it is based upon the assumption that even these new changes are but an interim step towards full independence.

The elections under the pre-independence constitution proceeded as planned with Seretse Khama elected Bechuanaland's first Prime Minister in March 1965. In December 1965 Seretse Khama tabled a proposal for the constitution of the Republic of Botswana.⁷⁸ What was clear at that time was that there was need to make modifications to the existing constitution to make provision for Bechuanaland as an independent state.⁷⁹ It was

⁷¹ As above.

⁷² As above.

⁷³ Nsereko (n 35 above) 152.

⁷⁴ Munger (n 67 above) 33.

⁷⁵ Munger (n 67 above) 34.

⁷⁶ As above.

⁷⁷ Munger (n 67 above) 35-36.

⁷⁸ Stevens & Henry (n 18 above) 156.

⁷⁹ Stevens & Henry (n 18 above) 157.

proposed that the independence constitution be based on the 1965 Constitution.⁸⁰ The proposals to the constitution that was to govern Botswana, post-independence, were handled entirely within the Cabinet.⁸¹ According to Fawcus and Tilbury, the main modifications to the 1965 Constitution was the change of the name Bechuanaland to Botswana, the decision to have Botswana as a republic within the Commonwealth as opposed to being a monarchy with the Queen as the Head of State,⁸² to have the legislative power vest in a parliament composed of the President and the National Assembly,⁸³ the continuation of the parliamentary system of government, that the elected chief executive should also be the head of the executive and 'exercise not only executive authority but also formal and ceremonial functions consistent with that authority rather than to assign this function to some person acting as a figurehead'.⁸⁴ Seretse Khama suggested for a move towards a strong executive with sufficient powers to 'initiate development and provide firm leadership',⁸⁵ a republican form of government under the control of the executive president.⁸⁶

Stevens notes that Prime Minister Seretse Khama then did not claim that the proposals received public approval but indicated that they were explained to the people including the House of Chiefs.⁸⁷ This is confirmed by Fauwus and Tilbury when they indicate that before the government's proposals for the revised 1965 Constitution were considered,

more than [a] hundred and fifty public meetings were arranged throughout the country at which the proposals were explained to the people, and a meeting of [the] House of Chiefs meetings postponed to permit those chiefs who wished to do so to hold *Kgotla* meetings to discuss the proposals. Important meetings were attended by government ministers.⁸⁸

It is documented that even though the House of Chiefs eventually agreed with the modifications, at one point the chiefs strongly objected to the propositions and sought another constitutional conference to re-examine their position under the independence constitution and to draw up a federal constitution.⁸⁹ However their requests were refused.⁹⁰ Some members of the opposition parties such as Philip Matante also objected to the proposals demanding that the question of independence be postponed to allow for more consultations.⁹¹

⁸⁰ Fawcus & Tilbury (n 47 above) 196-197.

⁸¹ Fawcus & Tilbury (n 47 above) 197.

⁸² As above.

⁸³ As above.

⁸⁴ As above.

⁸⁵ As above.

⁸⁶ As above.

⁸⁷ As above.

⁸⁸ Fawcus & Tilbury (n 47 above) 201.

⁸⁹ As above.

⁹⁰ As above.

⁹¹ As above.

Following the endorsement of the revised constitution, the government made a request that Bechuanaland be granted independence on the basis of the proposals.⁹² The British obliged and the last round of constitutional talks was held in London in February 1966 at the Bechuanaland Independence Conference.⁹³ Those who attended the Conference included, among others, the Prime Minister, Seretse Khama, his deputy Mr QKJ Masire both of the BDP, Kgosi Bathoen representing the chiefs, Mr PG Matante representing the opposition parties and other officials of the Protectorate's administration.⁹⁴ It is indicated that during the final round of talks, the representative of the opposition parties, Mr Matante, insisted that the issues be referred back to the people for their input and requested that the discussions of the proposals be suspended.⁹⁵ He further requested that a commission inclusive of all stakeholders be set up to consult the people on the form and content of the independence Constitution.⁹⁶ His requests were refused and he allegedly walked out of the conference as an indication of his displeasure.⁹⁷

That notwithstanding, the proposals for the Independence Constitution were accepted by the British with a few modifications.⁹⁸ It is this Constitution that was eventually passed as Botswana's first Constitution effective as of 30 September 1966.

2.3 Botswana's 1966 Republican Constitution

When Botswana finally gained independence in 30 September 1966 it adopted a constitution that was in most material respects based on the 1965 Constitution with, as already indicated, some slight modifications.

At the time of this study, 45 years later, the Constitution remained in force. Countries, such as Malawi, have reviewed and adopted new constitutions. Even though Botswana's constitution saw some amendments, provisions touching on the limits of power of the rulers somehow remain intact. A comprehensive study of Botswana's Independence Constitution is beyond the scope of this study.

The 1966 Constitution made provision for three separate arms of government; the Executive, the Legislature and the Judiciary under its chapter IV, V and VI respectively. Thus, from the time Botswana attained independence something akin to the concept of separation of powers was

⁹² As above.

⁹³ As above.

⁹⁴ Fawcus & Tilbury (n 47 above) 202; Nsereko (n 35 above) 30.

⁹⁵ Fawcus & Tilbury (n 47 above) 203; Nsereko (n 35 above) 30.

⁹⁶ As above.

⁹⁷ As above.

⁹⁸ Fawcus & Tilbury (n 47 above) 203.

made part of the Constitution.⁹⁹ However, as it was the case under the 1965 Constitution, the executive wields immense power through the authority that is vested in the president and not the people.¹⁰⁰ The President is the Head of State, the supreme executive authority of the Republic and Commander in-chief of the Armed Forces and leader of the ruling party.¹⁰¹ The President forms part of Parliament.¹⁰² Except as otherwise provided by an Act of Parliament, in the exercise of his functions the President would act on his own discretion and would not be obliged to follow advice tendered by any other person.¹⁰³ The President further enjoys a wide range of powers in all arms of government since he has the power to appoint and remove from office the Vice-President, cabinet ministers and their assistants, ambassadors and High Commissioners, the Director of Public Prosecutions, the Attorney-General as well as other high senior government officials.¹⁰⁴ He is also empowered to appoint judges of the High Court on the advice of the Judicial Service Commission (JSC).¹⁰⁵ The President is also vested with the prerogative of mercy.¹⁰⁶ The centralisation of power in the executive and the presidency emanates from the constitutional talks and the constitutions that came as a result. The first President of Botswana, Sir Seretse Khama, is credited for engineering a scheme¹⁰⁷ that under no circumstances evince the notion of democracy and the rule by the people.

Constitutionalism is the idea that a government should not only be sufficiently limited in a way that protects its citizens from arbitrary rule but that operates efficiently and within its constitutional limitations.¹⁰⁸ The various elements of constitutionalism have been identified to include the separation of powers, an independent judiciary, the recognition and protection of human rights,¹⁰⁹ 'the power of courts to review the legislative

⁹⁹ Nsereko (n 35 above) 63; CM Fombad 'The separation of powers and constitutionalism in Africa: The case of Botswana' (2005) 25 *Boston College Third World Law Journal* 301, 318; in the case of *Botswana Railways Organisation v Setsogo and Others* 1996 BLR 763 (CA) 804 the Court noted that "the Constitution did not establish that theory in this country in its rigid form. None of the various arms of government: The Executive, the Legislature and the Judiciary, comes to life or lives in a hermetically sealed enclave".

¹⁰⁰ See generally MG Molomo 'Democracy under siege: the presidency and executive powers in Botswana' (2000) 14 *Pula: Botswana Journal of African Studies* 95; K Good *Diamonds, dispossession and democracy in Botswana* (2008) 25-43.

¹⁰¹ Good (n 100 above) 25; B Otlhogile 'The President: His office, functions and powers' in WA Edge & M Lekorwe (eds) *Botswana: Politics and society* (1998) 213-226.

¹⁰² 1966 Botswana Constitution, sec 57; Nsereko (n 35 above) 110-111.

¹⁰³ 1966 Botswana Constitution, sec 47.

¹⁰⁴ Otlhogile (n 101 above) 219.

¹⁰⁵ As above.

¹⁰⁶ 1966 Botswana Constitution, sec 53.

¹⁰⁷ Good (n 8 above) 2.

¹⁰⁸ CM Fombad 'Challenges to constitutionalism and constitutional rights in Africa and the enabling role of political parties: Lessons and perspectives from Southern Africa' (2007) 55 *The American Journal of Comparative Law* 14; SA de Smith *The New Commonwealth and its Constitutions* (1964) 106, quoted in J Hatchard, M Ndulo & P Slinn *Comparative Constitutionalism and Good Governance in the Commonwealth: An Eastern and Southern African Perspective* (2004) 1.

¹⁰⁹ Fombad (n 108 above) 7-8.

acts of the legislature and the administrative acts of the executive branch',¹¹⁰ limits on the various departments of the government to unilaterally change the constitution,¹¹¹ and institutions that support democracy.¹¹² The inadequacy of the current constitutions to sufficiently provide for these issues has been of late the subject of intense domestic debate. The argument being that the legislature is weak and that the constitution fails to properly guarantee human rights.

Constitutionalism is also about political processes and institutions that must be structured in accordance with the constitution and the perceptions of those who wish to maintain or establish the supreme power of a constitution in a specific state to protect the citizenry from arbitrary use of power by the government.¹¹³ Constitutionalism is indeed necessary for the sustainable process of democratisation and eventual consolidation of democracy in Africa. For democracy to be stable and function properly, it needs a constitutional framework that will ensure that there is no arbitrary use of power.¹¹⁴ In that light, the checks and balances provided for by separation of powers must be clearly delineated in the constitution and practiced.¹¹⁵ In particular, the judiciary must remain independent so as to be able to mediate in times of dispute, uphold the principles enshrined in the constitution and ensure respect for the rule of law. Without an effective system of government with clearly separated functions, the development of democracy and constitutional states in Africa will not be possible.¹¹⁶ There should be a balance between presidential and parliamentary power in relation to the citizenry, so that political power is not abused. Building a culture of constitutionalism is the best way of achieving this balance. By strengthening the Constitution so as to diffuse the executive powers, the executive power is not bestowed in the presidency as is the case now in Botswana. Presidential powers must be limited to functions subject to constitutional mechanisms specifically designed to provide adequate safeguards on the exercise of such powers. Such mechanisms will ensure that leaders who try or threaten to undermine the constitutional order will be dealt with accordingly.¹¹⁷ This will ensure that there exist early warning systems against actions likely to undermine the democratisation process.

It is unfortunate that despite Botswana's efforts there are still implementation gaps that need to be addressed so as to secure a better Botswana for future generations. Some unsatisfactory aspects of the Republican Constitution include the mode of electing members of legislature which are first-past-the-post (FPTP), otherwise known as the

¹¹⁰ As above.

¹¹¹ As above.

¹¹² As above.

¹¹³ Fombad (n 108 above) 9.

¹¹⁴ As above.

¹¹⁵ R Henwood *Democratic political systems* (2008) 17, on file with the author.

¹¹⁶ Henwood (n 115 above) 8.

¹¹⁷ As above.

winner takes all. Under such a system, there are no direct elections of the President.¹¹⁸ The system has been dismissed on numerous occasions as being wholly unsatisfactory and as having 'ensured that Botswana operates a predominant one party system'.¹¹⁹ Presidential succession under the Botswana constitution remains one of the factors that are identified by several critics as undermining democracy in Botswana. As already alluded to, the chiefs were also dissatisfied with their role under the new constitution, in particular their limited powers in so far as decision making is concerned.

Another shortcoming of the Constitution is its failure to offer sufficient human rights protection. The 1966 Constitution contains an extensive list of civil and political rights with no mention of socio-economic rights. It is worth noting that since independence, Botswana has been hailed as a shining example of democracy in Africa where rights and freedoms of individuals are guaranteed under the Constitution and respected and fulfilled by the Government without any discrimination of sorts. It has been consistently alleged that Botswana has maintained a good human rights protection record.¹²⁰ This is despite the increasing dismissal of Botswana's Constitution as offering insufficient human rights protection,¹²¹ an unimpressive record as regards ratification and poor reporting on international treaties. Botswana falls into the category of countries that have a constitution that is not consonant with its international human rights obligations such as those found under the African Charter on Human and Peoples' Rights (African Charter).

The independence of the judiciary has also been under attack with the concern largely concentrated on the appointment of judges by the President.¹²² However, Fombad argues that what sets Botswana apart from the rest of Africa is the fact that the courts are able to adjudicate over disputes concerning alleged violation of people's rights.¹²³

¹¹⁸ M Molomo 'Electoral systems and democracy in Botswana' in Z Maundeni (ed) *40 years of Democracy in Botswana: 1965-2005* (2005) 29 31.

¹¹⁹ Molomo (n 118 above) 31; MZ Botlhomilwe & D Sebudubudu 'Elections in Botswana: A ritual enterprise?' (2011) 4 *The Open Area Studies Journal* 96 100.

¹²⁰ RA Kumar 'Constitutional rights and judicial activism: Bridging the gaps in Botswana' in E Quansah & W Binchy (eds) *The judicial protection of human rights in Botswana* (2009) 119 121; challenged by Cook & Sarkin (n 3 above) 458-488.

¹²¹ Stakeholders' Information on Botswana, Submitted by Centre for Human Rights, University of Pretoria, South Africa, 13 June 2008 http://www.upr-info.org/IMG/pdf/Centre_for_Human_Rights_University_of_Pretoria_Botswana_E_2008.pdf (accessed 15 April 2009).

¹²² Good (n 100 above) 36; 'Is the Independence of the Judiciary Threatened? *The Botswana Gazette* 27 March 2009 http://www.gazettebw.com/index.php?option=com_content&view=article&id=2775:is-the-independence-of-the-judiciary-threatened&catid=15:editorial&Itemid=2 (accessed 25 July 2011); The law society of Botswana position paper on the appointment of judges (2012) <http://www.lawsociety.org.bw/news/Position%20Paper%20on%20Appointment%20of%20Judges%20Final%2014%20jun%202012%20Final.pdf> (accessed 9 August 2012).

¹²³ Fombad (n 108 above) 9.

The above and other matters relating to Botswana's Constitution remain issues which are of concern to many in Botswana. Constitutionalism dictates that some of the fundamental problems found in the Botswana Republican Constitution should be corrected so as to enhance constitutionalism in the country.

3 Understanding Botswana's constitution-making process and its impact on constitutionalism

A better part of this paper has been devoted to providing a picture of the conception and birth of the constitution of the Republic of Botswana. The following discussion is an examination of this process in the context of constitutionalism.

It is beyond doubt that the Bechuanaland 1961 and 1965 Constitutions paved way for the eventual transition of the Bechuanaland Protectorate to the independent Botswana. One can thus confidently come to the conclusion that the period beginning 1961 to 1966 was a period of transition for the British Territory to an independent republican state. The constitutional and legislative events of that period indeed shaped and continue to shape the future of Botswana. Additionally, the fact that the constitution is the supreme law in Botswana fortifies the position adopted herein that the period of negotiations or constitutional talks, whatever nomenclature, was a defining moment for the then Protectorate.

A review of the available literature indicates that Botswana was not handed a constitution for implementation by the British. This to a certain extent distinguishes Botswana from other African countries where the participation of the British was more pronounced. It is indicated that a process of constitutional review was initiated in 1965 to allow the people to create a constitution that will govern the Republic of Botswana. In the case of both the 1961 and 1965 Constitutions, the people were given the opportunity to participate in the constitution-making process. The fundamental difference between Botswana and other African states, it appears, is that while both were elite driven processes, in the case of Botswana at one point more than a hundred meetings were allegedly held to explain the constitutional reforms to the people. Relative to other African countries emerging from colonisation, Botswana fared better. However, the question that begs attention is whether that participation was sufficient enough to suggest that the constitutions were endorsed by the people.

According to Hara, to achieve greater participation of the people in constitutional making processes certain requirements must be met.¹²⁴ He posits that: the populous must be educated about the role they will play in the creation of the new constitution; the process must be inclusive with consultation reaching all 'classes' of society, all of whom should be enabled to participate in the process; thirdly, civil society must be involved in the process; and fourthly, such a process must be 'open and transparent' with the public being informed about the progress of the constitution-making process.¹²⁵

It is understood that during colonialism the civil society was almost non-existent and there might have been financial constraints on the ability of those in power to educate the people about the importance of the processes of constitutional reviews. It is also possible that the political elites then thought that the issues at hand were beyond comprehension of the people and they were better placed to deal with them adequately. It is only fair that it be acknowledged that a substantial number of meetings were held and the proposals were explained to the people.¹²⁶ That in itself appears to be imposition of ideas by the ruling elite on the people and does not amount to participatory constitution-making. Justifications can be identified for failure to meet some of the requirements suggested by Hara during the constitutional reviews in Botswana. There is absolutely no reason, however, for lack of sufficient participation of the people in the processes.

At the risk of coming forth as an armchair critic and having the benefit of hindsight, one cannot avoid coming to the conclusion that the participation of the people in the constitution-making process was insufficient.¹²⁷ With respect to the 1961 Constitution, the Legislative Council was at the fore of the consultations presumably for and in the best interest of the people. As indicated in the preceding discussion the BPP noted their displeasure in the manner in which the consultations took place as well as the composition of the Legislative that purported to represent the people. Similar objections were recorded with respect to the 1965 constitution and during the independence conference when the opposition representative, Mr Matante, staged a walkout. Cognisance is taken of the fact that to a certain extent the objections by the BPP might have been politically motivated. However, that their objection may have been justifiable cannot be ignored.

¹²⁴ MH Hara 'Popular involvement in constitution-making: the experience of Malawi' presented at the World Congress of Constitutional Law, Athens, Greece, 11-15 June 2007 <http://www.enelsyn.gr/papers/w1/Paper%20by%20Mabvuto%20Herbert%20Hara.pdf> (accessed 23 July 2011).

¹²⁵ Hara (n 124 above) 3-4.

¹²⁶ Fawcus & Tilbury (n 47 above) 201.

¹²⁷ See 'The challenges of a unitary, all powerful presidency' *Mmegi* 21 July 2011 <http://www.mmegi.bw/index.php?sid=10&aid=140&dir=2011/July/Thursday21> (accessed 24 July 2011).

It is beyond doubt that those constituting the new government were desirous of having a unified state. They did all they could do to ensure that Bechuanaland would emerge as a unitary state that is not governed along tribal lines. It thus became necessary to curtail the powers of the chiefs in a manner that would not cause alarm amongst the then influential traditional leaders. It is alleged that difficult as it was, the compromise with respect to the role the chiefs would play once the territory became independent was eventually agreed upon through 'unanimous consent'.¹²⁸ Recent events seem to suggest that this might not actually be true.

It is only logical that those who seek to limit the power of the rulers, so as to avoid arbitrary rule, should be involved in the processes putting in place such limitations. It is participation in the decision-making process and in the resolution of disputes about rights for example,¹²⁹ that is of most significance. It is this significance that prompted Waldron to describe participation as 'the rights of rights'.¹³⁰ This is so because people take part in politics because of the desire to affect the way decisions are made and thus striving to live up to the idea of making collective decisions.¹³¹ It is also through participatory democracy that the citizenry are given the right to participate in the decisions that affect them¹³² and will in the process reduce social and economic inequalities that are inherent in societies.¹³³

More emphasis is nowadays being placed on the participation of the citizenry in the constitution-making process which 'form of constitution-making' is referred to as democratic or participatory constitution-making'.¹³⁴ Over the years many states in the wake of democratisation embarked on constitutional reviews in a manner that embraced the democratic norms and practices.¹³⁵ The Ugandan constitution-making process involved extensive participation of the people. Côte d'Ivoire, Eritrea, South Africa, Kenya, Zimbabwe and Zambia, to some extent, were also involved in constitution-making processes that saw the increased participation of the public.¹³⁶ The advantages of participation in the construction of the constitution of a particular country are manifold, chief

¹²⁸ Bechuanaland Protectorate: Constitutional Discussions (1963), para 5.

¹²⁹ J Waldron *Law and disagreement* (1999) 254.

¹³⁰ As above.

¹³¹ P Lenta 'Democracy, rights disagreements and judicial review' (2004) 20 *South African Journal of Human Rights* 2 14.

¹³² T Roux 'Democracy' in S Woolman *et al* (eds) *Constitutional law of South Africa* (2007) 10-14.

¹³³ Roux (n 132 above) 10-15.

¹³⁴ AM Banks 'Expanding participation in constitution-making: Challenges and opportunities' (2008) 49 *William & Mary Law Review* 1043 1046 <http://scholarship.law.wm.edu/wmlr/vol49/iss4/2> (accessed 20 July 2011).

¹³⁵ DC Moehler *Distrusting democrats: Outcomes of participatory constitution-making* (2008) 1.

¹³⁶ Moehler (n 135 above) 1; DF Meledje 'The making, unmaking and remaking of the constitution of Côte d'Ivoire: an example of chronic instability' & MLM Mbaio 'The politics of constitution-making in Zambia: Where does the constituent power lie?' in C Fombad & C Murray (eds) *Fostering constitutionalism in Africa* (2010) 119 and 87 respectively.

among them being constitutional legitimacy. Additionally the participation of the people in the constitution-making process allows them to have a say in what they regard as appropriate and necessary to have as part of their constitutional principles. This in fact is one of the important elements of participatory constitution-making.

Yet again Botswana's position in the context of this paper is different considering that the transition referred to was of decolonisation. Is it possible then to apply the concepts and ideals of today, such as constitutionalism and participatory constitution-making, to past situations and circumstances? These aspirations have started gaining prominence in the 21st century becoming more imperative over the recent years.

The answer to that question is a resounding 'yes'. In the main, constitutionalism is an ancient concept and the '[l]iterature on constitutionalism distinguishes between ancient, modern and contemporary constitutionalism as three distinctive types'.¹³⁷ Federico has rightly noted that constitutionalism is a process of constant dialogue between the rulers and the ruled about the limitation of power and that many African countries have endeavored to limit and balance this power before colonialism.¹³⁸ It is in that context that one cannot dispute that the conceptions and ideals of constitutionalism and participatory constitution-making were very much applicable during and for the years leading up to Botswana's decolonisation. The decision to draw up a constitution that clearly limited the powers of the Prime Minister and eventually the President of Botswana goes to show that constitutionalism is indeed an old phenomenon that the acts of the past leaders could be assessed with and should have adhered to. That is why the three main features of constitutionalism, being the limitations and separation of powers, government of laws and not of men and the normative/moral justification of the new order or government¹³⁹ are found within the Botswana Constitution despite that the Constitution was developed in the 1960s.

¹³⁷ H Hansen-Magnusson & A Wiener 'Studying Contemporary Constitutionalism: Memory, myth and horizon' (2010) 48 *Journal of Common Market Studies* 21-24; AA Mazrui 'Constitutional change and cultural engineering: Africa's search for new directions' in J Oloka-Onyango (ed) *Constitutionalism in Africa: creating opportunities, facing challenges* (2001) 35; see further D Monyae 'South Africa in Africa: Promoting constitutionalism in Southern Africa 1994-2004' in V Federico & C Fusaro (eds) *Constitutionalism and democratic transitions: lessons from South Africa* (2006) 132-133, highlighting that contemporary scholars on constitutionalism 'draw much of their understanding of constitutionalism from Immanuel Kant's Perpetual Peace (1795), Adam Smith's Wealth of Nations (1776), and Hugo Grotius' writings in the first half of the 17th century'.

¹³⁸ V Federico 'Democratic transitions and constitution-making processes: The role of constitutionalism as a mechanism of building consensus: the South African case' in V Federico & C Fusaro (eds) *Constitutionalism and democratic transitions: Lessons from South Africa* (2006) 47-52.

¹³⁹ Federico (n 138 above) 69.

Participation in the affairs of one's country and participatory constitution-making are not contemporary concepts. As shown by the limited participation of the people during Botswana's pre-independence constitutional talks they are or they should be the cornerstones of many democracies. Likewise participation of people in the making of the constitution prior to decolonisation was as relevant, as their participation is today, in the context of review(s) of constitutions.

It is therefore apposite to point out that participatory constitution-making fosters constitutionalism in the sense that it allows for the country to adopt a constitution that is accommodative and inclusive. In that light people are able to place agreed limitations on the powers that can be exercised by the politicians. This in turn helps foster the legitimacy of that constitution, enabling the constitution to be implemented with little, if any, resistance.

It has been pointed out by Yeh and Chang that:¹⁴⁰

In a time of profound transition, a society has to cope with the past, deal with the current, and look forward to the future. Intense conflicts in interests, values, norms, and priorities abound, and thus any solid, final constitutional solutions may be too far away to get materialised.

Even though this was said in the context of 'transitional' constitutions, the same conclusion can be reached with respect to transitions, the term used in its original grammatical meaning, from colonial periods to independence. Pre-independence constitutions have played a fundamental role in the development of independence constitutions in Africa. As earlier indicated, in the case of Botswana, the Independence Constitution is largely based on the 1965 Constitution. Little attention is paid to these constitutions despite their profound influence in the direction of the constitutional framework of a particular country. Very little attention is equally paid to the processes that led to the creation of these constitutions. As a result, the impact of pre-independence constitutions on constitutionalism in Africa has not been adequately interrogated. Some African constitutions are proving to be inadequate and are constantly being dismissed as not reflecting the true ideals of the people. A careful analysis of these constitutions will reveal that they are indeed based, with slight modifications, on the country's pre-independence constitutions. The arrival of constitutions in Africa brought along with them major dilemmas.¹⁴¹ In the case of Botswana it was the issue of the tribal leaders and their place in the new dispensation. This issue was 'resolved' in a manner that was not satisfactory to some of the chiefs¹⁴² and, it emerged

¹⁴⁰ J Yeh & W Chang 'The changing landscape of modern constitutionalism: Transitional perspective' (2009) 4 *National Taiwan University Law Review* 145 <http://ssrn.com/abstract=1482863> (accessed 21 July 2011).

¹⁴¹ Mazrui (n 137 above) 35.

¹⁴² Fawcus & Tilbury (n 47 above) 201.

over the years, to some of the tribes. The then political elites created a constitution that ushered Botswana into independence, slightly modified it upon independence and then forgot about the defects that some continue to complain about. The Independence Constitution is similar in certain areas to the constitutions of former British colonies or protectorates. It has been noted that most of these constitutions have a similar pedigree and similar features such as a parliamentary system of government.¹⁴³

It is important and beneficial that pre-independence constitutions, in particular processes that led to their adoption, be interrogated to ascertain whether they represent a consensus about the principles embodied in those constitutions. Of major concern in relation to constitutionalism is the issue of the limits placed upon the powers of the executive and the president by these constitutions.

The assertion that the 1965 constitution proposals received 'unanimous consent'¹⁴⁴ is also questionable. Just like it was the case with Malawi and the Malawi Congress Party (MCP), the constitutional talks were dominated by the BDP who were at one point a *de facto* government within the Legislative Council.¹⁴⁵ Their victory during the 1965 elections also somehow propelled them into a superior position *viz* opposition parties during the constitutional talks.

Even though we are led to believe that the British allowed Botswana to play a central role in the constitution-making process their influence should not be underestimated. They played a significant role in these processes and transplanted, among other things, systems of governance as obtainable in other former protectorates into Botswana.¹⁴⁶ It is therefore not by coincidence that the constitutions of most former British colonies and protectorates are similar in some respects.¹⁴⁷

The conclusion arrived at by Hara with respect to the Malawi Constitution of 1964 is equally applicable to Botswana's 1961 and 1965 Constitutions. He concluded:¹⁴⁸

[t]hus the Constitution resulting from the compromise cannot be said to be based on any broad consensus on specific aspects of democratic governance. There were no broad public discussions aimed at bringing out some kind of consensus on fundamental Constitutional issues such as the nature and the limits of the power of the State over citizens and vice versa, the nature of the relationship between the various constitutive parts of the government, and the nature of the relationship between the state and other states.

¹⁴³ GP Tumwine-Mukubwa 'Ruled from the grave: Challenging antiquated constitutional doctrines and values in commonwealth Africa' in Oloka-Onyango (n 137 above) 287.

¹⁴⁴ As above.

¹⁴⁵ Hara (n 124 above) 8.

¹⁴⁶ Tumwine-Mukubwa (n 143 above) 287.

¹⁴⁷ As above.

¹⁴⁸ Hara (n 124 above) 9.

Despite these glaring anomalies, the pre-independence Constitution of 1965 remains one of the building blocks of Botswana's independence Constitution of 1966.

4 Post-independence: Calls for a constitutional review take centre stage

Constitutions in Africa have failed to avert the danger of states plunging into authoritarianism and totalitarianism. This has been a major obstacle to the consolidation of democracy in Africa because constitutionalism has been and continues to be weakened by the inadequacies of constitutions. Many failed experiences with democracy in Africa are largely due to faulty constitutions. A few amendments have been made to the Constitution since its adoption in 1966. Perhaps this is due to the fact that upon attainment of independence the constitution conferred extensive powers on the executive. As a result while other African governments amended constitutions to consolidate executive powers, in Botswana such steps were unnecessary. Whatever changes that have been made by Parliament to the 1966 Constitution have only strengthened the undemocratic character of the Constitution. The successive Presidents in Botswana's post-independence era have been the alpha and omega of the social, political, economic and cultural life of the nation. The Botswana Constitution simply does not provide clear and adequate checks and balances between the three arms of government.¹⁴⁹ These provisions are a serious disservice to the people of Botswana as they are likely to find themselves in a crisis in the future.

A similar constitution in Malawi was used by President Banda to stifle any criticism of his regime and to further plunge Malawi into a constitutional crisis.¹⁵⁰ It is Constitutions like the 1966 Botswana Constitution that could be used as an autocratic tool as they vest too much power onto the president, thereby creating a suitable environment for tyranny. This anomaly has caused some commentators to describe Botswana as autocratic and as encouraging presidentialism.¹⁵¹ However, Fombad suggests that the 1966 Constitution has been instrumental in

¹⁴⁹ Fombad (n 99 above) 341.

¹⁵⁰ Hara (n 124 above) 11.

¹⁵¹ Good (n 120 above) 25-43; Wanjala defines 'presidentialism' as the centralisation of power in one person and more specifically in the hands of the president or his office. Typically, most African leaders derive their authority not from any popular electoral mandate or from elections that could be termed free and competitive. 'It is this type of leaders who instead of using their authority to further the development of democratic sentiments, practices and institutions throw their weight behind the construction of all sorts of repressive systems and use their authority to justify the forms of repression engendered by those systems'. See generally S Wanjala 'Presidentialism, ethnicity, militarism and democracy in Africa: The Kenyan Example' in J Oloka-Onyango *et al* (eds) *Law and the struggle for democracy in East Africa* (1996) 88.

enabling a working democracy in Botswana.¹⁵² Considering the nature of the powers vested in the President, a parallel argument could be made that it might not be the nature of the Constitution that has enabled a working democracy in Botswana but the leadership that Botswana has enjoyed since independence.¹⁵³ In particular, arguably the past presidents have not sought to use the powers vested in them by the constitution to silence critics and abuse state resources.

It is apparent that in the case of Botswana the processes that lead to the adoption of the 1965 Constitution were flawed. It cannot be said as a matter of fact that the 1965 Constitution came about as a result of inclusive participation of the people and was based on consensus. It is this Constitution that forms the basis of the present constitutional framework. The weak constitutional foundation in Botswana is becoming more apparent as many call for a constitutional review.

Most pre-independence constitutions in Africa were adopted without popular support and in certain instances copied from other jurisdictions. When such constitutions can no longer hide their non-original status, calls for a constitutional review take centre stage. Calls for constitutional review usually require principles of constitutionalism to be entrenched into the constitution and adhered to by those in government. Emphasis is always placed on the limits of power on the executive by the constitution. Since the 1990's, many African states introduced clauses in constitutions addressing civil and political rights often associated with constitutionalism.¹⁵⁴ Fombad notes that these Constitutions purport to protect the people against the government by ensuring that there exist checks and balances.¹⁵⁵

With the current Constitution it has always been clear that a time will come when Botswana will want their Constitution to be reviewed. In fact '[c]alls for a review of the constitution have grown both in intensity and persistence lately'.¹⁵⁶ These calls have culminated in an interesting development at the centre of which is the accusation that the BDP

¹⁵² Fombad (n 99 above) 318-342.

¹⁵³ 'To review or not to review the Constitution' *Sunday Standard* 20 June 2011 <http://www.sundaystandard.info/article.php?NewsID=11071&GroupID=4> (accessed 26 July 2011).

¹⁵⁴ Fombad (n 99 above) 1.

¹⁵⁵ Fombad (n 99 above) 12-15.

¹⁵⁶ 'The challenges of a unitary, all powerful presidency' *Mmegi* 21 July 2011 <http://www.mmegi.bw/index.php?sid=10&aid=140&dir=2011/July/Thursday21> (accessed 24 July 2011); 'Amend Outdated Botswana Constitution – BONELA' *The Botswana Gazette* 04 August 2008 <http://mmegi.bw/index.php?sid=1&aid=62&dir=2008/August/Monday4> (accessed 26 July 2011); T Lucas 'Amend Botswana Constitution' 08 September 2009 http://www.gazettebw.com/index.php?view=article&catid=18%3Aheadlines&id=3906%3Aamend-botswana-constitution-taolo-lucas&format=pdf&option=com_content (accessed 26 July 2011); 'We demand a new constitution for Botswana' *Sunday Standard* 27 February 2011 <http://www.sundaystandard.info/article.php?NewsID=10062&GroupID=5> (accessed 26 July 2011).

leadership misled the British into believing that the Constitution was based on consensus. In particular consent from the people through their chiefs on the content of the constitution was never obtained. It is on that basis that the traditional leadership of the Bakgatla tribe challenged the legitimacy of Botswana's Republican Constitution.¹⁵⁷ The case was submitted to the High Court where the chief of that tribe requested the Court, among other things, to set aside the 'fraudulent' Constitution of Botswana and all laws made under its authority pending the drafting of a new constitution.¹⁵⁸ Pending the finalisation of this dispute, the Chief proceeded to launch an urgent application before the High Court and upon its dismissal, an appeal to the Court of Appeal. He applied for a stay of execution of the death penalty imposed upon one Gotlhalosamang Gabaokelwe pending the final determination of his application to the High Court to invalidate and set aside the Constitution of Botswana.¹⁵⁹ The argument was simply that the courts of Botswana derived their authority from the Constitution and from legislation promulgated under the Constitution which is a fraud and must be set aside.¹⁶⁰ The Court of Appeal echoing earlier decisions in the jurisdiction¹⁶¹ on similar matters held that no Court has the power to set aside the Constitution or any part of it.¹⁶² The Court concluded that the Chief's constitutional challenge was absurd as according to his papers he was 'asking a fraudulently appointed Judge, in a fraudulent Court, to make a non-enforceable order setting aside a fraudulent Constitution from which the Court derives its existence'.¹⁶³

To some this suit might seem to have been ill advised or misinformed. However, that such desperate measures could be contemplated and actually carried out is an indictment on the processes that led to the adoption of Botswana's pre-independence constitutions. The spill over of such grave errors is now manifested through desperate attempts aimed at challenging the constitutionality or legality of the Constitution.

¹⁵⁷ 'Why Bakgatla are challenging the constitutionality of the Constitution' *Sunday Standard* 19 May 2011 <http://www.sundaystandard.info/article.php?NewsID=10759&GroupID=5> (accessed 26 July 2011); 'Why Bakgatla are challenging the Constitution (Part II)' *Sunday Standard* 26 May 2011 <http://www.sundaystandard.info/article.php?NewsID=10835&GroupID=5> (accessed 26 July 2011).

¹⁵⁸ The applicant launched an application in the High Court under Case No MCHLB-0002861 of 2011.

¹⁵⁹ As above.

¹⁶⁰ *Kgosikgolo Kgafela II Kgafela & Another v Attorney-General of Botswana & Others*, Court of Appeal Criminal Appeal No CLCGB-027-12, para 18 (Unreported).

¹⁶¹ *Kamanakao I v The Attorney-General* (2001) 2 BLR 654 (HC); *Attorney-General v Dow* (1992) BLR 119 (CA).

¹⁶² *Kgosikgolo Kgafela II Kgafela & Another* (n160 above) para 67.

¹⁶³ *Kgosikgolo Kgafela II Kgafela & Another* (n160 above), para 59.

In response to calls to amend the Constitution, the current President of Botswana, Lieutenant General Seretse Khama, was quoted as saying that democracy does not exist in the absence of law hence:¹⁶⁴

We should therefore, exercise caution in heeding calls to alter the founding document that has been the guarantor of our enviable record of political stability and socio-economic progress. In this country we are fortunate to have as our supreme law a Constitution that for nearly half a century has upheld both our human rights and responsibilities to one another.

It is in light of his statement that it should be indicated that nowhere is it suggested that the constitution in its current form is useless. To dismiss the Constitution as a useless document will be to lose sight of the contribution it has had in the development of democracy in Botswana. The better sections of the Constitution, such as the Bill of Rights in its chapter II, coupled with good leadership has managed to ensure that this potentially autocratic constitution is not used to the detriment of the citizens.

5 Conclusion

There exist numerous challenges to democratisation in Africa brought about by both external and internal factors, that is, within and outside Africa. These challenges are conditions that have impeded the establishment of stable democratic structures in much of Africa from the time of independence onwards, and which are likely to continue to do so. Examples of such include 'negative' ethnicity, weak politico-economic institutions, political leadership and privatisation of the states by leaders, proliferation of weak states, militarism, political conditionalities and financial aid by major world donors, poorly run elections, statism and weak African constitutions.

For a state to function properly in the context of democracy and constitutionalism there has to be in place limitations to the exercise of power by the government and other stakeholders. Such limitations are usually contained in the constitution. The so-called 'third wave' of democratisation that has swept through Africa since the 1990s introduced constitutional making in Africa. It has brought about the introduction of constitutions which contain clauses that purport to recognise and protect most of the human rights that are associated with constitutionalism.¹⁶⁵ It cannot be doubted that for democracy to be stable and to function properly it needs a constitutional framework that will ensure that there is no arbitrary use of power.¹⁶⁶

¹⁶⁴ 'Botswana leader dismisses calls to amend constitution' *Afrique Avenir* 9 November 2010 available at <http://www.afriqueavenir.org/en/2010/11/09/botswana-leader-dismisses-calls-to-amend-constitution> (accessed 25 July 2011).

¹⁶⁵ Fombad (n 99 above) 1.

¹⁶⁶ Fombad (n 99 above) 9.

That the constitution of Botswana fails to adequately provide for such limitations on state power can be traced to events surrounding the 1965 Constitution. The above discussion has shown that the process surrounding the creation of the constitution was not inclusive. It is only now that the effects of such anomalies are felt. This in turn has affected and is likely to affect the legitimacy of the Constitution as well as the consolidation of democracy in Botswana. It has heavily impacted on constitutionalism and the manner in which the Constitution regulates the relationship between the individual and the state. It is the failure of those involved in the creation of the Constitution of Botswana to allow greater participation of the people in the constitution-making process that is bringing the constitution into disrepute and has made it difficult for some of the people to identify with the Constitution.

Everyone wants to be faithful to their constitution and no one wants to be seen and known as a 'constitutional adulterer'.¹⁶⁷ That most of Botswana look at the South African and Namibian Constitutions with utmost admiration make us unfaithful to our constitution. It makes us constitutional adulterers. Under the circumstances it is impossible to guarantee our allegiance to a constitution that was not based and is not based on consensus. This is due to the fact that consultations leading up to the adoption of the 1965 and 1966 Constitutions were inadequate.

Unlike other African states, even though the chiefs eventually disagreed with the constitutional reforms suggested by the political elites, their substantial participation in the constitutional negotiations is noteworthy. One common assertion across Africa is that independence negotiations totally pushed aside and ignored traditional institutions entirely and in the process replaced them with formal government structures that mirrored processes of the former colonial masters. The end result of such a step was that it was the African elite who controlled the decolonisation processes while the traditional leaders were relegated to non-political areas of influence. The reason could be that Bechuanaland never reached the dominion status like the other African states hence traditional rule found space as British administration was not very much expanded.

Objections by the opposition political parties and chiefs to some of the constitutional reforms should have been accorded serious attention. The objections have resurfaced albeit in a different form brought to the fore by another equally dissatisfied generation. The recurrence of such complaints should put to notice the engineers of the constitution, being the ruling party, to consider the ramifications of not revising it through acceptable means of participatory constitution-making. It is acknowledged that the

¹⁶⁷ JM Balkin 'Agreements with hell and other objects of our faith' in W Sadurski (ed) *Constitutional theory* (2005) 33.

'constitution cannot be a perfect document',¹⁶⁸ as '[i]t was fashioned by imperfect people in imperfect times and entrusted to future generations for its interpretation; and the people and the times have gotten no more perfect since'.¹⁶⁹ This notwithstanding, historical asymmetries can always be corrected and should be corrected. Otherwise Botswana's constitutional legacy will forever be haunted by the ghosts of its pre-independence constitutions.

¹⁶⁸ Balkin (n 167 above) 46.

¹⁶⁹ As above.

CHAPTER 9

POPULAR INVOLVEMENT AND CONSTITUTION-MAKING: THE STRUGGLE TOWARDS CONSTITUTIONALISM IN MALAWI

Mwiza Jo Nkhata

1 Introductory remarks

The roots of modern constitution-making in Malawi are traceable to the processes surrounding the adoption of the 1964 Constitution of Malawi ‘the Independence Constitution’ or ‘the 1964 Constitution’. Prior to the adoption of the Independence Constitution, no claim could be maintained for the involvement of the populace in the adoption of the laws under which Malawi was governed.¹ While legitimate questions may be raised about the level of popular involvement in the crafting of the Independence Constitution it is clear that the nationalist leaders of the time, who negotiated the Independence Constitution, proceeded on the basis that they were representing the interests of all Malawians. The dynamics that surrounded the adoption of Malawi’s second Constitution in 1966 (the Republican Constitution) were markedly different from those that had accompanied the Independence Constitution. Even more different were the dynamics that surrounded the adoption of Malawi’s current Constitution in 1994 ‘the 1994 Constitution’ or ‘the Constitution’. The three Constitutions so far adopted by Malawi have also been distinct substantively.

In shaping the broader context for the discussion herein, this chapter begins with a discussion of some of the generally accepted principles in constitution-making. While accepting that some general principles underlie constitution-making, I am also mindful of the fact that local conditionalities crucially shape the manner in which constitutions are made. After discussing the principles underlying constitution-making, generally, the chapter focuses on the Malawian experience in constitution-making. In this regard the chapter commences by exploring the manner in

¹ Malawi was declared a British protectorate on 14 May 1891. For a succinct analysis of the constitutional changes in Malawi up to 1965 see ZD Kadzamira ‘Constitutional changes in Malawi 1891-1965’ in GW Smith *et al* *Malawi: Past and present: Selected papers from the University of Malawi history conference* (1971) 81-87.

which the Independence Constitution was adopted before interrogating the manner in which the Republican Constitution was adopted. This section concludes by analysing the manner in which the 1994 Constitution was adopted. After presenting the Malawian experience in constitution-making, the chapter presents some of the lessons that can be had from constitution-making processes in Malawi. These lessons will largely be with regard to popular involvement and its implications on the constitution-making processes as well as the final product of constitution-making processes. The chapter concludes with a brief discussion of the implications that the constitution-making process in Malawi can have on the entrenchment of constitutionalism. The constitution-making processes in Malawi are used to illustrate the implications of constitution-making on constitutionalism.

2 Of constitutions and constitution-making

A constitution occupies a special place in the life of any nation,² and is its supreme and fundamental law. Constitutions, it is said, are like blue prints laying down the basic architecture of power, delineating the main lines of authority and the way it ought to be distributed in society.³ Unlike blue prints, however, constitutions are both descriptive and prescriptive. Stipulations in a constitution are only relevant to the extent that they constrain those in power to act only in ways permitted by the constitution.⁴ It is the extent to which constitutions actually constrain and direct decision-making in a polity that determines the prevalence or lack of constitutionalism. This is because constitutionalism is about both the letter and spirit of the constitution. Constitutionalism is about the fidelity to the letter of the constitution and the core values and principles upon which a constitution is based.⁵

The past twenty years have witnessed the adoption of a remarkable number of constitutions in Africa.⁶ This, arguably, confirms the importance that constitution-making and constitutionalism have assumed over the past two decades. This increased activity in constitution-making, especially in Africa, also reflects a changed perception of the importance and purposes of constitutions.⁷ Even though this is clearly the case it is important to note that constitution-making is a ubiquitous but poorly

² J Hatchard *et al* *Comparative constitutionalism and good governance in the Commonwealth: An Eastern and Southern African perspective* (2004) 12.

³ AM Bejarano & R Segura 'Transforming politics into Constitutions: The politics of constitution-making in Latin America' Paper delivered at the Annual Meeting of the American Political Science Association, 2-5 September 2004.

⁴ Hatchard *et al* (n 2 above).

⁵ NM Mulikita 'A false dawn? Africa's post-1990 democratisation waves' (2003) 12 (4) *African Security Review* 105 108.

⁶ As above.

⁷ Y Ghai & G Galli *Constitution building processes and democratisation* (2009) 5.

understood phenomenon.⁸ While much has been written about constitution-making, there is little interrogation of the impact of different design processes on constitutional outcomes. Although there are as many constitutional design processes as there are constitutions in the world, it is clear that all constitutional design processes grapple with similar problems. These include designating who is to be involved in constitution-making, when the involvement must take place and how the actors must proceed in formulating, discussing and approving the constitutional text.⁹ All constitutional design processes involve striking complex bargains between various stakeholders.¹⁰ Ideally, the objective of the design process is to come up with a constitution that is autochthonous, enjoys popular support and is durable. These factors are important because it is central to the establishment of an ethos of constitutionalism, which is the recognition by the people that the constitution which binds them is theirs and is worth defending.¹¹

Constitution-making is a pre-eminently political act.¹² A constitution will invariably be the product of political actors making choices about the norms that must govern the particular polity. Constitutions represent the results of complex bargaining among political coalitions and multiple designers with diverse values, beliefs and interests.¹³ While this is evidently true, it is also important to acknowledge that many extra-political forces influence constitution-making processes. Making choices about the norms that must regulate a polity is thus both an art and a science.¹⁴ It is a science in the sense that constitution-makers must have a thorough understanding of principles that normally undergird constitutions, for example, separation of powers, judicial independence and the rule of law. It is an art in the sense that after crafting a document that reflects the principles that must undergird constitutions, the framers must imbue the document with legitimacy normally by seeking the consent of the people governed. For a constitution to have real meaning it must be premised on consensual legitimacy. To properly understand constitution-making, therefore, a useful starting point is to appreciate that constitution-making is not only about what is chosen as a constitution but also about who has done the choosing and how this has been done.¹⁵

⁸ T Ginsburg *et al* 'Does the process of constitution-making matter?' (2009) 5 *The Annual Review of Law and Social Science* 201-202.

⁹ A Ginsburg *et al* (n 8 above) 204-205.

¹⁰ Hatchard *et al* (n 2 above) 28-29.

¹¹ As above.

¹² DJ Elazar 'Constitution-making: The pre-eminently political act' <http://www.jcpa.org/dje/articles3/constisramer.htm> (accessed 16 February 2011).

¹³ Bejarano & Segura (n 3 above) 6.

¹⁴ Elazar (n 12 above).

¹⁵ As above.

2.1 Making a 'perfect' constitution

It is manifest that no country has ever created a constitution that is perfect. At the same time, however, it is also clear that certain countries have created constitutions that have worked much better than others and for that reason stood the test of time. The basic processes underlying constitution-making are shaped by the fundamental form or character of the polity concerned.¹⁶ This is because constitutions are, first and foremost, local and must build on already existing resources.¹⁷

Elazar identifies three basic models of political founding and organisation that have shaped constitution-making from ancient times to the present.¹⁸ The first model corresponds to polities founded by conquest in which political organisation is necessarily hierarchical. In these polities, constitution-making is essentially a process of handing down a constitution from the top. Most independence constitutions in Africa conform to this model as they were essentially handed to the newly independent African countries with minimal local involvement in their crafting. The second model relates to polities that have evolved and concretised power in defined centres and use that to govern the peripheries. This model often conforms to authoritarian and dictatorial regimes where the ruling elite dictates the constitution largely by dominating and monopolising the process of crafting the constitution. As will be seen later, the 1966 Republican Constitution of Malawi conforms to this model. The third model involves polities founded by design through covenant or compact in which power is shared through a matrix of centres created by the constitution. In this model the process of constitution-making involves a convention of partners to the pact or their representatives. Where change is sought to be made to the constitution, another convention of the partners is called or the proposed changes are referred to the citizens of the polity in a referendum. This is because the constitution is regarded as a pact among equals thus requiring the consent of all the partners thereto or at least a majority of the partners before it can be changed. The Constitution of the United States of America is clearly one that falls under this third model.

While different forms of political organisation have shaped the constitutions that various countries have adopted, it is undeniable that constitutions, generally, tend to be written at momentous turning points in a country's history.¹⁹ Such momentous moments could be, for example, the conclusion of a war, the vanquishing of an empire, the death of a

¹⁶ As above.

¹⁷ KE Soltan 'Constitution-making at the edges of the constitutional order' (2008) 49(4) *William and Mary Law Review* 1409 1419.

¹⁸ Elazar (n 12 above).

¹⁹ J Elster 'Forces and mechanisms in the constitution-making process' (1995 - 1996) 45 *Duke Law Journal* 364 370.

dictator or the replacement of an autocratic regime by another.²⁰ Constitutions are rarely written at moments of continued tranquillity in the life of a state but instead are often written at moments of political crisis or at least in moments of political dishevelment.²¹ Making a constitution thus involves the making of difficult choices while acting under considerable pressure and constraints.²²

The very nature of the moment during which constitutions are made entails that the framers are simultaneously compelled to look into the past to deduce lessons that they can utilise as well as to look into the future and provide for eventualities that they cannot fathom with exactitude. This is because new constitutions are often envisioned not only as devices to get a state through a crisis but also as providing a platform for progress.²³ In some instances the creation of a platform for progress necessarily requires a radical break with the past and the establishment of a new order.²⁴ While so much hope often accompanies the adoption of new constitutions, the pressures and constraints that typically influence on the framers make it very difficult for them to come up with a document that sufficiently embodies all aspirations of the populace. In spite of the difficulties that ordinarily accompany constitution-making, it is important that the process must reflect adherence to the basic principles governing constitution-making for the process and product to be credible. Some of these principles will now be discussed. A caveat must be made here; the discussion below does not pretend to be an exhaustive discussion of the principles governing constitution-making. The discussion merely highlights some of the important principles while at the same time emphasising that the context for constitution-making remains a crucial determinant of the final product.

2.1.1 Public participation and oversight

On the face of it, the key to making a good constitution is to consult the people concerned over its contents.²⁵ This approach, supposedly, has several benefits. Its inclusiveness can help raise public awareness of the constitution-making process and enhance the chances of the new document addressing issues of real importance to the people. The approach also, it is argued, enhances the acceptability of the constitution by the people it must govern. The argument in this regard is that a

²⁰ KL Scheppele 'A constitution between past and future' (2008) 49 *William and Mary Review* 1377.

²¹ Scheppele (n 20 above) 1378-1379.

²² Elster (n 19 above) 364 365.

²³ Scheppele (n 20 above) 1379.

²⁴ While breaking with the past is often stated as the motivation for adopting new constitutions the extent to which a constitution can achieve such a break is often far limited than is conceded – JT Gathii 'Popular authorship and constitution-making: Comparing and contrasting the DRC and Kenya' (2008) 49 *William and Mary Law Review* 1109 1123.

²⁵ Hatchard *et al* (n 2 above) 29.

constitution that is the result of thorough participation exudes more legitimacy than one which has not undergone equally intense participation. It must also be recalled that constitutions produced in a democratic manner are bound to be democratic in tenor.²⁶

Public participation and oversight of the constitution-making process is crucial in any attempt to devise an autochthonous and durable constitution. Public participation or popular involvement in constitution-making, however, needs to be properly understood for it may very well be antithetical to constitution-making especially if it is miscomprehended. While constitutional legitimacy is often tied to the degree of public participation in the making of a constitution, it seems to be the case that the quality of participation is also centrally important to the legitimacy of a constitution. Merely increasing the number of actors involved in the crafting of a constitution will not lead to the creation of a more legitimate constitution. This is because an otherwise broadly participatory approach to constitution-making may be manipulated and subverted by some interest groups thus emptying the participation of any meaning. To be meaningful for constitution-making, participation must, first, strive to accommodate the diversity of the populace the constitution seeks to govern.²⁷ Second, the conditions for participation must be such that the voices of the weak and marginalised are allowed to influence the final product.

In reflecting on the nature and importance of participation for constitution-making, it is important to acknowledge that all political systems have 'members' and 'challengers'.²⁸ Members are those groups that possess sufficient politico-economic resources to ensure that their interests are always taken into account in decision-making. Challengers are those groups whose interests are routinely organised outside of institutionalised avenues particularly because of their lack of bargaining leverage. In as far as facilitating political change is concerned, members tend to have the upper hand in instigating and shaping change in society as compared to challengers. In constitution-making, however, the crucial goal is to increase the participation of both members and challengers. Only when meaningful dialogue between members and the various challengers is allowed to take place can a properly inclusive constitution be drafted. Such dialogue ensures that the constitution adopted is a product of the integration of ideas from all major stakeholders in a country.²⁹

While broad participation in constitution-making is to be encouraged at all times it is important to acknowledge that in spite of the clear benefits

²⁶ Ginsburg *et al* (n 8 above) 214.

²⁷ Bejarano & Segura (n 3 above) 10-11.

²⁸ AM Banks 'Expanding participation in constitution-making: Challenges and opportunities' (2008) 49 *William and Mary Law Review* 1043 1056.

²⁹ M Ndulo 'The democratic state in Africa: The challenges for institution building' (1998) 16 *National Black Law Journal* 70.

that participation confers it comes with a cost. This means that adequate provision for both financial and human resources must be made if the consultation is to be meaningful. It is also important to acknowledge that despite the emphasis on participation in constitution-making, the value of participation to constitution-making is more equivocal than is often conceded.³⁰ Merely increasing the number of people involved in the crafting of a constitution is, by itself, no guarantee of a more legitimate constitution.³¹ Broad participation, it is commonly asserted, enhances the legitimacy of the constitution. Even though this may be true in the majority of instances, numerous examples urge the tempering of the premium placed on participation in constitution-making. As has become evident, certain forms of participation in constitution-making can actually be delegitimising in the end as happened in the adoption of the 1996 Constitution of the Republic of South Africa.³²

Further, and as demonstrated by the Japanese Constitution, a constitution may enjoy long term acceptability and legitimacy even though it is crafted through a process that is not participatory and inclusive. In the end, therefore, there are numerous factors that can make participation in constitution-making useful or worthless. The individual circumstances of each country must be sufficiently factored into any participatory processes if the participation is to contribute to the legitimacy of the constitution. Some of the factors that may be considered are a country's history of democratic reform, its level of ethnic tension, its degree of development and the strength of existing institutions.³³ Participation in constitution-making, therefore, need not take predetermined paths but must be crafted to respond to the reality in the societies in which a constitution is to be adopted.

2.1.2 Legitimacy and efficacy

The ultimate objective of any constitution-making process is to come up with a document that is legitimate as well as efficacious. As demonstrated above, while broad participation in constitution-making is often hailed as a prerequisite for legitimacy this is not always the case. Broad participation is important in generating legitimacy for a constitution but it is not the only factor that brings about legitimacy for a constitution. Concededly, participation allows the people to understand a constitution and thus be in a position to mobilise for its implementation.³⁴ Legitimacy of a constitution, it must be recalled, centrally revolves around the reasons that make the citizenry feel compelled to obey a constitution. This is in turn

³⁰ AL Bannon 'Designing a constitution-drafting process: Lessons from Kenya' (2006-2007) 116 *Yale Law Journal* 1824 1842.

³¹ Ginsburg *et al* (n 8 above) 215.

³² EV Schneier *Crafting constitutional democracies: The politics of institutional design* (2006) 27.

³³ Bannon (n 30 above) 1844.

³⁴ Ghai & Galli (n 7 above) 10.

shaped by the contents of a constitution as well as the process by which the contents of a constitution were arrived at. Efficacy of a constitution is manifested by the extent to which a constitution forms the basis for predicting political behaviour and sanctioning officer holders for violating it.³⁵ While legitimacy may explain why the citizenry may feel compelled to obey a constitution, efficacy speaks of the degree to which the constitution actually regulates political life in a society.

Legitimacy and efficacy are centrally important if a constitution is to be successful as the fundamental law of a country and the constitution-making process can contribute enormously to the attainment of both ideals. A well designed constitution-making process can in itself be an education in and preparation for the deliberative and participatory politics that most constitutions embody.³⁶ It is for this reason that constitution-making processes tend to have a strong bearing on legitimacy and efficacy of the final document. Again, while participation in designing a constitution is often heralded as the key to legitimacy and efficacy, experiences reveal a mixed picture. It is now clear that the traditional view that people are more likely to approve a constitution if they participated in its drafting or if it was drafted by people who had the mandate to do so is not always true.³⁷ The high approval rating of the 2005 Constitution of the Democratic Republic of Congo (DRC), for example, clearly confirms this point. The 2005 DRC Constitution received high approval ratings across the country in a national plebiscite even though it was crafted by a small section of the population without significant local consultation on the document, but it was backed by an internationally negotiated and supported peace process. In this case, it seems to have been the case that war wariness rather than the full acceptance of the terms of the new constitution contributed to the high approval ratings. Clearly, high approval ratings, while they may go some way towards establishing the legitimacy of a constitution, do not predicate the efficacy of a constitution.³⁸ As contended by Gathii, 'to argue that legitimacy arises from popular drafting alone is to inaccurately suppose that legitimacy similarly predicts the efficacy of a constitution'.³⁹

Evidently, legitimacy and efficacy of a constitution are a product of a complex interplay among societal forces and processes in the crafting of a constitution as well as in its operationalisation. At the one level, legitimacy and efficacy are dependent on an unequivocal commitment by the 'governors' to a constitution that is owned by the people.⁴⁰ At another level, legitimacy and efficacy of a constitution are invariably fashioned by

³⁵ Gathii (n 24 above) 1125.

³⁶ Ghai & Galli (n 7 above) 10.

³⁷ Gathii (n 24 above) 1123-1124.

³⁸ As above.

³⁹ Gathii (n 24 above) 1125.

⁴⁰ Mulikita (n 5 above) 111.

the domestic social and political realities within which the constitution was adopted and subsequently implemented. In the end, how a constitution is made and what it actually says are crucial factors in determining its legitimacy and efficacy.⁴¹

2.1.3 Empowerment of civil society

Civil society is often understood to connote 'the realm of organised social life standing between the individual and the state'.⁴² It is 'the arena of social engagement which exists above the individual yet below the state ... It is that part of society that connects individual citizens with the public realm and the state ... [it] is the political side of society'.⁴³ According to Sachikonye, civil society may be defined as

[a]n aggregate of institutions whose members are engaged primarily in a complex of non-state activities – economic and cultural production, voluntary associations and household life – and who in this way preserve and transform their identity by exercising all sorts of pressures or controls upon state institutions.⁴⁴

It is generally agreed that there are linkages between civil society and democratisation.⁴⁵ The most important link is that civil society strengthens democracy. This is so because civil society can contain the power of the state through public scrutiny, stimulating political participation by citizens and developing democratic norms such as tolerance and compromise.⁴⁶ Civil Society involvement also creates ways for articulating, aggregating and representing interests outside of political parties especially at local levels, mitigating conflicts through cross-cutting or overlapping interests, questioning or reforming existing democratic institutions and procedures and disseminating information.⁴⁷ Particularly because of its ability to harness the interests of various groups that may otherwise be excluded by mainstream politics, civil society remains particularly relevant to constitution-making. It is for this reason that civil society must be properly empowered during constitution-making so that a proper articulation of the views of the 'voiceless majority' is achieved.⁴⁸ An empowered civil society is bound to contribute to the adoption of a constitution that ably reflects the

⁴¹ V Hart *Democratic constitution-making* (2003) United States Institute of Peace Special Report 1.

⁴² G Hyden 'The challenge of analysing and building civil society' (1996) 26 *Africa Insight* 93 100.

⁴³ As above.

⁴⁴ L Sachikonye 'Democracy, civil society and social movements in Southern Africa' in L Sachikonye (ed) *Democracy, civil society and the state: Social movements in Southern Africa* (1995) 7.

⁴⁵ WC Chirwa 'Civil society in Malawi's democratic transition' in M Ott *et al* (eds) *The power of the vote: Malawi's 2004 parliamentary and presidential elections* (2004) 91.

⁴⁶ As above.

⁴⁷ As above.

⁴⁸ Mulikita (n 5 above) 112.

views of a broad cross section of society. The relevance and importance of civil society's participation was amply demonstrated during the drafting of the 1994 Constitution of Malawi. It is remarkable that the transition to multipartism was centrally managed by civil society, led by the Public Affairs Committee (PAC).⁴⁹

2.1.4 Legal validity

As earlier pointed out, it is generally assumed that popular authorship confers legal validity on a constitution. While this is often true, constitutions have been adopted in various ways that all purport to convey legal validity on the document so adopted. A fundamental problem that most constitution-makers face is to properly trace the source of the validity of a new constitution. In most Commonwealth countries, the legal validity of a newly drafted constitution is often assumed to be traceable to another norm – the pre-existing constitution.⁵⁰ This notion presumes that the constitution itself contains its ultimate rule of recognition or acceptance. However, tracing the validity of a constitution to an already existing constitution ignores whether the pre-existing constitution itself has proper legitimacy or efficacy.⁵¹

Since constitutions are first and foremost local, it is important that local choices be made about the validation of a constitution. While local conditionalities will inevitably determine the approach to be adopted by a country some of the approaches used in other countries are worth alluding to. The crucial consideration must be how to maximise the involvement of the people in the adoption of their new constitution. It is generally agreed that being the supreme law of the land a constitution cannot be adopted in the same way as ordinary legislation.⁵² In this connection the debate has often been about whether the adoption of a constitution is the legislature's function – albeit with the requirement for a special majority or procedure – or whether it is the function of a separate constituent assembly. Where the adoption of a constitution is deemed to be the function of a constituent assembly, further questions arise pertaining to the selection of people to serve on the assembly and the manner in which the assembly must operate, among other things. In other cases it has been deemed necessary to subject the final document to a national referendum for approval. Whether a referendum is used to seek approval for the constitution or the legislature

⁴⁹ Chirwa (n 45 above) 100-103. The Public Affairs Committee (PAC) was a 'pressure group' formed in 1992 to, among other things, pressure the government to look into national grievances and also to enter into dialogue with the government for the resolution of the grievances. PAC was initially composed of faith-based organisations though its membership subsequently included the Malawi Law Society and the Associated Chamber of Commerce and Industry in Malawi – B Muluzi *et al* *Democracy with a price: The political history of Malawi since 1900* (1999) 143-146.

⁵⁰ Gathii (n 24 above) 1125.

⁵¹ As above.

⁵² Hatchard *et al* (n 2 above) 35.

is used, is important to ensure that the process chosen preserves the sovereign will of the people in a legitimate and credible manner.⁵³

Using a national referendum to approve a constitution encourages the full participation of the people who can give the document their formal seal of approval.⁵⁴ It is the clearest indication of the source of validity of a constitution. The process of a referendum is also important because it can generate wide publicity and engender full public debate on the document. A referendum can also be useful to stem a constitution-making process that has been manipulated by the executive and would be easily approved by a compliant parliament.⁵⁵

3 The crafting of constitutions in Malawi

The dynamics and processes surrounding the adoption of the three Malawian Constitutions have been very diverse. In this section an attempt is made to chronicle the processes and dynamics that surrounded the adoption of each of the three Constitutions starting with the Independence Constitution.

3.1 The 1964 Constitution

Malawi achieved independence from Britain on 6 July 1964 under a 'Lancaster House' type of Constitution. Such a constitution, generally, provided for a Bill of Rights and also allowed political pluralism.⁵⁶ The 1964 Constitution itself was a product of the struggle for independence by Malawians.⁵⁷ To properly understand the forces that shaped the 1964 Constitution one must recall that the first general elections in Malawi were held in 1961 and that these elections brought the nationalist politicians into government.⁵⁸ The Malawi Congress Party (MCP) secured an overwhelming majority of the African vote in the 1961 general elections and became the principal nationalist party in government and the country at large.⁵⁹ In December 1963 the country was granted self-governing status subsequent to the dissolution of the Federation of Rhodesia and Nyasaland. It is this status that paved the way for independence in July of 1964. The 1964 Constitution was a product of the Nyasaland

⁵³ BO Nwabueze & SA de Smith *Constitutionalism in the emergent states* (1973) 305.

⁵⁴ Hatchard *et al* (n 2 above) 40.

⁵⁵ As above. Concededly, referenda also have their own limitation as a process of legitimating a constitution.

⁵⁶ C Ng'ong'ola 'Managing the transition to political pluralism in Malawi: Legal and constitutional arrangements' (1996) 34 *Journal of Commonwealth and Comparative Politics* 85–86.

⁵⁷ FE Kanyongolo 'The Constitution' in N Patel & L Svåsand (eds) *Government and politics in Malawi* (2007) 31.

⁵⁸ See, for details, B Pachai *Malawi: The history of the nation* (1973) ch 17.

⁵⁹ Ng'ong'ola (n 56 above) 86.

Constitutional Conference which was held in Lancaster, England. The negotiations for the Constitution were between the nationalist leaders led by Dr Hastings Kamuzu Banda and officers from the British Colonial Office. The dominance of Dr Hastings Kamuzu Banda's MCP meant that negotiations for the Independence Constitution were conducted by MCP officials led by Banda himself and the officers from the Colonial Office. The voices of those that did not belong to the MCP were clearly excluded from the processes leading to the adoption of the Independence Constitution.

As Kanyongolo aptly notes, the Independence Constitution was not a reflection of any broad consensus on specific aspects of democratic governance such as the minimum degree of governmental accountability to the electorate, the form and substance of legal guarantees of human rights or the nature and scope of separation of powers, among other things.⁶⁰ In line with the trend in most post-colonial Africa, the Independence Constitution was nothing more than a compromise between the nationalist leaders – who purported to represent the interests of all Malawians – and the departing colonial authorities whose principal concern was to safeguard the interests of their citizens left in Malawi. The MCP did not attempt to canvass consensus on the terms of the Independence Constitution. It seemed to have been the dominant perception that as a result of its overwhelming showing during the 1961 general elections the MCP had acquired the unassailable right to represent the interests of all Malawians. In appreciating events it is important to bear in mind that by 1964 the MCP was *de facto* the only political party in Malawi and by 1966 it was made *de jure* the only political party in Malawi.⁶¹ The failure by the MCP and the colonial administrators of the time to gather consensus on the fundamentals of the Independence Constitution meant that the constitution adopted was lacking in authority because it did not have any popular legitimacy.⁶² The Independence Constitution was negotiated by small delegations representing narrow political interests and offered to the people of Malawi as a *fait accompli*.⁶³ It is thus not surprising that the Independence Constitution not only failed the test of time but was also unable to form the bedrock of constitutionalism and democratic governance in Malawi.

3.2 The 1966 Constitution

Not long after independence, the MCP government announced its intention to replace the 1964 Constitution, which had retained the Queen as the Head of State in Malawi, with a Republican Constitution. Sometime

⁶⁰ FE Kanyongolo 'The limits of liberal democratic constitutionalism in Malawi' in KM Phiri & KR Ross (eds) *Democratisation in Malawi: A stocktaking* (1998) 353 356.

⁶¹ Pachai (n 58 above) 244.

⁶² Kanyongolo (n 60 above) 357.

⁶³ As above.

in 1965, Dr Banda, by then Prime Minister, announced the formation of a Constitutional Committee to consider and make recommendations with regard to the provisions of the new Republican Constitution.⁶⁴ The Constitutional Committee was chaired by one Aleke Banda who was then the Secretary-General of the MCP and was also staffed by other members of the MCP elite. To be adopted, the Constitution was to reflect 'the need, in a country comparatively under-developed and inexperienced in nationhood, for a form of government which [would] afford the necessary degree of unity, resolution and stability to permit the maximum fulfilment of the country's human and physical resources in the shortest period of time'.⁶⁵ The Constitutional Committee held deliberations and also conducted meetings in at least three places in Malawi before coming up with its proposals for the Republican Constitution. In all, the Constitutional Committee took two months to conduct the consultations and develop the proposals for the Republican Constitution.⁶⁶ The proposals were then submitted to the 1965 National Convention of the MCP, which was held between 13 and 17 October 1965. On 16 October 1965, the National Convention passed a unanimous resolution accepting the proposals and cabinet subsequently also endorsed the proposals as the basis for the Republican Constitution. These proposals became the basis of the 1966 Republican Constitution. The Constitution was formally passed by a Parliament that was overwhelmingly dominated by MCP cadres.

As can be seen, the 1966 Republican Constitution was, essentially, the product of deliberations at the 1965 MCP Convention.⁶⁷ These deliberations at the Convention, in turn were conducted on the basis of proposals developed by a Committee set up by the MCP government. Although the Constitutional Committee attempted to conduct consultations the 'process of consultation was not significantly inclusive or comprehensive'.⁶⁸ The result was that the attempted consultation did not succeed in drawing out public opinion on the form and content of the Constitution.

It is important to highlight three points in relation to the adoption of the 1966 Republican Constitution. Firstly, by the time negotiations for the 1966 Constitution were being conducted, the MCP was not yet *de jure* the only political party in Malawi. However, the negotiations and consultations for the 1966 Constitution were only conducted through MCP channels and thus excluded anyone who did not belong to the MCP. By 1965, the MCP was already a very autocratic political party and there was unlikely to be sufficient space for open discussion of the terms of the

⁶⁴ See, Government of Malawi *Proposals for the Republican Constitution of Malawi* (1965).

⁶⁵ As above 3.

⁶⁶ Kanyongolo (n 60 above) 359.

⁶⁷ J Banda 'The constitutional change debate of 1993-1995' in Phiri & Ross (eds) (n 60 above) 317.

⁶⁸ Kanyongolo (n 60 above) 359.

Constitution.⁶⁹ As events over the years came to prove, the Annual MCP Convention was not a forum renowned for robust debates on policy matters. Secondly, the composition of the Constitutional Committee was very elitist. The Committee was predominantly filled by senior MCP apparatchiks. The elitist composition of the Committee necessarily excluded a significant section of the country from participating and influencing the terms of the Constitution. Thirdly, the Committee's consultations were not thorough. The Committee held meetings only at three places in the entire country. This was clearly insufficient and could not be hailed as an opportunity for seeking comprehensive public input on the Constitution. In the end, the manner in which the 1966 Republican Constitution was adopted deprived the document of clear popular legitimacy.

3.3 The 1994 Constitution

In spite of deficiencies in the legitimacy of the 1966 Republican Constitution it remained in force until 1994. The 1966 Republican Constitution, it must be stated, had many autocratic tendencies built into it and was a recipe for the gross violations of human rights that occurred during Dr Kamuzu Banda's rule of Malawi.⁷⁰ The 1966 Constitution managed to survive for almost thirty years largely due to constitutional oppression. By way of illustration, under the 1966 Constitution, Malawi was made a one-party state and a subsequent amendment made Dr Kamuzu Banda the life president of the country. However, against the backdrop of the 'Third Wave of Democratisation', in a referendum held in 1993, voters were asked to choose whether they preferred Malawi remained a one-party state with the MCP as the sole political party or if they wished Malawi to become a multiparty state. The results of the referendum indicated that a majority of the population were in favour of the re-introduction of multipartism in Malawi.⁷¹ The results of the referendum heralded significant changes on the Malawian political scene which culminated in the adoption of a new constitution in 1994.

To properly appreciate the origins of the 1994 Constitution one must begin by noting that a power vacuum was created in Malawi subsequent to the MCP's defeat in the referendum. While the results of the referendum

⁶⁹ The crucial event here is the so called Cabinet Crisis. The Cabinet Crisis, an open manifestation of differences between Dr Banda and his ministers, erupted barely three months after independence. Although explanations vary, the Cabinet Crisis was essentially a challenge by Dr Banda's ministers against his increasingly autocratic tendencies and also a manifestation of ideological differences between Dr Banda and his ministers. Dr Banda dismissed three of his ministers and another four ministers resigned in support of their dismissed colleagues. In the wake of the crisis all organised opposition to the MCP was banned and political space severely constricted – see C Baker *Revolt of the ministers: The Malawi Cabinet Crisis 1964-1965* (2001).

⁷⁰ Banda (n 67 above) 317.

⁷¹ See L Dzimbiri 'The Malawi Referendum of June 1993' (1994) 13 *Electoral Studies* 229.

emphatically endorsed the abandonment of the one-party state, no arrangements had been made as to what was to be done should the results of the referendum be in favour of the re-introduction of multipartism.⁷²

To ensure that the transition to multipartism was independently managed, the government established the National Consultative Council (NCC) and the National Executive Committee (NEC) in terms of the National Consultative Council Act of 1993 (NCC Act).⁷³ The NEC was entrusted with executive power while the NCC was tasked with initiating appropriate legislative measures to amend the Constitution necessary for holding the impending General Elections and also the drafting of the electoral legislation.⁷⁴ The NCC was composed of leaders from the MCP appointed by Dr Banda and representatives from the newly formed opposition groups and faith organisations appointed by their peers.⁷⁵ It soon became apparent that the 1966 Constitution needed to be abandoned altogether and that amending it would not suffice. The decision to adopt a new constitution rather than amend the 1966 Constitution was taken in November 1993 at a workshop convened by the NCC.⁷⁶ In February 1994 the NCC hosted a Constitutional Drafting Conference that was attended by appointees of various political parties and the result was the adoption of an Interim Constitution on the basis of which the General Elections of May 1994 were contested.⁷⁷ In a bid to refine the Interim Constitution, a Constitutional Review Conference was convened in February 1995. This conference reviewed the Interim Constitution and made recommendations to Parliament for improvement of the document.⁷⁸ The Final Constitution was adopted by Parliament in May 1995.⁷⁹

Several points are notable about the manner in which the transition to multipartism was managed and the 1994 Constitution adopted. It is my contention in this chapter that the manner in which the transition was managed has had serious repercussions for governance and con-

⁷² D Cammack 'Democratic transition in Malawi: From single party-rule to a multi-party state' in J Daniel *et al* (eds) *Voting for democracy: Watershed elections in contemporary Anglophone Africa* (1999) 191.

⁷³ For a succinct assessment of the legal aspects of the transition to multipartism in Malawi, see Ng'ong'ola (n 56 above).

⁷⁴ Section 5(1) of the NCC Act.

⁷⁵ D Chirwa 'Democratisation in Malawi 1994-2002: Completing the vicious circle?' (2003) 19 *South African Journal on Human Rights* 316 317-318.

⁷⁶ In deciding to adopt a new constitution it was argued, in part, that the 1966 Constitution contained provisions that were diametrically opposed to political pluralism and democratisation and that only a new constitution could remedy this – Banda (n 67 above) 321.

⁷⁷ As above.

⁷⁸ For a comprehensive summary of resolutions of the National Constitutional Conference on the Provisional Constitution, see Banda (n 67 above) 329-333.

⁷⁹ Constitution of the Republic of Malawi Act 7 of 1995.

stitutionalism in Malawi.⁸⁰ This chapter takes issue with both the processes leading to the adoption of the Constitution as well as the final product itself. Three points are noteworthy.

First, the period in which the Constitution was negotiated is remarkable for its brevity. The process of drafting the Constitution, as Banda has pointed out, was a 'hurried affair, conceived at the end of 1993 and executed at the beginning of 1994'.⁸¹ The Constitution was negotiated, drafted and adopted within a space of four months.⁸² Even though the Constitution was allowed a one year interim period of operation, it still, according to one commentator, holds the 'dubious distinction, among constitutions, of being enacted in one day'.⁸³ All parliamentary processes were completed and presidential approval given on 16 May 1994. As a matter of fact, the disbanded one-Party parliament had to be recalled solely for the purpose of enacting the Constitution.

The haste with which the Constitution was adopted entails that there was insufficient time for proper and broad-based societal consultation and negotiation on the terms of the Constitution.⁸⁴ It must be recalled that the transition to multipartism was occurring at a time when many other activities were taking place, foremost among these activities being the preparations for the first General Elections in almost thirty years in Malawi. This meant that inadequate focus was paid to the process of drafting the new Constitution.⁸⁵ This lack of thorough consultation has certainly detracted from the document's popular legitimacy and made it problematic for the Constitution to act as a sound basis for democratisation.⁸⁶ The implications of this lack of consultation, Chirwa argues, are very easy to locate in the Malawian Constitution.⁸⁷ For example, the Constitution makes no commitment to addressing regionalism which remains a major concern to the country. Further, the Constitution treats social and economic rights in a very disappointing manner in spite of their centrality to achieving social justice and alleviating poverty. The manner in which the Constitution was adopted was oblivious

⁸⁰ This is because constitutions derive their legitimacy principally from the historical-political act that precedes their adoption. What commands obedience to a constitution is not the way the text is framed or the words used but the intentional historical-political act that creates constitutions – RS Kay 'American constitutionalism' in L. Alexander (ed) *Constitutionalism: Philosophical foundations* (1998) 29-33.

⁸¹ Banda (n 67 above) 321.

⁸² Chirwa (n 75 above) 317.

⁸³ Ng'ong'ola (n 56 above) 64-65.

⁸⁴ Chirwa (n 75 above) 317.

⁸⁵ The political climate prevailing at the time, argues Mutharika, was such that the Banda regime was in the decline while the NCC was in the ascendancy. The result was that various opposition parties attempted to push for inclusion in the Constitution of provisions that would promote their interests – see AP Mutharika 'The 1995 Democratic Constitution of the Republic of Malawi' (1996) 40 *Journal of African Law* 205-206.

⁸⁶ Chirwa (n 75 above) 318.

⁸⁷ Chirwa (n 75 above) 319-320.

to the fact that, to be viable and acceptable, a constitution must be the product of consultation and consensus.⁸⁸ It must be recalled that consultation and consensus does not mean that everyone's view will take the day but ensures that 'everyone' is involved in the process of coming up with a constitution. Involvement allows for easy acceptance and identification with the final product. In the circumstances it is arguable that public functionaries' unwillingness to voluntarily and consistently abide by the terms of the Constitution is, in part, traceable to a failure to identify with the principles embodied in the Constitution.

Second, it is important to reflect on the players that actually influenced the basic content of the Constitution. The Constitution was, in essence, drafted by the NCC, which, as stated earlier, was made up of representatives of the various political parties. What is notable is that the NCC engaged in the process of drafting the Constitution even though none of its members were in the NCC by virtue of a popular election.⁸⁹ The entire NCC thus lacked any direct and popular mandate from the people to determine 'even the most basic framework of the Constitution'.⁹⁰ Commenting on the process, Hara concludes 'there can be no valid claim to popular involvement in the Constitution-making process [in Malawi]'.⁹¹ Clearly, and as pointed out in respect of the Independence Constitution, there still remains a legitimacy gap in relation to the 1994 Constitution.⁹² Such a gap makes the entrenchment of constitutionalism and good governance problematic as the citizenry will find it difficult to identify with such a document and its stipulations.

It may be argued that the lack of proper consultation and participation in drafting the Constitution was cured by the one year interim period of operation that the Constitution was subjected to and the subsequent National Constitutional Review Conference that was convened in February 1995.⁹³ It is my contention, however, that the February Constitutional Review Conference did not redress the lack of consultation, participation and representation that have been identified above. Admittedly, others have argued that the Constitutional Review

⁸⁸ T Maseko 'Constitution-making in Swaziland: The cattle-byre Constitution Act 001 of 2005' http://www.publiclaw.uct.za/usr/publi_law/Nairobi/Maseko_ConstitutionMakingInSwaziland.doc (accessed 23 March 2010).

⁸⁹ Kanyongolo (n 60 above) 364.

⁹⁰ As above.

⁹¹ MH Hara 'Popular involvement in constitution-making: The experience of Malawi' Paper presented at the World Congress of Constitutional Law, Athens, 11-15 June 2007 <http://www.enelsyn.gr/papers/w1/Paper%20by%20Mabvuto%20Herbert%20Hara.pdf> (accessed 22 April 2010).

⁹² According to Ng'ong'ola, the transition was entrusted to institutions which, strictly speaking, had no legal mandate to manage it – Ng'ong'ola (n 56 above) 98.

⁹³ By virtue of section 212(1) of the Constitution, the Constitution came into provisional operation on 18 May 1994 for a period of 12 months. During the period of provisional operation a Constitution Committee was given the task of canvassing views on the document and also convening a National Constitutional Conference to review the Constitution.

Conference was 'unique in the extent to which it accommodated democratic impulses' and how it was attended by a cross-section of Malawi's population.⁹⁴ There are, however, other subtle but equally crucial issues surrounding the Constitutional Review Conference that must also be appreciated. In the first place, in spite of the attempt to include a cross-section of Malawi's population, one notices an obvious urban bias in the list of participants.⁹⁵ This urban bias ignored the fact that the majority of Malawians live in rural areas. The Conference thus retained an elitist composition. In the second place, the Conference was convened for four days only.⁹⁶ This was, in the light of the enormity of the task before the Conference, far too inadequate for a proper and thorough discussion of the issues. Lastly, subsequent events undermined whatever valuable contribution the Conference may have attained. In this connection it must be noted that Parliament subsequently ignored or overruled explicit recommendations from the Conference.⁹⁷ This defeated the popular participation that the Conference had intended to achieve.⁹⁸

Third, in terms of the product of the transition, one notes that the transition bequeathed a liberal democratic Constitution to the country.⁹⁹ Rather disturbing is the fact that there is no evidence of debate on the appropriateness of the liberal democratic model for Malawi during the drafting process.¹⁰⁰ It was assumed, without consideration of the alternatives, that liberal democracy was not just the best but also the only sound ideological basis on which to premise the Constitution. The result is that Malawi has, arguably, one of the world's most liberal constitutions even though this seems to have come about more by accident than

⁹⁴ Banda (n 67 above) 322.

⁹⁵ J Lwanda *Promises, power, politics & poverty: Democratic transition in Malawi, 1961 – 1999* (1996) 192-195. Lwanda argues that some of the resolutions of the Conference were explicitly influenced by this urban bias. He states that 'This conference, for example, allowed only 51 chiefs, 10 trade unionists, 8 women's delegates, 3 smallholder farmer delegates and 3 disabled as opposed to 60 MPs, 17 political party delegates and 10 big business delegates. When we examine the rest of the list, the urban bias is even more obvious and this together with the political inexperience of most of the delegates showed how politicians were able to be so influential at the conference: the church 7, lawyers 2, university 5, journalists 3, professionals 8, Asians 3, Europeans 2, human rights bodies 5. Even more telling was the lack of briefing given to the chiefs at the constitutional conference. Chief Mchilamwera of Thyolo admitted on the MBC [Malawi Broadcasting Corporation] that he had only been given the draft of the constitution when he arrived at the conference'.

⁹⁶ The National Constitutional Conference on the Provisional Constitution was held in Lilongwe from 20 to 24 February 1995.

⁹⁷ According to Hara '[i]t is important to note that when the Constitution came before Parliament the UDF/AFORD majority in Parliament ignored all the decisions of the Conference on which the Conference had voted against their positions, and pushed through their own amendment proposals' – Hara (n 91 above) 17.

⁹⁸ For example, the Constitutional Conference recommended the retention of section 64 of the Constitution which allowed constituents to recall their parliamentarians in appropriate cases. However, the repeal of section 64 (repealed by the Constitution (Amendment) Act 6 of 1995) was one of the first things parliament did after convening to consider the Conference's recommendations.

⁹⁹ Kanyongolo (n 60 above) 364.

¹⁰⁰ As above.

deliberate choice. This lack of debate on the ideological basis of the Constitution ignored the fact that liberal democracy never historically developed as a part of the indigenous Malawian political culture and that liberal democracy is not a self-evident truth.¹⁰¹ It seems, however, that the lack of sufficient time to consider the proposals for the Constitution also contributed to the absence of an informed debate on the form that the Constitution was supposed to take. While all politicians were agreed on the need to adopt a new Constitution, there was a marked absence of an informed motivation to drive the entire process.¹⁰² As Phiri and Ross accurately observe, the lack of reflection on the form and content of the transition immediately reveals the limitations of the entire transition.¹⁰³

4 Popular involvement and constitution-making in Malawi: Lessons from the Malawian experience

Constitution-making moments are invariably heavily impregnated with hope and lofty aspirations for the future. In reality, however, the hope that normally accompanies the adoption of new constitutions is never fully fulfilled. There is so much uncertainty in the constitution-making moment and even though constitutions ordinarily seek to improve on an existing condition, constitution-makers cannot fully provide for a future that they cannot and do not know.¹⁰⁴ The best they can achieve is to soberly look to the past for lessons and then attempt to craft a constitution that can adequately respond to future challenges that a country may face.

The manner in which the three constitutions in Malawi were adopted confirms some important lessons for constitution-making, generally. First, it ought to be recalled that a constitution is normally the basic but most supreme law of any country. The cardinal position of the constitution in the life of any country ordains that sufficient time should be allocated for the negotiations and the drafting of one. Unfortunately, the link between crisis and constitution-making is quite robust.¹⁰⁵ This often entails that faced with the question of adopting a new constitution, the pressure on a country to adopt a constitution quickly is frequently phenomenal. Such pressure, as was the case in Malawi between 1993 and 1994, forces countries to abbreviate the processes that must be undertaken in pursuit of

¹⁰¹ Kanyongolo (n 60 above) 370-371.

¹⁰² K. Bampton in J. Lewis *et al* (eds) *Human rights and the making of constitutions: Malawi, Kenya, Uganda* (1995) 57-58. In Bampton's words '[t]here simply was no education. This was the fundamental flaw of the Malawi Constitution. There was no consultation ... There was simply a political will among the Malawi politicians to form a new political structure: a political motivation to embody human rights but a weak motivation. For it was not an informed motivation, not informed on the nature of human rights nor the problems of implementing human rights in the context of an actual working democracy'.

¹⁰³ Phiri & Ross (n 60 above) 12.

¹⁰⁴ See Scheppele (n 20 above) 1379-1380.

¹⁰⁵ Elster (n 19 above) 370.

a new constitution. The process of adopting a new constitution is of such fundamental importance that it does not allow for quick fix solutions. Countries must allocate sufficient time for the processes involved so that the final product must be reflective of the general will of the population.

Second, it is important to allocate sufficient time for constitution-making so that sufficient consultation, negotiation and consensus over the constitution is generated. This means that allowing a long period of time for the constitution-making process by itself is not sufficient. The activities that take place during the time set aside for the making of a constitution are also important. While setting aside time for consultation and negotiation is to be specifically encouraged, the means adopted for the consultation must also be designed to allow differing voices to actually influence the constitution. It makes no sense to allow a ten year consultation period, for example, where all the views solicited in the consultation are subsequently ignored and discarded in drafting the constitution. For example, where a country opts to appoint a constitutional commission to solicit views on a constitution, some of the things that need to be properly interrogated include the composition of the commission and the methodology that it adopts for the consultation. It is pointless, as has happened in other African countries, to fill a constitutional commission with sympathisers of the current government. This is likely to raise suspicions of manipulation and must be avoided at all costs. Further, the means for consultation adopted by a commission are crucial in determining the level of input into the process by the citizenry at large. Having regard to the low income levels in most African countries and low levels of literacy a constitutional commission that, for example, opts to operate only from a country's capital city and only by receiving written submissions will invariably exclude a huge section of the population's voice. This means that while it is important to allow sufficient time for constitution-making especially so that broad-consultation and participation by the citizenry is achieved, appropriate means, reflective of the country's situation, must also be devised.

Third, the Malawian experience highlights the fact that it is important that individuals with the requisite mandate should be involved in the negotiations and drafting of a constitution. The people who negotiate and draft a constitution cannot be imposed on a populace. It is important to have a democratic and transparent process that confers on some, among a population, the mandate to negotiate the terms of the constitution. As earlier highlighted, the 1994 Constitution has legitimacy deficiencies because the people who negotiated and drafted it had no popular mandate to do so. Admittedly, the actual drafting of a constitutional text requires technical expertise. However, this does not mean that the technocrats must proceed willy-nilly without paying regard to the input from the populace. The technocrats must proceed on the basis of the 'raw materials' collated from the consultation and negotiations. They must strive to give full

meaning to the people's will as gleaned from the deliberations, consultations and negotiations.

Lastly, as the ideological choice for the 1994 Constitution of Malawi starkly reveals, it is important to be judicious about 'borrowing' in constitution-making. Given, 'constitution-makers borrow from one another not only within the framework of a particular tradition but across traditions as well'.¹⁰⁶ However borrowing for constitution-making has serious limitations which must always be borne in mind. Constitution-makers may legitimately not seek to reinvent the wheel at every corner in the constitution-making process and may borrow a mechanism here or there. In the end, however, everything in a constitution must be integrated in such a way that it responds to conditions prevailing in a particular society. This is because all constitutions are first and foremost local. Constitutions must incrementally build on already existing local commitment and loyalties to constitutional governance.¹⁰⁷ All constitutions must be built from below and not imposed from above and all 'borrowing' for constitution-making must respect this important dynamic – one of the major weaknesses with most independence constitutions in Africa is that they were largely imposed from above. To avoid indiscriminate borrowing in constitution-making it is important to allow a broad-based consultation on the terms of the constitution so that the final document is fully reflective of the prevailing local conditions.

5 Constitution-making and constitutionalism in Malawi

The process of negotiating and adopting a new constitution is fraught with considerable challenges¹⁰⁸ and the adoption of the 1994 Constitution amply demonstrates this fact. Almost seventeen years after the 1994 Constitution was adopted, it is evident that the struggle to attain constitutionalism in Malawi remains an on-going preoccupation. It is beyond the scope of the present chapter to detail the examples that manifest the highs and lows of the struggle towards constitutionalism in Malawi. Suffice it to point out that the executive excesses, legislative impotence together with a weak and compromised civil society, are all factors that are slowing down the entrenchment of constitutionalism in Malawi.¹⁰⁹

¹⁰⁶ Elazar (n 12 above).

¹⁰⁷ Soltan (n 17 above) 1419-1420.

¹⁰⁸ Hatchard *et al* (n 2 above) 309-310.

¹⁰⁹ For a deeper interrogation of these issues, see MJ Nkhata 'Rethinking governance and constitutionalism in Africa: The relevance and viability of social trust-based governance and constitutionalism in Malawi' LLD thesis, University of Pretoria, 2010.

There is no doubt that in many countries, Malawi included, there is a gap between the written constitution and the real constitution – a discrepancy between the written norms and reality. This chasm between norms and reality should not be taken to assert the irrelevance of constitutions, generally. Rather, the existence of constitutions must be understood as a collective attempt to bridge the gap between the aspirations and hopes of a people and the road that must be taken to fulfil the aspirations.¹¹⁰ It is important to recognise that the success of a constitution is not wholly predicated on its initial design.¹¹¹ The success of a constitution hinges on how political leaders and the citizenry learn to live within the constitution's framework. What is crucial is the creation of a constitutional culture which is often manifested by the willingness of everyone to be regulated and controlled by the constitution.

The three constitutions that Malawi has adopted so far demonstrate that there is a connection between the manner in which a constitution is adopted and its 'acceptability' as a basis for governance in a country.

First, with respect to the Independence Constitution, it was in force for less than two years. It was negotiated by the nationalist leaders and the representatives of the departing colonial power to the exclusion of a large section of the Malawian population. It is not far-fetched to assert that the majority of the people who were meant to be governed by this Constitution did not actually know what it provided for even at a very general level. There is no way such a constitution could have operated as a basis for constitutionalism in Malawi.

Second, the 1966 Republican Constitution was adopted in a process eerily similar to the processes surrounding the adoption of the Independence Constitution. While the Independence Constitution was negotiated between the nationalist leaders and the departing colonial power to the exclusion of the Malawian populace, the 1966 Republican Constitution was adopted by an MCP elite and imposed on the nation without any meaningful consultation on its terms. In a clear demonstration of the MCP regime's lack of commitment to constitutionalism, the 1966 Republican Constitution abrogated all the provisions in the Independence Constitution that could have allowed for the entrenchment of constitutionalism.¹¹² For example, under the 1966 Republican Constitution the President could nominate any number of members of Parliament and could also appoint the Speaker of Parliament and the President could dissolve Parliament at any time.¹¹³ In a further gesture of its lack of commitment to constitutionalism, the 1966 Republican

¹¹⁰ Bejarano & Segura (n 3 above) 2.

¹¹¹ Scheppele (n 20 above) 1406.

¹¹² The Bill of Rights which was in the Independence Constitution was completely deleted when the 1966 Republican Constitution was adopted.

¹¹³ 1966 Republican Constitution, secs 20, 25(1) & 45(2).

Constitution also declared that the President would have the 'supreme executive authority of the Republic' with power to appoint ministers and other executive officers as he saw fit and to act 'in his own discretion without following the advice tendered by any person.'¹¹⁴ By 'deifying' the Presidency, the 1966 Republican Constitution did not leave any room for separation of powers or the rule of law. In my view the 1966 Republican Constitution was the result of a flawed process which, expectedly, bequeathed a defective product on the Malawi nation. Such a Constitution could not have acted as a basis for constitutionalism in the country.

Last, while the context for the adoption of the 1994 Constitution was markedly different from the circumstances surrounding the adoption of both the Independence Constitution and the 1966 Republican Constitution, mistakes similar to those that occurred between 1965 and 1966 were replicated. These mistakes, which have been discussed earlier, have contributed to the lethargic commitment to constitutionalism in Malawi. Principal in this regard is the fact that the 1994 Constitution was crafted by people who did not have the mandate to do so and neither was there a conscious and deliberate effort to interrogate the ideological basis of the Constitution. Nevertheless it is important to acknowledge that the 1994 Constitution is unlikely to be repealed *in toto* anytime soon. Evidently, in spite of the problems that surrounded the adoption of the 1994 Constitution it is important to acknowledge that the entrenchment of constitutionalism in Malawi can benefit from a creative approach to the Constitution.¹¹⁵ The resources and avenues within the 1994 Constitution need to be creatively utilised if the 1994 Constitution is to act as a sound basis for constitutionalism in Malawi.¹¹⁶

6 Conclusion

Constitutions remain relevant in all African countries. The extent to which constitutions have influenced political life in African polities, varies from country to country. As the Malawian experience in constitution-making amply demonstrates, in spite of the continued relevance of constitutions, most African countries still struggle with entrenchment of constitutionalism. In as far as a constitution can contribute to the entrenchment of constitutionalism, it is important to pay particular attention to the content of a constitution as well as the process of determining the content of a constitution. As earlier pointed out, in a constitution it is acutely important to reflect deeply not just on what is to be adopted but also who is involved in determining what is to be adopted.

¹¹⁴ 1966 Republican Constitution, secs 8 & 47.

¹¹⁵ Nkhata (n 109 above).

¹¹⁶ An avenue that could be utilised is the periodic constitutional review process that the Malawi Law Commission undertakes. This could be utilised to rectify some of the structural defects to the Constitution, as has happened in some instances in the past.

At the same time, it must be highlighted that while constitution-making is important, once a constitution has been adopted it is crucial to focus on constitution-building which is the process by which a polity commits itself to the values underlying a constitution. Constitution-building is an evolutionary process that takes a long time to reach fruition but it is important that countries take steps that consciously lead to the entrenchment of constitutionalism.

In the end it must be acknowledged that it is not just the text of a constitution, by itself, however expertly crafted, that will bring about constitutionalism in a society. It is the spirit of the people that is central. The presence of a culture that actively engenders constitutional governance is central to the entrenchment of constitutionalism. It is on the entire citizenry that the duty to entrench constitutionalism falls.

PART III: PERSPECTIVES ON DEMOCRATIC GOVERNANCE

CHAPTER 10

BETWEEN PRESIDENTIALISM AND A HUMAN RIGHTS APPROACH TO CONSTITUTIONALISM: TWENTY YEARS OF PRACTICE AND THE DILEMMA OF REVISING THE 1990 CONSTITUTION OF BENIN

Horace Sègnonna Adjolohoun

1 Introduction

The new constitutionalism launched by the 11 December 1990 Constitution of Benin has been influenced strongly by the country's social and political experience in the two decades following its independence. Since it obtained independence on 1 August 1960 as Dahomey, Benin has experienced an eventful political and constitutional history. Between 1963 and 1972 the country experienced eight *coups d'état*, adopted ten Constitutions¹ and had ten Presidents.²

Three major periods followed independence. The 1960-1972 decade was one of political instability and successive regime changes. Civilian and military regimes alternated with regularity. During this period, the country was known to be 'the sick child of Africa'³ in reference to its political turbulence and frequent *coups*.⁴

¹ These are the Constitutions of 28 February 1959, 26 November 1960, 11 January 1964; the Charter of 1 September 1966; the Constitution of 11 April 1968; the Ordinances of 26 December 1969, 7 May 1970, 18 November 1974; the Fundamental Law of 26 August 1977 amended by the Constitutional Act of 6 March 1984, and the Constitutional Act of 13 August 1990 which served as a constitution for the transition to democracy.

² Six of the *coups* were successful while three failed. For a comprehensive discussion of Benin's political and constitutional history see P. Météhoué *Les gouvernements du Dahomey et du Bénin: 1957 – 2005* CNPMS (2005). See also M. Ahanhanzo-Glèlè *Naissance d'un Etat: l'évolution politique et constitutionnelle du Dahomey, de la colonisation à nos jours* Paris: L. G. D. J. (1969) and L. B. Bio Bigou 'La contribution du pouvoir législatif à la vie politique du Bénin de 1965 à 1979' in CAPAN (ed) *L'histoire du pouvoir législatif des indépendances à nos jours* Actes du colloque parlementaire du cinquantenaire Porto-Novo (2011) 81.

³ N. Dossou-Yovo 'The experience of Benin' (1999) 16 *Journal on World Peace* 59 and GriooCom 'Bénin: de l'enfant malade au modèle démocratique' <http://www.grioo.com/ar,benindelenfantmaladeaumodeledemocratique,19522.html> (accessed 20 June 2012).

⁴ B. A. Magnusson 'Testing democracy in Benin' in R. Joseph (ed) *State, conflict and democracy in Africa* (1999) 221.

The military *coup* of 26 October 1972, which brought President General Mathieu Kérékou to power and subsequently established the Benin Revolutionary People's Party marked the beginning of a second era. Kérékou ruled the country under a Marxist-Leninist dictatorship for 17 years and imposed a tight ban on freedoms. The regime actively abused the human rights of its citizens and transformed the country into a police state, sending the opposition underground.⁵

In 1989, the oil crisis in neighbouring Nigeria adversely affected Benin's economy. At the same time the pro-USSR regime could not withstand the democratic wind that swept across the continent in the aftermath of the collapse of the Berlin Wall. The long ban on civil and political rights fuelled growing discontent among domestic social and political forces, these forces resorted to indefinite strike and country-wide protests demanding change.⁶ These events led to the demise of the regime. Benin Marxist leaders agreed to the idea of the first national conference as part of the so-called 'third wave' of democratisation⁷ and new constitutionalism in Africa. The famous *Conférence des forces vives de la nation* was held in February 1990.⁸ Constitutional and liberal democracy, the rule of law, separation of powers and human rights have been at the heart of this third era of democratic revival which the country is still experiencing.

While this new constitutionalism was experienced amidst excitement, it also came with challenges. In fact, given the turbulent political history of the country, the drafters of the Constitution strictly followed the demands of the National Conference to design a fundamental law that leaves no room for the evils of the past. Right from its Preamble, the Constitution therefore reaffirms the Beninese 'fundamental opposition' to abuse of power, absolute power, lack of checks and balances, corruption, dictatorship and personal power and abuse of fundamental rights. In the vigilant custody of a Constitutional Court enjoying wide powers, constitutionalism in Benin gained unprecedented momentum with individuals and organisations directly challenging state governance and respect for fundamental rights. Fears to return to the abuses of the past eventually led actors to a dramatic rejection of any amendment whatsoever to a Constitution that has thus remained intact for over 21 years at the time of writing.⁹

⁵ As above, A Rotman 'Benin's Constitutional Court: An institutional model for guaranteeing human rights' (2004) 17 *Harvard Human Rights Journal* 281 283.

⁶ J Aivo 'Constitution de la République du Bénin, La Constitution de tous les records en Afrique' (2010).

⁷ C Fombad & NA Inegbedion 'Presidential term limits and their impact on constitutionalism in Africa' in C Fombad & C Murray (eds) *Fostering constitutionalism in Africa* (2010) 7-8.

⁸ K Nwajiaku 'The National Conferences in Benin and Togo revisited' (1994) 32 *The Journal of Modern African Studies* 429 439.

⁹ Aivo (n 6 above).

However, constitution-making and constitutionalism are living mechanisms which face situational challenges in practice. When the revision of the Constitution eventually became a matter of public debate in 2004 the main concern was to avoid an ‘opportunistic’ amendment. The debate that followed provided an enriching experience of dilemmas surrounding constitutional revision and distribution of powers in modern constitutions. In the next section, an overview of the history of constitutionalism in Benin and the main features of the 1990 Constitution is provided. Subsequent analysis focuses on the main challenges that arose during more than two decades of constitutional practice, in light of the Constitutional Court’s decisions made while facilitating major political and constitutional conversations. The discussion deals with the guarantee of fundamental rights, separation and distribution of powers, powers of the President, and prerogatives of the Legislature, appointment and independence of the highest courts. Over the years since it adopted its new Constitution, the most important dilemma faced by Benin is certainly whether it should amend the fundamental law. The constant fear has remained that any amendment would open a Pandora’s box that would lead to adventurous and opportunistic amendments with the risk of putting the entire constitutional order in jeopardy. Actors within the system have had the daunting task of balancing a human rights-leaning Constitution and growing trends of a stronger presidential regime, namely presidentialism. The disputes that ensued over distribution of powers are revealed, before the discussion turns to the analysis of the advantages and disadvantages of the proposed amendments to Benin’s Constitution of 1990 and their potential impact on constitutionalism.

2 From constitutional instability to an African Charter-based Constitution

Compared to its predecessors, the Beninese Constitution of 1990 holds the record in respect of both its longevity and its human rights-friendliness. The first Constitution of the country, the Constitution of 28 February 1959, was a replica of the French Constitution, with the President of France at the time also the President of the ‘Africa’ French Union. Then, immediately after independence, the country adopted the Constitution of 26 November 1960 followed by a height of fundamental laws enacted under the military rule between 1972 and 1989.¹⁰ To understand

¹⁰ These are the constitutions of 11 January 1964 (adopted by referendum following a military coup – 2 years and 9 months), 1 September 1966 (19 months), 11 April 1968 (21 months), 26 December 1969 (adopted by a military directorate following a military coup – 4 months), 7 May 1970 (2 years and 5 months), 18 November 1974 (adopted by a military directorate following a military coup), 26 August 1977 (adopted under the Marxist military rule – 13 years), 13 August 1990 (adopted as an interim constitution during the political transition).

constitutional instability in Benin in the independence decade, one should look into the country's ethnic heterogeneity.

Along the omnipresence of the army, the North-South divide manifestly played in the frequent change of constitution.¹¹ Just as was the case in most of African countries at the time, political activity in Benin was organised along ethnic lines. Probably due to their geographic position, Beninese living in the southern part of the country had first encounters with colonial invaders and thus with modernity and knowledge. The largest part of the elite was therefore made up of cadres from the South who studied at French established education institutions while very few Beninese from the North had the same opportunity. This situation led to suspicion between ethnic groups and translated into the political arena in the form of ethnic strong hold based political organisations led by elite from specific ethnic groups. The failure for the three main political leaders from the North, Centre and South even led to the very peculiar phenomenon of collegial presidency known as 'presidential triumvira' with three heads of state alternating.¹² Although the history of nation-building has gained in strength in the democratic era, ethnic, and especially the North-South divide, is still used by political leaders particularly when the stakes are high, for example during presidential elections.

The drafting history of the 1990 Constitution made Benin's constitutional human rights entrenchment unique particularly from the perspective of its domestication of the African Charter on Human and Peoples' Rights (African Charter). As referred to earlier, the history of democracy and the protection of human rights by the Constitution in Benin are rooted in the popular struggle, which led to the demise of the 17 years long Marxist-Leninist dictatorial regime in March 1990. The ultimate achievements of the subsequent February 1990 Benin National Conference included the establishment of a Constitutional Commission. The Commission was tasked to draft a new constitution emphasising the 'promotion and the protection of human rights, as proclaimed and guaranteed by the African Charter'.¹³

The Commission faithfully followed-up on the demands of the sovereign national conference and drafted a constitution with a strong African Charter fingerprint. As in most constitutions adopted by African countries in the 1990s, the Preamble to Benin's Constitution includes a reference of the Benin people's adherence to the principles of the African Charter. From a legal standpoint, such a reference would have been

¹¹ HK Manga represented the North, Justin T Ahomadégbé originated from the central part of the country and SM Apithy came from the South East.

¹² Aivo (n 6 above).

¹³ JR Heilbrunn 'Social origins of national conferences in Benin and Togo' (1993) 31 *Journal of Modern African Studies* 277, quoted in Rotman (n 5 above) 284.

sufficient since Benin, as a monist country, had made the African Charter part of its municipal law through ratification in 1986.

However, the debate about the constitutional nature of the Preamble's provisions was still alive.¹⁴ An interpretative reading of the drafting history of the Constitution suggests that top constitutional law scholars and practitioners within the drafting commission failed to agree on the preamble question and thus resolved to a deeper entrenchment of human rights in the text of the new Constitution. As a consequence, the first provision of the Bill of Rights provided that 'the rights and duties of the African Charter' are 'part and parcel of the Constitution'.¹⁵ One could suspect that strong pro-human rights voices among the drafters of the Constitution¹⁶ insisted that further safeguard provisions be included in response to the still recent history of systematic rights abuse. The full text of the African Charter was consequently added as an annex to the Constitution. On the institutional side, two mechanisms were designed to give life to the normative human rights entrenchment. A Constitutional Court was established, and provided with a triple mandate to check the constitutionality of laws, regulate and guarantee the separation of powers, and adjudicate individual human rights complaints. The latter mandate was to be implemented through direct access granted to individuals and groups to initiate human rights cases and challenge the constitutionality of laws. These reforms were endorsed by the out-going Marxist regime and adopted by a popular referendum in December 1990.

3 Main features of the 1990 Constitution

For the purpose of the discussion, I adopt the definition of 'constitutionalism' as limited government where power is shared among at least three branches of the state independent from each other, which are the executive, the legislature and the judiciary. Such approach to constitutionalism will of course be incomplete in the absence of constitutional norms and mechanisms aiming at safeguarding individual and groups' fundamental rights.

¹⁴ Only the French Court of Cassation took the position in its decision 71-44 of 16 July 1971 that provisions of the Preamble to the French Constitution carry the same weight as constitutional provisions.

¹⁵ 11 December 1990 Constitution of Benin, art 7.

¹⁶ The 1990 Constitutional Commission included for example Professor Maurice Ahanhanzo-Glèlè, a pro-human rights legal expert and former member of the United Nations' Human Rights Committee, and Advocate Robert Dossou, a renowned lawyer and pro-African Charter jurist who was minister and President of the Constitutional Court (2008-2013).

3.1 Fundamental principles of the Constitution

Given the political unrest and civil rights' restraints suffered during the dictatorship, it was no surprise that the 1990 Constitution set very liberal goals for building a new nation. The Constitution provides for liberal democracy, the rule of law, separation of powers and respect for fundamental rights.¹⁷ As reflected in the Preamble, the people express its determination to:

- (i) Oppose any political regime based on arbitrary, dictatorship, injustice, corruption, regionalism, nepotism, confiscation of power and personal power;
- (ii) Create a state based on the rule of law and plural democracy, where fundamental human rights and freedoms, human dignity and justice are upheld, protected and promoted as the necessary condition for each Beninese to enjoy development in its temporal, cultural and spiritual dimensions; and
- (iii) Defend and safeguard its dignity in the face of the world and regain their place and role as pioneers of democracy and the defence of human rights which they once held.

This preliminary enunciation of principles in the Preamble has been spelt out in provisions of the Constitution. Article 2 of the Constitution provides that 'the Republic of Benin is one and indivisible, secular and democratic; its principle is government of the people, by the people and for the people'. Article 3(1) of the Constitution restates the principle of democracy through 'national sovereignty', which is said to 'belong to the people'. As mentioned earlier, the history of Benin reveals that power was frequently seized by unconstitutional means namely through *coups d'état*. One-man rule was also part of the political history of the country for decades and officials or state institutions could repeal legislation as it pleased. Hence, the principle of national sovereignty was provided in the same provision as the 'supremacy of the Constitution'. The presence of those principles in the same provision could imply that only the sovereign people may legitimately entertain constitutional changes, directly through the power of the ballot or indirectly through their representatives in Parliament. When it comes to amending key constitutional principles, as discussed later in greater detail, the Constitutional Court of Benin seems to even afford a higher weight to the direct expression of the people over the decisions of their representatives.¹⁸ Considering who has legitimacy to entertain amendments of the Constitution, the Constitutional Court held in the Amendment of the Constitution by Parliament case that since some

¹⁷ For a commentary on the goals and principles of the Constitution see Fondation Konrad Adenauer *Commentaire de la Constitution béninoise du 11 décembre 1990: esprit, lettre, interprétation et pratique de la constitution par le Bénin et ses institutions* (2009) 15.

¹⁸ Centre pour la Gouvernance Démocratique au Burkina Faso 'Constitutionnalisme et révisions constitutionnelles en Afrique de l'ouest: le cas du Bénin, du Burkina Faso et du Sénégal' (2009) <http://ddata.over-blog.com/1/35/48/78/Burkina-Faso/CONSTITUTIONNALISME-ET-REVISION-CGD.pdf> (accessed 21 June 2012).

principles of the Constitution proceeded from the people and the sovereign National Conference, no single entity had enough legitimacy to amend them without reverting to the people.¹⁹ The principle of 'national consensus', thus raised by the Court to the rank of a 'constitutional principle', was derived from the sovereignty of the people through the National Conference.

The 1990 Constitution has also made provisions for the rule of law and its protection. As one of the peculiarities of the constitutionalism established in 1990, individuals may challenge the constitutionality of any law or act in the Constitutional Court.²⁰ The Court was therefore well positioned to play a prominent role in upholding the rule of law, and it in fact did so right from the beginning. In the early years of its operation, the Court termed itself in the Executive Limitation of Constitutional Court Member's Freedom of Association case as 'the cornerstone of the liberal rule of law' and the 'keystone of the entire politico-legal system'.²¹

Political parties are placed at the heart of the electoral machinery in Benin and article 5 of the Constitution obligates them to operate in conformity with principles of national sovereignty, democracy, integrity of the territory and secularity of the state.²² Article 5 of the Constitution materialises the multi-party option decided at the National Conference although freedom of association allows individuals to run for elective positions. The President, Members of Parliament and municipal councillors are elected by universal suffrage which is equal and secret.²³ Universal suffrage is a consequence of popular sovereignty and a feature of liberal democracy.

Human rights constitute a central axis of Benin's 1990 Constitution. The African Charter is given precedence over other international norms including the Universal Declaration of Human Rights (Universal Declaration). The Preamble to the Constitution includes a reference to the Charter. The rights and duties of the Charter are made part and parcel of the Constitution through the first provision of the Bill of Rights, article 7

¹⁹ Benin Constitutional Court Decision DCC 06-074 of 8 July 2006. In Benin's constitutional practice, cases are not named as the South African *Treatment Action Campaign* and *Grootboom* or the Bostwanian *Unity Dow*. Rather, they are numbered as DCC (for *Décision de la Cour Constitutionnelle*) followed with the two last numbers of the year and the number of the case. Accordingly, DCC 06-074 of 8 July 2006 should be read as the 74th decision of the Constitutional Court delivered in 2006, on 8 July. In a very few instances, the number of the case comes before the year such as for DCC 33-94 of 24 November 1994. DCC is replaced with EL for decisions relating to electoral matters.

²⁰ The Constitution, art 3(2). The Constitutional Court of Benin has developed an extensive jurisprudence on the constitutionality of legislation including bills originating from both the Parliament and the Executive. See Cour constitutionnelle du Bénin 'Contrôle de constitutionnalité' http://www.cour-constitutionnelle-benin.org/cour_consbj.html (accessed 27 February 2012).

²¹ DCC 33-94 of 24 November 1994.

²² Art 5.

²³ Art 6.

of the Constitution. The full text of the African Charter is also annexed to the Constitution. Two interlinked mechanisms were designed for the enforcement of the rights enshrined in the Constitution. A Constitutional Court was established with an express human rights mandate and direct access was granted to individuals and groups to file human rights complaints.

Besides separation of powers, which is discussed below, Benin's 1990 Constitution provides for safeguards to prevent the military from intervening in political life. Arguably, the need to circumscribe the military's intervention is reasoned by its frequent incursions in the political arena in the past. As a consequence, one of the very few times the word 'military' is mentioned in the Constitution is in article 34 which makes it a 'duty for all citizens, civilians and the military to respect the Constitution and constitutional order in all circumstances'. The Constitution also prevents members of the armed forces from standing for elective positions²⁴ or sitting in the cabinet²⁵ unless they have retired or resigned well ahead of the considered election.²⁶ In 2007, when the country was confronted with the intervention of the military to support election management by transporting material, the Constitutional Court re-affirmed the independence and administrative autonomy of the National Autonomous Electoral Commission in EL 07-001.²⁷ Approached in a similar situation on the occasion of the 2010 parliamentary election, the Court threw out the application in DCC 10-116 on the basis that its previous decision on the matter was final and thus not open to appeal.²⁸ Although the military eventually supported the Electoral Commission, the Court had made it clear that its intervention must remain within the prescriptions of the new constitutional order.

3.2 Fundamental rights' protection in Benin's Constitution of 1990

3.2.1 *Strong normative protection*

The Constitution is articulated in a Preamble and 160 articles under 12 titles. Title II is devoted to the Bill of Rights and entitled 'Rights and Duties

²⁴ According to article 51 of the Constitution, members of the military cannot stand for presidential elections.

²⁵ Art 54(4).

²⁶ The Constitution, art 64(1). The timeframe within which such resignation should be filed is determined by the law. Relevant successive electoral laws seem not to have provided for the time frame. However, a 2010 presidential election act provides that prefects must resign 12 months before a local election in which they intend to be a candidate. The timeframe is of three months for candidates who hold top management positions in state companies. See *Loi* no 2010-35 of 24 August 2010 governing the election of members of Parliament.

²⁷ EL 07-001 of 22 January 2007.

²⁸ DCC 10-116 of 8 September 2010.

of the Person'. It comprises 35 articles (from article 7 to article 40) which enshrine both rights and duties of the person.

All categories of rights are enshrined in the Constitution of Benin, including civil and political rights, socio-economic and cultural rights, and solidarity rights. As expressly mentioned in the formulation of title II, the Constitution recognises individual and state duties. A particular feature of people's rights in Benin is article 66, the 'constitutional right to resist'. This article provides that any member of a constitutional organ has the right and the duty to recourse to all means to reinstate constitutional legitimacy in case of a *coup*, an aggression by mercenaries or any other attempt to take over power through the use of force. Article 66 further makes it a 'supreme right and imperative duty for any citizen to disobey and organise to oppose the illegitimate authority in the same circumstances'.

Like the Constitutions of most African countries, Benin's Constitution includes references to the Universal Declaration and the African Charter in the Preamble. However, as mentioned above, the Constitution further incorporates the Charter. The first implication is that all the rights omitted from or limited in the Constitution – such as people's rights – are made constitutional human rights through the African Charter. Another consequence is that stronger protection is potentially afforded by the African Charter to the human rights entrenched in the Constitution. Over the past two decades, the African Charter has remained at the heart of the constitutional protection of human rights in Benin.²⁹

3.2.2 Constitutional protection mechanisms and remedies

Constitutional human rights provisions bind all categories of both public and private subjects. Private persons, state and state agencies, social organisations as well as corporate entities are bound by these rights as there is no special derogation provided under the Constitution for the breach of human rights. In several instances, litigants of any of these categories have been involved in human rights litigation before the Constitutional Court and other domestic courts.³⁰ The police and armed forces have been at the centre of constitutional litigation of human rights involving state

²⁹ On the place and role of the African Charter in the constitutional protection of human rights in Benin see in general AL Sidi 'La protection des droits humains par la Cour constitutionnelle du Bénin de 1993 à 2005' *Mémoire de DEA Chaire UNESCO Université d'Abomey-Calavi* (2006) and H Adjolohoun *Droits de l'homme et justice constitutionnelle en Afrique: le modèle béninois à la lumière de la Charte africaine des droits de l'homme et des peuples* Paris: L'Harmattan (2011).

³⁰ Constitutional Court Decision DCC 03-083 of 28 May 2003 in the case of 438 civil servants. The Administrative Chamber of the Supreme Court had previously decided in the same matter that 111 of them be reinstated in their office by the Executive. See Supreme Court Arrêt no 33/CA of 20 November 1998. In both cases, public administration, and officials were involved on behalf of the Executive.

responsibility.³¹ These have involved not only top police service members but also the police as an institution. Individual judges,³² ministers,³³ court presidents and registrars,³⁴ domestic courts, public education bodies, the Secretary-General of the Cabinet, and private companies, have been found in violation of human rights by the Constitutional Court.³⁵

In addition to the strong protection of human rights in the light of the African Charter, the Beninese Constitution provides for judicial and supervisory mechanisms for the protection of these rights. One novelty of Benin's model as compared with many other constitutions in Africa is the generous and liberal individual access to its Constitutional Court.³⁶ The Court has special jurisdiction over human rights cases brought by individuals and groups.³⁷ Direct individual access is provided in cases of human rights violation by private persons, the state, its agencies or any other entities. Indirect access is provided through the 'exception of unconstitutionality' whereby proceedings before ordinary courts are suspended pending the decision of the Constitutional Court.³⁸ Individuals may also have the constitutionality of law tested when they believe a bill or acts of state organs are not in accordance with the provisions of the Constitution or may violate human rights. Although nothing prevents ordinary courts from exercising jurisdiction over human rights matters, the possibility of such competence is frustrated by their duty to refer constitutionality questions to the Constitutional Court. The very poor human rights jurisprudence inordinately seems to confirm the supremacy and exclusivity of the Constitutional Court's competence in human rights adjudication.

³¹ Police officers, including Director General of Police, have personally been found in violation of human rights in DCC 06-057, DCC 06-059 and DCC 06-060 (violation of article 5 of the African Charter, degrading treatment; reparatory order), DCC 06-062 (violation of article 6 of the African Charter, illegal arrest; reparatory order).

³² Constitutional Court Decisions DCC 03-084 of 28 May 2003 (15 years investigation without judgment, undue delay, violation by the Tribunal of First Instance of Lokossa of article 7(1)(d) of the African Charter) and DCC 03-125 of 20 August 2003 (violation of article 7(1)(c) of the African Charter, right to defense, violation of article 35 of the Constitution by the investigating judge).

³³ Both ministers and their offices were found in violation of human rights. See for instance Constitutional Court Decisions DCC 01-058 of 27 June 2001 where the Ministry of Education was found in violation of article 26 of the Constitution (equality before the law) for having allowed a teacher access to compete for a professional exam but refused access to a colleague of the same category, specialisation and criteria; in DCC 05-067, DCC 06-016 (involving the Minister of Justice for violation of the right to equality and refusal to execute the decision of the Constitutional Court) and DCC 06-052 (involving the Minister of Education).

³⁴ DCC 05-114, DCC 05-127 (involving the Chief Registrar of the Supreme Court), DCC 06-046 and DCC 06-113.

³⁵ For an overview of the human rights case law of the Constitutional Court of Benin, visit <http://www.cour-constitutionnelle-benin.org/>.

³⁶ See C Gangnon 'Les droits fondamentaux de la personne humaine' *Séminaire de formation des journalistes* Cotonou 2 August 2005 (unpublished conference paper on file with the author) 1.

³⁷ Art 114.

³⁸ Art 122.

A problem with the human rights mandate of the Constitutional Court is that no provision in the Constitution expressly grants power to the Court to provide remedies let alone evaluate the quantum of compensation when it finds that a violation has occurred. However, the right to remedy and reparation is self-evident by reference to the African Charter and the jurisprudence of the African Commission on Human and Peoples' Rights.³⁹ Moreover, the Constitutional Court has an express human rights mandate and its decisions are final and binding on the state and non-state entities. In its early years of existence, 1993-2001, the Court adopted a restrictive approach to its human rights jurisdiction. It limited its decisions to declaratory orders and findings of violations. From 2002, it embarked upon an 'era of reparation' although awards of reparation still applied on an inconsistent and unprincipled basis. Clear reparation orders including injunctions to public authorities have been made in very few cases, some of which the executive refused to comply with.⁴⁰ The victims collected monetary compensation in very few instances following new proceedings in ordinary courts to have the Constitutional Court orders enforced.⁴¹ The Executive-led process that began in 2008 to amend the Constitution envisages the inclusion of an express provision for the right to a remedy and reparation for human rights violations. I discuss the proposed provision further below.

This overview shows that the constitutionalism adopted by Benin in 1990 shares traditional features and principles of modern constitutionalism. However, the lurking dangers of Benin's new constitutionalism are revealed by practice especially on the several occasions of political debates and disputes as the country's democracy developed. While some of the challenges are technical and actual, others have appeared to be only perceived by political actors and prompted by purely opportunistic motivations. The following analysis focuses on how those issues were resolved in practice, whether there is a need for constitutional revision to address outstanding issues and the dilemmas of such revision.

4 Separation and distribution of powers

The principle of separation of powers is provided by the Constitution as follows: Executive power is exercised by the President and the Cabinet; legislative power falls within the competence of the National Assembly; and judicial power is vested in courts and tribunals.⁴²

³⁹ GM Musila 'The right to an effective remedy under the African Charter on Human and People's Rights' (2006) 6 *African Human Rights Law Journal* 442.

⁴⁰ *Equality for candidates to the Magistracy exam* case DCC 06-016.

⁴¹ *Favi (compensation for degrading treatment) v State* DCC 02-058.

⁴² Arts 3, 4 and 6.

While the Benin constitutional model provides for strict separation of powers, these boundaries are blurred by a strong presidential system. In fact, the issue is not one of lack of separation but unequal distribution of powers and its use by the President of the Republic. In practice, and when political actors are cooperative enough, the executive ends up exercising legislative powers and has the capacity of exerting strong direct influence on the judiciary. Segregation of powers under the law are eroded by strong prerogatives afforded to the President of the Republic to both make the law and exercise important political influence-related powers over public administration, armed forces, the judiciary and other checks and balances institutions, including the media, social and economic council, and the ombudsman institution.

4.1 Strong presidential Executive: ‘Presidentialism’?

Under its Constitution, Benin adopts a presidential system of the executive with a limit of two five-year presidential terms.⁴³ The President combines the functions of President of the Republic, head of state,⁴⁴ head of the executive⁴⁵ and supreme head of the army.⁴⁶ Other members of the Cabinet are appointed by the President, who determines their functions and powers and to whom they account.⁴⁷

The President also appoints three of the seven members of the Constitutional Court. His wide appointment powers⁴⁸ are extended to the President of the Supreme Court and members of the Supreme Court although from a list prepared by the *Conseil Supérieur de la Magistrature* (Judicial Service Commission), which is chaired by the President of the Republic. He appoints the President of the *Haute Autorité de l’Audio-Visuel et de la Communication*, a Broadcast Authority body, and the *Médiateur* or Ombudsman.

In addition to these powers, the President receives law-making powers directly from the Constitution although actions derived from this constitutional conferment may be brought to the scrutiny of the Constitutional Court by both the Parliament and citizens in ex-post constitutional litigation. The President shares the ‘initiative of laws’ with the National Assembly and while ‘propositions’ of law, parliamentary bills, are introduced by members of the Assembly, the President is given the power to make law through ‘projects’ of law, executive bills.⁴⁹ The

⁴³ Art 42.

⁴⁴ Art 41.

⁴⁵ According to art 54(1) he retains executive power; is the head of the executive and as such he determines and conducts national policies.

⁴⁶ According to art 54(2) he is responsible of national defence.

⁴⁷ Art 54(3).

⁴⁸ Arts 54 to 63 of the Constitution.

⁴⁹ Art 57.

President also has to assent to new legislation passed by Parliament. He makes regulatory norms and has the initiative of a referendum.⁵⁰ Although the law-making powers of the President appear to be wide, they are quite limited in terms of the law as the law-making powers of Parliament cover a much wider set of areas including citizenship, civic rights, fundamental freedoms, nationality, matrimonial regimes, criminal law, amnesty, organisation of the judiciary, taxes, currency, electoral law, creation of public entities, organisation of the territory, a state of emergency, environment and natural resources, and property.⁵¹

Despite the separation, constitutional practice has revealed that Benin's model should be considered as *presidentialism* instead of a parliamentary system.⁵² As a matter of general principle, the President of the Republic has always obtained the majority of the seats in Parliament and sponsored all members of the Bureau of the Assembly. He appoints top members of the judiciary including the President of the Supreme Court and he has an influence in the career management of magistrates and judges. In many instances, all seven members of the Constitutional Court were eventually nominated by the President as he had a say in the appointment by the Parliament of four of them. As pointed out in subsequent analysis, the President indirectly appoints the majority of members of the High Court of Justice which has the mandate to try the President, members of the cabinet and their accomplices for offences committed during their term in office. As discussed later, a bone of contention between the executive and other branches of the state has been the President's power, the so called 'article 68 powers', to issue special measures.

4.2 The Parliament

The Parliament of Benin has one chamber, named the 'National Assembly'.⁵³ The 83-member Assembly is elected by universal suffrage for four year terms.⁵⁴ The National Assembly has three main functions which are to make the law, to control the actions of the executive and represent the people.⁵⁵ It also has referral powers, through an impeachment-like procedure for trying the President, members of the Cabinet and their accomplices before the High Court of Justice. Members of Parliament enjoy parliamentary immunity and may not be investigated, wanted,

⁵⁰ Art 58.

⁵¹ Art 98.

⁵² DF Meledje 'The making, unmaking and remaking of the Constitution of Côte d'Ivoire: An example of chronic instability' in C Fombad & C Murray (eds) *Fostering constitutionalism in Africa* (2010) PULP 119. See also S Bolle 'Le regime présidentiel: cache-sexe du présidentielisme?' *La constitution en Afrique* 2 October 2007 <http://www.la-constitution-en-afrique.org/article-12777017.html> (accessed 12 November 2012).

⁵³ Art 79(1).

⁵⁴ Art 80.

⁵⁵ Art 79(2).

arrested, detained or prosecuted for opinions or vote issued in the discharge of their duties.⁵⁶

4.2.1 *Internal functioning issues*

Benin's Parliament, as it operated from 1991, has also enjoyed the stability and political pluralism brought by the 1990 Constitution. Different to Members of Parliament in the one-party era whose terms could be interrupted before they ended, parliamentarians under the new constitutional dispensation not only always completed their terms but the National Assembly was also renewed every four years.⁵⁷ Moreover, while the 'Peoples' Commissioners' of the Marxist regime were exclusively sponsored by the 'Party'⁵⁸ and merely endorsed pro-USSR government programmes, democratic era parliamentarians are the representatives of the people who elect them directly through an open political competition.⁵⁹ These new constitutional processes not only ensured competition and diversity of views and opinions but also ethnic or regional representation. Most importantly, the new dispensation endowed Parliament with the necessary independence to balance the strong powers of the executive. The fact that the Speakers of the Parliament came from the ranks of opposition groups in at least two terms also helped the National Assembly to assert its independence in relation to the President of the Republic in some instances.⁶⁰

Although it has played the roles assigned to it under the new constitutional dispensation, Benin's Parliament has had issues of organisation and functioning. For instance, disputes have frequently raged over the Speaker's disregard for the National Assembly's Rules of Procedure. On several occasions the requirement that parliamentary secretaries must be present during sessions of the Assembly has been either ignored or used to postpone discussions depending on the political

⁵⁶ Art 90. Exceptions are provided in article 91.

⁵⁷ The Bureau of the Parliament has constantly been renewed as well as the presidents of its parliamentary committees. In the first two terms, the Speakers of the Parliament were not necessarily sponsored by the presidential coalition, which in fact fought their election as presidents of the National Assembly. See FJ Aivo 'Le Parlement béninois sous le renouveau démocratique: réussites et échecs' RADC-CRDA Conférence annuelle sur 'L'internationalisation du droit constitutionnel' Rabat, Morocco (20 January 2011) 3-4 and K Somali 'Le parlement dans le nouveau constitutionnalisme en Afrique: essai d'analyse comparée à partir des exemples du Bénin, du Burkina Faso et du Togo' Doctoral thesis Université de Lille, 27 May 2008, 2.

⁵⁸ Members of the then 'Assembly of the People' were designated as follows: 90 per cent were directly elected by the voters from a list of members of the Benin Revolutionary Peoples' Party (the Party) and 10% were appointed by the President of the Republic as one for each province.

⁵⁹ Aivo (n 57 above) 3-4.

⁶⁰ For the 1991-1995 and 1995-1999 terms of Parliament, the Speakers were sponsored by the opposition and the Bureau included members of various political groups. See Aivo (n 57 above) 6 and Somali (n 57 above). Those were the years when President Soglo's bills were systematically and strongly rejected by Parliament. See Fondation Konrad Adenauer (n 17 above) and Somali (n 57 above) 152.

interests at stake. In the *Parliamentary Secretaries* case, the Constitutional Court declared unconstitutional an amnesty law⁶¹ which was adopted in the absence of the secretaries.⁶² The latter were replaced by the Speaker with the Principal Accountant of the National Assembly despite the opposition of some Members of Parliament.

Another problem with the functioning of Parliament has been the tendency to resort automatically, if not overly frequently, to the Constitutional Court to resolve issues that could have been dealt with by a consensual application of the Rules of Procedure. The tendency to abuse its institutional autonomy has led Parliament to be subject to tight scrutiny and restriction by the Constitutional Court. An illustration is given in the *Adoption of Parliamentary Rules of Procedure* case where the Court held that Rules of Procedure of Parliament, including a section entitled 'regulatory provisions', which were enforced before they could be reviewed by the Constitutional Court, were in violation of the Constitution as 'legally speaking, the provisions of the Rules of Procedure of the Parliament are not regulatory acts'.⁶³ As discussed further below, in instances such as between 2006 and 2012 where the Speaker and the majority of the Bureau were sponsored by the presidential coalition, the presidential majority automatically resorted to the Constitutional Court to deal with any contradiction from minority parties within Parliament.

4.2.2 Law-making powers of Parliament

The law-making powers of Parliament include a wide range of issues. Such powers are also expanded by prerogatives to control the executive and the President. Law-making primarily falls within the powers of the National Assembly which also consents to taxes.⁶⁴ Ordinary legislation is adopted by a simple majority. Adoption of organic laws follows a more complicated procedure, is adopted by an absolute majority and may be promulgated after the Constitutional Court have declared them consistent with the Constitution.

The national budget is adopted through a finance bill according to the law. The bill is introduced no later than a week before the October session of Parliament. In case the Parliament has not adopted the bill by 31 December its provisions may be passed into law by ordinance. The Executive must however seek the ratification of such ordinances by the Parliament within 15 days of their signature. In such circumstances where

⁶¹ Loi no 98-013 relative à l'amnistie de certains faits commis entre 1990 et 1996 adopted on 20 February 1998.

⁶² DCC 98-039 of 1 April 1998.

⁶³ DCC 95-016 of 14 March 1995. For some other instances in which the Constitutional Court has declared provisions of the Parliament's Rules of procedure unconstitutional see DCC 95-010 of 13 and 14 December 1994 and 21 February 1995.

⁶⁴ Art 96.

the finance bill was not introduced for promulgation before the next budgetary year, the President of the Republic requests Parliament to implement incomes and expenditures by provisional ordinances named *douzièmes provisoires*.⁶⁵

4.2.3 *Parliamentary control of the Executive*

In the exercise of its control over the Executive, the National Assembly has several instruments at its disposal. These include interpellations, written questions, oral questions with or without debate followed with no vote, and parliamentary commissions of inquiry.⁶⁶

Experienced as one of the main control mechanisms, interpellation is used according to article 71. The President or any of his cabinet members may be called upon to provide explanation on on-going actions or projects implemented by the executive. The President is obligated to respond personally or instruct a minister to do so, the latter option being the most frequently used. Following the hearings, Parliament may take a resolution to make recommendations to the executive.

4.2.4 *Impeachment or dismissal of the President*

There is no specific procedure or mechanism in the Constitution for members of Parliament to impeach the President of the Republic. Members of Parliament may however initiate the dismissal of the President should they decided to have him investigated and tried by the High Court of Justice. This Court is provided under the Constitution to try the President and members of Cabinet for felonies, offences committed during or in the discharge of their function, and to try their accomplices in case of an attempt to threaten state security.⁶⁷ The decision of having the President investigated must be reached by a two-thirds majority vote of members of Parliament. Upon their indictment, the President or members of his cabinet are suspended. In case of conviction, they are dismissed.⁶⁸ As a general principle, the responsibility of the President is engaged in case of a felony, contempt to the National Assembly and attempt to honour and probity.⁶⁹ Each of these crimes is defined in the Constitution.⁷⁰

Members of Parliament enjoy parliamentary immunity and may not be investigated, wanted, arrested, detained or prosecuted for opinions or vote issued in the discharge of their duties.⁷¹ Exceptions are provided

⁶⁵ Art 111.

⁶⁶ Art 113.

⁶⁷ Art 136.

⁶⁸ Art 138.

⁶⁹ Art 73.

⁷⁰ Arts 74, 75 and 76.

⁷¹ Art 90.

under the Constitution. For instance, members of Parliament may, during parliamentary sessions, be arrested in criminal proceedings upon the authorisation of Parliament except in flagrant cases. Arrest may occur out of sessions, with the authorisation of the Bureau of Parliament except in flagrant or final condemnation. Any authorisation to detain or prosecute may be suspended by a two-thirds vote of members of the Parliament.⁷²

4.2.5 Presidential prerogatives erode Parliament's powers

While these powers are clearly delineated by the Constitution, they suffer direct interference from the President either under constitutional powers or by controlling other organs indirectly through appointments prerogatives afforded to him by the Constitution. One such prerogative that permits the President's interference with legislative powers of Parliament is 'article 66 powers' which are discussed later. The provisions allow the President to bypass Parliament and make the law under specific circumstances. The issue is that the provisions seem to be interpreted as enabling no control of the opportunity of recourse to those 'special powers'. Therefore, it has been used to circumvent Parliament rather than serve the purposes of emergency at which it was initially aimed.

Another way of interfering with legislative powers is the election of Parliament's Bureau which is supposed to be done according to the number of seats held by political parties and coalition of parties in Parliament. However, as discussed later, appointment powers of the President have been seen to be used in a way to control the Constitutional Court which has competence to settle disputes arising from the election of the Bureau and any other political matters within Parliament. Finally, the same means are used in practice to quash decisions made by the Parliament when they tend not to be in favour of the executive. While those manoeuvres constitute a violation of separation of powers and interference of the Executive in other powers, they seem to find a legal basis in constitutional provisions.

4.3 Judicial 'power' versus judicial 'authority'

The Constitution of Benin provides for a 'judicial power' (*pouvoir judiciaire*)⁷³ which includes ordinary courts and tribunals headed by two

⁷² Art 91.

⁷³ A whole title VI is devoted to the judiciary from articles 125 to 138.

highest institutions, the Supreme Court and the High Court of Justice.⁷⁴ As the Supreme Court has jurisdiction over administrative, criminal and financial matters, its decisions are final to the extent of their successful review by the Constitutional Court endowed with highest jurisdiction over constitutional matters and human rights. In other words, final decisions of the Supreme Court may be called to the scrutiny of the Constitutional Court should they be inconsistent with the Constitution or have the potential of infringing human rights.

In relation to the political branches of government both the Supreme Court and Constitutional Court play important roles. The Supreme Court is the constitutional legal advisor of the executive as it must issue an advisory opinion on any bill introduced by the executive and provide legal opinions on any legislation or international agreement projects upon the request of the President of the Republic. It also has jurisdiction over electoral matters for communal elections.

The Constitutional Court is endowed with much wider and stronger powers in relations to state governance. First it hears all matters related to the functioning of and relationships between state organs. Second, it has jurisdiction over cases of human rights violations and thus may control the constitutionality of all acts, decisions, and actions of the executive, parliament and the judiciary. Third, all disputes between branches of government fall within its jurisdiction including organisation, appointment, designation article proceeding from the functioning of Parliament, the executive and the judiciary. Last, the Constitutional Court also has jurisdiction over disputes arising from presidential and parliamentary elections.

Although established under a separate chapter in the Constitution, the Constitutional Court of Benin has played a central role in the political organisation in Benin. Over the years since 1993, it has shaped both the functioning of state organs and the political landscape especially through a close scrutiny of Parliament. In the recent years, the Court has however faced strong criticism due to the increased distrust in some of its decisions. Some of its members had prior to their appointment openly campaigned for the President of the Republic or even run for legislative election under the banner of the coalition of political parties which support the President.

⁷⁴ Constitutional provisions are completed by the following legislation on the judiciary: *Loi* no 2001-37 of 27 August 2002 on the organisation of the judiciary in Benin; *Loi* no 2004-07 of 23 October 2007 on the composition, organisation, functioning and competences of the Supreme Court; *Loi* no 2004-20 of 17 August 2007 on the rules of procedure applicable before the judicial sections of the Supreme Court and the Organic law on the judiciary. The 2002 Act brought significant changes in the judicial scheme which provided only height courts to cover the whole country since independence in 1960. The new law created 28 first instance tribunals and three appeal courts in Cotonou, Abomey and Parakou respectively in the south, centre and north of the country. According to the law, administrative, criminal and financial chambers are instituted at all three levels of the judicial system.

Whether potential influence may be avoided goes back to the possible influence of the President's appointment powers on the independence of Constitutional Court judges.

5 Challenges brought by the Constitution in action

5.1 Blurring boundaries to separation of powers: Executive's supremacy

5.1.1 Are 'article 68 powers' immune from jurisdiction?

The President's power to issue special measures has been at the heart of disputes with other branches of the state. Under article 68 of the Constitution, the President of the Republic may 'issue exceptional measures required by the circumstances without the citizens' constitutional rights being suspended'. The main condition is for the circumstances to include 'when institutions, the nation, the territory, execution of international commitments, functioning of public institutions are threatened or interrupted'. Presented with a petition challenging abuse of presidential special powers, the Constitutional Court held in the *Discretionary Recourse to Article 68 Powers* case⁷⁵ that recourse to article 68 powers constitutes 'a discretionary act of the President, ... an act of government which may not be subject to constitutionality check except as to the forms in which it was exercised'. Such a pronouncement suggests an absolute immunity from jurisdiction as long as the powers are exercised within the forms prescribed by the Constitution. Considering that article 69(2) of the Constitution further provides that the Parliament will determine the period within which the President may use article 68 powers, the Court has later held in the *Limitations to the Use of article 68 Powers* case⁷⁶ that since the President of the Republic concentrates so much power in the considered period, such powers must be exercised within the realm of article 69. The objective of article 68 powers has also been specified by article 69(1). The provision reads that 'measures issued must be inspired by the purpose to quickly provide public and constitutional institutions the means to discharge their duties'.

Recourse to article 68 powers has raised political tension as its use was perceived as a window for the executive to circumvent the legislature's power to control executive actions. Under the 1990 Constitution, all three presidents have had recourse to article 68 powers. They were used either to pass the national budget or to authorise loans despite the opposition of the majority of the day which was hostile to the executive. Opposition grew stronger since 2007 with the systematic use of article 68 powers which

⁷⁵ DCC 27-94 of 24 August 1994.

⁷⁶ DCC 96-023 of 26 April 1996.

is perceived as an erection of the Constitutional Court into a legislator by the Executive. Benin's Parliament has made an effective use of its power and prerogatives to keep the executive under close check. Importantly, recourse to article 68 powers to circumvent parliamentary control has been fiercely fought by the National Assembly especially when the majority had shifted to opposition groups. One of the main cases arose during the summer of 1994 when Parliament rejected President Soglo's budget and passed a revised version that called for greater increases in wages and student grants. Determined to meet his commitments to the International Monetary Fund (IMF), President Soglo passed his budget version by an article 68 based decree.⁷⁷ The Speaker of Parliament challenged the presidential decrees in the Constitutional Court for violation of separation of powers as most provisions dealt with issues within the competence of the National Assembly.⁷⁸ Although the Court declined its competence to decide on presidential recourse to article 68, in the Discretionary Recourse to article 68 Powers case referred to earlier, it declared the decrees unconstitutional for failure to abide by the proper procedure.⁷⁹

5.1.2 *Independence of the Judiciary: How powerful is the 'judicial power'?*

The independence of the judiciary from the two other branches of the state is primarily secured by the Constitution which provides that the judiciary is independent from the executive and legislature.⁸⁰ Reinforcing the aforementioned provision, article 126 of the Constitution makes it clear that 'judges, in the discharge of their duty, are subject only to the authority of the law' and that they are 'irremovable'. However, in terms of article 127(1), the President is the guarantor of the independence of the judiciary. The French word used in the Constitution is not '*pouvoir judiciaire*', which is the equivalent of the judiciary, but '*justice*' which should rather be understood as the fact that justice is administered, or the proper functioning of justice as in the justice system.⁸¹ Article 127(2) seems to suggest that the President also sees to the independence of judges, as the provision expands that 'he [the President] is assisted by the *Conseil Supérieur de la Magistrature*'.⁸²

Read in the light of constitutionally enshrined separation of powers and independence of the judiciary, the mandate of guarantor should be

⁷⁷ President Soglo issued Decrees 94-001 and 94-002 of 1 August 1994. See Answers.Com 'Nicéphore Soglo' *Gale contemporary black biography* <http://www.answers.com/topic/nic-phore-soglo> (accessed 25 June 2012).

⁷⁸ Those included the determination of income and expenditure, taxes, which are primarily within the domain of legislature. See arts 96 and 98 of the Constitution.

⁷⁹ DCC 27-94 of 24 August 1994.

⁸⁰ Art 125(1).

⁸¹ This meaning seems to be reinforced by article 41 of the Constitution which provides that the President shall also be the guarantor of the national independence.

⁸² The *Conseil* is the equivalent of the Judicial Service Commission.

understood as a duty rather than a privilege allowing the President to interfere in the functioning of the judiciary. This was confirmed by the Constitutional Court's decision in the *Executive Suspension of Court Orders* case that a presidential decree suspending execution of court orders was in violation of the Constitution.⁸³ Such prohibition extends to the executive as a whole, including members of cabinet, as well as to the legislature. In the *Minister of Justice Interference with Correctional Services* case the Court thus held that an order by the Minister of Justice to unlock an inmate's cell constitutes an interference with the judiciary and a violation of the Constitution. In the *Public Prosecutor Interference with Court Proceedings* case, the Court similarly found a letter, from a public prosecutor implying observations and orders in civil matters pending before courts,⁸⁴ to be in violation of the Constitution.

The same seems to apply to the principle that judges may not be removed without the observance of a minimum procedure even in the exercise of appointment prerogatives by the executive. In that respect, the Court made it clear that the principle of immovability constitutes the key guarantee to the independence of judges, the final beneficiary of which is the litigant. More specifically, the Court stressed that the principle demands that judges are personally consulted on the position proposed and the place of appointment even in case of a promotion. A letter and decrees from the Minister of Justice which omitted to mention the proposed post were therefore declared in violation of the independence of the judiciary and of the Constitution.⁸⁵ As a consequence, in application of its precedent, the Court also declared unconstitutional the posting of a judge without his prior consent.⁸⁶

Similar principles have applied in respect of the appointment of judges as article 129 stipulates that the President appoints judges as proposed by the Minister of Justice upon the opinion of the Judicial Commission of the High Council of Magistracy, the body in charge of the recruitment, training, and career management of magistrates and judges. An issue has been raised of the legal nature of the Commission's opinion and at what stage of the process it must be requested. In the *Limitations to Presidential Appointment Powers* case,⁸⁷ the Court determined that the silence of the President must be considered as a refusal to follow the opinion of the Commission and that such refusal to appoint a judge in the Supreme Court is in violation of the Constitution. However, independence of the judiciary as thus upheld by the Constitutional Court does not resolve the issue raised by an unbalanced distribution of powers. This leaves open the question

⁸³ DCC 07-175 of 27 December 2007.

⁸⁴ DCC 00-005 of 26 January 2000.

⁸⁵ DCC 97-033 of 10 June 1997.

⁸⁶ DCC 06-063 of 20 June 2006.

⁸⁷ DCC 00-054 of 2 October 2000.

how the independence of the judiciary will resist the wide appointment powers of the President.

5.1.3 Independence threatened by executive appointment in highest judicial positions

Appointment powers vested in the President of the Republic by the Constitution leaves him or her with the legal tools to threaten the independence of judges. First, as mentioned earlier, members of the Supreme Court are appointed by the President. The professional career of judges from recruitment to retirement is mainly managed by the executive⁸⁸ and the budget of both the Supreme Court and Constitutional Court are concealed within the financial control of the Executive if not annexed to the general state budget. It must be pointed out that the procedure for appointment of judges is clearly provided for under the law and must meet minimum requirements such as experience, training, and age.

Second, three of the seven members of the Constitutional Court are appointed by the President of the Republic and the probability is high that all seven are eventually appointed with his political approval, recommendation or support.⁸⁹ It is so because, as referred to earlier, the coalition of political parties supporting the President secures the majority of seats in Parliament as a general practice if not all the time and by all means. Constitutional Court judges are appointed for no more than two terms of five years.

The President's appointment powers might be mitigated by the requirements for nomination to the highest judicial positions in Benin. The country has demanding requirements for sitting on the Supreme and Constitutional Court. For instance, the minimum experience to sit on the Supreme Court is 15 years. Although the appointment of judges is left to the Judicial Commission High Council of Magistracy, the body is headed by the President of the Republic. As for the Constitutional Court, it must be composed as follows:⁹⁰

- (i) three magistrates with a minimum of 15 years' experience;
- (ii) two legal experts, law professors or legal practitioners with a minimum of 15 years' experience; and

⁸⁸ *Loi No 2001-37 du 27 août 2002 Portant Organisation Judiciaire en République du Bénin* and *Loi No 2001-35 du 21 février 2003 Portant Statut de la Magistrature en République du Bénin*.

⁸⁹ Benin's experience confirms this, and in fact prominent members of the current bench happened to have run for parliamentary election under the banner of the incumbent presidential coalition.

⁹⁰ Art 115 (3).

(iii) two personalities of high professional reputation.⁹¹

Article 116 of the Constitution provides that the President of the Constitutional Court is elected by his or her peers among magistrates and legal expert members.⁹² Articles 133 and 134 make similar provisions as regards presidents of the Supreme Court and its chambers as well as members of the Court. The Constitutional Court was petitioned as to who is a legal expert or '*juriste de haut niveau*'. The Court answered that 'the legal expert must inevitably be a professor⁹³ or legal practitioner'. As Benin's experience has shown, despite the fact that judges appointed to the Constitutional Court were so far unquestionably well qualified, they have not shown enough boldness towards the executive. For instance, their timidity in asserting powers of injunction has given rise to the question whether the problem was with the absence of express provisions or the judges' loyalty to the President for appointing many of them and having an influence in the appointment of others with a pro-presidential Parliament majority.

5.1.4 *May the executive suspend execution of court orders?*

The *Executive Suspension of Court Orders* case⁹⁴ is certainly the best illustration of how separation of powers is perceived and should be interpreted depending on the branch of Government involved. In the early months following his inauguration in April 2007 the newly elected President sought to respond to pressing calls from the capital city electorate to freeze evictions of hundreds of suburb dwellers. Evictions were ordered by courts through proper process following proceedings initiated by land owners.

Without consulting with judicial authorities, the executive issued an order that all court proceedings as well as the execution of court orders pertaining to the enforcement of evictions be suspended. This led to an indefinite strike decreed by the Benin Magistrates' Union. Petitioned by a group of citizens, the Constitutional Court decided that the decision of the executive constituted a clear interference with and violation of the independence of the judiciary.

⁹¹ In practice, those personalities have always been chosen among top civil servants with more than 10 years' experience in the public service.

⁹² Art 116.

⁹³ In Francophone Africa, the title of professor is granted following successful participation in the notoriously selective exam organised by the *Conseil Africain et Malgache de l'Enseignement Supérieur (CAMES)*. Conditions to apply for such examination include holding a doctoral degree and having published a couple of articles in accredited journals.

⁹⁴ DCC 07-175 of 27 December 2007. This case could as well be named *Benin Magistrates' Union v Executive*.

5.1.5 *May the Constitutional Court make injunctions to the executive?*

There is no doubt that decisions of the Constitutional Court are final and binding on all state organs, individuals and non-state entities. Whether the parties in a particular case comply with such decisions is another issue altogether. So far, no particular issue has arisen in respect of individuals or private parties complying with the decisions of the Court. The same cannot be said of state organs. May the Constitutional Court make injunctions to the executive? On the one hand, it may be argued that the Court has lacked judicial activism while it has also missed the opportunity to use its constitutionality control powers vis-à-vis the executive to secure compliance with its decisions. On the other hand, the Court has adopted a restrictive construction of its adjudicatory powers under the Constitution, namely regarding the *res judicata* of its decisions.

One problem with the powers of Benin's Constitutional Court has indeed been whether the Court may issue orders or make injunctions when it has found state organs in violation of the Constitution or in case of non-compliance with its decisions. With regards to reparation of human rights violations, the Court has taken a progressive approach. Initially, the Court made it clear that it could not grant orders against the executive without breaching separation of powers as illustrated in a number of decisions starting with the *Constitutional Court Jurisdictional Limitations to Review Administrative Acts* case.⁹⁵ However, this position has evolved in subsequent decisions where the Court made pronouncements in the form of clear injunctions, for instance that the 'complainants *must* be reinstated',⁹⁶ thus making orders for the performance of specific actions, as was the case in the *Executive Non-Compliance with Constitutional Court Orders* cases, even without expressly indicating the addressee of such order.⁹⁷

The Constitutional Court seemed to have had a better compliance securing influence over Parliament. In most of the cases concerned, the Constitutional Court construed upon its constitutional role to maintain a smooth functioning of Government through a review of the actions of its organs. For instance, in the *Expedite Election of the Parliament Bureau* case, the Court held that multiple suspensions by the dean – the oldest sitting Member of the Parliament – during the election of the Bureau of the National Assembly were in violation of the Constitution. The Court thus ordered that 'the 'dean' [call] a meeting of Parliament and [proceed] to have the Bureau elected during the same session; failing which, the dean

⁹⁵ DCC 95-024 of 6 July 1995. See also DCC 95-029 of 17 August 1995; DCC 03-003 and DCC 03-004 of 18 February 2003; DCC 03-052 of 14 March 2003; and DCC 03-083 of 28 May 2003.

⁹⁶ Emphasis added.

⁹⁷ DCC 05-067 of 12 January 2005 and DCC 06-016 of 31 January 2006.

should be replaced by the next oldest [Member of the Parliament] until the process is completed within 48 hours of the decision'.⁹⁸ The decision was complied with. In 2004, the Court made a similar order when eight members of the Economic and Social Council decided to block the election of their bureau by boycotting the session. The Court ordered in DCC 04-065 that the session be called and elections be completed within 72 hours of its decision.⁹⁹ In 2008, the Constitutional Court also found Parliament's decision to postpone *sine die* the adoption of a bill authorising the executive to loan for coastal erosion projects, to be in violation of the Constitution.¹⁰⁰ After protesting that the decision breached separation of powers, Parliament eventually adopted the bill as prescribed by the Court in the *Limitations to Parliament Powers concerning the Adoption of Executive Bills* case.

5.1.6 The High Court of Justice: A political tribunal?

The *Haute Cour de Justice* (High Court of Justice) is mandated to prosecute the President of the Republic and members of the Cabinet for treason and other crimes committed during their term in office. The Court is composed of six Members of Parliament, all Constitutional Court judges except the President and the President of the Supreme Court. The issue with this Court lies in its very nature, as well as in its composition, competence and procedures. That the Court has faced difficulties in its functioning is an understatement. Since its inception and operation on 15 February 2001, Benin's High Court of Justice has failed to hear a single case, although not for lack of actual and potential opportunities to do so.

The first issue is the composition of the Court and the fact that referral is left exclusively to Parliament. Decisions to investigate and then indict must be reached by a two-thirds majority vote.¹⁰¹ One is therefore not surprised by the timidity of members of the executive and the legislature to expose their political allies and former colleagues to such a political tribunal. Four cases referred to the Court by President Yayi Boni's *régime du changement* between 2007 and 2011 were met with rejection among parliamentarians as the accused were former Members of Parliament or leaders of political parties who support the President.¹⁰²

⁹⁸ DCC 03-077 of 7 May 2003.

⁹⁹ DCC 04-065 of 29 July 2004.

¹⁰⁰ DCC 08-072 of 25 July 2008.

¹⁰¹ Art 137.

¹⁰² Afriqinfos 'Bénin: le dossier de poursuite d'un ancien ministre devant la haute cour de justice est rejeté par le parlement' <http://www.afriqinfos.com/articles/2012/5/24/benin-dossier-poursuite-dun-ancien-ministre-devant-haute-cour-justice-rejete-parlement-203014.asp> (accessed 21 June 2012) and Adjinakou 'Poursuite devant la haute cour de justice Nouveau casse-tête pour anciens ministres' <http://www.journal-adjinakou-benin.info/?id=4&cat=1&id2=9648&jour=03&mois=11&an=2011> (accessed 21 June 2012).

Another issue about the High Court of Justice is the process through which its members are designated. Besides the direct involvement of the President of the Republic in the designation, Members of Parliament have the power to barely refuse to refer cases to the Court or simply delay the designation of their representatives to the tribunal. For instance, between 2007 and 2009, Parliament delayed the designation of its members on the third batch of High Court of Justice judges for two years with no specific reasons.¹⁰³ Noteworthy, some sitting Members of Parliament at the time were targeted by the executive's application for referral. However, the dispute equally involved political representation within Parliament and the bid of long marginalised opposition groups to take their revenge on the presidential majority. The Constitutional Court was eventually called to settle the dispute in DCC 09-002, when it ordered Parliament to designate its representatives to the High Court of Justice within six days of its decision.¹⁰⁴

From a legal standpoint, the lack of a specific law for the High Court of Justice to operate effectively is compounded by the constitutional silence about who may apply to Parliament for referrals. One consequence is that the two initial cases of former ministers properly referred to the Court could not proceed due to legal technicalities. The other inevitable consequence is that the 'political tribunal' is turning into a political weapon that both the President of the Republic and Parliament are believed to use against opponents.¹⁰⁵ Due to the personal jurisdiction of the High Court of Justice, it may be assumed that referral lies with the President of the Republic as the head of the executive. The problem with this assumption is that the prerogative to move a political and economic crimes mechanism is left with those most likely to be probed.

5.2 Development and interpretation of the Constitution

As was discussed above, the Constitution of Benin provides for a separate Constitutional Court which is not under the judiciary. Therefore, constitutional review is the exclusive function of the Constitutional Court although, as explained earlier, nothing in the Constitution or other laws prevents ordinary courts from hearing matters on breach of constitutional provisions and applying provisions of the Constitution.

¹⁰³ P Zinsou-Ply 'Bénin: Désignation des représentants du parlement à la Haute Cour de justice – Une 6ème session extraordinaire se négocie' 27 Septembre 2007 <http://fr.allafrica.com/stories/200709280692.html> (accessed 21 June 2012).

¹⁰⁴ DCC 09-002 of 8 January 2009.

¹⁰⁵ All Africa 'Bénin: Adihou devant la Haute Cour pour avoir osé insulter les députés' 19 July 2006 <http://fr.allafrica.com/stories/200607190590.html> (accessed 11 July 2012). The case involved former minister of relations between the institutions and education in the Cabinet of President Mathieu Kérékou. The minister was released after a three-year remand without being charged.

Both the exclusivity of jurisdiction granted by the Constitution and the self-restraint adopted by ordinary courts with respect to the competence of the Constitutional Court have asserted the Court as the central body of Benin's constitutionalism. Since 1993, the Court has decided hundreds of cases on the breach of fundamental rights and freedoms but also on other matters mainly concerning power regulation between state organs. Some of these cases are worth examining for their significant bearing on constitutionalism in Benin.

5.2.1 Candidates to Presidency must 'reside at the time of the election'

Article 44 sets six main eligibility conditions for presidential candidates.¹⁰⁶ The condition which has attracted most political suspicion is probably that of six-month residence 'at the time of the particular election'. The Constitutional Court was called to determine the 'time of the election' on two occasions in 2006 and 2011. In EL-P 06-002, the petition was submitted before the publication of the final list of candidates and was thus declared premature.¹⁰⁷ Upon publication of the list, a new petition on the same issue in EL-P 06-014 was rejected for lack of standing.¹⁰⁸ The Court seemed to have resolved the issue while checking the constitutionality of the 2005 Code for presidential elections in which Parliament defined 'the time of the elections' as the period running from the inauguration of the Electoral Commission to the proclamation of the final results.¹⁰⁹ In DCC 05-069, the Constitutional Court held that 'by determining the period as set in the law, law-makers have set a supplementary condition relating to the duration of residence' while the only condition set by the Constitution is the one of residence.¹¹⁰

An informed observer of Benin politics could well argue that the whole dispute was about the high chances of an outsider in the 2006 presidential election, a candidate viewed with great sympathy by the electorate but whom veterans generally disliked. The spirit of the condition seems to be that candidates to the highest political and public position in a country are expected to have a sound and grounded knowledge of realities on the ground. As far as constitutional development is concerned, it is re-assuring to note that the Court has respected what has now become a 'public interest' precedent. In the 2011 presidential election, the Court authorised the candidature of a non-resident national in the same circumstances as in 2006. By adopting such a position, the Court has upheld equality and

¹⁰⁶ These are: nationality, morality, civil and political rights, age between 40-70 years, residence 'at the time of election', and physical and mental health.

¹⁰⁷ Decision EL-P 06-002 of 19 January 2006.

¹⁰⁸ Decision EL-P 06-014 of 28 February 2006.

¹⁰⁹ Art 5 of the Loi No 2005-26 portant règles particulières pour l'élection du Président de la République.

¹¹⁰ DCC 05-069 of 27 July 2005.

belied public perceptions that it had interpreted the rule to serve a particular candidate in 2006.

5.2.2 *Role of armed forces and their involvement in the management of elections*

Arguably because Benin has experienced frequent incursions of the military in the political arena in the past, specific reference to this section of society has been limited if not avoided under the new constitutional order.

In turn, both positive and negative behaviour is required from the armed forces. For instance, the punishment of any 'agent of the state' found guilty of acts of torture and degrading treatment¹¹¹ applies to the armed forces not only as a punishment but as a proscription. This implies responsibility and penal sanction although these have not been used consistently against numerous members of the armed forces found in violation of human rights by the Constitutional Court. Equally, the fact that 'any person or agent of the state is released from the duty to obey where the order constitutes a grave attempt to human rights and public freedoms'¹¹² is a supreme obligation on armed forces.

One of the very few times the word 'military' is mentioned in the Constitution is in article 34, which makes it a 'duty for all citizens, civilians and the military to respect the Constitution and constitutional order in all circumstances'. Such a duty is arguably mostly directed at armed forces given the history of Benin, but also recent instances of power seizure by the military through unconstitutional means in Africa. It is also an expression of constitutional supremacy over armed forces in a rule of law context. As a consequence, the Constitution also prevents members of the armed forces from standing for elective positions,¹¹³ or sitting in the cabinet,¹¹⁴ unless they have retired or resigned well ahead of the considered election.¹¹⁵

This prohibition is emphasised by the most express negative obligation on the armed forces. In terms of article 65, 'any attempt by armed or public security forces to overthrow the constitutional order shall be considered as a treason-felony and a crime against the Nation and the state and shall be punished according to the law'. To secure the effectiveness of this provision, the Constitution makes it both a right and a duty to 'constitutional organs' for recourse to 'all means, including military

¹¹¹ Art 19(1).

¹¹² Art 19(2).

¹¹³ Art 51, they cannot stand for presidential elections.

¹¹⁴ Art 54(4).

¹¹⁵ Art 64(1). The time frame within which such resignation should be filed is determined by the law.

cooperation or defence agreements' in instances of a *coup*.¹¹⁶ For citizens, 'it is also the most sacred of all rights and most imperative duty to disobey and organise to oppose the illegitimate authority'.¹¹⁷

The clearest illustration of the option to keep armed forces out of public and political affairs is in article 63 which provides that 'the President of the Republic may ... involve the army in the economic development of the nation and any other work of public interest as determined by the law'. This implied role of the army has developed in many ways in Benin, especially since the 1990s. The '*génie militaire*' are renowned for their high standards in public works, for example the construction of roads, schools and health centres.

The military have also been involved in the transportation of electoral equipment which led to a public debate on the independence of the Electoral Commission. On such involvement of the army in 2007 parliamentary election, the Constitutional Court re-affirmed the independence and administrative autonomy of the National Autonomous Electoral Commission.¹¹⁸ However, the court avoided a clear declaration that such involvement was unconstitutional and violated separation of powers and had the potential of the executive interfering with the mandate of the Electoral Commission. Called on to confirm its precedent during 2010 parliamentary election, the Court threw out the application on the basis that its previous decision on the matter was final.¹¹⁹ The army eventually got involved in the process at least to some extent, although amid suspicious circumstances and under tight scrutiny of civil society organisations and opposition parties. The main argument of the executive was the outrageous cost of elections in Benin. For opposition parties and civil society, the issue was the overly strong influence of the Executive on the army, the chief of which is the President. The issue might also be the civilians' distrust for Benin's army which has been too present in the country's public life in the recent past.

5.2.3 *Controversial principes à valeur constitutionnelle*

The *principes à valeur constitutionnelle* are those that are considered to be so central to the supremacy of the Constitution that their amendment or infringement would amount to threatening the survival of the whole Constitution. Therefore, they ought to be amended or revised only through a popular consultation or with the involvement of all branches of government under the most demanding conditions. The principles are formulated from cases in which the Court is called to regulate the

¹¹⁶ Art 66(1).

¹¹⁷ Art 66(2).

¹¹⁸ EL 07-001 of 22 January 2007.

¹¹⁹ DCC 10-116 of 8 September 2010.

functioning of state organs, and precise or complement specific provisions of the Constitution. Most of the cases are concerned with keystones of Benin's constitutionalism.¹²⁰

5.2.3.1 Amendment of the Constitution

Similar to other constitutions, Benin's Constitution of 1990 may under certain conditions be amended. What the fundamental law does not say is whether 'non-consensual' revision is in violation of the spirit of the Constitution. The Constitutional Court of Benin has responded to this uncertainty by carving consensual revision in the textual stone of the Constitution. In 2006 and 2007, the Court dismissed unilateral attempts at amending the Constitution on the grounds that the fundamental law had been adopted by the people through a national consensus reached at the 1990 National Conference. The landmark decision of the Constitutional Court in that regard is the *Amendment of the Constitution by Parliament* case, referred to earlier, where the Court held that such national consensus had become a *principe à valeur constitutionnelle* which ought to take precedence over any amendment of the Constitution. The case concerned an amendment effected by Members of Parliament behind closed doors to extend their term of office from four to five years. In the view of the Court, the principle of 'national consensus' was adopted by the February 1990 National Conference which also gave birth to the December 1990 Constitution; and any amendment of the Constitution should follow the public and open process adopted by the Conference. The Court thus declared the term extension contrary to the Constitution.

Issues surrounding the revision of Benin's 1990 Constitution have evolved beyond just how amendments must be undertaken. In fact, the issue in the first place was whether the Constitution should be amended at all, especially just to serve personal political purposes and ambitions. Civil society and the Constitutional Court initially fought so called opportunistic amendments in 2006 and 2007. The 'Do Not Touch My Constitution' social movement, which was launched as early as in 2004, led to a country-wide rejection of any revision in 2006, the final year of former President Mathieu Kérékou's second term under the democratic regime. Social uprisings led the Constitutional Court to decide in DCC 05-139 and DCC 05-145 that the economic arguments used to seek amendments of the Constitution and extend presidential terms were not constitutionally justified. Subsequent developments around the constitutional revision project 'officially' launched in 2008 attest to the

¹²⁰ R Dossou 'La Cour Constitutionnelle du Bénin: l'influence de sa jurisprudence sur le constitutionnalisme et les droits de l'homme' Paper presented at the World Conference on Constitutional Justice, Cape Town (23-24 January 2009) 10-12. Advocate Dossou is an experienced lawyer, former President of Benin's Bar, Law Professor and the current President of the Constitutional Court of Benin.

importance of the position of the Constitutional Court regarding opportunistic amendments of the supreme law of the land.

5.2.3.2 Political ‘majority – minority’ principle

This principle was developed by the Court in a dispute between the executive and Parliament about how political forces should be represented in the Bureau of Parliament and its commissions. In 2009, the Court decided that the principle of ‘the winner takes all’ is not acceptable in a democratic society. It thus raised the rights of the political minority, which it defines as the party or coalition of parties with the least number of members in Parliament, as a *principe à valeur constitutionnelle* in the Political Minority Rights case.¹²¹ At the time of the decision, Constitutional Court judges were believed to be favourably disposed towards the coalition of political parties supporting the incumbent President of the Republic which had just lost the majority of seats in Parliament.

Unfortunately, the same bench of the Court declined to stick to its precedent two years later under the same circumstances, after the presidential coalition had re-secured the majority in Parliament. In 2011, the Court held in the *Proportionality of Right to Political Representation in Parliament* case that proportionality must be determined *in casu*, and the majority-minority notion must be ‘enlightened’ by the *summa divisio* presidential coalition versus opposition.¹²² This inconsistency led parliamentary opposition – the minority of the day – to blame the constitutional tribunal for devaluating the minority principle to the rank of a *principe à géométrie variable*.¹²³

The move of the Constitutional Court to flesh out the right to political representation in Parliament seems to have caused more problems than it was initially purporting to resolve. Previously, the Court had consistently held, starting from the *Discretionary Parliament Internal Affairs Powers* case,¹²⁴ that Parliament has discretionary powers to decide how its internal elections should be conducted, as long as the ballot is secret and candidates are Members of Parliament. Changing constructions of the Constitution on grounds that are or are perceived to be political may attract the risk of legal and constitutional insecurity. It also has the potential of diminishing citizens’ trust in the Court and the constitutional system as a

¹²¹ DCC 09-002 of 8 January 2009.

¹²² DCC 11-047 of 21 July 2011.

¹²³ The term is used to mean ‘a principle that changes according to the minority or the majority of the day’. Arguably, the principle that majority should not take all was afforded constitutional value by the Court, members of which are believed to be favourable to the executive, which did not have majority in Parliament at the time of the decision. The principle was overturned by the same Court after the same presidential coalition had recovered the majority of seats in Parliament.

¹²⁴ DCC 03-168.

whole. Opposition groups have indeed fiercely criticised the Court for trespassing on the legislature's domain by forcing and basically dictating how the Bureau of the Parliament should be composed.

However, one should embrace caution in a critical analysis of what may well be termed 'political question' cases. The Constitutional Court of Benin had already in 2000 considered political representation and participation as central to pluralist democracy as well illustrated in DCC 00-078. The same concern has led the Court to emphasise the need for pluralist democracy to 'combine political configuration, equity and proportionality' while dealing with representation in any organ established by virtue of the Constitution including National and Departmental Electoral Commissions as was the case in DCC 01-011. More recently, the Constitutional Court has clarified how political parties should be represented in various organs and bodies by elaborating upon its longstanding precedent in DCC 09-002. This decision of the Court is also important in strengthening Benin's democracy as it clearly differentiates between political parties with very few seats and the political coalition which does not have the majority of seats, namely the main political opposition group in Parliament. It is understood that the purpose of the political opposition group in Parliament is to criticise the policies of the executive and propose viable political alternatives.

5.2.4 Interpretation of human rights provisions

Perhaps due to the fact that violations of fundamental rights were frequent in the era preceding the operation of the 1990 Constitution, human rights cases have stolen the lime-light in constitutional litigation. How the Constitutional Court adjudicated some of those issues is therefore of interest.

The Constitutional Court has lacked judicial activism with regard to the protection of the right to life. In the *Constitutionality of the Death Penalty with Unqualified Right to Life* case the Court had to determine whether the provision for the death sentence in article 381 of Benin Criminal Code was in violation of the right of the human person's inviolability and the right to life in Benin's Constitution.¹²⁵ The Constitutional Court answered in the negative.¹²⁶ The Court took the position that there is no express or implicit abolition of the death penalty and concluded that the unqualified constitutional right to life cannot in itself have the consequence of rendering the death penalty provision in the criminal law inconsistent with the Constitution. The argument was that the death penalty is constitutional as long as it is not arbitrary, that it is imposed in accordance with the criminal law. In the subsequent *Preventive Constitutional Review of Death*

¹²⁵ Arts 8 and 15.

¹²⁶ DCC 99-051 of 13 October 1999.

Penalty case,¹²⁷ decided the same year, the accused persons approached the Constitutional Court as they were likely to be sentenced to death by the Assize Court, which they were due to appear before. The Constitutional Court merely confirmed its precedent. Considering its express human rights mandate and related powers, the Constitutional Court ought to have advanced the constitutional right to life by setting a more progressive precedent for other courts, namely the Supreme Court.¹²⁸ In the light of the incorporation of the African Charter in Benin's Constitution, the 'death penalty free' provision for the right to life in the Charter,¹²⁹ and the jurisprudence of the African Commission¹³⁰ should have also informed the Constitutional Court's decision.

However, the Constitutional Court finally succeeded, by means of a *contrôle de conventionnalité* to achieve what it had failed to do through a *contrôle de constitutionnalité*. Constitutional review is traditionally meant for the Constitutional Court to test the conformity of municipal law with the Constitution. The question is whether the Court may check the conformity of municipal law with an international instrument in the absence of express constitutional powers to do so.¹³¹ In 2012, Benin's Constitutional Court responded positively in the *Constitutionality of Death Penalty with International Abolition Obligations* case¹³² by declaring the death penalty provisions of the Criminal Code of Procedure in violation of article 147 of the Constitution which provides that international law has precedence over municipal law. In the opinion of the Court, any municipal provision that refers to the death penalty is henceforth contrary to article 147 of the

¹²⁷ Of 29 December 1999.

¹²⁸ In the *Azonhito* (death penalty) case, the Supreme Court took the view that the provision for the right to life in the ICCPR did not amount to abolition of the death penalty. Counsel for the application did not make any reference to either the unqualified constitutional right to life, article 4 of the African Charter or the jurisprudence of the African Commission. Given the precedence of the Constitutional Court, it may be argued that the Supreme Court would not have withheld such arguments in any case. See *Azonhito and Others v Public Prosecutor*, Cassation decision, 034/CJ-P; ILDC 1028 (BJ 2000), 29 September 2000. For the full judgement and analysis on the case, see H Adjolohoun 'Analysis of the case of *Azonhito and Others v Public Prosecutor*, Cassation decision, 034/CJ-P; ILDC 1028 (BJ 2000)' in *International Law in Domestic Courts* http://www.oxfordlawreports.com/subscriber_article?script=yes&id=/oril/Cases/law-ildc-1028bj00&recno=4&module=ildc&category=Benin (accessed 28 February 2012).

¹²⁹ Unlike the ICCPR, the African Charter, which is annexed to the Constitution of Benin, makes no reference to the death penalty thus not allowing the imposition of the sentence as an exception to the right to life.

¹³⁰ For instance in *Interights & Others (on behalf of Bosch) v Botswana* (2003) AHRLR 55 (ACHPR 2003), the African Commission took a contrary view to Benin's courts. One should note that none of the Constitutional and Supreme Court in Benin has used the jurisprudence of the African Commission in the numerous human rights cases they adjudicated.

¹³¹ Before it was vested with express powers to undertake constitutional review by the 2008 reform in France, the French Constitutional Council had consistently refrained from checking the constitutionality of domestic law with an international instrument. The landmark decision in this regard relates to the Veil Act and was rendered on 15 January 1975. Ordinary courts filled in the gap by undertaking such review starting with the criminal judge move in the *Jacques Vabre* case of 24 May 1975. The administrative judge subsequently asserted jurisdiction later in the *Nicolo* case decided on 20 October 1989.

¹³² DCC 12-153 of 4 August 2012.

Constitution as Benin had just ratified ICCPR's Second Optional Protocol on 5 July 2012. Although some have challenged its power to undertake such a review,¹³³ it is believed the Court is filling a gap until the on-going process to amend the 1990 Constitution to include the abolition of the death penalty is completed.¹³⁴

The contribution of the Constitutional Court to the improvement of police practices and judicial proceedings is also worth noting. For instance, the Court has made a purposive construction by borrowing from the work of United Nations treaty bodies in cases of cruel, inhuman and degrading treatments. In several instances, starting from DCC 98-065, the Court consistently held that in deciding whether violations have occurred, focus should be placed on intention, effects and duration of the treatment.¹³⁵ With regards to the constitutional obligation for courts to complete proceedings within a reasonable time, the Constitutional Court has, right from DCC 03-119, set the factors of reasonable time as depending on the 'circumstances of the case, complexity and multiplicity of procedures, the applicant's behaviour and the behaviour of jurisdictional authorities'.¹³⁶ In other instances, the Court found undue delay in processes where a 'flagrant case' lasted fourteen months;¹³⁷ no decision was reached in fourteen-year first instance proceedings,¹³⁸ or where criminal proceedings have been on for twenty years without an outcome.¹³⁹

Other important constitutional human rights to the development of which the Constitutional Court has greatly contributed are equality and non-discrimination. In DCC 96-067, while deciding a labour case, the Court defined equality as 'a general principle according to which the law must be the same for all and must not include any discrimination that is unjustified' thus concluding that 'persons of the same category must be treated alike with no discrimination'.¹⁴⁰ It was no surprise that when reviewing Benin's 2004 Family Code, the Constitutional Court held in the *Unconstitutionality of Polygamy* case that 'there is unequal treatment between men and women in that the option provided under article 143(2)

¹³³ I Salami 'La mort de la peine de mort au Bénin' Conference paper on file with author (October 2012). Also available at <http://www.lanouvelletribune.info/index.php/reflexions/opinion/12563-la-mort-de-la-peine-de-mort-au-benin> (accessed 23 October 2012).

¹³⁴ Decree No 2009-548 of 3 November 2009 of the President of the Republic transmitting the amendment bill to Parliament.

¹³⁵ DCC 98-065 of 5 August 1998, DCC 99-011 of 4 February 1999, DCC 03-088 of 28 May 2003, DCC 96-084 of 13 November 1996 and DCC 98-100 of 23 December 1998.

¹³⁶ DCC 03-119 of 28 August 2003 and DCC 03-167 of 11 November 2003.

¹³⁷ DCC 97-006 of 18 February 1997. According to the relevant provisions of the criminal code of procedure, a 'flagrant case' or those in which the offender is 'caught in the act' are dealt with under a more expedited procedure than other cases. See arts 19, 20, 27, 40, 48-75 of Benin's new Code of Criminal Procedure, Loi n° 2012-15 portant code de procédure pénale en République du Bénin, of 30 March 2012.

¹³⁸ DCC 97-011 of 6 March 1997.

¹³⁹ DCC 03-144 of 16 October 2003.

¹⁴⁰ DCC 96-067 of 21 October 1996.

of the Code, allows the man to embrace polygamy while the woman may only be monogamous'.¹⁴¹ In 2009, the Court took the same approach to discrimination as unjustified differentiation. In this case, the Court declared articles 333 to 336 of the Criminal Code unconstitutional for providing that the adultery of a man is constituted only when committed in the marital home while the adultery of a woman was constituted wherever it took place.¹⁴² The Court however allowed positive discrimination when it held in DCC 01-005 that 'the law-maker may derogate the principle of equality for persons with disabilities concerning public service regulations for reasons relating to public interest and the continuity of the public service ... provided that specific measures are undertaken to their benefit'.¹⁴³ In DCC 12-106, decided in 2012, the Constitutional Court confirmed its precedent on non-discrimination and found discriminatory the decision of the Ministry of Labour to reject the visually impaired complainant's application to the magistracy entrance exam. The Ministry had justified its decision by the fact that the positions were not accessible to candidates who use brail.¹⁴⁴

It transpires from the foregoing that Benin has opted in its Constitution of 1990 for a typical form of constitutionalism. While the 1990 Constitution provides for a strong guarantee of fundamental rights and power sharing mechanisms between the three traditional powers of state – the executive, legislature and judiciary – the peculiarity of Benin's constitutionalism lies in the distribution of power among these organs. In practice, the constitutional superiority of the executive, namely the President of the Republic, over the legislature and judiciary, has been used as a means of circumventing checks and balances institutions. As seen earlier, the Constitutional Court, the Union of Magistrates and opposition led majorities in Parliament have acted effectively as checks and balances bodies between the operation of the Constitution and 2006. However, the presidential coalition that took power in 2007 brought about an express will to legalise *presidentialism* through constitutional revision.

As opposed to real problems emerging from more than two decades of constitutional practice, the circumstances surrounding various attempts to revise the Constitution right from 2004 have triggered country-wide anti-revision movements based on the suspicion that revision will open a Pandora's box. Most feared amendments relate to provisions on the presidential term and age limits, but the 2009 Executive Amendment Bill has made it clear that the proposed erosion of legislative and judicial powers to reinforce the executive is also problematic.

¹⁴¹ DCC 02-144 of 23 December 2002.

¹⁴² DCC 09-081 of 30 July 2009.

¹⁴³ DCC 01-005 of 11 January 2001.

¹⁴⁴ DCC 12-106 of 3 May 2012.

6 Dilemmas of whether, when, what and how to revise

As mentioned earlier in the introduction to this chapter, the main concern of the Benin 1990 National Conference delegates was to provide the country with a Constitution that announces in no uncertain terms to the people and Government: 'Never again shall we live these 18 years of dictatorship and ban of freedoms'. This explains the fact that in response to the problems that objectively arose in the early years of Benin's new constitutionalism, as exemplified above by jurisprudence, all actors consistently rejected the proposed revision. The subsequent anti-revision movement born in 2004 has however not eroded the actual need to avoid breaching the contract by fear of not amending it. As discussed below, the debate has moved from whether and when to revise, to what and how to revise.

6.1 'Do not touch my Constitution': Opportunistic or progressive revision?

Whether the 1990 Constitution of Benin should be revised at all has first been an elitist debate that begun in 2003, or even earlier, and was restricted to political and intellectual circles. At that stage, only minor issues such as bringing the supreme law in line with regional community regulations were at stake. Even if the country's electoral system had already experienced deadlocks due to the vagueness of some provisions of the Constitution as mentioned earlier, the revision debate grew in momentum as the stakes grew higher.

The year 2004 witnessed two major events. Two senior members of Benin politics, presidents Nicéphore Soglo¹⁴⁵ and Mathieu Kérékou,¹⁴⁶ were due to retire for constitutional ineligibility as they had both either exhausted the two five-year terms allowed¹⁴⁷ or passed the 70-year age threshold.¹⁴⁸ According to the Constitution, both presidents were therefore out of the race for the 2006 presidential election.

Two years before the election, fierce battles opposed various dauphins of President Kérékou and many of his ministers increasingly agitated the revision of either term or age limits. A first attempt consisted in creating

¹⁴⁵ Who was prime minister of 1991 transition government led by Mathieu Kérékou and president between 1991-1996. He failed to secure a second five-year term in the 1996 election in which he lost to Mathieu Kérékou.

¹⁴⁶ Who was president between 1972-1991 and came back in 1996. He obtained a second and last term until 2006.

¹⁴⁷ Art 42 of the Constitution provides that no president can run for more than two five-year terms in all.

¹⁴⁸ Art 44.

fear among the people by using the slogan 'after and without Kérékou, there will be chaos'. One of the arguments presented the Northern leader as the only president who had the capacity to keep the country together and to effectively handle the North-South divide. Some proponents have gone as far as suggesting him as a 'God sent' or 'God elect'¹⁴⁹ and that not even constitutional term limits could prevent him from staying if he wished to. Kérékou's Minister for Energy's declaration that 'power proceeds from God and that Kérékou is God elect' was then rightly associated with the late Togolese president General Gnassingbé Eyadéma's statement that 'I have always asked God to remove me from power if I do wrong; and let me stay if he deems my governance right'.¹⁵⁰

While President Kérékou cautiously refrained from making his position known in public and left such indirect pro-revision propaganda to his ministers, he could not circumvent the March 2006 electoral *rendez-vous*. Faced with the country-wide 'Do Not Touch My Constitution' movement, Kérékou's revisionists changed tactics arguing that the executive lacked financial resources to organise the election and that in fact, presidential, legislative and communal elections should be merged for cost effectiveness. More clearly, the executive merely refused to avail funds for the Electoral Commission to ensure registration of voters and subsequent steps of the process.¹⁵¹

Two subsequent landmark civil society initiatives confirmed Benin as the 'laboratory of democracy in Africa',¹⁵² despite the huge controversy raised in the aftermath of the 2006 presidential election. In response to Kérékou's succession battle and revision propaganda, civil society coalition ELAN launched a country-wide campaign named *Touche Pas Ma Constitution* – Do Not Touch My Constitution. The main objective was to 'raise awareness among citizens about the lurking dangers of a constitutional revision before the 2006 presidential election considering the socio-economic context of the country'.¹⁵³ Although Kérékou's coalition renounced a direct term extending revision, the country is yet to

¹⁴⁹ P Noudjènoumè *Cours de philosophie du droit* INIREF (ed) (2004) and Les chroniques de TLF 'Il ne sait pas quitter les choses le Général, les choses vont mal le quitter' <http://chronique.blessnet.com/index.php?blog=9&p=104&more=1&c=1&tb=1&pb=1> (accessed 21 March 2012).

¹⁵⁰ As quoted from Noudjènoumè as above 3.

¹⁵¹ 'Le Président Kérékou manœuvre-t-il réellement pour repousser l'élection présidentielle de mars prochain?' Africa Time http://www.africatime.com/benin/sondage.asp?UrlRecherche=archiveasp%3Ffrech%3D1%26no_pays_sondage%3D1%26IsAfrique%3DFalse%26pageno%3D&no_sondage=369&result=1 (accessed 21 March 2012).

¹⁵² LMK Tshitenge 'Bénin : ébullition dans le laboratoire de la démocratie' in *Jeune Afrique* of 25 March 2010 <http://www.jeuneafrique.com/Articles/Dossier/ARTJAJA2567p038-041.xml0/pauvrete-democratie-independance-nicephore-soglobenin-ebullition-dans-le-laboratoire-de-la-democratie.html> and Slate Afrique 'Bénin, une démocratie qui marche' <http://www.slateafrique.com/215/benin-democratie-liberte-expression-electi> ons (accessed 21 March 2012).

¹⁵³ 'Campagne de sensibilisation: Touche Pas Ma Constitution' <http://fr.ongel.an.org/content/view/8/5/> ELAN (accessed 21 March 2012).

face an alternative play through which revisionists sought to use the economic argument to hijack the electoral process. The economic argument was not ill-founded¹⁵⁴ but pro-revision precedents of the Kérékou coalition left non-governmental actors suspicious.

The second initiative was launched with litigation in the Constitutional Court where two citizens asked the Court to declare the executive in violation of its duty to provide the *Commission Electorale Nationale Autonome* (CENA) with the necessary funds to organise the election. In DCC 05-139, relying on article 114 of the Constitution, the Court asserted its jurisdiction to regulate the smooth functioning of state organs and concluded that it had the duty to prevent a national crisis that would ensue from the paralysis of the proper operation of public institutions.¹⁵⁵ Finding the Executive in violation of the Constitution, the Court therefore ordered that it availed all necessary means to the CENA, in the 24-hours of the decision, for the election to be held before the end of the on-going term of the incumbent President.¹⁵⁶

As the executive refused to comply three weeks after the decision of the Constitutional Court, three citizens approached the Court seeking a non-compliance declaration and contempt order. In DCC 05-145,¹⁵⁷ the Court held that 'decisions of the Court are final and bind public powers, civilian, military and judicial authorities'. The Court thus found the executive in violation of that provision but also in non-compliance with the 'obligation for a public organ or official to discharge a public duty with consciousness, competence, devotion, and loyalty in the public interest' as prescribed by article 35 of the Constitution.

Once again, civil society's intervention supported by donors had been scheduled to save Benin's democracy. Along with litigation, civil society groups had organised a national trust fund calling on citizens to contribute cash to the budget of the CENA.¹⁵⁸ Benin is remembered for its motor-taxi drivers switching their motorcycles' light to substitute power-cuts allegedly organised by the incumbent political coalition to rig election in the darkness of voting stations. One should also recall that it is now a well-established practice for the same taxi men to escort electoral commission's cars as they transferred results to the headquarters of the CENA, to

¹⁵⁴ The CENA's budget had increased from US\$3,6 million in 1996 and US\$14,5 million in 2001, to US\$26 million in 2006 for presidential elections. For legislative elections the figures increased from US\$2,4 million in 1995 and US\$7,5 million in 1999, to US\$14 million in 2003.

¹⁵⁵ DCC 05-139 of 17 November 2005.

¹⁵⁶ While members of the Electoral Commission were sworn in on 25 September 2005, the CENA was yet to receive any funds from the executive on 17 November 2005. The last constitutional term of the incumbent President was due to end on 6 April 2006 at midnight.

¹⁵⁷ DCC 05-145 of 1 December 2005.

¹⁵⁸ Some calculations suggested that even a CFA 1000 (US\$2) contribution by each of the then 8 million Beninese would have provided more than what the Commission needed.

guarantee the integrity of the elections.¹⁵⁹ The peculiarity of civil society's recourse to public trust funds as a pressure mounting tool was to have increased costs of non-compliance by asking donors to directly provide for whatever material the *CENA* needed.¹⁶⁰

The fact that the executive eventually released the budget demonstrated that it had acted in bath faith all along. The election took place and led to a clean regime-change, massively voted by Beninese to put an end to president Kérékou's rule under the democratic dispensation. Boni Yayi was voted the third President of Benin, since 1991, with popular support to yield socio-economic development from two decades of civil and political stability. Unfortunately, events that followed seem to give no better assurance that the executive is committed to use its constitutional superiority to achieve the constitutionally intended purpose of strengthening Benin's constitutional model.

Public disappointment was perceptible as it became apparent that the President who was voted in by the 2006 election had sponsored an anti-revisionist civil society coalition. As a matter of fact, several members of the coalition were subsequently co-opted and joined the new presidential coalition as members of the Cabinet or other public bodies. In other words, their anti-revision movement was prompted by political motives while they claimed to be countering 'opportunistic' revisions. This led the public to become even more suspicious about any revision debate coming from either government or from non-governmental organisations. To start with, the new Boni Yayi presidential coalition dragged Parliament before the Constitutional Court for amending the Constitution to extend the term of Members of Parliament. In DCC 06-074, the Court declared the amendment unconstitutional for violating the 'national consensus' which presided over the adoption of the Constitution.¹⁶¹ The amendment was consequently annulled, thus moving the debate from whether and when to *how* and *what* should be amended.

The Constitutional Court's pronouncement against non-consensual amendments suggested a clear answer to how revision must be conducted and arguably left one question, namely what to revise. However, a number of elements suggest that the debate of both how and what is still open. In fact, all actors now agree on the need for revision. In 2002, the West African Economic and Monetary Union (UEMOA) directed member states to create a judicial body to control public finances, which Benin never did as it requires a constitutional amendment. As discussed earlier, another issue is one of the vagueness of the provision for two weeks

¹⁵⁹ 'BENIN/ELECTIONS: des conducteurs de taxi moto empêchés de marcher sur la CENA' *Benin News* <http://beninnews.centerblog.net/rub-actu-des-departements-du-benin-.html> (accessed 21 March 2012).

¹⁶⁰ G Badet *Benin, démocratie et participation à la vie politique: une évaluation de 20 ans de renouveau démocratique* AfriMAP & OSIWA (2010) 133.

¹⁶¹ DCC 06-074 of 8 July 2006.

between the first round and the run off of presidential elections. The question of 'residence at the time of the election' equally requires constitutional changes. However, these questions are relatively minor and do not demand profound changes or massive revision but only specific limited amendments. In fact, Parliament could deal with the issues through constitutional bills introduced by the executive. The on-going executive led revision yet reveals far wider amendments if not a new Constitution.

6.2 Stronger executive for socio-economic development? Dilemmas of a revision

Praised for its democratic model, Benin has not experienced a civil war or *coup* since it organised the first successful national conference in Sub-Saharan Africa in the post 1989 era. Since then, the country has never missed any of its presidential, parliamentary or communal elections. The country has therefore accumulated democracy and civil and political rights credits in sharp contrast to the persisting poverty of more than half of its population. As a response, the regime of 'change' led by 2006 elected president Boni Yayi, committed itself to yield economic development from Benin's democratic credentials. While such commitment is legitimate, one should question its implementation to ensure the sustainability of the very constitutional model on which it is supposed to capitalise.

The current amendment process is unfortunately all but open, clear and consensual. In 2008 the executive set up a *Commission Technique Ad-hoc de Relecture de la Constitution* whose membership included most renowned Beninese jurists, some of whom were drafters of the 1990 Constitution. The Commission had a mandate to 'read the Constitution in order to correct the imperfections that arose from two decades of practice'.¹⁶² To the satisfaction of other actors, the President made it clear from the very beginning that some provisions are excluded from the project. These legacies of the 1990 National Conference include 'the rule of law, liberal democracy, the Republic, integral multi-party system, presidential regime, presidential term and age limits'.¹⁶³ Moreover, the executive decided that 'whatever changes it will make to the report of the Commission and indifferently of whether the Parliament passes the bill, the President will promulgate the revision only after the people have approved it through a referendum'.¹⁶⁴ Several public statements by the President that none of the foundational principles of the 1990 Constitution will be changed succeeded in convincing all actors of the executive's good faith.

¹⁶² Presidential Decrees No 2008-525 of 18 February 2008 and No 2008-597 of 22 October 2008 setting up the Constitutional Commission.

¹⁶³ Paragraph 6 of the *Exposé des motifs*, Presidential Decree No 2009-548 of 3 November 2009, transmitting to the National Assembly a bill to the effect of revising the Constitution of the Republic of Benin.

¹⁶⁴ As above, para 8.

This was until the executive decided to table the bill before Parliament in 2009. To start with, there is apprehension as to why the executive should have the bill adopted by Parliament before conducting the 'wide national consultation' it refers to in the decree. Popular consultation generally precedes finalisation of the bill and parliamentary discussion.¹⁶⁵ Proceeding so allows a wide dissemination of proposed changes and participation of all sets of the society in the transformation of the Constitution they opted for. The executive-led process that was officially launched in 2009 suggests some malicious intent and in fact lacks transparency. First, the bill put to parliament in November 2009 substantially differs from the report of the Constitutional Commission. Second, the transmission of the bill was kept under wraps and the bill itself was never made public until Parliament scheduled its discussion on 19 March 2012. Civil society and scholars basically obtained the document through informal contacts in Parliament. Three days ahead of the parliamentary session, civil society coalition conducted a seminar on the outcomes of which included a recommendation that any discussion and adoption of the bill by Parliament is postponed for one year.

While civil society recommendations were mainly supported by the need to conduct wide consultation and abide by foundations of the National Conference, the Constitution and pronouncements of the Constitutional Court, more serious issues seem to dwell in the very changes sought by the Executive bill. Discrepancies between the executive's bill and the report of the Commission particularly attract interest.

6.2.1 Constitutionalising existing bodies

The bill includes provisions establishing the Mediator, Electoral Commission and Account Court. As indicated earlier, the Institution of the Ombudsman, the Electoral Commission and an Account Chamber within the Supreme Court already exist under specific legislation. Only the Account Chamber needs to be raised into a full court to comply with UEMOA directive, and this may well be done by having Parliament enact a law on the establishment and functioning of the tribunal. The proposed court will be entrusted with controlling financial orthodoxy of public bodies, companies and other institutions providing public service.

6.2.2 Constitutional Court's involvement in elections

The role of the Constitutional Court in presidential and legislative elections has attracted criticism as the Court was recently perceived to

¹⁶⁵ J Hatchard *et al* *Comparative constitutionalism and good governance in the Commonwealth* (2004) 13-43.

become ‘politicised’. In Benin, the Electoral Commission has no mandate to issue even provisional results as it must only compile the results and transmit them to the Constitutional Court. The Court therefore has the first and final word in the outcome of such important elections. In addition, the Court may decide not only on the basis of petitions from the candidates but also of its own accord, on the basis of evidence collected by its own observers. These appear to be too strong powers for one institution be it the Constitutional Court, members of which are appointed by the President. One would have expected a constitutional revision to re-balance powers by providing for a less disproportionate mechanism.

6.2.3 Time limit for Parliament to pass executive bills

As an independent state organ, Parliament has its internal rules and may function independently, although it should keep public interest and respect for the Constitution at heart. This should not however justify that time limits are provided in the Constitution to force Parliament to pass any bill introduced by the executive. The amendment bill proposes that Parliament must authorise ratification of loan agreements within two months of their transmission failing which such authorisation will be granted by the Constitutional Court. As illustrated earlier, crises arose in many instances where the President used its special powers or those of the Constitutional Court to circumvent opposition in Parliament. One example is the refusal of Parliament to authorise a loan agreement for coastal erosion projects. After the executive forced the authorisation through a decision of the Constitutional Court in 2009, the project was yet to be implemented in 2012 just for the issues raised by the Parliament to refuse authorisation. The same applies to the proposed two-week time limit for passing a state budget failing which the President of the Republic will pass the budget by ordinance. One may recall that the executive has on many occasions in the past reverted to special powers of the President to force controversial budgets rejected by unfavourable Parliament.

6.2.4 Using the Constitutional Court to erode the independence of the judiciary?

As indicated earlier, the Constitutional Court of Benin is not part of the judiciary which is headed by the Supreme Court and includes ordinary courts and tribunals. It is consequently surprising that the bill proposes that the Constitutional Court is given jurisdiction to review decisions made by ordinary courts. Even if the wording indicate that such decisions must be related to human rights issues, the executive has the prerogative to claim rights violations which it may well use to undermine the Judiciary. Here, the reader is reminded of President Boni Yayi’s decision to suspend the execution of court orders of expulsion which a previous bench of the Constitutional Court annulled. Over the past years, President Yayi’s presidential coalition has also faced challenges from the judiciary’s moves

to assert its independence. On 2 February 2012, the executive initiated a constitutional suit to limit the right of judges to go on strike.¹⁶⁶ President Yayi's Minister of Justice approached the Constitutional Court on the grounds that the right of judges to go on strike violates human rights, the right of detainees, and access to justice.¹⁶⁷ It remains to be seen how the Constitutional Court will balance executive demands, fundamental rights and the independence of the judiciary.

6.2.5 *Progressive amendments or wasted opportunities?*

Despite unequivocal regressive proposed amendments, the constitutional bill has the interest of resolving some of the key issues of concern to the people of Benin. The bill excludes the two-term limit from revision, and prohibits revisions from any actor that is not endorsed by popular consultation and referendum. The project abolishes the death penalty and makes economic crimes and crimes against humanity imprescriptible, criminal law being retroactive for such offences. Preventive detention is also limited to 18 months.

One controversial progressive change is however that of opening legislation to 'popular initiative'. According to the proposed amendment, 1,000 citizens from each of the 12 provinces of the country may put a bill to Parliament. The feasibility of this provision is questionable as more than half of Benin's population is illiterate and the project sounds like providing a pen to a person who has never been schooled. Another such 'disappointing progress' is the provision that human rights violations found by the Constitutional Court open up a right to reparation to be obtained in ordinary courts. This is no progress, as it restates the jurisprudential development of the Court since 2002 and any progressive amendment should have allowed the Court to deal with human rights cases fully.

In any case, this is not as disappointing as the missed opportunity to tackle a major challenge to the independence of the judiciary, namely the nomination and appointment of the highest court's judges. Benin's constitutionalism would have made a landmark innovation by including provisions for a fully independent *Conseil Supérieur de la Magistrature*, the composition and operation of which might always be challenged before the Constitutional Court. This would have freed the judiciary from the current

¹⁶⁶ Le Matinal 'Suite au dernier mouvement de débrayage dans le secteur judiciaire: Gbèdo pour une restriction du droit de grève des magistrats' in Sonangnon http://www.sonangnon.org/index.php?option=com_content&view=article&id=4148:suite-au-dernier-mouvement-de-debrayage-dans-le-secteur-judiciairegbedo-pour-une-restriction-du-droit-de-greve-des-magistrats&catid=1:actualite (accessed 22 March).

¹⁶⁷ M Zoumènou 'Gbèdo veut attiser un nouveau feu dans le secteur judiciaire' in *La Nouvelle Tribune* 22 March 2012 <http://www.lanouvelletribune.info/index.php/actualite/une/10428-gbedo-veut-attiser-un-nouveau-feu-dans-le-secteur-judiciaire> (accessed 22 March 2012).

patronage of both the President and Minister of Justice who are prominent sitting members of Benin's Judicial Service Commission. The innovation would have been reinforced by the nomination, appointment and election of Supreme and Constitutional courts judges and presidents by their peers under the scrutiny of the Judicial Commission and the check of the Constitutional Court. Such constitutional amendment would have definitely re-balanced separation and distribution of powers by tempering the current strong presidentialism and opened greater avenues for Benin's constitutionalism.

Despite controversial proposed amendments, the constitutional bill has the interest of resolving some of the key issues of concern to the people of Benin. The bill excludes the two-term limit from revision, and prohibits any revision that is not endorsed through popular consultation and referendum. The bill further abolishes the death penalty and makes economic crimes and crimes against humanity imprescriptible, criminal law being retroactive for such offences. Pre-trial detention is also limited to 18 months.

However, the overall analysis of the executive's bill reveals that it seeks to even more of the powers of both the Judiciary and the Legislature to reinforce the powers of the President of the Republic. Instead of balancing distribution of powers to moderate the current strong *presidentialism*, the bill envisages a 'presidential monarchy' or '*monocracy*'.¹⁶⁸ Faced with a country wide campaign led by academia, civil society, trade unions and political opposition groups against what they consider to be a secret and opportunistic revision of the Constitution, the President withdrew the bill in June 2012.¹⁶⁹

7 Conclusion

This chapter has discussed Benin's 'new constitutionalism' as spearheaded by its 1990 Constitution in light of its norms and subsequent practices. As discussed, the version adopted by Benin's National Conference included the three main requirements for constitutionalism, which are: separation of powers among an executive, a legislature and a judiciary; institutions and mechanisms that guarantee checks and balances and ensure that state organs control one another; and institutions and mechanisms that protect and guarantee individual rights from abuse and infringement by any state organ or other actor.

¹⁶⁸ J Djogbénou 'L'idée de réforme de la Constitution béninoise du 11 décembre 1990: entre progrès et regrets' in Fondation Konrad Adenauer *Projet de révision de la Constitution béninoise: portée et limites* (2010) 17-51.

¹⁶⁹ Koaci 'BENIN: Boni Yayi retire la révision de la Constitution du Parlement et rassure sur son départ en 2016' <http://koaci.com/articles-74730> (accessed 21 June 2012).

Even if the 1990 Benin version meets all these requirements, it has the peculiarity of providing for a political regime that allows for the constitutional superiority of the executive, namely the President, over the legislature and judiciary. In fact, while the letter and spirit of the Constitution seek to ensure a smooth functioning of the state through a slightly unbalanced distribution of powers, successive Presidents have used relevant provisions to circumvent other organs. Instead of fostering constitutionalism, led by foundational principles of the National Conference, the executive has progressively given life to *presidentialism* in which both counter-power institutions and individuals are deprived of prerogatives to the benefit of the President. After 22 years of such *de facto presidentialism*, the on-going constitutional revision led by the executive seeks to aim at legalising this presidential ascendancy to the detriment of watchdogs and human rights' organisations.

Although Benin's Constitution of 1990 has raised important issues in its 22 years of practice, this was never to the extent of paralysing the proper functioning of the state. The country has always found it in its essence to overcome major political and institutional crisis. I do not suggest that revision should never be considered but that regressive amendments should be prevented. Such amendments may weaken Benin's model instead of enriching and strengthening the country's democracy. The most dramatic situation would be a revision that erects the President as an absolute constitutional monarch with control over all state powers, organs and individuals rights. There would be no constitutionalism without individual freedoms and segregation of powers; and no segregation of powers may be achieved except with a clear delineation and balanced distribution of powers among state organs. It is indeed illusory to sacrifice foundational principles of constitutionalism and individual rights for socio-economic achievements that, in the context of the proposed revision, remain for now just projections and promises. There is at least an assurance as the history of Benin's democracy suggests that any attempt to erode the fundamental principles of the 1990 National Conference will be challenged by the people. This does not exclude vigilance from the citizenry, civil society and state organs.

The civil society movement is central to ensuring that the will of the people remains paramount at all times in the democratic conversation. Benin's civil society deserves a tribute for spearheading the new constitutional order through its significant contribution to the National Conference.¹⁷⁰ Hundreds of associations and non-governmental organisations were represented at the Conference challenging arrest warrants and other threats from the Marxist regime. After giving birth to an African Charter-oriented Constitution, these organisations also made catalytic use of the various constitutional mechanisms. They took the

¹⁷⁰ Dossou-Yovo (n 3 above) and Heilbrunn (n 13 above).

forefront position in human rights and constitutionality of laws litigation in the Constitutional Court. As discussed earlier, civil society coalitions also stood against opportunistic revisions of the Constitution and led nation-wide fund raising campaigns to substitute the state's unwillingness to organise elections.

However, in the recent years, two main challenges have faced Benin's civil society. First, the movement seems to experience a serious generation change failure. This problem is manifested through the individualistic feature of civil society leadership. Main figures of civil society organisations do not appear to emanate from the grassroots level of the movements but are rather the product of an elitist representation, which would well illustrate the concept of 'GONGO' which stands for 'government non-governmental organisations'.¹⁷¹ Second, the involvement of civil society leaders in political life for example their inclusion in the Cabinet has damaged the reputation of the movement. The most negative illustrations were given in the wake of the first term of President Boni Yayi whose Cabinet included no less than three ministers from the civil society coalition that campaigned against the amendment of the Constitution to ensure that the candidate did not compete against Benin's senior politicians. The consequences of this debacle of civil society's leading voices are not only the loss of popular confidence but also the confusion resulting about the possibility of a progressive revision of the Constitution. Just a few years after campaigning strongly against any revision, civil society leaders turned into proponents of such revision.¹⁷²

In the light of the above, it appears that the contribution of civil society to the sustainability of Benin's constitutionalism will depend on how much effective institutional reform the movement would undergo in the years to come.

¹⁷¹ A Yang & M Taylor 'Relationship-building by Chinese ENGOS' websites: Education, not activation' (2010) 36 *Public Relations Review* 342; and Taber 'Who defines what civil society is?' <http://ta3beer.blogspot.com/2008/03/who-defines-what-civil-society-is.html> (accessed 13 November 2012).

¹⁷² La Nouvelle Tribune 'Reckya Madougou à propos de la révision de la Constitution: "Pour le Chef de l'Etat, ce débat doit être national"' <http://www.lanouvelletribune.info/index.php/actualite/une/10510-pour-le-chef-de-letat-ce-debat-doit-etre-national> (accessed 13 November 2012).

CHAPTER 11

FROM MILITARY RULE AND NO PARTY STATE TO MULTI-PARTISM IN UGANDA

Christopher Mbazira

1 Introduction

Since gaining independence in 1962, Uganda has had a dramatic political history. Indeed, one can confidently assert that in terms of democracy and governance, the last 49 years of independence have largely gone to waste. The country has been characterised by all forms of bad governance practices and dictatorial rule. The aftermath of independence (1962-1971) gave birth to the practice of the militarisation of political power, while the period 1971 to 1979 introduced the military dictatorship of Idi Amin and took the militarisation of politics to new heights. The overthrow of Idi Amin laid the ground for the rigging of elections as an entrenched practice in the country. From 1986, when the National Resistance Movement (NRM) government came to power, until 2005, governance was characterised by 'no-party rule', a metaphorical form of one-party rule. The liberalisation of the political system by the legalisation of political parties in 2005 was received with high hopes that the country had finally found the compass to guide it to full democratisation after decades of turbulent high tides.

What is becoming evident though is the fact that the full liberalisation of politics in the country still has a long way to go. To summarise, there are many challenges that have to be overcome in order to make multi-party democracy fully operational. Some of the bottlenecks that have to be overcome in addition to the problems presented by the environment arise from institutional weaknesses facing all political parties. As a matter of fact, the country is now reaping the fruits of the many years of suffocation of political party activity. All parties, whether those as old as the Democratic Party (DP) and the Uganda Peoples Congress (UPC), as massive as the National Resistance Movement (NRM), or as young as the Forum for Democratic Change (FDC) lack proper internal institutional arrangements to enable them to effectively participate in the liberalised politics. The party primaries held in late 2010, which were marred by

irregularities across the board, are testimony to this fact. Additionally, the political will to move towards fully fledged multi-party politics is lacking, while the 'Movement' ideology dominates a number of public structures, including the security forces and local government structures. Political parties have also remained resource-constrained, which has undermined their political and organisational structures. Many parties lack the means to recruit or even establish local branches with effective management.

Based on the above background, the main objective of the chapter is to investigate the challenges that are hampering the effective implementation of multi-party democracy in Uganda. The challenges are investigated from a historical perspective by briefly exploring the history of multi-party politics in the country, while highlighting the hurdles which the system has historically faced. Since independence, the culture of freely and fairly competing for political power has eluded the country. This has occurred at a number of levels, extending from inter-party competition to individual internal party organisation and competition. Indeed, the country's political history is largely characterised by dictatorship and one-party leadership only punctuated with short periods of pseudo multi-party politics. The days of the movement system and its impact on multi-party democracy on the country is discussed, followed with a discussion of the hurdles parties are facing after the 2005 reversion to the multi-party system.

2 The history of political parties in Uganda

2.1 Pre-independent Uganda

Many scholars have investigated and discussed the political events characterising the struggles against colonial rule and leading to the country's independence. There is no need to belabour these events.¹ Nonetheless, some conclusions can be drawn from the history of pre-independent Uganda, more particularly the nature of political parties that the historical events produced. The first political parties were ideologically grounded and were formed to challenge colonial exploitation. These parties had grassroots support and touched on issues that were pertinent to the local populace, such as the price of agricultural produce and equity in the colonial economic system. One could say that political parties at this stage commanded popular mandate. However, the colonial move to suppress nationalism and voices of dissent shattered the growing grassroots party movements that had sprang up.² The effect was that

¹ M Mamdani *Politics and class formation in Uganda* (1999); M Lowenkopf 'Uganda: Prelude to independence' (1961-1962) 15 *Parliamentary Affairs* 74; S Karugire *Roots of instability in Uganda* (2003); GW Kanyeihamba *Constitutional and political history of Uganda: From 1894 to the present* (2002); G Asiimwe & W Nahamya *A historical analysis of produce marketing cooperatives in Uganda: Lessons for the future* (2006).

² As above.

political parties were isolated and disentangled from the grassroots. As a result, the parties became elitist. Byrd describes the candidates of the 1959 elections as having consisted of an elite group, which among others arose from a requirement that '[a]ll candidates had to pass examinations in the use of the English language, or possess qualifications which could not be obtained without a working knowledge of English'.³ With this, education became a political asset.⁴

Rather than focus on nation building, events at the eve of independence show that political parties became obsessed with capturing political power. This explains why UPC managed to grab political power through manoeuvres and 'unholy' alliances with factions with which it had competing ideological positions. Additionally, the pre-colonial history gave political parties a religious flavour, something which spilled over and reigned for some time after independence. To be a member/sympathiser of UPC also meant to be protestant, conversely to be member of the DP meant being not only catholic but also Muganda by tribe. The political elite were later to ride on these parochial but pertinent differences to attain their selfish political interests.

2.1.1 Political parties in independent Uganda (1962 – 1986)

The nature of multi-party politics in independent Uganda is not any different from the rest of independent Africa. As summarised by Joshua Rubogonya, post-colonial parties in Africa have traditionally been personalised, patriarchal, ethno-elitist, lacking in programmatic and ideological orientation, illiberal, clientalist and dependant patronage. Rubogonya adds that, not unlike the political systems of which they were a part, political parties exhibited strong tendencies of neo-patrimonialism.⁵ The situation in post-independent Uganda was summarised in the report of the Uganda Constitutional Commission as follows:⁶

Since independence, there have been numerous examples of manipulation of the various kinds of political systems that have operated. Under the multi-party system in the early 1960s, temporary and unprincipled alliances of convenience were formed and groups of party representatives 'crossed the floor' of the National Assembly, all in the interests of the dominant ruling party, after which alliances dissolved and an effective one-party system was imposed. Under military regimes, parties were done with allegedly because of their divisiveness, but national unity did not follow. The situation was further

³ O Byrd 'Characteristics of candidates for election in a country approaching independence: The case of Uganda' (1963) 7 *Midwest Journal of Political Science* 19.

⁴ As above.

⁵ J Rubogonya 'The "No-Party" System and the women's movement in Uganda: Preliminary observations,' Paper presented at the International Political Science Association (IPSA) conference, Fukuoka, Japan, July 2006.

⁶ Republic of Uganda *The report of the Uganda Constitutional Commission: Analysis and recommendations* (1992) 199 para 8.22.

manipulated by narrow military cliques which oppressed the population in the interests of enriching themselves and their supporters and keeping themselves in power.

The first years of independence were chaotic; as objectionable as this had been, colonial Uganda had been held together under a common British leadership. For a moment, communities ignored their ethnic and religious differences and combined forces to fight a common enemy, the colonial state. Now that independence had been obtained, the question was 'what next?'. In a country characterised by ethnic, regional and religious differences, the search for Ugandan leaders to hold the country together became a daunting task. This state of affairs shifted focus from political parties as the vehicles of finding leadership to competition for power between the different kingdoms and regions, artificially dubbed 'Federal States' by the Independence Constitution. It is in this context that UPC outmanoeuvred the other parties and captured political power. Unfortunately, however, UPC lacked any concrete ideological stitches to hold it together. It survived by political patronage extended to persons that would attract regional blocks. As strong as UPC appeared, it was internally a weak party held together in a fragile manner.

A number of internal wrangles divided UPC; a faction that had arisen to discredit the top leadership of the Party was growing stronger by the day. As a final blow, a plan was hatched to discredit the Prime Minister, Milton Obote, also leader of the Party. A motion was presented in Parliament linking the Prime Minister and some military personnel, including the Army Commander, Idi Amin, to illegal acquisition of ivory and gold from the Democratic Republic of Congo. Later, cabinet appointed a judicial commission of inquiry to investigate the allegations. However, it appears that Obote did not believe in the processes. To contain the situation and protect himself, Obote with the aid of the army abrogated the Independence Constitution and replaced it with the 1966 Constitution which culminated in the 1967 Republican Constitution. The new Constitution abolished the kingdoms and federal states; the country was to be a unitary state.

Although the 1967 Constitution retained the multi-party system of governance, in practice all other political parties were forced into oblivion by Obote's repressive regime. By 1969, Uganda had become a *de facto* and *de jure* one-party state. On 25 January 1971, Idi Amin Dada overthrew the UPC government. Parliament was immediately dissolved and the Constitution suspended. Assisted by a military council, Amin usurped all government powers. As a matter of fact, there is nothing to discuss about political parties during this period because they did not exist, either on paper or in name. Opposition politicians, real and perceived, were assassinated by Amin, many were forced into exile.

Although many thought that the overthrow of Amin would return democracy, this is a dream which was never attained. The year 1980, following the downfall of Amin, was the beginning of unstable governments,⁷ this year left an indelible impact on electoral democracy in the country. The multi-party elections organised that year turned out to be a mockery of electoral democracy. The campaigns were marred with massive irregularities; candidates belonging to political parties other than UPC were harassed in many cases beaten and even detained. UPC partisan electoral officials in some cases made it difficult for non-UPC candidates to register.⁸ The military, through the Paulo Muwanga led Military Commission, usurped powers from the Electoral Commission. When rumours circulated that UPC had lost, Paulo Muwanga pushed for the adoption of a law which prohibited electoral officials from announcing the results. It is believed that this gave the Military Commission chance to falsify the results in favour of UPC.⁹ It is this disputed election that Museveni was later to give as justification for taking up arms and later overthrowing the government.

3 The no-party movement state

In spite of the fact that the period of the NRM government has witnessed considerable political and economic stability, it has also been characterised by a two decade civil war in Northern Uganda and the stifling of political space. When the NRM took power in 1986 after a military *coup*, it established what it described as 'new democracy,' operating as a 'movement' or 'no-party system'.¹⁰ Legal Notice No 1 was adopted to regulate the activities of political parties. In a paradoxical manner, while the Legal Notice indicated that political parties had not been banned, it prohibited parties from doing things that parties ordinarily do. The parties were not supposed to be involved in activities such as the opening of local branches, convening delegates' conferences and political rallies, recruiting members and supporting individual candidates for political offices.¹¹ The argument advanced by the NRM was that the composition of political parties was sectarian, ethnically and religiously based and was in the past responsible for violent clashes among respective party supporters. It was also argued that in a backward country, where the majority are illiterate, poor and rural and where communication is lacking, people cannot

⁷ S Makara *Deepening democracy through multipartyism: The bumpy road to Uganda's 2011 elections* http://www.iese.ac.mz/lib/publication/proelit/Sabiti_Makara.pdf (accessed 11 March 2011).

⁸ Kanyeihamba (n 1 above) 200.

⁹ C Mbazira *Reform overdue: Making a case for electoral restructuring in Uganda* Human Rights & Peace Centre Working Paper No 26 (December 2009).

¹⁰ GM Carbone 'Political parties in a "no-party democracy": Hegemony and opposition under "movement democracy" in Uganda' (2003) 9 *Party Politics* 485.

¹¹ J Oloka-Onyango 'Uganda's "benevolent" dictatorship' (1997) *Current History* 213.

seriously be organised into political parties as is the case in Western countries.¹²

The Movement system also received support from some academic quarters. Writing in the 1998 *The Review*, a publication of the International Commission of Jurists, Professor George Kirya, justified the movement as a form of democracy answering to the very definition of the latter: 'government of the people, by the people and for the people'.¹³ Kirya argued that it was the movement system which was most suited for Uganda: '[a] country should ... be allowed to evolve a political system ... taking into consideration the historical background and experience, geography and cultural peculiarities in the country involved'.¹⁴ According to Kirya, Uganda's history was characterised with: sectarian politics; lack of democracy; lack of transparency; and a winner takes all attitude.¹⁵ In contrast, the movement system was a win-win system in which no single group won because there was a fluid coalition situation all the time.¹⁶

According to Carbone, the resort to no-party democracy was aimed at solving the problem of profound socio-cultural divisions: 'the country's political history had been largely shaped by changing power balances among its various ethnic groups'. This has produced '[t]he politics of exclusion – whereby dominance by one or more communities was, or was perceived to be, at the expense of Uganda's other communities ...'.¹⁷ The new politics of 'no-party rule' was purportedly based on the principle of 'participatory democracy' and promoted 'individual merit' as the basis of candidates contesting for political offices.

It is important to note that the Movement system was resisted from a number of circles. According to Mamdani, the system side-lined political parties, which 'turned into a ban on discussion of issues, thereby focusing the electoral process much more on personalities than ever before'.¹⁸ Ssenkumba argued that the NRM's approach of excluding participation in politics of political parties as organised groups had atomised the citizens, with the result that the factors that determine political developments were external to this process.¹⁹ Political success was for instance based on such factors as the personal qualities of a candidate and not on the policy positions they advocated. Additionally, the argument that parties were

¹² See J Ssenkumba 'The dilemmas of direct democracy: Neutralising opposition politics under the National Resistance Movement (NRM)' (1997) *East African Journal of Peace & Human Rights* 242.

¹³ G Kirya 'The "no party" or "movement": Democracy in Uganda' (1998) *The Review* 79.

¹⁴ Kirya (n 13 above) 81–82.

¹⁵ Kirya (n 13 above) 82.

¹⁶ Kirya (n 13 above) 84.

¹⁷ Carbone (n 10 above) 7–8.

¹⁸ M Mamdani 'The politics of democratic reform in contemporary Uganda' (1995) *East African Journal of Peace & Human Rights* 91–97.

¹⁹ Ssenkumba (n 12 above) 253.

responsible for all the atrocities that took place in the country became hard to verify as long as the parties continued to be muzzled by the government.²⁰

When the 1995 Constitution was adopted, although it guaranteed the right to form a political party,²¹ it in effect froze political parties in place. The relevant provision read as follows:

270. Regulation of political organisations

On the commencement of this Constitution and until Parliament makes laws regulating the activities of political organisations in accordance with article 73 of this Constitution, political activities may continue except –

- (a) opening and operating branch offices;
- (b) holding delegates' conferences;
- (c) holding public rallies;
- (d) sponsoring or offering a platform to or in any way campaigning for or against a candidate for any public elections;
- (e) carrying on any activities that may interfere with the movement political system for the time being in force.

In spite of this, the NRM continued to operate as a political party, fielding and supporting candidates, and preying on public resources to sustain party activities. According to Sabiti Makara, '[i]n other words, the legal framework under the NRM tended to undermine the work and growth of political parties. The NRM on its part used the suspension of activities of parties to entrench itself politically'.²²

Amidst considerable acrimony in 1997, Parliament adopted the Movement Act (now chapter 261, Laws of Uganda) to make provision for the movement political system. In what appears to be an entrenchment of a one-party state,²³ the Act created a number of movement structures which in effect co-opted several state bodies as part of the movement, right from the national to the local level. At the national level, for instance, all district chairpersons were to be part of the Movement National Executive Committee (NEC).²⁴ The chairpersons were also made part of the District movement committees, as were the chairpersons of city divisions, municipal councils, town councils and sub-county councils.²⁵ This was in addition to district councils. The structure trickled down, co-opting all administrative structures right up to the village level. Also co-opted were legislative councils such as the National Women's Council and the

²⁰ As above.

²¹ Article 72.

²² Makara (n 7 above) 2.

²³ Carbone has described the Movement Act as resembling a party statute which was adopted in a public forum, Parliament, rather than a private party forum.

²⁴ Section 9(2)(d).

²⁵ Section 15(2).

National Youth Council, in addition to such organisations as the National Organisation for Trade Unions and the National Union of Disabled Persons.²⁶

The Political Parties and Organisations Act which was enacted in 2002 was intended to make provision for regulating the financing and functioning of political parties and organisations, their registration, membership and organisation. Among other regulations, the Act required political parties to register with the Registrar General after meeting prescribed regulatory requirements, thereby re-enacting article 270 of the Constitution prohibiting political parties from doing things which one could say are the things that political parties ordinarily do. Hence, sections 18 and 19 of the Act – which enshrined the most severe restrictions – were contested in the Constitutional Court in the case of *Paul Kawanga Ssemwogerere & Others v Attorney-General*.²⁷ In the Petition, it was argued that sections 18 and 19 of the Act were unconstitutional in that they imposed unjustifiable restrictions on the activities of political parties and organisations, rendering them non-functional and inoperative contrary to articles 20, 29(1)(a) - (c) and (e), 2(a), 43(1) and (2)(c), 71, 73(2) and 286 of the Constitution.

It was also argued that the sections were unconstitutional in that they effectively (by implication) established a one party state of the Movement, which was contrary to article 75 of the Constitution. In what one could describe as an abbreviated judgment, the Court unanimously allowed the petition, holding as follows:

[W]e were satisfied on the evidence before us that the petitioners have discharged their burden and did establish a *prima facie* case. On the other hand, we found that the respondent did not prove that the restrictions or limitations imposed by those two sections were justified.

Although the Attorney-General appealed the judgment to the Supreme Court, the Appeal was later withdrawn in 2004.²⁸ This was because the political tide had changed in favour of the re-introduction of multi-party politics.

Another important case which challenged the Movement system was the case of *James Rwanyarare & Others v Attorney-General*.²⁹ In this case, the petitioners contested several provisions of the 2002 Political Parties and Organisations Act. One of the provisions which was contested was section 2 which defined the term 'political party' to mean a political organisation the objects of which include the sponsoring of, or offering a platform to,

²⁶ Section 4 of the Act.

²⁷ Constitutional Petition No 5 of 2002, [2004] UGCC 5 (16 November 2004).

²⁸ *Attorney-General v Paul Kawanga Ssemwogerere & Others* Constitutional Appeal No 3 of 2003 [2004] UGSC 21 (30 June 2004) (*Semwogerere* case).

²⁹ Constitutional Petition No 7 of 2002.

candidates for election to a political office and participation in the governance of Uganda at any level. The provision also defined the term 'political organisation' to mean any free association or organisation of persons the objects of which include the influencing of the political process or sponsoring a political agenda whether or not it also seeks to sponsor or offer a platform to a candidate for election to a political office or to participate in governance of Uganda at any level. One particular concern was a sub-section which excluded the 'Movement' from this definition. The provision was to the effect that the definition of political organisation did not include the Movement Political system and the organs under the Movement Political system. The Petitioners argued that the Movement by the nature of its make-up and organisation was not a system but a political organisation. The Court agreed, holding that there was overwhelming evidence to show that the Movement sponsored candidates for political offices; participated in the governance of Uganda at all levels; was no longer inclusive or non-partisan; had abandoned the principle of individual merit as a basis for election to political offices; and had a caucus in Parliament.

Over most of the period from 1996 (when the first Presidential Elections were held) until 2006, 'the Movement/NRM' concentrated on reducing and restraining the power of political parties and strengthening itself as the only viable political system for the country. I use the phrase 'the Movement/NRM' for two reasons: First, as indicated above, the Movement system was in reality entrenched as a single party, inseparable from NRM the party, although the latter continuously denied it was a political party.³⁰ All legislative provisions designed to proscribe political parties excluded the Movement, thereby shielding the NRM from the strict regulations which applied to everybody else, creating both a legal fiction that the NRM was 'outside' politics, while shackling all opposition to the regime. Second, to a certain extent the NRM party appeared not to exist. It remained an apparition only actualised in the Movement, the system, and its Chairperson, President Museveni.

Ultimately moves adopted by the Movement/NRM rather than strengthening the 'party' were actually designed to concentrate power in the person of Yoweri Kaguta Museveni and to thereby prolong his stay in power. Indeed, the sceptics were proved right when in 2004 debate was ignited around the lifting of presidential term limits, justified among others on the basis of the argument – which one author has described as 'insulting'³¹ – that there was no immediate alternative leader in the country.³² With regard to political management, Museveni became, and

³⁰ *Semwogerere* case (n 28 above).

³¹ B Tumasirwe 'Political succession in Uganda: Threats and opportunities' in CM Peter and F Kopsieker (eds) *Political succession in East Africa: In search for a limited leadership* (2006) 83 95.

³² As above.

continues to be, a micromanager in what has been described as highly personalised politics and extreme concentration of power.³³ In many cases, the President usurped, and continues to usurp, the powers of other government institutions; no important decision can be made without his consent. It has been argued that Museveni's overall aim has been to maintain a degree of general instability and to position himself as the only stable point of reference so that people are forced to turn to him for guidance.³⁴ This concentration of power in Museveni has dwarfed not only government institutions but also the NRM itself, with the result that as populous as the party appears, it lacks any institutionalised foundation. Consequently, President Museveni is the brain/engine and the embodiment of all organs/parts of the party. It is therefore not uncommon for party loyalists, or even from local branches, to by-pass all party 'organs' and to insist on seeing the chairperson to resolve what may sometimes be petty power struggles.

In the above context, no definition fits the NRM better than that which has been given by Carbone.³⁵

As with the Movement, the NRM-O remained a poorly organised party that was only favoured by the fact that the opposition at that time was even weaker. The internal primaries organised prior to the 2006 elections [and later 2010], for example, were reportedly a sham. Neither Museveni nor the party were able to fully discipline internal politics. During the course of its history, the Movement had never developed any degree of internal democracy. Many politicians, used to individual merit politics, were not ready to fit in with the requirements of an organisation. Several of them did not accept the outcome of the primaries and went on to run as independents ...

The party's interim leadership was only convened by the President about one year after the NRM-O had been launched, confirming the view that Museveni did not actually want the NRM-O 'to function as an institution'.³⁶

4 Confronting the irresistible winds of change

In 2003, the Movement/NRM removed its disguise, finally registering as a political organisation, the National Resistance Movement Organisation (NRM-O), in the first steps towards the return to a multiparty system of government. Ironically, until 2006, the statutory Movement Secretariat which was created by the Movement Act and funded from state coffers, continued to be used by the NRM-O as its secretariat. Some statutory movement officials stayed on and occupied similar positions in the NRM-

³³ Carbone (n 10 above) 85.

³⁴ As above.

³⁵ As above.

³⁶ Carbone (n 10 above) 104 (footnote omitted).

O. The example has been given of Ofwono Opondo, who doubled as the Director of Information at the Secretariat and as spokesperson of the NRM-O.³⁷

Before analysing the precise processes and events that facilitated the transition to multiparty democracy, it is important to understand the extent to which the global context contributed to this enterprise. The struggle for independence by African states carried with it a number of hopes, the ultimate of which being that the continent would provide a better life for its inhabitants after the departure of the colonialists. These expectations were however dashed. Rather than dismantling the inherited colonial political system, independent states often nurtured their colonial heritage. One-party political systems and the militarisation of politics soon emerged, as did the re-creation of the politics of tribalism, thereby building a state founded on patronage.

Rather than witness economic blossoming, the vast majority of independent African states witnessed retrogression in economic terms; poverty, disease, and ignorance soon become the indicators to describe an African state. Billions of dollars pumped into donor aid funding by western countries and international financial institutions fell on barren ground and instead created donor dependence. This was in addition to providing a resource base for the corrupt and the building of a system of political patronage. It is against this background that the international community realised that aid without good governance was unlikely to take Africa's economies far. This forced institutions such as the World Bank to change strategy by adopting the term 'good governance' in their strategies.³⁸ In this regard, the World Bank based this new approach on the conclusion that '[u]nderlying the litany of Africa's development problems is a crisis of good governance ... [b]ecause countervailing power has been lacking, state officials in many countries have served their own interest without fear of being called to account'.³⁹ One should not, however, forget the fact that the dictatorial post-independence governments had for a long time been supported and maintained by the same institutions that now sought to influence change towards greater democratisation.

Thus, the developments in the international arena marked the beginning of aid conditions that required governance reforms which included the adoption of constitutions that guaranteed civil and political liberties, and made provision for free, fair and regular elections based on the multiparty system. In spite of this, what appeared to be a display of double standards, Uganda was spared from the demand for multiparty

³⁷ Carbone (n 10 above) 103.

³⁸ S Adejumobi 'Africa and the challenges of democracy and good governance in the 21st century' (2000) <http://unpan1.un.org/intradoc/groups/public/documents/cafrad/unpan008483.pdf> (accessed 19 March 2011).

³⁹ As above.

democracy. The factors that forced the international community to deal with Uganda the way it did are various. From the mid-1980s up to the beginning of the 1990s, Uganda had made significant economic achievements under the NRM Government. The Government had also enthusiastically and unreservedly implemented the structural adjustment programmes (SAPs). One could argue that there was at the time nothing to suggest that reversion to a multiparty system would assure more stability than what already prevailed. This could explain why the international community tolerated the 1995 Constitution, even when it in effect outlawed multiparty democracy. At the same time, Museveni had successfully portrayed himself as an influential leader in the Eastern and Central African region, with whom the international community had to maintain an alliance, at all costs.

By the early 2000s, however, many things had changed. The country had held a number of tainted elections characterised by state-sponsored violence, militarisation, vote rigging and the overt intolerance for opposition voices. The emergence of a strong opposition leader – Dr Kizza Besigye – provided President Museveni with his first real challenge and pushed the leadership into defence gear with a heightened determination to retain political power at all costs. It soon became clear that rather than nurturing democracy, the movement system was itself becoming a flashpoint of future instability and could drag the country back into chaos. Criticism had also produced clear evidence showing that the movement was more of a one-party state than a democratic system.⁴⁰

From the perspective of the movement leadership, the ‘Movement’ had itself become a threat to the continued existence of the ‘Movement’. According to Sabiti Makara: ‘[s]trategically, the Movement officials and their supporters perceived the opening of political space as a strategic calculation that would give the NRM an advantage ... the calculation was that they would gain more legitimacy as champions of democratic initiatives’.⁴¹ From another perspective, the movement leadership argued that opening up was an opportunity to get rid of internal critics.⁴² More importantly, however, the process provided President Museveni with an opportunity to amend the Constitution by removing term limits and giving himself a life presidency. The debate to open up the political space and allow multi-party politics started at a meeting of the National Movement Conference held in March 2003 at the National Leadership School in Kyankwanzi. At the conference, President Museveni made six proposals, which include opening the political space and lifting the limitation on Presidential terms of office. In a manner that appeared to deflect international and internal pressures, the President argued that opening the space was justified as a way of getting rid of a clique in the NRM that

⁴⁰ Makara (n 7 above).

⁴¹ Makara (n 7 above) 4.

⁴² As above.

should be allowed to go so to avoid disorganising the NRM.⁴³ On the third term, in what he crafted as a response to talk of 'a third term', the President argued that the correct way of putting the issue was 'to talk of removing the limit of two consecutive five year presidential terms so that the question of who leads the country depends on the popular vote'.⁴⁴ In the weeks which followed, public debate on the matter was ignited, with NRM sycophants supporting the move as necessary to allow Museveni to complete his project of modernising Uganda.⁴⁵

These debates came on the heels of the 2001 appointment of the Commission of Inquiry (Constitutional Review) to review and make proposals for the amendment of the 1995 Constitution. The establishment of this Commission came after the 2001 much criticised Presidential and Parliamentary Elections. These elections were characterised by a number of irregularities and had exposed the Movement's operation as a party rather than a system. One of the terms of reference of the Commission, required the Commission to

examine the consistency and compatibility of the constitutional provisions relating to the sovereignty of the people, political systems, democracy and good governance and make recommendations as to how best to ensure that the country is governed in accordance with the will of the people at all times.⁴⁶

One of the most contentious issues in the inquiries conducted by the Commission with regard to the terms of reference above was the question of whether the movement system should be maintained or replaced with a multi-party system. A number of arguments were put forward to support the retention of the Movement system. In summation, it was asserted that the system had minimised divisive politics because it accommodated everyone and had brought about democracy through the individual merit system which guaranteed the free participation of all people regardless of political affiliation or leaning.⁴⁷

The other views in support of the system appeared to base themselves much more on the achievements of the NRM Government in economic and social terms, without establishing a direct *nexus* with the system.⁴⁸ The arguments in support of the multi-party system were various: the need to respect freedom of association; parties are necessary to establish a system of checks and balances; parties offer alternative policies which makes

⁴³ J Oloka-Onyango 'Dictatorship and presidential power in post Kyankwanzi Uganda: Out of the pot into the fire' Human Rights & Peace Centre, Democratic Governance Working Paper Series No 3 (2006) 2.

⁴⁴ Oloka-Onyango (n 43 above) 6.

⁴⁵ Tumasirwe (n 31 above) 95.

⁴⁶ *Report of the Commission of Inquiry (Constitutional Review): Findings and Recommendations* (December 2003) xxi.

⁴⁷ *Report of the Commission of Inquiry* (n 46 above) 4-26.

⁴⁸ As above.

effective electoral choices and competitive politics; there is nothing evil about political parties, the problem in the past has been with the leadership which has abused electoral processes; outlawing parties could result in tyrannical rule by one party; and political parties minimise instability and wars.⁴⁹

A number of observations were also made regarding the shortcomings of the movement system. The Commission observed that the movement lacked internal democracy and was moving more towards a monolithic system. According to the Commission, it was not clear how some top leadership positions were accessed and that many people believed that those positions had been purged of leaders who subscribed to multiparty politics.⁵⁰ The Commission also observed that contrary to the Movement principles, those people and groups who subscribed to different views and principles had not been accommodated and were branded the 'opposition'. In this regard the Commission observed that:⁵¹

[A]n open space for all political groups is universally accepted as a democratic form of participation. An open political space encourages people with similar goals and objectives to organise, sell their policies to the people so as to take power and implement those policies. Opening up provides opportunities for all organised groups. It promotes peaceful change in leadership and also changes methods of pursuing common good. Therefore a multiparty system gives full effect to the freedom of the people to associate for purposes beyond elections.

The Commission also enumerated the functions of political parties, which included offering the public alternative policies, principles and approaches to solving the problems of the country. This is in addition to uniting people of different ethnic, religious and other divides into organised groups that can promote national interests. The Commission concluded that political parties served the public, they were important tools of democracy and were also the breeding grounds of leadership and good governance.⁵²

The Government proposals were presented in the most irregular manner; although the Commission started work in February 2001, it was only in September, a few months before the report of the Commission was due that Government presented its proposals. Commenting on the timing of the Government proposals, the Commission observed that by this time it had officially concluded public hearings and oral presentation from the public to the effect that the Government proposals subjected to public responses. In what one would describe as pseudo rationality, the Commission reasoned that it was 'aware though, of the media debates

⁴⁹ *Report of the Commission of Inquiry* (n 46 above) 4-27.

⁵⁰ *Report of the Commission of Inquiry* (n 46 above) 4-29.

⁵¹ *Report of the Commission of Inquiry* (n 46 above) 4-30.

⁵² As above.

generated by some of the proposals'.⁵³ It later became clear that the purpose of the government proposals was to push the positions adopted at Kyankwanzi, especially on the lifting of the presidential term limits. I revert to this issue later in this paper.

Against the backdrop of the controversy generated by the Ssempebwa report, a referendum was held in July 2005, by which Ugandans agreed to revert to the multi-party system.⁵⁴ The referendum was however not without controversy. In the first place, many stakeholders, including the opposition, civil society and development partners thought that the referendum was unnecessary since both government and the opposition supported the reversion to a multi-party system. The opposition viewed the referendum as an opportunity for the incumbent to begin his 2006 election campaign for purposes of early bribing of voters. For this reason, the opposition mounted a boycott campaign with the effect that the turn out for the exercise was very low.⁵⁵ Only 47 per cent of the registered 8.5 million voters turned out.⁵⁶

In the referendum, the electorate was asked the following question: 'Do you agree to open up the political space to allow those who wish to join different organisations/parties to do so and compete for political power?' Following a more than 92 per cent 'yes' answer, the Constitution was amended by among others repealed article 270. Unfortunately, the amendment package came with the removal of presidential term limits, thereby giving Museveni the opportunity to rule for life.

On the issue of lifting the presidential term limits, the Constitutional Commission had recommended that the matter be determined by referendum. The portion of the report containing this proposal, however, appeared to support the amendment to remove the limits. Argument was made of the changing context; that unlike at the time of the Odoki Commission, this time with relative peace and the regular elections, public opinion indicated that the matter should be re-visited.⁵⁷ Government submitted a memorandum reflecting the views of cabinet on the matter in which among others it was argued that '[g]ood leaders should [not be] barred from serving the nation' and that two term limits provided for a weakened and shackled Presidency because focus shifts from policies and legislative programmes of the incumbent to the campaign.⁵⁸ Two members of the Commission, including the Chairperson disagreed and even wrote minority reports. In his Minority Report, Professor Frederick Ssempebwa

⁵³ *Report of the Commission of Inquiry* (n 46 above) xxv.

⁵⁴ The Referendum was held on 28 July 2005.

⁵⁵ CHR Michelsen Institute and Makerere University *Lessons from the referendum for the 2006 elections: The role of Parliament, courts, the political parties and the Electoral Commission* (October 2005) 4.

⁵⁶ CHR Michelsen Institute and Makerere University (n 55 above) 3.

⁵⁷ CHR Michelsen Institute and Makerere University (n 55 above) 7-94.

⁵⁸ CHR Michelsen Institute and Makerere University (n 55 above) 7-93.

argued that he did not see any reason for repealing article 105(2), the provision which limited the President to two five terms. He argued that:⁵⁹

The limit on terms of the President was adopted by the people because of concrete historical experiences. In an independent Uganda, the people have not witnessed any orderly succession from one President or regime to another. They had seen an elected leader use the power of incumbency to enhance his position and to prolong his tenure of office undemocratically.

Similarly, Commissioner Sam Oworu argued that he saw no convincing explanation of what was wrong with the untried term limit or why the constitutional provisions must be flouted.⁶⁰

4.1 Multi-party politics after the lifting of the ban

One would have expected the unleashing of political parties to mark the rebirth of democracy in the country. Unfortunately, this is not what has happened; the country is still hounded by a number of undemocratic practices, which are explicable by a number of factors. The over-riding cause for this development has been the lack of political will on the part of the ruling party to champion full democratisation. Other factors include: resource constraints on the part of opposition parties and institutional weakness that bedevil all political parties, including the ruling NRM. In the following sections of the chapter, I will examine a number of the factors which have affected the re-establishment of democratic rule in Uganda.

4.2 The lack of political will

As illustrated above, the reversion to multi-party rule was not informed by good will and a commitment to democratisation. The process in the main resulted from the irresistible winds of change described that were blowing both inside and outside Uganda. Oppression of the opposition continued, almost in the same manner as it had before the reforms. In 2006, the main opposition figure in the presidential elections (Kizza Besigye) was arrested on trumped-up charges, which almost lost him the nomination.⁶¹ Although Besigye was ultimately nominated as a presidential candidate, a lot of campaign time was wasted attending court proceedings. The lack of political will, among others, was also exhibited in the failure to adopt comprehensive legal reforms to operationalise the multi-party system at all levels.

⁵⁹ CHR Michelsen Institute and Makerere University (n 55 above) 262.

⁶⁰ CHR Michelsen Institute and Makerere University (n 55 above) 266.

⁶¹ See R Naluwairo 'The trials and tribulations of Rtd Col Dr Kizza Besigye and 22 Others: A critical evaluation of the role of the general court martial in the administration of justice in Uganda' Human Rights and Peace Centre Working Paper No 1 (October 2006).

One of the main shortcomings has been the failure to overhaul the Electoral Commission, which has remained partial in favour of the ruling party (at least in perception). As has been stressed elsewhere, full democracy cannot exist in the absence of an independent, impartial and effective electoral monitoring body.⁶² Unfortunately, Uganda's Electoral Commission has not fully lived up to these qualities. Although the Commission is always quick to assert its independence and impartiality, the legal framework by which it is constituted nurtures the perception that the Commission is not independent. Hence, all Commissioners are appointed by the President, although the appointees have to be vetted by Parliament. However, at the moment there is no distinction between Parliament and the ruling NRM Party Parliamentary caucus. In spite of demands from all quarters of society, the ruling party has refused to disband the Commission and in its place establish an institution which is representative of all shades of political opinion and compatible with a fully-operational multi-party system.

Another indicator of the absence of political will is the failure to fully dismantle the structures of the movement system that permeate political institutions at all levels. Evidence at the local government level, for instance, shows that the concept of a multi-party system has not yet been fully internalised in local governments. These governments still operate to a large extent as they did under the Movement system.⁶³ The ruling party has been quick to exploit these structures in some instances by including members of the structures within its party structures. The structures, especially LC 1 and 2 have been used by the NRM as the main conduits of political mobilisation and for channelling public resources for this purpose.⁶⁴ During the campaigns for the 2011 Presidential and Parliamentary elections, the government decided to pay local council 1 chairpersons salaries, in what appeared to be political bribery.⁶⁵ The party also co-opted the Resident District Commissioners (RDCs) and used them extensively as part of the party structures. The Constitution provides for an RDC appointed by the President for every district.⁶⁶ The main function of the RDC is to monitor the implementation of central and local government services and to chair the District Security Committee. Under the Movement Act, RDCs were defined as *ex officio* members of the Movement National Conference.⁶⁷ This is in addition to being *ex officio* members of the district movement committees.⁶⁸ Although the Movement system has been sent into oblivion, RDCs continue to enthusiastically hold themselves out as NRM supports instead of acting as non-partisan state

⁶² Mbazira (n 9 above) 3.

⁶³ As above.

⁶⁴ 'Uganda – What needs undoing?' *The Observer* 4 May 2011.

⁶⁵ 'Government to pay LC1 salaries' *The Monitor* 3 June 2010; 'Local councils receive first salary' *New Vision* 19 January 2011.

⁶⁶ Article 203.

⁶⁷ Movement Act, section 4(p).

⁶⁸ Section 15(2)(b).

bureaucrats; they hold themselves as cadres of the NRM and are usually at the fore-front of suppressing opposition voices, sometimes seeking the aid of the police. Many RDCs actively campaigned for the NRM in the recently concluded elections. Media reports for instance indicated that when the main opposition candidate was campaigning in Arua, the RDC of that region organised an NRM campaign rally at which cows were slaughtered for people to eat.⁶⁹ This act was designed to discourage people from attending the opposition rally in favour of the meat eating festival that was not intended for any celebration.

4.2.1 Resource constraints

One of the major factors affecting the performance of political parties is the lack of resources to run their political activities and administration. There is no doubt that political parties require resources in order to discharge their core activities. According to Van Biezen, political activity involves expenses which should be seen as the necessary and unavoidable costs of democracy. In order to function properly, political parties need to maintain their party organisations, to employ party personnel, to conduct election campaigns and to communicate with the electorate at large. All this requires adequate resources.⁷⁰

It is on the basis of the above that political party funding has become a matter of public concern. Research shows that political party funding is one of the major challenges to the health and quality of democracy in Uganda today.⁷¹ In 2010, Uganda joined the list of countries that provide public funding for political parties. The 2010 Political Parties and Organisations (Amendment) Act, amended the principal Act by introducing section 14A, entitled 'Use of Government or public resources for political party or organisation activities'. The new section 14A requires government to contribute public funds to the running of political parties.

Elsewhere, I have critiqued the new provision and pointed out a number of loopholes in the law.⁷² The first weakness arises from the fact that the new provision only caters for political parties that have representation in Parliament. This has in effect left out parties that may not be represented in Parliament and yet are strong at the grassroots. Secondly, the implementation of the provision is likely to be hampered by the lack of clarity on certain issues. The provisions do not for instance specify in clear terms the authority or the state structure which is responsible for managing and apportioning resources for the political parties. Is it Parliament, the

⁶⁹ 'Amin deserves credit – Besigye' *The Monitor* 31 January 2011.

⁷⁰ As above.

⁷¹ Ssenkumba (n 12 above).

⁷² C Mbazira & K Kisekka *Electoral reforms and political party participation at the local government level* Policy Review Report prepared for Makerere University Institute of Social Research (forthcoming).

Ministry of Finance, the Ministry of Justice or the Electoral Commission? Although in the past the Electoral Commission has been responsible for disbursing funds and other resources to presidential candidates after nominations, there are no detailed provisions on how the Commission manages such resources.⁷³

Additionally, the budget to implement the new provision has been demonstrably inadequate. Hence, only Shs500 Million (approximately US\$210,000) was approximated for financial year 2010/2011. This was in spite of the fact that 2011 was the year for presidential, parliamentary and local government elections. The lack of adequate funding on the part of opposition political parties has given the ruling NRM an unfair advantage. A few days to the date of the presidential and parliamentary elections, the NRM pushed through Parliament the approval of a supplementary budget of Shs600 billion (approximately US\$30 million),⁷⁴ a thing many people including the opposition viewed as a ploy to finance NRM election activities using public resources.⁷⁵ The high rate of inflation that ruled the economy of the country is among others attributed to the excessive and wasteful expenditure during the election campaigns.⁷⁶

One of the factors which have heightened the need for financial resources to run political activities is the increasing commercialisation of elections. This is manifest in the blatant buying of votes using cash and distributing essential household items such as sugar, soap and kerosene.⁷⁷ In its preliminary statements following the 18 February 2011 presidential and parliament elections, the EU Election Observation Mission observed that, '[t]he distribution of money and gifts by candidates, a practice inconsistent with democracy, was widely observed by EU EOM observers'.⁷⁸ Besides undermining democracy, this practice has made it very hard for opposition political parties with their meagre resources to maintain visibility on the political scene. Yet, at the same time, the inequitable access to public resources, including access to the state media has been grossly in favour of the ruling party.⁷⁹ This has made it hard for

⁷³ As above.

⁷⁴ 'MPS Pass Shs 600 Billion Additional Budget' *The New Vision* 4 January 2011.

⁷⁵ Democracy Monitoring Group *Report on Money in Politics: Pervasive Vote Buying in Uganda Elections* (January 2011)

⁷⁶ S Mayanja & H Abdullah 'Election funding: Uganda is broke, says Bbumba as tough times loom' *The East African* 14 February 2011.

⁷⁷ F Golooba-Mutebi 'Decentralization, democracy and development administration in Uganda, 1986-1996: Limits to popular participation' unpublished PhD Thesis, Development Studies, London School of Economics and Political Science, 1999.

⁷⁸ European Union Uganda 2011 Elections: Improvements Marred by Avoidable Failures <http://www.eueom.eu> (accessed 7 April 2011).

⁷⁹ In its Final Report, the European Union Election Observation Mission notes that during the election campaign, UBC Radio and UBC Television (the public broadcaster) remained subservient to the interests of the government and the ruling party. See European Union Election Observation Mission Uganda *Final Report: General Elections 18 February 2011* (March 2011) 26.

opposition parties to hoist themselves up as a countervailing and alternative power to the ruling party.⁸⁰

Expensive election campaigns also have the effect of forcing political parties to solicit large sums of money from sources which may on some occasions move to influence the party positions. This could undermine the credibility of the political party.⁸¹ In some cases the top leadership of a political party could also be the primary source of funding, sometimes from personal resources, which could result in the personalisation of the party, and thereby holding the party at ransom.

Expensive political processes make it hard for new actors to enter the political arena. This directly contributes to the entrenchment of incumbency arising from the unfair advantage which incumbents enjoy with regard to access to resources. In countries like Uganda where politics has largely remained the monopoly of the elite class, expensive political activities will work to deepen political marginalisation and the exclusion of the majority poor from political processes except as a clientele class to be used as a stepping stone.

There are a number of things that could be done to ameliorate the resource woes of political parties. In the first place, resources for political parties should be viewed beyond funding in monetary terms. There is a need to grant greater and more equitable access to all political parties to public resources such as the public media and all other public institutions that parties may require for building themselves. In the second place, public funding – in addition to being legitimatised as has already been done – should be increased to make it adequate. This is in addition to extending funding to parties that do not have national visibility but operate at the grassroots. This will help to entrench multi-party governance at all levels, including at the local government level. These measures should however be implemented simultaneously with regulatory measures that promote transparency in the management and utilisation of party resources. This is in addition to measures that require the disclosure of the sources of funding as is already to a certain extent reflected in the Political Parties and Organisations Act. Where necessary, parties should be allowed to seek funding through the solicitation of donations from public sources, and when required should be allowed to use public facilities including electronic telecommunications fund transfer for this purpose.

4.2.2 *Institutional weaknesses*

To effectively play their role in society, political parties, like other institutions in society, have to be built on an effective institutional

⁸⁰ Ssenkumba (n 12 above) 3.

⁸¹ As above.

foundation. This requires parties to establish efficient administrative structures and management systems for the purposes of effectively managing their affairs. Where necessary, technical expertise should be harnessed and put to effective use in a professional manner. Unfortunately, most times political parties commit efforts and resources to organising political campaigns and pay little attention to building their internal party structures.⁸² The National Democratic Institute for International Affairs has observed that new political parties are often so busy that they do not spend the time necessary to develop an efficient structure.⁸³ In many cases more established parties take the party structure for granted and do not realise the importance of reviewing the structure to adapt to emerging trends and priorities.⁸⁴ This could be viewed as a perfect description of the organisational status of political parties. Some parties only emerge during elections and disappear from the political scene as soon as polling is over only to re-appear at the next election.

One of the manifestations of the poor organisation and institutional management of political parties in Uganda has been the failure to build institutions for the management of disputes. The primaries leading up to the 2011 elections are a clear illustration of this fact. The primaries in a number of parties, including the ruling NRM, were marred with vote rigging, outright bribery and violence.⁸⁵ In many cases the primaries descended into chaos, forcing many persons who would have otherwise been party candidates to stand for elections as independents. Out of 1 270 candidates who contested the parliamentary elections, 529 contested as independents, and out of 367 persons who contested for district chairperson's seats, 150 contested as independents. This arose from the failure of parties, especially the NRM, to effectively resolve a number of complaints, in many cases legitimate, filed after the primaries. The NRM Electoral Commission was weak and poorly organised, and lacked the requisite resources to effectively manage the primaries all over the country. There was also a clear problem of bias and preference for candidates who were close to party headquarters over others either regarded as mavericks, or as hostile to the headquarters clique. Other parties could have had similar problems but the impact was not as prominent as it was for the populous NRM party.

To illustrate the extent of the poor performance of the NRM in the primaries, one case will be examined, namely the case of Theodore Ssekikubo, Member of Parliament for Lwemiyaga in Ssembabule District. At the centre of the drama in this constituency is the rivalry between Hon Sam Kuteesa, one of the most influential members of the NRM, and

⁸² National Democratic Institute for International Affairs (2004) 8.

⁸³ As above.

⁸⁴ As above.

⁸⁵ 'Violence during NRM primaries' *The New Vision* 11 September 2010; and 'NRM polls: Vote rigging tricks now revealed' *The Observer* 12 September 2010.

Theodore Ssekikubo, which is said to have began way back in 2001 when Sam Kutesa's cousin, Sam Rwakojo, lost in Parliamentary elections to Ssekikubo.⁸⁶ Since then, Kutesa and his supporters, on the one hand, and Ssekikubo and his supporters, on the other, have engaged in several verbal and physical battles. During the primaries, Ssekikubo was pitched against the Kutesa supported Patrick Nkalubo. When the results of a violent primary campaign and election were filed, Ssekikubo had lost to Nkalubo. Ssekikubo alleged that the election had been rigged by returning officers who altered the results. Ssekikubo warned that Museveni would pay heavily if he continued to ignore Kutesa's atrocities.⁸⁷ Ssekikubo is quoted as having said that '[t]he elections were rigged with impunity and everybody witnessed this. The party's electoral body should handle my petition immediately otherwise something might happen'.⁸⁸ In the weeks which followed, the NRM Electoral Commission was bombarded with hundreds of complaints. In the case of Ssekikubo, contradictory messages came from the Commission, initially showing that he had won,⁸⁹ but later being told that Nkalubo had won and after a few days Ssekikubo being declared the winner. It was clear from these events that Ssekikubo's threats were not taken lightly by the NRM leadership and it is not clear whether it was a recount which gave him the victory or the force of the threats.

Another manifestation of the weak institutional structures has been the failure of political parties to build principled and consistent ideological political positions. Of course this could be blamed on the fact that for a long time political suppression denied parties the chance to develop concrete ideological positions on issues of governance and statehood. Ideological bankruptcy on the political scene seems to transcend all parties. Indeed, many times party spokespersons have failed to project clear and consistent messages about their organisational positions on issues, and have on some occasions been disowned by the party leadership. Many a time, political campaigns have been characterised by cheap politicking and personal attacks on opponents instead of clear ideologically-defined messages based on long term political commitments. For the opposition, the concentration has mainly been on removing Museveni and the NRM from power. On its part, the NRM has spent most of its time admonishing the opposition and painting a scene of a violent Uganda and the return to insecurity without the NRM in power.

According to Oloka-Onyango, Uganda does not as a matter of reality have opposition political parties; rather there are only opposition personalities. Oloka-Onyango adds that these leaders 'have constructed around themselves weak or non-existing party structures that only come to

⁸⁶ 'Uganda: Kutesa, Ssekikubo divide Sembabule' *The New Vision* 18 December 2009.

⁸⁷ 'Museveni will pay for my loss' *The Observer* 8 September 2010.

⁸⁸ 'MP Ssekikubo Petitions NRM Electoral Body over Results' *The Monitor* 8 September 2010.

⁸⁹ 'Ssekikuo wants talks with Kutesa' *New Vision* 16 September 2011.

life in the run up to elections'.⁹⁰ Although written way back in 1996, John Ssenkumba's description of political parties is as valid today as it was then:⁹¹

Their support is not membership based that can hold the leadership accountable, but more an amalgam of followers that has little control or influence over leadership. Besides, there is hardly anything democratic about the internal organisations of these parties. These attributes make Uganda's existing political parties more an obstacle to democratisation than a vehicle for it.

Indeed, some political parties less than a year after the presidential and parliamentary elections disappeared from the political scene. This disappearance was epitomised by the disappearance from the scene of the personalities behind these parties. The disappearance from the public arena of for instance such personalities as Betty Kamya has also meant the disappearance of the Uganda Federal Alliance (UFA). The same could be said of the disappearance of the People's Development Party (PDP), epitomised in the disappearance of its most visible members, Abed Bwanika. So has been the disappearance of Jaberu Bidandi Ssali and his People's Progressive Party. These personalities and 'their' parties may re-appear in the run up to the 2016 elections.

In spite of the above, 2011 developments also show that with a little organisation, political parties still have a chance to influence political developments in the country. This is especially so if they among others speak with one voice and address issues that are close to the general populace in a more organised and systematic manner. The 2011/2012 'walk-to-work' protests are proof to this. All major opposition political parties came out to speak with one voice against the rising inflation and the costs of living. As a result, the parties were able to galvanise substantial public support on the matter within a short time. Nonetheless, the campaign was immediately over-shadowed by the politics of personalities with Kizza Besigye, then President of FDC, taking centre stage. Within a short time, the campaign turned into what one would call 'a Besigye thing', thereby dying down as soon as Besigye was neutralised.

5 Conclusion

Uganda's road to full democratisation remains a bumpy one. Although multi-party democracy has worked in many parts of the world, the system has not been provided the necessary space to flourish in Uganda. Dictatorial practices and the intolerance for opposition voices has continued to hound the country, which in many cases has been governed

⁹⁰ Oloka-Onyang'o (n 43 above).

⁹¹ Ssenkumba (n 12 above) 249.

under systems akin to one-party rule. In such an environment, political parties have not had the space to grow and flourish as powerful voices in the governance of the country. Hence, political parties have remained weak, disorganised and lacking in defined political ideologies. Parties have largely been built around individuals. This state of affairs is without any exception and extends to opposition political parties as well as to the ruling party. The political will to democratise the country is largely lacking, and the political elite have continued to prey on public resources in order to maintain their hold on political power. Indeed, if there is one thing where there is unanimous agreement across the divide, it is that politics is an arena for the amassing of wealth, as was demonstrated by the recent action of the new Members of Parliament in increasing their emoluments.

As events such as the 'walk-to-work' protests showed, political parties have a critical role to play in enhancing good governance in the country. What needs to be done is to create a favourable political environment to allow parties to flourish. It is important to help political parties overcome their internal weaknesses, which include resource constraints and ideological bankruptcy. A culture of free and fair competition for political power needs to be inculcated and political rights and civil liberties respected. Multi-party democracy should be allowed to function without hindrance and at all levels including local government. In order to do that, it is necessary for bureaucrats and government agencies to be sensitised not only on the role of multi-party politics but also on the fact that Uganda is now legally a multi-party democracy. It is also necessary for political parties to increase their coverage beyond the national level and to build structures at the local level. All this, however, is dependent on the good will of the ruling NRM to nurture and develop multi-party democracy by allowing political parties to flourish. All parties should among others be allowed equitable access to public and other resources.

1 Introduction

Since independence about fifty years ago, African states have laboured under the burden of European models of governance. Chafing under such unfamiliar frameworks, many of these countries have limped from crisis to crisis, unable to establish democratic legitimacy or to sustain a democratic culture. With six successful *coups d'état* and two abortive but bloody attempts, Nigeria leads the African continent in number and duration of military regimes. Africa's so-called 'new wave' of liberation in the 1990s indeed witnessed a variety of transformations towards genuine democratic governance; that period also witnessed a number of countries in which the emergence of democratisation cloaked, however lightly, the certainty of the maintenance of autocratic governance.¹ Furthermore, although a number of African countries, such as Nigeria, began the democratisation process, they would appear to succeed for a time, and then drastically relapsed to autocratic rule. What has been responsible for this spate of topsy-turvy democratisation in Africa? Are there lessons from recent failed constitutional experimentations in Nigeria that implicate the *problematique* of democratic governance elsewhere in Africa? This chapter does not pretend to answer all the questions surrounding Africa's myriad of challenges in establishing an enduring constitutional culture. Rather, it is to be seen as a modest effort in bringing to the fore some of the latent indicators of inherent difficulties in the constitutional democratisation processes midwived by the military institution in Africa's most populous

¹ CM Fombad 'Limits on the power to amend constitutions: Recent trends in Africa and their impact on constitutionalism' (2007) 6 *University of Botswana Law Journal* 27; A Durotoye 'Democratic transition in Africa since the 1990s' (2006) 13 *African Update* 1; EE Amadife 'Liberalisation and democratisation in Nigeria: The international and domestic challenge' (1999) 29 *Journal of Black Studies* 619; 'Democracy is losing ground in Africa' *Other News* 13 July 2008 <http://other-news.info/index.php?p=2552> (accessed 8 August 2012).

country and how these impact on the foundations of an enduring constitutional statehood in Africa.

Although many African countries have been able to make varying degrees of progress towards the actualisation of liberal democratic governance, much still needs to be done for the amelioration of the human condition. To a verifiable extent, the history of post-colonial Africa is characterised by instability, corruption and strife. Between the 1960s, when a preponderance of African states attained independence and the end of the first decade of the twenty-first century, over a hundred regimes in Africa have been toppled either through *coups d'état*, civil war or rebel invasion, about a dozen African heads of state have been assassinated, several heads of state have either been jailed or suddenly evicted from office, the African sub-region has witnessed more than two hundred regime transitions.² Within the same period and therefore, there have been numerous sporadic outbursts of civil strife, protest and demonstration, quite often challenging the legitimacy of the government of the day. A comprehensive diagnostic consideration of the roots of the series of instability and conflict need not delay us here, for scholarly volumes exist on the subject.³ However, one fundamental point should be restated at this juncture: At the bottom of Africa's seemingly intractable instability are the problematic contestations for power in relation to the perennial quest for the most appropriate constitutional framework for the control of the African state.

This chapter projects Africa's most populous country, Nigeria, as a basket case that provides gainful insights into the challenges that confront African countries in the quest for constitutional governance and democratisation.

2 Nigeria: A panoramic overview

Along with a wide array of mineral resources, including limestone, coal, tin, columbite, asbestos, iron ore, gold, silver, lead, zinc, and numerous other natural resources, the country also has natural gas deposits and is one of the leading producers of crude oil in the world.⁴ By current empirical data, Nigeria stands as Africa's most populous country with an estimated population of 160 million people. It has an annual growth rate of 2.3 per

² African Development Bank *African Development Report* (2001) 111; A Ninalowo *Democratic governance, regional integration and development in Africa* Development Policy Management Forum, Occasional Paper No 11 (April 2003) 8-9; O Okechukwa 'Lawyers in fragile democracies and the challenges of democratic consolidation: The Nigerian experience' (2008-2009) 77 *Fordham Law Review* 1295.

³ A Bujra *African conflicts: Their causes and their political and social environment* Development Policy Management Forum, Occasional Paper No 4 (2002); Ninalowo (above); JP Pham 'Legitimacy, justice, and the future of Africa' (2005) 5 *Human Rights & Human Welfare* 31; O Okechukwa 'The challenges of democratic consolidation in Africa' (2008-2009) 43 *New England Law Review* 165.

cent with the majority of the population between 15-64 years, while 43.6 per cent of its people are between 0-14 years of age; only 2.8 per cent of its population falls within the age of 65 years and above.⁵

In terms of anthropological diversity, there are some estimated 250 to 400 distinct ethnic/linguistic groups in Nigeria, with the following being the most populous and politically influential: the Hausa-Fulani in the north (29 per cent), the Yoruba in the West (21 per cent), and the Igbo in the East (18 per cent).⁶ To this factor must be added the dimension of religion: The northern region of Nigeria, predominantly inhabited by the Hausa-Fulani people is overwhelmingly Islamic. The Yoruba people of the South-West Nigeria are mixed between Islam and Christianity while the Igbos in the East are predominantly Christian. There are pockets of indigenous traditional worshippers among the various ethnic groups. While English is the official language, Nigerians also speak the language of their respective ethnic groups.

Because this chapter revolves around Nigeria's chequered political history, there is no way justice would be done to the theme here without considering a profile of the country's colonial history, no matter how brief.

In 1861, Great Britain annexed Lagos and subsequently moved inland to conquer all that is known as modern Nigeria under the leadership of Sir Frederick Lugard. Prior to 1900, this expansion occurred under the auspices of the Royal Niger Company, which initially wanted control of the lucrative Niger River trade route. When the British government formally took control in 1900, Nigeria was divided into two separate units – the northern and southern protectorates. This marked the onset of the incessant practice of dividing Nigeria into ethnic groupings laying the foundation for the existing federalist configuration in the polity. The Colony and Protectorate of Nigeria was formally established in 1914, comprising of the northern and southern regions. The British had administered the northern region through the 'indirect rule' system which they operated by the use of hegemonic Muslim emirs, and administered the southern region through the 'direct rule' system. By 1939, the country had been split into the groundnut-producing North; the cocoa-producing

⁴ EC Ejiogu 'The roots of political instability amongst indigenous nationalities and in the "Nigerian" supra-national state, 1884-1990: A longitudinal and comparative historical study' unpublished PhD dissertation, University of Maryland, 2004 81-88; PJ Kaiser *Comparative government and politics: Nigeria Briefing Paper* 2005 9-10; HT Ejibunu 'Nigeria's Niger delta crisis: Root causes of peacelessness' EPU Research Papers Issue (7 July 2007) 5-6.

⁵ United Nations Population Fund (UNFPA) *State of World Population 2010: From conflict and crisis to renewal: generations of change* (2010) 103; Population Reference Bureau *2010 World Population Data Sheet* 6.

⁶ JI Elaigwu 'Military rule and federalism in Nigeria' in JI Elaigwu & RA Akinjide (eds) *The foundations of Nigerian federalism 1960-1995*, Vol 3 (2001) 166; Kaiser (n 4 above) 8; IA Ayua & DCJ Dakas 'Federal Republic of Nigeria' <http://www.federalism.ch/files/categories/IntensivkursII/nigeriag1.pdf> (accessed 8 August 2012).

West; and the oil palm-producing East. By the end of the Second World War (WWII), these provinces had attained limited self-government with a central legislature elected by the regional legislatures.⁷

From 1945 until independence in 1960, four Constitutions were enacted for Nigeria, namely, the Sir Hugh Clifford Constitution, 1946; the Sir John Macpherson Constitution, 1951; and the Sir Oliver Lyttleton Constitution, 1954. The whole country attained full independence under a new constitution, the Independence Constitution, on 1 October 1960. After 1960, Nigerian governments designed five other constitutions, the Republican Constitution, 1963; the 1979 Constitution – which governed the truncated Second Republic; the 1989 Constitution – which introduced the ill-fated Third Republic; the 1995 draft Constitution – which never saw the light of day; and the 1999 Constitution, which is governing the current Fourth Republic.⁸

Like many other troubled African states, Nigeria has since its independence alternated between civilian and military rule. There have been three democratically elected governments and a series of eight military regimes. The military had ruled for a total of 28 years – 15 January 1966 to 30 September 1979 and 1 January 1984 to 29 May 1999 – in the country's 39 years of existence as an independent country, prior to the current democratic dispensation that started in 1999. This overview will therefore be incomplete without discussing the constitutional framework of governance as well as the democratic processes of the failed republics in Nigeria. However, to make this a holistic analysis, it will be apt to quickly examine the conceptual underpinnings of this discourse in the broader African context.

3 Governance, constitutionalism, and democratisation: Reflections on the African scenario

At the Fourth Annual Conference of the Africa Leadership Forum, held in Ota, Nigeria, in 1991, a cardinal consensus among the intelligentsia, diplomats and activists who participated was how to extricate the tripartite phenomena of constitutionalism, democracy and governance from the failures of the past constituted 'one of the most important and fascinating

⁷ Elaigwu (above); JI Elaigwu 'Federal Republic of Nigeria' http://www.forumfed.org/libdocs/Global_Dialogue/Book_2/BK2-C08-ng-Elaigwu-en.htm (accessed 08 August 2012); Ayua & Dakas (above); BO Nwabueze *A constitutional history of Nigeria* (1982) 153.

⁸ JS Omotola 'Democracy and constitutionalism in Nigeria under the Fourth Republic, 1999-2007' (2008) 2 *Africana* 1 7.

task[s] of our time.⁹ More than two decades after that sensible expression, the same challenge remains across emerging African democracies. The focus on the concepts here is neither abstract nor esoteric and serves more than mere aesthetic value. The conceptual analysis at this juncture speaks directly to the fulcrum of this chapter without which the entire chapter falls into irrelevance. By Olowu and Sako's definition, 'governance' refers to 'a system of values, policies and institutions by which a society manages its economic, political and social affairs through interaction within and among the state, civil society and private sector'.¹⁰ Placed in the context of the constitutional state, governance is about the use of power and authority and how a country manages its affairs. This can be interpreted at many different levels, from the state down to the local community or household. The governance analysis here considers all the mechanisms, processes, relationships and institutions through which citizens and groups articulate their interests and exercise their rights and obligations. It concerns the way that people mediate their differences, make decisions and enact policies that affect public life and economic and social development.¹¹ Governance therefore is about relationships between citizens and the state, relationships whose success or failure may reflect the legitimacy of the operators of state power.

One mechanism through which the state acquires legitimacy for its establishment of power or balance of competing interests is predicated on the tenets of legalisation or through legal/rational instrumentality; the form of legalised legitimation in the present context is that which is rooted in a democratically adopted grundnorm, otherwise referred to as a constitution. This type of legitimation-inducing method stipulates, in definite terms, the rights and privileges of diverse actors within the state and civil society. The tenet behind this type of legitimation is the notion of 'social contract'.¹² This is from the viewpoint that constitutional legalisation of moments of control defines in explicit terms the character of relationships, rights and obligations of the state to individuals and groups such as omnibus provision of safety and security to life and property, as well as other essential necessities of life. In the same vein, in return for the state's performance of its own part of the 'social contract', individuals, groupings or entities as well as other units of society are expected to discharge assured duties to society in general.¹³

⁹ Africa Leadership Forum 'Democracy and Governance in Africa: Conclusions and Papers Presented at a Conference of the Africa Leadership Forum', Ota, Nigeria, 29 November – 1 December 1991 <http://www.africaleadership.org/rc/democracy%20and%20governance.pdf> (accessed 8 August 2012).

¹⁰ D Olowu & S Sako (eds) *Better governance and public policy: Capacity building for democratic renewal in Africa* (2002) 37.

¹¹ World Bank *Sub-Saharan Africa: From crisis to sustainable development, 1989* (1989) 6; World Bank *Annual Report, 1997* (1997) 9. See also World Bank *World Development Report 1999/2000: Entering the twenty-first century* (2000) 3; DFID *Governance, development and democratic politics* (2007) 6.

¹² Ninalowo (n 2 above) 16; DFID above 40.

¹³ Ninalowo (n 2 above) 9-10.

Experience on the African continent has shown that the raising of a new flag does not always signal the launch of a democratic state. There remain vast portions of the African continent where prevailing realities are still a far cry from some of the key precepts of constitutional governance, socio-political legitimacy, the rule of law and popular empowerment. This generally suggests that African states have generally not lived up to the historical expectations of fulfilling their own ends of social contract, as between the state and civil society. Consequently, there are pervasive instances of legitimacy crisis and social conflict, due to non-attainment of vested interests and aspirations of the citizenry.¹⁴ Pervasive instances of corruption in public and private sectors of African societies exacerbate conditions of poverty, thereby reproducing the cycle of shabby governance.

What, then, is contemplated by our use of the term 'constitutional governance' here? In its simplest rendition, constitutional governance denotes a form of governance based on a prescribed division of powers among public officials. Its leading principle, by which it is often defined, is known as the rule of law, which signifies that no political authority is superior to the law itself. When and where the rule of law obtains, the rights of citizens are not dependent upon the will of rulers; rather, they are established by law and protected by independent courts.¹⁵ In theory and practice, therefore, constitutional governance and the democratic process are closely related. For example, constitutional checks and balances are often relied upon to repel threats to liberty by authoritarian politicians, even when they are supported by a majority of the people. Conversely, regular democratic elections and other manifestations of popular power neutralise the disconcerting tendency among public office-holders and their influential supporters to exercise power on an oligarchic basis, without having to answer to the public for their actions. Democracy and constitutional governance in our present discussion must thus be seen as mutually reinforcing notions. This is because even if we adopt the 'minimalist' approach to constitutionalism as propounded by De Smith in

¹⁴ G Hyden 'Rethinking the study of African politics' in D Olowu & K Soremekun (eds) *Governance and democratisation in West Africa* (1999) 11; YK Salami 'The political economy of Nigeria and the continuing agenda of recolonisation: A challenge for critical knowledge production' (2009) 3 *The Journal of Pan African Studies* 131; CK Daddieh 'Beyond governance and democratisation in Africa: Towards state building for sustainable human development' (2002) <http://www.kzoo.edu/africa/susfinal2.html> (accessed 8 August 2012).

¹⁵ R Hubbard 'Criteria of good governance' (2000) 30 *Optimum: The Journal of Public Management* 40; P Westerman 'Governing by goals: Governance as a legal style' (2007) 1 *Legisprudence: International Journal for the Study of Legislation* 51 71.

1964,¹⁶ African experiences have not fully matured into the basics of minimalist constitutionalism, meaning that the establishment of constitutional governance will remain problematic.

The task therefore lies in building a state in which governance rests on the foundation of both elite processes to maintain political settlements and societal efforts to hold those elites accountable from day-to-day. Such a state derives its strength from understanding the difference between citizen participation through the act of voting in regular elections and citizen agency that determines the extent to which any form of political settlement, and particularly a democratic dispensation, is sustainable. Certainly, building sustainable constitutional governance through the democratic process has been particularly challenging for Africa and Africans.¹⁷ It therefore becomes inevitable for us to conceptualise that any discourse on constitutionalism in Africa naturally engenders the inclusion of the concepts of governance and democratisation, in tandem.

Following an elaborate study on Africa in 1989, and after assessing the main impediments to development in Africa, the World Bank had posited that

[u]nderlying the litany of Africa's development is a crisis of governance. By governance is meant the exercise of political power to manage a nation's affairs ... [Appropriate economic policies must] go hand-in-hand with good governance – a public service that is efficient, a judicial system that is reliable and an administration that is accountable to the public.¹⁸

While one recognises that tremendous resources have been committed to the cause of tackling Africa's numerous governance and development challenges, the most pronounced governance challenges facing Africa largely remain more than two decades after the World Bank's assertion. What is responsible for this state of things? How should African discourses respond to these challenges? The African scenario places beyond all polemics that there is a definite and inevitable nexus among the concepts of governance, constitutionalism, and democratisation, howsoever defined or contemplated. Without squarely placing all these concepts on

¹⁶ SA de Smith *The new Commonwealth and its constitutions* (1964) 106, contending that: 'governmental power shall be bounded by rules, rules prescribing the procedure according to which legislative and executive acts are to be performed and delimiting their permissible content – Constitutionalism becomes a living reality to the extent that these rules curb the arbitrariness of discretion and are in fact observed by the wielders of political power, and to the extent that within the forbidden zones upon which authority may not trespass there is significant room for the enjoyment of individual liberty'.

See IG Shivji 'State and constitutionalism: a new democratic perspective' in IG Shivji (ed) *State and constitutionalism* (1991) 28.

¹⁷ J Hatchard *et al* *Comparative constitutionalism and good governance in the Commonwealth: An Eastern and Southern African perspective* (2004) 9; S Adelman 'Constitutionalism, pluralism and democracy in Africa' (1998) 42 *Journal of Legal Pluralism* 73 74 81.

¹⁸ World Bank *Sub-Saharan Africa: From crisis to sustainable growth, a long term perspective study* (1989) 60.

the African agenda and approaches, concurrently, achieving the ends of human, national and sustainable development may turn out to be a chimera.¹⁹

An unmistakable indicator that makes the praxis of governance, constitutionalism, and democratisation particularly problematic for Africa is that the normative/institutional frameworks for their realisation are often misconceived, poorly applied or impracticable in much of Africa's political processes. While multi-party elections are becoming commonplace across Africa, the African contraption of democracy often assumes that states with prolonged histories of authoritarian and repressive regimes can simply transform into liberal democracies by fiat. Empirical studies of national elections in Africa repeatedly show that in the majority of transiting countries, there were neither changes in leadership nor in the regimes at all.²⁰ The fall-out of these findings is that more needs to be done in proffering the electoral processes that characterise formal democratisation as guarantees for the emergence of a constitutional state in Africa. This is the juncture where the Nigerian narrative makes its entry point in our discourse.

4 Nigeria's evolutionary processes in constitutional governance and democratisation: The military dimension

Nigeria's stride to its present phase of what can be termed constitutional statehood has been quite arduous. The First Republic that emerged in 1960 mirrored the unitary and highly centralised mentality of governance from the United Kingdom, despite the formal division of the country into several regions and notwithstanding the fact that some large parts of the country had been under indirect rule. This centralist idea is reflected in the fact that the democratic experimentation lasted for less than six years: from 1 October 1960 to 15 January 1966. Following the British governance model, the First Republic had the House of Representatives, which was

¹⁹ D Olowu 'Human development challenges in Africa: A rights-based approach' (2004) 5 *San Diego International Law Journal* 179-208; JS Omotola 'Democratisation, good governance and development in Africa: The Nigerian experience' (2007) 9 *Journal of Sustainable Development in Africa* 247-255-256.

²⁰ D Abubakar 'Ethnic identity, democratisation, and the future of the African state: Lessons from Nigeria' (2001) 29 *African Issues* 31; Olowu & Sako (n 10 above); D Bekoe 'Trends in electoral violence in Sub-Saharan Africa' Peace Brief No 13, 10 March 2010 (US Institute of Peace, 2010); S Coulibaly 'The strange trajectory of the democratisation process in Africa' <http://www.civicus.org/media/Democracy-in-Africa.pdf> (accessed 8 August 2012); SI Lindberg *Democracy and elections in Africa* (2006) 10-130; 'Africa's year of elections: The democracy bug is catching on' *The Economist* 22 July 2010 <http://www.economist.com/node/16640325> (accessed 8 August 2012); A Cyllah 'Democracy and elections in Africa: Recent trends and the role of the international community' 24 March 2010 <http://www.economist.com/node/16640325> (accessed 8 August 2012).

popularly elected through single-member constituencies. Similarly, the Nigerian House of Representatives elected the Prime Minister and cabinet from among its members. There was also the Senate which was fashioned after the British House of Lords. It was quite unfortunate that rather than correct the 'mistake' of the amalgamation of 1914, the Independence Constitution, 1960, and the Republican Constitution, 1963, pursued the agenda of keeping naturally distinct and vast ethno-linguistic groups under one superficial national umbrella. This was perhaps the beginning of all the turmoil that was to later engulf and threaten the existence of the Nigerian state.

That troubled democratic period was marked by political turbulence inspired by mutual suspicions of domination by other ethnic groups, snowballing into competitive politics along ethnic lines and geo-linguistic sentiments, eventually degenerating into near anarchy which eventually resulted in two consecutive *coup d'états* in 1966 and, ultimately a bloody 30-month civil war from July 1967 to January 1970. The details of this dark era in Nigeria's evolution as a nation-state have been the subject of volumes of treatises and it will serve no purpose revisiting them.²¹ It suffices to mention, however, that Nigeria has alternated between civilian and military governments several times since independence. In the past, the military intervened when the country found itself at the precipice, and if there was a successful military coup, until the country appeared set to handle a civilian government again. The most recent change was in 1999 when Nigeria embraced the democratic process, once more, and Obasanjo, a former military head of state (1976-1979), was elected to the presidency.²²

It is worth mentioning that because of the perceived weaknesses in the federalist arrangement under the 1960 and 1963 Constitutions, 'the regions were so large and powerful as to consider themselves self-sufficient and almost entirely independent [and the] Federal Government which ought to give lead to the whole country was relegated to the background',²³ the emphasis of successive Nigerian governments, since 1970 and through 1999, had become how to fortify the central government in order to avoid the aggressive threats of the component units of the Nigerian federation under the First Republic.²⁴ The era of powerful regions (component units

²¹ Ayua & Dakas (n 6 above); Elaigwu 'Federal Republic of Nigeria' (n 7 above); JD Fearon & DD Laitin *Nigeria: Random narrative on civil war onset* (2006); R Uwechue *Reflections on the Nigerian Civil War: Facing the future* (2006).

²² For scholarly insights into Nigeria's elections and their role in country's evolution, see O Oyediran *Nigerian government and politics under military rule, 1966-79* (1979); D Kew 'Nigerian elections and the neopatrimonial paradox: In search of the social contract' (2010) 28 *Journal of Contemporary African Studies* 499.

²³ General Yakubu Gowon's Broadcast to the Nation 26 May 1968, in Federal Republic of Nigeria *Faith in Unity* (1970) 108; Elaigwu 'Federal Republic of Nigeria' (n 7 above).

²⁴ NA Inegbedion & E Omoregie 'Federalism in Nigeria: A re-appraisal' (2006) 4 *Journal of Commonwealth Law & Legal Education* 69; Ayua & Dakas (n 6 above); JB Adekunso *Nigeria in search of a stable civil-military system* (1981) 10-11.

of the federation), later carved into states, was over – a subtle way of describing the end of true federalism in Nigeria. Such has been the prolific ascendancy of the central government in Nigeria that today state governors converge at the Aso Rock Presidential Villa at the shortest notice of invitation by a sitting President. It will not amount to exaggeration to assert that much of the current discussions on federalism in Nigeria are essentially about efforts to grapple with, and prevail over, the manifold devastating legacies of military rule.

Is it however only in terms of the federal arrangement that Nigeria's constitutional developments have reflected drastic change? By no means. The first fall-out of the geometric superiority of the central government in a three-tier federal arrangement is the tilting of greater allocation of powers and responsibilities to the government at the centre, to the detriment of the state and local government units of the federation. Whereas successive Nigerian federal constitutions created the exclusive list of powers – on which only the central government can legislate; the concurrent list of powers – on which both the central and state governments can legislate; and the residual list of powers – on which only the state government can legislate, the exclusive list has had its scope of powers elongated from time to time such that under the present dispensation, all that makes a modern state what it is, is vested in the Federal Government of Nigeria.²⁵

Similarly, although Nigeria's political economy, immediately after independence and until the collapse of the First Republic, had been orientated towards agro-allied performances and measurements, this orientation gave way with the oil boom of the early 1970s such that the cash crops that had been the drivers of the Nigerian economy vanished only to be replaced by the rat-race for crude oil earnings, with all the attendant consequences of petro-politics.²⁶ With the oil boom emerged a monolithic national economic culture tied almost exclusively to the oil market, eventually giving birth to the emergence of a neo-colonial economy controlled by a new class of opportunistic bourgeoisie and cronies of entrenched rulers. In the absence of well-reasoned state policy on how to harness the economic buoyancy of the oil boom era towards industrialisation and massive infrastructural development, the result of the new-found oil wealth was the elevation of rampant corruption, prebendalism and despoliation of national prosperity. The Nigerian economy was to later descend into the abyss of despair as the central government had no option than to seek the fiscal interventions of the

²⁵ The Exclusive Legislative List, Second Schedule, Part 1, Item 68, of the 1999 Constitution. See Inegbedion & Omoregie (n 24 above) 74.

²⁶ A Amuwo 'Between elite protectionism and popular resistance: The political economy of Nigeria's fractured state since juridical independence' (2010) 28 *Journal of Contemporary African Studies* 423.

World Bank and the International Monetary Fund, with all their anti-people, anti-welfare conditionalities.²⁷ With corruption diverting public resources into private coffers and clientelism ensuring that only the powerful and connected can flaunt wealth to secure personal recognition and political mileage, the entrenchment of the patrimonial state had become a foregone conclusion, and massive poverty levels became widespread and the direct victims of this order were ordinary Nigerians.²⁸

Renowned Nigerian political economist, Adekunle Amuwo, recently summed it up this way:²⁹

The Nigerian state was sucked into the vortex of unequal relations and false partnership with former colonial (and other Western) powers at the expense of a genuine social compact with the Nigerian people. Two, as an archetypal neo-colony, Nigeria has appeared trapped since independence between two social logics: the imperative of popular democratisation and people-friendly and genuine development on the one hand, and the stranglehold of structural imperialism and neo-colonialism, on the other. Fifty years on, the latter logic remains ascendant.

How did this scheme of things come to appear on Nigeria's developmental horizon? Beyond any doubt, the singular and most pronounced inspiration for both the centralised federation that Nigeria has become and its stunted growth as a constitutional state was its military institution. Although Nigeria's constitutional landscape is dotted with numerous changes and landmarks, the unmistakable reality is that the most notable changes, for whatever they were worth, have been effected largely through extra-constitutional means. Apart from the creation of the Mid-West Region by the troubled democratic government of the First Republic, no civilian government has been able to create a state or even a local government in Nigeria despite all popular agitations for such. The four regions were carved into twelve states in 1967 under Gowon's military rule; these became nineteen states under Murtala/Obasanjo military regime in 1976; and further broke into twenty-one under Babangida's rule in 1991; and finally to the present 36 under Abacha military administration in 1996. It

²⁷ Abubakar (n 20 above) 33-34; E Obadare & W Adebaniwi 'Transnational resource flow and the paradoxes of belonging: Redirecting the debate on transnationalism, remittances, state and citizenship in Africa' (2009) 36 *Review of African Political Economy* 499.

²⁸ P Lewis 'From prebendalism to predation: The political economy of decline in Nigeria' (1996) 34 *The Journal of Modern African Studies* 79; S Musa 'The Nigerian political economy in transition' Friedrich-Ebert-Stiftung, February 2006 <http://library.fes.de/pdf-files/iez/03522.pdf> (accessed 08 August 2012); UB Ikpe 'Patrimonialism and military regimes in Nigeria' (2000) 5 *African Journal of Political Science* 146.

²⁹ Amuwo (n 26 above) 429.

was also under the latter that the number of local governments in the country rose from 300 in 1976 to 774 by 1996.³⁰

What's more, all the Nigerian constitutions since 1979 under which elected regimes were supposed to operate were neither the creation of Nigerians nor of democratic institutions and none of the landmark legal rearrangements were carried out by the sovereign people of Nigeria, rather, they were the products of military fiat expressed through several decrees.³¹ One such decree was the Land Use Decree No 6 promulgated in 1978 by the Obasanjo government that vests all land in the country in the government in 'trust' for the people. This decree has been retained in all subsequent Nigerian constitutions despite all objections.³² While the various military regimes conducted various public opinion-seeking ventures like constitutional conferences, constituent assemblies, political bureaus, and debates, all these were essentially smoke-screens as the military regimes would sooner promulgate decrees that often run contrary to popular aspirations.³³

The threats and adverse impacts of the over-centralisation of the Nigerian state structure, championed by the military since the 1970s, cannot be ignored. With the central government being made the *de facto* and *de jure* custodian of the wealth, fortunes, resources and liabilities of the entire country, what the military institution wanted to avoid by over-centralising governance in a strong federal government, namely, the threat of secessionist tendencies, is exactly what the multifaceted Nigerian state has been contending with since the advent of the Fourth Republic in 1999.³⁴

Now that the control and distribution of federation account funds is vested in the central government which handles disbursements to other tiers of the government, the heavy reliance on remittances from the centre has largely turned states and local governments as well as their political

³⁰ S Adejumo & A Momoh (eds) *The Nigerian military and the crisis of democratic transition: A study in the monopoly of power* (1999); DO Adeyemo 'Local government autonomy in Nigeria: A historical perspective' (2005) 10 *Journal of Social Sciences* 77; U Ukiwo 'Creation of local government areas and ethnic conflicts in Nigeria: The case of Warri, Delta State' (2006) <http://www.crise.ox.ac.uk/copy/decentralization%20conference/ukiwo.pdf> (accessed 8 August 2012).

³¹ Elaigwu 'Federal Republic of Nigeria' (n 7 above); EE Osaghae 'The limits of charismatic authority and the challenges of leadership in Nigeria (2010) 28 *Journal of Contemporary African Studies* 407.

³² Elaigwu (n 31 above). See 1979 Constitution of the Federal Republic of Nigeria, s 274 & 1999 Constitution of the Federal Republic of Nigeria, s 315.

³³ S Adejumo 'The structural adjustment programme and democratic transition in Africa' (1996) 29 *Law and Politics in Africa, Asia and Latin America* 433; Ikpe (n 28 above); Amadi (n 1 above) 626-627.

³⁴ D Olowu 'From defiance to engagement: An evaluation of Shell's approach to conflict resolution in the Niger-Delta' (2010) 10 *African Journal on Conflict Resolution* 75.

and career administrators into consumers of revenues rather than promoters of income generation.³⁵

Since survival/security is the first law of the state, as far as the Nigerian military was concerned, it took no time for the government at the centre to assume powers over police and state security such as were never known prior to 1966. Whereas policing had hitherto been a matter within the competencies of the respective federating units in colonial and immediately after the colonial period, the centralisation obsession of the Nigerian military has transformed the Nigeria Police Force (NPF) into one effectively and totally controlled by the federal government.³⁶ Against the background of severe under-funding, lack of professionalism, politicisation and the sheer magnitude of the required human and material resources to cover the entity as vast and complex as Nigeria, therefore, the NPF has become an institution justifiably derided as crassly incompetent and brazenly corrupt. What's more, section 214(1) of the 1999 Constitution prohibits the establishment of any other police structure anywhere in Nigeria, something entirely alien to the concept of federalism at its very onset in Nigeria.

Plausible opinions of commentators on Nigeria suggest that even the political space within which democratic processes that will usher in constitutional governance were to take place was never free from the control of the military, despite all their pretensions.³⁷ Indeed, all the elections organised and supervised by the military as paths of transition from dictatorship to constitutional democracy were marred by one anomaly or the other. If the military was not stealthily postponing hand-over dates, its leadership was either transforming itself into civilian presidency through stick-and-carrot negotiations with unscrupulous politicians, or its top-ranking officials were resigning to take part in elective campaigns, or the military was outrightly proscribing political parties or even annulling freely conducted elections outrightly, and on very flimsy excuses.³⁸

³⁵ P Ekeh *Military rule and damage to the spirit of the Nigerian constitution*, lecture delivered at a forum organised by the Lagos State Government, at the Eko City Hall, Lagos, Nigeria, 1 December 2010 (unpublished); Ikpe (n 33 above) 153, 157; E Okpanachi & A Garba 'Federalism and constitutional change in Nigeria' (2010) 7 *Federal Governance* 17.

³⁶ Ekeh (n 35 above); Elaigwu 'Federal Republic of Nigeria' (n 7 above); EC Onyeozili 'Obstacles to effective policing in Nigeria' (2005) 1 *African Journal of Criminology & Justice Studies* 32-39.

³⁷ S Adejumo *Demilitarisation and the search for democratic stability in Nigeria* (1999) 3-5 9; JB Adekanye *The retired military as emergent power factor in Nigeria* (1999); K Fayemi 'Entrenched military interests and the future of democracy in Nigeria' (1999) 2(1-2) *Democracy & Development* 15; 'The limits of democratic groups' *The Guardian* 9 April 1996 23; Osaghae (n 31 above) 408-411.

³⁸ On this note, see generally Abubakar (n 20 above) 31; A Abimbola 'Pressure groups and the democratic process in Nigeria (1979-1993)' (2002) 11 *Nordic Journal of African Studies* 38; Kaiser (n 4 above); Amadi (n 1 above) 629-632; RA Joseph 'Democratisation under military tutelage: Crisis and consensus in the Nigerian 1979 elections' (1981) 14 *Comparative Politics* 75; S Mahmud 'The failed transition to civilian

Ekeh expressed the gloomy consequences of military in Nigerian politics this way:

military rule has served Nigeria poorly because it relentlessly operated under an ideology of centralisation of governmental functions, particularly after the military putsch of 1975. The most tangible and nagging consequence of this mania of centralisation is the 1999 Constitution of the Federal Republic of Nigeria. Nigeria's military leaders have misread the central canons of the nation's history and sociology. First, they have treated Nigeria's cultural diversities as disabilities that have to be cured. Second, military rulers have used the instrument of centralisation of governmental structures and functions as a vehicle for overcoming what they saw as inefficiencies that regional diversities compel. We all are witnesses to the appalling failures of the 1999 Constitution for which the downfall of Nigeria's local governments and the current disgrace of the erstwhile illustrious Nigeria Police Force should serve as forceful examples.³⁹

Military incursions into Nigeria's constitutional evolutionary processes have inflicted profound damage to the country's psyche and progress. Apart from abruptly truncating Nigeria's democratic experiences, incessant military interventions have compounded the establishment of enduring constitutional foundations for the country's governance, political economy and human development.

The devotion of this segment to the military dimension to our discussion is neither esoteric nor theoretical. No study of Nigeria's constitutional history or political metamorphosis will be complete without acknowledging the role of the military in every aspect of national life. As contemporary experience shows, even during civilian dispensations in Nigeria, the intimidating shadows of the military appear on the horizon. While not inclined towards democratic precepts, the military is often seen as being more representative than political parties and government whenever ethnic hostilities or contestations flare up in Nigeria's fragile polity. The Nigerian military rode on the crest of this image on all occasions when it seized power. Regrettably, however, much of the ethnic, religious and geo-political dilemmas often associated with the political elite in Nigeria have also manifested after prolonged rule by the Nigerian military. One case in point was the *counter-coup* of July 1966 in which young military officers of the northern extraction killed the Head of State, General J.T.U. Aguiyi-Ironsi, an Igbo man, an action that is still seen to this very day as retaliation for the killing of Sir Abubakar Tafawa-Balewa, Prime Minister in Nigeria's First Republic, in 1966.⁴⁰ Another case is the ascension of Alhaji Shehu Shagari to the Executive Presidency in 1979

rule in Nigeria: Its implications for democracy and human rights' (1993) 40 *Africa Today* 87; DM Metumara 'Democracy and the challenge of ethno-nationalism in Nigeria's Fourth Republic: Interrogating institutional mechanics' (2010) 15 *Journal of Peace, Conflict & Development* 92.

³⁹ Ekeh (n 35 above).

⁴⁰ Amadife (n 1 above) 624; Ikpe (n 33 above) 152.

after elections organised by the Murtala/Obasanjo military regime. Against the backdrop that the military government deliberately rigged the elections in favour of the conservative northern political party to which Alhaji Shagari belonged, the Second Republic laboured under this yoke until it collapsed following another *coup d'état* at the end of 1983.⁴¹

The 1990s were to expose the susceptibility of the military to all the negative vagaries normally associated with Nigeria's political class: ineptitude, patronage, graft, profligacy, and directionless. It did not take long to expose the military's contradictions as a corrective regime. With the heavy politicisation of the military and its agencies since and the institutionalisation of the 'settlement' syndrome under the Babangida regime, conspicuous aggrandisement and broad-based corruption became norms in the Nigerian polity, and like the Hobbesian state, might translated into right. The militarisation of politics, known only to some extent under the two earlier republics had become elevated and pronounced. Assassination of political dissidents, the imprisonment of opponents of the military and civil society leaders, and the rustication of student leaders had become weapons of the state.⁴² The leadership of Nigeria's military was helpless against itself as these vices spiralled under the Abacha regime such that the succeeding General Abubakar administration that assumed power in mid-1998 could do nothing else but hand over to the contrived Obasanjo civilian administration in May 1999.

Rather than making any attempt at redressing the failures and weaknesses inherent in the 1979 Constitution or advancing the frameworks proffered by the 1989 Constitution and 1995 draft Constitution ahead of the Fourth Republic that took off on 29 May 1999, the Abubakar military regime virtually re-christened the 1979 Constitution as the 1999 Constitution of the Federal Republic of Nigeria, with all its shortcomings, and notwithstanding all the huge investments into adopting a constitutional instrument that truly reflects the genuine aspirations of Nigerians. It must be mentioned however that the last straw for the Nigerian military in the 1990s was the inability of its leadership under General Babangida to overcome ethno-religious and personal sentiments when Chief MKO Abiola, a Yoruba man, was striding towards a landslide victory in the presidential election held on 12 June 1993, against a candidate of the established northern oligarchy. The military had annulled what was universally regarded as the freest and fairest election in Nigeria's history. What followed was brutal repression of Nigerians massively demanding for the actualisation of the 12 June 1993 presidential election

⁴¹ Kew (n 22 above) 503.

⁴² Among the litany of decrees promulgated to incapacitate the labour unions were: the National Economic Emergency Power Decree 22 of 1985; the Trade Union (Miscellaneous Provisions) Decree 17 of 1986; Decree 12 and 16 of 1986; and Decree 47 of 1987. For more analysis, see Abimbola (n 38 above) 45; Adejumobi (n 37 above) 7; Metumara (n 38 above) 93.

mandate, the incarceration of the acclaimed winner of that presidential election, and his eventual death in custody under mysterious circumstances.⁴³

The militarisation of the Nigerian political space during the downward years of the military was neither addressed nor appreciated until a retired military ruler took over the civilian rule in May 1999. Butts and Metz had painted a vivid picture of the condition of the Nigerian military in those dark years as follows:⁴⁴

During the decades of military rule the Nigerian armed forces have lost nearly all semblance of professionalism and became thoroughly corrupted. Senior officers all became immensely rich through theft, while junior officers and enlisted men live in poverty. Today, there are no civil-military relations in the normal sense of the phrase. The military is incapable of self-reform and cannot lead democratisation. Only a radical transformation of the military and the wholesale replacement of the officers corps could open the way to democracy.

Against his background vocation as supreme military commander and the established hierarchical structure of the military, the Executive President Obasanjo set out in his task of ruling Nigeria with this mental baggage in 1999. In responding to the series of ethnic uprisings across the country and resource-oriented agitations of the Niger-Delta peoples, Obasanjo's strategy was brutal military force.⁴⁵ Beyond these were his shabby treatments of state governors as prefects who must be at the beck and call of their 'supreme commander'.⁴⁶ Whatever hopes many Nigerians had about democratic solutions to the country's myriad constitutional, socio-economic and political challenges were becoming forlorn. Obasanjo did not help matters when at the height of campaigning for re-election in 2007, he proclaimed that winning the presidential election was 'do-or-die'.⁴⁷

Since no tangible steps were taken to remedy either the politicisation of the military or the militarisation of politics that had become entrenched, the best that Nigeria has achieved in its 50 years of independence has essentially been constitutions without constitutionalism, elections without democratic culture.

The bottom-line of the foregoing analysis is that whether in formal or structural terms, the tide of constitutional governance through democratic

⁴³ For more insights, see Amuwo (n 26 above) 437; Ikpe (n 33 above) 157-158.

⁴⁴ K Butts & S Metz 'Armies and democracy in the new Africa: Lessons from Nigeria and South Africa' *US Army War College Monograph Series* (Strategic Studies Institute, 1996) v.

⁴⁵ Metumara (n 38 above) 100; A Ikelegbe 'The economy of conflict in the oil rich Niger-Delta region of Nigeria' (2005) 14 *Nordic Journal of African Studies* 208; Olowu (n 34 above) 81-82; JO Agbola *Control of large-scale civil conflicts in democratic Nigeria* (2003) 11-21.

⁴⁶ Elaigwu (n 7 above).

⁴⁷ IM Alumona 'The politics of democratisation in Nigeria: Are the people involved?' (2010) 12 *Journal of Sustainable Development in Africa* 96 99.

processes in Nigeria has been what the military carved it to be. It goes without saying that every aspect of national life reflects the legacies of the Nigerian military and the challenge squarely remains how to evolve a genuine people-owned, people-centred constitution that will galvanise and sustain a constitutional culture in Africa's most populous country.

5 Consolidating constitutional governance through the democratic process in Nigeria: Facing the future

In the Nigerian milieu, the deep-seated question has been whether the establishment of the 1999 Constitution in the aftermath of the collapse of the military in the post-Babangida-Abacha era can in fact stimulate constitutionalism. It seems that by itself, the constitution cannot achieve this objective; or to put the matter more plainly, the constitution is a necessary but not sufficient condition for the establishment of constitutionalism. Extrapolating from the seminal works of Dahl (1971), Gottfried (1991), and Przeworski (1993), constitutionalism requires the regulated political unpredictability of polyarchy – a form of uncertainty contained within and structured by a predictable system of rules. Most critically under this notion, political actors have, at a minimum, to be convinced that the uncertainties of defeat do not outweigh the gains of a possible future victory. The prerequisite for the establishment of such convictions is the institutionalisation of uncertainty within a predictable framework within which outcomes would neither be permanent nor arbitrary. This, in turn, requires political actors to agree to the rules of constitutionalism. Such agreement, however, is thoroughly dependent on a relative equilibrium of power among the major competing political blocs of society.⁴⁸ So conceived, constitutionalism is not merely a set of institutional constraints on majority rule or a binding limit to passions and arbitrary power, it is, above all, a pattern of predictable and civil behaviour generated by a balance of class forces. The making of the constitution and the incentive to obey it are both dependent on dynamic power relations.

Furthermore, power relations can undermine constitutionalism when a privileged minority – such as the military, neo-colonial bourgeoisie or feudal capitalists, in the case of Nigeria – unremittingly uses the fundamental law of the land to maintain its interests in the face of popular opposition. In this condition, constitutionalism becomes nothing more

⁴⁸ RA Dahl *Polyarchy: Participation and opposition* (1971); P Gottfried 'On liberal and democratic nationhood' (1991) 10 *Journal of Libertarian Studies* 1; A Przeworski 'Democracy as a contingent outcome of conflicts' in J Elster & R Slagstad (eds) *Constitutionalism and democracy* (1988) 59 72 79-80. See also M Coppedge *Venezuela: Popular sovereignty versus liberal democracy* Kellogg Institute Working Paper No 294 (2002) 14; AO Adesoji 'Globalisation of the media and the challenges of democratisation in Nigeria' (2006) 3 *Nebula* 38.

than the defence of the *status quo* and a legal obstacle to any meaningful democratisation. It leads to a dangerous political inertia which is likely to be settled by exercising brute force even if the contending parties make vain appeals to constitutionalism.⁴⁹

Constitutionalism is safe only when the contending interests are convinced that their respective weaknesses and strengths are such that if either of them violates the basic 'rules of the game', the other would have enough power to, at least, launch a reciprocally negative conflict of all against all. Thus, balance of power and threat is decisive in the consolidation of constitutionalism in any milieu. Unless constitution-making takes place in a conjuncture where the coercive *apparatchik* of the state is thoroughly emasculated, it is unlikely to prevent ruling classes from launching multiple *coups de force* to suppress the eruption of popular classes onto the political stage and the potential transformation of the existing balance of class power.⁵⁰

As the Nigerian experience has shown, a constitution cannot on its own transform political actors into polyarchical, let alone democratic agents; in conditions of extreme socio-ethno-religious polarisation, it can only offer the vulnerable of written codes and regulations which are unlikely to withstand the ferocious retaliation of a threatened dominant class.⁵¹ The provisions of constitutional polyarchy are thus likely to function effectively only when subordinate and dominant classes perceive themselves as equally armed or disarmed; only such conditions create the incentives for surrender to the moral force of written pacts and documents. It is no wonder, therefore, that Nigeria's adoption in 1999 of a 'new' constitution implied neither disentanglement from authoritarianism, nor a successful democratisation process. In fact, democratisation failed miserably with the protests that erupted after the 1964-65 general elections, the 1983 general elections, the 1993 truncated march to constitutional statehood, and the stealth violence that followed the 2011 presidential elections. The uncertainties of democratic elections with their potential to upset power holders and indeed power losers have on several occasions induced wanton destruction of lives and property on Nigerians.

Where do the dwindling fortunes of Nigeria's long quest for constitutional statehood lead its people? What paths lie ahead for consolidating its experiences for the future of constitutionalism in Nigeria?

It is submitted that consolidating constitutional governance through democratic process requires a conscious and well-informed civil society.

⁴⁹ C Pateman 'Contributing to democracy' (1998) 4 *Review of Constitutional Studies* 191; PT Robinson 'Democratisation: Understanding the relationship between regime change and the culture of politics' (1994) 37 *African Studies Review* 39.

⁵⁰ K Roth 'Despots masquerading as democrats' (2009) 1 *Journal of Human Rights Practice* 140.

⁵¹ Roth (n 50 above) 142-143.

Nigeria cannot consolidate democracy in a situation where citizens lack conviction in the capacity of the basic framework to effectively respond to their aspirations. The first task will therefore be to rejuvenate the organised civil society that will champion the cause of mass mobilisation and education towards a constitutional culture. The vibrant civil society that Nigeria had known prior to 1999 had become emasculated and disoriented as a result of loss of purpose beyond the military.⁵²

Like all aspects of governance, democratic politics cannot be transplanted to or imposed on a country from outside. What works in one country to improve governance may not work in another. The demand for democratic politics must come from within. It is argued that democracy defined in terms of participation in regular free and fair elections can be applied to many African states but democracy defined in terms of credible agency must be a democratic society created by the on-going work of all. In other words, it is a state run by its citizens – including those in government – and it is only as strong as its ability and willingness to respect, nurture and draw on the extraordinary abilities and potential of the ordinary people that make up its nation. It is only when a credible atmosphere exists for credible participatory politics to take place that Nigeria may assume the tag of a state marching towards constitutional statehood. With the litany of electoral abuses, gerrymandering, godfatherism, institutional failure, large-scale corruption and nepotism, the national question, mass poverty, ethno-religious conflicts, illiteracy, disease, and all the host of problems that currently beleaguer the Nigerian polity and political space,⁵³ genuine constitutionalism remains a far cry.

Research and experience show the importance of the state in promoting development. Since only the state has the legitimacy to exercise power over a particular territory and its people, it is in an unrivalled position to transform economies and society. Improving governance is therefore at the heart of building an effective, developmental state because it strengthens consensus among different groups in society about how the country's affairs are managed. This helps to consolidate security and the rule of law. It enables the state to become more stable, with broad legitimacy and capability across all regions and parts of society. However, building effective states is usually a long and contested process. Even some stronger states have elements of fragility within them, and could become more fragile given a particular set of circumstances, such as regional conflict or an economic downturn. Any regime that is dependent on its patrimonial capability is unlikely to solve its financial dilemmas either by

⁵² A Harneit-Sievers 'The military, civil society and democratisation in Nigeria' (1996) 31 *Afrika Spectrum* 333; Abimbola (n 38 above) 45; Oko (n 3 above) 172-184; Adejumo (n 37 above) 3.

⁵³ JY Fashagba 'De-constitutionalising? Democratic governance in Nigeria: Assessing executive-legislative handling of executive-power vacuum in the fourth republic' (2010) 4 *Africana* 7.

structural reform or by tapping new sources of revenue. This has been the sorry revelation from African governments, time and again.⁵⁴

For Nigeria, democracy will work in establishing the framework for constitutional governance when all Nigerians develop faith in the tenet and its processes. For now, such faith is pathetically lacking.⁵⁵ Nigerians will only repose faith and confidence when the small class of rulers and their collaborators in the neo-colonial state recognise the inevitable restructuring of the Nigerian state in an atmosphere devoid of repression and victimisation. One benchmark for that choice is dealing with the question of what arrangement Nigerians really desire should govern this wobbly polity. Sermonising about constitutional and socio-economic reforms has not improved the lot of the majority of Nigerians since the 1970s. It will be foolhardy to expect the same to appeal to Nigerians in the years ahead. The political atmosphere ushered in by the recent election of a president from the minority Niger-Delta area – albeit on the platform of support from a ruling party favoured by the majority Hausa-Fulani oligarchy – is auspicious to brave the odds in convening a sovereign national constitutional conference that has been a subject of debate since 1993.

If all the legal reform efforts as well as several policy initiatives by successive regimes, and all the ‘extra-constitutional’ changes by the military, to effectively tackle the menaces of endemic corruption, bureaucratic and infrastructural decay, bloated cost of governance, heavy budget deficits, increasing infant and maternal mortality, stunted human development, misdirected priorities, illiteracy, mass unemployment, grinding poverty, sporadic geo-ethnic violence, religious intolerance and identity politics have failed in Nigeria after more than five decades of existence as an independent state, the only path of wisdom is to go back to the drawing board to squarely confront these very fundamental problems that have stagnated Nigeria’s march to constitutional statehood.

Since 1922 when the British enacted the country’s first constitution, Nigerians have never had the opportunity to vote in a referendum to approve or reject any constitution in whole or in part. It is non-negotiable that Nigerians democratically choose an autochthonous constitution

⁵⁴ DW Brinkerhoff & AA Goldsmith *Clientelism, patrimonialism and democratic governance: An overview and framework for assessment and programming* US Agency for International Development Office of Democracy and Governance under Strategic Policy and Institutional Reform (2002) 9.

⁵⁵ As the German President reportedly observed: ‘Not even the most perfect constitution can ensure the development of democracy in any state if this development is not supported by citizens ... [d]emocracy lives from bases which not even the best possible democratic constitution can guarantee the active engagement of the citizens. Democracy can serve us only if we learn to serve democracy’, ‘Havel say citizen involvement builds democracy’ *Czech News Agency World Report* 26 February 1999, quoted in O Oko ‘Consolidating democracy on a troubled continent: A challenge for lawyers in Africa’ (2000) 33 *Vanderbilt Journal of Transnational Law* 573 588.

which will truthfully commence with the phrase 'We the people of the Federal Republic of Nigeria ...'. The alternative to the suggested approach is to play the ostrich and watch the Nigerian state implode or disintegrate.

6 Conclusion

The relationships contemplated within the context of our discourse on constitutional governance in Nigeria, and indeed throughout Africa, will invariably be influenced by institutions, the way in which formal rules – laws and regulations – and informal rules – shaped by tradition and culture – affect the way people relate to each other. These institutions are embedded in the way power is held, used and projected in different contexts. They affect relations between men and women in the household, among poor people and elites in communities, and among different political groups in national politics. Improving governance therefore requires institutional and behavioural changes, which often involve changing power relationships through the democratic process. It is this process that determines how a society makes choices about the way in which people live together, how competing interests are mediated and how available resources are allocated. The democratic process touches many aspects of people's lives, not only through government but also in areas of cooperation, collective action and the provision of public goods. This is just as relevant at the household level in relations between men and women as it is at the national level among politicians and the ruling class.

An effort has been made in this chapter to demonstrate that, despite all the indicators of failure and stagnation, governance founded on the pillars of democracy and constitutionalism is still a bright prospect in Africa. Without mincing words, however, this chapter has shown that it will require more than wishful thinking for this ideal to materialise.

Although Nigeria was the set model for the discussion in this chapter, the implications of the discourse for several African countries grappling with the transitional and often volatile issues of developmental constitutional statehood have been brought to the fore. Far from being an *ex cathedra* pronouncement on all the dynamics that should inform the calibration of pathways to constitutional statehood in post-colonial African states, this contribution would have served its purpose if it stimulates further intellectual inquiry.

Ademola Oluborode Jegede

1 Introduction

Military rule refers to the displacing and supplanting of an existing political order by soldiers whose main aim is to govern or influence the governance of a nation in a direction of their choice.¹ Since the military is constitutionally empowered to bear arms in defence of a nation, its rule is an aberration, although military leadership as other autocratic regimes labour, often unsuccessfully, to be perceived as democratic. Evidence of involvement of the military in political governance from nations such as Nigeria and Ghana also points at a semblance of 'self-styled identity' where military leaders wore the toga of 'President' and demanded being addressed as such.² An overview of the chequered constitutional history including protracted periods of military rule, has been provided in chapters 6 and 12 above.

The mysterious death of Sanni Abacha in 1999 brought in General Abdulsalami Abubakar, whose brief transition programme resulted in the passage of the 1999 Constitution and election of Olusegun Obasanjo, a retired army general and former MHS, as the president.³ Under this new constitutional dispensation, Obasanjo served two terms in office, and was succeeded by Umaru Shehu Yaradua in 2007,⁴ whose death paved the way

¹ OO Goddey 'Military in politics in Nigeria: An assessment' (2011) 3 *Journal of Arts and Contemporary Society* 30; WA Fawole 'The military and the future of democracy in Africa' in Omo-Omoruyi, D Berg-Schlossen, A Sambo & A Okwuosa (eds) (1994) 2 *Democratisation in Africa: African perspective*

² See for instance 'General Ibrahim Badamasi Babangida' <http://www.online.nigeria.com/babangida.asp> (accessed 12 August 2012).

³ EO Ojo & PF Adebayo 'Can Nigeria's nascent democracy survive?' (2009) 11 *Journal of Sustainable Development in Africa*.

⁴ EO Ojo 'Nigeria's 2007 general elections and the succession crises: Implications for the nascent democracy' (2007) 6 *Journal of African Elections*.

for his vice president, Goodluck Jonathan to become the President in 2010, and in 2011 winning the presidential elections.⁵

While military rule does not invoke much debate in terms of its meaning and connotations, constitutional government appears to be different. Often regarded as governance according to rules laid down in some written text, constitutional government implies the concept of constitutionalism, which has attracted different shades of views from writers. De Smith for instance proposed a western liberal model of the concept of Constitutionalism as follows:⁶

The idea of constitutionalism involves the proposition that the exercise of governmental power shall be bounded by rules, rules prescribing the procedure according to which legislative and executive acts are to be performed and delimiting their permissible content. Constitutionalism becomes a living reality to the extent that these rules curb arbitrariness of discretion and are in fact observed by the wielders of political power, and to the extent that within the forbidden zones upon which authority may not trespass there is significant room for the enjoyment of individual liberty.

Owing to the shadow of Africa's colonial past, bias towards liberal conceptions occurs frequently. Shivji, for instance argues that liberal constitutionalism is representative of Western ideas which are foreign to African tradition, history or practice of governance.⁷ While this view does not necessarily support authoritarianism, as Hatchard, Ndulo and Slinn seem to have argued,⁸ Shivji's position is difficult to maintain considering that Africa does not have a homogenous tradition, history and practice in terms of indigenous governance. While a monarchical system of government was prevalent in most parts of pre-colonial Africa for instance and rulers generally enjoyed unfettered powers, there were exceptions in some settings. In the old Oyo Empire, monarchs were put in check by other assemblies, such as Oyo Mesi and Ogboni.⁹ It is therefore too incorrect to argue that liberal constitutionalism is alien to indigenous Africans' governance practice.

In modern times, the debate is shifting from legitimacy of liberal constitutionalism and the question to which writers have lent divergent vocal views is the extent to which constitutional governments are

⁵ 'Nigeria Goodluck Jonathan sworn in as president' *BBC News Africa* 29 May 2011 <http://www.bbc.co.uk/news/world-africa-13587545> (accessed 12 August 2011).

⁶ SA de Smith *The new commonwealth and its constitution* (1964) 106.

⁷ IG Shivji 'State and constitutionalism: A new democratic perspective' in IG Shivji (ed) *State and constitutionalism: An African debate on democracy* (1991) 28-29.

⁸ J Hatchard, M Ndulo & P Slinn *Comparative constitutionalism and good governance in the Commonwealth: An eastern and southern perspective* (2004) 2.

⁹ S Johnson *The history of the Yorubas* (1966); P Morton-Williams 'The Yoruba Ogboni cult in Oyo' (1960) 30 *Africa* 362.

complying with the textual content of the constitutions. As Oloka-Onyango observes:¹⁰

For many scholars, politicians and activists, the notion of Constitutionalism is one that produces numerous and often times conflicting responses. For some, especially the more positivist or legally minded, Constitutionalism simply represents a concern with the instrumentalities of governance. These range from the Constitution itself and other legally constructed documents that have been created to support it, the structures and institutions that are established under their framework ... others adopt a more nuanced and embracing view, considering Constitutionalism within the much broader context of the social, economic, political, gender and cultural milieu wherein those instrumentalities operate. A nicely worded or eloquently phrased document means nothing if the context in which it is supposed to operate is harsh and hostile – a context in which you may have a “Constitution without Constitutionalism”.

Following this introduction, this paper considers some specific stigmatised features which typified military regime in Nigeria and argues that similar features exist under constitutional government, particularly since 1999. It concludes by making some recommendations for the future of constitutional governance in Nigeria.

2 Military rule in Nigeria: Heritage of stigmatised features

Except for its political acts of state creation and constitutional enactments, the Nigerian Military particularly while in government, behaved according to Basil Davidson ‘like pirates in power’.¹¹ By its very coercive nature of intrusion into government, the military culture does not fit into a culture in tune with citizens’ quest for participatory governance and consequently suffers some stigmas which undermine it as a model of governance. This is explained in terms of three features namely separation of powers, devolution of power, and a human rights’ record.

2.1 Tainted separation of powers

While underscoring the importance of the principle of separation of powers, Nwabueze remarks:

Concentration of governmental powers in the hands of one individual is the very definition of dictatorship and absolute power is by its very nature arbitrary, capricious and despotic. Limited government demands therefore

¹⁰ J Oloka-Onyango (ed) *Constitutionalism in Africa: Creating opportunities, facing challenges* (2001) 2–3.

¹¹ Quoted in K Maier *This house has fallen: Midnight in Nigeria* (2000) xxi.

that the organisation of government should be based on some concept of structure, whereby the functions of law-making, execution and adjudication are vested in separate agencies, operating with separate personnel and procedure ... By separating the function of execution from that of the law-making, by insisting that every executive action must, in so far as any rate as it affects an individual, have the authority of some law, and by prescribing a different procedure for law-making the arbitrariness of executive action can be effectively checked.¹²

Under the military regime, legislative and executive powers were fused in the Supreme Military Council (SMC), which operated as the law-making and the implementation arm of government at the federal level.¹³ The ministers usually appointed to head ministries largely came from a military background. At the state level, military officials, and at times members from the police force, are appointed as the governors while administrators are appointed by governors in the states as heads of the local government areas, although state commissioners are often civilian members.¹⁴ These appointments were not based on any coherent standard of academic qualification or other experiences in governance. Tenure of office is not fixed; both rather depended on a culture of patronage. While the SMC ruled by decrees, the State governments ruled by edicts, which were made without public consultation.¹⁵

Although the judicial arm existed to adjudicate some matters, justifying Oyeboade's view that 'humankind is yet to invent a substitute for an institution specifically charged with the task of interpreting and applying the law',¹⁶ attempts were often made by the military to curtail the judiciary through a number of decrees. For instance, Decree 5 of 1972 conferred on the Federal Military Government the power of appointment and dismissal of the Chief Justice of Nigeria.¹⁷ It was this provision that was employed to compulsorily retire the incumbent Chief Justice, TO Elias.¹⁸

Further eroding the independence of the judiciary is the establishment of military tribunals. Examples of such tribunals include: the Recovery of Public Property Special Military Tribunal,¹⁹ Robbery and Firearms (Special Provision) Act Tribunal,²⁰ the Miscellaneous Offenses

¹² B Nwabueze *The presidential constitution of Nigeria* (1982) 32-33.

¹³ A Ojo *Constitutional law and military rule in Nigeria* (1987) 268-271.

¹⁴ As above.

¹⁵ As above.

¹⁶ A Oyeboade 'Executive lawlessness and the subversion of democracy and the rule of law' in Ajomo *et al* (eds) *Nigeria: Democracy and the rule of law* (1996) 144.

¹⁷ Constitution (Amendment) Decree 5 of 1972.

¹⁸ AM Sanni 'The Nigerian judiciary trends since independence' <http://www.unilorin.edu.ng/ejournals/index.php/uilj/article/view/15/16> 225 (accessed 13 August 2011).

¹⁹ Recovery of Public Property (Special Military Tribunals) Act Chap 389, Laws of Nigeria, 1990.

²⁰ Robbery and Firearms (Special Provisions) Act Chap 398, Laws of Nigeria, 1990.

Tribunal;²¹ Exchange Control (Anti-Sabotage) Tribunal;²² and the Special Appeal Tribunal.²³ The nature and proceedings before these tribunals have been the subject of critical comments.²⁴ According to Giwa-Amu, through these laws the 'independent third arm of government, the judiciary, which is supposed to adjudicate impartially between a citizen and the executive, is made to play second fiddle by acting in an advisory capacity'.²⁵

The appeal process from the decisions of these tribunals was also questionable. In the military regime of Buhari and Idiagbon, for instance, appeals on the decision of tribunals only lay to the SMC. Largely composed of military officers, the SMC hardly reviewed the sentence of Tribunals but more often than not confirmed such verdicts. Under the Babangida's regime, efforts were made to amend this approach with the creation of Special Appeal Tribunals.²⁶ Still, this was limited in its application as it was only applicable to offences relating to recovery of public property. Particularly typifying proceedings at these tribunals was the outcome of the trial of Ken Saro Wiwa, which revealed a gross violation of international standard.²⁷

2.2 Eroded devolution of powers

The earlier 1960 and the slightly amended Nigerian Constitution of 1963, which was suspended by the military when it first assumed power in 1966, portrayed a different vision of devolution of powers among the tiers of government existing in Nigeria. As Eke argues:²⁸

The result of the negotiations of the protracted constitutional conferences of the pre-independence era was a home-grown form of federalism that protected regional interests, resulting in a central government with limited and circumscribed powers. The Independence Constitution was not ideologically driven nor was it fashioned from any templates copied from other people's experiences. On the contrary, it was grounded in the practical experiences of Nigerian history and the preferences of Nigerians to ensure that their teeming ethnic nationalities should co-exist in a common political space in full anticipation of mutual benefits for all, while avoiding enforced uniformities.

²¹ Special Tribunal (Miscellaneous Offences) Act Chap 410, Laws of Nigeria, 1990.

²² Exchange Control (Anti-Sabotage) Act, Chap 114, Laws of Nigeria, 1990.

²³ See sections 15 and 16, Recovery of Public Property (Special Military Tribunals) Act.

²⁴ Ojo (n 13 above).

²⁵ G Amu quoted in PA Oluyede *Nigerian administrative law* (1988) 187.

²⁶ Ojo (n 13 above).

²⁷ 'The case of Ken Saro-Wiwa' *The New York Review of Books* 20 April 1995 <http://www.nybooks.com/articles/archives/1995/apr/20/the-case-of-ken-saro-wiwa/> (accessed 10 August 2011)

²⁸ P Ekeh 'Military rule and damage to the spirit of the Nigerian constitution' (2010) http://www.waado.org/nigerdelta/Nigeria_Facts/MilitaryRule/federalism_ekhe.htm (accessed 10 August 2011).

The attempts made by the military regime to construct different Constitutions in 1979, 1989, and 1999 have seen earlier impressions of power devolution eroding with the result that states and the local governments particularly from 1976 upward focused on the federal government for revenue allocation and implementation of projects.²⁹ This greatly encourages a culture of patronage as development became determined by support of other tiers of government to the government in centre.³⁰ Several competencies, such as those related to the police, railway and power are inserted under the exclusive list of the federal government, thus further resulting in an overburdened central government.

2.3 Poor human rights record

Military regimes in Nigeria, through the instrumentality of decrees, have a history of suspending several parts of the Constitution, particularly those relating to freedom of assembly, association and political activity. Prominent among these decrees are the State Security (Detention of Persons) Decree 2 of 1984 and the Civil Disturbances (Special Tribunal) Decree 2 of 1987. Section 8 of the latter decree excludes the jurisdiction of the courts to review the decision of any tribunal. Section 8(1) in particular provides:

The validity of any decision, sentence, judgment, confirmation, direction, notice or order given or made as the case may be, or any other thing whatsoever done under this Decree shall not be inquired into any court of law.

In addition to the ouster clause in Decree 2 of 1984, the Constitution (Suspension and Modification) Decree 107 of 1993 and the Federal Military Government Supremacy and Enforcement Power Decree 12 of 1994 also shield the actions of government from judicial review. These decrees were enacted with the view of coping with perceived pressures particularly from the civil society which resulted from popular dissatisfaction with military rule. This is supported by the sheer number of the decrees which in addition to ousting human rights provision of the constitution created several crimes which implicate human rights. Nwabueze, in its general classification of decrees notes the following:³¹

Of the 627 Decrees enacted between 16 January 1966 and 28th September, 1979, 295 or nearly 50 per cent had retrospective effect with 52 creating criminal offences. 27 of the 49 or 55 per cent of the Decrees enacted between January, 1, 1984 and May, 15 1985 had retrospective effects, with 11 or 22.5 per cent creating criminal offences.

²⁹ As above.

³⁰ As above.

³¹ B Nwabueze 'Our match to constitutional democracy' (1989) *Law & Practice* 10.

It is thus not surprising that under the military era, the human rights situation was not impressive. This is notwithstanding the fact that it was during a military regime, that in 1983 Nigeria ratified the African Charter on Human and Peoples' Rights. Military rule featured extreme and excessive use of force by security forces and extra-judicial killings at roadblocks, during patrols, at police stations, in the course of protests, disturbances and pro-democracy rallies, when combating crimes and when dealing with detained persons. Other incidents such as officially sanctioned murders, assassinations and disappearances of persons, indefinite detention, seizure of passport, refusal of government to comply with orders of court for the release of detainees or to produce detainees upon the grant of *habeas corpus* applications; were all rampant.³²

The approach of the court of appeal to decrees and violations of human rights under the military was cautious in nature. In *Wang Ching Yao & Others v Chief of Staff Supreme Headquarters & Others*,³³ Adenekan Ademola JCA held that the refusal of the Lagos High Court to grant an order of *habeas corpus* against the respondent was correct because section 4(2) of the State Security (Detention of Persons) Decree 2 of 1984 precluded the High Court from entertaining such an action and the appellants suit was therefore a device to challenge the validity of the Decree. The Judge proceeded to observe that 'in matters of civil liberties in Nigeria, the courts must blow muted trumpets'.³⁴

In some instances, the Supreme Court sounded a similarly cautious note. For instance, in *Attorney-General of the Federation & 16 Others v Attorney-General of Anambra State & 12 Others*, Mohammed Bello CJN was blunt about the helplessness of the Court in the face of military decrees that fettered human rights, when he noted as follows:³⁵

Under our present condition, decrees are the supreme laws in Nigeria and all other laws including the current Constitution are inferior to the decree the Federal Military Government (Supremacy and Enforcement of Power) Decree 1984.

However, there were instances when the courts demonstrated great courage in the face of military repression. In *Lakanmi & Another v Attorney-General of West & Others*,³⁶ a Commission of Inquiry was constituted by the then western state Military Government to investigate the assets of public officers of the state. The resultant order forfeiting the assets of the appellants was first contested at the High Court as being inconsistent with

³² UN Commission of Human Rights 'Nigeria – Report of the Special Rapporteur' E/CN.4/1998/62.

³³ *Wang Ching Yao & Others v Chief of Staff Supreme Headquarters & Others* Suit No CA/L/25/85.

³⁴ As above.

³⁵ *Attorney-General of the Federation & 16 Others v Attorney-General of Anambra State & 12 Others* Suit No SC 28/2001.

³⁶ *Lakanmi & Another v Attorney-General of West & Others* (1969) SC18.

the Public Officers (Investigation of Assets) Decree of 1966. The Court declined jurisdiction since the Edict ousted its jurisdiction, and this decision was affirmed at the Court of Appeal.

Between the decisions of the High Court and the Court of Appeal, the Federal Military government promulgated three Decrees apparently in favour of the respondent, which among others, validated all orders made under any enactment, ousted the jurisdiction of the courts from questioning the validity of any Decree, and abated all pending proceedings in respect of any Decree. Notwithstanding this military fiat, the Supreme Court held the Edict inconsistent with the Decree and hence void under the doctrine of covering the field. In *Governor of Lagos State v Ojukwu*,³⁷ Eso JSC, along similar lines held as follows:

It is a very serious matter for anyone to flout a positive order of a court and proceed to taunt the court further by seeking a remedy in higher court while still in contempt of the lower court. It is more serious when the act of flouting the order of the court ... is by the Executive ... Executive lawlessness is tantamount to a deliberate violation of the Constitution ... the essence of the rule of law is that it should never operate under the rule of force or fear. To use force to effect an act and while under the marshal of that force, seek the court's equity is an attempt to infuse timidity into court and operate a sabotage of the cherished rule of law. It must never be.

In the case of *Saidu Garba v Federal Civil Service Commission & Another*,³⁸ the Supreme Court was also emphatic in its condemnation of the executive lawlessness on show by the Federal Military Government when it cautioned that

[t]he rule of law knows no fear, it is never cowed down, it can only be silenced. But once it is not silenced by the only arm that can silence it, it must be accepted in full confidence to be able to justify its existence.

Notwithstanding the brave efforts, the military regimes have a tradition of not complying with court orders. For instance the reaction of the Gowon regime to the Lakanmi's case was to promulgate Decree 28 of 1970, which had the effect of nullifying the decision of any court in any part of the Federation whether given before or after the passing of the Decree. Also, the military government did not immediately comply with the order of court in *Ojukwu v AG Lagos State*,³⁹ which declared the eviction of the plaintiff illegal and ordered that he be allowed access to the property from which he was evicted.

In all, it will be nothing strange to rate military participation in governance, particularly in Nigeria, as far from being impressive.

³⁷ *Governor of Lagos State v Ojukwu* (1986) 1 NWLR 621.

³⁸ *Saidu Garba v Federal Civil Service Commission and Another* (1988) 1 NWLR 449.

³⁹ As above.

Abubakar, who in commenting on the impact of military on democratic institutions and human rights, similarly observes:⁴⁰

The intervention of the military in the political process in the mid 1960s opened the polity to authoritarian rulers. Military rule, particularly during the Babangida-Abacha epochs was characterised by massive abuse of human rights: The violent crises in Ogoni land in 1994-95 that culminated in the execution of Ken Saro Wiwa remains an important landmark in the abuse of basic Constitutional/ human rights in Nigeria. The annulment of the 12 June Presidential election and the violent crises it generated in the polity further deepened the crises of Nigeria's transition.

The enactment of Constitution and the transition of 1999 by the military regime of Abdulsalam ushered in a new wave of constitutional government in Nigeria. However, the question is the extent to which the constitutional culture of Nigeria has changed in the face of the above stigmatised features which define the military era. This is assessed in the paragraphs below.

3 Constitutional culture post-1999: From stigmas to what?

The present political dispensation is based on the 1999 Constitution which contains some unique provisions. These include provisions in relation to unconstitutional change of government,⁴¹ and forbidding the national or state assembly from enacting law that ousts or purports to oust the jurisdiction of a court of law or of a judicial tribunal established by law.⁴² However, to merit the legitimacy of an instrument of governance, the formative process of a constitution must be engaging, and the end result should reflect the articulate and collective views of the populace in the political space about their vision of society.⁴³ It is this legitimacy that motivates compliance with the provisions of a constitution.⁴⁴

When measured against this yardstick the 1999 Constitution fails in certain material respects. The formulation of the 1999 Constitution did not involve elaborate and popular participation, at least by the representatives

⁴⁰ D Abubakar 'Constitutional rights and democracy in Nigeria' being the abridged text of lecture presented at the Center for Research and Documentation (CRD) Kano, Nigeria 23.

⁴¹ 1999 Constitution, art 1(2).

⁴² The 1999 Constitution, art 4(8).

⁴³ C Cronin 'On the possibility of a democratic constitutional founding: Habermas and Michelman in dialogue' (2006) 19 *Ratio Juris* 343-369; J Habermas 'Constitutional democracy: A paradoxical union of contradictory principles?' (2001) 29 *Political Theory* 775; J Habermas 'Struggles for recognition in the democratic constitutional state' in A Gutman (ed) *Multiculturalism* (1994) 107-135.

⁴⁴ FI Michelman 'Constitutional essentials' (2011) Harvard Law School Public Law & Legal Theory Working Paper Series, Paper No 12-06; JW Müller *Constitutional patriotism* (2007).

of people, which characterised its antecedents such as the 1960 Independence and 1963 Republican Constitutions, respectively.⁴⁵ In formulating the 1999 Constitution, the Federal Military Government which assumed office in 1998 and handed over power to a democratically elected civilian administration on 29 May 1999 inaugurated the Constitution Debate Coordinating Committee (CDCC) on 11 November 1998. The CDCC was charged with the responsibility of piloting the debate on the new constitution for Nigeria, coordinating and collating views and recommendations canvassed by individuals and groups for a new constitution for Nigeria.⁴⁶ The CDCC had fewer than three months to effect its assignment; it is therefore not strange that the outcome of the exercise only led to a hurriedly drawn constitution which essentially retained the character of 1979 Constitution.⁴⁷ Notwithstanding, to what extent has the 1999 Constitution aided Constitutional culture in Nigeria? This is addressed in terms of how the polity has fared on the three stigmatised discussed as peculiar to the military regime.

3.1 Separation of powers

The 1999 Constitution set out in clear terms, what entity should perform the legislative,⁴⁸ executive,⁴⁹ and judicial⁵⁰ roles in Nigeria, and provide for checks and balances to ensure that one arm does not overreach the other.⁵¹ The reality of the implementation of these Constitutional provisions is however different. In the 1999-2003 civilian regime, there were challenges which focused on the will of the legislature to assert independence in performing its oversight function. The executive in that era did not take this lightly, and the consequence of this was the removal of one Senate President after another.⁵² Senate Presidents and Speakers

⁴⁵ JO Ihonvbere 'Constitutionalism and the national question in Nigeria' in AAB Agbaje, BL Diamond & E Onwudiwe (eds) *Nigeria's struggle for democracy & good governance: A Festschrift for Oyeleye Oyediran* (2004) 243.

⁴⁶ N Tobi 'Nigerian Constitution Debate Coordinating Committee (CDCC)' http://www.waado.org/nigerian_scholars/archive/debates/constitution/cdcc.html (accessed 11 August 2011).

⁴⁷ As above.

⁴⁸ 1999 Constitution, art 4(1) provides that the legislative powers of the Federal Republic of Nigeria shall be vested in a National Assembly for the Federation, which shall consist of a Senate and a House of Representatives, while art 4(6) provides that the legislative powers of a State of the Federation shall be vested in the House of Assembly of the State.

⁴⁹ 1999 Constitution, art 5 vests the executive power of the Federation in the President and such power is exercisable by the vice president ministers and the public service of the Federation while state executive power is vested in the Governor, exercisable through the Deputy Governor, commissioners and public officers of a state.

⁵⁰ 1999 Constitution, art 6(1) vests the judicial powers of the Federation in the courts to which this section relates, being courts established for the Federation while art 6(2) vests the judicial powers of a State in the state courts.

⁵¹ For instance see the 1999 Constitution, Third Schedule Part 1 para 20(I) on the establishment of the NJI meant to protect the independence of the judiciary.

⁵² UN Udechukwu 'The courts and politics in Nigeria today' being the text of the paper presented at the National Conference on Nigerian Government and Politics, 1999 – 2004 at The University of Nsukka (22 April 2004) 13-15.

would keep their heads only when in harmonious relationship with the President.⁵³ In describing the political arena of Nigeria since 1999, Sklar identifies a personalised arena dominated by a powerful 'godfather' at the apex of a vast patronage network at federal, state and local level. Political outcomes are therefore the function of intense competition between these godfathers, often at the expense of the population.⁵⁴

Similarly, while the Constitution is clear on the procedures for the removal of governors in section 188, and the role of the legislature and judiciary in the process, this is not always followed. The procedures, particularly the one prescribing that votes of not less than two-thirds majority of all the members of the House of Assembly are required before a motion to investigate an allegation of gross misconduct as a ground of impeachment of a governor can be passed,⁵⁵ was in serious violation by the state Legislative House in states such as Bayelsa, Oyo, Plateau, Anambra and Ekiti.⁵⁶ In Oyo State, in contravention of section 188(4) of the Constitution, for a two-third majority, 18 of 32 of the members of the House passed the requisite motion while in Plateau, it was 5 out of the 24 members. The situation was not in any way different in Anambra, where 12 of the 30 members of that State House of Assembly passed the motion.⁵⁷ The way and manner the legislative arms in the above states conducted the impeachment exercises and the attendant tension and violence raises concern over the commitment of the functionaries to the rule of law and their understanding of constitutional responsibility to make laws for peace and progress of their states.

Of similar fate is the constitutional role of the court as laid down in section 188(5), which requires the Chief Judge of a given state to appoint a panel of seven persons who in his opinion are of unquestionable character, not being members of any public service, legislative house or political party, to investigate allegations against the governor or deputy governor. Although, the Chief Judge can only do so at the request of the Speaker, legislative history in relation to impeachment at the state levels demonstrates that this is hardly followed. Often, impeachment processes had been commenced or concluded in the face of courts,⁵⁸ because the legislatures have not leant to conduct the exercise in a manner consistent with the provisions of the Constitution. Berating these manipulative tendencies on the part of the State legislative bodies, Aguda rightly argues thus:⁵⁹

⁵³ *Daily Sun* 12 April 2004 12.

⁵⁴ R Sklar 'Nigeria: Completing Obasanjo's legacy' (2006) 17 *Journal of Democracy* 100.

⁵⁵ 1999 Constitution, art 188(4).

⁵⁶ 'Constitutional crises rock two States: Confusion in Anambra, Oyo' *This Day* 3 November 2006; also see 'Abuse of impeachments' *This Day* 30 October 2006.

⁵⁷ As above.

⁵⁸ As above.

⁵⁹ A Aguda quoted in Udechukwu (n 52 above) 4.

We should cease making the judiciary the sacrificial lamb of people who put themselves on trial and deliberately (or is it inadvertently?) decide later to seek the protection or intervention of the judiciary. It is no answer to say that, that is why the judiciary exists. I think that I have the responsibility to say that I have never known of any impeachment exercise either in Great Britain (where it originated) or in the United States of America which has ever been decided in the courts.

The legislative arm was crucial to the defeat of the ambition of the president to amend the Constitution with the view of extending its terms of office in 2007,⁶⁰ which if allowed to succeed would have altered constitutional democracy, and motivated autocratic leadership in the cloak of democracy in Nigeria. There are however illustrations indicative of disregard on the part of the legislative arm of government to certain provisions of the Constitution. An example was the insertion of a new section 140(2) and 141 into the Electoral Act 2010. According to section 140(2) of the Electoral Act:

[w]here an election tribunal or court nullifies an election on the ground that the person who obtained the highest votes at the election was not qualified to contest the election, the election tribunal or court shall not declare the person with the second highest votes as elected, but shall order a fresh election.

This provision jeopardises section 6 of the Constitution, which vests the judicial powers of the state in the courts. It amounts to legislative judgement being foisted on the courts to hand over to parties in matter of elections properly brought by parties. It is a dangerous culture when the legislative arm of government formulates law prescribing to the courts what to do or what not to do in election petitions before it. Tactically, this essentially will achieve in the political space what the ouster clauses sought to do during the military era, rendering the courts almost redundant in matters of human rights relating to democratic process such as the right to political participation and fair hearing in electoral disputes.

Amenable to a similar critique is section 141 of the Electoral Act, which points towards equally manipulative ends, when it provides:

An election tribunal or court shall not under any circumstance declare any person a winner at an election in which such a person has not fully participated in all the stages of the said elections.

Effectively, by making the courts incapable of rendering a binding verdict on an election, these two provisions confront the inherent duty of courts and violate the principle of separation of powers entrenched in the Nigerian Constitution. The role of a court to decide a matter one way or

⁶⁰ 'Third term: Obasanjo offered senators, reps N50m each – Dabiri Erewa, ACN Secretary' *The Punch* 11 May 2011.

another is critical to Nigeria's democratic development.⁶¹ In addition to ensuring there is an end to disputes, the verdicts of courts help in bringing force and reality to democratic values such as fairness and integrity of an electoral process. This is not achieved when the courts are muzzled by legislative fiat.

It is noteworthy here that in *Unongo v Aku*, the then Chief Justice of Nigeria, Justice Mohammed Bello, in a comparative restatement of the law had warned against the exercise of legislative functions in a manner that stifles judicial duty.⁶²

In the United States of America, it is a trite rule of constitutional law that in consequence of the principle of separation of governmental powers embodied in the Constitutions of the United States and of several States, any statute by which the legislature attempts to hamper judicial functions of Courts or to interfere with the discharge of judicial duties or to unduly burden the exercise of judicial functions is unconstitutional and void.

Another sad commentary on the legislative arm in a constitutional dispensation is visible in its pre-occupation to include some clauses conferring on the law-makers the right for their consent to be sought on the availability of their position before elections could be conducted in such constituencies.⁶³ Although these proposals were unsuccessfully implemented, they raised serious concerns that the democratic process may be used to attain undemocratic ends. If these clauses were successfully introduced into the Electoral Act, it would have exempted the law-makers from participation in election primaries and would have effectively stopped the interest of those desiring to compete with such legislators at that level. These changes would have violated the spirit of the Constitution, when it provides as follows in section 7(4):

The Government of a State shall ensure that every person who is entitled to vote or be voted for at an election to House of Assembly shall have the right to vote or be voted for at an election to a local government council.

The right to vote, and arguably to be voted for, is crucial to constitutional government. As Venkatarangaiya rightly argues:

If popular control of government through the mechanism of elections is the essence of democracy, it follows that the control should be by all people and not by any few among them. Unless it can be proved that those who are excluded are either unfit or incompetent to exercise the vote ... the basis of

⁶¹ 'Election Tribunals and the survival of Nigeria democracy' *Nigerian Compass* 21 August 2008 24; J Osuntokun, 'Judiciary and the sustenance of democracy' (2008) 20 March - 3 April *The Nation*, Lagos; AE Davies 'Reflections on the imperative of transparency and accountability for good governance' (2003) 8 *Journal of Business and Social Science*.

⁶² *Unongo v Aku* (1983) 9 SC 126; see also *Sofekun v Akinyemi & Others* (1980) 5 - 7 SC1.

⁶³ A Avwode 'Curbing legislative tyranny' <http://www.thenationonline.net/2011/index.php/mobile/politics/14022-curbing-future-legislative-tyranny.html> (accessed 7 August 2012).

democracy is the principle of equality of all citizens and that to give the right to vote to some and to deny it to others is in conflict with this principle and is therefore unjust.⁶⁴

Even if Nigeria had been under civilian government since 1999, this period has been characterised by intense threats to the judiciary. Courts have been harassed and prevented by hooliganism at times to deliver judgement, compelling Judges to retire to chambers.⁶⁵

The integrity of the apex courts, namely the Court of Appeal and the Supreme Courts have been faulted on some occasions due to their questionable management of political pressure by other stakeholders in the political space. The face-off between the Court of Appeal President and the Chief Justice of Nigeria over impropriety in matters of electoral disputes in certain election petitions of some states demonstrates how pressures from other arms of government play out in the judiciary and the vulnerability of the judiciary to attacks by a desperate political class.⁶⁶

3.2 Devolution of power

The 1999 Constitution recognises three levels of governance, that is the federal, state and local governments,⁶⁷ and retains a list of 68 exclusive items to 30 concurrent items prescribed for the state. Items on the exclusive list include issues which border on the socio-economic improvement of the population, such as the police, railways, traffic, prisons and electricity. The result of this is that the central – federal – government is expected to implement more than it has the political will to handle. The retention of these items excludes states' initiatives. This is needless as some of these items can be handled by states, if empowered to do so.

Also, although local government is key to democratic development,⁶⁸ the vision behind the operation of the local government in Nigeria is still unclear. The nature of Nigerian local government neither reflects the British model, its colonial master, where it is viewed as 'administrative level' where certain services are rendered,⁶⁹ nor are they established as 'autonomous units' as in such places as Netherlands and Switzerland, nor

⁶⁴ M Venkatarangaiya *Free and fair elections* (1966).

⁶⁵ Vanguard 'Okada operators attack High Court' <http://www.vanguardngr.com/2012/08/okada-operators-attack-high-court-judge/> (accessed 10 August 2011).

⁶⁶ Vanguard 'Katsina-Alu/Salami face-off: Probe panel fails to meet deadline' 16 May 2011 <http://www.vanguardngr.com/2011/05/katsina-alusalami-face-off-probe-panel-fails-to-meet-deadline/> (accessed 10 August 2011).

⁶⁷ See the combined reading of arts 2(3) and 3(6) of the 1999 Constitution.

⁶⁸ W Zybrands 'Local government' in A Venter & C Landsbury (eds) *Government & Politics in the New South Africa* (2005) 3rd edition 133.

⁶⁹ H Allen 'Enhancing decentralisation of development' Unpublished working document for the 27th Congress of the International Union of Local Authorities (1985) 16.

are they regarded as 'civil society',⁷⁰ not part of the government. The objectives of local government are not clear in the 1999 Constitution, even though there is constitutional recognition of this level of government. In contrast to this position, the Constitution of South Africa states the objectives of its local government as including the promotion of democratic and accountable governance, as well as ensuring the provisions of services in the community.⁷¹ This is not the case under the Nigerian 1999 Constitution.

Currently the interaction between the federal levels of government in Nigeria with the local governments may be influenced by the political party to which the state government belongs. For instance, in spite of the decision of the court ruling that the allocation meant for the newly created local governments in Lagos State, under the control of opposition, be released, the federal government under Obasanjo's regime failed to release the revenue, and those local governments are still not recognised by the Constitution.⁷² Also, state initiatives on power generation have for long been compromised by federal bureaucracy which views the generation of power as exclusive to federal government.⁷³

3.3 Human rights compliance

A culture consistent with human rights will ensure at the very least that the provisions of the Constitution on human rights are respected and become a major tool and official script for internal assessment of state actors. Despite current constitutional government, observance of human rights in Nigeria is a concern. Respect of such values as the right to life and fair hearing are situational and not a matter of state policy. In May 1999 and October 2001, there were massacres and gross violations of human rights in Odi, Bayelsa State and Zaki-Biam and other locations in Benue State.⁷⁴ According to Human Rights Watch, the events in Benue were strikingly reminiscent of a military reprisal operation which took place two years earlier, in Odi, in Bayelsa State in the South of Nigeria.⁷⁵ The right to a fair hearing before, during and after trial is understood in a similar light when in 2003, the former Inspector-General of Police, Tafa Balogun announced that from March to November 2002, the police killed more

⁷⁰ As above.

⁷¹ South African Constitution, sec 152(1).

⁷² EO Innocent 'Evaluation of the practice of constitutionalism and the rule of law in a democracy: A Case of Nigeria, 1999-2009' (2009) *International Research Journal of Arts and Social Sciences*.

⁷³ 'A practical solution to Nigeria's power problem' *Sahara Reporters*, 1 February 2011.

⁷⁴ Human Rights Watch Report 'Nigeria military revenge in Benue: A population under attack', April 2002, Vol 14, No 29a.

⁷⁵ As above.

than 1 200 criminals.⁷⁶ The reality about the state of human rights in Nigeria is revealed with particular clarity in matters of socio-economic rights and religion.

Constitutionalism is yet to translate into justiciable socio-economic rights in Nigeria. This is as much the responsibility of the legislative and judicial arms of government. While one would expect the wave of democratisation to bring about an approach differing from military dispensation, this is not yet the norm. Section 6(6)(b) of the Constitution provides that judicial powers of states shall not apply to issues as to whether any law or judicial decision conforms with the Fundamental Objectives and Directive Principles of State Policy set out in chapter II of this Constitution. The Supreme Court re-affirmed this principle in *Attorney-General of Ondo State v Attorney-General of the Federation & 35 Others*.⁷⁷ It held, among others, that the provisions of the Fundamental Objectives and Directive Principles of State Policy can only be enforced through the promulgation of laws.

Literally, the approach to socio economic-rights has remained discouragingly negative despite a return to democratic governance in Nigeria. As Hakeem Yusuff argues, the provision of the Constitution on this body of rights is not in tandem with the International Covenant of Economic, Social and Cultural Rights, to which Nigeria is a state party.⁷⁸ One would expect a constitutional government which assumes power on the platform of people's trust to appreciate the importance of these rights to the improvement of standard of living of the people whose interest they claim to be representing and to commit state resources to achieving it. One would expect the courts in a democratic space to follow the line of the Supreme Court of India, which though it has a non-justiciable provision for socio-economic and cultural rights in its Constitution, has utilised its interpretative powers to extend the frontiers of enforceable rights in the country. The Indian courts have consistently held that good health is cardinal to the enjoyment of the right to life.⁷⁹

Along similar lines, the politics of religion since the return to democracy in 1999 has brought the gravest threat yet to be seen in the annals of Nigerian history, to its constitutional secularity as a state. Section 10 of the Constitution provides: 'The Government of the Federation or of a State shall not adopt any religion as State religion'. This provision

⁷⁶ US Department of State 'Nigeria Country Reports on Human Rights Practices – 2003' 25 February 2005, 2; Human Rights Watch Report 'Rest in Pieces Police Torture and Death in Custody in Nigeria' Vol 17, July 2004, 15.

⁷⁷ *Attorney-General of Ondo State v Attorney-General of the Federation & 35 Others* (2002) 6 SC Pt I 1 (179).

⁷⁸ HO Yusuff 'Oil on troubled waters: Multinational corporations and realising human rights in the developing world, with specific reference to Nigeria' (2008) 8 *African Human Rights Law Journal* 86.

⁷⁹ *Paramand Katra v Union of India* [1989] AIR 1989 SC 2039; 1990 Cvi LJ 671 and *Bandua Mukti Morcha v Union of India* [1984] AIR 1984 SC 802.

emphasises religious neutrality on the part of the Federal or State Government. According to Peters, it is generally understood to mean that neither the legislative nor the executive power may in any way be used to aid, advance, foster, promote or sponsor a religion.⁸⁰ However, following the 1999 national elections, the state of Zamfara under Alhaji Ahmed Sani, enacted the Sharia Establishment Law, Law of Zamfara State, 1999 and it came into force on 27 January 2000. By 2002, twelve states in the Northern part of Nigeria namely: Bauchi, Borno, Gombe, Jigawa, Kaduna, Kano, Katsina, Kebbi, Niger, Sokoto, Yobe and Zamfara, have all adopted some form of Sharia into their criminal legislation.⁸¹ The report of the Centre for Religious Freedom concludes that the implementation of the new Sharia in Nigeria:

instituted harsh, cruel and unusual punishments, including stoning in which the victim is to be buried with only the head and shoulders showing, before being stoned, amputations of hands, lashings, removal of eyes, and death by stabbing.⁸²

Ezzat observed that the application of Sharia in Nigeria was misused and manipulated.⁸³ According to the Centre for Religious Freedom, the type of Islam being propagated in Nigeria, referred to as 'new Shari'a', was alarmingly similar to that imposed in Afghanistan under the Taliban.⁸⁴

The right to religion, no doubt, includes the practice of Shari'a by Muslims. However, the use of political office to promote the concept of Shari'a in a given state raises fundamental argument about the constitutional vision of a state such as Nigeria where the religious and the non religious are expected to live together in harmony. It is difficult to imagine how a vision of 'unity, faith, peace and progress' can be achieved in a section of a nation, where religion has become heavily politicised. It is a sad commentary in Nigerian constitutional history that the secularity of its state has been more violated under a democratic space.

4 The future of constitutional government

Although the 1999 Constitution is significant for constitutional governance in Nigeria, the stigmas under the military rule continue to feature under the new constitutional space. The 1999 Constitution is not an outcome of mass sensitisation and participation. It retains a federation where the central level is burdened with responsibilities it may never have

⁸⁰ R Peters & M Barends *Islamic criminal law in Nigeria* (2003) 33.

⁸¹ LI Uzoukwu 'Constitutionalism, human rights and the judiciary in Nigeria' LLD Thesis, University of South Africa 2010 120.

⁸² Paul Marshall 'The Talibanisation of Nigeria: Shari'a law and religions freedom' The Centre for Religious Freedom (2002) 59-60.

⁸³ E Qureshi & HR Ezzat 'Are Sharia laws and human rights compatible?' http://en.qantara.de/wcsite.php?wc_c=9091 (accessed 20 July 2011).

⁸⁴ As above.

the political will to perform. Also, wide gaps still exist between some of the provisions in the Constitution and compliance. Essential questions with regard to devolution of power and enforcement of socio-economic rights of the people similarly remain problematic under the new order.

The integrity of the process of making a constitution matters for a government to be truly constitutional. Even so is compliance to the basic tenets of the constitution. True constitutional government will however be difficult in Nigeria without a popular constitution which is developed in line with the true history and values of its populace. The confidence of the populace in a constitution and the internally generated commitment to the constitution cannot be achieved if the instrument is not well negotiated by people it is required to bind. Such negotiation must debate the pragmatic model of federalism as essentially applicable particularly in the 1963 Constitution, where the central was not overburdened and regions enjoyed some measure of freedom. Appropriate constitutional making process should debate the vision of different levels of federalism with the view of driving and contributing to democratic development.

Considering its constitutional role as the enforcer of the law, the need for the executive, particularly its key institutions to uphold the Constitution by submitting to legislative oversight and comply with court orders cannot be overstated. When leadership is demonstrated on these ends, the Constitution will make sense to the vast majority of the populace, who then is able to see that all the institutions of governance act responsibly in accordance with the rule of law. The Constitution must assume the point of reference for the legislature in its law making process. It must ensure that laws are not made to scuttle democratic process, rather to strengthen it. The legislature should be ready to submit itself to the scrutiny of the public and increase public participation in its law making process.

In addition to demonstrating activism in matters of political and socio-economic rights, the judiciary should develop a positive approach towards dealing with controversies around its functions. While it may not always adopt silence in the face of criticisms at all times, the involvement of judges in engaging political actors in media debates over its rulings and decisions leaves much to be desired. A professional public relations statement carefully made when necessary will go far in protecting the image of the judiciary. To maintain its toga as the bastion of democratic hope, it is important that the judiciary be far away from political controversy relating to its operation and be pro-active in matters of safeguarding socio-economic rights. This is imperative for it to retain public confidence which is critical to its impartial role. A consistent culture of compliance will be critical to the future of constitutional government in Nigeria.

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