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Community Law Centre, University of the Western Cape

Constitution-Building in Africa

Edited by: Jaap de Visser, Nico Steytler, Derek Powell and Ebenezer Durojaye

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COMMUNITY LAW CENTRE

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Introduction

In this book, 12 African scholars examine constitution-building in nine African jurisdictions. The chapters emanate from the International Conference on Constitution-Building in Africa, hosted by the Community Law Centre on 6 September 2013 at the University of the Western Cape (UWC). The Conference was part of the African Human Rights Moot Court, convened by the UWC Law Faculty in collaboration with the University of Pretoria's Centre for Human Rights. The Conference was attended by more than 250 participants from across the continent who engaged with close to 30 papers in four working groups. Eleven chapters were selected for inclusion in this book.

These chapters contain a range of narratives located in five themes, namely the process of constitution-making; designing the structure of the state; the judiciary and constitutionalism; limiting executive power; and sustainable constitutionalism. What follows is an overview of the selected chapters and how they address critical questions about constitution-building in Africa.

1 Process of constitution-making

The process towards the adoption of a constitution is determined by the context in which the constitution is written. It navigates such issues as political engagement, keeping politically agreed timelines, ensuring the inclusion of a variety of constituencies and groups, the use of domestic and foreign technical expertise, and ensuring legitimacy and public awareness. This book examines examples of constitution-making processes around the continent and how they attempt(ed) to accommodate the many interests at play.

As such, the chapters offer a range of different constitution-making narratives. In Zimbabwe, the Global Political Agreement (GPA) provided for a parliamentary select committee, co-chaired by the three main political parties, to lead the drafting of a constitutional text. The process included public hearings and a referendum. In the case of Malawi, all of its five constitutional review projects were initiated by the presidential appointment of a constitutional review commission or technical drafting committee. The drafting of the country's 1966 Constitution took place primarily under the auspices of the ruling Malawi Congress Party; the 1995 constitutional review process was led by a National Consultative Council and consisted of various consultative processes. While this review was markedly more inclusive, it still lacked legitimacy. The making of Kenya's 2010 Constitution was, by all accounts, impressive in its inclusivity. With the horrors of the 2007/2008 post-election violence engraved in collective memory, and the experience of the impressive consultation, led by the Ghai Commission, still fresh in mind, Kenya's Constitution was drafted on the basis of extensive consultation.

Zembe and Masunda examine the detail of Zimbabwe's constitution-making process, including the political structure and consultation procedures that were used. The authors do so against the backdrop of the important but difficult balance that had to be struck between facilitating the broadest possible participation and securing a political settlement to end conflict. They argue that Zimbabwe's Constitution Select Committee (COPAC), tasked with driving the drafting of the Constitution, was always ill-suited to strike that balance. Zembe and Masunda challenge the COPAC process as being strikingly partisan, statist and incapable of facilitating participation. For example, they point to the absence of predetermined rules of engagement within COPAC. They question the credibility of the outcome of the referendum, and substantiate this by referring to par-

ticipation numbers, inadequate dissemination of the Bill, scant consultation and the illegitimate use of unscientific surveys.

Negotiations towards peace are never conducted between friends. Zembe and Masunda argue that, even so, the COPAC process lacked the required level of basic trust between the three partners. They describe violence and hostilities, interference by security agencies, donor pull-out and public condemnation by political principals, submitting that this undermined the credibility of the process and its outcome. Ultimately, they argue, the 2013 Constitution is an elite-negotiated settlement reflecting the views of political parties and power-holders, a contention the authors support by pointing to specific provisions that bear testimony to the overwhelming influence of partisan politics and the views of the incumbent president on the constitutional text.

Writing from the basis of the Malawian experience, Chilemba echoes these sentiments when he remarks that a constitution will have been made by 'a majority' but must have served 'diverse interests' rather than only those of powerful elites. He links the difficulties in limiting the power of the Malawian presidency to the constitution-making processes that led to the 1966 and 1995 Constitution. The process towards the 1966 Constitution served only the interests of the ruling party, 'interests which included the desire to avoid division and create a unified, one-party state led by a hegemonic president'; the process towards the 1995 Constitution, while decidedly more open and inclusive, was nevertheless rushed and lacking in legitimacy.

Masengu's chapter provides insight into five constitutional review processes in Zambia, including the one that was initiated in 2011 but which has subsequently been stalled. She focuses on the manner in which communities were consulted, giving a detailed account of how women have been consistently under-represented both in constitutional review bodies and petitions made to constitution-making processes. She acknowledges that representation is but one element of effective participation, yet makes the compelling point that being outnumbered even before the process begins does little to dispel the patriarchal attitudes that continue to prejudice women in Zambia.

Masengu takes the argument further by linking this exclusionary procedure to substantive failures. She discusses four major themes regularly highlighted by women's groups in Zambia: the problematic exceptions to the anti-discrimination clause; the absence of reproductive rights in the Constitution; the uncertainty surrounding the status of customary law; and

gender discrimination in citizenship rules. Masengu shows how well-crafted proposals that were thoroughly canvassed with communities and women's groups often met with a dismissive response from the government. Her chapter, complete with practical recommendations such as ensuring that there are female chairpersons or facilitators in consultation sessions, serves as a stark reminder of the importance of having a truly inclusive constitution-building process that emphasises substantive equality between men and women.

Musumba's argument is located in Kenya's experience of constitution-making. She argues for 'pre-promulgation scenario-building' and calls for the constitution-making process to be lifted out of, on the one hand, the sterility of the art of legal drafting, and, on the other, the exclusive emphasis on aspiration. By devoting more time and effort to the feasibility of implementing the suggested provisions, critical ruptures in constitution-building can be avoided, particularly in the early, delicate stages. She maintains that the process should include a practical assessment of the feasibility of each clause, based on the construction of scenarios.

For example, she discusses the legal dispute concerning the eligibility of William Ruto and Uhuru Kenyatta to stand for presidential election, a dispute which turned upon the leadership and integrity clauses in the Constitution. The Supreme Court's ultimate reduction of these requirements to an absence of a criminal conviction, she argues, could have been avoided had greater care been taken to subject this provision to such a scenario-building exercise.

2 Structuring the state

Almost all constitution-building processes tend to raise questions about using multi-level government structures to respond to imperatives for peace, development and democracy.

Dersso, writing about the Kenyan Constitution, attributes Kenya's problems in part to a fervent commitment to centralisation and a corresponding repudiation of aspirations for decentralisation. He finds the introduction of county government 'potentially one of the most transformative changes in the organisation and distribution of government power'. Muchadenyika in turn examines how devolution featured in the process leading to the 2013 Constitution of Zimbabwe. He discusses various forms of decentralisation and their benefits for development and deepening de-

mocracy, but also warns against possible setbacks such as rising inequality, macroeconomic instability and the risk of local capture.

The author compares the viewpoints on devolution of the three main political actors assigned by the Global Agreement to negotiate the constitution, namely ZANU-PF, MDC-T and MDC-N. The public debate on devolution was largely based on misinformation, he argues. His conclusion is that the constitutional text left the devolution theme largely 'unfinished', despite having provided a promising starting point. The Zimbabwean Parliament thus faces the task of leading the local government reforms and dealing with critical themes such as the allocation of functions, the financing of local governments, and intergovernmental relations. However, with the Constitution providing little guidance and parliament controlled by a party fiercely opposed to devolution, the outcome is uncertain.

Constitutional drafting often takes places in a context of strife between groups defined by religious, ethnic or other cultural differences; further complexity is added by the difficulty of accommodating minorities in representative democratic systems. This theme is taken up by Mahadew, who discusses a number of mechanisms for ensuring minority representation, such as communal rolls, reserved seats and mixed or mandated candidate lists. In particular, he examines the best-loser principle which has been included in the Constitution of Mauritius. This system operates in addition to Mauritius's multi-member constituency system, and is an ingenious mechanism for distributing eight reserved parliamentary seats among Hindu, Muslim, Sino-Mauritian and a General Population category. Any form of specific electoral treatment of religious, ethnic or culturally defined groups requires these groups to be identified in one way or another and data on communal affiliation to be collected.

Mahadew's chapter demonstrates that the precise method of identifying groups will always attract contention. The Mauritian case is no exception, as opposition to this electoral mechanism persists and the courts, politicians and international community appear divided on its merits. Mahadew's message is to look beyond the system's obvious inadequacies (such as the use of dated census statistics) and appreciate the contribution which, he argues, it has made to inclusive politics, stability and prosperity in Mauritius.

3 The judiciary and constitutionalism

Constitutionalism is a precondition for successful constitution-building. Adherence to the rule of law and recognition of the primacy of the constitution are key ingredients for the successful implementation of a constitution. Two chapters examine the role of the judiciary in this regard. Mugyenyi examines the role of the judiciary in Kenya's efforts to build and sustain the momentum of the 2010 Constitution, while Sermet examines its role in creating transitional constitutional law during times of immediate constitutional crisis.

Efforts at transforming the Kenyan judiciary are shaped by the latter's history, and in Kenya that history is a problematic one, as explained by both Mugyenyi and Musumba; at the same time, Kenya needs judicial activism during this delicate state of constitution-building. Mugyenyi describes various attempts, before 2010, to undermine the judiciary and takes note of its persistently high levels of corruption, observing that, prior to the 2010 Constitution, the judiciary in essence had been 'designed to fail'. She commends the constitutional elements which seek to change that design, these including improved arrangements concerning tenure and financial autonomy, judicial vetting and the insistence on bringing progressive judges onto the bench. Despite the recent difficulties described by Mugyenyi, the prospects remain good for Kenya's judiciary to emerge as the country's key guarantor of constitutionalism.

It is in times of major political crisis leading to 'regime change' that the limits of constitutionalism are tested most severely. Notwithstanding the unequivocal condemnation of 'unconstitutional change' in the African Charter on Democracy, Elections and Governance, the continent continues to be confronted with revolutionary changes and *coups d'état*. Sermet discusses the concept of transitional constitutional law and focuses on the judge-made variety of it. He examines two comparable incidents in the Comores and Madagascar in which courts acted outside of the prescripts of the constitutional text yet did do in order to preserve constitutional order in response to acute constitutional crises. His examination of these 'acutely paradoxical' scenarios leave one bewildered as to whether these courts advanced or frustrated constitutionalism. He locates his examination in a distinction between 'controlled transgression', with the actions of the court in the Comores as an example, and 'uncontrolled transgression', which occurred in Madagascar.

In the Comores example, the Court accepted as a *fait accompli* that the executive would remain in power unconstitutionally. Instead of ruling to nullify the executive's authority (which could have deepened the crisis), it prescribed an interim regime and thus produced constitutional standards 'out of nothing'. In Madagascar, the uncontrolled transgression of the Court was triggered by a presidential regulation that clearly went beyond what was constitutionally permitted. The Court ruled that the impermissibility could be ignored on the grounds of the 'acknowledgment of circumstances' and justified by 'the principle of the continuity of the State'. It proceeded to issue a broad principle of legality, confirming that key tenets of the constitutional state remained.

It is clear that the courts in these examples felt forced to let facts triumph over law. They constructed their own prerogative to proclaim an interim constitutional order when faced by the prospect of constitutionalism's total oblivion. Sermet notes the undeniable difficulty in accepting this, but also makes a plea to engage with and understand the problems that arise when the law encounters its limits and is powerless to counter political disorder. He posits the judge's actions as a last line of defence in a crisis before the onset of arbitrary power. Perhaps one may take solace in the self-cleansing ability of the interim order in Madagascar: the Court later used this exact same set of transitional legal provisions to disqualify the three major contenders in a presidential election, thereby signalling that the utility of the transitional constitutional law went beyond averting immediate crisis.

4 Limiting executive power

Chilemba identifies the phenomenon of the powerful presidents as a major obstacle to constitutionalism in Africa. In particular, he discusses the powers allocated by the Malawian Constitution to the presidency. A series of presidential prerogatives – including powers over parliament and the judiciary, powers to appoint and dismiss, criminal provisions to protect the presidency, and dangerous 'residual' presidential powers – combine to produce what he terms a 'hegemonic presidency'. He acknowledges the complicated interplay between laws that were not designed to create an imperial president but were used as such, and presents a number of examples of how presidents abused constitutional provisions to entrench their hegemony. He also points to the Bill of Rights and the courts as instituti-

ons that succeeded in limiting executive power, but while he commends the courts for acting as a bulwark against the imperial president, he bemoans the fact that the law itself seems to radiate little normative value.

Assefa's chapter about Ethiopia's parliamentary system contains an important lesson about constitutional texts: critical omissions, such as those on the removal of members of Ethiopia's national executive, are not without consequence. They may very well have contributed to the executive predominance that characterises Ethiopian politics. However, Assefa locates his assessment of the origins of executive predominance mainly in the ruling party's doctrine of 'democratic centralism': state institutions that command levers of power are seen as tools for achieving the party's economic and political goals rather than as a manifestation of the limits placed on state power. Furthermore, party loyalty in parliament is not primarily about maintaining stability in government but about adherence to the sacred order that is party discipline.

Assefa argues that this threatens liberal notions of the 'will of the people' as expressed through democratically elected assemblies. He substantiates his assessment by pointing out, for instance, that Ethiopia's House of Public Representatives does not seem to control its own operations: the executive operations necessarily take precedence or priority. His chapter also shows that when constitutional controls over executive law-making are weak and the principle of legality does not hold sway, parliament is marginalised and national executives become imbued with seemingly unfettered powers to make laws.

Assefa reviews a range of constitutional options to limit executive dominance, options drawn from democracies that have had more time to develop them, and argues that there is a need to debate Ethiopia's electoral system and consider moving from the first-past-the-post system to proportional representation.

5 Sustainable constitutionalism

Dersso and Nabukenya discuss the ingredients that promote or frustrate the ability of a constitution to absorb the inevitable tension in complex African societies and keep a country on a sustainable trajectory towards peace and the realisation of human rights.

Dersso emphasises the distinction between decreeing a new constitutional order and achieving a complete break from the politics of old. The

first is a matter of constitutional quality and is relatively easily achieved; the second places requirements on the conduct of actors and is infinitely more difficult to accomplish. He concludes that, with the passage into law of its 2010 Constitution, Kenya succeeded in doing the first, that is, creating just institutions. He notes, for example, the genuine attempts that have been made to restore the judiciary and electoral management bodies through the creation of credible procedures to appoint and regulate them. However, until Kenya addresses issues such as the political manipulation of ethnicity and the widespread corruption among the country's elite, the 2010 Constitution remains, for all intents and purposes, unimplemented. He points to a number of developments that signal positive change, but is adamant that it is too early to tell whether Kenya is living up to the promise contained in its landmark 2010 constitutional text.

Nabukenya engages with the concept of constitutional stability by examining Uganda, a country which has had four constitutions since independence. The fact that its current one has been amended more than 120 times raises questions about the point at which amendments cease to revitalise a constitution and begin to tarnish its very legitimacy. Nabukenya argues that, in Uganda, the amendments were informed by an incapacity to govern in accordance with the Constitution, and as such he presents the Ugandan tale as one of constitutional instability. He points to a range of factors that may, in varying degrees, apply to other post-independence states on the continent. These include colonial history, ethnicity, economic structure, manipulation by international actors and the behaviour and ideology of incumbents.

He also identifies design features that have bedevilled constitutionalism in Uganda. Uganda's constitutional ambivalence towards multiparty democracy has left it bereft of well-functioning parties that contribute to stability and policy-making. Nabukenya submits as well that the absence of real constraints on executive authority, majoritarian politics, unresolved tension about federalism and decentralisation, and uncertainty about the role and status of traditional leadership are fault lines in the Constitution which prevent it from bringing about constitutional stability. In so doing, he raises important questions about the durability of constitutions that are grounded in international human-rights norms but out of sync with the cultural mores of their societies.

6 Conclusion

The chapters above are testimony to the abundance of critical thought and argument on the continent about issues relating to constitutionalism. Without fail, the authors celebrate the wave of constitutional reform sweeping over Africa and its potential to build more inclusive, resilient African states that are accountable to citizens and responsive to human rights. Without fail, too, they are vigorous in criticising undemocratic or unrealistic constitution-making processes, the autocratic behaviour of executives, the exclusion of marginalised groups, undue foreign interference and violations of basic tenets of constitutionalism such as separation of powers and respect for human rights.

The continent is propelling itself into a seemingly accelerating programme of constitutional reform, along with all the attendant challenges and pitfalls. At the same time, the margin of error is small and the time for learning short, given that popular demand for democratisation is growing and the need for home-grown solutions is urgent. It is hoped, then, that this book makes a useful contribution to constitutionalism in Africa.

The Editors
Cape Town, November 2014

The Global Political Agreement (GPA) Constitution in Zimbabwe: A New People-Driven Constitution or a Misnomer?

Wurayayi Zembe and Octavious Chido Masunda

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Abstract

This chapter assesses whether the Select Parliamentary Committee (COPAC) constitution of Zimbabwe is truly democratic or simply a further amendment to the existing Lancaster House Colonial Constitution of Zimbabwe. The Zimbabwean people are striving to establish a multiparty constitutional democracy as a permanent solution to the nation's longstanding problems in governance evidenced in violence during elections, disputed election results, allegations of illegitimate and corrupt governance, economic decay, unemployment and social unrest. Zimbabweans have been clear in their demand for a democratic constitution capable of producing a legitimate elected government through a peaceful and credible electoral process. Under the guidance of the Southern African Development Community (SADC) and the African Union (AU), and in the aftermath of violent and disputed elections in 2008, three rival political parties entered into a pact dubbed the Global Political Agreement (GPA) on 15 September 2008. The parties agreed to end political violence; alter the Lancaster House Colonial Constitution of Zimbabwe through amendment 19; form an Inclusive Presidential Government; and create a new constitution. On 12 April 2009 a 25-member select parliamentary committee (COPAC) was appointed comprising representatives of the three political parties in the legislature. The largely partisan COPAC constitution-making process took four years, instead of the planned eighteen months, to produce a draft constitution that was put to a referendum on 16 March 2013.

This chapter assesses whether the COPAC constitution-making process was democratically run and whether the draft constitution reflects Zimbabweans' demands for peace, fundamental human rights, credible multiparty elections, legitimate government, and economic reconstruction and development. Already the GPA parties have disagreed sharply on such issues as security sector reforms, an elections roadmap, the registration of voters and preparation of the voters' roll. How democratic, then, is Zimbabwe's current constitution?

1 Introduction

Constitutional reform has swept over Africa from the late 1980s to the present as a product of democratisation. Since 1975 almost 200 constitutions appeared in countries at risk of intra-state violence, including Zimbabwe.[1] Presently, the national and international perceptions are that Zimbabwe has a new people-driven constitution that became effective and operational as a new governance charter on 22 May 2013, the date on which the document was given presidential assent. The constitutional development that produced the new national governance document originated from the Global Political Agreement (GPA) signed by three competing political parties on 15 September 2008.[2]

The need for constitutional reform in Zimbabwe emerged from problems in economic, social, and foreign policy that had their roots in British colonial rule, which ended officially when the country gained full independence on 18 April 1980. Internal and external pressures on the independent African state, both of which were a result of increasing intra-state conflict and state decay, can be cited as reasons behind this need for constitutional reform.[3] For the past 33 years of independence, Zimbabweans have experienced increasing problems of poor state governance, violent electoral conflicts, alleged governmental illegitimacy and corruption, dis-

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1 Widner J 'Constitution writing and conflict resolution' (2007) 94 *The Commonwealth Journal of International Affairs* 505-18.

2 Given this origin, in this chapter the new constitution will be referred to as the GPA Constitution of Zimbabwe.

3 Berman BJ 'Ethnic politics and the making and unmaking of constitutions in Africa' (2011) 43 *Canadian Journal of African Studies* 441-61.

regard for human rights and the rule of law, economic collapse, unemployment, social disintegration, and international isolation.

As a response to these crises, the people of Zimbabwe in the recent past began to call for a new people-driven constitution as a permanent solution to the nation's problems. By means of a democratic constitution, Zimbabweans hoped to ensure peace, observance of fundamental human rights, credible democratic elections, the formation of legitimate government, rule of law, and economic reconstruction and development. It is important to stress that Zimbabweans have been vocal and unequivocal in demanding what they branded as 'a people-driven democratic constitution'. During the past three decades there has been an increasing demand in Zimbabwe for the creation and strengthening of democratic institutions and for meaningful popular participation in democratic processes, that is, for constitutionalism.[4]

This chapter provides an analytical assessment of the GPA constitution-making process with a view to determining whether the country now has a new people-driven constitution, as is claimed to be the case by those who were in control of the process. The chapter begins by identifying the legal instruments and structures of the constitution-making process. This is followed by a critical analysis of the process and the contents of the constitution.

2 Genesis of the GPA Constitution in Zimbabwe

Under the amended Lancaster House colonial constitution of Zimbabwe, elections took place between 29 March and 27 June 2008 for president, senators, members of the House of Assembly, and councillors of local authorities. The elections were marred by intimidation, beatings, arrests, abductions, torture, murder, rape, arson and the displacement of people. The election results were withheld by the electoral commission for six weeks, and the public perception was that they were manipulated in order to force the electorate into a presidential run-off election, given that the published results did not show a winner by a clear majority.

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4 Kamba WJ 'Constitutionalism in Zimbabwe' (2006) (unpublished inaugural paper, Africa University).

Due to the intensity and magnitude of the violence that characterised the run-off election, one of the candidates, Morgan Tsvangirai of the Movement for Democratic Change (MDC), was forced to flee and sought refuge in Botswana. On returning to Zimbabwe, he found refuge in the Dutch foreign embassy before withdrawing his candidature in the light of the violence directed against him and his supporters. The remaining candidate, Robert Mugabe of the Zimbabwe African National Union-Patriotic Front (ZANU-PF), was declared the winner and sworn into office as president on 29 June 2008. His five-year term ended on 29 June 2013. The international community rejected the results of the June 2008 run-off elections as undemocratic.

In the aftermath of these elections, and under the tutelage of the Southern African Development Community (SADC) and African Union (AU), the three political parties that had competed in the elections and obtained seats in parliament, entered into a pact dubbed the Global Political Agreement (GPA) on 15 September 2008. The parties agreed to: end political violence in Zimbabwe; alter the Lancaster House Colonial Constitution of Zimbabwe through Amendment 19; form one combined Inclusive Government (IG); and write a new constitution for the country. Thus, the GPA Constitution in Zimbabwe was born out of article 6 of the agreement of 15 September 2008 between ZANU-PF and the two MDC formations. The GPA was witnessed by the SADC Facilitator and its implementation was guaranteed and underwritten by the Facilitator, SADC and the AU.[5]

The GPA constitution-making process was largely controlled by party executives, as shall be outlined below. Scholars disagree as to which is the best approach in constitution-making processes. Those in favour of participatory constitution-making recommend it as the route to follow in building constitutional legitimacy in highly challenging cases of democratisation.[6] However, this model has its critics, who counter that participatory approaches can be counter-productive and wasteful of resources as there is a lengthy period required for mass participation; in some cases, participants are ordinary people with little understanding of constitutional issues and can be easily frustrated or manipulated by their leaders. In the case of Zimbabwe, the GPA leaders created the impression that the process was to

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5 Ministry of Constitutional and Parliamentary Affairs Global Political Agreement (2008) Harare, section 22.6. [Hereafter GPA.].

6 Moehler DC 'Participation and support for the Constitution of Uganda' (2006) 44 *The Journal of Modern African Studies* 275-308.

be participatory, but the reality is that the outcome was privately negotiated by the GPA parties and its formulation no different to that of its predecessor, the Lancaster House Colonial Constitution, which some scholars label as merely a compromise between competing interests.[7]

3 Constitutional Amendment 19

Although the GPA was a treaty between political parties, it was to be implemented through state structures. The parties unconditionally agreed[8] that the necessary constitutional amendments would be passed through parliament, with presidential assent to pave way for the implementation of the agreement. Consequently, the GPA parliament amended the Lancaster House Colonial Constitution of Zimbabwe by consensus through the Constitution of Zimbabwe Amendment 19 of 2008.

Section 115: Schedule 8, clause 20.1.6(1) of the amended Constitution stated that there shall be a president, which office shall continue to be occupied by President Robert Gabriel Mugabe, and clause 20.1.6(3) stated that there shall be a prime minister, which office shall be occupied by Mr Morgan Tsvangirai. Other provisions of Schedule 8 name the three political parties in the GPA as ZANU-PF, MDC-T, and MDC-M. The material effect of the Amendment 19 was to put two names of individuals and three names of political parties in the Constitution, as indicated in section 115, thereby converting the document into a personal and partisan private constitution. As a result, the Lancaster House Colonial Constitution of Zimbabwe lost its public status.

On 11 February 2009, the presidential government inaugurated after the 2008 elections, and supported by the GPA of 15 September 2008 and Amendment 19, appointed an Inclusive Government (IG) that comprised vice-presidents, a prime minister, deputy prime ministers, ministers and deputy ministers drawn from members of the three political parties in the GPA. The IG undertook to produce a new people-driven constitution during its term of office from 29 June 2008 to 29 June 2013. It is important to highlight the fact that the IG governed the country using the Lancaster House Colonial Constitution of Zimbabwe as amended, together with its

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7 Sachikonye L 'Constitutionalism, the electoral system and challenges for governance and stability' (2004) 4 *Africa Journal on Conflict Resolution* 171-95.

8 GPA section 24(1).

subsidiary laws, organs, structures, and institutions. This was the institutionalised political power that produced the GPA Constitution in Zimbabwe.

4 GPA Constitution parliamentary select committee

Article 6: 6.1(a) of the GPA states, 'The Parties hereby agree that they shall set up a Select Committee of Parliament composed of representatives of the Parties ... .' In accordance with this provision, on 12 April 2009 the Speaker of House of Assembly of the GPA parliament appointed 25 members of parliament, representing the three political parties, to form the Constitution Parliamentary Select Committee (COPAC) with a mandate to spearhead the writing of a new constitution for Zimbabwe.[9] According to section 6.1(a) of the GPA, COPAC's tasks included: setting up sub-committees chaired by and composed of members of parliament and representatives of civil society, as deemed necessary to assist the Select Committee in performing its mandate; holding public hearings and consultations on constitution-making; convening an All Stakeholders Conference to consult stakeholders on their representation in the sub-committees; tabling the draft constitution at a second All Stakeholders Conference; and reporting to parliament on the Select Committee's recommendations for the content of a new constitution. The planned timeline for the COPAC constitution-making process was 18 months, but the process took four years to complete.

Considering that the COPAC constitution-making process fell under the jurisdiction of the Minister of Constitutional and Parliamentary Affairs, COPAC can be viewed as a departmental project. However, COPAC did not have an instrument of governance that regulated its operations. In June 2013, COPAC reported to the GPA parliament that all its deliberations and decisions were by consensus – which suggests compromises – and that no voting took place to decide any issue.[10] An important observation to note is that, as much as many scholars and practitioners champion participatory constitution-making, there are others who favour elite-negotiat-

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9 Constitution Parliamentary Select Committee Final Report (2013) Harare: COPAC. [Hereafter COPAC Final Report, 2013.].

10 COPAC Final Report, 2013.

ed settlements. The latter approach is exactly the one adopted in Zimbabwe.

5 Instruments of the GPA constitution-making process

The GPA constitution-making process was based on two legal instruments, one contractual and the other constitutional. The two legal instruments were the sources of power and regulations that guided the implementation of the constitution-making process. The contractual legal instrument used in the constitution-making process is the GPA of 15 September 2008 that was signed by the presidents of the three political parties and witnessed by the SADC Facilitator, Thabo Mbeki, the then president of South Africa. The implementation of the GPA agreement was underwritten by the SADC Facilitator and AU in terms of section 22.6 of the pact. The constitutional legal instrument that provided the framework within which the GPA constitution-making process was undertaken is the Lancaster House Colonial Constitution of Zimbabwe as amended by Amendment 19 (discussed in section 3).

6 Structures of the GPA constitution-making process

Based on the contractual and constitutional legal instruments detailed in section 5 above, the following organisational structures were used in the GPA constitution-making process.

6.1 Principals to the GPA

The three presidents of the political parties, namely Robert Mugabe of ZANU-PF, Morgan Tsvangirai of MDC-T, and Arthur Mutambara of MDC-M, who had signed the GPA of 15 September 2008 as principals on behalf of their organisations, constituted the top governance structure of the GPA constitution-making process. The three principals also held top cabinet posts in the IG, which controlled the entire constitution-making process. Robert Mugabe was the President, Head of State and Commander-in-chief of the Defence Forces. Morgan Tsvangirai was the Prime Minister and Arthur Mutambara was the Deputy Prime Minister.

6.2 Management Committee

The Principals of the GPA appointed a Management Committee to give policy and strategic direction to the constitution-making process. The Management Committee also served as a deadlock-breaking mechanism. The Committee was made up of two negotiators from each of the three GPA political parties, the Minister of Constitutional and Parliamentary Affairs, and the three co-chairpersons of COPAC.

6.3 GPA political parties

As mentioned, the political partners to the GPA were ZANU-PF, the Movement for Democratic Change-Tsvangirai faction (MDC-T) and the Movement for Democratic Change-Mutambara faction (MDC-M). The parties agreed to operate by consensus. These were the parties which had participated in the sham 2008 elections and obtained seats in parliament. The same parties had been involved previously in a bloody conflict in March 2007 at an aborted Save Zimbabwe Campaign prayer meeting held at the Zimbabwe Grounds in Highfield, a suburb of Harare. That violent event, in which leaders of the MDC-T, MDC-M, and civil society organisations were assaulted by the police and one opposition activist, Gift Tandare, shot dead, shook the world and led SADC to intervene in Zimbabwe's political crisis. Throughout the GPA constitution-making process the three parties' top decision-making organs met separately on several occasions to determine party positions on issues arising from the implementation of the process.

6.4 Cabinet of the Inclusive Government

In the IG, the cabinet provided collective executive power and authority over the GPA constitution-making process. All cabinet ministers were members of the three political parties in the GPA agreement.

6.5 Ministry of Constitutional and Parliamentary Affairs

The Ministry provided supervisory and administrative oversight over the GPA constitution-making process inasmuch as the business of making a constitution fell under the executive function and mandate of the Minister. The minister was a member of one of the three GPA parties.

6.6 GPA parliament

On 12 April 2009, parliament appointed COPAC from its members to spearhead the constitution-making process. After the referendum on 16 March 2013, the final draft GPA constitution was presented to both houses of parliament through a constitutional bill referred to as Constitutional Amendment Number 20. It was passed by the House of Assembly on 8 May 2013 and by the Senate on 14 May 2013. All parliamentarians were members of the three political parties in the GPA agreement.

6.7 COPAC

As mentioned, COPAC was appointed by the House of Assembly in April 2009 to drive the GPA constitution-making process. The Select Committee comprised 25 MPs from the three political parties in the GPA and one representative of the Traditional Chiefs Council, who was also a ZANU-PF party member with a seat in parliament. COPAC created five standing subcommittees made up of its members: Budget and Finance; Human Resources; Stakeholders; Information and Publicity; and Legal. In December 2009 COPAC appointed its own secretariat of 24 employees and established a head office in Harare. Its activities were conducted in an *ad hoc* manner based on policy directives from the GPA principals. In the analysis below, it will be observed that a direct effect of the latter structural weakness was that the three political parties ended up monopolising the process to the exclusion of other parties, such as the Democratic Party, that had been calling for constitutional reform since the early 1990s.

6.8 First All Stakeholders Conference

The First All Stakeholders Conference, which was attended by 4,000 individuals drawn mainly from the GPA parties and their affiliate civil society organisations, was held on 21 July 2009. The conference produced discussion topics in the following thematic areas:

- founding principles of the constitution;
- separation of powers of the state;
- systems of government;
- executive organs of the state, public service commission, police and defence;
- elections, transitional mechanisms and independent commissions;
- citizenship and a bill of rights;
- land and natural resources;
- public finance and management;
- media;
- traditional institutions and customs;
- labour;
- youth;
- the disabled;
- war veterans/freedom fighters;
- local languages, arts and culture;
- women and gender; and
- religion.[11]

The 17 thematic areas became the basis upon which the COPAC outreach consultation was done. The First All Stakeholders Conference also instructed COPAC to ensure that in all its processes GPA political parties constituted 30 per cent and their affiliate civil society organisations 70 per cent, following the principle of equal representation of men and women in all COPAC organs.

11 COPAC Final Report, 2013.

6.9 Outreach teams

Seventy outreach teams were set up by COPAC to conduct outreach exercises in the 10 provinces of the country. Each team was made up of 16 members, comprising three team leaders, six ordinary team members, three rapporteurs, three drivers and one technician. A group questionnaire of 26 questions, referred to as 'Talking Points', was developed from the 17 thematic areas. The Talking Points questions were used to collect group responses from 1,118,760 individual participants who attended the 4,943 meetings held in 1,950 local authority council wards countrywide.

6.10 Thematic committees

Thematic committees were formed to analyse the data emerging from outreach consultations. Each committee had a total of 425 members, made up of 30 per cent members of parliament and 70 per cent members of affiliate civil society organisations. The analysed data were compiled into National Statistical Reports Versions One and Two. Version One used a quantitative descriptive statistical analysis based on frequency percentages relating to the 1,950 wards nationally. Version Two used both quantitative and qualitative analysis of data based on provincial outcomes. In the preparation of the Draft GPA Constitution, greater importance was attached to quantitative than qualitative data. The COPAC constitution-making process outreach programme was not scientific.[12]

6.11 Principal drafters

COPAC set up a committee of three lawyers to draft the constitution. To guide this drafting exercise, the principal drafters were given a document entitled *Drafting Instruments* and made up of the following sections: List of Proposed Constitutional Issues; Revised Gap Filling on Identified Issues; and Constitutional Principles. COPAC extracted what it deemed to be constitutional issues from the National Statistical Reports Versions One

12 COPAC Final Report, 2013.

and Two before developing the other two documents on Constitutional Principles and Gap Filling.

6.12 Drafting Committee

The three political parties in the GPA appointed a Drafting Committee to assist the principal drafters in producing a draft constitution. The Drafting Committee comprised five nominees from each political party represented in parliament and two others nominated by the Traditional Chiefs Council.

6.13 Co-Chairpersons' Forum

The Co-Chairpersons' Forum, made up of six members, two from each GPA party, was appointed to review the Preliminary Draft Constitution, which resulted in fresh instructions being issued to the principal drafters. A second Draft Constitution, which was produced in April 2012, triggered some disagreements among the parties, causing the Management Committee to intervene. After the Management Committee's intervention, a third Draft Constitution was produced on 18 July 2012. That is the COPAC Draft Constitution that was taken to the Second All Stakeholders Conference held in October 2012.

6.14 Second All Stakeholders Conference

The conference was held from 21-23 October 2012 and attended by 1,400 representatives from the GPA political parties and their affiliate civil society organisations. The Second All Stakeholders Conference received reports on the constitution-making process from COPAC. The reports comprised the two versions of the National Statistical Report, Drafting Instruments, and the Draft Constitution. Although the conference made recommendations and changes to the Draft Constitution, participants disagreed on them and this deadlock brought the constitution-making process to a halt.

6.15 Committee of Seven

On 25 November 2012 the principals to the GPA appointed a committee of seven members to resolve the deadlock. This committee consisted of three cabinet ministers (one from each GPA political party) and three co-chairpersons of COPAC, with the Minister of Constitutional and Parliamentary Affairs acting as convener and chair. The committee met with the principals on 17 January 2013 and resolved the disagreements. The third Draft Constitution that was produced on 18 July 2012 was changed, paving the way to the production of the fourth and Final Draft Constitution on 31 January 2013.

6.16 Referendum

A referendum on the final GPA Draft Constitution was conducted on 16 March 2013. A total of 3,316,082 individuals took part in it. Most of the voters had not seen the draft constitution but did so at the instigation of the GPA parties. There were 3,079,966 votes in favour of the draft constitution, 179,489 votes against, and 56,627 spoiled ballots. Zimbabwe has a population of about 13 million people and approximately 4 million live in the diaspora. Those who live in the diaspora were not allowed to vote in the referendum. Only 1,118,760 individuals were consulted on the constitution during the outreach phase, through 4,943 partisan group meetings countrywide (section 6.9 above). All the GPA political parties who campaigned for the 'yes' vote made vigorous use of state machinery and institutions, including public media; those who campaigned for a 'no' vote were not given free space to do so.

In view of the above, the credibility of the 'yes' vote is questionable, more so given that the referendum was also a self-serving exercise by the three GPA parties. The people were not given adequate time to read the Draft Constitution. In addition, COPAC produced insufficient copies of the document due to financial constraints. Only 70,000 copies were printed for distribution countrywide. The visually impaired were literally excluded as they got only 200 braille copies, much to the chagrin of the League of the Blind, which has a membership of over 100,000.

It has been noted that in most constitution-making processes in Africa, an overwhelming majority of the populace never see the constitution and

never have the opportunity to study and understand it.[13] At the beginning of the constitution-making exercise, the vigilance of civil society during this stage was crucial for a legitimately democratic constitution to be drafted and adopted.[14] In contrast, civil society organisations such as the National Constitutional Assembly, the International Socialist Organisation and the Democracy Institute, among others, which clamoured for more copies of the draft and more time to be given to the people to analyse the draft, were demonised and denied adequate media space to voice their concerns.

After the referendum, the Draft Constitution was presented to parliament, which consisted only of members from the GPA political parties.

6.17 State President

Following the passing of the Constitutional Bill by both houses of parliament, on 22 May 2013 the state president assented by signing the Bill into the Constitution of Zimbabwe Amendment Number 20 Act of 2013. The State President was also a GPA principal and the president of one of the three political parties, ZANU-PF.

6.18 Financiers

The GPA constitution-making process was funded by donors and the IG of Zimbabwe through a 'basket fund' jointly managed by the United Nations Development Programme (UNDP), the Zimbabwe Institute (ZI), UNICEF, the Electoral Institute of Southern Africa (EISA), and the GPA IG of Zimbabwe. A total of US$51.9 million was used for the constitution-making process, with a contribution of US$23.2 million from donors and US$28.7 million from the IG.

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13 Ihonvbere JO 'How to make an undemocratic constitution: The Nigerian example' (2000) 21 *Third World Quarterly* 343-66.

14 Makumbe J 'Transitional arrangements' in Kersting W (ed) *Constitution in Transition* (2009).

7 Analysis of the GPA constitution-making structures

7.1 Political violence

The consummation of the GPA of 15 September 2008 was preceded by two major episodes of violent conflict between ZANU-PF and the two MDC formations. As previously mentioned, the first major clash occurred when leaders of the MDC formations and civil society organisations were brutally attacked and assaulted by the police on 11 March 2007 at a disrupted prayer meeting organised in Harare by the Save Zimbabwe Campaign. A member of the MDC-T, Gift Tandare, was shot and killed on the spot by the police. The bloody event attracted international attention and condemnation. In the region, the event triggered external intervention by SADC in Zimbabwe's political crisis. The SADC intervention was mandated by a resolution of the regional body's Summit held in Dar es Salam, Tanzania on 29 March 2007. The AU supported the intervention. The second major class took place during the 2008 elections. Section 2 above covers the nature of the violence witnessed.

In the aftermath of the bloody and violent sham elections, the GPA of 15 September 2008 was consummated by the three parties under the auspices of the SADC external intervention initiative of 29 March 2007. These two major acts of violence created the conditions under which the GPA agreement was entered into, but the parties were never socially reconciled; inwardly, they remained hostile towards each other. This point is confirmed by the fact that violence and hostilities pervaded all structures of the GPA constitution-making process.

The initial meeting of the First All Stakeholders Conference was violently disrupted by rowdy ZANU-PF war veteran on 13 July 2009.[15] In 2010 one of the vice presidents of ZANU-PF, John Nkomo, baldly stated, 'We can't sit at the same table with the enemy [MDC] and pretend to be friends when we are not.'[16]

The GPA COPAC constitutional public-outreach meetings in Harare were abandoned after violence and chaos rocked the proceedings when ZANU-PF youths chased away MDC-T supporters from the gatherings. One person was killed in the attack. In Chitungwiza, the constitutional

15 *Zimbabwe Independent* 17 July 2009.
16 *The Herald* 13 November 2010.

public-outreach consultation programme was aborted after a gun was drawn during disagreements at the start of the meeting.[17] The *Zimbabwe Independent* reported that the army and other state security agents terrorised villagers during the public consultation programme.[18] This was echoed by similar media coverage across the country that pointed to the military's heavy involvement in the constitution-making process.

7.2 Intimidation and coaching of respondents

Throughout the implementation of the GPA constitution-making process, media reports indicated that people were being intimidated, threatened and sometimes beaten for voicing their thoughts on the constitution during the COPAC public consultation programme. In Bikita, the leader of the War Veterans Association was alleged to have established a base in the area for disrupting COPAC meetings and threatening villagers against saying anything opposed to the ZANU-PF at these events.[19]

In addition, the media reported instances where GPA political parties competed among themselves by coaching their members on what to say in the public constitutional consultation process.[20] In some cases, only one person was appointed and authorised by the party to speak as the respondent representing a group of members at an outreach consultation gathering.

It was also reported that COPAC data collected in the constitution-making outreach disappeared because when it was erased from computers by security officials who objected to people's opinions on the constitution.[21] It was said, too, that the UNDP had ditched the COPAC constitution-making process by withdrawing funding, amounting to US$2 million, for Second All Stakeholders Conference because the event would be marred by violence. 'The UNDP could not sink US$2 million into violence,' the report concluded.[22]

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17 *The Standard* 19 September 2010.
18 *Zimbabwe Independent* 1 October 2010.
19 *NewsDay* 20 August 2010.
20 *Zimbabwe Independent* 2 July 2010.
21 *The Herald* 27 January 2011.
22 *The Herald* 18 November 2011.

In the same vein, the leader of the MDC-T, Morgan Tsvangirai, publicly declared that the GPA constitutional outreach consultation programme had 'failed to pass the test of legitimacy, credibility and people-drivenness' due to the violence and intimidation that had characterised it.[23]

7.3 Partisan character

All the legal instruments and organisational structures of the GPA constitution-making process were established, managed, controlled and governed by members of the three political parties to the exclusion of other political parties, civil society organisations and individual stakeholders in Zimbabwe. The entire COPAC constitution-making process was strikingly partisan: only the coached views of these mutually hostile parties were collected, after which these views were edited by the party principals and their subordinate constitution-making structures before a draft constitution was produced.

It may be observed that one of the reasons why neither the ZANU-PF nor MDC-T obtained an outright majority in the 2008 elections was that Simba Makoni of Mavambo/Kusile/Dawn party garnered 8.3 per cent of the vote. Nevertheless, he was conspicuously absent from the GPA processes. Several other political parties and civil society organisations that dominate the Zimbabwean political space were also excluded from the constitutional reform process.

8 Analysis of the GPA constitution-making process

8.1 Definition of terms and methodology

Although COPAC's operating motto was 'ensuring a people-driven constitution', the GPA constitution-making process did not provide operational definitions of the terms 'people', 'constitution', and 'people-driven'. The only flimsy reference made in this regard was a description, unelaborated upon, of the constitution as 'the supreme law of Zimbabwe'. Other

23 *NewsDay* 23 September 2010.

key concepts used but not defined in the constitution-making process were: *constitution-making, constitution-writing, process, constitution-making process, consultation, outreach, public, public consultation, public hearing, participation, All Stakeholders, democratic,* and *inclusive.*

COPAC's constitution-making process was hence an inquiry that, lacking defined terminology, groped about in conceptual darkness. Definitions of key operating terms and concepts would have provided a framework of theoretical principles for guiding the implementation of the GPA constitution-making process, data collection, analysis and interpretation of empirical findings in an objective way. COPAC took an unscientific dive into a crucially important human inquiry without the necessary preparation. The absence of contextual meanings for the terms used in the exercise makes it difficult or impossible to establish the truth of the results of COPAC's constitution-making process, raising the possibility that its stated target of 'ensuring a people-driven constitution' by a wide margin.

Regarding data collection, the GPA's terms of reference to COPAC stated that the latter was 'to hold such public hearings and such consultations as it may deem necessary', thereby giving unlimited discretionary power to the Select Committee in how it chose to operate in the absence of a prescribed research methodology. The lack of clearly-specified data-collection methods, data-collecting instruments and a framework within which to analyse the data, compromised COPAC's constitution-making process.

The implementers of the constitution-making process struggled to achieve their goals. For instance, COPAC crafted its group questionnaire instrument for data collection using 26 Talking Points which it derived from the 17 thematic areas; these in turn had been derived from the deliberations of the First All Stakeholders Conference, deliberations that were marred initially by serious disturbances. The data gathered by outreach teams from 1,118,760 individual participants were analysed by 17 Thematic Committees, each with 425 members, after which information was extracted for the Constitutional Principles, Constitutional Issues, and Gap Filling (see section 6.11 above).

Another major problem linked to the lack of a clear methodology was the question of how to measure, analyse and interpret quantitative and qualitative data. In all its official reports from the constitution-making process, COPAC openly admitted its process was not scientific. As it stated in its Final Report of June 2013 to parliament,

> [g]iven the fact that this was not a scientific study, the Select Committee resolved that both the statistics (quantitative) and qualitative outcomes must be taken into account in deciding what would eventually go into the Constitution. The interpretation of these statistics therefore had to take into account these limitations in methodology. Whilst a high frequency was a general guide that in itself was not the sole determinant of the importance of an issue enough to find its way into the new Constitution.

The absence of a theoretical framework covering the operational definition of key terms and methodology of collecting data resulted in too many ad hoc structures and committees being created in an adaptive, sometimes contradictory, manner, thereby eroding the credibility of the GPA constitution-making process and its outcome. The process simply did not have a people-driven constitution-making model firmly in mind, even though such models are not hard to come by: the researchers Zembe and Sanjeevaiah, for instance, have developed precisely this, a people-driven constitution-making process model for Zimbabwe.[24]

If the purpose of COPAC's constitution-building were for the Zimbabwean people to make a constitution by themselves and for themselves, then the GPA process missed the target due to the absence of a guiding theory and methodological framework capable of achieving this objective.

8.2 Ownership of the GPA constitution-making process

Constitution-making is itself a major part of constitutionalism and an important means of promoting consensus among the people.[25] In this regard, a preamble in article 6 of the GPA document clearly states 'that the process of making this constitution must be owned and driven by the people and must be inclusive and democratic'. While the COPAC constitution-making process was born out of this article, the people were not consulted, neither prior to nor after the GPA, for their input in determining the shape this process would take. The determination of the process was instead an elite-driven initiative that side-lined the grassroots. Given the nature of its

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24 Zembe W & Sanjeevaiah J 'Developing a democratic constitutional framework through a people-driven constitution-making process for Zimbabwe' (2013) 2(8) *International Journal of Science and Research*.

25 Kamba WJ 'Constitutionalism in Zimbabwe' (2006) (unpublished inaugural paper, Africa University).

origins, the GPA constitution-making process was not owned and driven by the people of Zimbabwe because the process did not come from them.

To this, it may be counter-argued that although the COPAC constitution-making process was founded by the GPA, the people of Zimbabwe did have the opportunity later to buy into it and gain ownership and control. Such an argument is quickly dismissed by considering how the structures and instruments of the GPA constitution-making process (see sections 5 and 6 above) were implemented. The Common Issues Platform (CIP) makes a strong point in its submission of issues and observations on Zimbabwe's political crisis to the SADC Facilitator in July 2012 that the 'COPAC constitution-making process has failed to be an inclusive arena for open popular people participation as the secretive, and often violent, process is serving partisan political power designs and electoral agendas of the three parties in the GPA/GNU'.

The ownership of the GPA constitution-making process remained firmly in the hands of the partners to the agreement from conception to conclusion, as is shown clearly by the empirical evidence presented above and elaborated upon immediately below.

8.3 Control of the GPA constitution-making process

Inside and outside of government, then, the presidents of the three GPA parties were in exclusive control of the COPAC constitution-making process from beginning to end. Inside government, the GPA principals had executive power and authority over these processes by means of the following legal instrument and structures:

- the Lancaster House Colonial Constitution of Zimbabwe, as amended;
- the cabinet of the Inclusive Government;
- the Ministry of Constitutional and Parliamentary Affairs;
- parliament;
- government finance; and
- COPAC.

Outside government, they controlled these constitution-making legal instruments and structures:

- the GPA of 15 September 2008;
- the top decision-making bodies of their respective political parties;
- the Committee of Seven;

- the Management Committee;
- Co-Chairpersons of COPAC;
- the Drafting Committee;
- the First All Stakeholders Conference;
- the Second All Stakeholders Conference; and
- donor financiers.

Even though the COPAC constitution-making process exhibited political polarisation, confusion, disagreement and impasse, in the final analysis the GPA principals' wishes prevailed because they had contractual control of the process emanating from the provisions of the GPA agreement and constitutional and legal statutes.

9 Analysis of the GPA Constitution in Zimbabwe

9.1 Nature and status of the GPA Constitution

The main heading of the constitutional document is 'Constitution of Zimbabwe Amendment (No. 20)' while the short title is 'The Constitution of Zimbabwe Amendment (No. 20) Act, 2013', indicating that it is an Act enacted by the President and the Parliament of Zimbabwe to repeal and substitute the Constitution of Zimbabwe. In actual fact, the Constitution of Zimbabwe which is being repealed and substituted is the Lancaster House Colonial Constitution of Zimbabwe.

Two issues arise from the document's title. First, whereas the GPA Constitution is entitled, 'Constitution of Zimbabwe Amendment (No. 20) Act, 2013', that of the Lancaster House Colonial Constitution of Zimbabwe is simply termed 'Constitution of Zimbabwe'. The former is an amendment, the latter an original. Secondly, the GPA Constitution is an Act of the President and the Parliament; the Lancaster House Colonial Constitution of Zimbabwe is not an Act.

There is a fundamental difference between an amendment and the original statute. An amendment document alters or changes the content of a prior document, while an original is a new, self-standing and non-derivative entity. Another fundamental difference is that between an Act of the President and the Parliament, and a constitution. If the institutions of the President and the Parliament are elected according to a constitution, then it is not possible that they can create a constitution; instead, the furthest extent to which these two constitutional institutions can go is that of amend-

ing the constitution from which they are created, provided it is permissible to do so in terms of that constitution itself. It appears, indeed, that this is what the President and the Parliament of Zimbabwe did: they simply amended an old constitution.

It is the Lancaster House Colonial Constitution of Zimbabwe that was amended by the GPA Constitution. Additional evidence of the above observation is contained in the Sixth Schedule of the GPA Constitution. According to section 1 of the Schedule, the term 'former Constitution' means the Constitution of Zimbabwe that came into operation on the 18 April 1980, as subsequently amended. The definition of 'former Constitution' sanitises a colonial document that the people of Zimbabwe seek to discard.

Another observation in support of the amendment status of the GPA Constitution is contained in sections 4, 9 and 10 of the Sixth Schedule. Section 4 says that subject to this Schedule, the former Constitution is repealed with effect from the effective date. Section 9 states that the government constituted under this Constitution is in all respects the successor to the former Government of Zimbabwe. Section 10 stresses that subject to this Schedule, all existing laws continue in force but must be construed in conformity with this Constitution.

Considering the implications of the empirical evidence given above as to the nature and status of the GPA Constitution in Zimbabwe, it seems an inescapable conclusion that the Constitution is not a new people-driven democratic governance charter but a mere amendment number 20 to the existing Lancaster House Colonial Constitution of Zimbabwe. Consequently, the national and international perception that there is a new people-driven democratic constitution in Zimbabwe must be dismissed as incorrect: no such thing exists in legal reality.

In a multiparty constitutional democracy, the constitution can only legitimately come from the collective free will and action of the people. It is the people who create a constitution, and through it, establish institutions of government like the President and the Parliament. It cannot be vice versa. The President and the Parliament can certainly not create the people and a people-driven constitution. Unfortunately, this was not the case in the constitution-making process in Zimbabwe. The non-participatory approaches generally adopted by African constitutions have led to a number

of contradictions and limitations that ultimately impact adversely on the management of democratic systems.[26]

9.2 Sources of ideas in the GPA Constitution

Two major sources of ideas that went into the GPA Constitution in Zimbabwe are, on the one hand, the Lancaster House Colonial constitution of Zimbabwe, as amended, along with all its subsidiary laws, and on the other, the principals of the GPA and their political parties. Point 9.1 above revealed ample evidence that the GPA Constitution is an amendment to an existing constitution.

Regarding the GPA principals and political parties, their views entered the GPA Constitution through the implementation of the COPAC constitution-making process. After collecting data from their largely partisan combined membership of 1,118,760 individuals in an outreach exercise, the information was collated and filter-treated through a maze of convoluted *ad hoc* and partisan negotiating structures. The GPA constitution-making process, in other words, was one based on secretive bargaining and compromise. What the GPA principals wanted, prevailed; what prevailed in particular was what the state president wanted, given that executive power, authority and control is vested in his office.

In terms of the Lancaster House Colonial Constitution of Zimbabwe, as amended, under which the GPA Constitution of Zimbabwe Amendment (No.20) Act, 2013 was enacted, the President named as Robert Gabriel Mugabe[27] was the Head of State and Head of Government and Commander-in-Chief of the Defence Forces[28]. The executive authority of Zimbabwe was vested in the President, who exercised the authority directly or through the Cabinet, a Vice President, a Minister or a Deputy Minister.[29]

Section 27(1) of the former constitution was replicated in section 89 of the GPA Constitution, which states that the President is the Head of State and Government and the Commander-in-Chief of the Defence Forces. Section 31H of the former constitution was also replicated in section 88(2)

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26 Ihonvbere JO 'How to make an undemocratic constitution: The Nigerian example' (2000) 21 *Third World Quarterly* 343-66.

27 Section 115: schedule 8: section 20.1.6(1).

28 Section 27(1).

29 Section 31H.

of the GPA Constitution, according to which the executive authority of Zimbabwe vests in the President, who exercises it, subject to this Constitution, through the Cabinet. However, surely the Cabinet is made up of the President, Vice Presidents and Ministers, while Deputy Ministers are appointed by the President and fall under the executive authority of Ministers?

Further evidence that the ideas of individual principals of the GPA went into the GPA Constitution is found in section 14(1) of the Sixth Schedule, which states that '[n]otwithstanding section 92 [of the Constitution], in the first election and any presidential election within ten years after the first election, candidates for election as President do not nominate persons in terms of that section to stand for election as Vice Presidents'. Section 92 of the GPA Constitution states that every candidate for election as President must nominate two persons to stand for election jointly as running mates and designated as first and second Vice President. It is the interests of the incumbent State President that dictated the idea of suspending the operation of the running-mates clause in elections for ten years. Clearly, the idea did not come from the people consulted.

Another issue in the GPA Constitution clearly dictated by the GPA political parties concerns the death sentence for men aged 21 to 70 years.[30] This is an open violation of the fundamental rights to life, equality before the law, human dignity, personal security and freedom from torture. Considering that newly-born males will inevitably enter the prescribed age group at some point in their lives, one wonders what sort of a constitution it is that conspires to murder its male citizens when they turn 21-70 years. A further consequence of this brutal provision is that it is discriminatory to boot: despite committing similar crimes, women and other male age groups will not suffer the death sentence.

It can be concluded that that the ideas used to amend the Lancaster House Colonial Constitution of Zimbabwe through the GPA Constitution certainly did not come from the collective thinking of all Zimbabweans.[31] In this regard, the GPA Constitution failed to meet the expectations of the people of Zimbabwe to achieve, through a people-driven democratic constitution, peace and security, fundamental human rights, rule of law, credi-

30 Section 48(c).
31 COPAC Final Report, 2013 section 7.3.

ble multiparty elections, legitimate governance, employment, economic reconstruction and social development.

9.3 Ownership of the GPA Constitution

Axiomatic to this chapter is the belief that process-ownership predetermines content and product-ownership. From the analysis given of the GPA constitution-making process and the resultant constitution, it follows that the people of Zimbabwe do not own the current constitutional order governing their country. They neither made the Lancaster House Colonial Constitution of Zimbabwe nor the GPA Constitution of Zimbabwe Amendment No. 20 Act of 2013. The GPA constitutional order is owned jointly by the three political parties that made it, and severally by the principals and presidents of those organisations. The GPA Constitution is a privatised and partisan document that cannot serve as an instrument for good public management and governance of a multiparty constitutional democracy.

10 Constitutional disagreements among GPA political parties

Soon after the enactment of the GPA Constitution on 22 May 2013, sharp disagreements arose among the GPA political parties about security-sector reform, an elections roadmap, media reforms, and voter registration and preparation of the voters' roll. In view of the fact that Section 10 of the Sixth Schedule in the GPA Constitution states that, subject to this schedule, all existing laws continue in force but must be construed in conformity with the new Constitution, there has also been disagreement about the scrapping or amendment of statutes. This disputed legislation includes the Presidential Powers (Temporary Measures) Act; Electoral Act; Public Order and Security Act; Access to Information and Protection of Privacy Act; Criminal Law (Codification and Reform) Act; Political Parties Finance Act; Broadcasting Services Act; Defence Act; Police Act; and Prisons Act.

The disagreements were exacerbated when the state president set the date for the next general elections as 31 July 2013. Using the same powers of decree, he amended the Electoral Act through the enactment of four statutory instruments. Parliament was dissolved by operation of law on 29

June 2013, and until the general elections the president would rule the country by decree in terms of the Presidential Powers (Temporary Measures) Act.

The president's announcement of the election date followed a Constitutional Court ruling that the elections were to be held on the date specified. *The Southern Eye* carried a front-page report that, on the day of the ruling, the Court would be hearing six cases, including one involving demands by SADC that the date of elections be moved to 14 August 2013.[32] The Court decided, however, to postpone this hearing in order to consolidate issues raised by the applicants. Meanwhile, the nomination court sat on 28 June 2013 and received candidates contesting the harmonised presidential, parliamentary, and local council elections. More petitions were filed at the Constitutional Court to have the election date postponed and the presidential proclamation annulled. However, on 4 July 2013 the Constitutional Court ruled that the elections would be held on 31 July 2013 according to the electoral law, thereby dismissing all challenges opposing the proclamation of the elections date. *The Herald* reported that at a launch of his party's Manifesto on 5 July 2013, Mugabe as president of ZANU-PF threatened to quit the SADC if the regional body interfered with the July 31 2013 elections in Zimbabwe.[33]

At the time of writing, political violence in Zimbabwe had not stopped. More arrests of political opponents, human rights activists, and journalists were being witnessed. Top security-sector officials were increasingly issuing public threats that if their party lost the elections planned for 31 July 2013, they would resort to violence as they had in June 2008. The indications on the ground were that, once again, the nation was at risk of another disputed election, an election which, because of the flawed constitution-making process, was set to be vigorously contested. Constitutionalism ensures the electorate has the necessary confidence in the state and government, confidence which fosters political stability and constructive conflict-management. Had its constitutional process been people-driven rather than selfishly partisan, Zimbabwe could have found the elusive path to democratic governance.

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32 *The Southern Eye* 26 June 26 2013.
33 *The Herald* 6 July 2013.

11 Conclusion

From the above assessment and analysis of the GPA constitution-making process, it can be concluded that Zimbabwe does not have a new people-driven democratic constitution. The history of constitutionalism and constitutional democracy in Africa is not a particularly happy one, and Zimbabwe's case is no different.[34] By and large the GPA Constitution is an amendment of the Lancaster House Colonial Constitution of Zimbabwe, and it is a misnomer to call an amendment 'a new people-driven constitution'. There is an urgent need to embark on a genuine people-driven democratic constitution-making process if further social, economic, political, and constitutional disorder and instability, as recently experienced in Egypt, is to be avoided. In doing so, the following recommendations from the Commonwealth best practice guidelines of constitution-making[35] should be considered:

- Government must adopt credible constitution-making; that is, a process that constructively engages the majority of the population.
- Government should assist and empower civil society groups to effectively participate in the constitution-making process and in the promotion of constitutionalism.
- The public should be informed at every reasonable stage about the progress of the constitutional process.
- Mechanisms used for adopting or ratifying constitutions should be credible and truly representative of the peoples' views.

Zembe speaks tellingly of the norms Zimbabwe should adopt in the event of meaningful constitution-building in the future:

> The rule of law is a value of society that must come from the people as owners of political, civil, economic, social, and cultural rights. The source of the law is the people. For the law to be legitimate, the citizens, who will become subjects of their own law, should participate in its evolution. The law should not be used to deny people their rights and freedoms. Citizens should enjoy even more freedoms. The law must lead to social, economic, and political development. In other words, the rule of law based on the legality and practice

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34 Fombad CM 'Challenges to constitutionalism and constitutional rights in Africa and the enabling role of potential parties: Lessons and perspectives from Southern Africa' (2007) 55 *The American Journal of Comparative Law* 1-45.

35 Widner J 'Constitution writing and conflict resolution' (2007) 94 *The Commonwealth Journal of International Affairs* 505-18.

of constitutional law should lead to human development where all citizens are free to actualise their full potential in the fulfilment of their human needs. The principle of constitutional rule of law should create peace and prevent violence in society. The concept works well in a system of government where there is popular participation of citizens in public policy decision-making processes.[36]

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36 Zembe W *Constitutionalism in Zimbabwe: Unfinished Business* (2009) 37.

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Standing on the Sidelines Watching: Women and Zambia's Constitutional Processes

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Abstract

Zambia is one of the few countries in the world that can boast four constitutional reform processes (with a fifth having recently been concluded) in a period of only 49 years, the length of time which (at writing) has elapsed since the country gained independence. These processes were highly contested and resulted in three constitutions that were not especially favourable towards certain women's rights. This chapter examines women's participation and representation in Zambia's constitutional processes. It traces women's role in constitution-making, and considers whether the increase in their participation and representation has led to an advancement of their rights. This question is raised because previous constitutions ignored various rights for which women advocated, with women's movements contending that constitutional processes were driven by patriarchal attitudes aiming to maintain male domination. Four rights have been selected for discussion in this chapter, and it is argued that the failure to include them has resulted in procedures that fail to accommodate the needs of more than half of the population. The first draft Constitution currently under consideration addresses many of the concerns raised by women, but it could be derailed if other interests are placed ahead of women's rights. As such, this chapter recommends a number of potential measures which could ensure that more women are incorporated in the constitutional process.

1 Introduction

Zambia is a landlocked country with an estimated population of 13.5 million people. It has been relatively peaceful since gaining independence from Britain in 1964, so it is somewhat ironic that at present Zambia is un-

dergoing its fifth constitutional process. It has had three constitutions, with two major amendments in 1969 and 1996.[1] Every constitutional process has emphasised the need to have a constitution that stands the test of time, or as a former vice president put it, to have 'a constitution … which is pertinent to the aspirations of our people'.[2] The content of such a constitution is largely determined by the process of drafting, considering and adopting it, because process crucially shapes and/or protects the content.[3]

It has been correctly observed that:

> [a] constitution is not an ordinary piece of legislation. It is the person's sovereign and inalienable right to determine the form of governance for their country by giving to themselves a constitution of their own making.[4]

While this sovereign and inalienable right requires that all sectors of society be included in the process, especially those who were side-lined in the past, one of Zambia's biggest challenges has been securing the effective participation of women. Deeply patriarchal and conservative, Zambia has often sacrificed women's rights on the altar of national decisions.[5] This chapter focuses on two indicators of this sacrifice, namely citizens' participation and representation, in an attempt to illustrate how a constitutional process in a democratic state has side-lined an important part of its citizenry.

The chapter commences with an overview of how Zambia's constitutional processes have been conducted between the immediate post-independence period and the present, after which it analyses women's representation and participation therein. Representation is examined through an investigation of the number of women who have been appointed as commissioners and been part of national consultations. Citizens' participation is

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1 Ndulo M & Beyani C *As Tedious as a Twice-Told Tale: The Struggle for a Legitimate and Democratic Constitution In Zambia* (2011).

2 Former Vice President Mainza Chona at the 2nd Reading of the Zambian Constitutional Bill, 1973.

3 Mwale S *Constitutional Review: The Zambian Search for an Ideal Constitution* (paper presented at the 10th African Forum for Catholic Social Teachings Working Group Meeting on 2 May 2006, Nairobi, available at http://www.jctr.org.zm/index.php?option=com_content&view=article&id=76&Itemid=99 (accessed 15 August 2013).

4 Mungomba Constitutional Commission *Mungomba Constitutional Commission Review Report* (2005) 493.

5 While this is not peculiar to Zambia alone, it does inform the argument made in this chapter.

addressed by considering how many women have made submissions to the previous four commissions and how wide the consultation process was. Thereafter, four women's concerns are identified and used to gauge if any positive outcomes arose from participation, further to which the draft Constitution is briefly analysed to determine whether it provides any relief in respect of these concerns. The chapter concludes by recommending a number of possible measures to ensure better inclusivity of women.

2 A history of Zambia's constitutional processes

In order to trace the role of women in the constitution-making process, one needs to understand the form that Zambia's constitutional processes have taken. These involve the appointment of a Constitutional Review Commission (herein referred to as CRC) by a sitting president. The power to appoint a CRC is vested in the Inquiries Act 45 of 1967, and has been used on four separate occasions to appoint a commission intended to canvas the country for people's views about what should be included in the constitution.

The first such occasion was in 1972, when then President Kenneth Kaunda appointed a commission chaired by his vice president Mainza Chona and known popularly as the Chona Commission.[6] The views the CRC sought were mainly concerned with constitutional changes that would facilitate the workings of the ruling United National Independence Party (UNIP) and government and bring about a one-party state. Subsequently, the 1973 Constitution was adopted.[7]

The second occasion was in 1990, when years of discontent with the one-party state had prompted call for changes. Kaunda appointed another CRC,[8] led by Professor Patrick Mvunga and known as the Mvunga Commission. One of its most important Terms of Reference (TORs) was the examination and determination of a system of political pluralism[9] that would ensure a government strong enough to rule the Zambian nation and

6 National Commission on the Establishment of a One-Party-Participatory Democracy in Zambia, gazetted under Statutory Instrument No. 46 of 1972.
7 The Constitution of the Republic of Zambia, Cap 1 of 1973.
8 Gazetted under Statutory Instrument No. 135 of 1990.
9 Multiparty elections were held under a new Constitution on 31 October 1991.

secure the personal liberties of the people.[10] This process led to the 1991 Constitution,[11] and with political pluralism came winds of change: the Movement for Multi-Party Democracy (MMD) governed henceforth.[12]

Fredrick Chiluba was appointed as President, and he, too, in 1995 appointed a third CRC known as the Mwanakwatwe Commission.[13] This was the first commission that, among other TORs, specifically included the need to entrench and promote legal and institutional protection of fundamental human rights.[14] The result was the 1996 Amendment to the 1991 Constitution.[15]

Seven years later, Chiluba's successor, President Patrick Levy Mwanawasa, appointed another CRC in 2003. Known as the Mungomba Commission,[16] it was intended to garner opinions on a constitution that would exalt, effectively entrench and promote legal and institutional protection of fundamental human rights and, most importantly, stand the test of time.[17] A novel inclusion in the TORs was the requirement for the CRC to investigate the extent to which gender equality should be addressed in the Zambian Constitution.[18] The constitutional changes were never implemented as they failed to meet parliamentary approval.

In November 2011 the newly elected President, Michal Sata, announced that, unlike the case in previous instances, he was appointing a Technical Drafting Committee.[19] He stated that the Technical Committee was appointed to draft a constitution[20] that would provide the structures ne-

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10 Constitution Commission *Report of the Constitution Commission* (1991) available at http://www.unza.zm/zamlii/const/1991/act91.htm (accessed 5 August 2013) 4.

11 The Constitution of Zambia, Act No. 1 of 1991.

12 Gisela Geisler, who has written extensively on women in southern Africa, credits these winds of change with having created a need in women for greater political representation.

13 Chaired by John Mwanakatwe Esq, gazetted under Statutory Instrument No. 151 of 1993 as amended by Statutory Instrument No. 173 of 1993.

14 Report of the Mwanakatwe Constitution Commsision, Inquiries Act, Cap 181 at 4.

15 The Constitution of Zambia, Act No. 1 of 1991.

16 Chaired by Willie Mungomba Esq, under Statutory Instrument No. 40 of 2003.

17 As stated in the introduction of the Mungomba Commission Report of 2005.

18 Pg xxvi of the Mungomba Commission Report of 2005.

19 The Committee was appointed on 16 November 2011 but was beset with controversy when various prominent Zambians declined to be part of it.

20 The appointment of the Committee has been highly contested in itself. Critics argue that there is no legal basis for its appointment and that the process is thus disingenuous.

cessary to ensure constitutional democracy[21] and the development of a constitutional culture to underpin Zambia's political system. One of the Technical Committee's TORs has been to draft a constitution that establishes a democratic system of government guaranteeing gender equality, gender equity and affirmative action.[22] The history of the women's engagement with these processes, however, tells a different story.

3 Constitutional review bodies: Whom do they represent?

Representation often entails serving as a symbol for, or illustration of, a certain theme or group. While it is true that 'representivity' is only a necessary though by no means sufficient condition for effective public participation,[23] it exerts a strong influence on the efficacy of the process. The CRCs were appointed to facilitate public involvement in the constitutional processes, and as such effective participation has always been touted as an important objective of theirs.[24]

Nevertheless, in the first CRC, the Chona Commission of 1972, the twenty-person delegation had only one female.[25] The Mvunga Commission of 1991 was nineteen-persons strong,[26] but boasted just three women,[27] even though Zambia ratified the Convention on the Elimination of Discrimination Against Women (CEDAW) in 1985.[28] The preamble to the CEDAW states that 'state parties to the convention are convinced that the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women on equal

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21 This is despite the fact that renowned academics like Dr Chaloka Beyani and Dr Muna Ndulo declined a role on the committee. They said there should be no more review commissions to collect the public's views on the future constitution for Zambia as these had been canvassed adequately in several previous commissions.

22 Item (c) ii of the TORs, available at http://zambianconstiution.org/terms-of-reference-.html (accessed 10 July 2013).

23 Jayal NG *From Representation to Participation: Women in Local Government* (paper presented at the Expert Group Meeting on Equal Participation of Women and Men in Decision-Making Processes, with Particular Emphasis on Political Participation and Leadership, October 2005) 3. [Hereafter Jayal (2005).].

24 Present in all CRC reports.

25 Mrs Lily Monze, editor the parliamentary debates.

26 Excluding two secretaries, who were both male.

27 Ms Celestina L Kabalu, Ms Bernadette Sikanyika and Ms Any Kabwe.

28 Adopted by Resolution 34/180 of the General Assembly in 1979.

terms with men in all fields'.[29] Given the developmental importance attached to women's participation, the CRC should have included more women in keeping with the obligations contained in the CEDAW. The subsequent Mwanakwatwe Commission of 1993, although larger in size with 21 members, only had four women,[30] while the Mungomba Commission of 2003 had but eight women among its 42 commissioners,[31] this is despite the fact that one of the TORs was to investigate the extent to which gender equality should be addressed in the constitution.

The Mungomba Commission was unique, however, in that whereas other draft constitutions depended on the government's response,[32] it initially held some hope of being adopted by a Constituent Assembly.[33] In July 2007, following an inter-party dialogue,[34] it was resolved instead that a National Constitutional Conference (NCC) rather than a Constituent Assembly would adopt the constitution.[35] The NCC was tasked as a forum for the examination, debate and adoption of proposals to alter the Constitution as contained in the draft Constitution submitted by Mungomba CRC.[36] Comprised of 495 members drawn from all sectors of Zambian society ranging from women's organisations and the youth to professional bodies and the judiciary,[37] the NCC had merely 131 women, which equated to 26 per cent of the members of the conference.

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29 Text of CEDAW available at http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm (accessed 12 July 2013).

30 Chieftainess Chiyaba, Ms Beatrice Chileshe, Mrs Hilary Mulenga Fyfe and Mrs Lucy Banda Sichone.

31 Chiefteness Nkoehsya Mukambo II, Ms Rosemerry Chimpape, Ms Rosemery C Banda, Ms Joyce Namonde, Ms Charity Mwanza, Mrs Nellie B.K.Mutti, Mrs Hilary M Fyfe and Ms Lauren M Sikanyege.

32 The Inquiries Act allows the government the power to reject or accept people's recommendations and make any modifications that it desires through a document called the government 'White Paper'.

33 This followed pressure from civil society groups under the broad umbrella of the Oasis Forum after a stalemate of two years.

34 Mbao M 'The politics of constitution-making in Zambia: Where does the constituent power lie?' in Fombad C and Murray C (eds) *Fostering Constitutionalism in Africa* (2010) 87-117.

35 Established under the National Constitutional Conference (NCC) Act 19 of 2007.

36 Part II clause 3 of the NCC Act.

37 Composition of members available at http://www.ncczambia.org/members.php (accessed 11 July 2013).

The poor female representation in NCC and CRCs was not a reflection of any passivity on the part of women; instead it expressed the nature of Zambia's patriarchal culture, one which affects all spheres of society, including politics. The inclusion of women in any political process was considered a privilege and not a right that women could claim, despite the numerous attempts that had been made to fight for it. Commissioners on the NCC and CRCs were appointed purely at the discretion of the President, with the result that the bodies were dominated by men, notwithstanding efforts by women's groups to be engaged in the process.[38] It is also worth mentioning that between 1991 and 1996 when two of the CRCs were appointed, only 10 per cent of parliamentarians were women – further evidence of the lack of opportunities afforded to them. This situation was manifest not only in the representation women had in the constitutional review bodies but in the participation afforded to them.

4 Citizens' participation

People's participation in a constitution-making process from inception to completion is a prerequisite of any democratic institution, community or society.[39] In Kenya, participation was considered so critical that the Constitution of Kenyan Review Act was amended to reflect an agreement placing people's participation at the centre of the review process.[40] The Kenyan Constitution[41] is arguably one of the best in the world, and the emphasis placed on participation has played a large role in this.

Until recently, the same has not been true of the Zambian process, where there has been a historical and continuing lack of civil education about constitution-making.[42] Women's rights activists and women's organisati-

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38 The Zambian National Women's Lobby group was created in 1991 to identify ways of integrating women into all spheres, including political spheres such as constitutional reviewing bodies.

39 Mwale S 'Conflicting interests in constitution process' (2005) 6(7) *The Challenge Magazine*.

40 International IDEA Democracy-building & Conflict Management (DCM) The Constitution of Kenya Review Commission, the Constitution Review Process in Kenya: Issues and Questions for Public Hearings (March 2002) 8.

41 The Constitution of Kenya Review Act 2010.

42 The current process has distributed the draft Constitution in all major languages and has had wide media coverage to facilitate this.

ons have taken it upon themselves to mobilise women in order to educate them and ensure that their views are heard.[43] Regarding the 1972 process, it could be argued that it was a sham because it was focused on entrenching one-party rule and thus negated the values of democracy. However, the other processes which followed it should certainly have been different in their accommodation of women and their interests.

In 1991, a total of 576 petitioners from across the country made oral submissions before the Mvunga Commission, of whom only 35 – or just 6.7 per cent – were women. The Mwanakatwe Commission (of 1993) received 969 oral submissions. Of these, 108 were from women,[44] amounting to 10.84 per cent of the total. This was a small improvement on the previous CRC, but it could be due less to changing attitudes than to the fact that the Mwanakatwe Commission canvassed more cities than its predecessor.

While the Mungomba Report did not disaggregate petitioners by gender, the Commission did hold public sittings in all 150 constituencies, with a total of 12,647 petitioners making submissions.[45] With representation of only 26 per cent at the NCC that followed the Mungomba Commission process, women were outnumbered even before the adoption process began. Of the ten committees that were formed, women were the majority only in the Disciplinary Committee and General Purposes Committee.[46] By contrast, there were fewer of them in more influential committees such as the Human Rights, Democratic Governance and Public Finance committees, an arrangement indicative of an attitude that women should be excluded from areas of key decision-making.

The Zambian government has not at any time funded civic education specifically targeting previously advantaged groups, among them women. Over the years, despite various conferences organised by civil society on the subject of participation, there has been no admission from government

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43 Sara Longwe was first contracted by a donor agency to do so in 2007; organisations such as WILDAF, NGOCC and ZARD have also been involved.

44 The largest number were from the town of Zambezi, which had 33 submissions from women.

45 Matibini P (2008) Constitution-making process: The case of Zambia. *Special Edition Zambian Law Journal*, 1(17).

46 Six women were in the Disciplinary Committee and five in the General Purposes Committee, which both had 13 members in total.

about the importance of educating women.[47] Women have tried at numerous times to fight for better inclusion, and frustration with their exclusion led to the Citizens' Convention in March 1996.[48] Spearheaded by women's organisations, it sought to develop an alternative to the government's processes; the outcome is what is referred to as the 'Green Paper'.[49] Simutyani believes that the legacy of previous constitutions undermined vertical accountability by limiting public participation in the design and approval of the Constitution.[50] Such an observation is especially pertinent for women, because the limitations on their participation further entrenched the existing attitudes that disadvantaged them.

These attitudes came to the fore when a member of a leading women's organisation described receiving hostile treatment[51] at a district convention in Lusaka in September 2012. She said:

> Whenever I spoke regarding the importance of ensuring that women were protected and recipients of equality, they would boo. They kept interrupting me and had to be cautioned by one of the chairpersons, who luckily is a well-known lawyer.[52]

She believes this treatment was permitted because the facilitators, chairpersons and other organisers were men. She was appalled at the backlash she experienced, expressing concern for women who are not activists and wish to have their voices heard.

The environment posed an impediment to women both in its immediate context and wider socio-political ramifications, because women's participation empowers them to engage with their subordination within the larger

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47 The role of constitutional education has been left to ZARD, YWCA, WILS, WILDAF and WID-NCDP.

48 The convention was an initiative begun in October 1995 by a number of NGOs and church organisations.

49 The 'Green Paper' was an alternative to the government White Paper. It purpose was to raise awareness and mobilise public resistance to the government's failure to consult properly at a national level.

50 Simutyani N 'The politics of constitutional reform in Zambia: From executive dominance to public participation?' in Chirwa D and Nizjink L (eds) *Accountable Government in Africa: Perspectives from Public Law and Political Studies* (2012) 33.

51 This included booing and noisemaking whenever she tried to speak.

52 Anonymous interview on 25 October 2012 in Lusaka, Zambia, with a member of the NGOCC.

social framework of patriarchal gender relations.[53] Jayal notes that effective participation cannot be legislated. It involves the creation of a political, social and cultural environment in which women acquire the awareness, information-base and confidence to articulate their concerns; participation requires, furthermore, an institutional environment which is receptive and responsive to this articulation.[54] Such a response has been lacking in the Zambian constitutional process, as will be evidenced by the discussion below of four selected themes.

5 Key issues raised by women and the outcomes

5.1 Discrimination

Article 25(1) of Zambia's Constitution of 1973 stated that that 'subject to provision in clauses (4), (5) and 7 no law shall make any provision that is discriminatory either of itself or in its effect'. Article 25(3) described discriminatory treatment as that which treats people different according to a range of factors such as race, tribe and creed; however, it made no mention of sex or gender. Recounting her experience of making constitutional submissions, Sarah Longwe observes that 'the realisation of the gaps in the Constitution happened in the 1980s where it was noticed that the prohibition on discrimination in the 1973 Constitution did not include, gender or marital status'.[55]

A number of petitioners expressed similar views before the Mvunga Commission.[56] These concerns were adopted by the Commission, with the result that gender and marital status were reflected in its draft constitution of grounds of prohibited discrimination. However, the final 1991 Constitution contained exemptions under the discrimination clause, including marriage. Article 23(1) of the Zambia Constitutional Act of 1991 contai-

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53 Jayal (2005) 3.

54 Jayal (2005) 10.

55 Audio interview with Sara Longwe, recorded on 23 September 2013. Having suffered gender-based discrimination herself, she successfully sued the Intercontinental Hotel for barring her from entering the premises unaccompanied because she was a woman. See *Sara Longwe v International Hotels* 1992/HP/765; [1993] 4 LRC 221.

56 Mvunga Constitution Commission *Mvunga Constitution Commission Review Report* (1991) 60.

ned the same exemption clause as article 25(1) in the 1973 Constitution. Similarly, in line with article 25(4)(c) of the 1973 Constitution, article 23(4)(c) of the 1991 Constitution added:

> Clause (1) shall not apply to any law so far as that law makes provision … (c) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law … .

This was a major setback for women, and during the 1996 review process, they hoped that things would be different this time.[57] With an increase in submissions from women,[58] the Mwanakatwe Commission made substantive and progressive recommendations which included, inter alia, widening the scope of the Bill of Rights to include women's rights.[59] Unfortunately, an expanded Bill of Rights was not a government priority. While the White Paper[60] noted the criticisms that had been made of the existing Bill of Rights, it rejected most of the recommendations. The 1996 process provided merely an amendment to the 1991 Constitution, with the key changes affecting only the preamble, qualifications for presidential candidates, and the limit on the term of presidential office.[61]

The Mungomba report highlighted article 23(4)(c) of the 1991 Constitution as a major limitation in the Bill of Rights.[62] However, when the NCC produced its draft after having considered the Mungomba recommendations, it still retained this contested article. The justification for this from the NCC was that the discrimination clause needed to state grounds where discrimination could be included. It sought the inclusion of a positive discrimination caveat, which is a common feature in popular constitutions globally. However, it sought this inclusion without making further provision for a declaration that identifies certain grounds of discrimination that will automatically be declared unfair until proven otherwise. This type of declaration can be found in article 9(5) of the South African constituti-

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57 Views expressed by Sara Longwe.

58 Ten-comma-four per cent of of oral submissions were from women, and at least ten associations affiliated specifically with women made written submissions.

59 Petitioners believed, among other things, that anti-discrimination clauses were not sufficiently addressed and that women and children's rights had not been given sufficient emphasis.

60 The White Paper: Government Reaction to the Mwanakatwe Commission (Government Paper No. 1 of 1995).

61 It also rejected, inter alia, the recommendation that the Constitution be adoped by a Constituent Assembly and National Referendum.

62 Mungomba Commission Report of 2005 11.

on,[63] which contains listed grounds, including marital status, that are deemed to be are unfair unless it is established to the contrary that they are fair. Providing presumed unfair grounds of discrimination in a constitution ensures that abhorrent forms of discrimination have to meet very high criteria before they are permissible.

5. 2 Marriage and citizenship

Article 8(1) of the 1973 Constitution stated that the following persons would be entitled to apply to the Citizenship Board:

(b) any woman who has is or has been married to a citizen of Zambia and has been ordinarily resident in Zambia for a continuous period …
(c) any person who –
(i) has attained the age of twenty-one years or is a woman who is or has been married …

This article specifically excluded men who were married to Zambian women from attaining citizenship, thus prejudicing foreign nationals marrying Zambian women but not foreign nationals marrying Zambian men. Article 8(1)(b) resulted in Zambian women being deprived of the prospect of having their foreign spouse claim citizenship.

The issue of citizenship and foreign spouses also arose in the case of *Attorney General v Unity Dow*[64] where the Botswana court held that sections 4 and 5 of the Citizenship Act of 1994 discriminated against the applicant who was a woman. It was held that the sections denied her children the right to be citizens because she had married a foreigner, and this was judged as unconstitutional because it interfered with her dignity. Before the Mvunga Commission in 1991, petitioners expressed concerns about article 8(1)(b), stating that it was discriminatory not to give men who married Zambian women the choice to take up their wives' citizenship.[65]

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63 Constitution of the Republic of South Africa, 1996.
64 (2001) AHRLR 99 (BwCA 1992).
65 *Sara Longwe v International Hotels* 1992/HP/765; [1993] 4 LRC 221.

When the 1991 Constitution was promulgated, it thus stated in article 6 that citizenship could be attained by:

1. Any person who –
   a) has attained the age of twenty-one years or is or has been married to a citizen of Zambia; and
   b) has been ordinarily resident in Zambia for a continuous period of not less than ten years immediately preceding that person's application for registration; [**or**]
   c) is a woman who has been married to a citizen of Zambia for a period of more than three years preceding 24th July, 1988 … .

The contentious clause had been removed, allowing foreign men the option of taking up their wives' citizenship if they (the men) met the requirements; however, foreign women were still provided an additional advantage by article 6(1)(c). Unsurprisingly, during the 1995 Constitutional review process article 6(1)(c) was a major obstacle, and hence the Mwanakatwe Commission recommended that marriage should be removed as a grounds entitling a person to apply for citizenship.[66] The efforts of women paid off and were visible in the 1996 Constitutional Amendment when article 6 (1)(c) of the 1991 Constitution was removed, thus eliminating a clause that benefited Zambian men married to foreign spouses but not Zambian women.

5.3 Customary law

Regarded as a system of law practised in the community and based on its own values and norms, customary law evolves and develops from generation to generation to meet changing needs.[67] Among the various tribes in Zambia, it has been responsible for customary divorce and inheritance practices; bride wealth; widow inheritance (*levirate*); and dehumanising rituals pertaining to widows, early childhood marriage and polygamy.[68]

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66 Mwanakatwe Commission *Mwanakatwe Commission Review Report* (1996) 41-42.

67 *Modjadji Florah Mayelane v Mphephu Maria Ngwenyama and another* (2013) ZACC 14, 2013 (4) SA 415 (CC).

68 Trip AM 'Women's movements, customary law, and land rights in Africa: The case of Uganda' (2004) 7 *African Studies Quarterly* 7.

These practices have continued to subordinate women because, as Banda notes, in Africa women are largely excluded from this norm-making process, leading to the charge that customary law is gendered and marginalises the female voice.[69]

The 1973 Constitution provided exemptions to customary legal practices, stating that the prohibition of discrimination would not apply: 'for the application in the case of members of a particular race or tribe of customary law …'. Submissions to the Mvunga Commission included the need to reinforce the law of inheritance to protect the surviving spouse and child after a husband is deceased. This was so because the death of a husband often led to what is known as 'property-grabbing' in which the relatives of the deceased would take everything, leaving the wife and children with nothing. Mwenda et al. have argued that because formal wills do not exist in African customary law, claims of intestate succession are often open to manipulation and abuse by members of the deceased's family.[70] This is not uncommon in Zambia, and, consequently, during the Mwanakatwe process in 1995 petitioners expressed their desire for a cultural policy that promoted the best values in people's traditional heritage but also adopted positive measures when it came to customs and practices deemed harmful to women.[71]

Ironically, the Marriages Act 34 of 2002 recognised the harm that widow inheritance (*levirate*) was causing, stating that a sibling wishing to marry or 'inherit' his brother's widow cannot elect a valid statutory marriage if he is already married. However, it is not applicable if the man's first marriage is under African customary law and he intends to marry his brother's widow under customary law as well.[72] This leaves no recourse for women who are married under African customary law, resulting in their continued oppression. The Mungomba Commission therefore drafted a constitution that eliminated all the anti-discrimination exclusions previously found in article 23. Article 40 of the Mungomba draft stated that:

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69 Banda F 'Women, law and human rights in southern Africa (2006) 32 *Journal of Southern African Studies* 13-27.

70 Mwenda M, Mumba F and Mvula-Mwenda J 'Property-grabbing under African customary law: Repugnant to natural justice, equity, and good conscience, yet a troubling reality' (2005) 37(4) *George Washington International Law Review* 949-967.

71 Mwanakatwe Commission *Mwanakatwe Commission Review Report* (1996) 39.

72 The Marriages Act 34 of 2002.

> Every person has the right not to be discriminated against, directly or indirectly, on any grounds including race, sex, pregnancy, health, marital, ethnic, tribal, social or economic status, origin, colour, age, disability, religion, conscience, belief, culture, language or birth. [73]

An anti-discrimination clause with no exemptions was a fresh development. Furthermore, inserting ethnicity and culture as grounds of discrimination recognised that women and children bore the brunt of ethnic or cultural practices that violated their rights.[74] At the NCC, however, it was decided that the words 'on any grounds including' opened the provision to varying interpretations,[75] and it was recommended that articles 23 (3) and (4) of the 1996 constitution be included, thereby reverting matters to the previous position. With a 26 per cent minority, women were outnumbered and out-voted on what over the years had been a critical aspect of women's struggles in Zambia.

5.4 Reproductive health rights

Bodily integrity includes women's intrinsic right to have control and autonomy with respect to their bodies, which entails, inter alia, the right to make choices about sexual and reproductive health.[76] A woman's livelihood and status has long been tied to her ability to reproduce and the notion, perhaps, that, because she procreates, her body is not her own. In Zambia a woman's body, and what she does with it, has been a site of contestation.[77] Reproductive health rights were absent in the 1973 Constitution, the closest reference to it appearing in article 13(a),[78] which stated that every person in Zambia, subject to the limitations in article 4, has the right to security of person.

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73 Mungomba Draft Commision Report.

74 Virginity-testing and initiation into womanhood is also practised.

75 Initial Report of the National Constitutional Conference (2010) 197.

76 Mathur K 'Body as site, body as space bodily integrity and women's empowerment in India' (June 2007), working paper of the Institute of Development Studies available at http://www.idsj.org/Paper_148.pdf (accessed 30 July 2013).

77 This is so despite the fact that Zambia is a signatory to numerous regional and international conventions, including the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa.

78 Under Fundamental Rights and Freedoms.

In 1991, before the Mvunga Commission, petitioners raised rights such as the rights of the unborn child, the rights of parents to decide freely the number of children they should have, and the right to information on family-planning methods.[79] The Commission recommended that the latter be recognised explicitly in the Constitution.[80] In addition, it recommended that the Constitution should explicitly provide for the recognition of the right to life of the unborn child from conception, subject to medical considerations affecting both mother and child.[81]

The government's response was to accept the recommendation about the rights of the unborn child without condition, but to accept the rights regarding family planning and the number of children on the condition that they were inserted in the Constitution's preamble rather than in its main text.[82] The reason was that the government did not want women deciding when and how to have children, hence its emphasis that the right should be placed in the preamble. However, the notion of allowing a woman freedom in matters regarding the termination of pregnancies was a matter that needed to be controlled; as such, it was allowed into the main body and introduced by way of a new section under the right to life[83] in the 1991 Constitution[84]. Article 12 *(2)* stated that:

> No person shall deprive an unborn child of life by termination of pregnancy except in accordance with the conditions laid down by an Act of Parliament for that purpose. [85]

The inclusion of this clause was a double-edged sword. On the one hand, it was a positive sign for the pro-life groups which had sought protection of the unborn child. On the other, it was considered a setback for those who sought to protect fully a woman's decision to make choices about her

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79 Religious groups argued that the rights of the unborn child should be enshrined and that abortion should not be sanctioned as ameans of family planning.

80 Mvunga Constitution Commission *Mvunga Constitution Commission Review Report* (1991) 12.

81 Mvunga Constitution Commission *Mvunga Constitution Commission Review Report* (1991) 18.

82 The White Paper: Government Reaction to the Mvunga Commission Report (Government Paper No. 2 of 1991).

83 Previously article 14 of the 1973 Constitution and now article 12 in the 1991 Constitution.

84 Constitution Act of Zambia, Act No. 1 of 1991.

85 The Act referred to is the Termination of Pregnancy Act 13 of 1972, amended in 1994.

body, including having an elective abortion.[86] There was no mention of reproductive rights and health outside the termination-of-life clause, leaving women very disappointed. Years later, before the Mwanakwatwe Commission held in 1995, women reiterated their wish to have access to information, education on family planning, and be consulted on issues that affect them. The Commission recommended granting the rights of access to education and information on family planning to women in order to enhance their good health.

The response from the government was simply to reject the recommendation by stating that the necessary provisions were contained in the Marriages Act Cap 211 and article 11 of the 1991 Constitution.[87] Yet a review of both of these finds no mention of the right to access education and information on reproductive health rights; indeed, nine years later the Mungomba Commission made the same recommendations about reproductive health rights,[88] underscoring the fact that the rights were never mentioned. As stated previously, the recommendations and the Mungomba Commission draft were later abandoned.

6 The proposed Constitution: What hope does it hold?

The first draft Constitution[89] was translated into seven major languages[90] as well as transcribed into braille for the visually impaired.[91] It was distributed around the country in print and audio format for comments before

86 The Non-Governmental Organizations Coordinating Council (NGOCC) considered it a claw-back clause.

87 Government Paper No. 1 of 1995 'Summary of the Recommendations of the Mwanakatwe Constitutional Review Commission and Government Reaction to the Report' 36.

88 Report of Constitutional Review Commission, available at http://www.ncczambia.org/media/final_report_of_the_constitution_review_commission.pdf (accessed 26 August 2013) 142.

89 First Draft Report of the Technical Committee on Drafting The Zambian Constitution, available at http://zambianconstitution.org/images/downloads/draft%20report%20%20of%20the%20technical%20committee.pdf (accessed 14 August 2013).

90 Bemba, Kaonde, Lozi, Lunda, Luvale, Nyanja and Tonga.

91 Technical Committee on Drafting the Zambian Constitution 'Update on the constitution-making process' available at http://zambianconstitution.org/component/content/article/35-press-release/85-update-on-the-constitution-making-process.html (accessed 14 August 2013).

provincial and national conventions facilitated by the Technical Committee on Drafting the Zambian Constitution (herein the TCDZC).[92] While the Committee has not released official information regarding the total number of people who participated, reports from various sources indicate that women have again been outnumbered by men.[93] In addition, the TCDZC itself is dominated by men, with only four of its 16 members, excluding the Secretary, being women.

The First Draft Constitution was then debated at provincial and national consultations held from the November of 2012 to April 2013. For ease of reference, the following table summarises the four thematic areas of concern to women discussed above.

Identified Concern	First draft Constitution	Resolutions from Conventions
Prohibition on discrimination	Article 51: 1. Women and men have the right to equal treatment, including the right to equal opportunities in cultural, political, economic and social activities. 2. Women and men are entitled to be accorded the same dignity and respect of the person. 3. Women and men have an equal right to inherit, have access to, own, use, administer and control land and other property. 4. Women and men have equal rights in the marriage, during the marriage and at the dissolution of the marriage.	This draft article was accepted at provincial and national conventions. The submission was rejected that the word 'same' in clause (2) be replaced with 'similar'.[94]
Marriage and citizenship	Article 16(3): Notwithstanding clause (1), a person who is, or was, married to a citizen for a period of not less than three years shall be entitled to apply to the Citizenship Board of Zambia, to be registered as a citizen, in such	The provincial resolutions wanted the period of marriage in article 16(3) to be increased to at least five to ten years to prevent marriages of convenience.

92 Submissions from the diaspora were welcomed, with the author making submissions in collaboration with various Zambians in Cape Town.

93 These are the views of women's groups that were allowed to attend the conventions.

94 Report of The National Convention held at Mulungushi International Conference Centre Lusaka from 10th to 17th April 2013 , 'Consolidated National Convention Resolutions' available at http://zambianconstitution.org/downloads/Consolidated%20%20Provincial%20and%20National%20Conventions%20Resolutions.pdf (accessed 14 August 2013).

Identified Concern	First draft Constitution	Resolutions from Conventions
	manner as may be prescribed by or under an Act of Parliament.[95]	The national convention resolved not only to increase the period of marriage to ten years but to remove the term 'who was married', making the clause inoperable for those foreigners no longer married to Zambians.
Customary law	Article 51(5) : Any law, culture, custom or tradition that undermines the dignity, welfare, interest or status of women or men is prohibited.[96]	The resolutions of both the provincial and national conventions included an acceptance of article 51(5) and a rejection of proposed amendments to delete the entire article.
Reproductive health rights	Article 28; (1) A person has, subject to clauses (2) and (3), the right to life, which begins at conception.[97] Article 52: Without limiting any right or freedom guaranteed under the Bill of Rights, women have the right to: reproductive health, including family planning and access to related information and education.	At the provincial and national conventions it was resolved that article 28(1) should be left unamended because it was felt that any danger to the health of the mother is catered for in clause (2), which authorises termination of life under any other law.[98] The provincial and national resolutions unanimously accepted the inclusion of article 52 (a) into the constitution, thereby recognising the need to ensure that women have power over their reproductive decisions.

While these articles were progressive, they nevertheless merely reiterated what the Mungomba Commission had recommended in 2003. The responses from the provincial and national conventions, though commendable, demonstrated that marriage and citizenship continued to be sensitive topics. In addition, it was of great importance that the TDCZC highlighted an element of discrimination that is often ignored. It noted that the Constitution assumes equality of the sexes without regard to the reality of the inequalities created by the socio-cultural and economic constructs of the society.[99] These constructs permeate women's lives so deeply that the TDCZC was most likely alluding to the need to address discrimination by achieving substantive equality between the genders.

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95 The reference is to requirements that must be made in clause (2), which states age, and clause (4), regarding diplomats.
96 Draft Constitution of Zambia at pg 30.
97 Clauses (2) and (3) relate to deprivation life as authorised by the Constitution and any other law which includes conviction on a capital offence.
98 Draft Constitution of Zambia at pg 14.
99 First draft Constitution report at pg 48.

The TCDZC also highlighted that any customary law which is not inconsistent with the Constitution shall form part of the laws of Zambia,[100] thus promoting the supremacy of the Constitution in all matters. This was welcome relief for organisations such as Women for Change, which believe that women have suffered indiscriminately due to the conflict arising from the application of customary and statutory law in a dual legal system.[101]

Finally, the rationale for article 28(1) was the view that the right to life is inherent in all human beings and nobody should be deprived of life arbitrarily. Article 52 was included because the TCDZC felt that, apart from those aimed at gender equality, the Constitution needed to provide additional measures that would uplift the status of women.[102] The TDCZC then used responses from the national conventions as input into the final Constitution.

By this time[103] the process was already a year overdue. It emerged, moreover, that the final draft Constitution would not be put to a national referendum as promised earlier.[104] After an announcement in October 2013 from the TDCZC that the final Constitution was ready for printing, the process was stalled yet again.[105] The Constitution was handed to President Sata only in December 2013, and thereafter uncertainty grew that the text would be tampered with, concerns fuelled by the fact that the initial roadmap said the draft Constitution would be issued to the public and government simultaneously. Then the president said it should not be released to the public at all: amid reports that the government was going to retreat from its promises, protests took place and civil society urged the government to honour its commitments.[106]

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100 First draft of the Constitution, Article 7(c).

101 First Draft Report of the Technical Committee on Drafting The Zambian Constitution, available at http://zambianconstitution.org/images/downloads/draft%20report%20%20of%20the%20technical%20committee.pdf (accessed 14 August 2013).

102 First Draft of the Constitution at pg 49.

103 The conventions were meant to have been held in April 2012.

104 The initial roadmap from the government planned a National Referendum for June 2012.

105 This was caused by the government's insistence that only ten copies should be printed and all of them should go to the president.

106 They were widely reported in Zambian press.

A notable protest was the impressive public rally held in January 2014 at the Cathedral of the Holy Cross in Lusaka to demand the release of the final Constitution and a timeline for its enactment. A consortium of civil society groupings called for a prayer rally to press for the release of the draft constitution to the public.[107] Though it was dismissed by the authorities as unnecessary, the rally served as a reminder that, after many failed initiatives, Zambian citizens would not meekly accept a process that sidelines public participation because it is convenient for the government to do so.

In February 2014 two media outlets leaked the final Constitution.[108] There was no response from the government indicating that the document was inaccurate, so for the purposes of this discussion it is worth noting how the leaked Constitution affects women. With regard to article 51(1), men and women have the right to equal treatment and opportunities, but there is a notable omission of the phrase 'in cultural, political, economic and social activities'. In view of this omission, the article is left open to the interpretation that women are entitled to equal treatment only in certain domains rather than others. Furthermore, article 51 no longer contains the subsection, 'Women and men are entitled to be accorded the same dignity and respect of the person.' The convention resolutions opted for the use of the word 'similar' instead of 'same' in this subsection, which confirms just how problematic the idea of equality still is in Zambia. The TDZC's complete removal of the subsection is worrying because it implies that the dignity of women cannot be put on par with that of men and enshrined in the Constitution.

In respect of the citizenship clause, article 16 of the final Constitution is a welcome relief for women as it does not discriminate against foreign spouses married to Zambian women. Article 16(3) of the draft Constitution was retained, meaning that any person currently or previously married to a Zambian citizen – regardless of that citizen's gender – can apply for citizenship after five years.[109] That being said, the customary law article has been dealt a huge blow. The entire subsection referring to the prohibition of any custom, law or tradition that undermines the dignity, welfare or

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107 Geloo Z 'Trying to bury Zambia's new constitution' *OSISA* 16 January 2014 available at http://www.osisa.org/law/blog/trying-bury-zambias-new-constitution (accessed 26 May 2014).

108 The Zambian Watchdog and Lusaka Times.

109 It is now under article 16(2) of the leaked final Constitution.

interest of any person has been deleted, with no alternative provided. This is so in spite of the repeated submissions that were made (as discussed earlier) to highlight the ways in which women suffer from conflicts relating to the application of customary law.[110]

It is worth noting that article 1 of the final Constitution declares that the Constitution is the supreme law and that 'any customary law and customary practice that is inconsistent with its provisions is void to the extent of the inconsistency'. If a constitutional-law challenge to a customary practice is made relying on this article, the outcome will depend on how the court chooses to interpret the phrase 'void to the extent of its inconsistency'. Leaving this thorny issue up to the court will not sit well with many gender activists, given that a specific article referring to customary law would have provided a definitive position. With no specific article in the Constitution relating to dignity and self-worth, the exclusion of the customary-law article amounts to an egregious omission of a much-needed constitutional shield for women.

In closing, two aspects of reproductive health rights have also undergone slight changes. Article 28 still states that life begins at conception, but, remarkably, removes the clause that permits the intentional deprivation of life to the extent as authorised by the Constitution or any other law. Pro-life advocates relied on this clause to allay fears that women would be denied elective terminations even if their lives were in danger. Thus, its absence may lead to more controversy and debate as to whether women have the right to make decisions about their bodies; worse yet, it could deny them the right to terminate a pregnancy as prescribed by the Termination of Pregnancy Act.

The right to reproductive health, including family planning, has been moved from article 52 and falls under the rubric of the equality of both genders in article 51. There is no article specifically for women's rights;[111] in fact, article 51 now says that 'women and men' have the right to reproductive health services and family planning. It is well known that women and men have different reproductive needs and that in Zambia family-planning methods are practised almost solely by women. Moreover, it has been proven time and time again that women are discriminated against on the basis of their gender; as such, the specific reference made to their re-

110 Submissions in each process have included complaints about customary law.
111 Article 52 of the first draft Constitution applied to women only.

productive needs in the first draft Constitution was a sign of progress and goodwill. One is left wondering what the intention of this new phrasing is and whether it is a stratagem for subverting the demand for substantive equality.

7 Recommendations

In the light of the fact that Zambia has endured many constitutional processes, it is hoped that in future there will be no need for another one. Failing this, it is recommended that future constitutional processes strive for a more inclusive working procedure. First, any future commissions or committees need to reflect Zambia's gender demographics. A number of astute women in different fields hold a variety of leadership positions, and their participation would enrich any constitutional commission; there is thus no reason why future commissions or committees should have anything less than 50 per cent representation by women. Secondly, a concerted effort is needed to ensure that widespread civil education about the opportunities for marginalised groups, including women, to make submissions directly to the commission.[112] Educating women in rural and urban areas in this regard should not be left to non-profit organisations alone but be financed and administered by the government.

Although the recent constitutional process involved district, provincial and national consultations, these were facilitated and chaired mostly be men.[113] It is suggested that there should be a quota for female participation at conventions; this should include ensuring that at least one female facilitator and chairperson is present at each convention. Such an intervention would provide a more welcoming environment for female participants and help to prevent situations such as those described earlier, in which a female speaker was booed and interrupted. Lastly, the adoption of a constitution by a Constituent Assembly is key to ensuring not only vertical accountability[114] but also an outcome inclusive of women's needs.

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112 The recent process was widely advertised, but there was no concerted effort to encourage people to make submissions outside of the conventions.

113 Reports from attendees indicate that men controlled the processes; official accounts of the conventions confirm that there is merit to this complaint.

114 Beyani and Ndulo argue that previous processes have been executive-driven, thus limiting vertical accountability. See Ndulo M & Beyani C *As Tedious as a Twice-*

8 Conclusion

A wave of constitutional reform is sweeping over Africa, one which acknowledges that democracy is strengthened when people gather to deliberate collectively on issues of common concern. In Zambia, this acknowledgment is made on paper, but the reality is that women and their concerns have not been of the greatest priority. The processes in Zambian history, from the establishment of the CRCs to the responses by the government, have not made a concerted effort to engage genuinely with equality, inclusiveness and the needs of more than half of the population. What has been the rule instead is a top-down approach that selectively chooses what rights it deems important for women and rejects those it finds objectionable.

In addition, executive interference in the processes has frustrated citizens who desire a solid, participatory system. Despite women being outnumbered at the conventions, it is heartening that most of the resolutions from the conventions in response to the first-draft Constitution have appreciated the massive challenges that women face. Deep-seated patriarchal practices have been led to women being under-represented both on commissions and as petitioners making submissions to these bodies; in general, too, women have played a limited role in Zambia's first-ever participatory constitutional body, the NCC.

There is no doubt that women know what they need: they have said repeatedly that discrimination, inequality, harmful customary practices and the absence of reproductive-health knowledge have no place in the Zambia in which they wish to live and raise future generations. If the leaked Constitution is anything to go by, then, of the four themes discussed in this chapter, only the citizenship clause would have entirely met the wishes of the women's movement. Moreover, at the time of writing the president had been saying that Zambia does not need a new Constitution,[115] or at any rate not until 2016 at the earliest,[116] pronouncements which suggest there is no guarantee that these changes will come into effect anytime soon. Hence, the question that remains is whether the needs that women

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Told Tale: The Struggle for a Legitimate and Democratic Constitution In Zambia (2011).

115 These statements, along with those of his minister of justice, were reported in local media.

116 The next presidential and national elections were scheduled to be held in 2016.

have worked so hard to articulate will be met in this constitutional process – or, should it fail, in any other future one.

As the country awaits the final Constitution from the government, it is hoped that this time women's hopes will not be crushed by a White Paper or parliamentary vote. It is also hoped that this will indeed be a Constitution that stands the test of time and ensures the absolute entrenchment of women's rights, not just as a vision but as a lived reality.

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Pre-Testing Proposed Constitutions through Intelligent Scenario-Building as a Means of Promoting Their Viability: A Case Study of Kenya

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Abstract

Whilst the participatory constitution-making and revision exercises undertaken by African states with such gusto in recent decades have aimed to address contentious issues that threaten stability, it has become clear that these exercises in themselves are often part of the problem. This is evident in the fact that countries have faced challenges in interpreting and implementing their constitutions after promulgation. In some cases, the constitutional texts are fraught with shortcomings such as inconsistencies and contradictions that prevent the intentions of the public from being realised. The contestation that arises from varying interpretations of the constitutional text, along with the failure to implement the consitution in the ways expected by sections of the public, has led to tension and, in certain instances, to the affected persons waging resistance against the state.

This chapter proposes that where scenarios are built around the articles of a constitution before its promulgation, an intelligent process of inquiry bringing together relevant experts in theory and practice could significantly reduce the dissonance in expectations experienced later on by different sectors of the public. This proposal is developed by means of a case study of Kenya in which three illustrative issues are reviewed, each of which turns around the interpretation and implementation of various clauses of the constitution. What the study suggests is that much of the ensuing confusion could have been avoided if scenario-building had been made a formal step in the constitution-making process. For comparative purposes, selected provisions of the constitutions of Uganda and South-Africa are considered.

> 'The people made the Constitution, and the people can unmake it. It is the creature of their will, and lives only by their will' – John Marshall, Chief Justice of the USA (1801-1835).[1]

1 Introduction

The proof of the pudding is in the eating. The truth of this adage has been amply demonstrated in Kenya, a country grappling with significant incongruities arising from the interpretation and implementation of its Constitution of 2010. Promulgated on 27 August 2010 after an arduous constitution-making process that took more than two decades, the Constitution since then has elicited joy and frustration in equal measure.

This chapter seeks to highlight the complexities of modern constitution-making processes, complexities evidenced by the challenges that have arisen post-promulgation in the interpretation and implementation of Kenya's constitution. These challenges relate, inter alia, to the dissonance between the expectations of the governed and governors, as well as to the varying expectations different social classes had of the constitutional review process. Inconsistencies and contradictions in the text of the Constitution have also caused complications in that they obscure the intended meaning of various articles when these are read on their own or together with other elements of the same document. Ultimately, the state has been left unable to implement the Constitution in line with the expectations of interested parties among the citizenry.

There is no doubt that constitution-making can be highly polarising. This reality reflects Okoth-Ogendo's view that constitutions are akin to power maps which, in their making, draw on past experiences and future aspirations: constitution-making is an eminently political act in which choices are made as to which concerns appear on the map, and hence it can hardly be regarded as a simple reproduction of basic principles particular societies have endorsed and operationalised.[2]

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1 See the Marshall Cases: Cohens v Virginia 1821, cited in 'American history from revolution to reconstruction and beyond' available at http://www.let.rug.nl/usa/documents/1801-1825/marshall-cases-cohens-v-virginia-1821.php (accessed 14 June 2013).

2 Okoth-Ogendo HWO 'Constitutions without constitutionalism: Reflections on an African political paradox' in Shivji GI (ed) *State and Constitutionalism: An African Debate on Democracy* (1991) 3-25.

Thus, where the body mandated with overseeing the constitution-making or amendment exercise does not take care to ensure that the power map is equitably apportioned and that competing concerns are well balanced, a danger exists that the emergent constitutional document will be unworkable or ineffective in two respects. At one level, the emergent constitution could fail to engender a sense of ownership among large and/or influential sectors of the population whose buy-in is needed for it to work. At another level, poor drafting of constitution can result in inconsistencies, contradictions and ineffectual clauses. Whatever the case, such a constitution is open to unending contestation inside and outside the courts both by citizens and the state as they seek to have different clauses discussed, debated, interpreted and enforced.

The consequences of unremitting contestation can be far-reaching if they are not managed within the stable framework of a democratic culture characterised by tolerance and a robust judiciary – factors considered necessary to guarantee a working constitutional order. Tushnet defines the latter as the legal regime through which political authority is expressed; more specifically, a constitutional order is

> a reasonably stable set of institutions through which a nation's fundamental decisions are made over a sustained period, and the principles that guide those decisions … . These institutions and principles provide the structure within which ordinary political contention occurs. [3]

Against this conceptual backdrop, the present chapter explores the idea of scenario-building with reference to its use as a tool for promoting the viability of newly made or comprehensively revised constitutions, the nature of the challenges facing the implementation of Kenya's Constitution of 2010, further to which it also considers examples from international experience; whilst the subject matter is relatively new and lacks a developed body of literature, every effort has been made to refer to relevant extant scholarship.

2 The faltering of recent constitution-making and amendment exercises

Once the drive for post-colonial African states to re-invent themselves began in the 1980s, it was just a matter of time before individual countries

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3 See Tushnet M *The New Constitutional Order* (2003) 1.

decided to overhaul their constitutions entirely or make radical amendments to particular sections of them. According to Oloka-Onyango, new winds blowing across Africa saw a revival of popular and elite interest in governance, statecraft and constitutionalism; this revival led to a surge of constitution-making and inaugurated what he calls 'the epoch of the rebirth of constitutionalism'.[4]

Indeed, constitution-making exercises such as those in Ghana (1992), Uganda (1995), Eritrea (1997), South Africa (1996) and Kenya (2010) have brought about major changes in the nature of these states and tilted the former balance of power. One undeniably important outcome of post-independence constitutional reform in Africa has been the expansion of political space for the public to engage with processes of national governance.

Ihonvbere sees this wave of constitutional reform as predicated on the adoption of a different type of constitutionalism suited to Africa, a continent he describes as rife with debate about the obstacles impeding full realisation of human rights, gender, minority groups and the rule of law and the question of how to overcome them. In essence, the debate concerns struggles for constitutional reform, with the focus being on the long-marginalised masses who are articulating their aspirations and demanding that the rights they seek be incorporated into new constitutions. For Ihonvbere, these struggles amount to agitation for a new constitutionalism, 'a process for developing, presenting, adopting and utilizing a political compact that defines not only power relations between political communities and constituencies, but also defines the rights, duties, and obligations of citizens in any society'.[5] Today, the new constitutionalism is an integral part of constitutional reform occurring within African political processes.

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4 In the same breath, Oloka-Onyango muses about the direction these winds are taking Africa – towards political nirvana or back to repression and autocracy? He wonders whether the efforts to address the gnawing questions of marginalisation, discrimination, or exclusion are genuine in motivation or simply another ruse for reconfiguring the state to ensure the hegemony of a leadership principally concerned with self-preservation. Will the experiments in constitutional engineering – built, it it is hoped, on sustainable foundations – outlast their political and legal architects? See Oloka-Onyango's comments in the Introduction to Oloka-Onyango J (ed) *Constitutionalism in Africa: Creating Opportunities, Facing Challenges* (2001) 1.

5 See the Preface to Ihonvbere JO *Towards a New Constitutionalism in Africa* (2000) Centre for Democracy & Development, Occasional Paper Series No. 4.

In this regard, the Centre for Democracy and Development observes:

> At every level on the continent, the idea has taken root that the Leviathans of Africa must no longer function as virtual democracies but must be refashioned to reflect the realities of their multifaceted societies. This has been reflected in the constitutional Conferences in Benin, Mali, Togo, Niger, the Democratic Republic of the Congo, and Cameroon in the early 1990s, in the successful constitutional arrangement of South Africa, and in the process-based constitutional commissions in Uganda and Eritrea … Today, the struggle for constitutional reform in Kenya, Tanzania, Zimbabwe and Nigeria typifies the second liberation/independence struggle in the continent. The struggle has been led predominantly by civil society in Africa, since the political parties have proved either incapable or unwilling to push for constitutions that will promote just and equitable societies, being instead distracted by a chance to exercise power.[6]

Commenting likewise on Africa's democratic re-awakening and the constitutional reviews it has entrained, Akibá notes that while these reviews have been enthusiastically received and taken as signs that Africa is in the throes of political renaissance, 'reversals in the momentum of political reform have also occurred in a few countries, suggesting uncertainties and contradictions in the future of democratic consolidation'.[7] Indeed, though many post-colonial African countries have undergone such a renaissance, one expressed mainly through elaborate constitution-making or amendment exercises, a number of them have not seen lift-off in achieving the political, governance and administrative regimes that were envisaged as the outcome, notwithstanding that these processes, by and large, were people-driven, people-centred and participatory.[8]

For many people, the objective of the constitution-making or amendment exercises was to remedy various historical injustices relating to, inter

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6 See Centre for Democracy and Development The Zimbabwe Constitutional Referendum: Report of the Centre for Democracy & Development Observer Mission from 12-13 February (2000) 33-34.

7 Akibá O (ed) *Constitutionalism and Society in Africa* (2004) 3.

8 For instance, Eritrea adopted its constitution in 1997, one which had been drafted through a participatory process involving Eritrean citizens as outlined in Proclamation No. 37/1993. Indeed, before its adoption, public debate on the draft constitution had taken two years, but delays in implementation prevented the public to a significant degree from enjoying its otherwise progressive provisions. See Bereket HS 'Constitution making in Eritrea: A process-driven approach' in Miller EL (ed) *Framing the State in Times of Transition: Case Studies in Constitution Making* (2010).

alia, land access and land rights among the excluded;[9] discrimination on grounds such as gender,[10] disability, ethnic origin and religious faith; and the systematic marginalisation of communities from the mainstream developmental agenda[11]. In this chapter it is argued that the key reasons why so many countries have failed to achieve 'lift-off' include: deliberate or inadvertent structural weaknesses in the constitutions; misplaced expectations by citizens; and the covert motives of hegemonic authorities or ruling political classes.

3 The making of Kenya's Constitution of 2010

Kenya's journey towards constitutional reform conforms to the general trends outlined in the preceding section. Briefly, the popular clamour for reform in Kenya was occasioned by radical amendments to the country's independence constitution, amendments which had the deleterious effect of altering the balance of power between the executive, legislature and judiciary. As a result, individual rights and freedoms were constricted and various groupings in Kenyan society faced acute marginalisation. In addition, the poor governance that began with the founding president, Jomo Kenyatta, and his successor, Daniel Moi, continued to flourish through a

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9 The Constitution of Kenya, 2010, seeks to address, among other things, historical injustices and the emotive land question. Its Chapter Five deals with land and natural resources, establishes the National Land Commission and requires the parliament to enact land laws to ensure equitable access to, and use of, land and mineral resources.

10 The 1995 Constitution of Uganda, for instance, addressed various concerns of the Ugandan people, including the rights of the child, gender issues, the rights of the disabled, and the environment. As a result of the explicit recognition of gender equality under the Constitution, Uganda is among the countries with the highest number of female members of parliament in the world.

11 The Constitution of Kenya, 2010, entrenches inclusivity in governance by requiring the consideration of marginalised communities and regional balance in state appointments. This requirement necessarily ensures that persons from such communities have a fair and equal opportunity to participate in state governance, which historically has been the preserve of dominant ethnic groups. In addition, the Constitution requires affirmative action to ensure the inclusion marginalised persons in electoral politics. In this regard, article 100 states, 'Parliament shall enact legislation to promote the representation in Parliament of (a) women; (b) persons with disabilities; (c) youth; (d) ethnic and other minorities; and (e) marginalised communities.'.

succession of authoritarian regimes.[12] For instance, repressive laws and detention without trial were frequently used to curb perceived political dissent, and it is clear that, as in the case under Kenyatta, certain constitutional amendments were made in Moi's personal interest.[13] Moreover, judicial independence was further eroded, and, given that an inflexible environment deterred judges from making decisions contrary to what the government wished, brought with it alarming consequences for the protection of human rights.

Against this background, the struggle for increased democratisation that started in 1991 began to show signs of progress in 2000 with the enactment of legislation to review the Constitution and the appointment of the Constitution of Kenya Review Commission (CKRC), led by Professor Yash Pal Ghai. The CKRC's primary directive was to ensure a comprehensive review of the Constitution 'by the people of Kenya': in carrying out its mandate, the Commission was required to ensure that the review process accommodated the diversity of the Kenyan people, taking into account 'socio-economic status, race, ethnicity, gender, religious faith, age, occupation, learning, persons with disabilities and the disadvantaged'.[14]

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12 The Kenya Human Rights Commission (KHRC) states that if Kenyatta's tenure was characterised by the willy-nilly making and un-making of laws, including the strong-arm use of the apparatus of government, Moi's tenure definitely surpassed it in this respect. For one, Moi had at his disposal the constitutional and other devices created during Kenyatta's tenure. In principle, disturbing constitutional amendments passed during the Moi era followed the same pattern and were undertaken for similar reasons as those under the Kenyatta regime. See Kenya Human Rights Commission 'Independence without freedom: Legitimization of repressive laws and practices in Kenya' in Kibwana K (ed) *Constitutional Law and Politics in Africa: A Case Study of Kenya* (1998) 132.

13 For instance, in 1979 a constitutional amendment was passed to the effect that if civil servants wanted to be elected as MPs, they had to resign from office six months before the nomination date. This amendment sought to circumvent the earlier position during Kenyatta's reign in which civil servants were forbidden from engaging in politics. Interestingly, the amendment was motivated more by the desire to enable Charles Njonjo, the then Attorney General and a confidant of the newly-elected President Moi, to contest the by-elections of the Kikuyu Constituency. The sitting MP, Amos Ng'ang'a, had 'conveniently' resigned. Njonjo won the by-election and was appointed the Minister for Constitutional Affairs. See Korwa GA and Munyae IM 'Human rights abuse in Kenya under Daniel Arap Moi 1978-2001' 5(1) *African Studies Quarterly* 1.

14 The Kenya Constitution Review Commission *The Final Report of the Constitution of Kenya Review Commission* (2005) 9.

Having devised its internal procedures, the CKRC took steps to prepare Kenyans for participation in the review, sparing no effort in establishing an elaborate national infrastructure to facilitate the stimulation, discussion and collection of citizens' views.[15] Given that the country historically did not have a culture in which direct civic consultation had taken root, the process designed by the CKRC to get feedback from Kenyans about the constitution they wanted was without doubt unprecedented in its openness and participatory manner. Clearly, the Ghai Commission had set out to reach Kenyans where they were and engage with their diversity.

However, for reasons that fall outside the scope of this chapter, Kenya's constitution-making process was interrupted from time to time, with the result that eventually it was overseen by two other individuals as well. Ensuring that the process was participatory and people-centred nevertheless remained a key feature of the subsequent Commission led by Abida Ali Aroni (2004) as well as the Committee of Experts led by Nzamba Kitonga (2009); the latter completed the work begun by the Ghai Commission and paved the way for the adoption of the Constitution through a national referendum held on 4 August 2010.

4 The case for scenario-building as a means of pre-testing constitutions

The salient argument in this chapter is that constitution-making and amendment processes would, as a matter of course, benefit from thorough and systematic scenario-building exercises bringing together experts in both theory and practice before the promulgation stage. The purpose of these exercises would be to test each constitutional article along the logi-

15 Immense resources were expended in view of the importance attached to making sure that the process was as participatory and people-led as possible. This included establishing documentation centres in every district to inform the public about reform-related issues. Among the materials provided were records of conferences, workshop reports and proceedings of the Commission. District coordination machinery was set up in all administrative districts, as were Constituency Constitutional Forums. Information from the Commission and participating organisations was disseminated as well in the print and electronic media. See generally the Report of the Ghai Commission, *Report of the Constitution of Kenya Review Commission*, Volume 2, The Draft Bill to Amend the Constitution. Available at http://www.mlgi.org.za/resources/local-government-database/by-country/kenya/constitution/Ghai%20Draft.pdf (accessed 15 June 2013).

cal path of its eventual interpretation and implementation in order to determine the strength and feasibility of the right conferred, the reasonableness of the obligation conferred, the precise responsibility to be borne by respective parties, and the role that relevant institutions have to play.

It is submitted that – through such a formal exercise of interrogating each and every article of a constitution in the light of existing problems, reviewing the courts' litigation experience of the issues canvassed by the articles, conducting other relevant research, and posing devil's-advocate questions – a number of challenges that could arise post-promulgation can be resolved ahead of time or be considerably ameliorated.

While legal expertise would be essential to these scenario-building exercises, it is inarguable that experts should also be drawn from other disciplines, given that constitutions legislate on a range of matters. For instance, historians and political scientists would be able to point out the impracticality of certain clauses of the proposed constitution on the basis of their knowledge of a particular society's development and of the groups of which that society is comprised. Historical factors might render clauses in the constitution inapplicable as drafted; alternatively, where a clause is mandatory, knowledge of history would provide a basis for addressing beforehand the contingencies on which its application depends. Clearly, a constitution that articulates equality for all would occasion injustice to groups of persons who have been marginalised historically if it did not include affirmative action measures to remedy the situation.

Scenario-building would be incomplete without considering how each clause of the proposed constitution would affect an individual or group of persons, how the individual or group would appropriate a right or benefit conferred, and how, if aggrieved, he, she or they would go about seeking a remedy from the courts. For instance, if the right to a fair trial is captured in the bill of rights of a proposed constitution, it is essential that it be tested and reviewed in practical terms. Based on the relevant provisions, a hypothetical scenario would be developed from the point at which an individual who has committed the crime of theft is arrested and placed in custody, arraigned in court and brought to trial, with the scenario progressing to the point at which the magistrate or judge makes the final pronouncement and the matter is either terminated in the first instance or goes on to appeal. In a similar fashion, another scenario could be reviewed in which an individual is accused of acts of terrorism.

Through such an exercise, one incorporating experts in theory and practice from institutions like the police service, prisons, judiciary, political

parties, civil society and the relevant ministry, it is possible to weigh up the strengths and weaknesses of various issues. For instance, one could assess, among other things, whether the right to a fair trial – considered with regard to the availability of bail pending trial – applies equally in all offences; whether in all cases it is possible to arraign an accused person before the courts within 24 hours of arrest (if the law provides so); whether the public views all offences in the same way in terms of the consideration that should be given to different categories of accused persons; and whether the state possesses the wherewithal in terms of human and other resources to ensure that the right is upheld throughout.

By interrogating the right in this manner, a number of issues could emerge: the state might not have the means to ensure all aspects of the right to fair trial and at all times; likewise, it might not be desirable to treat all offenders equally in availing them of bail pending trial; in practice, it might be impossible to arraign all offenders in court within 24 hours of arrest, given the exigencies and constraints under which the state operates; and the public's view of how the right should be implemented may vary according to the nature of the offence.

In view of the knowledge generated by the scenario-building exercise, it would be expected that the relevant article of the constitution is couched in terms that make it available in such a way as to eliminate or reduce bottlenecks in its implementation. Rights or benefits that are expected to be enforced immediately upon promulgation would be clearly identified; similarly, those that depend on other exigencies having come into force would also be clearly stated.

It is argued that the mandatory incorporation of pre-promulgation scenario-building into constitution-making and amendment exercises is a measure that would serve to strengthen the efficacy and viability of new constitutions in achieving the desired goals; by the same token, the role of the courts in resolving post-promulgation contestation cannot be overemphasised.

5 Post-promulgation challenges to Kenya's 2010 Constitution

Whilst Kenya's Constitution of 2010 has been hailed by many as a progressive document, its contradictions and inconsistencies have also been highlighted, especially the potential they hold for reversing certain of the fundamental gains that were made. Some have gone so far as arguing that

the Constitution is a document ahead of its time and out of alignment with the beliefs, traditions and political proclivities of the people who participated in making it. Indeed, since its promulgation, a number of significant anomalies that affect implementation have been detected; many of these, it is submitted, could have been avoided at the constitution-making stage. The review of the following three cases highlights some of the anomalies that were keenly debated nationally, regionally and internationally.

The first and most glaring anomaly concerns the interpretation of Chapter Six of the Constitution of Kenya, 2010, which deals with the themes of leadership and integrity, and describes, inter alia, the responsibilities of leadership and states:

> **73.** (1) Authority assigned to a State officer – (a) is a public trust to be exercised in a manner that (i) is consistent with the purposes and objects of this Constitution; (ii) demonstrates respect for the people; (iii) brings honour to the nation and dignity to the office; and (iv) promotes public confidence in the integrity of the office …. (2) The guiding principles of leadership and integrity include (a) selection on the basis of personal integrity, competence and suitability, or election in free and fair elections …[16]

Several cases arose in connection with the interpretation and implementation of Chapter Six. However, the one that attracted the most attention involved an acrimonious debate before the general elections of March 2013 about whether the duo of the president, Uhuru Kenyatta, and his deputy, William Ruto, was eligible to stand for re-election to these positions. The question arose because they were facing charges of crimes against humanity[17] before the International Criminal Court[18] at The Hague.

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16 The Constitution of Kenya is available at http://www.kenyalaw.org/klr/index.php?id=741 (accessed 14 June 2013).

17 Mr Kenyatta is charged with the crimes against humanity of murder, deportation or forcible transfer, rape, persecution and other inhumane acts; Mr Ruto is accused of being criminally responsible as an indirect co-perpetrator for the crimes against humanity of murder , deportation or forcible transfer of population and persecution. For further information, see http://www.icc-cpi.int/EN_Menus/ICC/Situations%20and%20Cases/Situations/Situation%20ICC%200109/Pages/situation%20index.aspx (accessed 16 June 2013).

18 The International Criminal Court (ICC) was established in 1998 by the Rome Statute as the first permanent and treaty-based institution to help end impunity and punish the perpetrators of the most serious crimes of concern to the international community. The ICC is an independent international institution with its seat at the Hague in the Netherlands.

The debate split the country, with one section of it adamant that the men were ineligible to do so in view of the clear provisions of Chapter Six; the other section argued that, the charges against them notwithstanding, they were indeed eligible, given the equally compelling provisions in the Constitution concerning to the right to a fair hearing. In this regard, article 50 of the Constitution of Kenya was cited:

> (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. (2) Every accused person has the right to a fair trial, which includes the right – (a) to be presumed innocent until the contrary is proved … (e) to have the trial begin and conclude without unreasonable delay … .

The provisions of article 50, coupled with the fact that the two men had not been convicted and sentenced by the ICC or any other court of law for the offences of which they were accused (and even if they had been, had not exhausted any available appellate processes),[19] persuaded the High Court in *International Centre for Policy and Conflict & 5 Others v Attorney General & 4 Others*[20] to rule in their favour. In its ruling, the Court said that, in the absence of the duo having been convicted of an offence by

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19 The qualifications and disqualifications applicable for election as a member of parliament are spelt out in article 99 of the Constitution of Kenya; of relevance in this case are sub-articles 2(h) and 3, which state: '99. (2) A person is disqualified from being elected a member of Parliament if the person (g) is subject to a sentence of imprisonment of at least six months, as at the date of registration as a candidate, or at the date of election; or (h) is found, in accordance with any law, to have misused or abused a State office or public office or in any way to have contravened Chapter Six … . (3) A person is not disqualified under clause (2) unless all possibility of appeal or review of the relevant sentence or decision has been exhausted.'.

20 High Court at Nairobi Petition No. 552 of 2012 [Coram – M Msagha, L Kimaru, H A Omondi, P Nyamweya, GK Kimondo JJ]. The specific issues for determination in this case were, among others: '1. Whether the 3rd and 4th Respondents were qualified to offer their candidature for the office of President and Deputy President respectively. 2. Whether the High Court had jurisdiction to determine matters relating to the qualification or disqualification of a person who had been duly nominated to contest the position of President of the Republic of Kenya. 3. Whether the nomination of 3rd and 4th Respondent to contest the offices of president and vice president respectively was in violation of the Constitution on account of the International Criminal Court charges under the Rome Statute. 4. Whether the ICC and the Kenyan courts could simultaneously adjudicate over the same matter … .'.

a court of law prior to the elections,[21] and, moreover, there being no law which had been enacted to enable enforcement of the provisions of Chapter Six,[22] there was no bar to the two candidatures. The effect of the former element of the ruling was to raise the threshold required to invoke the provisions of Chapter Six to that required in proving a criminal offence, namely, guilty beyond a reasonable doubt. This development thus negated the essence of Chapter Six's prescriptions on leadership and integrity, which are not based on the strict evidentiary requirements of criminal trials.

The second major anomaly in the interpretation and implementation of the Constitution concerns its much-fought-for affirmative action provisions to facilitate women's access to appointive and elective positions. The case at issue was debated thoroughly by the public and had high visibility in the media. Briefly, whilst the method for achieving the 47 seats reserved for women in the National Assembly in terms of article 97(1)(b) of the Constitution was clear, what was less clear was the method for achieving (as per article 27(8)) the surplus required to ensure that not more than two-thirds of either sex dominated the National Assembly and Senate.

More precisely, there was confusion about the proper reading of the relevant constitutional articles regarding the electoral process insofar as satisfying the requirements of the mandatory affirmative action measures in

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21 The Judges stated at Point No.8: 'It had neither been alleged, nor had any evidence been placed before the High Court, that the 3rd and 4th Respondents have been subjected to any trial by any local court or the ICC that had led to imprisonment for more than 6 months. The confirmation of charges at the ICC might have formed the basis for commencement of the trial against the 3rd and 4th Respondents. The end result however, could not be presumed, neither was there sufficient evidence that at the end of it all, a conviction might have be arrived at.' See *International Centre for Policy and Conflict & 5 Others v Attorney General & 4 Others*, High Court at Nairobi Petition No. 552 of 2012.

22 The Judges stated at Point 6: 'An inquiry into the integrity of a candidate for State office whether appointed or elected, was an essential requirement for the enforcement of Chapter Six of the Constitution. The nature and procedures of such inquiry was for Parliament to decide by way of legislation enacted pursuant to Article 80 of the Constitution. The relevant legislation in this respect includes the Leadership and Integrity Act 2012, the Ethics and Anti-Corruption Commission Act 2011, the IEBC Act 2011, the Public Officer Ethics Act 2003 and the Political Parties Act 2011. These Acts provide mechanisms under which inquiry may be made concerning the integrity of the person who aspires to public office.' See *International Centre for Policy and Conflict & 5 Others v Attorney General & 4 Others*, High Court at Nairobi Petition No. 552 of 2012.

the Constitution was concerned. Article 81(b) prescribes the nature of Kenya's electoral process and states that 'the electoral system shall comply with the following principles: (b) not more than two-thirds of the members of elective public bodies shall be of the same gender'. This provision is in tandem with the requirements of article 27(8), which says that 'the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.' However, articles 97[23] and 98[24] of the Constitution, which make provision for the composition of the National Assembly and Senate, respectively, have a fixed allocation of seats for the various members comprising these bodies.

Thus, a dilemma arose from the inconsistencies between, on the one hand, the strict constitutional provisions making prescriptions about the electoral process as regards the composition of the National Assembly and Senate, and, on the other, the provisions that make particular reference to the affirmative action measures required by article 27(8). Notably, this contradiction did not arise with respect to the county assemblies, whose composition – as prescribed under article 177[25] – includes a mechanism

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23 Article 97 provides that: '(1)The National Assembly consists of – (a) two hundred and ninety members, each elected by the registered voters of single member constituencies; (b) forty-seven women, each elected by the registered voters of the counties, each county constituting a single member constituency; (c) twelve members nominated by parliamentary political parties according to their proportion of members of the National Assembly in accordance with Article 90, to represent special interests including the youth, persons with disabilities and workers; and (d) the Speaker, who is an *ex officio* member. (2) Nothing in this Article shall be construed as excluding any person from contesting an election under clause (1) (a).'.

24 Article 98 provides that: '(1) The Senate consists of – (a) forty-seven members each elected by the registered voters of the counties, each county constituting a single member constituency; (b) sixteen women members who shall be nominated by political parties according to their proportion of members of the Senate elected under clause (a) in accordance with Article 90;(c) two members, being one man and one woman, representing the youth; (d) two members, being one man and one woman, representing persons with disabilities; and (e) the Speaker, who shall be an *ex officio* member. (2) The members referred to in clause (1) (*c*) and (*d*) shall be elected in accordance with Article 90. (3) Nothing in this Article shall be construed as excluding any person from contesting an election under clause (1) (a).'.

25 Article 177 provides that: '(1) A county assembly consists of – (a) members elected by the registered voters of the wards, each ward constituting a single member constituency, on the same day as a general election of Members of Parliament, being the second Tuesday in August, in every fifth year; (b) the number of special

for ensuring that the surplus required to effect the not-more-than-two-thirds gender principle is achieved within the county assemblies after the general elections.

Various persons and institutions held differing opinions about the consequences of this dilemma and how to resolve it. It emerged anecdotally in popular discussions that some took the view that if a parliament arose after the March 2013 general elections which did not conform to the gender principle expressed in article 27(8), it would not have been properly constituted and would thus be unconstitutional. Others argued, however, that if this came to pass, the courts would not necessarily declare the parliament unconstitutional. Regardless of the stance they took, many people agreed that the inherent inconsistency required final determination before the elections to prevent any unwanted consequences afterwards from these uncertainties.

Ultimately, two solutions were proposed, both of them strongly contested by their protagonists. The first was that the Constitution should be amended to include a mechanism for achieving the surplus required to ensure adherence to the not-more-than-two-thirds principle. The second was that achieving the affirmative action principle in the elections was unrealistic and that the principle instead ought to be realised progressively in the long term.

With regard to the second option, commentators argued that guidance on how the courts should view the matter was already available in *Federation of Women Lawyers Kenya (FIDA-K) & 5 Others v Attorney General & Another*.[26] Here, the complainants' claim arose from what they saw as

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seat members necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender; (c) the number of members of marginalized groups, including persons with disabilities and the youth, prescribed by an Act of Parliament; and (*d*) the Speaker, who is an *ex officio* member. (2) The members contemplated in clause (1) (b) and (c) shall, in each case, be nominated by political parties in proportion to the seats received in that election in that county by each political party under paragraph (*a*) in accordance with Article 90. (3) The filling of special seats under clause (1) (b) shall be determined after declaration of elected members from each ward. (4) A county assembly is elected for a term of five years.'.

26 See *Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & another* [2011] eKLR Petition No. 102 of 2011 [Coram J.W. Mwera, M. Warsame, P.M Mwilu JJ] available at http://kenyalaw.org/Downloads_FreeCases/83092.pdf (accessed 17 June 2013).

an anomaly in the Judicial Service Commission's appointment of judges to Kenya's newly established Supreme Court. They argued that, in terms of article 27 of the Constitution, the not-more-than-two-thirds requirement for either sex as regards elective and appointive positions was not adhered to because fewer women than expected had been appointed. The upshot of the High Court's ruling was that article 27 ought to be construed as having been intended for progressive implementation. The judges opined that, since one could not merely appoint anybody at all as a Supreme Court judge, the Constitution could not have intended that the impossible be achieved in the absence of suitable persons. According to the court, the crux of the matter instead was whether or not the government was taking legislative and other measures to ensure a sufficient pool of future talent from which qualified judges worthy of appointment could be drawn.

Ultimately, after much effort by the legislature and civil society organisations to resolve a dilemma that threatened to throw the first general elections under the 2010 Constitution into disarray, the Attorney General sought an advisory opinion on the immediate implementation of the not-more-than two-thirds gender principle in the elections. Delivering its majority opinion of four to one in December 2012, the Supreme Court acknowledged that for decades women had been disenfranchised by discriminatory practices, laws, policies and regulations, and that it had had a major negative impact on their social standing. Nevertheless, the Court was of the opinion that the not-more-than-two-thirds gender principle as provided for by the Constitution could not be enforced immediately and was to be applied progressively. Furthermore, the Court stated that '[l]egislative measures for giving effect to the one-third-to-two-thirds gender principle under article 81(b) of the Constitution and in relation to the National Assembly and Senate, should be taken by 27 August, 2015'. While the decision evoked much concern in the women's movement and among other allied civil society organisations, the Court's timeline for the implementation of the affirmative-action provisions was regarded all the same as a step forward.

The third high-profile matter that illustrates Kenya's constitutional crisis relates to the conduct of the Supreme Court in a landmark petition filed on 16 March 2013 by the loser of the presidential elections in the 4 March general elections, Raila Odinga. According to him, the Independent Electoral and Boundaries Commission (IEBC) erred in declaring Uhuru Kenyatta and running- mate William Ruto as the president- and deputy-president-elect. Odinga took the view that the electoral process was so mired in

flaws that it was not possible to ascertain the veracity of the presidential results.

During the pre-trial conference stage of this case – that is, in *Raila Odinga & 2 Others v Independent Electoral and Boundaries Commission, Isaack Hassan, Uhuru Kenyatta and William Ruto*[27] – Odinga sought leave to submit a nearly 900-page-long affidavit containing information he regarded as fundamental to his case. However, his application was made outside of the timelines prescribed by the Supreme Court's procedures. The respondents were unyielding in their insistence that these procedures be followed to the letter, maintaining that their own case would be imperilled by the late introduction of copious amounts of information; furthermore, they argued, the petitioner had filed the affidavit without leave of the court and hence should not be allowed to benefit from the irregularity.

Odinga in turn relied on article 159(2)(d) of the Constitution, which describes judicial authority and states, inter alia, that '[i]n exercising judicial authority, the courts and tribunals shall be guided by the following principles … (d) justice shall be administered without undue regard to procedural technicalities … .' In refusing Odinga's late application, the Supreme Court drew on the same document's article 140, which deals with issues regarding the validity of a presidential election. Article 140(2) in particular requires that petitions filed under this clause be disposed of within 14 days after the petition is filed. For this reason, the Supreme Court was of the view that, due to time-constraints, it could not allow the affidavit to be filed late as it would be unfair to expect the respondents to grapple at short notice with such a voluminous document.[28] Justice Tunoi, who delivered the ruling on behalf of the bench, stated that parties to a petition are duty-bound to ensure compliance with the timelines stipulated by Court procedures and refrain from wasting the Court's time as well as that of other parties to a petition. The Court also said that article 159(2)(d) of the Constitution concerning 'undue regard to technicalities' did not mean to ob-

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27 Supreme Court of Kenya at Nairobi, Petition No. 5 of 2013 as Consolidated with Petition No. 3 of 2013 and Petition No. 4 of 2013. (Coram: W.M Mutunga, Chief Justice and President of the Supreme Court; P.K Tunoi, M.K Ibrahim; J.B Ojwang; S.C Wanjala, N.S Ndungu, SCJJ.) available at http://kenyalaw.org/CaseSearch/pdf_export.php (accessed 23 June 2013).

28 See paragraphs 214-216 of the judgment available at http://kenyalaw.org/CaseSearch/pdf_export.php (accessed 23 June 2013).

viate the need for procedural propriety or allow technicalities imposed by the Constitution or other written law to be ignored at will.[29]

The Supreme Court's decision received mixed reactions. Many supported its reasoning but others disagreed, on the basis that it set a dubious precedent liable to see the reformed judiciary revert to its former tendency to uphold procedures to the detriment of substantive justice. Furthermore, those opposed to the decision felt that the Court had not provided cogent reasons for giving one constitutional article more prominence than another. Indeed, Odinga's view was that, with this refusal, his case had been weakened substantially *ab initio*. Notably, the Court's decision flies in the face of the Judiciary Transformation Framework 2012-2016, which restates the provisions of article 159(2)(d) of the Constitution in its declaration that

> justice must be done to all irrespective of status and … all state organs must assure access to justice for all persons. These twin constitutional demands require that justice be delivered expeditiously and without undue regard to technicalities. [30]

Adding his voice to the fray, the Chairman of the Law Society of Kenya, Eric Mutua, was quoted in the dailies expressing his concern about the full import of the decision:

> [T]he decision by the highest court in the land to reject the affidavit on the grounds that it was time-barred will undermine reforms in the Judiciary … the Supreme Court should have considered the affidavit on its own merits instead of rejecting it on technicalities … . The Chief Justice and President of the Supreme Court, Justice Willy Mutunga, has time and again reminded lawyers that the era of reliance on procedural technicalities is gone … . I see some lawyers taking advantage of this decision to return us to the era of litigating by advancing arguments of a technical nature … . [31]

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29 See paragraph 218 of the judgment available at http://kenyalaw.org/CaseSearch/pdf_export.php (accessed 23 June 2013).

30 The Judicial Transformation Framework is the blueprint upon which the judiciary 'seeks to reset the relationship between the Judiciary and other arms of government whilst maintaining its independence, reorient its organizational culture to customize it with the exigencies of its social realities, and its institutional design and leadership style ,and to emerge and operate as a service entity which serves the people'. Available at, http://www.judiciary.go.ke/portal/assets/downloads/reports/Judiciary%27s%20Tranformation%20Framework-fv.pdf (accessed 21 July 2013).

31 Mutua E 'Supreme court turned back the wheels of justice in rejecting affidavit on technicalities' *Business Daily* 2 April 2013.

The above are but three instances that demonstrate the challenges that have been experienced in the interpretation and implementation of sections of Kenya's Constitution of 2010, and in each case the conflict which arose ended up in the courts; but the list is by no means exhaustive, and in various instances the courts have been called upon likewise to interpret or decide on clauses that created undue confusion in their interpretation and implementation. This lends credence to Burnham's observations[32] about the importance that should be attached to the body charged with interpreting a constitution post-promulgation. In her view, the role of such a body is critical, given that a constitution ought to be a living document which extends beyond a written text articulating concepts, ideals and principles to embody dynamically the hopes and aspirations of citizens. In the case of South Africa, this body is the Constitutional Court, created under the 1996 Constitution after a comprehensive constitution-making exercise.

6 A comparative analysis of post-promulgation challenges to constitutions in Africa

The post-promulgation challenges of Kenya's Constitution of 2010 are far from unique. For comparative purposes, this section briefly reviews a sample of such challenges facing a number of other countries in Africa.

To begin with Uganda's constitution, after its promulgation in 1995 it ran into difficulties in the implementation of several radical clauses that set out to empower women.[33] In Manisuli's view, the difficulties were due

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32 Burnham MA 'Constitution-making in South Africa: Forging a new legal system, the former pariah state reveals the virtues of an activist supreme court' available at http://new.bostonreview.net/BR22.6/Burnham.html (accessed 29 July 2013).

33 The Constitution of Uganda of 1995 contains several provisions on non-discrimination and the equal rights of men and women. According to article 21, '(1) All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law; (2) … a person shall not be discriminated against on the ground of sex, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion or disability; (3) … [to] "discriminate" means to give different treatment to different persons attributable only or mainly to their respective descriptions by sex, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion or disability.' Furthermore, article 31 sets the marriage age at 18 years and recognises men and women as equal partners in a marriage. Article 33 creates an obligation on the state to put measures

largely to a lack of political will to ensure that women fully enjoyed the rights granted to them by the Constitution. For instance, she decries the fact that, ten years after promulgation, customary laws and practices continued to restrict the emancipation of women even though article 33(6) of the Constitution proscribes laws, customs or traditions that offend the dignity, welfare or interests of women. Manisuli believes this could be attributable to 'the lack of political will to confront issues of inequality and discrimination in a holistic and comprehensive manner'.[34]

In South Africa, the constitutional inclusion of sexual orientation as a ground upon which one may not be discriminated against is an example of a clause that is conceivably out of alignment with the beliefs of the majority and which thus raises operational difficulties in its enforcement. Article 9 of the Constitution makes unconstitutional the discrimination of persons based on sexual orientation. The clause represented the first time in the world that a constitution had clearly spelled out the protection of persons in same sex relationships, but it sharped divided South African society, given that it did not receive support among the majority of the population. A survey conducted by the University of the Witwatersrand in 1995 prior to the Constitution's promulgation found that only 38 per cent of respondents supported equal rights for persons in same-sex relationships.[35]

Discussing the incongruity of the fact that the Constitution included a proposition that was not widely supported by South African citizens, Massoud opines that laws are not necessarily reflective of social attitudes. His opinion is supported by Duarte's statement:

> Not only are there legal injustices to be done away with, but mindsets and cultures have to be done away with too. It's one thing for you to have your

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in place to assist women in realising their full potential. The Constitution also takes cognisance of women's special role in society, including their maternal role. Constitution available at http://www.uganda.at/Geschichte/verfassung_der_republik_Uganda_2008.pdf (accessed 21 July 2013).

34 See Manisuli S 'Women's rights to equality and non-discrimination: Discriminatory family legislation in Uganda and the role of Uganda's Constitutional Court' (2007) 21(3) *International Journal of Law, Policy and the Family* 341-372.

35 See Ilyayambwa M 'Homosexual rights and the law: A South African constitutional metamorphosis' (2012) 2(4) *International Journal of Humanities and Social Science* 50-58.

> rights and equality in the law, it's quite another to have them each day in the street, at work, in the bar, in public places. [36]

Duarte's opinion shows clearly the daily conflict that is likely to exist for persons in same-sex relationships wishing to avail themselves of the benefits of the right conferred by article 9 of the Constitution.

Ultimately, the protection of the rights of persons in same-sex relationships was restated in the case of *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*.[37] Here, the Constitutional Court was called upon to confirm an order made by the Witwatersrand High Court to the effect that the legal offence of sodomy, and its inclusion in the schedules of some Acts of Parliament as well as in a section of the Sexual Offences Act prohibiting sexual relationships between men, was unconstitutional and hence invalid. The Court not only confirmed this order but also refined the definition of equality to mean that it should be defined against the background of historical disadvantage, in which case the rights of persons in same-sex relationships should be be protected for having been repressed by the apartheid regime.

Since this ruling, the Constitutional Court has made further pronouncements on the subject, defining the rights of persons in same-sex relationships who are in permanent life partnerships to include their right to enjoy the same rights as married persons with respect to immigration, custody and adoption of children, and employment benefits. However, Louw notes that despite progressive legislation on the rights of persons in same-sex relationships, there still remains more to be done, particularly with regard to granting such persons the right to same-sex marriage or a civil union/domestic partnership model.[38]

On another matter, the case of *Soobramoney v Minister of Health (Kwazulu-Natal)*[39] illustrates the gap between the aspirations of people, as captured in constitutional provisions, and the implementation of the same by

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36 Ilyayambwa M 'Homosexual rights and the law: A South African constitutional metamorphosis' (2012) 2(4) *International Journal of Humanities and Social Science* 50-58.

37 *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* (CCT10/99) [1999] available at http://www.saflii.org/za/cases/ZACC/1999/17.html (accessed 23 July 2013).

38 Louw R 'Advancing human rights through constitutional protection for gays and lesbians in South Africa' (2005) 48(3-4) *Journal of Homesexuality* 141-62.

39 See *Soobramoney v Minister of Health (Kwazulu-Natal)* (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997).

the executive. In this case, the Constitutional Court was seized of a question about the right to health guaranteed by the Constitution. Article 27 contains a raft of pronouncements on this right, providing in particular at subarticle (3) that 'no one can be denied emergency medical treatment'. It was therefore the contention of Mr Soobramoney, a patient with chronic renal illness, that a decision based on a government-instituted system of priorities to deny him regular life-saving kidney dialysis at a government health clinic had infringed his right to health and was thus unconstitutional. The Court ruled that the constitutional right of citizens to equal access to health care must be balanced with governmental imperatives to prioritise the allocation of resources necessary for enjoyment of this right, a prioritisation determined on the basis of other relevant considerations.[40] In effect, the ruling introduced a restriction on the enjoyment of the right to health that had not been envisaged in the constitution-making stage.

The cases discussed above from Uganda and South Africa offer but a sample of the challenges states can encounter after promulgating new constitutions. Clearly, some clauses, as drafted, can simply be impractical and require interpretation by the courts to clarify them and resolve the contradictions that arise between different constitutional provisions.

7 Courts as sites for safeguarding constitutional integrity

Notably, courts have been used in some constitution-making processes around the world in order to safeguard the integrity of the emergent constitution and to promote its viability. A case in point is South Africa's post-apartheid constitution, which was adopted in 1996 after having been developed in negotiations between political leaders previously at war with each other. Ebrahim[41] states that although the Constitution was drafted between May 1994 and October 1996, its ideas and provisions were not new but emerged from the long period of struggle which preceded the drafting. It is a period which the country's Constitutional Court described as having been 'characterized by strife, conflict, untold suffering and injustice which generated gross violations of human rights, the transgression of humanita-

40 *Soobramoney v Minister of Health (Kwazulu-Natal)* (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997).

41 Ebrahim H *Soul of a Nation: Constitution-Making in South Africa* (1998) Cape Town: Oxford University Press.

rian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge'.[42]

In South Africa's constitution-making process, the mandate given to the multiparty negotiating forum to draft an interim constitution included a compulsory list of principles that had to be reflected in the final constitution; thus, the draft of the final constitution to be prepared by the elected constitutional assembly could be promulgated only if the Constitutional Court certified it as compliant with the principles agreed to in the interim constitution. The idea of involving the Constitutional Court was proposed by the African National Congress, a key player in these events, but quickly taken up by the National Party and other minority groups worried about being affected negatively by majority opinions.[43] Indeed, the first draft of the Constitution was rejected by the Constitutional Court for non-compliance with some of the 34 principles initially set out as benchmarks for determining whether the resultant constitution met public expectations. Clearly, the constitution-making process was undertaken with firm preconceived ideas about what the character of the eventual constitution should be.

Bosnia and Herzegovina (BiH) present another example where constitutional reform was guided by predetermined and defined standards. According to Gavrić, the ruling of the European Court of Human Rights in Strasbourg in December 2009 in the case of *Sejdic and Finci v Bosnia and Herzegovina*[44] was definitive in requiring BiH institutions and political

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42 See the case of *In Re: Certification of the Constitution of the Republic of South Africa 1996* (10) BCLR 1253 (CC) at para.13). This case is cited in Jagwanth S (2003) Democracy, Civil Society and the South African Constitution: Some Challenges (Discussion Paper 65 presented at the UNESCO/MOST seminar on Democracy, Governance and Associated Complexities: The Challenges Involved in Recognizing Cultural Pluralism, 2003) 7. [Hereafter Jagwanth (2003).].

43 Jagwanth (2003).

44 *Sejdic and Finci v Bosnia and Herzegovina* (application nos. 27996/06 and 34836/06) European Court of Human Rights, Strasbourg. In this case, Jakob Finci, a BiH diplomat and president of the Jewish community, and Dervo Sejdić, president of the Roma organisation, had taken BiH to the Court of Human Rights. The two pleaded that they were subject to discrimination as members of minority communities in BiH because, according to the Dayton Constitution, only members of the constituent peoples, namely Bosniacs, Serbs and Croats, could be elected to the State Presidency and the Upper Chamber of the House of Peoples of the BiH Parliamentary Assembly. For this reason, minorities were excluded from participation in these institutions in a BiH which after the war was built on clearly identifiable ethnic grounds. See Gavrić S 'Constitutional reform in Bosnia and Herzego-

elites to reorganise the political system so as to enable all citizens wishing to stand for election to the BiH Presidency and House of Peoples of the BiH Parliamentary Assembly to do so without reference to their ethnicity. The Court stated: 'Exclusion of minorities from active participation in the elections has no objective and logical justification and thus stands in contradiction with the European Convention on Human Rights, which prohibits discrimination.' The ruling triggered constitutional reforms in BiH, where the relevant parties and institutions were enjoined to adopt amendments to the BiH Constitution as well as to electoral law in order to facilitate an environment in which all citizens could vie for the presidency and a seat in the House of Peoples of the BiH Parliamentary Assembly.[45] Evidently, the Court had prescribed the standards to which the emergent constitution and electoral laws had to conform.

Where standards and benchmarks are determined for the review of a constitution before its promulgation, as in the two preceding cases, there is an improved likelihood that the resultant constitution will meet the expectations of key protagonists in the political process. This is because inconsistencies and contradictions arising after promulgation can be resolved by courts making reference to the prior agreed-upon or determined standard. For the latter to take place seamlessly, there must be strict adherence to the rule of law in the respective jurisdiction so as to preclude the possibility that the orders of the courts will be flouted by agents of the ruling political class charged with implementing the new constitution.

8 Conclusion

From the information examined in this chapter it is evident that as much attention should be paid to discovering the feasibility of the clauses in a constitution as to the compulsion to include a clause capturing a certain right or aspiration. The failure to do this before the promulgation of the constitution is likely to result in significant challenges after its promulgati-

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vina: A unicameral parliamentary political system as a solution for the implementation of the ruling in the case "Sejdić and Finci vs. Bosnia and Herzegovina"?' (2013) 1(2) *South-East European Journal of Political Science*. [Hereafter Gavrić (2013).].

45 See generally Gavrić (2013).

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on, which in turn could lower the esteem with which citizens view the new constitutional document. Ultimately, where these issues are not addressed through the arena of courts, it may become necessary for them to be resolved politically through the initiation of revisions to the new constitutional document in whichever the manner the latter prescribes for this undertaking. In the nature of things, amendments that come soon after promulgation can stir anxiety and pose a threat to the viability of the constitution in the long run. This tendency is especially apparent in the history of post-independence African states, where a myriad of constitutional amendments after independence typically served to annihilate the substance of the constitutions and make them unrecognisable.

In Kenya, a constitutional document originally hailed as progressive has become since then the source of bitter acrimony, with various parties striving to establish their rights or positions in respect of a number of different matters. Along with the other issues that have emerged after the promulgation of the Constitution of 2010, the raging debate that surrounds the three cases discussed in detail in this chapter have often threatened to tear the nation apart. This, to be sure, was not a consequence intended by the constitution-making exercise that Kenyans undertook with such vigour and enthusiasm.

Had comprehensive scenario-building been undertaken before the promulgation of Kenya's new constitution, the exercise would have revealed, for example, the weaknesses in Chapter Six, which concerns leadership and integrity. Questions would have been raised as to whether each of the Chapter's provisions are consonant with those in the rest of the Constitution. Such an enquiry would then have revealed that the provisions of Chapter Six are not entirely enforceable when read together with article 50, which establishes the right to presumption of innocence. What would also have been thoroughly discussed are issues about the threshold to be applied when considering the eligibility of persons under the provisions of Chapter Six in relation to the threshold required in criminal trials.

In conclusion, it is submitted that a strong case exists for ensuring the viability of a constitution by means of comprehensive scenario-building prior to its promulgation. The various scenarios that were examined in Kenya, Uganda and South Africa indicate clearly the repercussions that structural deficiencies and inherent contradictions in constitutions can have on the state or sections of the population. As such, it is recommended that countries undergoing constitutional reform should incorporate scenario-building by experts in theory and practice as an integral element of the

process. This would serve to avoid the untidy outcome of a constitution fraught with challenges of interpretation and implementation, challenges that could eventually cause instability in the state. By the same token, countries that have already undergone constitutional reform ought to conduct similar enquiries with a view to effecting the necessary changes.

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The Inevitable: Devolution in Zimbabwe – From Constitution-Making to the Future

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Abstract

The new Constitution of Zimbabwe was written in a tense political environment in which devolution was one of the most contentious questions dividing the Movement for Democratic Change (MDC) and Zimbabwe African National Union Patriotic Front (ZANU-PF). The debate engaged with two issues – the number of government tiers, and arguments for and against devolution in general – and saw conflicting viewpoints come into play among political parties, civil society organisations, business, citizens, the media and international development organizations. In the process, political players and the media both informed and misinformed the public about devolution and its potential benefits to the country.

Fostering peace, democracy and development are the main aims of writing new constitutions. The chapter outlines how arguments for and against devolution were made on the basis of these aims. ZANU-PF maintained it would cause regional instability and threaten the nation-state; proponents contended it is essential for managing violence and conflict. Arguments emphasising development held that devolution is necessary in view of the state's incapacity to provide 'tailor-made' development interventions at local level, while those in support of democracy stressed the accountability of devolved structures. This chapter argues that adopting a multi-level government structure was imperative in the constitution-making process and that, in assessing the prospects for devolution, six issues require careful thought: intergovernmental coordination; management of expectations, public service considerations; accountability incentives; financial considerations; and collaboration.

1 Introduction

That the writing of the new Constitution of Zimbabwe was premised on contentious grounds is not in doubt. The formation of the Movement for Democratic Change (MDC) in 1999 was triggered by human rights abuses, the breakdown of norms of governance, and the need for writing a new and progressive constitution. Ultimately, it was the strategy of the Zimbabwe African National Union Patriotic Front (ZANU-PF) to ensure that the constitution-making process was delayed or diluted – an aim it eventually achieved. Nonetheless, the constitutional reform, a process beginning in 2009 and concluded in March 2013, provided a window of hope for most citizens by outlining a new governance charter and setting out the parameters within which the state is governed.

Against this backdrop, one of the sticking points between political competitors was the issue of devolution. It was clear that the majority of Zimbabweans across the political spectrum were in favour of it; what was also clear was that ZANU-PF was opposed to it. As such, devolution generated immense debate in the constitution-making process, among the major questions being: *What is devolution? Why were the Inclusive Government (IG) parties agreed on decentralisation as a principle and not devolution*? *What are the fundamentals of devolution? Why did devolution threaten the smooth conclusion of the new Constitution? Why devolution in the first instance?*

The main arguments for and against devolution were premised on peace, democracy and development. This chapter outlines the debate and examines how the new Constitution engages with it, further to which it seeks to answer the following research question: Is the inclusion of devolution in the Constitution likely to result in an improvement in governance and the realisation of development, given (1) the provisions in the Constitution and (2) the political context and commitment to devolution?

In brief, the chapter deals with legal, policy and political matters surrounding devolution in Zimbabwe. It begins by discussing key concepts in decentralisation before giving an overview of the history of decentralisation in Zimbabwe. Thereafter it focuses on the devolution debate in the constitution-making process, bringing into relief the main policy arguments and the viewpoints of the MDC and ZANU-PF. The chapter goes on to explain the Constitution's devolution provisions, and assesses the prospects for devolution in Zimbabwe.

2 Decentralisation: concepts and definitions

The role of the state in service delivery and the development process is a topical issue in international development. In both development theory and practice, there is no role distinction between central and local government. The failure of centralised planning systems heralded the concept of decentralisation in the 1970s and 1980s, especially in developing countries. A consensus on the need to 'roll back the state to the frontiers of development planning' – or, in simpler terms, to reduce the role of the state in public service provision and development processes – provided the impetus for decentralisation. In its report *Sub Saharan Africa – From crisis to sustainable growth*,[1] the World Bank argues that decentralisation concerns the division of roles and responsibilities between central authority, local government and local communities with a view to reduce the number of tasks performed by central government and to decentralise the provision of public services. The debate about decentralisation brings to the fore the centrality of local governments in any state.

Deconcentration, delegation, privatisation and devolution are the four main types of decentralisation.[2] *Deconcentration* occurs when sub-national units within line ministries are given administrative and managerial responsibility, a practice sometimes called field administration, local administration or integrated local administration.[3] In Zimbabwe, deconcentration is practised through government ministries like health, education, home affairs, and local government, among others. In a deconcentrated model, people's participation is limited to the implementation of centrally planned policies. *Delegation* is the transfer of responsibilities by the centre to public enterprises and other semi–autonomous government agencies to operate public utilities and services. In the Zimbabwean context, delegation is manifested in public utilities like the Zimbabwe Electricity Supply Authority, Zimbabwe National Road Administration, Posts and Telecommunications Regulatory Authority, Zimbabwe National Water Authority and others. *Privatisation* is the transfer of responsibilities and functions from

1 World Bank *Sub Saharan Africa: From Crisis to Sustainable Growth* (1989).
2 Rondinelli AD and Cheema GS (eds) *Decentralisation and Development: Policy Implementation in Developing Countries* (1983).
3 Rondinelli AD and Cheema GS (eds) *Decentralisation and Development: Policy Implementation in Developing Countries* (1983).

government to non-state actors, for example, non-governmental organisations (NGOs), private associations and community associations.

Devolution refers to a situation where central government transfers legislative, executive, administrative and financial decision-making authority to local governments that have clear and legally recognised jurisdictions within which they provide public services to constituents to whom they are accountable.[4] The purpose of devolution is to create and strengthen independent levels of government that are mandated to perform defined functions. Devolution involves the 'transfer from centre to locality of decision-making powers and associated resources'.[5]

These definitions of devolution underline its essential element, namely that local government exercises political, administrative and fiscal power and responsibilities. Devolution is the most complete form of decentralisation in that functions as well as resources are transferred: central government relinquishes certain functions and, conversely, devolved spheres of government take over delivery and management of previous central government functions.

Table 1: Fundamentals of devolution[6]

Attribute	**Manifestation**
Local units of government	Autonomous, independent and clearly perceived as separate levels of government over which central authorities exercise little or no *direct* control.
Local governments	Clear and legally recognised geographical boundaries within which they exercise authority and perform public functions.
Local governments	Corporate status and the power to secure resources to perform their functions.
Centre-local relations	Reciprocal, mutually beneficial, and coordinate relationships.

The purest form of devolution, rare in the African context, contains the attributes listed in Table 1. In theory, these attributes are unambiguous but in practice devolution takes various forms, with central government exer-

4 Yilmaz S, Beris Y & Serrano-Berthet R *Local Government Discretion and Accountability: A Diagnostic Framework for Local Governance* (2008).

5 Elcock H & Minogue M 'Local government: Management or politics?' in McCourt W and Minogue M (eds) *The Internationalization of Public Management: Reinventing the Third World State* (2001).

6 Adapted from Rondinelli AD and Cheema GS (eds) *Decentralisation and Development: Policy Implementation in Developing Countries* (1983) 22.

cising some degree of control and influence in local government units. Devolution as a concept entails that

> local governments discharge obligations as part of a national political system and not as dependent elements of a central hierarchy. The concept of devolution is non-hierarchical in the sense that it posits a number of governments having a coordinate systems relationship with one another on an independent, reciprocating basis.[7]

In a devolved government structure, the interaction between central and local government pivots on reciprocity and interdependence. Government tiers engage each other with respect and trust, co-existing in a national governance system and working towards common national development goals. An important element of devolution is discretionary authority, which limits central government to maintaining a supervisory role in which it ensures that local government is operating within national policies.[8]

From the above conceptual analysis, the reasons in favour of devolution are many. First, it reduces the number of tasks performed by central government, leaving it to concentrate on those on which it can deliver efficiently and effectively. The provision of basic services and governance remains a governmental function but is a responsibility shared between the central and local levels. Thus, central government performs tasks with huge spill-over effects and economies of scale. Secondly, devolution leads to distinct governmental spheres, for example, central, provincial and local government. These spheres are critical for accountability, transparency and planning in national development. Thirdly, the role of government in the provision of basic services can be done best by institutions closer to the people, whereas central governments usually perform functions of national significance such as defence, foreign affairs and macro-economic management. Local governments, due to their proximity to the population, are in a better position to be effective in providing human development services that address the context-specific needs of the poor. World Bank studies in Indonesia, Pakistan and the Philippines find an increase in the

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7 Sherwood FP 'Devolution as a problem of organization strategy' in Roland RT (ed) *Comparative Urban Research: The Administration and Politics of Cities* (1968).

8 Elcock H & Minogue M 'Local government: Management or politics?' in McCourt W and Minogue M (eds) *The Internationalization of Public Management: Reinventing the Third World State* (2001).

delivery of basic services after local government assumed these functions from central government.[9]

3 The history of decentralisation in Zimbabwe

In 1980 Zimbabwe inherited from the British colonial regime a dichotomous and tripartite local government framework comprised of urban councils, 'white' rural councils and 'black' rural local authorities fragmented along racial lines.[10] The 1988 Rural District Councils Act eliminated fragmentation by amalgamating 'white' rural councils and 'black' rural local authorities into rural district councils (RDCs). Local government reforms became vehicles for pursuing the twin objectives of socioeconomic development and the reduction of colonial disparities.

The Prime Minister's Directive (1984 and 1985)[11] outlined the new local government structures and introduced development committees at village, ward, district, provincial and national levels with the aim of fostering bottom-up development planning. The newly-created development committees' roles were information supply, implementation, delegated and independent planning, and policy-making and review.[12] Development priorities were identified and formulated at village level, and channelled through ward, district, and provincial levels to national level. The national development plan was to be premised on development priorities discussed and agreed upon at the village and ward level.

In practice, development planning agencies experienced time and budgetary constraints, lacked skilled personnel, and saw central government

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9 World Bank *East Asia Decentralises: Making Local Government Work* (2005).

10 Masundu-Nyamayaro O 'The case for modernization of local planning authority frameworks in Southern and Eastern Africa: A radical initiative for Zimbabwe' (2008) 32 *Habitat International* 15-27.

11 This directive is enunciated in three government documents: 'The Provincial Governors and Local Authorities in Zimbabwe: A Statement of Policy and directive by the Prime Minister', released in 1984; 'The Provincial Councils and Administration Act,' 1985; and 'Structure of Village Development Committees and Extension Services', released in 1985.

12 Gasper D 'Decentralisation of planning and administration in Zimbabwe: International perspectives and 1980s experiences' in Helmsing HJ, Gasper DR, Mutizwa-Mangiza ND and Brand CM (eds) *Limits to Decentralisation in Zimbabwe*: *Essays on the Decentralisation of Government and Planning in the 1980s* (1991) 7-37.

interference in local decision-making, and as a result became ineffectual. After the first decade of decentralisation, it was clear the process had failed to yield the desired results; Coenraad Brand likened it to 'centrally created decentralisation'.[13] Central government was evidently not committed to the letter and spirit of making local government a distinct sphere.

Local governments play a pivotal role in the promotion of local participation and local-level democracy. In the 1990s the objective of the government's decentralisation programme shifted to promoting democracy, and the focus of attention turned to elected local authorities.[14] As such, it became necessary to democratise local governments in the post-1990 period. An important vehicle in democratisation is elections, which started in 1993 in rural district councils and in 1995 in urban councils. The introduction of local government elections was a landmark development as citizens became active agents in deciding who administers rural and urban councils.

The introduction of a directly-elected executive mayor in 1995 marked a key change in urban governance. It was aimed at strengthening representative democracy as urban residents were given a chance to elect the political and administrative head of urban councils. Despite this development, the Zimbabwe Institute argues that

> [t]he Executive Mayor is a poor hybrid of the traditional British-style Mayor and the American Strong Mayor … . Unlike the American strong Mayors who are executives with appointing and dismissing powers and veto powers, the Zimbabwe Executive Mayor is accountable to full council. In real terms, the Executive Mayor gained no executive authority. Attempts by Executive Mayors to assume executive functions have often led to clashes between the Mayor and Town Clerks.[15]

The executive mayoral position caused political problems in cases where the mayor was not from the ruling party, ZANU-PF. Such mayors were castigated by central government for pursuing parallel policies to the governmental policy agenda. The executive mayoral system resulted in a tug

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13 Brand CM 'Will decentralisation enhance local participation?' in Helmsing HJ, Gasper DR, Mutizwa-Mangiza ND & Brand CM (eds) *Limits to Decentralisation in Zimbabwe: Essays on the Decentralisation of Government and Planning in the 1980s* (1991) 79-103.

14 Conyers D 'Decentralization in Zimbabwe: A local perspective' (2003) 23 *Public Administration and Development* 115-124.

15 Zimbabwe Institute Local Government: Policy Review (2005).

of war between the mayor and town clerk, with overlapping roles and responsibilities being a major trigger of conflict.

In summary, despite the government's idealistic rhetoric, decentralisation ran into a number of practical challenges. As Rondinelli and Nellis point out, most decentralisation policies are undertaken primarily for political reasons, and how the policy works out in practice will depend on similar political struggles.[16] The post-2000 era revealed how high the political stakes of decentralisation were when, to the consternation of ZANU-PF, the MDC took control of various urban councils.[17] Central government reacted by interfering heavily in local government, which defeated the purpose of decentralisation. A strong belief in centralised planning and staffing, along with technical and financial inadequacies and lack of political will, compromised what could have been an effective decentralisation programme. The government's attempts to intervene can be likened to re/centralisation,[18] and saw devolution inevitably taking centre-stage in the constitution-making process.

4 The devolution debate in the constitution-making process

Article 6 of the Global Political Agreement (GPA) provides for a people-driven, inclusive and democratic constitution-making process. The GPA was signed on 15 September 2008 by two MDC formations and ZANU-PF, heralding the consummation of the Inclusive Government (IG) in February 2009. Article 6.1 of the GPA mandated the Select Committee of Parliament, composed of three co-chairs of the IG political parties, to steer the constitution-making process. The Constitution Select Committee (COPAC) spearheaded public hearings and consultations, the drafting of the Constitution, two All Stakeholders Conferences, and a referendum that voted for the new Constitution on March 16, 2013.

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16 Conyers D 'The Management and Implementation of Decentralised Administration' (1989).

17 RTI & IDAZIM *Local Governance in Transition: Zimbabwe's Local Authorities during the Inclusive Government* (2010).

18 Machingauta N 'Supervision of local government' in De Visser J, Steytler N and Machingauta N (eds) *Local Government reform in Zimbabwe: A Policy Dialogue* (2010) 139-151.

COPAC defined devolution as a unitary system in which political and administrative power is shared between a national government and lower-level spheres of state such as provinces and local authorities; thus, devolution is a process in which authority, responsibility, human and financial resources are transferred from central governments to provincial and/or local ones.

COPAC's findings on devolution, gathered from outreach meetings, are presented in Table 2. COPAC asked people in 1,950 wards what their preferred system of government is ('National frequency' refers to the number of wards where the same response was mentioned). However, it is unclear what COPAC understood as the difference between unitary and devolved systems of government, since this was not explained in its working documents. Using statistics reflected in Table 2, ZANU-PF held that most people rejected devolution of power as 'it was divisive and inappropriate for a unitary state such as Zimbabwe'.[19]

Table 2: Preferred systems of government chosen by 1,950 wards

Concept	**Response**	National Frequency	**National frequency (%)**
System of Government	Unitary	1,386	71.08%
	Devolved	1,138	58.36%
	Federal	34	1.74%

Source: COPAC, 2012: 33.[20]

The devolution debate is discussed below in two parts: the policy arguments and the debate as a whole; and the viewpoints of the MDC and ZANU-PF.

4.1 Policy arguments and the debate as a whole

The devolution debate in the constitution-making process engaged with two issues: the number of tiers devolved governance should have, and ar-

19 Share F 'Devolution of power rejected' *The Herald* 14 May 2012 available at http://www.herald.co.zw/devolution-of-power-rejected/ (accessed 17 January 2013).

20 COPAC *National Statistical Report Version 1: Second All Stakeholders Conference October 2012* (2012).

guments for and against the notion of devolution itself in the Zimbabwean context.

4.1.3 Number of tiers

Regarding the first issue, the COPAC process proposed a three-tier system of central, provincial and local government.[21] This system, similar to that of South Africa and Australia, was also supported by the Zimbabwe Human Rights NGO Forum.[22] Arguments against a three-tier system were premised on three main points. First, a three-tier system poses the challenge of determining the political legitimacy and practical developmental benefits of having a provincial government. Secondly, well-functioning provincial governments require a vast geographical region from which to draw their own financial and material resources. Thirdly, provincial governments are costly to run, considering the superstructure and infrastructure that are needed to support them. In a nutshell, provincial governments were seen as an expense to the taxpayer as they require the appointment of extra government officials, in addition to the retention of existing provincial ministry officials.

Opposing COPAC's three-tier system, a number of organisations advocated a two-tier one made up of central and local government. For instance, the Democratic Councils Forum (DemCoF) proposed a two-tier system composed of national government and local authorities.[23] Local authorities were categorised as provincial councils and district councils. A total of 13 provincial councils – that is, the five cities of Harare, Bulawayo, Gweru, Mutare and Kwekwe, along with eight provinces – would form the devolved local government.[24] The proposal was premised on democracy, equity, devolution and mutually reinforcing centre-local rela-

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21 See COPAC *Constitution of Zimbabwe* (draft: 17 July 2012); COPAC *Constitution of Zimbabwe* (final draft: January 2013).

22 Zimbabwe Human Rights NGO Forum *Devolution of Power: Human Rights Bulletin* No. 73 English (2012).

23 This is an association of reform-minded councils, consisting of 31 urban councils and 19 rural councils out of a potential of 31 urban councils and 60 rural councils, aimed at adopting pro-democracy and good governance approaches and practices in local authorities.

24 DemCOF *Democratic Councils Forum Constitutional Position on Local Government* (2010).

tions. DemCoF's position was guided by results of a consultation process involving mayors and chairpersons of local authorities, results which required that the relationship between central government and local authorities be clearly defined and respected.

In its turn, the Local Governance Trust (LGT) advocated likewise for a two-tier system of government consisting of central and local government, but this proposition was based on the devolution of power from central government directly to local governments without a provincial tier. In the LGT's view, considering the size of Zimbabwe, a provincial tier 'is not needful [sic] and is in all appearance a middle-man of sorts who is an unnecessary inclusion in the tax paradigm'.[25] The LGT's argument was 'Devolution YES but NO to overburdening the tax payer'.

In outlining the arguments made in favour of a two tier-system, the following questions will be examined: Why a two-tier system? What to devolve and what not to devolve? How to devolve (that is, what form of devolution to take)?

What to devolve to local government level? Proponents of the two-tier system argued that functions like land allocation, land use planning and control, primary education, clinics, public works, local economic development, integrated development planning and regional development should form the core of local government functions.

The next logical question is: *What functions should not be devolved?* Central government should concentrate on services/issues that are inter-agency and inter-jurisdictional, such as foreign affairs, public (civil) service, defence, home affairs, national infrastructure projects, national economic development, mining, and energy development. Inter-agency services are those cutting across branches of government and thereby scaling-up service production and delivery. Inter-jurisdictional functions or services are ones that cannot be demarcated between geographical boundaries within a nation-state.

How does this form of devolution happen in practice and what is required to achieve it? Chief among the required policy and legislative changes are reforms to the taxation system to create a situation in which local authorities are established as legal corporate bodies with the power to raise revenue and manage their expenditure. Budget allocations are made in

25 Local Governance Trust *Devolution and the Constitutional Debate: A Position Paper Offering an Alternative View* (2012).

such a way as to avoid conferring functions on local governments unless the latter have the financial capacity to perform them. A two-tier system entails strengthening local authorities, which in turn requires considerable resources and capacity-building. The strengthening process is gradual and piecemeal, with the goal of empowering local authorities to take on more tasks. Supporting them with managerial, financial and technical resources is key to effective devolution.

4.1.4 Arguments for and against devolution

Three major arguments were made for and against devolution. They revolved around remaking the state and fostering development; broadening participation and democracy; and around giving the people a voice and creating stability.

Remaking the state and fostering development

Devolution is among the reforms aimed at building a strong and effective developmental state. As such, it is not an attempt to dismantle the state; rather, it matches roles to the state's capacities. By sharing functions between central and devolved governments, the goal is to improve service delivery and advance socioeconomic development. Pemberton and Lloyd argue that in a 'congested state', devolution can serve as 'a policy and institutional decongestant'.[26]

Zimbabwe's government has a record of failure in performing basic functions, in addition to which state institutions in general are weak when it comes to designing and implementing sound policies.[27] When a state fails in its functions for a long stretch of time, its reconfiguration becomes essential. In Zimbabwe, central government has been the prime agent of development for more than three decades, and the results need hardly be mentioned: unemployment, poor public service provision, lawlessness, increasing poverty, dilapidated infrastructure, and corruption in government corridors.[28] This has made it necessary to rethink the situation by moving from the idea of *one central government* doing everything to that of *diffe-*

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26 Pemberton S and Lloyd G 'Devolution, community planning and institutional decongestion?' (2008) 34(4) *Local Government Studies* 437-451.

27 UNDP *Comprehensive Economic Recovery in Zimbabwe: A Discussion Document* (2008).

28 Barclay P *Zimbabwe: Years of Hope and Despair* (2010).

rent government tiers performing devolved functions. Indeed, what devolution seeks is to match the state's functions with its capacity and achieve effective service delivery to citizens.

Necessity, in other words, is the mother of invention. The country has been in prolonged crisis largely due to its intransigent, authoritarian and anti-developmental ZANU-PF central government,[29] one which has too much power and delivers virtually nothing. The unrestrained powers conferred upon the president by the Lancaster House Constitution lie at the heart of Zimbabwe's constitutional crisis,[30] and the constitution-making process thus presented an opportunity to devolve power across state institutions. As a result, devolution became a non-negotiable theme in the Constitution as a remedy to a centralised state.

Local development projects require extensive resources as well as proper management. Over the last three decades local infrastructure projects have been failing due either to inefficient use of resources or limited resources from the treasury. Local development initiatives normally lack adequate funding and resources from the centre, which often leads to projects and programmes being abandoned before completion and local beneficiaries therefore being negatively affected. In this context, devolution was seen as holding the potential to mobilise local resources in order to sustain local community-development projects.

Broadening participation and democracy

The transfer of power and authority to local institutions is critical in fostering people's participation in the formulation and implementation of development plans as well as in the overall development process. Democracy has been under severe threat in Zimbabwe as the 'liberators have become the oppressors'.[31] Devolution was therefore seen as a vehicle to liberate and democratise both the state and the development process. According to this argument, development plans come to resonate well with local needs and priorities while the number of 'white elephant' projects declines.

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29 Bracking S 'Development denied: Autocratic militarism in post-election Zimbabwe' (2005) 32(104/105) *Review of African Political Economy* 341-357.

30 Linnington G 'Reflections on the significance of the constitution' in Masunungure EV and Shumba JM (eds) *Zimbabwe: Mired in Transition* (2012).

31 MacLean JS 'Mugabe at war: The political economy of conflict in Zimbabwe' (2002) 23(3) *Third World Quarterly* 513–528.

The GPA identifies constitutional reform as one of the fundamental milestones of the IG, seeing the new Constitution as a way of deepening democratic values and encouraging active citizenship. In particular, the principle of subsidiarity – that state organs at the very local level are better able to manage and deliver services than are higher levels of government – was envisaged as key feature of this Constitution. Devolution is a vehicle for democratisation.[32] Following this argument, devolution is viewed as a means of reducing the democratic deficit in a state.[33]

Three constitutional drafts (the Kariba Draft; Law Society of Zimbabwe Model Constitution and the COPAC draft) sought to implement devolution as a mechanism 'to enhance participation and accountability by increasing local government in decision-making at national, provincial and local levels'.[34] Government programmes perform better when they involve potential users and local social capital. Why is this so? Implementation is easier, and there are better prospects for programme sustainability and meaningful feedback to government agencies. Devolution entails development programmes implemented and managed at the very local level, where development is needed most. In a devolved state, local dynamics, rather than central government, dictate the pace of development programming.

Devolution brings with it constructive popular participation in decision-making, plan-formulation and development work. Participation by local people has brought immense benefits in, for instance, housing projects in Port Elizabeth, South Africa; forest management in Gujarat state, India; and water-borne sanitation systems in Recife, Brazil.[35] But Zimbabwe does not need to look abroad for examples of participatory development in action: the Zimbabwe Homeless People's Federation, a community-based organisation, has transformed the lives of thousands of people by involving them in housing development.

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32 Kersting N (ed) *Constitution in Transition: Academic Inputs for a New Constitution* (2010).

33 Ashworth ER, Boyne AG & Walker MR 'Reducing the democratic deficit? Devolution and the accountability of public prganisations in Wales' (2001) 16(1) *Public Policy and Administration* 1-17.

34 Sims MB *Conceptualising Local Government: Local Perceptions on Devolution and Participation in Zimbabwe* (2013).

35 Muchadenyika D 2012. 'Devolution: Bringing government closer to the people' *Daily News* 23 September 2012 available at http://www.dailynews.co.zw/articles/2012/09/23/devolution-bringing-govt-closer-to-the-people.

In Zimbabwe, most government-directed infrastructure programmes suffer premature death[36] due to corruption in public infrastructure entities[37]. Dysfunctional boreholes, unused gardens, collapsing fowl runs and deteriorating pigsties are manifestations of central government's failure to embrace local participation. Devolution is a strategy that fosters local ownership of development projects. When local people have a sense of project ownership, they often fight for the survival and success of their projects.

Voice to the people and stability

Despite its patriotic rhetoric ZANU-PF has consolidated its power and extended its access to resources;[38] obtained through violent accumulation[39] and privatised among the party and its supporters. With the country mired in poverty as a result, and the populace lacking a political voice and access to economic and natural resources, devolution has come to be seen as an essential means of democratic empowerment. Linking empowerment and devolution leads, in Miliband's term, to 'Double Devolution', in which central government, local government and their partners are committed to devolve to communities the capacity to take up the opportunities offered to them.[40]

Zimbabwe's policy-making is elitist, side-lining the majority of citizens who variously enjoy or suffer the outcomes. Whereas the country has been captured under the 'discourse and destructive party accumulation project of ZANU-PF',[41] devolution makes public the debate about policy-making and allows people a voice in deciding the course of action to take. Public confidence and trust in the state increase; the incidence of violence and in-

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36 World Bank Zimbabwe Multi-Sector Mission in Support to Planning and Implementation of the 2012 Capital Budget. Harare September 26 to October 21, 2011. Poverty Reduction and Economic Management (AFTP1). November 10, 2011.

37 Ministry of Economic Planning and Investment Promotion *Zimbabwe: Medium Term Plan (2011-15)* (2011).

38 Kriger N 'From patriotic memories to "patriotic history" in Zimbabwe, 1990–2005' (2006) 27(6) *Third World Quarterly* 1151–1169.

39 Moore D 'Progress, power, and violent accumulation in Zimbabwe' (2012) 30(1) *Journal of Contemporary African Studies* 1-9.

40 Jordan G 'Policy without learning: Double devolution and abuse of the deliberative idea' (2007) 22(1) *Public Policy and Administration* 48-73.

41 Raftopoulos B 'The Global Political Agreement as a "passive revolution": Notes on contemporary politics in Zimbabwe' (2010) 99(411) *The Round Table* 705-718.

stability declines. Citizen charters in Malaysia and client surveys in Nicaragua, India and Tanzania have shown options for drawing upon the previously ignored voices of the people.[42]

Channelling the voice of the people through community organisations is key to building a critical public space and sustaining peace. Organisations representing communities on policy-making bodies enable citizens to articulate their interests in public policies; however, if their participation is thwarted and their interests not articulated in national policy-making processes, the result is resentment and civil unrest.[43] Devolved government units work closely with formal and informal organisations representing the people. This approach integrates society and fosters peace and stability. Devolved governments create opportunities to devise governance arrangements tailor-made to respond to individual economic and social issues.

4.2 The viewpoints of the MDC and ZANU-PF

Two political parties turned the constitution-making process into a showdown between warring ideologies. The ZANU-PF regime is premised on destructive party-accumulation, 'authoritarian nationalist disengagement away from the dominant international norms of political and economic accountability', in contrast to the MDC, which defined itself 'through a language of liberal constitutionalism, human rights advocacy and post-nationalist aspirations' with a sound economic vision.[44] The MDC fought hard and drove the constitution-making process,[45] even when the Select Committee of Parliament represented a position on which the MDC compromised in order to try to gain as much as possible from the content.[46] One of the MDC's founding objectives was to change the Lancaster House

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42 Nelson J *Building Linkages for Competitive and Responsible Entrepreneurship: Innovative Partnerships to Foster Small Enterprise Promote Economic Growth and Reduce Poverty in Developing Countries* (2007).

43 Green D *From Poverty to Power: How Active Citizens and Effective States Can Change the World* 2 ed (2013).

44 Raftopoulos B 'The Global Political Agreement as a "passive revolution": Notes on contemporary politics in Zimbabwe' (2010) 99(411) *The Round Table* 705-718.

45 Movement for Democratic Change *Election Manifesto 2013: A New Zimbabwe – The Time is Now* (2013).

46 Raftopoulos B 'The Global Political Agreement as a "passive revolution": Notes on contemporary politics in Zimbabwe' (2010) 99(411) *The Round Table* 705-718.

Constitution and replace it with a new 'people-driven' and democratic constitution.

On March 16 2013, a total of 3,316,082 Zimbabweans voted overwhelmingly for a new constitution, with 94.5 per cent in favour and 5.5 per cent against.[47] The MDC sought to ensure in any way it could that a new constitution would be written for Zimbabwe. ZANU-PF, the beneficiary of the Lancaster House Constitution, in turn tried everything it could to frustrate that same constitution-making process.

The political environment under which the Constitution was written was tense and divisive. Competition between the MDC and ZANU-PF was characterised by the privatisation of politics, patronage and violence,[48] and spilled over into COPAC, where the co-chairpersons were forever locked in disagreement and where public outreach meetings were events fraught with animosity between party supporters. Informal and parallel government structures instigated by ZANU-PF and often more powerful than their state counterparts[49] constantly attempted to sabotage the constitution-building enterprise.

Not surprisingly, then, the positions the parties took on the issue of devolution were varied and conflicting. ZANU-PF was anti-devolution, evident in a raft of changes it made to the COPAC draft of 17 July 2012 and reflected in Table 3.

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47 ZESN Zimbabwe Constitution Referendum Report and Implications for the Next Elections – Advance Copy, 16 March 2013 (2013).

48 Kriger N 'From patriotic memories to "patriotic history" in Zimbabwe, 1990–2005' (2006) 27(6) *Third World Quarterly* 1151–1169.

49 Kriger N 'From patriotic memories to "patriotic history" in Zimbabwe, 1990–2005' (2006) 27(6) *Third World Quarterly* 1151–1169.

Table 3: ZANU-PF's anti-devolution position in the constitution-making process

Section	**COPAC's position based on Draft Constitution of July 17, 2012**	ZANU-PF's position in response to COPAC Draft Constitution
14.1	***'Devolution*** of governmental powers and responsibilities'	***'Decentralisation*** of governmental powers and responsibilities'
14.1 (1)	'governmental powers and responsibilities must be devolved to provincial and metropolitan councils and local authorities'	'governmental powers and responsibilities must be ***decentralised*** to ***provincial councils*** and local authorities'
14.1 (2)	'The objectives of the ***devolution*** of governmental powers and responsibilities to ***provincial and metropolitan councils*** and local authorities ...'	'The objectives of the ***decentralisation*** of governmental powers and responsibilities to ***provincial councils*** and local authorities ...'
14.2 (1)	'***Provincial and metropolitan councils*** and local authorities must, within their ***spheres***'	'***Provincial councils*** and local authorities must, within their spheres ***of jurisdiction'***
14.2 (c)	'exercise their functions in a manner that does not encroach on the geographical, functional or institutional integrity of another ***tier*** of government'	'exercise their functions in a manner that does not encroach on the geographical, functional or institutional integrity of another ***structure*** of government'
14.5 (1)	'There is a provincial council for each province, ***except the metropolitan provinces***, consisting of ..'	'There is a provincial council for ***each province consisting*** of …'
5	'***Tiers*** of government'	'***Structures*** of government'

Adapted from COPAC Draft Constitution of Zimbabwe, 17 July 2012; The Draft Constitution of Zimbabwe 18 July 2012, incorporating approved ZANU-PF Amendments;[50] and The Herald 30 August, 2012.[51]

Driven by a strong belief in centralisation, ZANU-PF saw devolution as a threat to its hold on power. Its 2013 election manifesto leaves out devolution in the list of the 'goals of the people' it had defended in the COPAC process;[52] nor, for that matter, is the term *'devolution'* mentioned anywhere else in this 108-page document, as telling a sign as any of the party's disregard for it.

In contrast, the MDC-Tsvangirai manifesto takes pride in it: 'We fought for devolution and it is now a cardinal principle of the new Constitution

50 As distributed by Veritas.

51 'ZANU-PF-approved amendments to COPAC Draft Constitution' *The Herald* 30 August 2012.

52 ZANU-PF Taking Back the Economy, Indigenise, Empower, Develop and Create Employment. 2013 Election Manifesto (2013).

and we are committed to making sure it works for the people'.[53] In the run-up to the July 2013 elections, the party reiterated its pro-devolution stance in its vision of 'promot[ing] devolved local governance that is democratic, sustainable and delivers quality services equitably'.[54] As for the MDC-Ncube 2013 harmonised elections manifesto, it mentions devolution more often than any other manifesto, and, what is more, carries the banner, *Actions for Devolution, Devolution is the New Revolution*.[55]

These contrasting views were not unexpected, as the successful completion of a progressive Constitution would be interpreted as a milestone for the MDC and a drawback for ZANU-PF.

The documentary *Part of the Solution*, aired on 25 July 2013 by First Television, conveys the fierce contestation of the constitution-making process.[56] In it, the National Constitution Assembly chairman argued that COPAC outreach meetings were stage-managed by ZANU-PF each to allow only four or five MDC supporters to give one- or two-word responses to official questions. In response, the ZANU-PF COPAC co-chairperson said his party had simply mobilised supporters as it had in the victorious liberation struggle. The documentary exposes how MDC members were killed during this period, and their houses set on fire; human rights lawyers were hamstrung by selective application the law, which saw victims of violence – rather than perpetrators – being incarcerated. The defining features of Zimbabwe's constitution-making, indeed, were nothing less than violence and torture.

The Constitution was drafted not only in a highly contested process but a protracted one, too. Due to the deeply entrenched conflict surrounding the content of the Constitution, the process took nearly 48 months to complete instead of the planned 18 months.[57] Table 4 shows the time taken by the constitution-making process compared to its planned time-frame.

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53 Movement for Democratic Change *Election Manifesto 2013: A New Zimbabwe – The Time is Now* (2013).

54 Movement for Democratic Change *Agenda for Real Transformation: 2013 Policy Handbook* (2013).

55 Movement for Democratic Change (Ncube Faction) *Harmonised Election Manifesto: Actions for Devolution – Devolution is the New Revolution!* (2013).

56 First Television *Part of the Solution* 25 July 2013 (documentary).

57 ZESN Zimbabwe Constitution Referendum Report and Implications for the Next Elections – Advance Copy, 16 March 2013 (2013).

Table 4: constitution-making process compared to the planned time frame.

Aspect	Planned Time frame	**Actual Time Taken**
Set up Inclusive Government	-	February 2009
Set up COPAC	Within 2 months of Inclusive Government inception	April 2009
1st All Stakeholders Conference	Within 3 months of COPAC appointment	July 2009
Completion of public consultation	No later than 4 months after 1st All Stakeholders Conference	June-October 2010
Draft Constitution	Tabled within 3 months of the completion of public consultation	17 July 2012
2nd All Stakeholders Conference	Within 3 months of the completion of public consultation	October 2012
Draft Constitution & accompanying report	Within 1 month of 2nd All Stakeholders Conference	Draft Constitution (17 January 2013), 2nd All Stakeholders Conference Report (October 2012)
Draft Constitution & accompanying report	Debated in Parliament within 1 month	February 2013
Referendum	Within 3 months of completion of debate	16 March 2013
Gazetting	1 month of referendum date	22 May 2013

Source: Adapted from Ministry of Constitutional and Parliamentary Affairs (2009: 6-7)[58] and ZESN, 2013.

Although ZANU-PF's highest decision-making body, the politburo, rejected devolution, as shown in Table 3, most of its supporters favoured it, as shown in Table 5.

58 Ministry of Constitutional and Parliamentary Affairs Global Political Agreement, 15 September 2008 (2009).

Table 5: Devolution of power by party affiliation.

	Strongly agree and agree	**Neither agree or disagree**	Strongly disagree and disagree	**Don't know**
MDC-T	67	7	19	7
ZANU-PF	55	7	26	12
Others	77	13	9	2
Would not vote	71	9	11	9
Refused to answer	59	8	22	12
Do not know	54	10	26	10

Source: Afrobarometer, 2012.[59]

The Afrobarometer survey reveals that 65.7 per cent of Zimbabweans were in favour of devolution. Thus, the survey shows considerable support for a devolved system of government by Zimbabwean citizens across the political divide.

5 Devolution provisions in the Constitution

What was the outcome of the devolution debate? The Constitution of Zimbabwe Amendment (No. 20) Act, 2013 recognises and entrenches three tiers of government – national, provincial and local – in that chapter 14 provides for provincial and local government. The vision of provincial and local government as outlined is to preserve national unity and promote democratic citizen and community participation in government, equitable national resource allocation and participation of local communities in determining development priorities.[60] Devolution of power and responsibilities to lower tiers of government constitutes the essentials of provincial and local government.

59 Afrobarometer *Summary of Results* (2012).
60 Government of Zimbabwe *Constitution of Zimbabwe* (2013).

The general principles of provincial and local government, as outlined in section 265 of the new Constitution, include:

- ensuring good governance through effectiveness, transparency, accountability and institutional coherence of provincial and local governments;
- cooperation between tiers of government;
- avoiding performing functions that encroach on other tiers of government;
- public welfare security;
- preservation of peace, national unity, and indivisibility of Zimbabwe;
- fair and equitable representation of people; and
- coordination mechanism between central governments, provincial and metropolitan councils and local authorities to be outlined in an Act of Parliament.

The devolved structures include eight provincial councils, two metropolitan councils, and urban and rural local authorities. The composition of provincial councils includes the chairperson of the council, elected at first sitting of provincial council after elections, senators elected from the province concerned, two senator chiefs, all members of the National Assembly elected under a party-list system of proportional representation, and mayors and chairpersons of all local authorities in the province concerned.

The Constitution creates the two metropolitan councils of Bulawayo and Harare. The composition of metropolitan councils includes the mayor of the city concerned, who chairs the metropolitan council; the mayor or chairperson of the second-largest urban local authority in the province; all members of the National Assembly whose constituencies fall in the metropolitan council concerned; six women members of the National Assembly elected under a party-list system of proportional representation; senators elected from the metropolitan council; and mayors, deputy mayors or chairpersons and deputy chairpersons of local authorities in the metropolitan council concerned.

Section 270 of the new Constitution outlines the functions of provincial and metropolitan councils with socioeconomic development as the key function. Other functions include:

- socioeconomic development planning and implementation;
- government programmes coordination and implementation;

- natural resources planning and management;
- tourism promotion and development; and
- provincial resources monitoring and evaluation.

The Constitution, subject to an Act of Parliament, gives a local authority 'the right to govern, on its own initiative, the local affairs of the people within the area, for which it has been established, and has all the powers necessary for it to do so'. Furthermore, it provides two ways of electing mayors and chairpersons of urban local authorities. One is through the election of non-executive mayors or chairpersons by councillors at the first meeting of the council after a general election (section 277(2)). The second is through an Act of Parliament conferring executive powers on the mayor or chairperson of an urban local authority, with such mayors or chairpersons being elected directly by registered voters in the area for which the local authority has been established (section 274(5)).

The Constitution provides for an Act of Parliament to confer powers and functions to local authorities. Section 276 outlines the functions of local authorities, including making by-laws and other regulations for effective local authority administration; and taxation and revenue-raising powers.

The functions assigned to local governments are not fully stated in the new Constitution. The COPAC constitution failed to incorporate substantive provisions to specify how the devolution process will work, what structures are to be set up, and how the provincial councils will work.[61] Thus, devolution to local authorities is still unfinished and it awaits an Act of Parliament to determine the scope and depth of devolution. However, the constitutional provisions are a promising starting-point. How the new government will deal with devolution by enacting an Act of Parliament is still unclear and will depend largely on the shrewdness of the 8th Parliament, in which ZANU-PF has more than a two-thirds majority.

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61 Zimbabwe Lawyers for Human Rights 'An Analysis of the COPAC Final Draft Constitution of 1 February 2013' *SW Radio Africa* (2013) available at: https://www.google.co.zw/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CDcQFjAB&url=http%3A%2F%2Fwww.sokwanele.com%2Fsystem%2Ffiles%2Fzlhranalysisofcopacdraft.pdf&ei=_anNUq66HImshQfMxYDgAQ&usg=AFQjCNHez9oLBEAggwoH_zs5kVVrJe4q-w&sig2=z0Gryr_jqCtopSdQdgQOKA (accessed 10 February 2013).

6 Assessment of the prospects for devolution

This section explores some of the implications of the Constitution's devolution provisions.

6.1 Intergovernmental affairs coordination

The new Constitution recognises local authorities (rural and urban), provincial and metropolitan councils, Parliament (National Assembly and Senate), and central government (executive, ministries, government departments). Inevitably, there has to be a coordination mechanism between these state institutions. Thus government has to decide on the nature and location of an intergovernmental agency aimed at facilitating interactions and relations as well as allowing feedback between the aforementioned institutions. In executive-dominated, Westminster-style parliamentary federations, intergovernmental relations tend to be coordinated by agencies located near the centre of government.[62] The location of the intergovernmental agency is critical in facilitating coordination between different government tiers.

6.2 Managing public expectations

Frustration with the practical problems of devolution may result in calls for recentralisation,[63] necessitating the management of public expectations. There was, and is, a strong belief among Zimbabweans that devolution would solve most of the problems facing the country. As such, it is critical that devolved tiers manage expectations and deliver on their constitutional mandates. Devolution has its limits, which should be understood by both the state and its citizens.

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62 Horgan WG 'Devolution and intergovernmental relations: The emergence of intergovernmental affairs agencies' (2003) 18(3) *Public Policy and Administration* 12-24.

63 Devas N & Delay S 'Local democracy and the challenges of decentralising the state: An international perspective' (2006) 32(5) *Local Government Studies* 677-695.

6.3 Public service considerations

While it is clear that the Constitution provides three tiers of government, this raises questions about the public service. Does it mean Zimbabwe is to have a 'unified' civil service or a disaggregated one (that is, one for central government and one for provincial governments)? Section 199 of the new Constitution, however, provides for a single civil service responsible for the administration of Zimbabwe. It is unclear in terms of the Constitution as to whether the workforce of provincial government and metropolitan councils falls within the 'unified' civil service, but local governments at least will maintain their status in respect of having their own workforces. Nevertheless, if lower-level structures are staffed by poorly trained and incompetent personnel, the chances are high that devolution will fail.

6.4 Accountability incentives

Devolution requires that there be incentives to make institutions accountable, given that tiers will each be responsible for providing different services. An example is ensuring that local governments are responsible and accountable to local communities in the provision of basic services such as local roads, water and sanitation. A suitable mechanism should be in place, either through a senior tier or voters reprimanding a tier if it fails to deliver an appropriate mandate. One way of promoting accountability is by endowing electorates with the power to recall failed governments. In addition, transparent and participatory budgeting processes can forge a critical link between communities and their governments.

6.5 Financial considerations

Distributing funding resources to provincial and local governments is imperative. Shifting the tax base to provincial and local governments can enable devolved governments to perform their functions adequately. Furthermore, intergovernmental transfers from central to local governments play an important role in ensuring that devolved systems work – the share of such transfers in the total revenue of local governments is quite large in countries like Cambodia (100%), Thailand (34%), Indonesia and the

Philippines (70-80%), and Vietnam (50%).[64] In short, devolution requires proper intergovernmental transfers or a shared taxation mechanism to match the devolution of functions with finances.

6.6 Collaboration

Devolution creates distinct levels of competence and power, and while reality demands that they collaborate with one another, the Constitution does not offer assistance in this regard by providing explicitly for intergovernmental collaboration: this collaboration needs, then, to be actively promoted. Sharing responsibilities across government tiers fosters competition between them and invites citizens to compare their efforts, with better-performing tiers receiving public support. However, if this is not well-managed, it may lead to instability and antagonism.

7 Conclusion

Devolution is not a magic wand for solving each and every problem that confronts Zimbabwe; it is, instead, a promising starting-point for rebuilding a 'collapsed' state. If not properly planned and executed, however, it could end up creating more problems than it solves. To achieve the desired outcomes, devolution has to be designed and implemented with care and thoroughness. In simple terms, in Zimbabwe, as elsewhere, devolution currently is unfinished business.

While it has brought significant developmental gains to India, China and Latin America, in the Zimbabwean case policy-makers should be on the lookout for three setbacks it could incur: rising inequality, macroeconomic instability and the risk of local capture. The gap between regions may widen, and marginalisation according to ethnic origin can spark civil unrest. If devolved governments lack fiscal discipline, central government may be required to provide financial stimulus – bail-outs that could weaken its national macroeconomic policy. Local governments may also be captured by local elites with political power and intent on pursuing their self-interests to the detriment of ordinary citizens.

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64 World Bank *East Asia Decentralises: Making Local Government Work* (2005).

The dangers of devolution show the importance of central government to the success of any devolution strategy. Finding a formula of sharing responsibilities between central government and other tiers of government is a crucial step in this regard; but set against this is the equally crucial consideration that various political forces will view devolution as a threat to their hold on power and seek to resist it at all costs.

This chapter has argued that devolution, by transferring greater decision-making powers to local and provincial governments close to communities, is a powerful means of enabling citizens to participate in governance and of advancing peace, democracy and development. To be sure, it has its challenges, which range from its practical implementation to coordination of various development programmes at different tiers of government. A devolved structure with a two- rather than three-tier system dominated the devolution debate in Zimbabwe, with a three-tier system eventually finding its way into the new Constitution. The devolution debate was hotly contested, and citizens themselves were not clear on what form of devolution they wanted. They were clear on one thing, though: that devolution was inevitable.

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The Best Loser System in Mauritius: An Essential Electoral Tool for Representing Political Minorities

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Abstract

The Best Loser System (BLS) has been part of the electoral arrangements of Mauritius since independence. It is a system which is regarded as having been instrumental in holding different religious communities together in peace; as such, the BLS is held as one of the underlying reasons for the country's social, economic and political development. However, in recent years it has drawn criticism for allegedly entrenching ethnic divisions and thereby hampering the attainment of solidarity in Mauritius.

This chapter examines the BLS from a historical perspective in order to shed light on its raison d'être. Using the simple mathematical calculations that are the basis of the system, the chapter explains how the BLS works and goes on to assess it against the international legal framework for the political representation of minorities. An analysis is undertaken of the case law that interprets the BLS and its essential components; the BLS is also discussed in relationship to other inclusive political systems. The chapter concludes by assessing its effectiveness as a means of securing political representation of minorities in Mauritius; in so doing, this section responds to the criticism that has been directed at the BLS.

1 Introduction

The African continent is distinctive for its great diversity of ethnicity, religion, language and culture, a situation of heterogeneity diversity which the unifying term 'African' itself can remove from view: as a reference to the continent's indigenous peoples, it embraces nearly 3,000 distinct ethnic groups. This immense diversity should be cause for celebration, but in several states it has triggered bloodshed and war instead, with unhappy and

dissatisfied sections of the population often being at the root of political, social and economic unrest. For instance, it was reported that Coptic Christians face persecution in post-Morsi Egypt.[1] The Coptic Pope, Tawadros II, said former President Morsi intended to 'islamicize' the political system, side-lining the Copts and preventing free expression of religions other than Islam.[2]

In the few years since the so-called Arab Spring, ethnic conflict has become common in the African Arab world. Libya, Tunisia, Egypt and Sudan have all known such conflicts, which are serious hurdles to state-building in those countries. This chapter argues that, as Africa enters another era of constitution-making after the Arab Spring's challenge to autocratic regimes, appropriately designed constitutions can serve as starting-points for fostering participatory politics and securing adequate representation of minorities in countries demographically dominated by one or more religious or ethnic groups.

The chapter examines a unique political arrangement in Mauritius known as the Best Loser System (BLS) to determine the extent to which it can provide a useful working model for African countries engaged in constitution-making. On the one hand, the BLS is regarded as an underlying reason for Mauritius's success in maintaining a peaceful and tolerant multiracial society; on the other, some believe that, having served the political system for 46 years, it has institutionalised racial division. The BLS, it is said, violates the principle of Mauritianism, is undemocratic in nature, and is in need of reform.

As such, the following questions emerge and will be considered: Is the BLS in line with the international normative framework on political representation of minorities? Is it inherently flawed, given that it is drawn up along religious lines? Does it breed racism, or has it been instrumental in binding Mauritians with diverse religious backgrounds?

The chapter begins with an explanation of the BLS and how it works in practice. The focus shifts to the historical reasons for its incorporation in the electoral system. What follows is a summary and discussion of major

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1 Curtis M 'Certain persecution awaits Coptic Christians in post-Morsi Egypt' *The Balfour Post* 9 July 2013 available at http://balfourpost.com/certain-persecution-awaits-coptic-christians-in-post-morsi-egypt/ (accessed 28 July 2013).

2 Hussein AR 'Egypt's new Coptic pope faces delicate balancing act' *The Guardian* 4 November 2012 available at http://www.guardian.co.uk/world/2012/nov/04/egypt-coptic-pope-balancing-act (accessed 28 July 2013).

court decisions on the BLS; this system is also assessed in terms of existing norms regarding minority representation in politics and public affairs. The chapter ends with a critical analysis of the BLS that appraises its democratic nature and the main objections that have been made to it.

2 The Best Loser System

2.1 An overview of the electoral system

The Republic of Mauritius has a population of about 1.3 million, with 1,255,020 inhabitants on the Island of Mauritius, 38,240 in the Island of Rodrigues and 289 in Agalega.[3] Mauritian society consists of people who affiliate themselves to Hinduism, Islam, Christianity and Buddhism. The diversely religious nature of Mauritian society is further apparent in the scores of denominations that exist in turn within each of these faiths, diversity which explains why it was essential to design a political system that would ensure political representation of all the various communities.

The electoral system of Mauritius is a distinctive one, as is evident in the First Schedule to the Constitution. The country is divided into 20 constituencies (with Rodrigues Island being the twenty-first constituency) in which each voter votes for three candidates who get elected based on the highest number of votes, an electoral arrangement known as the 'three-first-past-the-post' system (TFPTP). The National Assembly consists of 70 members, 62 of whom are voted in directly through the TFPTP (20 constituencies each return three members, with the remaining two being elected from Rodrigues Island) and eight through the BLS (discussed further below).

Regarding the TFPTP system, it leads to relatively stable governance since voters have the opportunity to hold accountable each elected member from a specific constituency based on the way he or she has implemented a manifesto.[4] It therefore keeps a connection between the people and parliament through the elected member, as the latter represents a particular geographical area. However, the drawbacks are significant. The pos-

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3 Statistics Mauritius 'Population and vital statistics, Republic of Mauritius 2012' (2012) available at http://statsmauritius.gov.mu/English/StatsbySubj/Documents/ei1018/Amended%20FINAL%20_ESI%202012.pdf (accessed 5 March 2014).

4 Woolf A *Systems of Government: Democracy* (2009) 25.

sibility exists that representatives can be elected with only tiny amounts of public support, seeing as the number of votes obtained does not matter – what does is getting more votes than other candidates.[5] In addition, the votes cast for losing candidates count for nothing even if there is a narrow difference between the losing and winning candidate.

2.2 The BLS explained

While the TFPTP system can be observed in other democracies in the world, the BLS can be said to be distinct to the Mauritian electoral system. As mentioned, 62 of the country's 70 members of parliament are directly elected from 21 constituencies, while the other eight enter the National Assembly through the BLS, which was designed to ensure political representation of religious minorities. This section describes how it works.

Section 5(1) of the First Schedule to the Constitution states that 'in order to ensure a fair and adequate representation of each community, there shall be 8 seats in the Assembly, additional to the 62 seats for members representing constituencies'. This raises questions about how a 'community' and how the Mauritian population is divided into communities. According to section 3(4) of the First Schedule:

> the population of Mauritius shall be regarded as including a Hindu community, a Muslim community and a Sino-Mauritian community; and every person who does not appear, from his way of life, to belong to one or other of these three communities shall be regarded as belonging to the General Population, which shall itself be regarded as a fourth community.

What is equally important to know is how many people belong to each category. This is where the 1972 census comes into play, according to which 428,348 Mauritians belong to the Hindu, 261,439 to the Muslim, and 24,374 to the Sino-Mauritian community; 137,173 people belong to the General Population.

As indicated, 62 MPs are elected directly to the National Assembly. To demonstrate how the BLS works, it is assumed that for any particular general election these 62 members have been elected as follows: 40 Hindu candidates, 15 Muslim candidates, six candidates elected as General Popu-

5 Electoral Reform Society 'First Past the Post' available at http://www.electoral-reform.org.uk/?PageID=481 (accessed 30 July 2013).

lation and one as Sino-Mauritian. The next step is to calculate the ratio of representation, that is, how each category is represented numerically. This is done by dividing the number of people in the category by the number of elected candidates.

Table 1: Ratio of elected members to population

Community population (category)	Number of candidates elected	Ratio of representation (number of people in the category divided by number of elected candidates for that category)
Hindu (A) 428,348	40	428,348 divided by 40 = 10,709 people for each elected member
General Population (B) 261,439	15	261,439 divided by 15 = 17,429 people for each elected member
Muslim (C) 137,173	6	137,173 divided by 6 = 22,862 people for each elected member
Sino- Mauritian (D) 24,374	1	24,374 divided by 1 = 24,374 people for each elected member

From the above calculation, it is clear that the General Population and Sino-Mauritians are less represented than, for example, the Hindus. While every 10,709 Hindus have one elected candidate to represent them, 24,374 Sino-Mauritians have only one representative in the National Assembly – and could even have none if the candidate were not elected. However, the BLS tries to remedy such unfair representation in a mathematical way, as illustrated below.

The Electoral Commission has to determine which community/category is the most poorly represented in parliament. The most poorly represented communities/categories are designated the 'best losers'. A best loser is an unsuccessful candidate who has come fourth (in the TFPTP system) in a constituency, but who has acquired the highest number of votes among the 'losers', that is, the unsuccessful candidates.

As a first step, one best loser is allocated to each category. The second step is to calculate which category has the largest number of people represented by one MP. This would then mean that the most poorly represented category is entitled to be allocated another best loser.[6] The first four seats would be allocated to under-represented communities without regard to

6 See Lalit *Against Communalism of the Best Loser System* (2005) 47. The computation of the allocation of the best losers is somewhat complex and not clearly understood by Mauritians themselves. Lalit is a political party which has worked extensively in the field of electoral reforms and the BLS. It is also the only party that has

party affiliation and on a purely 'communal' (community/category/religious) basis. The second set of four would be designated on the basis of party and community/category. The second set takes into account party affiliation so that it can still maintain the winning political party as winners in case there is a change after the allocation of the first set of best-loser seats. In simpler terms, the remaining four best losers would be best losers of the political party that won the election through the TFPTP system; these 'losers' are there to make sure the winning party stays a winner.

The entirety of the mathematical process is summarised in Table 2.

Table 2: Calculation for allocation of best loser seat

Logical steps	Category A	Category B	Category C	Category D
1972 census	428,348	261,439	137,173	24,374
Elected members after the TFPTP system	40	15	6	1
Each member represents (no. of people divided by no. of members elected):	10,709	17,429	22,862	24,374
If one is added into each category, then each MP will represent:	41 MPs 10,448	16 MPs 16,340	7 MPs 19,596	2 MPs 12,187
The second best loser therefore is allocated to:			Category C, since it is still the most poorly represented, with 19,596 people represented by one member	
What is the new composition and ratio of representation?	41 MPs 428,348/41 10,448	16 MPs 261,439/16 16,340	8 MPs 137,173/8 17,147	2 MPs 24,374/2 12,187
The third best loser is allocated to:			Again, the most poorly represented is allocated as the third best loser	
What is the new composition and ratio of representation?	41 MPs 428,348/41 10,448	16 MPs 261,439/16 16,340	9 MPs 137,173/9 15,241	2 MPs 24,374/2 12,187
The fourth best loser is allocated to:		Category C, since it is the most poorly represented – 16,340 people represented by one		

made a concerted effort to explain the BLS, and the author of this chapter has drawn on its work for the explanation he provides here.

The process goes on as above until all the eight best loser seats are allocated to make representation fair and equally distributed. The only difference with the last four best-loser seats is that they are allocated to the best loser of the winning political party to maintain them as winners. Table 3 shows the constitution of the National Assembly and its ethnic representativeness after the BLS was applied after the 2010 general elections.

Table 3: Ethnic representation in National Assembly after BLS applied to 2010 election results

Category	Number of members
Hindu	36
Muslim	11
Sino-Mauritian	1
General Population	21

2.3 The concepts of 'community' and 'way of life'

The backbone of the BLS is the categorisation of the population along religious lines first and, then, if there is no religious affiliation, into the General Population. However, this was challenged in *Narain v Mauritius*, heard before the United Nations Human Rights Committee.[7] The complainants made a number of submissions:

- Regulation 12, paragraph 5, of the National Assembly Elections Regulations 1968, to the extent that it invalidates the nomination of a candidate to a general election who does not declare to which of the Hindu, Muslim, Sino-Mauritian or General Population communities he allegedly belongs, violates article 25 of the International Covenant on Civil and Political Rights (ICCPR).
- In imposing an obligation on a candidate in a general election to declare the 'community' to which he or she supposedly belongs, paragraph 3(1) of the First Schedule to the Constitution, also violates article 25 of the Covent.
- Regulation 12, paragraph 5, of the National Assembly Elections Regulations 1968 and paragraph 3(1) of the First Schedule to the Constituti-

7 *Devianand Narain et al v Mauritius* (2012) Human Rights Committee Coomunication No. 1744/2007 CCPR/C/105/D/1744/2007.

on, individually or cumulatively violate article 25, inasmuch as they create objectively unreasonable and unjustifiable restrictions on the right to stand as candidates and be elected at general elections to the National Assembly.[8]

- The criterion of a person's 'way of life', which is the basis of the four-fold classification of the State party's population, is not only vague and undetermined but also unacceptable in a democratic political system. It cannot form the basis of a sanction, and leads to curtailment of the complainants' rights under article 25.

In its ruling, the Committee referred to its jurisprudence in stating that any condition which applies to the exercise of the rights protected by article 25 must have a reasonable and an objective basis.[9] It also made reference to its General Comments on article 25, in which it stated that persons who are otherwise eligible to stand for election should not be excluded on unreasonable or discriminatory grounds by unreasonable or discriminatory grounds such as education, residence or descent, or political affiliation.[10] The Committee found Mauritius to be in violation of article 25, and the State party was ordered to report to the Committee within 180 days on any measure taken to remedy the situation.

The Committee's views on this matter drew considerable criticism. For instance, it has been argued that it failed to understand concepts such as 'way of life' as explained by the Supreme Court of Mauritius and that its decision was hence ill-informed. The Committee simply accepts the complainants' argument that they were 'unable to categorise themselves in the prescribed compartments, that is, as belonging either to the Hindu, Muslim, Sino-Mauritian or General Population community', whereas it is clear that the General Population residual category was created precisely to cover instances like these where the 'way of life' test does not apply.[11]

Moreover, the challenge to the BLS and the Committee's finding raise other, and deeper, questions. If the BLS – as discussed, a distinctive ele-

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8 *Devianand Narain et al v Mauritius* (2012) para. 3.1.

9 *Debreczeny v Netherlands* (1995) Human Rights Committee Communication No. 500/1992.

10 General comment No. 25, para. 15.

11 'Mauritius will not be bullied by an unfair and biased UN Human Rights Commission' *Le Matinal* 7 September 2012 available at http://www.lematinal.com/blogs/18398-Blog-BLS---Mauritius-will-not-be-bullied-by-an-unfair-and-biased-UN-Human-Rights-Commission.html (accessed 27 August 2013).

ment of the Mauritian electoral system and one involving a fairly elaborate computational procedure – rests on a 'four-fold classification' of the population – what are the historical reasons for its design? In particular, how did it happen that 'Hindu', 'Muslim', 'Sino-Mauritian' and 'General Population' came to form the categorical matrix for the application of the BLS?

2.4 The historical background of the BLS

The Mauritian population consists mainly of Hindus, Muslims, Christians and Buddhists, with the latter two being minority groups; the rationale behind the BLS was primarily to give concrete reassurance to religious minorities that they would be fairly represented in parliament and thus able to participate actively in political life.

Before the country gained its independence, elections held under British rule were based solely on the TFPTP system. Mauritians themselves did not really participate in local politics except for playing merely symbolic advisory roles. At the time, then, the under- or over-representation of this or that religious group was not a serious issue as the locals contented themselves with the fact that at least Mauritians were represented at all.

However, the need to have all religious communities represented politically was raised by Hilary Blood, Governor of Mauritius from 1949 to 1953.[12] While he was of the view that a temporary measure to accommodate minorities was necessary in the interests of fair and equal representation, he warned of the danger of having such a measure installed for long as it would show that the country was still divided along racial lines and unable to find a basis for national unification. In 1956, at the London Conference, the independence and electoral system of Mauritius was discussed, and it was decided that an electoral system based on multipartyism rather than race and religion should be designed.[13] But, given the population's religious diversity, it was also decided that this system should provide an opportunity for all sections of the populace to elect representatives in a proportional way.

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12 Blood H *Ethnic and Cultural Pluralism in Mauritius* (1982) 356-362.

13 Collendavelloo I *Report of the Select Committee on the Introduction of a Measure of Proportional Representation in Our Electoral System* (2004) 7.

The London Agreement of 1957 set up the first commission that was responsible for the design of an electoral system in line with the above-mentioned criteria. Under the chair of Sir Malcolm Trustman-Eve, it submitted a report in terms of which Mauritius was divided into 40 constituencies, with each returning one elected candidate through the TFPTP system. A second part of the report contained the BLS, which suggested that 'nominees' be appointed by the governor on racial lines in order to secure proper representation of all religious groups.

It was the first time communal representation was institutionalised in the electoral map of Mauritius.[14] For it to function, the Mauritian population was divided into Indo-Mauritian Hindus, General Population and Indo-Mauritian Muslims. At the time, Sino-Mauritians had not yet naturalised and were not considered part of the Mauritian population. The election of 40 members and a maximum of 12 nominated members based on the Trustman-Eve Report were provided for by section 17 of the Mauritius (Constitution) Order in Council of 1958. In 1964, the number of nominees was increased to 15.[15]

A second meeting, the Lancaster House Conference, followed in 1965, at which the Banwell Commission of 1966 was appointed to review the Mauritian electoral system.[16] Banwell's task was to advise the British Government on the most appropriate way of allocating seats in Mauritius with regard to the main sections of the population being given a fair representation of their interests.[17] Banwell proposed that there be 20 constituencies and each constituency elect three members based on the TFPTP system: this proposal was enacted and the system still exists today.

However, his proposal of five constant correctives or 'best losers' to provide for fair representation was opposed by the majority party, the Mauritius Labour Party, headed by Sir Seewoosagur Ramgoolam. According to this party, such a measure would be against the concept of proportional representation. Due to major differences between political parties as far as the BLS was concerned, John Stonehouse was nominated to act as negotiator. The Stonehouse Report maintained the 20 three-member constituencies for Mauritius and one two-member constituency for Rodrigues,

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14 Mathur H *Parliament in Mauritius* (1991) 55.
15 Mauritius (Constitutional) Order in Council 1964, section 25.
16 Cawthra G *Security and Democracy in Southern Africa* (2001) 98.
17 Central Office of Information Great Britain *Mauritius* (1968) 9.

an arrangement in terms of which 62 members were directly elected based on the TFPTP system.

2.5 A legal overview of the BLS

Entrenched in the First Schedule of the Constitution, the BLS was designed for fair and adequate political representation of minorities. At the insistence of Sir Abdool Razack Mohamed, leader of the Muslim Action Committee, the BLS became an integral part of the Constitution. In short, it involves the division of the population into religious groups and the allocation of eight additional seats as best losers. Nevertheless, the division of the population along religious lines requires closer scrutiny as it has been the reason for criticisms levelled at the BLS; moreover, the population census on which this division is based dates back to 1972 and has not been revised.

The third and fifth paragraph of the First Schedule reads as follows:

> Every candidate for election at any general election of members of the Assembly shall declare in such manner as may be prescribed which community he belongs to and that community shall be stated in a published notice of his nomination.
> For the purposes of this Schedule, the population of Mauritius shall be regarded as including a Hindu community, a Muslim community and a Sino-Mauritian community; and every person who does not appear, from his way of life, to belong to one or other of those 3 communities shall be regarded as belonging to the General Population, which shall itself be regarded as a fourth community.

It is mandatory for candidates in the elections to state in the nomination paper to which community (religious group) they belong, as this information is essential for the calculation of best losers' seats after the counting process. If the community is not stated, the returning officer can treat the nomination paper as invalid.[18]

The interpretation of the word 'community', and the way some candidates have used the provision, have required the intervention of the Supreme Court of Mauritius. In the case of *Carrimkhan v Tin How Lew Chin & Orsi*,[19] the respondents did not belong to the communities they stated in

18 Paragraph 11 of the National Assembly Elections Regulations 1968.
19 *Parvez Carrimkhan v Tin How Lew Chin & Ors* SCJ 264 (2000).

their nomination papers. Being ardent opponents of the BLS, which they viewed as instigating racism, five of the respondents, who were candidates of the Tamil Council, declared in court that they are atheists and therefore do not belong to the Hindu, Muslim or Sino-Mauritian communities but to the General Population. However, historically Tamils have been considered part of the Hindu community. The remaining respondents, again to show their opposition to the BLS, decided upon their communities by drawing lots. In summary, the respondents believed that qualified candidates could not have their nomination papers rendered invalid based on their community. The applicant was claiming that his right to stand as a candidate had been violated by the respondents wrongly declaring their communities and that this would affect the allocation of the best loser seats.

The judge stated that the respondents' nomination papers could not be rendered invalid per se, given that their communities had been declared. However, the question was whether they really belonged to the communities they pretended to. The judge argued that it would be incorrect to interpret 'community' in the First Schedule as community according to one's religion. This is because it is possible that a Sino-Mauritian can be Buddhist or Christian. According to the judge, it was perfectly constitutional for some of the respondents to declare themselves as belonging to the General Population, but he left the BLS as a matter to be addressed by parliamentary electoral and constitutional reform. This judgment was considered proof that the BLS is an aspect of the electoral system on which even the Supreme Court is not ready to pronounce; the case was also regarded as a missed opportunity for the Court to initiate reformist debate on racism and the BLS.

In *Narain & Ors v Electoral Supervisory Commissioner & Ors*,[20] the matter again related to the declaration of community in the nomination paper. The applicants had chosen not to fill in the required community in the form, and when their nomination was declared invalid, they challenged this in Court. The main contention was about whether a provision enacted by parliament rendering a nomination invalid in the case of failure to declare community was contrary to the spirit of the Constitution. The Supreme Court ruled in favour of the applicant, stating that forcing a candidate to declare his or her community curtailed the constitutional right to stand as a candidate at general elections, but the decision was reversed by the

20 *Narrain & Ors v Electoral Supervisory Commissioner & Ors* SCJ 159 (2005).

full bench of the Supreme Court, which maintained that declaration of community in a nomination paper was compulsory under the First Schedule to the Constitution.[21]

The 1972 census on which the division of the population along community lines is based has also been the subject of criticism and contention. In *Ex Parte Electoral Supervisory Commissioner and Electoral Commission & Ors*,[22] the issue was whether the allocation of best-loser seats should be based on a census that harks back to 1972. The Court held that the exercise could be conducted only on the basis of the latest census, as can be read from paragraph 5(8) of the First Schedule, saying it was questionable that representation would be fair and adequate if the allocation of best-loser seats were founded on statistics reflecting the reality of 20 years ago rather than the present.[23] However, the wording 'latest census' had been amended by parliament to 'the results of the published 1972 official census', because from 1982 censuses no longer asked people to indicate to which community they belonged, with the result that only the 1972 census could provide the required information.

In an effort to respect the separation of powers, the Supreme Court in this case yet again invited parliament to look into the matter, as it did when the 'archaic' nature of the 1972 census was highlighted once more in *Joomun v The Government of Mauritius & Anor*.[24] Here, too, the Court opted to apply the principle of separation of powers in a rigid way and left any possible reform in the hands of the executive.

From the Supreme Court rulings, it can be observed that a number of cases were decided on technicalities relating to the interpretation of 'way of life', the definition of 'community' and the use of the 1972 Census. The general perception is that while judges of the Supreme Court may not be in favour of the BLS, they have not taken a proper stand because they are either daunted by the prospect of coming out against it or especially heedful of the constitutional separation of powers.

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21 *The Electoral Supervisory Commission v The Honourable Attorney General* SCJ 252 (2005).

22 *Ex Parte Electoral Supervisory Commissioner and Electoral Commission & Ors* MR 166 (1991).

23 Leclezio H 'People and Politics' in Macmillan A (ed) *Mauritius Illustrated* (1914) 139–141.

24 *Joomun v The Government of Mauritius & Anor* SCJ 234 (2000).

3 The BLS assessed against the international legal framework

Given that there are political parties completely opposed to the BLS, the population in general may not necessarily understand its importance in protecting the representation of minorities. As discussed later, the principle of Mauritianism is often accorded a higher status than personal religious belonging, but such nationalistic passion can be endorsed only if there is a guarantee that minorities are adequately represented.

With technical and practical aspects of the BLS having been examined and the system as a whole having been placed in historical context, this section assesses it in the light of the international legal framework on the political representation of minorities, a framework provided by the ICCPR as well as other UN legal instruments.

3.1 Participation of minorities in public life

To highlight the importance of the participation of minorities in public life, it is first worth considering the definition of a minority. Article 1 of the United Nations Minorities Declaration makes reference to minorities as groups based on national or ethnic, cultural, religious and linguistic identity, and imposes an obligation on states to protect their existence. It is notable that there is no globally agreed definition of a minority. This is explained by the fact that minorities live in different countries and under different conditions, such that categorising them may not be easy or even appropriate. According to Francesco Capotorti,[25] a minority would be

> [a] group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.[26]

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25 Former Special Rapporteur of the United Nations Sub-Commission on Prevention of
Discrimination and Protection of Minorities.

26 See 'Minorities' rights under international law' *United Nations Human Rights* available at http://www.ohchr.org/EN/Issues/Minorities/Pages/internationallaw.aspx (accessed 26 August 2013).

Capotorti's definition implies that a minority is not only a numerical minority but one with 'a non-dominant position'. The latter, then, is an essential criteria for a group to qualify as a minority, given that a numerical minority could indeed be dominant, as in the case of apartheid South Africa. Furthermore, as the definition suggests, categorisation as a minority also depends on subjective criteria, such as whether the particular group wants to preserve its distinctness or whether an individual wants to be part of that group.

As a distinct section of the population, minorities have particular concerns and needs, be they economic, social or political. For these to be taken into account, it is essential that minorities have access to means of political participation that give them the opportunity to influence the course of a society's general development.[27] A number of mechanisms have been adopted across the world to realise minority political representation, such as federalism, proportional electoral systems, territorial autonomy or guaranteed minority seats in parliaments.[28] The goal of ensuring political participation by minorities is to guarantee that they can enjoy similar treatment as the majority. They need to be consulted when laws are enacted, their interests must be taken into consideration when decisions are made by the government, and, most importantly, they need to be given the proper platform for effective political representation. International law has developed a framework for such representation (summarised below).

In Mauritius, the BLS exists to cater for religious and non-religious minorities. Non-religious minorities would include citizens who do not affiliate themselves to any religion but who would be regarded as a minority under the General Population class. The BLS allows them to be represented in the National Assembly and they are therefore able to participate in public life through representatives who voice their needs and concerns.

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27 Crowley J 'The political participation of ethnic minorities' (2001) 22 *International Political Science Review* 99-121.

28 Bauböck R *Multinational Federalism: Territorial or Cultural Autonomy* (2001) Willy Brandt Series of Working Papers in International Migration and Ethnic Relations available at http://muep.mah.se/bitstream/handle/2043/690/Workingpaper201.pdf?sequence=1 (accessed 28 July 2013).

3.2 Participation of minorities under the UN rights system

Article 25 of the ICCPR provides the right for everyone to be involved in the public affairs of a state, directly or through freely chosen representatives. This provision is, in fact, inspired by article 21 of the Universal Declaration on Human Rights, which provides that '[e]veryone has the right to take part in the government of his country, directly or through freely chosen representatives'.

The Human Rights Committee has interpreted the conduct of public life as the exercise of power in the legislative, executive and administrative branches.[29] It adds that once a mode of participation in public affairs is established, no distinction can be made between citizens based on grounds such as colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and that no unreasonable restrictions should be imposed. This implies that, via the BLS, minorities in Mauritius have acquired political representation and been provided further protection against discrimination on the grounds mentioned above. Their voice can be heard in the National Assembly and they can participate actively in public life; stated conversely, based on the pattern of voting in Mauritius and the FPTP system, it is evident that without the BLS the human right provided for by article 25 of the ICCPR would have been difficult to fulfil.

The United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Linguistic or Religious Minorities (UNDM) states that 'persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life'.[30] The same Declaration provides for the right to 'participate effectively in decisions on the national, and where appropriate, regional level concerning the minority to which they belong or the regions in which they live'.[31] It is important to highlight the use of the word 'effectively' to qualify the participation, because it implies an understanding that the mere existence of political structures is not good enough: what is crucial is whether such structures can be used 'effectively' by minorities and whether the latter have a

29 General Comment No. 25 'The right to participate in public affairs, voting rights and the right of equal access to public service' *Human Rights Committee* UN Doc CCPR/C/21/Rec.1/Add.7, para. 5.

30 Article 2(2).

31 Article 2(3).

significant, and not merely symbolic, role when it comes to participation in public affairs.

In addition to the provisions of the ICCPR and UNDM, article 5 of the International Covenant on the Elimination of Racial Discrimination (ICERD) prohibits racial discrimination and guarantees equality in the enjoyment of political rights. Furthermore, in terms of article 7 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), women are guaranteed equal rights to men to political participation, a guarantee that imposes an obligation on states to take all appropriate measures to eliminate discrimination against women in political and public life.

The importance of minority participation in public affairs cannot be emphasised enough. Given the small size of Mauritius, its high level of literacy, the keen interest of its people in politics and the relatively high number of political parties there, the BLS guarantees direct forms of participation in public life, such as standing as a candidate for election. It may not always be easy for minorities to participate actively in elections, as can be seen in *Antonina Ignatane v Latvia*[32] in which the complainant was prohibited from standing as a candidate in a local election in Latvia on the grounds that she was not competent in the Latvian language even though she had passed a certified test on the highest level of proficiency in that language. The Human Rights Committee upheld article 25, stating that minorities cannot be excluded (in this case, on the basis on language) from the public affairs of a state by preventing them from standing as candidates for elections.

In this regard, the BLS guarantees not only that a member of a minority group can stand for election, but that, even if he or she were unsuccessful in the FPTP system, he or she has a chance of acquiring a seat as a minority representative in the National Assembly.

3.3 Participation of minorities under the African rights system

The African Charter on Human and People's Rights (ACHPR) provides, in article 13, for the right of every citizen to participate freely in the go-

32 *Antonina Ignatane v Latvia* (2005) Human Rights Committee Communication No. 884/1999, CCPR/C/72/D/884/1999.

vernment of his or her country directly or through freely chosen representatives. This is reinforced by article 20 on the right to self-determination, which provides for the right of peoples (minorities included) freely to determine their political status.

An example of how article 13 has been interpreted is found in the case of *Legal Resources Foundation v Zambia*, where the African Commission on Human and People's Rights held that the phrase 'in accordance with the law' should not allow states to create laws that would prevent an individual from freely exercising his or her right as guaranteed under article 13; instead, the ACHPR's provisions should be interpreted holistically, with all of its clauses reinforcing each other.[33] In addition, the Commission emphasised that legal limitations to article 13(1) can be allowed only if they conform to internationally acceptable norms and standards.[34] In this way, the BLS helps Mauritius to fulfil its obligation under the ACHPR with respect to the political rights of minorities.

3.4 International examples of inclusive political systems

Minority groups are present in almost all countries of the world, albeit to varying degrees. Minority representation can present real challenges as it is not easy to identify clearly who should count as a minority in a given country. Certain countries, such as Belgium and France, refuse to make distinctions among citizens and, for instance, do not even collect data about ethnicity but only citizenship.[35] The problem is accentuated by the fact that there is no internationally-agreed definition of 'minorities'. However, some countries have tried to engineer their political systems in such a way that minorities are either politically represented or, at any rate, accommodated. Explicit recognition of minorities is provided by way of communal rolls, reserved seats for minorities, ethnically mixed or mandated candidate lists, and best-loser seats.

Communal rolls provide an entire system of parliamentary representation based on communal considerations. In other words, each defined mino-

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33 *Legal Resources Foundation v Zambia* reference (2001) AHRLR 84 (ACHPR 2001).

34 *Purohit v The Gambia reference* (2003) AHRLR 96 (ACHPR 2003).

35 Feskens R 'Collecting data among ethnic minorities in an international perspective' available at http://fmx.sagepub.com (accessed 28 August 2013).

rity has its own electoral roll and minorities can elect members to represent them in the parliament. Fiji and New Zealand are examples where communal rolls are applied in the electoral system. Fiji, for instance, allows its minority groups (indigenous, Indian, European and Chinese) to elect members to parliament based on this system.[36] In New Zealand, Maori candidates can choose to be on either national electoral rolls or a specific Maori roll.[37]

Reserved seats are considered the most effective system when it comes to political representation of minorities. Here, reserved seats are allocated to members of the legislature who are elected by voters from minority groups.[38] The system has been adopted by countries as diverse as India (in respect of scheduled tribes and castes), Pakistan (non-Muslim minorities), Colombia (black communities), Slovenia (Hungarians and Italians) and Taiwan (aboriginal community).

The UK has modified this system by using representation of regions; in other words, since most minority groups tend to be from Scotland or Wales, the electoral rolls for those regions cater for that diversity.[39]

Other countries, such as Lebanon, make use of an ethnically mixed list to ensure balanced ethnic representation.[40] The list consists of candidates from all ethnic groups: hence, the voters can ensure their political representation.

Finally, the Best Loser System is similarly designed for political representation of minorities. However, it is important to note that in some countries where it is used, such as Singapore and Ecuador, the system is not based on ethnic or racial criteria.

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36 Newton W 'Fijians, Indians and independence' (1970) 42 *The Australian Quarterly* 33.

37 Stern P & Druckman D *International Conflict Resolution after the Cold War* (2000) ch 14.

38 Reilly B & Reynolds A *Electoral Systems and Conflict in Divided Societies* (1999) 41.

39 Saggar S & Geddes A 'Negative and positive racialization' (2000) 26 *Journal of Ethnic and Migration Studies* 28.

40 Ekmekji A *Confessionalism and Electoral Reform in Lebanon* (2012) 16.

4 A critical analysis of the BLS

This section analyses the drawbacks and merits of the BLS in order to arrive at a balanced opinion as to whether it has helped Mauritius maintain a peaceful and tolerant society or whether it breeds racial sentiments. While it is commonly alleged that politicians have exploited the system to suit their needs (for example by increasing the number of minorities in their parties to improve their chances of being allocated seats under the BLS and hence to strengthen their hold on power in parliament), this allegation will not form the basis of the discussion here. The aim instead is to look at the system itself, consider its inherent defects or advantages, and assess whether it has assisted Mauritius in its process of nation-building.

The most frequent criticism of the BLS is that it is 'undemocratic' and inimical to 'Mauritianism'. For instance, Raj Mathur, a famous political scientist in Mauritius, described it as 'undemocratic and … incompatible with the spirit and the letter of the Constitution, which stipulates that Mauritius shall be a sovereign and democratic state'.[41] Rama Sithanen, a former Minister of Finance and Vice Prime Minister of Mauritius, contended that it 'ethnicizes' the electoral system, classifies candidates and electors, legitimises communalism and inhibits nation-building in contradiction of the new dawn hailed by so many.[42]

The two key phrases are 'undemocratic' and 'against Mauritianism'. Among the most important components of democracy are inclusivity and the possibility of all eligible citizens to participate in government.[43] This is why it was important to assess the BLS using the international normative framework on political representation of minorities. It is clear that the BLS allows minorities to be represented in parliament and actively take part in politics. As such, it is highly questionable to call the BLS undemocratic for seeking to include minorities and give them more effective representation.

In addition, the Mauritian political system has been applauded by the outside world for the way in which minorities have been taken into account. According to the World Development Report, the country's governments have generally chosen broad-based growth and distributive policies

41 Mathur R *Parliament in Mauritius* (1991).

42 Sithanen R 'The Best Loser System: Can the new Prime Minister rise to the national unity challenge?' *L'express* 6 October 2003.

43 Young I *Inclusion and Democracy* (2002) 21.

over ethnic preferences. In other words, the BLS has allowed minorities to be fairly represented and ensured that economic and developmental policies apply to all and do not exclude minorities.

Moreover, several globally accepted indicators testify to the effect that Mauritius is peaceful and politically and economically stable. For instance, the Africa Global Peace Index ranks it first among African countries, while the Mo Ibrahim Index has it in first place as the least corrupt country in Africa. Mauritius is also a frontrunner in the Ibrahim Index of African Governance as well in the Rule of Law Index of the World Governance Indicators (WGI) project. These achievements have often been credited to the fact that the country has been able to accommodate ethnic differences within a well-designed parliamentary political system.[44] All governments of Mauritius have had to form multi-ethnic coalitions to assume and maintain power,[45] and political parties have developed a spoils system that ensures minorities have an established stake in public affairs.[46]

It is essential to point out that the BLS opposes the principle of 'Mauritianism', a locally coined term that can be paraphrased as 'feeling Mauritian first and then Hindu, Muslim or Christian second'. What matters most in a multi-racial society are tolerance and the will to learn and respect differences, which sociologists refer to as managed intimacy – the will to minimise open conflicts and undue stress.[47] Mauritius is often used as an example to illustrate how the most dominant religions of the world have co-existed peacefully. Differences in culture, tradition and religious practices are celebrated, rather than erased for the purpose of nation-building. The country has enjoyed positive peace for a long time. Not only has it been able to avoid violence but it has also managed to strengthen its institutions.

This raises the question: Does the BLS institutionalise racism in Mauritius? Institutional racism describes any system of inequality based on

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44 See National Bureau of Economic Research 'Mauritius: African success story' available at http://www.nber.org/digest/may11/w16569.html (accessed 12 March 2014).

45 World Bank Report (1997) 113.

46 Mukonoweshro E 'Containing political Instability in a poly-ethnic society: The case of Mauritius' (1991) 14 *Ethnic and Racial Studies* 199-224.

47 Bunwaree S 'Economics, conflicts and interculturality in a small island state: The case of Mauritius' (2002) 9 *Polis/R.C.S.P*.

race,[48] and it occurs when access to goods, services and opportunities are limited and regulated negatively on this basis.[49]

The BLS was introduced in the electoral system to allow political representation of minorities: it is not a system that breeds institutionalised racism. On the contrary, it has encouraged political parties to be multi-ethnic in nature and prevented their polarisation on religious or racial grounds. It has created the possibility for minorities to be represented in parliament and influence debates on matters that touch their affairs and way of life directly. Minorities and their representatives in parliament have been able to guide law-makers on how to balance their competing demands through legislation. For instance, the Marathi Speaking Union Act of 2008 regulates and promotes the Marathi language, culture and tradition.[50] The drafting process and substantive components of such a piece of legislation would have been highly ineffective and insensitive to the Marathi minority if the latter were not adequately represented in parliament.

5 Conclusion

The BLS was introduced in the Mauritian electoral system as a temporary measure up to the point where, with the good will of political parties, a new system which is not based on religion could be devised to ensure the political representation and participation of minorities. Four and a half decades after independence, the BLS is still very much present in Mauritius and expected to remain so for a long time. Undeniably, the system may have defects. However, at the end of the day, it serves one purpose – representation of minorities in parliament. They have an opportunity through the BLS to exercise their right to political representation and participation.

Mike Moore, former Prime Minister of New Zealand assessed the BLS in the following terms:

> How to handle minorities is a difficult path to navigate in many societies which have deep differences in religion, race, language and customs. Some

48 McCormack D 'Stokely Carmichael and Pan-Africanism: Back to Black Power' (1973) 35 *The Journal of Politics* 386-409.

49 Coretta P 'Institutional racism and ethnic inequalities' (2011) 40 *Journal of Social Policy* 173-192.

50 Mauritius also has the Tamil Speaking Union Act, the Telegu Speaking Union Act, the Urdu Speaking Union Act and the Chinese Speaking Union Act.

> seek solutions to ensure a majority does not overwhelm minorities by embracing federal systems. Others seek proportional representation to ensure all opinions sit in Parliaments but proportional representation sometimes means candidates only mobilise their own communities, creating polarisation. It's not easy. Clever little Mauritius has a unique way of ensuring that their large Muslim, Hindu and smaller Christian communities are represented in their parliament. It's called the 'best loser' system, not the most snappy or dignified title but it means that individuals from different communities must seek support from across all groups. A constitutional quota demands a certain number of members of Parliament from each community. [51]

Many African countries that are either looking to remodel their constitutions or entering a new era after a long period of dictatorship can draw inspiration from the BLS. Whether after 45 years of it their citizens would feel that it institutionalises racism or not is an altogether different story. Nevertheless, even if they did, it would be good news, a sign that they feel patriotic and wish to belong more so to a country as a whole than a religion or race. This is currently the feeling in Mauritius, but what tends to be overlooked is that such a feeling has been made possible in the first place largely by the BLS and the way it has enabled minorities to feel part of the country and its public life.

The BLS has been a success in Mauritius, and while it is true there cannot be an ideal model capable of fitting each and country given their differing contexts, it is also possible that certain of its aspects, as discussed in this chapter, could usefully inform constitution-building in African societies that are on the road to political democratisation.

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The Judiciary: Emerging Vanguard of Kenya's New Constitution

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Abstract

The adoption of the Constitution of Kenya, 2010, radically altered the rules of the game for the country's political class and public institutions. These actors continue to grapple with the practical challenges of constitutional reform and struggle to internalise the values upon which that reform was based. To mitigate resistance to the implementation process, the Constitution strengthened key institutions and put in place a number of procedural safeguards. Of these, the judiciary – as the guardian of the law – is arguably the most important. Mandated to uphold the purpose and principles of the Constitution, it is relishing its newfound autonomy and is better positioned to deliver than ever before.

Against this backdrop, the chapter investigates the extent to which the judiciary's independence has enabled it to deliver on its mandate in an environment in transition. It is argued that the contemporary judiciary is a more accountable and transparent institution than its politicised and defunct predecessor. This can be attributed, first, to structural changes that have insulated the courts from undue external interference and enhanced their operational efficiency, and, secondly, to the progressive leadership of some senior judicial officers. The chapter also examines whether the judiciary has the capacity to preserve these gains in the long term. In this regard, it is observed that succession politics and internal tensions within the courts are exposing areas of vulnerability which the political class exploits in order to undermine judicial authority.

> 'The political elite may be fragmented, the transition may be fragile, but it is such moments that provide an opportunity for great institutions and leadership to emerge and stabilize societies. The Judiciary is conscious of its historical mission in making Kenya a strong constitutional democracy.' – Chief Justice Hon. Willy Mutunga, 3 December 2012, Supreme Court of Kenya

1 Introduction

The judiciary of Kenya plays a central role in upholding the purpose and principles of the Constitution of Kenya, 2010. This function is particularly important in the current transition period, one in which public institutions grapple with implementing the practical and normative changes brought about by the Constitution and, in many instances, resist those change altogether. It is against this backdrop that the present chapter investigates the extent to which the judiciary's newfound independence has enabled it to deliver on its mandate in a context of uncertainty.

Section 1 contextualises the discussion by providing historical and contemporary insight into the strained relationship between the judiciary and the political class.[1] Section 2 assesses the specific structural changes that have accorded the judiciary greater independence under the new constitutional dispensation. Section 3 analyses how this independence has been leveraged by the institution's leadership to reduce outside interference in the affairs of the courts. Section 4 critically analyses the judiciary's capacity to preserve in the long term those gains it has made.

2 Background

Various bodies are mandated to facilitate and oversee the implementation process. These include the Ministry of Justice National Cohesion and Constitutional Affairs (MoJNCCA),[2] Kenya Law Reform Commission (KLRC),[3] Ministries, Parliament, Office of the Attorney General (AG), Com-

1 In this chapter 'the political class' or 'political elite' refers to arms of government other than the judiciary, that is, the legislature and executive.

2 The MoJNCCA is mandated to 'co-ordinate and facilitate the realization of Democratic Governance through protection and enjoyment of fundamental rights and freedoms, creation of a Constitutional Order, promotion of Ethics and Integrity and nurturing a cohesive society'. Presidential Circular No. 1/2008 dated 30th May 2008.

3 'The KLRC is mandated to keep under review all the law and recommend its reform to ensure— (i) that the law conforms to the letter and spirit of the Constitution; (ii) that the law systematically develops in compliance with the values and principles enshrined in the Constitution; (iii) that the law is, among others, consistent, harmonized, just, simple, accessible, modern and cost-effective in application; (iv) the respect for and observance of treaty obligations in relation to international instruments that constitute part of the law of Kenya by virtue of Article 2(5) and (6)

mission for the Implementation of the Constitution (CIC)[4] and Parliamentary Constitutional Implementation Oversight Committee (CIOC).

Collectively, these institutions contribute to the implementation process in two ways: first, by enacting and reviewing the necessary raft of legislation and policies required to implement the Constitution, and, secondly, restructuring and creating institutions, structures and systems in alignment with the Constitution. The judiciary, meanwhile, assigns normative meaning to the Constitution.[5] If implementation is viewed as a time-bound, linear process, each of the aforementioned actors play an important role at different stages of that process. The buck stops at the judiciary, which is why in this chapter it is held as the ultimate guardian of the Constitution. Furthermore, the assumption that processes of implementation require safeguarding implies the existence of one or multiple threats to constitutional implementation. These threats are defined as political interests 'which seek to retain the status quo, reverse the gains, or manipulate the content, direction and pace of reform or implementation'.[6]

2.1 Historical context

The Repealed Constitution of Kenya, 1963 created a weak judiciary susceptible to political interference and subjugation by the executive. The colonial state's autocratic systems shaped the judiciary to such an extent that they remained intact even in the post-colonial era. Fundamentally, colonial systems of rule were based on concentrating power in the leading classes. Following independence in 1963, these powers were transferred to the in-

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of the Constitution; (v) keep the public informed of review or proposed reviews of any laws; and (vi) keep an updated date of all laws passed and reviewed by Parliament.' Section 6 of The Kenya Law Reform Commission Act, No.19 of 2013.

4 The (CIC) is established under section 5(6) of the Sixth Schedule of the Constitution of Kenya, 2010, and The Commission for the Implementation of the Constitution Act, No. 9 of 2010. Section 4(a) of the latter mandates the Commission to'monitor, facilitate and oversee the development of legislation and administrative procedures required to implement this Constitution'.

5 Section 159(e) of The Constitution of Kenya, 2010.

6 Sihanya B 'Constitutional implementation in Kenya, 2010 – 2015: Challenges and prospects, 2 December 2012' Friedrich Ebert Stiftung Kenya, Occasional Paper No. 5.

digenous Kenyan elite, who continued on the course of centralising state power.

Under the leadership of Kenya's first president, Mzee Jomo Kenyatta of the Kenya African National Union (KANU), a series of constitutional amendments was passed to centralise the authority of key public institutions within the Office of the Executive. One extreme instance saw the Office of the Prime Minister abolished in 1964 and all its powers absorbed by the executive. In 1986 Kenyatta's party successor, President Daniel Arap Moi, issued an Amendment Bill aimed at removing security of tenure for the Attorney General and Controller and Auditor General; in a KANU-dominated Parliament, the bill was passed.[7] This action set a precedent for disregarding the 'importance of tenure for officials that uphold the rule of law'.[8] The impact of the amendment was felt two years later when the Constitutional (Amendment) Bill of 1988 removed security of tenure for judges in the High Court and Court of Appeal.[9] Under intense international pressure, President Moi restored judicial tenure in 1990, but the damage had been done, given that 'once tenure is abolished there is no guarantee that it will not happen again'.[10] Although the space for democracy expanded somewhat when Moi's successor, President Mwai Kibaki, came into power in 2002, judicial independence was habitually undermined. It is this process – one in which institutions have been politicised through constitutional dismantling – that largely explains why constitutional reform has a central place in Kenya's struggle for democracy.

2.2 A constitutional moment

In December 2007 Kenyans took to the polls in a presidential election. Claims of electoral malpractice emerged as results were announced putting the incumbent Kibaki, of the Party of National Unity (PNU), ahead of the opposition heavyweight, Raila Odinga, leader of the Orange Democra-

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7 Ogot BA 'The politics of populism' in Ogot BA and Ochieng WR (eds) *Decolonization & Independence in Kenya 1940-93* (1995) 211.

8 Mutua M 'Justice under siege: The rule of law and judicial subservience in Kenya' (2001) 23(1) *Human Rights Quarterly* 100.

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10 Mutua M 'Justice under siege: The rule of law and judicial subservience in Kenya' (2001) 23(1) *Human Rights Quarterly* 101.

tic Movement (ODM).[11] Although the opposition protested that the resultant irregularities had not been thoroughly investigated, Kibaki was declared winner, with 4,584,721 votes to Odinga's 4,352,993.[12] On the same day, he was hurriedly sworn in for a second term. The eruption of violence that followed was instantaneous and characterised by ethnic divisions.[13]

Throughout the crisis, Odinga publicly contested the presidential results. However, at no point did he consider seeking a fresh election by filing a petition in court, because the judiciary was perceived as partisan. This was due largely to the ethnic bias Kibaki had shown in the choice of High Court and Appellate judges he appointed shortly before the elections, appointments which were widely interpreted as 'a strategy to counter the possibility of a petition to contest the results'.[14] The political impasse between PNU and ODM was resolved on 28 February 2008 after a tense process of mediation led by the African Union's (AU) Panel of Eminent African Personalities and creation of a Grand Coalition government. In sum, the crisis claimed 1,133 lives and seriously injured 3,651 people.[15]

Comprehensive democratic reforms were seen as critical to achieving long-term stability, with the result that the political elite fast-tracked reforms[16] by putting in place a legal framework to govern the review process.[17] The framework was a revolutionary first for Kenya in that it entrenched the process of review in the Constitution in order to safeguard it from executive interference. Moreover, it established the Committee of Experts on Constitutional Review (CoE), an independent body charged with developing a harmonised draft Constitution for Kenyans to consider

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11 Cheeseman N 'The Kenyan elections of 2007: An introduction' (2008) 2(2) *Journal of Eastern African Studies* 176.

12 Cheeseman N 'The Kenyan elections of 2007: An introduction' (2008) 2(2) *Journal of Eastern African Studies* 176.

13 Branch D & Cheeseman N 'Democratization, sequencing, and state failure in Africa: Lessons from Kenya' (2008) 108(430) *African Affairs* 2.

14 Cussac A 'Institutional shortfalls and a political crisis' (2008) *The General Elections in Kenya, 2007 Special Issue: Les Cahiers d'Afrique de I'Est* No. 38 273-4.

15 Commission of Enquiry into Post-Election Violence *Report of the Commission of Enquiry into Post-Election Violence* (15 October 2008) ('Waki Report') available at www.dialoguekenya.org (accessed 30 August 2013) 245-6.

16 Elite consensus was achieved through a shared sense of vulnerability to the risk that Kenya would enter a state of permanent emergency; this provided sufficient levels of group unanimity for enacting the revolutionary legal framework.

17 See The Constitution of Kenya (Amendment) Act, No. 10 of 2008 and The Constitution of Kenya Review Act, No. 92 of 2008.

through a referendum.[18] The document provided for the protection of Kenyan's human, economic and social rights through a Bill of Rights; introduced a devolved system of government; and established checks and balances to executive authority. Informed by a history of institutional corruption, partisan affiliations and failed reform efforts, the drafters put in place a legal framework conducive to the realisation of an independent, non–partisan, transparent and fair judiciary. On 4 August 2010, Kenyans went to the polls once again, with an overwhelming 67 percent[19] of them voting in favour of the then draft Constitution.

The drafters of the Constitution accurately foresaw that the political class could not be trusted with the responsibility of shepherding the implementation process. Indeed, the Coalition was a frail one, borne from a need to bring an end to the election crisis. Once stability had been restored and the terms of the constitution review process agreed to, politicking recommenced with replenished zeal. Post-promulgation, coalition members began campaigning ahead of the first general election under the new constitutional dispensation, which was expected to take place in 2012. The stakes were higher than ever before in contemporary Kenya as both the opposition and incumbent were equal players in government and the rules of the game had been radically altered. The drafters attempted to avert the risk of a politicised implementation process by embedding statutory deadlines into the Constitution to ensure that legislation would be enacted to implement the Constitution fully within a period of five years. Judicial reforms were prioritised, and most of the supporting legislation required to effect them had to be passed within the first year. This was considered necessary if the judiciary was to assume at the outset its guardianship role over constitutional implementation.

3 The judiciary under the Constitution of Kenya, 2010

> 'In the exercise of judicial authority, the Judiciary … shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority.' - The Constitution of Kenya, 2010, article 159(1)

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18 Section 5, The Constitution of Kenya Review Act, 2008.

19 'Final Kenyan referendum result' *Reuters* 6 August 2010 available at http://www.alertnet.org/thenews/newsdesk/LDE6751DA.htm (accessed 14 September 2010).

3.1 Establishment of a supreme court

Where the Court of Appeal (CoA) was previously the most superior Court in the country, the 2010 Constitution establishes a Supreme Court (SC) with '*exclusive original jurisdiction* to hear and determine disputes relating to the elections to the office of the President,'[20] 'the interpretation or application of … [the] …Constitution,'[21] and 'in any case in which the [SC], or the [CoA], certifies that a matter of general public importance is involved'.[22] In addition, 'the [SC] may give an advisory opinion at the request of the national government, any state organ, or any county government with respect to any matter concerning county government'.[23]

The establishment of the SC can be understood as part of a universal trend in contemporary constitutional design in which the excesses of the executive and legislature are constrained by the articulation of fundamental rights for the individual and the establishment of special courts to safeguard those rights.[24] This is not to say that the rights of individuals are not protected in judiciaries without SCs; rather, the establishment of a body dedicated solely to the adjudication of constitutional matters raises the esteem of the constitution itself and respect for processes of implementation. Beyond the typical client-service provider relationship, an additional layer of accountability is created whereby citizens fully expect the courts to uphold the values and principles of the constitution. For the judiciary, the guardianship function bestowed upon it produces an ideal which is internalized by its members and informs their individual sense of purpose. This relationship is particularly important in the Kenyan context, whereby judicial authority is derived from the people of Kenya.[25]

Atieno Odhiambo, Law Clerk of the Supreme Court of Kenya, speaks to this heightened normative accountability:

> The Courts must interpret the Constitution, for [the ordinary man] and ensure that it is understood by [him]. The Judiciary is the only institution that will salvage and keep the promises of the Constitution alive.

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20 The Constitution of Kenya, 2010, article 163(3)(a).
21 The Constitution of Kenya, 2010, article 163(4)(a).
22 The Constitution of Kenya, 2010, article 163(4)(b).
23 The Constitution of Kenya, 2010, article 163(6).
24 Ginsburg T *Judicial Reviews in New Democracies: Constitutional Courts in Asian Cases* (2003) 2.
25 The Constitution of Kenya, 2010, article 159.

3.2 Financial autonomy

In the past the judiciary lacked financial autonomy. Given that annual fiscal allocations were determined by the executive and parliament, the judiciary's operational and decision-making independence was severely compromised; because its officers feared monetary reprisal, the tendency was to pacify other arms of government by means of conservative judgments or ones otherwise biased in favour of the political class.

In a strong departure from this state of affairs, article 173 of the 2010 Constitution creates an autonomous financial mechanism under the Judiciary Fund. The Fund is managed by the administrative head of the institution and can be utilised for administrative expenditure 'and such other purposes as may be necessary for the discharge of the functions of the Judiciary'.[26] By providing an administrative buffer from political interference, this development has enabled the judiciary to implement an ambitious and expensive reform programme.

However, annual budgets must be approved by the National Assembly (NA). This has led to tension between the two of them, with the judiciary often complaining of substantial reductions in requested allocations and reallocations or earmarked funds. Most recently, in March 2014 US$5.8 million intended for construction of courts was reallocated to the Director of Public Prosecutions and State Law Office. According to members of parliament, this followed underutilisation of funds by the judiciary. For Chief Justice Willy Mutunga, the move was a deliberate attempt to intimidate members of the judiciary after various state officials ignored orders to appear in court in relation to an impasse between senators and governors.[27]

Even so, what is important is that budgetary negotiations no longer take place behind closed doors or through the courtrooms but have been transferred instead to the institutional level and public domain.

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26 The Constitution of Kenya, 2010, article 173(2).

27 Mutai E 'Parliament denies Mutunga's courts budget cut claims' *Business Daily Africa* 3 March 2014 available at http://www.businessdailyafrica.com/Parliament-denies-Mutunga-s-courts-budget-cut-claims/-/539546/2229596/-/ptjodx/-/index.html (accessed 5 June 2014).

3.3 Security of tenure

Although the Repealed Constitution created a Judicial Service Commission (JSC) with a mandate to recruit, discipline and dismiss judicial officers,[28] it lacked autonomy as all six of its members were appointed directly by the president.[29] Essentially, the executive possessed discretionary powers in the selection, promotion and dismissal of judicial officers. This led to casual appointments – based on ethnic and political considerations – and entrenched a culture of corruption and complacency within the judiciary.

Today's reconstituted Commission comprises 12 members, the majority of whom are nominated by their peers and are more representative of Kenya's legal fraternity.[30] In contrast to its predecessor, the Commission is responsible for promoting the 'independence and accountability of the judiciary and the efficient and transparent administration of justice'.[31] This entails an expanded human-resource function, including: the design and implementation of capacity-building initiatives;[32] provision of 'recommendations on the conditions of service';[33] and means of improving the administration of justice.[34] When appointing judicial officers and staff, the Commission must follow transparent and competitive processes.[35] With

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28 The Repealed Constitution of Kenya, 1963, article 69(1).

29 Composition of the JSC – **Repealed Constitution of Kenya, 1963**: *Article 68(1)* Chief Justice (appointed by the President); Attorney General (appointed by the President); Chairman of the Public Service Commission (appointed by the President); two judges from the High Court (HC) and Court of Appeal (COA), appointed by the President.

30 Composition of the JSC – **Constitution of Kenya, 2010:** *Article 171(2)* Chief Justice (who is appointed by the President, in accordance with the JSC recommendation and approval of the National Assembly, NA); Attorney General (who is nominated by the President and, following approval of the NA, appointed by the President); a COA judge elected by the judges of the COA; a Supreme Court (SC) judge elected by the judges of the SC; a HC judge and Magistrate elected by members of the Kenya Magistrates and Judges Association (KMJA); two advocates (one woman, one man), elected by the Law Society of Kenya; one person nominated by the Public Service Commission; one woman and one man to represent the public, appointed by the President with the approval of the NA.

31 The Constitution of Kenya, 2010, article 172(1).

32 The Constitution of Kenya, 2010, article 172(1)(d).

33 The Constitution of Kenya, 2010, article 172(1)(b).

34 The Constitution of Kenya, 2010, article 172(1)(e).

35 The Constitution of Kenya, 2010, article 172(1)(a).

regard to the dismissal of officers, the 2010 Constitution provides clear circumstances warranting removal from office, whereas the previous Constitution was vague.[36] Furthermore, it is the JSC – and not the executive or parliament – which initiates the process of removal from office. In addition, a maximum age limit for retirement is set at 70 years, whereas in the past parliament was responsible for capping this age limit.

4 Minimising political interference to enhance institutional independence

> We found an institution so frail in its structures; so thin on resources; so low on its confidence; so deficient in integrity; so weak in its public support that to have expected it to deliver justice was to be wildly optimistic. We found a Judiciary that was designed to fail …. [and in which] power and authority were highly centralised. Accountability mechanisms were weak ... [but] that is the old order. – Chief Justice Dr Willy Mutunga[37]

The totalitarian nature of the colonial regime shaped Kenya's post-independence judiciary in that its autocratic structures remained largely intact. These were susceptible to political interference, and the primary function of the courts was to protect the interests of the ruling elite and often facilitate their illicit and corrupt activities. In 2003 the judiciary's Integrity and Anti-Corruption Committee estimated that 'fifty six (56) per cent of the Court of Appeal, fifty (50) per cent of the High Court and thirty two (32) per cent of the magistracy is probably infected with corruption'.[38]

Ten months after the promulgation of the 2010 Constitution, the judiciary commenced its first strategic-planning process under the new constitutional dispensation. Three high-level outcomes were identified for the 2012–2016 period:

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36 The Constitution of Kenya, 2010, article 168.

37 Judiciary of Kenya *The Judiciary Transformation Framework, 2012 – 2016* available at www.judiciary.go.ke (accessed 30 August 2013). [Hereafter The Judiciary Transformation Framework.].

38 Integrity and Anti-Corruption Committee of the Judiciary of Kenya Report of the Integrity and Anti–Corruption Committee of the Judiciary of Kenya ('The Ringera Report') available at http://www.marsgroupkenya.org/Reports/Government/Ringera_Report.pdf (accessed 30 August 2013) 46.

- 'reset the relationship between the judiciary and other arms of government … premised on the principle of robust independence and constructive interdependence';[39]
- 'reorient [our] organizational culture, institutional design and leadership style to customize the judiciary with the exigencies of its social realities and known models of modern management science';[40] and
- 'emerge and operate as a service entity which serves the people'.[41]

The outcomes were designed to support the institution's legal framework and purposefully delimit the judiciary's space in relation to other arms of government. In addition, they were intended to build a lasting alliance with the public which – in part – would further mitigate excessive influence from the executive and legislature.

4.1 Vetting judges and magistrates

In previous years attempts were made to address corruption and partisan affiliations within the courts, but the public generally perceived them as illegitimate because these processes lacked transparency. The most notable of such initiatives was President Kibaki's 'radical surgery' of 2003, which resulted in the removal of the then Chief Justice Bernard Chunga and suspension of 82 magistrates and 23 judges on the grounds of corruption.[42] Although evidence was found against some of the judges, the purges eroded judicial independence thanks to their blatant neglect of security of tenure and of the right to due process.

The transition to the new constitutional dispensation made it necessary to appraise the fitness of those senior judicial officers who held office when the 2010 Constitution became effective, appraisals undertaken against redefined minimum standards of appointment. In line with the Sixth Schedule of the Constitution, the Vetting of Judges and Magistrates Act, 2011 was enacted and an independent Judges and Magistrates Vetting Board (JMVB)[43] constituted in that same year. The primary function of

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39 The Judiciary Transformation Framework 3.
40 The Judiciary Transformation Framework 3.
41 The Judiciary Transformation Framework 3.
42 Transparency International *Radical Surgery in Kenya's Judiciary* available at www.transparency.org (accessed 30 March 2014).
43 The Judges and Magistrates Vetting Board Act, 2011, No. 2 of 2011.

the JMVB was to vet the suitability of 53 senior judicial officers to remain in service in accordance with the principles and values enshrined under articles 10 and 159 of the Constitution.[44]

Various criteria were employed in determining suitability, including the quality of the officers' judgments, the extent to which complainants had perceived officers as biased, and objective measures such as timeliness in concluding cases. Of the vetted judges, 40 were found suitable and 13 dismissed.[45] Rather than seeking to punish, exonerate or reward judges, the Board was centrally motivated in its decisions by the desire to restore public faith in the courts. As it noted in its interim report:

> If the processes followed were themselves arbitrary and … [the board's]… decisions were not solidly based on material before it, public confidence would not be restored. Equally, if judges who had manifestly failed to meet the required criteria were passed as suitable, public confidence would not be restored. [46]

4.2 Recruiting non-judiciary careerists

Running parallel to the vetting process, mass recruitment of senior officers commenced in 2011 and has continued until the time of writing. The aim is to address gross understaffing which saw the judiciary operate at just '47 per cent of the established staff capacity'[47] before internal reforms began. As at the end of 2012, approximately 251 senior officers and staff were appointed.[48] Where previously there were only two legal researchers in the entire judiciary, the figure now stands at 61. By the close of the 2014/2015 fiscal year, the judiciary estimates that the number of judges

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44 The Constitution of Kenya, 2010: The Sixth Schedule, Transitional and Consequential Provisions, article 23(1).

45 JMVB *JMVB Interim Report – Sept 2011 – Feb 2013* available at http://www.jmvb.or.ke/downloads/viewdownload/1/24.html (accessed 25 January 2014) 40. [Hereafter JMVB Interim Report.].

46 JMVB Interim Report 39.

47 Chief Justice of Kenya *State of the Nation Address* (October 2012) available at www.judiciary.go.ke (accessed 30 August 2013) 9.

48 Chief Justice of Kenya *State of the Nation Address* (October 2012) available at www.judiciary.go.ke (accessed 30 August 2013) 10. The amendment of the Judicature Act paved the way for many of these appointments by increasing the ceiling on the number of officers that could sit in each court. The Judicature Act Amendment, No. 10 of 2012.

and magistrates will total 925 – an increase from 417 in 2011.[49] Prior to this, officers were unable to carry out their core functions proficiently, with magistrates being expected to supervise the construction of court station buildings and judges sitting on administrative committees.

Notably, the majority of incoming judicial officers and staff are being drawn from the private and civil society sectors. For instance, SC Judge Smokin Wanjala was formerly a law lecturer and his peer, Judge Njoki Ndung'u, a gender rights activist. Several explanations can account for this shift away from judiciary careerists. Since understaffing was so chronic, the judiciary had to look outwards as a means of boosting its human-resource capacity. As all job openings were advertised and competitively filled in a manner previously unheard of, the pool of applicants was broader. From a strategic perspective, hiring from the 'apolitical' private sector or 'non-political' civil society sector served to distance the courts from partisan affiliations.

In addition, the judiciary is adopting streamlined, private-sector management approaches to its administrative and operational organisation. The Office of the Chief Registrar is split horizontally into seven directorates and vertically into five registrars.[50] New directorates include Public Affairs and Communication, Performance Management and ICT. Initiatives to decentralise functions to the court-station level have been implemented to empower relevant officers and staff and produce a more customer-driven, results-oriented institution.

4.3 Setting the terms of engagement with the executive

Encouraged by the new dispensation, the judiciary is growing increasingly bold in its determinations – even where the executive is directly involved. The case of *Centre for Rights Education and Awareness (CREAW) & 7 others v Attorney General [2011]* illustrates this well. On February 2011

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49 'Narrative on the 2012/2013 Budget Estimates' *Judiciary of Kenya* available at http://www.judiciary.go.ke/portal/assets/files/CRJ%20speeches/Judiciary%20-%20Executive%20Summary%20on%202012-13%20Budget%20Estimates%20(24%20April%202012).pdf (accessed 29 January 2014).

50 Judiciary of Kenya *State of the Judiciary Report 2011 – 2012* available at http://www.judiciary.go.ke/portal/assets/files/Reports/State%20of%20Judiciary%202011-2012.pdf (accessed 30 August 2013).

former President Kibaki made a series of unilateral public appointments which included the nomination of Alnashir Visram as Chief Justice.[51] The High Court ruled the Chief Justice nomination unconstitutional as it did not comply with article 166(1)[52] and section 24(2) of the Sixth Schedule[53] of the Constitution. In delivering his ruling, Justice Daniel Musinga stated that

> in view of [the] Court's findings regarding [the] constitutionality of the manner in which the nominations were done, I make a declaration that it will be unconstitutional for any state organ to carry on with the process of approval and eventual appointment … based on President Kibaki's nominations.

Kibaki withdrew his nominations and, on the recommendation of the JSC, went on to nominate the human rights activist Dr Willy Mutunga as Chief Justice after a competitive and public recruitment process.

The significance of this case is that the judiciary asserted its standing as an equal arm of government from the outset of the constitution-implementation process by setting the terms of engagement with the executive. In reaching its judgement, the High Court consulted with other stakeholders in the justice sector – including the attorney general – who went on to become strategic allies and fight the 'nominations' battle in the political arenas.[54] This approach diluted the influence of the executive on the judiciary, thereby serving to depoliticize the role of the courts. The constitutional law expert Tom Ginsburg is a proponent of the alliance-building tactic and argues that the 'judiciary cannot survive without some support from somewhere in the system'.[55] Given Kenya's history of constitutional dismantling at the hands of the political class, the construction of a network of allies within and beyond the justice chain should indeed provide this system

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51 In addition, Kibaki recruited Kioko Kilukumi as Director of Public Prosecutions, William Kirwa as Controller of Budget and Githu Muigai as Attorney General.

52 'The President shall appoint – (a) the Chief Justice … in accordance with the recommendation of the Judicial Service Commission, and subject to the approval of the National Assembly.'.

53 'A new Chief Justice shall be appointed by the President, subject to the National Accord and Reconciliation Act, and after consultation with the Prime Minister and with the approval of the National Assembly.'.

54 It is noteworthy that the Court's bold decision went on to influence the declaration of the then Speaker of Parliament, Kenneth Marende, who reaffirmed that the nominations were unconstitutional.

55 Private correspondence between the author and Professor Ginsburg, 19 August 2013.

support. Arguably, bold judgements and alliance-building are tantamount to judicial activism. Professor Ginsburg agrees, but affirms that activism is not necessarily a bad thing for Kenya:

> There is a real justification for an activist Judiciary at this particular time. We are in this period of transition and the political institutions are not yet … [fully] … functioning. The Judiciary is the only body that is in a position to step in. Over time political institutions mature, and at that time the legislature will step into its own, to sometimes constrain the Courts. From a normative point of view, that is appropriate. If I could speak to the critics I would defend judicial activism as being appropriate but also being a temporary condition.

Crucially, an increasingly litigious public has legitimised the judiciary's growing activism. The Constitution of Kenya, 2010, has empowered Kenyans through a series of rights, freedoms and an expanded democratic space.[56] This, combined with a participatory process of constitution design during the review process, has resulted in strong levels of public ownership of the new Constitution. Kenyans frequently seek the courts to interpret the Constitution in individual matters as well as in cases with high public interest. As Lucianna Thuo, the former Research Coordinator for the Judiciary Working Committee on Election Preparations (JWCEP), remarked:

> Anyone who comes before the Courts seeking clarification on a constitutional provision or applying that provision in a petition must be heard and the courts must duly interpret the Constitution. This is important because our Constitution is new and complex, few understand it. It is these cases which will clarify the meaning of the text. [57]

5 Challenges

Until August 2013 the judiciary appeared to have effectively established its institutional independence and credibility. It was the JSC's suspension and eventual dismissal of Chief Registrar (CR) Gladys Boss Shollei on the grounds of financial mismanagement, favouritism and impropriety that

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56 Chapter 1 upholds the supremacy of the Constitution and sovereignty of Kenya's people; Chapter 4 provides for the rights and freedoms of Kenyans, through a bill of rights; Chapter 6 outlines the minimum leadership and integrity standards that public servants must comply with; and preceding each chapter is a set of specific principles and values intended to guide the reading of subsequent provisions.

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brought the institution's internal divisions to the fore. The integrity of the institution was shaken in September 2013 when an alleged 'war strategy' aimed at forcing Shollei out of the judiciary was leaked to the press. According to local media, email exchanges and documents detailing the strategy originated from the Office of the Chief Justice and other senior judicial officers. In March 2014 the Industrial Court ruled the JSC's dismissal of Shollei unlawful. A month later the Court of Appeal suspended the decision of the Industrial Court. Some attribute Shollei's dismissal to 'the sweeping administrative powers of … [the CR function which] … upset old networks that traditionally controlled how money was spent in the Judiciary'.[58]

Others maintain that the CR is guilty of the allegations brought before her, but most analysts blame succession politics. It is the very mechanisms introduced by the 2010 Constitution to accord the judiciary greater independence that have ushered in an era of succession politics within the institution. Senior judicial officers are lobbying for the highly coveted titles of Chief Justice, Deputy Chief Justice and positions on the JSC, with the current holders of those positions eliminating threats to their tenure.

On a day-to-day basis, these internal power struggles are visible in the conflicting ideological approaches to reform that have caused the emergence of opposing camps. Led by a Judiciary Transformation Secretariat (JTS), the institution's official reform programme is initiating change from below through the creation of leadership and management teams at the court-station level. However, the Secretariat lacks strategic leadership, and there is no oversight body to assess its progress. Meanwhile, administrative reforms – including staffing, physical infrastructure and Information Communication Technologies (ICT) development – are led by the Office of the Chief Registrar through newly established directorates. Changes under the CR tend to be uncoordinated and in most cases less than consultative. In addition, there are idealists in the judiciary who possess a grandiose vision of the institution but lack a framework by which to see it through to fruition. Finally, at the policy level, the strengthening of the broader justice sector is guided by the National Commission on Administration of Justice (NCAJ), which was established under section 34 of the Judicial Service Act, 2011. These reform camps represent competing inte-

58 Munene M 'Mutunga succession and budget row behind dispute in corridors of justice' *The Daily Nation* 25 August 2013.

rests; in other words, where there should be synergy in the reform process, there is tension instead.

The result is a steady erosion of the public confidence accorded to the judiciary just one year previously. A poll conducted by Transparency International in August 2013 revealed that of all the public institutions in Kenya, the judiciary was the most trusted in the fight against corruption.[59] In March 2014, however, levels of public confidence in the lower courts had fallen by seven per cent since November 2013, while confidence in the Supreme Court had declined by 12 per cent.[60]

Troublingly, internal wrangling has exposed areas of vulnerability within the political class. Following Shollei's dismissal, the National Assembly summoned the JSC to explain its decision to suspend Shollei, arguing that Commission members had breached the law on disciplinary procedures. The JSC refused to comply, countering that doing so would undermine the principle of separation of powers. The matter escalated into a turf war, culminating in President Kenyatta's suspension of six JSC members and his appointment of a tribunal to investigate their conduct. The six were later reinstated by the High Court.[61]

6 Conclusion

The 2010 Constitution has endowed the courts with increased autonomy and an expanded mandate that the judicial leadership has leveraged to effect far-reaching reforms. Given the judiciary's history, the role bestowed upon it by the new constitutional dispensation is a Herculean one and the public has high expectations that it should prove itself fit to the task. Nevertheless, incremental internal reform was never an option. The judiciary had to capitalize on this unique window of opportunity to transform the outward and inward face of the courts. But cracks are starting to show, and

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59 Wanyama H 'Kenyans trust the judiciary, shows new poll' *The Star* 17 September 2013 available at http://allafrica.com/stories/201309171392.html (accessed 29 January 2014).

60 Ipsos Synovate *Ipsos Poll: Performance Ratings of Public Institutions and Public Office Holders 4th March 2014* available at http://www.ipsos.co.ke/home/index.php/downloads (accessed 30 March 2014).

61 Komugor K 'Battle between legislature and Judiciary spills into 2014' *The People Online* 29 December 2013 available at http://www.thepeople.co.ke/43467/battle-legislature-judiciary-spills-2014/ (accessed 29 January 2014).

at the group level members of the judiciary are not entirely unified, suggesting that their sense of a shared purpose often wavers. In the absence of clarity, the judiciary is weakening, which could create openings for the political class to undermine it permanently. Should this scenario come to pass, the most unfortunate aspect of it will be that Kenya's constitutional vanguard would have collapsed – and, seemingly, from within.

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Reflections on Transitional Constitutional Law in the Light of the Jurisprudence of the Constitutional Courts of the Comoros and Madagascar

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Abstract

Working in the light of recent experiences in Madagascar and the Comoros, this chapter examines the transgression of constitutional rule. Transgressions are serious violations of a constitution that endanger democracy. To counter the collapse of the legal and constitutional order, a constitutional court is required to adopt the extraordinary response of inventing transitional constitutional law. The chapter addresses the formal and substantive constitutional law of the two countries during their respective transitional periods, with the expression 'sui generis non iuris' emerging as the most appropriate way of characterising it. While valid objections can be raised against transitional constitutional law, it is the case nevertheless that in the Comoros the court's action facilitated a prompt return to a state of normality in which institutions operate in accordance with constitutional law.

1 Introduction

How do constitutional judges guarantee democratic order in the face of excesses of political power and of manoeuvres that are increasingly inventive, indeed brilliant, in their effort to bypass and dilute the ostensible

norms of the highest constitutional authority?[1] The question merits reflection given the many crisis situations in which these judges seem to be among the last lines of defence of that order. In these instances, the judge has to affirm a pragmatic form of constitutionality that mediates between two extremes: on the one hand, there is the notion that 'a constitution is the supreme law', a notion that presupposes a perfect – yet unrealistic – state of legal order; on the other, there is an executive which, whether because it is too weak or over-developed, disregards the constitution and thereby works in opposition to democracy.

Recent crises of governance in the Comoros and Madagascar called for the intervention of the constitutional judge and, by implication, a normalisation of the relationship between the judge and the political authorities. After seceding from France and attaining independence in 1975,[2] the Comoros have been characterised by periodic upheavals and *coups d'état* that side-lined both the people and the judge.[3] In Madagascar, which gained independence from France in 1960, the judge had been called upon as early as 1996, in a controversial impeachment case[4] made against the head of state for violating the Constitution. Instability seems to be chronic in this country,[5] and the latter case did little to temper the madness of the political with the rationality of the law. Nevertheless, interventions of this kind serve in times of crisis to reassert the founding importance of constitutional law, and, beyond the specifics of the matters brought before judges, allow more general findings to be articulated.

These interventions, moreover, take place in a context that sets the Comorian and Malagasy constitutional courts apart from other jurisdictions and which can be termed the experience of transitional law. This is not a common notion in Francophone doctrines of constitutional law, which favour a formal conception of law, but is fitting as a description of

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1 This chapter was written in French and proceeds from a French-speaking doctrinal perspective. The author thanks the editors for translating his work into English.

2 See Abdallah *A Le statut juridique de Mayotte: Concilier droit interne et droit international; réconcilier la France et les Comores* (2014) 656.

3 See Bourhane I '*L'actualité constitutionnelle dans la vie politique des Comores'* in Colom J (ed) *Le développement constitutionnel dans les Etats de l'océan Indien* (2013) 145-163; Madi B & Sermet L 'La crise comorienne et le droit' (2002) *Revue juridique de l'océan indien* 7-15.

4 The verdict is available at http://www.saflii.org/mg/cases/MGHCC/1996/1.html.

5 Sermet L & Goussot P 'La crise malgache et le droit' (2002) *Revue juridique de l'océan indien* 33-42.

the law adopted by the current Malagasy government and Constitutional High Court.[6]

Transitional constitutional law may be characterised as follows:

- It forms a legal order and, as such, it is endowed with legal force. Transitional law is the product of a transitional power or government.
- It may be the applicable law in times of war, but it differs from conventional war-time constitutional clauses such as the French Constitution's notorious article 16[7] in that it respects neither procedural nor substantive niceties.
- If it is not *contra constitutionem* it is at any rate *para constitutionem*, owing to the support provided of the constitutional judge, who thereby demonstrates pragmatic adaptability. By showing at least partial non-observance of the constitution, he or she ensures the survival of his or her office by signalling approval of, or acquiescence to, the transitional state of affairs.

From a theoretical perspective, transitional law is a fascinating subject. It reveals how flexible constitutional judges can be when confronted by crisis situations, yet also highlights the intractable dilemmas they encounter as they drift away from the constitutional pact. As such, in analysing these circumstances one is necessarily engaging with the field of transgression of the law.[8] Transgression, a notion which belongs less to classical legal theory than to the social sciences, refers to a predicament in which (a.) judicial rulings reach an impasse and are unable to stop a crisis or rectify political disorder, and (b.) serious violations of the letter and spirit of constitutional principles are accepted and accommodated by virtue of the actions of the judge. The situation is acutely paradoxical: under normal circumstances constitutional violations are expelled from the legal system; in

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6 For information in English on transitional constitutional law, see the online resources of the Centre for Research of New York University, available at http://constituti onaltransitions.org/.

7 Under exceptional circumstances this provision gives enhanced powers to the President of the Republic. At the start of the Fifth Republic, General de Gaulle used it in the Algerian War, a decision severely criticised as an abuse of presidential power.

8 On the theme of transgression, see Torcol S 'Trangresser pour le peuple, par le peuple: La volonté contre la norme?' in *La transgression,* Toulon, 24-25 November 2011, Dir. J-J Sueur, P. Richard, Bruxelles, Bruylant, 2013 225-259. Drawing on the French constitutional experience, the author develops a distinction between reasonable transgressions and unacceptable ones.

times of crisis, however, transgressions are acknowledged, analysed and often accepted. The collapse of the rule of law is obvious, and is compounded by the legitimacy given to the transitional power.

Thus, a fourth characteristic can be added to the three definitional elements of transitional law provided so far: it constitutes a legal order parallel but different to common law, and aims to curb political excesses albeit in a limited and biased way, given that it is obliged to work within a condition of disorder and take this as the basis for the notional order it constructs.

Two distinct situations emerge from observation of the Comorian and Malagasy constitutional disputes. In the Comoros, in a controversy concerning an unjustified postponement of the date of the presidential elections, the Constitutional Court was asked to record and declare the term of office of President Sambi, this term not having been the result of a presidential election. Here, the conduct of the judge was ambiguous. On the one hand, the Court clearly stated its support for the postponement as well its conditions, and was thus obviously in breach of the public trust; on the other hand, the time-limits of the president's mandate were nevertheless precisely circumscribed: 26 May 2006 – 26 May 2011.

In Madagascar, by comparison, one could argue that any such ambiguity was resolved by the fact that the judge completely redefined the country's constitutional norms in such a way as to legitimate the transitional regime. The root causes of the Malagasy crisis are deeper and more complex than those of the crisis in the Comoros, but the apparent explanation relates to the incapacity of President Ravalomanana – elected for a second term between 2006 – 2011 and literally ousted from power in March 2009 when he had to flee abroad – to respect the separation of powers and renounce personal enrichment in a society which, according to a World Bank report, is the poorest in the world only after countries at war.[9]

Although this is perhaps a schematic approach, one may consider the Comoros as an instance of controlled transgression, and contrast it with Madagascar as an instance of much bolder, uncontrolled transgression. This chapter discusses each of these situations in turn, after which it demonstrates the existence of transitional constitutional law and examines its character.

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9 See http://www.banquemondiale.org/fr/news/feature/2013/06/05/madagascar-measuring-the-impact-of-the-political-crisis.

2 Controlled transgression in the Comoros

A Comorian Constitutional Court decision made on 8 May 2010 is the basis of the discussion in this section. The judge was faced with an attempt to extend the term of the mandate of the executive by 18 months by law. Originally, the presidential term was meant to end on 26 May 2010, whereupon elections were to be held. According to a new law enacted on 1 March 2010, the general elections of the President of the Union and Governors of the islands would be held on 27 November 2011; in addition, the President, Vice-Presidents and Governors would remain in their posts during the extension.[10] Given that, even in the absence of this law, the executive had arranged matters so as to rule out the possibility of elections on or after 26 May 2010, the judge was presented in effect with a *fait accompli*.

The law was also not without constitutional arguments in its favour. Amendments in 2009 to the country's referendum law served to revise certain clauses of the Constitution of the Union of Comoros. Article 8(4) of the referendum law refers to the second sentence of article 13 of Constitution, which previously stipulated that the President and Vice-President are elected together by a direct majority vote in one ballot for a four-year term renewable in respect of the rotation between the island; in article 8, the four-year term is replaced by a five-year term, and the word 'renewable' is deleted. As such, the constitutional amendment of 2009, in terms of which the next executive term would be in four to five years, would apply to the present term, albeit that the extension would be for six months only, not 18 months.

The court did not accept these arguments, ruling that the provisions of article 2, according to which the President, Vice-Presidents and Governors would exercise their functions until the elections on 27 November 2011, were unconstitutional. However, it did not declare the postponement of the elections as unconstitutional, which at first sight seems strange.

The picture becomes clearer when other factors are considered. The court ruled that when the presidential term ended at midnight on 26 May

10 According to article 1 of the law, 'General elections of the President of the Union and of the Governors of the islands will be held on 27 November 2011.' According to article 2, 'The President of the Union, the Vice-Presidents as well as the Governors of the islands continue their respective functions until the abovementioned elections.'.

2010, there would be an interim period until the inauguration of the new President during which the executive would have to rule by consensus. The requirement of consensus is not official policy, and although legally this was not a time of exceptional circumstances, the imposition of an interim period was itself an exceptional event. Moreover, the court secured rule by consensus with a triple interdiction: an interdiction to dissolve the parliament; an interdiction to change the government; and an interdiction to modify the composition of the Constitutional Court. These measures were coupled to a stipulation that there would be 'no recourse to exceptional measures except in the case of interruption of the normal functioning of constitutional institutions'.

Conceptually, the decision involved establishing a relationship between a judicial legal order and an order of standards fabricated *ex nihilo*; sociopolitically, it drew scandalised reaction from Comorian citizens on the Internet, but the interim period had the virtue of being short and effective, with elections being held only six months later than originally scheduled, on 7 November and 26 December 2010. The outgoing president, Ahmed Abdallah Mohamed Sambi, could not stand for election again, and Ikililou Dhoinine was elected president of the Comorian Union in the second round of elections, taking 60.91 per cent of the votes.

By comparison, the situation in Madagascar is more complex than that in the Comoros. Its transgression is not controlled, because the court has embarked on a dangerous adventure.

3 Uncontrolled transgression in Madagascar

3.1 'Deconstitutionalisation'

The transitional period in Madagascar began when President Ravalomanana fled abroad on 17 March 2009 and plunged the country into crisis. Ordinance no. 2009-001 of 17 March 2009 transferred his powers to a military committee, which, mindful of its lack of experience in exercising ultimate political responsibility, in turn transferred them in terms of ordinance no. 2009-002 of 17 March 2009 to Andry Rajoelina, the then mayor of the Malagasy capital. However, Rajoelina's accession to power was declared unconstitutional – and yet at the same time validated by the judge. The High Constitutional Court [HCC] delivered its decision on 23 April 2009,

in the process breaking new ground because the decision resulted in a hitherto-unknown construct: the transitional ordinance.[11]

An ordinance [*ordonnance*] is a regulation proclaimed by the President of the Republic, but though it emanates as such from the executive it is a materially legislative act. The Malagasy Constitution of 1992, as amended in 2007, allows that the constitutional competence of the legislature may be bypassed under six conditions, set out in its articles 60, 86, 88, 99, 100 and 156, which recognise the constitutional competence of presidential recourse to regulations.

In this instance, the HCC took issue with ordinance no. 2009-001 of 17 March 2009, maintaining that it did not conform to any of these six preestablished conditions, notably that of article 60, which authorises such an ordinance in exceptional circumstances but with its proclamation subject to the approval of the presidents of the National Assembly, the Senate and the HCC. The HCC thus found that the ordinance 'does not meet the conditions and form prescribed by the Constitution … [that] its purpose does not fall within the scope of the law but that of the Constitution; [and] that, finally, it was not subjected to constitutional review before its promulgation'. Putting matters plainly, the Court called this unconstitutional act 'a unilateral manifestation of the will of the President of the Republic which does not conform to constitutional [principles]'.

The Court's line of reasoning is impeccable; but it does not end here. Despite recognising the non-observance of the Constitution, the HCC goes on to declare that 'notice is … taken of the decision as being the acknowledgement of circumstances which prevailed and the necessity to save the principle of the continuity of the State'. This raises the question of the extent to which constitutional rule may be ignored on the grounds of the 'acknowledgment of circumstances' and justified by 'the principle of the continuity of the State'. Yet whatever the depth and range of the implications, both of the ordinances were approved by the HCC on 18 March

11 Decision no. 03-HCC/D2 of April 23 2009.

2009[12] by means of a simple letter not subjected to constitutional scrutiny[13]. The result was that 'the legitimacy of the transition is founded on the objective necessities of social order'.[14] Fact triumphs over law, with the approval of the court; the latter asserts the authority of the law and, in the same gesture, exposes the law's powerlessness.

In its decision of 23 April 2009, the HCC adopted the approach of 'deconstitutionalising' the executive, a notion that is now part of constitutional jurisprudence. 'Deconstitutionalisation' relates to a theory developed by Marcel Prélot and Jean Boulouis to describe what happens when constitutional formations from an earlier order survive uprisings and revolution by virtue of their compatibility with the new regime and lack of direct connection to its form of government.[15] However, their theory is not applicable to Madagascar, where the constitutional formation did not so much survive as fall to pieces. 'Deconstitutionalisation' entailed the decline of former constitutional standards, which were both negated and displaced by a reconstructed constitutional order.

3.2 'Deconstitutionalisation' and 'reconstitutionalisation'

In order not to abandon constitutional order when faced by the prospect of oblivion, the Court affirms the ongoing existence of this order; however, the price for it is the renunciation of the Constitution itself. Thus, the centrifugal movement of deconstitutionalisation is, to a degree, compensated for by the inverse, and centripetal, movement of re-constitutionalisation. As the HCC's ruling of 23 April 2009 attests, despite the transition in Madagascar and the formal and organic change in the State's organisation brought about by deconstitutionalisation,

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12 Decision no. 03-HCC/D2 of 23 April 2009 concerning the transitional situation. See also Decision no. 04-HCC/D2 relating to ordinance no. 2009-003 March 18 2009 bearing on the suspension of parliament.
Decision no. 04-HCC/D2 relating to the unconstitutionality of ordinance no. 2009-003 March 18 2009 bearing on the suspension of parliament.

13 Decision no. 04-HCC/D2 relating to the unconstitutionality of ordinance no. 2009-003 March 18 2009 bearing on the suspension of parliament.

14 Avis no. 02-HCC/AV July 31 2009 on the interpretation of article 53 of the Constitution.

15 Prélot M & Boulouis J *Institutions politiques et droit constitutionnel* (1980) 201.

> the fundamental principles remain inviolable, such as the separation of powers as well as the integrity of national territory, the Republican nature of the State and the cultural values peculiar to the nation.

Here, a special notion of legality is invoked so as to counteract the vacuum that results from the negation of the Constitution, this shrinkage of its substance. Of course, taking refuge in the merely implicit – in this case the fundamental principles of the Republic[16] – and in a body of interpretation rather than in the explicit letter of a constitution is always, by comparison, a backward step and an imperfect means of protection. In this regard, the HCC has shown on numerous occasions that the level of transitional legal protection is, unsurprisingly, lower than what it would be under normal circumstances.

An example of this attenuation is evident in a decision concerning the rights and privileges of members of parliament (MPs).[17] Having addressed the two relevant elements of the matter, that is, an exception to equality before the law (non-accountability) and a temporary exception to the separation of powers (immunity), the Court refused to extend those provisions of the common law which are affirmed in article 73 of the Constitution and which grant MPs special protection to enable them to fulfil their duties as public representatives. Instead, it considered the ordinance before it (the ordinance of 8 October 2010) purely in terms of the transitional regime's internal rules, which in this instance were being modified to acknowledge certain parliamentary privileges. Having validated the ordinance (on 7 October 2010), the HCC thus duly granted immunity to MPs, but it is a qualified, partial immunity recognised only within, and on the basis of, the framework of the transitional period.

3.3 Components of transitional legality

In its opinion of 31 July 2009, the Court was both more – and less – direct in its explication of the substitution of law that had taken place:

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16 The 'fundamental principles of the Republic' amount to a constellation of notions and meanings implied by the 'content' of the Republic; as such, they are neither predetermined, nor entirely predeterminable.

17 Notice no. 01-HCC/AV of July 15 2011 relating to article 73 of the Constitution and its provisions regarding the immunity of parliamentarians.

> During the transition, although the Constitution cannot be applied in all its provisions, the general principles of the law remain applicable, [as do] the general principles of law with constitutional value, the commonly accepted international commitments, the spiritual and cultural values proper to the nation, [and] the ordinances and statutory texts after their publication and promulgation.[18]

The HCC admitted that the Constitution could not be applied in its entirety, in particular because the Road Map signed by various Malagasy political actors on 17 September 2011 had, if not replaced, then at least supplemented the Constitution and eclipsed certain of its provisions.

The Road Map is a political agreement meant to resolve the country's crisis. Previously, in August 2009, the four parties affiliated, respectively, to Andry Rajoelina, Marc Ravalomanana, Didier Ratsiraka and Albert Zafy adopted a transition charter; the Road Map of 2011, however, was signed by 11 parties and is partly internationalised since it falls under the authority of the Southern African Development Community (SADC).

The Road Map was developed into a law (Act no. 2011-014 of 28 December 2011) and, with the cognisance of the HCC in its Decision no. 15-HCC/D3 of 26 December 2011, inserted into the internal juridical order. The HCC observed that

> the present law appears amongst the sources of the transitory law which must serve in the implementation of the commitments of Malagasy political actors in order to put a transitional Parliament and of a Government of national union in place, the organisation of credible elections, just and transparent in cooperation with the international community, of the adoption of measures of trust and efforts for national reconciliation, of the unconditional return to Madagascar of all Malagasy citizen in exile due to political reasons, in the respect of national integrity, national sovereignty and of the independence of judiciary systems of the country ….

However, from a constitutional perspective, this so-called 'Road Map legislation' has a highly ambiguous status. Vested with a centrally important role in the transitional legal order, and yet by nature a political artefact setting forth significant aspirations on the assumption that there is unanimity about what these aspirations are and how they should be achieved in terms of practical implementation, strictly speaking it cannot at one and the same time have a political nature and the meta-reflexive distance from its own procedures and assumptions to be able to act as a judge, arbiter and

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18 Notice no. 02-HCC/AV July 31 2009 on the interpretation of article 53 of the Constitution.

assessor of disputes that arise and/or of implementation measures taken to achieve these aspirations and bring about a return to constitutional order. The Road Map, that is to say, is endowed with a quasi-constitutional status but without the forms, norms and procedures of constitutional law.

Indeed, at the time of writing, the HCC had recently issued an important clarification that partly *excluded* the Road Map from the transitional legal order. In a decision of 17 July 2013, the Court tellingly referred to the 'coexistence of the Constitution and the Road Map' and moved to disqualify its applicability with respect to the vacant office of the presidency, this on the grounds that any such pronouncements would amount to redundant clauses no longer needed at such time as the Constitution is again fully in place.

Currently, then, Madagascar's transitional law seems to consist of three main components: the Constitution (or at any rate those parts of it that remain in force, along with the inviolable standards highlighted by the HCC); the transitional legality; and the Road Map of September 2011. This transitional order is not a normatively homogeneous 'constitutional bloc' capable of being assimilated into a single body of standards; rather, it contains diverse ideological, legal and constitutional norms.

3.4 Inviolability of transitional legality

Transitional legality is composed of both inviolable and temporary norms. What, then, is the substance of this inviolable legality? An appropriate term appears to be 'intangibility', namely those aspects of the constitutional order that are immune from amendment even if the constitution is abrogated. A second term that appears appropriate is 'constitutional reserve', namely elements of the constitutional order that are left untouched. These terms are to be preferred to 'supraconstitutionality', which seems to miss the necessary nuance. It is suggested that the Court's decision implies that there are two forms of intangibility. The first is specific to the transitional period and was established by the Court in its decision of 23 April 2009. This constitutional reserve seems to contain four components, relating to the organisation of power (respect for the separation of powers), to the state (respect for territorial integrity), to the republic (respect for the republican form of government), and to the nation (respect for the cultural values of the Malagasy nation).

The HCC's formula may lead one to think that the list is not exhaustive, but in the absence of further elaboration, only these four principles should be considered certain.

This first 'reserve' must be distinguished from the constitutional reserve, which follows from article 163 of the new Constitution. This 'reserve' excludes any constitutional amendment regarding the following three components: the republic (respect for the republican form of government), the state (respect for territorial integrity) and the organisation of public power (respect for the decentralisation to local government as well for the number and duration of presidential terms). The protection of the republic and the protection of the state are aspects of the constitutional reserve that appear in both of its manifestations.

It would thus seem that the transitional intangibility is sustained by a form of legal order. This is inferred from the opinion of 31 July 2009, which complements the decision of 23 April 2009. The order is pluralistic, given that the spiritual and cultural values of the nation are regarded as material and non-formal sources of law.[19] An important question remains whether the transitional intangibility comes about as a result of international commitment. The purpose of international commitments is generally not to fashion transitional law. Or does the intangibility come about as a result of the general principles of law or, *a fortiori*, as a result of the acts of transition?

Furthermore, the opinion of 31 July 2009 reveals a formally diversified hierarchy. At the apex thereof is the Constitution, and this part of the configuration contains the general principles of law with constitutional value. Then, at a lower level, are the accepted international commitments. Under the heading of transitional law are the general legal principles that apply to ordinances and statutory texts; it is also advisable to consider the insertion of the Road Map in legal form, as noted by the HCC on 26 December 2011. This particular transitional law, given its ambiguous legal status, escapes all constitutional control and does so with the acceptance of the HCC itself.

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19 'During the transition, although the Constitution cannot be applied in all its provisions, the general principles of the law remain applicable, [as do] the general principles of law with constitutional value, the commonly accepted international commitments, the spiritual and cultural values proper to the nation, [and] the ordinances and statutory texts after their publication and promulgation.'.

The following observations can be made:

- The normative inviolability that obtained in this context seems to have originated in a reserve of constitutionality decided by the HCC for the transitional period and has little if anything to do with the constitutional pact. There is uncertainty about the nature of the inviolability of general law principles with constitutional value.
- As the terminology implies, transitional constitutional law is temporary and belongs to the transition. In periods of transition, it should not be confused with the legal order proper, which is a wider concept.
- The transitional legal order is organised according to a hierarchy of norms which remain applicable even if the ideal of a formal constitution is set aside.
- The law introducing the Road Map is an exception to this transitional hierarchy of norms. It cannot be directly challenged and disputed, although its measures of application and enforcement can be, indirectly.
- Transitional constitutional law pursues a functional vocation: 'to establish constitutional institutions and organs in the shortest possible time and in the most appropriate manner'.[20]

On the basis of these observations it can be said that in a transitional period there exists a materially constituted and formally organised legality.

4 Transitional constitutional law

From an abstract perspective, three types of situations can be discerned, each of which can lead to greater degradation: ordinary constitutional law; constitutional law carried out under exceptional circumstances; and transitional constitutional law outside the framework of law and legality. Beyond the third type, there is anarchy, be it with or without war.

In its extreme form, transitional constitutional law is a phenomenon that arrogates the right to speak in the name of the law, but in the Malagasy and Comorian situations it is more apt to evoke a twilight where darkness and light, obscurity and clarity, intermingle with one another. Transitional constitutional law has not entirely extinguished ordinary constitutional law, and they co-exist in a dynamic tension in which each attempts to sub-

20 Speech of the HCC president at the announcement of the results of the constitutional referendum of November 17 2010.

ordinate the other. From a principled point of view, the ordinary law would be imagined as inexorably triumphing over the transitional law, forcing it out in the way that law per se is meant to overcome the brute facticity of existence; yet in this transitional period there can be no certainty that the principle of the supremacy of the law will prevail, given that no date has been set by which the period must end and no conditions specified for its termination.

What exists instead is an interplay of 'deconstitutionalisation' and 're-constitutionalisation' without an end-point in sight or – as in South Africa's post-apartheid exercise in transitional justice – a political pact directed clearly towards a state of normalisation. Transitional law is ostensibly a form of law with a temporary character, but the more it is prolonged the more it loses precisely this characteristic, its temporariness, and becomes an open door for corruption to thrive and multiply: if the head cannot lead by example, how shall the body on its own be able to seek out, let alone form a conception of, the common good?

Nevertheless, in thinking about transitional constitutional law, the task is not to appeal for reformist 'improvement' within it or to denounce the actions of the constitutional judge, but to engage with and understand the problems that arise when the law encounters its limits and is powerless to counter political disorder. Transitional constitutional law raises many questions, yet offers few clear or satisfactory answers.

A first question, perhaps, is this: What should one call it? 'Transitory law', 'experimental law', 'transitional law', 'law under exceptional circumstances', 'interim law', 'the law of necessity'? The possibilities are many and varied. For instance, it is fairly easy to distinguish transitory law and transitional law, as the former is that which can be accommodated within the legal system whereas the latter is that which overruns it. However, the two have a tendency to be intertwined. Thus the Constitution of the IVth Malagasy Republic was adopted in a referendum, but it did not end the transition *ipso jure*. The Constitution remains in force, but until the presidential elections are held it is applicable only inasmuch as it conforms to a number of transitional measures; it remains in force, moreover, but is applicable only in a deferred manner, given its 'amendment' by the Road Map. The situation, indeed, is a chain of paradoxes: adopt a new political pact, but postpone its application *sine die*; organise a constitutional referendum, but not the presidential elections; legally recognise that the Constitution has been replaced by a transitional text, but by one which is not of a constitutional nature.

Alternatively, transitional constitutional law is not a 'law of necessity', if one takes this to mean something that sanitises transgression or gives infidelity the righteous air of marriage. The fact that the HCC affirmed a hierarchy of transitional orders of which it is the guardian is relatively solid proof of the distinction between transitional law and the law of necessity.

There are other questions over and above that of the most fitting terminology to use. Maya Sahli Fadel, a member of the African Commission of Human and Peoples' Rights, asked the three following ones:

- Given its frequency in African countries, could transitional constitutional law qualify as common law?
- Could it qualify as law *sui generis*?
- Does it constitute a regional custom?[21]

To respond to each question in turn, the absence of an established term appropriate to transitional situations is not in itself, legally speaking, a sufficient criterion for transitional constitutional law to become constitutional common law in the place of the transitional law. From a scholarly point of view, there is no doubt that the confrontation between transitional constitutional law and common constitutional law shows a shortcoming of the latter in relation to the former and that it is necessary to disqualify it.

The following consideration should also be borne in mind. Transitional constitutional law presents itself as a last line of defence in a crisis before the onset of arbitrary power and the dissolution of the law into regressive violence and generalised corruption; indeed, in its way the HCC protects what remains in the field of law, that is, the fundamental constitutional and republican principles, while the Comorian Constitutional Court, too, has been in a similar, albeit easier, situation.

Generally speaking, the expression *sui generis* is used to qualify a regime that does not enter into legal reasoning. Is the nature of transitional constitutional law *sui generis*? The term *sui generis juris* could not be accepted if one sees the law *sui generis* as a component of the legal system, a law of exception or an inadequately written law. Common constitutional

21 Oral intervention at a colloquium hosted by the Community Law Centre, University of the Western Cape, on 6 September 2013.

law provides no justification for accepting transitional constitutional law, so it would be more appropriate to speak of *sui generis non juris*.[22]

Finally, the repeated occurrence of transitional regimes in Africa would not be admitted as proof of an emerging regional custom. Under article 2 of the African Charter on Democracy, Elections and Governance, democracy is held as 'a universal value and principle' and as such is a binding obligation in international law; by extension, the principles of the rule of law, the supremacy of the constitution, and free elections and democratic changes in government are obligatory.

What is less clear is whether the Charter is an instrument codifying international law in Africa. Given that few African states – ten in all – have ratified it, the Charter appears to be a developing, rather than established, instrument of international law. Simplifying the situation in extreme terms, in this developing space there are two tendencies, the first aligned to the Charter and affirming the principles of democratic constitutional law, the other engaged in the regressive practice of transitional law.

Nevertheless, one cannot see how the latter could be accorded *opinio juris* in view of article 2(4)'s declaration that one of the Charter's objectives is to '[p]rohibit, reject and condemn unconstitutional change of government in any Member State as a serious threat to stability, peace, security and development'. In the circumstances it would be difficult indeed to maintain in effect that Africa is not made for democracy, given that it can be counter-argued that transitional situations show the difficulties of implementing the principle of democracy rather than resistance to the principle itself.

Moreover, the phrase 'unconstitutional change of government' is interesting in that it makes no distinction between a *coup d'état* and revolution. While this does not leave any room for considering the legitimacy or otherwise of such changes, it does have a positive implication: no matter what the case, there can be no compromise with democratic principles. It is possible, therefore, to outline a tripartite typology of changes of government based on both their legality as well as legitimacy: *coup d'état* (neither legal nor legitimate); revolution (legitimate but not legal); and a constitutional change of government (legal and legitimate).

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22 Sofie Baker Djoumessi, oral intervention at a colloquium hosted by the Community Law Centre, University of the Western Cape, on 6 September 2013.

The concluding question is perhaps the most trenchant of them all. 'Transitional constitutional law' is such an ambiguous, twilight object that one may wonder if it is even tenable to link those three words together. In other words, is it not a contradiction in terms? More plainly, can such a thing as 'transitional constitutional law' properly be said to exist – or is this just a beguiling term of art for mystifying a reality of domination, capitulation and misrule?

There are grounds, however, for qualifying the pessimism of these observations. In a decision of Madagascar's special electoral board on 17 August 2013, the three 'elephants' of the presidential election – the current president, Andry Rajoelina, former president Didier Ratsiraka, and the wife of the former president, Mars Ravalomanana – had been disqualified on the basis of transitional legal rules, namely for not having filed for candidacy in person and for lacking proof of having been resident on Malagasy territory for longer than six months. The decision came as a thunderbolt: it was unprecedented – two presidents disqualified! An appeal was lodged against the decision but declared inadmissible; and, at the time writing, general elections were scheduled for October 2013, presaging – perhaps – an end to the crisis.

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They Keep Saying, 'My President, My Emperor, and My All': Seeking an Antidote to the Perpetual Threat to Constitutionalism in Malawi

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Abstract

In acknowledging that constitutionalism is the liberal democratic value that aims at having a constitutional government the powers of which are capable of being effectively limited, this chapter seeks to highlight the significant role that a country's constitution plays in ensuring constitutionalism. The chapter examines the potential of the constitution to provide checks on the powers of the president in order to achieve constitutionalism in Africa's democratic states; in so doing, it singles out the presidency, because this institution wields more powers that impact on constitutionalism than other institutions. With the focus on Malawi, the chapter highlights how the 1966 Constitution of Malawi gave the president unlimited powers whereas the 1995 democratic Constitution contains provisions that seek to limit the president's powers; nevertheless, post-1995 presidents of Malawi have continued to wield unlimited powers that choke constitutionalism. In view of this, the chapter traces the constitutional conceptualisation of the presidency in Malawi by comparing the 1966 and 1995 constitution-making processes and the provisions which emerged. Whilst the 1966 process created a strong presidency, the 1995 process did not do enough to put effective limits on the president's powers despite the expectations that it would do so.

Zonse zimene nza Kamuzu Banda ('Everything else belongs to Kamuzu Banda') was a song in praise of Kamuzu Banda, the president of Malawi from 1964 to 1994. It shows how people came to view their ruler as the owner of everything, as the man 'who has it all'.

1 Introduction

Malawi replaced its autocratic constitution of 1966 with the democratic one of 1995 amidst a general belief that constitutionalism would be promoted.[1] However, challenges continue to face the realisation of constitutionalism under the 1995 dispensation.[2] A feature common to both constitutions is that neither of them managed to limit the powers of the presidency.[3] Accordingly, this chapter analyses the role that constitutions play in Africa's democratic states in checking presidential power and thereby advancing constitutionalism. The study singles out the presidency because it wields more powers than other institutions and has a major impact on constitutionalism.[4] The focus is on Malawi, and the chapter mounts a critical discussion of how neither the constitution-making processes of 1966 nor 1995 were capable of adequately constraining presidential power, a power which, when unchecked, stands as a perpetual threat to constitutionalism.

The chapter's structure is as follows: after introducing concepts relevant to constitutionalism, hegemonic presidency and constitution-making, it undertakes a comparative analysis of Malawi's constitution-making processes of 1966 and 1995 and their impact on the presidency and, by extension, constitutionalism. Thereafter, the chapter appraises measures in the 1995 Constitution that could check or augment presidential powers and thus (depending on how these powers are used or abused) promote or frustrate constitutionalism. Furthermore, the chapter examines the fact that the

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1 The 1995 Constitution was based on the aspiration to have a democratic state. See, for example, Kanyongolo FE 'The limits of liberal democratic constitutionalism in Malawi' in Phiri & Ross (eds) *Democratisation in Malawi* (1998) 365; Kanyongolo FE 'The Constitution and the democratization process in Malawi' in Sichone O (ed) *The State and Constitutionalism in Southern Africa* (1998) 1; Banda J 'The constitutional change debate of 1993–1995' in Phiri KM & Ross KR (eds) *Democratisation in Malawi*: A Stocktaking (1998) 320. See also Malawi Constitution (1995), section 12. Constitutionalism had been stifled under the 1966 Constitution. See Kanyongolo (1998) 358, 359 & 361; Meinhardt H & Patel N Malawi's *Process of Democratic Transition* (2003) 3.

2 See generally Kanyongolo FE 'Law, power and the limits of liberal democratic constitutionalism in Malawi' (2012) 6(1) *Malawi Law Journal* 1, 2.

3 See generally Msisha M 'The nature of the Malawian presidency' (2012) 6(1) *Malawi Law Journal* 63-73.

4 See generally Prempeh H 'Presidents untamed' (2008) 19 *Journal of Democracy* 109-123; Diamond L 'The rule of law versus the big man' (2008) 19 *Journal of Democracy* 138-149.

1995 Constitution envisages a strong presidency, one in terms of which the presidency retains numerous powers in spite of the existence of constitutional safeguards.

2 Key concepts

2.1 Constitutionalism

Constitutionalism is a liberal democratic notion that advocates having a constitutional government with powers that can be limited and checked;[5] by implication, a democratic constitution must ensure constitutionalism if it is to have any worth[6]. Although there is no single agreed-up definition and the concept is interpreted in different ways in the literature, including in the context of Malawi, much of this literature suggests that it should be thought of as the spirit of a political system in which limited government is guaranteed by a constitution.[7] As such, constitutionalism entails, inter alia, the ability to limit the power of the state, including checking the powers of the president.

Constitutionalism is expressed through a number of attributes, these being constitutional or legal mechanisms that serve to limit governmental power. Among the attributes are the rule of law; constitutional supremacy; respect for human rights; regular periodic elections; and transparency and accountability.

The rule of law is especially noteworthy in this regard. It facilitates constitutionalism by requiring that political power be used with restraint, efficiently, and for the good of all citizens;[8] moreover, it emphasises limit-

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5 Allen M & Thompson B (eds) *Cases and Materials on Constitutional and Administrative Law* (1998) 13.

6 See Okoth-Ogendo HWO 'Constitutions without constitutionalism: Reflections on an African political paradox' in Shivji I (ed) *State and Constitutionalism in Africa* (1991).

7 Heywood A *Key Concepts in Politics* (2000) 124. For discussion specific to Malawi, see Ngwira T & Kaukonde M 'The role of the courts in the promotion of accountability by the government' (2003) 7(1) *UNIMA Student Law Journal* 1-18; M'meta M & Kayuni J 'Civil society and constitutionalism' (2003) 7(1) *UNIMA Student Law Journal* 34-44.

8 Banda 'The Constitutional change debate' in Phiri & Ross (eds) *Democratisation in Malawi* (1998) 316.

ed government, separation of powers, checks and balances, and judicial review of executive actions or decisions.[9] Constitutionalism would be an illusion in the absence of respect for the rule of law.[10] Above all, constitutionalism ensures that, in order to avoid abuse, the government's power is limited by mechanisms within the law.

A very strong institution of government, such as a hegemonic presidency, defeats the ends of constitutionalism by wielding unlimited powers and flouting the rule of law.

2.2 Hegemonic presidency

A hegemonic presidency is one which is so strong that it dominates all other entities in a political system.[11] Such presidencies are no strangers to African countries, where they are commonly seen as a key to 'everything', that is, a route to accessing state resources for personal abuse.[12] By the same token, hegemonic presidents and their supporters are often unwilling, sometimes ruthlessly so, to relinquish the presidency due to the power and scope for abuse associated with it. The hegemonic presidency is also personalised, thereby forming a neo-patrimonial leadership constituting a political system of governance dominated by personalised authority and clientelism, private appropriation of public funds, selective resource distribution and nepotism.[13] The result is that the phenomenon of persistent hegemonic presidency presents a major obstacle to constitutionalism in Africa.[14]

As will be argued below with reference specifically to Malawi, hegemonic presidency flourished under the 1966 Constitution, with a number

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9 Alder J General Principles of Constitutional and Administrative Law (2002) 27.

10 See Joseph R 'Africa, 1990-1997: From arberture to closure' in Diamond L & Plattner MF (eds) *Democratisation in Africa* (1999) 13.

11 See generally Prempeh H 'Presidents untamed' (2008) 19 *Journal of Democracy* 110.

12 Prempeh H 'Presidents untamed' (2008) 19 *Journal of Democracy* 110; Diamond L 'The rule of law versus the big man' (2008) 19 *Journal of Democracy* 138, 145.

13 Abbink J 'Introduction: Rethinking democratisation and election observation' in Abbink J & Hesseling G (eds) *Election Observation and Democratisation in Africa* (2000) 11.

14 See Southall R 'Electoral systems and democratisation in Africa' in Daniel J, et al. (eds) *Voting for Democracy* (1999) 33.

of its elements continuing to manifest themselves in the subsequent constitutional dispensation of 1995. Thus the presidency has posed a longstanding challenge to the realisation of constitutionalism in this country. The lesson which emerges is that, since hegemonic presidency is incompatible with constitutionalism, a constitution which leaves room for the former to flourish will either place the latter under constant threat or ensure its demise. In view of this, constitutionalism is most likely to be guaranteed if the makers of the constitution take care that it does not accommodate elements of hegemonic presidency. There is, hence, a close relationship between, on the one hand, constitutionalism and hegemonic presidency, and, on the other, constitutionalism and constitution-making.

2.3 Constitution-making

As the term implies, constitution-making is the process of developing a constitution, a process which in itself is considered a political action.[15] In this regard, the manner in which constitutions are made is as important for securing constitutionalism as the constitution that emerges as the outcome: the more democratic the framers, the more democratic the process and its result.[16] Furthermore, '[for] a constitution to have real meaning it must be premised on consensual legitimacy'.[17] This entails a process that embraces the concepts of participation and legitimacy, which are achieved through popular consultation and 'authorship'.

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15 See Nkhata MJ 'Popular involvement and constitution-making: The struggle for constitutionalism in Malawi' in Mbondenyi MK & Ojienda T (eds) *Constitutionalism and Democratic Governance in Africa* (2013) 219-242, 221; Elazar DJ 'Constitution-making: The pre-eminently political act' available at http://www.jcpa.org/dje/articles3/constisramer.html (accessed 27 August 2013).

16 See generally Ginsburg T, et al. 'Does the process of constitution-making matter?' (2009) 5 *The Annual Review of Law and Social Science* 2001, 214.

17 Nkhata MJ 'Popular involvement and constitution-making: The struggle for constitutionalism in Malawi' in Mbondenyi MK & Ojienda T (eds) *Constitutionalism and Democratic Governance in Africa* (2013) 221.

2.3.1 Participation: A constitution of the people and by the people

Popular participation affects a constitution's principles and values as well as its legitimacy and acceptability. Achieved, inter alia, by consulting the masses, it makes for an inclusive process that serves the interests of the people and renders the constitution acceptable to them. Participation can be understood in terms of degree and quality. It should involve large numbers of participants (its degree) and draw in actors from diverse sectors with diverse interests, notably the socially weak and marginalised (its quality). In such a case, the constitution will have been made by 'a majority' but also have served 'diverse interests' rather than only those of powerful elites. The process, in short, should strive for a product that '[integrates] ideas from all major stakeholders in a country'.[18]

2.3.2 Legitimacy: A constitution for the people and accepted by the people

A legitimate constitution is one which citizens believe it is proper to respect and obey; it rests on a *grundnorm* from which it derives its validity.[19] Legitimacy 'centrally revolves around the reasons that make the citizenry feel compelled to obey a constitution'.[20] These reasons are determined both by the constitution's contents and the constitution-making process itself. Thus the citizenry will be inclined to obey a constitution in which they have actively participated.

In this regard, ensuring a consultative constitution-making process through popular participation increases the likelihood of advancing constitutionalism.[21] The failure to do so does not necessarily mean that the re-

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18 Ndulo M 'The democratic state in Africa: The challenges for institution building' 1998) 16 *National Black Law Journal* 70.

19 See Dias RWM *Jurisprudence* (1985) 362. The grundnorm is the highest norm in the hierarchy of norms and the original source of authority from which all laws derive their validity. See generally Riddall JG *Jurisprudence* (2002) 128; Dias (1985) 361.

20 Nkhata MJ 'Popular involvement and constitution-making: The struggle for constitutionalism in Malawi' in Mbondenyi MK & Ojienda T (eds) *Constitutionalism and Democratic Governance in Africa* (2013) 225.

21 Olivier L & Ludman B *Constitutional Review and Reform and the Adherence to Democratic OPrinciples in Southern African Countries* (2007) 6-7.

sultant constitution will not facilitate constitutionalism,[22] given that the quality of the final text (including its potential to promote constitutionalism) is influenced by a variety of factors;[23] nevertheless, a participatory process plays crucial role in engendering respect for the principles of constitutionalism and, as such, giving them legitimacy in the eyes of citizens.

3 The making of the 1966 and 1995 Constitutions

3.1 Historical overview: 1964-2013

Malawi gained independence from Britain in 1964 and became a republic in 1966. Post-colonial Malawi has had three constitutions: the 1964 independence Constitution; 1966 republican Constitution; and 1995 democratic Constitution. It has also had five presidents: Kamuzu Banda (1964-1994) of the Malawi Congress Party (MCP); Bakili Muluzi (1994-2004) of the United Democratic Front (UDF); Bingu Mutharika (2004-2012) of the Democratic Progressive Party (DPP); Joyce Banda (2012-2014) of the Peoples' Party (PP); and Peter Mutharika of the DPP, who assumed the presidency in 2014 after having won the presidential elections held that year.[24]

The country has had two systems of party government. Between 1966 and 1993 it was a one-party dictatorship, but since then – and specifically under the 1995 Constitution – it has been a multiparty democracy. Nonetheless, it continues to face challenges in achieving constitutionalism. This is attributable in part to the shortcomings of the 1966 and 1995 constitution-making processes and the absence of effective constitutional mechanisms to check the presidency, as will be discussed below.

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22 See Nkhata MJ 'Popular involvement and constitution making: The struggle for constitutionalism in Malawi' in Mbondenyi & Ojienda (eds) (2013) 226.

23 For further discussion in this regard, see Elazar (2011); Nkhata (2013) 22, 223, 225.

24 At the time this chapter was written, Peter Mutharika had been inaugurated as president following the general elections on 20 May 2014.

3.2 Making the 1966 Constitution

The 1966 Constitution, which replaced the 1964 independence Constitution, was designed to transform Malawi into a republic.[25] The focus was on maintaining peace and unity in order to further development, with the result that provisions such as constitutional supremacy and a Bill of Rights, ones which would have facilitated constitutionalism, were sacrificed.[26]

Malawi became independent on 6 July 1964 under the 1964 Constitution, with Kamuzu Banda as Prime Minister and head of government; the British Monarch, acting through the Governor General, was head of state. The only de facto party was Banda's MCP, which had won a landslide majority in the elections of 1963. In 1965 Banda formed a Constitutional Committee to produce what became the 1966 Republican Constitution of Malawi.[27] The Committee was made up of MCP members and chaired by the party's secretary general, Aleke Banda. The constitution-making process was geared towards a constitution that would achieve unity and stability, as Malawi was considered underdeveloped and inexperienced in nationhood. Within merely two months, the Committee managed to compile its proposals for the constitution, after having held deliberations and conducted consultative meetings in at least three sites.[28]

These proposals demonstrated the framers' intention to have a strong imperial presidency. For example, it was proposed that the president would serve as many terms as the support of the people determined. In addition, members of parliament (MPs) would be expected to declare their support for the president before standing for parliamentary elections.[29] The common thrust of the constitution-making process was to have 'a very strong executive in general and a very strong presidency in particular'[30] in

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25 Chirwa DM 'A full loaf is better than half: The constitutional protection of economic, social and cultural rights in Malawi' (2005) 49(2) *Journal of African Law* 207, 208; Nkhata (2013) 230.

26 See Chiwra (2005) 209.

27 See generally *Malawi Government Proposals for the Republican Constitution of the Republic of Malawi* (1965).

28 Nkhata (2013) 231; Kanyongolo FE 'The limits of liberal democratic constitutionalism in Malawi' in Phiri & Ross (eds) *Democratisation in Malawi* (1998) 353, 359.

29 For more details of the proposals, see Malawi Government *Proposals for the Republican Constitution* (1965).

30 Nkhata MJ *Rethinking Governance and Constitutionalism in Africa* (2010) 105.

the belief that centralised governance would serve to drive national development. The Committee submitted its proposals to the MCP National Convention held between 13 and 17 October 1965. On the sixteenth, the Convention unanimously adopted them. They were endorsed by the cabinet, and, in time, parliament passed the 1966 Constitution, which was based extensively on the proposals of the MCP Constitutional Committee.[31]

The 1966 Republican Constitution was negotiated by the MCP (through the Constitutional Committee); proposed and endorsed by the MCP (through the MCP National Convention and Banda's cabinet); and passed by the MCP (through the MCP-dominated parliament). The process, in other words, served only the interests of the MCP, interests which included the desire to avoid division and create a unified, one-party state led by a hegemonic president. Put differently, it did not follow the principle of securing popular participation in constitution-making and, by extension, of enhancing legitimacy and creating a basis for constitutionalism.

3.3 Making the 1995 Constitution

Malawi became a multiparty state after a referendum in 1993. It was agreed that general elections would be held in 1994 to elect MPs as well as a president, and that, in order to do away with the one-party dictatorship, a democratic constitution would be adopted.

Opposition groups made up of the newly-formed UDF and Alliance for Democracy (AFORD) parties, pushed the government to establish the National Consultative Council (NCC) and National Executive Committee (NEC) to lead the transition from dictatorship to democracy.[32] The NEC was given appropriate executive powers, while the NCC was allocated legislative powers to spearhead the necessary legal changes, including the adoption of a new constitution. Comprised of leaders from the MCP, opposition parties and churches, the NCC hosted a Constitutional Drafting

31 See Nkhata MJ 'Popular involvement and constitution-making: The struggle for constitutionalism in Malawi' in Mbondenyi MK & Ojienda T (eds) *Constitutionalism and Democratic Governance in Africa* (2013) 231.

32 Chirwa DM 'A full loaf is better than half: The constitutional protection of economic, social and cultural rights in Malawi' (2005) 49(2) *Journal of African Law* 210; Mutharika AP 'The 1995 Democratic Constitution of Malawi' (1996) *Journal of African Law* 205, 208; Nkhata (2013) 234; Muluzi B, et al. *Democracy with a Price* (1999) 7.

Conference attended by party representatives and other delegates. The draft it produced was adopted as 'an interim Constitution' by the MCP parliament on 16 May 1994.[33]

Following the 1994 elections, the Constitution provisionally entered into force on 18 May 1994 under Bakili Muluzi's UDF-led government. It was to stay in effect for a one-year period because the consensus was that it had been adopted in a short span of time (four months) that did not permit sufficient consultation or popular involvement.[34] In addition, it was held that participants at the Drafting Conference did not represent a wide cross-section of interests and that discussions were dominated by foreign experts. In view of this, a Constitution Committee was formed to review the interim Constitution. Its mandate included facilitating education and consultation; reporting to the public on proposals received; and convening a fully representative national conference.[35]

While the Committee failed on the first point of its mandate and the public was not aware of its existence, it did discharge the task of holding of the Constitutional Review Conference in February 1995, which was attended by a wider range of people than the previous conference. Participants included politicians, traditional leaders, professionals, businessmen, women's groups and youth associations.[36] The Review Conference proposals were submitted to parliament, which adopted the 'apparently revised' Constitution – but not before making major amendments and rejecting most of the recommendations. This revised Constitution came into force on 18 May 1995.[37]

Although the 1995 constitution-making process saw improvements on the 1966 process, several drawbacks affected its credibility. First, the Con-

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33 Republic of Malawi (Constitution) Act 20 of 1994.

34 Chirwa DM *Human Rights under the Malawian Constitution* (2011) 5.

35 Chirwa DM 'A full loaf is better than half: The constitutional protection of economic, social and cultural rights in Malawi' (2005) 49(2) *Journal of African Law* 211; Meinhardt H & Patel N *Malawi's Process of Democratic Transition* (2003) 12.

36 Banda J 'The constitutional change debate of 1993–1995' in Phiri KM & Ross KR (eds) *Democratisation in Malawi*: *A Stocktaking* (1998) 322.

37 Republic of Malawi (Constitution) Act 7 of 1995. This chapter relies on the copy of the 1995 Constitution as last revised in 2010 containing the amendments done to the Constitution between 1994 and 2010. The first revision was done through Republic of Malawi (Constitution) Act, 20 of 1994; while the last amendment was effected by Constitution (Amendment) Act, 11 of 2010.

stitution was negotiated, drafted and adopted in a short period of time; one author describes it as a 'hurried affair, conceived at the end of 1993 and executed at the beginning of 1994'.[38] This does not accord with the principle of participation since there was no time for proper consultation. Secondly, there was insufficient popular involvement in negotiating the basic content of the Constitution, which is contrary to the key principles of legitimacy and popular participation.[39] The 1995 Constitution in fact was 'drafted' by the NCC, a body comprising party-political representatives who assumed their positions not through elections but appointments by their parties. Thus, the NCC led constitution-making process lacked a legal mandate from the people to draft the Constitution.

Furthermore, while it was attended by a wider spectrum of participants than the Drafting Conference, the Review Conference did not remedy the shortfalls in the constitution-making process. For instance, participation was biased in favour of elites and people from urban areas; the Conference was held for only four days, which was not long enough for meaningful deliberation; and parliament subsequently undermined the Conference by rejecting most its recommendations.[40]

It can be concluded, then, that the 1995 constitutional process fell short of complying sufficiently with the crucial principles of popular participation and legitimacy to increase the likelihood of ensuring effective guarantees for constitutionalism.

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38 Banda J 'The constitutional change debate of 1993–1995' in Phiri KM & Ross KR (eds) *Democratisation in Malawi*: *A Stocktaking* (1998) 321.

39 Nkhata Nkhata MJ 'Popular involvement and constitution-making' in Mbondenyi MK & Ojienda T (eds) *Constitutionalism and Democratic Governance in Africa* (2013) 235.

40 See generally Nkhata (2013) 235-236. See also Lwanda J *Promises, Power, Politics & Poverty* (1996) 192-196; Hara MH 'Popular involvement in constitution-making: The experience of Malawi'. Paper presented at the World Congress of Constitutional Law, Athens, 11-15 June (2007) 17.

4 Constitutional mechanisms relating to presidential powers

4.1 Mechanisms under the 1966 Constitution

The 1966 Constitution made Malawi a one-party state under President Banda's reign, thereby increasing his power.[41] It also concentrated state powers in the presidency. For example, it made Banda the 'supreme executive authority of the Republic' with powers to appoint cabinet ministers and other top public executives as he deemed fit; gave him the latitude to act 'in his own discretion without following the advice tendered by any person';[42] and granted him powers to assign any ministerial position or government post to himself.[43] In 1970 the Constitution was amended to make Banda the president of Malawi for life,[44] further entrenching his power in that he could act in any manner without being accountable to the people or fearing removal from office.

The Constitution, moreover, gave the presidency powers to control parliament, the effect of which was to render the MCP parliament subservient to Banda and enable him to fortify his already unlimited authority.[45] As the president, Banda had powers, for instance, to appoint up to 15 MPs who held their seats at his will and pleasure;[46] to appoint or fire the parliamentary speaker at his will;[47] and to dissolve parliament at any time,[48] a power which could also be exercised if parliament passed a vote of no confidence in him or the government or insisted on enacting a bill to which he had refused to assent.[49] Such powers militate against the checks and balances and separations of power that are central to constitutionalism.

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41 The Constitution recognised the MCP as the (only) national political party. See Malawi Constitution, 1966, section 4; Chirwa (2011) 4.
42 Republic of Malawi Constitution 1966, sections 8 and 47.
43 Republic of Malawi Constitution 1966, section 54. At one point Banda held six government positions. See Nkhata (2010) 118-120.
44 Republic of Malawi Constitution 1966, section 9, as amended by Republic of Malawi (Constitution) (Amendment) Act 3 of 1970.
45 See Nkhata (2010) 119; Muluzi, et al. (1999) 90.
46 Republic of Malawi Constitution 1966, sections 20 and 28(2)(i).
47 Republic of Malawi Constitution 1966, section 55.
48 Republic of Malawi Constitution 1966, section 45.
49 Republic of Malawi Constitution 1966, section 35.

Also contrary to the tenets of constitutionalism was that the 1966 Constitution did not contain a Bill of Rights.[50] By implication, the president had powers to act in the manner that contravened human rights standards, especially if such action could be justified as falling within section 2(2) of the Constitution, which exempted conduct backed by law from complying with the UDHR if it was deemed 'reasonable and required in the interest of defence, public safety, public order or the national economy'.[51] It is no surprise, then, that the 'Banda regime ... was characterised by oppression, intolerance and lack of respect for human rights, the rule of law and constitutionalism', not to mention 'hero-worship, centralised authority structures, exclusiveness, and intimidation of potential critics'.[52] The basis for this lay in the 1966 Constitution, which created and sanctioned the hegemonic presidency that so stifled constitutionalism during Banda's thirty-year old rule.

4.2 Mechanisms under the 1995 Constitution

Malawi adopted the 1995 Constitution to reverse autocracy and usher in a new order based on constitutional democracy.[53] However, although changes were made to the presidency, other elements of this institution remained unchanged. Consequently, the 1995 Constitution contains mechanisms that place checks on the continuation of hegemonic presidency; at the same time, the effect of other provisions is instead to perpetuate it.[54]

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50 The only reference to human rights was a constitutional principle stating that Malawi recognised the personal liberties enumerated in the Universal Declaration of Human Rights (UDHR). See the Republic of Malawi Constitution 1966, section 2(1)(iii).

51 See Republic of Malawi Constitution 1966, section 2(2), as introduced by Constitution (Amendment) Act 6 of 1968.

52 Phiri KM & Ross K 'Introduction: From totalitarianism to democracy in Malawi' in Phiri & Ross (1998) *Democratisation in Malawi* 9, 10; Chirwa (2011) 4; Chirwa (2005) 209.

53 J Banda 'The Constitution change debate of 1993-1995' in Phiri & Ross (1998) *Democratisation in Malawi* 320; Nkhata (2010) 131-132.

54 See generally Msisha M 'The nature of the Malawian presidency' (2012) 6(1) *Malawi Law Journal* 63-73.

4.2.1 Pro-hegemonic constitutional mechanisms

4.2.1.1 Powers to make appointments

The presidency has the authority to make almost all key appointments across all the branches of government. In respect of the executive, he or she can appoint ministers and deputy ministers;[55] the chief secretary to the president and cabinet;[56] the director of public prosecutions (subject to confirmation by the public appointments committee of parliament);[57] the inspector general of police (subject to confirmation by a majority vote in parliament);[58] and the chief inspector of prisons.[59] The president can also appoint a second vice president, who must come from another party, if it is necessary in the public interest.[60] In addition, the president is responsible for the appointment of most senior public officers in the civil service and in statutory corporations, which includes members of boards of directors.[61]

In respect of the judiciary, the president appoints the chief justice (who has to be confirmed by parliament),[62] as well as judges to the high court and supreme court (on the recommendation of the Judicial Services Commission).[63] The presidency has powers, moreover, to assign a judge temporarily to another public office. With regard to the legislature, the president has the power to appoint and dismiss the clerk of parliament (on the recommendation of the Parliamentary Service Commission).[64] He or she can also appoint MPs or non-MPs, whether from the ruling or opposition party, as cabinet ministers.[65]

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55 1995 Constitution, section 92(1) and 94(1). The 1995 Constitution does not set the size of cabinet and does not prevent the president from holding ministerial positions.

56 1995 Constitution, section 92(4).

57 1995 Constitution, section 101(1).

58 1995 Constitution, section 154(2).

59 1995 Constitution, section 166.

60 1995 Constitution, section 80(5).

61 See generally Msisha M 'The nature of the Malawian presidency' (2012) 6(1) *Malawi Law Journal* 66.

62 1995 Constitution, section 111(1).

63 1995 Constitution, section 111(2).

64 See Parliamentary Service Act 29 of 1998, sections 16(1) and 17(1).

65 See *In the Matter of Presidential Reference of Dispute of a Constitutional Nature* under Section 89(1)(h) of the Constitution and in the Matter of Section 65 of the

Furthermore, the president retains powers to make other crucial senior appointments to institutions with oversight and rule-of-law-related functions. These include the attorney general;[66] the law commissioner (on the recommendation of the Judicial Services Commission);[67] and members of the Malawi Human Rights Commission (from a list of nominees by the law commissioner and the ombudsman);[68] and the chief of the defence force.[69]

These powers of appointment are so extensive that they virtually institutionalise the potential for the presidency to be misused as a conduit, inter alia, for patronage, clientelism and nepotism; they embody, that is to say, elements of presidential hegemony and thus stand to perpetuate it, meaning that they are inconsistent with constitutionalism.

4.2.1.2 Powers of legislative interference

Under the 1995 Constitution, the president may prorogue parliament at any time as long as it is done so in consultation with the parliamentary speaker.[70] However, the courts take the view that 'consultation' means the president need only inform, and solicit views from, the consulted party before taking any action.[71] Such an interpretation, contrary to the Constitution,[72] gives him or her excessive powers to frustrate parliament and advance personal interests.

Constitution and *In the Matter of the Question of Crossing the Floor by Members of Parliament* Presidential Reference Appeal No. 44 of 2006 (Malawi Supreme Court of Appeal, unreported); *Fred Nseula v Attorney General & Malawi Congress Party* Civil Cause No. 63 of 1996 (High Court of Malawi); *Fred Nseula v Attorney General & Malawi Congress Party MSCA* Civil Appeal No. 32 of 1997 (Malawi Supreme Court of Malawi).

66 1995 Constitution, section 98(3).

67 1995 Constitution, section 133(a).

68 1995Constitution, section 131(2).

69 1995 Constitution, section 161(2).

70 1995 Constitution, section 49(1) and 59(1)(b).

71 See the case of *State and The President of the Republic of Malawi, ex parte Dr Bakili Muluzi & John Tembo* Miscellaneous Civil Cause No. 99 of 2007.

72 See, for example, section 12, which provides for fundamental principles of the Constitution.

The Constitution also provides that parliament can be convened only after consultations between the president and the Speaker of Parliament.[73] The implication is that, in practice, it is the president who has powers to summon parliament for a session or meeting in consultation with the Speaker.[74] Considering the powers the president already wields, it is unlikely that parliament could meet without his or her consent.[75] Thus, the president can abuse these powers to frustrate parliamentary meetings if the parliament intends to deliberate on issues that threaten his or her interests.

The president, furthermore, has the power to assign a cabinet post or other position to the Speaker, a move which compels the office-holder to relinquish the position.[76] This could easily be done if the Speaker is from the president's party. Such powers have the effect of making the Speaker subservient to the president, contrary to the constitutional requirement that the Speaker, elected by parliament, must discharge his or her duties without interference from any person.[77]

Lastly, although in terms of the Constitution the clerk of parliament is answerable to the speaker and serves parliament,[78] the legislation that regulates the operation of parliament gives power to the president to appoint and dismiss the clerk (on the recommendation of the Parliamentary Service Commission).[79] This implies that the clerk is, in fact, under the president's thumb and predisposed to facilitate the interests of the president rather than those of parliament or its speaker.

It can thus be observed that the 1995 Constitution gives the president powers that could be used to place a stranglehold on the legislature, including its speaker and clerk.

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73 See 1995 Constitution, sections 59(1) and (3).

74 See 1995 Constitution, sections 59(1) and (3).

75 This is the practical implication of the powers that the president has over convening g parliamentary meetings and sessions. See 1995 Constitution, sections 59(1) and(3).

76 See section 53(3)(c).

77 See 1995 Constitution, sections 53(1) and (5).

78 1995 Malawi Constitution, section 55.

79 See Parliamentary Service Act 29 of 1998, sections 16(1) and 17(3). See also Msisha (2012) 66.

4.2.1.3 Powers of leverage in independent institutions

The Constitution establishes a number of state institutions and positions which are supposed to be independent. However, it still manages to allocate powers that grant the president considerable influence over their operations and public officers. For example, it establishes the Malawi Police Service as an independent institution within the executive, in view of which the Police Service is accountable to the courts.[80] At the same time, though, the Constitution grants the president powers in respect of the appointment and dismissal of the police chief, the Inspector General (IG).[81] The Police Service Commission, formed under section 155 of the Constitution,[82] has the authority to inquire into the appointment, confirmation, discipline and dismissal of members of the police service – except for the IG,[83] who is made unanswerable to the Commission.[84] It is left instead to parliament's Public Appointments Committee to inquire into matters relating to the IG.[85] The implication in practice, then, is that the Police Service is answerable to the presidency, even though there is no legal basis for it apart from the fact that the president has a stranglehold over the IG.

Similarly, the Constitution establishes the Malawi Electoral Commission as an independent institution entrusted with all matters relating to the electoral process.[86] In view of this, the Judicial Service Commission chairperson nominates the chair of the Electoral Commission.[87] The enabling legislation, however, gives powers to the president to appoint the other members of the Electoral Commission in consultation with the leaders of political parties in parliament;[88] but since the courts' view on consultation is that the president merely has to get the views of the party leaders before making the appointments, the president is at liberty to reject these views. Msisha has correctly observed that ultimately 'the presidency is by the

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80 1995 Constitution, sections 153(1) and (2).
81 1995 Constitution, sections 154(4).
82 Section 155(1).
83 Sections 155(2) and (3).
84 See Msisha M 'The nature of the Malawian presidency' (2012) 6(1) *Malawi Law Journal* 69.
85 1995 Constitution, section 154(2).
86 1995 Constitution, section 75.
87 1995 Constitution, section 75(1).
88 See Electoral Commission Act No. 11 of 1998, section 4.

Constitution placed in a commanding position regarding the custodians of and aspects of the electoral process'.[89]

4.2.1.4 Lack of a strong accountability framework

The Constitution lacks strong mechanisms for holding the president accountable. For instance, while it requires that the president, among others, must declare assets, including business interests and liabilities, on assuming office,[90] this is largely ignored.[91] The asset law has been revised to be made more effective, but until it is tested, it is the case that the law as it stood has proven to be toothless as a check on the president, thus weakening accountability and thwarting constitutionalism.

4.2.1.5 Powers making the presidency 'untouchable'

The presidency enjoys certain powers making it 'untouchable' and allowing it to get away with conduct that contradicts the tenets of the rule of law and constitutional democracy. Enumerated below, these powers augment the presidency to the detriment of constitutionalism.

4.2.1.5.1 Powers to fire top public officers arbitrarily

The president is constitutionally empowered to hire and fire most top public officers.[92] Although he or she is supposed to comply with the rules of administrative justice and fairness when removing people from office, it would seem that the *Lunguzi* case (discussed below) set a precedent whereby the president may fire any public official so long as compensation is paid. While the law is no doubt meant to prevent such arbitrary dismissals,

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89 See Msisha M 'The nature of the Malawian presidency' (2012) 6(1) *Malawi Law Journal* 70.

90 1995 Constitution, section 88A(1).

91 See Nkhata MJ 'Popular involvement and constitution-making: The struggle for constitutionalism in Malawi' in Mbondenyi MK & Ojienda T (eds) *Constitutionalism and Democratic Governance in Africa* (2013) 211.

92 See, for example, 1995 Constitution, sections 98(3) and (6); 101(1) and 102(2).

it has not had the intended effect. The reality is similar to that under the 1966 Constitution, where offices were held at the president's pleasure.

4.2.1.5.2 Criminal laws and immunity fortify the presidency

Various laws create criminal offences against individuals for the mere act of criticising the president. These include the offences of sedition and insulting the president.[93] Such laws impinge on the right to freedom of expression and can be abused by presidents to suppress public scrutiny of their actions. Moreover, whilst in office the president is immune from criminal prosecution as well as personal civil suits, except if these relate to orders under the Constitution or statutes to do with human rights obligations. [94] Immunity of such magnitude makes the presidency a fortress.

4.2.1.5.3 Discretionary powers

The 1995 Constitution recognises that the president can exercise any other powers which are not conferred by law as long as they are exercised in accordance with the Constitution and are deemed to be incidental duties or functions.[95] This provides a blank cheque to exercise many additional powers as long as they do not contravene clear legal provisions. Although the courts would be expected to interpret the provision strictly in favour of constitutionalism, the situation nevertheless embodies elements of hegemonic presidency.

In summary, therefore, it can be observed that although the 1995 Constitution was adopted to foster constitutional democracy, it has numerous provisions conducive to a mushrooming of a presidency with unlimited powers – a hegemonic presidency that threatens constitutionalism.

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93 See, for example, Penal Code, Chapter 7:01 of the Laws of Malawi, sections 51 and 50. See also the Protected Flag, Emblems and Names Act, Chapter 18:03 of the Laws of Malawi, section 4.

94 See, for example, 1995 Republic of Malawi Constitution, section 91(2) and (3); section 91(1).

95 See 1995 Republic of Malawi Constitution, section 89(5).

4.2.2 Anti-hegemonic constitutional mechanisms

4.2.2.1 Presidential term-limit

The 1966 Constitution provided for a life-presidency. Seeking to avoid a repetition of this, the Constitution in section 83(3) imposes a presidential term-limit of two terms. The High Court, sitting as a constitutional court, has clarified that whenever a person serves two terms of five years as president or vice president, he or she is precluded from standing again for the presidency.[96] The term-limit provision thus acts as a limitation on the power of the person serving as president, thereby promoting constitutionalism.

4.2.2.2 Constitutional outline of presidential powers

The 1995 Constitution has provisions that outline the president's powers and responsibilities. For example, section 89(1) lists his or her duties and functions.[97] This position is a departure from the 1966 Constitution in that the president would be expected to discharge the duties allocated under the Constitution.[98] The position could also facilitate constitutionalism by preventing arbitrary exercise of presidential powers. However, as discussed above, section 89(5) has the effect of neutralising the impact of the listed presidential duties as it allows the president to exercise any other powers as long as they do not contravene the law. Set against this is the fact that presidential powers must be consistent with the law and that the Constitution could act as a check against abuse.

4.2.2.3 The courts' judicial powers of review

The 1995 Constitution gives powers to the High Court of Malawi, amongst others, to review any decision or action of the government, including the presidency, for consistency with the Constitution.[99] As such, the judi-

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96 See *State & Electoral Commission v Bakili Muluzi & United Democratic Front* Constitutional Civil Cause No. 2 of 2009, being Civil Cause No. 36 of 2009 (High Court (Constitutional Court) of Malawi, unreported).

97 Section 89(1).

98 The 1966 Constitution allowed the president to act in any manner without following anyone's advice.

99 1995 Constitution, sections 108(2) and 5.

ciary could play a crucial role in putting a check on governmental power. As will be shown below, the courts have stepped in to constrain the exercise of presidential powers on a number of occasions on the basis of this constitutional mandate. The implication is that if the president acts in disregard of the Constitution, the courts could be called on to review the exercise of such powers.

4.2.2.4 The Constitution's Bill of Rights

Chapter 4 of the 1995 Constitution contains a justiciable Bill of Rights which could play a role in curbing presidential power. The Constitution expressly provides that everyone, including the president, is bound by the Bill of Rights.[100] Furthermore, it guarantees avenues for redress in cases of any threats to the enjoyment of Constitution's human rights.[101] It also expressly prohibits any governmental or state action that interferes with the enjoyment of the rights.[102] Above all, section 91(1) recognises that the president is not immune to orders regarding human rights made by the courts under the Constitution. Hence, any presidential conduct that is contrary to the enjoyment of the human rights within the Constitution could be successfully invalidated.

4.2.2.5 Other measures: Declaration of assets and impeachment

As mentioned, presidents are constitutionally required to declare their assets on assuming office, a measure which is intended to promote transparency and accountability as well as prevent abuse of the presidency for material or financial gain. Nevertheless, as it has proven ineffectual, the asset law has been revised to address this.[103] In terms of the enabling legislation, it will be mandatory for senior political and public officers, including the president, to declare their assets, with penalties to be imposed for non-compliance; in addition, the public will be able to apply to the Di-

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100 See 1995 Constitution, section 15(1).
101 See 1995 Constitution, sections 15(2) and 46(2)(a).
102 See 1995 Constitution, section 46(1).
103 See generally 'Assets law sparks row' *The Nation* 26 April 2014 available at http://www.mwnation.com/assets-law-sparks-row/ (accessed 2 June 2014).

rector of Public Officers' Declarations to access information about the declared assets.[104]

The Constitution also allows the president and/or vice president to be removed from office through impeachment in the event of serious violations of Malawi's written laws and Constitution.[105] The impeachment mechanisms could provide checks on presidential powers, whereas the only means of removal which the 1966 Constitution recognised was the death of the president.

Accordingly, it can be observed that, unlike the 1966 Constitution, the 1995 Constitution has several mechanisms which, if used properly, could go a long way in limiting presidential powers. However, as previously discussed, it also has provisions that perpetuate presidential hegemony. It is thus relevant to examine how the Constitution has fared so far in practice in its effort to check the powers of the president.

5 The impact of the strong presidency under the 1995 Constitution

A number of events demonstrate the extent to which the 1995 Constitution has variously failed or succeeded in providing mechanisms for checking presidential powers. This section discusses a selection of them.[106]

5.1 The unstoppable semi-hegemonic presidency in action

5.1.1 Legislative interference: Disregard for separation of powers

On several occasions the presidency has exercised those of its powers that enable it to dominate the legislature. In 2006 and 2008 President Mutharika prorogued the parliament with the sole aim of preventing it from deliberating on a motion that would have resulted in most of the DPP's MPs

104 See Public Officers (Declaration of Assets, Liabilities and Business Interests) Bill 21 0f 2013, section 5 as read with First Schedule; see also sections 17 and 18.

105 See 1995 Constitution, sections 86(1) and (2)(a); Malawi National Assembly, Draft Standing Orders 208 and 209.

106 Many recent presidential actions impacting on constitutionalism, especially those of presidents Mutharika and Joyce Banda, have not yet been documented in scholarly literature. As a result, this study has had to rely on coverage by the print and electronic news media.

being expelled for having earlier defected from the parties which sponsored them into parliament and crossed the floor to join the DPP. Mutharika abused his powers of prorogation to frustrate parliament and serve his own partisan interests.

In addition, he thwarted parliament's ability to hold meetings by taking advantage of the fact that in practical terms the Constitution gives the presidency a major say in convening these sessions. Indeed, in the later years of Mutharika's first term, he reduced parliament to a budget-passing institution: given that his party, the DPP, did not command a majority in parliament and he thus saw the legislature as a threat, he would not approve meetings other than budget sessions. Even though the Constitution requires parliament to convene at least twice a year,[107] Mutharika was able to defeat these provisions by means of his powers to summon parliament.

In the case of President Muluzi, he invoked his powers to assign a cabinet post or another position to the parliamentary speaker in order to force Sam Mpasu to relinquish this position. Initially Mpasu refused the ministerial position and sought intervention from the courts, which ruled in his favour before finally bowing to Muluzi's demands.[108] Hence, Muluzi managed to remove Mpasu as Speaker of Parliament even though the Speaker is elected by parliament. This illustrates a point made earlier, namely that the president has powers which in effect subordinate to the Speaker to him or her. It can thus be observed that the presidency has had the leeway to wriggle through the Constitution and gain a stranglehold over the legislature.

5.1.2 Manipulating the weak framework of 'pecuniary' accountability

5.1.2.1 Hiding behind a toothless declaration-of-assets law

As earlier discussed, the presidency has frequently ignored its obligations regarding the declaration of assets. Ironically, even if presidents do declare their assets, the information is not publicised. For example, when Presi-

107 1995 Constitution, section 59(2).

108 See 'Malawi: Court blocks Muluzi's appointment of Speaker as minister' *Panafrican News Agency* 21 April 2003 available at http://www.afrika.no/Detailed/3378.html (accessed 8 February 2014).

dent Joyce Banda declared hers, the government refused to make the information public.[109]

5.1.2.2 Becoming instant billionaires

Experience shows that Malawi's presidents become billionaires on assuming office. For example, when Mutharika became president in 2004, he declared assets worth about 154 million kwacha (or US$360,000), but, strikingly, after eight years in office he had managed to amass assets valued at about 61 billion kwacha (US$143-million).[110] Similarly, President Joyce Banda was said to own assets worth billions in kwacha.[111] It is not unreasonable to suspect that corruption and abuse of office could have played a hand in the acquisition of such vast personal wealth.[112]

It is noteworthy, too, that presidential incumbents rapidly gain the ability to make lavish donations at any time yet do not offer explanations as to the source these funds. For example, President Joyce Banda distributed maize, shoes and cattle, in addition to which she made cash donations at her rallies.[113] Such largesse sustains a perception that individuals and or-

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109 See, for example, 'Joyce Banda's assets not for public consumption' *Malawi Voice* (*Zodiak Online*) 6 August 2013 available at http://www.malawivoice.com/2013/08/06/joyce-bandas-assets-not-for-public-consumption/ (accessed 8 February 2014).

110 See 'Bingu wa Mutharika amassed wealth worth K61 billion in 8 years of power, civil society cry foul' *Malawi Today* 24 June 2013 available at http://www.malawitoday.com/news/129300-bingu-wa-mutharika-amassed-wealth-worth-k61-billion-8-years-power-civil-society-cry-foul (accessed 30 August 2013). The exchange rate at 9 February 2014 was 1US$ to 428K.

111 See, for example, 'Malawi president Joyce Banda is also a billionaire!' *Maravi Post* 28 July 2013 available at http://www.maravipost.com/scope/op-ed/4203-malawi-president-joyce-banda-is-also-a-billionaire.html (accessed 30 August 2013).

112 See, for example, 'Ex-Malawi leader Bakili Muluzi's K1.7 billion graft case resumes Wednesday' *Maravi Post* 14 May 2013 available at http://www.maravipost.com/scope/law-and-order/3779-ex-malawi-leader-bakali-muluzi-s-k1-7-billion-graft-case-resumes-wednesday.html (accessed 8 February 2014).

113 See, for example, 'Malawi Pres. Banda says won't stop giving out handouts' *Nyasa Times* 2 November 2013 available at http://www.nyasatimes.com/2013/11/02/malawi-pres-banda-says-wont-stop-giving-out-handouts/ (accessed 8 February 2014); 'Malawi top musician Lucius Banda attacks President Joyce Banda on cows, maize, shoes handouts: Having no idea is a bad thing' *Malawi Voice* 14 January 2014 available at http://www.malawivoice.com/2014/01/14/malawis-top-

ganisations can always resort to approaching the president when financial assistance is needed: he or she is a money tap that never runs dry. It is a notion which reinforces, and legitimates, beliefs that the president is (and should be) a mighty – indeed, hegemonic – potentate. Moreover, Joyce Banda did not give any indication of where these funds originated, and unexplained sources of wealth contradict important tenets of constitutionalism such as accountability and transparency.

5.1.2.3 Becoming virtually 'untouchable'

As mentioned, the presidency is an 'untouchable' institution that can get away with conduct which contradicts the tenets of the rule of law and constitutional democracy.

5.1.2.3.1 Disregarding court orders

Presidents have defied court orders on a number of occasions without facing sanctions.[114] For example, Mutharika defied a court order to restore Chilumpha's benefits as vice president, which had been withdrawn after the latter's purported dismissal from office.[115] Mutharika also defied a court order to open the Electoral Commission offices, which he sealed after suspending it due to allegations of fraud and abuse of funds.[116] In the same vein, he defied a court injunction restraining him from assenting to an enacted Injunctions Bill, which was being challenged before the

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musician-lucius-banda-attacks-president-joyce-banda-on-cows-maize-shoes-hand-outs-having-no-idea-is-a-bad-thing/ (accessed 8 February 2014).

114 See generally Kanyongolo FE *Malawi: Justice Sector and the rule of law* (2006) 51-57.

115 See *State v The President & Others ex parte Dr Cassim Chilumpha* Miscellaneous Civil Cause No. 22 of 2006 (High Court of Malawi).

116 *The State v The President & Others ex parte Malawi Law Society* Miscellaneous Civil Cause Number 173 of 2010 (High Court of Malawi, Principal Registry, unreported); 'Malawi president challenges injunction over elections body' *Panapress* 14 December 2010 available at http://www.panapress.com/Malawi-president-challenges-injunction-over-elections-body--13-746168-17-lang1-index.html (accessed 6 February 2014).

courts.[117] Equally President Joyce Banda defied court orders stopping her from installing Chief Chikowi and elevating Chief Kapeni.[118]

In practice, the president is capable of defying court orders, with little that can be done about it while he or she remains in power. This perpetuates the belief that the president is 'untouchable', and renders the doctrines of constitutional supremacy and checks and balances meaningless.

5.1.2.3.2 Wantonly firing top public officers

When a new president assumes power, he or she typically fires most of the top public officers, including those in government departments, statutory corporations and public boards (usually without reasons), only to pay them huge sums of money in compensation for the otherwise 'unlawful' dismissals.[119] For example, after becoming president, Muluzi removed the incumbent, Lunguzi, from his post as Inspector General (IG) of Police without any reason, as did Joyce Banda in her turn.[120] Similarly, all post-1994 attorneys general were removed from office by the president before they completed their five-year tenure, for reasons inconsistent with section 98(6) of the Constitution.[121] The practice fuels perceptions that presidents cannot be stopped and get exactly what they want; the further implication of such presidential powers is that all senior government and public offici-

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117 See 'Bingu overlooks court injunction, signs Injunctions Bill' *Malawi Today* 14 July 2011 available at http://www.malawitoday.com/news/871-bingu-overlooks-court-injunction-signs-injunctions-bill (accessed 30 August 2013).

118 Banda went ahead with the installation and elevation ceremonies despite injunctions against her doing so. See, for example, 'Malawi president defies court order on chieftaincy' *BNL Times* 26 July 2013 available at http://timesmediamw.com/malawis-president-defies-court-order-on-chieftainship/ (accessed 30 August 2013).

119 See, for example, 'Donors to Malawi: Huge payouts to people fired by Banda's Govt unjustified' *The Maravi Post* 1 March 2013 available at http://www.maravipost.com/national/society/3178-donors-to-malawi-huge-payouts-to-people-fired-by-banda%E2%80%99s-govt-unjustified.html (accessed 30 August 2013).

120 See, for example, 'Malawi's new president sacks police chief Mukhito' *BBC News* 9 April 2012 available at http://www.bbc.co.uk/news/world-africa-17655999 (accessed 10 February 2014).

121 See generally Msisha M 'The nature of the Malawian presidency' (2012) 6(1) *Malawi Law Journal* 71.

als are forced to serve the interests of the president (rather than those of the nation).

5.1.2.3.3 Using penal laws to fortify the presidency

A number of arrests have been made pursuant to laws that create criminal offences against individuals for making critical statements directed at the president (these laws were discussed in more detail above).[122]

5.1.2.3.4 Using discretionary powers and arbitrary powers based on practice or tradition

As mentioned, section 89(5) of the Constitution enables the president to exercise any other powers which are not given under law as long as they are exercised subject to written law and are deemed as incidental duties or functions – a 'blank cheque' which presidents continue to manipulate in their favour, given that they have been called upon to resolve issues falling outside their ordinary ambit of duties and that they thereby reinforce the notion that, like emperors, they rule by decree.

For example, whenever teachers, university lecturers and students, civil servants, vendors or others are staging protests over complaints, the president is usually expected to intervene in the impasse even if this falls within the purview of another institutional authority.[123] Similarly, when two of Malawi's football teams, the Silver Strikers and Mighty Wanderers, were banned from the country's top league due to violence by supporters at a match in December 2013, officials and supporters of the Mighty Wande-

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122 See, for example, 'Man arrested for "insulting" Malawi President Joyce Banda' *Nyasa Times* 18 July 2013 available at http://www.nyasatimes.com/2013/07/18/man-arrested-for-insulting-malawi-president-joyce-banda/ (accessed 29 August 2013); Gondwe G 'Mutharika to arrest journos who "insult" him' *Bizcommunity* 12 March 2012 available at http://www.bizcommunity.com/Article/129/15/72145.html (accessed 9 February 2014); 'Malawi: Republican party chairman arrested for insulting president' *Malawi Nation* 15 September 2005 available at http://www.afrika.no/Detailed/10476.html (accessed 9 February 2014).

123 See, for example, 'Bingu orders Chanco lecturers reinstatement' *The Malawi Democrat* 25 October 2011 available at http://www.malawidemocrat.com/bingu-orders-chanco-lecturers-reinstatement/ (accessed 30 August 2013).

rers threatened to march to present a petition to President Joyce Banda.[124] Thus, it is still believed that the president has powers to do 'anything' as long as it is not contrary to law. This position embodies elements of presidential hegemony in which the president is perceived 'the Emperor'.[125]

Furthermore, the president enjoys other powers and titles derived purely from tradition or practice and without any basis in law. For instance, although under section 153 of the Constitution the Malawi Police Service (MPS) is supposed to be an independent institution answerable to the courts, the president has the title of Commander of the Malawi Police Service.[126] As a result, in practice the MPS is answerable to the presidency, who is regarded as its Commander even though there is no legal basis for it save for the fact that the president has a stranglehold over the Inspector General of Police. Msisha sees this development as an illustration of Malawi's imperial (hegemonic) presidency.[127]

In summary, experience shows that the presidency, insufficiently constrained by the Constitution, is semi-hegemonic and continues to exercise powers that suffocate constitutionalism.

5.2 Stopping the semi-hegemonic presidency in its tracks

However, set against the above, in a number of instances constitutional mechanisms have indeed managed to put a brake on the presidency and thereby promote constitutionalism.

5.2.1 Presidential term-limit

Malawi's former President Muluzi attempted to remove the presidential term-limit of two terms in section 83(3) of the Open Term Constitution

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124 See, for example, 'Nomads plan demo, won't play rematch' *Nyasa Times* 3 January 2014 available at http://www.nyasatimes.com/2014/01/03/nomads-plan-demo-wont-play-rematch/comment-page-5/ (accessed 8 February 2014).

125 See Msisha M 'The nature of the Malawian presidency' (2012) 6(1) *Malawi Law Journal* 67.

126 See Msisha (2012) 71; Kuwali D 'The end of securocracy: The future of security sector governance in Malawi' (2012) 6(1) *Malawi Law Journal* 75.

127 See See Msisha M 'The nature of the Malawian presidency' (2012) 6(1) *Malawi Law Journal* 72.

Amendment Bill.[128] The Bill was defeated in the National Assembly after it fell short of the three votes needed for the required two-thirds majority. If the Bill had been passed, it would have created the possibility of a sitting president winning every subsequent election and thus ruling indefinitely, a development that would certainly have thwarted the advance of constitutionalism.

Furthermore, in 2009 Muluzi unsuccessfully sought the intervention of the court in his bid to stand for presidency despite having already served two consecutive terms, his argument being that since he had taken a break after serving the two terms, the Constitution allowed him to 'bounce back' and serve another 'fresh presidential term'.[129] In effect, therefore, section 83(3) of the Constitution acts as a limitation on the power of the person serving as president and thus promotes constitutionalism.

5.2.2 The courts' judicial powers of review

The judiciary plays the crucial role of checking governmental power by acting pursuant to the powers under the Constitution to review any decision or action of the government, including the presidency, for consistency with the Constitution.[130] On the basis of this constitutional mandate, the courts have stepped in to constrain the exercise of presidential powers on a number of occasions. As early as 1994, when Muluzi removed Lunguzi from the post of Inspector General of Police (IG) and assigned him a diplomatic post without giving any reasons, the High Court and Supreme Court found that the president had acted unconstitutionally by removing Lunguzi without giving him reasons in writing, contrary to section 43 of the Constitution.[131] Hence, the courts made it clear the president could no

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128 Constitution (Amendment) Bill 1 of 2002.

129 See *State & Electoral Commission v Bakili Muluzi & United Democratic Front* Constitutional Civil Cause No. 2 of 2009, being Civil Cause No. 36 of 2009 (High Court (Constitutional Court) of Malawi, unreported).

130 See 1995 Constitution, section 108(2) as well as section 5, which recognises that the courts can invalidate any action of the government that is inconsistent with the Constitution to the extent of the inconsistency.

131 See *Lunguzi case* [1994] MLR 72. Section 43 entrenches the right to fair administrative action, which includes the right to be heard and given reasons before a decision that affects one's rights or legitimate expectations is executed.

longer act in disregard of the Constitution and that they would intercede to review the exercise of presidential powers.

5.2.2.1 Quashing unconstitutional presidential decrees

In 2011 a stand-off occurred between the government and lecturers at the University of Malawi during the notorious 'academic freedom' battle.[132] Lecturers alleged the state was using student spies to inform the authorities, including the police, whenever they made comments critical of the government in their teaching. The lecturers stayed out of classes, saying these were unsafe places infested with spies; in turn, the president, without addressing their concerns, ordered them to return to duty. Lecturers then obtained an injunction against the president's directive and sought a judicial review of a decision forcing them to attend class when, contrary to the right to academic freedom, they were being spied upon.[133] The courts ordered that the injunction should subsist for the duration of the crisis.[134] The president, through the University Council, fired lecturers suspected to be 'ringleaders', following which the courts granted injunctions stopping these dismissals. In the end, the president's orders came to nought: after an impasse of eight months, he reinstated the lecturers and gave assurances that academic freedom would be respected.

Similarly, when Muluzi, allegedly in the interests of national peace and security, issued a ban on all demonstrations for or against the proposed amendment to the presidential term-limit (discussed above), the High Court quashed the decree, finding that it was unconstitutional as it had not

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132 See generally 'Malawi: Collapsed dialogue, campuses stay closed' *University World News* 28 August 2011 available at http://www.universityworldnews.com/article.php?story=20110827181402793 (accessed 30 August 2013).

133 See *State & President of the Republic of Malawi & Others, ex parte Chancellor College Academic Staff Union* (Academic freedom case) Miscellaneous Civil Cause No. 2 of 2011 (High Court of Malawi, unreported).

134 See, for example, *Academic freedom case Miscellaneous Civil Cause No. 2 of 2011* (High Court of Malawi, unreported); *Council of the University of Malawi & Others v Dr Jessie Kabwila (Sued in her own personal behalf capacity and on behalf of all members of CCASU and all academic staff of Chancellor College) & Others* Civil Cause No. 24 of 2011 (as consolidated with Miscellaneous Civil Cause No. 16 of 2011) (High Court of Malawi, unreported).

been issued in writing and did not carry a presidential (public) seal as required by the Constitution.[135]

5.2.2.2 Reviewing the exercise of presidential prerogatives

President Mutharika appointed a Commission of Enquiry to investigate the circumstances surrounding the academic-freedom issue discussed above and to assist in defining academic freedom. University lecturers saw this as an attempt by the president to interfere with the right to academic freedom through the back door. Hence, they obtained a court injunction stopping the Commission from doing its work on the basis that the president had misconstrued his powers by, inter alia, seeking to interpret a constitutional provision instead of leaving this to the courts.[136] They also moved for a judicial review of the exercise of the powers by the president.

In another instance, parliament enacted a bill amending a statute that regulated civil suits against the government, purporting to limit the court's exercise of powers to grant *ex parte* injunctions against government or public officers.[137] The amendment would have watered down the essence of injunctions as an effective remedy against the government.[138] The High Court issued an interim injunction restraining Mutharika from assenting to the passed bill, pending the outcome of a judicial review of its constitutionality.[139] It is noteworthy that powers to assent to bills and appoint commissions of inquiry are among the presidential prerogatives under the Constitution.[140] By curbing them, the Court sent a message that the presi-

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135 See 1995 Malawi Constitution, section 90; *Malawi Law Society & Others v The President of Malawi & Others,* Civil Cause No. 78 of 2002 (High Court of Malawi, unreported).

136 See generally 'Lecturers stop Bingu's commission on academic freedom' *Malawi Today* 23 November 2011 available at http://www.malawitoday.com/news/96251-lecturers-stop-bingu%E2%80%99s-commision-academic-freedom (accessed 30 August 2013).

137 Civil Procedure (Suits by or against the Government or Public Officers) (Amendment) Bill of 2010.

138 The law would have made it impossible to obtain urgent injunctions against the state without the government being heard and contesting.

139 Although the president defied the court and assented to the law, the injunction stood and it is unlikely that the courts would respect such law.

140 1995 Constitution, sections 89(1)(a) and (g).

dent cannot hide behind prerogatives to exercise powers contrary to the Constitution and the law.

5.2.2.3 Halting the unconstitutional removal of the vice president

Towards the end of his term, Muluzi attempted to remove his deputy by filing two cases before the High Court through the Attorney General seeking a declaration that the vice president (VP) had resigned 'constructively' by going on leave during an election year when the resident needed someone to deputise him.[141] The Court found against the president. Similarly, Mutharika tried to remove his VP, Cassim Chilumpha, by announcing that Chilumpha had constructively resigned as VP since he was not attending cabinet meetings.[142] The High Court (Constitutional Court) held by a majority decision that the VP could not resign constructively; hence, Mutharika did not succeed in firing Chilumpha.

5.2.3 The Constitution's Bill of Rights

The justiciable Bill of Rights in the 1995 Constitution plays a role in checking the powers of the president by, inter alia, guaranteeing avenues for redress in cases of any threats to the enjoyment of the rights.[143] The courts have intervened accordingly. As mentioned, for example, when Muluzi banned demonstrations around proposed changes to the presidential term-limit, the High Court quashed the ban for violating the right to demonstrate as provided by the Bill of Rights in section 38 of the Constitution.[144]

In view of the discussion in this section, it can be observed that there have been instances where mechanisms under the 1995 Constitution have managed to stop the abuse of presidential powers. However, such mechanisms have often involved the courts, the implication being that it might

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141 *Attorney General v Justine Malewezi* Civil Cause No. 10 of 2004 (High Court of Malawi, unreported); *Attorney General v Justine Malewezi* Civil Cause No. 370 of 2004 (High Court of Malawi, unreported).

142 See *State v The President & Others ex parte Dr Cassim Chilumpha* Miscellaneous Civil Cause No. 22 of 2006.

143 See 1995 Constitution, section 15(2).

144 *Malawi Law Society & Others v The President of Malawi & Others* Civil Cause No. 78 of 2002 (High Court of Malawi, unreported).

have been futile to rely on them on their own and without the force of a court order.

6 Conclusion

6.1 Diagnosing Malawi's constitutionalism debacle

Malawi's experience of constitutional democracy shows that the president has retained various unlimited powers that stifle constitutionalism. It can be concluded that, to this extent, the 1995 constitution-making process gave Malawians a raw deal by not emancipating them from the jaws of presidential hegemony.

This is a theme taken up by authors like Msisha, who seem to blame the imperial presidency on the constitution-making process, one which left loopholes allowing semi-hegemonic powers to flourish over the years.[145] This suggests that the constitution-makers did not appreciate the implications of giving the presidency the benefit of the doubt rather than putting checks on its powers; in other words, they were under the mistaken impression that hegemonic presidency was a thing of the past buried with the 1966 Constitution. Indeed, it could be said they merely rectified those powers which Banda had abused rather than developed checks to cover all potential abuses, for instance, by instituting a two-term limit in view of the fact that Banda had been made president for life. Similarly, given that he had powers to hire and fire most senior public officers, they put in a procedure for parliament to have a say in such appointments – ironically leaving the president with all of the powers to remove most of these, not to mention absolute powers to hire and fire a number of other public officers without any involvement at all by parliament or another body.

As such, the constitution-making process did not put the presidency under close enough scrutiny,[146] as evidenced by the fact, amongst others, that certain presidential abuses have flouted what are clearly strong constitutional provisions, abuses for which the Constitution offers no ready solution. Msisha's verdict appears to express regret for the missed opportunities in the constitution-making process: 'The experience of democracy

145 See See Msisha M 'The nature of the Malawian presidency' (2012) 6(1) *Malawi Law Journal* 72.

146 See Chimango (2012) 137; Msisha (2012) 72-73.

over the past 18 years suggests that we were probably wrong in taking those arguments lightly. The presidency wields too much power in Malawi due in part to the fact that the Constitution allows it.'[147]

Therefore, it can be observed that the realisation of constitutionalism in Malawi will remain a pipedream as long as the Constitution fails to prevent the mushrooming of a semi-hegemonic presidency. Elements of presidential hegemony can be traced to Kamuzu Banda's one-party dictatorship, elements which have subsisted in the 1995 constitutional dispensation and suggest that, consciously or subconsciously, Malawi's presidency has been enduringly conceptualised in hegemonic terms. The presidency is, in practice and theory, still regarded as 'the owner of everything, as an untouchable and unstoppable institution, and as saviour and emperor'. The difference is that under Malawi's one party-dictatorship, imperial presidency was created and nourished by *both* practice and the 1966 Constitution; under multiparty democracy, it was partly created by the Constitution *but* nourished through practice. Unfortunately, the 1995 Constitution manages to provide mechanisms for checking only some of the presidential powers, while leaving unscathed many others which are open to abuse. As a result, the 1995 Constitution, in its current form, provides the recipe for the mushrooming and manifestation of the semi-hegemonic presidency and its consequent perpetual threat on constitutionalism. The antidote to the constitutionalism conundrum thus lies to a significant degree in checking presidential hegemony.

6.2 Searching for the antidote

As discussed at the outset, the purpose of a democratic constitution is generally to limit the powers of government. Hence, preserving constitutionalism is crucial to maintaining the democracy which the 1995 Constitution envisioned after Malawi was emancipated from dictatorship. However, with a flawed constitution-making process having allowed for a renascence of a semi-hegemonic presidency, it can be deduced that the remedy is to find mechanisms that can quell the perceived and actual manifestations of such a presidency.

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147 See Msisha M 'The nature of the Malawian presidency' (2012) 6(1) *Malawi Law Journal* 73.

The situation might not be as hopeless as it seems since, as demonstrated above, Malawi's present constitutional dispensation provides avenues for checking presidential powers. The drawback, as experiences shows, is that the president has the potential to act in any manner unless the courts intervene. Thus, the only interim remedy is to resort to the courts while the hunt for an antidote goes on. Another avenue could be for Malawi to make use of the 'the periodic constitutional review process that the Malawi Law Commission undertakes' in addressing gaps and loopholes in the Constitution.[148] Malawi could use this process to identify other mechanisms for controlling the powers of the president.

Nonetheless, Malawians have to continue to explore other viable means to identify appropriate constitutional measures that could constrain the exercise of presidential powers. Among other measures, Malawi should seize the opportunity that the process of strengthening the law on the declaration of assets has presented and put in place mechanisms requiring the president to account for large disparities between the wealth declared on assuming office and the wealth amassed by the time of leaving it. Furthermore, it should strengthen respect for the principle of the separation of powers between the presidency, parliament and judiciary by, inter alia, establishing mechanisms to limit presidential interference in the legislature. In addition, measures should be taken to deal with practices that elevate the presidency as 'untouchable'. For example, the president should be liable for defying court orders. This will build confidence among the public that no institution is above the law. Moreover, section 89(5) of the Constitution could be revised or deleted to remove loopholes allowing the president to exercise powers that are not founded in law.

Indeed, unless Malawi successfully explores the mechanisms that could be utilised to quell the otherwise unlimited powers of the president,[149] the strong presidency will pose a perpetual threat to constitutionalism.

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148 See Nkhata MJ 'Popular involvement and constitution-making: The struggle for constitutionalism in Malawi' in Mbondenyi MK & Ojienda T (eds) *Constitutionalism and Democratic Governance in Africa* (2013) 219-242, 241. See generally Malawi Law Commission *Report of the Law Commission on the review of the Constitution* (2007). See also 1995 Malawi Constitution, sections 132 and 135(b), (c) and (d).

149 See generally 'Malawi lobby pushed for reduced presidential powers' *Africa Review* 21 October 2012 available at http://www.africareview.com/News/Malawi-lobby-pushes-for-reduced-presidential-powers/-/979180/1608380/-/urchqp/-/index.html (accessed 29 August 2013).

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Legislative–Executive Relations in the Ethiopian Parliamentary System: Towards Institutional and Legal Reform

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Abstract

This chapter examines legislative-executive relations in Ethiopia in the period 1995–2013. It identifies factors that have contributed to executive domination of an apparently sovereign parliament, after which it recommends that a number of legal and institutional reforms be made in order to swing the balance in favour of parliament. Ethiopia is characterised by cabinet supremacy rather than parliamentary sovereignty, but the chapter goes beyond this obvious conclusion by finding that legislative-executive relations cannot be understood fully without taking into account intra-party politics and their impact on democratic institutions. Some comparative insights are drawn from selected parliamentary systems to explain gaps and controversies; the chapter also draws on constitutional principles, policies issued by the government, laws, the internal regulations of the House of Peoples' Representatives (HoPR) and trends observed in parliamentary practice.

1 Introduction

The parliamentary system is not new to Ethiopia.[1] The 1931 and revised constitution of 1955 provided for a bicameral parliament, albeit in an ab-

1 Ethiopia's parliamentary practices before 1991 are discussed in several publications. For example, see: Berhanu K 'Parliament and dominant party system' in Salih M (ed) *African Parliaments: Between Governance and Government* (2005); Markakis J *Ethiopia: Anatomy of Traditional Polity* (1974); Clapham C 'Constitutions and governance in Ethiopian political history' in *Constitutionalism: Reflections and Re-*

solute monarchy in which the chambers played merely an advisory role. The military regime (1974 – 1991) that deposed the monarch ruled by decree until 1987 when it issued a socialist-oriented constitution with some presidential elements. After the overthrow of the military in 1991 and four years of transition, the constitution of 1995 established a federal parliamentary system, one which remains in effect to this day.

It is possibly the case, however, that the narrative of Ethiopia's parliamentary system is taking a new turn. Soon after the death in 2012 of the prime minister Meles Zenawi, a senior member of the ruling Ethiopian People's Revolutionary Democratic Front (EPRDF) spoke publicly about the government's failure to build democratic institutions, notably a vibrant parliament, quipping that 'parliament's programme on Ethiopian Television is the least attractive [of them all]'. Likewise, a Member of Parliament observed that 'until recently the House of People's Representatives [HoPR] did not even exercise the right to approve its own budget'; that budget 'was decided by the executive'.[2]

As these remarks suggest, Ethiopia's parliament is regarded as subordinate to the executive, yet it did indeed challenge the executive in the first half of the 2013 term. While it is too early to tell what this betokens, it offers food for thought. Is it, for example, simply a transient phenomenon, the result of temporary political vacuum created by the death of a strong prime minister, or is it the first sign of emergent institutional reform, an indication that strict party-discipline is weakening and that the centre of political gravity is shifting to parliament?

2 Historical and constitutional basis of parliamentary sovereignty

Modern parliamentary systems first evolved in Europe,[3] notably so in Great Britain where the cardinal principle is that of parliamentary sovereignty[4]. What the latter means is that parliament can make and unmake

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commendations, Symposium on the Making of the New Ethiopian Constitution (1993).

2 Former Member of Parliament, conversations with the author. Addis Ababa, April 2009.

3 See Hoogwoods P & Roberts G *European Politics Today* (2003) 155.

4 Sartori G *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes* (1997) 101.

any law whatsoever,[5] that a law enacted by parliament is sovereign, and that, conversely, no individual or institution is allowed to set aside such an act of parliament.

Although the principle is centrally important, its actualisation was a slow process spanning nearly three centuries of contestation and negotiation between the monarch and parliament, a process that began with the revolution of 1688 and its limitations on monarchical power, saw ministers becoming accountable to parliament at the end of the eighteenth century, and entered an especially significant phase thereafter with the extension of voting rights to widening circles of the population and eventually all adults.

In sum, the locus of power shifted from an absolute monarch to a sovereign parliament, with the result that 'parliament inherited the King's omnipotent position'.[6] Crucially, what proved the most efficacious in limiting the monarch's power was occupation of seats in parliament by way of elections, a lesson that is key to contemporary thinking. As it is understood today, democracy is manifested primarily, if not exclusively, through elected legislative bodies; at the heart of democracy is the recognition of the central role of the legislature.

The parliamentary systems of government that originated in Britain and continental Europe spread to other countries, among them Ethiopia, which too has adopted the principle of parliamentary sovereignty. Although the country's parliament is subject to the supremacy of the constitution,[7] the latter enshrines it as 'the *highest authority* of the Federal Government',[8] one which expresses 'the will of the people' through regular and competitive elections[9] and which serves as the primary source of laws. The legislature has the strongest democratic credentials in the state; as for the exe-

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5 The adage is that there is nothing the British parliament cannot do except make a woman a man, and a man a woman. De Lolme's popular expression is quoted in Dice AV *An Introduction to the Study of the Constitution* 10 ed (2008) 43.

6 Koopmans T *Courts and Political Institutions: A Comparative View* (2003) 19.

7 Other limitations include the introduction of constitutional courts as distinct institutions that check the compatibility of an Act of Parliament with the constitution, and the notion of human rights as constitutional entrenchments by which the lawmaker must abide.

8 Article 50(3), emphasis by the author.

9 See article 54(1), which provides that members of the HoPR are elected by the people for a term of five years on the basis of universal suffrage and through direct, free and fair elections held by secret ballot.

cutive, it gains its legitimacy indirectly from parliament – as discussed in the sections below, it comes from and is accountable to parliament. In this respect, parliament legitimises the executive and is hence a key institution of governance.

3 Government accountability to parliament

Examining legislative-executive relations in the context of a sovereign parliament leads to a second core feature of parliamentary democracies. Inasmuch as there is a fusion of power between a legislature and executive, the executive *derives* from and is constitutionally *accountable* to the legislature.[10] That is to say, the cabinet, including its prime minister (PM), is *appointed, supported* and, if need be, *removed* from power by parliament.[11]

Parliamentary systems, however, are not all the same. In the United Kingdom (UK)[12] the leader of the majority party in parliament assumes the position of PM, a convention that often results in a one-party cabinet though not necessarily a one-party parliament – unlike the case in Ethiopia's HoPR, largely dominated by a single party and thus unreflective of the people's divergent opinions.

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10 'Parliament makes and breaks the government' expresses this in an extreme form. See Giannetti D & Benoit K (eds) *Intra Party Politics and Coalition Governments* (2009) 10.

11 Sartori G *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes* (1997) 101; Flinders M 'Shifting the balance? Parliament, the Executive and the British Constitution' (2002) 50 *Political Studies* 24.

12 It has been argued that the UK parliament's supremacy over the executive is thwarted by the latter's tight party discipline and procedural control of the House's timetable. More than 95 per cent of the bills proposed by the executive are adopted, while 82 per cent of all laws are initiated by the government. See Meny Y & Knapp A *Governments and Politics in Western Euro*pe 3 ed (1998) 189; Flinders M 'Shifting the balance? Parliament, the Executive and the British Constitution' (2002) 50 *Political Studies* 24: 30-31.

By comparison, in Germany the chancellor is 'first among unequals'[13] in that he or she is elected by parliament as chancellor and is often not the party leader.[14] Any MP with majority support in parliament has the opportunity to become chancellor, but once elected, stands above the other cabinet ministers as their head and takes responsibility for designing the government's policies. In addition, the fact that the German parliament is frequently run by a coalition limits the chancellor's power to establish his or her government, given that the coalition parties decide on their own which candidates to nominate for ministerial positions.[15] This paves the way for a more balanced relationship between the legislature and executive.

Whatever the parliamentary system, though, once a government has been appointed to power by parliament, it must secure a functioning majority in parliament to stay in power.[16] In other words, a government's durability depends on continuous support in parliament. Conversely, parliament can ensure executive accountability[17] through a number of mechanisms, the most prominent of which are the vote of confidence or the constructive

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13 Sartori G *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes* (1997) 102. In the UK the PM is 'first above unequals', i.e. parliament has little role in his or her appointment or the PM's hiring and firing of ministers. The PM's powers are comparable to those of the president of the United States.

14 Sartori G *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes* (1997) 105.

15 Oeter S 'Republic of Germany' in Le Roy K & Saunders C (eds) *Legislative, Executive and Judicial Governance in Federal Countries* (2006) 146.

16 Some authors present this as a matter of mutual dependence between parliament and executive; others, like Sartori, argue that the fact that parliament is sovereign rules out a reciprocal dependence between parliament and the executive.

17 Related to this is the cabinet's collegial responsibility to parliament, which applies differently across systems. In the UK, for example, the PM is first above unequals and cabinet members are often more accountable to the PM and less to parliament. In parliamentary systems such as those in Germany, with its principle of 'first among unequals', and Scandinavia, where the PM is first among equals, collegial responsibility is more apparent. See Cheibub JA & Limongi F 'Legislative-executive relations' in Ginsburg T & Dixon R (eds) *Comparative Constitutional Law* (2011).

vote of no-confidence[18] in which a parliamentary majority can remove government out office.[19]

The notion that the executive comes from and remains accountable to parliament is expressly provided in the Ethiopian constitution. With regard to the establishment of the government, the constitution declares, 'The Prime Minister shall be *elected* [emphasis added] from among members of the House of Peoples' Representatives (HoPR),'[20] while Article 74 states that the PM is required to submit nominees for ministerial posts to the HoPR for approval. Similarly, in relation to government accountability to parliament, the constitution states that the HoPR 'has the power to call and question the PM and other federal officials and to investigate the executive's conduct and discharge of its responsibilities'.[21] Furthermore, the HoPR 'shall at the request of one third of its members, discuss any matter pertaining to the powers of the executive. It has in such cases, the power to take decisions or measures it deems necessary.'[22]

Yet while the constitution ensures parliamentary supremacy over the executive and is thereby consistent with parliamentary systems, it is not clear how ministers who fail to discharge their responsibility are removed; in other words, they are appointed subject to the approval of parliament, but it is unclear who has the final say when it comes to their removal.

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18 For details on the initiation of vote of confidence, see Storm K, Muller W & Bergman T 'Parliamentary democracy: Promises and problems' in Storm K, Muller W & Bergman T (eds) *Delegation and Accountability in Parliamentary Democracies* (2003) 13-19; article 67 of the Basic Law; Ackerman B 'The new separation of powers' (2000) 113 *Harvard Law Review* 3:654-655. In Ethiopia, articles 93 and 94 of Regulation No. 3/2006 require the approval of the Business Advisory Committee and support of one-third of the MPs to initiate a motion of no confidence. See also article 6/94 of the same regulation.

19 For details on other mechanisms of control, see Meny Y & Knapp A *Governments and Politics in Western Euro*pe 3 ed (1998) 208.

20 See articles 73/1 of the constitution and article 95(2) of Regulation No. 3/2006, which reinforce parliament's mandate to elect the PM. Nevertheless, article 97(2) of the Regulation suggests that the party or coalition of parties with a majority in the House shall be given the privilege of introducing the candidate PM to the House through the Speaker, which in turn might imply that the party's decision does not, as such, need the House's approval.

21 55(17) of Regulation No. 3/2006. Article 4(1)(b) goes even further by stating that parliament has the mandate to control government bodies – a stronger expression than the softer and commonly-used term '*oversight'*.

22 55(18) of Regulation No. 3/2006.

The leading precedent in this respect is the Tamirat Layne case. In a report to parliament after dismissing Tamirat, his deputy prime minister, Meles Zenawi expressly said he was doing so to inform the House of the decision rather than because such decision-making is a mandate of the House, hinting that the dismissal of ministers is the PM's exclusive domain. However, under paradigmatic parliamentary systems this is not the case, because the executive – be it collectively or individually – remains accountable to the House, and a House dissatisfied by the executive's performance can take whatever measures it deems necessary.

Constitutionally, Ethiopia is comparable to the German rather than Westminster system in that the PM must be *elected* from among the members of the House. This implies that he is not necessarily the party leader, given that two or more candidates can be nominated. In practice, however, during the first two terms (1995–2000 and 2000–2005) parliament has voted on the PM's appointment albeit there was only one nominee for the position. In the later two terms (2005–2010 and 2010–2012), the party simply declared its decision to the House as to whom the PM was, a decision that parliament endorsed without voting on it. The appointment of Haile Mariam Desalegn as the new PM in September 2012, following the death of the former PM Meles Zenawi in August 2012, seemed to reinstitute the former practice, however. Parliament was requested to approve the nomination of the only candidate from the party. The latter indicated the intention of the EPRDF (or its leader) to shift away from the German practice to that of the Westminster model.

The significance of these developments is that, due to internal party differences, it is possible that two or more contenders for the premiership could emerge from the same party; accordingly, the House could play the pivotal role of having to decide between them. If legislative-executive relations were rendered as a triangle, the legislature would occupy the apex and the executive and judiciary, the bottom two corners. However, compared to the German system, the Westminster version of parliamentary democracy gives the executive greater leverage since the PM has a dual role as both head of the executive branch and leader of the majority party in the legislature, the cohesiveness of this group being enforced by party discipline.[23]

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23 In Germany and other parliamentary systems the House elects the PM because often it is composed of a coalition government and there may be no clear majority; in additon, overlaps between the PM and the party leadership (in parliament) are

What this discussion highlights is that important contextual factors shape the operation of parliamentary systems in general and Ethiopia's in particular, so much so that in certain cases the executive could gain supremacy over the legislature. In this respect, three interrelated factors are crucial: the nature of the dominant political party and its internal rule; the overlap of functions between key party leadership and the executive; and the widespread practice of delegated legislation with little or no political control. The following sections elaborate on them in the context of the Ethiopian parliamentary system.

4 Parliamentary-fit party and internal party rule

4.1 Parliamentary-fit parties

An effective parliamentary system depends on what Sartori calls 'parliamentary-fit parties'.[24] For a government to stay in power, it must obey the 'majoritarian imperative'[25] and ensure that its party members in parliament continue to support and approve its policies; if its MPs rebel, it may not be able to garner a majority in parliament. The way to achieve governmental stability, then, is to maintain a parliamentary-fit party.

Depending on the nature of the parliamentary system, such parties manifest their fitness through *party cohesion* or *party discipline*.[26] Conceptually, this is where the political party and its leadership come into the picture as central institutions defining legislative-executive relations in par-

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not conspicuous. See Krotosznski R 'Separation of legislative and executive powers' in Ginsburg T & Dixon R (eds) *Comparative Constitutional Law* (2011) 242.

24 Sartori G *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes* (1997) 102. By this he means parties that do not cross House party lines when voting. See also see Storm K, Muller W & Bergman T 'Parliamentary democracy: Promises and problems' in Storm K, Muller W & Bergman T (eds) *Delegation and Accountability in Parliamentary Democracies* (2003) 67. The term refers to complex relations between the party and its members both within the party's internal decision-making processes and outside of it (usually in public institutions such as parliament and the executive).

25 See Cheibub JA & Limongi F 'Legislative-executive relations' in Ginsburg T & Dixon R (eds) *Comparative Constitutional Law* (2011) 222.

26 Giannetti D & Benoit K (eds) *Intra Party Politics and Coalition Governments* (2009) 118.

liament, because parliamentary fitness is a key factor determining whether the government is able to sustain itself or is at risk of being ousted. If there is too little fitness, a government could collapse; if too much, it could turn into a cabinet dictatorship.

In this regard, authors often draw a distinction between cohesive and disciplined political parties.[27] Why do members of a party in parliament vote together and differently to those of another party? One answer is to look at the sources of cohesion within the party and within parliament, which can be of two kinds: party cohesion or party discipline.

In the former, party members vote together because intra-party organisation and democratic decision-making processes enable them to reach consensus on the main issues and thus stand by the positions that the party adopts. The assumption is that members debate freely inside the party machinery, after which they present a united front in parliament. In other words, the party secures loyalty and support from MPs by ensuring the right to debate within the party. If the party does not do this, the normal expectation is that MPs may rebel on the floor of the House, potentially bringing about the collapse of the government and early elections.

Party cohesion is common in Germany and other coalition-based parliamentary systems, where it usually makes for a balanced relationship between the legislature and executive. For example, the German parliament has the mandate to set an agenda of its own, one which need not align with the government's initiatives. Parliamentary autonomy is further enhanced by how MPs view themselves, given that Germany is noteworthy for the way it promotes the legislature's autonomy by separating parliamentary and cabinet leadership.

The Chancellor and leader of the majority party are not necessarily the same person; they have different jobs, and in terms of their hierarchical positions the latter is not necessarily a servant of the former. By extension, German MPs tend to see themselves as members of the Bundestag (House of Representatives) *first and members of their party, second.*[28] King notes that 'members of the Bundestag take seriously their work as members of parliamentary committees and approach it in a non-party or more precisely

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27 Giannetti D & Benoit K (eds) *Intra Party Politics and Coalition Governments* (2009) 1-6; Cheibub JA & Limongi F 'Legislative-executive relations' in Ginsburg T & Dixon R (eds) *Comparative Constitutional Law* (2011) 118.

28 King A 'Modes of executive–legislative relations: Great Britain, France and West Germany' (1976) 1(1) *Legislative Studies Quarterly* 28-29.

a cross-party frame of mind', examining bills on their merits and making concessions on this cross-party basis; as implied by Article 38 of the Basic Law, MPs represent the people and are supposed to act as a check on government.[29]

In the case of party discipline, however, party members vote together – be it within the party or in parliament – not so much because there is consensus but because party leaders have the leverage to impose party discipline on rank-and-file members. The party and its key leaders take priority over MPs, who are members of the party first and members of parliament only second. Through its leadership, the party mobilises voters, finances election campaigns, serves as a gatekeeper to political careers, nominates candidates for election and office, and determines the substance of policy proposals as well as, at times, even the order in which these proposals appear on the parliamentary calendar.

In a balanced legislative-executive relationship, parliament as an autonomous institution has the mandate to determine its own agenda and rules of procedure,[30] a situation in which the executive proposes and the parliament disposes (i.e. accepts, endorses or rejects). However, where party discipline obtains, the legislature takes executive proposals as decisions.[31] Through the cabinet, the party has virtually monopolistic control of the parliamentary agenda,[32] a tendency that seems to apply in the case of Ethiopia. Regulation No. 3 of 2006, Article 32, states, 'In all cases, a government agenda shall be given priority and submitted for debate.'[33] The legislature's function becomes a mainly executive-driven operation, especially so in a context where the party system is crucial to political life and

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29 King A 'Modes of executive–legislative relations: Great Britain, France and West Germany' (1976) 1(1) *Legislative Studies Quarterly* 1: 27.

30 Hoogwoods P & Roberts G *European Politics Today* 2 ed (2003) 155.

31 Laver M 'Divided parties, divided government' (1999) 24 *Legislative Studies Quarterly* 1:8; Storm K, Muller W & Bergman T 'Parliamentary democracy: Promises and problems' in Storm K, Muller W & Bergman T (eds) *Delegation and Accountability in Parliamentary Democracies* (2003) 71.

32 Flinders M 'Shifting the balance? Parliament, the Executive and the British Constitution' (2002) 50 *Political Studies* 25-26.

33 Article 31 of Regulation No 3/2006 states: 'Initiating an Agenda: The business to be debates may be initiated by: (1) The Executive, (2) The Speaker, (3) The Committees, 4) Members, and (5) Parliamentary groups.' In practice the executive controls virtually all agenda-setting.

party members who are also MPs can achieve their career and policy goals only if they act in line with their party's preferences.[34]

The fact that party leaders can employ a carrot-and-stick strategy to ensure discipline necessarily also has impact on the autonomy of individual MPs and the question of whether they are free to decide on matters of public concern or must abide by party dictates; a related question is whether MPs represent their specific constituencies, and are thus merely agents of those who voted for them, or if they are elected as trustees competent to decide issues on the floor according to their own free judgment and without instructions from voters.

Ethiopia's constitution addresses these issues in its declaration that '[m]embers of the House are representatives of the Ethiopian People as a *whole*. They are governed by the constitution, the will of the people and their conscience.'[35] Furthermore, it adds that '[t]he House is *responsible to the People*.'[36] The fact that MPs represent people 'as a whole' suggests that they have the mandate to decide national issues freely based on what is best for the country rather than on the basis of constituency interests. It should also be noted that the article makes no mention of a party to whom MPs should defer or consult in arriving at their decisions.

Nevertheless, an MP who is tempted to ignore constituency demands will pay dearly come the following election; nor can he or she afford to ignore the role of the party, which emerges as a dominant force influencing decision-making in the House. The reality is thus that there are three conflicting interests. One is the constituency voter who wants the MP to address his priorities and concerns; if the MP fails to do so, the voter may rebel in the next election. Moreover, as noted, parties nominate candidates, finance election campaigns and mobilise voters, which implies that, through its leaders, the party has full control of the process.

Lastly, MPs are bound by their own conscience. A crucial issue which arises is this: What happens in the event of a conflict between party priori-

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34 Laver M 'Divided parties, divided government' (1999) 24 *Legislative Studies Quarterly* 1:8; Storm K, Muller W & Bergman T 'Parliamentary democracy: Promises and problems' in Storm K, Muller W & Bergman T (eds) *Delegation and Accountability in Parliamentary Democracies* (2003) 68-69; Flinders M 'Shifting the balance? Parliament, the Executive and the British Constitution' (2002) 50 *Political Studies* 24.

35 Article 54(4).

36 Article 50(3).

ties and voter/national priorities, or between the latter and the MP's conscience? How should he or she decide in such cases, and which interest ought to prevail? The constitution dictates that MPs are bound by the constitution, their conscience and will of the people, while party discipline dictates that MPs should obey party lines or be purged from parliament and the party.

It is here that intra-party democracy is vital. If the party is internally democratic, it can handle situations where MPs are in a dilemma, and perhaps also tolerate their deviation from the party line; if not, it gives rise to party autocracy instead of parliamentary democracy. In more developed parliamentary systems, the issue of whether MPs who deviate from the party line on the floor of the House should be tolerated is linked to whether the government enjoys a large majority or only a bare minimum.

If it is a large majority, of, say, 80 per cent of seats, then a degree of deviation by MPs from the ruling party does not necessarily put the government at risk of losing power. Seen from the perspective of the MPs of majority party, the expectation is that the legislature would be more autonomous in its functions as there is little or no fear that the government could collapse as a result of defeat in the House. The size of the opposition (in this case, 20 per cent of seats) is not significant enough to cause trouble to the government; the legislature can therefore be vigilant in relations with the government and act as a 'debating club'.

However, if a government has only a slender majority (for example, 52 to 48), then deviation by two or three of its MPs might be enough to remove it from power. Here, a party would be likely to impose tight discipline on its members to toe the party line in parliament to ensure the government continues in power. As a result, the parliament has a dilemma in its relations with the executive in that the fear of parliamentary dissolution could lead to a reduction of parliamentary autonomy. The compensation is that MPs stand to enjoy more freedom in the intra-party decision-making process and that whatever has been approved at the party level will become government's/parliament's decision in the House.

The EPRDF has controlled Ethiopia's parliament for four consecutive elections since 1995; in none of these elections has the opposition posed a threat.[37] While this would seem likely to lead to a situation in which

37 Following the 2005 elections, a coalition of opposition parties secured improved representation in parliament, but even so it was not enough to pose a threat to the government.

EPRDF MPs would be relatively autonomous, parliament has, on the contrary, remained a weak institution unable to monitor the executive, and, save for the 2005-2010 term (see below), less than vibrant in representing voters' concerns.

Two explanations for this are the excessive use of party discipline and the hegemonic nature of the ruling party. Excessive party discipline, rather than party cohesions, requires MPs to support the government no matter what the circumstances, thereby undermining parliament's role in holding the government accountable and, in the worst case, turning it into a rubber-stamp institution serving as a mouthpiece for the executive. Where MPs might otherwise be compensated for this through heightened intra-party democracy, party documents suggest that the EPRDF has problems in this regard owing to its practice of 'democratic centralism'.

According to one such document, 'members of the ruling party in parliament or in other places shall have the right and the duty[38] to support the party's policy and decisions'[39]. What is noteworthy is that the need for an MP's complete loyalty to the party is in no way linked to any perceived threat of government collapse or to the size of the ruling party in parliament. Indeed, the document states that should MPs experience a contradiction between the party's policy and their own conscience, they have the option of leaving the party.[40] By implication, if the party's policy and decisions are in contradiction with those articulated in parliament, then the former prevails over the latter.

While parliament's supremacy over the executive is stipulated in the constitution, in practice 'democratic centralism' seems at odds with an autonomous, sovereign legislature. A recent publication on 'democratic centralism' and how it is incorporated in the EPRDF's internal regulation likens it to the 'command and control/order system' in the military.[41] Lo-

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38 If someone has a right, then there must be an entity that bears the duty. So, if MPs have a duty to support their party, the party has the right/authority/power to impose it on its members in parliament. Something cannot be a right and a duty at the same time.

39 Ministry of Information *Be Ethiopia Ye Democracy Sirat Ginbata Gudayoch* (1994) 66.

40 Ministry of Information *Be Ethiopia Ye Democracy Sirat Ginbata Gudayoch* (1994) 67.

41 See the book by the former ruling-party politbureau member, Siye Abraha, *Nestanet ena Dagninet be Ethiopia* (2002) 39-9 and 48. Among the numerous publications describing democratic centralism in Ethiopia, see, for example: Bach J-N

wer-level party members must accept decisions made by the higher level (hence 'centralism'); though this does not rule out the possibility of grassroots participation and influence over the higher levels of party structure (hence 'democratic'), in practice whatever comes from the political leadership must be obeyed at all costs. In short, it is 'centralism with little or no democracy'.

If this is so, it suggests something of the nature of intraparty democracy in the EPRDF in particular and political parties in general. Since the mid-twentieth century, these have become key institutions of democracy,[42] making it critical to understand their internal politics and the impact thereof on the wider polity.

In Ethiopia the Party is omnipresent: both within the party and parliament, voting is more a matter of organisational coercion than of democratic decision-making process. Operating under party discipline, MPs are consequently not free agents but instruments of party preferences as determined by party leaders. In effect, the MP's mandate as trustee is 'expropriated',[43] with the executive occupying the apex of a triangular hierarchy and the legislature and judiciary, the bottom corners. The legislature is replaced in position by the executive; parliamentary supremacy is replaced by cabinet predominance. As Berhanu aptly remarks:

> [T]he Ethiopian Parliament has consistently depicted a feature of dependence on mainstream centres of power to which it is inextricably linked. ... Successive Ethiopian Legislatures have increasingly been subservient to the wielders of power, notably the political executives.[44]

An important point to draw from parliamentary systems such as Germany's is that the government has no monopoly over the parliamentary agen-

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(2011) 'Abyotawi democracy: Neither revolutionary nor democratic – a critical review of EPRDF's conception of democracy in post-1991 Ethiopia' (2011) 5 *Journal of Eastern African Studies* 4: 641-663; Aalen L *Ethnic Federalism in a Dominant Party State: The Ethiopian Experience 1991-2000* (2002).

42 According to Przeworski, political parties were detested institutions in the nineteenth century, when they were known factions with parochial interests; political parties are a twentieth-century phenomenon. See Przeworski A *Democracy and the Limits of Self-Government* (2010) 23.

43 Cheibub JA & Limongi F 'Legislative-executive relations' in Ginsburg T & Dixon R (eds) *Comparative Constitutional Law* (2011) 226.

44 Berhanu K 'Parliament and dominant party system' in Salih M (ed) *African Parliaments: Between Governance and Government* (2005); Markakis J *Ethiopia: Anatomy of Traditional Polity* (1974) 178-179.

da and that bills introduced by the government do not necessarily have priority:[45] the speaker, not the government, defines the legislative agenda. There is also a degree of separation between party/executive positions and parliamentary leadership, enabling parliament to maintain a certain autonomy from executive control.

In the light of such lessons, Ethiopia should consider amending its internal rules of procedure to allow MPs more initiative in the legislative process and ensure they can set their own priorities, amendments which could pave the way for a more negotiated policy-making arrangement between the legislature, executive and ruling party. Furthermore, a healthy parliamentary system requires a cohesive rather than a disciplined party, one which does not undermine parliament's autonomy as a democratic institution.

4.2 The nature of the party system

The party system in Ethiopia also tends to sway legislative-executive relations in favour of the executive. A thin line distinguishes 'hegemonic' parties from 'dominant' ones[46], and in Ethiopia there are growing doubts whether the country is a multiparty or one-party state.[47] While the constitution stipulates that '[a] political party, or a coalition of political parties, that has the greatest number of seats in the HoPR shall form the Executive and lead it',[48] thus declaring Ethiopia a multiparty system, the actual political practice is more complicated.

The 2010 national and regional elections made it clear that Ethiopia's transition to genuine multiparty democracy is far from achieved. The ruling party's aggressive campaign, its advantages of incumbency (for example, using government institutions and resources such as the media to its advantage), its better organisational structure,[49] its improved service

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45 Cheibub JA & Limongi F 'Legislative-executive relations' in Ginsburg T & Dixon R (eds) *Comparative Constitutional Law* (2011) 126, 131.

46 See Sartori G *Party and Party Systems: A Framework for Analysis* (1976) 109.

47 Tronvoll has already concluded it is a one-party state. See Tronvoll K 'Briefing: The Ethiopian 2010 federal and regional elections – re-establishing the one-party state' (2010) 110 *African Affairs* 438: 121-136.

48 Article 56.

49 The EPRDF has penetrated deeper into rural Ethiopia than any of it predecessors. Kebele was the lowest unit of government administration the DERG invented. The

delivery at grass-roots level, and the fragmentation of the opposition[50] led to an electoral outcome dominated by a single party,[51] with only one seat going to the opposition and another to an independent candidate. While it is premature to conclude, as some have done, that Ethiopia's multiparty system is giving way to a one-party state,[52] the results certainly do suggest where the country's democratisation process is heading.

In this respect, Sartori draws a useful distinction between a dominant-party system and a hegemonic one.[53] In the former, the political system is not antagonistic to multipartyism as such, but it happens that voters are satisfied with the dominant party and continue to elect it to office in consecutive elections. Regular and free elections are held, opposition parties take part in competitive elections, there are few complaints of irregularity or fraud in the electoral process, and the outcome is respected by winners and losers alike.

By contrast, a hegemonic-party system is not competitive, yet, even so, is not the same as a one-party state.[54] Often associated with the 'developmental state', it aims to create a political and economic hegemony, for example by designing development projects that require more than one term; opposition parties are tolerated so long as they do not pose a threat to the party in power, but because the latter seeks to retain power at all costs, the system does not bode well for multiparty democracy. The political elite retains control of the political process and economic sector, and

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EPRDF has gone further in setting up '1 to 5' units that go down to the family level for electoral, administrative and other purposes. See '*And le amist yelimat weyis ye political serawit' The Reporter* available at http://www.ethiopianreporter.com/index.php/politics/item/292 (accessed 22 February 2013).

50 There are more than 60 national political parties in the opposition camp.

51 The European Union held that the elections failed to meet international standards. See European Union Election Observation Mission *Ethiopia Final Report on the House of Peoples Representatives and State Council Election* (2010).

52 Tronvoll K 'Briefing: The Ethiopian 2010 federal and regional elections – re-establishing the one-party state' (2010) 110 *African Affairs* 438: 121-136.

53 Sartori G *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes* (1997) 102; Cheibub JA & Limongi F 'Legislative-executive relations' in Ginsburg T & Dixon R (eds) *Comparative Constitutional Law* (2011) 29-30.

54 Cheibub JA & Limongi F 'Legislative-executive relations' in Ginsburg T & Dixon R (eds) *Comparative Constitutional Law* (2011) 29-30.

while the government it is not against competition per se, as in a one-party state, it plays a *central* role in politics and in leading the economy.[55]

Particularly in the wake of the elections in 2010, the EPRDF maintains that Ethiopia needs an *Awra*, or a dominant, vanguardist party,[56] with the party literature citing precedents for this in countries such as Japan between 1954 and 1993. Restrictions are imposed on other parties attempting to stand for election; complaints about election-rigging are common; and political pluralism is far the order of the day. Competition and uncertainty of outcome are vital elements of a democratic electoral process,[57] but in hegemonic systems the hegemonic party's victory is virtually assured; moreover, should it lose an election, there is no guarantee it will peacefully transfer power.

The EPRDF argues that Ethiopia post-2010 Ethiopia is a dominant-party system, not a one- party system. The analysis is based largely on comparisons with Japan after World War II, yet it does not mention the electoral irregularities mentioned by several international observers, nor, more importantly, does it address the case, stated above, of hegemonic parties that occupy the ground between dominant- and one-party systems. Furthermore, while the constitution and electoral laws formally ensure a multiparty system, irregularities were reported in nearly all of the four elections between 1995 and 2010.[58]

The EPRDF plans to have control over the economy and political process, something which will certainly create hegemony and which is likely to embolden its leadership in dominating institutions of governance created by the constitution. These institutions are perceived as tools for achieving the party's economic and political goals rather than checking or balancing power; as such, contrary to what the constitution declares, they are not regarded as superior to the party but subordinate to it.

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55 Chalmers J *MITI and the Japanese Miracle: The Growth of Industrial Policy 1925-1975* (1982).

56 EPRDF 'Addis Raey Hamle-Nehase' (2002) 3 Bulletin of EPRDF 3: 30-38.

57 Cheibub JA & Limongi F 'Legislative-executive relations' in Ginsburg T & Dixon R (eds) *Comparative Constitutional Law* (2011) 29-30.

58 For instance, see Abbink J 'Discomfiture of democracy? The 2005 election crisis in Ethiopia and its aftermath' (2006) 105 *African Affairs* 419: 187; Lyons T 'Ethiopia in 2005: The beginning of a transition?' (2006) 25 *Centre for Strategic and International Studies*.

4.3 Post-2005 parliamentary reforms and procedure

The discussion above describes a reversal of legislative-executive relations in favour of the executive, a shift arising from the EPRDF's dominance over the political process in general and parliament in particular. Certain of its members explain this as a development in common with those in other parliamentary systems such as that of the UK, but it oversimplifies key differences between the two systems.

While a one-party cabinet may be the norm in the UK, a one-party parliament is certainly not. The opposition plays a critical role in parliament: along with the existence of vigorous mass media, centuries of democratic parliamentary practice counter-balance executive dominance in parliament.

An important exception is the third parliamentary period (2005 – 2010). After the election outcomes of May 2005, the outgoing parliament was engaged during the summer of the same year in making new laws for the forthcoming parliament composed of the ruling EPRDF and two major opposition parties, the Coalition for Unity and Democracy (CUD) and United Ethiopian Democratic Forces (UEDF). This gave rise to a widespread uproar in June and November 2005 that claimed 192 lives. Once a larger section of the opposition joined the parliament, it became clear that the HoPR's internal rules had to be revised to accommodate this new development. Intense negotiations between the government and opposition led to an agreement that the revision would be based on the parliamentary practices of India, Germany, Canada and the UK.[59]

Among the major reforms was the enactment of a new regulation.[60] One pitfall of the former practice was that the agenda could be set only through the ruling party. In the new regulation, agendas for debate and the time allocated for discussion are to be decided by consensus in the Busi-

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59 See the final report of the committee of experts of all these countries, which made important suggestions that served as basis for the new rules of procedure of the HoPR issued in 2006 (Regulation No. 3/2006): Committee of *Experts Integrated Comparative Study of the Rules of Procedures of the House of Peoples' Representatives of the FDRE Ethiopia and the Rules of Procedures of the House of Commons of Canada, of the Bundestag of the Federal Republic of Germany, of the Lok Sabha of the Parliament of India and of the House of Commons of the United Kingdom* (2006). [Hereafter The Committee of Experts.].

60 The House of Peoples' Representatives of FDRE Rules of Procedure and Member's Code of Conduct Regulation No. 3/2006. [Hereafter the Regulation.].

ness Advisory Committee.[61] If this fails, the matter is referred to the floor of parliament by the speaker for it to be decided by a one-third vote (in a 548-seat parliament).[62] The total number of the opposition seats (diverse in itself) was 173, if all the opposition were to vote together.

In response to this development, a former opposition MP remarked, 'The irony of the matter is that all of the opposition combined cannot add up to one-third of the vote of the total members of parliament. It is thus a foregone conclusion that the ruling party will have a simple majority vote on any issue either in the committee or the floor.'[63] Another former opposition MP noted that although the opposition may have been better represented in parliament than ever before, this did not improve its effectiveness as the new rules required the support of 183[64] members for an agenda item to be tabled for debate, whereas previously they required only 20[65].

Thus, despite the reforms, it remains difficult for the opposition to set an agenda in the House without the agreement of the ruling party. The only way to do so is through the 'one hour a month' schedule; known as 'opposition day', it enables the opposition to discuss its agenda, as provided in the regulation.[66]

Modest efforts were also made to accommodate opposition MPs in various committees. The number of committees rose from 12 to 13 (even increasing after 2010 to 16), and membership in each committee increased from 13 to 20, allowing members of the opposition to participate in committees; in addition, in line with parliamentary traditions elsewhere, the

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61 According to articles 32 and 142 of the Regulation, the House's Business Advisory Committee is composed of the speaker, deputy speaker and party whips (presumably including the government whip in parliament). It is responsible for key business related to the House, such as agenda-setting time allocation for MPs in parliament.

62 See articles 31 and 32 of the Regulation for details; the experts suggested that the restriction be removed.

63 Zewdie T 'One year of experience with democracy in the Ethiopian parliament' in Muller-Scholl M (ed) *Democracy and the Social Question: Some Contributions to a Dialogue in Ethiopia* (2009) 150.

64 Combined, the opposition had 173 elected MPs.

65 Gudina M 'Elections and democratization in Ethiopia, 1991-2010' (2011) 5 *Journal of Eastern African Studies* 4: 672.

66 See article 35 of the Regulation. For an item to be tabled on the agenda as per this provision required the support of the majority of the opposition MPs in the Business and Advisory Committee.

budget and finance affairs standing committee was chaired by the opposition.

Overall, the reforms do not appear to have satisfied the opposition, and in the 2010 elections such gains as had been made were reversed when the ruling party took control of 99.6 per cent of the seats in parliament.[67] Experts from the countries from which the reform process drew for its models noted that, despite the differences between their respective systems, 'all have in common either that the opposition parties are given a formal role in drawing up the agenda or, as in the UK, are given many safeguards under the rules and practices of the House to provide space for them to pursue their own wishes … .'[68] In particular, the experts underlined the value of understanding the mutual roles of government and opposition: the former needs to make the necessary decisions, pass laws and explain policies in parliament; the latter needs to able to criticise the executive and present and deliberate political alternatives.[69]

Because the business of parliament is often decided by a majority, one-party dominance stands to make the life of the opposition difficult and its voice insignificant. To minimize this risk, a minority in parliament may be given procedural guarantees to ensure its voice is heard. Filibustering/blocking is one such measure, but if it is overused it can create complications for the majority.[70] As a result, certain parliaments make use of a motion of closure in which the speaker initiates a vote that enough debate has taken place; if it is supported by a majority, the motion terminates the filibustering. In Ethiopia, the absence of a significant opposition and procedural guarantees to the opposition diminishes parliament's role of reflecting diversity of opinion.

Given these realities, the post-2005 reforms saw some improvements favourable to multiparty democracy but did not cause any significant shift in legislative-executive relations. If such a shift is to occur, it requires an

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67 Only two seats exist, one for an opposition candidate and another for an independent.

68 The Committee of Experts (2006) 115.

69 The Committee of Experts (2006). The experts recommended that the opposition be represented in the office of the speaker, for example as deputy speaker (pg 38), a position which in Germany is occupied by a representative from the largest opposition party (pg 42). It was also recommended that open, recorded and secret ballots be introduced in parliament (pg 48).

70 Meny Y & Knapp A *Governments and Politics in Western Europe* 3 ed (1998) 202-205.

overhaul of the parliamentary system that goes beyond small, tinkering amendments to the House's internal rules of procedure. Indeed, political scientists have maintained that the most important variable in these systems is not the number of parties in parliament but the number of parties in government.[71]

Currently, the operative law in Ethiopia[72] is based on the notion of First Past the Post (FPTP). In an ideal parliament with three parties, A, B and C – each with three, four and five votes, respectively, in a parliament of 12 seats – C is the winner even though it secures less than half of the votes; in fact, seven (the sum of the votes for A and B) of the voters are opposed to C. Party C obtains 100 per cent of them despite the fact that it has not won with an absolute majority ('50' plus one vote). As for A and B, they get zero seats, and the votes cast for them are effectively thrown into the dustbin. Ethiopia's electoral system, in other words, discards the preferences of innumerable voters, while the winner in turn is not necessarily the party with an absolute but merely a relative majority.[73]

By implication, Ethiopia has to consider shifting from an FPTP to proportional (PR) electoral system in which parties with a minimum threshold of five to ten per cent of voter support can share executive as well as legislative positions, a development which prepares the way for genuine power-sharing and multiparty democracy. A first step would be to reform the electoral law to require an absolute majority to win in elections, that is, to require a candidate to win an absolute majority in each district. The more radical reform, though, as above, would change from an FPTP to PR system. The latter is a workable instrument for translating voter preferences into seats in parliament and executive power; whether it would work in Ethiopia in particular is another question, but this is a debate worth having.[74]

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71 See Lijphart A *Democracy in Plural Societies* (1977) 68-75.

72 Article 54(2) states that members of the HoPR shall be elected from candidates in each electoral district by a plurality of the votes cast.

73 For details see Lijphart A *Democracy in Plural Societies* (1977) 68-75.

74 The challenges of coalition-based parliaments are well known but Germany's is a workable example. For details, see Sartori G *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes* (1997) 101; Lijphart A 'Consociationalism and federalism: Conceptual and empirical links' (1979) 12 *Canadian Journal of Politics* 3: 499-515; McGarry J & O'Leary B *The Northern Ireland Conflict: Consociational Elements* (2004) 1-51; Mehler A 'Introduction: Power-sharing in Africa' (2009) 44(3) *Africa Spectrum* 2-10.

4.4 Overlapping functions between the executive and party leadership

Another factor subordinating parliament to higher-level leadership is the overlap of functions between key party figures and top government executives. The EPRDF has a clear tendency to assign party leaders to the executive rather than parliament. Almost all party executives are MPs; in turn, party MPs who do not also hold government portfolios – and who are hence parliamentarians in the strict sense – are nearly all junior party members. For example, the EPRDF has not once assigned its deputy-chair to lead parliament as the HoPR speaker; the rule instead is that he and the party chairman occupy top positions within the executive.

The resulting problem is what Kaare and Storm term 'adverse selection'.[75] The executive is bound to prevail in parliament,[76] because it is hard indeed to see how junior political figures in parliament could control or exercise oversight over their own party leaders, especially so in the context of democratic centralism and party discipline.

4.5 Widespread delegated legislation and lack of political control

Central to limited government is the assumption that all administrative authority must be conferred by legislation. Consequently, if the executive assumes powers not conferred by the constitution or proclamation, it can be challenged either as unconstitutional or *ultra vires*, that is, beyond delegated authority. Delegated legislation is often preceded by guidelines and principles contained in the constitution or a proclamation. It is, in other words, a conditional grant of power by the legislature to the executive.

As discussed in this section, the widespread practice of delegated legislation,[77] combined with parliament's failure to exercise effective political

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75 Storm K, Muller W & Bergman T 'Parliamentary democracy: Promises and problems' in Storm K, Muller W & Bergman T (eds) *Delegation and Accountability in Parliamentary Democracies* (2003) 25. It means the legislature as a principal cannot control the executive as agent.

76 Laver M 'Divided parties, divided government' (1999) 24(1) *Legislative Studies Quarterly* 8.

77 Powers exercised under delegation from parliament have different names across jurisdictions. For present purposes they can be taken to mean the same thing, and 'regulations' will be the term of reference used.

control over it, can be considered as a final factor contributing to executive predominance in Ethiopia's parliamentary system.

Viewing the issue in a comparative perspective, it is the case that the shift in the twentieth century from the *laizzez faire* to welfare state saw a huge expansion in the government's role in the economy and society at large. Punder argues there are some justifications for this: owing to the complexities of the modern state and a lack of time and resources, the legislature cannot be expected to get involved in the level of detail required in regulations.[78] In this regard, studies suggest that governing by executive-issued regulations has become the rule rather than the exception.[79] In the UK some 3,000 regulations are made annually, while in the US the number increases to about 7,000.[80] Similarly, in Ethiopia it is estimated that the number of regulations issued every year far exceeds proclamations made by parliament.[81]

The government's expanded role is not without consequences, notably the risk of arbitrariness and abuse of power. Increased executive discretion through the use of delegated legislation tends towards legislative inflation, a multiplication of legal sources that creates uncertainty and thereby jeopardises the rule of law. Another difficulty relates to the separation of powers and the specialised roles of each branch of the state. If parliament's main function is to make laws, delegating its powers in this regard to the executive may reach the point where it undercuts its relevance and, indeed, its reason for being. In addition, delegated legislation has fuelled concerns about the 'new despotism' of rule of bureaucracy[82] and raised

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78 Punder H 'Democratic legitimation of delegated legislation: A comparative view of America, Britain and German law' (2009) 59 *International Comparative Law Quarterly* 354.

79 Page E *Governing by Numbers: Delegated Legislation and Everyday Policy-Making* (2001).

80 Page E *Governing by Numbers: Delegated Legislation and Everyday Policy-Making* (2001) 4, 14.

81 A recent study indicates that in 1991-2010 parliament made 313 proclamations and the government, 325 regulations. See Worku L 'Express repeal of delegated legislation in Ethiopia' (2012) available at www.abyssinialaw.com (accessed 10 June 2012).

82 Punder H 'Democratic legitimation of delegated legislation: A comparative view of America, Britain and German law' (2009) 59 *International Comparative Law Quarterly* 356.

the question of whether there are sufficient mechanisms of political control over such delegated powers.

More importantly, powers exercised through delegation can lead to a democratic deficit or crisis of legitimacy. Whereas the executive is only indirectly responsible to the electorate via a legislature which represents the will of the people, the legislature derives legitimacy directly from voters; however, overuse of delegated authority causes a shift of significant power away from the legislature and, by implication, the voters they represent. To address the democratic deficit and ensure executive accountability, then, parliament must exercise political control over delegated legislation.

In the United States (US), the country's non-delegation doctrine has become largely irrelevant in limiting executive discretion but still applies to human-rights issues. When fundamental rights and interests are at stake, the choices must be made not by the executive but Congress, with its diverse membership, bicameral houses and multiplicity of voices; the courts will not permit the executive to intrude on liberty or limit rights without congressional authorisation.[83]

Moreover, while the US apparently grants wide powers to the executive, the latter is subject to a range of political and judicial checks and balances. For instance, regulations (issued by the executive as a body) and rule-making (directives issued by agencies or individual ministers) are strengthened in their democratic legitimacy by the requirement for public participation. The American Administrative Act provides for participation by interested persons as a necessary step in all cases of delegated legislation (553 APA). The Act also provides details on the process of rule-making, which is strictly monitored by state and federal courts.[84] Public participation thus compensates for the lack of substantive predetermination by Congress.

Another mechanism for giving regulations democratic legitimacy is to limit executive discretion by requiring that regulations be made only when there is an explicit provision in the primary legislation.

In the UK, for example, regulations cannot stand on their own: nearly all of them must be consistent with the parent law, which implies that the

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83 Sunstein C *Designing Democracy: What Constitutions Do* (2001) 138-139.

84 Punder H 'Democratic legitimation of delegated legislation: A comparative view of America, Britain and German law' (2009) 59 *International Comparative Law Quarterly* 369-370.

executive has no inherent power to make regulations separately from a primary source. Delegated legislation must be aligned with the intentions of the parent law,[85] and delegated powers are to be used only for that law's express or implicit purpose. Setting guidelines and principles in the parent law – the details of which are fleshed out by regulation – is *ex ante* political control of delegated legislation and has been termed 'parliamentary substantive predetermination of executive rule'.[86]

The UK also provides *ex post* parliamentary mechanisms of control over delegated authority. These take many forms over and above the normal requirements that the executive report to parliament and reply to questions. Most regulations are subject to an affirmative resolution procedure in the House of Commons and the House of Lords, a requirement which can be met in a variety of ways.

First, the draft regulation is laid before parliament for approval within a certain period to time to come into effect; here, parliament may annul or endorse it. Secondly, the regulation is laid before parliament, coming into effect immediately but only for a specified period (often 40 days), its fate dependent on parliamentary approval; if there is no approval within that period, the regulation expires at the end of it. In a third possibility – a negative resolution – the executive allows parliament to annul the regulation in a stated period after submission to a special committee; if it is not annulled within, say, 40 days of submission, it remains effective.[87]

This third practice emanates from Germany, which has even stricter requirements than the UK for issuing regulations. According to Article 80 (section 1) of the Basic Law, 'The Federal government, a Federal Minister, or the Land (state) governments may be authorised by a law to issue statutory instruments [regulations]. The *content*, *purpose* and *scope* of the authority conferred shall be specified in the law ... .'[88] Not only is delegated authority required to emanate from parent law but the parent law also determines the content, scope and purpose. If this is not complied with, the

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85 Punder H 'Democratic legitimation of delegated legislation: A comparative view of America, Britain and German law' (2009) 59 *International Comparative Law Quarterly* 357.

86 Page E *Governing by Numbers: Delegated Legislation and Everyday Policy-Making* (2001) 20.

87 Page E *Governing by Numbers: Delegated Legislation and Everyday Policy-Making* (2001) 26; 155-157.

88 Emphasis added by the author.

Constitutional Court can quash the law. Ordinary courts are also competent to check the compatibility of the regulation with the parent law.

The Basic Law thus places a substantive limit on parliament's power to delegate, given that proclamations must predefine the 'content, purpose and scope' of the delegated authority. In other words, parliament may not simply give the executive broad authorisation to do as it wishes; moreover, post-enactment political control applies in Germany as it does in the UK, in that parliament can veto delegated legislation. These requirements ensure that, as the representative of the people, parliament bears political responsibility for all laws issued by the executive, an arrangement that in turn guarantees the executive's constitutional responsibility to parliament.[89]

The procedures discussed in respect of the US, UK and Germany are all tools for exercising parliamentary control over the executive, and, more particularly, for legitimising delegated legislation and thereby addressing the problem of a democratic deficit. By contrast, Ethiopia has a very weak system for doing so, with delegated legislation subject neither to prior substantive predetermination by parliament nor to plenary or committee approval after having been enacted. Instead a common trend is for the parent law to make a general statement that enables the executive to issue regulations but which gives little in the way of guiding detail.

An example is Article 34 of Proclamation No 691/2010 on the Re-organization of Federal Government, which states:

> The Council of Ministers is hereby empowered, where it finds it necessary, to Re-organize the Federal Government executive organs by issuing regulations for the closure, merger or division of an existing executive organ or for change of its accountability or mandates or for the establishment of a new one.

Such a broad authorisation to the executive, literally entitling it to 'make and unmake' itself, does not sit well with the principle that the executive derives its existence from, and is accountable to, parliament. In this case, parliament has not so much delegated authority to the executive as abdicated its core function in favour of another branch of state, a function which, in view of the notion of separation of powers, is arguably non-delegable.

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89 Punder H 'Democratic legitimation of delegated legislation: A comparative view of America, Britain and German law' (2009) 59 *International Comparative Law Quarterly* 358.

As Scalia has noted, '[t]he legislative power is the power to make laws, not the power to make legislators'.[90]

What purpose has it left to serve, then, if a parliament not only delegates a primary function – that of organising, supporting and supervising the executive – but sets no guidelines or principles in terms of which it could later check to see if the executive has complied with its intentions? By the same token, this delegation of authority endows the executive with powers more comparable to those in a presidential than a parliamentary system, such a system being one in which the presidents gets a mandate from direct election and remains the sole office for making and unmaking the executive.

In short, the executive takes away one of the powers of parliament and at the same time keeps the latter in the dark about what it then does with it – a situation revealing how emboldened Ethiopia's executive is and how impotent its parliament.

A second case relates to the executive mandate emanating from a parent law. Proclamation No. 587/2008 deals with the establishment of the Ethiopian Revenue and Customs Authority and, in Article 19 sub 1 (b), declares 'the administration of the employees of the Authority shall be governed by regulation to be issued by the Council of Ministers'. This proclamation, in other words, is meant to serve as a parent (enabling) law to the regulation to be issued by the Council of Ministers. The latter issued Regulation No. 155/2008, in which Article 37 states:

1. Notwithstanding any provision to the contrary, the Director General may, without adhering to the formal disciplinary procedures, dismiss any employee from duty whenever he has suspected him of involving in corruption and lost confidence in him.

An Employee who has been dismissed from duty in accordance with sub article 1 of this Article may not have the right to reinstatement by the decision of any *judicial body*.

The regulation mandates the Director General (DG) with two contested powers, the first of which is the DG is not required to prove that the employee is corrupt since a mere suspicion is enough to dismiss an employee;[91] secondly, contrary to the separation of powers, the DG is a judge

90 Scalia A *A Matter of Interpretation* (1997) 35.

91 Article 20 subsec 3 of the Constitution states that 'accused persons have the right to be presumed innocent until proven guilty'. Corruption is an increasingly serious

on his or her own case and has no need to subject it to a court decision or investigation by an impartial body.

Here, the parliament has set no guiding principles against which the decisions of the DG are to be checked via the institution of political control. In effect, it wrote a blank cheque, leaving the executive free to fill in whatever amount it pleases – and, as a bonus, parliament even ousted the judiciary from adjudicating cases arising from such unlawful dismissal, a power the executive lacks under Ethiopia's constitution.

As these examples show, the executive enjoys wide and unrestrained discretion while the judiciary and parliament exercise little or no control over it. Executive enactment of delegated legislation is widely practised, not subject to accountability, and often democratically deficit.

To redress these problems, parliament needs to limit executive discretion in regulations by stating some general principles when it authorises secondary legislation. Each standing committee must also be expressly empowered by the HoPR to check the compatibility of delegated legislation of the respective executive wing with the law enacted by parliament. In addition, the committees need to check whether executive discretion has been exercised in line with the purpose stated in the legislation. A more comprehensive reform would require parliamentary approval of regulations issued by the executive before they come into effect.

Such institutional reforms, it is hoped, would mitigate executive power and help to restore some balance in favour of the HoPR.

5 Conclusion and recommendations

This chapter has analysed the Ethiopian case in the light of two key notions: parliamentary supremacy and government accountability to parliament. What the analysis demonstrates is that, if Ethiopia is any guide, parliament's role as an institution of democracy hinges on intra-party democracy, particularly in the ruling party. If the party is authoritarian, parliament will become a rubber stamp for an executive composed of party leaders, with parliamentary supremacy replaced by executive supremacy,

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issue in Ethiopia and proving such sophisticated crimes is a difficult job, but one wonders if it is not possible to fight corruption without violating rights.

even cabinet dictatorship; if it is democratic, parliament may become a viable institution for policy debate and oversight of the executive.

Ideally, parliamentary systems require 'parliamentary-fit parties' based on party cohesion, not party discipline. These systems, to be sure, need some manner of party rule at their disposal to ensure that MPs continue to support their party's positions, yet that should not be extended to allow party leaders to impose discipline on MPs under all circumstances no matter if the government is threatened with collapse or not. The reality is that 'democratic centralism' and an excess of party discipline have compromised, if not defeated, parliamentary supremacy in Ethiopia.

It is therefore recommended that there be a shift from party discipline to the practice of party cohesion. Parliament may then have the means to initiate policy and laws on its own. Through the speaker and party whips, parliament should have an undisputed mandate to set its own agenda and revise its internal rules of procedure in ways that restore its supremacy.

Furthermore, the overlap of functions between party and executive leadership needs to be reconsidered. The fact that heads of the party are automatically heads of the executive sends the message that, in the opinion of the party, the legislative body is of lesser important and encourages voters to adopt the same attitude. It is crucial to assign key party figures to head the legislature without assuming executive positions. This new approach can pave the way for the evolution of the differing institutional interests and enhance parliament's role as a democratic institution. It is naive to expect junior political figures in parliament to exercise effective oversight and control of the executive and the party leadership at the helm of power.

Closely related to these considerations is the idea that parliament should represent society's diversity of views. Except for the 2005 – 2010 term, Ethiopia has been a one-party-dominated parliament, a state of affairs due in part to its FPTP system. Revisiting the relevant electoral laws is crucial to ensuring better representation of diverse political views in parliament.

The absence of *ex ante* and *ex post* control of parliament over delegated legislation and the widespread practice of executive discretion are matters requiring that parliament give priority to establishing mechanisms for checking the executive. In other parliaments, executive discretion is subject either to parliamentary guidelines set before secondary legislation is enacted or to approval by parliament after to their enactment. None of these mechanisms exist in Ethiopia. It is high time to revise parliament's inter-

nal rules and establish these practices in order to enable parliament to exercise political control over the executive.

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More than Enacting a Just Constitution: Lessons from Kenya on the Challenges of Establishing a Rule-Based Democratic Politics

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Abstract

The post-election violence that brought Kenya to its knees in 2007/2008 was blamed on the poor construction of its post-independence constitution. Like many other countries that turned to constitution-making to resolve structural political and socioeconomic issues, Kenya resorted to constitutional reform in the belief that a democratic and properly designed constitution would address the factors that occasioned instability and violence. The resultant constitutional negotiations and reform led to a wide range of institutional and policy changes. The constitution provided for an independent judiciary and a number of independent commissions; an executive that is now limited both in scope and through a robust system of checks and balances; and a judicially enforceable bill of rights. Moreover, in a departure from a history of highly centralised and unitary governance, the constitution devolved part of the national government power to 47 newly constituted counties.

However, these institutional niceties did not see constitutionalism and the rule of law becoming embedded in the society's lived experience. As the elections in March 2013 showed, power is contested and voters are mobilised by political actors who behave in much the same way as they did before the advent of the new constitution. What factors account for this? What needs to be done to help ensure that the fine institutional designs of the Constitution become part of society's lived experience? In addressing these questions posed by the experience of Kenya, I submit that any attempt to achieve a just, democratic and rule-based political dispensation should go beyond making a good constitution and seek to achieve a societally-rooted democratic polity.

1 Introduction

In the aftermath of the 2007-2008 post-election violence, Kenya reopened the process of reviewing the country's constitution, a process which opposition and civil society actors had been demanding since the 1990s. This resort to constitutional reform was informed by a widely held view that the violence was attributable in significant measure to structural flaws in the way the Lancaster House constitution had organised power and designed institutions. The constitutional review process culminated in the adoption of a new constitution, one supported by 67 per cent of voters in a popular referendum and promulgated on 27 August 2010 at a ceremony at Uhuru Park in Nairobi.

The 2010 Constitution of Kenya promised to usher in fundamental changes to the legal and political system. It provided for an independent judiciary and a number of independent commissions; an executive that is now limited both in scope and through a robust system of checks and balances; and a judicially enforceable bill of rights. Moreover, in a departure from a history of highly centralised and unitary governance, the constitution devolved part of the power of the national government to 47 newly constituted counties. Yet while these are undoubtedly important and necessary changes, the institutional and policy changes enacted in the 2010 Constitution are not enough on their own to lead to a triumph of constitutionalism and rule of law over the corrupt and violence-ridden politics of the old regime. In this chapter, I argue that any attempt to achieve democratic transformation should go beyond the making of a good constitution and seek to attain democratic politics in a democratic society. Unless it is accompanied by democratic politics, a constitution in and of itself will not result in the emergence of a just and democratic system of governance free from violence.

To the extent that the country's elites are bent on upholding the political techniques of the old order, the promise of the 2010 Constitution for ushering in a new political dispensation would be very difficult to realise. As the general elections in March 2013 showed, power is contested, voters are mobilised and political actors conduct themselves in much the same way as before the making of the new constitution. This clearly indicates that the success of Kenya's 2010 Constitution remains uncertain and that it will depend on the degree to which the country is able to break with the political practices of the old regime.

2 Analytical framework

Amartya Sen's theory of justice underlines the importance of democratic politics. In *The Idea of Justice*, he suggests that the achievement of a just democratic system should go above and beyond John Rawls's contractarian theory of justice and its emphasis on the virtue of fairness. As Sen points out, 'the exercise of fairness through the approach of [the] social contract is geared, in the Rawlsian case, to identifying only the "just institutions".'[1] Accordingly, '[i]n the Rawlsian system of justice as fairness, direct attention is bestowed almost exclusively on "just institutions", rather than focusing on "just societies" that may try to rely on both effective institutions and on actual behavioural features'.[2]

For Sen, it is one thing to identify just institutions, but quite another to have their ideals realised in practice; in other words, identifying just institutions does not by itself lead to the emergence of a just democratic system. As he maintains, '[t]he unanimous choice of the principles of justice is ground enough, Rawls argues, for their forming a "political conception" of justice that all accept, but that acceptance may still be a far cry from the actual patterns of behaviour that emerge in any actual society'.[3]

From Sen's insightful critique of the Rawlsian theory of justice, it follows that the effort to achieve a just democratic system should address both just institutions as well as the behaviour of political actors and members of society. Sen's theory gains further applicability to the purposes of this chapter when it is read in conjunction with the distinction Yash Ghai makes between 'the enactment of a constitution and the adherence to its values, institutions and procedures'.[4] As Ghai emphatically reminds us, the 'notion of a constitutional order is broader than merely the text of the Constitution. It represents, a fundamental commitment to the principles and procedures of the constitution and therefore emphasizes behavior, practice, and internalization of norms.'[5]

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1 Sen A *The Idea of Justice* (2009).
2 Sen A *The Idea of Justice* (2009).
3 Sen A *The Idea of Justice* (2009) 68.
4 Ghai Y 'Decreeing and establishing a constitutional order: Challenges facing Kenya' *African Arguments* available at http://africanarguments.org/2009/08/10/decreeing-and-establishing-a-constitutional-order-challenges-facing-kenya/ (accessed 20 August 2010). (Hereafter Ghai Y 'Decreeing and establishing a constitutional order'.).
5 Ghai Y 'Decreeing and establishing a constitutional order'.

This distinction between, on the one hand, decreeing and, on the other, establishing a constitutional order suggests that a just, democratic system of governance depends on more than the rules and institutional designs of the constitution itself. Although these are essential, of equal or even greater importance are 'the social and political processes, the interplay of economic, social and ideological interests, which influence, and often determine, the impact of constitutions'.[6] As such, in addition to restructuring institutions of state and enacting democratic policy principles in a constitution, inaugurating a democratic order demands a complete break from the corrupt politics of the old order and the pursuit of a democratic culture founded on the rule of law, constitutionalism and human rights.

Such institutional and political transformation necessitates the self-empowerment and active mobilisation of various centres of public power as key elements in the pursuit of the vision and aspirations of the constitution. In this regard, the role of civil society organisations, individual citizens, professional associations, the free press and public intellectuals is of paramount importance.

3 Locating the roots of the crisis

The theoretical framework above provides a means of locating factors that precipitated large-scale post-election violence in 2007-2008. Two sets of factors can account for the crisis of the post-colonial state in Kenya. The first relates to flaws in the design and structure of state institutions; the second is the emergence of a corrupt and conflict-ridden political culture and the resultant absence of ethical leadership and a culture of respect for constitutionalism and rule of law.

3.1 Post-election violence as a manifestation of a crisis in state institutions

One of the major manifestations of the crisis in state institutions was the way in which the power of the presidency had been configured. Since Ke-

6 Ghai Y & Ghai GC 'Kenyan constitution: The challenges of implementation' *Pambazuka News* available on http://www.pambazuka.org/en/category/features/66501 (accessed August 2010).

nya's independence in 1963, the constitution was routinely amended and manipulated to consolidate and over-concentrate government authority in the hands of the presidency. Although the 1963 Lancaster House constitution provided for a dual executive authority divided between a president and a prime minister, it lasted only until December 1964, when it was replaced by a pure presidential system. The constitutional change instituting this system marked the beginning of a series of constitutional amendments that gave the president absolute authority and control over all affairs of the state.[7]

This process saw the rise of a legendary 'imperial presidency' reminiscent of the all-powerful Ruler of the fictional Republic of Aburiria in Ngugi wa Thiong'o's novel *Wizard of the Crow*.[8] As had happened with the Ruler, power had been concentrated in the office of Kenya's president to such an extent that, according to the Waki Report, people eventually seemed to believe that 'everything flows not from laws but from the President's power and personal decisions'.[9] Indeed, as the Report put it, 'acquisition of presidential power [was] seen both by politicians and the public as a zero sum game, in which losing is seen as hugely costly and is not accepted'.[10] Because control of the presidency amounted to control of a system of patronage for the exclusive advantage of the president's support-base, it became the main site of struggle between rival groups vying for power over the state machinery and the economic prosperity that came with it.

The accumulation of absolute power in the hands of the president emasculated the authority and independence of various state entities. Key institutions such as the judiciary, the electoral management body and security organs became entirely subservient to the president. The administrative bureaucracy served as the machinery for primitive accumulation, abuse, repression, and the dispensing of patronage; lack of professionalism further undermined the role assigned to these institutions under modern de-

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7 As the Waki Report established, laws were routinely passed to increase executive authority, while those laws which stood in the way were either changed or ignored. By 1991 the constitution had been amended about 32 times. See Report of the Kenya Commission of Inquiry into Post-Election Violence available at http://reliefweb.int/sites/reliefweb.int/files/resources/15A00F569813F4D549257607001F459D-Full_Report.pdf (accessed 10 July 2013). (Hereafter Waki Report.).

8 Ngugi T *The Wizard of the Crow* (2006).

9 Waki Report 29.

10 Waki Report 29.

mocracy. Consequently, as the Waki Report pointed out, state institutions were seen as neither credible nor legitimate.[11]

One of the instruments through which modern states resolve disputes through democratic process rather than violence is judicial adjudication. By providing disputing parties an impartial hearing, an independent judiciary ensures that disputes do not degenerate into violence. In 2007, the judiciary's lack of independence from the president and its resultant loss of credibility led to an institutional vacuum at a time when there was a critical need for a mechanism to resolve the country's electoral dispute and prevent it from escalating, as it did, into Kenya's worst political violence since independence.[12] There was a widely-held public perception 'that Government institutions, and officials, including the judiciary, were not independent of the presidency, were not impartial and lacked integrity. Hence, they were perceived as not able to conduct the election fairly.'[13]

In addition, the electoral commission and security institutions suffered a similar crisis as the judiciary, in the process losing public confidence in their ability to discharge their mandates credibly and effectively.[14] For example, deep mistrust of the Electoral Commission of Kenya meant that opposition politicians had little reason to believe commissioners would address their complaints fairly.[15] The irregularities that blighted these institutions are described in detail in the Kriegler and Waki reports.

A further structural flaw arose when the country's first post-independence government repudiated the semi-federal system of government that had been provided for in the 1963 constitution. Regional and local governments were stripped of autonomous power, with all governmental power being concentrated in the national government in Nairobi. Ghai describes the adverse effects thereof in the following terms:

> [The] CKRC (Constitution of Kenya Review Commission) noted widespread feeling among the people of alienation from central government because of

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11 Waki Report 29.

12 The Kenya Independent Review Committee Report of 2008 (also known as the Kriegler Report) 141. (Hereafter the Kriegler Report).

13 Kriegler Report 28.

14 As Ghai notes, 'The subordination of the electoral commission, the police, and the judiciary to the executive has resulted in their inability to resolve national problems, though this is why they are set up, with independent powers.' See Ghai Y 'Decreeing and establishing a constitutional order'.

15 International Crisis Group 'Kenya's 2013 elections' (2013) *Africa Report* No. 197. (Hereafter the ICG Report.).

> the concentration of power in the national government, and to a remarkable extent, in the president. They felt marginalised and neglected, deprived of their resources; and victimised for their political or ethnic affiliations. They considered that their problems arose from government policies over which they had no control. Decisions were made at places far away from them … . As their poverty deepened, they could see the affluence of others: politicians, senior civil servants, cronies of the regime. They felt that under both presidential regimes, certain ethnic groups had been favoured, and others discriminated against. There was particular resentment against the provincial administration which was seen as an extension of the president's office, and of the arbitrariness and abuse of power by its officials. Local government had lost its authority and had been deprived of financial resources since independence.[16]

As Michela Wrong puts it, 'Under both Kenyatta and Moi, the (central) government's hold on the Kenyan economy – whether in terms of civil service jobs, parastatal posts or contracts up for grabs – was … vast.'[17] In the context of the winner-take-all politics of a patronage system, successive governments used their hold on the economy for the benefit of groups and regions within their support base. Kenya's post-colonial period has been marked consequently by uneven development of the different regions of the country. As the Waki Report noted, this produced 'a feeling among certain ethnic groups of historical marginalization, arising from perceived inequities concerning the allocation of land and other national resources as well as access to public goods and services'.[18]

3.2 Post-election violence as a manifestation of corrupt and violent politics

Considered on its own, the crisis facing state institutions does not fully explain the 2007-2008 violence. Indeed, that crisis is, to a significant degree, attributable to the nature of the political behaviour and conduct that has been nurtured in the country during both the colonial and post-colonial periods. Corruption, violence, the manipulation of ethnic grievances, abuse

16 Ghai Y 'Devolution: Restructuring the Kenyan state' (2008) 2(2) *Journal of Eastern African Studies* 215.

17 Wrong M *It's Our Turn to Eat* (2009) 160. (Hereafter Wrong (2009).).

18 Waki Report, 23.

of public office and the arbitrary exercise of power have come to define much of the character of Kenya's politics.[19]

Perhaps the strongest manifestation of Kenya's troubled political culture is corruption, a problem of such pervasiveness and obscenity that it calls to mind Chinua Achebe's treatment of this subject in his essay, *The Trouble with Nigeria*. In Achebe's diagnosis, corruption is Nigeria's central problem, and the same can be said of Kenya. As Wrong aptly notes, the 'system of corruption [was] so ingrained, so greedy it was … throttling the life from the country': [20]

> Whether expressed in the petty bribes the average Kenyan had to pay each week to fat-bellied policemen and local councillors, the jobs for the boys doled out by civil servants and politicians on strictly tribal line, or the massive scams perpetrated by the country's ruling elite, sleaze had become endemic.[21]

An equally troubling dimension of Kenya's political culture, one inherited from the colonial era and widely entrenched since then, is tribalism.[22] Given that the government power centrally controlled in Nairobi was used to the exclusive benefit of the group from which the president comes, membership of an ethnic group determined the life chances of citizens. Indeed, as Wrong points out, ethnic favouritism 'does more than blight life chances. It can actually kill'. Illustrating this dramatic point, she observes:

> A 1998 survey found that Kalenjin children were 50 per cent less likely to die before the age of five than those of other tribes, despite the fact that most lived in rural areas, where life is generally tougher … . Under Moi, Kalenjin areas benefited from better investment in clinics, schools and roads.[23]

Ethnic membership is manipulated and marshalled whether to consolidate power or to attempt to wrest it from an existing ruling class. In the Waki Report, tribalism is described as 'a feeling among certain ethnic groups of historical marginalization, arising from perceived inequities concerning the allocation of land and other national resources as well as access to public goods and services'. The Report notes that

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19 See generally Branch D *Kenya: Between Hope and Despair 1963-2011* (2011); Wrong (2009) 160.
20 Wrong (2009) 160.
21 Wrong (2009) 11.
22 Wrong (2009) ch 4.
23 Wrong (2009) 56.

> [t]his feeling has been tapped by politicians to articulate grievances about historical injustices which resonate with certain sections of the public. This has created an underlying climate of tension and hate, and the potential for violence, waiting to be ignited and to explode.[24]

Following the introduction of multiparty elections in 1992, ethnic grievances have been manipulated so routinely and extensively in the contest for government power that the practice has virtually institutionalised violence, particularly during elections.[25] According to the Waki Report, '[v]arious reports covering elections held during this period alleged that high-ranking political figures, civil servants, and others close to the heart of the Government organized and used violent gangs to intimidate people in areas of potential opposition support, most of whom were Kikuyu, Luo, Luhya, Kamba, and other groups'.[26]

The failure to bring to justice those responsible for violence has created what the Report called a 'culture of impunity',[27] one that involves the practice 'of forming groups and using extra-state violence to obtain political power and of not being punished for it'[28]. This culture of impunity applies not only to politically-motivated ethnic violence but to corruption. Thus, in spite of the fact that a number of independent commissions were established, none of them has resulted in anyone being held accountable for massive corruption scandals such as the Goldenberg and the Anglo Leasing scandals.

4 The 2010 Constitution of Kenya

In addition to its preamble, Kenya's Consitution of 2010 has 18 chapters and 264 articles. It introduces important norms, values and principles that could potentially transform the Kenyan polity from one based on the whim of politicians to one founded on the rule of law and committed to accountability and responsible leadership. While the contents of the 2010 Constitution were shaped by political compromises meant to accommodate the

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24 Waki Report 29.
25 See Branch D *Kenya: Between Hope and Despair 1963-2011* (2011) 197-215; Waki Report 25.
26 Waki Report 25-26.
27 Waki Report 26.
28 Waki Report 26.

diverse interests of Kenya's political elites, the Constitution also introduced substantive institutional and policy changes. With their aim and promise of ushering in a new democratic order in Kenya, the changes have received the support of vast majority of the public.

4.1 Establishing just institutions

The logic of the analytical framework developed in this chapter, one based on Sen's theory, suggests that the first step for achieving a just and democratic system is the establishment of just institutions. This objective was central to the 2010 Constitution of Kenya. At the institutional level, the most important changes include the attempt to reconfigure the power of the president, the establishment of a system of devolved government, and the restructuring of the judiciary and the election management system.

4.1.1 Demolishing the imperial presidency and boosting the role of parliament

The 2010 Constitution of Kenya redefined the power configuration of the executive branch of government. Before it was quashed at the stage of the Parliamentary Select Committee, the draft that the technical experts submitted proposed a shift from a purely presidential system to a mixed system of government in which executive power is divided between a president and prime minister.[29] Despite the defeat of the dual executive system at the parliamentary stage of the constitution-making process, the 2010 Constitution introduced changes that have curbed to a degree the scope of executive power vested in the president and which have institutionalised a system of checks and balances, albeit that the system is not far-reaching.

In terms of redefining the balance of power in the relationship between the executive and the other branches of government, the 2010 Constitution did a good job of institutionalising separations of powers and the system of checks and balances. Unlike the case in the old system, the president cannot be a member of parliament; in addition, the practice of appointing

29 The proposal divided the two camps in the Government of National Unity into opposing positions, with President Kibaki and his party rejecting the proposal and Prime Minister Raila Odinga supporting it.

cabinet ministers from members of parliament has been abolished, thereby substantially reducing the influence of the executive over parliament. Similarly, the president can no longer suspend or dissolve the national assembly; its members will be elected to fixed five-year terms.

Significantly, the 2010 Constitution enhanced the authority of the legislature and the judiciary to enable them to exercise effective checks and balances over the executive. Key presidential appointments are subject to vetting and approval by parliament.[30] The role of the president in the appointment of members of the judiciary has also been drastically reduced and replaced by a transparent, independent selection process.

The Constitution established a bi-cameral parliament, with a legislative assembly and a senate. The senate will have a limited role in developing legislation and will function primarily as a checks-and-balance mechanism for legislation developed by the Members of Parliament (MPs) in the legislative assembly. The senate will also be able to oversee the activities of the executive. In particular, the senate can impeach the president of Kenya if circumstances require that this be done. The parliament has powers of accountability, such as reviewing the conduct of the executive (including that of the president) and exercising oversight over state organs.

In order to entrench the accountability of MPs to the people, the 2010 Constitution also provides for the right of recall, allowing the electorate to remove an MP through a vote of no confidence. Furthermore, public participation in the conduct of parliament has been made a constitutional obligation.

In terms of curbing the power of the president, the most substantive change introduced under the 2010 Constitution is the removal of the authority of the president over regional governments. This puts a limit on the traditional powers of the president in a number of ways, including determination of the appointment of regional governments and the distribution of resources. The entrenchment of an enforceable bill of rights adds further limitations to the president's power.

However, as significant as these limitations are, their impact on the authority of the president is not far-reaching, given that most of the powers of the president have been left almost intact. The president retains the power to constitute offices in the public service and make government appointments.

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30 See articles 95, 152, 166, 228 and 229.

4.1.2 Devolving government authority

Devolution of government is another important change introduced under the 2010 Constitution. Article 176 provides that there shall be a county government for each county, consisting of a county assembly and a county executive. Accordingly, apart from the national government, the Constitution envisages the establishment of 47 county governments. In a departure from the previous highly centralised unitary state structure, government power is now divided between the central government and the county governments. This has not only led to a reduction in and limitation on the authority of the central government, but has also created the possibility for county representatives to participate in national policy-making through a second house of parliament, the senate, in which they are represented.

While the system carries, and may itself encounter, certain challenges at the stage of implementation, it has substantially eroded the over-centralisation of power in Nairobi by constitutionally assigning certain forms of political and financial authority to county-level governments.[31] This constitutes potentially one of the most transformative changes in the organisation and distribution of government power.

4.1.3 Rectifying the deficiencies of state institutions

The 2010 Constitution envisages a process for substantive reform of various institutions of the state. While the reform covers all organs of the state, among the most notable of these are the judiciary and the electoral management body.

In an effort to reinstate the credibility of the judiciary, the 2010 Constitution provides for mechanisms for boosting and securing its independence. Administrative and political independence of the judiciary is to be secured through the establishment of the Judicial Services Commission (JSC), a body with the authority to nominate judicial appointees in a legally established and transparent process. For example, in April 2011, after the president withdrew his nomination of Justice Alnasir Visram as the Chief Justice and deferred to the JSC, the Commission conducted public interviews of the candidates short-listed for the offices. Judicial office-

31 Ghai Y 'Devolution: Restructuring the Kenyan state' (2008) 2(2) *Journal of Eastern African Studies* 215.

holders such as the chief justice (CJ), deputy chief justice as well as judges and magistrates were appointed on the basis of a more rigorous, thorough, competitive and transparent recruitment process.

The judicial restructuring envisaged in the Constitution involves not only ensuring the independence of the judiciary but also restoring its integrity and credibility. Accordingly, the Constitution provides for justices and magistrates to be vetted in order to identify and dismiss those found to be corrupt, impartial and incompetent. This is undertaken in accordance with article 73 of the Constitution and the Vetting of Judges and Magistrates Act (2011).[32]

The Independent Electoral and Boundaries Commission (IEBC) is established by section 88 of the 2010 Constitution. Since the failure of the Electoral Commission of Kenya in 2007 was attributable to the unilateral control the president exercised over the election of its members, the 2010 Constitution requires that commissioners to the IEBC be appointed through a consultative and more transparent process. This has led to the emergence of an electoral management body that enjoys greater independence and credibility than was the case in 2007. As one report put it: 'A selection panel, set up in August 2011 through consultations between president and prime minister, identified commissioners who were formally nominated by the president. The list was vetted and approved by parliament in transparent hearings, some of which were even streamed online.'[33]

4.2 Breaking from the corrupt and conflict-ridden politics of the old order

As the analytical framework adopted in this chapter makes clear, one of the most significant contributions of Sen's theory of justice compared to the Rawlsian theory is its emphasis on the notion that the conduct of political actors and members of society is a key element of a just and democratic system. Applied to the discussion at hand, it suggests that while having a just and effective constitution is important, constitutional change in itself cannot be expected to serve as a panacea for Kenya's social and political woes. Indeed, as Yash Ghai would remind us, the constitution does

32 Article 73 outlines the required qualities of leadership, which include competence, integrity and accountability.

33 ICG Report 19.

not have arms and legs of its own by which to transform Kenya. For the constitution to effect the required changes, what is required is more than a redesign of institutions and restructuring of political power. Equally important, if not more so, is that a culture of constitutionalism should be implanted in the psyche of the Kenyan people, including its leaders – a culture of respecting the rule of law and abiding by the dictates of the constitution and its values.

To this end, it is imperative that the Constitution provide for a complete break from the country's corrupt, authoritarian, violent political culture and put in place provisions that nurture ethical, democratic and rule-based politics. In this respect, what the late Ismail Mohamed, Chief Justice of South Africa, said of South Africa's constitution is most instructive:

> In some countries the Constitution only formalizes, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic. The past institutionalized and legitimised racism.[34]

In a similar fashion, the 2010 Constitution of Kenya seeks to mark a decisive break from a culture characterised by tribalism, corruption, violence, impunity and disregard for constitutionalism and rule of law. Accordingly, it elaborates on the values to which state institutions and holders of public office should adhere. The preamble asserts the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law. Article 10 of the Constitution outlines national values and principles of governance, which include (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; (c) good governance, integrity, transparency and accountability; and (d) sustainable development.

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34 See *The State v T Makwanyane and M Mchunu* 1995 (6) BCLR 665 (CC) at 262.

Additionally and most notably, the Constitution dedicates an entire chapter (Chapter 6) to articulating the qualities of ethical and democratic leadership. The chapter requires that state officers (elected leaders included) meet appropriate standards of integrity, ethics, and morality. To give effect to the provisions of the Charter, article 80 of the Constitution provides that parliament should enact legislation establishing procedures and mechanisms for the effective administration of Chapter Six. It further tasks parliament with making relevant laws for ensuring the promotion of the principles of leadership and integrity and for the enforcement of the chapter.

5 *The inadequacy of constitutional reform and the persistence of old-regime politics*

In an assertion that captures the emphasis the analytical framework puts on the conduct and behaviour of political actors and members of society, the Commission on the Implementation of the Constitution (CIC) rightly pointed out that '[c]onstitutional building as well as constitutionalism require positive reaction and response from every citizen. The absence of good values from the citizenry and government officials is a significant challenge to the implementation of process.'[35] This requires one to look beyond the Constitution and examine the political practice and disposition of the political forces that control and shape the exercise of government power.

The political elites that dominate Kenya's politics – and the manner in which politics has been conducted since the adoption of the 2010 Constitution – illustrate Sen's argument that the 'political conception' of justice, one which all accept in theory, can be 'a far cry from the actual patterns of behaviour that emerge in any actual society'.[36] While it could be said the 2010 Constitution was largely successful in establishing just institutions and in articulating the values and principles that ought to guide their behaviour, it is the case, unfortunately, that the country's political elite demonstrably lack commitment to these norms; as a result, politics continues to be conducted largely on the basis of the rules of the old regime.

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35 Commission for the Implementation of the Constitution (CIC) *2nd Quarterly Report* (April–June 2011) 4.

36 Sen A *The Idea of Justice* (2009) 68.

Notwithstanding the provisions of the Constitution, and despite their internal differences, political elites holding public office deploy practices that are meant to serve their vested interests. In this regard, Charles Nyachae, head of the CIC, observed that a major challenge facing the process of implementation emanates from precisely those state organs with the greatest obligations to ensure the Constitution's implementation.[37]

Recent cases which illustrate that personal enrichment is the overriding concern of political elites involved the controversy over benefits and salaries to public officials. In October 2012 members of the old parliament, among the highest paid in Africa, proposed a $110,000 bonus to reward themselves at the end of their term.[38] A pay structure put forth by the Salaries and Remuneration Commission in March 2013 sought to reduce the salaries of public officials under the new government, but was fiercely contested by the newly-elected office-holders; following public protests, a compromise was reached to keep the reduced salaries but reinstitute the benefits that the proposed pay structure sought to eliminate.[39]

Another manifestation of the reluctance of the political elites to abandon the rules of the old politics and abide by the principles of the constitution is the failure of parliament to uphold the standards of leadership and integrity envisaged under Chapter 6 of the Constitution in the implementation law it passed. The Leadership and Integrity Act No. 19 of 2012, which the previous parliament adopted to give effect to Chapter 6, reduced the ethical criteria initially proposed in the draft that the Constitutional Implementation Committee (CIC) adopted. According to Kenya's *The Nation* newspaper:

> The original Bill created by CIC had put in place stringent vetting measures for individuals seeking elective posts (presidency, senatorship, governorship etc.). The vetting agencies included [the] National Intelligence Service, Kenya Revenue Authority, Chief Registrar of the Judiciary, the Commission for Administrative Justice, Higher Education Loans Board, professional agencies, commercial organizations and any individual or institution as prescribed by the Bill. Thereafter, the Ethics and Anti-Corruption Commission would issue a Certificate of Compliance with Chapter 6, which would then clear them to vie. This provision was however removed by Cabinet, which cited time

37 Commission for the Implementation of the Constitution (CIC) *3nd Quarterly Report* (July–September 2013).

38 See 'Kenyan MPs' proposed pay rise sparks protest' *Al Jazeera* 9 October 2012.

39 See 'See Kenyan MPs take first pay cut, but allowances mount' *Reuters* 12 June 2013.

> constraints and impracticability of the proposed vetting process as being among the reasons for the amendment.[40]

Upon receiving the draft bill from the CIC, the cabinet and parliament changed the requirement of mandatory vetting with a permissive one.

In this context, a Constitution of Kenya (amendment) 2013 bill was introduced to remove members of parliament, judges, magistrates and members of the county assembly from the list of designated state officers under article 260 of the 2010 Constitution.

These strategies were deployed as measures to secure the personal interests of office-holders by insulating them from various rules of the constitution.[41] Similarly, the mandatory requirement in the CIC draft for state officials to declare their income, assets and liabilities was replaced with an optional declaration. In contravention of article 77(1) of the Constitution, the bill as amended and subsequently enacted by parliament made it permissible for public office-holders to engage in other gainful employment while in office.

Political elites also showed little appetite to establish accountability for embezzlement of public funds or the violations perpetrated in the 2007-2008 post-election violence. As the *Economist* magazine put it in 2010, 'Few leading politicians seem to be genuinely determined to end the culture of impunity'; instead, 'Kenya's politicians across the spectrum seem far more concerned to jockey for position'.[42]

The March 2013 elections manifested the tension between the corrupt culture of the old regime and the new political order envisaged by the Kenyan Constitution of 2010. While the Constitution envisions a political process based on democratic principles, the major candidates conducted their electoral campaigns using the rules and techniques of the old order. One commentator deftly captured the disjuncture between the changes introduced by the Constitution and the actual conduct of politics:

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40 Mureithi F 'Cabinet dilutes Bill on integrity' *The Star* 7 August 2012 available at http://www.the-star.co.ke/news/article-7181/cabinet-dilutes-bill-integrity (accessed 26 August 2013).

41 For example, regarding the proposed amendment to article 260 of the Constitution, the Head of the CIC observed that '[b]eyond the individual, partisan and group interests, it is not clear whether some of the proposed amendments enhance the constitutionalism and promote the interest of the Kenyan people'. See Commission for the Implementation of the Constitution (CIC) *3nd Quarterly Report* (July–September 2013).

42 *The Economist* 18 February 2010, 55.

> It is certainly the case that, in the intervening years, formal institutions have been overhauled and reforms implemented, a new constitution has been approved, and transitional justice mechanisms have been pursued. But the underlying dynamics of how power is contested and distributed have not changed. The salience and politicization of ethnicity remains a defining characteristic of the Kenyan political system, even if at the local level voters have shown that they are willing not to vote along ethnic lines. The winner-takes-all nature of the system generates dynamics that reinforce fault lines of conflict along ethnic and regional divides and make it extremely hard for political leaders to look beyond their narrow self-interest (or who gets to 'eat) and focus on the broader national interest. But unless these kinds of perverse incentives are addressed at their core, the patterns of exclusion and patronage they engender will continue to be latent sources of violence.[43]

Writing in 2010 about notable features of the country's polity, the *Economist* argued that 'tribalism remains the motor – and the bane – of Kenyan politics'.[44] Political choices, it said, are not made out of ideological preference; due to perceptions of discrimination, politically-fanned prejudice and the manipulative acts of political elites, they are made instead on the basis of 'tribe or tribal alliances'.[45] As John Githongo observed after the 2010 constitutional referendum, 'the results demonstrated that no idea as yet transcends the ethnic one and so the tribal number-crunching by the elite in the new dispensation has started'.[46] The March 2013 elections demonstrated beyond doubt that the politics of tribalism are alive and well. Politicians running for elected offices formed alliances, mobilised the electorate and conducted their electoral campaigns in terms of the politics of tribalism, and it was mainly on the basis of ethnic arithmetic that Uhuru Kenyatta and William Ruto formed the winning electoral alliance.[47]

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43 Menoca AR 'Kenya's peaceful election does not make it a healthy democracy' *Foreign Policy* 22 March 2013 available at http://transitions.foreignpolicy.com/posts/2013/03/22/kenyas_peaceful_election_doesnt_make_it_a_healthy_democracy?wp_login_redirect=0 (accessed 30 March 2013).

44 *The Economist* 18 February 2010, 56.

45 *The Economist* 18 February 2010, 56.

46 Githongo J 'The old is dead but the new is not yet born' 6 October 2010 available at http://johngithongo.wordpress.com/2010/10/06/kenyas-new-constitution-the-old-is-dying-but-the-new-is-not-yet-born/ (accessed 19 October 2010).

47 Mutua M 'Why the tribe is still king in Kenya's power politics' *Daily Nation* 9 March 2013 available at http://www.nation.co.ke/oped/Opinion/Why+the+tribe+is+still+king+in+Kenyas+power+politics/-/440808/1715680/-/view/printVersion/-/n1bxj3/-/index.html (accessed 20 March 2013).

It emerges from the foregoing discussion that while the establishment of just institutional and policy frameworks has largely been met, the conduct of key political actors remains untransformed. Indeed, despite the institutional and normative changes under the constitution, the elites of the old order have not been dislodged and maintain much of their political and economic leverage. This is visible from both the leadership of the new government and the membership of parliament. These important political actors are still inclined to conduct themselves in accord with the rules of the old political order; as such, they impede development of the democratic political culture which is required if the ideals of the 2010 Constitution are to be translated into reality.

A struggle clearly exists between the change the Constitution seeks to bring about and the continuity with the past which the old order wants to maintain in one form or another. Although it is too early to conjecture as to which of these will eventually triumph, it is not out of the question that the forces of changes could prevail. The dispute over the March 2013 elections was successfully resolved through judicial adjudication; attempts by MPs to award themselves egregious pay rises were countered by civic mobilisation; and the media, civil society organisations and the CIC continue to promote adherence to the Constitution and challenge acts of constitutional sabotage by public officials. These and other actions offer hope for the incremental realisation of ethical, rule-based and democratic politics.

6 Conclusion

Countries seeking democratic transformation often place great faith in achieving this objective through constitutional reform. As the experience of Kenya vividly shows, however, such reform alone is not sufficient for the task. An equally, if not more, important determinant is the existence of political commitment in adequate supply.

With the adoption of the 2010 Constitution and the subsequent process of putting in place the right institutions and legal frameworks, Kenya has fulfilled one of the two requirements of Sen's theory of justice, namely the establishment of just institutions. Not unexpectedly, Kenya faces major challenges in relation to Sen's second theme, the conduct and behavior of political actors and members of society. This chapter has shown shown that the entrenched culture of political corruption, along with the lack of a culture of rule of law and constitutionalism, is yet to be overcome. The

most serious impediment to attaining the Constitution's vision of a decisive break with the old regime is the nature of the politics practised by Kenyan politicians. This is characterised by the manipulation of ethnicity, disregard for the rule of law, the abuse of public office, corruption, and the infliction of socioeconomic and political injustices on various sectors of Kenyan society.

The dilemma concerns the institutionalisation of constitutionalism and the rule of law, and the answer has to be drawn from sources outside of the constitution. Accordingly, there is a need for all political actors to demonstrate commitment to abiding by, and faithfully applying, the constitution's democratic principles and values. This, Ghai points out, is about 'the inculcation of a culture of respect for and discipline of the law, acceptance of rulings by the courts and other bodies authorised to interpret the law, giving effect to judicial decisions, acceptance of the limits on the government, respecting and promoting human and collective rights, [and] the participation and empowerment of the people.'[48] As the Waki Report said, 'What is required … is political will and some basic decisions to change the way politics is conducted, as well as to address its intersection with other issues related to land, marginalization and inequality, and youth.'[49]

Where such commitment is absent, proponents of constitutional renewal should make a sustained and stronger investment in mobilising and nurturing constituents of constitutionalism to push the implementation of the principles of democratic values and rule of law. As the Kenyan experience shows, this is particularly necessary where constitutional reform has not led to the replacement or removal of elites wedded to the rules and methods of old-regime politics. Under such circumstances, the implementation of the Constitution should not be left entirely to these elites; indeed, doing so stands to condemn the Constitution to the same tragedy as in the past, given that 'vested interests among politicians, businesspeople, and the bureaucracy will sabotage reforms (as they have done ever since Kenya's independence)'.[50]

In the absence of political elites and leaders genuinely committed to the values of the Constitution and willing to abide by them, centers of public power should be mobilised to serve as the constituents and guardians of

48 Ghai Y 'Decreeing and establishing a constitutional order'.
49 Waki Report 36.
50 Ghai Y 'Decreeing and establishing a constitutional order'.

constitutionalism. These include independent public institutions, such as the judiciary and other constitutional bodies, which are able to exercise their authority to enforce constitutionalism. Most importantly, organised and leading members of the public – including civil society actors in all their forms and diversity, public intellectuals and the media – should assume greater responsibility for galvanising the public into holding public officials accountable for the implementation of the Constitution.

In adopting the 2010 Constitution, Kenya has taken the first step for making a decisive break with its corrupt, violence-ridden and abusive past. But for this new constitution to achieve the objectives of justice, rule of law and constitutionalism, there is a need for a sustained and a far more robust struggle than was required for reforming the Constitution: changing the country's politics.

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Why Do Constitutions in Africa Not Stand the Test of Time? Lessons and Perspectives from Uganda

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Abstract

Since the 1990s Africa has seen an unprecedented wave of newly-crafted constitutions, with more than 50 countries having modified their constitutions or written new ones. In 1995 Uganda rewrote its constitution, embarking on consultative as well as non-consultative constitution-making processes with the hope that consultation would make the constitution stand the test of time, unlike its three previous constitutions which each had been abrogated or abolished within a decade. Nevertheless, the 1995 Constitution has not survived intact. In less than six years after it was adopted, a commission was established to review it and, in the two decades since the Constitution came into effect, more than 120 amendments have been made or proposed. Such constitutional instability is variously a cause and/or effect of the political conflicts that have characterised African countries in the post-independence era. Using Uganda as a case study, this chapter examines why constitutions in Africa do not stand the test of time and argues that contextual factors are centrally important to long-term outcomes. The context in which a constitution is conceived, drafted, debated and promulgated influences not only its framing as a document but whether it will be respected and upheld after promulgation.

1 Introduction

A constitution, it has been said, is a work of political engineering, 'to be judged like any other construction by how well it stands the test of time'.[1] Although constitutions are intended to withstand this test, some do not:

1 Hague R, Harrop M & Breslin S *Comparative Politics* 6 ed (1988) 154.

they are usually designed to endure in order to maintain political stability but are not immutable documents untouched by changes in the polity's circumstances and the values of citizens. Since it is inevitable that a constitution will fall into obsolescence, processes should exist for updating it regularly to avoid the dangers of change.[2]

In recent years, amidst a wave of democratisation around the world, constitutionalism has become prominent in Africa in questions of politics, statehood and democracy. There have been new winds of change, bringing hope that the continent will see an end to the corruption and authoritarianism for which it was notorious. Today African governments look to written constitutions as a way of legitimising themselves in the eyes of citizens and the world at large, and, under pressure from within and without, have sought to re-establish credibility by amending or radically changing their constitutions.

Against this backdrop, 38 African constitutions have been rewritten since the 1990s and eight underwent major revisions.[3] However, given that nineteenth-century European laws have generally been the primary foundation of law in Africa, these new or revised constitutions take a diversity of forms that nevertheless reflect received colonial models – a tendency particularly evident in the earlier, independence constitutions, which merely imitated the constitutional models of former colonial powers, making it no wonder they could not stand the test of time and were altered or overturned soon after promulgation.

The constitutions of the last two decades, that is to say, contain numerous structural weaknesses and gaps that point to a failure to learn from the lessons of Africa's authoritarian past. For example, little has been done to curb attempts by leaders to entrench their parties or themselves in office, and executive power remains dominant, partly because leaders do not believe in constitutional rule or the provisions that limit their authority.

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2 Manga CF 'Challenges to constitutionalism and constitutional rights in Africa and enabling role of political parties' (2007) 55 *AM. J. COMP. L.* 1.

3 Tripp AM 'The politics of constitution-making in Uganda' in Miller L (ed) *Framing the State in Times of Transition: Case Studies in Constitution-Making* (2010) 158.

The result is that while recent developments in Africa could rightly be described as a constitutional-rights revolution, its prospects are uncertain.[4] Several countries have amended, abrogated, suspended or rewritten their original constitutions, changes usually motivated less by a wish to preserve and improve upon them than to weaken or eradicate them. The Zimbabwean constitution was amended 19 times in 32 years; by 2010, Kenya's constitution had been amended 50 times; and in the two decades since its passage in 1995, Uganda's constitution has seen 120 amendments.

Despite the promise in the air, then, Africa's history of constitutionalism is not a happy one. Many of the problems have been caused not by the absence of constitutions per se but the ease with which their provisions were abrogated, subverted, suspended or brazenly ignored.[5] Uganda provides a laboratory of considerable magnitude for examining such issues. Its history is replete with constitutional crises, civil wars, military coups, insurgencies, ethnic/religious/political cleavages and violent unconstitutional regime-changes, all of which have led to constitutional instability.

2 The concept of constitutional stability

'Constitutional stability' is difficult to define and measure. The lifetime of constitutions can be affected by various events. From a formal or legal point of view, constitutions can be altered by amendment, interpretation and replacement.[6] Arguably, suspension of all or part of their provisions is also a form of alteration; as such, any alteration of the original agreement would affect a constitution's stability.

Indeed, the very notion of a 'stable constitution' is perhaps only an abstract ideal, given that (as noted earlier) constitutions are not immutable and that amendment procedures, for instance, exist for adapting them to new circumstances without affecting their legal continuity.[7] Constitutions need to be, and often are, altered over time to respond to changes in their

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4 Manga CF 'Challenges to constitutionalism and constitutional rights in Africa and enabling role of political parties: Lessons and perspectives from southern Africa' (2007) 55 *AM. J. COMP. L.* 3.

5 Manga CF 'Challenges to constitutionalism and constitutional rights in Africa and enabling role of political parties: Lessons and perspectives from southern Africa' (2007) 55 *AM. J. COMP. L.* 2.

6 Negretto G *The Durability of Constitutions in Changing Environments* (2008) 3.

7 Negretto G *The Durability of Constitutions in Changing Environments* (2008) 2.

political, economic or social environments. This underlines the paramount importance of contextual appropriacy: a constitution's design should match a country's circumstances at particular historical moments; however, alteration or amendment does not imply the legal abrogation of the existing constitution.

The situation is different with constitutional replacement. Here, whether or not procedural forms are observed, institutional reformers decide that a new constitution should be created. Even if it is symbolic and involves little substantive change to the existing constitution, the sheer act of replacing a constitution introduces discontinuity and thus counts almost self-evidently as an indicator of constitutional instability.[8] By contrast, the irregular suspension of a constitution by a military or civilian coup is harder to classify. Clearly, this disrupts the continuity of the constitution; the problem is that such suspensions generally coincide with regime change, indicating political rather than constitutional instability.

Taking these considerations into account, constitutional stability may be defined as the durability, in legal terms, of the original constitution. From this perspective, the lifespan of a constitution is the length of time that passes between its enactment and formal replacement by another constitution. Thus, constitutions that stand the test of time are those which survive for long periods without being replaced.

In the scholarly literature, numerous theories seek to explain constitutional stability, a multi-factorial phenomenon in which the durability of constitutions is seen as a function of variables that increase or decrease their capacity to survive.[9] One group of theories emphasises the role of social and political environmental or exogenous shocks, both domestic and international, in determining the probability of constitutional survival. Others focus, inter alia, on factors such as constitutional design, self-enforcement mechanisms, judicial independence, and the inclusivity of the constitution-building process.[10]

Within this context, some scholars argue that constitutions are more likely to survive if they have elements that make them self-enforcing, for example, counter-majoritarian provisions. Such provisions include federal structures, limits on governmental power, and super-majority requirements for amendments; in particular, a constitutional court with powers of judici-

8 Negretto G *The Durability of Constitutions in Changing Environments* (2008) 5.
9 Negretto G *The Durability of Constitutions in Changing Environments* (2008) 3.
10 Rice E 'International participation and constitutional survival' (2013) 2.

al review is seen to contribute to constitutional stability.[11] In this vein, Elkins, Ginsburg and Melton examine the design factors of inclusivity, flexibility and specificity: inclusive drafting processes make constitutions more visible and engender greater consent because they 'can promote a unifying identity and invite participants to invest in a bargain'.[12]

The touchstone for arguments about constitutional endurance is Thomas Jefferson, who derided those who 'look at constitutions with sanctimonious reverence, and deem them like the arc of the covenant, too sacred to be touched'.[13] James Madison, his equally famous interlocutor in these debates, tied constitution-making to crisis, believing that reform without crisis could be overly tainted by self-interest.[14] It is certainly true that constitutions tend to be created in the wake of crises such as revolution, coups, civil war, political demonstrations, or even shifts in the political landscape that are not a direct consequence of the constitution, for example, the sudden rise of a new dominant party.[15]

Constitutions also interact with processes in the economy, and researchers have examined in particular the relationship between constitutions and capitalism.[16] Since constitutions provide a basis for regulating economic activity, correlations are likely to exist between their duration and long-term investment. Little explored, though, is the international community's role in influencing constitutional survival or replacement. Constitutions do not exist in a vacuum,[17] and their content has grown increasingly isomorphic. This is partly attributable to the fact that third-party countries often serve as constitutional models for others.[18]

This chapter asserts the primacy of context in determining constitutional stability, arguing specifically that the context in which a constitution is drafted, debated and promulgated influences its shaping and operationali-

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11 Weingast BR & Mittal S 'Symposium: The judiciary and the popular will: Constitutional stability and the deferential court' (2010) 13 *University of Pennsylvania Journal of Constitutional Law*.

12 Elkins Z, Ginsburg T & Melton J *The Endurance of National Constitutions* (2009) 90-1, 211.

13 Letter to Samuel Kercheval, July 12, 1816.

14 Elkins Z, Ginsburg T & Melton J 'The lifespan of written constitutions' (2007) 12.

15 Negretto G *The Durability of Constitutions in Changing Environments* (2008) 18.

16 Person T & G Tabellini *The Economic Effects of Constitutions* (2003).

17 Rice E 'International participation and constitutional survival' (2013) 7.

18 Bailey MJ 'Toward a new constitution for a future country' (1997) 90(4) *Public Choice* 73-4.

sation; more widely, it examines the political, socio-economic and international structural factors that have contributed to constitutional instability in Africa in general and Uganda in particular.

3 Factors shaping the operationalisation of the 1995 Constitution

3.1 Structural factors

3.1.1 Historical legacy

Uganda emerged as an administrative unit when it was declared a British protectorate in 1894. Britain began its colonisation in the kingdom of Buganda, situated in the southern parts of modern Uganda, a development that saw its inhabitants receive preferential treatment to those in other kingdoms in Uganda. In 1900 the Buganda Agreement,[19] a treaty between the British protectorate and the kingdom of Buganda, dealt with nearly all aspects of Buganda's relations with the protectorate government.[20] Although the British signed similar agreements with Toro and Ankole, these were neither as detailed nor favourable as that with Buganda, which was thrust into the centre of Uganda's constitutional crisis.[21] Successive governments until the present day have experienced problems with Buganda, which still demands special treatment and federal status, the latter due to the fact that the Buganda Agreement was legally binding as it had been incorporated into the protectorate law.

A further crucial legacy arose from colonial boundaries, dictated purely by economic logic. British colonialism brought within the fold of one country peoples of different levels of social development, at the same time splitting nationalities among several countries.[22] The colonial, and later the post-colonial, state found it a daunting task to weld these communities into one nation-state. In addition, as suggested above, British policy facili-

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19 The Buganda agreement of 1900 is also sometimes referred to as the Uganda Agreement.

20 Mugambwa TJ 'The legal aspects of the 1900 Buganda Agreement revisited' (1987) 25 & 26 *Journal of Legal Pluralism* 246.

21 Francis MS *Protection of Fundamental Rights in the Uganda Constitution* (1994) 2.

22 Mukherjee R *Uganda: A Historical Accident* (1985).

tated economic investment primarily in the southern parts of the country, whereas the north was considered less valuable.[23] The north-south divide in Uganda today is one of the most enduring legacies of colonialism, a division rooted in divide-and-rule strategies and political structures that encouraged polarisation of ethnic identities.[24] The assignment of the north, for instance, as a source of soldiers and policemen had negative implications for post-colonial stability, given that the ruling-class elite, drawn from the north, used their military predominance either to acquire and retain power undemocratically or to abrogate the constitution.

Religion, too, produced social cleavages. Religious groups include Catholics, Protestants and Muslims. The British-supported administrative elite had largely converted to Protestantism but most of the population were Catholics, which meant that Protestants excluded Catholics from power.[25] Because religion was entrenched in the status quo since the 1900s, it has been highly influential in Uganda's political and constitutional history. Catholics were affiliated to the Democratic Party (DP), which was founded on their marginalisation; while the Uganda People's Congress (UPC) was mainly Protestant, Muslims had no independent party but felt more comfortable in the UPC than the DP. Political parties entered the constitutional process as purveyors of irredentist ideologies.[26]

Thus, colonial governments created highly factionalised political cultures, institutionalised conflict, and strengthened centrifugal forces.[27] While in the colonial context factionalism was an aspect of divide and rule, in the post-colonial state it enhanced the power of bureaucracy.[28] A rising bureaucracy and the personalisation of power accompanied the demise of formal institutions and constitutions.

Colonialism has had a lasting impact on Africa. As Young observes, ' [The] colonial legacy cast its shadow over the emergent African state sys-

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23 Lunyigo S *The Colonial Roots of Internal Conflict* (1987) 30-3.

24 Okuku J 'Ethnicity, state power and the democratization process in Uganda' (2002) *IGD Occasional Paper* No. 33: 8.

25 Kabagambe J *The Democratisation Process in Uganda* (2006) 29.

26 Okoth-Ogenda I 'Constitutions without constitutionalism: Reflections on an African political paradox' in Greenberg D, et al. (eds) *Constitutionalism and Democracy: Transitions in the Contemporary World* (1993) 69. [Hereafter Okoth-Ogenda (1993).].

27 Okoth-Ogenda (1993) 10.

28 Okoth-Ogenda (1993) 69.

tem to a degree unique among the major world regions.'[29] The implication is that Africa cannot be understood without first unravelling its colonial experience. In a nutshell, colonial rule distorted the political, social, and economic institutions indigenous to Uganda society by imposing its own logic. Coupled with the decentralised despotism of the colonial state, it left the post-colonial elite (and society at large) bereft of any experience with democratic governance. This fundamental problem became manifest in the later post-colonial crisis, a crisis arising from the challenge of acquiring and maintaining the right to rule fragmented societies that had been corralled into the unwieldy entity known as Uganda. These conditions resulted in coups d'état and the general failure of the post-colonial constitutions.

The foundation of political and constitutional instability in Uganda, in other words, can be traced to colonialism and the independence constitution. Uganda has undergone a turbulent constitutional history, given that since independence it has had four constitutions, namely those of 1962, 1966, 1967 and 1995. From colonial times, Uganda has witnessed a number of changes in government and subsequent constitutional alterations, in the course of which successive governments have politicized constitution-making processes and manipulated the constitutions to suit their needs. None of the constitutions has stood the test of time. The manner in which they were made and unmade, as well as the suitability of the institutions and the processes that were established, have long been subjects of controversy.[30]

Uganda's first constitution was put in place at independence. Coming into force in October 1962, it was the culmination of negotiations that sought to reconcile the conflicting interests of, on the one hand, Buganda, the western kingdoms and Busoga, and, on the other, the rest of the country. The result was a delicate compromise between the UPC and Buganda traditionalists. Under this constitution, Uganda instituted a unitary system, with Buganda enjoying autonomous or federal status as well as greater rights and privileges than other districts in Uganda; by contrast, the country's other three kingdoms – Ankole, Bunyoro and Toro – had quasi-autonomous status. As such, the constitution had a mixture of federal, semi-

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29 Young C 'The heritage of colonialism' in Harbeson JW & Rothchild D (eds) *Africa in World Politics: Post-War Challenges* (1995) 24.

30 Odoki B in Oloka-Onyango (ed) *Constitutionalism in Africa: Creating Opportunities and Facing Challenges* (2001) 264.

federal and unitary features, which is why it was described as a mere 'Elastoplast' over a system held together largely by force and expedient compromise.[31] It lacked political legitimacy and became unworkable, with Buganda's special status being a notable source of tension; the constitution survived for only three years and was suspended in February 1966.

Ugandans had little say in the making of this constitution, to the extent that articles and clauses with limited applicability to local contexts were imported from foreign constitutions. As Okoth-Ogenda notes, Anglophone Africa adopted modified versions of Westminster-modelled constitutions, complete with bicameral legislatures, separation of powers, judicial review and bills of rights.[32] While these constitutions were democratic in the Western-liberal sense, they were not based on the values and beliefs of the people to whom they applied, a cultural disconnection that made post-independence constitutions seem contrived and distant from everyday life. Literature on decolonisation reports widespread dissatisfaction among new African rulers with the imported constitutional regulations, which is why the latter were soon withdrawn, ignored or modified;[33] in addition, these constitutions were superimposed in situations where constitutionalism had not significantly taken root.

It is thus not surprising that soon after independence Uganda was plunged into political and constitutional chaos when the implementation of the constitution became impractical. The fusion of a cultural leader as a political head of state with an executive prime minister presented a conflict of interest which led to the abrogation of the independence constitution and a constitutional crisis thereafter. The matter came to ahead when Uganda was to decide on the 'Lost Counties' in a 1965 referendum allowing residents to choose between remaining part of Buganda Kingdom or returning to Bunyoro Kingdom. The British had used the Baganda to conquer Bunyoro and rewarded Buganda by giving it six counties of Bunyoro territory, the so-called 'Lost Counties'. In the referendum, they voted to re-join Bunyoro, leading to a split between the Baganda leadership and Prime Minister Obote and precipitating the constitutional crisis of 1996.

Following a confrontation between Obote and the president, Edward Mutesa, Mutesa (also Kabaka of Buganda) was suspended from office and

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31 Olaka-Onyango J *Judicial Power and Constitutionalism in Uganda* (1993) 478.

32 Okoth-Ogenda (1993) 70.

33 Nohlen D, Thibaut B & Krennerich M (eds) *Elections in Africa: A Data Handbook* (1999) 1-4.

ministers arrested. In April that year, a new constitution was promulgated under the declaration that it would 'remain in force until such time as a Constituent Assembly established by parliament enacts a constitution in place of this constitution'.[34] However, it was not debated and came to be known as the 'pigeon-hole constitution', given that Obote had told MPs they would find copies of it in their pigeon-holes at the end of the National Assembly sitting. These developments led the king of Buganda to attempt secession and demand that the central government remove itself from Bugandan soil; in retaliation, Obote staged a military takeover of the Buganda Kingdom palace.

The 1966 crisis led to the introduction of a new constitution in 1967. Republican in nature, it provided for a more powerful executive president while paying lip-service to parliamentary supremacy. It also abolished kingdoms and other aspects of federalism, turning Uganda into a unitary state, and although the constitution recognised a multiparty system, opposition political parties were later banned and the country transformed into a single-party state.[35]

These events set the stage for the reign of terror under Idi Amin (1971-1979) and later Obote's second government (1980-1998). When Amin seized power in 1971, he suspended the constitution, declared himself president for life, and violently suppressed all political opposition. Between 100,000 and 500,000 people were estimated to have been killed under the Amin regime, a regime which poisoned ethnic relations by alienating one ethnic group after the other and brought about social dislocation and institutional decay.

When the dictator's fall was imminent, a general sense arose in Dar es Salaam that there was a need for opposition groups and organisations to meet and agree on a strategy for the way forward. This led to the Moshi 'Unity' Conference of March 1979,[36] followed by the Moshi Agreement which acted as a constitution for Uganda after the fall of Idi Amin in 1979. The December 1980 elections were held in a tense atmosphere of mistrust, violence and threats of civil war. The UPC government that came to power thus faced a crisis of legitimacy, and in February 1981, Yoweri Musev-

34 Constitution, 1996, article 145.

35 Oloka-Onyango J *Constitutionalism in Africa* (2001) 265.

36 Baganchwera B *Parliamentary Democracy in Uganda: The Experiment that Failed* (2011) 162.

eni, who had threatened to 'go to the bush' and wage war if the elections were rigged, launched a guerrilla war against it.

By the time his National Resistance Army/Movement (NRA/M) came to power in January 1986, the government had lost control of the country: Uganda was in a shambles, violence was rampant, and the military had disintegrated into armed gangs of looters. The NRA/M's rise to power was greeted as an optimistic sign that peace, democracy and stability would be restored. The movement embarked on constitutional reform, seeking through its Ten Point Programme to establish democratic governance, constitutionalism and rule of law.[37] In 1989 it appointed a commission to draft a constitution and seek the views of the population, a draft which formed the basis for a new constitution in 1995 and which has been regarded as the NRM's greatest legacy to Uganda.[38] The framers were cognisant of the country's history of political and constitutional instability, and set to make a constitution that would stand the test of time, promote unity and stability, and heal past wounds.[39]

However, although it has not been abolished yet as its predecessors were, the much-hailed Constitution of 1995 has not stood the test of time as it has been amended several times even before certain provisions could be tested in practice. For example, the limit on presidential terms of office was amended, with the constitution now allowing unlimited terms; President Museveni, under whose incumbency it was made, has not been succeeded. In less than six years after the 1995 Constitution was adopted, a commission was formed to review it; and in less than two decades, more than 120 amendments have been made or proposed to it.

From the preceding account it can be observed that while the independence constitution laid the basis for constitutional instability, the immediate post-independence governments made little attempt to remedy this with an acceptable constitutional order, preoccupying themselves instead with regime-perpetuation and the fortification of executive power. These actions have kept Uganda in prolonged constitutional instability, as evidenced by Obote's abrogation of the independence constitution, Amin's of the 1967 constitution, and numerous amendments to the 1995 Constitution.

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37 The Ten Point Programme.

38 Kanyeihamba GW *Constitutional and Political History of Uganda* (2002) 266.

39 See the Preamble to the Constitution of Uganda, 1995.

3.1.2 Structure of society

The structure of a society should be a central consideration in the organisation of its politics, administration and economy. Most African societies are heterogeneous, comprising a diversity of tribal, ethnic, cultural and religious groups, traditions and people divided along urban and rural lines. It would seem to follow that the states would manifest a healthy legal pluralism, but this is not necessarily so.[40] As Welsh notes, 'Establishing and sustaining democratic institutions in ethnically divided societies is a difficult task'.[41] Ethnic heterogeneity is likely to promote instability, inasmuch as political competition often proceeds along ethnic lines. A large literature on ethnic conflict points to the difficulties of institutional design in such environments. The combination of the dominance of ethnicity and the centrality of the state to accumulation leads to intense competition for the capture of the state, which leads in turn to abuse or subversion of democratic constitutional elements such as publicly financed political parties, independent electoral systems, operationally independent policing, freedom of expression and association, and judicial impartiality.

Uganda as a country is a mere geographical expression of British colonial administration. The 64 formally recognised indigenous communities that inhabit it were brought together under the colonial era, communities with different languages, cultures and social systems; seen more widely, Uganda is also divided along religious, regional and ethnic lines. These divisions have had a profound impact on the political framework: the more fragmented a country, the greater the number of competing groups and the smaller the chances of their reaching any lasting agreement about shared, fundamental values that need constitutional protection – all of which threatens constitutional stability.

After independence, most African leaders denounced these divisions, outlawing opposition groups 'based on particularistic, sectarian or ethnic interests'[42] and ushering in one-party states[43]. The early, broad-based

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

41 Welsh D 'Domestic politics and ethnic conflict' in Brown ME (ed) *Ethnic Conflict and International Security* (1993) 55.

42 Chazen N, et al. *Politics and Society in Contemporary Africa* (1992) 50.

43 Okoth-Ogenda (1993) 75-76.

NRM government sought to incorporate a spectrum of political, ethnic, religious and other interests. As Tripp puts it,

> much as Museveni attempted to distinguish himself from the dictators that had ruled Uganda before him, he espoused the same kind of anti-sectarianism that Amin and Obote had adopted and was ultimately challenged by the same dilemmas they faced in trying to create a workable ethnic matrix.[44]

In fact, Museveni's opponents said his anti-sectarian stance was nothing more than populist rhetoric and that he was playing the ethnic card just as his predecessors had, only with more finesse. Eventually the objective of inclusive governance came into conflict with the imperatives of remaining in power, and he too banned political parties to secure his future. National assemblies and parliaments packed with supporters of the ruling party have increasingly become decree-sanctioning bodies instead of legislatures.[45]

Curbing opposition and favouring cultural homogeneity in the context of pluralistic societies has had a profound effect on participatory and representative institutions. Current tensions around, and demands for, ethnic recognition and pluralism are important factors driving the protracted conflict in new democracies. Among the problems are unitary conceptions of the state, the preponderance of homogeneous majorities, and a lack of constitutional co-authorship by national minorities. The tension between the cultural homogeneity of powerful majorities and the diversity of the wider society continues to fuel constitutional conflict, thus affecting constitutional stability.

3.1.3 Economic structure

Although its value has been in decline, the agricultural sector is the most important aspect of the Ugandan economy and employs 80 per cent of the labour force.[46] Reliable statistics are hard to come by, but the deputy prime minister has reported that unemployment among youth is more than 22 per cent and even higher among young people with university degrees and

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44 Tripp AM *Museveni's Uganda: Paradoxes of Power in a Hybrid Regime* (2010) 39.

45 Chazen N, et al. *Politics and Society in Contemporary Africa* (1992) 48.

46 FAO as reported by World Resources Institute.

those in urban areas.[47] Levels of civic competence are still low. The number of university graduates is estimated to be below one million in a population of more than 34 million.[48] Illiterate and poor people do not normally pursue abstract issues such as constitutionalism and human rights, a factor which in turn has an effect on constitutional stability.

Moreover, as one of the world's poorest countries, Uganda is heavily reliant on foreign aid. Thirty per cent of the population lives in extreme poverty, donors fund about 45 per cent of the national budget, and the country has received about US$2 billion in debt relief. In Uganda, as elsewhere in Africa, governmental efficacy hinges on the international community; put differently, because African countries are poor and depend on foreign support, they have no choice but to allow Western powers to influence their policies.[49]

In this regard, Museveni's neo-liberal agenda has inflicted heavy social costs in exchange for economic growth, which has been concentrated in the Bantu regions, where the NRM's support is rooted, while the Nilotic north has been neglected. Dire economic conditions promote the conditions for change, but paradoxically impede ones that favour the endurance of constitutions. Economic crises are likely to threaten the stability of the constitution.[50] For example, they have led to popular and elite discontentment as well as state dependence on external aid, dependence which donor countries sometimes use to pressurise developing countries into carrying out political and social reforms. Economic crisis may also cause splits within the elite, creating opportunities for the opposition to mobilise and claim new legitimacy for itself while weakening the bargaining power of the incumbents.[51] Rural poverty and unemployment continue to drive migration to urban areas, with the ever-increasing urban poor mobilising in demonstrations and strikes; nevertheless, labour has been too weakly organised to be a force for positive and issue-based political change in Uganda.

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47 World Bank 'Uganda grapples with youth unemployment as WDR 2007 is launched' (2007) available at http://go.worldbank.org/FTO3IRJZ30 (accessed 1 August 2013).

48 The State of Uganda Population Report 2012.

49 Mbabazi P, Mugyenyi J & Shaw T 'Uganda elections 2001: Lessons for/from democratic governance' (2001).

50 Elkins Z, Ginsburg T & Melton J *The Endurance of National Constitutions* (2009) 119.

51 Haggard S & Kaufman *The Political Economy of Democratic Transitions* (1995).

3.1.4 Constitutional design

Certain aspects of constitutional design may also generate the type of events that affect the durability of constitutions. Design factors are those relating to the content and drafting process of the constitution. The design of institutions that will meet the needs of a nation is of central concern to constitutional stability. The 1995 Constitution's provisions were based by and large on the wishes of the people as expressed in their views to the constitutional commission. In the Constituent Assembly, most of the provisions in the constitution were adopted by delegates through consensus. However, a few controversial provisions were resolved through majority vote and some of them continue to attract controversy, debate, and challenge in courts of law.[52] These include provisions relating to the suspension of political-party activities, separation of powers, federalism and traditional institutions.

Entrenched in the 1995 Constitution was the 'no-party' Movement system of government, one based on personal merit rather than organised political action. Under the system, the NRM would serve as the big tent within which all political competition would take place. This led to restriction of political-party activities under article 269 of the Constitution, with implications for human rights such as freedom of assembly, association and expression. Due to pressure for democratisation, the nature of the future dispensation was put to the vote in a referendum. Article 69 of the Constitution provides that the people shall have a right to choose between the Movement system, a multiparty system or any other democratically representative system.[53] Although Museveni later conceded to pressure and opened himself to competition through constitutional amendments in 2005 that replaced the Movement system with a multiparty one, he stifled it by resorting to extra-constitutional and extra-legal tactics.

What should be noted is that democracy is unthinkable in the absence of viable political parties, which serve ideally as a force for constitutional stability and democratisation by articulating and aggregating public opinion and interests, engendering popular participation, and promoting political education and national integration. Well-established parties function as mediating institutions through which differences in ideas, interests and

52 Benjamin O in Oloka-Onyango (2001) 263.
53 Constitution of the Republic of Uganda 1995: section 58, article 69.

perceptions of political problems at a given time can be managed; without them, constitutional stability and the general system run the risk of subversion or outright collapse.

The principle of separation of powers involves placing checks on the amount of power in the hands of any individual or group in order to avoid its abuse. The resultant balance of power between the executive and legislature is thought to have some effect on constitutional endurance;[54] moreover, an independent judiciary and the notion of the supremacy of law work together to ensure that the letter and the spirit of the constitution are honoured in the workings of government. However, the Constitution of Uganda enables the executive to function without being checked at every turn, and the office of the president combines a wide range of powers: he is the head of state and head of government, commander in chief, a part of the parliament, and bills passed in parliament cannot become law without his consent. Many constitutions have come to an end thanks to power-hungry executives, which suggests that constitutions with few constraints on the executive are less able to survive than others.

A design feature that has also undermined the Constitution's stability is its winner-take-all electoral system and the ills associated with it, such as election violence and vote-buying. Uganda's majoritarianism has encouraged a tyranny of the majority and, correspondingly, a perpetual exclusion of minorities from government due to their inability to gain parliamentary majorities in elections. As the UN Development Programme observed in its 2004 report on multiculturalism,

states need to recognize cultural differences in their constitutions, their laws and their institutions. They also need to formulate policies to ensure that the interests of particular groups – whether minorities or historically marginalized majorities – are not ignored or overridden by the majority or by dominant groups. And they need to do so in ways that do not contract other goals and strategies of human development, such as consolidating democracy, building a capable state and ensuring equal opportunities to all citizens. [55]

The 1995 Constitution and the subsequent amendments in 2005 fell short of bringing about genuine representation for all groups and parties in Uganda. Although the choice of electoral system is foundational to a de-

54 Elkins Z, Ginsburg T & Melton J *The Endurance of National Constitutions* (2009) 106.

55 UN Development Programme (2004).

mocracy, there is no clear explanation why the Constitution did not adopt another kind of plurality/majority system, or even a proportional-representation or mixed one, given that scholars on constitutional design in fractured societies have advised against majoritarian and first-past-the-post systems based on Anglo-American models.[56] Uganda is divided on religious and ethnic cleavages, but the drafters of the Constitution opted for the most extreme form of the plurality electoral system, the first-past-the-post one.

Moreover, in the framing of the Constitution, political lines were drawn between federalism and decentralisation over concerns and developmental aspirations to do with cultural identity. The NRM sought to pre-empt the Constitutional Assembly (CA) debate on the subject of federalism by passing a traditional rulers statute in 1993 that allowed for the restoration of traditional rulers as cultural leaders.[57] In addition, fearing an alliance among opposition parties and the Buganda leadership in Mengo, the NRM met with the Mengo Kingdom government and agreed that Buganda would form a regional government under the new constitution. Unfortunately, in the end, Mengo gambled and lost its bid for federalism.

Although Buganda had agreed to support NRM positions on anti-democratic aspects of the constitution in exchange for federalism, the NRM reneged on this perceived bargain. The majority of the CA delegates took the view that federalism would undermine the unity of the country. They agreed to recognize Buganda as a distinct entity, but opted not for federalism, but decentralisation and devolution of power from the centre to the district level, a policy that had been in place already before the CA was convened.

The issue of federalism continued to dog Ugandan politics after the Constitution's enactment. Pressure from Buganda for a federal system led to a government proposal for regional parliaments in a federal system for Buganda, Busoga, Toro and Bunyoro. With political support waning nationwide, Museveni was eager to shore up support among the kingdoms, especially Buganda, prior to the 2006 presidential elections. Having been granted symbolic cultural recognition in the 1995 Constitution, the kingdoms persisted in their demands for greater political power and a more public role. In 2005 a constitutional amendment was passed to create regio-

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56 See, for example, Lewis A *Politics of West Africa* (1965) 71.

57 Mukholi D *A Complete Guide to Uganda's 4th Constitution, History, Politics and the Law* (1995) 33.

nal tiers throughout the country as a government-funded layer of administration above the existing district system, but the Buganda leadership in Mengo rejected this regional-tier arrangement, preferring its own version of autonomy, commonly known as 'federo'. Although Buganda's dominance is less pronounced today, the debate about the relative autonomy granted to the Kingdom of Buganda and other traditional kingdoms within the larger Ugandan state continues to be a bone of contention and the basis for political mobilisation.

As such, the lack of clarity surrounding these traditional institutions has been a further cause of constitutional instability. For centuries, the regional kingdoms of Buganda, Toro, Bunyoro and Ankole were apex powers, with Buganda considered the strongest and most influential, but in modern-day Uganda their status remains a thorny issue. Their demands were met to some extent in 1993 when the incumbent NRM government decided to restore traditional rulers and recognise other cultural institutions under article 246 of the 1995 Constitution. The restored kingship, unlike its political character in the past, was confined to cultural functions, implying that it had changed from being a functioning state within Uganda to an institution located outside the political sphere and the formal state structure.[58]

However, despite the spirited denial of formal political roles to traditional rulers in the 1995 Constitution, these rulers continue to wield enormous power and influence over the lives and well-being of Ugandans. Not only is their role contested in the country's political discourse, but disputes frequently erupt over traditional thrones and create socio-political crises in different corners of the land. Recent tribal clashes and tensions in parts of the Kasese, Bundibugyo and Ntoroko districts have defeated the spirit of the Constitution. Indeed, traditional rulership could be a powerful instrument aiding Uganda's search for constitutional stability, peace and order. It is in the country's best interests that this institution be acknowledged and that clear provisions be made in the Constitution for its functions. The present lack of clarity has caused a great deal of uncertainty and undermined political and constitutional stability.

As will be apparent from this account, the 1995 Constitution faced numerous challenges in its operationalisation. In 2001, mindful that the Con-

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58 Kayunga S *The No-Party System of Democracy and the Management of Ethnic Conflicts in Uganda* (2001).

stitution had several inadequacies that needed to be addressed in service of proper governance,[59] the government established the Constitutional Review Commission (CRC). Chaired by Professor Fredrick Ssempebwa, it was mandated to examine, and make recommendations about, the consistency and compatibility of constitutional provisions relating to popular sovereignty and democratic political systems. While it is clear that certain provisions called for reappraisal, it is highly doubtful that a wholesale review was warranted.

However, before the CRC's official report was released, the *Monitor* newspaper published a document it claimed was the draft report of the CRC, which among other things made recommendations opposed to lifting term limits; appearing before a parliamentary committee, Professor Ssempebwa basically admitted this was a genuine CRC document. Quite evidently there was a problem. To address it, the government – well after the closure of time for receipt of public submissions – presented its proposals on constitutional reform to the Commission. Given that the commission was supposed to submit its report to cabinet, this was a strange step, and of the many reasons supplied for it, the most compelling is that the government wanted to ensure that the proposal for lifting term limits (which was not in any earlier submissions) would become part of the CRC report.[60]

It is little surprise, then, that the final report, submitted in 2003, was seen largely as a failure to address serious constitutional issues in ways that would consolidate democracy, rule of law and constitutionalism;[61] especially disappointing was the CRC's lack of resolve when it came to the issue of presidential term limits, notwithstanding that the Constitution itself imposed such limits. To some observers, the CRC was a missed opportunity for meaningful reform of the constitutional order, with the amendments seen as manipulative, transitory and motivated at times by personal agendas. The idea of lifting term limits was not widely accepted among

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59 Republic of Uganda (2003) Government White Paper on the Report of the Commission of Inquiry (Constitutional Review) & Government Proposals not Addressed by the Report of the Commission of Inquiry (Constitutional Review).

60 The Cabinet Memo contained other issues that were alarming, such as the proposal to give the president power to dissolve parliament in case of deadlock and to extend presidential powers to acquire land for investment or environmental protection; there were also several proposals for curbing the judiciary.

61 Olaka-Onyango J *Judicial Power and Constitutionalism in Uganda* (1993) 500.

Ugandans, and a number of groups opposed the proposal; even the CRC chair wrote a minority report objecting to them. Nevertheless, the provision on presidential term limits was duly amended.

The removal of term limits opened the possibility of a life presidency, with all its attendant problems and far-reaching repercussions for constitutional stability and observance of rights in Uganda. Museveni's long tenure of presidential office poses dangers to democracy: the longer rulers stay in office, the more they take it for granted that the power they hold is theirs and theirs alone and that no one else has a right to it. It could be argued, moreover, that the post-1995 amendments were no different in nature to the abrogation of the post-independence constitution: in the earlier case, the premier was elevated to the presidency and powers concentrated in the executive, while, post-1995, term limits were removed for the sole benefit of a sitting president. None of these amendments has enjoyed the support of the majority, and all failed to rally consensus across the political aisle. They did not entrench constitutionalism but rather personal rule through legalese.

The Public Order Management Bill, amended and signed into law by Museveni in 2013, is yet another blow to constitution stability. The Act gives the police discretionary powers to prohibit gatherings of as few as three people in a public place to discuss political issues; they can also break up meetings of three or more people discussing political issues in their own homes. These restrictions on the rights to speak, associate and demonstrate amount to an overthrow of the foundation on which the 1995 Constitution was built, with critics calling the Act a measure to stifle opposition to the government. Amnesty International has described it as a 'serious blow to open political debate' and part of a pattern of repression that includes the closure of two newspapers and radio stations in May 2013 for reporting an alleged government plot to assassinate opposition MPs.[62]

As suggested earlier in this chapter, constitutional reforms are not inherently bad for they reflect a realisation that the aspirations of the people have changed. Indeed, as long as correct procedure is observed, amendment processes can contribute to the stability and durability of constituti-

62 Amnesty International 'Public Management Order Bill is a serious blow to open political debate' (2013) available at http://www.amnesty.org/en/news/uganda-public-management-order-bill-serious-blow-open-political-debate-2013-08-05 (accessed 10 August 2013).

ons. What commentators in Uganda often lament, however, is that the primary motive for the frequency of amendment is the incapacity of the government and political class to govern in accordance with the Constitution. Given that its article 3 prevents any unlawful amendment which has the effect of suspending, overthrowing, or abrogating the Constitution, it may be argued that in theory these high-frequency amendments are lawful; it is their legitimacy, though, which is in question. Adhering to the rule of law entails more than mechanical application of legal technicalities.[63] It involves an evolutionary search for institutions and processes that facilitate authentic stability through justice.

In practice, longer constitutions are more frequently amended than shorter ones.[64] Lutz predicts that longer constitutions will be amended more because they are more likely to contain detailed provisions that risk becoming obsolete over time. With 287 articles and seven schedules, the 1995 Constitution is one of the longest in the world, several times longer than most European constitutions and ten times the length of the US constitution.[65] This, in part, reflects the fact that Uganda's constitution addresses numerous policy issues which are ordinarily not included in constitutions because they encumber legislators when dealing with new situations and contingencies.

3.1.5 Regime type

Since the end of colonial rule, several African states have been dominated by authoritarian or military regimes, but most of them, like Uganda, are hybrid regimes at a crossroads between democratisation and authoritarianism, rarely if ever reverting to full-blown authoritarianism of the kind witnessed under Idi Amin yet rarely transitioning fully to democracy either.[66] Development in Uganda since Museveni took power reflect some of the paradoxes of hybrid regimes: neither entirely autocratic nor democra-

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63 Kritz, NJ 'The rule of law in the post-conflict phase' in Crocker CA, Hampson FO & Aall P (eds) *Turbulent Peace: The Challenges of Managing International Conflict* (2001).

64 Tsebalis G & Dominic J *A Long Constitution is a (Positively) Bad Constitution: Evidence from OECD Countries*.

65 Furley O & Katalikawe J 'Constitutional reform in Uganda: The new approach' (1997) 96 *African Affairs* 383: 257.

66 Tripp AM *Museveni's Uganda: Paradoxes of Power in a Hybrid Regime* (2010) 1.

tic, they range from semi-democratic to semi-authoritarian along a spectrum of hybridity. The political scientist William Muhumuza sums up the contradictions well:

> Museveni's government created an impression that it was on a steady path to strengthen democratic institutions … . Nonetheless, these institutions have ended up being used for propaganda purposes, they have not been enabled to perform their duties independently. Therefore, Museveni's motive to retain power in a pseudo-democratic dispensation has significant implications for Uganda's political future … . Personalisation of power leads to authoritarianism and corruption that may reverse Uganda's current gains.[67]

The Ugandan state, in essence, is an authoritarian, patronage-based regime. Increasing authoritarianism and NRM dominance in the country's politics clearly deviates from the pluralistic, democratic tone of the Constitution. At the time of writing, the NRM leadership has been in power for 27 years and only recently opened up political space after many years of monolithic rule, a style of governance with serious implications for constitutional stability.

As suggested above, Uganda is not only authoritarian but neo-patrimonial as well. Neo-patrimonialism denotes a political system in which the outer appearances of a legal-rational state are in place but where actual power rests on a deeply-embedded patrimonial logic; power arrangements, that is, are based informally on patron-client relationships, favouritism and loyalty.[68] Neo-patrimonialism and democratic institutionalisation are opposing logics, and Uganda's slow or resistant response to democratisation can be attributed to the countervailing strength of patrimonial logics such as presidentialism and clientelism.

3.1.6 Global context

The constitution of any one country is often influenced by, and must be interpreted and operationalised within, the broader external context. With many countries in Africa becoming independent, the 'great powers' realised they could induce and govern, by various informal means, the formati-

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67 Muhumuza W 'From fundamental change to no change: The NRM and democratization in Uganda' (2009) 41(1) *Les cahiers d' Afrique de l' est* 40.

68 Amundsen I *Corruption and Lack of Political Will and the Role of Donors (in Uganda)* (2006) 11.

on of legal and political regimes in non-European countries that would open resources, labour, and markets to free trade dominated by economic competition among European powers without the need for the expensive and increasingly unpopular old imperial system of formal colonies and monopoly-trading companies.[69] Neo-colonialism uses capitalism, business, globalisation and cultural imperialism to influence a country.

This new, non-colonial ensemble of global institutions came together to govern the persisting imperial network of relationships of dependency, inequality, and economic exploitation. Through this dependency, rich nations manage to influence poor countries through the different sectors of society. Gallagher, Robinson, and Mommsen stress the importance of imperially-imposed legal and political institutions in dispossessing non-European peoples of popular sovereignty over resources, labour and markets and opening them to the informal paramountcy of the great powers and their trading companies.[70]

African leaders who support a global market economy will always get support or aid from these powers. The interests of donors, as well as their inconsistency in promoting the rule of law, democracy and good governance in Uganda, have been seen by all actor groups as the biggest obstacle preventing development partners from becoming agents in the process of democratisation.[71] Donors talk democracy, but oftentimes their economic and ideological interests are more important than political pluralism in the countries where they operate.

The global powers have been indifferent with regard to ensuring that African leaders learn the democratic principles. Instead, they help them to strengthen oppressive regimes, perhaps because the West still needs to exploit their resources. The influence of global powers (that is, development partners) on Uganda's policies is visible at both the governmental and non-governmental levels. The funds provided to the state enable donors to set the policy agenda. President Museveni sacrificed his left-orientated ideology for this budgetary support and embraced liberal economic poli-

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69 Tully J 'Modern constitutional democracy and imperialism' in Loughlin M and Walker N (eds) *The Paradox of Constitutionalism* (2007) 462.

70 Tully J 'Modern constitutional democracy and imperialism' in Loughlin M and Walker N (eds) *The Paradox of Constitutionalism* (2007) 462-3.

71 For the nature of interests of donors in Uganda, see also Hauser 1999; Okuku 2002; Barya, Opolot, Otim
2004; Kanyeihamba 2006.

cies directed by the World Bank in order to legitimize his rule and prolong his stay in power. Therefore, Western powers pay lip-service to democratisation in Africa, normally playing it safe where their economic interests take precedence over issues of democracy in Africa. What seems to inform Western relations with African regimes is not democracy but whether the regime in power serves their economic and strategic interests.

In addition, in Africa many new constitutions and provisions relating to human rights and freedoms provisions have been shaped largely by progressive international norms and principles. As a result, these constitutions are grounded not in the cultural mores of their societies but in international human-rights norms that are destined to fail and become irrelevant. A good mix is needed between international normative standards and local norms in shaping the design of constitutions in Africa. That this is lacking explains why most post-colonial constitutions in sub-Saharan Africa have succumbed to irrelevance and debacle. They failed, that is, because they were not fine-tuned to the realities of society. In Uganda's case, it has unique features which should be reflected in its constitution-making; at the same time, it should also observe certain internationally accepted democratic norms.

Global powers, furthermore, are also ready to support any country endorsing the war on terror irrespective of whether or not it is democratic and notwithstanding that anti-terrorism laws and human-rights protection are among the most controversial issues in the contemporary international legal and political environment. Terrorism is often an excuse for governments to pursue measures that violate human rights and thereby undermine the very foundations of democratic societies.

In Uganda, the NRM government takes advantage of the war against terrorism to incriminate political opponents and limit their freedoms and rights. For example, in the Buganda riots of 2009 some activists were arrested and charged with terrorism; in the case of the Walk to Work protests, a campaign against food-price increases and declining health care, criminal suits including terrorism charges have been brought against opposition leaders such as Dr Kiiza Besigye of the Forum for Democratic Change (FDC) and his supporters, only for the courts later to release them. In response to the Walk to Work demonstrations, Museveni has appealed to parliament to change the law so as to deny bail to those charged with terrorism, corruption, treason and defilement.

If the proposal becomes law, it will remove judges' discretionary powers to grant bail for certain categories of crime; and if the right of bail

is removed, several other rights will be affected too, such as freedom of movement and the right to life. As commentators have noted, a mandatory six-months' sentence without bail or trial merely for walking to work amounts to a reintroduction of detention without trial and violates article 43(2)(b) of the Constitution. Such an amendment would also offend other constitutional principles, chief among them the independence of the judiciary; a second key principle is contained in article 126(3), which stipulates that all state organs and agencies shall 'accord to the courts such assistance as may be required to ensure the effectiveness of the courts'. In effect, the proposed amendment would overturn the Constitution.

3.2 Agential factors

3.2.1 Political leadership

As the leader of the NRM government, President Museveni has undoubtedly influenced the constitution-making process. Though the 1995 Constitution has provisions that curb the president, in practice he wields considerable power over parliament. James Rwanyarare, the former UPC chairman of the Presidential Policy Commission, observes the following:

> President Museveni had a personal hand in the making of the constitution: First of all, he wanted to continue entrenching his movement system of government in power, thereby fighting with all his mechanics to influence the constitutional debate proceedings. He was the architect of the whole thing of the movement. He helped in the defeat of federalism in Uganda which UPC and other political organisations supported. He personally met the then Sabalangira Besweli Mulondo who had a last card for the federal ticket to pass through. This was after president Museveni discovering the Federo will pass through with a nod of the UPC and other opposition parties.[72]

Museveni tends not to trust anyone but himself, and no decision of any relevance is taken without his consent. Building institutions and organisations requires delegating power, something which is foreign to Museveni's approach. The president notoriously prefers to dictate and micro-manage all decisions, regardless of their institutional settings, norms and procedures. Ministers and other officials who are nominally in charge of a policy area are hardly consulted and often bypassed. This is notably the case in

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72 Interview with James Rwanyarare, 20 October 2005. .

key sectors such as defence, foreign policy, the economy and finance. Museveni's leadership style makes him a significant roadblock to democratic transition and constitutional stability.

3.2.2 State agencies

State agencies, too, effect constitutional stability. The laws governing Uganda's constitutional commission and constituent assembly provide key roles for a minister of constitutional affairs, who is supported by the public service department (the ministry of constitutional affairs). The Constitutional Commission Statute of 1988 then gave the minister a number of significant roles in relation to the commission. To make matters worse, there was no provision guaranteeing the independence of these constitution-making bodies. The difficulty with arrangements giving government authorities key roles in establishing constitution-making bodies is that those bodies then take centre-stage and interfere in the operations of the constitution-making bodies.

Constitutional and electoral commissions play an important role in democratisation but have also been influenced through *ex officio* government representation. For example, the twenty-one-member constitutional commission included two *ex officio* members both of whom were senior officials, the one in the army, the other in the ruling-party secretariat. Some members appointed by the minister for constitutional affairs were not approved by the president, while others were appointed by the president but without the minister's approval, as required by the Constitutional Commission Act of 1988. There was no nomination process allowing anyone else to suggest names.[73] The most obvious dangers that arise when governmental interests are represented in constitution-making bodies concern the likelihood of there being pressure to protect those interests generally or the interests of particular parts of the government.

The police and army have also played a prominent role in politics. Militarism has been employed as a means of capturing and maintaining power, and no clear divide exists between the army and the political sphere. The army is at the core of the political system and is represented in parliament;

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73 Furley O & Katalikawe J 'Constitutional reform in Uganda: The new approach' (1997) 96 *African Affairs* 383: 24.

similarly, the police have been militarised in maintaining law and order. These various tendencies have eroded democracy and pluralism.

Excessive accumulation of power by the executive has undermined the role of parliament and the judiciary. Parliament exists to rubber-stamp decisions predetermined by the NRM caucus. The Chief Justice's protestations notwithstanding, President Museveni will not rest until only NRM cadre judges grace the judicial benches of Uganda. In this regard, the recent re-appointment of Chief Justice Benjamin Odoki, who is supposed to be the custodian of 1995 Constitution, was unconstitutional in that he exceeded the retirement age limit of 70 stipulated by the Constitution. Whereas the independence of the executive, legislature and judiciary is key to constitutional stability, these three arms have been fused in Uganda. Civil society has also remained fragmented and vulnerable to manipulation by the state.

3.3 Ideational factors

Practices are informed by ideation. Museveni's political and philosophical thought and overall mentality is incompatible with Uganda's supposedly liberal constitution and can be best described as an instance of old wine poured into new bottles. He came to power by violence, has retained power through the abuse of it, and his militaristic ideology is steeped in Fanon's theories of violence. He does not believe in liberal democracy and to him anybody with opposing political views is an enemy; even small protests against his rule are usually put down through the use of force.

Moreover, he is steeped in non-pluralistic Marxian thought even though he later adopted a capitalistic style of economic management, a shift which at any rate was largely forced upon him by his bid to receive aid from the International Monetary Fund. However, Museveni and NRM party-members run the state along the monolithic lines of the old communist regimes. Prior to the multiparty dispensation in 2005, the NRM was a quintessential communist party. Every Ugandan was deemed to be of the NRM, and no legal differentiation was made between party and government. It is these beliefs that underpinned the dubious case he made for the 'no-party' Movement dispensation, the argument being that since Uganda had not developed an industrial proletariat and no clear class structure had emerged, it was not ready for multiparty politics. Using a pseudo-Marxist model, he said that because people in peasant societies

lack a class identity, they are prone to ethnic and religious polarisation and easily exploited by politicians, who are 'messengers' of perpetual backwardness.[74]

Nevertheless, in spite of the reintroduction of multi-partyism in 2006, pluralism has not been allowed to take root in Ugandan politics. The country is not at war and is formally a multiparty system, but Museveni runs a militaristic, single-party government that uses violence to suppress opposition both directly, through actual force, and indirectly by creating a climate of fear in which potential candidates think twice before challenging him either in the ruling party's internal structures or in opposition ranks. In recent years, for example, the speaker of parliament, Rebecca Kadaga, has been pushed to the wall by NRM stalwarts who wanted her to toe their party line and therefore act in a partisan manner that contradicts the norms of liberal politics enshrined in the Constitution. In another example, the NRM secretary general requested that the speaker expel 'rebel' NRM MPs who had been dismissed from the party following disciplinary procedures. Although the speaker refused, there was, in this case as in so many others, pressure on her to obey the party line.

Old wine in new bottles: the crisis facing Uganda's constitutional order is one in which a liberal constitution is managed by an illiberal mind. There is, that is to say, a mismatch in the ruling class between illiberal theory and the practice of constitutionalism; and when politics come into conflict the Constitution, the executive is predisposed to suspend, amend, abrogate or subvert the latter.

4 Conclusion

Uganda's 1995 Constitution is a good case to explain why constitutions in Africa do not stand the test of time. The context in which the constitution is written and operates in Africa, and Uganda in particular, determines why this is so. The contextual factors that were discussed include the structure of society, the historical legacy, constitutional design, regime-type, as well as the socioeconomic and international environments. This

74 Museveni KY *Sowing The Mustard Seed: The Struggle for Freedom and Democracy in Uganda* (1997) 187.

chapter has argued that Uganda's constitutional instability has been conditioned by these structural factors.

However, there has also been an interplay of other factors, such as the values informing political behavior and the character of key political players. In other words, contingent issues such as political agents, state agencies and ideational factors do matter in constitutional rule. Human agency is critical in rearranging social structures to meet human needs in the realm of politics and economy. Nevertheless, structure also imposes limits on human agency. Structural factors, Linz and Stephen argue, '[c]onstitute a series of opportunities and constraints for social and political actors'.[75] Ideas are powerless unless they are fused with material forces and connected to their social settings, institutions and social groups.

Context is fundamental in shaping constitutional outcomes, and attempts to understand Africa's constitutional instability start with the contextual conditions in which constitutions are made and operate. As Karl Marx observed, 'Men make their own history, but they do not make it just as they please; they do not make it under circumstances chosen by themselves, but under circumstances directly encountered, given and transmitted from the past'.[76]

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Elkins Z, Ginsburg T and Melton J 'The lifespan of written constitutions' (2007). Paper presented at the American Political Science Association Meeting, Chicago.

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Rice E 'International participation and constitutional survival' (2013). Presented at the ninth annual CSD Southern California Graduate Student Conference, Irvine, California.

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