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The Democratization Process and Structural Adjustment in Africa

MUNA NDULO*

INTRODUCTION

Africa's problems are myriad and complex. However, most scholars of Africa agree that one particular issue that continues to bedevil African countries is how to establish democratic nation-states with institutions that promote economic development, consolidate political harmony and stability, and avoid conflicts through enfranchisement. Many parts of Africa have thus far failed to develop democratic institutions and modes of conducting public affairs.¹ As a result, Africa has been strife-torn for most of the post-colonial era. Rwanda, for example, was the scene of the world's biggest genocidal massacre in half a century.² The Liberian conflict has been going on for over twelve years and affected its neighbors and an entire region.³ Africa has the largest share of conflicts in the world today.⁴ Specifically,

[s]ince 1970, more than 30 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 worldwide and resulting in more than 8 million refugees, returnees and displaced persons. The consequences of those conflicts have seriously undermined Africa's efforts

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1. See *Hopeless Africa*, THE ECONOMIST, May 13-19, 2000, at 17.

2. See generally ALISON DES FORGES, LEAVE NONE TO TELL THE STORY, GENOCIDE IN RWANDA (1999). See also Douglas Anglin, Rwanda Genocide Revisited: The Military Options—What Could and Should the International Community Have Done? (unpublished manuscript) (on file with author).

3. See generally U.N. Dep't Pub. Info., *Conflict Diamonds: Sanctions and War*, at <http://www.un.org/peace/africa/Diamond.html> [hereinafter *Conflict Diamonds*].

4. See *The Causes of Conflict and the Promotion of Durable Peace and Substantial Development in Africa: Report of the Secretary-General*, at <http://www.un.org/ecosocdev/geninfo/afrec/sgreport/report.htm> [hereinafter *Causes of Conflict*].

to ensure long-term stability, prosperity and peace for its peoples.⁵

Conflicts in Africa have typically been rooted in struggles for political power, ethnic privilege, national prestige, and scarce resources.⁶ Currently, the vast majority of disputes are domestic in origin.⁷ Often, even interstate conflicts are reflections of domestic politics.⁸ Governments going through difficult times commonly intervene in conflicts in neighboring states as a means of deflecting public anger away from themselves.⁹ As a result of the numerous conflicts raging in Africa, it remains host to the largest population of refugees and displaced persons of any continent.¹⁰ Too many Africans are trapped in conditions of grinding poverty, face daily violence and abuse, suffer under corrupt and oppressive regimes, and are condemned to live their lives in squatter settlements or rural slums with inadequate sanitation, schooling, and health facilities. All of these factors contribute to conflict, poverty, instability, and misery.¹¹ Underlying the prevalence of conflict in Africa is a crisis of governance and poverty leading to a scramble for resources.¹² Good governance would make a major contribution to the reduction of conflict and poverty. It would do this by creating an environment conducive to sustainable

5. *Id.* ¶4.

6. *See id.*; *see also* DEMOCRACY AND DEEP-ROOTED CONFLICT: OPTIONS FOR NEGOTIATORS (Peter Harris & Ben Reilly eds., 1998) [hereinafter Harris & Reilly].

7. *See Causes of Conflict, supra* note 4, ¶ 12 (noting that “[a] communal sense of advantage or disadvantage is often closely linked to this phenomenon, which is heightened in many cases by reliance on centralized and highly personalized forms of governance.”).

8. *See, e.g., Democratic Republic of Congo, in* HUMAN RIGHTS WATCH WORLD REPORT 1999, 34-36 (1999).

9. For example, Zimbabwe’s costly military intervention in the Democratic Republic of the Congo (DRC) is widely considered by the public, western diplomats and analysts as partly a reaction to its severe economic conditions. *See ZIMBABWE: A GROWING POLITICAL AND ECONOMIC CRISIS 1* (AFRONET, Inter-African Network for Human Rights and Development 11th ed. 1999). Other elements external to the states may also be involved in such conflicts. The U.N. General Assembly has acknowledged the role that diamonds, for example, play in fueling conflict. It has found that they are a crucial factor in prolonging brutal wars in parts of Africa. In Angola and Sierra Leone diamonds funded rebel groups. *See* General Assembly Resolution 55/56, U.N. GAOR, 55th Sess., U.N. Doc. A/RES/55/56 para. 1 (2001).

10. *See generally* Symposium, *Refugees and Displaced Persons in Africa: From Emergency Relief to Food Security and Development*, INST. AFR. DEV. CORNELL UNIV. (Oct. 16-17, 1991).

11. In fact, as Douglas Anglin has observed, Africa has arguably slipped into one of the most violent phases of its post-independence history “with political struggles spilling across borders as states interfere militarily in their neighbor’s 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 2.

12. *See* WORLD BANK, SUB-SAHARAN AFRICA: FROM CRISIS TO SUSTAINABLE GROWTH 60 (1989) [hereinafter FROM CRISIS TO SUSTAINABLE GROWTH].

development, thereby reducing poverty—the root cause of many African conflicts. Development seeks to expand choices for all people—women, men, and children of both current and future generations. Development would promote the economic, social, civil, and political realization of human rights through the elimination of poverty and the promotion of human dignity and rights, and by providing equitable opportunities for all through good governance.

Human rights and sustainable development are interdependent and mutually reinforcing. In conditions of prosperity, conflicts are less likely to arise and more likely to be resolved quickly and peacefully if they do arise. As the Secretary General of the United Nations has observed:

[i]n a country where those who hold power are not accountable, but can use their power to monopolize wealth, exploit their fellow citizens and repress peaceful dissent, conflict is all too predictable and investment will be scarce. But in a country where human rights and property rights are protected, where government is accountable, and where those affected by decisions play a part in the decision-making process, there is real hope that poverty can be reduced, conflict avoided, and capital mobilized both at home and from abroad.¹³

The answer to Africa's conflict and development quagmire lies in establishing democratic governance in African countries. This calls for a critical examination of the question of governance in Africa, with a view toward identifying the obstacles to its development and toward possible approaches to developing systems of governance that give political space to all groups, thereby avoiding conflict and political instability. The most important legal instrument in the scheme of good governance is the national constitution. Thus, a major part of the answer to Africa's present predicament lies in the development of constitutions by African countries that will stand the test of time, and that will deliberately structure national institutions in such a way as to ensure that a capable state is created. In the past two decades, Africa has been the scene of constitutional changes unmatched on the continent since the end of

13. U.N. Secretary General Kofi Annan, Address at University of Yaounde, Cameroon (May 2, 2000).

European colonialism in the 1960s.¹⁴ In 1989, only five African countries could be described as democracies, but today well over three-quarters of the countries in Africa have adopted democratic systems of governance. However, in many of these countries the advances in democracy, though real, remain fragile and in need of strengthening. Reversals in such countries as Zimbabwe remind us that we should not become complacent and assume that democracy has taken hold on the African continent.¹⁵ Further, the tragedies in Rwanda, Somalia, Liberia, Sierra Leone, and the Congo graphically illustrate the horrendous consequences of failed constitutional arrangements. The future of democracy in Africa is predicated on the development of viable constitutional arrangements that set up practical institutions within which to conduct the business of governance and which foster an environment where peace and development can flourish. Such arrangements will ensure that the exercise of governmental authority is conducted in a predictable, responsible, and legally regulated way, to the satisfaction of civil society and society at large.¹⁶

This article considers, in the context of globalization, the challenges facing Africa in the democratization process. It first considers security and causes of conflicts in Africa, the economic condition of Africa, and the relationship between governance, conflict, and development. It then seeks to identify some of the key issues that must be addressed in the process of developing durable African constitutions, and the conditions under which constitutions should be developed if they are to be acceptable to the people of the country they are intended to govern. The article argues that good governance can endure only in conditions of relative economic prosperity and development. In conditions of extreme poverty, democracy cannot prosper. To the extent that the process of structural adjustment has increased poverty in Africa, it has undermined the process of democratization and made it much more difficult.

14. Filip Reyntjens observes that "virtually no country has been untouched by the wave of political reform." Filip Reyntjens, *The Winds of Change: Political and Constitutional Evolution in Francophone Africa, 1990-1991*, 35 J. AFR. L. 44 (1991); see also Peter Slinn, *A Fresh Start for Africa? New African Constitutional Perspectives for the 1990s*, 35 J. AFR. L. 1 (1991); Adrien Katherine Wing, *Towards Democracy in a New South Africa: Reviewing Ziyad Motala, Constitutional Options for A Democratic South Africa: A Comparative Perspective*, 16 MICH. J. INT'L L. 689 (1995).

15. The recent March 2002 election in Zimbabwe was widely condemned as undemocratic. The government harassed the opposition and prevented campaigning. See *Mugabe's Madness*, MAIL AND GUARDIAN NEWSPAPER, Mar. 22-27, 2002, at 7 (citing a psychometric study that concluded Robert Mugabe will become "increasingly suspicious, thin-skinned, vengeful, self-righteous and impervious to correction").

16. R.P. Meyer, Remarks at the Second Session of the Constitutional Assembly (Jan. 24, 1995), in REPUBLIC OF S. AFR. DEBATES OF CONSTITUTIONAL ASSEMBLY 12-14 (1995).

I. SECURITY, CONFLICTS AND GOVERNANCE

The sources of African conflicts comprise a complex, interlocking web of factors that are steeped in both history and contemporary realities, including economic, social, and political conditions. At the 1885 Berlin Conference, the colonial powers partitioned Africa into territorial units by arbitrarily dividing kingdoms, states, and communities.¹⁷ Unrelated areas and peoples were joined together, and united peoples were torn apart.¹⁸ In the 1960s, the newly independent African states inherited the colonial boundaries, a legacy that challenged their territorial integrity and their attempts to achieve national unity.¹⁹ The territorial challenge was enhanced in some new states by the colonial laws and institutions that were designed to exploit local divisions.²⁰ However, the era of serious conflict over state boundaries has largely passed, aided by the Organization of African Unity's (OAU) 1963 decision to accept the colonial boundaries inherited at independence.²¹ Nevertheless, the challenge of creating a genuine national identity among different ethnic groups remains in most African countries. In general, threats to the territorial integrity of African states arise from three principal sources: challenges to national boundaries; minority demands of self-determination and secession; and cross-border disputes.²² The preferred resolution has been mediation or adjudication, although there are several cases in which countries have chosen to occupy a contested area by force and later argue the merits of the case.²³ Secession is almost universally condemned by African states;²⁴ it not only contravenes the OAU charter, but is a threat that most African states fear.²⁵

Colonialism, and its concomitant changes in the nature of commercial relations, also created long-term distortions in Africa's political economy.

17. See RICHARD HALL, *ZAMBIA* 52 (1965).

18. *Id.*

19. Zambia, Zimbabwe, and almost all African countries inhabit colonial boundaries. *Id.*

20. Lord Frederick Lugard perfected the theory of indirect rule, a policy which used African institutions to the advantage of the British. See LORD FREDERICK LUGARD, *THE DUAL MANDATE IN BRITISH TROPICAL AFRICA* (5th ed. 1965). See also HALL, *supra* note 17, at 104.

21. *Resolution on the Intangibility of Frontiers*, in ASSEMBLY OF HEADS OF STATES AND GOVERNMENT, First Ordinary Session, AGH/RES.16(1) (1964) (declaring "that all Member States pledge themselves to respect the frontiers existing on their achievement of national independence").

22. An example of this is the 1999-2001 Ethiopia-Eritrea border war. See *Ethiopia Declares Horn of Africa War Over*, CNN.COM, May 31, 2000, <http://www.cnn.com/2000/WORLD/africa/05/31/horn.africa.02/>.

23. Harris & Reilly, *supra* note 6, at 31.

24. Organization of African Unity Charter, May 25, 1963, 479 U.N.T.S. 39, art. 3, reprinted in 2 I.L.M. 766 (1963).

25. See *id.*, pmb.

Transportation networks, especially railroads and related infrastructure, were specifically designed to satisfy the colonial country's trade needs and not intended to support economic growth within the indigenous economy.²⁶ Colonial powers imposed unfavorable terms of trade and strongly skewed economic activities toward extractive industries and exportation of primary products. These conditions stimulated little demand to improve skills and educational levels of the work force,²⁷ a situation that continued into the post-independence states.²⁸ The political competition in many African states is aimed not at creating viable national economic systems, but rather at encouraging the capture of key economic sectors for factional advantage.²⁹

The methods of capturing and maintaining political power in Africa are a key source of conflict across the continent. Frequently, the candidate of a political victory assumes a "winner-take-all" mentality with respect to patronage, wealth, and resources, as well as the prestige and prerogative of office.³⁰ A feeling of communal sense of advantage or disadvantage is often closely linked to this phenomenon, which is heightened in many cases by reliance on centralized and highly personalized forms of governance.³¹ The stakes for political control become dangerously high in jurisdictions with insufficient accountability of leaders, lack of regime transparency, inadequate checks and balances, non-adherence to the rule of law, absence of peaceful means to change or replace leadership, or lack of respect for human rights.³² Whoever captures power can dispense the spoils of office to his or her followers. The situation of political control is exacerbated when, as is often the case in Africa, the economic pie to be shared is small and the state is the major source of wealth accumulation.³³ Given the multi-ethnic character of most African states, political conflict leads to a violent politicization of ethnicity.³⁴

26. *Causes of Conflict*, *supra* note 4, ¶ 9.

27. *See id.*

28. WORLD BANK, ACCELERATED DEVELOPMENT IN SUB-SAHARAN AFRICA: AN AGENDA FOR ACTION 3 (1981) [hereinafter AGENDA FOR ACTION].

29. *See Causes of Conflict*, *supra* note 4, ¶ 9.

30. *Id.*

31. Khabele Matlosa, *Political Turbulence Ahead of the 2002 General Election*, 14 S. AFRICA POL. & ECON. MONTHLY 19 (2001).

32. *Id.*

33. In the case of Lesotho it has been observed that "the main problem confronting the resource poor and economically underdeveloped Lesotho is that the state is perceived as the main pillar of accumulation. The political elite constantly engage in fierce struggles over control and retention of state power in zero-sum conflicts which often turn violent." *Id.*

34. *See id.*

In extreme cases, rival communities believe that they can ensure their survival only through control of state power; thus, conflict becomes virtually inevitable.

Given the limited existence of a middle class due to lack of industrialization, there is usually no countervailing force to blunt the excesses of warlords, or the state itself,³⁵ and conflict is intensified.³⁶

During the cold war, external interference in the internal affairs of African governments was a familiar feature of superpower rivalry.³⁷ Today, external interests continue to play a large and sometimes decisive role both in suppressing and in sustaining conflict³⁸ in the competition for oil, diamonds, timber, and other natural resources in Africa. The General Assembly has, for instance, expressed concern over diamond-fuelled conflicts in a number of African countries.³⁹ Intervention is not limited, however, to governments outside of Africa. Neighboring states, in the case of the Congo, have intervened for military and economic reasons.⁴⁰ The conflict in the Congo has involved six African countries: Zimbabwe, Angola, Namibia, Rwanda, Uganda, and Burundi.⁴¹ Much of the conflict in the Congo is fueled by the economic interests of Uganda and Rwanda. These countries are engaged in the exploitation of Congo's precious mineral resources. A U.N. Panel of Experts, reporting on the exploitation of natural resources in the Congo, concluded that:

[t]he Panel has credible information indicating that various actors, some based in South Africa and others outside, are using the territories and facilities of South Africa to conduct illicit commercial activities involving the natural resources of the Democratic Republic of the Congo. For example, the Panel has evidence that coltan, diamonds, and gold from the Democratic Republic of the Congo are being smuggled into

35. YOWERI MUSEVENI, WHAT IS AFRICA'S PROBLEM? 192 (1992).

36. Matlosa, *supra* note 31, at 20.

37. *See Causes of Conflict*, *supra* note 4, ¶ 13; MUSEVENI, *supra* note 35, at 244.

38. *See ZIMBABWE: A GROWING POLITICAL AND ECONOMIC CRISIS*, *supra* note 9, at 1.

39. U.N. GAOR, G.A. Res. 175, 55th Sess., at 1, U.N. Doc. A/RES/55/56 (2001).

40. *See id.*

41. *Mission Visit to the Democratic Republic of Congo, May 4-8*, U.N. SCOR, 55th Sess., U.N. Doc. S/2000/416 (2000); *see also*, Christopher S. Wren, *Congo's New Leader, at the U.N., Pledges Talks With War Foes*, N.Y. TIMES, Feb. 3, 2001, at A7.

South Africa, either through its porous northern border or through its 4,000 unmonitored airstrips.⁴²

In Liberia, the control and exploitation of diamonds, timber, and other raw materials financed, and was one of the principal objectives of, the various warring factions.⁴³ It has been argued that many of the conflicts in Guinea have little to do with the country's politics, and more to do with President Taylor of Liberia's quest for economic control of the timber and diamonds in Guinea.⁴⁴ The same can be said of Angola, where many of the peace-process difficulties are owed to the struggle to control the exploitation of the country's lucrative diamond fields.⁴⁵ In Sierra Leone, those who seized power from the elected government in May 1997 were highly motivated by the chance to plunder national resources.⁴⁶

Despite the destruction from armed conflicts, many profit from war, as well as from the resulting chaos and lack of accountability. International arms merchants, for example, profit greatly from African conflicts.⁴⁷ Indeed, a key component to the surge of violence in Africa has been the ready availability of cheap arms, mainly imported from Eastern Europe.⁴⁸ Coupled with the availability of arms is the huge population of unemployed and mercenaries which can be contracted to wage interminable war.⁴⁹

In addition to the sources of conflict identified above, a number of other factors are especially important in particular sub-regions. "In Central Africa, they include the competition for scarce land and water resources in densely

42. *Addendum to the Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo*, U.N. SCOR, 56th Sess., at 22, U.N. Doc. S/2001/1072 (2001).

43. *Causes of Conflict*, *supra* note 4, ¶ 14; see also HUMAN RIGHTS WATCH WORLD REPORT 2000 50 (1999) [hereinafter HUMAN RIGHTS].

44. Lansana Gberie, *Destabilizing Guinea: Diamonds, Charles Taylor and the Potential for Wider Humanitarian Catastrophe*, The Diamond and Human Security Project Occasional Paper 1, 4 (2001).

45. *Causes of Conflict*, *supra* note 4, ¶ 14; see also HUMAN RIGHTS WATCH, ANGOLA UNRAVELS: THE RISE AND FALL OF THE LUSAKA PEACE PROCESS 137 (1999).

46. *Causes of Conflict*, *supra* note 4, ¶ 14; see also HUMAN RIGHTS *supra* note 43, at 67 (describing conditions in Sierra Leone as a result).

47. *Causes of Conflict*, *supra* note 4, ¶ 14.

48. U.N. Reports expose a vast and complex international network of illegal diamond and arms trafficking involving the Angolan, Sierra Leone, and Congo wars. See, e.g., Carola Hoyos, *UN Exposes Angola Diamond Trade*, BBC NEWS, Dec. 22, 2000, at <http://www.globalpolicy.org/security/issues/diamond/2000/1222ang.htm>; Eighth Report of the Secretary-General on the U.N. Mission in Sierra Leone, U.N. SCOR, 55th Sess., U.N. Doc. S/2000/1199 (2000).

49. See generally Jakkie Cilliers & Richard Cornwell, *Mercenaries and the Privatisation of Security in Africa*, 8 AFR. SECURITY REV. (1999), <http://www.iss.co.za/Pubs/ASR/8No2/Cilliers.html>.

populated areas.”⁵⁰ In Rwanda, for example, several families often claim rights to the same piece of land, causing multiple waves of displacement.⁵¹ In oil-producing areas, conflict often arises from local complaints that the communities where the resources are located do not adequately reap the benefits of oil exploitation, or do not receive adequate compensation for the resulting environmental degradation and pollution.⁵² In some North Africa states, conflicts result from tensions between different factions holding strongly opposing visions of the nature of society and the state. For instance, in the Sudan, a clash of vision between the Arab Islamic north and the culturally and religiously more diverse black south threatens the state’s territorial integrity.⁵³ Thus, the Wars of Africa are not inevitable; they are caused by leaders who yield to the narrowest definition of self-interest and sacrifice the country’s citizens to their own greed, ambition, and weakness, and they are sustained by the social and economic conditions in African countries.

II. GOVERNANCE, CONFLICTS AND POVERTY

A 1993 study of 233 internal conflicts around the world, concluded that democracies had a far better record of peacefully managing such conflicts than alternative systems.⁵⁴ The empirical fact that democracies are far less likely to go to war with each other than other regimes further substantiates the relationship between poverty and conflict, and their impact on the democratization process.⁵⁵ Authoritarian or totalitarian systems simply do not have the institutions by which conflicts in society can be peacefully expressed and resolved. Dictatorships generally try to deal with conflicts by ignoring or denying them, or by suppressing them using state coercive apparatus. While such methods may indeed control conflicts (albeit usually at a severe cost), they

50. *Causes of Conflict*, *supra* note 4, ¶ 15.

51. *Id.*

52. *Id.* See also generally BRONWEN MANBY, *THE PRICE OF OIL: CORPORATE RESPONSIBILITY AND HUMAN RIGHTS VIOLATIONS IN NIGERIA’S OIL PRODUCING COMMUNITIES* (1999).

53. See Abdullahi A. An-Na’im & Francis M. Deng, *Self-Determination and Unity: The Case of Sudan*, 18 *LAW & POL’Y* 199, 215-18 (1996).

54. Harris & Reilly, *supra* note 6, at 22-23.

55. See ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, 2 *DAC ORIENTATIONS ON PARTICIPATORY DEVELOPMENT AND GOOD GOVERNANCE* 12-13 (1994) [hereinafter ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT]; U.N. DEVELOPMENT PROGRAM, *THE SHRINKING STATE: GOVERNANCE AND HUMAN DEVELOPMENT IN EASTERN EUROPE AND THE COMMONWEALTH OF INDEPENDENT STATES* (1997).

generally cannot resolve them.⁵⁶ The implication of fundamental issues such as identity and cultural integrity in such conflicts means that almost nothing short of mass expulsions or genocide will make the conflicts disappear. It is generally believed that the ethnic conflict that erupted in the former Yugoslavia in 1990, for example, had been suppressed for almost fifty years during the years of communism, but was always present and unresolved.⁵⁷ An authoritarian system can present an illusion of short-term stability through its use of coercive state power to suppress dissent, but is unlikely to sustain that stability over the long term.

In contrast, it is argued that under a democracy, disputes that arise are likely to be processed, debated, and reacted to, rather than resolved definitively and permanently.⁵⁸ In short, democracy operates as a conflict management system. As Harris and Reilly have observed, it is this ability to handle conflicts without having to suppress them or be engulfed by them that distinguishes democratic governance from authoritarian rule.⁵⁹ This does not by any means suggest that democracy is perfect, or that the mere establishment of democratic governance will itself lead to the settlement or prevention of conflicts. There are a number of cases in which democratic institutions are hastily “transplanted” to post-conflict societies without taking root or with a subsequent resumption of hostilities—as in the cases of Burundi, Cambodia and Liberia.⁶⁰ But it is equally true that these cases offer many lessons as to how deals are struck and which choices are of crucial importance to building a sustainable outcome.⁶¹ Democracy is often messy and difficult, but it is also the best hope for building sustainable solutions to most conflicts in the world. However, democratic institutions have to be strong enough to function effectively and fairly. They can only be strong where the economic conditions are such that they can be sustained.

The United Nations has observed that conflicts are most prevalent in poor countries⁶² (especially those with significant economic inequalities).⁶³ The

56. See Harris & Reilly, *supra* note 6, at 33 (discussing management of conflict through “the right combination of procedures and institutions”).

57. See generally LAURA SILBER & ALLAN LITTLE, *YUGOSLAVIA: DEATH OF A NATION* (1996).

58. Harris & Reilly, *supra* note 6, at 139 (emphasizing the prevalence of consensus in democracies).

59. See *id.* at 136.

60. *Support by the United Nations System of the Efforts of Governments to Promote and Consolidate New or Restored Democracies*, U.N. Doc. A/51/512 (1996) [hereinafter *Support by the U.N. System*].

61. One learns from the mistakes made in earlier efforts. See *id.*

62. See generally *Causes of Conflict*, *supra* note 4.

63. *Id.* ¶ 3.

existence of sustainable livelihoods, and the absence of poverty, are closely linked to human rights and the exercise of democratic rights.⁶⁴ Poverty and inequality can undermine human rights by fueling social unrest and violence, and by increasing the precariousness of social, economic, and political rights.⁶⁵

The situation in many countries is often made worse by the existence of sharp ethnic or religious cleavages.⁶⁶ Almost invariably, where the rights of subordinate groups are insufficiently respected, the institutions of government are insufficiently inclusive, and the allocation of society's resources favors and benefits the dominant faction.⁶⁷ The solution is clear, even if difficult to achieve in practice: it is to promote human rights; to protect minority rights; to build strong political and governmental institutions; and to institute democratic governance in which all groups are represented. "[I]t is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law."⁶⁸ One cannot successfully lead an insurgency against a government that is democratic, strong and effective and meets the basic social and economic needs of its people.⁶⁹ It stands to reason that recruitment to the cause of the insurgency will be nearly impossible when people are happy and believe that warfare is not the only way to draw attention to their grievance or to create change.⁷⁰ Successful recruitment for insurgencies thrives on unemployment, especially among youth.

Conflicts and poor governance have exacted a horrendous toll on Africa's economic condition. Africa has the dubious distinction of being both the least developed and, in terms of natural resources, the most endowed continent in the world.⁷¹ With a land area three times the size of the United States and a population of some 600 million people, Africa enjoys the resources required to attain sustainable development, characterized by increasingly productive

64. *Id.* ¶ 3.

65. *See id.* ¶ 4.

66. *Id.* ¶ 12.

67. *See Harris & Reilly, supra* note 6, at 33.

68. Universal Declaration of Human Rights, U.N. GAOR, 3d Sess., U.N. Doc. A/810 pmb. (1948) [hereinafter Universal Declaration of Human Rights].

69. *See Harris & Reilly, supra* note 6, at 33 (discussing the "economic factors" of deep-rooted conflict).

70. *Id.* (where "new patterns of interaction" are introduced, the parties become "most amenable to the consideration of novel alternatives and different solutions").

71. *See generally* AGENDA FOR ACTION, *supra* note 28; *The Lagos Plan of Action for the Implementation of the Monrovia Strategy for the Economic Development of Africa*, 2nd Extra Ordinary Assembly of the OAU Heads of State and Government Devoted to Economic Matters ¶ 76 (1980), at <http://www.uneca.org/adfiii/riefforts/ref/other2.htm>.

employment opportunities and a steadily improving quality of life for all of its citizens.⁷² The continent has vast mineral, oil, water, land, and human resources.⁷³ Nonetheless, about 240 million Africans live on less than one dollar a day, have no access to safe drinking water, and are illiterate.⁷⁴ The ambiguity in Africa's position is revealed with particular clarity in relation to its production of food: although during pre-colonial times the continent was self-sufficient in this sector, it is now increasingly dependent upon external supplies, and many countries in Africa rely on food aid for the survival of their populations.⁷⁵ On the face of it, the African continent's apparent inability to feed itself is paradoxical since one of the region's chief assets is its agricultural potential. It has huge tracts of arable land and water resources. Africa possesses all of the necessary elements for becoming one of the world's major food baskets.⁷⁶

Unfortunately, Africa lacks the capital necessary to translate its enormous wealth into realizable benefits for its people, and it has failed to attract foreign investments sufficient to fill the gap. Africa receives only five percent of all direct foreign investment flowing to developing countries.⁷⁷ This is in spite of the fact that investments made in Africa consistently generate high rates of return. For example, during the period from 1990 to 1994, the average annual return on book value of U.S. direct investment in Africa was nearly twenty-eight percent, compared with eight and a half percent for U.S. direct investment worldwide.⁷⁸ At the root of the problem is the world-wide perception of Africa as an unstable, poorly governed, and conflict-ridden continent that cannot

72. See generally FROM CRISIS TO SUSTAINABLE GROWTH, *supra* note 12; Julius Nyerere, *Africa Exists in the Economic South*, 41 DEV. & SOC. ECON. PROGRESS, 3, 7-8 (1988); U.N. ECONOMIC COMMISSION FOR AFRICA, AFRICAN ALTERNATIVE FRAMEWORK TO STRUCTURAL ADJUSTMENT PROGRAMS FOR SOCIO-ECONOMIC RECOVERY AND TRANSFORMATION, U.N. Doc. E/ECA/CM.15/6/Rev.3 (1989), available at <http://www.africaaction.org/african-initiatives/aaf1.htm>.

73. Nyerere, *supra* note 72, at 45.

74. For a discussion of Africa's economic situation, see generally Adebayo Adedeji & Tariq Husain, *The Leadership Challenge for Improving the Economic and Social Situation of Africa* (1988); PROSPECTS FOR RECOVERY AND SUSTAINABLE DEVELOPMENT IN AFRICA (Aguibou Y. Yansané ed., 1996) [hereinafter PROSPECTS FOR RECOVERY]; FROM CRISIS TO SUSTAINABLE GROWTH, *supra* note 12.

75. ALFRED JOHN WILLS, AN INTRODUCTION TO THE HISTORY OF CENTRAL AFRICA 1 (4th ed. 1984).

76. Karl Lavrencic, *Food for Africa*, NEW AFR., Feb. 1979, at 90, 137.

77. U.N. CONFERENCE ON TRADE & DEVELOPMENT, FOREIGN DIRECT INVESTMENT IN AFRICA 3, U.N. DOC. UNCTAD/DTCI/19 (1995).

78. SOUTHERN AFRICAN DEVELOPMENT COMMUNITY (SADC)-USA: TRADE AND INVESTMENT, UNITED STATES DIRECT INVESTMENT IN AFRICA (1998).

guarantee the safety of foreign investments.⁷⁹ 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.⁸⁰

Reports by the United Nations and multilateral lending institutions unanimously attribute Africa's inability to realize its potential to its lack of good governance.⁸¹ A growing international consensus recognizes the central role that a good, efficient, and capable government plays in the economic and social development of a country.⁸² The General Assembly has recognized that democratic, transparent, and accountable governance in all sectors of society forms an indispensable foundation for the realization of social and people-centered sustainable development.⁸³ The General Assembly has called on member states to respect and protect all human rights and fundamental freedoms, especially the right to development, while maintaining focus on the "interdependent and mutually reinforcing relationship between democracy,

79. See *Hopeless Africa*, *supra* note 1; see also TED ROBERT GURR & BARBARA HARFF, *ETHNIC CONFLICT IN WORLD POLITICS* 13 (1994). However, Africa also suffers from the image that 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; however, the Flemings Research Institute found the levels of corruption, in Africa to be below the levels in the former Soviet Union and Central America. See FLEMINGS RESEARCH INSTITUTE, *FLEMINGS AFRICA INDEX* (1998).

80. See *FROM CRISIS TO SUSTAINABLE GROWTH*, *supra* note 12, at 60-61. See generally WORLD BANK, *GOVERNANCE AND DEVELOPMENT* (1992) [hereinafter *GOVERNANCE AND DEVELOPMENT*]; INTERNATIONAL MONETARY FUND, *GOOD GOVERNANCE: THE IMF'S ROLE* (1997) [hereinafter *GOOD GOVERNANCE: THE IMF'S ROLE*]; WORLD BANK, *CAN AFRICA CLAIM THE 21ST CENTURY?*, 48-53 (2000) [hereinafter *CAN AFRICA CLAIM THE 21ST CENTURY?*].

81. See U.N. SYSTEM-WIDE SPECIAL INITIATIVE ON AFRICA [hereinafter UNISA], *DELIBERATIONS OF AFRICAN GOVERNANCE FORUM*, July 11-13, 1997; see also WORLD BANK, *DEVELOPMENT REPORT* (1997) [hereinafter *DEVELOPMENT REPORT*].

82. See UNISA, *supra* note 81; see also *DEVELOPMENT REPORT*, *supra* note 81.

83. *Support by the U.N. System*, *supra* note 60, ¶ 60.

development, and respect for human rights.”⁸⁴ Indeed, the African states themselves have come to realize the importance of governance in the development process. The New Partnership for Africa Development, while recognizing the historical and colonial roots of African underdevelopment, argues that Africa’s future is in its own hands. It candidly recognizes that past attempts to set out continent-wide development programs have not succeeded in part because of questionable leadership and ownership by Africans themselves. The Partnership welcomes the fact that “[a]cross the continent, democracy is spreading backed by the African Union.”⁸⁵

The U.N. Development Program (UNDP) has defined good governance as “the responsible exercise of political, economic and administrative authority in the management of a country’s affairs at all levels.”⁸⁶ Good governance is, among other things, participatory, transparent, accountable, effective, equitable, and fair.⁸⁷ Good governance promotes the rule of law.⁸⁸ Participation involves members of the public in the decisionmaking as to, and implementation of, public projects or other government activity. It goes beyond the arena of consultation. It implies the existence of opportunities to contribute through gainful employment; opportunities to move in the mainstream of political, economic, and cultural processes without suffering marginalization and discrimination; freedom from poverty and deprivation; and freedom from vulnerability through a guaranteed system of social safety nets and social security systems.

Transparency involves establishing appropriate lines or forms of accountability between the government and the public, which can include access to information, open decisionmaking, and rules of procedural fairness. Fairness is broken down into substantive and procedural elements, with substantive fairness requiring the actual fairness of results and procedural fairness requiring that the process of representation, decisionmaking, and

84. U.N. GAOR, 50th Sess., 112th plen. mtg., U.N. Doc A/Res/50/25 (1996).

85. NEW PARTNERSHIP FOR AFRICAN DEVELOPMENT (NEPAD), A NEW AFRICAN INITIATIVE ¶45 (2001), at http://www.avmedia.at/cgi-script/csNews/news_upload/NEPAD_2dARCHIVES_2edb.AA0020105.pdf.

86. U.N. DEVELOPMENT PROGRAMME, GOVERNANCE FOR SUSTAINABLE HUMAN DEVELOPMENT (1997), at <http://magnet.undp.org/policy/default.htm>; see also U.N. DEVELOPMENT PROGRAMME, AIDE MEMOIRE: INTERNATIONAL CONFERENCE ON GOVERNANCE FOR SUSTAINABLE GROWTH AND EQUITY (July 28-30, 1997), at <http://magnet.undp.org/icg97/GovConference/annexes17.pdf>.

87. Apolo R. Nsibambi, *The Interface Among the Capable State, the Private Sector and Civil Society in Acquiring Food Security in Africa*, Keynote Presentation at Conference on Building for the Capable State in Africa, Inst. for Afr. Dev., Cornell University (Oct. 24-28, 1977).

88. *Id.*

enforcement in an institution be clearly specified, non-discriminatory, and internally consistent. Good governance ensures that political, social, and economic priorities reflect broad consensus in society and that decisionmakers represent the voices of the poorest and the most vulnerable in allocating development resources. In short, good governance creates what may be described as a capable state. In this context, a capable state is transparent; accountable in the conduct of national affairs; able to enforce law and order throughout the country; respectful of human rights; effective in providing infrastructure; limited in its involvement in the market economy; responsible for the creation of a favorable policy environment; and successful a partner with the private sector and civil society.⁸⁹ Other important characteristics of a capable state include acceptance of opposition and competitive politics; predictable, open, and enlightened policymaking; a bureaucracy imbued with a 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.⁹⁰

III. THE COLONIAL LEGACY IN AFRICA

Africa's problems are, to a very large extent, rooted in its inability to overcome the legacy of the past. The continent has suffered a painful history that includes some of the worst human tragedies in living memory: slavery, colonialism, and apartheid. As a direct result of these tragedies, when African countries won independence, they faced formidable constraints to governance and development. These constraints included underdeveloped human resources, political fragility, and insecurity rooted in ill-suited institutions. This legacy will continue to hamper African development for decades to come. But Africa should draw lessons, strength, and determination rather than despair from the past. The serious problems facing Africa should prompt a fundamental reexamination and redirection, rather than a feeling of hopelessness and a mindset of blaming everything on the colonial past.

Traditional African society had its own system of social and political organization.⁹¹ For instance, the Lozi of Zambia had a complex economy that

89. Patricia Armstrong, *Human Rights and Multilateral Development Banks: Governance Concerns in Decision Making*, 88 AM. SOC'Y INT'L L.PROC. 277, 280-81 (1994).

90. Nsibambi, *supra* note 87.

91. See generally ELIZABETH COLSON, *SEVEN TRIBES OF CENTRAL AFRICA* (1968); ELIZABETH COLSON, *SEVEN TRIBES OF BRITISH CENTRAL AFRICA* (1959); ELIZABETH COLSON, *MARRIAGE AND THE FAMILY*

required many people to cooperate in various productive activities.⁹² The village constituted the basic unit of organization in the structure of their economic, political, and domestic system.⁹³ The Lozi exploited gardens and parcels of land throughout the village.⁹⁴ A headman was the political and administrative head of the village, took responsibility for it to the King in Council, and represented the village at the chief-headed Council.⁹⁵ The Chief governed with the assistance of councilors.⁹⁶ Since the advent of colonialism, however, African societies have experienced fundamental and protracted economic and social changes.⁹⁷ The era of colonialism initiated—and the era of independence consummated—a dynamic process of disruption in tribal organization and tribal life. After those changes, unlike in pre-colonial times, the financial, political, and military security of African societies no longer depended on traditional organizations and custom but rather on new political and economic institutions.

Many African societies have departed from agrarian self-subsistence communities to a money economy dependent on the capitalist economic system. With such fundamental changes, the political institutions governing African societies also had to transform. 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; these communities were granted with overriding political control within their whole area of

AMONG THE PLATEAU TONGA OF NORTHERN RHODESIA (1958); MAX GLUCKMAN, POLITICS, LAW AND RITUAL IN TRIBAL SOCIETY (1965); Isaak I. Dore, *Constitutionalism and the Post-Colonial State in Africa: A Rawlsian Approach*, 41 ST. LOUIS U. L.J. 1301, 1302 (1997).

92. MAX GLUCKMAN, THE JUDICIAL PROCESS AMONG THE BAROTSE OF NORTHERN RHODESIA 7 (2d ed. 1967).

93. *Id.* at 6.

94. *Id.* at 7.

95. *Id.*

96. *Id.* at 9; *see also* MUTUMBA MAINGA, BULOZI UNDER THE LUYANA KINGS 43 (1973).

97.

In 1890, for example, Lord Salisbury, the British Prime Minister, remarked at a dinner at Mansion House following the conclusion of the Anglo-French Convention which established spheres of influence in West Africa, that “[w]e 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 knew exactly where the mountains and rivers and lakes were.”

Makau wa Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 MICH. J. INT’L L. 1113, 1135 (1994) (quoting J.C. ANENE, THE INTERNATIONAL BOUNDARIES OF NIGERIA 1865-1960, at 3 (1970)).

jurisdiction.⁹⁸ Dislocation of African peoples from their lands and communities 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.⁹⁹ Independence did not change the fundamental structure of the colonial society, and therefore did not stop the decline of traditional institutions. In almost all cases, the African independence leadership took over the colonial state as established by the departing colonial power.

Colonial rule was philosophically and organizationally elitist, centralist, and absolute. Lacking representative institutions, the colonial administration not only implemented policy, but made it as well. Seidman has observed that authoritarian forms of government everywhere express their character by giving relatively unbound discretion to the man or woman on the spot.¹⁰⁰ Colonial officials were given almost unlimited discretion with no formal controls over their exercise of power.¹⁰¹ As colonial rulers sought expedient interlocutors, they distorted or destroyed pre-colonial governance systems by creating or encouraging arrangements, such as indirect rule, that manipulated traditional forms of governance.¹⁰² Such arrangements made existing local chiefs more despotic and created new ones (warrant chiefs) where none existed before.¹⁰³ During the colonial period, African societies became divided into the rural and the urban, with two distinct cultures. Traditional culture resided in the rural areas, where the great majority of the people lived and which operated largely outside the framework of colonial elitism,¹⁰⁴ whereas the urban areas housed

98. See R. ROTBERG, *THE RISE OF NATIONALISM IN CENTRAL AFRICA: THE MAKING OF MALAWI AND ZAMBIA, 1873-1964*, at 303 (1965); Abdulqawi A. Yusuf, *Reflections on the Fragility of State Institutions in Africa*, 2 AFR. Y.B. INT'L L. 4 (1995); J.B. OJWANG, *CONSTITUTIONAL DEVELOPMENT IN KENYA* 24-26 (1990).

99. Okoth Ogendo, *Property Systems and Social Organization in Africa: An Essay on the Relative Position of Women Under Indigenous and Received Law*, in *THE INDIVIDUAL UNDER AFRICAN LAW: PROCEEDINGS OF THE FIRST ALL-AFRICA LAW CONFERENCE* 47 (Peter Nanyenya Takirambudde ed., 1982); see also Kwamena Bentsi-Enchil, *Do African Systems of Land Tenure Require a Special Terminology?*, 9 J. AFR. L. 114, 133-39 (1965) (discussing the colonial heritage in land issues).

100. Robert B. Seidman, *Drafting for the Rule of Law: Maintaining Legality in Developing Countries*, 12 YALE J. INT'L L. 84, 105 (1987).

101. See Ogendo, *supra* note 99.

102. J. GUS LIEBENOW, *COLONIAL RULE AND POLITICAL DEVELOPMENT IN TANZANIA: THE CASE OF THE MAKONDE* 84 (1971).

103. See generally L.F.G. ANTHONY, *NORTH OF THE ZAMBEZI: 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); L.H. GANN, *A HISTORY OF NORTHERN RHODESIA* (1964).

104. J.B. Ojwang, *Rural Dispute Settlement in Kenya*, 7-10 ZAMBIA L.J. 63 (1975-78).

the “modern culture.” The urban economy and culture served as the link between the metropolitan country and the colony in the export of raw materials.¹⁰⁵ Colonial economic policies kept African economies small, excessively open, dependent, and poorly integrated.¹⁰⁶ The colonial state was characterized by a huge gap in the standards of living between the rural and urban areas.

This rural/urban divide, dating from the colonial period, continues today and indeed has widened.¹⁰⁷ The rural areas continue to be neglected, marginalized, and impoverished, as states are extremely weak and fail to provide services to rural areas. Furthermore, increasing evidence indicates that the International Monetary Fund (IMF) and World Bank stabilization and structural adjustment programs, which are in place in almost all African countries, have worsened the situation.¹⁰⁸ For instance, the withdrawal of state marketing agencies absent an adequate competitive private sector to replace it has exposed poor farmers to exploitation by large city traders.¹⁰⁹ In the case of Zambia, it has actually led to a decline in food production and a crisis in agriculture.¹¹⁰ The crisis is further exacerbated by the lack of popular participation in governance, and by the lack of effective devolution of power to local communities.

In addition to enduring long after independence, the colonial legacy has had a major influence in the style of governance prevalent in Africa.¹¹¹ Colonial rule bequeathed to 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.¹¹² Many governments that emerged after

105. Robert Seidman, *Law and Stagnation in Zambia*, in *LAW IN ZAMBIA* 273 (Muna Ndulo ed., 1984).

106. See, e.g., Cherry Gertzel et al., *Introduction: The Making of the One-Party State*, in *THE DYNAMICS OF THE ONE-PARTY STATE IN ZAMBIA* 5 (Cherry Gertzel ed., 1984).

107. See U.N. DEVELOPMENT PROGRAMME, *ZAMBIA HUMAN DEVELOPMENT REPORT 1999/2000* (2000) [hereinafter *ZAMBIA HUMAN DEVELOPMENT REPORT*].

108. Ann Seidman, *Toward an Alternative Development Strategy*, in *PROSPECTS FOR RECOVERY*, *supra* note 74, at 263.

109. See Samuel S. Bowles, *Globalization and Economic Justice*, Benjamin H. Hibbard Memorial Lecture given at the University of Wisconsin – Madison (March 1, 2000). See also *THE WORLD BANK, CAN AFRICA CLAIM THE 21ST CENTURY?* 184 (2000).

110. See generally *ZAMBIA HUMAN DEVELOPMENT REPORT*, *supra* note 107.

111. Benjamin Obi Nwabueze, *Our March to Constitutional Democracy*, Guardian Lecture (July 24, 1989), in *L. & PRAC.*, J. NIG. B. A. 19-38 (1989). See generally Robert B. Seidman, *Perspectives on Constitution-Making: Independence Constitution for Namibia and South Africa*, 3 *LESOTHO L.J.* 45 (1987).

112. In the analysis of factors that led to the introduction of the one-party system in Zambia, the authors note that early analyses emphasized the continuing influences of the “colonial legacy of bureaucratic

independence soon became undemocratic, over-centralized, and authoritarian.¹¹³ Predictably, political monopolies led to corruption, nepotism, abuse of power, and conflict.¹¹⁴ African presidents replaced their colonial governors in fact but also in deeds.¹¹⁵ Like the colonial governors, 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.¹¹⁶ With one-party systems, power came to be concentrated in one person. "Dissent, for which there had always been a secure and honoured place in traditional African society, came to be viewed with ill-concealed hostility, almost as if it was treason."¹¹⁷ Multiple parties, even if originally formed around national agendas, generally evolved into ethnically based parties that made African states ungovernable.¹¹⁸ Single-party or military rule became regarded as a viable, sometimes desirable, solution to the ethnically based parties in Africa's new modern states.¹¹⁹ Ultimately, the single party supplanted the machinery of the state, blurring the differences between the two.¹²⁰

authoritarianism" in many parts of Africa. Gertzel, *supra* note 106, at 1; *see also* Dore, *supra* note 91, at 1303-04 (observing that the imperfections of post-colonial constitutions were in part a reflection of the fact that those who prepared the colonies for independence were themselves not democratic and were ignorant or insensitive to the prevailing social and cultural dynamics of the societies which they had colonized).

113. James C.N. Paul, *Putting the Governance of African Internal Security Forces Under the Rule of Law*, in *THIRD WORLD LEGAL STUDIES 1996-97: THE GOVERNANCE OF INTERNAL SECURITY FORCES IN SUB-SAHARAN AFRICA* viii, xv (James C.N. Paul ed., 1997).

114. *Id.* at xiv.

115. *Id.*

116. *See generally* Gertzel, *supra* note 106; Yusuf, *supra* note 98; Lawrence Zimba, *The Origins and Spread of One-Party States in Commonwealth Africa, Their Impact on Personal Liberties: A Case Study of the Zambian Model*, in *LAW IN ZAMBIA* 113 (Muna Ndulo ed., 1984); *Nkumbula v. Attorney-General*, ZAMBIA L. REP. 204-15 (Ct. App. 1972) (deciding that the presidential decree establishing a one-party democracy in Zambia did not infringe appellant's rights).

117. Olusegun Obasanjo, *Africa in Today's World*, in *IBRAHIM B. BABANGIDA & OLUSEGUN OBASANJO, AFRICA IN TODAY'S WORLD AND THE CHALLENGES OF LEADERSHIP: PRESENTATION AT THE AFRICA LEADERSHIP FORUM 17* (1988); *see also* John Kimwanga, *Tortuous Road to Multi-Partyism*, in *IN SEARCH OF FREEDOM AND PROSPERITY: CONSTITUTIONAL REFORM IN EAST AFRICA* 55 (Kivutha Kibwana et al. eds., 1996).

118. Museveni's main justification for his movement system in Uganda is that political parties form on the basis of ethnicity. MUSEVENI, *supra* note 35, at 42 (observing that one of Africa's biggest weaknesses is how "tribalism and other forms of sectarianism" are emphasized in African politics). The Secretary-General of the United Nations has observed that this problem is "compounded by the fact that the framework of colonial laws and institutions which some new States inherited had been designed to exploit local divisions, not overcome them." *Causes of Conflict*, *supra* note 4, ¶ 8.

119. *See* Simbi V. Mubako, *Zambia's Single-Party Constitution—A Search for Unity and Development*, 5 ZAMBIA L.J. 67, 68-69 (1973); *see also, e.g.*, *REPUBLIC OF ZAMBIA, REPORT OF THE NATIONAL COMMISSION ON THE ESTABLISHMENT OF A ONE-PARTY PARTICIPATORY DEMOCRACY IN ZAMBIA* 1, 21-22 (1972) [hereinafter *REPORT OF THE NATIONAL COMMISSION*].

120. Gertzel, *supra* note 106; JOHN M. MWANAKATWE, *END OF THE KAUNDA ERA* 101 (1994).

Thus, forty years or so into independence, governance in Africa was in crisis, with a litter of failed and dysfunctional states whose characteristics included: (1) highly centralized systems of governance; (2) excessive state control coupled with limited capacity to govern; (3) arbitrary policymaking and abuse of executive power; (4) erosion of the boundaries between the state and civil society; (5) weak institutions of both state and civil society, with few forces countervailing the executive branch of authority; (6) unaccountable bureaucracies; (7) widespread corruption; (8) unenforced or unjust legal systems; (9) widespread violation of human rights; (10) limited participation in governance by the general citizenry; and (11) preferential access to power and resources often determined by religious, ethnic, or geographical considerations.

The lack of democratic governance has resulted in unprecedented economic decline and mismanagement, causing unimaginable poverty and conflict. In fact, the dreams of post-independence prosperity and self-rule have become the nightmare of insecurity and poverty.¹²¹ Lack of democratic governance has shut off the springs of activity in the people. As Obasanjo observed, “[t]he 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 own loss yes, but to the even greater loss of society at large.”¹²² There are more African medical doctors working in the Western countries than there are in Africa, and UNESCO estimates that as many as 30,000 Africans holding PhD degrees are living outside the continent.¹²³

IV. GOVERNANCE AND INTERNATIONAL HUMAN RIGHTS

Good governance furthers the protection of human rights at both the international and national levels. Democracy involves three central rights: the right to take part in government, the right to vote and to be elected, and the right to equal access to public service. The Universal Declaration of Human Rights states that the will of the people shall be the basis for the authority of government.¹²⁴ A number of international instruments reflect the principal

121. Timothy M. Shaw & Paul Goulding, *Alternative Scenarios for Africa*, in *ALTERNATIVE FUTURES FOR AFRICA* 98 (Timothy M. Shaw ed., 1982).

122. Obasanjo, *supra* note 117, at 17.

123. Thalif Deen, *Africa's Brain Drain Accelerates*, *DAILY MAIL & GUARDIAN NEWSPAPER*, Feb. 10, 1999, available at http://www.chico.mweb.co.za/mg/news/99feb1/10feb-science_braindrain.html.

124. Universal Declaration of Human Rights, *supra* note 68, art. 21(3) (“The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections . . .”).

concerns underlying governance, including the right of peoples freely to determine their political status,¹²⁵ the right of all elements of society actively to participate in defining and achieving developmental goals,¹²⁶ and the right of all people to participate in the political life of their country.¹²⁷ Thus, international instruments for the promotion and protection of human rights within the U.N. system are replete with admonitions that popular political participation must be free.¹²⁸

While such instruments do not describe a particular methodology for ensuring such freedom, their essence is clear: to be free, participation in the political processes of a country must be conducted in an atmosphere characterized by the absence of intimidation and the presence of a wide range of fundamental human rights.¹²⁹ While the Universal Declaration of Human Rights enunciates and elaborates upon each of the rights in the covenants, and regional conventions too contribute to their protection, some of those rights take on additional importance for political participation purposes. Worthy of

125. *Id.*, art. 20 (“(1) Everyone has the right to freedom of peaceful assembly and association. (2) No one may be compelled to belong to an association.”); American Declaration of the Rights and Duties of Man, May 2, 1948, art. XXI (right to peaceful assembly), XXII (right to associate “to promote, exercise and protect . . . legitimate interests of a political, economic, religious, social, cultural, professional, labor union or other nature”), OEA/Ser.L. VII/71, Doc. 6 rev. 1, 18 (1988) [hereinafter American Declaration of Rights and Duties].

126. *See, e.g.*, Universal Declaration of Human Rights, *supra* note 68, art. 21(1) (“Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.”); International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 25(a), 999 U.N.T.S. 171 (echoing article 21(1) of the Universal Declaration of Human Rights) [hereinafter International Covenant of Civil and Political Rights].

127. *See, e.g.*, Universal Declaration of Human Rights, *supra* note 68, art. 21(2) (“Everyone has the right of equal access to public service in his country.”); International Covenant of Civil and Political Rights, *supra* note 126, art. 25 (“Every citizen shall have the right and the opportunity . . . (b) To vote and to be elected at genuine periodic elections . . . guaranteeing the free expression of the will of the electors; (c) To have access . . . to public service in his country.”); American Convention on Human Rights, July 18, 1978, art. 23, 1144 U.N.T.S. 123 (right to participate in government).

128. *See, e.g.*, International Covenant on Civil and Political Rights, *supra* note 126, art. 25 (emphasizing that “[e]very citizen shall have the right and the opportunity [for political participation] . . . without unreasonable restrictions”) and art. 2 (ensuring the protection of rights “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”); Universal Declaration of Human Rights, *supra* note 68, art. 21 (emphasizing that political participation is an individual freedom); *cf.* International Covenant on Economic, Social and Cultural Rights, Jan. 3, 1976, pmbl., 993 U.N.T.S. 3 (noting that “the equal and inalienable rights of all the members of the human family is the foundation of freedom, justice and peace in the world”) [hereinafter International Covenant on Economic, Social and Cultural Rights].

129. International Covenant on Civil and Political Rights, *supra* note 126, pmbl. (“[r]ecognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom . . . can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights.”).

individual mention in this regard are the rights to free opinion,¹³⁰ free expression,¹³¹ information,¹³² assembly and association,¹³³ independent judicial procedure,¹³⁴ and protection from discrimination.¹³⁵ To this end, all obstacles to full participation of individuals in the affairs of state must be removed, and legislation that grants the rights of individuals must not contain any reservations.¹³⁶

Increasingly, a norm is emerging pursuant to which only democracy validates governance. As Thomas Franck has argued, a democratic entitlement, while not yet fully worldwide law, is rapidly becoming a normative rule of the international system.¹³⁷ Governments increasingly recognize that their legitimacy depends on meeting a normative expectation of the international community. This recognition has led to the emergence of a particular expectation: that those who seek the validation of their empowerment must patently govern with the consent of the governed. U.N. actions support the emergence of this norm. On June 16, 1993, U.N. Security Council, for the first time in the U.N. history, authorized member states to use force to restore democracy in the independent state of Haiti.¹³⁸

In recent years, the United Nations has become increasingly involved in promoting democracy, primarily by providing various forms of electoral

130. See Universal Declaration of Human Rights, *supra* note 68, art. 2, 19; see also International Covenant on Economic, Social and Cultural Rights, *supra* note 128, art. 2; International Covenant on Civil and Political Rights, *supra* note 126, art. 19; *cf. id.*, art. 18 (right to freedom of thought, conscience and religion) and art. 20 (prohibiting war propaganda and incitements to discrimination).

131. See Universal Declaration of Human Rights, *supra* note 68, art. 19; see also International Covenant on Civil and Political Rights, *supra* note 126, art. 19.

132. See International Covenant on Civil and Political Rights, *supra* note 126, art. 20.

133. See Universal Declaration of Human Rights, *supra* note 68, arts. 20(1), 23(4) (right to form and join trade unions); see also International Covenant on Civil and Political Rights, *supra* note 126, arts. 21, 22 (right of freedom of association including trade unions).

134. See Universal Declaration of Human Rights, *supra* note 68, arts. 6-11; see also International Covenant on Civil and Political Rights, *supra* note 126, arts. 2(3), 14-16.

135. See Universal Declaration of Human Rights, *supra* note 68, arts. 2, 23(2); see also International Covenant on Civil and Political Rights, *supra* note 126, arts. 2, 26.

136. *Cf.* AFRICAN CHARTER ON HUMAN AND PEOPLE'S RIGHTS, OAU Doc. CAB/LEG/67/3, rev. 5 art. 11 (1981), reprinted in 21 I.L.M. 58 (1982) ("Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others."), available at <http://www1.umn.edu/humanrts/instree/z1afchar.htm>; see also *id.* at art. 10 ("Every individual shall have the right to free association provided that he abides by the law.").

137. Thomas Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992).

138. See *The Situation of Democracy and Human Rights in Haiti: Report of the Secretary-General*, U.N. Doc. A/47/975, S/26063, at 2-3 (July 12, 1993). See generally Irwin Stotzky, *SILENCING THE GUNS IN HAITI: THE PROMISE OF DELIBERATIVE DEMOCRACY* (1997).

assistance to member states. Prior to the Security Council Resolutions on Haiti, the U.N. efforts to promote democracy were essentially limited to assisting voluntary transitions to democratic governance with the consent of a member state or the parties to a conflict.¹³⁹ These efforts to promote democratic governance through voluntary means arguably began at the inception of the United Nations under Chapters XI, XII, and XIII of the U.N. Charter.¹⁴⁰ Pursuant to these provisions, the U.N. Trusteeship Council has organized over thirty plebiscites since 1945, bringing self-rule and independence to former colonies and other non-self-governing territories.¹⁴¹ Since the 1980s, however, the United Nations has become increasingly involved in the active promotion of democratic governance among its membership. The most important and visible forms of this activity have been the Security Council's sponsorship of elections relating to international peace keeping and the General Assembly's authorization of civilian election assistance requested by member states.¹⁴² There are two Charter-based rationales for the Assembly's authority to conduct such activities in support of democracy. The first rests on the Assembly's residual role in preserving international peace and security.¹⁴³ The second rests on the General Assembly's broad mandate to promote peace, human development, and human rights.¹⁴⁴ One can also point to the fact that a growing number of international peace processes, many under the auspices of the United Nations, have also addressed the construction or strengthening of democratic institutions and the protection of human rights.¹⁴⁵

Good governance gives societies sound structures for economic and social development. In post-conflict settings, good governance can promote reconciliations and offer a path for consolidating peace. In addition, U.N. programs now target virtually all the key elements of good governance, such as safeguarding the rule of law; verifying elections; training police; monitoring

139. See U.N. DEVELOPMENT PROGRAMME, GUIDELINES ON SPECIAL ARRANGEMENTS FOR ELECTORAL ASSISTANCE 1 (1992).

140. See *id.*

141. See UNITED NATIONS, HUMAN RIGHTS AND ELECTIONS: A HANDBOOK ON THE LEGAL, TECHNICAL AND HUMAN RIGHTS ASPECTS OF ELECTIONS 3 (1994).

142. See *Mozambique: Report of the Secretary-General*, U.N. Doc. S/25518 (Apr. 2, 1993); COMMONWEALTH SECRETARIAT, THE END OF APARTHEID: THE REPORT OF THE COMMONWEALTH OBSERVER GROUP TO THE SOUTH AFRICA ELECTIONS 26-29 APRIL 1994 (1994).

143. See U.N. CHARTER arts. 11, 14.

144. See *id.*, art. 62.

145. See G.A. Res. 1260, U.N. SCOR, 4035th mtg., U.N. Doc. S/RES/1260 (1999) (calling upon the Government of Sierra Leone to ensure compliance with its obligations under the Peace Agreement to promote peace and national reconciliation, and to foster respect for human rights).

human rights; fostering investments; and promoting accountable administration.¹⁴⁶ The U.N. Development Program has connected the practice of good governance with the improvement of human development.¹⁴⁷

Similarly, the World Bank has promoted good governance practices, including reform of the public sector and promotion of the rule of law.¹⁴⁸ The IMF has implemented a policy of promoting those components of good governance that relate to economic performance.¹⁴⁹ Other international and supranational organizations, such as the Organization of Economic Cooperation and Development (OECD),¹⁵⁰ the Organization for Security and Cooperation in Europe (OSCE),¹⁵¹ the British Commonwealth,¹⁵² and the European Union (EU),¹⁵³ have all developed good governance standards for their development assistance activities.¹⁵⁴ In addition, many individual donor states have developed assistance policies that include good governance. Democracy is thus well on the way to becoming a global entitlement, one that will be increasingly promoted and protected by collective international processes. We are witnessing a change in international law, and as a result, the legitimacy of each government will someday be measured by international rules and processes. We may not be quite there, and this norm is still challenged, but we can see the outlines of this new world in which citizens of each state will look increasingly to international law and organizations to guarantee their democratic entitlement.

146. See generally *Report of the Secretary-General on the United Nations Transitional Administration in East Timor*, U.N. Doc. S/2000/53 (2000).

147. U.N. DEVELOPMENT PROGRAMME, GOVERNANCE FOR SUSTAINABLE HUMAN DEVELOPMENT, U.N. Doc. (1997).

148. See generally GOVERNANCE AND DEVELOPMENT, *supra* note 80.

149. See generally GOOD GOVERNANCE: THE IMF'S ROLE, *supra* note 80.

150. ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, *supra* note 55.

151. See generally U.S. COMMISSION ON SECURITY AND COOPERATION IN EUROPE, DOCUMENT OF THE COPENHAGEN MEETING OF THE CONFERENCE ON THE HUMAN DIMENSION OF CSCE (1990).

152. *The Harare Commonwealth Declaration, 1991*, in COMMONWEALTH DECLARATIONS: DECLARATIONS AND STATEMENTS ISSUED BY COMMONWEALTH HEADS OF GOVERNMENT, 1971-1991 (1993) [hereinafter *Harare Commonwealth Declaration*].

153. See *EU Sets Conditions for New Lome Convention*, TIMES OF ZAMBIA, Sept. 8, 1999, at 1 (stating that the European Union has established good governance and respect for human rights and the rule of law as a principal condition for the 71 African, Caribbean and Pacific (ACP) states in the New Lome Convention); see also *The Cotonou Agreement (2000)*, at http://europa.eu.int/comm/development/cotonou/agreement_en.htm.

154. See, e.g., CANADIAN INTERNATIONAL DEVELOPMENT AGENCY, GOVERNMENT OF CANADA POLICY FOR CIDA ON HUMAN RIGHTS, DEMOCRATIZATION AND GOOD GOVERNANCE 21-22 (1996).

V. CONSTITUTIONS AND THE DEMOCRATIC PROCESS

Economic recovery and political stability in Africa must begin with a recovery of those values which are acknowledged worldwide to be the true foundation of every human society. These values are in turn the foundation of social creativity and democratic governance.¹⁵⁵ African states must establish stable political and constitutional orders that promote development and aid the eradication of poverty, hunger, disease, and ignorance, while also guaranteeing citizens the rule of law and equal protection of the law regardless of the citizen's sex, color, or ethnic origin.¹⁵⁶ If the continent is to respond successfully to the needs of its people and realize its dreams of rapid economic development and political stability, it will have to apply careful thought to the proper organization of political, economic, and administrative institutions to ensure the proper governance of the nation-state.¹⁵⁷ The aim should be to achieve a constitutional order that is legitimate, credible, and enduring, and which is 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 as African countries are characterized by large territorial, multi-ethnic groupings, high rates of illiteracy, and poor communications infrastructure. The international community can assist this process by creating conditions that can bring about economic growth and development in Africa, thereby consolidating any advances made in democratization.

In general terms, constitutional democracy concerns the following principles: (1) the use of the constitution, as a supreme and fundamental law, to regulate and limit the powers of government, and to secure the efficacy of such limitations in actual practice; (2) assurance that the legitimacy of the government is regularly established by requiring that governmental powers are assumed or exercised only with the mandate of the people, given at periodic intervals through free and fair elections or referenda that are executed and

155. See generally Obasanjo, *supra* note 117.

156. Kwamena Bentsi-Enchill, *Civitas Dei Africana*, 1 ZAMBIA L.J. 65; cf. YOWERI KAGUTA MUSEVENI, *SOWING THE MUSTARD SEED: THE STRUGGLE FOR FREEDOM AND DEMOCRACY IN UGANDA* 188 (Elizabeth Kanyogonya & Kevin Shillington eds., 1997).

157. Constitutions only pose a limit on possible actions, however, and do not therefore solve problems of poverty, inequality, and violence in and of themselves. SIRI GLOPPEN, *SOUTH AFRICA: THE BATTLE OVER THE CONSTITUTION* 255-56 (1997).

administered according to the constitution and well-defined electoral laws, and in the context of a system-wide pluralism; (3) protection of the fundamental rights of the people; (4) resolution of disputes, including disputes relating to the constitutional propriety of legislation and other government acts, impartially, in accordance with the constitution, and by ordinary courts which are independent of the disputants; (5) 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 lawmaking prescribed therein, and ensuring that such procedures conform to internationally accepted norms; (6) clearly formulated and transparent processes by which political leaders and government officials are held accountable for their actions to the people; (7) 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; (8) 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; (9) providing information that permits accountability to be achieved, laws to be carefully applied, markets to function, and people to be creative and innovative;¹⁵⁸ and (10) freedom of expression and association, and the protection of human rights. Among all virtues, freedom of speech is perhaps the one most necessary to the success of a democratic enterprise. Unless a people tell one another the truth about what they know, think, and see, they cheat themselves of their courage and destroy the possibility of freedom. This is because democratic institutions do not renew themselves as effortlessly as flowering trees. They require cultivation by people brave and honest enough to admit their mistakes and to accept responsibility for even their most inglorious acts.

The process of democratization, however, goes beyond the question of simply installing a multi-party system.¹⁵⁹ The demands for a multi-party system

158. See generally James C.N. Paul, *Developing Constitutional Orders in Sub-Saharan Africa: An Unofficial Report*, 1988 THIRD WORLD LEGAL STUD. 1-34. As Singhvi described in his elaboration on 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 compass and the steering wheel for the ship of the state.” Laxmi M. Singhvi, *Democracy and the Constitution*, Presentation at the International Roundtable on Democratic Constitution Development, Pretoria, S. Afr. (July 17-20, 1995).

159. In 1991, the Secretary-General of the United Nations wrote:

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

are easier to meet than a comprehensive demand for democracy. Democracy means the freedom of the people in their daily lives to determine their destinies, encompassing, for example, their right to build their own organizations, including residences, schools, and cultural institutions. To a large extent, democracy is less of a formalistic system than an attitude. It is a way of approaching the business of government, of setting up rules for government, of creating enough checks and balances that the government is dependent less on individuals and their personal whims, and more on systems and processes.¹⁶⁰ “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.”¹⁶¹ Additionally, democracy depends on certain values, such as tolerance and trust, which cannot be secured in a written constitution. Rather, in order to gain a foothold in a given country, these values depend on the political will of a nation. The lack of these values can seriously undermine the democratic enterprise. A clear example of this is President Mugabe in today’s Zimbabwe, where the law as it exists prohibits intimidation and protects property, and yet the Government has been able to engage in land seizures.¹⁶²

Thomas Paine defined a constitution as “not the act of a Government, but of a people constituting a Government; and Government without a Constitution is power without a right.”¹⁶³ A constitution is a thing antecedent to a government, and a government is only the creature of a constitution. It represents the basic structure of any organized society. Formal or informal, written or unwritten, its existence, in whatever form, is inevitable.¹⁶⁴ When one

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.

Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections: Report of the Secretary-General, U.N. GAOR, 46th Sess., Agenda Item 98(b), U.N. Doc. A/46/609 (1991).

160. Cf. LEARNED HAND, *THE SPIRIT OF LIBERTY* 189-90 (3d ed. 1960).

161. Muna Ndulo, *The 1996 Zambian Constitution and the Search for a Durable Democratic Constitutional Order in Africa*, 5 AFR. Y.B. INT’L L., 137, 174 (1997).

162. See *Justice for All in Zimbabwe: An Advocacy Agenda for US Policy*, 27 WASHINGTON NOTES ON AFR. (Fall 2001).

163. THOMAS PAINE, *THE RIGHTS OF MAN* 182 (E.P. Dutton & Co., 1951) (1752).

164. OJWANG, *supra* note 98, at 1 (observing that “[t]he constitution is the scheme of organisation of public responsibilities which must be performed in any community. It identifies or prescribes the public organs of

speaks of a modern constitution, however, notions of formality emerge.¹⁶⁵ In post-colonial Africa, the notion of a constitution has been reduced to that of a single written document, a charter for the exercise of political power. Some African scholars have criticized the move 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, and have questioned the relevance of Western models to the African condition.¹⁶⁶ Be that as it may, the impact of history seems clear: one may interpret history or reinterpret it, but no one can repeal it. Moreover, while transplanting European models into Africa might be problematic, the motives of some 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, natural facilitators for economic growth and promoters of national unity.¹⁶⁷ Today it is quite evident that these justifications had little to do with “African concepts of governance” and more with the consolidation of political power through the elimination of all political opposition.¹⁶⁸ After three decades of independence, neither growth nor national unity has occurred for most African states.

the community and vests in them . . . particular roles which are to be performed in the interest of the people as a whole.”).

165. Whatever form a constitution takes, however, its legitimacy and authority should be beyond question. See GLOPPEN, *supra* note 157, at 38-39 (noting that “[i]n order to have a 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”).

166. See RHODA E. HOWARD, *HUMAN RIGHTS IN COMMONWEALTH AFRICA* 16 (1986) (commenting on the issue of cultural relativism, social change and human rights, the author concludes that “[d]uring five centuries of contact between Africa and the Western world, social changes have been introduced that increasingly undermine any social-structural or cultural uniqueness Africa might once have possessed”); see also PROSPECTS FOR RECOVERY, *supra* note 74, at 7 (observing that colonialism “destroyed many indigenous institutions by transforming non-European societies into European replicas”); cf. Wing, *supra* note 14, at 690.

167. See Zimba, *supra* note 116, at 119. For example, in Kenya the post colonial government justified the one party state on the basis that “[h]ere . . . 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 98, at 79 (quoting 3 MINISTER OF JUSTICE AND CONSTITUTIONAL AFFAIRS, HOUSE OF REPRESENTATIVES, OFFICIAL REPORT, pt. 3, cols. 3381ff (1964)).

168. See Mubako, *supra* note 119, at 67.

VI. DEVELOPING A VIABLE CONSTITUTIONAL ORDER IN AFRICA

A serious search for viable constitutional arrangements that will bring political stability in any African state must begin with a frank examination of the specific social, political, and economic conditions present in 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 elegant constitutional provisions from other, existing constitutions spread across the glittering sideboard, from which the constitution-maker can fill her place to her taste.”¹⁶⁹ “[S]entences, paragraphs, whole sections and chapters float from one constitution to the next.”¹⁷⁰ Such drafting was accomplished without any serious attempt to relate the process to the social and political conditions in the countries concerned. Obviously, this is not an appropriate approach for enacting legitimate constitutions that would adequately address African problems while remaining consistent with Africa’s cultural and historical peculiarities. As Judge Chaskalson, President of the South African Constitutional Court, 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.”¹⁷¹ Overall, one can accurately say that “[m]any of these piecemeal constitutions have been symbolic at best, totally irrelevant at worst.”¹⁷²

There are many conditions specific to the African situation which, unless addressed, would negatively impact good governance. First, there is the need to debate the type of society the country wishes to create. Is it a nonracial, nonsexist, secular society? In 1993, before the South Africans developed their constitution, they engaged in a serious debate as to what sort of society South Africa was to be.¹⁷³ A clear image of the type of state that is envisaged is important if questions of religion and the status of non-African races in the society are not to be problematic.¹⁷⁴ Additionally, there is the need in each country for sufficient national unity or cohesion to generate social and political

169. Seidman, *supra* note 111, at 56.

170. *Id.*

171. Arthur Chaskalson, President of the South African Constitutional Court, Opening Speech to the International Roundtable on Democratic Constitution Development, Pretoria, S. Afr. (July 17-20, 1995).

172. Wing, *supra* note 14, at 690.

173. See Nelson Mandela, *Foreword* to THE POST-APARTHEID CONSTITUTIONS: PERSPECTIVES ON SOUTH AFRICA’S BASIC LAW, at vii (Penelope Andrews & Stephen Ellmann eds., 2001).

174. Part of the land issue in Zimbabwe seems to arise because of the lack of clarity as to whether the country accepts white Zimbabweans as nationals entitled to the same rights as black Zimbabweans.

power. This unity and cohesion must be strong enough to enable the diverse peoples in each state to achieve purposes of well-being and development that are beyond their reach as separate units.

African states also face the need to accommodate the vast ethnic diversity that exists on the continent, and to acknowledge institutionally the intensity of the attachment that Africans have to their ethnicity. Unfortunately, in much of the continent the pattern of ethnic relations has been characterized by growing self-consciousness and, at times, intolerance, intransigence, and intemperance.¹⁷⁵ Against this background, the issue of ethnicity could potentially be destabilizing to the democratization process. Democracy may magnify rather than reduce the adverse effects of ethnicity. African states also need to accommodate the significant racial minorities that exist in their countries. Constitutions must deal with this fact sensitively, not only consciously acknowledging the fears and apprehensions of racial minority groups, but also meeting their legitimate demands and involving them, in a meaningful and satisfying way, in the political systems that have evolved and also in the nation-building process. The issue of ethnic or racial minority protection will not be solved by simply ignoring it. It has to be addressed in a pro-active manner. Another condition that complicates the search for viable constitutional arrangements is the newness and artificiality of African states which were, for the most part, recently and arbitrarily created during the colonial period.

Additionally, the quest for a viable constitution must anticipate and prepare for the general unfamiliarity of most Africans with the philosophy and machinery of modern democratic governance. A viable constitution must also accommodate the general economic and social backwardness that exists in these countries, and the consequential need and urgency for development on all fronts simultaneously. Moreover, 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 also recognize the temptations of arrogance, discrimination, abuse of power, and corruption assailing persons in office,¹⁷⁶ and must face the influence of money in the electoral process, especially in economies where a large percentage of

175. Emmanuel Tatah Mentan, *Colonial Legacies, Democratization and the Ethnic Question in Cameroon*, UNESCO Management of Social Transformations (MOST) Programme (1999), at <http://www.hri.ca/partners/aga/publication/livrelegacies.shtml>.

176. THABO MBEKI, REMARKS AT THE DEBATES OF THE CONSTITUTIONAL ASSEMBLY JAN. 24-FEB. 20 1995, REPUBLIC OF S. AFR. 10 (1995) [hereinafter DEBATES OF THE CONSTITUTIONAL ASSEMBLY].

voters are unemployed.¹⁷⁷ The situation is worsened by the fact that most opposition parties in Africa lack resources to operate effectively; thus, the funding of political parties should also be addressed. The principle of government funding of political parties is well established across the democratic world.¹⁷⁸ In the absence of state funding arrangements, the party in power has an undue advantage, as it has access to state resources and institutions to push its political agenda. Additionally, there is the problem of cultural values and traditional roles assigned to women that perpetuate the inequality of the sexes.¹⁷⁹ As Mill observed, only complete equality between men and women in all legal, political, and social arrangements can create the proper conditions for human freedom and a democratic way of life.¹⁸⁰ The goal should be, as the Beijing Conference declared: “[to remove] all the 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 decisionmaking.”¹⁸¹

There is also a need to build a free and vibrant press. Only 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 “choose their representatives in an informed manner and to force state officials to respond to the desires of the public.”¹⁸² In addition, a free press, by exposing wrongdoing, encourages accountable behavior by public officials and politicians and discourages corruption. Further, a free flow of accurate information has economic implications in that a competitive market economy

177. See generally Muna Ndulo, *Political Parties and Democratic Rule in Africa*, in GOVERNANCE, DEVELOPMENT, AND GLOBALIZATION: A TRIBUTE TO LAWRENCE TSHUMA 165 (Julio Faundez et al. eds., 2000).

178. See Michael Pinto-Duschinsky, *Political Funding in Europe*, presented at the International IDEA Conference “Towards Sustainable Democratic Institutions in Southern Africa,” Gaborone, Botswana (May 8-10, 2000).

179. See generally H.J. SIMONS, *AFRICAN WOMEN: THEIR LEGAL STATUS IN SOUTH AFRICA* (1968). See also Muna Ndulo, *Widows Under Zambian Customary Law and the Response of the Courts*, 18 COMP. & INT’L. L.J. S. AFR. 90, 102 (1985); Thando Nhlapo, *The African Family and Women’s Rights: Friends or Foes?*, 1991 ACTA JURIDICA 135, 145-46.

180. See JOHN STUART MILL, *THE SUBJECTION OF WOMEN I* (1869). For a discussion of Mill on this issue, see DAVID HELD, *MODELS OF DEMOCRACY* 113-14 (2d ed., 1996) (1987). The inequality of the sexes has deprived Africa of a vast pool of talent. See generally Penelope E. Andrews, *Affirmative Action in South Africa: Some Theoretical and Practical Issues*, in THE CONSTITUTION OF SOUTH AFRICA FROM A GENDER PERSPECTIVE 49 (Sandra Liebenberg ed., 1995).

181. The Beijing Declaration and the Platform for Action, U.N. Fourth World Conference on Women, at 17, U.N. Doc. A/CONF.177/20 (1995).

182. See OWEN M. FISS, *LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER* 142 (1996).

requires that economic actors have access to relevant, timely, and reliable information. The less available or credible the information, the greater the uncertainty and risk, and therefore the cost, of committing capital or labor. In many African countries, for example, Zambia and Zimbabwe, governments continue to own newspapers. As many of the papers are unable to survive without government subsidies, they practice self-censorship in order not to run foul of the hand that feeds them.

Another complication is the need to define and assess the role of the military in African states. It is essential for a democratic society 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.¹⁸³ There is also the need to encourage the development of a viable civil society. Civil society in democracies provides the checks and balances that assist in the regulation of governments. In Africa, years of one-party systems of governance, military regimes, and poverty have hindered the development of powerful civic organizations that could act as countervailing forces to governments. The role of traditional institutions in modern African political systems must also be addressed. Finally, a serious search for viable constitutional arrangements must respond to the need to decentralize power. The search must address the distribution of power between the center and the regional level entities.

A constitution that aspires to be legitimate and authoritative as the fundamental law of any state in Africa must address the issues identified above if it is to succeed. A constitution affects the lives of all citizens and therefore ought to address the concerns of all citizens, regardless of their ethnicity, color, gender, or station in life. As the Chief Justice of South Africa, Justice Ismail Mohammed, observed in a 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 bonding its people and disciplining its government.¹⁸⁴

183. See Anglin, *supra* note 2.

184. *State v. Acheson*, 1991 N.R. 1, 3B (Namib.).

A constitution ought therefore to be an autobiography of the nation. It should reflect the lives of all its citizens, young or old, male or female, rich or poor, straight or gay. People should be able to look at the constitution and see their lives within its pages and their protection within its words. The people must feel a sense of ownership of the document before they can respect, defend, and obey it.¹⁸⁵ Van der Vyver has observed that “superimposed constitutional formulae, or constitutional arrangements that . . . do not address the real causes of discontent . . . are sure to generate their own legitimacy crisis.”¹⁸⁶

Beyond the essential ingredients of a democracy, a democratic constitution should be seen as a liberating document—one that not only limits the powers of the state and its institutions, but guarantees the kinds of liberties that will make the pursuit of happiness and self-fulfillment a reality for the people. It should empower the young, as well as women and other historically disadvantaged groups. It should guarantee equality of opportunity for all citizens irrespective of gender, race, religion or ethnic background. Equal opportunity for all is a mark of true liberation. It ensures that benefits of economic development accrue to the many and not to the few, and that all citizens have a chance to live up to their potential and to achieve self-fulfillment.

VII. DEVOLUTION OF POWER TO LOCAL AUTHORITIES

In a typical African state, a large percentage of the people remain outside of the formal structures of the state. They rely on self-help for law enforcement and self-reliance for their survival. Many of these people operating outside the formal structures of government are in rural areas. There is a critical need for the devolution of power, which is a means of not only improving governance and enhancing the accountability of leaders, but also making the state a participant in people's lives.

As was discussed earlier, post-independence African governments, like their colonial predecessors, tend to be overly centralized.¹⁸⁷ In the institutional sense, centralization of power refers to the constitutional concentration of power in the hands of a few executive offices and, therefore, a few people,

185. When India launched its constitution-making exercise in the wake of the advent of independence, India's leader Jawaharl Nehru described it as India's “tryst with destiny.” See Singhvi, *supra* note 158, at 2.

186. Johan D. van der Vyver, *Constitutional Options for Post-Apartheid South Africa*, 40 EMORY L.J. 745, 822 (1991); see also ZIYAD MOTALA, CONSTITUTIONAL OPTIONS FOR A DEMOCRATIC SOUTH AFRICA: A COMPARATIVE PERSPECTIVE 232-42 (1994).

187. See *supra* notes 97-121 and accompanying text (discussing Africa's colonial legacy).

greatly undermining the constitutional importance of courts, legislatures, and subregional governments.¹⁸⁸ These effects are usually reinforced by the tendency of most governments to concentrate the most critical human and financial resources at headquarters, while leaving rural administration with a lean administrative structure that lacks adequate resources or discretionary authority.¹⁸⁹ A major feature of any centralized state is its preoccupation 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.¹⁹⁰ Another feature is financial centralization. The central state collects all of the most important and buoyant tax resources and makes only scant funds available to subnational organs.¹⁹¹ Compounding this problem, financial transfers to subregional organs are accomplished via grants, which are given sporadically rather than on a regular and systematic basis.

Effective devolution of power to local authorities requires local communities endowed with democratically constituted decision-making bodies and possessed of a wide degree of autonomy with regard to their responsibilities, the ways and means by which those responsibilities are exercised, and the financial resources required for their fulfillment. Devolution of power to local communities has been recognized in many parts of the world as one of the cornerstones of democracy.¹⁹² The right of citizens to participate in the conduct of public affairs is more directly exercised at local levels. The existence of local authorities who are given real responsibilities can provide an administrative set-up which is both effective and close to the citizen. Unlike more 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 which is especially

188. Cf. B.C. Chikulo, 'Decentralization in Centralism': *An Analysis of the Zambian Experience (1964-1981)*, in *ISSUES IN ZAMBIAN DEVELOPMENT* 341 (Kwaku Osei-Hwedie & Muna Ndulo eds., 1985).

189. *See id.* at 341-42.

190. *See id.* at 341-45, 347.

191. *See id.*

192. *See* EUROPEAN CHARTER OF LOCAL SELF-GOVERNMENT, Oct. 15, 1985, pmbl., E.T.S. No. 122, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/122.htm>.

important in Africa in view of the numerous tasks of development and transformation that face a typical African government.¹⁹³

Very few current African political systems have made any serious efforts to decentralize power.¹⁹⁴ Even among those systems which profess commitment to decentralization, there is a wide gap between political rhetoric and reality.¹⁹⁵ African governments tend to co-opt or, in extreme cases, abolish social institutions that they determine to be harmful to their interpretation of nation-building.¹⁹⁶ In reality, this includes anything that threatens the ruling party's hold on power.¹⁹⁷ Current arrangements not only waste resources, but also encourage corruption in central government institutions and lower the ability of lower-level government institutions to expand or even to maintain existing infrastructures.¹⁹⁸

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.¹⁹⁹ Observers have noted that African states tend to be strong in those areas in which they ought to be weak (repressive power), and weak where they ought to be strong (popular mobilization and responsiveness).²⁰⁰ 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 subnational and community levels. State structures must work with society-based organizations. Societal and state institutions must exist as partners in social engineering. They must seek to empower the ordinary people in matters of governance. As is so often pointed out, democracy means governance by the people for the people. Community-based social and political institutions ought to be the building blocks of a new and effective African polity that can deliver a better life for African people.

193. See Richard Simeon, *The Structures of Intergovernmental Relations*, paper presented at the International Roundtable on Democratic Constitution Development Conference, Pretoria, S. Afr. (July 17-20, 1995).

194. See generally Chikulo, *supra* note 188.

195. *Id.* at 340.

196. See generally Patrick McAuslan, *Good Governance and Aid in Africa*, 40 J. AFR. L. 168 (1996); Stephen Chan, *Humanism, Intellectualism and the Left in Zambia*, in *ISSUES IN ZAMBIAN DEVELOPMENT* 290 (Kwaku Osei-Hwedie & Muna Ndulo eds., 1985).

197. See generally McAuslan, *supra* note 196.

198. See Reyntjens, *supra* note 14, at 52, 54.

199. See, e.g., *id.* at 48.

200. Cf. James C.N. Paul, *Developing Constitutional Orders in Sub-Saharan Africa: An Unofficial Report*, *THIRD WORLD LEGAL STUD.* 5 (1988).

Any examination of the modalities affecting the devolution of power in Africa must, among other things, address the future of traditional institutions of governance in modern African political systems.²⁰¹ There is a consensus among most Africans that traditional leaders, such as chiefs, should have a role in the governance of the state.²⁰² But the exact role they should play is a source of disagreement and, as a result, their role in most African countries remains largely undefined. There are various ways traditional leaders could be accommodated in constitutional arrangements. For instance, they could be incorporated into the local government system and form the nucleus of that system. This could, quite conceivably, enhance the legitimacy of local government structures in the rural areas. In these areas, traditional leaders provide the link between the people and the external world, that is, the government. Colonial authorities were fairly successful in using traditional institutions to their advantage, and perhaps modern African leaders can learn from that experience. Reaching rural communities in Africa effectively requires one to confront this reality.²⁰³ Traditional leaders could be used to reach out to small communities and build national consensus and cohesion.²⁰⁴

In any event, it makes sense to find a place in the national political system for structures and institutions that cannot be wished away. The reality in many African countries is that the majority of people in the rural population live their lives within a traditional social and cultural context.²⁰⁵ The people in the rural areas, in the absence of legitimate local institutions, have been driven to rely on informal institutions for day-to-day ordering of their affairs and of society,

201. See generally Nana Akuoko Sarpong, *Local Government Structures, Managements and Elections*, paper presented at the International Roundtable on Democratic Constitution Development Conference, Pretoria, S. Afr. (July 17-20, 1995). 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 the traditional institutions into the mainstream South African post-apartheid political system. See S. AFR. CONST., arts. 211, 212. The Ugandan Constitution 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).

202. See Thandabantu Nhlapo, *Accommodating Traditional Forms of Governance in a Constitutional Democracy: A Motivation*, paper presented at the International Roundtable on Democratic Constitution Development Conference, Pretoria, S. Afr. (July 17-20, 1995).

203. See generally LUGARD, *supra* note 20 (describing colonial use of traditional institutions).

204. See Nhlapo, *supra* note 202.

205. See *id.*

especially in the area of dispute resolution.²⁰⁶ It would therefore be a mistake to sideline traditional institutions and establish wholly modern institutions that will have to establish their legitimacy with the people over time. Since democracy means involving the various communities within a country in the governance of their affairs, it is imperative that rural communities not be 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 accommodation of traditional governance within the modern political systems of governance would actually enhance rather than diminish the state's vital interests in public order and stability.

While accommodating traditional structures in modern political systems, one should not ignore the fact that these institutions can at times be oppressive, exploitative, discriminatory, and intolerant, especially with respect to women and children.²⁰⁷ 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.²⁰⁸ With regard to aspects of these institutions that are gender-discriminatory, governments must address the areas that need reform, discarding the discriminatory aspects of traditional institutions and confronting the traditional values that underpin gender discrimination and authoritarianism.²⁰⁹

VIII. THE ELECTORAL SYSTEM AND EFFECTIVE REPRESENTATION

As observed, free and fair elections are indispensable elements 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.²¹⁰ However,

206. See generally GLUCKMAN, *supra* note 92.

207. See generally Muna Ndulo, *Liability of a Paramour in Damages for Adultery in Customary Law*, AFR. SOC. RES. 655 (1979); Nhlapo, *supra* note 179; Penelope 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 (Penelope Andrews & Stephen Ellmann eds., 1998).

208. See DEBATES OF THE CONSTITUTIONAL ASSEMBLY, *supra* note 176, at 11.

209. Customary law is the source for much of this discrimination. South Africa and Namibia have provisions in their constitutions which render invalid customary law that conflicts with the constitution. This practice should be emulated. It gives the courts the ability to declare gender-insensitive customs and practices illegal and unenforceable. S. AFR. CONST. art. 211(3); NAMIB. CONST. art. 66(1).

210. See, e.g., Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, June 29, 1990, ¶ 5; see also, e.g., Universal Declaration on Human Rights, *supra* note 68, art. 21;

when the rules of the game are not universally accepted and respected, the process becomes controversial and a source of conflict rather than a mechanism for resolving strife.²¹¹ Elections must be organized in a manner that maximizes 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 an incipient civil war between supporters of rival presidential contenders.²¹² The April 2002 elections in Zimbabwe were a travesty of democracy.²¹³ The opposition was harassed and prevented from campaigning for the vote. Similarly, the May 1998 elections in Lesotho led to a total breakdown of law and order, and required the intervention of the Southern African Development Community's military forces.²¹⁴ The 1996 Zambian elections²¹⁵ led to unprecedented tensions and to an attempted coup, and the 2001 elections were disputed and are now in the courts.²¹⁶ Such results largely because national elections are often manipulated by the party in power and often result in substantial minorities being unrepresented in Parliament or feeling cheated by the process.²¹⁷ In addition, many elections have been riddled with irregularities not always calculated to defraud, but resulting from the sheer inability of the state to conduct effectively conduct such a formidable managerial and logistical undertaking.²¹⁸ As Chazon has observed: "In Africa, elections provide ritual occasions for sanctioning the existing power

American Declaration of Rights and Duties, *supra* note 125, art. XX; International Covenant on Civil and Political Rights *supra* note 127, art. 25; Council of Europe, Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms March 20, 1952, art. 3; American Convention on Human Rights, Nov. 22, 1969, art. 16; African Charter on Human and Peoples' Rights and the Rules of Procedure, June 27, 1981, art. 13.

211. See Anglin, *supra* note 2.

212. See *id.*

213. See 'Massive Rigging' in Zimbabwe Poll, BBC NEWS, Mar. 26, 2002, at <http://news.bbc.co.uk/2/hi/world/africa/1895289.stm> [hereinafter *Massive Rigging*].

214. South Africa and Botswana intervened in Lesotho to restore law and order after an election led to conflict.

215. See generally *Zambia: Elections and Human Rights in the Third Republic*, 8 HUM. RTS. WATCH (1996); *Zambia: No Model for Democracy*, 10 HUM. RTS. WATCH (1998).

216. See generally COALITION 2001, THE DECEMBER 27, 2001 TRIPARTITE ELECTIONS IN ZAMBIA ¶ 3.0 (2002), at <http://afro.net.org.za/monitor206/supplement.htm>.

217. See, e.g., *id.*

218. See generally END OF APARTHEID, *supra* note 142; see also *A Democratic, Non-Racial and United South Africa*, Final Report of the United Nations Observer Mission in South Africa (UNOMSA) to the United Nations Secretary-General (May 26, 1994) [hereinafter *A Democratic, Non-Racial and United South Africa*]. Both reports discuss difficulties encountered in organizing the South African elections, which were due to the gigantic nature of the task of organizing the first-ever democratic elections.

constellation but allow for precious few opportunities for affecting the composition of the ruling circles or policy outcomes.”²¹⁹ The utility of elections is further undermined by the fact that the electoral process is not often accompanied by the building of institutions that foster accountability and greater transparency in the governance of the country.²²⁰ The challenge here is to make elections an effective tool for choosing representatives of the people, as well as an integral process in the construction of a democratic state. At a minimum, national elections must be organized in a manner that ensures the maximum participation of all sectors of the population in the political system.²²¹

The design of an electoral system is increasingly recognized as a key lever that can be used in promoting of political accommodation and stability in ethnically divided societies. As Reynolds has observed, “[a]lthough appropriate electoral laws are insufficient to ensure stability and good governance in divided societies, poorly designed laws can entrench societal divisions and exacerbate preexisting conflict.”²²² In many African countries, election results show the main political party as having overwhelming support in a core region. This is because, as Nwabueze has observed:

For [most African politicians] the tribe was the base for political activity and tribal sentiment the focus of appeal, which inevitably disabled them from rising above tribal interest and pressures in the administration of government. The result was that the government came to be regarded as one huge cake, already baked, which it was 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, was viewed

219. NAOMI CHAZON ET AL., *POLITICS AND SOCIETY IN CONTEMPORARY AFRICA* (3d ed. 1988).

220. See, e.g., *Zambia: Elections and Human Rights in the Third Republic*, 8 HUMAN RIGHTS WATCH/AFR. REP. (1996) (reporting on the 1996 Zambian elections) [hereinafter *Zambia: Elections and Human Rights*]. 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. *Massive Rigging*, *supra* note 213. The elections led to a crisis which caused a complete collapse of law and order in Lesotho, and resulted in military intervention by the Southern African Development Community.

221. See Larry Garber, *Establishing a Legal Framework for Elections*, Address at the Conference on Free and Fair Elections, Center for Development Studies (CDS) and the National Democratic Institute for International Affairs (NDI), (Mar. 12-14, 1993), Capetown, S. Afr.

222. Andrew Reynolds, *Constitutional Engineering in Southern Africa*, 6 J. AFR. DEMO. 86 (1995).

from the standpoint of tribal advantage, and support or opposition to it depended upon whether or not it advanced the interest of one's tribe.²²³

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 voter and representative."²²⁴ 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, it could be under-represented in parliament. 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 nonhomogeneous.²²⁵

African countries need to re-examine the possibility of using the proportional representation system in elections in their ethnically and racially divided societies in order to enhance democracy and avoid conflict.²²⁶ 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 relationship 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 parties, are represented in

223. Nwabueze, *supra* note 111, at 24.

224. See Bertus de Villiers, *An Electoral System for the New South Africa*, in CONSTITUTION-MAKING IN THE NEW SOUTH AFRICA 29 (Alexander Johnston et al. eds., 1993) [hereinafter CONSTITUTION-MAKING IN THE NEW SOUTH AFRICA].

225. See THE BLACKWELL ENCYCLOPAEDIA OF POLITICAL INSTITUTIONS 195 (1987) (arguing 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).

226. Cf. Antonio Nadais, *Choice of Electoral Systems*, in NEW DEMOCRATIC FRONTIER 190-91 (Larry Garber & Eric Bjornlund eds., 1992); see also LANI GUINIER, LIFT EVERY VOICE: TURNING A CIVIL RIGHTS SETBACK INTO A NEW VISION OF SOCIAL JUSTICE 117 (1998) (noting how proportional representation can be "less polarizing than conventional race-conscious districting." The author 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 to elect corporate boards throughout America").

accordance with their support base.²²⁷ The experiences of South Africa and Namibia suggest that in ethnically divided societies, the system of proportional representation in one form or another is more appropriate than that of the winner-take-all system.²²⁸ If minorities are to accept their legislature, they must be adequately represented in it. Winner-take-all elections do not sufficiently address this issue.²²⁹ Without effective representation, a majority will have little incentive to address the grievances of the minority.

The use of a 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, the Democratic Party and the Pan Africanist Congress (PAC).²³⁰ Proportional representation allowed the South African parliament to reflect fairly South African society as a whole.²³¹ Nonetheless, a major criticism of proportional representation is that it allows extremist parties to gain representation in parliament, thereby gaining legitimacy in society.²³² There is also the perception that the system leads to coalitions and therefore to weak governments.²³³ These objections, however, 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 large majority, would be able to work effectively if its society were perpetually on the verge of breakdown, aggravated by threats of extra-constitutional action by under-represented minorities. Moreover, it would appear that proportional representation, rather than the winner-take-all system, is more in line with

227. There are many variations of both winner-take-all and proportional representation systems. See, e.g., de Villiers, *supra* note 224, at 33.

228. See André du Pisani, *Namibia: The Making of a New State in the Region*, in CONSTITUTION-MAKING IN THE NEW SOUTH AFRICA *supra* note 224, at 234. But see Guy Lardeyret, *The Problem with PR*, 2 J. DEMO. 30, 32 (1991) (arguing that proportional representation tends to reproduce ethnic cleavages in the legislature).

229. See W. ARTHUR LEWIS, *POLITICS IN WEST AFRICA* 71 (1965) ("The surest way to kill the idea of democracy in a plural society is to adopt the Anglo-American electoral system of first-past-the-post. . . . [t]he 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.").

230. See *A Democratic, Non-Racial and United South Africa*, *supra* note 218 (providing the results of the 1994 South African elections).

231. The results of the 1994 South African elections 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). See *id.*

232. See Nadais, *supra* note 226, at 193.

233. See GLOPPEN, *supra* note 157, at 100-01.

traditional African political organization. Traditional African society insisted that major decisions affecting the whole community should not be made by a bare majority of the society. Bentsi-Enchill has observed that “[e]verything should be done, our ancestors insisted, on achieving the consensus of all key sectors” of the community before a decision was made.²³⁴

After the choice of the electoral system, the second fundamental choice is whether to have a presidential or a parliamentary system. In a majority of African countries (including Zambia, Zimbabwe, Tanzania, Ghana, and Kenya), the president is elected directly in a national election.²³⁵ Good constitutional design for divided societies would seem to militate against directly elected presidents. Shugart and Carey have identified three key traits of presidential systems that often have negative consequences: temporal rigidity, majoritarianism, and dual democratic legitimacy.²³⁶ 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. One observer from the U.S. State Department laid the blame for the 1994 collapse of peace plans in Angola, and the bloody conflict that ensued, largely on the country’s presidential system.²³⁷ She observed that because Dos Santos and Savimbi were vying for the only prize worth having, it was certain that Savimbi would inevitably resume his violent struggle after losing the election.²³⁸ In Nigeria, the all-or-nothing structure of the 1993 presidential election made it easy for the military to succeed in annulling the election before the final results had been officially announced.²³⁹ Unsuccessful candidates had no immediate stake in the political outcome, and many readily acquiesced in the election’s annulment in the hope of being able to run again.²⁴⁰ In the Congo (Brazzaville) in 1992, Sassou Nguesso succumbed to popular pressure and permitted multi-party elections in which he stood as a candidate for president. After losing the

234. Bentsi-Enchill, *Civitas dei Africana*, *supra* note 156, at 72.

235. Some, like Kenya, moved away from the parliamentary system. At Kenya's independence, the president was an elected member of Parliament and his term of office was tied to that of the National Assembly. See OJWANG, *supra* note 98, at 79. The Zambian Constitution provides for direct elections for the president. See ZAMBIA CONST. arts. 34, 35.

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

237. Ann Reid, *Conflict Resolution in Africa: Lessons from Angola*, INR Foreign Affairs Brief, U.S. Department of State, Apr. 6, 1993.

238. *Id.*

239. See Ian Campbell, *Nigeria's Failed Transition: The 1993 Presidential Election*, 12 J. CONTEMP. AFR. STUD. 179, 182 (1994).

240. See *id.* at 183; see also Reid, *supra* note 237.

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 of 1998.²⁴¹ In the 2002 elections in Madagascar, Marc Ravalomanana was sworn in as president, but his victory was disputed by long standing leader Didier Ratsiraka. As a result the country is “divided between Mr. Ravalomanana’s supporters based in the capital . . . and those backing Mr. Ratsiraka who control coastal areas.”²⁴²

Directly-elected presidents interpret their mandate as distinct from that of the members of parliament and as entitling them to supervise parliament in its work. Another danger of a presidential system is that a directly-elected president tends to be pressured into ethnic or regional exclusivity.²⁴³ Such presidents have a great incentive to offer special privilege to their own ethnic or regional groups as a means of ensuring re-election through a simple majority or plurality of votes.²⁴⁴ The arrangement in which the president is elected by parliament is more conducive to formal and informal power-sharing arrangements. In such an arrangement, “[e]ven without grand coalition requirements, minority parties can influence the choice of president and the composition of the cabinet, particularly when there is no clear parliamentary majority.”²⁴⁵ Given the factors discussed above, it would seem that a president elected by members of parliament would foster the feeling of greater participation in the election of all stake holders in the country as represented by parliament. South Africa²⁴⁶ and Eritrea²⁴⁷ are examples of African countries that presently follow this arrangement. The adoption of the parliamentary system for the election of a president would be an extension of the proportional representation system to the elections for the office of president.

241. See Anglin, *supra* note 2.

242. See *Madagascar Rivals Reject Peace Plan*, BBC NEWS, June 10, 2002, <http://news.bbc.co.uk/1/hi/world/africa/2036580.stm>.

243. See Nwabueze, *supra* note 111.

244. See *id.*

245. GLOPPEN, *supra* note 157, at 217-18.

246. S. AFR. CONST. art. 86.

247. Article 41 of the Eritrean Constitution provides that “[t]he President shall be elected from amongst the members of the National Assembly by an absolute majority vote of its members. A candidate for the office of the President must be nominated by at least 20 percent vote of all the members of the National Assembly.” ERI. CONST. art. 41.

IX. LEGITIMACY AND THE PROCESS OF DEVELOPING A CONSTITUTION

The process of adopting a constitution is as important as its substance.²⁴⁸ The process must be legitimate and, in order for it to be legitimate, it must be inclusive.²⁴⁹ It should represent the interests of all the people in the country, and the people must be made to feel that they own both the process and the end product.²⁵⁰ A constitution should be the product of the integration of ideas of all the major stakeholders in a country, including all political parties both within and outside parliament, organized civil society, and individuals in the society.²⁵¹ Constitution-making structures must be open to the views and opinions of all stakeholders, who must be given a meaningful opportunity to make their views known. If a constitution is to represent the aspirations and dreams of all the people, deliberate steps must be taken to ensure that those who might be disempowered, and any other marginalized groups, become part of the process.²⁵² The process must be transparent; that is, it must be undertaken in full view of the country and the international community. The constitutional text must be in a simple language that is accessible to all. It should therefore also be translated into all the major languages spoken in a given state. A constitution that is perceived as imposed on a large segment of the population, or as adopted through the manipulation of the process by some of the stakeholders, is unlikely to gain sufficient popularity or legitimacy to endure the test of time. The process of constitution-making cannot and should not be determined solely by the government of the day, but by all stakeholders.

The post-independence constitutions in Africa were the result of agreements reached at independence conferences that followed nationalist

248. See Muna Ndulo & Robert Kent, *Constitutionalism in Zambia: Past, Present and Future*, 40 J. AFR. L. 256, 257 (1996).

249. 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. In a study carried out in mid-1996, "60 per cent of the adult population had heard about the Constitutional Assembly . . . [w]hen asked whether they believed that the Constitutional Assembly would treat their submission seriously, 41 per cent responded positively . . . [a]n amazing 57 per cent of the respondents believed that the constitution would guarantee freedom and equality for all South Africans." GLOPPEN, *supra* note 157, at 264-65. But a word of caution: "[t]he high confidence in the process, in the ability of the constitution to reflect everybody's views, and to guarantee freedom and equality, could also prove to be a double-edged sword, if expectations turn into disillusionment." *Id.* at 266.

250. See C. Ramaphosa, *Remarks at the South African Constitutional Assembly*, in DEBATES OF THE CONSTITUTIONAL ASSEMBLY, *supra* note 176, at 7.

251. See Ndulo & Kent, *supra* note 248, at 256-57.

252. See DEBATES OF THE CONSTITUTIONAL ASSEMBLY, *supra* note 176, at 10.

campaigns for independence.²⁵³ The texts of the constitutions bequeathed to the new states followed colonial models developed by the various colonial powers for newly independent states.²⁵⁴ Mozambique, Namibia, Angola, and South Africa followed different paths because protracted liberation struggles preceded independence in those countries.²⁵⁵ One of the unfortunate legacies of the colonial model has been the extreme level of detail in African constitutions.²⁵⁶ For example, a typical African constitution contains hundreds of detailed provisions, which might undermine development and the ability to meet the needs of a rapidly changing society.²⁵⁷

Since independence, the practice in many African countries has been to adopt new constitutions through the use of "constitutional commissions."²⁵⁸ The commissions, composed of a number of individuals appointed by the government in power, typically tour the country soliciting public views of possible constitutional arrangements and then recommend a draft constitution for adoption by the national legislature. In many countries, this approach fails to produce durable and lasting constitutions.²⁵⁹ In Zambia, the opposition parties continue to dispute the constitution adopted in May 1996, on the grounds that it does not reflect the views of the people and that the process was manipulated by the ruling party.²⁶⁰ Experiences such as this suggest that the use of constitutional commissions is susceptible to manipulation by the government and often results in the imposition of its preferred constitutional model.²⁶¹ Matters are made worse by the common perception that such

253. See, e.g., Report of the Constitutional Review Commission, Government of the Republic of Zambia, Lusaka, Zambia § 2 (1995) [hereinafter Constitutional Review Commission, Zambia]. Chapter two 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.

254. See, e.g., ZAMB. CONST.

255. The countries in question did not have colonial models. See GLOPPEN, *supra* note 157, at 69 (reviewing the South African process).

256. See, e.g., ZAMB. CONST. (1991) (containing a total of 113 articles).

257. The 1973 Constitution of Zambia is 291 pages long and contains over 130 articles. Each of the articles has several subsections.

258. See, e.g., Constitutional Review Commission, Zambia, *supra* note 253, § 1; UNITED REPUBLIC OF TANZANIA, REPORT OF THE PRESIDENTIAL COMMISSION ON THE ESTABLISHMENT OF A DEMOCRATIC ONE-PARTY STATE I (1965); REPORT OF THE NATIONAL COMMISSION, *supra* note 119, at 1.

259. Ibrahim Juma, *Constitution Making in Tanzania: The Case for a National Conference*, in LAW AND THE STRUGGLE FOR DEMOCRACY IN EAST AFRICA 393 (Joseph Oloka-Onyango et al. eds., 1996).

260. See Report of the Citizens Convention on the Draft Constitution of Zambia (Mar. 1-10, 1996) [hereinafter Citizens Convention on Draft Constitution of Zambia]; see also Zambia: *Elections and Human Rights*, *supra* note 220, at 13.

261. See HUMAN RIGHTS WATCH/AFRICA, ZAMBIA: NO MODEL FOR DEMOCRACY 24 (1998).

commissions are often staffed by people sympathetic to the ruling party.²⁶² 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 African commission method is that people come to the commission hearings and voice their unguided opinions about what they individually consider to be constitutionally significant.²⁶³ Typically, the issues that they address are not appropriate for inclusion in a national constitution. A large number of petitioners take advantage of the process to air grievances relating to issues like unemployment, land allocation, lack of schools or health care, inadequate transport facilities, and development.²⁶⁴ Questions of relevance are glossed over for political reasons, expediency, or decorum.²⁶⁵ This scenario provides an opportunity for the government in power to manipulate the constitutional process.²⁶⁶ Moreover, with thousands of submissions, an average lawyer could easily write and find justification for any submissions made to the commission.²⁶⁷

South Africa and Namibia stand out as unique in the process they adopted in elaborating their national constitutions, and provide an alternative to the commission method.²⁶⁸ In both countries, democratically elected constitutional assemblies adopted and elaborated a national constitution.²⁶⁹ This process ensured that before each country's constitution was adopted, there were extensive consultations with all the principal stakeholders in the respective countries.²⁷⁰ As these experiences reflect, it is imperative that a broad spectrum

262. See Citizens Convention on Draft Constitution of Zambia, *supra* note 260.

263. See generally Constitutional Review Commission, Zambia, *supra* note 253.

264. See, e.g., *id.* at 84; see also What the People Said: Mashonaland Central Provincial Report on Findings From the Outreach Programme (Oct. 22, 1999) [hereinafter What the People Said].

265. See, What the People Said, *supra* note 264.

266. Cf. Constitutional Review Commission, Zambia, *supra* note 253 (providing that the President appointed some members of the commission, while others were appointed by the President on the recommendations of organizations and institutions).

267. See *id.* (noting the large numbers of participants in commission discussions).

268. See generally Jill Cottrell, *The Constitution of Namibia: An Overview*, 35 J. AFR. L. 56 (1991); CONSTITUTION-MAKING IN THE NEW SOUTH AFRICA, *supra* note 224; END OF APARTHEID, *supra* note 142; *A Democratic, Non-Racial and United South Africa*, *supra* note 218; cf. NATIONAL DEMOCRATIC INSTITUTE FOR INTERNATIONAL AFFAIRS, NATION BUILDING: THE U.N. AND NAMIBIA 26 (1990).

269. Hassen Ebrahim, *The Process of Drafting South Africa's New Constitution*, paper presented at the International Roundtable on Democratic Constitution Development Conference, Pretoria, S. Afr. (July 17-20, 1995).

270. See *supra* note 249 for a description of the South African public's reaction to the efforts of the Constitutional Assembly in this regard.

of people have an opportunity to discuss and voice their opinions as to the appropriate form of constitutional arrangements to govern their country.²⁷¹ 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. The South African experience teaches us that, in order to engage the widest possible segment of the population and to make the widest possible consultations meaningful, the method of consultation must include meaningful and open discussions.²⁷² An appropriate strategy would be to have a group of experts, representative of all the political parties operating in the country, and the other stakeholders draw up constitutional principles to guide the elaboration of a constitution and a draft constitution. The draft should be informed by theme committees set up as part of the constitution-making structure to facilitate public participation in the exercise.²⁷³ For example, the South African constitution was organized along the following six themes: character of democratic state; structure of government; relationship between levels of government; fundamental rights; judiciary and legal systems; and specialized structures of government.²⁷⁴

The main task of the committees would typically be to gather, collate, and refine the views of the political parties and the public. The draft constitution, as established by the constitution-making body, should be based on a list of constitutional principles established and agreed to by all the stakeholders prior to drafting. The draft should also be accompanied by commentaries on each of the specific provisions analyzing the various aspects, highlighting options, and identifying problems that might arise. The adoption of the constitution should be by consensus and every effort should be made to achieve that. It is not wise to adopt constitutional provisions through voting, as that tends to be divisive. The resulting document should then be subjected to public scrutiny and analysis in a forum such as an assembly, specifically elected to elaborate a constitution. This approach would structure the ensuing debate along specific constitutional themes. The existence of a draft would limit the parameters of discussion to constitutional issues and avoid petitioners addressing the commission on every aspect of human endeavor.

271. See Ebrahim, *supra* note 269.

272. See *id.*

273. South Africa adopted this method. See DEBATES OF THE CONSTITUTIONAL ASSEMBLY, *supra* note 176, at 3-4.

274. See Ebrahim, *supra* note 269.

X. THE ADOPTION AND ENACTMENT OF THE CONSTITUTION

After a draft constitution is elaborated, the next issue is how to adopt and enact the constitution into law 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.²⁷⁵ A constitution should have sanctity, and should not lightly be subject to amendments.²⁷⁶ In Africa, in the post-colonial period, two methods have been used in adopting constitutions: adoption through a two-thirds majority in Parliament, and adoption through a constituent assembly or national referendum.

It could be argued that the adoption of the constitution through a constituent assembly or referendum is unnecessary, as the enactment of a constitution is the preserve of the legislature.²⁷⁷ Whether or not the legislature has power to enact a constitution is not the issue, however. The real question is: how do you ensure that the sovereign will of the people on which the edifice of democracy rests is included in the process of producing a legitimate, credible, and enduring constitution? If anything, the process of consulting the people strengthens parliament, as it implies an unequivocal acceptance of the fact that parliament's powers are delegated to it by the people. The relationship between parliament and the people can only endure where it is recognized and accepted that the people are supreme. Therefore, in matters of great national importance, such as the adoption of a national constitution, parliament must defer to the wishes of the people who, after all, are the source of popular sovereignty.²⁷⁸ A successful constitution is one that obtains legitimization by popular will.²⁷⁹ Popular democracy demands the institutionalization of a culture of consultation and reciprocal control with regard to lawmaking 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.

275. See Constitutional Review Commission, *Zambia*, *supra* note 253, § 27.0.

276. Most African constitutions allow for the amendment of the constitution with a two-thirds majority. See, e.g., CONSTITUTION OF ZAMBIA ACT, art. 84(2)(b) (1991). This is not a significant constraint and is one that is easily obtained in systems where the opposition is often taken.

277. The Government of Zambia argued that way with respect to the 1996 Constitution. See REPUBLIC OF ZAMBIA, THE MWANAKATWE CONSTITUTIONAL REVIEW COMMISSION SUPPLEMENT NO. 1 (1995).

278. See B.O. NWABUEZE, CONSTITUTIONALISM IN THE EMERGENT STATES 135 (1973) (relating an example from Nigeria of the consequences of not deferring to the wishes of the population when making changes in government).

279. See *id.* at 25.

Furthermore, 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. The two-thirds majority requirement is often within the reach of the largest party in parliament, especially in a winner-take-all electoral system.²⁸⁰ The requirement is therefore, in practice, not much more than the simple majority required for ordinary lawmaking. In order to safeguard democracy, much more should be required to effect a constitutional amendment than the will of the majority party in parliament. Popular consultation in the form of a referendum should in fact be entrenched in African constitutional practice as a mechanism for obtaining the mandate of the people on constitutional matters and as a deterrent to frequent amendments. In addition, the public's involvement in the constitution-making process can be an educational experience, enabling them to focus on the contents of the constitution in a manner they would not have otherwise done. To discourage amendments, the Namibia Constitution has adopted a novel approach: it provides that the bill of rights provisions in the constitution may not be diminished or detracted from through amendments, and any such purported repeal or amendment shall be invalid.²⁸¹ Recent attempts in Namibia to amend the constitution and remove the two-term limitation on the presidency in order to facilitate a third term for the incumbent President are regrettable, and can serve only to undermine the sanctity of the Namibian constitution and the development of democracy in that country.²⁸²

XI. STRUCTURAL ADJUSTMENT AND GOVERNANCE

The most recent economic initiative on Africa, the New Partnership on African Development (NEPAD), has recognized that development "has, as one of its foundations, the expansion of democratic frontiers and the deepening of the culture of human rights."²⁸³ The discussions in the previous sections of this paper have demonstrated the enormous challenges that Africa faces in its efforts to achieve democratic governance and economic development. They include the need to develop durable constitutions, build institutions that can effectively

280. See Ndulo & Kent, *supra* note 248, at 264.

281. NAMIB. CONST. (1989) art. 131.

282. See DAILY MAIL & GUARDIAN NEWSPAPER (Johannesburg, S. Afr.), Oct. 31, 1998 [hereinafter MAIL & GUARDIAN].

283. Ravi Kanbur, *The New Partnership for Africa's Development (NEPAD): An Initial Commentary*, 29 POLITIKON 87, 91 (2002).

govern the countries and resolve conflicts, devolve power to local communities, and develop electoral systems that guarantee effective representation. The challenges cannot be met in conditions of poverty and scarce resources.²⁸⁴ The poverty, weak institutions, and conflict, described in the preceding sections, are worsened by the structural adjustment programs that have been put in place in African countries by the World Bank and the International Monetary Fund.²⁸⁵ Economic reforms, culminating in privatization, encapsulate how a combination of excessive deregulation and a lack of balancing safeguards have worsened poverty and deprived governments of the resources required to build strong national institutions, including political parties, that promote democracy and development.²⁸⁶ Structural adjustment programs demand that African countries, irrespective of their level of development and industrial base, should liberalize their trade regimes in order to expand production and exports, and consequently promote their economic development.²⁸⁷ That is, they should integrate into the global economy. There are definitely huge benefits to globalization. Increased trade has given consumers and producers a wide choice of low-cost goods. It leads to more efficient use of global resources. Greater access to world markets allows countries to exploit their comparative advantages more intensely. Increased capital and investment flows raise capital in countries able to attract them. However, the abilities of investment capital to seek out the most efficient markets, and of producers and consumers to access the most competitive sources, expose and intensify existing structural weaknesses in individual economies. With the speedy flow of information, the margins of maneuvering for domestic policy are much reduced.

Because African countries have failed to participate in the global economy, they have been marginalized.²⁸⁸ Their role in international trade in terms of their share in world trade and output has decreased dramatically.²⁸⁹ In many

284. A World Bank Report has observed, “[a]t the start of the 19th Century, Africa’s income level stood at roughly one-third of Europe’s.” *CAN AFRICA CLAIM THE 21ST CENTURY?*, *supra* note 80, at 18; *see also* THANDIKA MKANDAWIRE & CHARLES C. SOLUDO, *AFRICAN PERSPECTIVES ON STRUCTURAL ADJUSTMENT: OUR CONTINENT OUR FUTURE* 1-20 (1999). *See generally* PROSPECTS FOR RECOVERY, *supra* note 74.

285. *See* MKANDAWIRE & SOLUDO, *supra* note 284, at 49-85; *see also* AFRICAN ALTERNATIVE FRAMEWORK, *supra* note 72, at i. *See generally* Adedeji & Husain, *supra* note 74.

286. *See* MKANDAWIRE & SOLUDO, *supra* note 284, at 21-40.

287. *See id.*

288. *See id.* at xi.

289. A World Bank report observes, “Africa’s share of world trade has plummeted since the 1960s: it now accounts for less than 2 percent of world trade. Three decades ago, African countries were specialized in primary products and highly trade dependent. But Africa missed out on industrial expansion and now risks

African countries, rapid expansion of exports requires the development of supply capacity and diversification of manufactured goods for export, which in turn requires increased investment.²⁹⁰ An export industrial base requires a wide and modern production structure. In part due to the colonial legacy, the majority of African countries lack such structures, and production is based on simple processing and traditional industries.²⁹¹ There is also the problem of protectionism in the West. Wolfenson, the World Bank President, has “urged the world’s richest nations to lower their trade barriers to African exports.”²⁹² He has argued for market access and a level playing field for African products and goods.²⁹³ The result is that the structural reform programs have been less than successful in stimulating expansion, and instead have created untold hardships for the majority of the people.²⁹⁴ Consequently, cash-strapped economies and governments are not able to fund the various institutions of government adequately. Oxfam has observed that in Zambia “there has been a catastrophic decline in overall levels of funding of social sectors in real terms which has been exacerbated by the austerity measures demanded by the World Bank and IMF.”²⁹⁵

Moreover, the effects on poor economies are compounded by the adverse impact of the debt burden.²⁹⁶ Africa is the only region in the world where debt has exceeded GNP since 1990; the ratio stood at 124 percent in 1991. The debt problem is so extreme in some countries that annual debt service today actually

being excluded from the global information revolution.” CAN AFRICA CLAIM THE 21ST CENTURY?, *supra* note 80, at 8.

290. THE WORLD BANK GROUP, WORLD BANK BRIEF: SUB-SAHARAN AFRICA, at <http://www.worldbank.org/afr/africabrief.pdf>.

291. See CAN AFRICA CLAIM THE 21ST CENTURY?, *supra* note 80, at 3 (emphasizing the need to invest in people if poverty is to be reduced).

292. PeaceLink, Africa News Bulletin, June 6, 2002, available at http://www.peacelink.it/anb-bia/week_2k2/020606a.htm; see also James D. Wolfensohn, Africa: An Urgent Agenda, Speech Delivered at the InterAction Forum (June 4, 2002), available at <http://www.worldbank.org/afr/speeches>.

293. See *Africa Fine-Tunes Development Plan*, BBC NEWS, June 6, 2002, at <http://news.bbc.co.uk/1/hi/business/2024827.stm>.

294. This failure has been admitted by the World Bank. See *Interview with Robert Calderisi*, *World Bank’s External Affairs Manager for Africa*, DAILY MAIL AND GUARDIAN NEWSPAPER, March 31, 1999.

295. See OXFAM, GLOBALIZATION AND HUMAN RIGHTS IN AFRICA 2 (undated).

296. The World Bank has acknowledged that “[r]apid enrollment growth in higher education, coupled with declining resources, has significantly lowered quality.” CAN AFRICA CLAIM THE 21ST CENTURY?, *supra* note 80, at 106; Thandika Mkandawire and Charles Soludo have observed, “[t]he consequences of debt overhang to the macroeconomy are monumental, and meaningful growth is unlikely to resume without a resolution to the debt crisis . . . First, the rising debt-service ratios . . . reduce the availability of resources for initiating growth. Second, in the face of stagnating exports, rising debt-service payments have entailed either payment defaults or a drain on scarce foreign exchange needed to import production inputs.” MKANDAWIRE & SOLUDO, *supra* note 284, at 121.

exceeds their total foreign exchange earnings.²⁹⁷ More than twenty-five African countries have debt burdens regarded by the World Bank as unsustainable; in 1992 the discounted present value of their debt service was more than 200 percent of exports. Whatever process was originally at fault for the situation, it is simply unreasonable and unrealistic to demand that the debt be serviced. For countries where the ratio is 1,000 percent or more, such as Mozambique, Sudan, and Somalia, the situation is almost surreal, as the compounding of interest pushes servicing obligations to stratospheric levels.²⁹⁸ As a result, the development and the strengthening of democratic institutions is threatened by the failure of government to maintain budget allocations in the face of economic decline and the need to divert domestic resources to meet debt servicing requirements. The result is that many institutions are dependent on donor funding. For instance, the 2001 elections in Zambia could not have been held without European Union funding.²⁹⁹ Institutions such as the Anti-Corruption Commission and the Human Rights Commission depend on donor funding for as much as ninety percent of their budgets. Even in the case of South Africa, as a Human Rights Watch researcher observed, “although South Africa, of all the African nations, has the requisite resources and technology to be able to compete in the world market, given that globalization process is driven by inequality, it threatens to worsen inequality in the world and thus destabilize the political and economic reconstruction process.”³⁰⁰

The problem is exacerbated by the austerity measures demanded by the World Bank and the IMF. The protection of relative social expenditure must be viewed in relation to the massive absolute reduction in public spending simultaneously insisted upon by the same institutions. Stabilization measures often required of governments include strict cash budgeting, and the

297. See Shalebda Sharma, Book Review, Fletcher F. World Ass. 165 (1996) (reviewing AFRICA'S DEVELOPMENT CHALLENGES: BETWEEN DESPAIR AND HOPE).

298. See *id.* See also the case of Tanzania, where the government spends four times as much per capita on debt servicing as it does on primary education. See OXFAM, FROM UNSUSTAINABLE DEBT TO POVERTY REDUCTION: REFORMING THE HEAVILY INDEBTED POOR COUNTRIES INITIATIVE (1991), at <http://www.oxfam.org.uk/policy/papers>. Another example is Mozambique, where debt servicing for 1997 absolved around half of government revenue, or \$7 per capita. This is compared to \$3 per capita spent on health. The effect of this has been that approximately 190,000 child deaths and 10,000 maternal deaths can be linked to shortages of basic drugs and inadequate access to health services. See generally Shridath Ramphal, *Debt Has a Child's Face: Children Pay the Price*, at <http://www.unicef.org/pon99/debtcom2.htm>.

299. See *EU to Provide Funds for Zambia's General Elections*, PANAFRICA NEWS AGENCY, at <http://allafrica.com/stories/200012110181.html>; *EU Statement on the Zambia 2001 Elections*, THE MONITOR, Feb. 8-11, 2002, at <http://afronet.org.za/monitor203/report.htm>.

300. See OXFAM, *supra* note 295, at 2.

establishment of limits on the amount of money the government borrows for public expenditure-public sector borrowing requirements. The apparent abdication of governments' power to control and determine their own national economic policies is one of the most visible consequences of globalization in African countries. In particular, it seems that African governments no longer have the power to determine their own development or political policies. Unemployment, slumps, higher levels of poverty, and social unrest are evident all over Africa, as is the AIDS pandemic.³⁰¹ This social unrest results in political instability. When there is political instability, the government is constantly challenged, and where there is political instability democracy cannot flourish. Poverty affects the individual's capacity to exercise political, economic, and cultural rights. The individual's ability to participate in political activities is greatly undermined. In that sense, globalization poses a huge challenge to democratization. The poor cannot even think of their rights, because survival is foremost in their minds. The polarization of income therefore further aggravates already prevalent human rights violations in the form of poverty, gender inequalities, and exploitation of children.

CONCLUSION

Some have expressed skepticism at the viability of democracy in African societies given their deep ethnic divisions; widespread illiteracy; lack of a sizeable middle class; lack of a vibrant civil society; and lack of a political culture of tolerance, debate, and compromise in the face of the huge economic and environmental hardships that confront Africa.³⁰² As observed, Africa's economic conditions are exacerbated by the debt crisis.³⁰³ When this is added to demographic and cultural problems, some ask whether democracy can take root in Africa at all.³⁰⁴ In response, there is already substantial evidence that

301. See U.N. GENERAL ASSEMBLY SPECIAL SESSION ON HIV/AIDS, DECLARATION OF COMMITMENT ON HIV/AIDS 6 (2001).

302. For example, Wing, who has expressed doubts of Africa's ability to establish democratic governance in conditions of poverty, suggests that in such conditions there would be an inevitable scramble for scarce resources, even if all citizens were of the same ethnicity, and he wonders whether democracy can exist—much less flourish—in such an environment. See Wing, *supra* note 14, at 691, 701-02. Such a view ignores the link between good governance and development. Cf. Carol Lancaster, *Democracy in Africa*, 85 FOREIGN POL'Y 148-49 (1991-92).

303. OXFAM, *supra* note 295.

304. See Adrien K. Wing, *Towards Democracy in a New South Africa: A Review of Ziyad Motala Constitutional Options for a Democratic South Africa*, 16 MICH. J. INT'L L. 762 (1995).

democratic institutions can prosper, and indeed are prospering, on the African continent.³⁰⁵ Africans publicly claim to be committed to democratic governance. The New Partnership for Africa's Development (NEPAD) states clearly that the foundation of the program is the expansion of the frontiers of democracy and the deepening of the culture of human rights. There is continent-wide acceptance of multi-party systems and of the direct link between good governance and development.³⁰⁶

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 decisionmaking requires determined long-term efforts and a huge investment in the development of institutions. This transition cannot succeed unless the economic conditions in African countries improve and develop to a level where they are able to sustain the institutions necessary for good governance. Structural adjustment programs and the world trading system must give greater priority to social and economic development if the right climate for the development of democracy in Africa is to be created.

305. Botswana, South Africa, Mauritius, Ghana, and Benin are good examples of thriving democracies.

306. See *The Harare Commonwealth Declaration*, *supra* note 152. The majority of the member countries are African States.