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Constitutionalism and Africa's Agenda 2063: How to Build "The Africa We Want"

John Mukum Mbaku

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CONSTITUTIONALISM AND AFRICA'S AGENDA 2063: HOW TO BUILD "THE AFRICA WE WANT"

*John Mukum Mbaku**

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INTRODUCTION

From 1963–2013, Africans, under the leadership of the Organization of African Unity (OAU) and the African Union (AU), strived to achieve certain well-specified objectives, which included decolonization and the dismantling of the racially-based apartheid system in South Africa.¹ In May 2013, when the continent celebrated the golden jubilee of the OAU, Africans re-dedicated themselves “to the attainment of the Pan African Vision of *[a]n integrated, prosperous and peaceful Africa, driven by its own citizens, representing a dynamic force in the international arena.*”² In an effort to achieve this important goal, the AU’s Golden Jubilee Summit, which took place at Cairo, Egypt from May 18–30, 2013,³ asked the African Union Commission (AUC) “to prepare a continental 50-year agenda through a people-driven process outlining the Africa We Want, namely Agenda 2063.”⁴ At the Twenty-Fourth Ordinary Assembly, which took place in Addis Ababa, Ethiopia, during January 30–31, 2015, the AU Assembly of Heads of State and Government adopted *Agenda 2063: The Africa We Want* (“*Agenda 2063*”).⁵

1. AFRICAN UNION COMMISSION, *AGENDA 2063: THE AFRICA WE WANT: FIRST TEN-YEAR IMPLEMENTATION PLAN 2014–2023* 15 (African Union Commission, ed., 2015), <https://nepad.org/agenda-2063/publication/agenda-2063-first-ten-year-implementation-plan-2014-2023>.

2. *Id.* at 11. Emphasis in original.

3. AFRICAN UNION, *Celebration of the 50 Anniversary of the Establishment of the Organization of African Unity/African Union in AU Office in Cairo, Egypt* (May 13, 2013), <https://au.int/en/newsevents/29101/celebration-50th-anniversary-establishment-organization-african-unity-african-union>.

4. AFRICAN UNION COMMISSION, *supra* note 1, at 11.

5. United Nations Economic Commission for Africa [UNECA], *AU–UN Framework on Implementation of Agenda 2063 and Agenda 2030*, 2 (Jan. 27,

Agenda 2063 contains, inter alia, “Seven Aspirations.”⁶ Aspiration Three, which deals with “good governance, democracy, respect for human rights, justice and the rule of law,” holds the key to Africa’s political and economic transformation.⁷ Under this aspiration, Africans hope to consolidate the democratic gains that have been made since the 1950s and 1960s when new countries began to emerge from the colonies; improve the quality of governance; create institutional environments within which human rights are recognized and fully protected; promote the rule of law; build and sustain “strong institutions for a development state”; and facilitate the “emergence of development-oriented and visionary leadership in all spheres and at all levels.”⁸ The fulfillment of this aspiration will provide the foundation for the effective implementation of the other aspirations. Hence, the first line of business for the AU and individual African countries must be institutional reforms to provide each state with a governance process that is undergirded by the rule of law.

Although *Agenda 2063* is a fifty-year development and transformation program, the AU set within it priorities for the First Ten Year Implementation Plan.⁹ During this first period, the continent is expected to fully entrench the “[d]emocratic values and culture as enshrined in the African Governance Architecture.”¹⁰ The First Ten Year Implementation Plan states that “[f]ree, fair and credible elections will be the norm and at least 7 out of 10 persons will perceive democratic processes and institutions as being accountable and relevant.”¹¹ In addition, the plan also states that there will be “[r]espect for the rule of law

2018), <https://www.uneca.org/publications/au-%E2%80%93un-framework-implementation-agenda-2063-and-agenda-2030>.

6. AFRICAN UNION COMMISSION, *supra* note 1, at 11–12.

7. *Id.* at 68.

8. *Id.* at 37.

9. *Id.* at 14–16.

10. *Id.* at 23. The African Governance Architecture (AGA) was inspired by the Constitutive Act of the African Union—the latter “expresses the AU’s determination to ‘promote and protect human and peoples’ rights, consolidate democratic institutions and culture and ensure good governance and the rule of law.” *African Governance Architecture*, AFRICAN GOVERNANCE ARCHITECTURE, <http://aga-platform.org/index.php/about> (last visited on January 25, 2019). The AGA’s overall goal is to strengthen good governance in Africa. *Id.*

11. AFRICAN UNION COMMISSION, *supra* note 1, at 44.

and due process, the rights of all citizens will be part of the socio-political culture and the institutions that nurture them will be found to be capable by at least 70% of the citizenry.”¹² The AU also expects that “[a]t least 70% of the citizenry will perceive the judiciary to be independent and impartial and acknowledge the relevance of the legislature as a key component of the democratic process.”¹³ Finally, it is expected that by 2023, the “African Peer Review Mechanism would be reflected by the perceptions of the citizenry in the various continental governance metrics.”¹⁴

There are two goals and four priority areas under Aspiration Three. The goals are to entrench “[d]emocratic values, practices, universal principles of human rights, justice and the rule of law” and to put in place “[c]apable institutions and transformed leadership . . . at all levels.”¹⁵ The priority areas include making certain that democratic values and practices are the norm; to significantly enhance human rights, justice, and the rule of law; to provide effective institutions and leadership; and to ensure participatory development and local governance.¹⁶

On April 19, 2017, the AU and the United Nations (UN) signed one of two “significant partnership frameworks,” which they believed would bolster “efforts to optimize the peace-security-development nexus” on the continent.¹⁷ The agreement was titled the *Joint UN-AU Framework for Enhanced Partnership in Peace and Security*,¹⁸ and it was expected to provide “a

12. *Id.* at 44–45.

13. *Id.* at 45.

14. *Id.* The African Peer Review Mechanism (APRM) is “[a] Specialized Agency of the African Union, . . . [which] was initiated in 2002 and established in 2003 by the African Union in the framework of the implementation of the New Partnership for Africa’s Development (NEPAD).” AFRICAN UNION, *African Peer Review Mechanism*, <https://au.int/en/organs/aprm> (last visited on Jan. 25, 2019).

15. AFRICAN UNION COMMISSION, *supra* note 1, at 68–69.

16. *Id.*

17. Office of the [UN] Special Adviser on Africa (OSAA), *African Dialogue Series (ADS 2018): Concept Note for Session I: AU-UN Frameworks for Enhanced Partnership on Peace and Security and Implementation of Agenda 2063 and the 2030 Agenda: From Policy to Implementation*, available at <https://www.un.org/en/africa/osaa/events/2018/ds2018.shtml> (last visited on Jan. 12, 2020) [hereinafter OSAA].

18. AFRICAN UNION, *Enhancing Partnership for a Peaceful Africa: AU-UN Partnership*, <https://dpa.un.org/en/african-union> (last visited on Jan. 26, 2019).

basis for collaboration through joint mechanisms and regular consultations, with an emphasis on prevention and conflict.”¹⁹ In January 2018, the AU and the UN signed the second framework agreement, titled the *AU-UN Framework for the Implementation of Agenda 2063 and the 2030 Agenda for Sustainable Development*.²⁰ This agreement was expected to make certain that the AU’s *Agenda 2063* and the UN’s *Agenda 2030* (“*Agenda 2030*”) are fully “mainstreamed and integrated into countries’ national development frameworks.”²¹

The signing of the agreements between the AU and the UN was undertaken “against the backdrop of global challenges,” which include “[p]overty, inequality, health pandemics, climate change, terrorism and violent extremism, and illicit financial flows.”²² The two “partnership frameworks” were expected to “function complementarily to underscore the peace-development nexus in the implementation of the two Agendas in Africa.”²³ Specifically, these agreements are supposed to:

Facilitate dialogue among Member States, the African Union, United Nations and other stakeholders on ways and means of shifting from policy to effective and results-based implementation of the two joint AU-UN frameworks, while ensuring their coherence.

Identify concrete areas for practical support in optimizing the implementation of the AU-UN frameworks in Africa and promoting the peace-development nexus.

Identify key synergies between the two frameworks, which will lay the groundwork for forthcoming discussion on the “Revitalization of the Interdepartmental Task Force on African Affairs (IDTFAA)” as one of the key follow-up mechanisms for the implementation of the frameworks.²⁴

19. OSAA, *supra* note 17.

20. *UN-AU Leaders Sign Framework for Implementation of Agenda 2063 and 2030 Agenda for Sustainable Development*, UNECA (Jan. 27, 2018), <https://www.uneca.org/stories/un-au-leaders-sign-framework-implementation-agenda-2063-and-2030-agenda-sustainable>.

21. OSAA, *supra* note 17. *See also* UNECA, *supra* note 5, at 9.

22. OSAA, *supra* note 17.

23. *Id.*

24. *Id.*

Talking about the framework agreements between the AU and the UN, Sahle-Work Zewde²⁵ stated that an enhanced partnership between the two organizations was “not a choice but a necessity” in fully and effectively confronting the complex and multifarious challenges and threats to peace and security in Africa.²⁶ Zewde went on to state that “[t]he complex peace and security challenges we face in Africa are such that neither the United Nations nor the African Union can address the challenges on their own.”²⁷

Speaking about the framework agreements between the AU and the UN, Moussa Faki Mahamat, then the AU Commission Chairperson, thanked the UN Secretary-General, António Guterres, “for the support and assistance given by the UN to the AU and its Member States in the implementation of Agenda 2063, and also in facilitating investment in African youths.”²⁸ Both Guterres and Zewde “underscored the need to work together through regular consultations, frank dialogue, and principled positions, as well as recognizing the importance of African leadership and ownership as far as African issues are concerned.”²⁹ *Agenda 2030* was adopted by the UN General Assembly in September 2015, representing “a global framework for achieving sustainable development in its three dimensions—economic, social and environmental—in a balanced and integrated manner, with a vision of leaving no one behind.”³⁰

Both *Agenda 2063* and *Agenda 2030* emphasize a people-centered approach to development, as well as economic growth that is inclusive and sustainable. For example, *Agenda 2063* states that it:

builds on past achievements and challenges and takes into account the continental and global context and

25. Zewde was at the time the UN Special Representative to the African Union and Head of the UN Office at Addis Ababa where the AU Secretariat is located. See *UN-African Union Partnership ‘Not a Choice but a Necessity,’ Security Council Hears*, U.N. NEWS (July 18, 2018), <https://news.un.org/en/story/2018/07/1015082>. The UN Office in Addis Ababa is generally referred to as the UN Office at the African Union (UNOAU). *Id.*

26. *Id.*

27. *Id.*

28. *UN-AU Leaders Sign Framework for Enhancing Partnership in Peace and Security and Stress Strengthening Their Partnership*, AFRICAN UNION (April 19, 2017), <https://au.int/en/node/32383>.

29. *Id.*

30. UNECA, *supra* note 5, at 2–3.

trends in which Africa is realizing its transformation, including: [p]eople-centered development, gender equality and youth empowerment, which place the African people at the center of all continental efforts, to ensure participation in the transformation of the continent, and to build caring and inclusive societies.³¹

Agenda 2063 adds that “[n]o society can reach its full potential, unless it empowers women and youth and removes all obstacles to women’s full participation in all areas of human endeavors.”³² Finally, *Agenda 2063* argues that “Africa must provide an enabling environment for its women, children and young people to flourish and reach their full potential.”³³

The critical themes undergirding the partnership between the UN and the AU include “preventing and mediating conflict and sustaining peace,” “responding to conflict,” “addressing the root causes,” and “continuous partnership review and enhancement.”³⁴ Both the UN and the AU have acknowledged what they believe is a nexus between peace and security, human rights, and development; they are aware that there cannot be genuine development without peace and security and that the recognition and protection of human rights must be foundational to that effort. The UN and the AU are expected to “bring their collective experiences in these areas to promote sustainable development.”³⁵

A. Framing the Issues: The Need for Effective Institutions and a Participatory Approach

Although *Agenda 2063* is a transformative program that is expected to significantly improve prospects for human development in Africa, its success will be determined by how well

31. AFRICAN UNION, AGENDA 2063: THE AFRICA WE WANT, POPULAR VERSION, 12, ¶ 66e (2015), https://au.int/sites/default/files/documents/36204-doc-agenda2063_popular_version_en.pdf. [hereinafter AGENDA 2063]

32. *Id.*

33. *Id.*

34. United Nations & African Union, *Joint United Nations-African Union Framework for Enhanced Partnership in Peace and Security*, United Nations-African Union Annual Conference, New York (Apr. 19, 2017), 3–5, available at <https://dpa.un.org/en/african-union>.

35. African Union & United Nations, AU-UN Framework on Implementation of Agenda 2063 and Agenda 2030, at 22, ¶ 28 (Jan. 27, 2018), https://www.uneca.org/sites/default/files/PublicationFiles/au-un-implementation-framework-for-a2063-and-a2030_web_en.pdf.

Africans are able to improve their present governance architecture and engage all relevant stakeholders in the program's implementation. First, despite the fact that various external actors, including the UN, the UN Economic Commission for Africa (UNECA), Organization for Economic Cooperation and Development (OECD),³⁶ and the European Commission,³⁷ are standing by to cooperate with Africans and provide them with necessary assistance to realize the aspirations elaborated in *Agenda 2063*, it is critical that both continental leaders and their foreign benefactors understand that Africans must take ownership of the program, as well as responsibility for its successful implementation.³⁸

If a development program is to achieve its objectives, its implementation must be bottom-up, participatory, inclusive, and people-driven. Projects designed to implement *Agenda 2063* must be localized and involve all relevant stakeholders. As has been argued by many researchers, "effective economic, political, and social development in Africa requires that Africans take ownership of their problems and seek appropriate ways to deal with them."³⁹ Africans and their leaders "must recognize that

36. MO IBRAHIM FOUNDATION, AGENDAS 2063 & 2030: IS AFRICA ON TRACK?: AFRICAN GOVERNANCE REPORT (2019), https://mo.ibrahim.foundation/sites/default/files/2019-10/African_Governance_Report_2019.pdf.

37. Press Release, African Union & European Commission, Joint Communiqué: 10th African Union Commission – European Commission Meeting (Feb. 27, 2020), <https://au.int/en/pressreleases/20200227/joint-communique-10th-african-union-commission-european-commission-meeting>.

38. See, e.g., John Mukum Mbaku, *NEPAD and Prospects for Development in Africa*, 41 INT'L STUD. (NEW DELHI) 387, 400–01 (2004) (arguing, inter alia, that "while the World Bank and the IMF may be at fault for contributing to the failure of many of Africa's development initiatives, it is important to note that the lack of political will [on the part of African elites] and resources doomed the majority of these initiatives"). Note that "stakeholders" include, for example, all the various subcultures that inhabit each country, as well as historically marginalized groups, such as women, youth, the urban poor, rural inhabitants, and religious and ethnic minorities, as well as labor unions and other civil society organizations. See, e.g., MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES, *infra* note 43, at 211.

39. See, e.g., John Mukum Mbaku, *Providing a Foundation for Wealth Creation and Development in Africa: The Role of the Rule of Law*, 38 BROOK. J. INT'L L. 959, 980 (2013). See also Larry Diamond, *Promoting Real Reform in Africa*, in DEMOCRATIC REFORM IN AFRICA: THE QUALITY OF PROGRESS 263, 276 (E. Gyimah-Boadi ed., 2004) (arguing that "Africans must take ownership of their own future" and that "peace, democracy, and good governance are preconditions for reducing poverty").

eliminating poverty in the continent and significantly improving the living standards of the people must be based on and informed by full participation of all Africans in the policy design and implementation process.”⁴⁰

Second, success will also depend, to a large extent, on the quality of each country’s governance institutions—each African country must provide itself with a governing process that is undergirded by the rule of law. Such a governing process must, at a minimum, be characterized by separation of powers with effective checks and balances, including an independent judiciary, a robust and politically active civil society, and a free press. Throughout the continent, the absence of effective checks on the executive has allowed civil servants and political elites to act above the law and engage in harmful behaviors, such as corruption and rent seeking,⁴¹ as well as enabled widespread

40. Mbaku, *Providing a Foundation*, *supra* note 39, at 980.

41. Rent seeking involves expenditures made (e.g., by firms or interest groups) *to persuade the government to artificially create transfers*. Firms then expend additional resources to compete for the artificially created transfers—this too, is rent seeking. Rent seeking, thus, involves a process in which firms and organized interests utilize the political process to “earn” economic returns that are in excess of their opportunity costs. Since these expenditures do not create any social value, they represent a social cost or waste. See Mwangi S. Kimenyi & Robert D. Tollison, *Rent Seeking, Institutions and Economic Growth*, in INSTITUTIONS AND COLLECTIVE CHOICE IN DEVELOPING COUNTRIES 199 (Mwangi S. Kimenyi & John Mukum Mbaku eds., 1999). According to Tollison, “[t]he social cost arises because the resources used for transfer seeking have a positive opportunity cost somewhere in the economy with respect to engaging in positive-sum activities.” See Robert D. Tollison, *The Economic Theory of Rent Seeking*, 152 PUB. CHOICE 73, 74 (2012). In the African countries, corruption is an important rent-seeking behavior—private business interests pay bribes to civil servants and politicians so that the latter can create opportunities for these businesses to monopolize certain sectors of the economy. Such behaviors can lead to the stunting of entrepreneurship, significantly reducing economic activities and the creation of wealth. In addition, rent seeking can exacerbate income and wealth inequality and inflame conflict between subcultures. See, e.g., John Mukum Mbaku & Mwangi S. Kimenyi, *Rents and Development Failure in Africa*, in COMPANION TO THE POLITICAL ECONOMY OF RENT SEEKING 371 (Roger D. Congleton & Arye L. Hillman eds., 2015) (showing the contribution of rent seeking to development failure in Africa). State capture, which is defined as “the actions of individuals, groups, or firms both in the public and private sectors to influence the formation of laws, regulations, decrees, and other government policies to their own advantage as a result of the illicit and non-transparent provision of private benefits to public officials,” is an extreme form of rent seeking. See

human rights abuses that have endangered peace and security while stunting economic growth and development.⁴²

It has been argued that many of today's African countries remain burdened by dysfunctional legal and judicial systems that were inherited from the colonial state.⁴³ This is due to the fact that

the Africans who had captured the evacuated structures of colonial hegemony . . . failed to adequately reconstruct and reconstitute the critical domains—that is, the political, administrative, and judicial foundations of the state—in order to provide institutional arrangements that enhanced the management of ethnocultural conflict and the safeguarding of the rights of each new country's various subcultures.⁴⁴

Countries such as the Democratic Republic of Congo (DRC) and South Sudan, which are currently burdened by dysfunctional governance structures, “remain embroiled in violent mobilization by groups that believe that the central government is dominated and controlled by their enemies and that the only way to improve their lot in life is to forcefully capture the state.”⁴⁵

Without the full and effective participation of the citizens of the various countries in Africa, it will be virtually impossible for the aspirations of *Agenda 2063* to be realized.⁴⁶ Each African country must provide itself with a governing process that enhances the practice of *constitutional government* and *constitutionalism*. The latter should provide the necessary enabling environment for the achievement of the goals elaborated in *Agenda 2063*, including peaceful coexistence of subcultures and the creation of the wealth that is needed to alleviate poverty and significantly increase the people's quality of life.

Although *Agenda 2063* is a continental development initiative, its implementation will involve the participation of two

WORLD BANK, ANTICORRUPTION IN TRANSITION: A CONTRIBUTION TO THE PUBLIC POLICY DEBATE xv (2000) (emphasis in original).

42. See, e.g., Mbaku, *Providing a Foundation*, *supra* note 39, at 992–93 (arguing, *inter alia*, that the rule of law and adherence or fidelity to it, is the key to and foundation for development).

43. See JOHN MUKUM MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES: A CONSTITUTIONAL POLITICAL ECONOMY APPROACH 131 (2018).

44. See *id.*, at vii.

45. See *id.* at 2.

46. AGENDA 2063, *supra* note 31, at 2.

important multilateral organizations—the UN and the AU. Below, this article will provide a brief overview of the UN and the AU, as well as *Agenda 2063*.

B. The United Nations and the African Union

The UN is an international, intergovernmental organization that was founded in 1945 in San Francisco, California.⁴⁷ According to its founding document—the Charter of the United Nations—it is charged with (1) maintaining “international peace and security”; (2) developing friendly relations among nations based on “respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace”; (3) achieving “international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”; and (4) serving as “a center for harmonizing the actions of nations in the attainment of these common ends.”⁴⁸

The UN is currently made up of 193 member states.⁴⁹ In addition to “maintaining international peace and security, promoting human rights, fostering social and economic development, protecting the environment and providing humanitarian aid in case of famine, natural disasters and armed conflict,” the UN also “provides a forum for its members to express their views through the General Assembly, the Security Council, the Economic and Social Council, the high-level political forum on

47. See Thomas G. Weiss, *The United Nations: before, during and after 1945*, 91 INT'L AFF. 1221, 1224 (2015) (noting that “[t]he United Nations resulted from the gathering in San Francisco from April to June 1945 that began even before the end of the war in Europe”).

48. U.N. Charter art. 1, ¶ 4.

49. See U.N., *Growth in United Nations Membership, 1945-Present*, <https://www.un.org/en/sections/member-states/growth-united-nations-membership-1945-present/index.html> (last visited on January 12, 2020) (noting that the UN currently has a membership of 193 nations, with South Sudan, which joined in 2011, as the latest member). See also JOSEPH E. SCHWARTZBERG, *TRANSFORMING THE UNITED NATIONS SYSTEM: DESIGNS FOR A WORKABLE WORLD* 37 (2013) (noting, inter alia, that the UN currently consists of 193 nations).

sustainable development and other bodies and committees.”⁵⁰ Essentially, the UN serves as a forum and platform for member states’ governments to engage in negotiations to find “agreement and solve problems together.”⁵¹

In contrast to the UN, the AU is a continental organization that was founded on May 26, 2001 in Addis Ababa, Ethiopia and launched in South Africa on July 9, 2002.⁵² The AU was established to replace and continue the work of the OAU, which was founded in Addis Ababa on May 25, 1963 and disbanded on July 9, 2002.⁵³ While the primary objectives of the OAU were to encourage and enhance political and economic integration in Africa, as well as eradicate colonialism—including apartheid in South Africa—and neo-colonialism,⁵⁴ the goals of the AU also included efforts to fight impunity⁵⁵ and

50. United Nations-African Union Annual Conference, *supra* note 34, at 2, ¶ 2.

51. *Id.*

52. See ABOU JENG, *PEACEBUILDING IN THE AFRICAN UNION: LAW, PHILOSOPHY AND PRACTICE* 163 (2012) (noting that the Africa Union was officially launched in Durban, South Africa, in July 2002).

53. See RICHARD WEITZ, *WAR AND GOVERNANCE: INTERNATIONAL SECURITY IN A CHANGING WORLD ORDER* 87 (2011) (noting that the AU was established “on July 9, 2002, in Durban, South Africa, as a replacement to the OAU”).

54. Specifically, the purposes of the OAU were:

(a) To promote the unity and solidarity of the African States; (b) To coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa; (c) To defend their sovereignty, their territorial integrity and independence; (d) To eradicate all forms of colonialism from Africa; and (e) To promote international cooperation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights.

Charter of the Organization of African Unity art. 2(1), May 25, 1963, 479 U.N.T.S. 70 [hereinafter OAU Charter].

55. Impunity is defined as

the impossibility, de jure or de facto, of bringing the perpetrators of human rights violations to account—whether in criminal, civil, administrative or disciplinary proceedings—since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.

significantly improve the environment for the protection of human rights.⁵⁶ Unlike the OAU, the AU is empowered by its Constitutive Act to intervene in the internal affairs of member states “pursuant to a decision of the Assembly [of Heads of State and Government of the African Union] in respect of grave circumstances, namely war crimes, genocide and crimes against humanity.”⁵⁷

The OAU based its operations on seven principles, including “[n]on-interference in the internal affairs of [Member] States.”⁵⁸ Thus, during its existence, the OAU believed that it did not have the legal authority to intervene in the internal affairs of member states, even when, as was the case with the Nigerian Civil War and the Rwandan Genocide, intervention was needed to prevent the deaths of millions of people.⁵⁹ The AU, on the other hand, can intervene “in respect of grave circumstances.”⁶⁰ As a consequence, the continent went from a culture of “non-intervention”⁶¹ to one of “non-indifference.”⁶²

U.N. Comm’n on Human Rights, *The Administration of Justice and the Human Rights of Detainees: Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political): Revised Final Report Prepared by Mr. Joinet Pursuant to Sub-Commission Decision on 1996/119*, 15, 17, U.N. Doc. E/C.4/Sub.2/1997/20/Rev. 1, (Oct. 2, 1997).

56. Constitutive Act of the African Union, art. 3, May 26, 2001, 2158 U.N.T.S. 3 [hereinafter Constitutive Act].

57. *Id.* art. 4(h).

58. OAU Charter, *supra* note 54, art. 3(2).

59. John Mukum Mbaku, *International Law and the Struggle Against Government Impunity in Africa*, 42 HASTINGS INT’L & COMP. L. REV. 73, 88 (2019).

60. Constitutive Act, *supra* note 56, art. 4(h).

61. OAU Charter, *supra* note 54, art. 3(2).

62. INT’L REFUGEE RIGHTS INITIATIVE, FROM NON-INTERFERENCE TO NON-INDIFFERENCE: THE AFRICAN UNION AND THE RESPONSIBILITY TO PROTECT 4 (September 2017), <https://reliefweb.int/sites/reliefweb.int/files/resources/AU%20R2P%20-%20final.pdf>. According to the International Refugee Rights Initiative,

[w]hile the Organization of African Unity (OAU) had no legal power to get involved in internal conflicts on the continent and was largely inactive on this front, its successor, the African Union (AU) has been granted the right to intervene in a member state in respect of war crimes, genocide and crimes against humanity. Those provisions, contained in the AU Constitutive Act, have together been termed ‘non-

C. The African Union's Agenda 2063

The AU's *Agenda 2063* is “a strategic framework for the socio-economic transformation of the continent over the next 50 years.”⁶³ As stated by the AU, *Agenda 2063* “builds on, and seeks to accelerate the implementation of past and existing continental initiatives for growth and sustainable development.”⁶⁴ *Agenda 2063* is intended to harness “the continent's

indifference' and may be viewed as the African equivalent of R2P.

Id. Note that “R2P” means the Responsibility to Protect. R2P was produced by the International Commission on Intervention and State Sovereignty (ICISS), which was established by the Government of Canada, in cooperation with several foundations. See generally INT'L COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (Dec. 2001), www.idrc.ca/en/book/responsibility-protect-report-international-commission-intervention-and-state-sovereignty.

63. U.S. MISSION TO THE AFRICAN UNION, *About Agenda 2063: What is It?*, <https://www.usau.usmission.gov/our-relationship/official-reports/> (last visited on Jan. 12, 2020).

64. See AGENDA 2063, *supra* note 31, at 2. Some of the past and current development initiatives that the AU is expected to build on with *Agenda 2063* include The Lagos Plan of Action for the Economic Development of Africa, 1980–2000 (a plan that was devised under the auspices of the OAU to increase and enhance the continent's self-sufficiency); The Abuja Treaty Establishing the African Economic Community (adopted by OAU Heads of State and Government on June 3, 1991 at Abuja, Nigeria and entered into force on May 12, 1994, it was designed to establish and promote economic, social and cultural development among others between African States); The Minimum Integration Program (started under the auspices of the OAU and designed to “serve as a connecting link or common denominator for African continental integration players”—see AFRICAN UNION, *Minimum Integration Program*, <https://au.int/en/ea/ric/mip> (last visited on January 27, 2019); Program for Infrastructural Development in Africa (PIDA); PIDA is “a strategic continental initiative which has the buy-in of all African countries, for mobilizing resources to transform Africa through modern infrastructure”—see AFRICAN UNION, *What is PIDA?*, <http://www.au-pida.org/> (last visited on January 27, 2019). The African Development Bank is the Executing Agency for PIDA. See AFRICAN DEVELOPMENT BANK, *Program for Infrastructure Development in Africa (PIDA)*, <https://www.afdb.org/en/topics-and-sectors/initiatives-partnerships/programme-for-infrastructure-development-in-africa-pida/> (last visited on January 27, 2019); the Comprehensive Africa Agriculture Development Program (CAADP) (CAADP is the continent's “policy framework for agricultural transformation, wealth creation, food security and nutrition, economic growth and prosperity for all”—see U.N. OSAA, *Comprehensive Africa Agriculture Development Program (CAADP)*, <http://www.un.org/en/africa/osaa/peace/caadp.shtml> (last visited on January 27, 2019); The New Partner-

comparative advantages such as its people, history and cultures; its natural resources; its position and repositioning in the world to effect equitable and people-centered social, economic and technological transformation and the eradication of poverty.”⁶⁵

Agenda 2063 is, in many ways, a blueprint for the economic, political, and social transformation of Africa. It is expected to deliver, inter alia, inclusive and sustainable development, as well as the transformation of the continent into a major player in international and global affairs. A key to understanding *Agenda 2063* begins with taking a look at what are called “African aspirations for 2063[.]” These aspirations “reflect [the continent’s] desire for shared prosperity and well-being, for unity and integration, for a continent of free citizens and expanded horizons, where the full potential of women and youth, boys and girls are realized, and with freedom from fear, disease and want.”⁶⁶ *Agenda 2063* presents seven aspirations for Africans for 2063, all of which are interrelated.⁶⁷ For example, Aspiration One deals with “inclusive [economic] growth and sustainable development.”⁶⁸ Nevertheless, in order for the continent to achieve that aspiration, it must, at the very least, achieve the goals of the remaining aspirations, including: (1) a fully inte-

ship for Africa’s Development (NEPAD) (Nepad is the New Partnership for Africa’s Development—it was adopted at the 37th session of the Assembly of Heads of State and Government of the OAU in July 2001 in Lusaka, Zambia and was expected to provide both the vision and the policy framework for accelerating and enhancing economic cooperation and integration among all African countries—see AFRICAN UNION, *New Partnership for Africa’s Development (NEPAD)*, <https://au.int/en/organs/nepad> (last visited on January 27, 2019). At the 31st African Heads of State and Government in Nouakchott (Mauritania) from July 1, 2018 to July 7, 2018, the Assembly authorized the establishment of the African Union Development Agency (AUDA)—this was to be accomplished by transforming NEPAD into AUDA-NEPAD. See African Union, *Nepad is Transforming into the African Union Development Agency*, <https://www.nepad.org/nepad-transforming-african-union-development-agency> (last visited on January 27, 2019). See also U.S. Mission to the African Union, *Official Reports: About Agenda 2063: What is It?*, <https://www.usau.usmission.gov/our-relationship/official-reports/> (last visited on April 13, 2020) (noting some of Africa’s “past and current [development] initiatives”).

65. AGENDA 2063, *supra* note 31, at 12, ¶ 67.

66. *Id.* at 1, ¶ 6.

67. *Id.* at 1.

68. *Id.* at 2–4.

grated African economy;⁶⁹ (2) “good governance, democracy, respect for human rights, justice and the rule of law”;⁷⁰ (3) guaranteed peace and security throughout the continent,⁷¹ (4) respect for religious (and, indeed, other types of) diversity,⁷² (5) development that is “people-driven, relying on the potential of African people, especially its women and youth,⁷³ and (6) becoming “a strong, united, resilient, peaceful and influential global player and partner.”⁷⁴ In addition, by 2063, Africa is expected to emerge as “[a] major social, political and economic force in the world, with her rightful share of the global commons (land, oceans and space).”⁷⁵

The most important aspect of *Agenda 2063* involves fully confronting chronic and pervasive poverty and material deprivation on the continent. Doing so must begin with the creation of wealth, and this involves establishing within each African country, “viable and fully functioning entrepreneurial communities.”⁷⁶ An African country that significantly increases its ca-

69. Integration is Aspiration Two. Presently, most African economies are extremely small and not particularly viable. Hence, they are unable to provide themselves with industries that can benefit from technological economies of scale. Integration can allow these smaller economies to expand their domestic markets and provide themselves with the foundation for effective industrial development, as well as achieve the wherewithal to participate gainfully in the global economy. Perhaps more importantly, integration should provide for the development of critical regional institutions (e.g., research institutions, road and rail networks, ports, etc.) that can support the production of goods that are globally competitive in both price and quality. This would enhance the continent’s ability to promote wealth creation, inclusive economic growth, and sustainable development. See, e.g., JOHN MUKUM MBAKU, *INSTITUTIONS AND DEVELOPMENT IN AFRICA* 279 (2004) (arguing, inter alia, that free trade, even that which is made possible by integration at the continental level, can expand “the size of domestic markets, allowing businesses to more effectively exploit technological economies of scale—exposure to larger and more diverse markets implies that entrepreneurs would require formal institutions that provide them the necessary information, as well as serve them in the enforcement of contracts”). In addition, free trade exposes “traders to new forms of technology (i.e., knowledge) and improves the ability of enterprise owners to manage their concerns more efficiently.” *Id.* at 279.

70. This is Aspiration Three. See *AGENDA 2063*, *supra* note 31, at 5–6.

71. This is Aspiration Four. See *id.* at 6–7.

72. This is Aspiration Five. See *id.* at 7–8.

73. This is Aspiration Six. See *id.* at 8–9.

74. This is Aspiration Seven. See *id.* at 9–10.

75. See *AGENDA 2063*, *supra* note 31, at 10, ¶ 60.

76. Mbaku, *Providing a Foundation*, *supra* note 39, at 992.

capacity to create wealth can use the additional wealth to, within the appropriate institutional environment, invest in human development.⁷⁷ The additional resources generated can be used to “increase spending on nutrition, especially for infants and children; education, especially at the primary and secondary levels; clean water; women’s health, especially on prenatal care; and the social overhead capital that is needed to enhance [the] country’s ability to create more wealth.”⁷⁸

Agenda 2063 talks of eradicating poverty; producing more educated and highly skilled citizens; providing an enabling environment for the creation of knowledge and technology relevant to African societies; elimination of all forms of discrimination, inclusive economic growth and development; creating a United Africa, one that is sovereign, politically and economically independent, self-reliant, peaceful and secure, and undergirded by a strong cultural identity, a common heritage, as well as values and ethics; and finally, an Africa that can take its place as a full and equal participant, with other regions of the world, in global affairs.⁷⁹

The creation of such an Africa must begin with the continent first meeting the goals detailed in *Agenda 2063*’s Aspiration Three—good governance; democracy; respect for human rights; justice; and the rule of law.⁸⁰ Although Aspiration Three states that by 2063 Africa will be “a continent where democratic values, culture, practices, universal principles of human rights, gender equality, justice and the rule of law are entrenched, . . . with capable institutions and transformative leadership in place at all levels,”⁸¹ it is important to make clear that this transformative process must begin with each country revisiting constitutional reforms and constitutionalism. Such constitutional reforms must make certain that each country has a con-

77. That is, an institutional environment in which the state is adequately constrained by the law and, as a consequence, civil servants and political elites cannot engage in self-dealing and other activities (e.g., corruption) to enrich themselves at the expense of their fellow citizens. Within such an environment, no one, regardless of their political, social, ethnic, economic, and religious position, is above the law—that is, the law is supreme. *See, e.g., id.* at 993–94 (arguing, *inter alia*, that the supremacy of law is critical to the minimization of corruption and other growth-stunting behaviors).

78. *Id.* at 992.

79. *See* AGENDA 2063, *supra* note 31, at 1–10.

80. *See id.* at 5.

81. *See id.*

stitution that is capable of adequately providing it with the modalities for constitutional governance, while constitutionalism must enhance the ability of citizens to understand and appreciate the problems of unconstrained government. Though constitutionalism is often understood to imply the “legal enforcement of constitutional limits” on government or state power, it is important to recognize that it also “requires the creation of an effective and competent set of state institutions.”⁸²

In Part I, this article will examine the failure of African countries to fully and effectively transform the critical domains—that is, “the political, administrative, and judicial foundations of the state, in order to render them more suitable for governance in the post-independence society.”⁸³ This failure has created governance problems that continue to plague many countries to this day and which are likely to become a major challenge to the implementation of *Agenda 2063*.⁸⁴ This section will show that the transition from colonialism to post-independence state building was “reluctant, repressive, and opportunistic” and, hence, failed to provide Africans with effective governance architectures.⁸⁵

Part II is devoted to an examination of *constitutional government* and *constitutionalism* and why they are important to the realization of the aspirations of *Agenda 2063*. This section begins by defining a constitution and examining its relationship with *government* and *governance*. Then, it will distinguish between a constitution, constitutionalism, and the practice of constitutional government. This section will also discuss democracy and show that it is a prerequisite for constitutionalism. In addition to examining related concepts, such as the separation of powers, Part II will note the importance of the *consent* of the people (i.e., the governed) to effective governance. Finally, it will demonstrate the importance of an effective

82. N. W. BARBER, *THE PRINCIPLES OF CONSTITUTIONALISM* 1–19 (2018) (providing, inter alia, a broad and expansive definition for constitutionalism).

83. Mbaku, *International Law and the Struggle Against Government Impunity in Africa*, *supra* note 59, at 76.

84. Examples include the failure of countries, such as Burundi, Cameroon, the DRC, Central African Republic, Libya, to effectively manage ethnic and religious diversity and achieve peaceful coexistence. *See, e.g.*, MBAKU, *PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES*, *supra* note 43, at 2, 10, 177.

85. *See* Robert Fatton, Jr., *Liberal Democracy in Africa*, 105 *POL. SC. Q.* 455, 457 (1990).

and competent governing process to peace and security and, hence, to the achievement of the development goals elaborated in *Agenda 2063*.

Part III provides a detailed analysis of the legal and institutional reforms that each African country must undertake in order to provide itself with the necessary institutional environment for realizing the aspirations of *Agenda 2063*. At the very minimum, each African country must provide itself with institutional arrangements that enhance the deepening and institutionalization of the practice of constitutional government and constitutionalism. Major challenges to the practice of constitutional government and constitutionalism in Africa are examined. One such challenge, the resurgence of "majoritarian abuse or dominant party dictatorships," is examined. It is noted that the ability of dominant political parties to manipulate national constitutions, as well as the electoral systems of their countries, in order to monopolize political and economic markets, is a threat to peace and security and, hence, to any efforts to fully and effectively implement *Agenda 2063*. An overview of South Africa's "accountability institutions" provides insight into how other African countries can significantly enhance the functioning of their own political institutions.

In Part IV, this article will engage in a more detailed analysis of the types of institutional reforms that Africans must undertake in order to lay the foundation for the realization of each of the seven aspirations elaborated in *Agenda 2063*. Part V then concludes the analysis and suggests the way forward for the AU, African countries, and Africans as they seek ways to transform the continent economically, politically, and socially. This article pays special attention to process-driven constitution making, which is the key to producing a constitution that creates a governing process characterized by separation of powers, with effective checks and balances. In addition to providing each African country with a Bill of Rights as part of the constitution, constitutional designers should also provide independent accountability institutions (e.g., a Public Protector), which can serve as an important check on the exercise of government power. Finally, this article argues that the AU must adhere to its basic framework for the promotion of democracy in the continent as elaborated in its Constitutive Act and use that

framework to strengthen, deepen, and institutionalize democracy and constitutionalism in all member states.⁸⁶

I. CONSTITUTIONAL REFORMS AS A PREREQUISITE FOR MEETING *AGENDA 2063*'S ASPIRATIONS

In this section, this article will briefly examine Africa's experience with institutional reforms and show that the opportunistic and reluctant transition from colonialism to post-independence nation-building failed to provide each country with effective institutional arrangements. Consequently, robust institutional reforms must be the first step toward the implementation of *Agenda 2063*.

A. Historical Context

Most African countries inherited their political and economic institutions from their former colonizers—Belgium, Britain, France, Portugal, and Spain. Robert Fatton, Jr., an expert on African politics and its colonial history and Professor of Government and Foreign Affairs at the University of Virginia, notes that these inherited governance institutions “disintegrated rapidly and without much popular opposition[,]” and that at independence, Africans were “confronted . . . with a fundamental contradiction between the imperatives of democracy and the imperatives of building bourgeoisies. It was a contradiction that Africans failed to resolve.”⁸⁷ As a result, what emerged in the post-independence period, “were varied forms of personal rule that achieved varied degrees of successes with varied degrees of coercion.”⁸⁸ Fatton also notes that in those situations where:

there was success, . . . it was precarious, temporary, and crippled by its class and ethnic limitations; where there was failure, it was egregious, massive, and tragic. Where there remained civil liberties, they were fragile, vulnerable, and under constant threat of sudden death;

86. See Constitutive Act, *supra* note 56. See also African Union, *African Union Declaration on the Principles Governing Democratic Elections in Africa*, AHG/Decl. 1 (XXXVIII), 2002, available at <https://www.ohchr.org/EN/Issues/RuleOfLaw/CompilationDemocracy/Pages/AHG.aspx> (last visited on January 12, 2020).

87. Fatton, *supra* note 85, at 458–59.

88. See *id.*

where despotism prevailed, it was cruel, murderous, and incompetent.⁸⁹

As a consequence of this failure to adequately and effectively transform the economic and political institutions inherited from the colonial state, African countries remained pervaded by governance institutions incapable of adequately constraining civil servants and political elites.

The result was extremely high levels of bureaucratic corruption and government impunity.⁹⁰ Thus, as noted by several scholars:

Africa of the mid-to-late twentieth century was a continent afflicted with many ills—extremely inefficiently managed economies; high levels of political and bureaucratic corruption; capriciousness and arbitrariness in the delivery of public goods and services; rampant military intervention in politics; violent and destructive ethnic mobilization, some of which resulted in brutal civil wars; ecosystem degradation; and generally very poor economic performance.⁹¹

The failure of Africans to transform the institutions inherited from the colonial regimes and provide themselves with effective governance structures, particularly “those that would have significantly enhanced their ability to practice constitutional government and constitutionalism, is partly responsible for some of the governance and security issues that now plague the continent.”⁹²

In addition to the fact that such institutional environments have not been conducive to foreign investment, they have not attracted domestic investment and entrepreneurial activities

89. *See id.*

90. *See, e.g.,* Mbaku, *International Law and the Struggle Against Government Impunity in Africa*, *supra* note 59.

91. *See* Mbaku, *Providing a Foundation*, *supra* note 39, at 959. *See also* THE POLITICAL ECONOMY OF DEVELOPMENT AND UNDERDEVELOPMENT IN AFRICA (Toyin Falola & Jessica Achberger eds., 2013) (presenting a series of essays that examines Africa’s multifarious development problems); CHRISTOPHER E. S. WARBURTON, *THE EVOLUTION OF CRISES AND UNDERDEVELOPMENT IN AFRICA* (2005) (examining the persistent crises of poverty and underdevelopment in Africa).

92. *See* John Mukum Mbaku, *Entrenching Constitutionalism in African Countries: Lessons from America’s Founding Fathers*, 55 TEX. INT’L L. J. 89, 106 (2019).

either. In fact, the political and economic uncertainties created by such institutional dysfunction have not only stunted domestic entrepreneurship, but have also encouraged capital flight and brain drain as domestic savers have sought investment opportunities in “more stable economies abroad[,]”⁹³ and skilled and educated human resources have fled to Europe and North America.⁹⁴

In the late 1980s, there was a “resurgence of serious and concerted demands by the people, some of them violent, for transition to democratic governance.”⁹⁵ The end of the Cold War, which in Africa “was marked by the end of apartheid in South Africa and the collapse of many military dictatorships,” represented the beginning of civil society–led efforts to dismantle the continent’s dysfunctional governance systems and replace them with more democratic and rule of law–based ones.⁹⁶ Mbaku notes, however, that

[d]espite the institutional reforms that began in the African countries in the early-1990s and which involved the production and adoption of new constitutions, the process was piecemeal and not comprehensive, partici-

93. See Mbaku, *Providing a Foundation*, *supra* note 39, at 960. See also CAPITAL FLIGHT FROM AFRICA: CAUSES, EFFECTS, AND POLICY ISSUES (S. Ibi Ajayi & Léonce Ndikumana eds., 2015) (presenting a series of essays that examines the causes and impacts of capital flight from African economies).

94. See Olumide Henrie Benedict & Wilfred Isioma Ukpere, *Brain Drain and African Development: Any Possible Gain from the Drain?*, 6 AFR. J. BUS. MGMT. 2421, 2421 (2012) (noting that on a daily basis, “Africa loses her best academics, scientists, doctors, nurses, accountants, and other sought-after professionals, through brain drain, into other richer countries”). See also Soumana Sako, *Brain Drain and Africa’s Development: A Reflection*, 30 AFR. ISSUES 25, 25 (2002) (noting the continued loss of “highly skilled professionals” from the African economies to migration).

95. See 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 8 (2003).

96. This so-called “third wave” of transition to democratic governance in the continent began in the early-1990s. See, e.g., Mbaku, *Entrenching Constitutionalism*, *supra* note 92, at 119 (noting, *inter alia*, that since the third wave of democratization began in Africa in the early-1990s, some countries have “recognized their obligations under international law”). See also George Klay Kieh, Jr., *Unsteady Steps and Uncertain Politics: Political Democratization in Post-Civil War Liberia*, in POLITICAL LIBERALIZATION AND DEMOCRATIZATION IN AFRICA: LESSONS FROM COUNTRY EXPERIENCES 197 (Julius O. Ihonvbere & John Mukum Mbaku eds., 2003) (noting, *inter alia*, the impact of the ‘third wave of democratization’ on African regimes).

patory, and inclusive enough to produce compacts that reflected the values and interests of all of each country's relevant stakeholder groups, especially including minorities.⁹⁷

Although many of the post-1990s constitutions made allowances for the "separation of powers, with independent judiciaries," many of these countries still have relatively unconstrained executive branches and, as a result, government impunity remains a major challenge to governance in virtually all countries throughout the continent.⁹⁸

An institutional environment with national laws and institutions that are not able to adequately constrain civil servants and politicians and effectively prevent them from acting with impunity, is hardly conducive to the realization of the ideals elaborated in *Agenda 2063*. Within such dysfunctional governance systems, it is not likely that Africans will be able to successfully undertake the type of economic transformation that can lead to the creation of the wealth necessary to confront extreme poverty and improve the people's quality of life. Reforms that entrench "crucial institutions, principles, and mechanisms that promote constitutionalism, accountability, democracy, and good governance," are needed.⁹⁹ The next sub-section shall examine how many of today's African countries descended "into this political and governance quagmire" and now find themselves saddled with dysfunctional legal and judicial institutions.¹⁰⁰

B. Decolonization and African Governance Institutions

The general belief during the colonial period in Africa was that European policies, which were designed to maximize benefits to Europeans in the colonies and in the metropolitan economies,¹⁰¹ were responsible for the exploitation, infantilization,

97. See Mbaku, *Entrenching Constitutionalism*, *supra* note 92, at 128.

98. See *id.* See also Mbaku, *International Law and the Struggle Against Government Impunity in Africa*, *supra* note 59 (noting, *inter alia*, the pervasiveness of government impunity in African countries).

99. See Charles Manga Fombad, *Constitutional Reforms and Constitutionalism in Africa: Reflections on Some Current Challenges and Future Prospects*, 59 BUFF. L. REV. 1007, 1011 (2011).

100. Mbaku, *Entrenching Constitutionalism*, *supra* note 92, at 103.

101. As used here, the "metropolitan economy" was the economy of the European country colonizing the Africa territory, while the "colonial economy"

and impoverishment of Africans.¹⁰² Many Africans, including those who were actively involved in the anti-colonial and decolonization movement, saw “colonialism as an exploitative, repressive, and cruel system, established primarily to enhance the ability of Europeans to extract resources from Africa for the benefit of the metropolitan economies.”¹⁰³ As argued by Michael Crowder, an expert on European colonialism in Africa:

the colonial state was conceived in violence rather than by negotiation. This violence was often quite out of proportion to the task in hand, with burnings of villages, destruction of crops, killing of women and children, and the execution of leaders. . . . The colonial state was not only conceived in violence, but it was maintained by the free use of it. Any form of resistance was visited by punitive expeditions that were often quite unrestrained by any of the norms of warfare in Europe.¹⁰⁴

Fatton, also an expert on colonial history in Africa, argues that “[t]he transition from colonial despotism to liberal democracy was expedited in a few years without any fundamental transformation in the economic, cultural, or bureaucratic domains.”¹⁰⁵ The decolonization process throughout virtually all

was the economy of the colony. RICHARD L. ROBERTS, *TWO WORLDS OF COTTON: COLONIALISM AND THE REGIONAL ECONOMY IN THE FRENCH SOUDAN, 1800–1946* 21 (1996). Nevertheless, it is important to note that some experts of colonial political economy have argued that “[t]he idea of a colonial economy was merely the projection on the colonial scene of a metropolitan category.” *Id.* Consider, for example, France’s *politique d’assimilation*, which was later changed to a *politique d’association*. See generally RAYMOND F. BETTS, *ASSIMILATION AND ASSOCIATION IN FRENCH COLONIAL THEORY, 1890–1914* (U. Neb. Press, 2005) (providing, inter alia, a thorough examination of the French colonial policies of assimilation and association). The former was designed by the colonial office in the 19th and 20th centuries to impose French language and culture on colonial inhabitants and create an empire administered from Paris, while the latter represents an acknowledgment of the failure of the former. *Id.* The latter (i.e., the *politique d’association*) was similar to Britain’s policy of indirect rule and was designed to allow France to rule the colonies through a carefully selected and indoctrinated class of indigenous elites. *Id.*

102. Mbaku & Ihonvbere, *supra* note 95, at 1 (examining, inter alia, the impetus to the decolonization movement in the African colonies).

103. *Id.*

104. Michael Crowder, *Whose Dream was It Anyway? Twenty-Five Years of African Independence*, 86 AFR. AFFAIRS 7, 11–12 (1987).

105. Fatton, *supra* note 85, at 457.

African colonies was undertaken reluctantly and opportunistically, and, as a consequence, it failed to effectively transform the critical domains—that is, the political, administrative, and judicial foundations of the state—and provide each country with effective institutional arrangements.¹⁰⁶ According to Fatton, “[i]t was only in the last decade of colonialism, when independence became a certainty, that the imperialist powers gradually began to institute democratic reforms in what had hitherto been structures of exploitation, despotism, and degradation.”¹⁰⁷ Additionally, Fatton states that:

The transition was in fact reluctant, repressive, and opportunistic. In addition, African leaders never fully accepted the precepts of the European political model, few were enthusiastic about it, and most tolerated it as a means to a different end. The African commitment to liberal democracy was shaky, hesitant, and ultimately short-lived.¹⁰⁸

The opportunism on the part of the colonialists and some indigenous African elites was evident in the fact that throughout the continent, many Africans were not provided with the wherewithal to participate fully and effectively in constitutional design.

In French colonies, for example, robust constitutional discourse was abandoned in exchange for the adoption of then-French president Charles de Gaulle’s constitution—the French Constitution of October 4, 1958 (“Constitution of the French Fifth Republic” or “de Gaulle’s constitution”).¹⁰⁹ Numerous scholars of the decolonization process have criticized the decision by many African political elites to forego genuine and robust constitution-making in favor of simply adopting European models.¹¹⁰ For example, Victor T. LeVine, an expert on the de-

106. *Id.*

107. *Id.*

108. *Id.*

109. *See, e.g.,* VICTOR T. LEVINE, *THE CAMEROONS: FROM MANDATE TO INDEPENDENCE* 224–27 (1964).

110. *Id.* *See also* ELIZABETH SCHMIDT, *COLD WAR AND DECOLONIZATION IN GUINEA, 1946–1958*, 158 (2007) (noting that all former French colonies in sub-Saharan Africa, except Guinea, voted to adopt Charles de Gaulle’s 1958 constitution and effectively deprived their citizens of the opportunity to create their own institutions). *See also* Charles Manga Fombad & Enyinna Nwauche, *Africa’s Imperial Presidents: Immunity, Impunity and Accountability*

colonization process in Africa, has commented on the decision by the UN Trust Territory of Cameroons under French administration (“French Cameroons”) to adopt de Gaulle’s constitution instead of engaging the people in the process of creating their own constitution—one that would have reflected the values of the country’s relevant stakeholders.¹¹¹ French Cameroons’ various subcultures were effectively deprived of the opportunity to engage in robust national dialogue and produce their own constitution and governance institutions.¹¹² LeVine argues that although the Constitution of the French Fifth Republic was drafted “in the context of the constitutional crisis that brought De Gaulle to power,” the “circumstances surrounding the writing of the Cameroun constitution were not in any way analogous to those existing in France in 1958.”¹¹³ Indeed, LeVine notes that the decision by Cameroonian leaders to adopt the French constitutional model and forego a more inclusive, participatory and locally-focused constitution making process may have been due to political considerations—he states that “there is some question whether the constitution of the [République du Cameroun] was more a child of political exigency than of mature reflection.”¹¹⁴ With respect to former French colonies in Africa generally, LeVine notes that their constitutions:

created (i) national legislatures based on universal suffrage, (ii) legal and judicial systems resembling those of

ity, 5 AFR. J. LEG. STUD. 91, 93 (2012) (noting that the constitutions adopted by many Francophone African states at independence allow “overbearing and ‘imperial’ presidents [to] continue to reign and dominate the legislature as well as control the judiciary”).

111. LEVINE, *supra* note 109.

112. See MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES, *supra* note 43, at 32. Note that “Cameroun” is often used to refer to the UN Trust Territory of Cameroons under French administration. Some writers also refer to that colonial territory as “French Cameroons.” Although the French treated the Cameroons as a colony, it was actually a trust territory under the UN Trusteeship Council. Under the trust territory guidelines, France was supposed to hold the Cameroons lands in trust and prepare them and the people for independence and majority rule. See ANTHONY AUST, HANDBOOK OF INTERNATIONAL LAW 32 (2010) (examining, inter alia, UN Trust Territory system).

113. LEVINE, *supra* note 109, at 227.

114. The *République du Cameroun* was the name taken by the former UN Trust Territory of Cameroons under French administration when it gained independence on January 1, 1960. LEVINE, *supra* note 109, at 226.

France, and (iii) *governments nominally ratified by parliament, but in fact wholly responsible to an executive president*. The resemblance to the French system was certainly more than nominal since the text of several of their constitutions, especially in sections dealing with the presidency, followed the French document almost word for word.¹¹⁵

Despite the similarities between the constitution of France and its governmental system, on the one hand, and those of the emerging Francophone countries in sub-Saharan Africa, on the other, the new African countries did not have a national democratic tradition. Although some subcultures within these countries “did have relatively democratic systems of government before they were forcefully incorporated into the colonial project, what emerged after independence as sovereign states did not have any historical experience with democratic government.”¹¹⁶ Unlike the France of 1958, Francophone countries did not have civil society organizations (e.g., a free press) that could have helped the people check the exercise of government power. Hence, while these African countries used the Constitution of the French Fifth Republic as a foundation for their own laws and institutions, they “did not possess the other ingredients needed to create and sustain democratic political orders, as has been done in France since 1958.”¹¹⁷

Throughout the continent, many new African countries adopted constitutions that created imperial presidencies that came to dominate the other branches of government and continue to do so to this day. In fact, in countries such as Cameroon, the National Assembly (*l'Assemblée nationale*) serves at the pleasure of the president of the Republic, and the judiciary—which is supposed to be independent—is actually a department within the Ministry of Justice and, as a result, totally under the control of the president.¹¹⁸ In addition, the Constitu-

115. Victor T. LeVine, *The Fall and Rise of Constitutionalism in West Africa*, 35 J. MOD. AFR. AFF. 181, 184 (1997) (emphasis added).

116. MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES, *supra* note 43, at 131.

117. *Id.*

118. *See id.* at 137 (noting, inter alia, that in Cameroon, “the Supreme Court, the country’s highest court, is located within the Ministry of Justice, a cabinet department within the Presidency of the Republic”).

tion of the Republic of Cameroon grants the president the power to guarantee the independence of the judiciary.¹¹⁹

When the founders drafted the United States (US) Constitution, they argued that a government had to “stand on the original and *ongoing* consent of the governed.”¹²⁰ The US founders further developed John Locke’s idea of “ongoing consent” and extended it to include “the right of the people to dissolve the government and replace it with an entirely new one,”¹²¹ even if through revolution. Such a “republican” form of government was defined by James Madison in *Federalist Number 39* as:

a government which derives all its powers directly or indirectly from the great body of the people; and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior. It is *essential* to such a government, that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it.¹²²

A very important outcome or consequence of a government that only derives its power and legitimacy to govern from the “great body of the society” is that those who govern are “kept dependent upon the people themselves and not on some specially favored class.”¹²³ Through the process of inclusive, participatory, and people-driven (i.e., democratic) constitution-making, the people reserve to themselves “the right to judge and discipline, if necessary, their governors.”¹²⁴ Through, for example, regular, fair, free, transparent, and credible elections, the people can check the exercise of government power and discipline recalcitrant and non-performing elites. Indeed, the peo-

119. CONST. OF THE REPUBLIC OF CAMEROON (1996 as amended through 2008), § 37(3).

120. Judith A. Best, *Fundamental Rights and the Structure of Government*, in THE FRAMERS AND FUNDAMENTAL RIGHTS 37, 39 (Robert A. Licht ed., 1992) (emphasis in original).

121. *Id.* John Locke was an English philosopher and physician. See, e.g., JOHN MARSHALL, JOHN LOCKE, TOLERATION AND EARLY ENLIGHTENMENT CULTURE (Cambridge U. Press, 2006) (providing an overview of Locke’s contributions to the development of democracy).

122. FEDERALIST. NO. 39 at 232, 233 (James Madison) (James Madison & John Jay eds., G.P. Putnam’s Sons, 1888) (emphasis in original).

123. Best, *supra* note 120, at 39.

124. MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES, *supra* note 43, at 132.

ple can remove such individuals from office by not voting for them.

In contrast, most of Africa's post-independence governments were neither dependent on the people, nor did they derive their power and legitimacy to govern from the people. First, constitution-making was not participatory or inclusive, and, as a result, many citizens did not participate in it.¹²⁵ Hence, what emerged

125. While it is usually not advisable to generalize, except for post-apartheid South Africa, it is difficult to find any African country that, at independence, engaged in participatory and inclusive constitution-making. For example, all former French colonies in sub-Saharan Africa, except Guinea, accepted the French Constitution of October 4, 1958 as a blueprint for their own constitutional design exercises, and, hence, these countries did not make any serious efforts to engage all relevant stakeholders in constitutional discourse. See, e.g., LEVINE, *supra* note 109, at 225 (noting, inter alia, that the constitution of the newly-independent *République du Cameroun* "bore a remarkable similarity to that of the French Fifth Republic," especially with those "sections dealing with the presidency"). Although the people of Guinea overwhelmingly rejected de Gaulle's constitution in the September 1958 referendum, constitution-making was not participatory nor inclusive; it was dominated and controlled by Sékou Touré's ruling *Parti démocratique de Guinée* (PDG: Democratic Party of Guinea). See THOMAS O'TOOLE & JANICE E. BAKER, *HISTORICAL DICTIONARY OF GUINEA* 155 (2005) (noting that the *Parti démocratique de Guinée* "became the sole legal party in Guinea after independence in 1958"). O'Toole and Baker note that Guinea's Constitution of 1958, the constitution that brought the country to independence, was "altered, bent, and totally ignored as suited the objectives of Touré" and the PDG. See *id.* at 53. See also ELIZABETH SCHMIDT, *COLD WAR AND DECOLONIZATION IN GUINEA, 1946-1958*, 157 (2007) (noting the rejection of the Constitution of the Fifth French Republic by the people of Guinea in 1958). Although some former UK colonies "did attempt to engage in participatory and inclusive constitution making," the "process was plagued by several problems." See MBAKU, *PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES*, *supra* note 43, at 63. First, the process was dominated by "urban-based [African] elites, most of whom had been educated in the United Kingdom and were quite attracted to the British model of governance"—that is, the Westminster model with its great potential for majoritarian dictatorship. *Id.* Second, many of these urban elites were also representatives of dominant ethnocultural groups and worked essentially to maximize the interests of the groups that they represented and not those of the entire country. See *id.* Third, most of the constitutional deliberations were undertaken in the UK "and away from the people whose socio-political interaction was to be regulated by the rules chosen," and, as a result, the outcome of these negotiations—the constitution—was a bargain between these African elites and the British government. See *id.* Of course, there have since been some improvements in constitution-making in many African countries. Post-apartheid South Africa managed to produce a very progressive constitution through an

were constitutions that did not reflect the interests and values of each country's relevant stakeholders.¹²⁶

Second, in the immediate post-independence period, the military intervened in politics, took control of the government, and proceeded to discard even these poorly constructed constitutions.¹²⁷ As argued by LeVine, many of Africa's post-independence constitutions "were soon abrogated by the new governments, which generally preferred to rule without the constraints that they embodied."¹²⁸ Within each of the new African countries, LeVine argues further, a constitution effectively "became simply another instrument of rule if not discarded altogether," and "[m]any a replacement [constitution] was simply octroyé, 'handed down from on high,' or cobbled together by a compliant constitution-making conference or convention, and then adopted by a 'controlled' plebiscite."¹²⁹ In some countries, the "[n]ew constitutions . . . were written, re-written, re-

inclusive and participatory process during the 1993–1996 transitional period. See generally Emily Sauter, *The Constitution of South Africa: The Making of a Modern Identity*, 21 J. INT'L COMM. 189 (2015) (examining, inter alia, the making of the post-apartheid Constitution of the Republic of South Africa); ANDREA LOLLINI, CONSTITUTIONALISM AND TRANSITIONAL JUSTICE IN SOUTH AFRICA (Alexandra T. Marot Pollard trans., 2011) (examining, inter alia, the making of South Africa's post-apartheid constitution). Similar robust efforts have produced relatively progressive constitutions in Kenya and Ghana. See generally GHANA'S TRANSITION TO CONSTITUTIONAL RULE (Kwame A. Ninsin & Francis K. Drah eds., 1991) (examining, inter alia, Ghana's constitutional experiences); CHARLES O. OYAYA & NANA K. POKU, THE MAKING OF THE CONSTITUTION OF KENYA: A CENTURY OF STRUGGLE AND THE FUTURE OF CONSTITUTIONALISM (2018) (examining Kenya's experiences with constitution-making). However, most African countries continue to be governed by constitutions that were developed through elite-driven, top-down, and non-participatory processes. See MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES, *supra* note 43, at 124 (noting that constitution making in many African countries has been top-down, elite-driven, and non-participatory). For example, the Constitution of Nigeria, the continent's largest country in terms of population and economy, was not designed through a participatory and inclusive process. See Julius O. Ihonvbere, *How to Make an Undemocratic Constitution: The Nigerian Example*, 21 THIRD WORLD Q. 343, 350–51 (2000). Instead, it was imposed on the people by the military government that ruled the country until 1999. *Id.* (noting the undemocratic process through which the constitution that the outgoing military government handed to Nigerians in 1999 was designed).

126. Ihonvbere, *supra* note 125, at 343.

127. LeVine, *supra* note 115, at 188–89.

128. *Id.*

129. *Id.*

configured, suspended, abrogated, and sometimes simply discarded, following the political tides in each country.”¹³⁰ The constitutions of the Francophone countries in sub-Saharan Africa had one thing in common—“they all led to the establishment of strongly authoritarian regimes, most with constitutions to suit.”¹³¹

As destructive to the democratic process as these constitutional manipulations were, the military coup d'état represented the most politically and economically damaging form of opportunism in the post-independence period in Africa. As argued by LeVine, military coups “epitomized the low estate to which constitutionalism had fallen during 1963–89”¹³² in Africa. LeVine further maintains that:

[n]ot only did they [i.e., military elites] 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.¹³³

In virtually every situation where soldiers had taken control of the government through a military coup, post-coup leaders argued that they had acted to save their fellow citizens from corrupt, opportunistic leaders and to create a legitimate and people-centered government.¹³⁴ For example, on January 15, 1966, Major Chukwuma Kaduna Nzeogwu, who led the military against the government of Nigeria's First Republic, addressed the nation and told Nigerians why the military had intervened.¹³⁵ He claimed that the military had intervened to get rid of the country's enemies, namely:

130. *Id.* at 189.

131. *Id.*

132. *Id.* at 190.

133. *Id.*

134. See, e.g., MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES, *supra* note 43, at 34.

135. See *Radio Broadcast by Major Chukwuma Kaduna Nzeogwu - Announcing Nigeria's First Military Coup on Radio Nigeria, Kaduna on January 15, 1966*, VANGUARD (Sept. 30, 2010), <https://www.vanguardngr.com/2010/09/radio-broadcast-by-major-chukwuma-kaduna-nzeogwu-%E2%80%93>

the men in high and low places that seek bribes and demand 10 percent; those that seek to keep the country divided permanently so that they can remain in office as ministers or VIPs at least, the tribalists, the nepotists, those that make the country look big for nothing before international circles, those that have corrupted our society and put the Nigerian political calendar back by their words and deeds.¹³⁶

Major Nzeogwu went on to say that “[l]ike good soldiers,” they were not going to promise the nation “anything miraculous or spectacular.”¹³⁷ The soldiers, Major Nzeogwu argued, were promising “every law abiding citizen [of Nigeria] . . . freedom from fear and all forms of oppression, freedom from general inefficiency and freedom to live and strive in every field of human endeavor, both nationally and internationally.”¹³⁸ Despite these promises, the military went on to unleash on Nigerians a reign of terror characterized by exceptional cruelty, corruption and self-dealing, financial malfeasance, bureaucratic inefficiency, and outright murder.¹³⁹

The military took control of the government of Nigeria in 1966 and ruled the country until 1979, at which time a civilian government was chosen to lead the country.¹⁴⁰ Nevertheless, in

announcing-nigeria%E2%80%99s-first-military-coup-on-radio-nigeria-kaduna-on-january-15-1966/.

136. *Id.*

137. *Id.*

138. *Id.*

139. No case better illustrates the maladministration, the gross abuse of human rights, and the fragrant disregard of basic norms of a decent and civilized society than the execution of environmental and human rights activist and leader of the Movement for the Survival of the Ogoni Peoples (MOSOP), Ken Saro Wiwa, along with eight other Ogoni human rights activists by the military government of Sani Abacha in Nigeria. See John Mukum Mbaku, *Threats to the Rule of Law in Africa*, 48 GA. J. INT’L & COMP. L. 293, 301 (2020). General Sani Abacha overthrew the transitional government of Chief Ernest Shonekan on November 17, 1993 and ruled Nigeria until his death, in office, in June 1998. See generally OLAYIWOLA ABEGUNRIN, NIGERIAN FOREIGN POLICY UNDER MILITARY RULE, 1966–1999 45 (2003) (examining, inter alia, international reactions to the hanging, by the Nigerian military government, of human rights activist, Ken Saro-Wiwa, and his Ogoni compatriots). The military ruled Nigeria during the periods 1966–1979 and 1983–1999. See Mbaku, *Threats to the Rule of Law in Africa*, at 354, n. 385.

140. In 1979, Alhaji Shehu Shagari won the presidential election that took place on August 11, 1979 and was installed as President of Nigeria’s Second Republic, bringing an end to the Federal Military Government, which had

1983, the military returned and remained in power until 1999.¹⁴¹ Nigeria, however, was not the only African country whose transition to democratic governance was severely damaged by military intervention. There were military coups in Algeria; Dahomey/Bénin; Upper Volta/Burkina Faso; Burundi; Congo, Democratic Republic of; Congo, Republic of; Central African Republic; Côte d'Ivoire; Egypt; Equatorial Guinea; Ethiopia; Gabon; Gambia, The; Ghana; Guinea; Guinea-Bissau; Lesotho; Libya; Madagascar; Mali; Mauritania; Niger; Rwanda; Seychelles; Sierra Leone; Somalia; Sudan, Republic of; Togo; Tunisia; Uganda; Zanzibar and Zimbabwe.¹⁴²

Since the early 1990s, there have been significant transformations in the economic and political systems of many African countries. Unfortunately, most of these institutional reforms have been “piecemeal,” and, as a consequence, while there have been “significant gains in some areas (e.g., improvements in the entrepreneurial environment),”¹⁴³ the state, in virtually all of these countries, remains relatively unconstrained. This is

ruled the country since 1966. See HENRY BIENEN, *POLITICAL CONFLICT AND ECONOMIC CHANGE IN NIGERIA* 1 (2013) (noting that Alhaji Shehu Shagari had won the 1979 presidential elections in Nigeria). He won re-election to another four-year term on August 6, 1983. See TOYIN FALOLA & MATTHEW M. HEATON, *A HISTORY OF NIGERIA* 207 (2008) (noting that Alhaji Shehu Shagari had won re-election in August 1983). However, on December 31, 1983, Shagari's second term in office was brought to an abrupt end by military coup. See *id.* at 209. He was succeeded by a Supreme Military Council led by Major-General Muhammadu Buhari. See Shehu Othman, *Classes, Crises and Coup: The Demise of Shagari's Regime*, 83 AFR. AFF. 441 (1984) (examining, inter alia, the coup that overthrew the government of Alhaji Shagari); see also generally Seun Opejobi, *1983 Coup: What Shehu Shagari Did to Buhari for Overthrowing his Govt—Family Reveals*, DAILY POST (NIGERIA) (Dec. 30, 2018), <https://dailypost.ng/2018/12/30/1983-coup-shehu-shagari-buhari-overthrowing-govt-family-reveals/> (noting, inter alia, the overthrow of the Shagari regime by then Major-General Muhammadu Buhari, who returned to government as a civilian president following the presidential election of March 28–29, 2015. He won re-election in 2019). See Ruth Maclean & Eromo Egbejule, *Muhammadu Buhari Wins Nigerian Election with 56% of the Vote*, GUARDIAN (Feb. 27, 2019), <https://www.theguardian.com/world/2019/feb/26/muhammadu-buhari-to-claim-victory-in-nigerias-presidential-election>.

141. See, e.g., MAX SIOLLUN, *SOLDIERS OF FORTUNE: A HISTORY OF NIGERIA (1983–1993)* (2013) (examining, inter alia, the impact of the military on governance in Nigeria).

142. See LeVine, *supra* note 115, at 190.

143. See MBAKU, *PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES*, *supra* note 43, at 38.

evidenced by the fact that government impunity remains a major concern for virtually all African countries.¹⁴⁴ Additionally, existing laws and institutions in many African countries have provided civil servants and political elites with the tools to engage in corruption to enrich themselves at the expense of their fellow citizens.¹⁴⁵ Religious and ethnic minorities, as well as other vulnerable groups (e.g., women, youth, rural poor) in these countries have been pushed to the political and economic margins, where they remain impoverished and without an effective voice.¹⁴⁶ These marginalized groups are denied full and effective participation in the design and implementation of public policies, including even those that directly affect them. During the last several years, some of these groups or subcultures have resorted to violent mobilization in order to improve their participation in the political system and minimize further marginalization.¹⁴⁷

144. See, e.g., JOHN MUKUM MBAKU, *CORRUPTION IN AFRICA: CAUSES, CONSEQUENCES, AND CLEANUPS* 37–85 (2010) (examining, inter alia, the pervasiveness of corruption in Africa). See also Mbaku, *International Law and the Struggle Against Government Impunity in Africa*, *supra* note 59 (examining, inter alia, the fight against government impunity in Africa).

145. See John Mukum Mbaku, *International Law and the Fight Against Bureaucratic Corruption in Africa*, 33 ARIZ. J. INT'L & COMP. L. 661, 713 (2016) (noting that because “existing laws and institutions do not adequately constrain civil servants and political elites, . . . , the latter can easily engage in corruption and other forms of opportunism”).

146. See Mbaku, *Entrenching Constitutionalism*, *supra* note 92, at 98 (noting that “existing institutional arrangements” in many African countries have forced many “minority subcultures to remain permanently on the political and economic margins”).

147. For example, since 1972, the Anglophone minority in Cameroon has been involved in a struggle against what they argue is economic and political marginalization by the Francophone-dominated central government. See John Mukum Mbaku, *International Law and the Anglophone Problem in Cameroon: Federalism, Secession or the Status Quo?* 42 SUFFOLK TRANSNAT'L L. REV. 1 (2019). In recent years, the struggle has turned bloody, due primarily to the fact that the central government has refused to engage in dialogue with the protesting Anglophones to find an acceptable solution to the problem. *Id.* at 3–4. Instead, the central government has used force to suppress any efforts by the Anglophones to resist their continued marginalization by the government. See, e.g., Peter Zongo, “*This is a Genocide*”: *Villages Burn as War Rages in Blood-soaked Cameroon*, GUARDIAN (May 30, 2018) <https://www.theguardian.com/global-development/2018/may/30/cameroon-killings-escalate-anglophone-crisis>.

Thus, the institutional environment that currently exists in most African countries today is not one that could be used to promote the type of economic transformation (e.g., inclusive economic growth and development) that is envisioned by *Agenda 2063*. In preparation for the full implementation of *Agenda 2063*, the AU must make certain that each member state engages in democratic (i.e., people-driven, bottom-up, inclusive, and participatory) constitution-making to provide itself with a governing process undergirded by the rule of law. As argued by constitutional scholar, Professor Charles Manga Fombad, each African country must ensure that its constitution entrenches "crucial institutions, principles, and mechanisms that promote constitutionalism, accountability, democracy, and good governance."¹⁴⁸

Although African countries have gone through significant transformations during the last several decades, which have resulted in the elimination of the racially-based apartheid system in South Africa and several dictatorships, as well as significantly minimized corruption and improved bureaucratic efficiency in many countries, there is still more work to be done. The danger of returning to authoritarianism still looms large in many countries on the continent.¹⁴⁹ Hence, both the continent and each individual African country must maintain the momentum of constitutionalism and constitutional government that has been developed in recent decades. Perhaps more importantly, each country must introduce and sustain "the fundamental principles and institutions that will make the values of constitutionalism a practical and daily reality."¹⁵⁰

II. WHY CONSTITUTIONAL GOVERNMENT AND CONSTITUTIONALISM ARE CRITICAL TO AGENDA 2063

As indicated by the African Union, *Agenda 2063* "is a shared framework for inclusive growth and sustainable development for Africa to be realized in the next fifty years."¹⁵¹ Unfortunately, many African countries currently have governing processes that are not characterized by fidelity to the rule of law. In such

148. Fombad, *Constitutional Reforms and Constitutionalism in Africa*, *supra* note 99, at 1011.

149. *Id.*

150. *Id.*

151. See AGENDA 2063, *supra* note 31, at 2.

countries, corruption and government impunity are pervasive, making it very difficult for them to contribute positively to the realization of the aspirations contained in *Agenda 2063*.¹⁵² In order for any African country to participate effectively in realizing or achieving the aspirations of *Agenda 2063*, it must provide itself with institutional arrangements that significantly enhance the practice of constitutional government and constitutionalism. The practice of constitutional government should, for example, minimize government impunity, promote the peaceful coexistence of subcultures, and provide for an environment that is conducive to wealth creation and the alleviation of poverty.

This section begins with an introduction to the constitution and its role in governance. It then examines the concept of constitutionalism and whether the modifications made to many African constitutions since the early-1990s are enough to enhance the ability of these countries to contribute positively to the realization of the aspirations of *Agenda 2063*. In addition, the section also examines certain constitutional guarantees (e.g., constitutional entrenchment of fundamental rights) and how they impact *Agenda 2063*. Finally, the article makes suggestions on how Africans can improve their governing processes in order to more effectively contribute to the realization of the aspirations of *Agenda 2063*.

A. Introduction to the Constitution and Its Role in Governance

Economist Dennis C. Mueller has defined a constitution as “a form of social contract among citizens defining the rules within which society functions.”¹⁵³ In many African countries, “kinship networks, extended families, and ethnic and nationality groups perform the job of regulating socio-political interaction, as well as coordinating the activities of individuals.”¹⁵⁴ For many years, these traditional governance processes have been rela-

152. See, e.g., Mbaku, *International Law and the Struggle Against Government Impunity in Africa*, *supra* note 59 (examining the pervasiveness of government impunity in African countries). See also MBAKU, CORRUPTION IN AFRICA *supra* note 144 (noting the pervasiveness of corruption throughout many countries in Africa).

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

154. See MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES, *supra* note 43, at 60–61.

tively effective in regulating intra- and inter-ethnic relations.¹⁵⁵ Mueller has argued that in many traditional societies, "custom and tradition dictate the appropriate penalties to be meted out for deviant behavior."¹⁵⁶

Nevertheless, as societies and economies become more complex, argues Mueller, "new situations arise and the proper behavior and appropriate penalties should this behavior not be forthcoming are not always known."¹⁵⁷ Within these more complex and dynamic societies, the effective resolution of conflict, and the regulation of socio-political interaction, requires the crafting and adopting of explicit rules. A constitution is such an explicit set of rules. It has been argued, however, that "although modern tradition is for constitutions to be written, that need not be the case. That is, the constitution can be unwritten, as is the case with the constitution of the United Kingdom."¹⁵⁸

In every country, including those in Africa, the constitution creates the various branches of government, defines the powers of each branch of government, and places necessary limits (as determined by the people) on the exercise of those powers.¹⁵⁹

155. JOHN MUKUM MBAKU, INSTITUTIONS AND REFORM IN AFRICA: THE PUBLIC CHOICE PERSPECTIVE 218 (1997) (arguing, inter alia, that many kinship networks have functioned effectively as regulators of social and political interaction).

156. Mueller, *supra* note 153.

157. *Id.*

158. See MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES, *supra* note 43, at 61.

159. *Id.* Such limits or constraints are critical because they allow the people (the principal) to determine when civil servants and political elites (the agent) are engaging in unconstitutional activities. Through this process, the people can effectively check the exercise of government power—that is, the power that the people have granted the government in order to enable the latter to perform their constitutional functions. Mbaku argues, for example, that "[t]he government, having been created by individuals and designed to perform certain well-specified functions for them, should not act in a tyrannous manner towards citizens or allow itself or its structures to be used as instruments of plunder to violate the rights of the people." *Id.* at 85. Mbaku adds that "[o]nce the people, through the constitution, have established the government and delegated to it a certain level of authority, if that government tries to either exceed the scope of its powers or redefine 'individual rights,' it effectively becomes illegitimate and loses its constitutional right to govern and the people may employ procedures and mechanisms provided by the constitution (e.g., impeachment) to remove such government." *Id.* See also G. BRENNAN & JAMES M. BUCHANAN, THE REASON OF RULES: CONSTITUTIONAL POLITICAL ECONOMY 26 (1985) (arguing, inter alia, that a government that

The people may place limits on the exercise of government power in the form of “individual or group rights against the government.”¹⁶⁰ Africa’s post-independence states have become more complex, economically and politically— “[t]he 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.”¹⁶¹ In order to manage ethnic and religious diversity and provide the wherewithal for peaceful coexistence, as well as the creation of the wealth needed to deal fully and effectively with poverty, it is necessary for each African country to provide itself with governance processes based on explicit rules. That calls, of course, for the development of a constitution. Such a constitution must provide the country with the mechanisms to enhance and sustain the practice of constitutional government and constitutionalism.

Fombad notes that a constitution “empowers the government to be strong enough to operate effectively while imposing reasonable restraints which do not make it too weak and create a risk of anarchy.”¹⁶² In other words, the government must be accorded enough power to fully and effectively perform its function, but must be constrained enough to minimize opportunism (e.g., corruption and self-dealing) on the part of civil servants and political elites. As already mentioned, most post-independence African constitutions were actually instruments of exploitation and tyranny directed at the people. Consequently, without effective constraints on the exercise of government power, it was difficult, if not impossible, “for many African countries to practice [constitutional government] and constitutionalism.”¹⁶³ Okoth-Ogendo termed this situation in post-independence Africa, “constitutions without constitutionalism.”¹⁶⁴

acts beyond its constitutionally granted powers loses its legitimacy to govern).

160. MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES, *supra* note 43, at 61.

161. MBAKU, INSTITUTIONS AND REFORM IN AFRICA, *supra* note 155.

162. See Fombad, *Constitutional Reforms and Constitutionalism in Africa*, *supra* note 99, at 1012.

163. *Id.* at 1013.

164. See H.W.O. Okoth-Ogendo, *Constitutions Without Constitutionalism*, in STATE AND CONSTITUTIONALISM: AN AFRICAN DEBATE ON DEMOCRACY 3–4 (Issa Shivji ed. 1991).

It is not likely that the continent will be able to successfully accomplish or realize the aspirations elaborated in *Agenda 2063* without the practice, in each country, of constitutional government and constitutionalism. Put another way, the climate of political opportunism and pervasive corruption, gross violations of human rights, and high levels of sectarian violence that exist in many African countries today are not conducive to the fulfilment of the ideals of *Agenda 2063*. Of course, this state of affairs is made possible by the existence of dysfunctional governing processes in these countries. Hence, the urgent need for each country to revisit constitutional design and state reconstruction. Before proceeding, however, it is necessary to provide an overview of constitutionalism, how it differs from a constitution, and why it is critical to the fulfillment of the ideals of *Agenda 2063*.

B. What is Constitutionalism?

James A. Curry and others have argued that “[t]he distinction between a ‘constitution’ and ‘constitutionalism’ is more than a simple exercise in semantics.”¹⁶⁵ They add that “[t]he world is full of countries with written constitutions, but few [of them] possess constitutional governments.”¹⁶⁶ They further argue that the reason why these countries do not have “constitutional governments” is that “constitutionalism requires a government limited in its power and accountable for its actions. In short, constitutionalism, in addition to providing the theory underlying a constitution, must include an effective limitation on governmental power.”¹⁶⁷

The practice of constitutional government is tied closely to the recognition by many constitutional scholars and statesmen¹⁶⁸ of the dangers posed by unconstrained government, par-

165. JAMES A. CURRY ET AL., CONSTITUTIONAL GOVERNMENT: THE AMERICAN EXPERIENCE 5 (2003).

166. *Id.*

167. *Id.*

168. For example, James Madison, a founding father of the US, was quite cognizant of the dangers of unconstrained government when he argued in *Federalist 51*:

[i]n framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place, oblige it to control itself. A dependence on

ticularly to human rights.¹⁶⁹ Curry, et al. argue that “constitutionalism is tied to a suspicion and distrust of power in general and to the concentration of power in particular.”¹⁷⁰ In the discussion of constitutionalism and constitutional government, reference is often made to Lord Acton’s dictum that “all power tends to corrupt and absolute power corrupts absolutely.”¹⁷¹ In Africa, one need not search far to find presidents with absolute power who have subsequently abused that power.¹⁷²

American constitutionalism, it is argued, follows “an analogy between a constitution and ordinary law. Just as it is desirable to restrain and empower individuals by subjecting them to the rule of law, so it is desirable to restrain and empower the state. The idea of conducting government under law is the core of American constitutionalism.”¹⁷³ Implied in this definition is the supremacy of law and, hence, “no one, not even the people who hold leadership positions in government, including the executive, judiciary officers, and legislators, is above the law.”¹⁷⁴ Fombad argues that constitutionalism today “encompass[es] the idea that a government should not only be sufficiently limited in a way that protects its citizens from arbitrary rule but also that such a government should be able to operate efficiently and . . . compelled to operate within its constitutional limita-

the people is no doubt the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

FEDERALIST 51, at 245, 247 (James Madison) (David Wootton ed., 2003).

169. See, e.g., MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES, *supra* note 43, at 9.

170. CURRY ET AL., *supra* note 165, at 5.

171. Quoted in Gerald E. Caiden, *Symposium: A Cautionary Tale: Ten Major Flaws in Combating Corruption*, 10 SW. J. L. & TRADE AM. 269, 271 (2004).

172. Many of these presidencies are often referred to as “imperial presidencies” and can be found in countries such as Cameroon, DRC, Republic of Congo, Gabon, among many others. See, e.g., Fombad & Nwauche, *supra* note 110, at 91 (arguing, inter alia, that a “fundamental tenet of modern constitutionalism is that nobody, regardless of his status in society, is above the law”). See also Kwasi H. Prempeh, *Presidential Power in Comparative Perspective: The Puzzling Persistence of Imperial Presidency in Post-Authoritarian Africa*, 35 HASTINGS CON. L. Q. 761 (2008).

173. STEPHEN M. GRIFFIN, AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS 13 (1997).

174. Mbaku, *Providing a Foundation*, *supra* note 39, at 985.

tions.”¹⁷⁵ Fombad goes on to argue that “constitutionalism combines the idea of a limited and accountable government and rests on two main pillars.”¹⁷⁶ These are (1) “limitations . . . imposed on government when it is based on certain core values,” and (2) “the ability of citizens to legally compel government to operate within these limitations.”¹⁷⁷

Giovanni Sartori, a former professor at Columbia University and an internationally renowned political scientist whose work centered on the study of democracy and comparative politics, argued that “liberal constitutionalism” rests on six core elements, namely:

- (1) the recognition and protection of fundamental rights and freedoms;
- (2) the separation of powers;
- (3) an independent judiciary;
- (4) the review of the constitutionality of laws;
- (5) the control of the amendment of the constitution; and
- (6) institutions that support democracy.¹⁷⁸

Although the institutionalization of these core elements does not guarantee the practice of constitutionalism, it has been argued that “their presence makes the prospects for constitutionalism better.”¹⁷⁹ In African countries, the absence of these elements has greatly diminished prospects for the practice of constitutional government and constitutionalism.

175. Charles Manga 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, 7 (2007).

176. Fombad, *Constitutional Reforms and Constitutionalism in Africa*, *supra* note 99, at 1014.

177. *Id.*

178. See GIOVANNI SARTORI, THE THEORY OF DEMOCRACY REVISITED 307–09 (1987) (examining, inter alia, core elements of what he refers to as liberal constitutionalism). See also Org. of African Unity [OAU], *Lomé Declaration of July 2000*, AHG/Decl.5 (XXXVI), July 10–12, 2000 available at https://www2.ohchr.org/english/law/compilation_democracy/lomedec.htm; African Union [AU], African Charter on Democracy, Elections and Governance (Democracy Charter), January 30, 2007, available at <https://au.int/en/treaties/african-charter-democracy-elections-and-governance>. Both the Lomé Declaration and the Democracy Charter emphasize the adoption, by African countries, of democracy constitutions, which provide each country with separation of powers regimes, with independent judiciaries. See generally *id.*

179. Fombad, *Constitutional Reforms and Constitutionalism in Africa*, *supra* note 99, at 1014.

However, the question still remains: why should Africans be concerned with constitutionalism and constitutional government? First, constitutionalism can ensure that the constitution does not become simply another governance instrument to be easily discarded by opportunistic political elites, allowing them to violate the law with impunity.¹⁸⁰ Second, constitutionalism can and “must provide a solid basis for the respect of the rule of law, democracy, and good governance.”¹⁸¹

Constitutionalism, however, has been distinguished from democracy and the rule of law.¹⁸² Fombad states that, while “many of the core elements of constitutionalism . . . are also necessary for the rule of law to exist, . . . the latter concept [i.e., the rule of law] is slightly narrower in scope.”¹⁸³ While respect for, or adherence to, the rule of law “on its own may not necessarily lead to the existence of constitutionalism,” the latter is “safeguarded by the rule of law and without the rule of law there can be no constitutionalism.”¹⁸⁴

In 1959, political scientist Seymour Martin Lipset defined democracy as “a political system which supplies regular constitutional opportunities for changing the governing officials. It is a social mechanism for the resolution of the problem of societal decision-making among conflicting interest groups which permits the largest possible part of the population to influence these decisions through their ability to choose among alternative contenders for political office.”¹⁸⁵ Lipset’s definition places emphasis on elections as a way to select individuals to serve in government.¹⁸⁶

In his definition of political democracy, Robert A. Dahl, political theorist and founder of the pluralist theory of democracy, argued that “a key characteristic of a democracy is the continuing responsiveness of the government to the preferences of its citizens, considered political equals.”¹⁸⁷ Of course, in order for

180. See, e.g., LeVine, *supra* note 115, at 188.

181. Fombad, *Constitutional Reforms and Constitutionalism in Africa*, *supra* note 99, at 1015.

182. Fombad, *Challenges to Constitutionalism*, *supra* note 175, at 8–10.

183. *Id.* at 8.

184. *Id.*

185. Seymour Martin Lipset, *Some Social Requisites of Democracy: Economic Development and Political Legitimacy*, 53 AM. POL. SC. REV. 69, 71 (1959).

186. *Id.*

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

the government to respond fully and effectively to the preferences of its citizens, it must provide them with the legal mechanisms necessary “to effectively articulate their preferences, make known these preferences to both their government and fellow citizens (either through private or collective action), and have the government accord those preferences equal treatment without any prejudice against the individual or group making the request.”¹⁸⁸ Abraham Lincoln articulated his own concept of democracy—a “government of the people, by the people, for the people.”¹⁸⁹ However, as has been argued by some constitutional scholars, “if the underlying idea behind democracy is no more than rule by the popular will, this can well be achieved with or without a constitution.”¹⁹⁰

Does having a constitution, however, imply that a country will necessarily practice constitutionalism? Throughout the African continent, one can find cases of countries that have constitutions and hold regular elections to legitimize the government but can hardly be considered to be practicing anything remotely close to constitutionalism. Countries such as Jean-Bédél Bokassa’s Central African Republic; Mobutu Sese Seko’s Zaire/DRC; and Teodoro Obiang Nguema Mbasogo’s Equatorial Guinea have been identified as representations of “a tyranny of the majority or of a minority or more often of one man.”¹⁹¹ Of course, there are many more countries on the continent that exhibit this type of approach to governance, including: Paul Biya’s Cameroon, Pierre Nkurunziza’s Burundi, Yoweri Museveni’s Uganda, and Denis Sassou Nguesso’s Republic of Congo, just to name a few.¹⁹²

188. John Mukum Mbaku, *Copyright and Democratization in Africa*, 7 BYU INT’L L. & MGT. REV. 51, 76 (2011).

189. ABRAHAM LINCOLN, GETTYSBURG ADDRESS, NOVEMBER 19, 1863, *reprinted in* 7 COLLECTED WORKS OF ABRAHAM LINCOLN 23 (1990).

190. Fombad, *Challenges to Constitutionalism*, *supra* note 175, at 9.

191. *Id.*

192. In all three countries, the presidents have manipulated their national constitutions to remain in power indefinitely. *See, e.g. Changing the Constitution to Remain in Power*, FRANCE24 NEWS (Dec. 12, 2013), <https://www.france24.com/en/20091023-changing-constitution-remain-power> (listing African countries whose presidents have changed their constitutions to prolong their stay in power); *Burundi Backs New Constitution Extending Presidential Term*, ALJAZEERA (May 22, 2018), <https://www.aljazeera.com/news/africa/2018/05/burundi-backs-constitution-extending-presidential-term-limits-180521134736408.html> (noting that Burundi approved a new constitution

The question still remains, what is the relationship between democracy and constitutionalism? It has been pointed out by several constitutional scholars that modern constitutionalism “involves the reconciliation of the democratic rule of men with the constitutional rule of law.”¹⁹³ For there to be constitutionalism, the government must not only be democratic, but should also operate only within the limits provided in the constitution. Such a government must be adequately constrained by the constitution so that those who serve in it—that is, civil servants and political elites—do not act capriciously and arbitrarily, but instead exercise only those powers granted them by the constitution. In order for this to happen, there must be separation of powers with effective checks and balances, including not just an independent judiciary, but also a robust and politically active civil society that can serve as a check on the exercise of government power. For example, civil society can use its organizations, such as a free press, to check the government. Additionally, citizens can vote recalcitrant, poorly performing, corrupt, and self-dealing politicians out of office and replace them with more productive and law-abiding individuals.

In order for a democratic system to function effectively and maintain the necessary level of stability, it must be built on a constitutional foundation. Constitutionalism, on the other hand, can only function and thrive in a country if “it [has] a democratic pedigree. Democracy is therefore an essential prerequisite for constitutionalism.”¹⁹⁴

C. Post-1990 Constitutional Modifications and Agenda 2063

One can argue that modifications made to African constitutions since the early 1990s have provided these countries with the mechanisms to effectively assist in the successful imple-

that would allow President Pierre Nkurunziza to remain in office until 2034); Sibusiso Tshabalala, *When 30 Years as President is Not Enough, You Change the Constitution*, QUARTZ AFRICA (Oct. 28, 2015), <https://qz.com/africa/533903/when-31-years-as-president-is-not-enough-you-change-the-constitution/> (noting the successful referendum to change the constitution of the Republic of Congo to allow President Sassou Nguesso to run for another term in office).

193. See Fombad, *Challenges to Constitutionalism*, *supra* note 175, at 9. See also Imer Flores, *Law, Liberty and the Rule of Law (in a Constitutional Democracy)*, in *LAW, LIBERTY, AND THE RULE OF LAW 77* (Imer B. Flores & Kenneth E. Himma eds., 2013) (arguing, *inter alia*, that the constitutional rule of law is the foundation for constitutionalism).

194. Fombad, *Challenges to Constitutionalism*, *supra* note 175, at 9–10.

mentation of *Agenda 2063*. Indeed, constitutional scholars have argued that the changes made to many African constitutions since the early 1990s have incorporated the “core elements of constitutionalism” that were identified earlier,¹⁹⁵ and that the protection of human rights and freedoms has improved significantly to become “a standard of constitutionalism recognized and accepted by most African countries.”¹⁹⁶

Nevertheless, there have been major setbacks in some countries during the last several years. The major constitutional innovations undertaken in the post-1990 period were supposed to enhance the fight against government impunity and improve the protection of human rights through the separation of powers with checks and balances. The belief was that these changes would minimize the misuse of executive power and prevent civil servants and political elites from committing crimes with impunity.¹⁹⁷ Unfortunately, constitutional reforms in the Francophone countries were made within the Gaullist model.¹⁹⁸ Although many Francophone countries tried to improve on the Gaullist constitutional model by introducing the notion of separation of powers into their constitutions, these changes have nevertheless failed to guarantee constitutional justice.¹⁹⁹ As argued by Mbaku with respect to the 1996 constitutional changes in Cameroon, “[a]lthough Cameroon’s institutional arrangements are modeled after those of the French Fifth Republic, the country has not been able to maintain the same level of judicial independence and the separation of powers as have the

195. Fombad, *Constitutional Reforms and Constitutionalism in Africa*, *supra* note 99, at 1016.

196. *Id.* See also Christof Heyns & Waruguru Kaguongo, *Constitutional Human Rights Law in Africa: Current Developments*, 22 S. AFR. J. HUM. RTS. 673, 676–82 (2006) (providing an overview of current developments in human rights protection in African countries up to 2006).

197. See, e.g., Mbaku, *International Law and the Struggle Against Government Impunity in Africa*, *supra* note 59 (noting the pervasiveness of government impunity in many African countries).

198. See, e.g., ANTON ANDEREGGEN, FRANCE’S RELATIONSHIP WITH SUBSAHARAN AFRICA 42 (arguing, *inter alia*, that Guinea was the only French colony in sub-Saharan Africa to reject de Gaulle’s Constitution).

199. See Fombad, *Challenges to Constitutionalism*, *supra* note 175, at 21 (noting that the post-1990 constitutional amendments “can not be seen, even from a purely formal point of view, as a success”).

French.”²⁰⁰ Mbaku goes on to state that “[a]lthough Cameroon’s present constitution does provide for a separation of powers, it nevertheless, fails to provide mechanisms for making certain that one branch of government does not usurp the powers of another or dominate another.”²⁰¹ In fact, under Cameroon’s existing constitutional order, the President of the Republic has allocated to himself enough power to dominate and control both the judiciary and the legislature, effectively allowing him to act with impunity.²⁰²

Of course, countries such as Ghana, South Africa, and Kenya have provided themselves with constitutional arrangements that significantly enhance judicial independence. With respect to Kenya, during the country’s highly disputed 2017 presidential election, the judiciary exhibited a significant level of independence.²⁰³ According to Article 140(1) of the Constitution of the Republic of Kenya, enacted in 2010, “[a] person may file a petition in the Supreme Court to challenge the election of the President-elect within seven days after the date of the declaration of the results of the presidential election.”²⁰⁴ This is followed by Article 140(2), which states that “[w]ithin fourteen days after the filing of a petition under clause (1), the Supreme

200. John Mukum Mbaku, *Judicial Independence, Constitutionalism and Governance in Cameroon: Lessons from French Constitutional Practice*, 1 EUR. J. COMP. L. & GOV. 357, 389 (2014).

201. *Id.*

202. *Id.* at 387. Cameroon, of course, is not the only Francophone sub-Saharan African country whose constitution grants the president the power to guarantee the independence of judicial power. For example, the Constitution of the Republic of Côte d’Ivoire grants the president the power to guarantee the independence of judicial power. Article 139 states: “Le pouvoir judiciaire est indépendant. Le Président de la République est le garant de l’indépendance du pouvoir judiciaire” (“Judicial power is independent. The President of the Republic is the guarantor of the independence of judicial power.”). See CONST. OF THE REPUBLIC OF CÔTE D’IVOIRE, § 139 (2016).

Loi no 2016-886 du 8 novembre 2016 portant Constitution de la République de Côte d’Ivoire, 12 octobre 2016, disponible à <http://www.koaci.com/cote-divoire-lintegralite-constitution-3eme-republique-1ere-partie-102863.html>.

203. See John Mukum Mbaku, *Kenyan Democracy and the Rule of Law*, GEO. J. INT’L AFF. (Mar. 28, 2018), <https://www.georgetownjournalofinternationalaffairs.org/online-edition/2018/3/28/kenyan-democracy-and-the-rule-of-law>. See also John Mukum Mbaku, *Kenya: Presidential elections and the rule of law*, BROOKINGS (Sept. 6, 2017), <https://www.brookings.edu/blog/africa-in-focus/2017/09/06/kenya-presidential-elections-and-the-rule-of-law/>.

204. CONSTITUTION art. 140(1) (2010) (Kenya).

Court shall hear and determine the petition and its decision shall be final.”²⁰⁵

On August 8, 2017, Kenya held general elections between incumbent President Uhuru Kenyatta of the Jubilee Alliance party and Raila Odinga of the National Super Alliance.²⁰⁶ Kenya's Independent Electoral and Boundaries Commission subsequently declared President Kenyatta the winner with 54.7 percent of the votes cast.²⁰⁷ Odinga argued that the election had been marred with irregularities and that the results “were hacked and rigged in favor of the incumbent, Kenyatta.”²⁰⁸ While asking his supporters to remain peaceful, Odinga appealed the disputed results to the Supreme Court, which, on September 1, 2017, overturned the results and ordered a re-run election to be held within sixty days.²⁰⁹ Although incumbent President Kenyatta and his supporters expressed anger at the decision of the Supreme Court, Kenyatta nevertheless proceeded to instruct his supporters and all Kenyans to accept the ruling and resist any temptation to engage in violent mobilization.²¹⁰ In the disputed elections of 2017, Kenyan courts exhibited a significant level of independence and performed their constitutional functions fully and effectively.²¹¹

South Africa's post-apartheid judiciary has also shown a significant level of independence. In 2017, for example, the Gauteng Division of the South African High Court at Pretoria ruled,

205. *Id.* art. 140(2).

206. See Kevin Sieff, *Who are the Men Competing to be President of Kenya?*, WASH. POST (Aug. 8, 2017), https://www.washingtonpost.com/news/world-views/wp/2017/08/08/who-are-the-two-men-competing-to-be-president-of-kenya/?utm_term=.d61a42f166d8.

207. Christopher Torchia & Tom Odula, *Kenyatta Declared Winner of Disputed Kenya Presidential Vote*, AP NEWS (Aug. 11, 2017), <https://www.apnews.com/7f4aca8818724e7f9829ad74944568e0>.

208. Dominique van Heerden & Lauren Said-Moorhouse, *Kenyan Challenger Claims Election was Hacked, but John Kerry Disagrees*, CNN INT'L (Aug. 11, 2017), <https://www.cnn.com/2017/08/10/africa/kenya-elections/index.html>.

209. Jason Burke, *Kenyan Supreme Court Annuls Uhuru Kenyatta Election Victory*, GUARDIAN (Sept. 1, 2017), <https://www.theguardian.com/world/2017/sep/01/kenyan-supreme-court-annuls-uhuru-kenyatta-election-victory>.

210. Maggie Fick & George Obulutsa, *Kenyan Court Scraps Presidential Vote, Kenyatta Calls for Calm*, REUTERS (Sept. 1, 2017), <https://www.reuters.com/article/us-kenya-election-court/kenyan-court-scraps-presidential-vote-kenyatta-calls-for-calm-idUSKCN1BC4A5>.

211. See, e.g., Mbaku, *Kenyan Democracy and the Rule of Law*, *supra* note 203.

in the case of *Democratic Alliance v. Minister of International Relations and Cooperation and Others (Council for the Advancement of the South African Constitution Intervening)*,²¹² that the executive branch of government did not have the constitutional authority to terminate an existing international agreement and ordered the government to revoke its notice to withdraw South Africa from the Rome Statute of the International Criminal Court (ICC).²¹³ On March 7, 2017, the South African government accepted the High Court's ruling and revoked the notice of withdrawal.²¹⁴

Many Anglophone countries, including Kenya, "have by and large adopted variants of the American decentralized system of concrete judicial review influenced by *locus classicus*, *Marbury v. Madison*."²¹⁵ Most Francophone and Lusophone countries, on the other hand, have adopted, "with important and significant modifications, the very limited French system of quasi-administrative quasi-judicial review before a Constitutional Council."²¹⁶

A core element of constitutionalism involves how the constitution should be amended. The effective practice of constitutionalism requires that each constitution provide appropriate procedures for amending or revising it. Jon Elster, a Norwegian social and political theorist, has argued that each country must strike a balance between "rigidity and flexibility[.]" and to do so, constitutional drafters can utilize several devices, either "singly or in combination."²¹⁷ First, the drafters can require that the constitution be revised or amended only by a given

212. *Democratic Alliance v. Minister of International Relations and Cooperation and Others*, 2017 (3) SA 212 (GP) (S. Afr.), available at <http://www.saflii.org/za/cases/ZAGPPHC/2017/53.html>.

213. Robbie Gramer, *South African Court Tells Government It Can't Withdraw from the ICC*, FOREIGN POL'Y (Feb. 22, 2017), <http://foreignpolicy.com/2017/02/22/south-african-court-tells-government-it-cant-withdraw-from-the-icc/>.

214. Norimitsu Onishi, *South Africa Reverses Withdrawal from International Criminal Court*, N.Y. TIMES (Mar. 8, 2017), <https://www.nytimes.com/2017/03/08/world/africa/south-africa-icc-withdrawal.html>.

215. See Fombad, *Constitutional Reforms and Constitutionalism in Africa*, *supra* note 99, at 1017. See also *Marbury v. Madison*, 5 U.S. 137 (1803).

216. Fombad, *Constitutional Reforms and Constitutionalism in Africa*, *supra* note 99, at 1017–18.

217. Jon Elster, *Constitutionalism in Eastern Europe: An Introduction*, 58 U. CHI. L. REV. 447, 470 (1991).

qualified majority.²¹⁸ South Africa's 1996 post-apartheid constitution—that is, the Constitution of the Republic of South Africa—states that the constitution may be amended only “by a Bill passed by (a) the National Assembly, with a supporting vote of at least 75 percent of its members; and (b) the National Council of Provinces, with a supporting vote of at least six provinces.”²¹⁹ In Cameroon, however, the constitution can be amended by Parliament alone. According to Article 63(1) of the Constitution of the Republic of Cameroon, 1996, “[a]mendments to the Constitution may be proposed either by the President of the Republic or by Parliament” and according to Article 63(2), “[t]he amendment shall be adopted by an absolute majority of the members of Parliament.”²²⁰

The ease with which Cameroon's constitution can be amended is evident in the fact that it took incumbent President Paul Biya little effort to change the constitution in 2008 in order to grant himself the right to contest the 2011 presidential election.²²¹ Biya was prohibited by the constitution from standing for a third term in office.²²² Although the Constitution of the Republic of Cameroon provides that the constitution can be amended by popular referendum, it grants only the President of the Republic the power to submit a bill for such an amendment.²²³

218. *Id.*

219. S. AFR. CONST., 1996, art. 74(1)(a)–(b).

220. CONST. OF THE REPUBLIC OF CAMEROON (1996 as amended through 2008), § 63(1-2).

221. See Tansa Musa, *Update 1—Cameroon's Biya Signs Law Allowing Third Term Bid*, REUTERS (April 15, 2008), <https://uk.reuters.com/article/cameroon-constitution-idUKL1529602420080415>.

222. Before the constitution was amended in 2008, Article 6(2) of the constitution stated as follows: “The President of the Republic shall be elected for a term of office of 7 (seven) years. He shall be eligible for re-election once.” See CONST. OF THE REPUBLIC OF CAMEROON (1996 as amended through 2008), § 6(2). Paul Biya, who had been president of Cameroon since 1982, was mandated by the constitution of 1996 to serve a maximum of two seven-year terms and then leave office. Thus, when he was elected in 1997, and again in 2004, he was expected to leave office at the end of the second post-1996 term in 2011. However, in 2008, he had the constitution changed to allow him to run again. The 2008 amendments to the constitution changed Article 6(2) to: “The President of the Republic shall be elected for a term office of 7 (seven) years. He shall be eligible for re-election.” See *Id.*

223. *Id.* at § 63(4).

Alternatively, constitutional drafters could impose what Elster refers to as a “cooling device”—that is, a period that would require, for example, two successive legislative assemblies or parliaments to approve the amendments before they become law.²²⁴ Elster adds that “delays protect society against itself, by forcing passionate majorities, whether simple or qualified, to cool down and reconsider.”²²⁵ A third procedure requiring bills to amend or alter the constitution to be considered successful only if they have been approved by both the national parliament and the legislative assemblies of the subnational units (e.g., states or provinces) could be incorporated into the constitution.²²⁶ A fourth procedure that drafters may use involves taking the duty of amending the constitution out of the hands of the national parliament and the assemblies of subnational units, and placing it in the hands of specially-constituted or convened assemblies, such as the Sovereign National Conference (SNC)—which emerged, primarily in the Francophone African countries, during the pro-democracy uprisings of the early-to-mid-1990s—or a Constitutional Assembly chosen through nation-wide, fair, free, credible and transparent elections.²²⁷ Finally, constitutional drafters can leave the job of amending the constitution to the people through a national referendum.²²⁸ It is hoped that these approaches will minimize the

224. Elster, *supra* note 217.

225. *Id.*

226. S. AFR. CONST., 1996, art. 74.

227. The SNC was considered an important mechanism for mass participation in governance, emerging in the 1990s to provide citizens with the opportunity to participate in the institutional reforms that were designed to introduce and sustain democracy on the continent. *See, e.g.*, ‘Kunle Amuwo, *The State and the Politics of Democratic Consolidation in Benin, 1990–1999*, in *POLITICAL LIBERALIZATION AND DEMOCRATIZATION IN AFRICA: LESSONS FROM COUNTRY EXPERIENCES* 141 (Julius O. Ihonvbere & John Mukum Mbaku eds., 2003) (providing an overview, inter alia, of the role played by the SNC in Benin’s democratization); *see generally* John F. Clark, *The National Conference as an Instrument of Democratization in Francophone Africa*, 11 J. THIRD W. STUD. 304 (1994) (examining the SNC as an instrument of democratic transformation in Francophone Africa).

228. For example, citizen-initiated referendums to amend national constitutions have taken place in Slovenia and Croatia. *See* Robert Podolnjak, *Constitutional Reforms of Citizen-Initiated Referendum*, 26 REVUS: J. CONST. THEORY & PHILOSOPHY L. 129 (2015).

ability of special interest groups to control and manipulate the process in their favor.²²⁹

Aspiration One of *Agenda 2063* seeks “[a] prosperous Africa based on inclusive growth and sustainable development.”²³⁰ In each country, entrepreneurship is very important to economic growth. However, one of the most important prerequisites for entrepreneurship, and hence, economic growth and the creation of wealth, is legal stability.²³¹ If it is relatively easy to amend or change the constitution, it will cease to provide prospective investors and entrepreneurs “with the confidence that they need to commit their resources to the economy.”²³² In fact, in countries where the constitution is subjected regularly to revision, there can arise a situation in which “citizens are no longer able to determine what their fundamental rights are and whether those rights are protected or not.”²³³ Thus, “constitutional stability is important, not only to instill confidence in prospective investors and promote entrepreneurial activities and the creation of wealth, but also for the protection of individual rights.”²³⁴ As argued by Dunoff²³⁵ and Trachtman,²³⁶ a

229. MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES, *supra* note 43, at 92–94.

230. See AGENDA 2063, *supra* note 31, at 2.

231. Klaus Heine & Erich Oltmanns, *Law, Finance, and the Investors Psychological Motive of Control*, 3 EUR. BUS. ORG. L. REV. 479, 500 (2002) (arguing, inter alia, that “it is legal stability that in the long run breeds economic growth”). See also Paul G. Mahoney, *The Common Law and Economic Growth: Hayek Might be Right*, 30 J. LEGAL STUD. 181 (2001) (arguing, inter alia, that common law countries experienced faster economic growth than civil law countries during the period 1960–1992).

232. MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES, *supra* note 43, at 93–94.

233. *Id.*

234. *Id.*

235. Jeffrey L. Dunoff is an expert in public international law and international courts and a professor of law at Temple University Beasley School of Law. He is the author (with Steven R. Ratner and David Wippman) of *INTERNATIONAL LAW: NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH* (2015). See JEFFREY L. DUNOFF, STEVEN R. RATNER & DAVID WIPPMAN, *INTERNATIONAL LAW: NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH* (Wolters Kluwer 4th ed., 2015).

236. Joel P. Trachtman is an expert in international law and a professor of international law at The Fletcher School of Law and Diplomacy at Tufts University. He is the editor (with Jeffrey L. Dunoff) of *RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE* (2009).

country must protect its constitutional norms against temporary shifts in power given that constitutional stability is “a critical component of fundamental rights.”²³⁷

In as much as the core elements discussed above are critical to the entrenchment of constitutionalism in African countries, these are necessary but not sufficient conditions. Sufficiency requires that each country avail itself of institutions that support constitutional government and make certain that those who serve in government are accountable to both the constitution and the people. As South Africans struggled to produce a permanent constitution for the post-apartheid society, they were quite aware of the need to strengthen and deepen constitutional democracy in the country.²³⁸ They felt that the most effective way to do so was by establishing, through the constitution, “state institutions supporting constitutional democracy.”²³⁹ These institutions include “(a) The Public Protector; (b) the South African Human Rights Commission; (c) The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; (d) The Commission for Gender Equality; (e) The Auditor-General; [and] (f) The Electoral Commission.”²⁴⁰

See RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009).

237. Jeffrey L. Dunoff & Joel P. Trachtman, *A Functional Approach to International Constitutionalization*, in RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE 20 (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009).

238. This was made explicitly clear in the Preamble to the Constitution of the Republic of South Africa Act, No. 108 of 1996. The people of South Africa proclaimed as follows:

We [the people of South Africa] therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic [of South Africa] so as to—Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental rights; Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law.

S. AFR. CONST., 1996.

239. S. AFR. CONST., 1996, art. 181–194.

240. *Id.* at art. 181.

The constitutions of other African countries also provide similar institutions.²⁴¹ Fombad argues, nonetheless, that South Africa's institutions can be distinguished from those in other African countries in that South Africa's institutions "have been constitutionally entrenched in such a way that they can operate as independent sites of oversight, supervision, and enforcement of the constitution."²⁴² He adds that "[i]n this way, they not only support but also help to sustain constitutionalism."²⁴³

During the last several decades, particularly since the end of the Cold War, the demise of apartheid, and the emergence of a non-racial democratic constitutional order in South Africa, many African countries have created constitutions that "for the first time tried to promote constitutionalism."²⁴⁴ Many of these countries now have constitutions "that include a bill of rights or some clauses that purport to guarantee the protection of fundamental rights."²⁴⁵ Nevertheless, as argued by Judith Best,²⁴⁶ "fundamental rights are expressed in and secured by a competent and balanced governing process, not by mere 'parchment barriers.'"²⁴⁷ Thus, for African countries to effectively practice constitutionalism, their "parchment barriers," or constitutional guarantees of fundamental rights, must be secured or support-

241. For example, the Constitution of the Republic of Ghana provides for a Commission on Human Rights and Administration of Justice (art. 216) and a National Media Commission (art. 166), all of which are expected to protect the country's democracy. *See* CONST. OF GHANA (1996), arts. 166 & 216. The Constitution of the Republic of Kenya, which provides for a National Human Rights and Equality Commission (art. 59), Independent Electoral and Boundaries Commission (art. 88), Auditor-General (art. 229), and the Public Service Commission (art. 233). *See* CONST. OF THE REPUBLIC OF KENYA (2010), arts. 59, 88, 229, 233.

242. Fombad, *Constitutional Reforms and Constitutionalism in Africa*, *supra* note 99, at 1019–20.

243. *Id.* at 1020.

244. *Id.*

245. *See, e.g.,* MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES, *supra* note 43, at 128.

246. Professor Judith A. Best is an expert on American government, American political thought and the Electoral College. She is the author of *THE CASE AGAINST DIRECT ELECTION OF THE PRESIDENT: A DEFENSE OF THE ELECTORAL COLLEGE* (1975). *See* JUDITH A. BEST, *THE CASE AGAINST DIRECT ELECTION OF THE PRESIDENT: A DEFENSE OF THE ELECTORAL COLLEGE* (1975).

247. Best, *supra* note 120, at 37.

ed by “a competent and balanced governing process.”²⁴⁸ The failure of many African countries to secure their constitutional guarantees with an effective governing process has produced persistent and pervasive abuse of human rights by both state and non-state actors.²⁴⁹ That is, there is a failure of these countries to practice constitutionalism and constitutional government despite the existence of various constitutional guarantees.²⁵⁰

Hence, within the institutional framework that exists in many African countries today, it is not possible to effectively carry out the aspirations outlined in *Agenda 2063*. In order for African countries to successfully undertake these aspirations, each one of them must not only have a constitutional order that guarantees fundamental rights, but must also be armed with a “competent and balanced governing process,”²⁵¹—one that enhances the practice of constitutionalism. Within such a governing process, the state is constitutionally well-constrained, and those who serve in the government—that is, civil servants and political elites—are constrained enough so that they are held fully accountable for their actions.²⁵²

D. The Issue of Constitutional Guarantees and Agenda 2063

In the post-independence period in Africa, it was generally believed that the “constitutional entrenchment of fundamental rights, especially the legalization of multi-party political competition, would provide a solid foundation on which [to build] constitutional democracy, a culture of tolerance, transparency, and accountability, as well as political stability, and would dis-

248. *Id.*

249. See, e.g., Mbaku, *International Law and the Struggle Against Government Impunity in Africa*, *supra* note 59, at 77.

250. MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES, *supra* note 43, at 128. For example, in a country such as the Republic of Sudan, not only have government security forces been responsible for the massacre of many people in the Darfur region of the country, but non-governmental organizations (e.g., the Janjaweed) aligned with the government have been involved in the committing of atrocities against the people of Darfur. See, e.g., JANEY LEVY, *GENOCIDE IN DARFUR* (2009) (examining, inter alia, the genocide in Darfur and those responsible for it).

251. MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES, *supra* note 43, at 128

252. *Id.* at 189.

courage dictatorship and military adventurism.”²⁵³ Unfortunately, these transformational changes in many African political systems have not brought about the expected results. Many of these countries still remain pervaded by high levels of corruption and government impunity.²⁵⁴ The period from independence, around the 1950s and 1960s, to the mid-1970s, was pervaded by military coups, single party political systems, and highly centralized and dictatorial governmental regimes.²⁵⁵

Nevertheless, after the onset of the democratization processes that began in many countries in the early-1990s, it was expected that there would be a significant reduction in the incidence of military intervention in politics, as well as government impunity. This expectation was contradicted by the fact that there was an increase in the incidence of military coups d'état from 1991 to 2001.²⁵⁶ In fact, democratization in many African countries did not produce “a more stable political and socio-economic environment that would discourage military adventurism.”²⁵⁷

1. The failure of post independence reforms to entrench democracy

The failure of many democratizing African countries to entrench democracy and practice constitutionalism and constitutional government was due to the fact that democracy in these countries came to mean simply the regular holding of presidential and parliamentary elections, many of which were neither fair, free, transparent, nor credible. They were designed by in-

253. Fombad, *Constitutional Reforms and Constitutionalism in Africa*, *supra* note 99, at 1020.

254. See, e.g., MBAKU, CORRUPTION IN AFRICA, *supra* note 144 (examining, inter alia, the pervasiveness of corruption in African countries).

255. A. B. ASSENSOH & YVETTE M. ALEX-ASSENSOH, AFRICAN MILITARY HISTORY AND POLITICS: COUPS AND IDEOLOGICAL INCURSIONS, xi–xii (2001) (examining, inter alia, the history of military coups in Africa); GODFREY MWAKIKAGILE, MILITARY COUPS IN WEST AFRICA SINCE THE SIXTIES 1–5 (2001) (examining, inter alia, the evolution of military coups in West Africa from the 1960s).

256. Fombad, *Constitutional Reforms and Constitutionalism in Africa*, *supra* note 99, at 1020. See also Patrick J. McGowan, *African Military Coups d'État, 1956–2001: Frequency, Trends and Distribution*, 41 J. MOD. AFR. STUD. 339, 351–52 (2003).

257. Fombad, *Constitutional Reforms and Constitutionalism in Africa*, *supra* note 99, at 1020–21.

cumbent governments to convince observers, especially external observers, that theirs was a legitimate democratic system.²⁵⁸ As argued by Andreas Schedler, an expert on democracy and electoral systems, in many of these countries, “the electoral arena” is “little more than a theatrical setting for the self-representation and self-reproduction of power.”²⁵⁹ According to Fombad, “[b]oth the old guard ‘born-again’ democrats and the post-1990 democrats have used numerous sophisticated tactics to pre-empt and frustrate any potential threats emanating from popular elections.”²⁶⁰

Throughout the continent, incumbent political parties have manipulated electoral codes in their favor, allowing them to maintain a monopoly on power. One example of this is the decision by the government of Frederick J. Chiluba and the Movement for Multiparty Democracy (MMD) to change the Zambian constitution in order to disqualify former president Kenneth David Kaunda from participating as a candidate for the presidency in the elections that were scheduled for November 18, 1996.²⁶¹ After Chiluba and the MMD had changed the constitution, Kaunda’s candidacy was invalidated by the high court, which argued that because Kaunda’s parents were not Zambian by birth—as required by the constitutional amendment—he was not eligible to contest the presidency.²⁶² Nevertheless, Kaunda appealed the high court’s ruling to the Zambian Supreme Court, but the case was settled before it was heard and his citizenship was restored.²⁶³

258. See, e.g., Vikram K. Chand, *Democratization from the Outside in: NGO and International Efforts to Promote Open Elections*, 18 *THIRD WORLD Q.* 543, 549 (1997) (noting that many countries conduct elections and are “willing to allow international observers . . . because they find it [the presence of these observers] a politically convenient way to gain credibility, placate the opposition and avoid a deterioration of relations with the international community and the United States”).

259. Andreas Schedler, *Elections Without Democracy: The Menu of Manipulation*, 13 *J. DEM.* 36, 47 (2002).

260. Fombad, *Constitutional Reforms and Constitutionalism in Africa*, *supra* note 99, at 1021.

261. John Mukum Mbaku, *Citizenship Laws and Political and Economic Participation in Africa*, 43 *N.C. J. INT’L L.* 110, 114–16 (2018).

262. *Id.* at 115.

263. *Id.* Nevertheless, the restoration was not granted in time for Kaunda to participate as a candidate for the presidency in the presidential elections of November 18, 1996. See also BRONWEN MANBY, *CITIZENSHIP IN AFRICA: THE LAW OF BELONGING* 120 (2018).

Another example of this manipulation is the decision by then-president of Côte d'Ivoire, Henri Konan Bédié, to change the electoral code to prevent his most important political opponent, Alassane Ouattara, from participating as a presidential candidate in elections that were scheduled for October 22, 1995.²⁶⁴ Ouattara was born in Côte d'Ivoire to parents who had migrated from neighboring Burkina Faso.²⁶⁵ Under the new electoral code and the 2000 constitution, he was not qualified to run for president.²⁶⁶ Article 35 of the 2000 Constitution of the Republic of Côte d'Ivoire states: "The candidate for the presidential election must be at least forty years of age and not more than seventy-five years of age. He must be of Ivorian origin, born of a father and mother who are themselves of Ivorian origin."²⁶⁷

In addition to the manipulation of electoral codes and constitutions in order to place the opposition at a competitive disadvantage and guarantee themselves electoral victory, incumbent governments in many African countries have also engaged in other forms of election malpractice, which have made it very difficult for opposition parties to win elections. Fombad argues that some of these election malpractices include "the disenfranchisement of voters in opposition strongholds, forging identification cards, vote stuffing, and placing the conduct of elections in the hands of electoral bodies controlled and managed by supporters of the ruling parties."²⁶⁸

264. Mbaku, *Citizenship Laws*, *supra* note 261, at 122–23. Those changes to the electoral code were later incorporated into a new constitution that was drafted and approved by a referendum that was held from July 23 to 24, 2000. The new constitution, like the electoral code, mandated that a candidate for the post of President of the Republic of Côte d'Ivoire must have parents (mother and father) who are Ivorian citizens by birth. Ouattara's parents were said to be immigrants from Burkina Faso, and hence, under the new constitution, he was not eligible to run for president in both the 1995 and 2000 elections. *See, e.g., id.* at 122–27.

265. *Id.* at 125.

266. CONST. OF THE REPUBLIC OF CÔTE D'IVOIRE (2000), art. 35.

267. CONST. OF THE REPUBLIC OF CÔTE D'IVOIRE, art. 35 (2000) (also known as Loi n° 2000–513 du 1^{er} août 2000 portant constitution de la Côte d'Ivoire). The constitution's original language is French. The relevant sections of Article 35 state: "Le candidat à l'élection présidentielle doit être âgé de quarante ans ou moins et de soixante quinze ans au plus. Il doit être Ivoirien d'origine, né de père et de mère eux-mêmes ivoiriens d'origine." The English version presented here is the author's translation.

268. Fombad, *Constitutional Reforms and Constitutionalism in Africa*, *supra* note 99, at 1021. *See also* Charles Manga Fombad, *Election Management*

2. The 1980s early-1990s reform efforts and the rise of elections as a tool of democratization

When African countries began their transitions to democratic governance in the late 1980s and early 1990s, it was generally believed that opposition political parties would be an important and critical contributor to a successful transition. Elections in which opposition parties could participate were not only viewed as an important tool that citizens could use to check the exercise of government power,²⁶⁹ but they were expected to provide members of the opposition the opportunity and wherewithal to capture positions in the government.²⁷⁰ Unfortunately, in recent years, incumbent governments have developed “more and more sophisticated means of rigging elections,”²⁷¹ effectively preventing opposition candidates from taking control of the apparatus of government through peaceful means. It is very difficult for African countries to deepen and institutionalize democracy and produce political economies in which the aspirations of *Agenda 2063* can be successfully undertaken “when elections have been reduced into a process of participation with predictable results rather than a process of competition with uncertain results.”²⁷²

The opposition political party is considered a very important and “essential structural characteristic of modern liberal democracy.”²⁷³ Unfortunately, in today’s African countries, oppo-

Bodies in Africa: Cameroon’s ‘National Electoral Observatory’ in Perspective, 3 AFR. HUM. RTS. L. J. 25, 30–31 (2003) (examining various electoral malpractices by the Biya-led government in the Republic of Cameroon).

269. For example, through elections, citizens could deny recalcitrant and non-performing political elites the votes that they needed to stay in power. See, e.g., MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES, *supra* note 43, at 133.

270. *Id.*

271. Fombad, *Constitutional Reforms and Constitutionalism in Africa*, *supra* note 99, at 1022. Michael Bratton and Nicholas van de Walle have provided a list of several election malpractices that have been used by incumbents to maintain their monopoly on power. See MICHAEL BRATTON & NICHOLAS VAN DE WALLE, DEMOCRATIC EXPERIMENTS IN AFRICA: REGIME TRANSITIONS IN COMPARATIVE PERSPECTIVE 114 (1997) (examining, inter alia, election rigging by incumbent regimes, which include constitutional amendments, changes to electoral codes, and the declaration of states of emergency to avoid carrying out elections).

272. Fombad, *Constitutional Reforms and Constitutionalism in Africa*, *supra* note 99, at 1022.

273. *Id.*

sition political parties have not been able to function as essential contributors to the practice of constitutional government and constitutionalism. As argued by Mbaku, “[a]lthough opposition parties in Nigeria, Ghana, and Bénin Republic were able to successfully overthrow incumbent regimes through democratic elections in 2015 and 2016, opposition parties in other African countries have found it very difficult to overcome the impediments placed before them by their existing electoral systems.”²⁷⁴ One explanation for this is that many opposition political parties are often poorly organized and lack necessary financial resources to fund their campaigns and effectively bring their message to the voters.²⁷⁵ A second reason is that some opposition parties are simply “ethnic alliances or just opportunistic alliances set up by disgruntled former members of the ruling single party”²⁷⁶—these parties are either unwilling or unable to present an electoral platform that appeals to voters across the country. Such ethnic-based political parties are not likely, even if they win, to serve effectively as vehicles for the transformation and democratization of national politics. A third reason is that most of the continent’s opposition political parties are usually unable or unwilling to unite and present a viable candidate and platform to help them more effectively participate in the election.²⁷⁷ As evidenced by the 2018 presidential election in Cameroon, the opposition was divided and failed to pool its resources and mount a single effective cam-

274. MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES, *supra* note 43, at 267.

275. See, e.g., Mangasini Atanasi Katundu, *Why is Tanzanian Opposition Weak Twenty-Five Years Since Its Re-introduction?*, 13 AFR. J. POL. SC. & INT’L REL. 69, 69 (2018) (noting that opposition political parties in Tanzania “have remained both numerically institutionally weak and fragmented”).

276. Fombad, *Constitutional Reforms and Constitutionalism in Africa*, *supra* note 99, at 1022.

277. See, e.g., John Mukum Mbaku, *The Postponed DRC Elections: The Major Players for 2018*, BROOKINGS (Dec. 2, 2016), <https://www.brookings.edu/blog/africa-in-focus/2016/12/02/the-postponed-drc-elections-the-major-players-for-2018/> (noting that “[h]istorically, the Congolese opposition has been fractured and unable to unite under a single candidate who can mount a serious and effective campaign against the incumbent”). See also Calestous Juma, *Viewpoint: How Tribalism Stunts African Democracy*, BBC NEWS (Nov. 27, 2012), <https://www.bbc.com/news/world-africa-20465752> (noting that, during the last several years in Kenya, “[l]eaders of the different opposition parties [have been] primarily focused on pursuing their tribal interests rather than uniting around a common political program”).

paign.²⁷⁸ A fourth reason is that many opposition politicians are only interested in capturing the government in an effort to maximize their personal interests and those of the ethnocultural groups of which they are a member.²⁷⁹ This opportunistic approach to politics has significantly damaged political development in many African countries.

Finally, as argued by Fombad, “[m]any Africans seem to feel that the elections merely function to ‘enable[] self-seeking and greedy politicians to get jobs.’”²⁸⁰ As a consequence, African “voters are increasingly turned off by elections, allowing incumbents to inflate voter turn-out figures, sometimes to the extent that more voters are reported to have voted than were actually registered to vote in some polling stations.”²⁸¹ Throughout the continent, many of the African leaders and political parties that came into power in the early 1990s have made virtually no effort to deepen and institutionalize democracy. Instead, they have reduced democracy in their countries to elections, which they have manipulated to maintain a monopoly on power. Within such an institutional environment, it is not possible for the continent to carry out the aspirations of *Agenda 2063*.

Consider, for example, Aspiration One, which mandates “[a] prosperous Africa based on inclusive growth and sustainable development.”²⁸² According to this aspiration, the African continent is supposed to significantly improve the living standards of all Africans, regardless of their individual characteristics (e.g., ethnocultural or religious backgrounds) by 2063. Achieving this goal will require the creation of wealth through a process that is participatory and inclusive enough to benefit all of

278. See, e.g., Moki Edwin Kindzeka, *Cameroon's Opposition Fails to Present Candidate to Challenge Biya*, VOA NEWS (July 20, 2018), <https://www.voanews.com/a/cameroon-s-opposition-fails-to-present-candidate-to-challenge-president-biya/4490911.html>; *Cameroon Opposition Fails to Unite Ahead of Presidential Poll*, APR NEWS (REGIONAL PRESS AGENCY) (Sept. 22, 2018), <https://apr-news.fr/en/actualites/cameroon-opposition-fails-unite-ahead-presidential-poll>.

279. MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES, *supra* note 43, at 200.

280. Fombad, *Constitutional Reforms and Constitutionalism in Africa*, *supra* note 99, at 1023.

281. *Id.*

282. See AGENDA 2063, *supra* note 31, at 2.

each country's stakeholders.²⁸³ Yet, it is obvious that *inclusive* wealth creation cannot be undertaken in countries, such as South Sudan, Central African Republic, Libya, DRC, Cameroon, and Mali, that are consumed by high levels of ethnic-induced violence. Without peace, argues Mbaku, "it is virtually impossible to attract the investment (both foreign and domestic) needed to create wealth—continued political and economic instability has exacerbated capital flight and endangered economic growth and development" in all the countries listed above.²⁸⁴

The source of most of the violence that has pervaded countries such as Cameroon, Central African Republic, Libya, and South Sudan can be traced to destructive and violent mobilization by groups that believe that the central government is dominated and controlled by "their enemies[.]"²⁸⁵ These groups believe that central governments develop and implement policies that generate a lot of benefits for members of the ruling coalition, but marginalize and impoverish protesting groups.²⁸⁶ For example, in the Republic of Cameroon, Anglophones who have long argued that they were being politically and economically marginalized at the hands of the Francophone-dominated central government, have now taken up arms to fight government security forces that were sent to stop their peaceful protests.²⁸⁷ The confrontation between government forces and the Anglophone protesters began in November 2016, and by the fall of 2018, when the country held a presidential election, the international press was calling the situation a genocide against the Anglophone peoples.²⁸⁸

283. See, e.g., MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES, *supra* note 43, at 211.

284. *Id.* at 3.

285. *Id.* at 2.

286. *Id.*

287. John Mukum Mbaku, *International Law and the Anglophone Problem in Cameroon: Federalism, Secession or the Status Quo?*, 42 SUFFOLK TRANSNAT'L L. REV. 1, 122–23 (2019) (examining, inter alia, the decision by Cameroon's Anglophones to declare their independence).

288. Zongo, *supra* note 147. See also *Burning Cameroon: Images You're Not Meant To See*, BBC NEWS (June 25, 2018) <https://www.bbc.com/news/world-africa-44561929>; Moki Edwin Kindzeka, *Homes, Villages Burned as Cameroon Targets Separatists*, VOA NEWS (Oct. 25, 2018), <https://www.voanews.com/a/homes-villages-burned-as-cameroon-targets-separatists-/4629531.html>; Stephanie Busari, *Cameroon Security Forces Torturing English Speakers*,

Perhaps one way to approach this problem is to ask the following question: Why do people form a government? People form a government to protect their rights,²⁸⁹ provide themselves with necessary public goods and services,²⁹⁰ and create legal tools to undertake various activities to maximize their interests, as well as their values.²⁹¹ In addition to protecting human rights, the government can also provide the framework for regulations that enhance entrepreneurship and the creation of wealth that the country needs to eradicate poverty.²⁹²

A people can form a government and empower it through the constitution in order to guarantee and protect their rights. It is argued that the definition of fundamental rights “can be couched in the form of prohibitions or constraints on government, which are then expressly elaborated in the constitution.”²⁹³ Best argues, however, that the problem with this approach is that there can be “omission—either through lack of foresight or through failure to recognize the potential breadth and complexity of liberty.”²⁹⁴ Recognizing this problem, Americans have dealt with it through the Ninth Amendment, which states that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”²⁹⁵ In the US, the Ninth Amendment speaks to the fundamental truth of American constitutionalism and constitutional practice; namely, that in forming a government, the people retain the power to “define and refine their

Amnesty Says, CNN (GLOBAL) NEWS (June 11, 2018), <https://www.cnn.com/2018/06/11/africa/cameroon-anglophone-torture-amnesty-intl/index.html>.

289. These are rights, which have been defined by the people or their duly elected representatives and elaborated in the national constitution.

290. Examples of these public goods and services include police protection, national defense, public education, and basic health care. *See, e.g.*, FRED E. FOLDVARY, PUBLIC GOODS AND PRIVATE COMMUNITIES: THE MARKET PROVISION OF SOCIAL SERVICES 7 (1994) (examining, inter alia, the provision of public goods).

291. For example, a government can enhance the ability of citizens to engage in entrepreneurial activities to create wealth for themselves and to get married and raise a family. The government can also protect citizens from tyranny, either by government or non-government actors. *See, e.g.*, MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES, *supra* note 43, at 106.

292. *Id.* at 128.

293. *Id.*

294. Best, *supra* note 120, at 38.

295. U.S. CONST. amend. IX.

rights in time and place.”²⁹⁶ Best goes on to state that in order for the people to undertake this task, they must, during the construction of the constitution and the subsequent setting up of the government, retain a governing *process*.²⁹⁷ Such a governing process allows the people to actively participate in various aspects of governance, including adjusting it through replacing their governors (i.e., those who administer the governing process). By regularly and timely eliminating, through constitutional means, recalcitrant, inefficient and/or opportunistic civil servants and politicians, the people can minimize pervasive government impunity, which might lead to the need to take such extreme measures as abolishing the government and creating a new one.

3. Threats to peace and security and Agenda 2063

It would be virtually impossible for Africa, under the leadership of the AU, to meet its development goals as stated in *Agenda 2063* if most of its member states are unable to deal fully and effectively with threats to peace and security. Where there remain significant threats to peaceful coexistence—as is evident in Libya, Cameroon, Mali, DRC, Central African Republic, and South Sudan—it is not likely that each of these countries would be able to engage in the types of entrepreneurial activities that are needed to create the wealth necessary for poverty alleviation and eradication.²⁹⁸

296. Best, *supra* note 120, at 38.

297. *Id.*

298. Since 2011, Libya has been trapped in a state of perpetual civil war, as radical Islamist groups and secularists fight for control of the government. See, e.g., *The Battle For Libya's Southern Frontier: Gunmen Have Made A Fortune There As Mercenaries, Smugglers And Robbers*, ECONOMIST (Feb. 14, 2019), <https://www.economist.com/middle-east-and-africa/2019/02/16/the-battle-for-libyas-southern-frontier> (describing, inter alia, the descent of southern Libya into anarchy). See also The Associate Press, *US Forces Are Bombing Libya Again*, MILITARY TIMES (Feb. 14, 2019), <https://www.militarytimes.com/flashpoints/2019/02/14/us-and-libyan-forces-jointly-strike-al-qaida-militants/> (detailing the military activities of joint Libyan and US forces in their efforts to defeat al-Qaeda militants in southern Libya). Despite having signed several peace agreements since independence in 2011, peace and security continue to elude South Sudan as fighting between ethnic-based rival political factions continues. See, e.g., Adam Valavanis, *Another Hollow Peace Deal Signed in South Sudan*, COUNCIL ON FOREIGN REL. (Sept. 26, 2018), <https://www.cfr.org/blog/another-hollow-peace-deal-signed-south-sudan> (arguing, inter alia, that despite the peace agreement signed on September

What is the source of the threats to peace and security in Africa today? The threat comes from both state and non-state actors, as well as from other groups outside the country. In light of this, how can citizens of a country secure their rights and make certain that they are fully protected against abuse by various actors, including those who serve in government? As constitutional scholars argue, these rights “can only be secured by the people employing a properly structured governing process.”²⁹⁹ Nevertheless, Best cautions that “parchment prohibitions,” such as a bill of rights, are not enough to secure fundamental rights and ensure the practice of constitutionalism and constitutional government.³⁰⁰

Within each African country, securing citizens’ rights and making sure that they are fully protected requires much more than just including a bill of rights in the national constitution or elaborating these rights in the constitution. Each country must provide itself with a “strong, effective, and competent government[], while at the same time [allowing the people to retain] the ability to control [the government] so that [it does not] act with impunity and engage in various forms of opportunism, which include corruption, financial malfeasance, and the violation of the rights of citizens.”³⁰¹

Recall the question posed by James Madison, a Founding Father and fourth president of the US from 1809–1817:³⁰² “But what is Government itself, but the greatest of all reflections on

12, 2018 between President Salva Kiir and former Vice President and opposition leader Riek Machar, peace remains a “distant hope” in South Sudan).

299. Best, *supra* note 120, at 38. *See also* THE FEDERALIST NO. 48 (James Madison) (noting that “parchment barriers” are not enough to protect or secure individual liberties and minimize abuse of power, and thus “some more adequate defense is indispensably necessary for the more feeble, against the more powerful, members of government”).

300. Best, *supra* note 120, at 38.

301. MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES, *supra* note 43, at 129.

302. James Madison is considered the Father of the U.S. Constitution, specifically, Father of the Bill of Rights. *See generally* BRENT KELLEY, JAMES MADISON: FATHER OF THE CONSTITUTION (2013) (recognizing James Madison as father of the U.S. Constitution). *See also* CHRIS DE ROSE, FOUNDING RIVALS, MADISON VS. MONROE: THE BILL OF RIGHTS AND THE ELECTION THAT SAVED A NATION (2013) (recognizing the role played by Madison in the production of the Bill of Rights).

human nature?"³⁰³ Madison then proceeds to state that "[i]f men were angels, no Government would be necessary. If angels were to govern men, neither external nor internal controls on Government would be necessary."³⁰⁴ Thus, he argues, "[i]n framing a Government which is to be administered by men over men, the great difficulty lies in this: you must first enable the Government to control the governed; and in the next place oblige it to control itself."³⁰⁵ Madison goes on to posit that "[a] dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions."³⁰⁶

In a society in which a competent and effective governing process does not exist, and where citizens do not have the legal and institutional mechanisms to restrain their government—as is presently the case in many African countries—government impunity is pervasive. Citizens are thus forced to rely on alternative means (e.g., vigilante groups or ethnocultural associations) to protect their person and property. As argued by Best, unless these people are “strong, smart, and above all lucky,” they are unlikely to be able to secure their own rights.³⁰⁷ Few African governments are well-constrained by their existing laws and institutions, and as a consequence, the people who serve in them (i.e., civil servants and political elites) abuse their public positions and engage in various activities³⁰⁸ to maximize their personal interests at the expense of their fellow citizens. In the process, the rights of many citizens, especially those of religious and ethnic minorities, are violated or derogated.³⁰⁹

303. THE FEDERALIST NO. 50, at 358, 360 (James Madison) (Henry B. Dawson ed., 1868).

304. *Id.*

305. *Id.*

306. *Id.*

307. MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES, *supra* note 43, at 129.

308. For example, they engage in corrupt activities to extract extra-legal income and other benefits for themselves and their benefactors. *See, e.g.*, MBAKU, CORRUPTION IN AFRICA, *supra* note 144, at 37 (examining, inter alia, the engagement of civil servants and political elites in Africa in corrupt activities).

309. MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES, *supra* note 43, at 130.

Throughout the continent, the fact that many governments either do not have the capacity or are unwilling to protect fundamental rights has manifested in the desire of many groups within Africa to resort to so-called “self-help” projects to protect themselves and their property.³¹⁰ The US Founding Fathers were quite aware of the problems posed by poorly or inadequately constrained governments, especially with regard to the protection of fundamental rights. As a consequence, they “put their faith in a governing process and not in a set of parchment prohibitions.”³¹¹ The situation in most African countries today, unfortunately, is marked by an inability to form strong, effective, and competent governments. Instead, many states remain saddled with “relatively weak and inefficient governments with bloated, highly non-productive, and parasitic bureaucracies.”³¹² Within such governing processes, it is not possible to carry out the aspirations elaborated in *Agenda 2063*.³¹³

E. African Governments Must be Based on Consent

For Africans to successfully undertake the aspirations presented in *Agenda 2063*, each country must be provided with a government that derives its legitimacy to govern, not just from the constitution, but also from the people (i.e., the governed). An important task of Africa’s “Founding Fathers”—that is, those who captured the evacuated structures of colonial hegemony—was to “form governments that were strong enough to perform their constitutionally-assigned functions, which included safeguarding the fundamental rights of all citizens.”³¹⁴ These new post-independence governments were also supposed to be fully and adequately constrained by the law so that state custodians³¹⁵ would not abuse their positions and act with im-

310. See e.g., DOMESTICATING VIGILANTISM IN AFRICA: SOUTH AFRICA, NIGERIA, BENIN, CÔTE D’IVOIRE, BURKINA FASO (Thomas G. Kirsch & Tilo Grätz eds., 2010) (examining the emergence of vigilantism as a law-enforcing mechanism in various communities in Africa where state security is usually absent).

311. Best, *supra* note 120, at 38.

312. MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES, *supra* note 43, at 130.

313. See AGENDA 2063, *supra* note 31, at 2–10.

314. MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES, *supra* note 43, at 130.

315. As used in this article, “state custodians” refers to civil servants (bureaucrats) and political elites (politicians). See, e.g., *id.* at 30.

punity.³¹⁶ Unfortunately, Africa's post-independence constitutional drafters failed to produce constitutions that were capable of adequately constraining the state and serving as effective foundations "for strong, robust, and adequately-constrained governments."³¹⁷ For example, Fombad has argued that the "purported separation of powers in the 1996 [amended] constitution [of the Republic of Cameroon] is purely symbolic."³¹⁸

Those who drafted the US Constitution in 1787³¹⁹ believed very strongly that government had to "stand on the original and ongoing consent of the governed."³²⁰ The founders adopted a republican form of government that, especially as it relates to the US, is defined by James Madison in *Federalist Number 39*. He stated as follows:

If we resort for a criterion to the different principles on which different forms of government are established, we may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior. It is *essential* to such a government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it; otherwise a handful of tyrannical nobles, exercising their op-

316. See also Mbaku, *International Law and the Struggle Against Government Impunity in Africa*, *supra* note 59 (examining, inter alia, the struggle to eradicate government impunity in African countries).

317. MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES, *supra* note 43, at 130.

318. Fombad, *Constitutional Reforms and Constitutionalism in Africa*, *supra* note 99, at 1017. See also Charles M. Fombad, *Protecting Constitutional Values in Africa: A Comparison of Botswana and Cameroon*, 36 COMP. & INT'L L. J. S. AFR. 83, 94-97 (2003) (examining, inter alia, the nature and effectiveness of separation-of-powers regimes in the constitutions of Botswana and Cameroon). This problem, of course, is not unique to Cameroon. It is a problem that affects many other countries in the continent. *Id.*

319. The drafting of the US Constitution began on May 25, 1787, when the Constitutional Convention met for the first time with a quorum at what was then the Pennsylvania State House (but which is now Independence Hall) in Philadelphia. The delegates met to revise the Articles of Confederation and worked until September 17, 1787. For example, see RICHARD BEEMAN, PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION (2009) for an examination of the events surrounding the drafting of the US Constitution during the summer of 1787.

320. Best, *supra* note 120, at 39.

pressions by a delegation of their powers, might aspire to the rank of republicans, and claim for their government the honorable title of republic.³²¹

Madison argued further that:

[i]t is *sufficient* for such a government that the persons administering it be appointed, either directly or indirectly, by the people; and that they hold their appointments by either of the tenures just specified otherwise; every government in the United States, as well as every other popular government that has been or can be well organized or well executed, would be degraded from the republican character.³²²

If a government derives its powers and legitimacy³²³ to govern from the “great body of the society”³²⁴ and not from “an inconsiderable proportion,”³²⁵ then those who govern the country are “kept dependent upon the people themselves and not on some specially favored class.”³²⁶ The people, at the time they draft the constitution and set up a government, reserve to themselves the right and power to judge and discipline their governors—if, where, and when necessary. Thus, the people may, for example, make regular, free, and fair elections an essential part of the governing process. In addition to using elections to change the government, the people can also use governing processes to discipline poorly performing, ineffective, and recalcitrant individuals who serve in government.³²⁷

Most of the governments that were established in African countries throughout the post-independence period were not dependent on the people, nor did they derive their powers and legitimacy to govern from the people. One reason for this was

321. THE FEDERALIST NO. 39, at 80 (James Madison) (Michael A. Genovese ed., 2009) (emphasis in original). James Madison’s *Federalist No. 39* was originally published in the *Independent Journal*, Wednesday, January 16, 1788.

322. *Id.* (emphasis in original).

323. As used here, legitimacy refers “either to acceptable reasons for the permissible uses of coercive power or to acceptable reasons for being obliged to obey the state.” Ludvig Beckman, *Deciding the Demos: Three Conceptions of Democratic Legitimacy*, 22 CRITICAL REV. INT’L SOC. & POL. PHIL. 412, 413 (2019).

324. MADISON, FEDERALIST NO. 39, *supra* note 321.

325. *Id.*

326. Best, *supra* note 120, at 39.

327. See, e.g., *id.* at 40.

because the constitution-drafting process, which produced the constitutions that set up these governments, was not participatory or inclusive enough to allow all of each country's relevant stakeholder groups to participate fully and effectively in the selection of post-independence laws and institutions.³²⁸

A second reason for this was because, in the period following independence, many of Africa's militaries intervened in government and proceeded to discard what had been poorly-designed constitutions in order to rule by decree.³²⁹ Speaking of constitutions in post-independence Africa, LeVine argued that "what neither the British nor the French expected was the speed with which the independence constitutions, and more often than not their premises, were soon modified, altered, or simply abandoned."³³⁰ LeVine asks, "[w]hy were the independence constitutions of the West African states, . . . soon left behind, abandoned, or abrogated?"³³¹ He then provides five answers to this question. He argues that the ease with which many political elites in West Africa discarded their constitutions can be explained by (1) their desire to create constitutional orders that matched their personal political ambitions;³³² (2) the determination of those who had captured power from the departing colonialists to entrench themselves and maintain a monopoly on power;³³³ (3) the need for the ruling elites to provide themselves with institutional arrangements, which they believed would allow them to "confront pressing social, economic, and political problems";³³⁴ (4) the need to rid the new countries of any "legal-constitutional traces of the past";³³⁵ and (5) "the disenchantment and impatience with democratic processes (more on the part of the leaders than their publics) that were often seen as an impediment to the consolidation of authority and the rapid achievement of national goals[.]"³³⁶

328. See, e.g., John Mukum Mbaku, *Constitutionalism and the Transition to Democratic Governance in Africa*, in *THE TRANSITION TO DEMOCRATIC GOVERNANCE IN AFRICA: THE CONTINUING STRUGGLE* 103, 109–11 (John Mukum Mbaku & Julius O. Ihonvbere eds., 2003).

329. See e.g. LeVine, *supra* note 115, at 188.

330. *Id.* at 186.

331. *Id.* at 187.

332. *Id.* at 188.

333. *Id.*

334. *Id.* at 188.

335. *Id.*

336. *Id.*

A third reason is that some post-independence governments in Africa undertook what were essentially opportunistic constitutional reforms, all of which were designed to create “imperial” or “re-enforced” presidencies.³³⁷ Such executive branches could be found, for example, in Cameroon, Côte d’Ivoire, Guinea, Mauritania, and Senegal.³³⁸ Fourth, some African countries flirted with socialism and adopted an approach to governance that came to be known as “African socialism,” with their governments often referred to as “Afro-Marxist” regimes.³³⁹ Included among these regimes were Angola, Benin, Burkina Faso, Republic of Congo (Congo-Brazzaville), Ethiopia, Madagascar, and Mozambique.³⁴⁰ In these Marxist regimes, many of which were led by military officers, governance was not any more dependent on “the great body of the society” than it was in the continent’s other dysfunctional governmental regimes.³⁴¹ Finally, several countries in the continent opted for one-party political systems, in which “the people were not able to use regular and fair elections to discipline recalcitrant or poorly performing politicians.”³⁴² These one-party systems were established in Cameroon, Côte d’Ivoire, Gabon, Guinea, Malawi, Mauritania, Senegal, Tanzania, and Zambia.³⁴³

Best argues that the republican principle, which is characterized by “free and frequent elections,”³⁴⁴ formalizes the concept of “ongoing consent” and effectively “forces consent to become a formal and explicit part of constitutional practice.”³⁴⁵ Through such a process, the need for governors to obtain the consent of the people in order to secure the power and legitimacy to gov-

337. MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES, *supra* note 43, at 139.

338. *Id.* at 133. *See also* LeVine, *supra* note 115, at 189 (noting, inter alia, the evolution of so-called re-enforced presidencies in the Francophone African countries).

339. MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES, *supra* note 43, at 133. *See also* MILITARY MARXIST REGIMES IN AFRICA 123 (John Markakis and Michael Waller eds., 1986) (examining, inter alia, Africa’s Afro-Marxist regimes).

340. LeVine, *supra* note 115, at 191.

341. MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES, *supra* note 43, at 133.

342. *Id.*

343. *Id.*

344. Best, *supra* note 120, at 40.

345. MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES, *supra* note 43, at 133.

ern "is no longer a rare and infrequent activity[,] but one that is omnipresent and considered an essential part of governance."³⁴⁶

Some constitutional and governance experts have argued, however, that this republican solution to the problem of government tyranny generally, and the abuse of presidential power in particular, is a necessary but insufficient condition for minimizing impunity and safeguarding liberty and fundamental rights.³⁴⁷ Within any nation or community of free peoples, it is argued, there is likely to be "factionalism"—that is, "interest groups or factions with interests that may not necessarily be in line with those of the community."³⁴⁸ In *Federalist Number 10*, James Madison provides a mechanism to deal with "domestic faction and insurrection," which he calls the "large republic."³⁴⁹ A large republic or union (e.g., the US), as opposed to a small one (e.g., a state or province), would "more effectively balance and check competing interests and provide a framework for the maximization of the interests of the whole community."³⁵⁰

During most of the post-independence period in Africa, the struggle between various factions—primarily ethnocultural groups—to capture and control the apparatus of government emerged as one of the most important constraints to governance generally, and economic growth and development in particular. In the absence of effective institutional mechanisms "to regulate [economic and political] competition and make certain that it is undertaken fairly, large ethnocultural majorities have dominated both political and economic markets, effectively marginalizing minorities and relegating the latter to the economic and political periphery."³⁵¹ The outcome has been that ethnocultural groups that are actually marginalized, or per-

346. *Id.*

347. Best, *supra* note 120, at 40. See also THE FEDERALIST NO. 10 (James Madison); MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES, *supra* note 43, at 133.

348. MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES, *supra* note 43, at 133.

349. *The Federalist No. 10* was James Madison's first essay and it was originally published in the *Daily Advertiser*, Thursday, November 22, 1787. THE FEDERALIST NO. 10 (James Madison). See also THE FEDERALIST NO. 9 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

350. MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES, *supra* note 43, at 133.

351. *Id.* at 133–34.

ceive themselves to be marginalized, have opted for violent and, in many cases, destructive mobilization.³⁵² The latter has produced civil wars in many of these countries, and has become a major threat to the peace and security that are a *sine qua non* for entrepreneurial activities and creation of the wealth that these countries need to confront poverty.³⁵³ It is not likely that the AU will be able to successfully undertake the aspirations elaborated in *Agenda 2063* within institutional environments that are pervaded by violent ethnic mobilization.

Can African countries, particularly those that are characterized by significant levels of ethnocultural diversity, employ James Madison's concept of the large republic to manage that diversity, enhance peaceful coexistence, and minimize the type of political violence that has become a major constraint to the creation of wealth and poverty alleviation? For virtually all African countries, the main public policy issue, as it was for the US at its founding, is how to structure government and constitutionally constrain it so that it would not be easily captured by a large majority and used to maximize their interests at the expense of other groups. In other words, how can each African country set up a government that maximizes and advances the interests of all citizens?³⁵⁴

It has been argued that constitutional federalism can be the answer to this political quagmire.³⁵⁵ A federal system of gov-

352. *Id.* at 158.

353. Recent examples include civil wars in Central African Republic, Libya, Liberia, Sierra Leone, and South Sudan. Since 2016, Cameroon's Anglophones, who have been complaining about their marginalization at the hands of the Francophone-dominated central government, have been involved in a violent struggle with the central government over the issue of self-determination. The confrontation, which began with peaceful demonstrations by Anglophone teachers and lawyers, has deteriorated into outright war. This is due primarily to the fact that the central government refused to engage in dialogue with the protesting Anglophones and, instead, sent security forces into the Anglophone Regions (Northwest and Southwest Regions), killing protesters and burning down their villages. *See, e.g., Burning Cameroon: Images You're Not Meant To See*, *supra* note 288; Moki Edwin Kindzeka, *Cameroon Police Arrest More Than 100 in Anti-Biya Protests*, VOA NEWS (Jan. 27, 2019), <https://www.voanews.com/a/cameroon-police-arrest-more-than-100-in-anti-biya-protests/4760665.html>.

354. MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES, *supra* note 43, at 135.

355. *See id.* at 203. *See also* Donald Rothchild, *The Limits of Federalism: An Examination of Political Institutional Transfer in Africa*, 4 J. MOD. AFR. STUD.

ernment—if armed with separation of powers with effective checks and balances, including especially judicial independence—can provide each ethnocultural group with the wherewithal to manage its own affairs, maximize its values, and create the wealth that it needs to fight poverty, without preventing other groups from acting similarly. Through such an institutional system, each group will also be able to participate fully and effectively in decision making at the federal level through its elected representatives. At the federal level, the constitutional system must be one that can prevent any one group from vetoing any policies that do not affect it or its members, but which are important to other groups and their welfare.³⁵⁶

Of course, securing peace and security, it has been argued, requires not just a “form of majority rule but also minority consent to that rule.”³⁵⁷ When, however, will a minority group acquiesce or grant the necessary consent? As Best argues, the minority will only voluntarily grant consent if it “can see that on some issues important to it and on some occasions, it can be part of the majority.”³⁵⁸ There must be a mechanism that can allow the minority to fully “articulate its interests and issues and present them for inclusion in the majority.”³⁵⁹ Best argues that this mechanism is the “rule of the concurrent majority[.]”³⁶⁰ that it is characterized by “shifting alliances[.]”³⁶¹ and it “provides a minority with the opportunity to be part of the majority some of the time and thus functions to secure minority consent.”³⁶²

Nevertheless, for such an institutional system to function and guarantee that issues of concern to the minority will be fully incorporated into the majority agenda, the country’s governing process must be set up so that it can effectively utilize all the

275 (1966) (noting that many of Africa’s post-independence elites considered federalism “an effective way of reconciling unity and diversity” and avoiding the “the extreme of overcentralization seemingly implicit in unitary government as well as the risks of disintegration which continually threaten multi-lateral economic and military communities”).

356. *Id.*

357. Best, *supra* note 120, at 44.

358. *Id.*

359. MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES, *supra* note 43, at 135.

360. Best, *supra* note 120, at 44.

361. *Id.*

362. *Id.*

various coalitions.³⁶³ A constitutionally established federal system of government can provide the tools needed to enhance minority participation in governance generally and public policy in particular, “for they are the instruments of the new science of faction that converts this human weakness into a political strength. They institutionalize rivalry: they sift and screen the contestants, schedule competition, arrange and supervise the contests.”³⁶⁴

In *Federalist Number 51*, James Madison argued that an effective federal system of government was a major constraint to or barrier against the tyranny of the majority.³⁶⁵ Madison argued that within a federal republic, while “all authority in it will be derived from and dependent on the society, the society itself will be broken into so many parts, interests, and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority.”³⁶⁶ For each African country, federalism can offer many benefits. As argued by Best, within a federal system of government, there is:

a more moderate, less ideological politics, one that is extremely sensitive to local needs, one that recognizes that those who share the same schools and roads, the same climate and natural resources and local economy, have common interests. But it is a process that not only recognizes the needs of those who live in close proximity; it also reflects the views and interests of broad cross sections of the country, because the districted division is not simply geographic.³⁶⁷

Thus, a federal system of government can provide each African country with the tools to effectively manage diversity, minimize ethnic-induced violence, and enhance wealth creation, economic growth, and development. Most importantly, such a system can significantly enhance peace and security and provide an institutional environment that is more conducive to the carrying out of the aspirations of *Agenda 2063*.

363. *Id.*

364. *Id.*

365. THE FEDERALIST NO. 51, at 120 (James Madison) (Bob Blaisdell ed., 2001).

366. *Id.* at 123.

367. Best, *supra* note 120, at 45.

F. The Separation of Powers as a Tool Against the Tyranny of the Majority

Over the years, the constitutional principle of the separation of powers has emerged as an effective mechanism for minimizing and, indeed, preventing government tyranny. Centuries ago, John Locke argued that those individuals who make the laws must not also be the ones who execute or enforce them, stating that

it may be too great temptation to human frailty, apt to grasp at power, for the same persons who have the power of making laws to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make, and suit the law, both in its making and execution, to their own private advantage, and thereby come to have a distinct interest from the rest of the community, contrary to the end of society and government.³⁶⁸

French jurist and political philosopher Charles-Louis de Secondat,³⁶⁹ known as the Baron de Montesquieu, is generally considered the father of the modern theory of the separation of powers—the one that was relied on by the founders of the US. He separated the powers of the government into three distinct categories, namely the (1) legislative; (2) executive; and (3) judicial.³⁷⁰ Montesquieu then argued that the individuals who hold public or government power are likely to engage in opportunistic behaviors to extract benefits for themselves and hence, would seek absolute power.³⁷¹ He posited that one way to minimize such abuse of power was to make certain that those who served in government were adequately constrained and sug-

368. JOHN LOCKE & ROBERT FILMER, TWO TREATISES ON CIVIL GOVERNMENT: PRECEDED BY SIR ROBERT FILMER'S PATRIARCHE" 267 (1884).

369. Charles-Louis de Secondat was an eighteenth-century philosopher and political theorist who championed freedom, toleration, moderation, and constitutional government. See, e.g., Paul Carresse, *Montesquieu, Charles-Louis de Secondat, Baron de (1689–1757)*, in THE ENCYCLOPEDIA OF POLITICAL THOUGHT 1 (Michael T. Gibbons ed., 2015).

370. BARON DE MONTESQUIEU, THE SPIRIT OF LAWS: BOOK XI, TRANSLATED FROM THE FRENCH BY THOMAS NUGENT, WITH AN INTRODUCTION BY FRANZ NEUMANN, TWO VOLUMES IN ONE 149–82 (1949 [1750]).

371. *Id.* at 150–60.

gested a system of “checks” and “balances” as a way to minimize abuse of public power.³⁷²

As has been argued by modern scholars of constitutional government, an important objective of separating powers is to prevent the majority from tyrannizing the minority.³⁷³ This can be accomplished by “dividing the national government into three distinct branches having shared powers.”³⁷⁴ The next step is to establish modalities to select individuals to serve in each of the branches of government. Best states that the process of selecting officials to serve in government must be undertaken in “different ways, by different coalitions of people, for different terms of office,”³⁷⁵ and through this process, “the ability of the majority to transform its will into law is slowed significantly,”³⁷⁶ making certain that minority interests are not neglected or kept out of the national agenda.

The experiences of the Republic of Cameroon with post-1990 constitutional reforms show that efforts to institutionalize separation of powers have not yielded positive outcomes. Thus, the concept, as it is in many other African countries, is simply an abstract constitutional construct that has virtually no practical application.³⁷⁷ For example, despite the fact that Cameroon’s constitution mandates that “[t]he Judicial Power shall be independent of the executive and legislative powers,” the executive—as embodied in the President of the Republic—dominates and controls the other branches of government.³⁷⁸ This is first evidenced by the constitution granting the president the power to “guarantee the independence of judicial power,” which he is expected to accomplish by appointing “members of the bench and for the legal department.”³⁷⁹ In practice, however, this power has allowed the president to force members of the judi-

372. *Id.*

373. Best, *supra* note 120, at 46.

374. *Id.* Within a federal system, the governments of subnational units (e.g., states or provinces) should also be divided into three distinct branches—executive, legislative, and judicial). *Id.*

375. *Id.*

376. MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES, *supra* note 43, at 137.

377. *Id.* See also Mbaku, *Judicial Independence*, *supra* note 200 (examining the extent of judicial independence in Cameroon).

378. CONSTITUTION OF THE REPUBLIC OF CAMEROON (1996 as amended through 2008), § 37(2).

379. *Id.* at art. 37(3).

ary to serve at his will. Fombad argues that “although it is ostensibly a regime of separation of powers based on cooperation and collaboration between the three organs of power, the exorbitant powers conferred on the executive, especially on the President of the Republic, enable the latter to completely dominate the other two powers.”³⁸⁰

Second, the lack of separation of powers is evidenced in the 1996 Constitution of Cameroon, which provided for a Constitutional Council (CC) and granted it the power to determine the constitutionality of laws.³⁸¹ The CC, however, is unable to fully exercise its independence because, in Article 51 of the same constitution, the president is granted the power to appoint members of the CC.³⁸² As argued by Fombad:

There is nothing that prevents the President of the Republic from appointing stooges and other associates whom he/she can easily manipulate [to the CC]. It is therefore difficult to see how a body that is likely going to be composed of persons appointed because of their political loyalty can act impartially and independently.³⁸³

Additionally, the CC can only decide issues referred to it by the government.³⁸⁴

Third, Cameroon’s Supreme Court, the country’s highest court, does not have an independent existence.³⁸⁵ It is located

380. CHARLES MANGA FOMBAD, *CONSTITUTIONAL LAW IN CAMEROON* 36 (2012).

381. CONSTITUTION OF THE REPUBLIC OF CAMEROON (1996 as amended through 2008), § 46; It states as follows: “The Constitutional Council shall have jurisdiction in matters pertaining to the Constitution. It shall rule on the constitutionality of laws. It shall be the organ regulating the functioning of the institutions.” *Id.*

382. *Id.*, art. 51.

383. See FOMBAD, *CONSTITUTIONAL LAW IN CAMEROON*, *supra* note 380, at 157, ¶ 280.

384. Constitution of the Republic of Cameroon, 1996 (as amended through 2008), Art. 46–52. See also Charles Manga Fombad, *The New Cameroonian Constitutional Council in a Comparative Perspective: Progress or Retrogression?*, 42 J. AFR. L. 172, 179–80 (1998) (examining, inter alia, the relative ineffectiveness of the Constitutional Council of Cameroon).

385. See, e.g., Charles Manga Fombad, *Endemic Corruption in Cameroon: Insights on Consequences and Control*, in CORRUPTION AND DEVELOPMENT IN AFRICA: LESSONS FROM COUNTRY CASE-STUDIES 234, 247 (2000) (noting that “[w]hat has in effect happened is that the Cameroonian judiciary has been reduced to allies and partners of the executive in enjoying the spoils of power”). See also U.S. Dep’t of State, *2019 Country Reports on Human Rights*

within the Ministry of Justice, which is a cabinet department within the Presidency of the Republic.³⁸⁶ Fombad argues that “the 1996 [constitutional] amendment did not add anything substantive to the pre-existing practice which lends any credence to the existence of a separate and independent judiciary in Cameroon.”³⁸⁷ According to a report on the human rights situation in Cameroon in 2009, the US Department of State determined that, while the Cameroonian “constitution and law provide for an independent judiciary,” nevertheless, “the judiciary remained subject to executive influence, and corruption and inefficiency remained serious problems.”³⁸⁸

The report also states that “[t]he court system is subordinate to the Ministry of Justice,” and “the constitution names the president as ‘first magistrate,’ thus ‘chief’ of the judiciary and the theoretical arbiter of any sanctions against the judiciary.”³⁸⁹ Under the system that exists in Cameroon today, argues Fombad, there are no effective constraints against the president’s ability to pack the courts with individuals that he can control and manipulate. It is difficult to see how such a politicized body can function impartially and independently.³⁹⁰

Fourth, separation of powers is undercut by the fact that Cameroon’s president has the power to dissolve the National Assembly, one of the chambers of the legislature. According to Article 8 of the Constitution of the Republic of Cameroon, “[t]he President of the Republic may, if necessary and after consultation with the Government, the Bureaux of the National Assembly and the Senate, dissolve the National Assembly.”³⁹¹ The ex-

Practices: Cameroon, <https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/cameroon/> (noting that “[d]espite the judiciary’s partial independence from the executive and legislative branches, the president appoints all members of the bench and legal department of the judicial branch, including the president of the Supreme Court, and may dismiss them at will”).

386. See MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES, *supra* note 43, at 137.

387. Fombad, *Endemic Corruption in Cameroon*, *supra* note 385, at 234, 247 (2000).

388. U.S. DEP’T OF STATE DIPLOMACY IN ACTION, 2009 HUMAN RIGHTS REPORT: CAMEROON § (1)(e) (2010), <https://www.state.gov/j/drl/rls/hrrpt/2009/af/135942.htm>.

389. *Id.*

390. FOMBAD, CONSTITUTIONAL LAW IN CAMEROON, *supra* note 380, at 157.

391. CONSTITUTION OF THE REPUBLIC OF CAMEROON (1996 as amended through 2008), § 8(12).

istence of such enormous power has significantly enhanced the ability of the president to control the National Assembly and get it to carry out his will. President Biya utilized that power to get the National Assembly to amend the constitution in 2008 to clear the way for him to run for a third term in office.³⁹²

Finally, while judicial independence is a complex and multifaceted concept, it requires that, at the very least, judicial officers be granted “security of tenure,” “financial security,” and “institutional independence.”³⁹³ In Cameroon, the Supreme Court is located within the Ministry of Justice, and, hence, its funding is controlled by the President of the Republic, who may use that power to manipulate judicial officers.³⁹⁴ Fombad concludes that “the Cameroonian judiciary has been reduced to allies and partners of the executive in enjoying the spoils of power. The judiciary, . . . in spite of the constitution, plays a vital role in the electoral process.”³⁹⁵ He added that, as Cameroon prepared for the 1996 and 1997 general elections, the President of the Republic issued a decree doubling judicial salaries, “and in the case of Supreme Court judges, [there was] an increase of almost 200 per cent [which came] with numerous perks and privileges.”³⁹⁶ In Cameroon, “[j]udges preside over the divisional election supervisory and vote-counting commissions which tabulate election results, which are often sent to the national vote-counting commission.”³⁹⁷

When the US Department of State issued its report on human rights in Cameroon in 2017, it indicated that the judiciary remains firmly under the control of the President of the Republic.³⁹⁸ Of course, Cameroon is not the only African country where the separation-of-powers doctrine is feigned, but not real. Except for a few countries—notably South Africa, Mauritius, and Botswana—most African countries either do not have

392. See Tansa Musa, *Cameroon Assembly Clears Way for Biya Third Term*, REUTERS (April 10, 2008), <https://www.reuters.com/article/idUSL10840480>.

393. *Valente v. The Queen* [1985] 2 S.C.R. 673, paras. 27, 40, 47 (Can.). This is the Supreme Court of Canada case that set the minimum standards for judicial independence in Canada.

394. Fombad, *Endemic Corruption in Cameroon*, *supra* note 385, at 247–48.

395. *Id.*

396. *Id.* at 248.

397. *Id.*

398. U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, 2017 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: CAMEROON (2018), <https://www.state.gov/wp-content/uploads/2019/01/Cameroon.pdf>.

truly independent judiciaries or are still struggling to establish them.³⁹⁹

III. LEGAL AND INSTITUTIONAL REFORMS NECESSARY FOR THE IMPLEMENTATION OF *AGENDA 2063*

What exactly are the institutional, structural, and other changes that each African country must make in order to provide an enabling environment for the successful implementation of *Agenda 2063*? Consider Aspiration One, for example, which seeks to establish “[a] prosperous Africa based on inclusive growth and sustainable development” by the year 2063.⁴⁰⁰ Specifically, Aspiration One seeks to fully “eradicate poverty in one generation and build shared prosperity through social and economic transformation of the continent.”⁴⁰¹ In doing so, Africans also intend to work with other international actors to address various threats to international peace and security, such as climate change.⁴⁰² Nevertheless, Africans would not be able to meet any of the aspirations elaborated in *Agenda 2063*, including dealing fully with poverty and improving their living standards, unless they provide themselves with the appropriate institutional structures.

At the very least, each African country must arm itself with institutions that enhance, strengthen, and deepen the practice of constitutional government and constitutionalism, democracy, and good governance. Specifically, each country must (1) guarantee the right to fair, transparent, credible, and free elections; (2) constitutionally entrench the “key principles and institutions of accountability”;⁴⁰³ (3) rid themselves of imperial presidencies; (4) make a concerted commitment to fight impunity and improve the recognition and protection of human and peoples’ rights; (5) make the fight against poverty a public policy priority; (6) provide a constitutional amendment process that cannot easily be manipulated by opportunistic political elites for their own benefit; (7) enhance the development of a robust

399. See generally WAHAB O. EGBEWOLE, JUDICIAL INDEPENDENCE IN AFRICA (2017) (examining judicial independence and issues associated with it in Africa).

400. See *AGENDA 2063*, *supra* note 31, at 2–10.

401. *Id.* at 2, ¶ 9.

402. *Id.* at 2, ¶¶ 15–18.

403. Fombad, *Constitutional Reforms and Constitutionalism in Africa*, *supra* note 99, at 1035.

civil society that is politically active, supports constitutionalism, and can serve effectively as a check on the exercise of government power, including potential presidential abuse of power; and (8) provide a truly independent judiciary, one that is firmly committed to the practice of constitutionalism and constitutional government.

A. Guaranteeing the Right to Free, Fair, Transparent, and Credible Elections and Other Political Rights

A very important part of a functioning democratic system is regular or periodic elections. According to Tatu Vanhanen,⁴⁰⁴ democracy is a “political system in which ideologically and socially different groups are legally entitled to compete for political power and in which institutional power holders are elected by the people and are responsible to the people.”⁴⁰⁵ Seymour Martin Lipset argues that democracy is “[a]n institutional arrangement in which all adult individuals have the power to vote, through free and fair competitive elections, for their chief executive and national legislature.”⁴⁰⁶ Hence, “democracy is a system of political rights that specifies how leadership should be designated at the highest national level in a polity.”⁴⁰⁷ In Lipset’s definition of democracy, therefore, elections are considered an important mechanism used by the people to select individuals to serve in the government, as well as to remove recalcitrant and poorly-performing public officials from their offices.⁴⁰⁸

Dahl also emphasizes elections as part of his definition of political democracy. He states, for example, “that elections are a crucial device for controlling leaders.”⁴⁰⁹ Dahl goes further and provides criteria that can be used to determine how democratic an election is. First, every single vote cast during an election

404. Tatu Vanhanen was a professor of political science at the University of Tampere (Tampere, Finland) who specialized in the study of democracy and democratization. See, e.g., TATU VANHANEN, *DEMOCRATIZATION: A COMPARATIVE ANALYSIS OF 170 COUNTRIES* 49 (2003).

405. *Id.* at 49.

406. SEYMOUR MARTIN LIPSET & JASON M. LAKIN, *THE DEMOCRATIC CENTURY* 19 (2004).

407. *Id.* at 19.

408. MBAKU, *PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES*, *supra* note 43, at 148.

409. ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* 131 (1956).

must be granted equal weight. In the 1950s, Dahl and Charles E. Lindblom, while discussing “political equality,” argued that “[c]ontrol over governmental decisions is shared so that the preferences of no one citizen are weighted more heavily than the preferences of any other one citizen.”⁴¹⁰ They went on to argue that “[i]n elections the vote of each member has about the same weight.”⁴¹¹

Second, information about the choices to be decided by the election should be made available to all voters.⁴¹² Although Dahl does not specifically mention Africa or its divided societies, Mbaku argues that “effective access to information about elections requires that local, instead of European, languages be used to provide the people with the information,” noting that because “most citizens in the African countries are not literate in the official languages of their own countries (i.e., French, English, Portuguese, and Spanish), providing information about elections in the European languages would be a grossly ineffective way to enhance the electoral process.”⁴¹³

Finally, after the election is completed, the votes have been counted, and the results are officially released, all citizens must accept and respect the outcome, as well as obey the orders of the newly elected officials.⁴¹⁴ The voluntary acceptance of the new elites would enhance governance and allow these individuals to develop and implement necessary public policies.⁴¹⁵

In his study of democracy, Anthony Downs also emphasizes periodic elections in which more than one political party is allowed to participate and present candidates for election to positions in the government. He argues that in each election, a voter should be allowed to cast only one vote and the outcome of

410. ROBERT A. DAHL & CHARLES E. LINDBLOM, *POLITICS, ECONOMICS, AND WELFARE* 41 (1953).

411. *Id.* at 277. See also Jonathan W. Still, *Political Equality and Election Systems*, in 91 *ETHICS SPECIAL ISSUE: SYMPOSIUM ON THE THEORY AND PRACTICE OF REPRESENTATION* 375 (1981).

412. DAHL, *supra* note 409, at 67–90.

413. MBAKU, *PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES*, *supra* note 43, at 149.

414. See DAHL, *supra* note 409, at 67–90.

415. *Id.* See also Mbaku, *Copyright and Democratization*, *supra* note 188, at 76–77; Kenneth A. Bollen, *Liberal Democracy: Validity and Method Factors in Cross-National Measures*, 37 *AM. J. POL. SC.* 370, 371–72 (1980).

the election should be determined or decided by majority rule.⁴¹⁶

Gerhard Lenski,⁴¹⁷ however, argues that, while elections are critical to the maintenance of a fully functioning democratic system, it is equally important that certain political liberties be guaranteed.⁴¹⁸ For example, if citizens are granted the power to “freely organize political parties and compete for positions in the government through elections,” then “other political liberties (e.g., the right to gather and engage in discourse over issues of importance to them) can provide them with the wherewithal to fully and effectively articulate their preferences and make them known to the electorate, and participate more fully in the democratic process.”⁴¹⁹

Political liberties, that is, “the rights that individuals and groups within a country have”⁴²⁰ and which provide them with the tools to “protest or support—freely—government policies and decisions,”⁴²¹ are “critical to the practice of democracy because they provide citizens, especially the nonelite, the additional political power they can use to organize political parties and oppose the government.”⁴²² Any country, including those in Africa, in which citizens, particularly the masses, possess “free speech, a free press, and freedom of opposition has a greater potential for influencing the decisions of elites than does a country where these liberties do not exist.”⁴²³

Until the early-1990s, many African countries either banned political gatherings or severely restricted them;⁴²⁴ such meetings were only allowed when they were designed or structured to support the incumbent regime or sing its praises. In fact, in

416. See Anthony Downs, *An Economic Theory of Political Action in a Democracy*, 65 J. POL. ECON. 137 (1957).

417. Gerhard Lenski was an American sociologist who made significant contributions to the study of democratic systems. See, e.g., GERHARD LENSKI, *POWER & PRIVILEGE: A THEORY OF SOCIAL STRATIFICATION* (1984).

418. *Id.* at 319.

419. MBAKU, *PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES*, *supra* note 43, at 150.

420. *Id.* at 151.

421. Bollen, *supra* note 415, at 372.

422. MBAKU, *PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES*, *supra* note 43, at 151.

423. Bollen, *supra* note 415, at 372.

424. MBAKU, *PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES*, *supra* note 43, at 152.

many of these countries, free media—such as independent newspapers—was totally absent; even where there was some type of media, it was severely censored, with most press releases consisting almost exclusively of the government's version of events.⁴²⁵

B. The Problem of the Dominant Political Party Dictatorship

A major challenge to democracy and the practice of constitutionalism in Africa is “the problem of countering the resurgence of majoritarian abuse or dominant party dictatorships that use multi-partyism as a convenient smokescreen behind which to practice their dictatorship.”⁴²⁶ In countries such as Cameroon and Uganda, for example, incumbent presidents and their dominant political parties have manipulated their constitutions and their electoral systems to remain in power indefinitely.⁴²⁷

The ability of dominant political parties to manipulate both the constitution⁴²⁸ and the electoral system⁴²⁹ to remain in power indefinitely has emerged as a major threat, not just to peace and security in the African countries, but also to the practice of constitutional government and constitutionalism, as

425. *Id.*

426. Fombad, *Constitutional Reforms and Constitutionalism in Africa*, *supra* note 99, at 1035–36.

427. In Uganda, Yoweri Museveni and the National Resistance Movement have been in power since 1986. In 2018, Museveni engineered a constitutional amendment that removed age limits for presidential candidates, allowing him to potentially remain in office indefinitely. See Elias Biryabarema, *Uganda's Museveni signs law removing age cap for president*, REUTERS (Jan. 2, 2018), <https://www.reuters.com/article/us-uganda-politics/ugandas-museveni-signs-law-removing-age-cap-for-president-idUSKBN1ER1CY>.

428. See, e.g., Mbaku, *International Law and the Anglophone Problem in Cameroon*, *supra* note 287, at 28 (examining, inter alia, the political party manipulation and domination in Cameroon).

429. In the presidential election that took place in the DRC on December 30, 2018, many opposition candidates were disqualified by the country's electoral commission (CENI). Among those banned was Jean-Pierre Bemba, who was considered by observers in and outside the DRC as a formidable contender for the presidency. He had recently returned to the country after being acquitted of war crimes by the ICC. See, e.g., *Opposition leader Bemba banned from running for president*, ALJAZEERA (Aug. 25, 2018), <https://www.aljazeera.com/news/2018/08/opposition-leader-bemba-banned-running-presidency-180825063407514.html>.

well as adherence to the rule of law.⁴³⁰ This problem, commonly referred to as “tyranny of the majority” or “majoritarian tyranny,” has been recognized by many scholars of constitutional law and democracy, including, for example, Alexis de Tocqueville.⁴³¹ Can constitutionalism and the practice of constitutional government prevent African countries from “descending into the tyranny of the majority?”⁴³²

It has been argued that Africa’s only hope for securing the institutional environment that is needed to foster peace and security, as well as significantly enhance entrepreneurship and the creation of the wealth that these countries need to deal fully with poverty, is democracy.⁴³³ Democracy as it is practiced in many African countries today, however, has been reduced to periodic elections, most of which are pervaded by fraud, corruption, vote-rigging, vote buying, disenfranchisement of minority voters, registration of phantom voters, and other irregularities.⁴³⁴ To deepen and institutionalize their democracies, African countries must begin by finding ways to reduce “the risks

430. In fact, the revising of constitutions to allow individuals who have already come to the end of their constitutional mandates to seek additional terms in office has been referred to as *constitutional coups*. The latter have appeared in many countries throughout the continent, including, for example, Algeria, Cameroon, Burundi, Chad, Egypt, Gabon, Niger, Rwanda, Togo, Tunisia, and Uganda. See, e.g., Merrit Kennedy, *With Constitution Changes, Egypt’s President Could Stay in Power Until 2034*, NPR NEWS (Feb. 14, 2019), <https://www.npr.org/2019/02/14/694675332/with-constitution-changes-egypts-president-could-stay-in-power-until-2034>; See *Changing the Constitution to Remain in Power*, *supra* note 192; see, e.g., John Mukum Mbaku, *Constitutional Coups as a Threat to Democratic Governance in Africa*, 2 INT’L COMP., POL’Y & ETHICS L. REV. 77 (2018) (examining the emergence of the constitutional coup as a major constraint to democracy in Africa).

431. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 288 (Arthur Goldhammer trans., 2004) (examining, inter alia, the mechanisms used by the US to “temper[] the tyranny of the majority”).

432. Fombad, *Constitutional Reforms and Constitutionalism in Africa*, *supra* note 99, at 1036.

433. *Id.*

434. YONATAN L. MORSE, *HOW AUTOCRATS COMPETE: PARTIES, PATRONS, AND UNFAIR ELECTIONS IN AFRICA* 90 (2018) (examining, inter alia, the manipulation of elections in Africa, with specific emphasis on Cameroon, Kenya, and Tanzania); SOSTENESS FRANCIS MATERU, *THE POST-ELECTION VIOLENCE IN KENYA: DOMESTIC AND INTERNATIONAL LEGAL RESPONSES* 47 (2015) (providing an insight into the causes of post-election violence in Kenya).

of fraudulent elections,”⁴³⁵ including malpractices by dominant political parties, which, as argued by Fombad, can be accomplished by recognizing and entrenching “a right of free and fair elections in the constitution”⁴³⁶ of each African country.

The elaboration of certain principles in the constitution of each African country is critical to the entrenchment of democracy in the continent. First, each constitution must “recognize the basic rights and duties of political parties.”⁴³⁷ Fombad argues that Africa’s constitutional designers must go “beyond mere formal constitutional recognition of political pluralism into formal recognition of certain minimum rights of political parties in a way that can shield the political process from majoritarian opportunism and manipulation.”⁴³⁸ In the practice of democracy, political parties are very important. Before the re-emergence of multipartyism in Africa in the early 1990s, the “one-party system with all its restrictions inevitably led to a hemorrhage within the system and deleterious consequences on the whole political, social, and economic life of the state.”⁴³⁹

The legalization of multiparty competition was expected to constrain the ability of the single political party to limit democratic growth and significantly enhance the type of robust exchange of ideas that would strengthen national political systems and advance the development of a democratic culture. Competitive political systems in many African countries, however, were soon overwhelmed by dominant political parties and, given the fact that they have the potential to significantly damage each country’s transition to constitutionalism, they must no longer “simply be allowed to do their own things their own way.”⁴⁴⁰ Instead, constitutionally recognizing the “rights and duties of political parties”⁴⁴¹ essentially “means that their

435. Fombad, *Constitutional Reforms and Constitutionalism in Africa*, *supra* note 99, at 1036.

436. *Id.*

437. *Id.*

438. Fombad, *Challenges to Constitutionalism*, *supra* note 175, at 24. Political parties are defined as “any political group that presents at elections, and is capable of placing through elections, candidates for public office.” GIOVANNI SARTORI, *PARTIES AND PARTY SYSTEMS: A FRAMEWORK FOR ANALYSIS* 291 (1976).

439. Fombad, *Challenges to Constitutionalism*, *supra* note 175, at 25.

440. Fombad, *Constitutional Reforms and Constitutionalism in Africa*, *supra* note 99, at 1036.

441. *Id.*

actions will come under public scrutiny at all times, not just during elections.”⁴⁴²

The effective practice of constitutionalism requires that political parties and their members be held accountable for their actions. In addition, political parties must be internally democratic. For example, Kebapetse Lotshwao⁴⁴³ has argued that “the lack of internal democracy within the African National Congress (ANC) is a threat to the consolidation of South African democracy.”⁴⁴⁴ Ransford Edward Gyampo⁴⁴⁵ and Eileen Gans-Lartey⁴⁴⁶ argue that although political parties are “the heart and soul of every democracy” and “the key vehicles through which the ideals of multiparty democracy [can] be realized,” they can only serve these functions effectively if they themselves are “internally democratic.”⁴⁴⁷ Gyampo and Gans-Lartey argue further that “[i]nternal party democracy in political parties can be explained in terms of the extent to which all segments of a political party participate substantively in determining the affairs of the party.”⁴⁴⁸

In a report released by the International Institute for Democracy and Electoral Assistance in Stockholm, Sweden, the authors stated that “[p]olitical parties are indispensable for making democracy work and deliver.”⁴⁴⁹ Hence, “[f]inding the prop-

442. *Id.*

443. Kebapetse Lotshwao is an expert on democracy in southern Africa and a professor of politics at the University of Botswana. His latest publication is: Kebapetse Lotshwao, Robert Imre & Jime Jose, *Democracy Assistance for Botswana: Maintaining the Status Quo in a Peripheral Capitalist Country*, 35 J. DEV. SOC'Y. 205 (2019).

444. Kebapetse Lotshwao, *The Lack of Internal Party Democracy in the African National Congress: A Threat to the Consolidation of Democracy in South Africa*, 35 J. S. AFR. STUD. 901, 901 (2009).

445. Ransford Edward Gyampo is Ghanaian political scientist and an expert on multiparty politics in Africa. He is a professor of political science at the University of Ghana.

446. Eileen Gans-Lartey is a staff member at the Institute for Democratic Governance in Ghana (IDEG). The IDEG studies ways to consolidate good governance and democracy in Ghana and other African countries.

447. Ransford Gyampo & Eileen Gans-Lartey, *Assessing Internal Party Democracy in Africa*, 1 (July 2018).

448. *Id.*

449. M. A. MOHAMED SALIH, ET AL., POLITICAL PARTIES IN AFRICA: CHALLENGES FOR SUSTAINED MULTIPARTY DEMOCRACY 3 (2007), <https://www.idea.int/publications/catalogue/political-parties-africa-challenges-sustained-multiparty-democracy>.

er conditions for the better internal functioning and effective legal regulation of political parties is of key importance anywhere.”⁴⁵⁰ As Fombad argues, one way to force accountability in political parties and ensure that they are internally democratic is to constitutionalize their “rights and duties,”⁴⁵¹ and by doing so, one can “ensure that personal actions can be brought against political parties which break their own rules, as they are often apt to do, when they find this politically expedient.”⁴⁵² In addition, Fombad argues that each national constitution should elaborate “basic principles for elections within all political parties to ensure that persons with criminal records or who are subject to the legal process are barred from seeking or holding political office.”⁴⁵³

Richard Pildes⁴⁵⁴ argues that “the most enduring and powerful vehicle for organizing citizens into effective participants in politics is the political party.”⁴⁵⁵ He further argues that political “[p]arties are central to defining political agendas, organizing coalitions of voters, amplifying the voices of diffuse groups, and keeping officeholders accountable.”⁴⁵⁶ Nevertheless, given the fact that “political parties in control of the powers of government can also use that power to seek to entrench themselves and reduce competitive pressures from other parties,”⁴⁵⁷ it is necessary that “constitutional regimes . . . both protect the role of political parties in democratic processes and protect democracy from partisan attempts to manipulate the rules of political engagement.”⁴⁵⁸

450. *Id.*

451. Fombad, *Constitutional Reforms and Constitutionalism in Africa*, *supra* note 99, at 1036.

452. Fombad, *Challenges to Constitutionalism*, *supra* note 175, at 39.

453. Fombad, *Constitutional Reforms and Constitutionalism in Africa*, *supra* note 99, at 1037.

454. Richard H. Pildes is a leading scholar of constitutional law and an expert in legal issues concerning democracy. He is a professor of constitutional law at New York University School of Law. His publications include: Richard H. Pildes, *The Past and Future of Voting Rights*, 162 PROC. AM. PHILOSOPHICAL SOC'Y 221 (2018) and RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* (Robert C. Clark et al. eds., 5th ed. 2016).

455. Richard Pildes, *Political Parties and Constitutionalism* 1, 2 (N.Y.U. Pub. L. and Legal Theory, Working Paper No. 2010).

456. *Id.*

457. *Id.*

458. *Id.*

A second essential principle for entrenching democracy, as part of the effort to curb the ability of dominant political parties to act opportunistically and endanger constitutionalism, is that the "right to free and fair elections and a right to equality of treatment of all political parties"⁴⁵⁹ must be constitutionally guaranteed. With respect to legislation regulating political parties in particular and the political process in general, Fombad argues that for such legislation to be considered valid or constitutional, it must "conform to a number of principles."⁴⁶⁰ Thus, legislation regulating political parties is valid:

- (i) When the legislation does not hinder the exercise of political rights in a free and fair manner;
- (ii) When the legislation does not negate the essential content of the exercise of political rights;
- (iii) When the legislation is acceptable and demonstrably justifiable in a free and democratic society. In determining this, the benefits of the legislation in a democratic society, taking into account the purposes and values of the constitution, must be seen to outweigh the detriment it may cause;
- (iv) When the legislation protects the interests of minorities and indigenous people in a fair and reasonable manner taking into account all the circumstances; and,
- (v) Where there are restrictions, it must be determined whether:
 - (a) the objectives of the restrictions are sufficiently important to justify limiting the exercise of political rights in the manner contemplated;
 - (b) the measures are designed to meet the objective rationally connected to it; and
 - (c) the measures provided do no more than is reasonably necessary to achieve the legitimate objective.⁴⁶¹

To what extent have African constitutions recognized and protected the rights of their political parties as they prepare to begin the implementation of *Agenda 2063*? To what extent are political parties, especially those in the opposition, protected from the tendency of dominant political parties to entrench

459. Fombad, *Constitutional Reforms and Constitutionalism in Africa*, *supra* note 99, at 1037.

460. *Id.*

461. *Id.* at 1037–38.

themselves and create barriers for their competitors? The Constitution of the Republic of Uganda, for example, lays down a set of principles that “[a] political party in the [country’s] multiparty political system shall conform to.”⁴⁶² The Constitution of the Republic of Ghana provides similar principles to regulate the organization and functioning of political parties.⁴⁶³ Unfortunately, these constitutional principles are often ignored and not respected.⁴⁶⁴ Nevertheless, in the Ugandan case, *Rwanyarare v. Attorney General*, the country’s Constitutional Court struck down several provisions of the Political Parties and Organizations Act of 2002, arguing that they are not only unconstitutional, but are also a “monstrosity in a free and democratic society”⁴⁶⁵ and, hence, “should not stand.”⁴⁶⁶

In the Zimbabwean case, *United Parties v. Minister of Justice, Legal and Parliamentary Affairs and Others*,⁴⁶⁷ a political party challenged the constitutionality of certain provisions of the country’s Electoral Act.⁴⁶⁸ The Zimbabwean Supreme Court ruled that the political party did not have legal standing to challenge the Electoral Act’s provisions, arguing that section 24(1) of the Lancaster House Constitution⁴⁶⁹ granted the politi-

462. CONST. OF UGANDA (2005), arts. 71 & 72.

463. CONST. OF GHANA (1996), arts. 55 & 56.

464. See KWESI ANING & FIFI EDU-AFFUL, LEGAL AND POLICY FRAMEWORKS REGULATING THE BEHAVIOR OF POLITICIANS AND POLITICAL PARTIES—GHANA 13–14 (Int’l Inst. for Democracy and Electoral Assistance, Stockholm, 2013) (noting that although Article 55(7) of the Constitution stipulates that “Every political party shall have a national character, and membership shall not be based on ethnic, religious, regional or other sectional divisions,” political parties in the country are still “generally identified with one ethnic group or another”).

465. *Rwanyarare and Others v. Attorney General* (Constitutional Petition No. 7 of 2002) [2004] UGCC 22 para. 19 (Uganda).

466. *Id.*

467. *United Parties v. Minister of Justice, Legal and Parliamentary Affairs and Others* [1998] 2 BCLR 224 (Zim.).

468. Electoral Act, Ch. 2:01 of the Laws of Zimbabwe.

469. The Lancaster House Constitution was the constitution that brought Zimbabwe to independence on April 18, 1980. The constitution was the outcome of talks held at Lancaster House (UK), which involved the British Government; the Zimbabwe African Peoples Union (ZAPU), under the leadership of Joshua Nkomo; the Patriotic Front, under the leadership of Robert Mugabe; and the then–Unilateral Declaration of Independence (UDI) government of Rhodesia, led by Ian Smith and Bishop Abel Muzorewa. See JACOB CHIKUHLWA, A CRISIS OF GOVERNANCE: ZIMBABWE 32 (2004) (examining, inter

cal party standing only in relation to the party itself, and that standing did not empower the political party to act on behalf of anyone except itself.⁴⁷⁰ In addition, the Supreme Court also struck down the provision stating that political parties with fewer than fifteen members in the national parliament could not avail themselves of state funding, arguing that the funding system for political parties had been set too high, violating their freedom of expression.⁴⁷¹

The introduction of multiparty democratic systems that took place in the continent beginning in the early 1990s opened up political spaces for increased competition and participation. Nevertheless, many constitutional scholars have argued that “merely opening up political space for other parties to participate is not enough.”⁴⁷² For multipartyism to function effectively and help African countries deepen and institutionalize their democratic systems, each African country must provide itself with institutional arrangements that “give every party a chance to compete fairly and equally so that no party is allowed to abuse its incumbency in order to perpetuate itself in power.”⁴⁷³

C. Constitutionally Entrenching Principles that Ensure Openness, Transparency, and Accountability

Openness and transparency in government communication must be a critical part of the effort to create an enabling environment for the implementation of the aspirations of *Agenda 2063*. First, it is important that the processes through which African countries engage in institutional reforms, including, if necessary, amendments to their constitutions, are open and transparent so as to maximize inclusiveness and the participation of each country's relevant stakeholder groups.⁴⁷⁴

alia, the struggle for independence in Zimbabwe and the Lancaster House Constitution).

470. *United Parties v. Minister of Justice, Legal and Parliamentary Affairs and Others* [1998] 2 BCLR 227 (Zim.).

471. *Id.* at 234–39.

472. Fombad, *Constitutional Reforms and Constitutionalism in Africa*, *supra* note 99, at 1039.

473. *Id.*

474. This is very important in Africa where many ethnocultural groups have, during most of the post-independence period, complained of marginalization by the central government and the failure of the latter to provide legal mechanisms for minority groups to participate fully and effectively in eco-

Second, the making of all post-constitutional laws must be undertaken through an open and transparent process. Transparency can make it possible for individuals and groups that did not take part in the process to be fully aware of how the laws were made, why certain laws were selected instead of others, and why they must obey them.

Finally, openness and transparency are important elements in the fight against corruption and other forms of political opportunism—for example, rent seeking—all of which are major constraints to wealth creation and economic growth.⁴⁷⁵ Making certain that the public's business is conducted in an open and transparent manner significantly improves participation and increases the chance that the outcome will result in policies that reflect the interests, values, and aspirations of the country's relevant stakeholder groups. In addition,

[w]here openness and transparency are maintained, groups such as ethnic and religious minorities that believe that given [public] policies do not adequately reflect their values and interests are not likely to resort to violent and destructive mobilization, especially if as a result of the government's open approach to policy, these groups either had the opportunity to participate fully and effectively in the design process, or were aware of how the laws were made and why.⁴⁷⁶

What are openness and transparency? With respect to the performance of government activities, openness and transparency can be understood as “the availability and accessibility of relevant information about the functioning of the polity.”⁴⁷⁷ As argued by Lord Nolan,⁴⁷⁸ “transparency is said to require that

nomic and political markets. *See, e.g.*, PIET KONINGS & FRANCIS B. NYAMNJOH, *NEGOTIATING AN ANGLOPHONE IDENTITY: A STUDY OF THE POLITICS OF RECOGNITION AND REPRESENTATION IN CAMEROON* (Leiden-Boston, Brill Afrika-Studiecentrum Series, Vol. 1 2003 (examining, inter alia, the marginalization of the Anglophones by the Francophone-dominated central government)).

475. *See, e.g.*, MBAKU, *CORRUPTION IN AFRICA*, *supra* note 144 (examining corruption and its impact on economic growth and development in Africa).

476. Mbaku, *Providing a Foundation*, *supra* note 39, at 1012.

477. John Gerring & Strom C. Thacker, *Political Institutions and Corruption: The Role of Unitarism and Parliamentarism*, 34 *BRIT. J. POL. SCI.* 295, 316 (2004).

478. The Rt. Honorable The Lord Nolan (Lord of Appeal in Ordinary) was the Chairman of the (UK) Committee on Standards in Public Life. In May 1995, the Committee issued its Standards in Public Life Report. *See*

'holders of public office should be as open as possible about all decisions and actions they take.'"479 It is generally agreed that "transparent decisions must be clear, integrated into a broader context, logical and rational, accessible, truthful and accurate, open (involve stakeholders), and accountable."480 Of great importance, especially for Africa's minority subcultures, is the fact that "[a] transparent decision record should provide enough information to allow an interested person to 'verify claims made' or otherwise reconstruct both the process and rationale for the decision."481

In order for civil society to serve as a check on the exercise of government power, it must have adequate information about the activities of the government. A decision record that is made available to all of the country's relevant stakeholders can help them secure the information that they need to judge the performance of civil servants and political elites, then punish or reward them accordingly. Nevertheless, in presenting information about government activities to the people, the government must make certain it is presented in a relatively accessible manner.

Recently, it has become quite common for governments that are seeking higher levels of transparency and openness to build and maintain Internet websites on which they can place public documents for citizens to access. Nevertheless, while this might appear to be an effective way to significantly improve government transparency and accountability, it is important to note that this approach may not be very effective in most African countries where the majority of people do not have access to the

COMMITTEE (UK) ON STANDARDS IN PUBLIC LIFE, STANDARDS IN PUBLIC LIFE: FIRST REPORT OF THE COMMITTEE ON STANDARDS IN PUBLIC LIFE, VOLUME 1: REPORT, CM 2850-1, (1995), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/336919/1stInquiryReport.pdf (last visited Jan. 4, 2020).

479. Deidre Curtin & Albert Jacob Meijer, *Does Transparency Strengthen Legitimacy?*, 11 INFO. POLITY 109, 111 (2006) (quoting First Report of the Committee on Standards in Public Life, Cm 2850, HMSO (1995)).

480. Christina H. Drew & Timothy L. Nyerges, *Transparency of Environmental Decision Making: A Case Study of Soil Cleanup Inside the Hanford 100 Area*, 7 J. RISK RES. 33, 36 (2004).

481. *Id.* at 454, at 36 (citing LAURIE GARRETT, BETRAYAL OF TRUST: THE COLLAPSE OF GLOBAL PUBLIC HEALTH (2000)).

Internet.⁴⁸² As argued by Mbaku, the “adoption of a given technology to enhance transparency should be context-specific; that is, the ability of the people to use the technology should be considered before adoption.”⁴⁸³

In addition, the government must choose the language in which it is going to present the information very carefully in order to minimize marginalizing some population groups. Throughout the continent, most countries have adopted the language of their former colonizers as a national or official language (e.g., French in the former French and Belgian colonies).⁴⁸⁴ These languages are used widely in the conduct of government business and in the dissemination of information about government activities. Unfortunately, the majority of citizens in these countries do not understand or are not fluent in these foreign languages.⁴⁸⁵ Thus, in order to make certain that citizens have effective access to the government and the information that it generates, that information must be presented in languages that are easily accessible to the people.⁴⁸⁶

Openness and transparency in government communication can minimize corruption, provide information that the people need to check the exercise of government power, and generally improve government accountability to the people and the constitution. In addition, and especially for African countries, transparency can improve the ability of heretofore marginalized groups to participate in government generally and, in particular, the design and implementation of public policies.

As Africans engaged in institutional reforms in the early 1990s to provide themselves with more effective laws and institutions, many made efforts to introduce constitutional mechanisms to force public transparency and accountability. For example, Ghana’s 1996 Constitution introduced several institutions designed to force accountability in government, including (1) an Electoral Commission,⁴⁸⁷ (2) a Commission on Human

482. See, e.g., Mbaku, *Providing a Foundation*, *supra* note 39, at 100, n. 159, 1021–22.

483. *Id.* at 1011, n. 159.

484. MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES, *supra* note 43, at 65.

485. *Id.*

486. Mbaku, *Providing a Foundation*, *supra* note 39, at 1011, n. 159.

487. CONST. OF GHANA (1996), arts. 43–54.

Rights and Administrative Justice,⁴⁸⁸ (3) a National Commission for Civic Education,⁴⁸⁹ (4) a National Media Commission,⁴⁹⁰ and (5) the office of an Auditor-General.⁴⁹¹ Similarly, the 1990 Constitution of the Republic of Namibia (as amended up to 2010) provided for the establishment of the Office of the Ombudsman⁴⁹² and an Auditor General.⁴⁹³ Although ombudsman and anti-corruption institutions, as well as other accountability mechanisms, have become relatively common in African countries, many of them are not able to function effectively to fully check governmental (including especially presidential) abuses.⁴⁹⁴ This state of affairs is made possible by the fact that many African countries do not have robust, politically active, and effective civil societies that can hold their governments accountable for their activities. Thus, while each of these countries might have various accountability mechanisms, they are not likely to function effectively to keep the government in check.

In November 2016, South Africa's Public Protector, Thuli Madonsela, who had successfully investigated state capture in the country, released her report to the public against a background of determined efforts by the government to quash its release.⁴⁹⁵ The report revealed widespread capture of the exec-

488. *Id.* arts. 216–30.

489. *Id.* arts. 231–39.

490. *Id.* arts. 166–73.

491. *Id.* arts. 187–89.

492. CONST. OF NAMIBIA (2010), arts. 89–94. The Ombudsman is empowered, usually by the constitution, to investigate the complaints of individuals, particularly those against civil servants and political elites. According to the International Bar Association, the Office of the Ombudsman is:

[a]n office provided for by the constitution or by action of the legislature or parliament and headed by an independent, high-level public official who is responsible to the legislature or parliament, who receives complaints from aggrieved persons against government agencies, officials and employees or who acts on his own motion, and who has the power to investigate, recommend corrective action, and issue reports.

H. Rudolph, *The Ombudsman and South Africa*, 100 S. AFR. L. J. 92 (1983).

493. CONST. OF NAMIBIA (2010), art. 127.

494. Fombad, *Constitutional Reforms and Constitutionalism in Africa*, *supra* note 99, at 1040.

495. See, e.g., Lynsey Chutel & Lily Kuo, *What the "State Capture" Report Tells Us about Zuma, the Guptas and Corruption in South Africa*, QUARTZ

utive branch by the Gupta family and recommended several remedial actions to be undertaken by then President of the Republic of South Africa, Jacob Zuma.⁴⁹⁶ The government challenged the report in court, but the High Court dismissed the challenge in December 2017 and directed the government to undertake certain remedial action. In dismissing the President's challenge to the remedial action, Mlambo J, writing for the High Court, held that "none of the grounds of review has any merit," and that "the President is not entitled to the relief that he seeks."⁴⁹⁷ In addition, argued the High Court, "[t]he remedial action taken by the Public Protector is lawful, appropriate, reasonable and rational. In the premises the President's application cannot succeed and must be dismissed with costs."⁴⁹⁸ The release of the state capture report set in motion a series of events that eventually led to the ouster of Mr. Zuma as president of South Africa.⁴⁹⁹

So, why do South Africa's accountability institutions seem to be working effectively to curb the abuse of public power while those of other African countries remain dysfunctional and largely ineffective? Scholars of South African constitutional law have indicated that this could be due to the existence of "four legal principles that are spelled out in the constitution to ensure that [South Africa's accountability institutions] are effective, rather than a political charade of symbolic value only."⁵⁰⁰ The first guiding principle is found in § 181(2) and reads as follows: "These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without

AFRICA (Nov. 3, 2016), <https://qz.com/africa/825789/state-capture-jacob-zuma-the-guptas-and-corruption-in-south-africa/>.

496. See, e.g., *Thuli Madonsela's Last Report: South Africa's Public Protector Finds "State Capture" by the President's Pals*, *ECONOMIST* (Nov. 5, 2016), <https://www.economist.com/middle-east-and-africa/2016/11/05/south-africas-public-protector-finds-state-capture-by-the-presidents-pals>.

497. *President of the Republic of South Africa v. Office of the Public Protector and Others* 2018 (2) SA 100 (GP) (December 13, 2017) at para. 186 (S.Afr.)

498. *Id.* The court listed the activities constituting the remedial action. *Id.* at para. 186.

499. See Norimitsu Onishi, *Jacob Zuma Resigns as South Africa's President*, *N.Y. TIMES* (Feb. 14, 2018), <https://www.nytimes.com/2018/02/14/world/africa/jacob-zuma-resigns-south-africa.html>.

500. Fombad, *Constitutional Reforms and Constitutionalism in Africa*, *supra* note 99, at 1040.

fear, favor or prejudice.”⁵⁰¹ The second principle is: “Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions.”⁵⁰² The third principle reads: “No person or organ of state may interfere with the functioning of these institutions.”⁵⁰³ The fourth principle provides: “These institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year.”⁵⁰⁴

The closest one can come to these principles in the constitutions of other African countries is what is referred to, in both the Constitution of the Republic of Ghana and the Constitution of the Federal Republic of Nigeria, 1999,⁵⁰⁵ as “Directive Principles of State Policy.”⁵⁰⁶ As argued by many scholars of constitutional law in Africa, “unlike the principles in the South African Constitution, [‘the directive principles of state policy’ in other African constitutions] are stated in purely hortatory terms.”⁵⁰⁷ As a consequence, these institutions cannot function independently to force government accountability and protect each country’s democracy.

But, how have these guiding principles protected these institutions from interference by the political elite? First, it is necessary to take a look at the case in which President Zuma of South Africa sought a review of the “remedial action in the Public Protector’s Report No. 6 of 2016/17, which was released

501. S. AFR. CONST., 1996, art. 181(2). This principle is found in Chapter 9 of the Constitution, which is titled: STATE INSTITUTIONS SUPPORTING CONSTITUTIONAL DEMOCRACY. Section 181(1) provides the names of the “state institutions [whose function is to] strengthen constitutional democracy in the Republic [of South Africa].” These are (a) The Public Protector; (b) The South African Human Rights Commission; (c) The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; (d) The Commission for Gender Equality; (e) The Auditor-General; and (f) The Electoral Commission. *See id.* art. 181(1).

502. *Id.* art. 181(3).

503. *Id.* art. 181(4).

504. *Id.* art. 181(5).

505. CONST. OF NIGERIA (1999), art. 13–24.

506. CONST. OF GHANA (1996), art. 34.

507. Fombad, *Constitutional Reforms and Constitutionalism in Africa*, *supra* note 99, at 1041.

on 2 November 2016, and entitled ‘State Capture.’”⁵⁰⁸ The case was heard at the High Court of South Africa, Gauteng Division (Pretoria) and presided over by Mlambo J., the court’s Judge President.⁵⁰⁹ The court held that “none of the grounds of review [have] any merit,” and that “the President is not entitled to the relief that he seeks.”⁵¹⁰ The court also ruled that the “remedial action taken by the Public Prosecutor [was] lawful, appropriate, reasonable and rational.”⁵¹¹ Finally, the court ordered the President to pay the costs of adjudicating the matter and to do so “in his personal capacity, on the scale as between attorney and client, including the costs consequent upon the employment of two counsel.”⁵¹² By emphasizing that the Public Prosecutor acted lawfully, appropriately, reasonably, and rationally, the court asserted the institution’s independence and impartiality,⁵¹³ which are guaranteed by the constitution.⁵¹⁴

The second case of relevance is *The New National Party of South Africa v. The Government of the Republic of South Africa*,⁵¹⁵ which dealt with the question of the independence of South Africa’s Independent Electoral Commission (IEC) and whether government could interfere with the functioning and/or activities of the IEC.⁵¹⁶ Although the Constitutional Court held that it did not find any evidence that the Government had interfered with the functioning of the IEC, the court did, however, emphasize the fact that the IEC was a Chapter 9 institution,⁵¹⁷ designed specifically to support constitutional

508. *President of the Republic of South Africa v. Office of the Public Protector & Others* 2017 (2) SA 100 (GP) (S. Afr.).

509. *President of the Republic of South Africa v. Office of the Public Protector and Others* 2018 (2) SA 100 (GP) (13 December 2017) (S. Afr.).

510. *Id.* para. 186.

511. *Id.*

512. *Id.* para. 191(6).

513. *Id.* para. 186.

514. S. AFR. CONST., 1996, art. 181(2) (stating, inter alia, that The Public Protector and other State Institutions Supporting Constitutional Democracy “are independent, and subject only to the Constitution and the law” and that they “shall be impartial and must exercise their powers and perform their functions without fear, favor or prejudice”).

515. *The New National Party of South Africa v. The Government of the Republic of South Africa* 1999 (3) SA 191 (CC) (S. Afr.).

516. *Id.* para. 1.

517. This is in reference to Chapter 9 of the Constitution of the Republic of South Africa, 1996, which provides for “State Institutions Supporting Constitutional Democracy.” See S. AFR. CONST., 1996.

democracy, and that its independence had to be protected. The court held that

[t]he establishment of the Commission and the other institutions under Chapter 9 of the Constitution are a new development on the South African scene. They are a product of the new constitutionalism and their advent inevitably has important implications for other organs of state who must understand and recognize their respective roles in the new constitutional agreement.⁵¹⁸

The court also stated that “[t]he Constitution places a constitutional obligation on those organs of state to assist and protect the [IEC] in order to ensure its independence, impartiality, dignity and effectiveness.”⁵¹⁹

The Constitutional Court went further to state that “[i]n dealing with the independence of the [IEC], it is necessary to make a distinction between two factors, both of which, . . . , are relevant to ‘independence.’”⁵²⁰ The first factor, the court argued, is “financial independence”—the IEC must be granted enough resources to enable it to effectively and fully “discharge the functions it is obliged to perform under the Constitution and the Electoral Commission Act.”⁵²¹ The court went on to state that funding for the IEC should come from Parliament and not from the Government.⁵²² Finally, the court held that in setting the budget for the IEC, the IEC should “be afforded an adequate opportunity to defend its budgetary requirements before Parliament or its relevant committees.”⁵²³

The second factor that relates to the independence of the IEC is “administrative independence,”⁵²⁴ which “implies that there will be control over those matters directly connected with the functions which the [IEC] has to perform under the Constitution and the Act.”⁵²⁵ The Constitutional Court also emphasized that “[t]he executive must provide the assistance that the [IEC]

518. *The New National Party of South Africa*, 1999 (3) SA 191, at para. 78.

519. *Id.*

520. *Id.* para. 98.

521. *Id.*

522. *Id.*

523. *Id.*

524. *Id.* para. 99.

525. *Id.*

requires ‘to ensure [its] independence, impartiality, dignity and effectiveness.’⁵²⁶

Of course, South Africa’s constitutional framework is a work-in-progress. For one thing, during the last several years, there have been many challenges to the Chapter 9 institutions. This includes, for example, the Public Protector, which came under pressure during the presidency of Jacob Zuma when the holder of the position at the time, Thuli Madonsela, was called upon to investigate the alleged capture of the executive branch of government by business interests, notably the Gupta Family.⁵²⁷ One can attribute the problems that South Africa’s Chapter 9 institutions have encountered as part of the learning process that post-apartheid South Africa must go through before it can develop the ability and capacity to fully embrace constitutional government and constitutionalism, as well as develop a democratic culture, one that is undergirded by adherence to the rule of law by the majority of citizens, regardless of their political and economic standing.

Nevertheless, South Africa’s heretofore experience with constitutional government and constitutionalism has at least two lessons to teach other countries in Africa regarding how “they can make . . . accountability institutions effective and shield them from political manipulation by the opportunistic dominant parties of today.”⁵²⁸ First, the “basic structure of [each accountability] institution,” including its “composition and powers, must be laid down in the constitution.”⁵²⁹ Second, the constitution must provide effective legal limits to the ability of the government to “interfere with [the] operations” of the accountability institutions.⁵³⁰

During the last several years, scholars have argued that what has passed in many African countries as constitutionalism has been “a largely procedural notion” that “emphasizes values while paying little attention to the principles, struc-

526. *Id.*

527. See, e.g., Norimitsu Onishi & Selam Gebrekidan, *In Gupta Brothers’ Rise and Fall: The Tale of a Sullied A.N.C.*, N.Y. TIMES (Dec. 22, 2018), <https://www.nytimes.com/2018/12/22/world/africa/gupta-zuma-south-africa-corruption.html>. See also Fombad, *Constitutional Reforms and Constitutionalism in Africa*, *supra* note 99, at 1045.

528. *Id.*

529. *Id.*

530. *Id.* at 1046.

tures, and institutions that will enable these values to achieve concrete practical results.”⁵³¹ Throughout Africa, existing constitutions are still unable to address the root causes of many of the multifarious problems that currently confront the continent, such as extreme poverty, ethnic-induced and other chronic forms of violence, and the abuse of human rights.⁵³² Some constitutional scholars have suggested that certain of these problems can be dealt with effectively “by the constitutionalization of strong and independent institutions of accountability.”⁵³³

Fombad provides a sample list of accountability institutions that he believes should be made part of the constitutional design effort of any African country that is seeking to promote and enhance constitutional government and constitutionalism.⁵³⁴ These institutions, according to Fombad, are:

- (i) the ombudsman;
- (ii) a human rights commission;
- (iii) a public accounts committee;
- (iv) an Auditor-General office[];
- (v) an access to information commission;
- (vi) a media commission;
- (vii) an independent prosecuting authority;
- (viii) an anti-corruption agency;
- (ix) a judicial service commission;
- (x) a minority rights commission;
- (xi) an independent electoral commission; and
- (xii) an electoral boundaries commission.⁵³⁵

It is important to appreciate the fact that constitutionalizing these accountability institutions is a necessary, but not sufficient, condition for effective oversight and the practice of constitutional government. Sufficiency requires that “there be political will to make them work” and, most importantly, “the necessary legal safeguards to protect them from political interference.”⁵³⁶ Constitutional designers must make sure that the

531. *Id.*

532. MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES, *supra* note 43, at 66.

533. Fombad, *Constitutional Reforms and Constitutionalism in Africa*, *supra* note 99, at 1046.

534. *Id.*

535. *Id.*

536. *Id.*

“structure, functions, and composition”⁵³⁷ of each one of these accountability institutions is well-defined so as to prevent any of the three branches of government from interfering with the activities of any one of these institutions.

An important way to effectively protect each accountability institution and safeguard its independence is to make certain that the state is well constrained by the law such that no one who serves in government can act with impunity.⁵³⁸ Within such a constitutional order, “no one, not even the people who hold leadership positions in government, including the executive, judiciary officers, and legislators, is above the law—the law is supreme.”⁵³⁹ The ability of these accountability institutions to function fully and effectively must “presuppose[] a culture of fidelity to law—especially on the part of the executive.”⁵⁴⁰ It has further been argued that the constitution should also provide for a “general limitation clause,” which specifically would require that “any legislation or mechanism introduced to regulate any of [the accountability institutions], and which undermines the essential purpose of accountability and transparency that the institution is designed to achieve, must be declared null and void by the courts.”⁵⁴¹

Another way to improve the efficiency and effectiveness of African governments is to bring them closer to the people, particularly those people that these institutions are designed to serve. For example, the office of an ombudsman should be made fully accessible to all aggrieved individuals. That calls

537. *Id.* at 1047.

538. In other words, the country is provided with a governing process that is undergirded by the rule of law. Within such a constitutional order, the majority of citizens voluntarily accept and obey the law, especially including those who serve in government. As argued by the American Bar Association (ABA), “[t]he key point is that every form of government has to have some system to ensure that no one in the government has so much power that they can act above the law.” A.B.A. Division of Public Education, *Dialogue on the Rule of Law Part I: What is the Rule of Law?*, A.B.A., https://www.americanbar.org/advocacy/rule_of_law/what-is-the-rule-of-law/ (last visited on March 5, 2019).

539. Mbaku, *Providing a Foundation*, *supra* note 39, at 985.

540. Sujit Choudhry, *Bridging Comparative Politics and Comparative Law: Constitutional Design in Divided Societies*, in CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES: INTEGRATION OR ACCOMMODATION? 3, 10–11 (S. Choudhry ed., 2008).

541. Fombad, *Constitutional Reforms and Constitutionalism in Africa*, *supra* note 99, at 1047.

not only for the decentralization of the office so that people who live in remote villages can have access to the services of the ombudsman, but also to ensure that allowance is made for the use of local languages in the institution's outreach activities, particularly given the fact that most Africans are not literate in their countries' national languages.⁵⁴²

Of course, the accountability institutions must be granted the power to deal with crimes at all levels of society—from the poor street hustler to the highest-ranking government official. In other words, these institutions must be able to force accountability on members of the government, including even high-ranking civil servants and political elites. Unless the accountability institutions are able to effectively check impunity and the rampant abuse of power by high-ranking government officials, these institutions are not likely to be seen as legitimate tools of governance by most citizens, especially the historically marginalized and deprived ones. Corruption is a major problem for most Africans,⁵⁴³ and as such, they see corruption as a major constraint on their ability to “organize their private lives and create wealth for themselves.”⁵⁴⁴ Within the urban areas of many African countries, the poor, all of whom live on the economic margins, are harassed daily by police officers seeking bribes in exchange for access to basic protections.⁵⁴⁵ This “[c]ontinuous and incessant harassment of law-abiding but economically and socially disadvantaged individuals represents an important obstacle to the profitable operation of small-scale enterprises within the urban center.”⁵⁴⁶ The viability of these

542. For example, it has been estimated that nearly 40 percent of Nigerians are illiterate, meaning that over seventy million people lack the basic skills to participate fully and effectively in political and economic processes that require a basic understanding of the English language. See *38% of Nigerians are Illiterates*, VANGUARD (Dec. 7, 2018), <https://www.vanguardngr.com/2018/12/38-of-nigerians-are-illiterates/>.

543. See generally Mbaku, *International Law and the Fight Against Bureaucratic Corruption in Africa*, *supra* note 145, at 688-71.

544. See *id.* at 674.

545. Mbaku, *Providing a Foundation*, *supra* note 39, at 1029.

546. See Mbaku, *International Law and the Fight Against Bureaucratic Corruption in Africa*, *supra* note 145, at 674. It was this type of harassment by government operatives that forced Tunisian street vendor, Tarek el-Tayeb Mohamed Bouazizi, to set himself on fire on December 17, 2010—an act that gave rise to the Arab Spring. See, e.g., Sami Zemni, *The Roots of the Tunisian Revolution: Elements of a Political Sociology*, in ROUTLEDGE HANDBOOK OF

enterprises is critical to the creation of wealth and the fight against poverty and joblessness, especially within the urban centers.

Unless the accountability institutions can deal effectively with corruption and other forms of political opportunism, it is not likely that citizens will consider them legitimate. Thus, they must be able to effectively “tackle both petty and grand corruption.”⁵⁴⁷ Enhancing their ability to do so requires not just constitutional protections, but also mandates the establishment of a “whistleblower” program that empowers citizens and provides them with necessary incentives “to freely disclose information on corrupt or improper conduct and prohibit retribution against those who make such disclosures.”⁵⁴⁸ The key lies in making certain that each African country has a governing process that is undergirded by the rule of law, which implies that (1) the law is supreme; (2) the majority of citizens voluntarily accept and respect the law; (3) there is judicial independence; (4) there is openness and transparency in government communication; (5) the law is applied predictably and uniformly; and (6) human rights are recognized and fully protected.⁵⁴⁹

Whistleblower programs, requirements that all public officials should declare their assets before taking office, and other programs designed to minimize impunity, enhance government accountability, and promote good governance cannot function effectively unless each country is armed with a governing process undergirded by the rule of law. Such a governing process will be characterized by, at the minimum, a separation of powers with checks and balances, including a robust and politically active civil society, a free press, and “a strong bicameral legislature to counter the powers of the presidency.”⁵⁵⁰

D. Confronting Presidential Abuse of Power

An important tenet of modern constitutional government and constitutionalism is that “nobody, regardless of his [or her] sta-

THE ARAB SPRING: RETHINKING DEMOCRATIZATION 77, 81–84 (Larbi Sadiki ed., 2015).

547. Fombad, *Constitutional Reforms and Constitutionalism in Africa*, *supra* note 99, at 1048.

548. *Id.*

549. *See, e.g.*, Mbaku, *Providing a Foundation*, *supra* note 39, at 988–92.

550. MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES, *supra* note 43, at 60.

tus, is above the law.”⁵⁵¹ The first concept of constitutionalism, Fombad argues, “proceeds from an assumption of human fallibility, the corrupting influence of power and the need to limit it.”⁵⁵² This speaks directly to the element of the rule of law referred to as “supremacy of law.”⁵⁵³ As argued by Robert Stein,⁵⁵⁴ within such a constitutional order, “the law is superior, applies equally, is known and predictable, and is administered through a separation of powers.”⁵⁵⁵ In addition, “[t]he law is superior to all members of society, including government officials vested with either executive, legislative, or judicial power.”⁵⁵⁶ Regardless of their political, social, and economic status, individuals are treated as beings “who are bound to obey and act in accordance with the law.”⁵⁵⁷

It is becoming clear that of all the threats to constitutional government and constitutionalism in Africa, the most important is “executive lawlessness, which has been made possible by the excessive powers conferred on presidents and the absence of any effective checks on the exercise of these powers.”⁵⁵⁸ Consider, for example, countries such as Cameroon, Burundi, Rwanda, and Uganda, whose presidents have been able to manipulate their constitutions to remain in power indefinitely.⁵⁵⁹ In each one of these countries, abuse of executive power and government impunity are pervasive.⁵⁶⁰

551. Fombad & Nwauche, *supra* note 110, at 93.

552. *Id.*

553. See Robert Stein, *Rule of Law: What Does It Mean?* 18 MINN. J. INT'L L. 293 (2009) (examining, inter alia, the elements of the rule of law). See also MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES, *supra* note 43, at 9–10 (noting, inter alia, that “Africans approached independence constitution making without taking cognizance of the dangers posed by unconstrained government”).

554. Robert Stein is an expert on the rule of law and professor of law at the University of Minnesota Law School.

555. Stein, *supra* note 553, at 296.

556. *Id.* at 301.

557. Fombad & Nwauche, *supra* note 110, at 93.

558. Fombad, *Constitutional Reforms and Constitutionalism in Africa*, *supra* note 99, at 1050.

559. See, e.g., Mbaku, *Constitutional Coups as a Threat to Democratic Governance in Africa*, *supra* note 430, at 77 (examining the emergence of the constitutional coup as a major constraint to democracy in Africa).

560. *Id.* MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES, *supra* note 43, at 103.

Effective government in each African country requires that the president must be constitutionally made the “sole repository of executive power.”⁵⁶¹ This is necessary to make certain that there is no confusion or doubt as to who “bears the ultimate responsibility for executive decisions.”⁵⁶² While the government must be granted enough power to perform its constitutionally-assigned functions, it must also be adequately constrained “so that it would not [become] the source of tyranny directed at the people.”⁵⁶³ Such constraints must include adequate checks and balances, which can make certain that the president does not abuse his or her power.⁵⁶⁴

Despite the fact that many African countries have undertaken structural reforms to provide themselves with more effective laws and institutions, the imperial presidency remains a threat to peace, security, and constitutionalism. There is need, then, to specifically address ways in which such excessive presidential powers can be minimized and the presidency made more effective and accountable to the people and the constitution. First, constitutional and other legal safeguards must be put in place to minimize the politicization of civil service appointments, including those to the accountability institutions. Without such safeguards, political considerations, instead of merit, would become the primary criteria used to determine which individuals are hired for important positions in government. While it is important to create commissions that can advise the government on which candidates to appoint to public positions, it is critical that these commissions be granted enough independence to minimize interference in their activities by government operatives. Those who serve on these commissions must be granted financial security, as well as security of tenure, free from “arbitrary” interference by the executive in a way that could negatively affect the commission’s independence.⁵⁶⁵

561. Fombad, *Constitutional Reforms and Constitutionalism in Africa*, *supra* note 99, at 1050.

562. *Id.*

563. MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES, *supra* note 43, at 8.

564. These checks and balances are expected to minimize not only presidential abuses of power, but also opportunism on the part of other political elites and civil servants, including those who serve in the legislature and the courts. *See, e.g., id.* at 139–40.

565. *See, e.g.,* Valente v. The Queen [1985] 2 S.C.R. 673 (Can.). Although this case deals with judicial independence and sets the minimum require-

Second, each African country must totally reconstruct the state through democratic constitution-making in order to significantly reduce the powers of the imperial presidency. This will involve, at minimum, the constitutional devolution of power away from the center and in favor of subnational units.⁵⁶⁶ Decentralization, especially if undertaken through a democratic process—that is, one in which all the country's relevant stakeholder groups are provided the wherewithal to participate—can allow the new centers of power so established to significantly enhance the management of ethnocultural diversity. As argued by Fombad, in order

[t]o enhance the quality and practice of democracy and accountability, . . . recognize cultural and ethnic diversity[,] and also promote equal and equitable development, . . . there is a need in many countries for devolution or decentralization of power in order to establish new centers of authority and policy-making.⁵⁶⁷

Decentralization, as described here, must not be undertaken through ordinary legislation since that can easily be reversed or overturned by subsequent legislative assemblies; it must be undertaken through provisions in the national constitution.⁵⁶⁸

ments for judicial independence, these requirements can also apply to the independent commissions that are set up to advise the government on appointments to important public positions.

566. Following the ethnic-induced post-election violence that engulfed Kenya in 2008, the country began a National Dialogue and Reconciliation that eventually produced a new constitution that was approved by national referendum in August 2010. See OFFICE OF THE AU PANEL OF EMINENT AFRICAN PERSONALITIES, BACK FROM THE BRINK: THE 2008 MEDIATION PROCESS AND REFORMS IN KENYA: FOREWORD BY KOFI ANNAN (2014) (detailing efforts to implement reforms in post-election Kenya). Kenya's new constitution introduced the separation of powers with checks and balances, including an independent judiciary, and devolved power away from the center to the regions. Devolution was achieved by creating seventy subnational political units, called "counties." A Senate was created to represent the regions. See CONST. OF THE REPUBLIC OF KENYA (2010), art. 6.

567. Fombad, *Constitutional Reforms and Constitutionalism in Africa*, *supra* note 99, at 1051.

568. In many Francophone countries in sub-Saharan Africa (e.g., Cameroon), there can be found a practice referred to as "decentralization within the unitary state." This, however, is not the type of decentralization being described in this article. See Piet Konings & Francis B. Nyamnjoh, *President Paul Biya and the 'Anglophone Problem' in Cameroon*, in THE LEADERSHIP CHALLENGE IN AFRICA: CAMEROON UNDER PAUL BIYA 191, 217 (John Mukum

Decentralization or devolution of power away from the center helps bring government closer to the people and provides them with the necessary tools to organize their private lives and maximize their interests. Among other things, decentralization can enhance the ability of citizens to hold their governors accountable for their actions. For example, research demonstrates that “administration by sub-national governments of their own taxes is likely to enhance accountability at the sub-national level if taxpayers are more aware of sub-national taxes under this arrangement.”⁵⁶⁹

While it is argued that “tax administration” and other types of public policies undertaken at the subnational level are likely to be “less cost effective because of economies of scale,”⁵⁷⁰ it is important to recognize that bringing government closer to the people can enhance their ability to secure the information necessary to more effectively check the exercise of government power. In addition, in resource-rich African countries where the central government derives a significant portion of public revenue from the export of natural resources, there is less of a need for the government to rely on taxation as a source of public revenue, making those who rule the country “less accountable to

Mbaku, Joseph Takougang eds. 20003) (examining, inter alia, the type of “decentralization” common in many Francophone countries in sub-Saharan Africa). Decentralization within the unitary state is a type of decentralization that is common among Africa’s francophone countries. Within such countries, while the country may have subnational units (e.g., provinces, states, and local government areas), the central government usually does not transfer power to them. For example, even though Cameroon is divided into ten regions, the leaders of these regions (i.e., the governors) are not elected by the people but are appointed by the president. Under such a political system, these leaders of sub-national units are not accountable to their constituents, but are beholden to the country’s president, who appoints them and dictates the conditions of their service. See Mbaku, *International Law and the Anglophone Problem in Cameroon*, *supra* note 287, at 119 (noting that in Cameroon, the president has the power to appoint leaders of the country’s subnational political units).

569. See FISCAL FEDERALISM AND POLITICAL DECENTRALIZATION: LESSONS FROM SPAIN, GERMANY AND CANADA 34 (Núria Bosch & José M. Durán eds., 2008).

570. *Id.*

the people (since strong institutions might be viewed as a threat to the ruler's authority)."⁵⁷¹ Abba Kolo⁵⁷² has argued:

In most resource-rich African and Middle Eastern countries, where rents from natural resource exploitation account for more than 70 percent of government revenue, the rulers maintain tight control over power . . . and have no incentive to promote institutions that would ensure accountability, human rights, good governance and rule of law.⁵⁷³

Although the solution to such abuse of power requires state reconstruction to provide a governing process that adequately constrains the state and prevents political elites from engaging in self-dealing to enrich themselves with public revenues, reconstruction must include decentralization in order to bring government closer to the people and enhance their ability to force their governors to account for their activities. Nevertheless, it is important that subnational units be granted taxing authority and that they not be made dependent on the central government for budget subventions. For, "[a] dependence on transfers [from the center] shifts the focus of local governments' accountability away from citizens and closer to the upper tiers of governments. In other words, this shift changes the direction from local to upward accountability."⁵⁷⁴

In African and other countries, center elites—that is, those who are in control of the governance institutions, such as the president, prime minister, and other political elites, as well as civil servants—usually have more information about public policies, such as how they are designed and implemented, than the general population.⁵⁷⁵ Nevertheless, while center elites may have power over the design and implementation of public policies, "they usually do not have the necessary time-and-place

571. See Abba Kolo, *Dispute settlement and sustainable development of natural resources in Africa*, in NATURAL RESOURCE INVESTMENT AND AFRICA'S DEVELOPMENT 49, 54 (Francis N. Botchway ed., 2011).

572. Abba Kolo is an expert on natural resources law and a lecturer at the Center for Energy, Petroleum and Mineral Law and Policy at the University of Dundee (UK).

573. Kolo, *supra* note 571, at 54.

574. Uri Raich, *Fiscal Determinants of Empowerment* 11 (World Bank Policy Research, Working Paper No. 3705, 2005).

575. See, e.g., MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES, *supra* note 43, at 150.

information to design policies that reflect the interests and preferences of the majority of citizens, especially those who reside in the rural areas.”⁵⁷⁶ It is essential for each African country to understand and appreciate that development in general, and poverty alleviation in particular, cannot be undertaken effectively without the participation of the poor. Constitutional federalism and the provision of effective local governments is expected to significantly enhance the ability of each local community to design and implement development policies that are geared towards fully addressing its problems.

Third, in order to effectively check presidential power, it is important for each country to realize that no political leader, no matter how “virtuous or exceptional he [or she] may be, is indispensable and irreplaceable.”⁵⁷⁷ Many African leaders are notorious for reminding their fellow citizens that without them, chaos and disintegration would ensue.⁵⁷⁸ African leaders have their own version of Louis XIV of France’s claim that the country would descend into apocalyptic anarchy after his departure from the political scene—instead of “after me” (“après moi”), the African version says “without me” (“sans moi”), hence, “*après moi, le déluge*,” which is the expression attributed to Louis XIV, and “*sans moi, le déluge*,” which is attributed to today’s African dictator.⁵⁷⁹

Fombad and Inegbedion⁵⁸⁰ argue that “provisions limiting the number of terms a president may serve must now be regarded as a crucial element in Africa’s attempts to institutionalize genuine liberal democracy, good governance and the rule of

576. *Id.*

577. Fombad, *Constitutional Reforms and Constitutionalism in Africa*, *supra* note 99, at 1052.

578. See, e.g., Godfrey Muriuki, *Some Reflections on Cold War Africa and After*, in *THE UNITED STATES AND AFRICA: FROM INDEPENDENCE TO THE END OF THE COLD WAR 20* (G. Macharia Munene, J. D. Olewe Nyunya & Korwa G. Adar eds., 1995).

579. See Fombad, *Constitutional Reforms and Constitutionalism in Africa*, *supra* note 99, at 1052, n. 199. See also Charles Fombad & Nat Inegbedion, *Presidential Term Limits and Their Impact on Constitutionalism in Africa*, in *FOSTERING CONSTITUTIONALISM IN AFRICA 1*, 12–15 (Charles Fombad & Christina Murray eds., 2010).

580. Nathaniel A. Inegbedion is a Nigerian lawyer and legal scholar and an expert on presidential term limits in Africa. He is the author (with Charles Manga Fombad) of “Presidential Term Limits and Their Impact on Constitutionalism in Africa.” See Fombad & Inegbedion, *supra* note 579, at 1.

law.”⁵⁸¹ They argue further that prolonging a president’s term in office is a major threat to the “budding seeds of democracy and constitutionalism,” and that “[t]wo terms are long enough for any exceptional leader to leave indelible footprints without sowing the seeds of dictatorship. It is a period which is sufficient to give a good leader time to leave his mark and short enough for people to tolerate a poor leader.”⁵⁸²

Although presidential term limits were one of the most important innovations of the early-1990s constitutional design programs throughout Africa, this mechanism to constrain the abuse of presidential powers and minimize impunity has not been particularly effective because Africa’s constitutional designers failed to provide for the type of robust amendment processes that were immune to manipulation by incumbent presidents. As a consequence, many African presidents have been able to easily amend their constitutions to eliminate these term limits and prolong their stay in power.⁵⁸³

Constitutional experts have intimated that some African incumbent presidents have nurtured the fear that once they leave office, they would be subjected to various forms of abuse.⁵⁸⁴ Hence, it has been argued that “term limits provisions must in addition provide both protective immunities and financial incentives” in order to “protect [ex-leaders] from politically

581. *Id.* at 28.

582. *Id.*

583. See, e.g., Isaac Mufumba, *Presidents who amended constitution to stay in power*, DAILY MONITOR (UGANDA) (Sept. 18, 2017), <https://www.monitor.co.ug/Magazines/PeoplePower/Presidents-who-amended-constitution-to-stay-in-power/689844-4099104-qj5n58z/index.html>.

584. Ahmadou Ahidjo, the President of the Republic of Cameroon, who voluntarily left office in 1982, has been cited as an example of a former head of state who was persecuted after he left office. The regime of Paul Biya, who succeeded Ahidjo, accused Ahidjo of having orchestrated the failed coup against the Biya regime in 1984. Ahidjo was subsequently tried in absentia and sentenced to death. He eventually died in exile in Senegal. See Glenn Fowler, *Ahmadou Ahidjo of Cameroon Dies; Ex-Leader Was 65*, N.Y. TIMES (Dec. 2, 1989), <https://www.nytimes.com/1989/12/02/obituaries/ahmadou-ahidjo-of-cameroon-dies-ex-leader-was-65.html>. Then, there is the case of Kenneth David Kaunda, first president of the Republic of Zambia, who was rendered stateless after the regime of Frederick J. Chiluba, who succeeded Kaunda, amended the constitution and declared that Kaunda was not a citizen of Zambia. See, e.g., Mbaku, *Citizenship Laws*, *supra* note 261, at 112.

motivated prosecutions but not from criminal responsibility, especially for mala in se offenses.”⁵⁸⁵

Finally, it is important for citizens of African countries to understand that the main objective of constitutional immunities granted to presidents is to enable them to perform their jobs, not to exempt them from the law or place them above the law and provide them with the “license to violate other people’s rights with impunity.”⁵⁸⁶ Fombad argues that although “the constitution should certainly allow for presidential immunity with respect to both civil and criminal proceedings,” it is important that “this immunity does not become a license for abuse of powers.”⁵⁸⁷

Fombad further argues that, while presidential immunities are necessary, the constitution must provide effective mechanisms to prevent their abuse. This can be accomplished, he argues, by making certain exemptions, including:

- (i) Civil proceedings for acts or omissions committed by the president in his official capacity, because responsibility for this is usually imputed to the state.
- (ii) Crimes or wrongs committed before the president assumed office. To reduce the risk of corrupt leadership, the presidential office should be reserved for those who have a clean record and not those who want to use the office to escape liability for their past misdeeds.
- (iii) Any private act that amounts to abuse of the official position for private ends as well as any act that violates the spirit of the constitution.⁵⁸⁸

The existence of these provisions, of course, is a necessary but insufficient condition for the practice of constitutionalism. Sufficiency requires that each country establish institutional arrangements that guarantee the rule of law.⁵⁸⁹ For, without adequate and effective constraints on the exercise of government power, presidents are most likely to abuse their power and en-

585. Fombad, *Constitutional Reforms and Constitutionalism in Africa*, *supra* note 99, at 1054.

586. *Id.* at 1056.

587. *Id.* at 1057.

588. *Id.*

589. *See, e.g.*, MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES, *supra* note 43, at 237.

gage in activities that violate the rights of their fellow citizens.⁵⁹⁰

E. Dealing with Extreme Poverty in Africa

Institutional reforms geared toward providing each African country with effective governing processes will be unable to create “a solid foundation for constitutionalism if they fail to address the concerns of the weak and the vulnerable in society,”⁵⁹¹ especially those who have been pushed by government policies to the economic and political margins.⁵⁹² Extreme poverty, especially among historically marginalized groups, is a major contributor to the ethnic-induced violence that has pervaded many African countries during the last several decades.⁵⁹³

Extreme poverty is a significant problem for virtually all African countries. In an article published in *The Wall Street Journal* in late 2018, the Bill & Melinda Gates Foundation is quoted as saying that by the year 2050, 44 percent of people living in extreme poverty will be found in Nigeria and the DRC, “compared with 20 [percent] today.”⁵⁹⁴ The article notes that

590. See, e.g., Mbaku, *International Law and the Struggle Against Government Impunity in Africa*, *supra* note 59 (examining, inter alia, constitutional mechanisms to minimize government impunity in Africa).

591. Fombad, *Constitutional Reforms and Constitutionalism in Africa*, *supra* note 99, at 1058.

592. These will include those who have traditionally been discriminated against, such as women and children, as well as various ethnic and religious minorities. For example, despite the significant progress that post-apartheid South Africa has made, particularly in opening up political spaces for more participation by the country's African majority, the country's various ethno-cultural groups continue to suffer from strikingly high rates of extreme poverty. In 2018, as many as 13.8 million people in South Africa were living in extreme poverty, a rate of 24.33 percent (13.8 million out of a population of 56.72 million). See Yomi Kazeem, *Nigeria has Become the Poverty Capital of the World*, QUARTZ AFRICA (June 25, 2018), <https://qz.com/africa/1313380/nigerias-has-the-highest-rate-of-extreme-poverty-globally/>. See also Mbaku, *International Law and the Struggle Against Government Impunity in Africa*, *supra* note 59, at 80.

593. One glaring example is the current violent mobilization by the Anglophones of Cameroon against the Francophone-dominated central government, which has marginalized the former, economically and politically, since unification in 1961. See, e.g., Zongo, *supra* note 147.

594. Betsy McKay & Gabriele Steinhäuser, *Extreme Poverty Concentrates in sub-Saharan Africa*, WALL ST. J. (Sept. 18, 2018), <https://www.wsj.com/articles/extreme-poverty-concentrates-in-sub-saharan-africa-1537243201>.

the “number of people living in extreme poverty is becoming concentrated in some of the most unstable and populous parts of Africa, raising the risk of political violence and devastating disease outbreaks.”⁵⁹⁵ Bill and Melinda Gates then went on to argue that “poverty reduction in Africa” should be the world’s top priority and “investing in health and education in Africa can shift the trajectory” to have a significant positive impact on poverty eradication.⁵⁹⁶

When many Africans joined the pro-democracy movements of the early 1990s, there was more to their agitation than just an interest in increased levels of political participation. Granted, many of these grassroots efforts, including those of the anti-apartheid groups in South Africa, were designed to rid African countries of the exploitative and oppressive *ancien régimes* and replace them with more democratic, inclusive, and progressive constitutional orders. Nevertheless, undergirding these efforts was the poverty alleviation imperative—many years of dictatorship and dysfunctional governance had allowed a few ruling elites to appropriate public resources and live in extreme opulence, while their fellow citizens were subjected to enormously high levels of poverty and material deprivation.⁵⁹⁷ As a consequence, the need to fully address economic marginalization was part of the impetus for the pro-democracy street demonstrations that swept the continent in the early 1990s.⁵⁹⁸

Unfortunately, the new and amended constitutions that emerged from the post-1990s constitutional exercises failed to

595. *Id.* See also WORLD BANK, POVERTY AND SHARED PROSPERITY 2018: PIECING TOGETHER THE POVERTY PUZZLE, <https://openknowledge.worldbank.org/bitstream/handle/10986/30418/9781464813306.pdf> (examining, inter alia, the persistence of extreme poverty around the world, including in the African countries).

596. See Kevin J. Delaney, *Bill and Melinda Gates: The world’s priority should be poverty reduction in Africa*, QUARTZ AFRICA (Sept. 17, 2018), <https://qz.com/1392813/bill-and-melinda-gates-the-worlds-priority-should-be-poverty-reduction-in-africa/>.

597. See Mbaku, *International Law and the Fight Against Bureaucratic Corruption in Africa*, *supra* note 145, at 699 (noting that corruption and poor governance have enhanced “the ability of a few politically connected individuals and groups [in African countries] to maintain relatively high standards of living while the rest of the citizens swelter in extremely high levels of poverty and material deprivation”).

598. See, e.g., Mbaku & Ihonvbere, *supra* note 95, at 1 (arguing, inter alia, that poverty and economic exclusion were critical elements in the struggle for democratic transition that began in Africa in the early-1990s).

deal with or specifically address “the issue of equitable distribution of [each] nation’s resources, nor was there any attempt to liberate the masses from the scourges of poverty, oppression, and discrimination.”⁵⁹⁹ Without genuine opportunities for Africans to successfully engage in self-actualization, especially the creation of the wealth necessary to fight poverty and improve their living conditions, they are less likely to see democracy—including the right to participate in elections⁶⁰⁰—as an appropriate or effective tool of governance. Thus, democracy, as it is currently practiced in many African countries, must deliver significant improvements in the quality of life of the people, particularly those who have historically been discriminated against and pushed to the economic margins; otherwise, most people are likely to consider it an institutional construct that has no relevance to their lives.

In a recent survey conducted by Global Citizen to determine the ten most important issues to Africans, including the ones to which they believe their governments should devote public resources and efforts, the following issues emerged as the most critical: education, health, agriculture, infrastructure, security, access to energy, unemployment, access to clean water, poverty, and food security.⁶⁰¹ The result underscores that Africans generally view poverty alleviation and improved welfare as the most important public policy imperatives.⁶⁰²

As is well-known to economists, effective poverty alleviation must begin with the creation of wealth. Without wealth creation by the private sector, the government will not be able to generate the tax revenues needed to invest in areas such as healthcare, water-treatment plants, rural agriculture, education, nutrition (especially for children), prenatal care, and security, all of which are essential to improve the welfare of the poor.⁶⁰³ As argued by some scholars, democracy in Africa “will

599. Fombad, *Constitutional Reforms and Constitutionalism in Africa*, *supra* note 99, at 1058.

600. The right to vote for a candidate of their choice has emerged as the most visible manifestation of African democracy. *See, e.g., id.*

601. *See, e.g.,* Meghan Werft, *10 Issues Africans care about most*, GLOBAL CITIZEN (Jan. 14, 2016), <https://www.globalcitizen.org/en/content/10-development-issues-africans-care-about-most/>.

602. *Id.*

603. MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES, *supra* note 43, at 2.

remain meaningless for as long as a majority of the population lack the opportunities to lift themselves out of the poverty trap, lack of personal security, and are unable to have access to healthcare and basic education.”⁶⁰⁴

Scholars continue to argue that constitutional reforms to improve governance will not likely “provide a solid foundation for constitutionalism if they fail to [fully] address the concerns of the weak and vulnerable in society,” particularly for things such as, access to education, health care, food, housing, and clean water.⁶⁰⁵ In other words, constitutional reformers must deal with socio-economic or second generation rights. Thus, while virtually all African constitutions deal with so-called first generation rights,⁶⁰⁶ they do not specifically confront or deal with “second generation rights,” which concern social welfare.⁶⁰⁷ The failure to deal specifically with socio-economic rights is not unique to African countries. For example, although the Virginia Declaration of Rights of 1776 “contained clauses dealing with free elections, trial by jury, respect for property, and freedom of the press,” it “failed to mention any rights related to a social welfare function of the state.”⁶⁰⁸ In addition, while the US Constitution’s Bill of Rights⁶⁰⁹ specifically guarantees freedom of religion, speech, and the press, as well as the rights of the people to peacefully assembly, there is no mention of “any obligation incumbent upon the state to provide its citizens with any service other than physical security and a functioning judicial system.”⁶¹⁰

In a 2006 study conducted by Christof Heyns and Waruguru Kaguongo,⁶¹¹ they determined that “[c]ivil and political rights are on the whole significantly more widely protected than socio-economic rights in African constitutions.”⁶¹² They went on to state that, “[t]hrough recognition of the latter rights is generally

604. See e.g., Fombad, *Constitutional Reforms and Constitutionalism in Africa*, *supra* note 99, at 1058.

605. *Id.*

606. First-generation rights are civil and political rights. See, e.g., CHRISTIAN TOMUSCHAT, *HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM* 26–27 (2003).

607. *Id.* at 28.

608. *Id.* at 27.

609. U.S. CONST. art. I (amended 1992).

610. TOMUSCHAT, *supra* note 606, at 27.

611. Heyns & Kaguongo, *supra* note 196, at 673.

612. *Id.* at 677.

within the bill of rights, some constitutions recognize socio-economic rights as principles of state policy.”⁶¹³ The Heyns-Kaguongo study analyzed fifty-three African constitutions and determined that the right to education is recognized in forty-five countries;⁶¹⁴ the right to social security is recognized by twenty-nine African constitutions;⁶¹⁵ the right to development is recognized in twenty-four African countries;⁶¹⁶ and the right to “an adequate standard of living” is recognized by fourteen African constitutions.⁶¹⁷

A World Bank study released in 2016 shows that poverty remains a major challenge for Africa.⁶¹⁸ According to the study, while “the share of people living on less than \$1.90 a day (in 2011 international purchasing power parity PPP) fell from 57 percent in 1990 to 43 percent in 2012, . . . the number of poor still increased more than 100 million (from 288 to 389 million).”⁶¹⁹ The failure of Africa’s new constitutional orders—those that were established in the aftermath of the pro-democracy movements of the post-1990s period, including those of the Arab Spring⁶²⁰—to deal effectively and fully with pov-

613. These countries are Eritrea, Ethiopia, The Gambia, Ghana, Guinea-Bissau, Liberia, Malawi, Namibia, Swaziland, Tanzania, Uganda, and Zambia. *See id.*

614. *Id.* at 699.

615. *Id.* at 708.

616. *Id.* at 710.

617. *Id.* Post-apartheid South Africa, however, is the exception. The country’s constitution considers socio-economic rights as human rights and has included them in the Bill of Rights. Thus, the right to housing, health care, food, water, education, and social security are included in the Bill of Rights. *See S. AFR. CONST.*, 1996.

618. KATHLEEN BEEGLE, ET AL., *POVERTY IN A RISING AFRICA* v, 9 (World Bank, 2016).

619. *Id.* at 4.

620. The pro-democracy demonstrations usually referred to as the Arab Spring evolved from the self-immolation of Tunisian street vendor, Tarek al-Tayeb Mohamed Bouazizi, who was protesting his humiliation by government regulators. *See Mbaku, Providing a Foundation, supra* note 39, at 1041. *See also* DAFNA HOCHMAN RAND, *ROOTS OF THE ARAB SPRING: CONTESTED AUTHORITY AND POLITICAL CHANGE IN THE MIDDLE EAST* (2013) (examining, inter alia, the Arab Spring, its evolution, and its impact on the peoples of various countries in North Africa and the Middle East).

erty, remains a major threat to peace and security in the continent generally,⁶²¹ and constitutionalism in particular.⁶²²

Of course, it is important to note that the multifarious problems that now plague the African countries, including poverty, cannot be eradicated through simple constitutional design alone. Nevertheless, poverty eradication efforts cannot be successful without a strong constitutional foundation. For example, a constitution that creates a governing process undergirded by the rule of law and, hence, provides for superiority of law and judicial independence, as well as openness and transparency in government communication, can minimize bureaucratic corruption and significantly enhance government accountability. Such an improved and more accountable government can make certain that public “resources are used judiciously and equitably for the common benefit of all.”⁶²³

It is thus argued that, in order to significantly enhance respect for and adherence to the rule of law in Africa, it is important that socio-economic rights are entrenched in the constitution. Nevertheless, some scholars have argued that “the entrenchment of socio-economic rights will impose an unreasonable burden on the state.”⁶²⁴ The Constitution of the Republic of South Africa, promulgated in 1996, guarantees socio-economic rights in Articles 26 and 27.⁶²⁵ Article 26 guarantees everyone the right to “have access to adequate housing,” and Article 27 guarantees everyone the right to have access to “health care, food, water and social security.”⁶²⁶ With respect to these rights, the state is only required to “take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.”⁶²⁷

Constitutional provisions or guarantees, however, are a necessary but insufficient condition for the improvement of the quality of life for the people. Sufficiency, it is argued, requires

621. See, e.g., COMPENDIUM OF KEY DOCUMENTS RELATING TO PEACE AND SECURITY IN AFRICA 114 (Monica Juma ed., 2006) (arguing, inter alia, that poverty is a major threat to security in Africa).

622. Fombad, *Constitutional Reforms and Constitutionalism in Africa*, *supra* note 99, at 1059.

623. *Id.* at 1060.

624. *Id.*

625. S. AFR. CONST., 1996.

626. *Id.* art. 26–27.

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

that the judiciary play an important role in making certain that those rights are defended.⁶²⁸ A competent and independent judiciary is critical to the enforcement of constitutional guarantees. For, without such a capable judiciary, particularly one that is independent of the other branches of government, the executive is unlikely to enforce constitutional guarantees. Judicial independence, as argued by many constitutional scholars, is a core element of the rule of law⁶²⁹ and of constitutionalism and constitutional practice.⁶³⁰ To make certain that constitutional guarantees are fully and effectively enforced, each African country must provide itself with a judiciary that is truly independent of the other branches of government.⁶³¹

IV. LAYING THE FOUNDATION FOR THE IMPLEMENTATION OF *AGENDA 2063*

It is not difficult to see that the African aspirations elaborated in *Agenda 2063* cannot be successfully achieved within the institutional environments that currently exist in most African countries. In countries such as South Sudan,⁶³² Libya,⁶³³ Central African Republic,⁶³⁴ DRC,⁶³⁵ and Somalia,⁶³⁶ for example—

628. Fombad, *Constitutional Reforms and Constitutionalism in Africa*, *supra* note 99, at 1060.

629. Professor Stein argues, for example, that in a society governed by the rule of law, “[j]udicial power is exercised independently of the executive or legislative powers and individual judges base their decisions solely on facts and law of individual cases.” Stein, *supra* note 553, at 302.

630. Fombad, *Constitutional Reforms and Constitutionalism in Africa*, *supra* note 99, at 1061.

631. It is important that judicial officers be granted “security of tenure,” “financial security,” and “institutional independence.” See *Valente v. The Queen* [1985] 2 S.C.R. 673, paras. 27, 40, 47 (Can.). This is the Supreme Court of Canada case that set the minimum standards for judicial independence in Canada.

632. See, e.g., Hiba Morgan, *South Sudan: Fighting continues despite peace deal*, ALJAZEERA (Feb. 19, 2019), <https://www.aljazeera.com/news/2019/02/south-sudan-fighting-continues-peace-deal-190219151722056.html> (indicating, inter alia, that despite signing a series of peace agreements, ethnic-induced violence continues to endanger peace and security and stunt economic growth, poverty alleviation, and development).

633. See, e.g., Nick Paton Walsh, *Week of chaos a reminder that Libya is still broken*, CNN NEWS (Sept. 3, 2018), <https://www.cnn.com/2018/09/03/africa/libya-violence-analysis-intl/index.html>.

634. See Sarah Ferguson, *Central African Republic: An Escalating Crisis in Central African Republic*, UNICEF USA (Jan. 17, 2019), <https://www.unicefusa.org/stories/escalating-crisis-central-african-republic/35185> (arguing, inter

which either do not have an effective central authority or have governmental systems that are dysfunctional and pervaded by high levels of corruption—it is virtually impossible to guarantee the peace and security, as well as the peaceful coexistence of population groups, that are a *sine qua non* for entrepreneurial activities and the creation of wealth. Without the creation of wealth, these countries will not be able to “eradicate poverty in one generation and build shared prosperity through social and economic transformation.”⁶³⁷

Even African countries like Kenya, which have managed to provide themselves with a relatively strong governing process undergirded by separation of powers with checks and balances, are still struggling to minimize ethnic-induced violence and create an environment that is conducive to peaceful coexistence and wealth creation.⁶³⁸ Kenya’s 2010 constitution provided the country with not only a governing process based on separation of powers, but also constitutionally-entrenched federalism.⁶³⁹

alia, that “[a] resurgence of brutal violence has devastated the [Central African Republic]” and that “[c]hildren and families are in urgent need of protection and humanitarian aid”).

635. See Karen McVeigh, *Congo gripped by fear as thousands flee ‘bone-chilling’ violence*, GUARDIAN (Feb. 2, 2018), <https://www.theguardian.com/global-development/2018/feb/02/democratic-republic-of-the-congo-gripped-by-fear-as-thousands-flee-bone-chilling-violence> (describing, inter alia, the rising violence in the DRC).

636. See Human Rights Watch, *World Report 2019—Somalia: Events of 2018*, HUMAN RIGHTS WATCH, <https://www.hrw.org/world-report/2019/country-chapters/somalia> (last visited Mar. 12, 2019) (arguing, inter alia, that “[f]ighting, insecurity and lack of state protection, and recurring humanitarian crises had a devastating impact on Somali civilians in 2018”).

637. This is the essence of Aspiration One. See AGENDA 2063, *supra* note 31, at 9.

638. Human Rights Watch, *Kenya: Post-Election Killings, Abuse*, HUMAN RIGHTS WATCH (Aug. 27, 2017), <https://www.hrw.org/news/2017/08/27/kenya-post-election-killings-abuse> (noting the violence and killings that took place after Kenya’s 2017 presidential election); Eyder Peralta, *Post-Election Violence Continues in Kenya, As Opposition Leader Returns*, NPR (Nov. 18, 2017), <https://www.npr.org/2017/11/18/565095126/post-election-violence-continues-in-kenya-as-opposition-leader-returns> (noting the pervasive of violence in Kenya).

639. See CONST. OF THE REPUBLIC OF KENYA (2010), art. 6.

Yet, despite these institutional reforms, Kenya continues to struggle with high levels of corruption⁶⁴⁰ and ethnic-induced violence, especially following elections.⁶⁴¹ Nevertheless, the ability of the Kenyan Supreme Court to successfully assert its independence following the 2017 presidential elections is a sign that the 2010 constitutional reforms have provided an effective foundation for the practice of constitutional government and constitutionalism.⁶⁴² Of course, it is important to note that constitutionalism, which is the best defense against arbitrary acts and impunity,⁶⁴³ is an ideal that countries, including Kenya and others in Africa, hope and seek to achieve. Thus, in deepening and institutionalizing democracy and creating a society in which adherence to the rule of law is standard practice, a country is bound to make some mistakes, as is evident, for example, in Kenya's struggle with corruption and post-election violence and South Africa's fight against state capture and extreme income and wealth distribution inequality.⁶⁴⁴

It is further important to note that while South Africa has had its democratic constitution since 1996 and, hence, has had a much longer time within which to develop a culture of constitutional government than Kenya, whose democratic constitu-

640. See, e.g., KEMPE RONALD HOPE, SR., CORRUPTION AND GOVERNANCE IN AFRICA: SWAZILAND, KENYA, NIGERIA 61–112 (2017) (examining, inter alia, the pervasiveness of corruption in Kenya).

641. Winnie Walyaki & Maureen Onyango-Ngesa, *Kenya's post-election violence: the harm that's been done to children*, CONVERSATION (Aug. 17, 2017), <https://theconversation.com/kenyas-post-election-violence-the-harm-thats-been-done-to-children-82266>.

642. See e.g., Jason Burke, *Kenyan supreme court annuls Uhuru Kenyatta election victory*, GUARDIAN (Sept. 1, 2017), <https://www.theguardian.com/world/2017/sep/01/kenyan-supreme-court-annuls-uhuru-kenyatta-election-victory>.

643. Richard Bellamy, *Constitutionalism*, in 2 INTERNATIONAL ENCYCLOPEDIA OF POLITICAL SCIENCE 416 (Bertrand Badie, Dirk Berg-Schlosser & Leonardo Morlino eds., 2011) (arguing, inter alia, that “constitutionalism seeks to prevent arbitrary government”).

644. South Africa, through its post-apartheid constitution, and Kenya, through its 2010 constitution, have provided themselves with effective institutions for the practice of constitutional government and constitutionalism. Nevertheless, it is likely to take some time before citizens begin to trust national institutions and rely on them for the organization of their private lives and the resolution of their conflicts, including those arising from elections. See generally, CONST. OF THE REPUBLIC OF KENYA (2010); see also generally S. AFR. CONST., 1996.

tion only came into being in 2010, South Africa is also in a much better position to entrench constitutionalism than Kenya because the South African constitution also has established mechanisms to force public transparency and accountability.⁶⁴⁵ As evidenced by the work of the Public Protector and several cases brought before the Constitutional Court, these accountability institutions have performed well and their independence, integrity, and impartiality have been affirmed by the court.⁶⁴⁶ The key to realizing the aspirations detailed in *Agenda 2063* is to implement institutional reforms to create governing processes in African countries that are undergirded by separation of powers with effective checks and balances; this would include an independent judiciary, a robust and politically-active civil society, a free press, and other civil society organizations (e.g., political parties) that can effectively check the exercise of government power. Without such governing processes, it would not be possible for the AU and African countries to create the Africa that they want, as outlined in *Agenda 2063*.

A. Aspiration One: A Prosperous Africa Based on Inclusive Growth and Sustainable Development

Aspiration One calls for African countries to eradicate poverty and to do so in a single generation. Under this aspiration, Africans are expected to drastically transform their economies and provide the wherewithal for inclusive economic growth and sustainable development.⁶⁴⁷ Inclusive economic growth, it is argued, “focuses on long-term, sustained growth associated with productivity growth and employment opportunities for broad portions of households and firms within countries.”⁶⁴⁸ Looked at another way, inclusive growth can be seen as “‘sustained,’ broad-based (‘concerned with opportunities for the majority of the labor force, poor and middle-class alike’) and focused on employment more than ‘direct income redistribution, as a means of increasing incomes for excluded groups.’”⁶⁴⁹

645. S. AFR. CONST., 1996, art. 181(2).

646. See, e.g., *President of the Republic of South Africa v. Office of the Public Protector & Others*, 2017 (2) SA 100 (GP) at para. 1 (S. Afr.).

647. AGENDA 2063, *supra* note 31, at 2, ¶ 9.

648. Quoted in Jane Jenson, *The ‘Social’ in Inclusive Growth: The Social Investment Perspective*, in INCLUSIVE GROWTH, DEVELOPMENT AND WELFARE POLICY: A CRITICAL ASSESSMENT 108, 119–120 (Reza Hasmath ed., 2015).

649. *Id.* at 119–20.

With respect to African countries, inclusive growth is the type of growth that provides the wherewithal for all groups, including those that have historically been discriminated against, such as minority ethnocultural groups, to participate fully and effectively in the creation of wealth. Through such a process, poor households do not have to wait for tax and redistributive programs but can directly share in the proceeds of economic activities. The question to answer then is twofold: how can each African country make certain that its economy (1) provides an enabling institutional environment for the creation of wealth and (2) enhances the ability of all groups to participate in the wealth-creating process?

Certainly, an African country cannot create such an enabling environment if it is unable to guarantee peace and security. To create an institutional environment in which all citizens can engage in the creation of wealth, a country must first secure the peace and establish a governing process that can sustain peace and security. For, without peaceful coexistence, property rights are likely to be insecure and entrepreneurs will be less willing to invest in wealth-creating processes. In addition, where ethnocultural groups are engaged in violent mobilization and war—as is the case in South Sudan, parts of Mali, Nigeria, and Cameroon, as well as the DRC and Somalia—it is not likely that there can be substantive interest, on the part of citizens, in trade and investment or any form of wealth creation. Hence, the fulfilment of Aspiration One must be preceded by necessary institutional reforms to create, within each African country, robust and effective governing processes, particularly those that can guarantee peace and security.

Africans, through *Agenda 2063*, aim to achieve a “high standard of living, and quality of life, sound health and well-being” by the year 2063.⁶⁵⁰ In order to do so, they will need highly “educated and skilled citizens, underpinned by science and technology and innovation for a knowledge society.”⁶⁵¹ Africans also anticipate that by 2063, no child will miss school because of discrimination or poverty.⁶⁵² These transformative processes cannot be successfully undertaken without appropriate reforms to produce, in each country, institutional arrange-

650. AGENDA 2063, *supra* note 31, at 2, ¶ 10.

651. *Id.*

652. *Id.*

ments that enhance the practice of constitutional government and constitutionalism.

B. Aspiration Two: An Integrated Continent, Politically United, Based on the Ideals of Pan-Africanism and the Vision of Africa's Renaissance

Since the OAU was founded in 1963, African countries have been seeking ways to create a united Africa, with common governmental and economic institutions.⁶⁵³ Among the purposes of the OAU are: “(a) [t]o promote the unity and solidarity of the African States;” and “(b) [t]o coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa.”⁶⁵⁴ Part of the OAU’s charge, as evidenced by part of its title, was to work towards “African Unity.”

Agenda 2063 reprises the themes of unity provided in the OAU’s Charter. Aspiration Two seeks to create “[a]n integrated continent” that is “politically united” and “based on the ideals of Pan-Africanism⁶⁵⁵ and the vision of Africa’s Renaissance.”⁶⁵⁶ Specifically, *Agenda 2063* states that African unity is “motivated by development based on self-reliance and self-

653. OAU Charter, *supra* note 54.

654. *Id.* art. (1) (a–b).

655. Pan-Africanism has been defined as a movement “aimed at an intellectual understanding and cooperation among all groups of African descent in order to bring about the industrial and spiritual emancipation of the Negro people.” Olayiwola Abegunrin, *Origins of Pan-Africanism*, in PAN-AFRICANISM IN MODERN TIMES: CHALLENGES, CONCERNS, AND CONSTRAINTS 1 (2016). Other definitions have incorporated “economic, social, and cultural development of the continent, the avoidance of conflict among African states, the promotion of African unity and influence in world affairs.” *See id.*

656. AGENDA 2063, *supra* note 31, at 4. The African Renaissance is a movement to provide the continent with a “new beginning”—one that would “inspire the growth of men of genius that can guide its socio-economic rebirth and renewal.” WASHINGTON A. J. OKUMU, THE AFRICAN RENAISSANCE: HISTORY, SIGNIFICANCE AND STRATEGY 145 (2002). The African Renaissance is said to be built on three foundations:

(i) the right thing—in the context of post-cold war politics, now is the right time for a renaissance; (ii) strong leadership—Thabo Mbeki has emerged as an inspirational advocate of renaissance; and (iii) resources—Africa’s mineral wealth, natural resources and agricultural potential can sustain the economic development we so desperately need.

See id. at 146.

determination of African people, with democratic and people-centered governance,”⁶⁵⁷ and that Africa “shall be an integrated, united, peaceful, sovereign, independent, confident and self-reliant continent.”⁶⁵⁸ In addition, *Agenda 2063* states that there will be a “United Africa” by 2063, which will have a “world class, integrative infrastructure that criss-crosses the continent,” and “seamless borders, and management of cross-border resources through dialogue,” as well as “dynamic and mutually beneficial links with her Diaspora.”⁶⁵⁹

Agenda 2063 further hopes that, by 2063, “[a]ll kinds of oppression, including gender, racial and other forms of discrimination will be ended.”⁶⁶⁰ More specifically, the AU expects that “[t]he political unity of [the continent] will be the culmination of the integration process, which includes the free movement of people [as well as capital, goods and services] and the establishment of continental institutions, leading to economic integration.”⁶⁶¹ Achieving the goals listed in Aspiration Two will be extremely difficult given the nature of institutional arrangements in many of the countries in the continent today. How can one expect countries (e.g., South Sudan, Central African Republic, Libya, and Cameroon) that are currently torn apart by violent sectarian conflict and presently unable to achieve any reasonable level of national unity and integration to contribute positively to continental unity?

Continental unity must begin at the grassroots. Within each African country, the diverse groups that inhabit the country, whether defined by religion, ethnicity, or other trait, must find ways to coexist peacefully. The solution to minimizing ethnic-induced violence and enhancing peaceful coexistence is the provision of institutional arrangements undergirded by the rule of law. The development of such laws and institutions must be undertaken through a democratic (i.e., people-driven, bottom-up, participatory, and inclusive) constitution-making process. Such a process should provide all relevant stakeholder groups with the wherewithal to participate fully and effectively in the selection of the country’s laws and institutions. A participatory and inclusive process will ensure that the laws selected

657. AGENDA 2063, *supra* note 31, at 4, ¶ 19.

658. *Id.* at 4, ¶ 21.

659. *Id.* at 4, ¶ 20.

660. *Id.* at 4–5, ¶ 22.

661. *Id.* at 5, ¶ 23–24.

are those that the people can obey and those that would reflect their interests and values.⁶⁶²

Effective governance institutions should promote the peaceful coexistence of each African country's subcultures by providing them with the legal tools to maximize their values, but do so without preventing others from acting similarly. The imperative for peaceful coexistence is "for each African country to provide all relevant stakeholder groups (which may include the various subcultures) with the legal tools to maximize their values, resolve conflict, compete for the benefits of economic growth, and engage in other activities to advance their interests, without preventing other groups from acting similarly."⁶⁶³

The laws, as they exist, must not allow the majority to tyrannize the minority.⁶⁶⁴ For, where majoritarian tyranny exists, as is the case in Cameroon, aggrieved groups are likely to opt for violent mobilization in an effort to minimize their marginalization.⁶⁶⁵ Hence, in order to enhance peaceful coexistence, each African country must provide itself with institutional arrangements that adequately constrain the government, so as to prevent those who control the government from tyrannizing other groups, while at the same time providing all groups with the legal tools to participate fully and effectively in economic and political markets.

Promoting unity in Africa, then, must begin with securing the peaceful coexistence of ethnocultural groups within each country. This, of course, can only be done through providing each country with institutional arrangements that enhance

662. See MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES, *supra* note 43, at 106–07 (arguing, inter alia, that the most effective way to provide a country with laws and institutions that are respected and accepted by the majority of the people is to create these institutional arrangements through a participatory and inclusive process).

663. *Id.* at 211.

664. This is the "tyranny of the majority" that James Madison was concerned about during the founding of the US. See THE FEDERALIST NO. 51, *supra* note 365, at 123.

665. See, e.g., KONINGS & NYAMNJOH, *supra* note 474 (examining, inter alia, the marginalization of Cameroon's Anglophones by the Francophone-dominated central government). The Anglophones became violent in 2018 when they realized that the Francophone-dominated central government was not interested or willing to engage in peaceful dialogue with them to resolve the problem of their political and economic marginalization. See Zongo, *supra* note 147.

and guarantee the practice of constitutional government and constitutionalism.

C. Aspiration Three: An Africa of Good Governance, Democracy, Respect for Human Rights, Justice, and the Rule of Law

Aspiration Three expresses what must be done before Africa can achieve the other enumerated aspirations. Each African country must develop "a universal culture of good governance, democracy, respect for human rights, justice and the rule of law."⁶⁶⁶ Africans cannot successfully engage in the type of productive activities that create wealth without the existence of "good governance," which includes a "respect for the rule of law" and "human rights."⁶⁶⁷ For, where there does not exist a culture of good governance or the practice of constitutional government, some groups are likely to resort to violent mobilization in order to minimize their marginalization and/or secure higher levels of political and economic participation.⁶⁶⁸

According to *Agenda 2063*, Africa will "[b]e a continent where democratic values, culture, practices, universal principles of human rights, gender equality, justice and the rule of law are entrenched," and there are "capable institutions and transformative leadership in place at all levels."⁶⁶⁹ In addition, the "continent's population will enjoy affordable and timely access to independent courts and judiciary that deliver justice without fear or favor."⁶⁷⁰ The provision of these transformative institutions must begin at the country level—that is, before Africans can develop continental institutions that promote, deepen, and institutionalize democracy and the rule of law, that process must first be undertaken at the domestic level. Put another way, the practice of constitutional government and constitutionalism at the country level must precede its existence at the continental level.

666. AGENDA 2063, *supra* note 31, at 5, ¶ 27.

667. *Id.*

668. See MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES, *supra* note 43, at 2–3 (listing, inter alia, some of the subcultures in Africa that have opted for violent mobilization because of perceived or actual marginalization at the hands of the central government).

669. AGENDA 2063, *supra* note 31, at 5, ¶ 28.

670. *Id.* at 5, ¶ 29.

D. Aspiration Four: A Peaceful and Secure Africa

The AU hopes that by 2063 the continent will have established at all levels and made functional “[m]echanisms for peaceful prevention and resolution of conflicts,”⁶⁷¹ and that, as a first step, “dialogue-centered conflict prevention and resolution will be actively promoted in such a way that by 2020 all guns will be silent.”⁶⁷² In addition, “[a] culture of peace and tolerance shall [have been] nurtured in Africa’s children and youth through peace education.”⁶⁷³ Unfortunately, Africans would not be able to engage in the type of robust dialogue that can help them to peacefully resolve conflict unless they first arm themselves with effective governance systems—those that are specifically undergirded by the rule of law. Perhaps, more importantly, African children cannot actively engage in “peace education” if they are presently engaged as “child soldiers” fighting in one conflict or another or being held hostage by one extremist group or other. In a study released in 1999, Human Rights Watch determined that “there were more than 120,000 children under 18 years of age . . . being used as soldiers across the continent.”⁶⁷⁴ The report went on to state that many of the children being used as child soldiers were “no more than 7 years of age.”⁶⁷⁵ As argued by Reed Brody, Advocacy Director of Human Rights Watch, “African children are being targeted across the continent as tools of war.”⁶⁷⁶

In addition to the fact that children who have been forcefully conscripted to fight in various conflicts are not able to participate in normal childhood activities, especially learning the values and customs of their communities, they are likely to absorb the destructive and dysfunctional values of the extremist groups that have captured and conscripted them. Child soldiers live in an environment in which there is “wanton destruction of life and property.”⁶⁷⁷ In addition, daily exposure to violence and

671. *Id.* at 6, ¶ 32.

672. *Id.*

673. *Id.*

674. *More Than 120,000 Child Soldiers Fighting in Africa*, HUMAN RIGHTS WATCH (April 18, 1999), <https://www.hrw.org/news/1999/04/18/more-120000-child-soldiers-fighting-africa>.

675. *Id.*

676. *Id.*

677. Richard Cornwell, Comment, *War and the Decline of Africa*, 21 AFR. INSIGHT 74, 75 (1991).

the destruction of human life undermine the children's sense of values, and, as argued by one commentator, these child soldiers "are growing up without any sense of values. . . . They know nothing but the gun."⁶⁷⁸

Although the Human Rights Watch published its report in 1999, the problem of the child soldier remains as relevant today as it was back then. In fact, in South Sudan's ever escalating civil war, which started in 2013, child soldiers can be found in all areas of the fighting—from youngsters who serve as "bodyguards" to senior military officers of the various militias to frontline soldiers.⁶⁷⁹ Today, South Sudan has the largest number of child soldiers in all of Africa.⁶⁸⁰ Nevertheless, South Sudan is not the only country in Africa that hosts a large number of child soldiers—they can also be found in the Central African Republic, Mali, Libya, Sudan, and the DRC. In Nigeria, the extremist group, Boko Haram, has been very successful in forcefully abducting and using children as soldiers and suicide bombers; in Somalia, Al-Shabaab has been engaged in similar efforts to bring children to its ranks to serve as soldiers and suicide bombers.⁶⁸¹

Children have a very important role to play in Africa's efforts to achieve political and economic development generally and the ideals elaborated in *Agenda 2063* in particular. Nevertheless, these children cannot contribute positively to the transformation of Africa unless they are liberated from their present enslavement and provided with facilities to develop the skills and competencies necessary to function as productive adults. Hence, the first line of business for the AU must be to make certain that peace is secured in these conflict-plagued countries. Subsequently, each one of these countries must then engage in robust institutional reforms to create governing processes that are undergirded by the rule of law. Implied in such reforms is that each country will provide itself with legal mechanisms for the peaceful resolution of conflict. Such reforms should provide a sound foundation for the recognition

678. *Id.* at 76.

679. See, e.g., Jason Burke & Phil Hatcher-Moore, 'If you are old enough to carry a gun, you are old enough to be a soldier,' GUARDIAN (July 24, 2017), <https://www.theguardian.com/global-development/2017/jul/24/south-sudan-child-soldiers>.

680. As of 2017, there were 18,000 child soldiers in South Sudan. See *id.*

681. *Id.*

and promotion of human rights and “moral values based on inclusion and the rejection of all forms of terrorism, religious extremism and other forms of intolerance, irrespective of their motivations.”⁶⁸²

E. Aspiration Five: An Africa with a Strong Cultural Identity, Common Heritage, Values, and Ethics

Aspiration Five deals with the creation of a “common [African] history, destiny, identity, respect for religious diversity and consciousness of African people’s and her diaspora’s will.”⁶⁸³ The AU expects that by 2063, “Pan-Africanism will be fully entrenched,” the “African Renaissance” will have “reached its peak,” and the continent’s “diversity in culture, heritage, languages and religion shall be a cause of strength, including the tangible and intangible heritage of Africa’s island states.”⁶⁸⁴ In addition, *Agenda 2063* states, “Pan-African ideals will be fully embedded in all school curricula and Pan-African cultural assets (heritage, folklore, languages, film, theater, literature, festivals, religions and spirituality) will be enhanced.”⁶⁸⁵

It is also stipulated that by 2063, “African languages will be the basis for administration and integration,” and, in addition, “African values of family, community, hard work, merit, mutual respect and social cohesion will be firmly entrenched.”⁶⁸⁶ Finally, it is expected that the continent’s “stolen culture, heritage and artefacts will be fully repatriated and safeguarded.”⁶⁸⁷

As lofty as these ideals are, they cannot be achieved without effective and fully functioning governing structures in each African country. For example, even if an African country successfully retrieves and returns to its shores “stolen artefacts,” there is no guarantee that such treasures would not soon be misappropriated by corrupt civil servants and politicians and illegally sold to collectors abroad. Thus, unless each African country provides itself with institutional arrangements that adequately constrain the state and prevent civil servants and political elites from engaging in self-dealing and other forms of oppor-

682. *AGENDA 2063*, *supra* note 31, at 7, ¶ 38.

683. *Id.* at 7, ¶ 40.

684. *Id.* at 7, ¶ 41.

685. *Id.* at 7, ¶ 42.

686. *Id.*

687. *Id.* at 7, ¶ 43.

tunism to enrich themselves, it is not likely that Africans can successfully accomplish this aspiration.

Of course, the continent is not likely to deal fully and effectively with extremism and terrorism unless it confronts the direct causes of these behaviors. Creating and adopting institutional structures that constrain the state and provide all subcultures with the legal tools to live together peacefully and maximize their interests without preventing others from acting similarly is critical to any efforts to eliminate ethnic-induced violence and other forms of intolerance. For, as expressed by several groups that have opted for violent and destructive mobilization, they were forced to do so by the fact that they had been pushed by a central government controlled by their enemies to the economic and political margins, and their country's existing institutional arrangements failed to provide them with the legal tools to petition the government to address their grievances.⁶⁸⁸

F. Aspiration Six: An Africa Whose Development is People-driven, Relying on the Potential of African People, Especially its Women and Youth, and Caring for Children

Today, extreme poverty and severe inequalities in the distribution of income and wealth are major problems for most countries in Africa. Part of the problem lies in the fact that since independence, most African countries have engaged in econom-

688. For example, the Igbos and other minority groups from the Eastern Region of Nigeria, who were engaged in a war of secession against the central government of Nigeria from 1967 to 1970, argued that they had been marginalized and pushed to the economic and political margins by a government controlled and dominated by the Hausa-Fulani and Yoruba ethnic groups. As argued by their leader, Colonel Emeka Ojukwu, they had come to the conclusion that the Nigerian Government was either no longer capable of protecting the person and property of the country's minorities or was unwilling to do so. And, hence, secession was the option left for them, even if that meant war. See, e.g., Emeka Ojukwu, *The Ahiara Declaration: The Principles of the Biafran Revolution* (June 1, 1969), <https://searchworks.stanford.edu/view/2998890>. See also F. FORSYTH, *THE BIAFRA STORY: THE MAKING OF AN AFRICAN LEGEND* (2007) (explaining the events that led to the secessionist war that plagued Nigeria from 1967 to 1970); MBAKU, *PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES*, *supra* note 43, at 2.

(providing, *inter alia*, additional examples of subcultures in Africa that have opted for violent mobilization in an effort to minimize their political and economic marginalization).

ic and human development approaches that are top down, elite-driven, and non-inclusive.⁶⁸⁹ In addition to the fact that development policies in many countries on the continent are non-participatory, they are not people-driven and, hence, often do not reflect the issues that are critical to the people, especially the poor.⁶⁹⁰

Within any country, including those in Africa, center elites usually have more knowledge about and control over public policies, including their design and implementation, than the general population.⁶⁹¹ Nevertheless, although elites at the center have the power to control public policy, they usually do not have enough information to design programs that reflect the interests and preferences of the majority of the country's citizens.⁶⁹²

A more participatory and inclusive approach to policy design and implementation would not only enhance the ability of center elites to secure the necessary time-and-place information that they need to produce development programs that reflect the needs and aspirations of the poor and, hence, are capable of fully confronting extreme poverty, but would also ensure cooperation from the people whose lives are affected by the policies. Such cooperation should enhance their viability and sustainability.⁶⁹³

A people-driven approach to public policy design and implementation enhances the ability of any individual who "is interested in a public policy, or thinks or believes a decision might affect them, to understand and appreciate how the decision was made or arrived at and why."⁶⁹⁴ Participation is very im-

689. See MBAKU, INSTITUTIONS AND DEVELOPMENT IN AFRICA, *supra* note 69, at 196 (noting that "[a]s the political situation currently is in many African countries, . . . the public policy process is not participatory but is elite-driven, controlled and dominated by a few individuals at the center, with most public opinion effectively excluded").

690. See, e.g., UNITED NATIONS DEVELOPMENT PROGRAM, INCOME INEQUALITY TRENDS IN SUB-SAHARAN AFRICA: DIVERGENCE, DETERMINANTS, AND CONSEQUENCES 4 (Ayodele Odusola, Giovanni Andrea Cornia, Haroon Borhat & Pedro Conceição eds., 2017) (providing detailed analysis of income inequality in sub-Saharan Africa).

691. MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES, *supra* note 43, at 150.

692. *Id.*

693. *Id.*

694. See Mbaku, *Providing a Foundation*, *supra* note 39, at 1012–13.

portant, especially where the government makes decisions that have a direct impact on the lives of citizens. If, for example, a minority religious or ethnic group believes or argues that government policies are marginalizing, providing them with the necessary mechanisms to participate in the design and implementation of public policies not only significantly improves the quality of the policies, but also increases the trust that these groups have in their government. That increased trust can ensure that these groups are less likely to resort to violent mobilization since they know that, in some cases—especially in situations where policies directly affect them—these groups' preferences are made part of the majority. Thus, through "the process of participation, . . . citizens can articulate their preferences and make them part of the national debate on governance."⁶⁹⁵ As defined by the African Development Bank, participation is "a process whereby stakeholders exercise influence over public policy decisions, and share control over resources and institutions that affect their lives, thereby providing a check on the actions of government."⁶⁹⁶

While a people-centered and participatory approach to public policy is critical for poverty alleviation and human development, as well as the elimination of sectarian violence, it cannot be undertaken in a country that does not have democratic institutions—that is, those that adequately constrain the state and provide all citizens with the legal tools to participate fully and effectively in public policy design and implementation. Implementing a people-driven development agenda must begin with institutional reforms to provide the enabling environment for the people, not only to participate, but also to direct the development effort.⁶⁹⁷

695. MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES, *supra* note 43, at 264.

696. AFRICAN DEVELOPMENT BANK, BANK GROUP POLICY ON GOOD GOVERNANCE, ABIDJAN, CÔTE D'IVOIRE 3 (1999), <https://www.afdb.org/en/documents/document/bank-group-policy-on-good-governance-27134/>.

697. See MBAKU, INSTITUTIONS AND DEVELOPMENT IN AFRICA, *supra* note 69, at 265–301 (emphasizing the importance of the quality of institutions to economic and human development).

G. Agenda Seven: Africa as a Strong, United, and Influential Global Player and Partner

The AU anticipates that, by 2063, Africa will have evolved, through the efforts of its citizens, into a “strong, united, resilient, peaceful and influential global player and partner with a significant role in world affairs.”⁶⁹⁸ Africa, however, cannot become an “influential global player”⁶⁹⁹ if it is pervaded by ethnic-induced violence, extremely high levels of poverty, and corrupt and dysfunctional governments whose tyrannous policies are forcing citizens to flee their communities and undertake treacherous trips across the Sahara Desert in search of opportunities for self-actualization in Europe, the Middle East, and other parts of the world.⁷⁰⁰

Through *Agenda 2063*, Africans expect to build a political and economic union that would take its place as “[a] major social, political and economic force in the world, with her rightful share of the global commons (land, oceans and space),” as well as “[a]n active and equal participant in global affairs, multilateral institutions, and a driver for peaceful co-existence, tolerance and a sustainable and just world.”⁷⁰¹ In addition, the Africa of 2063 will be one that is self-reliant, does not depend on foreign development assistance, and is “[f]ully capable and [has] the means to finance her development.”⁷⁰²

The production of a self-reliant and globally important Africa must begin with institutional reforms to make certain that each country is equipped with institutional arrangements that guarantee the practice of constitutional government and constitutionalism. For, without such effective governing structures, corruption and government impunity will continue to pervade these countries, and it would be virtually impossible to engage in those activities that can create a self-reliant, as well as politically and economically secure, Africa—one that can play an important and positive role in global affairs. Hence, meeting *Agenda 2063*’s aspirations must begin with institutional re-

698. AGENDA 2063, *supra* note 31, at 9, ¶ 59.

699. *Id.*

700. See, e.g., LONG JOURNEYS: AFRICAN MIGRANTS ON THE ROAD (Alessandro Triulzi & Robert Lawrence McKenzie eds., 2013) (presenting a series of essays that examines the migration of Africans to Europe and their experiences in the various European countries).

701. AGENDA 2063, *supra* note 31, at 10, ¶ 60.

702. *Id.*

forms, through a democratic process, to arm each country with effective institutional arrangements, those that enhance the practice of constitutional government and constitutionalism.

CONCLUSION AND POLICY RECOMMENDATIONS

Agenda 2063 is an ambitious and “noble initiative”⁷⁰³ designed to create a united Africa, free of poverty, ethnic-induced violence, abuse of human rights, and the various forms of intolerance. It is essentially a blueprint to transform the continent into a highly developed and peaceful community, one that can take its place as a major player in global affairs. The heart of *Agenda 2063* are the seven aspirations, which African countries hope to achieve by the year 2063.⁷⁰⁴

Unfortunately, the fact that most African countries currently have governing processes that are not undergirded by the rule of law means that they would not be able to contribute significantly to the fulfilment of these aspirations. Thus, robust institutional reforms must be the first step toward the implementation of *Agenda 2063*. In general, each African country must provide itself with a governing process that enhances the practice of constitutional government and constitutionalism—the latter should provide the necessary enabling environment for the achievement of the goals elaborated in *Agenda 2063*, particularly including the peaceful coexistence of subcultures and the creation of the wealth necessary to eradicate poverty.

First, each country, with the help of the AU if necessary, should engage in process-driven constitution-making to produce a constitution that creates a governing process characterized by separation of powers, with effective checks and balances. Such checks should include, at the very least, an independent judiciary, a robust and politically active civil society, and a viable and independent press.⁷⁰⁵ Constitutional designers must

703. *Id.* at 1, ¶ 3.

704. *Id.* at 2–10, ¶ 9–63.

705. In addition to the fact that both a free press and an independent judiciary can help check the exercise of government power, the press can also help civil society have access to the information that they need to hold civil servants and politicians accountable for their actions, as well as expose corruption and help the courts prosecute the culprits. *See, e.g.*, MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES, *supra* note 43, at 141 (arguing, *inter alia*, that the absence of a free press in many African coun-

keep in mind that the process through which the constitution is designed is very important to its legitimacy.⁷⁰⁶ If the constitution-design process is participatory and inclusive enough, then the people will have an opportunity to engage in a robust discussion about what the constitution is supposed to do for them.

In addition to providing them with the legal tools to organize their private lives and engage in various activities to maximize their values (e.g., start and run a business to create the wealth that they need to meet their needs), a participatory constitution-design process can help the people place emphasis on (1) their fundamental rights while providing the necessary constitutional tools to protect them; (2) the structure of government and how to minimize the emergence of an imperial presidency; and (3) procedures for amending the constitution. A robust amendment process will prevent engagement of political elites in the constitutional coup.⁷⁰⁷

Second, in addition to providing a bill of rights as part of the constitution, constitutional designers should also provide independent accountability institutions, such as an Auditor-General and a Public Protector, which can minimize abuse of power by the president and other ruling elites and significantly enhance the ability of the country to practice constitutionalism. It is important to note, however, that the provision of a bill of rights in the constitution is a necessary but not sufficient condition for the effective and full protection of the rights elaborated within it, as well as the practice of constitutionalism. Sufficiency requires the establishment of a governing process that is characterized or undergirded by true separation of powers, with effective checks and balances.⁷⁰⁸

tries has constrained the ability of the people to check the exercise of government power).

706. See, e.g., *id.* at 94–101 (arguing, inter alia, that the legitimacy of a constitution is determined, to a large extent, by the way in which it was designed and adopted). For example, if the constitution is designed by a committee handpicked by the president, instead of one chosen through nation-wide, fair, credible, and transparent elections, the outcome is likely a constitution that would not be considered legitimate by the majority of citizens. *Id.* at 95.

707. See, e.g., Mbaku, *Constitutional Coups as a Threat to Democratic Governance in Africa*, *supra* note 430, at 77 (examining the emergence of the constitutional coup as a major constraint on democracy in Africa).

708. MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES, *supra* note 43, at 291.

Third, before the country can proceed to draft a constitution, it must first engage in a discussion of how the constitution is actually going to be drafted. One important issue to be dealt with is the design, through a participatory and inclusive process, of the *constitutional principles* that will inform and guide the drafters, as well as provide the foundation for the constitution. Such principles will serve as a constraint on the drafters and make certain that the constitution meets certain minimum standards, especially in such areas as the protection of human rights, democracy, the rule of law, and the exercise of government power.⁷⁰⁹

Fourth, once the constitution has been drafted and ratified, the government, with the help of civil society, should develop and implement an education program to help citizens understand the constitution, its provisions, and what it can do for them. The people must see the constitution as the country's "fundamental legal document"—that is, its basic law.⁷¹⁰ In order for the people to use the law to organize their private lives and resolve their conflicts, including those arising from trade and other forms of exchanges, they must understand what the law is.

Finally, the AU must follow its basic framework for the promotion of democracy and good governance on the continent. This framework is laid out in the AU's Constitutive Act and is also found in a number of treaties and declarations to which the AU is a signatory. This framework emphasizes the need to strengthen, deepen, and institutionalize democracy and constitutionalism on the continent.⁷¹¹ Specifically, the basic principles on which the AU democracy agenda is supposed to be based are contained or elaborated in four major instruments. These are (1) the *Constitutive Act of the African Union*;⁷¹² (2) the *African Union Declaration on the Principles Governing*

709. See *id.* at 70–71 (examining, inter alia, the construction of the thirty-four constitutional principles that guided and bounded the South African Constitutional Assembly during its design of the permanent constitution for the post-apartheid Republic of South Africa).

710. See Martin A. Rogoff, *A Comparison of Constitutionalism in France and the United States*, 49 MAINE L. REV. 21, 22 (1997).

711. See, e.g., Constitutive Act, *supra* note 56.

712. *Id.*

Democratic Elections in Africa;⁷¹³ (3) the *Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government*;⁷¹⁴ and (4) the *African Charter on Democracy, Elections and Governance*.⁷¹⁵

These basic principles represent a significant advancement in thinking concerning institutional reforms and the transition to democratic government in Africa since the formation of the OAU in 1963. Nevertheless, although some of Africa's constitutional scholars argue that the four instruments mentioned above provide "a solid framework for peer pressure to be brought to influence constitutional developments in the continent," the AU's failure to deal fully and effectively with "situations in the [Republic of] Sudan, Somalia, and Zimbabwe raises serious doubts about the agenda's credibility."⁷¹⁶ To that, one can add situations in Libya,⁷¹⁷ South Sudan,⁷¹⁸ Burundi,⁷¹⁹ and

713. AU, African Union Declaration on the Principles Governing Democratic Elections in Africa, AHG/Decl. 1 (XXXVIII), 2002.

714. African Union/Organization of African Unity, *Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government*, AHG/Decl. 5 (XXXVI), (July 10–12, 2000), <http://archives.au.int/handle/123456789/595>.

715. African Charter on Democracy, Election and Governance, *supra* note 178.

716. Fombad, *Constitutional Reforms and Constitutionalism in Africa*, *supra* note 99, at 1098–99.

717. See, e.g., Phillip Apuuli Kasaija, *The African Union (AU), the Libya Crisis and the Notion of 'African Solutions to African Problems*, 31 J. CONTEMP. AFR. STUD. 117 (2011) (examining, inter alia, the failure of the AU to provide an African solution to the governance crisis in Libya); Egara Kabaji, *Africa: Libya Crisis Exposes AU's Soft Underbelly*, Opinion., STAR (NAIROBI) (April 6, 2011), <https://allafrica.com/stories/201104070167.html> (arguing, inter alia, that there is a paralysis that characterizes the AU and has rendered the continental organization unable or unwilling to solve the continent's political and economic problems).

718. Since in gained independence from the Republic of Sudan in 2011, South Sudan has been unable to govern itself and has, instead, moved from one political crisis to another, including a civil war that started in 2013). See, e.g., Morgan Winsor, *South Sudan marks 5 years of vicious civil war*, ABC NEWS (Dec. 15, 2018), <https://abcnews.go.com/International/south-sudan-marks-years-vicious-civil-war/story?id=59797433>.

719. See, e.g., Elissa Jobson, *The AU tried and failed on Burundi: Now it's time to try again*, AFRICAN ARGUMENTS (Oct. 10, 2018), <https://africanarguments.org/2016/10/10/the-au-tried-and-failed-on-burundi-now-its-time-to-try-again/> (examining the AU's failed policy in the Burundian governance crisis).

the Central African Republic,⁷²⁰ which the AU has been either unwilling or unable to deal with. Nevertheless, as argued by some African scholars, the fact that many African leaders have recognized the critical role that democracy, good governance, and constitutionalism can play in the continent's struggle to institutionalize peaceful coexistence and significantly improve human development is "a giant step in the right direction."⁷²¹

Recent developments in international law, particularly the creation of the ICC and the subsequent indictment of the President of Sudan, Omar al-Bashir;⁷²² President of Kenya, Uhuru Kenyatta; and his Vice President, William Ruto,⁷²³ as well as the successful prosecution of former Chadian dictator, Hissène Habré, by the Extraordinary African Chambers within the courts of the Republic of Senegal,⁷²⁴ and of former Liberian president, Charles Taylor by the Special Court for Sierra Leone,⁷²⁵ have given hope to Africans that the continent, with the help of the ICC and the AU, might be able to deal with government impunity, including abuse of presidential powers, and help in the implementation of the aspirations elaborated in *Agenda 2063*.

It has been recognized that the killing of hundreds of thousands of people by the Hutu-dominated government in Rwanda in 1994 was a horrendous crime that qualified as a genocide,

720. See Ngah Gabriel, *60 Years of Conflict and Failed Peacebuilding in Central African Republic*, DEMOCRACY CHRONICLES (April 15, 2018), <https://democracychronicles.org/peacebuilding-in-central-african-republic/>.

721. See Fombad, *Constitutional Reforms and Constitutionalism in*, *supra* note 99, at 1099.

722. See, e.g., Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC-02/10-01/09 (July, 2017), <https://www.icc-cpi.int/darfur/albashir>.

723. See, e.g., Prosecutor v. Uhuru Muigai Kenyatta, ICC-01/09-02/11 (Jan. 23, 2012), <https://www.icc-cpi.int/kenya/kenyatta>. The case against was later dismissed for lack of evidence. See, e.g., Thomas Escritt, *International Criminal Court throws out charges against Kenyan deputy president*, REUTERS (April 5, 2016), <https://www.reuters.com/article/us-kenya-court-ruto/international-criminal-court-throws-out-charges-against-kenyan-deputy-president-idUSKCN0X21WC>.

724. See Ruth Maclean, *Ex-Chad dictator's conviction for crimes against humanity upheld by Dakar court*, GUARDIAN (April 27, 2017), <https://www.theguardian.com/world/2017/apr/27/conviction-chad-hissene-habre-crimes-against-humanity-upheld>.

725. See Owen Bowcott & Monica Mark, *Charles Taylor found guilty of abetting Sierra Leone war crimes*, GUARDIAN (April 26, 2012), <https://www.theguardian.com/world/2012/apr/26/charles-taylor-guilty-war-crimes>.

and warranted the perpetrators brought to justice.⁷²⁶ Some commentators have argued that it is equally a crime worthy of punishment for many of Africa's political elites who preside over governments that "cause millions of innocent people, especially vulnerable populations like children and the elderly, to die of hunger and malnutrition, or through lack of adequate health care as a result of misrule and corruption."⁷²⁷ One can add to that the unleashing of state security forces against some sectors of their national populations, as has happened, for example, in Cameroon, where the Francophone-dominated central government has engaged in what has been described by the international press as genocide against the country's Anglophone Regions.⁷²⁸

Thus, the AU, as well as Africans, must recognize and disavow dictatorships, imperial presidencies, and government impunity. If Africans are to achieve the aspirations spelled out in *Agenda 2063*, they must stand up to authoritarian and dysfunctional governments. The key to the building of the Africa that is desired by the majority of Africans is the African peoples themselves. Africans, through their organizations (e.g., the free press and political parties), should insist on the provision of laws and institutions that (1) adequately constrain the state and, hence, can minimize government impunity; (2) enhance peaceful coexistence; (3) promote entrepreneurial activities and the creation of wealth; (4) advance the cause of human rights; and (5) generally deepen and institutionalize democracy and the practice of constitutional government.

In the end, whether *Agenda 2063* functions effectively to transform Africa politically and economically into the Africa that Africans want will be determined by the role that civil society can play. In addition to the fact that "[a] robust civil socie-

726. See Owen Bowcott, *Rwanda genocide: The fight to bring the perpetrators to justice*, GUARDIAN (April 2, 2014), <https://www.theguardian.com/world/2014/apr/02/rwanda-genocide-fight-justice>.

727. See Fombad, *Constitutional Reforms and Constitutionalism in Africa*, *supra* note 99, at 1099–1100.

728. See, e.g., Zongo, *supra* note 147. The Republic of Cameroon is divided into ten administrative regions. Two of them—the North West Region and the South West Region—make up the Anglophone Regions. See, e.g., John Mukum Mbaku, *International Law and the Anglophone Problem in Cameroon: Federalism, Secession or the Status Quo?*, 42 SUFFOLK TRANSNAT'L L. REV. 1, 116 (noting that the Anglophone part of the Republic of Cameroon consists of the North West Region and the South West Region).

ty" can significantly enhance the continent's transition to democracy and constitutional government, it can also serve as an important constraint to any efforts by opportunistic political elites to engage in regressive policies (e.g., the constitutional coups) and stunt efforts to meet the aspirations elaborated in *Agenda 2063*. As argued by Mark Robinson and Steven Friedman, "[c]ivil society is widely believed to have the potential to make a positive contribution to democratization" through its ability to "provide structures for inculcating democratic norms and consensus-building."⁷²⁹

Of course, a vibrant civil society is not only critical to ensure that government impunity is minimized and the government is accountable to the people and the constitution, it can also participate in effecting necessary reforms to improve the quality of the judicial system. Although lawyers and the legal profession are usually considered the gatekeepers of the country's legal and judicial system, civil society also has a role to play in making certain that the country has a fully functioning legal system and that the majority of people have respect for the rule of law.

Finally, African legal and constitutional scholars, including "legal academics, legal researchers and others who contribute to the dissemination of legal knowledge in accredited journals, books and newspaper commentaries and internet blogs,"⁷³⁰ can play an important role in shaping the institutional and legal environment for the implementation of *Agenda 2063* generally and defending constitutionalism and constitutional government in Africa specifically. While *Agenda 2063's* aspirations can help positively transform Africa, this can only happen with the full and effective participation of the African people.

729. Mark Robinson & Steven Friedman, *Civil Society, Democratization, and Foreign Aid: Civic Engagement and Public Policy in South Africa and Uganda*, 14 DEMOCRATIZATION 643, 643, 644 (2007).

730. See Fombad, *Constitutional Reforms and Constitutionalism in Africa*, *supra* note 99, at 1103.