

CONSTITUTION-BUILDING IN AFRICA: THE NEVER-ENDING STORY OF THE MAKING, UNMAKING AND REMAKING OF CONSTITUTIONS

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Abstract

Constitution-building is a delicate and intricate process which requires ample reflection and careful choices. African constitution-builders and politicians have since the beginning of the 1990s embarked on a process of constitutional reforms. A careful examination of the developments of the last two decades shows that the process has almost provoked never-ending contagion of making, unmaking and remaking of constitutions. This paper attempts to provide an over-view of the changes that have been taking place. Some of the issues relating to the durability of national constitutions and theoretical foundations for constitutional change are discussed. The paper also considers some of the possible implications of the endless processes of making, unmaking and remaking constitutions. The critical question it tries to grapple with is how this unending process of constitution-building in Africa can be controlled in a manner that will ensure peace, political stability and provide a legitimate foundation for entrenching a firm culture of constitutionalism. In advocating for an entrenched permanent constitutional review commission to check against frequent and arbitrary constitutional changes, the paper argues that this is the best way for constitutional legitimacy to be sustained throughout the life of a constitution.

Keywords

Constitution-building; Constitution-making; Constitutional durability and change; constitutionalism

Introduction

Constitutions do not grow naturally on vine or fall from the sky. In fact, constitution-building is a delicate and intricate process which requires ample reflection and careful choices shaped by factors such as conventions, political struggle, historical context and experience rather than force or imposition. The moves to craft a new generation of African constitutions that began in the 1990s promised a new dawn of radical transformation of the continent's governance landscape and a concerted attempt to eliminate the risks of coups, political instability and other problems that had plagued the continent since independence in the 1960s. It provided an opportunity for African constitution-builders and politicians to design constitutions which for the first time were supposed not only to reflect and take into account the social, economic and other contextual realities of the continent but also draw from the wealth of experience of the past decades of blunders and failures. From a global perspective, Jon Elster has posited that constitution-making or what is increasingly being referred to as constitution-building tends to occur in waves and proceeds to suggest that what we are presently experiencing is the seven of such waves.¹ The concept of "waves" is particularly apt because it reflects the fact that at these critical periods, events in one country have in a sort of snowballing process inspired and accelerated events in other countries. Although in his analysis, Jon Elster associates Africa with only the fifth and seventh wave of constitution-building, one can from a strictly African perspective talk of three generations of constitution-

¹ "Forces and Mechanisms in the Constitution-Making Process." *Duke Law Journal* 45 (1995):368-376. He points out that the first wave of modern constitution-making began in the late eighteenth century, between 1780 and 1791, when the constitutions of the various American states, the United States, Poland and France were written.

building viz, the colonial “constitutions,”² the post-colonial or post-independence constitutions and the post-1990 constitutions.³

The first and second generation of African constitution-building processes, for a variety of reasons did not provide constitutions which promoted constitutionalism or a firm foundation for the social peace, coercion and stability which was needed for Africa’s development. Whilst the first generation constitutions which were generally designed to facilitate the exploitation of Africa, were repressive in nature and made no pretence towards promoting democracy, the second generation constitutions were introduced by the post-independence leaders who used the pretext of promoting national unity, nation-building and development, to quickly repeal some of the liberal principles contained in the post-independence constitutions. In doing so, they more or less re-instated, in most cases, and reinforced the authoritarian system that had been introduced by the colonialists. A common feature of the first and second generation constitutions was the scant attention paid to making constitutions what they are fundamentally supposed to be – a reflection of the will of the people, an expression of their common desires, hopes and aspirations and a solid foundation for peace and stability.

The dramatic events that started in 1989 with the fall of the Berlin Wall ushering a combination of what Jon Elster refers to as the seventh wave of constitution-building and political scientists as the “third wave of democratisation”⁴ is supposed to have brought Africa into a new age of constitutionalism through a process of constitution-building that should have learnt from the failures of the pre-1990 period. Most recent studies that have tried to review the state of constitutionalism in Africa since the 1990s suggest that the early signs of progress are fast giving way to despair as the forces of authoritarianism are beginning to re-emerge.⁵ Besides, the urgent problems of poverty, unemployment, conflicts, economic crisis and political instability that forced Africans on the streets in the early 1990s have lingered on. The constitutional reforms do not appear to have provided any answers to these problems. Instead, they seem to have provoked a wave of constitution-making that has produced a contagion of never-ending processes of constitutional reforms.

This paper attempts to provide an over-view of the constitution-building processes that have been taking place in Africa since 1990. It examines what has now become an endless process of making, unmaking and remaking constitutions to see what the possible implications of this are. The next section of the paper will briefly look at the concept of constitution-building and the issues that it normally raises. This will be followed by an overview of the unending processes of constitution-making. In doing so, it will consider the theoretical foundations of constitutional change and durability and the patterns of constitutional changes that have been taking place. This will provide the basis for the next section which in problematising the

² It is debatable if the colonialists ever pretended to or even attempted to govern their colonial possessions under anything that is remotely close to a constitution. The imperatives of ruthlessly maintaining social peace at all cost mattered more than the niceties of constitutional governance.

³ Charles Manga Fombad. “Constitutional Reforms in Africa and Constitutionalism in Africa: Reflections on Some Current Challenges and Future Prospects.” *Buffalo Law Review* 59(4) (2011): 1007-1009 But also see, Steve Odero Ouma. “Constitution-Making and Constitutional Reform in Fledgling Democracies: An East African Appraisal,” In Kenyan Section of the International Commission of Jurists, *Reinforcing Judicial and Legal Institutions: Kenyan and Regional Perspectives*(Nairobi: Konrad Adenauer Stiftung,2007), 41-61.

⁴ S. Huntington coined the expression in, *The Third Wave: Democratization in the Late Twentieth Century* (Norman: University of Oklahoma Press, 1991): 15-16.

⁵ Charles Manga Fombad (2011):1007-1108.

problem of frequent constitutions changes gauge its impact on the entrenchment of constitutionalism in Africa. The last part of the paper will be the concluding remarks. The critical question here is that of determining how this unending process of constitution-building in Africa can be controlled in a manner that will ensure peace, political stability and provide a legitimate foundation for entrenching a firm culture of constitutionalism.

The Idea of Constitution-building

The concept of constitution-building is fairly complex and means something more than just the process of constitution-making. Constitution-building can be described as a long-term process whereby a political entity commits itself to the establishment or adoption of the basic rules, principles and values that will regulate economic, social, political and other aspects of life within that entity. This entails a process of systematic and systemic strengthening of constitutions-based institutions and processes that foster greater public awareness, consciousness and social ownership of their national constitution. It is therefore often a protracted process that may involve several precise stages such as constitution-making and other events and activities associated with the existence and proper functioning of a constitutional order.

Constitution-building may entail the drafting of a new constitution without regard to the previous one, a wholesale redrafting of a constitution, a substantial revision of a constitution or slight revisions. To be valid, the process must be legitimate in a multidimensional sense. This means that it must have three forms of legitimacy:⁶

- Legal legitimacy; meaning that its adoption must conform to existing legal rules, principles and norms;
- political legitimacy; meaning that it must reflect the general will through the national ownership of the people and is adopted through their sovereign act; and
- moral legitimacy; meaning that it must reflect the shared values, desires and hopes of the people and deal with any problems of societal reconciliation, forgiveness after prolonged victimisation, social inclusion and moral rejuvenation of the society.

Constitution-building as a long-term process involves several steps. The main ones are:

1. Agreement on the need for constitutional change and its scope;
2. Establishing the institutions, procedures and rules for an inclusive and participatory process and the drafting of the constitution;
3. Giving legal effect to the constitution or ratification; and
4. Implementation.⁷

Whilst the process of drafting and adoption of the constitution lies at the heart of the constitution-building project two issues are critical to its multi-dimensional legitimacy and general acceptance. First is the process by which the constitution is built and second, the content of the constitution. On both issues, the process remains a sovereign exercise with practices varying across regions and countries often heavily dictated by the practical needs and the particular context of each situation. Thus, the approach to be adopted in a country that has been conflict-ridden for years and where the exercise is part of a post-conflict, peace-building and nation-building exercise will definitely be different from that in a country where there has been some experience of constitution-building and the purpose is just to change a number of constitutional provisions that have become dysfunctional with time.

⁶ Winluck Wahiu, *A Practical Guide to Constitution Building: An Introduction* (Stockholm: International IDEA, 2011),.2.

⁷*Ibid.*, 2.

As a practical reality, all African countries, even including those like Liberia who adopted a first Constitution on 26 July 1847, have little or no history, culture or even ethos of constitutional governance. The first two generations of African constitutions were in many respects, doomed from the start. They were largely “imposed” with very little consultation and involvement of the people. The post-independence leaders had no experience and were not trained or prepared for democratic constitutional governance and therefore easily misunderstood and misapplied these constitutions or manipulated them to stay in power. One of the main causes of political instability was the fact that most of the few liberal provisions that protected human rights and multi-partyism in the pre-1990 constitutions were quickly and easily dismantled through frequent and arbitrary amendments of the constitutions. A recent study has shown that most modern African constitutions now contain provisions designed to check against the perennial problem of abusive changes to the constitution.⁸ The continuous fever of constitution-building, the nature and extent of which has never been investigated, and to which we shall now turn, raises doubts as to the efficacy of these provisions.

An Overview of the Making, Unmaking and Remaking of Post 1990 Constitutions

This discussion starts by situating this issue in the general context of constitutional durability and change. This is followed by an overview of the patterns of changes that have been taking place.

Constitutional durability and change

In a very broad and general sense, constitutions act as road maps which lay the foundation for all aspects of social, political and economic life in any nation. In almost all countries, with the particular exception of countries that do not have a written constitution, such as the United Kingdom, Israel and New Zealand,⁹ they are expressly or implicitly stated to be the supreme law of the land. As such, any law or action taken which is inconsistent with its provisions is to the extent of the inconsistency illegal and invalid.

Because of their status as the supreme law, constitutions are often designed to endure in order to ensure peace and stability within a polity. This does not however mean that they should endure unchanged for ever. In fact, constitutions are not immutable documents cast in stone or frozen in time that they cannot be changed when the need arises. The US statesman, Thomas Jefferson, in deriding those who “look at constitutions with sanctimonious reverence and deem them like the arc of the covenant, too sacred to be touched,” argued that constitutions should be rewritten every generation because the “dead should not govern the living.”¹⁰ He then proposed a lifespan of 19 years, which the independent research conducted by Tom Ginsburg, James Melton and Zachary Elkins has confirmed is the average life

⁸ Charles Manga Fombad. “Some Perspectives on Durability and Change under Modern African Constitutions,” *J.CON* 11(2) (2013): 382-413.

⁹ Although these countries are often classified as having unwritten constitutions, this is not entirely accurate. For example, Israel has a series of basic laws that purport to be entrenched beyond ordinary legislative modification. New Zealand has long been governed by a UK statute that created its basic public institutions and procedures. The UK has some important constitutional rules contained in many written documents such as the Statute of Westminster 1931.

¹⁰ Cited in, Tom Ginsburg, James Melton and Zachary Elkins, “The Endurance of National Constitutions,” accessed at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1536925 .1. (accessed in August 2014).

expectancy of national constitutions today.¹¹ This is in marked contrast with the US Constitution which since its adoption in 1787 has only undergone 27 amendments. There does in principle, appear to be no problem with changing a constitution per se but more often with the manner in which it is done and what the changes result in.

Insofar as changing constitutions is concerned, it is now widely recognised as one of the fundamental principles of constitutionalism that a constitution, as the supreme law of the land should only be changed in accordance with a clearly defined procedure spelt out in the constitution itself. The purpose is to guard against arbitrary and abusive changes. Failing this, the constitution will lose its value and the will of the people will be subverted if it can be changed easily, casually, carelessly, by subterfuge or by implication through the acts of a few opportunistic people holding leadership positions.¹² Constitutionalism further implies that the constitution should not be suspended, circumvented or disregarded arbitrarily by the political organs of government. This raises the question of what exactly is meant by constitutional change and the basis on which this can be carried out.

It is important to point out that the word “change” is used here, unless the context indicates otherwise, in a general sense to refer to all forms of alteration, revision or amendment of the constitution whether this is slight or extensive or even entails the replacement of the whole constitutional document. There is a rich panoply of literature on the number of ways in which changes can be carried out to a constitution.¹³ This can usually be done in five main ways. First, this could be by way of a formal revision or amendment of the constitution (or remaking the constitution). Second, it could be through a formal replacement of the entire constitution (unmaking the constitution). Third, it could be changed formally, by legislative or executive revision. Fourth, it could be informally done by judicial interpretation. Finally, it could be done informally and irregularly, by revision or replacement of the constitution. The first four methods are usually done within the express or implied terms of the constitution whereas the last is done without regard to the constitution. In this latter case, the irregularity could be cured, as we will see with respect to some African constitutional changes, by a referendum in which the people vote in favour of the changes or the new constitution.

The question of the basis of constitutional change is of critical importance for as noted above, one of the core principles of constitutionalism require that the constitution should not be vulnerable to arbitrary changes at the whims of transient and unscrupulous politicians. What then may necessitate and justify moves to change the constitution? A number of theories some supported by legal principles, justify the occasional need to make, unmake and remake, so to speak, a constitution.

The first justification lies in the consent and popular sovereignty theory. If the constitution is seen as the expression of the general and sovereign will of the people, then it follows that it could be revised or replaced with the people’s consent. This consent could be exercised in an

¹¹ *Ibid.*, 2.

¹² The concept of constitutionalism is discussed in, Charles Manga Fombad, “Post-1990 Constitutional Reforms in Africa: A Preliminary Assessment of the Prospects for Constitutional Governance and Constitutionalism,” in Alfred Nhemba & Paul Tiyambe Zeleza(eds.), *The Resolution of African Conflicts. The Management of Conflict Resolution and Post-Conflict Reconstruction*, OSSREA & James Currey, Oxford (2008), pp. 179-199.

¹³ Bjørn Erik Rasch. “Foundations of Constitutional Stability: Veto Points, Qualified Majorities, and Agenda-Setting Rules in Amendment Procedures.” <http://verfassungswandel.files.wordpress.com/2008/10/bjc3b8rn-erik-rasch-constitutional-rigidity-and-formal-amendment-procedures1.pdf> (accessed in August 2014); and Donald S. Lutz. “Towards a Theory of Constitutional Amendment.” *American Political Science Review* 88(2) (1994): 355-370.

indirect manner, through the people's representatives in parliament, but subject to the terms of the constitution or directly by the people through a referendum, whether or not this is allowed for by the constitution.¹⁴ The second rationale is the human fallibility theory aptly articulated by Donald Lutz.¹⁵ This argument is based on the fact that since fallibility is part of human nature, provision has to be made to correct some of the flaws and other unintended and unforeseeable contingencies that have arisen in spite of the best efforts of constitution-builders. No constitution, however comprehensive, can pretend to provide a perfect and unassailable solution to every country's challenges. A third basis for change lies in the fact that constitutional revision inheres in the very nature of the constitution itself.¹⁶ A constitution is not a "lifeless museum piece,"¹⁷ or a document that contains "time-worn adages or hollow shibboleths,"¹⁸ but rather a living document which is designed to serve present and future generations as well as embody and reflect their fears, hopes, aspirations and desires.¹⁹ Consequently, a political system, whether dictatorial or democratic, will not survive for long without striving to reflect the political realities of the day in its constitution. This implies that change in a fast moving and advancing world is inevitable. In this respect, adjustment to the constitution becomes imperative to deal with matters such as;

- i) economic, social, technological, demographic and other changes taking place within the polity and the international environment within which the polity operates. No country is an island and changes in the scope and quality of international human rights protection as well as in the standards of good governance and rule of law both at international and regional level often require that national constitutions should be adjusted to accommodate and reflect these developments.
- ii) the fact that some of the values and principles or institutions in the constitution may become obsolete and may need to be revised or revamped to enable them deal with contemporary challenges.

It is clear from the foregoing that changing constitutions is not only an inevitable but also a necessary aspect of constitution-building. As noted earlier, almost all African constitutions do have provisions which allow for changes in the constitution although they vary in the extent to which the provisions check against the abusive use of these important powers. It is now necessary to see how these powers, some carefully crafted to avoid abuse and others, loosely worded and vulnerable to manipulation have affected the constitution-building processes in Africa in the last two decade.

An analysis of patterns of constitutional change in Africa

With probably the exceptions of the Constitutions of Botswana (adopted in 1966) and Mauritius (adopted in 1968) almost all African countries have either adopted new or substantially revised their previous independence constitutions or what was left of them after the numerous alterations that had quickly intervened after independence as the new leaders manipulated the constitutions to entrench themselves in power. Have these new or revised

¹⁴ It is however doubtful whether it is legal to resort to a referendum to seek approval for a controversial amendment in circumstances which are not expressly provided for in the constitution.

¹⁵ See *ibid* pp.356-257.

¹⁶ See Charles Manga Fombad (2013),385.

¹⁷ Aguda J.A., in *Attorney-General v Dow* [1992] B.L.R. 119 (Botswana):166.

¹⁸ Earl Warren C.J. in *Trop v Dulles* 356 U.S. 86(1958) :103.

¹⁹ Some argue that the constitution is for the living and the present generation should no longer be ruled by the dead hand of their ancestors. See Michael W. McConnell. "Textualism and the Dead Hand of the Past." *George Washington Review* 60 (1998): 1127-1128.

constitutions that unlike during the pre-1990 period, have provisions designed to check against arbitrary changes brought any stability in the order of constitutional development?

The analysis that follows and is reflected in the table in the annex below, is based on a study of the outcomes of the continuous constitution-building processes that have been taking place in Africa from 1990, when arguably the most dramatic changes started to the present. This must be read subject to a number of caveats. First, although all attempts were made to access, from diverse sources, the changes made to the constitutions of all African countries, this analysis focuses mainly on those countries where some reasonably reliable and complete information was available. Second, there are often differences in the way changes are indicated. For example, in some countries the amendments are numbered (examples of this are Nigeria, Seychelles, South Africa and Zimbabwe) or indicated in the side notes of the text of the constitution (for example, Cameroon and Gabon). For other countries, the only information available is an indication of the year in which changes were made but no details of exactly what provisions of the constitution were changed. Whichever approach is adopted, it is always easy to see the frequency of change and the articles amended. Third, relying solely by the number of articles or sections changed may do nothing more than indicate the possible scope of the change. This must however be treated with caution because in some cases, the changes are more of a technical than substantive manner over a number of provisions, such as replacing the word “Indigenous Courts” wherever it appears with “Customary Courts.” There might thus just be one or a few changes but these may have far reaching consequences. In the light of this, the value of the table below, is not in its absolute scientific accuracy but rather in its indication of some useful trends and tendencies that may be helpful in us understanding what is presently happening. Mindful of these points, we shall now proceed to examine the general picture that appears to be emerging.

As already stated above, apart from Botswana and Mauritius, the constitutions that operate today in African countries are either new or substantially revised versions of pre-1990 constitutions.²⁰ But during this period of 23 years, a good number of these countries (for example, Angola in 1991 and 2010, Central African Republic in 1994 and 2004, Guinea in 1990 and 2010, Republic of Congo in 1992 and 2002, DR Congo in 1994 and 2006 and Rwanda in 1991 and 2003) have rewritten their constitutions twice. Egypt has replaced the Constitution of 2012 with a new one²¹ Zambia has for the last few years been working on a new constitution to replace that of 1991 and by the end of which it would have changed its constitutions twice. However, the record for new constitutions belongs to Niger which has had five new constitutions since 1990 (constitutions of 1993, 1996, 1999, 2009 and 2010). It should also be noted that draft constitutions were rejected in referendums held in Zimbabwe in 2000 and Kenya in 2005.

²⁰ To some extent, Tanzania belongs to this category in the sense that the present Constitution which it is in the process of replacing is a pre-1990 Constitution. However, the reality is that by 1990 almost every article in this independence Constitution had been revised, some more than once and it looked more like a new Constitution than anything else.

²¹ The so-called Arab spring which started in Tunisia in 2011 and saw the departure of former dictator Zine Ben Ali is still in full swing. It will be hazardous to speculate exactly where this is heading to. Whilst Sub Saharan Africa was in turmoil in the 1990s, the dictators in the north, besides Zine Ben Ali, such as Abdelaziz Bouteflika of Algeria, Hosni Mubarak of Egypt and Muammar Ghaddafi of Libya looked firmly in charge and unperturbed. This was in spite of the fact that a country like Libya barely had a document that looked like a constitution. As the moderate and hard-line Islamic forces grapple for power, it is less clear whether these countries are moving forward towards establishing constitutional states governed by the rule of law or Islamic states subject to Sharia law.

Mali, with an average of one new Constitution every 4 years certainly defies any comparison. A closely related comparison is the frequency with which provisions in the constitutions are regularly revised. In this regard, South Africa, with a Constitution that has been amended in 10 different years out of its 17 years of existence shows that it has been amended almost once each year. The closest to this regularity are the Constitutions of Lesotho, Mauritius, Rwanda, Senegal and Seychelles which have been revised about once every 4 years.

The number of articles revised may give some indication of the extent of revision carried out.²² From this perspective, the most extensive revisions seem to have been carried out in Rwanda, where 175 articles of its 2003 Constitution have been changed within a decade after the adoption of the Constitution. Others, such as Tanzania (with 100 articles changed), Nigeria (86 sections), Burkina Faso (71 articles) and South Africa (69 sections) also display a high level of amendment. By 2013, through piece-meal amendments, Rwanda and Tanzania had almost completely revised every article in their respective 2003 and 1977 Constitutions.

Not too much needs to be read into the frequency of change or the number of provisions changed because, as pointed out above, some of these changes may be quite uncontroversial and of a merely technical rather than substantive nature. Besides this, there are a few instances where there has just been one series of changes but which have had significantly much greater impact than numerous other changes elsewhere. For example, Cameroon's 1996 Constitution was only revised once in 2008 but the changes undertaken, substantially reinforced an already heavily distorted governance structure in which the President of the Republic reigns supreme. It removed the two term limits in article 6(1) and grants the President in article 53(3) absolute immunity for any acts committed whilst in office and extends this to when he leaves office. On the other hand, when you compare this with South Africa, where they have been 20 amendments in as many years from 1996, these changes, although far more numerous and extensive, have not had as much impact as the Cameroonian changes. Nevertheless, whilst most of the changes have been of a technical nature, a few have had some significant substantive effect on the democratic system of governance. As we shall now see, the pre-1990 problems of political instability and uncertainty caused by the remaking of the constitutional text do not seem to have gone away.

Problematising the Never-ending Making, Unmaking and Remaking of Constitutions

If Tom Ginsburg, James Melton and Zachary Elkins' constitutional average life expectancy of 19 years is to be considered as a base, then about 24 of the countries in the table below, excluding those in turmoil or who have not had any changes, average a life span of 17 years. In this regard, Botswana and Mauritius who are still hanging on to their independence constitutions therefore have the oldest constitutions. Although a long life span is not necessarily synonymous with a happy and fulfilling life but the fact that these two countries have the best record on the continent on most indicators of good governance, human rights protection, democracy and corruption is indicative of the benefits of constitutional stability.²³

²² It is necessary to note that this is subject to the caveat that the details of the actual articles changed were not available for all the countries.

²³ For the better performances of these two countries over most other African countries, see indicators such as, Freedom of the Press 2013, <http://www.freedomhouse.org/regions/sub-saharan-africa> (accessed in August 2014); Freedom in the World 2013, <http://www.freedomhouse.org/sites/default/files/FIW%202013%20Booklet.pdf> (accessed in August 2014); Corruption Perceptions Index 2012, <http://cpi.transparency.org/cpi2012/results/> (accessed in August 2013); and 2013 Ibrahim Index of African Governance, accessible at <http://www.moibrahimfoundation.org/downloads/2012-IIAG-summary-report.pdf> (accessed in August 2014).

These two constitutions have on numerous occasions been revised²⁴ but beyond the fact that there has been no complete redrafting of these constitutions, the changes have in many respects, similar to those that have taken place in other countries in their piecemeal, ad hoc and inadequately thought-out manner. Sooner or later, these two constitutions too may have to undergo a more comprehensive review similar to that undertaken in all other African countries. Like other African countries, their constitutional foundations are still shallow. Unlike in the West, the very foundations of constitutionalism in Africa as well as its major principles are only being slowly, but strenuously entrenched in the written constitutions. It will take time, patience, wisdom, foresight and firm commitment by African politicians for a culture, tradition and ethos of constitutionalism to grow and complement the written constitution. It will also take time, integrity and a firm sense of commitment to truth and justice for judicial precedents to complement, as they have done elsewhere, the written constitutions in Africa.

The unending processes of making, unmaking and remaking constitutions and the possible instability that is has created in countries such as Niger that have had 5 constitutions in 20 years and others such as Central African Republic, Guinea, Republic of Congo and Rwanda are a reminder of the ugly ghosts of the past. Many of the changes, whether undertaken under manifestly illiberal constitutions, such as Cameroon's 1996 Constitution or liberal constitutions, such as South Africa's highly venerated liberal constitution, are usually designed to strengthen the continent's imperial presidents, and protect their dominant political parties in the legislature rather than deepen constitutionalism or democracy. Although most of these changes have been approved by parliaments, two pre-1990 problems have persisted. First, the legitimacy of the increasingly dominant parties that have replaced the former single party is questionable because there is hardly any internal democracy within these parties, leaving them to be controlled by powerful ethnically or tribally affiliated cliques. Second, parliaments have used the opportunity to revise the constitution to focus on consolidating their authority and promote reforms that entrench their interests. An excellent example of such a change occurred when the South African Parliament in the Eighth, Ninth and Tenth amendments (from 2002 to 2009) introduced highly contentious floor crossing provisions which allowed members of national and provincial parliaments and municipalities to cross the floor during two window periods, as long as more than 10% of the members of the party crossed the floor. This effectively insulated the ruling African National Congress Party (ANC) from floor crossing because smaller parties could be destroyed by one person crossing the floor whereas it would have required 25 to 30 ANC members crossing to meet this 10% threshold. Faced with the threats of factionalism within the ANC after a 2007 party conference, the fourteenth and fifteenth constitutional amendments were quickly adopted abolishing floor crossing which many analysts saw as a clear attempt to protect possible floor crossing by losing factions within the party.²⁵

One could question the legality of changes where they were so substantial that they resulted in directly or indirectly replacing the constitution with a new one. For example, in 1996, the Cameroon Government purported to revise its 1972 Constitution which had only 39 articles and ended up with a "revised" Constitution of 69 articles. The new Zimbabwean Constitution

²⁴ The Botswana Constitution, since its adoption in 1966, has been amended 20 times in 47 years (twice each in 1969, 1993, 1997 and 2002), and on average, just over once every two years. On the other hand, since the Mauritian Constitution came into force in 1968, it has been amended 10 times in 45 years, that is an average of one amendment every four years.

²⁵ Pierre De Vos, "On Changing the Constitution," 23 March 2012, <http://constitutionallyspeaking.co.za/on-changing-the-constitution/> (accessed in August 2014).

is adopted and enacted “as Constitution of Zimbabwe Amendment (No. 20) Act” of 2013. Most other constitutions, such as Kenya and Niger’s Constitutions of 2010 make no reference to the previous constitutions. It is doubtful, as a matter of strict constitutional interpretation, whether provisions in a constitution which provide for its amendment can lawfully serve as a basis for replacing the entire constitution. If we note the fact that hardly any constitution says anything about its replacement one may reject this strict positivist interpretation, otherwise hardly any written constitution could ever be replaced. But then something more is needed than the ordinary procedure for amending the constitution to completely replace the whole constitution. This is particularly so, because some of the constitutions, with carefully and thoughtfully crafted amendment mechanisms, such as the Ghanaian Constitution, provide different procedures for amending different sections of the constitution.²⁶ On this reasoning, it can be argued that the replacement of the Constitutions of Kenya in 2010 and Zimbabwe in 2013 was legitimated by the recourse to a referendum which enabled the people to exercise their sovereign right to consent to the change.²⁷ But just securing an approval during a referendum is definitely not enough for it is now a notorious fact that referenda, like elections, in most African countries have virtually become a plebiscite in which the incumbent governments ensures that they get the result they want.²⁸ It is the possibility of frequently making and unmaking of constitutions to frustrate the will of the people that has raised serious problems about the current state of constitution-building since the 1990s and its likely impact on constitutionalism.

Some of the literature that assesses the post-1990 constitutional developments show that there have been significant improvements in the standard of constitutionalism when compared with the preceding period.²⁹ Our analyses of the nature of the changes that have taken place suggest that although in some countries, there have been progressive improvements, in others, the changes have steadily undermined some of the gains that were made. On the positive side, the new Constitutions in countries such as Angola,³⁰ Kenya³¹ and more recently Zimbabwe³² are considerable improvements on the previous ones. Perhaps one of the biggest weaknesses of the present wave of constitution-building on the continent has been the failure in all the constitutions to check or bring under control, the exorbitant powers which African leaders often exercise abusively.³³ One of the few steps taken to prevent life presidencies was

²⁶ It distinguishes between what is terms “entrenched” provisions and non-entrenched provisions of the Constitution to which different amendment procedures apply. See articles 289-290 of the Constitution, which is discussed in Charles Manga Fombad (2013), 382-413.

²⁷ In fact, many post-1990 constitutions were eventually approved by the people during referenda. For example, the Constitutions of the Central African Republic (2004), Chad (1996), Comoros (2001), DR Congo (2005) and Equatorial Guinea (1991).

²⁸ As the irregularities that marred the Zimbabwean parliamentary and presidential elections show, many African elections, due to sophisticated and in some cases, crude rigging techniques, are lost before the first ballots are cast. For some reactions to this, see, “Zimbabwe Elections marred by Irregularities,” http://www.regjeringen.no/en/dep/ud/press/news/2013/zimbabwe_elections.html?id=733153 (accessed in August 2014); and “Not Credible: Zimbabwe’s 2013 Elections results marred by Fraud,” <http://www.sokwanele.com/zimbabwe-elections/evidence-of-fraud> (accessed in August 2014).

²⁹ Charles Manga Fombad (2008).

³⁰ Andre Thomashausen. “The Constitutions of Angola.” In: R Wolfrum, and R Grote, eds, *Constitutions of the Countries of the World - Oxford Constitutions Online*, <http://www.oup.com/online/us/law/oco/>. (accessed August 2014).

³¹ See, Waruguru Kaguongo, “Introductory Note to the Constitution of Kenya,” https://web.up.ac.za/sitefiles/file/47/15338/Introductory%20Note%20Kenya_FINAL.pdf (accessed in August 2014).

³² Gift Manyatera. “Introductory Note to the Constitution of Zimbabwe,” (forthcoming).

³³ Kwasi Prempeh. “Presidential Power in Comparative Perspective: The Puzzling Persistence of Imperial Presidency in Post-Authoritarian Africa.” *Hastings Constitutional Law Quarterly* 35(4) (2008): 1-87.

the introduction of presidential term limits.³⁴ Although attempts to repeal these provisions were repulsed in Malawi, Nigeria and Zambia, these provisions were successfully repealed in Burkina Faso, Cameroon, Chad, Gabon, Guinea, Namibia,³⁵ Niger, Togo and Uganda.³⁶ It is not mere coincidence that the presidents of most of those countries where the two term limit was repealed are amongst the longest serving rulers on the continent.³⁷ It is doubtful if any of these rulers have any intentions of relinquishing power especially given the ease with which modern African elections are won by incumbents with the increasing complicity of the African Union and other regional organisations.³⁸

A cursory examination of the nature and scope of the constitutional revisions that have been taking place show that the overriding objective in most cases, especially where this entails nothing more than amendments to the existing constitution, are usually narrowly focused and often designed to protect the interests of certain individuals or institutions.³⁹ Where a complete overhaul of the constitution has taken place, as was the case in Angola, Kenya, Zimbabwe and presently Algeria, Egypt, Libya, Tanzania and Tunisia, this attracts a lot of international attention and interest. The challenge is often to negotiate the scope for change with elements of the old order. This often leads to protracted negotiations between elements of the old regime and those of the new order that eventually leads to compromises. In most countries, the elements of the old order have usually, through the benefit of their incumbency and dominance determined the scope of the change. For example, in Kenya, although since 1997 all were agreed that a comprehensive constitutional change was needed, the Government virtually imposed a draft constitution in November 2005 which was rejected by the people at a referendum. After the violence that followed the disputed presidential elections in 2008, the political class was now able to agree to a comprehensive reform that led to the 2010 constitution. It took 10 years of wrangling before the scope of the revision could be agreed upon in Kenya whilst in South Africa, this process took 6 years, from 1990 to 1996.

³⁴ Ben Armstrong. "Ne Touche Pas Ma Constitution: Pressures and Presidential Term Limits," <http://www.polisci.northwestern.edu/undergraduate/documents/2011HonorsThesisBenArmstrong.pdf> (accessed in August 2014).

³⁵ It is necessary to point out here that article 134 was specifically amended to benefit only then president, Sam Nujoma as all future presidents will be bound by the two term limits. The justification given for the amendment was that until then, Sam Nujoma had only been elected once and was thus technically entitled to stand for election a second time.

³⁶ There are many indications that the DR Congo and Burundi are seriously contemplating removing the term presidential limits in their constitutions. Although such an attempt has already been repelled once in Burundi, the incumbent President has not given up.

³⁷ For example, Paul Biya of Cameroon has been in power since 1982, Yoweri Museveni since 1986, Blaise Compaore since 1986 and Idriss Deby since 1990.

³⁸ See, Faith Karimi and Nana Karikari-Apau. "Zimbabwe Elections praise by African Union, Sidesteps Rigging Claims," accessed at <http://edition.cnn.com/2013/08/02/world/africa/zimbabwe-election/index.html> (accessed in August 2014).

³⁹ For example, Fatima Diallo, "Constitutional Developments in Africa: Senegal," Paper presented at a Seminar of the Oxford Constitutions of the World African Reporters, Wallenberg Conference Centre, Stellenbosch Institute for Advanced Study (STIAS), 3-4 September 2013, points out that the more than 15 times that the Senegalese Constitution of 2001 has been amended and the resulting political instability were all designed by the former president, Abdoulaye Wade, to hang on to power and subsequently install his son as his successor. Some of the constitutional changes included re-introducing the Economic and Social Affairs Council in 2003, two years after it was abolished, coupling presidential and parliamentary elections, extending their terms, re-introducing the Senate after it had been abolished, establishing the position of Vice President and perhaps the most serious being changes to article 33 of the Constitution on the eve of the simultaneous parliamentary and presidential elections in 2007, which resulted in the main opposition party, the Socialist Party and others boycotting the polls.

Although constitution-building is essentially a sovereign national process, external actors remain a very essential part of the process in Africa. They have and continue to play useful roles such as providing financial assistance for projects like facilitating public participation through civic education and providing study guides and specialists who can help in mediation and neutral facilitation of sensitive talks. Some of these external actors like the UN and the AU can help break deadlocks especially where the process is dominated by one party. The advice given by international civil society organisations such as the International Institute for Democracy and Electoral Assistance (International IDEA) and Democracy Reporting International based on their guidelines and best practices combined with some of the recommended principles and best practices developed by the UN and the AU can help break stalemates.

Whilst it is clear that the role of external actors is neither value free nor neutral they cannot be ignored. For better or for worse, national constitutions are becoming increasingly uniformised and standardised. Besides this, the international community has legitimate interest in ensuring constitution-builders design stable, democratic and durable constitutions. A dysfunctional constitution that leads to civil strife can easily threaten international peace and stability. A leader who seeks to perpetuate himself in power through acts of genocide cannot expect the international community to look the other way. The numerous conventions and declarations that African governments have signed, for example the AU instruments to promote democracy and good governance,⁴⁰ and various anti-corruption treaties and other human rights instruments cannot be ignored. In short, constitution-builders cannot ignore the country's international obligations. Besides this, pressure to conform to internationally accepted standards of good governance is reinforced by remedies such as universal jurisdiction, the ICC processes and the responsibility to protect principles in cases of genocide, war crimes and crimes against humanity.⁴¹

Looking at the evolution of what is certainly Africa's new era of constitutionalism, it is clear that once the glare of national and international spotlight disappears with the adoption of a new constitution containing some progressive ideas, African leaders have for their own selfish ends slowly but stealthily diluted the benefits introduced by these reforms, much as they did with the post-independence constitutions. Revising a constitution doesn't attract as much attention as writing a new constitution. There is little public participation, except in those instances where the reforms are required to be approved by parliament. With the increasing control of African parliaments by dominant parties, most of the constitutional changes that are frequently introduced often do no more than serve the narrow interest of the ruling elites.

Looking to the future, it is suggested that there are two main ways to deal with the contagion of making and remaking constitutions. First, if we work from the idea that constitutions may well have a possible lifespan, then it could be made imperative that a review of the way a constitution has performed should be carried out, within a period of 15-20 years of its existence. Second, a permanent statutory constitution review commission should be set up

⁴⁰ These are contained in the Constitutive Act of the AU, the African Charter on Democracy, Elections and Governance and a number of other Declarations and Resolutions.

⁴¹ Cedric Ryngaert. "The International Criminal Court and Universal Jurisdiction," https://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp41-50/wp46.pdf (accessed in August 2014); and Xavier Phillippe. "The Principles of Universal Jurisdiction and Complimentarity: How Do the Two Principles Intermesh?" *International Review of the Red Cross* 88(862) (2006) ; 375-398.

alongside the constitution; something like Kenya's Commission for the Implementation of the Constitution,⁴² to carry out this review. The permanent constitution review commission should be constituted in such a manner that no political party can hold a majority in it.⁴³ This will obviate the danger of a constitutional reform agenda being driven solely on the programme of a ruling party. Furthermore, constitutional changes will be more acceptable if they are the product of a carefully constituted and representative commission rather than something single-handedly contrived by the ruling party.

Conclusion

If pre-independence constitution-building was a staged *ad hoc* event that took place in secret places and behind closed doors, this has changed dramatically today. Democratic constitution-building now demands not only an open, transparent and participatory process during the critical moments when the constitution is being drafted but also a similar approach when the constitution is to be amended. The frequency with which most African post-1990 constitutions are being revised not only erodes their legitimacy but also impacts negatively on their implementation and is the main cause of constitutional fragility. The problem therefore is often not how frequently or infrequently the constitution is changed but rather the extent to which these changes, firstly reflect the genuine will of the people and secondly how it helps to consolidate democratic and constitutional governance and respect for the rule of law. In this respect, a fine balance needs to be struck between constitutional growth, durability and stability on one hand and popular sovereignty on the other.

This paper has shown that the 1990s reforms appear to have unleashed this interminable appetite for tinkering with the constitution. There is, from our analysis of many of the changes that have been made, reason to think that although some of these changes were necessary, many were prompted by opportunistic politicians anxious to bolster their positions. For example, introducing floor crossing legislation only to repeal this a few years later is evidence of political calculations trumping all other considerations. A constitution is too important to be changed willy-nilly. Besides, constitution-builders even in the most ideal situation where there is widespread public participation can hardly ever expect to achieve the best possible technical constitution: what they can at most get is the best possible compromise that accommodates the often divergent and conflicting interests and desires, especially in deeply divided societies. It is a compromise which needs to be carefully protected from both the tyranny of the minority as well as the tyranny of the majority.

The transparency and integrity that should be manifested throughout the constitution-building process, from its initial stages to when the constitution is in force and throughout its life, are

⁴² See section 5(1) in the Sixth Schedule of the Kenyan Constitution. It can be argued that the whole issue of constitutional implementation can no longer be ignored, taken for granted or left to be dealt with in an *ad hoc* manner. This must be comprehensively addressed in the constitution itself and involves at least three things. First, a clear implementation strategy; second, an implementation and monitoring body; and third, a legal obligation to implement. With respect to the latter, it can be argued that section 258 of the Kenyan Constitution gives every citizen the right to see enforcement of the constitution.

⁴³ South Africa's chapter 9 institutions, the most widely known of which is the Public Protector are examples of how such a permanent statutory commission could be constituted. In particular, the "guiding principles," in section 181 of the South African Constitution will help shield such a commission from political interference and enhance its ability to operate independently and effectively.

essential to winning and sustaining the trust of the people. In other words, constitution-building is not a “once-off” process that starts and ends with the drafting of a constitution nor is the legitimacy of the process once earned a *carte blanche* for frequent and arbitrary alterations of the constitution. The entrenchment in most modern African constitutions of provisions designed to limit and prevent arbitrary making, remaking and unmaking of constitutions is a step in the right direction but does not effectively deal with this problem. It is submitted that it is now necessary, in the light of actual practice, to reinforce this protection by entrenching provisions for an independently constituted permanent constitution review commission to oversee on a regular basis, any future changes in the constitution. Whilst it is prudent to forestall our human weaknesses by anticipating the need for change, the very special nature of constitutions ordains that it should not be reduced into a simple “one stop among many in a series of radical transformations”,⁴⁴ or mere periodicals.⁴⁵ Moreover, modern African constitutions, taking their cue from the South African Constitution of 1996 are sufficiently rich in foundational values and principles to ensure what Bruce Ackerman has described as an “intergenerational synthesis.”⁴⁶ This will enable the judiciary to blend constitutional values of one generation with that of another and limit constitutional changes to where this is absolutely necessary and entails textual alterations. In this way, constitutional legitimacy can be sustained throughout the life of the constitution and the hard-earned political bargains worked out during intensive but inclusive constitution-building processes are not destroyed by self-seeking transient majorities.

It goes without saying that the quality of a constitution and its practical, symbolic and legal legitimacy and endurance are directly linked to its constant ability to withstand the threats that those who hold leadership position continuously pose. A constitution is never perfect in the sense that it will ever be able to address all the problems that may arise during its life time. Nevertheless, any effective and legitimate mechanism that stands any chance of dealing with legal and political uncertainties caused by the frequent making, unmaking and remaking of African constitutions must be constructed around the need to introduce independent institutions that could tame the absolutism of Africa’s increasingly unruly dominant parties.

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⁴⁴ Laurence Tribe and Thomas Landry. “Reflections on Constitution-Making.” *American University Journal of International Law and Policy* 8 (1993): 628.

⁴⁵ Tom Ginsburg, James Melton and Zachary Elkins., 1: narrate the old joke about a man who goes into a library and asks for a copy of the French constitution. Because of the frequent and unpredictable changes to the constitution, he is turned away with the explanation that the library does not stock periodicals.

⁴⁶ *We the People: Foundations*, Cambridge, Harvard University Press, 1991, 113.

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