

# CONSTITUTIONAL LITERACY IN AFRICA: CHALLENGES AND PROSPECTS\*

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## Abstract

The issue of constitutional literacy has attracted very little attention in scholarship on constitutionalism in Africa. This is not surprising, because the early constitutions were virtually imposed by the departing colonial powers and perceived as alien not only by the ordinary citizens but also the new leaders, who had little knowledge or experience of constitutional governance. Has the new generation of ‘made-in-Africa’ constitutions changed the state of constitutional literacy on the continent? In addressing this question, the paper examines the concept of constitutional literacy and, using the example of South Africa, considers ways in which it could be promoted. The paper also considers the challenges to promoting constitutional literacy. It concludes by underlining the fact that strengthening the democratic constitutional foundations laid in the 1990s, foundations increasingly under threat today, requires a comprehensive programme of constitutional education, with a focus on the poor and other marginalised groups in society. Without knowledge and awareness of constitutional rights, citizens will not be able to vindicate their rights or challenge any violation of them.

## 1. INTRODUCTION

Knowledge of the constitution is among the serious challenges affecting on the project of deepening and sustaining constitutionalism in Africa today. Almost all the independence constitutions in Africa were in effect imposed by the departing colonial powers, sometimes with the complicity of the new leadership that had emerged.<sup>†</sup> The consequences of this were

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<sup>†</sup> In most cases, these were crafted hurriedly as pacts between the retreating colonial power and the nationalist elites. See further, Kwasi Prempeh, “Africa’s ‘constitutionalism revival’: False start or new dawn?” 5(3) *International Journal of Constitutional Law* (2007), at p. 473.

dire: it led to, amongst other ills, decades of corrupt, incompetent, repressive and autocratic governance. The global surge in democratic liberalisation following the so-called third wave of democratisation that swept through the continent from the 1990s has been marked by fervid writing and rewriting of the post-independence constitutions in attempts to entrench the fundamental principles, institutions and values of modern constitutionalism. In all but two countries (Botswana with its 1966 Constitution and Mauritius with its 1968 Constitution), new or substantially revised constitutions have been adopted. Even then, the contagious fever of amending African constitutions has continued unabated. It is thus not surprising that as in the past, the story of constitutionalism in Africa today is marked by frequent abrogation, derogation and retrogressive amendments of constitutions.<sup>‡</sup>

Almost three decades after these new generation of ‘made-in-Africa’ constitutions started appearing, several studies have tried to assess the extent to which they provide a solid foundation for the growth of a sustainable culture of constitutionalism, good governance, respect for the rule of law, and democracy.<sup>§</sup> One of the issues that has hardly attracted any scholarly attention is the extent to which ordinary Africans are today aware of the extensive rights and freedoms these constitutions are purported to have entrenched. Apart from the advantage that, unlike the case before the 1990s, Africans can now freely create a party or join one of their choice as well as vote or be voted for in elections, there are serious questions about how much else they know about the content, values, principles and myriad of checks and balances provided for in these constitutions. What is the level of constitutional literacy? A constitution will certainly not serve any useful purpose if the people who supposedly brought it to life, own it and enjoy the protection of its provisions are ignorant of its content.

In examining the state of constitutional literacy in Africa, the next section of this paper briefly looks at the concept of constitutional literacy against the background of the early constitutions perceived as alien impositions designed to control and perpetuate colonial rule using African surrogates. Section three focuses on constitutional literacy under the new generation of constitutions to see what has changed, and uses South Africa as a case study.

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<sup>‡</sup> See, Chales M. Fombad, “Constitution-building in Africa: The never-ending story of the making, unmaking and remaking of constitutions,” 13(4) *African and Asian Studies* (2014), pp. 429-451

<sup>§</sup> See, for example, for example, Charles M. Fombad, “Post 1990 constitutional reforms in Africa: A preliminary assessment of the prospects for constitutional governance and constitutionalism.” in A.G. Nhema and P. T. Zeleza, *The Resolution of African conflicts*. OSSREA & James Currey, Oxford (2008), pp. 179-199; Charles M. Fombad, “Constitutional reforms and constitutionalism in Africa: Reflections on some current challenges and future prospects,” 59(4) *Buffalo Law Review* (2011), pp. 1007-1108, and Kwasi Prempeh, ‘Africa’s ‘constitutionalism revival’: False start or new dawn? *op. cit.* pp. 469–506.

Section four examines the numerous challenges of promoting constitutional literacy in Africa and considers the prospects for the future. It is argued that the right to constitutional literacy is now so fundamental, especially in sustaining the fledgling attempts to entrench a culture of constitutional governance that it should now be considered a fundamental right. In concluding, it is contended that more needs to be done to promote constitutional literacy because it is only when citizens are adequately informed about the content of their constitutions that they can be vigilant, alert to any abuses, assert their rights and stand ready to defend these rights when they are threatened by the continent's power-hungry executives. A constitution has meaning and comes to life only if the citizens know it is there and can invoke it to vindicate their rights and freedoms. If it is accepted as a principle that a right is of no assistance to its bearer, if the bearer, through no fault of his, is ignorant of such a right, then constitutional literacy must become an imperative.

## **2. THE IDEA OF CONSTITUTIONAL LITERACY AND ITS TRAJECTORY IN AFRICA**

Two preliminary but important issues need to be briefly considered here. The first is the meaning and possible scope of constitutional literacy; the second is the background to constitutional literacy during the pre-1990 constitutional era dispensation. These issues will provide a foundation for focusing on the recent constitutions.

### **2.1 The idea of constitutional literacy**

At first blush, the idea of constitutional literacy seems simple to understand. However, just as the term 'literacy' has proven to be more complex and malleable than is often assumed, the same is also true of the concept of constitutional literacy. Beyond the postmodernist theory of literacy,\*\* the concept of constitutional literacy may best be understood in the context of the

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\*\*The postmodernist theory of literacy views it as an instrument of power and oppression legitimating dominant discourses and endangering local knowledge. See further, Shikshantar.2003. *The Dark Side of Literacy*. R. M. Torres, D. C. Soni, L. Shlain, A. Meenakshi, P. Dey, G. Esteva, M. S. Prakash, M. Fasheh, J. Ellul, D. Stuchul, contributors. Udaipur, India, Shikshantar, The People's Institute for Rethinking Education and Development. [http://www.swaraj.org/shikshantar/rethinking\\_literacy.htm](http://www.swaraj.org/shikshantar/rethinking_literacy.htm) (accessed in April 2019); and Kwesi Kwaa Prah, "Democracy, Education, Literacy and Development," (on file with author) where he quotes from the famous "Minute on Indian Education of 2 February 1835 in which Macaulay argued that the objective of colonial education must be to train people who will become "English in taste, in opinions, in morals and in intellect." Colonial education, in the conceptualisation of "literacy" was seen as part of a civilising mission to the less fortunate half of humanity. Also, see, Lord Hailey, *An African survey. A study of problems arising in Africa south of the Sahara*, Oxford University Press, London (1938).

four discrete meanings usually given to the word “literacy” as it has evolved over time in different disciplines.<sup>††</sup> The first looks at literacy as an autonomous set of skills. This is perhaps the most common understanding of the concept and limits it to a set of tangible skills, particularly the cognitive skills of reading and writing looked at independently of the context in which this is acquired or the background of the person who acquires this.<sup>‡‡</sup> Oral skills on their own may not be sufficient but are taken into account when they enhance reading and writing competences. However, the emphasis is on literal skills that enable easy access to knowledge and information. The second understanding of literacy as applied, practised and situated is often also referred to as functional literacy. This focuses on the potential for literacy to help people move out of their particular disadvantaged circumstances into fuller economic, social and political participation in society.<sup>§§</sup> The third understanding views literacy as an active and broad-based learning process, rather than as a product of a more limited and focused education intervention. For example, Ki-Zerbo used this understanding in his work on the mobilisation for an “Africanised” literacy that would directly respond to the pressing communication needs of the continent.<sup>\*\*\*</sup> This is a form of adult literacy with a focus on creating social awareness, which enables a better understanding of the world even to those with limited reading and writing abilities. The fourth understanding of literacy looks at it in terms of the various texts that are produced and consumed by literate individuals.<sup>†††</sup>

Against this background, constitutional literacy can be said to refer to the transformative process that, using Paulo Freire’s theory of “conscientization” goes beyond the mere process of reading, writing and oral expression.<sup>‡‡‡</sup> It entails the creation of social awareness and knowledge of the constitution, its values and objectives as well as the rights and duties it confers on the citizen to enable them participate fully in a sustained manner in public affairs. As a result, a high general literacy level is not to be equated with constitutional literacy. For

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<sup>††</sup>These are discussed in, EFA Global Monitoring Report 2006, Chapter 6,

<http://unesdoc.unesco.org/images/0014/001416/141639e.pdf> (accessed April 2019) at pp.147-152.

<sup>‡‡</sup>See generally, Street, B. (ed.).*Literacy Across Educational Contexts: Mediating Learning and Teaching*. Philadelphia, Caslon (2005).

<sup>§§</sup>See further, Maddox, B., *Literacy and the market: the economic uses of literacy among the peasantry in north-west Bangladesh*, in B. Street (ed.), *Literacy and Development: Ethnographic Perspectives*, Routledge, London, (2001), pp. 137–151.

<sup>\*\*\*</sup>This is cited in chapter 6, “Understandings of literacy,” in EFA Global Monitoring Report 2006, <http://unesdoc.unesco.org/images/0014/001416/141639e.pdf> (accessed in April 2019), at p. 152.

<sup>†††</sup>*Ibid* at pp. 152-153.

<sup>‡‡‡</sup>See his book, *The Politics of Education: Culture, Power, and Liberation*, South Hadley, Mass. (1985). Freire, P. 1993. *Pedagogy of the City*. Translated by D. Macedo. New York, Continuum

example, although Zimbabwe has one of the highest adult literacy rates in Africa,<sup>§§§</sup> a recent study showed that a majority of those who voted in the referendum to approve its 2013 Constitution had little knowledge of its content.<sup>\*\*\*\*\*</sup>

In a democracy, for citizens to be able to make informed decisions and choices about the people who will represent them and act on their behalf, they must be knowledgeable about the legal and constitutional framework that forms the basis for elections, and this can come only through literacy. As Christopher Dreisbach rightly points out, constitutional literacy is a 21<sup>st</sup> century imperative.<sup>††††</sup> In many respects, constitutional literacy often means a choice between “constitutional arbitrary authority, empowerment and marginalization, freedom and thralldom, voice and voicelessness.”<sup>‡‡‡‡</sup> Constitutional illiteracy is one of the major threats to Africa’s fledgling democracy, because limited knowledge of the understanding of democratic processes has progressively facilitated the elite capture and manipulation of electoral processes.<sup>§§§§</sup> Ignorance of constitutions is deeper and more pronounced amongst Africa’s poorest and marginalised communities. Lacking a basic level of literacy, many of these communities are unable to fully understand and appreciate how and why the government makes the important decisions that affect their lives or how to vindicate the fundamental human rights that most African constitutions have formally recognised. According to a recent UNESCO report, 38 per cent of African adults (some 153 million) are illiterate, with two-thirds of them being women.<sup>\*\*\*\*\*</sup> As will be shown later, one can safely assume from this that the level of constitutional illiteracy in Africa is even higher than that of general illiteracy.

Active participation in the constitution-making process may provide the opportunity for citizens to become familiar with the nature, content and purpose of a constitution. This raises the question whether the new generation of home-made African constitutions has increased

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§§§§§See, “Is Zimbabwe’s adult literacy rate the highest in Africa?”

<https://africacheck.org/reports/is-zimbabwes-adult-literacy-rate-the-highest-in-africa/> (accessed in April 2019).

\*\*\*\*See, Monica Zembere, “The nexus between literacy rate in Zimbabwe and constitutional literacy in Mashonaland Central,” <http://ir.buse.ac.zw/xmlui/handle/11196/566> (accessed in April 2019).

††††See, Christopher Dreisbach, *Constitutional literacy- A twenty-first century imperative*, Palgrave Macmillan, Baltimore (2016), who argues that pervasive constitutional illiteracy is a problem for both enforcement agencies and for ordinary citizens.

‡‡‡‡See, Kwesi Kwaa Prah, “Democracy, education, literacy and development,” *op. cit.*

§§§§See, Kibet Ngetich, “Towards a people-driven constitution: Opportunities, constraints and challenges of the Kenyan example,” in S. Adejumobi (ed.), *Democratic renewal in Africa: Trends and discourses*, (Palgrave Macmillan, New York (2015).

\*\*\*\*\* See UNESCO Office Dakar, ‘Literacy and non-formal education,’

<http://www.unesco.org/new/en/dakar/education/literacy/> (accessed in April 2019). According to this account, Africa is the only continent where more than half of parents are not able to help their children with homework due to illiteracy.

the level of constitutional literacy, especially amongst the poor, uneducated and marginalised groups in society. To put this in its proper perspective, whether there is need to review the situation under the post-independence constitutions and see if the level of such literacy has any impact on developments today.

## **2.2 Constitutional literacy under Africa's independence generation of imposed constitutions**

The colonial legacy and the perception it created amongst Africans of law as a blunt, alien instrument for controlling citizens and exploiting the colonies to the fullest without regard to the possible developmental and transformative role of the law,<sup>††††</sup> did not prepare Africans for constitutional governance. If we think of a constitution as the soul of a nation, a mirror image of people's desires and aspirations, then the post-independence constitutions were scarcely any of these.

For a start, the colonialists barely pretended to govern their colonial possessions under anything that was remotely close to a constitution.<sup>‡‡‡‡</sup> Maintaining social peace at all cost in order to exploit the colonies to their fullest mattered more than the niceties of constitutional governance. Under no colonial system in Africa was political organisation based on principles of constitutionalism such as the separation of the branches of government or checks and balances.<sup>§§§§</sup>

On the eve of the colonialists' departure, the first generation of African constitutions, crafted mainly by the departing colonial powers as a basis for transfer of power, involved fairly limited consultation with the emerging African political leaders and hardly any at all with the ordinary population.<sup>\*\*\*\*\*</sup> The constitutions were therefore more or less imposed, since the people, apart from a few elites, had not been involved in the constitution-making

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<sup>††††</sup> See for example, Richard Roberts, "Law, crime and punishment in colonial Africa," in John Parker and Richard Reid (eds), *The Oxford handbook of modern African history*, DOI: 10.1093/oxfordhb/9780199572472.013.0009, <http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199572472.001.0001/oxfordhb-9780199572472-e-017> (accessed in April 2019).

<sup>‡‡‡‡</sup>For a discussion of this, see, see Charles M. Fombad, "The Evolution of modern African constitutions: A retrospective perspective", in Charles M Fombad (ed.), *Separation of powers in African constitutionalism*, Oxford, Oxford University Press (2016), pp.13-57.

<sup>§§§§</sup>See Filip Reyntjens, 'Authoritarianism in francophone Africa from the colonial to the postcolonial state' (1988) 7 *Third World Legal Studies* 59.

<sup>\*\*\*\*\*</sup>The concept of 'civil society' was little known at the time because very few Africans occupied positions usually associated with civil society, such as civil servants, lawyers, engineers, doctors, journalists and university lecturers.

process.<sup>†††††</sup> Nonetheless, these constitutions introduced some elements of European liberal democracy and constitutionalism, including important features such as the separation of powers, checks and balances, limited government, and the protection of individual and minority rights.<sup>‡‡‡‡‡</sup> The fact is that the Western experts who crafted these constitutions had little knowledge of local realities and were more concerned with maintaining the *status quo ante* in which the interests of the former colonial powers and those of the white settlers left behind were well-protected (for those countries like Kenya, Tanzania and Uganda, where large numbers of whites had settled down).

In spite of some liberal principles regarding human rights and political freedom contained in these new constitutions, the new elites had learned the colonial lessons of repression and authoritarianism rather too well to change with any alacrity. Moreover, for the inexperienced Africans assuming the role of leadership, these constitutional documents were simply too complex, and perceived as too ill-adapted, to address the immediate problems with which they were confronted. The problem was exacerbated by the extreme haste<sup>§§§§§</sup> with which many European powers withdrew and their lack of advance planning for political transition.<sup>\*\*\*\*\*</sup>

The understanding of the fundamental principles of constitutionalism by African leaders was quite basic, then. Under the pretext of promoting national unity among the diverse communities which had been artificially forced together as states during the scramble for Africa, particularly after the Berlin Conference of 1884, and to promote a sense of political identity and thus facilitate nation-building and development, many of the liberal principles contained in the independence constitutions were progressively repealed.<sup>†††††</sup> The frequent constitutional amendments led to a concentration of powers, authoritarian rule and violations of human rights, which had been a common pattern of colonial administration. This

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<sup>†††††</sup>See, Muna Ndulo, “Constitution-making in Africa: Assessing both the process and the content,”21(2) Public Administration and Development (2001), pp.101-117.

<sup>‡‡‡‡‡</sup> See, Kwasi Prempeh, “Africa’s ‘constitutionalism revival’: False start or new dawn?” *op. cit.*

<sup>§§§§§</sup>In some cases, such as Algeria, this was because the colonial power was forced out after a war of independence, and in other cases, such as Guinea, the French left abruptly after trying to destroy every remnant of their presence because the Guineans would not accept independence on French terms.

<sup>\*\*\*\*\*</sup>In fact, Filip Reyntjens (*op. cit.* at p. 67) has suggested that the very short experience which the Congolese had with the use of political parties as vehicles for mobilization and communication explains the ease with which the late President Mobutu, on assuming power in 1965, was able to assume the apolitical style of his Belgian colonial predecessors.

<sup>†††††</sup> See, J.M. Breton, “ Trente ans de constitutionalisme d’importation dans les pays d’Afrique Noire Francophone entre mimetisme et reception critiques: Coherences et incoherences (1960-1990),” <http://www.droitconstitutionnel.org/congresmtp/textes7/BRETON2.pdf> (accessed in April 2019).

continued unabated in spite of the bill of rights or provisions purporting to recognise and protect human rights. Once again, ordinary citizens were little involved in the reform processes that saw African leaders and the ruling elites consolidate and centralise power whilst incrementally closing all avenues for open debate.

By the 1990s, this system of governance had not only spawned some of the worst dictators and repressive and authoritarian regimes the continent has ever seen<sup>\*\*\*\*\*</sup> but had led to serious problems such as political instability, severe economic crises and unemployment. As with the independence constitution-making processes, the immediate post-independence revision of these constitutions hardly ever involved the ordinary citizens. It is no surprise that these constitutions did little more than perpetuate the authoritarian, paternalistic style of colonial rule and result in what one writer aptly termed ‘constitutions without constitutionalism’.<sup>§§§§§§§§</sup>

Apart from the perception that these constitutions were remote and abstract documents with little relevance to the daily challenges of the ordinary Africans, high levels of illiteracy ensured that the majority of the population could barely understand them, particularly since the constitutions were not readily available. To the extent that the pre-1990 constitutional processes were not open and inclusive or involved dialogue between citizens and the state, they did not cultivate a sense of constitutional ownership, knowledge, understanding and legitimacy. Such top-down constitutionalism failed. Has the level of constitutional knowledge and awareness changed today?

### **3. CONSTITUTIONAL LITERACY UNDER THE ‘MADE-IN-AFRICA’ CONSTITUTIONS**

If constitutional literacy is premised on the knowledge of the people of the content and the scope of the rights and duties contained in their constitutions, it is clear from the preceding discussion that one of the important ways of acquiring such knowledge is through active participation in the constitution-making process. In this regard, a major innovation in African constitutionalism during the wave of change of the 1990s was the concerted efforts to root

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<sup>\*\*\*\*\*</sup>For example, Idi Amin Dada of Uganda, Emperor Jean Bedel Bokassa of Central African Empire (today Central African Republic), and Mobutu Sese Seko of Zaire (today DR Congo).

<sup>§§§§§§§§</sup>In Okoth-Ogendo, ‘Constitutions without constitutionalism,’ in Issa Shivji (ed.), *State and Constitutionalism in Africa*, SAPES, Harare (1991). For a more general account, see GN Barrie, ‘Paradise lost: The history of constitutionalism in Africa post-independence’ (2009) *2TSAR* 290.



constitutional change within society and construct constitutionalism from the bottom up rather than the top down.

Two important issues will be examined here. The first is what can be referred to as the generation of ‘made-in-Africa’ constitutions, which raises the question whether they provided an avenue for constitutional literacy amongst ordinary Africans. This is, however, only one of the ways in which knowledge of the constitution can be promoted. The second part is a case study of South Africa that illustrates the different ways in which constitutional awareness and sensitisation can be fostered. The level of constitutional education necessary to sustain constitutionalism is established not just by the process through which constitutions and democratic institutions in general are created, but also by the way in which regular interactions are facilitated between the different actors within these institutions in the course of its implementation.

### **3.1 Constitutional literacy in African constitution-making processes**

What to all appearances looked like a new era of constitutionalism in Africa emerged during the so-called third wave of democratisation and the almost contagious fever of making, remaking and unmaking constitutions that was associated with it. The key feature of this period was the involvement, often for the first time, of ordinary citizens in the constitution-making processes of various countries, particularly in Anglophone and francophone Africa. In the latter case, this occurred mainly through a number of national conferences that began in Benin and spread to many other francophone countries.<sup>\*\*\*\*\*</sup> Nevertheless, the nature and extent of popular participation varied considerably from country to country. For instance, it ranged from the symbolic, as was the case in the Cameroonian process that led to the 1996 constitutional revision,<sup>††††††††</sup> to the substantive, as was the case in the run-up to South

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<sup>\*\*\*\*\*</sup> Between 1990 and 1993, national conferences were held in 12 francophone countries, namely Benin, Chad, Comoros, Congo, Gabon, Mali, Niger, Togo and Zaire. Attempts to convene similar conferences in Burkina Faso, Cameroon, Central African Republic, and Guinea failed. Although such conferences were a francophone phenomenon, various non-Francophone countries such as Ethiopia, in 1991, and Guinea-Bissau, in 1992, also held them. See further, Pearl T Robinson, ‘The national conference phenomenon in francophone Africa’ (1994) 36 *Comparative Studies in Society and History* 575.

<sup>††††††††</sup> For a discussion of this, see , see Charles Manga Fombad, *International Encyclopaedia of Laws, Constitutional Law: Cameroon*, The Hague, Kluwer Law International (2003), pp.27-30.

Africa's 1996 constitution, a process that involved some of the most extensive popular participation in constitution-making the continent has yet seen.\*\*\*\*\*

Focusing on the issue of constitutional literacy, the main argument here is that a broad-based participatory constitution-making process provides one of the best opportunities not only for educating ordinary citizens but for canvassing their views and in this way raising awareness of the importance of a constitution, of its contents and of its potential impact on the people's lives. From this perspective, constitution-making provides one of the most important building blocks for constitutional literacy as well as constitutional legitimacy. The question then is whether the constitution-making processes in Africa since the 1990s have played a role in enhancing constitutional literacy in a manner that was lacking in the constitutions that were imposed post-independence and their subsequent abrogation and amendments by the dictatorial governments of the pre-1990 period.

The current wave of making, remaking, and unmaking of constitutions is still in full force. This has provided an opportunity for strengthening constitutional literacy in at least three critical stages of the constitution-making process, namely the initiation of the process when the agenda has to be set, the writing of the constitution itself, and the approval of the constitution.\*\*\*\*\*

In addition to the national conferences in francophone Africa that were spontaneous reaction to the desire to replace authoritarianism, most constitutional reform processes relied on provisions in the constitution providing for the latter's amendment or, as in many Anglophone countries, for commissions set up based on the Inquiries Act or similar pieces of enabling legislation. From the perspective of public awareness, decisions on the mandate of the commission, as well as regarding its membership, the timelines for its activities, and the final form in which its outcomes are submitted, usually provoke public debate. The possibilities for raising awareness around the process of setting up the constitutional review and determining its agenda often depended on the control that the government of the day

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\*\*\*\*\*Indeed, Heinz Klug, *The Constitution of South Africa: A Contextual Analysis* (Hart Publishing 2010) 54, has suggested that the degree of public participation in the constitution-making process in South Africa was probably without historical precedent anywhere in the world.

\*\*\*\*\* For an elaborate discussion of this, see Coel Kirkby and Christina Murray, 'Constitution-making in Anglophone Africa: We the people?' in Muna Ndulo and Mamoudou Gazibo (eds), *Growing Democracy in Africa: Elections, Accountable Governance and Political Economy*, Newcastle, Cambridge Scholars Publishing (2016), pp. 86-113.

had the process. Broad-based national conferences took place in many francophone countries, but where they were held in other cases such as Burkina Faso, Cameroon and Central African Republic, the incumbents manipulated the process and the constitutional reforms were fairly limited. In Anglophone Africa, as Coel Kirby and Christina Murray point out, although incumbents initially tried to limit and control the agenda, civil society pressure eventually ensured that there was extensive public participation in countries, which, apart from South Africa, included Ghana, Uganda and, more recently, Kenya, Tanzania, Zambia and Zimbabwe.

The constitution-drafting stage is the most technical part of constitution-making. It may involve specialised technical drafting committees, which prepare and submit draft proposals to parliament, or a parliamentary committee that does the drafting, or even a combination of appointed experts and elected members of parliament. It is the final step in the constitution-making process that provides the most opportunity for constitutional education. However, the scope of the opportunities depends on the manner in which the final constitution is to be approved. Where approval is only by parliament or even a constituent assembly, whether by a simple or weighted majority or not, the level of public engagement, and hence accrual of knowledge, is fairly limited. There is likely to be more effective public engagement, though, where approval by referendum is required. This provides greater opportunity not only for debate but for ordinary citizens to familiarise themselves with the content of the constitution.

In the final analysis, the process of initiating, writing and approving a constitution now infuses post-1990 constitutions with the legitimacy that earlier constitutions lacked and as a result of the active involvement of citizens creates an informed citizenry which knows how to assert its rights. The depth and breadth of inclusivity in the constitution-making would determine the depth and breadth of the knowledge acquired. Thus, where there was limited involvement of the public in the process, the chances of the ordinary citizen understanding its contents and scope is equally limited. The depth of public participation in the process is usually determined by factors such as the degree of inclusion of all stake holders, the extent to which the constitution review commission went around the country for consultation, the extent to which the views expressed by members of the public was taken into account, whether there was feedback after meetings and who made a final determination of the outcome (for example, the president by decree, parliamentary approval by law or the people through a referendum). Popular participation in the process enables the ordinary citizens to gain a reasonable acquaintance with the contents of the constitution. For example, the

rejection of the drafts constitutions by the people of Kenya in 2005 and the people of Zimbabwe in 2000 and the subsequent approval of substantially revised constitutions in both countries in 2010 and 2013 respectively, provides evidence that the people knew what they were rejecting or approving.\*\*\*\*\* However, the writing and adoption of a constitution is merely the starting-point, not the end-point, of constitutional literacy. This continues when the constitution becomes operational and throughout its life.

### **3.2 Constitutional literacy beyond the constitution-making process**

Surprisingly, only a few African constitutions contain provisions that formally recognise and provide a framework for constitutional literacy. It is equally surprising that even the African Union (AU), which since its creation in 2002 made the promotion of democracy, constitutionalism and good governance a priority of its agenda, has paid so little attention to this. Its predecessor, the Organisation for African Unity (OAU), adopted the Arusha 1990 African Charter for Popular Participation in Development and Transformation, which called for the promotion of education, literacy skill training and human resource development as a means of enhancing popular participation.†††††††† The Charter also viewed the literacy rate as an index of the capacity for mass participation in public debate, decision-making and general development processes.

The 1981 African Charter on Human and Peoples' Rights can be considered to place a positive obligation on state parties to promote constitutional literacy in its article 25. This article requires state parties to "promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter," and to see to it that "these freedoms and rights as well as corresponding obligations and duties are understood." In 2007, the AU adopted the African Charter on Democracy, Elections and Governance, which contains provisions seeking to promote literacy in issues of constitutionalism, good governance and democracy. For example, article 31(2) requires states to 'ensure systematic and comprehensive civic education in order to encourage full participation of social groups with special needs in democracy and development processes'.†††††††† However, neither the AU nor the regional economic communities (RECs)

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\*\*\*\*\* See generally, Tania Abbiate, Markus Bockenforde and Veronica Federico (eds.), *Public participation in African constitutionalism*, Routledge, London (2018).

†††††††† See resolution 23(B)(b) of the Charter.

†††††††† See also article 12, which contains an undertaking by states parties to implement programmes and carry out activities designed to promote democratic principles and practices as well as consolidate a culture of

have developed a clear strategy to promote constitutional education as an integral part of their democracy-promoting agenda.

At national level, only a few constitutions specifically make constitutional literacy imperative. One approach is that adopted by the Benin Constitution of 1990. Article 40 imposes on the state a duty to ensure the diffusion and the teaching of the Constitution, the Universal Declaration of Human Rights of 1948, the African Charter on Human and Peoples' Rights of 1981, and other important human rights instruments ratified by the state. Programmes to teach these documents must be integrated in the curriculum of secondary and university education as well as education programmes for the armed forces and security forces through all means of mass communication, including using national languages on radio and television. A similar approach is adopted in the Constitution of the Democratic Republic of Congo of 2006 and to some extent the Rwandan Constitution of 2003. §§§§§§§§§§

The best example of a constitutionally entrenched and comprehensive legal framework for promoting constitutional education appears in the 1992 Ghanaian Constitution. The whole of chapter 19 is devoted to the National Commission for Civic Education, which Parliament was directed to establish 'within six months after Parliament first meets after the coming into force of this Constitution'. The functions of this Commission are significant and deserve citing in their entirety. According to article 233, these functions are

- (a) to create and sustain within the society the awareness of the principles and objectives of this Constitution as the fundamental law of the people of Ghana;
- (b) to educate and encourage the public to defend this Constitution at all times, against all forms of abuse and violation;
- (c) to formulate for the consideration of Government, from time to time, programmes at the national, regional and district levels aimed at realising the objectives of this Constitution;
- (d) to formulate, implement and oversee programmes intended to inculcate in the citizens of Ghana awareness of their civic responsibilities and an appreciation of their rights and obligations as free people; and
- (e) such other functions as Parliament may prescribe.

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democracy and peace, for example by integrating 'civic education in their educational curricula and develop appropriate programme and activities'.

§§§§§§§§§§ See article 45 of the DR Congo Constitution and article 52 of the Rwandan Constitution. There is not much evidence to suggest that these provisions are being implemented. See for example, Wellars Gasamagena, "The constitution-making process in Rwanda: Lessons to be learned,"

<http://unpan1.un.org/intradoc/groups/public/documents/un/unpan026620.pdf> (accessed in April 2019).

This in many respects captures the essence of constitutional literacy. What it does not say is exactly how it is to be achieved. Nevertheless, the Ghanaian Commission has been particularly active since it was established in 1993. The Medium Term Expenditure Framework for the Commission that contains the budget estimates for 2019 provides some information on the numerous activities it undertook in 2018 to discharge its constitutional mandate.\*\*\*\*\* In the area of constitutional awareness creation, the report states that 26,889 activities were carried out. This consisted of engagements in the form of community meetings held in all 254 district offices, 6 Sub-Metro offices, 10 regional offices and the head office of the Commission for People with Disabilities. There was also various programmes on deepening and sustaining civic awareness, which was done through activities organised on combating corruption, nation building, co-existence and religious tolerance and effective citizenship participation in elections. †††††††††† A third area of focus dealt with patriotism and good citizenship and this involved 19,409 engagements with basic schools across the country. Debates were organised under the theme “Restoring our Ghanaian values as active citizens.” A competition that was dubbed “Civic challenge” elicited students’ knowledge of the 1992 Constitution and their readiness to defend it.

A study by Niworo, Gasu and Achanso, suggests that the beneficiaries of the Ghanaian National Commission for Civic Education programmes on civic education raises a high level of political participation, including the readiness to vote, join political party, contest elections, participate in community service and demanding accountability from duty bearers.†††††††††† By contrast, another study by Katusiimeh, carried out in Uganda, where there is no similar institution, shows that the absence of a well organised programme of civic education and voter education has been detrimental to the nurturing of a culture of

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\*\*\*\*\* See in general, Republic of Ghana, “Medium Term Expenditure Framework (MTEF) for 2019-2022. National Commission for Civic Education,” <https://www.mofep.gov.gh/sites/default/files/pbb-estimates/2019/2019-PBB-NCCE.pdf> (accessed in June 2019). †††††††††† Insofar as the Commission’s efforts in promoting civic education on issues of elections, see, Samuel Adu-Gyamfi and H. T. Yartey, “The Role of the National Commission for Civic Education in citizenship education during and after elections: A focus on the 2012 elections in Ghana,” 5 (4) *International J. Soc. Sci. & Education* (2015), pp. 631-645; and also see, “NCCE gears up for 2018; Outlines activities to sensitize citizenry on Ghana’s democratic journey,” <https://www.ghanaweb.com/GhanaHomePage/NewsArchive/NCCE-gears-up-for-2018-outlines-activities-to-sensitize-citizenry-on-Ghana-s-democratic-journey-619074> (accessed in April 2019).

†††††††††† Niworo, J., Gasu, J. and Achanso, S. A., “The Impact of Civic Education on Political Participation in the Sissala East District of the Upper West Region of Ghana,” 6(8) *Public Policy and Administration Research* (2016), pp. 48-55.

constitutionalism and democracy in the country.<sup>§§§§§§§§§§</sup> Whilst a constitutionally entrenched literacy framework is crucial for laying a foundation for constitutional literacy, its absence is not necessarily fatal. The South African experience, to which we now turn, is an excellent example of this.

### 3.3 The South African experience of constitutional literacy

The minutes of a Constitutional Review Committee meeting of 2002 noted that ‘the South African public does not have an understanding of the Constitution’.<sup>\*\*\*\*\*</sup> In fact, the Constitutional Court itself has observed that “a large number of people...may not be aware of their rights.”<sup>††††††††††</sup> Tim Fish Hodgson, puts it even more graphically thus: “Whilst the rights in the Bill of Rights are carved into the giant wooden doors of the Constitutional Court, they are not emblazoned across the sky for all to see.”<sup>††††††††††</sup> The state of constitutional literacy in South Africa is surprising on many counts.

The South African constitutional review process was probably one of the most consultative on the continent. The two houses of parliament that was elected in 1994 (made up of the National Assembly and the National Council of Provinces) was transformed into a Constitutional Assembly. It set up two parallel processes: a public participation programme and a programme for political discussion. The public participation programme was deliberately designed to ensure that the public was fully aware of what was happening, took part in the process and could therefore claim “ownership” of the final constitution. This also gave the politicians an opportunity to keep in touch with the ordinary people that they represent in all parts of the country. Perhaps most importantly, the public participation scheme was designed to provide the people with basic education on democracy and constitutionalism and elicit their views on what should go into the constitution. The Constitutional Assembly used the press, radio, television, its web site as well as its own publicity campaign efforts. However, most of this campaign was largely done through the

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<sup>§§§§§§§§§§</sup>Katusiimeh, “Civic Education and the Promotion of Participatory Democracy in Uganda,” <file:///C:/Users/u04380886/Downloads/Mr%20M%20Katusiimeh%20-%20Civic%20Education%20and%20the%20Promotion%20of%20Participatory%20Democracy%20in%20Uganda.pdf> (accessed in June 2019).

<sup>\*\*\*\*\*</sup>See ‘Constitutional literacy campaign: Briefing by GCIS,’ <https://pmg.org.za/committee-meeting/1595/> (accessed in April 2019)

<sup>††††††††††</sup> See, *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others* (CCT 25/12) [2012] ZACC 28; 2013 (3) BCLR 251 (CC) (29 November 2012).

<sup>††††††††††</sup> See, Tim Fish Hodgson, “Towards an active citizenry: Brining the Constitution to the people,” <https://www.dailymaverick.co.za/article/2013-10-30-towards-an-active-citizenry-bringing-the-constitution-to-the-people/> (accessed in April 2019).

radio, which at that time was the most important and widely used means of communication in that it was able to reach the people in both rural and urban areas. It is estimated that over 82% of the population over 18 years old at that time listened to the radio. There were regular radio discussions in five of the country's 11 languages. §§§§§§§§§§

This resulted in a constitution that is widely admired as one of the most progressive in the world and which has been translated into each of the country's 11 official languages, as well as in braille, and was for several years distributed free of charge. Yet, a 2015 study found that only 46% of the people in South Africa had heard of the existence of either the Bill of Rights or the Constitution and only 10% of them had ever read the Constitution or had it read to them. \*\*\*\*\* Merely translating a constitution into local languages and distributing it to citizens at no charge, significant though this might be, is not synonymous with educating them about its purport and content. It is only in recent years that serious efforts have been made to make ordinary South Africans aware of the Constitution and what it can do for their lives. To date, constitutional rights education has operated at three closely interrelated levels, each of which are discussed below in detail.

At the level of the government, the lead appears to have been taken by the Department of Justice and Constitutional Development, which has organised several conferences on constitutional education and awareness. †††††††††† In fact, in 2015/2016, the department allocated R73-million for promoting constitutional awareness and development on behalf of the state. †††††††††† Some of the funds were used in printing and distributing copies of the Constitution to national departments, municipalities, universities and schools, Parliament, resource centres, churches and other places. In 2011, a group of Constitutional Court clerks began to run constitutional education workshops for high school learners, and by early 2012,

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§§§§§§§§§§ For a full discussion of this, see, Christina Murray, "A Constitutional Beginning: Making South Africa's Final Constitution," 23(3) *University of Arkansas at Little Rock Law Review* (2001), pp. 809-838; Hassen Ebrahim, *The Soul of a Nation. Constitution-making in South Africa*. Oxford University Press, Cape Town (1998); and Steven Friedman, *Long Journey: South Africa's Quest For A Negotiated Settlement*, Ravan (1993).

\*\*\*\*\* See, Tim Fish Hodgson, "Bridging the gap between the people and the law: Transformative constitutionalism and the right to constitutional literacy," *Acta Juridica* (2015), pp. 189-212.

†††††††††† See, for example, Nomfundo Manyathi-Jele, 'Constitutional rights education on the spotlight at national colloquium,' <http://www.derebus.org.za/constitutional-rights-education-spotlight-national-colloquium/> (accessed in November 2018).

†††††††††† See, Parliamentary Monitoring Group, "ATC161026: Budgetary Review and Recommendation Report of the Portfolio Committee on Justice and Correctional Services, dated 26 October 2016," <https://pmg.org.za/taled-committee-report/2869/> (accessed in June 2019).



30 such workshops, involving nearly 1,500 learners, had been held, with their focus placed on the bill of rights and the role of the Constitutional Court in enforcing it. §§§§§§§§§§ In the 1990s, the Department of Basic Education introduced a new subject, Life Orientation, in the high school curriculum. It is supposed to, *inter alia*, help the learners understand citizenship in South Africa, democracy and human rights, but it is debatable whether this subject is effective in providing learners with even an elementary idea of the Constitution and democracy. \*\*\*\*\*

Perhaps the most important drivers of constitutional literacy in South Africa today are non-governmental organisations (NGOs). The most prominent of these is the Constitutional Literacy and Service Initiative (CLASI). Launched in 2011, it offers ongoing training to law students from several of the law schools in South Africa on constitutional literacy and uses these trained-up students to facilitate constitutional literacy workshops, classes, public debates and moot competitions in under-resourced schools, historically disadvantaged communities and community centres around the country. †††††††††† One of its key tools has been the use of moot court competitions. These engage with contemporary constitutional debates and use simulated court hearings in which participants play the role of lawyers and judges to explore the country's constitutional history and ongoing efforts to transform society in line with the Constitution. Along with smaller community-based organisations, several other NGOs and foundations, such as the FW de Klerk Foundation, Legal Aid South Africa, and the Black Sash, provide a variety of rights-based literacy programmes focusing on aspects of the Constitution such as human rights and legal aid.

Universities also run constitutional literacy programmes. One of the latter is the annual South African National Schools Moot Court Competition (NSMCC), which started in 2011 and is

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§§§§§§§§§§ See, Constitutional Trust, “Constitutional education for high schools,” <https://www.concourtrust.org.za/content/page/constitutional-education-for-high-schools> (accessed in June 2019).

\*\*\*\*\*“Life orientation as a subject: What is the value for learners?” <http://www.702.co.za/articles/1392/life-orientation-as-a-subject-what-s-the-value-for-learners> (accessed in April 2019). According to the South African Department of Education, Life orientation is aimed at developing and engaging learners in personal, psychological, neuro-cognitive, motor, physical, moral, spiritual, cultural and socio-economic areas, so that they can achieve their full potential in the new democracy of South Africa. It is furthermore intended to promote social justice, human rights, and inclusiveness, as well as a healthy environment. However, many studies have shown that many learners also seem to view the subject as unnecessary, boring and irrelevant. This is compounded by the fact that the grades earned in this subject, do count for their university admission. See further, Johan Allers, “Preparing learners for the future,” <http://www.ngopulse.org/article/2016/06/02/preparing-learners-future> (accessed in April 2019).

†††††††††† See generally, “Constitutional literacy and service initiative (CLASI),” <https://www.leonfoundation.co.za/clasi.htm> (accessed in April 2019).

organised by the Law Faculty of the University of Pretoria.<sup>\*\*\*\*\*</sup> Teams from schools in each of the provinces take part in a competition designed to use active participation to create greater awareness in schools and communities of the constitution and the values it embodies. The programme also helps learners to develop their research, writing and oral advocacy skills, and the focus is usually on a contemporary constitutional issue. More generally, law programmes in South Africa require students to perform community service. Besides the occasional credit bearing, programmes provided by CLASI when training law students to conduct constitutional literacy workshops, there is a more formal community service programme that is usually carried out in law clinics and which has become an integral part of law schools. The legal clinics provide a form of legal aid assistance. Although the mandate of these legal clinics is usually much broader than this, given that they render general legal services to poor and marginalised communities, they also play a role in strengthening constitutional literacy among the underprivileged.<sup>\*\*\*\*\*</sup>

It can be argued that these diverse approaches in many respects try to fulfil the enduring aspirations of the Constitution, which, according to its preamble, includes the following:

Heal[ing] the divisions of the past and establish[ing] a society based on democratic values, social justice and fundamental human rights;

Lay[ing] the foundations for a democratic and open society in which government is based on the will of the people and every citizen's equally protected by law.

There is no doubt that the critical thinking and problem-solving skills they foster help to develop the participatory skills and disposition needed to make students active and responsible citizens. Nevertheless, as we noted above, the level of knowledge remains low. If this is so for South Africa, then it is likely to be a much more serious problem in other African countries with more limited resources.

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<sup>\*\*\*\*\*</sup>See 'National Schools Moot Court Competitions (NSMCC),' <http://www.up.ac.za/en/national-schools-moot-court-competitions-nsmcc/article/262377/introduction-to-the-national-schools-moot-court-competition> (accessed in April 2019).

<sup>\*\*\*\*\*</sup>See 'History of legal clinics in South Africa,' <http://www.up.ac.za/up-law-clinic-home-page/article/1822984/history-of-law-clinics-in-south-africa> (accessed in April 2019).

## 4 CHALLENGES AND PROSPECTS: TOWARDS A RIGHT TO CONSTITUTIONAL LITERACY

Considering the enormous challenges that democracy and constitutionalism in Africa face today, it can be argued that the prospects for the future depend to a large extent on better popular understanding and appreciation of constitutions, their purposes, values and potential, on the grounds that such knowledge enable citizens to counter these challenges. Henry Peters Brougham succinctly captured the importance of this when he opined that; “Education makes a people easy to lead, but difficult to drive; easy to govern, but impossible to enslave.”<sup>\*\*\*\*\*</sup> For Africans to be able to defend their constitutions and resist the present efforts by opportunistic leaders to derail the present fragile transitions to genuine democracy and constitutionalism, a sustained and vigorous programme of constitutional literacy and citizenship education is necessary. Many have argued that the absence of such programmes have made national building efforts on the continent a slow, frustrating and almost impossible task.<sup>+++++</sup> There is something to be said for the views of some scholars that the advancement of major democracies across the globe has been the result of constitutional and political education.<sup>\*\*\*\*\*</sup> Be that as it may, in order to implement a credible and successful constitutional literacy programme, a number of challenges must be overcome.

### 4.1 Challenges to constitutional literacy in Africa

A serious and effective programme of constitutional literacy requires careful planning and the commitment of significant resources. This is particularly so because of the generally low literacy levels and the fact that many people, particularly those most in need of some knowledge of the constitution and its benefits, are poor and still live in remote rural areas with limited access to media such as radio and television.<sup>§§§§§§§§§§§§§§§§</sup> As Wellars

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<sup>\*\*\*\*\*</sup> See, SAAM, <https://americanart.si.edu/artwork/education-makes-people-easy-lead-difficult-drive-easy-govern-impossible-enslave-henry-peter> (accessed in June 2019).

<sup>+++++</sup> See for example, H. F. Akplu, “Participation, civic and political education,” cited in, Samuel Adu-Gyamfi and H. T. Yartey, “The Role of the National Commission for Civic Education in citizenship education during and after elections: A focus on the 2012 elections in Ghana,” 5 (4) International J. Soc. Sci. & Education (2015), at p.632.

<sup>\*\*\*\*\*</sup> See for example, Samuel Adu-Gyamfi and H. T. Yartey, *op. cit.* pp. 631-362.

<sup>§§§§§§§§§§§§§§§§</sup> Although new media such as internet, smartphones, and social media platforms have risen in the past decades, radio has remained the instrument that reaches the broadest audience in Africa. It must however be pointed out that this does not necessarily mean that civic education programmes on the radio will attract as much attention as other entertainment programmes. See further, “Radio is Africa's most influential information

Gasamagera rightly points out, “ the most important and very significant challenge... [is] general ignorance and illiteracy in the population, making it difficult [for them] to understand the philosophy and principles of the constitution.”\*\*\*\*\* The problems caused by illiteracy, poverty and the limited reach of state resources will not solve themselves in the natural course of time; instead, this requires a serious commitment by African governments, and so far, not many of them are committed to constitutional literacy or even, more generally, adult literacy. Funding constitutional literacy programmes is probably one of the most important ways in which international donor institutions and other international organisations can enhance democracy in Africa. This support can be provided, in the first place, to train constitutional literacy trainers and sponsor workshops in which the latter disseminate knowledge to larger audiences.

Constitutional literacy needs to be carried out by experienced and trained staff. This has been little considered as an area for academic research and specialisation. In South Africa, most of the training is conducted by students who themselves have been trained as part of their community service. It is of critical importance that specialised programmes are developed to train those who are required to facilitate constitutional literacy programmes. This may be done through workshops, moots or other forms of community engagement. However, the prospects for the future may well depend on a formal recognition of the right to constitutional literacy as a fundamental human right.

## **4.2 Towards a right to constitutional literacy**

Building a citizen-based participatory constitutional democracy that ostensibly emanates from the popular will of the people is not a once-off event. If it were, the diverse shades of African constitutional democracy to have emerged since the 1990s can claim to have achieved it. Similarly, it must be accepted that knowledge and understanding of the content and workings of a constitution do not automatically and spontaneously follow on from the adoption and implementation of a constitution. Nor is such knowledge automatically acquired merely by going through the ordinary general education system, regardless of the level. Nor

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outlet - UNESCO survey,” <https://www.africanews.com/2017/02/13/radio-is-africa-s-most-influential-information-outlet-unesco-survey/> (accessed in June 2019). In fact, this UNICEF study concludes thus, “At a time when many are pointing to a breakdown in civil, constructive discussion, and when the very idea of truth is increasingly being called into question, radio is uniquely-positioned to bring communities together and foster positive dialogue for change.”

\*\*\*\*\* In, “The constitution-making process in Rwanda: Lessons to be learned,” *op. cit.*















constitutions, seeing as African leaders and ruling elites have stealthily exploited the ignorance of their citizens to renege on their constitutional obligations.

The fact is that a constitutional right is of no assistance to the bearer if the latter is ignorant of such a right. In as much as a constitution is a living document, abrogation, derogation and amendment of constitutions is unavoidable, but this must be done in a controlled manner that does not undermine the essence of constitutionalism and the rule of law. This requires awareness and alertness on the part of citizens to ensure there are no abuses.

It has been argued that a constitutionally entrenched framework for constitutional literacy must now be regarded as an integral aspect of the life of a constitution. This entrenchment must take place during the drafting of the constitution through a participatory and inclusive process which allows citizens to know what the constitution is about and develop a sense of ownership of and identification with it.

However, over and above this, building and sustaining a bottom-up constitutional democracy requires a comprehensive programme of constitutional education with a focus on the poor and other marginalised groups in society. They are usually the least informed and need an effective system of constitutional literacy to enable them enjoy the benefits of constitutionalism. The main components of constitutional literacy should be a programme that provides easy access to copies of the constitution in a language that can easily be understood, regular seminars, conferences, dialogues and debates on the constitution, and mainstreaming constitutional education into the curriculum of schools and tertiary institutions. Civic education programmes through the mass media (radio and television) are probably the most effective means of reaching the rural and often illiterate populations. The fact remains that no matter how comprehensive and perspicuous a constitution is, if it does not find a home in the hearts and minds of the people and is venerated and actively used, then it will lose its essence.