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ARTICLE: Constitutional Reforms and Constitutionalism in Africa: Reflections on Some Current Challenges and Future Prospects

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LexisNexis Summary

... The 1990 reforms were expected to provide a new constitutional framework to deal with perennial ills such as political instability, dictatorship, repression, human rights violations, corruption and mismanagement of state property, and poverty, all of which had stymied progress on the continent since independence. ... In this broad sense, recent literature on the topic suggests that the modern concept of *constitutionalism* rests on the following core elements: (i) the recognition and protection of fundamental rights and freedoms; (ii) the separation of powers; (iii) an independent judiciary; (iv) the review of the constitutionality of laws; (iv) the control of the amendment of the constitution; and (v) institutions that support democracy. ... The provisions dealing with this in the constitutions of Anglophone African countries allow for a partial intermixing of powers, which to some extent is capable of limiting executive excesses. ... Since the founding elections at the start of the democratization process from 1989 to 1995, the prospects of opposition parties winning elections have progressively diminished as more and more sophisticated means of rigging elections have been devised by ruling parties. ... A. Recognition of a Right to Free and Fair Elections and Other Ancillary Rights The recognition of the right to form and/or join political parties of one's choice and to vote or to be voted for any political office in the post-1990 African constitutions is fast becoming an illusion because the dominant parties that have now replaced the single parties and their leaders have easily entrenched themselves or their parties in office in perpetuity. ... Traditional *constitutionalism*, in the form in which it has been incorporated in modern African constitutions, has rightly been criticized as being "a largely procedural notion" because it emphasizes values while paying little attention to the principles, structures, and institutions that will enable these values to achieve concrete practical results. ... In many instances it seems that the revised or new constitutions were not only designed to eliminate dictatorship and promote democracy and good governance but also to promote a new human rights culture that is particularly sensitive to issues such as hunger, poverty, unemployment, ignorance, illiteracy, disease, and other social ills that have inflicted so much hardship on a majority of the population on the continent. ... The courts have clearly recognized the fact that they cannot force the state to enact legislation to enhance fundamental rights or to pursue the directive principles, but the true measure of their judicial activism, which is of relevance to us here, is found less in the rhetoric of rights definition than in the remedial strategies they have deployed to deal with the public interest litigation cases. ... Unless the judiciary is ready to learn about and address current developments both nationally and internationally, judicial decisions will retain a rigid, positivist orientation, which is bad for both human rights protection and social justice. ... As one looks to the future of the constitutional rights revolution in Africa, there seems to be no better method of both promoting and sustaining the momentum of *constitutionalism* and good governance, while simultaneously restraining actual and potential governmental lawlessness than through the vigilance of civil society. ... If the post-1990 constitutional changes were designed to give African countries a fresh start, as most modern constitutions since the United States Constitution of 1787 usually try

to do, then the general result of this process must be considered as mixed, insofar as the commitment to constitutionalism, good governance, and accountability is concerned.

Text

[*1007]

Introduction

From antiquity down to the modern era, philosophers, political scientists, and jurists have always recognized the imperatives of constitutionalism¹ and the difficulties of attaining it. For Africa, after more than four decades of mostly authoritarian, corrupt, and incompetent rule, the 1990s began with a slow and painful move towards what many optimistically hoped would usher in a new era of democratic governance and constitutionalism. One of the main features of this process has been reforms designed to introduce constitutions that promote constitutionalism and good governance.² Many of the apparently radical changes that were introduced by these reforms have been widely [*1008] discussed and commented upon, and some of these studies have shown that many of the post-1990 constitutions do, more or less, provide better prospects for constitutionalism than almost all the pre-1990 constitutions.³ The objective of this Article is to consider, in light of the challenges to constitutionalism that have emerged since the third generation of constitutions were adopted in Africa,⁴ what [*1009] needs to be done to sustain the momentum towards constitutional governance on the continent. The basic contention of this Article is that although the foundations for promoting constitutionalism-good governance and democracy-have been laid down in these reforms, the threats of authoritarian resurgence that have emerged in the last few years suggest that these changes either did not go far enough or did not address the critical problems of the moment. The main focus of the discussion will be on developments in Sub-Saharan Africa.

The drafting of new constitutions and the revising of old constitutions by most African countries in the 1990s was a clear recognition of the need for radical changes to the status quo ante. In some cases, it meant a total break with a dreadful past-such as apartheid in Southern Africa-but in most cases it meant recognizing that a constitutional framework built around the one party system that had bred authoritarian and dictatorial rule was a recipe for political in-

¹ Constitutionalism is a concept that is difficult to define. See *infra* text accompanying notes 17-24.

² The spate of new or revised constitutions has been characterized by Maurice Glele as "a prolonged fit of constitution fever." Jean Du Bois de Gaudusson, Introduction to 2 LES CONSTITUTIONS AFRICAINES PUBLIEES EN LANGUE FRANCAISE 9, 9 (Jean Du Bois de Gaudusson et al. eds, 1998).

³ See, e.g., JOHN HATCHARD ET AL., COMPARATIVE CONSTITUTIONALISM AND GOOD GOVERNANCE IN THE COMMONWEALTH: AN EASTERN AND SOUTHERN AFRICAN PERSPECTIVE 122-23 (2004); OKON AKIBA, Constitutional Government and the Future of Constitutionalism in Africa, in CONSTITUTIONALISM AND SOCIETY IN AFRICA 3, 9-11 (2004); Veronica Federico, Introduction to CONSTITUTIONALISM AND DEMOCRATIC TRANSITIONS: LESSONS FROM SOUTH AFRICA 1, 1 (Veronica Federico & Carlo Fusaro eds., 2006); Charles M. Fombad, Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa, [55 AM. J. COMP. L. 1, 2-3 \(2007\)](#) [hereinafter Fombad, Challenges]; Charles Manga Fombad, Post-1990 Constitutional Reforms in Africa, in THE RESOLUTION OF AFRICAN CONFLICTS: THE MANAGEMENT OF CONFLICT RESOLUTION & POST-CONFLICT RECONSTRUCTION 179, 196 (Alfred Nhema & Paul Tiyambe Zeleza eds., 2008) [hereinafter Fombad, Post-1990 Constitutional Reforms]; J. Oloka-Onyango, Introduction to CONSTITUTIONALISM IN AFRICA: CREATING OPPORTUNITIES, FACING CHALLENGES 1, 1-2 (J. Oloka-Onyango ed., 2001).

⁴ The independence constitutions that were more or less imposed by the departing colonial powers in the 1960s can be considered the first generation of the African constitution-making revolution. See Steve Odero Ouma, Constitution Making and Constitutional Reforms in Fledgling Democracies: An East African Appraisal, in REINFORCING JUDICIAL AND LEGAL INSTITUTIONS: KENYAN AND REGIONAL PERSPECTIVES 41, 41 (Kithune Kindiki ed., 2007) (identifying five historical phases of constitutionalism: pre-colonial, colonial, immediate post-colonial, modern, and contemporary); see also Fombad, Challenges, *supra* note 3, at 2 n.2. "The second constitution-making revolution started soon after independence as African leaders under the pretext of nation-building and development revised and repealed the liberal principles in the inherited constitutions." *Id.* As described by the late Tanzanian President, Julius Nyerere, the leaders tried to make constitutions operate as "brakes" rather than "accelerators." ISSA G. SHIVJI, SILENCES IN THE NGO DISCOURSE: THE ROLE AND FUTURE OF NGOS IN AFRICA 7 (2006). Neither the goals of development nor national unity were attained. Fombad, Challenges, *supra* note 3, at 2 n.2. "The third revolution that started in the 1990s reflects the attempts to correct the errors of the past." *Id.* In making these classifications, the colonial constitutions are ignored, as they "made no pretence at being liberal or democratic and were essentially repressive instruments designed to facilitate the exploitation of the colonies." *Id.*; see Yash Ghai, A Journey Around Constitutions: Reflections on Contemporary Constitutions, 122 S. AFR. L.J. 804, 808-09 (2005) (describing colonial constitutions as instruments allowing colonial governments to organize economies and societies without regard for democratic principles).

stability and economic decline.⁵ In many countries, the problems were not caused by the absence of constitutions. Rather, it was the ease with which African leaders had rendered constitutions dysfunctional by regularly ignoring their provisions or arbitrarily amending them when it suited their convenience.⁶ The 1990 reforms were expected [*1010] to provide a new constitutional framework to deal with perennial ills such as political instability, dictatorship, repression, human rights violations, corruption and mismanagement of state property, and poverty, all of which had stymied progress on the continent since independence.

The 1990s provided African constitutional engineers with a historic opportunity to correct many of the errors made in the constitutions that were imposed by the departing colonial powers at independence. As Cass Sunstein has noted, constitutions should be designed to protect a country "against the most likely problems in the usual political processes," particularly those aspects of the "country's culture and traditions," as well as its history, "that will predictably produce harm through the country's ordinary politics" or its "most threatening tendencies."⁷ This, it is argued, did not happen. While many of the reforms have considerably opened up the political space for the ordinary person, they did not adequately address the institutional weaknesses that made dictatorship and the concomitant repression, corruption, and economic mismanagement inevitable. As a result, in spite of the progress made towards promoting *constitutionalism*, democracy, and good governance, the future prospects are not as bright as would have been expected. It is no surprise that one commentator has rightly suggested that these developments have made power in Africa resemble the two-faced god, Janus, from Roman mythology.⁸ What can be done to revive faith in a process that started with so much promise in the early 1990s? [*1011]

It must be made quite clear at the outset that this Article cannot pretend to look at everything that has gone wrong. Part I will briefly highlight the attempts made to adopt constitutions that promote *constitutionalism*. Part II will look at some of the main challenges that have arisen during the course of the last two decades with ominous and insidious signs of totalitarian resurgence.⁹ Part III will discuss how some of these challenges can be overcome. In sum, this Article will argue that African countries cannot be economically viable and socially and politically stable, or hope

⁵ See Paul Collier & Jan Willem Gunning, *Why Has Africa Grown Slowly?*, 13 J. ECON. PERSP. 3, 3 (1999) ("However, during the 1970s both political and economic matters in Africa deteriorated. The leadership of many African nations hardened into autocracy and dictatorship. Africa's economies first faltered and then started to decline."); Savo Heleta, *African Stagnation and Underdevelopment 5* (July 2007) (unpublished M. Phil. paper, Nelson Mandela Metropolitan University, Port Elizabeth, South Africa), <http://www.savoheleta.com/AfricanStagnationandUnderdevelopmentbySavSheleta.pdf> ("Dictators . . . are one of Africa's biggest problems. . . . Those who are on good terms with the leaders and the elites are able to get government contracts, jobs, and loans, while the rest of the population and the country's economy suffer." (citation omitted)).

⁶ See Grp. of Experts on the United Nations Programme on Pub. Admin. & Fin., *Major Problems and Emerging Trends with Respect to Governance in Africa* 16, U.N. Doc. ST/SG/AC.6/1998/L.4 (Apr. 16, 1998) (by Jacques Mariel Nzouankeu) ("African constitutions . . . must be rigorously respected. Governments must not amend constitutions in order to adapt them to their political ambitions. On the contrary, it is the governments which must adapt to the constitution, somewhat like a tenant adapts to an apartment which he occupies without having the right to modify it."); see also Fombad, *Challenges*, supra note 3, at 3 ("The history of constitutionalism and constitutional democracy in Africa is not a particularly happy one. Many of the continent's problems have been caused, not by the absence of constitutions per se, but rather by the ease with which constitutional provisions were abrogated, subverted, suspended or brazenly ignored.")

⁷ Cass R. Sunstein, *Against Positive Rights*, in WESTERN RIGHTS? POST-COMMUNIST APPLICATION 225, 226-27 (Andras Sajó ed., 1996); see also Fombad, *Challenges*, supra note 3, at 3 (arguing that Africa's constitutional engineers missed a historic opportunity).

⁸ Joseph Ki-Zerbo describes Africa as having "one liberal, democratic, polished, refined and orthodox face looking to the outside world, and another, concealed, surly, implacable, not to say savage, looking toward the interior." Joseph Ki-Zerbo, *African Intellectuals, Nationalism and Pan-Africanism: A Testimony*, in AFRICAN INTELLECTUALS: RETHINKING POLITICS, LANGUAGE, GENDER AND DEVELOPMENT 78, 83 (Thandika Mkandawire ed., 2005).

⁹ It is not just the regular rigging of elections but also the refusal of incumbents who lose elections, such as Paul Biya of Cameroon in 1992, Mwa Kibaki of Kenya in 2007, and Robert Mugabe of Zimbabwe in 2008, to depart gracefully. See PETER WUTEH VAKUNTA, *Aporia: Africa's Demo-Dictators*, in CRY MY BELOVED AFRICA: ESSAYS ON THE POSTCOLONIAL AURA IN AFRICA 67, 67, 69 (2008) (describing Paul Biya and Mwai Kibaki as "demo-dictators" refusing to relinquish their power); Muktar M. Omer, *Is Africa's Problem 'Big Men' or Big Colonial Interests?*, WARDHEERNEWS.COM (Jan. 6, 2011), <http://wardheernews.com/Articles11/Jan/Muktar/06Is%20AfricasProblemBigMenorBigColonialInterests.html> (describing how most news outlets identify Africa's problem as one of "big-men-who-won't-go-away"). "Monarchies" are beginning to emerge, with sons succeeding their fathers after staged elections, as has been the case of Foure Eyadima in Togo, Joseph Kabila in the Democratic Republic of the Congo, and Ali Bongo in Gabon. Rene Dassy, *The End of Dynastic Presidential Politics in Africa?*, TALKAFRIQUE.COM (Feb. 3, 2011), <http://www.talkafrique.com/issues/dynasty-politics-frica>. Both Muammar Khadafy of Libya and Hosni Mubarak of Egypt are openly grooming their sons to take over when they leave the scene. Id.

to reduce the scourge of disease, hunger, and poverty, until certain improvements are made to the present constitutions. This will require ensuring that these constitutions entrench certain crucial institutions, principles, and mechanisms that promote *constitutionalism*, accountability, democracy, and good governance. Africa has experienced enough change to bring about a new set of rulers, but not the profound institutional changes in the system that made dictatorship, corruption, and economic decline inevitable. If the momentum for *constitutionalism* and constitutional government on the continent is to be maintained, then the emphasis in the future should now be on the introduction of the fundamental principles and institutions that will make the values of *constitutionalism* a practical and daily reality. The reasonable progress made in some countries does not in any way diminish the looming danger of authoritarian reversal. [*1012]

I. The Revival of *Constitutionalism* on the African Continent

In many respects, the very essence of a constitution is its function as a "power map."¹⁰ In this regard, it tries to provide a careful balance in the way it confers powers on the state. It empowers the government to be strong enough to operate effectively while imposing reasonable restraints which do not make it too weak and create a risk of anarchy.¹¹ The ultimate goal is to prevent the twin evils of tyranny and anarchy.¹² Looked at from this perspective, many writers agree that post-independence African constitutions, most of which were imposed by the departing colonial masters, were quickly transformed into instruments of oppression under the pretext of pursuing the coveted but elusive goals of national unity and economic development.¹³ As a consequence of this, most of these constitutions became the source of tyranny, which in many countries provoked civil wars, coups d'états, and political instability.¹⁴ Without effective or meaningful constraints on [*1013] power, it was difficult for many African countries to practice *constitutionalism*. And as Okoth-Ogendo pointed out, what existed in Africa were "constitutions without *constitutionalism*."¹⁵ It is therefore important to distinguish between the idea of a constitution and the increasingly "omni-present"¹⁶ concept of *constitutionalism*.

As James Curry points out, "the distinction between a 'constitution' and '*constitutionalism*' is more than a simple exercise in semantics."¹⁷ Although a lot has been written about *constitutionalism* generally and *constitutionalism* in Africa in particular, constitutional law scholars, political scientists, and other social scientists have had great difficulties defining the concept of *constitutionalism*. Although some writers have confused the notion of a constitution with

¹⁰ JAMES A. CURRY ET AL., CONSTITUTIONAL GOVERNMENT: THE AMERICAN EXPERIENCE 3, 10 (3d ed. 1997) (quoting IVO D. DUCHACEK, POWER MAPS 3 (1973)).

¹¹ See STEPHEN HOLMES, PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY 270-71 (1995) (describing constitutionalism as the liberal-democratic solution to the problems of both tyranny and anarchy). Holmes aptly captures the paradox thus: "How can we exit from anarchy without falling into tyranny? How can we assign the rulers enough powers to control the ruled, while also preventing this accumulated power from being abused?" Id. at 270.

¹² Fombad, Challenges, *supra* note 3, at 6.

¹³ See Robert B. Seidman, Constitutions in Independent, Anglophonic, Sub-Saharan Africa: Form and Legitimacy, 1969 WISC. L. REV. 83, 91, who quotes from the Tanzanian Presidential Commission on the Establishment of a Democratic One Party State in 1965, which states, *inter alia*, "the two basic goals of African politics-development and legality-seem inherently contradictory. . . . Constitutions can never achieve a balance between those two poles to match the values of every strata in society." Id. The single party system that emerged, instead of bringing prosperity and contentment, brought about patrimonialism, nepotism, tribalism, and generalized corruption. See Bernard A. Muna, Africa's Second Independence, J. DEMOCRACY, Summer 1991, at 60, 60-61 ("Dictatorships, minority governments, and single-party regimes became the order of the day. . . . Country after country suffered as oppression, tribalism, and gross injustice ran rampant.").

¹⁴ See Frederick Cowell, Preventing Coups in Africa: Attempts at the Protection of Human Rights and Constitutions, 15 INT'L J. HUM. RTS. 749, 750-52 (2011) (describing a number of military coups d'états that occurred for "ostensibly constitutional reasons").

¹⁵ H.W.O. Okoth-Ogendo, Constitutions Without Constitutionalism, in STATE AND CONSTITUTIONALISM: AN AFRICAN DEBATE ON DEMOCRACY 3, 3 (Issa Shivji ed., 1991). See generally GN Barrie, Paradise Lost: The History of Constitutionalism in Africa Post Independence, 2009 J. S. AFR. L. 290 (outlining the history and development of constitutional governments in Africa).

¹⁶ Philip Alston, A Framework for the Comparative Analysis of Bills of Rights, in PROMOTING HUMAN RIGHTS THROUGH BILLS OF RIGHTS: COMPARATIVE PERSPECTIVES 1, 6 (Philip Alston ed., 1999).

¹⁷ CURRY ET AL., *supra* note 10, at 5.

the concept of *constitutionalism*,¹⁸ the two are quite distinct. *Constitutionalism*, as opposed to the central purpose of a constitution, means something more than merely the attempt to limit governmental arbitrariness.

To provide a legalistic definition of *constitutionalism*, it can be said to "encompass the idea that a government should not only be sufficiently limited in a way that protects its citizens from arbitrary rule but also that such a government should be able to operate efficiently and in a way that it can be effectively compelled to operate within its [*1014] constitutional limitations."¹⁹ In this sense, *constitutionalism* combines the idea of a limited and accountable government and rests on two main pillars. One is the fact that limitations are imposed on government when it is based on certain core values; the second is the ability of citizens to legally compel government to operate within these limitations.²⁰ In this broad sense, recent literature on the topic suggests that the modern concept of *constitutionalism* rests on the following core elements:²¹

- (i) the recognition and protection of fundamental rights and freedoms;
- (ii) the separation of powers;
- (iii) an independent judiciary;
- (iv) the review of the constitutionality of laws;
- (iv) the control of the amendment of the constitution; and
- (v) institutions that support democracy.²²

There are, however, three important points to note about *constitutionalism* as defined above. First, it is by no means a static principle and the core elements identified are bound to change as better ways are devised to limit government and protect citizens.²³ Second, the presence and institutionalization of these core elements do not necessarily guarantee *constitutionalism*. Nevertheless, their presence makes the prospects for *constitutionalism* better. In the absence of such provisions, the chances of [*1015] *constitutionalism* are very bleak. Finally, it is the cumulative effect of these core elements that enhance the chances for *constitutionalism*.

The fundamental idea behind *constitutionalism* is the need to ensure that a constitution does not become an ornamental document or a sham that politicians can ignore or violate with impunity. It must provide a solid basis for the respect of the rule of law, democracy, and good governance.²⁴ At independence, most African countries adopted constitutions that had been crafted by the departing colonial powers.²⁵ The leading type was the British parliamentary or Westminster model, prepared in the Colonial Office in London but slightly modified to suit the circumstances of

¹⁸ See, e.g., SIRI GLOPPEN, SOUTH AFRICA: THE BATTLE OVER THE CONSTITUTION 42-43 (1997) (confusing constitutionalism's purpose as merely outlining the powers of the state, which is actually the purpose of a constitution). But see B.O. NWABUEZE, CONSTITUTIONALISM IN THE EMERGENT STATES 1-2 (1973) (arguing that constitutionalism consists of outlining, but also limiting, the powers of the state and restraining its government accordingly).

¹⁹ Fombad, Challenges, supra note 3, at 7.

²⁰ See also id. for further discussion of the two pillars of constitutionalism.

²¹ See, e.g., GIOVANNI SARTORI, THE THEORY OF DEMOCRACY REVISITED 307-09 (1987) (listing five elements of what Sartori calls "liberal constitutionalism"); Mac Darrow & Philip Alston, Bills of Rights in Comparative Perspective, in PROMOTING HUMAN RIGHTS THROUGH BILLS OF RIGHTS: COMPARATIVE PERSPECTIVES, supra note 16, at 465, 465 (noting ten "minimum ingredients" of constitutionalism); Louis Henkin, Elements of Constitutionalism, 60 REVIEW 11-22 (1998) (identifying nine "essential" elements).

²² For a more detailed discussion of these elements, see Fombad, Challenges, supra note 3, at 7-9, 11-24 and Fombad, Post-1990 Constitutional Reforms, supra note 3, at 181-82.

²³ In this regard, one could add as an emerging core element the state institutions supporting constitutional democracy, found in Chapter 9 of the South African Constitution. See S. AFR. CONST., 1996 ch. 9.

²⁴ Nevertheless, constitutionalism needs to be distinguished from both democracy and the rule of law. See Fombad, Challenges, supra note 3, at 8-10.

²⁵ BEN NWABUEZE, 2 CONSTITUTIONAL DEMOCRACY IN AFRICA 337-39 (2003).

the different countries that adopted it.²⁶ Most of the Anglophone African countries²⁷ that adopted the Westminster model added elements of the United States presidential model to it.²⁸ The other major Western constitutional model that was adopted was the Gaullist constitutional system based on the French Fifth Republic constitution of 1958,²⁹ which was essentially an admixture of the Westminster parliamentary and the U.S. presidential system.³⁰ This model has been widely adopted in Francophone Africa³¹ and variations of it were adopted in Lusophone³² and Hispanophone³³ Africa.³⁴ [*1016]

Although there have been quite significant modifications to the constitutions that were adopted at independence, the changes that have emerged after the 1990s remain largely within the received Western models. Perhaps what is most significant for the purposes of this discussion is that recent analyses of the contents of the revised or new post-1990 constitutions show that with the exception of a few countries, such as Cameroon and Eritrea, most of these constitutions have in diverse ways gone to considerable lengths to incorporate the core elements of *constitutionalism* identified above.³⁵

These studies show that the protection of fundamental human rights and freedoms has become a standard of *constitutionalism* recognized and accepted by most African countries.³⁶ While the quality of human rights protection in most African countries increased somewhat after 1990,³⁷ as we shall soon see, there has been a steady decline in the quantum of human rights protection enjoyed in the last six years.³⁸

In order to check the abuse of the often exorbitant powers that many African leaders claimed for themselves, most modern African constitutions now provide for some form of separation of powers.³⁹ The provisions dealing with this in the constitutions of Anglophone African countries allow for a partial intermixing of powers, which to some [*1017] extent is capable of limiting executive excesses.⁴⁰ By contrast, the provisions in most Francophone and Lusophone African constitutions have adopted the rather defective French Fifth Republic model.⁴¹ Most of these countries have tried to improve on this model in their revised constitutions with the exception of Cameroon, where the pur-

²⁶ See BEN NWABUEZE, 4 CONSTITUTIONAL DEMOCRACY IN AFRICA 31-48 (2004) [hereinafter NWABUEZE, VOLUME 4].

²⁷ Anglophone African countries include Botswana, Cameroon, The Gambia, Ghana, Kenya, Lesotho, Liberia, Malawi, Namibia, Nigeria, Sierra Leone, South Africa, Swaziland, Tanzania, Uganda, and Zambia. The World Factbook: Field Listing Languages, UNITED STATES CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/fields/2098.html> (last visited Aug. 2, 2011) [hereinafter CIA World Factbook].

²⁸ See NWABUEZE, VOLUME 4, supra note 26, at 76-107.

²⁹ See id. at 147-170.

³⁰ See Fombad, Challenges, supra note 3, at 13.

³¹ See NWABUEZE, VOLUME 4, supra note 26, at 76-107. Francophone African countries include Benin, Burkina Faso, Burundi, Cameroon, Central African Republic, Chad, Comoros, Republic of the Congo, Democratic Republic of the Congo, Republic of the Cote d'Ivoire, Djibouti, Equatorial Guinea, Gabon, Guinea, Madagascar, Mali, Niger, Rwanda, Senegal, and Togo. CIA World Factbook, supra note 27.

³² Lusophone African countries include Angola, Cape Verde, Guinea-Bissau, Mozambique, and Sao Tome and Principe. CIA World Factbook, supra note 27.

³³ Hispanophone African countries include Equatorial Guinea. CIA World Factbook, supra note 27.

³⁴ See BEN NWABUEZE, 5 CONSTITUTIONAL DEMOCRACY IN AFRICA 181-82 (2004).

³⁵ For Southern Africa, see Fombad, Challenges, supra note 3, at 11-24. For a broader study, see Fombad, Post-1990 Constitutional Reforms, supra note 3, at 183-95. See generally H. Kwasi Prempeh, Africa's "Constitutionalism Revival": False Start or New Dawn?, 5 INT'L J. CONST. L. 469, 469-73 (2007).

³⁶ Christof Heyns & Waruguru Kaguongo, Constitutional Human Rights Law in Africa, 22 S. AFR. J. HUM. RIGHTS 673, 676-82 (2006).

³⁷ Fombad, Challenges, supra note 3, at 11-12.

³⁸ See infra text accompanying notes 97-106; tbls. 1, 2, and 3.

³⁹ Fombad, Challenges, supra note 3, at 12-15.

⁴⁰ Id. at 14-15.

⁴¹ See Charles Manga Fombad, The New Cameroonian Constitutional Council in a Comparative Perspective: Progress or Retrogression?, 42 J. AFR. L. 172, 172-73 (1998) [hereinafter Fombad, Cameroonian Council].

ported separation of powers in the 1996 constitution is purely symbolic.⁴²

Modern African constitutions also recognize and sometimes purport to protect the independence of the judiciary.⁴³ Because of the substantial scope for political interference, however, the prospect for effective judicial independence in Francophone and Lusophone countries is quite limited. By contrast, many Anglophone constitutions, especially those of Ghana and South Africa, contain provisions that can considerably enhance the chances of the judiciary operating relatively independently.⁴⁴

To check against the violations of the constitution that were very common before 1990, most modern African constitutions have now incorporated one of the important bulwarks of *constitutionalism*, that is, a mechanism for reviewing compliance with the constitution.⁴⁵ Anglophone African countries have by and large adopted variants of the American decentralized system of concrete judicial review influenced by the locus classicus, *Marbury v. Madison*.⁴⁶ Most of the Francophone and Lusophone African countries have adopted, with important and significant modifications, the very limited French system of quasi-administrative and [*1018] quasi-judicial review before a Constitutional Council.⁴⁷ It is perhaps only Cameroon which, in its 1996 constitutional amendment, copied the French 1958 model in its original and undeveloped form with all its defects and weaknesses.⁴⁸

One of the core elements of *constitutionalism* is the regulation of the procedure for amending the constitution. The aim is not to block constitutional amendments completely but rather to ensure that the process is reasonably difficult to check against any arbitrary or whimsical constitutional changes that may defeat the will of the people.⁴⁹ The need to limit and control the ability of African leaders to easily and frequently alter the constitution as they had done before the 1990s therefore seemed to be on the minds of the constitutional reformers. Insofar as the restrictions placed on constitutional amendments are concerned,⁵⁰ almost all African constitutions can be placed in the semi-rigid category, although the exact extent varies from country to country.⁵¹ A good number require that constitutional amendments should be approved in parliament by a special majority of two-thirds or three quarters,⁵² or that failing such a [*1019] majority the proposed amendment be put to a referendum.⁵³ In some constitutions, amendments

⁴² See Charles Manga Fombad, *Protecting Constitutional Values in Africa: A Comparison of Botswana and Cameroon*, 36 COMP. & INT'L L.J. S. AFR. 83, 94-97 (2003) [hereinafter Fombad, *Constitutional Values*].

⁴³ See generally Charles M. Fombad, *A Preliminary Assessment of the Prospects for Judicial Independence in Post-1990 African Constitutions*, PUB. L., Summer 2007, at 233 [hereinafter Fombad, *A Preliminary Assessment*].

⁴⁴ See CONST. OF THE REPUBLIC OF GHANA, Feb. 1992, § 127 (1), (2); S. AFR. CONST., 1996 ch. 8, § 165 (2), (3), (4).

⁴⁵ Fombad, *Challenges*, supra note 3, at 18-20.

⁴⁶ [5 U.S. \(1 Cranch\) 137 \(1803\)](#).

⁴⁷ Fombad, *Challenges*, supra note 3, at 18-19.

⁴⁸ See Fombad, *Cameroonian Council*, supra note 41, at 172-73 (describing how the French constitutional model was not sufficiently mastered nor tested before it was exported to Cameroon); see also Fombad, *Constitutional Values*, supra note 42, at 101-03 (describing how some weaknesses in the Cameroonian model are rooted in problems inherent to the French Civil law tradition).

⁴⁹ Fombad, *Challenges*, supra note 3, at 21.

⁵⁰ See generally Charles Manga Fombad, *Limits on the Powers to Amend Constitutions: Recent Trends in Africa and their Impact on Constitutionalism*, 6 U. BOTS. L.J. 27 (2007) (examining the control methods utilized by the major African countries to limit the powers of each government to amend their constitution).

⁵¹ Constitutions are described as rigid, semi-rigid, or flexible according to how difficult or easy it is to amend their provisions. For a more in-depth discussion on the control on amending constitutions and on the classification of written constitutions on a range between rigid and flexible, see Fombad, *Challenges*, supra note 3, at 21-26.

⁵² See, e.g., CONST. OF THE REPUBLIC OF ANGOLA Aug. 25, 1992, art. 234 (requiring a two-thirds majority); CONST. OF NIGER July 18, 1999, art. 176 (requiring a three-quarters majority for an amendment to be considered and a four-fifths majority for an amendment to be adopted).

⁵³ See CONST. OF THE GABONESE REPUBLIC Aug. 19, 2003, art. 116 (requiring proposals be put before the Constitutional Court for an opinion, although it is not clear what the purpose of such an opinion would be); CONST. OF NIGER July 18, 1999, art. 135 (requiring that, failing a four-fifths majority, the proposed amendment be submitted to a referendum).

must not only get the approval of a special parliamentary majority but must also be submitted to a referendum.⁵⁴

Finally, implanting and sustaining *constitutionalism* in Africa's fledgling democratic transitions needs something more than the mere entrenchment of the core elements discussed above. What has rightly been described as probably South Africa's most "important contribution to the history of *constitutionalism*"⁵⁵ appears in Chapter 9 of its Constitution, under the title "state institutions supporting constitutional democracy."⁵⁶ As will be seen shortly, this provides for the establishment of a number of institutions with the avowed purpose of strengthening constitutional democracy in the country.⁵⁷ Many of the constitutions of other African countries provide for one or more of these institutions,⁵⁸ but what distinguishes the South African institutions is that they have been constitutionally entrenched in such a way that they can operate as independent sites of oversight, supervision, and [*1020] enforcement of the constitution. In this way, they not only support but also help to sustain *constitutionalism*.

By way of conclusion, it can be said that by the end of the last century, most African countries were now operating under constitutions that for the first time tried to promote *constitutionalism*. However, having provisions in constitutions that can promote *constitutionalism* is one thing, and actually practicing *constitutionalism* is another. In fact, the past decade has shown the wide gap that often exists between the constitutional text and constitutional practice.

II. Challenges to Consolidating *Constitutionalism*

The main contention of this Article is that although the core principles of *constitutionalism* have been incorporated in one form or another in modern African constitutions, the experiences under these new or revised constitutions in the last decade have exposed numerous structural and institutional weaknesses and gaps. It is not possible nor is it desirable to fully catalog and discuss all the issues that have arisen. A few of what one can consider as some of the fundamental challenges that have made *constitutionalism* under present constitutions neither real, effective, nor meaningful will now be briefly considered.

For a start, the assumption that the constitutional entrenchment of fundamental rights, especially the legalization of multi-partyism, would provide a solid foundation on which constitutional democracy, a culture of tolerance, transparency, and accountability, as well as political stability, and would discourage dictatorship and military adventurism has not turned out to be true. Patrick McGowan, in a 2001 study, suggests that although the period from 1966 to 1970 had the highest rate of successful coups, the onset of the democratization process has not seen any significant reduction in their incidence.⁵⁹ In fact, the increase in the incidence of coups between 1991 and 2001 clearly contradicts the assumption that democratization would bring about a more stable political and socio [*1021] economic environment that would discourage military adventurism.⁶⁰

In many respects, the main basis on which many African countries can claim to be democracies, the regular holding of parliamentary and presidential elections, is paradoxically one of the main sources of democratic paralysis on the continent. Most of these elections have, in the words of Andreas Schedler, provided "little more than a theatrical set-

⁵⁴ See, e.g., CONST. OF BOTS. Sept. 30, 1966, ch. V, pt. IV, § 89 (requiring a referendum); CONST. OF THE REPUBLIC OF CONGO Mar. 15, 1992, art. 191 (same); CONST. OF THE REPUBLIC OF MALI Jan. 12, 1992, art. 118 (same). Under article 99 of the Constitution of Mauritania, the President may avoid the inconvenience of a referendum by ensuring that he obtains three-fifths votes of Parliament convened in congress. See CONST. OF MAURITANIA July 12, 1991, tit. XI, arts. 99-101 (explaining the process of constitutional revision).

⁵⁵ Heinz Klug, Constitutional Law, 1995 ANN. SURV. S. AFR. L. 1, 11.

⁵⁶ S. AFR. CONST., 1996 ch. 9.

⁵⁷ See *infra* Part III.B.

⁵⁸ See, e.g., CONST. OF THE REPUBLIC OF GHANA Apr. 28, 1992, arts. 43-54, 216-30, 231-39, 166-73, 187-89 (providing, respectively, for an electoral commission, a commission on Human Rights and Administrative Justice, a National Commission for Civil Education, a National Media Commission, and an Auditor General); CONST. OF NAMIB. Feb. 9, 1990, arts. 142, 127 (providing, respectively, for an Ombudsman and an Auditor General); CONST. OF ERITREA May 23, 1997, arts. 54, 57 (providing, respectively, for an Ombudsman and an Electoral Commission); CONST. OF THE REPUBLIC OF ANGOLA Aug. 25, 1992, art. 192 (providing for a judicial protectorate-an Ombudsman).

⁵⁹ Patrick J. McGowan, African Military Coups d'Etat, 1956-2001: Frequency, Trends and Distribution, 41 J. MOD. AFR. STUD. 339, 351-52 (2003).

⁶⁰ See *id.*

ting for the self-representation and self-reproduction of power.”⁶¹ Both the old guard “born-again” democrats and the post-1990 democrats have used numerous sophisticated tactics to pre-empt and frustrate any potential threats emanating from popular elections.⁶² A common strategy has been for ruling parties to tailor electoral codes to favor them and exclude their opponents from electoral competition. An example of this is the nationality clauses that were used by the incumbents in Cote d’Ivoire and Zambia to exclude serious competitors from the presidential race.⁶³ It has almost become an unbreakable rule that the party that writes the electoral code always wins the elections. This is aggravated by electoral malpractices and other irregularities such as the disenfranchisement of voters in opposition strongholds, forging identification cards, vote stuffing, and placing the conduct of elections in the hands of electoral bodies controlled and managed by supporters of the ruling parties.⁶⁴

Since the founding elections at the start of the democratization process from 1989 to 1995, the prospects of opposition parties winning elections have progressively diminished as more and more sophisticated means of [*1022] rigging elections have been devised by ruling parties.⁶⁵ In destroying faith in peaceful change through the ballot box, the ugly spectre of change through the use of force is increasingly present. In the famous and oft-quoted words of the late President John F. Kennedy, “those who make peaceful change through the ballot box impossible make violent change inevitable.”⁶⁶ Democracy can hardly be expected to take foothold in Africa when elections have been reduced into a process of participation with predictable results rather than a process of competition with uncertain results.

Opposition political parties, long considered to be an essential structural characteristic of modern liberal democracy, are barely tolerated on the continent.⁶⁷ In Africa, the large number of opposition parties often degenerates into either narrow ethnic alliances or just opportunistic alliances set up by disgruntled former members of the ruling single party sharing the traits of the former era: corruption, personalization of politics, excessive ambition, and a focus on grabbing power, but with no alternative program of government.⁶⁸ Fractious and diverse, many of the opposition parties, even in countries like Botswana, Africa’s best example of successful multi-party democracy, “spend their time squabbling and in most cases pose more competition for each other than for the ruling parties.”⁶⁹ [*1023]

Jean-Francois Bayart’s conception of the “politics of the belly” accurately reflects the tactics that the dominant parties that have replaced the former single parties are practicing today to perpetuate their dominance of the political scene.⁷⁰ The Machiavellian tactic that enemies must either be caressed by co-optation into the spoils of power or be anni-

⁶¹ Andreas Schedler, *The Menu of Manipulation*, J. DEMOCRACY, Apr. 2002, at 36, 47.

⁶² Fombad, *Challenges*, supra note 3, at 4. See generally ELECTIONS FOR SALE: THE CAUSES AND CONSEQUENCES OF VOTE BUYING (F.C. Schaffer ed., 2006).

⁶³ Schedler, supra note 61, at 42.

⁶⁴ See Charles Manga Fombad, *Election Management Bodies in Africa: Cameroon’s ‘National Electoral Observatory’ in Perspective*, 3 AFR. HUM. RTS. L.J. 25, 30 (2003) (discussing “at least eight main forms of electoral malpractices”).

⁶⁵ See, e.g., MICHAEL BRATTON & NICHOLAS VAN DE WALLE, *DEMOCRATIC EXPERIMENTS IN AFRICA: REGIME TRANSITIONS IN COMPARATIVE PERSPECTIVES* 114 (1997) (providing examples of election rigging including incumbents pushing through constitutional amendments or declaring a state of emergency to avoid an election); Nicholas van de Walle, *Presidentialism and Clientelism in Africa’s Emerging Party Systems*, 41 J. MOD. AFR. STUD. 297, 299-313 (2003) (noting the use of methods such as clientelism, harassment of the press, and government monopolies of the radio).

⁶⁶ John F. Kennedy, *Address on the First Anniversary of the Alliance for Progress* (Mar. 13, 1962), in PUBLIC PAPERS OF THE PRESIDENT 220, 223 (1962).

⁶⁷ See generally Wondwosen Teshome, *Opposition Parties and the Politics of Opposition in Africa: A Critical Analysis*, 4 INT’L J. HUM. & SOC. SCI. 287 (2009) (providing an analysis of the past and present challenges faced by opposition parties throughout Africa).

⁶⁸ For a discussion of this problem, see id.

⁶⁹ Charles M. Fombad, *The African Union, Democracy, and Good Governance*, 32 CURRENT AFR. ISSUES 9, 15 (2006). See generally Brian T. Mokopakgosi & Mpho G. Molomo, *Democracy in the Face of a Weak Opposition in Botswana*, 14 PULA: BOTS. J. AFR. STUD. 3 (2000) (critiquing Botswana’s democratic practice through the perspective of opposition parties).

⁷⁰ See JEAN-FRANCOIS BAYART, *THE STATE IN AFRICA: THE POLITICS OF THE BELLY*, at ix-x (1993) (“Not only can the expression ‘politics of the belly’ not be reduced to the sole aspect of corruption, but also it can just as well be used as a criticism of corruption.”).

hiliated has regularly been used to reduce multi-partyism into a farce.⁷¹ Many of the ideologically redundant and ethnic or opportunistic parties that were strategically formed have been regularly wooed away from the opposition by offers of lucrative and prestigious jobs in return for the charade of indulging in opposition politics.⁷² Many Africans seem to feel that elections merely function to "enable[] self-seeking and greedy politicians to get jobs."⁷³ The result is that voters are increasingly turned off by elections, allowing incumbents to inflate voter turn-out figures, sometimes to the extent that more voters are reported to have voted than were actually registered to vote in some polling stations.⁷⁴

Many of the new leaders that were swept to power by the democratization wave in the 1990s have done little to show that the new constitutional dispensation and constitutional democracy can change the status quo.⁷⁵ In fact, all that appears to have happened is that "the old monolithic one party dictators . . . simply made way for multiparty 'democratic' dictators, who have maintained the inherited repressive, exploitative and inefficient structures [*1024] installed by their predecessors."⁷⁶ Many of these new democrats have turned out to be as "corrupt, violent, power-drunk, manipulative and inefficient as their predecessors."⁷⁷ Even the two leaders who are considered to have been at the forefront of the third wave of democratization, Nicephore Soglo of Benin and the late Frederick Chiluba of Zambia, whose elections in 1990 and 1991, respectively, "raised high hopes that at long last African leaders could be replaced at the polls" rather than through the barrel of the gun, turned out to be huge disappointments.⁷⁸

One of the major problems that was not addressed by the post-1990 constitutional reforms was the issue of African absolutism, caused by the concentration and centralization of power in one man, the president, and in one institution, the presidency, and the abuses of powers that go with this. Many of the new constitutions merely paid lip service to separation of powers. Under most constitutions, especially in Francophone Africa, an overbearing and imperial president reigns and dominates the legislature as well as controls the judiciary.⁷⁹ This has been compounded by the fact that the traditional checks and balances are either absent or too weak and ineffective.⁸⁰ The problem of executive dominance is not only true of highly centralized and manifestly illiberal constitutions such as that of Cameroon, but also under quite liberal constitutions such as those of Ghana, Namibia, and South [*1025] Africa.⁸¹ The imbalance in power among the three branches of government means that the judiciary is not as independent as it should be and therefore cannot freely rule against the government, especially in closely contested election disputes.⁸² Execu-

⁷¹ See generally Charles Manga Fombad, *The Dynamics of Record-Breaking Endemic Corruption and Political Opportunism in Cameroon*, in *THE LEADERSHIP CHALLENGE IN AFRICA: CAMEROON UNDER PAUL BIYA* 357 (John Mukum Mbaku & Joseph Takoungong eds., 2004) (discussing political corruption).

⁷² Fombad, *supra* note 69, at 14-15.

⁷³ *Id.* at 16.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*; see also Chiluba: A Hero Turned Villain, *TIMES* (South Africa), June 19, 2011, <http://www.timeslive.co.za/sundaytimes/2011/06/19/chiluba-a-hero-turned-villain> (capturing the enigmatic character of Chiluba). In the case of Nicephore Soglo, he took over from the former military dictator, Mathieu Kerekou (he had come to power after a military coup in 1972) after free and fair democratic elections in 1991. Ed Decker, Nicephore Soglo, *GALE CONTEMPORARY BLACK BIOGRAPHY*, <http://www.answers.com/topic/nic-phore-soglo> (last visited Aug. 3, 2011). He performed so poorly that in the 1996 elections the people re-elected the former military dictator to replace him. *Id.*

⁷⁹ See ANDRE CABANIS & MICHEL LOUIS MARTIN, *LES CONSTITUTIONS D'AFRIQUE FRANCOPHONE* 77 (1999).

⁸⁰ See, e.g., Oda van Cranenburgh, *Democracy Promotion in Africa: The Institutional Context*, 18 *DEMOCRATIZATION* 443, 449-53 (2011) (discussing the roots of presidential power).

⁸¹ See generally RICHARD CALLAND, *ANATOMY OF SOUTH AFRICA: WHO HOLDS THE POWER?* (2006) (addressing each area of political power and what impact they may or may not have on the political landscape of South Africa).

⁸² See e.g., Charles Manga Fombad & Jonie Banyong Fonyam, *The Social Democratic Front, the Opposition, and Political Transition in Cameroon*, in *THE LEADERSHIP CHALLENGE IN AFRICA: CAMEROON UNDER PAUL BIYA*, *supra* note 71 at 453, 480-82 (discussing the role the Cameroonian Supreme Court played in elections, especially the closely contested 1992 presidential elections which most national and international observers felt were won by the opposition leader, Ni John Fru Ndi).

tive lawlessness has become very common in countries such as Cameroon, Ethiopia, Eritrea, and Zimbabwe.⁸³ Executive dominance is often aggravated by the hegemonic influence of the dominant parties, which are usually effectively controlled by the president and a small inner circle of cohorts.⁸⁴ As a result, the one-party dominated parliaments merely rubber stamp laws put before them by the executive, in much the same way as was the case under the single party regimes of the recent past. Executive dominance of the law-making process is completed by the process of subsidiary legislation because of the absence of any meaningful parliamentary oversight.⁸⁵ These anomalies are worst in the Francophone system where executive legislation, which is the main source of legislation, is usually outside the scope of judicial review for [*1026] conformity to the constitution.⁸⁶ It is no surprise that legislation, especially on electoral matters, deliberately designed to entrench the position of incumbent parties, has usually been approved with little resistance.⁸⁷ A glaring example of executive lawlessness has been manifested by the manner in which one of the hallmarks of the 1990s constitutional rights revolution—constitutional provisions imposing term limits on the tenure of presidents—have rapidly been removed in many countries.⁸⁸ Corruption, misuse of state funds, and clientelism has intensified and flourished during this multi-party period as incumbents do everything to stay in power. There is often no clear distinction between the party and the state or between state funds and ruling party funds.⁸⁹ This is particularly acute in Francophone and Lusophone African countries where the system of horizontal and vertical accountability is usually weak.⁹⁰ The continuous ability of most ruling parties in Africa to indiscriminately use state funds for their political activities whilst refusing or limiting state support to the usually impoverished opposition parties does not augur well for democratic consolidation.⁹¹ If power in general corrupts, then it can be argued that “the prospect of losing it, as has been the fate of many incumbent regimes in Africa, corrupts absolutely.”⁹² In fact, “corruption has been extensively used as a strategy of compensatory legitimization.”⁹³ What has in many instances made the extensive abuse of the exorbitant presidential powers in Africa possible is the wide ranging regime of presidential immunities that enables incompetent and corrupt leaders to get away with their [*1027] crimes.⁹⁴ A recent court case involving political machinations in Botswana, a country that has gained an international reputation as Africa’s leading example of a transparent and fully functioning multi-party liberal democracy,⁹⁵ is a somber reminder that in the absence of water-tight restrictions, African leaders will stop at nothing in their at-

⁸³ See, for example, HATCHARD ET AL., *supra* note 3, at 59, which describes the situation after 1999 in Zimbabwe, where the government incited “so-called war veterans to invade and seize farms without due process of law” and in doing so not only violated laws that it had passed through parliament but also ignored court orders and “denigrated the very judges who sought to assert the rule of law.” *Id.* As a result, the Zimbabwe Supreme Court in *Commercial Farmers’ Union v. Minister of Lands 2001 (2) SA 925 (ZWSC)* at 943 (Zim.) noted: “Wicked things have been done and continue to be done. They must be stopped. Common law crimes have been, and are being, committed with impunity. Laws made by Parliament have been flouted by the Government. The activities of the past nine months must be condemned.”

⁸⁴ Fombad, *supra* note 69, at 17; see also Heidi Brooks, *The Dominant Party System: Challenges for South Africa’s Second Decade of Democracy*, 3 J. AFR. ELECTIONS 121 (2004) (examining the dominant party effect in South Africa).

⁸⁵ See, e.g., Fombad, *Challenges*, *supra* note 3, at 19 n.56 (citing the constitutions of Angola, Madagascar, and Mozambique as examples).

⁸⁶ *Id.* at 18-19.

⁸⁷ *Id.* at 19.

⁸⁸ See generally Charles Fombad & Nathaniel A. Inegbedion, *Presidential Term Limits and their Impact on Constitutionalism in Africa*, in *FOSTERING CONSTITUTIONALISM IN AFRICA* 1, 12-15 (Charles Fombad & Christina Murray eds., 2010) (noting the removal of term limit provisions in Chad, Cameroon, and Uganda).

⁸⁹ Cranenburgh, *supra* note 80, at 446-54.

⁹⁰ See *id.*

⁹¹ See Fombad, *Challenges*, *supra* note 3, at 40.

⁹² Fombad, *supra* note 69, at 17.

⁹³ *Id.*

⁹⁴ See Enyinna Nwauche & Charles Manga Fombad, *Africa’s Imperial Presidents: Immunity, Impunity and Accountability*, INT’L. J. CONST. L. (forthcoming).

⁹⁵ See Botswana: Africa’s Prize Democracy, *ECONOMIST*, Nov. 4, 2004, <http://www.economist.com/node/3364739>; Africa’s Best Kept Secret: Botswana as ‘a Shining Liberal Democracy,’ *COURIER ACP-EU*, May-June 2003, at 54-55. But see KENNETH GOODS, *DIAMONDS, DISPOSSESSION & DEMOCRACY IN BOTSWANA*, at ix (2008) (“The romanticized Botswana is actually a tightly organized and hierarchical place with big gaps between power and popular weakness.”). See generally

tempts to neutralize their opponents and cling to power.⁹⁶

Although, from a quantitative point of view, a study by Heyns and Kaguongo suggests that there has been a tremendous expansion in the scope of human rights protection in Africa since 1990,⁹⁷ the actual quality of human rights protection on the continent, from most international indicators, shows a steady decline in recent years. Some indication of the possible effects of the post [*1028] 1990 constitutional changes on the quality of human rights and freedoms enjoyed by Africans can be gleaned from the following three tables:⁹⁸

B

Table 1. General Freedom in Africa Trend for the Period 1980-1989

No. of Free Countries

No. of Partly Free Countries

No. of Not Free Countries

1980

4 (7.8%)

18 (35.2%)

29 (56.8%)

1981

4 (7.8%)

18 (35.2%)

29 (56.8%)

1982

3 (5.8%)

19 (37.2%)

29 (56.8%)

1983

Amelia Cook & Jeremy Sarkin, *Is Botswana the Miracle of Africa? Democracy, the Rule of Law and Human Rights Versus Economic Development*, 19 *TRANSN'T'L L. & CONTEMP. PROB.* 453 (2010).

⁹⁶ *Motswaledi v. Botswana Democratic Party* 2009 BWCA 111 (CA) (Bots.). Because of factional in-fighting within the ruling Botswana Democratic Party ("BDP"), the President of the party, who was also the President of the Republic, decided to suspend the appellant (the Secretary General of BDP) from the party, effectively preventing him from standing for parliamentary elections and even more significantly, tilting the balance between the competing factions within the party in favor of the President's faction. *Id.* at 111-14. When the applicant challenged the legality of the President's action, the latter successfully relied on section 41(1) of the Botswana Constitution, which states that no civil proceedings shall be instituted against the President with respect to anything done or omitted to be done in his private capacity. *Id.* at 118; see also *CONST. OF BOTS.* Sept. 30, 1966, ch. IV, pt. I, § 41(1).

⁹⁷ See Heyns & Kaguongo, *supra* note 36, at 715-17 (showing tables with the number of rights protected under each national constitution). According to this study, the fewest number of rights (ten in number) are recognized and protected by the constitutions of Tunisia and Libya, while the highest number (twenty-five rights) are recognized and protected by the constitutions of the Democratic Republic of the Congo and Uganda. See *id.* tbl.2.

⁹⁸ The following tables are based on data compiled from Freedom House. See *Freedom in the World Comparative and Historical Data*, [FREEDOMHOUSE.ORG, http://www.freedomhouse.org/template.cfm?page=439](http://www.freedomhouse.org/template.cfm?page=439) (last visited May 30, 2011); see also Fombad, *Post-1990 Constitutional Reforms*, *supra* note 3, at 187.

3 (5.8%)
 19 (37.2%)
 29 (56.8%)
 1984
 2 (3.9%)
 18 (35.2%)
 31 (60.7%)
 1985
 2 (3.9%)
 15 (29.4%)
 34 (66.6%)
 1986
 2 (3.9%)
 15 (29.4%)
 34 (66.6%)
 1987
 2 (3.9%)
 16 (31.3%)
 33 (64.7%)
 1988
 2 (3.9%)
 14 (27.4%)
 35 (68.6%)
 1989
 3 (5.8%)
 14 (27.4%)
 34 (66.6%)
 E [*1029]

B

Table 2. General Freedom in Africa trend for the period 1990-1999

No. of Free Countries

No. of Partly Free Countries

No. of Not Free Countries

1990

4 (7.6%)

18 (34.6%)

30 (57.6%)

1991

7 (13.4%)

23 (44.2%)

22 (42.3%)

1992

8 (15.3%)

25 (48%)

19 (36.5%)

1993

8 (15%)

17 (32%)

28 (52.8%)

1994

9 (16.9%)

18 (33.9%)

26 (49%)

1995

9 (16.9%)

20 (37.7%)

24 (45.2%)

1996

9 (16.9%)

20 (37.7%)

24 (45.2%)

1997

9 (16.9%)
 20 (37.7%)
 24 (45.2%)
 1998
 9 (16.9%)
 21 (39.6%)
 23 (43.3%)
 1999
 9 (16.9%)
 25 (47.1%)
 19 (35.8%)
 E
 B

Table 3. General Freedom in Africa trend for the period 2001-2009

No. of Free Countries

No. of Partly Free Countries

No. of Not Free Countries

2001-2002

11 (18%)

23 (46%)

18 (36%)

2003

11 (20.8%)

23 (43.4%)

19 (35.8%)

2004

11 (20.8%)

24 (45.3%)

18 (34%)

2005

11 (20.8%)

22 (41.5%)

20 (37.7%)

E [*1030]

B

2006

11 (20.8%)

24 (45.3%)

18 (34%)

2007

11 (20.8%)

23 (43.4%)

19 (35.8%)

2008

11 (20.8%)

24 (45.3%)

18 (34%)

2009

10 (18.9%)

24 (45.3%)

19 (35.8%)

E

What these tables show is that there has been some improvement in the quality of freedom enjoyed by Africans, generally speaking. For the period 1980-1989, an average of 2.7 (5.2%) countries were classified as free, 16.6 (32.5%) as partly free, and 31.7 (62.1%) were classified as not free.⁹⁹ By contrast, for the period 1990-1999, the number of free countries had almost trebled to 8.1 (15.2%), while the number of partly free countries had increased to 20.7 (39%), and there was a fairly significant drop in the number of countries classified as not free, 23.9 (45%).¹⁰⁰ Perhaps the most interesting finding from the survey is that there are a number of countries who throughout the entire period studied have the dubious distinction of being classified as not free. The nine countries in this category are Chad, the Democratic Republic of the Congo, Equatorial Guinea, Libya, Rwanda, Somalia, Cameroon, and Mauritania.¹⁰¹ By contrast, Botswana is the only country that has been classified as free throughout this period.¹⁰²

Freedom House, in its 2009 report on the annual survey of global political rights and civil liberties, noted that "2008 marked the third consecutive year in which global freedom suffered a decline," and pointed out that "this set-

⁹⁹ See supra tbl.1.

¹⁰⁰ See supra tbl.2.

¹⁰¹ Freedom in the World Country Ratings, 1972-2011, FREEDOMHOUSE.ORG, <http://www.freedomhouse.org/images/File/fiw/historical/FIWAIScoresCountries1973-2011.xls> (last visited Aug. 3, 2011).

¹⁰² Id.

back was most pronounced in Sub-Saharan Africa and the non-Baltic [*1031] former Soviet Union.”¹⁰³ In its 2008 ranking of 150 countries, World Audit Democracy grouped each country into one of four divisions based on their rank in democracy, press freedom, and corruption.¹⁰⁴ No African countries appear in the first division, consisting of twenty-nine countries, and only Mauritius appears in the second group of eight countries in division two.¹⁰⁵ A number of other African countries, led by Botswana, South Africa, and Namibia, appear in the third division, while the rest appear in the fourth division.¹⁰⁶

Considering the importance of a free media to nurturing and sustaining democracy, the increasing threats to media freedom pose other serious challenges to *constitutionalism*. The much acclaimed record on democracy and good governance of countries such as Botswana is under threat today partly due to the existence of numerous media unfriendly laws, many dating to the colonial period, which are often used to hold the media in terrorem.¹⁰⁷ Similarly, the performances of countries such as Namibia and South [*1032] Africa are adversely affected by the continued existence on their statute books today of many laws impacting negatively on the mass media that were enacted during the apartheid period.¹⁰⁸ A recent study of media unfriendly laws in nine South African Development Community (“SADC”) countries is particularly revealing as to the type of laws that are used to restrict freedom of expression.¹⁰⁹ According to this study, Botswana has fifteen such media unfriendly laws,¹¹⁰ Lesotho has nine,¹¹¹ Malawi has eleven,¹¹² Namibia has eight,¹¹³ South Africa has twelve,¹¹⁴ Swaziland has seventeen,¹¹⁵ Zambia has seven,¹¹⁶ and Zimbabwe has ten.¹¹⁷ Reporters Without Borders, in their 2008 press freedom index involving a survey of 173 coun-

¹⁰³ Freedom in the World 2009 Survey Release, FREEDOMHOUSE.ORG, <http://www.freedomhouse.org/template.cfm?page=445> (last visited May 30, 2011).

¹⁰⁴ See World Audit Democracy, WORLDAUDIT.ORG (Nov. 2010), <http://www.worldaudit.org/democracy.htm>.

¹⁰⁵ Id.

¹⁰⁶ Id.

¹⁰⁷ See generally UNITED NATIONS EDUC., SCIENTIFIC AND CULTURAL ORG. ET AL., *UNDUE RESTRICTION: LAWS IMPACTING ON MEDIA FREEDOM IN THE SADC* 15-32 (Badala Tachilisa Balule & Kaitira Kandjii comps., Raymond Louw ed., 2004) [hereinafter *UNDUE RESTRICTION*] (outlining a number of laws restricting media freedom that arguably violate Botswana’s constitutional principles). The situation in Botswana is changing very rapidly for the worse as a result of the economic recession and a leadership change in April 2008. Demand for the mainstay of the economy—diamonds—dropped, and having had one of the highest growth rates in the world, the country suddenly had one of the lowest growth rates in Africa in 2009. The accession to power of the former commander of the armed forces and son of the first president, who has shown little respect for democratic values and principles, has raised serious doubts about the future of democracy in the country. Mpho G. Molomo, *Democracy Under Siege: The Presidency and Executive Powers in Botswana*, 14 PULA: BOTSWANA J. AFR. STUD. 95, 100-07 (2000); Christian von Soest, *Stagnation of a “Miracle:” Botswana’s Governance Record Revisited* 10-12 (German Inst. of Global & Area Studs., Working Paper No. 99/2009), available at <http://www.giga-hamburg.de/dl/download.php?d=/content/publikationen/pdf/wp99soest.pdf>.

¹⁰⁸ See *UNDUE RESTRICTION*, supra note 107, at 53-63 (describing the current state of laws restricting media freedom in Namibia and noting the impact of the South African occupation of Namibia during the apartheid period on these laws); id. at 65-78 (describing media laws in South Africa and stating that, “most of the offensive laws are a legacy of apartheid media controls”).

¹⁰⁹ See generally id.

¹¹⁰ Id. at 21-31.

¹¹¹ Id. at 36-41.

¹¹² Id. at 45-51.

¹¹³ Id. at 56-63.

¹¹⁴ Id. at 69-78.

¹¹⁵ Id. at 81-88.

¹¹⁶ Id. at 106-114.

¹¹⁷ Id. at 120-127. There are twenty-one such laws in Zambia. See MEDIA INST. OF S. AFR., *SOUTHERN AFRICAN MEDIA DIRECTORY* 2006/7 126 (2007), available at <http://www.misa.org/researchandpublication/mediadirectory/mdirectory20067final.pdf>.

tries, rank Eritrea, Africa's youngest country, last, stating that it is run "like a vast open prison."¹¹⁸ The steady decline in the quality of human rights enjoyed on the continent is evident not just from the limited scope of the rights recognized and enforced but also from the weak enforcement mechanisms in place.

An example of continuous human rights challenges is the regular exploitation of ethnicity and ethnic parochialism by opportunistic politicians. It is significant that in the Heyns and Kaguongo study, only three countries out of the fifty-three African countries whose constitutional provisions [*1033] were examined contain provisions which recognize and protect minority rights.¹¹⁹ In many complex multi-ethnic countries such as Cameroon, Nigeria, Zambia, Malawi, Cote d'Ivoire, and Kenya, politicians have exploited ethnic rivalries to fragment the opposition parties.¹²⁰ Incumbents might present themselves and their parties as the only credible option for holding the country together while presenting the opposition parties as divisive and unpatriotic.¹²¹ In actively promoting division amongst opposition parties in this manner, it becomes difficult to build the foundation for tolerance and trust that is essential in establishing viable democratic processes, institutions and culture.¹²²

Democratic progress will be easier in a situation where the economy is healthy and flourishing and offers good prospects for employment and improved quality of life. The African economies have remained depressed, and health shocks, such as the HIV/AIDS pandemic, have further diminished the ability of many people to support themselves, work, or even provide for their families. "Hungry people have little interest in democracy, even if it creates the environment for their survival."¹²³ Promises made in the 1990s regarding food, water, shelter, healthcare, employment, better wages, and increased accountability have not been fulfilled.¹²⁴ Instead, so-called multi-party elections have been more frequent and more expensive, offering better opportunities for self enrichment for politicians and their cronies and "little benefit to the ordinary voter."¹²⁵ Because the performance of the new democrats has been so disappointing, "some cynics now feel [*1034] that the third wave is fast degenerating into a 'third wail' for Africans."¹²⁶

In spite of the departure of Daniel Arap Moi of Kenya in 2002,¹²⁷ there are other African monuments of "standpatism," as Rene Lemarchand describes them,¹²⁸ such as Paul Biya of Cameroon, Teodoro Nguema Mbasogo of Equatorial Guinea, Blaise Campore of Burkina Faso, and Robert Mugabe of Zimbabwe, who are so deeply entrenched that they cannot be easily removed through the ordinary democratic process.¹²⁹ With formidable foes of democracy like this that have only grudgingly adopted some symbolic features of democracy, it seems reasonable to conclude

¹¹⁸ Press Freedom Index 2008, REPORTERS WITHOUT BORDERS, <http://en.rsf.org/press-freedom-index-2008,33.html> (last visited July 17, 2011).

¹¹⁹ Heyns & Kaguongo, *supra* note 36, at 716.

¹²⁰ Fombad, *supra* note 69, at 17; Julius O. Ihonvbere, Where is the Third Wave? A Critical Evaluation of Africa's Non-Transition to Democracy, 43 AFR. TODAY 343, 362 (1996).

¹²¹ Fombad, *supra* note 69, at 17-18.

¹²² *Id.* at 18.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*; see Julius O. Ihonvbere, A Balance Sheet of Africa's Transition to Democratic Governance, in THE TRANSITION TO DEMOCRATIC GOVERNANCE IN AFRICA 33, 50 (John Mukum Mbaku & Julius Omozuanvbo Ihonvbere eds., 2003).

¹²⁷ He Wenping, Lessons to be Learnt from Kenya's "Democracy," CHINA DAILY, Jan. 17, 2008, <http://www.chinadaily.com.cn/cndy/200801/17//content6400141.htm>.

¹²⁸ Rene Lemarchand, African Transitions to Democracy: An Interim (and Mostly Pessimistic) Assessment, 22 AFR. INSIGHT 178, 181 (1992).

¹²⁹ See List of African Dictators and Longest Serving Leaders, MYWEKU.COM (Mar. 20, 2011), <http://www.myweku.com/2011/03/list-of-african-dictators-and-longest-serving-leaders/>, which indicates that the longest serving leaders are: Moummar Gaddafi of Libya, forty-two years; Teodoro Ngueme Mbasogo of Equatorial Guinea, thirty-two years; Jose Santos of Angola, thirty-two years; Robert Mugabe of Zimbabwe, thirty-one years; Paul Biya of Cameroon, twenty-nine years; Yoweri Museveni of Uganda, twenty-five years; Blaise Campore of Burkina Faso, twenty-four years; Mswati III of Swaziland, twenty-four years; Omar Bashir of Sudan, twenty-one years; Idrissu Deby of Chad, twenty-one years; Isaias Afewerki of Eritrea, eighteen years; Yahya Jammeh of Gambia, seventeen years; Meles Zenawi of Ethiopia, seventeen years; Pakalitha Mosisili of Lesotho, thirteen years; Ismail Omar Guelleh of Djibouti, twelve years; Mohammed VI of Morocco, twelve years; Laurent Gbagbo of Cote d'Ivoire, eleven years; Abdoulaye Wade of Senegal, eleven years; and Paul Kagame of Rwanda, eleven years. According to East African Magazine, the five worst presi-

that there is still a long way to go for *constitutionalism* to be entrenched in Africa. [*1035]

III. Reflections on a Constitutional Reforms Agenda for the Next Decade

The main focus of this Part is to consider what institutional, structural, and other changes need to be made to prevent the progress towards *constitutionalism*, democracy, and good governance from being undermined by unconstitutional means such as military and electoral coups d'états or by constitutional means such as abuse of executive powers. From the nature of the challenges examined above, it is clear that many of the constitutional reforms either did not go far enough to address the real problems or were not sufficiently robust to withstand the recovery of many "standpattists" who, caught off guard in the 1990s, have sufficiently weathered the storm of the third wave of democratization and are now fast sailing towards the safe waters of dictatorship.

It is contended that the prospects for *constitutionalism*, democracy, and good governance will be considerably enhanced if a number of reforms and other changes suggested in this Article are implemented. These include the recognition of a right to free and fair elections, the constitutional entrenchment of key principles and institutions of accountability, the reduction of presidential powers, and a firm commitment to poverty reduction through the incorporation of socio-economic rights. Present and future constitutional reforms also require an ever vigilant civil society and a judiciary firmly committed to promoting *constitutionalism*. These and similar points are some of the issues that should preoccupy the minds of constitutional reformers in the next decade.

A. Recognition of a Right to Free and Fair Elections and Other Ancillary Rights

The recognition of the right to form and/or join political parties of one's choice and to vote or to be voted for any political office in the post-1990 African constitutions is fast becoming an illusion because the dominant parties that have now replaced the single parties and their leaders have easily entrenched themselves or their parties in office in perpetuity.¹³⁰ One of the major challenges that has emerged [*1036] from the developments of the last decade is the problem of countering the resurgence of majoritarian abuse or dominant party dictatorships that use multi-partyism as a convenient smokescreen behind which to practice their dictatorship.¹³¹ Inevitably, this one party dominance, even in countries such as Botswana and South Africa, which have regularly been classified as the least corrupt countries in Africa, has encouraged a culture of corruption, nepotism, and patronage.¹³² This poses a serious problem to entrenching *constitutionalism* and the rule of law on the continent. The question, then, is: How can *constitutionalism* "counter the risk of democratic majoritarianism descending into the tyranny of the majority?"¹³³ For better or worse, Africa is doomed to democracy as the only viable framework within which the political stability and economic development needed to help the continent recover is possible. It is submitted that one important way of reducing the risks of fraudulent elections will be to recognize and entrench a right to free and fair elections in the constitution itself. This can be done in several ways.

First, constitutional provisions must recognize the basic rights and duties of political parties.¹³⁴ While political parties will remain essentially private associations freely created and run by the membership in pursuit of a political goal, they are unlike all other private associations. Because of the potentially wide-ranging reach of their activities in the public domain they can no longer simply be allowed to do their own things their own way. Instead, "constitutionalizing their status necessarily means that their actions will come under public scrutiny at all times, not just during elections."¹³⁵ Under the traditional approach to actions against political parties, the parties enjoyed a high degree of immunity from actions by prior members because their internal rules were considered analogous to those of an unincorporated non-profit society.¹³⁶ Therefore, [*1037] the rules were considered unenforceable as a con-

dents are Isaias Afewerki of Eritrea, Omar Bashir of Sudan, Teodoro Nguema Mbasogo of Equatorial Guinea, Idrissu Deby of Chad, and Sheik Ahmed of Somalia. The African President's Index: The Good, the Bad, and the Ugly, E. AFR. MAG., Dec. 27, 2010, at III.

¹³⁰ For examples, see supra note 129.

¹³¹ Fombad, Challenges, supra note 3, at 5.

¹³² See infra Part III.B.

¹³³ Fombad, Challenges, supra note 3, at 5.

¹³⁴ The rationale and the mechanism for this approach are fully developed in Fombad, Challenges, supra note 3.

¹³⁵ Fombad, Challenges, supra note 3, at 39.

¹³⁶ Id.

tract.¹³⁷ However, this traditional approach should have no place in the modern constitutional approach.¹³⁸ Perhaps one of the most important advantages of constitutionalizing the rights and duties of political parties is that it will promote internal democracy¹³⁹ and "ensure that personal actions can be brought against political parties which break their own rules, as they are often apt to do, when they find this politically expedient."¹⁴⁰ Furthermore, constitutional provisions should lay down basic principles for elections within all political parties to ensure that persons with criminal records or who are subject to the legal process are barred from seeking or holding political office.

Second, constitutional provisions should guarantee a right to free and fair elections and a right to equality of treatment of all political parties. Based on this, all pieces of legislation dealing with electoral matters and processes should only be considered valid if they conform to a number of principles, namely:¹⁴¹

- (i) When the legislation does not hinder the exercise of political rights in a free and fair manner;
- (ii) When the legislation does not negate the essential content of the exercise of political rights; **[*1038]**
- (iii) When the legislation is acceptable and demonstrably justifiable in a free and democratic society. In determining this, the benefits of the legislation in a democratic society, taking into account the purposes and values of the constitution, must be seen to outweigh the detriment it may cause;
- (iv) When the legislation protects the interests of minorities and indigenous people in a fair and reasonable manner taking into account all the circumstances; and,
- (v) Where there are restrictions, it must be determined whether:
 - (a) the objectives of the restrictions are sufficiently important to justify limiting the exercise of political rights in the manner contemplated;
 - (b) the measures are designed to meet the objective rationally connected to it; and
 - (c) the measures provided do no more than is reasonably necessary to achieve the legitimate objective.

While the constitutions of a few African countries contain provisions which try to recognize and protect the rights of political parties and shield them from some of the excesses of ruling parties determined to maintain their dominant positions, these are usually not sufficiently comprehensive or clear. An example of this is found in articles 71 and 72 of the Ugandan Constitution, which lays down the principles that "the multi-party political system shall conform to."¹⁴² Although this has not always been respected, in *Rwanyarare v. Attorney General*¹⁴³ the Ugandan Constitutional Court struck down a number of provisions in the Political Parties and Organisations Act of 2002 on the grounds that they violated the constitutional principles of multi-party democracy and were a **[*1039]** "monstrosity in a free and democratic society."¹⁴⁴ A similar outcome could be achieved by invoking other provisions in the con-

¹³⁷ Id.

¹³⁸ Id.

¹³⁹ Internal democracy has often been a problem due to what political scientist Robert Michels has referred to as the "iron law of oligarchy," in which "parties tend to centralize powers around ruling elites (or a leader) that then dispense patronage to loyal followers." Anthony Egan, 'Coming to the Party': The Problem of Party Politics for Democracy, in *DEMOCRACY IN AFRICA: PROMOTING THE AFRICAN CHARTER ON DEMOCRACY, ELECTIONS AND GOVERNANCE* 10, 10 (Douglas Racionzer ed., 2009). The rulers then manipulate compliant masses by popular demagoguery to stay in power and fend off any actual or potential challengers. See id. at 10-11.

¹⁴⁰ Fombad, Challenges, supra note 3, at 39. It should be noted that this analysis "in no way underestimates the value of using the sometimes quite sophisticated internal rules for settling disputes that are found in the constitutions and rule books of political parties." Id. However, there is a potential for abuse and delay of these processes. Id.

¹⁴¹ These considerations are discussed further in Fombad, Challenges, supra note 3, at 42, where they are described as "imperative" tests.

¹⁴² CONSTITUTION OF THE REPUBLIC OF UGANDA Oct. 8, 1995, arts. 71-72. For similar provisions, see CONSTITUTION OF THE REPUBLIC OF GHANA Apr. 28, 1992, art. 55, and S. AFR. CONST., 1996 art. 19.

¹⁴³ 2004 AHRLR 279 (CC) (Uganda).

¹⁴⁴ Id. at 289.

stitution,¹⁴⁵ but as we shall soon see, the effectiveness of constitutional provisions recognizing the rights of political parties will depend on the attitude of the judges.¹⁴⁶

One important lesson from the pre-1990 era is that strong, active, and disciplined political parties, not just one political party, are necessary for any effective political representation and genuine democracy to take hold. However, merely opening up political space for other parties to participate is not enough. Multi-partyism will only be effective and meaningful when there are adequate rules in place to give every party a chance to compete fairly and equally so that no party is allowed to abuse its incumbency in order to perpetuate itself in power. Although *constitutionalism* is not necessarily synonymous with democracy or constitutional democracy, the latter two considerably enhance the prospects for *constitutionalism* and will render the latter an illusion in their absence.¹⁴⁷ Be that as it may, the core elements of *constitutionalism* that have now been accepted in Africa need to be reinforced by certain key principles and institutions of accountability.

B. The Constitutional Entrenchment of Key Principles and Institutions of Accountability

Many post-1990 African constitutions do make reference directly or indirectly to and provide for some accountability and transparency measures and mechanisms.¹⁴⁸ In many situations, these measures and mechanisms have been introduced through ordinary [*1040] legislation. These have often not worked well, mainly because the legal safeguards to protect them from being abused or manipulated by the governments are either weak or more often absent. For example, the ombudsman and anti-corruption institutions have now generally been accepted in Africa as essential components of good governance and accountability. Many recent constitutions or, more often, legislation, provide for them in one form or another.¹⁴⁹ However, in many instances, institutions such as the Botswana Ombudsmen have ended up "like a prize champion fighting with his hands tied behind his back."¹⁵⁰ While the absence of sufficient accountability measures and mechanisms remains a fundamental problem, in some cases even where they exist they are unable to operate effectively to check governmental abuses. It seems that the tenacity of the one party mentality within the new dominant parties, coupled with weak and ineffective civil societies in many African countries, has been a formidable obstacle in holding governments to account.

As indicated earlier, Chapter 9 of the South African Constitution creates a phalanx of institutions to uphold constitutional democracy and promote accountability.¹⁵¹ The mere listing of these institutions on their own is not novel, for many constitutions do provide for some of them. What is perhaps unique about the South African approach is that there are four legal principles that are spelled out to ensure that these institutions are effective, rather than a political charade of symbolic value only. The four guiding principles provide that:

(i) "These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice."¹⁵² [*1041]

(ii) "Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions."¹⁵³

¹⁴⁵ In the Zimbabwean case of *United Parties v. Minister of Justice* 1998 (2) BCLR 224 (SC) (Zim.), the Supreme Court struck down legislation stating that parties with fewer than fifteen members in parliament were not entitled to state funding. The Court held that the funding system, because it set the threshold too high, violated the political parties' freedom of expression. *Id.* at 234-39.

¹⁴⁶ See *infra* Part III.E.3.

¹⁴⁷ For further discussion on the relationship between constitutionalism and democracy see *supra* note 18.

¹⁴⁸ See *supra* note 58.

¹⁴⁹ See, e.g., *supra* note 58.

¹⁵⁰ Charles Manga Fombad, *The Enhancement of Good Governance in Botswana: A Critical Assessment of the Ombudsman Act*, 27 J. S. AFR. STUD. 57, 77 (2001); see *id.* at 76-77 for the history and context of the role of the Ombudsman in Botswana.

¹⁵¹ See *supra* Part I; see also S. AFR. CONST., 1996 ch. 9.

¹⁵² S. AFR. CONST., 1996 ch. 9, § 181(2).

¹⁵³ *Id.* § 181(3).

(iii) "No person or organ of state may interfere with the functioning of these institutions."¹⁵⁴

(iv) "These institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year."¹⁵⁵

Something close to these principles are referred to in some constitutions as "directive principles of state policy,"¹⁵⁶ but these, unlike the principles in the South African Constitution, are stated in purely hortatory terms. The six institutions provided for under the South African Constitution are: (i) the Public Protector (commonly referred to elsewhere as the ombudsman); (ii) the Human Rights Commission; (iii) the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; (iv) the Commission for Gender Equality; (v) the Auditor-General; and (vi) the Electoral Commission.¹⁵⁷

The effectiveness of the four guiding principles in protecting the South African Chapter 9 institutions from political interference can be illustrated with three cases decided by the South African Constitutional Court, all involving the South African Independent Electoral Commission ("IEC").¹⁵⁸ In the first case, *Independent Electoral Commission v Langeberg Municipality*,¹⁵⁹ the Court pointed out that because the independence and [*1042] impartiality of the IEC is guaranteed in the constitution,¹⁶⁰ Parliament is under a duty not to compromise the independence and impartiality of the IEC when adopting legislation to regulate its activities.¹⁶¹ The Court made it clear that any such legislation is subject to judicial review to ensure its conformity to the constitution.¹⁶² Without these constitutionally guaranteed principles, the Court would have had no basis to review any legislation dealing with the IEC to make sure that it is not biased in favor of the ruling ANC party.

The second case, *New National Party of South Africa v. Government of the Republic of South Africa*,¹⁶³ also raised the question of the independence of the IEC and the possibility of governmental interference with its functioning.¹⁶⁴ On the facts, the Court came to the conclusion that there was no evidence that the Government had actually interfered with the IEC. Nevertheless, the Court underscored the fact that the IEC, like other Chapter 9 institutions, was the product of what it termed a "new *constitutionalism*" whose independence had to be jealously preserved and protected.¹⁶⁵ The Court went further to emphasize two features which it felt were critical to the institution's independence. First, financial independence, which meant that the IEC should be given enough funds to enable it discharge its functions.¹⁶⁶ Such independence required that the funding should come not from Government, but rather from parliament. In deciding on the funding level, the IEC had to be "afforded an adequate opportunity to defend its budgetary requirements before Parliament and its relevant committees."¹⁶⁷ Second, the IEC's independence also implies administrative independence which made it subject only to the constitution [*1043] and the law. It also meant that the IEC was answerable in the way that it performed its functions only to Parliament rather than the ex-

¹⁵⁴ Id. § 181(4).

¹⁵⁵ Id. § 181(5).

¹⁵⁶ See e.g., CONSTITUTION OF THE REPUBLIC OF GHANA Apr. 28, 1992, arts. 34-41; CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA May 29, 1999, § 13-24.

¹⁵⁷ S. AFR. CONST., 1996 ch.9, § 181(1)(a).

¹⁵⁸ For a further discussion of these cases, see Fombad, *Challenges*, supra note 3, at 29-30.

¹⁵⁹ 2001 (9) BCLR 883 (CC) (S. Afr.).

¹⁶⁰ Id. at 895; see also S. AFR. CONST., 1996 ch. 9, § 181(2) ("These [Chapter 9] institutions are independent, and subject only to the Constitution and the law, and they must be impartial . . .").

¹⁶¹ Id. at 897.

¹⁶² Id.

¹⁶³ 1999 (3) SA 191 (CC) (S. Afr.).

¹⁶⁴ See id. at 224.

¹⁶⁵ Id.

¹⁶⁶ Id.

¹⁶⁷ Id. at 231.

ecutive.¹⁶⁸

In the third case, *August v. Electoral Commission*,¹⁶⁹ the IEC had refused to make special arrangements to enable prisoners to register for elections.¹⁷⁰ They argued that it was going to be too expensive and would be administratively and logistically difficult to do.¹⁷¹ The applicants, a prisoner and a prisoner awaiting trial, were unsuccessful in their application before the Transvaal High Court, which agreed with the arguments put forward by the IEC as justification for refusing to register the prisoners.¹⁷² When the matter came before the Constitutional Court on appeal, the Court rejected the reasons advanced by the IEC. The Court pointed out that since the Constitution did not have any provision which authorized Parliament to enact legislation disqualifying any group of people from voting, and Parliament had not made such legislation, the IEC was wrong to make an administrative decision which had the effect of disenfranchising a certain category of voters.¹⁷³ The Court declared that this was a violation of the political rights guaranteed in section 19 of the constitution.¹⁷⁴ It felt that the constitution imposed a positive duty on the IEC to take all reasonable steps to enable eligible persons to register and exercise their right to vote.¹⁷⁵

By way of contrast, the South African Constitution also provides for the establishment of a National Prosecuting Authority ("NPA").¹⁷⁶ The NPA, however, is not one of the Chapter 9 institutions that have been carefully protected from political interference. Although section 179(4) of the Constitution says that "national legislation must ensure that the prosecuting authority exercises its functions [*1044] without fear, favour or prejudice,"¹⁷⁷ the ability of the courts to intervene and prevent interference with the NPA is limited by section 179(5)(a), which states that the National Director of Public Prosecutions "must determine, with the concurrence of the Cabinet member responsible for the administration of justice, and after consulting the Directors of Public Prosecutions, prosecution policy, which must be observed in the prosecution process."¹⁷⁸ Because of this weak constitutional foundation, there has been frequent interference in the work of the NPA. For instance, at its 2007 Polokwane conference, the ruling African National Congress ("ANC") passed a resolution to dissolve the NPA's Directorate of Special Operations, popularly known as the Scorpions.¹⁷⁹ The resolution was deliberately designed to purge this independent unit of crime and corruption fighters who had been very successful in their campaign against corruption and racketeering against people in high places, including many prominent politicians.¹⁸⁰ Legislation to dissolve the Scorpions was easily approved by Parliament.¹⁸¹ [*1045]

¹⁶⁸ Id.

¹⁶⁹ 1999 (4) BCLR 363 (CC) (S. Afr.).

¹⁷⁰ Id. at 370-71.

¹⁷¹ Id.

¹⁷² Id. at 368-69.

¹⁷³ Id. at 373.

¹⁷⁴ Id. at 374.

¹⁷⁵ Id. at 372, 374.

¹⁷⁶ S. AFR. CONST., 1996 ch. 8, § 179.

¹⁷⁷ Id. § 179(4).

¹⁷⁸ Id. § 179(5)(a).

¹⁷⁹ African National Congress ANC, 52d National Conference: Resolutions (Dec. 20, 2007), available at <http://www.anc.org.za/show.php?id=2536>.

¹⁸⁰ David Bruce, *Without Fear or Favour: The Scorpions and the Politics of Justice*, SA CRIME Q. June 2008, at 11, 13 ("Rather than engaging in a process of self-reflection and self-criticism (something which is said to be one of the strengths of the ANC) the party chose to blame the Scorpions for the fact that several of its members had been implicated in corruption.").

¹⁸¹ The National Prosecuting Authority Amendment Act and the South African Police Service Amendment Act were passed by Parliament on October 3, 2008. See *Glenister v. President of the Republic of South Africa* 2011 (3) SA 347 (CC) at paras. 1, 12 (S. Afr.) (Ngcobo, C.J., dissenting). However, in *Glenister* the Constitutional Court, by a majority of five to four, declared that the legislation that introduced the new corruption fighting body that replaced the Scorpions with the Hawks was inconsistent with the constitution and invalid to the extent that it failed to secure an adequate degree of independence for the corruption-fighting unit that it sought to establish. Id. at paras. 197-98, 208 (Moseneke, D.C.J. & Cameron, J., majority opinion). Although there was no specific provision in the Constitution specifying that the unit must be independent, the majority held that the constitutional obligation to set up an independent corruption-fighting unit could be inferred from the duty imposed by section 7(2) of the constitu-

The weaknesses of the NPA were further underscored when its director was suspended, and later dismissed, because, as one critic put it, he took "his responsibility to act without 'fear, favour or prejudice' too seriously for those who would prefer to have a less independent person in his office."¹⁸²

It is therefore clear that in spite of its solid constitution, there are still weaknesses in the South African constitutional framework. In fact, because of the political turmoil of the last two years that led to the election of Jacob Zuma as President of the ANC, many of the Chapter 9 institutions, especially the Public Protector and the Human Rights Commission, have come under pressure.¹⁸³ The ad hoc Committee on the Review of Chapter 9 and Associated Institutions was established in 2006, under Chairperson Kader Asmal, to examine the effectiveness and efficiency of these institutions.¹⁸⁴ The Committee recommended that some of them, such as the Commission for the Protection of Cultural, Religious and Linguistic Minorities, be incorporated under the aegis of the Human Rights Commission.¹⁸⁵

Be that as it may, two main lessons can be learned from the example of South Africa with respect to the best way to make these accountability institutions effective and shield them from political manipulation by the opportunistic dominant parties of today. First, the basic structure of the institution, as well as its composition and powers, must be laid down in the constitution. Second, there must be clearly [*1046] defined legal principles to limit the ability of governments to interfere with their operations.

Traditional *constitutionalism*, in the form in which it has been incorporated in modern African constitutions, has rightly been criticized as being "a largely procedural notion" because it emphasizes values while paying little attention to the principles, structures, and institutions that will enable these values to achieve concrete practical results.¹⁸⁶ For example, it is submitted that these constitutions have not adequately addressed the root causes of the social and economic problems that continue to make the poor even poorer after the 1990 reforms. Some of these problems can be addressed by the constitutionalization of strong and independent institutions of accountability. In this regard, it seems that a number of institutions of oversight, either of a general nature or of specific branches of the government, have become a necessity in any constitutional design that aspires to promote both *constitutionalism* and accountability. These are:

- (i) the ombudsman;
- (ii) a human rights commission;
- (iii) a public accounts committee;
- (iv) an Auditor-General offices;
- (v) an access to information commission;
- (vi) a media commission;
- (vii) an independent prosecuting authority;
- (viii) an anti-corruption agency;

tion to "respect, protect, promote and fulfil" the rights in the Bill of Rights. Id. at para. 177. It went further to point out that based on section 39(1)(b) of the constitution, which required the Court in interpreting the Bill of Rights to consider international law, and section 231, which states that all international agreements approved by Parliament are binding, the establishment of a corruption-fighting unit ignoring binding international instruments which required such a unit to be independent was not a reasonable constitutional measure. Id. at paras. 192, 194.

¹⁸² Paul Hoffman, Democracy and Accountability: Balancing Majority Rule and Minority Rights 5 (S. Afr. Inst. of Int'l Affairs, Occasional Paper No. 27), available at <http://www.ifaisa.org/currentaffairs/BalancingMajorityRuleandMinorityRights.pdf>.

¹⁸³ See id. at 5-6.

¹⁸⁴ PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA, REPORT OF THE AD HOC COMMITTEE ON THE REVIEW OF CHAPTER 9 AND ASSOCIATED INSTITUTIONS 4-5 (2007), available at <http://www.sahrc.org.za/home/21/files/Reports/Report%20of%20the%20Ad%20Hoc%20Committee%20of%20chapter%209.%202007.pdf>.

¹⁸⁵ Id. at xii.

¹⁸⁶ Carla M. Zoethout & Piet J. Boon, Defining Constitutionalism and Democracy: An Introduction, in CONSTITUTIONALISM IN AFRICA: A QUEST FOR AUTOCHTHONOUS PRINCIPLES 1, 1-2 (Carla M. Zoethout et al. eds., 1996).

- (ix) a judicial service commission;
- (x) a minority rights commission;
- (xi) an independent electoral commission; and
- (xii) an electoral boundaries commission.

These institutions on their own cannot achieve much unless there is the political will to make them work and the necessary legal safeguards to protect them from political interference. In addition to the four constitutional principles [*1047] that govern the South African Chapter 9 institutions,¹⁸⁷ the constitution must also define their structure, functions, and composition in a manner that will ensure that none of the three organs of government can interfere with their operations.¹⁸⁸ Perhaps the main safeguard against any abuse would be a general limitation clause which provides that any legislation or mechanism introduced to regulate any of these institutions, and which undermines the essential purpose of accountability and transparency that the institution is designed to achieve, must be declared null and void by the courts.

Two important conclusions can be drawn from the experiences of the South African Chapter 9 institutions. First, that these institutions will be more effective if they are made easily accessible to the poor and marginalized in society. For instance, ombudsmen and anti-corruption institutions should be decentralized and have offices in as many districts as possible and not merely in the capital city. Second, they must be given powers to be both reactive and proactive. These institutions can only be credible if they provide what has been described as “low” *constitutionalism*, which addresses “the rampant impunity and abuse of power by officials at the most basic level of the public administration,” as opposed to “high” *constitutionalism* that addresses the concerns of the elites.¹⁸⁹ They will need to deal with the pervasive and perennial abuses of discretionary powers involving unjustified discrimination and extortion of money which a majority of Africans are subjected to on a daily basis, for example, the extraction of bribes by police [*1048] officers at road blocks and the bribes extracted by civil servants in order to process official documents.

However, in order to ensure that the institutions of accountability are not only proactive and reactive but are also able to tackle both petty and grand corruption there is need for the constitution to lay down the basic principles for effective whistleblower legislation¹⁹⁰ and legislation requiring mandatory declaration of assets for all political office holders and senior public officers. The whistleblower provision should require that legislation should, inter alia, provide incentives for citizens to freely disclose information on corrupt or improper conduct and prohibit retribution against those who make such disclosures. There should also be waivers from criminal and civil penalties for those who disclose secret information. Such legislation should impose penalties on those who harass whistleblowers. Many countries, such as South Africa, have introduced codes of ethics or legislation that requires all political office holders to declare their assets.¹⁹¹ Unfortunately, in most cases the legislation is weak, or, as in the case of South Africa,

¹⁸⁷ See supra text accompanying notes 152-22.

¹⁸⁸ In spite of the commendable attempt to limit political interference, the South African Chapter 9 institutions have been criticized for this very reason. The Human Rights Institute of South Africa (“HURISA”) has concluded that “the majority of people believe the Public Protector to be either ineffective or obedient to the interests of the African National Congress.” Butjwana Seokoma, Do or Die for Chapter 9 Institutions, NGO PULSE (June 18, 2008, 12:28 PM), <http://www.ngopulse.org/article/do-or-die-chapter-9-institutions>. It went further to state that “it is worrying that there is a culture of absolving any wrongdoing, especially in cases such as the arms deal, the Oilgate scandal, as well as Phumzile Mlambo-Ngcuka’s controversial trip to the United Arab Emirates in 2005.” Id.

¹⁸⁹ Premph, supra note 35, at 500. Premph refers to high constitutionalism as “wholesale” constitutionalism and low constitutionalism as “retail” constitutionalism. Id.

¹⁹⁰ In 2010, the Ugandan Parliament approved a comprehensive whistleblowers bill with the expressed intent to “provide for the procedures by which individuals in both the private and public sector may in the public interest disclose information that relates to irregular, illegal, and corrupt practices” Whistleblowers Protection Act, 2010 (Uganda). Uganda is the third African country with such legislation. South Africa regulates whistleblowing under the Protected Disclosures Act, which has the similar expressed purpose of providing procedures by which “employees in both the public and private sector may disclose information regarding irregular or unlawful conduct by their employers” Protected Disclosures Act 26 of 2000 (S. Afr.).

¹⁹¹ See Executive Members’ Ethics Act 82 of 1998 (S. Afr.), proclaiming that the President must publish a code of ethics. Id. at § 2(1). The Act notes further that this code of ethics may require officials to disclose all of their assets prior to and during the as-

the codes of ethics are not legally enforceable and therefore fail to check against any abuses.¹⁹² The basic principles [*1049] requiring strict declaration of assets by all office holders with sanctions such as removal from office for non-compliance will go a long way to control the rising political corruption that is fast undermining the fragile democratic transition in Africa, even in countries such as Botswana and South Africa¹⁹³ that have regularly been classified by [*1050] Transparency International as the least corrupt countries on the continent.¹⁹⁴

C. Reduction of Excessive Presidential Powers

Recent events have shown that the abuse of exorbitant power through reliance on presidential and executive immunities and privileges is not unique to Africa;¹⁹⁵ however, the effects of such abuses are usually more deleterious on African states. It must now be recognized that one of the major threats to *constitutionalism* in Africa that has been little affected by the 1990 constitutional reforms is the capacity for executive lawlessness, which has been made possible by the excessive powers conferred on presidents and the absence of any effective checks on the exercise of these powers. In general, while the president in each country must remain the sole repository of executive power to ensure that there is no confusion as to who bears ultimate responsibility for executive decisions,¹⁹⁶ the [*1051] impunity with which many presidents operate must be limited by adequate checks and balances. The excessive powers, which most presidents have been vested with or have been allowed to claim for themselves through sloppiness in constitutional design, can be curbed in a number of ways.

First, specific criteria must be laid down to ensure that all presidential appointments, especially for senior positions in the military, the public service, and the judiciary, are informed by clearly defined objective criteria based on experience, expertise, and qualifications which limit the scope for partisan political considerations. In particular, there is a need to ensure that commissions making the necessary recommendations for appointments, such as the Higher Council of Magistracy (in Francophone countries) or the Judicial Service Commission (in Anglophone countries), are genuinely independent and that those appointed directly or indirectly by the Government should never make up more than one-third of the membership. Thus, although the appointments are made by the Government, the appointment process must be such that merit rather than political considerations should be the decisive factor.

sumption of office. *Id.* at § 2(3)(a)(i), (ii). The Code of Conduct for the Parliament of South Africa does in fact provide that members must disclose information including "shares and financial interests" and "remuneration outside Parliament." Code of Conduct, PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA, <http://www.parliament.gov.za/live/content.php?ItemID=139> (last visited Aug. 1, 2011).

¹⁹² In South Africa, the Code of Conduct for Members of Parliament and the Executive Members' Ethics Act require members of parliament, ministers and deputy ministers as well as the president to disclose details of their financial interests, assets and gifts received. See *supra* note 191. In spite of this, President Zuma only complied with this requirement some eight months after the sixty day deadline stipulated in the Executive Members' Ethics Act and after considerable public pressure. See Zuma Declares Interests, *TIMES* (South Africa), Mar. 10, 2010, www.timeslive.co.za/local/article348521.ece/Zuma-declares-interests. By way of contrast, article 66 of the Cameroon Constitution provides:

¹⁹³ For example, the ANC's business arm, Chancellor House, as a 25% shareholder in Hitachi South Africa, stood to gain about 9.625 billion rand because of its stake in the company from a contract that the government awarded to Eskom, the national electricity supplier. Justin Brown, *Inside Resources: ANC Must Exit Hitachi to Fulfil its Manifesto*, *BUSINESS REPORT* (Mar. 17, 2010, 8:57 PM), <http://www.iol.co.za/business/opinion/inside-resources-anc-must-exit-hitachi-to-fulfil-its-manifesto-1.697119>. In 2009, the former Public Protector, Lawrence Mushwana, concluded that the then-Eskom chairman and ANC executive committee member had "acted improperly in the award of the contract to Hitachi SA." *Id.*

¹⁹⁴ The 2009 survey shows that Botswana ranked thirty-seventh in the world and remains the least corrupt country in Africa, while South Africa ranked fifty-fifth in the world and is the fifth least corrupt country in Africa. See *Corruption Perceptions Index 2009*, TRANSPARENCY INTERNATIONAL, <http://www.transparency.org/policyresearch/surveysindices/cpi/2009/cpi2009table> (last visited July 17, 2011).

¹⁹⁵ See Silvio Berlusconi's Troubles: Justice Can be Ever so Inconvenient, *ECONOMIST*, Oct. 10, 2009, at 53. On October 7, 2009, the Italian Constitutional Court declared an immunity law that would have protected the Prime Minister, President, and speakers of both houses of parliament unconstitutional. *Id.* Although a similar law had been rejected in 2004, Berlusconi still managed to govern Italy for two years after the decision. *Id.* On October 30, 2009, former French president Jacques Chirac was ordered to stand trial at the criminal court for complicity in "breach of trust and unlawful use of public funds." Chen Li & Zhang Xin, Jacques Chirac's Trial a Test on French Judicial Reform, *CHINA VIEW* (Nov. 6, 2009, 13:27), <http://news.xinhuanet.com/english/2009-11/06/content12399263.htm>. The trial marked "the first time in the history of the fifth Republic of France that a retired president was prosecuted at a criminal court." *Id.* If Chirac is found guilty, he faces "up to 10 years in prison and a fine of 150,000 euros." *Id.*

¹⁹⁶ The rationale for vesting executive power in one individual is understandable—the need for accountability, speed, and decisiveness in decision-making. In commenting with respect to a similar position under the U.S. Constitution, Justice Breyer of the U.S. Supreme Court said:

Second, there is a need to fundamentally restructure the modern state to reduce the excessive concentration of powers that has led to "imperial" presidents operating from state capitals where too much power and decision-making has also been concentrated. To enhance the quality and practice of democracy and accountability, as well as recognize cultural and ethnic diversity and also promote equal and equitable development, it is submitted that there is a need in many countries for devolution or decentralization of power in order to establish new centers of authority and policy-making. The need to enable people [*1052] today to have a greater say in the running of their daily lives cannot be gainsaid, but the exact form that the devolution should take will depend on the complexity of the society. For example, this requires more effective steps towards the decentralization of powers through federal systems in certain complex multiethnic societies such as Nigeria, Ethiopia, Sudan, and South Africa. On the other hand, Francophone Africa will need to overcome the Gallic obsession with centralization of powers, especially to defuse regional tensions in countries such as Senegal, Cameroon,¹⁹⁷ and the Democratic Republic of the Congo. What is actually needed is effective local government and not merely local administration, which is what is provided for under many of the present unitary and highly centralized constitutional structures.

Third, term prolongations do not only threaten the budding seeds of democracy and *constitutionalism* but often drive presidents to extremes such as murdering political opponents who threaten their positions or siphoning state funds to buy political support.¹⁹⁸ No leader, however virtuous or exceptional he may be, is indispensable and irreplaceable.¹⁹⁹ In fact, "two terms are long enough for any exceptional leader to leave indelible footprints without sowing the seeds of dictatorship. It is a period which is sufficient to give a good leader time to leave his mark and short enough for people to tolerate a poor leader."²⁰⁰ [*1053]

Presidential term limits were one of the major innovations in the post-1990 period and became a standard provision in most African constitutions.²⁰¹ These term limit provisions brought an end to the long reign of rulers like Jerry Rawlings of Ghana and Daniel Arap Moi of Kenya.²⁰² Others, such as Frederick Chiluba of Zambia, Bakili Muluzi of Malawi, and Olusegun Obasanjo of Nigeria, failed in their attempts to amend term limits provisions to extend their tenure.²⁰³ However, the last few years have seen a reversal with many rulers, such as Paul Biya of Cameroon, who has been in power for twenty-nine years, and Yoweri Museveni of Uganda, who has ruled for twenty-five years, amending their constitutions to extend their terms.²⁰⁴

It is submitted that there is a need to constitutionalize a two term limit in African constitutions in a manner that will make them more effective and less vulnerable to arbitrary amendments.²⁰⁵ In doing so, these provisions must also contain protective measures to accommodate the sometimes well founded fears that incumbents may harbor. In the past, African leaders have not only been killed or imprisoned, but even some of the few who retired voluntarily suffered per-

¹⁹⁷ See generally Charles Manga Fombad, Cameroon's Constitutional Conundrum: Reconciling Unity with Diversity, in *ETHNICITY, HUMAN RIGHTS AND CONSTITUTIONALISM IN AFRICA* 121 (2008) (noting increasing amounts of tension along regional ethnic lines throughout Cameroon).

¹⁹⁸ Fombad & Inegbedion, supra note 88, at 8-14.

¹⁹⁹ Versions of Louis XIV of France's claim of imminent apocalypse, "apres moi, le deluge," (literally, after me the deluge), has been expressed by many different African leaders to create a myth of indispensability and irreplaceability, with the possibility of dire consequences following their departure from power. See Ndiva Kofele Kale, Keynote Address at Africa at Crossroads: Complex Political Emergencies in the 21st Century: The Sovereign African State is Dead . . . Long Live the State! Reflections on the 'Collapsed State' Debate (Mar. 21-23, 2001), available at <http://www.ethnonet-africa.org/pubs/crossroadskale.htm> (noting that "sans moi, le deluge" is the African version of "apres moi, le deluge"); see also Fombad & Inegbedion, supra note 88, at 15-16.

²⁰⁰ Fombad & Inegbedion, supra note 88, at 28.

²⁰¹ See id. at 17-18.

²⁰² Larry Diamond, The Rule of Law Versus the Big Man, *J. DEMOCRACY*, Apr. 2008, at 138, 140.

²⁰³ Fombad & Inegbedion, supra note 88, at 7.

²⁰⁴ More recently, former president Mamadou Tandja of Niger tried but failed to pressure Parliament to amend the Nigerian Constitution in order to secure a third term in office. He then proceeded to organize a referendum through which the term limit was removed. See Kathryn Sturman, Niger: Who Needs Presidential Term Limits?, *ALLAFRICA.COM* (Aug. 17, 2009), <http://allafrica.com/stories/200908170007.html>. As a direct result of the political crisis that this provoked, he was overthrown in a military coup in February 2010.

²⁰⁵ For a detailed discussion of the need for term limits in African constitutions, see Fombad & Inegbedion, supra note 88.

secutions, vilification, and humiliation.²⁰⁶ Recent African history has shown that the [*1054] fear of political persecution of former leaders does not always come from the opposition parties.²⁰⁷ To encourage incumbents to retire without fear of an uncertain future, term limits provisions must in addition provide both protective immunities and financial incentives. The protective immunities should protect them from politically motivated prosecutions but not from criminal responsibility, especially for mala in se offenses.²⁰⁸ Generally, it is necessary to make a distinction between brutal and corrupt dictators, like Chiluba,²⁰⁹ who must be held accountable for their actions, and "benign, naive and misguided dictators," like Kenneth Kaunda, who "ought to enjoy immunity from prosecution,"²¹⁰ at least in respect of offenses that are not morally reprehensible or contrary to basic international [*1055] human rights norms.²¹¹ On the other hand, financial incentives in the form of generous retirement packages will not only ensure that former presidents have a reasonably comfortable and dignified standard of living in retirement but also that they will have no reason to embezzle government funds whilst in office in order to prepare for their future retirement. The fact that extremists like Robert Mugabe of Zimbabwe have not been induced to leave office gracefully in the face of promises of generous retirement packages and immunity does not diminish the importance of enticing presidents to leave office in this manner.²¹² Besides such constitutional measures, there are other means currently being used to coax African leaders to leave power at the end of their term. The best example is the Mo Ibrahim awards given to retired leaders who displayed exceptional leadership qualities.²¹³ The possibility of offering [*1056] them presti-

²⁰⁶ The best example of this is the late Ahmadou Ahidjo of Cameroon, who voluntarily resigned as president of Cameroon in 1982. In 1983, his successor accused him of complicity in a coup d'état. He was tried in absentia and sentenced to death in 1984. He died in exile in Senegal in 1989, a broken man. Glenn Fowler, Obituary, Ahmadou Ahidjo of Cameroon Dies; Ex-Leader was 65, N.Y. TIMES, Dec. 2, 1989, <http://www.nytimes.com/1989/12/02/obituaries//ahmadou-ahidjo-of-cameroon-dies-ex-leader-was-65.html>.

²⁰⁷ For a further discussion of political persecution of leaders, see Fombad & Inegbedion, *supra* note 88.

²⁰⁸ These are offenses that are inherently immoral such as unlawful homicide, arson, or rape, which are prohibited by statute. Offenses created under the Rome Statute of the International Criminal Court, such as genocide and crimes against humanity, will also fall under this category. Rome Statute of the International Criminal Court art. 5, adopted July 17, 1998, 2187 U.N.T.S. 90, U.N. Doc. A/CONF.183/9 (entered into force July 1, 2002).

²⁰⁹ In fact, in 2007 a British court found Chiluba guilty of stealing government funds of \$ 46 million and ordered him to repay 85% of the entire sum. See Former President Frederick Chiluba Acquitted of Corruption Charges, ZAMBIA EMBASSY, <http://zambiaembassy.se/documents/Microsoft%20Word%20%20Other%20News.pdf> (last visited Aug. 2, 2011). The judge noted that "while the former president had officially earned a total salary of just \$ 105,000 over his ten years in office, he had managed to pay an exclusive tailor's shop in Geneva \$ 1.2 million," all of which had been stolen from the state. Raphael G. Satter, Court: Ex-Zambian Leader Stole Millions, AP NEWS (May 5, 2007), available at <http://www.bookrags.com/news/court-ex-zambian-leader-stole-moc/>. In response, Chiluba described the judgment as "bordering on racism" and said he was the "victim of a witch hunt by Mwanawasa" for stealing money, part of which was given to him in the form of "gifts and donations." Zambia's Chiluba Rubbishes Court Ruling, IOL NEWS, (May 10, 2007, 2:50 PM), <http://www.iol.co.za/news/africa/zambia-s-chiluba-rubbishes-court-ruling-1.352442>. It is worth noting that the Zambian government decided to pursue the case "in a British court, rather than at home, because much of the stolen money was laundered through London." Satter, *supra*.

²¹⁰ Fombad & Inegbedion, *supra* note 88, at 23-24; see CONST. OF ZAMBIA Aug. 24, 1991, art. 43(3) (providing that a former president cannot be charged with a criminal offense for acts done while in office, unless the National Assembly determines that the proceeding will "not be contrary to the interests of the State").

²¹¹ Indeed, the Constitution of the Republic of Namibia confers qualified immunity on the president after leaving office. Article 31(3) provides that after a President has vacated office:

²¹² Owen Gagare, UN Offered Mugabe 'Exit Package,' NEWSDAY (Dec. 19, 2010, 19:27), <http://www.newsday.co.zw/article/2010-12-19-un-offered-mugabe-exit-package>; see also Fombad & Inegbedion, *supra* note 88, at 27. The additional advantage of entrenching these incentives in the constitution is that it will prevent an incumbent from making such pension and other immunities a condition precedent to them retiring.

²¹³ The Sudanese-born billionaire, Mr. Mo Ibrahim, has established the Mo Ibrahim Foundation, which awards the Ibrahim Prize each year to any retired president or prime minister who has served his country well. The Ibrahim Prize, MO IBRAHIM FOUNDATION, <http://www.moibrahimfoundation.org/en/section/the-ibrahim-prize> (last visited Aug. 2, 2011). Unprecedented in its scale and scope, the Ibrahim Prize "consists of \$ 5 million over ten years and \$ 200,000 annually for life thereafter." *Id.* A further \$ 200,000 per year for good causes espoused by the winner may be granted by the Foundation during the first ten years. *Id.* An Ibrahim Index of Good Governance is used to "collate data on the economic and social progress of every nation" on the African continent. Mamphela Ramphele, Africa: Continent Will Reap Reward of Leadership, ALLAFRICA.COM (Apr. 5, 2007), <http://allafrica.com/stories/200704050143.html>. Members of the prize committee include Kofi Annan, the former Secretary General of the UN, Salim Ahmed Salim, former Secretary General of the OAU and former prime minister of Tanzania, and Ngozi Okonjo-Iweala, former Finance Minister and Foreign Minister of Nigeria. The Ibrahim Prize Committee, MO IBRAHIM FOUNDATION.

gious positions in regional or international organizations has also been discussed.²¹⁴

Finally, another problem that needs to be urgently addressed is the tendency for many African presidents to abuse the absolute immunity which they enjoy from both criminal and civil proceedings, although in many Anglophone countries, such immunity does not apply to civil wrongs committed in the discharge of official duties, which are usually imputable to the state.²¹⁵ The objective of presidential immunity is certainly not to place the president above the law and give him a license to violate other people's rights with impunity. Presidents are usually charged with a long list of supervisory and policy responsibilities of utmost discretion and sensitivity that any unnecessary diversion of their energies by concerns with private lawsuits would pose serious risks to the effective functioning of government.²¹⁶ It is quite possible that in the often volatile political climate that operates today, an unrestricted right to sue the president may generate a large [*1057] volume of politically motivated harassing and frivolous litigation that will not only impact negatively on the dignity of this office but may also distract the president from his high and exacting duties. Nevertheless, because of the poor record of most African leaders in living up to the terms of their oath of office to faithfully and diligently discharge their duties as chief law enforcer, in maintaining the constitution, and in upholding the laws of the land, it is submitted that there is no longer any justification for absolute presidential immunity. As a general rule, the constitution should certainly allow for presidential immunity with respect to both civil and criminal proceedings; however, in order to ensure that this immunity does not become a license for abuse of powers, the following should be exceptions:

(i) Civil proceedings for acts or omissions committed by the president in his official capacity, because responsibility for this is usually imputed to the state.

(ii) Crimes or wrongs committed before the president assumed office. To reduce the risk of corrupt leadership, the presidential office should be reserved for those who have a clean record and not those who want to use the office to escape liability for their past misdeeds.

(iii) Any private act that amounts to abuse of the official position for private ends as well as any act that violates the spirit of the constitution.²¹⁷

Two points must be noted. First, it is not enough that there are often provisions providing for the impeachment of the president. Enforcing these provisions usually involves a cumbersome political process that the dominant parties of today will easily frustrate. Second, provisions limiting the scope of presidential immunity go hand in hand with provisions on term limits. The latter is designed to prevent presidents for life, and ensure that the right to legal action against former presidents can be exercised at a time when the evidence is still relatively fresh or has not been lost or [*1058] destroyed and witnesses have not died. Presidents who stay in power for inordinately long periods, or indefinitely, may never be held to account for their wrongful actions. Limiting the scope of presidential powers must go hand in hand with more concrete steps in dealing with the problems of the poor and marginalized in society.

D. Addressing Poverty Through the Recognition of Socio-economic Rights

Constitutional reforms, however extensive in their scope and however well intentioned, are unlikely to provide a

TION, <http://www.moibrahimfoundation.org/en/section/the-ibrahim-prize/the-ibrahim-prize-committee> (last visited Aug. 2, 2011). It is, however, important to note that this move is not without its critics, who feel that the prize is misplaced because it enriches people who have already accumulated more than enough wealth in office. See Kwodwo Asante, MO Ibrahim Award is Useless, PEACE FM ONLINE (Oct. 20, 2009), <http://elections.peacefonline.com/politics/200910/29540.php>.

²¹⁴ This suggestion was made by the prominent African scholar, Professor Ali Mazrui. Roger Southall, Presidential Transitions and Political Accountability, THE NORDIC AFRICA INSTITUTE (Jan. 2006), <http://www.nai.uu.se/publications/news/archives/061southall/index.xml>. Southall points out that "the idea has been taken up by the African Union, which is increasingly appointing former presidents to serve as mediators in conflicts between or within member countries." Id. This will certainly depend on the record and reputation of the particular former leader in question. It is difficult to see how some leaders, such as Robert Mugabe, Paul Biya, and Hosni Mubarak could, on their retirement and with any credibility, be used as mediators or guardians of democracy on the continent.

²¹⁵ See HATCHARD ET AL., *supra* note 3, at 81-90.

²¹⁶ For a discussion of the reasoning of this concept in the United States, see [Nixon v. Fitzgerald, 457 U.S. 731, 751 \(1982\)](#).

²¹⁷ If these standards were followed, the Botswana Court of Appeal would not have allowed the President of Botswana to use presidential immunity as a means to get rid of his political rivals in *Motswaledi v. Botswana Democratic Party 2009 BWCA 111 (CA) (Bots.)*. See *supra* note 96.

solid foundation for *constitutionalism* if they fail to address the concerns of the weak and vulnerable in society. It wasn't merely the lack of political participation that forced people to come out on the streets in the early 1990s; the rising unemployment, poverty, hunger, and the widening gap between the ruling elites and the masses caused by decades of dictatorship and mismanagement of the economy had been a critical factor.²¹⁸ Yet, the new constitutional dispensation in many countries did not specifically address the issue of equitable distribution of the nation's resources, nor was there any attempt to liberate the masses from the scourges of poverty, oppression, and discrimination. As a consequence, the right to vote for a party of one's choice, the most visible sign of Africa's democratic credentials, will remain meaningless for as long as a majority of the population lack the opportunities to lift themselves out of the poverty trap, lack personal security, and are unable to have access to healthcare and basic education.

Many modern African constitutions either contain no provisions on matters relating to socio-economic rights-what are generally referred to as second generation rights²¹⁹ -or refer to them in obscure and programmatic [*1059] language. For example, from the constitutions of fifty-three countries analyzed in the Heyns and Kaguongo study, the right to an adequate standard of living appears only in fourteen, the right to housing and shelter in twelve, the right to food and nutrition in eight, the right to clean and safe water in six, the right to education in forty-five, the right to social security in twenty-nine, and the right to development in twenty-four constitutions.²²⁰

A World Bank Report released on March 22, 2010 states that the number of people in Sub-Saharan Africa who live on less than two dollars a day has doubled from 292 million in 1981 to 555 million in 2005.²²¹ Poverty and the needs unfulfilled by the new constitutional dispensation probably pose one of the greatest threats to *constitutionalism*. In South Africa, service delivery protests have become a daily occurrence, and the threat by some of the poor communities to intensify their protests during the 2010 World Cup alarmed the government.²²²

Whilst no constitutional design or principle can on its own eradicate poverty and unemployment, it is submitted that it can nevertheless do two things that may considerably improve the conditions of the poor. First, it can reduce the endemic quiet corruption that is a major cause of failure to deliver goods and services paid for by the government through the constitutional entrenchment of [*1060] accountability principles and institutions discussed earlier. Second, it can ensure that government resources are used judiciously and equitably for the common benefit of all. An essential condition for maintaining respect of the constitutional order, which entails respect for the rule of law and social order, therefore requires the entrenchment of socio-economic rights in terms which allow for a more equitable redistribution of economic, social, and cultural resources.²²³ Contrary to the widely held fear that the entrenchment of socio-economic rights will impose an unreasonable burden on the state, the South African Constitution and the jurispru-

²¹⁸ I.S. Oguniye, Domestic Rebellion in Africa, INT'L. J. PEACE & DEV. STUD., Nov. 2010, at 25, 30.

²¹⁹ The idea of dividing human rights into three generations was developed by jurist Karel Vasak. See Karel Vasak, Human Rights: A Thirty-Year Struggle: The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights, UNESCO COURIER, Nov. 1977, at 29. Although controversial, it has since been adopted as a reasonable approach to analyzing and understanding the different types of human rights. Second generation human rights are based on principles of social justice and public obligation and tend to be positive in nature. They are fundamentally social, economic, and cultural in nature and are designed to ensure equal and fair conditions of treatment for all citizens. Id.

²²⁰ Heyns & Kaguongo, *supra* note 36, at 715-16.

²²¹ See Mohammed A. Salih, Corruption Carries High Cost, World Bank Says, INTER PRESS SERVICE (Mar. 16, 2010), <http://www.ipsnews.net/news.asp?idnews=50679>.

²²² See Frank Nxumalo, Service Delivery Protests Curious-HSRC, SABC NEWS (Mar. 16, 2010, 1:53), [http://www.sabcnews.com/portal/site/SABCNews/menuitem.5c4f8fe7ee929f602ea12ea1674daeb9/?vgnnextoid=9b8ca56b0c667210VgnVCM10000077d4ea9bRCRD&vgnnextfmt=default; World Cup Could be Disrupted by Violent Housing Protests, TELEGRAPH \(UK\), Mar. 10, 2010, http://www.telegraph.co.uk/sport/football/world-cup-2010/7413494/World-Cup-could-be-disrupted-by-violent-housing-protests.html](http://www.sabcnews.com/portal/site/SABCNews/menuitem.5c4f8fe7ee929f602ea12ea1674daeb9/?vgnnextoid=9b8ca56b0c667210VgnVCM10000077d4ea9bRCRD&vgnnextfmt=default; World Cup Could be Disrupted by Violent Housing Protests, TELEGRAPH (UK), Mar. 10, 2010, http://www.telegraph.co.uk/sport/football/world-cup-2010/7413494/World-Cup-could-be-disrupted-by-violent-housing-protests.html). Yet the South African President was spending 65 million rand (actually over \$ 9.6 million in U.S. dollars at today's exchange rate) in expanding his rural home. The new homestead is expected to have a police station, a helicopter pad, and a military clinic. All this, according to a press statement, was at his own cost. Sakhile Moidise, South Africa President Zuma's US\$ 8m Plus Home Renovations, AFRIK-NEWS (Dec. 4, 2009), <http://www.afrik-news.com/article16589.html>.

²²³ With hundreds of thousands uncertain of one good meal each day it is difficult to see any justifications for budgeting 200 million rand (about \$ 29.6 million in U.S. dollars at today's exchange rate) to upgrade the President's residence in South Africa's 2011/2012 budget. See Outrage over R200M Upgrade of Presidential Residency, INDEPENDENT DEMOCRATS (Feb 25, 2011), <http://www.id.org.za/newsroom/press-releases/id-outrage-over-r200m-upgrade-of-presidential-residency>.

dence of the South African Constitutional Court has shown how this can be done.²²⁴ Thus, in granting everyone a right to housing in section 26 and health care, food, water, and social security in section 27, the constitution makes it clear that the state is only required to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of these rights."²²⁵ However, such constitutional provisions on their own will not necessarily improve the conditions of the poor and marginalized unless the judiciary adopts a more progressive and imaginative approach to constitutional interpretation. This brings into focus the important role that the judiciary has to play in the new constitutional dispensation. [*1061]

E. An Independent Judiciary as Promoters and Defenders of *Constitutionalism*

Judicial independence is "one of the core element of modern *constitutionalism*" and a crucial rock on which democracy and good governance need to be anchored.²²⁶ Immediately after independence, African leaders quickly took control of the judiciaries, which, as a consequence, were hardly ever able to act as guardians of the constitutions and impartial enforcers of the law.²²⁷ Most post-1990 African constitutions now contain provisions which purport to provide for and guarantee the independence of the judiciary.²²⁸ However, although judicial independence is a key feature of liberal democracies,²²⁹ attaining the goal of judicial independence remains a challenge not only to Africa's fragile transitional democracies but even to advanced democracies in Europe, Japan, and the United States.²³⁰ This is because several studies have shown that judicial independence has never been a condition that is established fully once and for all or is enjoyed without debate, controversy or challenge.²³¹ The importance of judicial independence to strengthening [*1062] democracy is underlined by the observation made by an American judge that "the U.S. Constitution would be just a piece of paper today if there were not independent judges to enforce it."²³²

Because of the important role that judges in a constitutional system firmly rooted on *constitutionalism* have to play, it is inevitable that the prospects for deepening *constitutionalism* on the continent would require more serious measures to enhance the judicial role. Three main issues are critical: the strengthening of judicial independence and judicial competence, the expansion of the scope for judicial intervention, and the judiciary itself acting as agents of constitutional change and development.

1. Enhancing Judicial Independence. The only elaborate study on post-1990 judicial institutions in Africa carried out so far was performed by the Democratic Governance Rights Unit at the University of Cape Town and published in

²²⁴ See Danie Brand, Introduction to Socio-Economic Rights in the South African Constitution, in SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA 1, 45 (Danie Brand & Christof Heyns, eds., 2005) (noting that the court evaluates claims for socio-economic rights based on a "reasonableness standard" derived from "the state's duty to take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of socio-economic rights"); Linda Stewart, Adjudicating Socio-Economic Rights Under a Transformative Constitution, 28 PENN ST. INT'L L. REV. 487, 492-97 (2010) (discussing cases where the South African Constitutional Court has "positively adjudicated" socio-economic rights).

²²⁵ S. AFR. CONST., 1996 ch. 2, § § 26, 27(2).

²²⁶ Fombad, A Preliminary Assessment, *supra* note 43, at 234.

²²⁷ *Id.*

²²⁸ See *supra* note 43 and accompanying text.

²²⁹ For a discussion of liberal democracy, see SARTORI, *supra* note 21, at 383-93 ("The formula of liberal democracy is equality through liberty, by means of liberty, not liberty by means of equality.").

²³⁰ See Martin Shapiro, The European Court of Justice, in JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY: CRITICAL PERSPECTIVES FROM AROUND THE WORLD 273 (Peter H. Russell & David M. O'Brien eds., 2001) (discussing the judicial independence of the European Court of Justice); David M. O'Brien & Yasuo Ohkoshi, Stifling Judicial Independence from Within: The Japanese Judiciary, in JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY: CRITICAL PERSPECTIVES FROM AROUND THE WORLD, *supra*, at 37, 39 ("We present new data showing that expressions of individual judicial independence have in fact declined [in Japan] during the 1980s and 1990s."); Henry J. Abraham, The Pillars and Politics of Judicial Independence in the United States, in JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY: CRITICAL PERSPECTIVES FROM AROUND THE WORLD, *supra*, at 25, 26-28 (discussing the removal by impeachment of United States district court judges).

²³¹ See, e.g., Peter H. Russell, Judicial Independence in Comparative Perspective, in JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY: CRITICAL PERSPECTIVES FROM AROUND THE WORLD, *supra* note 231, at 301.

²³² Richard Arnold, Should More Limits be Placed on the Federal Judiciary: No, SPECTRUM: J. ST. GOV'T, Summer 1997, at 29, 29.

early 2006 ("UCT study").²³³ It is however, limited to eleven English speaking countries in Southern and Eastern Africa.²³⁴ The UCT study nevertheless provides a useful indication of the reality emerging from the attempts to constitutionalize judicial independence in Africa. It concludes that the "degree to which each of the 11 judicial systems approximates to a substantially independent mechanism . . . varies, although the general picture sketched is not a happy one."²³⁵ In the light of this study and a broader analysis of the constitutional provisions dealing with judicial independence in these post-1990 constitutions,²³⁶ it is clear that the important role an independent judiciary plays in the body politic is now, unlike in the recent past, recognized and accepted.²³⁷ [*1063] Nevertheless, there remain numerous challenges, especially the lack of good will, even in countries like South Africa, to allow the judiciary to operate independently and effectively without political interference. Bearing this in mind, it is submitted that any future reform agenda must pay particular attention to two issues.

First, there is need to entrench what are now considered to be the core principles of judicial independence in the constitution, rather than in ordinary legislation. This must be so, notwithstanding the well documented fact that Britain, New Zealand, and Israel are operating efficiently with functioning independent judiciaries without any entrenched constitutional provisions.²³⁸ Constitutionalizing judicial independence in this way does not guarantee that there will be no unwarranted interference by the executive with the judiciary, but it will certainly increase the odds against such interference.

Second, it is necessary that the bodies-such as Judicial Service Commissions or Higher Council of Magistracy-that decide important issues such as appointments, promotions, and dismissal of judges are made less vulnerable to partisan manipulation. They should be constituted in such a manner that the chairperson and the majority of members are independent of the government in power. Even then, the effectiveness of the judiciary will depend on the scope their powers to review constitutional violations, which also needs to be expanded.

2. The Expansion in the Scope for Judicial Review. Africa received and adopted two main systems of judicial review: the American and the French model.²³⁹ Although [*1064] substantial improvements have been made to the inherited French model in the modern constitutions of many Francophone and Lusophone African countries,²⁴⁰ the French model remains a very restricted and fairly ineffective means of ensuring that governments do not violate the constitution.²⁴¹ Though there is no perfect system, there are good examples, such as the South African Constitutional Court and the Constitutional Court of Benin.²⁴² There are others systems which are ineffective and merely shams designed to obfuscate the desire to avoid constitutional adjudication, such as Cameroon's Constitutional Council.²⁴³ A recent study suggests that a mixed model such as that adopted under the South African Constitution provides many

²³³ DEMOCRATIC GOVERNANCE AND RIGHTS UNIT, THE JUDICIAL INSTITUTION IN SOUTHERN AFRICA: A COMPARATIVE STUDY OF COMMON LAW JURISDICTIONS (Linda Van de Vijver ed., 2006).

²³⁴ See *id.* The countries covered in the study are Botswana, Kenya, Lesotho, Malawi, Namibia, South Africa, Swaziland, Tanzania, Uganda, Zambia, and Zimbabwe.

²³⁵ *Id.* at 279.

²³⁶ Fombad, A Preliminary Assessment, *supra* note 43, at 233-57.

²³⁷ *Id.*

²³⁸ See Brice Dickson, *Judicial Activism in the House of Lords 1995-2007*, in *JUDICIAL ACTIVISM IN COMMON LAW SUPREME COURTS* 363 (Brice Dickson ed., 2007) (describing activist opinions of Britain's House of Lords); Bruce Harris, *Judicial Activism and New Zealand's Appellate Courts*, in *JUDICIAL ACTIVISM IN COMMON LAW SUPREME COURTS*, *supra*, at 273 (discussing "the scope New Zealand law leaves for judicial creativity and the extent to which it has taken place"); Eli Salzberger, *Judicial Activism in Israel*, in *JUDICIAL ACTIVISM IN COMMON LAW SUPREME COURTS*, *supra*, at 217 (analyzing judicial activism and its sources in Israel).

²³⁹ See discussion in Charles Manga Fombad, Paper presented at the Konrad Adenauer Foundation and Max Planck Institute Conference: Constitutional Courts, Human Rights, Democracy and Development: African Constitutional Courts (Nov. 12-13, 2009).

²⁴⁰ Charles M. Fombad, *African Constitutional Courts: Trends and Challenges* (forthcoming).

²⁴¹ *Id.*

²⁴² For an interesting account of the great strides made by the Benin Constitutional Court to improve and avoid the limitations of the Constitutional Council model, which it inherited at independence, see Anna Rotman, *Benin's Constitutional Court: An Institutional Model for Guaranteeing Human Rights*, [17 HARV. HUM. RTS. J. 281, 285-95 \(2004\)](#).

²⁴³ See Fombad, *Cameroonian Council*, *supra* note 41, at 136-37 ("Only the president and a few specified political elites can challenge the constitutionality of any law, and this before Constitutional Council . . . a body composed essentially of his nominees.").

advantages from which many African countries can learn.²⁴⁴

Be that as it may, it is submitted that there are certain features which any modern African system of constitutional adjudication should have in order to be effective. First, adjudication of disputes should be by a judicial body operating within the hierarchy of courts whether as a specialized or non-specialized court. This is preferable to a quasi-judicial/quasi-administrative body, such as the constitutional court model, which operates outside the hierarchy of courts. Second, constitutional adjudication should be flexible by being both diffuse and concentrated, and should provide for both an abstract and a concrete review of constitutionality of laws. Third, litigants should be [*1065] provided with a remedy not only when the authorities violate or threaten to violate the constitution, but also where the alleged violation consists of a failure to fulfill a constitutional obligation. This may result in a declaration of unconstitutionality for the omission to carry out a constitutional obligation²⁴⁵ and is necessary on a continent where the executive and legislatures are well noted for regularly ignoring the implementation of constitutional provisions.²⁴⁶ This unique remedy will probably cajole or force the other two branches of government (that is, the legislature and the executive) to fulfill their constitutional obligations. It will guarantee that compliance with constitutional obligations is not a matter that lies within the exclusive and absolute discretion of these two branches. This form of judicial control of constitutionality is highly developed in certain countries, especially in Latin America.²⁴⁷

Finally, it is also worth noting that the scope of judicial review may also depend on the temperament and attitude of the judges. For example, two specialized courts, the French Constitutional Council and the German Constitutional Court, confounded their designers by becoming more effective defenders of the constitution largely due to the open-minded and proactive nature of the judges who have sat in these courts.²⁴⁸ This discussion leads to the next issue: the judicial role in promoting *constitutionalism*. [*1066]

3. The Judiciary as Active Agents of Change. An independent judiciary with wide powers to undertake judicial review on its own is not sufficient. As Chidi Odinkalu has observed, "the first generation of Constitutions and Bills of Rights in Common Law Africa was destroyed not so much by the intolerance of the executive as by the enthusiastic abdication of judicial responsibilities by the judges."²⁴⁹ *Constitutionalism* can only develop and grow with judges who are liberal, progressive, activist, or who have "bold spirits" and not the "timorous souls"²⁵⁰ of the passive judges of the recent past. If *constitutionalism* is to survive in Africa, then judges must be ready to play a more proactive role than they have played so far. It is contended that the constitutional rights revolution can only be realized with a judiciary that is ready to use its powers to negate the continuous authoritarian impulses of elected politicians. This requires a new judicial attitude towards adjudication in which judges adopt a more principled and rights-sensitive approach that takes account of the radical political, economic, and social changes of our times and the revulsion against dictatorship. In many instances it seems that the revised or new constitutions were not only designed to eliminate dictatorship and promote democracy and good governance but also to promote a new human rights culture that is particularly sensitive to issues such as hunger, poverty, unemployment, ignorance, illiteracy, disease, and other social ills that have inflicted so much hardship on a majority of the population on the continent. Attaining

²⁴⁴ Fombad, *supra* note 240, at 38 ("This mixed model . . . provides for both abstract and concrete judicial review that reflects a remarkable exercise in creative imagination, pragmatism and opportunism that has been shaped by the country's history."); see *infra* Part III.E.3.b.

²⁴⁵ Arguably, the South African Constitution provides for this possibility under chapter 1, section 2, which states that the "obligations imposed by [the constitution] must be fulfilled." S. AFR. CONST., 1996 ch. 1, § 2 (emphasis added).

²⁴⁶ For example, for more than twelve years after the amended Cameroon Constitution of 1996 appeared to provide for radical changes such as the establishment of a second chamber of parliament, the establishment of a Constitutional Council, the replacement of the existing provinces with regions, nothing was done.

²⁴⁷ See Gilmar Mendes, *Constitutional Jurisdiction in Brazil: The Problem of Unconstitutional Legislative Omission 2* (May 27, 2008) (unpublished manuscript), available at <http://www.stf.jus.br/arquivo/cms/noticiaArtigo/Discurso/anexo/ltuaniaIngles.pdf> (noting that the constitutional actions available in Brazil are "complemented by a variety of instruments aimed at exercising abstract control of constitutionality by the Brazilian Federal Supreme Court").

²⁴⁸ See, e.g., Fombad, *Cameroonian Council*, *supra* note 41, at 185 ("The French Constitutional Council has created for itself the power and duty to control the conformity of non-promulgated legislation beyond what is stated in the constitution.").

²⁴⁹ Chidi Anselm Odinkalu, *The Judiciary and the Legal Protection of Human Rights in Common Law Africa: Allocating Responsibility for the Failure of Post-Independence Bills of Rights*, 8 AFR. SOC'Y INT'L & COMP. L. PROC. 124, 136-37 (1996).

²⁵⁰ *Candler v. Crane, Christmas & Co.*, (1951) 2 K.B. 164, 178 (C.A.) (UK) (Denning, L.J., dissenting).

these goals requires a judiciary that is willing to reflect the new spirit of *constitutionalism* when interpreting these constitutions.

As the judiciary stands firmly between the individual citizens and the wielders of power, they are the ultimate arbiter in the arena of constitutional rights and need to take an activist role in adjudication. To place much reliance on [*1067] judges to defend and in many respects attempt through the judicial process to fill some of the gaps left by the 1990 reforms is bound to be controversial. However, the African judiciary cannot be immune from the forces of globalization which has affected all areas of political, social, and economic life. The conservative inward-looking culture which was characteristic of the old judiciary has to be abandoned as judges must now see themselves as members of a global legal community where knowledge and ideas are exchanged across jurisdictions. The need for adopting broad interpretative techniques in interpreting constitutions also inheres from the very nature of a constitution itself. Far from being a document that contains "time-worn adages or hollow shibboleths,"²⁵¹ or a "lifeless museum piece,"²⁵² a constitution must be regarded as a living document which is designed to serve present and future generations as well as embody and reflect the fears, hopes, aspirations, and desires of the people.²⁵³ Judges, it is argued, have a duty to continuously breathe life into the constitution.

The concept of judicial activism, although controversial, has an important role to play in entrenching the rule of law and constitutional governance in Africa. It must, from the outset, be made clear that the concept does not lend itself to an exact definition.²⁵⁴ It has variously been defined as: (i) a philosophy advocating that judges should interpret the constitution to reflect contemporary conditions and values;²⁵⁵ (ii) when courts do not confine themselves to reasonable interpretations of law, but instead create law;²⁵⁶ or (iii) when courts do not limit their ruling to the dispute [*1068] before them, but instead establish a new rule to apply broadly to issues not presented in the specific action.²⁵⁷ At the core of the concept is the notion that in deciding a case judges-particularly those of the appellate court-may, or some advocate must, reform the law if the existing rules or principles appear defective. On such a view, it could be argued that judges should not hesitate to go beyond their traditional role as interpreters of the constitution and laws given to them by others in order to assume a role as independent policy makers or independent "trustees" on behalf of society.²⁵⁸ The array of existing "disparate, even contradictory," ways of defining the concept has made its meaning increasingly unclear.²⁵⁹ For the purposes of this discussion, the concept refers to the situation in which judges go beyond their traditional role as interpreters of the constitution and strive to give effect to contemporary social conditions and values.

This concept is traditionally the opposite of the concept of judicial restraint, whereby the courts interpret the constitution and any law to avoid second-guessing the policy decisions made by other governmental institutions such as par-

²⁵¹ [Trop v. Dulles, 356 U.S. 86, 103 \(1958\)](#) (Warren, C.J.).

²⁵² *Attorney-General v. Dow* 1992 B.L.R. 119 (CA) at 166 (Aguda, J.A.) (Bots.).

²⁵³ Some argue that the constitution is for the living, and the present generation should no longer be ruled by the "dead hand" of their ancestors. See Michael W. McConnell, *Textualism and the Dead Hand of the Past*, [66 GEO. WASH. L. REV. 1127, 1127-28 \(1998\)](#).

²⁵⁴ See, e.g., CHRISTOPHER WOLFE, *JUDICIAL ACTIVISM: BULWARK OF FREEDOM OR PRECARIOUS SECURITY?* 1-32 (rev. ed. 1997) (providing a range of both conventional and radical definitions of judicial activism).

²⁵⁵ See BLACK'S LAW DICTIONARY 850 (7th ed. 1999) ("A philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions . . .").

²⁵⁶ See *id.* ("Adherents of this philosophy . . . are willing to ignore precedent.").

²⁵⁷ See Kenneth M. Holland, *Introduction to JUDICIAL ACTIVISM IN COMPARATIVE PERSPECTIVE* 1, 1 (Kenneth M. Holland ed., 1991) ("Judicial activism comes into existence when courts do not confine themselves to adjudication of legal conflicts but adventure to make social policies, affecting thereby many more people and interests than if they confined themselves to the resolution of narrow disputes.").

²⁵⁸ See Lino A. Graglia, *It's Not Constitutionalism, It's Judicial Activism*, 19 HARV. J.L. & PUB. POL'Y 293, 296 (1996) (defining judicial activism as "the practice by judges of disallowing policy choices by other governmental officials or institutions that the Constitution does not clearly prohibit"); see also Greg Jones, *Proper Judicial Activism*, [14 REGENT U. L. REV. 141, 143 \(2002\)](#) (defining the term as "any occasion where a court intervenes and strikes down a piece of duly enacted legislation").

²⁵⁹ Keenan D. Kmiec, *The Origin and Current Meaning of 'Judicial Activism'*, [92 CALIF. L. REV. 1441, 1442-43 \(2004\)](#) ("As the term has become more commonplace, its meaning has become increasingly unclear.").

liament and the president, within their constitutional spheres of authority.²⁶⁰ On such a view, judges have no popular mandate to act as policy makers and should defer to the decisions of the elected "political" branches of the [*1069] government in matters of policy making so long as these policymakers stay within the limits of their powers as defined by the constitution.²⁶¹ This Article will not debate the pros and cons of these two concepts²⁶² but will start from the premise that judicial activism is a reality in any modern judicial system that aspires to promote and defend *constitutionalism*.

The tremendous contribution that judicial activism has made to the development of modern constitutional law in two jurisdictions, one in Africa and the other abroad, will be used to show its prospects.²⁶³ First, there is India, an underdeveloped country, which continues to grapple with problems similar to those that African countries face today. The other is South Africa, where the judges, especially those of the Constitutional Court, have through bold and imaginative interpretative approaches strengthened the credibility of the new constitutional order. It will be shown that through judicial activism the frontiers of fundamental human rights and social justice have been expanded in both countries. On account of the importance of this judicial role in (1) defending constitutions; (2) developing, in an indirect and incremental manner, new principles of constitutional law; and (3) filling in some of the gaps left by the 1990 reforms, this issue will be discussed in some depth. This Article will first address the Indian experience.

a. The Experiences of Constitutional Development Through Judicial Activism in India. The judiciary in India has through a process of judicial activism struggled to bring law into the service of the poor and oppressed. Under what is usually known as public interest or social action litigation, and in the enforcement of fundamental rights under the constitution, the Indian courts "have sought to rebalance the distribution of legal resources and increase access to justice for the disadvantaged."²⁶⁴ Judicial activism [*1070] in India, especially its approach in public interest litigation, has been widely commented upon.²⁶⁵ It will suffice to note that through the process of judicial activism, the Indian judiciary can be considered to have rebalanced the scale of constitutional justice in the country in at least four areas: rules of standing have been liberalized, rules which provide procedural flexibility in litigation have been introduced, legal and fundamental rights have been interpreted creatively, and remedial flexibility has been introduced.²⁶⁶

One of the areas in which judicial activism has been greatly felt is in the increase of individual access to the legal process, which had become chaotic, expensive, time consuming, and too technical.²⁶⁷ In order to exclude intermeddlers and prevent a flood of litigation, the Indian courts had stuck to the traditional locus standi rule which requires the parties to have some real interest in the proceedings.²⁶⁸ However, in its attempts to help the poor and needy to vindicate the violation of their fundamental rights,²⁶⁹ the Supreme Court sidetracked the sanctity of locus standi

²⁶⁰ See *id.* at 1146-50 (comparing activists justices with restrained justices who believe that "laws have fixed meanings," and that these meanings should not be changed "no matter which groups may benefit from the departure").

²⁶¹ See Graglia, *supra* note 259, at 296.

²⁶² See generally THOMAS SOWELL, *JUDICIAL ACTIVISM RECONSIDERED* (1989) (debating the merits of judicial activism and judicial restraint).

²⁶³ For a detailed discussion, see Emmanuel Quansah & Charles Manga Fombad, *Judicial Activism as a Defence to Authoritarian Impulses: Lessons from India, Botswana and South Africa* (forthcoming).

²⁶⁴ Jamie Cassels, *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?*, 37 *AM. J. COMP. L.* 495, 497-98 (1989).

²⁶⁵ See, e.g., S.P. SATHE, *JUDICIAL ACTIVISM IN INDIA: TRANSGRESSING BORDERS AND ENFORCING LIMITS* 18-24 (2002); P.N. Bhagwati, *Judicial Activism and Public Interest Litigation*, 23 *COLUM. J. TRANSNAT'L L.* 561 (1985); Cassels, *supra* note 265; N.R. Madhava Menon, *Public Interest Litigation: A Major Breakthrough in the Delivery of Social Justice*, 9 *J. B. COUNCIL INDIA* 150 (1982).

²⁶⁶ For further discussion on this topic, see Cassels, *supra* note 265, at 498.

²⁶⁷ The magnitude of problems faced by litigants can best be gleaned from Bibek Debroy's report. See Bibek Debroy, *Losing a World Record*, *FAR E. ECON. REV.*, Feb. 14, 2002, at 23 (reporting that in 2002 there were more than 23 million pending cases in Indian courts).

²⁶⁸ Cassels, *supra* note 265, at 498.

²⁶⁹ See Vijayashri Sripati, *Constitutionalism in India and South Africa: A Comparative Study from a Human Rights Perspective*, 16 *TUL. J. INT'L & COMP. L.* 49, 98-104 (2007) (describing how the Supreme Court of India "sought to address broader social issues and . . . began to protect socioeconomic rights"); see also H. Kwasi Prempeh, *Marbury in Africa: Judicial Review*

and the procedural complexities that were an impediment to access to the courts.²⁷⁰ Thus, as early as 1976, the Court had declared that "where a wrong against [*1071] community interest is done, 'no locus standi' will not always be a plea to non-suit an interested public body chasing the wrongdoer in court."²⁷¹ Since then, the public interest litigation has been initiated by individuals on behalf of other individuals and groups, by academics, journalists, and many civil society organizations.²⁷² The court has also allowed public interest litigation to vindicate the right to fair judicial procedure,²⁷³ the right to legal aid,²⁷⁴ the right to livelihood,²⁷⁵ and the right to live free of pollution.²⁷⁶

Another area of judicial innovation by the Indian judiciary has been in the introduction of procedural flexibilities in litigation. Actions do not need to be commenced by a formal petition; a letter addressed to the judge or the court will suffice.²⁷⁷ A judge has even commenced an action by converting a letter to the editor in a newspaper into a public interest writ.²⁷⁸ Further procedural flexibilities are provided by courts waiving fees, awarding costs, and providing other forms of litigation assistance to public interest advocates.²⁷⁹ The courts found [*1072] that the adversarial process could operate fairly and produce just results only where the two parties are evenly matched in strength and resources, but, given that the poor often lacked the social and material resources, they were bound to be at a disadvantage in producing all relevant evidence before the court.²⁸⁰ The court decided to abandon the *laissez-faire* approach in the judicial process and devised a strategy and procedure for ascertaining, establishing, and articulating the claims and demands of the poor by appointing socio-legal commissions of inquiry.²⁸¹

It is in dealing with the fundamental rights provisions in the Indian Constitution that the Indian judiciary has been very bold. The former Chief Justice of the Supreme Court, P.N. Bhagwati, an exponent par excellence of judicial activism, has argued that in interpreting the constitution, the Supreme Court is neither bound by doctrines of literal meaning or original intent, nor constrained to read into it only formal rights and liberties. He put it thus:

The judges in India have asked themselves the question: can judges really escape addressing themselves to substantial questions of social justice? Can they . . . simply follow the legal text when they are aware that their actions will perpetuate inequality and injustice? Can they restrict their inquiry into law and life within the narrow confines

and the Challenge of Constitutionalism in Contemporary Africa, [80 TUL. L. REV. 1239, 1300-01 \(2006\)](#) (noting that the Supreme Court initiated procedural and substantive innovations in order to recognize the demands of social justice).

²⁷⁰ Prempeh, *supra* note 270, at 1301.

²⁷¹ Singh v. State of Uttar Pradesh, (1977) 1 S.C.R. 1072, 1083 (1976) (India).

²⁷² In Gupta v. Union of India, (1982) 2 S.C.R. 365 (1981) (India), Chief Justice Ghagwati explained this approach: "Where a legal wrong or a legal injury is caused to a person or to a determinate class of persons . . . and such a person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction . . ." *Id.* at 520.

²⁷³ Hoskot v. State of Maharashtra, (1978) 3 S.C.C. 544, 552-53 (India).

²⁷⁴ *Id.* at 554-55.

²⁷⁵ Tellis v. Bombay Mun. Corp. (1985) 2 S.C.R. Supp. 51, 52 (India).

²⁷⁶ Rural Litig. & Entitlement Kendra v. State of Uttar Pradesh, (1988) 2 S.C.R. Supp. 690, 726-27 (India) (ordering mines to close in order to promote the preservation of forests).

²⁷⁷ Jasper Vikas George, Public Interest Litigation, NGOS INDIA (Aug. 3, 2005), <http://www.ngosindia.com/resources/pilsc.php>.

²⁷⁸ See Menon, *supra* note 266, at 158-60.

²⁷⁹ For example, in Wadhwa v. State of Bihar, A.I.R. 1987 S.C. 579 (India), the petitioner, a professor of political science who had done extensive research in the State's administration, was "deeply interested in ensuring proper implementation of constitutional provisions." *Id.* at 579. He challenged the State's practice of repromulgating a number of ordinances without proper approval from the legislature. *Id.* at 579-80. The Supreme Court directed the State of Bihar to pay the petitioner 10,000 rupees for his excellent research that brought to light this repressive action. *Id.* at 590.

²⁸⁰ See Sripati, *supra* note 270, at 103-04.

²⁸¹ The practice of appointing socio-legal commissions of inquiry for the purpose of gathering relevant material and information bearing on the case put forward on behalf of a disadvantaged individual or section of a community in social action litigation has now been institutionalized as a result of the Indian Supreme Court ruling in *Morcha v. Union of India* (Bonded Labour Case), A.I.R. 1984 S.C. 802 (1983). See generally P.N. Bhagwati, Social Action Litigation: The Indian Experience, in *THE ROLE OF THE JUDICIARY IN PLURAL SOCIETIES* 20 (Neelan Tiruchelvan & Radhika Coomaraswamy eds., 1987) (discussing the judicial creation of new ways to bring issues affecting unrepresented people before the courts).

of a narrowly defined rule of law?²⁸²

Through an expansive interpretation of the fundamental rights provisions, the Supreme Court in *Tellis [*1073] v. Bombay Municipal Corp.* stated that “the sweep of the right to life conferred in article 21 [of the Constitution] is wide and far reaching” and includes the right to a livelihood.²⁸³ In *Mullin v. Union Territory of Delhi*, the court stated that “the right to life includes the right to live with human dignity and all that goes along with it . . . must in any view of the matter include the right to the basic necessities of life.”²⁸⁴ In *Morcha v. Union of India*, it was noted that article 21 of the Indian Constitution had been interpreted to include the right to be “free from exploitation.”²⁸⁵

Finally, the Indian courts have devised judicial remedies that go beyond the traditional judicial remedies mainly through the flexible interpretation of their inherent powers to do justice. In providing remedies that require continuous supervision by the courts, they appear to shift the line that separates adjudication from administration. The courts have not only appointed socio-legal commissions to gather facts, but have gone further to create agencies to suggest appropriate remedies and to monitor compliance. In *Mehta v. Union of India*,²⁸⁶ the lower court permitted a chemical plant to reopen after a gas leak only after it had satisfied specified stringent conditions.²⁸⁷ The court then noted that the company was required to obtain licenses for its manufacturing activities under several statutes.²⁸⁸ The company was subject to the control of the state “on all such activities . . . which can jeopardize public interest.”²⁸⁹

In *Morcha v. Union of India*,²⁹⁰ in dealing with oppressed workers, the court instructed local officials to [*1074] identify the victims and provide them with physical, economic, and psychological rehabilitation.²⁹¹ The officials were also directed by the court to accept the assistance of social action groups to set up labor camps to educate workers about their legal rights and to ensure a pollution-free environment with adequate sanitary, medical and legal facilities.²⁹² Indian courts have even gone further to provide remedies to ensure that their decisions are enforced by setting up a monitoring agency which would continuously check and report on the implementation of these decisions.²⁹³ Thus, in the *Morcha* case the court made an order giving various directions for identifying, releasing and rehabilitating bonded laborers.²⁹⁴ The order also contained instructions for ensuring “adequate and appropriate” wage payments, observance of labor laws, provision of good drinking water and setting up dust-sucking machines in the stone quarries.²⁹⁵ It also set up a monitoring agency to check continuously and report on the implementation of these directions.²⁹⁶ In another case, it gave a state government instruction to prepare annual reports detailing implementation of the Court’s

²⁸² P.N. Bhagwati, *Bureaucrats? Phonographers? Creators?*, THE TIMES OF INDIA, Sept. 1986, at 21-23.

²⁸³ *Tellis v. Bombay Mun. Corp.*, (1986) 2 S.C.R. Supp. 51, 52 (1985) (India). Article 21 of the Indian Constitution states that “No person shall be deprived of his life or personal liberty except according to procedure established by law.” INDIA CONST. Jan. 26, 1950, art. 21.

²⁸⁴ *Mullin v. Union Territory of Delhi*, (1981) 2 S.C.R. 516, 529 (India).

²⁸⁵ *Morcha v. Union of India (Bonded Labour Case)*, A.I.R. 1984 S.C. 802, 811 (1983).

²⁸⁶ *Mehta v. Union of India (Shriram Fertilizer)*, (1987) 1 S.C.R. 819 (1986) (India).

²⁸⁷ *Id.* at 826.

²⁸⁸ *Id.* at 839.

²⁸⁹ *Id.*

²⁹⁰ A.I.R. 1984 S.C. 802 (1983) (India).

²⁹¹ *Id.* at 827-28 (“Physical rehabilitation must go side by side with physical and economic rehabilitation.”).

²⁹² *Id.* at 827-28; 830-31.

²⁹³ See Cassels, *supra* note 265, at 505-07 (citing the *Shriram Fertilizer* and *Bonded Labour Case* as examples of this policy approach in environmental litigation).

²⁹⁴ *Morcha v. Union of India (Bonded Labour Case)*, A.I.R. 1984 S.C. 802, 834-36 (1983) (India); see Bhagwati, *supra* note 282, at 28-31; Bhagwati, *supra* note 266, at 574-75 (noting that *Morcha* “institutionalized” use of appointed commissions to gather relevant information for public interest litigation); see also Burt Neuborne, *The Supreme Court of India*, 1 INT’L J. CONST. L. 476, 500-04 (2003) (discussing the Supreme Court of India’s effort to enforce the rights of the weak by expanding its own remedial powers).

²⁹⁵ *Morcha v. Union of India (Bonded Labour Case)*, A.I.R. 1984 S.C. 802, 835 (1983) (India).

²⁹⁶ *Id.* at 836-37.

decisions.²⁹⁷ The courts have clearly recognized the fact that they cannot force the state to enact legislation to enhance fundamental rights or to pursue the directive principles, but the true measure of their judicial activism, which is of relevance to us here, is found less in the rhetoric of rights definition than in the [*1075] remedial strategies they have deployed to deal with the public interest litigation cases.²⁹⁸

The apparent "politicization" of the Indian judiciary has not been without its critics.²⁹⁹ However, the general consensus is that judicial activism has served India's democracy and constitutional development well.³⁰⁰ The Supreme Court's willingness to tackle controversial political and legal issues in a serious and thoughtful manner can be said to have given it legitimacy.³⁰¹ It can also be said that one of the major contributions of judicial activism in India "has been to provide a safety valve and a hope that justice is not beyond reach."³⁰² Furthermore, the courts' adoption of a proactive role to make up for the inefficiencies of the executive has proved beneficial to Indian society.³⁰³ Rao has expressed the view that "people, in general now firmly believe that if any institution or authority acts in a manner not permitted by the Constitution, the judiciary will step in to set right the wrong."³⁰⁴

b. The Experiences of Constitutional Development Through Judicial Activism in South Africa.³⁰⁵ An excellent [*1076] example of judicial activism in Africa is provided by the jurisprudence of the South African Constitutional Court. The long history of apartheid, the role which the judiciary played in it, and the radical transformatory foundation laid down by the South African 1996 Constitution has led to, as one commentator puts it, "judicial activism of a special type."³⁰⁶ The cue for this is laid down in section 39 of the South African Constitution, which states:

1. When interpreting the Bill of Rights, a court, tribunal or forum a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; b) must consider international law; and c) may consider foreign law.

2. When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.³⁰⁷

It is worth noting that section 39 merely requires the South African judge, "when interpreting" the Constitution, to do what judges should normally do when interpreting a constitution, that is, to give effect to its values. This is not nec-

²⁹⁷ See Bhagwati, *supra* note 282, at 28.

²⁹⁸ See Cassels, *supra* note 265, at 505-06.

²⁹⁹ See *id.* at 509-15 (discussing critiques of public interest litigation with a focus on the "highly problematic" issue of legitimacy); B. Errabbi, *The Constitutional Harmony and Balance Between Fundamental Rights and Directive Principles of State Policy: Nehru's Perception*, 14 INDIAN B.R. 151, 155-58 (1987) (discussing Mehru's criticism of the judiciary's interpretation of the relationship between Directive Principles and Fundamental Rights found in Parts III and IV of India's Constitution); Jagat Narain, *Judges and Distributive Justice*, in JUDGES AND THE JUDICIAL POWERS: ESSAYS IN HONOUR OF JUSTICE V.R. KRISHNA IYER 198-210 (Rajeev Dhavan et al. eds., 1985) (arguing that judges must be more creative in their approach rather than "mere law finders" to further socialism and democracy together).

³⁰⁰ See Anil Divan, *Op-Ed, Judicial Activism and Democracy*, HINDU, Apr. 2, 2007, <http://www.hinduonnet.com/2007/04/02/stories/2007040200941000.htm>.

³⁰¹ See Sathe, *supra* note 266, at 249-311 (tracing the development of the court's judicial activism and its acceptance by the people of India).

³⁰² Divan, *supra* note 301.

³⁰³ Mohd Haris Usmani, *Public Interest Litigation*, LEGALSERVICEINDIA.COM (Dec. 1, 2008), <http://www.legalserviceindia.com/article/1273-Public-Interest-Litigation.html>.

³⁰⁴ M.N. Rao, *Judicial Activism*, (1997) 8 S.C.C. (Jour.) 1 (India).

³⁰⁵ For further discussion of this topic see Hugh Corder, *Judicial Activism of a Special Type: South Africa's Top Courts Since 1994*, in JUDICIAL ACTIVISM IN COMMON LAW SUPREME COURTS, *supra* note 239, at 323, 323-62; Dennis Davis, *Socio-Economic Rights in South Africa: The Record after Ten Years*, 2 N.Z. J. PUB. & INT'L L. 47, 47-48 (2004) (challenging the approach taken by the Constitutional Court of South Africa in cases involving socio-economic rights). See generally Craig Scott & Philip Alston, *Adjudicating Constitutional Priorities in a Transitional Context: A Comment on Soobramoney's Legacy and Grootboom's Promise*, 16 S. AFR. J. HUM. RTS. 206, 206-08 (2000) (discussing constitutional development in South African judicial activism as a result of Soobramoney and Grootboom).

³⁰⁶ Corder, *supra* note 306, at 328-31.

³⁰⁷ S. AFR. CONST., 1996 ch.2, § 39.

essarily synonymous with judicial activism; nevertheless, it does make it much easier for a judge to adopt an activist stance. In some cases decided since the final Constitution came into effect in 1996, which are discussed below, the judges have adopted an activist approach and in doing so have frequently used section 39 language such as "constitutional values" and "the spirit, purport and objects of the bill of rights."³⁰⁸ This has, however, only served as a starting point. As most of these cases show, the judges have often tried to adapt the law in a [*1077] manner that will reflect the changing mores of the society. Further, the activist approach has been more pronounced in certain areas of the law than others.

On account of its recent history, South African judges have felt less restraint and quite courageous and innovative in dealing with human rights matters. One of the first cases that came before the Constitutional Court, *S. v. Makwanyane*,³⁰⁹ concerned the highly sensitive issue of the death penalty,³¹⁰ which the apartheid regime had regularly used in trying to undermine the resistance to its inhumane system. The sensitivity of the matter was not only compounded by the fact that the use of the death penalty had been suspended, but it also came at a time of rising crime rate.³¹¹ Both the Constitutional Assembly that adopted the Constitution and the South African Law Commission had been unable to agree on the matter and had decided to leave it in the words of the latter to the "Solomonic" wisdom of the courts.³¹² The Court, after reviewing the legislative history of the drafting of the Constitution and relying primarily on the prohibition of cruel, inhuman, and degrading treatment and punishment, as well as on the rights to human dignity and equality, concluded that the death penalty did not have a place in the legal system of a democratic South Africa.³¹³

Corder, after noting the public outcry against this judgment, concludes that it:

Represents a brave and principled staking of a claim for the authority of the judiciary in general and the Constitutional Court in particular to pronounce on matters of great social controversy, and even on occasion to go against the likely social consensus in giving expression to the words of the Constitution.³¹⁴

In *Bhe v. Magistrate of Khayelitsha*³¹⁵ the Constitutional Court was faced with yet another issue left open by the [*1078] failure of the constitution to adequately reconcile and balance the right to equality with customary law. The matter the Court had to decide was whether in the new constitutional dispensation, two young girls born outside marriage recognized in civil law could be deprived of the right to inherit their father's estate.³¹⁶ Under the relevant and applicable customary law of succession the principle of primogeniture would have applied to cause the estate to accrue to their paternal grandfather.³¹⁷ In granting an order that the legislative provisions under which this happened were invalid, the Constitutional Court relied on the infringement of the right to equality and dignity of women and the rights of the child enshrined in the Bill of Rights.³¹⁸ The court, after a detailed consideration of the customary law rule of primogeniture, concluded that it was inconsistent with the Constitution insofar as it discriminated against women and extramarital children.³¹⁹ To fill the gaps left by the declaration of invalidity, and pending Parliament finding the time to revise the law, the Court crafted a number of specific measures to guide inferior courts faced with a similar situation.³²⁰

³⁰⁸ See *infra* text accompanying notes 310-69.

³⁰⁹ 1995 (3) SA 391 (CC) (S. Afr.).

³¹⁰ *Id.* at 401-02.

³¹¹ *Id.* at 408, 441-42.

³¹² *Id.* at 407-09.

³¹³ *Id.* at 403-07, 409-10, 440.

³¹⁴ Corder, *supra* note 306, at 332-33.

³¹⁵ 2005 (1) SA 580 (CC) (S. Afr.).

³¹⁶ *Id.* at 594-97.

³¹⁷ *Id.* at 593-97.

³¹⁸ *Id.* at 607-12.

³¹⁹ *Id.* at 617-23.

³²⁰ *Id.* at 633.

Another example of judicial activism came in *Minister of Home Affairs v. Fourie*,³²¹ a case dealing with same-sex marriages. Two women in a long stable domestic relationship sought to be married, and because this was prohibited, sought an order of mandamus requiring the Minister of Home Affairs to recognize their union and a declaration that the common law definition of marriage was unconstitutional.³²² Although some of the judges in the Supreme Court of Appeal, whilst agreeing that the definition was no longer tenable, felt that it was for Parliament to change the law,³²³ the Constitutional Court declared the common law definition and the relevant [*1079] sections in the Marriage Act unconstitutional.³²⁴ The Court, however, suspended the declaration and gave the legislature one year to change the law.³²⁵ In reaching this conclusion, Justice Sachs, for the majority, while acknowledging the importance of religion in public life, ruled that it would be improper to use the religious sentiments of some as a guide to the enjoyment of constitutional rights of others.³²⁶

It is perhaps in the area of the protection of socio-economic rights that the South African Constitution was not only very innovative but has provided the courts with the opportunity to develop principles recognized and respected worldwide. A number of cases dealing with the right to housing and health illustrate the extent of judicial activism in this area. As Corder puts it, "the formulation of socio-economic rights [in the Constitution] clearly anticipates a relatively extensive but nuanced judicial role for their appropriate realization, and the judges have generally not disappointed."³²⁷

The leading case on the problem of housing is the case of *Government of the Republic of South Africa v. Grootboom*,³²⁸ involving the plight of 900 women and children³²⁹ living in an informal settlement under cold and wet conditions.³³⁰ The High Court ordered the provision of emergency shelter to the children and their parents, relying on the suffering and "immediate and urgent" need of the children³³¹ and on the straightforward language of the Constitution.³³² The State appealed to the Constitutional [*1080] Court, arguing that it had a logical plan for the provision of housing in an orderly and systematic manner and that the High Court's order would disrupt these plans by privileging certain groups over those patiently waiting on a housing list and adding expenditures to scarce resources.³³³ The Constitutional Court, while acknowledging the difficulties of the situation, pointed to the absence of mechanisms for dealing with the emergency needs of those in dire need of housing as a flaw in the plans and affirmed the order.³³⁴ In reaching this conclusion, the court was clearly going out of its way to look at the massive social needs for public housing and was willing to hold the executive accountable for the way it was dealing with the problem.

This approach was taken further in a series of cases, including *President of the Republic of South Africa v. Modder-skip Boerdery (PTY) Ltd.*³³⁵ Because of acute overcrowding in an informal settlement in Johannesburg, thousands of people moved to neighboring farm land and erected basic shelters in which to live.³³⁶ The landowner failed through various lawful means to evict the squatters and went to the Pretoria High Court seeking affirmation of his property

³²¹ 2006 (1) SA 524 (CC) (S. Afr.).

³²² *Id.* at paras. 1-6.

³²³ *Id.* at para. 135.

³²⁴ *Id.* at para. 114.

³²⁵ *Id.* at para. 162. For a critique of the decision, see N. Bohler-Muller, *Judicial Deference and the Deferral of Justice in Regard to Same-Sex Marriages and in Public Consultation*, 40 DE JURE 90 (2007).

³²⁶ See *Minister of Home Affairs v. Fourie*, 2006 (1) SA 524 (CC) at paras. 88-92 (S. Afr.).

³²⁷ Corder, *supra* note 306, at 341.

³²⁸ 2001 (1) SA 46 (CC) (S. Afr.).

³²⁹ *Id.* at para. 4 n.2.

³³⁰ *Id.* at paras. 7-11.

³³¹ *Id.* at para. 80.

³³² *Id.* at para. 19 ("Every child has the right . . . to basic nutrition, shelter, basic health care services and social services." (quoting S. AFR. CONST., 1996 ch. 2, § 28(1)(c))).

³³³ See *id.* at paras. 63-65.

³³⁴ *Id.* at paras. 93-98.

³³⁵ 2005 (5) SA 3 (CC) (S. Afr.).

³³⁶ *Id.* at 9-11.

rights and an acknowledgment that the state had an obligation to resolve the issue.³³⁷ The Constitutional Court, in affirming the novel remedy of constitutional damages that had been awarded by the High Court, held that the state was obliged to provide effective dispute resolution mechanisms for its citizens and had failed to do so in this case.³³⁸ The Court, once again recognizing the gravity of a social problem, made it clear that the state was under a duty to take action.³³⁹

In *Minister of Health v. Treatment Action Group (TAC)*,³⁴⁰ the Constitutional Court was faced with a highly sensitive political case in which the applicants contested the [*1081] state's policy of selecting test sites for the provision of anti-retroviral drugs to HIV-positive mothers and their new-born children and sought the right to these services for every child.³⁴¹ The Minister resisted the application, questioning the constitutional obligation of government to provide an "effective, comprehensive[,] and progressive program[]" such as that argued for by TAC.³⁴² The Court, while acknowledging that "courts are ill-suited to adjudicate upon issues where Court orders could have multiple social and economic consequences,"³⁴³ refused to be swayed by the State's argument that it should confine itself to a declaratory judgment.³⁴⁴ It decided that it was under a duty to grant effective remedies in all cases, including, in this case, an order for mandamus and the exercise of supervisory jurisdiction.³⁴⁵

Besides introducing the notion of constitutional damages in the *Modderklip* case, the judges in South Africa have also been active in crafting appropriate remedies and processes as the circumstances warrant. In *Permanent Secretary, Department of Welfare, Eastern Cape v. Ngxuzo*,³⁴⁶ the appellants had challenged the right of the defendants to act on behalf of other extremely poor people whose disability grants had been arbitrarily terminated by the provincial government because of problems of fraud.³⁴⁷ The Supreme Court of Appeal, in a clear instance of activist law-making, considered this a classic instance in which a class action could be brought and then proceeded to set out the hitherto undefined elements of a class action in South African law.³⁴⁸ In *Jaftha v. Schoeman*³⁴⁹ the appellant had lost her home to settle a debt of 250 rand based on section 66(1)(a) of the Magistrates' Courts Act, which authorized sales in execution against the immovable property of [*1082] judgment debtors.³⁵⁰ It was a piece of legislation which had been abused considerably, especially in rural areas, leading to many people losing their homes worth more than the debt for which execution is being levied to discharge the debt.³⁵¹ When the matter came before the Constitutional Court, it was held that the provision in the Act authorizing such sales was unconstitutional for being overbroad in effect and easily capable of being used by unscrupulous individuals to take advantage of debtors.³⁵² Instead of referring the matter to Parliament to amend the Act, the court held that the defect would be remedied by reading into the offending section the words, "a court, after consideration of all relevant circumstances, may order execution."³⁵³ Although reading into statutes words that will enable it to make sense is a common interpretative technique, it has been rightly suggested that what the court did here was a reflection of its desire to provide "greater protection for the vulnerable in society" and also a reflection of "growing judicial impatience with the legis-

³³⁷ Id. at 9, 11.

³³⁸ Id. at 21-27.

³³⁹ Id. at 22-23.

³⁴⁰ 2002 (5) SA 721 (CC) (S. Afr.).

³⁴¹ Id. at 728-29.

³⁴² Id. at 729.

³⁴³ Id. at 740.

³⁴⁴ Id. at 758.

³⁴⁵ Id. at 758, 764-65.

³⁴⁶ 2001 (4) SA 1184 (SCA) (S. Afr.).

³⁴⁷ Id. at 1190-91, 1194.

³⁴⁸ Id. at 1201-03 .

³⁴⁹ 2005 (2) SA 140 (CC) (S. Afr.).

³⁵⁰ Id. at 144-45, 148-49 (quoting Magistrates' Courts Act 32 of 1944 § 66(1)(a) (S. Afr.)).

³⁵¹ See id. at 147.

³⁵² See id. at 159-61.

³⁵³ Id. at 164.

lature's slow passage of legislation to address" society's deep rooted problems.³⁵⁴

Another remedy crafted by the South African courts is the concept of structural interdict, which has also been used with great success to overcome governmental inertia.³⁵⁵ In its judgment in *August v. Electoral Commission*,³⁵⁶ the Constitutional Court for the first time made use of a structural interdict, which directs a violator to take steps to rectify a violation of rights under the court's supervision.³⁵⁷ [*1083] This followed a holding that the Electoral Commission had violated prisoners' rights to vote by failing to take steps to allow them to register as voters on the national voters' roll.³⁵⁸ The Court ordered the Commission to make arrangements for them to register and once registered to vote in the election.³⁵⁹ A similar order was given by the court in *Strydom v. Minister of Correctional Services*,³⁶⁰ in which the prison authorities were ordered to report on affidavit to the court within a month of the order, setting out a timetable for the upgrading of the electrical system in the Johannesburg prison.³⁶¹

It is worthwhile also pointing out that the South African courts have not used the workings of section 39(2) of the Constitution to unlock their creative powers in dealing only with constitutional disputes but have in many cases tried to realign well established common law principles to reflect the new constitutional values. In *National Media Ltd. v. Bogoshi*³⁶² and again in *Khumalo v. Holomisa*³⁶³ the courts restated and extended the principles of the common law of defamation in the new constitutional era. In *Minister of Safety and Security v. Van Duivenboden*³⁶⁴ and *Van Eeden v. Minister of Safety and Security*,³⁶⁵ the courts consciously applied section 39(2) to extend the Roman-Dutch concept of wrongfulness in the light of recent developments in English law. In what has been considered to be "one of the most far-reaching and activist judgments yet delivered," the [*1084] Constitutional Court, in *NK v. Minister of Safety and Security*,³⁶⁶ drawing on comparative analysis and earlier South African case law, handed down a test of vicarious liability consistent with section 39 of the Constitution.³⁶⁷

Thus, as in India, the activist approach has in many respects progressively established principles which have strengthened the values espoused by the South African Constitution. It is now necessary to see what impact such an approach has on promoting *Constitutionalism*.

c. Implications of Judicial Activism on the Judicial Role in Promoting *Constitutionalism*. It is necessary to preface this discussion by cautioning that judicial activism must not be a license for judicial arbitrariness. In this regard, the words of Justice Rao of the High Court of Andhra Pradesh are particularly instructive. He said:

³⁵⁴ Corder, *supra* note 306, at 352-53.

³⁵⁵ See generally Danielle Elyce Hirsch, *A Defense of Structural Injunctive Remedies in South African Law*, BERKELEY ELECTRONIC PRESS (Sept. 4, 2006), <http://law.bepress.com/expresso/eps/1690> (follow "Download the Paper" hyperlink) (arguing that structural interdict has been effective and is necessary to secure the broad socio-economic rights guaranteed by the South African Constitution).

³⁵⁶ 1999 (3) SA 1 (CC) (S. Afr.); see also *supra* text accompanying notes 169-175.

³⁵⁷ *Id.* at 378-80. The decision has influenced other courts. See *Sauve v. Canada* (Chief Electoral Officer), [2002] 3 S.C.R. 519, paras. 37, 58-59 (Can.) (holding that a Canadian law denying the right to vote to individual serving two or more years in a correction facility was not a justifiable limit to democracy); *Hirst v. United Kingdom* (No. 2), 2005 Eur. Ct. H.R. 681, paras. 38-39 (discussing August); see also Cormac Behan & Ian O'Donnell, *Prisoners, Politics and the Polls*, 48 BRIT. J. CRIMINOLOGY 319, 320-22 (2008).

³⁵⁸ *August v. Electoral Commission*, 1999 (3) SA 1 (CC) at 378 (S. Afr.).

³⁵⁹ *Id.* at 379.

³⁶⁰ 1999 (3) BCLR 342 (W) (S. Afr.).

³⁶¹ *Id.* at 359-60.

³⁶² 1998 (4) SA 1196 (SCA) (S. Afr.) ("The common good is best served by the free flow of information.").

³⁶³ 2002 (5) SA 401 (CC) at para. 22 (S. Afr.) (holding that the Constitution and common laws of defamation were not inconsistent and common law heeds to balance constitutional interests of human dignity and freedom of expression).

³⁶⁴ 2002 (6) SA 431 (SCA) (S. Afr.).

³⁶⁵ 2003 (1) SA 389 (SCA) (S. Afr.).

³⁶⁶ 2005 (6) SA 419 (CC) (S. Afr.).

³⁶⁷ Corder, *supra* note 306, at 357.

Judicial activism should not result in rewriting of the Constitution or any legislative enactments. Reconciliation of the permanent values embodied in the Constitution with the transitional and changing requirements of the society must not result in undermining the integrity of the Constitution. Any attempt leading to such a consequence would destroy the very structure of the constitutional institutions. Conscious of the primordial fact that the Constitution is the supreme document, the mechanism under which laws must be made and governance of the country carried on, the judiciary must play its activist role. No constitutional value propounded by the judiciary should run counter to any explicitly stated constitutional obligations or rights. In the name of doing justice and taking shelter under institutional self-righteousness, the judiciary cannot act in a manner disturbing the delicate balance between the three wings of the State.³⁶⁸

Similar sentiments have been expressed by an Indian Supreme Court justice in *Morcha*:

The court . . . possesses the sanction of neither the sword nor the purse and . . . its strength lies basically in public confidence and support, and . . . consequently the legitimacy of its acts and decisions must remain beyond all doubt. . .

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Indeed, both certainty of substance and certainty of direction are indispensable requirements in the development of the law, and invest it with the credibility which commands public confidence in its legitimacy.³⁶⁹

While the activist role so far taken by the South African judiciary is commendable, there is at least one case that illustrates the dangers of "unrestrained activism" by which a judge injects his personal views into judgments or expresses his political preferences in a manner that may lead to far-reaching political consequences that could HIHI undermine the body politic of the country. The judgment of Justice Nicholson in *National Director of Public Prosecutions v. Zuma*³⁷⁰ is a case in point. The trial judge set aside the decision by the National Director of Public Prosecutions to indict the respondent, Jacob Zuma.³⁷¹ When the matter came before the Supreme Court of Appeal, the court concluded that in the course of his judgment, the trial judge subverted the judicial function by:

A failure to confine the judgment to the issues before the court; by deciding matters that were not germane or relevant; by creating new factual issues; by making gratuitous findings against persons who were not called upon to defend themselves; by failing to distinguish between allegation, fact and suspicion; and by transgressing the proper boundaries between judicial, executive and legislative functions.³⁷²

As Deputy President Harms put it:

The independence of the judiciary depends on the judiciary's respect for the limits of its powers. Even if, in the words of the learned judge, the judiciary forms a 'secular priesthood' this does not mean that it is entitled to pontificate or be judgmental especially about those who have not been called upon to defend

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themselves-as said, its function is to adjudicate the issues between the parties to the litigation and not extraneous issues.³⁷³

One will concede that this case is an aberration in an otherwise judicious use of the powers given to the judiciary by the constitution. Be that as it may, the danger posed by unrestrained judicial activism should be noted.

If the judiciary is to play an effective role in promoting constitutional governance in Africa, it is contended that it must liberate itself from being perceived as the handmaiden of the executive, and act boldly and decisively to en-

³⁶⁸ Rao, *supra* note 305.

³⁶⁹ *Morcha v. Union of India (Bonded Labour Case)*, A.I.R. 1984 S.C. 802, 844 (1983) (India) (Pathak, J., concurring).

³⁷⁰ 2009 (2) SA 277 (SCA) (S. Afr.).

³⁷¹ *Id.* at paras. 1, 88. It will be recalled that the African National Congress used this decision as a basis for "recalling" President Thabo Mbeki from office, a few months before his term was supposed to end in 2008.

³⁷² *Nat'l Dir. of Pub. Prosecutions v. Zuma* 2009 (2) SA 277 (SCA) at para. 15 (S. Afr.).

³⁷³ *Id.* at para. 19 (internal citation omitted).

force both the letter and spirit of the law. In fact, it can be argued that the judges in Africa today must act as the last line of defense to arrest the looming authoritarian resurgence. At this critical juncture in Africa's constitutional development, when most political institutions are facing a credibility and legitimacy crisis, courts can make a difference. A modern judiciary can no longer obtain social and political legitimacy without making substantial contributions to issues of social justice.

A number of interesting lessons can be drawn from this brief comparative perspective of judicial activism. The first is whether there should be a constitutional mandate for judicial activism. In countries such as England and Israel, without written constitutions, there is still judicial activism.³⁷⁴ Nevertheless, the broad mandate provided in the Indian and South African Constitutions is very helpful. The main advantage of a constitutional injunction is that it may help to keep judicial activism within bounds and prevent both extremes of judicial passivity and judicial adventurism. Besides this, it must now be recognized and accepted that the effectiveness of the constitution depends very much on the ability of judges to breathe life and relevance into its provisions to ensure that they are not frozen in time. This means going beyond the normal common law judicial liberalism which enables judges to refer to, cite, and rely on the decisions of courts in other common law jurisdictions as persuasive authorities.³⁷⁵ [*1087]

Because of the commonality not only in the provisions of many constitutions but also the fact that they have been inspired by the same philosophy, it is now imperative that judges, in dealing with legal problems, investigate how these problems have been solved in other jurisdictions, both by national and international courts. Although the judicial outcome equally depends on how thoroughly the counsel on both sides have done their research, the fundamental character of the common law as a system in which judges draw their inspiration from the basic conceptions of justice and fairness should remain the driving force.³⁷⁶ In interpreting the law, judges must try to keep in step with the standards and values of the times.

African constitutional systems have borrowed extensively from Western constitutional models in areas such as separation of powers, but these borrowed models have to be adjusted and adapted to the conditions unique to each country.³⁷⁷ There is no reason, therefore, why the concept of judicial activism should be an exception.

A passive judiciary in the face of Africa's overbearing executives and the constitutional weaknesses of the legislature, compounded by the looming phenomena of one party domination leading to the rubber stamping of legislation, does not augur well either for progressive or effective legislation. The timely intervention of the high courts in India and South Africa has not only resulted in defective legislation being promptly remedied. Additionally, new remedies and processes have been introduced to address serious social problems that the government and legislature have been too slow or indifferent to address. Thus, both in India and South Africa, the highest courts have devised imaginative means to facilitate access to courts by the poor and needy.

In India, the courts sidetracked the rigid doctrine of locus standi by introducing the device of socio-legal [*1088] commissions of inquiry in the cases of Morcha³⁷⁸ and Gupta.³⁷⁹ In South Africa, the Constitutional Court achieved a similar end by introducing the concept of class action in South African law in the Ngxuzo³⁸⁰ case. In the South African cases of Grootboom,³⁸¹ Modderskip,³⁸² and TAC,³⁸³ the South African courts had no hesitation in taking decisions that compelled the government to urgently address the desperate social needs of the poor. To ensure that government effectively complied with court decisions, the South African courts in the TAC case exercised supervisory juris-

³⁷⁴ Brice Dickson, Comparing Supreme Courts, in JUDICIAL ACTIVISM IN COMMON LAW SUPREME COURTS, supra note 239, at 1, 11-14.

³⁷⁵ Id. at 3.

³⁷⁶ See MELVIN A. EISENBERG, THE NATURE OF THE COMMON LAW 10-13 (1991) (characterizing "replicability" and "responsiveness" as core ideals of common law jurisprudence).

³⁷⁷ See Charles Manga Fombad, The Separation of Powers and Constitutionalism in Africa: The Case of Botswana, [25 B.C. THIRD WORLD L.J. 301, 316 \(2005\)](#).

³⁷⁸ Morcha v. Union of India (Bonded Labour Case), A.I.R. 1984 S.C. 802, 846 (1983) (Sen, J., concurring).

³⁷⁹ Gupta v. Union of India, (1982) 2 S.C.R 365, 520 (India).

³⁸⁰ Permanent Secretary, Department of Welfare, Eastern Cape v. Ngxuzo 2001 (4) SA 1184 (SCA) (India).

³⁸¹ Gov't of the Rep. of S. Africa v. Grootboom 2001 (1) SA 46 (CC) (S. Afr.); see supra text accompanying notes 329-36.

³⁸² President of the Rep. of S. Africa v. Modderskip Boerdery (PTY) Ltd. 2005 (5) SA 3 (CC) (S. Afr.); see supra text accompanying notes 337-41.

diction a circumstance where some courts would not.³⁸⁴ [*1089] They have also used the structural interdict in the August³⁸⁵ and Strydom³⁸⁶ cases to achieve a similar result; in similar circumstances, the Indian courts have adopted the policy of setting up a monitoring agency. Fearing that an amendment by the legislature of an unconstitutional piece of legislation may take too long to take effect and therefore cause undue hardship, the South African courts did not hesitate, in *Jaftha v. Schoeman*,³⁸⁷ to remedy the defect by reading into legislation words that would make it conform to the Constitution. It is perhaps in the defense of *constitutionalism* that judicial activism in South Africa has manifested itself in the most endearing manner. In *Makwanyane*³⁸⁸ and again in *Bhe*,³⁸⁹ the Constitutional Court did not hesitate to provide clarity to ambiguities resulting from the inability of the Constitutional Assembly to agree on certain controversial issues.

The main lesson that can be drawn from this brief discussion is that judicial activism is a powerful weapon which judges all over Africa can use not only to counter authoritarianism but also to promote policies that are socially and economically progressive. As B.O. Nwabueze has observed, "when the courts seek to confine their own function unduly by a narrow, positivist interpretation of the law, *constitutionalism* may be endangered."³⁹⁰ However, the ability of judges to influence the direction of future constitutional developments will also depend on their willingness to look beyond the national frontiers and the national legal system to see what ideas can be borrowed from other jurisdictions. This raises the important question of the role of cross-systemic fertilization. [*1090]

F. Cross-systemic Fertilization of Constitutional Law Ideas and Concepts

There is little evidence from the post-1990 African constitutions that African constitutional experts made serious efforts to learn from the experiences of their neighbors, especially where there are differences in constitutional and legal culture. This is particularly true of Francophone Africa.³⁹¹ In fact, the main reason why the prospects for *constitutionalism* have been far better under the constitutions of Anglophone African countries than those of Francophone African countries is that while reforms in all these countries have drawn substantially from their colonial legal heritages, the Anglophone African countries have approached these reforms with more openness and have looked far beyond England for inspiration and guidance.³⁹² Members of constitutional reform commissions have travelled to Europe, North America, Asia, and notably India, in order to learn more about modern constitutional developments.³⁹³ Many Francophone African constitutional draftsmen, by contrast, have continued to seek inspiration from and rely almost slavishly on what they perceive as the most reliable and unassailable constitutional model: the Gaullist Fifth Republic model and the timid amendments that have been made to it in the last fifty years.³⁹⁴

Recent developments suggest that African nations do not need to go abroad to look for and copy Western constitutional models. For example, the South African Constitution of 1996 has not only incorporated the best elements of Western constitutional systems but has so adapted this to its historical, social, and cultural context that it is now a model which even some Western countries can emulate. Evidence of cross-systemic fertilization [*1091] involving

³⁸³ *Minister of Health v. Treatment Action Grp. (TAC)* 2002 (5) SA 721 (CC) (S. Afr.); see supra text accompanying notes 342-47.

³⁸⁴ *Minister of Health v. Treatment Action Grp. (TAC)* 2002 (5) SA 721, 758 (CC) (S. Afr.). In contrast, see the more conservative approach adopted by the full bench of the High Court in the Botswana case of *Kamanakao I v. Attorney General*:

³⁸⁵ *August v. Electoral Comm'n* 1999 (3) SA 1 (CC) (S. Afr.).

³⁸⁶ *Strydom v. Minister of Correctional Servs.* 1999 (3) BCLR 342 (W) (S. Afr.).

³⁸⁷ 2005 (2) SA 140 (CC) (S. Afr.); see supra text accompanying notes 351-56.

³⁸⁸ 1995 (3) SA 391 (CC) (S. Afr.).

³⁸⁹ 2005 (10) SA 580 (CC) (S. Afr.).

³⁹⁰ B.O. NWABUEZE, *JUDICIALISM IN COMMONWEALTH AFRICA* 286 (1977).

³⁹¹ See Filip Reyntjens, *The Winds of Change. Political and Constitutional Evolution in Francophone Africa, 1990-1991*, 25 J. AFR. L. 44, 51 (1991) (indicating that Francophone countries have continued to rely on the French constitutional model, despite years of "innovations and experiments").

³⁹² Charles M. Fombad, *Constitutional Reforms in France and Their Implications for Constitutionalism in Francophone Africa*, AF-RIMAP (June 2008), <http://www.afrimap.org/english/images/paper/AfriMAPFombadEng.pdf>.

³⁹³ *Id.*

³⁹⁴ *Id.*

the borrowing of ideas from the civil law system in the South African constitution include the mixed system of control over determining the constitutionality of laws which is both centralized and decentralized, providing for both abstract (preventive) and concrete (repressive) review.³⁹⁵ The Constitution envisions an expansive approach to interpreting its provisions especially in section 39, which states that in interpreting the Bill of Rights, the courts must “promote the values that underlie an open and democratic society based on human dignity, equality and freedom,” and must also consider international law as well as foreign law.³⁹⁶ It is thus no surprise that the South African Constitutional Court has rendered very innovative and ground breaking decisions, especially in the area of socio-economic rights, which are respected and followed in many jurisdictions.³⁹⁷ Judge Guido Calabresi of the United States Court of Appeals for the Second Circuit points out that several post-1945 constitutions were modeled on the U.S. Constitution, but that exercise of American influence did not prevent the U.S. from learning from the experiences of emergent constitutional democracies, observing that “wise parents do not hesitate to learn from their children.”³⁹⁸

The universality of certain constitutional law principles and standards is no longer in doubt.³⁹⁹ In fact, it seems that [*1092] a court can hardly deal with a human rights dispute today without being invited by counsel to consider one foreign authority or another. More often than not, the reliance on these foreign authorities has been rather eclectic with scant or at most superficial references to the techniques of comparative law. Although, as a discipline, comparative constitutional law is still very much in its infancy and its techniques are still lacking in methodological rigor and coherence, it is increasingly necessary for judges to be conscious of its existence and to make efforts to study, understand, and apply its methods and techniques when considering the relevance and applicability of foreign legal authorities. The comparative approach broadens one’s vision and does not necessarily need to result in copying foreign examples, but learning from them and using international comparative law as tools in domestic adjudication.⁴⁰⁰ In borrowing from foreign sources there are therefore skills and techniques which judges must learn, and language resources which should be made available to them.⁴⁰¹ Unless the judiciary is ready to learn about and address current developments both nationally and internationally, judicial decisions will retain a rigid, positivist orientation, which is bad for both human rights protection and social justice.⁴⁰² Lord McCluskey in the [*1093] opening paragraph of his book, *Law, Justice and Democracy*, highlights some of the challenges when he says:

If I were to be asked what temptations any new judge is exposed to, I should have to admit that they include arrogance, self-esteem and impatience. That answer must alarm all who know that the principal qualities a judge must possess are humility, modesty and tolerance. But just think of the facts. He has been elevated to a position in which he wields a royal authority. The apparatus of state lies ready to enforce his orders. The visible symbols of his office, the way he dresses, the place in which he sits, the manner in which he is addressed, the respect which he is accorded, all are designed to buttress that authority, to intimidate those who might wish to challenge or evade it.⁴⁰³

³⁹⁵ See S. AFR. CONST., 1996 ch. 6, § 146.

³⁹⁶ Id. ch. 2, § 39.

³⁹⁷ See, e.g., *Pres. of the Republic of South Africa v. Modderskip Boerdery (PYT) Ltd.* 2005 (5) SA 3 (CC); *Minister of Health v. Treatment Action Group (TAC)*, 2002 (5) SA 721 (CC) (S. Afr.); *Gov’t of the Republic of South Africa v. Grootboom* 2001 (1) SA 46 (CC).

³⁹⁸ [United States v. Then](#), 56 F.3d 464, 469 (2d Cir. 1995).

³⁹⁹ Some constitutions specifically require that certain international instruments should be taken into account in interpreting their provisions. For example, the preamble to Benin’s Constitution refers to these international instruments and states that their provisions “make up an integral part of this present constitution and of Beninese law and have a value superior to the internal law.” CONST. OF THE REPUBLIC OF BENIN Dec. 2, 1990, pmbl. This is repeated in article 7 in regards to the African Charter on Human and Peoples’ Rights (“ACHPR”). Id. art 7. Article 40 imposes on the state a duty to teach its citizens about the Constitution, the Universal Declaration of Human Rights (“UDHR”), the ACHPR, and any other “international instruments duly ratified and relative to human rights.” Id. art. 40. In fact, the ACHPR is attached as an annexure to the Beninese constitution. The most significant effect is given to international law by the Bill of Rights in the Angolan and South African Constitutions. Article 26 of the Angolan Constitution states:

⁴⁰⁰ Julia Laffranque, *Judicial Borrowing: International & Comparative Law as Nonbinding Tools of Domestic Legal Adjudication with Particular Reference to Estonia*, 42 INT’L LAW. 1287, 1289 (2008).

⁴⁰¹ Id. at 1301.

⁴⁰² Id. at 1294 (“Comparative law has proven to be extremely useful in the countries of Central and Eastern Europe in reconstructing their legislation and legal order.”).

⁴⁰³ LORD MCCLUSKEY, *LAW, JUSTICE AND DEMOCRACY* 1 (1987).

Judges must therefore resist the intoxicating notion that their existing legal knowledge is conclusive and be prepared to keep up with the latest developments in the law. Another important reason for adopting a willingness to research and consider developments abroad is the growing influence on national constitutional law of international constitutional law standards.⁴⁰⁴

G. The Internationalization of Constitutional Law Principles and Standards

No government pursuing modern constitutional design can ignore certain basic principles, standards, institutions and values that are considered fundamental and essential in ensuring the rule of law, constitutional democracy, and good governance. Nor can states any longer hide behind the principle of sovereignty and non-intervention to violate their constitutions in a manner that will not only put the lives of their citizens at risk but also directly or indirectly threaten international peace and security. The adoption of a dysfunctional constitution that results in violence and political instability poses a threat not only to the state concerned but to neighboring states and the international community as a whole. [*1094]

Representative instances of dysfunctional constitutional processes that have threatened international peace and security include the situations in Cote d'Ivoire, Sudan, the Democratic Republic of the Congo, Somalia, Kenya, and Zimbabwe.⁴⁰⁵ More recently, uprisings have toppled the leaders of Tunisia and Egypt and are now spreading to Libya and other Arab countries in northern Africa and the Middle East, becoming matters of international concern.⁴⁰⁶ This is particularly so in Libya, not only because the lives of thousands of foreign workers on whom their economy depends have been put at risk, but also due to the brutality with which the Libyan leader has tried to suppress the uprising, resulting in thousands of deaths and thousands of refugees and internally displaced persons.⁴⁰⁷ Over the years, there have been attempts to devise international principles to deal with or preempt such breakdown of domestic constitutional order.⁴⁰⁸

The internationalization of constitutional law principles and standards can be traced to the end of the Second World War when governments' treatment of their nationals became a matter of legitimate concern for the international community.⁴⁰⁹ Since 1945, numerous international instruments both global and regional now prescribe certain minimum standards of human rights protection and have monitoring bodies to scrutinize national performance. Perhaps one of the most important of these instruments is [*1095] the Universal Declaration of Human Rights ("UDHR").⁴¹⁰ Although merely a declaration, and thus not strictly legally binding, its provisions have over the years been so extensively incorporated in other international and regional instruments as well as national constitutions that they are now generally considered to express principles of customary international law.⁴¹¹ As a result of this special status as customary international law, the UDHR and other instruments which contain rules considered as customary international law are automatically applicable in Common law countries as part of national law and must therefore be taken into account in any constitutional design.⁴¹²

⁴⁰⁴ For further discussion on this topic, see Charles Manga Fombad, *Internationalisation of Constitutional Law and Constitutionalism in Africa* (forthcoming).

⁴⁰⁵ See, e.g., ELDRIDGE ADOLFO, SWEDISH DEFENCE RESEARCH AGENCY, *THE COLLISION OF LIBERATION AND POST-LIBERATION POLITICS WITHIN SADC: A STUDY ON SADC AND THE ZIMBABWEAN CRISIS* (2009), <http://www.foi.se/upload/projects/Africa/FOI-R-2770%20Adolfo%20Collision%20of%20Liberation%20and%20Post-Liberation%20Politics%20in%20SADC.pdf> (last visited July 31, 2011).

⁴⁰⁶ For an analysis of the so called "Arab Spring," see Eduard Soler & Ana Almuedo, *Popular Uprisings in the Arab World*, CIDOB (Jan. 2011), <http://www.cidob.org/en/publications/dossierscidob/mundoarabe2011/popularuprisingsintheArabWorld>.

⁴⁰⁷ See, e.g., John J. Xenakis, *Massive Refugee Crisis in Libya Increases International Calls for Intervention*, BIG PEACE (Mar. 2, 2011), <http://bigpeace.com/jxenakis/2011/03/02/massive-refugee-crisis-in-libya-increases-international-calls-for-intervention/>.

⁴⁰⁸ Fombad, *supra* note 69, at 52-53.

⁴⁰⁹ See PETER MALANCZUK, *AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 26 (7th ed. 1997).

⁴¹⁰ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

⁴¹¹ MALANCZUK, *supra* note 411, at 213.

⁴¹² See generally JOHN DUGARD, *INTERNATIONAL LAW: A SOUTH AFRICAN PERSPECTIVE* 51-54 (3d ed. 2005); MALANCZUK, *supra* note 411, at 67-72.

Beyond international treaty obligations, what is perhaps most significant today is the growing number of regional and international frameworks that have been designed to put pressure on African politicians and constitutional designers to incorporate provisions that promote certain minimum constitutional standards.⁴¹³ As a result, constitutional provisions to promote democracy, good governance, and respect for the rule of law are no longer merely options which states can adopt at their pleasure but are in many instances mandatory obligations for any state that wants to interact and cooperate with others. In fact, the internationalization of *constitutionalism* in terms of the relevance of standards laid down by the international community has been increasing in relevance although the effect may be somewhat mixed.⁴¹⁴

At the global level, from the 1980s most of the largest Western aid donors to Africa, such as Britain, France, Japan, the United States, and the Scandinavian countries sought to link aid to constitutional reforms, respect for human rights, and political as well as economic liberalization amongst receiving countries.⁴¹⁵ The International Monetary Fund and the World Bank also [*1096] attached political conditionality to aid, loans, and investments to recipient countries.⁴¹⁶ The policy of political conditionality by Western governments and intergovernmental organizations such as the World Bank has been controversial,⁴¹⁷ but there is no doubt that these external forces played a very important role in ushering in the new era of democratization and constitutional reforms. Some of the international financial institutions actually provided financial assistance to many countries to assist them carrying out activities such as developing electoral processes, organizing elections, and drafting new constitutions.⁴¹⁸ However, since the 9/11 attacks, Western governments and IGOs now focus more attention on security issues than on democracy and *constitutionalism*.⁴¹⁹

The most interesting and potentially significant international influence on modern African *constitutionalism* originated from Africa itself. The wind of democratic change that swept through the continent in the 1990s was sufficiently powerful not only to affect individual states but also a conservative organization like the Organization of African Unity ("OAU").⁴²⁰ It is ironic that the first institutional attempt to commit African states to democracy and good governance was initiated by the OAU and has been continued by its successor, the African Union ("AU"). By the mid 1990s, the OAU could no longer pretend to be indifferent to the wind of democratization blowing over the continent. Although by 1981 it had adopted the African Charter on Human and Peoples' Rights, which recognized a [*1097] number of fundamental human rights,⁴²¹ the organization itself stuck to its policy of not intervening to condemn human rights abuses in the different countries.⁴²²

By the early 1990s, this was beginning to change, and perhaps one of the major signs of this came during the June 1997 summit in Harare.⁴²³ The leaders for the first time agreed that the organization would not accept or recognize any regime which had removed a legitimately elected government.⁴²⁴ During the Lome Conference of July 2000 the leaders came out with one of the most significant statements, the Declaration on the Framework for an OAU Re-

⁴¹³ Fombad, *supra* note 69, at 18-19.

⁴¹⁴ *Id.* at 20-23.

⁴¹⁵ *Id.* at 16.

⁴¹⁶ *Id.* at 43-44.

⁴¹⁷ See, e.g., Barbara Grosh & Stephen Orvis, Democracy, Confusion, or Chaos: Political Conditionality in Kenya, *STUD. COMP. INT'L DEV.*, Winter 1996-97, at 46, 46-61 (arguing that conditioning economic aid on democratization is counterproductive because it undermines the economic stability necessary for multiparty democracy and liberal rights); Rolf Hofmeier, Political Conditions Attached to Development Aid for Africa, 26 *INTERECONOMICS* 122, 122 (1991) ("Both the fear and the anger among recipient countries' governments with regard to this new form of external interference are now clearly perceptible, for they believe it threatens to reach way beyond the economic policy intervention previously experienced.").

⁴¹⁸ For a more detailed discussion, see Fombad, *supra* note 69.

⁴¹⁹ *Id.* at 18-20.

⁴²⁰ *Id.*

⁴²¹ See African (Banjul) Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (entered into force Oct. 21, 1986).

⁴²² Fombad, *supra* note 69, at 18-20.

⁴²³ See Roundtable of Heads of Government of Commonwealth Africa on Democracy and Good Governance in Africa, 41 *J. AFR. L.* 250, 250-52 (1997).

⁴²⁴ Fombad, *supra* note 69, at 18-19.

sponse to Unconstitutional Changes of Government.⁴²⁵ Although it could, with some justification, be argued that the leaders were more interested in protecting themselves from military adventurers than in promoting democracy per se, this declaration contains some important principles on promoting good governance and stability.⁴²⁶ Coming as it did, on the very eve of the establishment of the AU, it is now considered as one of the documents implementing the AU's democracy and good governance agenda.

The basic framework for promoting democracy and good governance amongst member states of the AU is laid down in the Constitutive Act setting up the Union and a number of treaties, declarations, and other instruments. There are four major instruments that contain the basic democratic principles on the AU democracy agenda:⁴²⁷ the Constitutive [*1098] Act itself,⁴²⁸ the Declaration on the Framework for an OAU (AU) Response to Unconstitutional Changes of Government,⁴²⁹ the Declaration on the Principles Governing Democratic Elections in Africa,⁴³⁰ and fairly recently, the African Charter on Democracy, Elections and Governance.⁴³¹ In fact, the latter contains some fairly radical ideas, and it is no surprise that since it was adopted in 2007 not many countries have ratified it.⁴³² Mention must also be made of the New Partnership for Africa's Development ("NEPAD")⁴³³ and the African Peer Review Mechanism ("APRM")⁴³⁴ which are supposed to provide a vision and strategic framework for Africa's renewal.⁴³⁵

The relevance of all these developments to future constitutional progress on the African continent is twofold. First, it can be said that the AU democracy agenda is today one of the boldest and most daring initiatives that the leaders of the continent have ever embarked on. The record so far has been neither good nor encouraging. Although the Constitutive Act and the various instruments provide a solid framework for peer pressure to be brought to influence constitutional developments on the continent, the inability of the AU to deal with the situations in Sudan, Somalia, and [*1099] Zimbabwe raises serious doubts about the agenda's credibility.⁴³⁶ The AU agenda on democracy and good governance reminds one of the "proverbial dog that danced on its hind legs, the significance of which lies less in how well it danced and more on the fact that it could dance at all."⁴³⁷ The mere recognition by African leaders that democracy and good governance is critical to the continent's recovery and survival is a giant step in the right direction.

Second, the evolution of international law and recent developments in certain Western countries such as Britain and Belgium coupled with the indictments of Charles Taylor, former president of Liberia, and the issuance of an international warrant for the arrest of Sudanese President Omar Hassan Ahmad Al Bashir, is bound to affect future constitu-

⁴²⁵ See Declaration for an OAU Response to Unconstitutional Changes of Government, July 10-12, 2000, AHG/Decl. 5 (XXXVI), available at <http://www2.ohchr.org/english/law/compilationdemocracy/lomedec.htm>.

⁴²⁶ See *id.* (calling for, among other things, the adoption of democratic constitutions, separation of powers, political pluralism, and free and regular elections).

⁴²⁷ Fombad, *supra* note 69, at 18-23.

⁴²⁸ Constitutive Act of the African Union, adopted Nov. 7, 2000 (entered into force May 26, 2001), available at <http://www.au.int/en/content/constitutive-act-african-union> (follow "Constitutive Act of the African Union" hyperlink).

⁴²⁹ See Declaration for an OAU Response to Unconstitutional Changes of Government, July 10-12, 2000, AHG/Decl. 5 (XXXVI), available at <http://www2.ohchr.org/english/law/compilationdemocracy/lomedec.htm>.

⁴³⁰ See OAU/AU Declaration on the Principles Governing Democratic Elections in Africa, July 8, 2002, AHG/Decl. 1-2 (XXXVIII), available at <http://www.eisa.org.za/PDF/oaudec.pdf>.

⁴³¹ African Charter on Democracy, Elections and Governance, Jan. 30, 2006, available at <http://www.un.org/democracyfund/Docs/AfricanCharterDemocracy.pdf>.

⁴³² One of its far-reaching provisions, article 15, requires State Parties to the Charter to establish institutions supporting democracy, *id.* at art. 15(1), and "ensure that the independence and autonomy of the said institutions is guaranteed by the constitution." *Id.* art. 15 (2).

⁴³³ THE NEW PARTNERSHIP FOR AFRICA'S DEVELOPMENT, <http://www.nepad.org> (last visited July 27, 2011);

⁴³⁴ THE AFRICAN PEER REVIEW MECHANISM, <http://aprm.krazyboyz.co.za>. (last visited July 27, 2011);

⁴³⁵ See Fombad, *supra* note 69, at 32-34.

⁴³⁶ See, e.g., Egara Kabaji, Op-ed, Libya Crisis Exposes AU's Soft Underbelly, NAIROBI STAR, Apr. 6, 2011, <http://www.nairobistar.com/opinions/others/19967-libya-crisis-exposes-aus-soft-underbelly>.

⁴³⁷ Fombad, *supra* note 69, at 38.

tional designs.⁴³⁸ As regards the latter, that this is the first warrant of arrest ever issued for a sitting Head of State by the International Criminal Court suggests that in the future, present or former rulers who have committed crimes against humanity in their attempts to hang on to power, can expect to be arrested and tried under international law anywhere regardless of the scope of any immunities that they may have under national constitutions.⁴³⁹

If it was a crime to kill half a million people in Rwanda in 1994, it should also be a crime to cause millions of innocent people, especially vulnerable populations like children and the elderly, to die of hunger and malnutrition, or through lack of adequate health care as a result of [*1100] misrule and corruption. All that remains now is to recognize the unacceptability, bestiality, and inhumanity of dictatorship for what it is, a crime that should be included in the crimes against humanity. There is a need for the recognition of an economic crime against humanity to be created to try rulers who have caused their people to die needlessly through bad governance.⁴⁴⁰ In spite of this, it can be argued that one of the strongest antidotes against authoritarian resurgence is the people.

H. Robust Defense of Constitutions and *Constitutionalism* by a Vigilant Civil Society

Looking at the present developments in Africa, it will be perhaps too optimistic to expect any constitutional reforms as far-reaching as those that took place in the 1990s and the ensuing few years. It is more realistic to expect some changes which, though radical, may take place in an incremental manner. Even then, a constitution, however comprehensive and good it is, cannot on its own guarantee either good governance or *constitutionalism*. As one looks to the future of the constitutional rights revolution in Africa, there seems to be no better method of both promoting and sustaining the momentum of *constitutionalism* and good governance, while simultaneously restraining actual and potential governmental lawlessness than through the vigilance of civil society.

Gerald Caiden rightly points out that people usually get the government they deserve.⁴⁴¹ If they are diligent, demanding, inquisitive and caring, they will get a good government.⁴⁴² However, if they allow themselves to be intimidated, bullied, deceived and ignored, then they will [*1101] get a bad government.⁴⁴³ Politicians are ordinary mortals and not saints.⁴⁴⁴ Africans, in most cases, do not elect inherently bad leaders.⁴⁴⁵ They elect potential Nelson Mandelas, such as Julius Nyerere of Tanzania, Kenneth Kaunda of Zambia, and Ahmadou Ahidjo of Cameroon. They, however, then close their eyes, lean back, relax, and hope to enjoy the promised land of democracy and good governance, or transform these ordinary mortals into infallible, indispensable and irreplaceable saviors whose departure

⁴³⁸ In 2009, Pre-Trial Chamber I of the International Criminal Court ("ICC") issued an arrest warrant for Omar Al Bashir for war crimes and crimes against humanity. ICC Issues a Warrant of Arrest for Omar Al Bashir, President of Sudan, INTERNATIONAL CRIMINAL COURT (Apr. 3, 2009), <http://www.icc-cpi.int/Menus/ICC/Press+and+Media/Press+Releases/> (follow "Press Releases 2009" link). He was suspected of "being criminally responsible, as an indirect (co-) perpetrator, for intentionally directing attacks against an important part of the civilian population of Darfur, Sudan, murdering, exterminating, raping, torturing and forcibly transferring large numbers of civilians, and pillaging their property." *Id.*

⁴³⁹ See, e.g., Fombad & Fonyam, *supra* note 82, at 484-85.

⁴⁴⁰ For a similar idea put forward by a 2004 Nobel Peace Laureate, see Wangari Maathai, Address at the 4th U.N. World Women's Conference in Beijing, China: Bottle-Necks of Development in Africa (Sept. 1995), available at <http://gos.sbc.edu/m/maathai.html>. See also Chris J. Bakwesegha, The Organization of African Unity and the Democratization Process in Africa: Lessons Learned, UN NON-GOVERNMENT LIAISON SERVICE, <http://www.un-ngls.org/documents/publications.en/voices.africa/number8/3bakwese.htm> (last visited Apr. 29, 2011).

⁴⁴¹ Gerald E. Caiden, Public Maladministration and Bureaucratic Corruption, in *FRAUD, WASTE AND ABUSE IN GOVERNMENT* 30, 47-48 (1986).

⁴⁴² *Id.*

⁴⁴³ *Id.*

⁴⁴⁴ If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary." *THE FEDERALIST* NO. 51, at 164 (James Madison) (Bernard Bailyn ed., 1993); see also Larry Diamond, Marc Plattner & Andreas Schedler, Introduction to *THE SELF-RESTRAINING STATE: POWER AND ACCOUNTABILITY IN NEW DEMOCRACIES* 1, 3 (1999) (placing Madison's observation within the context of horizontal accountability).

⁴⁴⁵ T.W. Bennett suggests that tyranny is an African disease of the modern era: "A certain degree of political insecurity . . . explains why an African ruler's power could not, in the past, have been absolute. Anyone who attempted tyrannical rule would soon face revolt or secession A common saying has it that kgosi ke kgosi ka batho [a chief is a chief through his people]." T.W. BENNETT, *CUSTOMARY LAW IN SOUTH AFRICA* 105 (2004). Although he was referring to the situation in Southern Africa, the same is true in many other parts of the continent, especially West Africa.

from power must be viewed with trepidation.⁴⁴⁶ In South Africa, the African National Congress is so adored that it can do no wrong and hence its leaders can do no wrong.⁴⁴⁷ Any accusations of impropriety against its leaders [*1102] can only be the machinations of racists suffering from the hangovers of apartheid.⁴⁴⁸ In other African countries, any criticism of a leader is viewed as the diabolical ploy of people who do not belong to the leader's tribe and want to replace the incumbent with their own tribesman.⁴⁴⁹ In many of these countries, the opposition, where it is real, is regularly castigated by the government media as unpatriotic dreamers and adventurers whose advent to power must be prevented at all cost.⁴⁵⁰ Because we have continued to deify our leaders today once they are elected to power, as we did in the recent past, they forget about those who elected them and rely only on the small cliques that repressively keep them in power, lose touch with the electorate, and are accountable only to them. Today we are haunted by the old demons of authoritarian rule which we had hoped were exorcised through constitutional reforms and multi-party democracy.

A constitution is only as good as the manifest will of the people to defend it. A robust civil society will not only enable the democratic transition to start, but will help to resist eventual reversals, contribute in pushing transitions to their completions and finally help to consolidate and deepen democracy.⁴⁵¹ As Steven Friedman has rightly argued, "there will never be effective *democracies in Africa* [*1103] until citizens can hold government accountable."⁴⁵² To ensure that the good people we elect today do not become the tyrants and dictators of tomorrow, the public must be ready to protest against any actual or threatened violations of the constitution. In fact, the creative intervention of the judiciary depends as much on the willingness of civil society (professional or business groups, and activist groups composed of urban and middle class people) especially the media and the activist quality of the Bar.

The judicial role in legal reforms can also be enhanced when there are vibrant civil society organizations that are ready to speak up for the weak, the poor, and other voiceless members of society through amicus curiae representation in court.

Civil society in general and the legal profession in particular are the watchdog for the respect of the rule of law, advocates for legal reforms and those who articulate the diverse and intricate legal and social issues that the judges need to consider in deciding cases. In many countries, these two groups can fill the void left by the absence of an effective and credible opposition party. And in looking at the crucial role that the Bar needs to play, one can rightly say that the judiciary in Africa is only as good as the Bar that serves it; an activist Bar will inevitably lead to an activist judiciary, and the converse is also likely to be true.

⁴⁴⁶ In fact, many of the founding fathers either invested themselves, which was usually the case, or were invested with messianic epithets such as: Osagyefo (the Victorious Warrior) for Kwame Nkrumah of Ghana; Mwalimu (the Teacher), for Julius Nyerere of Tanzania; Mzee (the Elder) for Jomo Kenyatta of Kenya; Le Grand Silly (the Elephant) for Leopold Sedar Senghor of Senegal; Nkuku Ngbendu wa Za Banga (All powerful warrior who goes from conquest to conquest) for Mobutu Sese Seko of Zaire (now the Democratic Republic of the Congo); Le Vieux (the Old Man) for Felix Houphouet-Boigny of Cote d'Ivoire; Le pere de la nation (father of the nation), for Ahmadou Ahidjo of Cameroon; and more recently, Ngwazi (the Great Lion) for the current President of Malawi, Dr. Bingu wa Mutharika. Some arguments for removing constitutional term limits are discussed in Fombad & Inegbedion, supra note 88.

⁴⁴⁷ See Raymond Suttner, The Character and Formation of Intellectuals Within the ANC-Led South African Liberation Movement, in AFRICAN INTELLECTUALS: RETHINKING POLITICS, LANGUAGE, GENDER AND DEVELOPMENT, supra note 8, at 177, 146-48 (suggesting that the rhetoric of ANC leadership after 1994 has become conclusory, thereby discouraging open intellectual debate, and that state patronage further contributes to this phenomenon through co-option of dissenters).

⁴⁴⁸ As noted earlier, the call for lifestyle audits in South Africa to check the rising tide of corruption and abuse of power has been termed a "'smokescreen' masking 'racists narratives'" by those who feel that "black Africans cannot be wealthy without being corrupt." Lifestyle Audits, supra note 193.

⁴⁴⁹ For example, in March 2011, the Secretary General of the ruling ANC in South Africa blamed "racial prejudice" and "hatred for change" for certain media criticisms of government decisions and actions. Fienie Grobler, ANC Blames Racism for Many, Gupta Controversies, ALLAFRICA.COM (Mar. 8, 2011), <http://allafrica.com/stories/201103090286.html>; see also Raji Bello, Our Destructive Obsession with Tribalism, <http://www.gamji.com/article/6000/NEWS7267.htm> (last visited July 27, 2011); Anneli Botha, Political Dissent and Terrorism in Southern Africa 10-11 (Inst. for Security Stud., ISS Paper 90, 2004), <http://www.iss.co.za/pubs/papers/90/90.pdf>.

⁴⁵⁰ See Fombad, Challenges, supra note 3, at 10-18.

⁴⁵¹ See JUAN J. LINZ, & ALFRED STEPAN, PROBLEMS OF DEMOCRATIC TRANSITIONS AND CONSOLIDATION 3-14 (1996).

⁴⁵² Steven Friedman, A Crucial, But Only the First, Step, in DEMOCRACY IN AFRICA: PROMOTING THE AFRICAN CHARTER ON DEMOCRACY, ELECTIONS AND GOVERNANCE, supra note 139, at 3, 4.

Finally, mention must be made of the important role that legal scholars—such as legal academics, legal researchers and others who contribute to the dissemination of legal knowledge in accredited journals, books and newspaper commentaries and internet blogs—can play in influencing legal developments. As Joseph Ki-Zerbo has argued, intellectualism is not a neutral exercise and African intellectuals cannot afford to decamp from public life like nomads to an oasis while all around is torture, mutilation, and genocide.⁴⁵³ Legal scholars therefore need to be more vocal in defending the constitution and respect for *constitutionalism*. [*1104]

Conclusion

In form and content, there is no ideal or standard constitutional design or model that is irreproachable and unimpeachable nor one that will solve all problems. Furthermore, a constitution is not a contract that is struck once and for all, but rather an important part of a continuous process of careful maintenance and step-by-step incremental accommodation to take account of changing circumstances. A constitution that promotes *constitutionalism* must therefore allow scope for strategic dialogue between the rulers and the ruled. From this perspective, the need to rethink and revise many aspects of the post-1990 African constitutions is inevitable. The major contention in this Article has been that the changes of the 1990s, although significant and far-reaching, just fell short of making *constitutionalism* on the continent irreversible and sustainable. They failed to entrench the degree of *constitutionalism* found in Western Europe, where a reversal is difficult or hazardous. For example, while as a result of a strong constitutional culture, a coup d'état in countries such as France or Britain is extremely unlikely, what *constitutionalism* appears to have done in many African countries is not to eliminate coups d'état but in many instances replace military with electoral coups d'état.⁴⁵⁴ This is not to suggest that no military coups d'état can take place under a constitution that entrenches and promotes all aspects of *constitutionalism*, but such an environment simply does not favor coup plotters.

Be that as it may be, African *constitutionalism* has now joined the mainstream of modern *constitutionalism* and [*1105] even started offering some quite original contributions to its developments, a typical example of this being South Africa's state institutions' support of constitutional democracy. Although not perfect, this support helps to check the inevitable excesses of a dominant one-party system, bearing many of the features of the discredited single parties of yesteryears. The major contention of this Article is that more action was required to deal with those specific issues that were a source of bitter conflicts in the past. For example, the multi-party debacle was more than just the prohibition of opposition parties—at the heart of it was the neutralization and criminalization of dissenters. There was an assumption that by allowing opposition parties to operate, multi-party democracy would take root.⁴⁵⁵ However, the restrictions and obstacles placed on the operation of opposition parties in most countries has rendered them redundant. As a result, the single party has been replaced by dominant parties operating in exactly the same reckless and arbitrary manner as the post-independence single party systems.

If a constitution manifestly embodies the values of *constitutionalism*, it will certainly include what most people hold as dear, and consider as prima facie right and good, and thus will most likely be treated with great respect, if not veneration. If the post-1990 constitutional changes were designed to give African countries a fresh start, as most modern constitutions since the United States Constitution of 1787 usually try to do, then the general result of this process must be considered as mixed, insofar as the commitment to *constitutionalism*, good governance, and accountability is concerned. There have been tremendous progress in some cases and dismal failure in others. South Africa's Constitution clearly stands out as an exemplar of modern *constitutionalism* and provides a rich source from which many African countries can learn. But even this good constitution is under threat from opportunistic politicians and a docile majority happy with having their own kind in charge regardless of what they are doing.

To entrench and sustain *constitutionalism*, good governance, and accountability on the continent, a number of

⁴⁵³ Ki-Zerbo, *supra* note 8, at 80-81.

⁴⁵⁴ Examples of such electoral coups d'état have taken place in Kenya in 2007 and Zimbabwe in 2008. See INT'L REPUBLICAN INST., KENYA PRESIDENTIAL, PARLIAMENTARY AND LOCAL GOVERNMENT ELECTIONS: ELECTION OBSERVATION MISSION FINAL REPORT 30-37 (2007), <http://www.iri.org/explore-our-resources/election-observation-and-assessment-reports> (follow "Election Observation Report: Kenya's 2007 Presidential, Parliamentary and Local Elections" hyperlink); DEREK MATYSZAK, RESEARCH & ADVOCACY UNIT, HEAR NO EVIL, SEE NO EVIL, SPEAK NO EVIL: A CRITIQUE OF THE ZIMBABWE ELECTORAL COMMISSION REPORT ON THE 2008 GENERAL ELECTIONS (2009), <http://www.idasa.org/ourproducts/resources/output/hearnoevilseenoevilspeak/> (follow hyperlink under "Files: Full Report"); Kenyan Presidential Election Blatantly Rigged, FREE FREEDOM (Dec. 31, 2007), <http://www.freefreedom.wordpress.com/2007/12/31/kenyan-presidential-election-blatantly-rigged/>.

⁴⁵⁵ See Mokopagosi & Molomo, *supra* note 69, at 3-6.

[*1106] important reforms need to be made.⁴⁵⁶ First, the right to free and fair election as well as the rights of political parties needs to be constitutionally entrenched in so as to reduce the possibilities for electoral fraud and other electoral irregularities. Second, while tremendous steps have been taken in most constitutions to promote *constitutionalism*, there is need to strengthen this with the entrenchment of certain key principles and institutions of accountability, good governance, and democracy. Third, there is need to limit the excessive powers that are usually given to African leaders and the immunities that go with this, because they have regularly used such power to entrench themselves in power and make genuine opposition politics impossible. Fourth, to enhance the judicial role which is crucial in promoting *constitutionalism*, it has been argued that the [*1107] bodies that appoint judges should be made more independent and the scope for judicial review needs to be expanded to include both abstract and concrete review and courts dealing with constitutional review should be decentralized to make constitutional justice more accessible in terms of cost and proximity to the people who need it most.⁴⁵⁷ Fifth, in this era of globalization and regionalization, it has been argued that constitutional drafters as well as judges cannot ignore the influence of certain constitutional law principles and standards that have been adopted at both regional and international levels. A new constitutional framework that ignores the imperatives of cross-systemic and international developments is bound to be dysfunctional.

In spite of the need for a new wave of reforms, more urgent and radical in some countries than in others, it is recognized that the momentum for radical changes might not be there now. It is a fact that many leaders of the ancient regime who have weathered the storm of the 1990 revolutionary waves and those leaders who emerged from it, are not anxious for further reforms for various reasons. This has led us to two conclusions that we think are fundamental to the future of constitutional reforms and *constitutionalism* in Africa today.

The first is that no matter how comprehensive the protections envisioned in the text of a constitution, it will mean nothing if the people are not ready to defend it. Sycophancy, idolatry, complacency, and indifference have encouraged dictatorship. People will only get the type of rulers they want. Ultimately, a constitution is only as good as the people who are ready and willing to defend it. Secondly, standing firmly between the people and the rulers is the judiciary generally and judges in particular. For the process of *constitutionalism*, good governance, and accountability to take root, African judges need to adopt a bold, imaginative, and judicially activist approach similar to that which has been manifested by the South African Constitutional Court in many of its decisions.⁴⁵⁸

After five decades of African independence, many lessons have been learned the hard way and the errors of [*1108] the past do not have to be repeated. The mammoth political, economic, and social challenges of the future cannot be confronted head-on without an irrevocable commitment to *constitutionalism* and all that this principle stands for. Once a country has crossed the *constitutionalism* Rubicon, the chances of it backsliding into anarchy or dictatorship are considerably reduced. The absence of *constitutionalism*, good governance, and accountability mechanisms in the constitutions of many African countries explains why there is still doubt whether the third wave of democratization will do any better than the preceding ones. The good prospect for *constitutionalism* in certain countries such as Ghana and South Africa certainly does not guarantee constitutional rule, good governance, or de-

⁴⁵⁶ Many of the suggested principles and institutions may look like superfluous aberrations to a Western constitutionalist or in a Western setting but in Africa, they must now be regarded as essential elements in the emerging constitutional rights culture of today. It is true that a constitution should not be cluttered and overloaded with trivia and one should not attack the vice of inadequate breadth with the equally fatal infirmity of overbreadth. One must therefore be mindful of the advice of K.C. Wheare that a constitution should contain "the very minimum, and that minimum should be rules of law." K.C. WHEARE, MODERN CONSTITUTIONS 33-34 (1966). Or, as Chief Justice Marshall put it in the celebrated United States case of *McCulloch v. Maryland*, a constitution by its very nature requires that only its "great outlines" be marked and its "important objects" designated, and that it not descend into the "prolixity of a legal code." [4 U.S. \(4 Wheat.\) 316, 407 \(1819\)](#). A good number of African constitutions have indulged in such lengthy, programmatic, and convoluted details that defy the wisdom of both Wheare and Marshall. For example, the Swaziland Constitution, which has 279 sections and nineteen chapters, is essentially a chaotic catalogue of contradictions that make nonsense of the essentials of constitutionalism while dwelling on matters which should normally be found in ordinary legislation. See CONST. OF THE KINGDOM OF SWAZILAND July 26, 2005. Another example is the Nigerian Constitution, which has 318 sections and seven chapters, which may be understandable for such a large and complex society. See CONST. OF THE FEDERAL REPUBLIC OF NIGERIA May 29, 1999. It must be recognized that African constitutions cannot be as brief as Western constitutions. Written constitutions in Africa contain almost every relevant and applicable constitutional principle, whereas Western constitutions rarely embrace all the constitutional principles that apply. These are normally complemented by a number of usages, understandings, customs, and conventions that may apply as well as judicial precedents. Over and above this, most Western constitutions are greatly strengthened and supported by centuries of political behavior, political culture, and political tradition and history, which is generally lacking under many African constitutions.

⁴⁵⁷ See supra text accompanying notes 267-76.

⁴⁵⁸ See supra Part III.E.3.b.

mocracy. Nevertheless, its presence acts as a powerful deterrent to potential dictators or tyrants.

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