

CONSTITUTIONAL REFORMS AND CONSTITUTIONALISM IN AFRICA: REFLECTIONS ON SOME CURRENT CHALLENGES AND FUTURE PROSPECTS

From antiquity down to the modern era, philosophers, political scientists and jurists have always recognised the imperatives of constitutionalism and the difficulties of attaining this. It is perhaps trite to say that we live in a time of rapid and momentous changes in every sphere of life, none more so than in constitutional governance. For Africa, after more than four decades of mostly authoritarian, corrupt and incompetent rule, the 1990s began with a slow and painful move towards what many optimistically hoped will usher in a new era of democratic governance and constitutionalism. One of the main features of this process has been constitutional reforms designed to introduce constitutions that promote constitutionalism and good governance. The objective of this presentation is to consider, in the light of the challenges to constitutionalism that have emerged since these third generation of constitutions were adopted in Africa, what needs to be done to sustain the momentum towards constitutional governance on the continent. The basic contention is that although the foundations for promoting constitutionalism, good governance and democracy have been laid down in these reforms, the threats of authoritarian resurgence emerging in the last few years suggests that these changes did not either go far enough or address the critical problems of the moment. It is no surprise that one commentator has rightly suggested that these developments have made power in Africa to resemble the two-faced god (Janus) in Roman mythology. One face which is looking at the outside world appears to be liberal, democratic, polished, refined and orthodox whilst the other one which looks inward and is concealed is surly, implacable, and savage.

The first part of this presentation will briefly highlight the attempts that have been made to adopt constitutions that promote constitutionalism. The second part will look at some of the main challenges that have arisen during the course of the last two decades with ominous and insidious signs of totalitarian resurgence. The third part will discuss how some of these challenges can be overcome. By way of conclusion, it will be argued that African countries cannot be economically viable and socially and politically stable or hope to reduce the scourge of disease, hunger and poverty without constitutions that entrench certain crucial institutions, principles and

mechanisms that promote constitutionalism, accountability, democracy and good governance. We have experienced enough change to bring about a new set of rulers but not the profound institutional changes in the system that make dictatorship, corruption, inefficiency, poverty and economic decline almost inevitable.

PART ONE: THE REVIVAL OF CONSTITUTIONALISM ON THE AFRICAN CONTINENT

Many studies have shown how most post-independence African constitutions were quickly transformed into instruments of oppression under the pretext of pursuing the coveted but elusive goals of national unity and economic development. And as Okoth Ogendo pointed out, what we had in Africa were “constitutions without constitutionalism.”

The concept of constitutionalism today can be said to encompass the idea that a government should not only be sufficiently limited in a way that protects its citizens from arbitrary rule but also that such a government should be able to operate efficiently and in a way that it can be effectively compelled to govern within its constitutional limitations. In other words, constitutionalism combines the idea of a government limited in its action and accountable to its citizens for its actions. The modern concept therefore rests on two main pillars. First, the existence of certain limitations imposed on the state particularly in its relations with citizens, based on certain clearly defined core values. Second, the existence of a clearly defined mechanism for ensuring that the limitations on the government are legally enforceable. In this broad sense, modern constitutionalism has six core elements:

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

There are however three important points that follow from this definition of constitutionalism. First, it is by no means a static principle and the core elements identified are bound to change as better ways are devised to limit government and protect citizens. Second, the presence and institutionalisation of these core elements do not necessarily guarantee

constitutionalism. Nevertheless, their presence makes the prospects for constitutionalism better. In the absence of such provisions, the chances of constitutionalism are very bleak. Finally, it is the cumulative effect of these core elements that enhance the chances for constitutionalism.

At independence, most African countries adopted constitutions that had been crafted by the departing colonial powers. The leading types were the British parliamentary or Westminster model, widely adopted in Anglophone Africa, although many of these countries often added elements of the US presidential system to it. The other major Western constitutional model that was adopted was the Gaullist constitutional system based on the French Fifth Republic constitution of 1958. This model has been widely adopted in Francophone Africa and variations of it were adopted in Lusophone and Hispanophone Africa.

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

These studies show that the protection of fundamental human rights and freedoms has become a standard of constitutionalism recognised and accepted by most African countries. They now provide for some form of separation of powers. They also recognise and sometimes purport to protect the independence of the judiciary. To check against the violations of the constitution that were very common before 1990, most modern African constitutions have now incorporated one of the important bulwark of constitutionalism, that is, a mechanism for reviewing compliance with the constitution. Diverse forms of restrictions, some more symbolic than real, have been adopted under modern African constitutions to control the constitutional amendment process. There is also what has rightly been described as probably South Africa's most "important contribution to the history of constitutionalism" which appears in Chapter 9 of its Constitution, under the title, "state institutions supporting democracy."

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

PART TWO : CHALLENGES TO CONSOLIDATING CONSTITUTIONALISM

As we have seen, the core elements of constitutionalism have been incorporated in one form or another in modern African constitutions. However, the experiences under these new or revised constitutions in the last decade have exposed numerous structural and institutional weaknesses and gaps. A few of what one can consider as some of the fundamental challenges that have made constitutionalism under present constitutions neither real, effective nor meaningful will now be briefly considered.

For a start, the assumption that the constitutional entrenchment of fundamental rights, especially the legalisation of multipartyism will provide a solid foundation on which constitutional democracy, a culture of tolerance, transparency and accountability as well as political stability will develop and discourage dictatorship and military adventurism has **not** turned out to be true. The main, and in most instances, the only basis on which many African countries can claim to be democracies, the regular holding of parliamentary and presidential elections is also potentially one of the major sources of democratic paralysis on the continent. As Andreas Schedler has observed, most of these elections have provided “little more than a theatrical setting for the self-representation and self-reproduction of power.” Ruling parties have skilfully tailored electoral laws to favour them and permit them to exclude their opponents from electoral competition. The real danger is that this destroys in a serious way faith in peaceful change through the ballot box and raises the ugly spectre of change by the use of force. In the famous and oft-quoted words of the late President John F. Kennedy, “those who make peaceful change through the ballot box impossible make violent change inevitable.” The so-called Jasmine revolution or Arab spring is a reminder of this truism.

Opposition political parties, long considered to be an essential structural feature of modern liberal democracy are barely tolerated on the continent.

The large numbers of opposition parties in Africa have often degenerated into narrow ethnic opportunistic alliances. Fractious and diverse, many of the opposition parties, even in countries like Botswana, Africa's "best example of successful multiparty democracy" spend their time squabbling and in most cases pose more competition for each other than for the ruling parties.

Jean-Francois Bayart's "politics of the belly," accurately reflects the tactics which the dominant parties that have replaced the former single parties are practising to perpetuate their dominance of the political scene today. The Machiavellian tactics that enemies must either be caressed by co-optation into the spoils of power or be annihilated has regularly been used to reduce multipartyism into a farce.

The new leaders that have replaced some of the old guards in the last decade have done little to show that the new constitutional dispensation and constitutional democracy can change the *status quo*. In fact, the old monolithic one party dictators appear to have simply made way for multiparty "democratic" dictators, who have maintained the inherited repressive, exploitative and inefficient structures installed by their predecessors. Many of the new democrats have turned out to be as unreliable, corrupt, violent, power-drunk, manipulative and inefficient as the regime they replaced.

One of the major problems that was not addressed by the post 1990 constitutional reforms is the issue of African absolutism caused by the concentration and centralisation of power in one man, the president, and in one institution, the presidency, and the abuses of powers that go with this. Many of the new constitutions merely paid lip service to separation of powers. Under most constitutions, especially in Francophone Africa, an overbearing and "imperial" president reigns and dominates the legislature as well as controls the judiciary.

Although since 1990, from a quantitative point of view, a study by Heyns and Kaguongo suggests that there has been a tremendous expansion in the scope of human rights protection in Africa, the actual quality of human rights protection on the continent, from most international indicators show a steady decline in recent years. For example, Freedom House in its 2009 report on the annual survey of global political rights and civil liberties noted that 2008 marked "the third consecutive year in which global freedom

suffered a decline.” It pointed out that “this setback was most pronounced in Sub-Saharan Africa and the non-Baltic former Soviet Union.”

A healthy and flourishing economy that offers employment and prospects for improving the quality of life of citizens will make democratic progress easy. The deepening socio-economic crisis that has continued to ravage the continent has not helped. Hungry people have little interest in democracy or constitutionalism, even if it would create the environment for their survival. As Ziad Limam laconically observed, “with nothing to eat, the right to vote is derisory.” The reality is that the promises of food, water, shelter, healthcare, employment, better wages, increased accountability and many other good things that were made by the new and old democrats in the 1990s have not materialised. All that has happened is the regular holding of more and more expensive elections that offer better opportunities for the politicians and their cronies and little benefit to the ordinary voter.

In spite of the departure of Arap Moi in 2002 and more recently Ben Ali of Tunisia and Hosni Mubarak of Egypt, there are other African monuments of “standpattism”, as Rene Lemarchand, describes them, such as Paul Biya of Cameroon, Teodoro Nguema of Equatorial Guinea, Blaise Campaoré of Burkina Faso, and Robert Mugabe of Zimbabwe, who are too deeply entrenched that they can not be easily removed through the ordinary democratic process. With formidable foes of democracy like this that have only grudgingly adopted some symbolic features of democracy, it seems reasonable to conclude that there is still a long way to go for constitutionalism to be entrenched in Africa.

PART THREE: REFLECTIONS ON A CONSTITUTIONAL REFORM AGENDA FOR THE NEXT DECADE

The main focus of this section is to consider what institutional, structural and other changes need to be made to prevent the progress towards constitutionalism, democracy and good governance being undermined by “unconstitutional means” such as military and electoral *coup d'états* or by “constitutional means” such as abuse of executive powers.

It is contended that the prospects for constitutionalism, democracy and good governance will be considerably enhanced when a number of changes take place. These can be summarised under 8 main points.

Point 1: The recognition of a right to free and fair elections and other ancillary rights

The recognition of the right to form and/or join political parties of one's choice and to vote or to be voted for any political office in the post-1990 African constitutions is fast becoming an illusion because the dominant parties that have now replaced the single parties and their leaders have easily entrenched themselves or their parties in office in perpetuity. One of the major challenges today is the problem of countering the resurgence of majoritarian abuse or dominant party dictatorships that use multi-partyism as a convenient smokescreen behind which to practise their dictatorship. This poses a serious threat to entrenching constitutionalism and the rule of law on the continent. It is submitted that one important way of reducing the risks of fraudulent elections will be to recognise and entrench a right to free and fair elections in the constitution itself. This can be done in several ways.

First, constitutional provisions must recognise the basic rights and duties of political parties. Because of the potentially wide-ranging reach of their activities in the public domain, political parties can no longer simply be allowed to do their own things their own way. Constitutionalising their status necessarily means that their actions will come under public scrutiny at all times, not just during elections. Perhaps the greatest merit of this process is that it will promote internal democracy and ensure that private actions can be brought against political parties which break their own rules. Constitutional provisions should lay down basic principles for elections within all political parties to ensure that persons with criminal records or who are subject to the legal process are barred from seeking or holding political office.

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

One important lesson from the pre-1990 era is that strong, active and disciplined political parties, not just one political party is necessary for any effective political representation and genuine democracy to take hold.

Point 2: The constitutional entrenchment of key principles and institutions of accountability

Many African post-1990 constitutions make reference directly or indirectly to and provide for some accountability and transparency measures and mechanisms. In many situations, these measures and mechanisms have been introduced through ordinary legislation. These have often not worked well mainly because the legal safeguards to protect them from being abused or manipulated by the governments are weak or more often absent. The tenacity of the single party mentality within the new dominant parties that are entrenched in power coupled with weak and ineffective civil societies in many African countries has been a formidable obstacle to holding governments to account.

The South African chapter 9 institutions provide an excellent example of institutions designed to uphold constitutional democracy and promote accountability. What makes them unique are the four key constitutional principles that are spelt out to ensure that these institutions are effective and not a political charade of symbolic value only. In a number of key cases, the Constitutional Court has relied on these principles to protect these institutions from political interference.

A number of institutions of oversight, either of a general nature or of specific branches of the government (e.g. the ombudsman, a human rights commission, a public accounts committee) have become a necessity in any constitutional design that aspires to promote both constitutionalism and accountability.

In addition to the four constitutional principles that govern the South African institutions, the constitution must also define their structure, functions and composition in a manner that will ensure that none of the three organs of government can interfere with their operations. Perhaps the main safeguard against any abuse would be a general limitation clause which provides that any legislation, or measures or mechanisms introduced which undermine the essential purpose of accountability and transparency that the institution is designed to achieve must be declared null and void by the courts. This would be a more convincing way of dealing with cases like *Glenister v President of South Africa*.

Two important conclusions can be drawn from the experiences of the South African chapter 9 institutions. First, that these institutions will be more effective if they are made more easily accessible to the poor and marginalised in society. For instance, ombudsmen and anti-corruption institutions should be decentralised and have offices in as many districts as possible and not merely in the capital city. Second, they must be given powers to be both reactive and proactive. These institutions can only be credible if they provide what one can describe as “low” or “retail” constitutionalism which will address the rampant impunity and abuse of power by officials at the most basic level of the public administration as opposed to “high” or “wholesale” constitutionalism that addresses the concerns of the elites. In saying this, one is acutely aware of the critics of the chapter 9 institutions. Can these critics figure out what would have been happening if there was, for example, no Public Protector in South Africa?

However, in order to ensure that the institutions of accountability are not only proactive and reactive but are also able to tackle both petty and grand corruption there is need for the constitution to lay down the basic principles of an effective whistleblower legislation and legislation requiring mandatory declaration of assets for all political office holders and senior public officers. In the light of the recent trepidations of the Public Protector, one may suggest that there is need for a code of political and administrative decency. The problem of limited accountability is directly linked with the problem of excessive powers.

Point 3: Reduction of excessive presidential powers

One of the major threats to constitutionalism in Africa that has been little affected by the 1990 constitutional reforms is the capacity for executive lawlessness which has been made possible by the excessive powers conferred on presidents and the absence of any effective checks on the exercise of these powers. These exorbitant powers can be curbed in a number of ways.

First, a constitutional provision must specify that all presidential appointments especially of senior government officials must be based on clearly defined and objectively verifiable criteria with emphasis on experience, expertise and qualifications which limit the scope for partisan political considerations. In particular, there is need to ensure that commissions which make the necessary recommendations for appointments,

such as the Higher Council of Magistracy (in Francophone countries) or the Judicial Service Commission (in Anglophone countries) are genuinely independent. They should be constituted in a manner that those appointed directly or indirectly by the Government should never make up more than one third of the membership. Furthermore, since the future of every country depends to a very large extent on the quality of its top administrators, the constitutions should shield these positions from appointments determined mainly on perverse factors such as ethnicity, race, sex, religion etc.

Second, there is need to fundamentally restructure the modern state to reduce the excessive concentration of powers that has led to “imperial” presidents operating from state capitals where too much power and decision-making has also been concentrated. To enhance the quality and practice of democracy and accountability, as well as recognise cultural and ethnic diversity, there is need in many countries for devolution or decentralisation of power in order to establish new centres of authority and policy-making.

Third, term prolongations do not only threaten the budding seeds of democracy and constitutionalism but often drive power drunk presidents to extremes. No leader, however virtuous or exceptional he may be, is indispensable and irreplaceable. The graveyards are full of indispensable men and women, yet the world has not come to an end. Two terms are long enough for any exceptional leader to leave indelible foot prints without sowing the seeds of dictatorship. It is a period which is sufficient to give a good leader time to leave his mark and short enough for people to tolerate a poor leader.

Limiting the scope of presidential powers must go hand in hand with more concrete steps being taken to deal with the problems of the poor and marginalised in society.

Point 4: Addressing poverty through the effective recognition of socio-economic rights

Constitutional reforms, however extensive in their scope and however well intentioned, are unlikely to provide a solid foundation for constitutionalism if they fail to address the needs of the weak and vulnerable in society. It wasn't merely the lack of political participation that forced people to come out on the streets in the early 1990s; the rising unemployment, poverty, hunger, and the widening gap between the ruling elites and the masses

caused by decades of dictatorship and mismanagement of the economy had been a critical factor. Yet, the new constitutional dispensation in many countries does not specifically address the issue of equitable distribution of the nation's resources nor is there any attempt to liberate the masses from the scourges of poverty, oppression and discrimination.

Dear friends, whilst no constitutional design or principle can on its own eradicate poverty and unemployment, it can nevertheless do two things that may considerably improve the conditions of the poor. First, it can reduce the endemic "quiet corruption" that is a major cause of failure to deliver goods and services paid for by the government through the constitutional entrenchment of accountability principles and institutions discussed earlier. Second, ensure that government resources are used judiciously and equitably for the common benefit of all. An essential condition for maintaining respect of the constitutional order, which entails respect for the rule of law and social order is the effective and not abstract entrenchment of socio-economic rights in terms which allow for a more equitable redistribution of economic, social and cultural resources. For example, it is contended that there is no longer any justification for not making quality basic education an absolute right, as is the case in Francophone Africa. Contrary to the widely held fear that the entrenchment of socio-economic rights will impose an unreasonable burden on the state, the South African constitution and the jurisprudence of the South African Constitutional Court has shown how this can be done. Such provisions on their own will not necessarily improve the conditions of the poor and marginalised unless the judiciary adopts a more progressive and imaginative approach to constitutional interpretation. This brings into focus the important role that the judiciary has to play in the new constitutional dispensation.

Point 5: The independent judiciary as a promoter and defender of constitutionalism

Before 1990, the judiciary in most African countries had been reduced to the handmaiden of the various dictatorial regimes in place and was thus incapable of operating effectively either as a guardian of the constitution, the protector of human rights or an impartial enforcer of the law.

Because of the important role that judges in a constitutional system firmly rooted on constitutionalism have to play, it is inevitable that the prospects

for deepening constitutionalism on the continent would require more serious measures to enhance the judicial role. Three main issues are critical to this: i) the strengthening of judicial independence and judicial competence, ii) the expansion of the scope for judicial intervention and iii) the judiciary acting as agents of constitutional change and development.

Issue 1: Enhancing judicial independence

Having regard to post-1990 developments, it is suggested that two important changes need to be introduced to enhance the prospects for judicial independence.

First, there is need to entrench what are now considered to be the core principles of judicial independence in the constitution rather than in ordinary legislation.

Second, it is necessary that the bodies (such as Judicial Service Commissions or Higher Council of Magistracy) that decide important issues such as appointments, promotions and dismissal of judges are made less vulnerable to partisan manipulation. Even then, the effectiveness of the judiciary will depend on the scope of their powers to review constitutional violations, which also needs to be expanded.

Issue 2: The expansion of the scope for judicial review

There are two main systems of judicial review in Africa; the American and the French model. Although substantial improvements have been made to the inherited French model in the modern constitutions of many Francophone and Lusophone African countries, it remains a very restricted and consequently fairly ineffective means of ensuring that governments do not violate the constitution. A recent study suggests that a mixed model such as that adopted under the South African constitution provides many advantages which many African countries can learn from.

Be that as it may, it is submitted that there are certain features which any modern African system of constitutional adjudication should have in order to be effective. First, adjudication of disputes should be by a judicial body operating within the hierarchy of courts whether as a specialised or non-specialised court.

Second, constitutional adjudication should be flexible by being both diffuse and concentrated, and provide for both an abstract and a concrete review.

Third, litigants should be provided with a remedy not only when the authorities violate or threaten to violate the constitution but also where the alleged violation consists of a failure to fulfil a constitutional obligation. This may result in a declaration of unconstitutionality for the omission to carry out a constitutional obligation and is necessary on a continent where the executive and legislatures are well noted for regularly ignoring the implementation of constitutional provisions.

This leads me to:

Issue 3: The judiciary as active agents of change

An independent judiciary with wide powers to undertake judicial review on its own is not sufficient. The first generation of constitutions and bills of rights were not destroyed so much by the intolerance of the executives as by the enthusiastic abdication of judicial responsibilities by the judges. If constitutionalism is to survive in Africa, then judges must be ready to play a more proactive role than they have played so far; they must be ready to use their powers to negate the continuous authoritarian impulses of elected politicians. This requires a new judicial attitude towards adjudication in which judges adopt a more principled and rights-sensitive approach that takes account of the radical political, economic and social changes of our times and the revulsion against dictatorship. It is manifestly clear in many instances that the revised or new constitutions were not only designed to eliminate dictatorship and promote democracy and good governance but also to promote a new human rights culture that is particularly sensitive to issues such as hunger, poverty, unemployment, ignorance, illiteracy, disease and other social ills that have inflicted so much hardship on a majority of the population on the continent. Attaining these goals requires a judiciary that is willing to reflect the new spirit of constitutionalism when interpreting these constitutions.

An excellent example of what many call judicial activism but we will prefer to call it progressive judicialism, in Africa is provided by the jurisprudence of the South African Constitutional Court. To some extent, the cue for this is laid down in section 39 of the 1996 constitution although this section merely requires the South African judge “when interpreting” the Constitution to do what judges should normally do when interpreting a Constitution, that is, to give effect to its values. This is not necessarily synonymous with progressive judicialism; nevertheless, it does make it much easier than not, for a judge to adopt a progressive stance. In a number of cases decided since

1996 where the judges can be said to have adopted a progressive judicialist stance, they have frequently invoked expressions such as “constitutional values,” and “the spirit, purport and objects of the Bill of Rights,” which appear in section 39 of the Constitution.

The progressive approach has in many respects steadily established principles which have strengthened the values espoused by the South African constitution.

If the judiciary is to play an effective role in promoting constitutional governance in Africa, it is contended that it must liberate itself from being perceived as the handmaiden of the executive, act boldly and decisively to enforce both the letter and spirit of the law. In fact, it can be argued that the judges in Africa today must act as the last line of defence to arrest the looming authoritarian resurgence. At this critical juncture in Africa’s constitutional development, when most political institutions are facing a credibility and legitimacy crisis, courts can make a difference. A modern judiciary can no longer retain its social and political legitimacy without making substantial contributions to issues of social justice.

It must now be recognised and accepted that the effectiveness of the constitution depends very much on the ability of judges to breathe life and relevance into its provisions to ensure that they are not frozen in time. This means going beyond the normal common law judicial liberalism which enables judges to refer to, cite and rely on the decisions of courts in other common law jurisdictions as persuasive authorities. Because of the commonality not only in the provisions of many constitutions but also the fact that they have been inspired by the same philosophy, it is now not just possible but actually imperative that judges, in dealing with legal problems, investigate how these problems have been solved in other jurisdictions, both by national and international courts.

A passive judiciary in the face of Africa’s overbearing executives and the constitutional weaknesses of the legislature, compounded by the looming phenomena of one party domination leading to the rubber stamping of legislation, does not augur well either for progressive or effective legislation.

Progressive judicialism is a powerful weapon which judges all over Africa can use not only to counter authoritarianism but also to promote policies that are socially and economically relevant to the poor and marginalised. It is

however contended that the ability of judges to influence the direction of future constitutional developments will also depend on their willingness to look beyond the national frontiers and the national legal system to see what ideas can be borrowed from other jurisdictions. This raises the important question of the role of cross-systemic fertilisation.

Point 6: Cross-systemic fertilisation of constitutional law ideas and concepts

There isn't much evidence from the post-1990 African constitutions that African constitutional experts made serious efforts to learn from the experiences of their neighbours, especially where there are differences in constitutional and legal culture. This is particularly true of Francophone Africa.

Recent developments suggest that we do not need to go abroad to look for and copy Western constitutional models. For example, the South African constitution of 1996 has not only incorporated the best elements of Western constitutional systems but has so adapted this to its historical, social and cultural context that it is now a model which even some Western countries can emulate.

The universality of certain constitutional law principles and standards is no longer in doubt. For example, a court can hardly deal with a human rights dispute today without being invited by counsel to consider one foreign authority or another. More often than not, the reliance on these foreign authorities has been rather eclectic with scant or at most superficial references to the techniques of comparative law. Although as a discipline, comparative constitutional law is still very much in its infancy and its techniques are still lacking in methodological rigour and coherence, it is increasingly necessary for judges to be conscious of its existence and to make efforts to study, understand and apply its methods and techniques when considering the relevance and applicability of foreign legal authorities.

Judges must therefore resist the intoxicating notion that they know it all and be prepared to keep up with the latest developments in the law. Another important reason for adopting an open mind that is willing to research into and consider developments abroad is the growing influence on national constitutional law of international constitutional law standards.

Point 7: The internationalisation of constitutional law principles and standards

Modern constitutional design can no longer ignore the emerging trend towards the internationalisation of certain constitutional law principles and standards as a result of the growing influence of globalisation and regionalisation. Internationalisation of constitutional law refers to the development that has seen the adoption in national constitutional laws of many shared norms whose origins can be traced to international and regional instruments. As recent events have reminded us, the adoption of a dysfunctional constitution that could provoke violence and political instability poses a threat not only to the state concerned but to neighbouring states and the international community as a whole. Typical instances of dysfunctional constitutional processes that have threatened international peace and security include the situation in Sudan, DR Congo, Somalia, Côte d'Ivoire, Zimbabwe and more recently the uprising in the Arab countries.

The most interesting and potentially significant international influence on modern African constitutionalism is what has originated from Africa itself. This has been brought about by the African Union (AU) setting up a basic framework for promoting democracy and good governance amongst its member states. This is laid down in the Constitutive Act setting up the Union and a number of treaties, declarations and other instruments. Mention must also be made of the New Partnership for Africa's Development (NEPAD) and the African Peer Review Mechanism (APRM) which are supposed to provide a vision and strategic framework for Africa's renewal.

The relevance of all these developments to future constitutional progress on the African continent is threefold. First, it can be said that the AU democracy agenda is today one of the boldest and most daring initiatives that the leaders of the continent have ever embarked on. The record so far has not been encouraging. Nevertheless, the AU agenda on democracy and good governance reminds one of the proverbial dog that danced on its hind legs, the significance of which lies less in how well it danced and more on the fact that it could dance at all. The mere recognition by African leaders that democracy and good governance is critical to the continent's recovery and survival is a giant step in the right direction.

Second, perhaps the most significant provision in the Constitutive Act for our purposes here is Article 4(h) which gives the AU the power to intervene

in a state “pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide, and crimes against humanity.” By adopting Article 4(h) in 2000 the AU became the first international organisation to formally recognise the concept that the international community has a responsibility to intervene in crisis situations if the state is failing to protect its population. It was only during the 2005 World Summit that member states of the UN accepted this responsibility to protect (RTP) principle as a norm of international law. Although critics have claimed that the RTP principle is an imposition of the West on developing countries, but as we have seen, the early endorsement of the principle in a less caveated version by the AU in 2000 suggests otherwise. The principle is considered to have at least three parts. One, the principle that the state has responsibility to protect its population from genocide, war crimes, crimes against humanity and ethnic cleansing. Two, the principle that if the state is unable to protect its population on its own, the international community has a responsibility to assist the state by building capacity. Three, the principle that if the state manifestly fails to protect its citizens from mass atrocities and peaceful measures do not work, the international community has the responsibility to intervene, first diplomatically, **then more coercively**, and as a last resort, with military force. What is clearly emerging is that intervention for humanitarian purposes, including military intervention without a state’s consent is legitimate in extreme cases when major harm to civilians is occurring or imminently apprehended and the state in question is unable or unwilling to end the harm or is itself the perpetrator of the harm. This RTP principle must be seen as an attempt by international law to ensure accountability and good governance, protect human rights, promote social and economic development and ensure a fair distribution of resources within the state. If the AU itself developed the RTP principle, it is difficult to understand the dubious position it has been taking against the intervention in Libya. One can only conclude that the AU, very much like its predecessor will remain what the great English statesman, Winston Churchill referred to as “a riddle wrapped in a mystery inside an enigma.”

Third, the evolution of international law and recent developments in certain Western countries such as Britain and Belgium coupled with the indictments of Charles Taylor, former president of Liberia and the issuance of an international warrant for the arrest of Sudanese President Omar Al Bashir, is bound to affect future constitutional designs. The crucial point to note here is that present or former rulers who have committed what amounts to crimes against humanity in their attempts to hang on to power, can expect to be

arrested and tried under international law anywhere regardless of the scope of any immunities that they may have under national constitutions. One could even venture to go further: if it is a crime to kill half a million people in Rwanda in 1994, it should also be a crime to cause millions of innocent people, especially the vulnerable ones like children and old people, to die of hunger and malnutrition, or through lack of adequate health care as a result of misrule and corruption. All that remains now is to recognise the unacceptability, bestiality, and inhumanity of dictatorship for what it is, a crime that should be included in the crimes against humanity. There is therefore a need for the recognition of an economic crime against humanity to be created to try rulers who have caused their people to die needlessly through bad governance. In spite of this, it can be argued that one of the strongest antidotes against authoritarian resurgence is the people.

Point 8 : The robust defence of constitutions and constitutionalism by a vigilant civil society

Looking at the present developments in Africa, it will be perhaps too optimistic to expect any constitutional reforms as far-reaching as those which took place in the 1990s in the next few years. As one looks to the future of the constitutional rights revolution in Africa, there seems to be no better method of both promoting and sustaining the momentum of constitutionalism and good governance as well as restraining actual and potential governmental lawlessness than through the vigilance of civil society. Eternal vigilance is the price we have to pay if we want to maintain and sustain our hard earned democracy.

Gerald Caiden rightly points out, it is submitted, that people usually get the government they deserve. If they are diligent, demanding, inquisitive and caring, they will get a good government. However, if they allow themselves to be blackmailed, intimidated, bullied, deceived and ignored, then they will get bad government. The recent reaction of the South African Public Protector puts this point beyond debate. Politicians are ordinary mortals and not saints. Africans in most cases do not elect inherently bad leaders. They elect potential Nelson Mandelas, such as Julius Nyerere of Tanzania, Kenneth Kaunda of Zambia and Ahmadou Ahidjo of Cameroon. But then, they either close their eyes, lean back, relax and hope to enjoy the promised land of democracy and good governance, or transform these ordinary mortals into infallible, indispensable and irreplaceable saviours whose departure from power must be viewed with trepidation. In many African

countries, the dominant ruling parties are so adored by their supporters that they can do no wrong and hence their leaders too can do no wrong. Accusations of impropriety or incompetence against these leaders can only be the machinations of racists, tribalists or imperialists. Because we have continued to deify our leaders today once they are elected to power, as we did in the recent past, they forget about those who elected them and rely only on the small cliques that repressively keep them in power, lose touch with the electorate and are accountable only to themselves. Today we are haunted by the old demons of authoritarian rule which we had hoped were exorcised through constitutional reforms and multiparty democracy.

Dear friends, it is our firm belief that a constitution is only as good as the strongly manifested will of the people to defend it. A robust civil society will not only enable the democratic transition to start, but will help to resist eventual reversals, contribute in pushing transitions to their completions and finally help to consolidate and deepen democracy. To ensure that the good people we elect today do not become the tyrants and dictators of tomorrow, the public must be ready to protest against any actual or threatened violations of the constitution. In fact, the creative intervention of the judiciary depends as much on the willingness of civil society, especially the media and the activist quality of the Bar.

The legal profession plays a vital role in the promotion and defence of constitutional rights because it is they who choose the cases that come before the courts and prepare all the necessary arguments. If the cases are well researched and powerful and irresistible arguments made before the judge, the latter will be bound to consider these arguments seriously.

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

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

good as the Bar that serves it; an activist Bar will inevitably lead to a progressive judiciary and the converse is also likely to be true.

Mention must be made of the important role that legal scholars – such as legal academics, legal researchers and others who contribute to the dissemination of legal knowledge in accredited journals, books and newspaper commentaries and internet blogs can play in influencing legal developments. As Joseph Ki-Zerbo has argued, intellectualism is not a neutral exercise. African intellectuals cannot afford to be neutral or encamp like hardened nomads in an oasis while all around are raging genocides, tortures and mutilations and other abuses of the law. Legal scholars therefore need to be more vocal in defending the constitution and respect for constitutionalism.

Vice Chancellor and Principal, colleagues, dear friends, distinguished ladies and gentlemen, I now come to my conclusion. I will not want to detain you much longer by trying to summarise the main points we have tried to make. Nevertheless, there are a few important things that can be said about the future. The beauty about thinking of the future is, as Abraham Lincoln said, “it comes one day at a time.”

5. CONCLUSION

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

electoral coup d'états. This is not to suggest that no military coup d'états can take place under a constitution that entrenches and promotes all aspects of constitutionalism; such an environment simply does not favour coup plotters.

Be that as it may be, African constitutionalism has now joined the mainstream of modern constitutionalism and even started offering some quite original contributions to its developments, a typical example of this being South Africa's state institutions supporting constitutional democracy. Although not perfect, they are contributing to check the inevitable excesses of a dominant one party system with many of the features of the discredited single parties of yesteryears. The major contention of this paper is that more needed to have been done to deal with those specific issues that have been a source of bitter conflicts in the past.

If a constitution manifestly embodies the values of constitutionalism, it will certainly include what most people hold as dear, and consider as *prima facie* right and good, and will most likely be treated with great respect, if not veneration. If the post 1990 constitutional changes were designed to give African countries a fresh start, as most modern constitutions since the American Constitution of 1878 usually try to do, then the general result of this process must be considered as mixed, insofar as the commitment to constitutionalism, good governance and accountability is concerned. There have been tremendous progress in some cases and dismal failure in others. The South African constitution clearly stands out as an exemplar of modern constitutionalism and provides a rich source from which many African countries can learn. But even this good constitution is under threat from opportunistic politicians and a docile majority happy with having their own kind in charge regardless of what they are doing.

To entrench and sustain constitutionalism, good governance and accountability on the continent, a number of important reforms have been suggested in this presentation.

It is a fact that many leaders of the old regimes who have weathered the storm of the 1990 revolutionary waves and those leaders who emerged from it, for diverse reasons are not anxious for further reforms. This has led us to three conclusions which we think are fundamental to the future of constitutional reforms and constitutionalism in Africa today. The first is that no matter how comprehensive and good the text of a constitution, it will

mean nothing if the people are not ready to defend it. Sycophancy, idolatry, complacency, and indifference have encouraged dictatorships. People will only get the type of rulers they want. Ultimately, a constitution is only as good as the people who are ready and willing to defend it. Second, any future reforms must have as its number one priority the social inclusion of the poor. People are poorer, the prospects for the future with neglected education, collapsing hospitals and rising unemployment is bleak. As the great US statesman Franklin Roosevelt once said, "The test of our progress is not whether we add more to those who have much; it is whether we provide enough for those who have little." The Arab spring is a clear harbinger of things to come unless the concerns of the poor are urgently addressed. Third, standing firmly between the people and the rulers, is the judiciary generally and judges in particular. For the process of constitutionalism, good governance and accountability to take root, African judges need to adopt a bold, imaginative and judicially progressive approach similar to that which has been manifested by the South African Constitutional Court in many of its decisions.

The absence of constitutionalism, good governance and accountability mechanisms in the constitutions of many African countries explains why there is still doubt whether the third wave of democratisation will do any better than the preceding ones. The good prospect for constitutionalism in certain countries such as Ghana and South Africa certainly does not guarantee constitutional rule, good governance or democracy. Nevertheless, its presence acts as a powerful deterrent to potential dictators or tyrants.

I thank you all so much for your presence, patience and kind attention. May God bless you all.