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# The Democratic State in Africa: The Challenges for Institutional Building

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# THE DEMOCRATIC STATE IN AFRICA: THE CHALLENGES FOR INSTITUTION BUILDING

## Muna Ndulo*

*Is there hope for rebuilding and promoting prosperity in Africa? What impact did President Clinton's recent visit to Africa have on interest in the African social and political landscape? In this piece, Professor Muna Ndulo attempts to contextualize some of these questions by exploring the challenges facing African nations today while identifying the main obstacle to African prosperity as one of governance. It is argued that until African nations begin to implement viable democratic institutions with responsive leadership, African citizenry will not overcome the problems that accompany slow growth and development. A stable government will not only promote social stability and attract foreign investment, but will also allow African businesses to enter the global marketplace and commence real socio-economic expansion.*

## INTRODUCTION

As the twenty-first century approaches, it is important to examine Africa's successes and failures in the field of governance and reflect on the future of democracy on the continent. One of the key questions that arise in this context is how to consolidate and institutionalize democracy in Africa while ensuring its sustainability. This article will examine the impact of colonialism on Africa while identifying key issues that need to be considered in the process of developing durable democratic institutions. This article will also provide a critique and analysis of contemporary features of African states while examining the challenges for creating viable political systems. In addition to constitutional systems, the current usefulness of traditional African leadership and authority will also be explored. Finally, this article will offer proposals, strategies and recommendations for entrenching democratic values and developing democratic structures in African states while considering what role, if any, the international community and multilateral development institutions such as the World Bank should play in this process. The goal of this article is to identify and address some of the key issues that can help foster the adoption of a constitutional framework that has a better chance of bringing about democratic governance in African countries.

Paradoxically, Africa is both the least developed and, in terms of natural resources, the most well-endowed continent in the world.[1] With a land area three times the size of the United States and a population of some 600

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1. World Bank, Accelerated Development in Sub-Saharan Africa: An Agenda for Action, Washington D.C., 1982.; Organization of African Unity, The Lagos Plan of Action for the Economic Development of Africa, Second Extra Ordinary Assembly of the OAU Heads of State and Government Devoted to Economic Matters, Lagos, Nigeria (April 28-29, 1982).

million people, Africa possesses the resources required to attain sustainable development characterized by increasingly productive employment opportunities and a steadily improving quality of life for all its citizens.[2] The continent has vast mineral, oil, water, land and human resources. Yet, about 240 million Africans live on less than one dollar a day, have no access to safe drinking water, and are illiterate.[3] The precariousness of Africa's position is revealed with particular clarity in relation to the production of food, a sector in which, the continent was self sufficient in the pre-colonial era, but is now increasingly dependent upon external supplies. On the face of it, the apparent inability of the African continent to feed itself is paradoxical, since one of the region's chief assets is its huge agricultural potential.[4]

Unfortunately, Africa lacks the domestic capital necessary to translate its enormous wealth of resources into realizable benefits for its people and it has failed to attract sizable foreign investments to fill the gap. For example, African countries have put in place a myriad of investment codes in an effort to attract foreign capital, they receive only 5% of all direct foreign investment flowing to developing countries.[5] Furthermore, about half of this investment goes into oil and mineral production and most of it to only a few countries such as South Africa, Nigeria, Angola and Botswana. This situation persists despite the fact that investments made in Africa consistently generate high rates of return. For example, during the period 1990-1994, the average annual return on book value of US direct investment in Africa was nearly 28% compared with 8.5% for US direct investment world-wide.[6] At the root of the problem is the world-wide perception of Africa as an unstable, poorly-governed, and conflict ridden continent that cannot guarantee the safety of foreign investments.[7] Several researchers have tested the impact of political stability, (or conversely, political risk), on foreign direct investment flows. They conclude that political instability

2. World Bank, Sub-Saharan Africa: From Crisis to Sustainable Growth, Washington, D.C. (1989); Julius Nyerere, *Africa Exists in the Economic South*, 41 Development and Social Economic Progress 3, 7-8 (1988); *African Alternative Framework to Structural Adjustment Programs for Socio-Economic Recovery and Transformation*, U.N., Economic Commission for Africa, U.N. Doc. E/ECA/CM.15/6/Rev.3.

3. For a discussion of Africa's economic situation, *see generally*, Adebayo Adedeji, The Leadership Challenge for Improving the Economic and Social Situation of Africa, (October 24 - November 1, 1988) (unpublished manuscript on file with author); *see* World Bank, *supra* note 2.

4. Karl Lavrencic, *Food for Africa,* 137 NEW AFR. J. 90 (1979).

5. *Foreign Investment in Africa,* United Nations Conference on Trade and Development, U.N. CTAD/DTCI/19, Current Studies, Series A, no. 28, at 3 (1995).

6. United States Direct Investment in Africa; Southern African Development Community *in* USA: Trade and Investment (1998).

7. Since 1970, more than 32 wars have been fought in Africa, the vast majority of them intra-state in origin. In 1996 alone 14 of the 53 countries of Africa were afflicted by armed conflicts, accounting for more than half of all war-related deaths world wide and resulting in more than 8 million refugees, returnees and displaced persons. *See* Causes of Conflict and the Promotion of Durable and Sustainable Development in Africa, Report of the Secretary-General to the Security Council (1998) (unpublished manuscript) (on file with author). *See also* ROBERT GURR, ETHNIC CONFLICT IN WORLD POLITICS 13 (1994). However, Africa also suffers from the fact that the image of the continent is poor even in areas such as corruption where the actual situation is better than that prevailing in other regions. For instance, the perception is that Africa has the most corrupt regimes in the world. The Flemish Research Institute found the levels of corruption in Africa to be below the levels in the former Soviet Union and Central America. *See* Flemings, Africa Index, 1998.

is one of the main factors that investors cite as an explanation for their decision not to invest in a particular country.[8] Africa's political instability has exacted a huge cost on its development efforts. In its 1989 report on Sub-Saharan Africa, the World Bank concluded:

> underlying the litany of Africa's development problems is a crisis of governance. By governance is meant the exercise of political power to manage a nation's affairs. Because countervailing power has been lacking, state officials in many countries have served their own interests without fear of being called to account. The leadership assumes broad discretionary authority and loses its legitimacy. Information is controlled, and voluntary associations are co-opted or disbanded. This environment cannot readily support a dynamic economy.[9]

The answer to Africa's development lies in establishing democratic governance in African countries. The future of democratic governance in Africa calls for identification of current obstacles to development and a critical examination of possible approaches to the creation of governance systems that meaningfully accommodate all social, religious, ethnic and political groups in the African state. Systems built on principles of inclusion can help prevent future conflict and political instability.[10]

Africa's problems are to a large extent rooted in its past. The continent's painful history is marked by some of the worst human tragedies in living social memory: slavery, colonialism, and apartheid. As a result of these tragedies, when African countries won independence, they faced formidable constraints to development. These constraints included underdeveloped human resources, political fragility and insecurity rooted in poorly structured institutions. This legacy will continue to impact African development for decades to come. However, the serious problems facing Africa should, rather than create despair, inspire fundamental reexamination and redirection.

If issues of governance are resolved, Africa has the potential to become one of the fastest growing regions in the world. Good governance would mean governments that adopt economic policies likely to resolve the constraints hindering sustained economic development. It is now widely acknowledged that African economies are now beginning to exhibit record growth. According to the 1997 World Bank Annual Report, African economies grew for the fourth year in a row.[11] The turn around was in the early 1990s such that economic growth was outstripping population growth in 31 African countries by 1996; overall annual GDP averaged 5% in 1997.[12] With the gloss of the Asian miracle, Africa is slowly becoming an attractive "emerging market" that offers tremendous investment opportunity. A

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8. YAIR AHARON, FOREIGN INVESTMENT DECISION PROCESS (1966); E.I. NWOGUGU, LEGAL ASPECTS OF FOREIGN INVESTMENT IN DEVELOPING COUNTRIES (1965).

9. World Bank, *supra* note 2.

10. *Id.*

11. World Bank Ann. Rep., Washington, D.C. (1997). Douglas Anglin has observed: "Africa, long the poor cousin of a resurgent Asia, is beginning to emerge from under its shadow. Stock market jitters and fears relate to Asia. The continent's long-heralded renaissance is at last capturing the imagination of the world in the process contributing to a new and more positive image as well as providing fresh momentum for constructive change." D.G. Anglin, Conflict in Sub-Saharan Africa, 1997-1998, Carleton University (July 1998) (unpublished paper on file with author).

12. World Bank Ann. Rep., *supra* note 11.

1996 US trade policy document describes Africa as the "last frontier for American businesses."[13] Entrepreneurs around the world are rediscovering the continent, or at least its rich mineral resources.[14] But because progress remains fragile and could easily be reversed, consolidation is necessary. Much needs to be done in order to translate the recent improvements into progress which is sustainable and will have a positive impact on the lives of the poor. In fact, not since independence have both the hopes and the challenges in Africa been simultaneously so great.

Africa may be doing well, but most Africans are not.[15] Africa remains host to the largest population of refugees and displaced persons on any continent. Many are condemned to live their lives in squatter settlements or rural slums with inadequate sanitation, schooling and health facilities; this inadequacy contributes to conflict, instability, and misery.[16]

Critics of this thesis assert that in treating Africa as one, both the problems and solutions are over-generalized. There is a strong case to be made that African countries, though diverse, share common problems in relation to governance and development. They face high rates of illiteracy and disease, poor infrastructure, are multi-ethnic in composition, live under demoralizing poverty and have only recently emerged from colonial rule. In other words, they are all struggling with the challenges of economic development and nation building. United Nations and multilateral lending institution's reports are unanimous in their assertions that Africa's inability to realize its potential is largely attributable to its lack of good governance.[17] The United Nations Development Program (UNDP) has defined good governance as "the exercise of political, economic and administrative authority in the management of a country's affairs at all levels."[18] Good governance has many attributes: it is effective, participatory, transparent, accountable, equitable, and promotes the rule of law. Others have characterized Africa's problem as a result of its inability to create capable states.[19] A capable state, in this context, is defined as one that espouses good governance, is characterized by transparency and accountability, enforces law

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13. Comprehensive Trade and Development Document for the Countries of Africa, Washington, D.C. (1996) (on file with author).

14. *See* World Bank Ann. Rep., *supra* note 11.

15. *The Africa Growth and Opportunity Act: A Cursory Appraisal*, Africa Faith & Justice Network (Sept. 1997); *see also* Letter from Several African Americans to Members of the US Senate (May 13, 1998). In the letter the authors urge modifications of the US-Africa Bill while pointing out the devastating social impact on Africans of the structural adjustment programs being pursued by the World Bank and the IMF in Africa.

16. In fact as T. Anglin has observed it can be argued that Africa has slipped into one of the most violent phases of its post-independence history with political struggles spilling across boarders as states interfere militarily in their neighbors' affairs in ways once uncommon. He cites the conflicts in Congo, Rwanda, Burundi and Lesotho where neighboring states have intervened in internal conflicts. *See* Anglin, *supra* note 11.

17. *See* Deliberations of African Governance Forum, Organized in the Context of the United Nations System-Wide Special Initiative on Africa, Addis Ababa (UNISA) (July 11-13, 1997). *See also* World Bank Ann. Rep., *supra* note 11.

18. Aide Memoire, International Conference on Governance for Sustainable Growth and Equity, *United Nations Development Program*, N.Y. (July 28-30, 1997).

19. Apolo Nsibambi, The Interface Among the Capable State, the Private Sector and Civil Society in Acquiring Food Security, Conference on Building for the Capable State in Africa (October 24-28, 1997) (unpublished manuscript on file with the Institute for African Studies, Cornell University).

and order throughout the country, demonstrates respect for human rights, effectively provides infrastructure, supports a free market economy, bears a favorable policy environment, and demonstrates an intent to work in partnership with the private sector and civil society.[20] Other important characteristics of a capable state are tolerance of opposition groups and competitive politics; predictable, open, and enlightened policy making; a bureaucracy imbued with professional ethos acting in furtherance of the public good; maintenance of fair terms of trade between the rural and urban sectors; and recognition and respect of the boundaries between itself, the private sector and civil society.[21] These characteristics enable a state to effectively perform its role of developing the country and bringing about a better life for all its people.

There is growing international consensus concerning the central role a good, efficient and capable government plays in the economic and social development of a country.[22] The General Assembly has recognized that democracy, transparency, accountable governance and administration in all sectors of society are indispensable factors to promote people-centered development. The Assembly has also recognized that governments in all countries should provide and protect all human rights and fundamental freedoms, including the right to development, bearing in mind the interdependent and mutually reinforcing relationships between democracy, development and respect for human rights.[23] For good governance to prevail, the rule of law must (first, also?) prevail. Political pluralism cannot prosper until effective legal institutions are established. In order to function effectively, a legal system must include not only legislation, but also an efficient institutional infrastructure for the design and administration of the law. The most important legal instrument in this scheme of things is the national constitution. Thus, a major part of the answer to Africa's present predicament lies in the development of constitutional structures that will create national institutions engaged in the management of the country in such a way as to ensure that a capable state is created.

In the past ten years, Africa has been the scene of constitutional changes unprecedented since the end of European colonialism in the 1960s.[24] The last two decades of this century will go down in African history as the era of renewed struggle for democracy. In 1989, there were only five African countries that could be described as democracies, but today well over half of the countries in Africa have adopted democratic systems of governance. Yet, in many of them, the advances in democracy, though significant, remain fragile. Reversals in such countries as Lesotho and Si-

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20. Patricia Armstrong, *Human Rights and Multilateral Development Banks: Governance Concerns in Decision Making*, 88 AM. SOC'Y INT'L L. PROC. 277 (1994).

21. *See* Nsibambi, *supra* note 19.

22. *See* World Bank Ann. Rep., *supra* note 11.

23. *See* U.N. Res. 50/225 (April 19, 1996).

24. Phillip Reyntjens observes that virtually no country has been untouched by the wave of political reform. *See* Phillip Reyntjens, *The Winds of Change: Political and Constitutional Evolution in Francophone Africa*, 35 J. AFR. L. 44 (1990). *See also* Adrien K. Wing, *Towards Democracy in a New South Africa: A Review of Ziyad Motala, Constitutional Options For A Democratic South Africa: A Comparative Perspective*, 16 MICH. J. INT'L L. 689 (1995); Peter Slinn, *A Fresh Start for Africa? New African Constitutional Perspectives for the 1990's*, 35 J. AFR. L. 44, 102 (1991).

erra-Leone remind us that we should not become complacent and assume that democracy has been entrenched in African countries. Further, the tragedies in Rwanda, Somalia, Liberia, and Zaire (now Congo) graphically illustrate the horrendous consequences of failed constitutional arrangements. The future of democracy in Africa requires the development of constitutional arrangements that set up viable institutions which foster an environment where peace and development can flourish. Such arrangements will ensure that the exercise of governmental authority is done in a predictable, responsible and legally regulated way, to the satisfaction of civil society.[25]

## THE COLONIAL LEGACY

Traditional African society had its own system of social and political organization.[26] For instance, Gluckman writing about the Lozi of Zambia, observed that the Lozi had a complex economy which required many people to cooperate in various productive activities. The basic unit of organization in the structure of their economic, political, and domestic system was the village. It was the center from which they exploited gardens and parcels of land. The village was headed by a headman responsible for the village to the King in Council and represented the village at the Council headed by the Chief. The Chief governed with the assistance of councilors.[27]

Since the advent of colonialism, African societies have experienced protracted economic and social changes. At the Berlin Conference of 1884, the colonial powers partitioned Africa into territorial units. African kingdoms, states and communities were arbitrarily divided;[28] unrelated areas and peoples were as arbitrarily joined together as were united peoples torn apart.[29] The era of colonialism initiated, and the later period of independence consummated, a dynamic process of disruption in tribal organization and tribal life. Unlike pre-colonial Africa, the financial, political, and military security of post-colonial African societies no longer depended on traditional organizations and custom. There has been a departure from agrarian self-subsistent communities to a money economy dependent on the capitalist economic system. With such fundamental changes, the human institutions governing African societies have also had to change.

25. R.P. Meyer, Republic of South Africa, Debates of the Constitutional Assembly, no. 1 at 14 (Jan. 24-Feb. 20 1995).

26. E. COLSON, SEVEN TRIBES OF NORTHERN RHODESIA (1957); MAX GLUCKMAN, POLITICS AND RITUAL IN TRIBAL SOCIETY (1965); Isaak Dore, Constitutionalism and the Post-Colonial State in Africa: A Rawlsian Approach, 41 ST. LOUIS U. L.J. 1301 (1997).

27. MAX GLUCKMAN, THE JUDICIAL PROCESS AMONG THE BAROTSE OF NORTHERN RHODESIA 7 (1967), see also M. MAINGA BULOZI, UNDER THE LUYANA KINGS (1973).

28. For example in 1890, Lord Salisbury, the British Prime Minister, remarked at a dinner that followed the conclusion of the Anglo-French Convention which established spheres of influence in West Africa that "we have been engaged in drawing lines upon maps where no white man's foot ever trod; we have been giving away mountains and rivers and lakes to each other, only hindered by the small impediment that we never really knew exactly where the mountains and rivers and lakes were." See Dr. Makau Wa Mutua, Why Redraw the Map of Africa? A Moral and Legal Inquiry, 16 MICH. J. INT'L. L. 1113, 1135 (1995) (quoting J.C. ANENE, THE INTERNATIONAL BOUNDARIES OF NIGERIA 1865-1960 3 (1970).

29. For example the Masai were divided between Kenya and Tanzania and the Ewe between Ghana and Togo, id.

The foremost act of disruption was the unification of ethnic communities under the umbrella of sovereign states created pursuant to the Berlin Conference of 1884 with overriding powers of political control within their whole area of jurisdiction.[30] Dislocation of African peoples from their lands continued throughout the colonial period as the needs of the colonial economy expanded, further undermining any tribal economy or social organization that might have been left in place after the initial establishment of colonial rule.[31]

Colonial rule was philosophically and organizationally elitist, centralist, and absolute. There were no representative institutions. The colonial administration not only implemented policy, but made it as well. Seidman has observed that "the authoritarian principle of colonial government was marked by its dominant theory of the exercise of power."[32] Authoritarian forms of government everywhere express their character by giving relatively boundless discretion to "the man on the spot." In Africa this philosophy of government was expressed in law principally by rules that gave unlimited discretion to colonial officials and the limited formal controls over its exercise.[33] As colonial rulers sought expedient interlocutors, they distorted or destroyed pre-colonial governance systems by creating or encouraging arrangements such as indirect rule, which made local chiefs more despotic and created new ones (warrant chiefs) where none existed before.[34] Culturally, colonialism divided Africa into two societies—the traditional culture found in the rural areas where the great majority of the people live and which was largely outside the framework of colonial elitism and the "modern" culture found in urban areas. The urban economy and culture was the link between the metropolitan country and the colony in the export of raw materials.[35] Colonial economic policies kept African economies small, excessively open, dependent and poorly integrated.[36] This resulted in a colonial state characterized by huge gaps between the standard and quality of life of the rural and urban populations.

The rural/urban divide inherited from the colonial period continues today and in fact has grown. The rural areas continue to be neglected, marginalized and impoverished. The state is extremely weak and is almost

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30. *See* R. ROTBERG, THE RISE OF NATIONALISM IN CENTRAL AFRICA: THE MAKING OF MALAWI AND ZAMBIA 303 (1965); R. HALL, ZAMBIA (1964); J.B. OJWANG, RURAL DISPUTE SETTLEMENT IN KENYA 63 (1975-78).

31. Okoth Ogendo, Property Systems and Social Organization in Africa: An Essay on the Relative Position of Women Under Indigenous and Received Law 47 (Takirambudde ed.,1982). *See also* Kwamena Bentsi-Enchil, Do African Systems of Land Tenure Require A Special Terminology, Reprint Series No. 7, North Western University Program of African Studies (1966). In this paper, Bentsi-Enchil discusses the colonial heritage in land issues.

32. Robert B. Seidman, *Law and Stagnation in Africa, in* LAW IN ZAMBIA 285 (Muna Ndulo ed., 1984).

33. *Id.*

34. *See* A.J. WILLS, AN INTRODUCTION TO THE HISTORY OF CENTRAL AFRICA (1973); L.F.G. ANTHONY, THE STORY OF NORTHERN RHODESIA (1953); L.H. GANN, THE BIRTH OF A PLURAL SOCIETY: THE DEVELOPMENT OF NORTHERN RHODESIA UNDER THE BRITISH SOUTH AFRICA COMPANY, 1894-1914 (1958); and L.H. GANN, HISTORY OF NORTHERN RHODESIA (1964).

35. Robert B. Seidman, *Drafting for the Rule of Law: Maintaining Legality in Developing Countries*, 12 YALE J. INT'L L. 84, 85 (1987).

36. Robert B. Seidman, *Perspectives on Constitution-Making: Independence Constitution for Namibia and South Africa*, 3 LESOTHO L.J. 45 (1987).

completely irrelevant as a provider of services in rural areas.[37] There exists mounting evidence that the International Monetary Fund (IMF) and World Bank stabilization and structural adjustment programs in place in almost all African countries have actually worsened the situation.[38] The IMF/World Bank schemes have undermined the position of the poor farmers by restricting their access to credit for production and marketing. The withdrawal of state marketing agencies has exposed poor farmers to exploitation by large traders.[39] The duality of the rural/traditional and the modern/urban sector of the African state finds its legal underpinning in a dualism of modern European law and traditional African customary law.[40] It is further reinforced by the lack of popular participation in governance and exacerbated by the lack of effective devolution of power to local communities.

The colonial legacy endured long after independence.[41] Colonial rule bequeathed on independent African states undemocratic governments and bureaucracies that emphasized hierarchy, compliance and discipline, without addressing other equally important concerns such as public accountability, responsiveness, and participation.[42] Many governments emerging after independence soon became undemocratic, over-centralized and authoritarian. Predictably, political monopolies led to corruption, nepotism and the abuse of power. African presidents replaced the colonial governor in fact and in deeds. Like the colonial governor, they became the sole embodiment of the social will and purposes of the countries they ruled. Repressive single or no party systems of government emerged.[43] With one party systems, power came to be concentrated in one man. Dissent, for which there had always been a secure and honored place in traditional African society, came to be viewed with ill-concealed hostility, almost as if it were treason.

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37. K. Ginter, The Domestic Policy Function of a Right of Peoples to Development: Popular Participation a New Hope for Development and a Challenge for the Discipline, (unpublished on file with author).

38. Ann Seidman, Toward an Alternative Development Strategy, in A.Y. YANSANE, PROSPECTS FOR RECOVERY AND SUSTAINABLE DEVELOPMENT IN AFRICA 263 (1996).

39. S.M. Shafeddin, The Impact of Trade Liberalization on Export and GDP Growth in Least Developed Countries, UCTAD Discussion Paper, no. 85, (July 1994).

40. See Robert B. Seidman and Ann Seidman, The Political Economy of Customary Law in the Former British Territories of Africa Inarticulate Premise, J. AFR. L. 44, 55 (1984); V. PALMER & S. POULTER, THE LEGAL SYSTEM OF LESOTHO (1972); Muna Ndulo, Customary Law and the Zambian Legal System, in P. TIKARAMBUDDE, THE INDIVIDUAL UNDER AFRICAN LAW 121-129 (1982); A. ALLOT, NEW ESSAYS IN AFRICAN LAW (1970).

41. B.O. Nwabueze, Our March to Constitutional Democracy, GUARDIAN LECTURE, July 24, 1989. See Seidman, supra note 36.

42. See C. GERTZEL, C. BAYLIES AND M. SZEFTEL, THE DYNAMICS OF THE ONE-PARTY STATE IN ZAMBIA (1984). The authors in the analysis of factors that led to the introduction of the one party system in Zambia note that the influences of the colonial legacy of bureaucratic authoritarianism continues in many parts of Africa. I. Dore observes that the imperfections of postcolonial constitutions were in part a reflection of the fact that those who prepared the colonies for independence were themselves not democratic and ignorant or insensitive to the prevailing social and cultural dynamics of the societies they had colonized. Dore, supra note 26.

43. Gertezel, supra note 42. See also A. Yusuf, Reflections on the Fragility of State Institutions in Africa, 2 AFR. YEARBOOK OF INT'L LAW, 2, 8(1994); L. Zimba, The Origins and Spread of One-Party States in Commonwealth Africa and Their Impact on Personal Liberties; A Case Study of the Zambian Model, in LAW IN ZAMBIA 113 (M. Ndulo ed., 1984); Nkumbula v. A. G. (1972) Z.R. 3 (Zambia).

Multiple parties, even if originally formed around national agendas, tended to lead to ethnically based parties that made African states ungovernable.[44] Single party or military rule was often regarded as a viable and sometimes desirable solution to the ethnically based parties in Africa's new modern states.[45] Ultimately, the party supplanted the machinery of the state and the differences between the two became blurred.[46] Thus, thirty years of independence produced a crisis in Africa and a litter of failed states. The characteristics of the resulting incapable states were typically characterized by: 1) highly centralized systems of governance; 2) excessive state control coupled with limited capacity to govern; 3) arbitrary policy-making and abusive executive power; 4) erosion of the boundaries between the state and civil society; 5) weak institutions of both state and civil society with few countervailing forces to the executive branch of authority; 6) unaccountable bureaucracies; 7) widespread corruption; 8) unjust legal systems lacking effective enforcement powers; 9) limited participation in governance by the general citizenry; and 10) preferential access to power and resources often determined by religious, ethnic, or geographical considerations. This political rigidity shut down public activity. As one commentator observed, "the men and women of spirit who are the leaven of every society either began to go into exile in foreign countries or withdrew into stultifying private life; to their loss yes, but to the even greater loss of society at large."[47] The result was unprecedented economic decline and mismanagement that resulted in unimaginable poverty and a growing economic divide between the urban and rural areas. In fact, the dreams of prosperity following independence and self rule became a nightmare of insecurity and poverty.[48] The 1970s and 1980s can rightly be characterized as lost decades for Africa.[49]

## The Establishment of Viable Political Systems: The Challenges

Economic recovery in Africa must therefore begin with a recuperation of those values which are acknowledged world-wide to be the true foundation of every true human society and which, in turn, are the foundation of social creativity and democratic governance.[50] African states need to establish stable political and constitutional orders that promote development

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44. Museveni main justification for his movement system in Uganda is that political parties form on the basis of ethnicity. *See* Y. Museveni, What is Africa's Problem? 42 (1992). He observes that one of the biggest factors weakening Africa is tribalism, and that in African politics tribalism is always emphasized. The Secretary-General of the United Nations has observed that this is compounded by the fact that the framework of colonial laws and institutions which most states inherited had been designed to exploit local divisions, not to overcome them. *See* Report of the Secretary-General, *supra* note 8.

45. S. Mubako, Single Party Constitution-A Search for Unity and Development, 5 Zambia L.J. 67 (1973); Republic of Zambia, Report of the National Commission on the Establishment of a One-Party Participatory Democracy in Zambia (The Chona Commission), Lusaka (1972).

46. Gertzel, *supra note 42*; J.M. Mwanakatwe, The End of the Kaunda Era 101 (1994).

47. O. Obasanjo, Africa in Today's World, The Africa Leadership Forum, Ota, Nigeria, (October 24 -November 1, 1988) (on file with author).

48. Alternative Futures for Africa 93 (T. M. Shaw ed., 1982).

49. Adebayo Adedeji, African Economy: Overview and Prospects for Recovery and Sustained Development at 1, African Leadership Forum, the Leadership Challenge for Improving the Economic and Social Situation of Africa, Ota, Nigeria (October 24, to November 1988).

50. Obasanjo, *supra* note 47.

and aid the conquest of poverty, hunger, disease and ignorance, while also guaranteeing citizens the rule of law and equal protection under those laws regardless of sex, color or ethnic origin.[51] If the continent is to respond successfully to the needs of its people and realize its dreams of rapid economic development, it will have to apply careful thought and inquiry to the proper organization of political, economic and administrative institutions which can ensure proper governance of the nation-state.[52] The aim should be to achieve a constitutional order that is legitimate, credible, enduring and structurally accessible to the people without compromising the integrity and effectiveness of the process of governance. Constitutional democracy in Africa will inevitably involve multiple or concurrent constitutional orders rather than a single center of authority and power, especially given that African countries are characterized by large territorial, multi-ethnic groupings, high rates of illiteracy, and poor communication facilities.

Constitutional democracy encompasses: a) the use of the constitution as a supreme and fundamental law to regulate and limit the powers of government, and securing the efficacy of such limitations in actual practice; b) ensuring that the legitimacy of the government is regularly established by requiring that governmental powers are not assumed or exercised except with the mandate of the people given at periodic intervals through free and fair elections or referenda executed and administered according to the constitution and well defined electoral laws; c) protection of the fundamental rights of the people; d) resolving disputes, including disputes relating to the constitutional propriety of legislation and other government acts, impartially and in accordance with the constitution and by regular, ordinary courts which are independent of the disputants; e) the application of ordinary laws regarding the execution of governance and adjudication of disputes in conformity with the limitations imposed by the constitution and in accordance with the procedure for law-making prescribed therein, while ensuring that such procedures conform to internationally accepted norms; f) holding political leaders and government officials accountable to the ruled for actions through clearly formulated and transparent processes; g) assuring the safety and security of citizens and the rule of law such that contracts can be fairly enforced both between the public and private operators and between private operators and the state; h) requiring public agencies to be responsive to the needs of the public and to promote social and economic development for the benefit of all citizens in an equitable manner and not just for a particular ethnic group; and i) providing information that permits accountability to be achieved, laws to be carefully applied, markets to function, and people to be creative and innovative.[53]

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51. Y. MUSEVENI, SOWING THE MUSTARD SEED: THE STRUGGLE FOR FREEDOM AND DEMOCRACY IN UGANDA 188 (1997); Kwamena Bentsi-Enchil, Civitas De Africana: Realizing the African Political Dream, 65 Zambia L. J. 2 (1969).

52. But as Gloppen has observed: "...neither ethnic conflict, nor (and even less so) problems of poverty, inequality, and violence are solved by enacting a constitution, not even if the ideal constitution could be found. Some constitutional structures provide more adequate frameworks, however, within which these problems may be addressed." This is what is critical in this whole matter of constitution making. S. GLOPPEN, SOUTH AFRICA: THE BATTLE OVER THE CONSTITUTION 264-265 (1997).

53. For an elaboration of some of these issues, see Third World Legal Studies, Building Constitutional Orders in Sub-Saharan Africa 1 at 34 (1988). As Singhvi put it during the elaboration

The basic law that implements constitutional democracy is the national constitution. It represents the basic structure of an organized society. Formal or informal, written or unwritten, its existence, in whatever form, is inevitable.[54] When one speaks of a modern constitution, however, notions of formality emerge.[55] In post-colonial Africa, this has come down to a single written document - a charter for the exercise of political power. Some scholars have criticized moves towards written constitutions and the current constitutional arrangements on the grounds that they are based on, or follow too closely, Western models of governance rather than African ideals of governance. These critics have questioned the relevance of Western models to the Africa condition.[56] Be that as it may, the impact of history seems clear; one may interpret history or reinterpret it, but no one can repeal it. While transplanting European models into Africa might be problematic, the motives of those who advocate "African solutions to African problems" are often suspect. Many post-independence dictatorships (and indeed the African one party system of governance in Zambia, Kenya, Tanzania and elsewhere in Africa) were justified on the grounds that they were a variant of democracy best suited to the peculiar African circumstances, and, at the same time, a natural facilitator for economic growth and national unity.[57] Today it is quite evident that these justifications had little to do with "African concepts of governance" and more to do with the consolidation of political power through the elimination of all political opposition.[58]

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of the South African constitution "a consistent framework of liberty and restraint is what the Constitutional Assembly is called upon to create for South Africa so that the constitution may at once prove to be the anchor, the campus and the steering wheel for the ship of the state." *See* L.M. Shinghvi, Democracy and the Constitution, Democratic Constitution Development, Pretoria, South Africa (July 17-20, 1995) (on file with author).

54. Ojwang observes, "[a] constitution is the scheme of organisation of public responsibilities which must be performed in any community. It identifies or prescribes the public organs of the community and vests in them particular roles which are to be performed in the interest of the people as a whole." J.B. OJWANG, CONSTITUTIONAL DEVELOPMENT IN KENYA 1 (1990).

55. But whatever form a constitution takes, its legitimacy and authority should be beyond question. As Siri Gloppen notes, "in order to have factual legitimacy and permanence, the constitution must be perceived as a permanent element of social life. It must be regarded as the stable rules of the game, which is more likely when it is believed to be resting on eternal moral principles." GLOPPEN, *supra* note 52, at 38-39.

56. R. HOWARD, HUMAN RIGHTS IN COMMONWEALTH AFRICA 16 (1996). In commenting on the issues of cultural relativism, social change, and human rights he concludes that during five centuries of contact between Africa and the Western world, social changes have been introduced that increasingly undermine any social structure or cultural uniqueness Africa might once have possessed. Yansane observes that colonialism destroyed many indigenous institutions by transforming non-European societies into European replicas. YANSANE, *supra* note 38, at 7. *See also* Wing, *supra* note 24.

57. Zimba, *supra* note 43, at 119. For example, in Kenya the post-colonial government justified the one party state on the basis that "Here . . . we seek out the modern constitutional form most suited to our traditional needs. . . . Our people have always governed their affairs by looking to an elected council of elders . . . headed by their own chosen leader, giving them strong and wise leadership. That tradition —which is an Africanism —will be preserved in this new constitution." OJWANG, *supra* note 54, at 79.

58. Mubako, *supra* note 45.

## AFRICAN CONSTITUTIONS AND A VIABLE POLITICAL ORDER

A serious search for viable constitutional arrangements in African states must begin with the frank identification and examination of the specific social, political and economic conditions present in the African countries. As Seidman has observed, most African constitution drafting that took place in the post-colonial era can be analogized to "an elaborate buffet, with elaborate constitutional provisions from other existing constitutions spread across the glittering sideboard, from which the constitutional maker filled her plate to her taste. . . sentences, paragraphs, whole sections and chapters float from one constitution to the next."[59] This was done without any serious attempt to connect the process to the social and political conditions in the countries concerned. This is not the correct approach for enacting legitimate constitutions that would adequately address African problems that are consistent with Africa's cultural and historical peculiarities. As Judge Chaskalson has observed: "constitutions are shaped by history. What is appropriate for one country in the light of its history, is not necessarily appropriate in another country with a different history."[60] Overall, one can accurately say that "many of these piecemeal constitutions have been symbolic at best and totally irrelevant at worst."[61]

There are several specific conditions within Africa which need to be addressed as a precursor to strong governance. There is the need in each country for sufficient national unity or cohesion to generate social and political power. These goals are beyond reach when countries operate as separate units. Additionally, African states need to accommodate the vast ethnic diversity that exists on the continent and acknowledge institutionally the intensity of the attachment Africans have to their ethnicity. Unfortunately, in much of the continent ethnic relations have been characterized by growing self-consciousness and, at times, intolerance, intransigence, and intemperance.[62] Against this background, the issue of ethnicity could potentially be destabilizing to the democratic process. Democracy can magnify rather than reduce the adverse effects of ethnicity. African states also need to accommodate the significant numbers of racial minorities that exist in their countries. Constitutions must deal with this fact sensitively by not only acknowledging the fears and apprehensions of the racial minority groups, but also by meeting their legitimate demands and meaningfully engaging them in political systems and nation-building. The issue of ethnic or racial minority protection has to be addressed in a proactive manner.

Also, the search for viable constitutional arrangements must acknowledge the newness and artificiality of African states which, for the most part, were recently and arbitrarily created during the colonial period. Basil Davidson identified the central role played by the Berlin Conference and other post-World War I actions in drawing and redrawing the colonial map. This post-independence map was drawn in a way that made no historical,

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59. Seidman, *supra* note 36, at 56.

60. A. Chaskalson, President of the South African Constitutional Court, Democratic Constitutional Development, Pretoria, South Africa (July 17-20, 1995) (unpublished manuscript on file with author).

61. Wing, *supra* note 24.

62. Anglin, *supra* note 11.

geographical, or ethnic sense.[63] More importantly, the quest for a viable constitution must anticipate and prepare for the general unfamiliarity that most people in an African state have with the philosophy and machinery of modern democratic governance. Further, African constitutions cannot ignore the disproportionate economic and social importance of public office to individuals in the midst of widespread poverty and ignorance. The search must recognize the temptations of arrogance, discrimination, abuse of power, and corruption that sometimes assail all persons in positions of power.[64] Good governance also calls for a response to the influence of money in the electoral process, especially in economies where a large percentage of the voters are unemployed.[65] This is complicated by the fact that most opposition parties in African countries lack resources to operate effectively, meaning that the funding of political parties should be addressed as well. The principle of government funding of political parties is well established across the democratic world. In the absence of state funding schemes, the party in power has an undue advantage as it has access to state resources and institutions to push its political agenda. Governance is further complicated by gender inequality which is perpetuated by cultural values and traditional roles assigned to women.[66] As Mills observed, only complete equality between all men and women in legal, political and social arrangements can create the proper conditions for human freedom and a democratic way of life.[67] The goal should be, as the Beijing Conference declared: to remove all obstacles to women's active participation in all spheres of public life and private life through a full and equal share in economic, social, cultural and political decision making.[68]

There is also a growing need to build a free and vibrant press. A free press can provide citizens with a range of information and opinions on the actions of the government, including fiercely critical views. This enables citizens to chose their representatives in an informed manner and force state officials to respond to public desires.[69] By exposing wrong-doing, a free press also encourages accountable behavior by public officials and discourages corruption. Further, a free flow of accurate information has economic implications in that a competitive market economy requires its economic actors to have access to relevant, timely and reliable information. The less available or credible the information, the greater the uncertainty and risk, and therefore the greater the cost of committing capital or labor.

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63. BASIL DAVIDSON, BLACK MAN'S BURDEN: AFRICA AND THE CURSE OF THE NATIONAL STATE 160-161 (1992)

64. Thabo Mbeki, Deputy President of South Africa, Republic of South Africa, Debates of the Constitutional Assembly, no. 1 at 10. (January 24 - February 20, 1995).

65. For a more detailed discussion of some of these issues, see Bentsi-Enchil, supra note 51, at 65-86.

66. H.J. SIMONS, AFRICAN WOMEN: THEIR LEGAL STATUS IN SOUTH AFRICA (1968).

67. J.S. MILLS, THE SUBJECTION OF WOMEN (1869). For a discussion of Mills on this issue, see D. HEL, MODELS OF DEMOCRACY 111 (1996). The inequality of the sexes has deprived Africa of a vast pool of talent. See also P. Andrews, Affirmative Action in South Africa: Some Theoretical and Practical Issues in THE CONSTITUTION OF SOUTH AFRICA FROM A GENDER PERSPECTIVE 49 (S. Liebenberg ed., 1995).

68. Platform for Action and the Beijing Declaration, Fourth Conference on Women, Beijing, China at 17 (September 4 - 15, 1995).

69. O.M. FISS, LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER 142 (1996).

In many African countries governments continue to own newspapers. In others, many newspapers are unable to survive without government subsidies, they practice self-censorship to avoid offending the hand that feeds them.

In building strong governance, it is also important to define and assess the role of the military in African states. It is also essential that the military be respectful of the democratic process. In some parts of Africa, especially West Africa, the military has proved to be the greatest threat to the development of democratic governance. The examples of Nigeria, Gambia and Sierra Leone illustrate this point.[70] Additionally, civil society within democratic states provides the checks and balances that assist in the regulation of governments. In Africa, years of one-party systems of governance and military regimes, have hindered the development of powerful civic organizations that could act as countervailing forces to governments. There is also a need to address the role of traditional institutions in modern African political systems. Finally, a serious search for viable constitutional arrangements must respond to the need to decentralize power.

A constitution affects the lives of all citizens and should address the concerns of all citizens regardless of their ethnicity, color, gender and station in life. As the Chief Justice of South Africa, Justice Ismail Mohammed, observed in a recent judgment in Namibia: "The constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed, it is a mirror reflecting the national soul, the identification of the ideals and aspirations of a nation; the articulation of the values binding its people and disciplining its government."[71] A constitution ought therefore to be an autobiography of the nation. The people must feel a sense of ownership of the document and see themselves and their history in it before they can respect, defend, and obey it. Van der Vyer has observed that a superimposed constitutional formulae or constitutional arrangements that "do not address the real causes of discontent [will result in] crisis."[72] Because of the importance of the issues relating to devolution and the role of traditional rulers in modern African political systems, these issues will be discussed in greater detail below.

## DEVOLUTION OF POWER AND THE ACCOMMODATION OF TRADITIONAL AUTHORITIES

In a typical African state, a large percentage of the people remain outside the formal structures of the state and rely on self help for their survival. Many of the people operating outside the formal structures of government are in the rural areas. The devolution of power can serve as a means of not only improving governance and enhancing the accountability of leaders but also making the state a real participant in people's lives. As

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70. Anglin, *supra* note 11.

71. When India launched its constitution-making exercise in the wake of the advent of independence, India's leader Jawaharlal Nehru described it as India's "tryst with destiny." *See* Shinghvi, *supra* note 53.

72. Johan D. van der Vyver, *Constitutional Options for Post-Apartheid South Africa,* 40 EMORY L.J. 745, 822 (1991). *See also* Wing, supra note 24.

noted earlier, post-independence African governments, like their colonial predecessors, tend to be overly centralized. Centralization of power refers to the constitutional concentration of power in the hands of a few executive offices and this greatly undermines the importance of courts, legislatures and sub-regional governments. This is usually reinforced by the tendency of most governments to concentrate the most critical human and financial resources at the headquarters, while leaving rural administration with a lean administrative structure that lacks adequate resources or discretionary authority. A major feature of any centralized state is the preoccupation it has with bureaucracy and planning and, hence, the preference for concentrated structures rather than diversified and decentralized institutions that emphasize the grassroots empowerment of the people. Another feature of the centralized state is financial centralization. The central state collects all of the most important and buoyant tax resources and makes scarce funds available to sub-national organs. Compounding this problem is the fact that financial transfers to sub-regional organs are done through grants that are distributed irregularly.

Effective devolution of power to local authorities involves the creation of local communities endowed with democratic decision-making bodies that possess a wide degree of autonomy with regard to their responsibilities. Devolution of power to local communities has been recognized in many parts of the world as one of the corner stones of democracy.[73] The right of citizens to participate in the conduct of public affairs is more directly exercised at the local levels. The existence of local authorities who are given real responsibilities can provide an administration which is both effective and close to the citizen. Unlike centralized systems, local government provides for more flexible responses attuned to local needs. It opens opportunities for innovation and experimentation in policy formulation and delivery. It can alleviate the workload of over stretched central government, something that is important in Africa given the level of development and transformation responsibilities that face a typical African government.[74]

Very few current African political systems have made any serious efforts to decentralize power. Even among those that profess commitment to it, there is a wide gap between political rhetoric and reality.[75] African governments tend to co-opt or, in extreme cases, abolish social institutions that they determine to be harmful to nation building. The results of the current arrangements include not only a waste of resources but also the suppression of corruption in central government institutions and the ability of lower level government institutions to expand or even maintain existing infrastructures. In addition, because power is not decentralized, the struggle to control the central government becomes a matter of life and death among the political leadership. Observers have noted that African states tend to be strong in those areas in which they ought to be weak (repressive

73. See Preamble, European Charter of Local Self-Government, Council of Europe Treaties, ETS No. 122.

74. R. Simeon, The Structures of Intergovernmental Relations, Democratic Constitutional Development, Pretoria, South Africa (July 17- 20, 1995) (on file with author).

75. B.C. Cacalia, Decentralization in Centralism: An Analysis of the Zambian Experience: 1964-1981, in ISSUES IN ZAMBIAN DEVELOPMENT 340 (K. Osei-Hwedie and M. Ndulo eds., 1984).

power) and weak where they ought to be strong (popular mobilization and responsiveness).[76] The process of democratization must go hand in hand with that of devolution of power to local communities. It is not enough to have democracy at the national level; it must be complemented at the sub-national and community levels. Societal and state institutions must exist as partners in social engineering. They must seek to empower the ordinary people in matters of governance. Democracy implies self-governance, and community-based social and political institutions ought to be the building blocks of a new and effective African polity.

Any examination of the modalities of effecting the devolution of power in Africa must address the future of traditional institutions of governance in modern African political systems.[77] There is a consensus among most Africans that traditional leaders, such as chiefs, should have a role in the governance of the state. But the exact role they should play is a source of disagreement and today their role remains largely undefined. For example, since 1994 nearly 800 South African chiefs and kings have complained that they do not have a proper role in the post-apartheid political system. Ongoing conflict has been reported between elected local structures and traditional leaders, with some local governments refusing to recognize traditional leaders.[78] There is a need to meaningfully accommodate traditional leaders into constitutional arrangements. For instance, they could be incorporated into the local government system and form the nucleus of that system. This could enhance the legitimacy of local government structures in the rural areas. Where traditional leaders provide the link between the people and the government. If colonial powers were shrewd enough to use traditional institutions in administering the colonial state,[79] why should modern African political systems not make use of them in efforts to reach out to small communities and build national consensus and cohesion?[80]

In any event, it makes sense to find a place in the national political system for traditional features of the African states which cannot be wished away. In many African countries, the majority of the rural population lead their lives within a traditional social and cultural context. For example, in highly urbanized South Africa about sixty percent of the people live in ru-

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76. James Paul, *Developing Constitutional Orders in Sub-Saharan Africa: An Unofficial Report*, in THIRD WORLD LEGAL STUDIES, *supra* note 53, at 5.

77. Nana Wereko Ampem II, The Role of Chiefs and Chieftaincy in the Development of a Democratic Constitutional Ghana, Democratic Constitutional Development, Pretoria, South Africa (July 17-20, 1995) (on file with author). At various points, some African countries have abolished chieftaincy only to re-instate it. Tanzania and Uganda are cases in point. In the South African constitutional negotiations, the question of what to do with traditional institutions was a major point of discussion. In the end, the South African constitution provides for the recognition of traditional institutions but leaves it to national legislation to provide for the role of traditional leadership as an institution. This does not really integrate them into the mainstream South African post-apartheid political system. *See* S. AFR. CONST. ch. 12, arts. 211(1), (2), and (3) and 212(1) and (2) (1996). The Ugandan Constitution takes the same approach. It states: "subject to the provisions of this constitution, the institution of traditional leader or cultural leader may exist in any area of Uganda in accordance with the culture, customs and traditions or wishes and aspirations of the people to whom it applies." UGANDA CONST. art. 246(1) (1996).

78. Mail Guardian, Johannesburg, South Africa (October 23, 1998).

79. F.D. LUGARD, THE DUAL MANDATE IN BRITISH TROPICAL AFRICA 149-50 (1905).

80. N. Nhlapo, Accommodating Traditional Forms of Governance in a Constitutional Democracy: A Motivation, Democratic Constitutional Development, Pretoria, South Africa (July 17-20, 1995) (on file with author).

ral areas under traditional leaders.[81] Those in the rural areas, in the absence of legitimate local institutions, have been driven to rely on informal institutions for routine affairs, particularly in the area of dispute resolution. Thus, it would be a mistake to sideline traditional institutions and establish wholly alien institutions that will have to work at slowly establishing their legitimacy with the public. Since democracy means involving the various communities in the governance of their affairs, it is imperative that rural communities are not ignored in any democratic arrangement. Every effort should be made to integrate traditional institutions into the modern political structures so that all institutions are made accountable and responsive to the people. The state's vital interests in public order and stability are enhanced, rather than diminished, by the accommodation of traditional governance within the modern political systems of governance.[82]

In advocating for incorporation of traditional structures in modern political systems, it is important to note that these institutions can at times be oppressive, exploitative, discriminatory and intolerant, especially to women and children.[83] The argument, however, is not that traditional institutions are perfect, rather that it is more effective to build democracy and effective governance through the traditional than through the untraditional. Since the goal is to establish a democratic order, the need to incorporate traditional institutions into the modern political system cannot take precedence over the needs of a democratic society.[84] With regard to objections that these institutions promote gender inequality, governments must address those areas that need reform, discard the discriminatory aspects of traditional institutions, and confront the values that underline gender discrimination and authoritarianism.[85]

In order to achieve effective devolution of power to local communities, the principle of local government should be recognized and provided for in the constitution. It should be clearly established that local government denotes the right and ability of these institutions, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility in the interests of the local population. This right should be exercised by councils or assemblies composed of members freely elected on the basis of direct, equal and universal suffrage. Powers given to local authorities should generally be full and exclusive.[86] They should not be undermined or limited by another central or regional authority except as

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81. Wing, *supra* note 24.

82. *Id.*

83. *See* M. Ndulo, "*Liability of a Paramour in Damages for Adultery in Customary Law*," 28 AFRICAN SOCIAL RESEARCH 179 (1981); N. Nhlapo, *The African Family and Women's Rights: Friends or Foes? in* ACT JURIDICA135 (1991); P. Andrews, *Uhuru at Last! Now What About The Women? Women and Rights in the New South Africa in* THE SOUTH AFRICAN CONSTITUTION AND THE ENFORCEMENT OF RIGHTS (P. Andrews and S. Ellmann eds., 1988).

84. Mbeki, *supra* note 64, at 11.

85. Much of the source of this discrimination is customary law. South Africa, and Namibia have provisions in their constitutions which render customary law which is in conflict with the constitution invalid. This practice should be emulated. It gives the courts the ability to declare gender insensitive customs and practices illegal and unenforceable. *See* S. AFR. CONST. art. 211(3) (1996); NAMIBIA CONST. art. 66 (1) (1989).

86. A good example is the South African approach. The South African constitution provides for Provinces and a system of local government have been created with their own legislatures and clearly defined powers. *See* S. AFR. CONST. arts. 103-150 (1996).

provided by law. To enable them to function effectively local authorities should be entitled, within the national economic policy, to adequate financial resources of their own, of which they should dispose freely within the framework of their powers. They should also have the power to levy local taxes and charges. The protection of financially weaker local authorities calls for the implementation of financial equalization procedures or equivalent measures that are designed to correct the effects of the unequal distribution of potential sources of finance.

## THE ESTABLISHMENT OF A DEMOCRATIC ORDER

Democracy is difficult to define. As Winston Churchill has stated, democracy is the worst form of government except for the rest of them. Given the difficulties of finding an acceptable definition, we will not attempt one here. Instead, we will take a descriptive approach and describe the characteristics of a functioning democracy. In a democracy, the following conditions are deemed essential: 1) system-wide pluralism—there should be no hindrance to alternative ideas, institutions, and leaders competing for public support; 2) freedom of expression and association as well as the protection of human rights; 3) an independent judiciary which has the power to rule on the constitutionality of legislation;[87] 4) accountability of the political leadership to the governed on the basis of openness, probity and honesty and 5) a non-partisan, ethnically diverse, and professional civil service that is accountable to the governed.[88] In a young democracy, an independent civil service can act as a hedge against anarchy when there are unavoidable clashes among political leaders. Periodic elections can give voters the opportunity to decide whether to renew the mandate of existing leaders or to elect new ones. People should also be afforded the opportunity to remove any party exercising power and this can only be done effectively in a multiparty political system. To guarantee public acceptance of election outcomes, it is important that there are independent election mechanisms to ensure that those elections are indeed free and fair.

The process of democratization goes beyond the question of simply installing a multiparty system.[89] The demands for a multiparty system are easier to meet than a comprehensive demand for democracy. Democracy means the freedom of the people to determine their life-destinies such as

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87. As Nwabuze has observed "the African politician, uninhibited by the influence of tradition on which respect for the independence of the judiciary is based in Britain, is also exposed to far greater temptation to interfere with the judiciary, with judges having, unlike in Britain, to decide red-hot political questions concerning the interpretation of the constitution and the validity of laws enacted by the legislature." B.O. NWABUEZE, JUDICIALISM IN COMMONWEALTH AFRICA 267 (1977); see also T. AKINOLA AGUNDA, THE JUDICIARY IN THE GOVERNMENT OF NIGERIA 18 (1983) (discussing some of the problems that confront the judiciary in Africa and emphasizes the need for transparent methods of appointing the judiciary).

88. K. Bentsi-Enchil, supra note 51.

89. In 1991, the Secretary-General of the United Nations wrote in this regard: "elections in and of themselves do not constitute democracy. They are not an end but a step, albeit an important and often essential one, on the path towards the democratization of societies and the realization of the right to take part in the governance of one's country as enunciated in major international human rights instruments. It would be unfortunate to confuse the end with the means and to forget that democracy implies far more than the mere act of periodically casting a vote, but covers the entire process of participation by citizens in the political life of their country." Report of the Secretary-General (A/46609), para. 76.

the right to build their own organizations, residences, schools and cultural institutions. These entitlements should be beyond the reach of the apparatus of the state and should be structured in such a way that the power and privileges of the rich do not arbitrarily and oppressively interfere with the rule of democracy. In safeguarding these rights, civil society organizations, which promote particular issues such as peace, a clean environment, human rights, and gender awareness must play a critical role. To a large extent, democracy is less of a formalistic system than an attitude. It is a way of approaching the business of government, setting up rules for government, a way of creating enough checks and balances that the government is less dependent on individuals and their personal whims and more on systems and processes.[90] There is probably no strong connection between democracy and having a written constitution. Britain and New Zealand stand out as strong democracies and yet do not have written constitutions. Where citizens of a country have no sense of democracy and are unwilling or unable to insist that their leaders deliver democracy, a written constitution, however eloquently it proclaims democracy, will be insufficient to guarantee it.[91] Democracy depends on values such as tolerance and trust which cannot be secured in the written document alone. Rather, these values, to gain a foothold in a given country, depend on the political will of a nation. Nonetheless, in a country without established democratic conventions, having a written constitution is a major step towards building a framework within which those values may be cultivated and developed.

## The Electoral system and Effective Representation

Free and fair elections are indispensable features of democratic governance. In addition, they are the obvious and traditional way of ensuring accountability and providing an institutional framework for the peaceful resolution of conflicts among competing political parties.[92] However, when the rules of the game are not universally respected, the process becomes a source of conflict rather than a mechanism for resolving strife.[93] Elections must be organized in a manner that ensures maximum participation of all stake holders in the political system. Unfortunately, many elections in Africa have been disputed and have sometimes led to conflict rather than the advancement of democracy. In the Congo (Brazzaville) for instance, the 1992 election precipitated a civil war between supporters of rival presidential contenders. Similarly, the May 1998 elections in Lesotho led to a total breakdown of law and order and required the intervention of Southern African Development Forces in order to restore peace to the region. The 1996 Zambian elections led to unprecedented tensions in the country and

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90. *See* Learned Hand, The Spirit of Liberty 189-90 (1960).

91. M. Ndulo, *The 1996 Zambian Constitution and the Search for a Durable Democratic Constitutional Order in Africa,* 5 Afr. Yearbook of Int'l L. 174, (1997).

92. *See* Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE: Universal Declaration on Human Rights, Article 21; American Declaration of the Rights and Duties of Man, Article xx ; International Covenant on Civil and Political Rights Article 25; Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, First Protocol, Article 3; American Convention on Human Rights, Article 16; and African Charter on Human and Peoples Rights, Article 13.

93. Anglin, *supra* note 11.

to an attempted coup.[94] These tensions and disruptions result when national elections have been manipulated by the party in power thus, resulting in substantial minority under-representation in Parliament or a feeling of being cheated by the process. In addition, many elections have been riddled with irregularities not always calculated to defraud but sometimes resulting from the inability of the state to conduct such a formidable managerial and logistical undertaking effectively.[95] As Naomi Chazon has observed, elections provide ritual occasions for sanctioning the existing power constellation but allow for precious few opportunities for affecting the composition of the ruling circles or polity outcomes.[96] The utility of elections is further undermined by the fact that the electoral process is often not accompanied by the building of institutions that foster accountability and greater transparency in the governance of the country.[97] The contemporary challenge is to make elections an effective tool for choosing representatives of the people and also to make them an integral process in the construction of a democratic state. At a minimum, national elections must be organized in a manner that ensures maximum participation of all sectors of the population in the political system.[98]

The design of an electoral system is increasingly recognized as a key lever that can be used in the promotion of political accommodation and stability in ethnically divided societies. Andrew Reynolds has observed that though appropriate electoral laws are insufficient to ensure stability and good governance in divided societies, poorly designed laws can entrench societal divisions and exacerbate pre-existing conflicts.[99] In many African countries, election results show the main political party as having overwhelming support in a core region. This is because

> for most African politicians the tribe is the base for political activity and tribal sentiment the focus of appeal, which inevitably disables them from rising above tribal interests and pressures in the administration of government. The result is that the government comes to be regarded as one huge cake, already baked, and it is the duty of a political leader to secure for his tribe as large a share as possible. Every question, whether it be the award of scholarships or contracts, appointments in the public service, economic development or the siting of industrial projects are viewed

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94. *The 1996 Zambian Elections*, POST NEWS PAPER, (Lusaka, Zambia) October 29, 1997.

95. Report of the Commonwealth Observer Group to the South African Elections, End of Apartheid, 26-29 April 1994; and Final Report of the United Nations Observer Mission in South Africa (UNOMSA) to the United Nations Secretary-General, (May 26, 1994). Both reports cite difficulties encountered in organizing the South African elections which was due to the gigantic nature of the task of organizing the first ever democratic election.

96. NAOMI CHAZON, POLITICS AND SOCIETY IN CONTEMPORARY AFRICA 138 (1988).

97. *See* Hum. Rts. Watch/Africa, Zambia: Elections and Human Rights in the Third Republic, December 1996. This is a report on the 1996 Zambian elections. The May 1998 elections in Lesotho which had been pronounced as "free and fair by international observers" and in which the opposition won only one seat were later found to have been riddled with irregularities by the Langa Commission of Inquiry. *See* Mail Guardian, *supra* note 78. The elections led to a crisis which caused a complete collapse of law and order in Lesotho and to Military intervention by the Southern African Development Community.

98. Center for Development Studies (CDS) and the National Democratic Institute for International Affairs (NDI), Free and Fair Elections, Capetown, South Africa (March 12-14, 1993).

99. Andrew Reynolds, *Constitutional Engineering in Southern Africa*, 6 J. AFR. DEM. 86-100 (1995).

from the standpoint of tribal advantage, and support or opposition to it dependent upon whether or not it advances the interests of one's tribe.[100]

The system of winner-take-all, which is applied in most African countries, tends to reinforce this kind of approach to politics as it creates permanent losers and permanent winners. The winner-take-all system is based on the principle of territorial representation, emphasizing the relationship between the voter and the representative.[101] The size of a party's representation is thus determined not only by the number of votes received, but also by their geographical concentration. Should a party's votes be too widely scattered or too highly concentrated, under-representation in parliament could result. In such a situation, groups that are numerically small can never win an election. They, therefore, remain permanently aggrieved. Such a system, will be unable to implement democratic principles in deeply divided societies that are non-homogeneous.[102]

To enhance democracy, African countries must re-examine the appropriateness of the proportional representation system in their ethnically and racially divided societies.[103] In a proportional representation system the political parties compete for support in multi-member constituencies and the division of seats is determined by the actual support that a party receives. The main objective of proportional representation, in contrast to the winner take all system, is to ensure that there is a proportional ratio between the votes received and the seats allocated to a particular party. The net effect of proportional representation is that all political parties (not only the majority or larger ones) are represented in accordance with their support base.[104] The experiences of South Africa and Namibia[105] suggest that in ethnically-divided societies, the system of proportional representation in one form or another is more appropriate than that of winner-take-all system. If minority groups are to accept their legislature, they must be adequately represented in it. Winner-take-all elections do not sufficiently address this issue.[106]

100. B.O. NWABUEZE, *supra* note 87, at 17.
101. Berus des Villiers, *An Electoral System for the New South Africa, in* CONSTITUTION-MAKING IN THE NEW SOUTH AFRICA 29 (A. Johnson, S. Shezi & G. Brandshaw eds., 1993).
102. Bagdanor argues that it seems that a national culture unified both ideologically and ethnically may be a precondition for the successful working of the plurality and majority methods. V. BOGDANOR, THE BACKWELL ENCYCLOPEDIA OF POLITICAL INSTITUTIONS (1987).
103. Antonia Nadais, *Choice of Electoral Systems, in New Democratic Frontier,* National Democratic Institute, Washington, D.C. 190-203 (1992); Lani Guinier, points out how proportional representation can be less polarizing than conventional race-conscious districting. In her book she gives examples where not only blacks and women but Republicans had been elected for the first time when Chilton County, Alabama, adopted cumulative voting, a strategy also used in corporate board rooms in America. *See* LANI GUNIER, LIFT EVERY VOICE: TURNING A CIVIL RIGHTS SETBACK INTO A NEW VISION OF SOCIAL JUSTICE 117 (1998).
104. There are many variations of both winner take all and proportional representation system. *See* des Villiers, *supra* note 100.
105. Andre du Pisani, *Namibia: The Making of a New State in the Region, in* CONSTITUTION-MAKING IN THE NEW SOUTH AFRICA 234 (A. Johnson, S. Shezi, and G. Badshaw eds., 1993). For opposing views, *see* G. Lardeyret, 2 J. DEM. 30 (1991). Lardeyret argues that proportional representation tends to reproduce ethnic cleavages in the legislature.
106. A. Lewis observes that "the surest way to kill the idea of democracy in a plural society is to adopt the Anglo-American system of first- past- the post." He further observes that; "the vagaries of plurality elections would produce racially exclusive and geographically parochial governments that would exploit a "mandate" from a plurality of the electorate in order to discriminate systematically against minorities." A. LEWIS, POLITICS IN WEST AFRICA 71 (1965).

The use of winner-take-all system in the 1994 elections in South Africa would have had a number of negative consequences. The immediate result would have been a denial of parliamentary representation to critical minority parties such as the Freedom Party, Democratic Party and the Pan Africanist Congress (PAC).[107] Proportional representation would allow the South African parliament to adequately reflect the political diversity of South African society as a whole.[108] Nonetheless, a major criticism of proportional representation is that it allows extremist parties to gain representation in parliament thereby giving them legitimacy in society.[109] There is also the perception that the system leads to coalitions and therefore weak governments. These objections are far outweighed by the benefits the system contributes to stability and representation of all population groups in a country. No government, not even one with a big majority, would be able to work effectively if its society were perpetually on the verge of permanent breakdown and aggravated by the threats of extra-constitutional action by underrepresented political minorities. Moreover, it would appear that proportional representation rather than the winner-take-all system is more in line with traditional African political organization. Traditional laws within African society insisted that major decisions affecting the whole community should not be made by a bare majority of the society. As Bentsi-Enchil has rightly observed, ancestral law insisted that everything should be done on achieving the consensus of all key sectors of the community before a decision was made.[110]

After the choice of the electoral system, the second fundamental issue is deciding whether to have a presidential or a parliamentary system. In a majority of African countries, (such as Zambia, Zimbabwe, Tanzania, Ghana, and Kenya), the president is elected directly in a national election.[111] Good constitutional design for divided societies dictates against directly elected presidents. There are three key traits of presidential rule that often have negative consequences: temporal rigidity, majoritarianism, and dual democratic legitimacy.[112] In a divided society without a history of stable democracy, there is no assurance that the losers of a presidential race will accept defeat in what amounts to a zero sum game. Recently, a member of the US State Department laid the blame for the collapse of peace plans in Angola in 1994 and the bloody conflict that ensued largely within the country's presidential system. It was observed that the contesting leaders, Dos Santos and Savimbi, were vying for the only prize worth having and that it was inevitable that Savimbi would resume his violent struggle

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107. *See* Report of the Commonwealth Observer Group to the South African Elections, *supra* note 95 (citing results of the 1994 South African elections).

108. The results were as follows with number of seats in brackets: African National Congress (252); National Party(82); Inkatha Freedom Party (43); Freedom Front (9); Democratic Party (7 ); Pan African Congress (5) and African Christian Democratic Party(2). *Id.*

109. Nadais, *supra* note 103, at 193.

110. Bentsi-Enchil, *supra* note 51, at 72.

111. Some, like Kenya, moved away from the parliamentary system. At the time that Kenya became independent, the president was an elected member of Parliament and his term of office was tied to that of Parliament. OJWANG, *supra* note 30, at 79. The Zambian Constitution provides for direct elections for the president. *See* ZAMBIAN CONST. art. 34, art. 35 (1996).

112. MATHEW SHUGART AND JOHN CAREY, PRESIDENTS AND ASSEMBLIES: CONSTITUTIONAL DESIGN AND ELECTORAL DYNAMICS 28-43 (forthcoming 1999).

after losing the election. In Nigeria, the all-or-nothing structure of the 1993 presidential election made it easier than it would have been for the military to succeed in annulling the election before the final results had been officially announced. Unsuccessful candidates had no immediate stake in the political outcome, and many readily acquiesced in the annulment in the hope of being able to contest again.[113] In 1992 in the Congo (Brazzaville), Sassou Nguesso succumbed to popular pressure and permitted multiparty elections in which he stood as a candidate for president. After losing the election, he became obsessed with ousting his successor, Pascal Lissouba. He mounted a military campaign against his successor until he succeeded in regaining power in June 1998.[114]

Directly-elected presidents interpret their mandate as distinct from that of the members of parliament entitling them to supervise parliament's work. Another danger of a presidential system is that a directly elected president tends to be pressured into ethnic or regional exclusivity. Such presidents have a great incentive to offer special privileges to their own ethnic or regional groups as a means of ensuring re-election through a simple majority or plurality of votes. Arrangements where the president is elected by parliament are more conducive to formal and informal power sharing arrangements. In such a system, even without grand coalition requirements, minority parties can influence the choice of president and the composition of the cabinet, particularly where there is no clear parliamentary majority.[115] Given the factors discussed above, it would seem that having a president elected by members of parliament would foster a feeling of greater participation in the election among all citizens of the country as represented by parliament. South Africa[116] and Eritrea[117] are examples of African countries that presently follow this arrangement. The adoption of the parliamentary system would be an extension of the proportional representation system to the elections for the office of president.

## THE PROCESS OF DEVELOPING AND ELABORATING A CONSTITUTION

The process of adopting a constitution is both important and substantive.[118] The process must be legitimate and legitimacy requires inclusiveness.[119] It should represent the interests of all the people in the country,

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113. Ann Reid, Conflict Resolution in Africa: Lessons from Angola, INR Foreign Affairs Brief, Bureau of Intelligence and Research, US Department of State, Washington, D. C. (April 1993); Ian Campbell, Nigeria's Failed Transition: 1993 Presidential Election, 12 J. CONTEMP. AFR. STUD. 182 (1994).

114. Anglin, supra note 11.

115. Gloppen, supra note 52, at 217-218.

116. S. AFR. CONST. art. 86, (1996).

117. Article 41 of the Eritrean Constitution provides that the president shall be elected from amongst the members of the National Assembly by a vote of the majority of its members. A candidate for the office of the President must be nominated by at least 20 percent of the votes of all the members of the National Assembly. ERITREA CONST. art. 41, (1996).

118. M. Ndulo and R. B. Kent, Constitutionalism in Zambia: Past Present and the Future, 40 J. OF AFR. L., 257 (1996).

119. In developing the constitution of South Africa, the Constitutional Assembly strove to ensure that the general public was involved in the development of the constitution and believed that it belonged to them. A study carried out in 1966 found that 60 per cent of the adult population had heard about the Constituent Assembly. When asked whether they believed that the Constituent Assembly would treat their submission seriously, 41 per cent responded in the affirm-

and the people must be made to feel that they own the process as well as the product.[120] A constitution should be the product of the integration of ideas from all the major stake-holders in a country (i.e., all political parties both within and outside parliament, organized civil society and individuals in the society).[121] Constitution making structures must be open to the views and opinions of all stake-holders who must be given a meaningful opportunity to make their views known. If a constitution must represent the aspirations and dreams of all the people, deliberate steps have to be undertaken to ensure that those who might be disenfranchised are meaningfully engaged in the process.[122] The process must be transparent, that is, it must be undertaken in full view of the country and the international community. A constitution perceived as having been imposed on a large segment of the population or having been adopted through the manipulation of the process by some of the stake-holders is unlikely to gain sufficient popularity or legitimacy to endure the test of time.

The post-independence constitutions in Africa were the result of agreements reached at independence conferences which followed nationalist campaigns for independence.[123] The texts of the constitutions of these new states followed colonial models developed by the various colonial powers for newly independent states. Mozambique, Namibia, Angola and South Africa followed rather different paths because protracted liberation struggles preceded independence in those countries. One of the unfortunate legacies of the colonial model has been the "too-much-detail" approach in African Constitutions. For example, a typical African constitution contains hundreds of detailed provisions which might undermine its development and its ability to meet the needs of a rapidly changing society.[124]

Since independence, the practice in many African countries has been to adopt new constitutions through the use of commissions.[125] The commission typically tours the country, soliciting views relating to possible constitutional arrangements from the public and ends its work by recommending a draft constitution for adoption by the national legislature. This approach fails to produce durable and lasting constitutions for many of the countries that have used it. Zambia is a case in point where the

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ative. GLOPPEN, *supra* note 52, at 264-265. But the study also provides a caution noting that "the high confidence in the process, in the ability of the constitution to reflect everybody's views, and in guaranteeing freedom and equality, could also prove to be a double-edged sword, if expectations turn into disillusionment." *Id.* at 266.

120. *See* Report of the Commonwealth Observer Group, *supra* note 95.

121. Ndulo and Kent, *supra* note 118, at 256.

122. Thabo Mbeki, *supra* note 64, at 10.

123. *See* Report of the Constitutional Review Commission, Government of the Republic of Zambia, Lusaka, Zambia, (1995). Chapter 2 of the report reviews the constitutional history of Zambia. The 1964 Zambian Constitution was provided for in Schedule 2 to the Zambian Independence Order, 1964, promulgated by Her Majesty in Council under the provisions of the Foreign Jurisdiction Act, 1890.

124. The 1973 Constitution of Zambia is 291 pages long. It contains well over 130 articles. Each of the articles has several sub sections. John Hatchard and Peter Slinn, *Towards an African Zimbabwean Constitution?*, 1988 THIRD WORLD LEGAL STUD. 119 (1988).

125. Report of the Constitutional Review Commission *supra* note 123. *See* Report of the National Commission on the Establishment of a One-Party Participatory Democracy in Zambia, Lusaka, Zambia (1972).

opposition parties continue to dispute the constitution adopted in May 1996 on the grounds that it does not reflect the views of the Zambian people and that the process was manipulated by the ruling party.[126] This experience and others suggests that the use of commissions to recommend a constitution is susceptible to manipulation by the government in power and often results in the imposition of its preferred constitutional model. This situation is further complicated by the public perception that such commissions are comprised of people sympathetic to the ruling party. Moreover, on practical grounds, the use of a commission with a broad and unregimented agenda to collect constitutional proposals is inappropriate for the elaboration of a complex document such as a constitution.

A major drawback of the commission method as practiced in Africa is that people would come to the commission hearings and without any guidance whatsoever, voice their opinions about what they individually consider to be constitutional issues.[127] Typically, the issues they would address are not appropriate for inclusion in a national constitution. A large number of petitioners would take advantage of the process to air grievances relating to issues such as employment, land allocation, lack of schools, lack of health care, inadequate transport facilities, and development rather than those relating to the constitution. Questions of relevance and weight to be attached to the individual submissions would be glossed over for political expediency or decorum. It is this scenario that provides a perfect opportunity for the government in power to manipulate the constitution-making process. Besides, with thousands of submissions, an average lawyer could easily write any number of versions of a constitution and find justification in the submissions made to the commission for each one of them. South Africa and Namibia stand out as unique in the process they adopted in elaborating their national constitutions.[128] In both countries, constitutions were adopted by democratically elected constituent assemblies specially elected to elaborate a national constitution. This process ensured that in each of these countries, before the country's constitution was adopted, there was extensive consultations with the people and all the principal stake-holders in the respective countries.[129] It is imperative that a broad spectrum of people discuss and voice their opinions as to what the proper constitutional arrangements for the country might be. In Africa, the difficult question is how to do this effectively so as to prevent the manipulation of the system by the party in power.

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126. *See* Hum. Rts. Watch, *supra* note 97, at 13.

127. Report of the Constitutional Review Commission, *supra* note 123.

128. *See* J. Cottrell, *Constitution of Namibia: An Overview*, 35 J. AFR. L. VOL. (1991); A. JOHNSON, S. SHEZI AND G. BRANDSHAW, CONSTITUTION- MAKING IN THE NEW SOUTH AFRICA (1993); The End of Apartheid, Report of the Commonwealth Observer Group to the South Africa Elections, (April 26-29, 1994); Report of the Commonwealth Observer Group, *supra* note 95; Nation Building: The UN and Namibia, National Democratic Institute for International Affairs, 26 (1990).

129. In a study carried out in mid 1996 "60% of the adult population had heard about the Constituent assembly. When asked whether they believed that the Constituent assembly would treat their submission seriously, 41 per cent responded positively." An amazing 57% of the respondents believed that the constitution would guarantee freedom and equality for all South Africans. GLOPEN, *supra* note 52, at 264-165.

The South African experience teaches us that in order to meet the needs of the largest possible segment of the population and to make the greatest number of possible consultations meaningful, the method of consultation must be properly structured so that there are productive and open discussions. An appropriate strategy would be to select a group of experts representative of all the political parties operating in the country and other stake-holders to draw up a draft constitution. The drafting should be informed by theme committees that are integrated into a structure that facilitates public participation in the exercise.[130] For example, the South African constitutional exercise was organized along the following six themes: character of democratic state, the structure of government, the relationship between levels of government, fundamental rights, judiciary and legal systems; and specialized structures of government.[131]

The main task of the committees would generally be to gather, collate, and refine the views of the political parties and the public on specific issues then submit them to the constitution-making body. The draft constitution as established by the constitution-making body should be comprised of those constitutional principles established and agreed upon by all the stake-holders before the drafting exercise commences. It should also be accompanied by commentaries on each of the provisions contained in the draft constitution, analyzing the various aspects of the constitution, highlighting options, and identifying difficulties that might be incurred in the application of the various suggested provisions. Such a document should then be subjected to public scrutiny, discussion and debate in a forum such as a constitutional assembly. This approach would structure the ensuing debate along specific constitutional themes. The existence of a draft would serve to limit the perimeters of discussion to constitutional issues and avoid the practice of petitioners addressing the commission on every aspect of human endeavor. After a constitution is drafted, the next issues that arise concern how to involve the people in the adoption of the draft constitution so as to give it maximum legitimacy. The supreme law of the land should not be adopted using the same procedures as those that are available for ordinary legislation.[132] A constitution should have sanctity and should not be subjected to willful amendments.[133] There are two methods that have been used in the adoption of constitutions in Africa in the post colonial period: 1) adoption through a two-thirds majority in Parliament and 2) the adoption through a constituent assembly or national referendum.

It can be argued that the adoption of the constitution through a constituent assembly or referendum is unnecessary because the enactment of a

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130. South Africa adopted this method. *See* Republic of South Africa, Debates of the Constitutional Assembly, Capetown, South Africa, 3 (January 24 - February 20, 1995).

131. H. Ebrahim, The Process of Drafting South Africa's New Constitution, International Roundtable on Democratic Constitutional Development, Pretoria, South Africa (July 17-20, 1995).

132. Report of the Constitutional Review Commission, Government of the Republic of Zambia, Lusaka, 64 (1995).

133. Most African constitutions allow for the amendment of the constitution with a two-thirds majority. This is not a significant constraint and is one that is easily obtained in systems where the opposition is often token. *See* ZAMBIA CONST. art. 72 (1991).

constitution is a power reserved to the legislature.[134] Whether the legislature has power to enact a constitution is not the issue. The real question is how to ensure that the sovereign will of the people, on which the edifice of democracy rests, occupies center stage in the process of producing a legitimate, credible, and enduring constitution. The relationship between parliament and the people can only endure where it is realized and accepted that the people are supreme. Therefore, in matters of great national importance, such as the adoption of a national constitution, parliament must consult and defer to the wishes of the people who are the source of popular soveirgnity.[135] A successful constitution is one which obtains legitimization by popular will.[136] Popular democracy demands the institutionalization of a culture of consultation and reciprocal control with regard to law-making and the use of power and privileges. The adoption of a constitution through a referendum is one of the most transparent ways of furthering the culture of consultation in a democracy.

Requiring a two-thirds vote in parliament to approve a constitution is not an effective safeguard against the adoption of an unpopular or unfair constitution or amendments to it. The two-thirds majority requirement is often within the reach of the largest party in parliament especially in a winner-take-all electoral system.[137] Therefore, in order to safeguard democracy, much more should be required to effect a constitutional amendment than the will of the majority party. Popular consultation in the form of a referendum should in fact be an entrenched feature in African constitutional practice as it can serve as a mechanism for obtaining the mandate of the people on constitutional matters and discourage frequent constitutional amendments. In addition, the involvement of the people in the adoption of a national constitution is an educational experience for them and enables them to focus on the contents of the constitution in a manner they would not have done otherwise. Once adopted the constitution should have sanctity and should not be subject to willful amendments. For example, the Namibia constitution has adopted a novel approach that provides that the "Bill of Rights" provisions in the constitution may not be diminished or eradicated through amendments and any such repeal or amendment shall be invalid.[138] Recent efforts in Namibia to amend the constitution and remove the two-term limitation on the presidency thus, granting the incumbent President opportunity to serve a third term are unfortunate. These types of constitutional revisions can only serve to undermine the sanctity of the Namibian constitution and the development of democracy in that country.[139]

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134. The Government of Zambia argued that way with respect to the 1996 Constitution. *See* The Mwanakatwe Constitutional Review Commission Supplement, Republic of Zambia, Government Paper, no. 1 (1995).

135. B.O. NWABUEZE, CONSTITUTIONALISM IN THE EMERGENT STATES 1305 (1973).

136. *Id.* at 25.

137. Ndulo and Kent, *supra* note 118, at 264.

138. NAMIBIA CONST. art. 131. (1989).

139. *See* Mail Guardian, *supra* note 78.

THE INTERNATIONAL COMMUNITY AND THE DEVELOPMENT OF
DEMOCRACY IN AFRICA

In thinking about governance, it is also important to think about the role the international community and multilateral development banks should play in the development of good governance in Africa. Until recently, multilateral development banks were not very helpful in the promotion of good governance in Africa. They sought to avoid any association with human rights concerns labeled "political" and therefore outside their legal competence.[140] In the case of the World Bank and the IMF, this view rested on restrictive charter provisions which stated: "only economic considerations shall be relevant" to decisions thereby prohibiting interference in the political affairs of a country. Unfortunately, this policy has often served to channel financial resources to dictatorships at critical times thereby enabling them to survive domestic pressure for good goverance.[141] Bank policy, though still unsatisfactory in its application, has somewhat changed and is beginning to respond to the denials of basic civil, political and economic rights that have seriously impaired economic development in many parts of Africa. In recent times, the international community and multilateral development banks have been involved in the promotion of democracy through programs aimed at election monitoring and infrastructure development to help guarantee free and fair elections.[142] They have also been involved in building the capacity of non-governmental organizations and institutions by assisting governments in designing and carrying out long-term strategic programs to improve both public sector management and the development of an independent press.[143]

International assistance, if properly structured and targeted, can play a facilitating role in the development of good governance in Africa. Securing democratic development in Africa will require the active collaboration of various actors engaged in that endeavor, including the international community. Multilateral development institutions and the international community could use their economic leverage to put pressure on African governments thereby improving their democratic governance. Economic difficulties have forced many African countries to become more dependent on Western aid and international development institutions. Moreover, the

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140. Patricia Armstrong, *Human Rights and Multilateral Development Banks: Governance Concerns in Decision Making*, 88 AM. Soc'y INT'L L. PROC. 271, 277 (1994). She points out that one multilateral development bank The European Bank for Construction and Development created in 1990 has a charter quite different from the World Bank model. Its charter conditions assistance on, inter alia, a country's commitment to and application of "the principles of multiparty democracy, pluralism and market economics." *Id.*

141. In November 1996 when the Zambian government was under pressure to abandon discriminatory legislation which was designed to bar certain members of the opposition from standing for the presidency, the World Bank released funding to the government. An example of where pressure worked is Kenya. Its decision to accept multiparty politics was a result of the withholding of funds from the international community. *See* Willy Mutunga, *Building Popular Democracy in Africa: Lessons from Kenya, in* K. OLOKA-ONYANGO, KVUTHA KIBWANA & CHRIS PETER, LAW AND THE STRUGGLE FOR DEMOCRACY IN EAST AFRICA 199 (1996).

142. M. Ndulo, The United Nations and Monitoring of Elections (1996) (unpublished manuscript on file with author)

143. Report of the Secretary-General, Support by the United Nations System of the Efforts of Governments to Promote and Consolidate New or Restored Democracies, (A/51/512) (October 18, 1996).

ruling elites are aware of the need for international approval. There is a
clear recognition that failure to cultivate an internationally acceptable im-
age would inevitably result in the international marginalization of the rul-
ing elites. On the other hand, international aid agencies and donor
countries have become increasingly aware of the link between good gov-
ernance and development. The democratic practices and human rights
records of these countries could be made key factors in the provision of
financial support and debt relief. This calls for a new approach in relations
between the Western governments and African countries. In the Cold War
era, assistance was given regardless of whether the dictator concerned was
violating human rights and regardless of whether funds earmarked for de-
velopment might have been misused or misplaced.[144] A system that pro-
motes absolute-aid could be connected to the development of popular
participation and good governance which are both preconditions for self-
sustaining and lasting economic growth.

Yet, there is debate as to the appropriateness of conditionality and its
implications for the sovereignty of African nations.[145] One view is that
conditionality is unacceptable as it contravenes the principle of non-inter-
ference in the internal affairs of a state and the inviolability of national
sovereignty. In addition, holders of this view argue that the system of
multi-party politics (which is often used as a criterion for democracy) is not
an accurate commitment to democracy, and, by itself, is no guarantee for
democracy and good governance. It is further argued that democracy and
popular participation in governance in Africa should be self-induced and
sustained, rather than externally imposed. In the area of human rights, the
world has moved from a rigid adherence to the principle of sovereignty and
non-interference in the internal affairs of states to a more liberal interpre-
tation of sovereignty. More and more the world has come to accept the
idea that human rights are a concern of every one every where. As has
been recently observed:

> Individual governments are responsible to the international community
> and to an international legal structure in how they treat their own citizens
> and others. This is a claim that could not have been made before the
> second World War. Sovereignty has taken on a new meaning. It is con-
> strained. The normatic claim by which a group says it is sovereign, en-
> joying a right of autonomy and self-government, is part of a structure that
> includes other claims as well. The westphalian state system co-exists with
> the claims of international human rights.[146]

Indeed, claims of sovereignty are often self-serving arguments ad-
vanced by rent-seeking politicians. These arguments devalue the efforts of
public servants and scholars in Africa who have worked and argued for
accountability and transparence in governance affairs. Often these efforts
were made under extremely difficult and dangerous circumstances long

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144. K. Ginter, *The Domestic Policy Function of a Right of Peoples to Development: Popular
Participation a New Hope for Development and a Challenge for the Discipline* (unpublished man-
uscript) (on file with author). *See also* P. McAuslan, *Good Governance and Aid in Africa*, 40 J.
OF AFR. L. 168 (1996).

145. See Ginter, supra note 143.

146. R. Wedgwood, Human Rights and the Legitimacy of State Power, Proceedings of the
Symposium on Conflict Between Human Rights and National Sovereignty, (October 21-22, 1993)
(unpublished manuscript, on file with Institute for African Development, Cornell University).

before the World Bank, and the IMF discovered that the virtues of those concepts or admitted to their importance in the development process. As Mac Aslan has observed, African countries and governments are not incompetent, corrupt nor brutal because of some cultural trait. They are as they are because they want to hold on to power, thereby making themselves and their families very wealthy by privatizing the state. This is more important to them than the welfare of their citizens.[147] What is needed is greater interaction and coordination between governments, multilateral development institutions and non-governmental organizations. They could establish innovative institutional frameworks at global, regional, and local levels in order to foster this type of cooperation. The challenges of democratization deserve a comprehensive and integrated approach to democratization as much as peace and development do.

Far from shrinking at the thought of imposing democracy on African countries, the international community must realize that in the 1990s, there is an internal push for democracy that comes from Africans themselves. Many Africans would like the international community to meaningfully help promote democracy by cutting funds to authoritarian dictators. The criticisms of the international community, the IMF, and the World Bank should not be directed at the idea of linking economic cooperation to good governance, but rather at the huge gap between rhetoric and reality.[148] These institutions have always been ready to compromise principle when the government in question is perceived to be pursuing the "right" economic policies.[149] It is in these situations that the World Bank and the IMF shield themselves under lending policies that claim to not distinguish between the various forms of political regimes of countries in lending decisions. This approach contradicts and fails to implement the Bank's own findings in regard to the relationship between governance and development. The Bank defines governance as the manner in which power is exercised in the management of a country's economic and social resources for development. Although a distinction is drawn between a country's political and economic dimensions, this cannot be reconciled with the claim that governance is central to social development and sustainable poverty reduction.[150] The Bank has acknowledged a direct link between political conditions in a country and a country's economic performance.[151] There is absolutely no satisfaction in continuing economic cooperation with countries where aid or any other form of financial assistance is known to be wasted or stolen. Aid has had very little impact on the development pro-

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147. *Id.*

148. M. Ndulo, International Initiatives and Good Governance, Symposium, Governance in Africa: Building the Capable State, Institute for African Development, Cornell University (October 24-25, 1997).

149. The Zambian Government was given funding by the World Bank in November 1996 at a time when it was under pressure from Western governments not to implement discriminatory constitutional amendments. *See* Hum. Rts. Watch/Afr., *supra* note 97.

150. Report of the Secretary-General, Support by the United Nations System of the Efforts of Governments to Promote and Consolidate New or Restored Democracies, para. 35, (A/51/512) (October 18, 1996).

151. World Bank, *supra* note 2.

cess in African countries[152] because aid is often wasted by corrupt regimes or misused by regimes that lack institutional capacity to effectively utilize it.

As one of this century's most successful aid programs, the Marshall Plan to Western Europe after WWII made strict conditionality a key feature of the program.[153] We should not attribute the general decline in Africa entirely to adverse terms of trade and/or inadequate amounts of aid, structural adjustment policies, inappropriate donor driven development projects, nor historical conditions. To exclude other factors simplifies the problem while failing to assign any blame to African governments themselves. As pointed out earlier, democratic governance is a pre-condition for sustainable development in Africa. Democracy ensures that policy decisions are arrived at after thorough debate thereby increasing the chances that the correct policies are adopted for the matters they intend to address. Arguments that democracy should not be rushed and has to wait until sufficient economic development has been achieved are not supported by experience elsewhere and are advanced as justification for autocratic rule by elites.[154]

## CONCLUSION

Some have expressed skepticism at the viability of democracy in African societies given deep ethnic divisions, widespread illiteracy, lack of a sizeable middle-class, a political culture of intolerance, and the huge economic and environmental hardships that confront Africa.[155] In response, it should be pointed out that there is already substantial evidence that democratic institutions are capable of prospering on the African continent. African states, no longer constrained by ideological divisions, are facing the African crisis boldly. They have evidenced a greater readiness to acknowledge their collective responsibility for promoting conditions of peace, good governance, and respect for human rights throughout the continent. Moreover, there is welcome evidence of increased political will to intervene actively to contain, resolve, or even suppress domestic conflicts. Interventions in Lesotho and Sierra Leone are examples of the changes that have occurred in this sphere. There is continent-wide acceptance of multi-partyism and of the direct link between good governance and development. There are also several African countries such as Botswana, Namibia and South Africa that qualify as modern examples of vibrant de-

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152. Kanbur argues that aid has failed in Africa and that there is very little chance of recovery from this failure under current institutional arrangements. *See* R. Kanbur, *Aid, Conditionality, and Debt in Africa,* Africa Notes, (October, 1998).

153. P. W. WALLER, DEVELOPMENT CORPORATION (1994).

154. Wing, *supra* note 24, at 690. Wing observes that, "very few attempts to maintain democratic constitutions have prevailed over the three decades of independence. The men and women and political factions whose forceful leadership served so well in the independence struggles often turned into petty despots."

155. Wing has expressed doubts of Africa's ability to establish democratic governance in conditions of poverty and suggests that in such conditions there would be an inevitable scramble for scarce resources, even if all citizens were of the same ethnicity and wonders whether democracy can exist, much less flourish in such an environment. Wing, *supra* note 24, at 762. Such a view ignores the link between good governance and development. For similar views, *see* C. Lancaster, *Democracy in Africa,* 85 FOREIGN POL'Y 148-149 (1992).

mocracies. These countries could form budding models for the development of more democratic systems. The Africa of today is no longer the one of televised images of famine, war, and genocide deliberately encouraged by the right-wing Western media. Such biased reporting on Africa is skewed towards the sensational with the result that Africa enters the Western consciousness as a continent capable of producing only the likes of Amin rather than a continent with both successes and failures.[156] Such images are highly misleading and are only a small part of the story. Africa is a vast and diverse continent where people are doing their very best to achieve maximum potential.[157]

Throughout the world, evidence of performance at both political and economic levels repeatedly calls attention to the importance of effective political leadership. Popular democracy requires responsible leaders and enlightened followers. The values and skills of political leaders have figured prominently into the destruction or nurturing of democracy throughout many parts of the world. Nothing written in the constitution has any meaning unless it is written in the hearts of the people. As Judge Learned Hand observed

> ". .I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it."[158]

This means that African countries should take deliberate steps to develop human resources that can lead the continent to new heights through education and leadership training.

African nations should take additional measures to cultivate a democratic culture in their countries. Nation-building, the culture and habit of democratic self governance, the ethos of human rights and obligations, cooperative governance, multi-cultural tolerance, and harmony should be developed. Programs promoting civic education are needed to help enlighten the public about concerning their rights in making institutions accountable, so that the people are able to resist the "know-it-all" attitude of government officials. Further, constitutions, once adopted, should be popularized among the people and made accessible to ordinary men and women by having them translated into the main languages spoken in the country. The future of democracy in Africa depends on the development of political systems that give people a sense of ownership of the political process. The transition from authoritarianism to greater participation in political decision-making requires sustained and long-term efforts. Concerted efforts to overcome the obstacles could ensure that the next millennium will further Africa along the road to democracy and development.

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156. Adeno Addis, *International Propaganda and Developing Countries*, 21 VAND. J. OF TRANSNAT'L L. 518 (1988).
157. *See* Deliberations of African Governance Forum, Organized in the Context of the United Nations System-wide Special Initiative on Africa (UNISA), Addis Ababa (July 11-13, 1997).
158. HAND, *supra* note 90, at 189-90.