

WHAT SHOULD AFRICANS EXPECT FROM THEIR CONSTITUTIONS?

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I. THE NEED TO REGULATE SOCIO-POLITICAL INTERACTION

One of the most intractable problems in post-independence Africa is the failure of many countries on the continent to effectively manage social, ethnic, and religious diversity.¹ African countries are extremely diverse—such extreme and rich diversity can be traced to the various ethnic groups that populate these countries, the influence of European colonialism, as well as the influence of Christianity, Islam, and other external factors, which include globalization and significant migrations of people from one country to another.² The failure of many African countries to provide effective mechanisms for the management of the interdependence, as well as the conflict that invariably arises from religious and ethnic diversity, has produced various forms of violence and political instability. Some of this instability can be traced to destructive mobilization by groups that believe that national, political and economic policies have either marginalized them or placed them on the competitive disadvantage, especially in the distribution or allocation of the benefits of economic growth.³ Such violent mobilization is

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1. See, e.g., MWANGI S. KIMENYI, *ETHNIC DIVERSITY, LIBERTY AND THE STATE: THE AFRICAN DILEMMA* 12-82 (1997) (using the Buchanan-Tullock model of constitutional choice to argue that African states presently do not constitute optimal units of collective choice and that the most effective way to manage ethnic diversity, as well as Africa's present States, is to engage in the reconstitution of the present "sovereign states," including adjusting existing state boundaries).

2. JOHN MUKUM MBAKU, *Preface* to *CULTURE AND CUSTOMS OF CAMEROON* (2005) [hereinafter MBAKU, *CULTURE AND CUSTOMS*] (examining, inter alia, the extraordinary diversity of the modern Cameroon nation-state).

3. Notable examples include the Igbos of Nigeria, who led a brutal war against the federal Nigerian government in an attempt to secede from the federation and form their own sovereign polity, in which they would no longer suffer marginalization and exclusion from political and economic markets. See ALEXANDER A. MADIEBO, *THE NIGERIAN REVOLUTION AND THE BIAFRAN WAR*, at xi-xii (1980) (providing an eye-witness account of the Nigerian civil war and narrating, from his perspective, reasons why the "Biafrans" waged the war and fought federal forces under extremely unfavorable military, economic, and social conditions); RAPH UWECHUE, *REFLECTIONS ON THE NIGERIAN CIVIL*

said to have contributed significantly to brutal and extremely destructive civil wars in Liberia, Sierra Leone, Rwanda, Nigeria, Sudan, and Ethiopia,⁴ as well as continued ethnic- or religious-induced violence in Kenya (following the 2007 disputed presidential elections),⁵ and many other countries.⁶

While conflict, especially as it relates to the competition for scarce resources, is inherent in the diversity that spans most African countries, it is not necessary that such conflict becomes destructive, or that the various groups that exist in these countries resort to violent, and often destructive, mobilization in order to resolve conflict. Individuals, as well as groups, have a natural tendency to pursue and maximize their own interests and values and this naturally causes conflict. As argued by H. Geoffrey Brennan and James M. Buchanan,⁷ “[o]nly the romantic anarchist thinks there is a ‘natural harmony’ among persons that will eliminate all conflict in the absence of rules.”⁸ This is true of individuals, as well as groups—be they ethnic, religious or otherwise—in Africa. Hence, to produce harmony, the behavior of individuals and collectivities must be constrained. Thus, as stated by Brennan and Buchanan,⁹ “[w]e require rules for living together for the simple reason that without them we would surely fight. We would fight because the object of desire for one individual would be claimed by another.”¹⁰ As has been

WAR: FACING THE FUTURE 7-10 (1971) (presenting a rigorous examination of the causes and consequences, for a future Nigerian nation, of the civil war that lasted from 1967 to 1970).

4. *See, e.g.*, MARK HUBAND, *THE LIBERIAN CIVIL WAR*, at xii (1998) (providing an eye-witness account of the horrific nature of Liberia’s extremely brutal civil war); *ETHNICITY AND GOVERNANCE IN THE THIRD WORLD 1* (John Mukum Mbaku, Pita Ogaba Agbese & Mwangi S. Kimenyi eds., 2001) (examining the challenges that are faced by governments in societies that exhibit significant levels of ethnic and religious diversity, including those in Africa); DOUGLAS H. JOHNSON, *THE ROOT CAUSES OF SUDAN’S CIVIL WARS*, at xiii-xiv (2003) (providing a thorough examination of the economic, social, political, and religious factors undergirding Sudan’s many civil wars); GEORGE KLAY KIEH, JR., *THE FIRST LIBERIAN CIVIL WAR: THE CRISES OF UNDERDEVELOPMENT 173-175* (2008) (providing an analysis of the civil war with a view to making suggestions on how the Liberian State can be reconstructed and reconstituted to minimize the probability of future destructive mobilization by ethnic-based organizations); MAHMOOD MAMDANI, *WHEN VICTIMS BECOME KILLERS: COLONIALISM, NATIVISM, AND THE GENOCIDE IN RWANDA 14-18* (2001) (exploring the social, economic, and political dynamics that led to the genocide in Rwanda); GEBRU TAREKE, *THE ETHIOPIAN REVOLUTION: WAR IN THE HORN OF AFRICA*, at xiv (2009) (providing a rigorous examination of Ethiopia’s military and political history, with emphasis on the civil war that ravaged the country during the latter part of the twentieth century).

5. *See* HEALING THE WOUND: PERSONAL NARRATIVES ABOUT THE 2007 POST-ELECTION VIOLENCE IN KENYA 1-5 (Kimani Njogu ed., 2009) (providing a series of narratives by individuals involved in or affected by the post-election violence in Kenya in 2007).

6. For an examination of civil wars in Africa generally, *see generally* CIVIL WARS IN AFRICA: ROOTS AND RESOLUTION (Taisier M. Ali & Robert O. Matthews eds., 1999) (giving examples of civil strife in Somalia, Sudan and Mozambique, among others); WILLIAM MARK HABEEB, *CIVIL WARS IN AFRICA* (2007) (explaining that since 1960, many African countries have been devastated by civil conflict, the affects of which continue today).

7. H. GEOFFREY BRENNAN & JAMES M. BUCHANAN, *THE REASON OF RULES: CONSTITUTIONAL POLITICAL ECONOMY 3* (1985).

8. *Id.*

9. *Id.*

10. *Id.*

argued by many scholars, most of the destructive ethnic-induced mobilization in Africa during the last several decades has been due primarily to the absence of effective legal constraints on the behaviors of individuals and groups.¹¹

Within each African country, as is the case in other societies, the desire by individuals and groups that inhabit these countries to maximize their various interests and values will invariably produce conflict. The natural proclivity of individuals and groups is to maximize their own values, and since the latter usually do not aggregate into a single set of community or societal interests, conflict usually results.¹² Thus, each society must seek what Brennan and Buchanan refer to as an “escape route”¹³ from a state of the world characterized by violent and opportunistic mobilization by individuals seeking ways to maximize their interests.

Studies by Brennan and Buchanan have produced two broadly defined “escape routes” for societies facing this dilemma: (1) the capacity of individuals within society to love each other; and (2) the design of rules to provide mechanisms for the coordination of the actions of individuals, and the peaceful resolution of the conflict that arises from socio-political interaction.¹⁴ The latter is usually considered a more efficient and predictable mechanism for coordination and resolution of conflict. Thus, individuals and groups living within an African country may desire rules in order to (1) minimize destructive mobilization by groups seeking ways to increase their participation in economic and political markets and arrest further marginalization; (2) enhance the ability of individuals and groups to coexist peacefully; and, (3) provide the wherewithal for individuals and groups to maximize their values and interests without unfairly interfering with the ability of others to do the same.¹⁵ Brennan and Buchanan state that although

11. In a 2001 essay, John Mukum Mbaku argued that “most of the destructive ethnic conflict that has pervaded most of post-independence Africa has been due primarily to the adoption at independence of institutional arrangements that (1) failed to adequately constrain the power of government; (2) did not guarantee economic freedoms; and (3) failed to provide procedures for peaceful resolution of the conflicting interests of the various ethnic groups within each country.” John Mukum Mbaku, *Ethnicity, Constitutionalism, and Governance in Africa*, in ETHNICITY AND GOVERNANCE IN THE THIRD WORLD 59, 59 (John Mukum Mbaku, Pita Ogaba Agbese & Mwangi S. Kimenyi eds., 2001) [hereinafter Mbaku, *Ethnicity*]. Mbaku argues further that, “in many instances, the laws and institutions adopted allowed some ethnic groups to dominate governance and use governmental structures to enrich themselves at the expense of the rest of society.” *Id.* Pita Ogaba Agbese, in an essay in the same volume, examines the management of ethnicity in Nigeria in the post-independence period and makes similar arguments as those advanced by Mbaku. Specifically, Agbese states “the state-based pattern of capital accumulation in which the ruling classes use their access to state power as a mechanism for private appropriation of wealth encourages the manipulation of ethnic and other forms of primordial identities.” Pita Ogaba Agbese, *Managing Ethnic Relations in a Heterogeneous Society: The Case of Nigeria*, in ETHNICITY AND GOVERNANCE IN THE THIRD WORLD 125, 127 (John Mukum Mbaku, Pita Ogaba Agbese & Mwangi S. Kimenyi eds., 2001).

12. Brennan & Buchanan, *supra* note 7, at ix (“[M]an’s natural proclivity is to pursue his own interests and that different persons’ interests almost inevitably come into conflict . . .”).

13. *Id.*

14. *Id.* at ix-x.

15. See JOHN MUKUM MBAKU, INSTITUTIONS AND REFORM IN AFRICA: THE PUBLIC CHOICE PERSPECTIVE 12-14 (1997) [hereinafter MBAKU, REFORM] (recommending state reconstruction to

human nature can “limit the attainable states of social harmony . . . sustainable social order can be achieved through the appropriate design, construction, and maintenance of *rules* that set limits on the way in which each person is allowed to order his conduct toward others.”¹⁶

For there to be effective management of diversity in Africa, each country must provide itself with a well-designed, locally-focused, and fully-functioning set of rules, as well as a set of counteracting agencies to enforce them.¹⁷ Here, “locally-focused” implies that the rules chosen reflect the values, aspirations, traditions and customs, and worldview of each country’s relevant stakeholder groups and, in addition, take into consideration the specificities of each country.¹⁸ Such rules can only be obtained or secured by making certain that the process through which the rules are chosen is participatory, inclusive, bottom-up, and people-driven (i.e., democratic) and not top-down or elite-driven, as was the case with constitution-making in the pre- and post-independence period.¹⁹ Full and effective participation of all of each country’s relevant stakeholders in the rules

provide institutional arrangements that adequately constrain the state as a way for African countries to enhance peaceful coexistence and sustainable economic growth and development).

16. Brennan & Buchanan, *supra* note 7, at x.

17. JOHN MUKUM MBAKU, INSTITUTIONS AND DEVELOPMENT IN AFRICA 17-18 (2004) [hereinafter MBAKU, INSTITUTIONS] (arguing, inter alia, that laws and institutions enhance peaceful coexistence in the African countries, providing the enabling environment for entrepreneurship and the creation of wealth).

18. John Mukum Mbaku, *The International Dimension of Africa’s Struggle Against Corruption*, 10 ASPER REV. INT’L BUS. & TRADE L. 35, 72-75 (2010).

19. See, e.g., John Mukum Mbaku, *Constitutionalism and Governance in Africa*, in SOCIO-POLITICAL SCAFFOLDING AND THE CONSTRUCTION OF CHANGE: CONSTITUTIONALISM AND DEMOCRATIC GOVERNANCE IN AFRICA 35, 39, 55 (Kelechi A. Kalu & Peyi Soyinka-Airewele eds., 2009) [hereinafter Mbaku, *Governance*]. It is important to note here that the foundation for rules selection must be one in which all individuals, no matter their station in life, are allowed to participate and, are “presumed capable of making rational choices among alternatives in accordance with individually autonomous value-scales.” JAMES M. BUCHANAN, THE ECONOMICS AND THE ETHICS OF CONSTITUTIONAL ORDER 16 (1994). As argued further by Buchanan, there should not be any “weighting scheme through which the evaluation of some persons in the community are deemed more important than other persons” *Id.* at 16. This point is critically important, especially for constitution-making in Africa, given the continent’s preference for top-down, elite driven and non-participatory approaches to constitution-making. Consider, for example, the constitution that produced the Union of South Africa in 1909. HEINZ KLUG, THE CONSTITUTION OF SOUTH AFRICA: A CONTEXTUAL ANALYSIS 8-9 (2010). Although it was an act of the British Parliament, it represented the outcome of deliberations carried out exclusively by white representatives of the four colonies that later formed the Union of South Africa. DENIS V. COWEN, THE FOUNDATIONS OF FREEDOM: WITH SPECIAL REFERENCE TO SOUTHERN AFRICA 43 (1961). The black population of these colonies, which included various African groups, Indians, Malays, and colored peoples, was not represented. *Id.* Also, during preparations for the independence of the U.N. Trust Territory of Cameroons under French administration, the process of compacting the constitution and developing institutions for the emerging country was monopolized and controlled by urban-based indigenous elites, French commercial and entrepreneurial interests resident in the colony, and the colonial government. See VICTOR T. LE VINE, THE CAMEROONS: FROM MANDATE TO INDEPENDENCE 167-92 (1964). None of these groups were selected freely by the Cameroon people to represent them in the process of selecting the rules that would govern them when they gained independence. *Id.*

selection process is critical because it helps achieve two important objectives—such a democratic approach: (1) ensures that the outcome is rules that reflect the values of the country's relevant stakeholders; and (2) significantly improves the chances that the majority of the people will accept the rules and see them as an appropriate tool that they can use to organize their private lives, protect themselves against government tyranny, and generally enhance their ability to live together peacefully.²⁰

Rules, especially those that reflect the values of the country's relevant population groups, serve many critical functions. In addition to providing mechanisms for the peaceful resolution of conflict and helping coordinate the actions of individuals,²¹ rules can provide individuals participating in both political and economic markets with information and enhance their ability to anticipate the behavior of other market participants, given the set of constraints.²² It is important that citizens understand the rules that they have chosen to regulate their socio-political interaction because such an understanding would enhance their ability to retain those rules that function properly and modify, amend, or repeal those that no longer serve their needs. The rules approach is the subject of constitutional design.

Rules, which Adam Smith called “laws and institutions,”²³ influence and, to a great extent, determine the outcomes that result from socio-political interaction.²⁴ Some laws and institutions produce outcomes that either enhance individual or group welfare, or harm it.²⁵ Constitutional political economy, an area of inquiry that deals with how societies determine the rules that regulate their socio-political interaction, can be used to determine the impact of existing rules on individual and community welfare.²⁶ Such a process can help a society determine which rules to

20. See, e.g., MBAKU, REFORM, *supra* note 15, at 217.

21. Brennan & Buchanan, *supra* note 7, at 1.

22. *Id.* at 8.

23. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 40 (1887).

24. See also Brennan & Buchanan, *supra* note 7, at 2.

25. For example, laws that do not adequately constrain civil servants and political elites may actually enhance the ability of these state custodians to engage in corruption and rent seeking. The latter, which are growth-inhibiting activities, discourage investment in productive activities, and hence stunt the creation of wealth. In many African countries, due to the existence of weak institutional arrangements, civil servants and politicians are able to plunder national economies for their own benefit and in the process, harm the welfare of the mass of the people. Also, throughout Africa, there exist statutory and customary rules that oppress women. Examples include explicit or customary rules that permit female genital mutilation, child bribes, spousal abuse, and the denial of opportunities for self-actualization for girls. Also, one can include religious practices that promote the enslavement of others. See, e.g., Dygert, *infra* note 150, at 143-44. See also JOHN MUKUM MBAKU, CORRUPTION IN AFRICA: CAUSES, CONSEQUENCES, AND CLEANUPS, at xi (2010) [hereinafter MBAKU, CORRUPTION] (demonstrating the destructive effects of corruption on the welfare of Africans and how weak laws and institutions have significantly increased the level of bureaucratic corruption in the continent).

26. For a discussion of constitutional political economy, which James M. Buchanan also calls “constitutional economics,” see JAMES M. BUCHANAN, THE ECONOMICS AND THE ETHICS OF CONSTITUTIONAL ORDER 3-18 (1994) (especially Chapter 1: *The Domain of Constitutional Political Economy*).

retain, which to reform or amend, and which to discard. Additionally, the process can also help a society pick any additional rules needed to meet changing societal needs.²⁷

A. *Why Rules?*

As argued by Thomas Hobbes, in the absence of rules, life would be “solitary, poore, nasty, brutish, and short.”²⁸ Brennan and Buchanan argue that given that the “object of desire for one individual would be claimed by another,” members of society would fight or engage in violent mobilization to protect their rights.²⁹

Our interest here is in the rules that govern or constrain socio-political interaction. Specifically, we are interested in the rules that constrain the “economic and political relationships among [individuals]” within a society.³⁰ In allowing or enhancing the ability of individuals within society to maximize their values, rules must do so within a context in which they do not constrain the ability of others to do the same. Thus, in helping individuals maximize their interests, rules also serve the “negative function of preventing disastrous harm.”³¹

Most Africans currently live in countries or societies governed by rules that they do not understand.³² More important, perhaps, is the fact that the majority of these people do not understand how and why the rules that govern them were selected.³³ In these countries, only politically well-connected interest groups—primarily the ethno-regional groups that control the governments of these countries and which regularly subvert these laws and institutions to enrich themselves at the expense of the rest of society—participate in the selection of rules and, hence, are familiar with the rules.³⁴ Participation of all the relevant stakeholders of each country in the rules selection process must be maximized so that the outcome is a set of rules that reflects the people’s values and enhances their ability to organize their private lives and defend against encroachment of their fundamental rights. Not only will such a process allow them to select rules that are relevant to their lives, but it will also enhance their ability to understand, appreciate, accept, respect, and comply with the rules so selected.

27. It is important to keep in mind that during the process of selecting a country’s laws and institutions, “[n]o single group, either a minority or majority, dominates the process of formulation of legal rules, and no special characteristic of individuals or groups, such as wealth or race, gives them systematic advantages or disadvantages in rule making.” David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 4 WIS. L. REV. 1062, 1071 (1974).

28. THOMAS HOBBS, *LEVIATHAN* 104 (New American ed., E.P. Dutton & Co., Inc. 1950) (1651).

29. Brennan & Buchanan, *supra* note 7, at 3.

30. *Id.* at 7.

31. *Id.* at 14.

32. MBAKU, *REFORM*, *supra* note 15, at 217.

33. *Id.*

34. *Id.*

B. What is a Constitution?

According to economist Dennis C. Mueller, a constitution is “a form of social contract among citizens defining the rules within which society functions.”³⁵ In many societies, kingship networks, extended families, and ethnic and nationality groups handle the job of governing socio-political interaction, or coordinating the actions of individuals.³⁶ These traditional forms of governance are present in virtually all African countries and for many years they have served as effective tools for the regulation of socio-political interaction.³⁷ Mueller argues that in traditional societies, “custom and tradition dictate the appropriate penalties to be meted out for deviant behavior.”³⁸ However, as societies become more complex, “new situations arise and the proper behavior and appropriate penalties should this behavior not be forthcoming are not always known.”³⁹ To enhance governance in such complex and more dynamic societies a set of more explicit rules is required. The constitution represents such a set of *explicit rules*.⁴⁰ Basically, the constitution creates and defines legislative, executive, and judicial powers, and places limits on the exercise of those powers.⁴¹ These limits may come in the form of

individual or group rights against the government and, depending on the nature of the society in question, emphasize such things as the right to liberty and security of person, or as favored by many developing societies, including those in Africa, the right of each ethnic or nationality group to its economic, social and cultural development.⁴²

During the last several decades, “due to industrialization and modernization and changes in the global division of labor, African societies have become more complex. The emergence of large urban areas, with populations made up of people from several ethnic, religious, and cultural backgrounds, has rendered the traditional methods of regulating social intercourse ineffective.”⁴³ It has become imperative, then, for each African country to adopt governance systems based on explicit rules.

An effective constitution is one that reflects “the desires, aspirations, values, customs and traditions of a society, including the worldview of the society’s relevant stakeholders,”⁴⁴ and, of course, is consistent with the Universal

35. Dennis C. Mueller, *Choosing a Constitution in East Europe: Lessons from Public Choice*, 15 J. COMP. ECON. 325, 326 (1991).

36. MBAKU, REFORM, *supra* note 15, at 218.

37. *Id.*

38. Mueller, *supra* note 35, at 326.

39. *Id.*

40. MBAKU, REFORM, *supra* note 15, at 218; *see generally* Mueller, *supra* note 35; ELINOR OSTROM, LARRY SCHROEDER & SUSAN WYNNE, INSTITUTIONAL INCENTIVES AND SUSTAINABLE DEVELOPMENT: INFRASTRUCTURE POLICIES IN PERSPECTIVE 21-22 (1993) (emphasizing the importance of institutional arrangements, both explicit and implicit, on sustainable infrastructure management).

41. Mbaku, *Governance*, *supra* note 19, at 45.

42. *Id.*

43. MBAKU, REFORM, *supra* note 15, at 218.

44. Mbaku, *Governance*, *supra* note 19, at 45.

Declaration of Human Rights (“UDHR”), as well as with the provisions of other international treaties and conventions that were agreed after the UDHR, such as the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and the Convention on the Rights of the Child. Such a constitution, however, need not contain all the laws that a country needs to regulate socio-political interaction. Additional laws can be enacted in the post-constitutional period on an “as-needed-basis.” However, any laws enacted in the post-constitutional period must be consistent with the constitution since the latter is considered the supreme law of the country. A constitution is expected to perform certain specific functions, for instance it:

(1) provides the general and overall framework for government power: the scope of that authority; how the authority is to be exercised; and the procedure for the enactment of the laws needed to enhance the effective and smooth functioning of society; (2) defines citizenship and provides procedures for attaining citizenship and the conditions under which a citizen can participate in governance (e.g., to vote or run for public office); (3) defines and establishes the critical domains—the political, administrative, and judicial foundations of the state; (4) empowers the government to perform certain well-specified functions (e.g., collect taxes and provide public goods and services such as national defense and police protection); (5) divides, where necessary, power among the various levels of government—this is very important, especially in Africa, where the effective management of ethnic diversity favors some form of constitutional federalism, which may require that each polity be divided into as many political jurisdictions as possible; and (6) must specify only general principles of government so that it has the flexibility to deal effectively with the changing needs of society.⁴⁵

Constitutional expert Herman Schwartz argues that in compacting a constitution, future governments must be provided with the flexibility to deal with “unpredictable and unforeseeable challenges.”⁴⁶ Nevertheless, it is critical that certain important issues be discussed thoroughly and dealt with during constitution-making. Examples include human rights, democracy, stability, sustainable development, and social justice.⁴⁷ Many African countries failed to provide adequate protections to human rights in their constitutions.⁴⁸ Those that

45. *Id.* at 46.

46. Herman Schwartz, *Building Blocks for a Constitution*, 9 ISSUES OF DEMOCRACY 12, 13 (2004), available at <http://infousa.state.gov/government/overview/docs/ijde0304.pdf>.

47. See, e.g., Bereket Habte Selassie, *Framing the State in Times of Transition: Focus on Five Core Values*, 28 J. THIRD WORLD STUD. 19, 20-26 (2011).

48. See Charles M. Fombad, *Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa*, 55 AM. J. COMP. L. 1, 3 (2007).

did, nevertheless, failed to arm themselves with laws and institutions capable of enforcing those constitutional guarantees.⁴⁹

It is rare to find an African country that engaged its people in the thorough examination of these critical issues during the pre- and post-independence constitutional exercises.⁵⁰ Constitution-making in virtually all the African colonies

49. Charles M. Fombad argues that although by the 1990s, “[a]lmost all of these [African] constitutions . . . [contained] provisions that purport[ed] to recognize and protect most of the fundamental human rights that are associated with constitutionalism and Western liberal democracy,” many of the political parties that came to power during this period and continue to rule these countries have failed to respect these constitutional provisions, and the abuse of human rights has become endemic. Professor Fombad further states that “[m]any of the continent’s problems have been caused, not by the absence of constitutions per se, but rather by the ease with which constitutional provisions were abrogated, suspended or brazenly ignored.” *Id.* The notable exception is post-apartheid South Africa. First, post-apartheid South Africa has one of the most progressive constitutions in the world, a constitution that was compacted through a bottom-up, participatory, inclusive, and people-driven process. See CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA NO. 108 OF 1996, Dec. 18, 1996, available at www.info.gov.za/documents/constitution/1996/a108-96.pdf [hereinafter CONSTITUTION OF SOUTH AFRICA]; HEINZ KLUG, THE CONSTITUTION OF SOUTH AFRICA: A CONTEXTUAL ANALYSIS 53 (2010) (providing a rigorous analysis of South Africa’s “final” Constitution of 1996 and its social and legal sources). A study of justice and the rule of law in South Africa by the Open Society Foundation for South Africa in 2005 found some weaknesses, (*e.g.*, by the time the study was completed, South Africa had not yet become a party to some important treaties in the international human rights system) but it also determined that the country had made significant accomplishments since 1994 when apartheid was officially abolished and a new state born. By 2005, South Africa had signed five of the most important international human rights conventions and was considered a global leader in human rights law. OPEN SOCIETY FOUNDATION, SOUTH AFRICA: JUSTICE SECTOR AND THE RULE OF LAW 4 (2005), available at http://www.opensocietyfoundations.org/sites/default/files/afri-mapdiscussion_20060223_0.pdf. Second, South Africa’s 1996 Constitution is “recognised as one of the most sophisticated and human-rights friendly constitutions in the world.” *Id.* at 3. In addition, since the demise of the apartheid regime, the new South Africa has made significant progress in providing its domestic legal system with a “comprehensive human rights framework.” *Id.* at 5. Third, unlike the constitutional situation in many other African countries, the separation of powers guaranteed by the South African Constitution has generally been realized in practice, and as a consequence the South African judiciary is not subservient to the executive. Instead, the judiciary is recognized as a coequal partner in governance, retains its independence, and is fully accountable to the Constitution. In several court cases, South Africa’s Constitutional Court has recognized judicial independence, holding that “judicial independence . . . is foundational to and indispensable for the discharge of the judicial function in a constitutional democracy based on the rule of law.” *E.g.*, *De Lange v. Smuts*, (1997) CCT 26/97, para. 59 (S.A.). Fourth, since 1994, a diverse and robust civil society, including people from historically marginalized and deprived groups and communities, has emerged in South Africa and has actively been engaging the political elite, effectively serving as a check on the exercise of government agency. Fifth, the country maintains many highly effective private (*e.g.*, private newspapers, radios, and TV stations) and public (*e.g.*, regular local, regional, and national elections) structures through which citizens can engage those who govern them. Finally, governance in South Africa, unlike that in many other countries in Africa, is characterized by a general adherence and fidelity to the rule of law.

50. See, *e.g.*, Victor T. Le Vine, *The Fall and Rise of Constitutionalism in West Africa*, 35 J. MOD. AFR. STUD. 181, 204 (1997). Note, however, that South Africa’s post-apartheid experience with constitutional discourse was quite robust—it was participatory, inclusive, and bottom-up and involved an examination of the issues listed above. MBAKU, REFORM, *supra* note 15, at 215 (examining, *inter alia*, post-apartheid South Africa’s experience with constitution-making).

was top-down, elite-driven and non-participatory.⁵¹ In the post-independence era, the elites who had captured the evacuated structures of colonial hegemony failed to create the enabling institutional environment for the type of robust civil dialogue that would have enhanced the ability of citizens to bring these issues into the reforms that were being carried out in the post-independence period.⁵²

II. CONSTITUTION-MAKING IN PRE- AND POST-INDEPENDENCE AFRICA

During the struggle for independence, Africa's freedom fighters argued that extremely high levels of poverty and material deprivation among each colony's indigenous populations was due to the European colonialists' monopolization of political and economic markets.⁵³ Of course, the objectives of the colonial government, as well as those of the European entrepreneurs who were resident in the colony, were in conflict with those of Africans. In the case of colonies that had large concentrations of settlers or colonists, the struggle for independence was complicated by the fact that colonists desired a post-independence polity that allowed them to monopolize both political and economic markets.⁵⁴

However, the African-led decolonization project was designed to (1) eject the Europeans from each colony and from any further participation in, or interference with, the latter's economic and political markets; and (2) provide laws and institutions capable of enhancing peaceful coexistence, and the creation of the wealth that these countries needed to deal with mass poverty and deprivation and improve the welfare of the indigenous peoples.⁵⁵ Of course, the failure to achieve these objectives in colonies such as South Africa and Southern Rhodesia delayed

51. See, e.g., LE VINE, *supra* note 19 (examining top-down, elite-driven constitution-making in the U.N. Trust Territory of Cameroons under French administration).

52. See Le Vine, *supra* note 50, at 183-184 (examining the failure of post-independence West African countries to engage in democratic constitution-making to arm themselves with effective institutional arrangements). Note that except for Guinea, all former French colonies in sub-Saharan Africa accepted Charles de Gaulle's offer of autonomy within the French community and hence, forfeited true constitutional discourse in favor of adopting the French Constitution of 1958 as a foundation for their laws and institutions.

53. See, e.g., John Mukum Mbaku & Julius O. Ihonvbere, *Introduction: Issues in Africa's Political Adjustment in the "New" Global Era*, in *THE TRANSITION TO DEMOCRATIC GOVERNANCE IN AFRICA: THE CONTINUING STRUGGLE* 1-2 (John Mukum Mbaku & Julius O. Ihonvbere eds., 2003).

54. Consider the Ian Smith-led unilateral declaration of independence in the British colony of Southern Rhodesia, which represented an effort by the colony's settler population to monopolize governance in the post-independence society. See CARL PETER WATTS, *RHODESIA'S UNILATERAL DECLARATION OF INDEPENDENCE: A STUDY IN INTERNATIONAL CRISIS* 1 (2008). Also consider the conditions under which the South African colonies gained independence in 1910 and formed the Union of South Africa. The Union constitution was drafted entirely by the representatives of the white minority, which desired institutional arrangements that would enhance their ability to maintain a policy of "white supremacy" in all spheres of life. Such laws and institutions eventually provided the foundation for the establishment of the dreaded apartheid system in 1948; the African population, which formed the bulk of the population of these colonies, was not allowed to participate in constitution-making. See COWEN, *supra* note 19, at 23-24; GEORGE M. FREDRICKSON, *WHITE SUPREMACY: A COMPARATIVE STUDY IN AMERICAN AND SOUTH AFRICAN HISTORY 195-198* (1981).

55. Mbaku & Ihonvbere, *supra* note 53, at 2.

genuine independence for many years—in South Africa until 1994 and in Rhodesia until 1980. Africans hoped that after independence and the departure of the Europeans from the continent, they would rid themselves of colonialism's opportunistic and Eurocentric laws and institutions, and replace them with locally focused, and relevant, governance structures.⁵⁶

The main strategy was for Africans—working on their own and taking into consideration their values, interests, needs, aspirations, customs and cultures, as well as a worldview—to reconstruct and reconstitute the state captured from the colonialists and provide governance structures capable of maximizing their values.⁵⁷ Specifically, the indigenous political elites who emerged to lead the African countries to independence were expected to engage each country's relevant stakeholder groups in a participatory, inclusive, bottom-up, and people-centered (i.e., democratic) constitution-making process. This process was to be used to select and adopt laws and institutions that would provide them with the ability to live together peacefully, to allocate their resources efficiently and equitably, and above all, to govern themselves without any interference from the Europeans.⁵⁸

Given their experiences under colonial rule, Africans expected post-independence institutional arrangements to (1) provide for the effective management of ethnic and religious diversity and significantly enhance peaceful coexistence; (2) promote and sustain entrepreneurial activities, especially among historically marginalized groups—women, rural inhabitants, minority ethnic groups, and the urban poor—and advance the creation of wealth and the socially equitable distribution of resources; (3) minimize agro-ecological degradation and ensure sustainability of natural resources; (4) fully and effectively constrain the state and minimize civil servants' and political elites' engagement in political opportunism (e.g., corruption and rent seeking); and, (5) place the welfare of the people at the core of all public policies. During the colonial period, indigenous groups had been pushed to the periphery of political and economic affairs and denied the right to govern themselves and create the wealth that they needed to meet their private and public obligations.⁵⁹

It was expected that post-independence Africa would consist of countries without any significant European presence or influence, and would have laws and institutions that reflected African, not European, interests and values. Many Africans viewed independence as a process through which they could rid themselves of both the Europeans and their anachronistic institutions and bring

56. *Id.* at 2-3.

57. *Id.* See also John M. Mbatia, *Constitutional Discourse and the Development of Structures for Sustainable Development in Africa*, 22 J. STUD. IN ECON. & ECONOMETRICS 1 (1998).

58. Mbatia & Ihonvbere, *supra* note 53, at 2-3. See also, e.g., Mbatia, INSTITUTIONS, *supra* note 17, at 9-11. Of course, those Europeans who had opted to remain in the new countries as citizens were expected to accept and respect the new political dispensation and live as responsible and law-abiding citizens.

59. See Mbatia & Ihonvbere, *supra* note 53, at 2-5.

into effect African-centered governance systems—those that were locally focused and designed to help Africans govern themselves effectively and manage their resources for their own benefit.⁶⁰

A. The Reluctant and Dysfunctional Decolonization Project

Decolonization, in virtually all African countries, failed to transform the critical domains—the political, administrative, and judicial foundations of the state—and failed to “make them more suitable for governing post-independence African societies.”⁶¹ Regardless of who the colonizer of record was—whether British, French, Belgian, Spanish, or Portuguese—decolonization and preparation for independence were dominated and controlled by three main groups: (1) the colonial state; (2) European entrepreneurs and commercial leaders resident in the colonies; and (3) a small group of urban-based indigenous elites—the majority of whom had been schooled in Europe, had lived there for many years, and had adopted European cultures, customs, and values.⁶² These three actors—colonialists, European entrepreneurs, and urban-based indigenous elites—were not representative of each colony’s diverse population, nor were they elected by the people to represent them in the process of selecting their laws and institutions.⁶³ More important, perhaps, is the fact that the elites who actually carried out the constitution-making project were not well-informed about “social, political and economic conditions then existing in most of the colony,”⁶⁴ and failed to consult all of the colony’s relevant stakeholder groups, or make allowance for and provide them with, the facilities, to participate. For example, in the colonies that merged to form the Union of South Africa in 1910, the constitution was an exclusive product of deliberations undertaken exclusively by representatives of the white minority.⁶⁵ The black majority was shut out of constitutional discourse completely.⁶⁶

60. According to Mbaku and Ihonvbere, after ridding the colonies of the European interlopers, Africans, with the help of their leaders, would “develop and adopt, through a democratic process (i.e., a people-driven, bottom-up, participatory, and transparent institutional reform process), institutional arrangements based on their own values, aspirations, traditions, and customs.” *Id.* at 2.

61. Mbaku, *Governance*, *supra* note 19, at 40-41.

62. *Id.* at 41.

63. John Mukum Mbaku, *Constitutionalism and the Transition to Democratic Governance in Africa*, in *THE TRANSITION TO DEMOCRATIC GOVERNANCE IN AFRICA: THE CONTINUING STRUGGLE* 103, 109 (John Mukum Mbaku & Julius O. Ihonvbere eds., 2003) [hereinafter Mbaku, *Transition*].

64. Mbaku, *Governance*, *supra* note 19, at 41.

65. COWEN, *supra* note 19, at 43.

66. *Id.* At the turn of the twentieth century, Britain had four self-governing colonies in South Africa, namely, the Cape of Good Hope, Natal, the Transvaal, and the Orange River Colony. Although the colonies enjoyed a significant level of self-government, they were still subject to oversight by Great Britain. In 1908, representatives of the legislatures of these four colonies met in convention to determine the nature of their proposed union. The African populations, which constituted a majority of the colonies, were not represented at the National Convention. The delegates, all white, compacted a constitution, which was cast in the form of a “draft bill,” and “which was ratified by the legislatures of three of the colonies and by a referendum in the fourth.” *Id.* Afterwards, the four colonies selected delegates (all white) and sent them to London, along with the draft bill, so that the British Parliament could enact it into law. Royal Assent was accorded to the draft bill in September 1909 “under the title

Of course, South Africa's constitution-making experience was not unique—in other colonies, urban-based African elites conspired with their European benefactors to impose on the citizens of each African country laws and institutions that did not reflect their values, interests, and customs and traditions.⁶⁷ This outcome, of course, was a result of the adoption of top-down, elite-driven, and non-participating approaches to constitution-making, which effectively deprived most Africans from determining their own governance institutions.⁶⁸ In 1958, under the leadership of Charles de Gaulle, France offered its sub-Saharan African colonies, under the auspices of the Constitution of the Fifth Republic, free association as autonomous republics within the *Communauté française* (French Community).⁶⁹ Of all the French colonies in sub-Saharan Africa, Guinea was the only one that rejected de Gaulle's offer.⁷⁰ Because virtually all of France's sub-Saharan African colonies accepted this so-called free association, these countries gained independence by adopting the 1958 French Constitution and by doing so, deprived their own citizens of the opportunity to determine their own laws and institutions.⁷¹ In each new "francophone" country, the French-inspired constitution created a Gaullist system of government with an imperial presidency and virtually no constitutional limits on the exercise of government agency.⁷²

of the South Africa Act (9 Edward VII, c. 9), and came into force in the Union on 31 May 1910." *Id.* Cowen states that the "South Africa Act itself, which established the Union's [i.e., Union of South Africa] framework of government, is often and very rightly quoted as discriminatory legislation openly adverse to non-whites, who were barred from being elected as members of an all-white Parliament; and save in the Cape, and to a minute extent in Natal, were excluded from the franchise." *Id.* at 26.

67. See LE VINE, *supra* note 19, at 227 (providing, inter alia, a critical analysis of constitution-making in the U.N. Trust Territory of Cameroons under French administration).

68. See, e.g., *id.* at 224, 226-27 (examining the top-down, elite-driven, and non-participatory approach to the design of the first constitution of the République du Cameroun—the former U.N. Trust Territory of Cameroons under French administration, which gained independence on January 1, 1960).

69. M. Daniel Pepy, *France's Relations with Africa*, 69 AFR. AFF. 155, 155 (1970).

70. LE VINE, *supra* note 19, at 183-184.

71. *Id.* at 185.

72. *Id.* at 187. Le Vine argues that "[t]he resemblance to the French system was certainly more than nominal since the text of several of [the African] constitutions, especially in the sections dealing with the presidency, followed the French document almost word for word." *Id.* at 184. Using constitution-making in the U.N. Trust Territory of Cameroons under French administration, Le Vine details the influence of the French Constitution of 1958 on constitutional discourse in Africa in the pre- and post-independence periods. The new Cameroon republic's constitution was, like that in other francophone countries, based on the de Gaulle blueprint. In his analysis, Le Vine argues that "there is some question whether the constitution was more the child of political exigency than of mature reflection." *Id.* at 226. Le Vine goes on to state that several members of the Consultative Committee, which was responsible for putting together the constitution, had indicated that the "government was more interested in producing almost any document and having it adopted as soon as possible than in encouraging wider discussion of its basic provisions—thus, according to these critics, accounting largely for following the French model so closely." *Id.* at 227. Le Vine also questions the "appropriateness of modeling the Cameroun constitution so closely on that of the Fifth Republic." *Id.* While the Constitution of the French Fifth Republic was designed "in the context of the constitutional crisis that brought De Gaulle to power," the environment and "circumstances surrounding the writing of the Cameroun constitution were not in any way analogous to those existing in France in 1958." *Id.*

The decolonization project, which was supposed to prepare Africans to live independently, govern themselves, and allocate their own resources, did not achieve these objectives.⁷³ Part of the reason for the decolonization project's failure to provide Africans with laws and institutions that reflected their values and hence, were capable of enhancing their ability to maximize those values, was due to the fact that constitution-making and institutional reforms in the pre-independence period were dominated and controlled by non-representative groups—European colonialists and entrepreneurs, as well as urban-based indigenous elites, the majority of whom had been educated in Europe, had lived there for many years, and were attracted to Eurocentric economic and political systems.⁷⁴ More important, perhaps, was the fact that these actors, all of whom controlled constitutional discourse in the colonies, were only interested in devising institutional arrangements that enhanced their ability to monopolize political and economic spaces in the post-independence society.⁷⁵ Hence, what emerged from the pre-independence reform efforts were laws and institutions that allowed a few urban-based indigenous elites (in South Africa, the white minority) to dominate political and economic markets and effectively enrich themselves at the expense of the rest of their fellow citizens.⁷⁶

The constitutions that many of the former European colonies adopted before or shortly after independence lacked legitimacy, which Sundhaussen argues derives from the “understanding and voluntary acceptance of the constitution by the people as a prescription for settling conflict within society.”⁷⁷ Even if these constitutions were, indeed, legal, they could not be considered legitimate instruments of governance.⁷⁸ Elster argues that the legitimacy of the constitution-making process itself must also be questioned, not just that of the outcome.⁷⁹ He

73. Mbaku, *Transition*, *supra* note 63, at 105.

74. The francophone countries were not the only ones that engaged in top-down, elite-driven, non-participatory constitution-making. In the British South African colonies, constitution-making was controlled and monopolized exclusively the colonies' minority white population; Africans, who constituted a majority of the population of all the colonies, were not allowed to participate in any form in constitution-making. In other British colonies, constitution-making was dominated by urban-based indigenous elites and the constitutional conferences were usually held in London, away from the people and lacking their active and full participation. See Le Vine, *supra* note 19, at 185. See also Mbaku, *Governance*, *supra* note 19, at 42.

75. Mbaku, *Transition*, *supra* note 63, at 111.

76. In the Union of South Africa, the constitution established a governance system controlled and dominated by whites; in the other African countries, the constitutions that brought these countries to independence, established governments that were controlled by certain ethno-regional coalitions, with minority ethnic and religious groups pushed to the economic and political periphery. Le Vine argues that in “francophone West Africa, each successful [political] party set about creating structures and institutions that would make it virtually impossible for any other to come to power by legal means.” Le Vine, *supra* note 50, at 187.

77. Ulf Sundhaussen, *Democracy and the Middle Classes: Reflections on Political Development*, 37 AUSTRALIAN J. P. & HIST. 100, 108 (1991).

78. Mbaku, *Transition*, *supra* note 63, at 110.

79. John Elster, *Constitution-Making in Eastern Europe: Rebuilding the Boat in the Open Sea*, 71 PUB. ADMIN. 169, 178-79 (1993).

identifies three types of legitimacy with regard to constitution-making: *upstream legitimacy*, which deals with how the “assembly” or “committee” that is charged with producing the constitution comes into being. If such an assembly came into being through a legitimate process (e.g., it is elected by the people), then it would enjoy upstream legitimacy.⁸⁰ The second type of legitimacy is *process legitimacy*, which applies to the outcome of the constitution-making process, as argued by Elster, “[i]f the internal decision-making procedure of the assembly is perceived as undemocratic, the document may be lacking in democratic legitimacy.”⁸¹ The third type of legitimacy Elster mentions is *downstream legitimacy*, which deals with how the constitution is ratified—if the constitution is approved by popular vote, it would have “much stronger claims to embody the popular will.”⁸²

Based on Elster’s criteria, most of the constitutional processes through which the majority of African constitutions were compacted lacked legitimacy. Few constitutional assemblies (or committees) came into being through a vote of the people. In some colonies, they were usually created through decrees.⁸³ Even where elections were held to determine the membership of assemblies or constitution-writing committees, certain interests, primarily those which enjoyed a comparative advantage in the employment of the instruments of violence, dominated and controlled these assemblies or committees and hence, the latter were not representative of each colony’s diverse population groups.⁸⁴

B. *Constitution-Making and Institutional Reforms in the Post-Independence Period*

Several of Africa’s indigenous leaders (e.g., Tanzania’s Julius Nyerere, Cameroon’s Ahmadou Ahidjo and Ghana’s Kwame Nkrumah) of the 1950s and 1960s argued that the institutional arrangements, which they had inherited from the colonial government, were not suited for governance and effective management of

80. *Id.* at 178. Consider the case of the constitution-making in the U.N. Trust Territory of Cameroons under French administration. The Consultative Committee, which was charged with writing the constitution for the soon-to-be independent territory, was created by Law No. 59-56 of October 31, 1959 (Loi No. 59-56 du 31 Octobre 1959 accordant au gouvernement le pouvoir de légiférer et de préparer la Constitution Camerounaise). LE VINE, *supra* note 19, at 185, 293.

81. Elster, *supra* note 79, at 178-179.

82. *Id.* at 179.

83. This was a common practice in the French colonies. See LE VINE, *supra* note 19, at 185.

84. In the South Africa colonies, constitution-making was controlled and dominated by the white minority—see, e.g., COWEN, *supra* note 19, at 26, 43; in other colonies, it became the exclusive purview of urban-based indigenous elites. In French Cameroons, for example, popular forces were not allowed to participate in constitutional discourse. As stated by Mbaku, the *Union des population du Cameroun* (“UPC”), the largest and most important indigenous political organization in the U.N. Trust Territory of Cameroons under French administration, and “one that represented a significant part of national political opinion,” was proscribed by the French colonial government and hence, could not participate in the preparations for independence, including, of course, the process of writing the constitution. John Mukum Mbaku, *Decolonization, Reunification, and Federation in Cameroon*, in *THE LEADERSHIP CHALLENGE IN AFRICA: CAMEROON UNDER PAUL BIYA* 31, 43-44 (John Mukum Mbaku & Joseph Takougang eds., 2004). See also Mbaku, *Governance*, *supra* note 19, at 50.

ethnic diversity in their new countries, nor for the promotion of the rapid economic growth needed to generate enough resources to fight poverty and deprivation.⁸⁵

85. MBAKU, INSTITUTIONS, *supra* note 17, at 251-252. For example, Ahmadou Ahidjo—who became president of Cameroon at unification in 1961—adopted an economic system that his government explained was based on both socialist and capitalist principles. This so-called uniquely Cameroonian model of development was referred to as “planned liberalism.” See, e.g., Fuebeh P. Fonge, *Cultivating an Economic Crisis in Cameroon: The Rhetoric versus the Reality of Planned Liberalism*, in THE LEADERSHIP CHALLENGE IN AFRICA: CAMEROON UNDER PAUL BIYA 337, 340-344 (John Mukum Mbaku & Joseph Takougang eds., 2004). Ahidjo, architect of planned liberalism, formally introduced the concept to the country at the inaugural congress of the Cameroon National Congress (“CNU”), the then ruling political party, in Baffousam in 1965. He further elucidated the concept in two important publications—AHMADOU AHIDJO, THE POLITICAL PHILOSOPHY OF AHMADOU AHIDJO (Imprimerie Nationale, 1967) & AHMADOU AHIDJO, ANTHOLOGIE DES DISCOURS, 1957-1979, 4 volumes (Les nouvelles éditions Africaines, 1980). The heart of planned liberalism was the establishment of an investment code that favored foreign investment and the setting up of parastatals to carry out projects that the government believed could not be easily undertaken by private investors. Planned liberalism created a lot of problems for the Cameroonian economy. First, the generous benefits offered foreign investors (e.g., generous tax benefits; subsidies for securing human capital; preferential access to government contracts; subsidized loans from government financial agencies; and easy access to locally- and foreign-sourced production inputs) placed local entrepreneurs on a competitive disadvantage. Second, since most of the businesses established by foreign investors were capital intensive, employed a relatively small amount of labor, most of which was foreign, the local labor pool did not benefit, at least directly, from most of the investments brought into the country by foreign firms. Finally, Ahidjo’s planned liberalism literally handed over the country’s economy, especially the industrial and manufacturing sectors, to French entrepreneurs, a process that significantly stunted the development of an indigenous entrepreneurial class. Fonge, *Cultivating an Economic Crisis in Cameroon*, *supra*, at 342-343. In Ghana, Kwame Nkrumah opted for a development model based on import substitution industrialization (“ISI”), which was anchored around significant control of the economy by the government. J. CLARK LEITH, FOREIGN TRADE REGIMES AND ECONOMIC DEVELOPMENT: GHANA 48-49 (1974). Instead of promoting rapid economic growth and development, the ISI provided opportunities for politically well-connected civil servants to enrich themselves at the expense of the rest of the population. As stated by Leith, the regulatory system, which had been designed to “meet the apparent national needs and to minimize capricious discrimination among importers was frequently set aside in favor of Mr. Djin and his associates.” *Id.* at 25. Mr. A. Y. K. Djin was Ghana’s minister of trade at the time. H. H. Werlin, who studied Ghanaian political economy under Nkrumah, revealed that, under the institutional structure set up by Nkrumah shortly after Ghana gained independence from Great Britain in 1957, “[a] kickback of from 5 to 10 per cent was expected in return for government contracts. The CPP garnered about 90 percent of its income in this way, amounting to over \$5 million between 1958 and 1966, which Nkrumah freely used for his own purposes. For example, the properties of A. G. Leventis were purchased in 1962 at an inflated price with the understanding that \$2.4 million would be turned over to Nkrumah for his own use.” H. H. Werlin, *The Roots of Corruption—The Ghanaian Enquiry*, 10 J. MOD. AFR. STUD. 247, 252 (1972). Generally, many post-independence African leaders set up institutional arrangements that enhanced their ability to oppress and exploit their fellow citizens, as well as satisfy their appetite for primitive accumulation. As argued by Ihonvbere, Africa’s post-independence “dominant classes” were interested primarily in their own political survival and not in nation building or economic development. Julius O. Ihonvbere, *A Balance Sheet of Africa’s Transition to Democratic Governance*, in THE TRANSITION TO DEMOCRATIC GOVERNANCE IN AFRICA: THE CONTINUING STRUGGLE 33, 34 (John Mukum Mbaku & Julius O. Ihonvbere eds., 2003). According to Ihonvbere, “[t]he dominant classes in Africa have no concrete class base, lack a serious national project, and remain highly fractionalized and factionalized. In several ways, they subvert their own regimes and promote an environment that directly challenges possibilities for regime consolidation, growth, and development.” *Id.* at 34.

These leaders, however, did not engage their citizens in reconstructing and reconstituting the post-colonial state through democratic constitution-making to create more effective and efficient political and economic dispensations.⁸⁶ Instead, they engaged in opportunistic reforms that strengthened their political positions, enhanced their ability to monopolize both political and economic spaces, and effectively marginalized those groups within the country that were not related to them.⁸⁷

As many of the immediate independence leaders argued (e.g., Nyerere and Ahidjo), what African countries needed were “political systems with strong central governments so that the several ethnic groups within each country could be kept together and the necessary environment provided for wealth creation.”⁸⁸ Many of these leaders argued that the political arrangement that they preferred, which would later evolve into the “one-party” authoritarian political system, was the most effective framework for dealing with the multifarious economic, social, and political problems that each new country faced.⁸⁹ Specifically, these leaders opted for a single-party political system and an economic system in which state ownership of productive resources and significant levels of state regulation of private exchange would dominate.

Competitive political systems were considered major obstacles to nation-building and peaceful coexistence. For example, in Malawi, President Kamuzu Banda stated that “there is no Opposition in Heaven. God himself does not want opposition—that is why he chased Satan away. Why should Kamuzu [President Banda] have opposition?”⁹⁰ These dictators argued that the one-party political system would represent “all streams of opinions and societal groups” and that governance systems with multiple political parties presented myriad opportunities for the politicization of ethnic, religious, and other social cleavages, rendering nation building virtually impossible.⁹¹ As argued by the former president of Sierra Leone, Siaka Stevens, multi-partyism is “a system of . . . institutionalized tribal and ethnic quinquennial warfare euphemistically known as elections [which]

86. MBAKU, INSTITUTIONS, *supra* note 17, at 251-252. See also Le Vine, *supra* note 50, at 188. Le Vine writes that in “West Africa such documents [i.e., the constitutions that brought these countries to independence] were soon abrogated by the new governments, which generally preferred to rule without the constraints that they embodied.” *Id.*

87. MBAKU, INSTITUTIONS, *supra* note 17, at 251-252.

88. *Id.* at 252. See also Samuel Decalo, *The Process, Prospects and Constraints of Democratization in Africa*, 91 AFR. AFF. 7, 9-10 (1992).

89. MBAKU, INSTITUTIONS, *supra* note 17, at 252. See generally ANNE O. KRUEGER, ECONOMIC POLICY REFORM IN DEVELOPING COUNTRIES: THE KUZNETS MEMORIAL LECTURES (1992) (providing a critical analysis of the reforms that many developing countries, including those in Africa, undertook in the post-independence period); JULIUS KAMBARAGE NYERERE, FREEDOM AND UNITY (1966) (detailing his economic and political agenda, based on socialism and self-reliance or *ujamma*, for an independent Tanganyika; note that Tanganyika later united with the island of Zanzibar to form the United Republic of Tanganyika and Zanzibar in 1964, the country later changed its name to the United Republic of Tanzania).

90. Decalo, *supra* note 88, at 10.

91. *Id.* at 9-10.

contributes an open invitation to anarchy and disunity.”⁹² In Nyerere’s view, “where there is one party, and that party is identified with the nation as a whole, the foundations of democracy are firmer than they can ever be where you have two or more parties, each representing only a section of the community!”⁹³ Hence, these leaders of the immediate post-independence period in Africa rejected the opposition political party as a check on arbitrary and non-accountable rule.

In France’s former colonies—that is, the francophone African countries—political elites undertook three major types of reforms, “[t]hey ‘amended’ national constitutions, enacted restrictive laws, and created elaborate ‘security’ structures that were later used to prevent the participation of popular forces in political markets.”⁹⁴ As argued by Le Vine, from these post-independence, constitutional manipulations emerged presidencies that were much more powerful than those expected of the Gaullist political model (i.e., the highly centralized political system with a very strong central authority which had been established in all the former French colonies in sub-Saharan Africa, except Guinea, at independence).⁹⁵ By the spring of 1963, these reinforced presidencies had been installed in as many as nine francophone African countries.⁹⁶

While the new African countries did not destroy or abandon the legislatures inherited from the colonial government, the individuals who served in these institutions (i.e., legislators or parliamentarians) functioned primarily, or in some cases exclusively, as mouthpieces for the executive, and did not exercise the true power of legislators.⁹⁷ In fact, in many of these countries, members of national assemblies or parliaments did not exercise independent power to enact laws. Instead, they simply rubber-stamped legislation demanded by the executive branch of government, as was common in Cameroon, Senegal, Côte d’Ivoire, Guinea, and Mauritania in the 1960s and 1970s.⁹⁸ In some countries, the president sacked legislators and dissolved the legislatures, and then he would proceed to rule by decree after the constitution was suspended.⁹⁹ Yet in other countries, the military intervened and captured the apparatus of government, subsequently destroyed most national institutions, and announced military decrees as the single mechanism for governing the country.¹⁰⁰

92. *Id.* at 10.

93. NYERERE, *supra* note 89, at 196.

94. MBAKU, INSTITUTIONS, *supra* note 17, at 252.

95. Le Vine, *supra* note 50, at 187.

96. *Id.*

97. *Id.* at 189 (“In many [African] countries, the parliamentary structures remained in place, but with only the ruling single-party remaining legal. Typically, the elected legislative assemblies tended to be relegated to the role of a prebendary pasturage, and their members usually gave automatic assent to the initiatives of the ‘reinforced’ presidencies as in Senegal, Côte d’Ivoire, Guinea, Mauritania, and Cameroon in the 1960s and 1970s.”).

98. *Id.*; MBAKU, INSTITUTIONS, *supra* note 17, at 252.

99. MBAKU, INSTITUTIONS, *supra* note 17, at 252.

100. *Id.* at 252-53. See also Victor T. Le Vine, *Parliaments in Francophone Africa: Some Lessons from the Decolonization Process*, in LEGISLATURES IN DEVELOPMENT: DYNAMICS OF CHANGE IN NEW AND OLD STATES 125, 146-147 (Joel Smith & Lloyd D. Musolf eds., 1979).

Military intervention in African politics, argued Le Vine, “epitomized the low estate to which constitutionalism had fallen during [the] 1963-89” period in Africa.¹⁰¹ He went on to state that:

[n]ot only did they commit acts which in themselves amply spoke to their disdain of the rule of law, but after taking power, they frequently suspended or discarded existing constitutions, to be removed from sight as offensive remnants of previous régimes, and then (more often than not in order to help legitimize their own rule) proceeded to write new ones to suit themselves—for example, Nigeria 1967, 1976, 1984; Dahomey/Benin, 1968, 1977; Upper Volta/Burkina Faso, 1970, 1977; Congo People’s Republic, 1973; Mali, 1974; the Central African Empire, 1974; Mauritania 1978, 1981.¹⁰²

The military elites who have intervened in politics since independence have rejected constitutions and constitutionalism as the basis for organizing their societies and resolving conflict.¹⁰³ In addition, these military elites have also rejected the idea that the relevant stakeholders in each country have the right to determine, design, and adopt their own institutional arrangements.¹⁰⁴ The view that the constitution is simply an instrument that can be manipulated to secure benefits for those who control the apparatus of government is not limited to military officers who have intervened in politics. It is only the exceptional African leader who has not attempted to manipulate his country’s constitution to either extend his stay in power or enhance that power.¹⁰⁵

Beginning in the mid-1980s, grassroots organizations, as they had done during the decolonization period, began to make demands, some of them violent, for a change in the status quo and transition to democratic governance.¹⁰⁶ This

101. Le Vine, *supra* note 51, at 190.

102. *Id.*

103. MBAKU, INSTITUTIONS, *supra* note 17, at 253.

104. *Id.*

105. Even as recently as 2011, an African politician was still trying to manipulate his country’s constitution to prolong his stay in power. Senegalese president Abdoulaye Wade attempted to change the national constitution in order to enhance his ability to secure another term in office. He was only forced to give up the attempt after what BBC News called the “most violent protests of Mr. Wade’s 11-year rule.” *Senegal: Abdoulaye Wade Drops Poll Plans After Riots*, BBC NEWS (June 23, 2011, 2:52 PM), <http://www.bbc.co.uk/news/world-africa-13887613>. Cameroon’s 1996 Constitution, which was approved by Paul Biya, as president, limits the president to two consecutive terms of seven years in office—that is, fourteen years in total. Yet, in 2008, Biya, who had been President of the Republic of Cameroon since 1982, set aside the law that he had earlier supported and used his position as leader of the ruling party to have the constitution changed so that he could continue in office as president. That year, Cameroon’s parliament, which is dominated by Biya’s Cameroon People’s Democratic Movement (“CPDM”) party—the CPDM at the time, held 153 seats in the 180-seat chamber—voted to amend the constitution so that Biya could contest the presidential elections in October 2011. He easily won those elections and is now serving as President of the Republic of Cameroon. By the time his term of office ends in 2018, Biya would have held the position of President of Cameroon for almost forty years. *E.g.*, Will Ross, *Cameroon Makes Way for a King*, BBC NEWS (Apr. 11, 2008, 7:08 AM), <http://news.bbc.co.uk/2/hi/africa/7341358.stm>.

106. *See, e.g.*, Mbaku, *Transition*, *supra* note 63, at 104.

resurgence, of course, was a continuation of efforts that were started during the colonial period to help Africans drive out the Europeans and then provide their societies with African-centered governance and economic systems. This time, however, the interlopers to be chased away were indigenous political elites, including military officers, who had captured the evacuated structures of colonial hegemony and proceeded to engage in opportunistic behaviors (e.g., corruption) to enrich themselves at the expense of their fellow citizens.¹⁰⁷ Granted, the pro-democracy organizations that spearheaded the continent's transition to democratic governance in the mid-1980s have made significant progress toward deepening and institutionalizing democracy. However, a lot remains to be done in order for each African country to provide itself with a constitution that specifically addresses the five core principles—democracy, stability, human rights, sustainable development, and social justice—that are considered the heart of, or central to, any set of modern governance principles.¹⁰⁸

III. WHAT DO AFRICANS EXPECT FROM THEIR CONSTITUTIONS? FIVE IMPORTANT CONSTITUTIONAL PRINCIPLES

An effective constitution is one that is locally-focused,¹⁰⁹ and reflects the values, customs, traditions, and worldview of the people to be governed by it. After all, a constitution consists of a set of constraints that individuals living in a society voluntarily impose on themselves in order to effectively regulate their socio-political interaction and more importantly, provide mechanisms for individuals to organize their private lives.¹¹⁰ Such a constitution can only be obtained if the constitution-making process is democratic—that is, it is bottom-up, people-driven, inclusive, and participatory.¹¹¹ Nevertheless, any constitution must reflect certain universally accepted principles of governance such as those elaborated in the UDHR and other international treaties (e.g., the International Covenant on Political and Civil Rights, the Convention on the Rights of the Child,

107. Mbaku & Ihonvbere, *supra* note 53, at 8.

108. See John Mukum Mbaku, *Postscript to MULTIPARTY DEMOCRACY AND POLITICAL CHANGE: CONSTRAINTS TO DEMOCRATIZATION IN AFRICA* 351 (John Mukum Mbaku & Julius O. Ihonvbere eds., 2006) (giving a review of developments in Africa's continuing struggle to deepen and institutionalize democracy).

109. As used here, "locally focused" means that the design of the constitution takes into consideration the country's specificities, its political economy, any special circumstances (e.g., emergence from oppressive colonial rule), and the values, culture and customs, as well as traditions, of the country's relevant stakeholders. This, of course, can only be accomplished if constitution-making is bottom-up, people-driven, participatory and inclusive. Mbaku, *Governance*, *supra* note 19, at 53. A major criticism of constitution-making in the francophone countries was that all these former French colonies based their constitutions on the Constitution of the French Fifth Republic (1958) even though the circumstances surrounding the writing of constitutions in the African countries "were not in any way analogous to those existing in France in 1958." LE VINE, *supra* note 19, at 227.

110. Mueller defines a constitution as "a form of social contract among the citizens defining the rules within which the society functions." Mueller, *supra* note 35, at 326.

111. Mbaku, *Governance*, *supra* note 19, at 53.

and the International Covenant on Economic, Social and Cultural Rights).¹¹² Specifically, each country's constitution must deal explicitly with democracy, stability, human rights, sustainable development, and social justice—these are core values that should apply universally to all human societies.¹¹³ Before we discuss how African countries can make certain that these values are elaborated in their constitutions, we must first examine them.

A. Five Important Constitutional Principles

Five constitutional principles—democracy, stability, human rights, sustainable development, and social justice—are considered central to any constitution.¹¹⁴ This section discusses each in detail.

1. Democracy

During the pro-democracy struggles of the mid-1980s and early-1990s,¹¹⁵ Africans began to see constitutions as “a ‘power map’ on which framers may delineate a wide range of concerns The process of *constitution making*, which involves, inter alia, making choices as to which concerns should appear on that map” has emerged as the central question of political discourse.¹¹⁶ More important, perhaps, is the fact that Africans came to see the constitution as “an instrument for addressing pressing socio-economic, cultural, and economic questions”¹¹⁷ as well as “an embodiment of consensus around constitutionalism.”¹¹⁸ What was critical in this realization was that while the content of the constitution is important, *process* is just as important. There was a conviction that process-driven constitution-making is superior because it enhances the ability of all of a country's relevant stakeholder groups to participate fully and effectively in the choice of laws and institutions.¹¹⁹ Constitution-making in the

112. See Selassie, *supra* note 47, at 20-27.

113. *Id.*

114. See John Mukum Mbaku, *Postscript to MULTIPARTY DEMOCRACY AND POLITICAL CHANGE: CONSTRAINTS TO DEMOCRATIZATION IN AFRICA* 351 (John Mukum Mbaku & Julius O. Ihonvbere eds., 2006) (giving a review of developments in Africa's continuing struggle to deepen and institutionalize democracy).

115. Mbaku & Ihonvbere, *supra* note 53, at 8.

116. H.W.O. Okoth-Ogendo, *Constitutions Without Constitutionalism: Reflections on an African Political Paradox*, in *CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD* 65, 67 (Douglas Greenberg et al. eds., 1993).

117. Julius O. Ihonvbere, *Constitutions Without Constitutionalism? Towards a New Doctrine of Democratization in Africa*, in *THE TRANSITION TO DEMOCRATIC GOVERNANCE IN AFRICA: THE CONTINUING STRUGGLE* 137, 139 (John Mukum Mbaku & Julius O. Ihonvbere eds., 2003).

118. *Id.* (citation omitted) (internal quotation marks omitted).

119. See *id.* at 138-39. Constitutional expert, Professor Bereket Habte Selassie, argues that in the constitution-making exercise, emphasis must be placed on “process.” Selassie, *supra* note 47, at 21. He states that in post-Cold War constitution-making in Africa, “more emphasis was given to process compared to previous times. This emphasis is related to the democratic imperative as the governing principle in modern times. For example in a long-running comparative constitutional study in which I have been involved, cosponsored by the U.S. Institute of Peace and the U.N. Development Program (“UNDP”) the study was focused on the process more than on the content of the constitution. The

pre- and post-independence periods was top-down, elite-driven and non-participatory. The process-driven approach was expected to be bottom-up, participatory, inclusive, and people-driven—i.e., democratic—making certain that the constitution was not designed by a select group of political elites, with the help of their foreign benefactors, but by the people themselves, with the help of their elected representatives.¹²⁰

The democratic approach to constitution-making demands that the public be provided the facilities to participate fully and effectively in rules selection and institution building. Such a process, as argued by constitutional expert, Bereket Habte Selassie, “empowers the public, giving its members a sense of ownership of the constitution and allowing them to air their views on a range of critical issues that affect their lives.”¹²¹

One can see a constitution as an instrument for “creating bridges of understanding among different segments in divided societies,”¹²² such as in today’s African countries. Despite the more than three decades of democratization and political liberalization in Africa, many of the countries on the continent are still in the process of transitioning from governance systems characterized by destructive mobilization by various groups—which are seeking either to minimize actual or perceived marginalization, or to defend their existing political and economic positions—to those in which citizens can live together peacefully.¹²³ A bridge-building constitution can provide the foundation for the construction of a political and economic society that enhances peaceful coexistence, maximizes the creation of wealth, promotes and sustains entrepreneurial activities, especially among historically marginalized groups (e.g., women, rural inhabitants, minority ethnic groups, and those who live on the urban periphery), and guarantees respect for human rights. Of course, the choice of the issues to be examined during constitutional discourse, and which should be elaborated in the constitution, must be based on (1) the values of the country’s relevant stakeholder groups—these values are determined by their historical experiences and can be extracted from them through their full and effective participation in the process of compacting the constitution—and (2) universally applicable criteria, which represent core values that apply universally to all human societies.¹²⁴

To reiterate, the participatory approach to constitution-making should enhance the ability of the country to address issues that are critical to effective

rationale behind this focus was the conviction that the recent approaches to process-driven constitution making are better than previous approaches were.” *Id.*

120. See Mbaku, *Governance*, *supra* note 19, at 37.

121. Selassie, *supra* note 47, at 21.

122. *Id.* at 19.

123. For a review of developments in Africa’s transition to democratic governance since the early 1990s, see KORWA G. ADAR ET AL., *THE STATE OF AFRICA 2010/11: PARAMETERS AND LEGACIES OF GOVERNANCE AND ISSUE AREAS* (2010); Mbaku, *supra* note 108, at 321.

124. See, e.g., John Mukum Mbaku, *Constitutionalism and Governance in Liberia: Where is the Liberty that Brought African-Americans to the West African Coast in 1820?*, 35 *LIBERIAN STUD. J.* 55, 74 (2010).

governance, such as peaceful coexistence, protection of human rights, citizenship, property rights, type of governmental regime (unitary or federal), and in the case of virtually all African countries, ability to structure governance systems in order to enhance the effective management of ethnic and religious diversity and minimize the tendency of groups to resort to destructive mobilization.¹²⁵

But, what is democracy? Dahl argues that one of the most important determinants of a political system that is democratic is “the continuing responsiveness of the government to the preferences of its citizens, considered as political equals.”¹²⁶ Within such a democratic system exists institutional structures that enhance the ability of citizens to effectively articulate their preferences, make them known to the government and other members of society, and have the government grant these preferences equal treatment without any prejudice against those individuals or groups advancing the request.¹²⁷ In his definition of democracy, however, Dahl does not consider issues of the distribution of income and wealth within the polity, what has been referred to as *economic democracy*.¹²⁸

Regardless of how it is defined, at the very least, democracy must enable citizens to effectively “negotiate, compromise, engage and hold themselves, and those they choose to represent them, accountable for action taken.”¹²⁹ Thus, in a country where governance is based on democracy, the state is adequately constrained by the law (i.e., the constitution) and, among other things, citizens have the right and ability to petition their government for relief from unjust and punitive state action, as well as participate fully and effectively in both political and economic governance.

2. Stability

Within a country, stability is a core value—for each African country, the twin values of stability and peaceful coexistence are essential for the achievement of social, political, and economic progress.¹³⁰ In fact, it is difficult to pursue an effective investment and economic growth program in an environment characterized by destructive political and ethnic strife.¹³¹ As argued by Selassie,

125. For an examination of various approaches to the management of ethnicity in developing countries, see *ETHNICITY AND GOVERNANCE IN THE THIRD WORLD*, *supra* note 4, at 5-7.

126. ROBERT A. DAHL, *POLYARCHY: PARTICIPATION AND OPPOSITION* 1 (1971).

127. *Id.* at 2.

128. *Cf. id.*

129. Selassie, *supra* note 47, at 22 (quoting Jean Bethke Elshtain, Laura Spelman Rockefeller Professor of Social and Political Ethics at the University of Chicago Divinity School).

130. Peaceful coexistence of each country's diverse ethnic and religious groups significantly encourages trade and other forms of voluntary exchange, minimizes the costs and maximizes the benefits of such exchanges, and hence, promotes engagement in productive activities. However, where there is, for example, political violence, including that arising from destructive ethnic mobilization, trade and other types of voluntary exchange are severely limited and wealth creation is stunted. See generally MBAKU, *REFORM*, *supra* note 15, at 91-110 (analyzing, inter alia, the impact of political instability on economic growth in Africa).

131. In a 1990 study, Mbaku determined that political instability has a significantly negative impact on economic growth in sub-Saharan Africa. In addition, he also determined that political instability

“the continued existence of the nation depends on [stability and unity]; and there is a sense in which the other core values are dependent on them.”¹³² During most of the post-independence period in Africa, few countries have been able to achieve the type of stability that can enhance national integration and nation-building.¹³³ Instead, many countries have been pervaded by high levels of political instability, some of which has been induced by violent mobilization by ethnic and religious groups that are fighting perceived, as well as actual, marginalization—consider, for example, civil wars in Liberia, Rwanda, and Sudan, as well as post-election violence in Nigeria and Kenya.¹³⁴

What then are the conditions that guarantee and sustain stability in a country? At the very least, the country's institutional arrangements must provide mechanisms for the peaceful resolution of conflict, as well as guarantee the rule of law. Within such a system, for example, the law is supreme—no one, even those who serve in government, including the executive, members of the judiciary and legislature, is above the law. Within a democratic system, citizens are knowledgeable of this fundamental constitutional principle.¹³⁵ As Dickinson argues, within a system in which the law is supreme, “every citizen is entitled, first, to have his rights adjudicated in a regular common-law court, and, secondly, to call into question in such a court the legality of any act done by an administrative official.”¹³⁶

Peaceful coexistence of the various ethnic and religious groups that live in each African country is a *sine qua non* for stability. That is, the effective management of ethnic and religious diversity is critical to the maintenance of peace and stability. The most effective way to ensure peaceful coexistence is to

weakens what is traditionally a positive relationship between inflows of development aid and economic growth (i.e., the aid-growth relationship). Finally, Mbatu determined that political instability discourages the inflow of official development assistance, funds that are usually very critical for development in poor economies. John M. Mbatu, *Political Instability, Flows of Foreign Development Assistance, Domestic Savings and Economic Growth in Sub-Saharan Africa*, 24 *ASIAN & AFR. STUD.* 137, 148-50 (1990). See also John Mukum Mbatu, *Direct Foreign Investment and Political Violence in Africa*, 25 *ASIAN & AFR. STUD.* 253 (1991) (showing empirically that foreign capital penetration significantly reduces domestic conflict in the African countries); John Mukum Mbatu, *Institutional Instability and Economic Growth in Sub-Saharan Africa*, 40 *RIVISTA INTERNAZIONALE DI SCIENZE ECONOMICHE E COMMERCIALI* 741 (1993) (showing, empirically, that political instability has a strongly negative impact on economic growth in Africa).

132. Selassie, *supra* note 47, at 22.

133. Of course, there are exceptions. Countries such as Botswana, Mauritius, and Seychelles have been relatively stable. Although a few others were able to maintain a significant level of stability, especially in the early years of independence, that stability was secured at the expense of significant levels of oppression of citizens. This was the case in countries that were ruled by both civilian and military dictatorships.

134. See JULIUS MUTWOL, *PEACE AGREEMENTS AND CIVIL WARS IN AFRICA* 12-13 (2009); GEORGE KLAY KIEH, JR., *THE FIRST LIBERIAN CIVIL WAR: THE CRISES OF UNDERDEVELOPMENT* 18-19 (2008); RAPH UWECHUE, *REFLECTIONS ON THE NIGERIAN CIVIL WAR: FACING THE FUTURE* 50 (1971).

135. Selassie, *supra* note 47, at 23.

136. JOHN DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES* 35 (1927).

provide the country with a constitution that guarantees the rule of law. Throughout most of post-independence Africa, most political elites, as well as the military elites who have intervened in politics, have behaved with impunity, refusing to subject themselves to the law.¹³⁷ In fact, many of them have subverted the law in an effort to monopolize political and economic spaces and enrich themselves at the expense of their fellow citizens.¹³⁸ The effect of the opportunism of Africa's post-independence political and military elites has been pervasive instability—most of this instability is attributed to (1) military intervention in politics; (2) corruption by civil servants and political elites; and (3) the political and economic marginalization of many minority ethnic and religious groups.¹³⁹ The latter have often resorted to violent mobilization in order to improve their participation levels and minimize further marginalization.¹⁴⁰ The solution lies in providing each country with institutional arrangements that guarantee the rule of law.

3. Human Rights

The evolution of modern human rights law started with the United Nations General Assembly's adoption of the Universal Declaration of Human Rights in 1948 ("UDHR"),¹⁴¹ and the subsequent adoption, in 1966, of the International

137. See, e.g., John Mukum Mbatia, *Military Coups as Rent-Seeking Behavior*, 22 J. POL. & MIL. SOC. 241, 274-75 (1994).

138. The subversion of rules to maximize the interests of a few politically well-connected individuals was not limited to military coups. In countries such as Cameroon, Malawi, Zambia, Liberia, and South Africa, where there were no military overthrow of the government, incumbent ruling coalitions—made up primarily of either a few ethno-regional elites or racial or religious minorities—were able to use government structures to enrich themselves at the expense of their fellow citizens. Liberia, which became an independent country in 1847, suffered a military coup in 1985. The militaries of the other African countries mentioned above have never intervened in their countries' political systems. See, e.g., GEORGE M. FREDRICKSON, *WHITE SUPREMACY: A COMPARATIVE STUDY IN AMERICAN AND SOUTH AFRICAN HISTORY* 269 (1981); BERNARD MAKHOSEZWE MAGUBANE, *THE POLITICAL ECONOMY OF RACE AND CLASS IN SOUTH AFRICA* 14-15 (1979) (detailing the manipulation of institutional arrangements by the white minority to oppress the black majority). See also NAOMI CHAZAN, *AN ANATOMY OF GHANAIAI POLITICS: MANAGING POLITICAL RECESSION, 1969-1982* 1-2 (1983) (examining the early years of Ghanaian independence, which were dominated by military coups); DAVID J. GOULD, *BUREAUCRATIC CORRUPTION AND UNDERDEVELOPMENT IN THE THIRD WORLD: THE CASE OF ZAIRE* 50-51 (1980) (detailing the subversion of rules by the Mobutu regime to enrich a few politically well-placed individuals and impoverish the rest of the people of Zaire).

139. For the influence of corruption on African societies, see MBAKU, *CORRUPTION*, *supra* note 25, at xi. See generally CORRUPTION AND DEVELOPMENT IN AFRICA: LESSONS FROM COUNTRY CASE-STUDIES (Kempe Ronald Hope, Sr. & Bornwell C. Chikulo eds., 2000) (discussing combating and controlling corruption in Africa referencing case studies in Zambia and Ghana, among others). For military intervention in African politics, see SAMUEL DECALO, *COUPS AND ARMY RULE IN AFRICA: STUDIES IN MILITARY STYLE* 5-38 (1976); Thomas H. Johnson et al., *Explaining African Military Coups d'État, 1960-1982*, 78 AM. POL. SCI. REV. 622, 622 (1984).

140. Examples of violent ethnic mobilization include the Rwanda genocide, Nigeria's civil war, and the Liberian and Sierra Leonean civil conflicts. See MUTWOL, *supra* note 134, at 50-52, 223-24; see generally ALFRED OBIORA UZOKWE, *SURVIVING IN BIAFRA: THE STORY OF THE NIGERIAN CIVIL WAR* (2003) (providing an account of the war by a survivor of the conflict).

141. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter Universal Declaration of Human Rights].

Covenant on Civil and Political Rights (“ICCPR”),¹⁴² and International Covenant on Economic, Social and Cultural Rights (“ICESCR”).¹⁴³ Of course, virtually all African countries, even including countries with dysfunctional political systems, pay lip service to human rights and have constitutions that mention, in some form or the other, protections for human rights.¹⁴⁴ Despite the fact that the constitutions of virtually all African countries make some allowance for the protection of human rights, the violation of the fundamental rights of citizens is widespread and continues unabated.¹⁴⁵ In many of these countries, children are routinely denied access to food and proper nutrition, education, clean water, and health care. They are subjected, almost on a daily basis, to harm and exploitation—including sexual abuse—and denied the right to participate fully and effectively in the cultural life of their communities, which includes the opportunity to be loved and nurtured by a family and the community.¹⁴⁶ In addition, various minority ethnic groups are routinely deprived of the opportunity to participate fully in economic and political markets, as well as to exercise the right to practice their traditions and culture.¹⁴⁷

Throughout Africa, corruption has made it virtually impossible for citizens to find access to justice, especially vulnerable groups such as women, children, ethnic minorities, rural inhabitants, and those forced by circumstances to eke out a living on the urban periphery. These individuals also do not have access to basic services, such as welfare-enhancing (and in some cases, life-saving) public services such as police protection, primary education, basic health care, clean water, shelter, and prenatal care for women.¹⁴⁸

142. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

143. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

144. For example, Chapter Five of the Constitution of the Republic of Ghana is headed “Fundamental Human Rights and Freedoms” and contains the following: “(1) The fundamental human rights and freedoms enshrined in this chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all other organs of government and its agencies and, where applicable to them, by all natural and legal persons in Ghana, and shall be enforceable by the Courts as provided for in this Constitution. (2) Every person in Ghana, whatever his race, place of origin, political opinion, color, religion, creed or gender shall be entitled to the fundamental human rights and freedoms of the individual contained in this Chapter but subject to respect for the rights and freedoms of others and for the public interest.” CONSTITUTION OF THE REPUBLIC OF GHANA, ch. 5, ¶¶ 1-2. In addition, Chapter Eighteen of the Constitution of the Republic of Ghana establishes a *Commission on Human Rights and Administrative Justice*, which is charged with making certain that the rights guaranteed by the Constitution are protected. CONSTITUTION OF THE REPUBLIC OF GHANA, ch. 18, ¶ 218.

145. See, e.g., HUMAN RIGHTS UNDER AFRICAN CONSTITUTIONS: REALIZING THE PROMISE FOR OURSELVES 18 (Abdullahi Ahmed An-Na'im ed., 2003) (detailing the struggle to protect fundamental rights in Africa with specific emphasis on Ethiopia, Ghana, Guinea, Morocco, Mozambique, Nigeria, Rwanda, South Africa, Sudan, and Uganda).

146. See, e.g., SEXUAL ABUSE OF YOUNG CHILDREN IN SOUTHERN AFRICA, at Section II (Linda Richter et al. eds., 2004) (detailing the sexual exploitation of children in various countries in southern Africa).

147. See, e.g., MAMDANI, *supra* note 4, 101-02.

148. MBAKU, CORRUPTION, *supra* note 25, at 110.

The violation of the fundamental rights of individuals and communities remains a serious problem for virtually all countries in Africa.¹⁴⁹ While institutions such as apartheid, slavery, and colonialism are usually considered the biggest violators of the rights of Africans and their communities, it is important to take cognizance of the fact that even post-independence governments—which were expected to remedy the effects of historical discrimination and put in place institutions capable of protecting citizens’ rights—continue to violate the rights of their citizens.¹⁵⁰ Unfortunately, most African countries engaged in institutional reform processes that were opportunistic, top-down, and elite-driven during the pre- and post-independence periods, and which failed to produce institutional arrangements capable of guaranteeing the protection of human rights.¹⁵¹ Thus, even though most post-independence African constitutions made some mention of human rights, the custodians of the state (i.e., civil servants and the political elites) were not adequately constrained by the law and as a consequence, they were able to routinely violate citizens’ rights with impunity. The failure, for example, to constitutionally guarantee the rule of law in these countries allowed many political elites to consider themselves above the law and hence, engaged with impunity in behaviors that not only inhibited economic growth and wealth creation (e.g., corruption), but also grossly violated the rights of citizens.¹⁵²

African governments have to look at all their public policies in light of how they affect human rights. For example, as argued by former U.N. High Commissioner for Human Rights, Mary Robinson, “analysing corruption in the

149. See, e.g., Comm. on Human Rights, Violations of Human Rights in Southern Africa: Rep. of the Ad Hoc Working Group of Experts, 34th Sess., Feb. 22, 1978, U.N. Doc. E/CN.4/Res/5(XXXIV), at pmb1. (Feb. 22, 1978) (providing a progress report of the human rights situation in southern Africa in 1978); Julia Sloth-Nielsen, *Children’s Rights and Law in African Context: An Introduction*, in CHILDREN’S RIGHTS IN AFRICA: A LEGAL PERSPECTIVE 3, 3 (Julia Sloth-Nielsen ed., 2008) (arguing that children are more likely to be victims of human rights violations than adults and that African children are more likely to be victims than children from other regions of the world).

150. See, e.g., Asifa Quraishi, *What if Sharia Weren’t the Enemy?: Rethinking International Women’s Rights Advocacy on Islamic Law*, 22 COLUM. J. GENDER & L. 173, 214-29 (2011) (discussing Sharia-based women’s rights advocacy, with specific emphasis on Nigeria); Sarah L. Dygert, Note, *Eradicating Sudanese Slavery: The Sudanese Government and the Abuse of Islam*, 3 REGENT J. INT’L L. 143, 153-54, 159-62 (2005) (identifying key characteristics of Sudan’s version of Islam that have contributed significantly to the continuing persistence of slavery in Sudanese society).

151. Consider the experiences of France’s former colonies in Africa, which gave up democratic constitution-making and opted for institutional arrangements based on the Constitution of the French Fifth Republic. See, e.g., LE VINE, *supra* note 19, at 225-29.

152. See, e.g., MBAKU, CORRUPTION, *supra* note 25, at 102-09 (examining, inter alia, the impact of rules subversion by state custodians on African economies). Corruption represents one of the most important ways in which civil servants and politicians subvert national rules to enrich themselves. Mbaku states that in Africa: “selling of young girls into prostitution continues as highly corrupt national enforcement agencies standby and do nothing. The police and the judiciary, compromised by corruption, are impotent to stop this insidious institution [i.e., corruption], which continues to destroy the lives of an important portion of the population of these countries. Such blatant violation of the human rights of poor young people in many countries in Africa has contributed to a rise in HIV/AIDS infections, guaranteeing an early grave for people whose only crime is that they are poor and live in a country pervaded by high rates of corruption.” *Id.* at 110-11.

light of its impact on human rights could well strengthen public understanding of the evils of corruption and lead to stronger sense of public rejection."¹⁵³

4. Sustainable Development

Since the United Nations Conference on Environment and Development held in Rio de Janeiro, Brazil in 1992, sustainable development has emerged as an important global issue.¹⁵⁴ Sustainable development can be defined as "economic growth that is not destructive to the environment."¹⁵⁵ Under the concept of sustainable development, a country can make efforts to use all available resources to improve the welfare of the present generation, but in doing so, it must not unfairly "interfere with or compromise the living standards of future generations."¹⁵⁶ Alternatively, sustainability has been described as "the ability of an agro-ecological system to maintain productivity in the face of 'natural' and structural hazards, such as drought or farmer indebtedness."¹⁵⁷

The concept of sustainability, however, can be viewed in terms of the impact that economic growth has on a country's resource base. Under this approach, a country is said to achieve sustainable development if it can successfully improve the quality of life for the poorer majority of the population without compromising or destroying the nation's resource base. Put another way, "the national resource base is sustained and allowed to continue to serve as the foundation for effecting improvements in the standard of living of the citizens for an indefinite period of time."¹⁵⁸

Unfortunately, throughout most African countries, "high levels of corruption and other forms of political opportunism (e.g., rent seeking) have usually interfered with the government's ability to develop and implement policies that promote and enhance agro-ecological sustainability."¹⁵⁹ In fact, the post-independence approach to the management of environmental resources has been for civil servants and politicians to devise programs that have enhanced their ability to enrich themselves, but which have imposed significant costs on the environment.¹⁶⁰ Part of the problem lies in the nature of constitution-making in the pre- and post-independence period—the process was top-down, elite-driven and non-participatory, and hence, failed to produce the types of laws and institutions that would have adequately constrained civil servants and political elites, and prevented them from engaging in behaviors that are detrimental to effective management of

153. TRANSPARENCY INT'L, GLOBAL CORRUPTION REPORT 8 (2004).

154. John M. Mbatia, *Book Reviews*, 25 GROWTH & CHANGE 381, 381 (1994).

155. *Id.* (citation omitted) (internal quotation marks omitted).

156. Mbatia, *supra* note 124, at 77.

157. Michael Redclift, *Sustainability and the Market: Survival Strategies on the Bolivian Frontier*, 23 J. DEV. STUD. 93, 93 (1986).

158. Mbatia, *supra* note 124, at 78; see Duane Chapman & Randolph Barker, *Environmental Protection, Resource Depletion, and the Sustainability of Developing Country Agriculture*, 39 ECON. DEV. & CULTURAL CHANGE 723, 733 (1991); Redclift, *supra* note 157, at 93.

159. Mbatia, *supra* note 124, at 78.

160. *Id.*

environmental resources. Post-independence institutional arrangements in the African countries did not provide the necessary mechanisms for civil society to check the exercise of government agency; therefore, civil society and their organizations were unable to prevent the type of political opportunism that has been very damaging to the environment, such as bureaucratic corruption.¹⁶¹ It is important, therefore, for African countries to engage in democratic constitution-making to secure institutional arrangements that adequately constrain the state and enhance the ability of civil society to check on those excesses of civil servants and politicians that have contributed significantly to agro-ecological degradation.¹⁶²

5. Social Justice

As a principle, social justice refers to the guarantee, usually through the constitution, of “second generation” rights.¹⁶³ First generation rights are those guaranteed by the ICCPR—they deal specifically with the individual’s ability to participate in the political life of his or her society. These rights include freedom of thought, conscience, and religion, the right to a fair trial, and freedom of speech.¹⁶⁴ Some of these are also found in the UDHR.¹⁶⁵

Second generation rights deal specifically with economic, social, and cultural issues and are codified in the ICESCR. These rights include access to the following: a job; housing and health care; social security and unemployment compensation; adequate and affordable nutrition, especially for women, infants, and children; housing in safe neighborhoods; and affordable education, especially at the primary level.¹⁶⁶ However, resource or supply-side constraints affect the way the government deals with the guarantees provided by the constitution. The concept of rationing, which is a fundamental principle in economics, is critical to understanding how countries whose constitutions have guaranteed these social and economic rights must deal with resource scarcity and the need to meet their constitutional obligations to the citizenry.¹⁶⁷

161. Throughout the continent, the development of private media was stunted and citizens were not granted any means through which they could petition their governments for relief from government tyranny. For example, in Cameroon, press censorship was so severe that there were only a few private newspapers in the country even after nearly thirty years of freedom from France and Great Britain—the colonial administrators of record. In fact, as late as the 1990s, the Cameroon government was still confiscating newspapers for publishing the “wrong” news and sending journalists to jail for exercising their rights to criticize opportunistic government policies. The editor of a newspaper who published an article about the health status of President Biya was imprisoned. Lyombe Eko, *Hear All Evil, See All Evil, Rail Against All Evil: Le Messenger and the Journalism of Resistance in Cameroon*, in *THE LEADERSHIP CHALLENGE IN AFRICA: CAMEROON UNDER PAUL BIYA* 123, 130-33, 137 (John Mukum Mbaku & Joseph Takougang eds., 2004).

162. See Mbaku, *Governance*, *supra* note 19, at 44-47.

163. Selassie, *supra* note 47, at 26.

164. ICCPR, *supra* note 142, arts. 14(1), 18(1), 19(2).

165. Universal Declaration of Human Rights, *supra* note 141, arts. 11, 18-19.

166. ICESCR, *supra* note 143, arts. 6, 9-13.

167. The concept of scarcity in economics explains that no country has enough resources to meet all the desires of its population. Specifically, scarcity is defined as “[a] situation in which unlimited

In virtually all economies, rationing has been used effectively as a device to deal with scarcity. In market-oriented economies, the rationing of *most* goods and services is usually left to the market, with price serving as the main rationing device.¹⁶⁸ In economies that rely more on non-market approaches to the allocation of resources, the bureaucracy usually is responsible for most decisions regarding allocation—the bureaucrats usually design various rationing mechanisms, which may include price, bribes (to be paid to the gatekeepers), long waiting periods to receive a service, etc.¹⁶⁹ Any rationing device must comply with constitutional provisions.

In South Africa's Bill of Rights, the following rights are enshrined: the rights to housing, health care, food, water, and social security.¹⁷⁰ However, the constitution expressly qualifies these rights in Section 27(2): “[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.”¹⁷¹ South Africa's highest court, the Constitutional Court, has addressed the government's obligations to make certain that these constitutionally guaranteed rights are not violated in view of the constraints of resource scarcity and the qualifications of Section 27(2) in four cases: *Soobramoney v. Minister of Health*;¹⁷² *Government of the Republic of South Africa v. Grootboom*;¹⁷³ *Minister of Health v. Treatment Action Campaign*;¹⁷⁴ and *Khosa v. Minister of Social Development*.¹⁷⁵

The purpose of this section of the paper, however, is not to examine the “available resource” question, but to remind the reader of its existence—those countries that constitutionally guarantee social and economic rights must keep in mind that the government's ability to fulfill its constitutional mandate vis-à-vis such rights is subject to the resource constraint, a problem that is universal and applies to all countries, regardless of whether they are advanced industrial economies, or poor and highly deprived developing countries. Thus, citizens must see the government's ability to fulfill its constitutional mandate as constantly evolving and affected significantly by improvements in economic conditions—both domestic and global.

wants exceed the limited resources available to fulfill those wants.” R. GLENN HUBBARD & ANTHONY PATRICK O'BRIEN, *MICROECONOMICS* 4 (2010). Scarcity is a universal problem and is encountered by all countries; its existence requires that each country design and adopt some form of rationing device to minimize arbitrariness and capriciousness in the allocation of existing resources.

168. The use of price as an “allocative” device is discussed in all elementary courses in microeconomics. *See, e.g., id.*

169. For example, in “centrally planned economies,” the “government decides how economic resources will be allocated.” *Id.* at 9.

170. CONSTITUTION OF SOUTH AFRICA, *supra* note 49, arts. 26-27.

171. *Id.* art. 27(2).

172. *Soobramoney v. Minister of Health*, (1998) (1) SA 765 (CC) at para. 11.

173. *Gov't of the Republic of S. Afr. v. Grootboom*, (2000) (1) SA 46 (CC) at para. 74.

174. *Minister of Health v. Treatment Action Campaign*, (2002) (5) SA 721 (CC) at para. 23.

175. *Khosa v. Minister of Soc. Dev.*, (2004) (6) SA 505 (CC) at para. 53.

How a country decides to attain social justice should be an issue for constitutional discourse. Like other critical constitutional issues, it should be put through rigorous discussion during constitution-making. Such discourse must be robust and involve the full and effective participation of each country's relevant stakeholder groups. Thus, facilities—such as language experts and interpreters or translators—should be provided to all individuals and communities who desire them so that they can participate fully and effectively in the process of selecting appropriate laws and institutions for the country.

IV. CONSTITUTIONS, CONSTITUTIONALISM, AND GOVERNANCE IN AFRICA

Significant levels of ethnic and religious diversity characterize most countries in Africa.¹⁷⁶ Such diversity has presented many problems for the governing of these countries in the post-independence period. Constitutional government and the practice of constitutionalism are the most effective mechanisms to govern countries with extremely heterogeneous populations such as those in Africa.¹⁷⁷ The type of constitutional government envisaged here is one characterized by a separation of powers among the executive, legislative, and judicial branches of government.¹⁷⁸ Those who serve in government derive their powers from the constitution—that is, the powers of public sector workers are defined, elaborated in, and duly constrained by the constitution. But what about the rights of citizens? As argued by Brennan and Buchanan, citizens' fundamental rights are not defined or granted by the state. Instead, citizens, either directly or indirectly—through their elected representatives—establish governments, and grant them the power to guarantee and protect their rights; these are the rights that the people have defined, agreed upon, and have subsequently elaborated in the constitution.¹⁷⁹ In situations where States already exist, as is the case in Africa today, the people, through a participatory and inclusive process, can reconstruct and reconstitute them through a negotiated change of rules.

Constitutionalism is an idea borrowed from English philosopher John Locke—who is considered the father of classical liberalism—and the founders of the American Republic.¹⁸⁰ In a governance system that practices constitutionalism, the state is constitutionally limited and those who serve in government (i.e., civil

176. For example, Cameroon consists of “more than 250 identifiable ethnic groups.” MBAKU, CULTURE AND CUSTOMS, *supra* note 2, at 1; Nigeria is said to have as many as 450 ethnic groups. ETHNIC & CULTURAL DIVERSITY IN NIGERIA 6 (Marcellina Ulunma Okechie-Offoha & Matthew N. O. Sadiku eds., 1996).

177. *See, e.g.*, Mbaku, *Ethnicity*, *supra* note 11, at 59-60 (arguing, *inter alia*, that the most effective way to manage ethnic diversity is to provide each country with constitutionally limited government).

178. For an examination of constitutionalism and how it applies to African countries, *see* Mbaku, *Governance*, *supra* note 19, at 44-46.

179. BRENNAN & BUCHANAN, *supra* note 7, at 26.

180. *See, e.g.*, Mbaku, *Governance*, *supra* note 19, at 44. *See also* DONALD S. LUTZ, THE ORIGINS OF AMERICAN CONSTITUTIONALISM 5 (1988) (detailing the contributions of the British legal tradition and Federalists to constitutionalism in the United States); DAVID A. J. RICHARDS, FOUNDATIONS OF AMERICAN CONSTITUTIONALISM 13 (1989) (examining the historical origins of the fundamental foundations of American constitutionalism).

servants and politicians) are well-constrained by the law and if they engage in extra-legal activities (e.g., corruption), they are subject to prosecution.¹⁸¹ In such a political system, resolution of conflict (e.g., inter-ethnic conflict or disagreements between individuals) is resolved peacefully through constitutionally-mandated procedures. Groups, which suffer from actual or perceived marginalization, do not resort to violent mobilization to improve their participation in political and economic markets and minimize further marginalization. Instead, they utilize the legal system and other constitutionally-mandated mechanisms for the resolution of conflict to deal with their problems.¹⁸²

Many scholars¹⁸³ have argued that constitutionalism is “an expression of culture” and that “there do not exist elements of constitutionalism that are universal and hence, applicable generally to all societies.”¹⁸⁴ Can African countries, then, benefit from the experiences of the United States with constitutionalism and constitutional government? Yes, especially if one recognizes the fact that the “importance of the U.S. experience [with constitutionalism] is not to be seen in the country’s formal constitution, but in the general principles which are reflected in American constitutionalism and, further, in the practical experience of making constitutional democracy work.”¹⁸⁵ Many of the most basic ideas and principles that undergird U.S. constitutionalism can be found in other cultures,¹⁸⁶ and are either highly valued or have the potential to contribute significantly to governance in these societies. Three of these ideas stand out: (1) federalism—a political structure that can help African countries effectively manage diversity; (2) separation of powers—a constitutional principle which can help African countries avoid being trapped with arbitrary and tyrannical rule; and (3) judicial review—a very effective mechanism to enforce constitutional norms, and arguably, one of the most important contributions of U.S. constitutionalism to governance around the world. The policy recommendation for African countries is not necessarily that they immediately construct new governance systems based on the U.S. model, but that they “recognize the ideas and principles, which for more than 200 years, have enhanced democratic governance in the United States and allowed the country to deal effectively and peacefully with governance, as well as economic problems.”¹⁸⁷

V. COMPACTING AN AFRICAN CONSTITUTION: THE VALUE OF PARTICIPATION

After the end of the Cold War and the demise of apartheid in South Africa, many Africans renewed their interest in institutional reforms to bring about more

181. See Mbaku, *Governance*, *supra* note 19, at 45.

182. See *id.* at 45-46.

183. A. E. Dick Howard, *Toward Constitutional Democracy Around the World: An American Perspective*, THE NATION WEBLOG, <http://blog.nationmultimedia.com/print.php?id=422> (last visited Dec. 8, 2012).

184. Mbaku, *Governance*, *supra* note 19, at 44.

185. *Id.* at 44-45 (citation omitted) (internal quotation marks omitted).

186. *Id.* at 45.

187. *Id.*

effective governance institutions in their respective countries.¹⁸⁸ The grassroots organizations that spearheaded Africa's pro-democracy struggles in the post-Cold War era recognized democratic (i.e., bottom-up, participatory, inclusive, and people-driven) constitution-making as the most effective way for each country to secure appropriate laws and institutions—those that reflected the values of each country's relevant stakeholders and provided legal mechanisms for peaceful resolution of conflict.¹⁸⁹ These institutions were also expected to promote entrepreneurial activities, especially among historically marginalized individuals and groups (e.g., women, rural inhabitants, the urban poor, and ethnic minorities), adequately constrain state custodians so that they cannot engage in opportunistic behaviors (e.g., corruption and rent seeking), and enhance the peaceful coexistence of each country's diverse ethnic and religious groups.¹⁹⁰ Making certain that all relevant stakeholders are provided with the facilities to participate fully and effectively in constitution-making is absolutely necessary in order for the country to produce institutional arrangements that are acceptable to the people, reflect their values, and are recognized by them as legitimate tools for governance generally and the organization of citizens' private lives particularly.¹⁹¹

Making certain that all of a country's diverse population groups are provided the opportunity to participate in constitution-making and enactment of the laws that regulate socio-political interaction is very important. But why is a participatory and inclusive constitution-making process important for a country? Such a process significantly improves the chances that: (1) the outcome is a set of constitutional rules that is relevant to the lives of citizens and the problems they face; (2) net benefits are maximized—benefits to gainers are maximized and costs to losers are minimized; (3) the people will understand the constitution and its provisions, and accept it as a legitimate tool for governance and for organizing their private lives; (4) the people will claim ownership of the constitution and see it as a product of their own efforts; and (5) the people will understand the need to constrain their behaviors.¹⁹²

The lesson here is that democratic constitution-making is very important for nation-building, and economic and social transformation. Each African country should engage in such a process in order to provide itself with institutional arrangements that enhance the peace and provide the appropriate environment for the creation of the wealth needed for human development. However, in order for a country to successfully engage its citizens in democratic constitution-making, it must first create the environment within which such a process can take place. Such an environment must promote and enhance "dialogue, public debate,

188. John Mukum Mbaku, *Transition to Democratic Governance in Africa: Learning from Past Failures*, in *POLITICAL LIBERALIZATION AND DEMOCRATIZATION IN AFRICA: LESSONS FROM COUNTRY EXPERIENCES* 17 (Julius Omozuanvbo Ihonvbere & John Mukum Mbaku eds., 2003).

189. See MBAKU, *INSTITUTIONS*, *supra* note 17, at 16.

190. See *id.* at 16-17.

191. See *id.* at 16.

192. See Mbaku, *Governance*, *supra* note 19, at 46-47.

accommodation, and political give-and-take. The existence of such an environment necessarily enhances peace and democracy.”¹⁹³

Any African country's decision to engage in democratic constitution-making necessarily takes the institutional reform process out of the hands of a few ethno-regional elites and situates it within popular forces. Such a development, of course, can produce significant opposition from center elites, most of whom are likely to lose their influence and ability to manipulate the rules-making process to obtain laws and institutions that favor them. Additionally, adopting a democratic approach to rules-making will enhance the ability of popular forces to bring to the table for discussion issues that are relevant and critical to the peoples' well-being. For example, vexing issues of language, nationality, identity and citizenship, gender, property rights, religious freedom, and resource allocation can be made a critical part of constitutional deliberations.¹⁹⁴ These issues are important to African peoples, but since independence they have never been adequately examined—they have only been opportunistically treated by urban-based elites and virtually no effort has been made to provide citizens with the opportunity to participate in the design of laws regulating their own socio-political interaction.¹⁹⁵ Most important is that situating constitution-making and rules selection within popular forces would allow for robust dialogue, not just on issues that are critical to the country's relevant stakeholders, but also on certain universally accepted core values—democracy, stability, human rights, sustainable development, and social justice—and their subsequent entrenchment in the constitution. When citizens design their own institutional arrangements, they are more likely to accept them and would make certain that they reflect values that are important to them. Given the fact that these locally focused institutional arrangements reflect the values of most of the country's citizens, the latter are most likely to want to comply with them, a process that can significantly minimize the costs of constitutional compliance and improve governance.

VI. CONCLUSION

Pre- and post-independence constitution-making in Africa was a failure, both in process and outcomes.¹⁹⁶ First, in the francophone countries, constitution-making degenerated into the adoption of the French Constitution of 1958 as a foundation for the institutional arrangements that brought these countries to independence. This was undertaken despite the fact that the political, economic, and social conditions then in existence in the colonies were quite different from those that led to and necessitated the establishment of the French Fifth Republic in

193. *Id.* at 54.

194. Ihonvbere, *supra* note 117, at 143.

195. Notable exceptions include post-apartheid South Africa, which engaged in democratic constitution-making and produced one of the most progressive constitutions in the world today. *See* CONSTITUTION OF SOUTH AFRICA, *supra* note 49.

196. *See, e.g.,* Le Vine, *supra* note 50, at 181.

1958.¹⁹⁷ Second, although constitution-making in the British colonies appeared to be *participatorier*, the actual negotiations that produced the constitutions of the soon-to-be independent colonies were carried out in the United Kingdom and away from the African peoples of each colony.¹⁹⁸ In London, the negotiations were usually carried out between the British Government and urban-based indigenous elites from each colony.¹⁹⁹ Given the fact that the resulting constitution was expected to regulate socio-political interaction among the peoples of the colony, the negotiations should have been undertaken between all these groups, the real stakeholders in the constitution-making process and its outcome. Such a truly participatory and inclusive process would have guaranteed that issues brought to the table for negotiation were those that were relevant and important to governance, peaceful coexistence, and economic growth in the post-colony.

The result in both the French and British colonies were institutional arrangements that failed to provide the enabling institutional environment for peaceful coexistence and wealth creation. More important, perhaps, is the fact that the dysfunctional decolonization process that characterized preparations for independence in virtually all European colonies in Africa deprived Africans of the opportunities to have the type of robust constitutional discourse that would have allowed them to thoroughly examine issues critical to post-independence governance.

Consequently, the constitutions that brought these colonies to independence did not specifically deal fully and effectively with such important issues as democracy, stability, human rights, sustainable development, and social justice. This paper has made a case for each African country to engage its citizens in democratic constitution-making so that they can deal effectively and fully with these issues. The end result, in this scenario, would be to craft institutional arrangements that enhance the ability of African nations in the future to live together peacefully, and to create wealth to ensure the continued development of their populations.

197. See LE VINE, *supra* note 19, at 227.

198. See Mbaku, *Governance*, *supra* note 19, at 50-51.

199. See *id.*